DISSENTING OPINION OF JUDGE OWADA

Characterization of subject-matter of the dispute crucial to deciding on preliminary objections — Treatment of Liechtenstein property by Germany as the real subject-matter of the dispute — Applicability of the Settlement Convention to Liechtenstein property — Scope of limitation ratione temporis *on jurisdiction under Article 27* (a) *of the European Convention for the Peaceful Settlement of Disputes — Meaning of "disputes relating to facts or situations prior to the entry into force" of the Convention — Difference in formulation between "disputes relating to facts or situations" and "disputes with regard to facts or situations" — Definition of "the facts or situations giving rise to the dispute" — Jurisprudence in* Phosphates in Morocco, Electricity Company of Sofia and Bulgaria *and* Right of Passage over Indian Territory *cases — "Change of position" by Germany as the real source of the dispute — Objection based on the limitation* ratione temporis *to be rejected — All other preliminary objections raised by Germany to be rejected — Jurisdiction of the Court to entertain the Application of Liechtenstein to be upheld.*

To my regret, I cannot associate myself with the conclusion of the Judgment that the Court has no jurisdiction to entertain the present case, especially as it relates to the finding that the second preliminary objection of Germany to the Court's jurisdiction is to be upheld. I wish to set out hereunder my own views on some of the salient issues involved with a view to clarifying the bases for my dissent.

I. The Essential Nature of the Dispute

1. This case is unique in the sense that the Applicant and the Respondent are arguing their case at cross purposes. They base their respective arguments on different understanding of what the dispute between the Parties is about and what precisely the cause of action of the Applicant is.

2. Clearly it is this difference in approach to the case between the Parties in defining the essential nature of the dispute that forms a crucial element in this case at the present stage of the preliminary proceedings on objections raised by the Respondent. One critical question that the Court has to decide on in the present preliminary proceedings therefore is the question of "what is the subject-matter of the dispute?" This question has its relevance to most, if not all, of the preliminary objections raised by Germany in the present proceedings; more specifically the Court is to define its position on this point in dealing with the first preliminary objection relating to the existence *vel non* of a dispute between the Parties and

the second preliminary objection relating to the limitation *ratione temporis* on the jurisdiction of the Court, on both of which the present Judgment has chosen to pronounce itself.

3. Liechtenstein in its Application to institute proceedings before the Court claims that:

> "*(a)* by its conduct with respect to the Liechtenstein property [which had been confiscated in Czechoslovakia under the 'Beneš Decrees' of 1945], in and since 1998, Germany failed to respect the rights of Liechtenstein with respect to that property;
>
> *(b)* by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals, Germany is in breach of the rules of international law." (Application of Liechtenstein, para. 25.)

4. In support of this claim, the Applicant contends, *inter alia*, as follows:

> "Under international law, having regard to Liechtenstein's neutrality and the absence of whatsoever links between Liechtenstein and the conduct of the war by Germany, any Liechtenstein property that may have been affected by measures of an Allied power could not be considered as 'seized for the purpose of reparation or restitution, or as a result of the state of war'." (*Ibid.*, para. 9.)
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> "Subsequent to the conclusion of the Settlement Convention [of 1952], it was accordingly understood, as between Germany and Liechtenstein, that the Liechtenstein property did not fall within the régime of the Convention." (*Ibid.*, para. 10.)
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> "In 1998 the position of the Federal Republic of Germany changed, as a result of the decision of the Federal Constitutional Court of 28 January 1998 [in a case concerning a painting which was among the Liechtenstein property seized in 1945 under the 'Beneš Decrees']." (*Ibid.*, para. 17.)
>
> "Liechtenstein . . . protested to Germany that the latter was treating as German assets which belonged to nationals of Liechtenstein . . . Germany rejected this protest and in subsequent consultations it became clear that Germany now adheres to the position that the Liechtenstein assets as a whole were 'seized for the purpose of reparation or restitution, or as a result of the state of war' within the meaning of the Convention." (*Ibid.*, para. 19.)

5. Thus Liechtenstein submits that "[t]here is accordingly a legal dispute between Liechtenstein and Germany as to the obligations of the latter with respect to Liechtenstein property" and that "[i]t is this dispute which is the subject of the present Application" (*ibid.*, para. 20).

6. In support of its first preliminary objection that there is no legal dispute between Germany and Liechtenstein, the Respondent contends that the "change of position [as alleged by Liechtenstein], which supposedly led to a disagreement on a point of law, never occurred" and that "it is impossible to discern any disagreement on a point of law or fact between Germany and Liechtenstein" (CR 2004/24, p. 21, para. 42). Referring to the confiscation of certain Liechtenstein property by Czechoslovakia under the "Beneš Decrees", the Respondent claims that

> "[b]etween Liechtenstein and Germany there exists no dispute concerning the lawfulness of the Czechoslovak seizures. Rather, the dispute is one between Liechtenstein and the successor(s) of former Czechoslovakia." (Preliminary Objections of Germany, Vol. I, Part III, Chap. I, Section I, D, p. 42, para. 60.)

It argues that "it is impossible to formulate the alleged dispute between Liechtenstein and Germany in a way which effectively distinguishes it from the real dispute between Liechtenstein and the Czech Republic" (CR 2004/24, p. 21, para. 43).

7. Liechtenstein on the contrary claims that "Germany address[es] a case that is not the case before [the Court]". According to Liechtenstein, its case is that

> "Germany bears international responsibility for infringing Liechtenstein's neutrality and sovereignty by allowing Liechtenstein assets to be treated, for the first time in 1995, as German external assets for purposes of the Settlement Convention"[1].

It categorically states that "[t]his case is *not* about the legality of the Beneš Decrees", and that "[it] is *not* about Liechtenstein's dispute with Czechoslovakia . . . over property belonging to Liechtenstein and its nationals" (CR 2004/25, p. 12; emphasis in the original).

8. It is clear that here the Parties are presenting their respective different positions on the "subject-matter of the dispute" in the present case, not only by employing different formulations but also by addressing different substances. Needless to say, the question of what constitutes the dispute in a case before this Court in the final analysis has to be decided by the Court. Nevertheless, it stands to reason that since the case has been brought before the Court by Liechtenstein as Applicant against

[1] Convention on the Settlement of Matters arising out of the War and the Occupation, signed by the United States of America, the United Kingdom, France and the Federal Republic of Germany at Bonn on 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, signed at Paris on 23 October 1954) (hereinafter referred to as the "Settlement Convention").

Germany as Respondent, it is in the Submissions of the Applicant that the formulation of the claims on which the Court must adjudicate is to be sought (cf. *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 27).

9. More specifically, the Court in the case concerning *Fisheries Jurisdiction (Spain* v. *Canada)*, in which the parties, while accepting that there existed a dispute between them, characterized the dispute differently, stated as follows:

> "*In order to identify its task in any proceedings instituted by one State against another, the Court must begin by examining the Application* (see *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 21; *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 27; *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24). However, it may happen that uncertainties or disagreements arise with regard to the real subject of the dispute with which the Court has been seised, or to the exact nature of the claims submitted to it. In such cases the Court cannot be restricted to a consideration of the terms of the Application alone nor, more generally, can it regard itself as bound by the claims of the Applicant.
>
> . . . . . .
>
> It is for the Court itself, *while giving particular attention to the formulation of the dispute chosen by the Applicant*, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties" (*Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 448, paras. 29 and 30; emphasis added).

10. When the divergent characterization of the subject-matter of the dispute given by the Applicant and the Respondent in the present case is closely examined in accordance with the principle enunciated by this jurisprudence of the Court, it seems clear that the subject-matter of the dispute in the present case is the question of international responsibility of Germany in its treatment of Liechtenstein property as "German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war" (hereinafter referred to as "German external assets or other property") for purposes of the Settlement Convention. On this point, therefore, I concur with the Judgment in its conclusion that

> "the subject-matter of the dispute is whether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of the international obligations it owed to Liechtenstein and, if so, what is Germany's international responsibility" (Judgment, para. 26).

11. Naturally the question of whether or not the allegation of Liechtenstein as quoted in paragraph 4 above, and especially the allegation that

there has been a change in this respect in the position of Germany, can be established is a question that obviously belongs to the merits of the case. In holding that there exists a situation in which "complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter" and that "[b]y virtue of this denial, there is a legal dispute" (Judgment, para. 25) between the Parties, the Court is not prejudging the validity of such "complaints of fact and law formulated by Liechtenstein". All that the Court should pronounce upon at this stage of the proceedings, where it is addressing strictly the preliminary objections raised by the Respondent only, is whether there does exist a legal dispute between the Parties on this point for the purposes of the jurisdiction of the Court.

II. The Issue of "Disputes relating to Facts or Situations"

12. Having come to its conclusion as stated above on the question of whether there exists a legal dispute between the Parties in the present case and what constitutes the subject-matter of this dispute, the Court has to adhere to this characterization of the subject-matter of the dispute in examining the question raised in the second preliminary objection of the Respondent, i.e., the question of whether the dispute thus formulated will fall within the jurisdiction of the Court, *ratione temporis*, under Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957.

13. Preliminary to proceeding to the examination of the facts of the case in this respect, however, the first issue to be analysed is the meaning of the provision in Article 27 *(a)* of the Convention which excludes "disputes *relating to facts or situations* prior to the entry into force of this Convention as between the parties to the dispute" (emphasis added) from the scope of jurisdiction conferred upon the Court under this Article.

14. In every case before the Court, the basis of jurisdiction of the Court is the legal instrument that confers jurisdiction on the Court, be it a unilateral declaration accepting the compulsory jurisdiction of the Court or a compromissory provision in a bilateral or multilateral treaty to refer a dispute under the treaty to the Court. Each case has to be assessed on its own by interpreting the legal instrument in question that serves as the basis for jurisdiction.

15. From this point of view the question could arise as to whether the language employed in Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes should be interpreted differently from the more usual expression employed in some other cases that have come before this Court. By way of illustrations, in the *Phosphates in Morocco* case before the Permanent Court of International Justice, the legal instrument in question, the French declaration of 1930 accepting the compulsory jurisdiction of the Court, employed the expression "any disputes which may arise after the ratification of the present declaration *with regard to situations or facts* subsequent to this ratification" (*Phosphates*

in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74, p. 22; emphasis added). In the *Electricity Company of Sofia and Bulgaria* case, also before the Permanent Court, the legal instrument in question was the Belgian declaration of adherence to the optional clause of the Court's Statute. That also used the formula "any disputes arising after the ratification of the present declaration *with regard to situations or facts* subsequent to this ratification" (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 82; emphasis added). In yet another case in which the same issue of the scope of limitation *ratione temporis* on jurisdiction of the Court came before the present Court, i.e., *Right of Passage* case, the legal instrument in question was also the Indian declaration of acceptance of the jurisdiction of the Permanent Court of International Justice of 28 February 1940. Here again the declaration used the same formula of limiting the scope of acceptance to "'disputes arising after February 5th, 1930, *with regard to situations or facts* subsequent to the same date'" (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 151; emphasis added).

16. By contrast, the formula used in Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes is different. Formulated as a compromissory clause in a multilateral instrument, Article 27 *(a)* of the Convention limits the scope of jurisdiction of the International Court of Justice *ratione temporis* 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." (Emphasis added.)

17. It therefore seems to be in order to engage in an examination of the legislative history of Article 27 *(a)* of the Convention within the Council of Europe where it was finally adopted, with a view to ascertaining whether this divergence from the more usual formulation employed in the other instruments was an intended one with the express purpose of producing a different legal effect on the part of the drafters of the instrument. At the drafting stage of the Convention, "Proposals of the Committee on Legal and Administrative Questions for a European Act for the Peaceful Settlement of Disputes"[2] included the following provision relat-

[2] Contained in Appendix, Part B, to Recommendation 36 (1952) on the establishment of a European Court of Justice and of a European Act for the Peaceful Settlement of Disputes.

ing to the limitation *ratione temporis* to be incorporated in the European Act (which grew into the European Convention for the Peaceful Settlement of Disputes of 1957):

> "It shall be deemed not to apply to disputes *arising out of* facts which occurred prior to the accession to the Act of Members parties to such disputes . . ." (Emphasis added.)

However, when these proposals were submitted to a Committee of Experts who then produced a draft "Final Report of the Committee of Experts on the Peaceful Settlement of Disputes and the Creation of a European Court of Justice" of 18 May 1953[3], some change in the wording of this part took place. Thus in the Final Report adopted of 22 May 1953, the then Article 1 (2) (which later became Article 27 *(a)* of the draft Convention) came to include the following formula in relation to the limitation *ratione temporis* on the jurisdiction of the Court:

> "This undertaking shall not apply to *disputes relating to facts or situations* prior to the entry into force of this Convention as between the parties to the dispute." (Council of Europe doc. CM (53) 58; A.12.822; TL.794/WM; Appendix II, p. 20; emphasis added.)

There is nothing in the relevant records available that can shed light on the background for this change. On the contrary, the "Comments on the Articles of the Preliminary Draft Convention" contained in the Final Report states by way of a commentary on Article 1 (2) (i.e., present Article 27 *(a)*) that:

> "This paragraph sets a time-limit to *the facts giving rise to a dispute* which may be submitted to the Court. It lays down that the starting point shall be the date of the entry into force of the Convention." (Council of Europe doc. CM (53) 58; A.12.822; TL.794/WM, p. 6; emphasis added.)

18. In the absence of any further documentary evidence to clarify this point, it would seem reasonable to presume that the final change in wording on this crucial part of the formulation in Article 27 *(a)* of the Convention from "disputes arising out of facts" to "disputes relating to facts or situations" did not signify any intentional modification on the scope of the limitation *ratione temporis*, both being treated indiscriminately as referring to *"the facts giving rise to a dispute"*.

19. Based on this analysis of the *travaux préparatoires* on the legislative history of the compromissory provisions of the Convention, it would

[3] Council of Europe doc. EXP/RPD/JU (53); A.12.379; TL.794/WM/Unrevised.

seem safe to conclude, as the Judgment seems to assume without going through a detailed analysis on this point, that the formulation of the limitation *ratione temporis* employed in the compromissory provisions of the European Convention for the Peaceful Settlement of Disputes should be interpreted as being no different from the comparable formulations employed in the other legal instruments which were the subject of scrutiny in the previous three judgments of the Court, which now form the case law on this issue.

III. The Relevant "Facts or Situations" in Relation to the Dispute

20. Having thus disposed of the issue of a possible distinction in law between different formulations on the question of limitation *ratione temporis* employed in different legal instruments, the next question that the Court is to examine is what are such "facts or situations giving rise to the dispute" in the present case.

21. In determining the issue of which facts or situations are to be regarded as "facts or situations giving rise to the dispute" in the context of the present case, it is of cardinal importance that we base ourselves on the characterization of the subject-matter of the dispute in the present case as the Court has identified it. I have already stated in Part I of this opinion that the proper way of looking at the present case, especially taking account of the claims of the Applicant as presented in its Application, is to define the subject-matter of the present dispute as consisting in the alleged change in the position of Germany in the 1990s, through a series of German court decisions, on the question of treatment of Liechtenstein property as "German external assets and other property" for the purposes of Article 3, paragraph 1, of Chapter Six of the Settlement Convention.

22. It is true that this allegation has not been fully elaborated by the Applicant at this stage of the proceedings, while the Respondent flatly denies that there has been any such change of position by Germany. In fact this question can only be determined definitively when the Court enters into a thorough examination of the facts of the case at the merits stage of the case. Nevertheless, on the basis of the relevant documents and the oral presentations both of the Applicant and of the Respondent submitted to the Court, it is difficult to deny that this Liechtenstein claim is something more than a sheer allegation which patently is not sustainable even on a prima facie basis of the facts made available to the Court. Germany claims that there has been no change of position in the jurisprudence of the German courts; and that its courts have consistently held that they are barred by the Settlement Convention from adjudicating on the lawfulness of any confiscation measures for the purposes named by the Settlement Convention (CR 2004/24, p. 15, para. 17). However, a glance at the jurisprudence of the German courts (cf. cases listed in Observations of Liechtenstein, Appendix I) seems to reveal that this

latter statement does not seem to be entirely accurate. It may be true that in those cases where the application of the Settlement Convention was involved, the German courts have consistently held that they lacked the competence to penetrate the legal veil of the provisions of Article 3, paragraph 1, of Chapter Six of the Settlement Convention and refrained from evaluating the lawfulness of the measures that had been applied to what were *unquestionably "German external assets"*. As the Respondent itself concedes (CR 2004/24, p. 13, para. 11), however, no concrete case had arisen, until the *Pieter van Laer Painting* case was brought before the court in Cologne in which *the applicability itself of the Settlement Convention* to Liechtenstein property as "German external assets or other property" was considered for the first time.

23. The *AKU*[4] case cited in this context by the Respondent as evidence of the German position quoted above (CR 2004/24, p. 15, para. 17) might appear to serve as a precedent for holding that "[Article 3, Chapter Six, of the Settlement Convention as amended by Schedule IV of the Paris Protocol of 23 October 1954] does not confer [upon German courts] a right to examine this question [of applicability of the Convention] in accordance with German law" (*International Law Reports*, Vol. 23 (1956), p. 23). However, it is preceded by one important condition by way of a proviso, which states as follows:

> "The sole condition . . . which must now be satisfied in order that the jurisdiction of the German Courts shall be excluded is that the claim is concerned with an asset seized for the purpose of reparation or one of the other purposes referred to in paragraph 1 [of Article 3]." (*Ibid.*, p. 22.)

It would seem therefore that this decision, with this expressly stated proviso, could not be an authority on the point at issue here, i.e., that the German courts have consistently held that they were barred under the Settlement Convention from examining the *applicability itself of the Settlement Convention to neutral assets*.

24. To this extent at any rate, it thus seems undeniable that the position of the German courts in the *Pieter van Laer Painting* case, culminating in the decision of the court of the final instance in civil matters, i.e., the Bundesgerichtshof, followed by the decision of the Federal Constitutional Court of 14 January 1998 on a constitutional complaint which held that Liechtenstein property fell within the scope of the Settlement Convention, has had the *effect* of creating a new case law in applying the principle — a principle that may well have been consolidated *in relation to uncontestably "German external assets" that had been subject to war-*

[4] See *AKU* case, Judgment of the German Federal Court of Justice (Bundesgerichtshof) of 13 December 1956 (II ZR 86/54); see also *International Law Reports*, Vol. 23 (1956), pp. 21-24; *Neue Juristische Wochenschrift*, Vol. 10, Issue 6 (1957), p. 217.

time or post-war reparation régime by allied or other powers — to a new situation involving a neutral property of Liechtenstein.

25. Whether this contention of Liechtenstein concerning the alleged change in the position of Germany in the 1990s can stand the test of scrutiny in terms of facts and law surrounding the situation involving the painting of Pieter van Laer is of course an entirely different matter. This is an issue which has to be scrupulously examined when the Court comes to the merits stage of the case. Suffice it to say at this preliminary stage on jurisdiction that there is at least sufficient basis for holding that the subject-matter of the dispute is real and not just artificially constructed. In fact, this alleged "change of position of Germany", or more precisely, the treatment by Germany of Liechtenstein property as falling within the scope of Article 3 of Chapter Six of the Settlement Convention embodied in the decision of the highest German court in the 1990s, which can only be examined in detail at the merits stage of the case, is the key to definitively determining whether this situation amounted to the "facts or situations which have given rise to the dispute", thus satisfying the conditions *ratione temporis* prescribed by the compromissory provisions of the European Convention for the Peaceful Settlement of Disputes.

IV. Jurisprudence of the Court on "Facts or Situations" Giving Rise to the Dispute

26. As the existence of a dispute between Liechtenstein and Germany has been established in the Judgment itself, the next step for the Court is to ascertain whether this dispute falls within or outside the scope of the jurisdiction conferred upon the Court by the compromissory provisions of Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. On the basis of the interpretation given above on the formula "disputes relating to facts or situations" (Part II of this opinion), the question for the Court to address is whether *this dispute* is one "relating to facts or situations prior to the entry into force of [the] Convention as between the parties" as interpreted above.

27. In my view, an analysis of the past three cases before the Permanent Court of International Justice and the International Court of Justice, in which the issue of what are the "facts or situations giving rise to the dispute" was addressed by the Court and its predecessor, reveals that there appear to be two lines of approach in the case law of the Permanent Court and this Court:

(1) the approach to look to those facts or situations which are *the real source of the dispute*, but not *the source of the rights which underlie the dispute*; and
(2) the approach to take the dispute as *"the whole" of a chain of events*

and looking to *those facts or situations which crystallize the dispute* by completing the cycle of its constituent elements.

The first approach places emphasis on the substantive problem of determining the *real cause* of the dispute, while the second approach looks to a formal aspect of the process of crystallization of the dispute by identifying the point in time at which a fact or a situation comes to constitute the critical factor which gives rise to a dispute in a concrete form.

28. These two lines of approach, however, represent different angles from which to look at the same situation, and therefore are not mutually exclusive. Indeed, it is the importance of a nexus of close and direct link between the dispute and the facts or situations which give rise to that dispute that is emphasized in both of the two approaches. This nexus of close and direct link connecting the dispute and the facts and situations which give rise to it is so essential that an authority on this subject was prompted to state that:

> "It is believed . . . that in the long run there is little practical significance in this distinction [between the date on which the dispute arose and the date of the facts and situations which gave rise to it], at least in so far as concerns what occurs in the process of reaching the decision: a distinction between the date of a dispute, and the date of the facts and situations regarding which that dispute exists, may be one of form only." (Shabtai Rosenne, *The Time Factor and the Jurisprudence of the International Court of Justice*, p. 40.)

29. It is thus incumbent upon me to analyse how the case law in each of the three precedents works out this nexus in a concrete context and see how the case law is to be applied to the facts of the present situation. In the *Phosphates in Morocco* case, Italy brought claims against France, alleging that by a series of decrees the French had denied certain rights of Italian nationals in the Moroccan phosphates industry. The decrees preceded the critical date in the French optional clause declaration, but Italy argued that there was a continuing illegality, which had only been completed by certain acts subsequent to the date. After stating that "[s]ituations or facts subsequent to the ratification [of the optional clause declaration] could serve to found the Court's compulsory jurisdiction *only if it was with regard to them that the dispute arose*" (emphasis added), the Permanent Court of International Justice made the point that

> "it would be impossible to admit the existence of such a relationship between a dispute and subsequent factors which either presume the existence or are merely *the confirmation or development of earlier situations or facts constituting the real causes of the dispute*" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24; emphasis added).

30. Relying on this dictum, Germany in the present case contends that the acts after 1980, including the decision of the German courts, were merely a confirmation or development of facts or situations that took place in the 1940s and the 1950s, i.e., the Beneš Decrees of 1945 and the Settlement Convention of 1952.

31. It is a fact, however, that the Settlement Convention as such, with its reference to "German external assets", created no dispute with neutral Liechtenstein. It is also a fact that the Settlement Convention had never before been applied to Liechtenstein assets by the German courts until the decision in the *Pieter van Laer Painting* case. Thus it was in the context of this new development of the 1990s which allegedly constituted a "new legal situation" and not just a "confirmation or development of earlier situations or facts" (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 24) that a concrete dispute arose between Germany and Liechtenstein.

32. In the *Electricity Company of Sofia and Bulgaria* case before the Permanent Court of International Justice, the Respondent, Bulgaria, relied on the so-called "double exclusion clause" (or the "Belgian formula") in the Belgian optional clause declaration. The Respondent argued that the situation underlying the dispute was created by the awards of the Belgo-Bulgarian Mixed Arbitral Tribunal, and in particular by the formula established by the awards for the fixing of the price, both of which antedated the critical date of the declaration. The complaints made by the Applicant, Belgium, concerning the application of this formula by the Bulgarian authorities related to the working of that formula and made it the centre point of the dispute.

33. In rejecting the argument of the Respondent on this point, the Court recalled what it said in the *Phosphates in Morocco* case, and stated that

> "[t]he only situations or facts which must be taken into account from the standpoint of compulsory jurisdiction accepted in the terms of the Belgian declaration are those which must be considered as being *the source of the dispute*" (*Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*, p. 82; emphasis added),

and concluded as follows:

> "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*." (*Ibid.*; emphasis added.)

Thus the Court found that it was the subsequent acts with which the Belgian Government reproaches the Bulgarian authorities with regard to a

particular application of the formula — which in itself had never been disputed — i.e., the decision of the Bulgarian Administration of Mines of 1934 and the judgments of the Bulgarian courts of 1936 and 1937 — which formed the centre point of the argument and must be regarded as constituting the facts with regard to which the dispute arose (cf. *Electricity Company of Sofia and Bulgaria, Judgment, 1939, P.C.I.J., Series A/B, No. 77*).

34. It seems clear that the present case has a close resemblance to the *Electricity Company of Sofia and Bulgaria* case in terms of how we define and apply the test of what constitutes *le fait générateur* in the context of the facts of the present situation. In the present case, the Beneš Decrees and the Settlement Convention are no doubt underlying factors of the dispute, and they relate to this dispute in the factual sense; it could thus be said that the dispute presupposes their existence. It does not follow, however, that the dispute therefore *arose in regard to those situations or facts*. It was not until the subsequent alleged position taken by Germany — the German court decisions applying the Settlement Convention to Liechtenstein property — that the dispute came into being in the eyes of Liechtenstein *as against Germany*.

35. In the *Right of Passage* case before this Court, the Applicant, Portugal, in its Application indicated that the subject of the dispute was the conflict of views which arose between Portugal and India when, in 1954, India opposed the exercise of Portugal's right of passage to certain Portuguese enclaves in the Indian territory. The Respondent, India, argued on the other hand that the Court was without jurisdiction under India's own optional clause declaration with limitation *ratione temporis*, because the dispute was the continuation of a conflict of views on this alleged right of passage, going back as far as 1818. There were also questions of treaty interpretation and practice dating back to 1779. Against the background of these complex historical factors, the Court came out with the conclusion that the critical factor that gave rise to the dispute occurred in 1954, when India opposed the exercise of Portugal's right of passage. After noting that the dispute submitted to the Court had a threefold subject — i.e., (1) the disputed existence of a right of passage in favour of Portugal; (2) the alleged failure of India in 1954 to comply with its obligations concerning that right of passage; and (3) the redress of the illegal situation flowing from that failure — the Court stated that "[t]he dispute before the Court, having this three-fold subject, could not arise until *all its constituent elements had come into existence*", in particular, the obstacles which India was alleged to have placed in the way of exercise of passage by Portugal in 1954 (*Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 34; emphasis added). On that basis the Court concluded that "[t]he dispute therefore as submitted to the Court could not have originated until 1954" (*ibid.*, p. 34).

36. The conclusion that the Court arrived at as the real source of the

dispute in that case, applying the principle of looking for the origin of a dispute through the process of formation of the dispute as "the whole", is the following:

> "It was only in 1954 that such a controversy [as to the title under which passage was effected] arose and the dispute relates both to the existence of a right of passage . . . 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* as specified in the optional clause declaration as the limitation *ratione temporis* on jurisdiction]." (*I.C.J. Reports 1960*, p. 35; emphasis added.)

37. When the criterion enunciated by the Court in the *Right of Passage* case is applied to the present case, it seems clear that the decisive conclusive event that gave rise to the "difference in the legal positions" between Germany and Liechtenstein concerning the treatment of the Liechtenstein property, giving a concrete shape to the dispute as "the whole", whatever may have been the earlier origin of the factors that affected the destiny of Liechtenstein property, was the alleged decision by the German courts which held that the Settlement Convention was applicable to the Liechtenstein property in question as "German external assets and other property" for the purposes of the Settlement Convention and that therefore the German courts were barred from passing a judgment on the legality of the measures referred to in Article 3 of Chapter Six of the Settlement Convention. While the validity of this allegation has to be tested in light of the facts of the case, the jurisprudence of the *Right of Passage* case definitely tilts towards a conclusion that it is this development which, if proved, constitutes *le fait générateur du différend* which arose.

38. The present Judgment, in addressing the issue of jurisdiction *ratione temporis* contained in the second preliminary objection of Germany, comes out with the conclusion that

> "the Court 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 purpose of reparation or as a result of the war" (Judgment, para. 50).

While the Applicant in its Application stated that "[s]ubsequent to the conclusion of the Settlement Convention, it was accordingly understood, as between Germany and Liechtenstein, that the Liechtenstein property did not fall within the régime of the Convention" (Application of Liechtenstein, p. 8, para. 10), it has not substantiated in the present proceed-

ings such common understanding between Liechtenstein and Germany. However, since the dispute at issue before the Court is whether Germany was in breach of its international obligations by its treatment of Liechtenstein property by applying the Settlement Convention to the property in question, this finding of the Court on the alleged change of position in itself does not seem to be decisive in determining whether the dispute has arisen with regard to this alleged new development. Of course whether such a "change of position", in the sense that Germany departed from a previously held position concerning the applicability of the Settlement Convention, thus incurring an international responsibility of Germany, has indeed taken place or not is an issue that has to be closely examined as the central issue of the merits of the case in subsequent proceedings.

39. On this last point, however, the Judgment, *ex cathedra* and without giving much substantive reasoning, declares as follows:

> "the Court 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. The Court finds that this case, *like previous ones on the confiscation of German external assets*, was inextricably linked to the Settlement Convention. The Court further finds that the decisions of the German courts in the *Pieter van Laer Painting* case cannot be separated from the Settlement Convention and the Beneš Decrees, and that these decisions cannot *consequently* be considered as the source or real cause of the dispute between Liechtenstein and Germany." (Judgment, para. 51; emphasis added.)

40. It is difficult to understand the logic of this conclusion, since the point at issue in the context of determining what constituted *le fait générateur* of this dispute is precisely the issue of whether a legal distinction can be made between the applicability of the Settlement Convention to what is undisputably to be regarded as "German external assets" (a thesis not contested by the Applicant) and the applicability of the Settlement Convention to neutral Liechtenstein property as "German external assets or other property" (a thesis fiercely contested by the Applicant, thus forming the *fons et origo* of the present dispute).

41. It is indisputable, as the Judgment states correctly, that the decisions of the German courts in the *Pieter van Laer Painting* case *cannot be separated from the Settlement Convention and the Beneš Decrees*. It does not follow, however, that "these decisions cannot *consequently* be considered as the source or real cause of the dispute between Liechtenstein and Germany" as the Judgment suggests (Judgment, para. 51; emphasis added). The fact that the Beneš Decrees and the Settlement Convention are even non-negligible factors that underlie, and thus constitute an

important background of, the colourful destiny of the Pieter van Laer painting is undeniable. In this sense it may be said that the decisions of the German courts on the *Pieter van Laer Painting* case cannot be separated from the Settlement Convention and, further, from the Beneš Decrees. However, this historical fact in itself cannot turn such "facts and situations" into *les faits générateurs du différend* (*Phosphates in Morocco, Judgment, 1938, P.C.I.J., Series A/B, No. 74*, p. 23), i.e., *something which generates the dispute*, constituting "the real source of the dispute", unless it is shown that indeed these facts and situations, directly and without further intervening events, gave rise to the dispute. It seems evident that such was not the case with either the Beneš Decrees or the Settlement Convention.

42. Based on the definition of the subject-matter of the dispute as identified earlier, and in light of the analysis offered above on the jurisprudence of the Court concerning the question of the limitation *ratione temporis* upon the Court's jurisdiction, the conclusion seems inescapable that, at any rate as far as this preliminary stage of the case is concerned, where the task of the Court is to be strictly confined to the examination of the question of whether the Court has jurisdiction to hear the case on the merits, it is difficult to agree with the conclusion of the Court, when it declares that

> "[w]hile these decisions [of the German courts in the *Pieter van Laer Painting* case] 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).

43. For these reasons, I come to the conclusion that the second preliminary objection of Germany has either to be rejected together with the first preliminary objection of Germany which has been rejected by the Judgment, or to be joined to the merits for further investigation, in accordance with Article 73, paragraph 7, of the Rules of Court.

44. It might be added that as can be seen from what has been stated above, I am not entirely in disagreement with the Judgment of the Court, as far as its general legal analysis of the case law of the Court is concerned, on the issue of what constitutes "facts or situations giving rise to the dispute" as represented by the three cases referred to in the Judgment. What I question is the manner in which this jurisprudence is applied to the facts of the present case.

V. Other Preliminary Objections

45. It would follow from this conclusion of mine that the Court would have to proceed further to the examination of four other preliminary

objections of Germany relating to the jurisdiction of the Court and to the admissibility of the claims of the Applicant, in order to determine whether it should go to the merits stage of the case. The present Judgment, however, has arrived at the conclusion that "[h]aving dismissed the first preliminary objection of Germany, but upheld its second, the Court finds that it is not required to consider Germany's other objections and that it cannot rule on Liechtenstein's claims on the merits" (Judgment, para. 53). Given my position as stated above, nevertheless, it is incumbent upon me to examine each and all of the remaining objections of Germany, in order to determine whether the Court has the competence to proceed to hear the case on the merits. Thus in the following paragraphs I shall state my views on the other preliminary objections raised by the Respondent; but I shall do so only in a somewhat summary fashion. This is due to the obvious point that there is no practical significance in such an exercise, seeing that the Judgment by majority has effectively terminated the present case for all purposes.

The Third Preliminary Objection relating to Domestic Jurisdiction

46. Germany contends that "the outcome of the German court proceedings would have been exactly the same even if the Settlement Convention did not exist", since according to the applicable rules of private international law and confiscation law as applied and recognized in Germany, as in so many other countries in the world,

> "[t]he painting found on German territory for the exhibition would have been returned to the owner according to Czech law, the museum, because Czechoslovakian law and now Czech law have governed the law of property for that painting for the last 50 years" (CR 2004/24, p. 33, para. 94).

On this basis Germany argues that "the decisions of the German courts, as to their results, were not a matter of international law" and that "as far as Liechtenstein is concerned, the matter was solely within the domestic jurisdiction of Germany" (*ibid.*, para. 95).

47. To this argument, Liechtenstein counter-argues that such an assertion is clearly a matter for the merits. It claims that in diplomatic consultation on the present dispute Germany at no time argued that this was a matter within its domestic jurisdiction, and further argues that

> "[t]he issue [then] was not whether this was a matter for Germany alone, but whether neutral property seized as a result of a war could be treated by German courts as 'German external assets' which were 'seized for the purpose of reparation or restitution' as a result of the Second World War" (CR 2004/25, p. 35, para. 12).

48. A careful examination of the arguments of the two Parties on this issue of domestic jurisdiction leads me to the following conclusions. First, the German argument that the German courts were simply applying a rule of private international law, accepted by the practice of States and the doctrine of international law, that the title to property is governed by *lex loci sitae rei* seems to be misdirected, inasmuch as the Liechtenstein cause of action in the present case is *not* based on the alleged violation of international law by the German courts in recognizing the validity of the Czechoslovak confiscation measures of 1945, but on their alleged violation in treating the neutral Liechtenstein property as "German external assets and other property" for the purposes of the Settlement Convention. On this basis, the dispute cannot be said to lie solely with the domestic jurisdiction of Germany. Also Germany, as the second line of defence on this objection has brought into its pleadings the argument that the Settlement Convention in effect disposed of the question and that Germany had no choice but to accept the terms of the Settlement Convention in the circumstances of the situation. Whatever the validity and the legal relevance of this argument, such a contention defeats the very legal basis of the third preliminary objection of Germany by bringing in the element of an international convention as relevant.

The Fourth Preliminary Objection relating to Article 40 of the Statute

49. On the admissibility of the Liechtenstein claims before the Court, Germany raises as its fourth objection the point that the Application is tainted by such profound flaws that the minimal requirement set out in Article 40, paragraph 1, of the Statute and in more detail in Article 38, paragraph 2, of the Rules of Court cannot be deemed to have been met. More specifically, it claims that "the Applicant has failed sufficiently to substantiate its contention that Germany has incurred responsibility on account of an internationally wrongful act" (CR 2004/24, p. 35. para. 101).

50. Liechtenstein counters this argument by stressing that Germany reshaped the Liechtenstein case into one entirely different from the one actually before the Court. Liechtenstein's point is that what is at issue in this case is "Germany's treatment of Liechtenstein property *as German external assets under the Settlement Convention* . . . which is the cornerstone of the present dispute" (CR 2004/25, p. 38; emphasis added). Liechtenstein further argues that "Article 40 (1) of the Statute and Article 38 (2) of the Rules of Court do not require an exhaustive statement of facts and grounds on which the claim is based in the application, but only a 'succinct' one" (*ibid.*, p. 37) and that the Applicant has done precisely that.

51. As has been stated earlier, some more substantiation may be needed for establishing this point both in terms of facts surrounding the

Liechtenstein allegation, as well as in terms of law that can legally link the German courts' judgments to an internationally wrongful act that is attributable to Germany. This does not lead us to the conclusion, however, that therefore the Liechtenstein Application does not satisfy the minimal conditions set out in Article 40, paragraph 1, of the Statute. The question of whether this claim of the Applicant, supported by the legal grounds offered by the Applicant, will meet the test of rigorous scrutiny by this Court is an entirely different matter. But this is a matter to be closely examined when the Court comes to the merits stage of the proceedings.

The Fifth Preliminary Objection relating to the Absence of the Third Party

52. In the fifth preliminary objection relating to the admissibility of the Liechtenstein claim, Germany raises the issue of the absence of a "necessary third party" and contends that the core of the Application of Liechtenstein is

> "the legality or illegality of the Beneš Decrees, that is to say decrees adopted by a State whose successor State is today visibly absent from these proceedings before [the] Court — not because it could not be present, but because it did not *wish* to be" (CR 2004/24, p. 48, para. 130; emphasis in the original).

53. Relying as authority on the jurisprudence of this Court in the *Monetary Gold Removed from Rome in 1943* case of 1954 (hereinafter referred to as the *"Monetary Gold"* case), Germany argues that in order to determine whether Liechtenstein is entitled to reparation on account of the damage it has suffered, it is necessary first to determine whether Czechoslovakia has committed an international wrong against it. To do that, according to Germany, it would be necessary to decide whether the Beneš Decrees were contrary to international law. On the basis of this so-called "necessary party" rule as established by the jurisprudence in the *Monetary Gold* case, Germany concludes that "the review of the lawfulness of the expropriations effected by Czechoslovakia constitutes a prerequisite for an examination of the unlawful acts attributed by Liechtenstein to Germany" (CR 2004/24, p. 52, para. 144). Under the circumstances of the present case, however, the Court cannot entertain Liechtenstein's claims which would oblige the Court to rule on the rights and obligations of the Czech Republic in its absence and without its consent.

54. Liechtenstein accepts that there is no disagreement on the analysis of jurisprudence of the Court offered by Germany that "[i]f . . . the legal interests of a third State constitute the 'very subject-matter' of a dispute brought to the Court and this third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter" and that "[l]egal

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 the rights or obligations of the third State" (CR 2004/25, p. 51, para. 5).

55. In applying this principle to the concrete situation of the present case, however, Liechtenstein argues *a contrario* that:

> "it equally follows that the Court not only has the right, but also the duty, to adjudicate on the application where the rights of a third State do not constitute 'the very subject-matter' of the judgment sought, even if that State's interests might be 'affected'[5], or [if] it has an 'interest of a legal nature' which might 'be affected'[6] or [if], as in the *Nauru* case, the Court's decision might 'have implications for the legal situation of the [third] States concerned'[7]" (CR 2004/25, p. 51).

According to Liechtenstein, the present case falls in this category, where neither the illegality of the Beneš Decrees nor Czechoslovakia's right to war reparation are in any sense the "very subject-matter" of the present proceedings. While Liechtenstein considers that it has been the victim of the Beneš Decrees of 1945, which resulted in the unjust confiscation of Liechtenstein assets wrongly equated with German property, it nevertheless claims that the dispute between Liechtenstein and the successor States of Czechoslovakia is completely separate from the one which is the subject of the present proceedings.

56. In light of the nature of the subject-matter of the dispute as characterized above (cf. Judgment, para. 26), i.e., the one consisting in the question of whether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that has been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of its obligations it owed to Liechtenstein, it would seem difficult to argue that the Application in question relates to a case in which the legal interests of a third State constitutes the "very subject-matter" of this dispute. If there should be any question on this point in view of the complex nature of the facts surrounding the case, this question could also be joined to the merits in accordance with Article 79, paragraph 7, of the Rules of Court.

The Sixth Preliminary Objection relating to the Exhaustion of Local Remedies

57. In the sixth and final objection relating to the admissibility of Liechtenstein claim, Germany raises the issue of non-exhaustion of local

[5] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.
[6] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 104, para. 34.
[7] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 261, para. 55.

remedies. Specifically, it contends that "the Liechtenstein nationals who had been victims of Czechoslovak confiscations had not exhausted all the local remedies with a view to recovering the property of which they had been dispossessed or to claiming compensation" (CR 2004/24, p. 57). Against this contention, Liechtenstein argues that "[i]n its Application [it] raises claims against Germany *primarily on its own account*, as Germany's conduct directly violated Liechtenstein's own rights as a sovereign State and as a State which was neutral during the Second World War" (CR 2004/25, p. 43; emphasis added), and "additionally on account of its citizens" (*ibid.*, p. 42).

58. Liechtenstein argues that the local remedies rule is restricted to cases of diplomatic protection, but is not applicable to cases where a State is *directly* injured in its State-to-State rights. This distinction, endorsed by the Court in the *Interhandel* and *Elettronica Sicula S.p.A. (ELSI)* cases, is accepted by Germany as a matter of general principle; at the same time Germany, denying its application to the present case, asserts that "it is impossible to find that there has been any infringement whatsoever of the sovereign rights of Liechtenstein as a State" (CR 2004/26, p. 24). As far as the Liechtenstein claim that it has suffered a direct injury as a State from Germany by its conduct is concerned, it is clear that the requirement of exhausting local remedies cannot be a procedural bar to this part of the claims presented by Liechtenstein.

59. As for injuries suffered by nationals of Liechtenstein, Germany argues that "the Liechtenstein nationals concerned did not defend their rights before the Czechoslovak courts when the confiscation strategy was implemented" (CR 2004/24, p. 59, para. 151). Germany claims that it is entitled to invoke this inaction of the Liechtenstein nationals concerned as a defence in the application of the rule of exhaustion of local remedies, "because the Czechoslovak measures were the decisive acts, depriving the owners of the enjoyment of their property" (CR 2004/24, p. 60, para. 152).

60. This is indeed a bizarre defence by the Respondent on the question of non-exhaustion of local remedies in relation to a claim whose cause of action lies, not in the illegal confiscation of assets of Liechtenstein nationals carried out by Czechoslovak authorities, but in the alleged illegal action by German authorities of treating these assets of neutral nationals as "German external assets and other property" for reparation purposes of Germany. Given this nature of the Liechtenstein claims, the principle of exhaustion of local remedies should be examined in relation to whatever local remedies available in Germany in relation to this point, and not in Czechoslovakia in relation to the confiscation measures.

61. In this respect, the final character in the German judicial system of the judgment of the Federal Constitutional Court of Germany in the

matter of the *Pieter van Laer Painting* case would seem to be conclusive. Given the nature of this pronouncement by the highest court in Germany, this decision should serve as the conclusive evidence to establish the point that the possibility for the Liechtenstein citizens concerned to exhaust local remedies for pursuing their cases in relation to their property before German courts is effectively foreclosed to them. Thus this case would seem to fall within the category to which the maxim "no need to exhaust local remedies where no remedies exist to exhaust" is applicable.

62. For all these reasons, I come to my final conclusion that the Court has jurisdiction to entertain the Application filed by the Principality of Liechtenstein on 1 June 2001. That is why I respectfully voted against the conclusions of the present Judgment, as contained in paragraphs (1) *(b)* and (2) of the *dispositif*.

(Signed) Hisashi OWADA.