DISSENTING OPINION OF JUDGE *AD HOC* BERMAN

Duties and functions of a judge ad hoc.
First preliminary objection: lack of dispute — Germany precluded, by ordinary considerations of good faith, from now arguing "no dispute".

Second preliminary objection ratione temporis *— Court's margin of discretion in identifying "source or real cause" of dispute — Interpretation of limitation* ratione temporis *contained in treaty as opposed to optional clause declaration.*

Settlement Convention — Centrality of argument regarding "consistent jurisprudence" of German courts — Argument not established on the facts — German courts retained for themselves freedom of manœuvre over how and when to apply the Convention — Improbable interpretation given to wording of Settlement Convention — No evidence of actual intentions of parties to Settlement Convention — Obligations of Three Powers towards neutral States.

Source of dispute not solely in German court decisions — Actions of German Government after Pieter van Laer Painting *case — Decision to apply Settlement Convention to neutral property and deny compensation clearly subsequent to critical date.*

Case does not depend on German "change of position" — Sufficient to show that Germany first took position regarding neutral assets after critical date — That dispute connected with Settlement Convention and Beneš Decrees undeniable but insufficient — Settlement Convention not opposable to non-party — Pacta tertiis *rules in Articles 34 and 35 of the Vienna Convention on the Law of Treaties — Significance of obligation to pay compensation — Modification of Settlement Convention régime, apparently at German request, well after critical date.*

Other preliminary objections equally to be rejected — Fifth preliminary objection (indispensable third party) — Dispute as defined by Court clearly capable of adjudication without determining lawfulness of Beneš Decrees or confiscations.
If available evidence insufficient, second and fifth preliminary objections should have been joined to the merits.
Existence of legal dispute now determined by the Court — Content of dispute likewise — Judgment does not bring dispute to an end — Settlement Convention (minus the obligation to pay compensation) not a proper way to deal with neutral property.
Unusual nature of claim not an issue in limine, *but for the merits.*

1. While there is much in the Court's decision, and in its reasoning, with which I agree, I find myself in substantial disagreement over certain

issues. That would not in itself be grounds for a dissenting opinion, since I do not take the view that it is virtually incumbent on a judge *ad hoc* to tell the waiting world where and how his conclusions differ from those of the majority on the Court. My views as to the duties and functions of a judge *ad hoc* are very much the same as those expressed by Judges *ad hoc* Lauterpacht and Franck respectively at the provisional measures (further request) phase of the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (*Provisional Measures, Order of 13 September 1993, I.C.J. Reports 1993*, pp. 408-409), and the merits phase of the case concerning *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (*Judgment, I.C.J. Reports 2002*, pp. 693-695).

2. Since, however (or therefore), I believe that the Court has gone seriously astray in deciding how this case should be handled at this preliminary objections phase, I must explain why.

3. In this case, the Federal Republic of Germany, the respondent State, has lodged with the Court no less than six preliminary objections to the Application brought against it by the Principality of Liechtenstein, as applicant State. Three of these objections are stated to go to the jurisdiction of the Court to hear Liechtenstein's Application, and the second set of three are claimed to be reasons why the Court, assuming it holds itself to have jurisdiction, should nevertheless declare Liechtenstein's claims inadmissible. No doubt this is not in itself a matter for judicial comment. Litigating States are free to argue their case before the Court as they think best; that is regarded as one of their sovereign attributes, in which the Court should not in normal circumstances interfere.

4. It remains true all the same that Liechtenstein's claim against Germany, though undoubtedly an unusual one, a claim without obvious precedent, a claim which depends upon creative legal reasoning, is nonetheless in its essence a simple claim, without multifarious strands or complexities. Liechtenstein asserts that the present-day German State has, throughout its lifetime, owed certain duties to Liechtenstein, as a recognized neutral in the Second World War, that those duties have been breached by certain specified conduct in recent years, and that the breach gives rise accordingly to the consequences provided for in the law of State responsibility. Even allowing for an understandable degree of forensic reinsurance, the interposition of a barricade of three jurisdictional plus three "admissibility" objections against so simple a claim creates the impression of indignation, not to say outrage, that the claim should have been brought in the first place. As indicated, however, this may not be fit matter for judicial comment — except (in the context of the present opinion) to the extent that the phenomenon unites with certain features of the case to which I will return below.

5. It is not necessary for me to say anything of my own about the first preliminary objection, the so-called absence of a dispute between the Parties. On it, I am in complete agreement with the Court. The objection has little merit. Germany had itself recognized, in a formal bilateral context, that there was a dispute between the two States which might have to be settled by judicial means. Indeed, given this recognition (I would be disinclined to call it an admission, as it amounted to nothing more than a reflection of the objective facts), I would be prepared to go further than the Court, and to hold that Germany was precluded, by ordinary considerations of good faith, from now raising an objection of "no dispute".

6. The issues on which I part company substantially from the Court relate rather to the second preliminary objection, that under which Germany claims that the dispute between the Parties falls outside Germany's acceptance of the jurisdiction of the Court by virtue of the exception *ratione temporis* contained in Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. There is no need for me to repeat the opposing contentions of the Parties on this question, or the prior jurisprudence of the Court on questions of this kind; on both aspects, I have no quarrel with the summary given in the Court's Judgment. I need only remark that, in my view, the prior jurisprudence of this Court and its predecessor, difficult as some aspects of it are to reconcile, at least establishes that, in interpreting clauses of this kind, the Court enjoys a certain latitude or discretion in determining what facts or situations should be regarded as what the Court now refers to as the "source or real cause" of a dispute before it — if only because no one international dispute exactly resembles another in the way in which it comes into existence. The Court discusses (in paragraph 43 of the Judgment) the fact that the limitation *ratione temporis* relied upon in the present case is contained in an agreed treaty instrument on the peaceful settlement of disputes, not in a unilateral acceptance under the optional clause, and decides that nothing material turns on that fact. With that conclusion I have no great difficulty, at least in the particular circumstances of this case, though I would not exclude the possibility of a different answer being appropriate in other circumstances. In the present case, at all events, each Party, in its pleadings, has half-expressly, half-implicitly accepted the relevance of the three cases primarily in question *(Phosphates in Morocco, Electricity Company of Sofia and Bulgaria,* and *Right of Passage)*, and the Court is entitled to treat that as an agreed understanding between these two Contracting States as to the extent of their treaty obligation towards one another, and give weight to it accordingly under normal Vienna Convention principles.

7. More to the purpose is however the fact that the Court, in reaching its conclusion (a somewhat discretionary conclusion, as I indicate above) that the essential facts or situations to which the present dispute "relates" are anterior to the critical date of 1980 under the European Convention, bases itself on the argument that the German courts, in their decision not

to hear the *Pieter van Laer Painting* case, were doing no more than continuing their consistent line of jurisprudence. I say, "bases itself on the argument", but I could equally well have said "concludes", because the point at issue, it will readily be apparent, is a critical element, perhaps even the crucial element, in the chain of reasoning that leads the Court, in paragraphs 50-52 of the Judgment, to uphold Germany's second preliminary objection, and on that basis to dismiss Liechtenstein's Application.

8. The argument in question is, of course, one that was vigorously advanced by Germany in both the written and the oral pleadings. My disappointment lies in the uncritical way in which the Court has adopted this argument as its own. The Court has failed, on the one hand, properly to distinguish the argument into its component parts, and compounded the lapse by then failing to subject these component parts — crucial as they are to its chain of reasoning — to adequate scrutiny.

9. As I see it, the argument that there was nothing new in the position taken by Germany in respect of the Pieter van Laer painting resolves itself logically into these three propositions: first, that there has been consistency in the jurisprudence of the German courts in respect of issues relating to the confiscation of German external property (at least since the entry into force of the Settlement Convention in 1955); second, that the tenor of these decisions has been compelled by the terms of the Settlement Convention (in other words, that the German courts have had no option but to decide as they did); and third, that it is simply these decisions of the German courts on their own that has served to generate the present dispute.

10. In my considered view, each one of those three propositions is open to serious question. As to the first issue (consistency of jurisprudence), the argument advanced by Germany before the Court has been more a matter of assertion than of demonstration. Germany says that its courts have consistently held, since well before the critical date, that they lacked the competence to hear claims in respect of property confiscated under the Beneš Decrees and similar foreign measures. Liechtenstein has contested this assertion, notably in Appendix I to the Liechtenstein Written Observations, which contains a schedule listing the key court cases heard in Germany in the period 1953-1991[1]. One could have wished, indeed one would have been entitled to expect, that Liechtenstein had been at greater pains to show the Court in detail what issues the German courts had actually been confronted with, and how exactly those issues had been dealt with. An attempt of my own to follow through the court decisions listed in Appendix I, including those which neither Party has

[1] The Appendix also contains an account of the views expressed in the German scientific literature which (if the account given is an accurate one) reveals anything but a settled view among the leading commentators that the question of the application of the Settlement Convention to neutral property had been settled by the earlier court decisions; quite the contrary.

thought fit to translate into the Court's official languages, suggests strongly that in fact it took some years before the German courts settled into the totally *non possumus* stance they now maintain, which in itself implies that there was nothing inevitable about it. There are clear indications in early decisions by the highest courts (e.g., the *AKU* case of 1956, extracts from which are contained in Annex 2 to the Respondent's Preliminary Objections) that room was consciously being left open for the argument to be made in appropriate future cases that the Settlement Convention did not apply, or even that it *should not be applied*[2]. In other cases dating from the same period, there are clear indications of the highest courts recognizing that they were perfectly entitled to distinguish between different items of property in order to determine whether the régime of the Settlement Convention (or, as the case may be, its predecessor, Allied High Commission Law No. 63) did or did not come into play (e.g., the decisions of three separate supreme courts of 1955, 1957 and 1958 listed as serials 2, 4 and 5 in the table in the Appendix referred to above). Even in the proceedings in the *Pieter van Laer Painting* case itself in the 1990s, there is repeated discussion in the lower courts about the preconditions that need to be met before the Settlement Convention[3] is applied (e.g., *Landgericht Köln*, Memorial, Annex 28, esp. pp. A260 *et seq.* and A264 *et seq.*, and *Oberlandesgericht Köln*, Memorial, Annex 29, esp. pp. A303 *et seq.*). Even the rejection of the Reigning Prince's appeal by the Federal Constitutional Court is on the basis that the lower courts had *decided* that the expropriation of his property was a measure effected against German external assets within the meaning of the Settlement Convention (Memorial, Annex 32, p. A356). And in the pleading by Germany before the European Court of Human Rights one encounters once again a discussion of the requirements, aims and purposes of Chapter Six that belies the bald proposition that the hands of the German courts were simply tied in advance (Memorial, Annex 36, pp. A423 *et seq.*).

[2] In a pair of judgments handed down in July 1957 (which were not cited to the Court by either Party) the Federal Supreme Court (Bundesgerichtshof) decided not to apply Article 3 of Chapter Six of the Convention to certain elements of confiscations carried out, respectively, by the Netherlands and under the Beneš Decrees, specifically as German property, notwithstanding that Article 3 was recognized as applying to German assets in Germany. In the second of these decisions, the court expressly based itself on its own assessment of the intentions of the Allied Occupying Powers, i.e., that their intention was not to cover the particular confiscation in question. Both decisions are readily accessible in *International Law Reports*, Vol. 24, pp. 31 and 35 respectively.

[3] Which had by then been made permanent by the arrangements reached in 1990 on a Final Settlement over Germany, of which more below.

11. As to the second issue (the constraining force of the Settlement Convention), one appreciates of course that under the German Constitution, as under those of many other States, treaties duly concluded are self-executing and fall to be applied directly by the courts. This is, to all appearances, how the German courts have treated Chapter Six of the Settlement Convention, or at least how they have treated its Articles 2 and 3, since the obligation in Article 5 (to compensate the owners of confiscated property) seems not to have been regarded as self-executing, but to have depended on parliamentary legislation; and, as the Court heard in argument, the corresponding legislation excluded the payment of compensation to non-German owners. All that said, however, and granted the proposition that Articles 2 and 3 of Chapter Six of the Settlement Convention were intended to be self-executing, it remains hard for any sophisticated jurist to understand why a treaty provision requiring respect for "measures . . . carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution" compels the conclusion that it applies equally to *non*-German property[4]; or (to put the proposition in its more developed form) why it requires the German courts to follow, without enquiry of any kind, the qualification placed on a confiscation by the confiscating State. Or, even if one accepts the proposition in that more developed form, why it requires the German courts to do what they do *without* any demonstration of the qualification placed on the property by the confiscating State, because any such demonstration (even if one had been available in the *Pieter van Laer Painting* case, which on the evidence it was not: cf. Memorial, Annex 28, pp. A265 *et seq.*) would have been outside the competence of the German courts to receive.

12. The justification for what I have called above this totally *non possumus* stance is stated over and over again to be that this was the intention behind the Settlement Convention (or, as the German argument has it, of the Three Western Powers in imposing the Settlement Convention), namely to prevent any German court or authority from enquiring into any confiscation in any manner whatsoever. That brings me however to the first of the two Great Silences in the case, both of which I regard as highly significant for its proper disposal.

13. If it was the intention of the Three Powers to impose a *universal* preclusion, against all comers, of the kind described above, it can surely be a presumed intention only. No evidence was offered to this Court to show that that was indeed the actual intention behind Chapter Six of the Settlement Convention. But would it not be strange in the extreme to

[4] With the consequence that it cannot therefore have been lawfully seized for the purposes of reparation or restitution.

suppose that the Three Powers *could* have intended to protect from all scrutiny confiscations that clearly went outside the scope of the reparations régime laid down by them jointly with their wartime Allies, especially confiscations carried out at the expense of neutral States, towards whom they themselves owed the legal obligations arising out of neutrality, and with whom they maintained friendly relations after the War? And, if one looks at the reported decisions of the German courts themselves, can one discern the slightest sign of a detailed enquiry having been made into what the actual intentions behind the Settlement Convention were? I, for my part, find no indication whatever of a *prise de position* being sought from, or given by, the German Government on that question in any of these domestic legal proceedings. Nor *a fortiori* has this Court been given even a hint that the German Government had sought (and received), at any point in time, confirmation from their Allies and co-Contracting Parties of the interpretation Germany was giving to their common treaty, and specifically not when the issue of *neutral* property arose four-square in respect of the Pieter van Laer painting. Nor, by the same token, is there any sign of any such evidence as to the intentions (common intentions) of the Contracting Parties to the Settlement Convention having been presented by the German authorities to their own courts at the time when the jurisprudence of the latter was taking shape.

14. In other words, this Court is now being asked to proceed on the basis of the proposition that the victorious Allies, in their eagerness to ensure that their former enemy should not be in a position to question measures taken by them against enemy property, were completely indifferent to any risk that this régime might be applied to the detriment of neutral (i.e., non-enemy) property; and that, a full ten years later, the three Western Allies, for their part, forced such a conclusion on a reluctant Germany (by then "Federal Republic of Germany"). The proposition is, to put it mildly, counter-intuitive, and yet it is offered up in a formal judicial context without the slightest element of positive proof to sustain it! Surely it must be the case that, if the question *had* been put (in either its negative or its positive form), say to the Three Powers during the negotiation of the Settlement Convention, the answer would have been obvious. Anything else would carry with it the supposition that the Three Powers consciously intended to breach *their own* obligations towards States whose neutrality they had recognized during the War.

15. In brief, no sooner does one proceed to probe beneath the surface of some of the propositions advanced in this case than one encounters the uneasy feeling that what has been presented to the Court as the inevitable and inescapable consequences of a régime imposed on Germany in fact seems more than likely to have contained along the way some elements of conscious choice by organs of the German State. This is not — of course — to say that the choices made were bad or ignoble ones, or that

there was any element of deliberate intention to damage the interests of third States. But that is not the issue. The issue, as it presents itself in this case, is what steps ought to have followed once it became clear that this was going to be the *result* of the positions that had been taken by Germany. And that, on all the evidence in the case, including that marshalled by the Court in support of the Respondent's second preliminary objection, did not become clear until the 1990s, well after the critical date under the European Convention for the Peaceful Settlement of Disputes.

16. It is that which brings me to the last of my three issues — and at the same time to the second of the Great Silences in this case.

17. The third issue I identify in paragraph 9 above goes to the question whether it is simply the decisions by the German courts over the years that were the real cause of the dispute which has been brought before this Court. Let us assume for a moment, for the purposes of argument, that (contrary to what I have shown above) the German courts did in fact have no other option open to them when the *Pieter van Laer Painting* case came before them. The question is: does the matter stop there? And the answer to that question appears plainly from the fact that the complaint by Liechtenstein is directed at the *adoption* of that position by the German Government in its international relations, and its interposition as a bar to any possibility of paying compensation to Liechtenstein or its citizens as a result (cf. paragraphs 19 and 20 of the Application instituting these proceedings). That is something which the Court, quite correctly in my view, recognizes by implication in paragraphs 25 and 26 of the Judgment. But, having recognized it, the Court fails to follow through. For, if what triggered this dispute was the realization that Germany, against all expectation, was going to take the position that its treaty obligations to the Three Allies precluded, absolutely and permanently, compensation for the confiscation of Liechtenstein property, then that was a state of affairs (I deliberately avoid the problematical phrase "fact or situation") that — so it seems to me — falls exactly within the framework of the *Right of Passage* Judgment, and ought at the least to have warned the Court off what I regard as the facile conclusion that the present dispute "relates to" the Beneš Decrees, for the purposes of applying Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes. It will be recalled that, in the *Right of Passage* case, the Court found that it was not in a position to pronounce on what were the "situations or facts" to which the dispute related until it had heard full argument on the substance, and accordingly joined the preliminary objection to the merits (*Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 125). The Court's reasoning for so doing (*ibid.*, pp. 151-152) bears a strong resemblance to the circumstances of the present case.

18. I pause at this point to observe that the conclusions I draw in the preceding paragraph are ones that, in my view, impose themselves simply

on the contours of the case. They do not in any sense depend either on there having been a prior understanding between Liechtenstein and Germany (with regard to neutral property) or on a supposed "change of position" by Germany. Both of these propositions I regard as red herrings, and the fact that they were introduced by the Applicant itself into its argument does not make them any the less so. The Court is quite right to dispose of them — on the facts. But the Court, once again, stops short there, without going on to look carefully enough at whether the logic of the Applicant's case really *does* require it to establish one or both of these propositions. To be sure, the Court does admit, in paragraph 49 of the Judgment, that Liechtenstein might be able to establish its case *ratione temporis* by showing that (I quote in full) "German courts, by applying their earlier case law under the Settlement Convention for the first time to Liechtenstein property, applied that Convention 'to a new situation' after the critical date". But I regret to say that the purport of that Delphic utterance remains closed to me.

19. To my mind it is perfectly clear that the main conclusion which Liechtenstein asks the Court to draw does not depend on either the "prior understanding" or the "change of position" as a precondition. Indeed, one might almost say that there was something of the perverse in insisting that, in order to show that the essential facts generating the dispute are dated *after* 1980, you must first establish their link to things dating *before* 1980. In my view it suffices entirely to show that Germany *first* took an explicit position over neutral assets in relation to the post-war confiscations after 1980, in order to bring the case squarely within the view taken by the Court in the *Right of Passage* case. To say, as the Court does in paragraph 51 of the Judgment, that the issue addressed by the German courts in the *Pieter van Laer Painting* case "cannot be separated from the Settlement Convention and the Beneš Decrees" is no doubt true — so far as it goes — but it is not the question that arises for the purpose of deciding whether the facts of the present case fit this Court's prior jurisprudence.

20. What, then, of the second Great Silence? If the German answer to the Liechtenstein claim, i.e. that it was the powerless agent of an obligation imposed upon it by the Three Powers, is to be subjected to critical examination — as in my opinion it manifestly must be — it has first to be broken down into its two component parts. To do so requires some further creative interpretation of my own, in the absence of any proper argument on either point by either Party before the Court. But I believe I do no more than tease out the inner logic when I say that this argument depends upon the following: *(a)* that Germany was entitled (i.e. legally entitled) to oppose its obligations (i.e. its claimed obligations) under the Settlement Convention to Liechtenstein, which was not a party to that treaty; *(b)* that there was no *novus actus interveniens* in the arrange-

ments in 1990 which brought about the Final Settlement with respect to Germany.

21. These constituent propositions have only to be stated in order to see how open to question both of them are.

22. Proposition *(a)* stands in obvious conflict with the *pacta tertiis* rules in Articles 34 and 35 of the Vienna Convention on the Law of Treaties, which certainly reflect the customary international law on the subject. Yet the German argument before the Court simply parrots that Germany had to follow its obligations (sc. towards the Three Powers) under the Settlement Convention, as if it was obvious (including, presumably, to all third States) that Germany would oppose this Convention to non-parties, to the detriment of the latter, and without regard to the elementary proposition that a State cannot, by contracting with a second State, absolve itself of its obligations towards a third State (for the application of which rule in the treaties field, cf. Article 30 of the Vienna Convention). And if the contradiction is glaring enough as it stands, how much more glaring still must it be when what is sought to be imposed on the third State is not even what the treaty, on its natural meaning, seems to say!

23. It is however proposition *(b)* that raises the more profound questions — at least in the context of the present Judgment. The relevant treaty provisions, Chapter Six of the Settlement Convention, were self-evidently the subject of conscious attention, if not in the Four-plus-Two negotiations themselves, then certainly when Germany and the *Three* Powers negotiated the Exchange of Notes of 27/28 September 1990, since they formed the explicit subject-matter of part of its paragraph 3. Of utmost significance is the fact that those parts of Article 3 of Chapter Six that preclude claims were prolonged, and in effect made permanent, whereas the obligation in Article 5 to pay compensation was extinguished; this notwithstanding the inescapable conclusion that the Allies, in negotiating the Settlement Convention at the time, must have regarded the obligation to pay compensation in Article 5 as the necessary counterpart to Article 3. No evidence has been offered to the Court — by either Party — as to how or why the Settlement Convention was dealt with in this particular way; presumably evidence of that kind was not accessible to the Applicant (other than the shreds in paragraphs 3.54 and 5.56 of the Memorial), but the evidence must most certainly be in the possession of the Respondent. Be that as it may, it is hard to imagine any possible reason why this carefully calibrated metamorphosis of Chapter Six can have been at the insistence of the Three Powers. If *per contra* there are grounds for the assumption that the perpetuation of the one obligation and the extinction of the other was procured by *Germany*, for its own benefit, then that must surely have a substantial effect on one's view of the case. On the one hand, because the Allies had specifically intended the régime of the Settlement Convention to be a temporary expedient only,

pending a final regulation of the reparations question, as Article 1 of Chapter Six recites. On the other hand, because it can certainly not be asserted that Germany was in the powerless position it claims to have been in in 1952/1955, and thus to have had to accept through gritted teeth in 1990 whatever its Western partners chose to impose upon it. But, in the very specific context of the present Judgment, the events of 1990 may be more than "substantial" in their effects; they may be decisive. Why? Because they may suggest a wholly different analysis of what represents "the source or real cause" of this dispute, and one which, without any doubt, does not fall within Article 27 *(a)* of the European Convention for the Peaceful Settlement of Disputes, on which the Court has chosen to rest its decision.

24. At all events, much of what I say in the preceding paragraph remains, for the moment, at the level of inference or supposition, in the absence of proper evidence or argument about what *did* happen in 1990. That in turn suggests, yet again, that the Court was not in a position adequately to assess, on the material available to it at the present stage of the case, whether the second preliminary objection was, or was not, well founded. If so, the accepted way to deal with the situation would be to join the objection to the merits, as foreseen in paragraph 9 of Article 79 of the Rules.

25. Since I would not therefore have upheld the second preliminary objection as denying the Court *in limine* the jurisdiction to hear the case, it is incumbent on me to say something about the remaining four preliminary objections. This I can do very briefly. I do not propose to say anything about the third, fourth and sixth objections; they seem to me devoid of any substantial merit. The fifth objection, however, relating to the absence before the Court of an indispensable third party, is a serious one, and would have required the Court's serious attention, as a matter going to the *admissibility* of the case, had the Court upheld its *jurisdiction* to hear it.

26. This is not the place for a lengthy excursus on a question which, in the event, does not figure in the Judgment of the Court at all. For my part, I am in the company of those who experience difficulty in following the Court's reasoning in the case concerning *Certain Phosphate Lands in Nauru*. It is however enough to say that that case, taken together with the classic pronouncements of the Court in the *Monetary Gold* case, establishes that the test is whether the determination of the rights or obligations of the absent third State would be a "necessary precondition" to the Court disposing of the dispute before it. This is something on which the Parties in the present case appear to be in agreement. It goes without saying, though, that that test cannot be applied until it is established what the dispute is. The Court has now made its objective determination of the subject-matter of the dispute between the Parties (a determination with

which I respectfully agree), and, in the light of that determination, it seems to me clear that the settlement of that dispute does not in any sense require the Court first to pronounce on whether the Beneš Decrees as such, or particular confiscations undertaken pursuant to any of those Decrees, were or were not lawful (in the particular sense of infringing the rights of Liechtenstein under international law). To the extent that it might, however, be felt that the final answer to that question was not yet sufficiently clear at this stage of the argument in the case, that would of itself suggest that the objection was not one of an exclusively preliminary character, and ought therefore to be joined to the merits, as with the second preliminary objection (para. 23 above).

27. Having reached the above conclusions, I feel it necessary to add some final remarks.

28. The first of these is the fairly elementary observation, which harks back to the remark in paragraph 4 above, that the decision by the Court that it has no jurisdiction to hear this case does not of itself resolve the dispute between the two States. To the contrary, the Court has now found that Liechtenstein and Germany are in dispute with one another, that the dispute is a legal dispute, and has made its own objective determination of what the subject-matter of the dispute is. Some element of *res judicata* doubtless attaches to those findings. One may assume that the matter will not rest there. The leader of the German delegation to the bilateral consultations in June 1999 recognized that a solution needed to be found, whether by judicial decision or otherwise. To have had that unresolved dispute — whatever its merits or demerits — settled by decision of this Court, if necessary by some form of *ad hoc* understanding between the disputants not to contest jurisdiction, would have been an entirely civilized way to handle the matter, one in accordance with the honourable traditions of both States, and, needless to say, entirely within the spirit of the European Convention for the Peaceful Settlement of Disputes. But other methods, of an equally civilized character, remain open to them as well.

29. The second observation may be thought a little more pointed, so I preface it by saying with all emphasis that it is not offered in a critical spirit. One cannot read the papers in this case without the feeling that, faced with the undoubtedly difficult and highly sensitive issue of the Beneš Decrees, the German courts have taken refuge behind the Settlement Convention (and previously Allied High Commission Law No. 63), and that then the German Government has taken refuge behind the German courts. That position, understandable as it may be in relation to the confiscation of *German* property, is not a proper way of dealing with the question of neutral property confiscated as if it were German. It is all too easy to portray Chapter Six of the Settlement Convention as if it were simply a heavy burden imposed upon an unwilling Germany. But the truth is that Chapter Six also served to *protect* the newly founded German State by absolving it of co-responsibility for the confiscations, and at the same time absolving its courts from the invidious task of having to

sit in judgment on a flood of complaints from its citizens about the treatment visited on their property abroad. Yet the counterpart to this protection for Germany — the necessary element for its completion — must surely have been, quite intentionally, the obligation to compensate laid down in Article 5 of that same Chapter (with no apparent limitation, it may be remarked, to German citizens at all). To lay claim to the one while disclaiming the other is surely a position that requires re-examination. One can only hope that even now some such re-examination may be possible.

30. My last observation of all goes back to the remark at the beginning of this opinion that Liechtenstein's claim in this case is a very unusual one, requiring, shall we say, a degree of legal creativity. That is however a question going to its *merits*. It is hard to resist the conclusion that the Respondent — and, dare one say it, in due course the Court itself — has allowed the difficulty it experiences in weighing the prospective legal merits of the claim to become transmuted into an issue *in limine*. However imaginative the claim, it deserved a hearing, and the Court could with ample justification have achieved just that by joining the second and fifth preliminary objections to the merits.

(Signed) Franklin BERMAN.