INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING CERTAIN PROPERTY

(LIECHTENSTEIN V. GERMANY)

PRELIMINARY OBJECTIONS

OF THE FEDERAL REPUBLIC OF GERMANY

27 JUNE 2002

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1. The present Submissions on Preliminary Objections contain the following parts:

- In Part I, Germany explains that it raises Preliminary Objections against the Application of the Principality of Liechtenstein. Germany refrains from commenting on the issues related to the merits of the case.

- In Part II, Germany sets out the factual background of the present dispute, solely for the purpose of demonstrating that the Court lacks jurisdiction to adjudicate Liechtenstein's claims and that these claims are inadmissible.

- In Part III, Germany explains in detail the nature and scope of its Preliminary Objections.

- In Part IV, Germany sets out its Conclusions and Submissions.

PART I

INTRODUCTION

2. The Principality of Liechtenstein (hereafter Liechtenstein) and the Federal Republic of Germany (hereafter Germany) are European States that have maintained good and friendly relations for more than fifty years. They are both members of the Council of Europe and parties to the European Convention on Human Rights. By virtue of the Statute of the Council of Europe and the European Convention on Human Rights they are committed to the rule of law, democratic principles and the protection of fundamental rights.

3. At the end of World War II Czechoslovakia confiscated private property of persons belonging, according to the applicable Czechoslovak legislation, to the "German people" irrespective of their nationality. Germany has always considered these confiscations to be in violation of public international law. Germany profoundly regrets that private property of Liechtenstein citizens was also confiscated in that context. However, Germany has no detailed information about the private property of Liechtenstein citizens affected by these measures and Liechtenstein has not provided such information in the present case.

4. For the very first time in 1999, to the great surprise of Germany, Liechtenstein claimed compensation from Germany for the property confiscated by the authorities of Czechoslovakia at the end of World War II. On 30 May 2001 Liechtenstein lodged an Application with the Registry of the Court against Germany.

5. Liechtenstein claims that

(a) Germany has failed to respect the sovereignty and neutrality of Liechtenstein and has committed other breaches of international law, and

(b) in consequence of its acts, is liable to compensate Liechtenstein for the injuries and damage suffered.

6. Liechtenstein filed its Memorial on 28 March 2002. In its Application and Memorial, Liechtenstein alleges constantly, much to the surprise of the Respondent, that Germany at some date "in the 1990s"[1], a date that changes on numerous occasions in the course of the Memorial, took the decision to change its position to henceforth treat certain property of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution, or as a result of the state of war" without ensuring any compensation for the loss of that property. Germany has never taken such a decision.

7. This surprising factual assertion of an alleged "change of position of Germany" appears in the Application of 30 May 2001 no less than five times, in one form or another. In the Memorial of 28 March 2002 the same factual allegation is then taken up again, repeated, restated, reformulated, elaborated, built upon and repeated again more than 50 times. Consequently, it is rather obvious that the factual assertion of an alleged "change of position" of Germany is the centrepiece, indeed the only basis for Liechtenstein's Application and claims.

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[1] Application of the Principality of Liechtenstein (hereafter: LA), para. 17; Memorial of the Principality of Liechtenstein (hereafter: LM), p. 54, para. 3.2.

8. Germany will show that the alleged "change of position" on its part never occurred and is neither based on nor supported by any demonstrable facts. Given this complete lack of any supportive evidence, it is clear that the alleged "change of position" is an artificial construct purposefully invented. With regard to the purpose of such a dubious invention, one must assume that Liechtenstein is apparently in desperate need of some factual conduct by Germany which might, at least with a minimum degree of plausibility, be presented and exploited as conduct interfering with Liechtenstein's rights. Furthermore, given the fact that the European Convention for the Peaceful Settlement of Disputes of 29 April 1957 entered into force between the Applicant and the Respondent only in 1980, Liechtenstein is apparently equally in desperate need of an alleged factual conduct by the Respondent which, in order to support Liechtenstein's claims, must have occurred after 1980. But, needless to say, even the systematic repetition of false allegations cannot turn them into facts and reality.

9. Germany will demonstrate that this dubious approach has the purpose of constructing the appearance of a factual basis for the Application of Liechtenstein, with regard to jurisdiction, admissibility and the merits of that Application. Accordingly, Germany avails itself of the opportunity provided for by Article 79, paragraphs 1 and 2, of the Rules of Court to contest the jurisdiction of the Court and the admissibility of the Application by raising Preliminary Objections. Germany is of the view that these Preliminary Objections must be decided upon first before the case can possibly be adjudicated on its merits.

10. The present Submissions contain the Preliminary Objections of Germany to the Application of Liechtenstein. The Objections relate to the jurisdiction of the Court as well as to the admissibility of the case. They are six in number. Their subject matter is set out below:

I. The Court has no jurisdiction to entertain the case.

1. There exists no dispute between Liechtenstein and Germany. Germany will show that the "dispute" as alleged by Liechtenstein is a completely artificial invention. Liechtenstein's claims do not meet the requirements for the existence of a dispute firmly established in the jurisprudence of the International Court of Justice, according to which it must be shown that the claim of one party is positively opposed by the other. The alleged change of position by Germany never occurred and is not based on any demonstrable facts **(Preliminary Objection No. 1)**.

2. The Court lacks jurisdiction *ratione temporis*. As the Liechtenstein Memorial shows, all relevant facts that might be the real source of a dispute, a dispute that would, however, be with the Czech Republic, date back to 1945 and the period immediately thereafter. Therefore, the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which entered into force between the parties in 1980, cannot be a basis for jurisdiction because it does not apply to disputes relating to facts and legal situations prior to 1980 **(Preliminary Objection No. 2)**.

3. Liechtenstein's claims fall within the domestic jurisdiction of Germany. The Liechtenstein Memorial shows that Liechtenstein does not even

allege that a rule of public international law was applicable to the dispute brought before the German courts concerning the Pieter van Laer painting. Consequently, that dispute fell exclusively within German domestic jurisdiction. This is also true for the dispute now brought before the International Court of Justice (**Preliminary Objection No. 3**).

II. Liechtenstein's claims are inadmissible:

1. **Liechtenstein's claims are not sufficiently substantiated**. Liechtenstein has not fulfilled the obligation to substantiate its claims. In particular, it has neither given any details on the affected Liechtenstein properties, nor has it identified the alleged victims (**Preliminary Objection No. 4**).

2. **Liechtenstein's claims would require the Court to give judgment on rights and obligations of the Czech Republic in its absence and without its consent.** The Czech Republic is therefore an indispensable third party to the present case. The sovereign acts of a third State, namely Czechoslovakia, the predecessor State of the Czech Republic, would have to be judged by the International Court of Justice if the Court decided the case on its merits. This, however, would require the Czech Republic to give its consent to such a judicial evaluation. The Court has no jurisdiction to decide upon sovereign acts of a third State in a case brought by Liechtenstein against Germany (**Preliminary Objection No. 5**).

3. **The alleged Liechtenstein victims have failed to exhaust local remedies.** By introducing its Application against Germany, Liechtenstein seeks to exercise diplomatic protection for the benefit of its citizens. Therefore, local

remedies available in Czechoslovakia should have been exhausted. Liechtenstein has not proven that that requirement was met (**Preliminary Objection No. 6**).

PART II

STATEMENT OF FACTS

11. After the tragic history Czechoslovakia had endured from 1938 onwards, the Beneš Decrees were adopted in 1945. On the basis of these decrees, agricultural properties, buildings etc. of persons belonging to the "German and Hungarian people" were confiscated.

12. As correctly described in the Liechtenstein Memorial[1], the relevant decrees applied to persons belonging to the "German and Hungarian people", regardless of their nationality. This was laid down expressly in Decree No. 12 of 21 June 1945[2]. In its § 2, this Decree specified:

> "Those persons are considered to belong to the German or Hungarian people who declared on the occasion of every census since the year 1929 that they belonged to the German or Hungarian people, or who have become members of national groups or political parties made up of persons belonging to the German or Hungarian people".

13. Liechtenstein claims that "substantial arable land and forests, numerous buildings and their contents, factories etc." of "[a]bout 38 Liechtenstein nationals"[3] were affected by these measures of confiscation taken by the

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[1] LM, p. 24, para. 1.13.

[2] LM, Annex 6, vol. I, p. 9.

[3] LM, p. 8, para. 2.

authorities of Czechoslovakia[1]. Liechtenstein states that the then Prince of Liechtenstein and members of his family were particularly affected as owners of large properties. According to the Applicant, they were at no time German nationals.

14. Germany has no information about the property concerned which is not identified in the Liechtenstein Submissions, with the exception of some details concerning one painting that gave rise to a dispute under private law between the Prince of Liechtenstein and the City of Cologne, where this painting was exhibited in 1991.

15. Liechtenstein explains that in 1945 its Government drew up lists of families affected by the confiscation measures of the Czechoslovak authorities[2]. It also points out that the competent judicial instance, the Bratislava Administrative Court, held in a judgment dated 29 November 1951 that the confiscations concerning the then Prince of Liechtenstein were lawful under the law of Czechoslovakia[3].

16. Liechtenstein does not explain whether any of the other property owners have brought any cases before the Czechoslovak courts nor has Liechtenstein explained to what extent the Government of Liechtenstein has exercised diplomatic protection on behalf of Liechtenstein nationals since 1945. In

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[1] Cf. LM, Annex 8, vol. I, p. 32.

[2] LM, p. 27, para. 1.19.

[3] LM, pp. 28-29, para. 1.22. For the judgment of the Bratislava Administrative Court, see LM, Annex 9, vol. I, p. 34.

particular, Liechtenstein has not informed Germany about any contacts with the Government of Czechoslovakia or of the Czech Republic after Czechoslovakia and later the Czech Republic adopted a constitutional system based on the rule of law[1].

17. During the occupation of Germany after 1945 the Council of the Allied High Commission for Germany stated in *Law No. 63 Clarifying the Status of German External Assets and Other Property Taken by Way of Reparation or Restitution* of 31 August 1951[2] that no claim or action in connection with measures against German foreign property was to be admissible in German courts. The same stipulation was later included in the *Convention on the Settlement of Matters Arising out of the War and the Occupation* (hereafter: Settlement Convention)[3], which entered into force on 5 May 1955, on the same day as the *Convention on Relations between the Three Powers and the Federal Republic of Germany* of 26 May 1952 as amended on 23 October 1954. Article 1, paragraph 2, of the latter Convention stated: "The Federal Republic shall have accordingly the full authority of a sovereign State over its internal and external affairs."

18. Article 3 of Chapter Six of the Settlement Convention provided:

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[1] In the Memorial only the steps taken by the Prince as to the family property are described; as to the property of other Liechtenstein nationals the Memorial only refers to the list of persons concerned which had been drawn up by the Government of Liechtenstein, LM, pp. 27-29, paras. 1.19- 1.23.

[2] *Law No. 63 of the Council of the Allied High Commission Clarifying the Status of German External Assets and Other Property Taken by Way of Reparation or Restitution of 31 August 1951*; LM, Annex 15, vol. I, p. 94.

[3] United Nations, *Treaty Series*, vol. 332, p. 219; LM, Annex 16, vol. I, p. 98.

"1. The Federal Republic shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of reparation or restitution, or as a result of the state of war, or on the basis of agreements concluded, or to be concluded, by the Three Powers with other Allied countries, neutral countries or former allies of Germany.

2. The Federal Republic shall abide by such provisions regulating German external assets in Austria as are set forth in any agreement to which the Powers now in occupation of Austria are parties or as may be contained in the future State Treaty with Austria.

3. No claim or action shall be admissible against persons who shall have acquired or transferred title to property on the basis of the measures referred to in paragraph 1 and 2 of this Article, or against international organizations, foreign governments or persons who have acted upon instructions of such organizations or governments."

19. In connection with the conclusion of the *Treaty on the Final Settlement with respect to Germany*, signed in Moscow on 1 September 1990, which entered into force on 15 March 1991[1], an *Exchange of Notes between Germany and the three Western Allies* was effected according to which Article 3, paragraphs 1 and 3, of Chapter Six of the Settlement Convention remained in force[2].

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[1] LM, Annex 18, vol. II, p. 175.

[2] LM, Annex 19, vol. II., p. 187.

20. Germany has never recognized the confiscation of German foreign property as lawful[1]. However, German courts have consistently held that they are barred by the Settlement Convention of 1955 from evaluating the lawfulness of any confiscation measures of that sort. Since the decisions rendered by the Federal Court of Justice (Bundesgerichtshof), the highest court for civil matters, on 13 December 1956[2] and 11 April 1960[3] it has been fully established that Article 3 of Chapter Six of the Settlement Convention applies if a foreign State has seized certain assets as German assets. It is the intention of the foreign State to confiscate the assets as German which is decisive for the application of the provision barring German jurisdiction.

21. In its decision of 1960, the Federal Court of Justice held:

> "German courts are barred by the Convention ... from deciding on the claims of the Plaintiff. It is true that the Respondent does not belong to the persons explicitly mentioned in Article 3, paragraph 3, of Chapter Six of the Settlement Convention. ... Nevertheless, German courts have no jurisdiction. Even if the conditions of Article 3, paragraph 3, of Chapter Six of the Settlement Convention are not fulfilled, German courts lack jurisdiction in a case in which the Plaintiff is trying to raise an objection against measures

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[1] Cf. LM, p. 55, para. 3.4.

[2] In this case, the so-called *AKU case*, the Federal Court of Justice held: "[T]he question as to the admissibility of this action [i.e., the confiscation] depends only on whether the holdings which are the subject of the proceedings must be deemed to have been confiscated by the Netherlands Decree to the extent to which they are still claimed by the plaintiffs. *This* question can be determined only by the law of the confiscating State...", 23 *International Law Reports*, p. 21, at 22-23, Preliminary Objections of Germany (hereafter: GPO), Annex 2.

[3] Federal Court of Justice, 32 *Collection of decisions* (BGHZ), p. 170, cited in LM, pp. 64 ff; para. 3.19, GPO, Annex 3.

mentioned in Article 3, paragraph 1, of Chapter Six of the Settlement Convention.

Article 3 of Chapter Six of the Settlement Convention is not inapplicable for the reason that the provision concerns German assets and the Plaintiff challenges the seizure arguing that the assets were not German assets. For the application of this provision it is sufficient that the assets were seized as German assets. Article 3, paragraph 1, of Chapter Six of the Settlement Convention concerns those measures which were directed against German assets as understood by the enemy-legislation of the State which seized the assets; whether the assets seized according to this legislation were in fact German or foreign assets is to be decided exclusively by the State which has seized the assets. ... If the foreign Plaintiff wants to raise claims against the seizure, the only remedies available are those which exist under the law of the State which has seized the assets. The courts of the Federal Republic are not in a position to render a judgment on the legality of the seizure or a judgment intended to interfere with the decision of the foreign State concerning the legality of the seizure."[1]

22. This case law was confirmed by the German court decisions in the case concerning a painting which was brought from Brno to Cologne and was claimed by the Prince of Liechtenstein as his property (hereafter: *Pieter van Laer Painting* case)[2]. The court procedures were brought by the Prince of Liechtenstein against the City of Cologne when in 1991 the Wallraf-Richartz-Museum, which is a museum of the City of Cologne, staged a large exhibition of

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[1] GPO, 32 *BGHZ*, p. 172 ff., translation by Counsel, GPO, Annex 3.

[2] LM, pp. 29-32, paras. 1.24 - 1.29.

Dutch painters of the 17th century. One of the exhibited paintings was the "Szene um einen römischen Kalkofen" ("Scene set around a Roman kiln"), which, according to the plaintiff in that case, had been confiscated by Czechoslovakia in or after 1945 in a castle belonging to his father, the then reigning Prince of Liechtenstein.

23. On 10 October 1995 the Cologne Regional Court (Landgericht), following a hearing, declared the plaintiff's action inadmissible[1]. In the court's view, Article 3 of Chapter Six of the Settlement Convention excluded German jurisdiction regarding the case. The Regional Court found that the confiscation constituted a measure within the meaning of that provision. The Regional Court rejected in particular the plaintiff's argument that this provision did not apply as it only concerned measures carried out with regard to German external assets or other property and his father had never been a German citizen. In this respect, the Court, referring to the case law of the Federal Court of Justice, stated that the view of the confiscating State was decisive. The aim and purpose of this provision, namely to immunize confiscation measures implemented abroad, could only be achieved by excluding such measures from judicial review in Germany.

24. On 9 July 1996 the Cologne Court of Appeal (Oberlandesgericht) dismissed the plaintiff's appeal[2]. The Court of Appeal confirmed that the plaintiff's action was

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[1] Original text and translation in: LM, Annex 28, vol. II, p. 256.

[2] Original text and translation in: LM, Annex 29, vol. II, p. 289.

inadmissible as German jurisdiction in respect of his claim was excluded under Article 3, paragraph 1, in conjunction with paragraph 3, of Chapter Six of the Settlement Convention. These provisions excluded German jurisdiction in respect of claims and actions against persons who, as a consequence of reparation measures, had directly or indirectly acquired title to German property confiscated abroad. The Court of Appeal further considered that Article 3, paragraph 3, of Chapter Six of the Settlement Convention applied in the plaintiff's case. In the Court's view, this provision was the procedural consequence of the idea that the legal relations resulting from the liquidation of German property abroad by foreign powers for the purpose of reparation were "final and unchallengeable". Following the above mentioned case law of the Federal Court of Justice, the Court of Appeal considered that the notion of "German external assets" had to be interpreted in the light of the law of the expropriating State. The confiscation in dispute was found to be in compliance with the legislation of the expropriating State since the competent Czechoslovak administrative authorities as well as the Bratislava Administrative Court had found that Presidential Decree No. 12 of 21 June 1945 applied to the confiscated property.

25. On 29 January 1998 the Federal Constitutional Court, through a Chamber of three judges, refused to entertain the plaintiff's constitutional complaint as it offered no prospect of success[1]. The Federal Constitutional Court considered

[1] Original text and translation in: LM, Annex 32, vol. II, p. 353.

that the interpretation of the terms "measures against German external assets" as comprising any measures which, in the intention of the expropriating State, were directed against German assets, could not be objected to under constitutional law. The bar on litigation did not constitute an agreement to the detriment of Liechtenstein, as only the Federal Republic of Germany and its courts were under this treaty obligation.

26. After the German courts had finally decided the *Pieter van Laer Painting* case, Liechtenstein asked for consultations with the German Government. Given the friendly relations between the two countries, Germany declared itself ready to hold such consultations. Consequently, two rounds of talks took place on 10 July 1998 in Bonn and on 14 June 1999 in Vaduz. These talks had a purely consultative character. Since the German Government had not been involved in the legal proceedings before the German courts in the *Pieter van Laer Painting* case, the German side clarified that it was not its role to comment on the substance of these decisions. At the same time, the German side emphasized that it did not share Liechtenstein's view according to which the decisions of the German courts concerning the painting had been contrary to international law.

27. In an Aide-mémoire of 9 December 1999, Liechtenstein for the very first time expressed the expectation that the Government of the Federal Republic of Germany would commence negotiations in the matter of Liechtenstein citizens

affected, with the objective of reaching just compensation[1]. In a letter of 20 January 2000, the German Foreign Minister declared "that the German Government does not share the legal opinion" expressed in the Aide-mémoire. He continued: "Even upon renewed examination of the legal and factual position, they [i.e., the German Government] do not see a possibility to make compensation payments to the Principality of Liechtenstein for losses of property suffered as a result of post-war expropriations in former Czechoslovakia"[2].

28. On 28 July 1998, the Prince of Liechtenstein brought an application before the European Commission of Human Rights alleging a violation of the European Convention on Human Rights by the decisions of the German courts concerning the painting. The Prince invoked Article 6, paragraph 1, of the Convention which guarantees effective access to court, and Article 1 of Protocol No. 1, which guarantees the right to property. The European Court of Human Rights, in a judgment of 12 July 2001[3], unanimously rejected the application and found that no violation of the European Convention on Human Rights had taken place. As to the alleged violation of Article 6, paragraph 1, of the Convention, the Court found that

> "the exclusion of German jurisdiction under Chapter 6, Article 3 of the Settlement Convention is a consequence of the particular status

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[1] LM, Annex 44, vol. II, p. 489; cf. LM, pp. 83 ff, paras. 3.55 ff.

[2] LM, p. 84; text of the letter in LM, Annex 45, vol. III, p. 503.

[3] *Prince Hans-Adam II of Liechtenstein* v. *Germany, Judgment, 12 July 2001,* GPO, Annex 1.

> of Germany under public international law after the Second World War. It was only as a result of the 1954 Paris Agreements with regard to the Federal Republic of Germany and the Treaty on the Final Settlement with respect to Germany of 1990 that the Federal Republic secured the end of the Occupation Regime and obtained the authority of a sovereign State over its internal and external affairs for a united Germany. In these unique circumstances, the limitation on access to a German court, as a consequence of the Settlement Convention, had a legitimate objective"[1].

The exclusion of jurisdiction of German courts was, therefore, compatible with Article 6, paragraph 1, of the European Convention on Human Rights, which guarantees in principle access to the courts in cases of this sort.

29. As to the alleged violation of Article 1 of Protocol No. 1 to the European Convention, the Court underlined that a violation could only be invoked by the applicant insofar as the decisions of the German courts related to his "possessions" within the meaning of that provision. In this context the Court recalled that:

> "according to the established case-law of the Convention organs, 'possessions' can be 'existing possession' or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional

[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany,* para. 59, GPO, Annex 1.

claim which lapses as a result of the non-fulfilment of the condition"[1].

After clarifying that the Court was not competent *ratione temporis* to examine the measures taken in 1945, it continued:

> "Subsequent to this measure, the applicant's father and the applicant himself had not been able to exercise any owner's rights in respect of the painting which was kept by the Brno Historical Monuments Office in the Czech Republic.
>
> In these circumstances, the applicant as his father's heir cannot, for the purposes of Article 1 of Protocol No. 1, be deemed to have retained title to property nor a claim to restitution against the Federal Republic of Germany amounting to a 'legitimate expectation' in the sense of the Court's case-law.
>
> This being so, the German court decisions and the subsequent return of the painting to the Czech Republic cannot be considered as an interference with the applicant's 'possession' within the meaning of Article 1 of Protocol No. 1"[2].

30. On 30 May 2001, Liechtenstein lodged its Application instituting proceedings in the name of the Principality of Liechtenstein against the Federal Republic of Germany before the International Court of Justice.

31. In its Application as well as in its Memorial of 28 March 2002, Liechtenstein alleges time and again that Germany at some unspecified date "in the 1990s" took the decision to change its position and to henceforth treat certain property

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[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany,* para. 83, GPO, Annex 1,.

[2] *Prince Hans-Adam II of Liechtenstein* v. *Germany,* paras. 85-86, GPO, Annex 1.

of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution, or as a result of the state of war", without ensuring any compensation for the loss of that property. More specifically, in Part I of the Liechtenstein Memorial dealing with the alleged "Factual Background" of the case, the whole of Chapter II is devoted to the allegation of "Germany's Change of Position". Thus, Liechtenstein bases its claim on an alleged "change of position" of Germany which is inferred from the decisions of the German courts in the *Pieter van Laer Painting* case and some statements of officials of the German Government[1].

32. Germany wishes to state explicitly that the alleged "change of position of Germany" never occurred and is neither based on nor supported by any demonstrable facts. Only by means of gross distortion can continued German adherence to legal obligations under the Settlement Convention be presented as a "change of position" concerning Liechtenstein property confiscated by a third party, namely Czechoslovakia. With regard to this purposeful invention, Germany submits that the Liechtenstein Memorial cannot be considered as containing "a statement of the relevant facts" pursuant to Article 49, paragraph 1, of the Rules of Court.

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[1] See LM, p. 8, para. 3: "Beginning in 1995, Germany has classified all the Liechtenstein property as having been 'seized for the purpose of reparation or restitution, or as a result of the state of war', within the meaning of Article 3 of Chapter Six of the [Settlement Convention]. It has done so by a combination of decisions of its courts and statements by Ministers and officials."

33. Consequently, Germany submits that Liechtenstein's claims, unsupported by any coherent facts, should be rejected *a limine* by the Court for the reasons explained in the following Preliminary Objections.

CHAPTER I

THE COURT HAS NO JURISDICTION TO ENTERTAIN LIECHTENSTEIN'S CASE

34. Germany submits that Liechtenstein has not been able to establish a legal basis for the jurisdiction of the International Court of Justice in the case brought against Germany on 30 May 2001. First, Germany will explain that there exists no "dispute" between Liechtenstein and Germany in the sense of the case law of the Court. Second, Germany will show that all aspects of the alleged dispute are outside the temporal jurisdiction of the Court. Third, Germany will demonstrate that Liechtenstein's claims fall exclusively within the domestic jurisdiction of Germany.

Section I.

There Exists No Dispute between Liechtenstein and Germany

35. The existence of a "dispute" constitutes the most fundamental prerequisite of the jurisdiction of the Court in inter-State litigation. The condition that a "dispute" must have arisen for the Court to exercise its functions in contentious proceedings has not only found expression in various provisions of the Statute of the International Court of Justice, including Article 38, paragraph 1, and Article 40, but has also been emphasized time and again in the Court's jurisprudence. For instance, in its Judgments in the *Nuclear Tests* cases the Court stated that

"the existence of a dispute is the primary condition for the Court to exercise its judicial function."[1]

Thus, basing itself on the pertinent provisions of the Statute and the very idea of the judicial function, the Court leaves no doubt that the existence of a dispute must be identified before the Court enters into questions of jurisdiction and admissibility proper, not to mention the stage of the merits of a given case.

36. In its first Preliminary Objection, Germany therefore submits that, due to the absence of a dispute between Liechtenstein and Germany, the Court cannot, and should not, exercise its judicial function in the present case.

37. In presenting this objection, Germany will proceed as follows:

First, Germany will briefly restate the crucial elements of the concept of "dispute" as developed in the jurisprudence of the Court (*infra,* A.).

Second, in the light of the special circumstances of the present case, Germany will request the Court to decline *ab initio* to render a decision in instances like the present one, in which the applicant arbitrarily distorts the facts and the law in order to make an alleged "dispute" fit within the Court's jurisdiction. Germany will argue that in order to establish the existence of a "dispute" within the meaning of the Court's Statute, it is not sufficient for an applicant to somehow construct opposing views between two States, but that an application and the

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[1] *Nuclear Tests (Australia* v. *France), I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand* v. *France), I.C.J. Reports 1974,* p. 476, para. 58.

claims contained therein must constitute a true reflection of legal problems which exist in reality according to indisputable facts (*infra,* B).

Third, Germany will demonstrate that, if looked at objectively, the "claims" brought before this Court against the Respondent by Liechtenstein have nothing to do with the real difficulties faced by Liechtenstein with respect to the seizure of property of some of its citizens in former Czechoslovakia in the aftermath of the Second World War. None of the claims raised in Liechtenstein's Application constitute a dispute within the meaning of the Court's Statute (*infra,* C).

Fourth, and finally, Germany will argue that, in any event, it is the wrong Respondent in the present case, the only conceivable dispute being one between Liechtenstein and the Czech Republic (*infra,* D).

A. THE COURT'S JURISPRUDENCE ON THE CONCEPT OF "DISPUTE"

38. The classical definition of the term "dispute" was coined by the Permanent Court of International Justice in 1924 in the *Mavrommatis* case. The Permanent Court stated:

> "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[1]

[1] *Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A No. 2,* p. 11. The authoritative French text reads as follows: "Un différend est un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts entre deux personnes."

39. Subject only to minor adjustments[1], this definition has been constantly applied by both the Permanent Court and its successor, the International Court of Justice.[2] The present Court then clarified that for it to have jurisdiction, a *real* dispute must exist between the parties. In the words of the Judgment on *Preliminary Objections* in the *South West Africa* cases:

> "[I]t is not sufficient for one party to a contentious case to assert that a dispute exists with the other party. A mere assertion is not sufficient to prove the existence of a dispute any more than a mere denial of the existence of the dispute proves its non-existence. Nor is it adequate to show that the interests of the two parties to such a case are in conflict. *It must be shown that the claim of one party is positively opposed by the other.*"[3]

40. Finally, the Court has emphasized that it is not bound by the determination of the dispute as made by the applicant in a given case. Only recently, in the *Fisheries Jurisdiction* case, the Court reaffirmed that

> "[i]t is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on

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[1] Such as the replacement of the expression "persons" by the more accurate formulation "parties", *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995,* p. 99, para. 22.

[2] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998,* pp. 314 f., para. 87; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 122, para. 21; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 17, para. 22.

[3] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328 (emphasis added). See also *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974,* p. 260, para. 24; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 463, para. 24.

an objective basis the dispute dividing the parties, by examining the position of both parties"[1].

41. Thus, the concept of "dispute" as it stands today comprises three essential elements: There must exist (a) a disagreement on a point of law or fact, a conflict of legal views or of interests between the parties, which (b) manifests itself in claims of the parties positively opposing each other; these claims in turn (c) serving as the point of departure for the Court itself to determine on an objective basis the existence of a dispute between the parties.

42. According to this settled jurisprudence of the Court, in order to establish the existence of a dispute it must therefore also be shown that the claim of one party is positively opposed by the other[2]. Germany will demonstrate that the "dispute" alleged by Liechtenstein vanishes into thin air if these criteria are applied (see *infra*, C).

43. Before doing so, however, Germany invites the Court to take the opportunity presented by the instant case to further develop and specify the concept of

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[1] *Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p.432,* p. 448, para. 30, referring also to *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974,* p. 466, para. 30; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests (New Zealand v. France) *Case, Order of 22 September 1995, I.C.J. Reports 1995,* p. 304, para. 55. See also *East Timor, I.C.J. Reports 1995,* pp. 99-100, para. 22.

[2] *South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962,* p. 328. See also *Application for Revision and Interpretation of the Judgment of 24 February 1982 in the Case concerning the* Continental Shelf (Tunisia/Libyan Arab Jamahiriya) *(Tunisia* v. *Libyan Arab Jamahiriya), Judgment, I.C.J. Reports 1985,* p. 217, para. 46; *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), 1927, P.C.I.J., Series A, No. 11,* p. 11.

"dispute" in perfect harmony with the Court's already established jurisprudence on the "objective" character of this concept.

B. THE COURT SHOULD DECLINE TO ADJUDICATE ARTIFICIALLY CONSTRUCTED CASES

44. The jurisprudence of the Court leaves no doubt that the question of whether or not a dispute exists cannot depend upon the subjective assertions of the parties but is a matter for objective determination by the Court. It has never been questioned that the fundamental principle according to which the Court is the master of its own jurisdiction[1] also applies to such determination of the existence of a dispute as "the primary condition for the Court to exercise its judicial function"[2].

45. As a rule, the Court will decide whether or not, and to what extent, it is called upon to exercise its judicial function on the basis of a comparative analysis of the positions of both parties. Germany submits, however, that in certain cases the objective determination of a dispute cannot be limited to this exercise. What Germany has in mind here are cases in which an applicant, by the way in which he presents the facts and ensuing claims, attempts to divert the Court from its proper function, namely to decide *real* disputes. Such attempts affect the judicial integrity of the Court.

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[1] See in greater detail on this fundamental issue Shihata, *The Power of the International Court to determine its own Jurisdiction: Compétence de la Compétence* (1965).

[2] *Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, p. 271, para. 55; *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974*, p. 476, para. 58.

46. For the Court, the maintenance of its judicial integrity has always been the ultimate test whether or not it will allow a case to proceed to the stage of the merits. As the Court stated in the *Northern Cameroons* case:

> "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity. ...
>
> The [judicial] function is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue, and may not frequently present themselves as a conclusive bar to adjudication in a concrete case. Nevertheless, it is always a matter for the determination of the Court whether its judicial functions are involved."[1]

47. The principles thus enunciated are of general validity: It is for the Court itself, and not for the parties, to safeguard the Court's judicial integrity, and it is always for the Court to determine whether its judicial functions are involved.

48. Germany submits that in this regard there exists an inextricable nexus between the concept of dispute on the one hand and the judicial function of the Court on the other. If an applicant were allowed to arbitrarily squeeze any kind of facts, interests and claims into the frame of a "dispute", the required objective examination of the positions of both parties by the Court would become

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[1] *Northern Cameroons, Preliminary Objections, I.C.J. Reports 1963,* pp. 29-30.

meaningless: In the last instance it would always be the applicant which would have the power to determine the existence and scope of an alleged "dispute".

49. The Court's role as the master of its own jurisdiction would be rendered impossible if the decision upon this "primary condition for the Court to exercise its judicial function" were to pass into the hands of the applicant. The Court should therefore not allow the parties to "invent" a dispute when it is obvious to any observer looking at the matter in a sober and reasonable way that no such dispute exists in reality. Germany submits that in order for a given subject-matter to be considered a "dispute" within the meaning of the Statute of the Court, there must be a reasonable relationship between the facts alleged to constitute the true essence of the case and the claims brought before the Court. Germany will show that Liechtenstein's case does not meet this requirement (*infra,* C).

50. Unlimited discretion on the part of an applicant as to the framing of its "dispute" would encourage States to (mis-)use the Court for purposes not embraced by its judicial function. If the parties were allowed to present the Court with an arbitrary selection of facts, interests and legal relationships artificially, if not forcibly, extracted from a complex and inseparable whole, the controversies involved could not be definitively settled by a judicial decision. On the contrary, they might even be aggravated.

C. THERE IS NO DISPUTE BETWEEN THE PARTIES SINCE IN REALITY NO POSITIVELY OPPOSED CLAIMS EXIST

51. An impartial evaluation of the facts which underlie the present Application cannot but come to the conclusion that what is in reality at the heart of the present case is the seizure of certain Liechtenstein property under the Beneš Decrees of 1945 in former Czechoslovakia. The very essence of Liechtenstein's claims therefore relates to certain legal consequences arising from this taking of Liechtenstein property by a third State. Viewed in an unprejudiced and objective way, what Liechtenstein really seeks in the present proceedings is an "indemnisation" for the loss of certain property of its citizens through confiscations effected by Czechoslovakia in the immediate aftermath of World War II. Thus, once the Applicant's claims are stripped of the distortions by which Liechtenstein aims to hide a few very simple facts behind a smokescreen of unfounded assertions, it will become evident to any objective observer that the real dispute, if any, is one between the confiscating State on the one hand and the State claiming the unlawfulness of these measures on the other. Indeed, Liechtenstein openly admits that it could not bring this "true" dispute before the Court. Since it cannot bring the "true" respondent before the Court, what Liechtenstein tries to do is to set up in a wholly artificial way a number of allegedly opposing views between itself and Germany that are, if at all, only very remotely and arbitrarily linked with the "true" dispute.

52. Thus, without the need to touch in any way on questions belonging to the merits of the case, it becomes obvious that the facts which are at the core of the Application and the claims actually raised by Liechtenstein do not correspond to

one another at all. Since adjudicating purposefully invented disputes is contrary to the Court's judicial function, the Court should not accept Liechtenstein's claims as establishing a "dispute" with Germany within the meaning of the Court's Statute, and should reject the Applicant's case on this ground.

53. To recall once again: In its long-standing jurisprudence, the International Court of Justice has maintained an "objective" definition of what constitutes a dispute. This definition penetrates to the real issues between the parties rather than merely basing itself on the formulation advanced by an applicant. If one pursues such an objective analysis, the only real legal controversy between the parties to the present case concerns the exclusion of jurisdiction of German courts over Liechtenstein assets (that is, assets owned by Liechtenstein citizens) seized by former Czechoslovakia in the aftermath of Word War II, pursuant to Article 3 of Chapter Six of the Settlement Convention. Germany fails to see what else could be in dispute between Germany and Liechtenstein regarding the treatment of Liechtenstein assets by a third State, namely (former) Czechoslovakia.

54. In its brief section on "The dispute between Liechtenstein and Germany", the Liechtenstein Memorial alleges that a change in the German legal position towards the seizure of Liechtenstein property by Czechoslovakia occurred by virtue of the pronouncements of German courts in the *Pieter van Laer Painting* case[1]. This allegation is wholly unfounded. Liechtenstein does not properly

[1] LM, p. 12, para. 13. The final judgment of the German Federal Constitutional Court of 28 Jan. 1998 concerning the painting has been reproduced in LM, Annex 32, vol. II, p. 353, along with earlier judgments of German courts on the matter, *ibid.*, pp. 256 ff.

separate the issue of the lawfulness of the Czechoslovak expropriations and that of the jurisdiction of German courts on this matter. On the former question, Liechtenstein itself cites (then) Chancellor Kohl's 1997 statement to the effect that the (then forthcoming) German-Czech Joint Declaration[1] would "leave[] open legal questions in connection with expropriations in the then Czechoslovakia"[2]. And, indeed, Point IV of the said Declaration reads, in the translation provided by Liechtenstein:

> "Both sides agree that the wrongs committed shall be a matter of the past, and will therefore orient their relations towards the future ... while each side remains committed to its legal order and respects that the other side has a different legal position."[3]

55. From this statement it is clear that Germany has steadfastly maintained its position towards the Beneš Decrees and other legal issues between Germany and the Czech Republic. No change of position of Germany regarding these matters has ever occurred. Germany has never recognized the validity of the relevant Czechoslovak measures against Liechtenstein property, neither before nor after 1995. Liechtenstein expressly states that it always agreed with this German position[4]. Accordingly, there exists no legal dispute on this matter at all.

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[1] *Declaration on Mutual Relations and Their Future Development*, 21 January 1997, LM, Annex 37, vol. III, p. 467.

[2] LM, Annex 40, vol. III, p. 479.

[3] LM, Annex 37, vol. III, p. 467.

[4] LM, p. 12, para. 12, p. 29, para. 1.23.

56. Again no change of the German position has occurred concerning the exclusion of German jurisdiction on the basis of Article 3 of Chapter Six of the Settlement Convention, from early German court decisions immediately following the adoption of the Settlement Convention[1] up to the more recent pronouncements now assailed by Liechtenstein. The exclusion of German jurisdiction, however, is not, and has never been, tantamount to a recognition of, or a change regarding the recognition of, the seizure of Liechtenstein property by Czechoslovakia. Germany maintains that it is under no obligation to lift that bar to jurisdiction. On the contrary, since Article 3 of Chapter Six of the Settlement Convention remains in force, it would not be permissible for Germany to lift the exclusion of jurisdiction unilaterally. Rather, Germany is obliged to keep it in force by virtue of an obligation arising from a multilateral treaty, that is, the relevant provision of the Settlement Convention, as upheld by the *Exchange of Notes concerning the Relations Convention and the Settlement Convention* of 28 September 1990[2] in the wake of the conclusion of the *Treaty on the Final Settlement with respect to Germany*[3].

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[1] *AKU Case*, Federal Court of Justice, Judgment of 13 Dec. 1956, 23 *ILR*, p. 21, GPO, Annex 2; Federal Court of Justice, Judgment of 11 Apr. 1960, 32 *BGHZ*, pp. 172-73, GPO, Annex 3.

[2] *Exchange of Notes concerning the Relations Convention and the Settlement Convention*, United Kingdom, Federal Republic of Germany, France, United States, Bonn, 28 September 1990, United Nations, *Treaty Series*, No. 28492, vol. 1656, p. 29, LM, Annex 19, vol. II, p. 187.

[3] *Treaty on the Final Settlement with respect to Germany* ("Two-plus-Four-Treaty"), Federal Republic of Germany, German Democratic Republic, France, Union of Soviet Socialist Republics, United Kingdom, United States, Moscow, 12 September 1990, United Nations, *Treaty Series*, No. 29226, vol. 1696, p. 115, LM, Annex 18, vol. II, p. 175.

57. Thus, as far as the first submission of Liechtenstein is concerned, Germany cannot detect any dispute between the parties. Germany has never changed its "conduct" towards Liechtenstein or Liechtenstein property, neither in 1995 nor at any other date. Germany continues to respect the sovereignty and neutrality of Liechtenstein, and it continues to recognize the legal rights of Liechtenstein and its nationals with respect to their property.

58. The only disagreement that really exists between the parties concerns the interpretation of the exclusion of jurisdiction of German courts over property "seized for the purpose of reparation or restitution, or as a result of the state of war" by a third country, namely Czechoslovakia. In this regard, however, Germany is legally obliged to conform to the relevant provision of a treaty validly concluded with other States, namely France, the United Kingdom and the United States of America. The European Court of Human Rights has accepted the respective interpretation of the Settlement Convention by German courts. Liechtenstein fails to show how continued German respect for and strict adherence to legal obligations contained in the Settlement Convention can lead to any conceivable negative consequences in international law. Thus, there exists no dispute between the parties regarding Liechtenstein's claims as to its sovereignty and neutrality as well as to its legal rights and the rights of its citizens with respect to the Liechtenstein property in the former Czechoslovakia.

D. The Dispute Regarding Expropriation of Liechtenstein Assets in Former Czechoslovakia is in Reality a Dispute between Liechtenstein and the Czech Republic

59. Regarding the second Submission advanced by Liechtenstein, the real grievance concerns the seizure of Liechtenstein property by a third State, namely Czechoslovakia. What injury Liechtenstein could possibly have suffered "as a result of the change in Germany's legal position"[1] remains a mystery.

60. The issue of compensation advanced by Liechtenstein can only arise if and to the extent that Liechtenstein is able to show that unlawful conduct on the part of Germany has resulted in injury to Liechtenstein. In this regard, even if all statements on the facts made by Liechtenstein were held to be correct, they still would not justify a claim to compensation by Germany. In reality, again, what is at issue here is not this or that German act related to Czechoslovak confiscations but the lawfulness of the Czechoslovak measures as such, and resulting obligations of compensation on the part of the successor States to former Czechoslovakia. Between 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.

[1] LM, p. 14, para. 16.

E. CONCLUSION

61. Regarding Liechtenstein's first Submission, there exists no legal dispute between the parties because Liechtenstein is not assailing the exclusion of German jurisdiction as such. Germany has always recognized and respected the sovereignty and neutrality of Liechtenstein, and continues to do so. In the same sense it has always recognized the legal rights of Liechtenstein and its nationals with respect to their property.

62. As to Liechtenstein's second Submission concerning the compensation issue, there exists no legal dispute between the parties either. Issues of compensation are to be decided between the State confiscating foreign property and the State victim of such measures. Thus, if any dispute concerning compensation exists, it could only be a dispute between Liechtenstein and the successor State(s) of Czechoslovakia, not between Liechtenstein and Germany.

63. As to the third and fourth Submissions by Liechtenstein (1 (c), 2), they both presuppose a dispute on the issues just dealt with. However, since these matters are undisputed, in reality, there exists no legal dispute on Liechtenstein's further claims.

Section II.

The Court Lacks Jurisdiction *ratione temporis*

64. Germany will now explain the limitation *ratione temporis* as interpreted by the Court and then show that all aspects of the dispute as alleged by Liechtenstein are outside the temporal jurisdiction of the Court.

A. The Alleged basis for Jurisdiction is not Applicable *ratione temporis*

65. Liechtenstein relies on Article 1 of the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957 (hereafter the "Convention") as the basis for the jurisdiction of the International Court of Justice. This Convention entered into force between Germany and Liechtenstein on 18 February 1980, Germany having ratified the Convention on 2 March 1961 and Liechtenstein on 18 February 1980. The Convention applies to legal disputes between member States. The Convention is, however, not applicable to the dispute as described by Liechtenstein, assuming *arguendo* that a legal dispute exists.

66. Article 27 of the Convention provides that the 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.
>
> (b) ... ."

This provision excludes the present case from the application of the Convention and therefore from the jurisdiction of the Court.

According to the case law of the Court (see *infra,* 1) disputes relating to facts or legal situations prior to the entry into force of this Convention as between the parties are those disputes whose "real source" or "real cause" are facts prior to the entry into force of the Convention between the parties. That is the situation here.

67. Clauses restricting the jurisdiction of the Court *ratione temporis* are principally concerned with two sorts of dates: the date on which a dispute arose and the dates on which facts and legal situations developed to which the dispute relates. Frequently both alternatives are combined. Where only the second alternative is relevant, as in the Convention of 1957, it has to be analyzed which facts or legal situations are the real cause of the dispute. Germany will show that all facts and legal situations which are the real cause of the alleged dispute are outside the jurisdiction of the Court.

1. The Case Law of the Permanent Court Concerning Restrictions ratione temporis *Shows that the Present Case is Excluded*

68. The International Court of Justice as well as the Permanent Court of International Justice have dealt in several cases with the interpretation of rules excluding from their jurisdiction facts and legal situations prior to the act by which the jurisdiction of the courts was established. These cases did not concern the interpretation of treaties like the Convention but the interpretation of declarations under the Optional Clause. As the Permanent Court of International

Justice explained in the *Phosphates in Morocco* case[1], the intention of limitations *ratione temporis* like the one included in the European Convention is clear. They are inserted

> "with the object of depriving the acceptance of the compulsory jurisdiction of any retroactive effects, in order both to avoid, in general, a revival of old disputes, and to preclude the possibility of the submission to the Court by means of an application of situations or facts dating from a period when the State whose action was impugned was not in a position to foresee the legal proceedings to which these facts and situations might give rise"[2].

69. The Court then added that the use of the two terms "situations" and "facts" placed in conjunction with one another, so that the limitation *ratione temporis* is common to them both, makes it clear that the employment of one term or of the other could not have the effect of extending the compulsory jurisdiction. Rather, as the Court stated,

> "the situations and the facts which form the subject of the limitation *ratione temporis* have to be considered from the point of view both of their date in relation to the date of ratification and of their connection with the birth of the dispute. Situations or facts subsequent to the ratification could serve to found the Court's compulsory jurisdiction only if it was with regard to them that the dispute arose"[3].

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[1] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 10.

[2] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

[3] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

70. The Court underlined that in interpreting a clause of that sort it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specified limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance. The Court added the important sentence:

> "But 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"[1].

71. In the specific case the Court found that it had no jurisdiction concerning French legislative acts which were seen as the basis for the dispute by the Italian Government. The situation which the Italian Government denounced as unlawful was a legal position resulting from the French legislation of 1920, prior to the entry into force of the French declaration. According to the Court this legal position could not be considered separately from the legislation of which it was the result and therefore it was outside the jurisdiction of the Court[2].

72. As shown by the extensive treatment of facts and legal situations falling into the period between 1945 and around 1955, but always prior to 1980, in the

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[1] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, p. 24.

[2] *Phosphates in Morocco, Preliminary Objections, Judgment, P.C.I.J., Series A/B No. 74*, pp. 25-26.

Memorial of Liechtenstein[1], the present dispute has its real cause in these facts and situations and is therefore outside the jurisdiction of the Court.

2. A Comparison with the Case Law of the International Court of Justice Shows that the Present Case is Excluded from the Jurisdiction of the Court ratione temporis

73. In the *Right of Passage*[2] case, decided by the International Court of Justice in 1960, the Court had to interpret a declaration by India, which had accepted the jurisdiction of the Court "over all disputes arising after February 5th, 1930, with regard to situations or facts subsequent to the same date". In this instance the Court found that it had jurisdiction. The Court explained in detail why this was the case.

74. After clarifying the nature of the dispute and the time when that dispute arose, the Court went into the question of whether the dispute was one with regard to facts and situations prior to the date of the Indian declaration. Here the Court relied on the interpretation developed by the Permanent Court in the *Electricity Company of Sofia and Bulgaria*[3] case and stated that the facts or situations to which regard must be had in this connection are "those which must be considered as being the source of the dispute", those which are its "real cause". It explained that the Permanent Court, in this connection, was unwilling to

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[1] LM, pp. 33 ff., para. 2.1 ff.

[2] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960*, p. 6.

[3] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 77*, p. 64.

regard as such real cause an earlier arbitral award which was the source of the rights claimed by one of the Parties, but which had given rise to no difficulty prior to the facts constituting the subject of the dispute. The Court explained, therefore, that the Permanent Court had drawn a distinction between the situations or facts which constitute *the source of the rights* claimed by one of the Parties and the situations or facts which are the *source of the dispute*. Only the latter are to be taken into account for the purpose of applying the declaration accepting the jurisdiction of the Court[1].

75. The Court then applied these principles to the situation in the *Right of Passage* case. It explained that the dispute submitted to the Court was one with regard to a situation and, at the same time, with regard to certain facts: It stated that a controversy arose only in 1954 and the dispute arising then related both to the existence of a right of passage to go into the enclaved territories and to India's failure to comply with obligations which, according to Portugal, were binding upon it in this connection. The Court underlined that a finding that the Court had jurisdiction would not involve giving any retroactive effect to India's acceptance of jurisdiction. The Court would only have to pass upon the existence of the right claimed by Portugal as at July 1954, upon the alleged failure of India to comply with its obligations at that time and upon any redress in respect of such a

[1] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 7.*, p. 82.

failure. The Court had not been asked for any finding whatsoever with regard to the past prior to 5 February 1930[1].

76. The *Right of Passage* case shows that the crucial question is whether earlier facts can be seen as the source of the rights which later become the central issue of the dispute, or whether the dispute really concerns those earlier facts or legal situations as such. In the *Right of Passage* case access to the enclaved territories had existed for a long time and it was only after the establishment of the jurisdictional link that India blocked the passage. It was this action which gave rise to the dispute as to whether there really existed a right for Portugal to have access over Indian territory.

77. The difference existing between the *Right of Passage* case and the present one is striking. In the present case it is quite impossible to make a meaningful distinction between the source of the rights alleged by Liechtenstein and the source of the alleged dispute. The entire case revolves around the confiscation of Liechtenstein property by Czechoslovakia in 1945 and thereafter and possible legal consequences of these confiscations. No factual or legal situation existed in 1980 on which Liechtenstein could rely. Germany has never changed its position or practice since the entry into force of the Settlement Convention in 1955. Therefore, the dispute as alleged by Liechtenstein relates entirely to facts and legal situations dating back before 1980. The Court clearly would have to give retroactive effect to the acceptance of jurisdiction if deciding the case.

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[1] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960,* pp. 35-36.

78. This shows that the attempt by Liechtenstein to invent facts which could be brought within the jurisdiction of the International Court of Justice after the coming into force of the Convention in 1980 is completely artificial. All the Submissions by Liechtenstein relate to facts and legal situations existing before 1980, namely the confiscation by Czechoslovakia, the reparation regime including the way it was dealt with in the Settlement Convention of 1955, and the legal consequences of these measures as far as movable property is concerned which comes within the jurisdiction of Germany.

79. The "real source of the dispute" in the present case is not to be seen in acts or decisions taken after 1980 but in the legal situation created in 1945 in the aftermath of World War II. Of course, it is correct that a specific dispute arose between the Prince of Liechtenstein and the City of Cologne concerning the Pieter van Laer painting[1]. However, it is quite incorrect to see this dispute as the real source of the present case.

80. A comparison between the *Right of Passage* case and the *Electricity Company of Sofia* case on the one hand and the present one on the other makes that clear. In the first two cases just cited the legal situation existing between the two countries concerned, although based on facts and legal situations prior to the establishment of jurisdiction, was recognized by both sides. That was true for the facts relevant for the right of passage[2] as it was true for the binding character

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[1] Cf. LM, pp. 63 ff., paras. 3.17 ff.

[2] *Right of Passage over Indian Territory, Merits, Judgment, I.C.J. Reports 1960,* p. 34.

of the awards of the Mixed Arbitral Tribunal in the *Electricity Company of Sofia* case[1].

81. In the present case no similar legal situation had ever been recognized between the two parties to the alleged dispute. Neither had Liechtenstein ever argued that Germany was under a legal obligation to pay compensation to Liechtenstein nor had Liechtenstein ever argued that Germany was bound by rules of international law on how to deal with movable property confiscated in Czechoslovakia in 1945 when brought into German territory.

82. Most recently, in the cases concerning the *Legality of Use of Force*[2], the International Court of Justice also had to apply a temporal restriction to its jurisdiction. These cases also prove that artificial constructions as to the time factor relevant in these circumstances will not be accepted. In these cases the Court decided that a dispute which had clearly arisen before the acceptance of jurisdiction could not be brought within the jurisdiction by the repetition of identical acts after the date relevant for the establishment of jurisdiction. The Court held as follows:

> "Whereas the fact that the bombings have continued after 25 April 1999 and that the dispute concerning them has persisted since that date is not such as to alter the date on which the dispute arose; whereas each individual air attack could not have given rise to a

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[1] *Electricity Company of Sofia and Bulgaria, Preliminary Objections, Judgment, P.C.I.J., Series A/B, No. 77*, p. 82.

[2] See, e.g., *Legality of Use of Force, Provisional Measures (Yugoslavia v. Belgium), Order of 2 June 1999, I.C.J. Reports 1999*, p. 124.

separate subsequent dispute; and whereas, at this stage of the proceedings, Yugoslavia has not established that new disputes, distinct from the initial one, have arisen between the Parties since 25 April 1999 in respect of subsequent situations or facts attributable to [the Respondent]"[1].

B. The Dispute between Liechtenstein and Germany as Alleged by Liechtenstein is outside the Temporal Jurisdiction of the Court

83. In its Application of 13 May 2001 Liechtenstein argues that the dispute between Liechtenstein and Germany arose in 1998 on the basis of the decision of the German Federal Constitutional Court of 28 January 1998[2]. In its Memorial Liechtenstein argues that the dispute concerns a decision by Germany to treat certain property of Liechtenstein nationals as having been "seized for the purpose of reparation or restitution or as a result of the state of war" by a combination of decisions of its courts and statements by ministers and officials beginning in 1995[3].

1. No New Facts of Relevance Arose after 1980

84. Whatever may be taken as the date on which, in the view of Liechtenstein, a dispute arose it is impossible to overlook that it relates to facts and legal

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[1] *Legality of Use of Force, Provisional Measures (Yugoslavia v. Belgium), Order of 2 June 1999, I.C.J. Reports 1999*, pp. 134-135, para. 29.

[2] LA, paras. 17, 21, 22.

[3] LM, p. 8, para. 3.

situations prior to the entry into force of the Convention which establishes the jurisdiction, namely before 1980.

85. This becomes particularly clear when one analyzes the facts to which Liechtenstein refers as occurring after 1995. These facts are German court proceedings and related decisions concerning the Pieter van Laer painting[1]. These German court decisions, however, had nothing to do with the present case since they concerned the status under German private law of movable property confiscated by Czechoslovakia in 1945 and thereafter.

86. Liechtenstein tries to argue that until 1995 or 1998 there had been a specific German legal position which then changed with the proceedings concerning that movable property[2]. However, Liechtenstein commits an important error when it tries to construct a change of attitude by German authorities. No such change has taken place, as is evident from Liechtenstein's allegations themselves.

87. As Liechtenstein correctly explains, German courts have always interpreted Article 3 of Chapter Six of the Settlement Convention as barring German courts from looking into the lawfulness of any measures against property considered German property by the confiscating State. Indeed, Liechtenstein correctly refers to the decision of the Federal Court of Justice of 11 April 1960[3], according to which it is the intention of the authority of the foreign country to

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[1] LM, p. 12, para. 13.

[2] LM, pp. 55 ff., paras. 3.3 ff.

[3] 32 *BGHZ*, pp. 172 ff., GPO Annex 3.

confiscate property as German property which is decisive for the application of this Article of the Settlement Convention. This case law has been applied continually and consistently and has been confirmed by the Federal Constitutional Court in the *Pieter van Laer Painting* case[1]. Therefore, the new facts alleged by Liechtenstein do not exist.

2. The Confiscations by Czechoslovakia are not within the Jurisdiction of the Court ratione temporis

88. As is described in detail in the Memorial of Liechtenstein, the confiscation by a sovereign third State, Czechoslovakia, in 1945-46, of certain property is the origin of the case[2]. Leaving aside the problem of whether these acts could be within the jurisdiction of the Court without the consent of the successor state of Czechoslovakia, the Czech Republic – a problem which will be dealt with separately[3] –, the dispute could not be judicially solved without deciding upon the lawfulness of these decisions taken in 1945-46.

89. Indeed the Memorial of Liechtenstein continually refers to the unlawfulness of the measures taken by Czechoslovakia at that time against Liechtenstein property[4]. Since the alleged dispute could not be decided without judicially

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[1] Cf. *supra,* paras. 22 ff.

[2] LM, pp. 23 ff.

[3] Cf. *infra,* Chapter II, Section II, paras. 151 ff.

[4] LM, pp. 27 ff., paras. 1.17 ff; pp. 94 ff., paras 4.15 ff. *et passim.*

evaluating confiscations carried out in 1945-46 by Czechoslovakia, it relates to facts prior to the entry into force of the Convention between the parties.

90. Liechtenstein tries to argue that it is the change of the German position as to the confiscation which can be seen as the real cause and the source of the alleged dispute. However, this is contradicted by the Liechtenstein Memorial itself. The Liechtenstein Memorial shows that Germany has never recognized the confiscation measures as compatible with public international law[1]. German courts have consistently held that they are barred by the Settlement Convention from investigating these issues[2]. This situation has not changed.

91. Apparently Liechtenstein implies that the German legal position as to the lawfulness under public international law of these confiscations must have the consequence that these measures are to be treated as a nullity in the German legal order[3]. However, this view is completely mistaken. As is well known, private international law rules in most, if not all States do not automatically refer to the lawfulness under public international law of confiscations as far as the validity of title under private international law is concerned. German courts have held consistently that expropriations in violation of public international law may nevertheless be treated as conveying title.

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[1] LM, pp. 55 ff., paras. 3.3 ff.

[2] Cf. *supra,* paras. 20 ff.

[3] LM, pp. 119-120, paras. 5.19-5.22.

92. In its decision of 23 April 1991[1] concerning expropriations in the former Soviet zone of occupation and in the German Democratic Republic, the Federal Constitutional Court explained the situation under German private international law concerning expropriations:

> "According to German international expropriation law, expropriations carried out by a foreign State, including "confiscations" without compensation, are regarded in principle as effective provided that the State in question has not exceeded the limits of its power. According to this principle, an expropriation is effective within the area of territorial sovereignty of a foreign State and affects property which at the moment of the expropriation was subject to the territorial sovereignty of the expropriating State (territoriality principle). *Acquiescence* to foreign expropriations is restricted in this regard only by the exception for the benefit of public policy (Article *30* of the Introductory Law to the German Civil Code *EGBGB* (old version) taken in conjunction with Article *220(1)EGBGB* (new version) and Article *6 EGBGB* (new version)). This exception is only applicable, however, where and in so far as there exists a sufficient domestic connection . . . The lack of compensation for the expropriation or some other impropriety according to domestic conceptions of justice is therefore not sufficient of itself, in so far as the expropriation affects property within the territory of the expropriating State to deprive it of its effectiveness."[2]

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[1] Federal Constitutional Court, 84 *Collection of decisions (BVerfGE)*, p. 90, English translation 94 *ILR*, p. 44, GPO Annex 4.

[2] 94 *ILR*, p. 60; 84 *BVerfGE*, pp. 123-124, GPO, Annex 4, citations omitted.

93. According to the Liechtenstein Memorial, the alleged dispute concerns immovable property situated now in the Czech Republic and movable property also situated in the Czech Republic. As far as immovable property is concerned, it is clearly the position of German law that the legal status of such property is governed exclusively by Czech law.

94. As far as movable property is concerned, Liechtenstein seems to imply, without expressly saying so, that there could be an obligation under public international law on Germany to treat movable property confiscated in violation of public international law by Czechoslovakia in 1945-46, and situated at that time in Czechoslovakia, as property belonging to the former owner[1]. However, this view is mistaken. There is no rule of public international law creating any obligation for States to treat movable property confiscated in violation of public international law as property of the former owner as soon as it enters the jurisdiction of the forum State. It is well known that this issue has been decided differently by courts in different countries and has been treated extensively in the doctrine. There is broad agreement that no obligation exists under public international law to disregard the transfer of title in such cases[2].

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[1] Quite unclear in LM, p. 173, para. 6.73: "Liechtenstein had, as a minimum, a legitimate claim". The basis for that statement is not explained nor is it clear why the claim could be a claim of "Liechtenstein" rather than of the "Prince of Liechtenstein".

[2] Cf., in particular, *Oppenheim's International Law,* 9th ed., vol. I, Peace (Sir Robert Jennings and Sir Arthur Watts eds., Harlow 1992), p. 363, at p. 376, where it is stated: "However, in view of the practice of states as revealed by the actions of their courts, some of which have been prepared to acknowledge legal effects of foreign acts in violation of international law, it probably cannot be said that international law forbids courts to give effect to such foreign act when to do so is in accordance with their own national law." Cf. also Nguyen Quoc Dinh/P. Daillier/A. Pellet, *Droit International Public* (6th ed., 1999), pp. 1044 ff.

95. As regards property confiscated in 1945-46 in connection with World War II, in particular, it cannot be argued that this property must be considered as property of the former owner when it comes into a State other than the State having confiscated the property. This shows that the position taken by Liechtenstein according to which the decisions by German courts concerning the Pieter van Laer painting are proof of a change of the German attitude, is completely erroneous. Even disregarding the Settlement Convention, Liechtenstein could not rely on any rule of public international law obliging Germany to treat the property concerned as Liechtenstein property.

3. The Reparations Regime is not within the Jurisdiction of the Court ratione temporis

96. In 1945 Liechtenstein became aware of the Czechoslovak position that Liechtenstein nationals were regarded as persons belonging to the "German people"[1]. According to Liechtenstein, the inclusion of Liechtenstein property in the confiscation of assets by Czechoslovakia in 1945 for the purpose of reparations gave rise to a legal relationship between Liechtenstein and Germany which continues until today. The case brought before the Court could not be decided without judging upon the reparations regime established in 1945 and thereafter. The alleged dispute, therefore, relates to facts and legal situations prior to the entry into force of the Convention between the parties in 1980.

[1] LM, p. 27, para. 1.17.

4. The Legal Situation of Property Confiscated in Czechoslovakia before 1980 is Excluded ratione temporis

97. Even assuming that the German position as to the confiscation of Liechtenstein property had in fact changed, which is not the case, the alleged dispute would still relate to facts and legal situations before 1980. For in a judgment concerning the alleged dispute the Court would have to judge upon the legal effect which the Czechoslovak measures in 1945 had in and outside Czechoslovakia. The Memorial of Liechtenstein states that Germany did not recognize the Czechoslovak confiscation measures but changed its position after 1990[1] or 1995[2], or 1998[3]. To decide whether this alleged change had any legal effect would require a finding on the legal situation created by the measures taken in 1945 by Czechoslovakia. This also shows that the alleged dispute relates to legal situations prior to the entry into force of the Convention between the parties.

98. The Memorial of Liechtenstein argues that the alleged change of attitude of Germany in and after 1995 – as shown before, a purposeful invention – affected the position of Liechtenstein property confiscated by Czechoslovakia in Germany and in other jurisdictions[4]. A finding on this issue would require that the Court clarify what effect the confiscation had for or in other countries.

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[1] LM, pp. 62 ff., paras. 3.15 ff.

[2] LM, p. 8, para. 3.

[3] LA, para. 21.

[4] LM, pp. 119 ff., para. 5.19 ff.; pp. 123 ff., paras. 5.26 ff.

Indeed, the lengthy discussion in the Memorial of Liechtenstein of the *Pieter van Laer Painting* case[1] shows the problem arising here very clearly. A painting confiscated in 1945 comes into Germany. Independently of the substantive question of the existence of any rules of public international law applicable in such a case[2], a decision on the Submission of Liechtenstein would require a clarification of the effects of confiscation measures by Czechoslovakia in 1945 on property being brought into other countries. This could not be done without establishing what were the legal consequences of the measures taken in 1945. Therefore, these issues are outside the jurisdiction of the Court because they relate to legal situations prior to the entry into force of the Convention as between the parties in 1980.

5. German Courts have Consistently Held that they Cannot Judge upon the Lawfulness of Czechoslovak Measures of Confiscation

99. As Liechtenstein correctly states in its Memorial, the Settlement Convention provides that no claim or action shall be admissible in German courts concerning measures of confiscation which were taken for the purpose of reparations[3]. It also correctly points out that the respective part of the Settlement Convention was maintained after the entry into force of the *Treaty on the Final Settlement with respect to Germany*[4]. The Memorial furthermore mentions that

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[1] LM, pp. 62-85, paras. 3.15-3.59.

[2] Cf. *supra*, paras. 91-95.

[3] LM, pp. 47 ff., paras. 2.31 ff.

[4] LM, pp. 49-52, paras. 2.36-2.41.

the Regional Court and the Court of Appeal of Cologne, in the *Pieter van Laer Painting* case, referred to the case law of the German Federal Court of Justice, the highest court for civil matters, which had held already more than 40 years ago that the provisions in the Settlement Convention apply to all property "seized as German assets"[1].

100. German courts consistently interpreted the Settlement Convention concluded with the three powers France, the United Kingdom and the United States as protecting all acts taken by countries like Czechoslovakia in the context of reparation measures from any legal evaluation by German courts or authorities. It is not known that any of the parties to this Convention took a different view or that Liechtenstein has approached any of those powers to argue its position. However, what is decisive in the present context is that this unchanged position is based on a legal situation prevailing since the Settlement Convention came into force on 5 May 1955, i.e., long before 1980, when Liechtenstein ratified the *European Convention for the Peaceful Settlement of Disputes*, which could not be the basis of jurisdiction for disputes concerning prior legal situations.

6. The Complete Inactivity of Liechtenstein between 1945 and 1995 Excludes the Case ratione temporis

101. Assuming that the Court were competent to decide on the legal situation prevailing between Liechtenstein and Germany as to the compensation issue

[1] LM, pp. 64 ff., paras. 3.20 ff., cf. *supra* paras. 20 ff.

brought before it, this would require an evaluation of the fact that Liechtenstein never claimed compensation from Germany until after 1998 for the assets confiscated by Czechoslovakia. The Court would have to establish whether any legal consequences follow from this inactivity. This shows that the dispute is not within the jurisdiction of the Court because it relates to facts and legal situations prior to the entry into force of the Convention as between the parties in 1980.

102. Germany has consistently taken the position that it is not for it to pay compensation to Liechtenstein nationals for the measures taken by Czechoslovak authorities in 1945. Indeed, this was clear to Liechtenstein since the German legislation provided for compensation only to German nationals for confiscations of German property in comparable situations[1]. Liechtenstein never claimed compensation from Germany. To decide on the claim would require judging a legal situation brought about by the Czechoslovak measures, the Settlement Convention of 1955 and the German legislation, long before 1980. Therefore, the Court has no jurisdiction for this issue.

7. The Claims of Liechtenstein all Relate to Legal Facts and Situations before 1980

103. The alleged failure to respect Liechtenstein's neutrality and sovereignty[2] is outside the jurisdiction of the Court because this allegation refers to developments outside the jurisdiction of the Court that had run their full course

[1] LM, p. 65, para. 3.21.

[2] LM, pp. 86 ff., paras. 4.1 ff.

prior to 1980[1]. A decision on these issues would require the Court to deal with events from 1945 to 1955, prior to the entry into force of the *European Convention for the Peaceful Settlement of Disputes*.

104. Liechtenstein's claim to compensation likewise concerns the interpretation of the Settlement Convention, as rightly developed in its Memorial[2]. However, this would require judging legal situations long prior to the entry into force of the Convention concerning jurisdiction in 1980.

105. Liechtenstein's claim on the basis of unjust enrichment[3] likewise relates to facts between 1945 and 1955. Clarifying a possible claim of unjust enrichment as the legal consequence of Czechoslovak confiscations which Germany had no power to hinder would require the analysis of the whole legal system of reparations concerning Germany after World War II. It is submitted that this would amount to judging a situation prior to the entry into force in 1980 of the Convention concerning jurisdiction. Therefore, this claim is outside the jurisdiction of the Court as well.

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[1] LM, pp. 87 ff., paras. 4.1 ff.; pp. 102 ff., paras. 4.32 ff.

[2] LM, pp. 109 ff., paras. 5.1 ff.

[3] LM, pp. 140 ff., paras. 6.1 ff.

Section III.

Liechtenstein's Claims Fall within the Domestic Jurisdiction of the Federal Republic of Germany

106. Germany submits that the alleged dispute as described by Liechtenstein is a dispute which by international law is solely within the domestic jurisdiction of Germany.

107. According to Article 27 (b) of the *European Convention for the Peaceful Settlement of Disputes* the Convention shall not apply to

> "disputes concerning questions which by international law are solely within the domestic jurisdiction of States".

108. As Liechtenstein argues, the decisions of German courts concerning the Pieter van Laer painting are at the basis of the case now brought before the Court. Liechtenstein also refers to "substantial arable land and forests, numerous buildings and their contents, factories etc." without substantiating the different items. The facts which are later described as basis for the decision to bring the case before the International Court of Justice are limited to the German court decisions concerning the Pieter van Laer painting and their interpretation by German authorities.

109. Liechtenstein does not dispute that the painting, when in Cologne, was fully under German territorial jurisdiction. Liechtenstein does not even allege that any rule of public international law exists which the German courts should have applied. Liechtenstein seems to assume that there is an obligation for the forum State to disregard title to property based on confiscation in violation of public

international law. However, Liechtenstein neither develops the legal basis for such a rule nor explains it in any detail. That means that Liechtenstein recognizes that the decision was a decision solely within the domestic jurisdiction of Germany, namely to apply the relevant rules of German private international law, if the Settlement Convention had not barred the German courts from deciding the case on its merits. Moreover it is evident, as Germany has shown earlier[1], that a rule of public international law which German courts should have applied in the case does not exist.

110. Of course, Germany recognizes that rules of public international law had to be respected in these decisions. The European Convention on Human Rights applies to German court procedures. The European Court of Human Rights held that the German court proceedings were fully compatible with that Convention[2]. However, that has nothing to do with the issue to be dealt with here.

111. Since Liechtenstein never explains its view why German courts, on the basis of public international law, should have decided the case brought by the Prince of Liechtenstein in his favour, Liechtenstein rather confirms that the alleged dispute, as far as this matter is concerned, is solely within the domestic jurisdiction of Germany.

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[1] Cf. *supra*, paras. 91-95.

[2] Cf. *supra*, paras. 28 f.

112. Therefore, the *European Convention for the Peaceful Settlement of Disputes* does not apply to the case, as its Article 27 (b) stipulates. This means that the International Court of Justice has no jurisdiction.

113. As far as the non-substantiated items of immovable property situated within the territory of the Czech Republic are concerned, their treatment under German private international law, assuming that German courts could have jurisdiction, is a matter solely within the domestic jurisdiction of Germany except insofar as the territorial jurisdiction of the Czech Republic has of course to be fully respected by German decisions.

114. This shows that, as far as the relationship between Liechtenstein and Germany is concerned, the alleged dispute is outside the jurisdiction of the International Court of Justice according to Article 27 (b) of the Convention. A dispute falls within the domestic jurisdiction of a State when no rules of public international law are applicable to it. This is the situation here since Liechtenstein itself does not suggest any rule of public international law to be applied by the German courts.

CHAPTER II

LIECHTENSTEIN'S CLAIMS ARE INADMISSIBLE

Section I.

Liechtenstein's Claims are not Sufficiently Substantiated

A. THE REQUIREMENT TO SUBSTANTIATE A CLAIM

115. According to Article 40, paragraph 1, second clause, of the Statute of the Court, a written application by which proceedings are instituted before the Court shall indicate "the subject of the dispute and the parties". This requirement is particularized in Article 38, paragraph 2 of the Rules of Court. Pursuant to this provision,

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

If this requirement is not fulfilled, the action brought by the Applicant is inadmissible.

116. In the case concerning *Certain Phosphate Lands in Nauru*[1], the Court had an opportunity to emphasize the importance of substantiation. It held that Article 40, paragraph 1, of the Statute of the Court and Article 38, paragraph 2, of the

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 240.

Rules of Court are essential elements of a fair proceeding "from the point of view of legal security and the good administration of justice"[1]. Indeed, if a claimant State confines itself to making vague statements, the respondent State is not in a position effectively to organize its defence. Germany finds itself in such a dire situation. Liechtenstein has submitted its Application and has expanded the reasoning contained therein in its Memorial. To date, however, Germany is not aware of the precise substance of the violations it has allegedly committed. Liechtenstein has made extensive submissions on abstract legal principles, but has remained remarkably silent on the basic facts underlying the case. Germany is therefore compelled to conclude that Liechtenstein has not fulfilled its duty to substantiate its claim. Such substantiation is a requirement determining the admissibility of an action introduced before the Court.

117. In one previous case, the Court had already to deal with a challenge by the respondent party to the claims brought by the applicant. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, Nigeria had raised the objection that the facts submitted by Cameroon provided no basis for a judicial determination that Nigeria bore international responsibility for alleged frontier incursions. In its Judgment rejecting Nigeria's preliminary objections, the Court noted that "succinct", the key word in Article 38, paragraph 2, of the Rules of Court, was not tantamount to "complete", which meant that the applicant was not prevented from later additions to the statement of the facts and

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, I.C.J. Reports 1992*, p. 267, para. 69.

grounds on which a claim is based.[1] The Court also recalled that it has become an established practice for States submitting an application to the Court to reserve the right to present additional facts and legal considerations.[2] Germany does not contest the necessity of some flexibility in this regard. But there exist some minimum requirements. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court came to the conclusion that Cameroon's application contained a sufficiently precise statement of the facts and grounds on which the applicant had brought its claim[3]. This is certainly true. The present case, however, is absolutely unique in the history of adjudication in that the Applicant refrains from providing almost all of the relevant factual data. Neither can Germany as the Respondent guess what is really at stake, nor will the Court be able to grasp the essence of the case, in particular its factual dimensions. Consequently, by virtue of Article 79, paragraph 1, of the Rules of Court, the action must be declared inadmissible.

B. The Lack of Substantiation as a Consequence of the Choice of the Wrong Defendant

118. The lack of specific clarity characterizing Liechtenstein's Submissions is not just an accidental feature that could easily be remedied. It reflects the simple fact

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[1] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 275, at 318, para. 98.

[2] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 318, para. 99.

[3] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 319, para. 100.

that the true respondent in the present dispute would have to be the Czech Republic as one of the successor States of the former Czechoslovakia. This elementary inference must be drawn on a first reading of Liechtenstein's Application. Rightly, Liechtenstein starts its account of the factual background by pointing out that the dispute has its origin in measures taken by the Czechoslovak State in 1945 after the Second World War[1]. For reasons which remain unexplained in Liechtenstein's Submissions, Czechoslovakia "treated the nationals of Liechtenstein as German nationals"[2]. It is well known that on that occasion, by virtue of the Beneš Decrees, Czechoslovakia deprived all persons of German or Hungarian origin or ethnicity of their assets, without ever providing any kind of reparation. Liechtenstein citizens were also subjected to that discriminatory regime of confiscation. Germany takes note of the conclusions presented by Liechtenstein in the following terms:

> "The application of the Beneš decrees to the Liechtenstein property remained an unresolved issue between Liechtenstein and Czecholosvakia until the dissolution of the latter, and it continues to be an unresolved issue as between Liechtenstein and the Czech Republic"[3].

119. It is obvious, therefore, that the pecuniary losses suffered by Liechtenstein are attributable not to Germany, but to a deliberate policy of the former Czechoslovak State. The damage caused to Liechtenstein lies more than half a

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[1] LA, para. 5.

[2] LA, para. 5.

[3] LA, para. 5.

century back in the past. The European Court of Human Rights, therefore, when it had to adjudicate the application of Prince Hans-Adam II against Germany, came to the conclusion that long before the proceedings concerning the Pieter van Laer painting, Liechtenstein had lost its title to property. It held:

> "83. The Court recalls that, according to the established case-law of the Convention organs, 'possessions' can be 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of the survival of an old property right which it has long been impossible to exercise effectively cannot be considered as a 'possession' within the meaning of Article 1 of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition (see the recapitulation of the relevant principles in the above-mentioned Malhous decision, with further references, in particular to the Commission's case-law).
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> 84. In the present case, the applicant brought proceedings before the German courts claiming ownership of the painting which had once belonged to his father. He challenged the validity of the expropriation carried out by authorities of former Czechoslovakia, his main argument being that the measure had allegedly been effected contrary to the terms of the Beneš Decree No. 12 and to the rules of public international law.
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> 85. As regards this preliminary issue, the Court observes that the expropriation had been carried out by authorities of former Czechoslovakia in 1946, as confirmed by the Bratislava Administrative Court in 1951, that is before 3 September 1953, the entry into force of the Convention, and before 18 May 1954, the entry into force of Protocol No. 1. Accordingly, the Court is not competent *ratione temporis* to examine the circumstances of the

> expropriation or the continuing effects produced by it up to the present date (see *Malhous v. the Czech Republic* (dec.), cited above, and the Commission's case-law, for example, Mayer and Others v. Germany, applications no. 18890/91, 19048/91, 19342/92 and 19549/92, Commission decision of 4 March 1996, Decisions and Reports 85, pp. 5-20).
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> The Court would add that in these circumstances there is no question of a continuing violation of the Convention which could be imputable to the Federal Republic of Germany and which could have effects as to the temporal limitations of the competence of the Court (see, *a contrario*, the Loizidou v. Turkey judgment (*merits*), quoted above, p. 2230, § 41)."[1]

120. It is remarkable that this judgment, which was handed down long before Liechtenstein had to submit its Memorial, is mentioned only in one single line of the Applicant's Submissions[2]. Liechtenstein has also refrained from providing it to the Court as an annex. It stands to reason that the assessment of the Strasbourg judges destroys the argument that the injury that was inflicted upon Liechtenstein could in any manner whatsoever be attributed to Germany. Quite obviously, having failed to enforce its reparation claim against Czechoslovakia and its two successor States, Liechtenstein has now started a last attempt to recover at least some of its losses from a third party which is somehow related to the implementation of a large-scale confiscation policy by Czechoslovakia to the detriment of a small State with limited means of enforcing its rights.

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[1] *Prince Hans-Adam II of Liechtenstein v. Germany*, Judgment of 12 July 2001, GPO, Annex 1.

[2] LM, pp. 13-14, para 15.

C. No Substantiation of Germany's Alleged Interference with Liechtenstein Property

121. The central issue of the dispute is constituted by the allegation that Germany breached its duty under international law to respect Liechtenstein's financial interests. But neither from a look at the Application nor from a careful perusal of the Memorial does it emerge in what way, by which measure, Germany might have interfered with the Liechtenstein property which until the end of the Second World War was located in the territory of the Czecholovak State. Liechtenstein makes the most desperate efforts to demonstrate that indeed Germany may be blamed for the admittedly deplorable financial losses of its citizens. But it is not able to substantiate that Germany took measures which might be characterized as interference with Liechtenstein assets.

122. In the *Nuclear Tests* cases[1], the Court pointed out that the application "must be the point of reference for the consideration ... of the nature and existence of the dispute brought before it".[2] However, Liechtenstein's Application provides only a meagre record which does not enable a reader to grasp what is really in issue. It starts out by saying[3] that "in and after 1998" the case law of German courts started treating "certain property of Liechtenstein nationals as German assets having been 'seized for the purposes of reparation or restitution, or as a result of

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[1] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 253; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457.

[2] *Nuclear Tests (Australia* v. *France)*, p. 260, para. 24; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 463, para. 24.

[3] LA, para. 1.

the state of war'". This is a rather enigmatic formula, which does not become much clearer by the additional explanation in para. 19 of the Application where it is stated 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'".

123. It has already been pointed out in the account of the relevant facts in Part II of the present Preliminary Objections that the thrust of the jurisprudence referred to by Liechtenstein is very simple: In the *Pieter van Laer Painting* case, no more was determined by the Oberlandesgericht Köln (Cologne Court of Appeal) and the Federal Constitutional Court than that the German judiciary was placed under a prohibition to entertain the merits of the case with which they had been seized. They derived this prohibition from Article 3, paragraph 3, of Chapter Six of the Settlement Convention, the raison d'être of which has already been explained. In other words, the German courts in the *Pieter van Laer Painting* case did not look into the substance of the matter. They made no determination on ownership, they did not rule on the permissibility under international law of the confiscatory measures carried out by Czechoslovakia in 1945 and 1946. Indeed, the Cologne Court of Appeal stated explicitly that it "refrains from any evaluation of the confiscation effected at that time"[1]. Likewise, the Federal Constitutional Court, which had to pronounce on a constitutional complaint

[1] LM, Annex 29, vol. II, p. 289, at 306. The translation provided by Liechtenstein is mistaken as far as it refers to the author of the judgment. Erroneously, the translator speaks of the "Federal Court's Division", whereas the reference is to the Chamber of the Cologne Court of Appeal which rendered the judgment on 9 July 1996.

lodged by Prince Hans-Adam II of Liechtenstein in the same case, stressed that the civil courts in dealing with the matter had not ruled on the lawfulness of the confiscation carried out by Czechoslovakia[1]. Therefore, in its decision of 28 January 1998 it confined itself to reviewing the lawfulness of the denial of judicial remedies imposed on Germany by the conventional obligation enunciated in the Settlement Convention, concluding that no violation of German constitutional law could be found. No word was said by the German courts on the substantive issue of ownership. Therefore, in good faith no conclusions can be drawn from the jurisprudence with regard to Germany's position regarding the confiscatory measures carried out to the detriment of Liechtenstein property on the basis of the Beneš Decrees.

124. The approach taken by the German courts to the claim brought by Prince Hans-Adam II von Liechtenstein was explicitly approved by the European Court of Human Rights. As pointed out, it denied the existence of any kind of interference by Germany with the Prince's property, given the fact that his claim had long since ceased to constitute an effective legal position.

D. Distortion of the German Case Law Concerning the Settlement Convention

125. Liechtenstein seeks to distort the plain meaning of the proceedings which its ruling Prince had initiated in Germany to recover the Pieter van Laer painting by

[1] See LM, Annex 32, vol. II, p. 353, at 355.

all means at its disposal. The first one of these misleading statements can be found on page 13 of the Memorial[1], where Liechtenstein points out that the Federal Constitutional Court held that by virtue of the Settlement Convention the German courts had "to treat the painting as the property of the Historic Monuments Office" in the Czech city of Brno. Anyone reading the decision of the Federal Constitutional Court of 28 January 1998 will easily find out that the reasons of that decision do not even mention Czechoslovakia or the relevant Czech institution, the Historic Monuments Office in Brno, which today claims to be the legitimate owner of the painting. Explicitly, the Federal Constitutional Court states in a disclaimer that the issue of expropriation is not before it[2].

126. On page 14 of its Memorial, Liechtenstein goes one step further by saying that Germany "claims that it is *entitled* to treat the Liechtenstein property as property 'seized for the purpose of reparation or restitution, or as a result of the state of war'"[3]. Progressively, the Memorial changes the plain meaning of the propositions derived in the case law from the Settlement Convention, trying to suggest that there was indeed some kind of interference. At page 88 of the Memorial[4], it is contended that Germany declared "Liechtenstein property to be German property" – something which the authors of the Memorial are of course not able to sustain by a proper documentary source. The line of distortion is

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[1] LM, para. 13.

[2] Section II 1 of the Judgment, LM, Annex 27, vol. II, p. 250.

[3] LM, p. 14, para. 16, emphasis added.

[4] LM, para. 4.1.

driven to a first extreme at page 89[1] where, without any hesitation, it is submitted that Germany pretended to be entitled "to use neutral property (such as Liechtenstein property) to meet its duty of reparations". Indeed, this unfounded allegation comes to its culmination at page 90[2], where Liechtenstein contends that Germany included Liechtenstein property in its reparations regime and that it treated Liechtenstein nationals as nationals of a belligerent State.

127. These baseless assertions are continued in the following. They constitute the *leitmotif* of Liechtenstein's line of argument. Again, at page 110 of the Memorial[3], the reader is confronted with the incorrect statement that Germany declared the property of Liechtenstein nationals "to be German property which could be used for reparation purposes". The Memorial even goes so far as to contend that the position taken by the German courts "entailed a final loss of the title to property being subject to reparation measures", and the concluding phrase "so far as Germany is concerned" does not make things much better. By all means at its disposal Liechtenstein seeks to hide the basic fact that in 1945-46, by a sovereign act of the Czechoslovak State, its citizens were deprived of their assets and that this state of affairs has continued ever since.

128. It is even more amazing to note that Liechtenstein extends the consequences which it draws from the *Pieter van Laer Painting* case to all the property held at

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[1] LM, para. 4.4.

[2] LM, para. 4.6.

[3] LM, para. 5.1.

the end of the Second World War by Liechtenstein citizens in the territory of the former Czechoslovakia. Again, this is a pure invention of the authors of the Application and the Memorial. However, the Memorial defends this position as from its very outset. At page 8[1], it is stated that Germany has classified "all the Liechtenstein property" as having been seized for purposes of reparation or restitution, and the same is repeated, for instance, at page 100[2].

129. This bold assertion is not supported by any piece of evidence. It is true that if a dispute concerning the land formerly owned by Liechtenstein citizens ever came before a German court that court would have to decline jurisdiction to rule on the merits of the case. But not a single dispute of that kind has effectively been brought to Germany for adjudication, and it is difficult to see how German courts could be competent for ruling on ownership of real estate in a foreign country. It is just by chance that the Pieter von Laer painting was encountered in Germany in 1991, where it was shown within the framework of an art exhibition. Germany has no actual relationship with all the other assets which are today located in the Czech Republic or in Slovakia.

130. In sum, Germany concludes that Liechtenstein has truly invented an interference which in fact has never occurred. Such a product of fantasy cannot be deemed to meet the requirements of substantiation as they are enshrined in Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court.

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[1] LM, para. 3.

[2] LM, para. 4.24.

E. A Failing Attempt at Diplomatic Protection

131. Essentially, Liechtenstein's claim must be classified as exercise of diplomatic protection in favour of its nationals allegedly injured by Germany. Liechtenstein seeks to obtain financial reparation for the losses suffered by the victims of the confiscatory measures carried out by the former Czechoslovakia and maintained by the Czech Republic. Therefore, it should be crystal clear who the persons are who sustained injury at the hands of the Czechoslovak State. As far as Germany is concerned, Liechtenstein would at least have to indicate the persons included in the adversely affected group. In this regard, the Application evinces a total lack of precision. Even the Memorial does not bring about the necessary clarity.

1. No Indication of the Victims

132. The Application refers to the identity of the victims in the most cavalier fashion. It limits itself to stating[1] that "the property of the then Prince of Liechtenstein and of his family as well as of other Liechtenstein nationals" was seized. Hardly could this point be dealt with more negligently. On the basis of the Application, one knows no more than that the Prince and his family lost some of their property, all that was located in the territory of the former Czechoslovakia. Obviously, such a blanket statement is not enough as substantiation of the claim raised. On the basis of the Application alone, Germany would not have had enough elements for its defence. In instances of diplomatic protection, it is the

[1] LA, para. 5.

individual person who counts. Claims cannot be brought on an aggregate basis, without any identification of the alleged individual victims.

133. Nor does the Liechtenstein Memorial make any great effort to enlighten Germany on who allegedly was hurt by the confiscatory measures taken by Czechoslovakia at the end of World War II. The first indication can be found at page 8[1]. Liechtenstein contends that "about 38" of its nationals were adversely affected as owners of property, "including the then Prince of Liechtenstein and members of his family". At page 27, first of all a fairly vague reference is made to "a number of Liechtenstein families" which "had lived in Bohemia and Moravia for several centuries"[2]. The reader is denied precise information even in the next paragraph in which Liechtenstein explains that in 1945 it drew up "a list of families affected by the confiscation measures of the then Czechoslovak government". This list[3], Germany must assume, is a list of persons of whom most, if not all, are dead by now. There is certainly no need to emphasize that 1995 is at a distance in time of 50 years from 1945. Thus, the Applicant has failed to specify for whom Liechtenstein wishes to exercise a right of diplomatic protection.

134. A number of conclusions may be drawn from the list provided by Liechtenstein, all of which confirm that the action is inadmissible.

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[1] LM, para. 2.

[2] LM, para. 1.18.

[3] LM, Annex 8, vol. I, p. 32.

135. First of all, the list makes clear once again that the only actual interference with the Liechtenstein property, which undoubtedly took place, was effected by Czechoslovakia in 1945. Annex 8 of the Memorial is intended to identify the victims of loss of property, and indeed the list may accurately reflect the situation as it existed in 1945 after the Czechoslovak Government had decided to equate Liechtenstein nationals with German nationals. Quite obviously, Liechtenstein is of the view that the damage was caused in 1945. The simple fact that it did not think of revising the list of 1945 makes abundantly clear that essentially it does not really believe that in 1995 Germany's so-called "change of position" caused any new injury. Therefore, rightly, it did not bother to find out who might have been affected in 1995. For Liechtenstein itself, 1995 is an absolutely irrelevant date. In any event, to date Germany has no clues who, apart from the ruling Prince himself, in 1995 believed to have property claims against the Czech Republic which, allegedly, were brought to extinction by the jurisprudence of the German courts.

136. Germany has noted, furthermore, that the 1945 list contains names which are well known to the Court. It contains the name of "Nottebohm" twice. Harriet Nottebohm and Hermann Nottebohm are said to be among the victims of the confiscation measures carried out by the Czechoslovak authorities in 1945. It would have been necessary for Liechtenstein to substantiate in detail that it is entitled to rely on the nationality of those two persons, for the purpose of diplomatic protection, given the fact that almost half a century ago the Court

formally denied it the right to do so with respect to another member of this very family[1].

137. In sum, Liechtenstein has failed to demonstrate that the right to diplomatic protection which it invokes does in fact exist. Not only has it failed to provide the evidence which would be necessary for that purpose, it has furthermore not even furnished the tiniest shred of evidence that, apart from the family of the Prince himself, there are Liechtenstein individuals who have suffered injury at the hands of German authorities in 1995.

2. No Indication of the Assets Allegedly Affected

138. The same kind of negligence can be observed concerning the assets which allegedly were damaged by Germany's "change of position". In order to bring its claim in line with the obligations laid down in Article 40, paragraph 1, of the Statute and Article 38, paragraph 2, of the Rules of Court, the Applicant would have had to give an account of the property which, in the view of Liechtenstein, can be deemed to form the subject-matter of the present dispute. However, again the most complete lack of precision obtains. Liechtenstein confines itself to a limited number of vague assertions concerning the assets which were held by its citizens in the territory of the former Czechoslovakia in 1945.

139. The Application provides an account of the assets concerned in a way which remains unspecific, even nebulous. Paragraph 5 speaks of "substantial arable

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[1] See *Nottebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 4.

land and forests, numerous castles and their contents, factories etc.". No more details can be gleaned from this first piece of the pleadings. In the following, Liechtenstein just focuses on the Pieter van Laer painting[1]. Although it stresses in paragraph 20 that the dispute "exists generally with respect to the Liechtenstein property" and "is not limited to the van-Laer painting", not a single word is lost on the specification of, for instance, the "castles" allegedly owned by the 38 persons. No hint as to the location of these castles can be found. No names are given. The phrase reproduced at the beginning of the present paragraph remains the only hint that real estate of scale may be in issue. But: no clear inferences can be drawn, the Respondent can do no more than guess.

140. One might have expected that Liechtenstein would use the opportunity provided by Article 45 of the Rules of Court to complement its pleadings by a memorial, to explain its argument in more detail. Even a cursory glance at the Memorial shows, however, that Liechtenstein has not remedied the flaws of the Application. The Memorial is of the same superficiality concerning the financial damage which Liechtenstein alleges to have suffered. Again, no details are given. By perusing the Memorial, the reader learns nothing about the extent of the injury which Liechtenstein suffered directly by the Czechoslovak measures and claims to have suffered "par ricochet" through Germany's "change of position".

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[1] LM, pp. 14 ff., paras. 17 ff.

141. At page 8 of the Memorial[1], Liechtenstein simply repeats the formula that the property in question included "substantial arable land and forests, numerous buildings and their contents, factories etc.". The only remarkable modification of the earlier statement of facts is that the castles have disappeared and have been replaced by "buildings". At page 27[2], another blanket statement is made. Liechtenstein contends that the victims of the confiscation measures by Czechoslovakia owned "extensive agricultural and forestry property, houses, livestock and equipment used in agriculture, personal furniture and fittings and other valuables, as well as interests in agricultural and industrial business". At page 28[3] the castles make a fresh entry. Liechtenstein submits that the family of the Prince of Liechtenstein owned not only "large forests and agricultural lands", but also "several castles which were home to an important art collection". Even the most eager study of the Memorial is unable to unearth any further details. Only indirectly is it possible to learn something more about the losses of the then Reigning Prince of Liechtenstein, Franz Josef II. The judgment of the Administrative Court in Bratislava of 21 November 1951 gives a short list of agricultural property confiscated in a number of districts of the Czechoslovak territory.[4] Even this list of names of districts is fundamentally lacking in precision. And it remains that as far as the other persons on the "list of 38" are concerned, the balance sheet of information can be described as zero.

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[1] LM, para. 2.

[2] LM, para. 1.18.

[3] LM, para. 1.20.

[4] LM, Annex 9, vol. I, p. 34.

142. It stands to reason that an action which claims reparation for financial losses, but which totally refrains from substantiating these losses cannot prosper. It is true that Germany raises Preliminary Objections in the present Memorial with the aim of having the Court abstain from going into the details of the merits of the case. If Germany had not done so, however, it would not have been able to respond to the allegations made in an adequate fashion. In instances of diplomatic protection, the person who has allegedly suffered injury and the assets which have allegedly been affected play the central role. Neither one of these two elements, however, has been duly identified by the Applicant. As far as the merits of the case are concerned, Germany is simply unable to provide any comments that would clarify the matter. The allegations put forward by Liechtenstein are so vague and lack precision to such a great extent that the duty of substantiation must be deemed not to have been fulfilled. The Application is therefore inadmissible.

F. No Violation of Liechtenstein's Neutrality and Sovereignty Substantiated

143. In order to give its claim a better basis than it actually has, Liechtenstein contends additionally that it was not only damaged in an indirect fashion by Germany in the person of its (unidentified) nationals, but that it also suffered direct damage through the conduct of German authorities, primarily its courts. It claims that Germany violated its sovereignty as an independent third State as well as its status of neutrality during the Second World War. Both allegations are again pure figments of imagination, for which Liechtenstein has not been able to produce any kind of substantiation. All that the reader can find in the

Application and the Memorial are blanket allegations, unsupported by any coherent statement of facts. As such, these allegations lack the necessary specificity, too. They do not meet the standards laid down in Article 40, paragraph 1, of the Statute and of Article 38, paragraph 2, of the Rules of Court.

1. Liechtenstein's Neutrality

144. In the Application, no trace can be found of the argument that Germany breached Liechtenstein's neutrality. This argument comes up for the first time in the Memorial. In the opening paragraph of Chapter 4[1], Liechtenstein asserts that "by declaring Liechtenstein property to be German property, Germany failed to respect Liechtenstein's acknowledged status as a neutral State during World War II, as well as infringing [*sic!*] its sovereignty". On the following pages, one can find many abstract explanations on the law of neutrality.[2] Germany acknowledges that this exposition as such accurately reflects positive international law. However, Liechtenstein has nothing of relevance to say about "Germany's violation of the law of neutrality"[3]. It rightly points out that a reparations regime cannot be extended to the assets of a neutral country, neither by the victorious powers nor by the defeated nation. But instead of concluding that, hence, Czechoslovakia breached its obligations under international law, Liechtenstein submits that there was a breach by Germany of Liechtenstein's neutrality.

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[1] LM, p. 88, para. 4.1.

[2] LM, pp. 91-97, paras. 4.9-4.28.

[3] LM, pp. 98-101, paras. 4.19-4.28.

145. In attempting to discover the factual basis of that bold thesis, the reader is again referred to the decision of the Federal Constitutional Court of 28 January 1998[1], which is interpreted as a denial of the "Liechtenstein nationality of these [unidentified] persons" and as an attempt to regard them "as German nationals for the purposes of the reparations regime"[2]. In other words, Liechtenstein is not able to identify a single act which might be able to be taken as actual interference with Liechtenstein property. As shown, the decision of the Federal Constitutional Court explicitly refrained from making a ruling on the lawfulness of the confiscation strategy pursued by Czechoslovakia to the detriment not only of persons of German or Hungarian ethnicity, but also of Liechtenstein citizens. It confined itself to stating that German constitutional law did not stand in the way of the prohibition, laid down in Article 3, paragraph 3, of Chapter Six of the Settlement Convention, to entertain claims seeking to challenge measures taken after World War II for the purpose of reparation or restitution. No more than this purely procedural point was determined by the Federal Constitutional Court, which thus confirmed the stance taken earlier by the ordinary courts in Cologne which Prince Hans Adam II of Liechtenstein had seized. Neither the German courts nor the German executive branch have ever taken the position that Liechtenstein property was German property. In other words, the allegation as presented by Liechtenstein constitutes a most serious distortion of the facts. To sum up, there is no shred of evidence susceptible of sustaining the contention

[1] LM, Annex 32, vol. II, p. 353.

[2] LM, pp. 100 ff., para. 4.28.

that Germany included Liechtenstein property in a reparations regime which in 1995 simply did not exist. The violation of Liechtenstein's neutrality remains therefore a lawyers' construct, a thesis which has no foundation. An allegation which lacks any inherent logic and thus constitutes a mere product of imagination is not only ill-founded, it must be dismissed as being inadmissible.

146. Given this totally erroneous premise, it is clear from the very outset that the legal inference drawn therefrom must also be wrong. But Liechtenstein's argument is also wrong on legal grounds. Neutrality governs relations between States in times of armed conflict. According to the words of a renowned authority in the field, the late Swiss lawyer Rudolf Bindschedler, who himself put into practice neutrality as legal advisor of his country , the term "neutrality" "designates the legal status of a State which does not participate in a war being waged by other States".[1] It is clear from the submissions of Liechtenstein itself that during World War II Germany never acted contrary to its obligation to respect the status of neutrality which Liechtenstein had chosen. According to the submissions of the Applicant, the dispute came into being in 1995, that is to say 50 years after the end of World War II. The parties are in agreement – and it is fairly obvious – that in 1995 no situation of armed conflict existed in the relations between any one of the States involved – Liechtenstein as the Applicant, Germany as the Respondent, the Czech Republic as one of the successor States of Czechoslovakia, the State which in 1945 deprived

[1] R. Bindschedler, 'Neutrality, Concept and General Rules', in: III *Encyclopedia of Public International Law* (R. Bernhardt ed., Amsterdam *et al.* 1997), p. 549.

Liechtenstein citizens of their property, and the Three Western Powers, which through the Settlement Convention imposed on Germany the obligation not to accept as admissible claims seeking to challenge any measures of reparation or restitution. Disputes arising between States who peacefully coexist with one another have nothing to do with the special rules on neutrality. These rules are needed to cope with the suspension as between the warring parties of many of the common rules which govern relationships between States in times of peace. Almost inevitably, in an indirect fashion, third States are also affected by an armed conflict between two or more other States. For that reason, it was necessary to bring into being a special body of rules, the law of neutrality. For events and occurrences in times of peace, however, the rules on neutrality provide no answers. Any issues can be resolved by the common rules of international law. In that regard, it is clear, above all, that no State has a right to violate the rights of third States under any pretext whatsoever. Germany unreservedly agrees with Liechtenstein that war and measures taken after an armed conflict to settle the financial consequences resulting therefrom should in no way affect the rights of States that have remained neutral. This is a rule inherent in the principle of sovereign equality. But the fact is that Germany has not engaged in any conduct which might reasonably be interpreted as violating the rights of Liechtenstein.

2. Liechtenstein's Sovereignty

147. The preceding considerations have already answered the allegation that Germany violated the sovereignty of Liechtenstein. Once again Germany fully agrees with Liechtenstein concerning the point of departure. All States are

entitled to see their sovereignty respected, no matter how large or small they are. For a small State like Liechtenstein sovereign equality is even more important than for a big State which may rely on its factual strength to defend its rights and interests. And yet, the application of this legal premise to the facts in the instant case lacks again any reasonable foundation. Liechtenstein comes back to its interpretation of the decision of the Federal Constitutional Court of 28 January 1998[1] as constituting the act from which originated the damage complained of.

148. The very core of Liechtenstein's complaint is as simple as it is hard to understand. Without hesitation, Liechtenstein submits that through its "change of position" Germany treated Liechtenstein nationals "like its own nationals"[2]. Liechtenstein even goes as far as stating that "this equal treatment amounts to a *de facto* involuntary conferment of nationality without any reasonable relationship of the Liechtenstein nationals to Germany"[3]. In fact, this allegation is not just a slip of the tongue. Liechtenstein insists that the effects of the position taken by Germany in and after 1995 "are comparable, *pro tanto*, to those of a forced imposition of nationality"[4].

149. Germany not only rejects this allegation in the most resolute manner, but submits that again Liechtenstein has come to its conclusions by deliberately

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[1] LM, Annex 32, vol. II, p. 353.

[2] LM, p. 103, para. 4.34.

[3] LM, p. 104, para. 4.35.

[4] LM, p. 106, para. 4.40.

distorting the meaning of the jurisprudence of the German courts seized with adjudicating the claim brought by Prince Hans-Adam II in the *Pieter van Laer Painting* case. By no stretch of the imagination can it be derived from the decisions of these courts that Germany, by a sovereign act, forcibly imposed its nationality on a given number of Liechtenstein citizens. It is particularly interesting to note in this connection that Liechtenstein has not been able to indicate who the "victims" of that hidden naturalization policy could be. As already shown, there exists the most absolute mystery concerning the persons who might have been affected by an indirect conferment of German nationality. In any event, Germany is not aware of any act of almost annexionist connotation, and it has not been able to detect the bases supporting such a harsh indictment in Liechtenstein's Memorial.

G. CONCLUSION

150. All in all, Liechtenstein acted with the utmost carelessness in formulating its allegations, not refraining even from purposeful distortions of the facts which constitute the basis of the present case. Not a single one of the relevant allegations brought is supported by specific substantiation. Again and again, Liechtenstein invokes the decisions rendered by the German judiciary in the *Pieter van Laer Painting* case by attributing to them a meaning which they do not have and have never had. On the other hand, it withholds from the Court important information, namely the judgment of the European Court of Human Rights which found that Germany's conduct in the *Pieter van Laer Painting* case was unobjectionable from the viewpoint of the European Convention on Human Rights. Consequently, Germany holds that the Application brought by

Liechtenstein should not be examined by the Court as to its merits, but must be dismissed *a limine*. An action the legal foundations of which even the Applicant himself is unable to substantiate should not unnecessarily obstruct the agenda of the Court.

Section II.

Liechtenstein's Claims Require the Court to Pass Judgment on the Rights and Obligations of the Czech Republic in Its Absence and without Its Consent

151. Germany's fifth preliminary objection concerns the absence of the successor States of Czechoslovakia, in particular the Czech Republic from the present proceedings. As Germany has maintained above[1], there exists no dispute between the parties concerning the issues brought by Liechtenstein before this Court. But even if the Court reached the conclusion that in regard to these issues there was a dispute between Liechtenstein and Germany, the Court could not exercise jurisdiction due to the so-called indispensable third party rule.

152. According to the principle of consent which constitutes the very foundation of the jurisdiction of the Court, the Court cannot sit in judgment over the behaviour of a State which has not given such consent. In the present case, the Court cannot make a legal determination of the behaviour of Germany without, at the same time, judging the behaviour of the Czech Republic, first, concerning the

[1] See *supra*, Chapter I, Section I, paras. 35 ff.

existence *vel non* of any claims for reparations between Germany and the Czech Republic, and second, as to the lawfulness of the conduct of its predecessor State, Czechoslovakia, regarding the seizure of property belonging to Liechtenstein and its nationals. The Czech Republic thus being an indispensable third party to this case, the Court needs the consent of the Czech Republic to proceed with it. But the Czech Republic has neither made a declaration according to the Optional Clause accepting the compulsory jurisdiction of the Court, nor is it a party to the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957, nor has it given its consent to the present proceedings on an *ad hoc* basis. Thus, in the absence of the Czech Republic, the Court lacks jurisdiction.

153. In the following, Germany will show that

(1) the principle of consensual jurisdiction requires the sovereign consent of an indispensable third party, that is, a party whose conduct is the very subject-matter of a case before the Court,

(2) the Czech Republic is an indispensable third party in the present case, both

(a) regarding the lawfulness *vel non* of the seizures of Liechtenstein property in the former Czechoslovakia, and

(b) regarding the existence of an enrichment of any kind of Germany, as claimed by Liechtenstein.

Thus, Germany concludes

(3) that the Czech Republic is an indispensable third party in the present proceedings, in whose absence the Court lacks jurisdiction over the case,

(4) that this matter is exclusively preliminary in character and should therefore be decided in the phase of the proceedings dealing with Germany's Preliminary Objections.

Therefore, Germany asks the Court to decline to decide on the merits of the present case.

A. THE COURT CANNOT EXERCISE JURISDICTION OVER AN INDISPENSABLE THIRD PARTY WITHOUT THAT PARTY'S CONSENT

154. In the statutory regime of the jurisdiction of the Court, the most fundamental principle is that of consent. To recall Article 36 of the Statute:

> "The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force."

155. Both in regard to cases referred to the Court by special agreement of the parties and in those arising under a convention or treaty, States have established the jurisdiction of the Court on a strictly consensual basis. The system of the Optional Clause embodied in Article 36, paragraph 2, of the Statute confirms this principle. Thus, in the case of the *Monetary Gold Removed From Rome in 1943*, it was emphasized that "the Court can only exercise jurisdiction over a State with its consent."[1] This basis of the rule of the "indispensable third party"

[1] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.

should be kept in mind when dealing with the question of jurisdiction of the Court in the present instance.

156. As is well known, the Court applied the principle of the indispensable third party first in the *Monetary Gold* case just referred to. It was brought before the Court by an Application of Italy against France, the United Kingdom and the United States. Italy requested the Court to decide certain legal questions concerning a quantity of monetary gold removed from Rome by the Germans in 1943, recovered in Germany but which belonged to Albania. Both Italy and the United Kingdom claimed to be entitled to the gold as compensation for breaches of international law on the part of Albania. The Government of Albania, however, had not consented to the jurisdiction of the Court in the matter. In order to decide which State was entitled to claim the gold, the Court needed first to determine whether Italy had a claim to compensation vis-à-vis Albania. In the absence of Albania's consent, however, the Court declined to do so. Due to the pertinence of this case, the reasoning of the Court in *Monetary Gold* deserves to be cited at length:

> "In order ... to determine whether Italy is entitled to receive the gold, it is necessary to determine whether Albania has committed any international wrong against Italy, and whether she is under an obligation to pay compensation to her; and, if so, to determine also the amount of compensation. In order to decide such questions, it is necessary to determine whether the Albanian law of January 13th, 1945, was contrary to international law. In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Albania vis-à-vis Italy – only two States, Italy and Albania, are directly interested. To go into the

merits of such questions would be to decide a dispute between Italy and Albania.

The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent in this case either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent."

And further:

"In the present case, Albania's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania."[1]

157. The similarity of the position of the three States involved in *Monetary Gold* to that of Liechtenstein, Germany and the Czech Republic in the present instance is striking, indeed this position almost completely coincides. One would only have to change some words in the passages from *Monetary Gold* just quoted to render this apparent. Thus, if, for the sake of illustration, we apply the reasoning in *Monetary Gold* to the present case, it would go as follows:

158. In order to determine whether Liechtenstein is entitled to receive reparation for the damage it has suffered, it is necessary to determine whether Czechoslovakia

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[1] *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, p. 32.

has committed any international wrong against Liechtenstein. In order to decide such questions, it is necessary to determine whether the so-called Beneš Decrees were contrary to international law. In the determination of these questions – questions which relate to the lawful or unlawful character of certain actions of Czechoslovakia vis-à-vis Liechtenstein – only two States, Liechtenstein and Czechoslovakia, are directly interested. To go into the merits of such questions would be to decide a dispute between Liechtenstein and Czechoslovakia. The Court cannot decide such a dispute without the consent of the successor State to Czechoslovakia, the Czech Republic. But it is not contended by any Party that the Czech Republic has given its consent in this case either expressly or by implication. To adjudicate upon the international responsibility of the Czech Republic without its consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent. In the present case, the Czech Republic's legal interests would not only be affected by a decision, but would form the very subject-matter of the decision. In such a case, the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of the Czech Republic.

159. So far Germany's demonstration of what could almost be called an identity of the position of the States involved in *Monetary Gold* and in the present case, and thus of the indispensability of the Czech Republic for the present proceedings.

160. In its jurisprudence, the Court has frequently referred to the *Monetary Gold* precedent ever since. Of the range of cases[1], only two require further analysis as to their incidence on the present litigation: the first one as an example where the Court has refused to apply the rule: the case concerning *Certain Phosphate Lands in Nauru*[2], and the second one as the prime example of the continuing validity of the rule: the case concerning *East Timor*[3].

161. In the *Nauru* case, the Court was faced with a situation related to, but – on one decisive point – differing from the *Monetary Gold* precedent. The respondent in this case, Australia, had argued that both the United Kingdom and New Zealand were indispensable third parties because they had been part of the Administering Authority over Nauru as well and thus were in the same position as Australia. The Court used the opportunity both to confirm the *Monetary Gold* rationale and to limit its scope to cases in which the interests of the third State were the very subject-matter of the dispute between the parties before it. First, the Court confirmed the consensual nature of its jurisdiction and thus the rationale of *Monetary Gold*:

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[1] See, e.g., *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene, Judgment,I.C.J. Reports 1984,* p. 25, para. 40; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 430, para. 88; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras), Application to Intervene, Judgment, I.C.J. Reports 1990,* pp. 116, 122, paras. 56, 73.

[2] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 240.

[3] *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 90.

> "National courts, for their part, have more often than not the necessary power to order *proprio motu* the joinder of third parties who may be affected by the decision to be rendered ... . But on the international plane the Court has no such power. Its jurisdiction depends on the consent of States"[1].

The absence of intervention by a third State, however, did not preclude

> "the Court from adjudicating upon the claims submitted to it, provided that the legal interests of the third State which may possibly be affected do not form the very subject-matter of the decision that is applied for."[2]

162. In the *Nauru* proceedings this was not the case. The Court thus distinguished *Nauru* from the *Monetary Gold* rationale by differentiating between the case in which the legal determination of the behaviour of third States is a *prerequisite* for a judgment of the Court and the case where it is a mere incidental *implication*. In the latter case, a third party is protected by the limitation of the binding force of the Court's decisions to the parties (Article 59 of the Statute); in the former case, the third party is indispensable. In the words of the Court:

> "[T]he determination of Albania's responsibility [in *Monetary Gold*] was a *prerequisite* for a decision to be taken on Italy's claims. ... In the present case [Nauru], the determination of responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru's claim. ... [A] finding by the Court

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* p. 260, para. 53.

[2] *Certain Phosphate Lands in Nauru*, p. 261, para. 54.

> regarding the existence or the content of the responsibility attributed to Australia by Nauru might well have implications for the legal situation of the two other States concerned, but no finding in respect of that legal situation will be needed as a basis for the Court's decision on Nauru's claims against Australia. Accordingly, the Court cannot decline to exercise its jurisdiction."[1]

Therefore, the decisive point is whether the third party's interest is the very subject-matter of the dispute, that is, whether it needs to be decided upon as a prerequisite for the decision on the case brought by the Applicant.

163. In the case of Liechtenstein, the result of this inquiry is obvious, as Germany will explain further in the following chapter: In order to be able to determine (1) the unlawfulness of the alleged German recognition of the Czechoslovak seizures, and (2) the existence *vel non* of any enrichment by Germany, the Court needs in the first place to legally qualify the conduct of a sovereign third State, namely Czechoslovakia, respectively its successor States, in particular the Czech Republic. Only following such a decision on the lawfulness of Czechoslovak conduct would the Court be able to decide on Liechtenstein's claims against Germany. Hence, the condition that a party is indispensable if a decision on its conduct is a prerequisite to the decision of the case before the Court, and thus concerns the very subject-matter of the dispute, is fulfilled in the present case.

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[1] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992,* pp. 261-62, para. 55 (Emphasis added).

164. In the other leading case on the indispensability of a third party, *East Timor*, the Court again recalled the principle of consensual jurisdiction.[1] The case concerned the permissibility of Australia concluding a treaty with Indonesia on the continental shelf resources of East Timor. And again, the Court emphasized that, if it is impossible to separate the behaviour of the applicant and that of the third State, the third State is an indispensable third party. In the words of the Court:

> "The Court has carefully considered the argument advanced by Portugal which seeks to separate Australia's behaviour from that of Indonesia. However, in the view of the Court, Australia's behaviour cannot be assessed without first entering into the question why it is that Indonesia could not lawfully have concluded the 1989 Treaty, while Portugal allegedly could have done so; the very subject-matter of the Court's decision would necessarily be a determination whether, having regard to the circumstances in which Indonesia entered and remained in East Timor, it could or could not have acquired the power to enter into treaties on behalf of East Timor relating to the resources of its continental shelf. The Court could not make such a determination in the absence of the consent of Indonesia."[2]

And the Court further observed:

> "[T]he effects of the judgment requested by Portugal would amount to a determination that Indonesia's entry into and continued

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[1] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995,* p. 100, para. 26.

[2] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995,* p. 101, para. 28. See also *ibid.*, para. 29, *ibid.*, p. 104, para. 33; *ibid.*, p. 105, para. 34.

> presence in East Timor are unlawful and that, as a consequence, it does not have the treaty-making power in matters relating to the continental shelf resources of East Timor. Indonesia's rights and obligations would thus constitute the very subject-matter of such a judgment made in the absence of that State's consent. Such a judgment would run directly counter to the 'well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent' (*Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954,* p. 32)".[1]

165. Following this line of argument in the present case, the Court cannot pronounce upon the question of compensation for the seizure of Liechtenstein property by Czechoslovakia without qualifying the Czechoslovak acts as lawful or unlawful.

166. The jurisprudence of the Court concerning the indispensability of third parties is crystal clear: If the legal interests of a third State constitute the "very subject-matter" of a dispute brought to the Court and the third State is absent from the proceedings, the Court cannot exercise jurisdiction on the matter. Legal interests of a third State do constitute the very subject-matter of a dispute if the Court cannot decide on the claims before it without prior determination as to the rights or obligations of the third State.

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[1] *East Timor (Portugal* v. *Australia), I.C.J. Reports 1995,* p. 105, para. 34.

B. THE CZECH REPUBLIC IS AN INDISPENSABLE THIRD PARTY TO THE PRESENT CASE

167. The Czech Republic is an indispensable third party to the present case in two respects:

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

(2) Germany could only be enriched by any action taken after 1980 if it were under an obligation to pay reparations to the Czech Republic as a successor State of Czechoslovakia. But again, this matter cannot be decided upon without the presence of the alleged holder of the rights to reparations or compensation against Germany, namely the Czech Republic.

1. The Czech Republic is an Indispensable Third Party Regarding the Unlawfulness of Seizure of Liechtenstein Property on Czechoslovak Territory

168. Liechtenstein cannot deny that a legal assessment by the Court of the Czechoslovak seizures of Liechtenstein property is a prerequisite of any decision on the merits of Liechtenstein's claims. It is striking that Liechtenstein itself apparently regards a determination by the Court as to the unlawfulness under international law of the Beneš Decrees to be such a prerequisite. As the Liechtenstein Memorial asserts:

> "[U]ntil the mid 1990s, Germany had consistently *regarded the 'Beneš Decrees' as contrary to international law. Under this situation, there was no question of Germany's enrichment*: the Respondent State rightly considered that the Liechtenstein nationals' assets were not part of the reparations regime and could not, therefore, be deducted from the debt it owed to Czechoslovakia on this account."[1]

169. Hence, even according to Liechtenstein's own view, the question of German enrichment as alleged could not be decided upon without prior determination of the lawfulness *vel non* of the conduct of a sovereign, but absent third State. Germany neither profited from unlawful acts of Czechoslovakia, nor can it be made responsible for unlawful acts of a third State.

170. Liechtenstein goes on to claim that Germany has changed its position, and alleges that Germany now regards the application of the Beneš Decrees to Liechtenstein property as being in conformity with international law:

> "The picture changed completely when Germany contended, following the Pieter-van-Laer case, that the Liechtenstein nationals' assets confiscated by Czechoslovakia had been rightly treated as German assets, as defined by the reparations regime."[2]

In yet another repetition of the purposeful invention of an alleged "change of position", this description again distorts any possible reading of the *Pieter van Laer Painting* case beyond recognition. As Germany has repeatedly emphasized,

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[1] LM, p. 156, para. 6.41, emphasis added.

[2] LM, p. 156, para. 6.41.

the *Pieter van Laer Painting* case concerned the question of jurisdiction of German courts, and nothing else. In no way can it be taken as any substantive recognition of the lawfulness of the seizure of property of Liechtenstein nationals. Liechtenstein persistently fails to properly distinguish between the question of jurisdiction of domestic courts and the question of the merits of a legal claim brought before them.

171. In the context of the indispensable third party rule, however, Liechtenstein's line of argument is relevant: A finding as to the unlawfulness of the alleged German recognition of the Czechoslovak takings presupposes a finding on the lawfulness of these very measures – a finding which can only be made in the presence of a sovereign third State, namely the Czech Republic as the relevant successor State of Czechoslovakia.

172. All of Liechtenstein's other charges – the alleged disregard for the property of its nationals and the allegedly ensuing violations of its sovereignty and neutrality – likewise depend on a finding upon sovereign acts of a third State, namely the seizures of Liechtenstein property by Czechoslovakia – again, a decision which cannot be made in the absence of Czechoslovakia, respectively its successor States.

173. Liechtenstein apparently tries to avoid this conclusion by changing the emphasis from the issue of the lawfulness of the Beneš Decrees as such to that of a German recognition of their effects. That is why it constructs – or, rather, invents – the "change of position" which would, in the face of all the facts ranging from the statement of the then Federal Chancellor Helmut Kohl to the German-Czech 1997 Declaration, transform this case from one between

Liechtenstein and the Czech Republic to one solely between Liechtenstein and Germany. But even if the question is thus put in "subjective" terms, the Court cannot avoid a prior – objective – determination of the conduct of a sovereign but absent third State. Thus, according to the *Monetary Gold/East Timor* doctrine, the Court cannot exercise jurisdiction in the present case.

2. The Czech Republic is an Indispensable Third Party Regarding any Enrichment on the Part of Germany

174. In addition, Liechtenstein bases its claims to compensation and reparation against Germany on the theory that Germany is still subject to reparation claims of a third party, namely Czechoslovakia[1] and, apparently, the Czech Republic as its successor State (again, the lack of precision in the Memorial is glaring – Liechtenstein simply glosses over possible effects of the succession issue, the State of Czechoslovakia having ceased to exist on 31 December 1992). Without introducing any evidence on the matter, Liechtenstein asserts: "Germany was subject to a strict obligation of reparations ... . *This is a continuing obligation*"[2]. But the Court could not decide on any compensation due for unlawful seizure of Liechtenstein property by Czechoslovakia without first determining the legal relationships between Germany and a third sovereign State, namely the Czech Republic.

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[1] LM, p. 156, para. 6.38.

[2] LM, p. 156, para. 6.38, emphasis added.

175. Even if, for the sake of argument, one accepted Liechtenstein's contention that Germany had somehow changed its position towards the lawfulness of the Beneš Decrees in the 1990s, there is no way to avoid a determination of hypothetical claims of reparations between the Czech Republic and Germany. If no reparations are due, why should Germany be enriched by an alleged change of position in 1995? However, the Court cannot proceed to such a determination in the absence of the successor States of Czechoslovakia.

176. Under these circumstances, the obvious conclusion must be that a judgment of the Court on the substance of Liechtenstein's claim would presuppose a decision on claims to reparations of a third party which is not present in the instant case. Germany suggests to the Court that it decline to deal with an issue between the Respondent in the instant case and a third party which is not present before it. Both the analysis of alleged "unjust enrichment" of Germany and the alleged detriment of Liechtenstein by an alleged "change of position" of Germany depend on a prior legal pronouncement of the Court on the existence of reparation claims between Germany and the Czech Republic. Therefore, the Czech Republic is an indispensable third party in the present proceedings. Hence, the Court cannot exercise jurisdiction.

3. Conclusion: In the Absence of Czech Consent the Court Lacks Jurisdiction over the Case

177. A decision of the Court on an alleged German recognition of the seizure of Liechtenstein property in Czechoslovakia, the question of reparations allegedly owed by Germany to the Czech Republic, and the question of German enrichment through recognition of Czechoslovak seizures, requires the consent

of the Czech Republic to the exercise of jurisdiction by the Court. However, such consent has not been given. In the absence of the consent of the Czech Republic, the Court cannot exercise jurisdiction in the present case.

C. The Question of Czech Consent is of Exclusively Preliminary Character

178. According to Article 79, paragraph 7, of the Rules of Court, the Court may declare that an objection does not possess an exclusively preliminary character. In the case concerning the *Land and Maritime Boundary between Cameroon and Nigeria*, the Court used this prerogative to refer a preliminary objection as to the indispensability of a third party to the merits. However, in that case, the Court had come to the conclusion that in deciding on the indispensability claim, "the Court would of necessity have to deal with the merits of Cameroon's request"[1].

179. But in the present case, in order to decide on the indispensability of the participation of the Czech Republic, it is not at all necessary that the Court deal with the merits of Liechtenstein's request: The Court does not have to deal with the question of an alleged change of position on the part of Germany. It does not have to approach the issue of unjust enrichment as between Liechtenstein and Germany. It does not have to deal with the question whether Germany has in any way disregarded Liechtenstein's sovereignty and neutrality. It does not have

[1] *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998,* p. 324, para. 116.

to deal with the legality of the Beneš Decrees, etc. Before any of these questions can be approached, the Court first has to deal with the necessary presence of the Czech Republic in these proceedings.

D. CONCLUSION

180. As a result of this inquiry, Germany asks the Court to declare Liechtenstein's Application inadmissible because the Court cannot rule on the case in the absence of the Czech Republic. In particular, the Czech Republic is an indispensable third party regarding the alleged infringements of the rights of Liechtenstein's citizens by Czechoslovakia. It is an indispensable third party regarding any claim of compensation or reparation by Liechtenstein or its citizens. And it is an indispensable third party regarding Liechtenstein's claims of unjust enrichment of Germany and of injury to Liechtenstein by the alleged change of position on the part of Germany.

Section III.

Liechtenstein Nationals have Failed to Exhaust Available Local Remedies

A. The Action Brought by Liechtenstein as Exercise of Diplomatic Protection

181. It has already been pointed out that according to Article 40, paragraph 1, of the Statute, which has been elaborated upon in the case law of the Court, the Application defines the subject of the dispute. In the *Nuclear Tests* cases, the Court stressed that the Application "must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it"[1]. Proceeding from this premise, there can be no doubt that the proceedings instituted by Liechtenstein against Germany must be classified as an attempt to exercise diplomatic protection for the benefit of a number of Liechtenstein nationals who were deprived of their properties through the large-scale confiscation measures carried out by Czechoslovakia during a period immediately after World War II.

182. The claims presented in paragraph 25 of the Application leave no doubt as regards the true nature of the legal relationship which in the view of Liechtenstein exists between it and Germany. Liechtenstein states quite unequivocally that it seeks reparation for the loss of property it has suffered. All

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[1] *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 260, para. 24; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 463, para. 24.

the property in issue is property of Liechtenstein citizens. Not even according to the submissions of Liechtenstein were sovereign rights of the State of Liechtenstein, or property held directly by it, affected. Textually, Liechtenstein contends that "by its conduct with respect to the Liechtenstein property, in and since 1998, Germany failed to respect the rights of Liechtenstein with respect to that property"[1]. The conclusions to be drawn from this first claim are confirmed by a second claim according to which Germany is alleged to be in breach of the rules of international law "by its failure to make compensation for losses suffered by Liechtenstein and/or its nationals"[2]. In this phrase, the reference to losses sustained by Liechtenstein itself can only be understood as indirect damage inflicted upon Liechtenstein on account of the measures of confiscation applied to its citizens. Indeed, nowhere in the Application or in the Memorial does one find even the slightest hint that State property of Liechtenstein was also taken away by Czechoslovakia.

183. Germany observes for the sake of clarity that personal property of the Reigning Prince and property of the State of Liechtenstein must be distinguished. Two propositions should be borne in mind. In the first place, the Reigning Prince is not the owner of all public property of Liechtenstein which the State holds in its own territory or elsewhere. Second, the personal property of the Prince is private property *tout court*, without any reservation or modification, in any event for the purposes of international law. Consequently, if the State of Liechtenstein seeks

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[1] LA, para.25, claim (a).

[2] LA, para. 25, claim (b).

to assert claims with respect to property formerly owned by its ruling Prince, or in any event owned by him until 1945, it proceeds according to the rules on diplomatic protection. Such a claim cannot be classified as a claim for the reparation of direct damage.

B. The Alleged Violations of Liechtenstein's Neutrality and Sovereignty Do not Change the Nature of the Case

184. In its Memorial, Liechtenstein expands its requests and considerably modifies the causes of action invoked by it. The sole conclusion of the Application is now shifted to the second position. In the first place, Liechtenstein wishes the Court to declare that by its conduct "Germany has failed to respect the sovereignty and neutrality and the legal rights of Liechtenstein and its nationals with respect to the property"[1]. In other words, Liechtenstein now contends that this is not just a case of diplomatic protection, but a case the subject-matter of which is direct violations of Liechtenstein's sovereign rights. However, just by changing the wording of its submissions Liechtenstein cannot change the true nature of the case.

185. It is not the first time in the history of the Court that a State appearing as a party in an adversarial proceeding contends that a claim brought by it, although essentially based on the allegation that its citizens were unlawfully deprived of their assets, cannot simply be classified as an exercise of diplomatic protection.

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[1] LM, p. 187.

In the *Interhandel* case[1], Switzerland argued that there was no requirement to exhaust the remedies available in the United States since the injury in issue had been directly caused to it through the breach of an international treaty. The Court did not accept that argument. Considering that the injury suffered by Switzerland was of an ancillary nature, it rightly held that the proceedings essentially remained a case for the vindication of the rights of Interhandel, a corporation under Swiss law. In fact, each and every case of alleged unlawful taking of property of aliens could easily be blown up to the dimensions of a genuine inter-State dispute rooted in direct injury to the victim State concerned. One would only have to interpret unlawful measures of expropriation as implying lack of respect for the sovereign rights of the State of nationality of the persons concerned. Such classification of property disputes, however, would, in practical terms, do away with the requirement of prior exhaustion of local remedies. It could not be reconciled with the traditional procedural framework the pivot of which is for good reasons constituted by the requirement of prior exhaustion of local remedies.

186. Likewise, in the *ELSI* case[2] the Court emphasized that a claim seeking reparation for an alleged injury to a private person, a national of the applicant, still comes within the purview of diplomatic protection even if the applicant invokes at the same time the violation of international treaty obligations by the respondent. It said that the matter which "colours and pervades the United States

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[1] *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959*, p. 6.

[2] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 15.

claim as a whole" was the alleged damage to the corporation that had been driven into insolvency; consequently, there was no part of the claim which could be "severed so as to render the local remedies rule inapplicable to that part"[1]. Hence, the present case must be considered as a coherent whole. It cannot be split up into different parts some of which would be subject to the requirement of exhaustion of local remedies, while others would remain exempt from that requirement.

187. In his second report on diplomatic protection, submitted in 2001[2], the ILC's Special Rapporteur on the topic, John Dugard, has devoted careful consideration to the distinction between direct and indirect damage, which defines the borderline between instances where immediate recourse to international adjudication is open and such other instances where the victim must wait until all remedies promising reasonable prospects of success have proven to be of no avail in the circumstances. On the basis, in particular, of the *Interhandel* and the *ELSI* cases, which he rightly sees as founded on the test of "preponderance" and the "but for" test[3], he suggests the following rule (Article 11) not as progressive development of the law, but as codification of the law as it stands:

> "Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national and where the

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[1] *Elettronica Sicula S.p.A. (ELSI), Judgment, I.C.J. Reports 1989*, p. 43, para. 52.

[2] J. Dugard, 'Second Report on Diplomatic Protection', 28 February 2001, UN doc. A/CN.4/514.

[3] Dugard, 'Second Report', p. 11, para. 21.

> legal proceedings in question would not have been brought but for the injury to the national. [In deciding on this matter, regard shall be had to such factors as the remedy claimed, the nature of the claim and the subject of the dispute.]"[1]

188. The application of these two tests yields very clear results. As can be seen from the requests formulated in the Application, Liechtenstein is primarily interested in obtaining financial compensation for the losses its nationals suffered through Czechoslovakia's policy of confiscation. Only at a later stage, during the drafting of the Memorial, did it occur to the Liechtenstein Government and their counsel that it might be useful to complement the original requests by additional submissions based on the premise that Germany's "change of position" amounted also to a direct violation of Liechtenstein's rights. However, a close look at Liechtenstein's pleadings reveals that in concrete terms all that forms the subject-matter of the present case is the loss of property that occurred in 1945 at the hands of Czechoslovakia, a conglomerate of actions by Czechoslovak authorities over which German courts do not hold jurisdiction, as authoritatively confirmed once more by the Federal Constitutional Court in its decision of 28 January 1998.[2] Although the Memorial puts into first place the alleged violation of Liechtenstein's sovereignty and neutrality[3], it is quite clear that the case contains not a single element outside the property issue which might give it a tinge that would remove it from the area of diplomatic protection.

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[1] Dugard, 'Second Report'., p. 10.

[2] LM, Annex 32, vol. II, p. 353.

[3] LM, p. 187.

189. Given this factual configuration, there can be no doubt that the property issue constitutes the centrepiece of the dispute. It has absolute preponderance. Likewise, the "but for" test leads to the same result. Liechtenstein had no other reason to institute proceedings against Germany "but for" its desire to seize the last chance it saw to be compensated for the damage caused to its nationals by Czechoslovakia in 1945. It certainly would never have brought an action against Germany if it had not been for the pecuniary aspects of the lamentable economic consequences of Czechoslovakia's policies, embodied in the Beneš Decrees. It is clear, therefore, that the requirement of exhaustion of local remedies applies to the instant case. The alleged victims had to make a reasonable effort to exhaust such remedies before Liechtenstein could commence legal action before the Court.

190. Liechtenstein refrains from specifying what happened in all the other cases apart from the *Pieter van Laer Painting* case. That dispute is described almost affectionately in every little detail, with one important exception, however, which should again be emphasized: Liechtenstein abstains from informing the Court about the reasons for which the European Court of Human Rights dismissed the application filed by Prince Hans Adam II under the European Convention on Human Rights as being ill-founded.[1] It is clear, therefore, that in the painting dispute local remedies, which include also the application under the European Convention on Human Rights, have indeed been exhausted. But there

[1] *Prince Hans-Adam II of Liechtenstein* v. *Germany*, Judgment of 12 July 2001, GPO, Annex 1.

exists an absolute lack of information concerning efforts relating to the real estate located in the Czech Republic and in Slovakia which until the end of World War II was allegedly owned by the persons accounted for in the "list of 38"[1].

C. The Applicability of the Local Remedies Rule – A Negative Result with Respect to Germany

191. Notwithstanding the inference already drawn that the requirement of exhaustion of local remedies applies to the facts submitted to the Court by Liechtenstein, Germany has great difficulties in specifying what legal remedies the alleged victims should have taken. This lack of certainty does not so much flow from the fact that decisions of the Federal Constitutional Court cannot be challenged any more within the German legal system: Decisions of the highest German judicial body can only be brought to judicial review by lodging an application with the Strasbourg Court of Human Rights. Rather, it is the absolute lack of an identifiable act of interference which would embarrass a German lawyer in pointing to a specific remedy. Germany has provided itself with a system which enables everyone to defend his/her rights in the widest possible way. Article 19, paragraph 4, of the Basic Law, the German Constitution, provides that judicial review shall be granted to everyone claiming that his/her rights have been violated by an act of governmental authority. But any such alleged violation must be identified. For that purpose, it is necessary precisely to state which act

[1] LM, Annex 8, vol. I, p. 32.

or omission has allegedly brought about the interference complained of. In the absence even of an allegation of interference, a remedy will not be granted.

192. In this regard, two factors must be noted. First of all, as already explained in Chapter III Section I of the present Preliminary Objections, Germany has no knowledge whatsoever regarding the Liechtenstein property adversely affected by Czechoslovakia's confiscation measures. The Federal Government must openly admit that it has never had official information about the extent of the damage suffered by the 38 Liechtenstein nationals, and, as the Court itself will be able to perceive, this information gap has not been cured by Liechtenstein's pleadings in that neither the Application nor the Memorial have bothered to provide the relevant data.

193. In fact, Germany is amazed to note that according to Liechtenstein's allegations it should have interfered with property the existence of which is unknown to it and which is located in a foreign country over which Germany does not enjoy jurisdiction. It is difficult to imagine that Germany, under these circumstances, should have made some kind of conscious decision with regard to this property consisting of "arable land and forests, numerous buildings and their contents, factories etc."[1]. The "change of position", which Liechtenstein believes to perceive in the case law of the German courts that have consistently respected the Settlement Convention since 1955, has nothing to do with all that real estate located in the Czech Republic and in Slovakia. Issues concerning the different

[1] LM, p. 8, para. 2.

component elements of that immovable property have never come before German courts, and they will never come before them inasmuch as in accordance with general rules of private international law, as they are also reflected in Article 23 of the German Code of civil procedure, only the local judiciary is competent to rule on issues connected with the ownership of real estate. There was never any interference by Germany with the property Liechtenstein citizens owned in Czechoslovakia at the end of World War II. The adoption of a certain interpretation of the Settlement Convention regarding proceedings instituted before German civil courts can by no stretch of imagination be construed as such interference.

194. Germany therefore comes to the conclusion that, although in principle the case must be classified as exercise of diplomatic protection, the requirement of the exhaustion of local remedies does not apply, for the simple reason that there was no act of interference that could have been challenged before German courts.

D. The Applicability of the Local Remedies Rule – A Positive Result with Regard to Czechoslovakia and the Czech Republic

1. Considerations Supporting the Requirement

195. However, Germany is of the view that the Liechtenstein victims of the Czechoslovak confiscation policy should have contested before the courts of the former Czechoslovakia the confiscation measures taken to their detriment. They should at least have attempted to avert the losses which Czechoslovakia inflicted upon them by depriving them of their possessions. In fact, the Czechoslovak

measures were the proximate cause of the damage which constitutes the heart of the present dispute. Liechtenstein itself confines itself to contending that Germany brought into being a second cause, a remote cause, for that damage.

196. The thesis defended by Germany may seem odd at first glance. There is a broad consensus in the case law of the Court[1] as well as in legal doctrine[2] to the effect that the requirement of exhaustion of local remedies is designed to provide the alleged wrong-doing State with an opportunity to make good any incorrect action it may have taken before the case will be dealt with at the international level by a body outside the domestic sphere. Here, the Respondent is Germany. Consequently, under normal circumstances only judicial remedies available in Germany would have to be taken into account. In any other case of diplomatic protection, in fact, Germany would just have submitted that the persons the claims of which the Applicant had espoused should have made use of the wide array of legal remedies provided by the German legal system.

197. This is, however, no normal case. Liechtenstein charges Germany with causing damage to its nationals by invoking a circumstance which is remote from the actual damage – the existence of which is of course not denied – and which is not connected by any link of causality with that damage. The interference which matters in fact is the strategy of confiscation pursued by Czechoslovakia in 1945-46. Even according to Liechtenstein's pleadings, Germany is at most

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[1] See *Interhandel, Preliminary Objections, Judgment, I.C.J. Reports 1959,* p. 27.

[2] See, for instance, C.F. Amerasinghe, *Local Remedies in International Law* (Grotius, Oxford, 1990), pp. 68-69.

second in the chain of events, or rather the third actor, inasmuch as the stipulation in Article 3, paragraph 3, of Chapter Six of the Settlement Convention goes back to a specific demand of the Three Western Powers which made the abolition of the occupation regime dependent on Germany's consent to a clause which would make all the measures taken with a view to enforcing reparations or restitution immune from scrutiny by German courts. In this special and absolutely extraordinary configuration the last actor in a chain of three cannot be denied the benefit of invoking the failure of the Claimant's nationals to contest the primary cause of the calamity that befell them, namely the Czechoslovak measures of confiscation.

2. The Case of the Reigning Prince

198. It emerges from Liechtenstein's Memorial[1] that the then Reigning Prince, Franz Josef II, filed appeals against the confiscation of his personal assets and the assets of his family. Apparently, all of these appeals were rejected. Liechtenstein has furnished the Court with a copy and an English translation of the judgment rendered by the Administrative Court in Bratislava on 21 November 1951[2] wherein the Court declared that the appeal lodged by the Prince "had to be dismissed for being unreasonable"[3]. But nothing is known about any measures of defence taken by the other victims. Since Liechtenstein remains silent in this

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[1] LM, p. 28, para. 1.22.

[2] LM, Annex 9, vol. I, p. 34.

[3] It would appear that the word "unreasonable" is a wrong translation of the original Czech word. Probably, the right word would have been "ill-founded".

respect, it is to be assumed that no steps were taken with a view to submitting the dispute to the courts of Czechoslovakia. Thus, during the decisive first stage, where the damage could possibly have been averted, the victims failed to exhaust the judicial remedies at their disposal.

199. Liechtenstein has provided no proof evidencing that the Administrative Court in Bratislava was the last instance in the dispute concerning the Czechoslovak confiscation measures. Assuming, however, that this can be proven in Liechtenstein's response to these Preliminary Objections, the fact remains that the other alleged victims have abstained from defending their rights before the courts of Czechoslovakia. The argument that judicial remedies offered no reasonable prospects of success would not be a pertinent defence, as will be shown in the following.

3. The Case of the Other Victims

200. It is true that Czechoslovakia's Decree No. 12 of 21 June 1945, "concerning the confiscation and accelerated allocation of agricultural property owned by Germans, Hungarians and also by people who have committed treason and acted as enemies of the Czech and Slovak people"[1] provides in a rigid manner that the confiscation policy decided by the government of the country should comprise the property of "all persons belonging to the German and Hungarian people, regardless of their nationality" (Article 1, paragraph 1, lit. (a)). Deliberately, as

[1] LM, Annex 6, vol. I, p. 9.

the text evinces, the Government chose to ignore the criterion of nationality. But this does not mean that for a Liechtenstein citizen any challenge of a confiscation decree was without any reasonable prospects of success from the very outset. When applying the Decree, the courts had in any event to find out whether a person belonged to "the German people". It is well known that before World War II important minorities of ethnic Germans lived in almost all countries of Eastern Europe, outside Czechoslovakia also in Hungary, Yugoslavia and Poland, for instance, countries which were close neighbours of Czechoslovakia. One may with good reason assume that the clause determining the scope of application *ratione personae* of Decree No. 12 was primarily meant to include in the confiscation regime all the ethnic Germans having the nationality of one of these countries.

201. It is a different matter altogether to interpret the relevant clause as including also nationals of third countries who in a wide cultural sense, because of their mother tongue, may be classified as Germans. Not only nationals of Liechtenstein, but also nationals of Switzerland or Luxembourg could be covered by such a wide notion of the German people. Nothing is known, however, about confiscatory measures taken by Czechoslovakia against Swiss or Luxembourg nationals. Consequently, the victims could with a high degree of persuasiveness argue that they did not come within the purview of application of Decree No. 12.

202. The fact that the appeals lodged by the then reigning Prince, Franz Josef II, were dismissed, could not be taken as a final and unchallengeable determination that all Liechtenstein nationals were members of "the German people". The main argument relied upon by the Administrative Court of Bratislava[1] was a very simple and succinct one. It argued that the capacity of Franz Josef II as a member of the German people was "of public knowledge". No further details were given. The Court did not hold that indeed Liechtenstein nationality was negligible and that therefore Liechtenstein citizens could be lumped together with other ethnic Germans as elements of "the German people". Rather, the decision focused on the specific personal characteristics of the Appellant, concluding that in his case the requirements of the law were fulfilled.

203. It may be true that other Liechtenstein victims of the Czechoslovak measures felt discouraged by the course the proceedings instituted by their Prince before the competent courts took. But on the basis of the available evidence it is by no means sure that an appeal lodged by another Liechtenstein national would also have been dismissed. There is no need, in this connection, to embark on a discussion of the different tests which have been suggested as constituting the appropriate method of defining the exemption from the burden of exhausting local remedies where in the circumstances doubts may have arisen as to the effectiveness of contesting a detrimental governmental act. In his third report on

[1] LM, Annex 9, vol. I, p. 34, at 37.

diplomatic protection[1], ILC Special Rapporteur John Dugard has carefully examined the three tests competing for general recognition. None of the three tests – obvious futility, lack of reasonable prospect of success, lack of reasonable possibility of an effective remedy – would have dispensed the other victims from resorting to litigation before the Czechoslovak courts to defend their rights.

204. In the first place, the judgment of the Administrative Court in Bratislava limits its findings to the actual case of the Reigning Prince it had to adjudicate. Second, during the time when the confiscatory measures were carried out in Czechoslovakia, it can be assumed that the judiciary was aware of Czechoslovakia's obligations under international law. Therefore the ambiguous formula of Decree No. 12 ("the German people") could without any difficulty have been construed as not including the population of a third State that had maintained its neutrality during the entire duration of the armed conflict from 1939 to 1945.

205. Germany feels also compelled to invoke the failure of the affected Liechtenstein nationals to try again, after Czechoslovakia had liberated itself from Communist rule, to recover the property of which they had been unlawfully deprived. By acceding to the European Convention on Human Rights, Czechoslovakia manifested its will to return to the Europe predicated on the rule of law. It signed the Convention on 21 February 1991, depositing its instrument of

[1] J. Dugard, 'Third Report on Diplomatic Protection', 7 March 2002, UN doc. A/CN.4/523.

ratification on 18 March 1992. The two successor States have held on to that act of faith by continuing their membership in the Council of Europe and the European Convention on Human Rights. At that time, there was an appropriate moment to attempt again at least to obtain financial compensation for the losses suffered. Once again, Germany must express its amazement that Liechtenstein, instead of immediately turning to Czechoslovakia and later to the Czech Republic and Slovakia to assert its compensation claims, seized none of these opportunities afforded by the demise of the Communist regime, but instituted the present proceedings against Germany under the pretext of a fundamental "change of position" in the German case law concerning the interpretation of the Settlement Convention.

206. In hindsight, it might be argued that neither in 1945 nor after the fall of the Communist regime in Prague, were there remedies that had the slightest prospect of success, so that there could be no requirement to undertake judicial steps for the recovery of the confiscated property. Indeed, the position taken by the Czech Government in proceedings under the First Optional Protocol to the International Covenant on Civil and Political Rights may be taken as an indication that the Czech Republic is intent on blocking any revision of the confiscation policy carried out in 1945.[1] But the prospects of an available remedy must be evaluated *ex ante*, focusing on the time when the remedy in issue could have been filed. It may now be clear that the Czech Republic is not

[1] See *Karel des Fours Walderode* v. *Czech Republic*, 2 Nov. 2001, UN doc. CCPR/C/73/D/747/1997, GPO Annex 5.

willing to review and correct unlawful actions which earlier governments took in the past. But in 1945 as well as after the restoration of most of civil liberties during the period from 1989 to 1993, it could by no means be taken for granted that the Czech Republic would rigidly stick to the policies conceived of and implemented by its former President, Mr. Beneš.

E. CONCLUSION

207. Summing up this section of its Submissions on the admissibility of the proceedings instituted by the Czech Republic, Germany concludes that the action must be declared inadmissible also on the ground that, apart from the *Pieter van Laer Painting* case and possibly the case concerning the real estate inherited by the present reigning Prince, the victims failed to exhaust the available local remedies.

208. Should the Court not share the view that the non-exhaustion of local remedies in Czechoslovakia and the Czech Republic qualifies as a preliminary objection that can be raised by Germany, Germany would develop the argument more fully in its written pleadings on the merits – in case the dispute should ever reach that stage. In any event, that failure would have to be taken into account as contributory negligence. If the victims abstained from fighting for their rights in the appropriate fora, they cannot expect that the losses confirmed by their passivity will be assumed by a third party which neither had any duty of diligence with regard to the property concerned, nor had the power to stop the unlawful actions committed by the Czechoslovak Government.

PART IV

CONCLUSIONS AND SUBMISSIONS

209. On the basis of the preceding Submissions, Germany summarizes its Preliminary Objections as follows:

1) The case is outside the jurisdiction of the Court since

   (a) there exists no dispute as between Liechtenstein and Germany in the sense required by the Statute of the Court and Article 27 of the *European Convention for the Peaceful Settlement of Disputes* of 29 April 1957;

   (b) all the relevant facts occurred before the entry into force of the European Convention as between the Parties;

   (c) the occurrences on which Liechtenstein bases its claims fall within the domestic jurisdiction of Germany.

2) Liechtenstein's Application is furthermore inadmissible since

   (a) Liechtenstein's claims have not been sufficiently substantiated;

   (b) adjudication of Liechtenstein's claims would require the Court to pass judgment on rights and obligations of the successor States of former Czechoslovakia, in particular the Czech Republic, in their absence and without their consent;

(c) the alleged Liechtenstein victims of the measures of confiscation carried out by Czechoslovakia have failed to exhaust the available local remedies.

210. For the reasons advanced, Germany requests the Court to adjudge and declare that:

- it lacks jurisdiction over the claims brought against Germany by the Principality of Liechtenstein, referred to it by the Application of Liechtenstein of 30 May 2001,

and/or that

- the claims brought against Germany by the Principality of Liechtenstein are inadmissible to the extent specified in the present Preliminary Objections.

27 June 2002 Dr. Gerhard Westdickenberg

Agent of the Federal Republic of Germany

LIST OF ANNEXES

(contained in Volume II)

Annex 1: *Prince Hans-Adam II of Liechtenstein v. Germany,* European Court of Human Rights, Application no. 42527/98, Judgment of 12 July 2001.

Annex 2: *AKU Case*, Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 13 December 1956, (1957) *Neue Juristische Wochenschrift (NJW)*, p. 217; Translation: 23 *ILR*, p. 21.

Annex 3: Judgment of the German Federal Court of Justice (*Bundesgerichtshof*) of 11 April 1960, 32 *Entscheidungen des Bundesgerichtshofs in Zivilsachen (BGHZ)*, p. 172.

Annex 4: Judgment of the German Federal Constitutional Court of 23 April 1991, 84 *Entscheidungen des Bundesverfassungsgerichts* (BVerfGE), p. 90; Translation: 94 *ILR*, p. 44.

Annex 5: *Karel des Fours Walderode* v. *Czech Republic,* Human Rights Committee, Communication No. 747/1997, 2 November 2001, (UN. Doc. CCPR/C/73/D/747/1997).