



INTERNATIONAL COURT OF JUSTICE

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Summary

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10 February 2005

Case concerning Certain Property (Liechtenstein v. Germany)

Preliminary Objections

Summary of the Judgment of 10 February 2005

History of the proceedings and submissions of the Parties (paras. 1-12)

The Court begins by recalling the history of the proceedings.

On 1 June 2001, the Principality of Liechtenstein (hereinafter “Liechtenstein”) filed an Application instituting proceedings against the Federal Republic of Germany (hereinafter “Germany”) relating to a dispute concerning

“decisions of Germany, in and after 1998, to treat certain property of Liechtenstein nationals as German assets having been ‘seized for the purposes of reparation or restitution, or as a result of the state of war’— i.e., as a consequence of World War II—, without ensuring any compensation for the loss of that property to its owners, and to the detriment of Liechtenstein itself”.

In order to found the jurisdiction of the Court, the Application relied on Article 1 of the European Convention for the Peaceful Settlement of Disputes of 29 April 1957, which entered into force between Liechtenstein and Germany on 18 February 1980.

On 27 June 2002, Germany raised preliminary objections relating to the jurisdiction of the Court to entertain the case and to the admissibility of the Application submitted by Liechtenstein. In accordance with Article 79, paragraph 5, of the Rules of the Court, the proceedings on the merits were suspended.

Liechtenstein filed a written statement of its observations and submissions on these preliminary objections within the time-limit fixed.

Public hearings were held on 14, 16, 17 and 18 June 2004. At those hearings, the following submissions were presented by the Parties:

On behalf of the Government of Germany,

at the hearing of 17 June 2004:

“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 that
- the claims brought against Germany by the Principality of Liechtenstein are inadmissible to the extent specified in its Preliminary Objections.”

On behalf of the Government of Liechtenstein,

at the hearing of 18 June 2004:

“For the reasons set out in its Written Observations and during the oral proceedings, the Principality of Liechtenstein respectfully requests the Court:

- (a) to adjudge and declare that the Court has jurisdiction over the claims presented in its Application and that they are admissible;
- and accordingly,
- (b) to reject the Preliminary Objections of Germany in their entirety.”

Historical background of the case (paras. 13-17)

The Court first sets out the historical background of the case.

During the Second World War Czechoslovakia was an allied country and a belligerent in the war against Germany. In 1945, it adopted a series of decrees (the “Beneš Decrees”), among them Decree No. 12 of 21 June 1945, under which certain property owned by Liechtenstein nationals, including Prince Franz Josef II of Liechtenstein, was confiscated.

Following earlier allied enactments concerning a reparations régime in general and German external assets and other property seized in connection with the Second World War in particular, a special régime dealing with the latter subject was created by Chapter Six of the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed by the United States of America, the United Kingdom, France and the Federal Republic of Germany, at Bonn on 26 May 1952 (as amended by Schedule IV to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, signed at Paris on 23 October 1954) (hereinafter the “Settlement Convention”). This Convention entered into force on 5 May 1955.

Article 3 of Chapter Six of the Settlement Convention reads as follows:

“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.

.....

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.”

The régime of the Settlement Convention was intended to be temporary until the problem of reparation was finally settled “by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter” (Article 1 of Chapter Six). A final settlement was brought about through the conclusion in 1990 of the Treaty on the Final Settlement with respect to Germany (signed at Moscow on 12 September 1990 and entered into force on 15 March 1991). On 27 and 28 September 1990, an Exchange of Notes was executed between the three Western Powers and the Government of the Federal Republic of Germany (the parties to the Settlement Convention) under which the Settlement Convention would terminate simultaneously with the entry into force of the Treaty. Whereas that Exchange of Notes terminated the Settlement Convention itself, including Article 5 of Chapter Six (relating to compensation by Germany), it provided that paragraphs 1 and 3 of Article 3, Chapter Six, “shall, however, remain in force”.

In 1991, a painting by the seventeenth century Dutch artist Pieter van Laer was lent by a museum in Brno (Czechoslovakia) to a museum in Cologne (Germany) for inclusion in an exhibition. This painting had been the property of the family of the Reigning Prince of Liechtenstein since the eighteenth century; it was confiscated in 1945 by Czechoslovakia under the Beneš Decrees.

A lawsuit filed in his personal capacity by Prince Hans-Adam II of Liechtenstein in the German courts in the 1990s to have the painting returned to him as his property was dismissed on the basis that, under Article 3, Chapter Six, of the Settlement Convention, no claim or action in connection with measures taken against German external assets in the aftermath of the Second World War was admissible in German courts (hereinafter the “Pieter van Laer Painting” case).

A claim relating to the decisions of the German courts brought by Prince Hans-Adam II of Liechtenstein before the European Court of Human Rights was dismissed in July 2001.

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The Court begins its reasoning by recalling that in the present proceedings, Liechtenstein based the Court’s jurisdiction on Article 1 of the European Convention for the Peaceful Settlement of Disputes which provides that:

“The High Contracting Parties shall submit to the judgement of the International Court of Justice all international legal disputes which may arise between them including, in particular, those concerning:

- (a) the interpretation of a treaty;
- (b) any question of international law;
- (c) the existence of any fact which, if established, would constitute a breach of an international obligation;
- (d) the nature or extent of the reparation to be made for the breach of an international obligation.”

Article 27 (a) of that Convention reads as follows:

“The provisions of this Convention shall not apply to:

(a) disputes relating to facts or situations prior to the entry into force of this Convention as between the parties to the dispute”.

Germany raised six preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

Germany’s first preliminary objection (paras. 20-27)

The Court recalls that Germany, in its first preliminary objection, argues that there is no dispute between the Parties. Germany in particular observes that even though the facts that are at the core of the dispute lie in Czechoslovakia’s seizure of certain Liechtenstein property under the Beneš Decrees of 1945, Liechtenstein bases its claims before the Court on an alleged “change of position” by Germany in the 1990s as to the need to apply the Settlement Convention to that property, whilst Germany contends that such a change has never occurred. Germany maintains that a distinction is to be made between the issue of the lawfulness of the Czechoslovak expropriations and that of the jurisdiction of the German courts regarding this matter. Germany contends that on neither issue has it changed its position either before or after 1995: as to the first, it has never accepted the validity of the relevant Czechoslovak measures against Liechtenstein property; as to the second, the German courts have always held that they are barred by the Settlement Convention from adjudicating on the lawfulness of confiscation measures, and for the purposes of the application of Article 3 of Chapter Six of the Settlement Convention, they have always relied on the assessment of the expropriating State. Germany further claims that it is not German acts related to Czechoslovak confiscations but the lawfulness of the Czechoslovak measures as such and the resulting obligations of compensation on the part of the successor States to the former Czechoslovakia that are in question. Germany therefore concludes that the only dispute which exists is one between Liechtenstein and the successor States of the former Czechoslovakia.

Liechtenstein maintains that its dispute with Germany concerns Germany’s position, whereby for the first time in 1995 it began to treat Liechtenstein assets as German external assets for purposes of the Settlement Convention, thus infringing Liechtenstein’s neutrality and sovereignty. Liechtenstein recognizes the existence of another dispute, one between itself and the Czech Republic, but observes that this does not negate the existence of a separate dispute between itself and Germany, based on Germany’s unlawful conduct in relation to Liechtenstein. Liechtenstein contends further that Germany itself acknowledged the existence of the dispute between them both in the course of bilateral consultations held in July 1998 and June 1999, and in a letter from the German Minister for Foreign Affairs to his Liechtenstein counterpart dated 20 January 2000.

Germany for its part denies that it acknowledged the existence of a dispute by participating in diplomatic consultations at the request of Liechtenstein. It argues that a discussion of divergent legal opinions should not be considered as evidence of the existence of a dispute in the sense of the Court’s Statute “before it reaches a certain threshold”.

In examining Germany’s first preliminary objection the Court refers to its own consistent jurisprudence and that of the Permanent Court of International Justice, according to which a dispute is a disagreement on a point of law or fact, a conflict of legal views or interests between parties. It goes on to observe that, moreover, for the purposes of verifying the existence of a legal dispute, it falls to the Court to determine whether “the claim of one party is positively opposed by the other”.

The Court finds that in the present proceedings complaints of fact and law formulated by Liechtenstein against Germany are denied by the latter, and concludes that “[b]y virtue of this denial, there is a legal dispute” between Liechtenstein and Germany. The Court further notes that Germany’s position taken in the course of bilateral consultations and in the letter by the Minister for Foreign Affairs of 20 January 2000 has evidentiary value in support of the proposition that

Liechtenstein's claims were positively opposed by Germany and that this was recognized by the latter.

Turning to the determination of the subject-matter of the dispute, the Court, upon examination of the case file, finds that the subject-matter of the dispute is whether, by applying Article 3, Chapter Six, of the Settlement Convention to Liechtenstein property that had been confiscated in Czechoslovakia under the Beneš Decrees in 1945, Germany was in breach of the international obligations it owed to Liechtenstein and, if so, what is Germany's international responsibility.

Having thus established the existence of a dispute between Liechtenstein and Germany and identified its subject-matter, the Court concludes that the first preliminary objection of Germany must be dismissed.

Germany's second preliminary objection (paras. 28-52)

The Court then examines Germany's second preliminary objection that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction ratione temporis to decide the present dispute.

Germany asserts that were the Court to find that there exists a dispute, it would nevertheless fall outside the jurisdiction of the Court by virtue of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes (see above, p. 3). In its view, such a dispute would relate to facts or situations prior to 18 February 1980, the date when the European Convention for the Peaceful Settlement of Disputes entered into force as between Germany and Liechtenstein. In Germany's view, the Application should therefore be rejected.

Germany claims that the property of Prince Franz Joseph II of Liechtenstein, including the painting by Pieter van Laer, as well as property belonging to other Liechtenstein nationals, was seized in Czechoslovakia pursuant to the Beneš Decrees; and that the Settlement Convention required Germany to bar any action in its courts that sought to challenge the legality of such confiscations. In Germany's view, the lawsuit brought by Prince Hans-Adam II of Liechtenstein before the German courts to recover the Pieter van Laer painting was governed by the provisions of the Settlement Convention. The dismissal of the lawsuit by various German courts, beginning with the decision of the Cologne Regional Court in 1995, acting in compliance with the provisions of that Convention, was in conformity with earlier decisions of German courts. According to Germany, its courts have consistently held that they lacked jurisdiction to evaluate the lawfulness of such confiscations. In Germany's view the dispute which arose in the 1990s with regard to the Pieter van Laer painting was directly related to the Settlement Convention and the Beneš Decrees; it had its real source in facts and situations existing prior to the 1980 critical date.

The Court observes that Liechtenstein contends that until the decisions of the German courts in the Pieter van Laer Painting case, it was understood between Germany and Liechtenstein that Liechtenstein property confiscated pursuant to the Beneš Decrees could not be deemed to have been covered by the Settlement Convention because of Liechtenstein's neutrality. German courts would therefore not be barred by that Convention from passing on the lawfulness of these confiscations. In Liechtenstein's view, the decisions of the German courts in the 1990s with regard to the painting made clear that Germany no longer adhered to that shared view, and thus amounted to a change of position. Liechtenstein maintains, inter alia, that, in so far as there was a change of position by Germany, the decisions of the German courts in the Pieter van Laer Painting case and the "positions taken by the German Government, in the period after 1995" gave rise to the present dispute. The facts that triggered the present dispute were therefore not the Settlement Convention or the Beneš Decrees, but Germany's decision in 1995 to apply the Settlement Convention to Liechtenstein property.

The Court notes that in support of their arguments on the subject of the legal test for temporal jurisdiction, both Liechtenstein and Germany refer to the jurisprudence of the Permanent Court of International Justice (the Phosphates in Morocco case and the Electricity Company case) and of this Court (Right of Passage case).

The Court observes that Germany's second preliminary objection requires it to decide whether, applying the provisions of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, the present dispute relates to facts or situations that arose before or after the 1980 critical date.

The Court finds that the text of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes does not differ in substance from the temporal jurisdiction limitations dealt with in the Phosphates in Morocco case, the Electricity Company in Sofia and Bulgaria case and the Right of Passage case. In particular, no consequence can be drawn from the use of the expressions "with regard to" or "relating to" which have been employed indifferently in the various texts in question. The Court notes further that in those cases the Permanent Court of International Justice and this Court were called upon to interpret unilateral declarations accepting the Court's jurisdiction under its Statute, whereas, in the present case, the Court has to interpret a multilateral Convention. Without pronouncing in any more general sense upon the extent to which such instruments are to be treated comparably, the Court finds no reason on this ground to interpret differently the phrase in issue. Nor, it observes, have the Parties suggested otherwise. The Court accordingly finds its previous jurisprudence on temporal limitations of relevance in the present case.

The Court considers that, in so far as it has to determine the facts or situations to which this dispute relates, the test in the above-mentioned jurisprudence for establishing the jurisdiction of the Court ratione temporis, which consists of finding the source or real cause of the dispute, is equally applicable to this case.

The Court points out that it is not contested that the present dispute was triggered by the decisions of the German courts in the Pieter van Laer Painting case. This conclusion does not, however, dispose of the question the Court is called upon to decide, for under Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, the critical issue is not the date when the dispute arose, but the date of the facts or situations in relation to which the dispute arose.

In the Court's view, the present dispute could only relate to the events that transpired in the 1990s if, as argued by Liechtenstein, in this period, Germany either departed from a previous common position that the Settlement Convention did not apply to Liechtenstein property, or if German courts, by applying their earlier case law under the Settlement Convention for the first time to Liechtenstein property, applied that Convention "to a new situation" after the critical date.

With regard to the first alternative, the Court finds that it has no basis for concluding that prior to the decisions of the German courts in the Pieter van Laer Painting case, there existed a common understanding or agreement between Liechtenstein and Germany that the Settlement Convention did not apply to the Liechtenstein property seized abroad as "German external assets" for the purpose of reparation or as a result of the war. The issue whether or not the Settlement Convention applied to Liechtenstein property had not previously arisen before German courts, nor had it been dealt with prior thereto in intergovernmental talks between Germany and Liechtenstein. The Court observes, moreover, that German courts have consistently held that the Settlement Convention deprived them of jurisdiction to address the legality of any confiscation of property treated as German property by the confiscating State. In the Pieter van Laer Painting case, the German courts confined themselves to stating that the Settlement Convention was applicable in cases of confiscation under Decree No. 12, as with the other Beneš Decrees, and that, consequently, the Convention was also applicable to the confiscation of the painting. In the view of the Court,

Liechtenstein's contention regarding the existence of a prior agreement or common understanding and an alleged "change of position" by Germany cannot therefore be upheld.

As to Liechtenstein's contention that the dispute relates to the application, for the first time, of pre-1990 German jurisprudence to Liechtenstein property in the 1990s, the Court points out that German courts did not face any "new situation" when dealing for the first time with a case concerning the confiscation of Liechtenstein property as a result of the Second World War. The Court finds that this case, like previous ones on the confiscation of German external assets, was inextricably linked to the Settlement Convention. It further finds that the decisions of the German courts in the Pieter van Laer Painting case cannot be separated from the Settlement Convention and the Beneš Decrees, and that these decisions cannot consequently be considered as the source or real cause of the dispute between Liechtenstein and Germany.

The Court concludes therefore that, while the decisions of the German courts triggered the dispute between Liechtenstein and Germany, the source or real cause of the dispute is to be found in the Settlement Convention and the Beneš Decrees. In light of the provisions of Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes, Germany's second preliminary objection must therefore be upheld.

Having dismissed the first preliminary objection of Germany, but upheld its second, the Court finds that it is not required to consider Germany's other objections and that it cannot rule on Liechtenstein's claims on the merits.

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The full text of the operative paragraph (para. 54) reads as follows:

"For these reasons,

THE COURT,

(1) (a) by fifteen votes to one,

Rejects the preliminary objection that there is no dispute between Liechtenstein and Germany;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Kooijmans, Rezek, Al-Khasawneh, Buergenthal, Elaraby, Owada, Tomka; Judge ad hoc Sir Franklin Berman;

AGAINST: Judge ad hoc Fleischhauer;

(b) by twelve votes to four,

Upholds the preliminary objection that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction ratione temporis to decide the dispute;

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Tomka; Judge ad hoc Fleischhauer;

AGAINST: Judges Kooijmans, Elaraby, Owada; Judge ad hoc Sir Franklin Berman;

(2) by twelve votes to four,

Finds that it has no jurisdiction to entertain the Application filed by Liechtenstein on 1 June 2001.

IN FAVOUR: President Shi; Vice-President Ranjeva; Judges Guillaume, Koroma, Vereshchetin, Higgins, Parra-Aranguren, Rezek, Al-Khasawneh, Buergenthal, Tomka; Judge ad hoc Fleischhauer;

AGAINST: Judges Kooijmans, Elaraby, Owada; Judge ad hoc Sir Franklin Berman.”

Dissenting opinion of Judge Kooijmans

Judge Kooijmans agrees with the Court's finding on the existence of a dispute between Liechtenstein and Germany and with its identification of the subject-matter of that dispute.

He cannot, however, subscribe to the Court's conclusion that the dispute relates to facts or situations prior to the entry into force of the European Convention on Dispute Settlement as between the Parties on 18 February 1980 and that the Court is consequently without jurisdiction. After having analysed the case law of German courts on the application of Article 3, Chapter Six, of the 1952 Settlement Convention, he concludes that German courts did not rule before the critical date on the applicability of that Article to assets of the nationals of a State which had remained neutral during the Second World War. They did so for the very first time in the Pieter van Laer Painting case, submitted by the then Reigning Prince of Liechtenstein, thus establishing a "new situation" subsequent to the critical date. The preliminary objection ratione temporis should, therefore, not have been upheld.

Since Judge Kooijmans is of the view that the remaining preliminary objections which have not been considered by the Court are without merit, he concludes that the Court has jurisdiction and that Liechtenstein's Application is admissible.

Dissenting opinion of Judge Elaraby

Judge Elaraby agreed with the Court's conclusion that Germany's first preliminary objection — alleging that there was no dispute — should be rejected. He disagreed, however, with the Court's finding that the second preliminary objection should be upheld, and with the Court's consequent dismissal of the case on the ground that it lacked jurisdiction ratione temporis.

Judge Elaraby began by noting that the temporal limitation clause before the Court was different from those which the Court, and its predecessor the Permanent Court of International Justice, had interpreted in prior cases (a) because its terms were broader and (b) because it was contained in a multilateral treaty, as opposed to a unilateral acceptance of jurisdiction. In his view, these differences may have justified a departure from the approach adopted in prior cases — according to which the facts or situations relevant to a ratione temporis analysis are those that constitute the "real cause" of the dispute — but he confined his opinion to an explanation of why, in his view, the Court reached the wrong conclusion in applying the "real cause" test to the specific facts of the case.

In Judge Elaraby's view, the real cause of the dispute between Liechtenstein and Germany was the German court decisions of the 1990s — well after the critical date — in the Pieter van Laer Painting case. Because these court decisions purported for the first time to include neutral Liechtenstein property as "German external assets" under the Settlement Convention, Judge Elaraby found that any facts or situations before these court decisions (such as the Settlement Convention, the Beneš Decrees, and prior cases dealing with the Convention) were mere historical background and could not be the real cause of the dispute between the Parties.

In reaching this conclusion, Judge Elaraby found it pertinent that, unlike in the three cases relied on by the Court (Right of Passage over Indian Territory, Electricity Company of Sofia and Bulgaria and Phosphates in Morocco), there were no pre-critical-date acts imputable to the Respondent that were relevant to the Applicant's claims; the only actions attributable to Germany that might potentially have engaged its international responsibility vis-à-vis Liechtenstein occurred after the critical date.

Judge Elaraby's conclusion was that the Court should not have found that it was precluded by the temporal limitation clause from exercising its jurisdiction and he pointed out that the European Court of Human Rights reached the same conclusion as him when it analysed the question of its jurisdiction ratione temporis in the case filed by the Prince of Liechtenstein under the European Convention on Human Rights. He added that, in the alternative, the Court should have joined the objection ratione temporis to the merits instead of disposing of the case in limine. Finally, Judge Elaraby expressed regret that the Court, having recognized and defined the dispute between the Parties, then opted to dispose of it without a hearing, as this was not, in his view, a positive contribution to the settlement of international disputes.

Dissenting opinion of Judge Owada

Judge Owada appends his opinion dissenting from the main conclusion of the Judgment that the Court has no jurisdiction to entertain the Application filed by the Principality of Liechtenstein.

Judge Owada concurs in the first finding of the Court (paragraph 1 (a) of the dispositif) in rejecting the preliminary objection of the Federal Republic of Germany that there is no dispute between Liechtenstein and Germany. However, he dissents from the second finding of the Court (paragraph 1 (b) of the dispositif) upholding the preliminary objection of the Respondent that Liechtenstein's Application should be rejected on the grounds that the Court lacks jurisdiction ratione temporis to decide the dispute.

In Judge Owada's view, the Court has correctly identified the subject-matter of the dispute that exists between the Parties as consisting in the treatment by Germany of Liechtenstein property confiscated in Czechoslovakia under the Beneš Decrees, in that Germany has applied Article 3, Chapter Six, of the Settlement Convention to the property in question. On this basis the critical date for determining the scope of limitation ratione temporis upon jurisdiction of the Court under Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes should be determined with reference to this subject-matter of the dispute thus defined. It cannot be denied in this respect that the alleged "change in position of Germany" in the treatment of the Liechtenstein property in question in applying the Settlement Convention, which came through a series of decisions of German courts and confirmed by German authorities, created a situation that gave rise to a dispute which had not existed between the Parties prior to those events. Thus Judge Owada argues that these events did in fact amount to creating a "new situation", for the purpose of application of the jurisdiction ratione temporis rule as established by jurisprudence of the Court, through the treatment of Liechtenstein property by the German courts in applying Article 3, Chapter Six, of the Settlement Convention for the first time to neutral property. It goes without saying that the question of whether this "new situation" has had the effect of bringing into existence international responsibility attributable to Germany is a matter to be examined at the merits stage of the proceedings. Since this new development took place only in the late 1990s, to that extent and strictly for the purposes of determining its jurisdiction, the Court should have concluded that this development could constitute "facts or situations giving rise to the dispute" between the Parties for the purpose of application of the compromissory clause contained in Article 27 (a) of the European Convention for the Peaceful Settlement of Disputes. This question, which may require further examination at the merits stage of the proceedings, is therefore to be joined to the merits of the case.

As for the other preliminary objections of Germany relating to the jurisdiction of the Court (the third preliminary objection) or to the admissibility of the Liechtenstein claims before the Court (the fourth, fifth and sixth objections), it is the view of Judge Owada that they are either to be rejected as unfounded (the third, fourth and sixth objections) or to be joined to the merits of the case (the fifth objection) as not possessing an exclusively preliminary character.

Declaration of Judge ad hoc Fleischhauer

Judge Fleischhauer expresses his agreement with the upholding by the Court of Germany's second preliminary objection. Regarding the first preliminary objection, he cannot follow the Court with respect to Germany's position in bilateral consultations and in the letter of the Minister for Foreign Affairs of 20 January 2000.

Dissenting opinion of Judge ad hoc Berman

Judge Berman explains in his dissenting opinion why, although he agrees with much of what the Court has said, he agrees neither with the finding that Germany's second preliminary objection should be upheld nor with the Court's handling of the preliminary phase of the case more generally.

Having pointed out that Liechtenstein's claim, although possibly without precedent, is nevertheless essentially straightforward, Judge Berman draws attention to the fact that it has been opposed by no less than six preliminary objections raised by Germany, three of which ask the Court to decline to hear the case even if it finds that it has the jurisdiction to do so. He is in full agreement with the Court in rejecting Germany's first preliminary objection (that there is no dispute between the Parties) and would have been prepared to go further, and hold that Germany is precluded from raising such an objection now, having earlier recognized in its diplomatic contacts with Liechtenstein that there existed differences between the two States which might have to be settled by judicial means.

While he has no fundamental disagreement with the way in which the Court assesses its previous jurisprudence on temporal clauses limiting the acceptance of the Court's jurisdiction (Germany's second preliminary objection), Judge Berman states that, in his view, the earlier case law establishes that the Court possesses a degree of latitude or discretion in deciding what situations or facts are indeed the "source or real cause" of a particular dispute, not least because no two international disputes arise in exactly the same way. He adds that, in his opinion, this discretion might, in appropriate circumstances, be influenced by whether the parties' acceptance of the jurisdiction is in an agreed general treaty on the peaceful settlement of disputes, as opposed to unilateral declarations under the optional clause.

His main disagreement with the Court is however over its uncritical acceptance of an argument that lies at the heart of the German case and also of the Court's own reasoning, namely the claim that the German courts had no option but to apply the Settlement Convention of 1952/1955 to neutral property when the question arose for the first time many years later. He demonstrates that, on his reading of the German case law (not all of which had been presented to the Court, or explained to it in detail), the German superior courts had clearly not regarded themselves in the early days as prevented from considering whether the Settlement Convention (or its predecessor Allied legislation) did apply, or even should be applied, in particular cases, and that the practice of considering whether the preconditions were met for applying the Convention continued throughout the handling of the case of the Pieter van Laer Painting itself in the 1990s, including before the European Court of Human Rights.

Moreover, to interpret the Settlement Convention (to which Liechtenstein was not in any case a party) as covering neutral property is contrary to the wording of the Convention, and had never been justified before the German courts with evidence that this was in fact the intention of the Contracting Parties. To attribute such an intention to the Three Allied Powers was, furthermore, against all logic, and would have entailed a breach of their own obligations towards the States which had been neutral in the Second World War. It was not therefore to be foreseen that Germany would in due course adopt such a position in its bilateral relations, and use it as an argument for excluding any possibility of compensation. It is, however, precisely the adoption of this position which, according to Judge Berman, was the real source of the dispute; it gave rise to a

new situation, and it took place well after the critical date. While it cannot be denied that the Settlement Convention and Beneš Decrees are connected with the dispute, that does not in itself make them the dispute's "source or real cause".

Judge Berman goes on to discuss the circumstances under which certain parts of what had been an avowedly temporary régime under the Settlement Convention were made permanent, whereas other parts (the obligation to pay compensation) were abrogated, on the unification of Germany in 1990. Although the Parties had either not possessed, or at least not produced, evidence to the Court showing why this had been done, the inference must be that it had been at Germany's request, and that too reinforced the view that the source of the dispute lay after the critical date.

Judge Berman concludes by stating that, if there was however any remaining doubt on any of these points, the correct procedure would have been to join the second preliminary objection to the merits, so as to allow the opportunity for full evidence and argument.

As to the remaining preliminary objections, Judge Berman states that he would reject them all. He discusses briefly the fifth objection (absence of an indispensable third party), but finds it clear that the dispute, as now defined in the Judgment of the Court, would not have required the Court to have pronounced in any way on the lawfulness of the Beneš Decrees as such, or particular confiscations undertaken pursuant to them. Once again, he concludes, any doubt on this score would most appropriately have been managed by joining the objection to the merits.

Finally, Judge Berman points out that the Judgment of the Court declining jurisdiction does not dispose of the dispute itself, which the Court has now formally determined to exist between the two States, and regrets their failure to agree, if necessary ad hoc, that the dispute be settled by the International Court in accordance with the traditions of both Parties. He comments on the propriety of claiming protection under the Settlement Convention while disclaiming its corresponding obligation to pay compensation, and indicates that the claims advanced by Liechtenstein, even if unusual, deserved a hearing.
