

PERMANENT COURT OF INTERNATIONAL JUSTICE
Twelfth (Ordinary) Session

Case Concerning the Factory at Chorzów (Claim for Indemnity) (Jurisdiction).

Germany v. Poland
Judgment

BEFORE: President: Huber
Former President: Loder
Judges: Lord Finlay, Nyholm, Moore, de Bustamante, Altamira, Oda, Anzilotti, Pessôa,
Deputy Judge(s): Yovanovitch,
National Judge: Rabel, Ehrlich

Represented By: Germany: Dr. Erich Kaufmann, Professor at Bonn
Poland: Dr. Thadeus Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal

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Citation: Factory at Chorzow (Germ. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9 (July 26)
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[1] [p5] The Court,
composed as above,
having heard the observations and conclusions of the Parties,
delivers the following judgment:

[2] The Government of the German Reich, by an Application instituting proceedings filed with the Registry of the Court on February 8th, 1927, in conformity with Article 40 of the Statute and Article 35 of the Rules of Court, has submitted to the Permanent Court of International Justice a suit concerning the reparation which, in the contention of the Government of the Reich, is due by the Polish Government to the Oberschlesische Stickstoffwerke A.-G. (hereinafter designated as the Oberschlesische) and Bayerische Stickstoffwerke A.-G. (hereinafter designated as the Bayerische), by reason of the attitude adopted by that Government towards those Companies at the time when it took possession of

the nitrate factory situated at Chorzów, which attitude had been declared by the Court in Judgment No. 7 (May 25th, 1926) not to have been in conformity with the provisions of Article 6 and the following articles of the Convention concerning Upper Silesia concluded at Geneva on May 15th, 1922, between Germany and Poland (hereinafter described as the Geneva Convention).

[3] It is submitted in the Application:

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) that the amount of the compensation to be paid by the Polish Government is 59.400.000 Reichsmarks for the injury caused to the Oberschlesische Stickstoffwerke Company and 16.775.200 Reichsmarks for the injury to the Bayerische Stickstoffwerke Company;

(3) in regard to the method of payment:

(a) that the Polish Government should pay within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking [p6] possession of the working capital (raw material, finished and half-manufactured products, stores, etc.) and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment;

(b) that the Polish Government should pay the sums remaining unpaid by April 15th, 1928, at latest;

(c) that, from the date of judgment, interest at 6% per annum should be paid by the Polish Government;

(d) that, the payments mentioned under (a)-(c) should be made without deduction to the account of the two Companies with the Deutsche Bank at Berlin;

(e) that, until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy.

[4] In the Case filed with the Court on March 2nd, 1927, in accordance with Article 35 of the Rules, the Applicant amended his conclusions as follows:

(1) that by reason of its attitude in respect of the Oberschlesische Stickstoffwerke and Bayerische Stickstoffwerke Companies, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought;

(2) that the amount of the compensation to be paid by the Polish Government is 75.920.000 Reichsmarks, plus the present value of the working capital (raw materials, finished and half-manufactured products, stores, etc.) taken over on July 3rd, 1922, for the injury caused to the Oberschlesische Stickstoffwerke Company and 20.179.000 Reichsmarks for the injury caused to the Bayerische Stickstoffwerke Company;

(3) that until June 30th, 1931, no nitrated lime and no nitrate of ammonia should be exported to Germany, to the United States of America, to France or to Italy;

(4) in regard to the method of payment:

(a) that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke Company for the taking [p7] possession of the working capital and the compensation due to the Bayerische Stickstoffwerke Company for the period of exploitation from July 3rd, 1922, to the date of judgment;

(b) that the Polish Government should pay the remaining sums by April 15th, 1928, at latest; in the alternative, that, in so far as the payment may be effected in instalments, the Polish Government shall deliver, within one month from the date of judgment, bills of exchange for the amounts of the instalments, including interest, payable on the respective dates on which they fall due to the Oberschlesische Stickstoffwerke Company and to the Bayerische Stickstoffwerke Company;

(c) that from the date of judgment, interest at 6 % per annum should be paid by the Polish Government;

(d) that the Polish Government is not entitled to set off, against the above mentioned claim for indemnity of the German Government, its claim in respect of social insurances in Upper Silesia; that it may not make use of any other set-off against the above-mentioned claim for indemnity; and that the payments mentioned under (a)-(c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin.

[5] The Application instituting proceedings was, in accordance with Article 40 of the Statute, communicated to the Polish Government on February 8th, 1927; whereupon that Government, after having received on March 3rd, 1927, the German Case in the suit, on April 14th, 1927, filed with the Registry of the Court in conformity with Articles 34 and 38 of the Rules, a Preliminary Objection, accompanied by a Preliminary Counter-Case in the suit concerning the factory at Chorzów (indemnities).

[6] The Preliminary Objection denying the Court's jurisdiction to hear the suit brought before it, submitted that the Court should, "without entering into the merits, declare that it had, no jurisdiction".

[7] In accordance with Article 38 of the Rules, the German Government was invited to present, before June 1st, 1927, a written statement setting out its observations and conclusions in regard to the objection to the jurisdiction.

[8] On April 25th, however, the German Government transmitted to the Polish Government a memorandum in which the former Government – arguing that, even if the Court declined jurisdiction [p8] on the basis of Article 23 of the Geneva Convention, it would have jurisdiction under Article 1 of the Germano-Polish Arbitration Treaty initialled at Locarno on October 16th, 1925-suggested that the five following questions concerning the case of the factory at Chorzów should be referred by mutual consent and by means of a special agreement to the Court:

(1) Up to what amount is the Polish Government bound to make compensation for the injury caused by its attitude to the Oberschlesische and Bayerische Companies?

(2) Is the German Government justified in claiming, over and above the pecuniary compensation, that the exportation of nitrate of lime, nitrate of ammonia, etc., to Germany, the United States of America, France and Italy, should cease?

(3) What are the appropriate methods of payment for the settlement of the indemnity fixed in accordance with (1)?

- (4) At what rate should the sums in question bear interest until paid in full?
- (5) Can the Polish Government set off against these sums claims in respect of social insurances in Upper Silesia, or any other claim; must the sums to be paid by the Polish Government under (1), (3) and (4), be paid in ready money and without deduction?

[9] The text of this memorandum was transmitted on April 29th by the German Minister at The Hague to the Registrar of the Court.

[10] The Polish Government replied to it by a memorandum dated May 14th, of which the text was communicated to the Registrar of the Court both by the German Minister (note of June 1st, 1927) and by the Polish Minister at The Hague (note of June 2nd, 1927). In this memorandum, the Polish Government, observing amongst other things, that it was unable to share the opinion of the German Government as to the relevance of the Germano-Polish Treaty of arbitration in regard to the present case, declined the proposal made on behalf of the German Government.

[11] The German Government, therefore, filed on June 1st a reply to the Preliminary Objection of the Polish Government.

[12] Since, under Article 38 of the Rules, the further proceedings had to be oral, the Court, in the course of public sittings held on June 22nd, 24th and 25th, 1927, heard the statements, replies and rejoinder presented by Messrs. Sobolewski and Politis, Agent and [p9] Counsel respectively for the Polish Government, and Kaufmann, Agent for the German Government.

The Facts

[13] The facts relevant to the present case are set out as follows in Judgment No. 6 given by the Court on August 25th, 1925:

[14] On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayerische Stickstoffwerke A.-G. of Trostberg, Upper Bavaria, by which contract this Company undertook "to establish for the Reich and to begin forthwith the construction of", amongst other things, a nitrate factory at Chorzów in Upper Silesia. The necessary lands were to be acquired on behalf of the Reich and entered in its name in the land register. The machinery and equipment were to be in accordance with the patents and licences of the Company and the experience gained by it, and the Company undertook to manage the factory until March 31st, 1941, making use of all patents, licences, experience gained, innovations and improvements, as also of all supply and delivery contracts of which it had the benefit. For this purpose a special section of the Company was to be formed, which was, to a certain extent, to be subject to the supervision of the Reich which had the right to a share of the surplus resulting from the working of the factory during each financial year. The Reich had the right, commencing on March 31st, 1926, to terminate the contract for the management of the factory by the Company on March 31st of any year upon giving fifteen month's notice. The contract could be terminated as early as March 31st, 1921, always on condition of fifteen month's notice being given, if the Reich's share of the surplus did not reach a fixed level.

[15] On December 24th, 1919, a series of legal instruments were signed and legalized at Berlin with a view to the formation of a new Company, the Oberschlesische Stickstoffwerke A.-G., and the sale by the Reich to that Company of the factory at Chorzów, that is to say,

the whole of the land, buildings and installations belonging thereto, with all accessories, reserves, raw material, equipment and stocks. The management and working were to remain in the hands of the Bayerische Stickstoffwerke Company, which, for this purpose, was to utilize its patents, licences, experience gained and contracts. These relations between the two Companies were confirmed by means of letters dated December 24th and 28th, 1919, exchanged between them. The Oberschlesische Stickstoffwerke Company was duly entered on January 29th, 1920, at the Amtsgericht of Königshütte, in the Chorzów land register, as owner of the landed property constituting the nitrate factory of Chorzów. [p10]

[16] On July 1st, 1922, this Court, which had become Polish, gave a decision to the effect that the registration in question was null and void and was to be cancelled, the pre-existing position being restored, and that the property rights of the lands in question were to be registered in the name of the Polish Treasury. This decision, which cited Article 256 of the Treaty of Versailles and the Polish law and decree of July 14th, 1920, and June 16th, 1922, was put into effect the same day.

[17] On July 3rd, 1922, M. Ignatz Moscicki, who was delegated with full powers to take charge of the factory at Chorzów by a Polish ministerial decree of June 24th, 1922, took possession of the factory and took over the management in accordance with the terms of the decree. The German Government contends and the Polish Government admits that the said delegate, in undertaking the control of the working of the factory, at the same time took possession of the movable property, patents, licences, etc.

[18] On November 10th, 1922, the Oberschlesische Stickstoffwerke Company brought an action before the Germano-Polish Mixed Arbitral Tribunal at Paris. It called upon that Court "to allow the claim submitted by the Oberschlesische Stickstoffwerke Aktiengesellschaft, and to order the Polish Government, the Respondent in the suit, to restore the factory, to make any other reparation which the Court may see fit to fix and to pay the costs of the action".

[19] In its reply to this application, the Polish Government asked the Court to declare that it had no jurisdiction (in the alternative to non-suit the Applicant).

[20] The suit was admitted to be ready for hearing on October 15th, 1923. It is, however, still pending.

[21] Furthermore, the Oberschlesische Stickstoffwerke Company brought an action before the Civil Court of Kattowitz. It asked that Court "to order the Respondent to inform the Applicant as to the movable property found at the Chorzów nitrate factories at 11 a.m. on the morning of July 3rd, 1922, when the working of those factories was resumed by the Respondent; to state what debts it had collected; to restore to the Applicant or to the Bayerische Stickstoffwerke Company such movable property, or, should this be impossible, the equivalent value, and also to repay to the Applicant or to the Bayerische Stickstoffwerke Company the amount of the debts collected".

[22] This action is still before that Court, which, however, decided on December 7th, 1923, that there was no pendency, as notice of the action had not yet been served on the Procurature générale at Warsaw. [p11]

[23] In regard to this suit, the German Government stated in its "Observations" filed on July

9th, 1925, that the application made to the Court of Katowice was mainly intended to serve as a basis for claiming, under Article 588 of the Geneva Convention, the reference of the suit to the Upper Silesian Arbitral Tribunal, but that the Court rejected this claim.

[24] These suits were pending, when, on May 15th, 1925, Germany filed in the Permanent Court of International Justice an Application praying the Court to adjudge (1) that Articles 2 and 5 of the Polish law of July 14th, 1920, constituted a measure of liquidation of the property, rights and interests involved, (2) that this liquidation was not in conformity with Articles 92 and 297 of the Peace Treaty of Versailles, (3) that it was contrary to Article 6 and subsequent articles of the German-Polish Convention concluded at Geneva on May 15th, 1922 ; and finally to state (4) what the attitude of Poland should have been under the Treaties mentioned.

[25] Article 297 of the Versailles Treaty relates to the liquidation by the Allied and Associated Powers of property, rights and interests belonging at the date of the coming into force of the Treaty to German nationals, or companies controlled by them, within the territories, colonies, possessions and protectorates of such Powers, including territories ceded to them by the Treaty, and, while stipulating that the liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, Article 297 lays down certain rules. which connect the subject with that of reparations.

[26] Article 92 of the Treaty of Versailles, however, in accordance with Article 297h of that Treaty, expressly provides that the property, rights and interests of German nationals shall not be liquidated under Article 297 by the Polish Government, except on condition (1) that the proceeds of the liquidation shall be paid direct to the owner, and (2) that if, on the owner's application, the Mixed Arbitral Tribunal ... or an arbitrator appointed by it, is satisfied that the conditions of the sale or measures taken by the Polish Government outside its general legislation were unfairly prejudicial to the price obtained, they shall have discretion to award to the owner equitable compensation to be paid by the Polish Government. [p12]

[27] Poland, in answer to the German Application, asked the Court to hold either (1) that it had no jurisdiction of the suit, or (2) that the Application could not be entertained until the German-Polish Mixed Arbitral Tribunal, at Paris, had given judgment.

[28] Without repeating provisions of the Statute relating to the jurisdiction of the Court, it suffices to say that the Court's jurisdiction was, in the present instance, invoked upon the stipulations of Article 23 of the Geneva Convention. This article, consisting of two paragraphs, reads:

“1. Si des divergences d'opinion, résultant de l'interprétation et de l'application des articles 6 à 22, s'élevaient entre le Gouvernement allemand et le Gouvernement polonais, elles seraient soumises à la décision de la Cour permanente de Justice internationale.

“2. Il n'est porté aucune atteinte à la compétence du Tribunal arbitral mixte germano-polonais résultant des dispositions du Traité de paix de Versailles [FN1].”

[FN1] This text, which is the sole and authoritative text of the article, may be translated into English as follows:

"1. Should differences of opinion, resulting from the interpretation and the application of Articles 6 to 22, arise between the German and the Polish Governments, they should be submitted to the decision of the Permanent Court of International Justice.

"2. The jurisdiction of the German-Polish Mixed Arbitral Tribunal under the provisions of the Peace Treaty of Versailles is in no way impaired."

[29] On the objection taken by Poland to the Court's jurisdiction, the Court, in its Judgment No. 6, August 23th, 1925, held:

(1) That the Court's jurisdiction under Article 23 was not affected by the fact that the rights claimed were contested on the strength of provisions of other treaties as well as on those of Articles 6 to 22 of the Geneva Convention.

(2) That the suits pending before the German-Polish Mixed Arbitral Tribunal at Paris and the Civil Court at Katowice, did not prevent the Court from exercising its jurisdiction under Article 23.

(3) That the plea to the jurisdiction should be dismissed.
Judgment on the merits was reserved.

[30] Before proceeding to the judgment later rendered by the Court on the merits, it is essential briefly to summarize the provisions [p13] of Articles 6 to 22 of the Geneva Convention so far as they are involved in the pending case.

[31] Article 6 provides that Poland may expropriate in Upper Silesia major industrial undertakings, conformably to the provisions of Articles 7 to 23 of the Convention; but that, with this exception, the property, rights and interests of German nationals, or of companies controlled by them, cannot be liquidated. By Article 7 this right of expropriation may be exercised, in accordance with the provisions of Articles 92 and 297 of the Versailles Treaty, during fifteen years from the date of the transfer of sovereignty, "if, on the request of the Polish Government, this measure has been recognized by the Mixed Commission as being indispensable to the maintenance of the exploitation", the Mixed Commission thus referred to being an international tribunal for the establishment of which provision is made by Article 562 of the Convention. Article 8 deals with the subject of expropriation after the fifteen-year period above mentioned. The stipulations of Articles 9 to 11 it is unnecessary here to particularize. Articles 12 to 16 relate to the expropriation of large rural estates. Article 19, paragraph 1, assures to the Polish Government the right from time to time to inquire into the real ownership of a major industry or a large rural estate, and into the real control of a company appearing as owner. If the Polish Government reaches the conclusion that the owner is really a German national, or that the Company is really controlled by such nationals, and if, after receiving notice, the interested Party contends that the facts are not as stated, the latter, during a month after the date of the notice, may appeal to the German-Polish Mixed Arbitral Tribunal which may provisionally suspend the procedure for expropriation.

[32] After the delivery by the Court of Judgment No. 6, the German Government amended the submissions made in its Application, so that, as the submissions finally stood, the Court was asked to give judgment:

(1) That the application of the Polish law of July 14th, 1920, in Polish Upper Silesia, decreed by the law of June 16th, 1922, constituted a measure of liquidation within the meaning of Article 6 and the following articles of the Geneva Convention, and that, [p14] as it did not conform to those articles, any more than to Articles 92 and 297 of the Versailles Treaty, to which the Convention expressly referred, such application was illegal.

(2) That the attitude of the Polish Government towards the Oberschlesische and the Bayerische was not in conformity with the above-mentioned articles of the Geneva Convention, and, should this be held to be so, that the Court would state what attitude would have been in conformity with them.

[33] In reply, the Polish Government asked the Court

(1) To non-suit the Applicant as regarded submission No. 1.

(2) To find that it was not necessary to decide as to the conformity or non-conformity of the attitude of the Polish Government with Article 6 and the following articles of the Geneva Convention, since no measure of liquidation had been taken by that Government.

[34] Issue being thus joined, the Court, at its tenth (extraordinary) session, heard the case on the merits, and rendered judgment.

[35] In this Judgment – No.7 (May 25th, 1926) – the provisions of the Polish law of July 14th, 1920, are analyzed and set forth in detail. The subject matter of this law is the "transfer of the rights of the German Treasury and of members of reigning German houses to the Treasury of the State of Poland". Article 1 directs the Polish Courts automatically to substitute in the land registers of the former Prussian provinces the name of the Polish Treasury for that of "the Crown, the German Reich, the States of Germany, the ex-Emperor of Germany or other members of reigning houses", entered after November 11th, 1918, as owners or as possessors of real rights. Article 2, paragraph 1, directs the Polish Courts, where such persons or institutions had, after November 11th, 1918, alienated or charged the landed property, or requested or consented to the cession, cancellation or modification of real rights, to restore the registers to their condition on that date. Article 5 authorizes the Polish Treasury to require the eviction of persons who, as the result of a contract concluded with one of the persons or institutions mentioned in Article 1 remained in occupation of the property after the law came into force. [p15]

[36] The Court held:

(1) That Articles 2 and 5 were incompatible with the provisions of the Geneva Convention, and that Poland had invoked no title of international law which would permit Articles 2 and 5 of the law of July 14th to be regarded as constituting the exercise of a right overcoming the obligations ensuing from Head III of the Geneva Convention;

(2) That, in the transfer of the factory to the Oberschlesische, there was no misuse by Germany of the right of alienation of property in the plebiscite area; that the alienation was a genuine transaction effected in good faith and was not designed to be detrimental to Poland's rights and that the Oberschlesische's right of ownership must be regarded as established, and could have been disputed only before a competent tribunal;

(3) That the property and operating rights claimed by the Bayerische were also valid, and had been violated by Poland's action ;

(4) That expropriation without compensation was contrary to Head III of the Geneva Convention; and that the application of the law of July 14th, 1920, was contrary to Article 6

and subsequent articles of the Geneva Convention, and that the Court had express and definite jurisdiction of the subject matter by Article 23 of that Convention.

[37] In conclusion, the Court held:

(1) That the application of Articles 2 and 5 of the law of July 14th, 1920, decreed by the law of June 16th, 1922, constituted, as to German nationals or companies controlled by them, within Part I, Head III, of the Geneva Convention, an infraction of Article 6 and the following articles of that Convention;

(2) That the attitude of the Polish Government toward both Companies was not in conformity with those articles, but that the Court was not called upon to state what attitude would have been in conformity with them.

[38] It was on the basis of this decision of the Court that negotiations were undertaken by the two Governments for an amicable settlement of the claims of both Companies by the payment of pecuniary damages. [p16]

[39] Following upon the judgment of May 25th, 1926, the German Government, on June 25th of the same year, sent to the Polish Government a note in which it requested that Government "to take the steps necessary to establish a situation conforming to the judgment both in fact and in law". These steps should, in the view of the German Government, comprise three different features:

(1) the re-entry in the land registers of the Court of Königshttte of the Oberschlesische as owners of the real estate constituting the Chorzów factory;

(2) the restoration of the factory as an industrial enterprise to the Bayerische;

(3) the payment to these two Companies of an indemnity, the amount of which to be fixed by direct negotiations between the two Governments.

[40] The Polish Government replied to this note on September 9th, 1926, the German Government having in the meantime asked the Polish Government whether it did not intend to reply and whether it would prefer that the question should be settled by the institution of new proceedings before the Court. The Polish reply was to the effect that the Warsaw Government was disposed "to settle by means of an agreement with the Berlin Government all questions in dispute with regard to the Chorzów factory". But the Polish Government stated in regard to the claim for the restoration of the factory that it was unable to comply for reasons of fact and of law; it also made reservations as regards the validity, in municipal law, of the entry of the Oberschlesische in the land register. Finally, it suggested that it would be better "having regard to the nature of the matter" that representatives of the interested Companies should directly approach the management of the factory and that the two Governments should only intervene if agreement could not be reached in this manner. In a subsequent note, dated October 18th, the Polish Government, whilst, maintaining that the disputed questions were questions of private law, agreed that delegates of the two Governments should also take part in the negotiations.

[41] In these circumstances, the German Government proposed in a note dated October 30th, that the negotiations should be begun at Berlin on November 15th. Believing that it could be said that differences of opinion still existed between the two Governments "in regard to the legal principles established by the Court's judgment" of May 25th, 1926, the German Government reserved the right to appeal to the Court in regard to the execution of that

judgment, should these differences of opinion subsist during the negotiations and make such appeal necessary.

[42] The Polish Government, whilst agreeing to enter into negotiations at Berlin on November 22nd, maintained the standpoint taken in its previous notes.

[43] The negotiations had been in progress since November 22nd, 1926, when, on January 19th, 1927, the German Delegation sent to the Polish Delegation a note setting out two alternative proposals for a compromise, which proposals, leaving aside the question of restitution, solely related to the amount of the indemnities and the method of payment: payment was to be effected by the issue on the date of signature of the agreement, it concluded, of bills of exchange payable at different dates; in the event of the payments not being made within the times specified, the German Government reserved the right once more to have recourse to the Court. Should one of the two proposals be accepted, the existing differences of opinion would be regarded as disposed of. But if not, the German Government declared itself ready to reopen negotiations, but the possibility of further negotiations would not prevent the German Government from referring the existing differences of opinion to the Court; in the judicial proceedings that Government would not of course be bound by the proposals for a compromise which it had made. To the note was attached a memorandum in regard to the position of negotiations on January 14th, 1927; this memorandum made it clear, amongst other things, that the reason why the German Government had abandoned its original claim for the restitution of the factory was that it had come to the conclusion that the Chorzów factory, in its present condition, no longer corresponded to the factory as it was before the taking over in 1922, and that the German Government reserved the right, should the Polish reply to the German proposals be too long delayed, to bring the matter before the Court so that it might be included in the list for the Court's twelfth session, it being always possible to withdraw the Application, should an agreement be reached within a relatively short time. The reply of the Polish Government, dated February 1st, accepted more or less completely the amounts suggested by the German Government for the indemnities-the Polish Government proposing for the amounts to be paid subsequently to the Bayerische, bills of exchange issued by the Chorzów factory-but it stated that the Polish Government was not willing to meet the wishes of the German Government in regard to the issue of bills of exchange for the Oberschlesische, particularly for the reason that, as it contended, it possessed claims on the German Government for various amounts, one of which, in respect of social insurances in Upper Silesia, had been fixed by the League of Nations at 25 million Reichsmarks, and that, this being so, in the view of the Polish Government, it was essential to set off the respective claims against each other. It should be noted that, in its reply, the Polish Government proposed the resumption of negotiations in regard, amongst other things, to the "possible filing of an Application with the Court", a point which, according to that Government, "had not yet been discussed". Should the German Government not accept the Polish proposals, the Polish Government would not consider itself bound by them.

[44] The German Government, by a note dated February 8th, 1927, then informed the Polish Government that the points of view of the two Governments seemed so different that it appeared impossible to avoid recourse to an international tribunal, and that therefore the German Minister at The Hague had received instructions to file an Application with the Court. In its note, the German Government also drew attention to the fact that, throughout the whole of the negotiations, the German Delegation had emphasized that, failing an agreement, appeal to the Court would be inevitable.

The Law

[45] As has already been indicated, the Applicant has, in his Case on the merits, made submissions which constitute an amendment of the submissions made in the Application.

[46] Since this amendment has been effected in the first document of the written proceedings, in a suit brought by Application-i.e. at a time when, in accordance with Article 38 of the Rules, the Respondent still retains a completely free hand to file preliminary objections-no exception can be taken to it. Moreover, the Respondent, in his preliminary plea, has referred to the Applicant's submissions as formulated in the Case and not as formulated in the Application. It is, therefore, the submissions as formulated in the Case that the Court has now before it. [p19]

[47] The submissions formulated in the Application were based, is apart from the above-mentioned provisions of the Statute and Rules of Court, exclusively upon the jurisdictional clause contained in Article 23 of the Geneva Convention. The basis of the amended submissions set out in the Case remains unchanged.

[48] It is true that, in this document, the German Government has referred to the Germano-Polish, Arbitration Treaty initialled at Locarno on October 16th, 1925. The only object, however, of this reference is, as shown by the context, to establish that, in the contention of the German Government, a certain claim which Poland may have against Germany cannot, without the consent of the other Party, be set off extrajudicially against any indemnities which may be awarded by the Court in the present case, especially having regard to the procedure instituted by the above-mentioned Treaty. This reference therefore cannot serve to modify the source from which, according to the Application, the Court derives jurisdiction.

[49] The same reasoning applies a fortiori with regard to the statement made in Court by the Agent for the German Government to the effect that even if the arbitration clause contained in Article 23 of the Geneva Convention does not apply in the present case, the Court would have jurisdiction under the Arbitration Treaty of Locarno "if it were applicable in this case"; for this statement which was, moreover, made at a very late stage, can hardly have been intended to do more than affirm a more or less theoretical opinion in regard to the interpretation of that Treaty.

[50] The Court, therefore, holds that the submissions set out above have been laid before it solely under Article 23 of the Geneva Convention.

[51] Before proceeding to set out the reasons for which it must overrule the preliminary objection taken by Poland to its jurisdiction to deal with these submissions, the Court would observe that, for the purposes of this statement of reasons, as also for the purposes of its future judgment on the merits, it cannot take account of declarations, admissions or proposals which the Parties may have made in the course of direct negotiations which have taken place between them, declarations which, moreover, have been made without prejudice in the event of the points under discussion forming the subject of judicial proceedings. For the negotiations in question have not, as acknowledged by the representatives before the Court of the Parties themselves, led to an agreement between them. [p20]

[52] It is common ground that the Application of February 8th, 1927, and the submissions of the German Case of March 2nd, 1927, relate to reparations alleged to be due by the Polish Government for acts set out in the German Application of May 15th, 1925, and which the Court, in Judgment No.7, has declared not to be in conformity with Articles 6 to 22 of the Geneva Convention. Poland denies that the jurisdiction, which the Court, by Judgment No. 6, decided that it possessed in regard to the above-mentioned Application of May 15th, 1925, also covers the new Application of February 8th, 1927, and the submissions in the Case of March 2nd, 1927.

[53] The position of the Polish Government is mainly based on the two following contentions:

1. that Article 23, paragraph 1, of the Geneva Convention, which gives the Court jurisdiction for "differences of opinion, resulting from the interpretation and the application of Articles 6 to 22", which may arise between the German Government and the Polish Government, does not contemplate differences in regard to reparations claimed for violation of those articles;
2. that the Geneva Convention has instituted special jurisdictions for claims which private persons might assert in the event of the suppression or diminution of their rights, and that the existence of these jurisdictions would affect that of the Court even if Article 23, paragraph 1, of the Geneva Convention could be construed as including differences of opinion in regard to reparations amongst those relating to the application of Articles 6 to 22; therefore, the interested Parties should themselves have recourse to the jurisdictions in question.

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[54] In the first place, the meaning and scope of paragraph 1 of Article 23 must be considered, for it is upon this clause – and upon this clause only – that the Court's jurisdiction in the present case rests.

[55] The Court, by Judgments Nos. 6 and 7, has recognized that differences relating to the application of Articles 6 to 22 include not only those relating to the question whether the application of a [p21] particular clause has or has not been correct, but also those bearing upon the applicability of these articles, that is to say, upon any act or omission creating a situation contrary to the said articles. It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.

[56] Now, Poland maintains that the words "differences of opinion, resulting from . . . the application" in Article 23 cannot have the meaning just indicated, but that they must be construed as covering merely the question whether, in a given case, the application of Articles 6 to 22 is or is not correct, to the exclusion of any differences in regard to reparations.

[57] In this connection, the Polish Government, in support of its contention that paragraph 1 of Article 23 of the Geneva Convention should be restrictively construed, has traced the development of general treaties of arbitration during the last fifty years, comprising (1) the so-called clause compromissaire (arbitration clause) introduced into commercial and other

treaties during the last twenty-five years of the XIXth century and subsequently, by which the contracting Parties agreed to submit to arbitration any differences as to the interpretation or application of the particular treaties; (2) general treaties for the compulsory arbitration of certain specified categories of disputes, concluded since 1900, and (3) treaties and clauses for the arbitration of pecuniary claims. It is needless to say that paragraph 1 of Article 23 is an example of the first of these three classes of agreements.

[58] Counsel for Poland admitted in Court, for the sake of the argument, that the clause *compromissoire* was originally interpreted as including claims for reparation; but he maintained that, because of later developments, the clause must now be interpreted as excluding such claims. The Court is unable to share this view. By the Convention for the Pacific Settlement of International Disputes, concluded at The Hague in 1899, although no exceptions [p22] were made in the provisions relative to "arbitral justice" included in the first Chapter of Head IV of that Convention, arbitration was not in any case made obligatory. An active movement was then begun for the conclusion of treaties by which the submission of differences would be made obligatory, treaties already foreshadowed by Article 19 of the said Convention. The attainment of this object, so far as concerns general questions of legal right and obligation, was found to be feasible by including only certain classes of questions, and subjecting even these to reservations. On the other hand, it had, ever since the end of the XVIIIth century, been found to be possible to conclude agreements for the submission of pecuniary claims to arbitration without reserve. These facts appear to be logically fatal to the inference sought to be drawn from them, for they clearly show that, in the opinion of governments, the differences concerning which reserves were deemed to be necessary were those relating to legal rights and obligations and not those relating to pecuniary reparation. To say, therefore, that the clause *compromissoire*, while confessedly providing for the submission of questions of right and obligation, must now be restrictively interpreted as excluding pecuniary reparation, would be contrary to the fundamental conceptions by which the movement in favour of general arbitration has been characterized.

[59] Moreover, apart from the question whether expressions used in conventions between other Powers and at different periods can be taken into account in interpreting the intention of the signatories of the Geneva Convention, the Court holds that, in view of the fundamental difference between the nature of arbitration clauses (*clauses compromissoire*) and the object of the classification of disputes in general arbitration agreements, no conclusion can be drawn from the terminology of the one class of provisions in respect of the other.

[60] The classification of international disputes which would be most in point in the present case is undoubtedly the classification adopted in Article 13 of the Covenant of the League of Nations, and reappearing in Article 36 of the Court's Statute. For these instruments, which are very close to the Geneva Convention in point of time, constitute collective treaties of peculiar importance as they mark [p22] a step forward towards the realization of compulsory arbitration. But the classification which they contain would, in the Court's opinion, lead to the conclusion that the expression "differences of opinion resulting from the interpretation and application" in Article 23 of the Geneva Convention, should be construed as including questions relating to reparations. It is true that the Covenant and the Statute mention separately, in the first place, "disputes as to the interpretation of a treaty" and, in the fourth place, those relating to "the nature or extent of the reparation" ; but they also mention, in the third place, as a separate category, disputes relating to "the existence of any fact which, if established, would constitute a breach of an international obligation". Now it is established

by Judgments Nos. 6 and 7 that the Court has jurisdiction to decide whether a breach of Articles 6 to 22, has taken place or not. The decision whether there has been a breach of an engagement involves no doubt a more important jurisdiction than a decision as to the nature or extent of reparation due for a breach of an international engagement the existence of which is already established. If Article 23, paragraph 1, covers the disputes mentioned in the first and third categories by the two provisions above mentioned, it would be difficult to understand why – failing an express provision to that effect – it should not cover the less important disputes mentioned in the fourth category.

[61] Poland has, also drawn the Court's attention to the Convention which, acting also in the name of the Free City of Danzig, she concluded with Germany in 1921, - i.e. at a time not far removed from the conclusion of the Geneva Convention – in regard to freedom of transit between Eastern Prussia and the rest of Germany. Articles 11 and 12 of this Convention provide for the establishment of an arbitral tribunal to which each High Contracting Party may refer "disputes which may arise either in the interpretation or in the application" of the Convention. Poland observes that Article 11, the first paragraph of which establishes the jurisdiction just referred to, contains a special paragraph to the effect that the tribunal will have jurisdiction if necessary, to decide as to the reparation to be made by the Party which may have been responsible for a breach of the provisions of the Convention. Whatever may have been the reasons which led the Parties expressly to mention jurisdiction in regard to reparations in addition to that respecting interpretation and application, the fact that a convention explicitly [p24] confirms the conception generally adopted in regard to arbitration clauses, cannot be construed to mean that the same Parties, when employing in another convention the wording ordinarily used in conventions of this kind, have, by so doing, given evidence of an intention contrary to that which is to be presumed when interpreting an arbitration clause in a convention.

[62] It follows from the above that Article 23, paragraph 1, which constitutes a typical arbitration clause (clause compromissoire), contemplates all differences of opinion resulting from the interpretation and application of a certain number of articles of a convention. In using the expression "differences of opinion resulting from the interpretation and application", the contracting Parties seem to have had in mind not so much the subject of such differences as their source, and this would justify the inclusion of differences relating to reparations amongst those concerning the application, even if the notion of the application of a convention did not cover reparations for possible violation.

[63] Having regard to the fact that Counsel for the Polish Government has laid stress on the literal meaning of the word "application", the Court thinks it well to remark that in judgment No. 5 -which has been cited before it in this connection by the said Counsel – it observed not only that "application" is a wider, more elastic and less rigid term than "execution", but also that "execution is a form of application". It follows that Judgment No. 5 cannot be cited to support a restrictive interpretation of the term "application".

[64] For the interpretation of Article 23, account must be taken not only of the historical development of arbitration treaties, as well as of the terminology of such treaties, and of the grammatical and logical meaning of the words used, but also and more especially of the function which, in the intention of the contracting Parties, is to be attributed to this provision. The Geneva Convention provides numerous means of redress to secure the observation of its clauses and it does so in ways varying according to the subjects dealt with under the different Heads, Parts or other subdivisions of the Convention. Article 23 contains

provisions of this kind in so far as concerns Articles 6 to 22 which form the greater portion of Head III of the First Part. [p25]

[65] The object of these methods of obtaining redress-and that of Article 23 in particular-seems to be to avert the possibility that, in consequence of the existence of a persistent difference of opinion between the contracting Parties as to the interpretation or application of the Convention, the interests respect for which it is designed to ensure, may be compromised. An interpretation which would confine the Court simply to recording that the Convention had been incorrectly applied or that it had not been applied, without being able to lay down the conditions for the re-establishment of the treaty rights affected, would be contrary to what would, *prima facie*, be the natural object of the clause; for a jurisdiction of this kind, instead of settling a dispute once and for all, would leave open the possibility of further disputes.

[66] This conclusion, which is deduced from the object of a clause like Article 23, and, in general, of any arbitration clause, could only be defeated, either by the employment of terms sufficiently clear to show a contrary intention on the part of the contracting Parties, or by the fact that the Convention had established a special jurisdiction for claims in respect of reparation due for the violation of the provisions in question, or had made some other arrangement regarding them.

[67] It follows from what has been said in regard to the meaning and scope of the words "differences of opinion resulting from the interpretation and application of Articles 6 to 22" that the terms of Article 23, first paragraph, do not establish the existence of any such contrary intention. It now remains to consider the scope of Article 23, paragraph 2, and Article 22 of the Geneva Convention.

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[68] The Polish Government contends in the second place that there are other tribunals before which the injured companies could assert their right to an indemnity and that, in these circumstances, the German Government cannot, by substituting itself for these companies, disturb the jurisdictional system established by the Geneva Convention.

[69] The Court feels that it must consider this point, not only because Counsel for Poland have cited the general principle with regard to recourse to tribunals accessible to private persons, but also and more especially in relation to the terms of Article 23, paragraph 2, of the Geneva Convention. [p26]

[70] It must first of all be observed that any Jurisdiction which the Polish Courts may have does not enter into account. For the act on the part of the Polish Government, which the Court has held not to be in conformity with the Geneva Convention, consisted in the application of Articles 2 and 5 of the Polish law of July 14th, 1920, introduced into Polish Upper Silesia by the law of June 16th, 1922, which application, in the opinion of the Court (Judgment No. 7), is in itself a measure contrary to Article 6 and the following articles of the Convention. The Court of Huta Krolewska (Königshütte) effected this application by ordering the entry in the land register of the Polish Treasury as owner of the factory in place of the Oberschlesische. Accordingly, Poland has not argued that the Polish Courts have jurisdiction in regard to reparation.

[71] The tribunals to be taken into account are therefore those contemplated by the Geneva Convention itself, namely, the Upper Silesian Arbitral Tribunal and the Germano-Polish Mixed Arbitral Tribunal. The Agent and Counsel for the Polish Government spoke sometimes of the one and sometimes of the other of these tribunals, without specifying which of them would be competent in the particular case nor whether both of them would be so competent.

[72] The question whether the jurisdiction of these tribunals might prevent the exercise of the jurisdiction bestowed upon the Court by paragraph 1 of Article 23 of the Geneva Convention was brought up before the Court during the proceedings in regard to the jurisdiction in the suit submitted to the Court by the German Government's Application of May 15th, 1925. The Polish Government indeed submitted that that Application could not be entertained until the Germano-Polish Mixed Arbitral Tribunal had delivered judgment in the case concerning the same factory of Chorzów brought by the Oberschlesische on November 10th, 1922, before that Tribunal. The Polish Government also argued that, as it was a question of an alleged destruction of vested rights, the Upper Silesian Tribunal might have jurisdiction under Article 5 of the Convention.

[73] Some of the reasons for which the Court, in Judgment No. 6, overruled this plea that the suit could not be entertained—for instance the argument relating to the fact that the Parties are not the same—might to some extent be applicable also in the present case. It should however be observed that the position is not the same,^[p27] more especially in view of the fact that the German Application, of May 15th, 1925, only asked the Court for a declaratory judgment between States, which only the Court could give, whereas the present Application seeks an indemnity which is not necessarily different from that which the Companies on whose behalf it is claimed, might obtain from another tribunal, assuming that there was one which was competent. For this reason, the Court will not be content merely to refer to Judgment No. 6 and will once more examine the question in relation to the special conditions in which it presents itself on this occasion.

[74] Before undertaking this examination, the Court feels called upon to call to mind the following: In Judgment No. 7 it held that, as the expropriation allowed under Head III of the Geneva Convention, is a derogation from the rules generally applied as regards the treatment of foreigners and from the principle of respect for vested rights, and this derogation is itself of a strictly exceptional character, -any other measure affecting the property, rights and interests of German nationals contemplated in Head III and not supported by some special authority having precedence over the Convention, and which oversteps the limits of generally accepted international law, is incompatible with the regime established by the Convention. The seizure of the property, rights and interests belonging to the Oberschlesische and Bayerische was precisely a measure of this kind. It is in this sense that the measures taken by the Polish Government in respect of the above-mentioned Companies are, in the Court's opinion, contrary to Head III of the Geneva Convention, and this in spite of the fact that they do not, properly speaking, fall within the expropriations or liquidations regulated under that Head. The measures in question are therefore of a special nature; and it is only in relation to those measures, thus qualified, and to the regime established in Upper Silesia, that it must be considered whether the dispossessed Companies could apply either to the Upper Silesian Arbitral Tribunal or to the German Polish Mixed Arbitral Tribunal for reparation of the injury sustained.

[75] The Polish Government argues that the Upper Silesian Tribunal has jurisdiction on the

basis of Article 3 of the Geneva Convention. This article, which is the last of Head II of the Convention, is as follows: [p28]

“La question de savoir si et dans quelle mesure une indemnité pour la suppression ou la diminution de droits acquis doit être payée par l'État, sera directement tranchée par le Tribunal arbitral sur plainte de l'ayant droit. [FN1]”

[FN1] This text, which is the sole and authoritative text of the article, may be translated into English as follows:

"The question whether and to what extent an indemnity for the suppression or diminution of vested rights must be paid by the State, will be directly decided by the Arbitral Tribunal upon the complaint of the interested Party."

[76] In the Court's opinion, it is impossible to accept this proposition. Whatever the scope and limits of the jurisdiction conferred on the Upper Silesian Tribunal by this article may be in other respects, the fact remains that this jurisdiction relates to the subject matter dealt with in Head II of the Convention which concerns the protection of vested rights. Now the Court, in Judgment No. 7, has decided that the dispossession of the Oberschlesische and Bayerische was a violation of Head III and it has decided thus even though it may be true that any violation of this Head, which constitutes an exception to the general principle of respect for vested rights, is at the same time necessarily a violation of Head II also. It follows that the competent tribunals can only be those provided for by Head III. This is also borne out by the fact that the Upper Silesian Arbitral Tribunal, under Article 5, can only allow pecuniary indemnities; now it is certain that Head III of the Convention is mainly designed to preserve the status quo in Polish Upper Silesia and therefore that, whenever possible, restitutio in pristinum is the natural redress of any violation of, or failure to observe, the provisions therein contained.

[77] The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the Treaty of Peace of Versailles, is expressly reserved by Article 23, paragraph 2.

[78] In order to understand this provision, it should be remembered that Head III of the Geneva Convention has not abolished, although it limits in several respects, the liquidation regime instituted by the Treaty of Versailles, and that some provisions of that Treaty concerning that regime have been expressly declared applicable in Polish Upper Silesia. Thus Articles 7 and 8 of the Geneva Convention refer to Articles 92 and 297 of the Treaty. [p29]

[79] These articles, amongst other things, allow private persons to appeal to the Mixed Arbitral Tribunal. The right to do so is given to the interested Party in the event of the conditions of sale or measures taken by the liquidating government outside its ordinary legislation being unfairly prejudicial to the price; the Tribunal may then grant the interested Party a reasonable indemnity which is to be paid by the liquidating government.

[80] As the Geneva Convention was intended to secure to German nationals in Polish Upper

Silesia treatment more favourable than that resulting from the Treaty of Versailles, there could be no question of abolishing or diminishing the guarantees given by the Treaty to persons liable to have their property liquidated. Again, the jurisdiction bestowed upon the Court by Article 23, paragraph 1, which has no equivalent under the liquidation regime of the Treaty of Versailles, might have left some doubt as to whether the means of obtaining redress open to interested Parties under the Treaty of Versailles would remain open notwithstanding. Cases of the same kind as those contemplated by the provisions of that Treaty concerning the regime of liquidation are certainly possible, even in connection with the expropriations or liquidations authorized by the Geneva Convention. It was therefore natural expressly to reserve the right possessed by private persons to appeal in such cases to the Mixed Arbitral Tribunal : this is what paragraph 2 of Article 23 does.

[81] The Court has also not omitted to examine Article 22 of the Geneva Convention, in so far as it bestows jurisdiction upon the Germano-Polish Mixed Arbitral Tribunal. It is however clear that this article also contemplates regular expropriations effected within the limits fixed by the preceding articles. That this is the case is proved by, amongst other things, the fact that the contingency contemplated in the article is that of a claim for damages greater than the indemnity fixed; the case is therefore one of expropriation, in the proper sense of the term, and the jurisdiction given to the Mixed Arbitral Tribunal does not differ from that bestowed upon it by Articles 92 and 297 of the Treaty of Versailles.

[82] This being so, there would seem to be no doubt that neither this provision nor Article 23, paragraph 2, expressly contemplates acts of the kind for which the German Government claims an indemnity on behalf of the dispossessed Companies. As has already been stated, these acts constitute special measures [p30] which fall outside the normal operation of Articles 6 to 22 of the Geneva Convention, whereas the jurisdiction reserved by Article 23, paragraph 2, assumes the application of those articles. In the present case reparation is the outcome, not of the application of Articles 6 to 22, but of acts contrary to the provisions of those articles.

[83] It has not escaped the Court that the Oberschlesische supported the action brought by it before the Germano-Polish Mixed Arbitral Tribunal upon, amongst other things, Article 305 of the Treaty of Versailles. This cannot, however, affect the conclusion just arrived at by the Court, The aim of Article 305 – to which, besides, neither the Agent nor Counsel for the Polish Government have made any allusion – is to secure to interested Parties the possibility of having recourse to the Mixed Arbitral Tribunal, even if measures contrary to the terms of the Treaty of Versailles have been embodied in a judgment. Whatever construction in other respects the Mixed Arbitral Tribunals have placed or may place upon this article, with which construction the Court wishes in no way to interfere, the Court, when it has to define its jurisdiction in relation to that of another tribunal, cannot allow its own competency to give way unless confronted with a clause which it considers sufficiently clear to prevent the possibility of a negative conflict of jurisdiction involving the danger of a denial of justice. The Court does not consider that, in regard to the applicability of Article 305 to the situation of the Oberschlesische, all possible doubt is eliminated ; it would observe, however, that it is not called upon to decide this point. Furthermore, it should be noted that the Polish Government, in regard to the action brought by the Oberschlesische before the Germano-Polish Mixed Arbitral Tribunal on November 10th, 1922, filed a plea to the jurisdiction on the ground, amongst others, that Article 305 was not considered as applicable in that case.

[84] There is, moreover, another reason which the Court feels called upon to invoke in order

to show that the jurisdiction of the Mixed Arbitral Tribunal cannot be urged in this case in opposition to the jurisdiction conferred on the Court by Article 23 of the Geneva Convention.

[85] A careful examination of the provisions of Head III of the Geneva Convention brings out-as the Court has already had occasion to point out in Judgment No. 7 – that one of the fundamental principles [p31] upon which this Head is based, as regards procedure, is that no dispossession may be effected without previous notice to the real or apparent owner, affording him an opportunity of being heard before the competent tribunal. It is certain – having regard to the promulgation by the Polish Government of the laws of July 14th, 1920, and of June 16th, 1922, and to the application given to those laws-that in this case such a procedure has not been adopted, for the dispossession of the Companies concerned had, in the Polish Government's contention, taken place outside the framework of the Geneva Convention. Consequently, the Polish Government cannot in this particular case require the interested Parties to look for redress of the injury sustained by them to the tribunals which might have been open to them if the Convention had been applied. For, thereafter, the utmost that the interested Parties could obtain from these tribunals would be reparation for the wrong, whereas, if that procedure had been followed out, the wrong would perhaps never have occurred.

[86] From what has been said, it follows that once dispossession has taken place without previous investigation of the right of ownership, the possible undertaking of this investigation in order to justify such dispossession after it has taken place, cannot undo the fact that a breach of the Geneva Convention has already taken place, or affect the Court's jurisdiction.

[87] It is, moreover, a principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, that one Party cannot avail himself of the fact that the other has not fulfilled some obligation or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open, to him.

[88] If, against what has just been stated by the Court, it were contended that the measures taken by the Polish Government in regard to the Oberschlesische and Bayerische did not constitute expropriation within the meaning of Head III of the Geneva Convention, the Court would be called upon to repeat what it has already had occasion to say not only in Judgment No. 7, but also in the present Judgment, namely, that if expropriation in consideration of an indemnity is prohibited by that Head, a fortiori is a seizure, without compensation to the interested Parties, prohibited. [p32]

[89] It has been argued repeatedly in the course of the present proceedings that in case of doubt the Court should decline jurisdiction. It is true that the Court's Jurisdiction is always a limited one, existing only in so far as States have accepted it; consequently, the Court will, in the event of an objection - or when it has automatically to consider the question – only affirm its jurisdiction provided that the force of the arguments militating in favour of it is preponderant. The fact that weighty arguments can be advanced to support the contention that it has no jurisdiction cannot of itself create a doubt calculated to upset its jurisdiction. When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered

when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.

[90] It follows from the foregoing considerations that the Court affirms its jurisdiction and reserves the suit for judgment on the merits in so far as the first of the submissions of the Case of March 2nd, 1927, is concerned, that is to say, as regards the question whether, "by reason of its attitude in respect of the Oberschlesische and Bayerische, which attitude has been declared by the Court not to have been in conformity with the provisions of Article 6 and the following articles of the Geneva Convention, the Polish Government is under an obligation to make good the consequent injury sustained by the aforesaid Companies from July 3rd, 1922, until the date of the judgment sought".

[91] The other submissions (Nos. 2-4) of the Case relate to the amount of the indemnities to be paid by Poland, a prohibition of export affecting certain products and, finally, the method of payment. The Court's right to deal with these points and to grant or refuse the German Government's claim, follows from the fact of its jurisdiction to hear the claim for reparation.

[92] Whilst denying that the Court has jurisdiction to deal with claims seeking reparation for a breach of Articles 6 to 22 of the Geneva Convention, Poland, in her preliminary Counter-Case, has in the alternative submitted certain objections in regard, particularly, to [p33] the German submission concerning a prohibition of export and to the other submission to the effect that Poland should not be allowed to set off, against any amount which may be due as reparation, a claim which she has against Germany under the decision of the Council of the League of Nations of December 9th, 1924. The Court is not called upon to give a decision on these points at this stage of the proceedings; they belong to the merits of the suit.

[93] Consideration of the question of the forms of reparation which are admissible in this case and of the methods of payment indicated would presuppose that the Court had satisfied itself of the existence of an obligation to make reparation and of the existence, nature and extent of the injury resulting from an attitude contrary to Articles 6 to 22.

[94] As regards conclusion No. 4 (d) of the German Case, the question whether Poland could, if the case arise, assert a claim to set off against her debt to Germany any debt due to her by Germany remains therefore entirely reserved.

[95] For These Reasons, the Court, having heard both Parties, by ten votes to three,

1. dismisses the plea made by the Polish Government requesting the Court to declare that it has no jurisdiction to deal with the suit brought by the German Government on February 8th, 1927, and reserves this suit for judgment on the merits;
2. instructs the President to fix the times for the deposit of the Counter-Case, Reply and Rejoinder on the merits.

[96] Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-sixth day of [p34] July, nineteen hundred and twenty-seven, in three copies, one of which is to be placed in the archives of the Court, and the others to be forwarded to the Agents of the applicant and respondent Parties respectively.

(Signed) Max Huber,
President.

(Signed) Å. Hammarskjöld,
Registrar.

[97] M. Ehrlich, Polish National judge, availing himself of the right conferred on him by Article 57 of the Statute, has delivered the separate opinion which follows hereafter.

(Initialled) M. H.

(Initialled) A. H. [p35]

Dissenting Opinion By M. Ehrlich

[98] I, regret to find myself in disagreement with certain aspects of the judgment which has just been delivered.

I. [Jurisdiction Over Submission 1]

[99] While the Court has, in principle, jurisdiction to decide on submission No. 1, I do not think that the Court can consider that submission in the present case.

[100] It followed from Judgment No. 7, without the necessity of an explicit statement, that the Polish Government was bound to make reparation for any damage which may actually and unlawfully have been inflicted; is a result of the attitude of the Polish Government declared by that judgment not to have been in conformity with certain stipulations of the Geneva Convention. This is a consequence of the principle that the violation of an international obligation entails the duty of reparation, a principle so generally accepted that in the classification of international disputes of a legal character, embodied in Article 13 of the Covenant of the League of Nations, and in Article 36 of the Statute of the Court (of which classification more will be said presently), there is no special class of disputes as to the duty of making reparation for a breach of an international obligation, as distinguished from disputes concerning the existence of a fact which, if established, would constitute a breach of an international obligation: this latter class of disputes obviously includes the former. Both the applicant and the respondent Governments appear to have understood Judgment No. 7 in the sense just outlined, and, as the Case sets out they actually entered into negotiations with a view to determining the reparation due to the two Companies; the Polish Government even suggested that the negotiations be carried on directly with the Companies concerned.

[101] Since the jurisdiction of the Court in the present case is based on Article 23, paragraph 1, of the Geneva Convention which stipulates that: [p36]

[Translation]

"Should divergences of opinion resulting from the interpretation and from the application of Articles 6 to 22 arise between the German Government and the Polish Government, they should be submitted to the decision of the Permanent Court of International Justice.[FN1]"

it follows that the Court has no jurisdiction where there is no divergence of opinion. Now, the Case says:

[Translation]

"Thus there is no more a divergence of opinion between the two Governments that the reparation should be made, in principle, by way of a pecuniary indemnity.[FN2]"

[FN1] "Si des divergences d'opinion, résultant de l'interprétation et de l'application des articles 6 à 22, s'élevaient entre le Gouvernement allemand et le Gouvernement polonais, elles seraient soumises à la décision de la Cour permanente de Justice internationale."

[FN2] "Ainsi, il n'existe plus de divergence d'opinion entre les deux Gouvernements que la réparation doit être faite, en principe, par la voie d'une indemnisation pécuniaire."

[102] The principle of reparation seems, therefore, admitted; for there is not even a divergence of opinion as to the further question, what form reparation should take.

[103] The jurisdiction of the Court in any given case cannot be taken to rest on facts contrary to what is alleged by the Applicant. In the present case, a lack of such a divergence in the matter of submission No. 1 appears from the statements of the applicant Government.

[104] The conclusion to be drawn is not weakened by the fact that submission No. 1 asks for the determination of the time limits of the damage; for these are the logical time limits within which the damage must lie, whether or not the Court has jurisdiction to estimate it. Nobody can be made responsible for any damage before it has arisen, and a court in estimating damage will consider those of its aspects which, at the time of estimating, it will be in a position to appreciate.

II. [Jurisdiction Over Submissions 2-4]

[105] The judgment which has just been delivered holds that the jurisdiction of the Court to entertain submissions Nos. 2-4 of the [p37] Case, follows from the jurisdiction to decide upon the demand for reparation.

[106] Yet in international law jurisdiction to decide, in principle, that a violation of an international engagement has taken place and that, consequently, reparation is due, is distinct from jurisdiction to determine the nature and extent of reparation in general and the amount of a pecuniary indemnity in particular.

[107] I agree that the classification of international disputes (of a legal character) which would be of most importance in the present case, is the classification adopted in Article 13 of the Covenant of the League of Nations, and reappearing in Article 36 of the Statute of the Court. Article 36 of the Statute provides that a State may accept the jurisdiction of the Court:

... in all or any of the classes of legal disputes 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."

[108] It is quite possible that a State should accept the optional clause, for instance, as to disputes belonging to class (c) only, or to classes (a) and (c). The State in question would not thereby accept, and would not be presumed to accept, the jurisdiction of the Court as to class (d). The classes were understood to be distinct, and jurisdiction to decide disputes belonging to one class cannot be assumed to imply jurisdiction to decide disputes belonging to another class. In the present case, jurisdiction under Article 23, paragraph 1, of the Geneva Convention, relates only to disputes which would fall, as was submitted by the respondent Government, into classes (a) and (c).

[109] Neither can jurisdiction to decide disputes belonging to one class be deduced from jurisdiction to decide disputes belonging to another class, by estimating the relative importance of both classes; for the estimate will depend, like every question of the relative importance of things, on the criterion adopted as basis of the comparison. And even if a comparison could be made with [p38] the help of a universally accepted criterion, it could still not be inferred that jurisdiction concerning the more important class of disputes implies jurisdiction concerning a different, though less important class. For the Parties might purposely have conferred on a court-and most of all on this Court-the competence to settle the most important disputes, without wishing to burden the Court with disputes of less importance, particularly since, by deciding on the interpretation of a treaty stipulation or on the correctness of its application, the Court could probably point the way for the solution, or prevention, of a number of disputes, while the question of reparation might have to be considered in each individual case.

[110] It seems, indeed, to have been an established practice long before the adoption of the Covenant of the League of Nations and of the Statute of the Court, in cases in which an arbitral tribunal was to deal with the questions of the amount of reparation or the mode of payment, as distinguished from or in addition to a divergence of opinion as to the interpretation of a treaty or as to a violation of a treaty or of a rule of general international law, to specify such powers of the tribunal in the compromis.

III. [Jurisdiction To Assess Damages And Mode of Payment]

[111] While jurisdiction to assess the damages and to fix the mode of payment does not, in international law, follow automatically from jurisdiction to establish the fact that a treaty has not been applied, although it should have been applied, it is necessary to consider whether the Parties to the Geneva Convention did not intend to confer upon the Court that jurisdiction.

[112] Two preliminary remarks must be made.

[113] First, the answer to the question just formulated turns, not on the interpretation of any of Articles 6 to 22 of the Geneva Convention, but on the interpretation of Article 23 itself ; for the question is, whether Article 23, paragraph 1, should be read as conferring on the Court jurisdiction to decide what reparation is due to individuals from the Polish State (this is the correct term used in Article 3 of the Convention) if the Polish Government fails to act in conformity with Articles 6 to 22. [p39]

[114] Secondly, the intention to confer upon the Court such a jurisdiction must be ascertainable either from the wording of the compromise clause or at least from the circumstances in which the clause was drawn up, and it must be ascertainable in a way which demonstrates that the force of the arguments militating in favour of the Court's jurisdiction is preponderant.

[115] No affirmative answer to the question of the Court's jurisdiction in the matter of submissions 2-4 can be gleaned from Article 23. The words "interpretation and application" do not, by themselves, imply such an affirmative answer. They refer to processes, of which one, interpretation, is that of determining the meaning of a rule, while the other, application, is, in one sense, that of determining the consequences which the rule attaches to the occurrence of a given fact; in another sense, application is the action of bringing about the consequences which, according to a rule, should follow a fact. Disputes concerning interpretation or application are, therefore, disputes as to the meaning of a rule or as to whether the consequences which the rule attaches to a fact, should follow in a given case. Now, Articles 6 to 22 of the Geneva Convention do not prescribe any specific consequences which should follow if the Polish Government were to disregard the rule laid down in Article 6. Therefore, although such a disregard would be a violation of the Convention, yet the determination of the nature and the extent of the reparation would not be the settlement of a dispute concerning the interpretation or application of Articles 6 to 22.

[116] The word "resulting from", used in Article 23, although different from the words "concerning", "in the matter of", generally used in compromise clauses in connection with the words "interpretation and application", does not give to Article 23 a different meaning, which would prevent it from remaining a typical compromise clause. For every divergence of opinion "in the matter of" interpretation or application is, in a sense, a divergence of opinion "resulting from" interpretation or application, since, until each side has arrived at an opinion as a result of the process of interpretation 'or application of the treaty (application in the sense of determining the consequences which the treaty attaches to the occurrence of a fact), there can be no divergence of opinion in the matter of interpretation or application. The word "resulting" connects [p40] the divergence of opinion with its nearest cause, i.e. the process of interpretation or application.

[117] One might be tempted to maintain that since non-application, i.e., failure to bring about the consequences which a rule attaches to a fact, is bad application, and since bad application is a kind of application (in the second sense), therefore divergences of opinion, in the matter of reparation to be made for such non-application are divergences of opinion resulting from application. Yet non-application is not application. If the treaty contains rules concerning such reparation, the determination of such reparation is clearly application (in the first sense) of the treaty. But if the treaty does not contain such rules, divergences of opinion in the matter of reparation due for violations of the treaty are divergences of opinion in the matter of general, as distinguished from conventional, international law.

[118] Since, therefore, the words "interpretation and application" do not necessarily relate to the determination of the nature and extent of reparation for the violation of a treaty, it follows that to base such a jurisdiction on Article 23 would require an extensive interpretation, whereas not to deduce such a jurisdiction from that article would imply the natural and not a restrictive interpretation. In other words, a presumption must be taken to exist, not for, but against deducing that jurisdiction from Article 23. The presumption would, of course, be defeated if it could be shown that at the time of the Geneva Convention, or

shortly before that time, the meaning of the compromise clause was generally understood to be such as the clause has now been declared to have. But nothing has been brought to the attention of the Court to prove conclusively that the clause "interpretation and application" was considered in the practice of nations, during the last quarter of the nineteenth or in the twentieth century, up to the time of the Geneva Convention, to comprise jurisdiction in the matter of the determination of the nature and extent of reparation for the violation of the treaty in question. In particular, no such deduction can be made from the Postal Convention, to which reference was made, but which establishes a specific case of responsibility of the postal administrations. [p41]

[119] On the other hand, it is not easy to defeat the inference from the Russian Explanatory Memorandum which accompanied the Russian project for an arbitration convention in 1899 and which divides all possible international conflicts into two groups, one of them comprising cases in which

[Translation]

"one State demands from another an indemnity of a material kind for damages and losses caused to itself or to its nationals by the acts of the defendant State or of its nationals, which it considers not to be in conformity with the law",[FN1]

while the other group comprises cases in which

[Translation]

"one State demands from the other that it exercise or do not exercise certain specified attributes of the Sovereign Power, that it do or do not do certain specified acts which do not relate to material interests". [FN2]

[FN1] "Un Etat demande a un autre une indemnisation matérielle pour dommages et pertes causes a lui-même ou a ses ressortissants par des actes de l'Etat défendeur ou de ses ressortissants qu'il juge n'être pas conformes au droit."

[FN2] "Un Etat demande a un autre d'exercer ou de ne pas exercer certaines attributions déterminées du Pouvoir souverain, de faire ou de ne pas faire certains actes déterminés ne touchant pas a des intérêts d'ordre matériel."

[120] It is to the latter group that belong, among other disputes, the disputes concerning the interpretation and application of treaties, some of which were enumerated in the Russian project itself. While ultimately the Conference of 1899 did not adopt the principle of obligatory arbitration, even for the cases originally suggested by the Russian project, the Committee proposals accepted, in principle, the Russian division, and in all the history of the proceedings of the committees of the Conference, there seems to be nothing to suggest that the division outlined in the Russian explanatory note was not considered correct. It is difficult, therefore, to admit that the group of disputes concerning interpretation and application of treaties was supposed to include ipso facto disputes concerning the amount of damages to be paid in case of the violation of such treaties. [p42]

[121] In view, however, of the judgment now delivered, any treaty henceforward concluded, containing a compromise clause similar to that of Article 23 of the Geneva Convention, will have to be interpreted in the light of this judgment.

IV. [Jurisdiction to Interpret an Article and a Consequence of a Fact]

[122] The question arises whether it is permissible to interpret Article 23, paragraph 1, of the Geneva Convention as conferring upon the Court jurisdiction to decide only (1) how an article should be interpreted and (2) whether, in a given case, the consequences which should follow from a given fact have followed, without giving the Court the further power of deciding what reparation is due and in what way it should be made. The answer to this question was given by the Court in Judgment No. 7, when it dealt with the question of declaratory judgments. Moreover, while in the law of various countries it is possible to observe the development of the institution of declaratory judgments, in international relations a judgment of this Court, establishing the fact that a violation of a treaty has occurred, has no less power of settling a dispute than a subsequent judgment determining the amount of damages to be paid.

V. [Exclusive Jurisdiction]

[123] Next it must be considered whether the general construction of Part I of the Geneva Convention does not make it imperative to assume that the Court, and no other tribunal, has jurisdiction in cases like the present. The decision contained in Judgment No. 6 is of course binding, so far as the question, which was then before the Court, is concerned. As to the question which has now been raised, it seems that Heads I - III of Part I of the Convention form one whole. Head II lays down the general principle of respect for acquired rights. Head III, while maintaining the principle, permits of certain exceptions. It is possible, but it is not a priori necessary to suppose that the general remedies under Head II, which lays down the rule, should not be available in cases falling under Head III, which, while admitting exceptions, confirms the same rule. [p43]

[124] Both interpretations being admissible, it seems that there is a presumption in favour of that interpretation which (1) allows the individual to apply to a tribunal for the protection of his rights, without making that protection depend on a decision of the government, and (2) diminishes the amount of litigation, and therefore of disputes, between States.

[125] Of course, from now on, the judgment now passed must be considered as determining the question in a way which could only be changed by a new agreement of both Parties.

VI. [Jurisdiction Inferred From Contemporanea Expositio]

[126] It remains to consider whether an intention of the Parties to the Geneva Convention to confer the jurisdiction in question on the Court may not be inferred from a contemporanea expositio, to be gathered, in the words of Sir Robert Phillimore, from the acts of the Parties which preceded, accompanied, and followed soon after the making of the treaty.

[127] On behalf of the respondent Government, attention was drawn to Article II of a Convention concluded by Poland with Germany on April 21st, 1921, i.e. about a year before the conclusion of the Geneva Convention. That article provides that:

"Each High Contracting Party shall be entitled to refer any disputes which may arise either as to the interpretation or the application of the present Convention, to the decision of a permanent tribunal of arbitration

"The Tribunal shall decide all disputes on the basis of the provisions of this Convention, and on the general principles of law, and of equity.

"It shall be competent to decide the amount, if any, of compensation to be made to the injured Party by the Party found guilty of any infraction of the provisions of this Convention."

[128] Since both Conventions were concluded by the same Parties within a short space of time, the fact of the omission in the later Convention of a clause which, in the earlier, supplemented the statement of the jurisdiction conferred on the tribunal in question, [p44] seems to convey an indication that the omission was intentional and that it was not desired to produce the effects which the clause inserted in the earlier, but not in the later Convention, was to produce.

[129] As to the attitude of the Parties after the conclusion of the Geneva Convention, which is valuable as an indication of the views of the Parties regarding the clause in question and as calculated to throw light on the intention of the Parties at the time of the conclusion of the Convention, an inference may be drawn from the fact that the action which was brought by the German Government against the Polish Government in 1925 and which led to judgments Nos. 6 and 7, was stated, on behalf of the German Government, in the pleadings, not to demand restitution or indemnity and to have been limited to a demand for a declaration, for this reason, among others, that doubts might possibly arise whether the Jurisdiction under Article 23 relative to divergences of opinion "concerning" the interpretation and application of certain stipulations would also comprise reparation on account of an interpretation or application not in conformity with those stipulations. It was added that while the German Government believed that in principle such a jurisdiction should be considered as established, it did not desire to burden its Application with this delicate problem.

[130] It would appear, therefore, that as late as 1925 the German Government was not convinced of the undeniable correctness of the interpretation now suggested. Nothing has been alleged before the Court in the present proceedings to suggest that the Polish Government has admitted the correctness of such an interpretation of Article 23. The inference from this attitude of both Parties is that they had at the time of the conclusion of the Geneva Convention no intention to give to Article 23 a meaning such as is now suggested.

[131] I agree, however, that in the question of the jurisdiction of the Court and of the tribunals of the Geneva Convention, the present judgment will henceforth be binding,

(Signed) Ludwik Ehrlich.