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Docket VIII.
Judgment No. 6
25 August 1925

PERMANENT COURT OF INTERNATIONAL JUSTICE
Eighth (Ordinary) Session

Case concerning certain German interests in Polish Upper Silesia

Germany v. Poland
Judgment

BEFORE:	President:	Huber
	Vice-President:	Weiss
	Former President	Loder
	Judges:	Lord Finlay, Nyholm, de Bustamante, Altamira, Oda, Anzilotti, Pessôa,
	Deputy Judge(s):	Wang
	National Judge:	Count Rostworowski, Rabel

Represented By:	Germany:	Dr. Erich Kaufmann, Professor at Bonn
	Poland:	M. Mrozowski, President of the Supreme Council of Warsaw, M. Limburg, Leader of the Bar at The Hague, and M. Sobolewski, Assistant Delegate to the Reparations Commission

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[p5] Preliminary Objections taken by the Government of the Polish Republic.

THE COURT,
composed as above,
having heard the observations and conclusions of the Parties,
delivers the following judgment:

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[1] The Government of the German Reich, by an Application instituting proceedings filed with the Registry of the Court on May 15th, 1925, 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 certain German interests in Polish Upper Silesia. These interests concerned in the first place the taking over by a delegate of the Polish Government of control of the working of the nitrate factory at Chorzów, the taking possession by him of the movable property and patents, licences, etc., of the company which had previously worked the factory, and the removal from the land registers of the name of this company as owner of certain landed property at Chorzów and the entry of the Polish Treasury in its place. In the second place, these interests concerned the notice given by the Government of the Polish Republic to the owners of certain large agricultural estates of its intention to expropriate these properties.

[2] It is submitted in the Application:

1. (a) that Article 2 of the Polish Law of July 14th, 1920, constitutes a measure of liquidation as concerns property, rights and interests acquired after November nth, 1918, and that Article 5 of the same law constitutes a liquidation of the contractual rights of the persons concerned;
(b) that, should the decision in regard to point (a) be in the affirmative, the Polish Government in carrying out these liquidations has not acted in conformity with the provisions of Articles 92 and 297 of the Treaty of Versailles;
2. (a) that the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke and Bayrische Stickstoffwerke [p6] Companies was not in conformity with Article 6 and the following articles of the Geneva Convention;
(b) should the decision in regard to point (a) be in the affirmative, the Court is requested to state what attitude should have been adopted by the Polish Government in regard to the Companies in question in order to conform with the above-mentioned provisions;
3. that the liquidation of the rural estates belonging to Count Nikolaus Ballestrem; to the Georg Giesches Erben Company; to Christian Kraft, Fürst zu Hohenlohe-Oehringen; to the Vereinigte Königs -und Laurahütte Company; to the Baroness Maria Anna von Goldschmidt-Rothschild (nee von Friedländer-Fuld); to Karl Maximilian, Fürst von Lich-nowsky; to the City of Ratibor ; to Frau Gabriele von Ruffer (née Gräfin Henckel von Donnersmarck); to the Godulla Company and to Frau Hedwig Voigt, would not be in conformity with the provisions of Article 6 and the following articles of the Geneva Convention.

[3] In the course of the oral proceedings in Court, the German representative stated that he withdrew submission No. 3, in so far as it concerned the agricultural estate belonging to Madame Hedwig Voigt; this statement was duly recorded.

[4] The Application instituting proceedings was, in accordance with Article 40 of the Statute, communicated to the Government of the Polish Government on May 16th, 1925. That Government informed the Court on June 12th and 18th that it felt obliged in this suit to make "certain preliminary objections of procedure, and, in particular, an objection to the Court's jurisdiction to entertain the suit"; these objections it intended to set out in a Case which would be filed before the end of the month of June, that is to say in sufficient time "to enable the Court to commence the oral proceedings in regard to these objections of procedure on July 15th".

[5] The representative of the German Government, on being informed of the Polish Government's communication, also made a statement to the effect that the German Reply to the Polish Case on the question of jurisdiction would be filed in sufficient time, whereupon July 10th was fixed as the date for the filing of the German Counter-Case in reply to the Polish Government's Case [p7] setting out the preliminary objections which that Government intended to make.

[6] The Polish Case, which was headed "Réponse exceptionnelle to the Application of the German Government dated May 15th, 1925", was filed with the Registry and communicated to

the representative of the German Government on June 26th. It was submitted in this document that:

(a) in regard to suit No. I (the factory at Chorzów), the Court should declare that it had no jurisdiction or, in the alternative, that the application could not be entertained until the German-Polish Mixed Arbitral Tribunal had given judgment;
(b) in regard to the suits grouped under No. II (the large agricultural properties), the Court should declare that it had no jurisdiction, or, in the alternative, that the application could not be entertained.

[7] The German Counter-Case, which is headed "Observations of the German Government concerning the objections taken in the reply of the Polish Government to the Application of the German Government concerning certain German interests in Polish Upper Silesia", was filed with the Registry and communicated to the Polish representative on the day fixed. The German Counter-Case, whilst abstaining from making any definite submissions, endeavours to refute the submissions made in the Polish Case.

[8] In support of their submissions or arguments, the Parties have placed a number of documents before the Court, as annexes to their "Reply" and "Observations". The German Government has also filed a collection of "Documents concerning the question of the Nitrate Factory at Chorzów".

[9] Furthermore, the Court has heard, in the course of public sittings held on July 16th, 18th and 20th, the statements of MM. Mrozowski and Limburg, agents for the Polish Government, and of Professor Kaufmann, agent for the German Government.

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THE FACTS.

[10] Before commencing the legal examination of the preliminary objections raised by the Polish Government, it is necessary briefly [p8] to state the facts which have led up to the institution of proceedings by the German Government. A distinction must be made between the facts relating respectively to each of the two groups of interests referred to in the German Application, namely, those connected with the factory at Chorzów and those connected with the notice of an intention to proceed to expropriation given to certain owners of large agricultural estates.

A. -The Factory at Chorzów.

[11] On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayrische 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 months' notice. The contract could be terminated as early as March 31st, 1921, always on condition of fifteen months' notice being given, if the Reich's share of the surplus did not reach a fixed level.

[12] 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 [p9] stocks. The management and working were to remain in the hands of the Bayrische 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 Amstgericht of Konigshiitte, in the Chorzów land register, as owner of the landed property constituting the nitrate factory of Chorzów.

[13] 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.

[14] 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.

[15] 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."

[16] 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).

[17] The suit was admitted to be ready for hearing on October 15th, 1923. It is, however, still pending. [p10] 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 �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 Bayrische Stickstoffwerke Company such movable property, or, should this be impossible, the equivalent value, and also to repay to the applicant or to the Bayrische Stickstoffwerke Company the amount of the debts collected."

[18] 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.

B. -The large agricultural Estates.

[19] The Monitor Polski of December 30th, 1924, contains notice of the Polish Government's intention to expropriate certain large estates situated in Polish Upper Silesia and belonging to twelve proprietors, amongst whom were

Count Nikolaus Ballestrem,
The Georg Giesches Erben Company,
Christian Kraft, Fürst zu Hohenlohe-Oehringen,
The Vereinigte Königs-und Laurahütte Company,

Baroness Maria Anna von Goldschmidt-Rothschild, née von
Friedländer-Fuld,
Karl Maximilian, Fürst von Lichnowsky, The City of Ratibor, Frau Gabriele von Ruffer,
née Gräfin Henckel von Donnersmarck,
The Godulla Company,
Frau Hedwig Voigt.

[20] As stated at the hearing by the representative of the Polish Government, and as already mentioned, notice was subsequently [p11] withdrawn in the case of Frau Hedwig Voigt, the competent Polish authorities having recognized that this lady was entitled to retain her domicile in Polish Upper Silesia.

[21] These notifications were issued on the basis of the provisions of Article 15 of the Germano-Polish Convention concerning Upper Silesia, concluded at Geneva on May 15th, 1922. They contained an invitation to those concerned to submit any objections or observations within a fixed time.

[22] It is not alleged that in any case such notice has been followed by actual expropriation.

[23] Six of the proprietors mentioned above have brought actions before the Germano-Polish Mixed Arbitral Tribunal, in accordance with Article 19 of the Convention concerning Upper Silesia; the object of these actions is to obtain an order suspending expropriation proceedings and a declaration that such proceedings are illegal. Two of these actions are pending, but in the other four notice of proceedings has not yet been served on the defendant. As regards at least one of the actions pending, the Polish Government has disputed the jurisdiction of the Mixed Arbitral Tribunal.

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THE LAW.

[24] Before considering the preliminary objections made by Poland, it should be observed that the two Parties agree in recognizing that Article 23 of the Geneva Convention falls within the category of "matters specially provided for in treaties and conventions in force", mentioned in Article 36 of the Court's Statute, and the Polish Government does not dispute the fact that the suit has been duly submitted to the Court in accordance with Articles 35 and 40 of the Statute. But Poland raises an objection and submits that the Court should give judgment to the effect that the German Application refers to a difference which is not covered by Article 23 of the Convention of Geneva and, should this submission be rejected, that, even if the Court had jurisdiction, the Application could not be entertained.

[25] The Court finds as follows: The Application states in two Chapters, Nos. I and II, the facts and allegations on which its submissions [p12] are based. Chapter I relates to the taking possession by the Polish Authorities of the factory at Chorzów and of the movable property connected with it; it also states the German Government's opinion concerning the scope of certain clauses of the Polish Law of July 14th, 1920, and of the Treaty of Versailles. Chapter II, on the other hand, deals with the notice of intention to expropriate certain large agricultural estates.

[26] Submissions Nos. 1 and 2 of the German Application evidently relate to Chapter I of the statement, whilst submission No. 3 relates to Chapter II.

[27] The Polish Objection, in its submissions, follows the division into two chapters of the German Application, the first submission referring, according to the actual terms of the Polish Case, to Chapter I, whilst the second relates to Chapter II.

[28] It follows that the first Polish submission which refers to l'affaire I, the so-called "Case of the Factory at Chorzów", of the German Application, questions the Court's jurisdiction to deal

with either Submission No. 1 or Submission No. 2 of the German Application.

[29] In the form in which it is drafted, Submission No. 1 of the German Application seems to deal exclusively with the Polish Law of July 14th, 1920, and the relation between this law and Articles 92 and 297 of the Treaty of Versailles. It cannot be regarded as in terms relating to a difference of opinion respecting the construction and application of Articles 6 to 22 of the Geneva Convention. But in the light, more particularly, of the statement contained in Chapter I of the German Application, it is clear that Submission No. 1 may contemplate questions relating to the case of the factory at Chorzów and may have been made in regard to such questions.

[30] Having regard to this uncertainty as to the exact bearing of Submission No. 1 of the German Application, a declaration by the Court that it has jurisdiction to deal with l'affaire I mentioned in the first submission of the Polish Objection, must in no way prejudice the question of the extent to which the Court may see fit to deal with the questions contemplated by Submission No. 1 of the German Application, in the proceedings on the merits.

[31] For these reasons, the Court will consider separately the Polish submissions regarding l'affaire I, relating to the factory at Chorzów, and those relating to the large agricultural estates. [p13]

A. -The Factory at Chorzów

I.

The Plea to the Jurisdiction.

[32] Poland's first and principal objection, in the case of the factory at Chorzów, is an objection to the Court's jurisdiction. It will be well at this point to recall the terms of Article 23 of the Convention of Geneva on which the Court's jurisdiction -if it has jurisdiction -to try the suit on its merits must be based. This article runs as follows:

[Translation.]
"1. -Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice.
"2. -The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace of Versailles shall not thereby be prejudiced."

[33] Poland bases her objection on three different arguments; she contends : (a) that the Court has no jurisdiction because the existence of a difference of opinion in regard to the construction and applica-tion of the Geneva Convention had not been established before the filing of the Application; (b) that the Court has no jurisdiction be-cause the dispute is not one of those contemplated under Article 23; and (c) that the Court has no jurisdiction because submission 2 (b) of the Application is equivalent to a request for an advisory opinion, which cannot be made by an individual State, but only by the Council or Assembly of the League of Nations. As regards the last point, the Court considers that it rather affects the question whether the suit can be entertained, and will therefore take it together with Poland's subsidiary submission.

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[34] -As regards the first argument advanced by Poland in support of her contention that the Court has no jurisdiction to deal with submissions 1 and 2 of the German Application, the following [p14] facts should be noted: Article 23, differing in this respect from many compromissory clauses, but resembling certain other provisions of the Geneva Convention giving jurisdiction to the Mixed Commission or to the Arbitral Tribunal set up by it, does not stipulate that diplomatic negotiations must first of all be tried; nor does it lay down that a special procedure of the kind provided for in Article 2, No. 1, must precede reference to the Court. A comparison, therefore, between the various clauses of the Geneva Convention dealing with the

settlement of disputes shows that under Article 23 recourse may be had to the Court as soon as one of the Parties considers that a difference of opinion arising out of the construction and application of Articles 6 to 22 exists.

[35] Now a difference of opinion does exist as soon as one of the Governments concerned points out that the attitude adopted by the other conflicts with its own views. Even if, under Article 23, the existence of a definite dispute were necessary, this condition could at any time be fulfilled by means of unilateral action on the part of the applicant Party. And the Court cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned.

[36] Lastly, it has been contended that according to Article 23 there must be "a difference of opinion respecting the construction and {et) application of" the articles in question, the conjunction et being regarded as having a cumulative meaning. The Court cannot attribute this scope to the word et which, in both ordinary and legal language, may, according to circumstances, equally have an alternative or a cumulative meaning. This point, however, is without practical importance, as the present case concerns both construction and application. As will be demonstrated later, the discussion of the case of the factory at Chorzów relates to a concrete instance of the application of treaty stipulations differently interpreted by the Parties.

[37] 2. -The argument on which Poland seems principally to base her objection, and on which the Cases and statements by Counsel chiefly bear, is the alleged non-existence of a difference of opinion respecting the construction and application of Articles 6 to 22 of the Geneva Convention. The Polish Government contends that the difference of opinion between the Parties does not relate to Articles [p15] 6 to 22 of the Geneva Convention, but solely to the interpretation of the law of 1920. According to the Application, this law is a measure of liquidation; in Poland's contention, its effect is simply to annul acts alleged to be contrary to the obligations arising out of Article 256 of the Treaty of Versailles and the Protocol of Spa. And, in the view of the Polish Government, differences of opinion regarding the interpretation of the law of 1920 do not fall within the scope of Article 23 of the Geneva Convention which governs the Court's jurisdiction.

[38] It is clear that the Court's jurisdiction cannot depend solely on the wording of the Application; on the other hand, it cannot be ousted merely because the respondent Party maintains that the rules of law applicable in the. case are not amongst those in regard to which the Court's jurisdiction is recognized. The Court must, in the first place, consider whether it derives from Article 23 of the Geneva Convention jurisdiction to deal with the suit before it and, in particular, whether the clauses upon which the decision on the Application must be based, are amongst those in regard to which the Court's jurisdiction is established.

[39] In this connection, the Court observes in the first place that the objection to the jurisdiction filed by the Polish Government was submitted at a time when no document of procedure upon the merits had been filed and that, in consequence of the objection, the proceedings on the merits of the suit were suspended. In these circumstances, and although Poland herself has not refrained from taking some of the arguments advanced by her in support of her objection from the merits of the case, the Court cannot in its decision on this objection in any way prejudge its future decision on the merits. On the other hand, however, the Court cannot on this ground alone declare itself incompetent; for, were it to do so, it would become possible for a Party to make an objection to the jurisdiction -which could not be dealt with without recourse to arguments taken from the merits -have the effect of precluding further proceedings simply by raising it in limine litis; this would be quite inadmissible.

[40] The Court, therefore, for the purposes of the decision for which it is now asked, considers that it must proceed to the enquiry above referred to, even if this enquiry involves touching upon subjects belonging to the merits of the case; it is, however, to be [p16] clearly understood that nothing which the Court says in the present judgment can be regarded as restricting its entire freedom to estimate the value of any arguments advanced by either side on the same subjects during the proceedings on the merits.

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[41] The preceding statement of the points in regard to which the Parties disagree shows that the difference of opinion between them relates to the question whether, in the case of dispossession under consideration, Articles 6 to 22 of the Geneva Convention are or are not applicable, that is to say to the extent of the sphere of application of those articles.

[42] Article 6 of the Convention is as follows:

[Translation.]
"Poland may expropriate in Polish Upper Silesia in conformity with the provisions of Articles 7 to 23 undertakings belonging to the category of major industries including mineral deposits and rural estates. Except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia."

[43] Thus Article 6 on the one hand recognizes Poland's right to expropriate, in conformity with the provisions of Articles 7 to 23, certain industrial undertakings and agricultural estates and, on the other hand, stipulates that except as provided in these clauses, the property, rights and interests of German nationals or of companies controlled by German nationals may not be liquidated in Polish Upper Silesia.

[44] So that, whatever may be the relation between the two sentences of the article, and whatever may be the scope, in this article, of the conceptions of "liquidation" and "expropriation", it is clear that it is intended to define Poland's powers in regard to this point and in the territory in question.

[45] It follows that the differences of opinion contemplated by Article 23, which refers to Articles 6 to 22, may also include differences of opinion as to the extent of the sphere of application of Articles 6 to 22 and, consequently, the difference of opinion existing between the Parties in the present case.

[46] In the course of the oral proceedings it was contended on behalf [p17] of Poland that the question was one of vested rights, a question governed by Articles 4 and 5 of the Geneva Convention, in regard to which the Court was not given jurisdiction. The German Government, on the contrary, had maintained that the applicable clauses are those contained in Articles 6 to 22. These conflicting contentions, by emphasizing the fact that the difference of opinion relates to the sphere of application of the articles last mentioned, corroborate the view adopted by the Court.

[47] 3. -Poland considers that the Geneva Convention is not applicable and that, therefore, the Court has no jurisdiction, because, as she contends, the property in question does not belong to German nationals but to the Polish State, as successor of the German Reich in the property rights under Article 256 of the Treaty of Versailles, and that for this reason there is no question of liquidation or expropriation of an undertaking belonging to German nationals. In regard to this reasoning, the Court adopts the following line of argument :

(a) It does not appear from the documents laid before the Court and it has not even been contended that the industrial undertaking under consideration at any time belonged, in its entirety, to the German Reich. The German Reich had advanced, under the contract of March 5th, 1915, the funds for the purchase of the necessary land and to construct the factory; for this reason it had been entered in the land register as owner of the estate. But an undertaking as such is an entity entirely distinct from the lands and buildings necessary for its working, and in the present case it can hardly be doubted that, in addition to the real property which had belonged to the Reich, there were property, rights and interests, such as patents and licences, probably of a very considerable value, the private character of which cannot be disputed and which were essential to the constitution of the undertaking.
As Article 6 of the Geneva Convention refers to undertakings of "major industries" and as this article is intended to ensure the continuity of economic life, the factory at Chorzów must be

regarded as a whole. Whatever may be the effect of Article 256 of the Treaty of Versailles as regards real property which had belonged to the Reich, the undertaking as such, in the opinion of the Court, falls under the terms of Article 6 and the following articles of the Geneva Convention. [p18]
It is true that the application of the Geneva Convention is hardly possible without giving an interpretation of Article 256 of the Treaty of Versailles and the other international stipulations cited by Poland. But these matters then constitute merely questions preliminary or incidental to the application of the Geneva Convention. Now the interpretation of other international agreements is indisputably within the competence of the Court if such interpretation must be regarded as incidental to a decision on a point in regard to which it has jurisdiction.
(b) It is established that the Bayrische Stickstoffwerke is a German company the private character of which is not disputed. This Company had, under the contract of March 5th, 1915, with the Reich and also under the correspondence of December 24th to 28th, 1919, exchanged with the Oberschlesische Stickstoffwerke a contract for the operation of the factory obliging and authorizing it to work the factory under the same technical conditions as its own factories. The taking over of the factory by Poland put an end to this situation and consequently affected rights and interests possessed by German nationals in Polish Upper Silesia. The real property, the ownership of which Poland claims, was, at the time when the Geneva Convention came into operation, entered in the land register as the property of a German company which, as such, falls within the scope of Article 6 of that Convention and whose existence as a German company is not disputed.

[48] The jurisdiction possessed by the Court under Article 23 in regard to differences of opinion between the German and Polish Governments respecting the construction and application of the provisions of Articles 6 to 22 concerning the rights, property and interests of German nationals is not affected by the fact that the validity of these rights is disputed on the basis of texts other than the Geneva Convention.

II.

Admissibility of the Suit.

[49] The Polish Government has not confined itself to raising an objection to the Court's jurisdiction to deal with the German application concerning the factory of Chorzów which is now before [p19] the Permanent Court of International Justice. As an alternative it submits that this application cannot be entertained until the Germano-Polish Mixed Arbitral Tribunal in Paris has given judgment in the dispute regarding the same factory, which the Oberschlesische Stickstoffwerke Company submitted to that Tribunal on November 10th, 1922.

[50] Is this one of those grounds of defence based on the merits of the case and calculated to cause the judge to refuse to entertain the application, such as are generally called -in French law for instance -by the name of fins de non-recevoir ? Or is it not rather . a genuine objection, directed -like that which has just been considered by the Court -not against the action itself and the legal arguments on which it is based, but against the bringing of the action before the tribunal?

[51] In the case of a municipal court, it would be of some interest to solve this question in order to determine at what stage in the proceedings such a ground of defence might or should be put forward. But, in estimating the value of the alternative submission to the effect that it should suspend judgment in the suit before it, the Court has not to have regard to "the various codes of procedure and the various legal terminologies" in use in different countries.

[52] Whether this submission should be classified as an "objection" or as a fin de non-recevoir, it is certain that nothing, either in the Statute or Rules which govern the Court's activities, or in the general principles of law, prevents the Court from dealing with it at once, and before entering upon the merits of the case; for there can be no proceedings on the merits unless this submission is overruled.

[53] The Polish Government considers that because the Oberschle-sische Stickstoffwerke Company brought an action in 1922 before the Germano-Polish Mixed Arbitral Tribunal sitting in Paris for the restitution of the factory at Chorzów to that Company, which claims ownership of it, judgment on the application subsequently submitted by the Reich to the Court in regard to the same industrial concern must be suspended until judgment has been given in the previous action, which is still pending.

[54] The way in which the Polish Government states its point of view and the deduction which it endeavours to make therefrom show that it does not really advance the plea generally known as litispendance. In point of fact this word does not occur in the [p20] Polish reply; it has only been used in the statements of Counsel, and chiefly, it would seem, as a convenient expression. If, however, the plea were to be examined in accordance with the principles generally accepted in regard to litispendance, the Court would undoubtedly arrive at the conclusion that it is not well-founded. It is a much disputed question in the teachings of legal authorities and in the jurisprudence of the principal countries whether the doctrine of litispendance, the object of which is to prevent the possibility of conflicting judgments, can be invoked in international relations, in the sense that the judges of one State should, in the absence of a treaty, refuse to entertain any suit already pending before the courts of another State, exactly as they would be bound to do if an action on the same subject had at some previous time been brought in due form before another court of their own country.

[55] There is no occasion for the Court to devote time to this discussion in the present case, because it is clear that the essential elements which constitute litispendance are not present. There is no question of two identical actions : the action still pending before the Germano-Polish Mixed Arbitral Tribunal at Paris seeks the restitution to a private company of the factory of which the latter claims to have been wrongfully deprived; on the other hand, the Permanent Court of International Justice is asked to give an interpretation of certain clauses of the Geneva Convention. The Parties are not the same, and, finally, the Mixed Arbitral Tribunals and the Permanent Court of International Justice are not courts of the same character, and, a fortiori, the same might be said with regard to the Court and the Polish Civil Tribunal of Kattowitz.

[56] It would be useless to attempt to prove the contention of the Polish Government in regard to this matter by pointing to the alleged opposition in Article 23 of the Geneva Convention, and saying that this article, which gives the Court jurisdiction to decide differences of opinion respecting the construction and application of Articles 6 to 22 of that Convention, has, in the final clause already referred to, expressly reserved the "jurisdiction of the Germano-Polish Mixed Arbitral Tribunal under the Peace Treaty of Versailles". This reservation is easily explained. Section III of the Geneva Convention, to which it refers, relates in several respects to matters dealt with in the Sections of Part X of the Treaty of Versailles, in regard to which no jurisdiction is provided corresponding to that [p21] subsequently conferred, by the first paragraph of Article 23 of the Geneva Convention, upon the Permanent Court. It was, therefore, essential to state that the right of appeal to the Court, given by this clause to the contracting States as such, in no way affected the right conferred by the Treaty of Versailles on private individuals who had suffered a wrong to bring an action before the Mixed Arbitral Tribunal. The distinction between the two spheres of jurisdiction is thus clearly brought out, and paragraph 2 of Article 23, far from lending support to the Polish submission, supplies in favour of the adverse contention an argument which is of some value.

[57] Thus, the alternative plea, submitted by the Polish Government in the statement of its objections concerning the factory at Chorzów, for the non-suiting of the applicant on the ground of inadmissibility, like the principal objection to the Court's jurisdiction, also fails.

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[58] Nor can the Court admit the fin de non-recevoir incidentally raised against the German Application in the Polish Case and based on Article 14 of the Covenant of the League of Nations.

[59] It is true that this article, which is referred to in the Preamble of the Statute of the Permanent

Court of International Justice, provides that the Court may give advisory opinions at the request of the Council or Assembly of the League of Nations ; a request of this kind directly submitted by a State will not be considered. But, when the Government of the Reich submits under No. 2 (a) of its Application that the attitude of the Polish Government in regard to the Oberschlesische Stickstoffwerke and Bayrische Stickstoffwerke Companies was not in conformity with Article 6 and the following articles of the Geneva Convention, and under 2 (b) asks the Court, should it confirm this submission, to give judgment concerning the "attitude which should have been adopted by the Polish Government in regard to the companies in question in order to conform with the above-mentioned provisions", it is evident that the applicant State could not have intended to obtain an advisory opinion, for which it was not entitled to ask. In point of fact it asks the Court for a decision, but leaves for its Case on the merits the development of the submission set out under point 2, letter (b), of its application and the exposition of the facts to be laid before the Court at that [p22] stage of the proceedings. The observations submitted by the German Government in regard to Poland's statement of objections leave room for no doubt as to the intentions of the former Government, and the interrogative form in which the submission is formulated does not suffice to establish a construction which would place that submission outside the scope of Article 23 of the Convention on which the whole German Application is based.

B. -The large agricultural Estates.

I.

Plea to the jurisdiction.

[60] As regards the large agricultural Estates, the Court's jurisdiction is no less clear than in the case of the factory at Chorzów.

[61] For the reasons already stated in regard to that case, the absence of diplomatic negotiations proving the existence of the difference of opinion which is required under Article 23 of the Convention, cannot prevent the bringing of an action in the present case. Moreover, such absence would be of no practical importance, for even if the application were on this ground declared premature, the German Government would be free to renew it immediately afterwards.

[62] The notice given by Poland, in the Monitor Polski of December 30th, 1924, to the owners of large estates situated in Polish Upper Silesia is based on Article 15, paragraph 1, sub-paragraph 1, of the Geneva Convention which runs as follows:

[Translation.]
"Should the Polish Government desire to expropriate a large estate, it must give notice of its intention to the owner of the estate before January 1st, 1925."

[63] Germany is of opinion that ten of the notices thus given are not in conformity with the provisions of Articles 9, paragraph 3, sub-paragraph 2; 12, paragraph 1; 13, paragraph 2; and 17 of the Convention. [p23]

[64] The clauses in question are as follows:

[Translation.]

Article 9, paragraph 3, sub-paragraph 2.
"Rural estates which are principally intended to meet the requirements of undertakings belonging to the group of major industries (dairy farming estates, timber-raising estates, etc.} shall be considered, for the purposes of this article, as forming part of the undertakings the requirements of which they may serve."
Article 12, paragraph 1.
"Poland may expropriate estates of not less than 100 hectares of agricultural land (hereinafter called large estates) belonging on April 15th, 1922, and on the date of notification-(Article 15) to German nationals who are not entitled to retain their domicile in Polish Upper Silesia (Articles

40 and 42) or to companies controlled by such German nationals. The extent of such estates will be estimated in accordance with the situation on April 15th, 1922."

Article 13, paragraph 2.
"Agricultural estates which, in accordance with Article 9, paragraph 3, sub-paragraph 2, are to be regarded as forming part of undertakings belonging to the category of major industries, shall not be included for the purposes of the calculation of the total area of estates liable to expropriation, and the provisions regarding the expropriation of rural property shall not be applicable to them."
Article 17.
"German nationals who, ipso facto, acquire the nationality of an Allied or Associated Power by application of the provisions of the Treaty of Versailles or who ipso facto acquire Polish nationality by application of the present Convention, shall not be regarded as German nationals for the purposes of Articles 6 to 23." [p24]

[65] The German Government argues in support of its contention that in most cases these notices refer to estates which are principally intended to meet the requirements of undertakings belonging to the category of major industries, and which are considered as forming part of the undertakings, the requirements of which they serve (Article 9, paragraph 3, sub-paragraph 2), and are not subject to the provisions regarding the expropriation of rural property (Article 13, paragraph 2) ; in other cases the estates concerned are not liable to expropriation, because their extent is less than 100 hectares of agricultural land (Article 12, paragraph 1), or because they belong to persons who have ipso facto acquire Czechoslovak nationality under Article 84 of the Treaty of Versailles, or Polish nationality under Article 25, paragraph 1, of the Geneva Convention (Article 17), or again because they belong to a company which "is not controlled by German nationals", or to a city which "cannot be regarded either as a German national or as a company controlled by German nationals" (Article 12, paragraph 1).

[66] Poland replies to these contentions that hitherto she has only given notice of an intention to proceed to expropriation; so that up to the present there has been neither expropriation nor a decision to expropriate, and therefore the Court "is not yet competent" and the application "is premature".

[67] It will, therefore, be seen that the Polish Government does not attempt to deny that the subject matter of this part of the German Application is governed by the above-mentioned provisions of the Geneva Convention (which are to be found in Articles 6 to 22); it recognizes that, in principle, these provisions apply to the property in question and that this must be expropriated in accordance with the articles above-mentioned. It therefore becomes clear that the Polish Government accepts in principle the jurisdiction of the Court in this matter; what it does dispute is that, as alleged by Germany, these provisions are to be interpreted as being compulsorily applicable -and therefore as giving the Court jurisdiction-at the present moment when Poland has merely signified an intention to expropriate.

[68] But this difference of opinion, even when limited in this way, suffices to make it clear that the Court has jurisdiction. According to the wording of Article 23 of the Convention, it is precisely [p25] for cases in which "differences of opinion respecting the construction and application of Articles 6 to 22 arise" between them that the Court's jurisdiction has been accepted by the two Governments. But as the question of notification is governed by Article 15 in conjunction with Articles 9, 12, 13 and 17, that is to say, by provisions included between Article 6 and Article 22 of the Geneva Convention, it is clear that the dispute which has arisen regarding the question whether notice has or has not been given in accordance with these provisions is a difference of opinion respecting the construction and application of certain of the Articles 6 to 22 of the Convention, and therefore falls within the scope of Article 23.

[69] There are two distinct stages in the act of expropriating : notice of the intention to expropriate and the decree of expropriation. Both are dealt with in Article 15 of the Convention.

[70] How should Articles 9, 12, 13, 15 and 17 be interpreted in relation to these two stages ? Should they be regarded as only concerning the latter, which constitutes actual expropriation, or

do they also refer to the first step, the giving of notice ?

[71] Poland takes the former view and Germany the latter.

[72] There is, therefore, an undeniable difference of opinion.

[73] Poland, however, argues that notice of an intention to expropriate is merely an invitation to those concerned to submit their respective claims within a specified time, and that, therefore, the terms of the Convention are not yet applicable to it.

[74] This observation in no way alters the terms of the question. The difference of opinion still subsists ; for Germany, on the other hand, holds that, even reduced to these terms, the act of notification, being an act connected with the execution of measures of expropriation, is undoubtedly an act in application of the Geneva Convention and therefore can only relate to property liable to expropriation under the terms of Articles 9, 12, 13 and 17 of that Convention. Since the property dealt with in these articles can under no circumstances be expropriated, it is clear that it cannot be made the subject of an intention to proceed to expropriation.

[75] The Polish objection is not sound, not only because the right of complaint granted by Poland to the owners is a matter of domestic concern which cannot be used in argument against Germany, but also because, according to Article 20, directly notice has been [p26] given, expropriation is possible under the Geneva Convention without any restriction as to time, and thus becomes for the owner a menace which may continue for two years; and finally because under the terms of the same Article 20 and of Article 16, once notice has been given, the owner cannot, without the consent of the Polish Government, alienate inter vivos either the estate to be expropriated or its accessories, so that the giving of notice places serious restrictions on rights of ownership.

[76] It follows from what has been stated that a difference of opinion exists between Germany and Poland respecting the construction and application of Articles 9, paragraph 3, sub-paragraph 2; 12, paragraph 1; 13, paragraph 2; 15 and 17 of the Geneva Convention (all being provisions included between Article 6 and Article 22 of that Convention) in connection with the notice given to the proprietors enumerated in the Application instituting proceedings; the Court, therefore, under the terms of Article 23 of the same Convention, has jurisdiction also to reserve this part of the suit for judgment on the merits.

II.

Admissibility of the Suit.

[77] In this part of her preliminary objections, Poland returns to the question of the inadmissibility of the Application.

[78] In regard to this question, Poland argues as follows. Article 19, paragraph 2, of the Convention runs as follows:

[Translation.]
"Should the Polish Government come to the conclusion that an undertaking or estate really belongs to a German national, or that a company is really controlled by German nationals, and should the interested party, after notice has been given, contend that this is not the case, the latter may, within one month after receipt of notice, appeal to the Germano-Polish Mixed Arbitral Tribunal for a decision. If necessary, the Mixed Arbitral Tribunal may provisionally suspend expropriation proceedings."

[79] Now the Polish Government says that "six of the proprietors named in the Application filed with the Court have had recourse to this Arbitral Tribunal before which the cases are still pending". [p27]

[80] But, besides the general considerations already set out in regard to this matter in connection with the question of the factory at Chorzów, considerations which apply with full force in the present case, it must be added that, according to the statement of the Polish Government itself, only six of the ten proprietors have appealed to the Germano-Polish Mixed Arbitral Tribunal, and that in only two cases out of these six has actual notice of proceedings been given. Thus, even if the considerations referred to did not hold good, the Court would retain jurisdiction to deal with the case in so far as it concerns the other proprietors.

[81] Furthermore, Article 19 of the Convention contemplates a situation entirely different from that which the Court has to consider; for it only applies to cases in which the Polish authorities are of opinion that an undertaking or an estate really belongs to a German national or that a company is really controlled by German nationals, and in which the interested Party contends that this is not so. But, as has been seen, the hypothesis submitted to the Court is entirely different.

[82] FOR THESE REASONS,
The Court,
having heard both Parties,

I. (1) In affaire I referred to in the plea filed by the Government of the Polish Republic:dismisses this plea ;declares the Application to be admissible;and reserves it for judgment on the merits.
(2) In the affaires II referred to in the plea filed by the Government of the PolishRepublic:
dismisses this plea;
declares the Application to be admissible;
and reserves it for judgment on the merits.
II. Instructs the President to fix, in accordance with Article 33 of the Rules of Court, the times for the deposit of further documents of the written proceedings. [p28]

[83] Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-fifth day of August, nineteen hundred and twenty-five, 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.

[84] M. Anzilotti, while agreeing in the conclusions of the Court, desired to add the following observations in regard to one point in the statement of reasons.

[85] Count Rostworowski, Polish National Judge, declaring that he was unable to concur in the Judgment delivered by the Court, and availing himself of the right conferred on him by Article 57 of the Court's Statute, delivered the separate opinion which follows hereafter.

(Initialled) M. H.
(Initialled) A. H.[p29]

Observations by M. Anzilotti on one point in the Statement of Reasons.

[86] Amongst the reasons set forth in the Judgment, there is one point upon which I regret that I am unable to agree with the Court; this point is, I consider, of sufficient importance to compel me to state the grounds for my disagreement.

[87] I refer to the idea expressed on page 16 and following of the Judgment, where it is stated that the differences of opinion contemplated by Article 23 of the Geneva Convention may also include differences of opinion as to the extent of the sphere of application of Articles 6 to 22, and, consequently, the difference of opinion existing between the Parties in the present case. This

difference is, on page 16 of the Judgment, stated as relating to the question whether, in the case of dispossession under consideration, Articles 6 to 22 of the Geneva Convention are or are not applicable.

[88] In my opinion, this notion is scarcely in harmony with the nature and extent of the Court's jurisdiction.

[89] The nature of the enquiry which the Court must undertake in accordance with Article 36, last paragraph, of its Statute in order to reach the conclusion that the dispute submitted to it falls or does not fall within its jurisdiction, has been laid down in Judgment No. 2 (the Mavrommatis Concessions in Palestine) as follows:

"Neither the Statute nor the Rules of Court contain any rule regarding the procedure to be followed in the event of an objection being taken in limine litis to the Court's jurisdiction. The Court therefore is at liberty to adopt the principle which it considers best calculated to ensure the administration of justice, most suited to procedure before an international tribunal and most in conformity with the fundamental principles of international law.
"For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the [p30] merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes."

[90] I regard this passage as a very accurate statement of the principles of international law which govern the Court's jurisdiction, and I am very glad to note that its essential idea is restated on page 15 of the present Judgment.

[91] That being the case, it follows that, in order to reach the conclusion that the Court has jurisdiction, it is not sufficient to find that the difference of opinion between Germany and Poland relates to the question whether Articles 6 to 22 of the Geneva Convention are or are not applicable in the case of the factory at Chorzów.

[92] The applicability of the above articles is, on the contrary, the very condition of the Court's power to deal with the dispute, for it is only as regards disputes concerning the interpretation and application of these articles that Poland has accepted the Court's jurisdiction.

[93] A dispute on the point whether a particular case falls within Articles 6 to 22 is nothing else than a dispute on the extent of the Court's jurisdiction; it is in virtue of Article 36, last paragraph, of the Statute -and accordingly when it considers the question of its competence -and not in virtue of Article 23 -i.e. at the moment when it deals with the merits of the case -that the Court can deal with such a dispute.

(Signed) D. Anzilotti.[p31]

Dissenting Opinion by Count Rostworowski.

[Translation.]

[94] I very much regret that I am unable to concur with the judgment given, in the suit concerning certain German interests in Polish Upper Silesia, upon the "Plea to the Jurisdiction" filed by the Polish Government on June 25th, 1925.

[95] Without reverting to the various facts set out in the Judgment, it is necessary to take as a starting point the "plea to the jurisdiction" referred to, in which it was submitted that:

(a) in regard to "affaire I” [FN1], the Court should declare that it had no jurisdiction, or in the

alternative that the Application could not be entertained until the German-Polish Arbitral Tribunal had given judgment;
(b) in regard to "affaires II" [FN1] , the Court should declare that it had no jurisdiction, or in the alternative that the Application could not be entertained.

[FN1] Of the German Application. [Author's note.]
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[96] The jurisdiction of the Permanent Court of International Justice, which was accepted by the German Government in its first Application and subsequently affirmed in the German Government's Observations of July 10th, 1925, and in the course of the oral proceedings, was thus disputed by the Polish Government, both in its plea to the jurisdiction and in the statements of Counsel. Poland occupied the position of Applicant. The case was placed upon the list in so far as the objections in question were concerned. The Parties were duly informed of the decision to extend sine die the times fixed for the deposit of the documents of procedure in regard to the merits, should such procedure take place.

[97] Proceedings having thus been commenced solely as concerns the preliminary objections raised by Poland in regard to the Court's jurisdiction, it will be well to examine the legal aspect of the problem. [p32]

I.

[98] According to Article 36, last paragraph, of the Statute:

"In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled, by the decision of the Court."

[99] Such a decision which, if taken, can clearly be based only on the objective law applicable in the particular case, is of a purely declaratory nature; and it can never create a right, i.e. bestow on the Court itself a jurisdiction which is not supported by applicable rules of law either general or particular.

[100] A general rule laid down by Article 36, paragraph 1, of the Statute provides for a compromis between the Parties, which in the present case does not exist. It also refers to special Treaty provisions.

[101] The German-Polish Convention regarding Upper Silesia, concluded on May 15th, 1922, at Geneva, constitutes a special source of jurisdiction of this kind, for it gives the Permanent Court of International Justice jurisdiction in two different sets of circumstances:

(1) that dealt with in Article 2, paragraphs 1 and 2, in conjunction with Article 586, where the Court's jurisdiction is strictly limited and subordinated in each particular case to a previous decision by the German-Polish Mixed Commission; this clause does not come into account;
(2) that provided for in Article 23, which is the only clause that can be invoked in the present case. And it is precisely the applicability of this clause which was affirmed by one Party and denied by the other.

[102] The opposing Parties in the present case left it to the Court to decide whether Article 23 was applicable, being agreed to obtain a decision as to the Court's jurisdiction by means of an interpretation of this article, that is to say by means of an interpretation of their own common intention as expressed in this article.

[103] It would appear that this interpretation should be a strict and even a restrictive one, in order to avoid the possibility of either of the contracting States being placed in the painful position of [p33] having the Court's jurisdiction imposed upon it in a case which had not been willingly provided for in advance.

[104] The opinion given by Mr. Moore (Judgment No. 2, page 60) appears to be must judicious:

"The international judicial Tribunals so far created have been tribunals of limited powers. Therefore, no presumption in favour of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the record."

[105] A general idea of the great care taken by the Court before deciding on a similar point in the case of the Mavrommatis Palestine Concessions is given by the three following passages of Judgment No. 2:

1. "It appears in fact from the documents before the Court and from the speeches. that the preliminary question to be decided is not merely whether the nature and subject of the dispute laid before the Court are such that the Court derives from them jurisdiction to entertain it, but also whether the conditions upon which the exercise of this jurisdiction is dependent are all fulfilled in the present case." (Page 10.)
2. "Before considering whether the case of the Mavrommatis concessions relates to the interpretation or application of the Mandate and whether consequently its nature and subject are such as to bring it within the jurisdiction of the Court as defined in the article quoted above, it is essential to ascertain whether the case fulfils all the other conditions laid down in his clause ." (Page 11.)
3. ". . . .the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes." (Page 16) [p34]

[106] It seems necessary to exercise similar care in the two suits (I and II of the German Application) without losing sight of the fact that the Geneva Convention, in general, and its Section III in particular which includes the Article 23 in question, regulates the exercise of public authority by Poland in Upper Silesia which became Polish after the plebiscite. Certain rights of Poland, of the Polish authorities and of the Polish Government in various branches of public administration, in accordance with the various carefully defined legal domains, are dealt with in great detail. By freely consenting to submit to the Court's jurisdiction certain clearly defined disputes, Poland alone of the two Parties concerned was the one making concessions -the only Party in practice compelled to appear before the Court upon the application of the other Party; for the inverse situation could not arise. When Article 6 of the Geneva Convention begins : "Poland may expropriate in Upper Silesia undertakings..", it is the exercise of a right of expropriation accruing to Poland only which is therein regulated.

[107] In an endeavour to devote the same care to the settlement of the two groups of cases now before the Court, we will abstain from following the learned distinction, adopted in Judgment No. 2, between the nature and object on the one hand, and other conditions on the other hand, and we will rest content with considering one by one the various conditions -all the conditions - contained in Article 23 all of which are equally and to the same degree important for the solution of the problem under consideration.

[108] Article 23, the only clause dealing with this matter, is part of Section III -entitled "Expropriation" -of the Geneva Convention; This article runs as follows:

[Translation.]
Article 23.

"1. Should differences of opinion respecting the construction and application of Articles 6 to 22 arise between the German and Polish Governments, they shall be submitted to the Permanent Court of International Justice.

"2. The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace of Versailles shall not thereby be prejudiced." [p35]

[109] The first paragraph, which is positive in form, confers jurisdiction on the Permanent Court of International Justice ; this clause we will take first. The second paragraph, which is negative in form, constitutes a reservation in regard to the first; it will be analyzed afterwards.

[110] A. - Jurisdiction is conferred on the Court subject to the fulfilment of all the conditions of fact, which may be grouped under the three following headings:

[111] 1.- In the first place, the facts must include an actual interpretation and application of specified articles.

[112] The two contracting States are not in the same situation, Poland alone being in a position both to interpret and apply the articles, whilst Germany, or its Government, can only interpret them. Interpretation, unaccompanied by application, even if undertaken by both countries, is not sufficient, for it is devoid of all practical interest. It is interpretation and application undertaken by Poland, the responsible power, combined with the interpretation of the German Government, which alone can give rise to differences of opinion and render applicable the provisions of Article 23. Application must take a positive form, that is to say must consist of finding that the provisions of some particular article have been fulfilled and of the application of the contemplated sanctions or legal consequences. An article may have been well or badly interpreted and applied, but it must have been applied. The Court, therefore, is not given jurisdiction in the case of certain expressly specified acts; it only obtains jurisdiction indirectly through the use made by one of the two Governments of the articles specially enumerated.

[113] 2. -In the next place, the only articles the interpretation and application of which can give rise to a difference of opinion suitable for submission to the Court are those exhaustively enumerated, namely, Articles 6 to 22 of the same Convention. Of the three sections included in the first part of the Convention entitled General Provisions, only the third, Section III, regarding Expropriation and including the articles referred to, is thus in effect placed in a special position. Heading I concerning Laws in force and Heading II concerning the Protection of vested rights, like any other [p36] provisions of municipal or international law, are, on the contrary, as regards their correct or incorrect interpretation and application, entirely outside the Court's jurisdiction in so far as that jurisdiction is governed by Article 23. Are they or are they not also under the protection of some jurisdiction whether national or international ? Is it regarded as adequate or inadequate ? These are questions of policy, of high international policy, and, in my view, the Court of International Justice cannot, on the basis of Article 23, be called upon either to answer them or to find a remedy.

[114] 3.-Lastly, resulting from this interpretation and application of the articles mentioned, there must be a difference of opinion arising between the German and Polish Governments. Such a difference must result from -that is to say originate in -the interpretation and application, but it must also arise, that is to say, take the form of an official controversy between the two Governments. Article 23 does not specify the length of time which this controversy must last ; nor does it include a clause similar to that which exists in Article 26 of the Mandate for Palestine ("dispute.. . if it cannot be settled by negotiation"). It is sufficient but also essential that this disagreement, this contradiction, this opposition of legal arguments derived from practical experience, should in the first place take shape in a controversy which, far from being a mechanical juxtaposition of two individual opinions, constitutes the mutual confronting of these opinions in the form of diplomatic steps taken by the two Governments. If Article 23 requires that there must be a definite dispute between the two Governments, this condition cannot be fulfilled by unilateral action on the part of the applicant Party, and it does not rest solely with the Party concerned to remove this defect of form. It is equally necessary that the other Party should at least have an opportunity to decide upon its attitude with regard to its opponent's contentions and to communicate its views to the latter. Article 23, which makes a definite dispute one of the conditions for an action before the Permanent Court of International Justice, cannot be interpreted in a sense which would in fact lead to the elimination of that condition ; and this

would inevitably occur if the submission of the application were regarded as sufficient evidence of the existence of a difference of opinion. [p37] An action at law which is dependent on the fulfilment of certain conditions cannot be confused with, nor substituted for, one of these conditions. The practical importance of this essential condition is especially worthy of notice, because, apart from the advantage of seeing States have recourse to legal proceedings as an ultimum remedium, the mere reading of diplomatic documents furnished by the Party or Parties concerned in support of the application enables the Court at once to verify whether the two other essential conditions are also fulfilled and, in particular, whether the subject matter of the difference is indeed the interpretation and actual application of Articles 6 to 22.

[115] Such being the sense of Article 23, paragraph 1, it is easy to see that, if, on the one hand, that article indirectly provides individuals with a complete safeguard by guaranteeing to the State whose nationals they are the right of assuring that the articles concerning expropriation are correctly interpreted and applied, on the other hand, it places no obstacle in the way of the question of the Court's jurisdiction being examined and settled independently of any factors belonging to the merits of the case. The question of applicability or non-applicability in general of the regime of expropriation contained in Articles 6 to 22 cannot even arise; for the essential condition of actual application has indisputably placed the two Parties on the same common ground, that of Section III, entitled "Expropriation". The strict application of Article 23 in the sense referred to, and in conformity with its terms, thus enables us to avoid two equally undesirable possibilities : the possibility that the Court may affirm its jurisdiction in a purely provisional manner, on the basis of the doubt that may arise out of the very institution of proceedings, as regards the applicability or non-applicability; with the risk that later, in the course of proceedings on the merits, this doubt may be dispelled, in the sense that the articles are found inapplicable and the Court thus without jurisdiction ; and, on the other hand, the possibility that the Court may affirm its jurisdiction as the result of certain considerations relating to the merits of the dispute ; with the danger of prejudging by the decision as to jurisdiction some point or other which belongs to proceedings on the merits, and of compromising by this encroachment the essential position of equality which the two Parties are justly entitled to claim in entering on the field of these subsequent proceedings. [p38]

[116] B. -Paragraph .2 of Article 23 contains a negative provision :

"The jurisdiction of the Germano-Polish Mixed Arbitral Tribunal derived from the stipulations of the Treaty of Peace with Versailles shall not thereby be prejudiced."

[117] Whatever may have been the object of this reservation, whether it were to ensure that the jurisdiction of the Court of International Justice should not in any way exclude the right of individuals to sue for their rights before the Mixed Arbitral Tribunal, or whether it were to prevent one or other of the Governments from substituting itself for its nationals and transferring the suit to another sphere by making it the subject of a dispute between two Governments, there is no doubt that we have here a reservation which is indissolubly connected with the first paragraph and refers to the Court's jurisdiction, which it defines, by elimination, as compared with the jurisdiction of the Mixed Arbitral Tribunal of Paris. For there can have been no idea of creating in the previous paragraph a concurrent or privileged, nor yet a hierarchically superior jurisdiction. In each of these three eventualities the competence of the Mixed Arbitral Tribunal would, either as regards its sphere of activity, or as regards its authority, have certainly been impaired. This Tribunal, in favour of which Article 304 (g) of the Treaty of Versailles provides that:

"The High Contracting Parties agree to regard the decisions of the Mixed Arbitral Tribunal as final and conclusive and to render them binding upon their nationals",

thus remains, before and after the Geneva Convention, free in the exercise of its jurisdiction both to protect the private rights of individuals, and for this purpose to give a final interpretation of the law applicable in each particular case.

[118] It follows that the jurisdiction of the International Court of Justice, which cannot overlap

with that of the Mixed Arbitral Tribunal in Paris, must, within the sphere of its activities -a sphere very limited ratione materiœ -, differ from that of the Tribunal as regards its nature.

[119] It none the less remains a'true jurisdiction, and a jurisdiction for the hearing of disputes ; but, starting from an examination of particular instances of interpretation and application of Articles 6 to 22, which have necessarily been submitted to it, it reaches a decision which is in its turn an interpretation of the articles in question as regards the particular cases referred to. Without [p39] remaining confined within an academic sphere of pure doctrine -for this it avoids by dealing always with concrete contested cases -it is none the less bound, in virtue of the mandate given by the Parties in Article 23, paragraphs 1 and 2, to confine itself to determining only differences of opinion between the two Governments concerned, without endeavouring by its decision to impose on one or other Government any obligation as regards individuals, for instance in the matter of reparation or indemnity.

[120] It is solely in the interest of the Law - for Articles 6 to 22 of the Geneva Convention constitute in this case the Law common to the two Parties - that Article 23 of the same Convention, which has already been analyzed, gives a very particular and very special jurisdiction to the International Court of Justice.

II.

[121] When compared with the conditions laid down as necessary in Article 23, the German Government's Application instituting proceedings, as regards conclusions i(a), 1(6), 2(a) and 2(6), does not show that any of these conditions have been fulfilled. It is confronted with facts which are contrary to them. The documents and statements by Counsel have clearly shown that the steps taken by the Polish Government in regard to the Oberschlesische Stick-stoffwerke Company, far from having constituted the application and interpretation of Articles 6 to 22 of the Geneva Convention, were inspired by other treaty provisions, such as Article 256 of the Treaty of Versailles and the Spa Protocol, applied by the Polish legislative enactments which were necessary for their execution. This fact is so well established that the "Observations of the German Government" themselves recognize it in the following passage (page 1):

"The German Government's complaint against the Polish Government is precisely that the latter Government has not applied the articles in question, although it should have done so."

[122] But a complaint in regard to the non-existence of a fact cannot constitute its existence, or take the place of such fact.

[123] Considering that neither the conditions of fact in regard to the previous official dispute nor those relating to the source and subject [p40] matter of the dispute are realized; and considering that the submissions of the German Application tend to raise quite another issue, that of the applicability of the regime of expropriation, which stands outside the limited sphere of Article 23 of the Geneva Convention, and extends over a very large number of legal domains entirely foreign to that which had been reserved by the Parties for the jurisdiction of the Permanent Court of International Justice, I can only conclude that the Court has no jurisdiction in the present case.

III.

[124] As regards the third conclusion of the Application in the matter of the rural estates, it is to be noted that this is not based on the previous existence of an official dispute between the two Governments and thus does not satisfy one of the essential conditions laid down in Article 23.

[125] As regards its subject matter, the conclusion stands strictly within the scope of Article 23, since the Polish Government expressly recognized that it desired to avail itself of the rights provided in Article 12 and 13 of the Geneva Convention and that it had proceeded to apply Articles 6 and following by notifying to the proprietors its intention of expropriating them, as required by Article 15 of the Convention.

[126] The Court's jurisdiction being thus, as regards the subject matter of the dispute, definitely established, it is none the less clearly to be understood that the Court's enquiry and its decision can, in accordance with Article 23, only extend to differences of opinion duly found to exist in regard to the interpretation and application of Articles 6 to 22 of the Convention, without extending to the questions of fact referred to in the Application instituting proceedings (pages 6 and 8):

whether certain estates are or are not principally intended to meet the requirements of undertakings belonging to the group of major industries;
whether a certain company is or is not controlled by German nationals;
whether the description of the property to be expropriated is or is not sufficiently clear; [p41]
whether the extent of certain of the properties included in the notifications is or is not less than 100 hectares of agricultural land ;
whether any given person is or is not of a certain nationality.

[127] These questions of fact (which clearly lie outside the jurisdiction of the Court and the solution of which alone can give the Polish Government an opportunity of expressing its opinion and arriving either at an agreement or a disagreement with the German Government) form the subject matter of the steps taken by the Polish Government in regard to the persons to whom the notification of its intention was given. Six of the nine cases are still pending before the Mixed German-Polish Arbitral Tribunal in Paris. One of the ten cases -that of Madame H. Voigt, which was decided in favour of the objector -gave the Polish Government an opportunity of showing -by the immediate withdrawal of notice -that neither after nor before the decision of the question of fact was there in the case at issue any difference of opinion between it and the German Government in regard to the interpretation and application of Articles 6 to 22 of the Convention. It is by no means impossible that a similar agreement may become manifest after the solution, in one way or the other, of other problems of fact which have arisen.

(Signed) ROSTWOROWSKI.

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