PCIJ (PERMANENT COURT OF INTERNATIONAL JUSTICE)

PCIJ Series A. No 17

FACTORY AT CHORZÓW (MERITS)

JUDGMENT

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13 September 1928

Tribunal:
Dionisio Anzilotti (President); Max Huber (Former President); Robert Finlay (Judge); Bernard Loder (Judge); Didrik Nyholm (Judge); Antonio Sánchez de Bustamante y Sirven (Judge); Rafael Altamira y Crevea (Judge); Yorozu Oda (Judge); Epitácio da Silva Pessôa (Judge); Frederik Beichmann (Deputy Judge); Ernst Rabel (Judge Ad-hoc); Ludwik Ehrlich (Judge Ad-hoc)

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The Government of Germany, represented by Dr. Erich Kaufmann, Professor at Berlin,

Applicant,

versus

The Government of the Polish Republic, represented by Dr. Thadeus Sobolewski, Agent for the Polish Government before the Polish-German Mixed Arbitral Tribunal,

Respondent.

The Court,

composed as above,

having heard the observations and conclusions of the Parties,

delivers the following judgment :

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 for the damage suffered by the Oberschlesische Stickstoffwerke A.-G. (hereinafter designated as the Oberschlesische) and the Bayerische Stickstoffwerke A.-G. (hereinafter designated as the Bayerische) in consequence of the attitude adopted by that Government towards those Companies in taking possession of the nitrate factory situated at Chorzow, which attitude has 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).

On receipt of the German Government's Case in the suit, on March 3rd, 1927, the Polish Government, on April 14th, 1927, raised a preliminary objection denying the Court's jurisdiction to hear the suit brought before it and submitting that the Court should, "without entering into the merits, declare that it had no jurisdiction".

The Court dealt with this plea in its Judgment No. 8 given on July 26th, 1927, by which it overruled the preliminary objection raised by the Polish Government and reserved for judgment on the merits the suit brought on February 8th, 1927, by the German Government.

Furthermore, under the terms of this judgment, the President was instructed to fix the times for the filing of the Counter-Case, Reply and Rejoinder on the merits. These times, which were in the first place fixed to expire on

September 30th, November 15th and December 30th, 1927, were subsequently extended by successive decisions until November 30th, 1927, February 20th and May 7th, 1928, respectively.

The documents of the written proceedings were duly filed with the Registrar of the Court within the times finally fixed and were communicated to those concerned as provided in Article 43 of the Statute.

In the course of hearings held on June 21st, 22nd, 25th, 27th and 29th, 1928, the Court has heard the oral statements, reply and rejoinder submitted by the above-mentioned Agents for the Parties.

The submissions made in the German Government's Application of February 8th, 1927, were as follows :

It is submitted :

[Translation.]

(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 damage 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 damage caused to the Oberschlesische Stickstoffwerke Company and 16,775,200 Reichsmarks for the damage caused 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 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.

These submissions have, in the course of the written or oral proceedings, undergone modifications which will be indicated below. As the Court has not in the present suit availed itself of the right conferred upon it under Article 48 of the Statute to make orders as to "the form and time in which each Party must conclude its arguments", it, in this case, allows the Parties, in accordance with established precedent, to amend their original submissions, not only in the Case and Counter-Case (Article 40 of the Rules), but also both in the subsequent documents of the written proceedings and in declarations made by them in the course of the hearings (Article 55 of the Rules), subject only to the condition that the other Party must always have an opportunity of commenting on the amended submissions.

Submission No. 1 of the Application has not been subsequently amended.

On the other hand, with regard to submission No. 2, important amendments have been made. In the Case this submission is worded as follows :

It is submitted :...

[Translation.]
(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 damage caused to the Oberschlesische Stickstoffwerke Company, and 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke Company.

In comparing submission (2) of the Case with submission (2) of the Application, regard must be had to the following facts resulting from the Case :

(a) that the total of 59,400,000 mentioned in the Application as the figure representing the damage suffered by the Oberschlesische is calculated as on July 3rd, 1922 ;

(b) that this sum includes the sum of 1 million for raw materials, finished and half-manufactured products, stores, etc. ;

(c) that the sum of 75,920,000 mentioned in the Case as the figure representing the damage suffered by the Oberschlesische is made up of 58,400,000 for damages as on July 3rd, 1922, and 17,520,000 for interest at 6% on 58,400,000 for the period July 3rd, 1922, to July 2nd, 1927 ;

(d) that this sum does not include an amount for "working capital", compensation for the "present value" of this capital being in the Case sought in general terms ;

(e) that the sum of 16,775,200 mentioned in the Application as the figure representing the damage suffered by the Bayerische is calculated as on July 3rd, 1922 ;

(f) that the sum of 20,179,000 mentioned in the Case as representing the damage suffered by the Bayerische is calculated as on July 2nd (or 3rd), 1927, at a rate of interest of 6%; the amount for the Bayerische indicated in the Application is said to contain an error of calculation.

Lastly, submission (2) of the Application has been amended in the German Agent's oral reply as concerns the compensation claimed for the damage suffered by the Oberschlesische. This submission runs as follows in the submissions read by the Agent at the conclusion of his oral Reply :

It is submitted :
[Translation.]
that the total of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage done to the Oberschlesische Stickstoffwerke A.-G.) ;

that the total of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage done to the Bayerische Stickstoffwerke A.-G.

It follows that, as regards the Oberschlesische, the German Government *(a)* reverts to the sum of 58,400,000 as on

July 3rd, 1922 ; *(b)* fixes as 1,656,000 the value of the working capital on that date ; *(c)* claims on these two sums interest at 6 % until the date of judgment, thus abandoning the claim for a lump sum made in the Case.

As regards submission (3) of the German Government's Application, amendments both of form and of substance are to be noted in the course of the subsequent procedure.

As regards form, paragraph (e) of submission (3) of the Application constitutes by itself a new third submission in the Case, whilst the substance of paragraphs *(a)—(d)* of submission No. 3 of the Application has been embodied in a new submission No. 4 *(a)—(d)* in the Case. In these circumstances, it is preferable to trace back the modifications made to each of the paragraphs of the original third submission.

Paragraph 3 *(a)* is worded as follows in the Case (where it is numbered 4 *(a)*) :

> *[Translation.].*
> 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 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.

As compared with the Application, therefore, this paragraph has undergone a purely superficial modification (deletion of an explanatory remark in parenthesis), and it has not subsequently been amended.

Paragraph 3 *(b)* is worded as follows in the Case (where it is numbered 4 *(b)*) :

> *[Translation.]*
> that the Polish Government should pay the remaining sums by April 15th, 1928, at latest;
>
> in the alternative, that, in so far as 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.

Thus to the main original submission has been added an alternative contemplating the possibility of payment by instalments.

The same paragraph is couched in the following terms in the oral reply :

> *[Translation.]*
> It is submitted that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment; in the alternative that, in so far as payment may be effected by instalments, the Polish Government should, within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G.

The modification as compared with the previous version consists in the substitution for the date April 15th, 1928, which had already passed, a time-limit fixed in relation to the beginning of the Polish financial year.

Paragraph 3 *(c)* of the submissions of the Application (4 *(c)* of the Case) has undergone no subsequent modification.

On the other hand, paragraph 3 (*d*) of the Application appears in the Case in the following form (No. 4 *(d)* of the Case) :

> *[Translation.]*
> 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.

The original submission is contained in the last part of this paragraph, the principal clause of which now seeks a declaration excluding any possibility of extra-judicial set-off.

The wording of the Case is retained both in the written and in the oral reply, except that a new alternative submission is added in regard to the question of the prohibition of extrajudicial set-off. This addition runs as follows :

[Translation.]
In the alternative it is submitted that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

Turning lastly to paragraph 3 *(e)* of the submissions in the Application, it is to be observed that this reappears unchanged in submission 3 of the Case. On the other hand, in the written Reply, whilst the submission of the Application is repeated, the following alternative is added :

[Translation.].
It is submitted that the Polish Government should be obliged to cease the exploitation of the factory and of the chemical equipment for the transformation of nitrate of lime into ammonium nitrate, etc.

With this addition, this submission also appears in the oral reply in the following form :

[Translation.]
in the alternative, should the Court not adopt the points of view set out in paragraphs 55 and 57 of the Reply, it is submitted that the Polish Government should be obliged to cease the exploitation of the factory or of the chemical equipment for the production of ammonium nitrate, etc.

In connection with certain submissions made by the Polish Government in regard to the compensation of the Oberschlesische, the German Government has not merely asked the Court to reject these submissions but has also formulated two other submissions, namely:

[Translation.]

(1) that the Polish Government is not entitled to refuse to pay compensation to the German Government on the basis of arguments drawn from Article 256 and for motives of respect for the rights of the Reparation Commission and other third parties ;

(2) that the Polish Government's obligation to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory at Chorzow.

These submissions, which were made in the written Reply and in the first oral statement of the German Agent respectively, have been maintained unaltered in the oral reply.

Apart from the two additional claims just referred to, the final submissions of the German Government are therefore as follows :

> *[Translation.]*
> (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) *(a)* that the amount of the compensation to be paid to the German Government is 58,400,000 Reichsmarks, plus 1,656,000 Reichsmarks, plus interest at 6 % on this sum as from July 3rd, 1922, until the date of judgment (for the damage caused to the Oberschlesische Stickstoffwerke A.-G.) ;
>
> *(b)* that the amount of the compensation to be paid to the German Government is 20,179,000 Reichsmarks for the damage caused to the Bayerische Stickstoffwerke A.-G. ;

(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 ;

in the alternative, that the Polish Government should be obliged to cease from exploiting the factory or the chemical equipment for the production of nitrate of ammonia, etc. ;

(4) *(a)* that the Polish Government should pay, within one month from the date of judgment, the compensation due to the Oberschlesische Stickstoffwerke A.-G. for the taking possession of the working capital and the compensation due to the Bayerische Stickstoffwerke A.-G. for the period of exploitation from July 3rd, 1922, to the date of judgment ;

(b) that the Polish Government should pay the remaining sums at latest within fifteen days after the beginning of the financial year following the judgment ; in the alternative, that, in so far as payment may be effected by instalments, the Polish Government should within one month from the date of judgment, give bills of exchange for the amounts of the instalments, including interest, payable on maturity to the Oberschlesische Stickstoffwerke A.-G. and to the Bayerische Stickstoffwerke A.-G. ;

(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 sett 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 said claim for indemnity ; and that the payments mentioned under (à) to (c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin ;

in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments.

The Polish Government has made no formal objection to the amendments successively made in the original submissions of the German Government.

The submissions formulated by the Polish Government in reply to those set out in the Application and Case of the German Government are worded as follows in the Counter-Case :

It is submitted :

[Translation.]
A. In regard to the Oberschlesische ;

(1) that the applicant Government's claim should be dismissed ;

(2) in the alternative, that the claim for indemnity should be provisionally suspended ;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable : *(a)* after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzow factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzow factory ; *(b)* when the civil action brought against the said Company by the Polish Government in respect of the validity of the entry of its title to ownership in the land register has been finally decided in favour of the Oberschlesische.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische

Stickstoffwerke Company, of the nominal value of no,000,000 Marks, which are in its hands under the contract of December 24th, 1919.

B. In regard to the Bayerische :

(1) *(a)* that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed ;

(b) that, *pro futuro,* an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded ;

(c) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral Tribunal in respect of the Chorzow factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzow factory ;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrated lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy, should be dismissed.

C. In regard to the Oberschlesische and Bayerische jointly:

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off, against the abovementioned 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 abovementioned claim for indemnity, and that the payments mentioned under 4 (a)—(c) should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

These submissions have not subsequently been amended except that submission A, 3 (&), was withdrawn by means of a declaration contained in the written Rejoinder.

The German Government having disputed the right of the Polish Government to withdraw this submission (the rejection of which had been demanded by the former) at the stage of the proceedings reached when the withdrawal took place, the latter Government maintained its withdrawal.

For the reasons given above, the Court holds that there is nothing to prevent the Polish Government for its part from

amending its original submissions, especially seeing that this amendment occurred while the written proceedings were still in progress and took the form of the abandonment of a part of its submissions. In the Court's opinion, the second of the "additional claims" of the German Government mentioned above, was doubtless designed to meet the Polish submission which has been thus abandoned.

The Court therefore considers that the final submissions of the Polish, Government may be set down as under :

"It is submitted :

A. As regards the Oberschlesische :

(1) that the claim of the applicant Government should be dismissed ;

(2) in the alternative, that the claim for indemnity should be provisionally suspended ;

(3) as a further alternative, in the event of the Court awarding some compensation, that such compensation should only be payable after the previous withdrawal by the said Company of the action brought by it and pending before the German-Polish Mixed Arbitral Tribunal in regard to the Chorzow factory, and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzow factory.

(4) In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of no,ooo,ooo Marks, which are in its hands under the contract of 24 December 1919.

B. As regards the Bayerische :

(1) *(a)* that the applicant Government's claim for compensation in respect of the past, in excess of 1,000,000 Reichsmarks, should be dismissed ;

(b) that, *pro futuro,* an annual rent of 250,000 Reichsmarks, payable as from January 1st, 1928, until March 31st, 1941, should be awarded ;.

(c) that these indemnities should only be payable after previous withdrawal by the said Company of the claim pending before the German-Polish Mixed Arbitral

Tribunal in respect of the Chorzow factory and after the formal abandonment by it of any claim against the Polish Government in respect of the latter's taking possession and exploitation of the Chorzow factory ;

(2) that the applicant Government's third submission to the effect that until June 30th, 1931, no exportation of nitrate of lime or nitrate of ammonia should take place to Germany, the United States of America, France or Italy.

C. As regards the Oberschlesische and Bayerische jointly :

that submission No. 4—to the effect that it is not permissible for the Polish Government to set off against the abovementioned 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 abovementioned claim for indemnity, and that the payments mentioned under 4 *(a)—(c)* should be made without any deduction to the account of the two Companies with the Deutsche Bank at Berlin—should be rejected.

A comparison between the German and Polish final submissions as thus set out leads to the following results :

I.—(A) as regards the first German submission : that the Parties are at variance except in regard to the reparation of the damage sustained by the Bayerische ;

(B) as regards submission No. 2 *a* of the German Government : that the Polish Government asks that it should be dismissed ; and, in the alternative, that the claim for indemnity should be provisionally suspended ; it is doubtless the alternative claim thus put forward by Poland in reply to submission No. 2 0 of the German Government that the first of the "additional claims" of the latter Government mentioned above is intended to meet ;

(C) as regards submission No. 2 *b* of the German Government : that the Polish Government asks that it should be dismissed except as regards the award, in respect of

the past, of a sum not exceeding 1,000,000 Reichsmarks for the future, of an annual rent of 250,000 Reichsmarks payable as from January 1st, 1928, until March 31st, 1941 ;

(D) as regards the German submission No. 3 : that the Polish Government asks that the German Government's *principal* submission should be dismissed but does not formulate a definite submission with regard to the *alternative* submission under this number ;

(E) as regards the German submissions Nos. 4 *(a)—(c)* : that the Polish Government does not say anything specific concerning these submissions except in so far as it formulates its submission A 3, regarding the suspension of payment ;

(F) as regards the German Government's submission No. 4 *(d) :* that the Polish Government submits that the *principal* submission under this number should be rejected, but does not formulate any definite submission regarding the *alternative* German submission.

II. — As regards the Polish submissions : that submission A 4, which goes beyond the scope of the German submissions, has given rise to a claim for its rejection on the part of the German Government, formulated during the oral proceedings.

It is therefore solely with the points of divergence as set out above that the Court has to deal in the judgment which it is about to deliver. It is true that the Parties have, both in the written and oral proceedings, formulated yet other claims. In so far, however, as these claims do not constitute developments of the original submissions, or alternatives to them, the Court cannot regard them otherwise than—to use the expression of the Agent of the German Government—as "subsidiary arguments" or as mere suggestions as to the procedure to be adopted ; this is certainly the case as regards the numerous requests with a view to the consultation of experts or the hearing of witnesses. There is no occasion for the Court

to pass upon all these requests ; it may therefore confine itself to taking them into account, in so far as may be necessary during the discussion of the arguments advanced by the Parties in support of their submissions, for the purposes of stating the reasons of the judgment.

The Parties have presented to the Court numerous documents either as annexes to the documents of the written proceedings or in the course of the hearings, or, lastly, in response to requests made or questions put by the Court. (Annex.)

THE FACTS.

The facts underlying the present suit have already been succinctly stated or referred to in Judgments Nos. 6, 7, 8 and 11, given by the Court on August 25th, 1925, May 25th, 1926, July 26th, 1927, and December 16th, 1927.

The present judgment, however, must deal with the so-called case of the factory at Chorzow from a point of view with which the Court has not hitherto had to concern itself, namely, that of the nature—and, if necessary, the amount and method of payment—of the reparation which may be due by Poland in consequence of her having, as established by the Court in Judgment No. 7, adopted an attitude not in conformity with the Geneva Convention of May 15th, 1922. Accordingly, it is necessary, before approaching the point of law raised by the German Application of February 8th, 1927, briefly to trace out the relevant facts from this particular standpoint.

On March 5th, 1915, a contract was concluded between the Chancellor of the German Empire, on behalf of the Reich, and the Bayerische, according to which that Company undertook "to establish for the Reich and forthwith to begin the construction of", amongst other things, a nitrate factory at Chorzow 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 profits 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 determined 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.

This contract was subsequently supplemented by a series of seven additional contracts, of which, however, only the second and seventh, concluded on November 16th, 1916, and November 22nd, 1918, respectively, relate to the Chorzów factory. On May 14th, 1919, the Bayerische brought an action against the Reich, claiming that the latter was bound to compensate the Company for the damage said to have been suffered by it, owing to certain alleged shortcomings with respect to the fulfilment of the contract of March 5th, 1915, and the additional contracts. This matter was, however, settled out of court by an arrangement concluded on October 24th, 1919, between the Reich and the Bayerische, an arrangement which replaced the fifth additional contract and did not relate to the Chorzow factory.

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., with a share capital of 250,000 marks, increased subsequently to no millions of marks, and the sale by the Reich to this Company of the factory at Chorzow, 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 of the factory were to remain in the hands of the Bayerische, 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 was duly entered, on January 29th, 1920, at the *Amtsgericht* of Königshütte, in the Chorzow land register, as owner of the landed property constituting the nitrate factory at Chorzow. The registered office of the Oberschlesische which, under the memorandum of association, was established at Chorzow, was subsequently, by an amendment executed on January 14th, 1920, transferred to Berlin.

In the contract of December 24th, 1919, between the Reich and the newly created Oberschlesische, a second limited liability company, founded the same day and known as the *Stickstoff Treuhand Gesellschaft m. b. H.* (hereinafter called the "Treuhand") was also concerned. This Company had a share capital of 300,000 marks, subsequently increased to 1,000,000 marks. Under the contract, the whole of the factory for the production of nitrated lime, with the accessory installations, situated at Chorzow, was ceded by the Reich to the Oberschlesische at the price of approximately no million marks,—which price was calculated according to certain data indicated in the contract itself,—the Treuhand taking over, in the place of the Oberschlesische, as sole and independent debtor, all the obligations imposed by the contract upon the latter in regard to the Reich, and obtaining in consideration thereof, without payment, shares of the Oberschlesische—to the nominal value of 109,750,000 marks. Later, the Treuhand also acquired the rest of the shares of the Oberschlesische, thus becoming the sole shareholder of that Company. As guarantee for the sums due to the Reich under the contract, the Treuhand undertook to obtain for the Reich a lien on all the shares of the Oberschlesische. The Treuhand was to liquidate the purchase price exclusively by paying to the Reich the dividends on the shares of the Oberschlesische. Nevertheless, the Treuhand was authorized to pay at any time the whole or a part of the purchase price ; this would have the effect of removing the lien on shares of a nominal value corresponding to the payment

made. The Reich was authorized itself to exercise all the rights resulting from the possession of the shares, and in particular the right to vote at the general meeting of shareholders, but agreed that the management of the exploitation of the Oberschlesische should be left in the hands of the Bayerische. An alienation of the shares so pledged would be authorized only with the approval of the Reich, even after the lien had expired. As a guarantee for the fulfilment of this obligation, the Reich would, even after expiration of the lien, retain possession of the shares and the exercise of all rights resulting from such possession. The price realized in the event of a sale of the shares was in the first place to be devoted to the liquidation of the balance of the Reich's claim. Of any surplus, the Reich was to receive either 85%—if the sale were effected by the Treuhand—or 90 %—if it were effected by the Reich ; in both cases, the balance only would fall to the Treuhand which, however, in the second case, would obtain a right to acquire the shares at the price at which the Reich wished that they should be disposed of.

On May 15th, 1922, was signed at Geneva between Germany and Poland the Convention concerning Upper Silesia.

After the signature of this Convention, but before the actual cession of Polish Upper Silesia to Poland, the Treuhand, by a letter dated May 26th, 1922, offered to a Swiss company, the *Compagnie d'azote et de fertilisants S. A.* at Geneva, an option until the end of the year for the purchase, at a price of five million Swiss francs, to be paid by January 2nd, 1923, at latest, of one half (55 million marks) of the shares of the Oberschlesische, in consideration of which the Genevese Company would, amongst other things, acquire the right to take part in the negotiations with the Polish Government, This offer came to nothing.

On July 1st, 1922, the Polish Court of Huta Krolewska, which had replaced the *Amtsgericht* of Königshütte, gave a decision to the effect that the registration with this Court of the Oberschlesische as owner of the factory, which was declared null and void, was to be cancelled and the previously existing situation restored and that the right of ownership in the landed property in question was to be registered in the name of the

Polish Treasury. This decision, which cited Article 256 of the Treaty of Versailles and the Polish laws of July 14th, 1920, and June 16th, 1922, was carried into effect on the same day.

On July 3rd, 1922, M. Ignacy 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 contended, and the Polish Government did not deny, 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.

After having taken over the factory, the Polish Government entered it in the list of property transferred to it under Article 256 of the Treaty of Versailles, which list was duly communicated to the Reparation Commission. The Polish Government alleges that after the pronouncement of Judgment No. 7 by the Court, the German Government asked that the factory should be struck out of the list in question ; the former Government has not, however, been informed whether this has been done.

In the meantime, the Oberschlesische, on November 15th, 1922, had brought an action before the German-Polish Mixed Arbitral Tribunal at Paris, claiming, amongst other things, that the Polish Government should be ordered to restore the factory. This action, notice of which was served upon the respondent Government on January 17th, 1923, was withdrawn by the Oberschlesische in June 1928, before the Tribunal had been able to give a decision.

The Oberschlesische, on November 24th, 1922, instituted a parallel action in regard to the movable property existing at Chorzów at the time of the taking over of the factory, against the Polish Treasury before the Civil Court of Katowice, with a view to obtaining either the restitution to the Oberschlesische or the Bayerische of such property, or the payment of the equivalent value. This action however led to no decision on the merits.

As regards the Bayerische, that Company also, on March 25th, 1925, brought an action before the German-Polish Mixed

Arbitral Tribunal against the Polish Treasury with a view to obtaining an annual indemnity until the restitution of the factory to the Oberschlesische, and to causing the possession and management of the factory to be restored to it. Notice of this action was served on the respondent Government on December 16th, 1925 ; but the case was withdrawn in June 1928, at the same time as the action brought by the Oberschlesische and in the same circumstances.

The Court's Judgment No. 7 was given on May 25th, 1926. This judgment was the source of developments tending in two different directions.

On the one hand, at the initiative of the German Government, it formed the starting point for direct negotiations between the two Governments concerned. In regard to these negotiations, it is only necessary here to note that, on January 14th, 1927, the German Government had recognized that the factory could no longer be restored in kind and that consequently the reparation due must, in principle, take the form of the payment of compensation, a statement which is moreover formally repeated in the Case. The negotiations were unsuccessful owing, amongst other things, to the fact that, in the opinion of the Polish Government, certain claims which Poland was said to have against Germany, must be set off against the indemnity to be awarded to Germany. The failure of the negotiations resulted in the institution of the present proceedings.

On the other hand, the Court's Judgment No. 7 gave rise on the part of the Polish Government to the bringing of an action before the Polish Court of Katowice against the Oberschlesische in order to obtain a declaration that that Company had not become owner of the landed property at Chorzów ; that the entry in the land register made in its favour on January 29th, 1922, was not valid, and that—independently of the laws of July 14th, 1920, and June 16th, 1922,—the ownership of the landed property in question fell to the Polish Treasury. The judgment of the Court in this action— which was given by default—was published on November 12th, 1927, and took effect on January 2nd, 1928 ; it admitted all the submissions of the claimant.

Meanwhile, on October 18th, 1927, the Court had received a fresh application from the German Government which, relying on the terms of Article 60 of the Statute and Article 66 of the Rules of Court, prayed the Court to give an interpretation of its Judgments Nos. 7, of May 25th, 1926, and 8, of July 26th, 1927, alleging that a divergence of opinion had arisen between the two Governments in regard to the meaning and scope of these two judgments in connection with the point which had given rise to the proceedings before the Court of Katowice.

The Court, on December 16th, 1927, delivered its judgment in this suit (No. 11). According to this judgment the Court's intention in Judgment No. 7 had been to recognize, with binding effect between the Parties concerned and in respect of that particular case, amongst other things, the right of ownership of the Oberschlesische in the Chorzow factory under municipal law.

Whilst the proceedings in connection with the request for an interpretation were in progress, the German Government, by means of a Request dated October 14th, 1927, and filed with the Registry on November 15th, besought the Court to indicate to the Polish Government that it should pay to the German Government, as a provisional measure, the sum of 30 million Reichsmarks.

The Court gave its decision upon this request, which was submitted under the terms of Article 41 of the Statute, in the form of an Order made on November 21st, 1927. It held that effect could not be given to the request of the German Government, since it was to be regarded as designed to obtain not the indication of measures of protection, but judgment in favour of a part of the claim formulated in the Application of February 8th, 1927.

THE LAW.

I.

The Court, before proceeding to consider the Parties' submissions, must determine the import of the application which has given rise to the present proceedings, in order to ascertain its nature and scope. In the light of the results of this investigation, it will then proceed to consider the submissions made in the course of the written and oral proceedings.

In the application the Court is asked :

(1) to declare that the Polish Government, by reason of its attitude in respect of the Oberschlesische and Bayerische Companies, which attitude the Court had declared not to be in conformity with the Geneva Convention, is under an obligation to make good the consequent damage sustained by those Companies ;

(2) to award compensation, the amount of which is indicated in the application, for the damage caused to each of the respective Companies ;

(3) to fix the method of payment, and amongst other things to order the payments to be made by the Polish Government to be effected to the account of the two Companies with the Deutsche Bank at Berlin.

In the course of the oral proceedings, a difference of opinion between the two Parties became apparent as to the nature and scope of the application. The Agent for the German Government argued in his address to the Court that a government may content itself with reparation in any form which it may consider proper, and that reparation need not necessarily consist in the compensation of the individuals concerned. The following passage should especially be noted :

[Translation.]
"It is in fact a question of the German Government's own rights. The German Government has not brought this suit as representative of the individuals who have suffered injury, but it may estimate the damage for which it claims reparation on its own behalf, according to the measure provided by the losses suffered by the companies whose case it has

taken up. The German Government may claim the payment of this compensation at any *locus solutionis* which it may think fit in this case, whether it be a public or a private office.

The present dispute is therefore a dispute between governments and nothing but a dispute between governments. It is very clearly differentiated from an ordinary action for damages, brought by private persons before a civil court, as the Polish Government has said in its Rejoinder."

The Agent for the Polish Government in his Rejoinder submitted that this method of regarding the question involved a modification of the subject of the dispute and, in some sort also, of the nature of the application, for, according to Poland's view, the subject of the dispute had been defined by Germany as the obligation to compensate the two Companies. But damage and compensation being interdependent conceptions, the German claim assumed another aspect if it was no longer a question of compensating the Companies, but of compensating the State for the injury suffered by it. The Agent for the Polish Government disputed the German Government's right to make this change at that stage of the proceedings and refused to accept it.

Even should it be possible to construe the terms of the application and of the subsequent submissions of the Applicant as contemplating compensation due directly to the two Companies for damages suffered by them and not reparation due to Germany for a breach of the Geneva Convention, it follows from the conditions in which the Court has been seized of the present suit, and from the considerations which led the Court to reserve it by Judgment No. 8 for decision on the merits, that the object of the German application can only be to obtain reparation due for a wrong suffered by Germany in her capacity as a contracting Party to the Geneva Convention.

The present application is explicitly and exclusively based on Judgment No. 7 which declared that the attitude of the Polish Government in respect of the two Companies, the Oberschlesische and Bayerische, was not in conformity with Article 6 and the following articles of the said Convention. Already in Judgment No. 6, establishing the Court's jurisdiction to deal with the alleged violation of the Geneva Convention, the

Court recognized that—as had been maintained by the Applicant—the matter was exclusively a dispute between States as to the interpretation and application of a convention in force between them. Article 23 of the Geneva Convention only contemplates differences of opinion respecting the interpretation and application of Articles 6 to 22 of the Geneva Convention arising between the two Governments. The Court in fact declared itself competent to pass upon the claim for reparation because it regarded reparation as the corollary of the violation of the obligations resulting from an engagement between States. This view of the matter, which is in conformity with the general character of an international tribunal which, in principle, has cognizance only of interstate relations, is indicated with peculiar force in this case for the specific reason that the Geneva Convention, with its very elaborate system of legal remedies, has created or maintained for certain categories of private claims arbitral tribunals of a special international character, such as the Upper Silesian Arbitral Tribunal and the German-Polish Mixed Arbitral Tribunal. It was on the basis, amongst other things, of the purely interstate character of the dispute decided by Judgment No. 7 that the Court reserved the case for judgment, notwithstanding the fact that actions brought by the two Companies were pending before one of the arbitral tribunals above mentioned, actions which related to the same act of dispossession which led to the filing with the Court of the German Government's Application now before it.

The Court, which by Judgment No. 8 reserved the present application for judgment on the merits, could only do so on the grounds on which it had already based its Judgment No. 7 which constitutes the starting point for the claim for compensation now put forward by Germany. Accordingly the declarations of the Applicant in the present proceedings must be construed in the light of this conception and this method must also have been followed even if that Party had not stated its contention as explicitly as it has done in the German Agent's address to the Court.

It is a principle of international law that the reparation of a wrong may consist in an indemnity corresponding to the damage which the nationals of the injured State have suffered

as a result of the act which is contrary to international law. This is even the most usual form of reparation ; it is the form selected by Germany in this case and the admissibility of it has not been disputed. The reparation due by one State to another does not however change its character by reason of the fact that it takes the form of an indemnity for the calculation of which the damage suffered by a private person is taken as the measure. The rules of law governing the reparation are the rules of international law in force between the two States concerned, and not the law governing relations between the State which has committed a wrongful act and the individual who has suffered damage. Rights or interests of an individual the violation of which rights causes damage are always in a different plane to rights belonging to a State, which rights may also be infringed by the same act. The damage suffered by an individual is never therefore identical in kind with that which will be suffered by a State ; it can only afford a convenient scale for the calculation of the reparation due to the State.

International law does not prevent one State from granting to another the right to have recourse to international arbitral tribunals in order to obtain the direct award to nationals of the latter State of compensation for damage suffered by them as a result of infractions of international law by the first State. But there is nothing—either in the terms of Article 23 or in the relation between this provision and certain others of a jurisdictional character included in the Geneva Convention—which tends to show that the jurisdiction established by Article 23 extends to reparation other than that due by one of the contracting Parties to the other in consequence of an infraction of Articles 6 to 22, duly recognized as such by the Court.

This view is moreover readily reconcilable with the submissions of the Applicant. The first of its submissions, throughout all stages of the proceedings, aims at the establishment of an obligation to make reparation. The indemnities to be paid to the German Government, according to No. 2 of the final submissions, constitute, in the terms of submission 4 *d,* as set out in both the Case and the oral reply, a debt due to that Government. The claim formulated in the same submission, to the effect that payment should be made to the account of the

two Companies with the Deutsche Bank at Berlin, is interpreted by the Agent for the German Government as solely relating to the *locus solutionis.*

The Court therefore is of opinion that the Applicant has not altered the subject of the dispute in the course of the proceedings.

It follows from the foregoing that the application is designed to obtain, in favour of Germany, reparation the amount of which is determined by the damage suffered by the Oberschlesische and Bayerische. Three fundamental questions arise :

(1) The existence of the obligation to make reparation.

(2) The existence of the damage which must serve as a basis for the calculation of the amount of the indemnity.

(3) The extent of this damage.

As regards the first point, the Court observes that it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In Judgment No. 8, when deciding on the jurisdiction derived by it from Article 23 of the Geneva Convention, the Court has already said that reparation 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. The existence of the principle establishing the obligation to make reparation, as an element of positive international law, has moreover never been disputed in the course of the proceedings in the various cases concerning the Chorzow factory.

The obligation to make reparation being in principle recognized, it remains to be ascertained whether a breach of an international engagement has in fact taken place in the case under consideration. Now this point is *res judicata.* The nonconformity of Poland's attitude in respect of the two Companies with Article 6 and the following articles of the Geneva Convention is established by No. 2 of the operative provisions of Judgment No. 7. The application of the principle to the present case is therefore evident.

As regards the second point, the question whether damage has resulted from the wrongful act which is common ground, is in no wise settled by the Court's previous decisions relating to the Chorzow case. The Applicant having calculated the amount of the reparation claimed on the basis of the damage suffered by the two Companies as a result of the Polish Government's attitude, it is necessary for the Court to ascertain whether these Companies have in fact suffered damage as a consequence of that attitude.

As regards the Bayerische, Poland admits the existence of a damage affording ground for reparation ; the Parties only differ as to the extent of this damage and the mode of reparation ; on the other hand, Poland denies the existence of any damage calling for reparation in the case of the Oberschlesische and consequently submits that Germany's claim should be dismissed. The fact of the dispossession of the Oberschlesische is in no way disputed. But notwithstanding this, in the contention of the Polish Government, that Company has suffered no damage : it argues, first, that the right of ownership claimed by the Oberschlesische was null and void or subject to annulment, and, secondly, that the contract of December 24th, 1919, attributed to the Reich rights and benefits so considerable that any possible damage would not materially affect the Company. In the alternative, the Polish Government contends that these same circumstances at all events have the effect of essentially diminishing the extent of the damage to be taken into account in so far as the said Company is concerned.

Apart from these preliminary objections, the Parties are at issue as to the amount and method of payment of any compensation which may be awarded.

In these circumstances, the Court must first of all consider whether damage affording ground for reparation has ensued as regards not only the Bayerische but also the Oberschlesische.

II.

On approaching this question, it should first be observed that, in estimating the damage caused by an unlawful act, only the value of property, rights and interests which have been affected and the owner of which is the person on whose behalf compensation is claimed, or the damage done to whom is to serve as a means of gauging the reparation claimed, must be taken into account. This principle, which is accepted in the jurisprudence of arbitral tribunals, has the effect, on the one hand, of excluding from the damage to be estimated, injury resulting for third parties from the unlawful act and, on the other hand, of not excluding from the damage the amount of debts and other obligations for which the injured party is responsible. The damage suffered by the Oberschlesische in respect of the Chorzow undertaking is therefore equivalent to the total value—but to that total only—of the property, rights and interests of this Company in that undertaking, without deducting liabilities.

The Polish Government argues in the first place that the Oberschlesische has suffered no loss as a result of its dispossession, because it was not the lawful owner, its right of ownership having never been valid and having in any case ceased to be so in virtue of the judgment given on November 12th, 1927, by the Court of Katowice ; so that from that date at all events no damage for which reparation should be made could ensue as regards that Company.

In regard to this the Court observes as follows : the Court has already, in connection with Judgment No. 7, had to consider as an incidental and preliminary point, the question of the validity of the transactions in virtue of which the ownership of the Chorzow factory passed from the Reich to the Oberschlesische. It then arrived at the conclusion that the various transactions in question were genuine and bona fide ; that is why it was able to regard the Chorzow factory as belonging to a company controlled by German nationals, namely, the Oberschlesische. Whatever the effect of this incidental decision may be as regards the right of ownership under municipal law, it is evident that the fact that the

Chorzów factory belonged to the Oberschlesische was the necessary condition precedent to the Court's decision that the attitude of the Polish Government in respect of the Oberschlesische was not in conformity with Article 6 and the following articles of the Geneva Convention. For if the factory did not belong to the Oberschlesische Stickstoffwerke, not only would that Company not have suffered damage as a result of dispossession, but furthermore it could not have been subjected to a dispossession contrary to the Geneva Convention, but the Court established by Judgment No. 7 that such was the case. It should be noted that the Court in Judgment No. 7 has not confined itself to recording the incompatibility with the Geneva Convention of the application of the law of July 14th, 1920, to properties entered in the land register in the name of companies controlled by German nationals, but has, in replying to the objections put forward by the Respondent, also had to deal with the question whether such entry was the outcome of fictitious and fraudulent transactions or of genuine and bona-fide transactions. Poland herself objected in connection with the second submission of the German Application of May 15th, 1925, that the entry of the Oberschlesische in the land register was in any case not valid as it was based on a fictitious and fraudulent transaction and thus caused the Court to deal with this point.

As the application now under consideration is based on the damage established by Judgment No. 7, it is impossible that the Oberschlesische's right to the Chorzow factory should be looked upon differently for the purposes of that judgment and in relation to the claim for reparation based on the same judgment. The Court, having been of opinion that the Oberschlesische's right to the Chorzow factory justified the conclusion that the Polish Government's attitude in respect of that Company was not in conformity with Article 6 and the following articles of the Geneva Convention, must necessarily maintain that opinion when the same situation at law has to be considered for the purpose of giving judgment in regard to the reparation claimed as a result of the act which has been declared by the Court not to be in conformity with the Convention.

The Polish Government now points out that, after Judgment No. 7 had been rendered, the Civil Court of Katowice

which, under International Law, doubtless has jurisdiction in disputes at civil law concerning immovable property situated within its district, has declared the entry of the Oberschlesische in the land register as owner not to be valid under the municipal law applicable to the case, and this apart from the Polish laws of July 14th, 1920, and June 16th, 1922 ; it further contends that the Court, in now giving judgment on the question of damages, should bear in mind this new fact.

There is no need for the Court to consider what would have been the situation at law as regards the Geneva Convention, if dispossession had been preceded by a judgment given by a competent tribunal. It will suffice to recall that the Court in Judgment No. 8 has said that the violation of the Geneva Convention consisting in the dispossession of an owner protected by Article 6 and following of the Geneva Convention could not be rendered non-existent by the judgment of a municipal court which, after dispossession had taken place, nullified the grounds rendering the Convention applicable, which grounds were relied upon by the Court in Judgment No. 7. The judgment of the Tribunal of Katowice given on November 12th, 1927,—which judgment was given by default as regards the Oberschlesische, the Reich not being a Party to the proceedings,—does not contain in the text known to the Court the reasons for which the entry of the property in the name of the Oberschlesische was declared null and void ; but it appears from the application upon which this judgment was given that the reasons advanced by the Polish Treasury are essentially the same as those already discussed before the Court on the basis of the Polish Government's submissions in the proceedings leading up to Judgment No. 7, which reasons, in the opinion of the Court, did not suffice to show that the Oberschlesische did not fall within the scope of Article 6 and the following articles of the Geneva Convention. If the Court were to deny the existence of a damage on the ground that the factory did not belong to the Oberschlesische, it would be contradicting one of the reasons on which it based its Judgment No. 7 and it would be attributing to a judgment of a municipal court power indirectly to invalidate a judgment of an international court, which is impossible. Whatever the

effect of the judgment of the Tribunal of Katowice of November 12th, 1927, may be at municipal law, this judgment can neither render inexistent the violation of the Geneva Convention recognized by the Court in Judgment No. 7 to have taken place, nor destroy one of the grounds on which that judgment is based.

It is to the objection dealt with above and to a submission connected therewith which the Polish Government made in its Counter-Case but subsequently withdrew, that the following submission of the German Government relates :

[Translation.]
that the obligation of the Polish Government to pay the indemnity awarded by the Court is in no way set aside by a judgment given or to be given by a Polish municipal court in a suit concerning the question of the ownership of the factory situated at Chorzow.

This submission has been maintained notwithstanding the withdrawal of the Polish submission referred to.

The Court, being of opinion that this latter submission is to be regarded as having been validly withdrawn, but that, nevertheless, the objection to which it referred still subsists, considers that there is no need expressly to deal with the submission in regard thereto made by the German Government, save in order to dismiss the submission of the Polish Government based on the judgment of the Tribunal of Katowice.

The Polish Government not only disputes the existence of a damage for the reason that the Oberschlesische is not or is no longer owner of the factory at Chorzow, but also contends from various points of view that the rights possessed by the Reich in the undertaking, having passed into the hands of Poland, cannot be included amongst the assets to be taken into account in the calculation of the damage sustained on which calculation will depend the amount of the reparation due by Poland to Germany.

The Polish Government, admitting, for the sake of argument, that the contract of December 24th, 1919, was not null and void, but must be regarded as a genuine and valid legal instrument, holds that, according to that contract, the Ger-

man Government is the owner of the whole of the shares of the Oberschlesische representing the sole property of that Company, namely the factory. It deduces from this that the transaction consists in the transformation of an ordinary State enterprise into a State enterprise with a share capital, and as it holds that the property of a German company, the whole of the shares of which belong to the Reich, falls within the category of "property and possessions belonging to the Empire" acquired by Poland under Article 256 of the Treaty of Versailles, it considers that it is "difficult to see what the rights of the Oberschlesische were which had been infringed by the Polish Government".

In developing this argument, it has laid special stress on the allegation that the Oberschlesische is in reality a company controlled by the German Government and not a company controlled by German nationals, or even a private enterprise in which the Reich merely possesses preponderating interests.

Even if this should not be the case and if the instrument of December 24th, 1919, were, for argument's sake, to be regarded as an effective and genuine contract for the sale of the factory by the Reich to the Oberschlesische, the Polish Government contends that it is impossible not to take into account the circumstance that the German State retained a whole complex of rights and interests in the undertaking. As the indemnity claimed by the German Government is calculated, amongst other things, on the extent of the damage presumed to have been sustained by the Oberschlesische, it would not be "logically correct to award to that Company compensation for rights and interests in the Chorzow undertaking which belonged to the Reich". These rights should therefore be eliminated from the rights of the Oberschlesische, which, if this were done, would amount simply to a *nudum jus domini.*

The Polish Government also alleges that, under Article 256 of the Treaty of Versailles, the rights and interests of the German Government in the Chorzow undertaking are transferred to the Polish State, at latest as from the date of the transfer to Poland of sovereignty over the part of Upper Silesia allotted to her, and that, on the supposition that the contract of December 24th, 1919, gave the German State

the whole of the shares of the Oberschlesische, as guarantee for its rights, and to enable it to exercise those rights, these shares, on the possession of which depend the rights of the Reich, should be transferred to Poland. If the contract of December 24th, 1919, is to be regarded as genuine and effective, the Polish Government holds that, in order to determine the indemnity which may be due to the Oberschlesische, the rights of the Reich must first be eliminated ; and as if is of opinion that this can only be done in one way, namely,.: by the handing over by Germany to Poland of the shares of the Oberschlesische to the nominal value of no million marks, the Polish Government has in regard to this point made the following submission (No. A 4) in its Counter-Case :

[Translation.]
"In any case, it is submitted that the German Government should, in the first place, hand over to the Polish Government the whole of the shares of the Oberschlesische Company of the nominal value of 110,000,000 marks, which are in its hands under the contract of December 24th, 1919."

The German Government in its Reply made the following observations in regard to this submission :

[Translation.]
"In the first place, the Polish Government cites no provision on which it is possible to base the Court's jurisdiction to take cognizance of this question, which arises from the interpretation of Article 256. In the previous proceedings, the Polish Government strongly maintained that the interpretation of this article would not be admissible even as a question incidental and preliminary to the interpretation of Articles 6 to 22 of the Geneva Convention.

The German Government does not know whether the Polish Government has in mind the general treaty of arbitration signed at Locarno, according to which any dispute of a legal nature must be submitted to arbitration, and, unless some special arbitral tribunal is agreed upon, to the Permanent Court of International Justice. But, however that may be, the German Government, being animated by a wish to ensure that full scope shall be given to the Treaty of Locarno, without pausing to debate questions as to the procedure therein provided for, and also to see the Chorzow case settled once and for all, abstains from undertaking a detailed examination of the questions of lack of jurisdiction or prematurity, even though these questions might enter into account in connection with the counter-claim which, in the German Government's

contention, is formulated in submission A 4 of the Counter-Case. It will simply refer to Article 40, paragraph 2, No. 4, of the Rules of Court, according to which the Court may give judgment on counter-claims in so far as the latter come within its jurisdiction. As between Germany and Poland this applies in respect of any question of law in dispute between them. The only point which might be disputed is the question whether, for the application of this article of the Rules, the conditions respecting forms and times must also be fulfilled, or whether it is enough that the material conditions should be fulfilled. This point, however, may be left open, since the German Government accepts the jurisdiction of the Court in regard, to the question raised in the Counter-Case. In the course of the negotiations in regard to the Chorzow case, the German plenipotentiary had already proposed to the Polish plenipotentiary that this question should be referred to the Court."

In the subsequent proceedings, the Polish Government has not made any statement in regard to the question of the Court's jurisdiction. It is impossible, therefore, to say whether it accepts the view of the German Government according to which it may be inferred that such jurisdiction exists under the Convention between Germany and Poland initialled at Locarno on October 16th, 1925, or whether it contends that the Court has jurisdiction on some other basis. In any case, it is certain that it has not withdrawn its claim and that, consequently, it wishes the Court to give judgment on the submission in question. For its part the German Government, though basing the Court's jurisdiction on the Locarno Convention, seems above all anxious that the Court should give judgment on this submission in the course of the present proceedings.

The Parties therefore are agreed in submitting to the Court for decision the question raised by this submission. As the Court has said in Judgment No. 12, concerning certain rights of minorities in Upper Silesia, Article 36 of the Statute establishes the principle that the Court's jurisdiction depends on the will of the Parties ; the Court therefore is always competent once the latter have accepted its jurisdiction, since there is no dispute which States entitled to appear before the Court cannot refer to it, save in exceptional cases where a dispute may be within the exclusive jurisdiction of some other body.

But this is not the case as regards the submission in question.

The Court also observes that the counter-claim is based on Article 256 of the Versailles Treaty, which article is the basis of the objection raised by the Respondent, and that, consequently, it is juridically connected with the principal claim.

Again, Article 40 of the Rules of Court, which has been cited by the German Government, lays down amongst other things that counter-cases shall contain :,

> "4° conclusions based on the facts stated ; these con-elusions may include counter-claims, in so.. far as the latter come within the jurisdiction of the Court."

The claim having been formulated in the Counter-Case, the formal conditions required by the Rules as regards counter-claims are fulfilled in this case, as well as the material conditions.

As regards the relationship existing between the German claims and the Polish submission in question, the Court thinks it well to add the following : Although in form a counter-claim, since its object is to obtain judgment against the Applicant for the delivery of certain things to the Respondent—in reality, having regard to the arguments on which it is based, the submission constitutes an objection to the German claim designed to obtain from Poland an indemnity the amount of which is to be calculated, amongst other things, on the basis of the damage suffered by the Oberschlesische. It is in fact a question of eliminating from the amount of this indemnity,a sum corresponding to the value of the rights and interests which the Reich possessed in the enterprise under the contract of December 24th, 1919, which value, according to the Polish Government, does not constitute a loss to the Oberschlesische because these rights and interests are said to belong to the Polish Government itself under Article 256 of the Treaty of Versailles. The Court, having by Judgment No. 8 accepted jurisdiction, under Article 23 of the Geneva Convention, to decide as to the reparation due for the damage caused to the two Companies by the attitude of the Polish Government towards them, cannot dispense with an examination of the objections the

aim of which is to show either that no such damage exists or that it is not so great as it is alleged to be by the Applicant. This being so, it seems natural on the same grounds also to accept jurisdiction to pass judgment on the submissions which Poland has made with a view to obtaining the reduction of the indemnity to an amount corresponding to the damage actually sustained.

Proceeding now to consider the above-mentioned objections of the Polish Government, the Court thinks it well first of all to define what is, in its opinion, the nature of the rights which the German Government possesses in respect of the Chorzów undertaking under the contract of December 24th, 1919, the main features of which have been described above. Referring to this description, the Court points out that the Treuhand, and not the Reich, is legally the owner of the shares of the Oberschlesische. The Reich is the creditor of the Treuhand and in this capacity has a lien on the shares. It also has, besides this lien, all rights resulting from possession of the shares, including the right to the greater portion of the price in the event of the sale of these shares. This right, which may be regarded as preponderating, is, from an economic standpoint, very closely akin to ownership, but it is not ownership ; and even from an economic point of view it is impossible to disregard the rights of the Treuhand.

Such being the situation at law, to endeavour now to identify the Oberschlesische with the Reich—the effect of which would be that the ownership of the factory would have passed to Poland under Article 256 of the Treaty of Versailles—would be in conflict with the view taken by the Court in Judgment No. 7 and reaffirmed above, on which view is based the decision to the effect that Poland's attitude as regards both the Oberschlesische and Bayerische was not in conformity with the provisions of the Geneva Convention.

The same applies in regard to the contention that the Oberschlesische is a company controlled not by German nationals but by the Reich. It is true, as the Polish Government has recalled, that the Court in Judgment No. 7 has declared

that there was no need for it to consider the question whether the Oberschlesische, having regard to the rights conferred by the contract of December 24th, 1919, on the Reich, should be considered as controlled by the Reich, and, should this be the case, what consequences would ensue as regards the application of the Geneva Convention. But the reason for this was that the Court held that the Polish Government had not raised this question, and that, apart from its contention as to the fictitious character of the instruments of December 24th, 1919, that Government did not seem to have disputed that the Company was controlled by German nationals.

At all events, it is clear that only by regarding the said Company as a company controlled by German nationals within the meaning of Article 6 of the Geneva Convention, was the Court able to declare that the attitude of the Polish Government towards that Company was not in conformity with the terms of Article 6 and the following articles of the said Convention.

Even if the question were still open and the Court were now free once more to consider it, it would be bound to conclude that the Oberschlesische was controlled by the Bayerische. For seeing that, under the contract of December 24th, 1919, the Reich had declared that it agreed to leave the management of the Chorzow undertaking in the hands of the Bayerische, under the conditions previously settled with the Reich, and that, under the subsequent contract concluded on November 25th, 1920, between the Bayerische and the Treuhand, it had been stipulated that for this purpose the Bayerische was *to* appoint at least two members of its own board as members of the board of the Oberschlesische, the Court considers that the Bayerische, rather than the Reich, controls the Oberschlesische.

The Court, therefore, arrives at the conclusion that the Polish contention to the effect that the Oberschlesische has not suffered damage, because that Company is to be regarded as identifiable with the Reich, and that the property of which the said Company was deprived by the action of the Polish Government has passed to Poland under Article 256 of the Treaty of Versailles, is not well founded.

Alternatively, the Polish Government has contended that, even if the rights possessed by the Reich under the contract of December 24th, 1919, in the Chorzow undertaking are not to be considered as involving ownership of the shares of the Oberschlesische, the value of these rights, which fall within the scope of Article 256 of the Treaty of Versailles, should nevertheless be deducted from the indemnity claimed as regards the Oberschlesische. The Court is likewise unable to admit this contention.

In this respect, it should be noted that Article 256 contains, two conditions, namely, that the "property and possessions" with which it deals must belong to the Empire or to the German States, and that such "property and possessions" must be "situated" in German territory ceded under the Treaty.

It must therefore be ascertained, amongst other things, whether the rights of the Reich under the contract of December 24th, 1919, are "situated" in the part of Upper Silesia ceded to Poland. In so far as these rights consist in a claim against the Treuhand, it is clear that this claim cannot be regarded as situated in Polish Upper Silesia, since the Treuhand is a company whose registered office is in Germany and whose shares belong to companies which also have their registered office in Germany and which are undeniably controlled by German nationals. The fact that this claim is guaranteed by a lien on the shares on which the profit, as well as the price obtained in the event of sale, is to be devoted to the payment of this claim, does not, in the Court’s opinion, justify the view that the rights of the Reich are situated in Polish Upper Silesia where the factory is. These are only rights in respect of the shares ; and these rights, if not regarded as situated where the shares are, must be considered as localized at the registered office of the Company which in this case in at Berlin and not in Polish Upper Silesia. The transfer of the registered office of the Oberschlesische from Chorzow to Berlin after the coming into force of the Treaty of Versailles cannot be regarded as illegal and null :

the reasons for which the Court, in Judgment No. 7, held that alienations of public property situated in the plebiscite zone were not prohibited by that Treaty, apply *a fortiori* in respect of the transfer by a company of its registered office from this zone to Germany.

It is also in vain that the Polish Government cites paragraph 10 of the Annex to Articles 297 and 298 of the Treaty of Versailles, which paragraph lays down that Germany shall deliver "to each Allied or Associated Power all securities, certificates, deeds, or other documents of title held by its nationals and relating to property, rights or interests situated in the territory of that Allied or Associated Power, including any shares, stock, debentures, debenture stock, or other obligations of any company incorporated in accordance with the laws of that Power". Even disregarding the circumstances that the Oberschlesische was constituted under German law and has not been "incorporated" in accordance with the laws of Poland, the clause quoted has nothing to do with Article 256 and relates only to the articles to which it is annexed.

Since, as has been shown above, Article 256 of the Treaty of Versailles is not, in the Court's opinion, applicable to the rights possessed by the Reich under the contract of December 24th, 1919, it follows that the Polish Government's contention—based on the applicability of that article—to the effect that the value of these rights should be eliminated from the amount of the indemnity to be awarded, must be rejected. The same is true as regards the Polish Government's submission that. the whole of the shares of the Oberschlesische should be handed over to Poland, a submission the aim of which is precisely to bring about the elimination referred to. For this submission is likewise based solely on the alleged applicability of the same article of the Treaty of Versailles.

Alternatively, and also in regard to the claim for an indemnity based on the damage sustained by the Oberschlesische, the Polish Government has asked the Court "provisionally to suspend" its decision on the claim for indemnity.

The reasons for which it seeks this suspension appear to he as follows :

The Polish Government has notified the Reparation Commission of the taking over of the Chorzow factory, under Article 256 of the Treaty of Versailles, by entering it on the list of German State property acquired under that article. It is for the Reparation Commission to fix the value of such property, which value is to be paid to the Commission by the succession State and credited to Germany on account of the sums due for reparations. Now after the Court had delivered Judgment No. 7, the German Government asked the Reparation Commission to strike out the Chorzow factory from the fist of property transferred to Poland, but the Commission has not yet taken any decision in regard to this. The question whether Poland is to be debited with the value of the factory therefore remains undecided, and the Polish Government considers that, until this question has been decided and the Reparation Commission has struck the Chorzów factory off the list, it—the Polish Government—cannot be compelled to make a payment in favour of the Oberschlesische.

In addition to these considerations, the Polish Government also cites the Armistice Convention and Article 248 of the Treaty of Versailles. The latter lays down that, "subject to such exceptions as the Reparation Commission may approve, a first charge upon all the assets and revenues of the German Empire and its constituent States shall be the cost of reparation and all other costs arising under the present Treaty or any treaties or agreements supplementary thereto or under arrangements concluded between Germany and the Allied and Associated Powers during the armistice or its extensions". The Polish Government says that in Judgment No. 7 the Gourt has decided first that Poland, not having been a party

to the Armistice Convention, is not entitled to avail itself of the terms of that instrument in order to establish that the alienation of the factory is null and void, and secondly, that that country cannot, on her own account, cite Article 248 of the Treaty of Versailles for the same purpose. It would seem, however, that the said Government contends that, in view of the right which the States signatory to the Armistice Convention may have to oppose the sale of the factory and in view of the right of the Reparation Commission to ensure the discharge of reparation debts in general and especially in view of the right reserved to it under Article 248, Poland's obligation to pay to Germany an indemnity in favour of the Oberschlesische is dependent on the previous approval of the said States and of the Reparation Commission.

The German Government, for its part, whilst disputing the justice of these objections of the Polish Government, has accepted the jurisdiction of the Court to decide upon them "as preliminary points in regard to the questions of form, amount and methods of payment of the indemnities claimed by it, questions with which the Court has already declared itself competent to deal". It has asked the Court to dismiss the Polish alternative submission and to decide :

"that the Polish Government is not justified in refusing to pay compensation to the German Government on the basis of arguments drawn from Article 256 or for motives of respect for the rights of the Reparation Commission or other third parties".

The Court considers that there is no doubt as to its jurisdiction to pass judgment upon the Polish submission in question, but that this submission must be rejected as not well-founded.

In this respect, it should be observed in the first place that the facts cited by Poland cannot prevent the Court, which now has before it a claim for indemnity based on its Judgment No. 7, from passing judgment upon this claim in so far as concerns the fixing of an indemnity corresponding, amongst other things, to the amount of the damage sustained by the Oberschlesische, of which damage the most important element is represented by the loss of the factory. For the Court, when it declared in Judgment No. 7 that the attitude

of the Polish Government in regard to the Oberschlesische was not in conformity with the provisions of Article 6 and the following articles of the Geneva Convention—which attitude consisted in considering and treating the Chorzow factory as acquired by Poland under Article 256 of the Treaty of Versailles—established that, as between the Parties, that article was not applicable to the Chorzow factory. Again it appears from the documents submitted to the Court by the Parties that the Reparation Commission does not claim to be competent to decide whether any particular property is or is not acquired by a succession State under the said article. The Commission accepts in this respect the solution arrived at in regard to this question either by the means at the disposai of those concerned—diplomatic negotiations, arbitration, etc.—or as the result of a unilateral act on the part of the succession State itself. The fact that the Parties are now agreed that Poland must retain the factory has nothing to do with Article 256 of the Treaty of Versailles, but is owing to the impracticability of returning it. In these circumstances there seems to be no doubt that Poland incurs no risk of having again to pay the value of the factory to the Reparation Commission, if, in accordance with Germany's claim, she pays this value to that State.

With regard to the Armistice Convention and Article 248 of the Treaty of Versailles, the question assumes a different aspect. The Armistice Convention appears to have been cited in order to reserve the possibility of getting the sale of the factory to the Oberschlesische declared invalid by means of an action to be brought to that end by the States signatory to that Convention. As, however, the Court, in Judgment No. 7, has held that Poland cannot avail itself of the provisions of the said Convention to which she is not a party, the Court cannot without inconsistency admit that country's right to invoke the Convention in order to delay making reparation for the damage resulting from her adoption of an attitude not in conformity with her obligations under the Geneva Convention.

As has already been said, the Court in Judgment No. 7 has declared that Poland cannot on her own account rely on Article 248 of the Treaty of Versailles in order to obtain the

annulment of the sale of the factory. Furthermore, the Court has stated that this article does not involve a prohibition of alienation, and that the rights reserved to the Allied and Associated Powers in the article are exercised through the Reparation Commission. But it would be difficult to understand how these rights could be affected by the payment to the Reich, as an indemnity, of the value of the factory, seeing that, without such a payment, the rights of the Reich in the enterprise would probably lose all value. The objection based on this article must therefore also be overruled.

The Court considers that it should confine itself to rejecting the submission whereby the Polish Government asks for a suspension, since by so doing and by overruling the objections raised by the Polish Government on the basis of Article 256 of the Treaty of Versailles, it is deciding in conformity with the German submission to the extent that that submission is well-founded ; the Court cannot, in fact, consider the submission in question in so far as it relates to third parties who are not specified.

III.

The existence of a damage to be made good being recognized by the respondent Party as regards the Bayerische, and the objections raised by the same Party against the existence of any damage that would justify compensation to the Oberschlesische being set aside, the Court must now lay down the guiding principles according to which the amount of compensation due may be determined.

The action of Poland which the Court has judged to be contrary to the Geneva Convention is not an expropriation— to render which lawful only the payment of fair compensation would have been wanting ; it is a seizure of property, rights and interests which could not be expropriated even against compensation, save under the exceptional conditions fixed by Article 7 of the said Convention. As the Court has expressly declared in Judgment No. 8, reparation is in this case the consequence not of the application of Articles 6 to 22 of the Geneva Convention, but of acts contrary to those articles.

It follows that the compensation due to the German Government is not necessarily limited to the value of the undertaking at the moment of dispossession, plus interest to the day of payment. This limitation would only be admissible if the Polish Government had had the right to expropriate, and if its wrongful act consisted merely in not having paid to the two Companies the just price of what was expropriated ; in the present case, such a limitation might result in placing Germany and the interests protected by the Geneva Convention, on behalf of which Interests the German Government is acting, in a situation more unfavourable than that in which Germany and these interests would have been if Poland had respected the said Convention. Such a consequence would not only be unjust, but also and above all incompatible with the aim of Article 6 and following articles of the Convention—that is to say, the prohibition, in principle, of the liquidation of the property, rights and interests of German nationals and of companies controlled by German nationals in Upper Silesia—since it would be tantamount to rendering lawful liquidation and unlawful dispossession indistinguishable in so far as their financial results are concerned.

The essential principle contained in the actual notion of an illegal act—a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals—is that reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed. Restitution in kind, or, if this is not possible, payment of a sum corresponding to the value which a restitution in kind would bear ; the award, if need be, of damages for loss sustained which would not be covered by restitution in kind or payment in place of it—such are the principles which should serve to determine the amount of compensation due for an act contrary to international law.

This conclusion particularly applies as regards the Geneva Convention, the object of which is to provide for the maintenance of economic life in Upper Silesia on the basis of respect for the *status quo.* The dispossession of an industrial undertaking—the expropriation of which is prohibited by the

Geneva Convention—then involves the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible. To this obligation, in virtue of the general principles of international law, must be added that of compensating loss sustained as the result of the seizure. The impossibility, on which the Parties are agreed, of restoring the Chorzów factory could therefore have no other effect but that of substituting payment of the value of the undertaking for restitution ; it would not be in conformity either with the principles of law or with the wish of the Parties to infer from that agreement that the question of compensation must henceforth be dealt with as though an expropriation properly so called was involved.

Such being the principles to be followed in fixing the compensation due, the Court may now consider whether the damage to be made good is to be estimated separately for each of the two Companies, as the Applicant has claimed, or whether it is preferable to fix a lump sum.

If the Court were dealing with damage which, though caused by a single act, had affected persons independent the one of the other, the natural method to be applied would be a separate assessment of the damage sustained by each of them the total amount of compensation thus assessed would then constitute the amount of reparation due to the State.

In the present case, the situation is different. The economic unity of the Chorzow undertaking, pointed out by the Court in its Judgment No. 6, is shown above all in the fact that the interests possessed by the two Companies in the said undertaking are interdependent and complementary ; it follows that they cannot simply be added together without running the risk of the same damage being compensated twice over ; for all that the Bayerische would have obtained from its participation in the undertaking (sums due and shares in the profits) would have been payable by the Oberschlesische. The value

of the Bayerische's option on the factory depended also on the value of the undertaking. The whole damage suffered by the one or the other Company as the result of dispossession, in so far as concerns the cessation of the working and the loss of profit which would have accrued, is determined by the value of the undertaking as such ; and, therefore, compensation under this head must remain within these limits.

On the other hand, it is clear that the legal relationship between the two Companies in no way concerns the international proceedings and cannot hinder the Court from adopting the system of a lump sum corresponding to the value of the undertaking, if, as is the Court's opinion, such a calculation is simpler and gives greater guarantees that it will arrive at a just appreciation of the amount, and avoid awarding double damages.

One reservation must, however, be made. The calculation of a lump sum referred to above concerns only the Chorzow undertaking, and does not exclude the possibility of taking into account other damage which the Companies may have sustained owing to dispossession, but which is outside the undertaking itself. No damage of such a nature has been alleged as regards the Oberschlesische, and it seems hardly conceivable that such damage should exist, for the whole activity of the Oberschlesische was concentrated in the undertaking. On the other hand, it is possible that damage of such a nature may be shown to exist as regards the Bayerische, which possesses or works other factories of the same nature as Chorzow ; the Court will consider later whether such damage must be taken into account in fixing the amount of compensation.

Faced with the task of determining what sum must be awarded to the German Government in order to enable it to place the dispossessed Companies as far as possible in the economic situation in which they would probably have been if the seizure had not taken place, the Court considers that it cannot be satisfied with the data for assessment supplied by the Parties.

The cost of construction of the Chorzow factory, which the Applicant has taken as a basis for his calculation as regards compensation to the Oberschlesische, gave rise to objections and criticisms by the Respondent which are perhaps not without some foundation. Without entering into this discussion and without denying the importance which the question of cost of construction may have in determining the value of the undertaking, the Court merely observes that it is by no means impossible that the cost of construction of a factory may not correspond to the value which that factory will have when built. This possibility must more particularly be considered when, as in the present case, the factory was built by the State in order to meet the imperious demands of public necessity and under exceptional circumstances such as those created by the war.

Nor yet can the Court, on the other hand, be satisfied with the price stipulated in the contract of December 24th, 1919, between the Reich, the Oberschlesische and the Treuhand, or with the offer of sale of the shares of the Oberschlesische to the Geneva *Compagnie d'azote et de fertilisants* made on May 26th, 1922. It has already been pointed out above that the value of the undertaking at the moment of dispossession does not necessarily indicate the criterion for the fixing of compensation. Now it is certain that the moment of the contract of sale and that of the negotiations with the Genevese Company belong to a period of serious economic and monetary crisis ; the difference between the value which the undertaking then had and that which it would have had at present may therefore be very considerable. And further, it must be considered that the price stipulated in the contract of 1919 was determined by circumstances and accompanied by clauses which in reality seem hardly to admit of its being considered as a true indication of the value which the Parties placed on the factory ; and that the offer to the Genevese Company is probably to be explained by the fear of measures such as those which the Polish Government in fact adopted afterwards against the Chorzow undertaking, and which the Court has judged not to be in conformity with the Geneva Convention.

And finally as regards the sum agreed on at one moment by the two Governments during the negotiations which followed Judgment No. 7—which sum, moreover, neither Party thought fit to rely on during the present proceedings— it may again be pointed out that the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement.

This being the case, and in order to obtain further enlightenment in the matter, the Court, before giving any decision as to the compensation to be paid by the Polish Government to the German Government, will arrange for the holding of an expert enquiry, in conformity with Article 50 of its Statute and actually with the suggestions of the Applicant. This expert enquiry, directions for which are given in an Order of Court of to-day's date, will refer to the following questions :

I. — *A.*. What was the value, on July 3rd, 1922, expressed in Reichsmarks current at the present time, of the undertaking for the manufacture of nitrate products of which the factory was situated at Chorzow in Polish Upper Silesia, in the state in which that undertaking (including the lands, buildings, equipment, stocks and processes at its disposal, supply and delivery contracts, goodwill and future prospects) was, on the date indicated, in the hands of the Bayerische and Oberschlesische Stickstoffwerke ?

B. What would have been the financial results, expressed in Reichsmarks current at the present time (profits or losses), which would probably have been given by the undertaking thus constituted from July 3rd, 1922, to the date of the present judgment, if it had been in the hands of the said Companies ?

II. —What would be the value at the date of the present judgment, expressed in Reichsmarks current at the present time, of the same undertaking (Chorzów) if that undertaking (including lands, buildings, equipment, stocks, available processes, supply and delivery contracts, goodwill and future prospects) had remained in the hands of the Bayerische and Oberschlesische Stickstoffwerke, and had either remained substantially as it was in 1922 or had been developed proportionately on

lines similar to those applied in the case of other undertakings of the same kind, controlled by the Bayerische, for instance, the undertaking of which the factory is situated at Piesteritz ?

The purpose of question I is to determine the monetary value, both of the object which should have been restored in kind and of the additional damage, on the basis of the estimated value of the undertaking including stocks at the moment of taking possession by the Polish ; Government, together with any probable profit that would have accrued to the undertaking between the date of taking possession and that of the expert opinion.

On the other hand, question II is directed to the ascertainment of the present value on the basis of the situation at the moment of the expert enquiry and leaving aside the situation presumed to exist in 1922.

This question contemplates the present value of the undertaking from two points of view : firstly, it is supposed that the factory had remained essentially in the state in which it was on July 3rd, 1922, and secondly, the factory is to be considered in the state in which it would (hypothetically but proba,bly) have been in the hands of the Oberschlesische and Bayerische, if, instead of being taken in 1922 by Poland, it had been able to continue its supposedly normal development from that time onwards. The hypothetical nature of this question is considerably diminished by the possibility of comparison with other undertakings of the same nature directed by the Bayerische, and, in particular, with the Piesteritz factory, the analogy of which with Chorzow, as well as certain differences between the two, have been many times pointed out during the present proceedings.

In regard to this, it should be observed that the Agent for the German Government, at the public sitting of June 21st, 1928, handed in two certificates by notaries containing a summary of contracts concluded on April 16th, 1925, and August 27th, 1927, between the *Mitteldeutsche Stickstoffwerke A.-G.* and the Bayerische, and adhered to by the *Vereinigte Industrie-Unternehmungen A.-G.,* under which contracts the Mitteldeutsche leased to the Bayerische the landed properties at Piesteritz belonging to it, together with all installations, etc., connected therewith. The Agent for the Polish Government,

however, in his speech on June 25th, said that, not being acquainted with the contracts and being entirely unable to form an opinion as to whether the summaries in question contained all the data necessary for accurate calculations, he formally objected to the said summaries being taken as a basis in the present proceedings.'

As regards the *lucrum cessans,* in relation to question II, it may be remarked that the cost of upkeep of the corporeal objects forming part of the undertaking and even the cost of improvement and normal development of the installation and of the industrial property incorporated therein, are bound to absorb in a large measure the profits, real or supposed, of the undertaking. Up to a certain point, therefore, any profit may be left out of account, for it will be included in the real or supposed value of the undertaking at the present moment. If, however, the reply given by the experts to question I B should show that after making good the deficits for the years during which the factory was working at a loss, and after due provision for the cost of upkeep and normal improvement during the following years, there remains a margin of profit, the amount of such profit should be added to the compensation to be awarded.

On the other hand, if the normal development presupposed by question II represented an enlargement of the undertaking and an investment of fresh capital, the amount of such sums must be deducted from the value sought for.

The Court does not fail to appreciate the difficulties presented by these two questions, difficulties which are however inherent in the special case under consideration, and closely connected with the time that elapsed between the dispossession and the demand for compensation, and with the transformations of the factory and the progress made in the industry with which the factory is concerned. In view of these difficulties, the Court considers it preferable to endeavour to ascertain the value to be estimated by several methods, in order to permit of a comparison and if necessary of completing the results of the one by those of the others. The Court, therefore, reserves every right to review the valuations referred to in the different formulæ ; basing itself on the results of the said valuations and of facts and documents submitted to it, it will then

proceed to determine the sum to be awarded to the German Government, in conformity with the legal principles set out above.

It must be stated that the Chorzow factory to be valued by the experts includes also the chemical factory.

Besides the arguments which, in the Polish Government's opinion, tend to show that the working of the said factory was not established on a profitable basis—arguments which it will be for the experts to consider—that Government has claimed that the working depended on a special authorization, which the Polish authorities were entitled to refuse. But the Court is of opinion that this argument is not well-founded.

The authorization referred to seems to be that envisaged by paragraph 18 of the Prussian law of 1861, under which, failing international treaty provisions to the contrary, moral persons of foreign nationality cannot engage in industry without the authorization of the Government. In the present case, it is certain that the Geneva Convention does actually constitute the international treaty which, guaranteeing to industrial undertakings the continuation of their activities, does away with any necessity for the special authorization required by the law of 1861.

The fact that the chemical factory was not only not working, but not even completed, at the time of transfer of the territory to Poland, can be of no importance ; for chemical industry of all kinds was expressly mentioned in the articles of the Oberschlesische Company as one of the objects of that Company's activities, and the sections and plant of the chemical factory, which were, moreover, closely connected with the sections and plant producing nitrate of lime, had already been provided for and mentioned in the contract for construction and exploitation of March 5th, 1915 ; thus, the entry into working of the factory was only the normal and duly foreseen development of the industrial activity which the Oberschlesische had the right to exercise in Polish Upper Silesia.

In the Court's opinion, the value to which the above questions relate will be sufficient to permit it with a full knowledge of the facts to fix the amount of compensation to which the German Government is entitled, bn the basis of the damage suffered by the two Companies in connection with the Chorzow undertaking.

It is true that the German Government has pointed out several times during the written and oral proceedings that fair compensation for damage suffered by the Bayerische could not be limited to the value of what has been called the "contractual rights", namely, the remuneration provided for in the contracts between the Reich or the Oberschlesische and the said Company for having made available its patents, licences and experience gained, for the management and for the organization of the sale of the finished products. The reason given is that this remuneration, which was accepted in view of the special relationship between the Parties, would hardly correspond to the fair remuneration which the Bayerische might have claimed from any third party, like the Polish Government, for the same consideration. It was on these grounds that the German Government proposed to take as a basis for the calculation of damage suffered by the Bayerische a licence supposed to be granted by the said Company to a third party under fair and normal conditions.

The method adopted by the Court in putting the questions set out above to the experts meets the German Government's contention, in so far as that contention is justified. For if the Bayerische had demanded a larger sum or additional payments in its favour, or if it had stipulated for other conditions to its advantage, the value to the Oberschlesische of its participation would to the same extent be diminished ; this shows that the relation between value given and value received does not enter into consideration in calculating the worth of the enterprise as a whole. If the Bayerische had not merely managed but also owned the undertaking, this amount would still be the same ; in fact, all the elements constituting the

undertaking—the factory and its accessories on the one hand, the non-corporeal and other values supplied by the Bayerische on the other—are independent of the advantages which, under its contracts, each of the two Companies may derive from the undertaking.

For this reason, any difference which might exist between the conditions fixed in the contracts of 1915, 1919 and 1920 and those laid down in a contract supposed to be concluded with a third party, is of no importance in estimating the damage.

It therefore only remains to be considered whether, in conformity with the reservation made above, the Bayerische has, owing to the dispossession, suffered damage, other than that sustained by the undertaking, such as might be considered in calculating the compensation demanded by the German Government.

Although the position taken up on this subject by the German Government does not seem clear to it, the Court is in a position to state that this Government has not failed to draw attention to certain circumstances which are said to prove the existence of damage of such a nature. The possibility of competition injurious to the Bayerische's factories by a third party, alleged to have unlawfully become acquainted with and have obtained means of making use of that Company's processes, is certainly the circumstance which is most important and easiest to appreciate in this connection.

The Court must however observe that it has not before it the data necessary to enable it to decide as to the existence and extent of damage resulting from alleged competition of the Chorzow factory with the Bayerische factories ; the Court is not even in a position to say for certain whether the methods of the Bayerische have been or are still being employed at Chorzow, nor whether the products of that factory are to be found in the markets in which the Bayerische sells or might sell products from its own factories. In these circumstances, the Court can only observe that the damage alleged to have resulted from competition is insufficiently proved. '

Moreover, it would come under the heading of possible but contingent and indeterminate damage which, in accordance with the jurisprudence of arbitral tribunals, cannot be taken into account.

This is more especially the case as regards damage which might arise from the fact that the field in which the Bayerische can carry out its experiments, perfect its processes and make fresh discoveries has been limited, and from the fact that the Company can no longer influence the market in the manner that it could have done if it had continued to work the Chorzow factory.

As the Court has discarded for want of evidence, indemnity for damage alleged to have been sustained by the Bayerische outside the undertaking, it is not necessary to consider whether the interests in question would be protected by Articles 6 to 22 of the Geneva Convention.

In addition to pecuniary damages for the benefit of the Bayerische, the German Government asks the Court to give judgment :

"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 ;

in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc."

In regard to these submissions, it should be observed in the first place that they cannot contemplate damage already sustained, but solely damage which the Bayerische might suffer in the future.

If the prohibition of export is designed to prevent damage arising from the competition which the Chorzow factory might offer to the Bayerische factories, this claim must be at once dismissed, in view of the result arrived at above by the Court. To the reasons on which this result was based, it is to be added, in so far as the prohibition of export is concerned, that the Applicant has furnished no information

enabling the Court to satisfy itself as to the justification for the German submission naming certain countries to which export should not be allowed and stating a definite period for which this prohibition should be in force.

It must further be observed that if the object of the prohibition were to protect the industrial property rights of the Bayerische and to prevent damage which the latter might suffer as a result of the use of these rights by Poland, in conflict with licences granted by the Bayerische to other persons or companies, the German Government should have furnished definite data as regards the existence and duration of the patents or licences in question. But notwithstanding the express requests made in this respect by the Polish Government, the German Government has produced no such data. The explanation no doubt is that the German Government does not appear to wish to base its claim respecting a prohibition of export upon the existence of these patents and licences.

On the contrary, the German Government's claim seems to present the prohibition of export as a clause which should have been included in a fair and equitable licensing contract con-eluded between the Bayerische and any third party ; in this connection the following remarks should be made:

The mere fact that the produce of any particular undertaking is excluded from any particular market cannot evidently in itself be in the interests of such undertaking, nor of the persons who, as such, are interested therein. If the Bayerische —which, whilst participating with the Oberschlesische in the Chorzow undertaking, constitutes an entirely separate undertaking from that of Chorzow and one that may even to a certain extent have interests conflicting with those of Chorzow —were to limit in its own favour, by contract, the number of the markets of that factory, it would follow that the profit which it would draw from its share in the Chorzow undertaking might be correspondingly diminished. The Court having, as is said above, adopted, in calculating the compensation to be awarded to the German Government, a method by which such compensation shall include the total value of the undertaking, it follows that the profits of the Bayerische will be estimated without deducting the advantages which that Company might draw from a clause limiting export. The

prohibition of export asked for by the German Government cannot therefore be granted, or the same compensation would be awarded twice over.

This being so, the Court need not deal with the question whether such a prohibition, although customary in contracts between individuals, might form the subject of an injunction issued by the Court to a government, even if that government were working, as a State enterprise, the factory of which export was to be limited, nor if the prohibition asked for would be fair and appropriate in the circumstances.

As regards the German Government's alternative claim for a prohibition of exploitation, it may be added that this seems hardly compatible with the award of compensation representing the present value of the undertaking ; for when that compensation, which is to cover future prospects and will consist in a sum of money bearing interest, has been paid, the Polish Government will have acquired the right to continue working the undertaking as valued, more especially as the Parties agree that the factory shall remain in the hands of the Polish Government. This agreement cannot, in fact, be construed as meaning that the factory should remain inoperative or be adapted to some other purpose, if the reparation contemplated did not include, in addition to a pecuniary indemnity, the prohibition of export sought for. It is moreover very doubtful whether, apart from any other consideration, prohibition of exploitation is admissible under the Geneva Convention, the object of which is to provide for the maintenance of industrial undertakings, and which, for this purpose, even permits them, in exceptional cases, to be expropriated (Article 7).

IV.

The Court thinks it preferable not to proceed at this stage to consider the Parties' submissions concerning certain conditions and methods in regard to the payment of the indemnity to be awarded, which conditions and methods are closely connected either with the amount of the sum to be paid or with circumstances which may exist when the time comes for payment. This applies more especially as regards the

German submission No. 4 *(a)—(b)—(c)*, and the Polish submissions A 3 and B I *(c)*, which the Court therefore reserves for the judgment fixing the indemnity.

On the other hand, it is possible and convenient at once to decide the so-called question of set-off to which submission No. 4 *(d)* of the Applicant and submission C of the Respondent respectively relate.

The claim of the German Government in regard to this matter has, in the last instance, been couched in the following terms :

[*Translation.]*
"It is submitted 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 ;

in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments."

The Polish Government, for its part, has simply asked for the rejection of this submission.

If the German submission is read literally, it is possible to regard it as mainly designed to prevent a specific case of setoff, that is to say, the setting-off in this case of the claim which the Polish Government contends that it possesses in respect of social insurances in Upper Silesia, and which was the cause of the failure of the negotiations between the two Governments following Judgment No. 7. But, if we consider the submission in the light of the observations contained in the Case and more especially in the Reply, it is easy to see that the claim in respect of social insurances in Upper Silesia is only taken as an example. In reality, the German Government asks the Court for a decision of principle the effect of which would be either to prevent the set-off. of any counterclaim against the indemnity fixed in the judgment to be given by the Court, or, alternatively, only to allow such set-off in certain defined circumstances.

Though, as has been seen, the Polish Government for its part confines itself in its submission to asking the Court to reject the German submission, the arguments advanced in

support of its claim clearly show that it considers the said German submission to be both premature and inadmissible, and that the Court has therefore no power to deal with it.

The question of the Court's jurisdiction is thus clearly raised. Since there is no agreement between the Parties to submit to the Court the so-called question of set-off, it remains first of all to be considered whether the Court has jurisdiction to pass judgment on the German submission No. 4 *(d)* in virtue of any other provision, which, in the present case, could only be Article 23 of the Geneva Convention.

It is clear that the question whether international law allows claims to be set-off against each other, and if so, under what conditions such set-off is permitted, is, in itself, outside the jurisdiction derived by the Court from the said article. But the German Government contends that the question raised by it only relates to one aspect of the payment which the Polish Government must make and that, this being so, it constitutes a difference of opinion covered by the arbitration clause contained in the article.

The Court considers that this argument must be interpreted in the sense that the prohibition of set-off is asked for in order to ensure that in the present case reparation shall be really effective.

It may be admitted, as the Court has said in Judgment No. 8, that jurisdiction as to the reparation due for the violation of an international convention involves jurisdiction as to the forms and methods of reparation. If the reparation consists in the payment of a sum of money, the Court may therefore determine the method of such payment. For this reason it may well determine to whom the payment shall be made, in what place and at what moment ; in a lump sum or maybe by instalments ; where payment shall be made ; who shall bear the costs, etc. It is then a question of applying to a particular case the general rules regarding payment, and the Court's jurisdiction arises quite naturally out of its jurisdiction to award monetary compensation.

But this principle would be quite unjustifiably extended if it were taken as meaning that the Court might have cognizance of any question whatever of international law.

even quite foreign to the convention under consideration, for the sole reason that the manner in which such question is decided may have an influence on the effectiveness of the reparation asked for. Such an argument seems hardly reconcilable with the fundamental principles of the Court's jurisdiction, which is limited to cases specially provided for in treaties and conventions in force.

The German Government's standpoint however is that the power of the Court to decide on the exclusion of set-off is derived from the power which it has to provide that reparation shall be effective. Now, it seems clear that this argument can only refer to a plea of set-off raised against the beneficiary by the debtor, of such a nature as to deprive reparation of its effectiveness. Such for instance would be the case if the claim put forward against the claim on the score of reparation was in dispute and was to lead to proceedings which would in any case have resulted in delaying the entry into possession by the person concerned of the compensation awarded to him. On the contrary, if a liquid and undisputed claim is put forward against the reparation claim, it is not easy to see why a plea of set-off based on this demand should necessarily prejudice the effectiveness of the reparation. It follows that the Court's jurisdiction under Article 23 of the Geneva Convention could in any case only be relied on in regard to a plea raised by the respondent Party.

Now it is admitted that Poland has raised no plea of set off in regard to any particular claim asserted by her against the German Government.

It is true that in the negotiations which followed Judgment No. 7 Poland had put forward a claim to set off a part of the indemnity which she would have undertaken to pay the German Government, against the claim which she put forward in regard to social insurances in Upper Silesia. But the Court has already had occasion to state that it can take no account of declarations, admissions or proposals which the Parties may have made during direct negotiations between them. Moreover, there is nothing to justify the. Court in thinking that the Polish Government would wish to put forward, against a judgment of the Court, claims which it may have thought

fit to raise during friendly negotiations which the Parties intended should lead to a compromise. The Court must also draw attention in this connection to what it has already said in Judgment No. I to the effect that it neither can nor should contemplate the contingency of the judgment not being complied with at the expiration of the tinie fixed for compliance.

In these circumstances the Court must abstain from passing upon the submissions in question.

DISPOSITIF.

For these reasons,

The Court,

having heard both Parties, by nine votes to three,

(1) gives judgment to the effect that, by reason of the attitude adopted by the Polish Government 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 pay, as reparation to the German Government, a compensation corresponding to the damage sustained by the said Companies as a result of the aforesaid attitude ;

(2) dismisses the pleas of the Polish Government with a view to the exclusion from the compensation to be paid of an amount corresponding to all or a part of the damage sustained by the Oberschlesische Stickstoffwerke, which pleas are based either on the judgment given by the Tribunal of Katowice on November 12th, 1927, or on Article 256 of the Treaty of Versailles ;

(3) dismisses the submission formulated by the Polish Government to the effect that the German Government should in the first place hand over to the Polish Government the whole of the shares of the Oberschlesische Stickstoffwerke Company, of the nominal value of 110,000,000 marks, which are in the hands of the German Government under the contract of December 24th, 1919 ;

marks, which are in the hands of the German Government under the contract of December 24th, 1919 ;

(4) dismisses the alternative submission formulated by the Polish Government to the effect that the claim for indemnity, in so far as the Oberschlesische Stickstoffwerke Company is concerned, should be provisionally suspended ;

(5) dismisses the submission of the German Government asking for judgment to the effect 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, or, in the alternative, that the Polish Government should be obliged to cease working the factory or the chemical equipment for the production of nitrate of ammonia, etc. ;

(6) gives judgment to the effect that no decision is called for on the submissions of the German Government asking for judgment to the effect 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 said claim for indemnity, and, in the alternative, that set-off is only permissible if the Polish Government puts forward for this purpose a claim in respect of a debt recognized by the German Government or established by a judgment given between the two Governments ;

(7) gives judgment to the effect that the compensation to be paid by the Polish Government to the German Government shall be fixed as a lump sum ;

(8) reserves the fixing of the amount of this compensation for a future judgment, to be given after receiving the report of experts to be appointed by the Court for the purpose of enlightening it on the questions set out in the present judgment and after hearing the Parties on the subject of this report ;

(9) also reserves for this future judgment the conditions and methods for the payment of the compensation in so far as concerns points not decided by the present judgment.

Done in French and English, the French text being authoritative, at the Peace Palace, The Hague, this thirteenth day of September nineteen hundred and twenty-eight, 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.

M. Rabel, National Judge, desires to add to the judgment the remarks which follow hereafter.

Lord Finlay, Judge, and M. Ehrlich, National Judge, declaring that they cannot concur in the judgment of the Court and availing themselves of the right conferred on them by Article 57 of the Statute, have delivered the separate opinions which follow hereafter.

M. Nyholm, Judge, being unable to concur in the result arrived at by the judgment, desires to add the remarks which follow hereafter.