ILLINOIS CENTRAL RAILROAD COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES.

(March 31, 1926. Pages 15-21.)

This case is before this Commission on the Mexican Agent's motion to dismiss.

1. The claim is put forward by the United States of America on behalf of the Illinois Central Railroad Company (an American corporation) to recover the sum of $1,807,531.36, with interest thereon from April 1, 1925, alleged to be the balance due on 91 locomotive engines sold and delivered by the claimant to the Government Railway Administration of the National Railways of Mexico. The grounds of the motion to dismiss are (first) that the claim is based on an alleged nonperformance of contractual obligations and therefore not within the jurisdiction of this Commission and (second) that, the obligation itself not being denied by Mexico, no controversy exists for the decision of this Commission.

Jurisdiction over contract claims

2. The challenge of this Commission's jurisdiction to hear and decide any case grounded on a breach of contract obligations requires an examination and construction of the terms of the Treaty to ascertain the scope of this Commission's jurisdiction, which must be determined by it.

3. This Commission is constituted in pursuance of the provisions of a Convention entered into between the United States of America and the United Mexican States, signed at Washington September 8, 1923, which became effective on March 1, 1924. Its terms clothe this Commission with the jurisdiction and power and made it its duty to hear, examine, and decide:

(*a*) All claims against one Government by nationals of the other for losses or damages suffered by such nationals or by their properties; and

(*b*) All claims for losses or damages originating from acts of officials or others acting for either Government and resulting in injustice; but

(*c*) There is excepted from the foregoing categories claims "arising from acts incident to the recent revolutions".

The examination and application of clause (*a*) will suffice for the disposition of this case.

4. Before entering upon this examination the Commission feels bound to state that any representation of international jurisprudence, and especially of the jurisprudence of the Mexican Claims Commission of 1868, intended to proclaim in a general way that such jurisprudence was either in favor of jurisdiction over contract claims or disclaimed jurisdiction over contract claims, is contrary to the wording of the awards themselves. Whatever statements from authors in this respect it may be possible to quote, a perusal of the very awards clearly shows that not only either allowance or disallowance of contract claims is not their general and uniform feature but that it is even impracticable to deduce from them one consistent system. A rule that contract claims are cognizable only in case denial of justice or any other form of governmental responsibility is involved is not in them; nor can a general rule be discovered according to which mere nonperformance of contractual obligations by a government in its civil capacity withholds jurisdiction, whereas it grants jurisdiction when the nonperformance is accompanied by some feature of the public capacity of the Government as an authority. It seems especially hazardous to construe awards like the umpire's in the Pond case, the Treadwell case, the De Witt case, the Kearney case, etc. (Moore, 3466-3469), as if they decided in favor of jurisdiction over

contract claims but dismissed the claims on their merits. As, moreover, no claims convention or arbitration treaty known to the Commission used exactly the wording of the present Convention of September 8, 1923 (though the treaty of August 7, 1892, between the United States and Chile comes near to it; (Moore, 4691), the Commission has to seek its own way.

5. The Treaty is this Commission's charter. It must look primarily to the language of that Treaty, and particularly to Articles I and VIII and the preamble, to discover the scope and limits of its jurisdiction. The words "all claims for losses or damages suffered by persons or by their properties" (except one group of claims only which has been turned over to a Special Claims Commission) indicate in themselves a broad and liberal spirit underlying and permeating this Treaty; and it is well known to have been the purpose of the negotiators to have by this Convention removed a source of irritation between the two Nations and a constant menace to their friendly intercourse. The phrase "for losses or damages suffered by persons or by their properties" is broader than any provision in similar previous treaties with Mexico—apart from Article VI of the treaty of January 30, 1843,which says "all claims", and from the unratified treaty of November 20, 1843, which said the same (Moore, 1245, 1246; Malloy, 1120). This phrase in no wise limits the preceding phrase "all claims" save that it in effect restricts the Commission's jurisdiction to claims susceptible of measurement by pecuniary standards and excludes those of either a speculative or a punitive character. For all practical purposes the initial words "All claims" of Article I are as broad as the like phrase embodied in the unratified treaty of 1843. This is emphasized by the fact that the other clause in Article I contained in the foregoing paragraph 3 (*b*), providing for a special contingency repeats this same phrase, "all claims", and merely adds thereto "for losses, or damages * * * resulting in injustice".

6. Must these opening words of Article I be construed in the light of the closing words of paragraph (1) of the same article, reading that the claims should be decided "in accordance with the principles of international law", etc., to the effect that "all claims" must mean all claims for which either government is responsible according to international law? The conclusion suggested exceeds what is required by logic and in the Commission's view goes too far. If it be true that all the claims of Article I should be decided "in accordance with the principles of international law", etc., the only permissible inference is that they must be claims of an international character, not that they must be claims entailing international responsiblity of governments. International claims, needing decisions in "accordance with the principles of international law", may belong to any of four types:

(*a*) Claims as between a national of one country and a national of another country. These claims are international, even in cases where international law declares one of the municipal laws involved to be exclusively applicable: but they do not fall within Article I.

(*b*) Claims as between two national governments in their own right. These claims also are international and also are outside the scope of Article I.

(*c*) Claims as between a citizen of one country and the government of another country acting in its public capacity. These claims are beyond doubt included in Article I.

(*d*) Claims as between a citizen of one country and the government of another country acting in its civil capacity. These claims too are international in their character, and they too must be decided "in accordance with the

principles of international law", even in cases where international law should merely declare the municipal law of one of the countries involved to be applicable.

It seems impossible to maintain that legal pretensions belonging to this fourth category are not "claims". It seems equally impossible to maintain that they are not "international claims". If it were advanced that a state turning over claims of this category to an international tribunal waives part of its sovereignty, this would be true; but so does every treaty containing provisions which depart from pure municipal law, as the majority of treaties do. It is entirely clear that on several occasions both the United States and Mexico expressly gave claims commissions jurisdiction over contract claims, showing thereby that in principle conferring on an international tribunal jurisdiction over contract claims is not contrary to their legal conceptions. The so-called Porter Convention of the Second Hague Peace Conference of 1907, to which both the United States and Mexico are parties, though having for its object the prevention of the use of force in collecting debts growing out of contract obligations until other methods, including arbitration, had been exhausted, nevertheless is a striking illustration of the recognition of contract claims as proper subjects for submission to an international tribunal. The Commission concludes that the final words of Article I, which provide that it shall decide cases submitted to it "in accordance with the principles of international law, justice and equity", prescribe the rules and principles which shall govern in the decision of claims falling within its jurisdiction but in no wise limit the preceding clauses, which do fix this Commission's jurisdiction.

7. The argument is advanced that as Article V waives the requirement that as a prerequisite to diplomatic intervention remedies before local courts must be exhausted and as under its laws the United States can be sued only on claims arising out of contract, therefore Article V must refer to contract claims, as these are the only claims which could be enforced by local American tribunals. This argument lacks force inasmuch as Article V applies as well to Mexico as to the United States and under Mexican law not only claims against the Mexican Government based on contract but on other property rights or on torts may be enforced through the courts.

8. This much for the text of the Treaty of 1923. There remains the question whether there has been a misunderstanding on the part of the Mexican negotiators of this Treaty with respect to the inclusion of contract claims within its terms. In the absence of all evidence in this respect, an assumption to this effect appears to the Commission unlikely. If the Mexican negotiators of May-August, 1923, had been in doubt as to the views of the American Government relative to contract claims and had been desirous to ascertain it, nothing would have been more obvious than to consult Charles Cheney Hyde's book of 1922, "International Law Chiefly as Interpreted and Applied by the United States"; the more so as since February, 1923, the author was solicitor in the State Department at Washington. Volume I, page 559, of this work sums up the attitude of the United States in the following words:

> "That it is disposed both to seek and permit the adjustment by arbitration of contractual claims of American citizens against foreign governments, as well as those of citizens of foreign States against itself. Arbitrators have, moreover, not hesitated to interpret broadly the scope of jurisdiction conferred upon them."

It is irrelevant and immaterial to consider the correctness of this interpretation of Mr. Hyde; the quotation is conclusive to show that if the Mexican

negotiators had felt in want of acquainting themselves with current American views as to international jurisdiction over contract claims, they can not possibly have been victims of the impression that the United States was averse to including contract claims.

9. From the foregoing considerations no other deduction is possible than that claims arising from breach of contract obligations are included within the terms of Article I of the Treaty of 1923. This is in conformity with what is known about the broad and liberal intention of the negotiators of the Treaty as recalled in paragraph 5 above. The attention of the Commission has been directed to some of the secret records of the negotiations between the representatives of the two Nations preliminary to the conclusion of this Treaty. These records tend to confirm the soundness of the conclusion reached by the Commission independent of them.

10. That there may be no possible confusion of thought, the Commission expressly states that in what is above written it has not considered the problem whether in the absence of a claims convention a foreign office would be entitled to resort to diplomatic intervention on account of the nonperformance of contractual obligations owing to one of its nationals by the government of another country. Some high executive authorities have denied this right; others have held that it could not be doubted. It is not for this Commission to pronounce upon this problem; the Commission bases its opinion with respect to its jurisdiction on the terms of an express claims convention.

Exhaustion of legal remedies in local courts

11. The construction and application of Article V of the Treaty of 1923 has been called in question in connection with the problem of the Commission's jurisdiction over contract claims. The Commission has no hesitation in rejecting the contention that while under Article V the legal remedies need not be "exhausted" some resort must nevertheless be had to the local tribunals before the claim can be so impressed with an international character as to confer jurisdiction on this Commission.

Influence of nondenial of obligation on jurisdiction

12. Nonperformance of a contractual obligation may consist either in denial of the obligation itself and nonperformance as a consequence of such denial, or in acknowledgement of the obligation itself and nonperformance notwithstanding such acknowledgment. In both cases such nonperformance may be the basis of a claim cognizable by this Commission. The fact that the debtor is a sovereign nation does not change the rule. Neither is the rule changed by the fact that the default may arise not from choice but from necessity.

Decision

13. From the foregoing it follows that the motion to dismiss must be and is hereby denied. The running of time for filing the Answer has been suspended from November 19, 1925, to March 31, 1926.