

PAULA MENDEL AND OTHERS  
(UNITED STATES) *v.* GERMANY

(August 13, 1926, pp. 784-798;

*Certificate of Disagreement by the National Commissioners, May 14, 1926, pp. 772-784.)*

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CERTIFICATE OF DISAGREEMENT BY THE NATIONAL COMMISSIONERS

The American Commissioner and the German Commissioner have been unable to agree as to the jurisdiction of the Commission over the claim of Paula Mendel and others, Docket No. 4089, their respective Opinions being as follows:

*Opinion of Mr. Anderson, the American Commissioner*

The facts upon which this claim rests are briefly as follows:

The claimants are American nationals who owned shares representing a minority interest in two German companies. These German companies owned properties located in German New Guinea, which on August 1, 1914, at the outbreak of the war, was one of the German colonies in the South Sea Islands. In September, 1914, those colonies were conquered by the Australian military and naval forces and the properties above-mentioned were taken over and thereafter administered by an administrator appointed by such authorities. As of January 10, 1920, the aforesaid German companies were divested of the titles to the properties, through liquidation proceedings taken by the Australian Government under the express sanction of paragraph (b), Article 297, of the Treaty of Versailles. Both the companies were incorporated in Germany. A large majority of their shares are German-owned, the claimants being minority shareholders.

The question presented is whether the exceptional war measures or measures of transfer taken by the Australian Government in German territory as it existed on August 1, 1914, come within the meaning of the provisions of Article 297 (e) of the Treaty of Versailles, which read as follows:

"The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. \* \* \* This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. \* \* \* The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany."

It is argued in opposition to this claim that Germany should not be held liable for losses caused to American nationals by "exceptional war measures or measures of transfer" other than her own, but it is not disputed that the measures taken by the Australian Government were of the character defined in paragraphs 1 and 3 of the Annex to Article 297, or that damage was inflicted upon property, rights, and interests of American nationals by those measures within German territory as it existed on August 1, 1914.

An examination of Article 297 as a whole will show that it embraces, in its various subdivisions, *both* those measures taken by Germany *and* those measures taken by an Allied or Associated Power; and, also, that the language of the various subdivisions of that article discriminates between the obligations of Germany in respect to her own exceptional war measures and measures of transfer and her obligations in respect to such measures when taken by an Allied or Associated Power in the territory of such power or "in German territory *as it existed on August 1, 1914*". Under the accepted rules of interpretation full effect must be given to all of these provisions and a significant contrast between the German and the American contentions is that under the former many of these provisions will be meaningless, whereas under the latter all of them are given a clear and appropriate application.

The reply of the German Agent claims that the compensation mentioned in paragraph (e) of Article 297 "consists primarily in the restitution of the property in question" and cites paragraph (f) of the article in this connection. It appears, however, that paragraph (f) specifically relates to restitution by Germany only where the property has been subjected to a measure of transfer "in German territory", and the significant words "in German territory *as it existed on August 1, 1914*" are omitted. Manifestly, therefore, what is dealt with in paragraph (f) solely covers the obligation of Germany to restore, where possible, property which Germany herself subjected to a measure of transfer in her own territory as continued by the Treaty.

This is emphasized by paragraph (a) of Article 297, which states the general obligation of Germany in respect to the restitution of property subjected *by her* to exceptional war measures, no matter where such measures were applied by her. It is further emphasized by paragraph 6 of the Annex to Article 297, which also relates to the restitution by Germany of property subjected *by her* to exceptional war measures wherever applied. These provisions are as follows:

297 (a): "The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) *taken by Germany* with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed *and the property, rights and interests* concerned restored to their owners \* \* \*."

Paragraph 6 of the Annex to Article 297: "Up to the time when restitution is carried out in accordance with Article 297, Germany is responsible for the conservation of property, rights and interests of the nationals of Allied or Associated

Powers, including companies and associations in which they are interested, that have been subjected *by her* to exceptional war measures.”

The reply of the German Agent also refers to paragraph (h) of Article 297 as showing “The impossibility of applying par. (e) as far as it makes Germany liable for compensation, to war measures taken by other Powers” and states that “It appears from this clause that the framers of Art. 297 contemplated only those measures under which the proceeds of the property in question could and did come into the hands of the German Government”, and adds: “Otherwise it would have been necessary to add a special clause dealing with such proceeds ‘in the possession of Allied or Associated Governments.’” But the very next sentence of subdivision 2 of 297 (h) contains such a “special clause”, which reads: “the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations \* \* \*”. The German nationals, in a case like this, include the *German companies controlled by German subjects* (see 297 (b)), and under the foregoing provisions the proceeds of the property of such German nationals taken over by an Allied or Associated Power are “subject to disposal” by such power. On the other hand, the compensation for the minority interests of nationals of Allied or Associated Powers in such companies is the very compensation for which Germany is made liable under 297 (e).

Paragraphs 1 and 3 of the Annex to Article 297, which paragraphs are directly referred to in 297 (e), are most significant in this connection. Paragraph 1 of the Annex repeatedly mentions war measures of “*any of the High Contracting Parties*”. It cannot be doubted that the expression “*any of the High Contracting Parties*” includes the Allied and Associated Powers and therefore cannot be limited to Germany. Moreover the concluding sentence of this paragraph 1 of the Annex expressly *excludes* Germany so far as any such measures taken by her after November 11, 1918, are concerned. The definitions contained in paragraph 3 of the Annex are equally significant, as the following extracts will show:

“In Article 297 and this Annex the expression ‘exceptional war measures includes measures of all kinds, legislative, administrative, judicial or others’ that have been taken *or will be taken hereafter*”, etc.

“Measures of transfer are those which have affected *or will affect*”, etc.

Accordingly, as 297 (a) specifically requires Germany immediately to discontinue or stay all exceptional war measures and measures of transfer initiated by her, and as the concluding sentence of paragraph 1 of the Annex makes all such measures taken by her after November 11, 1918, absolutely void, it follows that 297 (e) is not limited to war measures and measures of transfer taken only by Germany, for the definition of such measures in paragraph 3 of the Annex includes those to be taken in the future as well as those already taken.

Articles 119 and 121 of the Treaty, particularly the latter, also have direct bearing upon the matter in controversy. They read as follows:

*Article 119*: “Germany renounces in favor of the Principal Allied and Associated Powers all her rights and titles over her oversea possessions.”

*Article 121*: “The provisions of Sections I and IV of Part X (Economic Clauses) of the present Treaty shall apply in the case of these territories whatever be the form of Government adopted for them.”

When the Treaty was written most if not all of the German colonies had already passed out of Germany’s possession. German New Guinea, for instance, had been out of her possession and in the control of Australia since September,

1914, and that fact, which was known to all the world, cannot be deemed to have been overlooked when the Treaty was framed. On the contrary, it is evident that in making the provisions of Section IV of Part X apply to those colonies it was intended to include such a claim as that here presented.

Under 297 (b) the Allied and Associated Powers expressly reserved the right "to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty". The use of the words "controlled by them", which words evidently contemplate the existence of Allied minority shareholders, is significant in connection with the provisions of 297 (e) giving Allied nationals a claim against Germany for injury "inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914". Obviously in no instance would Germany herself have taken over a German company controlled by German subjects, for the most she would have done would have been to seize the shares of any Allied minority shareholders. On the other hand, there could have been no case in which an Allied Power would have taken over a company controlled by Allied nationals, for there again the most that the Allied Power would have done would have been to seize the shares of any German minority shareholders. Hence, when the broad language of 297 (e) is considered, it cannot be doubted that the framers of the Treaty had in mind a case like that here presented.

It is important to note that the sustaining of this claim puts no additional liability on Germany.

Under Article 297 (i) of the Treaty, which by Article 121 is made applicable to the former German colonies, Germany undertakes in any event

"... to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States".

As already stated, the German nationals in this instance are the German companies which Australia took over, and the measure of Germany's obligation to compensate these companies would of course be reduced by the amount of compensation paid to American or Allied minority shareholders in these companies. In either case the sum total of Germany's liability is the same.

Inasmuch, however, as the primary obligation of Germany under Article 297 (e) is to make compensation to the nationals of the Allied Powers in respect of damages to their property, rights or interests, "including any company or association in which they are interested", and claims for such damages are expressly included in the first category of claims to be passed upon by this Commission, the claimants are entitled to present their claim here in preference to awaiting the uncertain adjustments which might at some later date be made between Germany and the German companies in which the claimants were shareholders.

The German Agent has raised the further question that even if Germany is liable for exceptional war measures of other Governments, such liability "could not apply to measures taken during the period of neutrality". It appears, however, that the title to the properties of the companies involved was divested, *i. e.*, to use the language of paragraph 3 of the Annex to Article 297, that the "ownership" of those properties was "transferred", after the United States entered the war.

Article 297 (b) expressly reserves to the Allied and Associated Powers the right "to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals,

or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty." Category (1) of Article I of the Agreement of August 10, 1922, between the United States and Germany specifically includes "Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914". As above pointed out, Article 297 (e) and paragraph 3 of the Annex thereto make Germany liable to compensate shareholders of such companies who are nationals of Allied or Associated States for injury suffered through such measures even though taken "hereafter", meaning after the Treaty took effect.

In the opinion of the American Commissioner the liability of Germany in the present case is clear, and the claim should accordingly be allowed, upon proof of the damages suffered.

Chandler P. ANDERSON

*Opinion of Dr. Kiesselbach, the German Commissioner*

Claimants allege that "by reason of the exceptional war measures and measures of transfer taken by said Commonwealth"—i. e., the Commonwealth of Australia—"in and for said German territory, both said Hamburgische Südsee Aktiengesellschaft and said Heinrich Rudolph Wahlen, G. m. b. H., and the several stockholders and shareholders in said respective companies have—since on or about September 17, 1914—been deprived of all benefits from their said respective properties in said German territory; and that as of January 10, 1920, all the right, title and interest in and to said respective properties and their increments and profits and in and to everything belonging and pertaining thereto have been, in the case of each of said companies, wholly, absolutely and finally divested, and that neither of said companies nor its stockholders or shareholders or any of them are or are ever to be permitted to share in said properties or in any of them or in any benefit, income or proceeds therefrom or thereof." Such allegation leaves it uncertain at what specific time the damage compensation for which is claimed has accrued, covering the period from September 17, 1914, to January 10, 1920.

Now, under Administrative Decision No. I during the period of neutrality—that is, the period between August 1, 1914, and April 5, 1917—Germany is liable only for damages or injuries caused by acts of Germany or her agents in the prosecution of the war. Therefore as far as the alleged damage may have accrued within that period the claim certainly is unfounded.

As far as the damage may have accrued in the period after April 5, 1917, it would fall within the period of belligerency—that is, the period between April 6, 1917, and July 2, 1921.

In so far as the rights of American nationals are concerned the same principles will apply during the whole of this time, but in so far as the Australian Commonwealth is concerned the legal situation would undergo an important change, since on January 10, 1920,—the date when the Treaty of Versailles came into force and when the Australian Commonwealth "wholly, absolutely and finally divested" the claimants of their property rights in the German companies—"German New Guinea", in which territory the companies and their properties were located, was ceded to the Australian Commonwealth.

The facts as far as they are disclosed make it doubtful whether the Australian Government applied its measures before or after the cession of the German territory, though it may be more likely that the Commonwealth waited for making the decision till the territory came under its own sovereignty.

Leaving aside for the moment the possible distinction arising out of this situation, it may be helpful to consider first claimants' argument as a whole, since if it should not be convincing at all the distinction mentioned becomes immaterial.

Such an examination seems to me to show that the argument is based on a misconception of the meaning of the Treaty of Versailles and especially of Article 297.

Article 297 and the Annex thereto provided:

(1) That the validity of all orders "in pursuance of war legislation \* \* \* is confirmed" in the Annex, paragraph 1.

This provision applies, as expressly stated therein, to the orders of "any of the High Contracting Parties," that is to say, to the orders of Germany as well as of the *Allied and Associated Powers*. An attempt to interpret this phrase as meaning Germany alone would, as claimants' counsel justly argues, be absurd, and such an attempt has never been made.

(2) That Germany agrees to immediately discontinue the exceptional war measures and measures of transfer taken by her.

This provision applies only and can only apply to Germany within that State's territory as it existed *after* the conclusion of the Treaty of Versailles. This is evident from the very fact that Germany lost her sovereign power over the territories ceded under the Treaty, and that furthermore the Allied and Associated Powers reserved to themselves expressly the right "to \* \* \* liquidate all property, rights and interests belonging \* \* \* to German nationals \* \* \* within their territories, \* \* \* including territories ceded to them by the present Treaty" (Article 297 (b)).

(3) That Germany is liable for all damage caused by the application either of the exceptional war measures or measures of transfer to nationals of Allied and Associated Powers in German territory *as it existed on August 1, 1914*.

(4) That the Allied and Associated Powers retain the right to apply exceptional war measures also in the *territories ceded*, as already mentioned, under Article 297 (b).

The structure of this system dealing with the exceptional war measures as applied by *any* power is so clear that it hardly needs an interpretation. Confusion is only possible if an interpretation of the provisions is sought for "apart from the *context* in connection with which they are found, and apart from the facts to which they relate" (see Reply Brief for Claimants, page 9).

It is true that Germany's liability under clause (d) is not restricted *expressis verbis* to her own measures. But it does not follow that *therefore* Germany is liable for the measures of other powers.

Certainly it is a general rule that an individual as well as a government is responsible only for its own acts or the acts of its agents and not for the independent acts of a third party. Any deviation from this common-sense principle requires a special provision in municipal law as well as in international law.

Since no such extension of Germany's liability was intended here, it was superfluous to provide specifically for the application of a rule self-evident under the law of nations as well as under the principles of the Treaty.

Moreover such an extension of Germany's liability would have been at variance with another principle established under the Treaty:

The Treaty provides that as far as the reparation claims proper are concerned Germany's liability is "limited to physical or material damage to tangible things" (Administrative Decision No. VII, page 308<sup>a</sup>) and that as far as Germany is liable for the application of exceptional war measures and measures

<sup>a</sup> Note by the Secretariat, this volume, p. 228 *supra*.

of transfer such liability is broader and applies not only to tangible things but also to property, *rights, and interests* (Article 242 and Article 297 (d)).

The reason for this discrimination is explained by the Umpire (Administrative Decision No. VII, page 313<sup>b</sup>: "The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. \* \* \* In applying these war measures Germany acted *advisedly*, with full knowledge of the nature, character, and extent of the property, rights, and interests affected \* \* \* and she and her nationals *enjoyed the use and the fruits* of and the income from such property."

But no measure has been "advisedly" applied by Germany and no use or fruits of property enjoyed by her where an Allied Power applied such measures and enjoyed such use and fruits.

To hold Germany nevertheless liable for such acts under Article 297 (e) would clearly be contrary to the principles laid down in the Treaty and developed in the Umpire's decision.

I do not concur with the American Commissioner in his opinion that accepting the interpretation as urged by the German Agent "many of these provisions will be meaningless". On the contrary, I believe them to have a sound and consistent meaning.

I further disagree with the argument of the American Commissioner taken from the provisions of Article 297 (b) and (e). If the framers of the Treaty had really in mind "a case like that here presented" and if they intended to increase the financial burden laid upon Germany by making her liable for the application of war measures by Allied Powers, they could have done that by the simple means of inserting *expressis verbis* such rather unusual provision.

In my opinion the purpose of Article 297 (b), regulating the application of after-war measures to property, rights, and interests of nationals of Germany, with which country the Allied Powers were supposed to have made peace, is so different from the intent of Article 297 (e), providing for the indemnification of Allied nationals who had suffered through the application of war measures by Germany, that a comparison of the wording of both clauses does not justify the conclusions drawn by the American Commissioner. Moreover, the provision of Article 297 (e) does not only cover the compensation for damage caused by the taking over of companies controlled by Allied nationals. The term "exceptional war measures" as interpreted by the victorious powers does not only comprise such acts as are directed against nationals or corporations of an enemy character but comprises all kinds of measures indiscriminately applied to *all* residents within German territory having the effect of removing from the proprietors the power of disposition over their property. Hence the broad language of Article 297 (e) does not justify the conclusions arrived at by the American Commissioner.

If the language of Article 297 (e) had the broad meaning urged by claimants' counsel nothing would prevent the conclusion that moreover Germany would be liable for all damage caused to Allied nationals in all cases falling under Article 297 (b), as far as the measures were applied in ceded territories.

If Article 297 (e) makes Germany liable for *every* application of war measures, regardless of by which power it was applied, so long as it was applied "in German territory as it existed on August 1, 1914," cogently the consequence would be that all measures applied under Article 297 (b) within territories formerly German—as for instance, Alsace-Lorraine—would establish German liability.

<sup>b</sup> Note by the Secretariat, this volume, p. 231 *supra*.

That such is not the meaning of Article 297 (*b*) and that certainly the framers of that part of the Treaty would have clearly said so seems to be beyond doubt.

Moreover, such theory as well as the special interpretation of Article 297 (*e*) propounded by claimants would be in contradiction with the Commission's decisions.

In the case of the Heirs of J. J. Helbron, Docket No. 6496, in which the French Government liquidated some German property in which an American national had an interest, the liquidation took place under the terms of the Treaty of Versailles—that means by virtue of the provision of Article 297 (*b*). The claim of the American heirs trying to hold Germany liable has been dismissed by this Commission.

And in the same way another claim before this Commission was dismissed, the case of Ernest Grutzmann, Docket No. 6602, which was based on the allegation that “the assets of the said banks” (that is, the Bank Jeremias in Strasbourg, Alsace) “were taken over by the French authorities”. In this case it is not disclosed whether the French Government applied the measure before or after January 10, 1920. Nevertheless the claim was disallowed under an unanimous decision of the Commission.

The reason in both decisions was that it is the taking over of property *by Germany*, as the Umpire stated in Administrative Decision No. III (page 65),<sup>c</sup> with regard to the provisions of Section IV of Part X, and that it is the war measure “on the part of the *German* authorities against the nationals of the Allied and Associated countries”, as stated in the unanimous decision of the German-Italian Mixed Arbitral Tribunal in the case of Fadin *v.* German Government, No. 132, which constitutes the basis of Germany's liability under Article 297 (*e*).

If, therefore, Article 297 (*e*) does not support the claim at issue here, claimant's recurrence to Articles 119 and 121 cannot be of any help. Article 121 says that the provisions of Sections I and IV of Part X (Economic Clauses) “shall apply in the case of these”, that is, of the German oversea “territories”. This clause may provide for the application of Article 297 (*e*) in the German oversea possessions ceded, but certainly it cannot extend the scope of that article itself.

Finally, dealing with the American Commissioner's argument that the sustaining of this claim puts no additional liability on Germany, since Germany has undertaken to compensate her nationals, I may remark that if Germany actually were in a position to live up to her obligation of indemnification of her nationals the claim at issue here would be unfounded because under those circumstances the company in which claimants have a share would have a right to a *full* compensation from Germany and because therefore the claimants would not have suffered a loss. But unfortunately the European victorious Powers, though taking over the German property seized under the provision cited by the American Commissioner, have prevented Germany from fulfilling her obligations towards her own nationals, with the effect that Germany is not allowed to “compensate” her nationals except on the rather disappointing basis of 2 to 4%!

My conclusion therefore is that since it is not contended that a *German* war measure has caused the alleged damage the claim must be dismissed.

W. KIESSELBACH

<sup>c</sup> *Note by the Secretariat*, this volume, p. 67 *supra*.



The National Commissioners accordingly certify to the Umpire of the Commission for decision the question of the jurisdiction of the Commission over this claim.

Done at Washington May 14, 1926.

Chandler P. ANDERSON  
*American Commissioner*  
 W. KIESSELBACH  
*German Commissioner*

*Decision*

PARKER. *Umpire*, on a certificate of disagreement of the National Commissioners delivered the opinion of the Commission.

This case is put forward on behalf of American nationals as minority stockholders in two German corporations whose properties in German New Guinea, it is alleged, were taken over, administered, and finally liquidated by the Australian Government. Claimants contend that under the Treaty of Berlin Germany is liable to compensate them for the value (placed at approximately \$275,000) of their interests in the properties of the German corporations expropriated by Australia.

From the record herein and from historical sources and official reports of which the Commission takes judicial notice it appears:

(1) On and before August 1, 1914, among the "oversea possessions" of Germany was German New Guinea, the largest part of which embraced about 70,000 square miles or about 22½ per cent of the northeastern part of the main island of New Guinea (the largest island in the world except Australia). The remainder of the main island belonged to the Netherlands (Dutch New Guinea) and to the British Empire (Papua).

(2) On or about September 11, 1914, an Australian naval and military expeditionary force occupied German New Guinea. On such occupation a formal proclamation was promulgated by the commander of the expeditionary force. It recited that by virtue of such occupation "the authority of the German Government has ceased to exist" in the occupied territories, which "From and after the date of these presents \* \* \* are held by me in military occupation in the name of His Majesty The King"; that "The lives and private property of peaceful inhabitants will be protected, and the laws and customs of the Colony will remain in force so far as is consistent with the military situation"; that all inhabitants shall "abstain from communication with His Majesty's enemies", and that "All male inhabitants of European origin are required to take the oath of neutrality prescribed".

(3) On September 17, 1914, a formal capitulation agreement was concluded between the commander of the Australian naval and military expeditionary force and the acting German governor of the German possessions known as German New Guinea, which in substance recognized and confirmed the terms of the proclamation above-mentioned and transferred the control and government of the colony to the Australian "Military Administration". Those taken prisoners (excepting officers of the German regular forces) were released on their taking the oath of neutrality and permitted to return to their homes and ordinary avocations. On September 18 the duly empowered Australian authorities appointed the commander of the expeditionary force as "Administrator" of the occupied territory. Every effort was made to restore normal conditions and avoid economic dislocations. All inhabitants, including German nationals, were encouraged to carry on their ordinary pursuits and

return to and cultivate their plantations. The military administration did not interfere with German private property in the occupied territory until after the coming into force of the Treaty of Versailles.

(4) Former German territory in the effective military occupation of Great Britain or her Allies was by royal proclamation designated "territory in friendly occupation", and former British, Allied, or neutral territory in the effective military occupation of an enemy of Great Britain was by the same proclamation designated "territory in hostile occupation". All proclamations for the time being in force relating to trading with the enemy were made to apply to territory in friendly occupation as they applied to British or Allied territory and to territory in hostile occupation as they applied to an enemy country. It was further provided that "Any references to the outbreak of the war in any Proclamation so applied shall, as respects territory in friendly or hostile occupation, be construed as references to the time at which the territory so became in friendly or hostile occupation".<sup>1</sup>

(5) On January 10, 1920, the Treaty of Versailles became effective. Article 297 (b) of that Treaty provides:

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

"The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State."

By Article 119 of that Treaty Germany renounced in favor of the "Principal Allied and Associated Powers all her rights and titles over her oversea possessions", and by Article 121 of that Treaty the provisions of Sections I and IV of Part X (Economic Clauses), which include Article 297 (b) above-quoted, were made to apply to such oversea possessions so ceded by Germany "whatever be the form of Government adopted for them".

(6) By the Treaty of Peace Act 1919/1920 of the Australian Parliament<sup>2</sup> the Governor-General of the Commonwealth was empowered to make regulations for giving effect within the commonwealth and territories administered by it to the provisions of the Treaty.

(7) On September 1, 1920, the "British Military Administrator of the Colony of German New Guinea" promulgated the "Expropriation Ordinance 1920", which provided for the expropriation of the properties of German firms, companies, and persons.<sup>3</sup> This ordinance was later amended to provide in effect that the property, rights, and interests belonging to a "prescribed company" on January 10, 1920, shall "be deemed to have vested, as on the 10th day of January, 1920, in the Custodian [of Expropriated Properties], and shall be treated at all times as having so vested". Among other things, this ordinance empowered the administrator by notice in writing to determine what companies were German companies (designated prescribed companies) to which the ordinance should apply, and section 4 of the ordinance provided that upon the service of such declaration "all property belonging to or held

<sup>1</sup> See the British "The Trading with the Enemy (Occupied Territory) Proclamation, 1915", dated February 16, 1915.

<sup>2</sup> See Volume I of Laws of the Territory of New Guinea.

<sup>3</sup> Volume III of Laws of the Territory of New Guinea, pages 484-490.

or managed for or on behalf of the prescribed company, \* \* \* and the right to transfer that property, shall thereupon vest in the Public Trustee and the estate and interest of the prescribed company \* \* \* shall be by force of this Ordinance determined”.

(8) On September 1, 1920, the work of taking over and managing the expropriated properties began, and the eight principal German companies in business in the Territory of New Guinea (including the two involved in this claim) were on that date prescribed under the expropriation ordinance above-mentioned and their properties vested in the “Public Trustee”.<sup>4</sup>

(9) By an order entered on December 17, 1920, the Council of the League of Nations, in pursuance of Article 22, paragraph 8, of the Treaty of Versailles, explicitly defined “the degree of authority, control or administration to be exercised” over the former German Colony of New Guinea by the Commonwealth of Australia, which had been tendered and had accepted a mandate in respect of said territory. Article 2, defining in part the terms of the mandate, provides that “The Mandatory shall have full power of administration and legislation over the territory subject to the present mandate as an integral portion of the Commonwealth of Australia, and may apply the laws of the Commonwealth of Australia to the territory”<sup>5</sup>. This mandate further provided that the mandatory should make an annual report to the Council of the League of Nations indicating the measures taken to carry out the obligations assumed thereunder.

(10) On April 7, 1921, regulations promulgated by the Commonwealth of Australia under the authority of the Treaty of Peace (Germany) Act 1919-1920 charged all property, rights, and interests within the Territory of New Guinea belonging to German nationals at the date when the Treaty came into force and the net proceeds of their sale, liquidation, or other dealing therewith with the payment of amounts due in respect of claims by British nationals with regard to their property in German territories and with the payment of other amounts, and power was conferred to sell such property, rights, and interests.

(11) On May 9, 1921, by virtue of a proclamation issued by the Governor-General of the Commonwealth of Australia, in pursuance of the terms of an act of the Parliament of the said commonwealth entitled the “New Guinea Act 1920”, the military occupation of the Territory of New Guinea terminated and the civil administration under the authority of the said commonwealth was installed.

(12) On May 14, 1923, the Commonwealth of Australia submitted to the Council of the League of Nations its first annual report on the “Administration of the Territory of New Guinea” from July 1, 1921, to June 30, 1922. Sections 465 to 472 inclusive of the report deal with the “Liquidation of Property of Ex-enemy Subjects”, from which it appears: (a) The “Expropriation Board” began its duties on September 1, 1920. Its first operation was to take inventories of the stock in trade of the German companies engaged in business in the territory and to open new books so that separate accounts could be kept from that date. (b) Up to that time these properties had remained in the possession of and the business had been conducted by the German corporations owning them. (c) Measures were taken to offer the whole of the properties and businesses of these corporations for sale by public tender, but these sales had

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<sup>4</sup> See Government Gazette, British Administration of German New Guinea, published at Rabaul September 1, 1920, pages 103-104.

<sup>5</sup> See XVII American Journal of International Law, Supplement, 158-159.

not been consummated when the report was made. <sup>6</sup> (d) The following excerpt from the report is illuminating in connection with the case here presented:

“The principal financial difficulty the Board had to face was the carrying on of the business operations of the three big companies, New Guinea Company, Hamburgische Südsee Aktien Gesellschaft, and Hershheim and Company. The business operations of these companies showed big profits during the war, which profits were either expended in the planting of young coconuts or lent out to private planters for the same purpose. This accounts for the large areas of young coconuts, much of which has been planted since the Armistice. The Germans expected the properties to be taken over, but had an idea that they would be paid for at a flat rate for old and young palms, and they rushed the planting of large areas (in very many cases hastily and badly planted), being under the impression that they would make a handsome profit from these later plantings when receiving compensation.”

(13) The Commonwealth of Australia adopted the clearing office system <sup>7</sup> for the settlement of debts and claims as provided by Section III (Article 296 and Annex) of Part X of the Treaty of Versailles.

(14) Paragraph 3 of the Annex to Section IV of Part X of the Treaty defines “exceptional war measures” and “measures of transfer” as those terms are used in the Treaty. The pertinent provisions embracing these definitions appear in the margin. <sup>8</sup>

(15) Article 297 (a) of the Treaty of Versailles provides:

“The exceptional war measures and measures of transfer (defined in paragraph 3 of the Annex hereto) taken by Germany with respect to the property, rights and interests of nationals of Allied or Associated Powers, including companies and associations in which they are interested, when liquidation has not been completed, shall be immediately discontinued or stayed and the property, rights and interests concerned restored to their owners, who shall enjoy full rights therein in accordance with the provisions of Article 298.”

Appropriate legislation was promptly enacted by Germany effective on or before January 10, 1920 (the date of the coming into force of the Treaty of Versailles), to carry into effect her obligations under the Treaty.

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<sup>6</sup> From the report made April 21, 1925, for the year ended June 30th, 1924, (page 50) it appears that these properties had not then been sold but were held and operated by the Custodian of Expropriated Property.

<sup>7</sup> Armstrong's War and Treaty Legislation 1914-1922 (2nd edition), page 363.

<sup>8</sup> “In Article 297 and this Annex the expression ‘exceptional war measures’ includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

“Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.”

(16) It follows that so much of the Treaty definitions of "exceptional war measures" and "measures of transfer" (set out in note 8 *supra*) as are prospective in their scope apply to the Allied and Associated Powers but not to Germany.

(17) The second clause of paragraph 1 of the Annex to Section IV of Part X of the Treaty of Versailles provides in substance that all exceptional war measures or measures of transfer taken by the German authorities with respect to enemy property, rights, and interests in invaded or occupied territory and those wheresoever taken since November 11, 1918, shall be void.

This claim is put forward by the United States on behalf of American nationals as minority stockholders in two German corporations (Hamburgische Südsee Aktien Gesellschaft, mentioned in the report quoted in paragraph 12 (*d*) *supra*, and Heinrich Rudolph Wahlen G. m. b. H.) whose properties in German New Guinea, it is alleged, were taken over and administered by the Commonwealth of Australia through the application of "exceptional war measures" or "measures of transfer" as those terms are defined in the Treaty of Versailles and finally liquidated by the Australian Government under the express sanction of paragraph (*b*) of Article 297 of that Treaty, above set out. The claim is based wholly on the provisions of Article 297 (*e*) of the Treaty, the pertinent part of which reads:

"The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto."

The sole question presented by the certificate of the National Commissioners to the Umpire for decision is, Under the Treaty of Berlin is Germany directly liable for damages indirectly suffered by American minority stockholders in German corporations resulting from the acts of the Government of Australia in seizing and retaining the New Guinea properties or their proceeds of such German corporations, at a time when New Guinea had been ceded by Germany and was occupied and governed by Australia?

From the foregoing chronological statement of the pertinent war and peace legislation and decrees it is obvious that the acts complained of not only were not taken by Germany but at the time they were taken the Treaty of Versailles had become effective and by its terms (and the German legislation enacted in pursuance thereof) Germany was stripped of all power to take any exceptional war measure or measure of transfer affecting the property, rights, and interests of the nationals of the Allied Powers wheresoever located. On the other hand, the Territory of New Guinea, where the properties of the German corporations with which we are here concerned were located, which territory had been with respect to the Allied Powers "territory in friendly occupation" since September, 1914, had been actually ceded by Germany to the "Principal Allied and Associated Powers" at the time the measures complained of were taken.

The claimants plant themselves on the letter of the Treaty where it is written that they are "entitled to compensation in respect of damage or injury inflicted upon their property, rights and interests, including any company or association in which they are interested, *in German territory as it existed on August 1, 1914*, by the application either of the exceptional war measures or measures of transfer", and applying this language to the facts alleged demand an award against Germany for approximately \$275,000 with interest.

But the language here relied on by the claimants cannot be construed as an isolated phrase. The pertinent provisions of the whole Treaty must be con-

sidered in the light of the conditions existing at the time of its conclusion, the nature and cause of the damages and injuries which had been inflicted and the allocation of responsibility therefor, in order to apply the master rule governing the construction of all treaties, that the intention of the parties must be sought out and enforced even though this should lead to an interpretation running counter to the literal terms of an isolated phrase, which read in connection with its context is susceptible of a different construction. In arriving at this intention the difference in scope of the "Economic Clauses" (Part X) and of the "Reparation" provisions (Part VIII) of the Treaty, as applicable to property, must be constantly borne in mind. As was pointed out in Administrative Decision No. VII,<sup>9</sup> the "Reparation" provisions deal only with material damage to tangible property suffered through the application of the exercise of force, not as a rule limited territorially. On the other hand, as there pointed out (pages 311-313),<sup>a</sup> "The evident purpose of the 'Economic Clauses' of the Treaty was (1) to restore as far as practicable the economic relations between the peoples of belligerent powers which had been disrupted by the war and (2) to compensate the nationals of the Allied and Associated Powers for the damages and injuries suffered by them through the application of war measures by Germany in German territory." Here the liability of Germany *was* limited territorially, but broad and apt terms were used to include intangible as well as tangible property. The reason for this is clear. German territory was not invaded. She was directly and solely responsible for what happened within her territorial limits. Her exceptional war measures and measures of transfer principally, though not exclusively, were directed against and operated upon debts, credits, accounts, stocks, bonds, notes, contract rights, and interests, rather than on tangible properties. In applying those war measures Germany acted advisedly, with full knowledge of the nature, character, and extent of the property, rights, and interests affected and of the fact that they were owned by American nationals; and she must be presumed to have had in contemplation the consequences of her acts and her responsibility for such consequences. Germany and her nationals had the use of much of the property, tangible and intangible, which she requisitioned or impounded through the application of exceptional war measures or measures of transfer, and she and her nationals enjoyed the use and the fruits of and the income from such property.

The introductory clause of Article 297 of the Treaty, of which the paragraph relied on by claimants forms a part, limits the "property, rights and interests" dealt with to those located "*in an enemy country*". Liability is placed on Germany for damages resulting from the application of exceptional war measures and measures of transfer in German territory. Manifestly this is on the assumption that German legislation and decrees were effective in such territory at the time the damage or injury was inflicted, and German liability must be limited to damage or injury inflicted *because* German legislation and decrees *were* effective at that time in that territory and were applied by Germany.

It is fundamental that in the absence of an express stipulation to the contrary a state or person can be held liable only for its own acts or those for whom it is responsible. With this rule in mind, where the purpose was to fix liability for damages caused by the acts of others, the makers of the Treaty in framing its "Reparation" provisions defining Germany's obligations to make compensation were careful to use apt language extending her liability

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<sup>9</sup> Decisions and Opinions, pages 308-314. (*Note by the Secretariat*, this volume, pp. 227-231 *supra*.)

<sup>a</sup> *Note by the Secretariat*, this volume, p. 229 *supra*.

in certain categories to war damages caused by "any belligerent" and in other categories to damages caused by either Germany or her allies, without any territorial limitations. But the "Economic Clauses" of the Treaty defining Germany's liability are limited to war measures applied to enemy property, rights, and interests "in German territory" or in "German territory as it existed on August 1, 1914" and do not even extend to war measures taken by one of her own allies.<sup>10</sup> The obvious reason for this is that the legislation and decrees of Germany's allies had no extraterritorial effect and could not be operative in German territory.

That New Guinea was "German territory as it existed on August 1, 1914" within the meaning of the Treaty cannot be doubted. But it does not follow that under the provisions quoted Germany is liable for the application *by Australia* of exceptional war measures or measures of transfer to the property of *German corporations* in that territory resulting in indirect damage to the American stockholders therein. Liability under the Treaty hinges not only on the territorial requirements but on the government applying the measures in question within the requisite territorial limits. While this latter test of liability is not in express terms incorporated in the provision quoted, it is clearly implied from the structure and terms of the Treaty as a whole. Why hold Germany liable for the act of Australia in seizing the property of German corporations (including the American interests therein) in territory which had, at the time of the seizure, been formally ceded by Germany and was in the possession and control of Australia, simply because it *had been* German territory and in her possession and control at the beginning of and during the first six weeks of the war, and not at the same time hold Germany liable for the American interests in properties of numerous German corporations seized and liquidated by Great Britain, France, and other Allied Powers? Claimants' only answer is that the German properties seized and liquidated by Great Britain and France were not located in "German territory as it existed on August 1, 1914", while the New Guinea properties seized by Australia were so located. Such a literal construction of the language quoted finds no support in the other provisions of the Treaty and is repugnant to the objects and purposes of the Treaty as a whole. It cannot stand alone and must fall.

What, then, is the meaning of the phrase upon which the claimants rely, found in Article 297 (e), "in German territory as it existed on August 1, 1914"?

In the opinion of the Umpire one of its purposes was to prevent Germany from denying her liability for exceptional war measures or measures of transfer taken by her in territory then in her possession and under her jurisdiction and control but which was thereafter wrested from and ceded by her. Under the Treaty of Berlin Germany is liable for all exceptional war measures taken by her "in German territory as it existed on August 1, 1914" resulting in damage to the property, rights, or interests of American nationals<sup>11</sup> even though after the Treaty of Versailles came into effect such territory was no longer German territory. As ordinarily a treaty speaks only from its effective date, had the

<sup>10</sup> *Fadin v. German Government*, Decision of the Italian-German Mixed Arbitral Tribunal, decided at Rome on September 3, 1924.

<sup>11</sup> The Mixed Arbitral Tribunals constituted under the Treaty of Versailles have dealt with several cases of exceptional war measures taken *by Germany* in German colonies as they existed on August 1, 1914, and where an Allied national has been injured thereby Germany has been held liable under the provisions of Article 297 (e) of the Treaty. It is such exceptional war measures taken *by Germany* in German colonies to which the Treaty refers. See *Lewa Rubber Estates, Ltd., v. Germany and Kamna Rubber Estates, Ltd., v. Germany*, III Decisions Mixed Arbitral Tribunals 29; *Brueninger v. Germany*, III *ibid.* 20.

phrase "as it existed on August 1, 1914" been omitted, it is conceivable that Germany might have contended that under the terms of the Treaty she was liable only for measures taken by her "in German territory" as it existed after the Treaty came into force. To guard against such a contention by Germany the phrase in question was used. But it was never intended by the use of this phrase to impose liability on Germany for war measures to be taken by her former enemies in a country which had already been ceded by Germany and was occupied and governed by them and at a time when Germany was stripped of her power to take any war measures whatsoever.

Another reason for the use of the phrase "in German territory as it existed on August 1, 1914" was to make it clear that the particular paragraph in which this phrase is found does not apply to measures taken by Germany in "occupied territory" or in territory of the Allied Powers in which Germany had been in effective military occupation, defined by the Allies as "territory in hostile occupation", to which all Allied measures relating to the trading with the enemy were applied by the Allied Powers as they were applied to an "enemy country". All measures taken by Germany in such "occupied territory" are by the express terms of the Treaty held void.<sup>12</sup> The damages inflicted by Germany in such occupied territory are dealt with in the reparation provisions of the Treaty.<sup>13</sup>

So far as the decisions of the Mixed Arbitral Tribunals constituted and functioning under Section IV of Part X of the Treaty of Versailles bear on the question here presented, they support the opinion here expressed.

A case decided by the Franco-German Mixed Arbitral Tribunal on October 8, 1924,<sup>14</sup> was put forward by a national of Alsace-Lorraine for the loss of his crops in the German colony of German East Africa, which he was compelled to abandon when it was evacuated by the German authorities and occupied by the British troops. The tribunal held (1) that the claimant, a national of Alsace-Lorraine, had the right to invoke against Germany the benefits of the provisions of Section IV of Part X of the Treaty of Versailles; (2) that the damages complained of by claimant were not caused by an exceptional war measure taken in respect of his property by Germany; (3) *that it was on the order of the English military authorities that the lands of the claimant were requisitioned and evacuated*; and (4) "that in consequence, the responsibility of the defendant [Germany] could not be maintained"; and the complaint was dismissed.

Another case, decided by the Italian-Austrian Mixed Arbitral Tribunal on November 12, 1924,<sup>15</sup> held that the liability of Austria under the provisions of the Treaty of St. Germain does not extend to the damages caused by war measures adopted by other states.

<sup>12</sup> Second clause of paragraph 1 of Annex to Section IV, Part X of the Treaty.

<sup>13</sup> The Allied Reparation Claim against Germany includes damages suffered by Allied nationals "on account of requisitions, sequestrations and other war measures" applied by the German authorities in territory invaded by the German forces. The Reparation Commission adopted and acted on the view that such measures applied by the German authorities in "occupied territory" did not constitute "exceptional war measures" or "measures of transfer" within the scope of Part X of the Treaty, and hence (in the view of the Reparation Commission) the Mixed Arbitral Tribunals, constituted under the Treaty of Versailles, had no jurisdiction of claims based on such measures taken by Germany in "occupied territory" (see letter of Reparation Commission addressed to M. Asser, President of the Franco-German Mixed Arbitral Tribunal, dated September 15, 1922).

<sup>14</sup> Rothbletz v. Germany, IV Decisions Mixed Arbitral Tribunals 747.

<sup>15</sup> Torres v. Spiegel and Austrian Government, V Decisions Mixed Arbitral Tribunals 518.



In another case<sup>16</sup> the Italian-German Mixed Arbitral Tribunal held that Germany was not liable for exceptional war measures taken by Austria as the provision of the Treaty of Versailles, upon which claimants here rely, concerns "only exceptional war measures on the part of the German authorities against the nationals of the Allied and Associated Countries".

Stress is laid by the claimants on the provisions of Article 121 of the Treaty, referred to in paragraph (5) above, which expressly provide that Sections I and IV of Part X of the Treaty shall apply to the territories of the former German colonies. But the inference which claimants would draw from this provision is not justified. Section I of Part X deals with the "Commercial Relations" between Germany and the Allied and Associated States, including within its scope "Customs regulations, duties and restrictions" (Chapter I), "Shipping" (Chapter II), "Unfair competition" (Chapter III), and "Treatment of nationals of Allied and Associated Powers" by Germany (Chapter IV). The provisions are prospective and bind Germany to take no action prejudicial to the Allied and Associated Powers in their commercial relations. These provisions are extended to and for the benefit of the governments administering the territories of the former German colonies and their residents, whether under mandates or "whatever be the form of Government adopted for them".

Section IV of Part X of the Treaty (the other section which Article 121 provides shall apply to the territories of the former German colonies) deals with "Property, rights and interests". While, as pointed out by claimants, it includes paragraph (e) of Article 297, upon the language of which as literally construed by the claimants this claim is based, it also includes among numerous other provisions paragraph (b) of Article 297, under which Australia retained and liquidated the property of German nationals located in German New Guinea—a former German colony—including the property of the German corporations in which these claimants are stockholders. There are numerous provisions in that Section IV which by Article 121 are extended to former German colonies for the benefit of the Allied and Associated Powers and their nationals. But there is nothing in Article 121 or elsewhere in the Treaty indicating an intention on the part of its framers to fix direct liability on Germany for indirect damages suffered by American nationals resulting from exceptional war measures taken by Germany's former enemies against German nationals or their properties.

It is suggested that, as under paragraph (i) of Article 297 of the Treaty "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States", an award rendered by this Commission on behalf of these claimants would place no additional burden on Germany, as her obligation to compensate the German corporations in which claimants are stockholders would be reduced to the extent of such award and the total of Germany's liability remain the same. But certainly it is not within the competency of this Commission to deal with the method and extent of Germany's compliance with her undertaking to compensate her own nationals. Those are matters of domestic policy and administration, to be dealt with exclusively by Germany in accordance with her municipal laws and regulations. In this case, so far as Germany is concerned, the claimants as stockholders must look to the German corporations in which they invested for their distributive share of such sums as those corporations may recover from any source to compensate them in whole or in part for their properties which were expropriated by Australia.

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<sup>16</sup> *Fadin v. Germany*, decided at Rome on September 3, 1924.

From the foregoing it appears that the measures complained of by claimants were taken by Australia against Germany, not by Germany; they were taken not in territory in which the German laws and decrees were then effective but in territory which had been ceded by Germany and which was governed and controlled by one of her former enemies; and they were taken at a time when Germany had been stripped of her power to take any war measures whatsoever.

It is the opinion of the Umpire, and he so decides, that while under the Treaty of Berlin Germany is liable for all exceptional war measures *taken by her* "in German territory as it existed on August 1, 1914" resulting in damage to the property, rights, and interests of American nationals, even though on the date of the Treaty's coming into force such territory was no longer German territory, she is not liable for exceptional war measures and measures of transfer, as those terms are defined in the Treaty, taken with respect to German property by a former enemy of Germany to her detriment and to its advantage in territory which was German on August 1, 1914, but which had been ceded by Germany and was governed and controlled by such former enemy at the time the measures were taken.

Wherefore the Commission decrees that under the Treaty of Berlin of August 25, 1921, and in accordance with its terms the Government of Germany is not obligated to pay to the Government of the United States any amount on behalf of Paula Mendel *et al.*, the claimants herein.

Done at Washington August 13, 1926.

Edwin B. PARKER  
*Umpire*

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