

## Decisions

### ADMINISTRATIVE DECISION No. I

(May 25, 1927. Pages 1-14. <sup>1</sup>)

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In addition to the Rules of Practice and Procedure heretofore prescribed <sup>3</sup> there are here set down for the guidance of the American Agent, the Austrian Agent, and the Hungarian Agent and their respective counsel definitions of terms and definitions of the functions and jurisdiction of the Commission, as well as general governing principles, which will, so far as applicable, control the preparation, presentation, and decision of cases submitted to the Commission.

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<sup>1</sup> References to page numbers following the date of each decision are to the final report of Commissioner referred to on p. 193 *supra*.

<sup>2</sup> References in this section are to publications referred to on p. 197 *supra*.

<sup>3</sup> *Note by the Secretariat*: see final report of Commissioner, pp. *et* 173 *seq*.

*Definition of terms*

The following terms as used in the decisions and opinions of the Commission shall be taken to have the meanings indicated below:

*United States:* the United States of America and/or the Government of the United States of America;

*Austro-Hungary:* the former Austro-Hungarian Dual Monarchy and/or the Imperial and Royal Austro-Hungarian Government as it or they existed on August 1, 1914,<sup>1</sup> or on December 7, 1917;

*Former Austrian Empire:* the Austrian Empire as it existed on and prior to August 1, 1914<sup>1</sup>;

*Former Kingdom of Hungary:* the Kingdom of Hungary as it existed on and prior to August 1, 1914;<sup>1</sup>

*Austria:* the Republic of Austria as now existing and as it existed on July 16, 1920, the date of the coming into effect of the Treaty of Saint-Germain-en-Laye, and on November 8, 1921, the date of the coming into effect of the Treaty of Vienna establishing friendly relations between the United States and Austria;

*Hungary:* the Kingdom of Hungary as now existing and as it existed on July 26, 1921, the date of the coming into effect of the Treaty of Trianon, and on December 17, 1921, the date of the coming into effect of the Treaty of Budapest establishing friendly relations between the United States and Hungary;

*Allied Powers:* the British Empire, France, Italy, Japan, Belgium, China, Cuba, Greece, Nicaragua, Panama, Poland, Portugal, Roumania, the Serb-Croat-Slovene State, Siam, and Czecho-Slovakia, which with the United States were designated "Allied and Associated Powers" in the Treaties of St. Germain and Trianon, the United States being an "Associated Power" engaged with the Allied Powers in the prosecution of the war against the Imperial and Royal Austro-Hungarian Government;

*Central Powers:* those with which the principal Allied Powers were at war, namely, the Imperial German Government, the Imperial and Royal Austro-Hungarian Government, Bulgaria, and Turkey;

*War period:* the period between August 1, 1914,<sup>1</sup> and July 2, 1921, both inclusive, the latter date being the effective date of the joint resolution passed by the Congress of the United States declaring at an end the state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

*Period of American belligerency:* the period between December 7, 1917, and July 2, 1921, both inclusive, the former being the effective date of the joint resolution passed by the Congress of the United States declaring the existence of a state of war between the United States and the Imperial and Royal Austro-Hungarian Government;

*Period of American neutrality:* the period between August 1, 1914,<sup>1</sup> and December 6, 1917, both inclusive;

*American national:* a person wheresoever domiciled owing permanent allegiance to the United States of America;

*Treaty of Versailles:* the Treaty between the Allied Powers and Germany signed at Versailles on June 28, 1919, which came into effect on January 10, 1920;

<sup>1</sup> See section 5 of the Peace Resolution approved by the President of the United States July 2, 1921, incorporated in the Treaties of Vienna and of Budapest, and paragraphs numbered (1) and (2) of the article I of the Tripartite Agreement.

*Treaty of St. Germain:* the Treaty between the Allied Powers and Austria signed at Saint-Germain-en-Laye on September 10, 1919, which came into effect on July 16, 1920;

*Treaty of Trianon:* the Treaty between the Allied Powers and Hungary signed at Trianon on June 4, 1920, which came into effect on July 26, 1921;

*Treaty of Berlin:* the Treaty between the United States and Germany signed at Berlin on August 25, 1921, restoring the friendly relations existing between the two nations prior to the outbreak of war, which Treaty came into effect on November 11, 1921;

*Treaty of Vienna:* the Treaty between the United States and Austria signed at Vienna on August 24, 1921, establishing friendly relations between the two nations, which Treaty came into effect on November 8, 1921;

*Treaty of Budapest:* the Treaty between the United States and Hungary signed at Budapest on August 29, 1921, establishing friendly relations between the two nations, which Treaty came into effect on December 17, 1921;

*Tripartite Agreement:* the Tripartite Agreement between the United States and Austria and Hungary signed at Washington on November 26, 1924, which became effective on December 12, 1925, under which the Tripartite Claims Commission is constituted;

*Commission:* the Tripartite Claims Commission constituted under and in pursuance of the Tripartite Agreement above defined;

*Commissioner:* the Commissioner selected by the United States, Austria, and Hungary to pass upon all claims of the United States and its nationals arising under the Treaty of Vienna and/or the Treaty of Budapest, including the three categories defined in Article I of the Tripartite Agreement;

*Custodian Property:* all property or the proceeds of the liquidation thereof now held by the Treasury of the United States or by the United States Alien Property Custodian or to which he is entitled under the provisions of the United States Trading with the Enemy Act of October 6, 1917, and amendments thereto, which at the time of his taking possession thereof or making demand therefor was the property of Austro-Hungary, the former Austrian Empire or its nationals, or the former Kingdom of Hungary or its nationals, or in which any of them had an interest;

*Valorization:* the conversion into American currency of Austro-Hungarian or other non-American currency at the pre-war cable transfer rate of exchange as provided in sections III and IV of part X of the Treaty of St. Germain carried into the Treaty of Vienna and of the Treaty of Trianon carried into the Treaty of Budapest.

All of the Allied Powers participated in drafting and became parties to both the Treaties of St. Germain and Trianon and the rights and advantages therein stipulated were, generally speaking, for the benefit of each and all of them. Consequently the language used in those Treaties as applied to the United States on the one part and to Austria and/or Hungary on the other part, incorporated in *haec verba* as a part of the Treaties of Vienna and of Budapest respectively, is sometimes inapt and confusing. Throughout the opinions and decisions of this Commission the language thus incorporated will, for the sake of brevity and lucidity, be so paraphrased as to make it applicable only to the United States on the one part and Austria and/or Hungary on the other part.

To avoid possible confusion this and subsequent opinions will generally deal with the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part as affected by the

Treaties of Vienna and of Budapest respectively. Such provisions of the Treaties of St. Germain and Trianon incorporated respectively in these two Treaties designated "parts", "sections", "articles", "paragraphs", etc., as are referred to or quoted in these opinions in the main employ literally the same language, differing occasionally in the numbering. For convenience, citations to both Treaties will be made, the first citation by number applying to the Treaty of Vienna and the second to the Treaty of Budapest, usually without designating the Treaty cited.

### *Functions of Commission*

This Commission was constituted and exists in pursuance of the terms of the Tripartite Agreement between the United States and Austria and Hungary which became effective on December 12, 1925. Therein are found the source of, and the limitations upon, the Commission's powers and jurisdiction in the discharge of its task of determining the amount to be paid by Austria and/or Hungary in satisfaction of their financial obligations to the United States and to American nationals falling within the terms of the Treaties of Vienna and/or Budapest respectively. Article I of the Tripartite Agreement provides that the Commissioner shall determine the amounts to be paid to the United States by Austria and by Hungary in satisfaction of claims embraced within the terms of the said Treaties "including the following categories":

"(1) 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 the territories of either the former Austrian Empire or the former Kingdom of Hungary as they respectively existed on August 1, 1914;

"(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to or death of persons, or with respect to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

"(3) Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

The financial obligations of Austria and/or Hungary which this Commission is empowered to determine arise out of claims presented by the United States falling within the several categories specified in the Tripartite Agreement and more particularly defined or described in the Treaties of Vienna and of Budapest. American nationals who acquired rights under these Treaties are without a remedy to enforce them save through the United States. As a part of the means of supplying that remedy this Commission was, by the Tripartite Agreement, created as the forum for determining the amount of the obligations of Austria and of Hungary. These Treaties fix those obligations and prescribe what Austria and/or Hungary shall pay for. The Tripartite Agreement neither adds to nor subtracts from the rights or the obligations thus fixed but clothes this Commission with jurisdiction over all claims of the United States and its nationals based on the terms of the Treaties and lays on the Commissioner the duty of applying those terms to the claims presented and of determining the amount, if any, due to the several claimants thereunder.

The Commission is not concerned with the enforcement of its awards or with the payment by Austria and/or Hungary of their financial obligations save as the terms of the Treaties with respect to payment affect such obligations absolute or contingent, direct or indirect, and the amount thereof. The definitions of what Austria and/or Hungary shall pay *for* are found in the

Treaties. The *amount* which Austria and/or Hungary shall pay must be judicially determined by this Commission through the application of appropriate rules for ascertaining pecuniary obligations and for measuring damages to the facts of such claims of the United States and its nationals as fall within the terms of the Treaties. But the problems of *how and when* the awards of this Commission shall be *enforced* and *how and when payment* shall be made or secured are political in their nature and must be settled by the appropriate political agencies of the Governments concerned. The Commission's task is confined solely to construing the Treaties and deciding what are the financial obligations of Austria and/or Hungary and their respective nationals arising thereunder and the amount thereof.

The liability of Austria and/or Hungary must be determined by the application of the terms of the Treaty or Treaties to the facts of each case. The Treaties embody in their terms contracts by which Austria and Hungary accorded to the United States, as one of the conditions of peace, rights in behalf of American nationals which had no prior existence. While these doubtless include some obligations of Austria and/or Hungary arising from violation of rules of international law or otherwise and existing prior to and independent of the Treaties, they also include obligations of Austria and/or Hungary which were created and fixed by their terms. All of these obligations, whatever their nature, are merged in and fixed by the Treaties. The Commission's inquiry in this respect is confined solely to determining whether or not Austria and/or Hungary by the terms of the Treaty or Treaties assumed the pecuniary obligation asserted or accepted responsibility for the act causing the damage claimed, and it is not concerned with the quality of that act or whether it was legal or illegal as measured by rules of international law.

*Consolidation of machinery set up under other Treaties*

The Treaties of St. Germain and Trianon (and similar Treaties between the Allied Powers and the Central Powers) provided for:

(1) A Reparation Commission to determine the amount of reparation claims (and clothed with other powers of a political and administrative character not necessary here to notice);

(2) Clearing Offices mainly for the purpose of "clearing" and paying the debts of the nationals of opposing Powers and paying designated claims of Allied nationals;

(3) Mixed Arbitral Tribunals clothed with power to hear appeals from Clearing Office decisions, to hear and adjudicate all claims for compensation lodged against Austria and/or Hungary for damage or injury suffered by nationals of Allied Powers arising under paragraph (*e*) of article 249 [232], and to hear and determine certain controversies between nationals of Allied Powers and nationals of Austria or Hungary arising out of contracts (paragraph (*b*) of article 256 [239]); and

(4) An Arbitrator to determine the amounts of certain claims of Allied nationals and debts of Austria and its nationals and of Hungary and its nationals with which amounts so ascertained Austrian or Hungarian property seized as a war measure by an Allied Power may be charged (paragraph 4 of the annex to section IV of part X).

Eliminating those provisions of the Treaties of St. Germain and of Trianon not adopted by the United States, the Tripartite Agreement in practical effect combines these several functions in one tribunal and the Commissioner is clothed with the power and it is made his duty to adjudicate reparation claims arising under part VIII and compensation claims arising under paragraph (*e*)

of article 249 [232] and as Arbitrator<sup>1</sup> to assess the amount of claims and debts to the payment of which the Government of the United States may, at its election, apply the Custodian Property.

### *Jurisdiction*

At the threshold of the consideration of each case is presented the question of jurisdiction, which obviously the Commissioner must determine preliminarily to fixing the amount, if any, of Austria's and/or Hungary's financial obligations. When the allegations in a memorial presented by the United States bring a claim within the terms of the Treaty of Vienna and/or the Treaty of Budapest and the Tripartite Agreement, the jurisdiction of the Commission attaches—otherwise the claim as presented will be dismissed for want of jurisdiction. Should these allegations be controverted in whole or in part the issue or issues of fact thus made must be decided by the Commissioner, and if under such decision the claim does not fall within the terms of the Treaty or Treaties and the Tripartite Agreement it will be dismissed. But if the issue or issues of fact be so decided that the claim does fall within the terms of the Treaty or Treaties and the Tripartite Agreement, the Commissioner will apply such terms to the facts in the particular case and render judgment accordingly.

### *The claimant—Nationality of claims*

All claims presented to this Commission shall be asserted and controlled by the United States as claimant either on its own behalf or on behalf of one or more of its nationals. With respect to espousing or not the claim of its national at the latter's request, and if espoused in determining when and how the claim will be presented and pressed or withdrawn or compromised, the United States will exercise an untrammelled discretion and the private owner will be bound by the action taken. While the nation's absolute right to control a private claim espoused by it is necessarily exclusive, because of the national interest that may be or become involved, nevertheless the private nature of such claim continues to inhere in it and the claim only in a very restricted sense becomes a national claim. The act of espousal does not vest in the nation the title to the claim. For the purpose of ascertaining the nationality of a claim as determined by its being impressed with the nationality of the private claimant, or for any other purpose pertinent to the proper exercise of its jurisdiction, the Commission will at any stage of a proceeding require a full disclosure of the private interest therein.

The nationality of claims as affecting the financial obligations of Austria and/or Hungary as well as the jurisdiction of this Commission will, so far as applicable, be determined by the principles and rules laid down by the present Commissioner as the Umpire of the Mixed Claims Commission, United States and Germany, in a decision rendered on October 31, 1924, appearing at pages 175 to 194 inclusive of the printed Decisions and Opinions of that Commission. In so far as the effective date of the applicable Treaty or Treaties affects the nationality of a claim, the date mentioned in that decision (November 11, 1921, when the Treaty of Berlin became effective) will be substituted in the case of Austria by November 8, 1921, and in the case of Hungary by December 17, 1921, the effective dates of the Treaties of Vienna and of Budapest respectively.

<sup>1</sup> See paragraph 4 of the annex to section IV of part X of the Treaties. The third category of article I of the Tripartite Agreement confers jurisdiction on the Commission to pass upon "Debts owing to American citizens by the Austrian and/or the Hungarian Governments or by their nationals."

*Categories of claims*

With a view to facilitating the preparation, presentation, and disposition of claims they are classified as follows:

I. *Reparation claims*: those arising under part VIII, the reparation provisions of the Treaties, including:

- (a) Damage resulting from death of or injury to persons;
- (b) Damage resulting from any kind of maltreatment of prisoners of war;
- (c) Damage resulting from injury to or destruction of or taking of property.

II. *Economic claims*: those arising under part X, the economic clauses of the Treaties, including:

(a) Compensation for damage to or injury inflicted on property, rights, and interests by the application of war measures;

(b) Debts, including:

(1) those owing by Austrian (Hungarian) nationals including bank deposits and estate claims;

(2) State obligations;

(c) Public bonds, unmatured, and not subjected to war measures.

*Reparation claims*

Most of the claims of the United States or its nationals falling within the category of reparation claims grow out of damages resulting from death of or injury to persons or from injury to or destruction of or taking of property through physical force operating on physical property. With respect to such claims the principles and rules announced in the decisions and opinions of the Umpire of the Mixed Claims Commission, United States and Germany, will, so far as applicable, govern.

*Apportionment of compensation in reparation claims and in claims for damages resulting from acts of Austro-Hungary*

The Commissioner decides that the compensation for damages suffered by American nationals: (1) falling within the reparation provisions of the Treaties; or (2) resulting from acts of Austro-Hungary or its agents during the period of American neutrality, will be borne 63.6 per cent by Austria and 36.4 per cent by Hungary and awards made accordingly. The reasons for this decision follow.

Prior to the war the former Austrian Empire and the former Kingdom of Hungary were separate and distinct States. Each had its own governmental machinery, including a parliament. The citizenship of each was distinct from the other. Austro-Hungarian citizenship did not exist. An Austrian citizen could abandon his Austrian citizenship and acquire Hungarian citizenship and *vice versa*.

In 1867 a *de facto* and constitutional union with limited powers was formed whereby each of these States delegated to the Austro-Hungarian Dual Monarchy the power to act for them in the common administration of: (1) foreign affairs; (2) the common army and navy (excluding the special army of each State); and (3) matters of finance in so far as concerned joint expenditures for State purposes. This union was expressed in the common head who bore the title "Emperor of Austria and Apostolic King of Hungary". These joint expenditures were apportioned between the former Austrian Empire and the former Kingdom of Hungary by the Austro-Hungarian law of December 30, 1907, (B.L.I., No. 278) on the basis of 63.6 per cent to be borne by Austria and 36.4 per cent

to be borne by Hungary. This was the basis upon which contributions were made by the former Austrian Empire and the former Kingdom of Hungary to the Imperial and Royal Austro-Hungarian Government enabling it to wage war against the United States.

The former Austrian Empire and the former Kingdom of Hungary while existing as independent States had no international status. It was against the Imperial and Royal Austro-Hungarian Government that the United States waged war (see resolutions of Congress effective December 7, 1917, and July 2, 1921). Following the Armistice that Government ceased to exist (see recitations in preambles to the Treaties of Vienna and of Budapest). In pursuance of the terms of the several Treaties entered into between the opposing Powers after the Armistice, not only was the Austro-Hungarian Dual Monarchy dismembered but substantial parts of the territories of the former Austrian Empire and of the former Kingdom of Hungary were ceded some to new and some to existing States. The Austria and the Hungary dealt with by the United States in entering into the Treaties of Vienna and of Budapest respectively not only bore little resemblance either to the Government or the territory of the Dual Monarchy with which the United States had been at war but differed essentially from the former Austrian Empire and the former Kingdom of Hungary. Unlike the Treaty of Berlin "*restoring* friendly relations" between the United States and Germany, these Treaties in terms "*establish*" for the first time such relations between Austria and the United States and between Hungary and the United States.

The questions here presented are: what existing Government or Governments are liable for the acts of the Austro-Hungarian Government or its agents resulting in damage to American nationals; is that liability joint or several; and what is its extent?

The answer must be found in the provisions of the Treaties of Vienna and of Budapest. It will not be profitable to examine the divergent views maintained by European continental writers on international law as compared with those of Great Britain and the United States with respect to the liability of a Successor State for the obligations either *ex contractu* or *ex delicto* of a dismembered State. It is, however, interesting to note in passing that while one group maintains that such obligations pass with succession and are apportioned between the Successor States, and while the other group maintains that the obligations do not pass with succession, neither group maintains that a *joint* liability rests upon two or more Successor States where the territory of a dismembered State has been divided between them.

Under the financial clauses (part IX of the Treaties) elaborate provision is made for the apportionment between the Successor States, including Austria and Hungary as they now exist, of the pre-war indebtedness, secured and unsecured, of the former Austro-Hungarian Monarchy, the former Austrian Empire, and the former Kingdom of Hungary, fixing sole responsibility on each Successor State for the proportion of such indebtedness allocated to it.

All of the Successor States other than Austria and Hungary are classed as "Allied or Associated Powers" and under the Treaties it is entirely clear that none of them is held liable for any damages suffered by American nationals resulting from acts of the Austro-Hungarian Government or its agents during either the period of American neutrality or American belligerency.

By article 178 [162] of the Treaty Austria [Hungary] undertakes that she will make compensation for damage done, as defined in the annex thereto, to the civilian population of the United States and to their property by the aggression of Austro-Hungary and her allies. The language is the same in



both Treaties.<sup>1</sup> There is an undertaking by Austria to make compensation for specified damage and a separate undertaking by Hungary to make compensation for the same damage. Obviously it was not intended that double compensation should be made. Neither is there a joint undertaking.

Likewise in charging Custodian Property with the payment of neutrality claims identical provision is made in both Treaties (paragraph 4 of the annex to section IV of part X) for the "payment of claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities since July 28, 1914, and before... [the United States] entered into the war."

Having in mind the pre-war and war relationship between the former Austrian Empire and the former Kingdom of Hungary and their respective responsibilities for the acts of the Austro-Hungarian Monarchy, the Tripartite Agreement under which this Commission is constituted was executed. It recites that all three of the parties are "desirous of determining the amounts to be paid by Austria and by Hungary" under the Treaties of Vienna and of Budapest respectively and provides that the Commissioner "shall determine the amounts to be paid to the United States by Austria and by Hungary". This language imports a distributive and not a joint liability and a purpose to apportion damages for which both may be liable, allocating to each a definite amount. The notes exchanged between the United States and Austria during the negotiation of this Agreement clearly reflect this purpose. This is in harmony with the spirit of the Treaties considered as a whole which indicates a purpose not to create joint obligations as between Austria and Hungary as they now exist but to divide and to allocate to each its separate liabilities.<sup>2</sup>

The Reparation Commission, which under the Treaties of St. Germain and Trianon is clothed with the power to fix the amount of compensation to be paid by Austria and Hungary respectively under the reparation provisions of the Treaties, has not as yet directly dealt with this question of apportionment as between them. That Commission, however, acting within its jurisdiction has in a number of instances considered questions of credits on their reparation accounts to Austria and to Hungary respectively for warships, mine layers, abandoned war material, and other property formerly belonging to the Austro-Hungarian Government and passing under the Treaties through the Reparation Commission or otherwise to the Allied and Associated Powers. The Reparation Commission in apportioning these credits as between Austria and Hungary accorded to Austria 63.6 per cent and to Hungary 36.4 per cent of the aggregate amount thereof, this being the basis on which the former Austrian Empire and the former Kingdom of Hungary respectively contributed to the acquisition of the ceded property by the Austro-Hungarian Government. It is believed that the rule applicable to the apportionment of credits to which Austria and Hungary are respectively entitled under the reparation provisions of the Treaties is equally applicable to the apportionment of their liabilities thereunder. The Governments of Austria and of Hungary in the agreement of June 1,

<sup>1</sup> This language follows like provisions in the Treaty of Versailles (article 232 and annex I) where Germany undertakes to make compensation for defined categories of damages including those inflicted by Germany's allies as well as by Germany herself. No claim has been pressed by the United States and no award made against Germany in any case of injury inflicted solely by the Government of Austro-Hungary or the former Austrian Empire or the former Kingdom of Hungary or their respective agents.

<sup>2</sup> *Wapa v. République d'Autriche*, Austro-Yugoslavian Mixed Arbitral Tribunal, III, Decisions of Mixed Arbitral Tribunals (hereinafter referred to as "Dec. M.A.T." 720.

1926, adopted as between themselves a division of liabilities in harmony with the rule here announced.

While this decision, in so far as applicable, will control the preparation, presentation, and decision of all claims submitted to the Commission falling within its scope, nevertheless should the American Agent, the Austrian Agent, and/or the Hungarian Agent be of the opinion that the peculiar facts of any case take it out of the rules here announced such facts with the differentiation believed to exist will be called to the attention of the Commissioner in the presentation of that case.

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