

ADMINISTRATIVE DECISION No. II ¹

(May 25, 1927. Pages 15-36.)

There are pending before the Commission claims asserted by the American Agent on behalf of American nationals under the Economic Clauses incorporated in the Treaty of Vienna and/or the Treaty of Budapest based on:—

- (a) Debts owing by Austrian or Hungarian nationals to American nationals;
- (b) Debts owing by the Government of Austria and/or the Government of Hungary to American nationals; and
- (c) Claims for compensation in respect of damage or injury inflicted upon the property, rights, or interests, including debts, credits, accounts, and cash assets, of American nationals in the territory of the former Austrian Empire or the former Kingdom of Hungary by the application either of exceptional war measures or measures of transfer as those terms are employed in the Treaties.

The Austrian and Hungarian Agents contend:

(1) That under the Treaty Austria [Hungary] is not primarily and directly obligated to pay debts owing by Austrian [Hungarian] nationals to American nationals which have not been subjected by Austria [Hungary] in the territory of the former Austrian Empire [former Kingdom of Hungary] to the application either of exceptional war measures or measures of transfer as those terms are employed in the Treaty;

(2) That with respect to debts owing in other than American currency by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the payment thereof in American currency at the pre-war rate of exchange;

(3) That with respect to debts owing by Austria [Hungary] or its nationals to American nationals the creditor is not entitled to the benefits of the provisions of paragraph 22 of the annex to section III of part X of the Treaty with respect to interest; and

(4) That debts owing by Austria [Hungary] or its nationals to American nationals do not constitute a charge upon the Custodian Property.

The Commissioner sustains the first contention of the Austrian [Hungarian] Agent and holds that under the Treaty Austria's [Hungary's] obligation to pay debts (which have not been subjected to war measures) owing by Austrian [Hungarian] nationals to American nationals is contingent and indirect and not absolute, primary, and direct.

The Commissioner provisionally sustains the second and third contentions of the Austrian [Hungarian] Agent, but holds that in the event the Government of the United States, through its law-making power, should elect to adopt the method of payment or procedure provided for by paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section IV of part X of the Treaty and apply the Custodian Property to the payment of the claims and debts defined therein, then under the terms of the Treaty for the purposes of such payment the American creditors would be entitled to have their debts converted into American currency at the pre-war rate of exchange and also be entitled to the benefits of paragraph 22 of the annex to section III of part X of the Treaty with respect to interest.

The Commissioner holds that under the Treaty only the Government of the United States, acting through its law-making power, may determine whether or not the proceeds of the liquidation of the Custodian Property will be applied to the payment of such claims and of such debts as may be found by this Commission to have been owing by Austria [Hungary] or its nationals to American nationals.

The reasons upon which these conclusions rest¹ can be understood by a

¹ The precedents of the Mixed Claims Commission, United States and Germany, in dealing with debts, credits, and accounts, including cash assets, owing by Germany or its nationals to American nationals are of comparatively little value in solving the

review of the pertinent Economic Clauses of the Treaties and their application as between the United States and its nationals on the one part and Austria and/or Hungary and their respective nationals on the other part. Those clauses constitute part X of the Treaties. We are here concerned directly only with section IV and incidentally with section III thereof.

Section III—Clearing Offices

Section III provides a "method of payment" (first clause of paragraph 14 of the annex to section IV). This is in the form of Clearing Office machinery for the settlement of four defined classes (article 248 [231]) of "pecuniary obligations" described as "enemy debts" (paragraph 2 of the annex to section III). Procedure is provided and reciprocal rules are prescribed for determining the relative rights and obligations of both groups of Powers when—but only when—this method of settlement is adopted.

The American delegates who participated in drafting the Versailles and similar Treaties declined to commit the United States to this Clearing Office plan¹ and an alternate method of settlement or payment was provided embraced in paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section

problems here presented because of the difference in practice between Germany on the one part and Austria and/or Hungary on the other part in the application of exceptional war measures to American property; and also because by agreement between the Government of Germany and the Government of the United States Germany assumed primary liability with respect to all such claims and debts falling within the jurisdiction of that Commission, and by another agreement they fixed the basis for the valorization of all such claims and debts. No such agreements have been entered into between the Government of the United States on the one part and the Governments of Austria and/or Hungary on the other part.

¹ The American delegates insisted that the adoption of the Clearing Office plan should be made optional with each of the Allied and Associated Powers, because of the difference in the economic conditions with which each and its nationals had to deal in relation to the opposing Powers and their nationals. Most of the principal Allied Powers were plunged into war with practically no warning. Their nationals had little opportunity to withdraw funds from enemy territory or liquidate or adjust existing contracts with enemy nationals. Consequently some of them—notably Great Britain—in order to avoid general financial disaster to their nationals and through them to the nation, and to prevent as far as possible economic dislocation, guaranteed pre-war acceptances or carried bills of exchange and similar negotiable paper falling due after the declaration of war drawn on enemy nationals in the territory of the Central Powers. But the situation was quite different with respect to the United States and its nationals. The war between the principal Allied Powers and Austro-Hungary had been in progress for more than three years prior to the declaration of the existence of a state of war between the United States and Austro-Hungary, during which period American nationals had had ample opportunity in their discretion to withdraw their funds from Austrian and Hungarian territory and liquidate and adjust their contracts with Austrian and Hungarian nationals.

Had the United States adopted the Clearing Office plan it would have been required to complete the liquidation of all Custodian Property held by it and to account for the proceeds thereof through the Clearing Offices. These requirements ran counter to the express provisions of section 12 of the American Trading with the Enemy Act which expressly reserved to Congress after the end of the war the right to determine the disposition to be made of seized enemy property. The Clearing Office plan contemplated the guaranty by both the United States and Austria [Hungary] of the payment of the private debts of their respective nationals and prohibited the voluntary settlement of debts between such nationals. It was believed that such a guaranty would have been repugnant to American conceptions of the functions of government and such interference with private contract rights in time of peace would have been repugnant to the spirit of American institutions.

IV of part X of the Treaty of St. Germain [Trianon], incorporated by reference in the Treaty of Vienna [Budapest],¹ which will be hereinafter noticed. Under that Treaty the United States (but not Austria [Hungary]) had the right to elect, within one month from the coming into effect of that Treaty, to adopt the provisions of section III (consisting of article 248 [231] and the annex of 25 numbered paragraphs embracing the Clearing Office plan) by giving notice to that effect.

The Treaties of Vienna and of Budapest came into effect on November 8, 1921, and December 17, 1921, respectively. The United States did not elect to adopt this "method of payment" provided through "the intervention of Clearing Offices" within one month thereafter and hence, under the express provisions of paragraph (e) of article 248 [231], the provisions of section III do not apply as between Austria [Hungary] and the United States, save in so far as they are read into section IV by express provision or by necessary implication.

The purpose and scope of section IV of part X of the Treaties

This section in both Treaties deals with State measures and the disposition of property subjected thereto. It is comprised of articles 249 and 250 [232 and 233] and an annex consisting of 15 numbered paragraphs. The opening clause announces its purpose to be the laying down of principles for the settlement of questions of "private property, rights and interests in an enemy country"; that is, so far as concerns the problems here under consideration, the private property, rights, and interests of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary] and also the private property, rights, and interests of nationals of the former Austrian Empire [former Kingdom of Hungary] in the "territories, colonies, possessions and protectorates" of the United States.

The second clause of paragraph 14 of the annex to section IV stipulates that "In the settlement of matters provided for in article 249 [232]" between Austria [Hungary] and the United States "the provisions of section III [which are copied in the margin²] respecting the currency in which payment is to be

¹ These provisions for the application by the United States of Austrian and/or Hungarian property and the proceeds of the liquidation thereof as an alternate method of payment are in harmony with the American Trading with the Enemy Act, leaving to the Congress the untrammelled right to dispose of such property and the proceeds thereof in its discretion.

² Article 248 [231] (d) reads as follows:

"Debts shall be paid or credited in the currency of such one of the Allied and Associated Powers, their colonies or protectorates, or the British Dominions or India, as may be concerned. If the debts are payable in some other currency they shall be paid or credited in the currency of the country concerned, whether an Allied or Associated Power, Colony, Protectorate, British Dominion or India, at the pre-war rate of exchange.

"For the purpose of this provision the pre-war rate of exchange shall be defined as the average cable transfer rate prevailing in the Allied or Associated country concerned during the month immediately preceding the outbreak of war between the said country concerned and Austria-Hungary.

"If a contract provides for a fixed rate of exchange governing the conversion of the currency in which the debt is stated into the currency of the Allied or Associated country concerned, then the above provisions concerning the rate of exchange shall not apply.

"In the case of the new States of Poland and the Czecho-Slovak State the currency in which and the rate of exchange at which debts shall be paid or credited shall be determined by the Reparation Commission provided for in part VIII, unless they shall have been previously settled by agreement between the States interested".

made and the rate of exchange and of interest shall apply.”¹ Here is found the only express warrant for reading into section IV any of the provisions of section III as between non-clearing Powers and their nationals, and it will be noted: (1) that this warrant is strictly limited to the carrying into effect of the provisions of article 249 [232], or to the settlement and adjustment of rights, claims, obligations, or “matters” arising thereunder, and (2) that there are read into section IV only such provisions of section III as apply to or deal with currency and rates of exchange and interest. It is apparent, therefore, that those provisions of section III under which Austria [Hungary] guarantees the debts of its nationals (paragraph (b) of article 248 [231] and paragraph 4 of the annex to section III) cannot be directly invoked to fix liability on Austria [Hungary] for the private debts owing to American nationals by Austrian [Hungarian] nationals.

Reading together the opening clause of article 249 [232] and the second clause of paragraph 14 of the annex to section IV,¹ it is apparent that the first simply indicates in a general way the subject-matter of the provisions following and the field of their application.² A general definition of the scope of the matters provided for does not in itself make provision for such matters. Neither do all of the indirect consequences flowing from the carrying into effect of the provisions of article 249 [232] in themselves constitute “matters provided for” therein. In order to determine what matters the settlement of which is “provided for in article 249 [232]” the provisions following the introductory clause must be examined.

Matters provided for in article 249 [232]

The “matters provided for in article 249 [232]”, so far as pertinent to the problems here presented, are:

(1) Provision for the discontinuance by Austria [Hungary] of the application of exceptional war measures and measures of transfer to the property, rights,

Paragraph 22 of the annex to section III reads as follows:

“Subject to any special agreement to the contrary between the Governments concerned debts shall carry interest in accordance with the following provisions:

“Interest shall not be payable on sums of money due by way of dividend, interest or other periodical payments which themselves represent interest on capital.

“The rate of interest shall be 5 per cent. per annum, except in cases where, by contract, law or custom, the creditor is entitled to payment of interest at a different rate. In such cases the rate to which he is entitled shall prevail.

“Interest shall run from the date of commencement of hostilities (or, if the sum of money to be recovered fell due during the war, from the date at which it fell due) until the sum is credited to the Clearing Office of the creditor.

“Sums due by way of interest shall be treated as debts admitted by the Clearing Offices and shall be credited to the Creditor Clearing Office in the same way as such debts.”

¹ This second clause reads as follows:

“In the settlement of matters provided for in article 249 [232] between Austria [Hungary] and the Allied or Associated Powers, their colonies or protectorates, or any one of the British Dominions or India, in respect of any of which a declaration shall not have been made that they adopt section III, and between their respective nationals, the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest shall apply unless the Government of the Allied or Associated Power concerned shall within six months of the coming into force of the present Treaty notify Austria [Hungary] that one or more of the said provisions are not to be applied.”

² *Margaret Williams v. Berlinische Lebens-Versicherungs Gesellschaft*, Anglo-German Mixed Arbitral Tribunal, V Dec. M. A. T. at page 325; *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, *ibidem*, page 26.

and interests of American nationals in Austrian [Hungarian] territory, and, where liquidation was not complete, the restoration of such property, rights, and interests to their owners (paragraph *(a)* of article 249 [232]);

(2) Provision reserving to the United States the right to retain and liquidate in accordance with its laws all Custodian Property (paragraph *(b)* of article 249 [232]);

(3) Provision for Austria [Hungary] making compensation to American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer" as those terms are employed in the Treaty (paragraph *(e)* of article 249 [232]);

(4) Provision that the proceeds of the liquidation by Austria [Hungary] of American property, rights, and interests, including debts, credits, accounts, and cash assets, should be paid immediately by Austria [Hungary] to the American nationals entitled thereto or to the Government of the United States (paragraph *(h)* (2) of article 249 [232]);

(5) Provision that the Custodian Property shall be subject to disposal by the United States "in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this article or paragraph 4 of the annex hereto" (paragraph *(h)* (2) of article 249 [232]);

(6) Provision that the Custodian Property may be charged with the payment of *(a)* amounts due in respect of claims by American nationals against Austria [Hungary] "with regard to their property, rights and interests, including companies and associations in which they are interested, in territory of the former Austrian Empire [former Kingdom of Hungary]", *(b)* debts owing to American nationals by Austrian [Hungarian] nationals, and *(c)* claims growing out of acts committed by the former Austro-Hungarian Government or by any Austrian [Hungarian] authorities during the period of American neutrality (paragraph 4 of the annex to section IV, which, by the language of paragraph *(h)* (2) of article 249 [232] above quoted, is read into article 249 [232] and is one of the "matters provided for" therein); and

(7) Provision that "Austria [Hungary] undertakes to compensate her nationals in respect of the sale or retention" of Custodian Property by the United States (paragraph *(j)* of article 249 [232]).

In carrying into effect any of the foregoing provisions with respect to the rights of the United States or its nationals and making settlements and adjustments thereunder "the provisions of section III respecting the currency in which payment is to be made and the rate of exchange and of interest" will, so far as applicable, be taken into account (second clause of paragraph 14 of the annex to section IV).

From this survey of the somewhat confused provisions of sections III and IV of the economic clauses of the Treaties, we come to determine their application to the several distinct questions raised by the Austrian [Hungarian] Agent involving (1) a definition of the term "debts" as found in section IV; (2) *compensation* by Austria [Hungary] to American nationals for *damages* inflicted through the application of exceptional war measures or measures of transfer to the property, rights, and interests (including debts, credits, accounts, and cash assets) of American nationals in the territory of the former Austrian Empire [former Kingdom of Hungary]; (3) the nature and extent of Austria's [Hungary's] *liability* for claims of, or debts owing to, American nationals not subjected to exceptional war measures; (4) when and on what basis debts or obligations contracted in Austro-Hungarian kronen or currency other than American,

owing by Austria [Hungary] or its nationals to American nationals, shall be *valorized* and the rate and manner of computing interest thereon; (5) how the *amount* of such claims and debts shall be determined; and (6) the method of payment thereof.

Definition of debts

The Commissioner holds that the term "debts" as used in paragraph (h) (2) of article 249 [232] of the Treaty is a short term for "debts, credits and accounts" which in turn is included in the term "private property, rights and interests in an enemy country" (first clause of section IV; see also first clause of paragraph 14 of the annex to section IV).

Only debts owing by Austria [Hungary] or its nationals residing in Austrian [Hungarian] territory (enemy country) to American nationals are here dealt with¹. The provisions of section III will be looked to as an aid in defining the very general term "debts". There are four classes of "pecuniary obligations" (first clause of article 248 [231]) described as "enemy debts" (paragraph 2 of the annex to section III) which are, by paraphrasing the language, defined thus:

(1) Debts payable before the war (December 7, 1917) and due by an Austrian [Hungarian] national residing² within Austrian [Hungarian] territory to an American national residing² within American territory;

(2) Debts which became payable during the war (period of American belligerency)² to American nationals residing² within American territory which arose out of transactions or contracts with Austrian [Hungarian] nationals residing² within Austrian [Hungarian] territory of which the total or partial execution was suspended on account of the existence of a state of war;

¹ Debts owing to American nationals by nationals of the former Austrian Empire [former Kingdom of Hungary] who under the Treaties became nationals of other States included in the designation "Allied and Associated Powers" are not here included. The nationals of such Succession States are not "enemy debtors"; the American creditors are not as to them "enemy creditors"; and the debts owing by them are not "enemy debts" and are not included within the term "debts" as here used (paragraph 2 of the annex to section III). Provision is made for the prompt return by Austria [Hungary] to the nationals of such Succession States of their property, rights, and interests, including debts, credits, and accounts, situated in Austrian [Hungarian] territory (article 266 [249]). Special provision was made for the settlement of debts between nationals of such Succession States and Austrian [Hungarian] nationals (article 271 [254] and paragraph (d) of article 248 [231]). Provision was made by the Congress of the United States for the release and return of the property, rights, and interests, and the proceeds of the liquidation thereof, of the nationals of such Succession States, which consequently are no longer charged with and cannot be applied to the payment of claims and debts of American nationals as provided in paragraph (h) (2) of article 249 [232] (see subsection (b) of section 9 of the Trading with the Enemy Act as amended by the Act of June 5, 1920, 41 Statutes at Large 978).

² The term "residing" as here used with respect to time as affecting debts means residing at any time falling within the period of American belligerency after the debt became due, *provided* all cash demand deposits will, for this purpose, be treated as due. The "period of American belligerency" is defined in Administrative Decision No. I as 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 and the latter being the effective date of the joint resolution passed by the Congress of the United States declaring such state of war at an end.

The terms "Austrian national" and "Hungarian national" as here used do not

(3) Interest which accrued due before and during the war to an American national in respect of securities issued or taken over by Austria [Hungary], provided that the payment of interest on such securities to Austrian [Hungarian] nationals or to neutrals was not suspended during the war; and

(4) Capital sums which became payable before and during the war to American nationals in respect of securities issued by Austria [Hungary], provided that the payment of such capital sums to Austrian [Hungarian] nationals or to neutrals was not suspended during the war.

Cash demand deposits, and time deposits expiring "during the war" as that term is defined in the Treaties, including ordinary bank demand and time deposits, made or established by American nationals with Austrian [Hungarian] nationals prior to December 7, 1917, are included in the term "debts" as used herein without affirmative proof of a demand for payment by the American depositor, subject to the right of the Austrian [Hungarian] Agent to prove that the facts of any particular case take it out of the general rule here announced.

The foregoing definitions will be applied to the term "debts" wherever found without a qualifying word or phrase in the Treaties or in this and subsequent opinions of the Commission.

The Commissioner rejects the contention of the Austrian and Hungarian Agents that because of the apparent limitation of the phrase "debts owing to them [American nationals] by Austrian [Hungarian] nationals", found in paragraph 4 of the annex to section IV, the term "debts" as here used does not include the State debts described in the foregoing paragraphs (3) and (4). No such limitation is found in the applicable paragraph (*h*) (2) of Article 249 [232]. The construction which the Commissioner gives to the term "debts", as here used, to embrace State debts of Austria [Hungary] finds support in the decisions of the Mixed Arbitral Tribunals constituted under the several Treaties and in the practice obtaining between the Allied Powers and the Central Powers.¹

include nationals of the former Austrian [Hungarian] ceded territory who ceased to be Austrian [Hungarian] nationals upon the cession of such territory.

"Debts" as that term is used herein, or claims based thereon, are such as have been impressed with American nationality continuously during the period of American belligerency; *provided, however*, that if a debt or a claim based thereon became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and remained to the latter date impressed with American nationality it will be separately dealt with by the Commissioner.

¹ See Agreement between the British and Hungarian Governments, ratifications of which were exchanged at London on April 20, 1922, copied in full in the supplement to volume 17 (1923), *American Journal of International Law*, pages 46-48. Paragraph 5 of that Agreement reads as follows: "To remove doubts the claims by British nationals with regard to their property, rights and interests with the payment of which all property, rights and interests of Hungarian nationals within British territory, and the net proceeds of the sale, liquidation or any other dealings therewith *may under paragraph 4 of the annex to section IV of part X of the Treaty be charged shall be deemed to include the classes of pecuniary obligations referred to in paragraphs (3) and (4) of article 231 of the Treaty.*"

Rubens v. Austrian Government, III Dec. M. A. T. 37; *The Municipal Trust Co., Ltd., v. Hungarian Government*, *ibidem* 248. While these cases were appeals from Clearing Office decisions, nevertheless they throw some light on the question here considered.

See also fourth annual report of the British Administrator of Austrian Hungarian, and Bulgarian Property (1924), page 8, and the fourth paragraph of the Agreement of July 24, 1924, between the British Government and the Austrian Government appearing on page 26 of that report.

Liability for interest or capital surms due to American nationals in respect of securities issued or taken over by the former *Austro-Hungarian Government* will be dealt with in another decision.

Compensation for damages arising under Article 249 [232] (e)

Paragraph (e) of article 249 [232] provides in substance that Austria [Hungary] shall compensate American nationals "in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in the territory of the former Austrian Empire [former Kingdom of Hungary], by the application either of the exceptional war measures or measures of transfer".

This provision constitutes one of the "matters provided for in article 249 [232]", and hence in arriving at the measure of damages the provisions of section III with respect to currency and rates of exchange and interest will be taken into account.

The phrase "property, rights and interests" includes "debts, credits and accounts" (first clause of paragraph 14 of the annex to section IV).

Under the Tripartite Agreement the extent of the damage or injury, if any, inflicted upon an American national by the former Austrian Empire [former Kingdom of Hungary] through the application of war measures must be determined by the Commissioner.

In such determination the following principles and rules will apply:

(1) "Exceptional war measures" include those enumerated in the first clause of paragraph 3 of the annex to section IV¹ and all others which were in fact exceptional war measures whether or not expressly enumerated as such in the Treaty or expressly provided for in any administrative, legislative, or judicial act or decree. It will be noted that the enumeration of exceptional war measures is very broad and sweeping and seems to include all measures taken by Austria [Hungary] or her authorized agents or by any person connected with the administration or supervision of enemy property. However, it is significant that this enumeration while inclusive is not exclusive, and all measures and acts of the general nature of those enumerated will be held to have been exceptional war measures.

(2) "Measures of transfer" include only those defined in the Treaty provision copied in the margin, which definition is exclusive in its nature.

¹ The language of paragraph 3 of the annex to section IV follows:

"In article 249 [232] 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."

(3) In assessing the compensation to be paid by Austria [Hungary] for the damage or injury inflicted upon American nationals by the application of exceptional war measures or measures of transfer to their property, rights, or interests, the provisions of section III with respect to currency and rates of exchange and interest will be taken into account.

(4) The Commissioner finds that the average cable transfer rate prevailing in the United States during the month immediately preceding the declaration of the existence of a state of war between the United States and Austro-Hungary (paragraph (d) of Article 248 [231]) was 9.36 cents American currency to one Austro-Hungarian krone. This is the rate which will be applied by this Commission whenever it is proper to apply the "pre-war rate of exchange".¹

(5) The Government of Austria and the Government of Hungary through their respective Agents represent that Austro-Hungary, the former Austrian Empire, and the former Kingdom of Hungary did not issue, promulgate, or give effect to any exceptional war measures or measures of transfer applicable to American nationals; that they had no Government agent or agency corresponding to the German Treuhänder or the Alien Property Custodian of the United States; that the decrees preventing their nationals from trading with enemies which applied to the nationals of Great Britain, France, Belgium, Italy, and other Allied Powers were never extended to or applied to American nationals or their property, rights, and interests, and that there were no Austro-Hungarian, Austrian, or Hungarian statutes, regulations, or decrees of any nature designed to prohibit, or which did in fact prohibit, Austrian or Hungarian nationals from communicating, trading, or having intercourse with American nationals during the period of belligerency, or designed to prevent, or which did in fact prevent, Austrian or Hungarian nationals from paying their debts owing to American creditors.

The burden will be upon the United States to prove the existence of Austro-Hungarian and/or Austrian [Hungarian] legislative, administrative, judicial or other general act or decree having general applicability to all the property, rights, and interests of American nationals in territory of the former Austrian Empire [former Kingdom of Hungary]. In the absence of such proof the burden will be upon the United States in putting forward a particular claim on behalf of one of its nationals to prove that the property, rights, and interests of the claimant in the territory of the former Austrian Empire [former Kingdom of Hungary] were in fact subjected to measures in the nature of exceptional war measures or to measures of transfer taken by Austro-Hungary and/or by Austria [Hungary] resulting in damage or injury thereto.

Austria's and Hungary's liability for claims and debts

From the analysis of the portions of sections III and IV of part X of the Treaty applicable to the United States and Austria [Hungary] and their

¹ The term "pre-war" applicable to the United States and its nationals as used in paragraph (d) of article 248 [231] fixing the rate of exchange refers to a time prior to December 7, 1917, while the same term as applied to Great Britain, France, and other Allied Powers refers to a time prior to the entry (on July 28, 1914, or later) of each into war with the Central Power concerned in the particular Treaty. During this period of American neutrality many of the debts which form the basis of claims before this Commission were incurred. Likewise during this period of more than three years the Austro-Hungarian krone as measured by the American exchange value depreciated to less than one-half of its par value. Consequently the Treaty pre-war rate of exchange applicable to Great Britain, France, and some of the other Allied Powers and their respective nationals is more than double the Treaty rate applicable to the United States and its nationals.

respective nationals it appears that the only provisions fixing *direct* and *absolute* liability on Austria [Hungary] for *debts* owing by their nationals are those embodied in paragraphs (e) and (h) (2) of article 249 [232], in the first of which Austria [Hungary] is held liable to make compensation for damage or injury resulting from its own acts in applying war measures to American property, rights, or interests, including debts, credits, accounts, and cash assets, and in the second of which Austria [Hungary] is required to pay to American nationals or the American Government the proceeds of the liquidation of American property, including debts¹.

An *indirect* liability is fixed on Austria [Hungary] for debts owing by its nationals (paragraph (j) of Article 249 [232]) *contingent, however*, on the Congress of the United States electing to retain and apply the Custodian Property to the payment of claims and/or debts in accordance with the provisions of paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section IV.

Austria [Hungary] is, of course, independent of any Treaty provisions, primarily liable for its public debts, evidenced by its bonds, treasury notes, and the like.

But nowhere in such of the clauses of the Treaties as became effective with respect to the United States and its nationals is there found any provision fixing direct and primary liability on Austria [Hungary] for the debts of its nationals to American nationals in the absence of some act of the Austrian [Hungarian] Government operating upon such debts to the prejudice of the American creditors. The suggestion that, in the absence of such act by the Austrian [Hungarian] Government, it is obligated to pay American creditors for losses sustained by them due to depreciation during and after the war in the exchange value of Austro-Hungarian currency can be sustained only on the theory that Austria [Hungary] is liable for all of the direct and indirect, immediate and ultimate, consequences of the war. Clearly such a construction of the Treaty is not justified (see reasons set forth in the "Opinion in War-Risk Insurance Premium Claims" rendered by the Umpire of the Mixed Claims Commission, United States and Germany, Decisions and Opinions, pages 33 to 59 inclusive).

Valorization of debts—Interest

In the absence of a treaty so stipulating, there is no warrant for requiring the payment in American currency at the pre-war rate of exchange of Austrian [Hungarian] public debts or debts of Austrian [Hungarian] nationals owing to American nationals which by their terms are payable in Austro-Hungarian or other non-American currency. A contract obligation of the Austrian [Hungarian] Government or of an Austrian [Hungarian] national to pay Austro-Hungarian kronen is exclusively a krone obligation and is unaffected either by the purchasing power of the krone in Austria [Hungary] or by the exchange value of the krone as measured by other currencies.²

¹ In carrying these provisions into effect the provisions of section III respecting currency and rates of exchange and interest must be taken into account in measuring the extent of the damage inflicted by Austria's [Hungary's] act or the amount which Austria [Hungary] is required to pay from the proceeds of liquidation of American property.

² This is the effect of the decision rendered by the Supreme Court of the United States on November 23, 1926, in the case of *Die Deutsche Bank Filiale Nurnberg v. Charles Franklin Humphrey*. Mr. Justice Holmes in delivering the opinion of the court said:

"An obligation in terms of the currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change the law takes no account of it. *Legal Tender Cases*, 12 Wall. 457, 548, 549. Obviously in fact a dollar or a mark may have different values at different times but to the law that establishes

The Commissioner rejects the contention put forward by the American Agent that as paragraphs 4 and 14 of the annex to section IV treat debts owing to American nationals by Austrian [Hungarian] nationals as within the provisions of that section, therefore the second clause of paragraph 14 requires the application of the provisions of section III respecting currency and rates of exchange and interest to such debts. The Commissioner holds that the mere fact that such debts may fall within the scope of or be dealt with in section IV does not under any and all circumstances require the application to such debts of the provisions of section III with respect to currency and rates of exchange and interest. These provisions of section III may be applied to debts only in carrying into effect such provisions of section IV as deal with or operate upon debts. The clause invoked by the American Agent stipulates that "In the settlement of matters provided for in article 249 [232] between Austria [Hungary]" and the United States the provisions of section III respecting currency and rates of exchange and interest shall apply. Article 249 [232] makes no provision for the direct settlement of debts as between nationals of Austria [Hungary] and those of the United States or as between the Government of Austria [Hungary] and American nationals. Such debts (except those subjected to war measures) are not dealt with by article 249 [232] save in those clauses providing in effect that the Government of the United States may charge or apply Custodian Property to their payment. Or, to state the proposition in another form, the provisions of article 249 [232] do not deal with the settlement of debts as between private parties or as between American nationals and the Government of Austria [Hungary] but deal only with State measures taken by the United States (or by Austria [Hungary]) in respect of such debts. Should the United States elect to exercise the power of charging Custodian Property with or applying it to the payment of such debts in accordance with the provisions of paragraph (h) (2) of Article 249 [232] and paragraph 4 of the annex to section IV—one of the "matters provided for in article 249 [232]"—then in the application by the Government of the United States as against the Government of Austria [Hungary] of these State measures to such debts the provisions of section III with respect to currency and rates of exchange and interest will apply.¹

it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off."

To the same effect is the decision of the Supreme Court of the United States rendered on May 16, 1927, in the case of *Zimmermann et al. v. Sutherland et al.* (*Wiener Bank-Verein, of Vienna*) brought by American nationals to enforce the application of funds seized during the war by the United States as the property of the Vienna bank to the payment at the pre-war rate of exchange of the pre-war bank deposit in kronen of the plaintiffs in the Vienna bank and payable there in accordance with the law of Austria. In denying the existence of the asserted right the court held: "The only primary obligation was that created by the law of Austria-Hungary and if by reason of an attachment of property or otherwise the courts of the United States also gave a remedy the only thing that they could do with justice was to enforce the obligation as it stood, not to substitute something else that seemed to them about fair." In disposing of the contention that this suit could be maintained under the Act of the Congress of the United States designated the "Trading with the Enemy Act" the court held: "That Act did not turn the Austrian into an American debt and impose a new and different obligation upon the Austrian Bank."

¹ The reasoned opinions of the Mixed Arbitral Tribunals constituted under the Treaty of Versailles and similar Treaties involving private debts between nationals of non-clearing States sustain the view here expressed. *National Bank of Egypt v. German Government and Bank für Handel und Industrie*, V Dec. M. A. T. 26; *Margaret Williams v. Berlinische Lebens-Versicherungs Gesellschaft*, *ibidem* 322.

See also *Goldschmiedt v. Heesch Hinrichsen et Cie.*, IV Dec. M. A. T. 530; *Loy*

The Treaty terms place the ultimate responsibility on the United States through its law-making power¹ to elect to apply or not to apply the Custodian Property to the payment of claims and debts of American nationals as defined therein. When the facts shall have been fully developed by this Commission, the debts ascertained and the claims adjudicated, this election may be made advisedly. Pending such election the Treaty provides that the Custodian Property shall be retained by the United States subject to the disposition of its law-making power until such time as Austria [Hungary] shall have made suitable provision for the satisfaction of all claims of American nationals against it. What those claims are must be determined by this Commission. What is suitable provision for their satisfaction must be determined by the law-making power of the United States. Should no other suitable provision be made by Austria [Hungary] for the satisfaction of American claims and debts, then the law-making power of the United States may at its election apply the proceeds of the liquidation of the Custodian Property to their payment in accordance with the provisions of paragraph (h) (2) of article 249 [232] and paragraph 4 of the annex to section IV of the Treaty, these being "matters provided for in article 249 [232]". In the event of such election—but only then—will the "debts" not subjected to war measures owing to American creditors by Austrian [Hungarian] debtors and by the Austrian [Hungarian] State payable in non-American currency be converted and stated for the purpose of payment in American currency at the pre-war rate of exchange, and the interest provisions of paragraph 22 of the annex to section III will apply. The amount so applied

and *Markus v. German Government et al.*, V Dec. M. A. T. 551; *Michalowski v. Deutsche Bank Berlin*, *ibidem* 463; *Tempel v. Deutsch-Russische Transport* (decided by German-Polish Mixed Arbitral Tribunal July 23, 1926); and *Zundhutschen und Patronenfabrik Aktiengesellschaft v. Westbank Aktiengesellschaft*, III Dec. M. A. T. 982.

The leading case apparently announcing a different rule, but without stating reasons therefor, is that of *George Stevenson & Co., Ltd., v. Banque Nationale de Bulgarie*, II Dec. M. A. T. 77. It was brought under the provisions of the Treaty of Neuilly by a British national against a Bulgarian national. While Great Britain had not adopted the Clearing Office system as a method of settlement of claims and debts between its nationals and Bulgarian nationals, it had by Order in Council, entered prior to the bringing of this suit, elected to adopt the alternate method of settlement and to apply the proceeds of Bulgarian property in its hands to the payment of debts owing by Bulgarian nationals to British nationals (see fifth annual report of the Controller of the Clearing Office of Great Britain dated September 15, 1925, on page 13 under the caption "Department for the Administration of Bulgarian Property"; *Armstrong's War and Treaty Legislation 1914-1922*, 2nd edition, page 313 *et seq.*). Having by this Order in Council—a State measure taken by Great Britain against Bulgaria—made such election, it necessarily followed that, under the express terms of the Treaty of Neuilly, the claims and debts owing to British nationals by Bulgaria and its nationals must be converted into British currency at the pre-war rate of exchange and that the interest provisions of section III must be applied. Likewise Great Britain, having made this election, was required to apply the same provisions of section III in accounting to Bulgaria for the property retained and liquidated. In the light of this analysis of what was really involved in that case, it is apparent that the disposition made of it is not in conflict with the rule here announced.

¹ Paragraph (h) (2) of article 249 [232] provides that the Custodian Property "shall be subject to disposal by such Power [United States] in accordance with its laws and regulations". Section 5 of the [Knox-Porter] Peace Resolution adopted by the Congress of the United States and incorporated in the Treaty of Vienna [Budapest] provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law," etc.

will be a credit to Austria [Hungary] which will in turn compensate its nationals in respect of such application of the proceeds of the liquidation of their property (paragraph *(j)* of article 249 [232]).

Method of payment

As heretofore noted, section III of part X of the Treaties, providing a "method of payment" of private debts and State obligations defined therein "through the intervention of Clearing Offices", was not adopted by the United States and hence has no application as between the United States and its nationals on the one hand and Austria [Hungary] and its nationals on the other hand.

But the provisions of paragraph *(h)* (2) of article 249 [232] and of paragraph 4 of the annex to section IV provide an alternate "method of payment" through the application by the Government of the United States of the Custodian Property to the payment of claims and debts of American nationals as defined therein. The Government of the United States by the terms of the Treaties reserved and it is expressly clothed with the power at its election¹ to make such application of the Custodian Property; but such election if made carries with it correlative burdens² and hence this alternate method of payment as well as the Clearing Office method is to some extent reciprocal.

Machinery for determining the amount of claims and debts

Eliminating those provisions of the Treaties not adopted by the United States, the Tripartite Agreement in practical effect clothes the Commissioner with the power and it is made his duty to adjudicate all claims presented by the Government of the United States on its own behalf or on behalf of its nationals against Austria [Hungary] or its nationals falling within the terms of the Treaties, including (1) reparation claims arising under part VIII, and (2) compensation claims for damage or injury falling within the terms of paragraph *(e)* of article 249 [232]; and, as Arbitrator appointed in pursuance of paragraph 4 of the annex to section IV of part X of the Treaties, to ascertain

¹ Paragraph *(h)* (2) of article 249 [232] and paragraph 4 of the annex to section IV. It will be noted that these clauses of the Treaties providing for this alternate method of payment are so drawn as to harmonize with the provisions of the American "Trading with the Enemy Act" which reserved to the Congress of the United States the right to dispose of the Custodian Property and also with section 4 of the Peace Resolution incorporated in the Treaties which reserved to the United States all rights "to which it is entitled by virtue of any Act or Acts of Congress", including the Trading with the Enemy Act, and also with section 5 of the Peace Resolution incorporated in the Treaties which provides that the Custodian Property "shall be retained by the United States of America and no disposition thereof made except as shall have been heretofore or specifically hereafter shall be provided by law until such time" as Austria and Hungary shall have respectively made suitable provision for the satisfaction of claims of American nationals against them.

² Should the United States elect to apply the Custodian Property to the payment of the claims and debts of American nationals it must to the extent of the amounts so applied credit Austria [Hungary] and the latter in turn is obligated to compensate its nationals in respect of the proceeds of the liquidation of their property so applied. Moreover, the United States to the extent it shall exercise the right reserved to it under paragraph *(b)* of article 249 [232] to retain and liquidate Custodian Property—one of the "matters provided for in article 249 [232]"—must, in the settlement of such liquidation, apply the provisions of section III respecting currency and rates of exchange and interest. *National Bank of Egypt v. German Government and Bank für Handel und Industrie, Anglo-German Mixed Arbitral Tribunal, V Dec. M. A. T. 26.*

and assess in the contract currency the amount of debts not subjected to war measures in order that an account may be stated as a basis for the interested Governments taking measures looking to final settlement and that the law-making power of the United States may act advisedly in making final disposition of the Custodian Property.¹ In the discharge of the last-named function action by the Congress of the United States must be awaited before the Commissioner can take final action with respect to the conversion of foreign into American currency, determine the rate of exchange applicable thereto, and the application, if any, of the interest provisions of paragraph 22 of the annex to section III of part X of the Treaties.

Rules of procedure

The Commissioner prescribes the following rules governing debts and claims based on debts presented to the Commissioner by the United States on behalf of American nationals:

I. All such cases will be grouped by the Commissioner into two major classes designated class A and class B respectively. Class A shall comprise those debts (or claims based thereon) found by the Commissioner to have been subjected by Austria [Hungary] to exceptional war measures or measures of transfer. Class B shall comprise those debts (or claims based thereon) which the Commissioner shall find were not subjected to or affected by any Austrian [Hungarian] State measures. Class B shall be subdivided into class B (1) and class B (2). Class B (1) shall comprise debts (or claims based thereon) impressed with American nationality throughout the period of American belligerency. Class B (2) shall comprise debts (or claims based thereon) which became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after December 6, 1917, but before July 2, 1921, and which remained to the latter date impressed with American nationality.

II. A final judgment will be entered by the Commissioner in all class A cases for an amount stated in American currency compensating the American creditor for the damage or injury inflicted with interest thereon at the rate of 5 per cent per annum from the date of such infliction to the date of payment, such judgment to be in favor of the United States on behalf of the claimant against Austria [Hungary].

III. An interlocutory judgment will be entered by the Commissioner in all class B cases reciting (*a*) the name and residence of the creditor, (*b*) the name and residence of the debtor, (*c*) the date the debt was incurred, (*d*) the date of its maturity, (*e*) the principal amount thereof, (*f*) the rate of interest stipulated if any, and (*g*) the contract currency. The interlocutory judgment entered in all class B (2) cases shall also recite the date on which debts or claims based thereon became impressed with American nationality. Final judgment in all class B cases will be reserved by the Commissioner pending further notice to the respective Agents.²

¹ See Administrative Decision No. I dealing with the functions and jurisdiction of the Commission. There is thus combined in one tribunal functions which under the Treaty of St. Germain [Trianon] and similar Treaties between the Allied Powers and the Central Powers were allocated to the Reparation Commission, the Mixed Arbitral Tribunals, and an Arbitrator appointed in pursuance of paragraph 4 of the annex to section IV of part X.

² *Note by the Secretariat.* On April 9, 1928, the Commissioner, in the eighteenth meeting of the Tripartite Claims Commission, announced the following Act (original report, pp. 196-198):

IV. All claims based upon debts owing by Austrian [Hungarian] nationals to American nationals shall be asserted against the Government of Austria [Hungary] and the Austrian [Hungarian] private debtor jointly. Thereupon the Austrian [Hungarian] Agent shall cause notice of such claim to be given to the said Austrian [Hungarian] debtor and require such debtor to furnish the Austrian [Hungarian] Agent within 45 days from the date of such notice with all necessary information and data for the proper defence, if any, of such claim.

 ACT OF THE COMMISSIONER OF THE TRIPARTITE CLAIMS COMMISSION (UNITED STATES, AUSTRIA AND HUNGARY) TAKEN IN PURSUANCE OF "SETTLEMENT OF WAR CLAIMS ACT OF 1928" FIXING THE RATE OF EXCHANGE AND OF INTEREST AND THE PERIOD DURING WHICH INTEREST SHALL RUN WITH RESPECT TO INTERLOCUTORY JUDGMENTS ENTERED BY THE COMMISSIONER.

Whereas the statute enacted by the Congress of the United States of America designated "Settlement of War Claims Act of 1928", which became effective on March 10, 1928, upon its approval by the President of the United States, provides in substance that the Commissioner of the Tripartite Claims Commission (United States, Austria and Hungary) is authorized and requested with respect to interlocutory judgments entered by him to fix such rate of exchange for the conversion of foreign currency into money of the United States and to fix such rate of interest applicable to said interlocutory judgments and such period during which such interest shall run as he may determine to be fair and equitable, and to give notice thereof within thirty days after the coming into force of said Act; and

Whereas the said Commissioner has considered all statements and arguments submitted by the Government of the United States and the Government of Austria and the Government of Hungary dealing with the fair and equitable rate of exchange and of interest and the period during which interest shall run, and is prepared to comply with the said request and to exercise the said authority conferred by said Act;

Now, therefore, the said Commissioner, being fully advised in the premises, does hereby comply with the said request and exercise the said authority conferred upon him and does hereby fix the rate of exchange at which all interlocutory judgments entered or to be entered by the Commissioner in foreign currency shall be converted into money of the United States, and the rate of interest applicable to all interlocutory judgments entered or to be entered by him and the period during which such interest shall run, as follows:

SECTION I

Rate of Exchange

(a) *Gold Currency.* Interlocutory judgments expressed in gold foreign currency shall be converted into United States currency at the rates following:

- (1) 20.26 cents to the Austro-Hungarian gold krone;
- (2) 48.237 cents to the Austro-Hungarian gold gulden or florin;
- (3) 19.3 cents to the French gold franc;
- (4) 23.82 cents to the German gold mark;
- (5) \$ 4.87 to the British gold pound.

(b) Interlocutory judgments classified by the Commissioner as B (1) and stated in foreign currency (other than gold) shall be converted into United States currency at the rates following:

- (1) 12 cents to the Austro-Hungarian paper or silver gulden or florin;
- (2) 6 cents to the Austro-Hungarian krone;
- (3) 10 cents to the German mark;
- (4) 12 cents to the French franc;
- (5) \$ 4.76 to the British pound sterling.

This practice, in pursuance of which final judgments stated in terms of American currency will be entered by the Commissioner in all cases save in class B cases as above defined, and interlocutory judgments will be entered in all class B cases, will enable the Governments of the United States, of Austria,

(c) All interlocutory judgments classified by the Commissioner as B (2) stated in a foreign currency (other than gold) shall be converted into United States currency at the cable transfer rate of exchange found by the Commissioner to have been in effect (at New York in case of British or French currency and at Zurich in case of all other currencies) at the time the claim became impressed with American nationality, by the naturalization of the claimant or otherwise through operation of law, not exceeding, however, the rate fixed for conversion of interlocutory judgments classified by the Commissioner as B (1).

(d) Interlocutory judgments, if any, which may hereafter be entered by the Commissioner expressed in a foreign currency other than those hereinbefore enumerated shall be converted into United States currency at a rate of exchange to be fixed by the Commissioner, at the time of the entry of such judgments.

SECTION II

Interest

The rate of interest applicable to interlocutory judgments and the period during which such interest shall run are fixed as follows:

(a) Prior to January 1, 1929, interest shall not be payable on judgments based on dividends, interest, or other periodical payments which themselves represent interest on capital. Beginning with January 1, 1929, such judgments if any, remaining unpaid shall bear interest at the rate of 5 per cent per annum.

(b) Where the obligation upon which the judgment is founded expressly stipulates that the obligation shall not bear interest after maturity, interest shall not run prior to January 1, 1929; but beginning with that date interest shall run at the rate of 5 per cent per annum.

(c) In all cases not falling within the preceding paragraphs (a) or (b) where the obligation upon which the judgment is based matured prior to December 7, 1917, interest shall run beginning on December 7, 1917, until paid; and where the obligation matured on or subsequent to December 7, 1917, interest shall run from the date of maturity until paid.

(d) The rate of interest shall be 5 per cent per annum except in cases where the judgment finds a different contractual rate of interest stipulated, in which event the rate shall be the contractual rate.

(e) A deposit in the Austrian special deposit account or in the Hungarian special deposit account, as the case may be, in pursuance of the provisions of the Settlement of War Claims Act of 1928, of an amount sufficient to make the payments in respect of the awards (as defined in said Act) against Austria or against Hungary, as the case may be, authorized by subsection (b) of section 5 of said Act, shall be treated as a payment within the meaning of this Section II.

DONE at Washington April 9, 1928.

Edwin B. PARKER

Commissioner of the Tripartite Claims Commission

Cross-references. Am. J. Int. Law, vol. 23 (1929), pp. 179-181; Friedensrecht, VIII. Jahr, Nr. 6/7 (1929), pp. 38-39.

Bibliography: Bonyge, pp. 21-23; Prossinagg, pp. 15-21.

and of Hungary to act advisedly in adopting measures for the ultimate payment of such judgments—measures political rather than juridical in their nature; and will enable the law-making power of the United States to act advisedly in making final disposition of the Custodian Property as contemplated by section 5 of the Peace Resolution constituting a part of the Treaties of Vienna and of Budapest.

This decision in so far as applicable will control the preparation, presentation, and decision of all claims based on debts owing to American nationals by Austrian [Hungarian] nationals or by Austria [Hungary] presented to the Commission and falling within its scope. In any case in which the American Agent, the Austrian Agent, and/or the Hungarian Agent is of the opinion that the peculiar facts of that 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.
