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ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

Norwegian shipowners' claims (Norway v. USA)

13 October 1922

VOLUME I pp. 307-346



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VIII.

NORWEGIAN SHIPOWNERS' CLAIMS¹.

PARTIES : Norway *versus* U.S.A.

SPECIAL AGREEMENT : June 30, 1921.

ARBITRATORS : The Honorable Chandler P. Anderson (U.S.A.),
His Excellency Mr. Benjamin Vogt (Norway),
Mr. James Valloton (Switzerland).

AWARD : The Hague, October 13, 1922.

Expropriation.—Municipal law and international tribunals.—Law and equity.—Equality of States in international law.—Meaning of word "property".—International law and private property.—Non-discrimination.—*Force majeure*.—Award of interest.—Rights of third party against claimant.

¹ For bibliography, index and tables, see Volume III.

Special Agreement, June 30th, 1921.

[See text below.]

AWARD OF THE TRIBUNAL.

Award of the tribunal of arbitration between the United States of America and the Kingdom of Norway under the special agreement of June 30, 1921.—The Hague, October, 13, 1922¹.

Whereas the United States and the Kingdom of Norway are Parties to the Convention for the Pacific Settlement of International Disputes signed at The Hague, on October 18, 1907, which replaced by virtue of Article 91 thereof as between the contracting powers the original Hague Convention of July 29, 1899;

Whereas the United States and Norway signed on April 4, 1908, a general Arbitration Convention in which it was agreed²:

Article II. In each individual case, the High Contracting Parties, before appealing to the Permanent Court of Arbitration, shall conclude a special Agreement defining clearly the matter in dispute, the scope of the powers of the Arbitrators, and the periods to be fixed for the formation of the Arbitral Tribunal and the several stages of the procedure. It is understood that on the part of the United States such special agreements will be made by the President of the United States by and with the advice and consent of the Senators thereof;

Whereas it is common ground that this general Arbitration Convention is still in full force and effect;

Whereas in pursuance of all the foregoing, by a special Agreement concluded on the 30th of June 1921, and ratified on the 22nd of August 1921³ the United States of America and His Majesty the King of Norway

desiring to settle amicably certain claims of Norwegian subjects against the United States arising, according to contentions of the Government of Norway, out of certain requisitions by the United States Shipping Board Emergency Fleet Corporation;

Considering that these claims have been presented to the United States Shipping Board Emergency Fleet Corporation and that the said Corporation and the claimants have failed to reach an agreement for the settlement thereof;

Considering, therefore, that the claims should be submitted to arbitration conformably to the Convention of the 18th of October, 1907, for the pacific settlement of international disputes and the Arbitration Convention concluded by the two Governments April 4, 1908, and renewed by agreements dated June 16, 1913⁴ and March 30, 1918⁵ respectively;

¹ Official print of the Permanent Court of Arbitration at The Hague.

² *U.S. Statutes at Large*, vol. 35, pt. 2, p. 1994.

³ As the text of the agreement for arbitration is here given in full, except for the signatures, it is not printed again under a special heading.

⁴ *U.S. Statutes at Large*, vol. 38, pt. 2, p. 1771.

⁵ *Id.*, vol. 40, pt. 2, p. 1618.

Have appointed as their plenipotentiaries, for the purpose of concluding the following Special Agreement:

The President of the United States of America: Charles E. Hughes, Secretary of State of the United States; and

His Majesty the King of Norway: Mr. Helmer H. Bryn, His Envoy Extraordinary and Minister Plenipotentiary at Washington;

Who, after having communicated to each other their respective full powers, found to be in good and due form, have agreed on the following articles:

ARTICLE I.

The Arbitral Tribunal shall be constituted in accordance with Article 87 (Chapter IV) and Article 59 (Chapter III) of the said Convention of October 18, 1907, except as hereinafter provided, to wit:

One Arbitrator shall be appointed by the President of the United States, one by His Majesty the King of Norway, and the third, who shall preside over the Tribunal, shall be selected by mutual agreement between the two Governments. If the two Governments shall not agree within one month from the date of the exchange of ratifications of the present agreement in naming such third Arbitrator, then he shall be named by the President of the Swiss Confederation, if he is willing.

The Tribunal shall examine and decide the aforesaid claims in accordance with the principles of law and equity and determine what sum if any shall be paid in settlement of each claim.

The Tribunal shall also examine any claim of Page Brothers, American citizens, against any Norwegian subject in whose behalf a claim is presented under the present Agreement, arising out of a transaction on which such claim is based, and shall determine what portion of any sum that may be awarded to such claimant shall be paid to such American citizens in accordance with the principles of law and equity.

ARTICLE II.

As soon as possible, and within five months from the date of the exchange of ratifications of the present Agreement, each Party shall present to the Agent of the other Party, two printed copies of its case (and additional copies that may be agreed upon) together with the documentary evidence upon which it relies. It shall be sufficient for this purpose if such copies and documents are delivered at the Norwegian Legation at Washington or at the American Legation at Christiania, as the case may be, for transmission.

Within twenty days thereafter, each Party shall deliver two printed copies of its case and accompanying documentary evidence to each member of the Arbitral Tribunal and such delivery may be made by depositing these copies within the stated period with the International Bureau at The Hague for transmission to the Arbitrators.

After the delivery on both sides of such printed case, either Party may present, within three months after the expiration of the period above fixed for the delivery of the case to the Agent of the other Party, a printed counter-case (and additional copies that may be agreed upon) with documentary evidence, in answer to the case and documentary evidence of the other Party, and within fifteen days thereafter shall, as above provided, deliver in duplicate such counter-case and accompanying evidence to each of the Arbitrators.

As soon as possible and within one month after the expiration of the period above fixed for the delivery to the Agents of the counter-case, each Party shall deliver in duplicate to each of the Arbitrators and to the Agent of the other Party a printed argument (and additional copies that may be agreed upon) showing the points relied upon in the case and counter-case, and referring to the documentary evidence upon which it is based. Delivery in each case may be made in the manner provided for the delivery of the case and counter-case to the Arbitrators and to the Agents.

The time fixed by this Agreement for the delivery of the case, counter-case, or argument, and for the meeting of the Tribunal, may be extended by mutual consent of the Parties.

ARTICLE III.

The Tribunal shall meet at The Hague within one month after the expiration of the period fixed for the delivery of the printed argument as provided for in Article II.

The Agents and Counsel of each Party may present in support of its case oral arguments to the Tribunal, and additional written arguments, copies of which shall be delivered by each Party in duplicate to the Arbitrators and to the Agents and Counsel of the other Party.

The Tribunal may demand oral explanations from the Agents of the two Parties as well as from experts and witnesses whose appearance before the Tribunal it may consider useful.

ARTICLE IV.

The decision of the Tribunal shall be made within two months from the close of the arguments on both sides, unless on the request of the Tribunal the Parties shall agree to extend the period. The decision shall be in writing.

The decision of the majority of the members of the Tribunal shall be the decision of the Tribunal.

The language in which the proceedings shall be conducted shall be English.

The decision shall be accepted as final and binding upon the two Governments.

Any amount granted by the award rendered shall bear interest at the rate of six per centum per annum from the date of the rendition of the decision until the date of payment.

ARTICLE V.

Each Government shall pay the expenses of the presentation and conduct of its case before the Tribunal; all other expenses which by their nature are a charge on both Governments, including the honorarium for each Arbitrator shall be borne by the two Governments in equal moieties.

ARTICLE VI.

This Special Agreement shall be ratified in accordance with the constitutional forms of the contracting Parties and shall take effect

immediately upon the exchange of ratifications, which shall take place as soon as possible at Washington.

Whereas, for the purpose of carrying out this Agreement, the two Governments have respectively appointed as Arbitrators:

The Government of the United States: The Honorable Chandler P. Anderson, Arbitrator American-British Claims Arbitration Tribunal;

The Government of the Kingdom of Norway: His Excellency Mr. Benjamin Vogt, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the King of Norway;

Whereas at the request of the two Governments, the President of the Swiss Confederation has named as third Arbitrator and President of the Tribunal: Mr. James Vallotton, Docteur en droit, Member of the Bar of Lausanne, Associate of the Institut de Droit International;

Whereas the two Governments have appointed as Agents: The Honorable William C. Dennis, for the United States; Captain C. Frölich Hanssen, for the Kingdom of Norway, assisted by the following Counsel:

for the United States: The Honorable George Sutherland, formerly United States Senator, *Counsel*, Mr. Stanley H. Udy, formerly Assistant Solicitor Department of State, *Associate Counsel*,

for the Kingdom of Norway: The Honorable Walter L. Fisher, formerly Secretary of Interior of the United States, *Counsel*, Mr. Edward B. Burling, lawyer, *Counsel*, Mr. George Rublee, lawyer, *Counsel*, Mr. Dean G. Acheson, lawyer, *Counsel*, Mr. Ole Roed, Barrister of Supreme Court of Norway, *Counsel*, Mr. Johan Bredal, formerly Minister of Justice of Norway, Government Solicitor ad hoc, *Counsel*, Mr. Tryggve Sagen, Chairman of the Christiania Group of Norwegian shipowners, *Counsel*;

Whereas the Agents of the Parties to the said Agreement of June 30, 1921 have duly and in accordance with the terms of the Agreement communicated to the Tribunal their cases, counter-cases, printed arguments and other documents;

Whereas Counsel and Agents for the Parties have fully presented to this Tribunal their oral arguments in the sittings held between the first assembling of the Tribunal on July 22nd and September 1st, 1922.

And whereas the two Parties have agreed on September 1st, 1922 to an extension until February 1st, 1923 of the period of two months provided for by Article IV of the Special Agreement for rendering the Award;

Whereas the arguments have been closed on the 11th of October, 1922,

And whereas according to Article I of the Special Agreement the Tribunal shall "determine what sum if any shall be paid in settlement of each claim of Norwegian subjects against the United States" and shall also "examine any claim of Page Brothers, American citizens, against any Norwegian subject in whose behalf a claim is presented under the present Agreement, arising out of a transaction in which such claim is based, and shall determine what portion of any sum that may be awarded to such claimant shall be paid to such American citizens";

Whereas, generally speaking, the principal facts and contentions of the Parties with regard to the fifteen Norwegian claims being the same, it is possible and advisable to embrace these several independent claims in one arbitral award (while pronouncing separately on the points at issue);

Now, therefore, this Tribunal (having carefully considered the said Conventions, Agreement, cases, counter-cases, printed and oral arguments, and the documents presented by either side) after due deliberation pronounces as follows:

The amount of the claims.

The details of the claims, both as originally presented in the Case of the Kingdom of Norway and as finally presented in the course of the oral argument, are as follows:

(1)	(2)	(3)	(4)	(5)
Number of claim.	NAME OF CLAIMANT.	Amounts originally claimed.		Amounts finally claimed.
		Amounts.	Amounts including interest.	(Without adding interest claimed.)
		\$	\$	\$
1.	The Manitowoc Shipping Corporation	731,500.00	1,028,220.24	766,500.00
2.	The Manitowoc Shipping Corporation	731,500.00	1,028,220.24	766,500.00
3.	The Baltimore Steamship Company ...	1,507,860.28	2,120,679.93	1,542,187.50
4.	The Vard II Steamship Company ...	1,944,877.26	2,731,749.47	1,957,200.00
5.	The Sørlandske Lloyd Corporation	1,617,000.00	2,273,753.21	1,837,000.00
6.	The Østlandet Steamship Company...	2,390,960.00	3,363,311.07	2,478,960.00
7.	Jacob Prebensen Jr	148,987.50	209,850.03	396,937.50
8.	The Tromp Steamship Company.....	257,737.50	361,745.30	396,937.50
9.	The Maritim Corporation.....	278,400.00	392,492.40	417,600.00
10.	The Haug Steamship Company.....	413,460.94	580,093.48	417,600.00
11.	The Mercator Corporation.....	434,123.44	609,083.36	438,262.50
12.	The Sørlandske Lloyd Corporation	196,875.00	277,871.43	451,875.00
13.	H. Kjerschow.....	447,250.00	627,500.16	451,875.00
14.	Harry Borthen.....	146,875.00	207,300.90	451,875.00
15.	E. & N. Chr. Evensen Incorporated	421,875.00	591,788.29	451,875.00
	Totals.....	11,669,281.92	16,403,659.51	13,223,185.00

It will be seen that the figures given in column (5) above are exclusive of the claims made by the Kingdom of Norway for interest, compounded semi-annually. Their comparison is, therefore, with the figures in column (3) and not column (4) above. The detailed amounts of the amended claims, including interest, were not submitted to the Tribunal. The total of such amended claims approximated \$18,000,000.

In reply the United States declared its willingness and desire to make just compensation for the property taken and recognized its liability to make compensation in the following amounts:

(1)	(2)	(3)
Number of claim.	NAME OF CLAIMANT.	Amounts.
1.	The Manitowoc Shipping Corporation ...	\$101,200
2.	The Manitowoc Shipping Corporation ...	101,000
3.	The Baltimore Steamship Company	255,900
4.	The Vard II Steamship Company	346,900
5.	The Sörlandske Loyd Corporation	400,800
6.	The Östlandet Steamship Company	1,184,700
7.	Jacob Prebensen Jr	40,820
8.	The Tromp Steamship Company	40,820
9.	The Maritim Corporation	39,720
10.	The Haug Steamship Company	39,720
11.	The Mercator Corporation	38,600
12.	The Sorlandske Loyd Corporation.....	22,260
13.	H. Kjerschow	22,260
14.	Harry Borthen	22,260
15.	E. & N. Chr. Evensen Incorporated	22,260
	Total	\$ 2,679,220

The claim made by the United States in reference to Page Brothers amounted to \$22,800. The validity of this claim was totally denied by the Kingdom of Norway.

I.

INTRODUCTION.

It is common ground between the Parties to this arbitration that the fifteen claims against the United States are presented by the Government of the Kingdom of Norway, which Government, and not the individual claimants, "is the sole claimant before this Tribunal".¹

The claims arise out of certain actions of the United States of America in relation to ships which were building in the United States for Norwegian subjects at a time, during the recent Great War, when the demand for ships was enormous, owing to the needs of the armies and to the losses of mercantile ships.

For some time before the United States declared war, the shortage of shipping was serious both in European countries and in the United States. In these circumstances, Norwegian subjects, amongst others, directed their attention to the possibilities of shipbuilding in the United States. From July 1915 onwards, various contracts were placed by Norwegian subjects with shipyards in the United States. Meanwhile, from the summer of 1916 onwards, the United States Government took a series of steps for the protection of its interests and these steps made possible the later "mobilisation for war purposes of the commercial and industrial resources of the United States".² Into most of these measures it is not necessary to enter in any detail, as they do not directly affect the merits of the claims.

¹ Norwegian Case, p. 1; U.S. Counter-Case, p. 5 (The cases, counter-cases and appendices are not reproduced in this volume).

² U.S. Counter-Case, p. 8.

The United States declared war against Germany on April 6th, 1917. Already by the United States Shipping Act of September 1916 the United States Shipping Board had been established "for the purpose of encouraging, developing and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with its territories and possessions and with foreign countries".¹ This Board was empowered by section 5 of the Act:

to have constructed and equipped in American shipyards and Navy yards or elsewhere, giving preference, other things being equal, to domestic yards, or to purchase, lease, or charter, vessels suitable, as far as the commercial requirements of the marine trade of the United States may permit, for use as naval auxiliaries or Army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels.

Provided: That neither the board nor any corporation formed under section eleven in which the United States is then a stockholder shall purchase, lease, or charter any vessel

(a) Which is then engaged in the foreign or domestic commerce of the United States, unless it is about to be withdrawn from such commerce without any intention on the part of the owner to return it thereto within a reasonable time;

(b) Which is under the registry or flag of a foreign country which is then engaged in war;

(c) Which is not adapted, or can not by reasonable alterations and repairs be adapted to the purpose specified in this section;

(d) Which, upon expert examination made under the direction of the board, a written report of such examination being filed as a public record, is not without alteration or repair found to be at least seventy-five per centum as efficient as at the time it was originally put in commission as a seaworthy vessel.

Section 7 of the Act provided: "That the board, upon terms and conditions prescribed by it and approved by the President, may charter, lease, or sell to any person, a citizen of the United States, any vessel so purchased, constructed, or transferred."

Section 9 of the Act gave the Board certain additional powers "when the United States is at war or during any national emergency the existence of which is declared by proclamation of the President." These additional powers were:

no vessel registered or enrolled and licensed under the laws of the United States shall, without approval of the board, be sold, leased, or chartered to any person not a citizen of the United States, or transferred to a foreign registry or flag. No vessel registered or enrolled and licensed under the laws of the United States, or owned by any person a citizen of the United States, except one which the board is prohibited from purchasing, shall be sold to any person not a citizen of the United States or transferred to a foreign registry or flag, unless such vessel is first tendered to the board at the price in good faith offered by others, or, if no such offer, at a fair price to be determined in the manner provided in section ten.

¹ U.S. Case, p. 17.

A proclamation under this section of the Act was issued by the President on February 5th, 1917, and thus these emergency powers of the Shipping Board came into operation.¹

Section 11 of the United States Shipping Act of September 1916, authorized the Shipping Board to: "form under the laws of the District of Columbia one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States."²

On the day of the declaration of war by the United States (April 6th, 1917) the Shipping Board exercised this authority and formed the United States Shipping Board Emergency Fleet Corporation to carry out, in general, the purposes set forth in section 11 of the Act. All the stock of this corporation was owned by the United States. Though its certificate of Incorporation of April 16th, 1917, provided "that the existence of this corporation shall be perpetual,"³ it had been laid down in section 11 of the Act that "at the expiration of five years from the conclusion of the present European War the operation of vessels on the part of any such corporation in which the United States is then a stockholder shall cease and the said corporation stand dissolved. . . . The vessels and other property of any such corporation shall revert to the board."⁴

For some time before the declaration of war the question of requisitioning ships by the United States had been considered and the fact that early in 1917 a large proportion of the shipyards in the United States was engaged with contracts for foreign shipowners led to various proposals and negotiations into which it is unnecessary to enter here. On the 4th of March 1917 (after the severance of diplomatic relations between the United States and Germany on February 3rd, 1917), a Naval Emergency Fund Act was passed. This Act authorized and empowered the President, "in addition to all other existing provisions of law" within the limits of the appropriation available, "to place an order with any person for such ships or war material as the necessities of the Government, to be determined by the President, may require and which are of the nature, kind, and quantity usually produced or capable of being produced by such person." Such orders were given precedence over all other orders and compliance was made obligatory. In the case of non-compliance, the President was authorized to "take immediate possession of any factory⁵ or of any part thereof."⁵ The President was furthermore empowered, under the same penalty, "to modify or cancel any existing contract for the building, production, or purchase of ships or war material," to place an order for the whole or any part of the output of a factory in which ships or war material were being built or produced, and to "requisition and take over for use or operation by the Government any factory or any part thereof."⁶ In all cases where these powers were exercised, provision was made for "just compensation" to be determined by the President, with the customary provision for an appeal to the courts.

Then on June 15th, 1917, two months after the declaration of War, further important powers were given to the President by the Emergency Shipping Fund Provision of the Urgent Deficiencies Act. The relevant provisions of this Act are as follows:⁷

¹ U.S. Case Appendix, p. 74.

² Id., p. 62.

³ Id., pp. 19-20, 80.

⁴ Id., p. 63.

⁵ U.S. Case, p. 19.

⁶ Ibid.; U.S. Case Appendix, p. 76

⁷ Id., pp. 80-90.

The President is hereby authorized and empowered, within the limits of the amounts herein authorized:

(a) To place an order with any person for such ships or material as the necessities of the Government, to be determined by the President, may require during the period of the War and which are of the nature, kind and quantity usually produced or capable of being produced by such person.

(b) To modify, suspend, cancel, or requisition any existing or future contract for the building, or purchase of ships or material.

(c) To require the owner or occupier of any plant in which ships or materials are built or produced to place at the disposal of the United States the whole or any part of the output of such plant, to deliver such output thereof in such quantities and at such times as may be specified in the order.

(d) To requisition and take over for use or operation by the United States any plant, or any part thereof without taking possession of the entire plant, whether the United States has or has not any contract or agreement with the owner or occupier of such plant.

(e) To purchase, requisition, or take over the title to, or the possession of, for use or operation by the United States, any ship now constructed or in the process of construction or hereafter constructed or any part thereof, or charter of such ship.

Compliance with all orders issued hereunder shall be obligatory on any person to whom such order is given, and such order shall take precedence over all other orders and contracts placed with such person. If any person owning any ship, charter, or material, or owning, leasing, or operating any plant equipped for the building or production of ships or material shall refuse or fail to comply therewith or to give to the United States such preference in the execution of such order, or shall refuse to build, supply, furnish, or manufacture the kind, quantities or qualities of the ships or material so ordered, at such reasonable price as shall be determined by the President, the President may take immediate possession of any ship, charter, material or plant of such person, or any part thereof without taking possession of the entire plant, and may use the same at such times and in such manner as he may consider necessary or expedient.

Whenever the United States shall cancel, modify, suspend or requisition any contract, make use of, assume, occupy, requisition, acquire or take over any plant or part thereof, or any ship, charter or material in accordance with the provisions hereof, it shall make just compensation therefor, to be determined by the President; and if the amount thereof so determined by the President, is unsatisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five per centum, will make up such amount as will be just compensation therefor, in the manner provided for by section twenty-four, paragraph three, and section one hundred and forty-five of the Judicial Code.

The President may exercise the power and authority hereby vested in him, and expend the money herein and hereafter appropriated through such agency or agencies as he shall determine from time to time, *Provided*: That all money turned over to the United States Shipping

Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended. All ships constructed, purchased, or requisitioned under authority herein, or heretofore or hereafter acquired by the United States, shall be managed, operated, and disposed of as the President may direct.

Up to the date of this Act, though different proposals had been mooted, no definite action as regards requisitioning ships or contracts for ships had been taken. Negotiations were opened between the Norwegian Government and the United States authorities and these will be discussed later. Definite action, however, began on August 3rd, 1917.

II.

WAS THE CLAIMANTS' PROPERTY TAKEN?

The Fleet Corporation sent a general order of requisition by telegram to almost all the shipyards of the United States on August 3rd and 4th, 1917, but it did not send any detailed order of requisition, giving the particular ships or contracts to which the requisition was intended to apply. Nor did the Corporation state precisely to what extent each of the yards was requisitioned. The Tribunal cannot regard this notice as sufficient as regards foreign owners of shipbuilding contracts, except for the purpose of preventing any transfer to a foreign flag or to foreign ownership or any other change to the status quo which could have been detrimental from the point of view of national defence.

This telegraphic order of August 3rd, sent to the shipyards only, ordered the completion of all vessels "with all practicable despatch," and referred to a letter which was to follow.¹

The order contained in the letter of August 3rd expressly requisitioned not only the ships and the material, but also the contracts, the plans, detailed specifications and payments made, and it even commandeered the yards (depriving them of their right to accept any further contracts). In spite of this the United States have contended that there was no requisition, except of "physical property" and have strongly maintained that the word "contract" in the letter of 3rd August only referred to commitments for material.²

It is common ground that the United States ordered the shipyards not to accept after August 3rd, 1917, any further progress payments under the contracts from the private owners, but that subsequent progress payments were made by some of the former owners to the shipbuilders.³

The United States have also proved that, for instance, on September 12th, 1917, Admiral Capps, General Manager of the United States Emergency Fleet Corporation, wrote to the Cunard Steamship Co. New York:

You are informed that all shipbuilders have been directed not to accept any payments from you on account of requisitioned ships, and that in this case, where you have actually made payment, the shipbuilders will be directed to return this payment to you.

You are now directed not to make any further payments or tenders of payments to any shipbuilders having under construction ships which

¹ U.S. Case Appendix, p. 212, etc.

³ Id.; p. 406, etc.

² Ibid.

were requisitioned by us. You are also further informed that no reimbursement will be made to you of payments which you have heretofore made to the shipbuilders, and no other form of settlement will be made with you without securing, for the benefit of our shipbuilders, complete releases of their contract obligations to deliver ships to you in place of the ships which we have requisitioned.

The foregoing is not to be considered even an additional agreement to reimburse you at this time. The whole subject of compensation to former owners is now under consideration.¹

To the British War Mission Admiral Capps wrote as follows, on September 13th, 1917:

I beg to acknowledge receipt of your letter of the 10th inst., in relation to the Cunard Line's action in making tenders of payment to the shipbuilders covering ships requisitioned by the Fleet Corporation. The Emergency Fleet Corporation specifically ordered the shipbuilders not to accept payments from former owners, and in similar cases has directed the owners not to make tenders of payment to the shipbuilders.

This is in strict conformity with the authority vested in the Fleet Corporation and the Cunard Company has again been directed not to make any such tenders.

In this connection it is of course assumed that it is not the intention of the Cunard Co., in making these tenders to place our shipbuilders in a position where they will have to deliver ships to the Cunard Line after the emergency has passed. The Fleet Corporation will necessarily take all suitable steps to protect the shipbuilders, and to prevent them from being placed in such an embarrassing position.

It is common ground that one of the progress payments was made, with the assent of the United States Fleet Corporation, by one of the Norwegian claimants to the Seattle Construction and Dry Dock Co., after August 3rd, 1917, to the amount of 70,000 Dollars, on hull No. 92 (Steamship "Sacramento" Claim No. 4); that this sum was due on August 2; that the claimants or their assignors, the former owners, had fulfilled their contracts up to the time of the requisition; that on December 3rd, 1919, the United States Requisition Claims Committee, in their award, authorized payment of these progress payments to the Norwegian claimants; that these sums have not yet been paid to the claimants, although the United States were asked repeatedly to do so; and that the formal claims were presented in 1919 on behalf of the present claimants.²

Counsel for the United States were invited by the Tribunal to prove that these payments were not credited by the Shipbuilders to the United States Emergency Fleet Corporation in their reciprocal accounts and payments. But no evidence was adduced to prove this; nor can it be denied that the United States Fleet Corporation debited these sums to the shipbuilders, as if they had been paid by the Corporation under the contracts³. There is an example of this in the letter to the Seattle Construction and Dry Dock Co., of May 10th, 1918.⁴

Although the Corporation wrote to the shipowners at the beginning of September 1917, that the subject of compensation to former owners "was

¹ U.S. Counter-Case Appendix, pp. 88-89.

² *Id.*, p. 89.

³ U.S. Case Appendix, p. 345.

⁴ U.S. Appendix, p. 439.

under consideration," the correspondence of the General Managers of the Fleet Corporation (as it has been submitted to the Tribunal) shows conclusively that there was at the beginning an intention—confirmed by the orders to the shipyards—of including these payments in the compensation to be paid, not by the shipbuilders, but by the Fleet Corporation, to the former shipowners, with interest from August 3rd, 1917. Thus the Board asked for "any information necessary to a fair and just determination of the obligations of the Emergency Fleet Corporation in taking over these ships and contracts."¹

In their correspondence of about August 20th, 1917 with the former owners of the contracts, the General Managers of the United States Emergency Fleet Corporation, after having expressly mentioned that they were writing to them as owners, or as the representatives of the owners, of the contracts with the shipyards, expressly stated their intention of reimbursing them,

promptly, so far as funds are available for the payments heretofore made to the shipbuilders, if, after the investigation of data submitted by the owner, such payments are found in order and in conformity with the contract requirements.

At your further and early convenience you are requested to submit to the Corporation, a statement of such indirect expenditures as you have made on account of each vessel; for instance the cost of superintendence, original design, interest on funds already paid, and the like. The matters mentioned will require careful audit, and in addition you may submit any other matters you deem pertinent.

It will be perceived that the Corporation presumes it is addressing this letter to the owners or responsible representatives of the owners or persons entitled to receive compensation on account of the requisition of the vessels listed above. The Corporation requests that there be included in your response to this letter all evidence of ownership, which is necessary to establish the right of those who are entitled to receive the compensation provided by law.

The consummation of the orders herein and heretofore transmitted will be made the subject of later appropriate corporate action.

The General Managers of the Fleet Corporation gave the following instructions to their district officers:²

You will please forward without delay the usual certificates for payments which have become due under the contract after that date, so far as practicable, certified by the former local inspector as well as yourself. These payments to the shipbuilder for the present must not exceed the actual cost of the contractor's outlay for labour, materials received since the last payment, plus the approved overhead expense, nor must the payment so determined exceed the contract payment accrued.

It is the expectation of the Corporation to carry out the substance and purpose of the contract but this decision cannot be made definite until the Corporation can investigate the facts and terminology of each contract to assure proper protection of the Government.

You will please furnish to the shipbuilder a copy of this letter and one copy of the enclosure, and you will request the shipbuilder to furnish

¹ U.S. Appendix, pp. 213, 215, 264, 397, 444, 445, 448, and 449.

² See for Claims 7-11 and 12-15 U.S. Counter-Case Appendix, pp. 270, 272, etc.

you without delay, for transmission to the Corporation, a statement in detail of such payments received on account of each contract prior to August 3rd, the date of requisitioning.

After the examination of the plans, specifications and contracts, interests and names of owners, lists of their payments under the contract, and of each ship under construction, the Fleet Corporation gave further information to the shipbuilders. This was done on or about August 22nd, 1917, as regards all the present claimants, except in the cases of claims 12-15; in these the information was given after November 15th, 1917.¹ This further information was as follows:

The ships now under construction at your plant and referred to above, having been requisitioned by the duly authorized order of this Corporation and title thereto taken over by the United States and an order having been placed with you by due authority to complete the construction of said ships with all practicable despatch, you are further ordered by the President of the United States, represented by this Corporation, to proceed in the work of completion heretofore ordered, in conformity with the requirements of the contract, plans, and specifications under which construction proceeded prior to the requisition of August 3, 1917, in so far as the said contract describes the ship, the materials, machinery, equipment, outfit, workmanship, insurance, classification, and survey thereof, including the meeting of the requirements of the said contract, and all tests as to efficiency and capacity of the ship on completion and in so far as the contract contains provisions for the benefit and protection of the person with whom the contract was made, but not otherwise.

All work will proceed under the inspection of such persons as have been or may hereafter, from time to time, be designated by this Corporation for that purpose.

For the work of completion heretofore and herein ordered the Corporation will pay to you amounts equal to payments set forth in the contract and not yet paid; provided, that on acceptance in writing of this order you agree that on final acceptance of the vessel to give a bill of sale to the United States in satisfactory form conveying all your rights, title, and interests in the vessel, together with your certificate that the vessel is free from liens, claims, or equities, with the exception of those of the owner and then only of those set forth in the contract. Compensation to the shipbuilder for expedition and for extra work will, when deemed appropriate, be made the subject of a subsequent order.

This order applies only to vessels actually under construction, and in accepting it the Corporation expects you to inform it of the actual stage of construction of each vessel or the parts to be assembled therein on the date of requisitioning, August 3, 1917. The Corporation reserves the right to decide whether or not a vessel was actually under construction on August 3, 1917, on consideration of the ascertained facts.

In replying to this communication please arrange to specify separately the vessels to which this order refers, and refer to the corresponding contract in sufficient terms for identification of it.

Please furnish a copy of this to (name of Shipbuilder) and ask for an early reply.

¹ U.S. Case Appendix, pp. 238-368, etc.

It would be superfluous to mention here that a "bill of sale" in the United States is considered as the instrument of transfer of property, and that ships, although considered as a species of personal property, are subject also to special rules. A ship does not pass by delivery, nor does the possession of it prove the title to it.

The next step of the Corporation was to give generally the same information to the owners of the shipbuilding contracts, and to require information whether a brokerage commission "claimed as part of the contract price of vessels" had been "paid or agreed to be paid on account of each uncompleted contract for vessels covered by the requisition order of August 3rd, 1917, giving the name of the broker and the amount paid or to be paid, and the times when payments are due, together with a copy of the brokerage agreement."

Such letters were written, for instance, with reference to the ships included in claims 1 and 2 on September 18th, 1917, to the Manitowoc Shipbuilding Co. To the Columbia River Shipbuilding Co., Admiral Capps wrote as follows on November 21st, 1917:

Re Completion of requisitioned hulls.

Your letter of October 25, 1917, relative to vessels requisitioned by this Corporation and under construction in your yard, has been received. From information at hand the above letter is understood to apply to your hulls No. 1 to 10 inclusive.

You will proceed with the completion of these hulls to meet the requirements of the contracts in force on August 3, 1917, between you and the Northwest Steel Co.

As just compensation for and as a reasonable price of such completion the Corporation will pay to you a total sum equivalent to the total unpaid amounts on contracts between you and the Northwest Steel Company.

Payments will be made on receipt of vouchers submitted through the district officer to this Corporation on a form to be forwarded to you and after certification by the district officer that such payments are due and warranted.

The above arrangements in this letter in reference to payments are based upon the assumption that there are no unpaid brokerage fees. If there are unpaid brokerage fees on said contracts, then the total amount of such fees will be deducted from the total unpaid amounts on the said contracts.

The district officer will be instructed to continue the inspection of work and material to insure that the vessels, when completed, will be equal in all respects to what was contemplated by the requirements of the contracts in force on August 3, 1917, between you and the Northwest Steel Company, and you will provide the district officer and his representatives all facilities necessary for the performance of this duty.¹

This last letter refers to claim 6, where the delivery of the completed ship was expected for December 1st.

It is common ground that the shipbuilders complied with these orders of the Corporation, repeating generally the words which had been suggested to them by the Corporation. The following is an example of one of the shipbuilders' replies:²

¹ U.S. Case Appendix, p. 512.

² Id., p. 376.

Dear Sir, Re requisitioned ships. A copy of a letter dated August 22, 1917, has been delivered to us with the request that we reply to the same and give the information therein called for, and in compliance to such request we beg to say: In obedience to the order of the President of the United States, represented by the United States Shipping Board Emergency Fleet Corporation, we will execute and deliver to the United States or to the United States Shipping Board Emergency Fleet Corporation, bills of sale of ships now under construction in our yard as they are completed and which were requisitioned on August 3, 1917, upon the following conditions:

1. The payments by you of all amounts specified in each several contract unpaid by the purchaser, said payments to be made by you pursuant to the terms of the contract.

2. The refunding to us of all customs duties paid by us upon any equipment going into the construction of hulls 80 and 81.

3. The payment to us of all extras and alterations not covered by the contract, ordered by authorized representatives.

4. The payment to us of all supplies ordered by authorized representatives furnished by this company for the outfitting of such ships.

In addition to the bill of sale, which is to be in such form as will be satisfactory, we will deliver a certificate that the vessel described in such bill of sale is free from liens, claims or equities excepting only equities and rights of the purchaser under the contract under which such ships were constructed.

You are further advised that on August 3, 1917, the undersigned was under contract to construct the following ships, above 2,500 tons dead-weight capacity, which are designated by us by hull numbers as follows: Hull Nos. 80, 81, 82, 83, 86, 87, 88, 90, 91, 92, 93, 94 and 95.

You are further advised that we will proceed with all practicable despatch the complete construction of said ships.

Without entering here into further details, the Tribunal, upon the abundant evidence brought by the United States, are of opinion that not only were material plans, specifications and other such physical or intangible property of the claimants taken, but also their money, for the United States did not refund their previous payments either to the shipbuilders or to the shipowners.

The fact that the progress payments were not refunded by the United States Emergency Fleet Corporation to the shipbuilders is specially strong evidence to show that the contracts with these builders were not cancelled by the United States' orders of August, that the property of the owners was not considered as destroyed as between the Fleet Corporation and the shipbuilders, and that the Fleet Corporation took over the legal rights and duties of the shipowners towards the shipbuilders. The necessary consequence is that the Corporation took over the rights and duties of the shipbuilders towards the shipowners. It expressly required the shipbuilders to give the Corporation a bill of sale which, when delivered to it, would, in the opinion of the Tribunal, relieve the shipbuilders from any liability to the previous owners in regard to their "liens, rights and equities" as set forth in their respective contracts. The shipbuilders were thus entirely relieved of any obligation to the former owners, for the Corporation inserted itself between the builders and the shipowners by an exercise of what is called, in the United States Law and Jurisprudence, the power of eminent domain. This action

can be considered, as far as the private shipbuilders are concerned, as a case of "force majeure" or restraint of princes and rulers.

In other words, the Corporation seems to have intended, in August 1917, to assume towards the Contract-owners the legal position of the shipbuilding contractor. The main obligation of such contractors was to proceed with the construction, and to deliver the ships to the owners of the contracts.

Further, the fact that the United States Shipping Board Emergency Fleet Corporation kept, and has had the exclusive profit up to the present time of, the progress payments made to the shipbuilders by the claimants or their assignors, amounting to almost 2½ million dollars, is of especial importance, not only with regard to the material consequences of such action, but also in connection with the legal aspect of the whole case.

It will be seen later on that the Corporation Managers, after having taken control of the shipyards, took also the property of the claimants in such a way as to destroy it. But it should be stated at once that in connection with the taking of the claimants' money, the Corporation, having first ordered the completion of all the 15 contracts, delayed or even cancelled the construction of the hulls for which the New Jersey Shipbuilding Co., had contracted. Claims 13, 14 and 15 are based upon contracts which, to quote the United States Case, Chart I, "were never completed but were suspended on January 31, 1919, and cancelled on August 23rd, 1919, before their keels were laid."

As the Tribunal is of opinion that the good faith of the United States Emergency Fleet Corporation is to be presumed, the Corporation must be given the credit of having contemplated delivery of the ships to their former owners, and of having written its first letters to the shipbuilders and ship-owners for the purpose of having the ships built and delivered. The first objects of the Corporation were evidently at that time to take control of the shipyards and of the contracts in order to expedite the construction of the ships, and to modify the ships, if necessary, in order to meet the war requirements.¹

This policy was not subsequently carried out by the Fleet Corporation. There were several successive changes in the personnel of the leading technical and legal advisers of the Corporation, and among the Directors themselves and these changes apparently resulted in a change of policy.

The Corporation seemed to have forgotten that it had assumed certain contractual obligations, and in particular to have ignored the fact that the retention of the money of the claimants without restoring the ships was obviously unlawful. Such action was not only contrary to international law, but also to the municipal law of the United States. The amounts of the progress payments should have been refunded at the time of the requisitioning of the ships. There can be no excuse for waiting until 1919 to make an assessment of these amounts. The Corporation could not have entertained any doubt after October 6th, 1917, that an immediate settlement of the claims was imperative. The Corporation may have intended, up to October 6th, 1917, to settle accounts with regard to these claims, namely so long as it was expected that the property of the claimants would be restored at the end of the war. More especially the Corporation should not have had any doubt with regard to claims 13 to 15 as to the legality of its action according to municipal law as well as under international law, after it had informed the shipbuilders not to go on with these contracts.

¹ Norwegian Case, Documentary Evidence, Exhibit 25, p. 281.

The Tribunal is therefore of opinion:

1. That, whatever the intentions may have been, the United States took, both in fact and in law, the contracts under which the ships in question were being or were to be constructed.

2. That in fact the claimants were fully and for ever deprived of their property and that this amounts to a requisitioning by the exercise of the power of eminent domain within the meaning of American municipal law.

III.

THE DATE ON WHICH CLAIMANTS' PROPERTY WAS EFFECTIVELY REQUISITIONED.

The Parties have disagreed as to the date, the object and the purport of the requisition.

Norway's contention is that the requisition should not be considered legally effective against the several members of the "Christiania Group"—the present fifteen claimants—until October 6th, 1917, when the negotiations between the special Norwegian Mission and the Shipping Board may be said to have been concluded by the formal notification from Mr. Hurley, Chairman of the Board, to Dr. Nansen, head of that Mission. Norway has contended that the contracts were requisitioned, and that, whatever may have been said to the claimants by the Fleet Corporation, the Tribunal has only to consider the real facts, in other words what the Fleet Corporation did; and that the action of the Corporation amounted to a taking without paying just compensation for the property so taken.

The contention of the United States is, on the other hand, that the requisition became effective against the claimants on August 3rd, 1917, the day of the general order issued to the American Shipyards; that the agreement between the Department of State and the Norwegian Minister was merely to suspend the requisition of completed vessels, but not of vessels under construction and that the requisition of the latter, though anticipated, was not yet announced; and that

The Emergency Fleet Corporation did not requisition contracts, but took only actual physical property, consisting of ships and materials for ships, together with commitments for material for ships, and that the property which it actually requisitioned is the only thing to be valued.¹

As Counsel for the Kingdom of Norway laid considerable stress upon the negotiations which took place in 1917 between the United States Department of State and the Norwegian Minister at Washington, Mr. Bryn, it is necessary to summarise the facts as to these negotiations and to examine their influence upon the legal position of the Parties.

In February 1917, as soon as the bill was introduced in the United States Senate and House of Representatives which proposed to prevent foreign owners of vessels "now being constructed or hereafter constructed in the United States" from registering their ships under foreign flags (proposals which matured on June 15th in the Emergency Shipping Fund Provision of the Urgent Deficiencies Act), the Norwegian Minister called the attention of the Secretary of State to the fact that

¹ U.S. Counter-Case, p. 56; U.S. Argument, p. 156.

as said bills do not provide for compensation to foreign shipowners, the Norwegian citizens for whose account the ships are now building in American yards would suffer a tremendous loss, amounting to many millions of dollars, if said provisions should be enacted into law.¹

The Attorney for the principal group (so called Stray Group) of Norwegian owners of Shipbuilding Contracts, and the United States Shipping Board endeavoured to reach a friendly solution of the difficulties raised by the Norwegian Government by a voluntary agreement (similar to the agreement arrived at between Great Britain and Norway), safeguarding the interests of the United States by placing these vessels at the disposal of the government during the war and for a reasonable period (six months) afterwards.

The negotiations were largely conducted through informal conferences with a special Norwegian Mission, presided over by Dr. Fridtjof Nansen. It is proved by the attitude of the United States themselves, that they complied with a formal request of Mr. Bryn to the Department of State, dated June 28th, 1917, to delay temporarily, until the arrival of the Norwegian Mission, "the executing, as far as same would involve Norwegian shipping interests, of the authority given to the President by the provisions of the Act approved June 15, 1917, which created an Emergency Shipping fund."²

The United States have contended that by the Executive Order of July 11th, 1917, the President of the United States delegated to the United States Shipping Board the authority to requisition constructed vessels, and to the United States Shipping Board Emergency Fleet Corporation the power vested in him of requisitioning "vessels in process of construction."

On 23rd July, 1917, the Shipping Board passed a resolution to requisition "title to and possession of all launched merchant vessels where construction is completed, and which construction was commenced in American yards under contracts which would lead to foreign documentation", on giving twenty-four hours' notice to the diplomatic representatives of the countries of which the foreign owners were citizens.

On July 24th Mr. F. L. Polk, Acting Secretary of State, notified the Norwegian Minister of this resolution. As Dr. Nansen's Norwegian Mission had not yet arrived, it was agreed between them that the Norwegian "new buildings" should not be requisitioned until the Norwegian Special Mission had arrived, and had had an opportunity of taking the matter up with the American Government. The Norwegian Minister guaranteed that no vessel built in American yards for Norwegian account would be transferred to the Norwegian flag after noon on July 25th.

Mr. Polk informed the Shipping Board of this arrangement, and the Board, on July 25th, resolved: "that nothing be done in connection with the requisitioning of Norwegian ships."³

Mr. Bryn gave instructions accordingly to the Norwegian consuls in the United States, referring to the Shipping Board's resolution that "all completed ships were to be requisitioned", and these instructions were carried out. Only one new steamer, the "Dicto", was authorized by the United States to clear, and for this ship the Norwegian certificate of nationality had been issued by the Norwegian consul at San Francisco on the morning of July 25th.

¹ U.S. Case Appendix, p. 121.

³ *Id.*, pp. 156-57, 134-35, etc.

² *Id.*, p. 131.

On August 3rd, 1917, Mr. Hurley, the Chairman of the United States Shipping Board, informed President Wilson that "after consultation with Admiral Capps, and with his approval", the Board

decided that the Emergency Fleet Corporation should proceed at once to commandeer all ships of suitable tonnage now being constructed in American shipyards, so that their completion may be expedited, and their disposition determined in the manner best adapted to the present needs of the nation.

We deem it of the highest importance that this action be taken without delay.

The question as to what disposition shall be made of the requisitioned ships can be determined later, after consultation with the Governments for whom, or for whose citizens a part of the ships are being built.

The general requisition order was issued on the same day, or on 4th August, by letter and telegram, to all the shipbuilders concerned with the claimants (except New Jersey Shipbuilding Company).

The order to practically all of the American Shipbuilders was worded as follows:

By virtue of an Act approved June 15th, 1917, and authority delegated to the Emergency Fleet Corporation by Executive Order of July 11th, 1917, all power driven cargo-carrying and passenger vessels above 2,500 tons, deadweight capacity, under construction in your yards, and materials, machinery, equipment and outfit thereto pertaining, are hereby requisitioned by the United States and will be completed with all practicable despatch. Letter follows.¹

One of the purposes of this statutory order is clear: the construction must be completed as rapidly as possible. Whether the requisition was for title or for use, and what would be the compensation etc., was not disclosed, and the requisition letter was equally reticent, containing only a promise "that the compensation to be paid will be determined hereafter, and will include ships, material and contracts requisitioned."

The Tribunal is of opinion that the Shipping Board and the Shipping Board Emergency Fleet Corporation were bona fide if they considered the order to American shipbuilders was consistent with an "agreement for the maintenance of the status quo on both sides". It is reasonable to infer that they had not rejected at that time the Norwegian suggestion of a voluntary agreement and that they did not deem it necessary to pay immediately the just compensation, nor to make even an inventory of the things taken. Their attitude may be explained by a belief on their part that future accounts would be settled by voluntary agreement.

It appears from the minutes of October 4th, 1917, that at that date the Members of the United States Shipping Board, held strongly divergent views with regard to the requisitioning of foreign vessels. While the majority proposed "that the Board conform its action with reference to foreign tonnage to the action already taken by the Board with reference to the British and French ships", Vice-Chairman Stevens presented the following resolution:

that vessels building for Norwegian account, commandeered by the Emergency Fleet Corporation, be transferred to American Corporations to be formed by their owners, on condition that they voluntarily charter

¹ U.S. Case, p. 14.

the vessels to the Board, bare boat or time charter, at Board's option, for the period of the war and six months thereafter, at the general requisition rate established by the Board, and reimburse the Corporation for all expenditure incurred in the completion of the vessels.

The motion not being seconded, the Vice-Chairman moved "that the question is of such international importance that it be referred to the President."

This motion also not being seconded, the Chairman of the Shipping Board, after having stated to the Board that the decision arrived at was to "retain the title to the tonnage for the present", wrote to Dr. Fridtjof Nansen, at Washington, D. C., on October 6th, 1917, as follows:

After careful inquiry into the present and prospective war needs of the United States and of the Allies, . . . the Board has concluded that it is its duty to retain for urgent military purposes, all vessels building in this country for foreign account, title to which was commandeered by the United States on August 3rd. The decision includes necessarily the vessels building for Norwegian account. . . . I need not add that it is our intention to compensate the owners of commandeered vessels, be they American, Allied or Neutral, to the full measure required by the generous principles of American Public Law.

After stating that, while this decision of the Board covered the case of one of the Norwegian ships commandeered, the "Wilhelm Jebsen", and that the Board approved a friendly settlement with regard to the "Jeannette Skinner", Mr. Hurley added:

I greatly regret the delay that has unavoidably attended the decision of this matter, and feel certain that you will appreciate that it was due solely to our keen desire to consider fully and weigh conscientiously the arguments which the representative of the Norwegian shipowners and of your mission have placed before us.

The correspondence between Dr. Nansen and Mr. Hurley continued in December, Dr. Nansen on behalf of Norway claiming on December 8th that these vessels "are being temporarily requisitioned by the American Government", while Mr. Hurley closed the correspondence on December 21st, 1917, by a letter stating that:

Mr. Munson has referred to me your letter to him, dated December 8, regarding insurance on vessels building in American yards for Norwegian account and commandeered by the Government of the United States.

I also have your letter of December 18 on the same subject.

Since these vessels have been completely and permanently taken over by the United States, it does not seem to me that the former Norwegian owners need be at all concerned over the question of insurance. The responsibility for loss or injury to the vessels is entirely in the Government of the United States, since the United States now hold title to the vessels. The former Norwegian owners have, under our Constitution and under the statutes governing the matter, a claim against the United States for just compensation, which claim I hope may be satisfactorily adjusted at an early date.

It cannot be denied, therefore, that the United States did claim in October 1917, to be the holders of the title to the Norwegian property, and that they expressly refused every interference from the claimants.

It is not necessary to examine here whether the holding of the title was valid. It is sufficient to state that the United States, in fact, did take and hold the title, the property of the claimants; that they had the "de facto" possession, enjoyment and use, and that they acted as owners of the claimants' property after the formal taking, as notified by the Shipping Board to Dr. Nansen.

After a most careful examination of the evidence produced on both sides, the Tribunal has come to the conclusion that:

1st. The Requisition became effective in August 1917, as regards the American shipbuilders;

2nd. But the requisition of the whole property of the claimants became effective only on and after October 1917. The date of October 6, 1917, may be admitted for all claimants.

The general requisition order of August 3rd, 1917, as well as the previous Statutes and Presidential Orders, certainly had legal importance, as they gave power to the executive officers to prohibit the export of materials, the transfer of ships to foreign flags, etc. But the requisition order did not say, for instance, that all the property of the foreign shipowners should be taken, not even that it should be taken for title or forever. It was construed as leaving it to the competent officers' discretion whether some of the ships under construction should be requisitioned or not. In fact, till October 1917, there was, in some cases, considerable doubt as to the ultimate decision, and some orders of requisition were not given until the end of November 1917.

As long as the Fleet Corporation was not following "due process of law", nor offering the "just compensation" provided for by American law for the property taken, it can be doubted whether the requisition was "effective", and the Tribunal, by admitting the date of October 6, 1917, as the date of requisition, has made ample provision for the special difficulties and the emergency invoked by the United States.

Another fact must be taken into consideration, not only with regard to the duration of the effective requisition, but also to the liability of the United States Shipping Board Emergency Fleet Corporation. Without examining here whether the Corporation could have kept the use and efficient control of the claimants' ships, but not their title, during the war, the Tribunal records that its attention was specially drawn to the fact that as early as February 1919, the Emergency Fleet Corporation was giving back to their former owners some of the ships which had been needed during the war, but for which there was no further use. After the Armistice was signed, in November 1918, and before the signature of the Treaty of Peace with Germany, there were no hostilities between the United States and any other nation. Counsel for the United States has conceded that the bulk of the American Army was demobilised in the spring of 1919 and, while the United States were still "technically at war", the reasons stated by the Shipping Board in support of its attitude had undoubtedly ceased to exist.

The Tribunal is of opinion that, whatever may be said in favour of the taking for title of the claimants' property during the war, there was no sufficient reason for keeping these ships after the signature of the Versailles Treaty in June 1919. The reasons which have been given afford no legal

interest which this International Tribunal could recognize as being superior to the rights of private foreign citizens in their own property.

IV.

THE LAW GOVERNING THE ARBITRATION.

The Parties have disagreed also as regards the question whether this Tribunal is bound by the municipal law of the United States, regarding the matters, within the jurisdiction of the United States, which have come before the Tribunal for its decision. The special agreement of June 30, 1921, Article I provides that "The Tribunal shall examine and decide the aforesaid claims in accordance with the principles of law and equity." The United States, after reviewing the diplomatic correspondence which led to the adoption of the phrase "principles of law and equity" as the rule for the decision in this arbitration, has advanced the contention that the Tribunal should not fail to give effect to the municipal law of the United States, regarding any matters within the jurisdiction of the United States, which have come before the Tribunal for its decision. The Kingdom of Norway, on the other hand, has maintained that, in the absence of an express agreement to the contrary, arbitration of differences between nations is governed by international law, and that no arbitral tribunal is bound by the municipal law of any of the States which are Parties to the arbitration.

It seems not necessary to dwell at length upon this difference of opinion. Obviously this conflict of opinion is more in the appearance than in the reality. This is largely due to the fact that both Parties have overlooked certain aspects of the case. This case presents to an exceptional degree questions of private law besides questions of public law.

As regards private law this Tribunal has not the power to modify, correct or improve the contracts agreed between citizens of the two countries, nor to modify their consequences. It may have to resolve certain conflicts of private law in the absence of contract. "L'Ordre Public International" is obviously not at stake when this Tribunal deals with such contracts. But should the public law of one of the Parties seem contrary to international public policy ("Ordre Public International"), an International Tribunal is not bound by the municipal law of the States which are Parties to the arbitration.

That there is misunderstanding between the Parties is also due to the use of the words "principles of law and equity". It is common ground that the United States, as well as Norway, are bound by the French text of the "Convention pour le Règlement pacifique des Conflits internationaux" of the 18th October 1907. Article 73 of this Convention provides that:

"Le Tribunal est autorisé à déterminer sa compétence en interprétant le compromis ainsi que les autres actes et documents qui peuvent être invoqués dans la matière, et en appliquant les principes du droit."

The word "droit" is also referred to in article 37 of the same convention of 1908:

"L'arbitrage international a pour objet le règlement de litiges entre les Etats par des juges de leur choix et sur la base du respect du droit."

As Dr. Lammasch says in his work upon international arbitration ("Die Rechtskraft Internationaler Schiedssprüche", page 37)¹, the significance of

¹ Norway Counter-Case, p. 4.

the words "on the basis of respect for law" have no other meaning than that "the arbiter shall decide in accordance with equity, *ex æquo et bono*, when positive rules of law are lacking

If no special principles are prescribed to the arbitrator, he must doubtless decide in the first place in accordance with international law to be applied from both sources of this science, not only from treaties, but also from customary law, and the practice of judges in other international courts."

Dr. James Brown Scott, in his Hague Court Reports, 1916, page xxi, says: "In the absence of an agreement of the contending countries excluding the law of nations, laying down specifically the law to be applied, international law is the law of an International Tribunal."

The words "law and equity" used in the special agreement of 1921 can not be understood here in the traditional sense in which these words are used in Anglo-Saxon jurisprudence.

The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State.

It must also be borne in mind that this Tribunal has been instituted in a general arbitration convention between United States and Norway, which has expressly provided that: "Difference which may arise of a legal nature or relating to the interpretation of principles existing between the two contracting Parties, and which it may not have been possible to settle by diplomacy, *shall*¹ be referred to arbitration" in the way which has been followed in this case.

This Tribunal is therefore a regular legal institution, which possesses by consent of the two Parties a compulsory jurisdiction, independent of the national courts of the Parties. Both Parties come before the Tribunal on a footing of perfect equality. The Tribunal cannot ignore the municipal law of the Parties, unless that law is contrary to the principle of the equality of the Parties, or to the principles of justice which are common to all civilised nations. But the Tribunal is not bound by the special rules instituted in any of the two countries for the purpose of restricting (for instance in favour of the sovereign against its own "justiciables") the equality between parties which would otherwise be the basis of justice as applied between private litigants.

The Tribunal cannot agree, therefore, with the contention of Norway that it should be entirely free to disregard the municipal law of the United States, when this has been implicitly accepted by Norwegian citizens in their dealings with American citizens, although this law may be less favourable to their present claims than the municipal laws of certain other civilised countries.

But the Tribunal cannot agree, on the other hand, with the contention of the United States that it should be governed by American Statutes whenever the United States claim jurisdiction.

This Tribunal is at liberty to examine if these Statutes are consistent with the equality of the two Contracting Parties, with Treaties passed by the United States, or with well established principles of international law, including the customary law and the practice of judges in other international courts.

After careful examination of the Constitution of the United States, of the American Jurisprudence quoted by both parties, and of the American legis-

¹ Italics by the Tribunal.

lation passed by Congress from 1916 onwards (commencing with the National Defence Acts of June 1916, and with particular reference to the legislation of 1917 which mobilised the industries of the United States), the Tribunal agrees with the contention of the United States that there was nothing in this emergency legislation, under the special circumstances, that was contrary to international law.

It should be observed, that it is not inconsistent with the United States Constitution and Statutes, or with the principles of international law and equity, to set aside certain special rules of the United States law which do not seem in harmony with the liberal principles of the American Constitution. Some of these will be quoted later on.

The Tribunal is further of opinion that the present arbitration is not due to possible defects in this legislation or in Presidential Orders, but to the action of some of the officials of the United States Shipping Board and Shipping Board Emergency Fleet Corporation.

The fifth Amendment to the Constitution of the United States provides: "*No person . . . shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.*"

It is common ground that in this respect the public law of the Parties is in complete accord with the international public law of all civilised countries.

The inviolability of the private property of a foreign citizen is a question of public policy, and it is for the courts in the United States, as well as in other countries, to settle conflicts that may arise between the respect for private property, and the "power of eminent domain", as is called in the United States the power of a sovereign state to expropriate, take or authorize the taking of any property within its jurisdiction which may be required for the "public good" or for the "general welfare".

The Courts in such cases have to settle three questions:

1. Whether this is a case of private property being appropriated or taken?

This has to be proved by the claimant.

2. Whether the "taking" is justified by public needs?

Here the "onus probandi" lies upon the Sovereign.

3. Whether just compensation has been offered or paid in due time?

Here it must be remembered that in the exercise of eminent domain the right of friendly alien property must always be fully respected. Those who ought not to take property without making just compensation at the time or at least without due process of law must pay the penalty of their action.

It is common ground that the word "property" in the fifth Amendment of the United States Constitution, is treated as a word of most general import, and that it is liberally construed and includes every so called "interest" in the thing taken. (Lewis: Law of Eminent Domain, Chicago 1909, paragraph 64-65 etc.) (Nichols: Law of Eminent Domain, Albany 1917, paragraph 118 etc.)

While in some other systems of law the notions derived from the "proprietas", as "propriété", are equivalent to *ownership*, the word "property", in the United States Constitution, as in the English and American common law system, includes all kinds of "personal property", all "jura in personam", and "choses in action". The word includes especially what the United

¹ See, for instance, Mr. Adams, Secretary of State, to the Spanish Minister, March 12, 1818, quoted in Moore's *Digest of International Law* (Washington, 1906, vol. 4, p. 5).

States Shipping Board and Fleet Corporation described as the "liens, rights and equities" for the benefit and protection of the person called "the owner", or the purchaser of a contract with a shipbuilder for the construction of a ship.

Some of the fifteen contracts submitted to the Tribunal contained protective provisions such as:

While said steamer is in the course of building and before or after launching, and until the final completion and delivery, the purchaser shall, on payment of instalments of contract price at the times and in the manner above stipulated and subject to the builders' lien for unpaid instalments of said contract price and for extras and bonus, become part owner of said steamer and of her hull, machinery and equipment and of all materials therefor, such part ownership to be in the proportion that the amount of payments made by the Purchaser shall bear to the value of the work done on and material furnished for said steamer; and the Builder shall, upon completion and delivery of such steamer furnish the Purchaser a Builder's certificate and such other documents and assurances as may be necessary to enable said steamer to be enrolled as the property of said Purchaser and as may be necessary to confer on said Purchaser an absolutely good and unencumbered title in and to said steamer, free of all liens (except as to any encumbrance created by said Purchaser). Until the completion and tender of delivery of said steamer to said Purchaser, as above provided, said steamer shall be at the risk of the Builder.

Some of those provisions went further:

this vessel shall at all times be the property of the Purchaser in all stages of construction and that all material purchased and delivered in the yard for her, or appropriated to the construction of her, shall become its property by such delivery or appropriation, subject to a lien by the builders for any unpaid instalments of the purchase price, and for work done, labour and materials furnished.¹

When such provisions are inserted, it is obvious that the contract is prima facie evidence of a *jus in rem*, arising out of the contract, while the contractor or his sub-contractor might otherwise deny the existence of this superior "interest" equivalent to ownership.

The Columbia River Shipbuilding Co.'s contract with W. Gilbert (Claim 6) expressly stated that:

(ninth) Should the Builders after the vessel's keel is laid, fail continuously to proceed with the work and to complete the vessel, her machinery etc., unless prevented by acts of the Purchaser or strikes or non-delivery of material beyond the reasonable control of the Builder, or other unavoidable causes beyond their reasonable control, the purchaser shall have the right to take possession of the vessel and machinery, pumps, engines, tackle, apparel and furniture, and all materials and fittings therefor, and complete the vessel at the expense of the Builders, and to remove said vessel, the material and fittings assembled therefor, if the Purchaser so desires. . . .²

¹ U.S. Case Appendix, p. 593.

² *Id.*, p. 619.

All the claimants were also fully protected by several other clauses which can be omitted here.

While the United States have not expressly denied that such liens, rights and interests *ex contractu* must be considered as property in their law of eminent domain, they have contended that this property was an entity distinct from the material and other tangible things subjected to the property, and that when the owner of the shipbuilding contract (to use the words of the United States Supreme Court, Nichols, paragraph 109) "continued to have the use and possession as before, the property is not taken in the constitutional meaning, however much it may be depreciated in value."

They contended that this was a case of consequential damages which are not awarded in the United States. The Tribunal cannot agree with this contention of the United States.

In order to justify the Tribunal's opinion, it seems not necessary to deal in detail with the numerous documents produced by both Parties, nor to touch upon the question whether consequential damages ought to be awarded in international law.

The United States intended to "take" and have "taken" in fact, the contracts under which the fifteen hulls in question were being constructed by American Shipbuilders in 1917. *These contracts were the property*, or created it, and what the United States call "physical property" is only one of the elements or aspects of the "property" under the municipal law of the United States, as well as under the law of Norway and other States. It is common ground that, in the absence of any treaty, the Norwegian owners of these contracts were protected by the fifth amendment of the Constitution of the United States against any expropriation not necessary for public use, and that they are entitled to just compensation if expropriation occurs.

It has been proved that the claimants lost the use and possession of their property through an exercise by the United States of their power of eminent domain. When, for instance, on October 6, 1917, the Shipping Board informed Dr. Nansen that the United States had taken the "title", the Board implicitly admitted that the ownership of all the liens, rights and equities set forth in the fifteen shipbuilding contracts had been transferred to the United States by operation of law. As the United States have taken up the position and have acted in such a way that such transfer of the property implied cancellation or "destruction" of the *Jura in personam* or *in rem*, it must be adjudged and awarded, in conformity with the American doctrine and jurisprudence itself, that this action of the United States is equivalent to the taking of private property as defined in the fifth Amendment of their Constitution.

Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as under the international law, based upon the respect for private property.

But, as it is common ground that such compensation is measured not only by:

- (a) the fair actual value of the property taken, but also
- (b) at the time and place it was taken, and
- (c) in view of all the surrounding circumstances,¹

it is necessary to examine first these surrounding circumstances, and to see first:

¹ U.S. Case, p. 81.

I. Whether the claimants' property was taken and withheld for public use,
II. Whether the taking for title and the keeping of the title without a sufficient emergency or after the emergency had passed, was necessary.

The United States took the claimants' property bona fide for public use in October 1917, and it has been proved especially that the general requisition orders to the shipbuilders of August 1917, made no undue discrimination against the claimants, as they included 437 steel vessels under construction.

In his report of June 11, 1919, to the Chairman of the United States Shipping Board, Mr. Brill stated, amongst other facts, that "of the 437 under order, 13 were released, 10 were cancelled, and 12 were transferred into contract", evidently meaning by this expression "transferred into contract" that the construction of all the others was continued under what was called the "statutory order" already quoted, i.e. continued in fact under the former contracts taken by requisition.¹

Mr. Brill was at this time Assistant to the Vice-President, and one of the general managers and consulting engineers of the Emergency Fleet Corporation. He seems to have been the first to have been requested (January 1919) by the Corporation "to investigate the technical and physical condition of the ships which were requisitioned as of August 3, 1917, upon which the claims at that time had not been settled".

Mr. Brill added that

The shipowners, particularly the Europeans who had control of over half of the requisitioned tonnage, were loath to ask to surrender their ships and to settle on a money basis because of their pressing needs, until it was clearly indicated to them that the necessities of the situation left no other course for the United States to follow.

A large number of foreign claims were settled before January 21, 1919, some of the American claims had been settled by retransfer of ships, return of payments made, and charters securing the use of the ships to the United States during the war.²

After having stated that the requisitioning order resulted in the completion and delivery of 49 ships (301,809 tons) in 1917, and of 248 ships (1,620,352 tons) in 1918, and that "on February 1, 1919, claims covering 154 hulls remained unsettled", Mr. Brill made the following "recommendation and suggestion on the general treatment of the matter":

Where contracts have been made at high prices by citizens of the Allied Countries or by other interests known to be friendly with the United States and dependable in assisting in the execution of any maritime programme which it may adopt, it is suggested that the completed vessels be restored to the original owners. This will, of course, involve some adjustments on account of payments made, interest and charter hire. Where little or no progress had been made on the construction of the hulls at the time of requisitioning, or little or no material had been received for the hulls and equipment, it would seem in a considerable number of cases that the return on money which had been paid on account, with reasonable interest to date of adjustment, should end the matter. When settlements are made on a physical basis, it is suggested that a reasonable profit might be allowed legitimate claimants, because of the rising market covering the time of requisitioning.³

¹ U.S. Case Appendix, p. 540.

³ Ibid.

² Id., p. 541.

Another expert whose official report has been produced by the United States (on the "Valuation of Property Requisitioned"). Mr. Edwin C. Bennett, who was a Naval Architect, Engineer, Marine Surveyor and appraiser, expressed the opinion on May 19, 1922, referring to the present fifteen claims, that, in fact the requisitioning order, issued on August 3rd, 1917, by the Emergency Fleet Corporation.

automatically brought into being a condition of "force majeure" and stopped all work on ships for private account. This condition of "force majeure" continued until the governmental control of shipbuilding facilities was released during June 1919.

It is my thought—he added—that inasmuch as the contracts had laid dormant, because of the activity of a "force majeure", from August 3, 1917, to July 1919, they could have been continued by the owners if they had so desired.

While the legal opinion of this technical expert is based upon the erroneous supposition that the United States had not taken the contracts, the Tribunal, after comparing these technical opinions with various other documents, has reached the following opinion:

It is not necessary to examine here the question whether the United States should have restituted the claimants' property as completed ships, as the Kingdom of Norway has only claimed just compensation in money. But in order to assess the amount of just compensation, and to justify liberal compensation, it is necessary to say this: In fact, the United States have not proved that the Shipping Board, nor the Fleet Corporation, acted in conformity with the liberal spirit of the municipal law of the United States, on which they rely in the present arbitration. Especially they have not proved:

(a) That the keeping for title to the claimants' property was needed for public use after 1st July, 1919; the Tribunal abstains from expressing any opinion on the question whether the claimants would have been entitled to restitution in kind during the War. This is not necessary, as compensation must be awarded for the loss of use and profits. It is sufficient to say, in fact, that already in 1918 and during the first months of 1919, a large number of ships requisitioned were not kept for title, nor for use, by the Fleet Corporation.

(b) That neither war emergency nor public needs forced them to act as they did, towards the claimants in July 1919, after the signature of the Treaty of Versailles. On the other hand, making due allowance for the circumstances, and especially for war conditions, it may be said that discrimination against the claimants has not been sufficiently arbitrary to justify any special claim for damages by the Kingdom of Norway, apart from damages for use, for the time of war, as far as the taking and keeping for *title* during that time was concerned.

It is necessary to mention here that, while the Norwegian claimants might have bona fide believed themselves to be entitled to privileged treatment under the Treaty between the Parties, it was agreed on June 30th, 1921, between the Parties not to apply such Treaty in the present arbitration. The Tribunal has acted according to this agreement. The Norwegian claimants are entitled, however, to the perfect equality of treatment which is provided for them under the Constitution of the United States.

The Kingdom of Norway has contended that the present claimants were entitled at law and equity to the same treatment as the owners of seventy Dutch ships, lying in American ports, which the United States took for use

only, on the basis of a voluntary agreement. The Tribunal cannot entirely agree with this opinion. These Dutch ships were not only completed, but were registered under the Dutch flag when they were requisitioned, while the claimants were only possessed of "ships under construction".

Although these contracts and their accessories etc. were Norwegian property, it can hardly be disputed that, provided that just compensation was duly assessed and paid as agreed without undue delay, the United States were entitled during the war to commandeer the yards and factories within American jurisdiction and to dispose of American labour, and steel etc., or that they had the right to expedite the construction of the ships for public use, even if the exercise of such a right necessitated the taking of these fifteen contracts for use for the time of the special war emergency.

It must be admitted, in favour of the present claimants, that the American War legislation gave a large discretionary power to the Shipping Board and to the Emergency Fleet Corporation, and that some officials do not seem, as regards the claimants, to have always used their power in the true spirit of the American Constitution, or of the Congressional Acts, or for instance of Presidential Orders of 1917 and 1918. As has already been stated, the national peril was not such as to free them from the obligation of making the necessary inventory and valuation of all the property taken for the purpose of determining and paying "just compensation". This was not a case of "requisition of neutral property" in the special meaning of that term in the laws and customs of war. While the taking or destroying of neutral property on the field of battle, or in invaded territory, without preliminary compensation or at least due process of law, is often excused on account of extreme emergency, an essential difference must be made here in favour of the claimants. The just compensation to which they are entitled includes not only the items which have been duly proved, but also those which could have been proved and estimated if the officials of the belligerent State had, in the interest of both parties, paid or offered payment, or at least required contradictory expert valuation and inventory, of the neutral property taken. The American authorities seem to have waited till 1919 to get the reports of their experts produced as evidence of just compensation, although "liberal" compensation had been expressly promised by the Chairman, Mr. Hurley, to Dr. Nansen and others in 1917. In the case of Claim No. 6, Hull No. 2 (Columbia River S.B.) for instance,¹ Mr. Brill, on May 12, 1919, admitted having been unable to find out exactly "the physical status", i.e. the degree of completion of the ship at the time of the taking.

The legal aspect of the case was clearly known as early as June 1917, when, after preliminary negotiations between the parties, the United States Shipping Board delivered the following opinion to the Department of State:

the Board has held in several cases that ships under construction for foreign account, under a contract, whereby the title to the vessel passes to the purchaser as payments are made, are not vessels owned by a citizen of the United States.

It has also held that ships under construction for foreign account, under a contract that retains title, are likewise not vessels owned by a citizen of the United States.²

¹ U.S. Case Appendix, p. 574.

² " " " " p. 129.

Despite this, the United States officials who dealt with the claimants on or after the requisition, took up an ambiguous and contradictory legal position and this is the primary cause of the present arbitration.

It is necessary to dispose here of some of the points raised by the United States in their defence and which do not require any detailed opinion. The United States have objected to some of the assignments of the contracts, although they have abandoned, in the course of oral argument, their previous objections which were based upon certain provisions of the contracts taken, or upon the form, place or date of the assignment, some of which were made after the general requisition order of August 3rd, 1917, and, they claimed, could not justify an increase of the amounts claimed.

The Tribunal agrees with this contention of the United States. It is of opinion that these assignments at an increased price were contrary to the spirit of the Bryn-Polk Agreement. The assignors at least, and some assignees should have known and respected the arrangement. Besides, the Tribunal is of opinion, as have been the Norwegian Courts, that some of these purchases cannot be considered as based upon a careful investigation of the circumstances of the possible compensation, based upon a fair market value of the property.

Just compensation implies a complete restitution of the *status quo ante*, based, not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property.

The Tribunal cannot agree, nevertheless, with the contention of the United States that no compensation should be given to the claimants over and above the sums offered by the United States, namely \$2,679,220. The United States say that there can be no liability, and that therefore there should be no compensation, when the contract has been destroyed or rendered void, or delayed, in consequence of "force majeure" or "restraint of princes and rulers" and *a fortiori* when the contract has been a "purchase of chances", after the requisition.

This last contention was accepted by Norwegian Courts. These Norwegian judgments are not to be disregarded, as they support the Tribunal's opinion adverse to the view that the compensation should be based upon the mere reimbursement of expenses. Such judgments are conclusive evidence that some of the assignees were imprudent.

But, although "restraint of princes" may well be invoked in disputes between private citizens, it cannot be invoked by the United States against the Kingdom of Norway in defence of the claim of Norway. International law and justice are based upon the principle of equality between States. No State can exercise towards the citizens of another civilised State the "power of eminent domain" without respecting the property of such foreign citizens or without paying just compensation as determined by an impartial tribunal, if necessary.

This remark applies to the contracts with Pusey and Jones (claims 7 to 11) and to those with the New Jersey Shipbuilding Co. (claims 12 to 15).

The table set out at the commencement of this award shows that the claims made on August 11, 1922, amounted to a total of \$13,223,185 and that in addition to this sum the Kingdom of Norway claimed interest for a period of more than five years at the rate of 7 cent per annum, compounded semi-annually, from the dates of the progress payments made to the shipbuilders up to and including 1st September, 1922. On this basis the total

amount claimed by the Kingdom of Norway would have amounted, at the present date, to a sum exceeding \$18,000,000.

While most of the claimants seem to have proved that they have really lost these sums, the reimbursement of expenses, disproportionate to the value of their property, cannot form the basis of just compensation in the present arbitration.

In the present instance the liability of the Emergency Fleet Corporation is due to its disregard, not only of the public law, but also of the municipal private law, as it should have settled accounts and delivered the ships to their original owners at least after the end of June 1919.

The United States are responsible for having thus made a discriminating use of the power of eminent domain towards citizens of a friendly nation, and they are liable for the damaging action of their officials and agents towards these citizens of the Kingdom of Norway.

The Tribunal is of opinion that the attitude of the United States in the present arbitration is excusable to a certain extent on account of the dubious nature of some of the acts of one of the shipbuilders and assignors, Christoffer Hannevig, and of one of his American agents; also on account of the fact that in some cases excessive claims have been made, based upon unjustified expenses of some of the present claimants or their assignors.

V.

THE AMOUNT OF COMPENSATION.

It is common ground between the Parties that just compensation, as it is understood in the United States, should be liberally awarded, and that it should be based upon the net value of the property taken.

It has been somewhat difficult to fix the real market value of some of these shipbuilding contracts. The value must be assessed *ex æquo et bono*. The Parties have obviously acted in a way which would not have been usual or even possible under ordinary circumstances, when peaceful shipping and shipbuilding were entirely free, and not hampered in their customary activities by the intervention of enemy or friendly Governments. The growing scarcity of ships in 1917, the risks and difficulties due to submarine warfare and to the extension of the field of hostilities, contributed to make speculative shipbuilding transactions possible and even unavoidable.

Belligerents and neutrals alike were fearful for their existence. The hardships of neutrality were felt so deeply by the United States themselves that they declared war on Germany as the only means of defence against its "repeated acts of War against the Government and the people of the United States of America". All neutral Nations needed ships for their food, materials and other commodities. Some governments took measures to protect themselves against speculation in ships and other property; they imposed standard prices and requisitioned ships for use during the war, etc.

As a rule, abnormal circumstances, speculative prices, etc., cannot form the legal basis of compensation in condemnation awards. While fair compensation cannot be artificially increased by such methods as were adopted by one of those interested in the case and which have been brought to the notice of this Tribunal, it would be equally unjust to attach much weight to artificial reduction of hire, chartering or purchase price of ships, as fixed under compulsion, requisition or other governmental action during the war.

For the reasons already stated in Chapter IV, the Tribunal is not bound by section 3477 of the Revised Statutes of the United States, 1878 (quoted in U.S. Case Appendix page 51); nor by section 24 of the Judicial Code of the United States 1911; nor by section 4 of the Naval Emergency Fund Act of 4th March, 1917; nor by any other municipal law, in so far as these provisions restricted the right of the claimants to receive immediate and full compensation, with interest from the day on which the compensation should have been fully paid *ex æquo et bono*.

Just compensation should have been paid to the Claimants or arranged with them on the basis of the net value of the property taken:

1. On the 6th October, 1917, for use, during the war (whenever such use was possible without destroying the property, according to the contract, state of completion of ship, etc.), and

2. At the latest on the 1st July 1919, as damages for the unlawful retaining of the title and use of the ships after all emergency ceased;

or

On the 6th October, 1917, as full compensation for the destruction of the Norwegian property.

Liberal compensation should be allowed in each case, inasmuch as the United States "recognizes its liability to make just compensation for the value of the property taken on August 3rd, 1917".¹

The amounts offered as compensation by the United States are shown in the table set out at the commencement of this award.

After careful comparative examination of the results of the two systems above described, the Tribunal is of opinion that the compensation herein-after awarded is the fair market value of the claimants' property.

In assessing the net amount of compensation, the Tribunal has taken into consideration in each case all the circumstances pertaining to the net value of the property requisitioned or taken by the United States and especially the following: the date of each contract or sub-contract between shipbuilder and shipowner; the technical characteristics and qualities of each contract (type and dead weight tonnage of the ship; its speed, etc.; the reputation, experience, technical and financial situation of the shipyard); the legal value of the contract, namely the liens, rights and interests in each original contract, etc.; the original contract (or sub-contract) price; the progress (and brokerage) payments made by each of the parties on the original contract price; the date of delivery promised in the contract; the date of delivery which was expected at or about the date of the general requisition order and about the date of the effective requisition of each contract as far as these can be ascertained; the various elements pertaining to the value and degree of completion of the tangible objects of completion as: for instance, the percentage of materials ordered, and the percentage of materials on hand; the date at which the keel was laid, before or after the general requisition; and the date when the ship was launched; the contracts, settlements, etc. made by the United States and by Norwegian or other shipowners, or by third parties, whether governments or private persons, whether with shipowners or shipbuilders, for the construction or purchase or hire of ships; the statistics, reports and opinions of experts produced by the Parties; the Award of the United States Claims Committee on the present claims; the reports of the Ocean Advisory Committee on just compensation for certain American ships lost in the service of the government; etc.

¹ U.S. Counter-Case, p. 69.

On the other hand the Tribunal has taken into consideration all the facts, which are exclusively or principally due to the United States' action (whether before or after the requisition of the shipyards and the effective requisition of the claimants' property), and which therefore may be considered as *res inter alios acta*, or as being without or of negligible influence upon the net value of property lost by the claimants.

VI.

INTEREST ON SUMS AWARDED.

The Tribunal is competent to allow interest as part of the compensation *ex æquo et bono*, if the circumstances are considered to justify it. So far as interest after the date of this award is concerned, the Parties decided in the Agreement of 30th June, 1921, that "any amount granted by the award rendered shall bear interest at the rate of six per centum per annum from the date of the rendition of the decision until the date of payment".

As this is a case of expropriation, the Tribunal is of opinion that interest should be paid. The Parties have cited before the Tribunal the work of Nichols on "The Law of Eminent Domain" (Albany, N.Y., 1917), in which is expressed the following opinion:

"The theory of the law is that, when land is taken by eminent domain, or when it is injured in such a way as to create a constitutional right to damages, payment for the land thus affected should be co-incident with the taking or injury, and, if for any reason payment is postponed, the right to interest from the time that payment ought to have been, until it is actually made, follows as a matter of strict constitutional right. . . . When the owner is not paid the compensation until after the taking or injury is complete. . . . it is well settled that he is entitled to interest, or at least to its equivalent in the form of damages for the detention of his money." (S. 216.)

Similar opinions are expressed in section 742 of Lewis' "A Treatise on the Law of Eminent Domain" (Chicago 1909), which book was also cited before the Tribunal.

In coming to the conclusion that interest should be awarded, the Tribunal has taken into consideration the facts that the United States have had the use and profits of the claimants' property since the requisition of five years ago, and especially that the sums awarded as compensation to the claimants by the American Requisition Claim Committee have not been paid; finally that the United States have had the benefit of the progress payments made by Norwegians with reference to these ships. The Tribunal is of opinion that the claimants are entitled to special compensation in respect of interest and that some of the claimants are, in view of the circumstances of their cases, entitled to higher rates of interest than others. The claimants have asked for compound interest with half-yearly adjustments, but compound interest has not been granted in previous arbitration cases, and the Tribunal is of opinion that the claimants have not advanced sufficient reasons why an award of compound interest, in this case, should be made.

In view of all these circumstances, therefore, the Tribunal is of opinion that it is just to allow a lump sum to each claimant in respect of interest for a period of five years from 6th October, 1917. Such lump sums have been

included in the total amounts of compensation awarded in respect of each claim.

As the Tribunal is of the opinion that full compensation should have been paid, including loss of progress payments, etc., at the latest on the day of the effective taking, and as the Tribunal has assessed the net value of the property and has decided to award damages as on that date, interest should, contrary to the claim of Norway, not run before that date as previous interest is included in the estimate of the net value.

VII.

THE CLAIM OF PAGE BROTHERS.

The Tribunal has been requested, by agreement between the Parties, to "examine any claim of Page Brothers, American citizens, against any Norwegian subject" and to "determine what portion of any sum that may be awarded to such claimant shall be paid to such American citizens in accordance with the principles of law and equity".

This claim arose out of a contract, dated 30th March, 1916, between the Seattle Construction and Dry Dock Company of Seattle, Washington, ship-builders, and Aktieselskabet Rederiet Odfjell, purchasers, whereunder the former were to construct for the latter a 7,500 ton steamship, known as Hull No. 92. This contract was, according to the Case of the United States, effected by cable through Page Brothers, as brokers. With Page Brothers other shipping and commission firms were associated. The contract was finally completed on 24th June, 1916, and provided for the payment by the purchasers of the brokerage charges of Page Brothers amounting to \$38,000.

From 21st April, 1916, onwards, Page Brothers received from the purchasers certain instalments of the agreed brokerage, but in the autumn of 1917, Hull No. 92 was requisitioned by the Emergency Fleet Corporation of the United States. On 23rd August, 1917, Page Brothers received the fourth instalment of this brokerage commission from the purchasers, making a total received of \$15,200 but after that date no payments were made by the Fleet Corporation on the progress payments which it made to the ship-builders in fulfilment of the requisitioned contract. Page Brothers have, therefore, claimed a further payment of \$22,800 from the Vard II Steamship Company, who are the assignees of Aktieselskabet Rederiet Odfjell, the original purchasers.

The United States have based this claim upon the law of California. The Tribunal has been informed by the United States that it would seem necessary to do no more than cite Section 1559 of the California Civil Code which has never been repealed nor amended since its enactment in 1872. This section reads as follows: "*When contract for benefit of third person may be enforced. A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it.*"

The Tribunal is, however, of opinion that the application of this Statute obviously depends upon the contract in question remaining alive between "the parties thereto". This contention is not fulfilled in this case. The contract upon which Page Brothers claim commission was not alive, so far as Aktieselskabet Rederiet Odfjell and their assignees were concerned, after the requisition of the autumn of 1917. The claim of Page Brothers is one for the fulfilment of contractual obligations, but after the requisition there was no contractual relationship between Page Brothers and any Norwegian subject.

The Tribunal has carefully examined the facts and documents submitted in this claim and has come to the decision that the non-receipt of the balance of their commission by Page Brothers on the further progress payments made by the Fleet Corporation after it requisitioned the contract, was due solely to the action of the United States.

It is not within the jurisdiction of the Tribunal to decide the question whether Page Brothers have any claim against the United States or any of its citizens.

But the Tribunal is of opinion that, as the evidence now stands, Page Brothers have no claim against the Kingdom of Norway or against any Norwegian subject.

The legal position being thus stated, it must, however, be remembered, that if the Emergency Fleet Corporation had paid the balance of the commission to Page Brothers according to the contract, this amount of \$22,800 would have been deducted from the fair market value of the contract, as fixed in the award by this Tribunal, just as the remaining instalments to the shipbuilders, paid by the Emergency Fleet Corporation according to the contract, have been deducted. In these circumstances it appears to be equitable, although the Emergency Fleet Corporation has not yet paid Page Brothers, to give the United States the right to retain the sum of \$22,800 out of the amount awarded in claim 4, in order that this sum can be paid by them to Page Brothers. This conclusion of the Tribunal is supported by the fact that in the view of the contract owner, who will now receive just compensation for the loss of his ship, the broker's commission was part of the contract price to be paid for the ship.

After the attitude taken up by the United States in this case with regard to the question here discusses, it is assumed that the amount thus to be retained by the United States will be paid by them to Page Brothers. The decision of the Tribunal is based on this condition.

VIII.

FOR THESE REASONS THE TRIBUNAL OF ARBITRATION DECIDES AND AWARDS THAT:

I. The United States of America shall pay to the Kingdom of Norway the following sums:

In claim No. 1 by the Skibsaktieselskapet "Manitowoc" the sum of	\$845,000
In claim No. 2 by the Skibsaktieselskapet "Manitowoc" the sum of	845,000
In claim No. 3 by the Dampskibsaktieselskapet "Baltimore" the sum of.....	1,625,000
In claim No. 4 by the Dampskibsaktieselskapet "Vard II" the sum of.....	2,065,000
Out of this amount of \$2,065,000 the United States are entitled to retain a sum of \$22,800 in order that this sum be paid to Page Brothers;	
In claim No. 5 by the Aktieselskapet Sørlandske Lloyd the sum of.....	\$2,045,000
In claim No. 6 by the Dampskibsaktieselskapet Östlandet the sum of.....	2,890,000
In claim No. 7 by Jacob Prebensen jun. the sum of	160,000

In claim No. 8 by the Dampskibsaktieselskapet "Tromp" the sum of.....	\$160,000
In claim No. 9 by the Aktieselskapet "Maritim" the sum of	175,000
In claim No. 10 by the Aktieselskapet "Haug" the sum of....	175,000
In claim No. 11 by the Aktieselskapet "Mercator" the sum of	190,000
In claim No. 12 by the Aktieselskapet Sørlandske Lloyd the sum of.....	205,000
In claim No. 13 by H. Kjerschow the sum of	205,000
In claim No. 14 by Harry Borthen the sum of	205,000
In claim No. 15 by E. & N. Evensen the sum of.....	205,000

II. The claim made by the United States of America on behalf of Page Brothers is disallowed as against the Kingdom of Norway, but a sum of \$22,800 may be retained by the United States as stated under claim No. 4 above.

Done at *The Hague*, in the Permanent Court of Arbitration, October 13th, 1922.

The President : JAMES VALLOTTON
The Secretary-General : MICHIELS VAN VERDUYNEN

LETTER OF THE SECRETARY OF STATE TO THE NORWEGIAN MINISTER
 AT WASHINGTON.

February 26, 1923.

Sir: By Joint Resolution approved February 20, 1923, the Congress of the United States took appropriate action to satisfy the award rendered on October 13, 1922, by the Tribunal of Arbitration between the United States and the Kingdom of Norway, established under the Special Agreement concluded June 30, 1921, for the purpose of adjusting by arbitration certain claims of Norwegian subjects against the United States arising out of requisitions by the United States Shipping Board Emergency Fleet Corporation. In pursuance of that resolution and in conformity with the award, I have the honor to send you herewith a draft upon the Treasurer of the United States for \$12,239,852.47 in full satisfaction of the total sums awarded to your Government after deducting the sum of \$22,800 retained by the United States under the terms of the award for payment to Page Brothers, and including interest at six per centum per annum upon the net total sum due to Norway from the date of the rendition of the decision until the date of payment.

By this action the Government of the United States gives tangible proof of its desire to respect arbitral awards and it again acknowledges devotion to the principle of arbitral settlements even in the face of a decision proclaiming certain theories of law which it cannot accept. Faithful to its traditional policy, my Government is most desirous to promote the judicial determination of international disputes of a justiciable character and in this interest to give its due support to judicial determinations.

It is because of this established policy that my Government especially regrets that it seems to be necessary to refer to statements contained in the present award, but with due regard for the maintenance of the principles of international law, my Government finds itself compelled to say that it cannot accept certain apparent bases of the award as being declaratory of that law or as hereafter binding upon this Government as a precedent.

The award deals with the principle governing the requisitioning power of a belligerent state and the maintenance of correct principle in this matter, quite apart from its application in the present case, is of no little importance. The award recognizes the requisitioning power of a belligerent but would seem to apply a limitation on its exercise, where the property concerned is that of neutral aliens, by defining the extent of the emergency and its termination, and by enhancing damages accordingly thus subjecting the Government to a different test and a heavier burden where the property is owned by neutral nationals than in the case where it is owned by nationals of the requisitioning state. No such duty to discriminate in favor of neutral aliens is believed to be imposed upon a state by international law, with respect to property such as is concerned in the present case. It is the view of this Government that private property having its situs within the territory of a state (and the property here concerned is wholly that of private individual claimants on whose behalf the Kingdom of Norway is merely the international representative), including as in the present case property produced or created therein and never removed therefrom, is from the standpoint of international law subject to the belligerent needs of the territorial sovereign quite regardless of the nationality of the owners, provided that in case of its requisition just compensation be made. Due process of law applied uniformly, and without discrimination to nationals and aliens alike and offering to all just terms of reparation or reimbursement suffices to meet the requirements of international law; and thus the requisitioning state is free to determine the extent and duration of its own emergency. In apparently maintaining a different principle, the tribunal is believed to have proposed and applied an unwarranted rule against which the Government of the United States feels obliged to protest and under which it must deny any obligation hereafter to be bound.

It is also to be regretted that the award fails to give a satisfactory explanation of the manner in which the tribunal has arrived at the amounts awarded. While purporting to award compensation on the basis of the fair market value of the property taken, the tribunal has seen fit to omit discussion of the particular circumstances of the different claims or of the methods of calculation applied, or of the reasons for determining upon the amounts awarded in each case. Indeed, any definite disclosure or specification of the particular grounds of the awards to respective claimants is so entirely lacking that the award gives to one who examines it no clue to the method of determining why one amount was awarded rather than another. Again, although holding that claimants were entitled to interest and that some claimants were entitled to higher rates of interest than others, the tribunal does not reveal the rates of interest which were allowed on the various claims or the period of time for which interest was calculated or the amounts which were awarded as principal and the amounts awarded as interest.

The inadequacy of the award in these respects is particularly regretted in view of the requirements of Article 79 of the Hague Convention of October 18, 1907, pursuant to which the Norwegian claims were submitted to arbitration, that the award must give the reasons on which it is based. In these circumstances the Government of the United States, while not rejecting the award, feels obliged to direct attention to the requirements of appropriate arbitral procedure, and to state that it cannot accept as proper or satisfactory in international arbitrations the mode by which the tribunal has assessed damages or the absence of a reasoned statement indicative of the methods of their computation.

In making these observations this Government has no desire to be controversial, much less to enter upon an exhaustive or critical discussion of the award, or to intimate acquiescence in the expressions of the tribunal upon other points not above mentioned, the purpose being simply to point out, not in opposition to, but in support of, the principle of arbitration, that the award cannot be deemed by this Government to possess an authoritative character as a precedent.

Accept, Sir, the renewed assurance of my high consideration.

(Signed) CHARLES E. HUGHES.

Mr. H. H. BRYN,
Minister of Norway.
