

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

**MIXED CLAIMS COMMISSION UNITED STATES AND GERMANY:
Appendices**

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Appendix I

MIXED CLAIMS COMMISSION UNITED STATES AND GERMANY

*Established in pursuance of the Agreement between the
United States and Germany dated August 10, 1922*

RULES OF PROCEDURE

[As adopted November 15, 1922, and amended from time to time, to
December 31, 1932.]

I

Definition of terms

The term "United States" as used herein shall be taken to mean the United States of America.

The term "Germany" as used herein shall be taken to mean the German Empire.

The term "Umpire" as used herein shall be taken to mean the Umpire appointed by the President of the United States under the terms of article II of the agreement between the United States and Germany dated August 10, 1922. The term "American Commissioner" and "German Commissioner" as used herein shall be taken to mean the Commissioners appointed by the United States and by Germany respectively in pursuance of the terms of article II of said agreement. The terms "American Agent" and "German Agent" as used herein shall be taken to mean the Agents appointed by the United States and by Germany respectively in pursuance of the terms of article VI of the said agreement.

The term "Secretaries" as used herein shall be taken to mean those appointed in pursuance of article IV of the said agreement of August 10th, 1922.

The term "Claim" or "Claims" as used herein shall be taken to mean such as are embraced within the categories designated in article I of the said agreement of August 10th, 1922.

II

Place and time of hearings

The Commission shall sit at Washington, where its principal office shall be maintained and its records kept and preserved.

Hearings may be held at other places, as may from time to time be determined by the Commission.

The time and place of hearings shall, from time to time, be designated by the Commission.

III

Docket

A Docket shall be provided by the Secretaries, in which they shall promptly enter the name of each claimant and the amount claimed, when a claim is formally

filed with the Commission. Each claim shall constitute a separate case before the Commission and be docketed as such. They shall be numbered consecutively, beginning with that first presented as No. 1.

IV

Claims-filing and docketing

(a) A claim shall be treated as formally filed with the Commission, upon there being presented to the Secretaries a memorial, petition, or written statement containing a clear and concise statement of the facts upon which the claim is based, the amount thereof, the nationality of the claimant, and a full disclosure of the nature and extent of the interest of claimant and all others therein, accompanied by copies of all documents and other proofs in support of such claim then in the possession of the American Agent; which memorial, petition, or written statement shall be signed or endorsed by the American Agent, and an endorsement of filing, with the date thereof, made thereon and signed by the Secretaries.

(b) The docketing of a claim so filed shall be noticed to Germany of its filing.

¹ (b1) Within fifteen days after a claim is so docketed, the German Agent shall file an answer thereto, specifically admitting or denying each paragraph thereof or setting up defensive matter.

(c) A petition, memorial, or written statement, or any answer thereto, may, upon leave granted by the Commission, be amended at any time before final submission of the case to the Commission.

(d) Within six months after October 9th, 1922, the American Agent shall give notice of all claims which will be submitted to the Commission and not already filed, by delivering to the Secretaries a list or lists of such claims, and a copy thereof to the German Agent.

V

Evidence

(a) When an original paper on file in the archives of either the United States or Germany can not be conveniently withdrawn, a duly certified copy, with English translation, if requested, may be received in evidence in lieu thereof.²

(b) The Commission shall, under such rules as it may prescribe, receive and consider all written statements or documents which may be presented to it in any case by either the American Agent or the German Agent, or their respective counsel. No such statement or document will be received or considered by the Commission if presented through any other channel.

(c) No oral evidence will be heard by the Commission save in exceptional cases for good cause shown, and upon order first entered by the Commission authorizing its introduction. Should oral evidence be introduced in behalf of one party, the Agent or counsel for the opposing party shall have the right of cross-examination.

VI

Hearings

(a) The order in which cases shall come on for submission before the Commission shall be determined by (1) agreement between the American Agent and the German

¹ Amendment adopted February 6, 1923 (Order No. 7).

² Order No. 3 of November 15, 1922:

“*Ordered*, That proofs may be received by the Commission in the form of *ex parte* affidavits or depositions taken on written interrogatories when sworn to a competent official having a seal of office.”

Agent, subject to revision in the discretion of the Commission; or (2) order of the Commission.

(b) The American Agent shall give notice to the Secretaries, and through the Secretaries to the German Agent, when he is prepared to present a case to the Commission, and at the same time may file with the Secretaries a brief prepared by the Agent or his counsel, or a brief prepared by the claimant if countersigned by the Agent and such proofs in support thereof in addition to those filed in pursuance of subdivision (a) of rule IV hereof as he may desire to present. The German Agent shall thereafter have such time, within which to file a brief and opposing written statements or documents, as may be fixed by the Commission from time to time by general or special order.¹ Either the American Agent or the German Agent may thereafter file such additional proofs and/or briefs at such time and on such conditions as the Commission may in its discretion permit.

² (b1) All briefs shall be confined to questions put in issue by the petition, memorial or written statement filed by the American Agent and the answer thereto filed by the German Agent.

³ (b2) Upon being docketed cases shall be classified in accordance with categories to be set forth in a schedule which shall be adopted by the Commission. Such schedule of categories may be enlarged or subdivided from time to time as shall be determined (1) by Agreements between the American Agent and the German Agent subject to revision in the discretion of the Commission; or (2) order of the Commission.

⁴ (b3) All cases falling under a particular category or subdivision thereof, shall as far as reasonably practicable, come on for submission in simple sequence.

⁵ (b4) The Commission will from time to time lay down general rules or principles covering a particular category or sub-division thereof, for the guidance of the respective Agents and their counsel in the briefing and preparation for submission of all cases embraced in such class or group.

(c) When a case comes on for submission in pursuance of orders entered from time to time by the Commission, it may, in its discretion, hear oral arguments by the American and German Agents or their respective counsel, limited as to time as the Commission may direct. The American Agent or his counsel shall have the right to open each case and the German Agent or his counsel may reply, in which event further argument may in the discretion of the Commission be heard.

(d) When a case is submitted in pursuance of the foregoing provisions, the proceedings before the Commission in that case shall be deemed closed, unless opened by order of the Commission.

VII

Duties of the Secretaries

The Secretaries shall:

- (a) Be subject to the directions of the Commission.
- (b) Be the custodians of all documents and records of the Commission, and keep them systematically arranged in safe files. While affording every reasonable facility

¹ Order No. 2 of November 15, 1922:

“*Ordered*, That the German Agent shall, upon the presentation of a case to the Commission by the American Agent, have fifteen (15) days thereafter within which to file a brief and/or opposing written statements or documents. Such period of fifteen (15) days may, by order of the Commission, be extended in its discretion.”

² Amendment adopted February 6, 1923 (Order No. 7).

³ See previous footnote.

⁴ See footnote no. 4.

⁵ See footnote no. 4.

to the American and German Agents and their, respective counsel to inspect and make excerpts therefrom, no such documents or records shall be withdrawn from the files of the Commission save by its order duly entered of record.

(c) Make and keep, in the English language, in duplicate, a docket of claims filed with the Commission.

(d) Endorse on each document presented to the Commission the date of filing, and enter a minute thereof in the Docket ¹.

(e) Make and keep, in the English language, in books provided for that purpose, duplicate minutes of all proceedings of each session of the Commission, which minutes shall be read at the next session and, after corrections if any are made, shall be approved and signed by the Commissioners and countersigned by the Secretaries.

(f) Keep a Notice Book in which entries may be made by either the American or German Agent, and when so made shall be noticed to the other Agent and all others concerned.

(g) Provide duplicate books, in which shall be recorded all awards and decisions of the Commission signed by the Commissioners, or, in case of their disagreement, by the Umpire, and countersigned by the Secretaries.

² (h) Provide a Seal of the Commission, which shall be used in all cases without wafer or wax, and which shall be circular in form and bear around the margin the words "Mixed Claims Commission, United States and Germany", around the upper half of the circle inside the outer margin the words "Agreement of", around the lower half of the circle inside the outer margin the word and figures "August 10, 1922", and in the center thereof the word "Seal". An impression of said Seal appears in the margin hereof. *

³ (i) Have the custody of the Seal of the Commission.

⁴ (j) Furnish, on direction of the Commission or on request of either Agent, a copy of any award or other document constituting a part of the records of the Commission or an extract therefrom, certified by their official signatures and further authenticated by the impression thereon of the Seal of the Commission ⁵.

¹ Order No. 5 of February 2, 1923:

"Ordered, That the Joint Secretaries, in endorsing on each document presented to the Commission the date of filing and entering a minute thereof in the docket, in conformity with Section VII (d) of the Rules, may use a rubber stamp bearing the name of the Commission, the date of filing and the names of the Joint Secretaries, which shall be initialed in ink by the Joint Secretaries. Where a number of documents are bound together in one volume, it is ordered further that the Joint Secretaries need not endorse each document contained in the volume, but that a single endorsement of the volume will be sufficient for a compliance with the provisions of the said rule."

² Amendment adopted January 8, 1924 (Order No. 21).

* Omitted from the printed copies of the Rules.

³ See footnote no. 2.

⁴ See footnote no. 2.

⁵ From Order No. 21 of January 8, 1924:

It is Further Ordered, That the Secretaries in authenticating any award or other document or extract therefrom forming a part of the records of the Commission shall use the following form:

"The undersigned, Joint Secretaries of the Mixed Claims Commission, United States and Germany, established in pursuance of the Agreement between the two Governments signed at Berlin on August 10, 1922, do hereby certify that the foregoing, according to its purport, is a true copy of a record of said Commission.

"In Witness Whereof, we have hereunto subscribed our names and affixed

******(k) Perform such other duties as may from time to time be prescribed by the Commission.

VIII ¹

Decisions

(a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.

(b) The Umpire shall at all times have the right to the complete record in any and all cases and to hear oral argument in his discretion.

(c) The Umpire may join with the two National Commissioners in announcing — or in the event of their disagreement certified to him shall announce — principles and rules of decision applicable to a group or groups of cases for the guidance as far as applicable of the American Agent, the German Agent, and their respective counsel, in the preparation and presentation of all claims.

(d) All decisions shall be in writing and signed by (1) the Umpire and the two National Commissioners, or (2) by the two National Commissioners where they are in agreement, or (3) by the Umpire alone when the two National Commissioners have certified their disagreement to him. Such decisions need not state the grounds upon which they are based.

IX

Amendments

After five (5) days' notice in writing to each of them, these rules may be amended at any time at a meeting participated in by the two Commissioners and the Umpire and by the affirmative vote of not less than two.

the Seal of the said Commission at Washington this day of, 192 . . .

.....
American Joint Secretary

.....
German Joint Secretary

****** Letter changed from " h " to " k " by order (No. 21) entered January 8, 1924.

¹ No. VIII of the rules adopted November 15, 1922, as amended on February 14, 1924 (Order No. 25). Rule VIII as adopted November 15, 1922, read as follows:

" Should the two Commissioners be unable to agree on the disposition of any case or upon any point that may arise in the course of the Commission's proceedings, they shall certify to the Umpire (1) the exact point or points of disagreement, and (2) the point or points, if any, upon which they are in agreement together with a complete but concise statement of the facts of the case or the proceedings in connection with which the difference shall arise. Each Commissioner shall prepare and submit to the Umpire his opinion in writing with respect to each point of disagreement certified to the Umpire. Such statements and opinions shall be deemed a case stated, upon which the Umpire may make his decision. He shall have the right to the complete record in the case, including the briefs of counsel, and in his discretion to hear additional oral argument upon any difference certified to him for decision. The decisions in writing (1) of the two Commissioners, where they are in agreement, otherwise, (2) of the Umpire, shall be final.

" If the two Commissioners agree the decision need not state the grounds upon which it is based."

X

Expenses of Commission

All expenses of the Commission which by their nature are a charge on both the United States and Germany, including the honorarium of the Umpire, the expenses of his office and the compensation of his secretary and other employees, shall, upon being approved in writing by the American and German Commissioners, be paid, one-half by the United States and one-half by Germany ¹.

XI ²*Agreed statements*

The American and German Agents may in any case present to the Joint Secretaries a memorandum signed by them, containing the name of the claimant, the amount of the claim and the essential facts upon which the claim is based, including an agreement as to the further procedure to be had in reference thereto accompanied by all documents in support of or in opposition to said claim. A claim thus presented shall be docketed by the Secretaries as required by rule VII. Upon the filing of such memorandum by the American and German Agents and the approval of such agreement by the Commission the requirements of rules IV and VI relative to the presentation and hearing of claims shall be dispensed with.

XII ³*Private debts*

(a) That all claims based upon private debts shall be directed against the Government of Germany and the German private debtor jointly.

(b) That in all cases based upon private debts the American Agent may at any time give notice to the German Agent that he proposes to present a claim thereon to the Commission and the service of such notice on the German Agent by the American Agent shall be considered the commencement of proceedings upon each and all claims covered by such notice. The giving of such notice shall not prejudice the contention of either Agent as to the character of the claim.

(c) That in all cases based upon private debts in which the German Agent shall be served with notice as provided for under Paragraph (b) hereof, the German Agent shall within forty-five days from the date of the service of such notice (subject to extension of time by order of the Commission) give notice thereof to the German national against whom, in conjunction with Germany, the claim is made and call upon such national to furnish the German Agent with all necessary information and data for his proper defense, if any, of such claim.

¹ Order No. 6, entered February 2, 1923:

“*Ordered*, That the Agents of the United States and Germany are hereby authorized to approve, on behalf of the American and German Commissioners, all expenses of the Commission which by their nature are a charge on both the United States and Germany, including the honorarium of the Umpire, the expenses of his office and the compensation of his secretary and other employees, and such approval by the Agents of the United States and Germany shall be considered a compliance with Section X of the Rules. It is also ordered that approvals in writing by the Agents of the United States and Germany heretofore made on behalf of the American and German Commissioners of any and all expenses of the Commission which by their nature are a charge on both the United States and Germany are hereby ratified and confirmed.”

² Amendment adopted October 26, 1923 (Order No. 18).

³ Amendment adopted October 26, 1923 (Order No. 18).

Such claims may be called for submission by the Commission at any time not less than ninety days after the giving of notice by the American Agent as provided by paragraph (b) hereof, — subject to an extension of time for submission by order of the Commission on the application of either party.

(d) That each award on all claims based upon private debts shall state the portion thereof for which the German private debtor is also obligated.

XIII ¹

Dismissal on motion of the American Agent

The Commission will consider a motion made by the American Agent for the dismissal of a claim for lack of evidence to justify its prosecution in any case in which a claimant has failed, after request made by the American Agent, either (a) to furnish evidence in support of a claim, notice of which has been given under subdivision (d) of rule IV, or (b) to furnish additional evidence in support thereof, or (c) to give satisfactory reasons in either case for the delay in furnishing such evidence.

Notice of his purpose to move for such dismissal shall be given by the American Agent to the claimant if his address is known and also to the claimant's attorney, if he is represented by an attorney; but if the address only of the claimant or only of the attorney is known the notice to the one whose address is known will be a sufficient compliance with this rule. Such notice shall be sent by registered mail at least two weeks prior to the filing of the motion by the American Agent for a dismissal of the claim: *Provided*, That if the address of either the claimant or his attorney is without the continental United States the notice shall be mailed at least six weeks prior to the filing of such motion for dismissal.

Such motion shall be supported by proof that such evidence has been requested and that the notice to the claimant and/or his attorney as herein provided for has been given. Such proof shall consist of copies of letters sent by the American Agent to the claimant and/or his attorney requesting proof or additional proof in support of the claim and of a receipt for the registered mail giving notice that motion will be made for a dismissal of the claim.

XIV ²

Late claims

The rules of the Commission as they now exist shall govern the preparation, presentation, and adjudication of all claims coming before the Commission by virtue of the said supplementary agreement (hereinafter designed "late claims")

¹ Amendment adopted January 22, 1924 (Order No. 24).

² Amendment adopted February 6, 1929, the text of the order being as follows:

"Whereas the Mixed Claims Commission, United States and Germany, has been established and exists in pursuance of the agreement between the United States and Germany dated August 10, 1922; and

"Whereas the jurisdiction of the said Commission has been extended by virtue of an agreement between the Government of the United States and the Government of Germany evidenced by an exchange of notes dated December 31, 1928 (hereinafter referred to as 'supplementary agreement'); and

"Whereas by virtue of the said supplementary agreement the said Commission is given jurisdiction over certain 'late claims of American nationals against Germany' described therein;

"Now, therefore, in order that the procedure of the Commission may conform to and that the terms of the said supplementary agreement may be speedily carried into effect in accordance with its true intent and purpose, the present rules of the said Commission are hereby amended by adding thereto rule XIV as follows: "

save as the said rules are superseded or modified by the provisions of this rule XIV, which shall apply only to such late claims.

Section 1. On or before July, 31 1929, each of the said late claims shall be presented to the Commission by the American Agent. Such presentation shall be in one of the following forms:

- (a) A Memorial together with all supporting evidence;
- (b) A statement signed by the American Agent that the claim submitted is for a loss or damage which in his opinion is not within the jurisdiction of the Commission. The American Agent may submit one or more claims under one statement. The German Agent need not join in such submission.
- (c) A motion to dismiss signed by the American Agent supported by the original papers in any case in which the American Agent has, by registered mail, requested the claimant, or his attorney, to furnish proof in support of such claim within a specified time and in which the claimant, or his attorney, has failed to furnish the proof requested within said time, or in any case in which the claimant, or his attorney, has advised the American Agent that the claimant does not desire to have his claim further prosecuted.
- (d) An agreed statement of facts signed by the American and German Agents in substantial accordance with rule XI of the Commission.

Section 2. Prior to the presentation of a claim under section 1 hereof, the American Agent may file a preliminary submission of a claim with a memorial accompanied by all evidence then available. On or before July, 31 1929, all such claims shall be presented to the Commission under the provisions of section 1. Upon filing a preliminary submission of the claim under this section, the American Agent shall, whenever the evidence in support of the claim is complete, serve notice upon the German Agent to the effect that he has filed all of the direct evidence he desires to submit in support of the claim. The German Agent shall admit service of such notice, and the original of said notice with such admission shall be filed with the Joint Secretaries. The service of said notice upon the German Agent shall constitute a presentation of the claim to the Commission under the provisions of section 1 (a) hereof.

Section 3. Within six months from the presentation of a claim by the American Agent, as provided in Section 1 hereof, the German Agent shall file with the Joint Secretaries such answer of the German Government, together with all evidence in support thereof, as he may desire to file.

Section 4. Within thirty days after the filing of an answer by the German Agent to any claim, the American Agent may file with the Joint Secretaries further evidence which shall be strictly limited to evidence in rebuttal of that submitted by the German Agent. Evidence which is merely cumulative of that previously filed by the American Agent shall not be filed by the American Agent subsequent to July 31, 1929, or subsequent to the filing of the answer and supporting evidence of the German Agent. The Commission may, for good cause shown, extend the time for filing rebuttal evidence by the American Agent.

Section 5. After the American Agent has given notice of the filing of all of the direct evidence which he desires to file in any claim, or after July, 31 1929, the German Agent may at his election demur to the claim as presented by the American Agent as insufficient in law, after which no evidence may be filed by either party, and the claim shall be submitted to and disposed of by the Commission on the record as it then stands.

Section 6. Within ten days from the filing of an agreed statement, or a demurrer by the German Agent, or within ten days from the filing of rebuttal evidence by the American Agent or from the expiration of the time for filing rebuttal evidence, either Agent may file with the Joint Secretaries a statement in writing indicating that he desires to file a brief in support of or in opposition to such claim. All briefs filed shall concisely present in logical sequence the propositions relied upon and shall be restricted to the issue or issues of fact and/or of law raised by the claim as presented by the American Agent and the answer or demurrer of the German Agent. Should the American Agent desire to file such brief it shall be filed within thirty days from the date of the filing of the answer or demurrer of the German Agent. Should the German Agent desire to file such brief it shall be filed within thirty days from (a) the date of the filing by the American Agent of his declared purpose not to file a brief or (b) the date of the filing of a brief by the American Agent. Neither Agent shall file more than one brief unless authorized so to do by formal order entered by the Commission.

Section 7. A claim shall be held to be finally submitted to the Commission (a) upon the expiration of the time within which briefs may be filed as provided in Section 6 hereof; (b) upon the filing of briefs in accordance with Section 6 hereof (c) upon the failure of either Agent to present a pleading, evidence, or brief within the time limits hereinbefore provided; and (d) upon the filing of a statement or motion by the American Agent in accordance with subdivisions (b) or (c) of Section I hereof.

Appendix II

Order of March 25, 1925, relating to Mark bank balances and Mark Debts

[Excerpt from the Minutes of the Meeting of the Mixed Claims Commission, United States and Germany, held on March 25, 1925.]

The Umpire announced the following order of the Commission:

BY THE COMMISSION:

Whereas the Commission is now called upon to deal with that certain category of claims based on mark balances in German banks due American nationals and/or private debts owing in marks from German nationals to American nationals, and

Whereas the American and German Agents have submitted for the consideration of the Commission correspondence passing between them with respect to said category of claims, which correspondence is fully set out in the minutes of the meeting of this Commission of February 25, 1925, at pages 410-416, inclusive ¹:

¹ The matter referred to is as follows:

[Excerpt from the Minutes of the Meeting of the Mixed Claims Commission, United States and Germany, held February 25, 1925.]

The American Agent, Mr. Robert W. Bonyng, announced that he was in receipt of a proposition submitted by the German Agent, Mr. Karl von Lewinski,

Now, after fully hearing the American and German Agents, and after full examination and consideration of the questions presented and the provisions of the Treaty of Berlin applicable thereto, it is

Ordered,

(1) That the basis set forth in the aforementioned correspondence for computing the amount of the awards to be made by this Commission in claims submitted to it

on behalf of the Government of Germany covering a general basis for the settlement of claims before the Commission involving Mark bank balances and private debts owing in Marks. This proposition reads as follows:

Berlin, Germany, *August 19, 1924.*

The Honorable Robert W. BONYNGE,

Agent of the United States

before the Mixed Claims Commission,

United States and Germany,

Washington, D. C.

Sir:

Reference is made to the class of claims against the Government of Germany included in the list of claims that have been notified to the Commission and to the German Agent that embrace (1) the Mark balances carried in German banks in favor of American nationals, (2) private debts owing in Marks from German nationals to American nationals, with respect to which two classes of claims the principal sum involved has not been paid over to the German Treuhaender in accordance with exceptional war legislation enacted by the Government of Germany.

As I understand your position in regard to claims of these two classes, it is briefly, that the American claimant under the Treaty of Berlin is entitled to recover, the principal sum involved at the pre-war rate of exchange, together with interest thereon as you contend is provided for in the Treaty.

As you know, the position of my Government in respect to claims of this particular class may, I believe, be stated briefly as follows:

The American claimant is only entitled to a recovery other than in Marks in those cases where the principal sum involved was affected by the exceptional war legislation. In such cases recovery may be had based on the difference between the value of the Mark as of the date affected and the value as of the date of the repeal of the exceptional war legislation. Interest on this principal sum should also, according to the contention of my Government, be suspended during the period that the United States was at war with the Government of Germany.

As it will, in my opinion, unquestionably be of material advantage to both Governments to arrange for a settlement of the many difficult and intricate questions involved. I have the honor to submit, with the approval of my Government, a proposition in the nature of a compromise covering a general settlement of the principles governing these particular claims. This proposition, my Government feels, should be submitted in order that an amicable adjustment may be reached that will be fair, just and equitable to the two Governments and their nationals concerned, and that a speedy adjustment of the differences may be had.

With respect to Mark bank balances, I am authorized to say that I will consent to an award being entered whereby the American claimant may recover such balances on the basis of one Mark equals 16 cents; the balances in general in such claims to be stated as of April 6, 1917, or as near such date as may be convenient and practicable, the balance as of the date stated to be increased or diminished by appropriate credits or debits arising out of changes in the account during the period of belligerency as defined in the Commission's Administrative Decision No. I. The balance as thus stated to bear interest at the rate of 5 per cent from January 1, 1920, until date of payment.

I am also authorized to say that a settlement of the Mark debts owing from German nationals to American nationals will be made on the same general basis,

falling within the terms of the Treaty of Berlin of August, 25 1921, and within the aforementioned category be, and the same is, hereby adopted and will be applied by this Commission in determining the amount, if any, to be awarded in such claims.

(2) Upon the submission of each claim falling within such category there shall be presented, by the American Agent, a waiver, in writing, in the form approved by the Commission, executed by the claimant in triplicate originals, one of which

namely, that an award may be entered whereby the principal Mark sum involved will be valued on the basis of one Mark equals 16 cents. Where the debt became due and owing prior to April 6, 1917, such debt to be stated as of April 6, 1917, including interest thereon at the rate agreed upon between the parties, or in the event of no express agreement, then at the rate provided for in accordance with custom and practice in good business dealings. Where the debt fell due during the period of belligerency as defined in Administrative Decision No. I. then the debt to be stated as of its due date. The awards thus arrived at are to bear interest at the rate of five per cent from January 1, 1920, until paid.

It will be understood that this offer of compromise does not embrace claims involving bank deposits or private debts that may have been satisfied under the legislation of the Government of Germany by the German national paying the amounts involved directly to the Treuhaender. In all such cases an award may be entered whereby recovery may be had of the amount involved on the basis of one Mark equals 17.4 cents; such award to bear interest at the rate of 5 per cent from date of payment to the Treuhander to the date of final payment of the award by the Government of Germany.

This offer of compromise is submitted with the understanding that as a condition precedent to an award in favor of the United States on behalf of one of its nationals, such national is to be required by the Government of the United States to execute a formal waiver of any rights he may consider he has to proceed directly against the German national involved in the courts of either Government or under the provisions of the Trading with the Enemy Act, approved October 6, 1917, and the amendments thereto.

It is my further understanding in case this offer of compromise is accepted by the Government of the United States that the awards in each case are to be made by the Mixed Claims Commission, United States and Germany, against the Government of Germany, such awards, however, to set out in appropriate detail the facts in relation to the debt between the nationals involved, including the amount thereof in Marks, and the due date arrived at in the manner above outlined.

It will, of course, be understood that in submitting this offer of compromise I reserve the right to make whatever defenses may be appropriate in any particular claim, other than such defenses as may involve the question of the rate of exchange or interest.

In submitting this offer of compromise my Government desires it to be understood that the offer in no way whatsoever is to be taken as affecting in any manner the question of the liability of the particular German national involved to the German Government.

I have the honor to be, Sir,
Your obedient servant

Karl VON LEWINSKI,
German Agent.

The American Agent informed the Commission that he had submitted this proposition to The Honorable The Secretary of State for his consideration with the request that appropriate instructions be issued to him in relation to its acceptance on the part of the United States.

A question having arisen as to the proper interpretation to be placed on the particular paragraph of the proposition relating to the execution by the claimant of a waiver of rights to proceed against the German national in a forum other than the Commission, the German Agent on February 16, 1925, submitted to the Ameri-

shall be placed in the Commission records pertaining to that particular claim, one delivered to the German Agent, and one retained by the American Agent ².

(3) Every appropriate defense to each claim of said category may be interposed by the German Agent and answered by the American Agent and will receive due consideration by the Commission.

(4) This order, in so far as applicable, will control the preparation, presentation,

can Agent the following interpretation to be placed on this particular paragraph of the proposition:

WASHINGTON, D. C., *February 16th, 1925.*

The Honorable Robert W. BONYNGE,
Agent of the United States Mixed Claims Commission

United States and Germany.

My dear Mr. BONYNGE:

Confirming our conference of today I beg to advise to you that I approve of the following interpretation of my proposition of August 19th, 1924:

1st. In case the particular claimant is the holder of a lien, or liens, the proposition is to be interpreted so as not to interfere with the claimant maintaining and prosecuting any lien he may have based on the possession prior to October 6, 1917, of assets of the German debtor involving property within the United States, title to which is alleged to be in the particular German debtor, or has been seized under the Trading with the Enemy Act of October 6, 1917, or amendments thereto, as property of such debtor. An award may be made at the rate provided for in the proposition of August 19, 1924, subject to the condition incorporated in and forming a part of the award that any funds recovered by the lienholder on account of such lien, or liens, be deducted from the amount awarded.

2nd. With respect to a claimant other than a lienholder, as hereinbefore mentioned, who has heretofore brought suit for the recovery of a Mark bank balance, or a debt owing in Marks; if such claimant does not make an election on or before December 1, 1925, or such later date as may be fixed by you, either to proceed before the Mixed Claims Commission or to continue with the suit, then an award may be entered by the Commission at the rate provided for in the proposition of August 19, 1924, subject, however, to the condition subsequent to be incorporated in and form a part of the award that such award shall be ineffective for any purpose whatsoever should the claimant proceed to enforce any judgment he may obtain in the court proceedings.

3rd. The waiver, hereinabove referred to, does not in any sense involve a waiver of the general charge on the privately owned enemy property provided for by the Treaty of Berlin in favor of the United States for the satisfaction of claims against the Government of Germany as enumerated in the Joint Resolution of the Congress of July 2, 1921.

Yours very truly,

Karl VON LEWINSKI,
German Agent.

The American Agent further informed the Commission that, in accordance with authority received from The Honorable The Secretary of State, he is now authorized to accept and does accept on the part of the United States of America the foregoing proposition subject to the interpretation placed thereon by the German Agent, as above set out.

² The Minutes of the Meeting of the Commission held on December 4, 1926, show the following:

"The Umpire joined with the National Commissioners in announcing the following order of the Commission:

"*Ordered*, That in all cases which have been or may hereafter be dismissed by the Commission wherein a waiver or waivers have been filed the Joint Secretaries be, and they hereby are, authorized and directed to return to the American Agent such waiver or waivers upon making appropriate notation upon the records and without retaining a copy thereof."

and decision of all claims submitted to the Commission falling within its scope, and whenever either Agent is of the opinion that the peculiar facts of any case take it out of the rules here announced, such facts, with the differentiation believed to exist, will be called to the attention of the Commission in the presentation of that case.

Appendix III

Order of May 7, 1925,

announcing

rules applicable to debts, bank deposits, bonds, etc.

[Excerpt from the Minutes of the Meeting of the Mixed Claims Commission, United States and Germany, held May 7, 1925.]

The Umpire joined with the two National Commissioners in announcing the following order of the Commission:

By the Commission:

Whereas the Commission is now called upon to deal with claims involving debts, bank deposits and/or bonds falling under Part X of the Treaty of Versailles as carried into the Treaty of Berlin; and

Whereas the Commission did, on March 25, 1925, enter an order in relation to certain of such claims:

Now, therefore, after fully hearing the American and the German Agents, it is *Ordered*. That in determining the financial obligations of Germany arising under the Treaty of Berlin with respect to all such claims the following rules shall govern:

1. In order to establish liability on a claim based on a debt or bank balance, owing in Marks from a German national or from the German Government, at the rate of 16 cents to the Mark the claim must have been impressed with American nationality continuously from April 6, 1917, to July 2, 1921. If, however, the claim became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after April 6, 1917, but before July 2, 1921, and remained to that date impressed with American nationality, the American national will be entitled to recover his Mark debt or Mark bank balance at the rate of exchange existing at the time the claim became thus impressed with American nationality, not exceeding, however, 16 cents to the Mark.

2. In all cases covered by paragraph 1 above, the residence of the American creditor as claimant must be established in the territory of the United States and the residence of the German debtor in German territory as it existed on July 2, 1921, at some time between April 6, 1917, and July, 2 1921, both inclusive, and also in so far as concerns debts at some time after the debt became due.

3. No pecuniary obligation of the German Government for debts or bank balances as such attaches to debts or bank balances that by direct action of the parties have been actually satisfied. In all cases, however, in which Germany is not obligated for the debt or bank balance as such, the claimant will be entitled to an award for such damages as he may establish he sustained as the direct result of the application of an exceptional war measure to a debt or bank balance.

4. In all cases of obligations satisfied by payment to the Treuhaender, the claim must have been impressed with American nationality at the time of such payment, but it will not be necessary to establish that the claimant had a residence in the United States. If, however, the claim became impressed with American nationality by the naturalization of the claimant, or otherwise through operation of law, after

the date of payment to the Treuhaender, but before July 2, 1921, and was continuously to that date impressed with American nationality, the American national will be entitled to recover the amount involved at the rate of exchange as provided for in the last sentence of paragraph 1.

5. In all cases of payment directly to the Treuhaender in satisfaction of obligations for money due by way of dividends, interest or other periodical payments, interest thereon shall be allowed from December 11, 1921, at the rate of 5 per cent per annum until paid.

6. German public bonds, including treasury notes, which became payable on or before July 2, 1921, to American nationals wheresoever residing, and which bonds or notes were impressed with American nationality as provided in paragraph 1 hereof, will be treated in the same way as debts are treated which are covered by the order of the Commission of March 25, 1925, provided that the bonds or notes are produced and filed with the Commission. Appropriate provision may, however, be made for cases in which it is established by competent evidence that the bond or note is lost or destroyed.

7. Interest on German public bonds, including treasury notes, which became due and payable, on or before July, 2 1921, to American nationals wheresoever residing, and which bonds or notes were impressed with American nationality, as provided in paragraph 1 hereof, will be treated in the same way as debts are treated which are covered by the order of the Commission of March 25, 1925, provided that the coupons, if any, are produced and filed with the Commission. Appropriate provision may, however, be made for cases in which it is established by competent evidence that such coupons have been lost or destroyed. The fact that coupons have not been presented to the debtor will not constitute a defense.

8. In all claims for debts or bank balances payable in other than German currency, the rules with respect to the nationality of the claims and the residence of the parties as set forth in paragraphs 1 and 2 hereof shall apply. In all claims based on German public bonds, including treasury notes, and/or on interest on such bonds or notes the rules with respect to the nationality of such claims as set forth in paragraph 1 hereof shall apply.

9. In all debt or bank balance cases involving other than German or United States currency the rate of exchange shall be the average cable transfer rate prevailing in the United States during the month immediately preceding April 6, 1917. If, however, the claim became impressed with American nationality by the naturalization of the claimant or otherwise through operation of law after April 6, 1917, but before July 2, 1921, and remained to that date impressed with American nationality, the American national will be entitled to recover such debt or bank balance at the rate of exchange existing at the time the claim became thus impressed with American nationality.

10. Bonds as such are not to be regarded as cash assets within the meaning of the Treaty, as the terms of the Treaty do not warrant a claim for valorization of bonds as such.

11. The American owners of bonds of any kind are entitled to compensation in respect of damage inflicted upon such bonds in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex to Section IV of Part X of the Versailles Treaty as incorporated in the Treaty of Berlin.

12. All American-owned bonds located in German territory on November 10, 1917, will be considered as subjected to an exceptional war measure by the issuance of the decree of that date.

13. Although all exceptional war measures of Germany then in force were repealed by law on January 11, 1920, a claimant nevertheless will be entitled to establish by evidence that his property, rights and interests were subject to measures in the nature of exceptional war measures in German territory, as defined in paragraph 11 hereof, before November 10, 1917, or after January 11, 1920, and in the event that he establishes such fact Germany will be responsible for any damage that the evidence shows he sustained by the application of such measures.

14. The fact that an exceptional war measure was applied to American-owned bonds is in itself not sufficient to justify a claim for compensation on account of depreciation in value but the claimant will be required to establish by evidence that the damage sustained was the proximate result thereof.

15. Whether an exceptional war measure was the proximate cause of the damage will depend on the facts in each particular case. In considering these facts the following principles will be observed:

(a) If the claimant took appropriate steps either to sell or exchange the bonds in Germany and was prevented from accomplishing this by an exceptional war measure, then the exceptional war measure will be regarded as the proximate cause of the damage sustained, on account of the depreciation in the value of such bonds.

(b) The exceptional war measure will be established as the proximate cause of the damage sustained on account of the depreciation in the value of such bonds that may be proven by the evidence in any particular case, if it appears that from all the facts and circumstances in such case the reasonable inference to be drawn therefrom is that the claimant would have withdrawn his bonds from Germany for the purpose of sale or exchange, had he not been prevented from doing so by such exceptional war measures.

(c) If the owner of the bonds was bound by contract or by the terms of the bond obligation to leave the bonds in Germany during the period of the war, the claimant must himself bear the consequence of the depreciation accruing during the period he was thus bound.

(d) If it appears from the circumstances and the evidence that the person having possession of the bonds in Germany was obligated to transmit them to the claimant without demand and did not fulfill this obligation on account of the war legislation, the principles laid down in Administrative Decision No. IV relating to Estates, will be followed.

Appendix IV

(A) *Minutes of Meeting of Commission, October 31, 1933, pp. 1597-1612*

The Commission met in its hearing-room in the City of Washington on October 31, 1933, at 4:00 o'clock p.m.

Present: The Umpire (presiding) and the American Commissioner.

The American Agent and the German Agent attended.

The American Commissioner made the following statement:

Notice of the calling of this meeting was given to all the Members of the Commission (in the case of the German Commissioner, to Dr. Ernst Meyer as substitute for Dr. Kiesselbach) and the two Agents both by telephone and in writing yesterday. The written notice, which was delivered by messenger, was as follows:

October 30, 1933.

Notice of meeting.

A meeting of the Mixed Claims Commission, United States and Germany, will be held on Tuesday, October 31, 1933, at 4:00 o'clock p. m., in the Commission's hearing-room, 1023 Investment Building, Washington, D. C.

By direction of the American Commissioner:

E. P. BOWYER,
Law Clerk to the Umpire.

Copies to —

Umpire.

American Commissioner.

German Commissioner.

American Agent.

German Agent.

American Joint Secretary.

German Joint Secretary.

The Acting German Commissioner, Dr. Meyer, was unwilling to attend this meeting lest by so doing he should compromise the [p. 1598] position of his Government on the question of the jurisdiction of the Commission, and it is understood by both the Umpire and the American Commissioner that his absence from this meeting is without prejudice to the interests of his Government.

Nevertheless, in the absence of the German Commissioner and the Substitute for the German Commissioner, the Commission will proceed with its meeting under the authority of the order entered on April 21, 1930, signed by the Umpire and both national Commissioners which order reads as follows:

Ordered, That during the absence of the German Commissioner from the United States the Umpire and the American Commissioner, be, and they are hereby, empowered from time to time to hold meetings (1) for the purpose of announcing and recording awards, dismissals, opinions, decisions, and orders approved in writing by the National Commissioners, (2) for the purpose of entering any order or orders which to the Umpire and American Commissioner may seem proper with respect to any administrative or other matter or proceeding coming before the Commission, — which decisions, opinions, awards, dismissals, and orders shall in all things have the same force and effect as if the German Commissioner were present, participating, and concurring therein.

Nothing herein contained shall be construed to limit or restrict the power of the Umpire to hold meetings of the Commission from time to time for the purpose of taking such action as to him may seem proper in connection with any case or point of difference certified to him by the National Commissioners.

Ordered, That the American Commissioner is hereby authorized and empowered to act for the Commission, in the absence of the German Commissioner, and also without requiring the participation of the Umpire, in calling meetings of the Commission in Washington, D. C., and announcing for record in the minutes of the Commission awards and dismissals of claims and orders of the Commission when the originals or copies of such awards, dismissals and orders signed or initialed by the German Commissioner to signify his concurrence in such action have been filed with the Joint Secretaries of the Commission or when he has notified them by letter or cable or radio communication of his concurrence therein, and also without the concurrence of the German Commissioner to announce orders on motions made by either Agent which are not opposed by the other, and the awards and dismissals and orders so announced shall have the full force and effect of final decisions and orders by the Commission.

This meeting of the Commission is called pursuant to the request contained in the following communication from the [p. 1599] Department of State to the American Agent which in compliance with the request contained therein, together with a letter dated October 11, 1933, inclosed therewith, from the German Embassy to the Secretary of State, is brought to the attention of the Commission:

DEPARTMENT OF STATE
WASHINGTON

October 19, 1933.

The Honorable Robert W. Bonyge,
Agent of the United States, Mixed Claims Commission,
United States and Germany,
Investment Building,
Washington, D. C.

Sir:

The Department encloses a copy of a note, dated October 11, 1933, received by it from the German Ambassador, stating that his Government considers petitions for rehearing to be in conflict with the provisions of paragraph 3, Article VI of the Agreement of August 10, 1922, between the United States and Germany, and that the Commission is without authority to pass upon a difference of opinion between the two Governments on this question. The Ambassador states that it is his understanding the same opinion is held by the German Commissioner, Dr. Kiesselbach.

It is the view of the Department that the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself. It is understood that the American and German Commissioners hold divergent views on this question and that in a normal course of procedure, under the claims agreement and the rules of procedure adopted by the Commission, the matter would be submitted to the Umpire for decision.

It is desired that you promptly bring this communication and its enclosure to the attention of the American Commissioner or the full Commission, as in your judgment may seem proper, for the purpose of obtaining the decision of the Umpire on this disputed point.

Very truly yours,

For the Secretary of State:
William PHILLIPS,
Under Secretary.

Enclosure:

Copy of note dated
October 11, 1933,
from the German
Ambassador. [p. 1600]

[Enclosure]

Translation.

Deutsche Botschaft

Washington, D. C., October 11, 1933.

Mr. Secretary:

Pursuant to yesterday's conference between a member of my staff and officials of your Department I have the honor to communicate to Your Excellency the following:

The German Government (as stated in the Embassy's note of July 6, 1933, and in my conversation on August 24, 1933, with the Acting Secretary of State, Mr. Wilbur J. Carr) considers petitions for rehearing in conflict with existing treaty provisions, as contained in paragraph 3, Art. VI of the agreement of August 10, 1922, between the United States and Germany. The German Government regards the commission as being without authority to pass upon a difference of opinion which may exist between the two governments in this connection.

Incidentally I understand this same opinion is held by the German Commissioner, Dr. Kiesselbach.

In February of this year Dr. Meyer, First Secretary of the Embassy, was named Acting German Commissioner for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the commission's work. He has no authority to act with respect to the petitions offered by the American Agent in

April and May of this year, but he is still authorized to participate in the formal conclusion of the compromises tentatively agreed upon in February, provided that the work of the Commission would be definitely closed.

Accept, Your Excellency, the renewed assurance of my highest consideration.
[Signed] LUTHER.

The Honorable
Cordell Hull
Secretary of State
of the United States of America
Washington, D. C.

This correspondence relates to only two petitions for rehearing:

(1) The petition on behalf of the New York Fire Insurance Company, as Successors to Norwegian Underwriters, Docket [p. 1601] No. 3120, which petition was presented April 17, 1933; and (2) the petition in the so-called sabotage cases, Docket Nos. 8103, 8117, et al., which petition was presented May 4, 1933.

It is appropriate to state at this point, for the purpose of simplifying the discussion, that although the two national Commissioners have disagreed as to the jurisdiction of the Commission to reconsider the decision of the Commission in the sabotage cases, it does not appear that they have disagreed as to the action to be taken by them on the petition in the Underwriters claim, and the American Commissioner now states that if the German Commissioner considers that that petition should be dismissed on the merits he is prepared to agree with him in that respect.

It follows, therefore, that the question now under consideration relates solely to the action to be taken with reference to the sabotage cases.

It further appears, from this correspondence, that the Government of the United States considers that "the question whether the Commission has jurisdiction to entertain petitions for rehearing is one properly to be decided by the Commission itself", and desires that the Umpire of the Commission shall render a decision on this point.

The American Commissioner concurs with the view of the Government of the United States that this question of jurisdiction is one properly to be decided by the Commission itself, and that the Umpire is authorized to render the decision of the Commission on that point. [p. 1602]

On the other hand, the German Government "regards the Commission as being without authority to pass upon the difference of opinion which may exist between the two Governments in this connection".

The American Commissioner regards this attitude of the German Government as an attempt to limit, without the consent of the Government of the United States, the jurisdiction conferred upon the Commission by the two Governments in their Agreement of August 10, 1922, in order to determine independently of the Commission, and on political or other considerations, questions submitted by virtue of that Agreement to the Commission for decision on purely legal grounds.

It also appears from the German Embassy's letter to the Secretary of State that the Acting German Commissioner, appointed as substitute for Dr. Kiesselbach, is acting under a very limited authority in that, as stated in that letter, he was named "for the sole purpose of expediting such formalities as would be found necessary for the conclusion of the Commission's work", and "has no authority to act with respect to the petitions offered by the American Agent in April and May of this year". It further appears that so far as those petitions are concerned, Dr. Kiesselbach is still in full authority as the German Commissioner.

With reference to the procedure to be taken by the Commission in order to bring before the Umpire for the decision the questions on which the two national Commissioners are in disagreement, the American Commissioner calls attention in the first place to the fact that the certification of these questions by a Certificate of Disagreement

signed by the national Commissioners [p. 1603] is purely a requirement of the rules of procedure adopted by the Commission for its own convenience, and, so far as the Agreement of August 10, 1922, under which the Commission was organized, is concerned, no Certificate of Disagreement is required in order to authorize the Umpire to decide questions of disagreement between the national Commissioners.

The requirement of the rules on this point is found in Rule VIII, which provides: “ (a) The two National Commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree, or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified.”

In view of the fact, as now placed on the record by the German Embassy's letter to the Secretary of State, that Dr. Kiesselbach is still the German Commissioner so far as the sabotage cases are concerned, and that the Acting Commissioner sitting as a substitute has no authority to sign a certificate of disagreement, and as Dr. Kiesselbach is in Germany and, accordingly, is not in a position to meet with the other members of the Commission, and as both Governments have expressed themselves as desirous of having the work of the Commission brought to a conclusion as soon as possible, the American Commissioner is of the opinion that the rule as to the certification of questions of disagreement is broad enough to permit the certification of the question of disagreement in a less formal way than by a joint written [p. 1604] certificate of disagreement, and that the Umpire may be called upon to act upon and decide questions of disagreement as to which either national Commissioner may certify to him that he is in disagreement with the other national Commissioner. In support of this view it must be recognized that this separate form of certification would be the only possible method of certification if the national Commissioners should find themselves unable to agree upon a form of joint certification, which might well happen in cases of serious dispute between them. Moreover, the requirement of the rule under consideration is of secondary importance, since, as above noted, no certification of any kind is required by the fundamental Agreement of August 10, 1922, which establishes the jurisdiction of the Commission.

It so happens that there can be no dispute or misunderstanding as to the questions upon which the two national Commissioners are now in disagreement, or the attitude of each Commissioner with respect to those questions.

In the first place, the Umpire made the following statement in his decision of December 3, 1932:

“ A matter upon which the Commissioners disagree is that of the jurisdiction of the Commission ever under any circumstances or for any reason to reopen a claim made under the international agreement of August 10, 1922, which created the Commission, once that claim has been formally passed upon and decided. The German Commissioner's position is that while the two Commissioners by mutual agreement may reopen in such a situation they may not do so where, as here, one of the Commissioners opposes the reopening. The German Commissioner does so oppose in this case.”

Dr. Kiesselbach, the German Commissioner, concurred in that decision, thereby concurring in that statement. [p. 1605]

In the second place, under date of May 5, 1933, Dr. Kiesselbach, as German Commissioner, wrote to the American Commissioner that his Government had advised him “ to bring now the question of whether or not our Commission has the right to reopen to a final decision ”, and that he had prepared an opinion on this question which he had filed with the Umpire, reserving the right to amend it should the American Commissioner disagree with him, and prepare an opinion in opposition. He also requested the American Commissioner in that letter to prepare

and send him, with his opinion, a certificate of disagreement, which he could sign and return, together with his final opinion. This letter reads in full as follows:

Dr. Wilhelm KIESSELBACH
Präsident
Des Hanseatischen Oberlandesgerichts

Hamburg 36, May 5th 1933.

My dear Mr. Anderson:

My Government informs me that its endeavours have failed to terminate the Commission's task by a compromise on the cases the reopening of which has been requested by the American Agent and advises me to bring now the question whether or not our Commission has the right to reopen to a final decision.

I therefore enclose a copy of my opinion on this question which I beg to consider as tentative in so far as I reserve the right to amend and supplement it if and when you disagree and should prepare also an opinion.

In order to expedite the matter I suggest that together with your opinion you send me the certificate of disagreement. Then I can sign and return it together with my final opinion.

In order to keep our *Umpire au courant* I have sent him a copy of my opinion and of this letter.

Very sincerely yours,
[Signed] W. KIESSELBACH.

Mr. Chandler P. ANDERSON,
Mixed Claims Commission,
Investment Building,
Washington D. C. [p. 1606]

The American Commissioner wrote to Dr. Kiesselbach, in reply, under date of June 1st, advising him of the then status of the negotiations which had been undertaken between the two Governments for the settlement of outstanding claims, and advised him that pending the outcome of those negotiations, and in order to expedite a conclusion, if occasion arises, "I am preparing an opinion on the jurisdictional question which you have discussed in your opinion inclosed in your letter to me, and I will have it ready for submission to the *Umpire* if that question is to be certified to him. I do not understand why you reserved it from our certificate of disagreement in the sabotage cases last November." A copy of that letter is in full as follows:

Washington, D. C., June 1, 1933.

Dr. Wilhelm KIESSELBACH,
Präsident,
Des Hanseat. Oberlandesgerichts.
Hamburg, Germany.

My dear Dr. Kiesselbach:

I have received your letter of May 5th, which was somewhat delayed in reaching me, and since then, owing to the temporary absence from Washington of the Undersecretary of State, who has charge of the German claims negotiations with your Government, I have only recently been able to find out what is the present situation.

In your letter you state that your Government informs you that these negotiations have failed and, therefore, the questions of the Commission's right to reopen should be brought to a final decision.

Apparently there is some misunderstanding about the situation, as my Government informs me that arrangements for the settlement of all pending cases on an agreed basis are still under consideration.

As I understand our position, the two Governments, [p. 1607] by undertaking these negotiations, have for the time being taken the disposition of these cases out of the hands of the Commission, and I do not feel at liberty to take action on any of these cases pending further instructions from my Government.

Meanwhile, however, in order to expedite a conclusion if occasion arises, I am preparing an opinion on the jurisdictional question which you have discussed in

your opinion inclosed in your letter to me, and I will have it ready for submission to the Umpire if that question is to be certified to him. I do not understand why you reserved it from our certificate of disagreement in the sabotage cases last November.

I note that you have sent to the Umpire a copy of your opinion, and I will do the same with mine when it is ready, and will also send a copy to you.

It is rather disappointing to have the closing stages of the Commission's work left in such a confused condition, after all the hard work which we have done, and the admirable results accomplished during the last ten years.

Very sincerely yours,
[Signed] Chandler P. ANDERSON.

Since then the only communications exchanged between the two national Commissioners consist of two cablegrams reading as follows:

Washington, June 17, 1933.

Dr. Wilhelm Kiesselbach
Aumuehle bei Hamburg Germany

With reference request in your letter May five that I prepare certificate of disagreement about jurisdictional right to reconsider decisions, my Government, in view of diplomatic discussion with your Embassy here, is willing to have this question certified now to Umpire, provided it applies only to reconsidering Sabotage cases. Under our practice hitherto followed this question has never been considered before the submission of the new evidence on which rehearing petitions rested and if the question is to be submitted to the Umpire before the new evidence is submitted in the Sabotage cases my Government considers that your Government should agree that regardless of what the Umpire's decision may be the awards tentatively agreed upon in the other pending cases will be entered immediately and [p. 1608] my Government will agree that no other rehearing petition will be submitted except the Sabotage petitions if authorized by Umpire's decision.

Please cable if this suggestion satisfactory to you and your Government and I will then cable form of certificate of disagreement.

ANDERSON

June 23, 1933.

Chanderson
Washington
Must leave negotiations and decision to my Government.

KIESELBACH

These cablegrams relate to a situation then under diplomatic discussion concerning the settlement of all the pending cases, except the sabotage cases, by agreement directly between the two Governments, which negotiation is still pending, as shown by the letter of October 11, 1933, from the German Ambassador to the Secretary of State, which is quoted above. The American Commissioner considers that these cables do not change the situation developed by the letters of May 5 and June 1, above quoted, between the German Commissioner and the American Commissioner.

The situation developed by that correspondence has since remained unchanged so far as the national Commissioners are concerned. It may be noted, however, that the American Commissioner has not as yet filed with the Umpire his opinion on the disputed questions in opposition to the German Commissioner's opinion already filed with the Umpire, and in compliance with the present attitude of the American Government, the American Commissioner now presents to the Umpire his opinion. Although, [p. 1609] for the reasons above stated, the American Commissioner considers that the questions in dispute between the two national Commissioners are already sufficiently evidenced and defined in the record without any final certification to justify the Umpire in taking jurisdiction to decide upon them, under the authority conferred upon him by Article II of the Agreement of August 10, 1922, "to decide upon any cases concerning which the Commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings",

nevertheless, the American Commissioner, in order to fulfill what may be considered a technical requirement under the rules, has prepared, and now presents to the Umpire, a separate certificate of disagreement in writing, signed by him, together with a formal written request that he take action on the questions about which the two national Commissioners are in disagreement, as shown by the record and in their respective opinions, having first, however, given the German Commissioner an opportunity to revise his opinion after reading the opinion of the American Commissioner, which is being forwarded to the German Commissioner in accordance with the request made by him to that effect.

The American Commissioner thereupon handed to the Umpire the following communication:

October 31, 1933.

The Honorable Owen J. ROBERTS,
Umpire of the Mixed Claims Commission,
United States and Germany,
Washington, D. C.

Sir:

Pursuant to the statement made by me at the meeting of this Commission today (October 31, 1933), [p. 1610] a copy of which is attached hereto, I have signed and hand to you herewith my written opinion and a certificate of disagreement concerning questions on which the German Commissioner and I are unable to agree, arising out of the pending petition for a rehearing presented to the Commission by the Government of the United States through its Agent on behalf of the claimants in the so-called sabotage claims.

On the basis of these documents and the record now before us concerning these claims, and in the exercise of the authority conferred on you by Article II of the Agreement of August 10, 1922, which authorizes you "to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings", I hereby request that in the circumstances you will proceed to render the decision of the Commission on the questions thus presented.

Respectfully yours,
Chandler P. ANDERSON,
American Commissioner.

If the German Commissioner should revise the opinion already filed by him with the Umpire the American Commissioner may wish to revise or add to his opinion and reserves the right to do so if he so desires.

The Umpire thereupon said "Let the record show that the Umpire has received the letter just read and the certificate of disagreement under the cover of that letter, and that in view of the statement of the American Commissioner that he is forwarding a copy of these papers to Dr. Kiesselbach in Germany I think I should take no action until a reasonable time has been afforded to Dr. Kiesselbach to advise me of any views he may have in the premises or to revise his opinion or supplement it in any way he sees fit."

The Umpire announced that the following order had just been signed by the Umpire and the American Commissioner: [p. 1611]

Ordered, That the certificate of disagreement dated October 31, 1933, signed by the American Commissioner, in Docket Nos. 8103, 8117, et al., the opinions of the German Commissioner and the American Commissioner respectively set out therein, and the statement made by the American Commissioner at the meeting of the Commission held this day, be placed in the records of the Commission.

Done at Washington October 31, 1933

Owen J. ROBERTS,

Umpire.

Chandler P. ANDERSON,
American Commissioner.

The Umpire inquired if the Agents had anything to submit in respect to the pending questions. The American Agent stated that he is willing to submit the questions thus raised as the record now stands, on the briefs and oral arguments heretofore had, but that he would desire an opportunity to submit further observations if the German Commissioner revises his opinion as heretofore filed.

The Umpire stated that it is understood that it is the position of the German Agent that he is not authorized to take any part in this proceeding, and the Umpire further stated that the Umpire will be entirely willing to receive any observations or representations the German Agent may wish to make in the pending matter and he is willing to receive such as in the nature of a special appearance as not conceding anything and without prejudice to the position of the German Agent's Government before the Commission.

The American Commissioner stated, for the particular information of Dr. Johann G. Lohmann, German Agent, that he is this day sending by mail to the German Commissioner, Dr. Kiesselbach, in Germany, a copy of the statement he had made at this meeting and of the certificate of disagreement filed by him, and [p. 1612] that a copy of the said documents would be furnished to the Acting German Commissioner and to the German Agent as soon after the adjournment of this meeting as possible.

There being no further business to be transacted at this meeting, the Commission, at 4: 40 o'clock p. m., adjourned subject to call.

Approved:

Owen J. ROBERTS,
Umpire.

Chandler P. ANDERSON,
American Commissioner.

Ernst W. MEYER,
German Commissioner.

Countersigned:

Walter R. DORSEY,
American Joint Secretary.

Alfred LÜDERS,
German Joint Secretary.

(B) *Except from Minutes of Commission for Meeting Held May 7, 1934, pp. 1625-1627*

The German Agent stated that there had just been an exchange of notes between the German Ambassador and the Secretary of State, and handed a copy of each of the notes to the Commission. The American Commissioner directed that the copies be spread on the Minutes of this meeting. They are as follows:

Translation
Washington, D. C.
May 7, 1934.

Mr. Secretary:

Pursuant to my note of March 3rd I have the honor to inform Your Excellency with reference to Your esteemed Note of February 20, 1934 — 462 11 W 892/2412— that following Your Excellency's suggestion all cases which were pending before the Mixed Claims Commission, United States and Germany, have been disposed of, with the exception of claims registered in Docket Nos. 8103, 8117, 8231-8296, 8361-8363, 8371-8450, 8467, 14901, and Docket Nos. 4712 and 11485.

Concerning the claim of Mrs. Catherine McNider Drier, Docket No. 11485, I beg to inform Your Excellency that the German Government prefers to have this matter left pending before the Commission for the time being, as the German Government has recently been advised that the material submitted by Mrs.

Mc-Nider Drier, on the basis of which the Commission granted her an award of \$250,000 plus interest in 1929, appears to be not beyond suspicion. An investigation has been started accordingly which will take a little time for its conclusion.

I should be grateful to Your Excellency if you would advise me that the American Government agrees with the German Government that the Mixed Claims Commission, United States and Germany, shall not be asked in the future to consider new cases or cases already decided, excepting the sabotage cases registered in Docket Nos. 8103, 8117, 8231-8296, 8361-8363, 8371-8450, 8467, 14901, and the claim of Mrs. Catherine McNider Drier, registered in Docket Nos. 4712 and 11485. [p. 1626]

Please accept, Your Excellency, the renewed assurances of my highest consideration.

(Signed) LUTHER

The Honorable Cordell HULL,
Secretary of State
of the United States of America,
Washington, D. C.

May 7, 1934.

Excellency:

I have received your note of May 7, 1934, informing me that, following the suggestion contained in my note of February 20, 1934, all cases that were pending before the Mixed Claims Commission, United States and Germany, have been disposed of, with the exception of the sabotage claims registered in Docket Nos. 8103, 8117, 8231 to 8296, both inclusive, 8361, 8362, 8363, 8371 to 8450, both inclusive, 8467 and 14901; and the claim of Mrs. Katherine McNider Drier, Docket Nos. 4712 and 11485.

As to the claim of Mrs. Katherine McNider Drier, covered by Docket Nos. 4712 and 11485, you state that your Government prefers to leave this matter before the Commission for the time being, as the German Government has recently been advised that the material submitted by Mrs. Drier, on the basis of which the Commission granted her an additional award of \$250,000 plus interest in 1929, appears to be not beyond suspicion; that an investigation has accordingly been started which will require a little time for completion; and that the case should be left for later decision, as are the so-called sabotage cases.

I regret that the German Government is unwilling to have this case closed along with the other cases on which agreements were reached by the two Agents in February of last year. The claim was the subject of discussion between the American and German Agents and counsel for the claimant at various times, and on February 27, 1933, an additional amount of \$160,000 was agreed upon. The German Agent, so I am informed, stated that he could not give his final approval to the settlement until he had consulted his Government. It appears that later, namely, on March 1, he informed the American Agent that his Government had approved the settlement, and this information was conveyed to counsel for the claimant.

Since that time the claim has been included in the list of claims on which tentative settlements had been reached, and prior to the receipt of your [p. 1627] note of May 7, 1934, no condition was stated, except that the work of the Commission be promptly closed. The present correspondence is calculated to limit the work of the Commission so as to bring its work to an end at the earliest practicable date. The failure to settle this claim in accordance with the understanding reached more than a year ago is placing the claimant and this Government in an embarrassing position, since both had relied upon the agreement reached and had considered the case as definitely settled, save for the formal consummation of the arrangement.

If the case is left before the Commission, it will be necessary to give the claimant time to marshal additional evidence to combat any evidence that the German Government may submit, which will mean that the completion of the work of the Commission will be indefinitely postponed. The amount involved is comparatively small.

It is therefore hoped that on further consideration your Government will deem

it desirable to give finality to the settlement heretofore reached in the Drier case.

I agree with Your Excellency that the Commission shall not in future be asked to consider any new cases or cases already decided, other than the sabotage cases and the case of Mrs. Katherine McNider Drier.

Accept, Excellency, the renewed assurances of my highest consideration.

(Signed) Cordell HULL

His Excellency

HEINRICH HANS LUTHER,
Ambassador of Germany.

(C) *Excerpts from Minutes of Commission for Meeting Held October 30, 1939, pp. 1725-1726*

[Following the announcement of the decision of the Commission by the Umpire of October 30, 1939, in Docket No. 8117, the Minutes then show that:]

The American Commissioner then made the following statement:

"In accordance with the order entered on June 15, 1939, the American Agent and the Acting American Agent prepared and submitted to the Commission for its approval memoranda relating to all the pending sabotage claims and the awards to be entered.

"Some of the questions which have arisen in the study of these cases are of a legal character, in which I have furnished the [p. 1726] Umpire memoranda of the Acting American Agent and memoranda prepared by me relating thereto.

"I have thoroughly examined the files for the purpose of determining the correct measure of damages in all of these cases, and have furnished the Umpire memoranda relating thereto. I have also furnished him memoranda prepared by the Acting American Agent relating to the question of damages.

"Wherever the files disclosed that a question of fact or of law was raised, I have discussed it with the Umpire personally. I have presented to him for his consideration an award in each of the 153 sabotage cases."

The Umpire then said that after a study of the data and the records and the memoranda prepared, he had found that the awards were, in his judgment, accurately and properly calculated, and that he had joined the American Commissioner in signing the awards and directed that these awards be entered and filed in the records of the Commission.

Appendix V

Copies of correspondence in March, and June, 1939, in relation to the retirement of the German Commissioner from the Commission, as set out at pages 1703-1713 of the Minutes of the Commission for the meeting held June 15, 1939; also copies of correspondence in October, 1939, between the German Embassy and the Department of State in relation to the work of the Commission, as set out as pages 1726-1751 of the Minutes of the Commission for the meeting held October 30, 1939.

[*The German Commissioner to the Umpire*]

Deutsches Mitglied
der
Mixed Claims Commission

The German Commissioner
Mixed Claims Commission

1439 Massachusetts Avenue
Washington, D. C.,
March 1, 1939.

My dear Mr. Justice Roberts:

I beg to apprise you of the fact that I retire from the post of German Member

of the Mixed Claims Commission. Please consider running appointments as cancelled.

The reasons for my step are these:

Our deliberations began with discussing whether there was a *prima facie* case made out by the claimants and at once one fact became conspicuous: In respect to the largest of our claims you introduced as your main point a point which was not made by the claimants at all and which, as far as I am aware, never was argued. It may be recapitulated in a few sentences:

When our Commission rendered their decision at the Hague, they had before them two American witnesses and one German witness [p. 1704] testifying to the central question. Our Commission did not believe the American witnesses and said so; neither did they believe the German witness, and they said so. In the reopening pleadings the testimony of the German witness is impugned by the claimants and the point which the claimants really make is: Had the Commission at that time known to what extent the German witness had been untruthful, then they would not have denied credence to the American witnesses with whom he was in contradiction. This point is logically impeccable, as I always have admitted; it makes the issue dependent on factual considerations which I always have been ready to consider. Instead of this point you introduced a totally different point (without being able by the way to substantiate it by any international or even municipal decision) which enables you to dispense with any factual consideration at all: You assume that although the Commission denied credence to the German witness they were still decisively influenced by the fact that he came forward at all. And actually this consideration was for you the decisive one regarding the question of the *prima facie* case which we were then discussing, for what other reasons you advanced for your attitude did not relate to the largest case before us, so that in this case the reason indicated was your only reason.

The grave irregularity created by your procedure was twofold. Fresh points introduced in as late a stage as the deliberations of the Court after the Argument make the other party defenseless. No opportunity is accorded to the defendants to show what they have to say against your views, and they may have to say a great deal.

But the other point is still of greater weight. I cannot shut my eyes to the fact that in my opinion it is not compatible with the position of an Umpire and it shows a bias if the Umpire makes points and bases his decisions on them which are not advanced by the party [p. 1705] favored by them. The Umpire actually assumes by such a procedure the attitude of a legal adviser for the favored party and does so under circumstances under which the other side can no longer expect equal justice.

The grave situation with which I felt myself confronted (especially when all my attempts to show you what I have just explained were of no avail at all) made it my duty to consider whether I could still cooperate in what was going on and what was to my mind no longer a really judicial procedure. It was perfectly clear to me that I was under a serious responsibility not to act hastily and to thoroughly consider the attitude which I had to take. But what accompanied the events described by me and what followed them in the next days only corroborated my original impression. My conviction that you had no longer an open mind deepened. I could not overlook certain points as, for instance, this: A very fully substantiated factual German argument on a certain point was discarded by you solely on the ground that "It merely was a clever piece of advocacy"; when I insisted what your reason was to discard it so summarily, you gave a factual reason which I could show at once to be erroneous. Instead of now reconsidering your attitude, your answer merely was in an impatient voice "You may be quite sure that I do not care in the least for all that." But this instance obviously was only a symptom.

It has become clear to me during these days that any argument advanced by the claimants at once attracts your attention and evokes the idea, How could it be corroborated? Any argument advanced in favor of the defendants at once evokes in you the idea, How can it be refuted! As you told the American Commissioner and me, in many respects this case has been a disillusion to you and this has left a strong emotional feeling with you. I cannot be but afraid that this emotional feeling carries you away when I see to what extent the responsibility of German advocates and witnesses is stressed by you whilst on the other [p. 1706] hand you find no way to put in the balance what under the same heading may be alleged against the other side.

The result to which I have come is that it is impossible for me to cooperate in a procedure which no longer offers to both parties equally the usual guarantees of a decision arrived at in a really judicial way. Our charter allows any member of the Commission to retire and this is the consequence which I have drawn.

Faithfully yours,

Dr. Victor L. F. H. HUECKING

[*The Umpire to Dr. Huecking*]

March 2, 1939

Dr. Victor L. F. H. HUECKING,
c/o German Embassy,
1439 Massachusetts Avenue, N. W.,
Washington, D. C.

My dear Dr. Huecking:

I have your letter of March 1, 1939, advising that you are retiring from the post of German member of the Mixed Claims Commission.

I do not propose to enter into any controversy with respect to the statements contained in your letter other than to say that they are unjustified and, in my opinion, present a wholly false picture of our deliberations with respect to the motion pending before the Commission.

Yours sincerely,

Owen J. ROBERTS,
Umpire

[*The German Commissioner to the American Commissioner*]

Deutsches Mitglied der
Mixed Claims Commission

1439 Massachusetts Avenue,
Washington, D. C.
March 1, 1939

The German Commissioner
Mixed Claims Commission

Dear Colonel Garnett:

Under even date I am sending a letter to Mr. Justice Roberts [p. 1707] in which I apprise him of my retirement from the post of German member of the Mixed Claims Commission.

I know that this step comes at a moment when our deliberations are still in an absolutely preliminary state and at a time when any question of possible agreement

or disagreement in necessarily still in the remote distance, but it was just the continuation of our deliberations under the present conditions which I had to object to.

Please consider running appointments as cancelled.

Faithfully yours,

Dr. Victor L. F. H. HUECKING

[*The American Commissioner to Dr. Huecking*]

Department of State,
Washington, D. C.
March 3, 1939

Dr. Victor L. F. H. Huecking,
c/o German Embassy,
1439 Massachusetts Avenue,
Washington, D. C.

Dear Dr. Huecking:

This will acknowledge receipt of your letter of March 1, 1939, in which you inform me that you have sent a letter to Mr. Justice Roberts, apprising him of your retirement from the post of German Member of the Mixed Claims Commission.

In your letter you state that this step has come at a moment when our deliberations are still in an absolutely preliminary state and at a time when any question of possible agreement or disagreement is still in the remote distance. I feel it my duty to say that this statement is not in accordance with my understanding of the situation. [p. 1708]

It developed at these conferences that I had come to the definite conclusion that the decision at Hamburg had been reached upon false and fraudulent evidence, and in this conclusion you refused to concur. This point of difference had been clearly brought out.

I am sure you will recall that, after several conferences had been held, the Umpire expressed himself in agreement with me, and we both informed you of our conviction that the decision at Hamburg had been reached upon false and fraudulent evidence, and that the proof of fraud was sufficient to set aside that decision and to reopen the case. Thereupon, you argued that if, upon an examination of the whole case, both the new evidence and the old, the Commission came to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague, the present petition would have to be dismissed. You then urged upon the Umpire and myself that we should consider the whole evidence for that purpose. It was thereupon agreed that we would proceed to examine the whole record to determine whether, upon the whole record, the American case had been proven. It was while we were examining this question that your action was taken.

I cannot let the record stand as stated in your letter.

Very truly yours,

Christopher B. GARNETT,
American Commissioner. [p. 1709]

CBG/AEC

[*The American Commissioner to the Secretary of State*]

Department of State
Washington, D. C.

March 3, 1939

Honorable CORDELL HULL,
Secretary of State,
Washington, D. C.

Dear Sir:

I have the honor to submit to you a report of the action of Dr. Victor L. F. H. Huecking, German Commissioner, Mixed Claims Commission, United States and Germany, announcing his retirement from the post as German Commissioner.

Under date of March 1, 1939, Dr. Huecking sent to Mr. Justice Roberts, the Umpire, a letter announcing his retirement. A copy of that letter is attached hereto, together with a copy of Mr. Justice Roberts' reply.

Under the same date, March 1, 1939, Dr. Huecking forwarded to me a letter apprising me of the fact that he had sent the aforesaid letter to Mr. Justice Roberts. I am attaching hereto a copy of Dr. Hueckings' letter and of my reply thereto.

I think it proper to give you the recent history of this case. The primary question now before the Commission is whether the decision which was reached at Hamburg, October 16, 1930, was induced by fraudulent and collusive evidence. In considering this question, the Commission has been operating under the decision of the Umpire rendered December 15, 1933. In order to reach a conclusion, it has been necessary for the Commission to take into consideration, not only the evidence filed since the Hamburg decision, but also the evidence filed theretofore. The whole record covers between thirty and forty thousand pages, and of this, the evidence filed since the decision at Hamburg covers about fifty per cent. [p. 1710]

The taking of evidence in this case was closed on the 14th day of January, 1939, and very voluminous briefs have been filed on both sides on every feature of the case. After extensive arguments covering twelve days, the case was submitted to the Commission on the 27th day of January, 1939.

After about two weeks had elapsed, the Umpire and the Commissioners began their conferences, and these conferences continued, but not on consecutive days, until Tuesday, February 28, 1939, when the last conference was held. Another conference was scheduled to be held on Thursday, March 2, 1939, at the office of the Umpire. Shortly before the time for the conference the letters from Dr. Huecking were delivered to the Umpire and myself, respectively.

As will be indicated clearly by my reply to Dr. Huecking's letter, the subject of these conferences was whether the evidence which had been adduced had proven fraud which was sufficient to set aside the decision at Hamburg. During these conferences, I expressed to the Umpire and the German Commissioner my opinion that the decision at Hamburg had been reached on false and fraudulent evidence and that the proof of fraud was sufficient to set aside the Hamburg decision, and reopen the case.

After the conferences had extended for a considerable time, the Umpire expressed himself in entire agreement with me on this proposition. Thereupon, the German Commissioner argued that, if upon an examination of the whole record both before and subsequent to the Hamburg decision, the Commission were to come to the conclusion that the United States had not proven its case, even though there had been fraud in the evidence before The Hague argument, the petition would have to be dismissed, and he urged upon the Umpire and myself that we should consider the whole evidence for that purpose. We thereupon proceeded to examine the whole

record to determine from that record whether the [p. 1711] American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken.

Very respectfully submitted,

Christopher B. GARNETT,
American Commissioner

CBG/AEC

[*The German Agent to the American Joint Secretary*]

Mixed Claims Commission
United States and Germany
German Agency
Mr. Walter R. Dorsey,
American Joint Secretary,
Mixed Claims Commission,
United States and Germany,
Washington, D. C.

1439 Massachusetts Ave., N. W.,
Washington, D. C.
June 10, 1939.

Dear Mr. Dorsey:

With reference to the "notice of meeting", dated June 7, 1939, in which you inform me by direction of the American Commissioner that "a meeting of the Mixed Claims Commission, United States and Germany, will be held on Thursday, June 15th, 1939, at 11 o'clock a. m., in the large conference room of the United States Supreme Court Building", I hereby advise you that in view of the note addressed by my Government to the Department of State today, I shall not appear at the meeting.

Very truly yours,

Richard PAULIG,
German Agent. [p. 1712]

[*Dr. Huecking's Secretary to the American Joint Secretary*]

Washington, D. C., June 10, 1939.

Mr. Walter R. Dorsey
American Joint Secretary
Mixed Claims Commission
United States and Germany
Washington, D. C.

My dear Mr. Dorsey:

Your notice of meeting of June 7th, 1939, addressed to Dr. Victor Huecking, was referred to me since, as the former Commissioner's secretary, I still take care of his mail.

Enclosed herewith I am returning your letter because, as you know, Dr. Huecking resigned as a member of the Commission at the beginning of March and left Washington shortly thereafter.

Yours very truly,

Frieda van MEGEN

[*German Chargé d'Affaires ad interim to the Secretary of State*]

[*Translation*]

German Embassy

Washington, D. C.,

June 10, 1939

Mr. Secretary of State:

I have the honor to advise your Excellency of the following:

As the German Agent on the German-American Mixed Commission reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at 11 a.m. on June 15th in the large conference room of the United States Supreme Court Building, was received by him on June 7th, of this year.

By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, Dr. Victor Huecking, on March 1st of this year, of which I notified the American Government by a note to your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently [p. 1713] there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that the Government of the Reich will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN

His Excellency

Mr. CORDELL HULL,
Secretary of State of the United States,
Washington, D. C.

[*The Secretary of State to the American Commissioner*]

Department of State
Washington

October 18, 1939

My dear Mr. Garnett:

In conformity with a request of Herr Hans Thomsen, German Chargé d'Affaires ad interim, I enclose a copy of the translation of his note of October 3, 1939 in relation to proceedings before [p. 1727] the Mixed Claims Commission, United States and Germany, regarding the so-called sabotage claims. I also enclose a copy of the Department's reply to the above-mentioned communication.

Sincerely yours,

CORDELL HULL

Enclosures:

1. Translation.
2. Department's reply.

The Honorable

Christopher B. GARNETT,
Commissioner, Mixed Claims Commission,
United States and Germany,
Washington, D. C.

[*German Chargé d'Affaires ad Interim to the Secretary of State*]

[*Translation*]

German Embassy

Washington, D. C.

October 3, 1939

Mr. Secretary of State:

By direction of my Government I have the honor to make the following detailed statements to Your Excellency, supplementing my note of July 11, 1939¹:

In the note of July 11, the German Government, through me, had protested to Your Excellency against certain acts in the proceedings before the German-American Mixed Commission on the so-called Black Tom and Kingsland cases and had called the attention of Your Excellency to the fact that measures for remedying [these matters] are urgently [p. 1728] required. By direction of My Government I had already protested most emphatically in this note against the decision of the American Umpire to grant awards in favor of the American and Canadian claimants, and also against all steps already taken and still to be taken by the American Agent for obtaining awards. At the same time I had requested Your Excellency to bring this protest and the declaration of my Government, that any "awards" of the rump Commission are void, to the knowledge of the Secretary of the Treasury of the United States. Lastly I had announced in this note that I would take occasion in a further note to return to details of the above-mentioned violations of the rules of procedure and all other serious irregularities which have occurred since March 1 in the procedure of the Commission.

As Your Excellency advised me by the note of July 20, a copy of my note of July 11 was sent to the Treasury Department of the United States.

The present note is intended to serve the purpose announced and will discuss in detail the violations of the rules of procedure in the proceedings continued before the rump Commission. The German Government regrets all the more to have to make protests against this procedure, because the German-American Mixed Commission could look back upon a model success in working, which had been made possible by confidential and friendly collaboration of the members of the Commission and the two National Agents. It is characteristic of the spirit in which the so-called Black Tom and Kingsland cases in particular were treated by the German Government that the claims of the Lehigh Valley Railroad Company arising out of the explosion at the Black Tom Terminal, which Company was chiefly concerned, were admitted into the proceedings before the German-American Mixed Commission only because [p. 1729] of voluntary admission by the German Government, after delay in submission. The German Government could have decisively excluded any discussion of these claims by referring to their delayed submission and the incompetence of the Commission arising therefrom. However, it did not pursue this course, but opened to the American Government and the American parties concerned the possibility of submitting the claims to the Commission for investigation and decision, by agreeing to the admission of these claims into the proceedings of the Commission, despite the delay in application, which would not have been possible without its assent. The outcome was the decision of October 16, 1930, by which the Commission unanimously denied the claims arising out of the explosion at the Black Tom Terminal and also the claims arising out of the fire at the Kingsland factory.

According to the agreement between the German Government and the United States Government of August 10, 1922, this decision was to be accepted by both Governments as final and binding. Despite this provision, however, the American

¹ Not part of Minutes of Commission.

Agent submitted three applications in succession for reopening [of the cases], the first two of which were rejected by decisions of the Commission of March 30, 1931, and December 3, 1932. The third application for reopening, which was submitted on May 4, 1933, formed the subject of the last proceedings. In these proceedings there began the serious irregularities under discussion, which led to the withdrawal of the German Commissioner on March 1, 1939, and which finally reached their culmination in those measures against which the German Government found itself compelled to protest most emphatically.

1. The German Government sees the first violation of the basic agreements of the two Governments and the Regulations on Procedure of the Commission in the fact that early in June 1939 the American Commissioner on his own motion drew up and published an order by which a "session of the Commission" was called for June 15. As I have already [p. 1730] stated in my note of June 10 addressed to Your Excellency immediately after this measure became known, there was no legal basis whatever for such a unilateral manner of action of the American Commissioner and for the holding of a "session of the Commission". Despite these protests, the American Umpire and the American Commissioner, to whose knowledge my note had been brought, held the "session" that was called and at this meeting issued a "judgment" and also a decision on questions of the greatest importance. At the conclusion of this "session", the American Umpire announced that the "Commission" would hold a further "session" for the issuance of "awards", notices of which would be sent out.

As previously in my notes of June 10 and July 11, 1939, I again consider myself compelled now to call attention to the fact that during the vacancy in the position of the German Commissioner the Commission was incompetent to make a decision and therefore could not assemble for meetings either. The Commission is a *mixed* Commission; consequently decisions as to the holding of sessions and all other decisions can be made only by collaboration of the two National Commissioners. This self-evident principle has, in addition, been confirmed explicitly in the Agreement of August 10, 1922, between the German Government and the United States Government, Article III of which reads as follows:

"They (the National Commissioners) may fix the time and place of their subsequent meetings according to convenience."

According to this the American Commissioner and the American Umpire have no power and no right to call meetings of the Commission without the collaboration of the German Commissioner or to hold sessions at which measures concerning Germany are discussed, ordered or promulgated. The Agreement of August 10, 1922 is the charter established for the Commission by the two governments, which is unalterable for the Commission. Under it, the Commission is composed of the two [p. 1731] National Commissioners, and the Agreement of August 10, 1922 gives them the right to adjust the procedure and determine its course.

In order that no doubt may arise as to the view of the German Government, it is emphasized that in none of its communications has it taken the stand that by the withdrawal of the German Commissioner the Commission has become "functus officio" and has thereby lost its competence. The withdrawal of the German Commissioner has, in the opinion of the German Government, not produced such an effect; the matters covered by the Agreement of August 10, 1922, which were brought before the Commission in the proper way, within the framework of the agreements of the two Governments, belong, just as before, under its competence. The sole conclusive question here is whether during the vacancy in the position of the German Commissioner the American Commissioner, whether alone or jointly with the American Umpire, can exercise functions which the governmental agreement has entrusted to the two National Commissioners for joint exercise. Under

the Agreement of August 10, 1922, no such authority of the American Commissioner exists.

By direction of my Government I therefore protest most emphatically against the holding of the further "session of the Commission" announced by the Umpire.

2. No less illegal than the calling and holding of the "session" of June 15, 1939, was the manner of action of the American Commissioner in the *first* matter which he treated at this meeting with the American Umpire. He made public a summary of the letters which he himself and the American Umpire had exchanged early in March 1939 with the German Commissioner, who has withdrawn. On the basis of an order issued by him the text of these letters, copies of which he made available, was reproduced in the report of the session. But not only was the text of the letters included in the records of the [p. 1732] Commission and in the report of the session, but the American Commissioner embodied it also in subsequent written statements in which he attempted to prove the existence of a disagreement between himself and the German Commissioner.

The correspondence thus employed by the American Commissioner concluded with a letter of March 3 addressed by him to the German Commissioner, in which he made the assertion that the stage of disagreement had already been reached in the discussions of the Commission. This enumeration and employment of the correspondence by the American Commissioner was bound to create the impression and doubtless was intended to do so, that the letters were reproduced in full and that the German Commissioner had accepted, by maintaining silence, the above mentioned assertion of the American Commissioner.

The picture of the written exchange of opinions between the two National Commissioners which the American Commissioner in this way caused to appear in the records and in his subsequent written statements was, however, incorrect. Immediately after the German Commissioner, [now] withdrawn, had received the letter of March 3 from the American Commissioner, he most decidedly contradicted the assertion that he had dissented in the deliberations. In a letter to the American Commissioner written on that same day, a copy of which I sent to Your Excellency on July 10, he set forth clearly and in detail those facts and opinions which showed the incorrectness of the stand of the American Commissioner. Of special significance on this point are the following statements in the reply of the German Commissioner to the American Commissioner, of March 3:

"I surely reserved any decision of mine with respect to the question as to whether the cases should be reopened or not. This was a necessary consequence of the point of view held by all three [p. 1733] of us, viz. that there could be no reopening, if the new decision on the old and new evidence taken together should be identical in tenor with the Hamburg Decision.

"... I reserved also my decision with respect to the question as to whether the Hamburg Decision had been reached upon false and fraudulent evidence. Certainly I put before you the doubts which might militate against such an assumption. But from reaching a decision about this point which might be considered as a definite agreement or disagreement I naturally refrained . . .

"I never should have formally disagreed on *anything* in this case without giving a fully substantiated written opinion.

"How far we were from any agreement or disagreement may be best evidenced by the fact that none of us had even touched upon the subject of the nationality of the Canadian Car Agency, also you yourself will hardly entertain any doubt that this question of jurisdiction or may be of the substance of the case would be a part and topic of any decision."

It does not need to be emphasized that this letter was of decisive significance in judging of the question whether a disagreement between the national Commissioners existed which would have justified the Umpire in taking up the questions brought before the Commission. The failure to place this letter of the German Commissioner

in the records of proceedings and the written statements of the American Commissioner which the American Umpire accepted as his own, for collaboration in the present cases, is an action which in itself alone stamps the proceedings conducted since March 1 as irregular. Failure to make known the position of the German Commissioner in opposition to the unilateral declaration of the American Commissioner regarding the alleged disagreement deprives the subsequent acts of the American Umpire of any legal basis and makes them void.

3. The following acts contrary to the rules of procedure were connected with the incomplete submission of the correspondence discussed in the foregoing paragraph:

After the American Commissioner had presented a document designated as a "Certificate of Disagreement" and a vote amounting to about 500 pages, signed by him, the American Umpire read aloud a statement [p. 1734] designated as a "decision", in which he approved the American proposal of May 4, 1933, for reopening. At the same time the American Umpire made the vote of the American Commissioner, comprising 500 pages, a constituent part of his "decision" by citing it.

I am instructed to call attention most emphatically to the fact that the cases in question were not at a stage in which the American Umpire had authority to make a decision. His functions, as well as the conditions under which he is authorized and called upon to act, are exactly circumscribed and delimited in the Agreement of August 10, 1922, as well as in the Rules for Procedure of the Commission, established by joint agreement.

Article II of the Agreement provides:

"The two Governments shall by agreement select an Umpire to decide upon any cases concerning which the Commissioners may disagree or upon any points of difference that may arise in the course of their proceedings."

In the Rules of Procedure the following is prescribed:

"VIII. (a) The two national commissioners will certify in writing to the Umpire for decision (1) any case or cases concerning which the Commissioners may disagree or (2) any point or points of difference that may arise in the course of their proceedings, accompanied or supplemented by any statement in writing which either of them may desire to make of his opinion with respect to the decision of the case or cases or point or points of difference certified."

It is thus made clear in a form excluding any doubt that the Umpire may move to a decision only if two prerequisites are fulfilled, viz.:

1. *A formal disagreement of the two National Commissioners* on the controversial question submitted to them for opinion or decision must exist.

2. Both *National Commissioners* must have certified this disagreement *in written form*.

Neither of these two conditions existed in the present case. [p. 1735]

[*Comment*] on 1. A disagreement of the National Commissioners in the sense of the provisions of the Agreement of August 10, 1922 did not exist either with respect to substance or form. The status of the deliberations at the time of the withdrawal of the German Commissioner is evidenced by a letter which the American Commissioner addressed to Your Excellency on March 3, 1939, and in which he made the following statement:

"... We thereupon proceeded to examine the whole record to determine from that record whether the American case had been proven. It was while the Commission was engaged in examining this question that Dr. Huecking's action in regard to his retirement was taken."

In connection with the statements which Dr. Huecking makes in his letter of March 3, withheld by the American Commissioner, the statement of the American

Commissioner shows plainly that the deliberations of the Commission had not yet led to a disagreement. Hence there was absolutely no factual basis for the assertion made in the "decision" of the Umpire: "Within the meaning and intent of this agreement . . . there exists a disagreement between the two National Commissioners."

[*Comment*] on 2. There was never submitted to the American Umpire a written certificate of disagreement prepared by the two National Commissioners. He had before him merely a document prepared and signed by the American Commissioner by himself, to which there was annexed a so-called vote of the American Commissioner. Of course, such a document is not a certificate in the sense of the Rules of Procedure cited above.

4. The content of the "decision" of the American Umpire and the American Commissioner gives reason for the most serious representations. It provides in a striking way a confirmation of the events which led the German Commissioner to withdraw.

The German Commissioner made use of the right of withdrawal which is open to the Members of international commissions at any time, and moreover is also expressly provided in Article II of the Agreement [p. 1736] of August 10, 1922, when during the course of the deliberations it became more and more evident to him that the American Umpire was most strongly biased in favor of the American private parties concerned and against Germany. Two phases of the deliberations in which this prejudiced view was shown with special clearness were characterized as follows by the German Commissioner in his letter to the American Umpire, of March 1, 1939:

" . . . In respect to the latest of our claims you introduced as your main point a point which was not made by the claimants at all and which, as far as I am aware, never was argued . . . I cannot shut my eyes to the fact that in my opinion it is not compatible with the position of an umpire and it shows a bias if the Umpire makes points and bases his decisions on them which are not advanced by the party favored by them. The Umpire actually assumes by such a procedure the attitude of a legal adviser for the favored party and does so under circumstances under which the other side can no longer expect equal justice.

" . . . It has become clear to me during these days that any argument advanced by the claimants at once attracts your attention and evokes the idea, How could it be collaborated? And any argument advanced in favor of the defendants at once evokes in you the idea, How can it be refuted? "

The German Commissioner supplemented this remark with the depiction of the behavior of the American Umpire during the discussion of certain concrete portions of the matter in the case and concluded his letter with the statement:

" The result to which I have come is that it is impossible for me to cooperate in a procedure which no longer offers to both parties equally the usual guarantee of a decision arrived at in a really judicial way."

This statement carries all the more weight as the American Umpire could find only the following answer to the letter of the German Commissioner of March 1, which, as shown, did not contain any accusations kept on a general plane, but described in detail concrete occurrences in the deliberations: [p. 1737]

" I do not propose to enter into any controversy with respect to the statements contained in your letter other than to say that they are unjustified and, in my opinion, present a wholly false picture of our deliberations."

The "decision" of the American Umpire and the American Commissioner of June 15 affords clear proof for the statements of the German Commissioner. Characteristic of this is in itself the fact that the American Umpire did not discuss the facts in the case exhaustively in his own remarks, as he had done in his earlier decisions, but himself wrote a "decision" containing only a few paragraphs, but

for the rest accepted the vote of the American Commissioner and made it the substance of his decision. Even a hasty examination of the "decision" thus made up discloses the character of a document in which the German Government is viewed and treated as an opponent in litigation. This attitude is characterized with special clearness by the appearance in a considerable number of places of expressions such as "We have proven" and "We have shown", which do not indicate the deliberations of a judge but are entirely natural for an advocate who sees it as his duty to prove his case against his opponent. In addition it must also be brought out that in astonishingly numerous places the evidence arguing in favor of Germany is represented as unessential or is made light of, while simple statements made by the American Agent against Germany are not only accepted without reserve, but their significance is even emphasized. Further, innumerable are the places at which statements of witnesses of the American Government are sustained in the "decision" without criticism as entirely conclusive and true, while German counter-proofs and German assertions against material of this sort are treated as nonexistent.

In this connection the treatment of the statement of an expert witness of the complainants, who designated the disputed "Herrmann report" as a genuine document, deserves special mention. On the German [p. 1738] side reference had been made to *material contained in the record*, which plainly refuted the conclusions of this expert. This German declaration was not only left unmentioned by the rump Commission in its "decision", but it cited instead, in order to show the witness to be dependable and qualified, alleged pieces of evidence, which had not been mentioned in the case at all, and therefore did not belong to the material in the case, and hence must have been brought to the knowledge of the American Umpire and the American Commissioner subsequently and outside the proceedings.

A further evidently wrong conclusion of the Umpire refers to the thesis upon which the "decision" of the rump Commission is founded, viz. that the Black Tom case and the Kingsland case are *proven* if the so-called "Herrmann report" is genuine. On this point the American Umpire merely states in the "decision" that this consequence is *admitted*. The German Agent, by whom alone such an admission could be made, has never made such a statement. On the contrary, when the "Herrmann report" was discussed before the Commission for the first time, it was explicitly declared by the German Agent that the "report" would not prove the allegation of the complainants even if it were genuine, which was not the case. In the written statement submitted by the German Agent in preparation for the last verbal discussion, it was also specially brought out that every assertion of the American Agent is opposed by Germany unless its correctness is explicitly admitted.

The German Government is further compelled to point out with all emphasis that the American Umpire has shown a complete reversal of his opinion in the judgment on the "Herrmann report", considered by him so important, in so far as its intrinsic value as evidence is concerned. When the American Umpire investigated the [p. 1739] question of the genuineness of the "Herrmann report" in 1932 and decided on it, he designated the contradictory statements of the witnesses and experts of the two parties as inconclusive. In contrast to this, he placed decisive weight on the intrinsic value of the document itself as evidence. The result of his exhaustive investigation and judgment of this intrinsic value as evidence, the naming of persons and places and the depiction of current and past events in the report, was summarized as follows by the American umpire in the decision of December 3, 1932:

"But enough has been said to show in how extraordinary a manner this document dovetails with all the important and disputed points of claimant's case and how pat all these references are, not to the request for funds but to the claimants' points of proof — this aside from the absurdity of sending this unnecessary information into an enemy country to a suspected spy then under surveillance."

After the Umpire had considered two further suspicious but less important factors, he closed his judgment on the "Herrmann report" with the statement:

"... The silent but *persuasive intrinsic evidence makes it impossible* to reach a conclusion in favor of the claimants and against Germany."

These statements of the Umpire, independent of any biased allegations and of external evidence, were bound also to remain unalterable for the whole future, just as the content of the document upon which they were based remained unalterable.

The difficulty arising out of this with respect to the overthrowing of his own decision was pushed aside by the American Umpire with the simple statement that further study had converted him to the opinion that the intrinsic evidence confirmed the genuineness of the "Herrmann report". What he had called "absurd" in December 1932 was now illuminating; what he had then designated as impossible, incredible and improbable now became convincing, credible and explicable. Without going into detail as to the points on which his earlier decision on the intrinsic evidence of the "Herrmann report", the reasons for which [p. 1740] were given in such conclusive form, had now proved to be faulty, he states in a few words that the renewed argument and a further exhaustive study of the content of the report (which, according to the explicit statement in his 1932 decision, he had already investigated and evaluated most thoroughly at that time) as well as further study of the statements of two witnesses and of the records as they existed at the time of the Hague pleadings, (again material which the Umpire had investigated most thoroughly prior to the decision of December 3, 1932) had led to this reversal of his opinion.

These facts speak more strongly than any criticism can do.

5. How little disposed the American Umpire was to concern himself with the German evidence and how he placed himself above recognized principles of international law and also above the firmly grounded practice of the Commission with respect to decisions, is shown by the treatment of the case of the Agency of Canadian Car and Foundry Company, which was chiefly concerned in the Kingsland case.

It was absolutely clear to the Commission that all of the shares of stock of this concern, which had been inactive for many years, belonged to a Canadian corporation domiciled in Montreal, and that consequently the claims of this complainant were made exclusively for the benefit of Canadian interests. According to practice supported by several decisions of the Commission, the claims of the Agency of Canadian Car and Foundry Company did not come within its jurisdiction at all. Although the Commission is to view this view in and of itself (*sua sponte*), the German Agent had also submitted a formal proposal in which he asked that the application for reopening of the case submitted for the benefit of the Canadian interests be rejected *a limine* in view of their lack of American nationality. A few days before the [p. 1741] beginning of the oral final arguments, the German Agent submitted also a printed statement giving the reasons in detail for this stand. Lastly, the German Commissioner, in his letter of March 3, 1939, withheld by the American Commissioner, pointed out the fact that the question of nationality of the complainant Canadian company belonged among those points which the Commission would have to investigate before the promulgation of a decision. It has become known to the German Government that American companies which are holders of older awards have requested the United States Government to refuse its protection to the Canadian claims and that they were informed that the question of handling the claims of the Agency of Canadian Car and Foundry Company would have to be decided by the Commission.

The American Umpire and the American Commissioner, however, did not express themselves at all on this question, which is decisive with regard to claims to

several million dollars, and they did not even find it necessary to mention the existence of the opposition raised by the German Government.

The German Government finds itself compelled to enter a most emphatic protest against this also. The approval of claims of *Canadian* interested parties in a procedure which the German Government and the United States Government have established for the settlement of claims of *American* citizens is null and void.

6. In the last arguments before the Commission, the procedure was limited strictly to the preliminary question of the alleged misleading of the Commission, as had been maintained by the American Agent. Hence the German Agent refrained at this stage of the proceedings from taking any stand on that point and refrained from the submission of counter evidence on all points which in his opinion were irrelevant to the preliminary question of "misleading", and without regard to the question of whether they would be of essential importance in case of a possible reopening of the proceedings on the main question, that is on the responsibility of Germany. He was able to follow this course with [p. 1742] all the less hesitation, as it corresponded to the principles which the Umpire had established in a decision of November 9, 1934. The German Agent also explicitly invoked these considerations, determining his behavior, in explaining his action in the case.

If the Commission, in opposition to the opinion of the German Agent, considered as essential a point which he held to be unessential and did not discuss in his written statements or his arguments, it should have called his attention to that fact and should have called on him for a statement with respect thereto. This duty arising out of general rules of procedure was explicitly laid down in the Regulations on Procedure, which the Commission established for the proceedings in the Black Tom and Kingsland cases in its order of March 29, 1929, and which, in view of the tens of thousands of pages of material in the cases, were intended to prevent the possibility of conclusions being drawn, to the disadvantage of one party, from failure to discuss single phases of this enormous amount of evidence. The essential provisions of the Order of the Commission of March 29, 1929 (Rule III) reads as follows:

"If any member of the Commission considers a point not orally argued one which should be taken into account in the Commission's decision, counsel's attention will be called thereto during the progress of the argument or subsequent thereto, and counsel for both parties will be given an opportunity to discuss same on the oral argument or to file written or printed briefs within a time to be fixed by the Commission covering such particular point or points."

Not only have the American Umpire and the American Commissioner disregarded this binding rule of procedure, but they have also made the statement at various places in their "decision" that the German Agent had not expressed himself regarding assertions of the American Agent. Important conclusions are drawn in the "decision", to the disadvantage of Germany, from this alleged silence. [p. 1743]

7. The violations of procedure stated in the foregoing reached their culmination in the occurrences following the reading aloud of the "decision", to illustrate which I should like to make the following preliminary remarks on the state of the proceedings at that time:

As I have already brought out once, the proceedings were strictly limited to the preliminary question of whether the Commission should revoke the unanimous decision of October 16, 1930, rejecting the complaints in full, and should grant reopening of the proceedings. The material question of the justification of the claims, which is entirely separate from the preliminary question of a possible reopening, had been postponed and could be decided, if at all, only after carrying out of the procedure after reopening. This plain method of procedure, established by the Commission itself, thus presupposed a decision on the proposal for reopening the proceedings. Not until after a possible pronouncement of a favorable decision

could and should the main question be entered upon in the proceedings, and not until after the conclusion of these proceedings could the question of the responsibility of Germany have been submitted to the two National Commissioners for decision and, in case of a possible disagreement of the Commissioners, to the Umpire for the granting of an award. Any proceedings that might have become necessary respecting the amount of the damage allegedly caused, the method of proving this and the proof of any financial claims of the complainants arising therefrom would have been reserved for a still further stage in the proceedings. In the correspondence exchanged in the years 1927 and 1928 the fully empowered representatives of both Governments had agreed that this last set of questions should be taken up only in case the Commission should decide that Germany was responsible in one of the two cases or both of them, and not until then. As a matter of course, Germany and the United States [p. 1744] would have the right to submit evidence and written statements in the proceedings, if any, regarding the alleged responsibility of Germany and in any further proceedings as to the amount of the claims, and also to demand oral arguments thereon if necessary. In the expectation that the American Agent and also the Commission would observe this agreement faithfully, the German Agent had not taken any stand with respect to the American evidence on the amount of damage and had not introduced opposing evidence of any kind.

The Commission itself has made plain this legal situation in unmistakable form in two decisions which it issued in order to establish directions for the two National Agents regarding the scope and the form of the action taken by them in the written as well as the oral proceedings. When in 1935 the American Agent adopted the surprising view that the next decision of the Commission ought to cover both the preliminary question of reopening and also the question of the responsibility of Germany, the Umpire stated in a decision of July 29, 1935;

“ . . . The first step is the determination whether the claimants’ assertions as to fraud, et cetera, are made out . . . The relevancy and weight of evidence upon the comparatively narrow issue made by the petition and answer will be one thing; the relevancy and weight of evidence upon the merits if a rehearing be granted will be quite an different thing . . . Germany insists that the preliminary question be determined separately. *I am of the opinion that is her right. The next hearing, therefore, will be upon the question of reopening vel non and not upon the merits.*”

A second time the Commission confirmed this legal status in the unanimous decision of June 3, 1936, in which it declared:

“ . . . Before the Hague Decision may be set aside the Commission must act upon the claimants’ petition for rehearing. Whether upon the showing made, the Commission should grant a rehearing, unless Germany shall agree to a different course, must, under the Commission’s Decision of July 29, 1935, be determined by a hearing separate from and distinct from any argument on the merits. *Both parties are entitled to file evidence (and to exchange briefs) as are in the proceedings in which a ruling for reopening is sought as in the subsequent proceedings dealing with the merits, should such a ruling be granted.*” [p. 1745]

It could not in fact be made clearer that on the basis of the oral arguments then in prospect, which took place in January 1939, a decision could and would not be issued on any other question than the justification or non-justification of the American Agent’s motion for reopening.

In spite of this unambiguous legal situation, the American Agent made the plea at the “session” of the rump Commission that awards be granted in favor of the private interests concerned. As this demand involved the question of the responsibility of Germany and the question of the amount of the damages allegedly arising, the Commission (assuming that it was capable at all of making a decision) would certainly have had to reject the application of the American Agent, in accordance with its decisions cited above, binding upon itself and the Agents of the two Govern-

ments. However, the American Umpire took the absolutely unjustifiable step of approving the petition forthwith, by declaring:

“In view of what appears in the record, and based upon the American Agent’s motion, the Commission is prepared to sign awards, to be submitted by the American Agent, if approved by the Commission as to form. Those may be submitted, and if approved will be made at a further meeting to be called on notice.”

As I have already stated in my note of July 11, 1939, this method of procedure is an event without parallel in the history of international commissions and courts.

Without hesitating even for a moment (not a single minute had elapsed since the making of the motion), the American Umpire decided, leaving out of consideration entirely the guarantees given to Germany by himself and the Commission, *on extremely important questions, which had never been the subject of proceedings and had never been submitted to the Commission for decision by the two National Agents*. In this connection it must be taken into consideration that the Umpire himself in a decision of December 15, 1933 on the cases in question, had declared that in view of the completion [p. 1746] of the arguments of the National Agents the Commission by no means had the freedom of action of ordinary courts and could not decide a disputed case unless both Agents had given their agreement thereto by written statements. He said at that time:

“The Commission has from its inception been sensible of its lack of power to compel the closing of the record and the final submission of any case . . . It has never, as I am advised, entered an order for the final closing of the record in any case without consent or over objection. *I do not think it has power to do so.*”

Plain language is also used in the order of the American Umpire that the American Agent should submit the awards “for signing by the Commission”. The Agreement of August 10, 1922, does not present the slightest ground for the authority to transfer unilaterally to the Agent of one party such important functions, which are exclusively the business of the two National Commissioners. As the German Agent, trusting, in the Agreement made with the American Agent in the years 1927 and 1928, had failed entirely to take any stand with regard to the amount of the alleged damages or to submit counter-proof, the action of the American Umpire means that the measurement of the amount of damage and of the claims is based entirely upon the allegations in the case and the evidence which the lawyers of the American and Canadian private parties have assembled, who are most keenly concerned in the fixing of the highest possible amounts of damage.

This method of action of the American Umpire, contrary to the rules and in contradiction to any idea of a judicial decision, reaches its culmination in his announcement that the “Commission” will sign the awards, if they have been approved by the “Commission” *as to form*. (“The Commission is prepared to sign awards to be submitted by the American Agent, if approved by the Commission *as to form*.”) The statement made by the American Umpire shows clearly that investigation of the sums of damages established unilaterally by the complaining party and without possibility of opposition, would refer only to [p. 1747] certain requirements as to outer form, but not to the material establishment of the amount of damages—and this in a litigation between two sovereign Governments, in which the uninvestigated claims amount to approximately \$40,000,000!

The statement of reasons for the decision of the American Umpire, that he was acting “in view of what appears in the record” and was taking as a basis “the motion of the American Agent” (“In view of what appears in the record and based upon the American Agent’s motion”), is adapted only to emphasize the arbitrary character of his action. Not one single fact is contained in the record which could form a basis for his decision above. As far as the motion of the American Agent that is referred to is concerned, the latter was restricted to the following unsubstantiated assertion:

" . . . In view of the attitude of Germany, as expressed in the communications between the German Commissioner and the Umpire and the American Commissioner, and the communication between the German Embassy and the Secretary of State of the United States, it is apparent that Germany does not intend to take any further part in the proceedings before this Commission, and seeks to avoid a final conclusion, and frustrate the work of the Commission."

It is evident from this that the American Umpire based decisions of the very greatest importance not upon facts according to the record but contented himself with one-sided partisan assertions which represented an arbitrary evaluation and interpretation by the American Agent of my note of June 10, 1939, addressed to Your Excellency and the two letters of the German Commissioner of March 1st. It does not need to be explained that such evaluations and interpretations cannot serve as the basis for an important motion in a case or in fact for a decision, entirely aside from the fact that the communications of the withdrawing German Commissioner were not submitted in full at the "session" of the rump Commission, the specially [p. 1748] significant letter of March 3, 1939, being omitted, and were entered in the record of the session in that form. The interpretation which the American Agent gave to the statements in my note to Your Excellency of June 10, 1939, and to the written remarks of the German Commissioner was in every respect baseless and arbitrary; the documents do not contain a single word that might justify his assertions.

The American Umpire has and had no authority at all to concern himself with the motion to grant awards. As I have had occasion to remark repeatedly, the statute of the Commission establishes the principle that the discussion and investigation of all matters brought before it is in the first place exclusively the business of the two National Commissioners. They compose the Commission. The Umpire can act only under certain fully defined conditions, and his duty is strictly limited "to deciding on all cases in which the Commissioners might be of differing opinions."

The motion of the American Agent asking for the issuance of awards was not discussed by both Commissioners at any stage of the procedure before the Commission nor was it the subject of an exchange of opinions between the Commissioners. Therefore there is not the remotest possibility of speaking of the occurrence of a disagreement of the National Commissioners, which is an indispensable prerequisite for the Umpire to concern himself with the matter and make a decision. The decision made by the American Umpire on this question is a function which he usurped in violation of the statute of the Commission.

To sum up, it appears therefore that the "decision" of the American Umpire, which contemplates the issuance of awards, was issued in disregard and violation of essential provisions of the statute of the Commission, essential agreements between the German Government and the United States Government, essential rules of procedure and binding decisions of the full Commission, the observance of which would have been the absolute duty of the American Umpire. (The Agreement between the two governments of August 10, 1922; the Rules of Procedure [p. 1749] established jointly; the Decisions of the Commission of July 29, 1935 and July 3, 1936, as well as the agreement of the Agents of the two Governments of the years 1927 and 1928 on the treatment of the question of the amount of alleged damages.)

Accordingly the acts and orders of the American Umpire and the American Commissioner since March 1, 1939, among them the reopening of the proceedings in the Black Tom and Kingsland cases, the "decision" of the Umpire and the American Commissioner on the responsibility of Germany in both cases, and the arbitrary granting of awards by the American Umpire, are null and void. Any awards which the American Umpire and the American Commissioner might issue on the basis of these measures are likewise null and void. They can never form the basis for a financial obligation of Germany. A document which has been drawn up

without any collaboration of the German Commissioner can, besides, never be considered or accepted as an award of the "Mixed Commission".

By direction of my Government I therefore raise once more the most emphatic representations against all violations of the rules of procedure and illegal acts of the American Umpire disclosed in this note. I am directed to protest against all further measures planned by the American Umpire, the American Commissioner and the American Agent, which are aimed at securing awards in the Black Tom and Kingsland cases. I request Your Excellency to advise the Treasury Department of the United States, upon which the payment of awards is incumbent, of the contents of this note, and I should be grateful if one copy of this note were also sent to the American Umpire and one to the American Commissioner.

By direction of my Government, I should like to express the hope that the United States Government does not approve of the violations of procedure discussed in this note and that it will find some way of quashing them, in order to restore, in collaboration with [p. 1750] the German Government, the basis existing before the beginning of these violations of procedure, upon which the proceedings can be brought to a conclusion in an orderly way.

Accept, Mr. Secretary of State, the renewed assurance of my most distinguished consideration.

THOMSEN

His Excellency

Mr. Cordell HULL,
Secretary of State of the United States,
Washington, D. C.

[Emphasis in original.]

[The Secretary of State to the German Chargé d'Affaires ad interim]

[p. 1751] October 18, 1939

Sir:

I acknowledge the receipt of your note of October 3, 1939 with reference to proceedings of the Mixed Claims Commission, United States and Germany, in relation to the so-called Black Tom and Kingsland cases pending before that tribunal.

In conformity with your request, copies of a translation of your note under acknowledgment are being forwarded to the Secretary of the Treasury, the Umpire, and the Commissioner appointed by the United States.

I must refrain from engaging in a discussion of the various complaints and protests set out in your communication and content myself by stating that since the Department is without jurisdiction over the Commission I consider that it would be highly inappropriate for it to intervene directly or indirectly in the work of the Commission or to endeavor, in the slightest manner, to determine the course of its proceedings.

I have entire confidence in the ability and integrity of the Umpire and the Commissioner appointed by the United States despite your severe and, I believe, entirely unwarranted criticisms, and I am constrained to invite your attention to the fact that the remarkable action of the Commissioner appointed by Germany was apparently designed to frustrate or postpone indefinitely the work of the Commission at a time when, after years of labor on the particular cases involved, it was expected that its functions would be brought to a conclusion.

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

CORDELL HULL

Herr Hans THOMSEN,
German Chargé d'Affaires *ad interim*