

**REPORTS OF INTERNATIONAL
ARBITRAL AWARDS**

**RECUEIL DES SENTENCES
ARBITRALES**

**United States Steel Products Company (United States) v. Germany, Costa Rica
Union Mining Company (United States) v. Germany, and South Porto Rico
Sugar Company (United States) v. Germany (War-Risk Insurance Premium**

1 November 1923

VOLUME VII pp. 44-63



NATIONS UNIES - UNITED NATIONS
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compensation and reparation for all losses falling within its terms sustained by American nationals. That compensation must be full, adequate, and complete. To this extent Germany will be held accountable. But this Commission is without power to impose penalties for the use and benefit of private claimants when the Government of the United States has exacted none.

This decision in so far as applicable shall be determinative of all cases growing out of the sinking of the Steamship *Lusitania*. All awards in such cases shall be made as of this date and shall bear interest from this date at the rate of five per cent (5%) per annum.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH,
German Commissioner

UNITED STATES STEEL PRODUCTS COMPANY
(UNITED STATES) *v.* GERMANY

COSTA RICA UNION MINING COMPANY
(UNITED STATES) *v.* GERMANY

SOUTH PORTO RICO SUGAR COMPANY
(UNITED STATES) *v.* GERMANY

(War-Risk Insurance Premium Claims, November 1, 1923, pp. 33-59.)

DAMAGE: WAR-RISK INSURANCE PREMIUMS, RULE OF PROXIMATE CAUSE.—EXTENT OF LIABILITY UNDER TREATY OF BERLIN, ENLARGEMENT BY AGREEMENT UNDER WHICH COMMISSION CONSTITUTED. Claims on behalf of American nationals for reimbursement for war-risk insurance premiums paid either during period of United States neutrality, or during period of United States belligerency, for protection against acts of naval warfare which never occurred (losses resulting from payments not passed on to purchaser or ultimate consumer). *Held* that, under Treaty of Berlin, Germany not liable: losses not attributable to “acts of Germany or her agents” as proximate cause (reference made to Administrative Decisions Nos. I and II, see pp. 21 and 23 *supra*); and that, in particular, no reimbursement for war-risk insurance premiums, paid during period of United States belligerency, imposed either by Article 232, Treaty of Versailles, carried into Treaty of Berlin (same reference made as above), or by Article I, Agreement of August 10, 1922 (Germany’s liabilities as fixed by Treaty of Berlin cannot be enlarged by Agreement).

PRECEDENTS.—EXTRAJUDICIAL ACTION. *Held* that decisions of Tribunal of Arbitration and of Court of Commissioners in *Alabama* Claims are no controlling precedents: (1) Tribunal, international in character and governed by Treaty of Washington of May 8, 1871, and applicable international law, dealt with “enhanced payments of insurance” in extrajudicial declaration

of June 19, 1872, not in its award of September 14, 1872; (2) Court of Commissioners rendering judgments in favour of war-risk premium claimants was created and governed by national law (United States Congress, Acts of 1874 and 1882, dealing with distribution among American nationals of lump sum awarded by Tribunal to United States in its capacity as sovereign).

DAMAGE: DIRECT AND INDIRECT; "NATIONAL" CLAIMS. *Held* that term "indirect" to describe "national claims" is inapt, inaccurate, and ambiguous, and that distinction between "direct" and "indirect" damage is frequently illusory and fanciful and should have no place in international law.

Cross-references: A.J.I.L., Vol. 18 (1924), pp. 611-613; Annual Digest, 1923-1924, pp. 195-198; Kiesselbach, *Probleme*, pp. 199-220 (German text); Witenberg, Vol. I, pp. 39-67 (French text).

Bibliography: Annual Digest, 1923-24, pp. 198-199; Borchard, p. 142; Isay, pp. 607-608; Kersting, p. 1844; Kiesselbach, *Probleme*, pp. 10, 100; Partsch, p. 136; Prossinagg, p. 12.

PARKER, *Umpire*, delivered the opinion of the Commission, the American and German Commissioners concurring in the conclusions:

The Commission is here dealing with a group of claims put forward by the United States on behalf of its nationals in which reimbursement is sought for war-risk insurance premiums paid by them for protection against stipulated hazards of war. There is no complaint of injury to or destruction or seizure of property by the acts of Germany or her agents. The premiums were paid for protection against possible acts which never occurred.

That these claims may be understandingly dealt with it will prove helpful at the outset to consider: What were the pertinent problems growing out of the war confronting American nationals, especially those engaged directly or indirectly in maritime commerce, at the time such insurance was written and premiums paid, and against what risks was protection sought?

The initial eruptions of the world war in the last days of July, 1914, found the United States, in common with other neutral powers, in a state of unpreparedness. Its commerce was on every sea, yet it was without an adequate merchant marine to keep it afloat. Intricate questions affecting the safety of neutral freights and cargoes, even when carried in neutral vessels, were, and some of them still are, unsettled, rendering uncertain the protection of a neutral flag. Yet American institutions were not then prepared to protect American commerce by insurance against the risks of war.

During the first two years and eight months of the war, which we designate the "period of neutrality", the United States was neutral.¹ Its nationals had, therefore, nothing to fear from war risks for their vessels or their cargoes, or for their freights shipped on vessels flying foreign flags, save

- (a) When part or all of the cargo was contraband,
- (b) When violating a blockade,
- (c) From mines, and
- (d) When shipments of American ownership were made under a belligerent flag.

The difficulty lay in determining what was and what was not contraband, and what ports were and what were not blockaded, and the location of mines. With a view to removing, as far as practicable, these uncertainties prejudicial to neutral commerce, the United States very promptly, by identic notes addressed to all belligerent powers, suggested that all agree to be bound by

¹ Reference is made to Administrative Decision No. I for the definition of the terms used herein.

the laws of naval warfare as laid down by the signed but unratified Declaration of London of 1909. In making this suggestion the opinion was expressed that "an acceptance of these laws by the belligerents would prevent grave misunderstandings which may arise as to the relations between neutral powers and the belligerents".² Germany and her allies acquiesced in this suggestion.³ Great Britain and her allies responded that they had "decided to adopt generally the rules of the declaration in question, subject to certain modifications and additions which they judge indispensable to the efficient conduct of their naval operations".⁴ On examination it was found that these "modifications and additions" touching the laws of contraband and blockade were so substantial and far-reaching in their nature that the United States, despairing for the time being at least of bringing the conflicting powers to agreement with respect to the laws of naval warfare, withdrew its suggestion and notified all belligerents that it would "insist that the rights and duties of the United States and its citizens in the present war be defined by the existing rules of international law and the treaties of the United States irrespective of the provisions of the Declaration of London".⁵

Then followed in quick succession numerous additions by the British Government to her lists of both contraband and conditional contraband, as defined by the Declaration of London, with modifications and extensions of the rule of "continuous voyage" or "ultimate destination" as applicable to blockade as well as contraband—all promptly followed by both her allies and her enemies. In their wake came numerous seizures, detentions, and requisitions of American cargoes by the British Government; the declaration by the German Government that the English Channel and the North and West Coasts of France and the waters surrounding the British Isles constituted a war area and that all enemy ships found therein would be destroyed⁶ and even neutral ships endangered—the latter vigorously protested by the United States;⁷ the declaration of the British Government and the French Government of March 1, 1915, that they would "detain and take into port ships carrying goods of presumed enemy destination, ownership, or origin", a course of action protested by the United States as previously unknown to international law;⁸ the declaration that "The British fleet has instituted a blockade, effectively

² Telegrams of Secretary of State to American Embassies at London, Paris, St. Petersburg, Berlin, and Vienna, and the American Legation at Brussels, Aug. 6, 1914, page 1 of Special Supplement to Volume 9 of American Journal of International Law, July, 1915, being "Diplomatic Correspondence between the United States and Belligerent Governments Relating to Neutral Rights and Commerce" (hereinafter cited as "Dip. Cor."), with volume and page numbers, vol. 10 being for October, 1916, and vol. 11 for October, 1917, supplements).

³ Telegram, Ambassador Penfield to Secretary of State, Aug. 13, 1914, Dip. Cor. vol. 9, p. 1. Telegrams, Ambassador Gerard to Secretary of State, Aug. 20 and 22, 1914, Dip. Cor., vol. 9, p. 2.

⁴ Dispatch, Ambassador Page to Secretary of State, August 27, 1914, enclosing note of Aug. 27, 1914, from British Foreign Office, Dip. Cor., vol. 9, p. 2-3; telegram Chargé Wilson to Secretary of State, Aug. 27, 1914, *ibid.*, p. 5; telegram, Ambassador Herrick to S. of S., Sept. 3, 1914, *ibid.*, p. 6.

⁵ Telegrams, Acting Secretary of State, Oct. 22 and 24, 1914, Dip. Cor., vol. 9, p. 7-8.

⁶ Dispatch, Ambassador Gerard to Secretary of State, Feb. 6, 1915, transmitting proclamation and memorial of German Government of Feb. 4, 1915, Dip. Cor., vol. 9, p. 83-85.

⁷ Telegram, Secretary of State to Ambassador Gerard, Feb. 10, 1915, *ibid.*, p. 86-88.

⁸ Declarations from British and French Ambassadors to Secretary of State, Mar. 1, 1915, *ibid.*, p. 101-102; telegrams, Secretary of State to Ambassadors Page and Sharp, Mar. 5, 1915, *ibid.*, p. 102-104.

controlling by cruiser 'cordon' all passage to and from Germany by sea";⁹ constant and emphatic protests directed by the Government of the United States against both the British Government and her allies and the German Government and her allies for "vexatious", "unwarranted", "unjustifiable", "oppressive", "indefensible", and "illegal" interference with American commerce;¹⁰ until on July 7th, 1916, the British and French Governments revoked their partial adherence to the Declaration of London and promulgated specific substitutes of their own devising,¹¹ protested by the Government of the United States "as at variance with the law and practice of nations in several respects".¹² Both Germany and Great Britain admitted planting mines.¹³ As stated in one of the briefs filed before this Commission by claimants in support of this group of claims, "retaliatory acts, *first of one belligerent and then of another*, accumulated progressively until what had always been believed to be the rights of neutrals substantially disappeared".¹⁴

Under the provisions of Article 59 of the Declaration of London, believed to be declaratory of the preexisting rules of international law "In the absence of proof of the neutral character of goods found on board an enemy vessel, they are presumed to be enemy goods".¹⁵ Article 3 of the Declaration of Paris (to which the United States has never unqualifiedly adhered) protects neutral goods, except contraband of war, under the enemy's flag against *confiscation*. Whether this rule will afford a neutral owner protection from loss flowing from damage to or *destruction* of his property, when such loss is incidental to its transportation on a belligerent vessel, is still involved in doubt.¹⁶ French Prize Courts have held that no such protection is afforded; that the Declaration

⁹ Telegram, Ambassador Page to Secretary of State, Mar. 15, 1915, transmitting memorandum of Mar. 13, 1915, from British Secretary of State for Foreign Affairs, *ibid.*, p. 106-108.

¹⁰ Instruction, Secretary of State to Ambassador Page, Oct. 21, 1915, Dip. Cor., vol. 10, p. 73-88; telegram, Secretary of State to Ambassador Gerard, Feb. 10, 1915, same, vol. 9, p. 86-88; note, Secretary of State to German Ambassador, Apr. 21, 1915, *ibid.*, p. 127-129; telegram, Secretary of State to Ambassador Page, July 14, 1915, *ibid.*, p. 153-154; telegram, Secretary of State to Ambassador Gerard, July 21, 1915, *ibid.*, 155-157; telegram, Secretary of State to Ambassador Penfield, Aug. 12, 1915, *ibid.*, 166-171; telegram, Secretary of State to Ambassador Gerard, Apr. 18, 1916, *ibid.*, p. 186-190; same to same, May 8, 1916, *ibid.*, p. 199-200.

¹¹ Dispatch, Ambassador Page to Secretary of State, July 10, 1916, enclosing copies of "The Maritime Rights Order in Council, 1916", Dip. Cor., vol. 10, p. 5.

¹² Instruction, Secretary of State to Chargé Laughlin, London, Sept. 18, 1916, Dip. Cor., vol. 11, p. 1-2.

¹³ Memorandum from British Secretary of State for Foreign Affairs to American Ambassador, Mar. 15, 1915; reply of German Govt. to protest of British Govt. against the laying of German mines, transmitted by Ambassador Gerard to Secretary of State, Nov. 13, 1914; notice of British Govt. of laying of mines given through Ambassador Page and transmitted by the latter to the Secretary of State, Jan. 25, 1917; Feb. 15, 1917; Mar. 23, 1917, and by Consul General Skinner, Apr. 27, 1917. See also note of Secretary of State to British Ambassador, Feb. 19, 1917.

¹⁴ Brief of George Grafton Wilson, page 11 (*italics* ours). See particularly par. 33 of note from Secretary of State to Ambassador Page, Oct. 21, 1915; and pars. 37 and 38 of Sir Edward Grey's memorandum in reply thereto of Apr. 24, 1916; also British Ambassador to Secretary of State, Mar. 1, 1915; memorial of German Govt. respecting retaliatory measures dated Feb. 4, 1915 transmitted by Ambassador Gerard to Secretary of State, Feb. 6, 1915.

¹⁵ The Roland, 1 B. & C. P. C. 188.

¹⁶ Hall Int. Law, 7th Ed., pages 787, 788; *The Magnus* (1798), 1 Ch. Rob. 31; *The Rosalie and Betty* (1800), 2 Ch. Rob. 343; *The Jenny* (1866), 5 Wall. 183; *The Carlos F. Roses* (1899), 177 U. S. 655; *The Roland* (1915), 1 B. & C. P. C. 188; *The Porto*, Journal Officiel, Mar. 30, 1915; *The Czar Nicolai*, Jour. Off. 19 Ap. 1915.

of Paris simply insures the owner of a seized neutral cargo the restitution of his property or the proceeds of its sale; but where German ships were destroyed at sea because the French captor could not bring them into port as prizes, the owners of the neutral cargoes could not complain, inasmuch as "such destruction was an act of war the propriety of which the owners of the cargo could not call in question, and which barred all claim on their part to an indemnity".¹⁷ Hence the risks taken by American exporters and importers in the use of belligerent vessels for the transportation of their property are obvious.

We are not here concerned with either justifying or condemning any one or all of the parties to the conflict for the measures taken by them. We have briefly sketched the situation confronting American maritime commerce solely for the purpose of clearly understanding and stating the nature, source, and extent of the risks insured against, for the cost of which insurance recovery is sought. It is manifest that the very existence of maritime warfare inevitably entails inconvenience and loss to neutral commerce, no matter how precisely established rules of international law may be observed. It is equally manifest that the kaleidoscopic changes in the lists of both absolute and conditional contraband; the extensions of the rule of "ultimate destination"; the novel conditions of the blockade and counter-blockade, and in part the novel naval instruments and methods used for their enforcement; the widespread mine fields; and, last but not least, the fact that the channels of American foreign commerce would have been choked but for the use of belligerent bottoms—all combined to create war hazards so numerous and so bewildering that sound discretion impelled American exporters and importers to insure against the numerous known and unknown and constantly increasing risks suddenly thrust upon them.

War-risk insurance afforded at least a measure of protection. But American companies were not at the outbreak of the war in a position to write in large volume insurance of this character, which had in the past been carried principally by foreign underwriters. These latter were for the moment suffering from the general demoralization resulting from the shock of the outbreak of the war and functioning but imperfectly. The varying conditions from day to day, the uncertainties as to the boundaries, extent, or duration of the conflict—in a word, the practical absence of known factors with which to construct formulæ based on the law of averages as a measure for the risks which the insurance companies were called upon to take—made it impossible for the American companies at the outset, with their limited facilities, to take any risks save at what seemed to be almost prohibitive rates. As pointed out in the American brief above mentioned, "many merchants refused to pay the premiums charged by American companies, which had in some instances advanced 400%". Fully realising the extreme gravity of the situation, the Congress of the United States acted promptly and effectively. By the act of September 2, 1914, the Bureau of War Risk Insurance was established in its Treasury Department, and the Government of the United States almost immediately began to write war-risk insurance on American vessels and cargoes at reasonable rates. It is significant that the writer of the American brief above mentioned assigns as the cause of particular suffering by American citizens not acts of Germany but the fact that "no adequate system of maritime insurance had been developed in the United States", and adds:

¹⁷ Calvo, Sec. 2817; see also *The Glitra*, decided by the German Imperial Supreme Prize Court Sept. 17, 1915; Amer. Jour. Int. Law, Vol. X, p. 921-927; *Indian Prince*, decided by the German Imperial Supreme Prize Court Apr. 15, 1915, Amer. Jour. Int. Law, Vol. X, p. 930-935; Oppenheim Int. Law, Vol. II, 3rd Ed. secs. 185 and 424; *The Nereide*, 9 Cranch, 388-418.

"In consequence cotton planters had almost no market and individuals were urged to buy bales of cotton to assist producers who had no market. Freight rates from many ports were consequently forced up, for example: per 100 lb., cotton New York to Liverpool July, 1914, \$.25; November, 1914, \$.50; January, 1915, \$1; April, 1915, \$2; December, 1916, \$5. * * * Such figures indicate in a measure the abnormal risks which the World War had brought upon merchants of the United States and against which they were compelled to insure."

The war situation with respect to cotton has very aptly been put forward by American counsel as typical, and we may profitably briefly examine it. At the outbreak of war the price of cotton to the American *producer* according to the reports of the United States Department of Agriculture was 12.4c. per lb. By September, 1914, it had declined to 8.7c. per lb.; by October to 7.8c. per lb. and in November to 6.3c. per lb.; notwithstanding the Government of the United States began to write war-risk insurance in September, 1914. After November, 1914, the price curve to the *producers* of cotton, speaking generally, was upward, until in December, 1916, it was 19.6c. per lb. and in September, 1918, the peak of 32.2c. per lb. was reached. The Declaration of London places "raw cotton" on the list of articles which "may not be declared contraband of war." It remained noncontraband until August 24, 1915, when the British Government by Order in Council declared it *absolute contraband*. Prior to that time cotton had received special consideration and treatment at the hands of Great Britain and its allies. While on March 1st the British and French Governments gave notice that they would "prevent commodities of any kind from reaching or leaving Germany"¹⁸ the British Government on March 9th announced in substance that all cotton for which contracts of sale and freight engagements had been made prior to March 2 would "be allowed free or bought at contract price if stopped, provided the ship sails not later than March 31st."¹⁹ This arrangement applied to cotton *for neutral destination only*.²⁰ Under the practice thus instituted by Great Britain, American cargoes of cotton, whether on American or other vessels, were detained and most of the cotton was purchased by the British Government, although some of it was permitted to move to neutral ports when the British became satisfied that it did not have an ultimate enemy destination. It appears that on May 14, 1915, when the British Secretary of State for Foreign Affairs prepared his memorandum for the Secretary of State of the United States, there were then being detained by Great Britain two American ships with cotton cargoes, and 23 other vessels carrying cargoes of American cotton. The cotton thus "detained" when not released by the British Government was paid for by it with reasonable promptness, usually on the basis of the market price at the port of shipment, *plus freight if prepaid, plus the current rate of insurance*. Thus the shipper was made whole as if he had sold at the American port of shipment. In this way neutral cotton was prevented from finding its way either directly or indirectly into Germany.²¹

¹⁸ British Ambassador to Secretary of State, Mar. 1, 1915.

¹⁹ Telegram Consul General Skinner to Secretary of State, Mar. 9, 1915; par. 5 of Note Sir Edward Grey to Secretary of State, Mar. 15, 1915; par. 4 memorandum of Lord Crewe, June 17; see telegram Ambassador Page to Secretary of State, June 22, 1915.

²⁰ Memorandum of Sir Edward Grey "Respecting American Ships and Cargoes detained at British Ports", May 14, with note of May 15, 1915; see also communication from Ambassador Page to Secretary of State, May 20, 1915.

²¹ Pars. 19, 20, and 36 of Sir Edward Grey's memo. delivered by the British Ambassador to Secy. of State, Apr. 24, 1916.

An American counsel has pointed out that ocean freight rates on cotton from New York to Liverpool advanced from 25c. per 100 lbs. in July, 1914, to \$5 per 100 lbs. in December, 1916. When opposite these figures we place the prices received for their cotton by American *producers* of 12.4c. per lb. in July, 1914, which declined to 6.3c. per lb. in November, 1914, during the period of general demoralization; then consider the gradual advance in price as war-risk insurance came to be more freely written and dislocated commercial conditions came to be readjusted to a state of war, until in December, 1916, the price was 19.6c. per lb. (although ocean freights had advanced from 25c. to \$5 per 100 lbs.); and further consider the continued advance in price during the period in which most of the American cotton not consumed at home was taken and paid for by Great Britain on the basis of the market price in the United States, plus insurance and freight—until the peak was reached in September, 1918, when the American *producer* received 32.2c. per lb.; all these facts considered together point directly to the conclusion that, in the great majority of cases if not in all of them, the war-risk insurance premiums and freights on raw cotton and cotton linters exported from the United States were *ultimately* paid (a) in the early days of the war by the *producer* in the decreased price received by him and (b) later by the *consumer* in the increased price paid by him—rather than by the shipper or exporter from whom the insurance companies directly received the premiums and in whose behalf claims are presented to this Commission. No such claims are being here asserted on behalf of the foreign *consumer*, for under the Treaty this tribunal is not competent to consider them. No such claims are being here asserted on behalf of the *producers* who were the real sufferers in the early days of the war when cotton declined from 12.4c. to 6.3c. per lb. The reason is obvious. These losses which were very real and substantial, and in many instances resulted in great distress, were simply inevitable and incidental consequences of the existence of a state of war, losses which must to some extent fall on neutrals as well as belligerents. Many of such premiums forming the basis of claims against Germany were paid to foreign underwriters either directly or indirectly through reinsurance. All such payments constitute an economic national loss to the United States. Similar considerations doubtless prompted Mr. Sumner, in 1869, in enumerating the several classes of damages embraced in the "Alabama Claims", to treat the "rise of insurance on all American vessels" as a "national loss" as contradistinguished from "private claims", which he separately dealt with,²² for in many cases it is practically impossible to allocate such premium payments to the individuals ultimately paying them. But even where they can be so allocated, this fact, for reasons presently mentioned, can not affect the result of this decision.

The situation as above outlined gives a fairly accurate understanding of the risks confronting those American nationals directly or indirectly interested in maritime commerce following the outbreak of the war. That business prudence suggested insuring against such risks is obvious. Diligent enquiry of counsel fails to discover any comprehensive compilation of the war-risk insurance actually written on American vessels and cargoes and disclosing what risks were actually covered thereby. There is available, however, a complete and accurate record of all such insurance written by the Bureau of War Risk Insurance of the Treasury Department of the United States, constituting a substantial percentage of all such insurance written by American

²² Moore, Vol. I, 511-12; also *post*, pages 50 and 57. (*Note by the Secretariat*, this volume, pp. 57 and 62 *infra*).

institutions, both public and private. An examination of these records throws a flood of light not only on the risks actually covered but also on the sources of such of these risks as matured into actual losses. The policies of insurance issued by this Bureau contain this clause:

"Touching the adventures and perils which the insurer is contented to bear, and does take upon itself, they are men-of-war, letters of marque and counter-marque, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and peoples, of what nations, condition, or quality soever and all consequences of hostilities or warlike operations, whether before or after declarations of war."

Insurance on merchandise to ports in Europe and Mediterranean ports in Africa, as expressed in the applications therefor, was based on "the amount of invoice (including freight, insurance premiums, and other charges when prepaid and included in the invoice) plus 10%." The experience of this Bureau with respect to policies written, premiums collected, and losses paid is reflected by the table, copy of which is in the margin.²³ From this table it will be noted that losses were lodged against the Bureau on 29 out of 2,590 policies issued during the period of neutrality. An analysis of these claims for losses is reflected by the other table copied in the margin.²⁴ (See page 52.)

From this it appears that there were 13 ships or their cargoes involved in the claims for losses based on the 29 policies in question. Of these 13 losses, five were directly attributable to Germany; while four were based on British detentions and seizure; three were presumably caused by German mines and one (unsettled and in litigation) was due to the wrecking of an American vessel on a submerged rock while under the control of a British naval prize crew.

Rejecting all speculations and considering only the actual experience of the United States Bureau of War Risk Insurance, it is apparent that American exporters and importers who paid war-risk insurance premiums to that Bureau were insured against "all consequences of hostilities or warlike operations", including "takings at sea, arrests, restraints, and detainments of all kings, princes, and peoples, of what nations, condition, or quality soever"; and that the losses actually sustained, against which American nationals were protected, directly resulted from the acts of the British Government as well as from the acts of the German Government. While the terms of some of the policies issued by private insurers, both domestic and foreign, differed in some particulars from those issued by the War Risk Bureau, this fact does not affect the result of this decision.

²³ Note:

Period	Insurance			Losses	
	Number of policies	Insurance \$	Premiums \$	Number of policies	Losses sustained \$
September, 1914, to March 31, 1917	2,590	293,915,486.00	5,048,678.96	29	1,711,555.96
April 1, 1917, to December 31, 1918	24,340	1,690,999,930.00	41,445,358.62	670	27,619,249.07
Total to approximate end of actual war	26,930	1,984,915,416.00	46,494,037.58	699	29,330,805.03
January 1, 1919, to December 31, 1920	297	82,337,077.00	246,366.88
GRAND TOTAL	27,227	2,067,273,293.00	46,740,404.46	699	29,330,805.03

Having examined the conditions confronting American nationals engaged in foreign commerce, the nature of the risks to such commerce, the sources from which they sprang, and the measures taken to protect against them, we come now to inquire: Do the premiums for insurance against such risks constitute claims for which Germany is financially liable falling within the jurisdiction of this Commission? We hold that they do not.

In announcing our reasons for so holding, we will apply them to the facts put forward by the United States in three claims, one on behalf of the United States Steel Products Company, one on behalf of the Costa Rica Union Mining Company, and one on behalf of the South Porto Rico Sugar Company, being

²⁴ Note :

United States Bureau of War Risk Insurance—Analysis of losses sustained August 1, 1914, to March 31, 1917, inclusive

[Compiled for the Commission from statements submitted by the United States Veterans' Bureau]

	<i>Insurance</i> \$	<i>Claimed</i> \$	<i>Net losses</i> \$
Directly attributed to Germany: 5 ships (Frye, Portland, Borinquen, Illinois, and Healdton), 7 policies (6 hull, 1 freight)	1,413,050.00	765,420.91	765,309.73
Presumably German mines: 3 ships (Evelyn, Carib, and Greenbrier), 14 policies (3 hull, 11 cargo) . . .	709,103.00	709,103.00	650,047.13
Total presumably and directly attributed to Germany: 8 ships, 21 policies (9 hull, 11 cargo, and 1 freight), being 2 submarine sinkings, 1 raider sinking, 3 mine sinkings, 1 seizure, and 1 detention	2,122,153.00	1,474,523.91	1,415,356.86
British detentions and seizures: 4 ships (Seguranca, Navajo, Carolyn, McCullough), 6 policies, cargo only, being 3 detentions and 1 seizure . .	623,480.00	136,422.76	136,199.10
Submerged-rock case in litigation (Llama): 2 policies on 1 ship (1 hull, 1 freight)	160,000.00	160,000.00	
	<u>2,905,633.00</u>	<u>1,770,946.67</u>	<u>1,551,555.96</u>
If Llama loss is paid			160,000.00
			<u>1,711,555.96</u>
GRAND TOTAL: 13 ships (8 German and 5 British claims), 29 policies (10 hull, 17 cargo, 2 freight) . .	2,905,633.00	1,770,946.67	1,711,555.96

claims numbered 20, 22, and 27, respectively, all selected by the Agent of the United States as typical and among the strongest cases of the war-risk premium group pending before this Commission. The facts are:

Case No. 20. United States Steel Products Company

In the latter part of 1913 and early part of 1914, long prior to any rumblings of a world war, the United States Steel Products Company, a New Jersey corporation, entered into a contract to fabricate and transport materials and apparatus to be used in the erection of bridges at the site of the coaling station at Cristobal, Panama. The Company's contract bound it to make deliveries at Cristobal for stipulated sums. The materials were shipped from Baltimore, Md., on or about October 30, 1914, by the *British* steamship *Westlands*. The Company, in the exercise of what it deemed business prudence, insured the shipment against the risks of war while being transported from Baltimore to Cristobal. The premium paid therefor by the Company on November 16, 1914, amounted to \$1,111.76. For this amount, with interest from the date of payment, claim is made.

Case No. 22. Costa Rica Union Mining Company

The Costa Rica Union Mining Company, a West Virginia corporation, owned and operated a producing gold mine in Costa Rica. On December 11, 1917, it shipped on the *American* steamship *Santa Marta* a consignment of cyanide of sodium which it protected with war-risk insurance, paying a premium therefor amounting to \$13.44, for which amount, with interest from the date of payment, it makes claim.

Case No. 27. South Porto Rico Sugar Company

The South Porto Rico Sugar Company, a New Jersey corporation, owned and operated sugar factories and plants on the Islands of Porto Rico and Santo Domingo, engaged in the manufacture of sugar for refining and sale in the United States. Several of these plants were in close proximity to harbors navigated by ocean-going vessels, and the high smokestack of one plant was clearly visible by day and night to vessels several miles at sea. Because of the exposed position of the plants the Company, upon the entrance of the United States into the war, protected them against risk from bombardment. The total amount of premiums for insurance of this class paid by this Company during the war amounted to \$60,760.00, for which amount, with interest, claim is made.

In the two cases first mentioned the voyages were uneventful and the shipments safely reached their respective destinations. In the third case the plants insured against bombardments were unmolested.

Inasmuch as long prior to the war the Steel Corporation had for a stipulated sum sold its products "delivered at Cristobal," it is clear that it could not pass the cost of the war-risk insurance on to the purchaser. Hence its profits were diminished to the extent of the premiums paid by it. The voyage was coastwise on mineless seas. The shipment was neutral and noncontraband. The destination, both immediate and ultimate, was unblockaded. The risk insured against was attributable to shipping under a British flag. The premiums paid unquestionably represented a loss suffered as a consequence of the war by the Steel Corporation during the period of the neutrality of the United States.

The Mining Company's shipment was made and premium paid during the period of belligerency of the United States. The insurance covered supplies for

use by the Company in its mining operations. It follows that the premium paid increased the Company's operating costs to that extent. Here also was a loss suffered as a consequence of the war.

The operating costs of the Sugar Company were increased to the extent of the premiums paid by it for insurance against the hazards of bombardment. We will assume (although the record is silent on this point) that this additional cost of operation was not passed on to the purchaser or ultimate consumer. On this assumption premiums claimed by the Sugar Company constitute a loss suffered as a consequence of the war.

The premiums paid for which reimbursement is sought in these three cases are, for the purpose of this decision, treated as losses to claimants not passed on by them. The precise terms of the policies for which such premiums were paid are immaterial. The pertinent enquiry is, Were these losses attributable to Germany's act as a proximate cause? If they were not, then all claims pending before this Commission for the recovery of amounts expended for war-risk insurance *as such* must be dismissed.

The principal arguments advanced by numerous counsel in several briefs presented by the American Agent pressing claims of this group may be summarized thus:

That under Section 5 of the Resolution of Congress and also under Article 231 of the Treaty of Versailles, both carried into and made a part of the Treaty of Berlin, Germany is (in the language of an American counsel) "responsible for all damage or loss in consequence of the war, no matter what act or whose act was the immediate cause of the injury"; and that the war-risk insurance premiums paid by American nationals constitute losses to them resulting as a consequence of the war and are therefore within the terms of the Treaty of Berlin.

Other statements of the argument made by American counsel are quoted in the three succeeding paragraphs as follows:

"It must be concluded that no matter how *remote* a particular loss, damage, or injury may have been with respect to some act on the part of Germany, *other than the initiation of the war itself*, if the loss, damage, or injury was the natural and connected effect of the war, Germany is liable therefor."

"The prime and direct cause of the risk was the illegality of the warfare which was then and thereafter conducted by the Imperial German Government."

"Under Section 5 of this same Joint Resolution German property was to be retained till suitable provision for American claims against the Governments of Austria-Hungary and Germany had been made. These claims were to include those of American nationals who had suffered 'since July 31, 1914, loss, damage, or injury to their persons or their property, directly or indirectly, * * * in consequence of hostilities or of any operations of war, or otherwise.'"

Examining these arguments in the light of the construction of the Treaty of Berlin as embodied in Administrative Decisions Nos. I and II of this Commission, handed down this day, it is apparent that in the opinion of this Commission they are based on a wholly erroneous interpretation of the language of that Treaty, coupled with a confusion of the legal concept of the proximate cause of a loss with that of the consequential and indirect damages flowing therefrom.²⁵

²⁵ Particular reference is here made to so much of Administrative Decision No. II as is embraced under the last caption, "Losses Suffered Directly or Indirectly".

Leaving out of consideration claims falling within defined categories, not applicable here. Germany's liabilities under the Treaty of Berlin for losses sustained by American nationals is limited to losses "caused by the acts of Germany or her agents." The proximate *cause* of the loss must have been in legal contemplation the act of Germany. The proximate *result* or *consequence* of *that act* must have been the loss, damage, or injury suffered. The *capacity* in which the American national suffered—whether the act *operated* directly on him or indirectly as a stockholder or *otherwise*, whether the subjective nature of the loss was direct or indirect, is immaterial, but the *cause* of his suffering must have been the act of Germany or her agents. Such an act proximately causing a loss, though sustained through an indirect channel, renders Germany liable. But where the causal connection between the act complained of and the loss is broken, or so involved and tangled and remote that it can not be clearly traced, there is no liability. The simple test to be applied in all cases is: Has an American national proven a loss suffered by him susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany's act as a proximate cause?

Applying this simple test to the facts in this group of cases the Commission has no hesitation in holding that they do not fall within the terms of the Treaty of Berlin. They are not claims for injury or damage to, or destruction or conversion of, property by the acts of Germany or her agents. They are claims put forward to recover the amount of premiums paid for protection against possible happenings which never in fact happened; for protection against risks to both neutral and belligerent commerce of a highly speculative and uncertain nature, incident to the very existence of a state of maritime warfare, participated in by both groups of belligerents.

From the quotation hereinbefore made from one of the briefs filed by American counsel ²⁶ it will be noted that freight rates on cotton from New York to Liverpool were advanced from 25c per 100 pounds in July, 1914, to \$5.00 per 100 pounds in December, 1916, as a direct consequence of the war. There is no more reason why war-risk insurance premiums paid by American nationals should be recovered from Germany than there is that these advances in ocean freight rates, which, as heretofore pointed out, were during the early days of the war in a large measure indirectly paid by the American cotton planters, should be so recovered. If the terms of the Treaty can be so expanded by forced construction as to embrace such claims, then they will include all increased living costs, increased railroad freights, increased income and profits taxes, in a word *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. The rejection of such a construction must follow its mere statement.

While in no wise binding on this tribunal, it is worthy of note that the Reparation Commission, constituted under the Versailles Treaty, has so construed that treaty as to exclude amounts paid by nationals of the Allied Powers as premiums for war-risk insurance.

The United States has declined to press very large claims against Germany representing the cost to it of pensions and separation allowances; costs which were undoubtedly incurred as a "consequence of the war"; costs which must be borne by all American taxpayers; costs which the United States was authorized to assert and which the Allied Powers are asserting under the Treaty of Versailles. ²⁷

²⁶ Page 38 *ante*. (Note by the Secretariat, this volume, p. 49 *supra*.)

²⁷ See note 11, this Commission's Administrative Decision No. II handed down this day.

There is nothing in the Treaty of Berlin or the history of its making to support the contention that the United States, while declining to press claims of the character mentioned in the preceding paragraph, nevertheless intended to assert, on behalf of a comparatively small group of American exporters and importers, claims for refund of war-risk insurance premiums, which belong to that numerous class of losses suffered as an incidental and remote consequence of the war, when similar claims are not being asserted by any Allied Power.

In a brief filed by private counsel and adopted by the American Agent, the argument is put forward that under the Treaties of 1785, 1799, and 1828 between the United States and Prussia American nationals were guaranteed freedom from "confiscation or condemnation and loss of property" even where contraband, and that these guarantees were violated by the unlawful warfare instituted by Germany, necessitating American nationals purchasing war-risk insurance. Without expressing any opinion with respect to the binding effect of the Treaties in question or the quality of the conduct of either party with respect thereto, suffice it to say that the claims for the recovery of war-risk insurance premiums paid by American nationals are not based on any alleged confiscation or condemnation or loss of property in the sense that these terms are used in those Treaties, but are rather to recover expenses incurred for protection against risks incident to the existence of a state of war, participated in by both groups of belligerents, claims not embraced within the terms of the Treaty of Berlin, which determines the jurisdiction of this Commission.

There is a suggestion in another brief filed by private counsel and presented by the American Agent that the Terms of Article 232 of the Treaty of Versailles, read in connection with Annex I to Section I of Part VIII thereof, impose liability on Germany to reimburse American nationals for war-risk insurance premiums paid by them during the period of belligerency. It follows from the rules laid down in Administrative Decisions Nos. I and II that such a construction must be rejected by this Commission.

In another brief, prepared by private counsel and presented by the American Agent, it is urged that under Article I of the Agreement under which this Commission is constituted Germany is obligated to pay claims of this class. While the construction placed by counsel on the language of the Agreement must be rejected, still if accepted the result would be the same, inasmuch as Germany's liabilities, which are fixed by the Treaty of Berlin, can not be enlarged by the Agreement.

The Alabama claims decisions considered and applied. The decisions of the Geneva Tribunal and the decisions of the *Alabama* Claims Courts in disposing of the so-called *Alabama* Claims are respectively invoked and earnestly pressed upon our consideration, the former by the German and the latter by the American counsel. A careful analysis will disclose that these decisions do not bear with controlling weight on the questions presented by this group of cases. So far as they are in point, they support the conclusions reached by this Commission. As, however, they are being constantly cited in cases here pending, and as the use of the terms "indirect claims," "indirect damages," and "indirect losses" in connection with these *Alabama* claims has led to much confusion of thought and a misapprehension of the real decisions made, they may be here profitably examined with care, historically and analytically.²⁸

The claims which came to be known by the generic term "Alabama Claims" were asserted by the United States against Great Britain because of the latter's

²⁸ By the designation "Moore" herein is meant the work of John Bassett Moore on "International Arbitrations." Italics used in quotations are ours.

alleged breach of neutrality in allowing cruisers to be built and fitted out or manned in British ports for the use of the Confederate States during the American Civil War. After diplomatic negotiations extending over a period of approximately seven years, during which the merits of these claims, their nature, and scope became political issues on both sides of the Atlantic, the Treaty of Washington of May 8, 1871, was executed, providing, among other things, for the creation of a "tribunal of arbitration" to dispose of them. They were finally disposed of, so far as Great Britain was concerned, by the "Geneva Award" of September 14, 1872, under which it was decreed that Great Britain should pay to the United States a lump sum of \$15,500,000 in gold "for the satisfaction of all the claims referred to the consideration of the tribunal."

This sum was awarded and paid to the United States in its capacity as sovereign, rather than in behalf of any of its individual nationals or group or groups of nationals. The disposition of this fund rested entirely with Congress, which by two acts—the first approved June 23, 1874, the second approved June 5, 1882—provided for the creation of a "Court of Commissioners of Alabama Claims" to hear and determine, in accordance with the provisions of these acts, the claims of all those seeking satisfaction out of this fund.

The Geneva "tribunal of arbitration" was international in character and was governed by the provisions of the Treaty of Washington and applicable international law.

The Court of Commissioners of Alabama Claims was a creature of the Congress of the United States, governed by the provisions of the acts creating it, constituting a part of the machinery for the distribution of a fund in the Treasury of the United States over which the Congress had absolute control.

This distinction must be constantly borne in mind in weighing the decisions of each of these tribunals.

It is significant that the term "indirect" to identify the particular class of claims which afterwards came to be known as "indirect claims", was not used in any of the diplomatic correspondence or in any of the negotiations preliminary to the execution of the Treaty of Washington or in that document itself. To an impassioned speech delivered by Charles Sumner in the Senate of the United States on April 13, 1869, may be traced the conception of a definite political issue in the form of a demand upon Great Britain for the payment, not only of "private claims", but "*national claims*". Mr. Sumner estimated the private claims at about \$15,000,000, and in addition thereto he enumerated classes of "national claims", embracing, as one of several classes, the "enhanced payment of insurance". He put forward this claim on behalf of the United States as a sovereign nation and not on behalf of any individual or group of individuals. The reason, doubtless, was that the exporter or importer who actually paid the war-risk premiums did not in the majority of cases sustain a loss equal to the premium paid or any loss at all; but took the cost of insurance into account in the purchase or sale of the product, passing such cost on to either the producer or the consumer, so that it was practically impossible to trace the loss to the individual ultimately bearing it. Hence Mr. Sumner treated this item as an economic loss sustained by the nation as a whole.²⁹ Mr. Sumner anticipated the objection that these enumerated national losses were too *indirect* and *remote* to afford a solid ground for claims against Great Britain, but brushed this objection to one side as of little moment.

The first time these and similar classes of claims were officially designated as "indirect" was on February 3, 1872, when Earl Granville, then British Minister of Foreign Affairs, addressed a note to General Schenck, then

²⁹ Moore, 509-512.

American Minister to Great Britain, announcing that it was the view of Her Majesty's Government "that it was not within the province of the tribunal of arbitration at Geneva to decide upon the claims for *indirect losses*". This was followed by a similar pronouncement in the Queen's speech opening Parliament three days later, and thenceforth these claims which Mr. Sumner had classed as "national claims" as contradistinguished from "private claims" came to be referred to in the press and elsewhere as "indirect claims".

A careful reading of the history of the Alabama Claims from their inception to the handing down of the Geneva Award strongly suggests that the Government of the United States in putting forward these so-called "national claims" was actuated by two motives: (1) domestic political considerations rendered it expedient for the Government to assert these claims for what they might be worth, and (2) they were put forward as makeweights, not with the hope that they would be allowed, but for trading purposes in the expectation of securing a large lump-sum award.³⁰ That the second motive mentioned actuated the Government of the United States is made manifest by a letter from Mr. Hoar, one of the American members of the Joint High Commission to Mr. Fish, written in response to the latter's inquiry after a controversy had arisen between the two governments with respect to these so-called "indirect claims," in which Mr. Hoar said that he—

"Always thought and expected that those claims, though incapable from their nature of computation and from their magnitude incapable of compensation, were to be submitted to the tribunal of arbitration, and urged as a reason why a gross sum should be awarded, which should be an ample and liberal compensation for our losses by captures and burnings, without going into petty details."

Mr. Fish, then Secretary of State, never had any confidence in the soundness of these claims.³¹ Mr. Adams, the American Commissioner, had, to Mr. Fish and others, expressed the opinion that these claims were without merit.³² All concerned agreed that the familiar rule of proximate cause must be applied in determining Great Britain's liability in each claim presented. The following excerpts from the "Counter Case" presented by the *American Agent* are significant:

"Both parties contemplate that the United States will endeavor to establish in these proceedings *some tangible connection of cause and effect* between the injuries for which they ask compensation and the '*acts committed by the several vessels,*' which the treaty contemplates are to be shown to be the fount of these injuries."

"The tribunal of arbitration being a judicial body, invested by the parties with the functions necessary for determining the issues between them, and being now seized of the substance of the matters in dispute, will hold itself bound by *such reasonable and established rules of law regarding the relations of cause and effect* as it may assume that the parties had in view when they entered into their engagement to make this reference."

It will be noted that the American Agent in substance admitted that claims must be limited to those proximately caused by the acts of the particular vessels in connection with the building, fitting out, and manning of which Great Britain had failed in her duties of neutrality. Parenthetically, attention is called to the fact that the language of paragraph 5 of the Peace Resolution

³⁰ Instructions of Mr. Fish to Mr. Motley, Moore, 512-513. Statement of Mr. Fish to Joint High Commission March 8, 1871, Moore, 629-630.

³¹ See instructions of Mr. Fish to Mr. J. Lothrop Mottey May 15, 1868, Moore, 512-516; statement of Mr. Fish to Joint High Commission March 8, 1871, Moore, 629-630; telegram of Mr. Fish to General Schenck April 27, 1872, Moore, 642.

³² Moore, 642-643.

and paragraph 4 of the Annex to Section IV of Part X of the Versailles Treaty (both carried into the Treaty of Berlin), fixing liability for *acts committed by Germany or her agents*, is not broader, so far as concerns the application of the rule of proximate cause, than the language of the Treaty of Washington, where the liability of Great Britain was restricted to losses sustained by American vessels "growing out of the *acts committed by the several vessels* which have given rise to the claims generically known as the 'Alabama claims'".

There is no reason to doubt that had the question been squarely presented to the Geneva Tribunal it would have *unanimously* held to the view which had already been expressed by Mr. Adams, the American Commissioner, that these so-called national or indirect claims were not within the purview of the Treaty of Washington. It will be borne in mind that the Geneva Tribunal found that under the terms of the treaty Great Britain was liable only for the damages inflicted by (1) the *Alabama* and her tender, the *Tuscaloosa*; (2) the *Florida* and her tenders, the *Clarence*, the *Tacony*, and the *Archer*, and (3) the *Shenandoah* after leaving Melbourne on February 18, 1865. These three cruisers and four tenders named will be hereinafter referred to as "inculpatated cruisers". The Tribunal further found that Great Britain was not liable for any damages inflicted by a number of other cruisers and vessels, including the *Retribution*, *Georgia*, *Sumter*, *Nashville*, *Tallahassee*, *Chickamauga*, *Sallie*, *Jefferson Davis*, *Music*, *Boston*, and *V. H. Joy*, which will be hereinafter referred to as "exculpated cruisers". In addition to the vessels above named, it appears from the British Case³³ that there were fitted out in Confederate ports a number of armed vessels, mostly of small tonnage, which preyed upon and captured and destroyed vessels of the United States. Some of these were the *Calhoun*, *Savannah*, *Saint Nicholas*, *Winslow*, *York*, *Echo*, and *Patrick Henry*. These vessels were stated to have taken from sixty to seventy prizes.

It was manifestly impossible to determine to what extent the inculpatated cruisers had required the purchase by American nationals of war risk insurance or influenced the rate thereof or the amount of the premiums paid. Manifestly, it could not be contended that the specific act of a specific cruiser caused the payment of a specific premium. But the Treaty of Washington fixed liability upon Great Britain only for claims "growing out of *acts committed by*" inculpatated cruisers, and all other claims were necessarily excluded from consideration by the Tribunal.

Had the question been submitted to the Geneva Tribunal and it had found—as it was apparent from the record it would have found—that these so-called "indirect claims" were not within the purview of the Treaty of Washington, then we would have had a decision of an international tribunal acting within its jurisdiction and as such entitled to due weight. However, the domestic political pressure on the then Government of Great Britain was so strong that it declined to be a party to the submission of these claims in any form to the commission, vigorously contending that under the Treaty of Washington they lay entirely outside of the commission's jurisdiction and hence it was not competent to receive, consider, or deal with them. In these circumstances and in order to prevent making abortive the work of the commission, resort was had to political expediency, which took the form of the reading of a statement by Count Sclopis, the president of the tribunal, in behalf of all the arbitrators, which, after reciting the facts of the controversy between the contending parties with respect to certain specified classes of claims (which were not, however, designated as "indirect claims"), proceeded:³⁴

³³ Moore, 594-595.

³⁴ Moore, 4113-4114.

“ . . . the arbitrators think it right to state that, after the most careful perusal of all that has been urged on the part of the Government of the United States in respect to these claims, they have arrived, individually and collectively, at the conclusion that these claims do not constitute, upon the principles of international law applicable to such cases, good foundation for an award of compensation or computation of damages between nations, and should, upon such principles, be wholly excluded from the consideration of the tribunal in making its award.”

While this ruling was in the nature of an interlocutory order or judgment, it was, when considered in the light of the record, nothing more than an extrajudicial declaration made necessary by political expediency and entirely justified on that ground. It was accepted and acquiesced in by both agents, being authorized by their respective governments so to do. Mr. Davis, the Agent of the United States, among other things stated that this ruling “is accepted by the President of the United States as determinative of their judgment upon the important question of public law involved.” After the commission had decided the issue of Great Britain’s liability with respect to the particular vessels, the agent and counsel of the United States devoted their energies toward securing a lump-sum award, “such a sum as should be practically an indemnity to the sufferers.”³⁵ These efforts resulted in the final award of \$15,500,000. It is important to determine how this result was reached. The estimate prepared by Mr. Staempfli and the memorandum of Sir Alexander Cockburn (both members of the Tribunal)³⁶ strongly indicate that it was a compromise figure. However, it is significant that Mr. Sumner in his speech in the Senate on April 13, 1869, in opposition to the Johnson-Clarendon Convention estimated the “private claims” at about \$15,000,000;³⁷ Mr. Fish in his statement which he read in opening the meeting of the Joint High Commission on March 8, 1871, recited that the “claims for the loss and destruction of private property which have thus far been presented amount to about \$14,000,000 without interest”;³⁸ and according to the records in the office of the Secretary of State of the United States the list of claims *presented* to the Geneva Tribunal for damages actually *inflicted by the inculpated cruisers and their tenders* aggregated \$15,530,434.00. It is also significant to note that this total of claims so presented included claims presented on behalf of insurance companies or associations claiming through subrogation reimbursement for losses paid by them to American nationals aggregating in amount \$5,111,133.01. This figure should be borne in mind in connection with the history of the distribution of this award by the United States.

While the history of such distribution is important and interesting, it is not sufficiently relevant here to do more than note that the provisions of the first act creating and governing the court with respect to the right to recover and the measure of damages conformed in the main to the bases used by the Geneva Tribunal. The outstanding exception was the extraordinary provision which denied to any insurance company the right to recover sums paid by it for losses sustained under war risk policies issued by it unless it could show that the aggregate of all war risk losses paid exceeded the aggregate of all war risk premiums received. The act authorized the allowance by the court of interest at the rate of 4% per annum on the “amount of actual loss or damage” from such date as the court should decide that such loss or damage was sustained

³⁵ Moore, 651

³⁶ Moore, 4116-4119.

³⁷ Moore, 511

³⁸ Moore, 630.

by the claimant. The fact that the Geneva award included interest at the rate of 6%³⁹ and that this Act of Congress limited interest to 4% suggests a belief on the part of Congress that the fund would not be more than sufficient to pay all of the awards which the court was authorized to make in pursuance of the provisions of the act. This may furnish a possible explanation for excluding claims of insurers, notwithstanding their claims to the extent of approximately \$5,000,000 had been embraced in the Geneva award. The court rejected a number of claims as being *indirect* and *remote* in their nature, including claims for war risk insurance premiums paid where the property insured had not been destroyed.⁴⁰ These decisions are not, however, regarded as important, as clearly claims of this class were placed beyond the jurisdiction of the court by the Act of Congress creating it.⁴¹

The judgments rendered by this first court, including interest, aggregated \$9,316,120.25.⁴²

The Geneva Award fund had been invested in bonds since its payment by Great Britain, and the accumulations, with the coin premiums on bonds sold and currency premiums sums, brought the total to an amount which, after paying the awards of the first court, left \$10,089,004.96 in the Treasury of the United States subject to disposition by Congress. It is worthy of note that a few public men advocated returning to Great Britain the fund remaining,⁴³ but this suggestion apparently was not taken seriously. It would seem that the more logical course would have been to have satisfied the claims of the American underwriters which had been allowed by the Geneva Tribunal based on losses actually sustained by American nationals and then to have returned to Great Britain the balance, if any, remaining. After heated political contests, apparently among those espousing (1) the cause of insurers who had taken risks on property destroyed by the inculpated cruisers and who sought to be subrogated to the rights of the insured, (2) those who had paid war-risk insurance premiums by reason of the Confederate cruisers being on the sea, and (3) those whose property was destroyed by Confederate vessels designated "exculpated cruisers" and others, for whose depredations Great Britain was held not to be responsible, the Act of June 5, 1882, was passed. This restricted the Court of Commissioners of Alabama Claims, which was reconstituted, to receiving and examining and entering judgment on claims falling within two classes: (1) "claims directly resulting from damage done on the high seas by Confederate cruisers"—exculpated as well as inculpated cruisers—excluding only those claims proven under the Act of 1874; (2) "claims for the payment of premiums for war risks, whether paid to corporations, agents, or individuals, after the sailing of any Confederate cruiser".⁴⁴

It was provided that claims of the first class should be first satisfied out of the fund. If any then remained, claimants of the second class should be paid *pro rata*.

As heretofore pointed out, an examination of the list of claims presented by the United States growing out of the acts of the inculpated cruisers discloses that approximately one-third in amount of these claims were asserted on behalf of insurance companies claiming to be subrogated for losses paid by them.

³⁹ Sir Alexander Cockburn's dissenting opinion, Moore 651.

⁴⁰ Davis Report 22. Also *Gannett v. U.S.*, 184, Davis Report 42; *Hyneman v. U.S.*, 643, Davis Report 45; *v. U.S.*, 1228, Davis Report 56.

⁴¹ See language of court in Davis Report 35-41.

⁴² Moore, 4648.

⁴³ Moore, 4662.

⁴⁴ This language is particularly significant when it is remembered that a number of Confederate cruisers were active long before the Confederate States came into possession of any of the inculpated cruisers.

The records of the Geneva Tribunal indicate that these claims were considered and allowed on the same basis as those of American nationals whose losses were not protected by insurance, care being taken, however, to eliminate "double claims," that is, claims where the owners of the property destroyed and the insurer had each put in a claim for its value.⁴⁵ Of these claims by insurance companies, aggregating a little more than \$5,111,000, which were apparently allowed by the Geneva Tribunal, only six, aggregating in amount a trifle over \$111,000, could be brought within the terms of the Act of 1874 by showing that their war risk losses were greater in amount than their aggregate premiums on the war-risk insurance written by them. It would seem, therefore, that approximately \$5,000,000 allowed by the Geneva Tribunal on behalf of the insurance companies was by the Acts of 1874 and 1882 diverted from the course for which it was intended, and applied (1) to the payment of claims for damages inflicted by cruisers other than the "inculpated cruisers", all of which claims were rejected by the Geneva Tribunal, and (2) to the payment of war risk premium claims which had been treated by Mr. Sumner and others as "national claims" and later came to be designated as "indirect claims", not falling within the terms of the Treaty of Washington.

The judgments rendered by the second court on claims of the first class aggregated \$3,346,000. This left nearly \$7,000,000 to be prorated among war-risk premium claimants, in whose favor judgments aggregating approximately \$16,313,000 had been rendered.

It is apparent from the foregoing that the fact that a portion of the lump-sum award paid by Great Britain to the United States was by the latter paid to war-risk premium claimants can not be regarded as a controlling precedent in support of a like class of claims before this tribunal. The acts of 1874 and 1882 of the Congress of the United States dealt solely with the *distribution* of an international award after it had been made and paid. Whatever the motives of Congress may have been, it was clearly acting within its jurisdiction in disposing of a fund which it had the absolute right to control. Its acts, however, were purely national in their scope and were not intended to have, and could not possibly have, any international effect. The disposition or distribution of this fund by Congress was not a matter of international concern. The numerous decisions of American courts dealing with the distribution of the Alabama award cited and discussed by American counsel are without application here.

While for the reasons hereinbefore indicated the decisions of the Geneva Tribunal are of doubtful value as precedents, still, in so far as they are entitled to be weighed, they hold: (1) that claims for war-risk premiums paid are not recoverable under the applicable principles of international law, and (2) that claims asserted by American underwriters for reimbursement of losses paid by them to American owners of property lost or damaged, which losses furnish a solid basis for a claim put forward by such owners, are direct losses and recoverable as such.

The use of the term "indirect" as applied to the "national claims" involved in the Alabama case is not justified by the early debates in the Senate of the United States, by the record of the preliminary diplomatic negotiations, by the Treaty of Washington, by the "American Case" as presented by the American Agent, or by the Award. Its use in this connection has been productive of great confusion and misunderstanding. The use of the term to describe a particular class of claims is inapt, inaccurate, and ambiguous. The distinction sought to be made between *damages* which are direct and those which are indirect is frequently illusory and fanciful and should have no place in inter-

⁴⁵ Moore, 4116.

national law. The legal concept of the term "indirect" when applied to an act proximately causing a loss is quite distinct from that of the term "remote." The distinction is important.

In the Alabama case the United States—a belligerent—asserted, on behalf of its nationals, claims against Great Britain—a neutral—for war risk insurance premiums paid by such nationals, based on the theory that the risks insured against which never matured into actual losses, were created by Great Britain's unneutral acts.

In this case the United States—both as a neutral and a belligerent—is asserting on behalf of its nationals, claims against Germany—a belligerent—for war risk insurance premiums paid by such nationals, based on the theory that the risks insured against, which never matured into actual losses, were created by Germany's acts.

In the Alabama case it appeared that while the activities of the inculpated cruisers for which Great Britain was held liable were, speaking generally, greater and more destructive than other Confederate cruisers, still the Confederate States had on the seas numerous other vessels preying on commerce of the United States. Great Britain, under the terms of the Treaty of Washington, could be held liable only for the losses inflicted by the acts of the inculpated cruisers. Obviously, it was impossible to attribute the risks insured against solely to them.

In this case it is evident that during the period of neutrality *both* groups of belligerents freely resorted to "retaliatory measures" to the detriment of all neutral commerce, over the vigorous and repeated protests of the Government of the United States; and in both theory and in practice, as demonstrated by actual experience, the American nationals insured against the risks created by the acts of *both groups*; risks inevitably incident to the very existence of a state of war. Obviously it is impossible, therefore, to attribute these risks to the acts of Germany without holding her liable for all the consequences of the war, which under the Treaty is not permissible.

In this group of claims there is no complaint of injury to or destruction or seizure of property by the acts of Germany or her agents. The sole complaint here is that the hazards of the war required the claimants as a matter of business prudence to protect by insurance against risks which never matured into damage to or destruction of the property insured, and the claimants seek to recover from Germany the cost to them of such insurance. Under the terms of the Treaty of Berlin as construed by Administrative Decisions Nos. I and II handed down this day, Germany is financially obligated to make full and complete compensation for all losses sustained by American nationals proximately caused by Germany's acts. But under the terms of that Treaty Germany can not be held liable for all losses incident to the very existence of a state of war. To this class belong claims by American nationals for refund of premiums paid by them for insurance against the risks of possible losses which never occurred, risks in their very nature uncertain, indefinite, indeterminable, and too remote to furnish a solid basis on which to rest a claim.

Done at Washington November 1, 1923.

Edwin B. PARKER
Umpire

Concurring in the conclusions:

Chandler P. ANDERSON
American Commissioner

W. KIESSELBACH
German Commissioner
