EDITORIAL COMMENT

THE CLAIMS AGREEMENT WITH GERMANY

The agreement between the United States and Germany providing for the determination of the amount of American claims against that State, signed at Berlin August 10, 1922, is not without significance. The mode of perfecting the contractual relationship between the parties, the choice of an umpire, and the function of the tribunal established thereunder, will obviously attract special attention.[1]

The arrangement takes its place among the so-called executive agreements of the United States; it does not purport to be a treaty. The compact provides for a mixed commission (comprising a commissioner to be appointed by each party, and an umpire, to decide upon cases where the commissioners may disagree), to determine the *amount* to be paid by Germany in satisfaction of the financial obligations of that State under the treaty with the United States of August 25, 1921, securing to the United States and its nationals rights specified under the Resolution of the Congress approved July 2, 1921, and embracing rights under the Treaty of Versailles.[2]

The right of the Executive, incidental to his management of the foreign relations of the United States, to adjust international controversies involving the ascertaining of the amount of pecuniary claims against a foreign State, and by recourse to arbitral procedure, is not to be questioned. This is believed to be true regardless of the will of the individual claimant (when a private one), and irrespective of the public or private aspect of the particular claim, and for most purposes, without reference to the causes giving rise to complaint. The right of the President is thus not sharply defined according to whether the particular claim arose as an incident of war, or whether the government rather than a national happens to be the aggrieved party,[3] or

[1] The text of the agreement is printed in the Supplement hereto, page 171.

[2] The Commission is to pass upon the following categories of claims more particularly defined in the treaty of August 25, 1921, and in the Treaty of Versailles:

(a) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

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

(c) Debts owing to American citizens by the German Government or by German nationals.

[3] Doubtless in the adjustment of certain classes of essentially public claims, and notably of those hardly capable of exact measurement or appraisal in pecuniary terms, and of large

whether a national whose cause has been espoused by his government is satisfied with the procedure or result.

The new agreement with Germany, having no political aspect whatever, is far from manifesting the full extent of the agreement-making power possessed by the President. As compared with the protocol signed at Washington August 12, 1898, fixing the basis of conditions for peace with Spain, or with the arrangement of September 7, 1901, establishing the burdens to be borne by China in consequence of the "Boxer" troubles of the previous year, or with the executive action in formulating in conjunction with the Associated Powers the basis of an arrangement productive of the armistice concluded with Germany in 1918, the recent agreement appears to be a very moderate exercise of Presidential power. While it entails the ascertaining of the limit of an aggregate sum of vast proportions, the amount involved hardly affects the theory of procedure or betokens recourse to a fresh principle.

Despite arguments to the contrary, it may be gravely doubted whether the Trading with the Enemy Act of October 6, 1917,[4] purported to deprive the Executive of any right possessed by him to conclude an agreement such as that of August tenth. That Act did declare that after the end of the war, any claim of an enemy or of an ally of an enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, should be settled as Congress might direct.[5] This was far from an assertion of control over American claims against Germany or its nationals, and still less over the mode of ascertaining their extent. It should be observed that it is the determination of the amount, rather than of the basis or mode of satisfaction of those claims, which is made the function of the commission established under the convention.

It would be difficult to maintain that any existing contractual arrangement with Germany tied the hands of the President, forbidding an executive agreement such as that which he has concluded. The treaty with Germany of August 25, 1921,[6] conferring upon the United States comprehensive and specified privileges under the Treaty of Versailles of June 28, 1919, made careful provision that the United States was not to be bound to participate in any commission established under that treaty or any agreement supplemental thereto. Moreover, it did not prescribe that should the United States and Germany elect to agree to have recourse to a mixed arbitral tribunal such as that outlined in Article 304 of the Treaty of Versailles, the compact should assume the form of a treaty, or that any mixed commission

political concern to the nation, the President would and perhaps should condition the consent of the United States upon the approval of the Senate, and accordingly incorporate the agreement in a treaty.

[4] 40 Stat. 411; also SUPPLEMENT to this JOURNAL, Vol. 12 (1918), p. 27.

[5] Section 12.

[6] U. S. Treaty Series, No. 658; also SUPPLEMENT to this JOURNAL, Jan. 1922 (Vol. 16), p. 10.

to be established as a means of ascertaining the amount of American claims against Germany, should be necessarily governed by the terms of the Treaty of Versailles.

It should be noted, however, that the Senate in its resolution of October 18, 1921, advised and consented to the ratification of the treaty of August 25, 1921, subject to the understanding made a part of the resolution of ratification, that "The United States shall not be represented or participate in any body, agency or commission, nor shall any person represent the United States as a member of any body, agency or commission in which the United States is authorized to participate by this treaty, unless and until an Act of the Congress of the United States shall provide for such representation or participation." The action taken during the last days of the Second Session of the Sixty-seventh Congress, in appropriating funds for American participation in and representation on the Claims Commission, would appear to satisfy the requirement in respect to Congressional authorization. Such must have been the view of the Senate to whose attention the text of its resolution was called.[7] In a word, the claims agreement appears to have been concluded in pursuance of the treaty of August 25, 1921, and arrangements for the operation of the commission to have been made by no process at variance with the terms on which that treaty was accepted.

Simultaneously with the signing of the agreement, the German Government expressed a desire to have an American citizen appointed as umpire, and requested the President of the United States to make the designation accordingly. Pursuant to that request, the President named the Honorable William R. Day, Associate Justice of the Supreme Court of the United States, to serve in that capacity. The reliance thus placed upon the sense of justice of the claimant State, and upon the fitness of one of its nationals to decide as umpire upon cases productive of disagreement, is an unusual expression of confidence in the United States. The President's choice of an umpire must assure Germany that that confidence has not been betrayed, and that the judicial function of that officer will be exercised in the same spirit as though he were a neutral person selected by reason of his known freedom from prejudice towards either contracting State.

However prolonged and exacting may prove to be its task, the commission begins its labors under conditions which inspire the hope that through the influence of its distinguished umpire, it may consciously and rigidly fulfill the highly beneficent function of an international court of justice, and thereby renew the confidence of America and Europe in the judicial settlement of international differences not lacking a justiciable character.

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[7] For an interesting discussion of the Claims Convention in the Senate, see, *Congressional Record*, Sept. 21, 1922, Vol. 62, No. 238, pages 14073–14093.