

The Gold Standard

Introduction

1. On 2 March 2004, Professor Ben S. Bernanke, then-Member (and later Chairman) of the Board of Directors of the Federal Reserve System of the United States of America (the “**Federal Reserve**”) gave the H. Parker Willis Lecture in Economic Policy in Washington, D.C. He titled the lecture “*Money, gold and the Great Depression*”. He posed the question: “*What caused the Depression?*”¹ Professor Bernanke addressed the conduct of the Federal Reserve. Relying on Milton Friedman’s and Anna J. Schwartz seminal 1963 *A Monetary History of the United States*, Professor Bernanke referred to three broader groups of decisions: first, the tightening of monetary policy; second, the lack of banking regulation; and third, keeping the gold standard. Professor Bernanke also remarked:

“[T]he most fascinating discovery arising from researchers’ broader international focus is that the extent to which a country adhered to the gold standard and the severity of its depression were closely linked. In particular, the longer that a country remained committed to gold, the deeper its depression and the later its recovery. [...] The finding that leaving the gold standard was the key to recovery from the Great Depression was certainly confirmed by the U.S. experience.”²

2. Our case-study involves the Federal Reserve’s actions with a view to the gold standard. Unless stated otherwise within this case-study, all events are historical. By contrast, the arbitrations and the facts mentioned in the Disputes section were invented for purposes of the Moot. Furthermore, the 1929 Swiss-U.S. BIT and the 1937 Termination Treaty are fictitious. Aside from this, the participants are to assume that all sources of and authorities on international law as of 1 June 2025 applied throughout the below events. Provisions from and authorities on national laws will not be relevant for the purposes of the Moot unless they are quoted in *verbatim* in this case-study or concern the Arbitration Act of England & Wales (which in its form and translation uploaded to the Moot’s homepage should also be assumed to have applied at the time of the events set out below).³

The Facts

3. On 23 December 1913, U.S. President Woodrow Wilson signed the Federal Reserve Act. The Act created the Federal Reserve, the central banking system of the U.S. The Federal Reserve Act also incorporated the gold standard into the framework of the Federal Reserve.

¹ Ben S Bernanke: Money, gold and the Great Depression Remarks by Mr Ben S Bernanke, Member of the Board of Governors of the US Federal Reserve System, at the H Parker Willis Lecture in Economic Policy, Washington and Lee University, Lexington, Virginia, 2 March 2004 , <https://www.bis.org/review/r040305e.pdf>, p. 2.

² *Id.*, p. 7

³ Neither this introduction nor the sources referenced in the footnotes are part of the case-study. The historical sources and documents span many hundreds of pages. For the purposes of the Moot, the chain of events has been summarized. U.S. judgments or other primary or secondary sources are not part of the case-study unless cited in *verbatim* in this case-study.

The Federal Reserve was obligated to exchange gold into U.S. Dollars at a statutory price of \$ 20.67 per ounce gold. Moreover, Section 16 paragraph 3 of the Act stated:

“Every Federal reserve bank shall maintain reserves in gold or lawful money of not less than thirty-five per centum against its deposits and reserves in gold of not less than forty per centum against its Federal reserve notes in actual circulation, and not onset by gold.”⁴

4. Following the entry into force of the Federal Reserve Act, “[t]he Federal Reserve typically held more than enough gold to back the currency it had issued. Bankers called the excess free gold. The Federal Reserve needed a stock of free gold sufficient to satisfy redemption requests that might occur in the near future. The Federal Reserve could increase the stock of free gold by increasing interest rates, which encouraged Americans to deposit in banks and encouraged foreigners to invest in the United States, shifting gold from the pockets of the public (both here and abroad) to the vaults of Federal Reserve district and member banks. Conversely, when the Federal Reserve lowered interest rates, gold would flow from its coffers into the hands of the public both at home and overseas.”⁵

5. On 24 October 1929 (Black Thursday), the U.S. American stock market crashed 11% at the opening bell.

6. On 28 October 1929 (Black Monday), the U.S. American stock market crashed a further 12 %.

7. On 29 October 1929 (Black Tuesday), the U.S. American stock market crashed yet another 11 %.

8. The Great Depression accelerated across the world. The years 1930 and 1931 saw the bank runs or bank panics, *i.e.* large groups of people requesting banks to withdraw their deposits.

9. “On 21 September 1931, Great Britain left the gold standard—that is, withdrew its promise to provide a specific amount of gold in exchange for its bank notes.

10. Foreigners became concerned the United States would do the same and began converting their dollar assets to gold. This external drain caused a large reduction in the US gold supply. At the same time, depositors became concerned about the safety of banks and withdrew currency from their accounts, creating an internal drain on the banking system. Together, these external and internal drains reduced the money supply, deepening the deflation which propagated the depression. The Federal Reserve Bank of New York responded to the external drain in the gold stock by raising its discount rate [primary interest rate] [...] in early

⁴ Original text available on the homepage of the Federal Reserve Bank of St. Louis, <https://fraser.stlouisfed.org/title/federal-reserve-act-975?page=2>.

⁵ Gary Richardson et al., *Roosevelt's Gold Program*, in: Federal Reserve History History (last accessed: 10 December 2024).

October. The goal was to encourage investors to deposit money in the United States by providing a relatively higher relative yield on US financial assets.”⁶

11. The Great Depression continued through 1933.

12. “On 27 February 1933, Uebersee Finanz-Korporation Aktien Gesellschaft [in this Case-Study: “**Uebersee**”] acquired for use in its affairs gold coins of the United States of the face value of \$ 1,250,000.00, and known as double eagles.”⁷ At \$ 20.67 per ounce, this amount equalled 60,474.12 ounces of gold.

13. “On 2 March 1933, it caused these double eagles to be delivered to Ladenburg, Thalmann Co. for storage, and the latter, when it received the gold, agreed to return it to the complainant on demand.”⁸ Ladenburg, Thalmann Co. is a U.S. private merchant bank.

14. On 4 March 1933, Franklin D. Roosevelt was sworn in as 32nd President of the U.S.

15. On 6 March 1933, at 1:00 a.m., President Roosevelt issued Proclamation 2039 ordering the suspension of all banking transactions, effective immediately. All banking transactions remained suspended for an entire week. This week was the so-called Bank Holiday of 1933.

16. On 9 March 1933, U.S. Congress passed the Emergency Banking Act. Sect. 2 stated:

“[T]he President may, through any agency that he may designate, or otherwise, investigate, regulate, or prohibit, under such rules and regulations as he may prescribe, by means of licenses or otherwise, any transactions in foreign exchange, transfers of credit between or payments by banking institutions as defined by the President, and export, hoarding, melting, or earmarking of gold or silver coin or bullion or currency, by any person within the United States or any place subject to the jurisdiction thereof.”⁹

17. Section 3 of the Emergency Banking Act provided:

“Whenever in the judgment of the Secretary of the Treasury such action is necessary to protect the currency system of the United States, the Secretary of the Treasury, in his discretion, may require any or all individuals, partnerships, associations and corporations to pay and deliver to the Treasurer of the United States any or all gold coin, gold bullion, and gold certificates owned by such individuals, partnerships, associations and corporations.”¹⁰

⁶ Kristie M. Engemann, *Banking Panics of 1931-1933*, in: Federal Reserve History (last accessed: 10 December 2024). In *verbatim* quotes, all dates have been adjusted to British spelling and paragraph numbers have been added for ease of reference.

⁷ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 226 (2d Cir. 1936).

⁸ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 226 (2d Cir. 1936).

⁹ Available at: <https://catalog.archives.gov/id/299829>.

¹⁰ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 228 (2d Cir. 1936).

18. On 5 April 1933, President Roosevelt issued Executive Order No. 6102. The Order stated:

“Section 2. All persons are hereby required to deliver on or before 1 May 1933, to a Federal Reserve Bank or a branch or agency thereof or to any member bank of the Federal Reserve System all gold coin, gold bullion and gold certificates now owned by them or coming into their ownership on or before 28 April 1933 [...].

Section 3. Until otherwise ordered any person becoming the owner of any gold coin, gold bullion, or gold certificates after 28 April 1933, shall, within three days after receipt thereof, deliver the same in the manner prescribed in Section 2 [...].

Section 4: Upon receipt of gold coin, gold bullion or gold certificates delivered to it in accordance with Sections 2 or 3, the Federal Reserve Bank or member bank will pay therefor an equivalent amount of any other form of coin or currency coined or issued under the laws of the United States.”¹¹

19. On 20 April 1933, President Roosevelt issued Executive Order No. 6111. Section 1 stated:

“Until further order, the earmarking for foreign account and the export of gold coin, gold bullion or gold certificates from the United States or any place subject to the jurisdiction thereof are hereby prohibited.”¹²

20. On 12 May 1933, as part of President Roosevelt’s so-called ‘New Deal’ aimed at stimulating the domestic economy, Congress enacted the Agricultural Relief Act aimed at improving the returns of farmers. Section 43 *lit. b* section 2 included the following provision:

“[T]he President is authorized [...] By proclamation to fix the weight of the gold dollar in grains nine tenths fine and also to fix the weight of the silver dollar in grains nine tenths fine at a definite fixed ratio in relation to the gold dollar at such amounts as he finds necessary from his investigation to stabilize domestic prices or to protect the foreign commerce against the adverse effect of depreciated foreign currencies, and to provide for the unlimited coinage of such gold and silver at the ratio so fixed, or in case the Government of the United States enters into an agreement with any government or governments under the terms of which the ratio between the value of gold and other currency issued by the United States and by any such government or governments is established, the President may fix the weight of the gold dollar in accordance with the ratio so agreed upon, and such gold dollar, the weight of which is so fixed, shall be the standard unit of value, and all forms of money issued or coined by the United States shall be maintained at a parity

¹¹ Available at: <https://www.presidency.ucsb.edu/documents/executive-order-6102-forbidding-the-hoarding-gold-coin-gold-bullion-and-gold-certificates>.

¹² Available at: <https://www.presidency.ucsb.edu/documents/executive-order-6111-relating-foreign-exchange-and-the-earmarking-and-export-gold-coin-or>.

with this standard and it shall be the duty of the Secretary of the Treasury to maintain such parity, but in no event shall the weight of the gold dollar be fixed so as to reduce its present weight by more than 50 per centum.”¹³

21. On 25 May 1933, “the Attorney General rendered an opinion to the effect that the Executive Order of 5 April 1933, No. 6102, had no concern with foreign owners of gold not within the United States. That opinion, however, by its very terms, did not purport to construe the [Emergency Banking Act], but only the Executive Order of 5 April 1933.”¹⁴

22. “In May 1933, [Uebersee] desired to transfer the gold to its own domicile in Switzerland, and caused Ladenburg, Thalmann Co. to apply for a license from the Secretary of the Treasury to export the coins and to that end to have them placed to the credit of the Central Bank of Switzerland. The effect of exportation would have been to enable the complainant to realize upon the gold in its own country a value in excess of \$ 2,100,000.

23. On 6 July 1933, the Acting Secretary of the Treasury, in reply to the application by Ladenburg, Thalmann Co. for the export license, stated that, in the opinion of the Attorney General, the Executive Order of 5 April 1933 [...] forbidding the hoarding of gold, did not apply to persons who had not subjected themselves to the jurisdiction of the United States, but added that the Executive Order of 20 April 1933 [...] prohibited the export of gold by any person except in certain specific cases enumerated in that order.”¹⁵

24. “By October 1933, though the dollar had fallen by more than 30 percent, commodity prices began to sink again and the economy started to stall once more. [President] Roosevelt decided that it was time for a new initiative. [Professor George] Warren’s original proposal to devalue the dollar had been controversial enough. Now the professor recommended that the government give the dollar another nudge downward by itself buying gold in the open market.” President Roosevelt followed Professor Warren’s proposal.¹⁶

25. On 30 January 1934, the U.S. Gold Reserve Act entered into force. The Act stated:

“Section 3. The Secretary of the Treasury shall [...] prescribe the conditions under which gold may be acquired and held, transported, melted or treated, imported, exported, or earmarked: (a) for industrial, professional, and artistic use; (b) by the Federal Reserve banks for the purpose of settling international balances; and, (c) for such other purposes as in his judgment are not inconsistent with the purposes of this Act. Gold in any form may be acquired, transported, melted or treated, imported, exported, or earmarked or held in custody for foreign or domestic account

¹³ Available from Federal Reserve Bank of St. Louis: <https://fraser.stlouisfed.org/archival-collection/william-mcchesney-martin-jr-papers-1341/agricultural-adjustment-act-1933-457089?page=6>

¹⁴ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 229 (2d Cir. 1936).

¹⁵ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 226-227 (2d Cir. 1936).

¹⁶ Liaquat Ahamed, *Lords of Finance*, 2009, Adobe eBook p. 433.

(except on behalf of the United States) only to the extent permitted by and subject to the conditions prescribed in, or pursuant to, such regulations.

Section 4. Any gold withheld, acquired, transported, melted or treated, imported, exported, or earmarked or held in custody, in violation of this Act [...] or of any regulations issued hereunder, or licenses issued pursuant thereto, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law; and in addition any person failing to comply with the provisions of this Act or of any such regulations or licenses, shall be subject to a penalty equal to twice the value of the gold in respect of which such failure occurred. [...]

Section 5. No gold shall hereafter be coined, and no gold coin shall hereafter be paid out or delivered by the United States: *Provided, however,* That coinage may continue to be executed by the mints of the United States for foreign countries [...]. All gold coin of the United States shall be withdrawn from circulation, and, together with all other gold owned by the United States, shall be formed into bars of such weights and degrees of fineness as the Secretary of the Treasury may direct.

Section 6. Except to the extent permitted in regulations which may be issued hereunder by the Secretary of the Treasury with the approval of the President, no currency of the United States shall be redeemed in gold. [...]

Section 11. The Secretary of the Treasury is hereby authorized to issue, with the approval of the President, such rules and regulations as the Secretary may deem necessary or proper to carry out the purposes of this Act. [...]

Section 12. Paragraph (b)(2), of section 43 of [the Agricultural Relief Act of 12 May 1933] shall be amended as follows: ‘Nor shall the weight of the gold dollar be fixed in any event at more than 60 per centum of its present weight. The powers of the President specified in this paragraph shall be deemed to be separate, distinct, and continuing powers, and may be exercised by him, from time to time, severally or together, whenever and as the expressed objects of this section in his judgment may require’. [...]

Section 17. All Acts and parts of Acts inconsistent with any of the provisions of this Act are hereby repealed.”¹⁷

26. On 31 January 1934, President Roosevelt issued Proclamation No. 2072 which stated:

¹⁷ Available from Federal Reserve Bank of St. Louis: <https://fraser.stlouisfed.org/title/gold-reserve-act-1934-1085>.

“WHEREAS, by Section 43, Title III of the [Agricultural Relief] Act approved 12 May 1933 as amended by Section 12 of the Gold Reserve Act of 1934, it is provided in part as follows: [*verbatim* quote of these provisions]

WHEREAS, I find, upon investigation, that the foreign commerce of the United States is adversely affected by reason of the depreciation in the value of the currencies of other Governments in relation to the present standard value of gold, and that an economic emergency requires an expansion of credit; [...]

WHEREAS, I find, from my investigation, that, in order to stabilize domestic prices and to protect foreign commerce against the adverse effect of depreciated foreign currencies, it is necessary to fix the weight of the gold dollar at 15 ^{5/21} grains nine tenths fine,

NOW, THEREFORE, be it known that I, Franklin D. Roosevelt, President of the United States, by virtue of the authority vested in me by section 43, Title III, of said act of 12 May 1933, as amended, and by virtue of all other authority vested in me, do hereby proclaim, order, direct, declare, and fix the weight of the gold dollar to be 15 ^{5/21} grains nine-tenths fine, from and after the date and hour of this Proclamation.”¹⁸

27. 1 ounce equals 437.5 grains. Therefore, under the aforementioned Proclamation, President Roosevelt fixed the price for 1 ounce gold at \$ 35.00.

28. “[O]n 18 April 1934, [Uebersee], through its president, executed in Switzerland an application to the Secretary of the Treasury [...] for a license to have the gold coins transferred to the Federal Reserve Bank of New York, to be held in custody for Banque Nationale Suisse, the central bank of Switzerland.

29. This application was filed with the Treasury Department on 9 May 1934, by Ladenburg, Thalmann Co., pursuant to instructions of [Uebersee].”¹⁹

30. On 18 February 1935, the U.S. Supreme Court announced its judgments in two separate matters, holding that the 1933 Emergency Banking Act was constitutional.²⁰

31. “On 8 May 1935, Ladenburg, Thalmann Co. received a letter from Acting Secretary of the Treasury T.J. Coolidge, stating that the application to have the gold coins transferred to the Federal Reserve Bank of New York to be held in custody for the Banque Nationale Suisse had been denied, that the applicant had been directed to deliver such gold to the Federal Reserve Bank of New York for the account of the Treasurer of the United States against payment, and that, if such gold was then in the possession of Ladenburg, Thalmann Co., or under their control,

¹⁸ Available at: <https://www.presidency.ucsb.edu/documents/proclamation-2072-fixing-the-weight-the-gold-dollar>.

¹⁹ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 227 (2d Cir. 1936).

²⁰ *Norman v. Baltimore O.R. Co.*, 294 U.S. 240 (1935); *Nortz v. U.S.*, 294 U.S. 229 (1935).

they were directed to deliver it forthwith to the Federal Reserve Bank of New York for the account of the Treasurer of the United States.”²¹

32. The letter set the payment at “*the dollar face amount*.”²² That is, the Secretary for the Treasury decided that in compensation for its gold coins Uebersee would receive \$ 1,250,000.²³

33. “From time to time subsequent to 4 May 1935, and as a result of discussions between counsel for [Uebersee] and representatives of the Treasury, the Department indicated that it would temporarily refrain from taking action, in respect of its demand, for certain limited periods which were successively extended until 15 June 1935.

34. On 14 June 1935, the attorneys for [Uebersee], anticipating the termination of further forbearance, demanded that Ladenburg, Thalmann Co. deliver to Mr. Kresel, [Uebersee’s] solicitor, the gold coins in its possession. This demand was refused, and Ladenburg, Thalmann Co. commenced to have the gold loaded into a truck for delivery to [Ladenburg, Thalmann Co.] and transfer by it to the Treasurer of the United States.”²⁴

35. Afterwards, Uebersee brought a suit in the U.S. District Court for the Southern District in New York against Ladenburg, Thalmann Co. and the Federal Reserve. Uebersee argued that the payment of a mere \$ 1,250,000 would be insufficient because the gold would have been worth \$ 2,100,000 in Switzerland.²⁵ Moreover, “[Uebersee] prayed that Ladenburg, Thalmann Co. or the Federal Reserve Bank, if the latter had received the gold, be directed to turn it over to [Uebersee] or its designee, and that in the meantime the defendants be enjoined pendente lite from turning over the gold to any person other than complainant. A restraining order issued in connection with the motion for the preliminary injunction alone prevented the final delivery of the coins to the Treasurer of the United States.

36. A preliminary injunction was denied by the District Court, and a motion by the Federal Reserve Bank of New York to dismiss the bill as to it was granted on the ground that the complaint stated no cause of action against the bank.”²⁶

²¹ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 227 (2d Cir. 1936).

²² *Id.*, 230.

²³ *Foreign Sue on Gold Seizure*, New York Times, 16 June 1935, p. 18: “The suit seeks to recover \$ 1,250,00 in gold coins, represented as having a market value in excess of \$ 2,100,100. [...] In return for the gold, it is alleged, the plaintiff would get only \$ 1,250,000 in currency.” *Fight Swiss Gold Appeal – Bankers Here Oppose Supreme Court Review in Seizure Case*, New York Times, 3 May 1936, p. 86: “an appeal brought by a Swiss corporation, Uebersee Finanz-Korporation Aktien Gesellschaft, in its effort to keep the United States from seizing its gold in this country, value at \$ 1,250,000. [...] The Swiss corporation contended the gold would be worth \$ 2,100,000 in Switzerland.”

²⁴ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 227 (2d Cir. 1936).

²⁵ *Foreign Sue on Gold Seizure*, New York Times, 16 June 1935, p. 18: “The suit seeks to recover \$ 1,250,00 in gold coins, represented as having a market value in excess of \$ 2,100,100. [...] In return for the gold, it is alleged, the plaintiff would get only \$ 1,250,000 in currency.” *Fight Swiss Gold Appeal – Bankers Here Oppose Supreme Court Review in Seizure Case*, New York Times, 3 May 1936, p. 86: “an appeal brought by a Swiss corporation, Uebersee Finanz-Korporation Aktien Gesellschaft, in its effort to keep the United States from seizing its gold in this country, value at \$ 1,250,000. [...] The Swiss corporation contended the gold would be worth \$ 2,100,000 in Switzerland.”

²⁶ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 227 (2d Cir. 1936).

37. Afterwards, Uebersee appealed the judgment. On appeal, “it [was] argued [by Uebersee] that [the Emergency Act of 9 March 1933’s] provisions did not affect the complainant if the latter, as is claimed, was not in business or, to use the common legal terms, was not ‘found’ or ‘present’ within the United States.”²⁷

38. On 6 April 1936, the U.S. Court of Appeals for the Second Circuit rejected Uebersee’s appeal.

“However doubtful may be the applicability of the Emergency Act of 1933 to [Uebersee]’s gold, there can be no question that the Gold Reserve Act of 1934 covers it. [...] If, as was thought, our financial system was in peril by reason of withdrawals of gold, it is hard to see why legislation should be enacted which did not apply to the gold of nonresident aliens as fully as to that of our own citizens or to discover upon what ground the rights of foreign citizens should be privileged.”²⁸

39. The court added:

“A letter from the Acting Secretary of the Treasury, T.J. Coolidge in May, 1935, denied the application of complainant for license to export the gold. [...] The instructions referred to in the letter of Mr. Coolidge provided for payment for the gold coin at ‘the dollar face amount.’ [...] It is entirely clear [...] that the payment proposed in the Coolidge letter would be lawful compensation and that the gold, as it could not be sold here or exported to a country where it would be worth more in the market, cannot be said to have had a unique value.”²⁹

40. On 25 May 1936, the U.S. Supreme Court dismissed Uebersee’s further appeal, confirming the decision of the Court of Appeal for the Second Circuit in full.³⁰

41. In 1936, the governments of the United States, Great Britain and France reached the informal so-called Tripartite Agreement. Belgium, Switzerland, and the Netherlands joined this informal Agreement as well. In the declaration of the U.S. Secretary for the Treasury Henry Morgenthau, the Agreement is formulated as follows:

“1. The Government of the United States, after consultation with the British Government and the French Government, joins with them in affirming a common desire to foster those conditions which safeguard peace and will best contribute to the restoration of order in international economic relations and to pursue a policy which will tend to promote prosperity in the world and to improve the standard of living of peoples.

²⁷ *Uebersee Finanz-Korporation AG v. Rosen*, 83 F.2d 225, 229 (2d Cir. 1936).

²⁸ *Id.*, 229-230.

²⁹ *Id.*, 230.

³⁰ *Uebersee Finanz-Korporation AG v. Rosen et al.*, 298 U.S. 679 (1936).

2. The Government of the United States must, of course, in its policy toward international monetary relations take into full account the requirements of internal prosperity, as corresponding considerations will be taken into account by the Governments of France and Great Britain; it welcomes this opportunity to reaffirm its purpose to continue the policy which it has pursued in the course of recent years, one constant object of which is to maintain the greatest possible equilibrium in the system of international exchange and to avoid to the utmost extent the creation of any disturbance of that system by American monetary action. The Government of the United States shares with the Governments of France and Great Britain the conviction that the continuation of this two-fold policy will serve the general purpose which all the Governments should pursue.”³¹

42. On 26 September 1936, Switzerland’s *Bundesrat* (Federal Council) decided to devalue the Swiss Francs by 30 % and released the Swiss National Bank from the obligation pay the former statutory price for gold.³²

43. For purposes of the Moot, the participants are to assume the following prices for gold:

Summary of Gold Prices 1931 – 1942 in U.S.\$ per ounce³³

	U.S.	Switzerland ³⁴	U.K. ³⁵
1930	20.67	20.78	20.67
1931	20.67	20.78	21.02
1932	20.67	20.80	20.65
1933	20.67	26.64	26.46
1934	35.00	34.71	34.68
1935	35.00	35.01	34.83
1936	35.00	34.92	34.84
1937	35.00	34.73	34.78
1938	35.00	34.64	34.87
1939	35.00	35.72	34.28
1940	35.00	36.44	[data not available]
1941	35.00	37.30	[data not available]
1942	35.00	44.75	[data not available]

³¹ Available at: https://avalon.law.yale.edu/20th_century/usmu001.asp

³² Bericht des Bundesrates an die Bundesversammlung über seine Beschlüsse vom 26. und 27. September 1936 über die Abwertung des Schweizerfrankens, Bundesblatt, 88. Jahrgang, Band II, 30 September 1936, p. 696: “Die Durchführung der Abwertung hat zur Voraussetzung, dass die Nationalbank von der Verpflichtung der Einlösung ihrer Noten in Gold oder Golddevisen zu dem im Gesetz vorgeschriebenen Kurs entbunden wird.”

³³ 1 ounce gold equals 31.1 grams.

³⁴ Until 1936: SFR 1 = 0.29 grams gold (*Die Schweizerische Nationalbank 1907-1932*, p. 266; 1934 Annual Report of Swiss National Bank, pp. 8-9). 1937-1939: SFR 4.869 per gram gold (1936 Annual Report of Swiss National Bank, p. 20). Gold prices for Vreneli 1940-1942 taken from: Independent Commission of Experts Switzerland – Second World War, Switzerland and Gold Transactions in the Second World War – Interim Report, 1996, Graph V (p. 89). Exchange rates taken from <https://www.measuringworth.com/>.

³⁵ Exchange rate \$/GBP and London market price for fine ounce of gold taken from <https://www.measuringworth.com/>.

44. Multiplied by the amount of gold originally purchased by Uebersee, this results in the following values:

Price in U.S.\$ per ounce	Resulting value of gold originally held by Uebersee
20.67	\$ 1,250,000.00
35.00	\$ 2,116,594.20
36.44	\$ 2,203,676.93
37.30	\$ 2,255,684.68
44.75	\$ 2,706,216.87

The Dispute

45. On 1 January 1929, the Agreement on the Reciprocal Promotion and Investments between Switzerland and the U.S. (the “**BIT**”) entered into force.

46. In 1935, Uebersee’s gold was delivered to and confiscated by the Federal Reserve.

47. On 1 October 1936, Switzerland and the U.S. signed the Agreement for the Termination of the Agreement on the Reciprocal Promotion and Investments between Switzerland and the U.S. (the “**Termination Treaty**”).

48. On 1 January 1937, the Termination Treaty entered into force.

49. On 28 August 1939, Uebersee finally received payment of \$ 1,250,000 by the Federal Reserve for Uebersee’s gold delivered to and confiscated by the Federal Reserve.

50. On 21 March 1940, Uebersee sent a letter to the President of the U.S., the State Department and the Treasury, notifying the U.S. that Uebersee considers the conduct of the Federal Reserve to be in violation of the Swiss-U.S. BIT, that Uebersee claims damages and that Uebersee invites the U.S. to settle the dispute amicably. Uebersee also informed that it accepted the offer to arbitrate under Article 10(4) *lit. c* Swiss-U.S. BIT. Uebersee did not receive any answer.

51. On 1 October 1940, Uebersee filed a Statement of Claim against the U.S. (Uebersee and the U.S. together, the “**Parties**”) in accordance with Article 7 of the Vienna International Arbitration Centre Rules of Investment Arbitration and Mediation (the “**VIAC Rules**”). Claimant nominated Hans Lewald as arbitrator. Claimant requested:

“that the Tribunal RENDER an Award

declaring that by enacting the Measures, the United States of America breached its obligations under the Treaty; and

ordering the United States of America to pay to the Claimant damages to be valued as of the date of the Award, but in any case, no less than \$ 866,594.20 in gold plus post-award interest at a commercial rate to be determined by the Tribunal.

Claimant reserves the right to update this prayer for relief in the courts of the arbitration.”

52. In the statement of facts under Article 7 (2.3) VIAC Rules, Claimant asserted that under U.S. law, it should have received compensation of at least \$ 35.00 per ounce gold. In addition, Claimant asserted that the Measures amount to an unlawful expropriation. Beyond the matters required under Article 7 VIAC Rules, the Statement of Claim did not contain a further legal analysis under Articles 4, 5 BIT.

53. On 2 December 1940, the U.S. filed its Answer to the Statement of Claim in accordance with Article 8 VIAC Rules. The U.S. nominated Hersch Lauterpacht as arbitrator. In addition, the U.S. submitted the following preliminary objections:

“i. There is no consent to arbitrate. Under the Termination Treaty, the BIT – including its sunset clause – has been terminated. The Termination Treaty also states explicitly in Article 5: “*The Arbitration Clause shall not serve as legal basis for New Arbitration Proceedings.*”

ii. The U.S. objects to the Tribunal’s jurisdiction *ratione materiae*. The gold allegedly purchased by the Claimant does not constitute an Investment within the meaning of the BIT. *First*, in U.S. courts, the Claimant itself asserted that it “*was not in business*” in the U.S. *Second*, the mere hoarding of gold does not meet the criteria set out in Article 1 *lit.* a, b BIT. *Third*, the BIT must exclude purely commercial transactions from its scope of application, *inter alia*, because it also included the option of ICSID arbitration.

iii. The Claimant made the final and binding choice to pursue its alleged rights in U.S. courts. Under the fork-in-the-road clause in Article 10(3) BIT, the Claimant can no longer choose arbitration.”

54. On liability, the U.S. made the following comments:

“iv. The Claimant does not have any claim for compensation under Article 4 BIT because the taking of the Claimant’s gold was a legitimate exercise of the U.S.’ police powers.

v. The Claimant does not have any claim under the umbrella clause in Article 5(2) BIT. *First*, the umbrella clause only applies to individual obligations, entered into specifically with the Investor, not U.S. law in its entirety. *Second*, even if the Tribunal holds otherwise (*quod non*), all provisions of U.S. law were complied with. The Tribunal does not have the authority to second-guess whether the U.S. Government and U.S. courts applied U.S. law correctly.”

55. On quantum, the U.S. made the following comments:

“vi. Contrary to the Claimant, the valuation date cannot be the date of the Award. It must be 6 July 1933, the date the Secretary of the Treasury denied the Claimant the export of gold.

vii. Contrary to the Claimant, the fair market value of the gold (if any) can only be the statutory U.S. price. *First*, Claimant held gold in the U.S., not in Switzerland. *Second*, for the avoidance of doubt, the BIT – unlike other treaties – does not prohibit the restriction of the transfer of capital. *Third*, the U.S. regulatory price must also be acknowledged in light of the 1936 Tripartite Agreement.”

56. On 9 April 1941, the party-appointed arbitrators, in consultation with their respective appointing parties, agreed on Francisco José Urrutia Olano as Chairman of the Tribunal.

57. On 16 April 1941, the Tribunal, in order to prepare the first procedural session and the procedural calendar, invited the Claimant to provide brief further observations on the Respondent’s comments made in the Answer to the Statement of Claim.

58. On 6 May 1941, newspapers quoted an unknown informant with the following statement regarding the U.S.’ gold purchases in the open market in fall 1933:

“Every morning at nine o’clock, [Secretary of the Treasury] Morgenthau; Jesse Jones, the head of the [Reconstruction Finance Corporation]; and George Warren would meet with the president over his breakfast of soft-boiled eggs, to determine the price of gold for that day. They began at \$ 31.36 an ounce. The next morning this increased to \$ 31.54, then \$ 31.76 and \$ 31.82. No one had a clue how they went about setting the price, although everyone presumed that some subtle analyses of the world bullion and foreign exchange markets went into their calculations. In fact, the choice of price was completely random. All they were trying to do was push the price a little higher than the day before. The exercise brought out the juvenile in Roosevelt. One day he picked an increase of 21 cents, and when asked why, replied that it was a lucky number, three times seven. [...]

By the end of the year, Roosevelt had begun to tire of the game; and in January 1934 he agreed to stabilize gold at \$35 to the ounce.”³⁶

59. On 7 May 1941, the Claimant filed the following observations:

“i. The Termination Treaty entered into force after Claimant’s Investment and after the Measures. It cannot affect Claimant’s vested rights, including the right to arbitrate. Above all, this right is not a derivative right of Claimant’s home State, but Claimant’s own right.

ii. Claimant’s gold is an Investment under Article 1 *lit.* a BIT, because the gold is an asset; the gold was Claimant’s property; the gold was acquired for indefinite

³⁶ Liaquat Ahamed, *Lords of Finance*, 2009, Adobe eBook pp. 433-434.

duration; and the gold involved a substantial amount of risk given the gold's value. Contrary to the U.S.' assertions, Article 1 *lit.* a BIT does not include any further requirement to contribute to the host State's economy.

iii. The BIT's fork-in-the-road clause does not apply because in U.S. courts, the claim and the cause of action were different than in the present arbitration. Claimant applied for an interim injunction (not financial compensation). Claimant exercised only its rights under U.S. law (not international law). Claimant also notes that the U.S. litigation also involved Claimant's bank Ladenburg as party. Finally, Claimant's umbrella-clause claim is a claim under international law.

iv. The so-called police powers doctrine remains a mere minority theory and would violate the explicit wording of Article 4 BIT.

v. The BIT's umbrella clause includes general legislative and executive acts provided they create rights for individuals. The 1934 Gold Reserve Act and the President's Proclamation of 31 January 1934 created the right to claim \$ 35.00 per ounce gold. Therefore, it was unlawful and, indeed, arbitrary to compensate Claimant only at the former price of \$ 20.67 per ounce.

vi. In case of an unlawful expropriation such as the present one, Claimant can choose either the valuation standard under Article 4 or under customary international law. Claimant chooses the latter one. This allows to value the damages *ex post*, *i.e.* as of the date of the award. The U.S. must not profit from its breach of the BIT through enjoying benefits of an international market price above \$ 35.00.

vii. The value of the gold must be determined in reference to market prices in Switzerland. *First*, the U.S. failed to meet its burden to prove that the evidence and U.S. law still mandate today to prohibit the export of gold. *Second*, in any case, international law refers to the fair *market* value, not some regulatory value.

60. In the same reply, Claimant also raised the following application:

“viii. Claimant requests that the U.S. produce all internal analyses created, modified or reviewed between 4 March 1933 and 8 May 1935 determining the gold prices for the U.S. Government's decisions to determine the price for gold regarding purchases, confiscations and the 1934 Gold Reserve Act. The request is as narrow and specific as possible because it must cover the timeframe between President Roosevelt's inauguration and the Treasury's letter fixing Claimant's compensation at only \$ 20.67 per ounce. The matter is relevant and material because, especially in light of yesterday's news, it is clear that the Respondent exhibited a pattern of arbitrary conduct.”

61. On 14 May 1941, the Parties and the Tribunal agreed on the appointment of Mr. Alejandro Herrero Rubio as Secretary of the Tribunal.

62. On 28 May 1941, as per the Tribunal's invitation, the U.S. commented as follows on Claimant's document-production request:

"viii. The U.S. objects to Claimant's request. *First*, the request is too broad. *Second*, the matter is not relevant and material. It is not in dispute that \$ 20.67 was not the market or regulatory price in 1935, but in 1933 when Claimant acquired the gold. Nor is it in dispute that when fixing the price at \$ 35.00 per ounce in January 1934, the U.S. set a price in line with the market. *Third*, the alleged newspaper articles of 6 May 1941 are mere gossip, not evidence."

63. On 3 June 1941, the arbitration was suspended with the agreement of the Parties for the purposes of settlement negotiations.

64. On 3 October 1941, the arbitration resumed.

65. On 15 October 1941, having heard the Parties on these matters, the Tribunal directed that the seat of the Tribunal be London, United Kingdom and that an 'Early Opening' be held on 2 March 1942 in Montreal, Canada.

66. On 3 February 1942, the Respondent filed the following application:

"ix. It is with a heavy heart that Respondent requests the disqualification of the Chairman of the Tribunal. Yesterday, Respondent learned that the law firm of Claimant's counsel has recently hired Mr. Osgood Fielding. The latter had also applied with Respondent's counsel. In his application, he listed the following experience: '1941/04 – 1941/09: *Traineeship with Francisco José Urrutia Olano personally assisting him with case review, legal research and procedural correspondence in the following cases: [...] Uebersee Finanz-Korporation v. U.S.*'"

67. On 10 February 1942, the Claimant filed the following observations:

"ix. Claimant opposes Respondent's application. Claimant's counsel has checked and confirms the above entry in Mr. Fielding's CV. Until 3 February 1942, Claimant's counsel was not aware of him being hired. Mr. Fielding was hired by a different office of Claimant's counsel. As the Tribunal and Respondent are aware, the law firm has more than 150 attorneys. Mr. Fielding is not part of Claimant's counsel team and will not receive any further information about the present case. In any case, a mere trainee cannot have any decisive knowledge, especially given that with Mr. Herrero Rubio, the Tribunal already has a Secretary."

68. On 17 February 1942, the Chairman provided the following comments on Respondent's application:

"I regret that the Parties had to be occupied with this matter. As the Parties will be aware, I employ a team of three full-time lawyers and usually three to four trainees.

Usually, I only communicate directly with my full-time assistants, including the Secretary of the Tribunal.

While I confirm that Mr. Fielding trained in my team, I can confirm that I have communicated with Mr. Fielding directly only twice during his time. Both times, I gave him tasks about abstract questions of law which may become relevant present, but did not tell him that the research was for the present case, nor anything else about the present case. I may add that the results he presented to me were not usable and went directly into the fireplace. Therefore, the information in his CV is incorrect.

With regard to the present case, all instructions for preparatory work not done by myself were made to the Secretary of the Tribunal. In light of the secrecy of deliberations, the Parties will appreciate that I will not provide further details of the Tribunal's inner workings. Further, I am not in a position to speculate about conversation between my staff members to which I was not privy."

69. On 2 March 1942, the 'Early Opening' begins. In the interest of efficiency, the Parties have agreed to address issues i. through viii. (before all three arbitrators) as well as the challenge of the Chairman (before his co-arbitrators) in one hearing.