

The Black Tom Explosion

Introduction

1. All events within the Facts section of this case-study are historical unless stated otherwise. The footnotes provided in the Facts section do not form part of the case-study but are added only for editorial reasons. The arbitrations and the facts mentioned in the Disputes section were invented for purposes of the Moot. 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 English Arbitration Act. The participants are to assume that all sources of and authorities on international law and the English Arbitration Act as of 1 June 2026 applied throughout the events described below.

The Facts

2. Long before the United States of America (the “USA”) joined World War I as a combatant on 6 April 1917, the American armaments industry had been producing military equipment and munitions for the Entente States. The pier of the peninsula Black Tom Island in New York Harbor was the largest transshipment point in the USA for shipments of arms and munition to Europe. Trains from the factories in Pennsylvania and New York State arrived at the pier. Their cargo was loaded onto barges and then transferred to larger ships bound for Europe. The Lehigh Valley Railroad Company (“LVRR”) operated by Black Tom pier together with a subsidiary, the National Docks and Railway Company.

3. Founded on 21 April 1846, LVRR got its name in 1853 under the leadership of entrepreneur Asa Packer. Holding a quarter of LVRR’s stock, he started to build a railroad network which would stretch from the Great Lakes to New York Harbor by the end of the 19th century.¹

4. In 1879, Asa Packer died. J.P. Morgan & Co. took his place and continued to drive the expansion.²

5. On 3 October 1890, the Russian Prince Sergei Platonovich Obolensky Neledinsky-Meletzky, known as Serge Obolensky was born.³

6. At the turn of the century, the economic prosperity of LVRR attracted many investors. In 1904, regular 10% dividends were revived.

¹ Herbert J. Harwood Jr.: Corporate history of the Lehigh Valley R.R., The Railway and Locomotive Historical Society Bulletin No. 126 (1972), pp. 7-14.

² Ibid., p. 18.

³ Serge Obolensky: A man of his time, 1958, p. 3.

7. In December 1910, the company's stock capitalization was doubled from \$ 40,000,000 to \$ 80,000,000.⁴ The company issued and sold shares for \$ 50 per share.⁵ J.P. Morgan & Co. would continue to hold a quarter of the stock until the mid-1920s.⁶

8. In 1915/1916, LVRR was an important carrier for the military industry. Despite an ordinance of Jersey City prohibiting the shipment of explosives within the city limits, LVRR had for some time been moving tons of munitions to its waterfront terminal on Black Tom Island.⁷ Since the departures of the ships could not always be planned, ammunition and explosives were often stored in waggons on site for up to a week.⁸

9. On 30 July 1916, shortly after midnight, a fire broke out on Black Tom Island. At 2:08 am, the whole area of New York Harbor was shaken by a large explosion. That explosion was heard even 100 miles away. At 2:40 am, a second blast followed. Tons of ammunition and other explosives exploded, claiming the lives of at least four people and damaging the surrounding (including the Statue of Liberty) heavily.⁹ The ammunition and explosives included a very large shipment to be delivered to the Russian Empire. The total property damage resulting from the explosion ran to an estimated \$ 20,000,000 (the "**Black Tom Explosion**").¹⁰

10. One day later, investigations against the local officials of LVRR at Black Tom Island began.¹¹ The background was that LVRR's security measures at Black Tom Island were not strict. At night, the pier was guarded by six guards from LVRR and four guards paid by the Russian Empire and the British Empire, but there were no gates or other physical barriers to stop intruders. In addition, LVRR did not keep a locomotive on standby to move cars quickly in the event of a fire thereby violating the fire safety regulations of the US Interstate Commerce Commission.¹² Despite a growing number of incidents regarding the production and the shipment of war related materials in 1916,¹³ the investigators did not attribute the explosions to sabotage.¹⁴

⁴ Robert F. Archer: A history of the Lehigh Valley Railroad. The Route of the Black Diamond, 1977, p. 189.

⁵ Lehigh Valley Railroad Company: Fifty-sixth annual report for the fiscal year ended 30 June 1910, p. 15. 404,411 shares were sold at par to existing shareholders.

⁶ Herbert J. Harwood Jr.: Corporate history of the Lehigh Valley R.R., The Railway and Locomotive Historical Society Bulletin No. 126 (1972), p. 21.

⁷ Robert F. Archer: A history of the Lehigh Valley Railroad. The Route of the Black Diamond, 1977, p. 191.

⁸ Ibid.

⁹ *First explosion terrific*, New York Times, 31 July 1916, p. 1.

¹⁰ Robert F. Archer: A history of the Lehigh Valley Railroad. The Route of the Black Diamond, 1977, p. 194.

¹¹ *First explosion terrific*, New York Times, 31 July 1916, p. 1.

¹² *Lehigh Valley R. C. v. State of Russia*, 21 F.2d 396, 402 (2d Cir. 1927), <https://law.justia.com/cases/federal/appellate-courts/F2/21/396/1510084/> (lastly accessed 14 August 2025).

¹³ Dale Rielage: Russian Supply Efforts in America during the First World War, 2002, p. 71: There were almost 200 explosions involving war supplies, factories and transportation attributable to Germany before April 1917.

¹⁴ *First explosion terrific*, New York Times, 31 July 1916, p. 1: "On one point the various investigating bodies agree, and that is that the fire and subsequent explosions cannot be charged to the account of alien plotters against the neutrality of the United States, although it is admitted that the destruction of so large a quantity of allied war material must prove cheering news to Berlin and Vienna."

11. In 1917, two revolutions happened in Russia. The February Revolution of 1917 led to the fall of the Imperial Government. The so-called Provisional Government of Prince Georgy Yevgenyevich Lvov succeeded.
12. On 22 March 1917, the USA recognized this Government.¹⁵
13. During the October Revolution of 1917, the Bolsheviks took over, ousting the Provisional Government.
14. From November 1916 to April 1917, LVRR employed a detective agency to shadow a man called Michael Kristoff, who was suspected to be an arsonist and involved in the Black Tom Explosion.¹⁶ LVRR received the agency's reports but kept them confidential.
15. On 3 February 1918, the Bolshevik Government adopted a decree repudiating all debts contracted by the Imperial and the Provisional Government. Under this decree, the Bolshevik Government cancelled all foreign debt owed by the Russian Empire.¹⁷
16. On 21 March 1918, US Congress enacted the Railway Administration Act.¹⁸ Congress released the budgetary funds for a measure by which US President Woodrow Wilson had ordered most US railroads to be taken into State possession.¹⁹ The rationale for this measure was that the Black Tom Explosion and other incidents had shown that the railroad companies were unable to solve war-related problems such as congestion of tracks and lack of storage facilities.²⁰ A government agency assumed control over LVRR's tracks, port terminals and rolling stock. Pursuant to the Act, LVRR received "*as just compensation an annual sum [...] not exceeding a sum equivalent as nearly as may be to its average annual railway operating income for the three years ended June nineteen hundred and seventeen.*"²¹
17. On 21 July 1918, a German submarine damaged a tugboat owned by LVRR off the east coast of Massachusetts.²² LVRR notified the Secretary of State of the damage suffered from this attack.²³

¹⁵ US Ambassador in Russia to the Secretary of State, 22 March 1917, Papers Relating to the Foreign Relations of the United States, 1918, Russia, Volume I, Document 13 <https://history.state.gov/historicaldocuments/frus1918Russiav01/d13> (lastly accessed on 19 September 2025).

¹⁶ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award, 16 October 1930, UN reports of international arbitral awards, Vol. VIII (2006), p. 92

¹⁷ US Ambassador in Russia to the Secretary of State, 12 February 1918, Papers Relating to the Foreign Relations of the United States, 1918, Russia, Volume III, Document 49, https://history.state.gov/historicaldocuments/frus1918Russiav03/d49?utm_source=chatgpt.com (lastly accessed 30 September 2025).

¹⁸ United States of America: Railway Administration Act of 1918, 40 Stat. 451.

¹⁹ United States of America: Presidential Proclamation 1419, December 26, 1917.

²⁰ Eugene Huddleston: Uncle Sam's Locomotives: The USRA and the Nation's Railroads, 2002, p. 3.

²¹ United States of America: Railway Administration Act of 1918, 40 Stat. 451, Section 1.

²² *U-Boat gives no warning*, New York Times, 22 July 1918, p. 1.

²³ Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, p. 244.

18. On 23 July 1918, Boris Bakhmetev, the ambassador of the Provisional Russian Government to the USA, began proceedings against LVRR. He acted on behalf of the “State of Russia”, as he put it in his claim, before the US District Court of New York. He claimed damages for the shipment not delivered to Russia as a result of the Black Tom Explosion. He argued that LVRR acted negligently in the handling of the explosives at Black Tom Island. He also emphasized that a considerable part of the munitions destroyed at Black Tom Island had already been owned by the Imperial Russian Government before the Black Tom Explosion.²⁴

19. In October 1918, Prince Obolensky fled Russia after he had fought as an officer against the Bolsheviks in the Russian Civil War and, before that, against the Germans during World War I.²⁵ First, he stayed in Western Europe.

20. On 27 January 1919, LVRR’s motion to dismiss the action “*on the ground that there was not in existence 'the Russian government,' and therefore no plaintiff*”²⁶ was rejected by the US District Court of New York. The Court reasoned:

“It may be observed that the importance of recognizing governmental continuity, quite irrespective of considerations as to the existing form of a foreign government, or as to the human beings in control at any particular time, is well illustrated in this case, where it is sought to deprive a foreign state forever of the opportunity to be heard in an effort to recover for the loss of property which belonged to the foreign state; i.e., the “Russian government,” by whatever name called. It may also be noted, in passing, that the executive and judicial branches of the government have recognized “the present government of Russian” in proceedings to naturalize Russian subjects. Since the fall of the Imperial Russian government, such applicants for citizenship forswear allegiance to “the present government of Russia.”²⁷

21. In addition to the lawsuit brought by the “State of Russia”, eleven civil lawsuits were filed against LVRR in connection with the Black Tom Explosion.²⁸ LVRR denied any external cause for the explosions in court. LVRR relied upon a theory of spontaneous combustion in its defence.²⁹ In the proceedings, LVRR did not submit the detective agency’s reports on Mr. Kristoff as evidence.³⁰

22. On 28 June 1919, the Peace Treaty of Versailles was signed between Germany and the “Allied and Associated Powers” (USA, the British Empire, France, Italy, Japan, Belgium, Bolivia, Brazil, China, Cuba, Ecuador, Greece, Guatemala, Haiti, The Hedjaz, Honduras,

²⁴ Arthur B. Darling: A Soviet Protest to the United States, Current History, Vol. 28 No. 1 (1928), p. 150.

²⁵ Ibid., pp. 176-209.

²⁶ *Lehigh Valley R. C. v. State of Russia*, 27 January 1919, 293 F. 133.

²⁷ *Lehigh Valley R. C. v. State of Russia*, 27 January 1919, 293 F. 133, 134-135.

²⁸ Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, p. 265.

²⁹ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award, 16 October 1930, UN reports of international arbitral awards, Vol. VIII (2006), p. 92.

³⁰ Ibid.

Liberia, Nicaragua, Panama, Peru, Poland, Portugal, Romania, The Serb-Croat-Slovene State, Siam, Czecho-Slovakia and Uruguay) (the “**Treaty of Versailles**”).³¹ The Treaty of Versailles imposed reparations on Germany for “*all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence*” of World War I.³² In addition, it established the League of Nations.³³ Absent Congress’ consent, the USA did not ratify the Peace Treaty of Versailles.

23. On 1 March 1920, the Transportation Act ended the USA’s State possession over the US railroads and reestablished private control over them.³⁴

24. On 25 August 1921, the USA and Germany signed a separate treaty, the Treaty concerning the re-establishment of Peace between Germany and the United States of America (the “**Treaty of Berlin**”), which entered into force on 11 November 1921. The Treaty of Berlin incorporated by reference most of the provisions of the Treaty of Versailles, in particular Germany’s obligation to pay reparations.³⁵

25. On 15 December 1921, the Bolshevik Government issued a decree “On the deprivation of citizenship rights of certain categories of persons abroad” (Decree No. 11). It stated:

“1. Persons in the categories listed below who are abroad after the publication of this resolution shall be deprived of Russian citizenship: [...]

b) Persons who left Russia after November 7, 1917, without permission from the Soviet authorities.

c) Persons who voluntarily served in armies that fought against the Soviet power or participated in any form in counter-revolutionary organizations. [...]

2. Persons named in subparagraphs “b” and “c” of Article 1 may, until June 1, 1922, submit applications for the restoration of their rights to the All-Russian Central Executive Committee through the nearest representative offices.”³⁶

26. Prince Obolensky did not apply for the restoration of his Russian citizenship under this Decree.

³¹ Treaty and protocol signed at Versailles, 28 June 1919, *Treaties and other international agreements of the United States of America 1776-1949*, Vol. 2, pp. 44-240.

³² *Ibid.*, Art. 231.

³³ *Ibid.*, Part I. The Covenant of the League of Nations.

³⁴ Transportation Act of 1920, 41 Stat. 456.

³⁵ Treaty concerning the re-establishment of Peace between Germany and the United States of America signed at Berlin, 25 August 1921, *League of Nations – Treaty Series No. 310* (1922), pp. 193-197.

³⁶ All-Russian Central Executive Committee and the Council of People's Commissars, Decree No. 11 on the deprivation of citizenship rights of certain categories of persons abroad, 15 December 1921, *Izvestia of the All-Russian Central Executive Committee of Soviets No. 286* (20 December 1921).

27. On 16 April 1922, Germany was the first major State to recognize the new Bolshevik Government. It signed the Treaty of Rapallo with the Russian Socialist Federative Soviet Republic, which would form the core of the Soviet Union founded at the end of the year.³⁷

28. On 10 August 1922, the USA and Germany signed the Supplementary Agreement to the Treaty of Berlin (the “**Supplementary Agreement**”). The two States agreed to submit the determinations of all reparations under the Treaty of Berlin to a Mixed Claims Commission (the “**MCC**”).³⁸ Pursuant to Article 1 (2) of the Supplementary Agreement, the MCC should decide – amongst others – the following category of claim:

“[...] 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”.

29. Article 2 sentence 1 of the Supplementary Agreement stated:

“The Government of Germany and the Government of the United States shall each appoint one Commissioner. The two Governments shall by agreement select an Umpire to decide upon any cases concerning which the Commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings.”

30. Germany appointed Wilhelm Kiesselbach as Commissioner. The USA appointed Edwin Parker as Commissioner. Due to Germany’s limited negotiation power, the Umpire was selected *de facto* by the USA. The Associate Justice of the US Supreme Court, William Day, became the Umpire.

31. Article 6 (1) of the Supplementary Agreement stipulated that Germany and the USA could designate State Agents “*who may present oral or written arguments to the commission.*”

32. On 15 November 1922, the MCC adopted its Rules of Procedure.³⁹

33. On 15 May 1923, Umpire Day resigned. The former Commissioner Parker became the new Umpire. The USA appointed Chandler Anderson as new Commissioner.⁴⁰

³⁷ Treaty of Rapallo, 16 April 1922, <http://www.documentarchiv.de/wr/1922/rapallo-vertrag.html> (lastly accessed 12 September 2025).

³⁸ Agreement between Germany and the United States of America, supplementary to the treaty of August 25, 1921, signed at Berlin August 10, 1922, League of Nations – Treaty Series No. 655 (1924), pp. 358-361.

³⁹ Rules of Procedure established in the pursuance of the Agreement between the United States and Germany dated August 10, 1922, United Nations – Reports of International Arbitral Awards Vol. VIII (2006), pp. 469-477.

⁴⁰ For an overview of the staffing see Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, p. 360.

34. On 1 November 1923, the MCC adopted its Administrative Decision II.⁴¹ Administrative Decision II specified the parties before the MCC:

“Though conducted in [sic] behalf of their respective citizens, governments are the real parties to international arbitrations. All claims, therefore, presented to this Commission shall be asserted and controlled by the United States as claimant, either on its own behalf or on behalf of one or more of its nationals. If in the decisions, opinions and proceedings of the Commission American nationals are referred to as claimants it will be understood that this is for the purpose of convenient designation and that the Government of the United States is the actual claimant.”⁴²

35. Under this provision, the US Agent had the competence to make the final decisions regarding questions of strategy and arguments regarding its citizens’ claims. Private US claimants submitted a form containing information to the State Department. The private US claimants were also able to draft briefs for the State Agent’s considerations. However, the latter made the final decisions.⁴³

36. One of the claims by US claimants against Germany, listed as claim No. 11,333, was LVRR’s case of its tugboat damaged by a German submarine.

37. On 25 January 1924, LVRR requested to add its asserted damages claim arising out of the Black Tom Explosion to claim No. 11,333.⁴⁴ LVRR argued that it had obtained new evidence that German agents were responsible for the Black Tom Explosion.⁴⁵ 82 other claimants also brought damages claims against Germany due to the Black Tom Explosion, mainly insurance companies and the relatives of the four persons deceased during the Black Tom Explosion. These claims were heard together. In the following, the claims of LVRR and the 82 other claimants regarding the Black Tom Explosion will be addressed together as the “**Sabotage Claims**”.

38. On 1 February 1924, the United Kingdom recognized the Soviet government.⁴⁶

39. On 13 April 1925, the German Agent informed the US Agent that he would not object to the Sabotage Claims being included in the list of cases to be dealt with by the MCC.⁴⁷

⁴¹ Administrative Decision No. II, 1 November 1923, UN Reports of international arbitral awards Volume VII (2006), pp. 23-32 (Adobe p. 1-6).

⁴² Adobe, p. 4.

⁴³ Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, p. 130.

⁴⁴ Petition of Lehigh Valley Railroad company to amend its claim No. 11333 against the German government (1924), US National Archive, MCC Rec, RG 76, Entry 25/26, Box 610, Copies of Memorials – Copies relating to petitions.

⁴⁵ *Black Tom blast laid to Germans*, New York Times, 26 January 1924, p. 26.

⁴⁶ *Britain recognizes Soviet government without conditions*, New York Times, 2 February 1924, p. 1.

⁴⁷ Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, p. 244.

40. On 2 July 1925, the US District Court of New York ruled in the case of the “State of Russia” against LVRR holding that LVRR failed to exercise due care as a carrier. The Court ordered LVRR to pay \$ 984,104.62 to the “State of Russia” as compensation for its property destroyed in the Black Tom Explosion.⁴⁸

41. On 8 August 1927, the US Court of Appeals for the Second Circuit rejected the appeal against the judgment of the US District Court of New York.⁴⁹

42. Afterwards, LVRR transferred \$ 984,104.62 to a bank account controlled by the last remaining representative of the Provisional Government, financial attaché Serge Ughet. At the time, the USA did not recognize the Government of the Soviet Union as the legitimate Russian government. After deducting the attorneys’ fees, Serge Ughet transferred the remainder of the \$ 984,104.62 to the US Treasury as a payment towards the Russian Empire’s debts towards the USA.⁵⁰

43. Afterwards, the Soviet Union sent a telegram to the US Secretary of State stating:

“taking into consideration the fact that Ughet had no authority whatever from the present Government of the State, previously known as the Russian Empire, the Government of the Soviet Union protests against the payment to a private person of money belonging to the former Russian Treasury, the application of which to any account can only be made with the sanction of the sole lawful owner of such money, namely, the Soviet Union as represented by its Government.”⁵¹

44. On 11 March 1928, the US President approved Congress’ “Settlement of War Claims Act of 1928”. The act regulated the further procedure on the German property confiscated by the USA during World War I. 80% of the seized property should be returned to the German owners. The remaining 20% should remain in the custody of the Secretary of the Treasury as security for the claims determined by the Mixed Claims Commission.⁵²

45. In 1929, Prince Obolensky permanently moved to the USA.⁵³

46. On 3 April 1929, the oral hearing in the Sabotage Claims began. The MCC assessed documentary evidence, witness testimonies and expert opinions. For instance, the US Agent submitted parts of LVRR’s detective agency’s reports on Mr. Kristoff as evidence. Mr. Kristoff himself had already died and could not be interrogated.⁵⁴

⁴⁸ *Verdict for Russia in Black Tom Explosion*, New York Times, 3 July 1925, p. 6.

⁴⁹ *Lehigh Valley R. C. v. State of Russia*, 8 August 1927, 21 F.2d 396, 406 (2d Cir. 1927), <https://law.justia.com/cases/federal/appellate-courts/F2/21/396/1510084/> (lastly accessed 14 August 2025).

⁵⁰ Arthur B. Darling: A Soviet Protest to the United States, *Current History*, Vol. 28 (1928), pp. 150 et. seq.

⁵¹ Cited *ibid.*, p. 149.

⁵² Settlement of War Claims Act of 1928, 45 Stat. 254 (261).

⁵³ *Ibid.*, p. 320.

⁵⁴ Paul Friedland: *Citizen of the shadows*, 1925, p. 12.

47. On 30 October 1929, Umpire Parker died. On 9 January 1930, he was replaced by Roland Boyden, who had to familiarise himself with the case material.⁵⁵

48. On 16 October 1930, the MCC held in its award:

“[A.] In speaking [...] we have not the least intention to raise any doubt as to the entire good faith of the present German Government in its management and presentation of these cases, nor of the Agent who has represented Germany as counsel. And in order that this last statement may not be construed as merely conventional courtesy, we state specifically that we have no such doubts. We believe that the present German Government was entirely prepared to bring out the truth and to take the consequences, whatever they might be.

[B.] It is unnecessary to go further and determine whether such sabotage was the general policy of the then German Government. [...] There was an admitted policy to destroy and damage property of the nations at war with Germany at this time and later, and it is obvious that such acts if committed in or from the United States were serious violations of neutrality, that agents engaged therein were not likely to discriminate very carefully between acts on United States territory and acts outside the United States, or between property belonging to Germany’s enemies and property not yet delivered, but intended for Germany’s enemies. But in general we are all inclined to the opinion that Germany’s diplomatic representatives in the United States were averse to attacks on American property [...]. And up to the entry of the United States into the war there were in the United States certain German agents who were, or at least pretended to be, active in sabotage work. But we are also convinced that the number of agents so engaged was always small in proportion to the field to be covered, that they were never organized effectively, and that their numbers and effectiveness continually decreased [...]. [...]

[C.] Hilken and Herrmann are both liars, not presumptive but proven. No one could in the light of all their evidence believe anything either says unless something other than his own assertion confirmed his statements. [...]

[D.] So far as we can see, the circumstances of the fire leave the question of its cause open. It may have been some fault in the preparation of the powder in the shells in this car; it may have come from some other cause connected with explosives, for though we know of no cause which would naturally be suggested by the supposed contents of this car we are suspicious of explosives in general; it may have come from some other accident of which no evidence appears; of course the fire may have been of incendiary origin, and in this connection it may be noted that all incendiaries are not German agents. [...]

⁵⁵ Burkhard Jähncke: *Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen*, 2003, pp. 263 et seq.

[E.] Suspicion was focussed very early on Kristoff in connection with Black Tom. [His aunt] said that she at some earlier time saw something like a blueprint or blueprints in Kristoff's room, when he was in her house, and that in his absence she once read a letter, which he had written but had not yet sent, to a man named Grandson or Grandor, demanding a large sum of money. [...]

[F.] The name Grantnor is of great significance in this case. The connection between Kristoff and Hinsch, who was a German agent and who is alleged to have used Kristoff as his tool in Black Tom, depends substantially on whether Hinsch used the name Grantnor as an alias. [...] According to Kristoff, Grantnor met him in the Pennsylvania Station in New York, asked him the time, got to talking, and then and there employed him to take with him a long trip covering many cities, including cities as far west as Chicago, Kansas City, and St. Louis [...]. Kristoff knew nothing whatever about what Grantnor did on these trips, except that Grantnor told him he was trying to get contracts. Grantnor had two suitcases which Kristoff said contained plans and blueprints. Kristoff's sole duties were to carry the suitcases and to watch them when Grantnor was not in his room. [...] The story is suspicious enough in all conscience. If Grantnor can be shown to be Hinsch, we can easily get a good deal of truth out of the story and add a good deal of detail. Hinsch himself testifies that he never went further west than Gettysburg. [...]

[G.] We have not all of [the detective agency's] reports. Why we do not know. We get the impression that the reports we have [...] were selected and put together in the shape submitted to us. [...] Whatever the explanation, the reports as submitted to us omit much that seems important to us. [...] And [the detective], entirely unconsciously, discredits every admission by Kristoff which appears in his reports [...]. [...] One singular omission is that Kristoff does not congregate with other German agents. The urge to congregate is in all the other testimony the most marked characteristic of all German agents. But we hear nothing of Kristoff's meeting other German agents or even sympathizers.”⁵⁶

49. The MCC rejected the claims and concluded:

“We cannot be sure that Kristoff did not set fire to Black Tom or take some part in so doing. [...] But it will sufficiently appear from the foregoing that, as we have said, the evidence falls far short of enabling us to reach the point, not merely of holding Germany responsible for the fire, but of thinking that her agents must have been the cause, even though the proof is lacking.”⁵⁷

⁵⁶ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award, 16 October 1930, UN reports of international arbitral awards, Vol. VIII (2006), pp. 84-98.

⁵⁷ *Ibid.*, pp. 100 et seq.

50. On 12 January 1931, the US Agent filed the First Petition for Rehearing. He argued that a procedural error had taken place because the Umpire not only participated in the deliberations but also co-signed the judgment. The US Agent argued that this violated Art. 2 of the Supplementary Agreement which addresses “*their [the Commissioners’] proceedings.*”

51. LVRR criticized the award as a “*political decision*”.⁵⁸

52. On 30 March 1931, the MCC rejected the application for rehearing unanimously by referring to its *consuetudo*:

“The Umpire participated in the deliberations of the Commissioners and in the opinion in accordance with the usual practice of the Commission in cases of importance since its foundation in 1922, a practice never before questioned and not in our judgment of doubtful validity even if it had not so long been accepted by all concerned.”⁵⁹

53. From 1 July 1931 onwards, LVRR discontinued dividend payments.⁶⁰

54. On 1 July 1931, the US Agent filed the Second Petition for Rehearing. He argued that new evidence would prove that the MCC incorrectly dismissed Germany’s responsibility for the Black Tom Explosion. The new evidence submitted by the US Agent included an issue of the Blue Book magazine of January 1917 containing a code message (written with lemon juice) forwarded by Fred Herrmann who had fled to Mexico to Paul Hilken in Baltimore, the so called “**Herrmann Message**”.⁶¹ Both Frederick Herrmann and Paul Hilken served as German operatives in the USA.⁶² According to the US Agent, Paul Hilken only discovered the Herrmann Message in December 1930 in his attic. The Herrmann Message stated the following:

“Have seen Eckhardt he is suspicious of me Can’t convince him I come from Maguerre and Nadolny Have told him all reference Hinsch and I Deutschland, Jersey City Terminal, Kingsland, Savannah, and Tony’s Lab. he doubts me on account of my bum German Confirm to him thru your channels all O.K. and my mission here I have no funds Eckhardt claims he is short of money send ly [by] bearer U.S. 25000.— Have you heard from Willie Have wired Hildegard but no answer Be careful of her and connections Where are Hinsch and Carl Ahrendt Tell Hinsch to come here I expect to go north but he can locate me thru Eckhardt I dont trust Carl Ahrendt, Kristoff, Wolfgang and that Hoboken bunch If cornered they might get us in Dutch with authorities See that Hinsch brings with him all who might implicate us tell him Siegel is with me. Where is Carl D. he worries me remember past experience Has Hinsch

⁵⁸ Copy of a letter to the US Secretary of State, 31 January 1931, Political Archive of the German Foreign Office, Fi. 5a, Vol. 4.

⁵⁹ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision on petitions for rehearing, 30 March 1931, UN reports of international arbitral awards, Vol. VIII (2006), p. 102.

⁶⁰ Robert F. Archer: A history of the Lehigh Valley Railroad. The Route of the Black Diamond, 1977, p. 225.

⁶¹ *Ibid.*, pp. 205 et seq.

⁶² Paul Friedland: Citizen of the shadows, 2025, p. 7.

seen Wozniak Tell him to fix that up. If you have any difficulties see Phil Wirth Nat Arts Club Tell Hinsch his plan O. K. Am in close touch with major and influential Mexicans Can obtain old cruiser for 50000 West Coast What will you do now with America in the war Are you coming here or going to South America Advise you drop every thing and leave the States Regards to Hoppenberg Sei nicht dum mach doch wieder bumm bumm bumm. Most important send funds Bearer will relate experiences and details Greetings.”⁶³

55. On 24 September 1931, Mr. Obolensky became a national of the USA.⁶⁴

56. On 29 March 1932, Supreme Court Associate Justice Owen Roberts was appointed as new Umpire after Boyden had passed away in October 1931.⁶⁵

57. On 3 December 1932, the MCC dismissed the US Agent’s Second Petition for Rehearing. The Umpire reasoned:

“[A.] [The] only questions now to be dealt with are those raised by the submission of new evidence, and the Commission, accordingly, will not re-examine the findings of fact made in its original decision of October 16, 1930, unless the Commission decides that it has jurisdiction to reopen these cases and the new evidence now submitted requires reversal or modification of such findings of fact. [...]

[B.] The American Commissioner and the German Commissioner have been unable to agree upon the decision of the questions presented in these cases as aforesaid, and their respective opinions having been stated to the Umpire they accordingly certify the above mentioned cases and all the questions arising under the supplemental petition therein to the Umpire of the Commission for decision, except that the German Commissioner takes the position that the question of the jurisdiction of the Commission to re-examine any case after a final decision has been rendered is not a proper question to be certified to the Umpire on disagreement of the National Commissioners and reserves that question from this certificate. [...]

[C.] A glance through this translation will indicate that, without reference to any other evidence, it is conclusive proof to any reasonable man that (a) Herrmann and Hilken knew [...] the Black Tom explosion [was] the work of German agents and (b) that Hinsch, Hilken, and Herrmann, undoubted agents, were privy thereto, and [...] (c) that Kristoff [was active participant]. [...]. I may utterly disregard all the

⁶³ Full text: *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award, 3 December 1932, UN reports of international arbitral awards, Vol. VIII (2006), p 114.

⁶⁴ *Ibid.*, 1958, p. 325.

⁶⁵ Burkhard Jähncke: *Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen*, 2003, p. 271.

new evidence produced and still, if I deem this message genuine, hold Germany responsible [...]. [But the] authenticity of the message is sharply challenged. [...]

[D.] As respects the production of the [Herrmann] message, I find that it comes from a source which the Commission has held unworthy of belief, and under circumstances which at least cause me to hesitate to give full faith and credit to the account of its discovery. [...]

[E.] The magazine [containing the Herrmann-Message] was produced by Paul Hilken [...]. The document comes, therefore, from a source which the former opinion of the Commission entirely discredited. Hilken, though an American citizen, is a former German agent. His attitude at first was that of loyalty to Germany. In December, 1928, he changed his position and testified at great length on behalf of the claimants. [...] In an affidavit made November 15, 1932, Hilken states that on Christmas Day, 1930, he made a search of the attic of his old home in Baltimore and unearthed the magazine at the bottom of a wooden box in a closet under the eaves, and at the same time discovered a large amount of correspondence bearing on his wartime activities. Apparently none of this other matter was delivered to the claimants with the magazine, but was filed with a later affidavit of Hilken dated June 29, 1931. Along with Hilken's affidavit of November 15, 1932, were filed affidavits bearing date November 12 and 15, by Mrs. Hilken. Hilken's daughter, and Elizabeth Braun. [...]

[F.] Elizabeth Braun, who is in no way identified to the Commission, [...] says that Hilken told her of the finding of an important message and described it; she does not say that she saw it. All of these witnesses seem to have communicated the contents of their affidavits to the claimants during early or late 1931, but their testimony was not submitted to the Commission until November 15, 1932. Hilken, [...] gives as his reason for not promptly producing the message on its discovery, that he feared publicity as he knew that certain articles were being prepared on the sabotage cases to appear in the Liberty magazine. As respects the production of the message, I find that it comes from a source which the Commission has held unworthy of belief, and under circumstances which at least cause me to hesitate to give full faith and credit to the account of its discovery. [...]

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

[H.] As it is my opinion that if the new evidence were formally placed on file and considered in connection with the whole body of evidence submitted prior to the Commission's opinion of October 16, 1930, the findings then made and the

conclusions then reached would not be reversed or materially modified, the question as to our jurisdiction need not be answered. The supplemental petition for rehearing is dismissed.”⁶⁶

58. For the year of 1932, LVRR reported a deficit in net income of \$ 3,933,000.⁶⁷ LVRR continued to operate at a loss until 1935.⁶⁸

59. On 16 November 1933, the USA recognized the Soviet government.⁶⁹

60. On 15 December 1933, the MCC decided on the US Agent’s Third Petition for Rehearing in the Sabotage Claims based on further new evidence which should proof that the MCC had been misled by fraud and collusion on the part of witnesses and suppression of evidence. Following the Commissioners’ disagreement, the Umpire decided to sustain the Petition. The Umpire reasoned:

“[A.] No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, a fortiori it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.

[B.] I am of opinion, therefore, that the Commission has power to reopen these cases, and should do so in order that it may consider the further evidence tendered by the American Agent and, dependent upon its findings from that evidence and any that may be offered in reply on behalf of Germany, either confirm the decisions heretofore made or alter them as justice and right may demand.”⁷⁰

61. On 24 March 1934, Germany appointed Victor Huecking as new German Commissioner to the MCC. Mr. Kiesselbach had previously resigned, possibly under pressure from the National Socialist German government.⁷¹

62. On 18 September 1934, the League of Nations adopted a resolution on the admission of the Soviet Union.⁷²

⁶⁶ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision on supplemental petition for rehearing, 3 December 1932, UN reports of international arbitral awards, Vol. VIII (2006), pp. 104-122.

⁶⁷ Robert F. Archer: *A history of the Lehigh Valley Railroad. The Route of the Black Diamond*, 1977, p. 225.

⁶⁸ *Ibid.*, p. 229.

⁶⁹ *United States recognizes Soviet*, New York Times, 17 November 1933, p. 1.

⁷⁰ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Decision on the petition to reconsider former decisions, 15 December 1933, UN reports of international arbitral awards, Vol. VIII (2006), p. 190.

⁷¹ Burkhard Jähncke: *Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen*, 2003, p. 279.

⁷² *Soviet is inducted as league member*, New York Times, 19 September 1934, p. 1.

63. Later in 1936, Commissioner Anderson passed away. The USA appointed Christopher Garnett as Commissioner. The appointment was in the public domain from this time onwards.

64. On 1 March 1939, Commissioner Huecking resigned, accusing Umpire Roberts of bias.⁷³ The German Foreign Office did not appoint a new Commissioner. The US side was convinced that the resignation only happened to stop further action by the MCC.⁷⁴

65. On 10 June 1939, the German Chargé d’Affaires to the USA, Hans Thomsen, stated Germany’s position on the further proceedings in the MCC in a letter to the US Secretary of State:

“As the German Agent [...] reports, a written notice from the American Secretary of the Commission, according to which the Commission will hold a meeting at II a.m. on June 15th [...], was received by him on June 7th, of this year. By direction of my Government, I call attention to the fact that since the withdrawal of the German Commissioner, [...], of which I notified the American Government by a note to your Excellency of March 24th of this year, the Commission has been incompetent to make decisions and that consequently [...] there is no legal basis for a meeting of the Commission at this stage. By direction of my Government, I advise you that [it] will ignore the decision to call the meeting on June 15th, as well as any other act of the Commission that might take place in violation of the International Agreement of August 10, 1922 and the generally established rules of procedure.”⁷⁵

66. On 15 June 1939, the truncated MCC consisting of US Commissioner Garnett and Umpire Roberts rendered its Award holding Germany liable in the Sabotage Claims:

“[A.] By reference to the Summary and Conclusions on the Question of Fraud [...], it will be ascertained that the pleadings filed on behalf of Germany were false, and were known to be false, in claiming that Germany had never authorized sabotage in neutral countries nor in the United States during its neutrality, and in claiming that, though men and material for sabotage were sent to the United States in 1916, definite instructions had been given limiting and prohibiting activity until the time when the United States should enter the war. [...] In order to substantiate Germany’s false pleadings Hinsch made many false statements upon which the Commission relied in its opinions. In order to attack the Herrmann message, he was guilty of the basest forms of prevarication, and upon these the Commission relied in its decisions [in 1930 and] in 1932. [...]

⁷³ Letter of the German Commissioner to the Umpire, 1 March 1939, United Nations – Reports of International Arbitral Awards Vol. VIII (2006), pp. 493-495.

⁷⁴ Burkhard Jähncke: Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen, 2003, pp. 288 et seq.

⁷⁵ Letter of the German Chargé d’Affaires to the US Secretary of State, 10 June 1939, UN reports of international arbitral awards, Vol. VIII (2006), p. 499.

[B.] [In its decision in 1932], the Commission was unanimously of opinion that, if the authenticity of the Herrmann message be accepted, this would conclusively prove the liability of Germany [...]. The final conclusions in these cases, therefore, may be stated as follows:

[C.] (1) The decision of October 16, 1930 [...] must be set aside, revoked and annulled; and the cases reinstated in the position they were before that decision was rendered. (2) Since the authenticity of the Herrmann message has been established, the liability of Germany in [...] the Black Tom case [...] has now been clearly established by the record [...].”⁷⁶

67. As to the procedural questions, Mr. Roberts stated the following:

“1. Within the meaning and intent of the agreement by which the Commission was constituted and its powers defined, there exists a disagreement between the two national commissioners. As I participated with them in the conferences after submission of the cases, I am cognizant of the disagreement, which makes it my duty to act in the decision of the cases. [...] Accordingly I record my opinion as Umpire.

2. I concur in the views expressed by the American Commissioner to the effect that the withdrawal of the German Commissioner, after submission by the parties, and after the tribunal, having taken the cases under advisement, pursuant to its rules, was engaged in the task of deciding the issues presented, did not oust the jurisdiction of the Commission. [...] I hold that the Commission as now constituted has jurisdiction to decide the pending motions.”⁷⁷

68. On 3 October 1939, Mr. Thomsen reacted to the award:

“[A.] The German Government regrets all the more to have to make protests against this procedure, because the [MCC] could look back upon a model success in working, which had been made possible by confidential and friendly collaboration [...]. It is characteristic of the spirit [...] that the claims of the Lehigh Valley Railroad Company arising out of the explosion at the Black Tom Terminal [...] were admitted into the proceedings before the [MCC] only because [...] of voluntary admission by the German Government, after delay in submission. The German Government could have decisively excluded any discussion of these claims by referring to their delayed submission and the incompetence of the Commission arising therefrom. [...]

⁷⁶ *Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited, and Various Underwriters (United States) v. Germany (Sabotage Cases)*, Award, 15 June 1939, UN reports of international arbitral awards, Vol. VIII (2006), pp. 457 et seq.

⁷⁷ *Ibid.*, p. 459.

[B.] In order that no doubt may arise as to the view of the German Government, it is emphasized that in none of its communications has it taken the stand that by the withdrawal of the German Commissioner the Commission has become ‘functus officio’ and has thereby lost its competence. The sole conclusive question here is whether during the vacancy in the position of the German Commissioner the American Commissioner, whether alone or jointly with the American Umpire, can exercise functions which the governmental agreement has entrusted to the two National Commissioners for joint exercise. [...]

[C.] [T]he acts and orders of the American Umpire and the American Commissioner since March 1, 1939, among them the reopening of the proceedings in the Black Tom and Kingsland cases, the ‘decision’ of the Umpire and the American Commissioner on the responsibility of Germany in both cases, and the arbitrary granting of awards by the American Umpire, are null and void. Any awards which the American Umpire and the American Commissioner might issue on the basis of these measures are likewise null and void.’⁷⁸

69. On 30 October 1939, the MCC determined the final sum of damages in the Sabotage Claims. The claim of LVRR was granted in the amount of \$ 9,900,322.⁷⁹ This sum included the \$ 984,104.62 paid by LVRR to the Russian claimant in the litigation. With interest at 5 % this amounted to \$ 21,396,444.⁸⁰ This would be the MCC’s last decision. Since 1923, it had dealt with 20,433 claims, of which it recognised 7,025.⁸¹

70. In January 1941, the US Treasury Department began paying out the sum awarded to LVRR. Germany had refused to pay and the remaining sum of the German funds available to the US Treasury Department in the framework of the Settlement of War Claims Act of 1928 did not cover the whole award.⁸² Therefore, LVRR received only a sum significantly below the amount awarded in the MCC’s award of 30 October 1939. For purposes of the Moot, the participants are to assume that LVRR received exactly \$ 9,900,322 corresponding to LVRR’s main claim without interest.

⁷⁸ Letter of the German Chargé d’Affaires to the US Secretary of State, 3 October 1939, UN reports of international arbitral awards, Vol. VIII (2006), pp. 500-510.

⁷⁹ *Black Tom losses put at \$ 50,000,000*, New York Times, 31 October 1939, p. 1.

⁸⁰ Burkhard Jähncke: *Washington und Berlin zwischen den Kriegen. Die Mixed Claims Commission in den transatlantischen Beziehungen*, 2003, p. 298 comes to a slightly higher number.

⁸¹ *Ibid.*, p. 299.

⁸² *Railroad pays RFC Loan with Black Tom Money*, New York Times, 12 January 1941, p. 3.

71. On selected dates of the above events, the share price of LVRR developed as follows:⁸³

Date	Price per share
1 December 1910	\$ 50
1 August 1916	\$ 40
27 December 1917	\$ 35
1 March 1920	\$ 35
2 July 1925	\$ 40
3 April 1929	\$ 70
16 October 1930	\$ 50
3 December 1932	\$ 12
3 June 1936	\$ 25
15 June 1939	\$ 28
12 January 1941	\$ 30

72. On selected dates of the above events, the interest rate on 10-year government bonds of the USA developed as follows:⁸⁴

Year	Interest rate
1916	4,13 %
1920	5,03 %
1939	2,29 %
1941	2,18 %

The Dispute

73. On 1 January 1908, the Protocol to the Treaty of Friendship, Commerce and Navigation between the Russian Empire and the USA on the Mutual Encouragement and Protection of Investments (the “**Protocol**”) entered into force.

74. On 1 December 1910, Prince Obolensky purchased 80.000 shares of LVRR with a nominal value of \$ 50 each, thereby acquiring a total of 5 % of LVRR’s stock capital. He continued to hold these stocks throughout the following decades.

75. On 1 May 1917, Prince Obolensky sent a letter to the US President, the State Department and the Treasury, notifying that he considered the USA’s failure to prevent the July 1916 explosion at the Black Tom pier as violation of the Protocol. He stated: “I invite the United States to enter into negotiations regarding the compensation for my losses. Should these negotiations fail, I hereby accept the United States’ offer to arbitrate under the LCIA Rules in accordance with the Protocol.”

⁸³ The figures are invented for the purpose of the moot but are in line with the overall trend: See Federal Reserve Bank of St. Louis, Table Data – American Railroad Stock Prices for United States, <https://fred.stlouisfed.org/data/M11005USM293NNBR?.com> (lastly accessed on 15 September 2025), <https://fred.stlouisfed.org/series/M1105BUSM343NNBR> (lastly accessed on 15 September 2025).

⁸⁴ Robert J. Shiller: Irrational Exuberance, 3rd edition, 2015, p. 7; see also <https://www.upmyinterest.com/treasury-10-year/> (lastly accessed 15 September 2025).

76. On 31 January 1941, Mr. Obolensky received a letter from the Government of the Soviet Union claiming immediate payment of \$ 984,104.62 from Mr. Obolensky as a shareholder of LVRR. In this letter, the Soviet Union wrote: *“following the judgment of the U.S. District Court of New York of 2 July 1925, this amount had been paid to a fraud who purported to represent the State of Russia when, in reality, he was wanted for treason. The Soviet Union has not benefitted from this amount having been paid to the U.S. Treasury against the Russian Empire’s debts because these debts had lost their relevance with the repudiation of debts on 8 February 1918. The Soviet Union has the right to claim the amount from any shareholder of LVRR against which the judgment of 2 July 1925 was ordered, particularly you who is guilty of treason for having opposed the revolution.”*

77. On 30 May 1941, Prince Obolensky filed a Request for Arbitration against the USA (Mr. Obolensky and the USA together, the “**Parties**”) in accordance with Article 1.1, 1.3 of the LCIA Arbitration Rules. The Claimant nominated Max Huber as arbitrator. The Claimant requested:

that the Tribunal to be established under the LCIA Arbitration Rules render an AWARD

DECLARING that the Respondent breached its obligations under Article 2 (2) Protocol;

ORDERING the Respondent to pay to the Claimant \$ 574,806, *i.e.* 5 % of the sum outstanding under the arbitral award of 30 October 1939, plus interest at a reasonable commercial rate from 30 October 1939 onwards until the day that the Award is satisfied; and

ORDERING the Respondent to indemnify the Claimant from any claims raised by the Soviet Union against Claimant in connection with the judgment of the U.S. District Court of New York of 2 July 1925.

78. In the Request for Arbitration, the Claimant offered as evidence on the responsibility for the Black Tom Explosion, *inter alia*, the Herrmann Message and the statements by Paul Hilken recorded in the MCC’s case records. By contrast, the Claimant stated that it was unable to receive Mr. Hilken’s testimony as a witness in this arbitration. In addition, the Claimant emphasized that in light of its limited financial means it would not submit an expert report by an independent forensic valuation expert. Instead, the Claimant insists that the quantitative determinations of the MCC be applied.

79. On 25 June 1941, the USA filed its Response to the Request for Arbitration in accordance with Article 2.1, 2.3 of the LCIA Arbitration Rules. The USA nominated Christopher Garnett as arbitrator. In addition, the USA raised the following preliminary objections:

i. The Tribunal does not have jurisdiction *ratione personae* under the Protocol. The Claimant is a U.S. national.

ii. Claimant's claim is an abuse of process. Claimant's alleged subsidiary has received a final and binding award against Germany in the MCC proceedings. Claimant does not have a right to seek a second award – 25 years after the Black Tom Explosion – rather than trying to enforce the first award against Germany.

iii. Under the applicable international law on diplomatic protection, Claimant's alleged claim must furthermore be precluded because the USA was asked to provide and did provide diplomatic protection in representing LVRR against Germany before the MCC regarding the identical facts now invoked again by LVRR's shareholder.

iv. The explosion at the Black Tom pier was a sovereign act of the German military as confirmed in the MCC's award of 15 June 1939 on which Claimant itself appears to rely for the determination of its financial losses. Article 2 (2) Protocol does not protect from foreign military acts during times of war.

v. Mr. Hilken's statements made in the MCC proceedings and the Herrmann Message must be excluded from the record of the present arbitration. Following the MCC's final award in 1939, doubts were raised about the truthfulness of Mr. Hilken's statements. The USA are not in a position to disclose more because this matter concerns sensitive information from its intelligence services. For the present arbitration, it is decisive that only statements of witnesses who testify before the Tribunal are admissible. Mr. Hilken, however, is unwilling to testify as he confirmed towards representatives of the USA. Since his unwillingness is not based on a valid reason (such as serious health issues), his statements cannot be relied on by the Tribunal. With his statements struck from the record, the authenticity of the Herrmann Message is not established.

vi. Claimant's claim must be dismissed in full because of Claimant's refusal to submit a damages valuation by an independent forensic valuation expert. The determination of LVRR's losses by the MCC cannot be binding on the present Tribunal. This determination was made in a different arbitration, on a different legal basis, and between different parties. In investment arbitration, claimants cannot escape their burden of proof by referring to alleged financial difficulties.

vii. The sum of which Claimant claims 5 % before this Tribunal equals the interest awarded by the MCC. If the Tribunal were to hold Respondent liable under the Protocol (*quod non*), the interest would have to be significantly lower because Respondent would only have to pay the rate of its own ten-year government bonds as of today.

viii. Claimant has no legal basis for its alleged claim that Respondent should indemnify against alleged claims of the Soviet Union. This indemnification claim goes beyond Article 2 (2) Protocol and the limits of established principles of causation. Even if *arguendo* the Tribunal holds otherwise, the judgment was paid to the correct recipient. Alleged

claims of the Soviet Union against their citizens are of no concerns for the USA's obligations under the Protocol.

80. On 18 July 1941, the LCIA appointed Sir John Fischer Williams, a national of the United Kingdom, as presiding arbitrator pursuant to Art. 5.6, 5.8 of the LCIA Arbitration Rules. The Tribunal was constituted. None of the Members of the Tribunal made any disclosure.

81. On 11 August 1941, Claimant delivered to the Arbitral Tribunal and Respondent his written election to have his request treated as his Statement of Case pursuant to Art. 15.2 of the LCIA Arbitration Rules.

82. On 3 September 1941, Respondent delivered to the Arbitral Tribunal and Claimant its written election to have its response treated as its Statement of Defence pursuant to Art. 15.3 of the LCIA Arbitration Rules.

83. On 23 September 1941, Claimant delivered to the Arbitral Tribunal and Respondent a written Statement of Reply pursuant to Art. 15.4 of the LCIA Arbitration Rules. Claimant stated as follows:

i. Respondent's objection to jurisdiction *ratione personae* is unfounded. It is undisputed that Claimant was a Russian national when the consent to arbitrate was perfected. This is the decisive point in time for jurisdiction. Even if the Tribunal holds otherwise (*quod non*), under the applicable principles of international law, it cannot be held against Claimant that he was de-naturalized by the Soviet Union in violation of international law. He acquired the U.S. nationality only to avoid being stateless. Claimant still considers himself Russian.

ii. Claimant's claim is the opposite of an abuse of process. *First*, until 1941, Claimant had been waiting in good faith for the USA to resolve the situation through representing LVRR adequately before the MCC and assisting with enforcement. The USA has not fulfilled this mandate adequately. *Second*, as a mere 5 % foreign shareholder, Claimant has limited influence over LVRR's decision-making. *Third*, given the currently ongoing World War II, Claimant cannot be referred to chasing German assets abroad. For these reasons, Claimant chose to bring this claim under the BIT. This claim is Claimant's self-standing right.

iii. Under international law, LVRR's choice to bring the claim before the MCC cannot preclude Claimant's rights under the BIT. *First*, the measure invoked in violation of the BIT is the USA's failure to prevent the July 1916 explosion, not the USA's failure to afford diplomatic protection properly (which the USA has not). *Second*, the rights under the BIT are Claimant's rights, not LVRR's rights. *Third*, LVRR's choice to bring the Claim before the MCC did not require Claimant's consent because Claimant owns only 5 %.

iv. Contrary to Respondent, Article 2 (2) BIT entails an obligation of the host State to protect investors from foreign acts of war. That the BIT

applies in times of war is already evident from Article 9 (1) BIT which applies in addition to, not instead of Article 2 (2) BIT.

v. Respondent's allegations against the Herrmann Message must be rejected. First of all, it is remarkable that Respondent is implying that it adduced false testimony from Mr. Hilken, used it actively before the MCC, but should be able to evade this evidence before the present Tribunal. Furthermore, Claimant did not submit a witness statement of Mr. Hilken but documentary records. In international arbitration, documents need not be submitted through a witness statement. Finally, Respondent itself has the authority to order Mr. Hilken (who continues to live in the USA) to testify. Respondent cannot benefit from its own unwillingness to do so.

vi. The determination of LVRR's losses by the MCC should be binding or, to the least, persuasive to the Tribunal. The determinative factor is whether the Respondent in the present case (the USA) had an adequate opportunity to influence this determination. The USA had such opportunity because before the MCC, the USA represented its nationals and made the final strategic decisions on argumentations. The USA has no adequate grounds to re-argue this matter. If the Tribunal considers it necessary (*quod non*), it has, at any time, the power to appoint an expert (which should then be paid out of the advance on costs paid by Respondent because Claimant is unable to make further advances).

vii. Contrary to Respondent, this Tribunal need not be bothered with calculating interest again. *First*, the \$ 9,900,322 enforced in January 1941 must be counted against the outstanding interest, not the main claim of LVRR. *Second*, in any case, the interest of 5 % applied by the MCC was adequate because pre-award interest must compensate for the claimant's inability to re-invest the money. *Third*, the interest rate of Respondent's ten-year Government bonds at the time of the breach was only marginally lower than 5 %.

viii. Under the final and binding judgment of Respondent's own courts, LVRR had to pay \$ 984,104.62 to the "State of Russia" represented by Serge Ughet. Therefore, LVRR saw no option other than to make payment to Russia's last remaining representative in the USA. This payment and the Soviet Union's alleged claims against Claimant have all been caused by Respondent's failure to adequately protect Claimant from foreign espionage attacks. Therefore, Claimant must be able to claim indemnity. The latter is nothing more than a means of full reparation.

ix. Finally, Claimant must, with a heavy heart, file its challenge of Mr. Christopher Garnett under Article 10.3 of the LCIA Rules. Only one week ago, Claimant's Counsel has learnt through conversations with Richard Paulig, the German Agent in the MCC from 1934 to 1939, that Mr. Garnett has served as Commissioner in the MCC. *First*, this fact had been unknown to Claimant. For the avoidance of doubt, LVRR did not send Claimant copies of the MCC's awards. *Second*, Mr. Garnett has knowledge of case materials superior to the other two co-

arbitrators. Already therefore, he cannot serve in the present Tribunal. Above all, Respondent itself is challenging the evidentiary value of the Herrmann Message and Mr. Hilken's testimony on new grounds. It is inconceivable that one of the arbitrators has already addressed these matters while the others have not. *Third*, as US Commissioner in the MCC, Mr. Garnett received in excess of what is permissible as repeat appointments by a party.

84. On 3 October 1941, Respondent replied as follows to the challenge:

ix. Claimant's challenge must be rejected by the two unchallenged arbitrators under Article 10 (3) BIT. *First*, under Article 10.3 sentence 1 LCIA Rules, the challenge is time-barred. It has been in the public domain for a long time that Mr. Garnett was US Commissioner in the MCC from 1936 onwards. *Second*, Mr. Garnett's knowledge of the case record in the MCC will benefit the Tribunal *Third*, Mr. Garnett had not received repeat appointments, but one appointment by the US, *i.e.* the one appointment to the MCC.

85. On 27 October 1941, the Tribunal holds its oral hearing on the Respondent's preliminary objections and the Claimant's challenge of Respondent's appointee.