REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Guastini Case (of a general nature)

1903

VOLUME X pp. 561-582

NATIONS UNIES - UNITED NATIONS

dating from 1867, although there have been intermediate French commissions. As it is understood that the arbitral sentences referred to were not accompanied by a statement of reasons, we may imagine that they were based upon some exception to the rule above indicated, and we may now refer, at least partially, to exceptions to the application of the principle of prescription between nations.

In a case referred to in 4 Moore, page 4179, it seemed to have been considered that where there was an infraction of a treaty obligation by the legislative power of the Government itself, prescription would not lie. Whether the position be sound or otherwise need not be discussed.

Again, it was recognized in the Williams case (4 Moore, p. 4194) that the time which would bar an account might not affect a bond as to which a public register had been kept.

Further, the fact will not be lost sight of that the presentation of a claim to competent authority within proper time will interrupt the running of prescription.

The qualifications above referred to, and others which might be imagined, can not, however, have any application to the present case, in which for thirty-one years after proof had been prepared the case does not appear to have been presented in any manner, the royal Italian legation, even, until very recently, having been in ignorance of its existence. Of this conduct on the part of the claimant no explanation is offered.

The umpire, while disallowing the claim, expresses no opinion as to the number of years constituting sufficient prescription to defeat claims against governments in an international court. Each must be decided according to its especial conditions. He calls attention to the fact that under varying circumstances the civil-law period is ten, twenty, and thirty years; in England, for many years — for contracts, six years; in the United States, on contracts with the Government, six years, and in the several States, on personal actions, from three to ten years.

It is sufficient to say that in the present case the claimant has so long neglected his supposed rights as to justify a belief in their nonexistence.

A judgment of dismissal will be signed.

GUASTINI CASE

(By the Umpire:)

Opinion in the Sambiaggio case as to non-responsibility of government for acts of unsuccessful revolutionists save in case of proven negligence (p. 666) affirmed and followed.

The legitimate government can not enforce a second payment of taxes once paid to revolutionary authorities when the latter were for the time being at the place in question the de facto government.[1]

AGNOLI, *Commissioner* (claim referred to umpire):

The honorable umpire in the claim of Sambiaggio has expressed the opinion that the protocol of February 13, 1903, does not implicitly allow indemnity for damages caused by the revolution.

The Italian Commissioner not being able to accept this point of view, on account, no doubt, of a lack of similar data of fact and of law, has the honor to

[1] See same principle affirmed by the British-Venezuelan Commission, Vol. IX of these Reports, p. 455.

present the following new considerations on this controversy, supporting them by documents not heretofore produced and by arguments not yet fully examined.

The honorable umpire justly remarks that the treaty of 1861 does not explicitly admit damages caused by revolution, but we must observe that neither does it reject them. In fact, it says that " Italians in Venezuela shall be entitled to indemnity in the same measure as the nationals," *not* that they " shall have right only." Now, if one right is conceded to foreigners this does not necessarily mean that they shall be excluded from additional rights, which is in point provided by article 26 of said treaty containing the most favored nation clause. And let us observe, by the way, that the treaty of 1861 may not be invoked against the protocol of February 13, and this is to say, that the protocol recognizes rights superior to those recognized by the treaty — that is, including the right to indemnity for revolutionary damages (Art. VIII of the protocol of February 13) above all when a similar advantage is granted others.

Now, we will undertake to show that the Royal Government has intended to reserve and make good the rights of Italian claimants on the basis of a responsibility which includes revolutionary damages. The whole question, according to and judging by the arguments employed in the Sambiaggio case, seems to hinge on the meaning of the word " injury " contained in the English version of the protocol.[1] " Injury," according to its English law meaning, is a " damage done contrary to law; illegal damage." The honorable umpire, therefore, holds that in order to render Venezuela responsible it would be necessary to show that she is so according to the "*jus gentium.*" To reach this conclusion the honorable umpire has recourse to the correspondence between Italy and Venezuela prior to the protocol, and from it he thinks it may be shown that the royal Italian legation sought only to reject the pretension of the Venezuelan Government to limit its responsibility to that recognized by the decree of 1873; but it does not seem to us that his opinion is justified; in fact, the royal Italian legation not only denied this restriction of responsibility decreed by Guzmán Blanco, but has expressly declared (in the note of April 24, 1901, of the royal Italian legation) as follows: [2]

> The Government has given me, in addition, the charge of adding, and I do so add, the most ample reservations in regard to the rights of Italian claimants.

This general reservation had for its object to protect the more important rights of injured Italians — rights which have been contemplated subsequently by the protocol of February 13 (Art. IV). Plainer still was the memorandum note presented by Minister Riva on December 11, 1902, which, by order of his Government, informed the Government of Venezuela that not only did it exact the payment of claims recognized by the legation, but made reservation with regard to other claims on the basis of a much broader Venezuelan responsibility than that partially discussed previously, and which Italy never expressly surrendered. This memorandum served as a starting point for fixing the conditions of the protocol of February 13, 1903. This has been impliedly admitted by the honorable umpire, who has evidently intended to take the text of the memorandum in order to explain the views of the Royal Government, and has formally alleged it, saying he had consulted the correspondence of the high contracting parties to acquaint himself with their intentions. Now the memorandum [3]—

---

[1] The Italian Protocol was signed in English.
[2] See the original Report, Appendix, p. 990.
[3] Idem, Appendix, p. 995.

expressly reserves all those claims which, posteriorly to the period 1898-1900, were or shall be presented by Italian subjects as well for damages arising from the civil war begun in 1901, *as for whatsoever title of credit or action* toward the Venezuelan Government.

Here, on the eve of a rupture of relations between the two countries, we have a new phase — one in which Italy has asked for a generic and complete, not partial settlement, of all accounts with Venezuela, in which she has considered her rights as a whole, making the most ample reservations, and invoking a broader and indisputable responsibility.

What is the significance of the words, " all those claims * * * for damages arising from the civil war begun in 1901?" Is it not evidently intended to cover thereby all losses and destruction of property occurring in civil strife? Such losses must include those occasioned as well by government as by revolutionary forces.

In the memorandum note reservation is also made " for whatsoever other title of credit or action against the Government of the Republic," thus making double reference to future demands for indemnity on account of Venezuela's negligence in protecting Italian citizens, and to revolutionary damages.

The damages arising from civil war form a sum total embracing all losses, deteriorations, destructions, and damages suffered by property, since such is the meaning of the word " damage," which has nothing to do with the sense of the word " injury," as understood by various American and English jurists. The word damage employed in the memorandum has been repeated in Article IV of the protocol, and translated in the English text by the word " injury." In case of doubt, which of the two meanings should hold, the Italian or the English? Fiore, at paragraph 1036, says:

> Where a word used in a treaty has a different juridical meaning in one State from that which it has in the other, it should be determined according as it is understood in the State to which the disposition of the treaty refers.

Evidently this State can be neither England nor the United States, but Italy, the English language having been employed simply for translation, or as an auxiliary tongue, because the third powers can have no part in a litigation which does not concern them. The language of a third nation can not have served except as a copy of the original substantiating the original in case of doubt, but is not to be construed against it. As a still further proof, it may be added that in the official documents published by the Venezuelan Government (Memorandum of December 11 and Gaceta Oficial, containing the official translation of the protocol), the words " danno " or injury were translated into " daño, daños," which are the equivalent of the English term.

The sense of the word " danno," as understood in the vernacular, as well as in Italian jurisprudence, is one and the same, whether referring to damages from natural causes, as storms, fire, etc., or the result of accident or intention, or to damages arising from war. While not wishing to enter into a juridical dissertation on this point, we will, nevertheless, remark that a damage caused by the fault of one occasioning it, directly or indirectly, becomes a civil crime or quasi crime. Only in practice has it happened that the meaning of quasi crime has sometimes been confused with that of damage, in order to avoid the reiteration of definitions and explanations already well understood.

In the Roman law the definition of *injuria* is taken from the Digest: " Injuriam accipimus damnum culpa datum," to become crime or quasi crime (in the English sense of " injury," which, however, at times simply means damage). To " damage " must therefore be added a new element — that of guilt. We say in Roman law that the " damnum est ademptio et quasi dimi-

nutio patrimonii; " that is to say, a substraction and a quasi diminution of patrimony; in other words, an indirect loss equivalent to a diminution.

From the foregoing it follows that the protocol did not intend to distinguish between damages caused by unlawful acts and those brought about by civil war, and has not therefore eliminated those of the latter class which the jus gentium, according to some authorities, does not consider entitled to indemnity.

The Venezuelan Government having assumed so broad and extraordinary a responsibility as that of Article IV, should pay not only the damages caused by the revolution, but also those caused by the operations of war, such as bombardments, breaching of walls by shot during battle; in other words, all damages coming under " whatsoever title of credit or action against the Government of the Republic." It is useless to repeat here that Articles III and IV set a limit to the powers of this Commission as regards claims of the second class of the period 1898-1900, and for all other claims without exception, saving as provided in the last line of Article IV.

The responsibility sanctioned by the protocol is, according to the principle that a nation admitted to the concourse of civilized nations, as Venezuela has been, should be held responsible for whatever abnormal occurrences happen within its territory in damage to the interests of pacific foreigners and neutrals. Such is the view of the " Institute of International Law," and more than once expressed by that distinguished body, which counts as members the greatest expounders of the doctrine of the " jus gentium." And further, the rule of the institute itself, formulated after mature consideration and learned discussion, and representing, as it were, the last word in the science of argument, establishes the general responsibility of a state for damages occurring during an uprising or a revolution.

Text of the regulation on the responsibility of states for damages suffered by foreigners during riots, insurrections, or civil war, adopted by the Institute of International Law in the session of September 10, 1900.[1]

1. Independently of cases where indemnity may be due foreigners in virtue of the general laws of the country, foreigners have right to indemnity when they are injured in their person or property in the course of a riot, an insurrection, or a civil war; *(a)* when the act through which they have suffered is directed against foreigners as such, in general, or against them as subject to the jurisdiction of any given state; or *(b)* when the act from which they have suffered consists in the closing of a port without previous notification at a seasonable time, or the retention of foreign vessels in a port; or *(c)* when the damage results from an act contrary to law committed by an agent of the authority; or *(d)* when the obligation to indemnify is founded in virtue of the general principles of the laws of war.

2. The obligation is likewise established when the damage has been committed (No. 1 *(a)* and *(d)*) on the territory of an insurrectionary government, either by said government or by one of its functionaries. Nevertheless, demands for indemnity may in certain cases be set aside when they are based on acts which have occurred after the state to which the injured party belongs has recognized the insurrectionary government as a belligerent power, and when the injured party has continued to maintain his domicile or habitation in the territory of the insurrectionary government. So long as this latter is considered by the government of the injured party as a belligerent power, claims contemplated in line 1 of article 2 may be addressed only to the insurrectionary government, not to the legitimate government.

3. The obligation of indemnity ceases when the injured parties are themselves the cause of the events which have occasioned the injury.

There is evidently no obligation to indemnify those who have entered the country in contravention of a decree of expulsion, or those who go into a country or seek to

[1] Annuaire de l'Institut de Droit International, volume xviii, pp. 254, *et seq.*

engage in trade or commerce, knowing, or who should have known that disturbances have broken forth therein, no more than those who establish themselves or sojourn in a land offering no security by reason of the presence of savage tribes therein, unless the government of said country has given the emigrants assurances of a special character.

4. The government of a federal state composed of several small states represented by it from an international point of view, can not invoke, in order to escape the responsibility incumbent on it, the fact that the constitution of the federal state confers upon it no control over the several states, or the right to exact of them the satisfaction of their own obligations.

5. The stipulations mutually exempting states from the duty of extending their diplomatic protection must not include cases of a denial of justice, or of evident violation of justice, or of the *jus gentium.*

CONCLUSIONS

1. The Institute of International Law expresses the hope that states will refrain from inserting in their treaties clauses of reciprocal irresponsibility. It believes that such clauses are wrong in that they dispense the states from the duty of protecting the foreigner in their territory.

It believes that states which, through a series of extraordinary circumstances, do not feel themselves to be in a position to insure in a sufficiently effective manner the protection of foreigners on their territory can not withdraw themselves from the consequences of such a state of things except by a temporary interdiction of their territory to foreigners.

2. Recourse to international commissions of inquest and international tribunals is, in general, recommended for all causes of damages suffered by foreigners in the course of a riot, an insurrection, or a civil war.

Is not the protocol of February 13 a sanction of these very principles which seem to be dictated by a desire to safeguard a pacific and well-ordered agreement among civilized nations? The council of contentious diplomacy in Rome referred directly to the foregoing expressions of the Institute of International Law in enunciating the views which served as a basic motive for the rupture of relations with Venezuela, and a demand for an equitable satisfaction.

In accord with this, Fiore, very far from sharing the opinions of the honorable umpire, as he seems persuaded, giving his views on the situation in Venezuela, thus defines her responsibility in the case of one Mammini, already known to this Commission.

The Venezuelan Government is especially responsible by reason of insufficient measures of security and a lack of vigilance in contravention of the principle laid down in the Italian-Venezuelan treaty of June 16, 1861, which provides that the citizens and subjects of one of the contracting states shall enjoy in the territory of the other the most constant protection and security in their persons, etc. (Extract of ministerial dispatch of March 29, 1899.)

It is clear, therefore, that Article IV refers to losses and deteriorations of property in civil wars, and to those inflicted by the government, by states, by the federation, and their employees, as well as by revolutionists, and undue appropriations chargeable to both parties. We lay stress on the term " undue appropriations." To unduly appropriate an article is to despoil the legitimate owner to one's own profit, and is equivalent to enriching one's self at the expense of one's neighbor. Whatsoever spoliation, says the protocol, if undue — that is, without right on the part of the spoliator — must give occasion to a claim for indemnity. Thus was had in view the numerous spoliations and forced requisitions unjustly suffered by Italians, especially during the struggles between contending factions at times when foreigners were frequently unable to tell which represented the legitimate power. Such are the limits which the protocol

assigns to the responsibility of a state, and this view is the only one which gives a logical and natural meaning to Article IV.

It is idle to insist that such a view is unreasonable and absurd in that, giving a too extended interpretation to Article IV, the Venezuelan Government would be obliged to recognize any claim for damages, even if inflicted by private individuals, and any claim which the royal legation might see fit to present. It is insinuated that in admitting such a responsibility the Venezuelan plenipotentiary would not have been in his right mind; but such a supposition is out of reason, because having accepted the situation we have clearly explained it was but natural he should have affirmed it. May he not have been in the same frame of mind which impelled the Commissioner for Venezuela in the French-Venezuelan Commission to accord, without objection, indemnity for revolutionary damages in 82 cases of the period 1900-1903?

If the French protocol of 1902, was, without objection by Venezuela, construed as allowing indemnity in a multitude of various cases, for the most part of revolutionary origin, running as far back as 1867, France having already had two settlements since that date, while Italy had had none, how can the latter nation be denied an equal treatment when it has a more stringent protocol and enjoys besides the provisions of the most favored nation clause?

Can the Venezuelan Commissioner above mentioned have intended to convey a lesson to the honorable Mr. Bowen, or did not, rather, the latter clearly recognize a condition of affairs so eminently logical and natural? Can the Commissioners and the umpires who on this point have so exactly agreed with the views here expressed be said to have lost their reason? If it be desired to ascertain the views of the high contracting parties, have we not here most precious data?

We have never maintained that indemnity should be exacted for damages inflicted by private parties for whatsoever motive. We have only sought to establish a responsibility for the state of disorder and insecurity arising from the revolutions which have almost continuously distracted the land, and obtain indemnity for damages in the past, with a moral guaranty for our people in the future.

This special responsibility the Institute of International Law establishes on a general principle such as to justify a demand for indemnity in all cases arising from riots and revolutions. In other words, there would be, according to the institute, a general responsibility from the very fact of the admission of Venezuela among the family of civilized nations. Having been received on a par with more progressive nations, it should guaranty order and security of persons and property. Failing in this, it should suffer the consequences of an habitual deviation from internal political order when such results in damage to its associates, and this in virtue of the principles of reciprocity of guaranties established on equal terms among civilized peoples. The International Institute lays down this concept as a fundamental maxim, and as the highest expression of progress in the "jus gentium."

Even should the Italian Commissioner not go as far as the Institute of International Laws in its conclusions on this point, he must insist that the protocol has established a concrete rule modeled after the most progressive doctrine, and this to him is sufficient.

But there is another point to be examined in this controversy. From our standpoint Venezuela has not been sufficiently diligent in the protection of foreigners — that degree of diligence the omission of which the honorable umpire himself holds to be sufficient to render the State responsible, and to receive claims for damages arising from the revolution. This lack of diligence consists not only in not preventing by appropriate means, but also in encour-

aging instead of repressing, the damages, violence, and spoliations charged.

To prove this it needs but to narrate in brief the different phases of the " Hernandez " revolution. This revolution, breaking out on May 2, 1898, interrupted on June 12 following, by the capture of its chief, burst forth afresh October 17, 1899. On May 27, 1900, Hernandez was again captured and shut up in the fortress of San Carlos to December 11, 1902. But his associates and partisans continued the war, coalescing subsequently with the forces of General Matos, who had in truth but a small following aside from the Hernandists.

The insurrection spread throughout almost all the Republic, embracing a majority of the nation, and involving an extraordinary organization. It established a de facto government, many even contending that the government so established in various States for considerable periods was more legitimate than that of the capital, alleging that the election of the President had been irregular and that the constitution was illegal, not having been duly published. But we will not enter into a discussion unsuited to a foreigner, who should be content to receive the protection and indemnity due him while respecting the laws of the country in which he lives.

Seeing itself unable to make headway against so many tireless enemies the Caracas Government compromised and offered guarantees and official positions to the principal leaders, civil and military, of the Hernandists, who controlled the most important nucleus of the revolution. In this guise attained to power, in part at least, the revolutionary party of " El Mocho " (Hernandez), which now has members in the cabinet, in Congress, among the high officials of the customs, and even among the presidents of the States. Some of these have governed uninterruptedly, first in the name of the revolution and now in the name of the Central Government. To others were given positions and emoluments, so that the revolution, to-day in subjection, might to-morrow become the controlling power of the Government.

For these reasons, in addition to the general responsibility sanctioned by the protocol, there is invoked here a special responsibility for the period of the Hernandez and Matos revolutions, the latter being a continuation of the former, whose adherents were its mainstay.

In the present case it is contended that the authorities failed in the use of due diligence. The officials who took part in the recent insurrections might, in fact should, be compelled to a restitution of the goods wrongfully taken. They should be proceeded against and condemned to punishment. But the Government has made no effort to punish or even prevent the wrong, nor is it our intention to advise it to do so, since we are not called upon to criticise its political movements. This policy, however, unquestionably weakens the guarantee of security to foreigners provided for by the treaties, by its constitution, and by international law. It would be absurd to require the claimant, in each case of damage from the Hernandez-Matos revolution, to prove that the Government could, but would not, prevent the damage, since the responsibility of that Government rises to the origin, even to the political and moral causes which precipitated the revolution, and depends upon the character and general consequences of civil war.

The case of Divine (Moore, Vol. 3, p. 2980) can not be appealed to in justification here. A pardon in certain special cases of riots is comprehensible, but certainly not in cases where revolution has progressed so far as to actually take on the functions of government.

In the present instance, either the Government is strong enough to crush the rebellion, and then it should punish at least the ringleaders, causing a restitution of the property unlawfully seized, or else, confessing its inability

to cope successfully with the opposing faction, seek to compromise by sharing its functions with the leaders, and then the honorable umpire is in duty bound to award indemnity in virtue of the very principles admitted by him (on which we make reservations with the object of establishing a general responsibility) in the case of successful revolutions. And besides, in the Divine case there was no protocol containing so categorical a clause as that of Article IV of the protocol of February 13, 1903. In that case it is stated that governments granting pardon are not obliged to pay indemnity for damage inflicted by rebels, while in our case, leaving out the discussibility of the principle in virtue of which Mexico was absolved from paying indemnity in the case of Divine, an agreement was made ad hoc which could not have sanctioned the civil and penal impunity enjoyed de facto by the successful revolutionists now sharing in the legal Government. Not thus, without cause, was abandoned the obligation of protecting foreigners, which led to the extreme resort of the blockade. What weight would an isolated and little known case in Mexico have in such a question by comparison with a general moral principle and the obligation of safeguarding the interests of foreigners?

Summing up our arguments, we maintain:

1. That no distinction should be drawn between revolutions wholly or partially successful.

2. Venezuela has been and is wanting in that degree of diligence which the umpire expressly recognizes as necessary to the exclusion of governmental responsibility.

Returning now to the construction to be given Article IV, let us determine to whom it belonged to make restrictions to the principle of general responsibility defined by the Institute of International Law and sanctioned by the protocol, and what modes of interpretation should be adopted for Article IV.

The making of restrictions, the elucidation of doubtful points, if such there can be, properly fell to the plenipotentiary for Venezuela. There having been submitted to him so rigid a draft of a protocol, one which insisted on a most categorical responsibility on the part of Venezuela (unprecedented in the annals of treaty making), would he not have refused to assent to the measure, if there had been any doubt in his mind, without further explanation? The opinion of Vattel (sec. 264, Vol. II), incorrectly invoked by the honorable umpire in favor of Venezuela, on the contrary, militates against that country. The Venezuelan Government, with power to explain itself clearly, failed to do so, and it can not now bring forward restrictions of which it gave no intimation in the protocol or during the negotiations at Washington. It accepted its responsibility in all cases of damages and wrongful takings and the admission of all claims without exception. On the other hand the Italian plenipotentiary based himself principally on the memorandum of December 11, above referred to, and on the well-understood meaning of the word " danno " (as was invoked by the honorable umpire himself, who has misinterpreted the intentions of the Royal Government and its plenipotentiary and their idea as to the character and extent of responsibility). The Italian ambassador had even considered the term " Matos revolution " (see the diplomatic documents), inserted in a first draft of the protocol, decisive though it was, not sufficiently rigid and comprehensive, and so preferred a more general formula, which would embrace all claims without exception. Who can complain if Venezuela did not see fit to protest against such general formula without precedent in diplomatic history? Certainly not Venezuela, as is evidenced by the fact that she allowed some 82 claims in the French-Venezuelan Commission for damages arising from the revolution without the least objection.

We will observe in passing that in the event of interpretation of clauses in-

volving the interests of persons who have actually been injured, despoiled, and robbed, any doubt in regard thereto should be resolved, according to general principles of jurisprudence, preferably in favor of the injured party.

The opinion of Wharton (Digest, sec. 133) inclines in favor of the claimants, since the Royal Government knew the extension given to the responsibility of Venezuela and was itself the proposing party.

As to the opinion of Woolsey (sec. 113), it seemed derisive to speak of benefits for claimants while intending to reject their claims, since no real advantage is reserved to them, but at most only a part of what they have lost, and in the case of revolutionary damages, even that will be lost to them.

It is their right, their just due, that it is proposed to secure to them not a favor or a benefit, a just indemnity; perhaps incomplete, but certainly not a gift. The benefit will, on the contrary, fall to Venezuela, whose payments will be far less than they would be were she to pay all she justly owes.

The vague opinion of Pradier-Fodéré (sec. 1188), quoted in the Sambiaggio case, is not sufficient to neutralize the effect of a public treaty so grave and important as is the protocol, under the pretext that there is something doubtful in its provisions and it can only have reference to matters of detail and not to the essence of an express stipulation. Were it so wished it would be possible to find in the clearest and most explicit of texts some elements of doubt and uncertainty by which its most equitable and just purposes might be assailed. What would be the use of protocols if they are to be opposed at every step by doubts, uncertain principles of international law, complex local legislation, and generic and hypothetic views of authors who, under the cloak of the rarely-applicable opinion of Pradier-Fodéré, would emasculate every provision drawn in the interest of unfortunate foreigners whose indemnities Venezuela has undertaken to pay.

How many opinions or maxims might not be adduced in favor of injured Italians! Calvo (par. 1650) says:

> Les traités étant essentiellement des contrats de bonne foi (actus bonæ fidei) doivent avant tout s'interpréter dans le sens de l'équité et du droit strict. *Lorsqu'il n'y a aucune ambiguité* dans les mots, que la signification est évidente, et ne conduit pas à des *résultats contraires à la saine raison*, on n'a pas le droit d'en fausser le sens et *la portée* pratique par des arguties et *des conjectures* plus ou moins plausibles.

Is it not an evident violation of the foregoing rule to seek to twist and distort out of their obvious meaning the words of a treaty, and to confuse the word " *danno* " with the word " *delitto*," or " quasi-delitto civile " (see art. 1151 *et seq.* of the Italian Civil Code), instead of applying to them their common meaning, spread throughout the entire Italian legislation?

Fiore (par. 1037) recommends:

> The second general rule which it appears to us should be established is suggested to us by Grotius, and this is that, even though the intention of the parties and that to which they have consented is to be considered as expressed in the words written and subscribed to, nevertheless there should be found a meaning in harmony with that which the parties intended, and not have recourse to pitiful subtleties to destroy by the dead letter the true intent of the contracting parties.

Now, who will undertake to say that the plenipotentiaries at Washington intended to elaborate out of their own minds that complicated tissue of hypothesis and technicalities upon the word " danno " with a view to giving it a meaning out of the ordinary, and such as to exclude the payment of indemnity for revolutionary damages — that is to say, more than half of all the Italian claims — while the honorable umpire, speaking of damages of the revolution, by this alone seems to give the word the meaning invoked by us in the name of common sense.

But it is superfluous, nay, even injurious to the cause of justice, to indulge in so many quotations, precedents, decisions of tribunals more or less obscure or contradictory, contrary to the spirit of the protocol, which takes equity as its principal rule of action. The Italian Commissioner and the royal legation have no desire to and can not follow in this road the other members of the arbitral Commission, since, so intending, they might by similar means destroy the integrity of any protocol whatsoever. "Give me but two words of any man's utterance," said Napoleon, "and I will undertake to hang him."

It would thus be possible to take away every vestige of restriction to the powers of the Commission as established by Article IV, which stipulates that in the case of damage or unlawful seizure it must determine if the damage actually occurred, if the seizures were unlawful, and what amount shall be paid.

Now, is it logical and equitable to say the damage took place, the Venezuelan Government is responsible in principle? These things are indisputable. But nothing will be awarded because the plenipotentiaries, though admitting that awards should be made to claimants who were fortunate enough to see the troops who despoiled them enter Caracas, decided to reject the claims of those whose damages were caused by those who did not succeed, but might yet do so, almost as if it had been their intention to cast the fortunes of these claimants on the hazard of a die, or the chances of success of the opposing factions as one would wager on the result of a horse race (in fact, Matos was still in the field after February 13). Would it not have been much more simple and logical to clothe the Commission with unlimited powers by suppressing altogether Article IV and thus, without words, say to the Commission: "Judge with full and absolute liberty, whether the damage done be legal or illegal, according or contrary to international law?" Where do we find international law, the existence of which is opposed by many, and which is of no force and effect without the mutual consent of the parties, sanctioned by the protocol as a rule of action, giving it preponderance over an express and mandatory clause?

Finally the following point is insisted upon: To say that Article IV, which affirms and establishes in principle the responsibility of Venezuela for damages to property, was simply and only intended to eliminate the objections which had in the past been discussed between the two Governments, is contrary to the rule of international law in matters of interpretation of treaties which states that each special clause must have a special object. Now, in order to do away with the objections formulated by Venezuela on the basis of her laws and the decree of 1873 with regard to claims, it would have been quite sufficient to invoke: First, the constitution of the Mixed Commissions having jurisdiction over all claims without exception, thus avoiding decrees and local legislation; second, Article II of the supplemental protocol of May 7 which removed objections of a technical nature, or those founded on the provisions of local legislation. The reservations made by Article IV have therefore another purpose and may not be considered vain or superfluous by a long argument based on the very local laws so expressly disregarded by the Italian plenipotentiary at Washington, and appeals to which were expressly prohibited by Article II of the protocol of May 7.

It is curious to note how, on certain occasions, for reasons which escape our comprehension, Venezuela pays for damages committed by the revolution, as for instance in the case of Gen. Manuel Corrao, who received 7482.29 bolivars for loss of stamps stolen from him by revolutionists. (See Gaceta Oficial of August 14, 1903.) It may be urged that this is simply a case of voluntary relief to which the Government was in nowise compelled.

But why afford relief when all should suffer equally; why derogate indirectly

and in favor of certain privileged ones to a principle which is proclaimed as absolute?

Let us now examine the question solely from the standpoint of equity.

It is repugnant to the umpire to hold the Venezuelan Government responsible for damages caused by revolutionists, for the reason that they are the enemies against which Venezuela is fighting. At first this seems plausible, but in fact is not so. It is not a case of foreign enemies penetrating from outside into the national territory and robbing the inhabitants. It is rather a case of damages committed by insubordinate subjects, whose very insubordination must be held as due to a lack of care and provision on the part of the Government.

The Venezuelan revolutionists are not belligerents, and they have not been regarded as such by either Venezuela or the powers. Their repression is wholly a question of internal policy, and Venezuela can not, in order to escape her responsibility, invoke the rules of international law, applicable only and in a certain measure to damages caused by belligerents.

For the chronic condition of internal political agitation in Venezuela some one must be found morally responsible, and this some one can be none other than the Government, upon whom falls, as a logical consequence, likewise a material responsibility for all damages occasioned by the revolutions.

In addition to refusing indemnities for damages caused by revolutionists, the honorable umpire places foreigners in a condition of manifest inferiority to the natives in so far as regards the protection of their persons and property. The latter may defend themselves by force of arms, the former can not. The natives run the chances of perils or advantages consequent upon the discomfiture or the success of the party to which they belong; but there is nothing for the foreigner but perils and damages. Justice demands, then, that provision be made for a relative indemnity, and thus in favor of the latter the powers have intervened and the protocols of Washington have been framed.

It is futile to say that the carrying out of these protocols will place the foreigners in better position than that occupied by Venezuelans. Venezuela is under no obligation not to indemnify her citizens, and she can readily place them on a par with the foreigners in this respect, as she has done in certain cases of revolutionary damages. Italy has nothing to do with this phase of the question. She only asks that justice be done her sons, and is in nowise concerned with those whom she is not bound to protect. So that if any difference of treatment exists, the fault thereof will not lie at her door, nor will her demands on that account be less equitable.

The refusal to grant indemnity for revolutionary damages will be a grave offense against equity under another point of view. It is a fact that the troops of the Government have everywhere defeated those of the revolution, and that all the arms, ammunition, stores, animals, money, etc., in possession of these latter, have passed into the possession of the former, for their use and disposal. Almost all of this property was violently, or at least unduly, taken from the inhabitants, and it is no exaggeration to say that the larger share belonged to foreigners. Were the honorable umpire to deny indemnity to the foreigners in question he would be sanctioning an enrichment of the Venezuelan Government at their expense — a thing which to us appears contrary to justice.

When, therefore, damages have been inflicted upon foreigners simultaneously by government and by revolutionary troops, or successively by either, it has frequently been impossible for claimants, perhaps for a lack of eyewitnesses easily understood at times of agitation and terror, perhaps because the courts were not in operation for months after the occurrences complained of, to deter-

mine what portion of the damages suffered by them were chargeable to one and what to the other party — i.e., government or revolution.

Now, it may happen that in these cases the honorable umpire will fail to find elements by which to discriminate between damages entitled to indemnity and those to which he has so far refused it. He must, therefore, either integrally accept the claims or reject them utterly. In the first hypothesis — the only just and acceptable one — he will run counter to the principles heretofore laid down by him; in the second he will deny the sacredness of a right admitted without restrictions of any kind by Venezuela herself.

Let us now cast a look to the future. However optimistic we may choose to be, it would be difficult to believe that revolutions in Venezuela are at an end. Hence, future revolutionists (never, according to our experience, promptly suppressed), strong in the decision of the honorable umpire, may with absolute impunity make themselves masters of the persons or property of Italians with entire freedom from any obligation to indemnify in the event of their party not being successful. This feeling of security will be a powerful incentive to abuses of every sort, while the assurance that the country would in every instance be held to a strict accountability for damages inflicted upon foreigners could not but act as a salutary check.

The decision in the Sambiaggio claim on the other hand will strongly tend to make Italians heedless of their neutrality, for even the honorable umpire himself would hardly expect these people to rise to the sublime heroism of allowing themselves, with meekness and equanimity, to be stripped of their possessions by revolutions, with the certainty that their claims would never be indemnified. They will have to either resort to arms for self defense, or, making common cause with the revolutionists, assist these latter to attain to power as the only means of securing reimbursement. All of which would injure the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of affairs.

Great as may be, therefore, the responsibility which the honorable umpire seems thus far disposed to assume for past events, a much greater will rest upon him in the future, either on account of attempts upon the life and property of Italian citizens, or the political tranquillity of the Republic, which, in view of its best interests, can hardly be grateful to him should he in this present claim decide not to adopt principles different from those governing his previous decision.

Let us now consider the treatment to which Italian subjects are entitled under the provisions of the " most-favored-nation " clause contained in the Italian-Venezuelan treaty of 1861, and confirmed with especial reference to claims in the Washington protocol of February 13, 1903.

Assuming that the Guastini claim (which, had it been French, would have been awarded indemnity for revolutionary damages, but, being Italian, is in danger of rejection) seems expressly calculated to render more glaring the injustice of the treatment which it is proposed to inflict upon our fellow-citizens, let us call attention to the fact that the treaty of 1861 has never been repealed, and has never for a moment ceased to be in force. There has been no declaration of war between Italy and Venezuela, and the blockade has been no more than an interruption of diplomatic relations, which could not have annulled existing treaties according to the opinion of the best authorities on international law.[1]

[1] See, however, decision of the Hague Permanent Court of Arbitration in the Venezuelan case, considering that a state of war existed. Vol. IX of these Reports, p. 107.

It is true that Article VIII of the protocol of February 13 speaks of the treaty as being " renewed." But if we consider well we will see that the word was used *ad abundantiam*, to obviate all future doubt and discussion. In the said article there is no explicit declaration that the treaty had ceased to exist, and the sole purpose in view was precisely to explicitly confirm the " most-favored-nation " clause now in force, and to give it so full and ample an application as to render its elusion by subterfuge impossible.

It was not possible to more clearly express this intention than was done by the phrase —

> The Italians in Venezuela and Venezuelans in Italy shall in all respects, and particularly in the matter of claims, enjoy the provisions of the most favored nation clause, as stipulated in article 26 (of the treaty).

In order that the scope of this fact might not suffer diminution from any restrictive interpretation of Article IV of the treaty, which, without excluding better conditions, provides that Italians in Venezuela shall not in any case receive a less favorable treatment than that accorded the nationals, the last line of Article VIII of the protocol provides that the treaty shall never be invoked against the provisions of the protocol.

In the decision in the Sambiaggio case not only was there no account made of this provision of the last line of Article VIII of the protocol of February 13 and the treaty invoked against it, but there was likewise invoked the noted Article IV, to prevent the application of which it is well known that the last clause of Article VIII, above mentioned, was especially framed, if it be desired to discuss the question logically and with unprejudiced mind. But let us admit, for the sake of argument, that the treaty of 1861 was no longer in force on February 13 of this year. None the less would the " most favored nation " clause apply in favor of Italian claimants since the treaty was renewed and confirmed by the protocol of that date.

In fact, it can not logically be held that so important a clause of a protocol framed expressly to settle a preceding question with regard to claims should not be applied to the claims themselves; to claims of a civil war not yet then terminated, and which continued for five months after the signing of that instrument.

It is in any event an unquestioned rule of law that an explanatory clause is retroactive in its effect, because, except in cases of resjudicata, it tends to clear up the intention of the legislator, and, in the present case, that of the original negotiators.

Fiore, after a long discussion of this subject, thus sums up his arguments in the following maxim (par. 1012):

> The effects of international conventions extend, on general principles, to juridical relations established and formed prior to the stipulations of the treaty. A contrary provision might, however, be provided by express agreement.

This " express agreement " does not appear either in the treaty or in the protocol, and hence the umpire's concept of the nonretroactivity of Article VIII of the protocol does not seem to conform to the principles of international law.

To us, however, it seems clearly established that the " most favored nation " clause should apply in every supposable case in the interests of Italian claimants. It remains to be seen whether this application may be invoked by us in view of the decisions rendered in the French-Venezuelan and German-Venezuelan Commissions, in which indemnities were granted to French and German claimants for revolutionary damages.

With regard to this, it has been objected that if this principle were admitted, should those commissions subsequently render decisions of an opposite nature,

it would become necessary for this Commission to follow them in this devious and uncertain path. Hence it has been concluded that this Commission is not to accept as binding on it decisions rendered in the others.

We will merely observe, in relation to the foregoing supposition, and more especially with reference to the French-Venezuelan Commission, that the latter has about terminated its labors, that more than eighty indemnities for revolutionary damages have been granted without discussion on the part of the Venezuelan delegate in said Commission, and that when he, with tardy objections attempted to raise difficulties, the umpire cut short those objections by declaring that there must be complete similarity between damages created by the Government and those of the revolution. So far as the German-Venezuelan Commission is concerned, we have time to consider this point, and should it transpire that its decisions have changed we will not refuse to do so, but there is no reason to anticipate such change, in view of the evident equity of the course so far adopted by it.

It suffices us that a single one of the Commissions assembled in Caracas for the settlement of foreign claims should have granted indemnity for revolutionary damages to give us the right to demand and obtain that an equal treatment be accorded Italian claimants.

In fact, the decisions in this sense of a single Commission even would constitute the authentic and sovereign interpretation of the treaty and of the protocol stipulated by the Venezuelan Government for the pacific settlement of claims brought forward by subjects of the respective nations. Hence it is that, according to the protocols and treaties, of which the decisions of the Commissions are the unchallengeable interpretations, we demand for our fellow-citizens the application of the " most-favored-nation " clause. But granting that Article IV of our protocol lends itself to a double interpretation, which we positively deny, the honorable umpire should, even reluctantly, give a decision granting indemnity for revolutionary damages, in order to avoid giving one which, in view of the action of the French and German Commissions in this respect, would be in open contradiction with the provisions of Article VIII of the protocol of February 13, above named.

If the treatment accorded the most favored nation be not accorded us by the granting of indemnity for revolutionary damages, in what other case may we hope to obtain this advantage? What effect, if not this, has the clause referred to? Shall we remain satisfied with a differential treatment which leaves us in a position of manifest inferiority, when the treaty of 1861 and the Washington protocol guarantee to us the contrary in the widest and most explicit manner?

If the honorable umpire rejects claims for revolutionary damages, the effect will be as though Article VIII of the Washington protocol had not been written, or as if the provisions of the same were to have no application — a conclusion repugnant at once to intellect and to conscience. In short, such a course would be tantamount to an emasculation of the entire protocol, since what has so far been granted by the honorable umpire is nothing if not that which in principle was not refused by Venezuela, even before the framing of that instrument — that is, that indemnity should be granted for damages caused by the Government or its agents. Now, when it is considered that, as has already been remarked, the Venezuelan Commissioner in the French Commission conceded, without discussion, over 80 claims for revolutionary damages, it should logically and in good faith be recognized that the interpretation given in that tribunal to the French protocol, much less explicit than ours, is the one admitted by the Venezuelan Government itself.

If, indeed, the Commissioners are free to judge according to rules of equity

and justice, and with full and absolute independence, the facts and circumstances on which the claims are based, and the efficacy of the respective proofs, they are none the less, in questions of principle, as in the question of revolutionary damages, bound by the instructions of their governments, and governed by them in the judgments they render.

None of us has accepted the honorable charge which has been intrusted to him without first thoroughly investigating between what limits and according to what general rules lay the duties of his office. Our appointment as Commissioners, who are not exactly or exclusively judges, clearly shows this.

The diplomatic course pursued by Italy in Venezuela in favor of her claimants, if always inspired by extreme moderation, has nevertheless constantly aimed to secure to injured Italians a treatment analogous to that granted to other foreigners. The honorable umpire will find an absolute proof of this in the documents we send herewith, which are all of an earlier date than that of the protocol of February 13, to wit, in the note of the royal Italian legation at Caracas to the Venezuelan minister of foreign affairs of April 24, 1901, in that of the Italian minister of foreign affairs at Rome to the United States ambassador at Rome, in a telegram of the aforesaid minister to the ambassadors at Berlin, London, and Washington and in the telegraphic reply to the latter.

Convinced that the honorable umpire will recognize that Italy is not here asking more than it has always been her intention to ask, even prior to the negotiations at Washington, we await with confidence a decision from him in favor of the claimant, Luigi Guastini in the sum of 582 bolivars for damages inflicted upon him by civil authorities and for judicial expenses, and in the sum of 6,247 bolivars on account of requisitions, forced loans, and other damages from troops and authorities of the revolution, or a total of 6,829 bolivars.

ZULOAGA, *Commissioner:*

In this case the honorable Commissioner for Italy has deemed it proper to reopen the discussion touching the responsibility of Venezuela for damages caused by acts of revolutionists, especially with reference to the Washington protocol.

To me it seems that the decision of the honorable umpire, given in the Sambiaggio case, has settled the question. The Commissioners fully stated their opinion in that case before the honorable umpire, verbally and in writing, and he then gave a learned and extended decision in which were carefully considered and solved all the points which the honorable Commissioner for Italy now desires to reconsider, and I believe the subject to be exhausted, as appears proven by the fact that the new opinion of the honorable Commissioner simply endeavors to refute the decision of the umpire. I will not undertake for my part to make a new exposition, since it would only result in uselessly prolonging the labors of the Commission.

Venezuela never accepted responsibility for claims arising from acts of revolutionists, as is evidenced by her laws. In the case referred to by the honorable Commissioner for Italy, which appears to be inferred from an Executive resolution published in the Gaceta Oficial of August 14, only by a strained interpretation may it be construed that the Government had accepted such responsibility. There was no disbursement in payment thereof, nor was it paid in any other way.

The honorable Commissioner for Italy insists that the French-Venezuelan Commission accepted revolutionary claims, and referring thereto I will quote here the opinion of the Venezuelan Commissioner in that Commission:

Notwithstanding the respect which the Commissioner for Venezuela owes to the decision which has been rendered by the honorable umpire in the claim of Antoine

Bonifacio and in other cases where indemnity has been claimed for damages to property by revolutionary forces which have committed depredations in various sections of the Republic, and principally in the town of Carúpano, I consider it my duty to maintain the opinion heretofore expressed by me, that claims based on negotiations, loans contracted between revolutionary chiefs and private individuals, as well as those for forced requisitions and damages sustained at the hands of revolutionary troops by neutrals, do not affect the responsibility of the Government of Venezuela.[1]

The historical-political narration made by the honorable Commissioner for Italy for the purpose of deducing the responsibility of the Venezuelan Government for its lack of diligence in suppressing the revolution is weakened by serious inaccuracy in both its general scope and minor details. The Venezuelan Government did energetically and resolutely attack the revolution, and the fact of its having continued to the present year was due to the action of the three allied powers in destroying the war vessels of the Government, with which Venezuela was pursuing the dismembered revolutionists, permitting the latter to reorganize, and thus cause new and bloody combats.

" The most-favored-nation " clause invoked by the honorable Commissioner for Italy finds no place in the labors of this Commission, but refers solely to the drawing up of treaties, not to the application of their provisions, which must necessarily depend on the point of view of those who construe them. It would be well to note, however, that it is extremely difficult to determine which is the nation having the most favored claimants in these mixed commissions.

In some, as in this one, by the decision of the umpire a long delay has been granted for the presentation of the claims: in others, not. In some, the consideration of proof has been left absolutely free; in others, not. In some, the responsibility of the Government for acts of revolutionists has not been admitted, while admitting its responsibility for the acts of its agents; in others, the Government has been held accountable for the acts of revolutionists, but not for the acts of its agents. Again, interest has been allowed in some commissions, and not in others. England has presented no revolutionary claims, yet it has a protocol similar to the Italian. By what criterion is it possible to determine which is the most favored nation in carrying out the provisions of the various protocols?

There remains but a brief consideration of the serious charge made by the honorable Commissioner for Italy that the doctrine of the non-responsibility of the Government for acts of revolutionists will prejudice the peace of the Republic and tend to inaugurate a profoundly immoral and subversive state of things, and, he adds, the umpire will incur a grave responsibility for future attempts against the lives and property of Italians in Venezuela, and even for the peace of the Republic, in deciding, as he has, that the Government can not be held for the acts of the revolution.

Immoral and unjust it is to assume to withdraw Venezuela from the operation of laws which govern all cultured peoples, and insist that the honorable umpire shall decide accordingly. Immoral and unjust to ask that foreigners in Venezuela shall be governed by laws other than those under which Venezuelans themselves live, and that the Government shall be as an insurance company against real or imaginary losses from *force majeure*, and profoundly immoral it would be, as well, to advocate the doctrine that the state is responsible for acts of revolutionists.

Foreigners should be interested in the preservation of peace and public order, and they have numerous ways of contributing thereto without inter-

---

[1] Acquatella case, *supra*, p. 5.

vening in the politics of the country. But the day when the state is made responsible for the damages mentioned will see foreigners grow indifferent to the continuance of public peace, aye, and even become eager to foment revolution, as a means of acquiring by trumped-up claims what they might not be able to obtain by means of honest labor.

The honorable Commissioner for Italy seems unduly preoccupied as to the future. In the future the foreigner in Venezuela will live as he has in the past — under the constitution of the country, which establishes that the nation has no more or greater obligations toward them than it has toward its own citizens, according to the laws of the land — as the Venezuelans themselves live, who know very well that under the law they have no right to claims for damages committed by revolutionists.

I am confident that the honorable umpire, abiding by his decision, will reject the claim of Guastini as one based on acts of revolutionists.

RALSTON, *Umpire:*

The above case has been referred to the umpire upon difference of opinion between his honorable associates relative to an allowance for damages committed by insurgents during the recent revolution.

The questions presented in this respect are the same as those presented by the recent case of Salvatore Sambiaggio, No. 13,[1] in which the umpire reviewed in extenso the subject of responsibility of the Government for revolutionary damages in the case of unsuccessful revolution. In the present case, as before, the honorable Commissioner for Italy has presented a learned and able exposition of his views, which exposition has received the careful and respectful consideration of the umpire. He is, however, unable to change the views then expressed, but feels obligated to discuss briefly some of the fundamental positions taken on behalf of Italy.

The honorable Commissioner for Italy rests his opinions largely upon the assumed inequity of a refusal to require the Government to pay such revolutionary damages. The subject was fully investigated by the umpire in the former opinion, in addition to which discussion he desires now to call attention to article 21 of the treaty of 1892 between Italy and Colombia, which reads as follows:

> It is also stipulated between the two contracting parties that the Italian Government will not hold the Colombian Government responsible, save in the case of *proven* fault or negligence on the part of the Colombian authorities or of their agents, for injuries occasioned in time of insurrection or civil war to Italian citizens in Colombian territory, through acts of rebels or caused by savage tribes beyond the control of the Government.[2]

The foregoing sufficiently indicated the opinion of the Italian foreign office, and, in exact accord as it is with the opinion he expressed in the Sambiaggio case (as well as with a fair interpretation of the Italian-Venezuelan treaty of 1861, as pointed out in the case mentioned), confirms the ideas of the umpire; for had Italy believed such a clause inequitable and unjust to her subjects that

---

[1] See *supra*, p. 499.

[2] It appears that by an exchange of notes, dated October 27, 1902, between the minister of Italy in Bogotá and the Colombian minister of foreign affairs, it was understood that if other countries were granted *by Colombia* damages for acts of revolutionists or savage tribes *Colombia* would afford the same relief in favor of Italians. ("Trattati e Convenzioni fra Il Regno d'Italia e gli altri Stati") This does not affect the recognition by Italy of a just principle, and, furthermore, in the case of Venezuela, she has accorded no more (or even as much) to other nations as to Italy. (Note by umpire.)

enlightened and cultivated nation would never have solemnly ratified a treaty with Colombia, situated as it was and is like Venezuela, containing such a provision.

It is worthy of note that, according to the opinions of nearly if not quite all the umpires now in Caracas in the various Commissions, there exists no legal responsibility on the part of Government for the acts of unsuccessful revolutionists. Such is the view of the umpire of the English and Netherlands Commission,[1] of the German Commission,[2] and, as it appears, of the Spanish Commission.[3] Furthermore, it is the opinion of the umpires above referred to (save that of the Spanish Commission, possibly) that such claims are inequitable. It is true that the umpire of the German Commission, influenced by a construction of his protocol which this umpire can not conscientiously follow, has allowed (but within strict limits) certain claims of the character in question. It is also true that the umpire of the Spanish Commission, notwithstanding his apparent belief as to their illegality, has granted claims of this nature, considering the objections raised thereto by Venezuela as " technical," and therefore opposed to the protocol. This view the present umpire is unable to accept, believing as he does that an objection going to the foundation of the right to recover can not be regarded as technical. In addition to the Commissions above named, the American Commission has already indicated[4] that it would deny the right to recover for claims of this nature. Nothing is said above about the decision of the umpire of the French Commission, as, according to information furnished, the reasons for his decision were not given and the particular facts are unknown.

To the suggestion that Italy is entitled to the benefit of the " most-favored-nation " clause contained in the protocol, and that she has been deprived of it — a point argued at length and ably — it only remains to add that Italy obtained from Venezuela a protocol, certainly so far as this discussion is concerned, more favorable than those given other nations, for while (to illustrate) under the German protocol Venezuela admitted its liability —

> in cases where the claim is for injury to or wrongful seizure of property, and consequently the Commission will not have to decide the question of liability, but only whether the injury or the seizure of property were wrongful acts, and what amount of compensation is due,

in the Italian protocol Venezuela admitted its —

> liability in cases where the claim is for injury to *persons and* property, and for wrongful seizure of the latter, and consequently the questions which the Mixed Commission will have to decide in such cases will only be: *(a)* Whether the injury took place or whether the seizure was wrongful; and *(b)* if so, what amount of compensation is due.

The French protocols contain no similar admission.

It is true that there have existed differences of opinion among umpires as to the responsibility of Venezuela for acts of unsuccessfull revolutionists; but such differences of opinion, relating as they do to questions of international law or of the construction of protocols, can not be said to have any relation to a " most-favored-nation " clause obligatory upon Venezuela, which nation has apparently given Italy all she promised. These opinions may be studied to

---

[1] Vol. IX of these Reports, p. 408; and *infra*, p. 713.
[2] *Supra*, p. 390.
[3] *Infra*, pp. 741 and 748.
[4] Vol. IX of these Reports, p. 145.

advantage, but they are not protocols, nor are they " treatment," within the meaning of the Italian-Venezuelan agreement.

It is greatly urged that the decision in the Sambiaggio case rested largely upon the meaning of the word " injury," and that the word " danni," used in the Italian version of the protocol, has a vastly different meaning. To this observation several answers are to be made. The text of the protocol is in English and Italian. It was the result of long negotiations between the representatives of England, Germany, and Italy on the one hand, and Mr. Bowen, Venezuela's representative, on the other. These negotiations were carried on almost altogether in English, and the drafts (afterwards becoming protocols) were in English. It is therefore evident that the basic language is English, and in case of difference of translation resort should be had to it.

But if this were not so, no difficulty would arise. We must conceive that the language employed, used as it was in a document in a sense legal, is to be interpreted with some regard to law. Examinations of articles 1151-1152 of the Italian Civil Code, with reference to " danni," " quasi delitti," shows that:

1151. Any act of man which results in damage to others obliges the one through whose fault the damage occurred to indemnify therefor.

1152. Every one is responsible for the damage which he has occasioned, not only by his individual act, but also by his own negligence or imprudence.

Careful examination of these words descriptive of " danni " will fail to show any difference between its significance where used in a legal way, and that of the word " injury " similarly employed, for there always exists the idea of responsibility only for acts with which one has some association, physically or by intendment of law.

Furthermore, if difference exist, it should be settled in favor of the party obligated, as pointed out under other conditions in the Sambiaggio case.

Although the umpire has the highest respect for the opinions of the Institute of International Law, which are referred to by the honorable Commissioner,[1] he does not discuss them specifically, as the principles covered by the citation made by him have received the attention of the umpire at great length, so far as they may be esteemed pertinent to the present case.

The claimant demands 150 bolivars for having paid double license to the revolutionary authorities in 1902 and 1903. The facts in connection with this item appear to be as follows:

The claimant paid —

		Bolivars
To the revolutionists:		
Apr. 1, 1902	For second quarter of 1902	50
July 16, 1902.	For third quarter of 1902	50
Mar.10, 1903.	For first quarter of 1903	50
To the Government:		
Jan. 1, 1902.	For first quarter of 1902	50
Mar.24, 1903.	For the entire year of 1902 and first quarter of 1903 . . .	250

It appears from the receipts evidencing the foregoing that during the period named the claimant was a merchant of the fifth class at El Pilar, and subject to annual license of 200 bolivars, payable quarterly.

It is impossible to grant the claim in the manner presented. If the taxes were wrongfully exacted by the revolutionary authorities the Government can not be required to refund them.

But the claimant apparently has a ground of recovery founded upon another

---

[1] Annuaire de l'Institut de Droit International, Vol. XVIII, p. 254 (1900).

principle. We are justified in believing from the evidence in the case that during nine months of 1902, and at least to March 10, 1903, the revolutionary authorities were in possession of El Pilar. The claimant was therefore authorized, and we may presume compelled, to pay them the license fees which would have been payable to the legitimate authorities had they controlled the town. In fact, without such payment or some other, he could not have gained his livelihood as a merchant. A payment to them discharged (at least so far as the " expediente " informs us) his obligations toward his municipality. For him in his local relations the revolutionary authorities were the Government. They constituted his municipal government de facto.

We learn from Bouvier's Law Dictionary (Rawle's edition, title de facto) that:

> Where there is an office to be filled, and one acting under color of authority fills the office and discharges its duties, his actions are those of an officer de facto, and are binding on the public. 159 U.S., 596. An officer in the actual exercise of executive power would be an officer de facto, and as such distinguished from one who, being legally entitled to such power, is deprived of it — such a one being an officer de jure only. * * * An officer de facto is prima facie one de jure. * * * An officer de facto is frequently considered an officer de jure, and legal validity allowed his official acts.

Money paid, therefore to the de facto authorities in the shape of public dues must be considered as lawfully paid, and receipts given by them regarded as sufficient to discharge the obligations to which they relate. Any other view would compel the taxpayer to determine at his own peril the validity of the acts of those exercising public functions in a regular manner.

We must apply to the facts before us the principle which would be invoked if the acting jefe civil had been illegally appointed or elected by legal authorities acting improperly. In such case no dispute could possibly exist as to the right of the taxpayer to be protected by payment to such illegal but acting officer.

Says Morawitz on Corporations, sec. 640:

> In order to secure the peaceful and orderly government of the community, the rule has been established that the right of a de facto public officer to exercise the powers of his office can not be investigated in a collateral proceeding. It must be determined once for all times in a direct proceeding to oust the officer.

In Norton *v.* Shelby Co., 118 U.S., 425, the Supreme Court of the United States held that where an office exists under law, it matter not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office and exercises the power and functions.

Let us add another consideration. During the period for which taxes were collected by the revolutionary government, the legitimate government (as we may believe from the " expediente ") performed no acts of government in El Pilar. It did not insure personal protection, carry on schools, attend to the needs of the poor, conduct courts, maintain streets and roads, look after the public health, etc. The revolutionary officials, whether they efficiently performed these duties or not during the time in question, displaced the legitimate authorities and undertook their performance. The legitimate government therefore was not entitled at a later period to collect anew taxes once paid to insure the benefits of local government which it was unable to confer.

We need not question the obligation of taxpayers to pay to the rightful authorities taxes accrued but not paid during illegitimate government. That does not enter into this discussion.

If the opinion above expressed need support from precedent and the views

of others, it is at hand. A situation analogous to that now presented arose out of the holding of the town of Castine, near the eastern extremity of the State of Maine, by the British during the war of 1812 between the United States and Great Britain. That eminent jurist, Justice Story, in passing upon the questions presented to the United States Supreme Court, said (U.S., *v.* Rice, 4 Wheaton, 246):

The single question arising on the pleadings in this case is, whether goods imported into Castine, during its occupation by the enemy, are liable to the duties imposed by the revenue laws upon goods imported into the United States. It appears by the pleadings that on the 1st day of September, 1814, Castine was captured by the enemy and remained in his exclusive possession, under the command and control of his military and naval forces, until after the ratification of the treaty of peace, in February, 1815. During this period the British Government exercised all civil and military authority over the place, and established a custom-house and admitted goods to be imported according to regulations prescribed by itself, and, among others, admitted the goods upon which duties are now demanded. These goods remained at Castine until after it was evacuated by the enemy, and, upon the reestablishment of the American Government, the collector of the customs, claiming a right to American duties on the goods, took the bond in question from the defendant for the security of them.

Under these circumstances we are all of opinion that the claim for duties can not be sustained. By the conquest and military occupation of Castine the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place. The sovereignty of the United States over the territory was, of course, suspended, and the laws of the United States could no longer be rightfully enforced there or be obligatory upon the inhabitants who remained and submitted to the conquerors. By the surrender the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose. From the nature of the case no other laws could be obligatory upon them, for where there is no protection, or allegiance, or sovereignty, there can be no claim to obedience. Castine was, therefore, during this period, so far as respected our revenue laws, to be deemed a foreign port, and goods imported into it by the inhabitants were subject to such duties only as the British Government chose to require. Such goods were, in no correct sense, imported into the United States. The subsequent evacuation by the enemy and resumption of authority by the United States did not and could not change the character of the previous transactions. The doctrines respecting the *jus postliminii* are wholly inapplicable to the case. The goods were liable to American duties when imported, or not at all. That they were not so liable at the time of importation is clear, from what has been already stated, and when, upon the return of peace, the jurisdiction of the United States was reassumed, they were in the same predicament as they would have been if Castine had been a foreign territory, ceded by treaty to the United States, and the goods had been previously imported there. In the latter case there would be no pretense to say that American duties could be demanded, and, upon principles of public or municipal law, the cases are not distinguishable. The authorities cited at the bar would, if there were any doubt, be decisive of the question. But we think it too clear to require any aid from authority.

American statesmen have since followed the precedent. For instance, in 1873, Secretary Fish wrote to Mr. Nelson (Wharton's Digest of Int. Law, vol. 1, sec. 7, p. 29):

The obligation of obedience to a government at a particular place in a country may be regarded as suspended, at least, when its authority is usurped, and is due to the usurpers if they choose to exercise it. To require a repayment of duties in such cases is tantamount to the exaction of a penalty on the misfortune, if it may be so called, of remaining and carrying on business in a port where the authority of the government had been annulled. * * * Since the close of the civil war in this country suits have been brought against importers for duties on mer-

chandise paid to insurgent authorities. Those suits, however, have been discontinued, that proceeding probably having been influenced by the judgment of the Supreme Court adverted to. (U.S. *v.* Rice, 4 Wheaton, 246.)

Without multiplying at length possible citations, reference is also made to a letter to like effect from Mr. Cass, Secretary of State, to Mr. Osma, dated May 22, 1858. (Wharton's Int. Law Digest, vol. 1, sec. 7, p. 28.)

Perhaps the latest similar instance in American international affairs is to be found discussed in Foreign Relations for 1899, and refers to an attempted second collection by the Government of duties at Bluefields, Nicaragua, a first payment having been made to a revolutionary government. After an extended correspondence, and pursuant to instructions from Mr. Hay, Secretary of State, the American envoy extraordinary and minister plenipotentiary, W. L. Merry, signed an agreement for settlement, providing, among other things, that —

> The deposit (conditional deposit for second payment made by merchants) shall be paid by Her Britannic Majesty's consul to the authorities of the custom-house if it is decided that that Government has had the right to demand the payment claimed, or to its owners, the American merchants, if it is decided that the payment made to the revolutionists of Bluefields was legal for the reason that they pretend that the revolutionary organization of General Reyes, between February 3 and 25, 1899, was the government de facto. (For. Rel., 1899, p. 576.)

It will be seen that the only question for consideration was the character of the government. In the pending case its de facto character is sufficiently established, and therefore the second payment, made, as satisfactorily appears, under circumstances of compulsion, must be returned to the claimant.

In this case an award will be signed for 1,517 bolivars, including amounts taken by the Government, for which receipts were or were not given, and the second payment of taxes above referred to, with interest, and refused for acts of revolutionists, no want of diligence on the part of the Government having been shown.

Cases of Revesno, Bignoso, Stiz, Marchiero, and Fanti

Government is not to be held liable for acts of revolutionists unless negligence be clearly apparent or proven by claimant, the more so when claimants have never appealed to it for protection.

Ralston, *Umpire:*

The above cases, all from Colonia Bolívar, came to the umpire on difference of opinion between the honorable Commissioners for Italy and Venezuela.

It is urged on behalf of Italy that the above cases come from a distance not greater than 30 miles from Caracas, that the takings were all by Matos revolutionists under command of General Rolando, and occurred during the months of May and October, 1902, and January, February, March, April, May, June, and July of 1903, happening at Custire, El Bautiamo, Chispita, and Colonia Bolívar; that by reason of their nearness to Caracas they could have been prevented by the exercise of proper diligence, and that therefore these cases are exceptions to the general rule laid down in the Sambiaggio case, No. 15,[1] and affirmed in the Guastini case, No. 225.[2]

A study of these cases will show that the burden of proving want of diligence

---

[1] See *supra*, p. 499.
[2] See *supra*, p. 561.