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Martini Case (of a general nature)

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if De Caro believed that the judge of hacienda had directed the seizure of an excessive amount of property, he had the right under the code of civil procedure of Venezuela to appeal to the court for the release of the excess, in this respect enjoying the remedy to which he would be entitled under similar circumstances in a common-law country. It does not appear that he availed himself of his rights, and it is not within the power of this umpire to grant damages to a claimant who, by a seasonable reliance upon his rights in a case in court, might have suitably protected himself. Certainly before he can appeal to an international tribunal, the suit in court having long since terminated, he should be prepared to show some actual denial of justice with relation to the subject-matter of his appeal.

A sentence will therefore be ordered in favor of De Caro in the sum of 21,788.62 bolivars, with two months' interest to December 31, 1903, at the rate of 3 per cent per annum.

MARTINI CASE

(By the Umpire):

The right of the sovereign power to submit all claims of its citizens to a mixed commission is superior to any attempt on the part of a subject or citizen to contract away such right in advance.

This Commission is, as between Venezuela and Italy, substituted for all national forums which, with or without contract, might have had jurisdiction over the subject-matter.[1]

Venezuela is responsible for attempts to enlist in her armies, in violation of her contract, Venezuelans employed by the claimant, and also for interference with foreign workmen employed by the claimant.

Venezuela is responsible for profits which claimant might have obtained had she not broken her contract where such profits are not uncertain or remote, or where it may reasonably be presumed they were within the intent and understanding of the parties when it was entered into.

Where the damage is continuous in its nature, an award may be made covering the loss up to the date of such award, although, under other circumstances, it seems damages after August 9, 1903, the last date for the presentation of claims, would not be recoverable.

A contract is to be interpreted in the light of the surrounding circumstances, and the port of Guanta being open to foreign commerce at the time the contract was signed, and such condition being a material element in the value of the contract, the government is responsible for damage incident to its subsequent closure by executive order.

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

In the memorial presented by the firm, at page 68, are enumerated the various items that the claim is composed of, and it is here proper to explain and sum them up.

(a) Thefts. Detailed at pages 72 and 73, and they amount to 9,104 bolivars. The proofs are to be found at fascicle B.

The firm call attention to the fact that it has not been possible to furnish proofs for some of these, because at the time of the taking the station master at Guanta, Marsilio Catelli had gone to Italy (December, 1902), but the more important amount of 8,334 bolivars is supported by the testimony of witnesses. It is to be noted at the outset that the firm relinquish their right to the sum of 750 bolivars because of the possibility that this sum may have formed a portion

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[1] See note attached to this opinion on p. 664.

of the indemnity awarded to A. Bonnon by the French Commission, which granted his claim in the sum of 6,000 bolivars for damages caused for the most part by revolutionists.

(b) Requisitions. At page 72 of the memorial is indicated the total amount requisitioned in different ways by General Marcano, of the Government, to the sum of 60,600, and the corresponding documents are in fascicle C. The firm, however, renounce all right to the repayment of this money, as they have explicitly declared to the writer, since the same is included in the account between the Venezuelan Government and the firm in compensation of the annual payment due the former by the latter. On this point it will be well to forestall a possible objection. From original documents shown by the honorable Commissioner for Venezuela, copies of some of which had already been presented by the firm (see fascicle N), it appears that Engineer Lanzoni, in the name of the firm, declared, under date of September 6, 1900, that in view of certain concessions obtained from the President of the Republic the firm renounced whatsoever claim they might have at that time against the Government. But on examining the previous correspondence, and especially the firm's letter of May 23, 1900, the original of which might be produced by the Government, it appears that among said claims therein enumerated in detail Lanzoni had not included the recovery of the requisitions of Marcano, which at that time did not possess the character of a claim, and the interested parties could not therefore regard it as such, since it was their intention to include it in the account with the Government, as was, in fact, done.

Such inclusion was foreseen, agreed to, and, so to speak, authorized by Marcano himself, as may be seen by the sentence in his own hand, contained in the receipts dated September 30 and October 15, 1899, which states that

dicha suma será pagada con las pensiones que deben satifacer dichos señores al Gobierno Nacional por arrendamiento de la Empresa ya mencionada.

It is clear, therefore, that not only had the firm no interest in making this credit the subject of a claim, but that they were exercising an already recognized right when they inscribed it in the account current as a part of the rent for the mines.

On the other hand it could not be explained why Lanzoni, Martini & Co. were induced to abandon a credit of 60,600 bolivars for a compensation of 52,000 bolivars, which sum represented the reduction to one-half of the yearly rent, while this advantage, which the Government was according, finds a sufficient *raison d'être* in the renunciation of the other items mentioned in said letter.

From all this it appears that the credit on account of requisitions or loans enforced by Marcano, although anterior to September 6, 1900, was not an object of the transaction, and it is therefore equitable that it should figure as a partial discharge of the annual obligation owed by the firm to the Venezuelan Government.

It is moreover just that the sum of these credits be taken into account, since they are all supported by documents in the most unexceptionable manner, and caused, in part, by forced loans exacted for the support of the army, in part by requisitions for animals, and in part for repairs of arms of the troops; that is, for various and distinct items.

A somewhat ambiguous phrase in the Martini memorial — the one which terminates page 71 and begins page 72 — may have induced the honorable Commissioner for Venezuela to doubt that the " vales " had been given as an equivalent of the amount of the invoices (" fatture ") signed by Marcano. This doubt, however, will appear wholly unwarranted when it is considered,

first, that the word " vale " was also used by the firm (see p. 72, line 5) to indicate " fatture " or invoices; and second, that the " vales " are of a date prior to that of the " fatture " themselves. Thus is explained the ambiguity of the phrase mentioned, and therefore of the one which reads, " to render his extortions legal, Marcano left receipt with us," and thus is excluded absolutely the idea that " vales " and " fatture " should mean one and the same thing.

(c) Destruction of 5,697 tons of coal stored at Guanta. The details of this fact are found at page 74 et seq. of the memorial, and the corresponding loss is fixed at 256,365 bolivars.

Before entering upon a consideration of this item the Italian Commissioner is in duty bound to call the attention of the honorable umpire to the fact that the Martini Company have acknowledged in effect (as has been stated by Gen. Pablo Guzmán) that 150 tons were excluded from this destruction and were used for and in the service of the railway. The value thereof, 6,750 bolivars, being necessarily subtracted from the previous amount, the firm have reduced this item to 249,615 bolivars. This destruction was ordered by the revolutionary general, and therefore, according to the rules laid down by the honorable umpire, would not in principle be susceptible to indemnity. But it must be observed that had it not been for the ineffective blockade of the port of Guanta the coal which was afterward destroyed might well have been sold, because at that time the strike in the United States had considerably increased both the price and demand (a fact which explains why the firm had fixed the price at 45 bolivars per ton), as will appear from two orders, which are found in fascicle F, and which it was impossible to fill, without adding that, given the agreement made between the firm and Del Buono, the coal could have been consigned to the latter and realized upon at an opportune moment, if the blockade had not prevented.

It must hence be admitted that if the Venezuelan Government had not resorted to this unlawful and, so far as the general interests of business in that section were concerned, injurious measure, and one particularly harsh with regard to the firm, which by reason of their contracts had special rights, the said firm would not have suffered the injury of which they now justly complain.

With regard to this destruction, the Venezuelan Government has submitted written evidence from which it appears that it took place in the presence and with the consent of Engineer Antonio Martini; that the order therefor was issued by Dr. Manuel Rodriguez Armas, formerly the attorney for the firm, and that in order to hasten and facilitate the destruction there were employed tins of petroleum brought there for the purpose by the same train which brought the revolutionary troops thither from Barcelona, as also it is said of Martini, who, it is further alleged, superintended the partial tearing up of the wharf to expedite the dumping of the coal into the sea.

From the evidence adduced it would seem as though the Government were endeavoring to create the impression that the destruction of the coal was the result of a tenebrous and dishonest collusion between General Guzmán and the firm, with the object on the part of the latter of either establishing the basis of a claim for an exaggerated loss, or of disposing at a high price of a quantity of coal of little value and of culm not otherwise merchantable.

Assuming that the coal was equal to that extracted from the mines — that is to say, good — and that the culm which the firm had accumulated in Guanta for the supply of its compressing plant (which reduces the culm to blocks) was not burned, since it could not have been used by the Government vessels, but remained there awaiting more favorable conditions, and was therefore not included in the account of 5,697 tons really destroyed, an examination of

the correspondence had between General Guzmán, then governor of Barcelona, and the firm proves beyond question that the latter not only was not in connivance with the enemy, but sought by all the means at hand to avoid a fact which could not but have most seriously prejudiced it, and which amounted to a disaster, given the very difficult situation to which it had already been reduced.

On being questioned by the writer as to the reasons for his (Martini) being present at the destruction, and as to the accuracy of the evidence submitted by the Government, the claimant furnished such explanations as to establish beyond doubt the inacceptability and the puerilty of the counterproof. The Italian Commissioner sums up these explanations in his own words:

The firm has charge, according to its contract, of all the movable and immovable property of the concession, which it is bound to preserve, and which it must render an account of and restore in good condition at the expiration of its term. Having received the order for the destruction of the coal, and exhausted to no purpose all efforts to have same countermanded, the claimant thought very properly that his presence might be useful to the interests of the firm and of the Government as well, since while directing the operations the destruction of the wharf upon which a part of the coal had been deposited might be avoided, as well as of the station, the custom-house, the warehouses and the compressing plant, about which was piled the larger part of the coal, and this sufficiently accounts for his presence there. In order to obviate the complete destruction of the wharf he caused openings to be made in the flooring thereof that the coal might the more readily be thrown therefrom into the water, and in order that this might be done in the least injurious manner he furnished the troops with the necessary tools from the company's own stock — a circumstance which he fully explains, while the evidence furnished by the Government makes no mention of it. In order to secure from the troops a certain amount of good will and obedience he offered them rum, and this detail is likewise passed over in silence. The claimant admits that, generally speaking, the narration of events in that document is correct, but calls attention to the fact that they have been set forth in a somewhat disingenuous and biased manner. Judging from the attempt to impute a false and absurd meaning to the presence of Martini at the destruction mentioned, it may be noted that while it is true that De Armas had been the attorney for the firm he certainly was not aiding them at this time, when, as secretary-general of the State of Barcelona, and therefore of the existing Government, he was transmitting the order for the destruction of the coal. This would seem to fully account for *his* presence at the place and time of this unfortunate occurrence.

It is not true that Martini arrived at Guanta with the troops and on the same train, because on being informed of the order by telephone he took a trolley in all haste from Barcelona and arrived fully a hour after the troops had reached the scene of operations. He does not, however, attach any importance to the assertion that he came on the same train with the troops; it might have been better had he been able to do so, for then some of the damage might have been prevented.

The reasons for his presence in Guanta are so obvious that had he remained in Barcelona he might properly be charged with having been negligent. With regard to the coal oil, the evidence seems to imply that it was furnished by the firm, because it came on the train with the troops, and as alleged, with the claimant. This is not true. The oil was not supplied by Martini & Co. But suppose it had been; what then? Since the order had been issued and could not be rescinded the sooner the destruction was accomplished, and the less dangerous the points at which the fire was applied, the better for the surrounding

buildings. But what he does explicitly deny is that his presence should have been due to wrong motives, or that he was so inexperienced as to burn his property in the hope of subsequently obtaining an indemnity therefor, which, had it not been for the blockade of the powers, there was not the slightest chance of his getting, and which, based as it is in part on the question of revolutionary damages, may possibly not be agreed to in this Commission, notwithstanding the blockade and the provisions of the Washington protocol.

(d) Damages to shops and materials. The particulars in regard to this item are found at pages 79 et seq., and the amount of indemnity claimed therefor is 1,500 bolivars. The corresponding documents are in fascicle B, and are substantiated by the evidence of witnesses. In consideration of the small sum involved it is not deemed necessary to enter into a more detailed exposition.

(e) For violence and offenses to persons, amply set forth at pages 84 et seq. of the memorial and established by testimony and various documents, an indemnity of 500,000 bolivars is claimed.

It seems to the writer more appropriate that any indemnity allowed under this head be included in the sum total awarded by the honorable umpire to the firm. The firm of Martini & Co. claim, as reparation for the violence and offenses above referred to and as an indemnity for damages occasioned by the nonobservance by the Venezuelan Government of the agreements made with the firm — collected under three heads, according to the principles sanctioned by the Italian law in matters of renting (see arts. 1575 and 1579 of the civil code) and analogous to those admitted by the Venezuelan civil code, which are:

I. Change in the thing rented and failure to preserve same to the use for which it was intended.

II. Nonobservance of the special obligations of the contract.

III. Nonobservance of the guaranty of the pacific enjoyment of the thing located —

an indemnity amounting in all to 8,737,396.34 bolivars, which is believed to correspond to the sum of resulting damages, comprising those occasioned by the suit of Del Buono and the loss of future profits; that is, of those which the concessions of the mines and their operation would have enabled the firm to realize if their activity had been allowed free and peaceful development.

Before discussing this question of demand for indemnity it would be well to point out the value of two documents submitted by the Venezuelan Government to the examination of this Commission, to wit, the report of the consul of the Republic at Genoa, of August 13, 1903, and the partial account rendered by the custom-house authorities at Guanta of the coal exported by the firm during a period of ten months.

From the first of these two documents we learn that the functionary by whom it was compiled acknowledges that Mr. Pilade Del Buono, the moneyed partner of the firm, " an intelligent, active man with great ideas," has invested " large sums in the exploitation of the mines," and that this affair may be the " source of riches, not only for the contractors, but for the country as well," and that the firm, " by reason of the war, were compelled to suspend their operations and discharge their workmen."

This is precisely what Martini & Co. affirm, and these data enumerated by the consul figure among those on which the claim is based, at least in part. But the conclusions drawn by him from these premises are certainly illogical. He says that it is *evident* that Del Buono has not sufficient capital, even with the aid of his partner, Tonietti, to " undertake such an enterprise as that of the mines, of the railway, and of the port of Guanta."

Whence does he draw this information? If Del Buono, an adept in mining

matters, since he had advantageously superintended those of the island of Elba, is an intelligent man, how could he, without giving evidence of a lack of perspicacity, have dared to undertake an enterprise too great for him?

If he invested a large capital in Guanta, and if to procure other large sums (these are the words of the consular report succinctly) he mortgaged his property, and if he has a partner whose financial resources are unknown to us and presumably to this confidential agent of the Government of the Republic, how can the consul allege the foregoing?

It would appear that the consul's reasoning is not altogether consistent, and we may properly infer instead that Del Buono ceased to advance funds when he became aware that on account of the obstacles confronting him, it would have been sheer folly to continue doing so. This is probably why he no longer had recourse to that credit which, given his competency, his energy, and his economic position, would certainly not have been denied him.

The consul has long sought, and perhaps may still be seeking, the firm's headquarters in Italy. Consulting la Gazetta Ufficiale del Regno, No. 167 of 1901, he would have found it, and Del Buono, in bringing his suit against the firm, knew very well where to send the summons. Did the consul suppose that the firm, paralyzed in their operations for nearly two years, were maintaining at Rome and at Partoperraio an office with numerous employees awaiting the resumption of the work in the mines, suspended for reasons already stated? He accuses the firm of an intention to speculate on the Government of Venezuela. If he refers to the future, it is an hypothesis or worse which is not worth discussing. If he refers to the past, it suffices to observe that the firm have so far lost time, money, and labor. " Speculation," in so far as regards the firm, may be excluded from consideration.

Lastly, the oft-quoted functionary formulates this query: " On what do these gentlemen base their claim? On the *reimbursement* of that which they *hoped* to realize, but so far have not realized? "

Exactly; when a contracting party, failing, as in this case, to fulfil the stipulated agreements, arrests or neutralizes the activities of an enterprise to its serious prejudice, the other injured party has a right to demand, not merely an indemnity for the damage actually suffered, and the reimbursement of lost capital, but also the payment of profits which it might justly have realized on the basis of the contract itself.

If the consul had consulted either the Italian or the Venezuelan civil code, he would have seen formulated the principles invoked by the firm and admitted by all tribunals.

Without going further, it must be evident that the report of the consul is only a tissue of puerilities and contradictions.

We come now to the other document, the object of which would be to demonstrate that the firm had produced very little coal, since, dividing the total tonnage of 1,765 into the time during which this amount was exported, the work of extraction appears utterly insignificant. But the document expressly refers to coal *exported*, not to coal *mined*, which changes the conditions of the question.

Let us begin by noting that the firm, precisely on account of the disastrous state of the mines at the time of consignment, were compelled (as appears in the memorial of the firm) to spend much time in the reorganization of the shops etc., foregoing the work of extraction, and that said firm had made no contracts for the delivery of coal until about the last of their dealings with Del Buono, and just at a time when operations were suspended on account of disorders.

What is complained of by the firm is that they were hindered in the manner set forth in the claim from exploiting the mines, as it was to their main interest

to do. It is alleged that in the brief period of peace and activity the firm spent more time in the preparation of the mines and the uncovering of new veins than in extracting coal for commercial purposes. This latter had not more than begun when all operations were paralyzed. So much for a general statement. Let us now come to details and figures.

The firm, by an account current, have reported a total extraction of 14,771 tons, on which a royalty of 7,385.50 bolivars was paid to the Government.

We see how all this agrees perfectly and with all the statements of the firm, as well as with that of the Government.

	Tons		*Tons*
Total production from the beginning of operations to July 12, 1902, date of suspension of operations, a period of two years and nine months . . .	14,771	Exported, as per custom-house report, Guanta, to September, 10, 1902	1,765
		Sold and consumed by workshops and Barcelona-Guanta railway from September, 1901, to July, 1902	2,735
		Destroyed by the revolutionists in Guanta	5,547
		Total	10,047
		Difference	4,724
Total	14,771	Total	14,771

Of these 4,724 tons there are, as culm, partly at Guanta and partly at Naricual 3,562 tons, more or less, because, after exposure to the elements for two years, a part must have been destroyed by wind and rain, there remains to be accounted for 1,162 tons, as follows:

1. The amount used by the railway and shops since the suspension of operations, i.e., from July, 1902, to the present time.

2. The total consumption of the mining machines during two years and nine months' work, as follows: One boiler for the ventilating apparatus, one hoisting engine, a pump for supplying the village of Naricual, and the 120-horsepower boilers used in the compressing plant.

All this is shown by the few documents saved from destruction by troops and included in the papers of the claim, and the depositions of witness (see question No. 6). The firm would agree to submit these statements to any expert in such matters who would visit the spot in order to establish their truth.

The true value of the two documents submitted by the Government being thus determined, let us sum up the reasons in general upon which is based the firm's demand for an indemnity, in order that we may ascertain if and to what extent such demand may be received.

Lanzoni, Martini & Co. at first, and subsequently Martini & Co., invested considerable capital in the mines, as well as their personal energy for nearly five years and their credit — a fundamental element in all enterprises, whether industrial or commercial. The contrary proofs brought before the Commission are not based on severe and dispassionate criticism. The "justificativo" drawn up at the instance of Vittorio Cotta, a presumably not very impartial individual, as he had been employed by the firm but was discharged in 1891, can not only have no value as a counterproof, but should be totally rejected on account of its having been made in the absence of one of the interested parties. But in any case what does it seek to prove? That the firm had some accounts unsettled, and that the members thereof have individual debts — as for instance, one of them owes a bread bill; that the firm sold some cement

and a few utensils — for the purpose of morally discrediting the management.

As regards the sales, it is to be observed, as has already been stated, that if these took place, even in the small amounts mentioned in the document referred to, they were in the nature of a necessity created by the disastrous conditions confronting the firm. As regards the debts, either of the firm or the members thereof, they are not only specifically denied, but constitute in this circumstance an additional support for their claim, and it is well to note that the unsettled accounts to which the document refers are of the period in which every commercial and industrial activity of the firm was paralyzed. Martini & Co. admit having other debts than those mentioned by their ex-employee; were their condition flourishing they would not be counted among the Italian claimants.

A greater importance has, at first sight, the fact that the bill of John Davis was not paid in 1901, as well as the invoice of John Davis & Son; but this is but an isolated instance which it would seem more equitable to attribute to an irregularity arising out of a change in the administration of the company occurring shortly after that time and within the same year, rather than to a lack of funds ever since, or, worse still, to a lack of good faith — things clearly contradicted by numerous circumstances established from the documents of the claim.

Is it possible that a firm which paid in cash, or otherwise compensated for its annual royalty of more than 100,000 bolivars to the local government by equivalent services which it could not have furnished without undergoing heavy expenses; that settled its account with Marcano, amounting to 60,600 bolivars; that promptly met its checks on the house of De Caro, of Barcelona, for more than 400,000 bolivars; that purchased a steamer at a cost of 567,000 bolivars, including the necessary repairs, etc.; that had through the Bank of Venezuela (as it could readily prove were it not that that institution had again and again delayed the rendition of the account) deposited and subsequently employed in the works several hundred thousand bolivars; that had engaged in Europe and transported to Venezuela numerous detachments of workmen; that according to the agreement of March 22, 1902, was indebted to its partner, Del Buono, over 2,000,000 bolivars, evidently employed in the mines, and that by a document found in fascicle O is shown to have expended more than that in the works themselves — that such a firm, we repeat, could have gravely and intentionally jeopardized their credit for the petty sum of £155 sterling? Is it not much more consistent to suppose it to have been due to an oversight as above suggested?

This supposition seems natural enough, even when it is considered that though the firm have a heavy indebtedness of recent contraction, which is the result of the financial disaster into which they have been thrown, they have no known debts whose origin antedates the beginning of their claim to this Commission. It may be observed, incidentally, that the Lanzoni management did not settle with the other partners, in favor of which he withdrew in 1901.

It may be urged that the agreement between Del Buono and the firm, in virtue of which the loan of 2,000,000 bolivars was negotiated was not recorded, and that this fact diminished its value from the point of view of the proofs which have been sought to be deduced therefrom. This objection can not well be raised by the Venezuelan Government, which not only had knowledge of said agreement but agreed to the clauses therein regarding the delivery of coal. In fact, while up to April 12, 1902, the date when the agreement was made known to the Government, the receipts from coal supplies were credited to the firm, those of subsequent deliveries were credited to Del Buono.

The importance of this agreement is besides shown by the citation before

the civil tribunal of Rome (see fascicle I), by which Del Buono summoned the firm in order to obtain a judgment against them for the sums borrowed of him and a settlement of damages. The citation was regularly served upon the firm's office in Rome through Sig. Giuseppe Tarabella, upon the special agent for the representative of the firm, the Hon. Francesco Fazi, whose domicile is near that of his attorney, Felice Gualdi, at the Circo Agonale, No. 14.

It is here opportune to note that the amounts stated by Del Buono in his citation are not those employed by him in the working of the mines, but those which he advanced the firm as silent partner and banker. This observation should be given due weight, in order that the data resulting from the citation itself may not be stigmatized as contradictory with regard to those arising out of the agreement between Del Buono and the firm concerning the supply of coal (fascicle L).

In the citation it is explicitly stated that for the *acceptances alone*, Del Buono's credit amounted to nearly 800,000 bolivars.

Before proceeding farther with the examination of the claim, it would be well to state that on August 31 of the past year, as appears by documents in fascicle O, the balance between royalties due the Government by the firm and the sums paid in cash or by coal, services, and otherwise, showed a credit in favor of the firm amounting to 15,185.64 bolivars. From that date to the present time there have been no more settlements, either because the claim was already submitted, or because, with the exception of a partial operation of the railway, the firm had been reduced to entire inactivity.

This form of settlement between the firm and the Government was the result of a tacit understanding by which convenience and economy was secured to both parties, since it obviated the forwarding of funds often prevented by the conditions of the country, without taking into account that any other form of settlement would have been difficult, because of the refusal to examine the books during the war, as established by documents in fascicle M. It would, therefore, be contrary to equity to object against the firm that the amount of the royalty had not actually been paid to the Venezuelan Government, and raise an objection before this tribunal which said Government had not previously deemed possible.

It will be said, perhaps, that the firm took credit for services rendered the revolution, but when it is considered that the revolution was the government de facto, it would seem that the same rules that were adopted in the Commission in regard to the double payment of duties (see the Guastini claim [1]) should apply here, and that the firm have kept within due limits of right in including those amounts likewise, in every way acting therein in good faith. Besides, the amount charged for services to the revolution being 32,286 bolivars, and its credit on August 31, 1903, being 15,185 bolivars, the difference would at most be only 17,091 bolivars — a relatively negligible quantity.

Let us pass now to the consideration of other fundamental reasons, as a whole and interlinked, which operate in favor of Martini & Co. Such an examination would demonstrate that the action of the contracting government was the principal, if not the sole cause, of the ruin of the company, and how from this fact arises the right of the firm to an indemnity.

From the evidence of witnesses presented by Martini & Co., it seems clear that the revolution, as well as the Government, but mainly the latter (see especially the deposition of the witness Riva Verni and documents contained in fascicle B), by manifest infractions of contractual agreements, recruited at various times the native workmen of the company, and principally those

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

assigned to the railway service, which could not well suffer interruptions and obstacles of any sort. General Marcano, president of the State, insisted upon having the complete list of the workmen, declaring publicly that he considered them as being wholly at his disposal. (See fascicle B.) It may here be objected that these recruitings in various instances did not go beyond mere attempts and threats; but the effects of these acts were otherwise injurious to the firm in that the workmen, not being able to foresee to just what extent these acts might proceed, fled and hid themselves to avoid any possible danger. Now, when we reflect that the work of the mines and of the railway must proceed in unison, and that their regular function depended entirely upon the harmonious collaboration of the two services, it must be admitted that the failure of one necessarily entailed the failure of the other, so that, for example, whenever the laboring element was lacking the technical or mechanical department of the enterprise remained in whole or in part useless. It is hence clear that a general disorder followed, involving grave damages to the firm, which was still compelled to pay and subsist the foreign element thus forcibly condemned to inactivity in the factories.

To this state of affairs and to other causes fully set forth in the Martini memorial, must be attributed the abandonment of the railway, shops, and factories in satisfaction of which the firm claim equitable indemnity, and which might erroneously be charged to the nonobservance on the part of the firm of its contractual obligations toward the Government.

The aggressions, arbitrary orders, stoppage of trains, seizing of goods, damages to real property, forced requisitions — in short, all the violence of which the firm complain, and which reduced their affairs to such a state that they were finally compelled, at a time when all communications were interrupted, to sell at a ruinous price materials imported from Italy, for their individual use, not for profit, seeing their exemption from import duties, but to procure means of subsistence, and to accept in charity from the Italian war vessel *Elba* gifts of flour and biscuit to satisfy the hunger of the operatives — were, indeed, partly the work of revolutionists; but from the documents submitted it is equally clear that the Government was pursuing a similar course, and this attitude on its part was doubly vexatious, since setting aside the actual damage to the firm, it induced in the rebels a conviction that everything was permissible against Martini & Co., the contract with whom was now practically a dead letter.

It is therefore not against the unavoidable consequences of war that claim is made, but against that accumulation of wrongs that under cover of this abnormal state were for so long a period unnecessarily perpetrated against them.

Most grave, in view of its consequences, was the aggression suffered at the siege of Naricual, in May, 1902, by General Mejia, of the Government. The circumstances thereof, which have been wrongfully sought to be excused under the plea of military necessity, are set forth in detail in the Martini memorial and in the testimony of the witnesses. The effects were truly disastrous because the foreign workmen, stricken with fear and convinced of the danger to their lives, since no protection was to be expected even from the Government authorities, became clamorous and demanded of the firm that they be sent back home. This completed the interruption of the work, and the enterprise, henceforth completely demoralized, was driven to new and serious pecuniary sacrifices, among which may be included the payment of 631 francs to each operative, to which the firm was compelled by the arbitral sentence contained in fascicle T.

The sacking of the station and warehouses at Guanta, the destruction of movables, and the aggression of General Mejia at Naricual, all of which are proved in the testimony, are events due entirely to the Government, and their

moral effects, particularly, have an exceptional importance. It was then that occurred the destruction and dispersion of documents, registers, and accounts, the loss of which fully explains the incompleteness of the claim in certain respects.

The ineffective blockade of the port of Guanta must be included among the measures which damaged the firm, not merely from a commercial point of view, in so far as it prevented exportation and the collection of duties at the port, but also from an industrial one, since it rendered impossible the replacing of the lost operatives by others, whether native or foreign. The duration of the blockade is shown from documents contained in fascicle P, in which is the decree of the governor of Trinidad, declaring that measure null and void from the beginning. As to its illegality the Italian Commissioner refers to his argument in the De Caro claim, No. 50,[1] which contains quotations from writers on international law and other authoritative opinions. He believes it opportune to add here that the question was discussed in the German-Venezuelan Commission,[2] which decided that, admitting the illegality of the noneffective blockade, damages should be awarded a claimant who based his demand for indemnity on damages produced thereby.

Among other culpable omissions of the Government there is that of not having stopped the abuse of power by the State authorities in imposing, contrary to provisions of section 11 of article 6 of the constitution of Venezuela, a duty on goods intended for exportation. This illegal exaction hinders commerce and drives it from the port of Guanta, necessarily prejudicing the firm by the consequent diminution of the port and railway rights, according to its concession.

By the decree of May 27, 1903, the Venezuelan Government violated its contractual concession by reducing the port of Guanta to a coast-trade port, thereby at once changing the very object of the concession. Aside from the direct damages arising from the reduction of the general export and import trade of that port, and the resulting diminution of railway business, it is clearly proved in the memorial above named that the exploitation of the mines is wholly impossible without perfect freedom of export from Guanta, because the transfer of goods to an authorized international port would impose a burden of 24 bolivars on each ton of coal, as shown by documents in fascicle S. Now, this measure can not be justified by an appeal to the faculty which the Government has of changing the character of a port for reasons of its own, because, so far as the port of Guanta is concerned, the contract made with the firm implies a renunciation on the part of the Government of the exercise of this very right. This measure was revoked, however, perhaps in consequence of the protest of the firm's home office in Italy, a copy of which was furnished the Mixed Commission by note of the royal Italian legation in Caracas of November 14, 1903. This tardy act of reparation of the local Government having been of no avail to the firm, now permanently incapacitated from resuming its labors, cannot constitute a guaranty of peace for the future.

The fact that the firm may suffer similar risks and the direct evils flowing therefrom seriously prejudices the enterprise from another point of view, as the concession is in fact negotiable, as shown by article 15 of that instrument. Now, what capitalist would think of investing in such a contract, in the face of a precedent which demonstrates the absolute instability of its relations with the Government and the looseness of the agreements in its behalf? It may be argued that the transfer of a concession is subject to the consent of the Govern-

[1] *Supra*, p. 635.
[2] Orinoco Asphalt Co. Case, *supra*, p. 424.

ment, but it cannot in equity be held that the Government should have agreed to this clause with the preconceived idea of refusing such a transfer in the event of the future holder of the concession being a person of consideration and means.

In short, the closure of the port shows that the Government in its relations with Martini & Co. may at any moment withdraw from its contractual obligations. Following this order of ideas, the firm call attention to the monopoly granted to one Feo of the shipment of cattle from Guanta. Feo is a Venezuelan, and either for this reason or because vessels flying the Venezuelan flag enjoy a reduction of 50 per cent on port duties, he finds it to his interest to sail his ships under the national colors; moreover Feo was bound by the Government to not cede his concession to foreign companies or individuals. Thus one of the principal resources of the port was for the firm reduced one-half.

The Italian Commissioner observes that it is here a question of a recent fact, and the firm recognize it as such in not making it the subject of special indemnity, but it merits being recorded as a proof of the hostility of the Government toward them, the more so in that the Feo concession constitutes an infraction of the provisions of article 9 of the Italian-Venezuelan treaty of 1861, still in force.

If such is the conduct of the Venezuelan Government toward the firm, it is no wonder that the revolutionists, following its example, cooperated in the work of destruction by which the company find themselves reduced to their present deplorable state. The Commission has adopted, against the opinion of the writer, the rule that no indemnity can be awarded for revolutionary damages; but this rule is counteracted by the other, which holds that when the Government has been guilty of apparent negligence damages should be considered as susceptible of indemnity. In the present instance the diligence of the Government appears to have been highly problematical. Its interventions not only have never been of assistance to the company or of a protective character, but, on the contrary, were pernicious to their interests. It is beyond doubt that the firm would have suffered much less from the revolutionists had these latter been permitted to operate undisturbed in the State of Barcelona during the last years. It is not believed that a single instance can be given where the Government adopted a protective measure in behalf of the firm, and even General Mejia, he who had captured the shops at Naricual, remained in his functions up to the time of his imprisonment by the revolutionists and held himself overbearingly and threateningly at the interrogatories of the witnesses, a transcript of which is submitted by Martini & Co.

It would therefore seem beyond question that the Government never exhibited the least desire to protect the interests of the company, and when it is considered that, in addition to its general obligations toward citizens and foreigners residing in Venezuela, there was incumbent upon it the further duties of a contracting party, and that it was recreant thereto, it must be evident that such negligence rightfully imposes upon it the payment of the indemnity claimed by the firm.

It has several times been pointed out in this Commission that if the firm not only failed to reap the benefits expected from the concession, but actually sunk their capital in the enterprise, this should not be charged to a nonobservance of the stipulations on the part of the Government or to damages suffered, but to the fact that the enterprise was essentially a nonprofitable one. Were this statement correct, it would follow that little faith could be placed on the Venezuelan reports, official in their nature, which magnify the productiveness of the mines and the quantity and quality of the coal. The firm will hold the Government blameless as to this, as before undertaking this enterprise they had fully investigated the conditions, as amply set forth in their memorial at

pages 2 et seq., and their reports accord substantially with that of Venezuela, the correctness of which they recognize and which the Government should not and can not deny.

The coal at Guanta and in the portions of the mines not yet developed is in sufficient quantity to supply the Caribbean Sea market for a great many years to come. As to its quality, the attention of the honorable umpire is invited to the dispatch of the minister of foreign affairs of Italy of December 1, 1899, and to other documents contained in fascicle R.

It has also been asserted that the Guanta coal is liable to spontaneous combustion, and testimony has been adduced to prove this, but where is the coal which will not under given conditions of weather or storage show similar tendencies? The coals of Pennsylvania and Cardiff are subject to like danger, as are all others. Are not fires on board steamers of frequent occurrence from this very cause, even where using coal other than that of Guanta? Is it likely that the Italian Government, as indicated in the above-mentioned dispatch, after the experiment of the Naricual coal, would have ordered the *Etruria* of the royal navy to fill its bunkers with said coal if it had been more dangerous in this respect than other varieties? Besides this, Venezuela has herself used it on her ships in recent years without thought of possible accident therefrom.

The Italian Commissioner flatters himself that he has in the foregoing summed up the chief reasons militating in favor of Martini & Co., and to enter into further details would be simply repeating what has been already well set forth in the memorial and what appears fully in the documentation of the claim. The demand for indemnity should be considered in its entirety, while holding in view the fundamental elements, to wit, the capital employed, a credit seriously compromised if not wholly lost, the energy spent by the members of the company, the impediments and injuries suffered as much from the Government as from the revolutionists, the nonobservance of agreements, the constant apathy manifested in preventing or obviating obstacles of various kinds, opposing the peaceful development of the enterprise, and the special nature of the relations and obligations existing between the lessors and lessees.

To judge this case upon the restricted and narrow ground of direct and material damages suffered by Martini would be illogical and unjust. The ruin of the company is palpably the result of an abnormal state of affairs, justifying the demand for indemnity here presented, because it has been abundantly proved that one of the contracting parties was not diligent in the performance of his duties.

The firm, taking into account the deductions from the original demand mentioned in the course of this paper, claim a total of 8,997,441.34 bolivars, including the judical expenses indicated in fascicle Q. This demand is undoubtedly susceptible of further reduction, but between the extremes of the total claimed and the complete rejection of all demands, which the Venezuelan Commissioner hopes to obtain, the honorable umpire will doubtless find a mean which will satisfy the requirements of that equity which should control the conduct of the Commission, according such an amount to the firm as will compensate its direct and indirect losses, while alleviating the disastrous consequences arising therefrom, and providing a means of renewing its activities in the near future, and renew an important but now paralyzed industry, with manifest advantage not only to the company but also to the Republic.

ZULOAGA, *Commissioner:*

The Italian company Lanzoni, Martini & Co. leased from the Government of Venezuela, on December 28, 1898, the Guanta Railroad and the coal mines called Naricual, Capiricual, and Tocoropo, situated in the State of Bermudez,

for the annual rent of 104,000 bolivars, besides 50 centimos for each ton of coal extracted. This contract was approved by Congress on May 4, 1899, and ran for a term of fifteen years counting from that date. In order to carry out the contract the company Lanzoni, Martini & Co. was organized, which had a capital of 125,000 bolivars, Pilades Del Buono being a silent partner therein to the extent of 70,000 bolivars. (The latter seems to have furnished the cash capital for the company.) On July 19, 1899, the corporation augmented its capital on behalf of Del Buono to the extent of 375,000 bolivars. On July 7, 1901, Antonio Lanzoni withdrew from the company, which continued under the name of Martini & Co. Del Buono was not only the only partner who had money, but he was the only capitalist who gave credit to the corporation. By order and for the account of the company it appears that Del Buono purchased the steamer *Alejandro*, but this latter remained mortgaged for a portion of the sum advanced. Del Buono also paid some drafts drawn by Martini & Co., although with some difficulty. By February, 1901, the company was in such a state of insolvency and disrepute that, having given an order to the English firm of John Davis & Son for £155.14 of oil these gentlemen, fearing that it would not be paid, sent the goods to Messrs. Dominici & Sons, of Barcelona.

The employees of the custom-house at Barcelona appear because of an error or because of the petition of Martini & Co. to have delivered them the goods, and the English house lost the value of them, since they sought in vain at Rome and Barcelona to obtain payment from their debtors. (The English firm made a claim against the Government of Venezuela because the custom-house had delivered the goods to Martini & Co.)

In May, 1900, Lanzoni, Martini & Co. had addressed themselves to the Government of Venezuela, petitioning it to declare the mines exploited and insinuating that having suffered because of the war they would ask that the annual rent which they should pay should be reduced. The Government answered them on September 5, 1900, agreeing to declare that the mines were in operation; and to reduce to one-half the yearly rent which was due from June, 1900; that the rent for the months of May and June should be paid completely, and that Lanzoni, Martini & Co., upon accepting these propositions, should declare " that they had no claim against the Government of Venezuela by virtue of the contract nor any other reason." The cessionaries answered this note on September 6, " gratefully accepting the concessions which the supreme chief of the Republic had made them " and " any claims which they might hold against the Government being considered as satisfied." The development company has only paid the Government on account of the lease the sum of 21,666.25 bolivars in September, 1900, which was the rent for the months of July and August of that year (as will be seen from the account in file O). Martini & Co. have presented their account with the National Government until August 31, 1903. In the account they charge sums owed by the Government which they say the latter owed by reason of railroad, harbor, and other charges, and 60,600 bolivars which they said they delivered to Gen. Martín Marcano prior to May 1, 1900, for various reasons, according to the account which appears in the file called extortion by Martín Marcano. But it will be observed, first, that these extortions of Marcano are prior to the declaration of Martini & Co. of September 6, 1900, that they held no claim against the Government on any account; and consequently if they occurred in reality they were released by the claimants in consideration of the concessions which the Government made them, and Martini & Co. so understood it, as has been said in September, 1900, that they paid a draft against the Crédit Lyonnais; second that 32,286 bolivars appeared to be charged to the Government during the period from the 10th of August to the 25th of November, 1902, and during this

time the government of Barcelona was a revolutionary government, and third, that none of the other sums charged to the Government are accompanied by any proof. Martini & Co. are therefore debtors to the Government for rent due for the mines from September, 1900, and they have paid nothing for the coal extracted; that by February, 1901, they had neither capital nor credit sufficient even to pay for a shipment of oil to the value of £155.14, and nevertheless, according as they themselves say in their petition, page 13, in order to realize their plans it was necessary to spend at least £2,000,000 in the first two years.

Martini & Co., lessees of the mines of Naricual claim from the Government of Venezuela the sum of 9,064,965.42 bolivars, which they compute in their memorial at page 166, in the following manner:

	Bolivars
Material injuries and moral offenses, damages, requisitions, confiscation of moneys and other things	326,069.00
Direct damages to the quarries and implements	1,000.00
Violences and offenses against the foreigners who compose the firm	500,000.00
Failure to perform obligations of the lessor:	
Changes in the property leased and neglect to preserve it	1,027,440.00
Failure to perform the special obligations of the contract of lease	696,288.75
Failure to maintain the lessee in peaceful possession	6,513,667.58
Total	9,064,965.42

In the 326,069 bolivars there are included the 60,600 bolivars of the so-called " extortions of Martín Marcano," which, as we have already said, were not demandable; but it is to be noted moreover that this is composed of two receipts of Martín Marcano for the value of 12,000 bolivars, each dated September 30, 1899, and October 15, 1899, and of various accounts admitted by Marcano as *compensation* for the sale of certain cattle and stacks of arms. The receipts of Marcano appear to be the amount of these accounts, since Marcano himself confesses when he says at folio 71 of the petition " that Marcano in *compensation*, and in order to give legal form to his extortions, signed these receipts." Martini, therefore, seeks to recover twice the quantity one time on the accounts and the other time upon the receipts. Besides, the total amount of these 60,600 bolivars on the one hand are credited as against the payment of rent, and on the other hand they are sought to be recovered as damages. Martini & Co. therefore seek to recover four times the amount of the supposed extortions of Marcano. The other damages which make up the 326,069 bolivars are attributable to revolutionists, and this is sufficient reason for their disallowance, but it is worthy of note that special reference is made to the value of some tons of coal which the revolutionary leader, Pablo Guzmán, ordered to be burnt at the custom-house of Guanta.

The agent of the Government of Venezuela has presented a deposition from which it is clearly proved that the destruction of this coal was with the consent of Martini; that he personally directed the operation, ordering that a part of it be burnt by making use of cans of coal oil, and that another portion of it be thrown into the sea; that it was known by all that the operation was gotten up by the lawyer of the company, and that the greater portion of the coal thrown into the sea was of a very poor quality, since it was only dust; that all the coal was not destroyed, and that Martini & Co. had since disposed of a portion of it for the use of the railroad and by selling it to individuals. By the destruction of the coal the cessionaries thought, as would appear, to carry out a profitable undertaking, collecting from the treasury of Venezuela for coal that was not marketable.

Martini & Co. seek to recover 500,000 bolivars for violence inflicted upon

the persons of those who constitute the firm, and these persons are Martini & Fazi, since Del Buono is not in Venezuela.

In the allegations which Martini & Co. make with respect to this point there are many injurious imputations cast upon the Government of Venezuela and upon the country; but nothing concrete and to the point. In the charge alone which treats of the supposition that an official of the Government by the name of Carmen Mejias entered into Naricual committing assaults upon the foreigners appears to be discredited by all the witnesses who are presented, who affirm exactly the contrary of what Martini says. The witness Casimiro Pinelli says —

that the soldiers committed some wrongs, and that they themselves said that the Italians were no good, but that these latter suffered no personal injuries.

The witness Juan Caprara says —

that with respect to the recruiting of workmen, the troops took one Venezuelan laborer that he had under his charge, but that they did not recruit any Italians, nor did they interfere with them.

The witness Nicolás Amore says —

that the soldiers of Mejias took the horses of the company, but that he and other persons having spoken with Mejias, the latter decided that the animals should be returned, as was in fact done.

The witness Bartolo Tononi says —

that an attempt was made to recruit Venezuelans from the works of Martini & Co., but that this was given up by the mere friendly intervention of the engineers, Antonio Martini and Francisco Fazi; that they took a saddle horse from Mr. Martini, but that they returned it to him afterwards.

Martini & Co. seek to recover 1,027,440 bolivars for injury to their credit by reason of a decree of the Government of Venezuela, dated May 27, 1903, in which by virtue of its powers, in accordance with article 10, law 14, of the code of the hacienda, it temporarily suppressed the custom-house of Guanta. Those who had no credit in 1903 could hardly suffer therein — they were bankrupt since 1901. The partners were in that state of penury that the partner Fazi was not able, about September, 1902, to pay his baker an account of 165.45 bolivars, for which he made Martini & Co. responsible, and which they did not pay, either (p. 3 of the deposition of Victor Cotta).

The decree of the Government of Venezuela is perfectly lawful.

Martini & Co. seek to recover 696,288.76 bolivars under the name of " failure to perform special obligations of the contract of lease," because the Government recruited the Venezuelan laborers, violating article 13 of the contract; and thereby they seek to secure the return of the amount of rent from April, 1902, to May, 1903, amounting to 120,155 bolivars, or, say, the return of a sum which they themselves have not paid; and second, the delivery of imaginary sums which they say were necessitated to repair the railway to the mines, which, according to Martini & Co., is in the most deplorable state, since no repairs have been made. The repairing and improvement of the line were by an express stipulation of the contract to be at the cost of Martini & Co. If they have not fulfilled this obligation, as they declare, they have fundamentally failed to perform the contract, and it is a singular idea to seek to recover a sum which in any case they themselves owe.

The last item of the claim of Martini & Co. is 6,513,667.58 bolivars for " the failure to carry out the guarantee of peaceful possession of the property leased." The items which make this up are as inconsistent and absurd as those already considered, and it appears useless to make any specific observation

upon them, since they are in truth the same as those already considered and rejected.

The examination of this claim shows, moreover, that the alleged failure in this covenant, with respect to Martini & Co., is false, and that, on the contrary, the authorities have always protected them as far as was compatible with the disturbed state of the country. It moreover appears that Martini & Co. have not fulfilled the obligations which were imposed upon them by the contract; that they have not paid the rent; that they have not only not preserved the property leased to them, but they have allowed it to deteriorate for the want of the most simple repairs; that they have committed fraud against the Government of Venezuela, selling the Roman cement and other goods which they introduced free of duty for the use of the enterprise; that they have sold things belonging to the railroad, which is the property of the Government.

The claim should be totally disallowed.

Every claim arising out of the contract ought to be prosecuted before the courts of Venezuela. Martini can not claim before the Mixed Commission for supposed breaches of the contract, since the Government can oppose thereto objections arising out of the contract.

RALSTON, *Umpire:*

The foregoing reclamation has been referred to the umpire upon difference of opinion between the honorable Commissioners for Italy and Venezuela. Briefly stated, the facts are as follows:

On December 28, 1898, by contract approved by the Federal Congress on May 29, 1899, the Venezuelan Government granted to Lanzoni, Martini & Co., of whom the claimants are the successors, for the term of fifteen years from the date of the approval of the contract by Congress, a national enterprise known as Ferrocarril de Guanta y Minas de Carbón, denominadas Naricual, Capiricual y Tocoropo, situate in the Bolívar district of the State of Bermudez, including in the lease wharf for the embarkation of coal, warehouse, workshops, railways between Guanta and the mines, with rolling stock, material on hand, bridges, the said mines and the other rights and the actions belonging to the National Government in the said enterprise.

The territory so rented embraced 810 kilometers superficial area, and the railroad from Naricual to Barcelona was some 17 miles long, and from Barcelona to Guanta some 19 miles.

In consideration of the foregoing lease the company undertook to pay annually to the National Government in cash the sum of 104,000 bolivars, which was to be delivered in monthly quotas of 8,666 bolivars, 66 centimos. The company was further to deliver to the Government in lieu of other taxes 50 céntimos for each ton of carbon exploited.

The company was to have the right to charge the then existing tariff for passengers and freight and wharf rates, without the right to augment them in any case; the Government undertaking to preserve closed the port of El Rincón, or Guzmán Blanco, except for vegetables and certain small articles.

The National Government was to enjoy a reduction of 50 per cent upon the tariff ordinarily charged for its employees on business and for freight upon goods consigned to the Government.

The company was obliged at its own cost to make all improvements, repairs, and enlargements which were necessary for exploitation on a large scale, as well as to perfect the railway and rolling stock; all of which work was to be commenced within four months after the approval of the contract by the National Congress, and to be terminated eight months after such date, which might, however, be extended for four months more in case of force majeure.

The company undertook to give preference in employment to the laborers of Venezuela over foreigners.

If the company had fulfilled its contracts for the term of the lease, the Government was obliged to extend its concession for ten years more, at the end of which time the lessees obliged themselves to deliver to the National Government, under inventory and in perfect state of preservation, and without any right of idemnity therefor, all the stock given by the Government, with its improvements. The Government was obliged, even in case of war, to exempt from all military service the personnel employed in the mines, railways, or service of the enterprise.

It was further provided that the doubts and controversies which might arise upon the meaning or execution of the contract should be decided by Venezuelan tribunals in conformity with the laws of the Republic, without it being possible that they should be made in any case ground for international reclamation.

Inventories were had of the property leased the company, which inventories were accepted by Lanzoni, Martini & Co., September 9, 1899, and the work under the contract was officially declared commenced September 18, 1899. We may at this point remark that some of the complaints of the company are addressed to the fact that the property delivered to it was in much worse condition than it had expected at the time the contract was originally entered into, but the company having accepted the inventory, one is compelled to disregard all that is now said upon this point.

The company complains of various grievances occurring in the years 1899 and 1900, but these also must be dismissed with a word, because by its letter of May 23, 1900, the company applied to the Government for a rebate of rent on account of the injuries referred to, and under date of September 3, 1900, in response to this application, the company was notified that its annual rent would be reduced one-half for the year from July 29, 1900, to the same day in 1901, provided the company in accepting this concession should declare that it had no claim against the Government by virtue of the provisions of its contract, or for any other reason, and upon the following day (September 6) the company accepted gratefully the concessions made to it by the Chief of the Republic, recognizing as satisfied whatever claim it might have against the Government under the contract on account of the events in question. It is not, however, the opinion of the umpire that this settlement extended to the claims of the company under "vales" to the amount of 60,600 bolivars, issued by President Marcano, of the State of Bermudez.

Historically, it may be noted that on the night of August 9, 1902, Barcelona was taken from the Government by troops of the revolution, and the civil authorities were named by them; that on November 26, 1902, Barcelona was reoccupied by the Government; that on February 17, 1903, the governmental forces retired; and on February 19, 1903, the revolutionists took possession of the town, retaining such possession until after a bloody conflict, lasting from April 5 to 10, when they were ejected. In addition, there were many skirmishes in and about Barcelona within the dates mentioned, and the history of Guanta was much like that of Barcelona.

A paper blockade of the port of Guanta was proclaimed in August, 1902, Guanta then being in the possession of the revolutionists, and this blockade continued during all the time of the revolutionary possession. It is to be noted that for about two months, in December and January, 1902, and February, 1903, Great Britain, Germany, and Italy maintained a blockade by force. In addition, it may be remarked that on May 27, 1903, the Government reduced the port of Guanta to the third category, so that thereafter, and until February 1, 1904, it was not open to foreign commerce.

We may now enumerate the various heads of claims as set out in the memorial, as follows:

	Bolivars
Material injuries and moral offenses:	
1. Injuries, requisitions, appropriations of money, etc	326,069.00
2. Direct damages to its quarries and implements	1,500.00
3. Injuries and offenses against foreigners composing the undertaking	500,000.00
Failure under the obligations of the lessor:	
4. Impairment of the thing rented and lack of its preservation, including return of rent and lost gains	1,027,440.00
5. Lack of performance of the special obligations of the contract of rent, including lost profits	696,288.76
6. Failure in the guarantee of the pacific enjoyment of the thing rented	6,513,667.58
Total	9,064,965.34

It is manifest from the above statement that the same items have been repeated several times, and that properly analyzed the claim should amount to about one-third of the above.

Before proceeding to study more in detail the various headings of the claim, we must bear in mind that the claimants are still in possession of the property rented to them, and that if the Venezuelan Government had fixed its rent upon the basis of a return of 5 per cent upon the value of the thing rented, the entire valuation of the subject-matter would be but 2,080,000 bolivars. It will also be borne in mind, before commencing a detailed examination, that as early as July, 1901, the company, through its offices, either in Venezuela or in Italy, was unable to meet the claim of John Davis & Son, of Derby, England, for the sum of £155, and besides was indebted to various individuals in different amounts, and in March, 1902, owed its limited partner, Del Buono, some 2,000,000 bolivars, with outstanding acceptances estimated at 800,000 bolivars.

Let us make a succinct summary of the various injuries of which the company complains, eliminating offenses committed by revolutionists and trivial offenses, such as personal insults to employees, and limiting ourselves as to the rest to proven offenses.

Early in the morning of May 29, 1902, the revolutionary troops passed through the town of Naricual, where were located mines and shops of the claimant. Two hours later Government troops, under the command of General Mejias, reached Naricual and fired several volleys into the town from different points, the shots piercing the habitations and injuring or destroying property, no lives being lost. At this time the general referred to attempted to carry off workmen, but after Martini's intervention recruited but one man.

The following day the Government troops returned and again attempted to recruit Venezuelans in the employ of the company, who, however, fled with one or two exceptions. The forces took some food and small articles. It is further stated that at various times Venezuelans were recruited even from the quarries of the company. As a consequence the Venezuelan laboring force was completely disorganized and its members terrified and dispersed. On many occasions Naricual was occupied by governmental troops who took hens, hogs, etc.

During the war the towns between Barcelona and Naricual abandoned care of the roads, and as a consequence the railway line was used as a means of transportation by men and animals and railway traffic was abandoned.

On September 16 and 17, 1902, the revolutionists threw into the sea or set on fire, to prevent national vessels from using it, some 5,697 tons of coal, worth

from 25 to 30 bolivars a ton, and it is said that the Government was responsible therefor, because, having closed the port of Guanta and prevented its exportation, it necessarily fell later into the hands of revolutionists.

It is further stated that during fights between revolutionists and the Government workmen were compelled to give up repairing the wharf, and the train officials were insulted and interfered with in their management of the trains.

On November 28, 1902, Venezuelan vessels of war fired on the Guanta custom-house and station. The proof upon this point is not uniform; some witnesses saying that there were 70 revolutionists who commenced the firing, and others fixing their number at 25, and some witnesses placing the responsibility for the beginning of the firing upon the Government. According to part of the testimony, both custom-house and station were occupied by the revolutionists. When the Government troops landed, it is said that they entered the custom-house and station and destroyed much property of the company, including all their books of account, and also destroyed the cattle corrals and injured the wharf.

We further find that on June 6, 1902, workmen were recruited and others could not be obtained, while President Marcano prevented the delivery of merchandise for eight or ten days in the same month. In many cases the consul at Barcelona sought a release of Venezuelans who had been recruited, often successfully and again unsuccessfully, while President Marcano at all times maintained his right to recruit them.

In the counter proof it is shown, among other things, that the company sold part and used another part of the coal said to have been burned by revolutionists, and it is contended that the company is heavily indebted on its account of rent to the Government, having only paid 21,666.65 bolivars.

The honorable Commissioner for Venezuela submits, as a preliminary question, objection to the jurisdiction, based upon article 16 of the contract, which reads as follows:

> Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato, serán resueltas por los Tribunales de la República, conforme á sus leyes, y en ningún caso serán motivo de reclamaciones internacionales.

Even if the dispute now presented to the umpire could be considered as embraced within the terms " Las dudas ó contraversias que puedan suscitarse en la inteligencia y ejecución del presente contrato," in the judgment of the umpire the objection may be disposed of by reference to a single consideration.

Italy and Venezuela, by their respective Governments, have agreed to submit to the determination of this Mixed Commission the claims of Italian citizens against Venezuela. The right of a sovereign power to enter into an agreement of this kind is entirely superior to that of the subject to contract it away. It was, in the judgment of the umpire, entirely beyond the power of an Italian subject to extinguish the superior right of his nation, and it is not to be presumed that Venezuela understood that he had done so. But aside from this, Venezuela and Italy have agreed that there shall be substituted for national forums, which, with or without contract between the parties, may have had jurisdiction over the subject-matter, an international forum, to whose determination they fully agree to bow. To say now that this claim must be rejected for lack of jurisdiction in the Mixed Commission would be equivalent to claiming that not all Italian claims were referred to it, but only such Italian claims as have not been contracted about previously, and in this manner and to this extent only the protocol could be maintained. The umpire can not accept an interpretation that by indirection would change the plain language of the

protocol under which he acts and cause him to reject claims legally well founded.[1]

Let us now consider the various branches of the contentions, which, for convenience, may be divided as follows:

1. Assaults upon Italian workmen and interference with Venezuelan laborers employed by the claimant.
2. Interference with the contract rights of the claimant arising out of the paper blockade and the closing of the port of Guanta.
3. Various injuries to claimant's properties.

The first two grounds of the claim are so far interwoven with respect to the damages consequent upon the events complained of that it will be convenient to discuss them together.

Let us first consider for a moment in this discussion the assaults upon Italian workmen and interference with Venezuelan laborers employed by claimant.

As appears from the foregoing, on May 29 and 30, habitations of workmen at Naricual were fired upon ruthlessly by the Government troops, and as a consequence Italian laborers to the number of 54 protested before the Italian consul at Barcelona, and afterwards demanded their immediate repatriation, being in fact sent back to Italy on July 12. Fifty of these laborers afterwards submitted to arbitrators their claim against the company, and the arbitrators in their judgment dated September 3, 1903, said that:

> The political situation of the country, troubled for many years by constant and ceaseless civil wars, rendered it impossible to carry on peacefully the work of the mines. * * * Things got worse around May, 1902, so that the mining properties, the employees, and even the owners were exposed to very great dangers and threats by the Government troops without any cause or justification. * * * The jury finds, moreover, that on May 29, 1902, the regular troops of Venezuela, without any justification, invaded the mines of Las Minas near Naricual, firing on the mining properties, factories, offices, and buildings and railroad stations, all belonging to the firm. Some of the Italian laborers ran the risk of being killed. The houses of some others were looted. Even Mr. Martini was in grave danger, while some of the native laborers were forced into the army in open violation of contract. These events caused a panic among the workmen, inducing them to what was described "a justifiable decision to leave Venezuela" in the protest filed by the firm with the minister of Italy at Caracas on July 10, 1902.
>
> The members of the firm spared no care in defending their countrymen and employees, as was their duty as defendants of the men they had engaged, but the political situation was getting rapidly worse, as appears by the above-mentioned consular document; food was scarce and supplies were not to be had; banking transactions were impossible even on usurious terms; the native laborers all around Naricual caught by the panic fled, so that railroad service was severely crippled, and the work incidental to mining entirely stopped. Next the sanitary service, which the firm had been organizing, ceased operating; wages which theretofore for the same cause had been paid irregularly were now entirely suspended, and the transmission of money by the laborers to their families in Italy became rare and difficult. The workmen, who two days after May 29, after the actual panic had passed, had resumed their work found themselves face to face with the situation which the jury agrees with the complaints made by the firm in terming unbearable. This was rendered even worse and more painful by the letters received by the laborers from their families in Italy, setting forth the suffering at home from lack of the support they had been used to receive.

It further appears from the arbitral decision that not until September 1

[1] For full discussion of the points here decided see Orinoco case, vol. IX of these Reports, p. 181, Rudloff case, idem, p. 244; Turnbull, etc., case, idem, p. 261, and Selwyn case, idem, p. 380.

were the complaining laborers paid for work actually done at Naricual up to and including July 9, they sailing for Italy from La Guaira on July 17.

As the result of this arbitration the claimants were held liable for —

lack of the clear foresight regarding the work offered which is obligatory upon every employer of laborers, and especially upon one seeking men for work in places far from the mother country and which takes them away from the material comforts and moral comforts which are found in the bosom of the family and in the protection of the mother country.

The arbitrators allowed a total of 631 lires, equivalent to the same number of bolivars, to each one of the fifty complainants.

The umpire is disposed to accept the view that Venezuela is, to an extent, which he will endeavor hereafter to fix, responsible for assaults committed upon Italian laborers — assaults of such a nature as might well have deterred any others from taking their places — and is also responsible for the repeated acts of its military authorities in attempting to enlist in its armies Venezuelans employed by the company — acts which were in express derogation of the terms of the contract of rental hereinbefore recited.

Let us now, before considering the measure of damages, turn to the matter of the paper blockade and the closing of the port of Guanta by governmental order.

From about August 10, 1902, until April 10, 1903, save during the period of actual blockade by the allied powers, and the time of its possession by the Government, Guanta was blockaded by proclamation. No naval force, however, was maintained in the vicinity to enforce the blockade, and such blockade was therefore illegal under the authorities referred to in the case of De Caro [1] already decided.[2]

Shortly after the termination of the paper blockade, and on May 27, 1903, the Government reduced the port of Guanta to what is known as the third category of ports, and in so doing cut off its foreign commerce, and this condition lasted until the port was reopened by Executive order, dated February 1, 1904. In the opinion of the umpire, this closure, while entirely legal and within the power of the Government as against the world at large, rendered the Government liable to an extent hereafter to be discussed, under its original contract with claimant's predecessors. It will be borne in mind that by that contract, claimant's predecessors received possession of the wharf of Guanta, with the right to charge and collect port duties. It must be assumed that this right was obtained, and that the whole contract was signed upon the theory that the port of Guanta was to be maintained as a port of at least the same degree of importance it then possessed. The contract is to be interpreted in the light of the surrounding circumstances, and one of the most significant of them was the importance of Guanta as a port of entry. It is not to be supposed that Lanzoni, Martini & Co. received the contract with the idea that the Government retained the power the following or any subsequent day to change its provisions, destroying or impairing the usefulness of the points of ingress and egress to and from the railways and mines. To allow the existence of such a power in the Government as a contracting party would be to give one of the parties to the contract the right to destroy all the interest of the other party in it.

We arrive, then, at the very important question as to the measure of damages

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[1] See *supra*, p. 635.

[2] The Convention of Paris, 1854, provides:

4. Les blocus, pour être obligatoires, doivent être effectifs, c'est-à-dire maintenus par une force suffisante pour interdire réellement l'accès du territoire ennemi. (Revue de Droit International, 1869, p. 157.)

for which the Government is responsible because of these several acts — that is to say, interference with the foreign workmen, with the native workmen, with the port by paper blockade, and with the rights of the contracting party by closure of the port.

As has already been demonstrated, the Government materially interfered with the labor of the foreign workmen, the natural result of its action being to prevent the employment of others. It interfered with the native workmen by a system of repeatedly attempted recruitings in plain violation of the contract. It (by paper) blockaded the port, and consequently diminished the value of the railroad concession for about five months, and it almost completely paralyzed operations under the concession by closing the port for a period of eight months.

It appears in proof that at the time the habitations of the foreign workmen were fired upon in May, 1902, the mine was capable of a daily production of 150 tons of the usual value of 25 bolivars per ton, upon which the company might ordinarily have expected a profit of about one-half, and the first question arising is whether the Government should be held responsible for this loss of profit during the period of twenty months from about the 1st of June, 1902, to the 1st of February, 1904.

It is the opinion of the umpire, several times expressed, that Venezuela is not to be held responsible for speculative profits, but the profits in the present case are not entirely speculative. In a question of contract presented to the Supreme Court of the United States, in Howard *v.* Stillwell, etc., Manufacturing Company, 139 U.S., page 199, it was said:

> It is equally well settled that the profits which would have been realized had the contract been performed, and which have been prevented by its breach, are included in the damages to be recovered in every case where such profits are not open to the objection of uncertainty or of remoteness; or where, from the express or implied terms of the contract itself, or the special circumstances under which it was made, it may be reasonably presumed that they were within the intent and mutual understanding of both parties at the time it was entered into.

While this language is not absolutely in point, it indicates that if a clear measure of damages exists with relation to future business, it may be invoked.

We find that by a contract entered into between Del Buono and his associates in March, 1902, the company agreed to furnish coal to Del Buono for the first year thereafter at the rate of 30,000 tons, and for the second year 50,000 tons, with an additional amount in subsequent years, which, however, does not concern us. To this extent the company had an assured market, with a reasonably well-established profit on its business. We are informed that this contract was notified to the Government April 12, 1902.

Bearing in mind the proven capacity of the mine, this amount of coal could have been furnished — that is to say, from June 1, 1902 (about the time the troubles of the workmen commenced), to April 1, 1903, 25,000 tons; and from April 1, 1903, to February 1, 1904, 41,666.66 tons; or a total of 66,666.66 tons for the twenty months. From this may fairly be deducted for the two months of blockade of the allied powers 5,000 tons, leaving a net total of 61,666.66 tons, upon which it could have made an average profit at the rate of 12½ bolivars per ton, or 770,833.25 bolivars.

It would, however, be manifestly unfair to hold the Government responsible for this amount, because a very large part of the difficulty in working the mines was due to the direct action of revolutionists, with whom the Government was at war, and another considerable percentage must be attributed to the fact that the mines could not have been worked with thorough success even had the

Government properly performed its duties, because of the existence of a state of warfare in the neighborhood of the mines and railway, as well as at the port of Guanta, a condition for which the Government can not be held to contractual or other responsibility. The umpire, therefore, feels that he would be performing his full duty in solving this very troublesome question if he were to allow in favor of the company one-third of the amount it could have gained under the Del Buono contract, or the sum of 256,944.42 bolivars.

The umpire does not ignore the fact that the mine might have sold its coal to others than Del Buono, but he attaches little importance to possible sales of this character, because, as appears in the proof, from the opening of the concession to the 20th of February, 1901, only 7,271 tons had been extracted, and from the last date up to July 12, 1902, including about a month's work of the Italian laborers, only 7,500 tons additional were supplied, making a total from September 18, 1899, to July 12, 1902, of 14,771 tons, or a daily average of about 18 tons.

In the foregoing calculation, and in another to be subsequently made, the umpire estimates damages in favor of the claimant up to February 1, 1904, not ignoring, however, the fact that the last date upon which claims could have been presented before the Commission, and therefore, in his opinion, the last possible date to which, under ordinary circumstances, damages could be claimed, was August 9, 1903, but he is influenced by the legal principle stated in the American and English Encyclopædia of Law, 2d edition, volume 21, page 732, and expressed as follows:

> When a court of equity grants relief by injunction for the abatement of a nuisance, it may award damages also if prayed and proved. In such case the usual practice is to assess the damages up to the rendition of the decree, in order to prevent further litigation.

To the above proposition many American and English cases are cited, and the damage in question, being continuous in its nature, is believed to fall within its clear reason.

By reason of the paper blockade and the closure of the port of Guanta, as well as interference with laborers, Italian and Venezuelan, the contract was broken by the Government, as hereinbefore set forth, and this breakage of contract forms an element of damage quite distinct from that involved in interference with the working of the mines. For if gangs of workmen employed in the maintenance of the railway were driven off and freight of all kinds could not longer be received at Guanta from abroad or carried to that port for exportation, then to perhaps an absolute point the concession became valueless. Such was the case, as we have seen, during the five months of paper blockade and eight months of closure of port, the interference with laborers bringing up the total time during which the contract was affected by governmental acts to twenty months. The rent due by the firm to Venezuela for this period would be 173,333.33 bolivars.

The umpire finds by the statement of account between the company and the Government presented by the company, made to September 1, 1903, that allowing the " vales " of General Marcano for 60,600 bolivars, which seem not properly embraced in the settlement of September, 1900, the Government was indebted to the company in the sum of 15,185.74 bolivars. In this account, however, credit is asked for 33,957 bolivars for services rendered the revolution. This must be rejected, leaving the company indebted to the Government on September 1, 1903, 18,771.26 bolivars. The account may, therefore, be stated as follows:

CREDIT

	Bolivars
Rent allowed by this opinion and sentence based hereon from June 1, 1902, to February 1, 1904	173,333.33

DEBIT

	Bolivars	Bolivars
Balance due September 1, 1903, to Government	18,771.26	
Rent to Government from September 1, 1903, to February 1, 1904	43,333.33	
		62,104.59
Balance due lessees on this account		111,228.74

This award must be made, however, without prejudice to the rights of the company to recover in other tribunals for services rendered after September 1, 1903.

Let us now refer to the third head of damages, to wit, the various material injuries to claimant's properties.

The most important of these is stated to be the throwing into the sea or the burning up by the revolutionists of 5,697 tons of coal on September 16 and 17, 1902. Responsibility is charged on the Government for this loss, the theory being that the Government, by its paper blockade of the port of Guanta, had prevented the exportation of the coal, thereby permitting its loss at the hands of the revolutionists. On the other hand, it is argued that at least 150 tons were sold to private parties or burned by the company itself, while it is suggested that much of the coal was doubtless worthless through long exposure prior to the blockade.

The umpire believes that the Government is responsible for the loss of the coal, having prevented its exportation, but he can not ignore the fact that some of it was used as stated, and that much of it in all probability, because of exposure, had slight value. He believes he will do full justice if he allows for the destruction of 2,500 tons, at 25 bolivars a ton, or a total of 62,500 bolivars.

Other damages than those above enumerated (including thefts) may be referred to, but although dwelt upon at length in the memorial, the proof does not show that the material loss involved was great. The umpire believes that for them an allowance of 10,000 bolivars will be ample.

No account is taken of the injury to the railroad track, consequent upon its being turned into a passageway for animals, the authorities being pecuniarily unable during the war to keep up the roads. This was an unfortunate consequence of war for which the company can claim no personal indemnity.

Many of the other claims for damage rest upon the existence of war, for which Venezuela can not be specially charged, however regrettable the facts in themselves may be.

It is strongly urged upon the umpire that large damages should be awarded under the head of lack of pacific enjoyment of the thing rented, and aid is invoked of the principle embodied in section 1575 of the Italian, and section 1529 of the Venezuelan Civil Code, making it the duty under any contract of the owner renting property to maintain the lessee in the peaceful enjoyment of the thing rented during the time of the contract. This simply means that such enjoyment shall be preserved as against the owner and others claiming title, but is no covenant against the action of trespassers. As far, therefore, as the Government may thus be legally responsible, the umpire has, in this opinion, sought to hold it to such responsibility.

An award will therefore be signed for 439,673.16 bolivars, with interest at the rate of 3 per cent per annum from October 30, 1903, to December 31, 1903,

without prejudice to the claimant to demand payment from the Government in any forum having jurisdiction for services rendered after September 1, 1903.

POGGIOLI CASE

(By the Umpire:)

The widow and children of an aggrieved Italian, who were all born in Venezuela and have always lived in that country, can not claim as Italian subjects before this Commission (affirming Brignone and Miliani cases).[1]

Venezuela is responsible for damages inflicted upon the property of a foreigner where she has allowed serious offenses to be committed against him personally and the offenders, although known, to go unpunished, and where the authorities, in conjunction with such offenders and with others, have depredated his property and driven off his employees, and no relief been afforded, although frequent complaints were made.[2]

A general claim for loss of credit is too indefinite and uncertain to be taken into consideration.

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[1] Pp. 542 and 584.

[2] In addition to the authorities upon this point cited in the decision, attention is called to the Ruden case (Moore, 1653-1655).

It was shown that on January 14, 1868, the inhabitants of Motupe invaded the claimant's plantation of Errepon and burned the buildings and fences; that on February 14, 1868, Ruden appealed to the executive power and demanded an indemnity, at the same time charging guilty omission on the part of the authorities: that the executive power two weeks later asked the prefect of the department for a report, and that the prefect ordered the subprefect to make one; and that the latter, on May 22, 1868, reported that Errepon had been burned, but that he could not then go to the plantation and ascertain the value of the property burned, as the roads were bad. No further steps were taken by the authorities till, three months afterwards, the prefect, urged on by Ruden, directed the subprefect to make another report; but in reply to this order the first report, which was deficient and passionate, was merely repeated. In July, 1868, the executive power, without having come to any decision, sent the papers to one of the government attorneys. A third petition of Ruden met the same fate, having been held without action for fourteen months. The facts were not investigated, nor were the guilty parties prosecuted. An order was indeed given for an investigation, but it was avoided. The judicial authorities, when appealed to for an investigation of Ruden's claim, refused to entertain it, on the ground that an executive order had forbidden the trial of suits against the treasury. And while justice was thus denied, it was charged that the local authorities were concerned in the attack on the plantation. A report of the consular body, drawn up at the place, declared that the burning of estates, both native and foreign, at the time and place in question, was committed by armed forces under the command of officers. On all these grounds the umpire held Peru liable for the burning.

The case of Johnson (Moore, 1656-1657) was similar to the Poggioli case in many respects, it being borne in mind that the laws of Venezuela only recognize responsibility for the acts of officials working in a public capacity. In the case now referred to the claimant's

property was destroyed, and he was personally and permanently injured by armed bands, headed by the governors of adjacent towns, instigated by the superior authorities of the province, who were dependent upon and immediately represented the supreme government. The supreme government issued a decree to the effect that the injuries should be redressed, but nothing substantial was done, nor were any of the malefactors punished. The Peruvian Commissioner had contended that is was necessary that Johnson should have had recourse to the courts and have been denied justice. But it was known that the judges of the province of Lambayeque were menaced and controlled by the mob, and, if not in sympathy with them, in a panic; and that it would have been useless to appeal to them. Mr. Elmore (the umpire) declared, however, that there had been an actual denial of justice. By the circular of the minister of justice of Peru o September 13, 1853, the judges were forbidden to receive expedientes affecting the law of December 25, 1851, closing the consolidation of the public debt. By that circular the courts were closed against the sufferers at Lambayeque. Mr. Elmore cited two cases of the actual denial of petitions of persons injured in Lambayeque on the ground of the circular referred to. One of these was the case of Ruden & Co., who applied April 2, 1868, to the judge of Lambayeque and were denied a remedy on that ground. The claimants were thus without hope. If they applied to the courts they were told they had no remedy. If they applied to the commission they were told that they must apply to the courts. Mr. Elmore therefore awarded the claimant the sum of 11,480 Peruvian silver soles.