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MIXED CLAIMS COMMISSION
SPAIN - VENEZUELA
CONSTITUTED UNDER THE PROTOCOL OF
2 APRIL 1903

REPORT: Jackson H. Ralston-W. T. Sherman Doyle, *Venezuelan Arbitrations of 1903,* **including Protocols, personnel and Rules of Commission, Opinions, and Summary of Awards, etc., published as Senate Document No. 316, Fifty-eighth Congress, second session, Washington, Government Printing Office, 1904, pp. 917-942.**

PROTOCOL, APRIL 2, 1903 [1]

Protocol of an Agreement between the Plenipotentiary of the Republic of Venezuela and the Envoy Extraordinary and Minister Plenipotentiary of His Majesty, the King of Spain, for submission to arbitration of all unsettled claims of Spanish subjects against the Republic of Venezuela.

The Republic of Venezuela and His Majesty, the King of Spain, through their representatives, Herbert W. Bowen, Plenipotentiary of the Republic of Venezuela, and His Excellency, Emilio de Ojeda, Envoy Extraordinary and Minister Plenipotentiary in Washington, have agreed upon and signed the following protocol:

ARTICLE I

All claims owned by subjects of His Majesty, the King of Spain, against the Republic of Venezuela which have not been settled by diplomatic agreement or by arbitration between the two Governments, and which shall have been presented to the commission hereinafter named by the Government of His Majesty, the King of Spain, or his Legation at Caracas, shall be examined and decided by a Mixed Commission, which shall sit at Caracas, and which shall consist of two members, one of whom is to be appointed by the President of Venezuela and the other, by his Majesty, the King of Spain.

It is agreed that an umpire may be named by the President of the Republic of Mexico. If either of said commissioners, or the umpire, should fail or cease to act, his successor shall be appointed forthwith in the same manner as his predecessor. Said commissioners and umpire shall be appointed before the first day of May, 1903.

The commissioners and the umpire shall meet in the City of Caracas on the first day of June, 1903. The umpire shall preside over their deliberations, and shall be competent to decide any question on which the commissioners disagree. Before assuming the functions of their office, the commissioners and the umpire shall take solemn oath carefully to examine and impartially decide, according to justice and the provisions of this convention, all claims submitted to them, and such oaths shall be entered on the record of their proceedings. The commissioners, or in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation.

The decisions of the commission, and in the event of their disagreement, those of the umpire, shall be final and conclusive. They shall be in writing. All awards made shall be payable in Spanish gold or its equivalent in silver.

ARTICLE II

The commissioners, or, umpire, as the case may be, shall investigate and decide said claims upon such evidence or information only as shall be furnished by or on behalf of the respective Governments. They shall be bound to receive

[1] For the Spanish text see the original Report referred to on page 735.

and consider all written documents or statements which may be presented to them by or on behalf of the respective governments in support of or in answer to any claim, and to hear oral or written arguments made by the agent of each Government on every claim. In case of their failure to agree in opinion upon any individual claim, the umpire shall decide.

Every claim shall be formally presented to the commissioners within thirty days from the date of their first meeting, unless the commissioners or the umpire in any case extend the period for presenting the claim not exceeding three months longer. The commissioners shall be bound to examine and decide every claim within six months from the date of its first formal presentation, and in case of their disagreement, the umpire shall examine and decide within a corresponding period from the date of such disagreement.

ARTICLE III

The commissioners and the umpire shall keep an accurate record of their proceedings. For that purpose, each commissioner shall appoint a secretary versed in the language of both governments, to assist them in the transaction of the business of the commission. Except as hereinafter stipulated, all questions of procedure shall be left to the determination of the commission, or in case of their disagreement, to the umpire.

ARTICLE IV

Reasonable compensation to the commissioners and to the umpire for their services and expenses, and the other expenses of said arbitration, are to be paid in equal moieties by the contracting parties.

ARTICLE V

In order to pay the total amount of the claims to be adjudicated as aforesaid, and other claims of citizens or subjects or other nations, the government of Venezuela shall set aside for this purpose, and alienate to no other purpose, beginning with the month of March, 1903, thirty per cent. in monthly payments of the customs-revenues of La Guaira and Puerto Cabello, and the payments thus set aside shall be divided and distributed in conformity with the decisions of The Hague Tribunal.

In case of failure to carry out the above agreement, Belgian officials shall be placed in charge of the customs of the two ports, and shall administer them until the liabilities of Venezuela in respect to the above claims shall have been discharged. The reference of the question above stated to the Hague Tribunal will be the subject of a separate protocol.

ARTICLE VI

All existing and unsatisfied awards in favor of Spain shall be promptly paid in accordance with the terms of the respective awards.

Done in duplicate in the City of Washington on the second day of April, 1903.

H. W. BOWEN [SEAL]
E. DE OJEDA [SEAL]

PERSONNEL OF SPANISH-VENEZUELAN COMMISSION [1]

Umpire. — Luis Gutierrez-Otero, of Mexico City, Mexico.
Spanish Commissioner. — Juan Riaño, Chargé d'Affaires at Washington, D.C.
Venezuelan Commissioner. — F. N. Guzmán Alfaro.
Spanish Agent. — Aristides Tello.
Venezuelan Agent. — F. Arroyo-Parejo.
Assistant Venezuelan Agent. — José T. Arnal.
Spanish Secretary. — José Gil Delgado y Olazábal.
Venezuelan Secretary. — Luis Julio Blanco.

OPINIONS IN THE SPANISH-VENEZUELAN COMMISSION

Extension of Time for Submission of Claims

Under the terms of the protocol no general extension can be allowed for the presentation of claims; but on cause shown any particular claim may be admitted for consideration and decision for ninety days after the time set for its presentation under the protocol.

Gutierrez-Otero, *Umpire:*

The umpire, having examined and reached a decision concerning the point on which the Commissioners have disagreed, relative to the extension of time which the Legation of His Catholic Majesty in Venezuela demands for the presentation of claims of Spanish subjects to this Mixed Commission;

Has decided that a general decision, which would permit the presentation of *any* claim without exception after thirty days, and during the three months additional, to which the second clause of the protocol refers, would not be compatible with a true interpretation of the protocol in question;

Nor could the decision be made limiting its effects to claimants who reside in the State or territory of Venezuela where a difficulty or lack of communication exists, which is considered sufficient to prevent their presentation during the first thirty days, since there is no reliable information upon which to base such a finding; besides this means might not always be in accord with absolute equity, which ought to control the decisions of the Commission.

But as equity demands — and it is universally recognized as justice — that the length of time granted for the exercise of a right should be sufficient and should be properly taken advantage of by the interested parties, it is certain, that in accordance with the proper interpretation of the protocol and the motive of its execution, the Commission may receive during the three additional months mentioned in the article already cited, claims which could not have been presented during the first thirty days, provided that in the judgment of the commissioners, or of the umpire, as the case may be, it is shown that a sufficient cause for not having made prompt presentation existed;

And thus the umpire decides this question which has arisen and been submitted for his determination.

Esteves Case

Spanish nationality of claimant may be shown by production of certificate from consulate of Spain showing that claimant is enrolled on register of Spanish citizens resident in Venezuela.

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[1] No rules of procedure were formulated in this Commission.

GUTIERREZ-OTERO, *Umpire:*

In the record of the claim which Miguel Esteves presents, claiming to be a Spanish subject, and demanding payment for various merchandise and animals which he asserts were taken by revolutionary and government forces during the civil war which terminated in the year 1900, a preliminary question, not decided by the commissioners, has arisen because the Commissioner of Venezuela is of opinion that said claim is not admissible, inasmuch as the claimant has not presented his certificate of naturalization, and it appears in the record that he is a native of Tetuan, a city of Morocco.

The Commissioner of Spain holds that, having a certificate of Spanish nationality, as appears by the certificate in evidence coming from the Spanish Legation, and in which it is stated that Esteves is enrolled upon the register of nationality of the vice-consulate in Villa de Cura, he is entitled to claim as a Spaniard. Because of a disagreement, the question has been submitted to the decision of the umpire.

It is not denied by the Commissioner of Venezuela that, although Esteves may be a native of Morocco, he could have acquired Spanish nationality, but he limits himself to claiming the necessity of the presentation of the document, which directly and originally evidenced this change of nationality, believing, no doubt, that by this means only it could be proved that said Esteves can rightly avail himself of the provisions of the protocol of April 2 of this year, signed at Washington by the representatives of Spain and Venezuela, relative to claims which *Spanish subjects* should make against this latter Republic.

In deciding if this necessity exists, the umpire has taken into account the following considerations:

It is a principle that it is the province of the internal legislation of States to declare or concede nationality to the individuals who form them, establishing the means by which it may be acquired, preserved or lost, and the manner that said States shall consider the character of their nationals as fixed.

The Spanish law, in article 26 of the civil code, provides that Spaniards who transfer their domiciles to foreign countries are under obligation to prove in every case that they have preserved their nationality, and so declare to the Spanish diplomatic or consular agent, who shall be obliged to enroll them, as well as their wives, if they be married, and their children, if they have any, in the *register of Spanish residents.*

The Spanish law, in articles 26 and 32 of the consular regulations, also provides that it is an attribute of Spanish consuls in foreign countries *to grant letters of residence or security to their nationals*, and it charges them with the duty of making a *register of the Spanish residents in the district.*

The enrollment in this list or register puts the party inscribed in it in possession of a letter which proves his nationality, and the letters with which Spanish residents in the Republic of Venezuela are provided, granted by the legation in the exercise of its powers as consulate-general which are united in it, or by their consulates and vice-consulates in the exercise of the faculties which ordinarily belong to them, prove that the holder of one of these letters is a subject of Spain, to which the protocol of May 30, 1845, made by the above-named powers, refers.

Thus it is that the enrollment and the letter mentioned constitute proof of nationality, which can give way only to a more convincing proof to the contrary, which has not been attempted, nor made in the present case.

To these considerations strictly of a juridic nature to which said case belongs,

others of admitted equity are joined which serve to support the idea of the sufficiency of this proof, since, on the one hand, certificates of enrollment have been considered sufficient by the decisions of this Mixed Commission to prove Spanish nationality, and, on the other hand, the umpire has diligently inquired concerning the manner in which such inscriptions are made in the register of the Spanish consular offices and has learned that they are not made unless the interested parties also produce proof of their character as subjects in the Kingdom of Spain. This last is in accord with the terms of the treaty of 1845,[1] already cited, in which it was provided as an indispensable requisite for the conservation of their nationality that Spaniards who at that time desired to reacquire it, as well as those who in the future might migrate to Venezuela, should have themselves inscribed in the consular register.

Finally, it must be considered:

First. That as a general rule and in the same manner as provided for Spanish consuls those of all nations are charged with the keeping of a register of their nationals.

Second. That even though it be true that the claimant, Miguel Esteves, stated in writing, which he executed before the judicial authority of Zamora, that he was a native of Tetuan, in the same document he began by stating that he was a Spanish subject and he continued to designate himself thus in all his proceedings without giving rise to any motive to suppose, all things being equitably considered, that the faith placed in his statement concerning his original origin by birth should contradict his statement relative to the nationality which he enjoys.

For these reasons the umpire decides that the claim of Miguel Esteves is to be admitted as one of a Spanish subject, and that the record should therefore be returned to the consideration of the commissioners, that they may consider it on the merits.

PADRÓN CASE

It is an accepted principle of international law that States are not responsible to aliens resident in their territory for damages and injuries inflicted upon them by persons in revolt against the constituted authorities.[2]

This principle if invoked before a court of absolute equity becomes a technical objection which is expressly barred by the terms of the protocol.

The fact that this principle was expressly agreed to by both Venezuela and Spain for all future claims in a treaty of 1871 does not bind Spain and Venezuela so as to prevent them from entering into a new agreement waiving this stipulation.

In the absence of express stipulations in the protocol an arbitral court must decide according to the accepted principles of international law; but a tribunal called upon to decide on a basis of absolute equity renders judgment in accordance with the conscience of the arbitrators.

GUTIERREZ-OTERO, *Umpire:*

With respect to record No. 4, made up by the claim of the Spanish subject María García de Padrón, in whose favor payment of 1,300 bolivars is demanded, to indemnify her for the price of the rent of her house in Naiguatá occupied by the forces of the Government, and those of the revolution, from the month of September, 1899, to May, 1900; for the sum which she expended in repairing it on account of the damages which the occupants caused it; and the value of

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[1] British and Foreign State Papers, Vol. 35, p. 301.

[2] See cases of Aroa Mines, Vol. IX of these Reports, p. 402; Kummerow, *supra* p. 370; Sambiaggio, *supra*, p. 499; J. N. Henriquez, *supra*, p. 713; Salas, *supra*, p. 720.

a shed destroyed by them, the commissioners because of difference of opinion have pronounced no judgment, and therefore the decision of the case has been left to the umpire.

The Venezuelan Commissioner has declared in his opinion relative thereto that he absolutely disallows the claim, and the Spanish Commissioner has stated that, in his opinion, the Government of Venezuela ought to be held responsible for the damages caused by the revolution and that the claimant has a right to the amount that she demands.

In the written memoranda [1] which the Commissioners have made to support their opinions, are explained the absolute opinion given by the Venezuelan Commissioner supporting the principle of irresponsibility of States for acts done by troops, or bands in rebellion against, or separated, in any way from, obedience to the constituted authorities; and on his part, the Spanish Commissioner holds that responsibility of States is not avoided by reason of internal or external changes, that it extends to injuries caused by political factions that strive to acquire power; and that if the Spanish subjects in Venezuela were not protected by indemnity for damages which the revolution has caused them, they would be in an oppressive position, and at the mercy of the misfortunes that it caused them, without resources on the one hand to prevent them, and on the other without a right to recover therefor.

This manner of arguing shows how the commissioners have forced the issue and drawn it into a state of absolute difference of opinion, indicated by the Venezuelan Commissioner in contending that States are not responsible for damages which insurgents cause foreigners, and in deducing from this statement or general rule that the claim made in this particular case should be disallowed.

And the strictness of the principle which has been brought out in its application by the one invoking it, has been followed to such a point that he has not taken into account for the purpose of making a distinction the circumstance which the claimant alleges, and concerning which she produced proofs, that the damages were caused her not only by forces of the revolution, but also by those of the Government; and concerning this point, the Commissioner of Venezuela claims that the extreme vagueness of the expression *troops of the Government*, which is used, makes it impossible to determine if regular forces are meant whose acts could affect the responsibility of the nation.

Thus the decision asked of the umpire has been understood to be with respect to this particular case of which we are treating, whether as a consequence of the application of the general principle which the Venezuelan Commissioner cites, who, in order to strengthen it and show that practically it has been accepted in the relations of his nation with Spain, refers to the convention of 1861,[2] made by both powers concerning some Spanish claims, and in which it was agreed that Spanish subjects injured by revolutions are obliged to prove the negligence of the constituted authorities in the adoption of the proper measures to protect their interests and persons, or to punish or reprimand those at fault; and that this provision, and the others that the convention contains, shall serve as invariable rules after it may be formally and explicitly ratified in the pending negotiations and those that may arise in the future.

The umpire will endeavor to render his judgment clearly and minutely, giving scrupulous attention to the important nature of said points, and the others he may have to touch on.

It is true that, with respect to international law, it is admitted that it em-

[1] Opinions of the commissioners not reported.

[2] British Foreign and State Papers, vol. 53, p. 1050.

braces certain principles and rules, deduced, more or less from its various aspects, but as Calvo remarks (preface to fifth edition, q. v):

Il n'existe point de code universel applicable aux questions et aux conflits de toute nature qui surgissent entre les Etats. Cette absence de loi suprême, de règle commune, est la source de nombreuses hésitations parmi les publicistes, de contradictions infinies dans la jurisprudence et la pratique des peuples, de désaccords sans cesse renouvelés dans les relations internationales, qui, n'obéissant point à des principes nettement définis et invariables, s'inspirent quelquefois plutôt de l'arbitraire que de la justice, de la force que de l'action du droit.

The same author remarks how difficult, if not impossible, it is to give a complete definition of international law, among other reasons because its signification changes or is modified according to the advances of civilization, which is what has suggested to Wheaton the following very general formula:

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct, *which reason* deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent. (Boyd's Wheaton, sec. 14, p. 22.)

It is unquestionable that this lack of a universal code common to all nations, and the necessity of deducing the principles and rules of international law from the various sources which constitute their origin, impress upon these principles and rules, as expounded and considered, be it by the states themselves in the relations of their governments; be it by local or international tribunals when they resolve questions of this sort; be it by the publicists in designating and explaining them, converting them into a doctrine; not the character of a written law, which no one has the power to give them, but necessarily the exclusive character of technical or scientific conclusions, rationally founded, capable of more or less contradiction, according to the force and clearness of their premises; more or less firm according as they are immediately or mediately deduced, and more or less general, more or less subject to modifications and exceptions, according to the subject-matter to which they refer.

This precise explanation having been made, it may be admitted as an established truth, that after a much debated discussion concerning the responsibility of states for damages which revolutionists cause to the persons and properties of foreigners residing in their territory, a negative solution has predominated and been accepted among the rules and principles, to which the umpire has heretofore alluded, that no right to demand indemnity for such damages exists; a principle, on the other hand, to which there have been pointed out various — we may say, numerous — exceptions which it is not necessary to state for the purposes of this decision.

Now, then, does this principle govern the case of María García de Padrón in such an absolute manner that it should be decided upon this point exclusively?

The protocol of April 2 of the current year, signed at Washington by the plenipotentiaries of Spain and Venezuela, and to which this Commission owes its origin, provides that *each claim* be examined and decided, and textually orders that —

The Commissioners, or in case of their disagreement, the umpire, shall decide all claims *upon a basis of absolute equity* without regard to objections of a *technical nature* or the provisions of local legislation.

There have, therefore, been imposed on the said commissioners and on the umpire the three following rules of an imperative nature, and from which, in order not to place themselves in conflict with the instrument which gives them

jurisdiction and confers on them their only powers, it is not permissible for them to depart:

First. Each claim must be specially and separately examined, without it being permissible to pronounce an abstract resolution conceived in general terms by which it might be supposed that, overlooking said consideration and decision of each case, different claims would simultaneously be decided. Therefore, in order to comply with the protocol, in each case the proper attention shall be paid to the general and special considerations which may be fitting and proper; and if it be necessary, the influence which is owed to the former shall be accorded them.

Second. In exercise of the right which nations naturally enjoy when they agree to create tribunals of arbitration, to establish the principles which must guide them in the decision of the disputed points which they submit to them, it has been made binding with respect to the members of this Commission *that they must found their decision upon a basis of absolute equity*.

Third. In order to dispel the least shadow of a doubt with respect to the scope of the preceding rule, and letting it be known that this Commission was created as a tribunal of equity only, it was provided, finally, that objections of a technical nature or provisions of local legislation should not govern or be taken into account as against the spirit and rule that their decisions should be reached in that sense.

The last of these rules would suffice to make it clear that the principle of the irresponsibility of states for damages which insurgents cause is incapable, unless we attribute to it an absolute force, to determine by itself the decision in the case of María García de Padrón.

This principle, like any other similar one, does not support any except a technical objection, and those of this nature are precluded by the protocol, in so far as they are opposed to the criterion of equity which must be the basis of their decisions.

Moreover, conceding to said principle any abstract force or merit desired, there is still room to inquire what the concrete force or merits that it has are in a case which must be decided by this tribunal of absolute equity.

In tribunals of internal arbitration the principle of equity holds a most important place, and it is to be borne in mind and applied by all of them, whether rules for pronouncing their judgments have been conventionally fixed, since in the many difficulties which may arise they shall resort to the principles of law moderated by equity to decide them, or if no rules have been prescribed for them.

Because with the soundest reason they can appeal to equity when the *compromis* is mute, says Mérignhac, concerning the principles on which they should rely, or finally if absolute liberty has been allowed them, since, in that case, as the author cited repeats, no rule restrains them in principle and they are free to render judgment in accordance with their personal conscience. (Mérignhac, l'Arbitrage International, No. 305 et seq., p. 297.)

To the *provisions* which leave the arbitrator at entire liberty, as the same author continues further on, belong those which permit him " to decide according to justice and equity." This vague expression operates in effect so as to leave him at absolute liberty.

The creation of tribunals of equity in which the arbitrator decides according to his conscience has been frequently put into practice; and it has been considered so regular and convenient that the Institute of International Law included in it the rules of August, 1875, which it proposed and recommended for States when they sought to negotiate agreements for arbitration. Article 18 runs as follows:

Le tribunal arbitral juge selon les principes du droit international, à moins que le compromis ne lui impose des règles différentes ou ne remettre la décision à la libre appréciation des arbitres. (Revue de Droit International, 1875, p. 281.)

For this reason, referring to the varied nature of tribunals of international arbitration, M. Lafayette, cited by Calvo and Tchernoff, says:

Quand c'est d'après leur conscience, les sentiments d'équité ou les principes de droit naturel, que les arbitres doivent rendre leur sentence, ils constituent un *tribunal d'équité;* si, au contraire, c'est d'après les principes de droit formulés dans la convention ou d'après les principes déjà établis du droit international, l'on a un tribunal de justice. Les uns comme les autres forment de véritables corporations judiciaires et, en cette qualité, jouissent d'une entière indépendence vis-à-vis des parties dont ils tiennent leurs pouvoirs. (Cited by Calvo, Inter. Law, Vol. III, p. 464, Note I. Tchernoff, Protection des Nationaux, p. 378.)

And this character of tribunals of equity is especially adapted to mixed commissions, which are almost always constituted nowadays to decide cases of protection, since amongst other considerations proper for an intimate appreciation of justice, in which that character places them, is found the one that enables them to take into consideration those claims which the States refuse to recognize as not touching the principle nor the pecuniary debt, confusing the two things in the same opposition; an opposition which becomes so profound, as one of the authors just cited remarks:

que l'Etat y persiste même quand il se trouve en face d'un individu dont la situation mérite incontestablement une attention particulière. (Tchernoff, Protection des Nationaux, p. 382.)

Pursuing the logical order of ideas concerning the nature of mixed commissions the Institute of International Law agreed at its session of September, 1900, after having adopted a resolution concerning the responsibility of States on account of damages caused to foreigners during an insurrection or civil war, to unite to it this recommendation: [1]

Recourse to international commissions of investigation and to international tribunals is in general recommended for all differences that may arise because of damages suffered by foreigners in the course of a revolt, an insurrection, or a civil war. (Annuaire de l'Institut de Droit International, Vol. XVIII, pp. 254, et seq.) [2]

In discussing this recommendation thus definitely drafted at the request of Mr. Lyon Caen, and as appears in the record of the 10th of September, attention was called to the fact that damages suffered by foreigners could be of two kinds, " those caused by the authorities and those caused by individuals." It was then further suggested that if the text did not comprise the second class it would be better to say " injuries caused *in the suppression* and not *during the course* of a revolt." The person who drew up the project and he who made the foregoing observation both expressly declared that the object was to exclude indemnities for damages caused by individuals; and after the declaration of the ideas of Mr. Descamps, asserting that while the institute was considering the proceeding and the conclusion it did not intend to exclude responsibility for damages which individuals might cause; and the explanations which the writer, Mr. Brusa, repeated, stating that by making no distinction the Commission had intended to include damages caused by individuals as well as the others, the proposal, such as it was and is drafted, was adopted and approved.

The institute relied evidently upon the principle that the tribunals to which they would be referred would be tribunals of equity.

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[1] See *supra*, p. 561 for fuller extract.

[2] For translation of all of these recommendations, see p. 561.

In a case which occurred years ago, that is in 1892, and as to which the United States of Venezuela agreed with the United States of America to constitute a mixed commission of arbitration, to which they accorded the attributes of justice and equity, so that in accordance with these and the principles of international law it might decide the claim of the Venezuelan Steam Transportation Company; and Mr. Seijas, representative of the first of these powers, being aware of what the inclusion of equity among the considerations of the judgment signified, proposed, at the conference of July 1 of the year mentioned, that " the word ' equity ' be stricken out, not only because of the conflict that existed between the doctrines of justice and equity, *but also to prevent the commissioners from believing themselves arbiters and not arbitrators in law, which is what Venezuela intended to name.*"

The American plenipotentiary did not consent to the change, and replied " that, in his opinion, the use of the word ' equity ' would result more favorably than adversely to Venezuela, because it would *enable the commissioners* to better take into consideration all the circumstances of the case." Thus the protocol was drawn, and accepted as such, the concept of *equity* admitted as a rule to decide in a mixed commission, it permits it to do so without conforming to the law, which is what essentially characterizes arbiters.

And concerning this difference, between what the law does not exact and equity may nevertheless allow, there exists an example most important in its scope, which is the reparation by the State, because of the internal law, of damages caused by revolts or civil wars.

This example, which has been followed by several nations, emanates from France, where, in consequence of the revolution of 1848, the decree of December 24, 1851, was made, which in the pertinent portion reads as follows (Calvo 5th ed., Vol. III, p. 152, note):

> Considering that according to the terms of the law of the tenth of Vendemaire, year 4 (October 1, 1797), communities are responsible for wrongs committed by violence in insurrections, as also for the damages and actions to which they may give rise; * * *
>
> * * * Considering that even if the State *is not subject to any legal obligation*, it is in conformity to the rules of *equity* and of sound politics to repair unmerited misfortunes and obliterate, as far as may be possible, the sad recollections of our civil discords;
>
> It is decreed:
>
> ARTICLE I. That there be opened in the ministry of the interior a credit * * * to pay the indemnities for damages occasioned by the revolution.

In that case, as well as in the others of reparation after the war with Germany the insurrection, and commune, said equitable reparations were affected without distinction as to damages inflicted by the authorities or the insurgents, and as well to nationals as to foreigners.

The foregoing is more than sufficient to show what are the points and attributes of international tribunals of equity, of which sort this Mixed Commission is, created by a protocol that does honor to the powers that signed it, in doing which they not only gave evidence of a lofty spirit, cutting off recourse from both to any principle or rule which smothers the inspirations of an upright and lofty conscience, but also of the most ardent desire that they show practically to foster the Institution of International Arbitration, conceding to it a broadness of scope that increases its efficacy and augments the number of cases intrusted to its cognizance and decision.

The umpire, therefore, believes it to be incontrovertible that classifying, as may be desired, the general principle of irresponsibility of States for damages which insurgents cause — that is to say, as a doctrine which gives rise to tech-

nical arguments, or as an inflexible rule of law — it can not govern in a positive way the case of María García de Padrón; and it being far from obligatory to decide it in accordance with the terms thereof, the positive duty of this Commission consists in deciding without taking into account a necessity which does not exist, resting upon a basis of absolute equity.

The preceding conclusion is in no way weakened by the circumstance that in the convention made in 1861 [1] between Spain and Venezuela relative to Spanish claims, it was agreed that subjects of that nationality injured by revolutions were obliged to prove the negligence of the lawful authorities, and that this rule should be unalterable in the pending negotiations and those that might arise in the future, since if it be true that it was so agreed at that time it is also true that both powers retained the natural and absolute power to agree upon a different course whenever they might desire, and as they have in effect done by means of their above-cited protocol of the 2d of April of this year, which they negotiated for the settlement of the other claims which in their *entirety* must be decided *equitably*.

" The commissioners," says the protocol, " or, in case of their disagreement, the umpire, *shall decide all claims upon a basis of absolute equity*." Thus it is that the application of the rule of 1871 as a requisite in order that the claims, for the decision of which this Commission was established, might prevail and be decided favorably, is clearly incompatible with the principle of equity exclusively and imperatively set down for its judgments.

Having arrived at this point the occasion also appears to have arisen for the umpire, in accordance with the foregoing principles which he has established, to pronounce the decision which he believes equitable and fitting concerning the claim; but, as he understands that it was the intention of the commissioners to consider the case anew, if the umpire did not disallow it because of its revolutionary origin; and it is to be desired that in effect they may do so since they will once more evince their intelligence and impartiality, of which they have given so many proofs, the undersigned decides:

That this record return to the examination of the commissioners so that they may be pleased to decide the claim presented on behalf of María García de Padrón, considering that the principle of irresponsibility of States for damages which insurgents cause does not govern it, since it is not submitted for judgment on any other basis than that of absolute equity.

LOZANO CASE

Under the terms of the protocol the Commission is bound to receive and consider all documents submitted by either government.[2]

GUTIERREZ-OTERO, *Umpire:*

In the record of the claim made in the name of the Spanish subject, José Lozano, demanding the payment of 15,000 bolivars as indemnity for the damages which the revolutionary forces inflicted upon him in his mercantile establishment, situated in the city of Barquisimeto, on the 1st of October, 1899, there has arisen a preliminary question concerning the admissibility of the proof produced with the claim, since, while the Commissioner of Venezuela maintains that it is inadmissible because the evidence presented was given before the vice-consul of Spain, and because, therefore, the evidence given for

[1] British and Foreign State Papers, vol. 53, p. 1050.

[2] See Vol. IX of these Reports, p. 147, and *supra*, p. 438 and note, and *supra*, p. 596.

him was of no value, the Spanish Commissioner is of the opinion that the declarations made before the consular agents of his nation ought to be admitted, since many times it is the only means of which Spanish subjects have been able to avail themselves to prove the facts upon which they base their claims. In an exposition of his belief said commissioner stated:

That the consuls of his country were authorized to receive the declarations of witnesses; that said faculty is in general inherent in all consuls, and that, at all events, it is to be borne in mind that this Mixed Commission is not a tribunal of justice, but that it ought to take into consideration all proofs that may be presented, giving to them the weight which they ought to have in accordance with equity, as prescribed in the protocol.

This point concerning the inadmissibility of the proof was submitted to the decision of the umpire, who, in rendering such opinion, believes that the express clause of said protocol, signed in Washington, April 2, of this year, by the representatives of Spain and Venezuela, are to be applied, in which, rules that must be observed are prescribed for this Commission, which can not assume powers which the protocol denies it, nor refrain from fulfilling the obligations which it imposes upon it.

The second article of the protocol cited, provides:

The Commissioners, or umpire, as the case may be, shall *investigate and decide* said claims upon such evidence or information only as shall be furnished by or on behalf of the respective governments. They shall be bound *to receive and consider all documents or written statements which may be presented by or on behalf of the respective governments in support of, or in answer to, any claim.*

And since the documents or statements, which tend to support the claim here considered, have been presented in writing and by the legation of Spain in the name of the Government, the Commission is bound to examine and consider them in order to take them into consideration in pronouncing the judgment which it may deem justified by the merits.

Nevertheless, the question of admissibility of the proof presented shall not prejudge its efficacy, which shall be appreciated by the commissioners or the umpire, as the case may be, as they may determine to proceed in accordance with absolute equity without regard to objections of a technical nature, or provisions of a local legislature, as prescribed as a binding rule.

Therefore the umpire decides that the proofs submitted with the claim made in the name of the Spanish subject, José Lozano, is admissible, and that the claim should be returned for the investigation of the commissioners, in order that they may decide it, examining and taking into consideration said proofs.

MENA CASE

It is an accepted principle of international law that states are not responsible for damages and injuries caused by persons in revolt against the constituted authorities; but this principle under the terms of the protocol can not be invoked by Venezuela.[1]

GUTIERREZ-OTERO, *Umpire.*

In record No. 5, presented in the claim of the Spanish subject Domingo Gonzalez Mena, in favor of whom the payment is claimed of 34,744 bolivars

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[1] See Aroa mines case, Vol. IX of these Reports, p. 402; see also *supra* cases of Kummerow, p. 370; Sambiaggio, p. 499; J. N. Henriquez, p. 713; Salas, p. 720; Guastini, p. 561; Padrón, p. 741.

as the value of 670 head of horses and mules situated upon the ranches belonging to him, the former having been destroyed by the belligerent forces in the war beginning in May, 1899, and the latter having been entirely lost during the same time, there arose a question concerning which the commissioners did not agree, and which, as a preliminary question, has been submitted to the umpire.

The Commissioner of Venezuela, referring to the circumstances, says that there is no exact statement concerning which force said troops belonged to, nor the name of the leader who commands them; and that there is question of the losses suffered because of war; he maintains that the State is only responsible for acts of its authorities, and also that strangers ought to suffer the consequences of wars which the country undergoes, and should not claim damages on this account, because they are produced by force majeure, which in no case can render said State responsible.

From this he deduces that Venezuela is not responsible for the damages which Gonzalez Mena says he suffered by reason of the war of 1899.

The Commissioner of Spain is of opinion that the interests of the claimant have not received the protection to which the treaties in force give them a right, and he maintains that said responsibility does exist.

The question set down in this way by the commissioners, it appears in the record that:

> Not being in accord upon this point, its resolution shall pass to the decision of the umpire.

In reality the two following principles are invoked by one of the commissioners, in order that they may be applied and govern the case:

Primarily, the State is responsible only for the acts done by its agents, and not for damages which insurgents cause to foreigners, and therefore Gonzalez Mena has no right, from this point of view, to claim damages which the revolutionary forces may have caused him:

In general, the State is not responsible for damages caused as a consequence of war because damages of this sort are considered as caused by force majeure, which exempts it from liability.

Do these principles in fact govern the case of Gonzalez Mena in such an absolute way, that, by reason of both, it is not permissible to take into account any other consideration in order to decide it and make it necessary to reject it summarily?

With respect to the first of these two rules which have been cited, the umpire has, upon another occasion,[1] already decided that although after a long discussion the theory has undoubtedly prevailed concerning the irresponsibility of states for damages which insurgents cause to the persons or property of foreigners living in their territory, and such a principle is now considered as a rule properly called one of international law, it does not govern a tribunal of the nature of this Mixed Commission, which, according to the protocol that created it, should, on the contrary, necessarily base its judgments upon absolute equity and not take into consideration objections of a technical nature which may be raised before it.

This character of a tribunal of equity, which is considered sufficient for the submission to arbitration of cases of protection, has been recognized as giving absolute liberty for a decision which is not against good conscience inspired by a true estimation of absolute justice, and which permits, finally, taking into consideration of all the circumstances of the case, conceding equitably what is

[1] *Supra*, p. 741.

not a matter of obligation and can not be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard to law.

The umpire has shown that the protocol of Washington, of April 2 of this year, by its own terms, and in accordance with the most reliable opinions which in this particular case can be produced, among them another protocol made in 1890 by the United States of Venezuela and the United States of America, places this Mixed Commission in that position.

Concerning the second principle — and even with more reason — substantially the same must be said, since if this doctrine to a certain degree did absolutely exist, that the acts of war do not give rise to the responsibility which obliges states to make arbitration, it would be modified by the theory that the distinction between these cases should be made as to those which, properly speaking, are defensible, and those which are not, therefore, of the nature of a fatal necessity.

Upon this point Fiore, cited by Tchernoff, says:

S'il est incontestable, dit un auteur, que la guerre a le caractère de nécessité fatale et de force majeure, tout ce qu'un gouvernement peut faire et entreprendre pour satisfaire aux justes exigences de la défense, en prévision d'une guerre, ou pendant la guerre, n'a pas en lui-même le caractère de nécessité fatale. La guerre imminente ou déclarée peut, sans doute, nécessiter certains faits contre la propriété privée, et autoriser les détériorations de cette propriété dans l'intérêt public de la défense militaire: mais ce que l'autorité publique peut faire dans un but stratégique revêt toujours le caractère de l'entreprise légitime dans un intérêt public, et non toujours celui de nécessité fatale, caractère qui devrait être réservé uniquement aux faits accomplis durant l'action et rendus nécessaires pour résister à l'ennemi qui s'avance pour commencer la lutte. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, p. 309, citing Fiore, France Judiciaire, X. 1, p. 193.)

Tchernoff contends, that the council of state in France established the distinction with respect to the demolition of real estate in the zone of the defense of Paris from between those which constituted a measure of this nature until the disaster of Sedan, and those after this event considering the latter as an act of war, which did not give, as the first did, a right to indemnity.

That the French court of cassation has decided that the damages caused to private property by the works completed, even in case of necessity for the defense of a stronghold in a state of war, give a right to indemnity in all cases where they do not constitute a case of force majeure;

And finally that an author, cited in La France Judiciaire, expresses himself as follows:

Si, au lieu de s'en tenir à la forme, on va au fond des choses, qu'il s'agisse des dommages résultant de travaux de défense antérieurs à l'action, ou des dommages résultant d'opérations militaires d'attaque ou de défense durant l'action, il y a toujours, dans un cas comme dans l'autre, des citoyens qui souffrent un dommage dans l'intérêt collectif de la patrie.

Dès lors, la collectivité des citoyens, ou le gouvernement qui la représente, doit indemniser intégralement les particuliers des pertes qu'ils ont subies dans l'intérêt commun, soit avant, soit après l'action. Du reste, le système contraire est tellement injuste, que ses partisans n'osent pas le pousser jusqu'à ses dernières conséquences logiques, mais le mitigent en disant que l'équité doit conseiller à l'Etat, même lorsqu'il s'agit des dommages causés durant l'action, à faire la charité aux victimes de la défense nationale. (Tchernoff, Protection des Nationaux Résidant à l'Etranger, pp. 311, 312; citing a note of the translator of La France Judiciaire, X, 1, p. 192.)

Thus it is that although without taking into consideration that the case of Gonzalez Mena is submitted to a mixed commission, which is obliged to decide according to equity, the question of indemnity for acts of war appears, moreover, to be a question recommended in general for its decision to the same criterion

of equity, but these considerations which fix the necessity of deciding this claim upon its merits in no way prejudges the facts nor entail an opinion concerning the nature of those facts which have been the subject of the proof produced.

It is for this reason that the umpire in declaring that the rules invoked in an absolute sense with respect to damages caused by the revolution or by acts of war do not govern the case proposed, necessitating its disallowance decides expressly and exclusively:

That this record is to be returned to the commissioners in order that they may decide the claim presented on behalf of the Spanish subject Gonzalez Mena, bearing in mind that it is not subjected in this respect to any other criterion than that of absolute equity.

FRANQUI CASE

In the absence of an express provision to the contrary, the Commission has the right to adopt whatever means it determines upon to obtain evidence.

A witness can not discredit by subsequent retraction statements made by him as a governmental authority, especially where his statements have been corroborated at the time they were first made.

GUTIERREZ-OTERO, *Umpire:*

In record No. 70 relative to the claim made on behalf of the Spanish subject Alonzo Franqui a difference of opinion has arisen, and it is submitted to the umpire for his decision because upon the Venezuelan Commissioner's demand that Gen. Maurice Aguilar, whose testimony has been presented in support of said claim, should be heard by the whole Commission, the Spanish Commissioner was of opinion that the protocol, in its second article, expressly limits the persons whom said Commission ought to hear, and therefore the declaration of Gen. Maurice Aguilar is not to be admitted; and the undersigned takes into consideration and decides this point in the following manner:

First. That the protocol, signed in Washington on April 2 of this year by the representatives of Spain and Venezuela for the establishment of this Mixed Commission, does not limit the means of proof which may be made use of before it, and only demands in the first part of the second article that the proof shall be rendered by the respective Government or in their name; and in the second part of the same article that the Commission shall receive and consider all documents or written statements which may be presented by the Governments in support of or in answer to any claim.

Second. That in the absence of an express prohibition concerning the admissibility of determining means of proof, it is the unanimous conviction of the most conspicuous writers upon international law, which Mérignhac expresses in these terms:

* * * Alors le tribunal arbitral demeurera libre d'employer, pour s'éclairer, tous les genres de preuves qu'il croira nécessaires; et il ne sera lié, à cet égard, par aucune des restrictions qu'on rencontre dans les lois positives, spécialement quant à l'administration de la preuve testimoniale. (Mérignhac, Traité de l'Arbitrage International, No. 272, p. 269.)

The Institute of International Law, in article 15 of the Rules for Arbitration between Nations, proposes substantially the same thing.[1]

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[1] Revue de Droit International, 1875, vol. 7, p. 280. (See *supra*, p. 744.)

Third. That although supposing that the text of the protocol of Washington was doubtful, and demanded to be interpreted for want of clearness, the interpretation ought to be made in a broad sense because the general principles of legislation and jurisprudence provide a broad scope in this matter of proof; and because it is clearly a general rule that the oppressive [in the protocol] ought to be restricted and what allows freedom of action extended in interpreting it; and finally because this broadness of interpretation should be more binding when there is question, as with this Commission, exclusively of a tribunal of equity.

Fourth. That the duty imposed by said protocol in the second part of Article II to hear oral or written arguments which the agent of each nation may make concerning each claim does not mean more than that they shall not be prevented from being heard, and the acknowledgment that it is incumbent upon the agents to argue for their respective Governments; but by no means does it include, according to the concept of the umpire, the other prohibition to receive specific proofs, and much less to hear those who naturally are to take part in them.

Fifth. That considering the broadness of the powers of the Commission and its character as a tribunal of absolute equity, there is no reason for not considering included in them the right to accede to the request of one of the arbitrators, who spontaneously for his own information and that of his colleagues believes it opportune and proper that there be heard by all, and examined if it please them, a person who in his public, civil, and military character has already given testimony in the matter under consideration; and this proposition, which is not ex parte, since it is not the request of any agent in the name of his Government and merits attention because of the impartiality of its origin and the benefit of its purpose, is to be counted in order to be accepted, with the reasons heretofore set forth, and perhaps even with other superior ones.

Therefore the umpire decides:

That Gen. Maurice Aguilar is to be heard by this Commission in accordance with the request of the Commissioner of Venezuela for the purposes which have already been expressed.

After this opinion was delivered, General Aguilar was called as a witness before the Commission, and testified that in the official letter given by him to the claimant, setting forth the latter's loss, he had overestimated the value of the property.

The Commissioners for Spain and Venezuela, being then unable to agree as to the decision of the case, it was passed to the umpire for his judgment, and after reciting in detail the facts and evidence of the case, he decided in the following manner with respect to the weight of the oral testimony of General Aguilar:

The umpire considers:

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Fourth. That with respect to the valuation of 250,000 bolivars, the umpire is of opinion that it ought to be accepted, because if it is true that General Aguilar in fact has retracted his statement concerning it, and testified before this Commission as to his want of knowledge, and the extraordinary inaccuracy with which said valuation was conducted, he can not succeed in discrediting with his later statement, given now, the official act of that time, when exercising the duties of public authority, namely, as civil and military superior of that locality, he estimated the loss caused during a battle in which he took part as one of the officers engaged.

His statement of that time is corroborated by the testimony of the bookkeeper, who testified relative to the character of the losses suffered; and by the declaration of Franqui, who, although the person injured, and the interested party, enjoyed the

reputation of unblemished integrity according to the declaration of witnesses, who affirm that the conditions of the houses of said Franqui could have suffered damages to the amount indicated, and in general by the nature of the event capable, no doubt, of producing the loss of whatever was situated in the place where such a dreadful disaster occurred; besides, it is to be remembered that, not only before this Commission, General Aguilar expressly said that before answering he had at various times thought what he was asked; but six months after having given his answer in writing and made the valuation aforesaid, he corroborated them judicially under oath, stating that their contents were true. He has also testified before this Commission that the reputation for honesty and integrity of Franqui was unassailable and generally known. Thus it is that a latent sense of justice indicates that the first testimony of General Aguilar is entirely credible.

After making various deductions on other grounds, the umpire awards the sum of 191,000 bolivars.

CORCUERA CASE

Where the Government of Venezuela has admitted and agreed to pay a debt due a Spanish subject for services, such debt becomes a portion of the national debt of Venezuela, and the obligation will not be extinguished by a clause of a treaty between Spain and Venezuela of a later date canceling all pending Spanish claims.

GUTIERREZ-OTERO, *Umpire:*

In record No. 120, which contains the claim of the Spanish subject Gen. Leonardo Corcuera, in favor of whom the payment of 2,201.96 bolivars is demanded, in accordance with an order recognizing and ordering him paid this debt by the minister of war, issued on February 18, 1898, a disagreement between the commissioners has arisen, and the case has been referred to the decision of the umpire.

The claimant presents the order referred to, and, moreover, a confidential note of the minister of foreign relations dated May 24, 1898, in which it is announced to the Spanish minister that the President of the Republic, lamenting that immediate payment of the order can not be made, has decided to do it in monthly installments of 500 bolivars, which would begin to be paid in the following June. Payment, however, has not been made in any way, and for that reason Corcuera has made a claim before this Commission.

The Commissioner of Venezuela is of opinion that the claim can not be admitted, and that no jurisdiction over it can be taken, because the claim is prior in date to February 25, 1898, when, in accordance with the convention of June 21 following, all Spanish claims then pending were canceled.

The Spanish Commissioner holds that Corcuera has a right to enforce his credit.

The umpire considers:

1. That with respect to the existence and legitimacy of the amount of the debt there is no doubt, because the claimant possesses an official document of the minister of war which acknowledges and orders this debt of the Government of Venezuela to be paid, the origin of which, moreover, is explained in detail, which shows that it arose because of military service furnished, which Corcuera performed by order of the minister of that department.

2. That this recognition and order were of February 18, 1898, and consequently constituted the debt from then on as a portion of the public debt of Venezuela and an asset which had become the property of Corcuera; it is not comprised among the credits canceled according to agreement of June 21 of the same year, because said credits were only the pending claimants, which

were ordered to be paid by a stipulated sum. This debt being of such a nature, it was by no means included among pending reclamations.

3. That this correct understanding of the agreement of June 21, 1898, is set forth in the text thereof, because it appears therein that for the renunciation on the part of Spain to the recovery and payment of another credit existing and recognized, as was that of the installments of the Spanish debt which were not recovered during eleven months, running from May, 1892, to April, 1893, an express stipulation was made, and the cancellation of the other pending reclamations until February 25 was not sufficient to include it.

With respect to the debt due Corcuera, no renunciation existed, as it was indispensable in order that it should be excluded from his property.

4. Besides, on May 18 it was already known that pending claims would be canceled, because it was thus agreed in the convention of December 20, 1897, and it was also announced in the judgment of February 25 following, rendered by the commissioners charged with the settlement of said claims, both of which documents served as premises for the agreement of June 21, which did no more than refer to such acts; and, notwithstanding this undeniable knowledge of the facts, on said 18th day of May the Government agreed, and so communicated to the Spanish legation, that it would pay the debt of Corcuera by monthly installments of 500 bolivars.

Because of all the foregoing, and the umpire also making it known that, although the claimant rendered military service to Venezuela, he did so with the permission of his Government, and therefore preserved his nationality, decides that the claim of the Spanish subject Leonardo Corcuera falls within the jurisdiction of this Commission and must be allowed for the sum of 2,201.96 bolivars, and that, therefore, the Government of the United States of Venezuela should pay a like sum to His Majesty the King of Spain for the services of this subject.

SANCHEZ CASE

Where the evidence produced in support of a claim is too vague to enable the Commission to determine the amount of the claim, said claim will be dismissed.[1]

GUTIERREZ-OTERO, *Umpire:*

In record No. 74, which comprises the claim of the Spanish subject J. Manuel León Sanchez, in favor of whom an indemnity of 50,000 bolivars is demanded for material damages which he says were caused by preventing him from continuing a periodical publication, legitimately established, a disagreement has arisen between the commissioners, and the case has been submitted to the umpire for his decision.

The claimant says:

That his said periodical leaflet which was called *Movimiento Marítimo y Comercial y Noticias Universales* was established by permission of the government of the Federal District granted on the 18th of December, 1902, and produced for him a profit from the start so encouraging that he was able thereby to satisfy all his obligations and outlays of expense, and to realize a monthly return of from 1,700 to 1,800 bolivars.

That upon the 15th of February following there was verbally announced to him by agents of the police an order, first from the prefectura and afterwards from the government of the district itself, that this publication should be suspended.

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[1] See also *supra* De Zeo case, p. 526.

That in vain he sought, by all the means in his power, for the revocation of the order; that he did not procure the aid of the lawyers who might defend his rights before the tribunals and help him in a claim for damages which he might wish to bring.

That in view of these circumstances, and suffering the inevitable execution of an order which was not based upon a true cause of complaint, which had been made without right, which was not even couched in legal form, he found himself obliged to realize upon all his business in Venezuela by an inopportune sale of his printing establishment, and to emigrate to another country to seek support for his family.

To the foregoing statement of facts, and to support it, León Sanchez annexed the original permission to publish his leaflet; a letter from the manager of the French cable, which certified that he had never altered any translation or notice which were received by said manager; copies of various private publications, which were made for the purpose of procuring the withdrawal of the order of suspension; copies of various periodicals in which the notice of this order was published, and the cause attributed for it, which was the inaccuracy of said translation; two letters of persons who assert that León Sanchez was the manager of two newspapers; that later he was the owner of the *Movimiento Marítimo*; that this was suspended in the manner stated; that Sanchez endeavored to procure the revocation, devoting himself to the steps before mentioned; that he did not seek redress before the tribunals, because everybody considered it useless; and that there were printed and distributed from 300 to 350 copies of each one of the editions of the *Movimiento Marítimo y Comercial y Noticias Universales*.

Such are the complaints and proofs exactly and minutely set forth.

The Venezuelan Commissioner is of the opinion that León Sanchez has no right to demand any indemnity for the suspension to which there is reference, and he cites in support of his opinion the decree issued on May 10, 1902, by which the President of the Republic suspended, among other guarantees or constitutional rights, that of free expression of thought by word of mouth or by means of the press.

The Spanish Commissioner maintained that where there is question of an enterprise legally established with previous permission of the Government of Venezuela the latter is responsible for the damages caused claimant.

The umpire does not take up this question of responsibility, because, in the supposition that it might be determined abstractly or in principle against Venezuela, it would not be possible to fix these terms concretely in order to make it effective, because the claimant has not proved even one of the facts necessary to estimate and determine any indemnity.

In order that this want of evidence might clearly appear, the undersigned made the detailed enumeration of the proofs presented, which do not relate to the value of the publication, nor to the expenses incurred, nor the income, nor even to the profits and possibilities of its being maintained, nor upon the necessity which the facts imposed on León Sanchez of selling his printing establishment and absenting himself from the Republic, nor upon the value of this establishment, nor upon the price for which it was necessary to sell it, nor in a word, upon anything that might justify the amount of property lost or injured.

Such an extreme in this respect was reached that not even when the private testimony of two persons was asked upon the fact of there having been published and distributed from 300 to 350 copies of each one of the editions of *Movimiento Marítimo* was there any proof as to how many of these editions there were, if they ceased to be published any day, and what expenses and profits they

produced, nor whether these later circumstances refer to each edition, each day, or each month of the two months which the publication approximately lasted In no case, therefore, could the umpire enter into an equitable appreciation of the facts which are not alleged and proven, nor much less invent them, in the want of all proofs produced by the interested party.

These reasons suffice to render it unnecessary to examine and resolve other questions, and make it necessary to decide, as the umpire does decide:

That there is no reason for granting (because of the reasons alleged in this record) any indemnity in favor of the Spanish subject, J. Manuel León Sanchez.

BETANCOURT CASE

In the absence of an express mention of a liquidated and acknowledged debt due from the Government of Venezuela to a Spanish subject in a stipulation of a treaty cancelling all pending Spanish claims, such obligation will not be released.[1]

For the proper interpretation of a treaty all the circumstances antecedent to its execution may be examined by the Commission.

GUTIERREZ-OTERO, *Umpire:* [2]

In record No. 71, which comprises the claim of the Spanish subject Federico Betancourt, in favor of whom the payment of 43,300 bolivars is demanded on account of the formation and management of an expedition of immigrants from the Canary Islands to the port of La Guaira in the year 1892, and the damages and injuries which he alleges to have suffered because of the failure of prompt payment, the commissioners have not agreed, and the case has been submitted to the decision of the umpire.

The claimant shows:

That in February, 1892, he brought into Venezuela, through the port of La Guaira, an immigration from the Canary Islands comprised of 389 persons, whom he brought over in the Spanish bark *La Fama*, in accordance with a contract which he had entered into with the government of the Republic, and that although the immigrants were carefully chosen and the inspection of them which the officers officially named for this purpose made of them resulted satisfactorily, not only at the point of sailing, but also at the place of arrival — that is to say, in the Canary Islands and in La Guaira — nevertheless, he estimated that the debt which was acknowledged for the passage should be fixed at the sum aforesaid, and not at the larger sum which the law of the subject matter fixed and that he believed that he had merited, in all justice, on account of the proper fulfillment which he made of the contract entered into by him.

He further shows that, notwithstanding the time elapsed since the debt was liquidated and fixed and the necessary steps which he has taken administratively in order that he might be paid it, it still remains unsettled, and thereby he has been caused grave injuries, on account of which he demands to be indemnified, besides having the principal debt paid him.

To determine these damages he enters into an explanation of various operations, which he could have undertaken with the value of the debt, if he had received it, and states that he is willing to consider it entirely satisfied with the result of any one of them.

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[1] See Corcuera case, *supra*, p. 753.

[2] For a French translation see Descamps-Renault, *Recueil international des traités du XX*eme *siècle 1903*, p. 893.

To prove his debt he put in evidence various documents, and among them a certified copy which, by order of the minister of fomento, on the 16th of January of this year, was issued to him, and also of another certification given on September 24, 1892, by the director of statistics and immigration, certifying that in the archives of the office there existed a record, properly substantiated, in which it appears that Betancourt brought the immigration aforesaid, composed of 389 persons, as appears in the list sent to the minister by the subordinate commission of immigration of La Guaira, in accordance with the law in the premises, and therefore the Government owed said Mr. Betancourt the sum of 43,320 bolivars according to the accounting which his commission found in said record.

In order to show what is the interest which is customarily collected here in negotiations of loans, he presents two letters from the banks of Venezuela and Caracas, in which their representatives state that it is 12 per cent per annum.

When the claim was presented to the commissioners, the Venezuelan Commissioner considered that it ought to be disallowed because the diplomatic convention of June 21, 1898, made by the ministers of foreign relations and public credit of Venezuela and the ministers plenipotentiaries of Spain and this Republic canceled it, and consequently it was excluded from the examination of this Commission in accordance with Article I of the protocol of Washington.

The Spanish Commissioner was of opinion that the claimant ought to be allowed the sum which he demanded, because there was question of a contract which he entered into with the Government of Venezuela, the fulfillment of which he had been attempting, and to obtain in an administrative way without being able to accomplish its fulfillment, and that the claim of Betancourt did not form a part of those which were readjusted by said convention.

The umpire considers:

That Article I of the protocol signed at Washington on April 2 of this year places under the jurisdiction and decision of this Commission all claims of Spanish subjects which have not been settled by diplomatic agreement or by arbitration between the two Governments of Spain and Venezuela, and the first thing to be done, therefore, is to investigate with respect to the claim of Betancourt if it was included in the agreement of 1898 and was canceled thereby, as the learned Commissioner of Spain and Venezuela has contended.

That said convention of 1898 acknowledged as a precedent another convention of December, 1897, concluded at a conference, which at that date the minister of hacienda of Venezuela and the plenipotentiary of Spain had, and in the text of which it was expressed that said conference treated all claims still pending made by various Spanish subjects for injuries suffered during the war of 1892, and for other reasons; and that one person was named by the minister of hacienda and another by the legation of Spain, who examined all claims and determined the total sum which the Government of the Republic should pay therefor. They decided thereafter the terms of the payment and it was agreed providing:

That as soon as the bonds of the diplomatic debt which should be issued for the sum which might be determined should have been delivered, the legation of Spain would renounce with full authorization of its Government all other claims of Spaniards against Venezuela up to date, and also any claim that might arise from the suspension of the monthly payments during the duration of the past war.

That in the record of the conference held on June 21, 1898, which resulted in the convention of that date, successively approved by all the executive and legislative powers of Venezuela, it appears:

That an exact transcription was made of the other protocol of 1897, relative to the adjustment of claims pending by Spanish subjects by reason of the war suffered in 1892, and for other reasons, and attention being called that in said protocol it was agreed that the legation of Spain should renounce every other claim of Spanish subjects up to that date; and also every other claim that might have originated on account of the failure of payment of the eleven monthly installments during the duration of last June, 1892;

Wherefore the minister of Spain declared that at no time could there be demanded from the Government of the Republic the payment of said eleven monthly installments.

It likewise provided that the persons named to adjust all the claims and fix the amount that on account of them should be paid, accomplished their mission, and determined the sum which ought to be delivered to the Government of Venezuela for the different cancellation of all pending claims.

Finally the terms of the convention of that date, June 21, 1898, were definitely fixed, the first part of which reads as follows:

> All claims of Spanish subjects up to the date of this judgment, or say February 25, 1898, shall be canceled.

That having considered the inducements which the convention of 1898 had and the definite text which has just been cited, it appears with entire clearness to the judgment of the umpire:

First. That all the claims which were canceled, were all those pending which were intrusted to the determination of the commissioners named for that purpose, and for the payment of which a specified sum was designated;

Second. That in no sense was there made or acceded to any claim which would likewise cancel debts which at that time were liquidated and acknowledged by the Government of Venezuela in favor of Spanish subjects, and which formed, therefore, a part of the public debt.

This proper understanding of the convention is corroborated by these very terms, since it being desired that there should be included also the cancellation or renunciation of another debt already liquidated and acknowledged, as was that of the eleven monthly installments, due on account of the Spanish debt, which were not paid from May, 1892, until April, 1893; with respect to this, particular and express stipulation was made, and it was not considered as included in the cancellation of the pending debts, which were the object of the transaction and the agreement to pay intrusted to the commissioners who were named for these purposes.

In a separate clause the following was agreed in said convention of 1898:

> The legation of Spain declares that at no time may it demand from the Government of the Republic of Venezuela the payment of eleven monthly installments that were owed in 1892-93.

That was the only renunciation contained in the convention, and there were no other debts then existing for the determination and acknowledgment of which the Government of Venezuela might have made, and which also, therefore, belonged to the patrimony and property of the creditors.

That the debt of Federico Betancourt belongs to those of this sort, supposing that an entirely trustworthy certification, because it proceeds from the ministry which has in custody the antecedents of this negotiation, proves the true amount and acknowledgment thereof before the convention of 1898 was made; consequently it was not included in the pending claims which at that time were adjusted and canceled in said year, nor was it the subject of any negotiation which might abstract it from his property.

That from the foregoing it is deduced upon the most secure basis that said credit, now that there is an attempt to collect it because it has not been satisfied, is not in any way excluded from the jurisdiction of this Mixed Commission, and that besides, in accordance with every sentiment of justice it must be declared that it ought to be paid, even if to this end it was necessary to apply equity as far as possible.

That upon this point it must be taken into consideration that although a long time has expired since the liquidation ought to have been made, since even in September of 1892 the debt was ascertained and acknowledged, and that without it the claimant must have experienced damages on account of the refusal to pay, they can not be repaired in any of the ways which he indicates and with respect to which he renders no proof.

Nor at the rate of 12 per cent per annum upon the capital, because, even supposing that he might have maintained a suit to ascertain these damages at this rate of interest, he would not have accomplished his intention.

Equity does no more than allow him for this capital a total and complete indemnity which is almost equivalent to 5 per cent per annum as long as it has been unsatisfied, and that the umpire should fix the sum of 14,295 bolivars and 70 centimos as corresponding exclusively to a period of eleven years exactly.

For the foregoing reasons the umpire decides that the claim of the Spanish subject Federico Betancourt must be allowed for the total sum of 57,615.60 bolivars; and that, therefore, a like sum must be paid by the Government of the United States of Venezuela to His Majesty the King of Spain destined to satisfy said claim.