

# REPORTS OF INTERNATIONAL ARBITRAL AWARDS

## RECUEIL DES SENTENCES ARBITRALES

Commission established under the Convention concluded between the United States of America  
and Colombia on 10 February 1864 for the settlement of claims arising from  
the Panama riot and other claims

**Case of the Pacific Mail Steamship Company v. Colombia (Capitation Tax Case), decision of the  
Umpire, Mr. Frederick W. A. Bruce, dated 8 August 1865**

Commission mixte établie par la Convention conclue le 10 février 1864 entre les États-Unis d'Amérique  
et la Colombie pour le règlement des réclamations découlant de la révolte  
au Panama et autres réclamations

**Affaire concernant Pacific Mail Steamship Company c. Colombia (Capitation Tax Case), décision  
du Surarbitre, M. Frederick W. A. Bruce, datée du 8 août 1865**

8 August 1865

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CLAIMS ARISING FROM THE PANAMA RIOT AND OTHER CLAIMS

COMMISSION MIXTE ÉTABLIE PAR LA CONVENTION CONCLUE  
LE 10 FÉVRIER 1864 ENTRE LES ÉTATS-UNIS D'AMÉRIQUE  
ET LA COLOMBIE POUR LE RÈGLEMENT DES RÉCLAMATIONS  
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RÉCLAMATIONS

**Case of the Pacific Mail Steamship Company v. Colombia  
(Capitation Tax Case), decision of the Umpire,  
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**Affaire concernant Pacific Mail Steamship Company c.  
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Recognition of the principle of exhaustion of local remedies as a pre-condition for the invocation by foreigners of the intervention of their Government to obtain for them indemnity.

Limited consequences of the protest made by a consul on behalf of the party in the absence of denunciation by the consul's Government of the proceedings of the foreign Government as a violation of treaty.

Decision that a breach of treaty has taken place as a pre-condition for the consideration of the claim of the party demanding redress.

Reconnaissance du principe de l'épuisement des voies de recours internes comme condition préalable à l'invocation par des étrangers de l'intervention de leur gouvernement pour l'obtention d'une indemnité en leur faveur.

Conséquences limitées de la protestation émise par un consul au nom d'une partie, en l'absence d'une dénonciation, par le gouvernement du consul, des procédures du gouvernement étranger en tant que violations du traité.

Décision portant sur l'existence d'une violation du traité comme condition préalable à l'examen de la réclamation de la partie demandant réparation.

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\* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 1412.

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The umpire rendered the following decision:

This claim is presented on behalf of the Pacific Mail Steamship Company for a refund of a tax on passengers carried by them between the ports of Panama and San Francisco, which they paid in obedience to a law passed by the provincial chamber of Panama requiring the captains of all vessels embarking or disembarking passengers in Panama to pay two dollars for each one of said passengers. The total sum thus paid is stated to amount to \$121,000 during the years 1850-1-2-3. But of this amount a large portion was recovered by the company from the passengers.

It is to be observed that the law complained of was not passed by the national legislature, but by the provincial chamber of Panama. Whether the chamber exceeded its powers according to the constitution in passing that law or not is a purely municipal question, which could only be decided by the tribunals of sovereign authority of New Granada.

No steps, however, appear to have been taken to test the validity of the law. If it be assumed that the supreme court had power under the former constitution of New Granada to annul the law as unconstitutional, the absence of any proceeding before that court would constitute a serious objection to this claim. For it is an admitted principle of international law, that parties who are aggrieved by the unlawful acts of a public authority are bound to exhaust every legal means given by the constitution of the country to have the illegality declared and the acts overruled. But if they, being foreigners and entitled under treaty to appeal to the courts of law, neglect to do so, they are not entitled to invoke the intervention of their government to obtain for them indemnity. A protest, whether made by the parties themselves or by a consul, can not be held to supply the place of an appeal to a legal tribunal competent to deal with the subject-matter, nor does it render the right to intervention perfect and complete.

Omitting, however, this objection to the claim upon which, in the absence of data not supplied by the documents before me, I am unable to pronounce a positive opinion, I proceed to consider the principle on which the claimants rest their demand for indemnity against the United States of Colombia. They allege that the tax was a violation of the thirty-fifth article of the treaty of 1846 between the United States of America and New Granada, and that they, as sufferers from that breach of treaty, are entitled to redress. The article, so far as is material to the question at issue, declares "that no other tolls or charges shall be levied or collected upon the citizens of the United States or their said merchandise passing over any road or canal that may be made by the Government of New Granada or by the authority of the same than is under like circumstances levied upon and collected from the Granadian citizens," "nor shall the citizens of the United States be held liable for any duties, tolls, or charges of any kind to which native citizens are not subject for passing the said isthmus."

It is evident from the language of the article that this tax, if a violation of the treaty at all, is a violation of the spirit and not of the letter of that instrument. The supreme court of New Granada, in deciding against the legality of a similar tax, subsequently imposed, annuls it on the ground that under the new constitution of New Granada the chamber had exceeded its powers in dealing with a matter affecting foreign commerce and expressly reserved to the national legislature, but the court does not base its decision on the ground that the tax was contrary to the treaty entered into with the United States, and the supreme council of the government in rejecting the demand for indemnity presented by the company after the decision of the supreme court annulling the posterior law had been made known, expressly denies that the tax was a violation of any article of the treaty of 1846.

Mr. Corwine, the consul of the United States, was directed to protest against the levy of the original tax, which, however, the authorities of Panama continued to exact in spite of his protest. It does not appear, however, from the documents furnished to the commission, that the Government of the United States, on finding that the protest of the consul had been disregarded, addressed any representations to the supreme government at Bogota denouncing the proceeding as a violation of treaty. The protest made by a consul under such circumstances is merely an act which reserves the right of the protesting party for future discussion, and which is intended to deprive the opposing party of the argument he might derive from presumed acquiescence, were the question of right not saved by some formal act.

Under these circumstances I am of opinion that there is a preliminary question to be settled, viz, the construction that is to be put on the treaty, and that until it is decided that a breach of treaty has taken place, the claim of the company does not arise, nor can it be taken into consideration. As the case stands at present, the commission is in fact called upon to determine the meaning and import of an international compact entered into by the high contracting parties with due solemnity and consideration. It is asked to decide in favor of a construction which the Government of the United States of America, one of the parties, has not formally adopted and urged in its correspondence with the Government of Colombia, while the latter government, the other contracting party, has expressly rejected it, as appears from the "Resolucion del Poder ejecutivo."

This point, involving considerations of much difficulty and delicacy, which has undergone no discussion and on which the two governments have arrived at no understanding, must be decided before the claim advanced by the company can be investigated.

If I entertained any doubts as to the proper functions of the commission, and as to its incompetency to assume jurisdiction in a case in which the principle out of which the alleged liability arises is still a legitimate matter of debate between the two governments, they would be set at rest by the manner

in which the Panama riot cases have been presented to this commission. The question of the liability of the Government of the United States of Colombia for the losses thereby incurred by the parties was made the subject of correspondence between the two governments, and that liability was recognized by the Government of Colombia previously to the constitution of the commission. The assent of that government was incorporated in the convention appointing the commission, and to the latter was left the duty which properly belongs to a tribunal of this kind, namely, that of deciding upon general principles of law and equity what claims are entitled to compensation under the general responsibility which the Government of the United States of Colombia had consented to assume. If further argument were required as to the scope of the commission, it would be found in the terms of the convention, which submits for its decision claims of American citizens against the Government of the United States of Colombia, but which do not confer jurisdiction over what in fact is a demand that the commission shall decide that the Government of the United States of Colombia has been guilty of a breach of treaty.

Being of opinion therefore that the construction to be put on the treaty has not been settled by the proper authorities, that the commission is not empowered to settle a question of such a nature, and that upon the decision of that question the right of the company to indemnity, if otherwise unobjectionable, must depend, I reject this claim, with the declaration that this award does not prejudice the rights of the claimant, should the Government of the United States decide at any time hereafter that under the treaty of 1846 the imposition of the passenger tax constituted such a violation of its letter or spirit as to authorize a demand for redress.

FREDERICK W. A. BRUCE  
British Legation,  
*Washington, May 9, 1866.*