

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Mixed Commission established under the Convention concluded between the
United States of America and Costa Rica on 2 July 1860

**Case of Isaac Harrington v. Costa Rica (No. 2), decision of the Umpire, Commander Bertinatti,
dated 31 December 1862**

Commission mixte établie en vertu de la Convention conclue entre les
États-Unis d'Amérique et le Costa Rica le 2 juillet 1860

**Affaire concernant Isaac Harrington c. le Costa Rica (No. 2), décision du Surarbitre, Commandant
Bertinatti, datée du 31 décembre 1862**

31 December 1862

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Treaty interpretation—no party has a right to interpret the deed or treaty according to his own fancy—treaty to be interpreted according to reason and in conformity with the principles *in subjecta materia*—interpretation which would render a treaty null and inefficient cannot be admitted.

Belligerency—actual belligerency—theory of constructive belligerency arising from domicile.

General principles—general principles may be invoked against all governments—inapplicability of general principles to cases submitted under the treaty.

Interprétation des traités—aucune partie n'a le droit d'interpréter l'acte ou traité selon sa propre fantaisie—le traité doit être interprété selon la raison et en conformité avec les principes *in subjecta materia*—une interprétation qui rendrait un traité nul et inopérant ne peut être admise.

Belligérance—belligérance effective—théorie de la belligérance constructive résultant du domicile.

Principes généraux—principes généraux pouvant être invoqués à l'encontre de tous gouvernements—inapplicabilité des principes généraux aux affaires soumises en vertu du traité.

In all cases of claimants who were residents of Nicaragua, when the *actual belligerency* is not proved, a *constructive belligerency* arising from *domicil* or other like source has been opposed in behalf of Costa Rica as sufficient in order to exclude the claimants from the benefits of the 3d article of the convention of July 2d, 1860. I do not find the theory applicable to the cases to be decided under said convention. "Neither the one nor the other of the parties interested in the contract having a right to interpret the deed or treaty according to his

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own fancy" (says Vattel, chap. 17, sec. 265), it becomes my duty to interpret said convention according to reason and in conformity with the principles *in subiecta materia*, with the same simplicity and candor shown by that great publicist in the research of the rules which regulate the intercourse of nations. "It is not to be presumed," says the Swiss publicist, "that sensible persons in treating together, or transacting any other serious business, mean that the result of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient can not be admitted. It must be interpreted in a manner that it should not be vain and illusory." (Vattel, chap. 17, sec. 283.) Admitting these principles, we need not inquire whether the Ministers Carazo, Dimitry, and Yglesias, who negotiated the said convention, meant to make a serious act or not; but we must inquire only if they knew beforehand the *hindrances* which could be opposed to the instrument which they signed, either in reference to the strict principles of public law—*summum jus*—or to the often quoted note of Mr. Marcy, well known to all the cabinets, in order to render vain and illusory the result of their negotiations.

Combining the general expressions of the first article of said convention with the *proviso* which limits them, and with the second article where it is said "they (the commissioners) will carefully examine into, and impartially decide, according to the principles of justice and equity, and to the stipulations of treaty upon all the claims laid before them," and adding to all this the third article of the same convention contemplating the case in which the commissioners "may agree to award an indemnity," we must conclude that the negotiators, in regard to those claimants whose *actual belligerency* should not be proved, intended to create a special and particular right which was the result of the convention itself; otherwise all the claimants being excluded by a *constructive belligerency* according to the note of Mr. Marcy, quoted by Costa Rica, the said convention would have no serious object or result.

Had Mr. Marcy been bound by any similar convention to those foreign governments whose subjects were made to suffer serious damages in consequence of the bombardment of Greytown, he certainly would not have been able to invoke the rigor of the absolute principles laid down in that elaborate note, in order to oppose a *hindrance* to the claimants. His note then would have been based upon other principles. That jurist, who was Secretary of State under President Pierce, would have easily perceived that it was necessary to modify the general right by the particular right; the absolute right by the relative right; the *summum jus*, laid down by the publicists when they treat of the terrible rights derived from the state of war, by the conventional right, such as established in the convention, which can not be regarded but as an act of reparation. Mr. Marcy consequently would have based his note not upon the theory of authors, and upon examples which history has judged, but he would have taken his inspirations from those generous and high-minded considerations which a government never puts aside, when it is the matter of alleviating the calamities resulting from war; and he would have mitigated, if I am allowed

the expression, the unbending rigor of the *Decemviral* laws by the equity of the *edict* of the *Pretor*.

This order of ideas in the interpretation of the convention of July 2d, 1860, is suggested by the impartial examination both of its letter and of its spirit. No other interpretation can be admitted if we will not render that convention vain and illusory. To make use of the *proviso* in order to derive from it the right to exclude the *actual belligerents* not only, but also those who are innocent, no belligerency being proved against them, is the same as to make use of the exception in order to overthrow the rule. To interpret the whole of the convention without paying attention to the proviso, is the same as to accept the general principle and overlook the limitation. It is in equity, then, that we must judge the cases of those claimants who are not proved to have been *actual belligerents*; and the amount of indemnity must be regulated by the same principle of equity.

As for the general principles quoted in the briefs, their value can not be denied; but they are not applicable to the cases submitted to my decision. The Government of Costa Rica may invoke those principles against all the governments to which it is not bound by a special convention; and will also be able to assert the same principles even against the Government of the United States after that the convention of July 2, 1860, whose term expires with my office of umpire, shall have obtained its object. Such seems to me to have been the conciliative thought of the two governments in making the aforesaid international convention; and the interpretation which answers their thought and their duty is at the same time the only rational interpretation, without which the convention would be illusory, because null and without effect.

For the reasons above explained, I find it just and equitable to give the claimant Isaac Harrington an indemnity. In measuring the damages to be awarded, the commission has been advised to take the stand on the high ground of national indignity, of violated treaty, of breach of trust, of the oppression of a citizen of a nation by the rulers of another. But the commissioner for the United States, who could not ignore that the republic of Costa Rica, placed in jeopardy of its existence and making war for its defense, had no interest or wish to provoke by outrages the great and powerful republic of the United States, has adopted for damages an equitable measure. And the commissioner for Costa Rica having invariably rejected all demands, I will be guided by said equitable measure in this as well as in all other cases in which I find that an indemnity is due. Consequently, I hereby award to said David Ogden, as administrator of Isaac Harrington, deceased, the sum of \$1,000.