REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME V

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REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME V

Decisions of Claims Commissions

GREAT BRITAIN—MEXICO, FRANCE—MEXICO AND GERMANY—MEXICO

Décisions des Commissions des Réclamations

GRANDE-BRETAGNE — MEXIQUE, FRANCE — MEXIQUE ET ALLEMAGNE — MEXIQUE

UNITED NATIONS — NATIONS UNIES

FOREWORD

In the foreword to volume IV, which contains the awards of the United States-Mexican General and Special Claims Commissions, it was stated that the awards of other Mexican Claims Commissions would be published in later volumes. It has not, however, proved possible to publish all the awards of these Commissions. Every award of the British-Mexican Claims Commission is reproduced here, but out of a total of 143 awards made by the French-Mexican Claims Commission, the texts of only forty-nine were available, ten of which have not been mentioned in this collection because they do not present questions of legal interest. Out of seventy-two awards of the German-Mexican Claims Commission, the text of only one could be obtained. None of the texts of the awards of the Italian-Mexican or Spanish-Mexican Claims Commission was available.

The mode of presentation followed in this volume is the same as that used in volume IV. Each award is captioned under the name of the individual claimant, together with identification of the espousing and the respondent governments. Notation is made of the date of the award, any separate concurring or dissenting opinions rendered by the commissioners, and the original report from which the decision was drawn. A head note or digest is offered in each case to facilitate its use in research by practitioners and students of international law. The index found at the end of this volume is based upon such head notes.

In some instances, the texts of decisions dealing with technical procedural points or non-substantive questions or opinions of a cumulative nature applying rules previously laid down have not been published here. In each such case, however, the head note and index reference will enable scholars to ascertain the points involved in the decision and to determine whether it would be of interest for their particular purpose. If so, they may study the case further in the original publication, of which citation is made in each instance, or, as far as the hitherto unpublished awards of the French-Mexican Claims Commission are concerned, in the Library of the Peace Palace at The Hague.

It will be observed that historical notes of the establishment and work of each tribunal, bibliographies relating to each tribunal, and, finally, bibliographical references to discussions of particular cases are included. In addition, if any case has been published in any source other than that from which the instant publication is made, reference has been given to such source or sources.

Since the appreciation of each decision depends not only upon its contents but also upon the terms of the particular *compromis* and the law laid down by it to be applied by the tribunal, the texts of the treaty or treaties under which each tribunal functioned are included.

This volume, like volume IV, was prepared by the Legal Department of the Secretariat of the United Nations.

TABLE OF CONTENTS

Page

Foreword v

Table of Abbreviations ix

PART I

British-Mexican Claims Commission

Historical Note 3

Bibliography 5

Conventions :

Convention between Great Britain and the United Mexican States of November 19, 1926 7

Convention between Great Britain and the United Mexican States of December 5, 1930 10

Decisions :

Section I 15

Section II 131

PART II

French-Mexican Claims Commission

Historical Note 309

Bibliography 311

Conventions :

Convention between France and the United Mexican States of September 25, 1924 313

Convention between France and the United Mexican States of March 12, 1927 316

Convention between France and the United Mexican States of August 2, 1930 318

Decisions 323

PART III

German-Mexican Claims Commission

Historical Note 563

Bibliography 565

Page

Conventions :

Convention between Germany and the United Mexican States of March 16, 1925 567

Convention between Germany and the United Mexican States of December 20, 1927 571

Convention between Germany and the United Mexican States of December 15, 1928 572

Convention between Germany and the United Mexican States of August 14, 1929 573

Decision 577

Table of Cases:

Part I 597

Part II 599

Part III 599

Index 601

TABLE OF ABBREVIATIONS

Annual Digest	*Annual Digest and Reports of Public International Law Cases*, edited by H. Lauterpacht
Am. J. Int. Law	*American Journal of International Law*
Am. J. Int. Law Supp.	*American Journal of International Law*, Supplement
Feller	Feller, A. H., *The Mexican Claims Commissions*, 1923-1934, (New York, 1935)
Jour. Compar. Legis. and Int. Law	*Journal of Comparative Legislation and International Law*
Law Q. Rev.	*Law Quarterly Review*
L.N.T.S.	*League of Nations, Treaty Series*
de Martens	de Martens, G. Fr., *Nouveau Recueil général de Traités*
Memoria	*Memoria de la Secretaría de Relaciones Exteriores*, Mexico
Reports	*Reports of International Arbitral Awards*, United Nations
Rev. de Droit Int.	*Revue de Droit International*
Rev. de Droit Int. L.C.	*Revue de Droit International et de Législation Comparée*
R.G.P.C.	*Recueil Général Périodique et Critique de Décisions, Conventions et Lois Relatives au Droit International Public et Privé*
State Papers	*British and Foreign State Papers*

PART I

BRITISH-MEXICAN CLAIMS COMMISSION

HISTORICAL NOTE

Informal negotiations between Great Britain and Mexico with regard to the conclusion of a claims convention began as early as October, 1921.[1] The insistence of the Mexican Government that recognition by Great Britain not be conditional upon the establishment of a claims commission proved to be a serious obstacle, however.[2] Finally British Chargé des Archives Cummins was requested by the Mexican Government to leave the country and all relations between the two countries were broken off on June 20, 1924.[3]

Negotiations were later resumed in 1925 and a claims convention covering the disposition of revolutionary claims arising during the period from 1910 to 1920 was entered into under date of November 19, 1926. An announcement of September 2, 1925, referred to a projected Mixed Claims Commission to deal with non-revolutionary claims, if these could not be settled through diplomatic channels.[4] However, no such commission appears to have been established.

The convention of November 19, 1926, under which the British-Mexican Claims Commission was established, provided for a term of two years within which it was to complete its labours. However, only twenty-one decisions were rendered during this term and it accordingly became necessary to renew the life of the Commission. On December 5, 1930, a supplementary convention was signed extending the term of the Commission for an additional period of nine months and also making certain amendments as to the bases of liability of Mexico under the prior convention. A still further extension of nine months was provided for under the convention of December 5, 1930, and was taken advantage of by the parties. The work of the Commission was finally completed on February 15, 1932, the first session of the Commission having taken place on August 22, 1928. Out of the 110 claims disposed of by the Commission, favourable awards amounting to 3,795,897.53 pesos were granted in fifty cases, the remainder being disallowed or dismissed.[5]

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[1] Parliamentary Debates, House of Commons, 5th ser., Vol. 151, pp. 2530-2531.
[2] *Ibid.*, Vol. 161, p. 1522.
[3] *1925 Survey of International Affairs*, II, pp. 421-422.
[4] *The Times* (London), Sept. 3, 1925, p. 9, col. 3.
[5] See generally in connexion with the foregoing, Feller, pp. 26-28, 78-80. It does not appear that opinions were entered in all claims disposed of.

BIBLIOGRAPHY

Convention of November 19, 1926: State Papers, Vol. 123, 1926, Pt. 1, p. 539; L.N.T.S., Vol. 85, p. 51; de Martens, 3d ser., Vol. 23, p. 8; Am. J. Int. Law Supp., Vol. 23, 1929, p. 13.

Convention of December 5, 1930: State Papers, Vol. 132, 1930, Pt. 1, p. 302; L.N.T.S., Vol. 119, p. 261; de Martens, 3d ser., Vol. 24, p. 434; Am. J. Int. Law Supp., Vol. 25, 1921, p. 200.

Other references: Memoria, 1926-1927, p. 270; Memoria, 1928-1929, Vol. 1, p. 752; Memoria, 1929-1930, Vol. 1, p. 609; Memoria, 1930-1931, Vol. 1, p. 628; Memoria, 1931-1932, p. 271, Appendix, p. 704.

Percival, Sir John H., "International Arbitral Tribunals and the Mexican Claims Commissions," Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98.

Phillips, G. Godfrey, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226.

Conventions

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED MEXICAN STATES,

Signed November 19, 1926, ratifications exchanged March 8, 1928 [1]

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India, and the President of the United Mexican States, desiring to adjust definitively and amicably all pecuniary claims arising from losses or damages suffered by British subjects or persons under British protection, on account of revolutionary acts which occurred during the period comprised between the 20th November, 1910, and the 31st May, 1920, inclusive, have decided to enter into a Convention for that purpose, and to this end have appointed as their Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland, and of the British Dominions beyond the Seas, Emperor of India: Esmond Ovey, Esq., Companion of the Order of St. Michael and St. George, Member of the Royal Victorian Order, His Envoy Extraordinary and Minister Plenipotentiary in Mexico.

The President of the United Mexican States: Señor Licenciado Don Aarón Sáenz, Secretary of State for Foreign Relations.

Who, having communicated to each other their respective full powers, found to be in good and due form, have agreed upon the following articles:

ARTICLE 1. All the claims specified in Article 3 of this Convention shall be submitted to a Commission composed of three members; one member shall be appointed by His Britannic Majesty; another by the President of the United Mexican States; and the third, who shall preside over the Commission, shall be designated by mutual agreement between the two Governments. If the Governments should not reach the aforesaid agreement within a period of four months counting from the date upon which the exchange of ratifications is effected, the President of the Permanent Administrative Council of the Permanent Court of Arbitration at The Hague shall designate the President of the Commission. The request for this appointment shall be addressed by both Governments to the President of the aforesaid Council, within a further period of one month, or after the lapse of that period, by the Government which may first take action in the matter. In any case the third arbitrator shall be neither British nor Mexican, nor a national of a country which may have claims against Mexico similar to those which form the subject of this Convention.

In the case of the death of any member of the Commission, or in case a member should be prevented from performing his duties, or for any reason

[1] Source: Decisions and Opinions of the Commissioners in accordance with the Convention of November 19, 1926, between Great Britain and the United Mexican States, October 5, 1929, to February 15, 1930. (H.M. Stationery Office, London, 1931.) Page 4.

should abstain from performing them, he shall be immediately replaced according to the procedure set forth above.

ARTICLE 2. The Commissioners thus designated shall meet in the City of Mexico within six months counting from the date of the exchange of ratifications of this Convention. Each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration in which he shall undertake to examine with care, and to judge with impartiality, in accordance with the principles of justice and equity, all claims presented, since it is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility should be established in conformity with the general principles of International Law; and it is sufficient therefore that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 of this Convention. for Mexico to feel moved *ex gratia* to afford such compensation.

The aforesaid declaration shall be entered upon the record of the proceedings of the Commission.

The Commission shall fix the date and place of their sessions.

ARTICLE 3. The Commission shall deal with all claims against Mexico for losses or damages suffered by British subjects or persons under British protection, British partnerships, companies, associations or British juridical persons or those under British protection; or for losses or damages suffered by British subjects or persons under British protection, by reason of losses or damages suffered by any partnership, company or association in which British subjects or persons under British protection have or have had an interest exceeding fifty per cent of the total capital of such partnership, company or association, and acquired prior to the time when the damages or losses were sustained. But in view of certain special conditions in which some British concerns are placed in such societies which do not possess that nationality it is agreed that it will not be necessary that the interest above mentioned shall pertain to one single individual, but it will suffice that it pertains jointly to various British subjects, provided that the British claimant or claimants shall present to the Commission an allotment to the said claimant or claimants of the proportional part of such losses or damages pertaining to the claimant or claimants in such partnership, company or association. The losses or damages mentioned in this article must have been caused during the period included between the 20th November, 1910, and the 31st May, 1920, inclusive, by one or any of the following forces:

1. By the forces of a Government *de jure* or *de facto;*
2. By revolutionary forces, which, after the triumph of their cause, have established Governments *de jure* or *de facto*, or by revolutionary forces opposed to them;
3. By forces arising from the disjunction of those mentioned in the next preceding paragraph up to the time when a *de jure* Government had been established, after a particular revolution;
4. By forces arising from the disbandment of the Federal Army;
5. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of this Article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way.

The Commission shall also deal with claims for losses or damages caused by acts of civil authorities, provided such acts were due to revolutionary events and disturbed conditions within the period referred to in this Article, and that the said acts were committed by any of the forces specified in subdivisions 1, 2 and 3 of this Article.

ARTICLE 4. The Commission shall determine their own methods of procedure, but shall not depart from the provisions of this present Convention.

Each Government may appoint an Agent and Counsel to present to the Commission either orally or in writing the evidence and arguments they may deem it desirable to adduce either in support of the claims or against them.

The Agent or Counsel of either Government may offer to the Commission any documents, interrogatories or other evidence desired in favour of or against any claim and shall have the right to examine witnesses under affirmation before the Commission, in accordance with Mexican Law and such rules of procedure as the Commission shall adopt.

The decision of the majority of the members of the Commission shall be the decision of the Commission. If there should be no majority the decision of the President shall be final.

Either the English or Spanish languages shall be employed, both in the proceedings and in the judgments.

ARTICLE 5. The Commission shall keep an accurate and up-to-date record of all the claims and the various cases which shall be submitted to them, as also the minutes of the debates, with the dates thereof.

For such purpose each Government may appoint a Secretary. These Secretaries shall be attached to the Commission and shall act as joint Secretaries and shall be subject to the Commission's instructions.

Each Government may likewise appoint and employ such assistant Secretaries as they may deem advisable. The Commission may also appoint and employ the assistants they may consider necessary for carrying on their work.

ARTICLE 6. The Government of Mexico being desirous of reaching an equitable agreement in regard to the claims specified in Article 3 and of granting to the claimants just compensation for the losses or damages they may have sustained, it is agreed that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of such claim.

In order to determine the amount of compensation to be granted for damage to property, account shall be taken of the value declared by the interested parties for fiscal purposes, except in cases which in the opinion of the Commission are really exceptional.

The amount of the compensation for personal injuries shall not exceed that of the most ample compensation granted by Great Britain in similar cases.

ARTICLE 7. All claims must be formally filed with the Commission within a period of nine months counting from the date of the first meeting of the Commission; but this period may be prolonged for a further six months in special and exceptional cases, and provided that it be proved to the satisfaction of the majority of the Commission that justifiable causes existed for the delay.

The Commission shall hear, examine and decide within a period of two years counting from the date of their first session, all claims which may be presented to them.

Four months after the date of the first meeting of the members of the Commission and every four months thereafter, the Commission shall submit to

each of the interested Governments a report setting forth in detail the work which has been accomplished, and comprising a statement of the claims filed, claims heard and claims decided.

The Commission shall deliver judgment on every claim presented to them within a period of six months from the termination of the hearing of such claim.

ARTICLE 8. The High Contracting Parties agree to consider the decision of the Commission as final in respect of each matter on which they may deliver judgment, and to give full effect to such decisions. They likewise agree to consider the result of the labours of the Commission as a full, perfect and final settlement of all claims against the Mexican Government arising from any of the causes set forth in Article 3 of this present Convention. They further agree that from the moment at which the labours of the Commission are concluded, all claims of that nature, whether they have been presented to the Commission or not, are to be considered as having been absolutely and irrevocably settled for the future; provided that those which have been presented to the Commission have been examined and decided by them.

ARTICLE 9. The form in which the Mexican Government shall pay the indemnities shall be determined by both Governments after the work of the Commission has been brought to a close. The payments shall be made in gold or in money of equivalent value and shall be made to the British Government by the Mexican Government.

ARTICLE 10. Each Government shall pay the emoluments of their Commissioner and those of his staff.

Each Government shall pay half the expenses of the Commission, and of the emoluments of the third Commissioner.

ARTICLE 11. This Convention is drawn up in English and in Spanish.

ARTICLE 12. The High Contracting Parties shall ratify this present Convention in conformity with their respective Constitutions. The exchange of ratifications shall take place in the City of Mexico as soon as possible and the Convention shall come into force from the date of the exchange of ratifications.

In witness whereof the respective Plenipotentiaries have signed the present Convention, and have affixed thereto their Seals.

Done in duplicate, in the City of Mexico, on the nineteenth day of November, 1926.

(L.S.) ESMOND OVEY
(L.S.) AARÓN SÁENZ

CONVENTION BETWEEN GREAT BRITAIN AND THE UNITED MEXICAN STATES

Signed December 5, 1930, ratifications exchanged March 9, 1931 [1]

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India, and the President of the United Mexican

[1] Source: Further Decisions and Opinions of the Commissioners in accordance with the Conventions of November 19, 1926, and December 5, 1930, between Great Britain and the United Mexican States. Subsequent to February 15, 1930. (H.M. Stationery Office, London, 1933.) Page 6.

States, considering on the one hand: that the Commission created by virtue of the Convention of the 19th November, 1926, could not complete its labours within the period fixed by the said Convention, and that furthermore the work of the said Commission showed the desirability of expressing with greater clarity certain of the provisions of the said Convention in order to determine the methods by which should have been and must now be decided the responsibility, held by the Mexican Government to be *ex gratia*, to indemnify British subjects and British-protected persons for losses arising from revolutionary acts done during the period comprised between the 20th November, 1910, and the 31st May, 1920, inclusive, have agreed to sign the present Convention, and to that effect have named as their Plenipotentiaries:

His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India: Mr. Edmund St. J. D. J. Monson, His Envoy Extraordinary and Minister Plenipotentiary in Mexico;

The President of the United Mexican States: Señor Don Genaro Estrada, Secretary of State and of the Department of Foreign Relations;

Who have communicated their respective full powers, and having found them in due and proper form, have agreed on the following Articles:

ARTICLE 1. The High Contracting Parties agree that the period fixed by Article 7 of the Convention of the 19th November, 1926, for the hearing, examination and decision of the claims already presented in accordance with the terms of the said Article 7, shall be extended by the present Convention for a period not exceeding nine months as from the 22nd August, 1930; this may, however, be extended for a period not exceeding nine months by a simple exchange of notes between the High Contracting Parties, should the Commission have failed to complete its labours within this period.

ARTICLE 2. Article 2 of the Convention of the 19th November, 1926, shall be amended as follows:

The Commissioners so nominated shall meet in the City of Mexico within the six months reckoned from the date of the exchange of ratifications of this Convention. Each member of the Commission, before entering upon his duties, shall make and subscribe a solemn declaration in which he shall undertake to examine with care, and to judge with impartiality, in accordance with the principles of justice and equity, all claims presented, since it is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility should be established in conformity with the general principles of International Law; and it is sufficient therefore that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 of this Convention, that it was not the consequence of a lawful act and that its amount be proved for Mexico to feel moved *ex gratia* to afford such compensation.

The aforesaid declaration shall be entered upon the record of the proceedings of the Commission.

The Commission shall fix the date and place of their sessions in Mexico.

ARTICLE 3. Article 3 of the Convention of the 19th November, 1926, shall be amended as follows:

The Commission shall deal with all claims against Mexico for losses or damages suffered by British subjects, British partnerships, companies, associations or British juridical persons; or for losses or damages suffered by British subjects, by reason of losses or damages suffered by any partnership, company or association in which British subjects have or have had an interest exceeding fifty per cent of the total capital of such partnership, company or association

and acquired prior to the time when the damages or losses were sustained. But in view of certain special conditions in which some British concerns are placed in such societies which do not possess that nationality, it is agreed that it will not be necessary that the interest above mentioned shall pertain to one single individual, but it will suffice that it pertains jointly to various British subjects, provided that the British claimant or claimants shall present to the Commission an allotment to the said claimant or claimants of the proportional part of such losses or damages pertaining to the claimant or claimants in such partnership, company or association. The losses or damages mentioned in this Article must have been caused during the period included between the 20th November, 1910, and the 31st May, 1920, inclusive, by one or any of the following forces:

(1) By the forces of a Government *de jure* or *de facto;*

(2) By revolutionary forces which, after the triumph of their cause, have established a Government *de jure* or *de facto;*

(3) By forces arising from the disbandment of the Federal Army;

(4) By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions (2) and (3) of this Article, or by brigands. provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the said authorities were blameable in any other way.

The Commission shall also deal with claims for losses or damages caused by acts of civil authorities, provided such acts were due to revolutionary events and disturbances within the period referred to in this Article, and that the said acts were committed by any of the forces specified in subdivisions (1) and (2) of this Article.

The claims within the competence of the Commission shall not include those caused by the forces of Victoriano Huerta or by the acts of his régime.

The Commission shall not be competent to admit claims concerning the circulation or acceptance, voluntary or forced, of paper money.

ARTICLE 4. The terms of procedure fixed by the said Convention and by its rules of procedure which were suspended on the 21st August, 1930, shall re-enter into force as from the date of exchange of ratifications of the present Convention.

All the provisions of the Convention of the 19th November, 1926, and its rules of procedure approved at the session of the 1st September, 1928, which are not modified by the provisions of the present Convention, remain in force.

ARTICLE 5. The present Convention is drawn up in English and Spanish.

ARTICLE 6. The High Contracting Parties shall ratify this present Convention in conformity with their respective Constitutions. The exchange of ratifications shall take place in the City of Mexico as soon as possible and the Convention shall come into force from the date of the exchange of ratifications.

In witness whereof, the respective Plenipotentiaries have signed the present Convention, and have affixed thereto their seals.

Done in duplicate, in the City of Mexico, on the 5th day of December, nineteen hundred and thirty.

(L.S.) E. MONSON

(L.S.) G. ESTRADA

SECTION I

PARTIES: Great Britain, United Mexican States.

SPECIAL AGREEMENT: November 19, 1926.

ARBITRATORS: Dr. A. R. Zimmerman (Netherlands), Presiding Commissioner, Artemus Jones, British Commissioner until December 6, 1929, Sir John Percival, British Commissioner after December 6, 1929, Dr. Benito Flores, Mexican Commissioner.

REPORT: Decisions and Opinions of the Commissioners in accordance with the Convention of November 19, 1926, between Great Britain and the United Mexican States, October 5, 1929, to February 15, 1930. (H.M. Stationery Office, London, 1931.)

Decisions

ROBERT JOHN LYNCH (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 1, November 8, 1929, dissenting opinion by Mexican Commissioner, October, 1929. Pages 20-32[1].)

NATIONALITY, PROOF OF. Nationality is a continuing legal relationship between a State and its citizen and not susceptible of proof in the same degree as a physical fact. Consequently, an international tribunal will merely require *prima facie* evidence of nationality sufficient to satisfy the tribunal and to raise the presumption of nationality, such presumption to be rebutted by the respondent State.

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY. A consular certificate constitutes *prima facie* evidence of nationality and may even possess greater evidential value than a birth certificate.

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY. A baptismal certificate showing baptism in Cape Town, Cape Colony, on June 21, 1868, of a child stated thereon to be born June 9, 1868, but apparently silent as to place of birth, will be accepted as further proof of nationality.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 754; Annual Digest, 1929-1930, p. 221.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. In this case the respondent Government have lodged a demurrer to the claimant's memorial on the ground that it fails to establish the British nationality of the claimant in accordance with Rule 10, paragraph *(a)*, of our Rules of Procedure. According to the terms of that rule, every claimant must, as a condition precedent to the consideration of his claim, give proof of his British nationality in the memorial.

The British Agent relies upon two documents in support of the memorial. The first is a certificate of consular registration, delivered on the 25th May, 1916, by the British Vice-Consul at Tampico, stating that the claimant was duly registered in the register of British subjects of the British Consulate-General of Mexico. The second document (which was delivered after the memorial was printed) is a baptismal certificate to the effect that the claimant was baptized at St. Mary's Cathedral in Cape Town, Cape Colony, on the 21st June, 1868.

The submission of the Mexican Agent is that these documents, taken either singly or in combination, do not amount to sufficient proof of the claimant's nationality within the meaning of Rule 10, paragraph *(a)*.

The British Agent contends, on the other hand, that the consular certificate is sufficient to establish *prima facie* evidence of the claimant's British nationality

[1] References to page numbers herein are to the original report referred to on page 15.

and that the second document is strong corroboration of the statements contained in the first.

The question which the Commissioners have to decide is which of the two contentions is right.

2. The question whether a consular certificate constitutes proof of nationality is not a new problem. From the date when international commissions were first established right up to the present time, the question has engaged the attention of these tribunals from time to time. Respondent governments have often contested the point that consular certificates afford sufficient proof of nationality. Sometimes the question has been decided in the affirmative and at other times in the negative. Various decisions were relied upon by both Agents in the course of the argument, and in a recent decision of the Mexican-German Claims Commission *(Memoria de Labores de la Secretaría de Relaciones Exteriores de agosto de 1926 a julio de 1927, página 221-235*[1]*)* the conflicting authorities are reviewed at some length. It is common ground between both sides in this case that the point has been decided in different ways.

The fact that so many international commissions have failed to agree in the matter points to one conclusion, namely, that international jurisprudence has not yet established any firm criterion whereby the problem can be determined. Neither in the actual decisions of the Commissions nor in the practice observed by such bodies can one find any universally accepted rule upon the point. It is quite clear that any enactment on the part of the British Legislature on the subject of nationality is not enough and is certainly not binding on this Commission. It is equally clear that the same observation applies to any enactment on the part of the Mexican Legislature. In these circumstances the Commission is of opinion that they must consider themselves free in each case to form their own independent judgment on the evidence placed before them. In other words, the Commissioners must attach such weight to the documents as appears to them to be just and fair in the particular circumstances of each case.

3. In the course of the discussion between the Agents of the respective Governments a general proposition was advanced to the effect that nationality is an issue of fact which admits of the same degree of proof as any physical fact, such as birth or death, and that it ought to be proved in the same way. This view, in the judgment of the Commission, is erroneous. A man's nationality forms a continuing state of things and not a physical fact which occurs at a particular moment. A man's nationality is a continuing legal relationship between the sovereign State on the one hand and the citizen on the other. The fundamental basis of a man's nationality is his membership of an independent political community. This legal relationship involves rights and corresponding duties upon both—on the part of the citizen no less than on the part of the State. If the citizen leaves the territory of this sovereign State and goes to live in another country, the duties and rights which his nationality involves do not cease to exist, although such rights and duties may change in their extent and character. A man's nationality is not necessarily the same from his birth to his death. He may according to circumstances lose his nationality in the course of his life. He may elect to become a citizen of another sovereign State. Moreover, the country into which he has moved may, by its domestic laws, impose upon him the nationality of the new country and in this way a state of dual nationality may be created.

These considerations show clearly that it would be impossible for any international commission to obtain evidence of nationality amounting to certitude

[1] See below, page 579. (Klemp case.)

unless a man's life outside the State to which he belongs is to be traced from day to day. Such conclusive proof is impossible and would be nothing less than *probatio diabolica*. All that an international commission can reasonably require in the way of proof of nationality is *prima facie* evidence sufficient to satisfy the Commissioners and to raise the presumption of nationality, leaving it open to the respondent State to rebut the presumption by producing evidence to show that the claimant has lost his nationality through his own act or some other cause. In the same way the respondent State may show that the citizen's first nationality has come into conflict with its domestic laws and that the position has arisen which is described as dual nationality.

4. A consular certificate is a formal acknowledgment by the agent of a sovereign State that the legal relationship of nationality subsists between that State and the subject of the certificate. A Consul is an official agent working under the control of his Government and responsible to that Government. He is as a rule in permanent touch with the colony of his compatriots who live in the country to which he is designed, and he is, by virtue of his post as Consul, in a position to make inquiries with respect to the origin and antecedents of any compatriot whom he registers. He knows full well that the registration of a compatriot entitled to all the rights of citizenship is a step which imposes serious obligations upon the State which he serves. That circumstance in itself is an inducement to him to see that the registration must be attended to with great care and attention.

It is, of course, conceivable that the inclusion of a man's name in the consular register may be made carelessly or erroneously or under circumstances which later may give rise to serious doubts. It is no less true that consular registration does not in any way solve the problem of dual citizenship. In such circumstances as those, a consular certificate cannot be considered as absolute proof of nationality, and it will be competent for the agent of the respondent State to produce evidence in rebuttal. But when, as in this case, nothing is alleged which raises the slightest doubt as to the accuracy or *bona fides* of the entries in the register, a consular certificate ought to be accepted as *prima facie* evidence which does not in any way lose its force from the general objections taken by the respondent Government.

A consular certificate, originating as it does at a more recent date than a birth certificate, may even possess greater evidential value.

5. With regard to the baptismal certificate, it was signed by a Roman Catholic priest and shows that Robert John Lynch, born on the 9th June, 1868, was baptized on the 21st June, 1868, in St. Mary's Cathedral, Cape Town. In the judgment of the Commission, this is still further proof to show that Robert John Lynch was of British nationality. The original certificate has been produced, and in the opinion of the Commission must be accepted as an authentic and genuine document. In view of the date of compulsory birth registration in England, it can be safely assumed that compulsory registration of births was not in existence in Cape Colony in 1868. A baptismal register established both the date of birth and the place and date of baptism. The objection was taken on the part of the respondent Government that the most essential fact on the question of nationality was the place of birth, and that the best evidence of the place of birth was not a baptismal certificate. This objection, however, carries little or no weight in view of the circumstances that the geographical location of Cape Town and the state of the means of communication in 1868 render it extremely unlikely that a child baptized in Cape Town on the 21st June could have been born on the 9th June in any country other than Cape Colony.

6. On these various grounds the Commission rules that the claimant's nationality has been established and that the demurrer must be overruled.

The Mexican Commissioner does not agree with this judgment and expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

The Mexican Commissioner regrets to have to dissent from the opinions of his honourable colleagues, the Presiding Commissioner and the Commissioner for Great Britain, and, with all due respect, begs to give his vote in the form of the following opinion in regard to the demurrer interposed by the Mexican Agent, in the matter of Claim No. 32, presented by His Britannic Majesty's Government on behalf of Robert John Lynch.

The demurrer is based on failure to establish the British nationality of the claimant.

The Facts

I. This is a case of a claim for losses sustained at the hands of "Zapatistas" on the Puente de Garay Ranch, Ixtapalapa, Mexico, in the month of July 1914, and at the hands of Constitutionalist forces, which occupied the ranch shortly afterwards.

II. The claimant endeavours to establish his British nationality by means of a certificate issued by the British Consulate at Mexico City, in which it is stated that the said Robert John Lynch was registered at the said Consulate as a British subject, said certificate having been issued on the 25th May, 1916, by the Vice-Consul, R. C. E. Milne.

III. The Mexican Agent forthwith interposed a demurrer with the Mexican-British Claims Commission, which can only deal with the claims of British subjects, having argued that the consular certificate produced by the British Government was in this case insufficient to establish the nationality of the claimant.

IV. The British Agent replied to the effect that the consular certificate submitted for the purpose of proving the nationality of Robert John Lynch was *prima facie* evidence of his British nationality; but that for better proof of the nationality of the claimant he produced a certificate of birth and baptism of the said Robert John Lynch. This certificate of baptism was issued by a priest of the name of John Colgan, in charge of St. Mary's Cathedral, Cape Town, South Africa, and it appears from it that Robert John Lynch was born on the 9th June, 1868, and that he was baptized on the 21st June, 1868. The names of his parents appear in the said certificate, and that of the clergyman who baptized him.

V. On the 8th October, 1929, the demurrer was argued before the Commission. The Mexican Agent averred that the only way of proving the nationality of a person is by means of a certificate issued from a civil register, and that only in the event that the British Agency should fully be able to prove that it had been impossible to obtain that document, could a certificate of baptism be accepted.

On those grounds the Mexican Agent challenged the certificate issued by the British Consulate in Mexico to Robert John Lynch, as being insufficient proof of nationality.

VI. The British Agent answered that he agreed that in a majority of cases a consular register is not convincing proof of nationality, but that it had been

impossible to obtain any evidence other than the certificate of baptism of Robert John Lynch and that it, in his opinion, was sufficient to establish his nationality.

VII. The Mexican Agent, in order to show that consular registers are insufficient to prove the nationality of a person, cited the precedents laid down to that effect by various internationalists, among them Cruchaga Tocornal, Umpire, in the claim of Carlos Klemp *v.* the United Mexican States, and Thornton, Umpire, in the Brockway case, before the Claims Commission, Mexico and United States in 1868.

VIII. The Mexican Agent also challenged the certificate of baptism produced by Lynch, and added that it should be looked upon as a private document lacking authenticity, due to not having been legalized by any English authorities, and called attention to the fact that this document did not state where Robert John Lynch was born, nor that his parents were English.

IX. The British Agent, on his side, contended that there was as yet no uniform jurisprudence in regard to this case in international law, and to that end he cited the cases of William A. Parker and Willard Connelly, decided by the General Claims Commission, Mexico and the United States; that in the first case the nationality of the claimant had been held proved by mere affidavits, and in the Connelly case the nationality of the claimant had been held to have been proved by means of a certificate of baptism, and that in this last case the decision of the Commission had been a unanimous one.

X. This matter took up two meetings: those of the 8th and 9th. On this last day, the Mexican Commissioner asked certain questions of the British Agent, for the purpose of obtaining information about English law and practice in regard to proof of nationality, and as a result of the said questionnaire, the latter agreed to the following points:

(a) That the fact of registration in a British Consulate abroad was of no assistance to a person desiring to acquire British nationality, this being the answer to the following question:

In England, is insertion in British consular registers abroad included among the ways of acquiring British nationality?

(b) That British Consuls do not exercise judicial functions, except in those places where extraterritorial jurisdiction exists.

(c) That as a general principle he admitted that the impossibility of producing certificates from a civil register should, when secondary evidence, such as certificates of baptism, is furnished, be established; but that in the particular instance, as Lynch was born six years prior to the enactment of the statute which created Civil Registers in England, the certificate of baptism was in itself sufficient to establish nationality.

(d) That clergymen in charge of parishes in England are not considered as authorities, and that documents issued by them are not in themselves public proof.

(e) That when a certificate of baptism is produced as a proof of nationality, the law requires that such certificate be compared with the original by the judicial authorities of the Kingdom; in the event of controversy, proof of authenticity of the document is required.

The above in substance is how the argument on this case was closed.

Considerations of a Legal Order

I. The Mexican Commissioner holds that the certificate from His Britannic Majesty's Consulate-General in Mexico, issued by the Vice-Consul, to the

effect that the name of Robert John Lynch appears in its register as a British subject, is not in itself sufficient to establish the fact of his British nationality, for the following reasons:

(a) Because as it is the imperative duty of the Mexican-British Claims Commission to satisfy itself as to the nationality of a claimant, inasmuch as its jurisdiction only extends to claims of British subjects; the Commission itself is the only authority competent to decide upon the nationality of a claimant, not by inspection of a consular certificate only, but also with the data taken into consideration by the Consulate when registering Lynch as a British subject, as the Commission would otherwise delegate its powers to the Consuls, for decision on so important a point; and as the British Agent reported in the course of the above-mentioned argument, as the Government of Great Britain does not specify fixed and concrete rules for its Consuls, for registration of persons as British subjects, but leaves such registration to their own discretion, it is unquestionable that if the Commission held that the certificate in question was sufficient proof for establishing the fact of Lynch's nationality, the British Consul, and not the Commission, would practically be the person to decide in every case as to nationality; that is, by overriding the jurisdiction of the Commission itself, which would be highly dangerous to the interests of the respondent Government.

(b) Because under international law consuls are not judicial officers, but of a merely administrative and commercial character, and registration in consular registers only determines nationality for statistical purposes, for compliance with laws as to compulsory military service, for payment of taxes on income from property which a national residing abroad may have in his own country, for the acquisition of property, the receipt of inheritances or legacies, annuities or allowance, &c.

It was thus most properly laid down in the Mexican-German Claims Commission, by the distinguished Chilean jurist, in the matter of Carlos Klemp *v.* the United Mexican States, pp. 20 and 21 of the booklet in which the decision was published by the Ministry of Foreign Affairs in Mexico, in the year 1927.

(c) Because, according to the opinion of the learned jurist and British Agent, Mr. Montague Shearman, registration at a British Consulate would be of no assistance to a person desiring to acquire British nationality.

(d) Because, according to the selfsame learned British Agent, Consuls do not exercise judicial functions, except in cases where extraterritorial jurisdiction exists.

(e) Because in order to establish the fact of British nationality by birth in a legal and authentic manner, it is necessary to produce a copy or extract from the proper Register of Births and this would not in itself constitute proof of such birth unless bearing the name of a person authorized to declare, register, &c. (Lehr, *Eléments de droit civil anglais*, Paris, 1885, p. 17), (British Act, 1874, in the *Annuaire de législation étrangère).*

(f) Because proof of nationality by means of a consular certificate has been declared insufficient by Courts of Arbitration (Borchard, *Diplomatic Protection of Citizens Abroad*, p. 490, with reference to the following cases: Brickway, U.S. *v.* Mexico, the 4th July, 1868, *ibid*, 2534; Goldbeck, U.S. *v.* Mexico, *ibid*, 2507; *vide* also Gilmore, U.S. *v.* Costa Rica, the 3rd July, 1860, *ibid*, 2539).

II. In so far as concerns the probative value of Lynch's certificate of baptism, as issued by the parish priest of St. Mary's Cathedral, Cape Town, South Africa, as regards the nationality of the claimant, the Mexican Commissioner would accept it as being sufficient for the purpose, if said document had been duly authenticated, due to the fact that Lynch was born prior to

compulsory registration in that colony and as he would therefore not be obliged to establish his nationality by means of a certificate from a civil register; but said document having been taken exception to by the Mexican Agent, on the ground of the failure to legalize the signature of the priest who issued the certificate, it undoubtedly cannot be considered as authentic and genuine, for the following reasons:

(a) Because the parochial certificate produced is a private document issued by a person not endowed with public functions in England; because by it an endeavour is made to determine the nationality of the claimant, in full controversy with Mexico, for which reason the said document should have been authenticated so that it might constitute proof before this International Tribunal, of the facts therein set out.

(b) Because who can affirm that the Rev. Mr. Colgan actually exists? Who can affirm that he really is in charge of St. Mary's parish, at Cape Town? Who can affirm that he is, within his own special functions, authorized to issue the certificate in question? Who can affirm that the signature on the document is authentic?

Authentication of documents, not only private documents like Lynch's baptismal certificate, but also of those issued by authorities lawfully acknowledged, is a requirement that must be met, so that they may be accepted as proof by International Courts, according to the opinion of such learned jurists as M. Charles Calvo *(Le droit international)*, Title II, paragraph 885, which reads as follows:

"*Deux catégories d'actes*

"Section 885. On peut diviser ces actes en deux grandes catégories; les actes authentiques et les actes sous seing privé.

"*Actes authentiques*

"L'acte authentique est défini par l'article 1317 du Code civil français comme celui qui a été reçu par officiers publics ayant le droit d'instrumenter dans le lieu où il a été rédigé et avec les solennités requises. Cette définition s'applique aux actes notariés et, en général, aux actes de juridiction volontaire.

"*En France*

"Les actes notariés ont force exécutoire comme les jugements en France et dans les pays qui ont adopté la législation française sur la matière, tels que la Belgique, les Pays-Bas. Dans les autres pays, les actes notariés et même ceux qui sont reçus par les membres des tribunaux n'emportent pas l'exécution parée; ils n'obtiennent force exécutoire qu'en vertu d'un jugement. Les législations allemandes admettent, pour arriver à l'exécution des conventions constatées par actes publics, une procédure sommaire, plus expéditive que la procédure ordinaire, la procédure du *mandatum sine ou cum clausula*, ou le 'procès d'exécution'.

"Pour déterminer si l'acte fait dans un pays est authentique ou non, pour apprécier le degré de foi qu'on lui doit en justice, il est nécessaire de tenir compte de la loi du pays où l'acte a été passé, de s'assurer que l'acte a été reçu réellement dans le pays à la loi duquel on veut le soumettre.

"Pour cela, il suffit que la partie qui prétend que l'acte est authentique prouve que l'officier qu'il l'a reçu avait caractère pour lui conférer l'authenticité et que la forme de cet acte est attestée et légalisée par un autre officier public digne de foi pour le Gouvernement auprès duquel on veut faire valoir l'acte.

"En ce qui concerne les rapports internationaux sur ce point, on comprend qu'il ne saurait être question de l'exécution forcée des actes étrangers passés dans les États dont la législation n'admet pas *de plano* l'exécution forcée des actes reçus par les officiers publics des mêmes États.

"Pour être exécutés en France, les actes passés en pays étrangers doivent être déclarés exécutoires par un tribunal français (Code de procédure, article 546); mais ils font foi devant les tribunaux sans cette déclaration, pourvu que la signature de l'officier public soit légalisée et que les formalités prescrites par la loi étrangère aient été observées.

"Les actes authentiques passés à l'étranger, conformément à la règle *locus regit actum*, peuvent-ils recevoir la force exécutoire d'une autorité française?

"L'article 546 parle bien de ces actes, mais c'est pour renvoyer à l'article 2128, qui ne donne pas de solution. Aussi dans un premier système qui se subdivise en deux opinions, on répond affirmativement. Quelques partisans de ce système attribuent au président du tribunal du ressort dans lequel on sollicite l'exécution de ces actes, compétence pour leur donner la force exécutoire. [1] D'autres reconnaissent que le tribunal entier a seul qualité à cet effet. [2]

"Mais l'opinion générale se prononce dans le sens de la négative, on déclare que ces actes ne peuvent directement recevoir en France la force exécutoire, en conséquence on traitera ces actes comme des actes sous seing privé et le demandeur devra s'adresser aux tribunaux pour faire condamner son adversaire, ces actes ne serviront qu'à titre de documents et ce qui sera exécutoire sera le jugement français.

"En général, lorsqu'on veut rendre un acte exécutoire, il est nécessaire, pour le compléter relativement à la forme, d'observer toutes les dispositions en vigueur dans le pays où l'on demande l'exécution, quand même l'acte serait valable et complet, d'après la loi du lieu où il a été passé.

"C'est un principe généralement adopté par l'usage des nations que la forme des actes est réglée par la loi du lieu où ils sont faits ou passés. C'est-à-dire que, pour la validité de tout acte, il suffit d'observer les formalités prescrites par la loi du lieu où cet acte a été dressé; l'acte ainsi passé exerce ses effets sur les biens meubles aussi bien que sur les immeubles situés dans un autre territoire dont les lois établissent des formalités différentes.

"En d'autres termes, les lois qui règlent la forme des actes étendent leur autorité tant sur les nationaux que sur les étrangers qui contractent ou qui disposent dans le pays. C'est l'application de la règle *locus regit actum*.

"*Prusse*

"Le Code général de Prusse, part. I, tit. 5, § III, porte: 'La forme d'un contrat sera jugée d'après les lois du lieu où il a été passé.'

"Le § 115, part. I, tit. 10, du Code de procédure civile reproduit le même principe.

"Dans les traités relatifs à l'administration de la justice que la Prusse a conclus avec divers États allemands de 1824 à 1841, on lit, à l'Article 33 de chacun des traités, la disposition suivante: 'Lorsque, d'après les lois de l'un des États contractants, la validité de l'acte dépend uniquement de la circonstance qu'il a été reçu par une autorité spécialement désignée et établie dans le même État, cette disposition recevra son exécution.'

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[1] "De Belleyme-Demangeat sur Foelix," t. II, p. 220, note.

[2] Cass., 25 novembre 1879: "Journal du droit international privé," p. 583, année 1880; p. 428, 1881; Grenoble, 11 mai 1881.

"*Pays-Bas*

"L'article du Code des Pays-Bas dit que 'la forme de tous les actes est régie par la loi du pays ou du lieu où l'acte a été passé'.

"*Russie*

"On lit dans le *Digeste russe :* 'L'acte passé à l'étranger d'après les formes qui y sont en vigueur, bien que non conforme au mode adopté en Russie, sera néanmoins admis à faire preuve jusqu'à production de moyens propres à en infirmer l'authenticité' (lois civ., x. suppl., article 546).

"*Wurtemberg*

"Le projet de Code de commerce pour le royaume de Wurtemberg (article 999) porte: 'Les conditions exigées pour la validité d'un acte passé en pays étranger, en ce qui concerne la forme et la matière de cet acte, sont déterminées par la loi du lieu où il a été passé, et particulièrement par la loi du lieu de la date portée dans un acte écrit: toutefois un Wurtembergeois ne peut attaquer l'acte pour cause d'omission d'une de ces conditions, lorsque cet acte se trouve conforme aux lois du royaume.'

"*Louisiane*

"L'article 10 du Code de l'État de la Louisiane est ainsi conçu: 'La forme et l'effet des actes publics ou privés se règlent par les lois et les usages du pays où ces actes sont faits ou passés; cependant, l'effet des actes passés pour être exécutés dans un autre pays se règle par les lois du pays où ils ont leur exécution.'

"La règle *locus regit actum* admet toutefois certaines exceptions, dont les plus généralement admises sont celles qui se rapportent aux Ambassadeurs ou Ministres publics et à leur suite, qui ne sont pas soumis aux lois de l'État auprès duquel ils exercent leur mission diplomatique; et le cas où la loi du lieu de la rédaction de l'acte attribue à la forme qu'elle prescrit un effet qui se trouve en opposition avec le droit public du pays où l'acte est destiné à recevoir son exécution."

F. Surville (Cours élémentaire de droit international privé), paragraph 420, says:

"1° Preuve littérale. Le juge devant lequel une pareille preuve sera invoquée devra naturellement s'enquérir avant tout de l'origine de l'acte.

"Lorsqu'il s'agira d'un acte émané d'une autorité publique étrangère, cette preuve de l'origine se fera au moyen de légalisations émanées d'abord d'autorités publiques étrangères, et, en dernier lieu, d'un fonctionnaire auquel le Gouvernement français ajoute foi, tel qu'un Ambassadeur, un chargé d'affaires, un consul, &c.

"Quant aux actes sous signature privée, ce sera à celui qui produira l'acte à justifier qu'il a été passé en pays étranger et que la règle *locus regit actum* a été obéie.

"Faisons un pas de plus. L'origine de l'acte est constatée. Il est établi que celui-ci a force probante d'après la loi du pays où il a été rédigé. Quel va être en dehors de ce pays, particulièrement en France, le degré de cette force?

"D'abord, s'il s'agit d'un acte sous seing privé il ne saurait s'élever de difficulté: tout doit se passer comme pour celui rédigé en France. En d'autres termes, les articles 1322 et 1328 du Code civil, puis les articles 193 et suivants du Code de procédure civile recevront leur application.

"Mais arrivons aux actes authentiques. L'acte authentique dressé conformément à la loi étrangère, par l'officier compétent aura-t-il la même autorité en France qu'un acte authentique français? Fera-t-il foi jusqu'à inscription de faux ou seulement jusqu'à preuve contraire? On pourrait être tenté de dire qu'un pareil acte n'aura pas en France un degré de force probante plus grand que l'acte sous seing privé. En effet, l'officier public étranger n'a agi comme tel que parce qu'il avait délégation de la puissance publique de son pays, délégation qui expire à la frontière. Ce n'est pas là toutefois la solution à admettre. En matière d'actes authentiques, il faut en effet se garder de confondre deux choses; d'une part, la *force probante* attachée à l'acte [1] et, d'autre part, la *force exécutoire*. Les actes publics étrangers ne peuvent pas, en raison même du principe de la souveraineté respective des États, avoir force exécutoire en France: mais rien ne s'oppose, étant donné le caractère officiel de ceux qui les ont rédigés à l'étranger, qu'ils y aient une force probante analogue à celle des actes français de même nature. Le principe de souveraineté est ici hors de cause. Les actes publics seront donc crus jusqu'à inscription de faux, et c'est par la procédure édictée à cet égard dans notre Code de procédure civile français qu'ils seront susceptibles d'être attaqués.

"Quant à la foi à attacher aux livres des commerçants, elle sera déterminée par la loi du lieu où ces livres ont été tenus."

F. Laurent (Le droit civil international), t. VIII, paragraph 27, provides that:

"Celui qui produit en France un acte authentique reçu à l'étranger, doit en prouver l'authenticité. Les actes notariés passés en France font preuve par eux-mêmes, parce qu'ils portent la signature d'un officier public français, sauf à contester la validité de l'acte; mais rien ne prouve que l'acte étranger soit dressé par l'officier public dont il porte le nom.

"Il faut d'abord que la signature soit légalisée conformément aux usages diplomatiques. Puis le porteur de l'acte doit établir que l'écrit a été rédigé d'après les lois en vigueur dans le lieu d'où il est daté. Pour faciliter cette preuve, la loi hypothécaire belge dispose que l'acte établissant une hypothèque sur des biens situés en Belgique soit visé par le président du tribunal de la situation des biens. Ce magistrat, dit l'article 77, est chargé de vérifier si les actes réunissent les conditions nécessaires pour leur authenticité dans le pays où ils ont été reçus. Si le président refuse le visa, il peut être interjeté appel. L'acte n'a d'effet en Belgique, c'est-à-dire qu'il n'est considéré comme acte authentique que lorsqu'il a été revêtu du visa. Cette disposition est spéciale aux actes d'hypothèque. J'ai proposé, dans l'avant-projet de revision du Code civil, de la généraliser; je le préviendrai des contestations presque inévitables sur la validité des actes reçus en pays étranger. Quoi qu'il en soit, la loi hypothécaire consacre le principe que je viens d'établir. Un acte authentique dressé à l'étranger n'a par lui-même aucun *effet* en Belgique. C'est-à-dire qu'il n'existe pas aux yeux de la loi (comparez l'article 1131 du Code Nap.); pour qu'il ait effet et, par conséquent, une existence légale, il faut que la partie intéressée le soumette au visa du président, ce qui implique qu'elle doit prouver que l'acte est authentique d'après la loi du lieu où il a été reçu et qu'il est valable comme tel; à défaut de visa, l'acte n'aura d'effet que si la preuve de l'authenticité est faite en justice."

(c) Because the principle that a private document has no probative value, once same has been challenged by the opposite party, is laid down in article 338 of our Federal Code of Civil Procedure, which reads literally as follows: "Pri-

[1] Rapp. J. Clunet, 1910, p. 478 *et seq.*

vate documents shall constitute full proof against the person who wrote them, when not objected to or once they are legally acknowledged," the origin of which is the Law of Civil Procedure of Spain.

Zavala, the author of *Elements of Private International Law* (Conflict of Laws), lays down on p. 319: "All the inhabitants of Mexico must be presumed to be Mexican citizens, which is in accord with article 257 of the International Code of Dudley Field."

Furthermore, a presumption is not destroyed by another presumption, but by proof.

It is true that there are no restrictions on the Mexican-British Claims Commission as regards the admission and weighing of evidence; but this power is undoubtedly always limited by the principles of public international law, especially when it is a matter of determining its own jurisdiction.

The Commission may not, therefore, be satisfied with evidence unless it complies with the principles generally accepted by jurists to enable such evidence to be considered as authentic. In other words, the sovereignty of the Commission when weighing the evidence is not absolute; its limits will always be those imposed by law and by ethics. So that although when estimating a fact in accordance with the best knowledge and judgment of the Commissioners, neither the Convention nor the Rules of Procedure are infringed, the Commission will always be obliged not to depart from the fundamental principles of international law.

(d) Because it must not, although there is subjectively no reason for doubting the certificate of baptism produced by Lynch, be forgotten that the *onus probandi* in this case falls wholly upon the demandant Government, and that the Commission is not authorized to supply any deficiencies in the evidence produced by either party.

In view of the whole of the foregoing, the Mexican Commissioner holds that the demurrer should be allowed, on the ground that the nationality of the claimant has not been properly established.

VIRGINIE LESSARD CAMERON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 2, November 8, 1929, concurring opinions by British and Mexican Commissioners, undated. Pages 33-50.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. In the absence of any express provisions in its *compromis* to the contrary, an international tribunal may permit any evidence whatever to be introduced before it.

AFFIDAVITS AS EVIDENCE. Affidavits will be admitted as evidence but will be weighed with the greatest caution and circumspection.

NATIONALITY, PROOF OF.—CONFLICTING STATEMENTS BY CLAIMANT CONCERNING NATIONALITY. Presumption of nationality raised by an affidavit as to nationality of decedent, together with a certificate of British consular registration of decedent, *held* rebutted by a document produced by Mexican Agent signed by decedent in which he described himself as an American citizen.

CLAIM IN REPRESENTATIVE CAPACITY. A claimant purporting to act on behalf of a decedent's estate must submit evidence of his legal representative capacity.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 757; Annual Digest, 1929-1930, p. 452.

1. In this case the demurrer filed by the Mexican Agent is based on two grounds: (1) that no reliable document has been produced by the British Government to establish the British nationality of either Dr. Murdock C. Cameron or of Mrs. Cameron, and (2) that the Memorial does not comply with article 11 of the Rules of Procedure, which requires an executor or administrator who claims on behalf of the deceased person's estate to give evidence of the legal representative capacity in which he or she is acting.

In the course of his argument the Mexican Agent raised other points. He contended, in particular, that the Commissioners were not entitled to accept affidavits, on the ground that Article 4 of the Anglo-Mexican Convention does not specifically mention affidavits. A further contention was that the third paragraph of Article 4 was governed by Mexican law and that documentary evidence as well as parole evidence given in examination before the Commission should be in accordance only with Mexican law. He relied in particular upon the fact that affidavits were a form of evidence which was unknown to the law of Mexico.

The Mexican Agent declined to attach any importance to an affidavit sworn by a brother of Dr. Cameron (annex 2 of the Memorial), dated the 25th August, 1909, in which it is declared that Dr. Cameron was born on the 9th May, 1855, as a British subject, and that he never lost that nationality. He submitted that the affidavit possessed no value, because it was sworn to by a near kinsman of the claimant, who was therefore not an independent witness and as to whose trustworthiness the Commission had no information.

Furthermore, the respondent Government produced a document signed by Dr. Cameron in 1896 in which he described himself as a citizen of American nationality.

Finally, the Mexican Agent submitted that Dr. Cameron must be considered a Mexican citizen under article 30 of the Mexican Constitution of 1857, because he had acquired land in Mexico and was the father of Mexican children.

2. Against these contentions the British Agent relied upon various points in the course of his argument. In the first place, the affidavit of Dr. Cameron's brother was the evidence of a person in a better position to know the facts of Dr. Cameron's nationality than anyone else. He produced a certified copy of entries in the register of the British Consulate at Tampico, showing that Dr. Cameron and his children were registered as British subjects on the 5th June, 1908. The fact that Dr. Cameron was born in Canada was, he suggested, an explanation why the deceased had described himself as being of American nationality. He relied upon the authorities set out on p. 186 of *Ralston*, that article 30 was to be construed in a permissive and not in an obligatory sense. With regard to Rule 11, he submitted that no letters of administration were required by the law of Texas to administer an intestate estate.

The British Agent contested strenuously the claim of the Mexican Government that affidavits were excluded by the treaty and that Article 4 was to be interpreted according to Mexican law. In the whole history of international commissions no treaty had ever been signed which permitted the law of one

sovereign State to determine disputes to the exclusion of the law of the other sovereign State. Affidavits were covered by the words "other evidence" and the application of the Mexican law related exclusively to the parole examination of witnesses before the Commission.

3. It is necessary that the Commissioners should make clear once and for all what their attitude is with regard to the claim that matters of evidence and procedure were to be governed by Mexican law and that affidavit evidence was excluded by the language of the treaty. This is a matter of great general importance which must be examined with care.

In the first place the Commissioners consider that there is no limitation in the terms of the treaty to restrict them in the evidence they receive. The Commission is independent of both the Mexican law and the British law and there is nothing in the treaty to suggest the contrary.

As an international tribunal the function of the Commission is fundamentally different from the function of a civil national tribunal. The Commission has been created by two sovereign States for the purpose of carrying out a determinate object and both States have selected experienced lawyers who possess their confidence. In signing the Convention the Governments have acknowledged that it is in the interest of both States that the claims should be disposed of once and for all. In the preamble to the treaty both Great Britain and the United States of Mexico express their desire "to adjust definitively and amicably all pecuniary claims arising from losses or damage suffered by British subjects".

By article 2 of the treaty a duty is imposed upon the Commissioners "to examine with care and to judge with impartiality in accordance with the principles of justice and equity all claims presented". In order to carry out the object of the treaty and the duty of the Commissioners it is necessary that this body should be equipped with more extensive powers than a domestic tribunal can enjoy so that the Commissioners can ascertain the truth in a manner which is not subject to any restriction.

It appears to us that the true principles to be observed are expressed in the following words taken from pp. 38-39 of the Report of the Mexican-American Claims Commission, dated the 8th September, 1928:

"For the future guidance of the respective Agents, the Commission announces that however appropriate may be the technical rule of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility or the weighing of evidence before this international tribunal. . . . On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission, with a view of discovering the whole truth with regard to each claim submitted."

4. It appears to the Commissioners that the reference to Mexican law in article 4 of the treaty applies only to the examination of witnesses. It would be a unique event in the history of international treaties if two sovereign States solemnly agreed that the law of only one should prevail. The true interpretation of article 4 of the treaty is quite clear. It is the only article in the treaty which made it necessary for the Mexican Government to safeguard the rights of their own subjects. It authorized the Commissioners to have Mexican citizens examined under affirmation, and signing the Convention the Mexican Government had to be careful that their citizens should not be subject to a system of interrogation more stringent and more oppressive to their consciences or less familiar to them than the system prevailing in the courts of their own country. For this reason it was stipulated that the Mexican law must be observed.

5. With regard to affidavits it appears to the Commissioners that they are bound to reject the view put forward by the Mexican Government. It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether.

The evidence of which the Commission will be able to dispose is limited by the very nature of the claims.

Most of the claims originate in acts of violence, of which documentary evidence will seldom, if ever, be available. The most recent of the facts have been committed nearly ten years ago and the most remote nearly twenty years ago. It is clear that oral testimonial evidence in most cases cannot be obtained owing to the death or the disappearance of witnesses, and that, if available, one would hesitate to attach much weight to the evidence of witnesses who spoke of events which happened so many years ago.

If, the evidence already being so scarce, the Commissioners were to be deprived of the light of truth, dim as it may be, that may shine out of some affidavits, it would mean that their task would be attended by greater difficulties than seems unavoidable, and that the position of one party to the convention would be seriously prejudiced.

Finally, there is nothing in the language of the treaty to warrant the proposition put forward by the Mexican Government.

6. In this particular case, the affidavit sworn by Dr. Cameron's brother is, however, not a document which ought to carry great weight with the Commissioners. Nothing is known about him, whether he is trustworthy or whether he kept in touch with his brother, who left Canada in 1881. On the other hand, for the reasons set out in our judgment in the case of R. J. Lynch, the certificate of consular registration put in by the British Agent does raise a presumption of British nationality, though that presumption is rebutted by another document put in by the Mexican Government. This is the annex attached to the demurrer, in which in 1896 Dr. Cameron designated himself as *ciudadano americano*. It may be that this referred to his Canadian birth, but, even so, the document affords evidence that Dr. Cameron did not at that time consider himself a British subject or had reasons for not avowing himself as such. The signature of Dr. Cameron to this declaration weakens very considerably the evidence of the consular certificate and justifies the Commissioners in holding that the claimant has not established his British nationality.

This being the case, it is not necessary to consider the effect of article 30 of the Mexican Constitution.

7. As regards the right of claimant to represent her deceased husband's estate, the Commission must declare that article 11 of the Rules of Procedure has not been observed. According to this article, claims on behalf of an estate must be filed by the deceased's legal representative, who shall duly establish his legal capacity therefor. The law of Texas, to which the British Agent appealed, cannot be conclusive for the decisions of the Commission, but even if it could, the Mexican Agent has in his brief put forward arguments raising serious doubt as to whether the Texas Law would give claimant any right to appear before the Commission. The Commission is not in possession of any document showing that Mrs. Cameron has the capacity to appear in her own right and in that of her children, three of whom were of age at the time of

Dr. Cameron's death, and all of whom were of age at the time when claimant made her statement (annex 1).

8. The Commission declares that *(a)* the British nationality of neither Dr. Cameron nor of his widow, the claimant, has been sufficiently established, and that *(b)* claimant has not duly shown her legal capacity to act on behalf of Dr. Cameron's estate in accordance with article 11 of the Rules of Procedure.

The demurrer is allowed.

The judgment is unanimous, but the other two Commissioners desire to express separately their reasons for arriving at the same conclusion.

Separate opinion of Mr. Artemus Jones, British Commissioner

Before dealing with the arguments of the respondent Government in the Cameron case, I want first to dispose of a point of great general importance. This is the question whether the Commissioners are free to decide all matters of evidence and procedure independently of the domestic law of Mexico or of the domestic law of Great Britain. In approaching this problem it is necessary to bear in mind the fundamental differences which distinguish an international claims commission from a municipal or national tribunal. The chief of these lies in the nature of their powers. On the one hand, a municipal or national tribunal is vested with compulsory powers for the purpose of enforcing the attendance of witnesses to give evidence and compelling litigants to disclose facts and documents relevant to the dispute. On the other hand, an international commission is equipped with no such powers, but it is wholly dependent and limited by the terms of the treaty which creates it. For example, in the case of this Commission Article 4 of the Anglo-Mexican Convention lays it down in emphatic language that the procedure adopted by the Commission shall not depart from the provisions of the treaty. An agreement between two sovereign States whereby compensation is paid in certain circumstances, not as a matter of right or of international law, but as a matter of grace on the part of one of the two Powers, stands of necessity in an entirely different category from those municipal laws which control the evidence and govern the procedure of national tribunals. On principle it appears to me beyond challenge that an international tribunal such as this cannot be bound by the municipal law of either country. In the course of the argument I drew the attention of the Agents of the British and Mexican Governments to the case of William A. Parker, which is reported in the American official reports of the American-Mexican General Claims Commission, 1927 Volume, pages 35 to 40. This very question was discussed in the unanimous judgment which was arrived at by three Commissioners in that case. It is of some significance that the Commissioner for Mexico concurred completely in the views of the American Commissioner and the President. The considerations which ought to guide international tribunals with regard to the question are set out at length on page 38 under the heading of "Rules of Evidence." The substance of the judgment is that an international commission cannot be governed by rules of evidence borrowed from municipal procedure. This view is fully established by the conclusive reasons set out therein. In my judgment the reasons which are there advanced ought to be adopted without qualification both by this and every other international commission. In expressing this opinion, I am not overlooking the fact that the decision of one international tribunal is not binding upon another. It is no less true, however, that the general principles relating to evidence and procedure which should guide them ought to be the same.

The broad question raised by the demurrer may be put in these terms: Does the word "proof" in Article 10, paragraph *(a)*, mean absolute and conclusive

proof of British nationality, as the Mexican Agent contends? Or does it mean, as the British Agent contends, *prima facie* evidence sufficient to satisfy the Commissioners, and to raise a presumption calling upon the Mexican Government to rebut the Memorial if they have any rebutting evidence? The Mexican Agent's first proposition is that consular certificates and baptismal certificates are *ex parte* statements and only secondary evidence, and that they ought not to be admitted in evidence unless it be proved that birth certificates are not procurable. He admits that such evidence of nationality as would satisfy an English Court of Justice would be sufficient for the Anglo-Mexican Claims Commission. It is necessary therefore that I should explain what the law in England is. In England, as elsewhere, the rule requiring the best evidence of the fact to be proved prevails, and secondary evidence is only admissible where the primary or best evidence is inaccessible. If, for example, an agreement in writing, or an entry in a bank-book or birth register, has to be proved, copies of such agreement or entries are only admissible on showing that the original agreement or original bank-book or original register has been lost or destroyed. It sometimes happens that it is extremely difficult or highly inconvenient to produce either the original book or the original register, and so Acts of Parliament have been passed, declaring that copies of entries therein (certified as being correct copies by the persons having custody of such books or registers) shall be admissible in evidence. A birth certificate is thus an easy and cheap method of proving the birth of a person, just as a copy of an entry in a bank-book proves payment or the state of a person's bank account. A birth certificate proves British nationality because the place of birth and the parentage of the person are facts from which British nationality is inferred. The register of births is the primary (or best) evidence of a birth because it records the statements made to the registrar about the time of birth by the parents of the child, who alone know the true facts about the birth and parentage. A birth certificate is secondary evidence, for it is the register (in which the particulars are entered by the registrar) which is the primary evidence of the fact to be proved. The registrar is a municipal official who accepts the *ex parte* (or uncross-examined) statements of the parents, but who may never see the child personally. Two strangers, man and woman, may induce him to make an entry in the register of a purely fictitious birth, but if they do so they can be prosecuted and punished, for it is a criminal offence in England to cause false entries to be made in a birth or marriage register. A birth certificate is thus just as much secondary evidence of the fact to be proved as the certificate of a Consul registering a man as a British national or a person's baptismal certificate. As a mode of satisfying the rule which requires the best evidence, a baptismal certificate is superior evidence in one or two respects to a birth certificate. Both documents are secondary evidence but the original entry in a baptismal register, recording the statements of the parents, is made in a church to which they both belong, to a clergyman who actually sees and baptizes the child. The signature of a clergyman who signs a baptismal certificate does not require to be verified by an attestation clause, and the same is true of a birth certificate. Where the original or first written statements are destroyed or inaccessible, verbal evidence of reputation may be given by neighbours who know the facts of birth and parentage. Similarly, entries of a family Bible are admissible in English law to prove the birth of a person. It follows from these considerations that the first proposition of the Mexican Agent is fallacious, since it rests upon the assumption that a birth certificate is primary evidence whereas, in fact, it is but secondary evidence.

The second proposition was that documents put in under clause 4 of the Convention can be admitted only in accordance with Mexican Law. It is

argued that the words "according to Mexican Law" which appear in the third paragraph of the clause govern the whole sentence and apply to documents as well as to parole testimony. The soundness or unsoundness of this proposition depends upon the true construction of clause 4. Now the golden rule of construction is that words in a document must be given their plain and ordinary meaning. It is true that negotiations leading to a treaty may be looked at, but no evidence has been given to the Commission as to what was said during the Anglo-Mexican negotiations. No verbal explanation ought to be given of the intention of the parties as expressed in a document. Thus parole evidence to vary or contradict the terms of a written agreement is not admissible. If, for instance, any question arises as to the meaning of a section or a word in an Act of Parliament, advocates are not allowed to quote Parliamentary debates to show what was the intention of Parliament. In England, the Mexican Agent would not have been allowed to tell the Court what his Government had in mind when they signed the Convention. The words of the clause must be interpreted according to the recognized canons of construction. If the words are read in their plain and ordinary meaning, clause 4 is free from ambiguity. The initial paragraph of the Article allows the Commission to determine their own method of procedure, with the stringent qualification that the provisions of the treaty must not be departed from. The second paragraph then permits both Governments to appoint Agents for the purpose of presenting documentary or parole evidence to the Commission. The third paragraph deals first with documentary evidence and then with parole evidence. It declares, first of all, that the Agents may offer documentary evidence in support of or against any claim. It then deals with parole evidence (which means evidence of witnesses by word of mouth at the trial) and declares that the Agents shall have the right to examine witnesses under affirmation, in accordance with Mexican Law, and such rules of procedure as they may adopt (e.g., Rule 27). In Mexico evidence is given in Courts of Law under affirmation. In England a witness must give evidence under the sanctity of an oath sworn upon the Bible, although a witness who objects to an oath may choose to affirm. This difference in the two systems explains the presence of the words "in accordance with Mexican Law" in the sentence immediately after the phrase relating to witnesses who are examined before the Commission in Mexico. It is clear that the words have no application to the first clause of the sentence, and that the contention of the Mexican Agent has no foundation.

The third proposition advanced by the Mexican Agent was that the absence from Article 4 of the word "affidavit" prevents the Commission from receiving evidence in that form. This proposition is fraught with vital consequences to the future work of the Commission. The object of the Convention is to compensate persons who suffered loss and damage between 1910 and 1920, and, as a result, a large proportion of the documents in support of the claims are affidavits. It follows therefore that if the demurrer is upheld, a very large number of the claims presented must be excluded from consideration at the hands of the Commissioners. The contention rests not so much upon the language of Article 4 as upon the verbal statements made to the Commissioners by the Mexican Agent that his Government intended, when drafting the Convention, to exclude affidavits. Accordingly, the duty rests upon the Commissioners of examining closely the reasoning upon which the Mexican Government founds such a proposition. If, according to legal principles the contention is sound, the Commissioners must say so, irrespective of what the consequences may be. The *onus probandi* of establishing the demurrer being upon the Mexican Government, they have to satisfy the Commissioners that the language of the Convention excludes affidavits from being admitted in evidence. In my opi-

nion, little consideration should be given by the Commissioners to the personal explanations, given both by the Mexican Agent as well as the British Agent, as to what the intentions of their respective Governments were. The question which the Commissioners have to decide must be determined solely by the meaning of the language both parties have used in the document. If the language is plain, there is no need to apply those canons of interpretation which are resorted to in Courts of Justice. If, however, the words are susceptible of more than one meaning, those rules of construction must be applied to remove any ambiguity.

The question is, do the words "documents, interrogatories or other evidence" exclude affidavits from being admissible? Each of these terms must be examined. No ambiguity can be found in the first word "documents." It is a generic term comprehensive enough to include affidavits as well as every other form of written evidence. Under this term all documents which are relevant to the issues before the Court are admissible in evidence. It is by virtue of this term that the Mexican Government put in evidence the official report which is attached to the Cameron demurrer as an appendix (consisting to some extent of pure gossip and hearsay evidence). "Documents" is followed by the word "interrogatories." This is a specific term which describes a particular kind of written testimony common in Courts of Justice. This specific term is followed by the general words "or other evidence." What was the intention of the Mexican Government and the British Government as expressed in the words "or other evidence"? There can be no doubt as to the meaning of the word "other." It means documentary evidence of the same kind or class as that to which interrogatories belong. The term "evidence" standing alone would include parole as well as written evidence, but the generality of this meaning is cut down here to documentary evidence by reason of its association with the preceding word "interrogatories." Are affidavits documentary evidence of the same kind or class as interrogatories? The answer is in the affirmative, since, in nearly all material respects, affidavits are almost identical with interrogatories.

On the assumption, however, that the meaning of the words is not plain, let us see how the position stands. The case for the demurrer is that affidavits are excluded, because in the American General Claims Commission, the words of the Convention were "documents, affidavits, interrogatories or other evidence," whereas in the Anglo-Mexican treaty the word "affidavits" is omitted. In order to deal fairly with this contention, certain principles of interpretation must be borne in mind. In the first place, the language of the American General Claims Commission has nothing whatever to do with the Anglo-Mexican Treaty. The former document was never placed before the British Government at the time when the latter treaty was negotiated. The document must be construed without reference to anything outside it. The Mexican Agent's proposition is that the words "other evidence" do not include affidavits, because (1) there was an intention to omit it in the mind of the Mexican Government when they negotiated the Anglo-Mexican Convention, and (2) because the statements of a witness in an affidavit are what Mexicans call testimonial (or parole) evidence and, therefore, not included in the term "documentary evidence." The fallacy underlying the latter argument lies in assuming that statements of a witness taken down in writing place this evidence in the class of parole testimony. If the language of the article is susceptible of more than one meaning, we must fall back upon the recognized canons of interpretation. The words here are subject to the *ejusdem generis* rule, namely, that the word "other" can only mean the same kind or class of thing as the specific term preceding the word. Apart from this, however, there is another ground why the Mexican Government cannot

sustain their objection. On their own showing the words of the article are ambiguous. If it was their intention to exclude affidavits (as the Mexican Agent assures us), and if it was the intention of the British Government to include them (as the British Agent assures us), it follows that the words used by both parties are ambiguous in the sense that the treaty did not express their true meaning. Can the Mexican Government reap any benefit from an ambiguity for which they are to a certain extent responsible? According to the *contra preferentes* rule of interpretation, no party to an agreement can take advantage of an ambiguity to which he has contributed. That is to say, no contracting party can be allowed to take advantage of his own ambiguity to the prejudice of the other party to the contract. There is another objection to the proposition of the Mexican Government. The very rule upon which the Mexican Government rely in the Cameron demurrer, Rule 11, requires the claim of the deceased British subject to be put forward by his executor or administrator. The probate of a will, whereby the appointment of an executor is proved, or the grant of letters of administration by which an administrator is appointed by the Court to administer the estate, can only be obtained in England and her Dominions by means of affidavits. Such affidavits must be sworn and taken before Commissioners for Oaths, solicitors who are appointed Commissioners expressly by Act of Parliament in their capacity as officers of the High Court of Justice for that purpose. To authenticate the probate of any will Dr. Cameron may have made, or the grant of letters of administration to Mrs. Cameron for production to the Anglo-Mexican Commissioners, as well as to obtain them, an affidavit would have been necessary. It is impossible, to my mind, to reconcile this fact with the contention put forward by the Mexican Government.

Another contention was that "interrogatories" ought to carry greater weight with the Commission than *ex parte* statements such as affidavits, because in the former case they are the statements of a witness who has been subjected to cross-examination. As a general proposition it is true that the evidence of a witness who has been cross-examined may carry greater weight than the evidence of a witness who has not. This proposition, however, depends upon what is meant by the term "cross-examination." To make the position clear, it is necessary that I should describe what "interrogatories" mean in England. A party to a civil action has the right to facilitate the proof of his own case by getting the other party to the suit to admit, in answer to interrogatories, certain facts within his own knowledge relevant to the issues in the case. Accordingly he frames in writing certain questions which the person interrogated has to answer in writing upon oath. From the information supplied by the Mexican Agent, in answer to my questions, it appears that interrogatories in Mexico are something different. Here a plaintiff or defendant who wishes to interrogate a witness has the right to put to him certain questions in writing, and the questions are put and the answers given by the witness in the presence of a judge. A copy of the questions is furnished beforehand to the other side, who have the right, if they so choose, to frame certain cross-questions which are enclosed in a sealed envelope and handed to the judge, and the judge apparently puts these questions to the witness at the time when the interrogatories are taken. Is this cross-examination in the generally accepted sense of the term? Cross-examination is one of the salient features of most judicial systems, and it is a powerful weapon for getting at the truth. Cross-examination in the true sense of the word means that a witness has to face the ordeal of an open court in which he is verbally cross-questioned by counsel, both with regard to the facts of the case, and his own antecedents and credibility. The value of this method of ascertaining the truth lies in the personal contact between the witness, who has no idea of what questions may be asked him, and the personality of the

advocate who puts the questions to him. The effect of the evidence of a witness subjected to this ordeal may be completely destroyed. In this sense the evidence of a witness who has been cross-examined is of greater weight than an *ex parte* statement. It appears to me that interrogatories as administered in Mexico should carry not much more weight than the statements of a witness in an affidavit. In nearly all essential respects interrogatories as understood in Mexico and affidavits as understood in England are identical. (1) In both cases the statements of the witness are taken down in writing. (2) They are taken down in writing by officials authorized to do so. (3) Both are written evidence taken down for the information of the Court. (4) Both must be relevant to the issues in the case. The Mexican Agent, in depreciating the value of affidavits, overlooks the fact that they are made before a public official. In England no affidavit can be taken except by Commissioners for Oaths, who are appointed expressly for the purpose and who, as solicitors, are officers of the High Court of Justice. The different notaries public before whom the affidavits were taken in the Cameron case are public officials quite as much as Señor Sierra, who certifies the annex attached to the Cameron demurrer. If the statements contained in that document are admissible because Señor Sierra certifies them as an official of the Court, so likewise are affidavits because they are made before notaries public who are officers of the High Court of Justice. It was argued by the Mexican Agent that as the statement of a witness in an affidavit was not cross-examined to, the affidavit should not be produced before the Commissioners. Here again there is a fallacy. The fact of the statement not being cross-examined to, does not remove affidavits out of the kind or class of written testimony to which that form of evidence pertains; it merely goes to the weight which the statements ought to carry with the tribunal or their probative value. In other words, the circumstance does not render affidavits inadmissible, but is a matter which the Commissioners can take into account in deciding what weight to attach to them. The case for the British Government against the demurrer can be put into a sentence. You have first of all, in Article 4, a generic term "documents," then a specific term "interrogatories," and then follow general words which extend the meaning of the specific term to documents of the same class or kind. In my opinion, affidavits, being in the same class of written evidence as interrogatories, are thus included in the words of the article.

The next contention was that public documents are superior in weight to any other kind of evidence. For example, the annex attached to the Cameron demurrer is a report taken from the files of the Mexican Government, recording a dispute with regard to certain land which Dr. Cameron had acquired prior to 1896. The case for the Mexican Government rests upon the proposition that, as the statements are contained in an official document, they amount to conclusive evidence. It is necessary to examine the grounds upon which this proposition is founded. The basis of this contention is admittedly derived from the maxim *omnia praesemunter esse*, which is derived from the Roman law and is in operation in most systems of jurisprudence, including the British. The maxim simply means that public documents shall be admitted in evidence without question on the ground that the law presumes that all acts done by public officials are done regularly and in good faith. In other words, the maxim merely facilitates the mode of proof. The evidential value of the contents of such documents is not in any way affected by the application of the maxim. For instance, the annex referred to consists in part of hearsay evidence and partly of extracts from official documents. The fact that these extracts are contained in Government archives dispenses with the necessity of proving them in a formal way. Notwithstanding this fact, it is still for the Commissioners to decide for themselves what credence to attach to the statements. It was alleged by the Mexican

Government that Dr. Cameron was not a British subject, inasmuch as he had signed a document in which he had described himself as an American citizen. In support of this allegation, they produced an official copy of the document referred to. No reflection was cast in any way on the authenticity of this document, but the Mexican Government, in their anxiety to produce all the evidence at their disposal, put in evidence the original document bearing Dr. Cameron's signature. It appears to me that the demurrer is established beyond all doubt by means of this document. The claimant had produced *prima facie* evidence, in my judgment, of Dr. Cameron's British nationality, but this evidence is rebutted by a document bearing Dr. Cameron's own signature, describing himself as a citizen of American nationality. On this ground I agree with my brother Commissioners that the demurrer must be allowed. This unanimous decision of the Commissioners renders it unnecessary to consider the further question whether the claim is barred by the operation of paragraph 3 of article 30 of the Mexican Constitution.

The final submission made by the Mexican Agent was founded on clause 11 of the Rules of Procedure, which requires an executor or an administrator to establish his legal capacity before the Commissioners can entertain a claim on behalf of a deceased person's estate. It appears that when Dr. Cameron was forced to leave Mexico in July 1916 in the circumstances set out in the Memorial, he moved, with his family, into the State of Texas. They were resident there at the time of his death in 1918 and the claimant lives there now. The Mexican Agent contended that Mrs. Cameron could not, under Rule 11, bring the claim before the Commission until she had obtained letters of administration from the courts to administer the estate of her husband, who had died intestate. The Agent of the British Government relied on a letter, written by Mrs. Cameron's lawyer in Texas, that husbands and wives are virtually partners in the property accumulated during marriage under the laws of that State, and also that it was not considered necessary in Texas that an intestate estate should be administered under the authority of the court. This contention, however, is of no avail, as the Mexican Agent has filed in reply a copy of article 2859 of the Texas Civil Code. According to the Texas Civil Code, Dr. Cameron's marital rights are governed by the law of Canada. There is no evidence before the Commission to suggest that the law of Canada does not require the administration of an intestate estate under the authority of the court. In these circumstances, it appears to me that Mrs. Cameron's failure to comply with Rule 11 is fatal to the hearing of her claim.

Separate opinion of Dr. Benito Flores, Mexican Commissioner

The demurrer is based on failure to establish the British nationality of Dr. Murdock C. Cameron and of his widow, Mrs. Virginie Lessard Cameron; and on the fact that, the claim having been made for damage to the property of a person deceased, the said claim should, pursuant to article 11 of the Rules of Procedure, be preferred on behalf of the estate interested and through its legal representative, the claimant not having shown that she is the legal representative of her husband's estate.

The Facts

I. This is a claim for damages, and compensation for loss of property by reason of the confiscation of the Glen Urquhart Ranch, situated at Gomez Farias, by Carranza soldiers under the orders of Lieutenant-Colonel Rodrigo Flores Villarreal, in the month of July 1916.

II. The evidence of the British nationality of Mrs. Cameron is based on an affidavit (annex 2) relating to the British nationality of her husband, Murdock C. Cameron, made by Daniel Cameron before Chas. E. Tanner, Notary, on the 25th August, 1909, in the Province of Nova Scotia, Canada. In said affidavit Daniel Cameron declares that his brother, Murdock C. Cameron, was born at West River, Pictou County, Province of Nova Scotia, on the 9th May, 1855, and that he preserved such nationality until the 25th day of August, 1909, deponent having added that the name and birth of his brother were entered in his father's family Bible, which was in his possession. The claimant further produced a certificate of the marriage solemnized between herself and husband (annex 3).

III. The Mexican Agent forthwith entered a demurrer, which he based on two grounds:

1. That the British nationality of Murdock C. Cameron has not been established, nor that of his widow, Mrs. Cameron.

2. On the fact that the claim should, pursuant to article 11 of the Rules of Procedure, be filed on behalf of the estate of the said Murdock C. Cameron, and that the claimant has not proved that she is the legal representative of the said estate.

IV. The British Agent replied to the effect that the affidavit of Mr. Daniel Cameron is the best evidence available for proof of the British nationality of Dr. Cameron, as due to the fact that he was born on the 9th May, 1855, before civil registration was compulsory in England, it was impossible to produce a birth certificate; that proof of the marriage of the claimant to Dr. Cameron was furnished by annex 3 to the Memorial, and that as the nationality of a wife is the same as that of her husband, the British nationality of Mrs. Cameron had been properly established; and, lastly, the British Agent contended that the claimant did not need to prove by means of any document whatsoever that she is the legal representative of the estate of her husband, because he died in the State of Texas, United States of America, where he had resided for some time; that according to the laws of that State, husband and wife were virtually partners in so far as concerned property acquired during marriage, and that it was not held to be necessary when a person died intestate without leaving real property that his estate be administered by the Courts, and that Dr. Cameron had died intestate and had left no real property, for which reason no proceedings were instituted in the Courts for winding up the estate; that Mrs. Cameron considered herself as the surviving member of the partnership with her husband, in community, and he in this manner contended that the claimant was entitled to claim in her own right and as the legal representative of the late Dr. Cameron.

V. The Mexican Agent filed a brief in this matter, and in support of the grounds on which he based his demurrer, contended that citizenship was one of so many facts that have to be proved in the same manner as any other facts: that evidence taken *ex parte*, such as depositions in the form of affidavits, was wanting in probative value; that even in the contrary supposition, the evidence of witnesses might not be offered as proof of nationality, except when proof was shown that no better evidence, such as a birth certificate, certificate of baptism or family register, was available; that the testimony of a single witness was not admissible as proof; furthermore, that the deposition of Daniel Cameron, the brother of the person from whom the claim was derived was open to suspicion and should be struck out, due to the degree of their relationship, and that he had all the more reason for requiring authentic proof of the nationality of Dr. Cameron, and that this gentleman, in a document filed with Mexican

authorities, in connexion with a different matter, had stated that he was of American nationality. And he submitted a certified copy of the document to which he had referred.

VI. The said Mexican Agent contended in his brief that the claim ought to be filed on behalf of the estate of Dr. Murdock C. Cameron, and through his legal representative, pursuant to the terms of the Convention, and in accordance with the practice followed in Courts of Arbitration. He assailed the proposition of the British Agent, to the effect that as Dr. Cameron had died in the State of Texas, United States, where husband and wife are virtually partners as regards property acquired since marriage, he did not consider it necessary to establish her capacity as the legal representative of the estate of Dr. Cameron by means of any document, because if he accepted the principle that the law of the country of the husband governs the marriage contract, the law of England, and not that of Texas, would apply; and if the Anglo-Saxon principle, that the relations of husband and wife in so far as concerns personal property must be governed by the law of the first domicile of husband and wife, be accepted, then as this claim was personal property, the law of England would also apply.

VII. This case having begun to be tried at the meeting of the 10th October, 1929, arguing of the same was concluded on the 17th day of the said month of October, both Agents having defended their standpoints at length, as mentioned above, the learned British Agent having submitted a copy of entries in a register at the British Consulate at Tampico, relating to registration of the children of Dr. Cameron. The Mexican Agent referred very fully to the nature of *ex parte* evidence, not conceding that it has any value, especially for proof of nationality, and developed his proposition to the effect that affidavit evidence should not, under the Convention, be admitted, a proposition which was assailed by the British Agent.

Considerations of a Legal Order

I. This case gave rise to the problem of the interpretation of paragraph 3 of Article IV of the Mexican-British Convention and was the cause of serious discussion, in which the Mexican Agent contended that affidavits should not be admitted under that provision, and it was called in question whether the Commission was or was not at liberty to weigh the evidence submitted, independently of the laws of Mexico and of England.

The British Agent contended that the Commission was authorized to receive all kinds of evidence, even that known as affidavits, on the understanding that the question of the admissibility of any evidence should not prejudge its sufficiency, and that the Commission is only bound to comply with the Mexican laws, when it is a matter of examining witnesses produced by the agents or counsel of either Government, pursuant to that provision of the Convention.

The Mexican Commissioner holds that as the admission of affidavits as evidence is not forbidden by the Convention, the Commission is authorized to receive them and to weigh them in due course, in accordance with the rules universally accepted, both in Municipal and International Law, and holds that a Judge should not be hindered in any way from investigating the truth of the facts, on which foundation he will have to deliver his judgment.

II. As regards the probative value of the affidavit made by the brother of Dr. Cameron, the Mexican Commissioner holds that no probative value should be ascribed to it, for the following reasons:

(a) Because Daniel Cameron is the brother of the claimant, and naturally his testimony cannot be impartial and will always have a tendency to be favourable to the interests of that member of his family, an objection that may very justly be made, which deprives his deposition of all value.

(b) Because he is the only person testifying as to the fact of the claimant's birth, and as a general rule the testimony of a single witness, however honourable he may be, cannot constitute full proof.

(c) Because the testimony of Cameron's brother is in open contradiction to the deposition of the claimant himself, as the latter in 1896 stated before the Land Agency of the Ministry of Fomento that he was an American citizen, while his brother now asserts that the claimant always preserved his British nationality. The declaration made by Cameron in 1904 was laid before the Commission for inspection in a document issued from the above-mentioned Ministry, in the form of a certified copy, the authenticity of which is undeniable. That being the case, the affidavit of Daniel Cameron should be rejected.

(d) Because, although the Commission by a majority has declared that consular certificates as to registration of British subjects constitute *prima facie* evidence of nationality, and in this case a certificate from His Britannic Majesty's Consul at Tampico has been produced, in which six persons of the name of Cameron, among whom the name of Murdock Campbell Cameron is to be found, appear as having been registered as British subjects in 1908; this evidence, far from being corroborated by other evidence, is contradicted by the admission of the late Murdock C. Cameron himself, in the document of 1896, mentioned above; and that being the case, a declaration should be made to the effect that Mrs. Virginie Lessard Cameron has not established either the British nationality of her husband, or her own.

The principles on which the above arguments for the rejection of the affidavit of the claimant's brother as insufficient are based find their origin in the remotest antiquity, and are duly applied in all modern courts. In this regard, we may cite article 283 of the French Code of Civil Procedure; article 283 of the Belgian Code; the Civil Code of the Netherlands, articles 1942, 1945 and 1946 (sections 1 and 2); Spanish Civil Procedure, article 660 (sections 1, 2 and 3); the Italian Civil Code, article 327 (second part); and our Federal Code of Civil Procedure, articles 302 and 356.

III. The second ground on which the Mexican Agent founds his demurrer is that the claimant has not shown that she is the legal representative of the estate of Dr. Murdock C. Cameron, notwithstanding that she claims for damage to the property of a deceased person.

In effect, article 11 of the Rules of Procedure, approved by the Mexican-British Commission, reads:

"Any claims presented for damage to a British subject already deceased at the time of filing such claim, if for damage to property, shall be filed on behalf of his estate and through his legal representative, who shall duly establish his legal capacity therefor."

In the Cameron case, his widow has not shown that she is the legal representative of the estate of her husband; either under the laws of England, or under those of Texas, or in any other way, having pleaded that she was not, under the laws of the place where Dr. Cameron died, bound to obtain any letters of administration; but the unquestionable fact is that in the present case the only rule governing the claim under discussion is that laid down by article 11 of the Rules of Procedure approved by the Commission, the relevant part of which is transcribed hereinabove. The Mexican Commissioner holds that Mrs. Cameron has failed to comply with that provision, and that the demurrer

interposed by the Mexican Agent on the ground of such omission should therefore be sustained.

In view of the whole of the foregoing, the Mexican Commissioner, concurring with the learned opinion of the Presiding Commissioner and with that of the British Commissioner, although in the latter case on different grounds, holds that the demurrer interposed by the Mexican Agent should be sustained, and the Commission abstain from taking cognizance of the aforesaid claim.

ANNIE BELLA GRAHAM KIDD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 3, undated, dissenting opinion by Mexican Commissioner, undated. Pages 50-54.)

NATIONALITY, PROOF OF.—BIRTH CERTIFICATE AS PROOF OF NATIONALITY. Proof of loss of a birth register will excuse a failure to submit a birth certificate of a British subject alleged to have been born in England at a time when compulsory registration of births was in operation.

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY. Consular certificate, affidavit of a father, and corroborating evidence *held* sufficient to establish British nationality.

1. In this case the Mexican Agent has filed a demurrer on the ground that the British nationality of the late William Alfred Kidd (and therefore of his widow and children) has not been established. The claimant relies on an affidavit sworn by the late Mr. Kidd's father (annex 8) to the effect that his son was born and baptized at Arundel in Canada in 1877.

In addition to the general objections to affidavits which were pleaded in the case of Mrs. Cameron, the Mexican Agent pointed out that compulsory registration of births was in operation in England a few years before the late Mr. Kidd was born, and that in all probability it was also in operation in Canada. In these circumstances, he contended that a birth certificate could have been procured or a baptismal certificate, and that in any event evidence of a better quality was required than the affidavit of a near relation to the claimant's husband.

It appears, according to the information given by the British Agent, that the birth register had been lost, and he contended that secondary evidence of the birth by means of an affidavit was the best available evidence. The British Agent also put in evidence the birth certificates relating to the claimant's children, together with the declaration of the British Consul-General in Mexico City, dated the 27th December, 1916, to the effect that the claimant had been duly registered as a British subject.

2. It is not necessary, in the opinion of the Commissioners, to repeat their views on the question of the admissibility or the value of affidavit evidence generally; those views are fully set out in the judgment in the Cameron case. From one point of view, an affidavit sworn by a father concerning the birth of his child has more value than the statement he may make to the Registrar of Births, since the latter statements are not made upon oath. In this instance the affidavit is corroborated by other documents.

There is first of all the consular certificate, which was delivered a few months after the murder of the late Mr. Kidd and at a moment when the Consul-

General must have realized that he was imposing on his Government the serious obligation of protecting the interests of the widow and children. Furthermore, the day after Mr. Kidd's murder, there were proceedings before the Constitutionalist Court of First Instance, and in the course of the interrogatories all the witnesses described Mr. Kidd as a native of Canada. Two weeks after the murder of Mr. Kidd, the British Chargé d'Affaires at Mexico City reported to the Governor-General of Canada that "a Canadian, Mr. W. A. Kidd," had been killed. Moreover, there is the further fact that Mrs. Kidd returned to Canada after she lost her husband and that she was at once appointed as tutor of her minor children with the approval of the relatives on both sides.

On the one hand, there are all these facts corroborating the statements of the affidavit and helping to establish Mr. Kidd's British nationality. No evidence of any kind has been adduced by the respondent Government in rebuttal.

3. On these grounds the Commission is of opinion that the British nationality of the late W. A. Kidd (and, therefore, of his widow and children) has been duly established. The demurrer is overruled.

The Mexican Commissioner does not agree with this judgment and expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

The Mexican Commissioner regrets to have to dissent from the opinion of his distinguished colleagues, as regards the legal considerations taken into account by them for overruling the Demurrer entered by the Mexican Agent, in the matter of claim No. 29, presented by His Britannic Majesty's Government on behalf of Mrs. Annie Bella Graham Kidd; and bases his own opinion upon the following considerations in fact and in law.

The Facts

I. The British Government claims compensation amounting to $75,000.00, Canadian currency, for the murder of William Kidd at El Carrizal, near Zitácuaro, and for the theft of all his personal property, committed by a band of men on the 8th October, 1916.

II. The British nationality of the claimant is proved by an affidavit made under date of the 11th August, 1927, by William Kidd, the father of the decedent, before G. Valois, a Notary Public in and for the Province of Quebec, Canada, and by means of the certificate of the marriage of William Alfred Kidd and Annie Graham. The claim is preferred on her behalf and on that of her five minor children at the rate of $25,000.00 for the claimant and $ 10,000.00 for each one of her said children.

III. William Kidd, the father of the decedent, asserts in his deposition that his son, William Alfred Kidd, was born at Arundel, Argenteuil County, Province of Quebec, Dominion of Canada, on the 3rd April, 1877.

The said William Kidd declares that the birth of his son was entered in the register, but that the original register was lost many years ago; and that his son was baptized about the 10th September, 1877, by the Rev. Arthur Whiteside, the Pastor of the Methodist Church at Mille-Isles Township.

IV. The Mexican Agent forthwith interposed a Demurrer, alleging that the British nationality of William Kidd had not been established by the affidavit made by the father of the decedent himself; that as the nationality of the said William Kidd had not been established, that of the claimant, the fact of whose marriage has been proved, had not been established either. He alleged that the

nationality of the minor children had not been properly proved, because no birth certificates were attached to the Memorial, and consequently prayed that the Commission should, as a British subject was not involved, abstain from taking jurisdiction over the claim.

V. The British Agent replied by asserting that the entry of Kidd's birth had been lost; but that the affidavit made by his father in order to prove his British nationality was sufficient and therefore for that of his wife; that in connexion with the nationality of the minors he subjoined with his Reply five certificates issued by the Supreme Court of St. Jerome, Province of Quebec, District of Terrebonne, for each one of the five children; but said certificates refer not to the Civil Register, but to the baptism of the said minors. When the case had already come up for hearing, the said British Agent also produced a Certificate of Consular Registry of Mrs. Annie Bella Graham Kidd as a British subject, dated the 26th December, 1916.

Legal Considerations

I. The Mexican Commissioner does not accept the affidavit of the father of William Kidd, as to the British nationality of his son, as sufficient to establish that fact, because it is an *ex parte* deposition, submitted by the father of the victim, a deposition which was challenged by the Mexican Agent, by reason of the very close relationship existing between the interested parties, as although the Commission has decided by a majority that affidavits constitute *prima facie* evidence, susceptible of conversion into full proof, by means of corroboration by other elements, the Mexican Commissioner holds that the affidavit of William Kidd's father finds no direct corroboration to demonstrate its sufficiency.

II. The consular certificate in which the British nationality of Mrs. Kidd is recorded is positively of no value as proof concurrent with the affidavit of her father, for two reasons:

(a) Because such registration was effected subsequently to the death of her husband and cannot have any retrospective effect; and

(b) Because, even on the assumption that proper proof had been shown of the nationality of Mrs. Kidd, it would not, either logically or in law, follow therefrom that the nationality of her husband had been established. The true principle is the contrary one, i.e., that if the nationality of the husband had been proved, that of his wife would also have been proved; but what happens is that the only element of evidence to show the nationality of William Kidd is the affidavit of his father, which is null and of no value, according to article 283 of the French Code of Civil Procedure; 283 of the Belgian Code; articles 1942, 1945 and 1946, subdivisions 1 and 2, of the Civil Code of the Netherlands; article 660, sections 1, 2 and 3, of the Spanish Code of Civil Procedure; article 327, second part, of the Italian Civil Code, and articles 302 and 356 of our Federal Code of Civil Procedure, all of which provisions unanimously reject the depositions of persons in any way interested in a controversy, on the understanding that the said laws assume a witness to have testified under oath and before the Court which is to weigh such evidence. In the present case, not even that circumstance is present; it is a case of the testimony of William Kidd's father, by way of *ex parte* evidence.

III. The fact that the witnesses who deposed before the Court of First Instance as to the details of the murder of William Kidd, reputed him to be a British subject, and the circumstance that the British Legation at Mexico, when reporting the murder of William Kidd to their Government, described him as a Canadian, do not mean anything but that the decedent, William Kidd, was at the outside considered by reputation as a British subject; but

seeing that the birth of William Kidd had, by the admission of his own father, been registered; that such registration was effected in April 1877, when compulsory registration was already in force in Great Britain; that he was baptized in September 1877, and that the certificate of baptism was duly issued by the Rev. Arthur Whiteside, the British nationality of William Kidd should have been established: (1) by means of a certified copy of the entry in the Civil Register; (2) by means of the certificate of baptism; and (3) by the evidence of witnesses, and in any event proof should have been shown of the impossibility of producing the best of said evidence, in the order given, according to the universally accepted principle in England, which says: "None but the best evidence may be adduced, that which is of a secondary kind not being admissible for that which is of a primary kind, where the primary evidence is accessible." (*Stephen's Commentaries on the Laws of England*, Vol. II, p. 603.)

The British Statute of 1874, which declared civil registry compulsory, and the authority of Lehr (*Eléments de droit civil anglais*, Paris, 1885, p. 17) assist in demonstrating the insufficiency of the evidence produced by the claimant for the purpose of establishing the British nationality of William Kidd.

In view of the whole of the foregoing, the Mexican Commissioner holds that the Demurrer entered by the Mexican Agent should be sustained, and that the Commission should therefore abstain from taking cognizance of this claim.

CAPTAIN W. H. GLEADELL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 4, November 19, 1929, dissenting opinion by British Commissioner, undated, concurring opinion by Mexican Commissioner, November, 1929. Pages 55-64.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY. An international claim must be founded upon an injury or wrong done to a citizen of the claimant government and must remain continuously in the hands of a citizen of such government until the time for its presentation before the tribunal.

A forced loan imposed by the Provisional Government of Yucatán upon real property owned by a British subject was a claim British in origin, but when such owner thereafter died and bequeathed her residuary estate to an American citizen, subject to a life estate in a British subject, *held* such claim lost its quality of a British claim.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 762; Annual Digest, 1929-1930, p. 190.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 231.

1. The respondent Government have lodged in this case a Motion to Dismiss the memorial on the ground that the right to claim the compensation for the loss which is the subject matter of the memorial is not vested in Captain Gleadell, a British subject, but in his stepdaughter, Mrs. Muse, who is an American subject.

Captain Gleadell was married in 1907 to Mrs. Katherine Baker de Gleadell, who was the owner of real property in Mexico. In 1914, when she was a British subject by reason of her marriage to the claimant, Mrs. Gleadell was compelled,

by means of a forced loan, to deliver the sum of ten thousand dollars to the Provisional Government of Yucatan. The memorial seeks to recover this sum from the Mexican Government on the ground that the right to it is vested in Captain Gleadell. In its origin the claim is undoubtedly British, but the contention of the Mexican Agent is that Mrs. Gleadell by her will bequeathed the right to claim the money to Mrs. Muse, who is her daughter by her first marriage and who was born in Mexico. In support of this contention the respondent Government relied upon the will of Mrs. Gleadell, executed in England on the 6th October, 1925 (annex 7 of the memorial), clause 5 of which reads as follows:

"I devise and bequeath all my real and personal property or share or interest in real and personal property which may be situate in Mexico at the time of my death unto my said daughter absolutely and beneficially."

The submission of the Mexican Agent is that this is a claim to recover money, that the right to claim money must be considered as a form of personal property, and that this right, according to English jurisprudence, is a right situated at the place where the debtor is domiciled.

On the other side it was contended by the British Agent that Mrs. Gleadell paid the forced loan from her general resources, which form no part in her Mexican estate. The testatrix nominated two executors under her will, namely, her husband, Captain Gleadell, and her daughter, Mrs. Muse, but the latter renounced probate and Captain Gleadell is now the sole executor. The British Agent contended that Captain Gleadell, under the terms of the will, possessed a life interest in the residuary estate of the late Mrs. Gleadell, and that the claim for the repayment of the forced loan was part of the estate.

2. In the opinion of the majority of the Commissioners, a long course of arbitral decisions has established the principle that no claim falls within a treaty which is not founded upon an injury or wrong done to a citizen of the claimant Government. According to *Ralston*, pages 161 and 163, and *Borchard*, pages 664, 666, such claim must have remained continuously in the hands of the citizen of such Government until the time for its presentation before the Commission.

It is admitted that the origin of the claim was British, and the contest between the two Governments is whether the claim has retained that British character until the present time.

This question cannot be solved by the fact that the deceased Mrs. Gleadell was a British subject at the time of her death and that her husband acts on behalf of her estate. The necessity of the continuous national character of the claim, as formulated above and as adhered to by the Commission, does not allow us to consider the estate as taking over and retaining the testatrix's nationality, as apart from the nationality of the heirs. It is essential to know in whose hands the assets of the estate have passed and whether this transition involved a change of nationality in the person entitled to the claim. These questions can only be answered by the will.

3. Mrs. Gleadell in her will divided her estate in two parts. The one was described in clause 5, quoted above, and the other in clause 6, reading as follows:

"6. I devise and bequeath the residue of my real and personal property (including any real and personal property to which I may be entitled or in which I may be interested in the United States of America or elsewhere out of Great Britain), not hereinbefore otherwise disposed of, unto my Trustees upon trust to sell, call in and convert the same into money (with full power to postpone such sale, calling-in and conversion for so long as my Trustees shall in

their absolute discretion think fit without being responsible for loss (Katherine Gleadell) caused by such postponement) and, out of the proceeds of such sale, calling-in and conversion and out of my ready money, to pay my debts and funeral and testamentary expenses and to stand possessed of the residue upon trust, to invest the same in manner hereinafter authorized, the said residue and the investments for the time being representing the same being hereinafter called 'my residuary estate.' "

It is quite clear that the testatrix disposed of all the assets of her estate, because she called the second part "my residuary estate." The title to claim the money paid unto the forced loan is, therefore, included either in clause 5 or in clause 6.

There can be little doubt that the right to claim falls under the definition of "personal property." Dicey (*Conflict of Laws, a digest of the Law of England*, p 313), when enumerating the kinds of goods which constitute personal property, mentions:

"*Chose in action.*—Personal property includes every kind of Chose in action, using that term in its very widest sense. It includes, that is to say, every movable which cannot be touched or intangible movable. Thus it includes 'debts' in the strict sense of the terms, and also everything (not an immovable) which can be made the object of a legal claim, as, for example, a person's share in a partnership property."

There is reason to identify this claim with a debt of which Mrs. Gleadell was the creditor, because the forced loan, raised by the Governor of Yucatán in 1914, was recognized by the Mexican Government and all holders of receipts were invited to submit their claims to a special Commission.

4. The question now to be answered is whether this part of Mrs. Gleadell's personal property was situate in Mexico (clause 5 of the will) or elsewhere (clause 6).

As the will was made in England by a British subject, the intention of the testatrix must be interpreted according to English law and jurisprudence.

In this connexion it is material to observe what Dicey says on pages 318 and 319:

"From these two considerations flows the following general maxim, viz., that whilst lands, and generally, though not invariably, goods must be held situate at the place where they at a given moment actually lie, debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced."

In this case the only country where the claim is recoverable is Mexico and, therefore, this personal property must be considered as situate in Mexico and to have been left to Mrs. Gleadell's daughter, an American citizen.

We are confirmed in this view by the circumstance that the burden of the forced loan was imposed among proprietors of real property in Yucatán, which property has been shown by the Mexican Agent in his brief to have belonged to Mrs. Gleadell jointly with her daughter.

As Mrs. Gleadell died before the Claims Convention was signed, the claim, although British in origin, has not retained that character until the time of its presentation. This fact cannot be modified by the circumstance that the executor of the estate is a British subject.

On these grounds the majority of the Commissioners take the view that the right to claim the money does not belong to a British subject and, therefore, falls outside the jurisdiction of the Court.

The motion to dismiss is allowed.

One of the Commissioners expresses a dissenting view.

Dissenting opinion of Artemus Jones, British Commissioner

In this case the claimant is Captain W. H. Gleadell, who is a British subject. In December 1907, he married a widow named Mrs. Katherine de Regil, who was the owner of some real property at Merida in the State of Yucatán. In September 1914, one Eleuterio Avila arrived at Merida and proclaimed himself the Military Commander of the State. He suspended the constitutional guarantees of the Republic, immediately declared martial law, and then issued a decree raising a forced loan of eight million pesos. The victims of the forced loan were citizens who possessed property above a certain amount, and the alleged objects of the loan were the pacification and the reconstruction of the country. Amongst those citizens was Mrs. Gleadell, who was absent from the State at the time. She was represented in the district by a lawyer, and A. P. Aznar, who held her power of attorney. The manner in which the alleged loan was enforced is described on page 12 of the memorial in Mr. Aznar's evidence. From this it appears that if any citizen refused to pay the sum which had been assigned to him or to her, violence was resorted to in order to obtain payment, e.g., the capture of the person who refused to make the advance. At this time all constitutional guarantees were suspended and therefore there could be no resort to legal redress, and in these circumstances a state of panic prevailed. It was in this situation that Mrs. Gleadell's attorney advanced the sum of ten thousand pesos to the Government. In 1917 all the holders of the receipts for the money contributed to the forced loan were enumerated in an official list issued by the Government, and Mrs. Gleadell's name appeared among them. The holders were invited to present their receipts to a Commission appointed by the Government, but Mrs. Gleadell did not do so. On the 28th October, 1925, Mrs. Gleadell died in Mexico, having about three weeks before that date executed a will at Northam, Devonshire, in England. As executors of the will, the testatrix nominated her husband, Captain Gleadell, and her daughter, Mrs. Muse, who is married to an American diplomatist and is not a British subject. Mrs. Muse renounced probate and Captain Gleadell is therefore the sole executor. Under the provisions of the will the real and personal property of the estate situated within Mexico at the time of her death was bequeathed to Mrs. Muse. After this provision came certain specific bequests, and then the residue of the estate was left to trustees upon certain trusts. Under the terms of the trusts, the income of Mrs. Gleadell's estate outside Mexico was left to her husband for life.

Upon these facts the Mexican Agent opposed the consideration of the memorial on the ground that the money contributed by Mrs. Gleadell to the forced loan formed part of her Mexican estate, which was bequeathed to her daughter, who is not a British subject. He argued that the money due to the estate from the Mexican Government was a debt or chose in action, which was only recoverable in Mexico (Dicey's *Conflict of Laws*, page 318). He founded this argument upon the fact that whilst the receipt for the money contained no promise to repay, there was a clause in Avila's decree stating that when constitutional rule was re-established, the Government would "agree to the form and dates on which the repayment of the amounts lent will be effected."

Moreover, Captain Gleadell claimed the money, not in his capacity of executor, but as a person who had a life interest in the residuary estate. To these contentions the British Agent replied that there could be no contract where money was raised under these circumstances. Debt could only arise out

of contractual relationships and the compulsion under which the money was admittedly taken was inconsistent with the consensual basis of contract. Dicey's dictum could not apply in this case as it was confined to contractual obligations. Moreover, the will and other documents produced in the memorial established the fact that the claimant was the sole executor of the will, although he was also a beneficiary of the residuary estate.

In my view it is impossible to dispose of the claim at this stage of the proceedings. The question whether the ten thousand pesos formed part of the Mexican estate cannot be determined until the circumstances attending the repayment of the money to Señor Aznar are ascertained. It is clear that the money was paid in the first instance by Señor Aznar, acting as agent for his principal, Mrs. Gleadell. It is not clear, however, how the agent was repaid the money by the principal. The crucial point of this case turns upon the particular source out of which the money was paid. All that is known is that Mrs. Gleadell's attorney paid it at a time when Mrs. Gleadell was in England. If the attorney sent in his bill of costs to his client in the ordinary way, including this sum, the cheque sent to him in payment would be drawn upon Mrs. Gleadell's general account. If these are the facts, Captain Gleadell is clearly entitled to claim an interest in the money on the ground that he has a life interest in the residuary estate out of which the ten thousand pesos came. It was suggested that Mrs. Gleadell's position was not unlike that of a debenture holder and the respondent agent argued that the contribution to the forced loan was a contract which could only be enforced in Mexico. Both analogies are fallacious. The essence of a debenture is the security it gives for the repayment of the money. Mrs. Gleadell possessed nothing except a receipt, which did not contain even a promise to repay and she entered into no contract. In view of these considerations I am of opinion that the demurrer should be rejected and the merits of the claim should be gone into.

Separate opinion of the Mexican Commissioner in the Motion to Reject Filed by the Mexican Agent, in the Matter of Claim No. 19, presented by the Government of His Britannic Majesty on behalf of Captain W. H. Gleadell. This opinion concurs with that of the Honourable Presiding Commissioner.

The Facts

I. The Government of His Britannic Majesty claims from the Government of Mexico the sum of $ 10,000.00, United States currency, with interest at the rate of 6 per cent per annum, counting from the 14th October, 1914, on behalf of Captain W. H. Gleadell, under the following heads:

II. Mrs. Katherine Baker de Gleadell, the wife of Captain W. H. Gleadell, a British subject, was in September 1914 subjected to a forced loan amounting to $10,000.00, United States currency, by the Governor of Yucatán, through a decree dated the 26th September, 1914, which established a forced loan of eight million pesos for the pacification and reconstruction of the country. Mrs. Gleadell received in exchange a receipt for the sum of $10,000.00, United States currency, issued by the Chief of the Revenue Department. The decree in article VI provides that the National Government would, on the re-establishment of constitutional order, determine the manner and dates on which repayment of the amounts loaned were to be effected.

III. Mrs. Gleadell died on the 28th October, 1925, leaving a will in which she appointed Mrs. Maria Beatriz Julia Muse, her daughter, and Mr. Gleadell, her husband, as executors.

IV. According to clause V of the said will, the Mexican properties were inherited absolutely by her daughter, who is now a citizen of the United States. Clause V, above mentioned, of the will executed by Mrs. Gleadell reads as follows: "V. I devise and bequeath all my real and personal property or share or interest in real or personal property which may be situate in Mexico at the time of my death unto my said daughter absolutely and beneficially."

V. The residue of her estate, both real and personal, wherever situated, and not otherwise disposed of in the said will, was to be applied in the following manner (clauses 6 and 7):

"6. I devise and bequeath the residue of my real and personal property (including any real and personal property to which I may be entitled or in which I may be interested in the United States of America or elsewhere out of Great Britain), not hereinbefore otherwise disposed of, unto my Trustees upon trust to sell, call in and convert the same into money (with full power to postpone such sale, calling-in and conversion for so long as my Trustees shall, in their absolute discretion, think fit without being responsible for loss (Katherine Gleadell) caused by such postponement) and, out of the proceeds of such sale, calling-in and conversion and out of my ready money, to pay my debts and funeral and testamentary expenses and to stand possessed of the residue upon trust, to invest the same in manner hereinafter authorized, the said residue and the investments for the time being representing the same being hereinafter called 'my residuary estate.'

"7. My trustees shall stand possessed of my residuary estate upon the following trusts:

(a) Upon trust to pay the income thereof (subject to the provisions of clause 4 hereof) to my said husband during his life.

(b) From and after his death to divide the same into two equal parts and to stand possessed of one such part as to both capital and income for my son Paul Gleadell on his attaining the age of twenty-one years.

(c) To stand possessed of the other of such parts (hereinafter called 'my daughter's share') upon trust to pay the income thereof to my said daughter during her life.

(d) From and after her death to stand possessed of my daughter's share as (Katherine Gleadell) to both capital and income upon trust for such one or more of her children as she shall by deed or will appoint.

(e) In default of such appointment, or so far as the same shall not extend, to stand possessed of my daughter's share upon trust for such of her children as being male attain the age of twenty-one years, or, being female, attain that age or marry under that age and, if more than one, in equal shares.

(f) If there shall be no such children, to stand possessed of my daughter's share upon trust for the said Paul Gleadell on his attaining the age of twenty-one years absolutely.

(g) If the said Paul Gleadell shall die under the age of twenty-one years, to stand possessed of his and my daughter's shares, but as to the latter subject as aforesaid upon trust as to both capital and income for my said daughter absolutely and beneficially."

VI. The British Agent contends that as payment of the forced loan had been made by Mrs. Gleadell out of her general resources, said resources had, on the date of her death, been reduced to the extent of $10,000.00, United States currency, from which he infers that although a citizen of the United States has an interest in the claim, there does exist at present a well-defined and ascertainable interest in favour of British subjects.

VII. The Mexican Agent, relying on article 3 of the Claims Convention, Mexico and Great Britain, prays that the claim be dismissed on the following grounds:

(a) That Mrs. Katherine Baker de Gleadell left all her property and rights, whether real or personal, and any interest she might have had in real or personal rights, situated in Mexico, to her daughter, Maria Beatriz de Regil y Baker, now the wife of Mr. Benjamin Muse, the Second Secretary of the American Embassy in Paris.

(b) On the fact that it is unquestionable that the right to prefer a claim for the above-mentioned loan is a right personal in character, for which reason it, after the death of Mrs. Baker de Gleadell, became the property of her daughter, the wife of Mr. Benjamin Muse, a Mexican citizen by birth, and now an American citizen, through her marriage to Mr. Muse.

(c) On the fact that, according to Article 3 of the Claims Convention, Mexico and Great Britain, the 19th November, 1926, the Commission only has jurisdiction to deal with claims against Mexico for losses and damages sustained by British subjects, and as the person who would in any event be entitled to claim would be a Mexican by birth and a citizen of the United States of America, through her marriage, it is undeniable that the Commission has no jurisdiction to take cognizance of this claim.

VIII. The British Agent contends in his Memorial that in the year of 1914 the Hacienda in respect of which the forced loan was exacted belonged exclusively to Mrs. Katherine Baker de Gleadell and that her daughter had absolutely no interest in the matter; that the right to claim did not pass to the daughter of Mrs. Katherine Baker de Gleadell, because the loan was paid out of the general resources of Mrs. Gleadell, and in his Reply the British Agent attributes that right to the Estate of Mrs. Gleadell, deceased, on whose behalf he now endeavours to prefer the claim.

Considerations of a Legal Order

I. The first point to be decided by the Commission is whether the British Government has preferred the claim on behalf of Captain W. H. Gleadell, as appears from the Memorial signed by the British Agent, or whether said claim should be understood to have been filed on behalf of the Estate of Mrs. Gleadell, through her executor, Captain W. H. Gleadell, as would seem to be the view of the British Agent, in his pleading in Reply.

In order to decide that point, which is to serve as the basis for the remaining legal considerations, it is sufficient to glance at the beginning of the Memorial from the British Agency, the title of which reads: "Claim of Captain W. H. Gleadell," while the last part of the said Memorial reads: "His Majesty's Government claim on behalf of Captain W. H. Gleadell the sum of 10,000.00 dollars . . .," without losing sight of the terms themselves of the Memorial, in which it is clearly stated that Captain Gleadell, in his capacity as holder of a life interest, asserts that he is entitled to the claim as coming within the terms of clauses 6 and 7 of the will of Mrs. Gleadell. It is then undeniable that the Memorial in question does not stand in need of any interpretation, but that it is self-explanatory to the effect that the claimant is Captain W. H. Gleadell and not the estate of Mrs. Gleadell.

II. The preceding point having thus been decided, it must in the second place be settled whether the right to claim for the forced loan imposed by the Governor of Yucatán, Mexico, belongs to Mrs. Maria Beatriz Julia Muse, the daughter of Mrs. Gleadell, or to the claimant, Captain W. H. Gleadell. And as under clause 5 of her will and testament Mrs. Gleadell bequeathed to her

daughter, Mrs. Muse, the whole of her real and personal property, choses in action or interest in such real or personal property situated in Mexico at the time of her death, it is unquestionable that the right to claim the loan under discussion falls within clause 5 of the said will, and is consequently vested in Mrs. Maria Beatriz Julia Muse, because it is a perfectly well-defined credit against the Mexican Government, created by the decree which created the said loan, and by the receipt executed to Mrs. Gleadell, as the lawful title for claiming same, inasmuch as said right was situated in Mexico at the time of the death of the testatrix. Dicey, on the *Conflict of Laws* (p. 247), "Situate" means locally situate, and the local situation of personal property must, it is conceived, be in the main decided in accordance with the rules for fixing the situation of personal property for the purpose of testamentary jurisdiction. (See chap. ix, comment on Rule (62, post.): "*Thus a debt, it is submitted, is situate in the country where the debtor resides.*" (Page 313.) "(iii) *Chose in action.*—Personal property includes every kind of chose in action, using that term in its widest sense. It includes, that is to say, every movable which cannot be touched, or intangible movable. Thus, it includes 'debts,' in the strict sense of the term, and also everything (not immovable) which can be made the object of a legal claim, as, for example, a person's share in a partnership property." (Page 318.) "(2) *As to the 'situation' of personal property. . . .* From these two considerations flows the following general maxim, viz., that whilst lands, and generally, though not invariably, goods, must be held situate at the place where they at a given moment actually lie, *debts, choses in action and claims of any kind must be held situate where the debtor or other person against whom a claim exists resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced.*")

III. And as it is apparent from the Memorial itself that Mrs. Muse, the daughter of Mrs. Gleadell, is not of British nationality, but an American citizen, it is obvious that she is not entitled to claim the amount of the forced loan of $10,000.00, United States currency, before this Commission, as the right to do so is only under the Claims Convention, Mexico and Great Britain (article 3), granted to British subjects. The claim must arise as a British claim and not cease to be British until the date of filing; Borchard so lays it down, quoting sundry decisions of Arbitral Tribunals, pp. 664 and 665 of his work on *The Diplomatic Protection of Citizens Abroad.* In the present instance, the claim was British in origin; it ceased to be so, however, when it passed into the possession of Mrs. Maria Beatriz Julia Muse, pursuant to the will of her mother, Mrs. Gleadell.

In view of the foregoing, and concurring with the opinion of the Honourable Presiding Commissioner, the Mexican Commissioner holds that the Motion to Dismiss filed by the Mexican Agent should be sustained, and that the Commission should, therefore, abstain from taking cognizance of the claim in question.

EDWARD LE BAS AND COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 5, November 22, 1929. Pages 65-66.)

PROCEDURE, MOTION TO DISMISS. A motion to dismiss raising issues as to ownership of claim and responsibility of respondent government *suspended* and the issues thus raised postponed until the examination of the claim on its merits.

(Text of decision omitted.)

ADA RUTH WILLIAMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES.

(Decision No. 6, November 22, 1929. Pages 67-68.)

NATIONAL CHARACTER OF CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY.—SURVIVAL OF CLAIMS FOR WRONGFUL DEATH. Any claim by a parent arising out of the killing in Mexico of a child who is a British subject will not survive to the estate of such parent, even though the killing occurred during the lifetime of such parent and while he was dependent upon the child for support.

This is a claim for compensation for the murder of an Englishman named George Ernest Williams, who was killed at the El Favor Mines at Hostotipaquillo, near Guadalajara, in the State of Jalisco, on the 26th April, 1914. He was employed as cashier and accountant to the El Favor Mining Company, and he was engaged on these duties as the time he met his death. He was thirty-four years of age and unmarried. According to the facts set out in the memorial the mine was attacked by mutinous Mexican miners, when he and another Englishman had surrendered their arms and both were stabbed to death by the crowd.

Mr. Williams was the son of Major George Williams, living at Ingleside, Northam, in the County of Sussex, England. The latter had retired from the army on a pension of £ 200 a year, and it was alleged that the son had, prior to his death, contributed to the maintenance of his father at the rate of ten pounds a month. At the time of his son's death in 1914 the father was sixty-three years of age, and he was said to be partly dependent upon the remittances from his son. On the 17th April, 1920, Major Williams (who was then a widower) was married to a spinster named Ada Ruth Roe, who was fifty-five years of age. On the 11th August, 1925, Major Williams died, leaving a will under which his widow, according to the British Agent, became sole executrix. He left, however, no estate.

The claim is lodged by Mrs. Williams upon two grounds. She alleges (1) that her late husband was partly dependent for his support on the contributions of the son, which amounted to £ 120 0*s.* 0*d.* per annum, and she estimates an annuity on a life of 63 years in 1914 (which was then the age of Major Williams) at £ 971 12*s.* 7*d.*, together with the sum of £ 40 0*s.* 0*d.*, which the father spent in equipping the son to go abroad; (2) she further alleges in her affidavit that George Ernest Williams had promised her that he would continue the allowance to her on his father's death.

It was contended on behalf of the respondent Government that the memorial should be dismissed on the ground that there was no legal relationship or dependency between G. E. Williams and the claimant, Mrs. Williams, and that therefore there was no liability on the part of the Mexican Government to pay compensation to her. The contention put forward by the British Agent was that the estate of Major Williams from 1914 had been impoverished by the loss of the son's contributions until his death in 1925, and that Mrs. Williams, as the executrix of the estate, was entitled to recover the money.

The Commissioners are unanimously of opinion that the Motion to Dismiss must be allowed. In order to succeed in the claim, Mrs. Williams must establish legal relationship or dependency as between herself and the late Mr. G. E. Williams, and there is no evidence of this in the facts set out in the Memorial, or in the oral argument. No claim against the respondent Government could form part of the estate of Major Williams until the right to present it had accrued to him. That right did not arise until the Anglo-Mexican Treaty was signed in 1926 and ratified in 1928, whereas Major Williams died in 1925, and with his death all his personal rights expired.

In view of the foregoing, and, further, in reliance upon article 11, first part, of the Rules of Procedure, it is hereby decided:

That the Motion is allowed.

CENTRAL AGENCY (LIMITED), GLASGOW (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 7, November 29, 1929, dissenting opinion by Mexican Commissioner, November 29, 1929. Pages 68-74.)

CORPORATE CLAIMS.—AUTHORITY TO PRESENT CLAIM.—CORPORATION, PROOF OF NATIONALITY OF CORPORATION. A certificate of incorporation of a claimant British corporation, together with an affidavit of its secretary that it was incorporated in Great Britain and that the firm signing the memorial on behalf of the claimant was its agent and authorized to make the claim, and certain other corroborating documents, *held* sufficient to establish authority to present the claim to the tribunal.

1. This claim is presented by the British Government on behalf of a limited liability company, registered in England, called the Central Agency (Limited), Glasgow. In 1913 the claimant company forwarded a consignment of cotton thread to a firm of merchants at Chihuahua. According to the memorial it had reached the railway station of Monterrey, when the place was fired upon by a party of revolutionaries on the 23rd and 24th October, 1913. The result was that the consignment was destroyed in the fire caused by the revolutionary forces, and never reached its destination.

2. The respondent Government have lodged a motion to dismiss the claim mainly on this ground: The Mexican Agent says that the memorial fails to comply with article 10 of the Rules of Procedure, which provides that each Memorial shall be signed by the claimant or by his attorney in fact, as well as by the British Agent. The rule provides also that the memorial may be signed only by the British Agent, but in this event the memorial must include a signed statement by the claimant of his claim.

The memorial contains a statement of claim made by Diego S. Dunbar, Sucr., before the British Consul-General at Mexico City on the 18th January, 1921. It is signed by Robert Craig, with the words "Per pro Diego S. Dunbar, Sucr." just above the signature. The contention of the Mexican Agent is that the Memorial does not show that the firm of Diego S. Dunbar, Sucr., is the representative of the Central Agency, nor that Mr. Craig is authorized to sign on behalf of the firm. An affidavit sworn by Mr. William Simpson, Secretary to the Central Agency, Glasgow, is set out in annex 4 of the Memorial. Mr. Simpson swears that the Central Agency is a British company, incorporated at Edinburgh in 1896, and that Diego S. Dunbar, Sucr., was the Agent of the Central Agency in Mexico City and authorized to make the claim. A certificate of the incorporation of the company is set out in annex 5.

It was contended by the Mexican Agent that Article 10 should be strictly observed in order to ensure that the claimant really wished his claim to be preferred by his Government. He submitted that the affidavit sworn by Mr. Simpson did not establish the fact that he was the Secretary of the Company, nor did it prove that the company had authorized him to make the statement.

It was contended on behalf of the British Government, on the other hand, that Mr. Craig signed the statement of the claim in his capacity as attorney in fact of Diego S. Dunbar, Sucr. The British Agent submitted, secondly, that the affidavits sworn by the Secretary of the Company, in annex 4, proved his authority to act on behalf of the Company, because such a statement came within the ordinary scope of his duties and contained facts and details which could only come within his knowledge in his official position as Secretary of the Company. The British Agent also produced, for inspection by the Commissioners, the original document signed by Mr. Craig, and also the original of the affidavit set out in annex 4. In addition to these he has produced two further documents: (1) a power of attorney, executed on the 16th March, 1918, whereby Mr. Craig is appointed attorney for the firm of Diego S. Dunbar, Sucr., and (2) a document executed before a Notary Public in Glasgow on the 11th February, 1926, signed by Mr. Simpson in his capacity as Secretary of the Company and by two directors of the Company. In his affidavit of the 28th July, 1927, Mr. Simpson declares that the Agent of the Company in Mexico City, Diego S. Dunbar, Sucr., is authorized to make the claim and that all the particulars contained in the claim are true.

3. It is evident from this document that the claim signed by Mr. Craig had been examined by Mr. Simpson as Secretary and that he authenticated it as a document issued by the firm of Diego S. Dunbar, Sucr. The information contained in the affidavit relates to matters affecting the Company which could be known to one who had access to the documents and business papers of the concern.

The Commissioners agree that the object of article 10 of the Rules of Procedure is to ensure that those on behalf of whom the claimant Government is acting really desire their Government to present their claim. On the other hand, the majority of the Commissioners are satisfied beyond any doubt that Mr. Simpson is the Secretary of the Company, that the firm of Diego S. Dunbar, Sucr., is the Company's Agent in Mexico City and that Mr. Craig is authorized to sign on behalf of the firm.

There is no valid ground, in the judgment of the majority of the Commissioners, for disputing the fact that the Central Agency not only assumed the responsibility for the claim, but also authorized its duly accredited agent to present it. On these grounds the majority of the Commissioners are of the opinion that article 10 of the Rules has been complied with.

The motion to dismiss is overruled.

The Mexican Commissioner expresses a dissenting view.

Dissenting opinion of Dr. Benito Flores, Mexican Commissioner

I. The Government of His Britannic Majesty claims on behalf of the Central Agency (Limited), Glasgow, the sum of $ 1,568.00, Mexican gold, being the value as per invoice of two cases of cotton thread said to have been destroyed by revolutionaries at Monterrey, when said goods were in transit to Chihuahua, consigned to Messrs. Pinoncely.

II. The Memorial has been signed by the British Agent, and the facts purport to be narrated by one Robert Craig, who signs as follows: "p.p. Diego S. Dunbar, Sucr., as the Agent of the Central Agency (Limited), Glasgow, Scotland."

III. In order to establish the standing of the claimant, the British Government submitted annex 4, in which is set out the deposition of Mr. William Simpson, the Secretary of the Central Agency (Limited), as to the following points:

(a) That the Central Agency (Limited) is a Company incorporated under the Companies Acts, on the 24th day of December, 1896, at Edinburgh, and that it is an English Company.

(b) That the Central Agency (Limited) shipped a consignment of cotton to Chihuahua, Mexico, with two cases of thread which were destroyed in the railway station at Monterrey, Nuevo Leon, by a fire caused by the Revolutionary party.

(c) That the Agent of the Central Agency (Limited) at the City of Mexico, Mr. D. S. Dunbar, Sucr., was authorized to present the claim, and that all the particulars contained in the claim lodged by him on the 14th January, 1921, are true.

IV. The Mexican Agent filed a Motion to Dismiss, based on article 10 of the Rules of Procedure of the Claims Commission, Mexico and Great Britain, which provides that the Memorial shall be signed by the claimant or by his attorney in fact and further by the British Agent, or only by the latter; but that in this case a statement of the facts giving rise to the claim signed by the claimant shall be included in the Memorial; that in the present instance, there is only submitted a statement signed by Mr. Robert Craig as the attorney in fact of Diego S. Dunbar, Sucr., and no proof has been shown that the said Mr. Craig is the representative of the claimant, which is the Central Agency (Limited), Glasgow.

V. The British Agent replied by contending that Mr. Robert Craig signed the statement of claim in his capacity as attorney in fact of Diego S. Dunbar, Sucr., and that it was, therefore, only necessary to show that the said Diego S. Dunbar, Sucr., was the authorized representative of the claimant; and that annex 4 to the Memorial duly proves that Diego S. Dunbar, Sucr., is the authorized representative of the claimant.

VI. In the course of the oral argument the British Agent submitted to the Commission a power of attorney executed by the Central Agency (Limited) to a stranger in this case, from which document it may be seen that one William Simpson signed said power of attorney as the Secretary of the said Company, together with two of the Directors, and he further exhibited the power of attorney executed by Diego S. Dunbar, Sucr., to Mr. Craig.

VII. Both the Agents defended their respective standpoints.

Legal Considerations

I. It is unquestionable that article 10, paragraph 1, of the Rules of Procedure, approved by the Mexican-British Claims Commission, lays upon the British Agent the duty of signing the Memorial, and requires that a statement of the facts giving rise to the claim *has to be signed by the claimant*, when the Memorial has been signed by the British Agent only.

II. It is also a precept established by the Rules of Procedure of the Mexican-British Claims Commission, that the Memorial shall state by whom, and on behalf of whom, the claim is filed; and if the person filing same does so in a representative capacity, that *he must establish his authority*. (Article 10, subdivision *(e)* of the Rules of Procedure.)

III. In the claim under discussion the claimant is the Central Agency (Limited), Glasgow. Therefore, that Company or its representative should have signed the statement of the facts which gave rise to the claim, pursuant to the legal provisions cited above.

IV. In the opinion of the Mexican Commissioner, the standing of the Central Agency (Limited) has not been established because Diego S. Dunbar, Sucr., has not shown proof of being the attorney in fact of the claimant Company. The deposition of the Secretary, Mr. Simpson, to the effect that Diego S. Dunbar, Sucr., is authorized by that Company to file the claim in question, would only establish the fact that such authorization existed; but from that very admission it is obvious that said authority has not been laid before the Commission. And the Rules of Procedure for the Commission do not consider it sufficient to have information to the effect that one person is the attorney in fact of another, or that it be known, through a third party, that some one is authorized to file a claim on behalf of some one else, but it is necessary, it is imperative, that the fact itself of such representative capacity be established by showing the manner in which it was granted.

At what particular time did the Central Agency (Limited), Glasgow, authorize Diego S. Dunbar, Sucr., to lodge the claim on their behalf? In what manner was such authority granted? What was the extent of such authority? We do not know, for the very reason that the Commission has never had the fact itself of such authority established before it. We do know that such authority exists, because Mr. Simpson, as the Secretary of the Company, has assured us of that fact; but no document whatever establishing the standing of the claimant Company has been produced before the Commission.

V. Neither the Mexican Commissioner, nor the other two Commissioners, would be unduly exacting if they had before them the power of attorney under which Diego S. Dunbar, Sucr., make their appearance, so as to examine same and to decide whether such power of attorney is sufficient or not, according to law, for representing the claimant Company. Not only that, but the Commission would fulfil its duty by examining the power of attorney under which Diego S. Dunbar, Sucr., desires to be considered as the attorney in fact of the claimant Company; but it so happens that if he were called upon to produce said power of attorney, the British Agent would not be able to do so, because it does not exist, and the Commission would, therefore, not be able to perform its duty of examining said power either, because it is not included among the documents submitted by the British Government. That being so, it must be concluded that the standing of the claimant has not been established in the matter of this claim.

VI. Obviously, Mr. Simpson is not the organ through which the Company executes powers of attorney. Then some one else, and not Simpson, the Secret-

ary, is the legal representative of the Central Agency (Limited). It may possibly be the Manager; perhaps it is the Board of Directors; perhaps even the Secretary, Simpson, himself, together with the Directors of the said Company. This we do not know, because the claimant has not established its standing. Through what organ does the Central Agency (Limited) have itself represented in these cases. That we do not know either, because we are not acquainted with the By-laws of the said Company. And judging from the power of attorney produced at the last moment by the British Agent, to show that William Simpson is the Secretary of the claimant Company, it may be inferred that only two Directors and the Secretary himself, *acting jointly*, can grant powers of attorney on behalf of the Central Agency (Limited), and that being the case, the statement of the Secretary only in regard to the existence of authority granted to Diego S. Dunbar, Sucr., is of absolutely no value for establishing the standing of the Company.

VII. The Mexican Commissioner wishes to place on record once more, that in his opinion the Commission is not authorized to supply any deficiencies in the proofs submitted by the parties, in the name of equity, when it is a matter of technical questions going directly to the jurisdiction of the Commission itself, or to the standing of the parties, and more especially when, as happens in this case, the Commission has Rules to which to conform, for deciding the point under discussion.

VIII. And, lastly, considering that on the side of the Commissioners the unavoidable duty exists of complying with the Rules of Procedure approved by the Commission itself, and of seeing that they are complied with, the Mexican Commissioner, conformably to that opinion, and for the reasons stated, holds that the claimant Company has not established its standing before the Commission, and has thus failed to comply with the provisions of article 10, paragraph 1, subdivision *(e)* of the Rules of Procedure. The Motion to Dismiss filed by the Mexican Agent should, therefore, be allowed.

VERACRUZ TELEPHONE CONSTRUCTION SYNDICATE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 8, December 6, 1929. Pages 74-78.)

PROCEDURE, MOTION TO DISMISS. A Motion to Dismiss raising issues as to ownership of claim, authority to present the same, nature of acts on which claim is based, agreement between Company and Member State, made previously to claim before Commission, and appeal to Mexican Courts, also made previously to this claim, *suspended* until the examination of the claim on the merits.

The Memorial sets out the following facts:

The Company was formed in 1910 to acquire and operate a concession, dated the 22nd October, 1906, for the installation of a telephone system at Veracruz, which was granted by the Government of the State of Veracruz to José Sitzenstatter and Manuel de Corbera, and a further concession, dated the 2nd January, 1911, which was granted by the Federal Government to the said José Sitzenstatter. In or about the month of January 1916 the Company was ordered by the Government of the State of Veracruz to make large increases in the wages of its employees. The Company's resident manager, Mr. Sitzenstatter, attended before the tribunals of the Government and attempted to satisfy them of the

absolute impossibility of compliance with these orders. They refused to entertain his protests and declined to examine the books of the Company. On the 13th May, 1916, an order was received signed by Gonzalo C. de la Mata, the President of the Civil Administration of the State of Veracruz, directing the Company to hand over its offices and all its effects to a commission. This commission took possession of everything, and the Government remained in possession until the 26th October, 1920, when the property was handed back to the Company. During the period of sequestration no materials or labour were expended on maintenance of the plant, no materials were purchased for new installation and the materials of the existing lines were used for other purposes.

By a decree of the 1st March, 1920, authorizing the retransfer of the concession to the company, the Government of Veracruz appointed a representative, and directed the company to appoint another representative, in order to examine the amount of the damages resulting from the intervention. A report was drawn up and the total of the damages was calculated at the amount of $100.824.95 Mexican gold. Although the Company took proceedings to recover the sum, the Veracruz Court declined to hear any evidence; the action was dismissed and no payment followed.

2. The arguments on which the Mexican Agent based his Motion to Dismiss are classified under three headings:

I. The Memorial does not comply with article 10 of the Rules of Procedure, because it is not shown that Mr. A. H. M. Jacobs, Secretary of the Company, really possesses that official character nor that he has been duly authorized to sign the statement of the claim (annex 1). Neither has the status of Mr. Sitzenstatter been established.

II. The Veracruz Telephone Construction Syndicate has no right to present the claim, because at the time of the sequestration the lines belonged to Mr. Sitzenstatter and not to the Company. Both concessions were in the name of Mr. Sitzenstatter, and there is no evidence that he transferred them to the Syndicate; on the contrary, annex 4 shows clearly that up to the 1st March, 1920, no transfer of the concession had taken place. Moreover, the concession provided that the lines could only be transferred to a Mexican company after the approval of the Government of the State of Veracruz had been obtained. If, in spite of this, the lines have been operated by the Syndicate, which is an English Company, the terms of the concession have been violated and the Company has no right to claim for damage, if suffered.

III. The Commission is not competent to decide the claim for the following reasons:

(a) The acts on which the claim is based are not covered by Article 3 of the Convention. It was a civil authority who ordered the sequestration and, according to the last paragraph of Article 3, losses or damages caused by acts of civil authorities must be due to revolutionary events and conditions, and the acts must have been committed by one of the forces specified in subdivisions 1, 2 and 3 of this Article.

In this case the order of the Governor of the State of Veracruz did not take its origin in revolutionary events but in the difficulties which had arisen between the enterprise and its workmen. It was, therefore, not a revolutionary movement but social and industrial discontent which led up to the sequestration. Furthermore, the sequestration was not executed by armed forces but by a commission which acted on behalf of a civil authority.

(b) As the memorial sets out, the lines were transferred in 1920, and at the same time the Company entered into an agreement with the Government of Veracruz whereby the consequences of the intervention were to be adjudicated

upon. By this arrangement the relations between the two parties became those of a contractual nature, and ceased to be of a nature which fell within the terms of the treaty.

(c) It is stated in the Memorial that the claimants, failing to receive the amount which in their opinion was due to them, appealed to the Mexican Courts. In the opinion of the Mexican Agent, this Commission is not a Court of Appeal from the judgments of the national Courts. Only in the event of there having been a denial of justice could there have been reason for intervention, but not in this case, where the Courts have given their decision.

3. The British Agent has filed copies of documents to the effect that the Board of Directors of the Veracruz Telephone Construction Syndicate have adopted the claim of Mr. Sitzenstatter, that he was a director and that Mr. Jacobs was the Secretary of the Company. The Agent drew the attention of the Commission to annex 7 of the Memorial, which shows that there was a decree of the Government of the State of Veracruz by which the formation of the Company was duly legalized and approved. The existence of this decree is denied by the Mexican Agent. In the view of the British Agent, the document reproduced in annex 4 only meant to regularize the actual form in which the lines were operated. The fact was that a British company carried out the concession and suffered the damages, which fact makes the question as to whether the concession had been legally transferred or not immaterial.

As to Article 3 of the Convention, the British Agent pointed out that there can be no doubt as to whether the confiscation found its origin in revolutionary events, which brought about the depreciation of the currency, the increase of prices and the consequent demand for higher wages. The official order to increase wages must be regarded as an act of force. Moreover, the order of sequestration was signed by an officer, Colonel de la Mata, who acted under the orders of General Jara, then Governor of the State of Veracruz. Behind the commission which executed the confiscation were the armed forces to which Article 3 of the Convention refers.

The British Agent denies that by the agreement between Mr. Sitzenstatter and the Government of Veracruz the right to claim has been extinguished. The damage has continued to exist, and there has never been an interruption of the responsibility which the treaty imposes upon the Mexican Government. Neither can the Company be made to suffer because it went to the Mexican Courts. The Convention in Article 6 provides that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of the claim, but there is no clause in the Convention declaring the Commission incompetent to deal with cases where the claimants tried to assert their right before the national Courts.

4. The Commissioners are of opinion that, in order to do justice to the arguments brought forward by the Agents, the following questions must be answered:

I. Has it been established that Mr. A. H. M. Jacobs possesses a representative capacity and that he is empowered to prefer a claim? (Article 10 of the Rules of Procedure.)

II. Has the same been established as regards Mr. José Sitzenstatter?

III. Is the question as to whether the concession had, at the time of the sequestration, been duly transferred to the claimant, material to the decision of the Commission on the Motion to Dismiss?

or

IV. Is it sufficient for admission of the claim that operation was actually carried on by the claimant without opposition from the Mexican authorities?

V. If the answer to question III be in the affirmative, to whom did the concession belong at the time of the sequestration, and is the Veracruz Telephone Construction Syndicate entitled to claim?

VI. Were the losses for which compensation is claimed caused by any one or more of the forces enumerated under subdivisions 1, 2, 3, 4 or 5 of Article III of the Convention, or do they fall within the terms of the last paragraph of this Article? Was the confiscation ordered by a civil authority? Were the losses due to revolutionary events and disturbed conditions *(sucesos y trastornos revolucionarios)* and were the acts committed by one of the forces specified in subdivisions 1, 2 and 3 of Article III?

VII. Is the fact that in 1920 the claimant entered into an agreement with the Government of the State of Veracruz on the return of the property sufficient ground on which to allow the Motion to Dismiss?

VIII. Is the fact that the claimant, when no payment was received, resorted to the Mexican Courts, sufficient ground on which to allow the Motion to Dismiss?

5. The Commissioners have come to the conclusion that question VI, which perhaps is the most important of all, cannot be answered without entering an interpretation of Article 3 of the Convention.

In nearly all the answers of the Mexican Agent to the claims, it has been contended that the acts on which the claim is based are not covered by Article 3. This question will therefore have to be answered by the Commission in its judgment on nearly all the claims that have been filed. The Commissioners see no reason why only in this particular case this very important point should be decided by way of a motion to dismiss.

In their opinion, the question as to whether the losses or damages were due to revolutionary events and caused by the acts of forces specified in Article 3 cannot be decided without entering into an examination of essential facts, i.e., of the merits of the claim itself, and the question must therefore be suspended until the claim itself will be examined by the Commission.

Although the other questions enumerated can be answered in this stage of the procedure, the Commission prefers to deal with the Motion to Dismiss as a whole, and therefore postpones the decision until the claim be examined on its merits.

In the meantime, the Commission invites the Mexican Agent to file his answer on the claim.

PATRICK GRANT (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 9, December 7, 1929. Pages 78-79.)

PROCEDURE, MOTION TO DISMISS. A motion to dismiss raising issues as to the ownership of the claim *overruled*, and the questions thereby raised postponed to the examination on the merits, when it appeared that as to certain of elements of damage no question as to ownership existed on the face of the record.

(Text of decision omitted.)

F. W. FLACK, ON BEHALF OF THE ESTATE OF THE LATE D. L. FLACK (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 10, December 6, 1929, dissenting opinion by British Commissioner, undated, separate opinion by Mexican Commissioner, December, 1929. Pages 80-97.)

PROOF OF NATIONALITY OF CORPORATION. A certificate of incorporation in London, with evidence that corporation was domiciled in London, *held* sufficient evidence of British nationality.

CONTINUING NATIONALITY OF CLAIM.—CORPORATE CLAIM, OWNERSHIP OF—WHEN CORPORATION WAS DISSOLVED SUBSEQUENT TO LOSS. Demurrer to a Memorial *allowed*, without prejudice to further proof, when it appeared that the damages claimed were sustained by a British corporation, subsequently dissolved, and proof was lacking of the continuing British ownership of the shares of stock of such corporation during its existence and of the assets of such corporation, including the right to claim, following its dissolution.

CLAIM IN REPRESENTATIVE CAPACITY. It was established that all the shares of stock of such corporation were at one time held by a certain D. L. Flack, subsequently deceased. Proof of his nationality and of the nationality of his heirs *held* necessary.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. According to the Memorial, the late Mr. Daniel Ludgate Flack carried on business in London, under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited). The latter, according to a certificate delivered by the Registrar of Joint Stock Companies, was incorporated in London under the Companies Acts, 1862-1907, as a Limited Company on the 19th February, 1909. The business of the company was the export from Great Britain of coal, patent fuel, coke and general merchandise. Compensation is claimed for the loss of stocks of coal belonging to the Company which were set on fire at Doña Cecilia during a battle between rebel and federal forces in April 1914. The claim stands in the name of Mr. Frederick William Flack, on behalf of the Estate of the late Mr. Daniel Ludgate Flack, who died on the 9th June, 1920, intestate. After his death letters of administration were given first to his widow and, after her death, to his son, Frederick William Flack. The Company has been dissolved, according to the Registrar's certificate, but the date of its dissolution is not known.

2. The Mexican Agent lodged a demurrer to the memorial on the ground that the certificate issued by a British authority is not sufficient proof of the British nationality of the Company, and also on the ground that it has not been established that Mr. F. W. Flack is, as Executor of the Estate of Mr. D. L. Flack, entitled to represent the Company of D. L. Flack and Son, Mexico (Limited). In his oral argument, and in a brief delivered on the 31st October, 1929 (the third day of the hearing), the Mexican Agent amplified his pleading with the further argument that, as the claim is preferred by F. W. Flack on behalf of the Estate of the late D. L. Flack, the following points should have been proved:

(a) That Daniel Ludgate Flack was a British subject when the damage was caused.

(b) That such and such persons were the heirs of the said Daniel Ludgate Flack.

(c) That the said persons inherited the right to prefer the claim.

(d) That the said persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is entitled to present the claim on behalf of the said persons.

He contended it was necessary to prove that the whole of the issued shares were held by D. L. Flack and that after the dissolution of the Company the right to present the claim was legally vested in him.

The British Agent argued, in reply, that the Registrar of Joint Stock Companies in London is a public official, appointed to register companies in London in accordance with the Companies Acts, and all companies registered by him must be presumed to have been formed in conformity with English law, and that the Certificate of Incorporation issued by him was sufficient proof of the British nationality of D. L. Flack and Son, Mexico (Limited). Moreover, the Company was domiciled in London and all the business was conducted from that place.

Secondly, the British Agent submitted that Mr. F. W. Flack is, as executor of the Estate of the late Mr. D. L. Flack, entitled to claim in respect of the deceased's interests in the firm of D. L. Flack and Son, Mexico (Limited). According to the British Agent, this Company had only one shareholder, Mr. D. L. Flack, to whose Estate all the assets of the Company (including the right to claim) were automatically transferred at the moment the Company ceased to exist.

3. In determining the issue before them the Commissioners must be guided by the rule laid down in the Gleadell case. When allowing the Motion to Dismiss in the claim of *W. H. Gleadell* (Claim No. 19), the Commission declared the principle by which it ought to be guided, namely, that a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that the title to that claim must have remained continuously in the hands of citizens of such Government until the time of its presentation for filing before the Commission. In the same judgment, the Commission laid down the rule that where the claim is preferred on behalf of an Estate, the nationality of the Executor is of less importance than the nationality of the heirs. Applying this principle to the case under consideration, the majority of the Commissioners are of opinion that in order to decide whether the nationality of the claim was originally British and remained so until the end, the following issues of fact must be determined:

I. Has it been established that the Company D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolution of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack at the time of his death still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that there were other heirs who were British subjects?

4. The questions have been answered as follows:

Question I.—In the affirmative, by the majority of the Commissioners, because in their opinion the Certificate of Incorporation, combined with the fact that

the Company was domiciled in London and the affairs conducted from there, is sufficient proof of the British nationality.

Question II.—The date of the dissolution of the Company does not appear. The last annual return of the Company filed with the Registrar of Joint Stock Companies at Somerset House, London, proves that on the 13th January, 1919, all the shares issued, numbering 2,606, belonged to Mr. D. L. Flack, but there is no evidence as to what happened with regard to those shares between that date and the date of the dissolution, whenever that may have been. The answer to the question is in the negative.

Question III.—There is no evidence as to the ownership of the shares at the time of the death of Mr. D. L. Flack. Neither is there evidence as to the ownership of the assets of the Company, including the right to claim (assuming the latter was dissolved at the time of the death of Mr. D. L. Flack). The answer is in the negative.

Question IV.—The majority of the Commissioners answer this question also in the negative. There is evidence as to the nationality of the son, but not of the father.

Question V.—There is no indication whatever as to the existence or the number or the names of the heirs of the late D. L. Flack. The answer is in the negative.

Question VI.—The answer must necessarily be the same as to question V.

5. The majority of the Commissioners hold the view that the permanent British nationality of the claim has not been established, and that as long as this has not been done, the Mexican Agent is not bound to answer the Memorial.

The demurrer is therefore allowed, without prejudice to the right of the British Agent to furnish other proof.

The British Commissioner expresses a dissenting view, and the Mexican Commissioner also expresses a dissenting view, but only as regards the proof of the nationality of the Company.

Dissenting opinion of Mr. Artemus Jones, British Commissioner

This is a claim for compensation for the loss of stocks of coal which were set on fire at Doña Cecilia in April 1914 during a battle between rebel and federal forces. The claimant is Frederick William Flack, who was born at Christchurch in Monmouthshire, Great Britain, the son of Daniel Ludgate Flack. The latter carried on business in London under the name of Daniel Flack and Son. He carried on business in Mexico also in the form of a limited liability company registered in London under the title of D. L. Flack and Son, Mexico (Limited). The business of the Company was the export of coal and kindred merchandise from Great Britain to Mexico, and the stocks of coal to which the claim relates were on their way to Tampico when they were destroyed at Doña Cecilia. The nominal capital of the Company was £10,000 divided into £1 shares, but only 2,602 shares were issued. The date of the last annual return filed with the Registrar of Joint Stock Companies was the 13th January, 1919, and on that date all these 2,602 shares were in the name of Daniel Ludgate Flack. (The Company was dissolved at a date unknown.) A certified copy of the return has been produced and it shows that a certain number of these shares held by another person had been transferred to Daniel Ludgate Flack during the year and helped to make up the total of 2,602. On the 9th June, 1920, Daniel Ludgate Flack died intestate, and letters of administration were granted by the English Courts to his widow, Laura Ellen Flack, on the 8th October, 1920. On the 24th January, 1924, the said Laura Ellen Flack died, and at that date the estate of her late husband had not been fully administered. Accordingly on the

7th May, 1924, letters of administration *de bonis non* of the unadministered estate were granted to the claimant.

The Mexican Agent put in a demurrer raising two points. He contended, first, that the certificate issued by the Registrar of Companies, which declares that the Company was registered in England, is not sufficient proof of British nationality; secondly, that the memorial does not establish that the claimant, F. W. Flack, is entitled to represent the firm of D. L. Flack and Son, Mexico (Limited). In his reply to the demurrer the British Agent contended that the certificate of the Registrar of Companies is, under English law, conclusive proof of the fact and that the authority of Mr. F. W. Flack to represent the Company of which D. L. Flack was the owner, is covered by his appointment by the Courts as an administrator *de bonis non*. The demurrer occupied the attention of the Commission on the 29th, 30th and 31st October. On the 31st October the Mexican Agent supplemented his demurrer by a document which raised three fresh points: (1) there was no evidence that all the shares belonged to D. L. Flack, either at the dissolution of the Company or at the time of his death; (2) there was no evidence that D. L. Flack was a British subject; (3) there was no evidence that there might not be heirs, other than F. W. Flack, of D. L. Flack.

The issue which is presented for the determination of the Commissioners is whether the memorial establishes a *prima facie* case so that the claim can be gone into. With regard to the three points raised by the Mexican Agent in his further pleading, there is no difference of opinion among the Commissioners. The only ground on which I do not agree with my colleagues is with regard to the deductions to be drawn from the answers to those questions. Had the British Agent objected to the further pleading put in by the Mexican Agent during the course of the argument, these further questions of fact could not have been raised, but Mr. Shearman (as he has done throughout the work of the Commission) studiously refrained from raising any technical points, and allowed the further pleading to go in. In my judgment the demurrer ought not to be allowed, because these issues of fact raised at a late stage by the Mexican Agent, when the British Agent could not possibly obtain information with regard to them, are not necessary in order to determine the question whether a *prima facie* case for investigation of the claim has been made out. On the two points raised by the Mexican Agent in his demurrer there is sufficient evidence disclosed in the memorial to show that the claim ought to be investigated. The further issues of fact could be well gone into when the merits of the claim are dealt with. It is necessary, I think, that the Commissioners should not lose sight of the fact that the *prima facie* evidence which it is necessary for the memorial to show, stands in a different category from the evidence which the Commissioners may deem necessary to establish the claim when the facts are gone into. The certificate of the Registrar is conclusive of the first point. In the second place there is sufficient evidence in the information contained in the memorial to establish that the Courts who appointed the claimant as administrator *de bonis non* have authorized him to pursue the claim on behalf of the estate of his father. While I regret to differ from the conclusions at which my colleagues have arrived, I agree that the answers to the further questions set out in the President's judgment are in the negative.

Separate opinion of Dr. Benito Flores, Mexican Commissioner

I. The British Agent, on behalf of F. W. Flack, and the latter as the representative of the Estate of D. L. Flack, claim the sum of $52,225.88, on the strength of the following facts:

That Daniel Ludgate Flack was the owner of the whole of the issued shares of the firm of D. L. Flack and Son, Mexico (Limited); that on the 9th June, 1920, he died intestate and letters of administration were granted to his widow, Laura Ellen Flack; but that the latter, having died on the 24th January, 1924, without having fully administered the estate of the late Daniel Ludgate Flack, letters of administration *de bonis non* were granted to the claimant, F. W. Flack.

II. That the said Daniel Ludgate Flack carried on business under the name of Daniel Flack and Son, and also in Mexico under the name of D. L. Flack and Son, Mexico (Limited), which was a British Company; that the nominal capital of the said Company was £ 10,000.00, divided into £ 1 shares; that of the said capital only 2,602 shares were issued, and that on the 13th January, 1919, the date of the last return filed with the Registrar of Joint Stock Companies at Somerset House, London, these 2,602 shares stood in the name of Daniel Ludgate Flack.

III. That the business of the Company consisted of the export of coal from Great Britain; that in April 1914 the Company had stored on a wharf adjoining the River Panuco at the Town of Doña Cecilia 5,567,027 kilos. of coal, brought out from England.

IV. That early in 1914 the town was attacked and bombarded by rebel forces; that as a result of such bombardment the stocks of coal belonging to the Company were set on fire, only a small portion thereof having been salvaged.

V. The following documents have been submitted with the claim:

(a) Certificate of Incorporation.
(b) Certified copies of invoice and bill of lading.
(c) Translation of notarial act drawn up at request of Mr. J. Hermosillo.
(d) Translation of notarial act drawn up at request of Mr. R. Everbusch.
(e) Birth certificate of F. W. Flack.
(f) Letters of administration in favour of Mrs. L. E. Flack.
(g) Letters of administration in favour of Mr. F. W. Flack.
(h) Letter dated the 11th July, 1914, from His Majesty's Consul at Tampico.
(i) Letter dated the 3rd February, 1926, from Messrs. Deloitte, Plender, Haskins and Sells.
(j) Sworn statement of Frederick William Flack.

VI. The Mexican Agent entered a Demurrer, supported by the following pleas:

A certificate issued by British authorities is not proof sufficient of the British nationality of D. L. Flack and Son (Limited), and the claimant, Frederick William Flack, is not, as administrator of the estate of D. L. Flack, entitled to represent D. L. Flack and Son, Mexico, (Limited).

VII. The British Agent maintained the positions taken by him in the Memorial.

VIII. On the 29th October this Demurrer began to be examined by the Court, and during the discussion the Mexican Agent, with the assent of the British Agent, amended the Memorial corresponding to the said Demurrer, by laying down the following points:

(a) That it should be shown that Daniel Ludgate Flack was a British Subject at the time the damage was caused.
(b) That such and such persons were the heirs of Daniel Ludgate Flack.
(c) That those persons inherited the right to claim.
(d) That those same persons were British subjects at the time of inheriting.

(e) That Mr. F. W. Flack is the administrator, entitled to claim on behalf of the persons having actually inherited.

The Mexican Agent ended by contending in his amendment:

I. That no proof has been shown that the Company was an English Company.

II. That it has not been proved that the whole of the shares in the Company were allotted to Daniel L. Flack.

III. That no proof has been shown that after the dissolution of the Company the right to prefer the claim was allotted to Daniel Ludgate Flack.

All the above points were again submitted to discussion, and the hearing of the case once closed, the Presiding Commissioner laid before the Commissioners of Mexico and Great Britain the following six questions for decision:

I. Has it been established that the Company. D. L. Flack and Son, Mexico (Limited) was a British Company?

II. Has it been established that at the time of the dissolving of this Company all the shares belonged to D. L. Flack?

III. If so, has it been established that D. L. Flack, at the time of his death. still held all the shares?

IV. If so, has it been established that D. L. Flack was a British subject?

V. Has it been established that F. W. Flack was the only heir of his father?

VI. If not, has it been established that the other heirs were British subjects?

Questions II, III, IV, V and VI were answered in the negative by the three Commissioners.

Question I was answered affirmatively by the Presiding Commissioner and by the British Commissioner; the Mexican Commissioner answered said question I in the negative, contending that it has not been shown that D. L. Flack and Son, Mexico (Limited) was an English Company, and he for that reason expresses a concurrent opinion, so that the Demurrer entered by the Mexican Agent may be upheld, not only because of the negative answer to questions II, III, IV, V and VI, but also because it has not, in his opinion, been fully shown that D. L. Flack and Son, Mexico (Limited) was a Company of British nationality. He bases his opinion upon the following:

Considerations

I. The nationality of physical persons, i.e., the bond uniting a person to a particular nation, has never been laid open to doubt. On the contrary, doubt has arisen when the thought occurs that there may be a person without any nationality; in the case of artificial, or civil, or juridical persons, however, the problem is a different one. In the first case, the bond uniting the individual to the State consists in his submitting to its laws, so as to be able to appeal to the said State for protection in case of necessity. Rights and duties are correlative to one another. In the second case, artificial persons cannot always be considered as identical with physical persons; they cannot, for instance, at a given moment, render military service, as an individual can, or comply with any other similar requirement on the part of the Government to which they have submitted. And by reason of the lack of similarity between physical and artificial persons, and by the legal fiction upon which the latter rest, the opinions of jurists have become divided, especially after the World War, some of them contending that limited companies should have no nationality at all.

M. de Vareilles-Sommières; *Les Personnes Morales*, 2nd edition, No. 1503, says:

"La vérité, écrit cet auteur, est que la personne morale n'étant qu'un résumé et une représentation des associés, n'étant qu'eux-mêmes fondus par l'imagination en un seul être, elle n'a point de nationalité propre, elle n'a aucune autre nationalité que la leur, ou plutôt elle n'a aucune nationalité, car elle n'est qu'un procédé intellectuel, qu'une image dans notre cerveau. Seuls les associés ont une nationalité."

A. Pillet (*Des Personnes morales en droit international privé*, un vol., Paris, 1914, Nos 82 et suivants), eminent professor of the Faculty of Law in Paris, shares the opinion of M. de Vareilles-Sommières, criticizing the fact that the endeavour has been made to extend to artificial persons a notion above all intended for physical persons, and asks:

"Les sociétés ont-elles, de même que les individus, une nationalité?[1]

Lorsqu'il s'agit de personnes vivantes, les principaux points de rattachement de la personne à un droit déterminé sont la nationalité et le domicile, deux notions différentes l'une de l'autre, la seconde étant un pur fait, la première supposant une construction juridique. De ces deux notions on sait que la première est la plus récente et qu'autrefois le domicile seul était pris en considération; il était surtout un élément matériel, car il consistait dans un certain lieu, le centre des affaires.

"La réception de l'idée de nationalité qui, dans le plus grand nombre des pays, est venue réduire l'importance de la notion du domicile, peut être considérée comme un signe du triomphe d'un certain idéal sur les pures relations matérielles. L'acquisition de la nationalité ne dépend pas, en effet, d'un simple fait comme l'acquisition d'un domicile; elle résulte de la volonté du législateur et aussi un peu de celle du sujet; elle engendre un lien purement idéal sur lequel les diverses circonstances de la vie des nationaux peuvent n'exercer aucune atteinte.

"L'une des causes du succès de l'idée de nationalité et du recul de l'idée de domicile provient de la solidité plus grande que la nationalité confère à l'emprise exercée par l'État sur l'individu. L'État demeure le maître absolu des lois sur la nationalité. Il est maître de légiférer sur la nationalité comme il l'entend et, en particulier, soit de fortifier le lien national, soit aussi, dans les cas où la persistance de ce lien lui paraît nuisible, de le trancher, même dans les cas extrêmes, sans la participation de la volonté de l'individu.

"Quoi qu'il en soit, il est certain que la nationalité et le domicile sont les deux grands points de rattachement de la personne au droit. Dans les pays où la nationalité et le domicile exercent chacun leur influence, il s'est produit entre leurs domaines une certaine séparation et dans leur autorité respective l'établissement d'un certain ordre, l'empire de la nationalité concernant plutôt la loi applicable, celui du domicile, la compétence du juge. De telle sorte qu'en général, et sous réserve d'assez nombreuses exceptions, l'individu est soumis, dans les rapports internationaux, à la loi déterminée par sa nationalité, c'est-à-dire à sa loi nationale, et, au point de vue de la compétence judiciaire, à l'autorité du juge de son domicile.

"C'est cette méthode que l'on a voulu transporter de la condition des personnes physiques à celle des sociétés. Il fallait en effet également pour elles un principe de rattachement afin de déterminer la loi à laquelle chaque société est soumise.

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[1] C'est là ce que dit très nettement le tribunal de Lille, 21 mai 1908 (S., 1908, 2. 177); voir aussi trib. com. Liège, 1er fév. 1901 (Clunet, 1901, p. 367); et surtout Cass. Rome, 13 sept. 1887 (Clunet, 1889, p. 510). Ce dernier arrêt pousse l'assimilation au point de confondre le simple fait de la constitution à l'étranger, en matière de société, à la circonstance de la naissance hors d'Italie d'un enfant issu de parents italiens.

"On aurait pu créer de toutes pièces ce point de rattachement, en constituant une règle juridique nouvelle et particulière aux personnes civiles, par exemple, les obliger de se conformer, pour leur constitution, aux lois en vigueur au lieu du centre de l'exploitation de leur industrie ou de leur commerce. [1]

"On aurait pu sans doute suivre cette méthode. On ne l'a pas fait cependant. On a préféré le procédé plus commode de l'analogie; il a paru plus rapide et plus simple d'étendre purement et simplement aux personnes civiles les principes qui avaient été déjà dégagés pour la condition des personnes physiques.

"De là un premier inconvénient est venu, c'est la confusion des notions de nationalité et de domicile en ce qui concerne les personnes civiles. Il est, en effet, impossible de rattacher la nationalité des sociétés comme celle des personnes physiques au lieu où elles naissent, car une société ne naît pas matériellement comme une personne vivante. On ne fait donc que reculer la question et non la résoudre, puisqu'il faut alors se demander quel est le lieu de naissance de la société. Or, avec cette nouvelle question, toutes les difficultés ressuscitent. On ne peut pas davantage admettre la possibilité d'une naturalisation pour les personnes purement civiles.

"On a en réalité absolument confondu à l'égard des sociétés les deux notions de nationalité et de domicile; de telle sorte que ce que l'on appelle nationalité des sociétés n'est, en réalité, qu'une espèce de domicile. Cette nationalité découle de l'établissement de la société dans un lieu déterminé. Il a donc fallu donner ici à la notion de nationalité un sens qu'elle n'a nulle part ailleurs et qui la rapproche par trop de la notion de domicile.

"A vrai dire, on objectera peut-être que les navires ont bien, eux aussi, une nationalité. Et l'on serait tenté de la rapprocher de celle de sociétés. Mais, la nationalité des navires résulte d'une inscription sur les registres de la douane faite à certaines conditions; elle se rattache à l'accomplissement d'une formalité juridique déterminée, tandis que la nationalité des sociétés résulte du choix fait par ses fondateurs d'un certain lieu dans lequel ils l'établissent.

"Quel est ce lieu? Ou, en d'autres termes, quel est le pays dont la personne civile doit avoir la nationalité?

"C'est sur ce point que s'est produit, aussi bien dans la doctrine que dans la pratique, un très grave embarras qui dure depuis fort longtemps et qui n'est point encore résolu à l'époque actuelle. Ainsi que nous le verrons, il a son origine et son caractère inéluctable dans la mauvaise définition donnée à la question qu'il s'agit de résoudre."

The tendency of modern jurists is now that of laying down in positive precepts the principle that artificial persons should not be considered as entitled to have any nationality. This has already been contemplated by the jurists of the American continent, at the Conference of Rio de Janeiro, following the opinion of a notable internationalist, Mr. Irigoyen, in the case of the Rosario Bank, who said (Report of the Ministry of Foreign Affairs, Vol. i, p. 385, 1887):

[1] En République Argentine, ainsi que nous l'avons déjà indiqué (supra No. 66), l'idée de nationalité des personnes morales n'a pas été admise. M. Zeballos (Clunet, 1905, p. 606), en donne notamment pour raison que "le système de droit international privé codifié par la République Argentine élimine soigneusement de ces solutions tout élément politique. Il traite les questions d'après l'école de Savigny au point de vue absolument scientifique. En conséquence, les personnes vivantes ou juridiques n'ont pas de nationalité dans leur rapport avec le droit privé. Elles doivent être soumises à une législation privée certaine et permanente, et cette racine de leur vie juridique est celle du domicile. Il convient de remarquer cependant que cette façon de présenter les choses est nettement exagérée, puisqu'elle ne tient à rien moins qu'à exclure la notion de nationalité, même pour les personnes physiques. On peut se refuser à donner une nationalité aux personnes morales sans tomber dans cet excès.

"The Bank of London is a Limited Company; it is a juridical person, which exists for a particular purpose. Juridical persons owe their existence solely to the laws of the country authorizing them, and consequently are neither national nor foreign. A Limited Company is a juridical person distinct from the individuals which compose it, and is not, even when composed of aliens exclusively, entitled to diplomatic protection. It is not the individuals who are joined, but merely their investments, in an anonymous form, which signifies, according to the meaning of that word, that such companies have neither name, nor nationality, nor any individual responsibility."

The Mexican Delegation at Rio de Janeiro supported the principles announced by the Argentine Delegate, at the International Commission of Jurists in that city, and at the meeting of the 30th April, 1927, having sought their inspiration in the valuable opinion of Doctor Bernardo Irigoyen. It is since the Great War that the principle of whether artificial persons should or should not have a nationality has been most warmly discussed.

C'est surtout, says Georges Demassieux (*Le Changement de nationalité de sociétés commerciales*, page 28), depuis le début de la Grande Guerre que la notion de nationalité des sociétés a trouvé beaucoup d'adversaires. De la guerre naquit une préoccupation nouvelle, trop justifiée bien souvent et tout à fait légitime. Il existait, sur le territoire français, des sociétés à qui l'on avait jusqu'alors reconnu, sans conteste, la nationalité française. Les sociétés commerciales ayant leur siège social en France constituées d'après les règles de la loi française, étaient, en effet, regardées comme françaises. Lorsque survint la guerre, on s'aperçut que certaines d'entre elles étaient dirigées par des sujets allemands, que leur capital avait été, en majeure partie, fourni par des Allemands, en un mot, qui résume bien la situation, que ces sociétés étaient "contrôlées par des Allemands."

Des sociétés ayant leur siège social en France, constituées, d'après les dispositions de la loi française, par conséquent françaises aux yeux de tous, étaient en réalité entre des mains ennemies, servaient des intérêts ennemis: allemands, austro-hongrois ou turcs. Il y avait là une situation paradoxale qui amena de distingués juristes à douter sérieusement de la notion même de nationalité des sociétés, laquelle aboutissait, dans son application, à d'aussi déplorables contradictions. Il leur sembla que cette notion ne signifiait rien, qu'elle était fausse, et qu'attribuer une nationalité à des êtres moraux, à des êtres fictifs, était une conception non seulement inutile, mais dangereuse, puisque, en temps de guerre, les manœuvres de l'ennemi risquaient de pouvoir impunément se perpétrer à l'abri de l'étiquette: "société nationale."

En 1917, M. Thaller, Professeur à la Faculté de droit de Paris, écrivait, dans la *Revue politique et parlementaire*. [1] "Entre l'idée de nationalité et celle de personnes fictives ou abstraites, il y a une impossibilité d'adaptation, une antinomie. La nationalité procède de la famille agrandie. Pas plus qu'une société ne possède un statut de famille, pas plus elle ne saurait prétendre au statut sous lequel les individus d'une même nation sont placés. La nationalité est faite de traditions, de mœurs communes, d'un esprit propre aux hommes qui font partie de l'État, différent de l'espèce des autres États, des autres races. En l'absence de ces éléments constitutifs, peut-il être question de nationalité?"

Aux côtés de M. Thaller, M. Lyon-Caen, M. Landry, député, M. Camille Jordan, juriste très versé dans les questions de nationalité, combattirent vigoureusement la notion de nationalité des sociétés. [2] Dans son fort intéressant ouvrage

[1] *Revue politique et parlementaire*, année 1917, page 297.

[2] *Bulletin mensuel de la Société de législation comparée*, janvier-mars 1927, article de M. Lyon-Caen, p. 535 et suiv. Numéro d'octobre-décembre 1927, article de M. Jordan, p. 534.

sur la "*Nationalité des sociétés de commerce*,[1]" M. Pepy considère que la nationalité des sociétés, d'après les idées généralement admises, ne peut que consister dans la soumission aux lois d'un État sur la constitution et le fonctionnement des sociétés. La véritable nationalité, au contraire, que seule peuvent posséder les individus, consiste dans l'emprise d'un organisme politique sur une personne humaine. C'est cette emprise qui forme le fond, la substance même de l'idée de nationalité. La Français ne relève pas seulement de la législation française, il voit de plus son activité dirigée, absorbée même par les forces propres de la communauté française. Cette communauté ne s'occupe que des êtres vivants, qui, seuls, peuvent lui être unis par ce lien personnel intime qui constitue la nationalité. Mais ce lien ne peut se concevoir à l'égard d'une entité juridique qui ne peut en avoir d'autre avec la communauté nationale que le fait *d'avoir son fonctionnement régi par ses lois*. Les sociétés n'ont pas de véritable nationalité, et vouloir leur en donner une, c'est fort dangereux. "C'est entretenir l'équivoque dans les idées, la confusion dans les esprits," dit M. Pepy.

Par la thèse de M. Pepy, les mesures prises par le Gouvernement français, pendant la guerre, à l'encontre des sociétés contrôlées par l'ennemi, se trouvent parfaitement justifiées. Si les sociétés commerciales ne pouvaient avoir de nationalité, elles n'étaient pas plus françaises qu'allemandes, austro-hongroises ou turques. Que certaines d'entre elles fussent dangereuses, cela suffisait pour que, dans l'intérêt supérieur de la défense nationale, on agît de rigueur avec elles, et qu'on sequestrât leurs biens.

Les idées des détracteurs de la notion de nationalité des sociétés trouvèrent leur écho dans la jurisprudence. Un jugement du tribunal mixte franco-allemand de 30 novembre 1923, [2] dénie à une société la possibilité d'avoir une nationalité. Il s'agissait, en l'espèce, d'une société en commandite simple établie à Paris, qui demandait à être considérée comme ressortissant d'un pays allié ou associé, aux termes de l'art. 297 e. du traité de Versailles. Le tribunal mixte, adoptant les motifs d'une précédente décision qu'il avait rendue le 30 septembre 1920,[3] considère que les sociétés en commandite, en tant que personnes morales, n'ont pas de nationalité proprement dite, et que celle-ci dépend de la majorité des associés. Voici les termes dont il se sert: "Attendu que les sociétés en commandite n'ont pas de nationalité proprement dite, puisqu'une telle nationalité d'une part confère des droits (tels que le droit de vote, le droit d'être nommé à des fonctions publiques, la protection contre l'extradition, &c.), et d'autre part impose des obligations (telles que le service militaire), qui ne peuvent s'appliquer qu'aux personnes physiques." Plus loin, le même jugement proclame que "la nationalité de la majorité des associés détermine le caractère de l'entreprise qui forme l'objet de la société."

It is true that in this instance the question as to whether the artificial person under discussion has any nationality or not, is not being gone into, because the Mexican Government had already undertaken to pay compensation to *English Companies* having sustained damage, but if the renowned jurists to whom I have referred, are contending for the abolition of the principle of nationality in the case of artificial persons, international Tribunals, when called upon to solve the problem in a specific instance, should, with all the more reason, proceed with great care before upholding the nationality of a given person, if the facts serving as the ground for their decision do not conform exactly to universally recognized principles, and more especially to the laws of the country the protection of which is invoked.

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[1] *De la nationalité des sociétés de commerce*, par M. Pepy, un vol., 1920, p. 92 et suiv.
[2] D. Hebd., 1924, p. 131.
[3] J. Clunet, 1923, p. 600.

II. Nationality is a question which must be decided in accordance with internal law, as decided by the Permanent Court of International Justice, in various judgments. The Laws of England do not state when a Company is of British nationality, and the decisions of English Courts do not fix unvarying rules for determining when a Company is of such nationality. On the contrary, there are decisions of English Courts openly contradictory to one another, some of them admitting the principle that the nationality of a company should be determined by the laws under which it was organized and registered, while other courts have ruled that the nationality of a company should be determined by the place where its operations are carried on, i.e., its principal place of business.

III. The certificate of incorporation of the Company (annex 1) produced by the demandant Government, only shows that D. L. Flack and Son, Mexico (Limited) was organized under the Companies Acts, 1862 to 1907, as a Limited Company, on the 19th February, 1909, and that said Company was dissolved; but it cannot be inferred from this that the said Company is of British nationality. There is no law providing that a Company is an English Company through the mere fact of having been organized in accordance with the English laws. In the present case the doubt as to the British nationality of the Company arises out of the fact that D. L. Flack and Son, Mexico (Limited) had the Republic of Mexico as its only centre of operations, or at least the Company for Mexico, as the British Agent himself assures us in his Memorandum.

Georges Demassieux, in *Le Changement de Nationalité des Sociétés Commerciales*, p. 45, says:

"En Angleterre, nous le dirons plus loin, une société, pour être anglaise, doit avoir son siège administratif sur le territoire national. Mais une société 'limited' doit, pour avoir la personnalité, remplir la formalité de l'enregistrement *de ses statuts* sur un registre spécial tenu par un fonctionnaire appelé registrar. Une société 'limited' ne peut avoir la nationalité anglaise si elle n'a pas accompli cette formalité."

In this case all that we know is that D. L. Flack and Son, Mexico (Limited) was incorporated on the 19th February, 1909; but we do not know whether the articles of association of said Company were registered or not; we do not know either whether the said Company had its *siège social* in Mexico, and all that we know is that it was incorporated under the English law; but for the purpose of effecting all its transactions in Mexico. It would have been desirable that the British Agent had submitted a copy of the deed of incorporation with this Memorial. This would have saved time and argument; but the lack of that document, or rather the omission on the part of the demandant Government, cannot be transformed into an affirmative statement to the effect that the Company is a British Company, to the detriment of the interests of a sovereign nation, which has graciously acquiesced in the payment to *British subjects* of damage suffered by them, although not bound to do so under International Law.

IV. International Jurisprudence precedents differ too much to make it possible to decide with absolute exactness, without fear of error, as to the nationality of a company.

Borchard, "*The Diplomatic Protection of Citizens Abroad*," p. 617, paragraph 277, says:

"S 277. *Citizenship of Corporations.*

"The nationality of corporations is one of the most actively discussed questions of the law of continental Europe. While some writers dispute the possibility of corporate nationality, the fact that the legislation of practically all countries takes account of foreign corporations, has persuaded publicists to endeavour

to establish the criteria of a national corporation. In some countries, little help is obtained from positive legislation.

"A corporation may be attached to a territory by three elements. The first is the place where it is created or founded, where the legal formalities of its constitution, authorization and inscription have been carried out. The second is the place where the home office, the active management or centre of administration, or what the French call the *siège social* is located. The third is the place where it carries on the purpose of its organization, its actual operations, its centre of exploitation *(principale exploitation)*.

"When these three elements are combined in one country, it is hardly open to question that the corporation has the nationality of that country. But when the three elements or some of them are located in different countries, the nationality of the corporation is not always easy to determine. Taking into consideration the three factors mentioned and some others, the following systems as to the determinative criterion of the nationality of a corporation have all had their adherents: It is governed (1) by the nationality of the State which authorizes its existence (Fiore and Weiss); (2) by that of the State within whose jurisdiction it has been organized (Brunard and Cassano); (3) by the nationality of the stockholders (Vareilles-Sommières); (4) by that of the country of subscription of domicile of the majority of the stockholders at the time of subscription (Thaller); (5) *by that of the country where it has its principal place of business, a system followed, with variations, by the legislation of most countries;* (6) the jurisdictional judge may determine the nationality on all the facts. Other solutions have been offered, e.g., that the will of the corporation or of the state should alone determine its nationality.

"Leaving aside all theoretical arguments, it may be said that the majority of States in their legislation have accepted *the country of domicil (siège, Sitz)* as the nationality of the corporation. The question then arises, is the domicil the centre of administration, the 'home office', or is it the centre of exploitation, where the business is carried on? Among the countries of Europe with the exception of Spain, which attributes Spanish nationality to corporations incorporated in Spain or administered from, or doing business in Spain, *and of Italy, Portugal and Romania,* which consider as domestic corporations those doing business within their borders (centre of exploitation), the majority adhere to the system by which nationality follows the country in which the *centre of administration* (the *siège social*) is located."

Jackson H. Ralston, in *The Law and Procedure of International Tribunals*, p. 155, paragraph 278, says:

"278. The mixed commissions sitting by virtue of the Versailles and subsequent treaties have several times rendered decisions upon the general subject. Thus, for instance, it has been held that a corporation formed in Germany and controlled by Frenchmen can claim, as a victim of exceptional measures of war, a house which has its site for business affairs in Germany, but of which no associate is German, cannot be considered as a German subject; under the terms of the treaty of peace the nationality of a corporation is fixed for the purpose of the interests which these treaties have in view, not according to the law under which they were constituted nor according to the site of their principal establishment of business, but according to the interests controlling them; a corporation or association composed of individuals all of the same nationality cannot have a nationality different from theirs. *Where there is no question of custody or liquidation, but there are mere contract relations between private parties, a joint stock company's nationality is determined by the location of the principal place of business unless this is merely nominal.*"

V. The Anglo-Saxon system for determining the nationality of limited companies is not uniform either. Borchard, *op. cit.*, p. 619, paragraph 275, says:

"*Anglo-American Law.*

"In Anglo-American law no such theoretical conflicts as have prevailed in continental law appear to have found a place. The conception of domicil with respect to corporations has been applied in cases of taxation and of belligerent rights, and for these purposes the seat of the corporation has on occasion *been considered the place where the business is carried on.* For other purposes the question of domicil and nationality is decided by practical considerations, the most important of which is the place of incorporation.

"In the United States the citizenship of corporations is judged almost exclusively according to the place of incorporation, which involves, in most municipal cases, the determination of State citizenship. Only thirteen States even require residence on the part of any of the incorporators and only six require State citizenship. New York appears to be the only State demanding United States citizenship. While the courts have made numerous distinctions between natural persons and corporations in the matter of citizenship, they have held a corporation to be a citizen for the purposes of suit under the federal constitution, and under the Act to provide for the adjudication and payment of claims arising from Indian depredations. The Supreme Court, moreover, has held that for jurisdictional purposes there is a conclusive presumption of law that the persons composing the corporation are citizens of the same State with the corporation, and, 'although an artificial person,' a corporation is 'to be considered as a citizen of the State as much as a natural person.'

"While it has been held that a corporation could be an alien enemy as well as an individual, it has not been definitely established whether the place of incorporation governs enemy character, or whether this is determined according to each place where the corporation has a branch and does business. In earlier cases, the place of actual business has been held to control; more recently, however, it has been held in England that the place of incorporation and registration, and not the place of operation governs. The British proclamation of the 9th September, 1914, in regard to trading with the enemy, provides that in the case of incorporated bodies enemy character attaches only to those incorporated in an enemy country. On the other hand, for the purposes of the effect of war on patents, designs and trade-marks, a British corporation controlled by or carried on wholly or mainly for the benefit of subjects of an enemy State was to be deemed an alien enemy."

VI. The foregoing considerations at least serve to show that the problem of the nationality of a limited company under international law is not an easy one to solve, when, as in this case, the Company was incorporated under the Laws of England, but to operate in Mexico. If the claimant Company had had its domicile in Great Britain, if its shareholders had been British and its principal place of business had been in England, the Mexican Commissioner would have agreed with his colleagues in acknowledging its British character; but this last element is lacking and he does not, for that reason, accept that opinion.

VII. The Mexican Commissioner holds, furthermore, that it is not necessary to decide this first question of the interrogatory in either sense, because the Demurrer having been upheld on the strength of the other grounds proposed, said Demurrer would, on the assumption that a British Company were involved, also be sustainable.

The Mexican Commissioner bases his opinion on the foregoing considerations, dissenting from his estimable colleagues in regard to the nationality of

the claimant Company; but he concurs, however, in all the other points which gave rise to the decision of this Court upholding the Demurrer entered by the Mexican Agent.

CARLOS L. OLDENBOURG (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 11, December 19, 1929. Pages 97-99.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM.—PARTNERSHIP CLAIM.—CLAIM IN REPRESENTATIVE CAPACITY.—DUAL NATIONALITY. Demurrer to a claim for damage to a partnership formed under Mexican law *allowed*, without prejudice to further proof, when evidence was lacking, as required by the *compromis*, that British subjects possessed an interest exceeding fifty per cent of the capital of the firm. Any interest in such partnership owned by persons of dual nationality, i.e., that of claimant and respondent Governments, *held* not the subject of an international claim.

Cross-reference: Annual Digest, 1929-1930, p. 189.

1. The claim is for losses suffered by Messrs. Jorge M. Oldenbourg, Sucs., at Colima (State of Colima), during the years 1914, 1915 and 1916. The Memorial divides the claim into three parts:

Part 1.—For 1,000.00 pesos, being a forced loan made by the Military Governor of the State of Colima;

Part 2.—For the value of two bundles of skins taken by order of the Military Governor of the State of Colima;

Part 3.—For the payment of a bill of 2,600.00 pesos issued by the Paymaster-General of the First Army Corps at Manzanillo (State of Colima) which the Treasury of the Federal Government refused to honour.

The Memorial states that the aforesaid Company was formed on the 20th July 1904, and, although Mexican, was composed entirely of British subjects. The partners were Mrs. Emeteria Oldenbourg, Mr. Carlos, Miss Martha, Miss Luisa, Miss Berta and Miss María Oldenbourg, the first being the widow and the others the children of the late Mr. Jorge M. Oldenbourg. By a deed dated the 6th August, 1925, the company was dissolved and Mr. Carlos L. Oldenbourg became sole owner, taking the responsibility of all present and past accounts.

Amongst the annexes is a certificate of the British Consul at Colima stating that in April 1908, Mrs. Emeteria, Miss Martha, Mr. Carlos, Miss Luisa and Miss María Oldenbourg were registered as British subjects.

2. The Mexican Agent lodged a demurrer on the two following grounds: The Consular certificate does not establish the British nationality of the members of the firm of Jorge M. Oldenbourg, Sucs., nor that of Mr. Carlos L. Oldenbourg, who presents the claim. The British Agent has not shown that the allotment referred to in Article III of the Convention was ever made to the claimant.

The British Agent has submitted a baptismal certificate and a certificate of the Secretary of State for Foreign Relations of Mexico as proof of the British nationality of the father, Jorge M. Oldenbourg. According to British law, his wife and his children possess the same nationality. The Company, when it was dissolved, was entirely formed by British subjects, and as the right to this claim,

by the deed of the 6th August, 1925, has passed to Carlos L. Oldenbourg, the allotment referred to in Article III is not required. Furthermore, the British Agent has filed copies of letters to the effect that Carlos L. Oldenbourg acted several times as British Consul at Colima and for that reason, according to the law of Mexico, is to be considered as a foreigner in that country.

3. In his oral argument the Mexican Agent has not contested the British nationality of the late Mr. Jorge M. Oldenbourg, nor of his widow, but as regards the nationality of their children he *first* drew attention to the fact that the Consular certificate does not mention Miss Berta Oldenbourg, and *second* maintained that according to article 2 of the Mexican "*Ley sobre Extranjería y Naturalización*," 1886 ("Law on Alienage and Naturalization," 1886), they must be regarded as Mexican subjects, because they were all born in Mexico and have not, when they became of age, declared before the competent authority that they opted for British nationality. For this last contention, he relied upon a telegram of the Governor of the State of Colima.

The Mexican Agent held therefore that, even if the British nationality of the claimant and his sisters were established, they possessed at the same time Mexican citizenship; in other words, that the Commission was faced by a case of dual nationality. In such cases, the principle generally followed has been that a person having dual nationality cannot make one of the countries to which he owes allegiance a defendant before an international tribunal. A person cannot sue his own Government in an international court, nor can any other Government claim on his behalf (Borchard: *The Diplomatic Protection of Citizens Abroad*, p. 587; Ralston: *The law and procedure of international tribunals*, p. 172).

As regards the second ground, upon which his demurrer is based, the Mexican Agent contended that at the moment when the company was dissolved and Carlos L. Oldenbourg became sole owner, the Convention was not yet signed and the partners of this Mexican firm had therefore not yet acquired the right to claim independently of the company. For this reason, Carlos L. Oldenbourg can only claim on his own behalf and he must prove which was his interest in the concern.

4. The British Agent observed that the question of the dual allegiance had not been raised in the written pleadings and he declared that the British Government, in cases of such duality, held the same view as expressed by the authors whom his Mexican Colleague had quoted. He pointed out, however, that the British nationality of the widow of Mr. Jorge M. Oldenbourg was not contested and that also the British nationality of Mr. Carlos L. Oldenbourg must be regarded as being recognized by Article 6 of the Mexican law of 1886, owing to the fact that he had held an office in the British public service. If therefore Mr. Carlos L. Oldenbourg and his mother could be proved to have possessed an interest exceeding fifty per cent of the total capital of the company (Article III of the Convention), the nationality of the other partners would be immaterial and the demurrer falls to the ground. He accordingly asked the Commission to postpone the further discussion in order to obtain evidence as to the proportional interest pertaining to claimant and his mother.

The Commission has allowed the postponement and in its meeting of the 5th December, 1929, the British Agent has declared that, having not been able to obtain the necessary evidence, he would not further oppose the demurrer.

5. The demurrer is allowed, without prejudice to the right of the British Agent to furnish other proof.

MEXICO CITY BOMBARDMENT CLAIMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 12, February 15, 1930, dissenting opinion (dissenting in part) by British Commissioner, undated, dissenting opinion (dissenting in part) by Mexican Commissioner, February, 1930. Pages 100-118.)

AFFIDAVITS AS EVIDENCE.—DAMAGES, PROOF OF. Only in rare instances will unsupported affidavits of a claimant be accepted as sufficient evidence. Affidavits of claimants made shortly after their losses, corroborating one another in their recitation of the facts, and supported by affidavits of other witnesses as well as certain historical facts, *held* sufficient proof of circumstances of loss. Affidavits of claimants as to amount of loss *held* not sufficient to establish damages to be allowed, damages instead allowed on basis of estimate of the tribunal. A statement neither signed nor sworn to by claimant held not sufficient evidence. A statement of a claimant supported by an affidavit of another person, which latter affidavit was executed more than fifteen years after the event, *held* not sufficient evidence.

PRIMA FACIE CASE.—BURDEN OF PROOF.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH. A *prima facie* case of liability will exist upon proof by the claimant Government that the existence of the insurrection, for acts of the forces of which claim was made, was known to the public authorities, when the respondent Government has failed to produce any evidence as to action taken by the authorities.

Cross-references: Am. J. Int. Law, Vol. 25, 1931, p. 765; Annual Digest, 1929-1930, pp. 166, 454.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. The British Government have joined in a single Memorial, under the title "Mexico City Bombardment Claims," one group of similar claims and two individual claims, all of which originate in the events which took place in Mexico City in February 1913, during a period known as "the tragic ten days." They are the following:

A. The claims of Walter Ralph Baker, Archibald William Webb, Herbert John Woodfin and George J. W. Poxon, all residents in the Hostel of the Young Men's Christian Association, for having lost property when the Hostel was occupied by troops.

B. The claim on behalf of Daniel John Tynan for losses suffered when, as a result of a bombardment, a fire was started in his house and his property destroyed.

C. The claim of James Kelly for losses suffered through the killing of twelve of his cows by a shell.

The Commission has considered and decided the three parts of the Memorial separately.

A

The Claims of Messrs. Baker, Webb, Woodfin and Poxon

2. Their losses are alleged to have been due to the occupation of the Y.M.C.A. Hostel, where they resided in February 1913, by revolutionary troops belonging to the forces of General Felix Díaz, then in arms against the Administration of President Madero. Claimants were ordered to leave the building without delay, and when they returned to their rooms after hostilities had ceased, they found that their personal property had been either destroyed or looted by the revolutionaries. The building was, and is still, situated at the corner of Calle Dalderas and Avenida Morelos, close to the so-called "Ciudadela," being the Arsenal, then occupied by the Felicistas (troops under command of General Felix Díaz).

The documents on which the British Agent relies are: (1) An affidavit sworn by Mr. Baker before the British Consul-General at Mexico City on the 2nd April, 1913; (2) a statement made by Mr. Webb on the 1st March, 1913, registered on the 27th March, 1913, at the British Consulate-General at Mexico City, and affirmed by his affidavit sworn before the British Vice-Consul at Guadalajara on the 15th April, 1928; (3) a statement made by Mr. Woodfin on the 3rd April, 1913, and affirmed by his affidavit sworn before the British Consul at San Jose, Costa Rica, on the 1st March, 1928; (4) an affidavit sworn by Mr. Poxon before a notary public at Los Angeles (California) on the 28th November, 1927; (5) several certificates of the Secretary of the Young Men's Christian Association, to the effect that Messrs. Baker, Webb and Woodfin occupied rooms in the Hostel when the building was invested by revolutionary troops on the 11th February, 1913.

In the course of his argument the British Agent has filed an affidavit sworn before the Vice-Consul of the United States of America at Mexico City by Mr. Richard Williamson, now National Secretary, and, in February 1913, Associate General Secretary of the Young Men's Christian Association. In this affidavit Mr. Williamson deposes that during the "tragic ten days" the Hostel of the Association was occupied by one hundred soldiers under the general command of Felix Díaz; that he (Williamson) was on hand at the same building immediately after the hostilities ceased, and that he found the majority of the rooms had been sacked and robbed. He further states that none of the occupants of the rooms had an opportunity to remove their personal belongings because of the suddenness of the occupation of the building and the impossibility of getting access to it after the troops had occupied it, and that, during the time the robbing and sacking was done, no troops, forces or individuals had access to the building.

The British Government claims, on behalf of Mr. Baker, 997.00 pesos Mexican gold; on behalf of Mr. Webb, 275.50 pesos Mexican; on behalf of Mr. Woodfin, 621.10 pesos Mexican silver or £62 3*s*.; and on behalf of Mr. Poxon, 631.00 pesos Mexican gold.

3. The Mexican Agent has denied any value whatever to the affidavits of the claimants, because they have not been sworn publicly before a court, because there has been no cross-examination of the affiants, and because, in case of perjury, the affiants cannot be prosecuted.

In his opinion, the unsupported affidavits of claimants cannot be considered as evidence, and certainly not as evidence in their favour. He pointed out that articles 10, 28, 29 and 30 of the Rules of Procedure make a clear distinction between the parties and the witnesses, and that documents emanating from the former are not equivalent to documents emanating from the latter. The

fact on which the claims are based, i.e., the looting of the room in each individual case, has not been proved, neither have the pre-existence or the value been established of the objects, for the loss of which compensation is claimed. Even if the occupation of the building were ascertained, the losses of the claimants individually would not have been proved by their uncorroborated affidavits. In the view of the Mexican Agent, the claimants have omitted to collect the necessary outside evidence, which, if they had made an effort, would have been available, and this makes their statements still more objectionable to him.

Although the Mexican Agent did not deny that the Felicistas are included in the forces enumerated in Article 3 of the Convention, he contested that there was any proof that they were responsible for the losses on which the claims rest. But even if this had been shown, they could, as being rebels, only fall within subdivision 5 of Article 3, and the British Agent ought to establish that the competent authorities had been blamable in some way.

4. The British Agent held that to unsupported affidavits of claimants more weight is to be attached than his colleague was inclined to admit. According to the British law, affiants can be prosecuted and punished for perjury even if they swore and signed outside England. In this case, however, the affidavits cannot be considered as lacking support, because they corroborate each other, having been sworn by different persons, who all suffered similar losses at the same time and owing to the same occurrences.

He further argued that, whereas it is impossible to obtain corroborated evidence as to the objects robbed from a room, the statement of the owner has the value of *prima facie* evidence.

That those who occupied the building and looted the rooms were Felicistas was, according to the Agent, of public notoriety, and is, moreover, proved by the certificates of the Secretary of the Y.M.C.A. and by the affidavit of Mr. Richard Williamson.

In his view, the Felicistas were included in subdivision 2 of Article 3 of the Convention, because they aimed at the overthrowing of President Madero, an aim which at the end of the "tragic ten days" was reached by General Victoriano Huerta. As, in the conception of the British Agent, Huerta established a Government *de facto*, the cause, which was common to him and to General Felix Díaz triumphed and the Mexican Government is responsible for the damages caused by the forces of the one as well as of the other. If, according to the opinion of his Mexican colleague, subdivision 5 of Article 3 were to be applied, the British Agent maintained that it was well known that neither General Felix Díaz nor his soldiers were punished.

5. In its decision on the demurrer, filed by the Mexican Agent in the claim of Mrs. V. C. Cameron, the Commission has made known its attitude as to affidavits in general. The unanimous view of the Commissioners was expressed as follows:

"It is true, no doubt, that affidavits contain evidence which can be described as secondary evidence and is often of a very defective character. In many cases, it may be, affidavit evidence may possess little value, but the weight to be attached to that evidence is a matter for the Commissioners to decide according to the circumstances of a particular case. Affidavits must and will be weighed with the greatest caution and circumspection, but it would be utterly unreasonable to reject them altogether."

Acting on the principle laid down in this sentence, the Commission has considered the weight to be attached, *first* to unsupported affidavits of claimants in general, and *second* to the affidavits produced in this case.

It may be useful for the further guidance of the Agents, that the Commission announces that its majority has come to the conclusion, in general, that unsupported affidavits of claimants possess the very defective character of which the quotation speaks, and that only in cases of the rarest exception, they can be accepted as sufficient evidence. Such documents are sworn without the guarantee of cross-examination by the other party; in nearly all cases a false statement will remain without penalty, and, as they are signed by the party most interested in the judgment, they can not have the value of unbiased and impartial outside evidence.

As regards, however, the affidavits, on which the British Agent relies in this case, an otherwise composed majority of the Commission does not consider them as being unsupported, at least not as regards the affidavits of Messrs. Baker, Webb and Woodfin. Their statements have been made at nearly the same time and very shortly after the events. Their depositions are identical. Their falseness would be equal to a perjury of such a premeditated and concerted character as seems difficult to admit. Moreover, their declarations are strengthened by the certificates of the Secretary of the Y.M.C.A., who attests that the Hostel was occupied by revolutionaries, and by the affidavit of Mr. Richard Williamson, who, as an eye witness, swears that he knew that the soldiers, who invested the building, were Felicistas and that the majority of the rooms have been sacked and robbed. As moreover, the Hostel was situated in the immediate neighbourhood of the place where, as is widely known, General Felix Díaz had his quarters, there is every reason to admit that, by corroboration, the various affidavits and statements prove sufficiently the occupation of the building by Felicistas and the looting by them of the rooms of Messrs. Baker, Webb and Woodfin.

It is the unanimous opinion of the Commissioners that these considerations do not hold good for the claim of Mr. Poxon for the reasons *first* that his affidavit, having been sworn on the 28th November, 1927, can not be regarded as being corroborated by the simultaneous and contemporary statements drawn up a few days or weeks after the events; and *second* that there has not been shown any evidence as to his residing in the Hostel during the "tragic ten days."

6. The majority of the Commission being satisfied that the Hostel was occupied by soldiers of the Felix Díaz forces, and that the rooms of Messrs. Baker, Webb and Woodfin were looted by them, the next question which arises is whether the Mexican Government can, under Article 3 of the Convention, be held responsible for these acts, in other words, whether the Felicistas fall within any of the subdivisions of Article 3, and if so, within which of them.

It is again a majority of the Commission who answer this question in the affirmative and hold that subdivision 5 of article 3 applies to the case under consideration.

The Commissioners, whose views are here exposed, do not admit such a close co-operation and community of aim between General Felix Díaz and General Victoriano Huerta as to identify them both together as one revolutionary force, which, after the overthrow of President Madero, set up a Government *de facto*. In their opinion, the Felicista forces must be considered as separate forces and merely as troops having risen in arms against the then Government *de jure*, i.e., as rebels.

For their acts the Republic of the United Mexican States owes compensation, in case, to quote the last part of subdivision 5: "It be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question or to punish those

responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.

In the claims here dealt with both conditions seem to be fulfilled. The occupying and the looting of the building must have been known to the authorities obliged to watch over and to protect life and property; and, furthermore, the British Agent showed notes of sufficient authenticity, written in the British Legation in margin of the affidavits of the claimants, which notes satisfy the majority of the Commission that the events have been duly and without delay intimated to the public authorities.

On the other hand there is no evidence at all that the soldiers, who looted the Hostel, have been prosecuted.

7. It remains to be examined if any proof has been shown of the amount of the loss for which compensation is claimed, and which decision is to be taken in case such proof is lacking.

The Commissioners join in the view that the corroboration of the three affidavits, adopted in section 5 of this judgment, does not go further than the mere facts of the occupying of the building and the looting of the rooms, and that neither in the other documents, on which the majority relies, is to be found anything which can throw light on the figures of the loss. But the majority cannot concede that this constitutes a reason why no award at all should be granted.

The majority of the Commissioners are convinced that losses have been suffered and that, according to the Convention, they are to be compensated by the United Mexican States, and the mere fact that their amount has not been established cannot deprive the claimants of their right. Another view might be taken if the claimants could be blamed for having omitted to take such steps as could lead to showing what the damages were. But there can be no reasonable doubt that such steps were not within their power. After the soldiers invested the Hostel, the residents had no choice but to evacuate their rooms at once. There was no one inside or outside the building who could be expected to know which objects had to be left in the rooms. A comparison between the inventory before and after the occupation was therefore impossible. It would be in conformity neither with justice nor equity if for this reason all compensation was disallowed.

But it seems equally wrong to accept, in the absence of convincing evidence, the figures calculated by each of the claimants. The Commission cannot believe that it would act in accordance with the principles laid down in Article 2 of the Convention if it decided that the Mexican Government must pay the uncorroborated and perhaps exaggerated amounts which appear in the affidavit of the interested parties.

To this dilemma the Commission sees only one solution, i.e., to lay down its own rule for the adjudging of the award. This rule must be established independently of the individual claims. It cannot grant to the one more than to the other because it rejects the figures which each of the claimants puts forward.

It must constitute the nearest approach to justice and equity which the case admits.

This rule, adopted by the majority of the Commissioners, is that the Mexican Government, in the absence of clear evidence, cannot be obliged to pay more to each claimant than the amount representing the value of such objects as may be safely supposed to constitute the average portable property of young, unmarried men of the social class for which the Hostels of the Y.M.C.A. are particularly destined. Arbitrary as this amount may seem, it is more in conformity with the spirit of the Convention than either the denial of all award whatever or the granting of sums for which no reliable evidence exists.

8. The Commission decides that the Government of the United Mexican States shall pay to the British Government, on behalf of Messrs. W. R. Baker, A. W. Webb and H. J. Woodfin, each the sum of 275.00 (two hundred and seventy-five) pesos Mexican gold.

The Commission decides that the claim of Mr. G. J. W. Poxon is disallowed.

B

The Claim of Mr. Daniel John Tynan

9. The Memorial states that in February 1913 Mr. Tynan was residing at 5a. Balderas No. 74. On the 17th and 18th of that month, as a result of a bombardment between Felicistas and Federal troops, a fire was started in the house and Mr. Tynan's personal property was destroyed.

On behalf of Mr. Tynan the sum of 2,743.00 pesos, Mexican currency, is claimed.

10. Contrary to article 10 of the Rules of Procedure, the Memorial is not signed by the claimant nor is there a signed statement of the claim by the claimant included in the Memorial. The only document on which the British Agent relies is a "*statement of losses suffered by D. J. Tynan,*" at the foot of which appear several signatures. This statement has not been sworn, nor has any information been given as to the identity of the signatories or as to how they came to the knowledge which they profess.

The Commission cannot regard this paper as sufficient evidence of the facts alleged in the Memorial.

11. The Commission decides that the claim is disallowed.

C

The Claim of Mr. James Kelly

12. In the Memorial the following facts are alleged:

In February 1913 Mr. James Kelly was engaged in a milk business at No. 45, Calzada de Cuitlahuac, in the City of Mexico. He had approximately 150 Holstein cows on the premises. On the 12th of that month, during a battle which took place in Mexico City, a shell burst in the archway of the cowshed, killing twelve cows. As the cows were in a perfect state of health before they were killed, Mr. Kelly, with the permission of the police authorities of the Second Commissariat of Mexico City, sold the flesh to Señor Ruben Carrillo, who was at that time engaged in the cattle trade. The value of the cows alive was 275.00 pesos Mexican each, but Mr. Kelly was only able to secure the price of 50.00 pesos each for the flesh.

The amount of the claim is for 2,800.00 pesos, being the difference between the value of the twelve cows and the proceeds of the sale of the meat.

Mr. Kelly's estimate of his loss is confirmed by Señor Ruben Carrillo in an affidavit of the 8th May, 1928.

13. The Mexican Agent did not accept the affidavit of Señor Carrillo, who, being a Mexican subject, ought not to have made his deposition before the British Consul, but before the authorities of his own country. Moreover, the witness has not been cross-questioned and he does not explain how he came to know the facts.

Apart from that, the Mexican Agent held that the bombardment to which the Memorial refers was part of the defence of the lawful Mexican Government against forces who had risen against them. The Government acted according to their most essential duty, in order to uphold the constitutional régime. The bombardment, therefore, was an act of lawful warfare and not a revolutionary act. The Agent made a distinction between *damnum cum injuria* and *damnum sine injuria*. In this case, according to his view, the Commission had to deal with damage resulting from legitimate self-defence, i.e., from acts which did not constitute any injustice. The Convention did not make Mexico responsible for damage of this nature.

14. The British Agent has replied that Señor Carrillo's affidavit is a strong corroboration of the statement of Mr. Kelly, and that it is only natural that as the claims are prepared by British authorities, the affidavit is sworn before a British Consul.

He could not agree that the events of the "tragic ten days" were to be classified as lawful warfare. At that stage there was a revolt of insurgents against President Francisco Madero and no civil war. But even if the action which the Government took were identical with warfare, there was nothing in the Convention that justified his colleague's view that hereby the obligation of the Government to give compensation was eliminated. The second article of the Convention says that "it is sufficient that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 for Mexico to feel moved *ex gratia* to afford such compensation."

Those words did clearly show that even in cases where according to international law responsibility could not be admitted, still compensation would be given to the injured parties, when it could be established that they suffered losses or damages as a result of revolutionary acts.

15. The first question with which the Commission is faced is whether the facts, upon which the claim is based, are sufficiently proved by the affidavits of Mr. Kelly and of Señor Ruben Carrillo.

As regards the affidavit of the former, the majority of the Commissioners refers to section 5 of this judgment and can only repeat that this document could only be accepted as evidence if it were corroborated by reliable outside statements of one or more other persons not interested in the claim.

As such nothing has been presented but the affidavit of Señor Carrillo, who is said to have bought the flesh of the killed cows. The majority of the Commission cannot regard this document as possessing such a force as to support in a convincing manner the claimant's deposition. The affidavit of Señor Carrillo has been drawn up more than fifteen years after the events; the declarations have been made without interrogation by the other party, and he does not say how the many minute details, about which the affiant gives evidence, came to his knowledge.

This document seems the less acceptable as sufficient evidence, because an effort ought and could have been made to obtain proof of a better quality.

Mr. Kelly relates in his affidavit that, on the very day of the event, he reported to the Police Office of the Second Ward, from which a police officer and other persons were at once sent, and prepared a written report of the facts, which report was forwarded to the Office of the Public Prosecutor under No. 2250. The producing of this document would probably have assisted the Commission very effectively to establish the truth, but no endeavour has been made to procure it. In these circumstances the majority of the Commissioners object to rely on Señor Carrillo's affidavit as a sufficient support of the deposition of claimant.

16. The Commission decides that the claim is disallowed.

Dissenting opinion of Sir John Percival, British Commissioner

1. In regard to these claims so many different points have been raised that, although I am in agreement with both my colleagues on certain points, and with the President of the Commission on certain others, it is impossible to explain the points of agreement and disagreement except in a complete separate opinion.

2. In the first place, I am unable to assent to the general proposition laid down in paragraph 5 of the President's opinion, and concurred in by my Mexican colleague, with regard to the unsupported evidence of the claimants. As the question has not only been raised in this case, but will inevitably arise not infrequently in the circumstances in which claims have had their origin and have been presented to this Commission, I deem it essential to set out what appear to me to be the rules which should guide the Commission in dealing with such evidence.

3. The view propounded by the Mexican Agent is that the statements made by the claimant are merely claims, and not evidence of fact at all, and he relied on the maxim recognized in the domestic law of many countries that no one is witness in his own action. On the other hand, the British Agent contended that such statements establish a *prima facie* case and should be accepted by the Commission unless some evidence in rebuttal is produced.

I do not find myself able to accept entirely either of these theses. On the one hand, the maxim mentioned above is not universally accepted; in England, the United States of America and elsewhere a plaintiff or a defendant is allowed, and indeed, in the case of the plaintiff, is expected to give evidence exactly like any other witness. On the other hand, it is clearly most dangerous to rely on the uncorroborated statements of a single person, even though they are not rebutted, and this danger is, of course, greater when such person is the claimant himself.

Under the rules governing the procedure of the Commission we are not bound by the laws of evidence prevailing in Mexico or in England or in any other country. But it is our duty to apply general principles of justice and equity and to give to any oral evidence or document produced before us such evidential value as we consider in all the circumstances of the case it ought to carry.

Thus, in the case of a contract, there is a principle which is almost universally admitted and with which I am in entire agreement, that, in general, both the existence and the terms of the contract must be established by a written document signed by the parties, for in making a contract it should always be possible to reduce it to writing, and this, moreover, is the common practice of civilized mankind.

But in the case of a tort or a criminal matter it is obviously almost always impossible to have any document attesting the facts, and the victim of the

wrong himself is clearly the best-informed and often the only person who has a direct knowledge of what occurred, together with all its details. In these cases, therefore, in my opinion, the Commission should not reject, as unproved, an allegation of the plaintiff merely because its truth depends on his statement alone, even although it considers that it might have been possible for him to have obtained some sort of corroboration. In arriving at its decision, it should take into consideration all the circumstances of the affair, the inherent probability or otherwise of the alleged facts and the likelihood of, and opportunity for, fraud or exaggeration.

If, after giving due weight to all these considerations, it feels a reasonable doubt as to the truth of any alleged fact, that fact cannot be said to be proved. But if the Commissioners, acting as reasonable men of the world and bearing in mind the facts of human nature, do feel convinced that a particular event occurred or state of affairs existed, they should accept such things as established, regardless of the method of proof presented.

In this matter I am in agreement with the principles laid down by the General Commission of the United States and Mexico in the unanimous decision in the Parker case, *Report*, Vol. 1, pages 37, 39 and 40, and more particularly set out in the opinion of Mr. Commissioner Nielsen when concurring in the decision of the Dillon case, *Report*, Vol. 2, page 65, as follows:

"An arbitral tribunal cannot, in my opinion, refuse to consider sworn statements of a claimant, even when contentions are supported solely by his own testimony. It must give such testimony its proper value for or against such contentions. Unimpeached testimony of a person who may be the best-informed person regarding transactions and occurrences under consideration cannot properly be disregarded because such a person is interested in a case. No principle of domestic or international law would sanction such an arbitrary disregard of evidence. It seems to me that, whatever may be said with regard to the desirability or necessity of having testimony to corroborate the testimony of a claimant, a statement need not be regarded in the legal sense as unsupported even though it is unaccompanied by other statements."

A

Claims of Messrs. Baker, Webb and Woodfin

4. Apart from these general considerations, I concur with the President for the reasons set out in paragraph 5 of his opinion, that there is ample corroboration to satisfy the Commission that the rooms of Messrs. Baker, Webb and Woodfin were looted by Felicistas.

Claim of Mr. Poxon

5. The case of Mr. Poxon is rather different. The Commission was informed that he also presented a claim in 1913 and made an affidavit at that time. But these documents were not put in, and it was admitted by the British Agent that they differed in certain particulars from those in the present claim. These facts cannot but cast some doubt on Mr. Poxon's statements; and for this reason, as well as for those set out in paragraph 5 of the President's opinion, I concur—though with some hesitation—in the view held by both my colleagues, that this claim is not sufficiently established.

6. The next point to be examined is under which, if any, provision of the Convention are the Felicista forces to be regarded as falling in order to render the Mexican Government liable for robberies committed by them. I am inclined

to think that they should be included in Article 3, subsection 2, as General Díaz undoubtedly revolted against the established Government of President Madero, and the result of his action was the fall of the Government and the death of Madero; though it is true that this result was not due solely or even chiefly to his efforts, but to the fact that General Huerta, commanding the Maderista forces, turned traitor, caused the death of Madero and eventually set up a *de facto* Government of which he was virtually the head. Now this probably was not at all what Felix Díaz intended. But he accepted the situation, as is shown by the fact that he did not continue hostilities and that General Huerta took no steps to punish him or his adherents. In these circumstances, although it cannot be said that his forces, after the triumph of their cause, established a *de jure* or *de facto* Government, it seems to me that, in interpreting the Convention, the Felicistas should be included in Article 3, subsection 2; in which case there would be no question as to the responsibility of the Mexican Government.

7. But if I am mistaken in this view and my Mexican colleague considers that its adoption would constitute an historical error, there is no doubt that the Felicistas must be included in Article 3, subsection 5; and I agree with the President, for the reasons set out in paragraph 6 of his opinion, that the robberies were brought to the attention of the authorities acting under the Government set up by General Huerta; that no steps were taken to discover or punish the authors; and that, therefore, the Mexican Government is responsible for the losses.

8. It only remains to consider what sum should be allotted to Messrs. Baker, Woodfin and Webb, and here I regret to find myself in disagreement with my colleagues as to the basis upon which these damages should be assessed. It is true that, as stated by the President in his opinion in paragraph 7, the Commission is not bound to accept the figures calculated by the claimants. Values are matters of opinion and can, moreover, be checked by other evidence or even by the personal experience of the Commissioners. But the identity of the article said to have been lost is a matter within the personal knowledge of the claimant and probably of the claimant alone. The President, in his opinion in paragraph 7, rightly points out that in this case it was impossible for the claimants to obtain corroboration with regard to the objects lost. It seems to me, therefore, that the principles I have laid down above in paragraph 3 should here be applied.

Adopting them as my basis, I am of opinion that it has been sufficiently established that these three gentlemen lost the articles specified in their respective lists. These lists were made out by the claimants immediately after they discovered their loss. There is nothing in the case or in their affidavits casting doubt on their *bona fides* or accuracy and, in the case of Mr. Woodfin, he withdrew an item from his list as soon as he recovered it.

I agree that in scrutinizing the accounts of the claimants we should take into consideration the probable value of the portable property of a young unmarried man of the class likely to reside at a Y.M.C.A. hostel. But all such young men do not have identical wardrobes, and I confess that the method adopted by my colleagues of awarding to each claimant the amount asked for by the one who appears to have suffered the least loss strikes me as more arbitrary than the one I should propose to follow, namely, to examine each list, to ignore any items which seem obviously unreasonable or exaggerated, and to value the remainder as far as may be possible at the prices at the time of the loss; bearing in mind that the actual and not the replacement value of the articles should alone be awarded.

Following this method I agree with my colleagues in awarding $275.00 Mexican gold to Mr. Webb. To Mr. Woodfin, whose objects and values appear to be very reasonable, I should award $600.00, and to Mr. Baker, some of whose items seem exaggerated and whose values are also rather high, the same sum of $600.00.

Claim of Mr. Daniel J. Tynan

9. I agree that this claim should be disallowed for the reasons set out in the President's opinion.

Claim of Mr. James Kelly

10. In this case I find myself obliged to dissent from the opinion of the majority of the Commission, for it appears to me that the facts upon which this claim is based are quite adequately established.

The difference of opinion is, no doubt, primarily based on the conflicting views as to the value in general of a claimant's own affidavit which are set out in paragraph 3 above and in paragraph 5 of the President's opinion. But in this particular case there is much more than the bare allegation of the claimant. In the first place, he at once reported the facts to the Police Office of the Second Ward of the City of Mexico, and it was with the express consent of the said Police Office that he sold the flesh of the cows. The documents relating to these proceedings have not been produced, but it has not been denied that they took place. In the second place, the chief points of Mr. Kelly's affidavit are directly confirmed by the affidavit of an independent witness, Mr. Ruben Carrillo.

11. The majority of the Commission reject Mr. Carrillo's affidavit on three grounds:

(a) That it was made fifteen years after the events;

(b) That the declaration was made without interrogation by the other party; and

(c) That he does not explain how certain statements that he makes came to his knowledge.

As to *(a)*, this objection is inherent in the work of the Commission. When the claims were originally made, it was not known how they would be dealt with. If any tribunal competent to deal with them had been set up at the time, no doubt witnesses would have been forthcoming with memory of the events sufficiently fresh in their minds. But the Convention under which the Commission is working was not signed until November 1926, and it was not till then that the British Government realized that evidence in corroboration of the claimants' original claims should be obtained. It is clear, therefore that the evidence, whether oral or in the form of an affidavit, which will now be presented to the Commission, must depend on the witnesses' recollection of events long past, and, consequently, it seems to me that the Commission should not attach too much importance to the discrepancies in detail which must inevitably exist.

With regard to *(b)*, the Commission, in its unanimous decision on the demurrer in the Cameron case, admitted affidavit evidence, and must, therefore, have held that this defect, which is inherent in such evidence, cannot be considered as destructive of the evidential value of an affidavit, at any rate in the case of a person other than the claimant.

As regards *(c)*, it is a fact that Mr. Carrillo includes in paragraphs 1 to 5 of his affidavit statements, as if they were within his personal knowledge, of which he can only have been aware by hearsay. But this is a very natural error in the case of an ignorant person. If the affidavit had been drawn up for him by a

lawyer he would have distinguished between the facts of which he had been informed and believed to be true and those which he stated to be the case of his own personal knowledge.

In any case, the facts related in paragraphs 6 and 7 of this affidavit were undoubtedly within the knowledge of Mr. Carrillo, and the events were of so exceptional a character that he might well recollect them after fifteen years' interval.

12. The majority of the Commission also comment on the fact that no effort was made to produce the police report referred to in Mr. Kelly's affidavit. It would certainly have been better if the British Agent had given notice to the Mexican Agent to produce this document, or to allow him to inspect it, under rules 24 and 25 of the Rules of Procedure. But in my opinion the Commission should not allow this omission to prejudice Mr. Kelly when they are examining the truth of his claim. We are unaware whether this document is or is not now in existence. If it is not, the evidence which the majority of the Commission consider to be the best is not available, and the claimant is entitled to rely on the next best. If, on the other hand, the document still exists, it is in the possession of the Mexican Government, and I would refer to the unanimous opinion of the General Claims Commission of the United States and Mexico in the Parker case, *Report*, Vol. 1, pages 39 and 40, as follows:

"While ordinarily it is incumbent upon the party who alleges a fact to introduce evidence to establish it, yet before this Commission this rule does not relieve the respondent from its obligation to lay before the Commission all evidence within its possession to establish the truth, whatever it may be. For the future guidance of the Agents of both Governments, it is proper to here point out that the parties before this Commission are sovereign Nations, who are in honour bound to make full disclosures of the facts in each case so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all the facts that can reasonably be ascertained by him concerning each case, no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision."

I would not go so far as to say that it was the duty of the Mexican Government to produce this document when they had never been asked to do so by the other side, but I consider from the fact that they have not done so of their own initiative the Commission is entitled to draw the inference that it does not contradict, to any material extent, the allegations contained in Mr. Kelly's affidavit.

13. For the above reasons I am of opinion that the facts upon which this claim is based are sufficiently established. But the defence upon which the Mexican Agent chiefly relied was the argument relating to acts of lawful warfare referred to in paragraph 13 of the President's opinion. As the majority of the Commission rejected the claim on the facts, this point did not come up for discussion in our deliberations. I think, therefore, that all I should say is that I agree with the contention of the British Agent set out in paragraph 14 of the President's opinion, and consider that under the Convention the Mexican Government is responsible for this loss; and furthermore, that the damages claimed are not excessive.

Dissenting opinion of the Mexican Commissioner in regard to the decision taken by a majority composed of the other two Commissioners, but only as regards question nine, propounded by the learned presiding Commissioner, which reads literally as follows: "IX. If they were to be considered as falling under subdivision (5) of Article III, i.e., as rebels, has it been established that the competent authorities were blamable in any way?"

The Mexican Commissioner answers the question thus transcribed, in the negative, for the following reasons:

I. Article III, subdivision 5 of the Convention, Mexico and Great Britain, reads as follows:

". . . . The losses or damages mentioned in this article must have been caused during the period included between the 20th November and the 31st May, 1920, inclusive, by any one or any of the following forces: . . . . 5. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of this article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way."

The three Commissioners being agreed upon the fact that the forces of Felix Díaz, which entrenched themselves in the Young Men's Christian Association building during the so-called tragic ten days, from the 9th to the 19th February, 1913, must be considered as rebel or insurrectionary forces, and as coming under subdivision 5 of Article III of the Convention, the text of which is above transcribed, it logically follows without the slightest effort, and from the terms themselves of said subdivision 5, that Mexico may only be declared liable for the losses sustained by Messrs. Baker, Webb and Woodfin, provided that it be proved that the competent authorities omitted to take reasonable measures to suppress the insurrection, or to punish the parties responsible therefore; or that it be shown, furthermore, that the authorities were to blame in some other manner.

Now, what should that proof consist of in this instance? The three Commissioners have with some difficulty, by a strong effort of goodwill, and by combining the depositions of the three claimants, reached the conclusion that the fact that the rooms respectively occupied by them in the Young Men's Christian Association were looted, can be considered as proved, although there is not a single declaration by any person other than the interested parties themselves, nor any other element of proof establishing the existence of that fact.

The fact of the looting of the rooms occupied by the claimants once established, *the obligation on the part of the British Government to demonstrate the fact of negligence on the part of the Mexican authorities in suppressing the insurrection or in punishing the guilty parties still stands.*

What proofs have the British Government submitted to establish the fact of such negligence? None whatever.

Did the claimants by any chance report the perpetration of the offence of theft, complained of by them, to the Mexican authorities? They did not do so, as admitted by the learned British Agent, when questioned upon this particular point by the Mexican Commissioner.

Have the British Government by any chance shown that the perpetration of the offence complained of by them came to the knowledge of the Mexican authorities in any other way? There is no evidence at all upon this point.

How can the Government of Mexico be accused of negligence in punishing the parties guilty of a theft, when the fact that the offence was committed has not been brought to their knowledge?

The Mexican authorities did have knowledge of the Díaz insurrection, and President Madero, and the Vice-President of the Republic in person combated that uprising, until they fell at the hands of the disloyal Huerta. What greater efficiency in suppressing that insurrection can be expected, than actually to lose life in defence of the institutions of Government?

Immediately after Huerta's defection, the Governor of the State of Coahuila, Venustiano Carranza, complying with the duty laid upon him by the Constitution, assumed the character of legal authority, by organizing a formidable army, effectively assisted by a public opinion, and he not only punished the insurrection, but Felix Díaz, the rebel, personally, having forced him to leave the country, and Huerta himself, by wresting from him the power he had usurped, and likewise forcing him to seek refuge in a foreign land. The remainder of the rebels either perished, or followed the fortunes of their leaders.

What more eloquent instance of the zeal and patriotism displayed by the Mexican authorities in suppressing the insurrection can be desired?

It is, however, asserted that Huerta should have punished the Díaz insurrection, and the parties guilty of the losses complained of by the claimants. (The Mexican Commissioner does not accept Huerta's authority as legitimate.)

That opinion is open to the objection that it involves a mistake in the construction of subdivision 5 of Article III of the Convention. The treaty does not provide that such and such authorities shall perform the duty imposed by the second part of said subdivision 5. It only mentions authorities in general, and this condition has been complied with. The authority of Carranza put an end to the insurrection and punished the parties responsible therefor. Mexico cannot then be liable for negligence in the performance of those duties.

It is necessary to draw a distinction between the insurrection of Felix Díaz and the looting of the Young Men's Christian Association, whether by the Felicista forces, or by the mob, as it certainly has not been shown just who was guilty of the said looting; but the fact of the looting cannot directly be inferred from that of the insurrection. The authorities punished the insurrection and not the looting, because the claimants did not report the latter fact, nor did it come to the knowledge of the Mexican authorities through any other channel.

Furthermore, this Commission has already, in various decisions, laid down the principle that the unsupported statement of the claimants cannot constitute proof of a claim. This has been expressly established by the learned President of this Court, and the Mexican Commissioner is in entire accord with his opinion. In this case, it has been said, and it is an absolutely true fact, that there is no evidence of negligence on the part of the Mexican Government, other than the claimants' own statement. The Commission will, if a decision is now rendered contrary to that principle, appear as acting inconsistently with their own ideas.

II. International Claims Commissions have always been very careful when it is a matter of declaring that a Government has been negligent in the performance of its international obligations, and have never done so without requiring proof conclusive of that fact. The charge is too serious a one to be founded on mere assumptions.

The General Claims Commission, Mexico and United States, dealt with the case of Charles E. Tolerton *v.* Mexico, in which the claimant sought to recover the sum of $50,000.00, United States currency, on the ground that he had, when attacked, on the afternoon of the 19th January, 1905, by a group of Yaqui Indians, sustained damage to that amount, by reason of the failure to protect said claimant, and the lack of prosecution and punishment of his assailants.

The three Commissioners, i.e., the United States Commissioner, the Mexican Commissioner, and the Presiding Commissioner, Dr. Van Vollenhoven, unanimously decided that the said claim should be dismissed, because they did not hold that the charge of negligence brought against the Government of Mexico had been sufficiently proven by means of the unsupported statement of Tolerton, the claimant. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States and Mexico,* page 402, Vol. I.)

The American Government, on behalf of G. L. Solis, before the General Claims Commission, Mexico and the United States, claimed from the Government of Mexico the sum of $ 530.00, United States currency, for the theft of some cattle by revolutionary forces belonging to Huerta, having imputed to the Mexican Government lack of diligence in the pursuit and punishment of the parties responsible. The aforesaid Commission, presided over by their learned President, Kristian Sindballe, declared Mexico not liable for the said claim, by a unanimous vote, having founded their opinion on the fact that there was not, beyond the claimant's own deposition, proof sufficient of negligence on the part of the Mexican authorities. This decision is based on the opinions handed down in other International Commissions, also worthy of respect, such as those between Great Britain and the United States, and Great Britain and Venezuela. (*Opinions of the Commissioners under the Convention concluded the 8th September, 1923, between the United States of America and Mexico*, p. 48, Vol. II.)

The selfsame General Claims Commission, Mexico and the United States, reports (Vol. II, p. 56) the claim of Bond Coleman *v.* the Government of Mexico, which was espoused by the American Government, and in which the three Commissioners unanimously dismissed the claim on the ground that proper proof had not been shown of negligence on the part of the Government of Mexico.

As will thus be seen, all International Claims Commissions agree that negligence in punishing crime must be proved by the demandant Government, the alternative, in case of failure to do so, being that the claim must be dismissed.

In virtue of the whole of the foregoing, the Mexican Commissioner now expresses an opinion dissenting from that of his learned colleagues, to the effect that as no negligence on the part of the Mexican Government in punishing the parties responsible for the loss sustained by the claimants has been shown, and still less in suppressing the insurrection which gave rise to the said losses, the said claims should be dismissed.

NORMAN TUCKER TRACY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 13, February 15, 1930, separate opinion by British Commissioner, undated. Pages 118-124.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavits of claimant *held* not sufficient evidence. An affidavit of claimant supported by an affidavit of another person in a position to know the facts of loss, which was made shortly after loss, *held* sufficient evidence.

RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. A seizure of a mine by the Constitutionalist Government held not to entrain responsibility under terms of *compromis*.

1. The facts on which the British Government in their memorial base the claim are the following:

Mr. Tucker Tracy was employed as manager of the Compañía Minera Jesús María y Anexas S.A. Mines and Hacienda at San José de Gracia, Sin., Mexico. On the 16th May, 1913, a .303 Winchester carbine with 100 cartridges and on the 30th May a .3 Luger automatic pistol with 100 cartridges were delivered personally to Melquides Melendez under threat of search and confiscation. It was impossible to obtain a receipt for them.

In May 1913 the Constitutionalist forces occupied the mine after the Federal forces which had been garrisoning the town had been dislodged, and disposed of a quantity of precipitate of cyanide, valued at $ 35,000. They were obliged by Federal troops to evacuate the place after a few days.

On the 3rd June, 1913, when the Federal garrison announced its intention of withdrawing from the town for the second time, Mr. Tracy considered it prudent to remove himself and his family to a place of greater safety. When he returned in January 1914 he discovered that a saddle mule, three horses and equipment, part of the household effects and almost all the clothing had been lost.

At the end of November 1913 the mine was seized with the aid of military forces by persons commissioned by the Constitutionalist Government of the State of Sinaloa and in February 1914 the administration was taken over by the Constitutional Federal Government. There was no reason in accordance with the civil laws operating at the time that might be offered as a pretext for the seizure of the Company's properties. There was no previous warning nor civil legal proceedings prior to the seizure. The property was returned to the Company on the 1st September, 1916. Mr. Tracy was refused permission to continue his employment as manager of the mine during the time the Government authorities had control. He consequently lost the salary which he would have earned during this period (annex 4). Information of the salary which Mr. Tracy would have earned is given in the affidavit signed by Miguel Tarriba, then president of the Company (annex 2).

The amount of the claim is 510 Mexican pesos for the objects and animals which he lost, plus 14,403.68 dollars, United States currency, for the loss of salary, and interest.

2. The evidence consists in three affidavits made by Mr. Tracy, the *first* on the 26th March, 1914, before the British Vice-Consul at El Paso (Texas), the *second* on the 20th September, 1916, before the British Vice-Consul at Mazatlán (Sinaloa), the *third* on the 30th September, 1927, before a notary public at Socorito (Sinaloa), and in an affidavit made by Señor Miguel Tarriba before the British Consul at El Paso (Texas) on the 15th December, 1914. Señor Tarriba was at that time the president of the Mining Company, which employed Mr. Tracy, and he supports the latter's claim for loss of salary.

3. The Mexican Agent pointed out that, as regards the claim of 510.00 pesos for the loss of property, there exists no other evidence than the affidavit of Mr. Tracy himself. The Agent has more than once argued that such uncorroborated statements cannot be accepted as proof.

In connexion with Señor Tarriba's affidavit he drew the attention of the Commission to the fact that the document had been sworn by a Mexican citizen before a British authority residing in the United States. He doubted whether this authority was in a posit on to know Señor Tarriba or to have information about his profession. In his opinion, the affidavit, drawn up without cross-examination, carried very little weight, if any.

He failed to see any evidence as to the nature of the confiscation of the mine. Nothing showed that this act was a military act, or a revolutionary act or an act committed by one of the forces falling within the terms of Article 3 of the Convention. But even if it had been satisfactorily proved that the mine was confiscated under the circumstances provided in that article, still the claim could not be allowed, because what Mr. Tracy asked was not the compensation of any direct loss or damage, but the indemnifying for the loss of prospective earnings. The Agent distinguished between *damnum emergens*, which in his opinion the Convention had solely in view, and *lucrum cessans*, which was outside the agreement between the two Governments. Mr. Tracy claimed for indirect damage, for speculative damage, for salary, which he had lost, which he might have earned, but just as well not have earned, because the duration of his employment was not guaranteed.

The Agent declined also any obligation on the part of his Government to pay interest on the sums awarded. The Convention does not speak of it and as Mexico only *ex gratia* undertook to compensate in certain cases the losses and damages suffered on account of civil war and revolutions, this country could never be deemed to be in delay, which would be the only ground on which the granting of interest could be based. Moreover, if the Commission were to decide that interest must be paid up to the date of payment of the award, it was obvious that such decision would exceed the life, and consequently the competence of this body.

4. The British Agent considered the statement of the losses suffered by Mr. Tracy, before he had to leave the mine, as a *prima facie* evidence, to which more value was to be attached than his colleague was inclined to do.

The affidavit of Mr. Tarriba was in his view a very important corroboration not only of the facts, which claimant alleges in the annexes 2 and 5 of the Memorial, but also of what he puts forward as to the character of the confiscation and of the forces who effected it.

The loss suffered by Mr. Tracy, because he lost his employment, was not prospective or speculative, but most real and direct, being the immediate consequence of the confiscation of the enterprise, where he earned his livelihood. Mr. Tracy's work was interrupted by revolutionary acts. His damage was similar to that of the Mining Company, both were involved in the same injury. He was General Manager, a man in control of the enterprise, and his prospects and future employment were so safely assured that his relation to the business had a permanent character. This was confirmed by the fact that he was restored in his function, when the mine was handed back.

The Agent could not see that the Convention excluded the awarding of interest, and the words *ex gratia* in Article 2 of the Convention could not be detached from the rest of this article, in which the principles of justice and equity are invoked, which principles in his opinion would not be complied with, if on the ascertained amount of the award no interest was accorded from the day of the presentation of the claim until the day of the final payment.

5. The views of the majority of the Commission in regard to uncorroborated affidavits of claimants are known from the decision in the claims of Messrs. Baker, Webb and Woodfin (Decision No. 12, section 5). Those views do not allow them to accept as sufficient evidence the statement of Mr. Tracy on his loss of property.

The affidavit of Señor Tarriba is accepted by the majority of the Commissioners, the Mexican Agent dissenting, as a corroboration of the statement of Mr. Tracy made on the 26th March, 1914. Señor Tarriba, as President of the Compañía Minera Jesús María y Anexas, was in a position to know exactly

what happened. He must have been in the closest touch with the events prior to the confiscation and with the confiscation itself. He swore his affidavit shortly afterwards, and there is no reason why his declaration should not be accepted as a sufficient proof of the seizure of the enterprise by public authorities.

This seizure in itself, however, does not make the Mexican Government liable according to the Convention. Property can be confiscated at all times, in all kinds of circumstances and on different grounds. To establish an obligation on the part of Mexico, it is necessary that it be proved that the act was committed by one of the forces enumerated in Article 3 of the Convention; in other words, the seizure must not have been an administrative act or an act ordered by purely civil authorities, but must have emanated from the elements which the article has in view, or, even if ordered by civil authorities, have been due to revolutionary events and disturbed conditions and committed by the forces already enumerated (last words of Article 3).

In examining whether in this case they had to deal with such circumstances, the Commissioners could not fail to remark a contradiction between the different statements.

On the 26th March, 1914, Mr. Tracy declared that the property had been confiscated by the Constitutionalist Government. On the 25th December of the same year Señor Tarriba said that the mine was seized by persons commissioned by the Governor of the State of Sinaloa and had been exploited since that date by order of and under officials appointed by that Governor, and afterwards by order of and under officials appointed by the Constitutionalist Government. On the 20th September, 1916, Mr. Tracy signed a statement, in which he declares that the mine was confiscated by the Government of Mexico.

In none of these documents the slightest indication is to be found that the confiscation was a military act or an act of violence or an act committed by forces. Only in his affidavit of the 30th September, 1927, drawn up after the terms of the Convention were known, Mr. Tracy amplifies his statements of 13 years ago and relates that the seizure and the administration of the Company's property were carried out with the aid and in the presence of military forces. He further mentions that a letter, sent by the Minister of Foreign Affairs of the Constitutionalist Government to the British Vice-Consul at El Paso (Texas), dated the 24th April, 1914, proved conclusively that the seizure and the administration of the properties of the Company was in accordance with the direct orders of the Chief of the Constitutionalist Arms.

Could this last document have been produced, it would probably have been of great assistance to the Commission, but it was not available, the archives of the Consulate of that period not having been preserved.

In these circumstances, the Commission must attach more value to the contemporary affidavits than to a document drawn up considerably later. In the former no mention is made of any forces, there is thrown no light on the nature of the confiscation, and there is nothing which prevents the Commission from regarding the measure as a civil act. Of the contrary, i.e., of the applicability of Article 3 of the Convention, which would be essential for the granting of an award, no convincing proof has been given.

6. The claim of the British Government on behalf of Mr. Norman Tucker Tracy is disallowed.

Separate opinion of Sir John Percival, British Commissioner

1. While I am prepared to concur in the opinion of my colleagues that this claim should be disallowed, I cannot entirely subscribe to the reasons set out in the opinion of the President.

2. With regard to the claim for $510.00 for objects belonging to the claimant which are said to have been stolen, appropriated or taken from him, I do not agree with my colleagues that the fact that this claim is based on the affidavit of the claimant alone is a sufficient ground for rejecting it, and this for the reasons set out in my opinion in the case of Messrs. Baker, Webb and Woodfin (Mexico City Bombardment Claims), paragraph 3. I do, however, consider that it has not been adequately established that the Mexican Government is responsible under the Convention for these losses for the following reasons:

(a) As regards the carbine and pistol said to have been taken by Melendez: this person must be presumed to be a bandit referred to in Article 3, subsection 5, of the Convention, and there is no proof of negligence on the part of the Mexican authorities in respect of this robbery; moreover, it is admitted that Melendez was afterwards executed, presumably for one of his misdeeds among which this may be included.

(b) As regards the mule, bridles and household effects, there is no evidence as to who were the persons who stole these articles nor in what circumstances they were taken, and consequently no proof that the Mexican Government is responsible for the loss.

(c) As to the three horses, it is stated in Mr. Tracy's affidavit that they were taken by Federal guerrillas, in which case the Mexican Government would be liable for the loss, but Mr. Tracy admits that he did not possess sufficient evidence to prove that they were his property.

For these reasons I do not consider that he has established this part of his claim to the satisfaction of the Commission.

3. Coming to the question of the claim for loss of salary, I agree with the President that it has been sufficiently proved that the mine was confiscated by certain Mexican authorities, which was the cause that Mr. Tracy lost his employment, and, furthermore, I also agree that there is not adequate proof to make the Mexican Government responsible for the losses caused by this confiscation under the last paragraph of Article 3 of the Convention.

But I arrive at this conclusion in view of the special circumstances of the evidence offered in this case and consider that it would be dangerous to treat the decision as a precedent for other cases. When property has been confiscated by civil authorities, the Mexican Government is only responsible for loss or damage caused by such action if two conditions exist:

1. That the acts were due to revolutionary events and disturbances, and
2. That the acts were committed—or, as it should better be translated, executed—by one of the forces specified in Article 3, subdivisions 1, 2 or 3 of the Convention.

Now the first of these conditions was undoubtedly, in my opinion, fulfilled in this case, and when this is so I do not consider that it is necessary for the British Government to establish that physical force was exercised by the agents referred to in the Article. It should be sufficient that the order emanated from a military chief or that the civil authorities were supported by a military force sufficient to overcome any justified resistance. In this case, for the reasons set out in the President's opinion, and more particularly as Mr. Tracy, who

alone alleges the presence of military forces at the time of the confiscation, was not himself on the spot at the time, I concur in the view of my colleagues that the existence of the second condition referred to above has not been established, and that, therefore, the claim must be disallowed.

FREDERICK W. STACPOOLE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES.

(Decision No. 14. February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner, January 29, 1930. Pages 124-130.)

AFFIDAVITS AS EVIDENCE.—DAMAGES, PROOF OF. An affidavit of claimant, made shortly after the loss, suported by an affidavit of a companion, made seven years after the loss, *held* sufficient evidence of circumstances of loss. Such affidavits *held* sufficient evidence of items of property lost, even though supporting affidavit was not fully corroborative, when such items could reasonably in the circumstances have been possessed by claimant. Affidavit of claimant as to value of item lost *held* not sufficient evidence and excessive. Tribunal instead estimates damages to be awarded.

1. The Memorial, filed by the British Agent, sets out that on the 4th May, 1920, Mr. Stacpoole left the Hacienda de Guadalupe, near Sultepec, with Mr. R. J. H. Danley for Mexico City owing to the danger to person and property from the numerous soldiers in that neighbourhood. About 2.30 on the same day they were stopped near Sultepec by a number of Obregonistas. They were threatened and insulted by these men and ordered to proceed with them to headquarters. On the way there, Mr. Stacpoole's pack mule, together with all their baggage, was taken away. At the headquarters an officer demanded that they should hand over their animals, saddles and their belongings. They requested permission to retain them for riding to Sultepec, where they promised to arrange matters with the Obregonistas. This request was refused and they returned to Sultepec on foot. Every effort was made to obtain the return of this property, but the next day, the 5th May, Mr. Stacpoole recovered his mule and raincoat only. On the following days he made attempts to recover his property in Toluca, but without success. At the time of the robbery Mr. Stacpoole produced a safe-conduct signed by General Pablo Gonzalez, and a card from the Ministry of War authorizing him to carry arms. These documents were not respected.

The amount of the claim is for $475.50 (four hundred and seventy-five pesos, fifty centavos).

2. The British Agent produced an affidavit of Mr. Stacpoole before the acting British Consul-General in Mexico City, dated the 5th June, 1920, and an affidavit of the afore-mentioned Mr. Danley before the acting British Vice-Consul in Mexico City, dated the 14th July, 1927. Mr. Danley was at the time of the hold-up and at the time he signed his affidavit Vice-President and General Manager of the Sultepec Electric Light and Power Company, and lived at Toluca. He confirms the facts set out in the affidavit of Mr. Stacpoole.

3. The Mexican Agent contended that as Mr. Danley, being an American citizen, had sworn his affidavit before a British Vice-Consul in Mexico, and could accordingly not be prosecuted either in Mexico or in the United States

or in England, in case of his having made a false statement, his assertions could not be relied upon. He denied that Mr. Stacpoole or Mr. Danley could know that the men who stopped them were Obregonistas, in consequence of which it had not been proved that the facts fell within Article 3 of the Convention. Neither could the Agent see in Mr. Danley's statement any evidence as to the amount, of the loss for which Mr. Stacpoole claims.

4. The British Agent argued that the two affidavits corroborate each other and constitute at least a *prima facie* case, against which his colleague had failed to produce any rebuttal. He thought the statements worthy of acceptance, and the amount, which Mr. Stacpoole claims, fair and reasonable.

5. The Commission by a majority judges Mr. Danley's affidavit a sufficient support of the statements of claimant. Mr. Danley travelled with Mr. Stacpoole, when the events set out in the Memorial occurred. He is himself not interested in the decision on the claim, and it is difficult to see why he should have committed perjury. There is no conflict whatever between both statements, and the time elapsed since the events is not too long to assume that an eye witness could still remember them in 1927. It is equally comprehensible that men like Mr. Stacpoole and Mr. Danley, who lived in the part of the country where they met the troops, and who had left their homes in order to bring themselves into safety, were sufficiently informed about the state of affairs to be able to know to which of the contending forces the assailants belonged.

The majority of the Commission is the more inclined to admit the evidence that has been shown, because, as the Mexican Agent informed the Commission, it has not been possible to trace the declaration of Mr. Stacpoole, according to his statement, made on the 4th May, 1920, before the Municipal President of Sultepec, which declaration, if it could have been obtained, would possibly have been evidence of a stronger quality.

In these circumstances the majority of the Commission is convinced that on the 4th May, 1920, the claimant was met by Obregonistas and that they took part of his property. As the Obregonistas at the time of the occurrences were to be considered as "revolutionary forces, which, after the triumph of their cause, have established Governments *de jure* or *de facto*" (subdivision 2 of Article 3 of the Convention), the members of the Commission, whose view is here expressed, deem that the obligation of the Mexican Government to compensate the loss exists.

6. The last question to be answered touches the objects which were taken and the value that must be ascribed to them. There is no absolutely convincing evidence in this respect, as there will hardly ever be in similar circumstances. It cannot be expected that Mr. Stacpoole was able to establish the pre-existence of what he claims as lost, neither could his companion possess knowledge in this matter. Mr. Danley does not mention more than a revolver, a raincoat (which was afterwards recovered), cash and other articles.

As the majority of the Commission explained in the decision on the claims of *Messrs. Baker, Webb and Woodfin* (Decision No. 12), it does not admit that, once the facts having been admitted as proved, the mere absence of detailed evidence as to the exact amount of the loss, justifies to disallow the whole claim. In this particular case, the Commission cannot estimate the enumeration, given by Mr. Stacpoole of the articles which he had to surrender, as exaggerated. The objects which he mentioned are certainly not more than a man who tries to save himself and his property, is likely to carry with him. But the Commission holds another view as regards the value, which the claimant attributes to each of his belongings. This estimate is considered as being, for nearly all the

items, on too high a level, and the Commission does not feel at liberty to adopt it.

7. The Commission decides that the Government of the United Mexican States is obligated to pay to the British Government on behalf of Mr. Frederick W. Stacpoole the sum of 300.00 (three hundred) pesos Mexican gold.

Dissenting opinion of the Mexican Commissioner in the Decision rendered in this Claim only as regards the Probative Value of the Depositions of Claimant and those of the Witness, Robert J. Danley

I. Claimant avers in his affidavit that he left the "Guadalupe" ranch, near Sultepec, State of Mexico, for the City of Mexico, on the 4th May, 1920, accompanied by R. J. H. Danley, on account of the danger then existing for life and property on the part of the numerous soldiers marauding in that vicinity; that they were stopped at 2.30 p.m. by some Obregonist soldiers under the leadership of General Crisóforo Ocampo; that they were threatened and insulted by these men and ordered to go with them to headquarters; that on their way, some of the men took away Mr. Stacpoole's pack mule and his luggage; that, on reaching headquarters they were ordered by an officer to hand over their horses, saddles and all their belongings, which they did, notwithstanding the request made by Mr. Stacpoole himself to be allowed to keep his belongings in the hope of arranging the matter in Sultepec with the Obregonistas; that on the following day he recovered the mule and his water-proof, but not the other things, the list of which appears in the affidavit, with their respective values.

Mr. Stacpoole also mentions Mr. Hughes as a witness in connexion with his efforts to recover the articles taken away from him, stating that on the 4th May he made a deposition before the Mayor, Mr. Nicolás Loza, and several Government employees and officers, identifying the men who had robbed him.

Mr. Robert J. H. Danley, an American citizen, declared before the British Consul at Mexico City *on the 14th July*, 1927, under oath, that he left the "Guadalupe" ranch, for Mexico, on the 4th May, 1920, accompanied by Mr. Frederick W. Stacpoole and a servant; that, on their way they met Obregonista troops, who, pointing their rifles at them, ordered them to halt; that said troops informed them that they were under General Crisóforo Ocampo; that they were deprived of their cash and other belongings and then arrested by these soldiers and taken to headquarters; that on their way to headquarters they took from them a mule led by a servant and carrying Mr. Stacpoole's luggage; that, once at headquarters, the officers and other men took their saddles from them; that he cannot testify just what the losses sustained by Mr. Stacpoole were, but he did know that he lost his revolver, his water-proof, the cash he had with him and other articles.

The Mexican Commissioner considers that the evidence produced by the British Government to establish the claim is very deficient and does not warrant a judgment against the Mexican Government for the amount claimed.

The statement of the claimant, Mr. Stacpoole, can never be considered, by itself, as sufficient proof of his own claim. Claimant's deposition, called an *affidavit* in Anglo-Saxon technical terms, is the equivalent of what is known as "confession" in the legislation of all countries of Latin origin. Confession, as an element of proof, is always applied against, and never in favour of the person making it. The opposing party generally makes use of that proof to be able to demonstrate, thereby, the fact he wants to submit, in an irrefutable manner, to the consideration of the judge for, evidently, there cannot be stronger proof

against the person making it than his own confession. This proof generally relieves the person making use of it, from producing other proofs on the same fact, and thus they say in Law: an admission by the party himself dispenses with proof.

The difference between confession and testimonial evidence is that the person making it is always one of the contending parties. Testimonial evidence generally emanates from persons who are strangers to the suit. In either case, both the one answering an interrogatory and the one declaring as a witness must do so under affirmation as to speaking the truth. The purpose of such affirmation is to warn the person confessing or the one declaring, as to the commission of the offence known as perjury, in case they do not speak the truth. The deponent is thus constrained to speak nothing but the truth, knowing that he will otherwise be prosecuted. That is why the affirmation of the person testifying is indispensable, whether he is a witness or a party directly interested, and why it is necessary that it should be made before a competent authority so as to produce all the corresponding legal effects. The declaration or confession, thus taken, constitutes a guarantee for the judge as well as for the opposite party, because he knows that a witness testifying against him can be cross-examined in order to make sure as to the truth sought after.

The foregoing principles, governing confession and testimonial evidence, once laid down, we shall now endeavour to examine the affidavits of Mr. Stacpoole and Mr. Danley, in order to arrive at the conclusion contained at the beginning of this study to the effect that the facts asserted in the affidavit have not been established either by the sworn statement of Mr. Stacpoole or by that of Mr. Danley.

The sworn statement made by Mr. Frederick W. Stacpoole before the British Consul in Mexico City has not the necessary guarantee for it to be held valid, for it is the claimant himself, who, in his own interest, makes same, and it would only be valid in whatever could be detrimental to him. His confession should, therefore, be looked upon with distrust, and, in no way, as sufficient in itself to prove the fact dealt with.

Mr. Danley's affidavit, not contemporaneous with the events, is still in worse condition to be considered as sufficient proof than that of Mr. Stacpoole, because he, being an American citizen, made his deposition before a British Consul to whom he probably was not known. Consequently, Mr. Danley's affidavit has not the safeguard, for the judge, in case there should be a false declaration, of its being possible to prosecute him for perjury, because he is neither a British subject nor a Mexican citizen. In other words, this witness could knowingly have made a mis-statement, feeling sure he was not incurring real responsibility. And a witness in such a condition does not deserve to be looked upon as such before any authority. His testimony has not the slightest weight in the balance of justice.

The learned Presiding Commissioner called upon the British Agent to state Mr. Danley's address and asked him whether he could produce him before the Commission. The British Agent replied that he did not know Mr. Danley's address, and that he could not, therefore, produce him, adding that he considered Mr. Danley's affidavit as sufficient, and that only in exceptional cases would the witnesses be able to appear before the Commission. This admission by the British Agent further weakens the probative value of Mr. Danley's affidavit, for, as the proof devolves on the British Agent, he should do his utmost to grant the request of the Presiding Commissioner, and show, in the last event, that production of the witness was not feasible.

The Mexican Assistant Agent showed before the Commission that he had

endeavoured to identify General Crisóforo Ocampo, by writing to the proper authorities, without any result.

It is to be regretted that the British Agent did not produce the witness, Mr. Hughes; that he did not produce the report of the proceedings held before the Mayor of Sultepec, Mr. Nicolás Loza, and the Government employees and officials referred to by Mr. Stacpoole in his affidavit (annex 1). The statement made by the servant accompanying Messrs. Stacpoole and Danley, referred to in annex 2, could also have been produced as evidence. This omission on the part of the British Agent makes it necessary for the Commission to dismiss the claim for lack of proofs, which should have been, but were not produced, without explaining the reason for said omission, for, if it is true that Mexico's responsibility should be determined according to equity and justice, this circumstance does not relieve the British Government from proving the facts on which they base their claim.

To declare a Government liable on the strength only of the depositions of the claimant and of a single witness, open to the objections mentioned above, would constitute a disregard for the general principles of Law followed by all International Claims Commissions which have always required conclusive proof before pronouncing judgment.

II. In order to show that the forces to which is ascribed the wrongful withholding of the objects for which claim is made were Obregonistas, to show also that the objects so wrongfully withheld were those listed by Mr. Stacpoole; and, to establish the value of these objects, there are no proofs other than the claimant's deposition and that of the witness, Mr. Danley. The Mexican Commissioner again invokes the arguments already advanced to maintain that such elements of proof are not sufficient to enter judgment against the Mexican Government, and for this reason regrets that he does not agree with his colleagues as regards the estimation of that evidence and holds that the claim in question should be disallowed.

A. H. FRANCIS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 15, February 15, 1930. Pages 131-132.)

DENIAL OF JUSTICE.—FAILURE TO PROTECT.—FAILURE TO SUPPRESS OR PUNISH. When murderers of British subject were apprehended and executed within two weeks of the commission of the crime and when no evidence was produced that the authorities had failed to take reasonable measures to protect the neighbourhood, claim *disallowed.*

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 773.

1. This is a claim on behalf of the widow of Mr. Thomas Francis, a British subject, who was murdered by a party of Mexicans on the 9th December, 1914, on the road about six miles north-east from the San José mining property in the State of Sonora.

2. There is no serious difference of opinion between the parties as to the facts, which may be summarized as follows: Mr. Thomas Francis, in the latter part of 1914, was working a mining property near the town of Nacozari, in the State of Sonora, on lease from the owner, Mr. Montgomery, and his family were residing at Douglas, in the State of Arizona, U.S.A. On the 9th December

Mr. Francis wishing to visit his wife, who was ill, started to ride across country to Douglas with two companions, it being necessary to go by road as the railway line had been cut during revolutionary hostilities. On the way they were ambushed by a party of Mexicans and all killed. The bodies were found the same day by a servant of Mr. Montgomery, who at once informed the authorities at Nacozari. The Commandant of that town, the local Judge and fifteen soldiers arrived that evening, proceeded next day to the place of the crime, found the bodies, which had been robbed and mutilated, and took them to Nacozari.

3. A judicial investigation was immediately commenced and on the 13th December two Mexicans, José Escalante and Estedin Cruz, were arrested in possession of some of the effects of the murdered men. The accused admitted their crime; were convicted, and, by order of General Benjamin Hill, were shot on the 21st December. There is some doubt as to whether the murderers were employees of the deceased and committed the murder for personal reasons, or whether they were bandits, and their object was robbery. But the Commission is of opinion that this point is immaterial, for, even on the latter assumption, the Mexican Government would only be liable in damages for the murder by virtue of Article 3, Subsection 5, of the Convention if the authorities omitted to take reasonable measures to suppress the acts of brigandage, or to punish those responsible for the same, or were blamable in some other way.

4. Now it is evident that the criminals were punished with exceptional promptitude, seeing that they were executed within a fortnight of the crime, and the only ground, therefore, upon which the British claim can be based is that the authorities omitted to take reasonable measures to suppress the offence or to protect peaceful citizens residing in the neighbourhood.

5. There is no direct evidence whatever of negligence on the part of the authorities, and the British Agent did not even suggest any specific measures that they should have taken. In no country in the world can isolated crimes of this nature be prevented, and even if, in view of the disturbed state of the country, the Mexican authorities had regularly patrolled the road, it cannot be said that this would necessarily have prevented the murder. Moreover, it is admitted in the claimant's affidavit that Mr. Francis had, on previous occasions, made trips between the mining property and the city of Douglas with perfect safety. The authorities, therefore, had no reason to anticipate that there was any special danger on the road which he took on this occasion.

6. The Commission consequently is of opinion that no omission or other fault has been established against the Mexican authorities and that the claim must be rejected.

Decision

The claim of His Britannic Majesty's Government on behalf of Mrs. A. H. Francis is disallowed.

MAZAPIL COPPER COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 16, February 15, 1930. Pages 132-136.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—PROOF OF REPRESENTATIVE CAPACITY.—RECEIPTS FOR REQUISITIONED PROPERTY.—RESPONSIBILITY FOR ACTS OF FORCES.—SEIZURE OF PROPERTY. Power of attorney ratifying proceedings of representatives *held* sufficient evidence of representative capacity. Vouchers or receipts delivered by captain of armed forces seizing property, signature of which was shown to be valid, *held* sufficient evidence of loss.

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 775.

I. The British Agent, on behalf of the Mazapil Copper Company (Limited), claims from the Government of Mexico the sum of $7,002.64 Mexican gold, for losses sustained at the Company's mines, in the vicinity of Concepción del Oro, during the occupation of that place by revolutionary forces in the month of May 1911.

II. The said Company is represented by Messrs. John Blackett, Desiderio S. Galindo and Percy E. O. Carr.

III. The British nationality of the Company has been established by means of annex 6, and consists of a certificate of incorporation issued in London on the 21st April, 1896, under the Companies Acts, 1862 to 1890.

IV. The Mazapil Copper Company (Limited) owned and operated certain mines at Concepción del Oro, Naranjera, San Pedro de Ocampo, Aranzazu, Cata Arroyo and San Eligio. In the month of May 1911 the Concepción del Oro District was occupied by revolutionary forces. Said revolutionaries did, at various mines and camps of the Company, demand and take horses, rifles, saddles, provisions and other articles for the assistance of their cause. First, Captain G. G. Sanchez was in command of the revolutionary forces responsible for these demands. The said G. G. Sanchez gave receipts for all articles taken by his forces; the copies of these receipts are given in annexes 8 and 9, and the originals were produced before the Commission.

V. The Mexican Assistant Agent alleged in defence that the damage had not been proved, and still less that it had been caused by any forces within the meaning of subdivisions 1 to 4 of Article III of the Claims Convention, Mexico and Great Britain, and that, should said damage have been caused by insurrectionists, mutineers or mere brigands, the Government of Mexico had not been guilty of omission or negligence in suppressing the act or in punishing the parties responsible for the same. He further contended that it had not been shown that the damage amounted to the sum claimed.

VI. The Mexican Agent contended that Messrs. John Blackett, Desiderio S. Galindo and P. E. O. Carr had not shown that they were authorized to represent the Company, for which reason the Memorial should be dismissed.

VII. The British Agent filed a reply, stating that proof that Messrs. Blackett, Galindo and Carr were authorized to file claims on behalf of the Mazapil Copper Company (Limited) would later be filed with the Secretaries to the Commission; that the originals of the receipts given by Captain G. G. Sanchez had already been asked for; that the proof that the claimants had sustained the losses and damages for which they claim was contained in annexes 7, 8 and 9

to the Memorial from His Britannic Majesty's Government; that the proof that said losses and damages were caused by rebel forces was likewise contained in the aforesaid annexes; that it was public and notorious that on the date on which said losses took place there was a revolution against the Mexican Government, and that said forces came within the meaning of the first four subdivisions of Article III of the Convention; and, lastly, that the proof that the losses did amount to $7,002.64 Mexican gold was contained in annexes 8 and 9 to the Memorial, as also the original receipts signed by First Captain G. G. Sanchez.

VIII. A certified copy of a deed containing the statements made by Mr. Lewis Daniel Fry as the attorney in fact for the Mazapil Copper Company, ratifying the acts of Messrs. P. E. O. Carr, John Blackett and Desiderio S. Galindo, the first as the former Manager of the Company from the end of 1907 until the end of 1916, the second as Auditor-General of the Coahuila and Zacatecas Railway since 1910, and the third as Superintendent of the said Railway from 1918 to 1920, has been submitted to this Commission; the said Attorney in fact approves the acts executed by Messrs. Carr, Blackett and Galindo in connexion with the claims presented to the Government of Mexico. The said Mr. Lewis Daniel Fry established before Notary Eulegio de Anda the representative capacity in which he appears for the Mazapil Copper Company (Limited).

IX. The vouchers to which claimant refers and which are signed by G. G. Sanchez, First Captain, are the following:

Value of one roll of tricolour ribbon for the army, signed at Concepción del Oro, the 14th May, 1911; another receipt signed by the said Captain G. G. Sanchez for the value of	$ 11.30
Sundry articles; a further receipt signed the 20th May, 1911, for	43.72
Being the value of one pair of boots; a further receipt for . . .	17.50
Being a loan for payment of the troops, signed the 16th May, 1911, by the said Captain G. G. Sanchez; a further receipt, signed at Concepción del Oro, Zac., on the 14th May, 1911, by the said G. G. Sanchez for the amount of	3,000.00
Being the value of two horses ready saddled; a list of horses, saddles and other articles delivered to the self-same revolutionary leader, G. G. Sanchez, to the value of	200.00
Signed at Concepción del Oro, Zac., the 15th May, 1911, intended for the equipment and arming of the forces of the said Captain Sanchez; a further receipt, signed by the said Captain G. G. Sanchez, for	3,500.22
Being the value of one horse, one rifle, and one revolver, dated the 20th May, 1911	170.00
And, lastly, a further list of articles commandeered by the said Captain Sanchez on the 31st May, 1911, to the value of	59.90
TOTAL	$7,002.64

X. The Mexican Agent filed a Rejoinder maintaining the pleas contained in his Answer.

With this claim, numbered 34, there was also filed a second claim of the Mazapil Copper Company (Limited) for the amount of $56,739.41 Mexican gold, for damage sustained by the Coahuila and Zacatecas Railway during the years 1918 to 1920 inclusive; but this Commission will only, by agreement between the two Agents, and for the time being, adjudicate upon the claim

for losses sustained at the Company's mines at Concepción del Oro in 1911, leaving the second claim for damage to the Coahuila and Zacatecas Railway, pending decision, until such time as the Mexican-British Claims Commission shall decide other claims of the same nature.

XI. This claim was, on the 17th day of the present month of January, argued before the Commission. The British Agent stated his claim, and the Mexican Agent said that, as the British Agent had filed a deed of ratification of the claim from the attorney in fact of the Mazapil Copper Company (Limited), the Commission would decide what they thought right. And in regard to the authenticity of the various receipts signed by First Captain G. G. Sanchez, he submitted various official documents, the originals, signed by G. G. Sanchez, at one time Governor of the State of Michoacán, so that the Commission might, after the necessary comparison of the signatures on the receipts submitted by the claimant with the signatures on the official documents mentioned above, decide whether the signatures on the former were authentic or otherwise.

XII. The deed of power of attorney produced by Mr. Fry on behalf of the Mazapil Copper Company (Limited) is undoubtedly a public instrument which constitutes full proof, and as the proceedings carried out by Messrs. Blackett, Carr and Galindo, as the representatives of the said Company, are therein ratified, the Commission declares that the claimant Company has duly shown proof that they are its representatives, in accordance with Article 10 of the Rules of Procedure.

XIII. It is an historical fact that First Captain G. G. Sanchez operated as a Maderista leader against the Government of General Forfirio Díaz, in the Concepción del Oro District, State of Zacatecas, where the mines of the Mazapil Copper Company (Limited) are situated, on the very dates appearing on the receipts issued to the claimant Company. It is also an historical fact that Gortrudis G. Sanchez, a First Captain in the Maderista forces in 1911, subsequently became the Governor of the State of Michoacán with residence at Morelia, and as from a careful examination by the Commissioners of the signatures on the receipts upon which the Mazapil Copper Company bases its claim, and of the signatures upon the official documents produced by the Mexican Agent, there is no reason to doubt that they are the same, the Commission consider themselves authorized to declare that the receipts executed by First Captain G. G. Sanchez to the claimant Company are authentic.

XIV. Consequently, and as the First Captain G. G. Sanchez comes within the meaning of subdivision 2 of Article III of the Convention, as a Maderista revolutionary, it is unquestionable that the Government of Mexico is liable for the damage claimed for. In view of these considerations, the Commission, by a unanimous vote, hereby declare:

That the Government of the United Mexican States is bound to pay to the Government of His Britannic Majesty, on behalf of the Mazapil Copper Company (Limited), the sum of $7,002.64 Mexican gold.

JOSEPH SHONE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 17, February 15, 1930. Pages 136-141.)

AFFIDAVITS AS EVIDENCE. Affidavit of claimant containing inconsistencies, obscurities and arithmetical errors, supported by sworn statement of brother-in-law that facts stated in such affidavit were true and correct, *held* not sufficient evidence when upon face of claimant's affidavit it appeared that such brother-in-law was not present at most of the material times.

(Text of decision omitted.)

WILLIAM E. BOWERMAN AND MESSRS. BURBERRY'S (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 18, February 15, 1930, dissenting opinion by Mexican Commissioner, February 12, 1930. Pages 141-146.)

ASSIGNMENT OF CLAIM. A successor to claimant's business, who took over such business by instruments dated subsequent to loss but effective as of a date prior to loss, *held* entitled to present claim. In any event, the right to claim passed as an existing asset among the assets sold and transferred.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT—PRIMA FACIE EVIDENCE. An assault on, and burning of, a train on line from Mexico City to Veracruz is an act of violence of such public notoriety as to entrain responsibility of respondent Government when it failed to show that it took any action whatever in the matter. *(Prima facie* evidence.)

DAMAGES, PROOF OF. Insurance value placed on trunk by claimant prior to loss *held* some evidence of value. Valuations of loss put forward by claimants accepted by tribunal to the extent reasonable.

EXECUTION OF DECISION.—EVIDENCE. Though there is no clear evidence of British nationality, decision not delayed, but right of execution made conditional on furnishing of such evidence. (See decision No. 25.)

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 778.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933. p. 226 at 238.

1. This case consists of two claims:

(1) A claim for £233 9*s.* 0*d.* put forward by Mr. Bowerman on behalf of Messrs. Burberry's (Limited) for the loss of a quantity of sample garments contained in a trunk which was despatched on the 6th December, 1919, by Mr. Bowerman from Tampico Station to Veracruz, and was destroyed *en route* by rebels who assaulted and burnt the train to Veracruz on the 10th December, 1919; and

(2) A claim by Mr. Bowerman himself for £16 11*s.* 0*d.*, the value of personal effects of his own contained in the same trunk.

2. To these claims the Mexican Agency, apart from a formal denial of the facts, opposed two principal defences:

(1) That Mr. Bowerman was not the Agent of Messrs. Burberry's (Limited), and was not authorized to put forward the claim on their behalf, as provided by article 10 of the Rules of Procedure; and

(2) That even assuming that the trunk was destroyed by rebels, they were not forces within the meaning of subdivisions 1-4 of Article 3 of the Convention, and if they were to be included in subsection 5 of this Article, the Mexican authorities were not to blame either in the matter of repressing the act or of punishing the parties responsible therefore.

3. To these defences the British Agency replied that they were prepared to furnish proof that Mr. Bowerman was the authorized Agent of Messrs. Burberry's (Limited), and that the persons responsible for the loss were forces included in one of the first four paragraphs of Article 3. At the hearing, however, the British Agent admitted that he was not able to establish the latter contention, and that therefore the forces referred to must be included in subsection 5 of Article 3, but he contended that the Mexican Government was liable for the losses as the competent authorities, with full knowledge of the facts, had taken no measures whatever to suppress the acts complained of or to punish those responsible for the same.

4. In his rejoinder the Mexican Agent contended that it lay with the British Government to establish the omissions or faults on the part of the Mexican authorities, and that of this no evidence had been given, and at the hearing he raised an additional defence, namely, that the loss claimed had been incurred by the partnership of Burberry's, and that the claimants, Messrs. Burberry's (Ltd.), who had purchased the business of the firm of Burberry's on the 12th January, 1920, i.e., after the events forming the subject of the claim, had suffered no loss and no *locus standi* to make the claim.

5. With regard to the first defence of the Mexican Government, which was really in the nature of a motion to dismiss, the British Agent put in a copy of the agreement dated the 12th January, 1920, between the firm of Burberry's and the Company of Messrs. Burberry's (Limited) whereby the latter purchased the business of the former.

From this document it appears that, although the agreement was made on the 12th January, 1920, it was provided by article 2 that the purchase and sale should take effect as on and from the 3rd April, 1919, and by article 9 it was provided that the vendors (i.e., the firm of Burberry's) should be deemed as from the same date to have been carrying on the business of Agents for the Company (i.e., the present claimants), and that the Company should assume all the transactions and acts done by the vendors as from the same date of the 3rd April, 1919.

Documentary evidence was also provided that Mr. Bowerman was, in December 1919, the travelling representative of the firm of Burberry's, who, as shown above, were acting as Agents at that time for Messrs. Burberry's (Ltd.), and that he is now the representative of Messrs. Burberry's (Limited) and authorized to make the claim on their behalf.

The majority of the Commission is therefore of opinion that the conditions of article 10 of the Rules of Procedure have been complied with, and that the objection of the Mexican Government must be overruled.

6. The Commission is of opinion that it has been sufficiently proved by the affidavit of Mr. Bowerman, dated the 6th May, 1921, and by the telegram dated the 18th December, 1919, from Mr. S. A. Orozco, Superintendent of

Express, Puebla, to Francisco R. Nino, Agent at Veracruz for the Constitutionalist Express, that the trunk containing the articles which are the subject of this claim, was destroyed in an assault on the south mixed train at Kilo 278 on the 10th December, 1919, and that this assault was committed by insurrectionary forces or brigands referred to in Article 3, sub-section 5 of the Convention.

7. With regard to the responsibility of the Mexican Government for the acts of these forces or brigands, the majority of the Commission would refer to the principles laid down in the opinion of the President in the decisions of the claims of Messrs. Baker, Woodfin and Webb (Mexico City Bombardment claims) Paragraph 6. Reference is there made to the difficulty of imposing on the British Government the duty of proving a negative fact such as an omission on the part of the Mexican Government to take reasonable measures, and it is stated that whenever an event causing loss or damage is proved to have been brought to the knowledge of the Mexican authorities or is of such public notoriety that it must be assumed that they had knowledge of it, and it is not shown by the Mexican Agency that the authorities took any steps to suppress the acts or to punish those responsible for the same, the Commission is at liberty to assume that strong *prima facie* evidence exists of a fault on the part of the authorities.

In this case Mr. Bowerman, who left Mexico almost immediately after the loss, did not call the attention of the authorities to the matter at the time, but an assault on, and the burning of, a train on the line from Mexico City to Veracruz was an occurrence of such importance that it cannot be supposed that the authorities were unaware of it, and the Mexican Agent has not shown that they took any action whatever in the matter.

For these reasons the majority of the Commission considers that the authorities were blamable in the matter, and that the Mexican Government is responsible in virtue of Article 3, subsection 5 of the Convention.

8. The final defence of the Mexican Government consists in the argument that the loss was suffered by the firm of Burberry's and could not have been taken over by Messrs. Burberry's (Limited) under the agreement of the 12th January, 1920, as one of the assets of the firm, as the right to claim for the loss did not exist at that time, but only came into existence on the signing of the Convention on the 19th November, 1926.

The majority of the Commission is, however, of opinion that the right to claim was not created by the signing of the Convention, but existed as a marketable asset from the time when the loss occurred, even although it might subsequently turn out to be worthless. This is shown by the fact that such rights may be assigned or inherited as appears from the decisions of numerous International Commissions, and the same principle is implicit in article 10 (paragraphs (*f*) and (*g*)) of the Rules of Procedure, which show that the eventuality of an assignment of the right to claim after the time when it had its origin, i.e., the date of the loss, has been taken into consideration.

The majority of the Commission is therefore of opinion that the right to make this claim existed in the firm of Burberry's at the date of the loss and was included in the assets sold by them to Messrs. Burberry's (Limited) on the 12th January, 1920, and that the latter are now entitled to make the claim on their behalf.

9. During the discussions of the Commission, it has been pointed out that there is no clear evidence that the firm of Burberry's, who suffered the original loss, was a British partnership. The probability of this being the case seems so high that the Commission does not consider it necessary to delay its decision,

but holds that before its execution evidence satisfactory to the Commission must be furnished upon this point.

10. The only remaining question is that of damages. No evidence is forthcoming except the affidavit of Mr. Bowerman as to the contents of the trunk, and no other evidence could possibly now be produced, but he insured the trunk for $2,000, which may be taken as some proof of its value.

The articles claimed by Mr. Bowerman as his own property appear to the Commission to be reasonable and the prices put upon them moderate, and they are prepared to accept this value of £16 11*s.* 0*d.*

With regard to the claim of Messrs. Burberry's (Limited) it must be remembered that these were sample garments and not really intended for sale, and, moreover, there is an item of £64 8*s.* 0*d.* for duty and agency fees, of which no proof has been given. The Commission is of opinion that £180 would be a fair sum to allow them for the loss sustained.

Decision

11. The United Mexican States shall, subject to the conditions set out in section 9, pay to the British Government on behalf of Messrs. Burberry's (Ltd.), the sum of £180, and on behalf of Mr. Bowerman, the sum of £16 11*s.* 0*d.*

Dissenting opinion of the Mexican Commissioner, in Claim No. 4, presented by His Britannic Majesty's Government on behalf of William Edgar Bowerman and Messrs. Burberry's (Limited)

1. The Mexican Commissioner does not agree with the opinion of his learned colleagues when deciding this case, upon the following points:

In considering Mr. Bowerman as *Attorney-in-fact* for Messrs. Burberry's (Limited), because only a commercial letter, signed by Murray Burberry, on behalf of Messrs. Burberry's (Limited), has been produced to prove it.

From said document it does not appear that the person signing it is authorized to execute said act on behalf of the company. It has not been shown either that the signer is actually the person whose name appears in the signature itself; that is, the letter in question is not authenticated. It is a private document that may or may not be authentic, but to which, at all events, objection was made by the opposing party.

The Mexican Commissioner has upheld this same principle respecting the probative value of private documents not acknowledged and presented before this Commission, to which objection was raised by the Mexican Commissioner in the case of Robert John Lynch, and, in order not to repeat the arguments therein invoked, he refers to them throughout: "Claim No. 32". Demurrer entered by the Mexican Agent.

2. The Mexican Commissioner does not agree either that any negligence on the part of the Mexican authorities in taking measures tending to suppress the act, or to punish those responsible for the same, have been proven, nor that the authorities were blamable in any other way.

The Mexican Commissioner has also upheld this principle in connexion with claims 2, 28, 40, 50, 55 and 58, referring to the bombardment of Mexico City, and it will therein be seen that the burden of proof, in the case specified in subdivision 5 of Article III of the Claims Convention, Mexico and the United States, always devolves on the claimant, and, therefore, the Mexican Government is not bound to prove its diligence, as maintained by his Honourable Colleagues.

3. The Mexican Commissioner is also of the opinion that this claim should be dismissed, because:

(a) The claimant company could not have obtained the right to claim, which is granted by the Convention only to those sustaining the damage or to their successors in interest by universal succession, but never to a third party through contract, if, when same was entered into, the predecessor in interest had not acquired the right to claim; and, in the present case it so happens that Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, who were originally the injured parties, transferred all their rights to Burberry's (Limited) in 1920, that is, prior to the date of the Convention between Mexico and Great Britain, which is the only title conferring the right to claim for the acts in question, when heirs are not concerned, i.e., the *partnership* signed by those gentlemen could not transfer to Burberry's (Limited), in 1920, what it only acquired in 1926, when the Convention between Mexico and Great Britain was signed.

(b) The Mexican Commissioner is also of opinion that, even supposing it were declared that the claimant company is the one entitled to claim, and not Messrs. Thomas Burberry, Thomas Newman Burberry, Arthur Michael Burberry and Ralph Benjamin Rools, as maintained by the Mexican Commissioner, as it has not been shown that these last-mentioned gentlemen were British subjects, the claim would not be sustainable without proof of this last requirement, both because the Rules of Procedure (article X, Frac. *(a)*) so provide, and because this Commission has so laid it down in conformity with the jurisprudence generally established by the International Claims Commission in compliance with the principle that the claim must have the nationality of the claimant Government, from the beginning and until decided by the Commission.

SANTA GERTRUDIS JUTE MILL COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 19, February 15, 1930, dissenting opinion (dissenting in part) by Mexican Commissioner, February 11, 1930. Pages 147-154.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT.—NECESSITY OF NOTICE TO AUTHORITIES. Forces constantly in opposition to any established Government *held* not to be considered revolutionary forces for whose acts direct responsibility under the *compromis* existed. An attack by them upon an important station on the railroad between Mexico City and Veracruz and the destruction of several railroad cars *held* an act of such public notoriety as to impute notice to the public authorities and accordingly to entrain responsibility on the part of the respondent Government when it failed to show that any action was taken against such forces. Absent circumstances of public notoriety, *held* claim must be disallowed when there was no proof that claimant advised competent authorities in due time of attack by rebels resulting in damage.

MEASURE OF DAMAGES.—EXPENSES INCURRED IN PREPARATION OF CLAIM. Expenses of public duties or charges incurred in preparation of claim *held* compensable.

INSURANCE, EFFECT OF UPON RIGHT TO DAMAGES. Opposition of Agent for respondent Government to payment of claim when it appeared that losses claimed may have been compensable in insurance *overruled* upon production of proof that efforts of claimant to obtain such compensation were unsuccessful.

Cross-reference: Am. J. Int. Law, Vol. 25, 1931, p. 782.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. On behalf of the Santa Gertrudis Jute Mill Company (Limited), the British Government have filed in one memorial two claims. The first is for compensation for the loss of three cars of jute which were burnt at the Paso del Macho station on the 1st February, 1917, and the second is for compensation for damages done to the company's electric plant on the 30th March, 1919.

The facts are set out in the Memorial as follows:

First Claim

In November and December 1916 the Santa Gertrudis Jute Mill Company (Limited) shipped, under three bills of lading from London via New York by the steamship *Lancastrian,* steamship *Michigan* and steamship *Mongolia,* a consignment of 1,851 bales of jute. The whole consignment was shipped from New York to Veracruz by steamers of the Ward Line during the month of January 1917, and was sent on from there, under the supervision of the company's agent, by the Terminal Company of Veracruz (Limited) via the Mexican Railway. Only 1,477 bales arrived at various dates during the first fortnight of February, resulting in a shortage of 374 bales. From the markings of the bales received it was easily established that the missing bales were:

From steamship *Lancastrian*

7 bales Narayangang mixings.
69 bales Chittagong mixings.
81 bales Substitute M.D.E.

From steamship *Michigan*

48 bales H. 2.
77 bales H. 3.

From steamship *Mongolia*

57 bales D. T. D/E.
24 bales L. B 2.
11 bales L. B 3.

On the 12th February, 1917, the Mexican Railway Company officially informed the Santa Gertrudis Jute Mill Company (Limited) that on the 1st February, 1917, the station at Paso del Macho was attacked and taken by rebel forces, who set fire to all the wagons which were in the yard of that station, including three containing 372 bales of jute belonging to the company, and that the railway company declined to accept any responsibility. The two missing bales are accounted for in a letter from the railway company stating that one wagon contained 126 bales instead of 124 bales as stated on the waybill.

The amount of the claim is 27,921.42 Mexican pesos.

Second Claim

On the morning of the 30th March, 1919, a party of rebels entered the electric plant belonging to the Santa Gertrudis Jute Mill Company (Limited) at Orizaba and partially destroyed the generating pipe by exploding a dynamite bomb which they had placed there. As a result of the damage effected, the factory which took its power from this generating plant was paralysed and unable to function until the 14th April, when the work of repair had been completed.

The amount of the claim is 1,709.81 Mexican pesos, being the cost of the repair of the damage to the generating pipe.

2. The Mexican Agent has made a motion to reject the claim and at the same time has filed an answer to the Memorial in the event that his motion should not be sustained.

The Motion to Reject

3. The Mexican Agent held that the Memorial did not comply with article 10 of the Rules of Procedure, pursuant to which the Memorial should be signed by the claimant and by the British Agent, or by the latter only, but in that case a statement of the facts giving rise to the claim should be included in the Memorial.

In his oral argument the Agent pointed out that there is no document inserted in the Memorial showing that Mr. C. M. Hunter, the General Manager of the Company, was duly authorized to present the claim, and he, furthermore, raised doubt as to the British nationality of the company, which in some of the documents is styled as Santa Gertrudis Compañía Manufacturera de Yute and which, in his opinion, might well be a Mexican Company, to be distinguished from the British Company in London.

4. The British Agent drew the attention of the Commission to Annex 11 of the Memorial, which in his view left no doubt as to whether Mr. Hunter, when making his declaration before a notary public at Orizaba, had produced a deed showing that he was the legitimate representative of the company and authorized by the terms of his Commission to collect and receive all and whatsoever sums of money that may be owing to the company from whatever cause or pretence.

He further asserted that the Spanish name of the company was nothing but a translation of the name under which the Company is incorporated in England and indicated one and the same British Company.

5. The Commission is satisfied that the document, of which the Notary Public makes mention and which was shown to him, establishes that Mr. Hunter was duly authorized to present the claim.

The Commission is equally satisfied that the Mexican branch of the company does not constitute a separate concern but is part of the company at London, the British nationality of which is proved by the certificate of the incorporation, printed as annex 12 of the Memorial.

6. The Commission decides that the Motion to reject is overruled and that the claim must be decided on their merits.

The First Claim

7. The Mexican Agent said that it was common ground between his colleague and himself that the facts had been committed on the day and under the

circumstances as described in the Memorial. The witnesses whom he had caused to be heard at Orizaba all declared that they knew that the station of Paso del Macho had been attacked by armed forces on the 1st February, 1917, and that the railway wagons had been destroyed. It was also of public knowledge that the forces in question belonged to those commanded by General Higinio Aguilar, a man whom the Agent described as a permanent rebel, having been in arms against nearly every Government since 1910 and during the whole time of the *de facto*, and afterwards the *de jure*, Government of President Carranza. But the Agent differed from his colleague in the classification of the said forces into one of the subdivisions of Article 3 of the Convention.

At the time of the attack on the station of Paso del Macho there existed in the Mexican Republic a constitutional Government, of which President Carranza was the Chief. A man like General Higinio Aguilar, who did not fight for any revolutionary programme but simply was in antagonism to every established system of public administration, had to be considered as a rebel and, consequently, he fell within the terms of the fifth subdivision of Article 3. This being so, the responsibility of the Mexican Government could only be considered to exist in case the British Agent established that the competent authorities were blamable in any way. As long as that was not proved, it had to be assumed that the Government had acted with normal diligence, the more so because the railroad where the attack occurred was of such vital importance, being the main connexion between the capital and Veracruz, the principal port, that it could not be supposed that proper measures of protection had been omitted.

That Higinio Aguilar had not been arrested did not prove that the authorities were to blame, because the region where the events happened was so mountainous as to afford easy means of escape.

As to the value of the jute which was burnt, the Agent saw no other evidence than the statement of the claimant himself, i.e., the invoices of the London Office, and observing that amongst the items of the claim also appeared expenses for insurance and war risk insurance, he asked whether the claimant had not already been compensated for his loss and. if not, whether he ought not to have tried.

The claim also including the expenses made in its preparation, the Agent denied that his Government could be made liable for them, the more so as Mexico could not claim from the other party restitution of costs incurred by defending itself, in case a claim was disallowed.

8. The British Agent held a different view as to the classification of the forces, who were guilty of the attack. In his opinion the Government of President Carranza was a revolutionary force which after the triumph of its cause, had established a Government *de jure* or *de facto*, falling within the terms of subdivision 2 of Article 3. To this force, the forces of Higinio Aguilar, being revolutionaries as well, were opposed. Acts committed by them, made Mexico responsible according to the treaty, even when no evidence of omission or negligence was produced. The Agent contended that at the time, when the station was attacked, the Carranza Government was still a *de facto* Government, against which the revolutionary forces under Aguilar were in arms. This General aimed at the overthrow of Carranza and he therefore joined a few years later his forces with those of General Obregón who—if the Agent's information were correct—finally granted him a pension.

But even if it were true that Aguilar was only a rebel and that his forces therefore were to be classified within subdivision 5, the Agent held that it was established that the competent authorities had omitted to take the mea-

sures which could have been expected from them. The railroad in question was of such an essential importance, from a political as well as from an economic point of view, that a permanent and very close military supervision would have been natural. Instead of that, conditions were such that the line and the stations were repeatedly attacked. The Agent did not doubt that this could have been prevented if there had been more diligence, and the fact that, a few months after the attack on the station of Paso del Macho, the railway was taken over by the Government, showed that the Government previously had not sufficient control of the situation.

In regard to the amount of the loss, the Agent relied upon annex 11 of the memorial in connexion with the invoices reproduced in the other annexes, and he presented copies of letters, written by the underwriters to the London Office, showing that endeavours to obtain compensation from the insurance companies had been made, but had remained without result.

An award for the expenses of the claim had often been granted by international tribunals in similar cases, and the Agent thought the amount which was claimed the more reasonable because many of the expenses consisted in the payment of stamp duties, &c.

9. Where the Agents agree as to the facts and their authors, the Commission has to examine in the first place under which of the forces, enumerated in Article 3 of the Convention, the men commanded by General Higinio Aguilar are to be classified. A historical exposition of the facts which occurred during this part of the revolutionary period and of the role played therein by this General, has been given to the Commissioners and leads them to the belief that Aguilar could not be considered as heading or participating in a revolutionary movement. At no time his aims have been stated or his programme made known. It was never shown that his action was based upon ideal, political or social principles. He seems to have been a man whose hand was against every organized system of government, ready to side with any force opposed to it. The Commission is satisfied that it must consider him and the armed men who followed his orders as rebels or as insurrectionaries other than those referred to under subdivisions 2, 3 and 4 of Article 3; in other words, as one of the elements which the fifth subdivision of that Article has in view, and the question that arises is, whether in this case the Mexican Government must be held responsible.

The majority of the Commission answers this question in the affirmative. They cannot but realize that the attack on an important station of one of the main railroads of the country, and the destroying by fire of several wagons, are facts, which must have been of public notoriety and were sure to come at once to the knowledge of the authorities. The railway between the capital and Veracruz is of such a vital importance to Mexico that it was to be expected that measures would have been taken to prevent acts of this kind. That they could occur is already a strong presumption of the absence of sufficient watchfulness. The witnesses, who at the instigation of the Mexican Agent were heard at Orizaba, all knew that the attack was the work of General Aguilar's men. As the authors were known at the time of the facts, a prosecution would have been possible, but there had not been produced any evidence showing that action was taken, and the fact that a few years later General Aguilar was still in command of armed men and able to place them under General Obregon's banner shows that he was not interfered with and retained complete liberty of movement.

There has been an exposition in section 6 of Decision No. 12 *(Mexico City Bombardment Claims)* of the attitude which the majority of the Commission takes

as to how the omission or the absence of suppressive or punitive measures is to be established. Acting on that line, the Commissioners, whose views are here expressed, must hold the Mexican Government responsible for the damage suffered by the claimant.

10. For the amount of this damage there is no other evidence than the invoices sent by the London office of the Company to the General Manager in Mexico and the letters from the Agents in New York to the same. They indicate the value of the jute then under way to Orizaba. All these documents are anterior to the attack on the station and the majority of the Commissioners cannot see why they are not to be accepted as *bona fide* statements.

The same Commissioners are satisfied, by the letters of which copies were shown, that the Company tried in vain to make the insurance pay the damage, and as regards the expenses for the preparation of the claim, they are of opinion that restitution of what has been paid for public duties is rightly claimed.

11. The Commission decides that the Government of the United Mexican States shall pay to the British Government for the Santa Gertrudis Jute Mill Company (Limited), the amounts of: Mexican pesos 27,726.42 (twenty-seven thousand, seven hundred and twenty-six pesos forty-two centavos) for damage, and Mexican pesos 67.55 (sixty-seven pesos fifty-five centavos) for expenses.

The Second Claim

12. The Mexican Agent produced the testimony of several witnesses who had been heard at Orizaba and who all said that they ignored the facts on which the claim is based. Apart from the evidence given by the claimant and some of his employees, to which the Agent attached no value, there was only the statement of Señor Reyes, who repaired the pipe, but while he could be regarded as a judge on the damage done, he was not in a position to give reliable information on the cause of it. For these reasons the Agent thought the evidence insufficient.

13. The British Agent maintained that the facts were sufficiently established by the statements produced in the annexes to the Memorial and that Señor Reyes' evidence was very important.

14. As to the authors of the destruction, the same controversy arose between the Agents as when they discussed the attack on which the first claim is based.

15. The Commissioners, although not doubting that the generating pipe has been destroyed, have not found convincing evidence as to the authors of this act. They therefore do not feel at liberty to declare that those responsible for the destruction have belonged to one of the forces enumerated in Article 3 of the Convention. The evidence collected on the spot shows that in the immediate neighbourhood it was not known that anything had happened, and as claimant does not show that he advised the competent authorities in due time, there is no ground on which they could be blamed.

16. The Commission decides that the claim is disallowed.

Dissenting opinion of the Mexican Commissioner when rendering the decision in this case, solely as regards the question asked by the Honourable Presiding Commissioner as to whether it was proved that the authorities were blamable in any way

I. In point of fact, the Mexican Commissioner is of the opinion that subdivision 5 of Article III of the Claims Convention, Mexico and Great Britain, should be construed as meaning that it is the demandant Government that has

to prove that the competent authorities omitted to take the necessary measures to suppress the insurrections, risings, riots, etc., or that said authorities were blamable in any other way, once it has been shown that the case falls within subdivision 5 of Article III already mentioned.

II. In the present case it has not been shown that the Mexican authorities were to blame in any way whatsoever.

The Mexican Government is not bound to prove that it acted diligently. The Law presumes that the Government has to act diligently, not only to protect other persons' interests, but also to safeguard its own existence. Both Governments being convinced of this legal presumption, the Convention imposed the burden of proof of negligence on the demandant Government. If this be difficult it only means that it is also difficult to give judgment against Mexico for mutinies or upheavals, or for acts committed by insurrectionary forces other than those referred to under subdivisions 2, 3 and 4 of Article III of the Convention, or for the acts of brigands. Said subdivision 5 of Article III of the Convention, thus construed in the light of the principles of international law, there is no reason why it should be inverted, and thus impose the burden of proof on the Government against whom claim is made, as his learned colleagues endeavour to do.

III. In order to maintain his viewpoint as regards this claim, the Mexican Commissioner refers, in every respect, to the dissenting opinion expressed by him on the same point of law in connexion with claims 2, 40, 58, 50, 55 and 28, relating to the bombardment of Mexico City, which were decided by this Commission. In that opinion, said Commissioner states that International Claims Commissions have always been very careful whenever it is a matter of declaring that a Government has been negligent in the fulfilment of its international obligations, and they have never done so without requiring conclusive proof, because it is too serious a charge to base on mere presumption. In this connexion, the cases of *Charles E. Tollerton*, vs. *Mexico*, decided by the General Claims Commission, Mexico and the United States of America, p. 402, Volume I; *Boni Coleman*, page 56, volume II; *G. L. Solis*, before the same General Claims Commission, Mexico and the United States of America, page 48, volume II, were cited, and, in these three cases that Commission uniformly upheld the principle that the obligation of fully proving negligence devolves on the claimant Government and not on the Government against which claim is made, and, that, to prove that fact, mere presumption and the assertions of the claimant Government are not sufficient.

It may well be agreed, in the present case, that the attack on Paso del Macho by rebel forces under Higinio Aguilar, was a most scandalous affair; it may well be wondered, and no doubt justly, why the Mexican Government did not suppress that act with the energy that Justice demands; it may well be established, as a basis on which to arrive at the conclusion reached by the Mexican Commissioner, that the Government itself had knowledge of those acts and that there is no proof in the record that the culprits were ever prosecuted and punished with all the severity of the law. Nevertheless, the Mexican Commissioner maintains that the Mexican Government is not responsible, for no other reason than because the claimant Government has not produced any evidence either sufficient or insufficient to comply with the obligation of proving that the Mexican Government was negligent. President Carranza's Government must certainly have suppressed the act of the attack or assault on the Mexican Railway at Paso del Macho station, and, had the Mexican Government been obliged to prove this fact, it would most certainly have complied with that obligation; but, relying on the fact that the burden of

proof did not devolve upon it, according to the Convention, no proof whatever was produced to establish the fact. The bare principle contained in section V of Article III of the Convention, is this: "The British Government is obliged to prove the Mexican Government's negligence in all cases included in subdivision 5 of Article III of the Convention." In the present case the British Government has not complied with that obligation. Therefore, the Mexican Government should be held not liable for the acts committed by Higinio Aguilar.

C. E. McFADDEN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 20, February 10, 1930. Pages 155-156.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. A claimant whose coal had been requisitioned by the Huerta Government for public use but who had never been paid for the same by any Mexican Government, despite repeated requests for payment, settled by agreement between British and Mexican Agents, approved by the tribunal.

(Text of decision omitted.)

MEXICAN UNION RAILWAY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 21, February , 1930, dissenting opinion by British Commissioner, undated. Pages 157-175.)

CALVO CLAUSE.—RESPONSIBILITY FOR ACTS OF FORCES. Claims by a British corporation, owner of a railroad in Mexico operated under a concession from the Mexican Government in connexion with which claimant had agreed to a Calvo Clause, for damages resulting from acts of Indian, rebel, revolutionary and State government forces, *held* not within the jurisdiction of tribunal.

EXHAUSTION OF LOCAL REMEDIES. The responsibility of a State under International Law is subordinated to the exhaustion of local remedies. Article VI of *compromis*, setting aside this rule, does not deprive Calvo Clause of its effect as long as there has been no denial or undue delay of justice or other international delinquency.

Cross-references: Am. J. Int. Law, Vol. 24, 1930, p. 388; Annual Digest, 1929-1930, p. 207.

Comments: Clyde Eagleton. "*L'épuisement des recours internes et le déni de justice, d'après certaines décisions récentes*", Rev. de Droit Int. L. C., 3d Ser., Vol. 16, 1935, p. 504 at 519; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d Ser., Vol. 19, 1937, p. 98 at 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 236; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 230.

1. According to the Memorial of the British Government, the Mexican Union Railway (Ltd.), constructed and operated for several years under a concession, dated the 9th March, 1897, granted by the Mexican Government, which was based on an earlier concession, dated the 30th April, 1896, from the State of Sonora, a railway from Torres to Campo Verde in the State of Sonora.

In connexion with this undertaking the company owned and possessed under lawful title various works, buildings, rolling-stock, fittings, rails, chattels and other property and effects, the whole of which has been entirely lost or destroyed by revolutionary acts, during the period the 20th November, 1910, and the 31st May, 1920. The principal business of the railway was provided by the Creston Colorado Mining Company. For this mining company the railway company carried the usual supplies needed for a mining business, fuel for machinery, and also supplies for the needs of the employees of this mining company. Owing to the unsettled conditions in Sonora through revolutionary activities, the mining company was forced to close down and consequently the railway was deprived of most of its normal business. When the Mexican Government granted rates for passengers and freight it was understood that these were to be in pesos Mexican valued at 2 pesos for 1 dollar (U.S.). During the above-named period, as each fresh Government was formed, an issue of paper money was put into circulation. The example of the Government was followed by the military chiefs of all parties, and the railway was obliged to charge for fares and freight on the basis of this paper money. The railway was unable to induce business men to accept this paper money unless some Mexican official was present to punish them for their refusal. On the other hand, the Mexican Government insisted on the payment of taxes in Mexican gold. These taxes were paid by the railway during the whole of the years covered by this claim. In addition to these difficulties, the railway was subjected to constant attacks by revolutionaries, chiefly Indians. Up to February 1912, when Mr. L. Reed left for England, two trains had been held up by rebels, and Mr. Reed and Engineer Page were held prisoners for a time at Colorado.

A chronological survey of events is given in John Symond's affidavit of the 17th April, 1923 (annex 2).

The following is a short account of the principal losses suffered by the company during the years covered by the claim, taken from Mr. Symond's chronological survey (annex 2).

1912. The company was harassed by Indian rebels. Four bridges and a crib were burnt and two camps were looted. Work was constantly held up by the presence of rebels.

1913. During this year practically all work ceased owing to the revolution.

1914. During this year an escort bringing ore to Represo station was attacked by Indians, but with the help of Government forces they were driven off. Torres was attacked and looted by Indians. There was no Government protection for Torres.

1915. Telephone wire was constantly cut; the station and warehouse at Represo were looted and trains were constantly fired on by Indians. The Government was advised of these outrages, but did nothing to protect the railway. Owing to the lack of protection it was impossible to repair the track and bridges. Later in the year, Represo was again attacked; trains were derailed and another bridge was burnt. On the 16th October, State troops, under Colonel Fortunato Tenorio, took charge in Torres. This colonel ran trains night and day in the greatest disorder. The troops took over the manager's house and destroyed everything that they did not steal. The outside of

the station and the manager's house was torn down and burnt by them. In November, Sancho Villa and his defeated troops, returning from an attack on Hermosillo, held Colorado under the greatest disorder for two days, killing, looting and destroying property.

1916. After asking for State protection, the company's manager was ordered to go to Hermosillo by the State Governor, who informed him that if construction was not under way within sixteen days the concession would be annulled. It was not possible to do any ordinary railway business, but trains were run at all hours for the Government without payment. The company, however, were obliged to pay the employees, purchase wood, water and oil and do such repairs for the trains as they were able. The orders for these trains on behalf of the Government were invariably given by telephone or verbally; the only written orders obtained by the company for moving troops were signed by General A. R. Gómez for 372.49 pesos and General A. Mange, 1,124.20 pesos. The manager was forced to forward these orders to Mexico City for payment and to make a receipt duly stamped for the full amount. No money, however, was ever paid to the company.

1917. Three box-cars, loaded by and for General A. R. Gómez, were completely destroyed by explosion and fire in Torres. General Gómez refused to give the company any kind of receipt for these cars.

1918. A bridge at K. 47 was destroyed by fire and telephone wire was continually cut and carried away.

1919. Indians were again very troublesome, attacking trains and trucks. The inspector sent by the State Government to investigate conditions could not understand that the railway could continue to run at all under such conditions.

1920. The Government again threatened to cancel the concession as the railway had not complied with the contract. By this time the company was entirely without funds and running into debt and has since been forced to abandon entirely the railway.

The amount of the claim is £200,000 sterling. This sum represents the value of the property of the Mexican Railway at the time the outrages commenced and is less than the value of the property, viz., £219,476 8*s*. 0*d*., given in the balance-sheet of the company dated the 30th September, 1911. A part of the sum claimed is the value of the property mentioned in Mr. Symond's affidavit as having been destroyed by rebel forces.

2. This case is before the Commission on a Motion of the Mexican Agent to dismiss, based on article 11 of the Concession, reading as follows:

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

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[1] *English translation from the original report.* "The Company shall always be a Mexican Company even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such

In the opinion of the Mexican Agent this article renders the Commission incompetent to take cognizance of the damage sustained by the Company in question, which consented to be considered as Mexican in everything connected with any acts relating to the operation of the railway for which it had acquired a concession.

3. It is clear that the Mexican Government meant through this article to insert in the concession what is generally known in international law as the Calvo Clause.

4. Many international tribunals have had to deal with this clause, and it has recently been the subject of a decision of the General Claims Commission, Mexico and United States of America (Pages 21-34, *Opinions of Commissioners*, Vol. 1). In this decision, which was taken unanimously, our Commission concurs, and as it adopts the considerations, which led to the conclusion, it refers to them, not thinking it necessary to repeat them, or possible to express them better. This decision has been accepted by the British Government as good law, and they declared that they were content to be guided by it (p. 184 of the *Bases of Discussion for the Conference for the Codification of International Law).*

5. The Commission is, however, aware that in the case before the General Claims Commission the scope was narrower than in the case now under consideration. In the former it was limited to the *execution of the work, to the fulfilment of the contract, to the business connected with the contract, and to all matters related to the contract,* whereas, in the concession granted to the Mexican Union Railway (Ltd.), it includes *all matters whose cause and right of action shall arise within the territory of the Republic, everything relating to the said company, and all titles and business connected with the company.*

While all the Commissioners are prepared to agree with and to follow the decision rendered by the General Claims Commission, only two of them are of opinion that the same considerations also apply to the claim of the *Mexican Union Railway,* and that article 11 of the concession is not invalidated because the words, in which it is expressed, comprise more than in the other case.

6. In the view of the majority of the Commission the difference between the two stipulations is not so important as to make the Calvo Clause in this concession null and void. They fail to see any very marked and essential divergence between the words *the business connected with the contract* in the first case, and the words *titles and the business connected with the company* in the second. They are of opinion that the intention of the Mexican Government, in inserting article 11 in the contract, was clear and did not go further than the legitimate protection of the rights of the country.

States possessing great natural resources which they are desirous to see developed, or wishing to improve the means of communication between the different parts of the country, or to promote the exploitation of public services, may follow different methods.

They can, when faced with a decision as to what persons or concerns a concession is to be given, make no discrimination whatever between aliens and their own nationals, and impose no special conditions when dealing with

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aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may consequently not intervene in any manner whatsoever."

the former. They may also reserve the exploitation of the wealth of the country and of public services for their own subjects and decline to give interests of vital national importance into the hands of the subjects of foreign Governments. And they may in the third place consider that they must not deprive their country of the advantages accruing from the investment of foreign capital and from foreign technical knowledge, and yet at the same time see to it that the presence of huge foreign interests within their boundaries does not increase their international vulnerability.

7. It is this third method which has been chosen by the Mexican Republic. It has accepted foreign co-operation in the economic development of the country, but has realized that this might expose the State to collisions and interventions of which its own history and the history of countries in similar circumstances has shown examples. In other words, the Government wanted to avoid the possibility that measures intended to promote economic prosperity might become a source of diplomatic friction or even international danger.

This aim seems completely legitimate, and does not in itself present any conflict with the acknowledged rules of international law.

How was this aim achieved in this case?

By inserting in the concession an article by which the foreign concern put itself on the same footing as national corporations, by which it undertook to consider itself as Mexican, to submit to the Mexican courts, and not to appeal to diplomatic intervention.

8. The Company accepted this stipulation for all matters whose cause and right of action should arise within Mexican territory. This covers a great deal, but does not exceed the limits of the legitimate guaranteeing of national interests because all that it means is that the fact of having granted the concession to an alien lessor, that such concern resides in the country as a result of the concession, and the operation of the concern under the terms of the concession must not create difficulties which would not have arisen had Mexico refused to accord privileges of this nature to others than Mexicans.

Onerous as this obligation may seem, it was the *conditio sine qua non* of the contract, which the Mexican Government would otherwise not have signed. It was accepted by persons who certainly realized the weight of contractual engagements. It cannot be considered as a unilateral clause, it cannot be detached from the rest of the contract; it is part of a whole and indissoluble system of rights and duties so balanced as to make it acceptable to both parties.

9. The advantages which the Company received in exchange for what it undertook were considerable; by the same deed the Government transferred to the Concessionnaire, without any consideration, ownership of all lands and supplies of water belonging to the State and required for the track, the stations, the sheds and other appurtenances. The concessionnaire was authorized for construction, operation and maintenance of the lines, to dispose of all materials afforded by the lands or the rivers owned by the State. In case ores, coal, salt or other minerals were found during the construction of the line, they were to become the property of the company.

It does not seem surprising that such far-reaching rights, including even the free disposal of national resources, were not granted to a foreign corporation until it had bound itself, in words allowing of no misunderstanding, always to act as a Mexican Company and, instead of invoking diplomatic intervention on the part of its own Government, to appeal to the means of redress open to Mexican citizens. This was the object of article 11, and it was article 11 upon

which the Mexican Government relied and which they thought would always be complied with.

Such was the contract under which the railroad was built and the concession carried out during a period of more than a quarter of a century; such the relation between the State and the Railway company. The contract may have been a source of profit or a source of loss, but it existed, it had been signed and it had to be taken as a whole.

If the Commission were to act as if article 11 had never been written, the consequence would be that one stipulation, now perhaps onerous to the claimant, would cease to exist and that all the other provisions of the contract, including those from which claimant has derived or may still derive profit, would remain in force.

The majority of the Commissioners deems that a decision leading to such a result could not be considered as based upon the principles of justice or equity.

10. In holding that under the rules of international law an alien may lawfully make a promise, as laid down in the concession, the majority of the Commission holds at the same time that no person can, by such a clause, deprive the Government of his country of its undoubted right to apply international remedies to violations of international law committed to his hurt. A Government may take a view of losses suffered by one of its subjects different to that taken by such subject himself. Where the Government is concerned, a principle higher than the mere safeguarding of the private interests of the subject who suffered the damage may be involved. For the Government the contract is *res inter alios acta*, by which its liberty of action cannot be prejudiced.

But the Commission is bound to consider the object for which it was created, the task it has to fulfil and the treaty upon which its existence is based. It has to examine and to judge the claims contemplated by the Convention. These claims bear a mixed character. They are public claims in so far as they are presented by one Government to another Government. But they are private in so far as they aim at the granting of a financial award to an individual or to a company. The award is claimed *on behalf* of a person or a corporation and, in accordance therewith, the Rules of Procedure prescribe that the Memorial shall be signed by the claimant or his attorney or otherwise clearly show that the alien who suffered the damage agrees to his Government's acting in his behalf. For this reason the action of the Government cannot be regarded as an action taken independently of the wishes or the interest of the claimant. It is an action the initiative of which rests with the claimant.

That being the case, the Commission cannot overlook the previous engagements undertaken by the claimant towards the respondent Government. A contract between them does not constitute *res inter alios acta* for the Commission. They are both, the Mexican Government and the claimant, standing before the Commission, and the majority is of opinion that no decision would be just or equitable which resulted in the practical annulment of one of the essential elements of their contractual relation.

By this contract the claimant has solemnly promised not to apply to his Government for diplomatic intervention but to resort to the municipal courts. He has waived the right upon which the claim is now presented. He has precluded himself by his contract from taking the initiative, without which his claim can have no standing before this Commission and cannot be recognizable. Quite apart from the right of the British Government, his claim is such that it cannot be pursued before a body with the jurisdiction intrusted to this Commission and circumscribed in Articles I and III of the Convention.

11. It has been argued that the view set out in the preceding paragraph conflicts with Article VI of the Convention, which provides that no claim shall be set aside or rejected on the ground that all legal remedies have not been exhausted prior to the presentation of such claim.

The Commissioners who are responsible for this decision cannot see that this provision applies to the case here dealt with.

The same argument was put forward before the General Claims Commission, Mexico and the United States, in the case quoted in section 4, and had the same strength there that it has here, because in that regard the two Conventions are identical and the difference in scope between the two clauses has no effect.

The General Claims Commission met the argument in question in the following words:

"It is urged that the claim may be presented by claimant to its Government for espousal in view of the provision of article V of the Treaty, to the effect that no claim shall be disallowed or rejected by the Commission by the application of the general principle of international law that the legal remedies must be exhausted as a condition precedent to the validity or allowance of any claim. This provision is limited to the application of a general principle of international law to claims that may be presented to the Commission falling within the terms of article I of the Treaty, and if under the terms of article I the private claimant cannot rightfully present its claim to its Government and the claim, therefore, cannot become cognizable here, article V does not apply to it, nor can it render the claim cognizable."

The majority of the Commission concurs in this opinion.

12. The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of international law.

It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected to Mexican jurisdiction and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted in a denial or undue delay of justice. It only took away the right to ignore them.

This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon

which the claim is based occurred in 1920 and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims, similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

If by taking the course agreed upon by both parties, the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course, and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to, the majority cannot regard the claimant as a victim of international delinquency.

13. The majority does not deny that one or more of the acts or omissions, alleged to have caused the damage set out in the Memorial, may in themselves constitute a breach of international law. But even if this were so, the Commissioners cannot see that it would justify the ignoring of article 11. It is one of the recognized rules of international law that the responsibility of the State under international law can only commence when the persons concerned have availed themselves of all remedies open to them under the national laws of the State in question.

In the Bases of Discussion for the Conference for the Codification of International Law, drawn up by a preparatory Committee of the League of Nations, the following request for information, addressed to the Governments, can be found (p. 137):

"Is it the case that the enforcement of the responsibility of the State under international law is subordinate to the exhaustion by the individuals concerned of the remedies afforded by the municipal law of the State whose responsibility is in question?"

Most of the Governments have answered in the affirmative, among them the British Government, which replied in the following words:

"In general the answer to point XII is in the affirmative. As was said by His Majesty's Government in Great Britain in the memorandum enclosed in a note to the United States Government, dated the 24th April, 1916:

" 'His Majesty's Government attach the utmost importance to the maintenance of the rule that when an effective mode of redress is open to individuals in the courts of a civilized country by which they can obtain adequate satisfaction for any invasion of their rights, resource must be had to the mode of redress so provided before there is any scope for diplomatic action' " (*American Journal of International Law*, 1916, Special Supplement, page 139),

and the note goes on to point out that this is the only principle which is correct in theory and which operates with justice and impartiality between the more powerful and the weaker nations.

"If a State complies with the obligations incumbent upon it as a State to provide tribunals capable of administering justice effectively, it is entitled to insist that before any claim is put forward through the diplomatic channel in respect of a matter which is within the jurisdiction of these tribunals and in which they can afford an effective remedy, the individual claimant (whether a private person or a Government) should resort to the tribunals so provided and obtain redress in this manner.

"The application of the rule is thus conditional upon the existence of adequate and effective local means of redress. Furthermore, in matters falling within the classes of cases which are within the domestic jurisdiction of the State the decisions of the national courts in cases which are within their competence are final, unless it can be established that there has been a denial of justice (see answer to point IV)."

It is this rule which made it necessary to stipulate expressly in Article VI of the Convention that no claim should be set aside or rejected on the grounds that all legal remedies had not been exhausted prior to the presentation of the claim. But the rule must apply to those claims which do not fall within the terms of the Convention because they can not be rightfully presented.

14. For the reasons developed in the preceding paragraphs the majority of the Commission holds the view:

(a) That the Anglo-Mexican Claims Convention does not override the Calvo Clause contained in article 11 of the concession.

(b) That the fact, that this article includes more than the interpretation and the execution of the contract does not bring it into conflict with international law and invalidate it.

(c) That the concession would not have been granted without incorporating the substance of article 11 therein.

(d) That article 11 must be respected as long as there has been no denial of justice, undue delay of justice or other international delinquency.

(e) That the claimant never made any attempt to comply with the terms of article 11 and that, therefore, there can be no question of denial of justice nor of undue delay of justice.

(f) That it is one of the accepted rules of international law that the responsibility of a State under international law is subordinated to the exhaustion of local remedies.

15. The Commission decides that the case as presented is not within its jurisdiction. The motion to dismiss is sustained and the case is hereby dismissed without prejudice to the right of the claimant to pursue his remedies elsewhere.

Dissenting opinion of British Commissioner

1. The question of the legality of what is known as the Calvo Clause has been long discussed by international lawyers and a number of rather conflicting decisions have been given upon it by various international commissions, which decisions have been cited and debated before us by the Agents of both sides. It is, however, not necessary for me to refer to these decisions (except to remark that there is not one of them which has approved so extensive a clause as the one in this case), for the whole present legal view on the subject has been admirably set out in the lucid and fair judgment in the case of the *North-American Dredging Company of Texas*, pronounced by Dr. Van Vollenhoven, President of the General Claims Commission of the United States and Mexico, and concurred in by both his colleagues. See *Report*, Vol. 1, pages 21 to 34.

Not only would this opinion be worthy of the highest respect in itself, but the Agents of both parties have specifically stated before us that they agree in general with what is laid down therein as being a correct statement of the law in the matter. Moreover, the British Government has replied to the question put by the League of Nations on the subject of the codification of international law as follows:

Question.—"What are the conditions which must be fulfilled when the individual concerned has contracted not to have recourse to the diplomatic remedy?"

Reply of Great Britain.—"His Majesty's Government in Great Britain accept as good law and are content to be guided by the decision of the Claims Commission between the United States of America and Mexico in the case of the North-American Dredging Company of Texas of the 31st March, 1926, printed in the volume of the *Opinions of the Commissioners*, page 21. It is laid down in this opinion that a stipulation in a contract which purports to bind the claimant not to apply to his Government to intervene diplomatically or otherwise in the event of a denial or delay of justice or in the event of any violation of the rules or principles of international law is void, and that any stipulation which purports to bind the claimant's Government not to intervene in respect of violations of international law is void, but that no rule of international law prevents the inclusion of a stipulation in a contract between a Government and an alien that in all matters pertaining to the contract the jurisdiction of the local tribunals shall be complete and exclusive, nor does it prevent such a stipulation being obligatory, in the absence of any special agreement to the contrary between the two Governments concerned, upon any international tribunal to which may be submitted a claim arising out of the contract in which the stipulation was inserted."

The Commission, therefore, has no hesitation in accepting the decision referred to above as a guide to the determination of the present motion to dismiss, and it only remains to apply the principles there laid down to the facts of the present case.

2. The first point raised by the British Agency was that the effect of article 11 of the contract was cancelled or overruled by Article 6 of the Convention, which provides that the Commission shall not set aside or reject any claim on the grounds that all legal remedies have not been exhausted prior to the presentation of such claim.

I am not prepared to dissent from the view held by my colleagues that this defence to the motion to dismiss fails. It is quite true that a stipulation in a contract between the Mexican Government and a private party could be overruled by an agreement between the Mexican Government and the Government of which the private party is a citizen. But I think that it would have to be done in express terms. I agree with the opinion of the Commissioners in the Texas Dredging Company's case quoted in paragraph 11 of the majority opinion in this case, that the object of Article 6 was to relieve claimants entitled to present their claims to the commission from a general principle of international law, but not to grant jurisdiction to the Commission in respect of cases which they would otherwise not have power to hear. If the latter had been the intention of the British and Mexican Governments it would have been easy to add to Article 6 some such phrase as "Even when the claimant has expressly agreed to have recourse to such remedies." When a claim can properly be presented to the Commission in virtue of Article 3, full effect must be given to Article 6, but this latter would not render a claim cognizable which the Commission could not otherwise entertain.

3. Admitting, therefore, in principle, the validity of a clause of the nature of that contained in the contract of the present claimants, we must next consider the scope of the particular clause in question and the nature of the claim. Throughout the decision in the Texas Dredging Company's case and particularly in paragraphs 11, 22 and 23, it is stated that no general rule can be laid down as to the validity or invalidity of a clause partaking of the nature of a

Calvo Clause. It is the duty of the Commission to endeavour to draw a reasonable line between the sovereign right of national jurisdiction on the one hand and the sovereign right of national protection of citizens on the other. Each case involving application of a Calvo Clause must be considered and decided on its merits.

4. If a distinction is to be drawn between the Texas Dredging Company's case and this one, it can only be on one of two grounds—

(1) The difference in phraseology between the clauses in the two contracts; and

(2) The difference between the grounds on which the claims are based.

Dealing first with (1) it is necessary carefully to compare the two clauses. That in the Texas Company's case runs as follows:

"The contractor and all persons who, as employees or in any other capacity, may be engaged in the execution of the work under this contract either directly or indirectly, shall be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work and the fulfilment of this contract. They shall not claim, nor shall they have, with regard to the interests and the business connected with this contract, any other rights or means to enforce the same than those granted by the laws of the Republic to Mexicans, nor shall they enjoy any other rights than those established in favour of Mexicans. They are consequently deprived of any rights as aliens, and under no conditions shall the intervention of foreign diplomatic agents be permitted, in any matter related to this contract."

In the present case the clause is as follows: [1]

"The Company shall always be Mexican, even though some or all of its members may be foreigners and it shall be exclusively subject to the jurisdiction of the courts of the Republic of Mexico in all matters whose cause or action may take place within the territory of the said Republic. The Company itself and all foreigners and successors of such foreigners, having an interest in its business either as shareholders, employees or in any other capacity, shall be considered as Mexicans in everything relating to the Company. They shall never be allowed to assert, with respect to the securities or business connected with the Company, rights of foreign status, under any pretext whatever. They shall only have the rights and means of asserting them which the laws of the Republic grant to Mexicans, and in consequence foreign diplomatic agents will not be allowed to intervene in any manner."

A careful comparison of the two clauses shows that the latter is much wider and more stringent than the former. The words "In any matter related to this contract" and "In all matters concerning the execution of such work and the fulfilment of this contract", on which Dr. Van Vollenhoven lays much stress in paragraphs 13 and 14 of his opinion, are not to be found in the clause in this case. They are replaced by the phrases "In everything relating to the Company" and "With respect to the securities and business connected with the Company", while, most important of all, the prohibition of intervention by foreign diplomatic agents is not confined as in the earlier case to "Any matter relating to the contract", but is absolutely general.

5. I am quite unable to agree with the opinion of the majority of the Commission expressed in their paragraph 6, that there is no very marked and

[1] The translation is mine and differs slightly both from that in the copy of the contract presented by the British Agent and that contained in the Mexican motion to dismiss, which do not entirely agree with each other. (Note by British Commissioner.)

essential divergence between the two clauses, and I also find myself bound to dissent from the view expressed in paragraph 12 of the majority opinion as to the intention of the Calvo Clause in this case.

It appears to me impossible to doubt, from the terms of article 11 of the contract, that it was the intention of the Mexican Government to prevent the claimant's Government from intervening diplomatically or otherwise in any case in which the Company might have suffered loss in relation to its existence, business or property, even though such loss had arisen through a breach of the rules and principles of international law. This is precisely the object which, in Dr. Van Vollenhoven's opinion, as stated in paragraph 22, would render the provision void. The same point is still more emphasized in Mr. Commissioner Parker's concurring opinion and indeed is admitted by my colleagues in their paragraph 12.

I am therefore forced inevitably to the conclusion that article 11 of the Mexican Union Railway Company's contract is repugnant to the general principles of international law and is void *ab initio*. The Mexican Government had only itself to blame for this result when it insisted on the insertion into the contract of a provision, the object of which could not be justified under international law.

This conclusion is in some ways unfortunate, and it is doubtless this consideration which induced the United States and Mexican General Commission to make the suggestion contained in paragraph 17 of their opinion, of which the intention evidently was that a sort of standard clause should be drafted "Frankly expressing its purpose with all necessary limitations and restraints", so that it could only be in the case of a departure from such a clause that a difficulty would arise. With this desire I am in hearty sympathy.

6. But I do not wish to base my opinion solely on the considerations set out in the preceding paragraph. It appears to me to be the only conclusion consistent with the strict rules of international law. But in our decisions we are bound by the terms of the Convention and under it the Mexican Government has agreed to accept liability beyond that strictly laid down by international law in respect of all claims justified by the principles of justice and equity. It may therefore, I think, fairly expect to be treated in the same way and it seems to me consistent with these principles that when a particular clause in a contract purports to bind a party in a manner which would be illegal, the Commission need not consider such a provision absolutely void, but might hold that it still retains its force to the extent of its legal limits.

I should therefore be prepared to recognize the clause as binding the parties in the manner and to the extent laid down in paragraphs 15 and 20 of Dr. Van Vollenhoven's opinion, i.e., the Mexican Union Railway Company would possess only the same rights as a Mexican Company in all matters arising from the fulfilment and interpretation of the contract and the execution of the work thereunder, and the British Government would only be entitled to intervene in the case of denial of justice, delay of justice, gross injustice or any other violation of international law.

7. Having laid down these principles, it remains to apply them to the facts of the present claim. When confronted with propositions *(c)* and *(d)* of paragraph 15 of the decision in the Texas Dredging Company's case, the Mexican Agent admitted that when a Calvo Clause existed, a foreign Power might be entitled to intervene in the case of a denial of justice, but he contended that where an appropriate tribunal existed (and the Mexican Government has set up a National Commission with power to deal with claims of the nature of this one whether put forward by Mexicans or foreigners), no breach of inter-

national law could exist until the claimant had applied to the tribunal in question and failed to obtain justice there.

This somewhat novel view of international law I am unable to accept. It appears to confuse principles of law with methods of procedure. Both international law authors and commissions have given many examples of international wrongs, such as failure to protect lives and property of foreigners from violence, arbitrary proceedings of public authorities, illegal acts of public officials, &c., which constitute breaches of international law having no connexion with denial of justice, which may constitute a breach in itself, as, for example, if a court refused to hear and determine a claim of a foreigner against a local citizen.

It is true that in any of the above cases of international wrong it is laid down that where "adequate and effective local means of redress exist" the claimant must have recourse to them before asking his Government to put forward his claim through the diplomatic channel. See answer of His Majesty's Government to point 12 of the questions in The Hague Conference on the codification of international law. But this does not mean that the wrong does not exist *ab initio*.

The theory also is quite inconsistent with the decision in the Texas Dredging Company case, which refers, in paragraph 20 and elsewhere, to denials of justice and *any other* violation of international law, and states definitely in paragraph 23 that the Commission will take jurisdiction "where a claim is based on an alleged violation of any rule or principle of international law." The adoption of the Mexican theory would in fact render any form of the Calvo Clause legal however extensive, and that is precisely what Dr. Van Vollenhoven's decision declares must not be allowed.

8. This brings me to the only remaining point of divergence between my view and that of the majority of the Commission. They admit in paragraph 13 that some of the acts and omissions alleged to have caused the damage set out in the Memorial might in themselves constitute a breach of international law. This fact in itself appears to me to justify the intervention of the British Government and its presentation of this claim to the Commission. My colleagues, however, still consider that their jurisdiction is ousted by the failure of the claimants to avail themselves of the remedies open to them under the national law of the Republic of Mexico. To this view Article 6 of the Convention seems to me a complete answer. As stated above in paragraph 2, this Article cannot be used to grant jurisdiction to the Commission in respect of claims which could not properly be presented to them. But once it has been admitted that the British Government is entitled to espouse a particular claim and present it to the Commission, the article is intended to prevent a revival of the argument of the Mexican Government based on the admitted general principle of international law. This is evidently the meaning and intention of paragraph 21 of the decision in the Texas Dredging Company's case.

9. There is also a matter of practical importance that should be referred to. It is admitted by all parties that the rule that local means of redress must be utilized, whether arising from express contract or from the general principles of international law, is conditional upon their being adequate and effective. In the *Robert E. Brown* case it was stated that "a claimant in a foreign State is not required to exhaust justice in such State when there is no justice to exhaust". *(Ralston*, page 88, paragraph 117. Moore 3129.) Consequently this and every other international commission would have to assume the odious task of deciding whether the machinery set up in the defendant State was really capable of remedying the wrong done and whether any

particular decision could be reconciled with the principles of international law. A procedure of this kind would inevitably cause far more international friction than the assumption of jurisdiction by the Commission in respect of the claim itself. In this case no evidence has been offered as to whether the National Commission mentioned in paragraph 7 above during the eighteen years of its existence, has provided claimants with adequate and effective redress.

10. The conclusion, therefore, at which I arrive is that this claim being based on the violation of certain recognized principles of international law, the British Government is entitled to present it to the Commission and the latter has jurisdiction to determine it, provided the losses claimed do not arise solely from the fulfilment or interpretation of the contract or the execution of the work thereunder.

11. This brings us to the consideration of question (2), mentioned in paragraph 4 above, and again a very wide difference appears between the facts alleged in this case and those in that of the *Texas Dredging Company*.

In that case the claim was for breaches of the contract itself and the dispute was concerned with the interpretation of certain articles of the contract. Here the claim is chiefly based on tortious acts of revolutionary forces; on wilful destruction of the Company's property; on assaults on its employees and passengers; on commandeering of trains, &c. It appears to me impossible to consider these to be matters arising out of the execution of the contract. They cannot have been in the anticipation of the parties when they drafted the clause during the peaceful days of President Porfirio Díaz.

It is, of course, necessary to examine the facts and decide whether or not the allegations are proved before we can say whether the condition mentioned at the end of the preceding paragraph does or does not exist.

12. I cannot help feeling—though I say it with all respect—that my colleagues have been too much inflenced by what may be called the ethical aspect of the matter. They point out in paragraphs 8 and 9 of their opinion that it would be contrary to the principles of justice and equity to allow a claimant to appear before the Commission and ask for an award when he has definitely waived such right and has obtained a valuable concession by such waiver. This view is most reasonable and even laudable, but, in deciding this motion to dismiss, the Commission is dealing with an important principle of abstract international law affecting the rights of the Sovereign States who are the parties appearing before it and it seems to me, therefore, that we should not be influenced by the considerations mentioned above.

13. There is one other matter to which I feel it my duty to refer. During the hearing the Mexican Agent, evidently acting under direct instructions from his Government, stated that the question of the Calvo Clause was a vital one to the Mexican Government, and that if the Commission should take jurisdiction in this case, the Mexican Government would register a protest against such decision and would make a reservation as to its rights. I am unable to understand how the Mexican Government, after signing a Convention determining the powers of the Commission, can be justified in protesting against any decision at which they may arrive, unless, indeed, they suggest that the Commission has been acting corruptly.

The Mexican Agent proceeded further and referred to the attitude which the Mexican Government would adopt in the event of a hostile decision in this case, both with regard to the renewal of the mandate of the Commission—which in the absence of renewal expires next August—and towards the various

companies which, having signed the Calvo Clause, had presented claims to the Commission. Such a communication might, perhaps, have properly been made privately to the British Agency, but I cannot see any object in making it publicly to the Commission except in the hope of influencing their decision by considerations entirely extraneous to the merits of the question in dispute.

It is a well-known historical fact that the numerous international commissions that have been set up during the last hundred years have never allowed themselves to be intimidated or browbeaten by any Government, however powerful or influential.

This Commission will certainly prove no exception to the rule. It is needless to add that any threat which may be thought to have been contained in the communication made to them has had no influence whatever upon the decision at which they have arrived. It might, therefore, be considered better to ignore the matter altogether, as was done by the President of the Commission at the time and by the British Agent in his reply.

But I feel that the communication so made has a bearing on one aspect of the case. It was claimed by the Mexican Agency that the Mexican Union Railway Company should have submitted its case to the National Claims Commission referred to in paragraph 7 above. Seeing that the Mexican Government has thought fit to take the course here referred to with regard to this International Commission set up under a treaty, it is reasonable to suppose that it would not have hesitated to adopt similar or even stronger measures towards a National Commission set up by itself. This conduct goes far to explain and excuse the reluctance of the Mexican Union Railway Company and other foreign companies in a similar position to have recourse to the National Commission. It appears, therefore, to me to form an additional ground why this Commission should hold that the omission of the Company to submit its claim to the National Commission is not a bar to its presenting it here.

14. The majority of the Commission have summed up their views in paragraph 14 of their opinion, and it may be convenient similarly to summarize the points on which I agree with them or dissent from them.

I agree with proposition *(a)* that Article 6 of the Convention does not cancel article 11 of the contract.

I also agree with propositions *(c)* and *(e)*, which are questions of fact.

I disagree with proposition *(b)* and consider that the terms of article 11 of the contract are repugnant to the principles of international law.

Alternatively, I consider that article 11 should be respected only in the manner and to the limits indicated in paragraph 6 of my opinion, and to that extent I disagree with proposition *(d)*.

I agree with the general proposition stated in *(b)*, but consider that it has no application in this case in virtue of Article 6 of the Convention.

Conclusion

15. I am of opinion that the Commission has jurisdiction to decide any part of the claim which does not arise from the fulfilment and the interpretation of the contract or the execution of the work thereunder, and does not, therefore, accept the motion to dismiss, but will examine the merits of the claim on the basis laid down in this opinion.

SECTION II

PARTIES: Great Britain, United Mexican States.

SPECIAL AGREEMENT: November 19, 1926, as extended December 5, 1930.

ARBITRATORS: Dr. A. R. Zimmerman (Netherlands), Presiding Commissioner, W. H. Stoker, British Commissioner, Dr. Benito Flores, Mexican Commissioner until January, 1932, and G. Fernández MacGregor, Mexican Commissioner after January, 1932.

REPORT: Further Decisions and Opinions of the Commissioners in accordance with the Conventions of November 19, 1926, and December 5, 1930, between Great Britain and the United Mexican States. Subsequent to February 15, 1930. (H. M. Stationery Office, London, 1933.)

Decisions

THE INTEROCEANIC RAILWAY OF MEXICO (ACAPULCO TO VERA CRUZ) (LIMITED), THE MEXICAN EASTERN RAILWAY COMPANY (LIMITED) AND THE MEXICAN SOUTHERN RAILWAY COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 22, March 24, 1931. Pages 11-12.[1]*)*

PROCEDURE, RIGHT TO AMEND. Leave to amend a motion to dismiss *granted*, despite opposition of adverse Agent on ground that no new facts were advanced justifying allowance of motion and that sufficient time had been had to plead.

Comments: Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 103.

(Text of decision omitted.)

CORALIE DAVIS HONEY, ON BEHALF OF THE ESTATE OF THE LATE RICHARD HONEY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 23, March 26, 1931. Pages 13-14.)

DUAL NATIONALITY. Motion to dismiss *granted* when person suffering damage for which claim was made appeared to have dual nationality.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 231.

(Text of decision omitted.)

JAMES HAMMET HOWARD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 24, March 26, 1931. Pages 15-17.)

CONTRACT CLAIMS.—RESPONSIBILITY FOR ACTS OF FORCES.—FORCED OCCUPANCY.—JURISDICTION. Motion to dismiss claim for rental value plus cost

[1] References to page numbers herein are to the original report referred to on page 131.

of repairs of house occupied by revolutionary and Government forces, on ground said claim was contractual in origin and outside jurisdiction of tribunal, *overruled* when it appeared that house was forcibly occupied. Acceptance by claimant of small payments as rent will not render such forcible occupancy consensual in nature.

Cross-reference: Annual Digest, 1931-1932, p. 233.

1. The claim is presented by the British Government on behalf of Mr. James H. Howard, and the Memorial sets out that in the month of July 1914, Mr. Howard's house, situated in the town of Ameca (State of Jalisco), was occupied by Julian Real, first as a revolutionary leader and later as Municipal President. For several subsequent periods, up to July 1918, it was occupied by other persons, all fulfilling the position of Municipal President. During all this time part of the building was occupied by revolutionary forces and later by forces of the Constitutional Government. When the house was returned to the owner in July 1918, it was found that it had suffered considerable damage. During the time of the occupation Mr. Howard received at certain times rent at the rate of 15 pesos a month. The rental value of the house is in the Memorial estimated at 80 pesos a month, and the claim is for the cost of repair of the house and for loss of rent.

2. The respondent Government have lodged a motion to dismiss on the ground that as Mr. Howard received a rent from the various individuals who occupied his house, he entered expressly and implicitly into a lease with the tenants. Therefore the claim arises out of a contract, and the owner of the house ought to have sued the tenants before the competent authorities. Damages caused by private individuals, even though they may have had the capacity of civil or military authorities, cannot be claimed before a Commission having only jurisdiction to consider damages caused by revolutionary troubles.

In the opinion of the Mexican Government the Commission lacks competence to take cognizance of the claim.

3. In the course of his oral argument the Mexican Agent contended that, although in the first instance the occupation of the house may have been a compulsory act, it was converted into a contractual relation by the fact that the owner accepted a rent. His legal position was thereby altered and he ought to have addressed himself to the Mexican Courts.

The British Agent has argued that it is incorrect to state that the claimant received rent during the term of the occupation of his house, as he only received it at certain times. He never entered into any lease with the revolutionary forces or forces of a Constitutional Government, but he was forced by those in authority to cede them his house and to accept what they were willing to pay. This was much less than the rental value of the house, and the relation can in no way be construed as a contractual one.

4. The Commission thinks it necessary to state that until now it has not yet had to deal with the question whether it is competent to take cognizance of claims arising out of contractual relations. This question will have to be examined and decided as soon as a claim of this nature comes up for decision. In the case now under consideration, the Commission fails to see such a claim because it cannot concur in the view that there existed a contractual relation between the owner of the house and those who successively occupied it during a period extending to four years.

5. The Commission holds that the most essential element of a contractual relation is the voluntary character for both parties. If, however, the statements

of claimant are correct—which can only appear when the merits of the claim are under examination—there could not be assumed free will on the side of the owner. His house was occupied by authorities, civil or military, and he had no other choice than to cede it to them. The fact that now and then he received a certain amount from some of those who were in actual possession, does not change the compulsory character of the occupation nor convert it into a contract of lease. It seems only natural that claimant accepted what those in power were disposed to pay. It is not shown that he declared himself satisfied with these payments, nor that he has ever waived his right to claim for indemnification as soon as this might prove possible.

6. The motion to dismiss is overruled.

WILLIAM E. BOWERMAN AND MESSRS. BURBERRY'S (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 25, April 10, 1931. Pages 17-18. See also decision No. 18.)

NATIONALITY, PROOF OF.—PARTNERSHIP CLAIM.—CERTIFICATE OF NOTARY PUBLIC AS EVIDENCE. Certificate of notary public as to pertinent facts *held* sufficient proof of nationality of British partnership.

(Text of decision omitted.)

JOHN WALKER (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 26. April 10, 1931. Pages 18-21.)

RESPONSIBILITY FOR ACTS OF CIVIL AUTHORITIES.—JURISDICTION.—MOB VIOLENCE. Motion to dismiss in part *allowed*, in so far as claim was based on confiscatory acts of civil authorities, and in part *rejected*, in so far as claim was based on personal injuries from acts of mob violence. Jurisdiction of tribunal over latter portion of claim sustained.

(Text of decision omitted.)

DOUGLAS G. COLLIE MACNEILL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 27, majority decision, not concurred in by Mexican Commissioner, April 10, 1931. Pages 21-25.)

CALVO CLAUSE. To be effective a Calvo Clause must be drafted so as not to permit of doubt as to intentions of parties and must emanate from an act of the national Government and not from a local authority.

Cross-reference: Annual Digest, 1931-1932, p. 222.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 237.

1. The Memorial sets out that Mr. D. G. C. MacNeill is the owner of a system of tramways in Colima (State of Colima), known as the Ferrocarril Urbano de Colima, which he acquired by purchase in September 1904. The claim is for compensation for the requisition from the Colima Tramways of animals, fodder and passenger and freight cars by the Constitutionalist Army during the years 1914 to 1916 inclusive. The amount claimed is 1,637.05 pesos Mexican gold.

2. The case is before the Commission on a motion of the Mexican Agent to dismiss based on two grounds:

(a) The Commission is not competent to take cognizance of any damage sustained by claimant, inasmuch as the Government of the State of Colima granted the original concession for the construction and operation of the tramway system, with the particular condition that if the concessionnaires or any company they might organize should transfer their rights to any other company or private person, the said undertaking would preserve its character as a Mexican company and have no rights of alienage, even though kept up by foreign capital.

(b) Mr. MacNeill does not show proof that he is the owner of the Ferrocarril Urbano de Colima.

3. In the discussion between the two Agents it was contended on the Mexican side that the same reasons which urged the Commission to allow the motion to dismiss in the case of the *Mexican Union Railway* (Claim No. 36, Decision No. 21) were also decisive in this case. The Agent saw in the stipulation of the concession, on which he now relied, another instance of the so-called Calvo Clause, of the same meaning and force as article 11 of the concession granted by the Federal Government of Mexico to the Mexican Union Railway (Limited).

The British Agent pointed out that in this case the wording of the stipulation was so vague that it did not make clear its real meaning. Moreover, he argued that nothing showed that claimant, in taking over the concession, knew that he thereby deprived himself of his right to appeal to his Government.

As to the ownership of Mr. MacNeill, the Agent submitted a document described by him as a certified copy of the deed of sale of the Tramway to the claimant.

4. The Commission is faced with the question whether the arguments which led to the decision in the case of the Mexican Union Railway (Limited) must also induce them to allow the motion to dismiss filed in the case of Mr. MacNeill.

It is therefore necessary to examine and decide how far the two cases are similar.

In order to do this it is essential to compare the text of the stipulations in the two concessions.

Article 11 of the concession of the Mexican Union Railway (Limited) reads as follows:

"La empresa será siempre mexicana aun cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o en cualquier otro carácter, serán considerados como mexicanos

en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

Article 7 of the concession of the Ferrocarril Urbano de Colima reads:

"Séptimo: los concesionarios o la compañía que organicen, podrán traspasar sus derechos a otra compañía o a persona particular, con aprobación del Ayuntamiento, bajo el preciso requisito de conservar la empresa su carácter de mexicana y sin derechos de extranjería, aunque estuviere sostenida por capital extranjero." [2]

5. The Commission has always realized that its decision in the case of the Mexican Union Railway (Limited) was of a very serious, momentous and consequential character in so far as it deprived British subjects of their right to ask through their Government redress before this Commission for damage and loss, suffered in Mexico. But the words in which the concessionnaire had divested himself of the right, were so clear, circumstantial and detailed, that no other decision was justified. In the text of article 11 everything seems to have been foreseen; all the actions from which the concessionnaire undertook to abstain himself, are enumerated, circumscribed and detailed with a complete fullness.

A single glance at the text of article 7 of the concession now under consideration, will show that even assuming that the insertion of a so-called Calvo Clause was intended, this object could certainly not be achieved by the limited, vague and obscure wording of the paragraph, in which the stipulation was laid down.

That the undertaking was to preserve its character as a Mexican Company was certainly not an obstacle against an appeal to the British Government in case the capital were British. Consequently there remain only the words "and have no rights of alienage".

So far as the Commissioners know, the distinct meaning of "*rights of alienage*" cannot be found in the municipal laws of Mexico or Great Britain nor in any acknowledged rule of international law, nor in judgments of international courts. It is an expression which as yet does not allow of a clear and a well defined interpretation.

The majority of the Commission is therefore not able to understand what were the precise rights waived by the concessionnaire, and for this reason they

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[1] *English translation.*—"The Company shall always be a Mexican Company, even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any manner whatsoever." *(Translation from the original report.)*

[2] *English translation.*—"The concessionaries, or the Company which they organize, may transfer their rights to another Company or to an individual with the approval of the Corporation, under the precise condition that the business will preserve its Mexican character and without rights of foreigners, even if it may be sustained by foreign capital." *(Translation from the original report.)*

cannot accept a similarity between this clause and the clause inserted in the concession dealt with in decision No. 21.

The majority holds the view that a so-called Calvo Clause, to be respected in international jurisprudence, must be drafted in such a way as not to allow any doubt as to the intentions of both parties. The Commission cannot see that this has been done in article 7 of the concession.

6. The majority of the Commission has another objection against acknowledging the clause, on which the Mexican Agent relied.

The clause forms part of a contract between a concessionnaire and the Municipal Corporation of the town of Colima, a local authority. Although this contract has been approved by the Congress of the State of Colima, it is not a deed to which the United Mexican States have been party.

It is the opinion of the Commissioners that provisions affecting citizenship, the rights of foreigners, naturalization, etc., to be valid before an international tribunal, must emanate from treaties, the national legislation, decrees of the National Government, or deeds signed by or on behalf of such a Government. They cannot be regarded as valid, when they are stipulated by a local corporation, which is not entitled to dispose of such vital matters as the right of a concessionnaire to appeal to his Government.

7. The fact that in this case the clause was one of the conditions on which a municipal concession was granted, gives rise to another consideration.

The stipulation, on which the motion is based, is part of a contract to which the Mexican Government were no party.

The majority of the Commission considers this to be another very important discrepancy between this case and the claim of the Mexican Union Railway (Limited), which had contracted with the same Government against which the claim was directed.

Here the Government had nothing to do with the concession. For the Government the contract was *res inter alios acta*. From the Government is claimed compensation not for the non-observation of the contract, but for losses outside any contractual relation.

The majority of the Commissioners fail to see how the Government can derive rights from this contract to which they were not a party.

8. The Commission disallows the motion, invites the Mexican Agent to file his answer to the claim, and reserves its decision on claimant's ownership until the claim shall be examined on its merits. The Mexican Commissioner reserves his right to present a dissenting opinion.

MARY HALE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 28, April 10, 1931. Pages 26-27.)

NATIONALITY, PROOF OF. Evidence of nationality of widow of British subject *held* satisfactory.

(Text of decision omitted.)

WEBSTER WELBANKS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 29, April 10, 1931, majority decision, not concurred in by Mexican Commissioner. Pages 28-29.)

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY. Consular certificate and declaration of claimant's sister as to British nationality *held* sufficient evidence of nationality.

(Text of decision omitted).

J. H. HENDERSON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 30, April 23, 1931. Pages 30-31.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—CLAIM IN REPRESENTATIVE CAPACITY. Certified copy of will *held* sufficient evidence of capacity as heir and executrix.

PROCEDURE, DEMURRER. Demurrer *overruled* when grounds asserted therefor did not affect entire claim.

(Text of decision omitted.)

THE EAGLE STAR AND BRITISH DOMINIONS INSURANCE COMPANY (LIMITED) AND EXCESS INSURANCE COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 31, April 23, 1931. Pages 32-36.)

NATIONAL CHARACTER OF CLAIM.—INSURERS AS CLAIMANTS. British insurers of a Mexican firm *held* not entitled to claim for losses sustained by insured and paid by insurers. Insurers, by virtue of their professional character, are not to be viewed as other claimants.

Cross-reference: Annual Digest, 1931-1932, p. 216.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. The Memorial sets out that on the 21st April, 1920, the Excess Insurance Company (Ltd.) insured in favour of Messrs. Fernando Dosal y Compañía 1,000 bags of granulated sugar at 35,000 pesos Mexican gold. The bags of sugar were located on cars N.T. 3033 and 3240 of the National Railways for the journey from Union Hidalgo to Mexico City.

On the 26th April, 1920, the Eagle Star and British Dominions Insurance Company (Ltd.) and the Excess Insurance Company (Ltd.), each Company taking half of the risk, insured in favour of Messrs. Fernando Dosal y Compañía 1,300 cases of cube sugar valued at 51,000 pesos Mexican gold, for the journey from San Jerónimo to Mexico City. The cases were loaded into cars N.T. 3311 and 3312 of the National Railways.

On the 26th April, 1920, the Eagle Star and British Dominions Insurance Company (Ltd.) insured in favour of Messrs. Fernando Dosal y Compañía 500 bags of granulated sugar valued at 21,250 pesos Mexican gold, for the journey from Union Hidalgo to Mexico City. The bags were loaded on car N.T. 3450.

On the 4th May, 1920, cars Nos. 3240, 3300, 3312 (or 3112) were left at the Railway Station at Tierra Blance in the State of Veracruz. The garrison of the town had been withdrawn. Taking advantage of this fact, a body of unknown armed men entered the station and, assisted by several local inhabitants, looted the contents of the cars.

On the 3rd May, 1920, car No. 3540 was completely looted in the Railway Station at Tres Valles in the State of Veracruz.

The Agents of the claimants, after making the necessary investigation, were satisfied that the loss of the sugar had been sustained, and paid to Messrs. Fernando Dosal y Compañía on the 15th June, 1920, the sum of 89,510 pesos Mexican gold. Of this sum 42,880 pesos Mexican gold were for the account of the Excess Insurance Company (Ltd.), and 46,630 pesos Mexican gold were for the account of the Eagle Star and British Dominions Insurance Company (Ltd.).

The former amount is claimed on behalf of the Excess Insurance Company (Ltd.), and the latter on behalf of the Eagle Star and British Dominions Insurance Company (Ltd.), being a total of 89,510 pesos Mexican gold.

2. The Mexican Agent has lodged a motion to dismiss on the following grounds:

(a) The Memorial contains two different claims, and each one of the claims of the two Insurance Companies is made under several different heads. As article 3 of the Rules of Procedure provides that each claim shall constitute a separate case before the Commission and shall be registered as such, this provision has been infringed.

(b) As the British Agent has only sent a list of the documents in his possession and neither the originals nor copies, he has infringed article 6 of the Rules of Procedure, which provides that the Memorial shall be accompanied by all documents in support of the claim that may be in the possession of the British Agent, and also article 49 of the same Rules, which provides that five copies of each one of the said documents shall be filed.

(c) The right to file the claim belonged originally to the owners of the goods, Messrs. Fernando Dosal y Compañía, and said right was as a result of the payment of the insurance, and according to the Mexican law, transferred to the Insurance Companies. The right of the Insurer is not an original, but a derived right; he is subrogated to the right of the Insured, and his loss is not direct but indirect. Moreover, he has received a premium for the risk he undertook, and he certainly did not suffer the entire loss. As the party originally entitled to file the claim was a Mexican company, the claim did not arise as a British claim, and the Commission was for that reason not competent to take cognizance of it.

3. The British Agent replied as regards *(a)*, that it was true that the Rules of Procedure provided that each claim should constitute a separate case, but

not that each claim should be dealt with in a separate Memorial. Article 3 had been complied with as the claims had been registered separately. The two claims which arose out of the same subject matter were included in one Memorial solely for the convenience of the Commission.

As regards *(b)*, that it was incorrect to state that he had filed only a list of documents, because the annexes to the Memorial had been filed with the Joint Secretaries in July 1929.

As regards *(c)*, that, although the insured cargoes belonged to a Mexican firm, the losses fell entirely upon the insurers. The Agent's view was that, according to the terms of the Convention, the claimants were fully entitled to compensation, as they were British Companies having suffered losses in consequence of revolutionary events.

4. The Commission, as regards *(a)* and *(b)*, concurs in the view that the Rules of Procedure have not been infringed, because *(a)* the claims have been filed and registered separately, and *(b)* the annexes to the Memorial have been filed in due form and in due time.

5. The principal question dividing the two Agents is as to whether the insurers are entitled to claim before the Commission for insurance money paid by them to insured parties, even if those parties, i.e., the original sufferers, did not possess British nationality.

The Commission sees a great difference between the position of Insurers and that of other claimants, although they are in a similar position in so far as the losses suffered by both of them can be traced to certain events. But that is where the similarity ends.

Other claimants—assuming that the facts are proved—have suffered losses directly, unexpectedly and unwillingly. Insurers suffer losses indirectly as a consequence of a contract, into which they have entered voluntarily, professionally, in the normal and ordinary course of their business and in consideration of certain payments. They suffer losses not in the first place and just because certain events have occurred, but because, in their legitimate desire to subserve their own financial interests, they have undertaken to run the risk of those events.

It seems difficult to look at Insurers in the same light as at other claimants. They who, as a professional act and with a view to make profit, undertake risks, to which other persons are exposed, who in order to cover those risks, stipulate for the payment of certain sums of money, balanced in the course of a long experience in proportion to the extent of the danger incurred, who direct an entire organization based on the existence of risks, which would be useless in the case of their absence, and who are finally able to assume such chances and to calculate such premiums as will ultimately result in a profit on the whole volume of their transactions, cannot be regarded as entitled to compensation on the same footing as persons to whom the occurrences which gave rise to the claim were an unforeseen calamity.

6. The professional character, in which Insurers apply for compensation, makes it more difficult to determine the amount of the loss than in the case of other claimants. Very often this amount will not be equal to the amount paid by them to the insured party, because it will be dependent upon the premiums received. It will also be dependent upon another circumstance. It is universally known that Insurers are working on a vast system of reinsurance, by which they, on the one hand, take over part of the risks insured by other Companies, while, on the other hand, they cede part of their own contracts to those other Companies. As a consequence of this system the surface over which the risks are really spread is often very extensive. It may not be confined to the Com-

panies of one country, but may be international. For this reason it is quite possible that, although the insurance contract was signed and the amount paid by a British Company, the ultimate loss was divided over many corporations, of which one or more may have another nationality. Consequently the decision on the nationality of the claim from its inception until now does not depend solely upon the nationality of the Insurer claiming, but would also require an investigation of the reinsurance contracts, subdividing the profits and losses from the original insurance.

7. The view may be taken—as is laid down in several codes—that the Insurer is, by the payment of the insurance money, subrogated to the right of the Insured, and that he is entitled to such compensation as was due to the latter, but at the same time it is evident that he can never exert any rights that did not belong to the Insured.

In the case now under consideration, the Insured party was a Mexican firm not entitled to claim compensation from their Government under the terms of the Claims Convention. By declaring themselves competent to adjudicate upon this claim, the Commission would grant to the Insurance Companies a right which the firm that suffered the loss did not have. There would be laid upon the Mexican Government a liability towards another Government, which would not have arisen out of the events had not the said firm entered into a contract to which the Mexican Government were not a party.

The Commission cannot believe that this would be a just or even a reasonable application of the Convention.

8. The motion to dismiss is allowed.

ANNIE BELLA GRAHAM KIDD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 32, April 23, 1931. Pages 36-39. See also decision No. 3.)

RESPONSIBILITY FOR ACTS OF BANDITS.—FAILURE TO SUPPRESS OR PUNISH. When Mexican authorities, upon being informed of killing of claimant's husband by bandits, took prompt and energetic action resulting in arrest and execution of six or eight men, claim *disallowed.*

1. This is a claim for compensation for the murder of William Alfred Kidd at El Carrizal, near Zitácuaro.

The Memorial sets out that on the 8th October, 1916, between 10 and 11 in the morning, Mrs. Kidd was in her house at El Carrizal Camp. Eight or ten men, who appeared to be of the Mexican Army, but might have been revolutionaries, arrived and started shooting. Mrs. Kidd went out to see what was happening, and these men demanded that they be given arms and horses. Mrs. Kidd replied that there were two horses, but no arms. The men then asked for Mr. Kidd, and on learning that she did not know where he was they took her into the house and commenced to search for arms. About this time Mr. Kidd arrived, and with his wife gave these men some food. After this certain members of the band began to disperse, while a few remained in the room. One of the band ordered Mr. and Mrs. Kidd and David Kidd, Mr. W. A. Kidd's brother, to stand up for execution. On being asked why they insisted on killing them, the leader replied that he was anxious that nothing should happen,

but that they required a horse belonging to Mr. W. A. Kidd. Mr. W. A. Kidd replied that it would be there soon as it was in the stable and turning around as though to order the servant to bring the horse he fell, shot by one of the band. Mrs. Kidd, with David Kidd, then made their escape, and hid in the neighbourhood. On returning afterwards they found that everything in the house had been taken except some crockery and flour. As a result of the murder of her husband, Mrs. Kidd, with five minor children, was left without means.

The late Mr. William Kidd had been earning an average of 300 pesos a month.

The amount of the claim is 75,000 dollars, Canadian currency, being 25,000 dollars in Mrs. Kidd's own right, and 50,000 dollars, or 10,000 dollars for each one of the five minor children.

2. The Mexican Agent opposed the claim in the first place because under article 11 of the Rules of Procedure, Mrs. Kidd could only, in her own right and as the legal representative of her minor children, claim for Mr. Kidd's death and not for any damage she may have sustained to her property, as the claim under this latter head should have been presented by the executor or administrator of Mr. Kidd's estate.

The Mexican Agent at the same time maintained that Mr. Kidd's murder was committed by a band of brigands and that the Mexican authorities proceeded with the necessary activity in repressing this act of brigandage, by pursuing and properly punishing the perpetrators. He produced documents showing that the Governor of the State had at once given orders to the military authorities to prosecute the bandits and to shoot them in case they were arrested. Eight of the bandits were, as a result of those instructions, taken and shot.

The fact that the murderers wore uniforms did not prove that they were part of the regular army, because soldiers, who went over to rebel forces, kept their military equipment.

The said Agent also denied that the amount of the loss suffered by Mrs. Kidd and her children had been duly proved.

3. The British Agent stated that the claim was only for the death of Mr. Kidd and therefore that it conformed to article 11 of the Rules of Procedure.

As regards the responsibility of the Mexican Government, under subdivision 4 of Article 3 of the Convention, the Agent pointed out that it had not been proved that the measures, taken by said Government, had been sufficient to repress the brigandage and to punish those who were guilty of the murder. Moreover it was his opinion that the individuals, who committed the murder, were neither brigands, nor bandits, but that they belonged to the forces of the Carranza Government. For this reason they fell within the terms of subdivision 1 of Article 3 of the Convention and it was not necessary to prove that the authorities were to be blamed.

This Agent considered the amount claimed as fair, reasonable and in proportion to the late Mr. Kidd's financial situation.

4. The Commission states that there is sufficient proof of the murder of Mr. Kidd in the circumstances described in the Memorial, but that for the adjudicating of the claim it is necessary to know whether the men, guilty of that act, formed part of the Government forces or not.

All the contemporary evidence points in the direction that the murderers were bandits. The Commission refers to the letter from the British Chargé d'Affaires to the Governor-General of Canada, dated the 23rd October, 1916 (annex 5 of the Memorial), to the Record of the Proceedings in the Constitutionalist Courts of First Instance of the District, dated the 9th October, 1916 (annex 6

of the Memorial), and to two documents filed by the Mexican Agent and containing the evidence of several witnesses interrogated in 1929. In all these papers no mention is made of soldiers, but only of bandits. It is only in affidavits sworn by claimant and her brother-in-law in the year 1924 that the view is taken that the men who killed Mr. Kidd belonged to the Mexican Army.

The Commission cannot but accept the contemporary version.

5. This being the case, the claim can only, according to the fourth subdivision of Article 3 of the Convention, be allowed if it has been established that any omission or negligence in taking reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same, has existed on the part of the competent authorities.

As regards this point, all the documents, mentioned in the preceding paragraph are unanimous in stating that the authorities, after having been informed, at once took prompt and energetic action. The Governor instructed the Military authorities to pursue the bandits and, if the culprits were caught, to shoot them at once. The result was that six or eight men were arrested and executed.

For this reason the Commission cannot admit that the authorities have been to blame. They obviously did all that was in their power and their diligence was crowned with success. The claim is therefore not covered by subdivision 4 of Article 3, nor by any other provision of the Convention.

It is not without reluctance that the Commissioners have been led to this conclusion. There is no doubt that Mr. Kidd was murdered in a most brutal manner, that by this atrocious act a young and prosperous family was entirely ruined and that an unfortunate widow and five minor children were left without means of subsistence. The Commissioners would heartily welcome any way which might be found to give compensation to this unhappy widow, but they deeply regret that, acting in a judicial function and tied to the wording of the Convention, they are not at liberty to grant an award.

6. The claim is disallowed.

DAVID ROY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 33. April 24, 1931, majority decision. Pages 39-42.)

RES JUDICATA.—EFFECT OF AWARD RENDERED BY MEXICAN NATIONAL CLAIMS COMMISSION. Prior to the date of the *compromis*, a claimant had received 15,000 pesos Mexican on account of his claim from the Mexican Government, filed his claim with the Mexican National Claims Commission, a domestic tribunal, and received an award of 60,000 pesos Mexican from the Commission, less the 15,000 pesos Mexican previously paid. Motion to dismiss claim, filed in sum of 103,601 pesos Mexican, *disallowed*, but tribunal will take into consideration in decision on the merits the prior judgment of the Mexican National Claims Commission.

Cross-reference: Annual Digest, 1931-1932, p. 39.

1. This claim is presented on behalf of Mr. David Roy, for losses and damages sustained by him on his farm known as "Tres Hermanos" in the Municipality of Camoa, District of Aldama, State of Sonora.

It is alleged that in March 1913, revolutionary forces under the command of General Benjamin Hill entered upon the claimant's property and took posses-

sion of all the cattle, the wheat crop from the previous year, which was stored, and turned his horses loose into the wheat which was about to be harvested. General Hill forcibly discharged the farm superintendent and put in his place a Mr. Blas Gil, as representative of the State of Sonora.

On the 9th March, 1914, Mr. Roy filed, with the British Vice-Consul, a claim for 197,258 pesos Mexican, but subsequently, after the 30th August, 1919, the date of the Decree of the Mexican Government establishing the National Claims Commission, he filed a claim with the Mexican National Claims Commission for a sum of $103,601.00 pesos, Mexican currency. After consideration thereof by that Commission he was awarded on the 17th July, 1925, a sum of $60,000.00 pesos Mexican. The claimant had received previously to this award $15,000.00 pesos, Mexican currency, but this, by the terms of the Award, was to be taken as in part liquidation of the Award of $60,000.00 pesos Mexican. No sums whatever were paid by the Mexican Government to Mr. Roy after the date of the Award before referred to. The British Government now claim the sum of $103,601.00 pesos Mexican less $15,000.00 pesos Mexican already received as aforesaid.

2. The Mexican Agent has lodged a Motion to Dismiss the present claim on the ground that the Commission is not competent to take cognizance of this case, because the claim had been settled by the decision of the Mexican National Claims Commission, by reason of the claimant having expressly agreed with this decision and by his having received $15,000.00 pesos Mexican as part of the compensation awarded to him.

3. The Mexican Agent stressed his point orally by arguing that since the National Commission had rendered a decision, and since Mr. Roy had signified his conformity thereto, he could not now claim compensation for losses or damages, but only the execution of a judgment, which falls outside the jurisdiction of the Anglo-Mexican Special Claims Commission. This Commission was, in the opinion of the Agent, here faced by "res judicata", a matter it was not competent to adjudge for a second time. Mr. Roy's claim had become merged in the Award of the National Claims Commission, and payment of the amount, therefore, would become the subject of direct negotiations between the two Governments, but could not be asked before this International Tribunal.

4. The British Agent denied that the claim had been liquidated. He pointed out that the judgment of the National Commission was dated the 17th July, 1925, that the first payment had been made previously, and that since then no other payment had followed. He—the British Agent—was not asking for the execution of a judgment, but for compensation for the losses suffered by Mr. Roy. He therefore did not claim the unpaid balance of the amount of $60,000.00 pesos Mexican, but $103,601.00, that being the amount originally asked by claimant before the National Commission, less $15,000.00 pesos. The Agent could not find a single clause in the Convention, which would prevent the Commission from taking cognizance of a claim, in which the National Commission had rendered a decision. He was not appealing from that decision, but had filed an original claim of the same nature as many others.

5. The Commission are called upon to answer this fundamental question: what is the relation between themselves and the Mexican National Claims Commission? They believe that the answer to that question can only be found in the Convention.

The National Commission was created, functioned and rendered judgments before the Claims Convention was entered into. If the intention of the contracting Parties had been that the work of the National Commission was in any way to interfere with the jurisdiction of the International Tribunal which they were about to create, it would have been natural to expect that they would have expressed their intention in the Convention. This was not done, and it was even agreed in Article 6 that no claim shall be set aside or rejected on the ground that all legal remedies had not been exhausted prior to the presentation of the claim.

The absence of any clause establishing a connexion between the jurisdiction of the one Commission and that of the other, may be easily explained if the reason which gave rise to the Convention be taken into consideration.

The National Commission was an institution which had to examine and decide all claims for compensation for revolutionary losses and damages, whether suffered by Mexican citizens or by aliens. It seems obvious that the various Claims Conventions were concluded because the foreign Governments desired that a means of redress of another character be open to their subjects for the adjustment of their claims. This means of redress was found in an International Commission possessing a strong neutral element.

In this respect the Convention gave to British subjects a right which they did not possess under the Decree which created the National Commission, and one not possessed by Mexican citizens either. In another respect they also received a new right in so far as the payment of the compensation was no more an act, dependent on the discretion of one Government or on that of the authorities of one State, but was converted into an international liability, i.e., a liability of one State towards another State.

The majority of the Commissioners hold the view that, had the two Governments desired to exclude from these rights British subjects who had already applied to the National Commission, this would certainly have been expressed in the Treaty.

The view taken in this case by the Mexican Government, would mean that those British subjects, who—at a time when no other court existed—had resorted to the National Commission, had *ipso facto* and beforehand waived rights which the Convention subsequently concluded gave to their compatriots.

The majority of the Commission cannot concur in this opinion, and they can find in the Convention no stipulation supporting it. For this reason they cannot admit that the jurisdiction of the Commission is limited to the claims not submitted to the National Commission, or not adjudicated upon by that body.

This opinion is not affected by a claimant's agreement to the award, in this case given before the Claims Convention was concluded, i.e., at a moment when alien claimants could seek no other means of redress than the National Commission. Moreover, the total amount of the award has not been paid, and the Commission would, by declaring themselves incompetent, place the claimant, as regards the unpaid balance, in a weaker position than that he would have found himself in had he not sued before the National Commission, and in a weaker position than those claimants to whom our Commission has granted or may grant awards.

In taking the view that the jurisdiction of the National Commission can have no legal or other bearing, originating in the treaty, on the acts of this Commission, the majority at the same time fully realize that the judgments of the former may have great weight for the decisions of the latter, principally because the examination of claims by the National Institution took place at a time less remote from the occurrence underlying the claim.

For this reason the decision already delivered in the claim of Mr. Roy will have to be carefully studied as it may furnish valuable material for judgment on the claim on its merits.

At the same time, the Commission wish it to be understood that the amount already received by claimant, will of course be taken into consideration in fixing any award which the Commission may feel justified in allowing.

6. The Motion to Dismiss is disallowed.

The Mexican Commissioner expresses a dissenting opinion.

CARL OLOF LUNDHOLM (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 34, April 28, 1931. Pages 43-44.)

RESPONSIBILITY FOR ACTS OF FORCES.—MILITARY ACTS. *Held,* no responsibility existed for acts of forces engaged in a battle taking place in the course of a rebellion, whether such forces be governmental or rebel.

The Memorial filed by the British Agent claims compensation for damages suffered by the claimant, Carl Olof Lundholm, a British naturalized subject, to his house at Coyoacan during a battle in February 1915 between the Constitutionalist forces and the Zapatista army, and for the robbery and destruction of the furniture and fittings of the house by Zapatistas, who afterwards took possession of the house.

The Memorial sets out the facts relative to the acquirement of the house and furniture and relates the occurrences giving rise to the claim. In February 1915 the Constitutionalist forces were established on the River Churubusco and a battle was fought between them and the Zapatista army on the ranch "Tasqueña". During the battle the house suffered serious damage, its walls and roof being pierced by shells. The Zapatistas, in order to dislodge the Constitutionalist forces from Coyoacan, took possession of the house. They took away all movables and destroyed the installation of water and light and carried away the iron-work of the doors and windows. The claim was for a total of 17,670 pesos (Mexican gold) arrived at as set out in the Memorial.

2. The claim was partly heard on its merits by the Commission during the term of the Convention, dated the 19th November, 1926, and further hearing was adjourned for the cross-examination of witnesses. This having taken place, also under the Convention of the 19th November, 1926, the claim came up for further and final hearing before the Commission under the Convention dated the 5th December, 1930, as now constituted.

3. The British Agent then stated that he did not desire to argue further the case, because if the damage was caused by Constitutionalist forces, it must be considered as the consequence of a lawful act of war, and if it was caused by Zapatistas, it did not fall within subdivision 4 of Article 3 of the Convention of the 5th December, 1930, as the fighting itself proved that there was no negligence on the part of the Government.

4. The Mexican Agent did not, in these circumstances, address any argument to the Commission on the merits of the claim, but asked the Commission in its decision to classify Zapatistas, the Mexican contention being that these

were not included in any of the subdivisions of Article 3 of the Convention of the 5th December, 1930, the date of the occurrence in this case being subsequent to November 1914.

5. The Commission decide that it is not necessary for the purposes of this case, in view of the statement and admission of the British Agent, to make any classification of Zapatistas and their position, but that it is sufficient to say that they do not see how the British Agent, on the facts of the case, could have taken any other course than he did, and they dismiss the claim under review, making no declaration or classification of the position of Zapatistas.

6. The claim is dismissed accordingly.

HERBERT CARMICHAEL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 35, April 29, 1931. Pages 45-48.)

NATIONALITY, PROOF OF.—NOTARY PUBLIC'S CERTIFICATE OF NATIONALITY AS EVIDENCE. Certificate of Canadian notary public *held* insufficient proof of nationality.

Cross-reference: Annual Digest, 1931-1932, p. 424.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

1. This is a claim for compensation for the losses and damages suffered by Herbert Carmichael on the Hacienda Coacoyolitas, in the State of Sinaloa, and Las Mariquitas o Romeros in the State of Nayarit, during the years 1915-19 inclusive.

The Memorial sets out that in December 1912 Herbert Carmichael purchased through Messrs. Francisco Echeguren y Cia. Sucrs., of Mazatlán, in the State of Sinaloa a property situated in the State of Nayarit, known as Las Mariquitas o Romeros, for the sum of 26,000 pesos Mexican gold. This property was paid for in full by the claimant. Owing to the revolution and the withdrawal of land registry facilities from Acaponeta the claimant was unable to secure the registration of his clear title to the property. At the time of purchase Las Mariquitas contained a large brick hacienda, outbuildings, a sugar mill, agricultural machinery and implements, live-stock and growing crops. The estate was operated for little over a year, when revolutionary parties and bandits overran the country and drove off his major-domo and the peons. The claimant has made many attempts to operate this property without success, and the last man who ventured on the property for purposes of its welfare was murdered. No effort was made by the Mexican Government or its officials to afford protection in this very disturbed area. The claimant sold his property in 1923 for the sum of 5,000 pesos. Loss on this property was therefore at least 21,000 pesos.

On the 15th February, 1913, Herbert Carmichael purchased from Señor Federico Ramirez of Mazatlán a portion of the property known as Coacoyolitos, Pitayas and Laguna Larga in the State of Sinaloa. The purchase price was 35,000 pesos gold, of which 20,000 pesos gold was paid in cash, and interest at the rate of 8 per cent per annum on the balance has been paid up to June

1919. On the 27th April, 1913, Mr. Carmichael purchased from Señorita Lina Hernandez of Chametla in the State of Sinaloa, another portion of the estate of Coacoyolitos, for the sum of 15,000 pesos, of which he paid 10,500 and interest on the balance up to the 29th April, 1914. On these two portions of the Coacoyolitos estate the claimant erected a brick hacienda, installed farm machinery, including a 60 horse-power Holt steam tractor, and purchased live-stock. The total sum expended on improvements amounted to 12,000 pesos gold. This property was the scene of continued conflict between Government forces and revolutionaries. The major-domo of the hacienda was murdered on the property by bandits. In view of the state of affairs, cultivation of the property was impossible, and most of the crops which had been sown were lost. Mr. Carmichael came to an arrangement with Señor Ramirez on the 12th September, 1918, by which the time for the payment of the balance of the purchase price was extended for three years from that date. The interest was paid in full to the end of June 1919, when a revolution again broke out in Mexico. At this time Mr. Carmichael was attached by the Banco Occidental de Mexico in Mazatlán, which placed an embargo on the property in connexion with a debt contracted by some people for business which had no connexion with Mr. Carmichael or his property. The bank took possession of the properties, but after short legal proceedings agreed to withdraw their action. The bank immediately afterwards purchased the interests of Señor Ramirez and demanded immediate payment of the balance of the purchase price, and at once served Mr. Carmichael with foreclosure papers. The bank were unable to obtain a clear title, and later Mr. Carmichael sold the ranch for a small sum.

In April 1913 Mr. Carmichael purchased from Señora Cruz Diaz, of Chametla, for the sum of 1,000[1] paid in cash, a small property near his other properties.

In 1913 the claimant and his representative entered into active working of all the above-mentioned properties, but owing to revolutions he was unable to proceed. He then operated on the Medias system with local Mexicans without success. In June 1919, when conditions appeared settled, Captain William Maurice Carmichael, a son of the claimant, was proceeding to Mexico with the sum of 30,000 United States gold dollars for the purpose of entering into occupation of the properties and paying off all indebtedness of principal, interest and taxes. On his arrival at San Francisco and while waiting for a ship to Mazatlán the revolution broke out and Captain Carmichael was forced to abandon the project. Immediately before leaving for Mazatlán Captain Carmichael had refused an offer from Mr. Luis Bradbury to purchase these properties as it was his intention to live on the properties. After he had been forced to abandon his project Mr. Bradbury declined to renew negotiations for purchase.

The claim was first registered at His Majesty's Consulate-General in Mexico City on the 15th November, 1920. This claim was for the sum of 78,360 pesos Mexican gold, being the purchase price, interest and losses of the claimant on these properties. In addition to this an indemnity, which was not specified, for being driven off the property was claimed. As an alternative it was suggested that the Mexican Government should reinstate Mr. Carmichael as holder of these properties, giving him clear titles and satisfying all outstanding claims against him on account of law suits, arrears and taxes and giving him five years of freedom from taxation in respect of these properties, in return for which Mr. Carmichael would forgo any claim for indemnity for loss of stocks, crops, machinery, implements or improvements. Since the date of this state-

[1] No currency indicated in original report.

ment of claim Mr. Carmichael has disposed of all his properties in Mexico. On the Mariquitas property the claimant has lost at least 21,000 pesos gold. This loss is merely the difference in the purchase price and the selling price. No account has been taken of the loss of interest on this money or of the reasonable profits of working this estate. On the Coacoyolitos property Mr. Carmichael estimates that he has lost about 70,000 pesos gold. The minimum amount of the claim is therefore 91,000 pesos gold, to which should be added compensation for being driven off these properties and the consequent loss of interest and livelihood. Three quarters of the capital for the purchase and improvement of these properties was provided by the claimant. The remaining quarter was provided by a partner.

His Majesty's Government claim on behalf of Robert Carmichael the sum of 68,250 pesos Mexican gold, being three-fourths of the total losses, together with such compensation for the loss of interest and livelihood as the Commission may consider equitable.

2. The Mexican Agent has lodged a demurrer on the ground that Mr. Herbert Carmichael's British nationality has not been established. The Agent does not accept as sufficient proof the certificate issued by a notary public in the Dominion of Canada.

3. The British Agent alleged that this document was sufficient proof to establish the British nationality of the claimant.

4. The Commission do not feel at liberty to attach to the certificate of a notary public the same value in matters of nationality as to a consular certificate. As regards the latter instrument they refer to the following passage of their decision No. 1 *(R. J. Lynch)*:

"4. A consular certificate is a formal acknowledgment by the agent of a sovereign State that the legal relationship of nationality subsists between the State and the subject of the certificate. A Consul is an official agent working under the control of his Government and responsible to that Government. He is as a rule in permanent touch with the colony of his compatriots who live in the country to which he is assigned, and he is, by virtue of his post as Consul, in a position to make inquiries in respect to the origin and antecedents of any compatriot whom he registers. He knows full well that the registration of a compatriot entitled to all the rights of citizenship is a step which imposes serious obligations upon the State which he serves. That circumstance in itself is an inducement to him to see that the registration must be attended to with great care and attention."

None of the guarantees which are offered by a consular certificate and which induced the Commission to accept it as *prima facie* evidence are presented by the document on which the British Agent relied.

A notary public, although a public servant, cannot be considered as an agent working under the permanent control of, nor as being in continuous touch with, the Government. The keeping of a register of British subjects does not form part of his official duties. Neither does his normal professional work, nor his previous training therefor, include frequent contact with questions of nationality. His function gravitates in civil law, not in public or international law. To his declarations in matters of citizenship no preponderating value can be attached.

5. The demurrer is allowed, without prejudice to the right of the British Agent to produce further evidence.

EDWARD LE BAS AND COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 36, April 29, 1931. Pages 48-51. See also decision No. 5.)

OWNERSHIP, PROOF OF. Claim *disallowed* for lack of evidence of ownership.

(Text of decision omitted.)

JAMES F. BARTLETT (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 37, May 13, 1931. Pages 51-53.)

IDENTITY OF CLAIMANT. When evidence raises question as to whether claimant was the same person as the one who suffered damage, an unsworn statement of another person as to claimant's identity *held* insufficient evidence to remove doubt.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY. Failure to drive out rebels in remote territory within one month *held* no negligence on part of respondent Government.

1. The British Government on behalf of James F. Bartlett claim the sum of $4,209.35 Mexican gold, for damage sustained by him at Alamo, Lower California, where (as he alleges) under the name of James F. Morgan he was the proprietor of a store and restaurant. It is stated that on the 23rd March, 1911, a band of Mexican rebels commanded by one Guerrero invaded his store and took 800 dollars and the articles itemized in annex 1; that the said rebels destroyed the roof of the store, the hen-house, a shed, two windows and a back door, that the town was in the possession of the rebels from the 24th March to the 24th April, 1911, and that he was during that period, forced to board ten rebels under order of Captain Moseby; that he suffered the damage incident to the stoppage of his business due to the invasion in question, under which head he also claims. He accuses the Mexican Government of not having sent troops until the 23rd June, 1911. The said claimant states that in 1911 he filed the same claim with the Comisión Consultiva de Indemnizaciones on the 12th September, under the name of James F. Morgan, but that he had obtained no result.

2. The British Government base their claim on the statements of the claimant himself and on those of certain witnesses, Max J. Weber, Henry Finel and C. B. McAleer; on a certificate of F. Simpich, American Consul, and of W. D. Madden, British Consul at Ensenada, Lower California, as regards the damage claimed for; but in order to establish the fact that J. F. Bartlett, in whose name the claim is filed, is the same person as J. F. Morgan, that being the name by which the claimant was known in Mexico, an unsworn statement by one John Shapley made before the Mayor of Windsor is produced. The claimant also submits a birth certificate in which he appears under the name of James Frederick, the child of George Bartlett and of Elizabeth Morgan, and as born in 1840.

3. The Mexican Agent answered by asserting that, to begin with, no proof had been shown that James F. Bartlett, who does prove that he was a British subject, and James F. Morgan, who sustained the damage, are one and the same person. He further maintains that the evidence of the witnesses filed in support of the claim, lacks probative value, and attaches to his Answer annexes Nos. 1, 2, 3, 4 and 5 which contradict the statement made by the claimant, and from which it is apparent that the invaders of Alamo were filibusters. He also adds that even though the alleged facts were actual facts, they could not give rise to a claim because they were committed by bandits and because it has not been shown that the Government of Mexico were negligent nor that they were in any way to blame in connexion therewith. Lastly the Mexican Agent maintains that the amount of the claim has not been proved and that losses of profits and expenses incurred in the presentation of the claim cannot, under the Convention between Mexico and Great Britain, be taken into consideration. Lastly, he requests that the claim be disallowed and that the Government of Mexico be absolved.

4. When this case came up before the Commission, the British Agent asked that judgment be rendered against the Government of Mexico for payment of the sum claimed, seeing that annexes 3, 4 and 5 were sufficient proof for the claim.

5. The Mexican Agent upheld the Answer filed by him to the claim and stressed the fact that the identity of the person claiming with the person who sustained the damage, had not been demonstrated, and that the Government of Mexico could not be accused of negligence, for as the events which gave rise to the claim took place at Alamo, Lower California, a place difficult of access from the rest of the Republic and more especially from the City of Mexico where the seat of Government is situated, it was not easy immediately to suppress the filibustering invasion which took possession of that town, and the protection as well as punishment was given in good time by executing several of the filibusters. He maintained that there was no evidence of negligence on the part of the Mexican Government in suppressing these acts.

6. The discussion of this case once closed, the Commission took upon themselves the task of rendering the necessary decision and agree:

That the identity of the claimant has not been established and consequently that it has not been proved that James F. Bartlett and James F. Morgan are one and the same person. The Commission hold that the unsworn and very bare statement made without adequate and particularized foundation of John Shapley is not sufficient to corroborate the assertion of the claimant to that effect, and that this sole consideration would in consequence be sufficient reason in itself for dismissing the claim; but the Commission further hold that even on the supposition that the identity of the claimant with the person who sustained the damage had been proved, no negligence on the part of Mexico in suppressing the filibustering acts that took place at Alamo, Lower California, has been proved, as in view of the great distance and difficult communications it was impossible for the Government to have done more than it did, in driving out and punishing the filibusters one month after the invasion.

7. In view of the above considerations, the Commission disallow the claim preferred against the Government of Mexico by the British Government on behalf of James F. Bartlett.

RUTH M. RAEBURN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 38, May 13, 1931, dissenting opinion by British Commissioner, May 13, 1931. Pages 54-61.)

CLAIM IN REPRESENTATIVE CAPACITY. Claim presented by an executor of a will probated in Scotland, said will having been executed in Mexico by a British subject domiciled there, *disallowed* for failure of the will to comply with the formalities of Mexican law.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 232.

(Text of decision omitted.)

W. ALLAN ODELL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 39, May 13, 1931. Pages 61-64.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported allegations of claimant as to circumstances of damage *held* insufficient evidence.

Cross-reference: Annual Digest, 1931-1932, p. 423.

1. The Memorial sets out that on the 21st March, 1911, Mr. W. Allan Odell was appointed locomotive engineer on the Interoceanic Railroad of Mexico, and was stationed at Puebla in the State of Puebla. On the 6th May, 1911, he was detailed in the regular manner to take a military train to the city of Atlixco, some 47 kilometres distant. This military train carried horses, mules, attire, ammunition and soldiers at the command of Colonel, afterwards General, Blanquet. Mr. Odell objected to taking this train, but was persuaded to go on the grounds that the city of Atlixco was without protection from revolutionaries. When the train reached the switchstand at San Agustín, kilometre 39.2, the train left the rails. The switch at this point had been secretly spiked and tampered with by Maderistas, who were against the Government. Mr. Odell was thrown out of the engine and very seriously injured, and his fireman was killed. The injuries which Mr. Odell suffered are fully described in his affidavit (Document C) and the Annexes to it. With the help of a crutch Mr. Odell was able to get back to work in January 1912, but he was making little progress towards recovery, and, finally, on the 23rd July, 1912, he left Mexico for Canada. Since the time of his injuries Mr. Odell has suffered considerably, and on the 6th May, 1923, he was taken seriously ill. The doctors attending Mr. Odell unanimously are of the opinion that Mr. Odell's illness is the direct result of the injuries which he received in 1911. Mr. Odell is now in such a state of ill-heath that it is extremely unlikely that he will recover sufficiently to work again.

The amount of the claim is 53,100.00 dollars gold, composed as follows:

For loss of earning capacity as locomotive engineer, based on an average rate of 1,500 dollars per annum for 18 years	27,000.00
Estimated overtime during 18 years	500.00
Interest on 27,500 dollars for 15 years	9,000.00
Medical expenses	1,600.00
Compensation for pain and suffering and for future disability . .	15,000.00
	53,100.00

His Majesty's Government claim, on behalf of Mr. W. Allan Odell, the sum of 53,100.00 dollars gold.

2. The Mexican Agent pointed out that there was no proof that the accident suffered by the claimant was due to the acts of men. It could just as well have been the consequence of a defect of the switch. And even if it were proved to have been a voluntary act, it had not been proved that this act had been committed by any forces within the meaning of Article 3 of the Convention nor, in the event that it fell within the fourth subdivision of Article 3, that the Mexican authorities were in any way to blame. In the submission of the Mexican Agent, Mr. Odell should have brought suit against the Interoceanic Railroad Company, the more so because he was, against his will, ordered to conduct a military train. Neither could the Agent admit that it had been proved that, as the British Agent contended, a passenger train had a very short time before the military train, passed the same spot without accident.

The Agent also denied that the amount of the alleged losses had been established.

3. The British Agent alleged that the injuries of the claimant were the direct result of the acts of forces within the meaning of the Convention, and that there was therefore no necessity for the claimant to have brought suit against the Railway Company. The Agent referred to the abundant medical testimony accompanying the Memorial, and also pointed out that the amount had been duly evidenced by the calculation given by the claimant.

4. The Commissioners do not deny that the description of the derailment, as given by the claimant, and taken as a whole, bares a certain appearance of truth, but a judicial decision cannot be based on this personal impression alone. If they were to do justice on such a subjective and uncertain foundation, an element of considerable frailty, and even whimsicality, would be introduced into international jurisdiction. A decision which imposes upon a state a financial liability towards another state, cannot rest solely upon the unsupported allegations of the claimant.

This is what the Commission have laid down in more than one of their judgments and to which they must in this case also adhere. [1]

All that has been proved in this claim by outside evidence is the injury suffered by Mr. Odell, which has been testified to by several medical experts. But as regards the derailment and the cause of it, and all the details in connexion with it, there is no other statement than that of the claimant himself. The Commission is therefore, through lack of proof, left in uncertainty as to whether it is true—

(1) That he did conduct a military train,

(2) That he was induced to conduct it against his will and in spite of his objections,

[1] See *i.a.* Decision No. 12, *Mexico City Bombardment Claims*, section 5.

(3) That the train was thrown off the rails through a defective switch,

(4) That a local passenger train had, a short time before, passed without accident,

(5) That the defect of the switch was due to the fact that it had been secretly spiked and tampered with,

(6) That those who were responsible for this act were Maderistas.

5. If an international tribunal were to accept all these allegations without evidence, it would expose itself to the not unjustifiable criticism of placing jurisdiction as between nations below the level prevailing in all civilized states for jurisdiction as between citizens. The Commission fully realize, as they have already expressed in their decision No. 2 *(Cameron)* No. 3, that in international jurisdiction technical rules of evidence may be less restricted and less formal than in lawsuits before a domestic tribunal. That in the admission of evidence great liberality can obtain, has been shown by the Commission on several occasions, but in the present claim there is no question of the admission or the value of evidence: there is an absence of evidence and the greatest liberality cannot overcome this defect.

6. The Commission also realize that the weighing of outside evidence, if any such be produced, may be influenced by the degree to which it was possible to produce proof of a better quality. In cases where it is obvious that everything has been done to collect stronger evidence and where all efforts to do so have failed, a court can be more easily satisfied than in cases where no such endeavour seems to have been made. This consideration has guided and will guide the Commission in other cases, for instance, as regards the fixing of the amount of the award. But in the claim now before them the Commission cannot believe that it would have been impracticable to produce at least some corroboration of the statements of the claimant.

The wrecking of a military train by revolutionaries in the neighbourhood of one of the principal towns of the country, is a fact that could hardly have passed unnoticed. It must have left some trace in the archives of the Railway Company and in the contemporary press. Mr. Odell relates that on the fatal spot itself he was attended to by a surgeon, that the Superintendent of the Railway Company at Puebla also spoke to him at the scene of the derailment, that he was as soon as possible taken to the Hospital at Puebla, that he resumed work nine months later, and that finally, in June 1912, he was given a certificate of dismissal on account of his disability to serve.

It is difficult to believe that none of those sources could furnish confirmation of one or more of the facts alleged by the claimant.

7. The claim is disallowed.

ANNIE ENGLEHEART (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 40. May 13, 1931. Pages 65-67.)

AFFIDAVITS AS EVIDENCE. An affidavit of claimant, unsupported as to circumstances of loss, though with corroborative evidence as to certain other details, *held* insufficient evidence.

(Text of decision omitted.)

THE MADERA COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 41, May 13, 1931. Pages 67-71.)

CORPORATION, PROOF OF NATIONALITY. Certificate of incorporation in Canada, together with power of attorney executed by officers of corporation in Canada, *held* sufficient evidence of British nationality.

Cross-reference: Annual Digest, 1931-1932, p. 265.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 234.

(Text of decision omitted.)

MESSRS. D. J. AND D. SPILLANE AND COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 42, May 13, 1931. Pages 72-80.)

PARTNERSHIP, CLAIM OF. Demurrer to claim of partnership formed under Mexican law but composed exclusively of partners of British nationality *allowed*, without prejudice to the later introduction of a claim filed in the name of the partners individually or otherwise in such form as may be admissible under the *compromis*.

Cross-reference: Annual Digest, 1931-1932, p. 218.

(Text of decision omitted.)

JOHN CECIL GERARD LEIGH (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 43, May 14, 1931, reservations by British Commissioner, May 14, 1931. Pages 80-85.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavit of claimant's manager *held* insufficient evidence. Claim *disallowed*.

(Text of decision omitted.)

JOHN GILL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 44, May 19, 1931. Pages 85-92.)

AFFIDAVITS AS EVIDENCE. Affidavit of claimant, supported by letters of other persons, *held* sufficient evidence.

FAILURE TO SUPPRESS OR PUNISH.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT. Proof of attack by insurrectionary or rebel forces within easy distance of capital of Mexico *held* sufficient to establish responsibility on the part of the respondent Government when Mexican Agent failed to present any evidence of failure to suppress or punish.

DAMAGES, PROOF OF.—EQUITY AS A BASIS FOR ALLOWANCE OF DAMAGES. Amendment of *compromis* by addition of words "and that its amount be proved" considered and *held* not to preclude tribunal from making a discretionary allowance of damages in cases in which British Agent, after due effort, has failed to prove exact amount of damage.

Cross-reference: Annual Digest, 1931-1932, p. 203.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238 n.

1. The Memorial sets out that Mr. John Gill was employed by the Sultepec Electric Light and Power Company as chief electrical engineer at San Simonito, and resided in a house near the power plant. On the 1st September, 1912, the power plant was attacked by revolutionary forces opposing the Madero Government. Mr. Gill, together with his wife and child, aged three years, were forced to flee in their night attire and seek protection from the attack. A considerable amount of personal property is reported as taken or destroyed by the revolutionaries. As a result of her experiences Mrs. Gill has, from the date of the attack to the present time, suffered from shock, and Mr. Gill has been obliged to expend money for medical treatment. Immediately after the attack, Mrs. Gill reported the losses to the British Legation, Mexico City. A letter (annex 3 of the Memorial) was received, stating that the matter had been brought to the notice of the President of the Republic and the Minister for Foreign Affairs, and pointing out that the Mexican Government were in a difficult position in that they wished to avoid taking any action on her behalf which would constitute a precedent for the payment of claims that might be made by companies and others for large and unknown amounts.

The amount of the claim is £180 sterling.

2. The Mexican Agent has opposed the claim on several grounds. He contended that it had not been proved that Mr. Gill has suffered any loss. He attached no value whatever to the claimant's own affidavit, and he denied that this affidavit was corroborated by the letter of the British Minister, dated the 4th October, 1912 (annex 3 of the Memorial) or by the letter of the General Manager of the Electric Light and Power Company, dated the 10th September, 1912 (annex 5), because in his view those letters proved nothing more than that the writers had been acquainted by Mr. Gill with his version of the events.

The Agent also, even assuming that the acts set out in the Memorial had been committed, denied that there was any evidence that they were covered by Article 3 of the Convention or that, in the event that they fell within subdivision 4 of that Article, the Mexican authorities were in any way to blame.

On this latter point he, the Agent, had tried to get some information, but his endeavours had produced no result, because the village of Sultepec, and also the public records, had been destroyed in the attack of 1912.

In the last event the Agent failed to see any proof of the amount claimed and he considered this as sufficient ground for rejecting the claim altogether. The discretion in fixing the amount of the award, which the Commission had formerly enjoyed and of which it had made use in its decision No. 12 *(Mexico City Bombardment Claims)* no longer existed, since the words: "and that its amount be proved" have been inserted in Article 2 by the last revision of the Convention.

3. The British Agent pointed out that the letters, mentioned by his colleague, constituted a very strong corroboration of the claimant's statement, because they certainly would not have been written, had the authors not had confirmation of Mr. Gill's assertions.

As to the character of the forces that caused the damage, the Agent referred to contemporary evidence, showing that they were revolutionaries or Zapatistas, in both cases forces which cannot be considered as rebels or insurrectionaries. Notwithstanding the steps, taken by the British Minister, the competent authorities omitted to take any measure for repression or punishment. According to subdivision 4 of Article 3 of the Convention, this failure to act rendered the Mexican Government liable for compensation.

The Agent went on to say that he was fully aware that the insertion of the words "and that its amount be proved" in Article 2 of the Convention, had been made with a definite meaning, but he differed from the Mexican Agent as to the interpretation of this meaning. He argued that in the majority of claims, the amounts were small and more or less uncertain, being the value of personal property such as furniture, clothes, &c. It would nearly always be impossible to show proof of the absolute correctness of the figures, at which the estimated value of such objects was set down. It could not have been the intention of the two Governments, in amending Article 2, that the claim should in all those cases, be rejected. The only logical interpretation and the only one, which did not lead to injustice, was that the British Agent was obliged to furnish all available evidence as to the amount, but that, if this amount did not seem exaggerated, the Commission was free either to award it or replace it by another figure; in other words that the Agent must enable the Commission to award an amount that was fair and reasonable.

4. The Commission answer in the affirmative the question as to whether it has been established that the claimant's residence at the Sultepec Power Plant was assaulted on the 1st September, 1912, that he, his wife and child were forced to flee, and that this event was the cause of his losing several articles of personal property.

The Commission find that Mr. Gill's statement is fully corroborated and confirmed by the letters from the British Minister and from the General Manager of the Sultepec Electric Light and Power Company. The former letter shows that the Minister had been in communication with the General Manager, and it seems quite unlikely that a diplomatic Representative would visit both the Chief of the Republic and the Minister for Foreign Affairs without having satisfied himself of the truth of what he was going to submit to them. The same holds good for the steps taken by the General Manager, who corresponded with the Head Office in the United States on the subject of the loss and who gave to the claimant a letter, verifying his statement. As Mr. Gill was not the local Manager of the Plant, it is evident that the General Manager

would not have relied on his information alone, but would have consulted the resident Manager of the Works.

5. All the evidence submitted to the Commission points to the fact that the assaulting forces were insurrectionaries or rebels, either Zapatistas or the followers of some other leader, in any case armed men falling within subdivision 4 of Article 3 of the Convention.

As regards the responsibility of the Mexican authorities, the Commission must adhere to the attitude taken by them in decision No. 12 *(Mexico City Bombardment Claims)* section 6;

"In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realize that the evidence of negative facts can hardly ever be taken in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which first the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and second the Mexican Agent does not show any evidence as to action taken by the authorities."

The same point of view is shown in decision No. 18 *(William R. Bowerman and Messrs. Burberry's)*, section 7:

"With regard to the responsibility of the Mexican Government for the acts of these forces or brigands, the majority of the Commission would refer to the principles laid down in the opinion of the President in the decisions of the claims of Messrs. Baker, Woodfin and Webb *(Mexico City Bombardment Claims)*, paragraph 6. Reference is there made to the difficulty of imposing on the British Government the duty of proving a negative fact such as an omission on the part of the Mexican Government to take reasonable measures, and it is stated that whenever an event causing loss or damage is proved to have been brought to the knowledge of the Mexican authorities or is of such public notoriety that it must be assumed that they have knowledge of it, and it is not shown by the Mexican Agent that the authorities took any steps to suppress the acts or to punish those responsible for the same, the Commission is at liberty to assume that strong *prima facie* evidence exists of a fault on the part of the authorities."

The same line was taken in decision No. 19 *(Santa Gertrudis Jute Mill Company)* and it will also direct the majority of the Commission in the claim now under consideration.

The majority fully realise that there may be a number of cases, in which absence of action is not due to negligence or omission but to the impossibility of taking immediate and decisive measures, in which every Government may temporarily find themselves, when confronted with a situation of a very sudden nature. They are also aware that authorities cannot be blamed for omission or negligence, when the action taken by them has not resulted in the *entire* suppression of the insurrections, risings, riots or acts of brigandage, or has not led to the punishment of *all* the individuals responsible. In those cases no responsibility will be admitted. But in this case nothing of the kind has been alleged. The highest authorities in the country were officially acquainted with what had occurred. They stated that they were touched by the account. They added that they had, as regarded compensation, to consider that the precedent might have grave consequences, but the Mexican Agent has not shown a single proof that any action to inquire, suppress or prosecute was taken, although Sultepec is within easy distance of the Capital. Evidence to that effect would, when existent, be at the disposal of said Agent, to whom the Archives of the Republic, of the various States and of the Munici-

palities are available for this purpose. The burning of the Sultepec archives in this connexion seems immaterial, because, if any action had been taken in consequence of the step of the British Minister, traces of it would certainly be found in the archives of the Central Administration.

For all these reasons the majority of the Commission cannot but hold that the Mexican Government is, according to the Claims Convention, obligated to compensate for the loss sustained by Mr. Gill.

The question that still remains is that of the amount to be awarded, and this question lays upon the Commission the duty of examining the meaning of the new words inserted in Article 2 of the Convention.

6. Although the words "*and that its amount be proved*" have undoubtedly been inserted in Article 2 with a certain meaning, the discussion between the Agents has shown that both Governments differ widely as to what this meaning was. The interpretations put forward by the Agents diverged considerably. As the words have been inserted by voluntary agreement, one interpretation cannot carry more weight with the Commission than the other. The Commission are therefore obliged to endeavour to lay down their own interpretation.

In order to do this it seems necessary to search for an answer to the following questions: *(a)* What is to be proved? *(b)* By whom is it to be proved? *(c)* How is it to be proved? and *(d)* To whom is it to be proved?

7. *What is to be proved?* The Convention only speaks of *its amount*. What is meant by this: the *amount claimed*, the amount of the British Government's claim, as it appears in the Memorial? The Commission cannot believe that this was the intention, because it would mean that in all cases, in which this amount was not proved by the British Agent, the Commission would have to disallow the claim entirely, in other words, that the Commission would have either to award the amount of the Memorial, or nothing at all.

This would *firstly* encroach to such a degree upon the discretionary competence of the tribunal as to entirely change its character. *Secondly* it would prevent the Commission, in a majority of the cases, from applying the principles of equity and justice, in accordance with which their members have solemnly undertaken to examine and judge the claims. *Thirdly* it would not be possible to reconcile this interpretation with "*the desire of Mexico* ex gratia *fully to compensate the injured parties*" (Article 2 of the Convention), because in all those cases in which the British Agent might not be able to prove exactly the original amount of the claim, even grave injuries, serious damages and huge losses would have to remain without compensation. And *fourthly* this interpretation might eventually prove prejudicial to the interests of Mexico, because it might induce the Commission, rather than disallow the total claim, to award a higher amount than perhaps would have been considered justified had the fixing of the amount been left to the discretion of the Commission.

Those cases would probably be not at all rare. The most recent of the events with which our jurisdiction has to deal, lie more than ten years behind us, the most remote more than twenty years. The case in question dates from nineteen years ago. It will, in the majority of the cases be next to impossible to produce reliable oral evidence. Damages and losses were very often caused by acts of violence, by occurrences of such a sudden nature as not to allow of the taking of timely measures to draw up inventories, make estimates, collect witnesses, etc., in order to be able subsequently to prove the losses. The establishing of the *exact* value of used objects, lost or destroyed so many years ago, will likewise almost always meet with almost insurmountable difficulties. It is also clear that to determine the compensation to which a person disabled by wounds, or the relations of a murdered man are entitled, is a matter into which

a good deal of discretion will always enter. In all similar cases, and probably in many more, it will hardly be possible to prove with precision the amount claimed. The Commission cannot believe that the new words, inserted in Article 2, mean that the Commission will, in all those cases, have to reject the claim entirely.

In their opinion those words can have no other meaning than that the amount of the alleged damage, which is, in the last event and when the facts are established, the amount of the award must be proved, but that such an amount may be one widely diverging from the sum claimed in the first instance.

8. *By whom is it to be proved?* The answer is: by the British Agent, who is no longer—as he was before the change in the Convention—allowed to leave the amount entirely to the discretion of the Commission, but who is now obliged to show everything in his possession and everything which may be available, and to do everything in his power, in order to make the amount of the damage acceptable. A claim for an obviously exaggerated amount, asked by a claimant, cannot be espoused by him while leaving the final determination to the Commission. He is to create the conviction that he has earnestly tried to place all existing evidence at our disposal. In other words, he has to produce such evidence and to use such arguments as to enable the Commission to award a fair and reasonable amount.

9. *How is it to be proved?* In the opinion of the Commission by the same means and instruments as all other equally important elements of the claim: e.g., British nationality, the acts which caused the damage, the forces which committed the acts, the responsibility of public authorities, etc. The new text of Article 2 does not in any way indicate that the Commission is to require, for the proving of the amount, any other means or instruments of evidence than those necessary for proving the rest of the claim. The liberty enjoyed by the Commission in that respect under Article 4, section 1, of the old Convention, has not been restricted by the amendment, nor has the liberty granted to the Agents by section 3 of the same Article and by article 23 of the Rules of Procedure.

Of this liberty the Commission has made ample use in many of its decisions, and it was strongly emphasized in Decision No. 2 *(Cameron)*, pages 34 and 35, by their adherence to a judgment in the Report of the Mexican-American Claims Commission.

10. *To whom is it to be proved?* The answer cannot be: to the parties. The answer can only be: to the tribunal, to the Commission, which will, by following the dictates of their conscience, bearing in mind the aim of all good jurisdiction and in accordance with the principles of equity and justice, to which they bound themselves by a solemn declaration, determine in any particular case, what is the amount that has been shown to be acceptable and that is therefore justified.

11. The question may arise whether there is by accepting the interpretation given in their answers to the four questions of section 6 any difference between the state of affairs existing under the old Convention as compared with that existing under the new. The Commission think that there is.

They do not believe that the new text originated in the assumption that the Commission will ever award compensation without having fair grounds for the determination of its amount. But what the amendment does desire is that the fixing of the amount shall be the final result of serious preparation—a preparation the initiative of which is expected to lie with the British Agent. It is desired that this Agent assume the responsibility for a certain amount,

while he had formerly only to prove facts, and was allowed to abstain from discussion of the amount. He could leave it all to the Commission. In the old Convention it was only in Article 6, sections 2 and 3, that the amount was mentioned. From Article 2, which deals with the desire of Mexico to give compensation, all reference to the amount was omitted.

It is quite natural that both Governments should have desired to eliminate this hiatus.

Seen in this light, the amendment would seem to be an improvement.

12. Applying to the present claim the principles laid down in the preceding paragraph, the Commission have come to the conclusion that although fair proof has been shown for the amount claimed, some items appear uncertain or not entirely reasonable. It does not seem probable that the claimant was, in 1927, able to estimate the exact value of clothing and household linen, or to remember the exact amount of cash he had to abandon in his sudden flight.

On the other hand, the facts being admitted, it is dictated by equity, that—apart from an exact confirmation of figures—some compensation be given. The Commission believe that they are acting in conformity with the spirit, as well as with the letter of the Convention, by making a total award of £120 sterling.

13. The Commission decide that the Government of the United Mexican States shall pay to the British Government, on behalf of Mr. John Gill, the sum of £120 sterling.

JESSIE WATSON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 45, May 19, 1931. Pages 92-96.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. When statement of circumstances and amount of loss are in general supported by independent witnesses, evidence *held* sufficient.

DAMAGES, PROOF OF. Tribunal will not after lapse of seventeen years weigh factors such as current economic conditions, rates of exchange, etc., affecting market value of goods lost.

CURRENCY IN WHICH AWARDS PAYABLE. Awards will be made in Mexican national gold.

Cross-reference: Annual Digest, 1931-1932, p. 226.

1. The Memorial sets out that in February 1910 Mrs. Watson purchased several holdings in Barrón, District of Mazatlán, in the State of Sinaloa, and was engaged in agricultural pursuits. From time to time she increased her holdings of land until she formed the self-contained Hacienda Barrón. During the siege of Mazatlán in 1913-14 by Constitutionalist forces under the command of General Carranza, the claimant's husband, who was the British Vice-Consul at Mazatlán, received orders not to leave his post. Consequently it was impossible for Mrs. Watson to personally supervise her Hacienda, and she placed it in charge of an administrator, Patricio Vergara. The garrison at Villa Unión was commanded by Lieutenant-Colonel Sergio Pazuengo, who, under threats, demanded products from the Hacienda. He imprisoned the administrator in the barracks at Villa Unión and demanded the entire harvest of beans. The

hacienda store and warehouse were also plundered by Pazuengo, who also took fifteen mules and some horses. The cattle and draft oxen were chiefly taken by Yaqui Indians under the command of Colonel Juan Cabral. A complaint being made to General Carrasco in El Potrero, Pazuengo forced the administrator to write two letters, one addressed to General Carrasco and the other to Mr. Watson, denying that these outrages had taken place. Directly the siege of Mazatlán was raised, the administrator confessed that these letters were false and that he had been compelled to sign them by Sergio Pazuengo. In support of the claimant's losses four affidavits by eye-witnesses are submitted by the claimant.

The amount of the claim is 13,590.00 pesos in Mexican silver, full particulars of which are given in Mrs. Watson's statement of claim. The claim has never been presented to the Mexican Government, and no compensation has been received from the Mexican Government or from any other source. The claim at the time of the losses did and still does belong solely and absolutely to the claimant.

His Majesty's Government claim in support of Mrs. Jessie Watson the sum of 13,590.00 pesos Mexican silver.

2. The Mexican Agent in his written answer to the claim denied that the facts had been proved, or that it had been shown that the acts complained of by the claimant were committed by any forces within the meaning of Article 3 of the Convention. He recognized, however, in his oral argument, that in the annexes of the Memorial considerable corroboration of the statement made by Mrs. Watson was to be found. He also recognized that those who were guilty of the acts fell within subdivision 2 of Article 3 of the Convention, as being Carrancistas. But he thought it very doubtful whether Mexico could be held liable for the acts of a single officer, who had later been dismissed from the Army. And he further contended that the taking of cattle was only confirmed by a statement made fifteen years afterwards by Felipe Vergara, the son of the administrator. He did not believe that this man was in a position to know the exact number of the cattle that had been taken. Furthermore, he thought the amounts claimed by Mrs. Watson extremely vague and also exaggerated, and he did not understand why the British Agent had not produced statements of experts and merchants to show the value of the lost property at the time the acts were committed.

3. The British Agent pointed out that he had produced abundant evidence from independent eye-witnesses, and he thought that there could be no doubt as to the facts. He attached much value to a letter of the Governor of the State of Sinaloa (reproduced in annex 1 of the Memorial), which showed very clearly that this high authority was satisfied that the acts of which claimant's husband had complained, were committed. As regards the value of the property, the British Agent thought the amounts absolutely fair and reasonable, and not in the least exaggerated.

4. The Commission have come to the conclusion that the ample corroboration to be found in the letters and depositions of independent witnesses leaves no doubt as to the exactness of the statement of the facts. All the witnesses declare that at the time mentioned by the claimant, Lieutenant-Colonel Sergio Pazuengo, who was then in charge of the garrison at Villa Unión, confiscated the entire harvest of beans of the Hacienda Barrón and that he imprisoned and intimidated the administrator. The witnesses also deposed that cattle, horses and mules were taken. They all agreed that the amount of the property confiscated and stolen could not have been less than stated by the claimant.

It is also certain—and acknowledged by the Mexican Agent—that Lieutenant-Colonel Pazuengo belonged to the Constitutionalist Army, in other words

to the Carrancista forces, who afterwards established a Government. They therefore fall within the terms of subdivision 2 of Article 3 of the Convention, and Mexico must be held responsible for their acts.

5. It will always be difficult, and in a majority of cases impossible, to ascertain the exact extent of losses suffered as a result of confiscation and robbery. The number of cart-loads of beans and of head of cattle taken may be subject to controversy. In this case the allegations regarding the items of loss have been confirmed, if not as far as the ultimate details, at least to a very great extent. Deponents all bear witness to the fact that during several days a number of large waggons were occupied in carrying away the beans. One of them declares that the greater part of the cattle and of the work oxen, some mules and horses, the stock of goods in the shop, and the cereals and fodder in storage were commandeered; another how he saw the cattle of the Hacienda were slowly but steadily growing less, until not a single head remained. And Mr. Felipe Vergara, the son of the then Administrator, who lived on the Hacienda and was employed as warehouseman in the store, gives a full account of the number of cattle appropriated, and of which a specification was drawn up as soon as possible.

The Commission see no reason why the quantities and numbers specified in the claim should not be deserving of confidence.

6. While it will hardly ever be practicable to reach complete exactitude in the determining of the volume of the losses, it will not be less difficult to arrive at an absolutely perfect estimate of their amount. The value of beans and cattle will of course depend upon their quality, and upon the current prices in the markets where their owner may be able to sell them. Those prices will be affected by the economic situation of the period, the rate of exchange for the national currency, by the possibilities of transport and exportation, and by the degree of stability and tranquillity prevailing at the time of the marketing.

The Commission do not feel themselves able to weigh all these factors separately and exactly after seventeen years have elapsed. But they feel justified in declaring that sufficient proof has been shown to adopt as fair and reasonable an amount of 8,000 pesos, Mexican national gold.

7. The Commission take this opportunity to lay down a rule regarding the currency in which their awards will be expressed.

It seems arbitrary to let such currency be dependent upon what is asked in the claim. There is no reason why gold pesos should be awarded in one case, silver pesos in another, Pounds Sterling in a third, and United States dollars in a fourth. The Commission, having also regard to Article 9 of the Convention, are of the opinion that the awards can be based upon no other money than the national and legal money of the State to be held liable for the payment. Awards will, for that reason, in future be made in Mexican national gold.

8. The Commission decide that the Government of the United Mexican States shall pay to the British Government on behalf of Mrs. Jessie Watson (*née* Louth) a sum of eight thousand Mexican pesos, oro nacional.

WILLIAM McNEILL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 46, May 19, 1931. Pages 96-101.)

FAILURE TO SUPPRESS OR PUNISH.—EFFECT OF NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT. When British Agent showed that the imprison-

ment of claimant by insurrectionary forces either had come or should have come to the knowledge of the authorities, while the Mexican Agent failed to submit evidence of any action taken by such authorities, *held* responsibility of respondent Government established.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—PROOF OF PERMANENT LOSS OF EARNING CAPACITY. Only testimony of independent medical experts appointed by the tribunal will be accepted as evidence of permanent loss of earning capacity of claimant.

ILLEGAL ARREST.—MISTREATMENT DURING IMPRISONMENT.—CRUEL AND INHUMANE IMPRISONMENT.—DETENTION INCOMUNICADO. Claim for illegal arrest and mistreatment during imprisonment *allowed.*

MEASURE OF DAMAGES FOR PHYSICAL INJURY.—PROXIMATE CAUSE. When fact of serious personal injury is established, the damages allowed will take into account the nature of such injury, the probability of resulting medical expenses, and claimant's station in life.

Cross-reference: Annual Digest, 1931-1932, p. 227.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 230.

1. This is a claim for compensation for physical, moral and intellectual damages caused by arrest and imprisonment by revolutionary forces at Bacis, in the State of Durango, in April 1913.

The Memorial sets out that William McNeill was at the time of his imprisonment General Manager of the Bacis Gold and Silver Mining Company (Limited), a British Company. During the night of the 18th April, 1913, the mining area of Bacis, in the State of Durango, was visited by a party of revolutionaries numbering about 100 men, under the command of Pedro Gutierrez, Santiago Meráz, and Fermín Núñez. These rebels demanded from the Company a sum of 5,000 pesos. Mr. McNeill refused to pay this sum on the ground that the Bacis Gold and Silver Mining Company (Limited) was a British company taking no part whatever in the political struggle, was paying off taxes, and was, therefore, entitled to be allowed to continue its work unmolested. Santiago Meráz, to whom this refusal was made, arrested the claimant and placed him in solitary confinement under armed guard for about twenty hours. During the time of his imprisonment no communication with the mine officials or other employees of the Company was allowed to the claimant. After several threats of shooting and hanging, the claimant agreed to deliver to Santiago Meráz five bars of silver and a promissory note in favour of Santiago Meráz for the sum of 5,000 pesos. Mr. McNeill was then set at liberty and the silver and promissory note were handed over. Later the five bars of silver and the promissory note, through the intercession of the *Jefe Político* at San Dimas, were returned to the company for a cash payment of 201 pesos. Shortly after this the revolutionaries left the neighbourhood of the mine. As a result of his imprisonment and the serious threats of death to which he was subjected, the claimant had a nervous breakdown, from which he has never recovered.

Dr. C. H. Miller examined Mr. McNeill after his release by the revolutionaries and found him suffering from "nervous shock and mental agony entirely due to his imprisonment". Dr. Miller's evidence is given in an affidavit made on the 16th June, 1913, before the Acting British Vice-Consul at Mazatlán. On the 19th June, 1913, Mr. McNeill was examined by Dr. J. A. René in the presence of Dr. C. H. Miller. Dr. René found that Mr. McNeill was suffering from "a

terrible nervous depression with total absence of reflex movement of the knees". He considered that the bad treatment to which the claimant had been subjected was sufficient to produce the state of nervous prostration in which he found Mr. McNeill. Dr. René was also of the opinion that the infirmity might be incurable and might become graver in later years. Mr. McNeill had been examined by his own medical adviser, Dr. Frederick Spicer, of 142, Harley Street, London, in 1912, and his state of health was then very good. He was again examined by Dr. Spicer in September 1913 when he was found to be a complete wreck, suffering from a loss of knee reflexes. Dr. Spicer, after reading the sworn statements of Mr. McNeill, Dr. J. A. René and others, was of the opinion that the claimant's state of health was a natural consequence of his ill-treatment. On the 25th October, 1928, Dr. Spicer again made a careful and thorough examination of Mr. McNeill and found that he was still suffering from the loss of knee reflexes. Dr. Spicer is firmly of the opinion that this loss of knee reflexes was entirely due to the suffering to which he was subjected by the revolutionaries in 1913. No improvement was found to have taken place in Mr. McNeill's condition during the past fifteen years and the claimant's medical adviser is now of the opinion that his condition is chronic.

The sum of £5,000 sterling is claimed as compensation for the permanent damage to the claimant's health. This sum is considered to be quite reasonable by Dr. Spicer. A claim is also made for compensation for the humiliating and severe treatment to which the claimant was subjected during his arrest and imprisonment. The amount of this part of the claim is left to the Commission for assessment.

His Majesty's Government claim on behalf of William McNeill the sum of £5,000 sterling, together with such sum as the Commission might consider equitable compensation for moral and intellectual damages suffered by him during his imprisonment.

2. The Mexican Agent, while allowing that proof had been shown of the claimant's imprisonment, denied that there was any evidence as to the way in which he was treated during his confinement. Furthermore, he contested that it had not been proved that the loss of knee reflexes was a consequence of the imprisonment, or that this loss in itself constituted a permanent reduction of the capacity for work or the earning power of the patient. In his submission the loss of knee reflexes was not an illness, but merely a symptom of neurasthenia, which could just as well originate in physical conditions or in a nervous disposition as in the events alleged in the claim. Upon the medical certificates, produced as annexes to the Memorial, the Agent refused to reply, since they were all signed by experts chosen by the claimant. He did not regard their testimony as independent evidence and asserted that no award, and certainly not the unfounded amount claimed by the British Government, could be granted before a new examination of the claimant by impartial and independent medical advisers had taken place.

Apart from these arguments, the Agent failed to see any proof of the character of the forces, to which the acts were attributed. He could not admit that they were Maderistas or that they formed part of forces that afterwards constituted a Government. In the archives of the Mexican War Ministry the names of Pedro Gutierrez, Santiago Meráz, and Fermín Núñez had not been found and he must therefore conclude that they never served in the army. In case the individuals in question had to be regarded as insurrectionaries or as brigands, the Agent rejected any responsibility of his Government, because it had not been established that the competent authorities had omitted to take reasonable measures for suppression or punishment.

3. The British Agent held that there could be no doubt, either as to the facts or as to their consequences. There had been presented abundant evidence as to Mr. McNeill's imprisonment and as to the effects of the inhuman treatment to which he was subjected. The documents filed showed that the claimant was a strong and healthy man at the moment when he was arrested and that he left the prison a complete wreck. It had also been shown that before his imprisonment he had refused to comply with the demands of the Revolutionists and that he had, when released, given them what they asked for. Therefore the inference might safely be made that he was, during his confinement, compelled by force to give in. The Agent, in opposition to his Mexican colleague, attached very great value to the testimony of the expert (Dr. Spicer) who had been the medical adviser of the claimant since 1894, and who declared in 1914 that he had then found him a complete wreck. It could not, in the Agent's submission, be contested that Mr. McNeill had suffered very grave personal injury, which, even apart from a permanent reduction of his capacity for work, entitled him to substantial compensation, the amount of which ought certainly not to be less than the figure claimed by his Government.

As regards the classification of the forces responsible for those acts, the Agent asserted that they were either Maderistas or Constitutionalists, in both cases forces for whose acts the Mexican Government had accepted financial liability.

4. The Commission have found in the annexes to the Memorial sufficient evidence of the imprisonment of the claimant on the 18th April, 1913. Corroboration is furnished by declarations made by George F. Griffiths, Engineer of the Bacis Gold and Silver Mining Company, by Charles Leon Whittle, an employee of the same Corporation, by Ismael Reyes, a merchant at Bacis, by Tomas Venegas, a citizen of Bacis, by Dr. C. H. Miller, the Company's physician at that place, and by Dr. J. A. René, who saw the claimant at Mazatlán. Their declarations, dated the 16th, the 23rd, the 24th, or the 30th June, 1913, all state that they were either present at, or were informed, very soon afterwards, of the imprisonment of the claimant. Three of them saw him immediately after his release, and they unanimously state that he was then suffering from a very serious nervous breakdown. The same documents show that the claimant, although he first refused to comply with the wishes of his assailants, afterwards not only gave them a note for the 5,000 pesos originally demanded, but five bars of silver over and above that amount.

This evidence satisfies the Commission as regards the following facts:

(1) Mr. McNeill was illegally imprisoned during twenty hours.

(2) He was during that time treated very harshly and subjected to indignities and probably threatened with worse things.

(3) He was only released when this maltreatment had resulted in his giving in.

(4) The effects of such ill-treatment and threats were that Mr. McNeill suffered very serious nervous prostration, which was apparent to those who knew him before his arrest and saw him soon afterwards.

(5) In the statement of the claimant and in the declarations of the witnesses, the forces commanded by Gutierrez, Meráz and Núñez are alternatively identified as revolutionaries and also as rebels, but there is no indication that they were Maderistas or Constitutionalists. As, furthermore, the Mexican Agent has not been able to trace the names of those three chiefs in the archives of the Army, it seems justified to classify them and their followers as insurrectionaries, dealt with in subdivision 4 of Article 3 of the Convention.

As regards the financial responsibility of the Mexican Government for their acts, the Commission refer to the rule laid down by them in previous decisions,

for instance in section 6 of their decision No. 12 *(Mexico City Bombardment Claims)*, reading as follows:

"In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in those cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities." [1]

In the present case it is evident that the authorities were informed of what had happened, because the *Jefe Político* of San Dimas intervened and returned to the Company the bars of silver and the promissory note in exchange for a cash payment of 201 pesos. Apart from this it seems next to impossible that such a sensational act as the imprisonment of the General Manager of one of the principal concerns of the State could not have come to the knowledge of those whose function it was to watch over and to protect life and property. But not the slightest indication has been given that they took any action.

For these reasons the Commission are of the opinion that the claim falls within the terms of Article 3 of the Convention.

6. The question of the permanent loss of capacity for work or earning power has not been stressed by the British Agent. If such a loss had to be the outstanding factor in the determination of the award, the Commission could not fail to observe that Mr. McNeill, at the age of sixty-eight, still carries on the profession of Consulting Mining Engineer, and still fills the positions of Secretary and Consulting Engineer of the Bacis Gold and Silver Mining Company. And they also hold that so serious a statement as the measuring of the permanent effect on a man's earning capacity of events which occurred eighteen years ago, could only be accepted when given by independent medical experts of high standing, appointed by the Commission.

In the present case, however, there are facts—and they are enumerated in section 4—which in themselves entitle the claimant to compensation. The alleged imprisonment of Mr. McNeill constitutes a serious personal injury, and this injury was very much aggravated by the appalling and cruel way in which he was compelled to deliver up silver and money. It is easy to understand that this treatment caused the serious derangement of his nervous system, which has been stated by all the witnesses. It is equally obvious that considerable time must have elapsed before this breakdown was overcome to a sufficient extent to enable him to resume work, and there can be no doubt that the patient must have incurred heavy expenses in order to conquer his physical depression.

The Commission take the view that the compensation to be awarded to the claimant must take into account his station in life, and be in just proportion to the extent and to the serious nature of the personal injury which he sustained.

7. The Commission decide that the Government of the United Mexican States shall pay to the British Government, on behalf of Mr. William McNeill, six thousand (6,000) Mexican pesos, oro nacional.

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[1] See also Decision No. 18 *(Bowerman)*, section 7, and Decision No. 19 *(Santa Gertrudis)*, section 9.

ROBERT JOHN LYNCH (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 47, May 21, 1931. Pages 101-104. See also decision No. 1.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Claim established in material parts only by unsupported affidavit of claimant *disallowed.*

RESPONSIBILITY FOR ACTS OF FORCES.—MILITARY ACTS.—FORCED OCCUPANCY. No claim will lie for military occupation of house by government forces, including plundering, incurred in course of military operations against revolutionary forces.

1. The Memorial sets out that Mr. Robert John Lynch was the proprietor of a ranch situated at Puente de Garay, Ixtapalapa, Mexico. Towards the end of July 1914 he was obliged to abandon his property owing to a threatened attack by revolutionaries, whom he supposed were Zapatistas. Mr. Lynch left a watchman in charge of the house who, on the arrival of the revolutionaries, was threatened with death if he offered resistance. These revolutionaries plundered and destroyed everything they found in the house. Later, Mr. Lynch was able to recover part of his furniture, which he replaced in the house. In October 1914 he was informed that a cavalry detachment of Constitutionalists belonging to the forces of Lucio Blanco had taken possession of the house for military purposes. When the Constitutionalists left in November 1914 Mr. Lynch found that his house had been completely ruined. The doors, windows and floors had been removed, and the fowl-houses had been destroyed. The remainder of his furniture had disappeared.

His Majesty's Government claim on behalf of Mr. Robert John Lynch the sum of 2,455 pesos, Mexican currency.

2. The Mexican Agent denied that any proof had been shown as to the facts on which the claim was based. He could not consider as such the uncorroborated affidavit of the claimant himself.

3. With his reply the British Agent filed a letter from the British Consul at Mexico City to the claimant, dated the 6th November, 1914, with which was enclosed a copy of a letter dated the 4th November, 1914, from the Governor of the Federal District. In this letter the Governor confirmed the fact that the house of Mr. Lynch had been occupied for military reasons, because it was situated right on the firing line between the Federal forces and the Zapatistas. The Agent submitted that this was sufficient proof of the facts.

4. The Mexican Agent drew the attention of the Commission to the fact that the Governor's letter did not prove any looting of the property in October and November 1914. It only showed that the Commander of the Constitutionalist Army found himself compelled temporarily to occupy the house, as a military measure, but also that instructions were, agreeably to a request of the British Consul, given to the effect that the house be no longer occupied if military operations did not make it absolutely indispensable.

5. The Commission are of opinion that a distinction must be drawn between the two parts of the claim, and between the losses alleged in both of them.

In the first place the claim is for losses sustained between the end of July 1914—when Mr. Lynch thought himself obliged to abandon his property—and a certain date, probably prior to October of the same year. According to

the Memorial the house was plundered during that period, but the claimant was able to recover part of his furniture, which he replaced in the house.

In the second place, the Commission have to deal with an allegation of losses sustained because the house was, in October 1914, occupied for military purposes. When in November 1914 such occupation ceased, Mr. Lynch found that the house had been completely ruined and that the remainder of his furniture had disappeared.

6. For the first part of the claim no outside evidence whatever has been produced, for the unsupported affidavit of the claimant cannot be accepted as such.

The facts on which the second part of the claim is based are evidenced by the letters of the Governor, Jara, and of the British Consul, referred to in section 3 of this decision. It is obvious that the house was occupied by the Constitutionalist forces and this occupation ceased in due time.

Amongst the amendments made to the Convention in December 1930 there is one in Article 2 to the effect that no claim can be made for damage that was the consequence of a lawful act. As the Constitutionalist forces were at that time the forces of the Federal Government and fighting against the Zapatistas, there can be no doubt that their occupying a house situated on the firing line between them and their opponents was a lawful act.

It may be a subject of controversy—and it is possible that the Commission may find themselves faced with this question when dealing with one or more of the other claims—whether the amendment to Article 2 covers *all* the consequences of the act, even those which could and ought to have been avoided, in other words, whether the liberating effect of a lawful act does or does not also extend to those acts which went farther than was necessary in order to attain the lawful aim. An act may be lawful in its origin and its object, but deteriorate in the course of its execution.

In the present case, however, this question need not be considered, because no outside evidence is shown as to the character or the consequences of the military occupation. The letters mentioned above were written while the occupation was still in force, but as to the condition in which the house was left after the occupation, there is no document other than the claimant's uncorroborated affidavit. The conclusion must be that the losses are not proved and that it would not, even if their existence were established, be possible to determine their extent with any degree of accuracy.

7. The claim is disallowed.

CECIL A. BURNE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 48, May 22, 1931. Pages 104-107.)

FORCED ABANDONMENT. To establish a claim for forced abandonment claimant must show that he was forced to leave place of his residence as a consequence of revolutionary acts and that during his absence his property was taken, or suffered depreciation to the extent claimed.

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavit of claimant *held* insufficient evidence.

1. The Memorial sets out that in May 1911 Mr. C. A. Burne, with his wife and family, resided in a house in San Carlos, Tamaulipas, Mexico, which he had furnished at a cost of 1,500 pesos Mexican. In August 1911 Mr. Burne leased the "Dulcinea" Mine, in the San Nicolas district, and operated it constantly at a profit, until he was forced to abandon his work. In December 1911 he leased the "Montezuma" Mine in the same district, which he also operated at a profit. In September 1912 he leased the "Americas" and the "Aquilares" groups of mines, and had invested 1,800 pesos Mexican in these properties up to the time when he was forced to stop operations; and in December 1912 he located and made a claim for a mining property called "La Gran Bretaña", consisting of 6 hectares of ground of proved value, but owing to the cessation of postal communications the Government Mining Agent at San Carlos had been unable to obtain for the claimant the legal title to the property.

On the 29th February, 1912, a party of Vazquistas attacked the "Montezuma" Mine, and the claimant and his family were taken prisoners. By threats of bodily harm he was forced to supply the bandits with goods and money to the value of 50 pesos. The authorities at San Carlos had taken no steps to protect the property from attack, but, on the representations of His Majesty's Consul at Tampico, the bandits were pursued and finally suppressed a month later. In March 1913 rebels appeared at the town of Burgos, some 8 leagues from the mines. On the 22nd April, 1913, the 21st regiment of Rurales, which had revolted, attacked the city of Victoria, and, being repulsed, fled to the hill country of San Carlos, arriving there about the 25th and 26th April, under the command of a Colonel Navarrete. These rebels levied contributions on all Mexican citizens, and, in consequence, the workmen in the claimant's mines became restless and irregular in their work. Conditions rapidly became worse; the district judge, Don Baronio Flores, fled; telephone and postal communication was suspended, and murders, outrages, burnings and sackings were frequent. The railroad was frequently cut between Tampico and Monterrey, so that the claimant's ore could not be shipped to the smelter in Monterrey. On the 12th May, 1913, a band of rebels arrived at San Carlos to raise forced loans, and then proceeded to the claimant's mines, where they took four boxes of dynamite, with the necessary caps and fuse, to the value of 80 pesos Mexican. Between the 12th May and the 11th June six more bands invaded the district, and all work was suspended. There were very few workmen, no supplies nor provisions, nor any postal or railroad communications. On the 11th June, owing to the scarcity of food, the claimant left San Carlos with his wife and two children in ox-carts and journeyed north through country infested with rebels and bandits to the town of Reynosa, then in possession of the rebels. They had travelled a distance of 180 miles in some fourteen days. Mr. Burne was obliged to abandon his horse and saddle at Reynosa, as no one would buy them there. Before leaving San Carlos, Mr. Burne obtained a certificate from the chairman of the Corporation of San Carlos to the effect that he had been of good behaviour during his six or seven years' stay at San Carlos, and that he was forced to abandon his work at the mines on account of the revolutionaries. In addition to the property taken by various bands of rebels, Mr. Burne was obliged to abandon his work on the various mining properties in which he was interested. He was thus deprived of his livelihood, and it became necessary for him to seek a fresh occupation.

The amount of the claim is 14,333 pesos Mexican gold. Of this sum 4,333 pesos represent actual losses of goods taken by revolutionaries, money invested in abandoned properties, loss of furniture in house at San Carlos, and expenses of the escape from Mexico and the return to England. The remaining 10,000 pesos gold represent a low estimate of the claimant's loss due to depreciation of

his properties, losses or depreciation of machinery, tools, livestock, and loss due to his being disengaged and having to seek fresh employment.

His Majesty's Government claim on behalf of Mr. Cecil A. Burne the sum of 14,333 pesos Mexican gold.

2. The Mexican Agent's contention was that, in order to prove the facts on which the claim was based, nothing had been shown but an affidavit of Mr. Burne himself and a copy of a certificate by the President of the City Council of San Carlos, in which this official merely declared that Mr. Burne had finished his work at San José on account of the revolution, and that he was therefore going to England with all his family, for the purpose of visiting his parents. At the instance of this Agent, several witnesses who at the time mentioned in the Memorial lived in the neighbourhood, had been heard, and all of them testified that even though revolutionary forces occupied the district at the times mentioned by the claimant, the said forces did not levy any forced loans on Mr. Burne, nor did they confiscate his property. If Mr. Burne had abandoned his property at San Carlos and said property had, in consequence of such abandonment, suffered depreciation, the Government of Mexico could not be held responsible therefor.

3. The British Agent pointed out that it was not claimed that forced loans were exacted from the claimant. The claim was for confiscation of property, for the loss of money invested, for loss of furniture, for expenses incurred in returning to England, and for the depreciation of the mines, machinery, &c. The British Agent did not pursue the first item of the claim, relating to loss of goods and money to the value of 50 pesos, because this loss was due to a group of Vazquistas who were pursued and finally suppressed. As regards the other items of the claim, the Agent submitted that the testimony filed by his Mexican Colleague showed that those who were responsible were Carrancistas. Consequently, it was with subdivision 2 of Article 3 of the Convention that he had to deal, and it was unnecessary to establish negligence of the competent authorities. All the losses were due to the fact that the claimant had been compelled to leave San Carlos. The evidence presented by the Mexican Agent did not deal with what happened at the mines in the surrounding district, but only with what happened at San Carlos, and one of the witnesses upon whose testimony the Mexican Agent relied, gave a declaration showing that there had certainly been one attack upon the "Montezuma" mine.

4. The Commission have not, in the documents filed by the British Agent, found any outside corroboration of the allegations of the claimant. The case rests entirely upon the latter's affidavit, because the certificate given by Francisco V. Meléndez does not confirm any of the facts set out in the Memorial, except that the claimant returned to England because he had terminated his work at the San Nicolas mine, on account of the revolution.

Among the declarations of the witnesses recently heard at the instance of the Mexican Agent is found the testimony of one Amado Flores, who said that he had heard by public rumour, without actually having seen it himself or remembering when it happened, that a group of rebels, under the command of Conzalo and Eleazar Zúñiga, had looted the claimant's store at Montezuma.

The Commission consider this evidence in support too weak for them to base an award upon it.

In order to enable them to accept the facts underlying the claim, there ought to have been shown evidence as to the articles confiscated at the mine. It would further have been necessary to prove that Mr. Burne was forced to leave the place of his residence as a consequence of revolutionary acts, and that during his absence his property was taken or had suffered depreciation to the

extent claimed. No such evidence has been produced, and adhering to the attitude taken in several other decisions, the Commission cannot feel that they are at liberty to award any compensation.

5. The claim is disallowed.

AUGUSTIN MELLIAR WARD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 49, May 22, 1931. Pages 107-110.)

AFFIDAVITS AS EVIDENCE. An affidavit of claimant based on hearsay and a statement of an independent witness based on personal knowledge *held* sufficient evidence.

DAMAGES, PROOF OF. Statement of independent witness, who had personal knowledge of facts stated and correctness of amount claimed, *held* sufficient evidence when the amounts involved seemed reasonable to the tribunal.

1. The Memorial sets out that Mr. Ward was appointed manager of the mill of the San Rafael Paper Company, Limited, at San Rafael in February 1907 and took up his residence in the manager's house within the mill walls. He had furnished this house with his own property, brought out from England. In March 1914 he returned to England on six months' leave of absence and, owing to the outbreak of the Great War in August 1914, did not return to San Rafael. About the end of 1916 he heard, through a friend, that a band of Zapatista rebels, who entered San Rafael in August 1914, had raided the manager's house and taken away all his effects. He wrote to the Company for confirmation of his loss and received a letter from Señor José Bernot Romano, the Sub-Manager, stating that everything had been taken from his house. Señor Romano has since embodied this information in a declaration.

The amount of the claim is £400 sterling, details of which are given in Mr. Ward's affidavit. The value which Mr. Ward has placed on this furniture is confirmed by Señor Romano in his declaration.

His Majesty's Government claim, on behalf of Mr. Augustin Melliar Ward, the sum of £400 sterling.

2. The Mexican Agent's contention was that the claim was not properly founded. Mr. Ward did not witness the facts on which he based his claim. Mr. José Bernot Romano had made the dogmatic assertion that in August 1914 a band of Zapatistas destroyed Mr. Ward's property, but he failed to say whether he had witnessed the events or whether he knew about them merely by hearsay.

In the submission of the Agent it was a further defect of this claim that no proof had been shown that Mr. Ward was the owner of the articles which he said were stolen from him, nor that they had the value he ascribed to them.

The Agent once more called the attention of the Commission to the fact that Article 2 of the Convention had been modified so as to make it necessary for the British Agent to produce proof of the value ascribed by him to losses of British subjects.

3. The British Agent considered that sufficient proof of the facts was given in Mr. Ward's affidavit and in Mr. Romano's statement. These documents also showed that the losses were caused by Zapatistas. As to the amount of the

Claim, the Agent submitted that the detailed nature of the schedule presented by Mr. Ward carried conviction, and that Mr. Romano confirmed the estimate. The Agent thought the amount fair and reasonable.

4. The Commission feel at liberty to accept the declaration of Mr. José Bernot Romano as sufficient proof of the facts. The deponent can be considered as an independent witness, who, at the time mentioned in the Memorial, was already in the service of the Cía. de Fábricas de Papel de San Rafael y Anexas, who resided on the premises and who often visited the house of the claimant. The Commission fail to see why his declaration should not be deserving of confidence.

5. There is just as little reason why Mr. Romano's statement as to the character of the forces who looted the mill and the house of the manager should not be accepted. He is a Mexican citizen, who lived at the place, and he may be supposed to have been able to distinguish between the different forces then in arms. Apart from that, it is of general knowledge that the San Rafael Paper Mills are situated in the immediate neighbourhood of the region where the Zapata movement originated and where up to the present day many ruined haciendas bear witness to their activities.

6. It is an equally known fact that the Zapatistas in August 1914 formed part of the Constitutionalist Army. This is also allowed in a brief filed by the Mexican Agent on the 7th April, 1931. As there is no doubt that the Constitutionalist Army was to be considered as a revolutionary force, which after the triumph of its cause established a Government, first *de facto*, and later *de jure*, the losses caused by this Army, and by the groups forming part of it, are covered by the Convention (Article 3, subdivision 2), even if some of the groups later separated and followed another cause.

The Commission, while satisfied as to the facts on which the claim is based, holds that the liability for the financial consequences of them must rest with Mexico.

7. The amount claimed has been confirmed by Mr. Romano, who was in a position to know the house and its contents, and neither the schedule nor the estimate seem exaggerated for furniture and movable property owned by the manager of an important industry, residing in a house with two living rooms, three bedrooms, hall and nursery.

8. The Commission decide that the Government of the United Mexican States shall pay to the British Government, on behalf of Mr. Augustin Melliar Ward, 4,000 (four thousand) pesos, Mexican national gold.

The Mexican Commissioner did not accept as an expert's proof, the testimony of Señor Romano in connexion with the value of the articles disappeared; hence the decision was by majority on this point.

HENRY PAYNE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 50, May 22, 1931. Pages 110-111.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Claim alleged to arise under same circumstances as those of *Mexico City Bombardment Claims* (*supra*, Decision No. 12), but with fact of loss resting solely on claimant's affidavit, *disallowed.*

(Text of decision omitted.)

ROBERT HENRY BEALES (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 51, May 29, 1931. Pages 112-114.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Corroborating evidence adduced in support of affidavit of claimant *held* insufficient.

(Text of decision omitted.)

ROBERT O. RENAUD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 52, May 29, 1931. Pages 114-117.)

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY.—IDENTITY OF CLAIMANT. A baptismal certificate of an individual having the same surname but not the same given names as those of claimant, together with a statement of claimant that he had later in life changed his name, as well as an affidavit of claimant as to place and date of birth, *held* sufficient evidence.

FORCED ABANDONMENT. Where evidence indicated claimant left his property in Mexico as a result of disturbed conditions, including assassination and robberies, and destruction of property thereafter ensuing may have been caused by gradual effects of time, claim *disallowed.*

RESPONSIBILITY FOR ACTS OF FORCES. Claim for taking and destruction of property by Carrancista forces *allowed.*

1. The Memorial sets out that during the period October 1895 to April 1907 Mr. Renaud purchased several lots of land in the Colony of Metlaltoyuca, District of Huauchinango, State of Puebla. On gaining possession of the property the claimant commenced to fence the land and had constructed about seven miles of barbed wire fencing with hardwood posts. He had cleared over 600 acres of land, planting it for pasture; constructed two corrals; built a good frame house for himself and family and several houses for his workmen. For the first few years after the establishment of the colony, land was held by some 150 foreign nationals, of whom about fifty lived in the colony. Assassinations and robberies committed in the colony, rendered possible by the lack of police protection, caused the numbers of the colony to dwindle.

As Mr. Renaud had five sons of school age, he was obliged to live in Mexico City and he obtained employment there. Mr. Renaud placed a Mexican caretaker in charge of his property in the colony of Metlaltoyuca. In June 1912, owing to the cessation of all business, which state of affairs was due to the disturbed conditions at the time, Mr. Renaud and his family left Mexico City for Alberta, Canada, via Veracruz. A short time after this the Mexican caretaker was driven out of the claimant's property by the revolutionaries, who had taken possession of the town of Metlaltoyuca. These revolutionaries took away all Mr. Renaud's movable property and destroyed the remainder, chiefly by fire.

The robbery and destruction was at the hands of some of the revolutionary bands in the neighbourhood and it was not possible to identify the individuals responsible, but from a letter written by a Mr. W. E. Springall, it appears that they were Carrancistas. There were no police in the neighbourhood, although taxes were charged for and paid by the members of the colony. The presence of Federal soldiers in the colony offered no restraint to the activities of the revolutionaries.

Although Mr. Renaud was baptized in the name of Achille Oscar Adjutor, he assumed the name of Robert at the time of his confirmation and has used it consistently since that date.

His Majesty's Government claim on behalf of Mr. R. O. Renaud the sum of 15,130.00 dollars, United States currency.

2. The Mexican Agent with his Answer to the Memorial, filed a record of proceedings for the hearing of witnesses, held at his instance on the 30th November, 1928, before the Municipal President of Metlaltoyuca; and with his Motion of the 26th March, 1931, he filed the record of further proceedings of the same nature, held before the same authority, on the 18th April, 1929.

In the Agent's submission both documents showed that the losses and damages were caused by the state of abandonment in which the claimant left his properties. There was no proof whatever that they were caused by any of the forces specified in Article 3 of the Convention, nor in case of having been caused by rebels, mutineers or brigands, that the Mexican authorities were in any way to blame.

The Agent also denied that the claimant's British nationality had been established, because there had only been filed a baptismal certificate of one Achille Oscar Adjutor Renaud, and it had not been shown that this man and Robert O. Renaud were one and the same person.

3. The British Agent considered that sufficient evidence had been produced with the Memorial to establish the fact that Mr. Renaud was a British subject.

Contrary to the opinion of the Mexican Agent, he asserted that the losses and damages had in fact been caused by the acts of forces within the meaning of Article 3 of the Convention. It might be true that the abandonment had also contributed to the losses and damages, but such abandonment had been enforced by the disturbed situation of the colony and by the many attacks by revolutionary forces on life and property. In his opinion, the testimony of more than one witness heard at the instance of the Mexican Agent confirmed the allegations on which the claim was based.

4. The Commission accept as sufficient *prima facie* evidence of the claimant's British nationality the certificate of baptism of Achille Oscar Adjutor Renaud, filed with the Memorial. They see no reason why they should not accept as *bona fide* the statement of the claimant that later in life he took a Christian name of his own choice and that he is the same individual as mentioned in the certificate. It is difficult to understand what reason he could have had for producing a certificate relating to another person, the more so as he had already, in his sworn affidavit of the 9th December, 1925, given the same date and place of birth as recorded in the baptismal certificate delivered nearly two years later.

5. The Commission have, in examining the claim, drawn a distinction between (1) the losses alleged to have been sustained through the destruction of a house and other buildings together with their contents, and (2) the losses alleged to have been sustained through the taking of cattle and horses, the

destruction of wire fencing and the deterioration of land that had been cleared and converted into pasture at great expense.

6. As regards the first item, the Commission have found no corroboration of the allegations of the claimant. The letter of Mr. W. E. Springall produced as annex 5 of the Memorial, and which gives an account of the situation of the colony, is dated the 4th October, 1916. It relates that nearly every house at Metlaltoyuca was robbed and burned by Carrancistas, and although it fails to state the dates when all this happened, the letter gives the impression of dealing with more or less recent occurrences. But Mr. Renaud left Mexico in June 1912, and his affidavit shows that his property was robbed and destroyed either before or very soon after that time. It is therefore not certain that Mr. Springall's letter refers to the same events as are alleged to have caused the claimant's losses.

This seems the less certain in that the witnesses, heard at the instance of the Mexican Agent, denied that the house had been looted and burned by armed forces. These witnesses—all of whom were living at Metlaltoyuca at the time mentioned in the Memorial, and some of whom lived close to Mr. Renaud's property or worked thereon regularly—deposed that the claimant's caretakers neglected their duties and left the property abandoned, although the state of safety prevailing would have allowed them to remain. It was not—according to all the witnesses—any acts of violence that had destroyed the house and annexes, but the gradual effects of time working on wooden buildings, when empty and not looked after.

In view of so much conflicting evidence, the Commission cannot consider this part of the claim as having been sufficiently proved.

7. As regards the second part of the claim, the letter of Mr. Springall contains no information, but some indication can be found in the record of the proceedings, when witnesses were heard on the 18th April, 1929.

Among them was the former caretaker of the claimant, and he indeed declared that a great number of cattle had been taken by Carrancistas. But other witnesses deposed that the whole or part of the cattle had been sold, and others again that the caretaker himself had appropriated the animals and sold them for his own account. All that proves to have been sufficiently confirmed is that the Carrancistas took seven horses.

The protocol also shows a good deal of contradiction as regards the area fenced in and made into pasture, but the figures given in the Memorial have not been confirmed by a single one of the witnesses. All of them gave much lower estimates, but it may, taking their depositions as a whole, be inferred that the claimant did, on that account, suffer losses through the acts of Carrancistas who visited the place.

The Commission hold that for the aggregate losses set down under this head of the claim, an amount of $1,300 pesos Mexican gold, is fair and reasonable compensation.

8. The Commission decide that the Government of the United Mexican States shall pay to the British Government, on behalf of Mr. Robert O. Renaud (baptized Achille Oscar Adjutor Renaud) the sum of $1,300 (one thousand three hundred pesos), Mexican gold.

This decision was a majority decision as regards the standing of the claimant, which has not, in the opinion of the Mexican Commissioner, been established.

THE INTEROCEANIC RAILWAY OF MEXICO (Acapulco to Veracruz) (LIMITED), AND THE MEXICAN EASTERN RAILWAY COMPANY (LIMITED), AND THE MEXICAN SOUTHERN RAILWAY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 53, June 18, 1931, dissenting opinion (dissenting in part) by British Commissioner, June 18, 1931. Pages 118-135. See also decision No. 22.)

CORPORATION, PROOF OF NATIONALITY.—ALLOTMENT. *Compromis* does not require that, in order to claim, British corporation must show that British subjects have or have had an interest exceeding fifty per cent of the total capital, or that an allotment be produced.

DENIAL OF JUSTICE. Acts of non-judicial authorities, as well as judicial, may result in a denial of justice at international law.

CALVO CLAUSE. When a denial of justice is established the tribunal will have jurisdiction over the claim despite that claimant may have agreed to a Calvo Clause. Circumstances of case examined and *held* not to establish that claimants exhausted all local remedies in vain or that a denial, or undue delay, of justice existed.

Cross-references: Annual Digest, 1931-1932, pp. 199, 265.

Comments: Clyde Eagleton, "*L'épuisement de recours internes et le déni de justice, d'après certaines décisions récentes*", Rev. de Droit Int. L. C., 3d ser., Vol. 16, 1935, p. 504 at 520; Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 237; Lionel Summers, "*La clause Calvo: tendances nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 231.

1. According to the Memorial filed in claim No. 79, the Interoceanic Railway of Mexico (Acapulco to Veracruz) is a British Corporation, registered with limited liability on the 30th day of April, 1888, under the British Companies Acts, for the purpose of *(inter alia)* constructing or acquiring, equipping, maintaining and working railways in Mexico, and its registered office is situated in England.

In the year 1903 the Interoceanic Company entered into an arrangement with the Mexican Eastern Railway Company, Limited, whereby the Interoceanic Company agreed to take the Mexican Eastern Railway and undertaking on lease from that Company, for a period which has not yet expired.

The Mexican Eastern Railway Company, Limited, is also a British Corporation, and was registered with limited liability on the 5th day of December, 1901, under the British Companies Acts, for the purpose *(inter alia)* of constructing or acquiring, equipping, maintaining and working railways in Mexico. Its registered office is situated in England.

All the shares of the Mexican Eastern Railway Company, Limited, are owned by the Interoceanic Company.

In the year 1909 the Interoceanic Company, at the request of the Mexican Government, entered into an arrangement with the Mexican Southern Railway, Limited, whereby the Interoceanic Company agreed to take the Mexican

Southern Railway on lease from that Company for a period which has not yet expired.

The Mexican Southern Railway, Limited, is also a British Corporation, and was registered with limited liability on the 9th May, 1889, under the British Companies Acts for the purpose *(inter alia)* of constructing or acquiring and equipping, maintaining and working railways in Mexico. Its registered office is situated in England.

In the month of November 1903 an agreement was entered into between the Interoceanic Company and the National Railroad Company of Mexico (since merged in the National Railways of Mexico) under which the National Company undertook the management of the operation of the system of railway lines of the Interoceanic Company. Such agreement was subsequently amended on the 17th day of December, 1903.

It was part of the terms of the Management Agreement that:

(a) The National Company in undertaking such operation should act solely as the agent and manager of the Interoceanic Company.

(b) The earnings of the operated lines of the Interoceanic Company should be kept separate from other earnings; that all available net earnings of such lines should be paid by the National Company to the Interoceanic Company in London, and that all moneys spent either in Mexico or in England should be allocated as between capital and revenue as might be determined by the Interoceanic Company.

(c) The powers of the Interoceanic Company were to continue as theretofore to be exercised by its own Board of Directors.

(d) The Management Agreement should continue for one year from the 1st January, 1904, and thereafter until six months' notice in writing to terminate should be given by either party, but terminable forthwith in certain events.

2. The claims are for—

(1) Indemnification for loss of earnings of the Claimants for the period from the 15th August, 1914, to the 31st May, 1920, inclusive, due to the acts of General Venustiano Carranza and his forces, which resulted in depriving the Claimants of their railway undertakings and material and the earnings in respect thereof during that period.

(2) Compensation for losses of and damages to rolling-stock and other property of the Claimants, caused during such period by reason of such acts.

(3) Compensation for cash stores and other assets of the Claimants, requisitioned during such period as the results of those acts.

(4) Compensation for damage caused by the destruction in April 1914 of the San Francisco Bridge, near Veracruz, and the railway track between that bridge and Veracruz, belonging to the Claimants' railway undertakings, due to the acts of the forces of General Victoriano Huerta.

(5) Compensation for loss of earnings during the period from April 1914 to the 14th day of August, 1914, by reason of the destruction of the said San Francisco Bridge and track, and due to the acts of the forces of General Victoriano Huerta.

(6) Compensation for other losses and damages caused to the Claimants by revolutionary forces and the Mexican Government between the 20th November, 1910, and the 31st May, 1920.

(7) Interest at the rate of 6 per cent per annum, compounded half-yearly upon the amounts so payable by way of indemnification and compensation from the 31st May, 1920, down to the date of actual payment of such indemnification and compensation.

3. The Memorial further sets out that the claimants have for years endeavoured, through the intermediary of the Interoceanic Company, but without any success whatever, to obtain a settlement by the Mexican Government of their claims against the Government arising out of such seizure and occupation.

A negotiation has gone on from the end of 1921 until the end of 1927. The claimants consider the conditions imposed by the Mexican Minister of Finance as unacceptable and they conclude that it is impossible to come to an arrangement upon an equitable basis.

The British Government claim on behalf of the Interoceanic Railway of Mexico (Acapulco to Veracruz), Limited, the Mexican Eastern Railway Company, Limited, and the Mexican Southern Railway, Limited, the sum of 44,624,035 pesos Mexican gold, together with interest at the rate of 6 per cent per annum on this sum, compounded half-yearly from the 31st May, 1920, until the date of actual payment.

4. The claim No. 85, presented by the same Companies, is in respect of the following items:

(1) Indemnification for loss of earnings of the Claimants for the period from the 1st June, 1920, down to the 31st December, 1925.

(2) Compensation for losses of and damages to rolling-stock and other property of the Claimants and other losses and damages suffered during such period.

(3) Interest at the rate of 6 per cent per annum compounded half-yearly upon the amounts so payable by way of indemnification and compensation from the 31st December, 1925, down to the date of actual payment of such indemnification and compensation.

The amount of this claim is $33,924,176 pesos Mexican gold together with interest as aforesaid.

5. The cases are before the Commission on a Motion of the Mexican Agent to Dismiss, based on the three following grounds:

(a) The British nationality of the Claimant Companies has not been established.

(b) It has not been proved that British subjects are holders of more than fifty per cent of the total capital of the said Companies, nor that the allotment to which Article 3 of the Convention refers was made.

(c) In the concessions granted to the claimant Companies, a so-called Calvo clause is inserted, reading—

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiera. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

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[1] *English translation from the original report.*—"The Company shall always be a Mexican Company, even though any or all its members shall be aliens, and it shall be subject exclusively to the jurisdiction of the courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens

6. The Mexican Agent pointed out that in this case the Calvo Clause was in tenor and wording exactly similar to article 11 of the concession of the Mexican Union Railway, with which Decision No. 21 of the Commission had dealt. In his submission the Commission should declare themselves incompetent, for the same reasons as in the other case.

7. The British Agent declared that he did not intend to argue against a decision taken by the Commission in a previous session, but that he did see a marked difference between the two cases. His contention was that the Commission were not only at liberty to come to another conclusion in the claim now under consideration, but he even found in the decision quoted a strong argument in favour of overruling the motion filed by his Mexican colleague.

To this end he relied more particularly upon No. 12 of Decision No. 21, reading—

"The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of international law.

"It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision, the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted in a denial or undue delay of justice. It only took away the right to ignore them.

"This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon which the claim is based occurred in 1920 and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims, similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

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having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any matter whatsoever."

"If by taking the course agreed upon by both parties the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice, as long as justice has not been appealed to, the majority cannot regard the claimant as a victim of international delinquency."

8. It was, in the eyes of the British Agent, clear that the Commission had, in the claim of the Mexican Union Railway, accepted the Calvo Clause *inter alia* because the claimant, so long as he had not had recourse to the Mexican Courts, could not be said to have been a victim of internationally illegal acts or breaches of international law, such as a denial of justice or an undue delay of justice. But the position of the Interoceanic Railway and of the two other Companies was quite different. They had not acted as if they had not signed a Calvo Clause. They had not disregarded local means of redress and they had not omitted to follow the course agreed upon in the concession.

In order to prove this, the Agent quoted article 14 of the Ley de Reclamaciones (30th August, 1919), reading—

"Art. 14. Las indemnizaciones debidas a empresas ferrocarrileras o de otros servicios públicos que hubieren sido ocupados o expropiados por el Gobierno con motivo de operaciones militares o a causa de las condiciones anormales que han prevalecido en el país, no tendrá necesariamente que sujetarse al conocimiento de la Comisión de Reclamaciones, sino que la indemnización que deba pagárseles podrá ser estipulada por medio de convenios celebrados por conducto de las Secretarías respectivas." [1]

And article 145, section X and section XI of the Ley sobre Ferrocarriles (29th April, 1899), reading—

"X. La autoridad federal tiene el derecho de requerir, en caso de que a su juicio lo exija la defensa del país, los ferrocarriles, su personal y todo su material de explotación y de disponer de ellos como lo juzgue conveniente.

"En este caso la Nación indemnizará a las compañías de camino de fierro. Si no hubiere avenimiento sobre el monto de la indemnización se tomará como base el término medio de los productos brutos en los últimos cinco años, aumentado en un diez por ciento y siendo por cuenta de la empresa todos los gastos.

"Si sólo requiriere una parte del material, se observará lo dispuesto en el párrafo IV de este artículo.

"XI. En caso de guerra o de circunstancias extraordinarias, el Ejecutivo podrá dictar las medidas necesarias, a fin de poner, en todo o en parte, fuera de estado de servicio, la vía, así como los puentes, líneas telegráficas y señales que formen parte de ella.

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[1] *English translation from the original report.*—"Article 14. Compensation due to railway companies or other public utilities occupied or expropriated by the Government in connexion with military operations, or by reason of abnormal conditions prevailing in the country, will not necessarily have to be dealt with by the Claims Commission, but such compensation as may be due to them may be the subject of stipulation under agreements to be entered into by the respective Departments."

"Lo que haya sido destruído será restablecido a costa de la Nación, luego que lo permita el interés de ésta." [1]

The claimants have done everything in their power to have justice done, and had followed the course prescribed by a Mexican law. They had, in strict accordance with article 14 of the Law on Claims, addressed themselves to the Minister of Finance in order to arrive at a settlement of the compensation due to them. They had earnestly tried by correspondence, and orally, to obtain an equitable arrangement. It had all been in vain. After six years of patient and arduous negotiations, they were confronted by conditions, which they considered as unjust, unacceptable and unfit to constitute the basis of an agreement. In 1927 they had found themselves compelled to realize that they could not along these lines obtain justice. Since then they had received no further communication from the Department of Finance, and it was obvious that they could no longer expect that anything would be done towards awarding them the compensation to which the Railway Act entitled them.

In these circumstances, they had sought redress by applying to the Comisión Ajustadora de la Deuda Pública Interior, but although they had filed their claims with this Institution in November 1929, they had not, until now, been made acquainted with the results of their action.

The Agent's conclusion was that there could be no doubt as to the claimants having exhausted all the local means of redress open to them. These local means of redress had, however, proved insufficient. By taking the course indicated by the Mexican laws, the claimants had not been able to pursue their right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words, that international delinquency which, according to the opinion laid down in Decision No. 21 of the Commission, entitled a claimant to apply to his own Government, in spite of having subscribed to a Calvo clause.

9. The Mexican Agent argued that, according to the opinion of many authorities on international law, only those acts or omissions could constitute a denial or an undue delay of justice, for which judicial powers were responsible. What the claimants complained of was that their negotiations with the Minister of Finance had not resulted in an agreement, because of the attitude taken by this official, but the Agent failed to understand how the attitude of this civil authority could ever be regarded as a denial of justice or as an undue delay of justice. It was only the courts that could be guilty of this kind of international delinquency, not an official, however highly placed, whose function was not that of administering justice, but that of directing one of the Departments of the Public Service.

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[1] *English translation from the original report.*—"X. The Federal authorities have the right, should it in their judgment be required by the defence of the country, to call upon the railways, their personnel and all their operating equipment, and to dispose of same as they may think fit.

"The Nation shall in that event compensate the railway companies. Should they fail to reach an agreement as to the amount of such compensation, the average gross earnings for the preceding five years, plus ten per cent shall be taken as a basis, all expenses to be borne by the Company.

"If only a part of such equipment should be requisitioned, the provisions of paragraph IV hereof shall be observed.

"XI. The Executive may, in case of war or of circumstances of an extraordinary nature, order such measures to be taken as may be necessary for putting out of service, either wholly or in part, any tracks, and also any bridges, telegraph lines and signals forming part thereof.

"Anything so destroyed shall be replaced at the expense of the Nation, as soon as the interests of the latter shall allow of its doing so."

The Agent went on to set out that article 14 of the Ley de Reclamaciones had no other purpose than that of suggesting to Railway Companies an easier, and perhaps a quicker way of obtaining compensation, than by filing an action with the National Claims Commission. But the law did not intend to preclude them from taking the latter course, in case they preferred it or in case they could not arrive at an agreement with the respective Departments. This was what the Law meant by declaring that it was not necessary for the corporations in question to go to the Comisión de Reclamaciones. By entering into negotiations with a civil authority, they had not therefore waived their right to resort to the Special Court, which the same law had created to adjudicate upon revolutionary claims.

The claimants had themselves interpreted the law in identically the same way, because they had, in November 1929, applied to the Conisión Ajustadora de la Deuda Publica Interior, to which Institution the functions of the National Claims Commission had subsequently been transferred. This proved that the claimants also understood that, when the negotiations with the Minister of Finance did not lead to an issue, they still possessed other means of redress.

The fact that the Comisión Ajustadora had not rendered a decision, could not—in the Agent's submission—be construed as a denial nor as an undue delay of justice. The magnitude of these claims was such that no court could be blamed for not having administered justice within the period that had elapsed since they were filed. The same claims had been presented more than two years previously to the Commission, before which the Agent was then speaking, but no one would, having regard to the volume of the work incumbent upon the Commission, accuse this tribunal of having deferred the judgment any longer than was reasonable.

Moreover, the Agent did not deem it unlikely that the National Institution, having received the claims at a time when they were already before the International Commission, preferred to postpone the taking of them into consideration, until they knew whether the latter would declare themselves competent or not.

The Agent thought the question as to whether the Minister of Finance had really stipulated unacceptable conditions, immaterial to the issue now before the Commission, because the claimants had the right to resort to the Comisión Ajustadora, a right of which they had availed themselves. But he felt bound to observe that in his opinion the conditions were fair and reasonable, and he still believed that an arrangement might be arrived at—just as had been done in the case of other Railway companies—if both parties approached each other animated by an earnest desire to settle their differences in an amicable way.

The Agent's conclusion was that nothing had been shown that could induce the Commission not to accept the Calvo Clause, on the same grounds as they had done in the claim of the Mexican Union Railway.

10. The Commission declare themselves satisfied as to the British nationality of the claimant companies. They have, in more than one of their decisions, accepted incorporation in England and domicile in England as sufficient evidence of such nationality. They do so in this case as well.

The Convention does not require that British Companies should, in order to have standing before the Commission, show that British subjects have or have had an interest exceeding fifty per cent. of their total capital; neither is it necessary, in case the Company is British, that any allotment be produced.

The Commission cannot admit as justified the Motion to Dismiss in so far as it is based upon the grounds set out under *(a)* and *(b)* of No. 4.

11. As regards the third group upon which the motion rests, set out under *(c)* of No. 4, the Commission, by a majority, adhere to their decision taken in the case of the Mexican Union Railway, and as it so happens that in the claims now under consideration, the Calvo Clause has exactly the same wording as in the former case, the question before them is whether the said clause must in this case be disregarded because the three claimant companies have been the victims of internationally illegal acts or breaches of international law, such as a denial of justice or undue delay of justice.

Before answering this question, the Commission deem it necessary to lay down their opinion as to the character of the authorities who can become guilty of a denial or undue delay of justice.

They do not concur in the view that the judicial authorities can only be the ones, in other words, that only the courts can be made responsible for international delinquency of this description. They are undoubtedly aware that denial of justice or its undue delay will, in a majority of cases, be an act or an omission of a tribunal, but cases in which administrative, or rather non-judicial authorities, can be blamed for such acts or omissions are equally existent.

If an alien is arrested by the police on a false charge, his strongest desire will be to be put upon his trial without delay, in order to prove his innocence. But if the authorities in whose power he happens to be prevent him from being led before a court, if they bar him access to a tribunal, this must certainly be characterized as a denial of justice or as an undue delay of justice, the responsibility for which does not rest with the courts or with any judicial authority, but with the non-judicial officials, who deprived the alien of his liberty.

If an alien, having won a lawsuit and being desirous of seeing the judgment executed, addresses himself to those non-judicial authorities upon whom, in most countries, execution of the judgments of civil courts is incumbent, and they either refuse to assist him, or postpone their action indefinitely, the alien in question is certainly entitled to complain of denial or undue delay of justice, although the responsibility cannot be laid at the door of the tribunal that sustained his action.

If a foreigner, in the pursuit of his private interests, needs a document, which can only be delivered by one of the administrative authorities in the country where he transacts his affairs, and if this document is improperly withheld or delivered too late to be of any use, this will again constitute the same breach of international law, without any judicial authority being blamable.

The Commission deem that these examples, which could be supplemented by many others, show that non-judicial authorities also can be guilty of a denial or undue delay of justice, and if it could, in the case now before them, be shown that such authorities had been guilty of that international delinquency, they would not hesitate to declare themselves competent in spite of the claimants having agreed to a Calvo clause.

12. They have, however, been unable to find any such omission or act in the case they now have to decide. As they read it, article 14 of the Ley de Reclamaciones does not contain this alternative, that the Corporations mentioned therein must exercise the right, either of submitting their claims to the National Commission, or of endeavouring to come to an extra-judicial settlement with one of the Departments. The wording of the article does not admit of the conclusion that the Companies, having once made the election between the two means of redress, precluded themselves once for all from seeking that remedy which they had not chosen.

The meaning of article 14 seems clear. The number of the enterprises to which it refers could not be so great as to render it impossible for the Public

Administration to deal with them. This must have been one of the reasons why the law made available a seemingly less complicated mode of settlement, to railway companies and other similar concerns, than could be offered to the many thousands of other claimants. A second ground may have been that as occupation and taking over of public services must in most cases have been carried out by organs of the Government, with certain formalities and the execution of several documents, it was logical that an effort should, before resorting to the Courts, be made to come to some arrangement with the same Government by whose orders confiscation had taken place, and in whose archives much evidence was sure to exist. And a third argument may be found in the Railway Act, which already provided for the compensation of Railway Companies, whose buildings, rolling-stock and equipment had been taken over for purposes of safety and defence. It seems probable that those who drafted article 14 held the view that the rights granted by the Railway Law made a settlement of claims of this nature an easier matter than adjudication upon claims which had their origin in revolutionary acts not provided for by any law. It does not seem too bold an inference that an agreement out of court was recommended for this reason also.

But this recommendation cannot be construed as going any further than its object of facilitating an understanding. The Mexican Agent gave the correct interpretation of the provision, when he stressed the fact that the Companies had lost nothing by applying to the Department of Finance, and that they continued to be fully entitled to have recourse to the National Claims Commission (later the Comisión Ajustadora de la Deuda Pública Interior).

13. Another remedy remained open to them, another means of redress existed, to which they could resort. And it was to this means of redress that the claimant had recourse in November 1929, thus showing themselves that their resources were far from being exhausted.

The Commission cannot, that being the case, admit that justice has been denied to the claimants because their negotiations with the Minister of Finance have not led to an agreement. The Commission see no reason why they should enter upon an appreciation of the conditions stipulated by the Government. These are for the present an issue of no importance, because the claimants could resort to a Special Tribunal in case no settlement proved attainable.

Just as little as they can admit a denial of justice, can the Commission hold that the claimants are the victims of an undue delay of justice. The time that has elapsed since they went to the Comisión Ajustadora is not so considerable as to justify the charge that this Institution has deferred rendering justice longer than a court of law is allowed to do. The claims amount to over 77 million pesos Mexican gold, with interest compounded at the rate of 6 per cent, and no one would criticize a tribunal for taking a substantial time for examining actions in which such huge interests are involved, quite apart from the fact that the Comisión Ajustadora may have kept the claims pending so long as the International Tribunal, with which they knew that the motion had previously been filed, had not pronounced judgment as to their competence.

14. The preceding considerations have led the Commission to the conclusion that it cannot be held that the claimants have exhausted all local remedies in vain, that in this case a denial of justice or undue delay of justice are not rightly alleged, that there is consequently no evidence of internationally illegal acts or omissions, and that no appeal can, for that reason, be made to the arguments used by the Commission in Decision No. 21 when stating under what circumstances a Calvo clause should, even when signed, be disregarded.

15. The motion to dismiss is allowed.

Dissenting opinion of British Commissioner

1. I agree with the other members of the Commission in their finding that denial or delay of justice has not been established in this case. But whilst recognizing that the decision of the Commission in the case of the Mexican Union Railway (Limited), Decision No. 21, covers the present case in so far as such decision finds that the Anglo-Mexican Claims Convention does not overrule the Calvo Clause contained in the Concession then under consideration (which is identical with the Calvo Clause in this case), and that it fettered the Commission in this case, yet my opinion is so strong that their decision in the case of the Mexican Union Railway case was wrong on the important point of the relevance and applicability of the decision in the American case, to which I shall refer presently, that I must in the present case offer a dissenting opinion, so far as concerns the applicability of the Calvo Clause.

2. For convenience of reference, the Calvo Clause (translation) in the Mexican Union Railway case, which is the same in the present case, was as follows:

"The Company shall always be a Mexican Company even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may consequently not intervene in any manner whatsoever."

3. I would begin my observations by noting that, in my opinion, having carefully studied the majority decision in the Mexican Union Railway case, the Commission gave undue and misconceived weight as regards the applicability thereto of the decision of the United States and Mexico Claims Commission in the case of the North American Dredging Company of Texas, quoted in the Commission's decision in the Mexican Union Railway case. They compared the terms of the Concession in the American case with those of the Concession in the Mexican Union Railway case, and found them practically similar. But in my opinion this factor was far from settling the matter. Other considerations of much greater importance entered into the question.

4.—(1) The subject matter of the claim in the North American Dredging Company of Texas was breaches of a contract made between that Company and the Government of Mexico, which contract contained the Calvo Clause. It related purely to questions arising out of such contract and was confined to these.

(2) The Claim came before the United States and Mexico General Claims Commission under the Convention of the 8th September, 1923, and not under the Special Convention of the 10th September, 1923, for dealing with losses or damages suffered by American citizens through revolutionary acts.

(3) The Convention of the 8th September, 1923, setting up the American General Claims Commission, differs widely in its terms from the Anglo-Mexican Convention, as it also does from the terms of the American Mexican Special Claims Convention of the 10th September, 1923, in the respect shown in subparagraphs (4), (5) and (6) hereof.

(4) The Convention under which the North American Dredging Company of Texas case came before the General Claims Commission was one for settling claims by the citizens of each country against the other (excluding claims for losses or damages growing out of revolutionary disturbances in Mexico, which formed the basis of another and separate Convention). They were submitted to a Commission (i.e., the General Claims Commission) for decision in accordance with the principles "of international law, justice and equity" (see Articles I and II), though both parties (in Article V) agreed that no claim should be disallowed or rejected by the application of the general principle of international law that legal remedies must be exhausted first.

(5) The terms of the Anglo-Mexican Special Convention had (and still have) as a foundation, the desire to adjust definitely and amicably all pecuniary claims "*arising from losses or damages suffered by British subjects on account of revolutionary acts occurring during the period named*". In Article 2 is set out that the Commission shall "examine with care, and judge with impartiality, in accordance with the principles of justice and equity, all claims presented, since it is the desire of Mexico *ex gratia* fully to compensate the injured parties, and not that her responsibility shall be established in conformity with the general principles of international law; and it is sufficient therefore that it be established that the alleged damage actually took place, and was due to any of the causes enumerated in Article 3 of this Convention for Mexico to feel moved *ex gratia* to afford such compensation". It will be seen therefore that the Commission was to deal, not with questions of the construction, performance or breach *of contracts*, but solely and purely with damages and losses on account of, and due to, revolutionary causes.

(6) The claim coming before the Commission in the Mexican Union Railway case was not, as it was in the case of the American Dredging Company of Texas, in respect of breaches of contract or arising thereout, but was one for losses or damages owing to revolutionary causes.

5. It is in my opinion clear from a perusal of the judgment in the North American Texas Dredging case, that the American Commission was dealing with a case arising under the contract containing the Calvo Clause. It based its decision therein on the fact that the Company had procured and entered into a contract stipulating that the contractor, etc., "should be considered as Mexicans in all matters, within the Republic of Mexico, concerning the execution of such work, and the fulfilment of the contract. They should not claim nor should they have, with regard to the interests and the business connected with this contract, any other rights or measures to enforce the same than those granted by the laws of the Republic to Mexicans, nor should they enjoy any other rights than those established in favour of Mexicans. They were consequently deprived of any rights as aliens, and under no conditions should the intervention of foreign Diplomatic agents be permitted *in any matter related to the contract*". The Judgment stated that what Mexico asked of the Company as a condition of awarding it the contract which it sought was: "If all the means of enforcing your rights *under this contract* afforded by Mexican law, even against the Mexican Government itself, are wide open to you, as they are wide open to our own citizens, will you promise not to ignore them and not call directly upon your own Government to intervene in your behalf in any controversy, small or large, but seek redress under the laws of Mexico through the authorities and tribunals furnished by Mexico for your protection." And the claimant, by subscribing to this contract and seeking the profits which were to accrue to him thereunder, had answered "I promise". (See paragraph 10 of American judgment.)

6. The judgment of the *North American Dredging Company of Texas* case added (see paragraph 14) that "this provision did not, and would not, deprive the Claimant of his American citizenship and all that that implied. It did not take from him his undoubted right to apply to his own Government for protection if his resort to the Mexican tribunals or other authorities available to him resulted in a denial or delay of justice as that term is used in international law. In such a case the claimant's complaint would be not that his contract was violated, but that he had been denied justice. The basis of his appeal would be not a construction of his contract save perchance in an incidental way, but rather an internationally illegal act".

7. As I read the judgment of the present Commission in the Mexican Union Railway case, they approve of this principle (which no doubt applies to all cases coming within the Calvo Clause), but they apply it, in my opinion unnecessarily and irrelevantly, to the Mexican Union Railway case as if that case were a case of alleged breaches of contract and not, as it was, a claim entirely distinct from the contract, and one arising on revolutionary acts. The Mexican Union Railway case had nothing to do with the position of the Mexican Union Railway as contractors and *qua contract*. On the contrary, it was merely incidental that they were contractors. They happened, unfortunately for them, to be a target for Revolutionaries, just as were any other British subjects carrying on business in Mexico. There was no question of contract, or interpretation thereof, or of breaches thereof, and the Mexican Union Railway were not seeking to enforce a contract.

8. To emphasize this further, the claim of the Mexican Union Railway was brought by them not as contractors nor as seeking any rights under their contract, but as British subjects carrying on business in Mexico who had suffered loss and damage, through revolutionary causes, losses or damages which the Government of Mexico, by virtue of a laudable wish, as expressed in the Convention, were moved to compensate for, not because she might be liable under international law, but because it should be "sufficient therefore that it be established that the alleged damage actually took place". This is entirely outside any contract, whether it contained or did not contain a Calvo Clause.

9. I may here perhaps usefully refer to some general observations on the subject of Calvo Clauses as contained in Borchard's *Diplomatic Protection of Citizens Abroad* (see page 795). "Since 1886 many of these States (Latin-American) have incorporated into their constitutions and laws a provision that every contract concluded between the Government and an alien shall bear the clause that the foreigner 'renounces all right to prefer a diplomatic claim in regard to rights and obligations derived from the contract, or else that all doubts and disputes "arising under it" shall be submitted to the local courts without right to claim diplomatic interposition of the alien's Government'. " And (at page 797) Mr. Gresham, Secretary of State, interpreted the clause of the Venezuelan constitution to the effect that "in every contract of public interest the clause that doubts and controversies which may arise regarding its meaning and execution shall be decided by the Venezuelan tribunals and according to the laws of the Republic, and, in no case, can such contracts be a cause for international claims", to mean that the party claiming under the contract "agrees to invoke for the protection of his rights only the authorities, judicial or otherwise, of the country where the contract is made. Until he has done this, and unless having done this, justice is plainly denied him, he cannot invoke the diplomatic intervention of his own country for redress".

10. In all instances referred to in the authorities, the discussion has ranged round and was confined to claims involving the interpretation of contracts or arising thereout. And the *Mexican Union Railway* case is the first case in which there has been any extension of it to other matters. Further, according to the quotation contained at page 168 of Sir John Percival's dissenting opinion in the *Mexican Union Railway* case, His Majesty's Government in Great Britain, in its answer to the question put by the League of Nations on the subject of codification of international law, while accepting as good law the decision of the General Claims Commission between the United States of America and Mexico in the case of the *North American Dredging Company of Texas*, yet in recapitulating what was laid down in that case, was careful to limit it as applying "*in all matters pertaining to the contract*", and also to "*a claim arising out of the contract in which the stipulation was inserted*". The claim in the *Mexican Union Railway* case did not, in my opinion, fall within this category, but was entirely outside it.

The Calvo Clause in the Mexican Union Railway Company's contract had reference only and was confined to questions arising between the Railway Company *qua contractor* and the Government, and did not extend to claims independently thereof, and *a fortiori* does not cover revolutionary claims arising out of the provisions of a Special Convention such as was concluded between the two Governments of Great Britain and Mexico. Reading the Calvo Clause, in the Mexican Union Railway's concession or contract, it is in my opinion clear that it is confined to the position of the Company *as Contractors* and to questions connected with that position, which were subject to the jurisdiction of the Courts of the Republic of Mexico and to be settled by them, and not made the object of diplomatic intervention. To my mind it is impossible to carry the stipulation further, or to make it override the plain terms of the Convention subsequently concluded between the Governments of Great Britain and Mexico. To do so would be to recognize the rights of a subject to sign away in anticipation and limit *in futuro* the rights of his Government to make a Convention on a subject never contemplated by, nor within the terms of, the contract signed by him.

11. Coming to the case of the *Interoceanic Company*, the subject of the present claim, it is common ground that the Calvo Clause in that case is identical with that in the *Mexican Union Railway* case, but I recognize that there are some differences in the character of some of the items of the claim; in particular as regards those arising on the action of the Carranza revolutionaries under the Mexican Railway Law, which to some extent, it may be argued, remove those items from the more general category of revolutionary claims. But whatever may have been the legal foundation or validity under the Mexican Railway Law for some of General Carranza's acts at the time, then (as a revolutionary) purporting to invoke the provisions of the Railway Law, the confiscation of, and damage to, the claimant's properties were nevertheless revolutionary acts and, as such, within the purview of the Anglo-Mexican Convention, and were, under its terms, made the subject of compensation before this Commission. Therefore, the same considerations and arguments as expressed above on the Mexican Union Railway Company's claim are applicable even to those portions of the Claim.

12. For the above reasons, in my opinion, the Calvo Clause in this case is not a bar to maintenance of the claim of the Interoceanic Company and its co-claimants, and the decision of the majority of the Commission to allow the Motion to Dismiss is wrong. And the Motion should be dismissed, and the case heard on its merits.

THE DEBENTURE HOLDERS OF THE SAN MARCOS AND PINOS COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 54, June 23, 1931. Pages 135-141.)

CREDITORS' CLAIMS. Claim of holders of debentures of a British corporation, whose real property in Mexico had been sold to another, subject to a mortgage held by such corporation, based on acts of forces occurring while such property was owned by the purchaser, *dismissed.*

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 233.

(Text of decision omitted.)

EL ORO MINING AND RAILWAY COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 55, June 18, 1931, dissenting opinion by Mexican Commissioner, June 18, 1931. Pages 141-152.)

CALVO CLAUSE.—EXHAUSTION OF LOCAL REMEDIES. Claim for compensation for transport of troops and goods on behalf of revolutionary and federal forces, for services and material furnished such forces, and for losses and damages resulting from the acts of such forces. Claimant was the holder of a railroad concession in connexion with which it had agreed to a Calvo Clause. Claimant had previously exhausted the only available local remedy and the domestic tribunal before which such claim was pending had taken no action thereon and made no indication as to when action might be taken. Motion to dismiss *disallowed.*

DENIAL OF JUSTICE.—UNDUE DELAY IN JUDICIAL PROCEEDINGS. While tribunal will not attempt to define with precision what will amount to an undue delay of justice, the holding of a case for nine years without any action whatever *held* undue delay. If such delay were due to volume of litigation, the judicial machinery itself must be deemed defective.

Cross-reference: Annual Digest, 1931-1932, p. 201.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 237; Lionel Summers, "*La clause Calvo: tendences nouvelles*", Rev. de Droit Int., Vol. 12, 1933, p. 229 at 232.

1. The claim is for compensation for the transport of troops and goods on behalf of revolutionary and federal forces, for work done and material supplied to revolutionary and federal forces, and for losses and damages suffered at the hands of revolutionary and federal forces during the period from the 20th November, 1910, to the 31st May, 1920.

The claimant Company was incorporated as a British Limited Company under the Companies' Acts, 1862 to 1898, on the 27th July, 1899.

The El Oro Mining and Railway Company, Limited, was, according to the Memorial, at the time of the losses and still is, engaged in mining and railway business in the State of Mexico. During the period from the 20th November, 1910, to the 31st May, 1920, inclusive, the Company suffered considerable losses on account of revolutionary or counter-revolutionary acts. The claim has been formulated in seven sub-claims.

CLAIM "A"

First Part

This claim is in two parts. The first is for compensation for the transport of troops by special and ordinary trains, for freight of materials and horses, and for repair to damage done to telegraph wire; and the second for compensation for material commandeered by the Libertador, Constitucionalista and Convencionista armies, and by the Secretary of War and Marine.

During November 1913 and the period from April to September 1914, troops and horses were transported over the railway belonging to the El Oro Mining and Railway Company, Limited, at the orders of Colonel J. C. Gamboa. Accounts 515-17, 521 and 524 are for services rendered at the orders of Colonel Gamboa.

During November and December 1914, January and February 1915, and November and December 1915, troops were transported for the Constitucionalista army, and a large number of special trains were used by that army. Fuel was supplied to, and some telegraphic lines were damaged by, this army. The names of the chief officers responsible for requisitions are: J. Gloriat, Arnulfo Gonzalez and F. Maguia.

During the period from February to September 1915 the Libertador army made use of the railway for the transport of troops, and requisitioned quantities of fuel.

Second Part

During the period from September to December 1915, material was supplied to, and work done for, the Constitucionalista army at the orders of Captain Juan Ramirez and Colonel Rivera.

During the period from February to September 1915 a considerable amount of work was done and material supplied to the Libertador army at the request of the same officers as detailed in group 3 of part I of this claim.

In August and September work was done for the Convencionista army at the orders of General Bonilla and General M. S. Pavon.

The amount of the claim is $13,810.64 United States gold.

CLAIM "B"

It is alleged that on the 26th October, 1917, a train No. 480, left Empalme Gonzalez, a station on the National Railroads, with a freight of dynamite, motor cars, glass, machinery and other goods. At kilometre post 293, on the same day, an armed band of some 300 men under the command of General Gutierrez attacked the train by placing a bomb on the track, the explosion of which made it impossible for the train to proceed. After the band had stolen all they could, they set fire to the train, and the explosion which occurred when the flames reached the dynamite truck totally destroyed the train. In this train was a quantity of goods belonging to the El Oro Mining and Railway Company, Limited. Particulars of the goods are given in *(j)* of Exhibit B.

The amount of the claim is $13,353.11 United States gold, or pesos 26,706.22 Mexican gold.

CLAIM "C"

This claim is for compensation for material taken by military forces and lost at Ciudad Juarez in 1915 and 1917. The claim is in two parts: the first is for some dynamite and fuse which was confiscated by military forces in 1916, and the second is for a shipment of ten kegs of litharge which was lost on the railways.

The Memorial sets out that on the 12th January, 1915, Messrs. T. J. Woodside and Company imported, on behalf of the El Oro Mining and Railway Company Limited, a car of dynamite and fuse. This car was No. 11205, and left Juarez City in a special train made up for Guanajuato. *En route* the car was cut out of the train as it was in bad order. On inquiry being made, it was found that the car had been taken to Dynamite Station and unloaded there by the order of the military authorities. Messrs. Woodside and Company wrote to the Constitutionalist Railways of Mexico and, in reply, were informed that this dynamite was unloaded by military command. This dynamite was never recovered by, or on behalf of, the claimant company. Part of this dynamite belonged to the El Oro Company.

In January 1915 ten cases of litharge were shipped to the El Oro Mining and Railway Company by J. A. Wright, customs broker of El Paso, Texas. This consignment of litharge was never received by the Company.

The amount of the claim is $4,934.20 United States gold, or $9,868.40 pesos Mexican gold. This total includes the cost of transport which had to be paid in advance.

CLAIM "D"

It is alleged in the Memorial that on the 7th August, 1914, revolutionary forces entered the mining property of the El Oro Mining and Railway Company and took possession of rolling-stock belonging to the Company. In October 1915 Colonel L. Rivera returned to the Company locomotive No. 2 and twelve trucks. The locomotive and trucks were in a very much damaged condition, and considerable repair was necessary before they were fit for further use. At the request of José P. Romo, the Judge of First Instance at El Oro ordered an investigation by experts of the damage and an estimate from these experts of the cost of repair. The report of these experts is attached to the voluntary proceedings *(b)* of Exhibit D.

On the 24th June, 1915, General Agustin G. Ceballos took, among other rolling-stock belonging to the Company, engine No. 5, and since that date the engine and almost all the rolling-stock was returned. On the 26th and 27th October, 1915, Colonel L. Rivera took an engine and twelve trucks belonging to the Company. In December 1915 engine No. 5, referred to above, and two trucks were returned to the Company. In an investigation made by experts at the request of the Judge of First Instance at El Oro, it was discovered that the trucks had not been badly used and were fit for further service. The engine, however, had received very bad treatment, and it was found necessary to expend a considerable sum of money on repairs.

The amount of the claim is 943.02 pesos Mexican gold, being 305.46 pesos Mexican gold the cost of repairs to locomotive No. 2 and twelve cars, and 637.38 pesos Mexican gold being the cost of repairs to locomotive No. 5.

CLAIM "E"

According to the Memorial, on the 11th December, 1918, wagon No. 115 left El Oro, and on the 13th it left Tultenango for Pateo. After the wagon had

been unloaded and entered for the return journey, it was set on fire by a party of rebels numbering between 200 and 300 men. The wagon was so badly damaged that it was necessary to reconstruct it.

The amount of the claim is $426.70 United States gold, or pesos 853.40 Mexican gold.

CLAIM "F"

The Memorial states that on the 10th August, 1914, a loan of pesos 20,000 paper was made to General Ramon V. Sosa, of the Constitutionalist army. The El Oro Mining and Railway Company wrote on the 15th October, 1914, requesting the return of this money. No reply was returned to this letter. On the 10th January, 1915, General Luis Colín, of the Constitutionalist Army, took pesos 1,500 paper. On the 10th February, 1915, The Administrator of the State Revenue at El Oro, by the order of General Luis Colín, took pesos 7,000 paper. On the 9th January, 1915, Colonel Alfonso León took pesos 500 paper. On the 16th February, 1914, Colonel J. Jesús Ayala took pesos 500 paper. On the 22nd February, 1913, the same officer took pesos 750 paper. On the 20th February, 1915, General Inocencio Quintanilla took pesos 500 paper, and on the 30th April, 1915, General Juan Mejía F. took pesos 500 paper. This money has never been refunded to the Company.

The amount of the claim is $4,298.88 United States gold, or pesos 8,597.76 Mexican gold, being the equivalent of the paper money taken by these officers at the rates of exchange ruling at the time.

CLAIM "G"

This is a claim for work done and for transport of troops and carriage of freight on various dates in 1914.

The accounts for this work were presented to the Secretariat of War and Navy for payment. This Department refused to pay the accounts on the grounds that, in view of the Decree of the 19th February, 1912, the acts of Victoriano Huerta could not be recognized.

The amount of the claim is pesos 140.20 Mexican gold.

The total amount of the seven sub-claims is $36,823.53 United States gold currency and pesos 1,083.22 Mexican gold.

A claim has also been filed with the Mexican National Claims Commission, but no award has been made by that Commission in respect of that claim.

The British Government claim on behalf of the El Oro Mining and Railway Company the sum of $36,823.53 United States gold and pesos 1,083.22 Mexican gold.

2. The claim is before the Commission on a motion to dismiss filed by the Mexican Agent.

The contention on which the motion is based is that the original concession granted in 1897 by the Mexican Government for the construction of this railway contains a so-called Calvo Clause, reading as follows:

"La empresa será siempre mexicana aún cuando todos o algunos de sus miembros fueren extranjeros y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República Mexicana en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en sus negocios, sea como accionistas, empleados o con cualquier otro carácter, serán considerados como mexicanos en todo cuanto a ella se refiere. Nunca podrán alegar respecto de los títulos y negocios relacionados con la empresa, derechos de extranjería bajo cualquier pretexto que sea. Solo tendrán los derechos y medios de hacerlos valer que las

leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

As the claimant Company has taken over this contract, they must, according to the view taken by the Mexican Agent, be regarded as bound by its provisions, including the Calvo Clause.

3. The Mexican Agent pointed out that in this case the Calvo Clause was in tenor and wording exactly similar to article 11 of the concession of the Mexican Union Railway, with which the Decision No. 21 of the Commission had dealt. In his submission, the Commission should declare themselves incompetent, for the same reasons as in the other case.

4. The British Agent declared that he did not intend to argue against a decision taken by the Commission in a previous session, but that he did see a marked difference between the two cases. His contention was that the Commission were not only at liberty to come to another conclusion in the claim now under consideration, but he even found in the Decision quoted a strong argument in favour of overruling the motion filed by his Mexican colleague.

To this end he relied more particularly upon No. 12 of Decision No. 21, reading:

"The question may arise whether the view expressed in this judgment does not lead to the ultimate conclusion that the Mexican Union Railway has, by signing article 11 of the concession, divested itself of its British nationality and all that it implies, to such a degree as to waive the right to appeal to its Government even in cases of violation of the rules and principles of International law.

"It is obvious that there could only be grounds for this question if the Calvo Clause in this case were construed as intended to prevent the other party from applying for the diplomatic support of his Government in any circumstances whatsoever. Had that been the scope of the provision, the Commissioners would unanimously have been of opinion that the clause was to be considered as null and void. Redress of internationally illegal acts and protection against breaches of international law are regarded by the Commission as being of such high importance to the community of civilized States that their preclusion would invalidate the stipulation. But the majority of the Commission cannot see that article 11 of the concession aims so far. The claimant has not, by subscribing to it, waived its undoubted right as a British Corporation to apply to its Government for protection against international delinquency; what it did waive was the right to conduct itself as if not subjected and as possessing no other remedies than international remedies. What the claimant promised was to apply to the courts and to resort to those means of redress which are, according to the Mexican constitution and laws, open to Mexican citizens. The contract did not take from claimant the right to apply to its Government if its resort to the Mexican tribunals or other authorities available resulted

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[1] *English translation from the original report.*—"The Company shall always be a Mexican Company, even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic of Mexico in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in its business, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any manner whatsoever."

in a denial or undue delay of justice. It only took away the right to ignore them.

"This was, however, just what the claimant did. It behaved as if article 11 of the concession did not exist. Although the most recent of the events upon which the claim is based occurred in 1920, and the Convention was signed in 1926, it took no action at all. The claimant never sought redress by application to the local courts or to the National Claims Commission, which was created to adjudicate upon claims similar to that now submitted, which has been in operation since the 17th June, 1911, and whose functions have subsequently been transferred to the Comisión Ajustadora de la Deuda Pública Interior.

"If by taking the course agreed upon by both parties, the claimant would have been unable to obtain justice, no international tribunal would have denied it access, on the ground of the engagement subscribed to by it. But the claimant omitted to pursue its right by taking that course, and acted as if said course had never been indicated by the State and accepted by it, and as there can be no question of denial of justice or delay of justice as long as justice had not been appealed to, the majority cannot regard the claimant as a victim of international delinquency."

5. It was in the eyes of the British Agent clear that the Commission had, in the claim of the Mexican Union Railway, accepted the Calvo Clause, *inter alia*, because the claimant, so long as he had not had recourse to the Mexican courts, could not be said to have been a victim of internationally illegal acts or breaches of international law, such as a denial of justice or an undue delay of justice. But the position of the El Oro Mining and Railway Company was quite different. It had not acted as if it had not signed the Calvo Clause. It had not disregarded local means of redress and had not omitted to follow the course agreed upon in the concession.

In order to prove this, the Agent drew the attention of the Commission to the Ley de Reclamaciones of the 30th August, 1919. This law created a special Court—called "La Comisión de Reclamaciones"—to which all claims should be submitted, arising out of damage—either to persons or to property—sustained through the revolutionary movements which had occurred since the 20th November, 1910. To this Tribunal aliens as well as Mexican citizens were to have access.

The Agent also quoted article 145, sections X and XI of the "Ley sobre Ferrocarriles" (the 29th April, 1899), reading:

"X. La autoridad federal tiene el derecho de requerir, en caso de que a su juicio lo exija la defensa del país, los ferrocarriles, su personal y todo su material de explotación y de disponer de ellos como lo juzgue conveniente.

"En este caso la Nación indemnizará a las compañías de camino de fierro. Si no hubiere avenimiento sobre el monto de la indemnización, se tomará como base el término medio de los productos brutos en los últimos cinco años, aumentado en un diez por ciento y siendo por cuenta de la empresa todos los gastos.

"Si sólo requiriere una parte del material, se observará lo dispuesto en el párrafo IV de este artículo.

"XI. En caso de guerra o de circunstancias extraordinarias, el Ejecutivo podrá dictar las medidas necesarias, a fin de poner, en todo o en parte, fuera de estado de servicio, la vía, así como los puentes, líneas telegráficas y señales que formen parte de ella.

"Lo que haya sido destruído, será restablecido a costo de la Nación, luego que lo permita el interés de ésta." [1]

The claimant Company has done everything in its power to have justice done, and had followed the course prescribed by a Mexican law. It had, in the year 1922, in strict accordance with the Ley de Reclamaciones, applied to the Comisión de Reclamaciones, but no award had until then been made. It had not received any communication on the subject of its claim, and it was obvious that it could no longer expect in this way to obtain the compensation due to it, according to article 145 of the Railway Act and the provisions of the Ley de Reclamaciones.

The Agent's conclusion was that there could be no doubt as to the claimants having exhausted all the local means of redress open to them. Those local means of redress had, however, proved inefficient. By taking the course indicated by the Mexican laws, the claimant had not been able to pursue its right. For this reason a denial of justice or undue delay of justice must be assumed to exist, in other words, that international delinquency which, according to the opinion laid down in Decision No. 21 of the Commission, entitled a claimant to apply to his own Government in spite of having subscribed to a Calvo Clause.

6. The Mexican Agent denied that the Comisión Ajustadora de la Deuda Pública Interior, to which the functions of the National Claims Commission had subsequently been transferred, could be blamed for undue delay of justice. The original total of the claims filed with the Mexican National Commission was over 10,000, of which 7,000 had already been settled. There was, in his submission, no reason to criticize the Commission for not yet having got through this huge volume of work.

7. The Commission, by a majority, adhere to the decision in the case of the Mexican Union Railway, and as it so happens that in the claim now under consideration the Calvo Clause has exactly the same wording as in the former case, the question before them is whether that clause must in this case be disregarded, because the claimant Company has been the victim of internationally illegal acts or breaches of international law, such as a denial of justice or undue delay of justice.

8. The local remedy open to the claimant was the "Comisión de Reclamaciones", now "Comisión Ajustadora de la Deuda Pública Interior". To this tribunal the Company had to resort according to the local law, under the Calvo Clause inserted in its concession. That there were no other means of redress open to the claimant is made clear by article 9 of the Ley de Reclamaciones, reading:

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[1] *English translation from the original report.*—"X. The Federal authorities have the right, should it in their judgment be required by the defence of the country, to call upon the railways, their personnel and all their operating equipment, and to dispose of same as they may think fit.

"The Nation shall in that event compensate the railway companies. Should they fail to reach an agreement as to the amount of such compensation, the average gross earnings for the preceding five years, plus ten per cent, shall be taken as a basis, all expenses to be borne by the company.

"If only a part of such equipment should be requisitioned, the provisions of paragraph IV hereof shall be observed.

"XI. The Executive may, in case of war or of circumstances of an extraordinary nature, order such measures to be taken as may be necessary for putting out of service, either wholly or in part, any tracks, and also any bridges, telegraph lines and signals forming part thereof.

"Anything so destroyed shall be replaced at the expense of the Nation, as soon as the interests of the latter shall allow of its doing so."

"Art. 9. Por el hecho de acudir a la Comisión en la forma administrativa determinada en esta ley, se entenderá que los damnificados renuncian a su derecho de entablar las mismas reclamaciones por la vía judicial." [1]

By filing an action with the National Commission, the claimant has, therefore, exhausted all local means of redress.

9. Following this statement, the Commission feel obliged to make another. It is to the effect that the claimant may rightly complain that it has applied for justice in vain.

Nine years have elapsed since the Company applied to the Court to which the law directed it, and during all those years no justice has been done. There has been no hearing; there has been no award. Not the slightest indication has been given that the claimant might expect the compensation to which it considered itself entitled, or even that it might be granted the opportunity of pleading its cause before that Court.

The Commission will not attempt to lay down with precision just within what period a tribunal may be expected to render judgment. This will depend upon several circumstances, foremost amongst them upon the volume of the work involved by a thorough examination of the case, in other words, upon the magnitude of the latter. It will often be difficult to define the time limit between a careful and conscientious study and investigation, on the one hand, and procrastination, undue postponement, negligence and lack of despatch on the other. The Commission have, in their Decision No. 53 *(Interoceanic Railway)*, laid down their opinion that a court with which a claim for an enormous amount had been filed in November 1929 could not be blamed for undue delay if it had not administered justice by June 1931. It is obvious that such a grave reproach can only be directed against a judicial authority upon evidence of the most convincing nature.

But it is equally obvious that a period of nine years by far exceeds the limit of the most liberal allowance that may be made. Even those cases of the very highest importance and of a most complicated character can well be decided within such an excessively long time. A claimant who has not, during so many years, received any word or sign that his claim is being dealt with is entitled to the belief that his interests are receiving no attention, and to despair of obtaining justice.

10. In the opinion of the Commission, the amount of work incumbent upon the Court, and the multitude of lawsuits with which they are confronted, may explain, but not excuse the delay. If this number is so enormous as to occasion an arrear of nine years, the conclusion can be no other than that the judicial machinery is defective, and that the organization of its jurisdiction is not in proper proportion to the task it has to fulfil. A very obvious delay of justice originating in the overburdening with work of Courts insufficient in number is in effect equivalent to that undue delay of justice which the Commission have, in their Decision No. 21, accepted as justifying claimants in applying to their own Governments, in spite of having signed a Calvo Clause.

For this reason the Commission hold that the terms of the concession do not in this case preclude the claimant from appearing before them.

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[1] *English translation from the original report.*—"Art. 9.—It shall be understood that the claimants, by resorting to the Commission in accordance with the administrative procedure hereby established, *ipso facto* waive their right to prefer the same claims in the Courts."

Dissenting opinion of the Mexican Commissioner

The Mexican Commissioner dissents from the Decision taken by his colleagues in the present case, for the following reasons:

Firstly.—He does not believe that the period of nine years, which has elapsed without the Adjusting Commission having pronounced judgment in the claim presented by the claimant company, justifies the statement that there has been a denial of justice on account of delay in administering it; and he bases his disagreement upon the fact that the said Commission has had many thousand cases to decide, some of them very complicated, and that, since the Commission itself knew that the claimant company had had recourse to the Anglo-Mexican Commission for a decision in the same case, it was logical to suppose that the Adjusting Commission itself would await the opinion of the Anglo-Mexican Commission before dealing with the case.

The General and Special Claims Commissions between Mexico and the United States have been functioning for more than six years and have not pronounced more than 200 decisions, in spite of the efforts of both Governments and of the Commissions themselves to make the best use of the time. They have more than three thousand cases to deal with, and up to the present they have not been accused of lenity in their labours.

The Claims Commission between Mexico and the United States in 1868 functioned for eleven years to decide a smaller number of cases than those enumerated in the preceding paragraph.

Delay in administering justice, according to the estimation of international authorities, should be malicious. In the present case this characteristic has not been demonstrated.

Secondly.—The Mexican Commissioner is also of opinion that the Anglo-Mexican Commission should declare itself incompetent since, even supposing it to be thought that there was denial of justice, through delay in administering it, on the part of the Adjusting Commission, this does not mean that the Anglo-Mexican Commission is the one to recognize that claim but the competent International Tribunal established in the case of the Union Railway Company. The Convention between Mexico and Great Britain does not authorize the Commission to recognize acts of civil authorities except when they have been committed by forces, which does not arise in the present case.

He agrees with all the other points in the Decision.

ALFRED F. HENRY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 56, June 9, 1931. Pages 153-154.)

FORCED ABANDONMENT. Though it appeared that claimant's place of employment and residence was occupied by revolutionary forces at the time of his alleged departure, in the absence of evidence of acts compelling claimant to leave hurriedly and abandon his property, as well as proof that his property was taken by revolutionary forces, claim *dismissed.*

1. In this case the claim is made on behalf of Mr. Alfred F. Henry. The claimant sets out in the Memorial that he was employed as Civil Engineer to the Huasteca Petroleum Company at Tampico, and in 1913-1914 was engaged

in the erection of tanks, distillate plant, etc., at Tampico. In April 1914 the town of Tampico was occupied by rebel troops, and Mr. Henry was forced to leave hurriedly. He left Tampico as a refugee on board the Company's yacht, the *S.Y. Wakiva,* and arrived at Aransas Pass, Texas, with just his working clothes, having been given enough money by the Vice-President of the Company to get to that town. As there was no likelihood of his returning to Mexico for some time, he was paid off by the Company and proceeded to his native town, Glasgow. In August 1914 the claimant returned to New York, with a view to attempting to trace his effects through the New York Agents of the Company. He was informed by the Vice-President of the Company that all trace of his personal effects and papers had been lost. Mr. Henry then returned to Glasgow to join His Majesty's forces in the Great War.

The amount of the claim is 2,500 pesos, details of which are given in the statement of claim attached to Mr. Henry's affidavit.

2. There was no oral hearing of this case, the respective parties putting forth their contentions in written briefs.

3. The Agent for Mexico contended that Mr. Henry left Tampico of his own will and that the proofs presented with his Contestation filed as Annexes thereto showed that he was not forced by the Government to leave Tampico. Further, that the American employees who left Tampico aboard the yacht *Wakiva,* following instructions from the American Consul, were not molested either by revolutionary forces or by Government forces, landing in safety.

4. The British Agent in his Brief stated that he relied upon the facts alleged in the claimant's Memorial and Annexes thereto. It was, in his submission, a matter of common notoriety that the rebels referred to in the Memorial, who occupied the town of Tampico in April 1914, were Constitutionalists, and therefore Mexico was responsible for their acts.

5. The Commission, whilst accepting that Tampico was occupied by Constitutionalist revolutionary forces in April 1914, and that the claimant left Tampico at the time of their occupation, do not find that there is any evidence of acts compelling him to leave Tampico hurriedly and abandon his property therein. Nor even, if the circumstances warranted him so leaving, that there is any proof that his property was taken by revolutionary forces.

6. The claim is dismissed.

GEORGE R. READ (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 57, June 9, 1931. Pages 154-157.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavit of claimant *held* insufficient evidence.

(Text of decision omitted.)

ROSA E. KING (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 58, June 9, 1931. Pages 157-159.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Claim for taking and destruction of property by various forces settled by direct agreement between Agents, approved by the tribunal.

(Text of decision omitted.)

GEORGE HENRY CLAPHAM (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 59, June 9, 1931. Pages 159-163.)

AFFIDAVITS AS EVIDENCE. Affidavit sworn by eye-witnesses within two years after events considered as more reliable than declarations of witnesses heard more than sixteen years later.

DAMAGES, MEASURE OF. Claimant was a mining engineer permanently incapacitated as a result of foot injury due to act of forces. *Held*, award will be granted in such an amount as will purchase a life annuity commensurate with claimant's station in life.

Cross-reference: Annual Digest, 1931-1932, p. 225.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. The Memorial relates that Mr. Clapham was employed as the Chief Engineer of the Mazapil Copper Company, Limited, and in May 1913 he was residing at their Smelter at Concepción del Oro, Zacatecas, Mexico. On the 20th May, 1913, some seven hundred revolutionaries, under the command of Eulalio Gutierrez and Pancho Coss, attacked Concepción del Oro. During the attack some rifle shots were fired at the revolutionaries from a place unknown, killing or wounding several of them. The revolutionaries suspected that the shots came from the Mazapil Copper Company's works and a party of them forced their way into the Smelter. They were preparing to blow up the buildings when Mr. Clapham took them into the garden of the works, where there was a full view of the roofs, to demonstrate to them that there was no one there. They were satisfied, and Mr. Clapham returned to his house to speak with several of the Company's employees. While speaking, another batch of revolutionaries rushed in and, without warning, opened fire on the group. Mr. Harold Bainbridge was shot through the hands. Mr. Clapham, after pushing his wife and child into the house, turned to close the door when a man entered and shot him through the thigh. As a result of damage to the main artery of the leg his foot had to be amputated, and he was for two years unfit to work. On several occasions since that time his leg has caused him considerable trouble and has necessitated prolonged medical treatment. As a result of the loss of his foot, which does not allow him to make inspections underground or in other difficult places, Mr. Clapham has found difficulty in

following his profession as mining engineer. During the fourteen years between 1913 and 1927 he has been employed only seven years, six months. The greater portion of his employment was during the war period, when able-bodied engineers were difficult to obtain. After Mr. Clapham's departure from Mexico, the revolutionaries took away a horse and saddle and a Jersey cow. They also set fire to all Mr. Clapham's household furniture.

The claim is for £12,000, the details of which are given as follows:

	£	s.	d.
Amount of his salary, as confirmed by letter of the Mazapil Copper Company	770	0	0
Estimated value of privileges allowed him with the Mazapil Copper Company. Free house, light, fuel, water. A man servant and a maid servant. A tax on his salary paid by the Mazapil Company to the Mexican Government in lieu of all other taxes	230	0	0
Equivalent value of his salary with the Mazapil Company	1,000	0	0
The damages at £12,000 are computed as follows:			
Compensation for 6½ years unemployment between 1913 and 1927 at £1,000 per annum	6,500	0	0
Estimated value of his furniture burnt by the rebels at Concepción, together with the value of his horse, saddle and Jersey cow taken by them	500	0	0
Cost of six artificial limbs for 14 years at £25	150	0	0
Cost of invalid's chair during convalescence	25	0	0
Compensation for continued disability	4,825	0	0
	12,000	0	0

His Majesty's Government claim, on behalf of Mr. G. H. Clapham, the sum of £12,000 (twelve thousand pounds).

2. The Mexican Agent, although allowing that the forces with which the claim deals were Carrancistas, and therefore that they fell within the terms of Article 3, subdivision 2 of the Convention, denied that it had been proved that the wound of Mr. Clapham was due to a wilful act of those forces; it might just as easily have been the consequence of his own lack of prudence. Neither had it, in the Agent's submission, been proved that the wound had had the consequences attributed to it. The Agent filed a record of the proceedings on the hearing of two witnesses, held at his instance by the Municipal President at Concepción del Oro, on the 14th June, 1929. Both witnesses declared that they believed that Mr. Clapham had been wounded through his own imprudence. They remembered having seen Mr. Clapham standing in one of the windows of the building of the Mazapil Company, shooting at the revolutionary forces. It was at that place, and not in his own house or in the garden, that Mr. Clapham had been wounded. They further believed that Mr. Clapham had killed one of the revolutionary chiefs; and as regards the amputation, they said that it was well known that the claimant already limped before the accident happened, and they could not therefore believe that the consequences alleged, were due to the wound. In his oral argument the Mexican Agent pointed out that the Doctor who swore an affidavit on the 3rd June, 1916, had only seen the claimant some years after the events, and the Agent contended that it had not been shown that amputation had been necessary. Furthermore, he thought the amount claimed grossly exaggerated, and he referred to the laws of several foreign countries on compensations for labour

accidents, in order to show that in all of them the loss of a foot was computed at a much lower amount than that claimed.

3. The British Agent observed that he failed to see any analogy between the accidents dealt with in the laws cited by his Mexican Colleague, and the case then under consideration. It was not a labour accident which had disabled Mr. Clapham but a revolutionary act, the financial responsibility for which devolved, according to the Convention, on the Mexican Government. He could not see that in this case the same considerations were valid as those on which labour laws base the liability of employers. The Agent laid great weight upon the fact that the evidence produced by him with the Memorial was contemporary evidence, whereas the testimony on which the Mexican Agent relied had been taken sixteen years afterwards. He maintained that there was abundant evidence of the allegations on which the claim was based.

4. The Commission feel bound to consider the testimony of eye-witnesses having deposed within two years after the events as more reliable than the declarations of witnesses heard more than sixteen years later. Messrs. W. J. S. Richardson, H. Burrell and H. Bainbridge, who swore the affidavits which fully corroborate the claimant's depositions, were all present when the Mazapil works were attacked; they were in Mr. Clapham's immediate vicinity; they formed part of the same group; they ran the same danger; and one of them was wounded on the same occasion. Their affidavits are dated the 15th and 19th February, 1915, at the time when the occurrences must still have been fresh in their recollection.

The testimony submitted by the other side cannot be looked at in the same light. Señores J. Jesús Góngora and José María Torrez were heard in June 1929. It is not stated in the record who or what they are, neither did they declare how they acquired the knowledge to which they gave utterance. If they were present at the attack, it was probably as onlookers upon whose minds the events must have left an impression less deep than upon that of those to whom the same events were a matter of life and death.

The Commission therefore accept the facts as proved and, as it is common ground between the Agents that Carrancistas were responsible, they declare that the case falls within the terms of Article 3, subdivision 2, of the Convention.

5. As regards the consequences of the wound inflicted upon Mr. Clapham, sufficient evidence is to be found in annex 8 of the Memorial.

This is the sworn affidavit of Dr. G. G. Farquhar, one of the medical experts, who on the 20th November, 1913, amputated the patient's left foot three inches above the ankle. Dr. Farquhar declares that he saw a letter written by Dr. McMeans, who attended the claimant in Mexico at the Monterrey Hospital after the attack. This letter described the case and was intended for the information of the doctor who was later to take up the treatment. It related that Dr. McMeans had tried to save the foot and had performed several operations on it. Dr. Farquhar therefore feels at liberty to declare that the removal of the foot was only decided on after it had been found impossible to save it.

The Commission, in the light of this evidence, cannot but accept as true the allegations in the Memorial as regards the consequences of the injury.

6. There can be no doubt that the loss of a foot must very seriously impair the earning capacity of a man carrying on the profession of Electrical and Mechanical Engineer. It is more than likely that such an injury will, for more than one kind of work, place him in an inferior position as compared with able-bodied applicants, that there will be many periods during which he will not be able to obtain employment, and that he will often have to be satisfied with a smaller remuneration than a man enjoying complete physical fitness.

It seems just and equitable, therefore, that an award be granted him, that will set off, by means of an annuity, the lifelong injury which was the result of the wound.

The Commission have found no guidance in any law or decree for the determination of the annuity, the less so as in nearly all other cases the annuity begins very soon after the accident, whereas in this case sixteen years and probably more will have elapsed before any payment can follow.

The Commission, also taking into account the station in life of the claimant, think an annuity of $2,000 pesos Mexican gold fair and reasonable, and as, in order to purchase such annuity a man of the age of Mr. Clapham will have to pay about $20,000 pesos Mexican gold, they fix the award at that figure.

7. The Commission have found no outside evidence of the other losses which the Memorial alleges were sustained by the claimant.

8. The Commission decide that the Government of the United Mexican States shall pay to the British Government, on behalf of Mr. George Henry Clapham, the sum of twenty thousand ($20,000) pesos Mexican gold.

CARLOS L. OLDENBOURG (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 60, June 23, 1931. Pages 163-165. See also decision No. 11.)

PARTNERSHIP CLAIM. Demurrer to claim of a Mexican partnership *sustained* when it appeared that less than half of capital was held exclusively by British nationals.

(Text of decision omitted.)

EDITH HENRY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 61, June 23, 1931. Pages 165-169.)

PROCEDURE, MOTION TO DISMISS. The tribunal will not, on a motion to dismiss, determine the status under the *compromis* of revolutionary forces at times not material to the claim.

1. This is a claim for compensation for the murder of the claimant's husband, Mr. Francis Colin Henry, and for loss of personal property at the hands of a band of Zapatistas at Zacualpam on the 3rd January, 1916.

According to the Memorial Mr. F. C. Henry, a British subject, was employed as superintendent of the mine San Miguel Tlaxpampa, and resided at Zacualpam, in the State of Mexico. On the 2nd January, 1916, a force of Constitutionalist soldiers, stationed at Zacualpam, left without warning, and the inhabitants were without protection from the bandits and revolutionaries which were in the neighbourhood. In the afternoon of the 3rd January some 150 men, under the command of Molina, Mora and Pantalon, and some men of the Salgado group under Castrejon, entered the town. It is understood that these

were Zapatistas. Shortly afterwards a small group came to Mr. Henry's house, demanding money, but they were persuaded to leave on being shown a "safe-conduct", which Mr. Henry had obtained shortly before from Molina for the price of 400 pesos. About 4 p.m. a large group of men arrived and started to break down the fence and to enter the patio. Mr. Henry told his wife and children to go to one of the bedrooms, and, taking his pistol, ran to the door to prevent the entrance of the soldiers. Some shots were fired and a few moments later the armed men, including Molina and Pantalon, entered the house and began to sack. They even forced the ring from Mrs. Henry's marriage finger. Finally, Mrs. Henry was able to escape from the house with her children by giving Molina some silver plate that had been hidden. On leaving the house she saw her husband's body lying on the patio. He had been shot in various parts of the body, and there were signs that he had been wounded by the door and flung into the patio, where he had been killed. Mrs. Henry's son had his arm badly damaged by one of the men, who had been wounded, clubbing him with his rifle. Pantalon was seen carrying Mr. Henry's revolver. After hiding for some time Mrs. Henry was able to escape with her three children to Mexico City.

The amount of the claim is 56,585 pesos (silver), composed of 50,000 pesos (silver) for the loss of her husband and 6,585 pesos (silver) for the loss of personal effects looted by the Zapatistas.

The British Government claim, on behalf of Mrs. Edith Henry, the sum of 56,585 pesos (silver).

2. A Motion to Dismiss the claim has been lodged by the Mexican Agent as a means of obtaining from the Commission a decision as to the character of the forces under the command of General Emiliano Zapata, and at the same time as to the character of the forces that followed General Francisco Villa.

The Agent distinguished three periods in the military career of both Generals.

The first was when they and their followers formed part of the Constitutionalist Army under General Venustiano Carranza and pursued the common aim of overthrowing the Huerta régime. This object was achieved in August 1914, but the victory initiated dissensions between Carranza on the one hand and Villa and Zapata on the other. The result was that the two parties separated in November 1914.

That was, in the view of the Agent, the commencement of the second period. Both armies, disposing of about equal strength, contended for the supreme power in the Republic until the Constitutionalist Army defeated its opponents in September 1915. Upon this triumph General Carranza established a Government *de facto*, which was, in October of the same year, recognized by the Government of the United States of America and by several other Governments.

This was the end of the second, and the beginning of the third period, during which the resistance of the forces of Zapata and Villa continued, although they could no longer be considered as political factors. This period ended when these forces were, at different dates, definitely subdued.

3. The said Agent held the view that during the first period, Zapatistas and Villistas fell within the terms of subdivision 2 of Article 3 of the Convention, because they then formed part of the Constitutionalist Army, which had, after the triumph of its cause, established a Government *de facto*.

During the second period the position was different. Before the revision of the Convention, subdivision 2 not only mentioned revolutionary forces that had succeeded in obtaining the control of the State, but also "*revolutionary forces opposed to them*". In that description were included both Zapatistas and Villistas. But when the Convention was amended, those words were struck

out, and the Agent had no doubt that this was done in order to release Mexico from any claims arising out of the acts of those forces.

They could not in this period either be made to come within the meaning of subdivision 4, because this was a period of civil war, during which two factions of equal strength were in arms against each other. Neither of them had as yet been able to establish a Government; neither of them had been recognized by foreign Powers; and the United States of America had Agents at the headquarters of both factions. It was a time of anarchy, and as there was no Government, one of the parties could not have the character of an insurrectionary force as mentioned in subdivision 4. As both parties pursued political aims, the acts of none of them could be regarded as acts of banditry.

In the third period, according to the Agent, the state of affairs was such that a Government *de facto* existed. Against this Government, mutinies, risings and insurrections could break out and be sustained. The subdivision 4 of Article 3 could therefore be applied to the acts then committed by Villistas and Zapatistas.

4. The British Agent did not follow his Mexican colleague into the whole length of his argument. He wished to confine himself to the facts then before the Commission. They had occurred in January 1916 at a time when the *de facto* Government of General Carranza had already been established for three or four months, and when the Zapatistas, in arms against that Government, had consequently to be considered as an insurrectionary force, falling within the terms of subdivision 4 of Article 3.

5. The Commission, in adjudicating upon this Motion to Dismiss, do not think it necessary, on this occasion, to commit themselves to the historical divisions made by the Mexican Agent, nor to a determination of the character of the Villista and Zapatista forces in each of the periods of their career. In section 6 of their decision No. 49 *(A. M. Ward)*, they have laid down the following opinion:

"It is an equally well known fact that the Zapatistas in August 1914 formed part of the Constitutionalist Army. This is also allowed in a brief filed by the Mexican Agent on the 7th April, 1931. As there is no doubt that the Constitutionalist Army was to be considered as a revolutionary force, which after the triumph of its cause established a Government, first *de facto*, and later *de jure*, the losses caused by this Army, and by the groups forming part of it, are covered by the Convention (Article 3, subdivision 2), even if some of the groups later separated and followed another cause."

6. As regards the present claim, the facts on which it is based are alleged to have occurred in January 1916, i.e., at a time when there was an established Government in Mexico. The acts of General Zapata, then in arms against that Government, must therefore be considered as a mutiny, a rising or an insurrection, unless they ought, depending upon the nature of the acts in certain instances, to be classified as acts of brigandage.

For this reason, when the claim comes up for examination on the merits, it is with subdivision 4 of Article 3 of the Convention that the Commission will have to deal.

7. The Motion is overruled.

THE ANZURES LAND COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 62, June 24, 1931. Pages 169-171.)

CORPORATE CLAIMS.—AUTHORITY TO PRESENT CLAIM. Evidence of authority to file claim *held* sufficient.

(Text of decision omitted.)

THE SONORA (MEXICO) LAND AND TIMBER COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 63, June 24, 1931. Pages 171-177.)

CORPORATE CLAIMS.—NATIONALITY OF CORPORATE CLAIM.—PROOF REQUIRED TO ESTABLISH BRITISH NATIONAL INTEREST IN MEXICAN CORPORATION.—ALLOTMENT. In a claim by a British corporation based on its interest in a Mexican corporation, an allotment to such British corporation *held* required under the *compromis*.

(Text of decision omitted.)

MINNIE STEVENS ESCHAUZIER (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 64, June 24, 1931, dissenting opinion by British Commissioner, June 24, 1931. Pages 177-184.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM. While as a general rule it is sufficient for purposes of jurisdiction if it be established that the claim has remained continuously in the hands of citizens of the claimant Government until the time of its filing, when the record disclosed that prior to the date of the award the claim had lost its national character, motion to dismiss *allowed*.

Cross-reference: Annual Digest, 1931-1932, p. 221.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 231.

1. This is a claim for compensation for damages suffered at the Hacienda de la Mula in the counties of Hidalgo, Valles and Ciudad del Maíz in the State of San Luis Potosí during the Constitutionalist revolution of the years 1912 to 1914 inclusive.

According to the Memorial the late Mr. William Eschauzier, who was the owner of the Hacienda de la Mula at the time of these losses, was a British

subject. Mr. William Eschauzier died on the 19th October, 1920, and by his will appointed his brother, Dr. Francis Eschauzier, executor and sole heir. Dr. Francis Eschauzier was also a British subject. Dr. Eschauzier submitted this claim, which had already been drawn up by the late Mr. William Eschauzier, to His Majesty's Consul-General at Mexico City. Dr. Eschauzier died on the 9th November, 1924, and left a will appointing his wife as executrix and sole heir.

Mr. William Eschauzier had purchased the two farms known as the Hacienda de la Mula and Casa Blanca from his brother, Mr. Louis Eschauzier. These two farms were joined and are now known as the Hacienda de la Mula. During the year 1912 Mr. William Eschauzier, who was absent from the country, heard that a political revolution had broken out and that armed forces would probably invade the region in which his property was located. He instructed his attorney, Dr. Francis Eschauzier, to draw up an inventory of the property of the Hacienda de la Mula. On the 13th April, 1914, the forces of General Victoriano Huerta, which were in control of the railway line to Tampico, fell back on the station of Cárdenas, leaving the region in which the Hacienda de la Mula is situated in the hands of Constitutionalist forces. It was impossible to continue work at the Hacienda, and Mr. William Eschauzier's manager was obliged to abandon the property completely. On the 23rd May, 1914, Mr. William Eschauzier wrote to the British Vice-Consul at San Luis Potosí requesting protection for the hacienda. The Vice-Consul replied in a letter dated the 17th June, 1914, that his property was in the hands of Constitutionalists, and that it was therefore useless to ask the Mexican Government for protection. Later the forces of General Huerta evacuated all the territory of the State of San Luis Potosí and Mr. William Eschauzier was able to re-establish communications with his hacienda. He learned that on the 12th June, 1914, Lieutenant-Colonel Teódulo Aguilar, of the Second Regiment of Pedro Antonio Santos Brigade, had named Aureliano Azua, Mariano Saldaña and Bartolo Ramos, as persons in charge of the Hacienda de la Mula. On the 22nd June, 1914, Lieutenant-Colonel Aguilar authorized these persons to sell the movable and immovable property of the hacienda, the proceeds of which should be used for the payment of herdsmen and other small expenses, and the remainder to be used for revolutionary purposes. On the 18th June, 1914, Lieutenant-Colonel Aguilar and Lieutenant-Colonel Higinio Olivo issued a declaration in the City of Rayon stating that by the orders of General Francisco Cosió Robelo, duly authorized by the First Chief of the Constitutionalist Army, the Hacienda de la Mula was declared confiscated. Provision was also made in this order for the division of the land among the labourers. In view of this order Mr. William Eschauzier requested authority from General Eulalio Gutierrez, the Governor of the State of San Luis Potosí, to take possession of his hacienda, and the Governor appointed Nabor Rodriguez to make an inventory on Mr. Eschauzier's taking possession of his hacienda. On comparing the two inventories Mr. William Eschauzier found that a considerable amount of his property was missing.

The amount of the claim, which is for the value of the property found to be missing, is 60,845.28 pesos Mexican gold. Of this sum, 47,378 pesos Mexican gold represents the value of cattle, horses and mules found to be missing, and 13,467.28 pesos Mexican gold represents the value of other property, such as agricultural machinery, tools, carts and articles from the house, which was found to be missing.

The late Mr. William Eschauzier complained to the British Vice-Consul at San Luis Potosí on the 23rd May, 1914. It has been explained above that at the time it was impossible to make a protest to the Mexican Government.

When Mr. William Eschauzier was able to communicate with the Governor of the State of San Luis Potosí he regained possession of his hacienda. A statement of claim with the necessary supporting documents was drawn up by Mr. William Eschauzier on the 27th December, 1919. The claim belonged at the time solely and absolutely to Mr. William Eschauzier. The claim was not filed at His Majesty's consulate-general at Mexico City until the 10th January, 1922, and it was then filed by the late Dr. Francis Eschauzier as executor to the estate of the late Mr. William Eschauzier. No claim has, however, been presented to the Mexican Government, nor has compensation been received from any other source.

The British Government claim on behalf of Mrs. Minnie Stevens Eschauzier the sum of 60,845.28 pesos Mexican gold.

2. The claim is before the Commission on a Motion to Dismiss filed by the Mexican Agent, who had been informed by his British colleague that, after the claim was presented, the claimant had, by marrying a citizen of the United States of America, ceased to be a British subject.

3. The British Agent confirmed this allegation, and observed that, although he did not intend to argue against a decision taken by the Commission at their previous session, he still wished to state that his Government did not share the point of view of the Commission that the nationality of the heirs of a deceased person, and not the nationality of his estate, determined whether a claim had preserved its British nationality. He referred to Decision No. 4 of the Commission (Captain W. J. Gleadell), section 2.

4. The Commission, while in their majority adhering to the opinion quoted by the British Agent, feel bound to observe that the motion filed by the Mexican side not only raises the question, which they then decided, but another one as well.

Decision No. 4 dealt with a case in which British nationality had already been lost prior to the presentation of the claim, whereas in the case now under consideration, the claimant became an American citizen after the date of filing.

It might be argued that international jurisdiction would be rendered considerably more complicated if the tribunal had to take into account changes supervening during the period between the filing of the claim and the date of the award. Those changes may be numerous and may even annul one another. Naturalizations may be applied for, and obtained, and may be voluntarily lost. Marriages may be concluded and dissolved. In a majority of cases, changes in identity or nationality will escape the knowledge of the tribunal, and often of the Agents as well. It will be extremely difficult, even when possible, to ascertain whether at the time of the decision all personal elements continue to be identical to those which existed when the claim was presented. Jurisdiction would undoubtedly be simplified if the date of filing were accepted as decisive, without any of the events that may very frequently occur subsequently to that date, having to be traced up to the date of rendering judgment.

It can therefore not be a matter for surprise that both *Borchard* (pages 664 and 666), and *Ralston* (section 293), state that a long course of arbitral decisions has established that a claim must have remained continuously in the hands of a citizen of the claimant Government, until the *time of its presentation.*

5. On the other hand it cannot, however, be denied that when it is certain and known to the tribunal, that a change of nationality has taken place prior to the date of the award, it would hardly be just to obligate the respondent Government to pay compensation to a citizen of a country other than that with which it entered into a convention.

Moreover, the most recent developments of international law seem inclined to attach great value to the conditions existing at the time of the award.

6. The Commission refer to point XIII of the Basis of Discussion for the Conference for the Codification of International Law drawn up by the Preparatory Committee, reading as follows:

"It is recognized that the international responsibility of a State can only be enforced by the State of which the individual who has suffered the damage is a national or which affords him diplomatic protection. Some details might be established as regards the application of this rule.

"Is it necessary that the person interested in the claim should have retained the nationality of the State making the claim until the moment at which the claim is presented through the diplomatic channel, or must he retain it throughout the whole of the diplomatic procedure or until the claim is brought before the arbitral tribunal or until judgment is given by the tribunal? Should a change occur in the nationality of the person making the claim, are there distinctions to be made according to whether his new nationality is that of the State against which the claim is made or that of a third State, or according to whether his new nationality was acquired by a voluntary act on his part or by mere operation of law?

"Are the answers given to the preceding questions still to hold good where the injured person dies leaving heirs of a different nationality?

"If in the answers given to the preceding questions it is considered that a claim cannot be upheld except for the benefit of a national of the State making the claim, what will be the position if some only of the individuals concerned are nationals of that State?"

The answer of the British Government to this question was the following:

"His Majesty's Government in Great Britain believe that the following rules represent the correct principles of international law, as deduced from the numerous decisions of international tribunals before which cases have come involving points falling within the scope of point XIII:

"*(a)* The person who suffered the injury out of which the claim arose must have possessed the nationality of the claimant State and not have possessed the nationality of the respondent State at the time of the occurrence.

"*(b)* If the claim is put forward on behalf of the person who suffered the injury, he must possess the nationality of the claimant State and not possess the nationality of the respondent State at the time when the claim is submitted to the commission and continually up to the date of the award.

"*(c)* If the person who suffered the injury out of which the claim arose is dead or has parted with his interest in the claim, the person to whom the interest has passed and on whose behalf the claim is presented must possess the nationality of the claimant State and not possess the nationality of the respondent State at the time when the claim is submitted to the commission and continually up to the date of the award.

"*(d)* Where a national retains part only of the interest in a claim and part passes to a non-national, the claim may only be presented and an award made in respect of so much of the claim as remains vested in the national.

"*(e)* The result is the same whether the non-national's interest in the whole or part of a claim is passed to him by voluntary or involuntary assignment or by operation of law.

"*(f)* Changes of nationality subsequent to the making of the award are immaterial.

"*(g)* Possession of a nationality other than that of the claimant or respondent State is immaterial, provided that the preceding rules are complied with."

A majority of the Governments answered in the same sense and accordingly the Preparatory Committee drafted the following Basis of Discussion, No. 28:

"A State may not claim a pecuniary indemnity in respect of damage suffered by a private person on the territory of a foreign State unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.

"Persons to whom the complainant State is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.

"In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the State whose national he was can only be maintained for the benefit of those of his heirs who are nationals of that State and to the extent to which they are interested."

In the light of such weighty documents on the subject, the Commission do not feel at liberty to ignore the fact that the claimant no longer possesses the British nationality.

7. The Motion to Dismiss is allowed.

The British Commissioner expresses a dissenting opinion.

Dissenting opinion by British Commissioner

1. Whilst recognizing the weight of authority supporting the Decision of the majority of the Commission, my opinion is that the true test to be applied is the nationality of the person who sustained the injury and damage, and whether the claim is made on behalf of his estate or by an alien assignee of the original claim. These should be the sole considerations, irrespectively of what may be the ultimate destination of the beneficial interest in the estate. Supposing, for instance, that the deceased owed debts, and left either no assets beyond the existing claim for injuries and damage to his estate, or left assets insufficient except for such claim, to pay his debts, then his solvency, and the payment of his debts, even to creditors of his own nationality, would depend on the recovery on behalf of his estate of such damages. To defeat recovery thereof because his Executor or Administrator, or the ultimate beneficiary (after payment of debts and pecuniary or other legacies), might be of a different nationality, would in my opinion be an injury and injustice to such creditors, and to legatees, as well as to the reputation of the deceased, by causing him to have died insolvent.

2. I would here refer to a quotation given at page 633 of Borchard's *Diplomatic Protection of Citizens Abroad.*

"In the case of injuries to the person or property of the deceased, which may be deemed debts due to his estate, the personal representative, usually the Executor or Administrator, and not the heir, has been regarded as the proper party claimant. The reason for this rule was stated by the domestic commission under the Act of the 3rd March, 1849, as follows:

" 'The Board has not the means of deciding questions touching the distribution of intestate estates, which depend upon local laws and involve inquiries as to domicile and many other topics of which we are furnished with no evidence. *Besides it may happen that the rights of creditors are involved, who are entitled to be paid before any distribution can be made.*' "

3. I am aware that my objections may seem to go to the extent of contradicting some of the authorities referred to in the Decision herein, even those as to nationality at the time of the presentation of the claim. But in my opinion, if the nationality attaches and remains attached or is deemed to attach to the *estate* on behalf of which the claim is really brought, there is no such contradiction. The nationality of a mere assignee of the original claim is of course a different matter.

4. I may here observe that I do not think that the Answer of the British Government *(c)* quoted in paragraph 6 of the majority Decision of the Commission goes so far as apparently it is interpreted to do by such majority.

THE MEXICAN TRAMWAYS COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 65, June 30, 1931. Pages 184-191.)

PROCEDURE, MOTION TO DISMISS. When it appeared that as to certain of the items of claim, even though not all, the tribunal may have jurisdiction, motion to dismiss *overruled.*

LESSEE AS CLAIMANT. Damage to property owned by a lessee does not fall under the rule that only the owner, and not the lessee, is entitled to claim.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 234.

(Text of decision omitted.)

JAMES RICHARD ANTHONY STEVENS AND MRS. GIBB (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 66, June 30, 1931. Pages 191-193.)

NATIONAL CHARACTER OF CLAIM.—CONTINUING NATIONALITY OF CLAIM.—PARTNERSHIP CLAIM. A claim by a British subject based on his interest in a partnership formed under Mexican law will not be rejected on the ground that such interest represented 50 per cent or less of the partnership capital when it apppeared that at the time the claim arose the British interest in such partnership exceeded 50 per cent.

ALLOTMENT. No allotment by a partnership to a claimant holding an interest therein will be required when such partnership was dissolved by virtue of the death of one of the partners.

Cross-reference: Annual Digest, 1931-1932, p. 219.

(Text of decision omitted.)

PATRICK GRANT (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 67, July 3, 1931. Pages 194-197. See also decision No. 9.)

OWNERSHIP OF CLAIM. Claim for farm equipment, agricultural products and other personal property, filed by manager of ranch, *allowed*, but claim for reduction in value of land and damages to premises *disallowed* on ground it must be filed by owner of ranch.

DAMAGES, PROOF OF. Though damages not proved to the full extent and amount claimed on some items exaggerated, award nevertheless granted.

1. According to the Memorial, Mr. Patrick Grant was, in 1911, managing a property known as the Ranch Mezquital at Culiacancito, in the District of Culiacan, State of Sinaloa, which belonged to his father, Captain Alexander C. Grant. Mr. Patrick Grant held a power of attorney from his father.

On the 16th April, 1911, a party of State Rurales visited the Ranch Mezquital with orders from Bernardo Sainz, the Juez of Culiacancito, to deliver to them a Winchester carbine and a belt of ammunition and to lend them one horse and saddle, to be returned as soon as possible. Two days after receiving this property the troops were captured at Caimanero by rebel forces under Amado Machado. Mr. Grant has never recovered his carbine, ammunition belt or horse and saddle. On the 27th May, 1911, a number of leaders of the Maderista revolution demanded and took from Mr. Grant certain quantities of maize and fodder for the use of the revolutionaries.

Owing to the operations of revolutionary forces under the leadership of Pilar Quintero, Francisco Quintero, Pedro Quintero, Miguel Rochein and Antuna, Mr. Grant found that his life was daily in danger, and some time in February or March 1912 he was forced to flee from the Ranch Mezquital. Before leaving, Mr. Grant asked a Mexican (a Mayo Indian) to look after the property during his absence. About two months after leaving the ranch the claimant returned to Culiacan by the last train to enter the town before its capture by the revolutionary forces known as Zapatistas. After the capture of the town the Zapatistas robbed and plundered ranches in the neighbourhood, including Mr. Grant's ranch, Mezquital.

The British Government claim on behalf of Mr. Grant the sum of 27,814.67 pesos Mexican gold.

2. Following Decision No. 9 of the Commission delivered on the 7th December, 1929, both Agents have filed new evidence.

The British Agent has presented an affidavit sworn by Sarah Elizabeth Grant, the mother of the claimant. She states that her husband, Alexander C. Grant, who died on the 9th January, 1930, had entered into an agreement with his son Patrick, according to which all real property located in the State of Sinaloa, Mexico, and all personal property located thereon, should belong to the said Patrick Grant. This agreement was made prior to the 1st day of July, 1906.

The other persons, whose affidavits were filed by the British Agent, all declare that they knew that the claimant was the owner of the ranch, and was everywhere recognized as such. The affiants testify that the claimant always sold the products of the ranch as his own, and that he was the real and responsible proprietor. The affiants further declare that they knew that the claimant had suffered the losses alleged in the Memorial, and they also confirm the amount of the losses, as estimated by the claimant.

The British Agent also presented copies of letters showing that Patrick Grant transacted the business connected with the farm in his own name.

The Mexican Agent filed documents of an opposite character. The first is a declaration of the Municipal President of Culiacancito, to the effect that the claimant, in 1911, was not the proprietor of the ranch, and that he had no knowledge of any of the facts on which the claim was based. Of the same nature is the testimony of three witnesses, heard in March, 1930; they all declare that the claimant was not known as the owner, and they deny that any losses, to the amount claimed, can have been sustained.

3. In his oral argument the British Agent contended that he had shown sufficient proof that the claimant was the owner of the ranch, and that he had been the one to suffer the losses, apart from the personal losses which did not pertain to the owner or to the person for whose account the property was farmed.

As regards the forces that committed the acts, the Agent asserted that they were either Maderistas or Rurales, i.e., forces of the State, or Zapatistas, for whose acts Mexico must, in cases like the present one, be held financially liable.

4. The Mexican Agent had, to the affidavits on which his British colleague relied, the same objections to which he had given expression in several other cases. They were obtained in 1930 and 1931, from persons living in the United States. Those persons had not been cross-examined, and could not be prosecuted in case they had sworn false statements. In the Agent's submission, there was no doubt that the father of the claimant was the owner of the ranch, and that he had finally sold it. The Public Register was the only valid proof of ownership, and as in that Register Mr. Alexander C. Grant was inscribed as the proprietor, the affidavits presented by the British Agent were of no value.

The Agent also drew the attention of the Commission to the fact that the claimant estimated the value of the property at 18,600 pesos, whilst the documents filed by himself showed a fiscal value of only 840 pesos.

5. The Commission, as they have already done in their Decision No. 9, think it necessary to draw a distinction between such of the alleged losses as bear a more personal character, and those pertaining to the ownership or exploitation of the Mezquital Ranch.

6. Within the first category falls the property stated in the Memorial to have been demanded and taken from the claimant on the 16th April, 1911, by State Rurales. This property consisted of a Winchester carbine, a belt of ammunition, a horse and a saddle.

The Commission have found in the evidence filed by the British Agent, sufficient corroboration of Mr. Grant's affidavit, and as the Rurales were a force under the command of the Government of the State, their acts fall within the terms of Article 3 of the Convention.

7. The other losses include in the first place the reduction in the value of the land, and also the damage to the fencing, the buildings and the wells. Secondly, the claimant asks compensation for the mules, wagons, ploughs and other implements, which were on the ranch. And in the third place he claims for agricultural products lost or taken.

In order to decide this part of the claim, it is necessary to know in what legal relation the claimant stood to the ranch, in other words, whether he or his father was the legal owner at the time of the events.

The Commission do not hesitate to declare that they must regard the father as such. The Memorial itself states that the claimant managed the property,

which belonged to his father, Alexander C. Grant. The Power of Attorney, annexed to the Memorial, and signed by Mr. Alexander C. Grant, confers nothing upon the son beyond the right to administer the farm. The Public Register shows that the father, and not the son, was the owner. It was Mr. Alexander C. Grant who finally sold the ranch, not through his son, but through another person, as his attorney. And it was also the father who—as is shown by his letter of the 20th November, 1929—received the price of the sale.

The father being the owner, it seems clear that the son is not entitled to claim in his own name for losses, which fall upon the legal ownership, such as the reduction of the value of the land, the fencing, the buildings and the wells.

8. A different conclusion must, however, be arrived at when those losses pertaining to the operation of the ranch, such as the loss of mules, agricultural equipment and products, are considered.

As regards this part of the claim, the Commission have acquired the conviction that the property was in reality farmed for the account and the risk of the son.

There is, in the first place, the power of attorney, already mentioned above, which conferred far-reaching authority upon the son. There are, furthermore, the affidavits—see section 2 of this Decision—of many persons, who lived in the immediate neighbourhood, and who transacted business with Mr. Patrick Grant. They all declared that they had always considered him as the owner. There are also the copies of Mr. Patrick Grant's correspondence, showing that he conducted affairs in his own name. And lastly, corroboration is to be found in the fact that the horses and the mules were branded with Mr. Patrick Grant's initials.

The losses sustained of animals and implements used in the operation, and of products obtained from the land, were therefore in reality losses sustained by the claimant, who ran the risk of the farming.

9. The Commission, having examined the affidavits filed by the British Agent, and containing the evidence of eye-witnesses, feel satisfied that the losses described in the preceding paragraph, were the consequences of the acts either of Maderistas or of Zapatistas, in either case of forces within the meaning of Article 3 of the Convention, because the Maderistas established a Government, and because, at the time when the acts were committed, the Zapatistas formed part of forces, which after overthrowing the Huerta régime, established a Government, first *de facto*, and later *de jure*. For this reason the claimant is entitled to compensation under the Convention.

10. That compensation must be for the losses, with which sections 6 & 8 of this Convention deal. The amount claimed under those heads have not, in the opinion of the Commission, been proved to the full extent. As certain items give rise to the impression of being exaggerated, the Commission can find no proof of amounts exceeding 5,000 pesos, Mexican.

11. The Commission decide that the Government of the United Mexican States shall pay to the British Government on behalf of Mr. Patrick Grant, 5,000 (five thousand) pesos, Mexican gold.

DAVID ROY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 68, July 3, 1931. Pages 198-199. See also decision No. 33.)

RES JUDICATA—EFFECT OF AWARD RENDERED BY MEXICAN NATIONAL CLAIMS COMMISSION. Claim was previously presented to domestic Mexican National Claims Commission and an award of 60,000 pesos Mexican gold was allowed by it, of which only 15,000 pesos Mexican gold had been paid. *Held*, award granted as to remaining 45,000 pesos Mexican gold.

(Text of decision omitted.)

FREDERICK ADAMS AND CHARLES THOMAS BLACKMORE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 69, July 3, 1931. Pages 199-201.)

DUAL NATIONALITY. Claim of person possessing nationality of both claimant and respondent Governments not pressed by claimant Government.

PARTNERSHIP CLAIM.—ALLOTMENT. No allotment from a partnership formed under Mexican law, but dissolved as a result of the death of a partner, will be required in the case of a British subject claiming loss by virtue of his interest in such partnership.

1. This is a claim for losses and damages suffered by Messrs. J. F. Brooks and Co., who formerly carried on business at Jalapa in the State of Veracruz as coffee growers and agriculturers.

The Memorial relates that Messrs. J. F. Brooks and Co. was a partnership of two British subjects, the late Mr. John Francis Brooks and Mr. Charles Thomas Blackmore.

Mr. J. F. Brooks died in September 1927, leaving a will in which he appointed Mr. Frederick Adams, a British subject, executor and sole heir.

In September 1912, owing to the general insecurity of the neighbourhood of Jalapa, in the State of Veracruz, Mr. Brooks was obliged to leave his ranch in the charge of an administrator. During the period from November 1916 to September 1918, local townspeople entered the property for the purpose of cutting down trees, saying that they had permission from the local authorities to cut all the wood they required. After several protests, the Governor of the State, on the 16th February, 1917, ordered investigations into this matter, but as no action was taken by the local authorities, Mr. Blackmore again protested to the Governor, and on the 25th May, 1917, the damage ceased. Shortly afterwards, however, the cutting of wood recommenced on this property. From January 1917 to September 1918, Government cavalry quartered their horses on the ranch. So much fodder was consumed by these animals that the company was obliged to purchase food for their own cattle. The soldiers in charge of these horses caused considerable damage, and in spite of frequent complaints, no satisfaction or redress was obtained. On the 21st February, 1915, armed rebels attacked the house on the ranch and compelled Mr. Honey, the administrator, to hand over all the money in his possession and to leave

the ranch. Since the beginning of September 1918, no one was allowed to live in the ranch, which was possessed by the rebels.

The ranch, with all the property contained therein, has been completely destroyed. The cutting of oak and shelter trees has destroyed the whole coffee plantations. The orange, lemons and other crops for the years 1917 to 1919 inclusive, and two coffee crops for 1918-19 and 1919-20 have been stolen.

The amount of the claim is $71,400.00 pesos Mexican gold.

This claim, which at the time of the losses belonged solely and absolutely to Mr. J. F. Brooks and Mr. Charles T. Blackmore, now belongs solely and absolutely to the estate of the late Mr. J. F. Brooks and Mr. Charles T. Blackmore. All possible efforts were made to obtain from the civil or military authorities the necessary protection, but without success. The claim has not been presented to the Mexican Government, and no compensation has been received from the Mexican Government or from any other sources.

The British Government claim, on behalf of Mr. Frederick Adams and Mr. Charles T. Blackmore, the sum of $71,400.00 pesos Mexican gold.

2. The Mexican Agent has lodged a demurrer, based on the following grounds:

The nationality of the partner, Blackmore, was uncertain; he was born in Mexico and there was no evidence that he had, when he came of age, chosen British nationality. He had, therefore, according to the Mexican law, to be considered as a Mexican citizen. If at the same time, the British law regarded him as a British subject, the conclusion must be that he possessed dual nationality, and was not entitled to claim before this Commission.

As regards the claim of Mr. Brooks, who named Mr. Adams as his sole heir, no allotment has been presented of the proportional part of the losses and damages of the partnership, to the partner Brooks.

3. The British Agent agreed as to the dual nationality of Mr. Blackmore, and on that ground abandoned this part of the claim. But he maintained the claim of Mr. Adams. In his submission the partnership, according to the deed by which it was founded, had been dissolved by Mr. Brooks' death, and the Agent could not see that, in a case like this, an allotment was required.

4. The Commission cannot concur in the view that the claim cannot be taken into consideration, because no allotment of the proportional part of the losses of the partnership has been presented. They can find for the provision requiring such allotment no other ground than a justifiable desire that Mexico should not, after once having been obligated to pay compensation to British subjects, whose interest in a non-British Company, Partnership or Association exceeded fifty per cent, be again confronted by an integral claim on the part of the Company, Partnership or Association itself. In order to safeguard the respondent Government against this eventuality, the Convention stipulates that the joint interest be reduced, by means of an allotment, by the proportional part of the losses, for which British partners or shareholders claim. But in the present claim, the firm, according to article 14 of the Deed of Partnership, has been dissolved through the death of one of the partners. The partnership no longer exists and it is therefore impossible to obtain the allotment. By those same facts the eventual possibility of a claim by the partnership of the amounts already awarded to a partner, is excluded. The reason for producing an allotment has therefore disappeared.

5. The demurrer is disallowed.

THE ANZURES LAND COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 70, July 7, 1931. Pages 202-203. See also decision No. 62.)

RES JUDICATA.—EFFECT OF AWARD RENDERED BY MEXICAN NATIONAL CLAIMS COMMISSION. Claim was previously presented to domestic Mexican National Claims Commission and an award of 71,087.50 pesos Mexican gold was allowed, no part of which was ever paid. *Held,* award granted in sum of 71,087.50 pesos Mexican gold.

(Text of decision omitted.)

ALFRED MACKENZIE AND THOMAS HARVEY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 71, July 7, 1931. Pages 203-207.)

NATIONALITY, PROOF OF. Birth certificate and supporting affidavits *held* sufficient evidence of nationality.

CORPORATE CLAIMS. In a claim by British subjects for losses sustained by virtue of their interest in non-British corporations, *held,* upon demurrer, that claimants must show (1) the existence of the corporations concerned, (2) the amounts of their respective capitals and share issues, (3) the number of shares held by the claimants, (4) their interest therein at the time of the various losses, and (5) the allotments. Decision on demurrer *postponed* to examination of claim on merits.

1. In this case the claim is made on behalf of Alfred Mackenzie and Thomas Harvey, for compensation for the total loss and destruction of three mining properties situated at Santa Eulalia, in the State of Chihuahua. The claim is made in respect of their ownership of the whole of the shares in three non-British Companies, that is to say in (1) a Company of the State of Arizona, U.S.A., formerly known as the Great Boulder Mining Company and now as the Compañía Minera El Gran Peñasco, in which out of a total capital of 300,000 shares Alfred Mackenzie owns 299,800, and Thomas Harvey 200, (2) a Company of the State of Arizona, U.S.A., formerly known as the London and Liverpool Mining Company, Incorporated, and now as La Victoria Mining Company, their holdings out of a total capital of 300,000 shares of stock, being respectively Alfred Mackenzie 299,800, and Thomas Harvey 200, and (3) of a Company of the State of Arizona, U.S.A., formerly known as the Seven Stars Mining Company Incorporated, but now as the Santa Eulalia Star Mining Company, their holdings therein out of a total share capital of 300,000 stock, being respectively Alfred Mackenzie 299,800 shares and Thomas Harvey 200 shares.

2. It is alleged in the Memorial that both Alfred Mackenzie and Thomas Harvey are British subjects, and that over 50 per cent of the capital of each of the aforesaid Companies, to wit 100 per cent. is owned by them. In order

to comply with the provisions of Article 3 of the Convention, they presented to the Commission allotments to the said Alfred Mackenzie and Thomas Harvey (1) by the Compañía Minera El Gran Peñasco, of a "proportionate share of the Company's claim against the Mexican Government" (annex 6), (2) by La Victoria Mining Company of "a proportionate share of the Company's claim against the Mexican Government" (annex 7), and (3) by the Santa Eulalia Star Mining Company of "a proportionate share of the Company's claim against the Mexican Government".

3. The evidence of the British nationality of the claimants annexed to the Memorial, consists, as regards Alfred Mackenzie, of the statements in his affidavits (annexes 1, 2 and 3) that he is a British subject born at Woodend, Victoria, Australia, on the 17th March, 1856, and that he has faithfully adhered to his allegiance to His Majesty and the Government of Great Britain. He declares himself unable to secure birth certificates, passports, or other registrations, but he refers, as to his nativity, responsibility and fidelity, to Courthrop Rason, of Bovril, Limited, London, who was Premier of Western Australia. He further produced an Affidavit (annex 4) by Alexander Peat sworn in California, U.S.A., on the 29th June, 1928, who having sworn that he is a British subject with home residence at Woodend, Victoria, Australia, states that he went from London, England, to Australia, in or about the year 1870, then becoming resident in Australia, that he is over seventy years of age, is personally acquainted with the claimant, Alfred Mackenzie, has personally known him and his family consisting of his father, Alfred Mackenzie, his mother, Hannah Mackenzie, together with three daughters and two sons (one of them the claimant, Alfred Mackenzie), He further deposes that on his (the said Alexander Peat's) arrival in Australia the said Mackenzie family were resident at Woodend, Australia, Woodend being then a small village the residents whereof were well and familiarly known to the affiant, that he visited frequently in the home of the said claimant, Alfred Mackenzie, and his father, such visits extending from almost the immediate arrival in Australia of the affiant and extending to the year 1900, when the claimant, Alfred Mackenzie, was travelling throughout Mexico and the United States. The said Alexander Peat further states that he is advised and believes that the said Alfred Mackenzie was born at Woodend, Australia, on the 17th March, 1856, such information having been conveyed to him, the affiant, by his wife, Maria Mackenzie Peat (now deceased), a sister of the Claimant, Alfred Mackenzie. Also that Alfred Mackenzie, Senior, the father of the Claimant, had personally informed the affiant that the claimant, Alfred Mackenzie, was born at Woodend, Australia, Alfred Mackenzie, Senior, having come to Australia from England about the year 1852. He further states that the claimant, Alfred Mackenzie, had communicated frequently with him, the affiant, during the claimant's absence from Australia, and that he is the identical Alfred Mackenzie known to the affiant in Australia, and is a British subject. And that he, the affiant, has no interest in the claim.

4. As regards the British nationality of the Claimant, Thomas Harvey, the evidence contained in the Annexes to the Memorial consists of (annex 21) the birth certificate of Tom Harvey, showing that he was born on the 6th June, 1858, at Townsend in the Registration district of Tiverton, Devonshire, England, of Thomas Harvey of Townsend, Tiverton, and Elizabeth Harvey (formerly Yeo), and of the statements in the Affidavits before referred to (annexes 1, 2 and 3) of the claimant, Alfred Mackenzie, that his associate, Thomas Harvey, was and is a British subject, born in Somersetshire, England.

5. The Mexican Agent filed a demurrer to the claim on the grounds—

I. That the nationality of the claimant, Alfred Mackenzie, had not been established; and

II. That the allotment required by Article 3 of the Convention had not been properly made by means of annexes 5, 6 and 7 to the Memorial, nor had the conditions which the said Article requires, in order that claims of British members of Companies not of that nationality may be presented, been complied with.

He argued before the Commission that in order to find what were the damages to the claimants it was necessary to look into the liabilities of the Company, as the loss might really fall entirely on the creditors of the Company, and that the allotments to claimants of a proportion of the loss of the Company was not a proper compliance with the provisions of Article 3 of the Convention. Further, he argued that the allotments to shareholders should be made according to Mexican Law. He questioned the legality of an allotment by Directors not in meeting of the Company, as it was not according to Mexican law, and he argued also that there was no proper proof of the claimants' ownership of the shares at the time of the losses or damage, or of the total capital of the Company. He admitted the claimant Harvey's British nationality.

6. The British Agent argued that the allotments were in reasonable satisfaction of Article 3 of the Convention, and that as regards the claimant Alfred Mackenzie's nationality the affidavits filed and annexed to the Memorial were reasonably sufficient to establish this and that they also established the ownership of the claimants at the time of the alleged losses and damage.

7. Since this case was heard by the Commission the British Agent has filed as further evidence as to the British nationality of the claimant, Mr. Mackenzie, copy of a statement dated the 8th February, 1916, from the Hon. Sir C. H. Rason, formerly Prime Minister and Treasurer of Western Australia, and the Chairman and Managing Director of Bovril Australian Estates, Limited, in which he states that he has known Mr. Mackenzie well and favourably for some twenty years past, that he held a very prominent position in Commercial and Municipal life in Western Australia, and he certifies that his reputation for straightforward conduct and commercial probity is of the highest. In view of this evidence in addition to Mr. Peat's Affidavit, the majority of the Commission hold that his British nationality has been sufficiently shown.

8. But the Commission hold that it has not been shown authentically that the total capital of British shareholdings in the non-British Company amounts to 100 per cent, nor over 50 per cent, thereof, as required by the terms of Article 3 of the Convention, nor that the damages or losses to the Companies concerned or to the claimants took place after their acquirement of such shareholdings and during their holdings. They desire to call the attention of the claimants to the necessity of showing by authentic evidence—

(1) The existence of the Corporations concerned;
(2) The amounts of their respective capitals and share issues;
(3) The number of shares held by the claimants;
(4) Their interest therein at the time of the various losses; and
(5) The allotments.

9. The Commission's final Decision on the demurrer is postponed until the claim can be judged on its merits, and the claimants shall have presented their evidence as indicated in paragraph 8.

10. The Mexican Agent is invited to file his answer.

THE VERACRUZ (MEXICO) RAILWAYS (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 72, July 7, 1931, dissenting opinion by British Commissioner, July 7, 1931. Pages 207-211.)

CALVO CLAUSE.—*Stare Decisis.* When Calvo Clause agreed to by claimant was identic in terms with that involved in previous decision of tribunal (i.e., *Mexican Union Railway*, Decision No. 21), such decision followed and motion to dismiss *allowed.*

Comments: Sir John H. Percival, "International Arbitral Tribunals and the Mexican Claims Commissions", Jour. Compar. Legis. and Int. Law, 3d ser., Vol. 19, 1937, p. 98 at 103; G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 237.

1. The Memorial sets out that there are two claims. The first is for losses and damages suffered by the Veracruz (Mexico) Railways, Limited, during the period from April 1914 to March 1917 and the second is for a proportionate part of the losses and damages suffered during the period April 1914 to April 1915 by the Compañía de Vapores de Alvarado, S.A., the shares of which are mostly held by the Vera Cruz (Mexico) Railways, Limited (hereinafter referred to as the Company).

Claim I

The Company is British having been incorporated under the Companies Acts, 1862 to 1898, on the 6th July, 1900. It is the owner of the railway from Veracruz to Alvarado in the State of Veracruz.

During the month of May 1914 the Military authorities of Veracruz sank the steamer *Tuxtepec* with 8,000 kilos of scrap iron belonging to the Company. The value of this scrap iron was 160 pesos. During the period from April 1914 to March 1917 the railway and its property was subjected to attacks by revolutionary forces under the leadership of various chiefs.

The amount of this claim is $759,556.97 pesos Mexican gold.

At the time of the losses notification was made by the Company either to the local authorities of the State of Veracruz or to the Mexican Government and occasionally protests were lodged with the British Consul at Veracruz.

Claim II

The Compañía de Vapores de Alvarado, S.A., was formed in 1910 under Mexican laws with a share capital of 100,000 pesos divided into 1,000 shares of 100 pesos each. At the time of its formation 995 fully-paid shares were allotted to the Veracruz (Mexico) Railways, Ltd., which still holds these shares.

The Compañía de Vapores de Alvarado, S.A., has allotted to the British Company 995 thousandths of the losses and damages sustained by it through revolutionary or counter-revolutionary acts during the period from April 1914 to April 1915.

On the 24th April, 1914, the Mexican authorities at Alvarado sequestrated the steamship *Tuxtepec*, which was sunk by Lt.-Major Eduardo Alivier of the Mexican Navy at the bar of this port on the 4th May, 1914. The sinking of

this vessel was brought to the notice of His British Majesty's Minister at Mexico City at the time.

On the 25th April, 1915, the steamship *Playa-Vicente* was set on fire and sunk at La Manga on the river San Juan about 103 kilometres from Alvarado by armed men under the command of General Raul Ruiz. The vessel had been ordered by the military authorities to transport three officers and six soldiers to San Nicolas in spite of the fact that a warning had been issued previously by General Ruiz to the effect that the river was mined and that the vessels should not be used for transport of Carranza forces. On the return journey the *Playa Vicente* was attacked and sunk. At this time the steamship Company did not have a regular service on this river and the only trips made were at the request of the military authorities for the transport of troops.

The total losses suffered by the steamship Company amount to 28,264.02 pesos Mexican gold.

The amount of the claim is 28,122.70 pesos Mexican gold, being 995/1000ths of the total losses sustained by the Compañía de Vapores de Alvarado, S.A.

His Majesty's Government claim on behalf of the Veracruz (Mexico) Railways, Limited, the sum of 787,679.67 pesos Mexican gold, being 759,556.97 pesos Mexican gold in respect of losses and damages sustained by the Veracruz (Mexico) Railways, Limited, and 28,122.70 Mexican gold in respect of the proportional part of the losses and damages sustained by the Compañía de Vapores de Alvarado, S.A.

2. The Mexican Agent has filed a motion to dismiss on the ground that in the concession granted to the claimant Company, a so-called Calvo Clause is inserted, reading:

"La empresa será siempre mexicana aun cuando todos o algunos de sus miembros fueren extranjeros, y estará sujeta exclusivamente a la jurisdicción de los Tribunales de la República, en todos los negocios cuya causa y acción tengan lugar dentro de su territorio. Ella misma y todos los extranjeros y los sucesores de éstos que tomaren parte en la Empresa, sea como accionistas, empleados o concualquier otro carácter, serán considerados como mexicanos en todo en cuanto a ella se refiera. Nunca podrán alegar respecto a los títulos y negocios relacionados con la empresa, derechos de extranjería, bajo cualquier pretexto que sea. Sólo tendrán los derechos y medios de hacerlos valer que las leyes de la República conceden a los mexicanos, y por consiguiente no podrán tener ingerencia alguna los Agentes Diplomáticos extranjeros." [1]

3. The British Agent, having withdrawn the second claim, has declared that he could not distinguish this case from the judgment of the Commission in the case of the *Mexican Union Railway* (Decision No. 21).

4. The Commission by a majority adhere to their decision taken in the case of the Mexican Union Railway, and as it so happens that in the claim now

[1] *English translation from the original report.*—"The Company shall always be a Mexican Company, even though any or all its members should be aliens, and it shall be subject exclusively to the jurisdiction of the Courts of the Republic in all matters whose cause and right of action shall arise within the territory of said Republic. The said Company and all aliens and the successors of such aliens having any interest in the Company, whether as shareholders, employees or in any other capacity, shall be considered as Mexican in everything relating to said Company. They shall never be entitled to assert, in regard to any titles and business connected with the Company, any rights of alienage under any pretext whatsoever. They shall only have such rights and means of asserting them as the laws of the Republic grant to Mexicans, and Foreign Diplomatic Agents may, consequently, not intervene in any manner whatsoever."

under consideration, the Calvo Clause has exactly the same wording as in the former case, they cannot but take the same attitude.

5. The Motion to Dismiss is allowed.

Dissenting opinion of the British Commissioner

Whilst appreciating that the Calvo Clause in this case is identical with that in the *Mexican Union Railway* Case (Decision No. 21), and that the alleged circumstances giving rise to the claim are similar to those in that case, it is, in my opinion, necessary that I should record my dissent from the decision in this case, as done already in the case of the *Interoceanic Railway Company* (Decision No. 53).

I do so for the same reasons, recording also my opinion that this is a yet stronger case of the inapplicability of the Calvo Clause to cases resting on revolutionary causes, and not relating to contracts containing a Calvo clause.

VENTANAS MINING AND EXPLORATION COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 73, July 7, 1931. Pages 211-212.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

THE SALINAS OF MEXICO (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 74, July 7, 1931. Pages 212-213.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

EL ORO MINING AND RAILWAY COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 75, July 7, 1931. Page 214. See also decision No. 55.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

CHRISTINA PATTON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 76, July 8, 1931, dissenting opinion by British Commissioner, July 8, 1931. Pages 215-222.)

RESPONSIBILITY FOR ACTS OF FORCES.—BRIGANDAGE COMMITTED BY REVOLUTIONARY FORCES—FAILURE TO SUPPRESS OR PUNISH.—NECESSITY OF NOTICE TO AUTHORITIES. No responsibility *held* to exist for acts of four soldiers of revolutionary force when such acts were not of public notoriety and no evidence was shown that the authorities were notified.

Cross-reference: Annual Digest, 1931-1932, p. 213.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission," Law Q. Rev., Vol. 49, 1933, p. 226 at 239.

1. This is, as the Memorial sets out, a claim for losses suffered by the late Mr. Patrick Thomas Patton on the 11th March, 1915, when his house was attacked and looted by armed Zapatista soldiers of General Barona's brigade. Mrs. P. T. Patton's interest in the claim is as follows:

Mr. P. T. Patton, a British subject, formulated this claim on the 5th March, 1919. Mr. Patton died in 1924 disposing of his property by a will made on the 26th March, 1920, and a codicil to this will made on the 4th March, 1921. This will and codicil, after disposing of 130 shares in the Patton Company, S.A., appoints his wife, Christina Patton, sole heir and executrix of the will.

On the 11th March, 1915, the late P. T. Patton was residing at Calle de la Reforma 22, San Angel, D.F. About 8 o'clock on the evening of that day four Zapatistas of General Barona's brigade, commanded by Salgado, forced the front gate of the house by shooting off the padlock. They shot at and smashed eighteen windows, killed a valuable Airedale terrier, and then entered the house. The late Mr. Patton, his wife and other members of the family made their escape through a side door and took refuge with some friends for the night. The soldiers took complete possession of the house for a few hours and systematically looted the place. In their search for articles of value they scattered about the rooms the furniture and other objects therein. On the following day Mr. (now Sir Thomas) T. B. Hohler, British Chargé d'Affaires at His Majesty's Legation, Mexico City, visited the house, and on the 7th April wrote a letter detailing the condition in which he had found the house on the 12th March, 1915. On the 12th April, 1915, the late Mr. P. T. Patton, with witnesses, appeared before a notary public, Heriberto Molina, and executed before him a document in Spanish, verifying and substantiating the facts and giving a list of the articles and specifying their values.

The amount of the claim is £321 0*s.* 6*d.*, the details of which are given in one of the annexes to the Memorial. A certificate of the rate of exchange ruling on the 1st and the 13th March, 1915, is also given in one of the annexes.

The British Government claim on behalf of Mrs. Christina Patton the sum of £321 0*s.* 6*d.*

2. The British Agent drew attention to the date on which the attack on, and looting of, Mr. Patton's house had taken place. It was the 11th March, 1915, and those responsible were Zapatista soldiers. He found himself, therefore, faced by the question raised by his Mexican colleague in the discussion

on the motion to dismiss filed by him in Claim No. 26 *(Mrs. Edith Henry)*.[1] The Mexican Agent had on that occasion drawn a distinction between three periods in the military career of Generals Emiliano Zapata and Francisco Villa.

3. According to that historical division the acts, upon which the present claim was based, fell within the second period. He, the British Agent, held the view that during that period the Zapatistas must be regarded as coming within the terms of subdivision 4 of Article 3 of the Convention. Their movement was a "rising" or an "insurrection" and in many cases their acts were those of brigands. For this reason Mexico was to be held financially responsible in case it could be established that the competent authorities had omitted to take reasonable measures to suppress the insurrection, rising, riots or acts of bri-

[1] See sections 2 and 3 of Decision No. 61:

"2. A motion to dismiss the claim has been lodged by the Mexican Agent as a means of obtaining from the Commission a decision as to the character of the forces under the command of General Emiliano Zapata, and at the same time as to the character of the forces that followed General Francisco Villa.

"The Agent distinguished three periods in the military career of both Generals.

"The first was when they and their followers formed part of the Constitutionalist Army under General Venustiano Carranza and pursued the common aim of overthrowing the Huerta régime. This object was achieved in August 1914, but the victory initiated dissensions between Carranza, on the one hand, and Villa and Zapata on the other. The result was that the two parties separated in November 1914.

"That was, in the view of the Agent, the commencement of the second period. Both armies, disposing of about equal strength, contended for the supreme power in the Republic until the Constitutionalist Army defeated its opponents in September 1915. Upon this triumph General Carranza established a Government *de facto*, which was, in October of the same year, recognized by the Government of the United States of America and by several other Governments.

"That was the end of the second, and the beginning of the third period, during which the resistance of the forces of Zapata and Villa continued, although they could no longer be considered as political factors. This period ended when these forces were, at different dates, definitely subdued.

"3. The said Agent held the view that, during the first period, Zapatistas and Villistas fell within the terms of subdivision 2 of Article 3 of the Convention, because they then formed part of the Constitutionalist Army, which had, after the triumph of its cause, established a Government *de facto*.

"During the second period the position was different. Before the revision of the Convention, subdivision 2 not only mentioned revolutionary forces, that had succeeded in obtaining the control of the State, but also "*revolutionary forces opposed to them.*" In that description were included both Zapatistas and Villistas. But when the Convention was amended, those words were struck out, and the Agent had no doubt that this was done in order to release Mexico from any claim arising out of the acts of those forces.

"They could not in this period either be made to come within the meaning of subdivision 4, because this was a period of civil war, during which two factions of equal strength were in arms against each other. Neither of them had as yet been able to establish a Government, neither of them had been recognized by foreign powers and the United States of America had Agents at the headquarters of both factions. It was a time of anarchy, and as there was no Government, one of the parties could not have the character of an insurrectionary force as mentioned in subdivision 4. As both parties pursued political aims, the acts of none of them could be regarded as acts of banditry.

"In the third period, according to the Agent, the state of affairs was such that a Government *de facto* existed. Against this Government, mutinies, risings and insurrections could break out and be sustained. The subdivision 4 of Article 3 could therefore be applied to the acts then committed by Villistas and Zapatistas."

gandage, or to punish those responsible for the same, or that they were blamable in any other way.

In the case of the looting of Mr. Patton's house, there could, in the Agent's submission, exist no doubt as to the negligence of the authorities. At that time the Zapatistas had a camp at San Angel and the act committed by a party of them must have been of public notoriety. There was not the slightest indication of any action undertaken to punish them.

4. The Mexican Agent upheld the view, put forward by him when his Motion to Dismiss in the claim of Mrs. Edith Henry was being discussed. Acts committed by Zapatistas and Villistas during the second period fall altogether outside the Convention. As there was no Government, there could be neither mutiny, nor rising, nor insurrection. Neither could their acts be classified as acts of brigandage, because their aims were of a political nature, not less so than those pursued by General Carranza. The character of the two factions was, during that period, identically the same. The fighting between them was a contest on equal footing, not a rising nor an insurrection of one against the other.

But even assuming, for the sake of argument, that the acts of the Zapatistas were covered by subdivision 4 of Article 3, the Agent reminded the Commission that, at the time of the alleged attack, the centre of the Carrancista movement was established at Veracruz. He failed to see how acts, committed by Zapatistas in the Capital, could be suppressed or punished by the opposing faction, when it was so far away.

5. The Commission feel satisfied that the attack on and the looting of Mr. Patton's house have been committed as they are described in the Memorial. They find sufficient corroboration of the affidavit of Mr. and Mrs. Patton in the letter of the British Chargé d'Affaires, and in the declarations made by several witnesses shortly after the events.

The Commission feel equally satisfied that those responsible for the losses were four soldiers of the Zapatista Army, and the question before them is whether Mexico is, in this case, obliged to pay compensation.

6. The Commission accept in its general lines the distinction drawn by the Mexican Agent between the various periods of the Zapatista and Villista movements, reserving, however, their liberty as to the determination of the dates on which such periods must be assumed to begin and to end.

They are equally of opinion that during the second period, the two contending factions were fighting with the same character for political aims, and that as neither of the two had been able to establish a Government, neither of them could be regarded as being in mutiny, rising or insurrection against the other. From that point of view their acts are not covered by the Convention, since by the last revision, the words "*or by revolutionary forces opposed to them*" have been eliminated. The Commission wish it, however, to be clearly understood that this opinion of theirs goes only to those acts, which were of a political or a military nature, or directed towards political or military aims. While acts of that description seem to have been excluded when the Treaty was amended, this cannot be maintained as regards acts of brigandage.

Both factions—or greater or smaller parties of them—may, as well as other independent groups, have become guilty of brigandage in special instances, and, as the Commission read subdivision 4 of the amended Article 3, they cannot admit that all those cases fall outside the financial liability of the respondent Government.

7. Even when a country passes through a period of anarchy, even when an established and recognized Government is not in existence, the permanent

machinery of the public service continues its activity. The Commission share the view expressed in this regard in Decision No. 39 of the General Claims Commission between Mexico and the United States of America (page 44). [1]

"4. The greater part of governmental machinery in every modern country is not affected by changes in the higher administrative officers. The sale of postage stamps, the registration of letters, the acceptance of money orders and telegrams (where post and telegraph are Government services), the sale of railroad tickets (where railroads are operated by the Government), the registration of births, deaths, and marriages, even many rulings by the police and the collection of several types of taxes, go on, and must go on, without being affected by the new election, Government crises, dissolutions of Parliament, and even State strokes."

They might add that the Police continued to function, that it continued to regulate traffic in the capital, to investigate crimes and to arrest criminals, as also that the Courts continued to administer justice.

This means that public authorities that were obliged to watch over and to protect life and property continued to exist, although it is not denied that the performance of those duties will often have been very difficult in those disturbed times of civil war.

The respondent Government have, in the opinion of the Commission, undertaken to grant compensation, for the consequence of the omissions of this permanent organization of the public service, also when Zapatistas or Villistas are involved. If, therefore, in the case now under consideration, such omissions were proved, the Commission would feel themselves bound to render a judgment in favour of the claimant.

8. But no such proof has been shown. The attack took place at San Angel, a suburb located at a considerable distance from the centre of the town. The time was the 11th March at 8 o'clock in the evening, after darkness had fallen. The guilty parties were four soldiers. The event could not therefore be considered as being of public notoriety, no more as in the case of any other burglary in a private dwelling.

Furthermore, nothing has been produced to prove that the competent authorities were informed. Although Mr. Patton, very soon after the event, swore an affidavit before the Acting British Consul-General, although he made, a few days later, several witnesses depose before a notary public, and although the British Chargé d'Affaires visited the house the day after it had been broken into, there is no indication that either the claimant or any of the British Representatives approached the police, or any other authority, with an account of the occurrences.

The Commission have more than once declared that, to find negligence on the part of the authorities, it is necessary to prove that the facts were known to them, either because they were of public notoriety or because they were brought to their knowledge in due time.

In this case they adhere to that same view.

9. The claim is dismissed.

The British Commissioner does not agree with the decision in this case.

Dissenting opinion of British Commissioner

There is so much in the majority judgment of the Commission in this case with which I am in accord generally, that I regret to have to sound a dissentient note as regards the conclusions and decision. I will endeavour as briefly as

[1] See Reports, Vol. IV, p. 43.

possible to express my opinion and the reasons therefor. Accepting the distinction drawn by the judgment between acts of revolutionary forces of a political or military nature or directed towards political aims, and, on the other hand, acts which do not come under that category, such as acts of brigandage, burglary or robbery, and agreeing entirely as I do with the finding of the majority of the Commission that the occurrences giving rise to this claim fall within the category of brigandage, I am not in accord with the decision relieving the Government of Mexico from financial responsibility on the ground that no blame attaches to the authorities.

2. As I understand the majority judgment it absolves the Mexican Government on the ground that the permanent civil authorities which must be regarded as functioning at the time notwithstanding political changes and unrest were unaware of the act of brigandage, because it was not an event of public notoriety so that they could be deemed to be cognizant of it, and that nothing had been produced to show that they were informed thereof. But assuming this to be so, though I am not in agreement, as I will explain presently, that the event was not of public notoriety, this does not conclude the matter. The question of negligence also arises, and the general question of blame, not merely blame for not punishing the guilty parties, but also for non-prevention of the occurrences. Further, whether responsibility or blame does not attach to the military authorities. What were these about that it was permissible for four private soldiers to emerge from the barracks or camp fully armed at about 8 o'clock in the evening and boldly commit in their neighbourhood acts of burglary and sabotage lasting for a considerable period of time? Acts committed not in the heat of battle or during its immediate aftermath, but just as an evening's profitable diversion, and with entire impunity. The outrage was committed by force of arms, the perpetrators forced the front gate of the house by shooting off the lock. They shot at and smashed eighteen windows and killed a dog and then entered the house. All this took place in a street leading out of a main street in San Angel and only a few doors away from it. Moreover, the soldiers were in complete possession of the house for a few hours, systematically looting it and scattering the furniture about the rooms. There must also have been an entire lack of police supervision or patrol in San Angel, which is not really strictly a suburb, but a town with its municipality, and in continuous frequent communication with the City by means, *inter alia*, of a tramway service which the Government were at that time operating and using for military as well as civil purposes. The time was not late in the evening, and it seems inconceivable that the events could have taken place without considerable notoriety. Mr. and Mrs. Patton were in the house at the time, and had to seek refuge with neighbours, who must have given full publicity.

3. The Mexican Agent in answer to my question whether these four private soldiers had no superior officer over them in charge of the barracks and camp, who should punish them, countered this question with a remarkable observation, "what, the Captain of bandits!" almost as if it were a matter of appealing from sin to Satan. It is difficult to reconcile this suggestion with his general line of argument as to the position of the Zapatista and Villista forces during the period November 1914 to October 1915, and I cannot believe this to be the attitude of the military authorities and officers of a redoubtable military force (General Barona's Brigade) in control at that time of the City of Mexico, and recognized as an important component part of revolutionary forces having a definite military and political status, by their leaders promulgating decrees, and carrying on administration, and all this with the potentiality of establishing a Government *de jure*. I think the Commission must assume that there were

at the time competent military as well as civil authorities on whom functions of discipline and the prevention and punishment of crimes by their forces rested.

4. The fact that it is not shown that the British Chargé d'Affaires or other British representatives approached the police or any other authority with an account of the occurrences, seems capable of explanation. The most obvious one is that it was a matter of such common notoriety that they thought it superfluous.

For all the above reasons I dissent from the decision of the majority of the Commission, and am of opinion that an Award should be given in favour of the Claimants.

GEORGE CRESWELL DELAMAIN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 77, July 10, 1931. Pages 222-226.)

AFFIDAVITS AS EVIDENCE. An affidavit of claimant supported only in most general terms by affidavit of another person *held* insufficient evidence. An affidavit of claimant supported by a letter of his brother, which corroborated claimant's statement in great detail, *held* sufficient evidence.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—DUTY TO PROTECT IN REMOTE TERRITORY.—NECESSITY OF NOTICE TO AUTHORITIES. Claimant was taken prisoner by bandit forces on an isolated ranch and not released until ransom was paid. Since no proof was furnished that the public authorities were advised and since the crime, being committed in a remote territory, was not of public notoriety, claim *disallowed.*

1. The Memorial sets out that in March 1891, Mr. G. Creswell Delamain entered the Republic of Mexico, and he resided there continuously until August 1915. During the whole of his residence in Mexico, Mr. Delamain was engaged in ranching. During the years 1912-15 he was living on a ranch known as Mesa de los Fresnos, where he owned horses, cattle and goats. In 1912 General Caraveo, with about 900 soldiers, camped on his ranch for eleven days, during which time he took from Mr. Delamain sixty head of cattle. From the year 1913 to the end of September 1915 an additional 500 head of cattle were taken by Carrancista officers and their soldiers stationed at Boquillas, Mexico. Some of these cattle were taken under the direction of Sebastian Carranza, who was the Jefe Politico at Boquillas, and who usually sent Captain Ernesto García or Sergeant Lazaro Morelos for the cattle. The balance of the 500 head of cattle were taken by Major Felipe Musquiz Castillo, Major Ferino and Colonel Peralde, all of whom were army officers. In 1914 Captain García, under the direction of Sebastian Carranza, took 18 head of saddle horses, and during the years 1914 and 1915, 400 head of goats were taken by the order of the commanding officer at Boquillas. No receipts were ever given to Mr. Delamain for his property; his protests were generally answered by the usual "Por la causa." On the 5th July, 1915, Mr. Delamain was taken prisoner by Major Felipe Musquiz Castillo, and held by him for ten and a half days in the mountains on the Enfante Ranch, near the La Babia ranch. The claimant was not released until a ransom of 4,000 pesos gold had been paid. Mr. Delamain was harshly treated during his imprisonment, and it was with difficulty that he persuaded Major Castillo to spare his life.

The amount of the claim is 40,460 pesos gold, details of which are given in Mr. Delamain's affidavit.

The British Government claim on behalf of Mr. G. Creswell Delamain the sum of 40,460 pesos gold.

2. In order to do justice to this claim, it must be divided into two parts. Within the first part enter the losses alleged as having been suffered through the taking of cattle, and valued at 36,460 pesos. The second part deals with the 4,000 pesos, which the claimant says he paid as ransom for his release.

3. As regards the first part, the Commission have the affidavit of Mr. Delamain and a deposition of Mr. W. R. Sharp, sworn on the 18th March, 1930, before a notary public at Val Verde (Texas) reading as follows:

"That he has known G. C. Delamain for a period of twenty-five years, and he knows that he was ranching in Mexico about the years from 1913 to 1915; that he was on the ranch of the said G. C. Delamain, and that he saw quite a number of cattle on the Treviño Ranch, that he, the said W. R. Sharp, bought cattle from G. C. Delamain on the above ranch, while it was under the control of the said G. C. Delamain. I further swear the said G. C. Delamain lost cattle through the agents of the Carranza Military forces."

The Commission have also a record, filed by the Mexican Agent, of the hearing of witnesses, following instructions of the Mexican Government.

Those witnesses, who testified in 1928 and 1929, and are said to have lived in the neighbourhood of Mr. Delamain's Ranch at the time of the events, have answered in the negative the question as to whether they knew that cattle was taken from the claimant by military officers. One of the deponents states that General Caraveo, mentioned in the Memorial and then Governor of the State of Chihuahua, has authorized him to deny that he, General Caraveo, camped in 1912 on the Ranch "Mesa de los Fresnos" and confiscated cattle.

4. The British Agent pointed out that no great value could be attached to the evidence of witnesses examined so many years after the occurrences. The denial by authority of General Caraveo himself should certainly not impress the Commission, because it was clear that he would try to evade responsibility for the acts for which the claimant blamed him. The fact that this rebel leader had not only subsequently been amnestied, but even promoted to high public functions, was, in the eyes of the Agent, an additional reason why Mexico should be held liable for the financial consequences of his deeds.

5. The Mexican Agent drew attention to the vague character of Mr. Sharp's letter, in which no details whatever were given, neither as regarded the time when the cattle was taken, nor as regarded the forces who took it, nor as to the extent of the loss.

He, the Agent, could not see why General Caraveo's deposition should not be accepted, nor why the amnesty granted to him should be considered as an act giving rise to responsibility for Mexico. Caraveo had first followed General Orozco, had then been exiled and had later fought for the Huerta régime. His subsequent amnesty was not blamable negligence, but a measure of wise prudence promoting the return of peace and order.

6. The Commission feel unable to accept Mr. Sharp's letter as sufficient corroboration of the affidavit of the claimant. There is a total lack of detail in this document, it does not circumstantiate a single fact, and cannot be admitted as presenting evidence, on which a financial award could be based.

This being the case, only the affidavit of Mr. Delamain himself remains, and the Commission have in several decisions held that, and explained why, they cannot be satisfied by the mere statement of the person interested in the claim.

7. As regards the second part of the claim, the British Agent has filed a letter of Mr. L. A. Delamain, a brother of the claimant, dated the 11th April, 1930, in which he relates how in July 1915 one of the men of Major Felipe Musquiz Castillo came to his house in Las Cruses and told him that his brother was being held. He then went to meet the Major and arranged with him that the prisoner should be released for a ransom of U.S. $2,000. He went back to cash this money, for which his brother had given him a cheque, and paid it to Castillo, who then released his prisoner.

The Mexican Agent considered this letter as extremely weak evidence, if it could be called such, because it had not in any way been authenticated. Moreover, he pointed to the testimony filed by himself, which showed that some of the witnesses knew nothing of the claimant's imprisonment and that others, who recollected having heard of it, at the same time declared that they thought that the ransom had later been returned to Mr. Delamain.

The same witnesses unanimously characterized Castillo as a bandit leader. This means that Mexico could only be held responsible for his acts in case the competent authorities had been shown to be guilty of negligence. The Agent asserted that Castillo had been pursued, and finally executed, and this was confirmed by his witnesses. He failed to see why the authorities could be blamed for what happened to the claimant, the less so as his colleague had not shown that they had been informed.

8. The Commission are prepared to accept the letter of Mr. L. A. Delamain as sufficient corroboration of this part of the claimant's affidavit. It gives a great many details and describes the events in such a vivid and circumstantial way, that it is difficult not to consider it as a genuine, *bona fide* and trustworthy account. It is strengthened by the deposition of those of the Mexican witnesses, who state that they knew of the holding and releasing of Mr. Delamain.

The Commission have seen no evidence showing that Castillo, at the time when he arrested the claimant, belonged to the army. All the witnesses call him a bandit leader and they assert that the Government forces brought him to execution.

In several of their decisions, the Commission have made known their attitude as regards the application of subdivision 4 of Article 3 of the Convention. They refer to section 6 of their Decision No. 12 *(Mexico City Bombardment Claims):*

"In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in these cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities."

9. In the present case they have not found any indication that Mr. G. C. Delamain, or his brother, advized the public authorities of the extortion, of which he had been a victim, nor can it be assumed that this crime, committed on an isolated ranch, was of such public notoriety as to come spontaneously to the knowledge of the authorities.

For these reasons the Commission do not feel at liberty to declare that the facts are covered by the Convention.

10. The claim is disallowed.

JAMES HAMMET HOWARD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 78, July 10, 1931. Pages 226-228. See also decision No. 24.)

RESPONSIBILITY FOR ACTS OF FORCES.—FORCED OCCUPANCY.—Claimant's house was occupied by a revolutionary leader, who subsequently became a civil authority, and house was thereafter occupied by civil authorities. Claim for use and occupancy and for damage to premises *allowed.*

1. The Commission refer, as regards the facts on which the claim is based, to their Decision No. 24.

2. Following this Decision, the Agents orally argued their views.

The British Agent pointed out that Julián Real occupied the house at the time when he was a Revolutionary leader. Although he later became Municipal President, and subsequent Municipal Presidents also lived in the house, the whole occupation during four years should be considered as one continuous act, taking its origin in, and its character from, the initial deed of Julián Real.

The Agent moreover drew attention to the fact that the evidence, filed by him, showed that during that period several military forces, first Revolutionaries and later Constitutionalists, had used part of the house and caused great damage. The Agent produced photographs showing the ruinous condition of the building at the time it was returned to the owner. He also filed receipts to prove the actual expenses of repairs paid by the claimant.

3. The Mexican Agent put forward that in his opinion the occupation of the house by subsequent Municipal Presidents must be regarded as the act of civil authorities, not coming within any of the provisions of the Convention. He could not see that damage had in this case been done, or losses caused, by any of the forces enumerated in Article 3 of the Convention.

He considered the photographs, which his colleague had exhibited, as irrelevant, because it had not been certified that it was really the claimant's house which they represented, and because they did not show the condition of the house before the first occupation. According to the documents filed with the Memorial, repairing the house started not less than three years after the occupation ceased. It was clear that during that intervening period the house must have suffered heavily by the normal working of time and climate.

As regards the cost of the repairs he did not attach much value to the receipts of the contractor, because they did not indicate what expenses had been necessary to restore the building to the same condition as in 1914, nor how much was spent on improving and modernizing it.

4. The Commission, in their majority, take the view that the original seizure of the house by Julián Real was undoubtedly an act committed by a Revolutionary force covered by the Convention, as the said leader was known to have served the cause which afterwards established the Constitutionalist Government. The fact that he remained in the house after becoming Municipal President, and that his successors in that office also continued the occupation cannot, in the opinion of the Commission, modify the character of the initial act. It has not been shown that the house was ever confiscated by a decree of a civil authority, nor that the first military and compulsory occupation was ever regularized by any civil instrument. All the subsequent Municipal Presidents obviously considered the act of the revolutionary leader Real as a sufficient title to possession, and they continued to avail themselves of it, without ever

notifying the owner that his property had been taken in a legal way and in the course of the transaction of civil administration.

As, moreover, it has been shown by the evidence of the two witnesses, George A. McCormick and Jesús Magallón, that a part of the building was repeatedly used for the quartering of military forces, the majority of the Commission feel bound to declare that the losses of the claimant fall within the terms of the Convention, as having been caused by forces described in subdivision 2 of Article 3.

5. The Commission feel satisfied that occupation lasted for four years, but they cannot believe that after that period the condition of the building was such as pictured by the photographs. It is inconceivable that the first local Magistrates would have continuously dwelt in a house, which is represented as a complete ruin. If the building actually has decayed to that extent, the cause must probably be sought in the fact that the repairs were started three years after the end of the occupation, rather than in the occupation itself.

Although the Commission consider it very likely that the occupants, living in a house not their own, did not spend on upkeep anything more than was strictly indispensable, and therefore, that compensation for repairs is rightly claimed, they cannot accept an expenditure of pesos 7,168.44 as a true account of the costs that would have been incurred, in case the house had been restored to its previous condition immediately after it was returned to the owner.

6. The Commission, furthermore, have found sufficient evidence of the allegation that the claimant suffered loss, because he only, from time to time, received rent at the rate of 15 pesos a month, while the rental value was 80 pesos, which, however, in estimating the amount of his loss, he only calculates at the rate of 50 pesos. For this loss he claims 4,800 pesos, being 600 pesos yearly during six years.

The Commission, although allowing that the claimant is entitled to compensation for this item also, have considered that the occupation did not deprive the owner of the use of his house for eight years, because it did not last longer than four years, and the repairs, according to the bill of Julio C. Solórzano, took one year and three months.

The amount claimed is evidently too high, the more so as no reduction is made for the rents from time to time paid by the occupants.

The Commission can only, therefore, accept a part of the amount claimed as proved.

7. The Commission decide that the Government of the United Mexican States are obligated to pay to the British Government on behalf of Mr. James Hammet Howard the sum of 5,000 (five thousand) pesos, Mexican gold.

THE MADERA COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 79, July 10, 1931. Pages 229-232. See also decision No. 41.)

RESPONSIBILITY FOR ACTS OF FORCES, DEGREE OF PROOF REQUIRED.—When the fact of damage was established but no proof was furnished as to identity of forces responsible, or the dates or places of the events complained of, claim *disallowed.*

1. The Commission, in so far as the facts on which the present claim is based are concerned, refer to their Decision No. 41.

2. In accordance with the said Decision, the Mexican Agent answered the claim, and prayed that it be disallowed and the Government of Mexico be absolved, because it had not been shown that the claimant Company had suffered losses and damages to the extent of $4,064,705.66 pesos, nor, in the event that the claimant had suffered them, that they were caused by any of the revolutionary forces in respect of whose acts the Government of Mexico had expressly agreed to be held responsible, nor had it been shown that the competent authorities were guilty of negligence.

3. After this case was tried by the Commission, the British Agent confirmed his Memorial by contending that it was only a matter of examining the documents annexed thereto, in order to consider the claim as proved.

The British Agent himself, during the hearing, admitted that there was no evidence in regard to the forces that had executed the various acts ascribed to revolutionaries and counter-revolutionaries; but he trusted that the Commission would, in equity, award some compensation to the claimant Company, as it had absolutely no proof beyond that already filed.

4. The Mexican Agent alleged that there was no evidence as to the nature of the forces, nor particulars to establish the claim or to make it specific, but only evidence of a vague and indeterminate nature, and therefore prayed that the claim be disallowed.

5. The Presiding Commissioner asked the British Agent whether it would be possible for him to submit to the Commission the extract from the books referred to on page 6 of the Memorial, as it might afford some light to the Commission. The learned British Agent answered that he had made an effort, but that he was not in a position to submit such evidence.

The Presiding Commissioner then asked the British Agent whether he could produce the documents referred to on page 6 of the Memorial, in regard to damage caused in the time of Mr. Francisco I. Madero. The British Agent answered in the negative, although he had tried to obtain them.

The Presiding Commissioner further asked the British Agent whether he knew if the claimant Company had reported its losses to the head office at Toronto, as in that case the correspondence might also serve to enlighten the Commissioners to a certain extent. The British Agent answered that the claimants had informed him that they had no such supplementary evidence in their possession.

6. The Commission do not hesitate to assert that the claimant Company did sustain damage during the revolutionary period, from the 20th November, 1910, to the 31st May, 1920, because this appears to be abundantly proved by means of annex 2 being a certified copy of the proceedings for examination of witnesses instituted by the Company before the Judge of the District Court at Ciudad Juárez in the State of Chihuahua.

The Commission do not, however, have the same opinion when they come to the evidence as to the kind of forces that committed the acts that caused the damage.

The witnesses fail to say where the acts were committed, and their testimony is so defective, and so wanting in precision, that they do not state the exact amounts of the losses. They confined themselves to stating that the Madera Company (Limited), since 1910, *at different dates*, and *at different places*, during the revolutionary period, and at the hands of revolutionaries, sustained great damage to its interests situated in the Districts of Galeana and Guerrero in the

State of Chihuahua; that said damage consisted of destruction, robberies, expropriations, violent requisitions of merchandise in transit and in storage, expropriations of arms, ammunition and explosives, robberies of horses, cattle, hogs and sheep, wherever they happened to be; requisitions of medicines, etc.; *but there was not a single witness to say who were the revolutionaries responsible for those acts in each case nor did they specify either the dates of, or the places where,* the events occurred upon which they testified. That being so the Commission are unable to make an award against Mexico, in accordance with the Convention entered into between Mexico and Great Britain.

Article III of the Convention, which determines the nature of the claims that may be presented against Mexico for losses or damages suffered by British subjects, etc., requires that it be established that such losses and damages have been caused by one or any of the following forces:

(1) By the forces of a Government *de jure* or *de facto*.

(2) By revolutionary forces which, after the triumph of their cause, have established Governments *de jure* or *de facto*.

(3) By forces arising from the disbandment of the Federal Army.

(4) By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2 and 3 of this Article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way.

According to the opinion of the Commission it is not sufficient that it be proved that a British subject sustained damage during the period from the 20th November, 1910, to the 31st May, 1920, in order to hold Mexico responsible for such damage, but it is further necessary to show—

(a) That said damage was due to the acts of forces;

(b) That said forces are included among those mentioned in Article 3 of the Convention, and no others; and

(c) That the date on which they were caused be also stated with such exactness as to enable the Commission to determine the nature of the forces that caused the damage, and the responsibility of Mexico, since under the new Convention Mexico is not responsible for any claims originated by the forces of Victoriano Huerta, nor for the acts of his régime, nor for those of revolutionary forces opposed to those which, after the triumph of their cause, established Governments *de jure* or *de facto*.

And as it has not, in the present case, been shown that any forces within the meaning of the Convention executed the acts that gave rise to the damages for which claim is made, the Commission, because of the lack of evidence, decide that the claim is disallowed and that Mexico is absolved from the said claim as presented against it by the Government of Great Britain on behalf of the Madera Company, Limited, for the sum of $4,064,705.66, Mexican gold.

JANTHA PLANTATION (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 80, July 14, 1931. Pages 232-235.)

CONFISCATION. Confiscation is an act emanating from public authorities and evidenced by an express order from them. In the absence of references to authentic orders of authorities, and with conflicting evidence on the fact of confiscation, claim *disallowed.*

1. The British Government have joined in one Memorial under the title of the "Jantha Plantation Claims," a group of similar claims, all of them arising out of the same set of facts, and presented on behalf of J. B. Aiton, Frank L. Roberts, John R. Sands, Charles Wieland, Walter C. Aust and Arthur Matthews; the first one being for £4,100, the second for $7,500.00 Mexican gold, the third for $4,000.00 United States currency, the fourth for $2,000.00 Canadian currency, the fifth for $2,000.00 Canadian currency, and the sixth for $4,000.00 Canadian currency.

2. The facts are common to all the claims, and in the Memorial they are set out as follows:

That during the years 1911, 1912, and 1913, Major J. B. Aiton, and Messrs. Frank L. Roberts, John R. Sands, Charles Wieland, Walter C. Aust and Arthur Matthews, purchased from the Jantha Plantation Company, an American concern, sundry tracts of land situated near the town of Macineso, State of Oaxaca.

That the said claimants expended large sums of money on clearing their property and on the cultivation of bananas thereon.

That the said claimants were not resident of Macineso, and that their lands were therefore left under the care of the Alvarado Construction Company, an American concern that developed the lands on behalf of the owners.

That on the 23rd April, 1913, the *Jefe Político* at Tuxtepec informed American nationals living at Macineso that he could not offer them protection and advised them to leave the place.

That on the 26th April, 1914, a company of federal soldiers under the command of Colonel Villanueva and Major Prida ordered the representatives of the Alvarado Construction Company to abandon the lands under their care and to go to Veracruz.

That the Government of Mexico appointed one D. J. García as administrator to take over the lands known as the Jantha Plantation Company, and that a band of armed men under the command of one Luis del Valle took possession of the lands under the care of the Alvarado Construction Company, among which were the properties belonging to the claimants, and forthwith used the bananas and cattle thereon as food for the soldiers.

That the Government of Mexico managed the lands for some time and availed themselves of the products therefrom for their own use. That the said lands were neglected and that they have by now become overgrown with jungle and of no use for cultivation, and that as a result of this the property has become practically worthless.

That the claimants have not been able to regain possession of their properties and that although their representatives were in 1919 allowed to visit the lands, they were not granted permission to take possession of same on behalf of the owners.

3. Attached to the Memorial filed by the British Government (annex 8) and as evidence in support of the facts on which the claims were founded, there were submitted the declarations of Paul Weber, May Crimshawe and Florence Crimshawe, who stated that the facts referred to in the Memorial were true.

4. The claims are for:

(1) Damage sustained by reason of forced abandonment by the claimants' agents.

(2) Confiscation of their properties by the Government of Mexico, in April 1913.

(3) Loss of profits which they had expected to realize, as from the 26th April, 1914.

(4) Depreciation of the properties by reason of lack of care because of their neglected condition, as a consequence of confiscation.

5. The Mexican Agent in his answer contended that the facts on which the claim was based were not correct, and by way of proof of his assertion he attached, as annex 1 to his answer, a copy of the testimony of Fermín Fontañén, Francisco Flores, Leonardo Martínez, Pedro Lavín, and José Roca, who positively denied the confiscation of the claimants' property as also the fact that D. J. García had taken possession of the said properties on behalf of the Government of Mexico.

As annex 2 to this answer, the Mexican Agent submitted a certificate from the Office of the Collector of Taxes of the State of Oaxaca, to show that the properties were very far from having the value ascribed to them, their value, according to the said certificate, being insignificant.

6. The British Agent replied by contending that there was a direct conflict between the evidence annexed to the Memorial and that annexed to the Mexican Agent's answer, but that the official denials of the authorities had not been presented, and that as his evidence had been taken before that of the Mexican Agent it was more likely to be reliable and accurate.

7. The Mexican Agent in his Rejoinder contended that the facts complained of were not correct, on the strength of the documents presented with his Answer. Moreover, he attached to his Rejoinder certain official communications from the Department of Finance, the War Department, and the Government of the State of Oaxaca, the only authorities that could have decreed the confiscations in question, and in them the fact of such taking over or confiscation of the claimants' property was positively denied.

8. The Mexican Agent also filed a Brief, contending that, although the evidence theretofore submitted showed that the facts on which the claims were based were incorrect and the amount claimed from the Government of Mexico unjustified, any losses and damages sustained by the claimant Company would—even accepting the claimant's own version of the facts—have been caused by forces belonging to the régime of Victoriano Huerta, forces which were, under the third paragraph of subdivision 4 of Article III of the Convention, expressly excluded from among those recognized as involving responsibility for the Government of Mexico.

9. The Commission, after having made themselves acquainted with the points upheld by both Agents, and with the evidence submitted by them in support of their arguments, formulate the following considerations:

(1) Confiscation is an act emanating from the public authorities and can only be carried out by means of an express order from the said authorities. The British Government have only, in order to establish the fact of such

confiscation, produced the affidavits of Paul Weber, May Crimshawe and Florence Crimshawe, without having in any way referred to any authentic orders from the authorities.

(2) The Mexican Agent has, in rebuttal of the above evidence, produced official communications from the Departments of War and Finance and from the Governor of the State of Oaxaca, denying the fact of such confiscation and the existence in the National Army of the officers to whom the act was attributed.

(3) The said Mexican Agent has filed the evidence of witnesses, in order to contradict the fact asserted by the British Agent, and his witnesses agreed with the official communications from the above-mentioned authorities, to the effect that no such confiscation had taken place.

10. The Commission do not, in the presence of this conflicting evidence, find sufficient reasons for declaring that confiscation of the claimants' property has been proved.

11. For the above reasons, and without entering upon the task of considering the arguments upheld by the Mexican Agent, the Commission declare that the Government of Great Britain have not established the fact of the confiscation of the claimants' property by the Mexican authorities, and in consequence.

12. The Commission disallow the instant claim.

ALFRED HAMMOND BROMLY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 81, July 22, 1931. Pages 235-238.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH. When the evidence established that the respondent Government had sent troops to pursue and punish bandits, for whose acts claim was made, though the result of such pursuit did not appear, claim *dismissed.*

1. The Memorial sets out that Mr. Alfred Hammond Bromly was engineer to the "Nueva Buenavista y Anexas, S.A." Company and was residing on the estate "Los Laureles". At 6 o'clock in the morning of the 20th February, 1913, he was awakened by continuous firing, and was informed that the house was being attacked. Shortly afterwards a parley took place between a Mr. Gorow and the chief to the assailants, who requested that the house should be evacuated. This request was refused, and thereupon the shooting began again. At this moment Mr. Bromly noticed a man named Chacón in the courtyard, who said he was a messenger of the bandits. As this man was a suspicious person, Mr. Bromly followed him to the exterior corridor, where he (Chacón) fell dead, a victim to a bullet fired from outside. Shortly afterwards the gang retired. Mr. Bromly and his companions learned from a youth named Pedro N., that the gang was composed of thirty persons, and that they had retired to La Yesca to bring up the remainder of their friends to complete the capture of the house. The total band was composed of about 130 persons under the command of Sacramento Sernón, who had been engaged in revolutionary pursuits at Tepic, ten days before, under the name of Don Félix Díaz. Previous to the attack the revolutionaries had stolen horses and harness from the stables, and had threatened the youth Pedro with penalties if he gave the alarm.

Pedro also informed Mr. Bromly that the labourers employed by the company had been killed by these Antimaderistas while they (the labourers) were running to the house for arms. After consultation it was decided to retire to the mine as the house was defenceless against so many. The revolutionaries returned shortly afterwards accompanied by armed civilians, and proceeded to attack the estate. Mr. Bromly was informed subsequently that the assailants were police officers without uniforms. The official version of these events was to the effect that the soldiers accompanied by the company's operatives, had approached the house in a peaceful manner and had been brutally fired upon by Messrs. Goisueta and Gorow without previous warning, and, as a result of this, there were a certain number of deaths. Mr. Bromly asserts that this is absolutely untrue. Mr. Bromly and others remained for two days in the buildings attached to the mine. On the 22nd February he was informed that Manuel Miramón would arrive in a few hours' time at the head of 400 revolutionaries, and, as this chief had a bad reputation, Mr. Bromly and his companions hired horses and left without delay. On their arrival at Hostotipaquillo, they informed the Government official in charge of what had occurred, and received every assistance and an escort from him. During the second attack on the estate the place was ransacked and Mr. Bromly suffered considerable loss.

The amount of the claim is one thousand three hundred and twenty-five pesos thirty centavos Mexican currency.

2. The Commission after consideration of all of the evidence produced to them have come to the conclusion that the attacking parties on the 20th February, 1913, were bandits. There is no evidence that they were revolutionaries, still less revolutionaries whose revolution afterwards succeeded. The sworn Exhibit A to Mr. Bromly's affidavit describes them in one place as "revolutionary bandits", in others as "bandits", and as "Maderista bandits", and as "gangs". In the letter from R. Gonzalez dated the 26th February, 1913 (part of the further evidence filed by the British Agent), written immediately after the occurrences, they are also described as "bandoleros" (bandits), and "bandidos". And in the extract from the Guadalajara Times of the 1st March, 1913, filed by the British Agent as further evidence, they are also referred to as "bandits".

This being so, and classing the attackers and robbers as the Commission feel compelled to do, as bandits or brigands, within subdivision 4 of Article 3 of the Convention, it remains for the Commission to decide whether the Government of Mexico can be held responsible for their acts, for any of the reasons set out in the said subdivision of Article III of the Convention.

3. The time when the events occurred was on the establishment or on the eve of the establishment of the Huerta régime and the overthrow of the Madero Government by Huerta. Madero is stated to have been taken prisoner on the 18th February, 1915, to have resigned on the 19th February, and to have been killed either on the 22nd or the 23rd February. If the acts were committed during the Madero régime, blame would have to be proved as attaching to these authorities. If, on the other hand, the Madero régime had then been overthrown and Huerta in power on the 18th February, as argued by the Mexican Agent, then the Huerta régime would be responsible for the events of the 20th February provided neglect or blame on their part were shown and unless liability for acts of omission is excluded by the provisions of the new and amended Convention.

4. But the Commission do not think it necessary for the purposes of this case to discuss or decide this last point, as they do not consider that any blame

has been shown attaching to the authorities whoever they were. According to the newspaper extract already referred to, the Government sent troops to pursue the bandits and punish them. It does not appear what the result was, but the Commission are unable to see any sufficient grounds proved upon which they can fix financial responsibility on the Government of Mexico in this case, within the terms of the Convention.

5. The claim is dismissed.

ERNEST FREDERICK AYTON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 82, July 22, 1931. Pages 238-241.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. When the fact of loss is established only by claimant's affidavit, *held*, evidence insufficient.

(Text of decision omitted.)

MAZAPIL COPPER COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 83, July 22, 1931. Pages 241-242.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

WILLIAM ALEXANDER KENNEDY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 84, July 22, 1931. Pages 242-244.)

DAMAGES, PROOF OF.—FORCED OCCUPANCY. Claim for damages sustained as a result of the occupancy of claimant's house for several days by revolutionary forces. Supporting evidence indicated, contrary to claimant's statements, that forces in question at most occupied house overnight, and evidence of loss was otherwise of a doubtful character. Claim *dismissed.*

1. In this case the claimant, according to the Memorial, on or before the 18th February, 1916, occupied a house at Tlahualilo, in the State of Durango. About this date Villista forces, numbering some five hundred men, under the direct command of Canuto Reyes, a subordinate of Francisco Villa, attacked Tlahualilo. After a short fight the federal garrison were driven out. The officers

of the Villista forces occupied the claimant's house for several days. Everything in the house, except the heavy furniture, was either carried away or destroyed. The heavy furniture was afterwards found to be in such a damaged state that the claimant was obliged to have it repaired, cleaned and disinfected.

The amount of the claim is 1,267.05 dollars United States currency.

2. The evidence filed with the Memorial was an Affidavit of Mr. W. A. Kennedy sworn at Mexico City on the 27th November, 1927, to which he attached an inventory and valuation of the property destroyed or lost. In this Affidavit, besides deposing himself as to the facts stated in the Memorial, he adds that the only eye-witnesses of the occurrences were the officers of the revolutionary forces themselves, that the Mexican employees of the Tlahualilo Agricultural Company stayed in their houses, that the foreigners escaped a few moments before the revolutionary forces occupied the place, and that if necessary the Mexican employees would certify to the accuracy of the facts as stated in his claim.

3. The Mexican Agent with his Answer, filed on the 24th September, 1929, produced certain testimony taken at Tlahualilo before the Municipal President, in which the deponents all testified that, although it was true that the revolutionary forces under Canuto Reyes in superior number attacked and dislodged the Government forces, it was untrue that they occupied the house of the claimant for several days, that they were not there for more than 15 to 20 minutes, and they took nothing but three pieces of bread and three bottles of table wine which were in the larder, and further that on the following day Canuto Reyes and his fellows were pursued by the Government forces, having been dislodged.

4. The further evidence filed by the British Agent consisting of answers to questionnaires, by T. R. Fairbairn and another person whose signature is illegible, taken before Pedro G. Moreno on the 21st November, 1929, was that General Canuto Reyes's forces in superior numbers attacked Tlahualilo on the 18th February, 1916, drove out the federal garrison under Colonel Olivares, of about 150 men, and occupied the principal ranch called Zaragoza, that they plundered the house occupied by Mr. W. A. Kennedy, and used it during the time when those rebels occupied Tlahualilo, and that several articles were destroyed by them. That the contents of the house were exceedingly maltreated, and that it was necessary for the Company to repair and replace some of the furniture owned by the claimant, after the occupation by the rebels, especially the parlour furniture. But they do not state specifically to what extent they plundered the house or destroyed the articles. And they add that very early the next morning the Federal forces evicted them from Zaragoza, but that they had enough time to plunder the house of Mr. T. M. Fairbairn, Assistant Manager of the Company (the deponent) and that of Mr. W. A. Kennedy.

5. The Commission consider it to be established that the attack and occupation of the Claimant's house took place, and that the attacking and occupying forces were Villistas and at that time, the Carranza Government being established, they come within subdivision 4 of Article 3 of the Convention. But they are not satisfied on the evidence that all or a substantial part of the articles claimed as lost and set out in the inventory and list annexed by the Claimant was taken by the said rebels or that the damages claimed for were caused by them. It was, according to the Claimant's Affidavit, a week after the occurrences before he returned to Tlahualilo, and made the inventory of his losses. Moreover, his statement that the rebel forces used his house for several days cannot

be accepted as correct in the face of the other evidence produced by him as recapitulated above. Nor is there any evidence, or any statement in his Memorial that he reported or made known to the authorities his losses, or the damage alleged to have been suffered by him, and attributed to the rebels.

6. The Commission consider that the essential elements, to which they have so frequently drawn attention in previous decisions, requisite for establishing claims of this nature before them are lacking, and that they are unable for this reason to make an Award in favour of the claimant.

7. The claim is dismissed.

DOUGLAS G. COLLIE MACNEILL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 85, July 22, 1931. Pages 245-246. See also decision No. 27.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. Evidence *held* sufficient to establish claim.

(Text of decision omitted.)

THE SUCHI TIMBER COMPANY (1915) (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 86, August 3, 1931. Pages 246-248.)

Res Judicata—EFFECT OF AWARD RENDERED BY MEXICAN NATIONAL CLAIMS COMMISSION. Previous rejection of claim by domestic Mexican National Claims Commission *held* not binding on tribunal.

RESPONSIBILITY FOR ACTS OF FORCES.—GOODS SOLD TO REVOLUTIONARY FORCES. Supplying of wood and timber to revolutionary forces not under violence but in ordinary course of business *held* not to entrain responsibility under the *compromis*.

1. This is, according to the Memorial, a claim for compensation for various articles supplied by the Suchi Timber Company, Ltd., a British company, to the revolutionary and counter-revolutionary forces.

This claim was filed with the Mexican National Claims Commission with which the claimants expressed their dissatisfaction.

The claim was then passed to the Anglo-Mexican Special Claims Commission, and, by direction of the Commission, was handed to the British Agent and counsel for his consideration.

The claim was made up by Alfred F. Main as manager and attorney for the claimant.

During the revolutionary events which are covered by the period of the Anglo-Mexican Special Claims Convention, the Suchi Timber Company, Ltd., was obliged to supply wood and timber to the Constitutionalist railways and to the army.

The Mexican National Claims Commission rejected this claim as contrary to law, on the ground that the claimant company had not presented proofs to show that it had suffered the damages it claimed. Mr. Alfred F. Main, on behalf of the Suchi Timber Company, Ltd., protested against this decision, and contended that the documents which he had submitted fully proved that the supply of wood and timber had been delivered.

The amount of the claim is 2,394.00 pesos. The claim belonged at the time of the loss, and still does belong solely and exclusively to the claimants. No compensation has been received from the Mexican Government or from any other sources.

The British Government claim, on behalf of the Suchi Timber Company Ltd., the sum of $2,394.00 pesos.

2. The Commission have found nothing to prove that the Company, in supplying wood and timber, acted under violence and not voluntarily in the ordinary course of their business transactions. The Commission cannot regard an order to supply fuel as an act of forces covered by the Convention.

3. The Commission disallow the claim.

MARY HALE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 87, August 3, 1931. Pages 248-250. See also decision No. 28.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—NECESSITY OF CORROBORATING EVIDENCE. Claim *disallowed* for lack of corroborating evidence.

(Text of decision omitted.)

THOMAS PULLEY MALLARD (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 88, August 3, 1931. Pages 250-254.)

RESPONSIBILITY FOR ACTS OF FORCES.—MILITARY ACTS. Killing by Villista forces in course of a battle against Government forces *held* a military act for which respondent Government was not responsible.

1. This is a claim for compensation for the deaths of the wife, Anna Mallard, and the son, Sidney Mallard, of the claimant, who were killed on the 6th June, 1915, during an attack by revolutionary forces on Tuxpam Bar, in the State of Veracruz.

According to the Memorial, the facts are the same as those giving rise to the claims of Mrs. Fanny Grave and of Mrs. Gwladys Amabel Jones. It should be explained that the claimant's birth certificate shows that his real name is Thomas Pulley, but that, owing to the death of his father during the claimant's infancy and his mother's remarriage to Mr. Mallard, the claimant was brought up in the name of Mallard and has used it consistently since. It should be noted that the claimant is described as Thomas Pulley Mallard, the son of James

Pulley Mallard, on the certificate of his marriage to Annie Matilda Patterson. His father's real name was James Pulley.

On the morning of the 6th June, 1915, the *de facto* Government forces stationed at Tuxpam Bar were attacked by revolutionary forces. During the attack and in view of the heavy shooting, and of the fact that the dwelling-houses, being made of wood, afforded no protection for the lives of the occupants, Mr. Mallard, his wife and child, together with a Mr. A. J. Grave and Mr. S. B. Jones, took refuge under one of these houses, which the Mexican Eagle Oil Company, Limited, provided for their employees. While taking refuge under this house, Mrs. Mallard and her son, Sidney Mallard, were, with others, fatally wounded by heavy volleys from the attacking forces. Mrs. Mallard died from her injuries on the next day, the 7th June, 1915, in the Company's hospital at Tanhuijo Camp, to which she had been taken after the fighting had ceased. The son, Sidney Mallard, died on the 6th June, 1915, while being taken to the hospital. Medical certificates given by Dr. T. M. Taylor describing the nature of the injuries and the cause of the deaths of Mrs. Mallard and of Sidney Mallard are contained in Exhibits T.M. 2a and T.M. 2b to annex 1. It is understood that in File No. 121 formed during the year 1915 in the archives of the Civil Registry Office at Tuxpam there is a record of the investigation made by the Court of First Instance at Tuxpam of the incidents which led to the deaths of Mrs. Mallard and Sidney Mallard.

The circumstances of the killing of these two British subjects were reported to His Majesty's Government at the time and urgent representations were made to General Carranza by the United States Agent at Veracruz. The British Vice-Consul at El Paso was instructed to make the strongest representations to General Villa, whose forces, it was afterwards understood, were those concerned in the attack on Tuxpam.

The claim, which amounts to 50,000 pesos Mexican, did at the time and still does belong solely and absolutely to the claimant.

The British Government claim on behalf of Thomas Pulley Mallard the sum of 50,000 pesos Mexican.

2. The British Agent drew the attention of the Commission to the fact that both victims had been killed by volleys from the attacking forces, and that those forces were commanded by General Villa. This leader was at the time of the events up in arms against Carranza, who had succeeded in establishing a Government *de facto*. The acts of the Villistas could not therefore be regarded as acts of lawful warfare, but were the acts of insurrectionaries or rebels, and as, in the Agent's view, no proof had been shown of any punitive action taken by the competent authorities against the perpetrators, the Mexican Republic should be held responsible for the consequences, according to subdivision 4 of Article 3 of the Convention.

3. The Mexican Agent argued that as regards the question of who had committed the particular acts that proved fatal to Mrs. Mallard and her child, the Commission merely had at their disposal the affidavits of the claimant himself. He considered this an insufficient proof of this very important matter. The volleys could just as well have been fired by the Government troops which defended Tuxpam and which, in doing so, performed a lawful act, for the consequences of which no recovery could be claimed from Mexico. Even if the victims had fallen through being struck by bullets from the attacking forces, they had been killed in the course of a battle. Their death had to be attributed to the hazards of war, and a great many judgments of international tribunals had decided that where injury was an ordinary incident of battle, no Government could be held liable. The Agent referred to the jurisprudence

quoted by Jackson H. Ralston *(The Law and Procedure of International Tribunals)* pp. 386 and following.

In case the killing had to be regarded as an act of insurrection or revolt, the Agent denied that any negligence on the part of the Mexican Government had been shown. It was outside the power of the authorities to trace the individuals who had fired the fatal shots; all the Government could do was to suppress the insurrection, and this duty they had certainly not failed to perform.

4. The Commission deem that no doubt can exist as to the facts or as to the forces whose volleys killed the wife and child of the claimant. All the contemporary evidence compels them to lay the responsibility upon the attacking forces, i.e., the Villistas, there being furthermore a greater likelihood that persons residing in a town subjected to attack would be killed by the attackers rather than by the defenders.

The question before the Commission is therefore whether Mexico is, under the Convention, financially responsible for the acts of General Villa and his followers at the time when the events occurred.

5. The time in question is the 6th June, 1915, a date falling within the second period of the Villista and Zapatista movements as described in the Decision of the Commission in the claim of *Mrs. Christina Patton* (Decision No. 76).

The Commission refer to paragraph 6 of that Decision reading as follows:

"The Commission accept in its general lines the distinction drawn by the Mexican Agent between the various periods of the Zapatista and Villista movements, reserving, however, their liberty as to the determination of the dates on which such periods must be assumed to begin and to end.

"They are equally of opinion that during the second period the two contending factions were fighting with the same character for political aims, and that as neither of the two had been able to establish a Government, neither of them could be regarded as being in mutiny, rising or insurrection against the other. From that point of view their acts are not covered by the Convention, since by the last revision the words "*or by revolutionary forces opposed to them*" have been elimination. The Commission wish it, however, to be clearly understood that this opinion of theirs goes only to those acts, which were of a political or a military nature, or directed towards political or military aims. While acts of that description seem to have been excluded when the Treaty was amended, this cannot be maintained as regards the acts of brigandage.

"Both factions—or greater or smaller parties of them—may, as well as other independent groups, have become guilty of brigandage in special instances, and, as the Commission read subdivision 4 of the amended Article 3, they cannot admit that all those cases fall outside the financial liability of the respondent Government."

6. The Villistas, on attacking a place occupied by the opposite faction, were certainly engaged in the execution of a military act and not of one of those provided for by subdivision 4 of Article 3 of the Convention.

That being so, the Commission must take the same attitude as in the Decision quoted, and they regret that they are not, reading the Convention as amended by the last revision, entitled to grant an award.

7. The Commission disallow the claim.

FANNY GRAVE AND GWLADYS AMABEL JONES (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 89, August 3, 1931. Pages 254-257.)

RESPONSIBILITY FOR ACTS OF FORCES.—MILITARY ACTS. Killing by Villista forces in course of a battle against Government forces *held* a military act for which respondent Government was not responsible.

(Text of decision omitted).

CENTRAL AGENCY (LIMITED), GLASGOW (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 90, August 3, 1931. Pages 258-259. See also decision No. 7.)

RESPONSIBILITY FOR ACTS OF FORCES. Burning of goods caused by attacking Constitutionalist forces, before they became a part of a Government *de facto* or *de jure*, *held* an unlawful act for which respondent Government was responsible.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 231.

1. As regards the facts on which the claim is based, the Commission refer to their Decision No. 7.

2. The majority of the Commission deem that the goods, at the time of the burning, belonged to the vendor (the claimant).

3. They take it that the burning of the Monterrey station was not caused by the acts of the defenders of the town (Huertistas), but by the fire of the attacking forces (Constitutionalists), this being more likely and also in accordance with all the contemporary evidence.

4. At the time the events occurred the Constitutionalist Movement had not yet succeeded in establishing a Government *de facto* or *de jure*, and for that reason, the Commission cannot accept their acts as being lawful. In their opinion the question of the lawfulness of an act must be judged in accordance with the circumstances prevailing at the time when it was committed.

5. The Commission feel, therefore, bound to declare that the burning of the station is an act covered by subdivision 2 of Article 3 of the Convention. They accept the amount claimed as proved by the invoice dated before the events occurred.

6. The Commission decide that the Government of the United Mexican States is obliged to pay to the British Government on behalf of the Central Agency (Limited), Glasgow, the sum of 1,568.00 (one thousand five hundred and sixty eight) pesos, Mexican gold or an equivalent amount in gold.

THE BUENA TIERRA MINING COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 91, August 3, 1931. Pages 259-266.)

RESPONSIBILITY FOR ACTS OF FORCES. Status under *compromis* of acts by various military forces considered.

FAILURE TO SUPPRESS OR PUNISH.—NECESSITY OF NOTICE TO AUTHORITIES. When act complained of was not of public notoriety or brought to attention of authorities in due time, *held* no responsibility of respondent Government existed.

EFFECT OF ACT OF AMNESTY. A grant of amnesty to Villa and his forces *held* not a failure to punish resulting in responsibility for acts of Villista forces on the part of respondent Government, in so far as acts of a political or military nature, such as seizure or confiscation of property, were concerned.

1. The claim is for compensation for the loss of property confiscated or taken by revolutionaries during the period November 1912 to September 1916. According to the Memorial, in November 1912, a quantity of 49,300 kilos of coal, the property of the company, standing in wagon No. 17462, in the National Railway Station in the City of Chihuahua, was confiscated by the Orozquista faction. In November 1913 a quantity of 54,200 kilos of coal which was in a railway wagon at the station at Terrazas was confiscated by Villistas. In January 1915, the so-called Government of Francisco Villa requisitioned coal belonging to the company in seven wagons which were standing in the station of Chihuahua. In February of that year further confiscation of coal belonging to the company was made by the Villa Government. In November 1915, a quantity of coal deposited or stored at the minefield of Santa Eulalia, in the district of Iturbide, was confiscated by Villistas forces, who were garrisoning the place. On the 19th November of the same year, the Villistas took three horses belonging to the company from the mine in Santo Domingo, Santa Eulalia, district of Iturbide. On the 24th December, 1915, a party of Villistas came to the same mine and destroyed an iron case and took from Messrs. W. E. Dwelly and John Brooke, Jr., 100 pesos National gold, belonging to the company. On the 26th of the same month, Villistas took away forty-four bundles of alfalfa belonging to the company. On the 22nd January, 1919, the ex-rebel Francisco Villa came to the minefield of Santo Domingo, ordered the company's safe to be broken open, and took possession of 385 pesos 4 centavos National gold belonging to the Company. In February 1916, a party of Villistas came to the mine in Santo Domingo and took away sixty-four cases of candles, one and a half tins of grease and ten cases of gasolene. On the 13th September, 1919, a party of Villistas assaulted a train belonging to the Chihuahua Mining Company, which was going to the minefield of Santa Eulalia and took the sum of 700 pesos National gold belonging to the Claimant company, which was being taken by Mr. Dwelly in order to pay the company's workmen of Ciudad Juarez.

2. The facts are set out in an Affidavit (Annex to the Memorial) made by Herbert Francis Wreford, Secretary to the Claimant Company, a British company, on the 16th May, 1928, and in a translation (Exhibit "B" to annex) of a certified copy of the Record of voluntary jurisdiction proceedings instituted, before the District Court, Ciudad Juarez, State of Chihuahua, on the 23rd June,

1921, by Mr. Arthur C. Brinker, as Attorney of the Claimant Company, to verify the damages caused by the revolution. Exhibit "C" to the above-mentioned Affidavit of Herbert Francis Wreford is a certificate, dated the 15th May, 1928, under the hand and seal of the Assistant Registrar in London of Joint Stock Companies, of the incorporation of the claimant company on the 10th February, 1912.

3. At the hearing the British Agent dropped the first item of the claim, being the confiscation of coal by Orozquistas in November 1912. As regards the rest of the claim, the acts complained of were those of Villistas and the Government of Mexico were in his opinion undoubtedly responsible for such acts during 1913 as being during the Constitutionalist movement prior to November 1914 and belonging to the period during which the Villistas must be regarded as falling within the category of successful Revolutionaries, as allied to the Constitutionalist cause. That as regards the subsequent acts of the Villistas complained of, the Government of Mexico must be held responsible provided negligence, failure to punish, or blame on the part of the competent authorities was proved, the offending parties being either insurrectionaries or bandits. He claimed that subdivision (4) of Article 3 of the Amended Convention was applicable. He argued further that the effect of the General Amnesty Decree issued by the Carranza Government in December 1915, and the Agreement made by the same Government with Villa on the 28th July, 1920, was to make the Mexican Government financially responsible for non-punishment of the Villistas and Villa respectively as insurrectionaries, or bandits, as the case might be, in respect of these acts.

4. The Mexican Agent in opposing the Claim confined his arguments to the legal issues involved, arising from the dates and the character of the acts complained of, and the applicability thereto of the amended Convention. As regards the legal questions arising on the dates when (and therefore the periods during which) the acts took place, the Commission have already in their decisions in the case of *Mrs. Edith Henry* (Decision No. 61) and in the *Christina Patton* case (Decision No. 76), set out the general arguments, on these points, of the Mexican Agent, which were similar, and it is not necessary to repeat them here. But in the case now under consideration the Mexican Agent dealt also with the effect of the Carranza Decree of Amnesty of December 1915 and the Villa Agreement of 1920. He distinguished between political and criminal offences. It might be an obligation of the State or the authorities to punish criminal or common law offences, but this did not apply to political offences, which only affected the State. It was to the interest of the State to terminate political unrest and civil war, and political amnesties and agreements with this end were in the interest of the State. The Amnesty and Agreement were political acts and the Government of Mexico could not be held responsible merely because of these, but only if negligence or blame were proved against it.

5. The Commission have already, in the Case of Christina Patton, referred to in the preceding paragraph, enunciated their views as to the general principles applicable during the first and the second periods therein described, and they refer to these as directly applicable to the losses occurring during those periods, that is to say, prior to November 1914, and between November 1914 and October 1915 respectively. But a large proportion of the losses arose on confiscations and takings by Villistas during the third period, when Carranza had established first a *de facto* and later a *de jure* Government. They were then insurrectionaries or bandits, as the case might be, within subdivision 4 of Clause 3 of the Convention. In such cases omission by the competent authorities to take reasonable measures to suppress, or to punish those responsible, or blame

in any other way, must be established in order to make the Mexican Government financially responsible.

6. Acting on the general principles before enumerated they must hold the Mexican Government financially liable for the confiscation complained of in the first period, that is to say, in November 1913, when the Villistas formed part of the Constitutional Army, of 54,200 kilos. of coal which, as well as its value at 262.18 pesos, they find has been proved. As regards the confiscations during the second period, that is to say in January and February 1915, it has not been shown and the Commission do not find that these acts were of other than a political or military nature, and acting on the principles already enunciated in the cases above referred to, and no omission, negligence or blame having been proved against the authorities in regard to the actual occurrences complained of, they must hold that under the Convention as amended the Government of Mexico is not financially responsible.

7. As regards the acts complained of which occurred during the third period, that is to say, between October 1915 and September 1919, it will be convenient to summarize by recapitulation from the Memorial and evidence annexed thereto the specific acts complained of:

1915, November.—Coal confiscated at Santa Eulalia, Iturbide, by Villista forces, who were garrisoning the place.

1915, November 19.—Three horses taken by Villistas at the same place.

1916, February.—Villistas took 64 cases of candles, 10 of gasolene and 1½ tins of grease.

1916, December 24.—Villistas destroyed an iron case and took 100 pesos Mexican gold.

1916, December 26.—44 bundles of alfalfa taken by Villistas.

1919, January 22.—Visit of ex-rebel Francisco Villa to the Minefield at Santo Domingo ordered safe to be broken open and took possession of 385 pesos 4 centavos National gold.

1919, September 15.—Assault by Villistas of train belonging to Chihuahua Mining Company, and robbery from Mr. Dwelly of 700 pesos National gold belonging to the Claimants.

The above facts being taken as proved, as in the opinion of the Commission they were sufficiently, it remains to be considered how far, if at all, the Mexican Government can be held to be financially responsible. During the whole of this period, and indeed up to the date of the Agreement concluded by the Carranza Government with Francisco Villa on the 28th July, 1920, Villa and his followers came under the category of insurrectionary forces, or brigands as the case may be, and the financial liability of the Government of Mexico for their acts depends on whether the competent authorities omitted to take reasonable measures to suppress the insurrections, or acts of brigandage as the case may be, or to punish those responsible for the same, or whether it is established that the authorities were blamable in any other way.

The position of Villistas and also Zapatistas during the third period was described by the Mexican Agent in his arguments before the Commission in the cases of *Edith Henry* and *Christina Patton* referred to in paragraph 4 hereof, and his view of their position may be summarized as follows:

The resistance of the forces of Zapata and Villa continued, though they could no longer be considered as political factors. This period ended when these forces were, at different dates, definitely subdued. The state of affairs during the third period was such that a Government *de facto* existed, and against this Government, mutinies, risings and insurrections could break out and be sustained.

In the decision of the Commission in the *Edith Henry* case, on the Motion of the Mexican Agent to dismiss the Claim (Decision No. 61), they expressed the following opinion:

"6. As regards the present claim, the facts on which it is based are alleged to have occurred in January 1916, i.e., at a time when there was an established Government in Mexico. The acts of General Zapata, then in arms against the Government, must therefore be considered as a mutiny, a rising, or an insurrection, unless they ought, depending on the nature of the acts in certain instances, to be classified as acts of brigandage."

8. The Commission is faced in the present case, in view of the arguments advanced as regards the effect of the Villa Agreement of the 28th July, 1920, with the necessity of considering what was the real nature of the acts during the third period here complained of. It is clear, in the opinion of the Commission, that, speaking generally, the Villista movement and Villa's activities continued as a political factor during the whole of the third period until the conclusion of the Agreement of the 28th July, 1920. In this respect they differ from the view of the Mexican Agent that during the third period Zapata and Villa could no longer be considered as political factors. Therefore, they will have to consider the category within which the various acts complained of in this case fall. In the opinion of the Commission, these acts, with possibly the exception of the train assault and gold taking in September 1919, were *prima facie* of a political or military character, done in pursuance or in aid of political aims, and they can find no evidence sufficient to establish that the acts were pure brigandage. Nor has, in the opinion of the Commission, any negligence or blame for the acts themselves been proved against the competent authorities. On the contrary, the Carranza Government, so far as the Commission can judge, were carrying on continuous warfare and prosecution against Villa and his followers, who were in such strength and activity that the Carranza Government finally found it necessary or expedient to conclude terms with Villa. The Villa agreement, which was referred to in the *Santa Isabel* case (Claims Nos. 22 and 59) and also in this case contains the following preamble:

"In the town of Sabinas, Coahuila, on the 28th July, 1920, at 11 a.m., we, the undersigned, Generals Francisco Villa and Eugenio Martinez, hereby certify that, after holding ample conferences for the purpose of consolidating peace in the United Mexican States, we have arrived at a cordial and satisfactory agreement and that the former accepts, in his own name and that of his forces, the bases which the Executive of the Union proposed to him through the good offices of the latter as follows:—"

It contains also the following important material provisions:

"*First:* General Villa shall lay down his arms and retire to private life.

* * * * * *

"*Fourth:* The Government shall give to the other persons at present forming part of General Villa's forces, that is, not only those present in this town but also those who are to be found in different places fulfilling commissions entrusted to them by General Villa, a year's pay corresponding to the rank which they hold at this date. They shall also be given tillable lands in places which the interested parties shall designate so that they may devote themselves to work upon them.

"*Fifth:* The persons who may desire to continue the career of arms shall be admitted into the National Army. General Villa swears on his word of honour that he will not take up arms against the Constitutional Government or his fellow-countrymen.

* * * * * *

"*Note:* The General, commanders, officers and troops belonging to the forces commanded by General Francisco Villa are as follows: One General of Division, one Brigade General, seven Brigadier Generals, twenty-three Colonels, twenty-five Lieutenant-Colonels, thirty-three Majors, fifty-two First Captains, thirty-three Second Captains, thirty-four Lieutenants, forty-one Second Lieutenants, thirty-one First Sergeants, thirty-three Second Sergeants, fourteen Corporals and four hundred and eighty soldiers."

The question with which the Commission is thus faced in the absence of proof of negligence, omission or blame as regards the occurrences complained of, is how far the conclusion of this agreement casts, under the terms of the Convention, financial liability on the Government of Mexico by reason of omission of the competent authorities to punish Villa, or those responsible for the acts complained of (1) as insurrectionary acts, or (2) proved acts of brigandage.

The effect of amnesties is discussed in Borchard's *Diplomatic Protection of Citizens Abroad*, particularly at pp. 238, 239. At page 238 the following passage occurs:

"The effect upon the liability of the Government of an amnesty to the rebels is somewhat uncertain. When the Government has treated the rebels as criminal offenders, and they did not attain the status of revolutionists, an amnesty operates as a pardon and constitutes a failure to punish criminals, a recognized ground of State responsibility."

Then follow cases with conflicting decisions, on the same page, and on page 239; with the concluding passage:

"As a practical matter, it is not always easy to distinguish between a movement on such a small scale as to amount to a conspiracy or plot against the established Government, punishable by municipal law, and a general movement assuming the proportions of an armed contest against the Government, of which international law takes notice by recognizing a status of insurgency, manifested in various ways, e.g., a warning by foreign Governments to their subjects to abstain from participation. While as a matter of strict right the Government may treat the insurgents as criminals, modern practice tends to regard them as belligerents, with rights as such, provided they observe the rules of legitimate warfare."

The Commission (on the whole) take the view that the Villa Agreement was an act of political expediency on the basis of the Villistas being regarded as belligerents, and does not in itself involve the Mexican Government in financial liability for acts done by Villistas of a political or military nature in pursuance and in aid of their political aims. The seizure or confiscation of coal, gasolene, and other materials, and even in some instances of cash by forced loans or otherwise fall under this description, and having regard to this factor and to the general circumstances in Mexico, the Commission do not feel that they can necessarily class all such acts as brigandage or criminal acts in the ordinary sense. The Commission desire, however, to make clear that they are not speaking here of acts such as wanton murder or other crimes committed with no possible legitimate excuse or reason of military necessity. Proceeding on the lines indicated above they find that the confiscations and takings in this case, as specified in paragraph 7 hereof, with the possible exception of that on the 13th September, 1919, belonged to the category of military or political acts as before described, and they give the Mexican Government the benefit of the doubt as regards the event of the 13th September, 1919. But in any case as regards this act, it has not been proved that there was any negligence on the part of the authorities, nor that the occurrence was of notoriety, nor that it was brought to the notice of the authorities or that they were informed thereof

in due time, so as to fix responsibility on them for non-punishment. The Commission here refer again to the passages in their judgment in the *Mexico City Bombardment Claims*, Decision No. 12, which have been referred to in other cases and in the *Christina Patton* case, at page 104 of the English Report of Decisions and Opinions:

"But a strong *prima facie* evidence can be assumed to exist in those cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time."

There is no evidence that this event was of public notoriety, or that it was brought to the knowledge of the authorities in due time. Therefore for all the above reasons the Commission hold that the Government of Mexico is absolved from financial liability for all these acts. The same observations apply generally to the acts in the third period prior to the Amnesty decree of December 1915, which of course does not touch subsequent occurrences.

9. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government on behalf of the Buena Tierra Mining Company (Limited), the sum of 262.18 (two hundred and sixty-two pesos and eighteen centavos) Mexican gold, or an equivalent amount in gold.

THE SANTA ROSA MINING COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 92, August 3, 1931. Pages 266-269.)

LITISPENDENCE. The fact that claim is filed with domestic Mexican National Claims Commission will not prevent the tribunal from exercizing jurisdiction.

CONFISCATION.—REQUISITION.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. Claim for property (i) requisitioned and confiscated, and (ii) stolen by rebels during attack on train. Evidence *held* sufficient to support award for first part of claim.

1. This claim as set out in the Memorial, is in two parts. The first is for compensation for property lost, requisitioned or confiscated by constitutionalist forces during the years 1913 and 1914 and the second is for compensation for the loss of 450 pesos Mexican gold stolen by rebels during their assault on a train belonging to the Coahuila and Zacatecas Railway on the 28th December, 1918.

PART I

On various occasions in the years 1913 and 1914 officers belonging to the constitutional army came to the mine and demanded different articles. The officers concerned were understood to be under the command of Eulalio Gutierrez, General of the Central Division, whose headquarters were at Concepción del Oro, Zacatecas. Early in 1913 two carloads of anthracite coal were purchased by the Company from Messrs. Flack and Son, Limited. This coal was shipped in cars Nos. 8865 and 9066 and bills of lading were duly received by the accountant of the Company. These bills of lading were sent by him to the railway station at Margarita so that delivery of the coal could be taken.

Shortly afterwards the constitutional forces arrived at Margarita station and destroyed all records. The two cars of anthracite coal never reached Margarita and all efforts to trace them proved fruitless.

About the same time twenty filter leaves for the Butters Filter Press were shipped by a Mr. Newcomb of Mexico City to the Company. The bill of lading arrived, but the filter leaves never reached Margarita station.

On the 20th June, 1914, Juan L. Aguilar, Chief of Arms at Mazapil, under the orders of General Eulalio Gutierrez, confiscated 273,805 tons of concentrates stored at Margarita station. These concentrates were shipped towards the American border and cars containing them were scattered at various points along the line. With help of diplomatic intervention the Company were able to recover these concentrates, with the exception of 12,804 tons. In order to recover these concentrates the accountant of the Company was obliged to expend the sum of 3,003.75 pesos Mexican gold.

The amount of this part of the claim is 8,544.68 pesos Mexican gold.

PART II

In December 1918, Juan Rodríguez, cashier of the Santa Rosa Mining Company, Limited, at Concepción, asked Messrs. G. Purcell y Cia., to remit the sum of 450 pesos Mexican gold to meet the expenses of the mine. This sum was remitted by express voucher, dated the 26th December, 1918. The money was remitted at the risk of the Santa Rosa Mining Company, Limited, by train to Concepción. This train was assaulted by rebel forces on the 28th December, 1918, and the money was stolen. Since the remittance was made at the Company's risk, the Company had to bear the loss.

The amount of this part of the claim is 450 pesos Mexican gold.

The total amount of the claim is 8,994.68 pesos Mexican gold.

A claim for these losses has been lodged with the Mexican National Claims Commission, but no award has been made in favour of the Company, nor has the Company received compensation from any other source. The claim belonged at the time of the losses and still does belong solely and absolutely to the claimant company.

The British Government claim on behalf of the Santa Rosa Mining Company, Limited, the sum of 8,994.68 pesos Mexican gold.

2. The Commission have found sufficient evidence of the losses suffered through the requisition and confiscation of property by Constitutionalist Officers during the years 1913 and 1914.

3. They have not found sufficient evidence of the losses alleged to have been sustained through the destruction of supplies in transit between Mexico City and Saltillo.

4. They have found sufficient evidence of the confiscation of concentrates by a Constitutionalist force in June 1914 and also of the cost of recovering part of the concentrates.

5. They have found no evidence as regards the forces that were responsible for the attack on the train of the 28th December, 1918. If those forces are to be considered as bandits, the negligence of the competent authorities has not been established.

6. The Commission accept the amount claimed for the losses mentioned in paragraph 2, being 2,277.30 pesos.

They also accept the amount claimed for the loss of concentrates, being 567.93 pesos, but as regards the cost of recovering part of the concentrates, they have found no proof of an amount higher than 1,500 pesos.

7. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of the Santa Rosa Mining Company (Limited), the sum of 4,345.23 (four thousand three hundred forty-five pesos and twenty-three centavos), Mexican gold, or an equivalent amount in gold.

GERVASE SCROPE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 93, August 3, 1931. Pages 269-272.)

AMENDMENT OF CLAIM. British Agent requested leave to amend by substituting wife of claimant as party claimant. Mexican Agent opposed on ground this would by indirection permit of a late filing, after time to file claims had expired. *Held*, amendment denied as unnecessary.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—CONTEMPORANEOUS EVIDENCE. When evidence is conflicting, tribunal will give greater weight to depositions by persons having first-hand knowledge thereof made contemporaneously with events complained of than to testimony by persons living some distance away and made fourteen years later. Claim for looting of ranch by Carranza forces *allowed*.

1. This is a claim for losses and damages caused by the looting of the Pensamiento Ranch, Zaragoza, in the district of Río Grande, Coahuila, in February 1915 by a party of Carrancistas under the command of General Vicente Dávila.

According to the Memorial the Pensamiento Ranch, now the property of the wife of Mr. Gervase Scrope, belonged formerly to her father, Mr. John O'Sullivan, who died in Saltillo on the 4th October, 1881. In the month of February 1915 a large party of revolutionaries known as Carrancistas, under the command of General Vicente Dávila, visited the Pensamiento Ranch. These revolutionaries ransacked the ranch, taking from the house all the drawing-room, dining-room and kitchen furniture, clothing, mattresses, carpets, pictures, wardrobes, ornaments, mirrors, and everything that could be carried away. Articles of furniture which were too bulky to carry away were broken in pieces. Among the things taken from the ranch were a gun, two rifles, harness, saddles, bridles, a buggy and ten horses. These losses are verified by the testimony of Mr. Gil Martínez and Mr. Candelario Salazar, which is recorded in the deposition drawn up by the notary public, Manuel Galindo Barrera.

The amount of the claim is 10,000 pesos Mexican. This sum is the considered estimate made by Mr. Martínez and Mr. Salazar of the value of the articles taken away or destroyed. Included in this total is the sum of 300 pesos, the value of the buggy, and the sum of 600 pesos, the value of ten horses.

Mr. Scrope reported his losses to His Majesty's Government at the time, and on the 6th April, 1916, he filed this claim at His Majesty's Consulate-General in Mexico City. The claim did at the time, and still does, belong solely and absolutely to the claimant's wife. No claim has been filed with the Mexican Government, nor has the claimant received compensation from the Mexican Government nor any other source.

The British Government claim on behalf of Mr. Gervase Scrope the sum of 10,000 pesos Mexican.

2. On the 20th May, 1931, the British Agent filed a motion in which he asked leave to amend this claim by substituting as the claimant Juanita Francisca Scrope, the wife of Gervase Scrope. On the 2nd June, 1931, the said Agent filed a letter from Gervase Scrope, in which he stated that, although the ranch property belonged to his wife, he had himself built the house and that the personal property in respect of which the claim was made, was his own.

The Mexican Agent opposed the amending of the claim. He argued that the claim would, if the amendment were allowed, be transformed into a new one, presented after the period provided in Article 7 of the Convention. He also based his objection upon article 10 of the Rules of Procedure, because the new claimant, on whose behalf his colleague now wished to act, had not signed the Memorial nor a statement of the claim. It had not, therefore, been shown that the new claimant had agreed to the filing of the claim.

3. As regards the facts, the Mexican Agent filed the testimony of three witnesses, Carlos Torres, Silverio Gómez and Francisco Gómez, who deposed in May 1929, declaring that at the time mentioned in the Memorial, Government troops visited the district, but did no harm to anyone. The same witnesses asserted that they had never heard that anything had been destroyed in Mr. Scrope's house, and they considered themselves in a position to give evidence, because, at that time, they lived at a distance of about one kilometre from the Pensamiento Ranch and were therefore familiar with what happened on that property.

4. The British Agent pointed to the fact that the evidence produced by him was the contemporary testimony of two eye-witnesses, of whom one had been present when the looting took place and the other had arrived upon the spot immediately afterwards. The Agent submitted that this evidence possessed more value than the deposition of the witnesses examined by the other side, fourteen years after the events.

5. The Mexican Agent, while not denying that the General Vicente Dávila mentioned in the Memorial was a Carrancista leader, was confident that the Commission would not, in the face of the wide divergence between the evidence produced by him and that presented by his colleague, shut their eyes to the fact that both the witnesses, who had deposed in favour of the claimant, were in the latter's service. The Agent, furthermore, pointed out that no particulars of the objects stolen or destroyed had been produced and that no reliable proof of their value was available.

6. The Commission, confronted with conflicting evidence, do not hesitate to accept as the more valuable the deposition of the witnesses Martínez and Salazar. That those witnesses were the servants of the claimant has not been established, but even if they were, this would not be a sufficient reason to reject utterly the testimony of persons who had first-hand knowledge of the events and who had been heard under affirmation a few months after they occurred. The account given by them makes more impression than the purely negative assertions of persons who lived a kilometre away and who were, after fourteen years had elapsed, asked to declare what they thought they remembered.

7. As it is common ground between the Agents that the troops that visited the Ranch belonged to Constitutionalist forces, the Commission deem that the acts are covered by subdivision 2 of Article 3 of the Convention.

As regards the extent of the looting and destruction and the amount of the value, the Commission have not found any specific details of the losses. Mr.

Scrope claims 10,000 pesos, and his witnesses declare that the value cannot, in their opinion, have been less.

In the view of the Commission these indications are vague and not entirely convincing. It does not seem likely that the witnesses were in a position to estimate, within a reasonable degree of precision, the value of the furniture in Mr. Scrope's house. For this reason the Commission cannot accept the claimed amount as proved to its full extent.

8. The Commission do not see the necessity of amending the claim by substituting as claimant the wife of Mr. Gervase Scrope, the latter having declared that, although the estate belonged to his wife, it was he who owned the property in respect of which the claim was made. While it seems irrelevant to enter into a further investigation of the question as to which of the two, the husband or the wife was the owner of the various articles, it can be regarded as sufficient to exclude the possibility of their both claiming for the same losses.

9. The Commission decide that the Government of the United Mexican States is obliged to pay to the British Government, on behalf of Mr. and Mrs. Gervase Scrope, the sum of five thousand (5,000) pesos, Mexican gold, or an equivalent amount in gold provided that the receipts for this payment be signed by both of them, or by the survivor.

THE BACIS GOLD AND SILVER MINING COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 94, August 3, 1931. Pages 272-277.)

RESPONSIBILITY FOR ACTS OF FORCES. Claimant alleged loss of shipments on railway by acts of revolutionary forces. In absence of proof of circumstances of loss, claim *disallowed.*

DAMAGES, PROOF OF. Damages based upon the loss of a certain percentage of inventory of goods in claimant's store *held* arbitrary and amount claimed allowed only in part.

FORCED PAYMENT. After claimant's mine closed down by reason of acts of revolutionary forces, rebel commander ordered payment of small weekly sums to workmen. Claim *disallowed* on ground required payment was a normal measure of social welfare.

1. The Memorial divides the claim into two parts. The first part is for compensation for the loss of mining machinery and equipment in transit from Tampico to the mine at Bacis; and the second is for compensation for goods taken from the Company's two stores at Bacis by revolutionary forces.

PART I

During the period from November 1912 to May 1913, the Bacis Gold and Silver Mining Company, Limited, purchased mining machinery and equipment at a total cost price of £2,084 5*s.* 7*d.* This machinery was shipped in various lots, on various dates within the above-mentioned period at Tampico. A list of these shipments, showing the value of the consignments, is given in Section 11 of the affidavit of William McNeill. About the time these goods

arrived at Tampico a revolution was in progress over the area through which the railway from Tampico to Bacis passed. As a result of this revolution the railway system was paralysed, and none of the consignments of machinery and mining equipment were delivered at Bacis. The Company made a number of efforts, without success, to trace the missing consignments. According to the Memorial, there appears to be no doubt that these goods were either looted or destroyed by revolutionary forces while in transit, or, owing to the disorganization of the railway system by the revolution, were dumped at various parts of the line and subsequently looted. The cost of replacing this machinery is now at least 50 per cent more than the cost in 1912 and 1913. The Company's claim has, therefore, been increased by that amount.

The amount of this part of the claim is £3,126 8*s*. 5*d*., being £2,084 5*s*. 7*d*. in respect of the cost price of the lost machinery and equipment, and £1,042 2*s*. 9*d*. in respect of the additional cost of replacement owing to the increased prices now prevailing.

PART II

The Company maintained at Bacis two stores, one of which was the general food and clothing store, and the other the maize and bean store. These stores were necessary for the clothing and subsistence of the men employed by the Company, and did not carry any stocks of machinery or other mining equipment. It was customary to take an annual inventory at Bacis on the 31st day of August, and on the 31st August, 1912, such an inventory was taken, which showed a value of 16,559.63 Mexican pesos. The value of the stocks in the general food and clothing store did not vary materially in total value throughout the year, except in April and May, when those stocks were increased because of the difficulties of transport during the rainy season, which usually commenced before the end of May. The value of the stocks in the maize and bean store varied throughout the year, being greatest in December, immediately after harvest. Purchases, however, were made throughout the year and the stock in April 1913 would be about equal to the stock held on the 31st August, 1912, when stocktaking took place. The value of the maize and beans held at the latter date was 2,850 Mexican pesos. On the 18th April, 1913, revolutionary forces, under the command of Pedro Gutiérrez, Santiago Meráz and Fermín Núñez, entered the town of Bacis and on the following day arrested William McNeill, the then General Manager of the Company at Bacis, and demanded the delivery of a sum of 5,000 pesos. After some twenty hours of ill-treatment and imprisonment Mr. McNeill agreed to hand over to the revolutionaries 10 Winchester rifles, 800 cartridges and five bars of silver. Some time later the revolutionaries returned the five bars of silver on the payment of 201 pesos. These rebels remained in Bacis until the 23rd April, 1913, and during their stay they continually demanded money, food and goods from the stores, and personal belongings from the Company's employees. Shortly afterwards another band of rebels, under the command of Carlos Flores, entered Bacis. About this time, owing to the difficulty in obtaining supplies on account of the complete disorganization of the railway during the previous two months, the Company's Manager was compelled to reduce the number of workmen employed at the mine. On the night of the 23rd April, 1913, Carlos Flores ordered that the Company should pay to each single workman the amount of 3 pesos a week and to each married workman the amount of 6 pesos a week in goods from the two stores. It was not possible to resist this demand, which was given with threats of death for disobedience, and the rebels were in fact so threatening in their demeanour that the General Manager and the other

foreign employees were compelled to leave Bacis secretly on the night of the 24th April. Full particulars of their flight from Bacis are given in the claim of William McNeill already filed with this Commission. [1]

The amount of this part of the claim is £1,516 19*s.* 11*d.*, details of which are given in the affidavit of William McNeill. The Company claim only 75 per cent of the valuation of the stocks in the food and clothing store, in spite of the fact that the stocks were greater in value immediately before the 18th April, 1913, and that on the 24th April, when the Company's manager left Bacis, at least 75 per cent of these stocks had been given away under threats or taken forcibly by rebels. In the case of the bean and maize store, the Company's manager is unable to state precisely the loss which took place, but he is certain that at least 50 per cent of the contents of this store had been given away under threats or forcibly taken during the period the 18th to the 24th April, 1913. The Company have, therefore, restricted their claim to 50 per cent of the inventory value of the 31st August, 1912. It should be noted that, in addition to the losses suffered at the two stores and to the payment of £20 for the return of the five bars of silver, the Company were obliged to billet twenty men for five days at the cost of £20, and that the revolutionaries carried off mules, saddles, rifles and ammunition to the value of £95.

On the 9th July, 1913, the Company forwarded a Memorial to His Majesty's Principal Secretary of State for Foreign Affairs. This Memorial having been presented before all the details had been received from the Company's employees, requires some alteration. The necessary alterations are given in section 9 of William McNeill's affidavit. Owing to the unsettled state of Mexico at that time it was impossible to take any steps to obtain compensation for the Company. This claim, which belonged at the time of the losses, and still does, belong solely and absolutely to the claimant, was presented to His Majesty's Government on the 29th January, 1929. It has not been presented to the Mexican Government, nor has the Company received compensation from the Mexican Government or any other source.

The British Government claim on behalf of the Bacis Gold and Silver Mining Company, Limited, the sum of £4,643 8*s.* 4*d.*, being £3,126 8*s.* 5*d.* in respect of machinery and mining equipment lost in transit from Tampico to the mine, and £1,516 19*s.* 11*d*, in respect of losses from the Company's two stores at Bacis and other losses inflicted by revolutionary forces.

2. The Commission will deal with the two parts of the claim separately.

As regards part I, the British Agent held the view that sufficient corroboration of Mr. McNeill's affidavit was to be found in the bills of lading and the invoices of the goods shipped from England to Tampico.

The Mexican Agent observed that those documents only showed that the Company ordered the machinery, and that it arrived at the Mexican port, but not that it had been lost or destroyed, and still less that this was due to revolutionary acts. The Agent had not seen the bills of lading of, nor any correspondence with, the Railway Company. He concluded that for this part of the claim all the evidence consisted in the affidavit of the General Manager of the claimant Company.

3. The Commission do not feel at liberty to accept this part of the claim as sufficiently proved. There is no evidence whatever as to what happened to the machinery after its arrival at Tampico. If it was lost, no proof has been given as to where or when or through what circumstances or by whose acts. It has not escaped the Commission's attention that the Company in its Memorial of

[1] See Decision No. 46.

the 9th July, 1913, addressed to the Secretary of State for Foreign Affairs, did not mention any loss on this account, nor was this done by Mr. McNeill and the other officials who, after their escape from the mines, made statements before the British Vice-Consul in San Diego (California).

The Commission fail to see a sufficient ground on which an award could be based.

4. The facts underlying the second part of the claim seem, in the eyes of the Commission, to have been satisfactorily established. The affidavit of the Company's General Manager is corroborated by the contemporary declarations of the witnesses, Carlos L. Whittle, Ismeal Reyes, Tomas Vanegas and Dr. C. H. Miller. They all certify that at the time mentioned in the Memorial, armed forces entered the town of Bacis, arrested the General Manager and demanded the delivery of 5,000 pesos. The witnesses also confirm the fact that after Mr. McNeill was released he gave the leaders what they asked, and further that the troops, during their occupation of the town of Bacis, continually demanded money, food and goods from the stores.

We have here the same assemblage of facts, of which the outrage done to Mr. William McNeill (see Decision No. 46) forms a part.

5. In the Decision cited the Commission explained why they looked at the forces responsible for the offences, as forces falling within subdivision 4 of Article 3 of the Convention. They here insert section 5 of the Decision:

"5. In the statement of the claimant and in the declarations of the witnesses, the forces commanded by Gutiérrez, Meráz and Núñez are alternately identified as revolutionaries and also as rebels, but there is no indication that they were Maderistas or Constitutionalists. As, furthermore, the Mexican Agent has not been able to trace the names of those three chiefs in the archives of the Army, it seems justified to classify them and their followers as insurrectionaries, dealt with in subdivision 4 of Article 3 of the Convention.

"As regards the financial responsibility of the Mexican Government for their acts, the Commission refer to the rule laid down by them in previous decisions, for instance, in section 6 of their Decision No. 12 *(Mexico City Bombardment Claims)*, reading as follows:

" 'In a great many cases it will be extremely difficult to establish beyond any doubt the omission or the absence of suppressive or punitive measures. The Commission realizes that the evidence of negative facts can hardly ever be given in an absolutely convincing manner. But a strong *prima facie* evidence can be assumed to exist in those cases in which *first* the British Agent will be able to make it acceptable that the facts were known to the competent authorities, either because they were of public notoriety or because they were brought to their knowledge in due time, and *second* the Mexican Agent does not show any evidence as to action taken by the authorities.' (See also decision No. 18 *(Bowerman)*, section 7, and Decision No. 19 *(Santa Gertrudis)*, section 9.)

"In the present case it is evident that the authorities were informed of what had happened, because the Jefe Político of San Dimas intervened and returned to the Company the bars of silver and the promissory note in exchange for a cash payment of 201 pesos. Apart from this, it seems next to impossible that such a sensational act as the imprisonment of the General Manager of one of the principal concerns of the State could not have come to the knowledge of those whose function it was to watch over and to protect life and property. But not the slightest indication has been given that they took any action.

"For these reasons the Commission are of opinion that the claim falls within the terms of Article 3 of the Convention."

6. The question remains as to what amount is to be granted as a reasonable compensation for the losses suffered by the claimant under this head. The exact dates when the goods were taken or delivered, are not available, nor are data as to their value. The valuation presented in the claim rests upon the calculation of a certain percentage of the last annual inventory of the stocks in the stores. It seems an estimate which contains a considerable element of uncertainty and arbitrariness. The Company also brings into the account the value of the provisions supplied to the workmen, after work had had to be stopped, but this item would seem to be a normal measure of social welfare rather than a loss, in respect of which a claim can be made.

For these reasons the Commission cannot regard the sum claimed as proved to its full amount.

7. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of the Bacis Gold and Silver Mining Company, Limited, the sum of $10,000 (ten thousand pesos), Mexican gold, or an equivalent amount in gold.

ALFRED MACKENZIE AND THOMAS HARVEY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 95, August 3, 1931. Pages 277-278. See also decision No. 71.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavit of claimant *held* insufficient evidence.

(Text of decision omitted.)

DAVID BRUCE RUSSELL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 96, August 3, 1931. Pages 278-281.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. When documentary evidence of title and ownership was lacking and claimant's affidavit was otherwise without corroboration, claim *rejected.*

(Text of decision omitted.)

DEBENTURE HOLDERS OF THE NEW PARRAL MINES SYNDICATE AND CAPTAIN C. D. M. BLUNT (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 97, August 3, 1931. Pages 281-287.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavits of claimants *held* insufficient evidence.

(Text of decision omitted.)

THE NEW SABINAS COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 98, August 3, 1931. Pages 287-289.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RESPONSIBILITY FOR ACTS OF FORCES. Evidence *held* sufficient to establish claim but claim not allowed in its entirety since some of the forces for whose acts claim was made came outside the scope of the *compromis*.

(Text of decision omitted.)

FREDERICK ADAMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 99, August 3, 1931. Pages 289-291. See also decision No. 69.)

AFFIDAVITS AS EVIDENCE.—NECESSITY OF CORROBORATING EVIDENCE. Unsupported affidavit of claimant *held* insufficient as evidence. An unauthenticated statement of another person which ascribed higher values to damage than claimant himself not accepted by tribunal as corroboration.

RESPONSIBILITY FOR ACTS OF FORCES.—ACTS OF INDIVIDUALS. Tribunal *held* not competent to consider claim based on acts of individuals. Identity of forces responsible for acts complained of must be established. If complaint were made to the Governor of the State, proof thereof is desirable.

1. The Commission, in so far as the facts on which this claim is based are concerned, here refer to their Decision No. 69.

2. Once the Demurrer interposed by the Mexican Agent in the instant case had been overruled, and the evidence submitted in support thereof had been examined, the Commission entered upon an examination of the facts on which it was based, which are the following:

(a) Forced abandonment of a property known as "El Roble" by Mr. J. F. Brooks, in September 1912, by reason of the general insecurity prevailing in the vicinity of Jalapa, Ver., as a consequence of revolutionary activities.

(b) Cutting down of trees and thefts of wood from the property of J. F. Brooks and Co., by local residents, during the period from November 1916 to September 1918.

(c) Damage caused by occupation of the aforesaid property by Government cavalry soldiers, from January 1917 to September 1918.

(d) Attack on the ranch house by revolutionary forces in February 1918, asserted in the Memorial to have forced Mr. Honey, the manager, to hand over all the money he had in his possession and to leave the ranch.

(e) Loss of orange, lemon and other crops during the years from 1917 to 1919, inclusive, and of two crops of coffee for the years 1918 to 1920, lost or stolen as a consequence of the above-mentioned acts.

3. The Commission have, after examination of the evidence submitted by the British Agent as proof of the facts on which the claim is based, formulated the following considerations:

(1) No proof has been shown of the forced abandonment of the property by Mr. Brooks; the evidence submitted to that effect consists in the affidavit of Mr. Blackmore (annex 3 to the Memorial) and taking into account the fact that Mr. Blackmore submitted that affidavit in the capacity of a claimant and that this document has not been corroborated by any other element of proof, the Commission do not, following precedents already established, accept the fact in question as proved. (Decision No. 12, the *Mexico City Bombardment Claims*.)

(2) The Commission consider that any cutting down of trees and thefts of timber carried out by local residents—even assuming that same were considered as proved—do not come within the meaning of the Claims Convention entered into between Mexico and Great Britain nor are they included in those acts binding upon Mexico, as enumerated in Article III of the extension of the Convention, which provides that the Commission shall deal with losses or damages caused to British subjects during the period included between the 20th of November, 1910, and the 31st of May, 1920, provided they were caused by one or any of the following forces:

1. By the forces of a Government *de jure* or *de facto*.
2. By revolutionary forces which, after the triumph of their cause, have established Governments *de jure* or *de facto*.
3. By forces arising from the disbandment of the Federal Army.
4. By mutinies or risings or by insurrectionary forces other than those referred to under subdivisions 2 and 3 of this Article, or by brigands, provided that in each case it be established that the competent authorities omitted to take reasonable measures to suppress the insurrections, risings, riots or acts of brigandage in question, or to punish those responsible for the same; or that it be established in like manner that the authorities were blamable in any other way.

As in the instant case none of those forces were involved, but only the acts of private individuals, the Commission do not consider themselves competent to take cognizance of this part of the claim.

(3) As regards the other facts giving rise to the instant claim, and referred to by Mr. Charles T. Blackmore in his affidavit dated the 21st May, 1929 (annex 3 to the Memorial), the Commission find that they are in part set forth by Mr. Norman S. Raeburn, dated the 9th September, 1920, and submitted as additional evidence by the British Agent. Nevertheless, the very noticeable discrepancy between the statements of Raeburn and those of Blackmore, as also the fact that the former ascribes much higher values to the damage than the claimant himself, and certain other objections to this testimony, such

as its not being in any way authenticated, have induced the Commission to abstain from accepting this document as the corroboration of Blackmore's statement.

The Commission realize that the above declaration only refers to damage sustained during the period comprised between the years 1918 to 1920, and does not contain any indication whatsoever from which the character of the forces responsible for those acts might be inferred, information which is indispensable for establishing Mexico's liability therefor, according to Article III of the Claims Convention, Mexico and Great Britain.

(4) As regards the various complaints which were, according to the Memorial (annex 3) made to the Governor of the State, and the local authorities, in February 1917, no proof has been submitted of their actually having been made; such proof would have been of great assistance to the Commission, which cannot, in consequence, find sufficient grounds on which to grant any compensation.

4. In view of the above considerations—

5. The Commission disallow the instant claim.

THE SONORA (MEXICO) LAND AND TIMBER COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 100, August 3, 1931. Pages 292-297. See also decision No. 63.)

CORPORATE CLAIMS. Evidence *held* sufficient to establish compliance with *compromis* in claim filed by British corporation for losses sustained by virtue of its interest in a Mexican corporation.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—NON-PRODUCTION OF EVIDENCE BY RESPONDENT GOVERNMENT. Acts of violence committed over many years by insurrectionary forces and forces of a similar character, as covered by the *compromis*, *held* to be presumed to be within the knowledge of the proper authorities and, since no action taken by them has been shown, claim *allowed*.

DAMAGES, LOSS OF PROFITS. Claim for loss of profits based on rate of profits prior to damage *held* too problematical to be allowed.

1. This claim is for 398/400ths of the losses suffered by the Compañia Explotadora de Tierras y Maderas de Sonora (Mexico) S.A. (hereinafter referred to as the Mexican Company), through the acts of revolutionary or counter-revolutionary forces during the years 1912-1920 inclusive.

The interest of the claimants, the Sonora (Mexico) Land and Timber Company, Limited, a British Company, in the losses suffered by the Mexican Company is as follows:

On the 9th January, 1911, the Sonora (Mexico) Land and Timber Co., Ltd. (hereinafter referred to as the British Company), was formed to hold and develop certain land in the State of Sonora. The land was duly acquired and was vested in a Mexican Company, the Compañía Explotadora de Tierras y Maderas de Sonora (Mexico) S.A., which was formed on the 30th January, 1913, under Mexican laws with a capital divided into four hundred shares of 1,000 pesos each. More than 50 per cent of this capital was at the time of the

Company's formation and still is held by British subjects, and is now held to the extent of 132 shares by William Richardson, a British subject, 88 shares by Lionel Skipwith, a British subject, 88 shares by George Grinnell-Milne, a British subject, 88 shares by Henry Chaplin, a British subject, 1 share by Alexander Baird, a British subject, and 1 share by James Paxton, a British subject. The shareholders of the Mexican Company were at the time of its formation and still are the nominees of the Sonora (Mexico) Land and Timber Company, Limited. In accordance with the terms of Article 3 of the Convention between His Majesty's and the Mexican Government for the settlement of British pecuniary claims in Mexico arising from loss or damage from revolutionary acts between the 20th November, 1910, and the 31st May, 1920, the Mexican Company has allotted to each British shareholder the proportional part of its losses and damages pertaining to the number of shares held. Each British shareholder has in his turn assigned to the Sonora (Mexico) Land and Timber Company, Limited, the rights allotted to him by the Mexican Company. The Sonora (Mexico) Land and Timber Company, Limited, is therefore now the sole claimant for 398/400ths of the losses suffered by the Compañía Explotadora de Tierras y Maderas de Sonora (Mexico) S.A.

Six claims have been formulated by the Mexican Company. The first is for losses incurred through raids of revolutionaries in 1912 and 1913, and for compensation for the stoppage of the Mexican Company's sawmill; the second is for the loss of 1,304 head of cattle through raids of revolutionaries; the third is for horses, cattle and other property taken by revolutionaries on the 11th February, 1915; the fourth is for losses due to the raids of revolutionaries in October and December, 1915; the fifth is for losses due to the occupation of the Company's property by a band of Carrancistas during June, 1916; and the sixth is for compensation for the stoppage of the sawmill and all the Company's operations on its property during the period November 1912 to May 1920. These claims are in the Memorial dealt with in detail.

Claim 1

During the month of February 1912 the State of Sonora was greatly troubled by bandits or revolutionaries, and on the 19th February, 1912, a band of some twenty-four bandits under the command of Adolfo Dunagon and José Rodríguez raided the Company's ranch at Nogales. They took away eight horses, some saddlery, two carbines and one revolver, for which they gave a receipt. Repeated attempts had been made by the Company's officials to obtain the protection of the State from those bandits, but no steps were taken by the competent officials. During subsequent months in 1912, various other small raids took place. On a few occasions the Governor of Sonora sent small parties of Federal soldiers for the property but always after the raids had been committed. During August 1912 the revolutionaries who had been operating in the State of Chihuahua moved towards Sonora, and at the end of the month some 2,000 of these revolutionaries were in the eastern part of Sonora. The Company's manager telegraphed twice to President Madero asking for the protection of troops and suggesting means by which these troops could be despatched from Juárez. Unfortunately the Mexican Government neglected to take these steps until after the damage to the Company's property was incurred. On the 1st September, 1912, some 150 men under Campas took seven horses and some stores. On the 4th September, 1912, the leader, Emilio Campo, with 200 men raided and ransacked the ranch. This band and others on various subsequent dates killed a number of cattle belonging to the Company. From the 1st September until the 1st October, 1912, the Company was

obliged to suspend operations as employees would not venture on the ranch. Consequently cattle and horses were not attended to, and the crops then ripe could not be properly harvested. The Company's manager made continuous efforts to obtain protection from the Mexican Government, but in spite of assurances that there were sufficient troops in Sonora, no Federal soldiers visited the ranch during August and September 1912. As a result of the enforced cessation of its operations, the Company lost some 200 calves and some 12,500 pesos Mexican gold.

The amount of this claim is $31,897.54 Mexican gold. The values are given in United States gold dollars. These values have been converted to Mexican gold pesos at the rates of exchange ruling at the time of the losses. Bankers' certificates in support of the rates of exchange used are given.

Claim 2

About the year 1911 the Mexican Company stocked the ranch, Hacienda Mababi, in the State of Sonora, with 3,492 head of cattle. Up to the beginning of 1914, 4,007 calves had been branded, making a total of 7,499 head of cattle. Of this number the Company's records show that 6,012 head had died, been sold, slaughtered or otherwise disposed of, and only 183 head remained on the ranch. The remaining 1,304 head are the losses due to thefts by various groups of bandits and thieves who were, owing to the lack of Government protection and in spite of the vigilance of the Company's employees, able to operate on the ranch. Repeated and urgent requests for protection were sent to the authorities and, although on several occasions soldiers were sent to the ranch, they, with one exception, made no attempt to suppress the bandits. Captain Martinez from Cannanea on one occasion caught and hanged a thief.

The amount of this claim is $71,720, being the value of the 1,304 head of cattle stolen by bandits and other persons.

Claim 3

On the 11th February, 1915, a body of some 400 men under command of Colonel Hara entered the Hacienda Mababi and proceeded to round up all the Company's horses and mules. Colonel Hara's attention was drawn to the order of the then Governor of Sonara, Señor José M. Maytorena, which stated that nothing on the Hacienda was to be touched, and to a similar order issued by General Urbalejo. No notice was taken of these orders. After Colonel Hara's departure, the main body of troops under General Sosa arrived at the Hacienda. This General allowed his troops to act as they pleased and considerable damage was done to the estate. Owing to the lawless state of the country, the Company suffered additional losses up to the month of June 1915. The amount of the claim is $8,532.50.

Claim 4

During the month of October 1915 the State of Sonora was invaded by parties of armed men belonging to the forces of General Pancho Villa, but the Carrancista troops in various parts of the State made no attempt to repel these men. On the 29th October, 1915, some twenty Villistas under the command of Major José Torres visited the Hacienda Mababi and took away eleven mules, three horses, a buggy, a wagon, harness and other stores. Early in December 1915 General Villa entered the State with from ten to fifteen thousand men and a large force of artillery. After his unsuccessful attack on Agua Prieta, General Villa split up his forces and these bands roamed the country looting

and destroying property. On the 5th December, 1915, some 2,500 of these men under General José Rodríguez arrived at the ranch and stayed five days, during which time they looted, burned or destroyed everything they could find. Considerable structural damage was done to the ranch buildings and practically all the live-stock was confiscated by them.

The amount of this claim is $36,402.75 Mexican gold.

Claim 5

About the end of the month of June 1916 there was a strong feeling against all foreigners in the State of Sonora, and on the 21st of that month the Company's foreign employees abandoned the property and stayed at Douglas, Arizona, U.S.A., for about a month. During their absence, a party of Carrancista soldiers under the command of Colonel Padilla were stationed on the Hacienda at the express orders of General P. Elías Calles. These soldiers used and/or destroyed a quantity of stores and supplies. The Company's officials were at the time repeatedly assured by General Calles, through the Mexican Consul at Douglas, that the occupation of the Hacienda was merely for the purpose of its protection, that nothing would be touched, and that any supplies needed for the soldiers would be paid for in cash. No payment was made at the time, and subsequent efforts to obtain reimbursement proved to be fruitless.

The amount of this claim is $3,453.90 pesos Mexican gold.

Claim 6

From a date prior to November 1912 until May 1920, and for some time later, the Company were unable to proceed with the development of the Hacienda. The sawmill was stopped owing to the operations of armed bands or forces of revolutionaries and of the armed forces of the Government which was from time to time in power. After taking account of the profits formerly made by the Company, it is estimated that the losses suffered through the enforced cessation of operations were at the rate of $150,000 Mexican gold pesos per annum.

The amount of this claim is $1,125,000 Mexican gold pesos, being $150,000 Mexican gold pesos for the period of seven and a half years, i.e., from November 1912[1] to May 1920.

The total amount of these six claims is $1,277,006.69 Mexican gold pesos, and this represents the losses and damages suffered by the Compañía Explotadora de Tierras y Maderas de Sonora (Mexico) S.A., during the period from the 20th November, 1912,[1] to the 31st May, 1920.

It has been explained earlier in this Memorial that the claimant company is interested in these losses to the extent of 398/400ths. The amount of this interest is $1,270,621.65 Mexican gold.

The British Government claim on behalf of the Sonora (Mexico) Land and Timber Company, Limited, the sum of $1,270,621.65 Mexican gold.

2. Following Decision No. 63 the British Agent has filed the documents indicated in paragraphs 14 and 15 thereof.

3. The Commission do not feel at liberty to include in an award any compensation for the loss of profits claimed in part VI of the Memorial because they consider this item as too problematical.

4. As regards certain other parts of the claim, the Commission have, in the declaration of Mr. A. V. Dye, formerly American Consul at Nogales (Sonora) found corroboration of the affidavits of the Directors of the Company. They

[1] In the original report: 1910.

have also found sufficient evidence that the losses referred to in those portions of the claim were due to the acts of persons falling within subdivision 4 of Article 3 of the Convention. As those acts, committed over a period of many years, cannot have escaped the knowledge of the competent authorities, and as no proof of any action taken by them has been shown, the Company is entitled to compensation.

5. The Commission deem that the total amount of the losses to be thus compensated for has been proved up to $72,500 pesos, 398/400ths of which is to be awarded to the claimant.

6. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of the Sonora (Mexico) Land and Timber Company (Limited), the sum of $72,137.50 (seventy-two thousand one hundred thirty-seven pesos and fifty centavos) Mexican gold, or an equivalent amount in gold.

JOSEPH TAYLOR (MESSRS. NORCROSS AND TAYLOR) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 101, August 3, 1931. Pages 297-299.)

PARTNERSHIP CLAIM. A partnership was formed by two individuals, one of whom subsequently died, with the business thereafter being carried on by the surviving partner, claimant herein. In such capacity, and before partnership was finally dissolved and claimant had paid heirs of deceased partner for his interest in business, losses complained of were suffered. Prior to filing of claim such acts were completed by claimant. *Held*, surviving partner is entitled to present the claim.

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH. An attack by rebel or other forces upon train on principal railroad of country *held* an act of public notoriety resulting in responsibility on the part of respondent Government in absence of proof of action taken by competent authorities.

1. This is a claim for the loss of three consignments of cotton yarn which were destroyed on the 10th January, 1914, by a party of rebels at Galera, on the Mexican Railway, while in transit from Nogales to Mexico City.

The Memorial sets out that in 1900 Mr. Joseph Taylor and Mr. Harold Norcross formed a partnership known as Norcross and Taylor and were engaged in the business of cotton spinning. Mr. Harold Norcross died on the 16th August, 1909, and during the winding-up of his estate the firm continued to trade in the name of Norcross and Taylor. The partnership was finally dissolved on the 27th May, 1916, and as Mr. Taylor paid to the heirs of Mr. Norcross his full share on account of capital and profits to the 16th August, 1909, he became the sole owner of the business. Details of the various deeds effecting this transfer of interest in the property of the partnership are given in Mr. John Harrison's affidavit. It follows, therefore, that all business transactions made in the name of Norcross and Taylor since the date of the 16th August, 1909, were in fact made in the name of Mr. Joseph Taylor, who was the sole person interested.

On the night of the 10th January, 1914, Messrs. Norcross and Taylor consigned from Nogales Station to their agents, Messrs. Watson Phillips and Co., Successors, 4A, San Agustin, No. 103. Mexico City, three consignments of cotton yarn.

These consignments, under vouchers Nos. 23, 24 and 26, were loaded on train No. 12, belonging to the Mexican Railway Company, which left Nogales Station at 9.50 p.m. on the 10th January. When the train had reached a place known as Galera it was attacked by a large party of rebels. These rebels ransacked the train and afterwards set fire to a number of the wagons forming it. Of the three consignments of cotton yarn only one badly-damaged bale was recovered, the remainder being destroyed by fire. Judicial proof of the destruction of this train is given in one of the annexes to the Memorial. The Mexican Railway Company, in notifying Messrs. Watson, Phillips and Co., Successors, and Messrs. Norcross and Taylor of the loss of the three consignments of cotton yarn, declined all responsibility for this loss on the grounds of *force majeure*.

The amount of the claim is 6,318.18 pesos Mexican. A certificate of the value of the three consignments of cotton yarn is given in one of the annexes.

The British Government claim on behalf of Mr. Joseph Taylor the sum of 6,318.18 pesos Mexican.

2. Although at the time of the assault on the train, the business was still being carried on in the name of the firm of Norcross and Taylor, the Commission after examining the terms of the dissolution of the firm, regard Mr. Joseph Taylor as entitled to present the claim.

3. In the opinion of the Commission, the goods which were destroyed, belonged to the claimant and not to his agent, to whom they were consigned.

4. The Commission have found sufficient evidence of the facts in the documents filed with the claim. They are also satisfied on the strength of the same documents, that the attacking forces were rebels or brigands, falling within subdivision 4 of article 3 of the Convention.

5. As it has not been shown that any action was taken by the competent authorities, to which an assault on a train on the principal railroad of the country must have been known, the Commission declare that negligence has been established.

6. The amount having been proved by the invoices, the Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mr. Joseph Taylor, the sum of $6,318.18 (six thousand three hundred and eighteen pesos eighteen centavos) Mexican gold or an equivalent amount in gold.

EDITH HENRY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 102, August 3, 1931. Pages 299-303. See also decision No. 61.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO PROTECT.—FAILURE TO SUPPRESS OR PUNISH. Upon representations by British and American Legations that residents of town were in imminent danger of their lives, Government forces occupied the town but thereafter withdrew overnight without notice. The next day rebel forces entered the town, killed claimant's husband and looted property. Claimant escaped in a destitute condition. Though British Legation informed respondent Government of events and requested apprehension and punishment of murderers, it did not appear that any action was taken by the authorities. *Held*, responsibility of respondent Government established.

CLAIM IN REPRESENTATIVE CAPACITY. Claim for property owned by deceased husband of claimant must be filed on behalf of his estate. Claim nevertheless *allowed* for items of property which appeared to belong to claimant.

MEASURE OF DAMAGES FOR DEATH. When claimant's husband was killed by forces for whose acts respondent Government was responsible, measure of damages will take into consideration age of murdered man, his position, and claimant's age and position.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 230.

1. This is a claim for compensation for the murder of the claimant's husband, Mr. Francis Colin Henry, and for the loss of personal property at the hands of a band of Zapatistas at Zacualpam on the 3rd January, 1916.

The facts giving rise to the claim are set out in the Memorial, and are fully recapitulated in Decision No. 61 of the Commission, on the motion to dismiss made by the Mexican Agent. It is therefore not necessary to set them out again here.

2. The Commission refer also to the same decision as regards the conclusions come to by them as to the circumstances empowering the Commission to deal with the claim. The date of the occurrences in this case, that is to say the 3rd of January, 1916, falls within the third period referred to in that decision, that is to say the period when there was a Government *de facto*. The Carranza party had then established such a Government, and therefore subdivision 4 of Article 3 of the Convention is applicable, provided that the facts necessary to be proved are established. As regards the losses of personal property the Commission will have to consider Mrs. Henry's claim under two heads, that is to say the portion of the claim relating to losses of her husband's property and consequently to his estate, and that relating to the loss of her own personal belongings. These items will be considered and dealt with later in their appropriate place.

3. The British Agent in opening the claim urged that it was proved that Mr. Henry had been killed by insurrectionaries or bandits believed to be Zapatistas, on the 3rd January, 1916. That on the previous day the Carranza or Constitutionalist forces stationed at Zacualpam departed therefrom without warning, leaving the inhabitants without protection from the bandits and revolutionaries which were in the neighbourhood. And that in spite of the information regarding the subsequent occurrences given to the Mexican authorities, no action was taken by them to punish the delinquents. The case came therefore within the provisions of subdivision 4 of Article 3 of the Convention, and the Government of Mexico as being to blame were financially responsible. He left the amount of the monetary compensation to be awarded to Mrs. Henry for the death of her husband to the Commission, bearing in mind his age, occupation, salary, and other circumstances. As regards Mrs. Henry's own personal effects, and their value, he referred to annex A to Mrs. Henry's Affidavit at pages 8 and 9 of the Memorial. He did not on the claim as it stood stress the claim of Mrs. Henry as regards the loss of her husband's property.

4. The Mexican Agent pointed out that as regards the loss of Mr. Henry's property the claim had not been filed by the proper party as on behalf of and representing Mr. Henry's estate, as required by the Rules of Procedure, and therefore no Award could be given to Mrs. Henry in respect of this part of the Claim. He argued that there was no sufficient evidence or sufficient corroboration of the facts alleged in the Memorial as supporting the claim for compen-

sation for Mr. Henry's death. The presumption was that the perpetrators had been pursued and exterminated, and that the murderers of Mr. Henry had been punished. The amount claimed as damage was excessive, and in any event where compensation is given *ex gratia*, as would be the case under the terms of the Convention, the amount to be awarded should be less severe than in the case of a claim under legal liability. The amount of 50,000 pesos claimed by Mrs. Henry for the death of her husband was excessive.

5. The Commission have found corroboration of the allegations of the claimant in the letter of Mr. E. W. P. Thurston, the British Consul-General, dated the 12th of February, 1916, being Annex 4 to the Memorial, and further in the letters addressed on the 10th and 12th January, 1916, to the Mexican Government by Mr. T. B. Hohler, the British Chargé d'affaires at the British Legation, Mexico, these last being further evidence filed by the British Agent. Mr. Thurston's letter, which was addressed to Mr. C. T. Davies at the County School, Neath, and was in reply to a letter addressed to him by Mr. Davies on the 21st January, 1916, confirms the murder and its circumstances, and also states that representations had already been made to the Constitutionalist authrities in Mexico in respect of Mr. Henry's murder and that he was still not without hopes that punishment would eventually be inflicted on the guilty parties. The letter of the British Chargé d'affaires, written by him as before referred to on the 10th January, 1916, was as follows:

"Mr. Secretary,

"I have the honour to inform you that in November last a guard was sent to protect the district of Zacualpam, but it was withdrawn on Sunday, the 2nd January. On the 3rd January a party of bandits occupied the place, and they murdered Mr. F. C. Henry, a British subject, superintendent of the mine of San Miguel Tlaxpampa. His wife after burying the body succeeded in escaping unhurt, but the mine was sacked.

"I have the honour to request that the *de facto* Government of Mexico will take the most prompt and energetic measures for the capture and punishment of the guilty parties.

"(Signed) T. B. HOHLER."

A further letter, also addressed to the Mexican Government, was sent by Mr. Hohler on the 12th January, 1916, which was as follows:

"Mr. Secretary,

"With reference to my Note No. 10 of the 10th instant, I have the honour to bring to your knowledge the further details concerning the assassination of the British subject Mr. F. C. Henry at Zacualpam.

"In the month of November last, information having been received to the effect that the foreigners in Zacualpam were in imminent danger of their lives, representations were made by this Legation in concert with the diplomatic agent of the United States of America to General Pablo González, who very courteously promised to do all that was in his power, and a force was promptly sent to occupy the said town.

"Most unfortunately, however, on the night of the 2nd January, this force withdrew without giving any notice of the intended movement, so that the following day the peaceful inhabitants of Zacualpam awoke to find themselves at the mercy of any band of marauders who chose to enter. On that same afternoon a party of some 150 did enter under the leadership of three men named Molina, Mors and Pantalon, and commenced a systematic sack of the

houses. There were also some followers of Castrejon who is known as a 'Salgadista', and the whole body are presumed to style themselves 'Zapatistas'.

"A small body of men soon presented themselves at Mr. Henry's house, but were eventually persuaded to depart on being shown a 'salvo conducto', which Mr. Henry had obtained from Molina a few days previously on payment of $400. However, at about 4 p.m. a large number of armed men began climbing over the fence, and Mr. Henry, telling his wife and three little children to retire to her bedroom, seized a rifle and went to the door to try and prevent the men entering. Shots rang out, and it subsequently transpired that Mr. Henry was wounded on his doorstep and finally dragged into the yard and despatched on the ground by revolver shots. The men then entered the house in large numbers, including Molina and Pantalon, who had Mr. Henry's pistol in his hand, and proceeded to scramble for all the loot that they could find. Mrs. Henry by dint of much courage and presence of mind, eventually succeeded in escaping with her children. As they were passing through the yard a 'soldier' attempted to club her little boy with the butt-end of his gun, but the boy dodged the gun and the blow fell on his shoulder. Mrs. Henry then saw her husband's dead body in the yard, and realized that there was nothing left but to escape. After hiding in a bed in a peon's house for some days they succeeded in leaving the town, and, after many hardships, reached Mexico City entirely destitute.

"I am given to understand that the headquarters of these horrible miscreants is at the Hacienda belonging to Sr. Amado Figueroa, near Zapolpia; that they are indifferently armed; and that they are deficient in courage.

"I earnestly trust, therefore, that the *de facto* Government of Mexico will take immediate steps to act upon this information, and to send an adequate force to capture the guilty parties and to inflict upon them the condign punishment which they have deserved. A salutary example will thus be given to them that Your Excellency's Government is resolved to punish murderers, and, not least, murderers of subjects of the friendly British Government.

"I have the honour to submit to Your Excellency that the action of the Officer who withdrew his troops from Zacualpam without warning the inhabitants, involves a direct and heavy responsibility.

"Finally, Mr. Secretary, I think it fitting that I should call your attention to the situation to which Mrs. Henry, the widow of the unfortunate victim, is reduced. Her husband was her sole support, and every scrap of property which she possessed in the world has been stolen from her so that she is now absolutely destitute. And she is burdened with three small children and an aged father.

"(Signed) T. B. HOHLER".

These letters in the opinion of the Commission afford strong corroboration (1) of the facts and circumstances of the murder as detailed in Mrs. Henry's Affidavit (annex 1 to the Memorial); (2) the fact of the withdrawal by the Mexican Government on the previous day of the protecting guard; and (3) of the representations made to the Mexican Government calling for prompt and energetic measures for the capture and punishment of the guilty parties, and placing at the disposal of the Government information as to their headquarters.

6. It does not appear, and it has not been shown, that any action was taken thereon by the Mexican Government, and the Commission must on the evidence before them hold that no such action was in fact taken, and feel bound to declare that the Claimant is entitled to compensation for the murder of her

husband. The Commission assess the amount of this compensation at 29,000 pesos, Mexican gold, taking into consideration the age of the murdered man, his position, and Mrs. Henry's age and position.

7. Mrs. Henry's claim as regards the loss of her husband's personal property is not brought by her as representing, or on behalf of her husband's estate, and she has not shown any legal authority for so claiming it, as provided by the Rules of Procedure. But the Commission find, on an analysis of the particulars of the total claim for losses of personal property, amounting to 6,585 pesos, that she lost personal and individual articles of property and deem that the value of these has been proved to the amount of 1,700 pesos, which they award to her in addition to the sum of 29,000 pesos awarded in respect of her husband's death.

8. The Commission accordingly decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mrs. Edith Henry, a sum of 30,700 pesos (thirty thousand and seven hundred pesos) Mexican gold, or an equivalent amount in gold.

THE BRITISH SHAREHOLDERS OF THE MARIPOSA COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 103, August 6, 1931. Pages 304-307.)

RESPONSIBILITY FOR ACTS OF FORCES.—EQUITY AS A BASIS FOR AWARD. Where cattle were confiscated by Villista forces in order to supply the population of a town with meat, *held* compensation will be awarded as a postulate of equity.

1. The Memorial describes the claim as one for losses and damages suffered by the Mariposa Company on its ranch in the State of Coahuila during the period from the 1st May, 1915, to the 1st May, 1920.

The Mariposa Company was incorporated on the 8th April, 1909, under the laws of the State of Arizona, U.S.A. The Company has therefore the status of a citizen of the United States of America, and in the first place the Company submitted a claim to the United States Agency, General and Special Claims Commissions, United States and Mexico. This Agency, in a letter dated the 19th August, 1925, enquired whether there was an American interest of any kind in the Mariposa Company. It appears that the Company were unable to point to any American interest, and in a letter dated the 17th August, 1926, the Agency definitely refused to file this claim on the grounds that all the stockholders of the Company are British subjects. A list of the shareholders in this Company is given in an affidavit made by Winchester Kelso, junior, on the 11th June, 1928, before Kelso Stanfield, notary public, Bexar County, Texas. A list of these shareholders, giving the proportions of their respective interests in this Company, is given in an affidavit made by Winchester Kelso, junior, on the 11th June, 1928, before the above-mentioned Kelso Stanfield.

The above-mentioned shareholders are all British subjects.

The Company has allotted to each of its shareholders a proportional part of its losses and damages forming the subject of this claim. This allotment is contained in an affidavit made by the Company's president, D. S. McKellar, on the 20th June, 1927, before Royal W. King, notary public in and for

Bexar County, Texas, and attested by the Company's Secretary, Winchester Kelso, junior.

The facts are set out in an affidavit made by Winchester Kelso, junior, on the 11th June, 1928, before Kelso Stanfield, notary public in and for Bexar County, Texas, and in an affidavit made by Luis Hernandez on the 1st July, 1925, before Drew Linard, consul of the United States of America, at Piedras Negras, Mexico. Winchester Kelso, junior, has made this statement of claim as Attorney for all the British shareholders in this Company. Proof of Mr. Kelso's right to claim on behalf of these shareholders is given in a Power of Attorney executed by D. S. McKellar, on the 8th June, 1928, and in a Substitution of Power Executed by D. S. McKellar, the Attorney for the remaining members of the Company, in favour of Winchester Kelso, junior. The Powers of Attorney executed by the remaining shareholders in favour of D. S. McKellar are also given.

The Mariposa Company are the owners of the Mariposa ranch situated in the State of Coahuila. On or about the 1st May, 1915, they were engaged in raising stock on this ranch. On the 14th May, 1915, the Jefe de las Armas at Muzquiz demanded by telephone four head of cattle from the ranch foreman. Three cows of the value of 168 pesos were delivered to this Jefe at Muzquiz. On the 1st June, 1915, the same officer requested one stag and six cows, which were delivered to him. On the 9th June in the same year four cows were delivered to the Jefe. Again on the 3rd July one stag and fourteen cows were delivered to him, and on the 30th July, 1915, twenty cows, one of which died before delivery, were handed to the Jefe. Copies of the receipts given by this officer are attached to the affidavit of the ranch foreman. The originals of these receipts are available for inspection if required. On the 18th August, 1915, the Colonel in command of Villista troops at Muzquiz ordered twenty head of cattle from this ranch to be delivered at Muzquiz on the 20th August. These cattle were delivered by the ranch foreman and some of his assistants. On the 20th June, 1916, General Zuazua, in command of Government troops, asked for the loan of five horses, worth 300 pesos. The ranch foreman delivered these five horses to Major Nicanor, but the horses were never returned to the ranch. On the 20th December, 1917, Colonel Pruneda, of the Federal Army, demanded corn, cattle and horses from this ranch, and accordingly 471 kilos of corn and four horses were handed to this officer. On the 27th December, 1917, General Pruneda ordered three more horses from this ranch. In the following cases no receipts were obtainable. On the 16th July, 1917, soldiers under the command of General Pruneda took three mules and three horses. On the 23rd December, 1917, General Pruneda demanded three more horses. On the 24th March, 1918, soldiers under the command of Lieutenant-Colonel Margis Cadena took two horses. On the 10th April, 1918, Lieutenant-Colonel Cadena, Sergeant Jesús Rentería and six soldiers visited the ranch and carried off four horses, one mule, provisions and corn. These soldiers belonged to the Federal forces. On the 25th January, 1919, forces under the command of General F. Villa took charge of the ranch, and on the next day they left with forty-six horses, three mules, saddlery, provisions, blankets and bedding. On the 10th December, 1919, the Villistas again raided this ranch and took the staff of the ranch prisoners. They also took twenty-one horses, four saddles, blankets, provisions and bedding. The staff of the ranch, with the exception of the manager of Las Racies Ranch, a Mr. Hugo, were released on the next day at Muzquiz.

The amount of the claim is 14,186 pesos Mexican. The detailed summary of the Company's losses, given in Exhibit "A" to Annex 2, totals 14,291.96 pesos. The discrepancy is explained in an affidavit made by Winchester Kelso,

junior, on the 8th August, 1928. It appears that the claim as originally drawn up included some losses which occurred in the year 1921, and these losses were excluded in the final draft of the claim, but by error the original total of 14,291.96 pesos remained. The correct amount is as stated above, 14,186 pesos Mexican. The ranch foreman, Luis Hernandez, states in his affidavit that the prices charged for the stock and other property taken by revolutionary and Federal forces are fair and reasonable. In an affidavit made by Winchester Kelso, junior, on the 27th June, 1927, before Royal W. King, notary public in and for Bexar County, Texas, it is stated that the amount of the claim is based on the actual price realized from sales of such property during the period of these losses.

No claim for these losses has ever been presented to the Mexican Government, and no compensation, either in whole or in part, has ever been received by the Company. The claim belonged at the time solely and absolutely to the Mariposa Company and has now been allotted solely and absolutely to the individual British shareholders.

The British Government claim on behalf of the British shareholders of the Mariposa Company the sum of 14,186 pesos Mexican.

2. The Commission answer the question whether the shareholders are entitled to claim and whether they possess British nationality, in the affirmative. They are of opinion that the allotments have been made in due form.

3. The Commission have found evidence of part of the alleged losses and they have come to the conclusion that the losses, as far as established, have been caused either by Constitutionalists or by Villistas.

As regards the Constitutionalists, Mexico must be held financially responsible, according to subdivision 2 of Article 3 of the Convention, and as regards the Villistas, the Commission have taken into account the fact that, in so far as the taking of the cattle is concerned, that where this is not covered by subdivision 2 of Article 3 of the Convention, it was to a large extent confiscated in order to supply the population of the town of Muzquiz with meat. It seems a postulate of equity, to award compensation for cattle thus exacted.

4. The Commission, acting along these lines, feel at liberty to grant compensation for 80 cows, five horses and 471 kilogrammes of corn. The amounts claimed for these items have, in their opinion, been sufficiently proved.

5. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of the British Shareholders of the Mariposa Company, the sum of $4,877.10 (four thousand, eight hundred seventy-seven pesos and ten centavos) Mexican gold or an equivalent amount in gold.

J. H. HENDERSON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 104, August 3, 1931. Pages 307-309. See also decision No. 30.)

RESPONSIBILITY FOR ACTS OF FORCES. Identity of forces causing loss must be established.

FAILURE TO SUPPRESS OR PUNISH. When notice of acts of banditry was given to the authorities in due time but it was not shown that they ever took any action, claim *allowed.*

1. As regards the facts on which the claim is based, the Commission refer to their Decision No. 30.

2. The Majority of the Commission have found that the transfer by Mr. Chadwick of his interest in the firm to the late Mr. David Young Henderson has been duly established.

3. Although the losses sustained by the firm, and set out in annex 2 to the Memorial, have been sufficiently proved, the Commission have not, by any document, been enabled to identify the forces that committed the acts.

For this reason, it is not possible to decide whether the events are covered by the Convention.

4. The Commission have also found sufficient evidence in respect of the losses suffered by Mr. Henderson on his ranch La Uranga, and it has been shown, by receipts and other testimony, that those responsible were either Zapatistas or Constitutionalists.

As regards the Constitutionalists, they fall within subdivision 2 of Article 3 of the Convention. And as regards the Zapatistas, their acts must be regarded as banditry, because they were committed after the establishment of the *de facto* Government of Señor Carranza.

It has been proved that the Municipal President of Cuautlacingo was informed in due time of the occurrences, but it has not been shown that he ever took any action.

The Commission feel bound to consider this as proof of negligence on the part of the competent authorities, and they consequently deem that the claimant is entitled to compensation.

In the opinion of the Commission the amount has been proved up to 10,000 pesos, Mexican gold.

5. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mrs. J. H. Henderson, the sum of $10,000 (ten thousand pesos) Mexican gold, or an equivalent amount in gold.

J. M. FRASER (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 105, August 3, 1931. Pages 309-311.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH. Evidence *held* to establish that authorities used due diligence in apprehension of bandits guilty of murder of claimant's husband. Claim *disallowed.*

1. This is a claim for compensation for the murder of her husband, Alexander Fraser, by rebels on the 30th July, 1916, at El Pozo, in the State of Guanajuato, Mexico.

It is alleged in the Memorial that the late Mr. Alexander Fraser was the general manager of the Cob. Negociación Minera Angustias Dolores y Anexas at Pozo, Guanajuato. On the 31st July, 1916, Mr. Fraser had just left the Hacienda de Beneficio and was proceeding towards the mine by a tram-route, which passes nearby. Four armed horsemen approached by a path from the high ground in the direction of the electric light plant and called to Mr. Fraser to stop. Mr. Fraser did not take any notice, and it is quite possible that he did not hear them call, as he was deaf. One of the horsemen fired a shot

which did not hit Mr. Fraser, and thereupon Mr. Fraser stopped to talk to them. While he was talking one of the four horsemen shot him. Three more shots were fired. When it was possible to reach Mr. Fraser it was found that he was dead. It is understood that the person in command of the rebels was General J. Jesús Núñez, and that one of the men who fired the shots was Pedro Villanueva. Mr. Fraser's watch was stolen and his wallet was found empty a few yards away from the body. The rebels then proceeded to the office of the mine, where they took 20,000 pesos in infalsificable notes and 1,000 pesos in gold. From there they went to the village of Pozos, and after having stolen various things, left in the direction of the Hacienda de Santa Ana.

On the next day an investigation as to the cause of Mr. Fraser's death was made before the Municipal Judge of Pozos. A warrant for the capture of General Núñez and Pedro Villanueva was issued on the 2nd August, 1916, but these two persons were never captured. There was no guard in the town of Pozos to protect its inhabitants and the interests of the mine.

The amount of the claim is £5,000 sterling or a pension of £150 per annum for life. In view of the nature of Mr. Fraser's employment, His Majesty's Government consider this claim to be very reasonable.

The claim, which was filed at the Foreign Office on the 28th June, 1926, did at the time of the murder, and still does, belong solely and absolutely to the claimant. A report of the murder of the claimant's husband was made to His Majesty's Government at the time. On the 4th August, 1916, His Majesty's Minister in Mexico addressed a note on the subject to General Candido Aguilar, Minister of Foreign Relations of the then *de facto* Government of Mexico. No claim for compensation has been filed with the Mexican Government, nor has the claimant ever received compensation from the Mexican Government or from any other source.

The British Government claim on behalf of Mrs. Johanna M. Fraser the sum of £3,000 sterling or a pension of £150 per annum for life as from the 1st August, 1916.

2. The Commission have found proved the facts on which the claim is based. There is also sufficient evidence that the murder was committed by bandits under J. Jesús Núñez and Pedro Villanueva.

3. In order to decide whether Mexico is to be held financially liable for the murder, it is necessary to examine the question as to whether any negligence on the side of the competent authorities has been established.

The Commission have come to the conclusion that this is not the case, because the annexes to the Memorial and the evidence filed by the Mexican Agent show that:

(a) At about six o'clock in the evening after the murder, some fifty Carrancista troops arrived at Mr. Fraser's Hacienda de Beneficio, having been sent by the Commanding Officer at Pozos.

(b) Those troops proceeded in pursuit of the bandits at 5 p.m. on the following evening.

(c) On the 2nd August, 1916, the local tribunal issued a warrant for the capture of the two aforesaid individuals.

(d) On the 24th August, 1916, this warrant was broadcast.

(e) Both bandits were finally killed.

(f) The British Chargé d'affaires in a letter of the 4th August, 1916, expressed to the Mexican Minister of Foreign Relations his appreciation of the activity shown by the Governor of Guanajuato.

That being so, the Convention does not entitle the Commission to grant an award.

4. The claim is disallowed.

JAMES W. HAMBLETON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 106, August 3, 1931. Pages 311-316.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—DILATORY ACTION BY AUTHORITIES. British subjects were attacked and robbed by armed forces, of which immediate notice was given by telephone to commander of Government forces stationed only a ten minutes' walk away. Notice was also given by telephone to the local judge. Troops arrived an hour and a half later and the judge arrived some four hours later. No action was taken by the civil or military authorities to apprehend and punish the guilty. *Held*, responsibility of respondent Government established.

DEATH OF CLAIMANT, EFFECT OF—UPON CLAIM FOR PERSONAL INJURIES. British Agent ceased to press claim for personal injuries following death of claimant.

DAMAGES, PROOF OF. A lump sum award granted for stolen property and personal injury, together with expenses which the latter entailed. When claimant left his house more than a year prior to the alleged looting of it by armed forces which had occupied it, evidence of loss *held* insufficient.

PUNITIVE DAMAGES. A punitive award *held* not to be justified.

1. The Memorial brings forward two claims. The first claim is in respect of damages for personal injuries and robbery at the hands of armed men at Parral on the 12th February, 1912; the second in respect of the looting of the house and office of Mr. James W. Hambleton at Parral during the years 1916-17 inclusive by Villistas and Federal troops.

Mr. James W. Hambleton died on the 21st April, 1925, leaving a will appointing his wife, Margarita Flores, sole executrix and heiress of all his property. Mrs. Hambleton is now the sole claimant.

Claim 1

The facts are set out in an affidavit made jointly by James W. Hambleton, a British subject, and Margarita Flores, the wife of James W. Hambleton, on the 5th April, 1913, before a notary public in and for the County of El Paso, Texas.

Mr. James W. Hambleton was established in Parral City, Chihuahua, as agent of the Compañía Metalúrgica de Torreón at that place, and was also engaged in mining and ore-buying on his own account. On the 12th February, 1912, Mr. Hambleton was living in his house near the railway station at Parral with his wife and three children. At 8 o'clock in the evening the family had almost finished their dinner, when, without warning, the front door was flung open and a masked man armed with a pistol jumped into the room,

ordering them not to move. Mr. Hambleton grappled with the man, but four other men had come into the room and by weight of numbers overpowered him. These five men stabbed Mr. Hambleton in the throat and face with the points of their daggers, causing blood to flow freely. Mrs. Hambleton and the children became hysterical from fright and shock, and Mr. Hambleton, realizing the danger in which they were placed, appealed to the robbers to take what they wanted without resorting to further violence. The robbers then allowed Mr. Hambleton to rise, and at the points of their pistols led him to the office adjoining the house and ordered him to open the safe. The robbers took 1,400 pesos Mexican currency from the safe. On their return to the house Mr. Hambleton discovered that the remainder of the band, about ten persons, had entered from the back of the house and ransacked the place. He found that his wife had been assaulted and roughly handled by one of the robbers and was bleeding from a stab in the throat. The robbers then ordered Mr. Hambleton to open his wife's safe, from which they took about 200 pesos Mexican currency. The robbers also took jewellery amounting to the value of 3,500 pesos Mexican, and 600 pesos Mexican which Mrs. Hambleton had placed in her jewellery box. The robbers also took several guns and other articles belonging to Mr. Hambleton, the values of which are given in the affidavit. After this the robbers left the house, and Mr. Hambleton immediately telephoned General José de la Luz Soto, the Federal Military Commander of Parral, explaining what had happened. Although the General promised to send troops immediately, it was an hour and a half before they arrived, in spite of the fact that the barracks were only ten minutes' walk away. The robbers had by this time made good their escape. Mr. Hambleton also telephoned to the Judge at Parral who, some four hours afterwards, arrived and took his deposition of the case and then left. Mr. Hambleton was not aware of any action taken by the civil or military authorities in Parral to bring the robbers to justice.

There were two watchmen employed by Mr. Hambleton on the night of the 12th February, 1912, one at the house and one at the platform of the railroad about 50 yards away. The robbers approached the man on the platform and asked for Mr. Hambleton. When they were near enough, they jumped at him, and putting pistols to his head, threatened him with death if he moved. The robbers then tied him up and threw him in the scale-house, where Mr. Hambleton found him after the affair was over. These robbers then went to the electric light switch and turned off the lights in the patio. The house watchman seeing the lights turned off, went to investigate and was met by four men, who threatened him with death if he made an outcry. The robbers wore the regulation dress of the Maderista troops, and from the fact that they were well acquainted with Mr. Hambleton's house and the position of the electric light switch and the safes, and from personal observation, Mr. and Mrs. Hambleton were of the opinion that these men were part of the troops under the command of General Soto. Mr. Hambleton afterwards learnt that nearly all General Soto's troops were out in patrols in the city that evening.

As a result of her treatment Mrs. Hambleton suffered from a serious nervous breakdown. She was attended first by Dr. Alvarez, a local physician at Parral. On the 14th February Mr. Hambleton was obliged to move his family to El Paso, in view of the insecurity and danger to which they were subjected. He then placed his wife under the care of Dr. Robinson of that town. Dr. Robinson's affidavit on the condition of Mrs. Hambleton's health is given in "Exhibit A" to this affidavit. It appears that Mrs. Hambleton will never completely recover from her breakdown.

The state of Mrs. Hambleton's health was such that Mr. Hambleton was obliged to maintain her in El Paso while he travelled to and from Parral on

business. The extra expense to which Mr. Hambleton was put is estimated to be at least $10,000 U.S. currency.

The amount of the claim is:

(1) 50,000 dollars, United States currency, as punitory and exemplary damages for the barbarous assault on Mr. James W. Hambleton.

(2) 50,000 dollars, United States currency, as punitory and exemplary damages for the barbarous assault on Margarita Flores, the wife of Mr. James W. Hambleton.

(3) 10,000 dollars, United States currency, as damages and compensation for the loss of money from the office safe, robbery of guns, pistols, etc., and the extra expense and loss of business due to the enforced removal from Parral to El Paso.

(4) 4,300 pesos Mexican, being the value of jewellery and money stolen by the robbers from Mrs. Hambleton. Interest at such rates as the Commission may decide to award is also claimed as from the date of each loss or damage.

As Mr. Hambleton has since died, His Majesty's Government are of opinion that his claim of 50,000 dollars United States currency as damages for personal injuries must be considered to have lapsed. Although the claim for personal injuries suffered by Mrs. Hambleton is high, His Majesty's Government have the claimant's authority to reduce it to a more reasonable amount. There are obvious difficulties in assessing the proper amount to claim, and His Majesty's Government prefer to ask the Commission to assess the amount of compensation which they consider to be appropriate in this case, having regard to the mental and physical shock suffered by Mrs. Hambleton and to the position that she occupied.

Claim 2

The facts are set out in a Memorial signed by James W. Hambleton on the 30th August, 1921, and addressed to His Majesty's Consul-General at Mexico City.

After the events described in Claim 1, Mr. James W. Hambleton continued to carry on his business in Parral up to the end of June 1915. At this time conditions were so bad and the campaign of Villistas against foreigners was so severe that he left his property in charge of his foreman, Encarnación Ogaz, and certain watchmen, and moved to El Paso, Texas. On the 5th November, 1916, the Villistas under the command of Francisco Villa, took the town of Parral, and Villa made his headquarters in Mr. Hambleton's house at Parral. Villa beat Mr. Hambleton's foreman and servant and threatened them with death for having served a foreigner. Villa made his headquarters in this house, with occasional absences, until the 5th January, 1917, when the troops under the command of General Murguía moved in and set up their headquarters there. On the 20th January, 1917, the Villistas were again in possession, and on the 10th February men under the command of Nicolas Fernandez moved into Mr. Hambleton's house. On the following day the Commands of Colonel Maltus and Lieutenant-Colonel Vega made their headquarters there. On the 15th April troops under General Amaro; on the 10th May troops under General Sarvazo; on the 27th July troops under General González; and on the 19th August troops under the command of General Escobar respectively made their headquarters in this house. During this period, the forces which occupied Mr. Hambleton's house from time to time completely sacked and stripped it of everything of value. Mr. Hambleton had complained of his losses to His Majesty's Ambassador in Washington, and he heard later that a report made by Colonel Castaños confirmed that Villa had partially looted

the claimant's house and that Government forces had finished looting it. Certificates as to the condition of Mr. Hambleton's house from notary public, Sr. Manuel Gomez y Salas, who visited the house on the 3rd December, 1916, and again on the 21st August, 1917, are given in "Exhibits C" and "D" to this Memorial.

The amount of the claim is 36,025 pesos gold, together with interest from the date of loss at such rate as the Commission may decide to award. A detailed statement of Mr. Hambleton's losses is given in "Exhibit A" to this Memorial.

His Majesty's Government claim on behalf of Mrs. James W. Hambleton, or as she is known in Mexico, Margarita Flores Vda. de Hambleton, the sum of:

(1) 50,000 dollars United States currency, or such compensation as the Commission may decide to award for Mrs. Hambleton's personal injuries.

(2) 10,000 dollars United States currency for loss of business and certain articles belonging to the late Mr. Hambleton.

(3) 4,300 pesos Mexican gold, being the value of Mrs. Hambleton's personal property stolen by armed men.

(4) 36,025 pesos Mexican gold, being the loss due to the looting of Mr. Hambleton's house in 1916-17.

(5) Interest in each case from date of loss or damage at such rate as the Commission may consider equitable.

2. The first part of the claim seems sufficiently proved by the late Mr. Hambleton's affidavit, corroborated by the documents showing that the British Minister and the British Vice-Consul at Chihuahua took immediate action after the assault happened.

The Commission must classify the men who committed the attack as bandits, and they do not hesitate to declare that the competent authorities were to blame. The Minister for Foreign Relations of the Republic was at once informed by the British Minister, and the Military Commander of Parral as well as the local Judge were immediately advised by telephone by Mr. Hambleton. It has not been shown that any measures were taken.

For this reason the claimant is entitled to compensation.

3. The Commission prefer to lump together into one sum the award for the stolen property, and the compensation for the personal injury, and the expenses which the latter must have entailed.

They have taken into consideration that there is not in this case any question of loss of earning power, and that a so-called punitive award does not seem to be justified. They fix the amount at 9,000 pesos, Mexican gold.

4. As regards the second part of the claim, the Commission have found evidence that Mr. Hambleton's house, as from the 5th November, 1916, was the headquarters of Francisco Villa and other military commanders, but they are not satisfied that the house was as a consequence of this occupation completely sacked.

From the documents it results that Mr. Hambleton left Parral in June 1915, and that, therefore, over a year elapsed before Villa took possession of the house. What happened in the meantime has not been made clear, and the witnesses produced by the Mexican Agent deposed that when Villa came the house was empty.

The Commission failed to see sufficient ground to base an award upon.

5. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mrs. James W. Hambleton, the sum of $9,000 (nine thousand pesos) Mexican gold or an equivalent amount in gold.

THE EL PALMAR RUBBER ESTATES (LIMITED) (IN LIQUIDATION) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 107, August 3, 1931. Pages 316-321.)

RESPONSIBILITY FOR ACTS OF FORCES. Claim for property taken by armed forces *allowed* to extent leaders were identified and amount of losses substantiated.

FORCED ABANDONMENT.—CONCENTRATION ORDER. Pursuant to an order of commander of Carrancista forces that inhabitants of ranches concentrate in certain nearby towns within forty-eight hours, claimant's manager abandoned its plantation. Claim for loss and destruction of property resulting therefrom *allowed*, the tribunal being of the view that there was sufficient evidence that revolutionary circumstances made it necessary to leave the property abandoned during several years after the concentration order.

EXPENSES IN PRESERVING PROPERTY. Claim for expenses incurred in keeping abandoned property in good order *disallowed.*

LOSS OF PROFITS. Claim for loss of future profits *disallowed.*

REMISSION OF TAXES. Claim for remission of taxes *disallowed.*

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. According to the Memorial, the El Palmar Rubber Estates (Limited) (in liquidation) owned a property situated in the Canton of Zongolica, State of Veracruz. This estate was sown with Hevea oil, Castilloa oil, Arabiga and Maragogipy coffee and large numbers of plane trees, lemons and sugar-canes. In addition to this cultivation there were enclosed poultry runs to the extent of 530 hectares. Cattle and horses were also kept on the estate. In 1910, when the revolutionary movement in Mexico first broke out, the profits of this estate began to diminish and finally, as will be shown later, the whole of the property became a total loss.

The claim has been divided into four main parts: (I) compensation for property taken by revolutionary and other armed forces; (II) compensation for losses due to the enforced evacuation of the property; (III) refund of the cost of bare upkeep of the property during the time of its enforced evacuation; and (IV) indemnity for loss of profits.

PART I

From 1911 onwards armed groups of men passed through the estate, exacting forced loans and confiscating goods, cattle and any other kind of property they could obtain. In some few cases the armed forces gave receipts for the property which they took, but in the majority of cases the leaders of these bands flatly refused to give receipts. Twenty-three receipts have been attached to the claim. It will be observed that these receipts cover losses amounting to 5,656.70 pesos only. Mr. Peragallo, in his affidavit, states that this sum represents a very small part only of the exactions imposed on the property. Mr. Peragallo wrote three letters at different dates to the military leaders who had taken property asking them either to return the property taken or furnish receipts. No replies to these letters were ever received. The amount of the losses from these causes is moderately estimated at 20,000 pesos, Mexican gold.

PART II

On the 29th May, 1915, the Carrancista leader, J. N. Miranda, sent a concentration order, proof of which is given in the evidence given before the Second Court of First Instance of Cordoba. This concentration order gave the inhabitants of the El Palmar Rubber Estates (Limited) and other ranches in the neighbourhood forty-eight hours to concentrate in Acatlán, Tierra Blanca or Córdoba. The general manager of the El Palmar Estate, Mr. Peragallo, knowing that it was impossible to arrange for the safety of the property within the period of forty-eight hours' grace, wrote a letter dated the 29th May, 1915, to Major J. N. Miranda, who had issued the order, explaining how inconvenient it would be for him to obey the order and pointing out that there were fifty families engaged on the estate who would find themselves without work and means of sustenance. He added that the coffee harvest was approaching and that he was then engaged on clearing the sugar-canes, and that if the work was stopped great losses would be incurred. He pointed out also that owing to the lack of transport to the estate it would be impossible to get away the stock, horses, mules and cows, and that if these animals were left on the estate they would be either stolen or killed or would die for want of attention. No reply was given to the manager's request for an extension of the period of grace or for permission to remain on the estate. He then approached the British Vice-Consul at Orizaba in a letter dated the 31st May, 1915. The Vice-Consul was unable to get the order revoked or to obtain permission to leave some person in charge of the estate. The Vice-Consul advised the manager to obey the order of concentration, and before leaving to make an inventory of the property. This inventory was made on the 31st May, 1915, and the value of the goods and property amounted to 107,931.60 pesos, Mexican gold. The whole of the property described in the inventory has become a total loss; the furniture, machinery and tools have been destroyed, and the cattle were either used for food by the military forces or sold by their leaders in neighbouring towns. The coffee and oil plantations have become overgrown by grass and other vegetation, and heavy expenditure and hard labour would be necessary to bring the plantation into bearing again. The poultry runs have been entirely destroyed, and the sugar-canes, after being exploited by the military forces, on the property, were used as pasture for the horses. The houses and buildings on the estate were broken down to obtain material for the use of the military forces. From the date of its evacuation the El Palmar Estate was the headquarters of the military forces who happened to be in charge of the neighbourhood, at times Federal forces and at other times revolutionary forces. When the federal forces, under the command of General H. Jara, entered the estate, Mr. Peragallo wrote a letter calling attention to the state in which the estate then was, and asking for protection from military operations, indicating the losses which the property had suffered and stating that the inhabitants were quite peaceful. No reply was received to this letter. It should be added that two days after the order of concentration was obeyed the manager was able to obtain permission from the military authorities to appoint a caretaker to look after the property as much as possible. The Federal Government of Mexico were fully aware of the losses suffered by this estate, and proof of this is given in a letter from the Finance Department of the 7th May, in which a refusal to remit the land taxes on the property was conveyed to Mr. Peragallo. A certificate given by General P. C. Martínez, on the 3rd June, 1920, states that El Palmar Rubber Estate "has been abandoned in obedience to concentration orders which were issued by the Constitutionalist Government since the month of June 1915".

PART III

Two days after the evacuation of the property the manager was able to obtain military permission to place a caretaker in charge of the property. From that date expenditure was incurred in keeping as far as possible the property in good order. Very little could be done in the circumstances, and it now appears that the expenditure incurred was entirely wasted. The claim includes expenditure incurred from the month of June 1915 to the 31st May, 1920. Monthly statements of expenditure are available for inspection, but have not been printed with this Memorial.

PART IV

The El Palmar Rubber Estates (Limited) has a capital of £145,000. Out of the company's estate of 4,680 acres, 2,948 acres were under cultivation at the time the company was incorporated on the 10th March, 1910. Between that date and the time when the rebels began to loot the estate an extensive programme of planting and improving the estate had been carried out, and the prospects of the company of becoming a prosperous one were very good. Owing to the circumstances described above these prospects were not realized and the company has now been obliged to go into liquidation. It is estimated that if the company had been allowed to proceed peacefully it would have been able to pay an average yearly dividend of at least 4 per cent on its capital. For the purpose of this claim it is assumed that the average profits would be sufficient to enable the payment of a dividend of 2 per cent on the capital to be made. At this low figure the profits would amount to £23,200 sterling for the period the 3rd December, 1912, to the 31st May, 1920. Particulars of the earnings of various other rubber estates are given in Mr. Marsden Banks' affidavit. The lowest average dividend paid by any of these companies is 6 per cent.

There is also a claim for remission of land taxes charged on the estate during the time of the enforced evacuation. A number of applications have been made to the Federal Government for remission of these taxes, but in each case the Government has refused to grant the remission.

The amount of the claim is £23,200 sterling and 189,515.46 pesos, Mexican gold. This amount is composed of 20,000 pesos for compensation for goods taken by revolutionary and other armed forces, 107,931.60 pesos for compensation for losses due to the forced evacuation of the property in 1915, 61,583.89 pesos being the money expended on upkeep during the period June 1915 to May 1920, and £23,200 sterling as an indemnity for loss of profits.

The British Government claim on behalf of the El Palmar Rubber Estates (Limited) (in liquidation) the sum of £23,200, plus 189,515.46 pesos, Mexican gold.

2. *Part I.*—The Commission have found the losses proved, partly by the receipts of the officers to whom the goods had to be delivered, and partly by the three letters of Mr. Thomas Peragallo, filed as annexes 9, 10 and 11 of the Memorial.

The Commission have not been able to identify all the leaders who signed receipts, or who are mentioned in Mr. Peragallo's letters, but sufficient evidence has been shown to satisfy them that several of those leaders must be classified as Constitutionalists, and others as rebels or bandits. The acts of the leaders thus classified, are covered by subdivisions 2 and 4 of Article 3 of the Convention. It has not been shown that any action was taken by the authorities, in so far as they were informed.

The amount claimed has not been proved to the full extent, because *(a)* not all the leaders could be identified, and *(b)* not all the figures are substantiated.

The Commission allow, for this part of the claim $4,300 (four thousand three hundred pesos) Mexican gold.

3. *Part II.*—In the opinion of the Commission the concentration order of the Carrancista leader Miranda has been proved. The order was delivered on the 29th May, 1915, at a time when the Carrancista movement had not yet succeeded in establishing a Government *de facto* or *de jure*. For this reason the Commission cannot consider the order as a lawful act within the meaning of the Convention.

While it is uncertain for how long the concentration order was to be in force, the Commission have found sufficient evidence that revolutionary circumstances made it necessary to leave the property abandoned during several years after the concentration. This is, *inter alia*, proved by annex 12 of the Memorial, being a letter dated the 7th May, 1917, from the Department of Finance of the State.

The alleged losses do, therefore, fall within subdivision 2 of Article 3 of the Convention, and the Commission deem that compensation to the extent of $80,000 (eighty thousand pesos) Mexican gold, may safely be granted.

4. *Part III.*—The Commission see no ground for allowing an award for expenditure incurred in keeping the property, as far as was possible, in good order. They do not regard this expenditure as a loss, but as a means of avoiding loss.

5. *Part IV.*—The Commission are of opinion that in this case the direct connexion between the facts and the alleged consequences of the same, has not been sufficiently proved to enable them to ground an award upon it.

6. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of the El Palmar Rubber Estates (Limited) (in liquidation), the sum of $84,300 (eighty-four thousand three hundred pesos) Mexican gold or an equivalent amount in gold.

THE TOMNIL MEXICAN MINING COMPANY (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 108, August 3, 1931. Pages 321-323.)

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO SUPPRESS OR PUNISH.—NECESSITY OF NOTICE TO AUTHORITIES. In absence of evidence that the competent authorities were informed of the acts of bandits complained of, *held* no responsibility of respondent Government existed.

RIOT.—MOB VIOLENCE. No responsibility of respondent Government *held* to exist under the *compromis* for losses sustained by rioting during a strike.

1. The Memorial gives the following statement:

The claimant Company was a prosperous mining enterprise with its main properties in the Tomnil District, in the State of Durango. During the revolutionary period from 1910 to 1920, the Company suffered the following damages:

(a) Early in March 1912 a revolution broke out. Pilar Quinteros appeared at the Company's mine with a number of his men and took from the Company rifles, mules, horses and cows, to the value of $1,333.80.

(b) At about the same time Quinteros demanded and received from the Company the sum of $120 pesos.

(c) At about the same time Emiliano Aispuro and his men visited Tomnil and obtained from the Company the sum of $100 pesos in cash, promising that such sum would be deducted from the taxes paid by the Company to the State of Durango.

(d) Pilar Quinteros also took from the Company's warehouse corn for his mules and horses and took from the Company's smelter two cases of dynamite, nails and canvas to manufacture bombs; under this head there are claimed $200 pesos.

(e) Owing to the activities of Quinteros and his men, there was a strike for three weeks of the employees of the mine, and the Company, in consequence, incurred expenses to the amount of $970 pesos.

During all this time, as appears from the statement of Mr. Henry Cribb, the Company repeatedly appealed to the Mexican Government for protection, but the Government, although at the time there were troops available in the district under Claro Molino, took no steps to furnish the necessary protection.

(f) The Company further suffered the following damage:

During the month of July 1912, riots took place at the Company's premises and the Company's employees declared a strike, and the Company was compelled to pay to the rioters the sum of $836.75 pesos. Ultimately, the Government belatedly sent an escort to the mine, but no steps were taken to punish those who had attacked the Company's property and staff, and the Government officer, León Meraz, deliberately failed to do his duty.

(g) Owing to the activities of Quinteros and his men, the Company were forced to incur a loss of $20,000 pesos, owing to extra expenditure incurred on account of the disorderly state of affairs.

(h) The Company further claims $90,000 pesos owing to depreciation of stock.

(i) The Company further claims $40,000 pesos in respect of repairs which will have to be undertaken owing to the damage caused by the cessation of work due to the Revolution.

(j) In May 1912 at a time when there had been no authority in the district for some ten months, the safety vault of the Company was broken open and gold and silver bars were stolen, to the value of $6,000 pesos. The authorities in Mazatlán refused to give any assistance to the Company.

(k) In the early part of 1912 the Mexican Government confiscated from the Company 2,000 Winchester cartridges of the value of $150 pesos.

(l) The Company further claims $100,000 pesos in respect of loss of profits.

The British Government claim on behalf of the Tomnil Mexican Mining Company, Limited, the sum of 258,610.55 pesos.

2. The Commission have come to the conclusion that Pilar Quinteros and Emiliano Aispuro must be considered as bandits. As there is no evidence that the competent authorities were informed of their acts, Mexico cannot be made responsible for the losses caused by them.

3. The Commission hold the view that the consequences of a strike, and the acts of violence accompanying a strike—if no other intervention is shown—do not fall within the terms of the Convention.

4. The Commission have not found evidence of the other losses claimed.

5. The claim is disallowed.

LEONOR BUCKINGHAM (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 109, August 3, 1931. Pages 323-327.)

RESPONSIBILITY FOR ACTS OF FORCES.—DUTY TO PROTECT IN REMOTE TERRITORY. When remote territory was in control of rebel forces, no responsibility of respondent Government will lie for failure to suppress acts of violence or to punish their authors, even though such acts be called to attention of proper authorities.

DUTY TO GIVE WARNING OF DANGEROUS CONDITIONS.—FAILURE TO PROTECT. It is the duty of any government to give warning to inhabitants, whether subjects or aliens, of an inability to give protection in any territory. In this case, after receiving notice of two raids on the district, Secretary of State for Protection, Colonization and Industry replied that measures were being taken. No protection was thereafter extended. *Held*, claim allowed.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 238.

1. This is a claim for damages for the murder, by bandits known as Tiznados, of Mr. H. W. T. Buckingham at Nanchital, near Puerto Mexico (Coatzacoalcos) on the night of the 9th March, 1917.

The facts are set out in the Memorial as follows:

Mr. H. W. T. Buckingham was employed as superintendent of the Oil Exploration and Exploitation Camp of the Mexican Petroleum Company "El Aguila", S.A., in the District of Nanchital, near Puerto Mexico. On the evening of the 9th March, 1917, Mr. Buckingham was entertaining several friends at his house. At about 8 o'clock three armed men came to the house and ordered Mr. Buckingham and his three guests, Messrs. H. E. Andersen, H. Bornacini and M. Walker to go outside the house. The armed men then demanded $1,500 and a revolver which they alleged was in Mr. Buckingham's possession. Canuto Garcia, the company's watchman, was sent to call Mr. Bannerman, the cashier, to open the safe, in order to meet the demand for $1,500. Mr. Bannerman was only able to produce $1,200, and the bandits told Mr. Buckingham that if he did not obtain the missing $300 he would pay with his life. One of the bandits then asked Mr. Buckingham to give them his best shirt, and they went into the house with another bandit to obtain it. The two bandits took a quantity of Mr. Buckingham's personal property, including blankets and sheets, and forced his guests to carry the goods down to the bottom of the hill, close to the Decauville track. On the way the bandits called Mr. J. J. Pardo, the store-keeper, from his house to open the store. They took from the store, and loaded on to a small platform car, three cases of gasoline, one case of kerosene, and also various tins of provisions and biscuits. The leader of the bandits then asked for Tirso Cruz, the stableman, who at first refused to come. Mr. Buckingham, hearing the leader ask for a tin of petrol in order to burn Tirso Cruz out of his house, sent a man to persuade him to obey the orders of the bandits. The bandits accused Tirso Cruz, when he arrived, of being the cause of the assassination of one of the bandits after the raid they had made on the 5th January, 1917, but in spite of his denial, they shot and killed him. Mr. Buckingham had no idea that the bandits intended killing Tirso Cruz when he sent to persuade him to leave his

house. As soon as the shooting started, the three guests ran behind the store, but two of the bandits ran after them and wounded Mr. Bannerman. On their return to the front of the store, one of the bandits fired at Mr. Buckingham, but his rifle misfired. Mr. Buckingham commenced to run and fell after going a short distance, but as far as could be gathered, he was not then wounded. The bandits then compelled Messrs. Walker and Pardo to push the car on the track away from the river, but after going about twenty-five yards, they were ordered to stop. The bandits went to look for Mr. Buckingham and, having found him, brought him to the car. They again asked Mr. Buckingham for his revolver, which he denied having, and gave them all the money from his pockets. The party then proceeded further up the track, those pushing the car gaining slightly, as Mr. Buckingham, owing to a recent accident, was slightly lame. For some unexplained reason, the bandits suddenly shot and killed Mr. Buckingham. After this the bandits decided to go from the camp by canoe, and compelled the remainder of the party to push the car back to the river and load the canoe. Before they left they threatened Messrs. Walker and Pardo with penalties if they should give information about this raid. Mr. Bannerman died later in the day from his wounds.

The local authorities were well aware of the unsettled state of the neighbourhood. On the 5th January, 1917, a band of armed men had taken possession of the camp of the Mexican Petroleum Company "El Aguila", S.A., at Nanchital, as well as the dwelling-houses of their employees, demanding a sum of money from the manager. On learning that the manager could not pay them the money, they beat him and led him away to be shot at the wharf. On the way there they met the rest of the personnel of the camp, who had been rounded up by the remainder of the band. The bandits then proceeded to rob the personnel of the camp. The threat of shooting was not carried out. Notice of the raid of the 5th January was given to the military commander of the district of the port of Puerto Mexico (Coatzacoalcos), in a letter signed by Mr. Buckingham on the 6th January, 1917. The military commander stated that, although the occurrence was deeply regretted, he was unable to give any protection whatsoever. The Mexican Petroleum Company "El Aguila", S.A., wrote on the 3rd February, 1917, to the Secretary of State for War and of the Navy, drawing his attention to the state of affairs. This letter was acknowledged on the 10th February. Copies of the letter to the Secretary of the Department of War and of the Navy were sent to the Secretary of State for Protection, Colonisation and Industry and to the Sub-Secretary of State for the Interior. These communications were acknowledged on the 10th and 12th February, respectively. In spite of the fact that the Mexican Government were aware of the possibility of repetitions of such raids, no effort was made to afford protection to the company or the company's employees. His Majesty's Government consider that the Mexican Government, by its neglect to take reasonable precautionary measures, is responsible for the loss of Mr. Buckingham's life.

The amount of the claim is 100,000 pesos (Mexican gold). Mr. Buckingham was forty-eight years of age at the time of his death, and was in good health. His probable term of service is estimated at twelve years. His salary at the time of his death was $350 (U.S. currency) or, say, 700 pesos (Mexican gold) a month, in addition to housing and living expenses. On the basis of 700 pesos a month for a period of twelve years, the loss suffered by Mrs. Buckingham would be 100,800 pesos (Mexican gold), but she has fixed the amount of compensation which she claims at 100,000 pesos (Mexican gold). No claim is made for her personal loss and suffering.

The British Government claim on behalf of Mrs. Leonor Buckingham the sum of 100,000 pesos (Mexican gold).

2. The Commission are of opinion that the facts on which the claim is based have been proved, and also that the acts were committed by bandits.

3. Faced by the question as to whether Mexico is to be held financially responsible, the Commission deem that the competent authorities cannot be blamed for not having taken reasonable measures to suppress the acts or to punish those responsible for the same.

No Government of a country, of the immense extent of the Mexican Republic, with scarce population, of a mountainous character and with great difficulty of communications, can be expected to furnish adequate military protection to all the isolated oil-fields, mines, haciendas and factories scattered over the territory. The oil camp where the murder was committed is in a very remote situation, and its connexions with the rest of the country are scarce and arduous.

At the time of the events the district was controlled by the rebel leader Cástulo Pérez, for whose protection against bandits and robbers a contribution was paid by the Aguila, as well as by other concerns. It was this leader who pursued the murderers and had them executed. It was outside the power of the Government forces to operate in the region, which was practically in the hands of others, who were superior in number, and, therefore, they cannot be blamed for not having punished the criminals.

4. But the question put forward at the commencement of the preceding paragraph has a wider scope, because the end of subdivision 4 of Article 3 of the Convention also lays responsibility upon Mexico in case the authorities were blamable in any other way.

And with such a case the Commission have, in their opinion, to deal in the present claim.

While admitting that the Government cannot be blamed because they did not prevent the murder or punish the murderers, the Commission hold that it is the duty of any Government to know the extent to which they can afford protection, and to warn subjects, as well as aliens, if they are unable to do so, leaving it to their judgment either, to remain at their own risk, or to withdraw from those isolated places, to where the hand of government does not reach.

5. In January 1917 two raids had already been made on the same oil-field. Notice was given to the Military Commander of the district, and he replied that, although the occurrence was deeply regretted, he was unable to give any protection whatsoever, an answer which left the responsibility for remaining at the camp with the "Aguila". But the raids of January were also reported to the Secretary of War and of the Navy, to the Secretary of State for Protection, Colonization and Industry, and to the Sub-Secretary of State for the Interior. The Secretary of State for Protection, Colonization and Industry answered, on the 10th February, 1917, that measures were being taken, and that it was hoped that the repetition of such cases would be avoided.

It is clear that, in the eyes of the Management of the concern, this answer must in itself have annulled the perfectly correct communication from the Military Commander, and must have induced the residents of the camp to believe that protection would be given, and that they ran no danger in remaining where they were.

The events have shown that this hope was false, and that the assurance given by one of the Cabinet Ministers was not followed up by acts of such a nature as to prevent a repetition of the occurrences, and worse.

The Commission regret that they cannot answer in the negative the question of whether the authorities were blamable in any way.

6. The Commission declare Mrs. Buckingham entitled to compensation, and they think it is in accordance with the principles of justice and equity to award

a sum of 31,000 pesos, which will enable her to purchase an annuity of 2,000 pesos.

7. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mrs. Leonor Buckingham, the sum of $31,000 (thirty-one thousand pesos) Mexican gold, or an equivalent amount in gold.

JAMES RICHARD ANTHONY STEVENS AND MRS. GIBB (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 110, August 3, 1931. Page 328. See also decision No. 66.)

RESPONSIBILITY FOR ACTS OF FORCES.—EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. In absence of evidence enabling tribunal to classify, under the *compromis*, the forces for whose acts claim was made, claim *disallowed.*

(Text of decision omitted.)

F. S. WHITE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 111, August 3, 1931. Pages 329-330.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

DENNIS J. AND DANIEL SPILLANE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 112, August 3, 1931. Pages 330-332. See also decision No. 42.)

AMENDMENT OF CLAIM. Amendment of claim by substituting, as claimants, Dennis J. and Daniel Spillane to Messrs. D. J. and D. Spillane and Company *allowed.*

DAMAGES, PROOF OF.—EQUITY AS A BASIS FOR AWARD. Where valuation of items of damage appears exaggerated, tribunal will, in accordance with the principles of justice and equity, fix amount of damages.

1. As regards the facts on which the claim is based, the Commission refer to their Decision No. 42.

2. Following that decision, the British Agent asked leave to amend the Memorial originally filed on behalf of Messrs D. J. and D. Spillane and Company, by substituting, as claimants, Dennis J. Spillane and Daniel Spillane.

The Commission having allowed this amendment, now consider the claim as falling within the terms of the Convention.

3. The British Agent, while conceding that not all the forces, whose leaders had delivered receipts, had been identified, pointed to the fact that nearly all the receipts were attested by the local judge and two witnesses. Moreover, he argued that a great many of the losses sustained by the claimants had occurred within the period when the Villista and Zapatista forces formed part of the Constitutionalist army and were therefore covered by the second subdivision of Article 3 of the Convention. In his submission the claimants had taken every precaution within their power, by applying in each separate case for the testimony of the local magistrate and of two witnesses.

As regards the amount, the Agent contended that the valuations of the various items bore every appearance of conscientiousness and exactitude.

4. In the opinion of the Mexican Agent only a very small part of the receipts could be traced to leaders for whose acts the Mexican Government had, by signing the Convention, assumed responsibility. By far the greater part had been delivered by individuals of whose political identity nothing was known. The Agent explained that the function of a local judge was a very modest one, and he did not consider this magistrate as an authority to whose declaration great value could be attached.

Lastly, he regarded the appraisement of the losses as exaggerated in the highest degree.

5. The Commission have found the facts alleged in support of the claim sufficiently proved by the receipts of those who took the goods, by the confirmation of the local judge and witnesses, or by other evidence, but they have not been enabled to classify in each case the forces to which the various leaders belonged. They have found that several receipts were delivered by officers of forces for whose acts the Convention does not, after revision, make the Mexican Republic financially responsible. Only a comparatively small part of the receipts show clearly that the goods were taken by forces falling within one of the subdivisions of Article 3 of the Convention. In a majority of the cases this remains uncertain.

6. As regards the amounts set down against the different items, many of them have appeared to the Commission to be exaggerated, and they do not feel at liberty to accept such valuation to its full extent.

7. For these reasons, only a portion of the amount claimed can be awarded, and the Commission hold that it is in accordance with the principles of justice and equity to fix this portion at 12,000 pesos.

8. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government on behalf of Dennis J. Spillane and Daniel Spillane, the sum of $12,000 (twelve thousand pesos) Mexican gold or an equivalent amount in gold.

ROBERT HENDERSON, ON BEHALF OF THE ESTATE OF THE LATE VIRGINIA HENDERSON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 113, August 3, 1931. Pages 332-334.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—RECEIPTS FOR REQUISITIONED PROPERTY. Evidence of loss consisting primarily of receipts for requisitions given by officers or officials *held* sufficient.

(Text of decision omitted.)

WEBSTER WELBANKS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 114, August 6, 1931. Pages 334-337. See also decision No. 29.)

RESPONSIBILITY FOR ACTS OF FORCES. Claim for loss of shipments of tomatoes on railway during period of its operation by State Government *held* not a loss resulting from acts of forces for which respondent Government was responsible.

(Text of decision omitted.)

CAPTAIN A. B. URMSTON (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 115, August 6, 1931. Pages 337-341.)

RESPONSIBILITY FOR ACTS OF FORCES.—DAMAGES, PROOF OF. Where evidence established facts of loss but did not establish with exactness whether the amounts claimed were correct, claim *allowed* in amount justified by the evidence.

PRESERVATION OF PROPERTY. Claim for expenses incurred in preserving property *disallowed.*

DEPRECIATION IN VALUE OF PROPERTY. Claim for depreciation of value of ranch during revolutionary period *disallowed.*

Cross-reference: Annual Digest, 1931-1932, p. 227.

1. This is a claim for losses and damages to the Hacienda de San Pedro Canton Galeana, in the State of Chihuahua, due to revolutionary acts during the years 1912 to 1920, inclusive.

The facts are set out in the Memorial as follows:

Captain A. B. Urmston is the sole owner of a property, 206,000 acres in area, known as the Hacienda de San Pedro and situated in the Canton Galeana, State of Chihuahua. The property was originally purchased from the Mexican

Government by Messrs. Macmanus Brothers, Bankers, of Chihuahua, who sold it to a Captain C. G. Scobell in the year 1885. Captain Urmston, in partnership with Mr. Alexander B. Henderson, purchased part of the property from Captain Scobell in 1891 and the remainder in 1895. The claimant purchased Mr. Henderson's share in 1896 and became the sole owner of the property.

Captain Urmston resided on the property from 1890 to 1909, during which time he expended large sums of money in building substantial houses, opening farms, saw-mills, fencing the entire range with wire fence where necessary, developing the water supply, and stocking the property with a herd of high-grade cattle of 14,000 to 15,000 head and 1,000 horse stock. In 1909 Captain Urmston returned to England, leaving the property in charge of Mr. W. A. M. Roxby as manager.

In the year 1912, when raids by revolutionary and other forces first commenced, the stock of cattle on the hacienda amounted to some 14,000 head and the stock of horses amounted to some 800. The claimant states that the value of his property then was 802,000 dollars United States currency, or 1,604,000 dollars Mexican gold, calculated as follows:

	U.S. Currency Dollars
206,000 acres, at 2 dollars per acre	412,000
14,000 cattle, at 25 dollars a head	350,000
800 horses, at 50 dollars a head	40,000
TOTAL	802,000

From the year 1912 the hacienda was subjected to continual raids and requisitions by revolutionary and other forces. These revolutionary and other forces took from the hacienda horses, cattle, corn and merchandise, giving in some cases receipts for the property taken, but in the large majority of the cases flatly refusing to comply with requests for receipts. The names of some of the revolutionary or counter-revolutionary officers responsible for part of the claimant's losses are given in the affidavits of Messrs. Hollingworth, McDow and Contreras.

During the period 1912 to 1921 only small sales of stock and horses were made by Captain Urmston or by any persons on his behalf, and none of the said stock or horses was removed from the hacienda. Such sales did not exceed 1,000 head of cattle. In May 1920 only 3,000 head of cattle and from 50 to 100 horse stock, mostly mares, remained on the property. Captain Urmston's losses during this period therefore amount to some 10,000 head of cattle and at least 700 horse stock.

The claimant values the cattle and horses lost during the period 1912-May 1920, inclusive, at 285,000 dollars United States currency, or 570,000 dollars Mexican gold, calculated as follows:

	U.S. Currency Dollars
10,000 cattle, at 25 dollars per head	250,000
700 horses, at 50 dollars per head	35,000
TOTAL	285,000

The houses, buildings and farms on the hacienda were damaged by the revolutionary and counter-revolutionary forces. It is not possible at this date

for the claimant to give the dates of the specific damages or to identify the individuals responsible. He estimates, however, that the damage done amounts to at least 50,000 dollars United States currency, or 100,000 dollars Mexican gold.

During the period under review Captain Urmston was obliged to spend at least £2,500 sterling per annum in maintenance of the said property, all of which has now become a total loss. During the eight years (1912-20 inclusive) the sum of £20,000, or 100,000 dollars United States currency or 200,000 dollars Mexican gold was expended.

As a result of the depredations of the revolutionary and other forces the value of Captain Urmston's property has deteriorated very considerably. In 1912 the value of the land, as has been shown, was 412.000 dollars United States currency, or 924,000 dollars Mexican gold. Captain Urmston was offered in 1912 the price of 600,000 dollars United States currency, or 1,200,000 dollars Mexican gold for his property, including cattle and horses, but owing to the outbreak of the revolution he was unable to proceed with the sale. He has since made innumerable attempts to sell the property with a view to saving further loss, and in 1924 he signed a contract agreeing to sell to a Mr. C. K. Warren, of Three Oaks, Michigan, the whole property and stock at the price of 170,000 dollars United States currency. This contract, however, was subsequently cancelled. Of this offer of 170,000 dollars United States currency the claimant attributed 125,000 dollars United States currency to the value of the land and 45,000 dollars United States currency to the value of the stock thereon. The property therefore has depreciated to the extent of 287,000 dollars United States currency, or 574,000 dollars Mexican gold.

The amount of the claim is 722,000 dollars United States currency, or 1,444,000 dollars Mexican gold; a summary of the various items comprising this total is given in paragraph 9 of Captain Urmston's affidavit. Partial proof of the losses of cattle and horses is given by the affidavits of Messrs. Hollingworth, McDow and Contreras. These affidavits do not represent the whole of Captain Urmston's losses, but cover only losses known to these employees to have been incurred during the period they were serving on the hacienda. The amount of the losses supported by these affidavits is 139,437.51 dollars United States currency, or 278,955.03 dollars Mexican gold, as compared with 285,000 dollars United States currency, or 570,000 dollars Mexican gold, claimed by Captain Urmston.

Further proof of these losses cannot be given by the claimant who has been unable to trace the present whereabouts of all his former employees. Such proof as he has been able to obtain is produced.

The British Government claim on behalf of Captain Urmston the sum of 722,000 dollars United States currency, or 1,444,000 pesos Mexican gold.

2. Evidence of part of the losses, suffered through the taking of animals, is to be found in the receipts of several military leaders and in the affidavits of Messrs. Hollingworth, McDow, Contreras and Metcalfe.

Sufficient evidence has not been submitted to the Commission to enable them to determine to which of the forces the military leaders belonged, and whether the acts of all of them are covered by the Convention, after revision of the same.

It has likewise not been made possible to the Commission to decide with absolute exactness whether the sums, claimed for the specific items, do or do not exceed the value thereof.

The Commission do not, therefore, feel at liberty to award the full amount claimed under this head, but they are convinced that 100,000 pesos is well justified.

3. As regards the second part of the claim, the Commission see no ground for allowing an award for expenditure incurred in keeping the property, as far as was possible, in good order. They do not regard this expenditure as a loss, but as a means of avoiding loss.

4. The deterioration of the value of the property can hardly be denied, but it is a phenomenon, which is probably common to all landed wealth in Mexico during the revolutionary period. It resulted from various circumstances and measures, but it is not a loss which can, at least not in the case now under consideration, be ascribed to any specific acts of revolutionary or other armed forces. Neither is it possible to determine the amount of the depreciation, nor to examine whether it has, partly at least, been compensated for by a subsequent rise in value.

For these reasons, the Commission do not feel that they are in a position to grant an award for this part of the claim.

5. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Captain Augustus Brabazon Urmston, the sum of $100,000 (one hundred thousand pesos) Mexican gold, or an equivalent amount in gold.

WILLIAM J. RUSSELL (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 116, August 6, 1931. Pages 341-343.)

RESPONSIBILITY FOR ACTS OF FORCES.—PROXIMATE CAUSE. Drunken soldiers set fire to a train, which fire spread to claimant's adjacent hotel, to his loss and damage. *Held*, respondent Government responsible.

MOB VIOLENCE. Claim for damages caused by a popular demonstration against foreigners *disallowed.*

1. The Memorial divides the claim into four parts:

Part I.—The claimant had an hotel and restaurant in Venegas Station in the State of San Luís Potosí, under a contract from the National Railways of Mexico. On the 29th May, 1913, armed men, under the command of Julián García, demanded the sum of $165 pesos in cash. On the 22nd June of the same year, Federal Volunteers partially sacked the hotel and carried off articles and merchandise. On the 11th July, 1913, armed forces under Jesús Dávila set fire to the hotel, destroying all the furniture and other objects.

Part II.—The claimant owned a brewery and ice factory in "La Panquita", Saltillo, State of Coahuila. On the 21st April, 1914, on the occupation of Veracruz by forces of the United States of America, serious disorders occurred in the town of Saltillo, which obliged the claimant and his family to take refuge in the British Consulate. The brewery was completely sacked, and a list of the losses, such as machinery, furniture and other objects, is given in Annex 6.

Part III.—The claimant also owned the National Hotel in the City of Saltillo, and this hotel was also sacked on the 21st April, 1914.

Part IV.—On the 20th May, 1914, forces under the command of General Gustavo Mass arrived at Venegas Station and carried off articles and furniture which the claimant had placed in passenger cars and freight cars.

The total amount of the claim is 50,750.00 pesos Mexican gold.

2. *Part I.*—As regards the taking of the $165, the Commission have not been enabled to determine to which forces Julián García belonged. They are not, therefore, in a position to decide whether the loss is covered by the Convention.

The sacking of the hotel was done by a group of Federal volunteers, who at the time served the Huerta Régime. The revision of the Convention has excluded the acts of this régime from the jurisdiction of the Commission.

The burning of the hotel was most probably due to the fact that drunken soldiers set fire to a train, which fire spread to the hotel. Even if it happened as a consequence of their commanders setting fire to the wagons of the train containing liquor, as suggested by some witnesses, such an act was highly dangerous, and calculated to set fire also to the immediately contiguous Hotel and Restaurant. As the soldiers were under the command of Jesús Dávila, and as it is known that this leader belonged to the Constitutionalist Army, Mexico must be regarded as bound to compensate the loss.

3. This loss affected the claimant only in so far as the items set down in the inventory of that place were his property and not that of the Railway Company.

The Commission find that considerable portions of the articles burned belonged to the claimant, and have found sufficient evidence to fix an amount of $2,000 as a fair and reasonable compensation for this loss.

4. *Part II and Part III.*—The Commission regard the occurrences, referred to in these parts of the claim, as the consequences of a popular demonstration of a violent nature. They cannot view them as revolutionary acts, nor as a mutiny, a rising, an insurrection, nor as acts of banditry. The movement was not directed against the Government or against public authorities, but against the foreigners residing at Saltillo. Regrettable as the events were, they cannot, under the wording of the Convention, justify the granting of compensation.

5. *Part IV.*—The damage recorded under this heading was done by Gustavo Mass, a Huertista leader. It falls, therefore, outside the Convention, as last modified.

6. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of William J. Russell, the sum of $2,000 (two thousand pesos) Mexican gold, or an equivalent amount in gold.

FRANK SCRIBNER MERROW (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 117, August 6, 1931. Pages 343-346.)

DEATH OF CLAIMANT.—PURSUANCE OF CLAIM. As since filing of Memorial claimant died, claim pursued on behalf of widow as executrix of claimant's will.

DAMAGES, PROOF OF.—NECESSITY OF CORROBORATING EVIDENCE. Claim for loss of furniture and other movable property in the sum of 177,026 pesos, uncor-

roborated by outside evidence, *allowed* in the sum of 3,000 pesos Mexican gold.

1. This is a claim for the looting of property by Zapatistas under the command of Lieutenant-Colonels Mauro Neri and Vicente Rojas in the town of Miraflores, district of Chalco, State of Mexico, after their entry into that town on the 12th August, 1914.

It is stated in the Memorial that Mr. F. S. Merrow was employed as Chief Dyer of the Blanket and Spinning Factory at Miraflores, the property of the Industrial Company of San Antonio Abad (Limited), and was living in a house, within the property of that factory, with his wife and two children. On the 10th August, 1914, orders were given to the federal troops commanded by General Vasconcelos to evacuate the towns of Ozumba, Amecameca and Chalco. This order was given without previous notice to the population of these towns. On that day the last train to leave Miraflores was used for carrying troops and, therefore, no opportunity was given to the inhabitants to leave the place or to save their property. On the 12th August, 1914, the Zapatistas first entered Miraflores and they offered full guarantees in respect of life and property. Later in the day the Zapatistas began drinking liquor in the shop and ransacking the warehouses of the factory. Mr. Merrow felt that there would be no security of life and property, and he therefore spent the night with his family at the house of a Mr. Felipe Robertson. On the following day, however, their hiding place was discovered and they were forced to hide in a field of lucern grass for a whole day. At night they went to the house of an old employee of the factory, Agustin Parra, and from there went by way of the mountains towards Puebla. On the way they were assaulted and robbed of all the money they possessed. They then decided to go to Presa, a place belonging to the Miraflores factory, where they stayed hidden for several days. While endeavouring to escape through the mountains, Mr. Morrow's son, Francis, was injured in the leg, and, as a direct result of this injury, he died at the American Hospital at Mexico City on the 6th July, 1920. Finally, through the help of a Mr. J. Robertson (Junior), of "El Nuevo Mundo, S.A." Clothing Store, Mexico City, they obtained a pass from the Zapatista General Juan Banderas to proceed to Mexico City, which journey occupied two days. In May 1915 Mr. Merrow, with a passport issued by His Majesty's Consul at Mexico City, proceeded to Miraflores to discover whether his property was still intact. On his arrival, Lieutenant-Colonel Fernando Almarez told Mr. Merrow that he could not see his house because, for the time, it was being occupied by a family named Gadea. Lieutenant-Colonel Almarez told Mr. Merrow frankly that they were making packing cases in order to take away his furniture, adding these words: "You must lend your furniture, piano, etc., to the revolution". In February 1916, as soon as the Carrancistas had taken possession of Miraflores, Mr. Merrow proceeded to that place on a visit of investigation with a view to making a report as to the condition in which the Zapatistas had left the factory. He found that practically all his furniture and effects had been taken away. Those that were too heavy to move had been destroyed beyond repair. On the 11th August, 1914, Mr. Merrow had taken a small safe, in which his wife's jewellery and other valuables had been placed, to the ranch house belonging to Mr. Robertson and buried it beneath the floor of Miss Fergus Robertson's dressing room. This hiding place was discovered and the safe robbed of all its contents.

The amount of the claim is for 177,026.00 pesos (Mexican), at the exchange of 2 Mexican pesos equal to 1 United States dollar. A detailed inventory and valuation of the effects looted by the Zapatistas is attached to Mr. Merrow's affidavit.

The British Government claim, on behalf of Mr. Frank Scribner Merrow, the sum of 177,026.00 pesos (Mexican) at the rate of 2 Mexican pesos equal to 1 United States dollar.

2. As since the filing of the Memorial the claimant has died, the claim is now pursued on behalf of his widow, Mrs. Annie Merrow, as executrix of the will of the late Mr. Frank Scribner Merrow.

3. The British Agent pointed out that the looting had been committed by followers of Zapata, at a time when this leader had joined forces with the Constitutionalist Army of Carranza. As this last Army was to be considered as a revolutionary force which had, after the triumph of its cause, established a Government, the facts on which the claim was based fell within the meaning of subdivision 2 of Article 3 of the Convention, and had consequently to be compensated for by the Mexican Government.

4. The Mexican Agent alleged, in the first place, that no proof had been shown of the contention that Mr. Merrow had been compelled to leave his house, and he argued in the second place that the time when the looting was done was uncertain. It could just as well have been committed much later, when the Zapatistas evacuated Miraflores, as when they first occupied it. In the second case, the argument of his British colleague did not hold, because by that time the Constitutionalist forces and the forces of Zapata had already separated and were fighting each other. Besides that, the Agent described the amount claimed as extravagant, considering that Mr. Merrow, who was an employee with a monthly salary of 150 pesos, could certainly not have had in his house property of the value of 177,026.00 pesos.

5. The Commission have, in the documents as well as in the depositions of the witnesses who were heard, found sufficient evidence of the facts on which the claim is based, and they are also satisfied that the looting was done by Zapatista forces during the period when they were nominally united with the Constitutionalists. Their acts are, therefore, covered by subdivision 2 of Article 3 of the Convention.

6. Mr. Frank Scribner Merrow was the Chief Dyer of the Factory at Miraflores. The evidence as regards his salary is of a conflicting nature, the highest estimate being 400 Mexican pesos a month, expressed in the value of the then circulating medium. It was, however, alleged that Mr. Merrow had acquired much property when formerly in South Africa, and that the quantum of his salary in Mexico did not in itself dispose of the question. But it was admitted that after leaving South Africa Mr. Merrow had been obliged to assist financially his father to a considerable extent.

At the same time a claim for 177,026.00 pesos, as the value of his furniture and other portable property, uncorroborated by any outside evidence, and moreover admitted by Mrs. Merrow in the course of her oral evidence to have been overstated in many particulars, appears to the Commission to be fantastically exaggerated, and it does not find the slightest confirmation in any of the depositions. To the Commission an amount of 3,000 pesos seems a nearer approach to the truth.

7. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government, on behalf of Mrs. Annie Merrow, the sum of $3,000 (three thousand pesos) Mexican gold, or an equivalent amount in gold.

THE PALMAREJO AND MEXICAN GOLD FIELDS (LIMITED) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 118, August 6, 1931, majority decision on claim for forced abandonment. Pages 347-352.)

RESPONSIBILITY FOR ACTS OF FORCES. Claim for property lost in transit *disallowed* for lack of evidence as to identity of forces causing loss.

PRESERVATION OF PROPERTY. Claim for expenses incurred in preserving property *disallowed.*

FORCED ABANDONMENT. Claim for damage to mine and railway caused through the forced suspension of operations as the result of the acts of Maderistas, such damage consisting primarily of depreciation through neglect and inattention, *allowed.*

RESTITUTION OF TAXES. Restitution of taxes paid by receiver, who was appointed while operation of claimant's mine and railway were suspended, *allowed.*

IMPORT DUTIES. Claim for import duty paid on property lost in transit *allowed* in part.

Comments: G. Godfrey Phillips, "The Anglo-Mexican Special Claims Commission", Law Q. Rev., Vol. 49, 1933, p. 226 at 231 and 239.

1. This is a claim for losses and damages suffered by the Palmarejo and Mexican Gold Fields (Limited) through the acts of revolutionary and counter-revolutionary forces during the period 1910 to 1920 on their mining properties situated principally on the Palmarejo and Huruapa estates in the State of Chihuahua.

The facts are set out in the Memorial as follows:

The Palmarejo and Mexican Gold Fields (Limited) was formed in 1866 with a capital of £700,000 for the purpose of purchasing, developing and working a group of mines on the Palmarejo estate in the State of Chihuahua, Mexico. The company, in developing these mines, erected a mill at Zapote, built a railway some twelve miles in length from that place to the Palmarejo mine and also built a conduit, 10 miles in length, to bring water from the upper reaches of the Chinipas river to the mill. The cost of these improvements amounts to 2,650,000 pesos. It is estimated that from 1886 to 1910 a sum of approximately 20,000,000 pesos had been expended by the company on the Palmarejo mine and on the adjoining Huruapa estate. The revolution which broke out in 1910 hampered the work of the company and, when in April 1911 a part of the conduit was destroyed by revolutionaries, the operations of the mill stopped through lack of water. Later labour was difficult to obtain and the whole business came to a standstill. For a period of two years the officials in charge of the mine were unable to communicate with their directors in London owing to a breakdown in the postal service. As a result of the complete stoppage of operations, the company has suffered large losses through damage and deterioration. These losses are divided into five headings. The losses under each of these headings will now be considered in detail.

Schedule A

This is a claim for the sum of 1,574,287.80 pesos for the cost of replacement caused by damage to and loss of plant and machinery. In 1910 the claimants,

with a view to increasing the output of silver and gold and to adopting a new and better system of ore treatment, decided to partly abolish the old mill, to erect a new one with the necessary plant and machinery and to erect an aerial tramway from the mine to the mill in order to facilitate all transport and to reduce its cost. The necessary purchases for the erection of the new mill and tramway were made in London, and the goods were shipped and landed in Mexico. Only a very small quantity of these materials was delivered to the mine. Some of the material was stolen by revolutionaries, some parts of the machinery were destroyed, rendering the remaining parts useless, other portions of machinery could not be delivered beyond the railway head of the Kansas City and Mexico Railway, where, at the time annex 1 was written, they still remained. These portions of machinery, after a lapse of some years without attention or care, became useless. The total amount expended on material for these two new installations was 524,762.60 pesos or £52,476 8*s*. 2*d*. Before operations can be restarted it will be necessary to purchase new sets of plant and machinery. It is estimated that to replace the lost materials will cost at least three times the amount of the purchase price in 1910. This estimate is made in a letter dated the 24th July, 1920, from the Cyanide Supply Company (Limited), and in a letter dated the 28th July, 1920, from E. T. McCarthy, the company's consulting engineer. The sum, therefore, that will be required to replace the machinery, either lost, destroyed or rendered useless, amounts to 1,574,287.80 pesos.

Schedule B

This is a claim for the sum of 234,538.75 pesos, being the amount paid in Mexico for the purchase of stocks in connexion with the reconstruction referred to under schedule A, and for freight paid on the importations of machinery and other goods from England. It is now impossible to give exact details of this loss as most of the books of the company in Mexico have either been mislaid or lost during the revolution. The total sum expended, however, appears in the company's books in London.

Schedule C

This is a claim for 375,000 pesos, being the expenditure incurred in protecting the property. In 1914, owing to the uncertain conditions in Mexico, which made it impossible for the company to continue operations, the company was unable to pay interest on its debenture debt. A receiver was appointed to take possession of the property on behalf of the debenture holders and he retained possession until 1918, when, by an arrangement between the shareholders and the debenture holders, the possession of the property was returned to the company. It was necessary, however, to pay to the receiver 375,000 pesos, being the amount expended by him in protecting the property. This amount is certified as correct by a chartered accountant.

Schedule D

This is a claim for compensation amounting to $384,926.20 pesos in respect of damage to the Palmarejo mine, aqueduct, railway and Guerra al Tirano mine. These damages are divided into four headings.

(1) *Damage to Interior and Exterior of Palmarejo Mine*

This damage is caused through the forced suspension of the company's operations. The executive staff of the company were forced to leave the property on the 12th May, 1912, owing to the revolution which was then in pro-

gress. From this date until the 18th October, 1918, no attention could be paid to the mine. On the latter date Mr. W. D. Hole made a careful survey of the mine and estimated the extent of the damage and the cost of repair. This estimate amounts to 222,086.28 pesos.

(2) *Damage to Conduit*

On the 11th April, 1911, Maderista forces broke down the sluices at Agua Caliente with axes. The conduit had been repaired and its respective bridges rebuilt, only a short time before this event, at a cost of 48,250.13 pesos. On the 12th of the same month these revolutionaries broke the sluices in Cuba and gave orders to Jesús Beltran, who was in charge of the aqueduct, not to let water in again without their permission. On the 7th May, 1911, Federal troops under the command of Lieutenant-Colonel Manuel Reyes, set fire to the wooden bridge which crossed the stream of Ranchito. The company's manager repaired provisionally the damages done by Señores Becerra and Loya, the leaders of the revolutionaries, and by the Federal troops and maintained the conduit until he was obliged to leave the district in May 1912. From that date the conduit has suffered considerable dilapidation. An account of the acts of the revolutionary and Federal forces is given in a letter dated the 15th July, 1911, from Jesús Beltran, whose signature is certified by the Judge of First Instance of Arteaga in the State of Chihuahua. A detailed report of the damage and an estimate of the cost of repair is given in Mr. W. D. Hole's letter dated the 5th March, 1920. The truth of the statements contained in this report is affirmed by certain local inhabitants of Chinipas.

(3) *Damage to the Railway*

This railway was in good condition when the company's officials were forced to leave the district in May 1912. Owing to the lack of attention and care a considerable amount of labour will be required to restore it to working order. Mr. W. D. Hole's estimate of the cost of repair is 27,684.92 pesos.

(4) *Damage to the Guerra al Tirano Mine*

This mine, through neglect and inattention, suffered considerable damage and the estimated sum of 53,000 pesos will be required to put it into working condition.

Schedule E

This is a claim for repayment of import duty, amounting to 41,267.40 pesos, paid on the plant and machinery referred to under schedule A.

A further proof of the fact that the company had expended large sums of money on the mine and had suffered damage through the revolutionary and counter-revolutionary forces is given in a certified copy of voluntary proceedings *ad perpetuam* before the Court of First Instance in the district of Arteaga in the State of Chihuahua, Mexico.

In order to substantiate the claims based on the reports of Mr. W. D. Hole, the Judge of First Instance of Chihuahua was requested to appoint an expert to estimate the damages caused by the revolution to the properties and interests of the Palmarejo and Mexican Gold Fields (Limited). The Court appointed Mr. Eduardo Enriquez for this duty and the Court subsequently appointed Mr. Jacob W. Breach to make a similar investigation on behalf of the Federal Government. Mr. Breach came to the conclusion that the losses suffered by the Company through the revolution amounted to 403,812.55 pesos. This valuation represents the losses referred to in schedule D, and it will be noted

that Mr. Breach's estimate is higher than the sum now claimed. At the end of Mr. Breach's report is attached a petition by the Judge of First Instance of the district of Arteaga and other local citizens requesting that this claim may be settled at an early date in order that the Palmarejo mines may be reopened and thus provide work for local people. Mr. E. W. Enriquez also submitted a report and supplementary report. Mr. Enriquez only considered the damage done to the aqueduct, the railway and the Palmarejo mine, and his estimate of the damage amounts to 335,012.88 pesos. Mr. Enriquez was unable to come to a decision about the Guerra al Tirano mines, but considered Mr. Hole's estimate of 53,000 pesos to be insufficient to re-condition this mine. In regard to the plant and machinery Mr. Enriquez considered that the best course would be to appoint two expert valuers to decide what parts of machinery and plant still existing in various places in Mexico are still usable and what further supplies would be required to complete the installations.

The total amount of the claim is 2,610,020.15 pesos Mexican gold.

This claim belonged at the time of the losses and still does belong solely and absolutely to the claimants. The company informed His Majesty's Government on the 12th March, 1912, that the neighbourhood in which their mines were situated was overrun by bandits and that communication with their employees at these mines was impossible. Acting on instructions from the Foreign Office, His Majesty's Minister at Mexico City addressed a note to the Minister for Foreign Affairs on the 14th March, 1912, asking for protection of this company's property. Señor Manuel Calero replied on the 18th March, 1912, that he had written to the Ministry of the Interior in the sense of His Majesty's Minister's note. Instructions were subsequently issued by the Governor of Sonora to the Prefect of the District of Alomas to take such steps as may be possible for the protection of the company's interest if the property should be situated within his jurisdiction. In May 1912 the company informed His Majesty's Government that they had been forced to close down their mines.

The British Government claim, on behalf of the Palmarejo and Mexican Gold Fields (Limited), the sum of 2,610,020.15 pesos Mexican gold.

2. As regards schedule A, the Commission have found, *inter alia,* in the report of E. W. Enriquez (annex 15) outside evidence that a part, but not the greater part, of the plant and machinery was lost, stolen or destroyed in transit. It has not been shown what caused the loss, nor who were responsible for it. If the machinery was lost because its transport became impossible, as a consequence of the confiscation of mules, the Commission have not been enabled to ascertain whether the confiscation was a governmental (and therefore a. lawful) act, or a measure taken either by revolutionary forces or by bandits.

For this reason the Commission are not in a position to determine whether the losses, claimed for under this heading, are covered by the Convention.

3. The Commission take the same line as regards schedule B, and moreover, fail to understand why these stocks, or part of them, could not have been sold or utilized for other purposes.

4. The expenditure referred to under schedule C, must not, in the view of the Commission, be considered as a loss, but as a means of avoiding loss, with the exception, however, of the amount which was paid out for Government taxes, restitution whereof seems just and equitable.

This restitution is, however, only justified as regards the period of the receivership, being from 1914 to 1918. As the claim relates to the taxes from 1910 to 1918, only one half of the amount of 94,120 pesos can be taken into consideration.

5. As regards schedule D, the majority of the Commission have arrived at the conviction that the damages recorded under numbers 1, 3 and 4 were caused through the suspension of the Company's operations in May 1912. They are equally satisfied that this suspension was a forced one, and a consequence of the revolution then in progress. This results from the contemporary correspondence between the Company and the British Minister and between the British Minister and the Mexican Ministry for Foreign Affairs, and from the fact that, according to expert testimony, the works were in perfect order before the abandonment and the Company had recently given large orders for new machinery. It cannot, therefore, be assumed that operations were voluntarily stopped or because the Company found itself in an unfavourable financial condition.

The amount claimed for these items is 302,771.20 pesos and has been corroborated by outside estimate, but it has not, in the opinion of the Commission, been taken into account that part of the expenditure must have been devoted to the replacement of old and worn out equipment by new.

A deduction would therefore seem to be necessary and the Commission fix the amount of this deduction at 27,771.20 pesos.

6. The damage, alleged under schedule D, No. 2, is sufficiently proved and it has been shown that it was caused by the acts of Maderistas, falling within subdivision 2 of Article 3 of the Convention, with the exception, however, of the burning of the bridge, which was done by Federal troops in a fight against the Maderistas. As the Federal troops were the troops of the Government, this last act must be regarded as lawful, and does not entitle the claimant to compensation.

For this part of the claim, the Commission think that an award of 60,000 pesos is adequate.

7. As regards schedule E the Commission deem it in accordance with the principles of justice and equity that a part of the import duty, paid on the plant and machinery referred to in paragraph 2, be repaid, and they determine this part at 30,000 pesos.

8. The Commission decide that the Government of the United Mexican States is obligated to pay to the British Government on behalf of the Palmarejo and Mexican Gold Fields (Limited) 47,060 plus 275,000 plus 60,000 plus 30,000 = $412,060 (four hundred and twelve thousand and sixty pesos) Mexican gold or an equivalent amount in gold.

THE SANTA ISABEL CLAIMS (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 119, January 22, 1932. Pages 353-354.)

PROCEDURE, MOTION TO REOPEN CASE. It is discretionary with the tribunal whether to allow a motion to reopen the case after closing of pleadings. Motion *granted*, limited to the presentation of oral arguments by Agents on a question of evidence raised by the Presiding Commissioner and the relevance thereto of certain testimony desired to be presented by Mexican Agent.

SUBMISSION OF EVIDENCE AFTER CLOSE OF PLEADINGS. Tribunal will not hear new witnesses after close of pleadings but will take cognizance of new documents in which may be protocolized the evidence to be given by such witnesses.

1. The Mexican Agent refers to a question asked by the Chairman of the Commission in the meeting of the 3rd August, 1931, whether in any letters, notes or telegrams exchanged shortly after the events, there was any declaration by the Mexican Government in regard to the authorities at Chihuahua having warned Mr. Watson that it was not advisable that he should enter the region where the attack took place.

The Mexican Agent states that he has not found a declaration to that effect, but, that Messrs. Rafael Calderón, Jr., and Gonzalo N. Santos are able to give evidence on the subject and with respect to other points connected with it, and that they are ready to appear before the Commission.

The Agent requests the Commission to reopen the case, so that the testimony of Messrs. Calderón and Santos may be received.

2. The Commission, considering articles 28, 41 and 43 of the Rules of Procedure, are of opinion that they are not entitled to hear new witnesses after the pleadings were closed on the 3rd August, and that a reopening can only tend to hear again the Agents on any points they, the Commission, may deem necessary.

They have no objection against taking cognizance of a new document produced by the Mexican Agent, and in which may be protocolized the evidence to be given by Messrs. Calderón and Santos before a Mexican authority. Neither will they object to a discussion on this new evidence, as far as it relates to the question asked by the Chairman in the meeting of the 3rd August, 1931.

3. The Commission rule that the case is reopened in order that the Agents may present oral arguments which must be strictly confined to the document described in section 2, and which may not exceed the scope of the question asked by the Chairman in the meeting of the 3rd August, 1931.

VERACRUZ TELEPHONE CONSTRUCTION SYNDICATE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 120, January 22, 1932. Pages 354-355. See also decision No. 8.)

PROCEDURE, MOTION TO REOPEN CASE. Motion to reopen case *granted*, limited to presentation of oral arguments by Agents on new evidence submitted to the tribunal.

1. The Mexican Agent has placed at the disposal of the Commission the original record of the proceedings instituted by the claimant Company against the Government of Veracruz, which record the Chairman of the Commission had requested the Agents to file.

The Mexican Agent, wishing to comment upon this evidence, has requested to reopen the case.

2. The Commission rule that the case is reopened in order that the Agents may present oral arguments which must be strictly confined to the new evidence submitted to the Commission.

THE MEXICAN TRAMWAYS COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 121. January 22, 1932. Pages 355-356. See also decision No. 65.)

PROCEDURE. MOTION TO REOPEN CASE. Motion to reopen case to argue issue of lack of jurisdiction on two grounds, one of which had been debated between the Agents prior to the closing of pleadings, *granted*, limited to a discussion by the Agents of that one of the grounds for lack of jurisdiction which had been not theretofore pressed.

1. The Mexican Agent has filed a motion in which he requests that the Commission may see fit to declare themselves incompetent to take cognizance of the claim. He relies upon two grounds of incompetence, the *first* being his contention that the claimant Company has accepted a Calvo Clause, and the *second* that the acts complained of by the claimant Company were not revolutionary or military acts, but ordered by civil authorities.

He requests the Commission to reopen the case in order that he may be able to amplify orally his considerations.

2. The Commission observe that the second ground on which the Mexican Agent bases his argument, has been amply discussed between the two agents before the pleadings were closed. They cannot allow that a new discussion shall take place.

As regards the first ground, the Commission admit that it was not pressed when the case was discussed.

The Commission rule that the case is reopened in order that the Agents may present oral arguments which must be strictly confined to the effect of the existence of a Calvo Clause.

VERA CRUZ TELEPHONE CONSTRUCTION SYNDICATE (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 122, February 15, 1932. Pages 356-357. See also decisions No. 8 and No. 120.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

RUTH M. RAEBURN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 123, February 15, 1932. Pages 357-358. See also decision No. 38.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

AUGUSTINA PLATT HALL AND RICHARD J. C. WOON (THE SANTA ISABEL CLAIMS) (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 124, February 15, 1932. Pages 359-360.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

THE MEXICAN TRAMWAYS COMPANY (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 125, February 15, 1932. Pages 360-361. See also decision No. 65 and No. 121.)

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS. Direct settlement of claim by agreement between British and Mexican Agents approved by tribunal.

(Text of decision omitted.)

SARAH BRYANT, COUNTESS D'ETCHEGOYEN (GREAT BRITAIN) *v.* UNITED MEXICAN STATES

(Decision No. 126, August 6, 1932. Pages 361-362.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—FAILURE TO FURNISH CORROBORATING EVIDENCE CAUSED BY ACTS OF AGENCY OF RESPONDENT GOVERNMENT. British Agent sought to excuse failure to produce evidence corroborating that of claimant on ground he had not been able to obtain return of the relevant documents from the Mexican National Claims Commission. Claim *disallowed.*

RESPONSIBILITY FOR ACTS OF FORCES.—FAILURE TO PROTECT. Respondent Government *held* to have acted with due diligence. Claim *disallowed.*

1. This is a claim for compensation for the loss of a mule, jewellery and the effects taken by the revolutionaries of the Jimenez Brigade from the San Jeronimo Ranch at Tlalnepantla, D.F., during 1914-1915 in the months of May and January.

2. A claim was presented to the Mexican National Claims Commission on the 19th August, 1921, for the sum of 14,710.25 pesos. This claim, after consideration by the Commission, was rejected.

3. The British Government claim on behalf of Sarah Bryant, Countess d'Etchegoyen, the sum of 14,710.25 pesos.

4. The Mexican Agent filed a Motion to Dismiss the claim on the grounds that it was unsupported by evidence. To this Motion the British Agent replied that he had not been able to obtain the return of the relevant documents from the Mexican National Claims Commission.

5. The Commission, having examined the claim, find that, as regards that part which originated in 1914, there is no responsibility on the part of the Mexican Government since far from having acted negligently, the Government acted with due diligence. As regards the damages caused in 1915, in accordance with the principles laid down in previous decisions, the declaration of the claimant cannot be accepted unless corroborated and, as no corroboration has been presented, the Commission have decided to dismiss this claim.

6. The claim is disallowed.

PART II

FRENCH-MEXICAN CLAIMS COMMISSION

HISTORICAL NOTE

Article 7, paragraph 2, of the *compromis* which established the French-Mexican Claims Commission required all claims presented to the Commission to be decided within two years from the date of its first meeting. The first term of the Commission expired without any claims being argued or decided, though there was a meeting to formulate the rules of procedure. A supplementary convention of March 12, 1927, provided for an additional term of nine months from the date of the first meeting of the Commission subsequent to the ratification of this Convention and also made provision for an extension of this term for an additional period of nine months, to be effected by a simple exchange of notes between the two Governments. The Commission duly met, a number of cases were argued, and three awards were rendered. The term expired on December 26, 1928, and the exchange of notes necessary for a further extension of the term did not take place until April 17, 1929. Nevertheless, on March 5, 1929, the Presiding Commissioner and the French Commissioner rendered in Paris a decision (Decision No. 20 *infra*) reopening the proceedings in those cases which had previously been argued before the Commission. This order was made notwithstanding the absence of the Mexican Commissioner.

The next session of the tribunal was set for May 16, 1929, but on May 2, 1929, the Presiding Commissioner was requested by the Mexican Government to postpone this session. On May 7, 1929, the Mexican Government requested the French Government to arrange for the appointment of a new Presiding Commissioner, since it considered the appointment to that office to have lapsed on December 26, 1928, the date of the expiration of the first term under the Convention of March 12, 1927. The Commission, nevertheless, convened on June 3, 1929, and rendered two decisions, the first (Decision No. 21 *infra*) sustaining the authority of the Presiding Commissioner and the second (Decision No. 22 *infra*) closing the cases reopened by the decision of March 5, 1929 (Decision No. 20), and sustaining the jurisdiction of the tribunal to render awards in such cases despite the absence of the Mexican Commissioner. Awards were thereafter rendered by the two-member tribunal in twenty-three claims. Finally, on June 24, 1929, the Commission decided (Decision No. 23 *infra*) to suspend its proceedings until the tribunal could be regularly constituted with its full membership. On August 29, 1929, the Presiding Commissioner, M. Verzijl, presented his resignation to the French Government.

On August 2, 1930, a new convention was signed which provided for a two-member tribunal composed of a representative of each state, with an umpire to be appointed in case of disagreement. It is significant that among the claims submitted to this body for decision were the claims previously decided by the tribunal in the absence of the Mexican Commissioner. Only two of the awards of the previous Commission were accepted as final (*George Pinson* award, Decision No. 1. *infra*, and Bimar award, Decision No. 31 *infra*).

The Commission provided for under the Convention of August 2, 1930, held sessions during 1931 and completed its work without recourse to the appointment of an umpire.

Of the 251 claims originally filed with the French-Mexican Claims Commission, 143 claims were disposed of by the tribunal, the remainder being withdrawn. Awards favourable to claimants were granted in 93 claims in the total sum of 1,300,000 pesos. [1]

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[1] See generally in connexion with the foregoing, A. H. Feller, pp. 69-76; R.G.P.C. 1936, Pt. 2, pp. 10-13, 28-31; Carlston, The Process of International Arbitration (New York, 1946), sec. 13.

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Convention of August 2, 1930: State Papers, Vol. 132, 1930, Pt. 1, p. 766; R.G.P.C., 1936, Pt. 2, p. 16.

Other references: Memoria, 1925-1926, p. 47; Memoria, 1926-1927, p. 206; Memoria, 1927-1928, p. 527; Memoria, 1928-1929, Vol. 1, p. 655; Memoria, 1931-1932, p. 284, Appendix, p. 691.

Conventions

CONVENTION BETWEEN FRANCE AND THE UNITED MEXICAN STATES

Signed September 25, 1924. Ratifications exchanged December 29, 1924 [1]*:*

La République française et les Etats-Unis du Mexique, désireux de régler définitivement et d'une manière amicale toutes les réclamations pécuniaires provoquées par des pertes ou dommages subis par des Français ou des protégés français à raison d'actes révolutionnaires commis pendant la période comprise entre le 20 novembre 1910 et le 31 mai 1920 inclus, ont décidé de conclure une convention à cet effet et ont nommé pour leurs plénipotentiaires, savoir:

Le Président de la République française:

M. Jean-Baptiste Périer, envoyé extraordinaire et ministre plénipotentiaire de la République française au Mexique, officier de l'ordre national de la Légion d'honneur; et

Le Président des Etats-Unis du Mexique:

M. Alberto J. Pani, secrétaire d'Etat aux Finances;

Lesquels, après s'être communiqué leurs pleins pouvoirs trouvés en bonne et due forme, sont convenus des articles suivants:

Article premier

Toutes les réclamations définies à l'article 3 de la présente convention seront soumises à une commission de trois membres; un membre de cette commission sera nommé par le président de la République française; un autre membre sera nommé par le président des Etats-Unis du Mexique; le troisième membre, qui présidera la commission, sera désigné à la suite d'un accord entre les deux gouvernements. A défaut de cet accord, dans le délai de deux mois à compter de l'échange des ratifications, le président de la commission sera désigné par le président du Conseil administratif permanent de la Cour permanente d'arbitrage de La Haye; la requête aux fins de nomination du président de la commission sera adressée au président de ce conseil par les deux gouvernements dans un nouveau délai d'un mois ou, passé ce délai, par le gouvernement le plus diligent. En tout cas, le tiers arbitre ne pourra être ni français ni mexicain, non plus que national d'un pays qui ait à faire valoir, à l'encontre du Mexique, des réclamations identiques à celles qui forment l'objet de la présente convention.

En cas de décès d'un membre de la commission ainsi qu'au cas où un membre de la commission serait empêché, ou, pour une raison quelconque, s'abstiendrait de remplir ses fonctions, il serait remplacé immédiatement suivant la procédure employée pour pourvoir à sa nomination.

Article 2

Les commissaires ainsi désignés se réuniront à Mexico dans les six mois à compter de l'échange des ratifications de la présente convention. Chaque

[1] Source: L.N.T.S., Vol. 79, 1928, p. 418.

membre de la commission, avant de commencer ses travaux, fera et signera une déclaration solennelle par laquelle il s'engagera à examiner avec soin et à juger avec impartialité, d'après les principes de l'équité, toutes les réclamations présentées, attendu que le Mexique a la volonté de réparer gracieusement les dommages subis et non de voir sa responsabilité établie conformément aux principes généraux du droit international. Il suffira, par conséquent, de prouver que le dommage allégué a été subi et qu'il est dû à quelqu'une des causes énumérées à l'article 3 de la présente convention, pour que le Mexique se sente, *ex gratia*, décidé à indemniser.

Ladite déclaration sera enregistrée dans les procès-verbaux de la commission.

La commission fixera la date et le lieu de ses audiences.

Article 3

La commission connaîtra de toutes les réclamations contre le Mexique à raison des pertes ou dommages subis par des Français ou des protégés français, ou par des sociétés, compagnies, associations ou personnes morales françaises ou sous la protection française; ou des pertes ou dommages causés aux intérêts de Français ou de protégés français dans des sociétés, compagnies, associations ou autres groupements d'intérêts, pourvu que l'intérêt du lésé, dès avant l'époque du dommage ou de la perte, soit supérieur à 50 p. 100 du capital total de la société ou association dont il fait partie, et qu'en outre, ledit lésé présente à la commission une cession consentie à son profit, de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir ladite société ou association. Les pertes ou dommages dont il est question dans le présent article sont ceux qui ont été causés pendant la période comprise entre le 20 novembre 1910 et le 31 mai 1920 inclus, par quelqu'une des forces ci-après énumérées:

1. Par les forces d'un gouvernement *de jure* ou *de facto*.

2. Par les forces révolutionnaires qui, à la suite de leur triomphe, ont établi des gouvernements *de jure* ou *de facto*, ou par les forces révolutionnaires qui leur étaient opposées.

3. Par les forces provenant de la désagrégation de celles qui sont définies à l'alinéa précédent, jusqu'au moment où le gouvernement *de jure* aurait été établi à la suite d'une révolution déterminée.

4. Par les forces provenant de la dissolution de l'armée fédérale.

5. Du fait de mutineries ou de soulèvements, ou par des forces insurrectionnelles autres que celles indiquées aux alinéas 2, 3 et 4 ci-dessus, ou par des brigands, à condition que, dans chaque cas, il soit établi que les autorités compétentes ont omis de prendre des mesures raisonnables pour réprimer les insurrections, soulèvements, mutineries ou actes de brigandage dont il s'agit, ou pour en punir les auteurs, ou bien qu'il soit établi que lesdites autorités ont été en faute de quelque autre manière.

La commission connaîtra aussi des réclamations relatives aux pertes ou dommages dus aux actes des autorités civiles, à condition que ces actes aient leur cause dans des événements ou des troubles révolutionnaires survenus dans la période prévue ci-dessus et qu'ils aient été exécutés par quelqu'une des forces définies aux alinéas 1, 2 et 3 du présent article.

Article 4

La commission réglera sa procédure tout en se conformant aux dispositions de la présente convention.

Chaque gouvernement pourra nommer un agent et des conseils qui présente-

ront à la commission, oralement ou par écrit, les preuves et les arguments qu'ils jugeront bon d'invoquer à l'appui des réclamations ou contre elles.

La décision de la majorité des membres de la commission sera celle de la commission. A défaut de majorité la voix du président prévaudra.

La langue employée tant dans la procédure que dans les sentences sera le français ou l'espagnol.

Article 5

La commission tiendra un registre où seront enregistrés, en toute exactitude et à leur date respective, toutes les réclamations et les cas divers qui lui seront soumis, ainsi que les minutes des débats.

A cet effet, chaque gouvernement pourra désigner un secrétaire. Ces secrétaires dépendront de la commission et seront soumis à ses instructions.

Chaque gouvernement pourra aussi nommer et employer autant de secrétaires adjoints qu'il jugera convenable. La commission pourra, elle aussi, nommer et employer autant d'aides qu'elle jugera nécessaires en vue de mener à bien sa mission.

Article 6

Le Gouvernement du Mexique étant désireux d'arriver à un règlement équitable des réclamations définies à l'article 3 ci-dessus, et d'accorder aux intéressés une indemnité juste qui corresponde aux pertes et dommages subis, il est convenu que la commission ne devra écarter ou rejeter aucune réclamation pour le motif que les recours légaux n'auraient pas été épuisés avant présentation de ladite réclamation.

Lorsqu'il s'agira de fixer le montant des indemnités à accorder pour des dommages à des biens, il sera tenu compte de la valeur de ces biens, telle qu'elle aura été déclarée au fisc par les intéressés, sauf dans les cas que la commission estimera vraiment exceptionnels.

Le montant des indemnités pour des dommages aux personnes ne dépassera pas celui des indemnités les plus larges accordées en France dans des cas analogues.

Article 7

Toute réclamation devra être présentée à la commission dans le délai de neuf mois à partir du jour de la première réunion de la commission, à moins que, dans des cas exceptionnels, la majorité des membres de ladite commission ne juge satisfaisantes les raisons données pour justifier le retard. La période pendant laquelle ces réclamations exceptionnelles pourront être enregistrées sera de trois mois au plus, après l'expiration du délai normal.

La commission devra entendre, examiner et régler, dans le délai de deux ans à partir du jour de sa première réunion, toutes les réclamations qui lui auront été présentées.

Trois mois après le jour de la première réunion des membres de la commission et ensuite, tous les deux mois, la commission devra soumettre à chacun des gouvernements intéressés un rapport détaillé relatant les travaux accomplis et exposant, en outre, les réclamations présentées, celles qui auront été entendues et celles sur lesquelles il aura été statué.

La commission devra statuer sur toute réclamation qui lui sera présentée, dans les six mois, à compter de la clôture des débats relatifs à ladite réclamation.

Article 8

Les Hautes Parties contractantes conviennent de considérer comme définitive la décision de la commission sur chaque affaire réglée par elle et de donner plein effet auxdites décisions. Elles conviennent, aussi, de considérer le résul-

Article 8

tat des travaux de la commission comme un règlement complet, parfait et définitif de toutes les réclamations contre le Gouvernement du Mexique procédant de quelqu'une des causes énumérées à l'article 3 de la présente convention. Elles conviennent, en outre, qu'à partir de la fin des travaux de la commission, sera désormais considérée comme entièrement et irrévocablement réglée toute réclamation de cet ordre, qu'elle ait été ou non présentée à ladite commission, à condition, pour celles qui auraient été présentées à la commission, que cette dernière les ait examinées et ait statué sur elles.

Article 9

Les paiements seront faits en or ou en une monnaie équivalente et ils seront versés directement au Gouvernement français par le Gouvernement mexicain.

Article 10

Chaque gouvernement paiera les honoraires de son propre commissaire, ainsi que ceux du personnel qu'il lui aura adjoint.

Les dépenses de la commission et les honoraires du tiers arbitre seront supportés par moitié par chaque gouvernement.

Article 11

La présente convention est rédigée en français et en espagnol, étant entendu que le texte français fera foi en cas de divergence.

Article 12

Les Hautes Parties contractantes ratifieront la présente convention conformément à leur constitution respective. Les ratifications en seront échangées à Mexico le plus tôt que faire se pourra. Dès la date de cet échange, la convention entrera en vigueur.

En foi de quoi les plénipotentiaires susnommés ont signé la présente convention et y ont apposé leurs cachets.

Fait en double, à Mexico, le vingt-cinq septembre mil neuf cent vingt-quatre.

(L. S.) JEAN PÉRIER.
(L. S.) A. J. PANI.

CONVENTION BETWEEN FRANCE AND THE UNITED MEXICAN STATES SIGNED MARCH 12, 1927

Ratifications exchanged October 22, 1927 [1]

La République française et les Etats-Unis du Mexique, considérant que la commission créée en vertu de la Convention du 25 septembre 1924, n'a pas pu terminer ses travaux dans le délai fixé par ladite convention, sont tombés d'accord pour conclure la présente convention, et à cet effet, ont nommé comme plénipotentiaires:

Le Président de la République française:

Monsieur Jean-Baptiste Périer, envoyé extraordinaire et ministre plénipotentiaire de la République française au Mexique, officier de l'ordre national de la Légion d'honneur;

[1] Source: L.N.T.S., Vol. 79, 1928, p. 424.

Le Président des Etats-Unis du Mexique:

Monsieur Aaron Saenz, secrétaire d'Etat aux Relations extérieures;

Lesquels, après s'être communiqué leurs pleins pouvoirs trouvés en bonne et due forme, sont convenus des articles suivants:

Article premier

La Commission, en vertu de la présente convention, entendra, examinera et résoudra, dans le délai de neuf mois à compter de sa première réunion, les réclamations qui font l'objet de la Convention du 25 septembre 1924 et qui ont été présentées conformément à ladite convention. Si, dans ce délai, la Commission ne pouvait pas terminer ses travaux, ce délai serait prorogé pour une durée n'excédant pas neuf mois, par simple échange de notes entre les Hautes Parties contractantes. La commission devra tenir sa première séance dans les deux mois qui suivront la nomination du président de la commission.

Article II

Aussitôt après l'échange des ratifications, il sera procédé à la désignation du président de la commission. Si les Hautes Parties contractantes ne parviennent pas, dans un délai de quatre mois comptés du jour où auront été échangées lesdites ratifications, à le désigner d'un commun accord, ils prieront le président du Conseil administratif de la Cour permanente d'arbitrage de La Haye de faire lui-même ce choix. Les Hautes Parties contractantes se réservent le droit de remplacer les arbitres actuellement en fonctions en vertu de la Convention du 25 septembre 1924.

Article III

Les délais de procédure fixés par le Règlement du 23 mars 1925 seront suspendus le 14 mars 1927 et recommenceront à courir à partir de la date de la première réunion de la commission.

Article IV

Toutes les dispositions de la Convention du 25 septembre 1924 et du Règlement de procédure du 23 mars 1925 qui ne sont pas modifiées par les dispositions de la présente convention restent en vigueur.

Article V

La présente convention est rédigée en français et en espagnol.

Article VI

Les Hautes Parties contractantes ratifieront la présente convention conformément aux dispositions de leur constitution respective. L'échange des ratifications aura lieu à Mexico aussitôt que faire se pourra et, dès cet échange, la convention entrera en vigueur.

En foi de quoi les plénipotentiaires susnommés ont signé la présente convention et y ont apposé leurs cachets.

Fait en double à Mexico, le douze mars mil neuf cent vingt-sept.

(L. S.) JEAN PÉRIER.
(L. S.) AARON SAENZ.

CONVENTION BETWEEN FRANCE AND THE UNITED MEXICAN STATES SIGNED AUGUST 2, 1930

Ratifications exchanged February 6, 1931 [1]

La République française et les États-Unis du Mexique,

Considérant que les délais fixés par la convention du 25 septembre 1924 [2] et la convention additionnelle du 12 mars 1927 [3] n'ont pas été suffisants pour permettre à la commission mixte des réclamations, créée par ladite convention du 25 septembre 1924, de terminer ses travaux;

Considérant que le fonctionnement de cette commission a montré qu'il convenait d'exprimer plus clairement certaines dispositions desdites conventions, afin de préciser les termes suivant lesquels a dû et doit être fixée la responsabilité que le Gouvernement mexicain a assumée *ex gratia*, en vue d'indemniser les citoyens français ou les sociétés françaises pour pertes subies au cours de la révolution du 20 novembre 1910 au 31 mai 1920 inclus;

Considérant que dans ces conditions il est possible de simplifier la procédure et même la composition du tribunal arbitral;

Ont décidé de conclure une convention et ont désigné, à cet effet, comme plénipotentiaires:

[*Here follow the names.*]

Lesquels, après s'être communiqué leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des dispositions suivantes:

ART. 1er. Une commission arbitrale, composée de deux membres désignés, l'un par le Gouvernement français, l'autre par le Gouvernement mexicain, terminera l'étude de toutes les réclamations pour pertes ou dommages subis au Mexique par des citoyens français, des sociétés françaises et des intérêts français dans des sociétés mexicaines, et qui sont énumérées dans la liste annexée à la présente convention [4]. Cette liste comprend les réclamations qui ont été dûment présentées devant la commission mixte créée par la convention du 25 septembre 1924 et qui étaient encore en instance lors de la fin des travaux de cette commission.

2. La commission aura son siège à Mexico et se réunira dès l'échange des ratifications de la présente convention. Elle jugera les réclamations énumérées dans la liste annexée d'accord avec les principes de l'équité, à condition toutefois qu'il soit prouvé que le dommage ait été subi, qu'il soit dû à une des causes énumérées à l'article 3 ci-après, sans qu'il soit la conséquence d'un acte légitime, et en outre à condition que son montant soit prouvé.

3. La commission connaîtra de toutes les réclamations contenues dans la liste jointe, à raison des pertes ou dommages subis par des citoyens français ou par des sociétés, compagnies, associations ou personnes morales françaises, ou des pertes ou dommages causés aux intérêts de citoyens français dans des sociétés, compagnies, associations ou autres groupements d'intérêts, pourvu que l'intérêt du lésé, dès avant l'époque du dommage ou la perte, soit supérieur

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[1] Source: State Papers, Vol. 132, 1930, Pt. 1, p. 766.
[2] See p. 313 of this volume.
[3] See p. 316 of this volume.
[4] Text of annex omitted in this edition.

à 50 p. 100 du capital total de la société ou association dont il fait partie, et qu'en outre ledit lésé présente à la commission une cession, consentie à son profit, de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir ladite société ou association. Les pertes ou dommages dont il est question dans le présent article sont ceux qui ont été causés pendant la période comprise entre le 20 novembre 1910 et le 31 mai 1920 inclus, par quelqu'une des forces ci-après énumérées:

(1) Par les forces d'un Gouvernement *de jure* ou *de facto;*

(2) Par les forces révolutionnaires qui, à la suite de leur triomphe, ont établi des Gouvernements *de jure* ou *de facto;*

(3) Par les forces provenant de la dissolution de l'armée fédérale;

(4) Du fait de mutineries ou soulèvements des forces insurrectionnelles autres que celles qui sont indiquées aux alinéas (2) et (3) ci-dessus, ou par des brigands, à condition que, dans chaque cas, il soit établi que les autorités compétentes ont omis de prendre des mesures raisonnables pour réprimer les insurrections, soulèvements, mutineries ou actes de brigandage dont il s'agit, ou pour en punir les auteurs, ou bien qu'il soit établi que lesdites autorités ont été en faute de quelque autre manière.

La commission connaîtra aussi des réclamations relatives aux pertes ou dommages dus aux actes des autorités civiles, à condition que ces actes aient leur cause dans des événements ou des troubles révolutionnaires survenus dans la période ci-dessus prévue et qu'ils aient été exécutés par quelqu'une des forces définies aux alinéas (1) et (2) du présent article.

Parmi les réclamations pour lesquelles la commission sera compétente, ne sont pas comprises celles ayant pour origine des dommages causés par des forces de Victoriano Huerta ou par des actes de ce régime.

La commission ne sera pas compétente pour connaître des réclamations relatives à la circulation ou à l'acceptation, volontaire ou forcée, de papier monnaie.

4. La commission ou, le cas échéant, l'arbitre dont il sera question plus loin, aura la faculté de rejeter en totalité ou en partie toute réclamation énumérée dans la liste annexée qui ne serait pas de la compétence de la commission telle qu'elle est définie à l'article précédent.

5. Les dossiers des réclamations énumérées dans la liste annexée, avec tous les documents échangés jusqu'à présent, y compris les conclusions des deux parties quant au fond, qui existent dans les archives du secrétariat de la commission mixte créée par la convention du 25 septembre 1924, seront mis à la disposition des membres de la commission dès qu'elle sera constituée; elle devra les étudier et rendre ses sentences dans un délai de 9 mois à partir de l'échange des ratifications de la présente convention. Dans le cas où l'un des membres de la commission serait empêché de participer activement aux travaux, par suite de maladie, d'absence de la ville de Mexico ou de toute autre cause, un suppléant sera désigné immédiatement à la demande de l'autre membre de la commission, et le temps pendant lequel les travaux auront été par suite pratiquement interrompus ne sera pas compté dans le délai de 9 mois ci-dessus prévu.

6. Chaque membre de la commission aura le droit de solliciter comme preuve tout document relatif à la réclamation envisagée et existant dans les archives du Gouvernement français ou du Gouvernement mexicain, qui devront les produire en original ou en copie. Exceptionnellement, la commission poura solliciter et recevoir tout autre mode de preuve.

7. Les décisions rendues d'un commun accord par les deux membres de la commission seront définitives pour les deux Gouvernements. Si les deux commissaires n'ont pu se mettre d'accord sur une ou plusieurs réclamations, il sera procédé par les deux Gouvernements, d'un commun accord et à la demande de l'un ou de l'autre des commissaires, à la désignation d'un arbitre. Si les deux Gouvernements ne peuvent parvenir à un accord dans le délai d'un mois, il sera procédé de la façon suivante:

Chaque partie désignera un membre de la Cour permanente d'Arbitrage de La Haye, qui ne sera pas de sa nationalité, et les deux personnes ainsi désignées choisiront l'arbitre. Au cas où ces deux membres de la Cour permanente d'Arbitrage de La Haye n'arriveraient pas à se mettre d'accord sur le choix de l'arbitre, ce choix sera fait par le président du conseil d'administration de ladite Cour, à la demande des deux Gouvernements ou de celui qui sera le plus diligent.

L'arbitre ne pourra être ni Mexicain ni Français, non plus que national d'un pays qui ait à faire valoir, à l'encontre du Mexique, des réclamations semblables à celles visées à l'article 3 de la présente convention.

L'arbitre ainsi désigné recevra les dossiers des réclamations sur lesquelles les commissaires n'ont pu se mettre d'accord et devra rendre sa sentence dans un délai de 6 mois à partir de la réception du dossier.

L'arbitre siégera dans la ville de Mexico et, avec les commissaires, décidera sur chaque cas.

Les sentences rendues par l'arbitre seront définitives et obligatoires pour les deux Gouvernements.

8. Pour fixer le montant des indemnités à accorder pour des dommages à des biens, il sera tenu compte de la valeur des biens telle qu'elle aura été déclarée au fisc par l'intéressé, sauf dans les cas que la commission ou l'arbitre estimera vraiment exceptionnels.

Le montant des indemnités pour dommages aux personnes ne dépassera pas celui des indemnités les plus larges accordées en France dans des cas analogues.

9. La forme dans laquelle le Gouvernement mexicain payera les indemnités sera fixée par les deux Gouvernements, dès que les travaux de la commission seront terminés. Les payements seront effectués en or ou en monnaie équivalente et seront versés directement par le Gouvernement mexicain au Gouvernement français.

10. Chaque Gouvernement payera les honoraires de son commissaire ainsi que ceux du personnel qu'il lui aura adjoint. Les dépenses de la commission et les honoraires de l'arbitre seront supportés par moitié par chaque Gouvernement.

11. Les hautes parties contractantes conviennent de donner plein effet aux décisions rendues, tant par les commissaires à l'unanimité, que par l'arbitre. Elles conviennent également de considérer les décisions de la commission et de l'arbitre comme constituant, avec les décisions de la commission mixte créée par la convention du 25 septembre 1924, un règlement complet, parfait et définitif de toutes les réclamations contre le Gouvernement mexicain pour dommages subis durant la révolution du 20 novembre 1910 au 31 mai 1920. Elles conviennent, en outre, qu'à partir de la fin des travaux de la commission et de l'arbitre, sera considérée comme entièrement et irrévocablement réglée toute réclamation de cet ordre, qu'elle soit ou non inscrite sur la liste annexée, à condition que celles figurant sur cette liste aient été examinées et réglées par la commission ou l'arbitre.

12. Les hautes parties contractantes ratifieront la présente convention conformément à leur constitution respective. Les ratifications seront échangées à Mexico aussitôt que possible. La convention entrera en vigueur dès cet échange de ratifications.

En foi de quoi les plénipotentiaires susmentionnés ont signé la présente convention et y ont apposé leur cachet.

Fait en double original, en langues française et espagnole, qui font également foi, à Mexico, le 2 août 1930.

(L.S.) JEAN PÉRIER
(L.S.) GENARO ESTRADA

PARTIES: France, United Mexican States.

SPECIAL AGREEMENT: September 25, 1924, as extended March 12, 1927, and April 17, 1929.

ARBITRATORS: Rodrigo Octavio (Brazil), Presiding Commissioner, 1925-1927, Jan H. W. Verzijl (Netherlands), Presiding Commissioner, 1928-1929, E. Lagarde, French Commissioner, 1925-1928, Victor Ayguesparsse, French Commissioner, 1928-1929, Fernando González Roa, Mexican Commissioner, 1925-1929.

REPORT (Awards Nos. 1, 30A, 32 and 33): La réparation des dommages causés aux étrangers par des mouvements révolutionnaires — Jurisprudence de la commission franco-mexicaine des réclamations (1924-1932). (Paris, A. Pedone, 1933.) [1]

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[1] The texts of the other awards included in this volume have been reproduced from the R.G.C.P. and from photostatic copies received from the Library of the Peace Palace, The Hague.

Decisions

DECISION No. 4

(April 13, 1928.)

EXTENSION OF TIME-LIMITS TO DISCUSS CERTAIN PRELIMINARY OBJECTIONS.—NO PERMANENT MODIFICATION OF RULES OF PROCEDURE. Time-limits set by article 37 of the Rules of Procedure [1] are extended by the Commission in order to enable the French Agent to reply to objections raised by Mexico. The nature of these objections is not specified in the decision. The Commission states, however, that this decision does not constitute a permanent modification of article 37 of its Rules of Procedure.

(Text of decision omitted.)

GEORGES PINSON (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 6 of April 24, 1928.)

EVIDENCE.—WITNESSES TO BE EXAMINED BY AGENTS. The French Agent applied for the examination by the Commission of a number of witnesses. In the Commission's opinion, however, there is no necessity for the Commission to examine the witnesses since this may easily be done by the Agents themselves who had already agreed to do so. Consequently, the Agents are directed to examine the witnesses and to inform the Commission about the results thereof.

(Text of decision omitted.)

DECISION No. 9

(August 3, 1928.)

PROCEDURE.—ADMISSIBILITY OF CLAIMS.—HOMOLOGATION OF AGREEMENT BETWEEN THE PARTIES. The French Agent requested the Commission to admit twenty-nine claims. The Mexican Agent making no objection to this request, the Commission, in accordance with article 45 of its Rules of Procedure, [2] declares the claims admitted. The Commission's reasons, the decision says, will be disclosed later. [3]

(Text of decision omitted.)

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[1] For the text of article 37 see Feller, p. 438.

[2] For the text of article 45 see Feller, p. 439.

[3] In the decisions which were available for publication, no such disclosure can be found.

HÉLÈNE BIMAR (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 10 of August 8, 1928.)

EVIDENCE.—FIXING OF DATE FOR EXAMINATION OF WITNESSES BY COMMISSION.—SUBMISSION OF QUESTIONNAIRES BY AGENTS. At the French Agent's request, with which the Mexican Agent agreed, the Commission fixes the date for the examination of two witnesses. The Agents are requested to submit questionnaires for the examination.

(Text of decision omitted.)

BARTOLOMÉ TURIN (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 12 of August 20, 1928.)

EVIDENCE.—FIXING OF DATE FOR EXAMINATION OF WITNESSES BY COMMISSION.—SUBMISSION OF QUESTIONNAIRES. The Commission makes the same ruling as in Decision No. 10, except that in decision No. 12 no agreement of the Mexican Agent is mentioned.

(Text of decision omitted.)

THÉOPHILE GENDROP (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 14 of September 13, 1928.)

EVIDENCE.—FIXING OF DATE FOR EXAMINATION OF WITNESSES BY COMMISSION.—SUBMISSION OF QUESTIONNAIRES. See Decision No. 12, with the same reservation to be made in connexion with Decision No. 14.

(Text of decision omitted.)

CASIMIR MAURIN (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 15 of September 19, 1928.)

EVIDENCE.—FIXING OF DATE FOR EXAMINATION OF WITNESSES BY COMMISSION.—SUBMISSION OF QUESTIONNAIRES. See Decision No. 12, with the same reservation to be made in connexion with Decision No. 15.

(Text of decision omitted.)

GEORGES PINSON (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 1, October 19, 1928. Pages 1-155, including annexes.[1]*)*

PROCEDURE, POWER OF TRIBUNAL TO RENDER ADMINISTRATIVE DECISIONS. The tribunal has the power to render administrative decisions, laying down principles covering a number of similar cases, subject to its freedom in particular cases to reach a different result.

LITISPENDENCE.—RES JUDICATA.—REVISION.—EFFECT OF JUDGMENTS OF DOMESTIC CLAIMS BODY. It is erroneous to assert that decisions of the domestic Mexican National Claims Commission raise the issue of litispendence, since they do not involve the simultaneous functioning but rather the successive functioning of two bodies. The tribunal, being regulated by its own fundamental rules, is not bound by the decisions of the domestic claims commission. Such decisions are not to be considered as raising the issue of appeal but instead that of revision, that is, revision in no technical sense but only in the sense that the tribunal is called upon to examine *de novo* certain claims upon which a decision has already been rendered by an inferior jurisdiction. Decisions of the domestic claims commission upon questions of law will not be controlling upon the tribunal but decisions upon questions of fact, holding that the facts asserted by the claimant had in fact occurred, will be given great weight by the tribunal. If, nevertheless, the respondent Government should present evidence throwing doubt upon the decisions of the domestic commission, the tribunal reserves freedom of action in such case.

EFFECT OF DOMESTIC LEGISLATION GOVERNING CLAIMS. Since the tribunal is governed by the *compromis*, domestic legislation governing claims is of no force before the tribunal. If, however, the *compromis* is vague, resort may be had to the provisions of such legislation as an auxiliary means of interpretation. The tribunal may also consider such legislation when the *compromis* is silent.

EQUITY AS A BASIS FOR DECISION UNDER THE *Compromis*.—CALVO CLAUSE.—EXHAUSTION OF LOCAL REMEDIES. The role of equity under article II of the *compromis* is to render inapplicable the ordinary rules of international law governing the responsibility of a State for acts of forces and to substitute in their place the rules stipulated in the *compromis*. The reference to equity under article VI of the *compromis* renders inapplicable the ordinary rule of international law requiring the exhaustion of local remedies. Thus, the exception of the Calvo Clause may not be raised. Equity may be resorted to as a supplementary means of decision when positive rules of law are lacking or when the strict application of rules of law will, in an exceptional case, lead to evidently unjust results.

ROLE OF AGENTS. The agents will be considered as the official representatives of the parties, expressing their official points of view, rather than the personal opinions of such agents.

NATIONALITY, PROOF OF.—CONSULAR CERTIFICATE OF REGISTRATION AS PROOF OF NATIONALITY.—BIRTH CERTIFICATE AS PROOF OF NATIONALITY. A consular certificate of registration is not sufficient to establish the French nationality

[1] Except where otherwise indicated, references to page numbers are to the original report referred to on page 323.

of a claimant. Documents which will establish in a more direct manner such nationality, notably a birth certificate, are necessary for this purpose. However, a consular certificate, regularly issued, has sufficient probative force to constitute *prima facie* proof of nationality before the tribunal, so long as no evidence to the contrary is produced. A birth certificate may corroborate such certificate but it is not indispensable. An international tribunal has the power to determine for itself what documents and other means of proof will be sufficient to establish nationality.

DUAL NATIONALITY.—APPLICATION OF MEXICAN LAWS OF NATIONALITY. While the possession by a claimant of nationality of claimant and respondent Governments will bar his claim, the existence of such dual nationality *held* not here established. It appeared that claimant's father was born in France, emigrated to Mexico in 1864, had a son born there in 1872 and had the claimant born there as a son in 1875. Claimant's father died in 1884. When claimant reached his majority he was in the French military service in Algeria and he took no act there to reject Mexican nationality. After his military service he returned to Mexico, had a son born there in 1904. He returned to France in 1914 on the outbreak of the war and in 1915 the loss and damage complained of was suffered. The Mexican Constitution of 1857 provided that aliens who had Mexican sons were to be considered Mexican, unless they manifested the intention to conserve their nationality. It also provided that Mexican citizenship would be lost by reason of serving officially the Government of another State. A law of 1886 provided that sons born in Mexico of an alien father should be considered as Mexicans, unless within one year after reaching majority they should manifest their intention to retain the nationality of their parent before the political authority of the place of their residence. *Held*, the Constitution of 1857 was inapplicable to claimant's father, since it is to be considered as a benefit to be availed of by voluntary act of the aliens affected thereby rather than as having a mandatory effect. The law of 1886 was inapplicable to claimant since, upon reaching majority, he was engaged in French military service and thereby lost any colour of Mexican nationality he may have possessed.

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—ADMISSIBILITY OF EVIDENCE.—BURDEN OF PROOF. The tribunal may in its discretion determine what evidence may be admitted and the weight to be given it. *Prima facie* evidence *held* sufficient if no reason for doubting offered by respondent. Both parties have the obligation to make full disclosure of the facts in each case, so far as such facts are within their knowledge, or can reasonably be ascertained by them.

PROOF OF LOSS. Evidence *held* sufficient to establish damages, though not the extent to which particular forces were responsible for these.

RESPONSIBILITY FOR ACTS OF FORCES.—MEANING OF TERMS "REVOLUTIONARY FORCES" AND "REVOLUTION". While the term "revolution" does not in international practice possess an exact meaning, it may be said that "revolutionary forces" imply forces co-operating in a movement to overthrow an established Government. The responsibility of the respondent Government for such forces under the *compromis* is not to be determined, in accordance with the principles of international law, on the basis of whether the revolution was or was not successful, but in accordance with the terms of the *compromis* itself. In the light of decrees of the respondent Government itself, the *compromis* must be construed to cover the acts of rebel or insurrectionary forces.

EQUALITY OF TREATMENT OF NATIONALS AND ALIENS. A Government extending relief to its own nationals in the matter of allowance of claims must extend at least equally favourable treatment to aliens. Respondent government accordingly *held* responsible for acts of Zapatista as well as Constitutionalist forces.

DAMAGES.—PLACE OF EQUITY IN DETERMINATION OF DAMAGES.—PAYMENT *ex gratia*. The fact that the respondent Government agreed to be responsible *ex gratia* and beyond the limits established by international law does not lead to the result that damages must be reduced to the minimum. Equity may in some circumstances favour the victims of the revolution. Accordingly the tribunal should balance the equities on both sides.

EFFECT OF DOMESTIC LAW GOVERNING PAYMENTS. The Mexican law of payments *held* inapplicable except when the objects seized by forces either consist of, or are valued by the claimants themselves, in depreciated currency at the time of seizure.

ALLOWANCE OF INTEREST. The allowance of interest will be governed by the following rules: (i) interest will not be allowed in cases in which the responsibility of the respondent Government is based only on the terms of the *compromis* and not pursuant to international law, except that even in such cases interest will run, pursuant to an exchange of notes between the two Governments, after an award has remained unpaid beyond a reasonable time, (ii) in cases involving contract claims and forced loans, interest will run from the date when the claim was brought to the attention of the respondent Government, and (iii) in cases involving international delinquencies, interest will in principle run from the date of the award, though in order to avoid the inequity of chance, a date will be fixed for this purpose at the midpoint of the deliberations of the tribunal.

Cross-reference: Annual Digest, 1927—1928, pp. 9, *passim*.

APERÇU DES FAITS ET DU PROCÈS

1. — Par un mémorandum enregistré par le secrétariat sous le numéro 59 et suivi d'un mémoire déposé le 15 juin 1926, l'agent du Gouvernement français a présenté à la Commission une réclamation contre les Etats-Unis mexicains, pour cause de pertes et dommages subis par M. Georges Pinson, au mois de février 1915, dans la localité de Coyoacán, D. F.

D'après l'exposé qu'en donne le mémoire français, ladite réclamation se base sur l'ensemble de faits suivants.

Le 13 février 1915, quand M. Georges Pinson, à cette époque propriétaire de l'"Establo Higiénico", établi dans la calle de Aguayo à Coyoacán, D. F., se trouvait lui-même en Europe en service dans les armées françaises, ladite localité de Coyoacán fut occupée par des forces de l'"Ejército Libertador", dépendant du Général Emiliano Zapata. Bien que, d'abord, des officiers commandant lesdites forces aient voulu installer des mitrailleuses sur les toits de l'étable, qui, à cette époque, était exploitée par la femme du réclamant, ils changèrent d'avis et respectèrent la maison, sur les instances de Mme Pinson qui avait mis le drapeau français. Seules, furent prises à l'étable une quantité de lait et quelques autres denrées. Mais le lendemain, quand les troupes carrancistes prirent Coyoacán, elles accusèrent Mme Pinson d'être Zapatiste, sous prétexte que sa maison n'avait pas été pillée, saccagèrent complètement l'établissement et enlevèrent ou détruisirent un nombre d'animaux, de marchandises et de meubles.

Quelques mois plus tard, les dommages ont été notifiés officiellement au Secrétariat des Relations Extérieures par la Légation de France.

S'appuyant sur les événements relatés ci-dessus, M. Georges Pinson, après son retour au Mexique, a fait, le 31 janvier 1921, une réclamation devant la Commission nationale des réclamations qui, en date des 5/25 janvier 1924, a rendu un "dictamen" en partie défavorable. Le réclamant ayant demandé une somme de $7.550, la Commission nationale ne lui adjugea qu'une somme de $2.082,50, pour le motif, d'une part, que les dommages causés par les forces zapatistes, et évalués à la moitié du montant total, ne rentraient pas dans l'énumération légale, et d'autre part que les indemnités réclamées semblaient exagérées.

Dans son mémoire déposé le 15 juin 1926, l'agent du Gouvernement français s'est borné à demander à la Commission franco-mexicaine de fixer l'indemnité pour les dommages et pertes subis par le réclamant à la somme de $7.500, plus intérêts de cette somme, à 6 %, à dater du 16 juin 1915, date de la notification du dommage par la Légation de France au Secrétariat des Relations Extérieures, mais à la suite du contre-mémoire de l'agent mexicain, en date du 18 août 1926, il a amplifié ses conclusions le 9 décembre 1926, en priant la Commission de vouloir préalablement déclarer prouvées la nationalité française du réclamant, la matérialité des dommages subis et l'imputabilité desdits dommages à l'une des forces visées à l'article III de la Convention des réclamations, étant donné que, contrairement au "dictamen" de la Commission nationale, l'agent mexicain n'admettait pas comme prouvés ces trois points. Enfin, dans sa réplique en date du 12 janvier 1927, l'agent français a de nouveau amplifié ses conclusions, en les répartissant en trois groupes intitulés: "conclusions sur les objets de l'instance en appel", "conclusions subsidiaires sur le cas Pinson" et "conclusions d'ordre général", et en élaborant ainsi un système d'argumentation qui surpasse de beaucoup les intérêts de la réclamation d'espèce.

En effet, l'agent français a formulé les conclusions définitives suivantes:

A. — *Conclusions sur les objets de l'instance en appel*

1. Déclarer que les forces qui ont commis les dommages rentrent toutes dans l'énumération de l'article III (alinéa 2) et que, le fait même des dommages ayant été antérieurement prouvé, la qualité des auteurs des dommages donne droit à indemnité;

2. — Déclarer justifiée la somme de $7.500 (sept mille cinq cents pesos) demandée et déclarer juste et équitable l'allocation des intérêts à 6 % de cette somme, à dater du 16 juin 1915.

B. — *Conclusions subsidiaires sur le cas Pinson*

Au cas où la Commission estimerait qu'elle doive se prononcer également sur la nationalité de M. Pinson et sur la matérialité des dommages, malgré que ces questions aient été résolues affirmativement par la Commission nationale:

1. Déclarer subsidiairement que la nationalité française de M. Pinson est prouvée;

2. Déclarer subsidiairement: que les dommages ont été réellement subis.

C. — *Conclusions d'ordre général*

a) Déclarer en outre, à titre de décisions générales susceptibles d'être appliquées *mutatis mutandis*, lors de l'examen d'autres réclamations:

1. Qu'aucune exception de litispendance n'est recevable, ni pour des réclamations portant sur le même objet et déjà décidées par la Commission nationale, ni pour des instances encore pendantes devant la Commission nationale,

étant bien entendu, toutefois, que l'agent du Gouvernement français est disposé à retirer de la Commission nationale les réclamations encore pendantes devant elle, à condition que, préalablement à ce retrait, la Commission franco-mexicaine ait, après avoir rejeté les exceptions préalables, décidé d'examiner le fond de chaque réclamation;

2. Que l'examen par la Commission franco-mexicaine des instances, ayant déjà fait l'objet d'une décision de la Commission nationale, et considérées par suite comme des instances en appel, ne portera que sur les points faisant l'objet de la demande, considérant comme acquis ceux du "dictamen" de la Commission nationale qui n'auront pas été objectés;

3. Que le certificat d'immatriculation ainsi que le passeport feront entièrement preuve, au même titre que la copie de l'acte de naissance, de la nationalité française:

4. Que la Commission acceptera toutes preuves qui à son avis seront humainement suffisantes pour entraîner sa conviction, que ces preuves soient ou non prévues dans les lois de procédure mexicaines, que ces preuves soient ou non rédigées conformément aux règles de forme et de fond desdites lois, et même si ces documents ne font pas preuve aux termes de ces lois;

5. Que les principes de la législation mexicaine touchant la qualification des auteurs des dommages qui sont contenus dans l'article III modifié de la loi mexicaine sur les réclamations, ainsi que d'une manière plus générale dans le Décret de Monclova, principes qui sont appliqués par la Commission nationale seront considérés par la Commission franco-mexicaine comme des directions générales, sous réserve bien entendu de l'examen de chaque cas particulier;

6. Qu'est approuvé en principe la désignation de deux experts, sur la proposition de chacun des Agents des deux Gouvernements, et qui seront chargés, sous la direction desdits Agents, d'établir des listes de prix des différents biens ayant fait l'objet de dommages; ordonner ensuite auxdits Agents de proposer sans délai des noms à l'agrément de la Commission, ainsi qu'un programme des travaux desdits experts, afin que ceux-ci puissent commencer sans retard;

7. Qu'il est juste et équitable d'allouer des intérêts calculés à 6 % sur l'indemnité reconnue à dater du jour où le Gouvernement mexicain a été dûment informé des dommages subis, sauf toutefois, dans les cas de dommages aux personnes;

b) Etablir une limitation des débats oraux dans chaque affaire, afin de hâter les travaux de la Commission.

Les discussions orales ont absorbé environ quatre semaines. Commencées le 10 avril, elles se sont prolongées d'abord jusqu'au 30 avril inclusivement et ensuite, après la présentation d'un document nouveau dans la séance du 21 mai, reprises le 23 mai, pour être continuées jusqu'au 30 mai, date à laquelle la Commission a pu déclarer les débats clos, conformément à l'article 39 (entre temps modifié) du Règlement de procédure.

2. — Attendu que les débats oraux qui se sont déroulés à propos de la présente réclamation se sont étendus sur différentes questions d'ordre général qui présentent un intérêt fondamental non seulement pour le litige actuel, mais encore pour bon nombre d'autres, il est indispensable de les examiner dans cette première sentence et de les approfondir autant que l'exige l'application exacte de la Convention des Réclamations franco-mexicaine.

Ainsi qu'il résulte du résumé de la réclamation donné ci-dessus, les questions concrètes sur lesquelles les discussions écrites et orales ont porté se rapportent successivement aux points suivants:

a) La nationalité française-mexicaine ou en même temps française et mexicaine du réclamant et, par conséquent, la recevabilité de sa réclamation devant la Commission franco-mexicaine. Dans la présente affaire l'agence mexicaine s'est abstenue de proposer cette exception ou fin de non-recevoir par voie de déclinatoire, ainsi qu'elle eût pu le faire sur la base des articles 18 et 19 du Règlement de procédure, et a préféré entrer en même temps dans la discussion au fond:

b) La suffisance ou l'insuffisance des preuves produites relativement à la matérialité des faits prétendus avoir causé les dommages, ainsi qu'aux auteurs réels des dommages. C'est sur ce point de fait que porte le document nouveau présenté à la Commission dans l'audience du 21 mai 1928, à la suite d'une nouvelle audition de témoins effectuée par les deux agences de commun accord, conformément au désir exprimé par la Commission;

c) La classification des auteurs des dommages dans un des groupes énumérés à l'article III de la Convention;

d) Le montant des dommages subis par le réclamant et le bien-fondé de la demande en intérêts en plus dudit montant [1].

Cependant, pour mieux appuyer ses thèses relatives à ces questions concrètes, l'agence française a cru devoir invoquer certaines considérations d'ordre général et fondamental — considérations que, d'ailleurs, l'agence mexicaine a déclinées avec autant de force — et qui peuvent être résumées dans les trois points suivants:

1. Quel est le caractère de la Commission franco-mexicaine: est-elle appelée à faire fonction d'un tribunal d'appel des "dictámenes" de la Commission nationale des réclamations, comme le prétend l'agence française, ou n'est-elle qu'un tribunal de première et unique instance, ainsi que le soutient l'agence mexicaine? Et quelles sont les conséquences juridiques de l'une et de l'autre thèse?

2. Quand bien même la Commission franco-mexicaine ne saurait être reconnue comme un tribunal d'appel dans le sens strict du mot, notamment dans le sens de la législation mexicaine, la législation spéciale du Mexique en matière de réclamations pour cause de dommages révolutionnaires n'a-t-elle pas pourtant pour la Commission un intérêt particulier?

3. Quel est le rôle que l'équité doit jouer dans les sentences de la Commission? Et quels sont les rapports qui existent entre la convention des réclamations et le droit international commun?

Outre ces questions générales, la Commission a pu constater que les deux agences sont encore divisées sur le point de savoir si la Commission a, ou non, compétence pour rendre des sentences de portée générale, dites "administratives".

Admissibilité de décisions de caractère général

3. — Pour commencer par ce dernier point, plutôt de procédure que de fond, j'estime que la Commission est, sans aucun doute, compétente pour

[1] Quant à la question de la litispendance mentionnée sub C, *a*), 1, des conclusions définitives de l'agent français, il a été convenu de ne pas la traiter dans l'affaire actuelle où elle ne joue pas.

Au cours des audiences, l'agent français a déclaré ne plus insister davantage sur sa conclusion sub C, *a*), 6, tendant à la désignation de deux experts aux fins d'établissement de listes générales de prix.

En ce qui concerne la force probante des certificats d'immatriculation (conclusion sub C, *a*), 3), cpr. ci-après, § 14 et ss., et quant aux preuves admissibles (conclusion sub C, *a*), 4), ci-après § 43 et ss.

rendre des décisions de caractère général, destinées à couvrir une série de cas analogues.

A l'encontre de cette thèse, l'agence mexicaine a invoqué un argument d'ordre juridique et un autre, d'ordre pratique. Selon elle, l'admissibilité de pareilles décisions doit être niée, d'abord, parce que le Règlement de procédure s'y opposerait et ensuite, parce que la pratique des sentences dites "administratives" comporterait des inconvénients trop sérieux.

L'argument juridique ne peut être retenu. Il ne s'appuie que sur le texte de l'article 3 du Règlement disant que: "Chaque réclamation constituera une cause distincte et sera enregistrée comme telle". Cet article n'étant qu'une prescription d'ordre et étant lui-même contrebalancé par l'article 20 du même Règlement disant que: "La Commission pourra toujours ordonner la jonction (ou la séparation) de plusieurs réclamations", n'a nullement la portée que veut lui attribuer l'agence mexicaine et ne limite en rien la compétence de la Commission de juger de la façon qu'elle croira la meilleure, les affaires soumises à son jugement. Si elle estime que la méthode des décisions de caractère général est opportune, elle est parfaitement en droit d'adopter cette méthode; aussi, la Commission se réserve-t-elle toute liberté à cet égard. Le fait invoqué par l'agence mexicaine que ni la Convention, ni le Règlement de procédure ne donnent à la Commission, en termes exprès compétence pour édicter des décisions de caractère général "administratif", n'est pas de nature à ébranler la conviction de la Commission, car il n'est pas nécessaire que la Convention lui attribue cette faculté en termes exprès, pour que la Commission soit autorisée à formuler dans des décisions générales certaines thèses qu'elle croit devoir admettre comme bases d'application de la Convention à toutes les affaires analogues qui lui ont été présentées. Le fameux exemple de la Commission mixte appelée à liquider les réclamations pendantes entre les Etats-Unis d'Amérique et la République Allemande après la grande guerre et qui a appliqué dans une large mesure la méthode des "décisions administratives", n'est qu'une des preuves du fait que la pratique arbitrale ne s'oppose nullement à de pareilles décisions.

L'argument d'ordre pratique ne saurait naturellement infirmer cette conclusion juridique. Si la Commission est, toutefois, unanime pour ne pas édicter pour le moment de dispositions de caractère général, c'est que d'une part, elle est convaincue, avec l'agence mexicaine, des inconvénients que peuvent entraîner ces dispositions, inconvénients, qui, d'ailleurs n'ont pas davantage échappé à l'agence française, et que, d'autre part, le but à poursuivre moyennant de pareilles décisions générales peut très bien être atteint par une autre voie qui, elle, ne présente pas les mêmes inconvénients.

Car si l'on adoptait la méthode des décisions de caractère général, les dispositifs de pareilles décisions seraient revêtus de la force de la chose jugée et pourraient former de sérieux obstacles pour la Commission elle-même, dans les cas où elle désirerait, au cours de ses travaux, en modifier la teneur un peu trop absolue ou les termes peu appropriés à des situations particulières qui pourraient se présenter.

C'est pourquoi la Commission préfère, non pas éviter des décisions de caractère général qui puissent servir de gouvernes aux agences et de précédents pour l'appréciation juridique d'autres réclamations, mais les rendre dans une forme plus souple qui lui permette de les adapter, en cas de besoin, aux conditions particulières de cas postérieurs, non prévues au début. Ce but serait de nouveau manqué si la Commission insérait ses décisions générales dans les dispositifs de ses sentences relatives aux réclamations particulières, car alors ces décisions auraient également part à la force de la chose jugée, conformément au principe de droit arbitral sanctionné par l'article 84 de la première Convention de La

Haye de 1907, pour le règlement pacifique des conflits internationaux. Elle se bornera donc à formuler ses opinions de portée générale sur les différentes questions de principe qui se sont posées, dans les motifs de ses sentences consécutives, afin que, d'une part, les agences y trouvent les gouvernes que la Commission suivra dans les affaires postérieures, mais que, d'autre part, cette dernière se réserve la liberté de s'en départir dans des cas particuliers qui méritent une solution différente. De cette façon, l'agence française, conformément à son désir, trouvera dans les sentences les éléments d'appréciation juridique que la Commission ne désavouera qu'en des cas exceptionnels qui pourraient se présenter dans la suite, sans qu'il en résulte les difficultés que l'agence mexicaine redoute, comme conséquence de décisions générales.

Caractère de la Commission franco-mexicaine

4. — Les deux agences ont, au cours des discussions écrites et orales, fait de grands efforts pour démontrer, l'agence française, que la Commission franco-mexicaine, est un tribunal d'appel, destiné à juger du bien-fondé des "dictámenes" de la Commission nationale des réclamations, et l'agence mexicaine, qu'il n'existe aucun lien juridique entre les deux commissions. Dans sa forme primitive, absolue, aucune de ces deux thèses diamétralement opposées n'a été maintenue au cours des débats, l'agence française ayant concédé qu'il n'était peut-être pas exact de parler d'une instance d'appel dans le sens strict du mot, et l'agence mexicaine ayant admis qu'il n'était pas possible de nier tous rapports entre les deux commissions. Tout de même, les points de vue des deux agences ne se sont approchés que fort peu et elles n'ont pas trouvé le moyen de concilier leurs thèses opposées dans une thèse intermédiaire commune. La divergence d'opinions se rapporte tant à la genèse de la Convention des réclamations et aux conclusions qui s'en dégagent relativement aux intentions des Hautes Parties Contractantes, qu'aux conséquences juridiques qui, pour le jugement des réclamations, découlent du fait de l'existence simultanée des deux commissions. Naturellement, c'est ce dernier aspect de la controverse où se concentre son véritable intérêt, le premier ne servant qu'à appuyer les thèses relatives au dernier.

La solution de cette question de grande importance pratique n'a pas été facilitée par le fait que mon honorable collègue mexicain a cru devoir soutenir une thèse qui est absolument contraire tant à la thèse de l'agence française qu'à celle de l'agence mexicaine, et qui fait apparaître la question sous un jour tout nouveau. Bien que, personnellement, je ne sois, pas plus que les deux agences et mon collègue français, en mesure d'admettre la bien-fondé de la thèse à laquelle je fais allusion, l'importance de la controverse est telle que je ne veux pas la passer ici sous silence, d'autant moins qu'elle a fait l'objet de discussions au cours des audiences.

Selon mon honorable collègue mexicain, le rôle de notre Commission se bornerait à examiner les "dictámenes" de la Commission nationale au seul point de vue du "déni de justice", c'est-à-dire: à son avis, ces "dictámenes" doivent être respectés par la Commission franco-mexicaine dans tous les cas où ils ne sauraient, à bon droit, être accusés d'un des vices quelconques qu'une longue pratique internationale a coutume d'indiquer par le terme collectif de "déni de justice". Cette thèse implique d'une part, que l'agence mexicaine ne serait pas qualifiée pour attaquer les "dictámenes" de la Commission nationale portés devant la Commission franco-mexicaine, par le motif que lesdits "dictáménes" seraient indûment favorables aux réclamants, soit au point de vue du fait, soit à celui du droit, et d'autre part, que notre Commission n'en pourrait décider la réforme en faveur du réclamant, toutes les fois qu'elle ne saurait

constater un déni de justice. Evidemment, cette théorie se base sur la thèse double, selon laquelle:

1. les "dictámenes" de la Commission nationale sont de véritables sentences judiciaires qui méritent le même respect de la part des autres Etats et des tribunaux internationaux dont jouissent, d'après le droit international, les arrêts des tribunaux de justice ordinaire, et

2. la Convention des réclamations n'a d'autre but que de revêtir notre Commission de la seule et même faculté dont tant de tribunaux arbitraux ont été revêtus après la renaissance de l'arbitrage international en 1794, à savoir de juger le bien-fondé d'inculpation de délits internationaux dont un Etat se serait rendu coupable envers un autre Etat par le fait de sentences illégales de ses tribunaux ou par d'autres faits semblables.

En ce qui concerne la théorie de mon honorable collègue mexicain et la double thèse sur laquelle elle se base, je me borne à faire les observations suivantes, pour indiquer la raison pour laquelle je ne saurais en aucun cas m'y associer.

Je crois pouvoir me passer de l'appréciation du caractère juridique des "dictámenes" de la Commission nationale des réclamations. Le Gouvernement mexicain, au cours de sa défense devant notre Commission, leur a formellement et à plusieurs reprises dénié le caractère de véritables sentences judiciaires. Peu importe que cette attitude négative se base sur ce que lesdits "dictámenes" n'ont, par eux seuls, aucun caractère définitif, étant toujours sujets à l'approbation ou désapprobation du Président de la Fédération, ou bien qu'elle s'explique par le fait qu'à la lueur du droit constitutionnel mexicain et du principe de la séparation des pouvoirs, l'existence légale d'un tribunal spécial dans le genre de la Commission nationale est douteuse, de sorte qu'après tout, elle ne saurait être reconnue que comme une instance administrative, ou enfin qu'elle soit repoussée par de seules raisons d'opportunité, s'appuyant sur l'espoir de pouvoir repousser plus de réclamations françaises moyennant la thèse soutenue par l'agence mexicaine qu'au moyen de la thèse défendue par mon honorable collègue mexicain. Peu importe également que la thèse qui assimile les "dictámenes" de la Commission nationale à de véritables sentences judiciaires, soit exacte ou non. Car, quand même cette thèse serait correcte, elle ne saurait influer sur l'attitude négative que, en tout état de cause, je crois devoir observer vis-à-vis de la seconde partie de la thèse de mon honorable collègue mexicain. La Convention franco-mexicaine n'a nullement pour but de charger notre Commission de la seule tâche d'examiner les "dictámenes" au point de vue de l'existence éventuelle d'un déni de justice, mais elle a l'intention claire et, à mon avis, incontestable de faire réviser les affaires par un tribunal international sous tous leurs aspects, construction de la convention qui ne préjuge en rien la question ultérieure de savoir dans quelles conditions doit s'effectuer cette révision et jusqu'à quel point l'existence d'une instance nationale et de "dictámenes" de cette instance doit influer sur le jugement des réclamations dans l'instance internationale de révision.

Il faut donc, à mon avis, localiser les différences d'opinion dans les limites que les deux Gouvernements eux-mêmes ont tracées aux discussions. Il s'agit, par conséquent, de déterminer laquelle des deux thèses opposées est correcte et, éventuellement, si le bien-fondé d'aucune d'elles ne pouvait être retenu, quelle doit être la solution de la question si controversée.

Or, en examinant les arguments apportés des deux côtés, j'en suis arrivé à la ferme conviction que ni le point de vue français, ni le point de vue mexicain n'est acceptable. Le dernier ne saurait être admis, par le motif qu'il est absolument impossible de détruire par des arguments, si subtils soient-ils, la connexité

historique et juridique qui lie la Commission franco-mexicaine, d'une part, aux commissions d'appel prévues par le décret de Monclova et les lois et décrets subséquents, et d'autre part, à la Commission nationale. Inversement, le premier est inadmissible, par le motif qu'il pèche par l'excès de conclusions juridiques qu'il prétend tirer de la connexité historique et juridique que je viens d'affirmer.

5. — Examinons d'abord, afin d'appuyer ces conclusions par des arguments assez solides pour détruire en même temps les thèses des deux agences opposées, le point de la connexité historique et juridique qui doit être reconnue exister entre la Commission franco-mexicaine et les commissions d'appel prévues par le décret de Monclova et les lois et décrets postérieurs en matière de réclamations d'indemnités pour cause de dommages révolutionnaires, d'une part, la Commission nationale des réclamations, de l'autre.

Les deux agences ayant attaché une importance particulière à une question surtout historique, il me faut bien entrer dans quelques détails.

La Convention des réclamations du 25 septembre 1924, sur laquelle se fondent les attributions de la Commission franco-mexicaine, a trouvé son origine dans l'invitation que, en exécution des instructions qu'il avait reçues de son Gouvernement, le Chargé d'Affaires du Mexique à Paris, M. Rodolfo Nervo, a adressée, le 15 juillet 1921, au Ministère des Affaires étrangères de la République française. Les instructions que le représentant diplomatique du Mexique à Paris avait reçues correspondaient, d'ailleurs, parfaitement, aux instructions que le Gouvernement de Mexico avait données en même temps et par une circulaire télégraphique de la même teneur, en date du 12 juillet 1921, à son ambassade à Washington et à ses légations à Madrid, Rome, Berlin, Christiania, Stockholm, Copenhague, Vienne, Londres, La Havane, Tokio, Pékin et Bruxelles.

Dans l'invitation susmentionnée, reproduisant fidèlement les termes de la circulaire télégraphique de Mexico, le Chargé d'Affaires, après avoir exprimé le désir de son Gouvernement de "entrar en arreglos con los Gobiernos extranjeros, a fin de indemnizar aquellos de los nacionales de éstos que hayan sufrido daños por causa de las revoluciones acaecidas en México desde 1910 hasta la fecha", continue dans les termes suivants:

"Con el propósito indicado, el Señor Presidente de la República, *fundándose en el artículo quinto del decreto de diez de mayo de 1913 dado en la ciudad de Monclova por el Primer Jefe del Ejército Constitucionalista, Don Venustiano Carranza, y en el artículo trece, reformado, de la ley de 24 de noviembre de 1917, que creó la Comisión de Reclamaciones*, ha tenido a bien acordar que la Secretaría de Relaciones Exteriores invite atentamente a los Gobiernos de cada uno de los países cuyos nacionales hayan sufrido daños por la revolución, para que de común acuerdo se proceda al establecimiento de comisiones mixtas permanentes que respectivamente conozcan de las reclamaciones de sus nacionales, *ya sea por que estos hayan quedado inconformes con las resoluciones de la Comisión de Reclamaciones creada por el referido decreto de 24 de noviembre de 1917, o bien porque prefieren que la Comisión Mixta Permanente respectiva se avoque el conocimiento de sus reclamaciones desde un principio*" (Italiques appliquées par l'auteur de la sentence).

Jointe à son invitation officielle, M. Nervo transmit en même temps au Gouvernement de Paris copie de l'article 5 du décret de Monclova, dont voici la teneur:

"Al mismo tiempo que se nombre la Comisión que menciona el artículo que antecede [1], el Primer Jefe del Ejército Constitucionalista, de acuerdo con el

[1] Dont voici le texte (Art. 4): "Luego que el Primer Jefe del Ejército Constitucionalista, al llegar a la capital de la República y de acuerdo con el Plan de Guadalupe, asuma el Poder Ejecutivo, nombrará una Comisión de ciudadanos

representante diplomático o especial que comisione cada Gobierno a que pertenezcan los damnificados extranjeros, procederá a nombrar una comisión mixta integrada por igual número de mexicanos y extranjeros, pertenecientes estos últimos a la nacionalidad de los reclamantes, para que se encargue de recibir, consultar y liquidar las reclamaciones que se presentaren, de acuerdo con lo dispuesto por los tres primeros artículos de este decreto" [1].

L'autre article cité dans l'invitation de M. Nervo, mais qu'il paraît n'avoir pas transmis en copie au Gouvernement français, à savoir l'article 13 de la loi du 24 novembre 1917, tel qu'il était modifié par la loi du 30 août 1919, est conçu dans les termes suivants:

"Los reclamantes extranjeros que, habiendo comprobado su calidad, no estuvieren conformes con el dictamen resolutivo de la Comisión, podrán presentar sus observaciones ya directamente a esta Comisión, ya por los conductos diplomáticos."

Il convient de faire remarquer tout de suite qu'en citant l'article 13, réformé, de la loi du 24 novembre 1917, la circulaire télégraphique du 12 juillet et l'invitation du 15 juillet 1921 citaient une disposition de peu d'importance, qui n'avait guère de connexité avec l'invitation et dont, vraisemblablement pour cette raison même, le Chargé d'Affaires n'a pas cru devoir remettre copie au Gouvernement français.

C'est pourquoi j'incline à penser qu'en citant "el artículo trece, reformado de la ley de 24 de noviembre de 1917", la circulaire de Mexico n'a pas eu en vue l'article 13 de la loi de 1917, tel qu'il fut modifié par l'article 11 de la loi de 1919, mais plutôt l'article 13 de la loi de 1919 qui, sous ce numéro, était venu remplacer l'article 15 primitif de la loi de 1917.

Cette supposition s'expliquerait par le fait que l'article 13 de 1919 (article 15, modifié, de 1917) est précisément l'article et le seul article qui mentionne les "Comisiones Mixtas permanentes" dont il est également question dans la circulaire télégraphique. En effet, cet autre "article 13, modifié" dit que:

"Las comisiones arbitrales de que habla el artículo anterior conocerán exclusivamente del caso para que hayan sido nombradas, salvo que el Ejecutivo hubiere celebrado convenios internacionales para la formación de Comisiones mixtas permanentes que conozcan de todas las reclamaciones de los nacionales de un mismo país. Las Comisiones arbitrales decidirán por mayoría de votos y sus resoluciones tendrán el carácter de definitivas."

Naturellement, l'invitation cordiale reçue, le Gouvernement français s'est appliqué à en approfondir la portée exacte. Voyant cité un article qui ne lui était pas communiqué textuellement, à côté d'un article dont copie était jointe à la lettre d'invitation, le Gouvernement de Paris a, tout naturellement, cherché à se procurer le texte de l'article manquant, ainsi que de l'ensemble des textes législatifs dont la lettre d'invitation ne citait que quelques dispositions isolées. Ayant trouvé les textes dont il avait besoin, il les a étudiés, ainsi qu'il appert de sa réponse à M. Nervo en date du 27 juillet 1921, et à la suite de sa lecture des documents, il doit avoir été frappé par une série de questions douteuses. Pour ne citer qu'une seule des raisons sérieuses de doute, qui ne

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mexicanos que se encargue de recibir, consultar y liquidar el importe de las reclamaciones que por daños sufridos en los períodos que fijanlos artículos 1. y 2. de este decreto, fueron presentadas".

[1] Les articles 1er, 2 et 3 se rapportent successivement aux dommages subis ou encore à subir: par les nationaux et les étrangers, durant les périodes comprises entre le 21 novembre 1910 et le 31 mai 1911 (art. 1er.), respectivement entre le 19 février 1913 et le rétablissement de l'ordre constitutionnel (art. 2), et par les seuls étrangers durant la période comprise entre le 31 mai 1911 et le 19 février 1913 (art. 3. Cpr. l'annexe II, sub A, de la présente sentence).

peut pas n'avoir pas attiré l'attention du Gouvernement de Paris, j'allègue le fait curieux et non sans intérêt réel, que les deux documents invoqués simultanément par le Gouvernement mexicain comme bases de son invitation, à savoir ceux de 1913 et de 1917, réformé, réglaient d'une façon tout à fait différente la composition des commissions arbitrales que l'on venait offrir à la France. En effet, contrairement au texte de Monclova de 1913, cité ci-dessus, le texte de 1917 (réformé en 1919) prévoyait des commissions arbitrales:

"compuesta(s) de tres miembros, de los cuales uno será designado por el Presidente de la República, otro por el Agente Diplomático del país a que pertenezca el reclamante y el tercero de común acuerdo con los dos primeros. Si éste último no fuere posible, el Ejecutivo hará también la designación del tercero, escogiéndolo de entre los nacionales de un país que no tenga ninguna reclamación que hacer en virtud de daños causados por la Revolución . . ."

Par conséquent, les commissions mixtes de caractère national mexicain de 1913 avaient, déjà dans le texte de 1917-1919, évolué bien loin vers le type des commissions mixtes arbitrales de caractère international, avec un président neutre pour départager les commissaires nationaux, bien que la méthode de nommer ce président non intéressé ne correspondît pas encore aux usages acquis en matière d'arbitrage international. Mais en tout état de cause, la distance qui séparait les commissions arbitrales selon la loi de 1917-1919 des commissions mixtes primitives de 1913 était devenue déjà beaucoup plus grande que celle qui séparait encore les premières des véritables tribunaux arbitraux mixtes.

En confrontant ces textes différents, quelles conclusions le Gouvernement français en a-t-il tirées? Vraisemblablement celle-ci que, conformément aux usages internationaux, la commission arbitrale proposée allait évoluer encore plus, lorsqu'il s'agirait de fixer les conditions précises dans lesquelles elle fonctionnerait, mais en tous cas cette autre que, conformément aux principes de législation admis dans tous les pays civilisés, les lois postérieures de 1917 et de 1919 l'emportaient sur le décret antérieur de 1913 et que, par conséquent, le texte de 1919 contenait le minimum de concessions sur lequel la France pouvait compter.

Les documents produits par les deux agences sont silencieux sur le point de savoir si cette différence notable entre les deux textes législatifs a fait l'objet d'un échange de vues entre les représentants des deux pays à Paris, mais ce qu'ils révèlent avec toute la clarté désirable, c'est que, malgré de nouvelles confusions, ils témoignent un accord parfait entre les deux gouvernements précisément sur le point discuté avec tant d'ardeur par les deux agences.

Dans sa lettre de réponse à l'invitation du Gouvernement mexicain, en date du 27 juillet 1921, le Ministre des Affaires étrangères de France demanda des informations supplémentaires à M. Nervo dans les termes suivants:

"Avant de faire la désignation que vous me demandez, je désirerai cependant savoir dans quelles conditions fonctionnent exactement les Commissions précitées (c'est-à-dire: les Commissions mixtes proposées) et qui semblent telles que le Président Carranza les avait instituées comme commissions d'appel ou de second degré."

Les termes de cette question ne permettent pas de conclusion certaine relativement à l'intention exacte du Gouvernement français. Désirait-il savoir si les Commissions seraient ou bien des commissions de première instance ou bien des commissions d'appel, ou voulait-il plutôt savoir si, projetées comme tribunaux d'appel, elles auraient à juger comme tels dans tous les cas, de sorte qu'elles ne pourraient jamais siéger en première instance, ou enfin demandait-il des

renseignements plus précis sur la façon dont elles fonctionneraient dans les cas où elles siégeraient en appel?

Avant de répondre à cette question, dont la rédaction vague s'explique peut-être par la confusion dans laquelle la lecture des textes mexicains doit avoir laissé le Gouvernement de Paris, M. Nervo, qui apparemment ne comprenait pas non plus très bien l'enchaînement des dispositions légales, a télégraphié à son Gouvernement, le 28 juillet 1921, dans les termes suivants:

"Paris, 28 julio 1921. Relaciones. Mexico. Ministerio Exterior pregúntame oficialmente si Comisiones arbitrales reclamaciones serán de primera instancia o en apelación (y si conocerán reclamaciones período Huerta). Nervo."

Ainsi qu'il résulte d'une simple comparaison de la question posée par le Gouvernement de Paris avec le texte du télégramme, ce dernier restreignait déjà dans une forte mesure la portée de la première et probablement l'interprétait, en outre, dans un sens qu'elle n'avait pas. Quoi qu'il en soit, à la réception du télégramme de son chargé d'affaire, le Gouvernement mexicain, à son tour, n'en comprit rien. Et pour cause! Car, dans sa circulaire télégraphique du 12 juillet 1921, il avait précisément exposé avec une correction et une clarté parfaites, que les Commissions mixtes fonctionneraient, selon les cas, ou bien comme commissions d'appel, ou bien comme commissions de première instance. Par suite, M. Nervo ne pouvait pas avoir voulu demander ce que, dans son télégramme, il demandait réellement, et la seule chose qu'il pût avoir voulu demander, dans le concept du Gouvernement de Mexico, était de savoir s'il y aurait possibilité d'appel des décisions à rendre par ces futures Commissions mixtes. Ainsi, les confusions se multiplient. La réponse de Mexico à M. Nervo fut dans les termes suivants:

"Mexico, 30 de julio de 1921. — Mexican Legation. — Paris. — Comisiones reclamaciones serán unica instancia y definitivas."

M. Nervo, n'ayant pas compris la portée exacte de la question primitive du Gouvernement français et ne comprenant pas non plus la réponse de son Gouvernement, qui n'était pas du tout une réponse à la question posée, se borna à la transmettre telle quelle au Gouvernement français, le 1er septembre 1921. Après avoir répété les termes de la lettre du 27 juillet 1921, il dit:

"En réponse, je m'empresse d'informer Votre Excellence que lesdites Commissions seront d'une seule instance et leur jugement sera définitif."

Le dossier n'explique pas, par quelles raisons cette réponse expédiée de Mexico le 30 juillet 1921, ne fut transmise au Gouvernement français que le 1er septembre suivant; peut-être, M. Nervo lui-même a-t-il désiré trouver d'abord le mot de l'énigme télégraphique, ou attendre quelque explication supplémentaire, qui n'arriva pas.

La réception de la réponse mexicaine doit avoir été pour le Gouvernement de Paris, à son tour, l'occasion d'une certaine surprise. Ayant désiré s'assurer, entre autres, que les Commissions mixtes jugeraient *en* appel et dans quelles conditions, il apprit par la réponse qu'elles jugeraient *sans* appel; au lieu d'une réponse concernant les rapports mutuels entre la Commission nationale et la Commission internationale projetée, une réponse concernant la force juridique des sentences de cette dernière et leur révision éventuelle par une instance supérieure! Il va de soi que le Gouvernement de Paris ne pouvait se contenter de cette "réponse": de là la lettre nouvelle du 12 septembre 1921 adressée à M. Nervo, dans les termes suivants:

"Par votre lettre en date du 1er de ce mois, vous avez bien voulu me faire savoir que les "Commissions mixtes" chargées d'examiner les réclamations

étrangères au Mexique formaient une juridiction sans appel dont les jugements seraient définitifs.

D'autre part, il résulte des termes de votre lettre du 15 juillet dernier et des articles 14, 15 et 16 du décret du 24 novembre 1917, que les Commissions mixtes seront appelées à connaître des réclamations présentées dans deux cas différents:

1) Quand les intéressés ne seront pas satisfaits des sentences de la "Commission des réclamations" et alors les "Commissions mixtes" rempliront le rôle d'un tribunal d'appel;

2) Quand les intéressés préféreront ne pas soumettre leurs réclamations à la "Commission des réclamations" et désireront au contraire les faire régler directement depuis le début par les "Commissions mixtes".

Dans l'un et l'autre cas, les décisions de ces "Commissions mixtes" seront sans appel.

Je vous serais très obligé de vouloir bien me faire savoir si telles sont bien les intentions de votre Gouvernement."

A cette lettre, M. Nervo, dans sa réponse du 30 septembre 1921, réplique par l'affirmative, de parfait accord avec la circulaire télégraphique du 12 et l'instruction télégraphique supplémentaire du 30 juillet 1921; après avoir répété les termes de la nouvelle lettre française, il y répondit par la phrase suivante:

"En réponse, j'ai l'honneur d'informer Votre Excellence que dans l'un et l'autre cas les décisions desdites Commissions seront définitives et sans appel."

Si j'ai cru nécessaire de reproduire et d'analyser ici le détail de ce petit épisode de la correspondance diplomatique entre le Mexique et la France, c'est que l'agence mexicaine s'est efforcée par deux fois successives, pendant les discussions orales, de dissimuler par une argumentation extrêmement subtile, l'essence de cette correspondance, en prétendant que ni l'invitation du Gouvernement mexicain, ni les lettres de M. Nervo, n'auraient jamais représenté la commission arbitrale proposée à la France comme constituant la commission mixte prévue par les textes législatifs de 1913, 1917 et 1919, et qu'elles n'auraient pas non plus dit un seul instant que la commission arbitrale fonctionnerait, le cas échéant, comme commission d'appel. Je regrette de devoir constater que cette affirmation est si carrément contraire à la teneur de la correspondance diplomatique résumée ci-dessus, que je ne crois pas nécessaire, et que je ne serais pas même en mesure d'opposer à cette affirmation sans fondement une contre-argumentation motivée. C'est pourquoi je termine cette partie de la démonstration par la déclaration que pour quiconque ne dispose pas de la subtilité d'argumentation de l'agence mexicaine, il doit paraître clair comme le jour que, envoyant son "invitation cordiale" du mois de juillet 1921 et en faisant répondre par son Chargé d'affaires à certaine demande d'informations supplémentaires, de la part du Gouvernement français, le Gouvernement mexicain a eu en vue, dès le début, des Commissions mixtes qui, selon les cas, fonctionneraient, ou bien comme commissions d'appel, ou bien comme commissions de première instance, et dont dans les deux cas, les décisions seraient définitives.

6. — Mais, a-t-on argumenté, quand bien même cette conclusion serait *in confesso*, la Commission franco-mexicaine ne saurait pas pourtant être considérée comme une des commissions d'appel, prévues par le décret de 1913, les lois de 1917 et de 1919 et l'invitation officielle du Général Obregón de 1921, parce que, déjà au moment de cette invitation, les choses avaient commencé à changer et qu'à la suite de ce changement, la base originelle des pourparlers diplomatiques se serait profondément modifiée, aussi avec la France.

Sur quels arguments cette thèse se base-t-elle? Sur une simple assertion, qui, envisagée à la lueur *a)* de l'évolution des événements historiques, ne peut être prouvée; *b)* de la législation mexicaine, doit être qualifiée comme une *protestatio actui contraria*, et *c)* de la Convention germano-mexicaine des réclamations, se révèle comme insoutenable.

Pour appuyer sa thèse, l'agence mexicaine a invoqué, d'une part, l'ensemble des pourparlers diplomatiques aveec les Etats-Unis d'Amérique, tels qu'ils se trouvent publiés dans une édition officielle du Gouvernement de Mexico, intitulé: *La cuestión internacional mexicano-americana, durante el Gobierno del Gral. Don Alvaro Obregón*, 1926, et d'autre part, le fait que, après la suspension des négociations franco-mexicaines durant la période entre le mois de septembre 1921 et le mois de mai 1923, elles auraient été reprises sur une base autre que celle mise en 1913-1921.

Ad a) Si j'envisage d'abord dans leur ensemble les événements historiques, tels qu'ils se sont déroulés, depuis le 11 mai 1921, date du premier mémorandum confidentiel dirigé par le Secrétaire des Relations Extérieures du Mexique, M. Alberto Pani, au Chargé d'affaires du Gouvernement américain, M. George T. Summerlin, jusqu'au 25 septembre 1924, date de la signature de la Convention franco-mexicaine des réclamations, je me crois autorisé à les résumer comme suit.

Après quelques conversations informelles préalables entre le Secrétaire des Relations Extérieures du Mexique et le Chargé d'affaires des Etats-Unis, le premier remit au dernier, le 11 mai 1921, un mémorandum confidentiel tendant à trouver une base commune pour le rétablissement de relations diplomatiques normales entre les deux Etats, restées en suspens depuis l'entrée en fonction comme Président intérimaire de la République de Don Adolfo de la Huerta. Dans ce mémorandum, M. Pani rappelait au représentant américain, comme une des preuves de la bonne volonté du Mexique de respecter et sauvegarder les intérêts étrangers, le décret du Général Obregón (en date du 1er février 1921) prolongeant d'une année le délai fixé pour l'introduction des réclamations pour dommages causés par la révolution, et promettait encore certaines modifications de la loi sur lesdites réclamations. Dans sa réponse du 27 mai suivant, M. Summerlin informait M. Pani des conditions que le Gouvernement américain considérait comme essentielles pour le rétablissement de conditions normales entre les deux pays. La plupart de ces conditions se trouvaient formulées dans un projet de traité d'amitié et de commerce, dans lequel figurait un article XIV, contenant dans son premier alinéa, la reconnaissance par le Mexique de sa responsabilité pécuniaire pour tous les dommages causés à des Américains, qu'ils trouvassent leur origine dans des actes de personnes représentant la Fédération, des actes de brigandage ou des insurrections ou révolutions contre le Gouvernement mexicain, et dans son second alinéa, le *pactum de contrahendo* une convention de caractère général et sur le pied de réciprocité, pour le règlement de toutes les réclamations pour pertes et dommages pécuniaires que les nationaux de l'un des deux pays pourraient avoir subis chez l'autre.

La forme dans laquelle, selon ces suggestions américaines, le rétablissement de rapports normaux s'effectuerait, était inacceptable pour le Gouvernement du Mexique, notamment pour la raison que celui-ci, tout disposé qu'il était à satisfaire aux demandes justifiées des étrangers, "no quería que, antes México y el mundo, se perdiera la espontaneidad de sus actos al realizar ese propósito bajo la apariencia de una imposición extraña" (mémorandum du 9 juin 1921, revisé). C'est pourquoi, entre autres, M. Pani promit de nouveau une loi sur les dommages révolutionnaires, qui pratiquement instituerait une commission mixte des réclamations et que, un mois plus tard, il "invita cordialement",

par sa circulaire télégraphique du 12 juillet 1921 citée ci-dessus, tous les Gouvernements intéressés à coopérer avec le Gouvernement mexicain à créer des commissions arbitrales-mixtes sur la base même des décrets et lois mexicains qui, depuis 1913, avaient manifesté la résolution spontanée des Gouvernements successifs d'indemniser les particuliers innocents, nationaux et étrangers, victimes des révolutions.

Malgré cette invitation adressée aussi au Gouvernement de Washington, le Chargé d'affaires des Etats-Unis présenta, le 11 novembre 1921, à M. Pani un projet de convention générale pour le règlement de toutes les réclamations réciproques, y compris les réclamations pour pertes et dommages révolutionnaires, ainsi que l'avait déjà prévu l'article XIV du projet de traité d'amitié et de commerce. Restant fermement sur ses positions, le Gouvernement mexicain se refusa à donner satisfaction aux propositions de Washington, telles qu'elles étaient, et répondit, le 19 novembre 1921, par une contre-proposition consistant à conclure d'abord une convention spéciale relative aux réclamations pour dommages subis durant les révolutions mexicaines, dans le sens de l'invitation générale adressée à tous les Gouvernements intéressés, sans réciprocité — convention qui impliquerait la reconnaissance du Gouvernement mexicain et le rétablissement des relations diplomatiques — et à faire suivre immédiatement une deuxième convention qui engloberait toutes les autres réclamations pécuniaires pendantes entre les deux pays depuis 1868. Le projet de convention spéciale qui accompagnait la contre-proposition était l'œuvre du Gouvernement mexicain, qui, pour obtempérer autant que possible aux désirs américains, y avait inséré une disposition spéciale, différant de la disposition correspondante de la convention générale proposée, et qui donnait à l'arbitrage sur les réclamations pour dommages révolutionnaires le caractère particulier d'une solution équitable ("con un simple espíritu de equidad").

Ainsi qu'il résulte du message du Président Obregón au Congrès, en date du 1er septembre 1922, les pourparlers diplomatiques avec la Grande-Bretagne suivaient presque le même cours: ici encore, l'initiative mexicaine aboutissait à la présentation au Foreign Office, le 4 mars 1922, de deux projets de conventions distincts. Les négociations avec la France, de même que celles avec la Belgique, se heurtaient, d'abord à l'obstacle que ces deux Etats voulaient tenir séparées les questions de la réparation des dommages révolutionnaires et de la reconnaissance du Gouvernement mexicain, mais le 23 mai 1923 les pourparlers entre la France et le Mexique furent de nouveau mis en mouvement à la suite de la remise par M. Pani au représentant français à Mexico, M. Blondel, du même projet de convention spéciale des réclamations. Enfin, le 21 mars 1924, le nouveau Ministre de France à Mexico, M. Périer, accepta officiellement, d'ordre de son Gouvernement, l'invitation qui avait été adressée spontanément par le Gouvernement mexicain à la date du 15 juillet 1921 au Gouvernement français, soulignant ainsi, on ne peut plus clairement, la continuité des négociations. Et évidemment, le Gouvernement mexicain envisageait les choses de la même façon, puisque, dans sa réponse du 29 mars 1924, il déclarait en toutes lettres: "que el Gobierno de México, consecuente con el ofrecimiento que hizo el 15 de julio de 1921, está dispuesto a reanudar las negociaciones para la celebración de una convención que cree una Comisión Mixta ... etc." A la suite de cette reprise des pourparlers diplomatiques, la Convention franco-mexicaine fut signée le 25 septembre 1924.

De la marche des négociations résumée ci-dessus, l'agence mexicaine a prétendu déduire la preuve historique que, loin d'être le descendant direct de la résolution spontanée du Mexique formulée dans le décret de Monclova de 1913 et les lois et décrets subséquents de 1917 et 1919, la Convention franco-mexicaine résultait plutôt de l'article XIV du projet américain du 27 mai 1921.

Cependant, à mon avis, cet historique prouve précisément le contraire, c'est-à-dire que, malgré la résistance américaine, le Mexique a victorieusement maintenu son point de vue primitif de ne vouloir admettre aucune responsabilité envers l'étranger pour dommages causés par les révolutions, que celle qu'elle avait spontanément déclaré prendre à sa charge dès le décret de Monclova de 1913, reproduit d'abord dans les décrets-lois de 1917 et 1919, ensuite dans l'invitation cordiale du 12 juillet 1921, répété depuis à maintes occasions, notamment par trois fois successives dans les messages présidentiels au Congrès du 1er septembre des années 1921, 1922 et 1923, et se reflétant jusque dans les termes mêmes des conventions dont j'ai tâché de rechercher la paternité.

La conclusion à laquelle j'en suis arrivé se résume, par suite, dans la thèse que la prétendue volte-face que les négociations auraient faite à la suite de l'intervention des Etats-Unis, n'est qu'imaginaire et qu'en vérité l'enchaînement des événements se trouve ininterrompu, thèse qui, n'en déplaise la vive opposition qu'elle a trouvée de la part de l'agence mexicaine, me paraît correspondre beaucoup plus à la dignité du Mexique et dont, par conséquent, je suis heureux de pouvoir le féliciter [1].

Ad b) D'ailleurs, envisagée à la lumière de la législation mexicaine, la question ne saurait trouver une réponse différente.

S'il était vrai que, en entamant les pourparlers avec les Etats-Unis et en adoptant comme base de toutes les conventions spéciales des réclamations le projet présenté aux Etats-Unis, le Mexique ait voulu renoncer au programme de Monclova, incorporé dans les lois et décrets subséquents, même vis-à-vis des Etats qui étaient plus disposés que les Etats-Unis à accepter la juridiction de la Commission Nationale comme première instance, la conséquence de cette volte-face eût dû être une modification de la législation nationale dans le sens d'une suppression des articles qui visaient la possibilité d'un recours à la Commission arbitrale projetée. Mais, bien au contraire, la législation mexicaine est restée intacte et la Commission nationale a continué jusqu'à aujourd'hui à adresser, dans ses "dictámenes", les réclamants étrangers à la Commission internationale correspondante, dans les cas où ils ne seraient pas d'accord avec la décision de la Commission nationale.

La prétention de l'agence mexicaine apparaît donc, à la lumière de la législation du pays, une *protestatio actui contraria.*

Ad c) Mais il y a plus, car une des conventions spéciales, à savoir celle avec l'Allemagne, fournit la preuve convaincante que le Gouvernement mexicain a toujours continué à considérer les Commissions arbitrales mixtes, comme la réalisation finale du projet de Monclova et, par conséquent, comme faisant fonction, le cas échéant, de commissions d'appel. En effet, l'article XII de ladite Convention, *sub* II, dit en toutes lettres que: "Las (reclamaciones presentadas por los ciudadanos alemanes a la Comisión Nacional de Reclamaciones de acuerdo con el decreto de 30 de agosto de 1919 y sus reglamentos) resueltas y objetadas por los reclamantes conforme al artículo XII del decreto mencionado, serán sometidas para los efectos del mismo decreto, a la Comisión nombrada conforme a esta Convención para la confirmación, modificación o revocación del fallo." L'on ne saurait guère alléguer de meilleure preuve que le Gouvernement mexicain n'a jamais cessé d'attribuer aux Commissions mixtes le rôle que déjà le décret de Monclova leur avait annoncé.

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[1] D'ailleurs dans la séance du Sénat du 26 novembre 1924, le Ministre des relations extérieures n'a pas cessé de souligner que la Convention franco-mexicaine était la conséquence de la promesse de 1913 et que le décret de Monclova "es el que ha servido de base a todos los convenios que México ha estado celebrando".

7. — Dans ces conditions, je ne saurais m'expliquer l'attitude de l'agence mexicaine à vouloir soutenir une thèse qui est absolument insoutenable, si ce n'était que les conclusions juridiques que l'agence française a prétendu tirer de la thèse opposée, lui ont paru si graves et si préjudiciables à la situation procédurale du Mexique qu'il a cru indispensable de mettre en jeu tous les arguments possibles, même les plus dénués de fondement.

Il me faut donc entrer maintenant dans un examen de l'autre aspect, pratique, de la controverse, à savoir des conclusions juridiques qu'il faut tirer de la thèse historique de l'agence française, dont le bien-fondé doit être reconnu sans réserve.

Or, à cet égard, la résistance acharnée de l'agence mexicaine me semble parfaitement justifiée.

En effet, l'agence française a commencé par inférer de sa thèse historique la thèse juridique selon laquelle la Commission franco-mexicaine étant un tribunal d'appel, lui seraient applicables les prescriptions relatives à l'appel en matière civile selon le Código federal de procedimientos civiles mexicain, c'est-à-dire notamment la disposition de l'article 424 dudit Code, dont voici la teneur:

"Si la sentencia o el auto constaran de varias proposiciones, puede consentirse respecto de unas y apelarse de ella respecto de otras. En este caso, la segunda instancia versará sólo sobre las proposiciones apeladas."

Comme je l'ai déjà déclaré ci-dessus, cette première déduction extrême ne peut en aucun cas être admise. Il va de soi que, si elle était correcte, la position de la France dans ces procès internationaux serait particulièrement commode et enviable, et que l'agence française n'a pu s'empêcher, par conséquent, de l'invoquer. Car dans cette hypothèse, la France serait assurée d'avance que toutes les décisions de la Commission nationale qui lui seraient avantageuses seraient inattaquables, sans que le Mexique eût le moyen de s'y opposer dans l'instance devant notre Commission, et que l'examen des réclamations par cette dernière ne saurait avoir, par suite, d'autre but que l'appréciation des arguments que la France pourrait alléguer pour demander plus que la Commission nationale a adjugé à ses ressortissants.

Mais cette thèse serait déjà inadmissible, à mon avis, s'il n'existait aucune autre base pour la juridiction de la Commission franco-mexicaine que la loi de 1919 et le règlement qui en règle l'exécution, c'est-à-dire la législation nationale en matière de réclamations. D'abord, il est fort douteux qu'il soit licite d'appliquer, sans que la loi le dise, des principes de procédure civile à une procédure d'un caractère tout spécial qui aboutit à la révision de la première sentence par une commission semi-internationale ou internationale. Ensuite, le caractère judiciaire des "dictámenes" de la Commission nationale des réclamations est fort controversé, de sorte qu'il n'est pas du tout certain qu'il serait à propos de leur appliquer des règles écrites pour la procédure ordinaire judiciaire, d'autant moins que les prescriptions du Code de procédure civile ne s'appliquent pas non plus à la revision éventuelle, par le Président de la République, des "dictámenes" de la Commission nationale relatifs à des Mexicains. Et enfin l'équité s'y opposerait, étant donné que la règle du Code de procédure civile est écrite pour des cas, dans lesquels le droit d'appel est réservé tant au demandeur qu'au défendeur tandis que, dans le cas présent, la faculté d'interjeter appel revient au seul réclamant.

Abstraction faite de ces considérations basées sur la situation légale, rien qu'à la lueur de la législation mexicaine, toute raison de doute disparaît dès qu'on se rend compte du caractère de la procédure devant la Commission franco-mexicaine, telle qu'elle se trouve ébauchée dans la Convention des réclamations et développée dans le Règlement de procédure. Même si, sous le

seul coup de la législation mexicaine, l'on devait admettre l'application du Code de procédure civile, la situation juridique eût essuyé en quelque sorte une novation sous le coup des documents internationaux qui sont venus donner la réalisation finale au programme de Monclova. La procédure que prévoient la Convention des réclamations et le Règlement de procédure présente les caractères essentiels d'un examen nouveau des réclamations dans tous leurs aspects, sur le pied d'une égalité parfaite pour les deux parties litigantes, et elle exclut toute idée d'une procédure dans laquelle, comme l'a si bien caractérisé l'agent mexicain, ce dernier serait un automate qui ne pourrait ouvrir la bouche que dans les cas où l'agent français le lui permettrait.

Si donc, d'une part, l'existence de certaines relations entre les deux instances ne peut être niée, mais que, d'autre part, ces relations ne puissent en aucun cas être caractérisées comme celles entre un tribunal de première instance et un tribunal d'appel dans le sens strict du Code de procédure civile, comment les définir? Pour éviter les malentendus que pourrait engendrer l'usage du terme technique d'appel, je ne m'en servirai plus dans la suite, mais j'indiquerai le rôle de la Commission franco-mexicaine dans les cas où le réclamant a déjà sollicité une décision de la Commission nationale, par le terme de révision. Bien que ce terme aussi ait un sens technique, d'ailleurs souvent différent, dans les différentes législations nationales, et que lui corresponde même en droit international un concept particulier, je me crois tout de même autorisé à l'adopter ici, tout en soulignant que je l'emploie dans un sens indéterminé, sans couleur technique, et seulement pour indiquer que la Commission franco-mexicaine est appelée quelquefois à entrer dans un examen nouveau de certaines réclamations sur lesquelles il existe déjà une décision d'une instance inférieure.

Avant de tâcher de définir plus exactement les conséquences juridiques du fonctionnement consécutif des deux commissions, en première instance nationale et en révision internationale, je tiens à faire observer qu'à côté de ce fonctionnement successif des deux instances, il se présente différents cas de fonctionnement simultané, ce qui a donné lieu, de la part de l'agence mexicaine, à soulever l'exception de (pseudo) litispendance. Vu, toutefois, que cette question ne surgit pas dans la présente affaire, je préfère ne pas y insister ici, tout en faisant remarquer que, naturellement, l'appréciation des effets du fonctionnement consécutif des instances ne laisse pas d'influer sur l'appréciation de leur fonctionnement simultané.

8. — Si je résume dès à présent en quelques mots la conclusion finale que je crois devoir tirer des considérations qui vont suivre, cette conclusion se réduit à la thèse que les rapports entre la Commission nationale de première instance et l'instance internationale de révision sont relativement peu étroits, que la Commission franco-mexicaine n'est liée en quoi que ce soit par les "dictámenes" de la Commission nationale, notamment pas en ce qui concerne l'appréciation juridique des affaires soumises à son jugement, mais que lesdits "dictámenes" auront nécessairement pour elle une importance très grande, toutes les fois que, après un examen sérieux des faits qui sont à la base de la réclamation, déjà la Commission nationale a gagné la conviction, que lesdits faits se sont passés tels que le réclamant les a relatés.

L'ensemble des relations internationales présente relativement peu de cas où une instance judiciaire internationale est, à titre de tribunal de révision, superposée à des tribunaux ou organes administratifs nationaux. Il arrive, sans doute, qu'incidemment un tribunal arbitral *ad hoc* soit investi du pouvoir de réviser une sentence nationale, accusée par exemple de déni de justice, ou chargée, quoiqu'ayant été rendue en conformité avec le droit national, d'avoir

violé les prescriptions du droit des gens, ainsi qu'il a été plusieurs fois le cas de jugements nationaux de prises. Mais la figure d'une instance, régulièrement organisée, de révision d'une série de jugements rendus en première instance par des tribunaux nationaux ne se présente que très rarement, et dans les cas où elle se présente, la situation juridique n'est pas toujours la même. Il y a des cas, comme celui de la navigation sur le Rhin, dans lesquels la juridiction de première instance, exercée par les tribunaux ordinaires des Etats riverains, et la juridiction internationale supérieure, exercée par la Commission centrale de la navigation sur le Rhin, ont à appliquer les mêmes règles de droit: par contre, il y en a d'autres, comme celui de la Cour Internationale des Prises projetée en 1907, dans lesquels la juridiction nationale (échelonnée elle-même, le cas échéant, en deux instances superposées l'une à l'autre) et la juridiction internationale ont à faire souvent application de normes différentes, la première de droit national, la seconde de droit international.

Les deux agences ne sont pas d'accord, d'après ce qui résulte de leurs plaidoiries, sur le point de savoir auquel de ces deux types de tribunal international de révision la Commission franco-mexicaine correspondrait éventuellement. Même si l'agence mexicaine admettait le parallèle, elle ne sera, en aucun cas, disposée à admettre, pour la Commission franco-mexicaine, d'autre classification que dans le groupe du dernier type; au contraire, l'argumentation française a fait son possible pour établir l'identité des normes à appliquer par les deux commissions. En effet l'agence française s'est efforcée de démontrer que les dispositions légales qui régissent l'activité de la Commission nationale doivent, en règle générale, régir également l'activité de la Commission franco-mexicaine, en se basant, aux fins de sa démonstration, non seulement sur le prétendu caractère de tribunal d'appel qui reviendrait à la dernière, mais encore sur certaines assurances que, au cours des pourparlers diplomatiques, le Gouvernement mexicain aurait données au Gouvernement de France, à l'effet que les ressortissants français bénéficieraient en tous cas d'un traitement pas moins favorable que celui accordé aux nationaux du pays. Le premier argument en faveur de sa thèse ne suffit pas à en faire admettre le bien-fondé. Car, une fois rejetée l'assertion que l'invocation de la Commission franco-mexicaine constituerait un appel dans le sens et aux effets de l'article 424 du Code de procédure civile, l'argumentation entière assume le caractère d'une pétition de principe, la qualité de cour de révision, dans le sens plus ample du mot indiqué ci-dessus, ne préjugeant en rien, par elle-même, sur les normes à appliquer dans l'instance de révision. La question de savoir quelles seront ces normes, dépend précisément de la réglementation concrète et du caractère des tribunaux en question.

Le second argument, reposant sur la promesse d'égalité de traitement est d'une valeur beaucoup plus grande. Non que le seul fait que la France a reçu, durant les négociations certaines promesses en faveur de ses ressortissants dans le sens indiqué, suffise à admettre qu'elle soit en droit d'invoquer à leur profit, dans chaque cas concret, l'égalité de traitement, en dessus de ce que la Convention des réclamations, dans sa rédaction définitive, lui a effectivement accordé comme résultat des pourparlers. Mais toujours est-il que, particulièrement en matière d'indemnités pour cause de dommages révolutionnaires, c'est un principe acquis de droit international coutumier que, si un Etat accorde des indemnités à ses propres nationaux, il est obligé, pour ne pas manquer à son devoir international, d'assurer au moins le même traitement aux ressortissants étrangers. La promesse d'égalité de traitement pour les étrangers et les nationaux ne fonctionne donc pas seulement comme un simple incident au cours des négociations diplomatiques, mais plutôt comme un principe de droit international sous-entendu, auquel il faut remonter toutes les fois que l'interprétation,

notamment de l'article 111 de la Convention, prêterait à des doutes sur la portée exacte de ses dispositions. Au reste, il n'est pas admissible de pousser à bout le principe invoqué, parce qu'alors il comporterait que les ressortissants étrangers pourraient se prévaloir, non seulement de tous les avantages que la Convention des réclamations, mais encore de tous ceux que la législation nationale, accorde aux personnes lésées par les révolutions.

Définie à grands traits, la situation juridique peut donc, à mon avis, être qualifiée comme suit. Le programme primitif de Monclova a conduit, au cours des années suivantes, à la promulgation de certaines lois et décrets nationaux instituant une Commission nationale des réclamations, également accessible aux nationaux et aux étrangers, et dans les mêmes conditions. La seule différence entre les deux groupes de lésés consiste en ce que les étrangers ont obtenu le droit de faire réviser les décisions de ladite Commission nationale par une Commission internationale, esquissée déjà dans le décret de Monclova et ayant pris corps finalement dans chacune des Commissions mixtes instituées à la suite de l'invitation générale du Général Obregón du 12 juillet 1921. Les conditions dans lesquelles ces Commissions internationales fonctionneront ont été formulées dans les conventions qui, à quelques légères différences près, en règlent d'une façon identique l'institution et l'activité. Par cette réglementation conventionnelle, complétée plus tard par les règlements détaillés de procédure, les instances internationales ont obtenu une existence indépendante, régie par leurs propres lois fondamentales, résultats des négociations diplomatiques entamées précisément dans le but de fixer les modalités de l'examen en révision (ou éventuellement de l'examen en premier et dernier ressort) des réclamations. En général, la conclusion des conventions doit donc être réputée avoir comporté en quelque sorte une novation de la situation juridique, en ce sens que ce qui était réglé antérieurement par la seule législation mexicaine, trouverait désormais sa base dans le droit conventionnel. Cela n'empêche pas, toutefois, que la législation nationale a conservé certaine importance aussi pour l'instance de révision; seulement, elle ne saurait jamais être invoquée à l'encontre des termes ou de la portée évidente de la convention, résultat de la libre volonté des Hautes Parties Contractantes.

Les conclusions pratiques qui, de cette définition générale de la situation juridique, se dégagent pour la solution du point controversé de l'intérêt que les "dictámenes" de la Commission nationale peuvent avoir dans l'instance internationale de révision, doivent donc, à mon avis, être déterminées comme suit.

En ce qui concerne les points qui ont trouvé une solution dans la Convention des Réclamations, tels que: l'énumération des personnes et associations ayant qualité pour se présenter comme réclamants devant la Commission franco-mexicaine, les conditions dont dépend la recevabilité de leur demande, la liste des auteurs de dommages pour les actes desquels le Mexique a *ex gratia* assumé la responsabilité, la période revolutionnaire qu'embrasse la Convention et la base sur laquelle les décisions de la Commission doivent se fonder, la Convention est décisive, sans que la France puisse invoquer en sa faveur, en quelque sorte comme droit acquis, le fait que par rapport à un de ces points la Commission nationale ait décidé dans un sens déterminé.

Il en est de même des points qui se trouvent réglés dans le Règlement de procédure, sous la réserve, toutefois, pour la Commission elle-même d'en modifier les dispositions, toutes les fois que leur observation entraverait le bon accomplissement de sa tâche. Les "dictámenes" de la Commission nationale, qui se fondent sur une base différente, n'ont donc, en général pas d'intérêt direct pour la Commission franco-mexicaine, tout en pouvant lui fournir des indices utiles sur les conceptions qui prévalent dans les cercles officiels du Mexique

relativement à l'appréciation, par exemple, de certains mouvements révolutionnaires du passé.

Cependant, en ce qui concerne d'autres points, le fait qu'une instance inférieure a déjà examiné les réclamations peut et doit avoir pour notre Commission un intérêt considérable. C'est le cas, notamment, des preuves apportées par les réclamants à l'appui de leur demande et de l'acceptation de ces preuves comme convaincantes par la Commission nationale. D'une part, la Convention franco-mexicaine ne contient aucune disposition qui limite la liberté souveraine de la Commission d'apprécier les preuves produites. D'autre part, les dispositions de la loi nationale sur les réclamations ou du règlement adopté en exécution des dispositions légales ne lient pas la Commission franco-mexicaine. Mais étant donné que la Commission nationale s'est toujours prononcée à un moment plus rapproché des événements révolutionnaires que ne pourra le faire la Commission franco-mexicaine; que la première a pu disposer de tous éléments d'information de nature à neutraliser les preuves produites en faveur de la réclamation; qu'en statuant sur la réclamation, la Commission nationale s'est généralement basée sur un examen minutieux des faits et que l'éventualité de décisions indûment favorables aux réclamants étrangers est très invraisemblable, le "dictamen" de l'instance nationale, basé qu'il est sur toutes sortes d'informations, notamment aussi sur des renseignements qui ont pu être recueillis à l'encontre de la réclamation, a nécessairement une force convaincante très considérable. Dans ces conditions, il me semble pratiquement exclu que l'agence mexicaine puisse encore alléguer des contre-preuves d'une force probante telle que la Commission franco-mexicaine doive reconnaître, en bonne conscience, que la preuve *prima facie* que fournit, dans des cas pareils, le "dictamen" de la Commission nationale, n'a pas de valeur intrinsèque et que la première instance a déclaré prouvés des événements qui, en réalité, ne se sont pas produits, ou adjugé aux réclamants plus que ce à quoi ils avaient droit. Pour les cas dans lesquels, contre toute attente, cette situation se présenterait, la Commission doit se réserver toute liberté d'appréciation des effets juridiques qu'elle comporterait.

La Commission franco-mexicaine vis-à-vis de la législation mexicaine

9. — Ce que je viens de dire par rapport aux relations qui existent entre la Commission franco-mexicaine comme tribunal de revision et la Commission nationale, s'applique, *mutatis mutandis*, également à l'attitude que la première, qu'elle fasse fonction de tribunal de première instance ou de revision, doit prendre vis-à-vis de la législation nationale du Mexique, notamment de la législation spéciale en matière de réclamations pour pertes et dommages causés par les révolutions.

La Convention franco-mexicaine est venue jeter les bases définitives de l'arrangement arbitral entre le Mexique et la France pour le règlement de l'ensemble des réclamations que les ressortissants et associations français au Mexique pourraient faire valoir contre ce pays. Ce faisant, elle a, comme je l'ai déjà fait remarquer ci-dessus, comporté en quelque sorte une novation de la situation juridique, telle qu'elle existait avant, sous le coup de la seule législation mexicaine, en réglant d'une façon indépendante les conditions dans lesquelles le Mexique serait obligé d'indemniser les victimes françaises des dommages datant de la période révolutionnaire. En tant que ce règlement s'écarte de la législation mexicaine, cette dernière ne peut plus être invoquée devant la Commission franco-mexicaine, la Convention étant le résultat de la libre volonté des Gouvernements contractants. Par contre, en tant que les dispositions conventionnelles laissent subsister un doute sur leur portée exacte, il reste

permis de remonter aux dispositions légales, comme moyens auxiliaires d'interprétation de la Convention, d'autant plus qu'en cette matière, si controversée, de la responsabilité internationale pour dommages révolutionnaires, le principe du devoir international de traitement égal de sujets étrangers semble constituer précisément le seul principe acquis et universellement admis. En tant, enfin que, sur des points particuliers, la Convention est absolument silencieuse, il n'est pas possible de formuler une règle générale, l'admissibilité et les effets d'un recours aux dispositions légales du Mexique devant être jugés dans chaque cas particulier.

D'ailleurs, les questions effleurées ci-dessus ne se prêtent pas à des solutions générales, mais trouveront leur réponse à propos des différents points contestés entre les deux agences, tels que: la force probante des certificats d'immatriculation consulaire, les moyens de preuve admissibles, le classement de certaines "forces" dans une des catégories énumérées à l'article III de la Convention, les obligations des sociétés commerciales en rapport avec la Convention, etc.

Le rôle de l'équité dans l'application de la Convention et les rapports entre cette dernière et le droit international commun

10. — La dernière question générale qui, devant la Commission, a donné lieu à des discussions de caractère fondamental, est celle de déterminer le rôle qui, dans cet arbitrage, revient à l'équité, concept mentionné deux fois dans le texte de la Convention, d'abord à l'article II, ensuite à l'article VI. Ce renvoi exprès à l'équité a suscité des discussions assez détaillées entre les deux agences, l'agent français s'étant efforcé d'en etendre les bornes aussi loin que possible, l'agent mexicain, au contraire, ayant fait de son mieux pour en réduire la portée au minimum compatible avec l'intérêt financier du Mexique.

Le contexte dans lequel l'équité se trouve mentionnée à l'article II de la Convention est la déclaration solennelle que les membres de la Commission, avant de commencer leurs travaux, feront et signeront, et par laquelle ils doivent s'engager "à examiner avec soin et à juger avec impartialité, d'après les principes de l'équité, toutes les réclamations présentées, attendu que le Mexique a la volonté de réparer gracieusement les dommages subis, et non de voir sa responsabilité établie conformément aux principes généraux du droit international", formule à laquelle le texte de l'article ajoute la proposition suivante. "Il suffira, par conséquent, de prouver que le dommage allégué a été subi et qu'il est dû à quelqu'une des causes énumérées à l'article III de la présente Convention, pour que le Mexique se sente, *ex gratia*, décidé à indemniser."

Si l'on confronte ce texte avec le texte de la déclaration solennelle que les trois commissaires primitifs, M. R. Octavio, F. Gonzalez Roa et E. Lagarde, ont faite au début des travaux de la Commission et de celle que, sur leurs traces et sans y apporter de modifications, ont faite, le 26 mars 1928, le président et le commissaire français nouveaux, on s'aperçoit que, dans cette déclaration, l'engagement "d'examiner avec soin et de juger avec impartialité, d'après les principes de l'équité, toutes les réclamations présentées" est répété, mais que toute reproduction des mots: "attendu que le Mexique a la volonté de réparer gracieusement les dommages subis, et non de voir sa responsabilité établie conformément aux principes généraux du droit international" fait défaut. Ce détail pourrait être conçu comme un indice que déjà les Commissaires primitifs aient considéré le rôle de l'équité dans le présent arbitrage comme plus vaste que ne ferait le soupçonner le contexte dans lequel cette notion se trouve mentionnée dans l'article II.

Mais je ne crois pas que cette interprétation de la déclaration soit exacte, et personnellement je n'ai pas eu l'intention d'exprimer pareille opinion. Ce qu'on peut, et ce qu'il faut dire, c'est seulement ceci, que le fait qu'il s'agit d'un arbitrage, consciemment détaché de la base des règles positives du droit international relatives à la responsabilité internationale des Etats pour dommages causés par des mouvements insurrectionnels, émeutes, etc., ne peut pas laisser de produire des contre-coups sur des questions connexes. Mais il n'est pas possible de prédire sur quelles questions et dans quelle mesure; aussi une discussion de cette controverse en termes généraux, ainsi que l'ont entreprise les deux agences, me semble-t-elle inutile et sans objet.

Le contexte dans lequel l'équité figure à l'article VI est tout autre, à savoir la stipulation qui exclut expressément, pour le jugement des présentes réclamations, le principe de la nommée "clause Calvo", aux termes suivants: "Le Gouvernement du Mexique étant désireux d'arriver à un règlement équitable des réclamations définies à l'article III ci-dessus, et d'accorder aux intéressés une indemnité juste, qui corresponde aux pertes et dommages subis, il est convenu que la Commission ne devra écarter ou rejeter aucune réclamation pour le motif que les recours légaux n'auraient pas été épuisés avant présentation de ladite réclamation."

Si l'on se rend compte de la portée des deux clauses où l'équité a trouvé une mention expresse, on doit reconnaître que, dans cet arbitrage, l'équité joue un rôle important, mais non illimité.

La fonction que l'équité remplit dans l'article II consiste à imposer à la conscience des membres de la Commission de juger les réclamations dans le même esprit d'équité dont, lors de la signature de la Convention, s'est inspiré le Gouvernement du Mexique lui-même, c'est-à-dire de faire abstraction, dans ce cas, de la question de savoir si, et dans quelle étendue les règles positives du droit international coutumier reconnaissent une obligation internationale des Etats d'indemniser les ressortissants d'autres Etats, établis sur leur territoire, des pertes et dommages qu'ils peuvent avoir subis à la suite de mouvements insurrectionnels, révolutions, guerres civiles, émeutes, etc., et de les juger à la seule lueur de quelques normes adoptées comme équitables par les deux Etats contractants et formulées dans la suite aux articles II et III de la Convention elle-même. Ce que la Convention interdit aux arbitres, c'est, par conséquent, d'appliquer aux réclamations actuelles les règles du droit international coutumier qui, à leur avis, régissent la responsabilité juridique des Etats en matière de dommages révolutionnaires.

A cet égard aussi, le projet primitif de Monclova paraît avoir subi, au cours des années, une évolution, sans que, toutefois, les modifications successives aient interrompu la continuité historique. D'après le décret de Monclova (article 6), le fonctionnement des Commissions des Réclamations, nationale et semi-internationales, se réglerait par une loi nationale spéciale; ce programme fut réalisé plus tard par le décret-loi du Président Carranza du 24 novembre 1917, élaboré par le décret organique du 24 décembre 1917, modifié par le décret-loi du 30 août 1919 et amplifié par celui du 29 juillet 1924. Tous ces décrets ont fixé eux-mêmes les bases de la responsabilité du Mexique (articles 1er, 2 et 3 du décret de Monclova; articles 5 et 8 du décret-loi du 24 novembre 1917; articles 1er, 3, 5 et 6 du décret-loi du 30 août 1919; article 1er du décret-loi du 29 juillet 1924). Lorsque le programme spontané des Gouvernements mexicains successifs fut définitivement passé dans le domaine international, à la suite de la circulaire télégraphique du 12 juillet 1921 aux légations mexicaines à l'étranger, la question de savoir sur quelle base précise les Commissions mixtes à instituer auraient à juger les réclamations des étrangers, devint urgente. La circulaire elle-même hésitait entre deux pensées bien distinctes. D'une part,

elle manifestait le désir du Gouvernement mexicain de "entrar en arreglos con los Gobiernos extranjeros a fin de indemnizar *ex-gratia* a aquellos de sus nacionales que hayan sufrido daños por causa de las revoluciones..."; d'autre part, elle annonçait que "con tal fin, la Secretaría de Relaciones Exteriores (quedó) facultada para celebrar las convenciones necesarias, las cuales seguirán en todo los principios de derecho internacional aceptados sobre esta materia". Le Gouvernement de 1921 s'est-il suffisamment rendu compte de la contradiction que contenait cette invitation aux Gouvernements étrangers? L'offre d'indemnisation *ex-gratia* présuppose, sinon l'absence de toute obligation de droit international, au moins la résolution de ne pas se retrancher derrière la non-existence éventuelle de pareille obligation; comment alors prescrire, quelques lignes plus loin, aux négociateurs futurs de suivre en tout précisément les principes de ce même droit international? Est-ce que, peut-être, le Gouvernement du Mexique a voulu dire que, *sauf* pour ce qui concerne le principe et l'étendue mêmes de la responsabilité juridique stricte, les conventions à conclure devraient se conformer, à tous autres points de vue, aux règles du droit international positif? Je ne saurais le dire, mais toujours est-il que, au cours des pourparlers diplomatiques postérieurs, notamment avec les Etats-Unis, le vague s'est éclairci et que les conventions ont fini par mettre hors de doute que non pas les principes du droit international positif, d'ailleurs très controversés, mais les seuls principes de l'équité, définis d'une manière concrète dans les termes mêmes des dispositions conventionnelles, décideraient du bien-fondé des réclamations. En effet, les négociations avec le Gouvernement de Washington (cpr.: *La cuestión internacional mexicano-americana, durante el Gobierno del Gral. Don Alvaro Obregón*, p. 29) démontrent que, pour donner le plus de satisfaction possible aux désirs des Etats-Unis, le Mexique lui-même a proposé à ces derniers, de sa propre initiative "y para mayores pruebas de la buena voluntad del Gobierno de México y de sus deseos de satisfacer todas las demandas justas (que) las reclamaciones no se resolverían de acuerdo con los principios del Derecho Internacional, sino — criterio éste más amplio y favorable a los reclamantes — con un simple espíritu de equitad" (cpr. aussi les communications contenues dans le message présidentiel au Congrès en date du 1er septembre 1923) *(loco cit.*, p. 267).

La mention de l'équité dans l'article VI de la Convention a un but tout à fait différent. Dans cet article, il s'agit d'écarter spécialement, pour le présent arbitrage, le fameux principe de droit international, selon lequel une réclamation internationale n'est, en règle générale, pas recevable, tant que les recours légaux devant les instances nationales n'ont pas été épuisés, principe qui, autant qu'il n'a pas trouvé de reconnaissance expresse dans les rapports conventionnels entre les deux Etats en cause, peut être considéré comme un principe généralement admis de droit coutumier.

Le rôle de l'équité dans le présent arbitrage, envisagé à la lumière combinée des articles II et IV de la Convention, consiste donc à rendre impossible au Mexique de faire valoir devant la Commission franco-mexicaine l'exception déclinatoire du défaut d'avoir épuisé préalablement les recours légaux, et de charger ladite Commission de mettre à la base de ses décisions les principes équitables admis par les Hautes Parties Contractantes elles-mêmes dans la Convention, au lieu de les fonder, soit sur la négation absolue de toute responsabilité internationale pour dommages révolutionnaires, soit sur un examen approfondi de la teneur des règles de droit international relatives à cette matière.

Au cours des débats oraux, l'agence mexicaine s'est efforcée d'accréditer la thèse que le texte de l'article II de la Convention sanctionnerait le principe de l'irresponsabilité juridique du Mexique de tous les dommages énumérés à

l'article III, et tous ses exposés se sont inspirés de cet axiome. Or, ce faisant, elle a construit son système de défense sur une base qui, à mon avis, est fondamentalement erronée. La genèse de la Convention mexicano-américaine démontre clairement que, en assumant la responsabilité de "los daños causados por las últimas guerras civiles", le Mexique a voulu aller — et est, en effet, allé — plus loin qu'il n'était obligé suivant le droit international. Ainsi que le Gouvernement mexicain lui-même l'a énoncé dans sa lettre du 3 juillet 1924 au Ministre de France, il s'était rendu parfaitement compte que, s'il s'en tenait simplement aux principes du droit international, "*en la mayoría de los casos* (je souligne) de daños o pérdidas causadas por las últimas guerras civiles. México no sería responsable de acuerdo con (dichos) principios"; tout de même, il a assumé la responsabilité même dans ces cas. C'est-à-dire à côté de l'obligation juridique incontestable et incontestée de réparer certaines catégories de dommages, il s'est engagé *ex gratia* à en réparer certains autres constituant à son avis la majorité. L'erreur fondamentale de la défense mexicaine devant la Commission consiste donc en ceci, que, du fait par le Gouvernement mexicain d'avoir promis des réparations gratuites, en plus des indemnisations obligatoires d'après le droit des gens, l'agence mexicaine a prétendu tirer la conclusion que même ces indemnisations obligatoires seraient devenues gratuites. Mais des actes délictueux ne deviennent pas légitimes par le fait d'avoir été commis pendant une révolution. L'axiome défendu par l'agence mexicaine est donc inadmissible, d'autant plus que la rédaction de l'article II de la Convention (notamment les mots: "non de voir sa responsabilité établie conformément aux principes généraux du droit international") ne part aucunement de cet axiome, mais admet plutôt l'état incertain du droit international actuel en cette matière et la possibilité que dans certains cas il existe une véritable responsabilité juridique internationale, qui doit être niée dans d'autres cas.

D'ailleurs, le Gouvernement mexicain n'est pas le seul contractant et le Gouvernement français, de son côté, ne paraît pas avoir exprimé d'opinion précise à cet égard.

11. — Il n'est donc pas permis de représenter le texte de l'article II comme une preuve de la thèse que les deux Etats contractants, et pas même que le seul Mexique, auraient nié dans le document fondamental du présent arbitrage l'existence de tout engagement international d'indemniser les ressortissants étrangers des préjudices subis à la suite de révolutions, d'insurrections et d'autres événements semblables. Ils ont plutôt écarté cette question pour l'allocation et la fixation des indemnités. Cette considération ôte beaucoup d'importance à la thèse soutenue de temps en temps par l'agence mexicaine que, le droit international excluant toute responsabilité internationale du chef de dommages causés par des mouvements révolutionnaires, insurrectionnels, etc. et la Convention ayant sanctionné ce point de vue, les dispositions conventionnelles, en tant qu'exceptions au droit commun, doivent être interprétées restrictivement et les indemnités réduites au minimum.

Personnellement je ne suis pas éloigné de penser que l'agence mexicaine affirme à bon droit que le droit international positif contemporain ne reconnaît pas encore d'une manière générale l'obligation d'accorder aux ressortissants étrangers le privilège de pouvoir réclamer des indemnités du chef de pertes et dommages qu'ils ont pu subir par suite d'insurrections, d'émeutes, de guerres civiles, etc., et de souscrire, par conséquent, à la conclusion à laquelle un des plus grands internationalistes modernes, actuellement Président de la Cour Permanente de Justice Internationale, M. Dionisio Anzilotti, a cru devoir arriver, à la fin de son étude de 1906, intitulée: *La responsabilité internationale des Etats à raison des dommages soufferts par des étrangers*, p. 49 (publiée avant dans

la *Revue générale de droit international public*, t. XIII, p. 305 et ss.) à savoir que: "Quoi qu'il advienne du droit futur, nous devons admettre qu'il n'existe pas à présent de principe de droit international qui oblige les Etats à réparer les préjudices subis par les étrangers en cas d'émeutes, de révolutions ou de guerres civiles, lorsque les dommages causés ne rentrent pas dans la catégorie de ceux pour lesquels le devoir d'indemnité est admis d'après les principes généraux de la responsabilité civile en vigueur dans l'Etat", conclusion admise par bien des auteurs sur le droit international [1].

Mais sous la forme absolue que l'agence mexicaine a prétendu lui donner, la thèse de l'irresponsabilité est inacceptable, car il est incontestable qu'il peut se présenter bien des dommages révolutionnaires, dont l'Etat est sans aucun doute obligé d'assumer la responsabilité. C'est pourquoi j'estime plus exacte l'opinion exprimée par le Gouvernement mexicain lui-même, dans sa lettre au Ministre français en date du 3 juillet 1924 (cpr. p. 21), et selon laquelle le Mexique n'est pas responsable, conformément aux principes du droit international, *dans la majorité des cas* de dommages ou de pertes causés par les dernières guerres civiles. Par contre, si les dommages trouvent leur origine, par exemple dans des réquisitions ou contributions forcées réclamées par le Gouvernement légitime pendant sa lutte contre les insurgés, ou par les révolutionnaires avant leur triomphe final, ou qu'ils aient été causés par des actes délictueux du Gouvernement légitime ou de ses forces militaires, ou par des délits commis par les forces révolutionnaires victorieuses, la responsabilité de l'Etat ne saurait, à mon avis, être niée [2].

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[1] En consultant les auteurs et en analysant la question de la responsabilité internationale des Etats au point de vue théorique, on doit, d'ailleurs, se garder de confondre deux hypothèses bien différentes, à savoir celle dans laquelle les dommages ont été infligés par des organes de l'Etat lors de leurs efforts pour refouler les émeutes, insurrections, mouvements révolutionnaires, etc., et celle dans laquelle les dommages ont été causés par les émeutiers, insurgés, révoltés, etc. Cf. dans le sens de Dionisio Anzilotti, parmi beaucoup d'autres:

Dr. K. Strupp, *Das völkerrechtliche Delikt*, dans *Handbuch des Völkerrechts (Stier-Somló) Dritter Band, Erste Abteilung*, p. 97 et ss., 103 et ss.: "Es war daher nicht nur politisch klug, sondern auch dem geltenden Volkerrechte gemäss, wenn in stetig wachsender Zahl amerikanische Staaten mit europäischen Verträge abgeschlossen haben, die — vom Falle des Verschuldens abgesehen — ihre Unverantwortlichkeit für Schädigungen Privater bei Aufruhr und Bürgerkrieg ausdrücklich feststellen."

Baty, *International Law*, p. 80, 136 et ss.: "How could a government, fighting for its life, be expected to prevent, or be responsible for such occurrences?"

Borchard, *Diplomatic protection of citizens abroad*, p. 228 et ss.

V. Pennetti, *Responsabilità internazionale in caso di revolte o di guerre civili*, p. 24 et ss.

Dr. P. Schon, *Die völkerrechtliche Haftung der Staaten aus unerlaubten Handlungen*, p. 95 et ss.

A. Rougier, *Les guerres civiles et le droit des gens*, p. 473.

Ne pas reconnaître de responsabilité de plein droit, implique rejeter les différentes théories inventées pour appuyer pareille responsabilité, telles que: la théorie du "risque étatif", défendue par P. Fauchille *(Annuaire de l'Institut de droit international*, t. XVIII, p. 233 et ss.), celle se basant sur une présomption de faute de l'Etat, donnant lieu à une responsabilité *quasi ex delicto*, défendue par C. Wiesse *(Reglas de derecho internacional aplicables a las guerras civiles)*, celle de Brusa *(Annuaire de l'Institut de droit international*, t. XVII, p. 96 et ss.), consistant à établir une analogie avec le devoir en droit public interne, d'indemniser les particuliers expropriés pour cause d'utilité publique, etc.

[2] Comp. à ce sujet, entre autres:

A. Rougier, *Les guerres civiles et le droit des gens*, p. 474 et ss., qui énumère différents groupes de cas de responsabilité de l'Etat: manque à son devoir international d'assurer la sécurité des étrangers sur son territoire; manifestation violente et injurieuse dirigée contre les étrangers à raison même de leur qualité d'étrangers;

S'il faut déterminer les rapports entre la Convention et le droit international commun, il serait donc absolument inexact, de dire que la Convention sanctionne le principe général de l'irresponsabilité, comme étant admis par le droit international commun, et que, par conséquent, toutes les indemnités, qui rentrent dans l'énumération de l'article III, soient gratuites, à la lueur dudit droit. Ce qui est exact, c'est que, parmi les dommages énumérés à l'article III, il y en a dont le Mexique est sans aucun doute responsable d'après le droit international commun, mais qu'il y en a d'autres dont ne lui incombe aucune responsabilité juridique. Mais étant donné que le Mexique n'a pas voulu se retrancher derrière son irresponsabilité des dommages rentrant dans le dernier groupe, les Hautes Parties Contractantes elles-mêmes ont prescrit à la Commission, pour ce qui concerne l'admission de la responsabilité financière du Mexique, de faire abstraction des règles strictes du droit des gens et, par conséquent, écarté, pour la question principale de l'indemnisation, la question du droit, sans la préjuger, ni en faveur, ni à l'encontre de la thèse de la responsabilité internationale.

12. — De ce qui précède, il résulte que, à mon avis, le rôle de l'équité, dans cet arbitrage, bien que très important, n'est pourtant que restreint, c'est-à-dire limité à écarter la question controversée de l'existence et éventuellement de l'étendue de la responsabilité internationale du chef de préjudices subis par des étrangers à la suite de guerres civiles, etc., ce qui ne laissera pas, d'ailleurs, de produire certains contre-coups sur des questions connexes, et à écarter de même l'exception tirée de la clause Calvo. Pour le reste, la Commission a, en règle générale, le devoir d'examiner les questions controversées au point de vue du droit international positif, sans pouvoir se contenter d'invoquer simplement des raisons d'équité comme motifs de ses sentences. C'est pourquoi, par exemple, la question de savoir si un réclamant a apporté des preuves suffisantes de sa nationalité française, ou celle de savoir quelles sont les conditions exactes de la recevabilité de réclamations introduites par des associés français dans des sociétés mexicaines, ou celle de l'interprétation des dispositions relatives aux auteurs des dommages, ne sauraient être tranchées à la lueur un peu diffuse de l'équité, mais demandent une solution strictement juridique. C'est aussi pourquoi les règles conventionnelles contenant les principes équitables que les deux Etats contractants ont formulés de commun accord comme base juridique du jugement des présentes réclamations (articles II et III de la Convention), pour éviter l'appréciation de la responsabilité du Mexique au point de vue strict du droit des gens coutumier, doivent, à leur tour, être interprétées à la lumière du droit international commun, notamment de la règle, généralement admise,

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mesures de défense contraires au droit international et préjudiciables aux étrangers; réquisitions militaires et exercice d'autres droits inhérents à la guerre; arrestations arbitraires, destruction ou saisie des biens des particuliers, emprisonnement illégitime, etc., même si ces actes ont été commis, non point par ses agents, mais par les insurgés et les agents de ces derniers (sur cette dernière thèse, voir toutefois ci-après dans le texte, 55).

K. Strupp, *Das völkerrechtliche Delickt*, p. 101: "Seine Haftung kommt erst dann in Frage, wenn in einem konkreten Falle der Staat einer sonstigen völkerrechtlichen Pflicht zuwidergehandelt, z. B. Fremde willkürlich verhaftet oder bestehenden Staatsverträgen zuwider Requisitionen bei ihnen vorgenommen oder etwa Massnahmen ergriffen hat, die nur nach Anerkennung der Aufständischen als kriegführende Macht zulässig gewesen wären".

D. Anzillotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, p. 136: "In tutti i casi nei quali lo Stato è internazionalmente tenuto ad osservare una determinata condotta riguardo agli individui, può esser chiamato responsabile delle conseguenze di non averla tenuta".

que (à moins de stipulation contraire) un Etat n'est pas en droit d'accorder à ses nationaux des indemnités pour des pertes et dommages révolutionnaires, sans accorder les mêmes indemnités aux étrangers. Et c'est enfin pourquoi on ne pourra s'empêcher d'invoquer les règles du droit international en différents autres cas, où la Convention elle-même est silencieuse, par exemple, pour fixer la responsabilité du Mexique d'actes commis par des fonctionnaires supérieurs ou subalternes, dans les limites de leur compétence ou par excès de pouvoir, d'actes de détachements militaires ou de militaires isolés, d'actes des Etats individuels de la Fédération, etc., ainsi que pour résoudre la question controversée des intérêts à payer en plus du montant des indemnités allouées, etc.

Ces conclusions sur le rôle restreint de l'équité, qui — soit dit incidemment — n'impliquent pas du tout l'applicabilité constante du droit mexicain, tant de fois invoqué par l'agence mexicaine, sont conformes à la tendance générale de la jurisprudence arbitrale, consistant à admettre que tout tribunal d'arbitrage qui n'est pas expressément autorisé à faire abstraction des règles positives du droit international et à fonder ses décisions sur des considérations, soit d'équité, soit d'opportunité, ou à entrer dans le domaine des transactions, est obligé d'appliquer les normes du droit international. C'est ce que, à bon droit, ont décidé plusieurs arbitres ou tribunaux arbitraux, dont je ne cite ici que le surarbitre américain Marsh dans sa sentence relative à la souveraineté de l'Alpe Cravairola contestée entre la Suisse et l'Italie, et le Baron de Lambermont dans sa lettre accompagnant sa sentence concernant l'île de Lamu [1]. Voir aussi l'article 38 du statut de la Cour permanente de Justice internationale.

D'ailleurs, il va de soi que, comme j'aurai encore l'occasion de le dire plus tard, des considérations d'équité doivent nécessairement jouer un rôle important dans l'appréciation des preuves et dans la fixation des indemnités.

Enfin, je tiens à faire remarquer que les conclusions formulées ci-dessus n'empêchent pas que l'équité soit invoquée encore comme principe supplémentaire de décision dans les cas où le droit positif est silencieux, ou comme correctif dans les cas exceptionnels où l'application du droit strict amènerait à des résultats évidemment injustes. Dans le premier cas, l'équité fait fonction de source subsidiaire de droit international; dans le second, invoquer l'équité équivaut à confesser que le droit positif, comme toute œuvre humaine, est imparfaite et que, pour cela, il a quelquefois besoin de correction par un principe supérieur, qu'on l'indique par justice ou par équité.

Rôle des agents

12 *bis*. — Enfin, il me faut faire encore quelques brèves observations sur le rôle des agents dans le présent arbitrage, question qui a soulevé certains doutes au cours des débats oraux. Pour bien préciser ce rôle, je tiens à déclarer que les agents doivent être considérés, et que, après certaines explications à propos de points particuliers, qui concernaient directement les bases mêmes de la défense, il m'a fallu les considérer constamment, non comme de simples avocats, ayant liberté d'énoncer toute sorte d'opinions personnelles, quand bien même ces opinions seraient en contradiction avec l'opinion de leur Gouvernement, mais comme les représentants officiels de ce dernier. S'il en était autrement, l'on ne saurait jamais si l'agent expose des opinions personnelles, ou bien le point de vue officiel de son Gouvernement, et les débats revêtiraient un caractère hybride et indéfinissable. Et seule cette interprétation du rôle des agents est conforme au droit international commun en matière de procédure arbitrale, tel qu'il

[1] La première se trouve publiée dans *Lafontaine, Pasicrisie internationale;* la dernière dans de Martens, *Nouveau Recueil général, 2e série* t. XXII, p. 109 et s.

se trouve formulé à l'article 62 de la (première) Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux, aux termes duquel: "Les Parties ont le droit de nommer auprès du Tribunal des agents spéciaux, avec la mission de servir d'intermédiaires entre Elles et le Tribunal."

NATIONALITÉ DU RÉCLAMANT

13. — Passant maintenant des questions de caractère général aux points controversés concrets, je constate d'abord que le système de défense du Mexique, en ce qui concerne la nationalité du réclamant, se réduit aux thèses suivantes.

Le certificat d'immatriculation consulaire produit par l'agent français, d'abord comme document unique pour prouver la nationalité française du réclamant ne suffirait pas à ces fins. La production de documents qui établissent d'une manière plus directe la nationalité invoquée serait nécessaire, notamment l'acte de naissance du réclamant, d'où résulte sa filiation. Mais même cet acte de naissance ne suffirait pas à déclarer prouvée la nationalité française du réclamant, toutes les fois que soit ledit acte laisserait subsister un doute sur la nationalité du père, soit des événements particuliers auraient fait perdre à celui-ci sa nationalité d'origine. Dans l'espèce, le père du réclamant aurait perdu la nationalité française bien avant la naissance de ce dernier, par le fait de s'être établi au Mexique sans esprit de retour.

Mais quand bien même la nationalité française du réclamant devrait être admise, il ne s'ensuivrait nullement que la réclamation fut recevable. Car pour être recevable, elle doit revenir à une personne qui ne possède pas en même temps, à côté de sa nationalité française, la nationalité mexicaine, Or, ce serait précisément le cas actuel. Non seulement, le père du réclamant aurait obtenu, déjà avant la naissance de ce dernier, la nationalité du pays de son domicile, mais, en outre, le réclamant lui-même aurait acquis la nationalité mexicaine par son propre fait, si même il ne l'avait pas déjà acquise par le seul fait de sa naissance.

La Commission se trouverait, par conséquent, en présence d'un cas de double nationalité, ce qui l'empêcherait de connaître de la réclamation introduite.

Etant donné que les débats oraux devant la Commission ont présenté une certaine confusion d'idées et qu'il en est de même d'une décision récente d'une commission mixte analogue, il est de toute nécessité d'éviter dans cette sentence la même confusion et de distinguer rigoureusement entre les deux aspects de la question, à savoir: d'une part, celui de la nationalité française et, d'autre part, celui de la nationalité mexicaine du réclamant.

A. — NATIONALITÉ FRANÇAISE DU RÉCLAMANT

1. *La preuve de la nationalité en général et la force probante des certificats d'immatriculation consulaire*

14. — L'agent français a commencé par se baser uniquement sur l'immatriculation du réclamant au Consulat de France à Mexico, dont il a produit le certificat.

Ce fait a soulevé la question de savoir jusqu'à quel point un certificat d'immatriculation consulaire ou diplomatique peut être considéré comme suffisant, par lui-même, à prouver la nationalité du porteur. Cette question ayant été soulevée dans la presque totalité des procès pendants devant la Commission, ne saurait être laissée sans réponse. C'est pourquoi je tiens à entamer d'abord l'examen de cette question importante.

Dans les pièces fondamentales et au cours des débats oraux, l'agence mexicaine a combattu la force probante des certificats d'immatriculation consulaire devant la Commission franco-mexicaine et, en outre, elle a prié la Commission, par un écrit spécial en date du 14 mai 1928 et se basant sur les articles 6, *sub* b), et 38 du Règlement de procédure, de vouloir ordonner la présentation par l'agent français des pièces justificatives auxquelles renvoient lesdits certificats.

Dans cette résistance opposée par l'agence mexicaine à certains moyens de preuve invoqués par la partie adverse à l'appui de la nationalité française des réclamants, se reflète une lutte ancienne et traditionnelle entre parties litigantes devant un tribunal arbitral international. Aussi longtemps que l'arbitrage moderne constitue un facteur réel dans les relations internationales, les Etats défendeurs n'ont pas cessé d'affirmer le caractère insuffisant des preuves apportées par les Etats demandeurs pour démontrer que les personnes en faveur desquelles ils faisaient valoir leur droit de protection diplomatique, leur ressortissaient en qualité de nationaux. Cette opposition a été dirigée contre toutes espèces de preuves: documents officiels, tels que déclarations des Gouvernements réclamants, certificats diplomatiques ou consulaires, jugements de tribunaux, décrets de naturalisation et autres; déclarations semi-officielles de personnes occupant une fonction publique, mais sans qualité pour attester la nationalité des réclamants, tels que gouverneurs d'Etats, chefs militaires, etc.; documents de caractère privé, tels que: affirmations sous serment, soit des réclamants eux-mêmes, soit de personnes tierces, etc.; jamais jusqu'ici, la pratique internationale n'a réussi à fixer des règles précises et généralement admises, de sorte que tout tribunal international nouveau a dû décider pour lui-même quels documents ou autres moyens de preuve il se croyait autorisé à accepter comme preuves suffisantes de la nationalité des réclamants, affirmée par l'Etat demandeur et contestée par l'Etat défendeur. C'est pourquoi la pratique arbitrale présente une diversité considérable d'opinions, diversité qui est encore augmentée par le fait que quelquefois les compromis d'arbitrage ou les règlements de procédure précisaient plus ou moins les preuves admissibles, et alors en sens différents, et que maintes fois un même Etat, le Mexique aussi bien que d'autres Etats, au cours des années, a invoqué une fois des documents qu'il combattait une autre fois comme insuffisants, selon que, dans la procédure arbitrale, il se présentait comme demandeur ou comme défendeur.

Autant que je voie, la convention des réclamations et le règlement de procédure franco-mexicains ne contiennent pas de règles au sujet des moyens de prouver la nationalité du réclamant, les articles cités par l'agence mexicaine ne donnant, à mon avis, aucun indice. C'est pourquoi je considère la Commission franco-mexicaine aussi libre que nombre de ses devancières pour décider des exigences qu'elle croit devoir poser à cet égard. Le fait qu'une disposition expresse au règlement du 24 décembre 1917, exécutoire de la loi mexicaine sur les réclamations, prescrit certains documents comme les seuls admissibles devant la Commission nationale, à savoir: le passeport visé par la Légation, le décret de naturalisation ou le certificat d'immatriculation [1], n'a pas, devant la Commission franco-mexicaine, d'intérêt directement décisif,

[1] Article 10 de la loi du 30 août 1919, identique à l'article 11 de la loi du 24 novembre 1917: "Los extranjeros acompañarán al escrito en que formulen su reclamación, los comprobantes con que acrediten su nacionalidad, y los que nolohicieren así, serán considerados como mexicanos para los efectos de la Ley."

Article 25 du Règlement du 24 décembre 1917: "Para los efectos del artículo 11 de la Ley de 24 de noviembre de 1917 sólo se admitirán como comprobantes de nacionalidad extranjera: el pasaporte visado por la Embajada, Legación o Consulado respectivo, la carta de naturalisación, en su caso, o el certificado de matrícula, cuando se trata de individuos..."

puisque ladite disposition ne la lie pas, en ce sens que les trois documents cités seraient pour elle les seuls admissibles, ni en ce sens qu'elle serait obligée d'en admettre la force probante, même dans les cas où elle douterait de leur exactitude ou considérerait les réclamants comme n'étant pas ou n'étant plus Français. Néanmoins, la disposition que je viens de citer n'est pas dépourvue de valeur juridique en tant qu'indice de l'attitude que le Mexique lui-même prend vis-à-vis des certificats d'immatriculation; j'aurai encore l'occasion de revenir sur ce point.

Ma décision relative à cette question aurait pu être beaucoup plus brève, si je ne m'étais trouvé en présence de deux sentences divergentes récentes, à savoir, d'une part: une décision de mon honorable collègue chilien, Président de la Commission germano-mexicaine des réclamations, M. Cruchaga Tocornal, en date du 11 avril 1927, et d'autre part, une décision, de caractère plus général en date du 31 mars 1926, que la Commission générale des réclamations entre le Mexique et les Etats-Unis a prise à l'unanimité, avec le concours du commissaire mexicain, et que, après mûre réflexion, je ne fusse arrivé à une conclusion différente de celle de mon honorable collègue chilien.

Etant donné l'état d'incertitude dans lequel se trouve, en droit international, la matière de la preuve de la nationalité des réclamants devant les tribunaux d'arbitrage, il eût mieux valu, sans doute, insérer dans le Règlement de procédure de la présente Commission une disposition expresse à cet égard, que de laisser la controverse en suspens pendant toute la procédure écrite et orale, jusqu'au moment où la Commission aurait à rendre ses premières sentences. Maintenant, toutefois, que la Commission franco-mexicaine, dans sa composition primitive, a négligé de trancher le point, il est indispensable de combler cette lacune dans l'état actuel de la procédure par une sentence motivée.

15. — En analysant la sentence de la Commission germano-mexicaine à laquelle je viens de faire allusion, à savoir la résolution interlocutoire intervenue à la date du 11 avril 1927 dans l'affaire de Karl Klemp (Mémorandum No 1), j'y ai trouvé des arguments qui, à mon vif regret, m'ont mis dans l'impossibilité d'y adhérer sans plus et obligé de refaire un peu le travail entrepris par mon honorable collègue chilien.

Ce faisant, je laisserai de côté différentes citations qui, à mon avis, n'ont qu'un rapport très éloigné ou même aucun rapport avec la question controversée, telles que celles relatives au droit de tout Etat indépendant de fixer les conditions de l'acquisition et de la perte de sa nationalité, à la qualité des ministres et consuls pour célébrer des mariages, au congé des marins, à la force probante des déclarations consulaires dans les procès civils, etc., pour ne retenir que celles qui présentent un intérêt réel pour la question discutée.

Les objections que j'ai à faire à la sentence interlocutoire dans l'affaire Karl Klemp, se réduisent aux points suivants, à savoir: que cette sentence attaque plutôt la force probante absolue (c'est-à-dire sans admissibilité de preuves contraires) que la force probante *prima facie* des certificats d'immatriculation consulaire; qu'elle n'analyse pas suffisamment les précédents invoqués, en oublie d'autres importants et donne quelquefois une impression pas tout à fait adéquate à la portée réelle du précédent cité; qu'elle fait preuve d'une certaine confusion entre les deux questions bien distinctes de savoir à quelles exigences doit satisfaire la preuve de la nationalité allemande du réclamant, et quelles conséquences découleraient éventuellement du fait que, à côté de sa nationalité allemande, le réclamant possède également la nationalité du pays auquel il réclame, et enfin, qu'elle combat les certificats consulaires par des arguments qui peuvent également, ou même à plus forte raison, être invoqués à l'encontre d'autres documents qu'elle considère comme pièces

justificatives suffisantes. Pour mieux préciser, ce sont particulièrement les conclusions *sub* 1., 11., 13., 14. et 15., qui me paraissent, par elles-mêmes ou envisagées dans leur ensemble, sujettes à de sérieuses réserves, sinon erronées.

Quant à la force probante, absolue ou seulement *prima facie*, des certificats d'immatriculation consulaire, il est constant que la thèse française devant la Commission franco-mexicaine ne va pas plus que celle du commissaire allemand dans l'affaire Klemp (voir p. 3 du texte espagnol de la sentence interlocutoire), jusqu'à dire que lesdits certificats méritent une foi absolue, l'agent français admettant parfaitement la preuve contraire, soit dans des cas exceptionnels où la bonne foi du consul aurait été surprise par l'intéressé, soit dans les cas où le réclamant aurait perdu sa nationalité française avant ou après la délivrance du certificat, soit pour une autre raison quelconque. C'est pourquoi m'échappe la force convaincante de la conclusion *sub* 11. de la sentence interlocutoire citée ci-dessus: "Que conceder al Cónsul facultad absoluta para apreciar y resolver sobre la documentación presentada por el aspirante a inscripción, equivaldría a eregirlo en Juez para determinar la procedencia de la interposición de reclamaciones ante una Comisión Mixta Internacional...", et c'est aussi pourquoi, par exemple, le précédent de *Medina contre Costa Rica* (cmp. p. 13 dudit texte espagnol et *infra*) n'appuie pas le dispositif de la sentence.

Quant aux précédents invoqués, il convient de faire entre autres les observations suivantes: S'il est vrai que le surarbitre américain Thornton a considéré comme insuffisant certain certificat consulaire dans l'affaire *Brockway*, il n'en est pas moins vrai — ce qu'oublie la sentence — que ce même arbitre a admis dans une autre affaire (*Ramón Garay*, *Moore*; *International Arbitrations*, III, p. 2532) comme preuve suffisante un autre certificat consulaire et que ce dernier certificat fut présenté précisément par le Gouvernement du Mexique même, qui en a profité dans un arbitrage international antérieur. D'ailleurs, le traitement différent de ces deux certificats s'explique aisément par leur nature différente (voir *infra*). — La citation du cas de *Medina contre Costa Rica*, mentionné ci-dessus, omet précisément les passages qui ont un intérêt direct pour la présente controverse, M. Bertinatti ayant commencé par déclarer en toutes lettres que: "The certificates exhibited — (il s'agissait ici non pas de certificats consulaires, mais de certificats de naturalisation) — being made in due form, have for themselves the presumption of truth; but when it becomes evident that the statements therein contained are incorrect, the presumption of truth must yield to truth itself." Donc, au lieu d'appuyer le dispositif de la sentence, la citation, prise dans son contexte, appuie plutôt la thèse du commissaire allemand, conforme à celle de l'agent français dans les procès actuels, c'est-à-dire que les certificats officiels méritent foi, au moins *prima facie*. — La citation du rapport du sous-comité de la Commission d'experts de la Société des Nations pour la codification progressive du droit international, relatif aux problèmes auxquels donne lieu la matière de la nationalité, ne suffit pas non plus, à mon avis, à soutenir la thèse mexicaine, adoptée par la sentence interlocutoire. D'abord, il s'agit, là encore, de certificats qui font "preuve officielle et absolue de la nationalité", c'est-à-dire "prueba en lo absoluto"; et ensuite, ledit rapport, aussi bien que la recommandation de la Grotius Society, semble vouloir dire qu'il est raisonnable d'étendre le système des inscriptions consulaires moyennant des dispositions légales internes ou par un accord international exprès, de sorte que tous les Etats qui l'auront adopté seront obligés, les uns envers les autres, d'accepter la force probante des inscriptions; or, c'est précisément le cas de la France et du Mexique, qui tous deux connaissent le système de l'immatriculation consulaire. — Enfin, il est toujours dangereux de vouloir déduire d'une disposition conventionnelle

expresse, comme celle de l'article 7 du traité hispano-argentin de 1863, cité à la page 18 du texte espagnol de la sentence interlocutoire, la conclusion, que sans elle, la règle contraire prévaudrait, de pareilles dispositions conventionnelles pouvant aussi bien être conçues comme preuves isolées d'une règle de droit coutumier admise, ou en voie d'admission, par les Etats intéressés ou par la communauté des Etats; en tous cas, là encore, il paraît être question d'une preuve absolue de nationalité. Pour quelques autres précédents de la pratique arbitrale, voir *infra*.

Mon objection principale, toutefois, se rapporte à la confusion qui se révèle à la lecture des conclusions *sub* 13. et 14. de la sentence susmentionnée. Après avoir fait mention des cas possibles de double nationalité ou de conflits de nationalités, résultant (mais pas du tout exclusivement !) des doctrines rivales du *jus soli* et du *jus sanguinis*, la sentence dit (*sub* 13.): "Si la inscripción consular es prueba suficiente de nacionalidad, tendría que aceptarse que el inscrito, a pesar de tener doble nacionalidad, es nacional del país en que hizo su inscripción, dejando desestimada la pretensión de considerarlo suyo que podría hacer valer el otro país. En caso de doble nacionalidad, el certificado consular fallaría sobre cual es la nacionalidad triunfante y, si el criterio que inspira al Cónsul es el impuesto por la ley del *jus sanguinis* quedaría, por su propio acto y por su sola voluntad, desconocido el criterio impuesto por la ley del *jus soli*. El Cónsul fallaría, de este manera, en forma inapelable, una cuestión en que se hallan envueltos los soberanos de dos países. . ." Or, même abstraction faite de l'objection que le "fallo" (la sentence) du consul ne fournirait qu'une preuve *prima facie* et ne saurait, par conséquent, être considéré comme "inapelable", les passages transcrits présentent la même confusion que j'ai dû signaler dans les plaidoiries de l'agence mexicaine, à savoir: qu'ils ne font aucune distinction entre la question de la preuve de la nationalité du réclamant comme ressortissant à l'Etat demandeur et la question tout autre de déterminer les effets éventuels d'une double nationalité. Mais il va presque sans dire que le simple fait par le consul allemand ou français de constater la nationalité allemande ou française d'un individu ne préjuge en rien, ni la possibilité que cet individu possède légalement en même temps la nationalité mexicaine, ni les conséquences juridiques que pareille circonstance comporterait. Donc, l'argument en question est dénué de tout fondement, puisqu'il part d'une supposition erronée, à savoir qu'un consul, en déclarant une personne ressortissant national, déciderait, ou aurait le pouvoir de décider en même temps, soit que cette personne n'est pas Mexicaine, soit que le conflit éventuel de nationalités doit être résolu en faveur de la nationalité du consul. Il n'est pas nécessaire de réfléchir longtemps sur la valeur de cette thèse, pour arriver à la conclusion que le considérant *sub* 13. est erroné. Exactement la même objection s'applique au cas d'une femme mariée, traité *sub* 14.

Enfin, la conclusion *sub* 15. est également sans valeur comme argument à l'encontre de la force probante *prima facie* des certificats d'immatriculation consulaire, étant donné que le même argument s'appliquerait à plus forte raison aux actes du registre civil, pourtant admis comme preuves par les conclusions *sub* 1. et 2. de la même sentence. Car, en effet, si lesdits certificats consulaires doivent être déclinés pour le motif qu'ils perdraient toute leur valeur dans des cas où la personne inscrite au registre aurait plus tard perdu sa nationalité primitive par le fait d'avoir passé un certain nombre d'années à l'étranger ou d'avoir accepté des fonctions ou des honneurs d'un gouvernement étranger, le même motif frapperait à plus forte raison les actes du registre civil constatant la naissance d'un individu, étant donné que lesdits actes se rapportent à un moment encore plus reculé de la vie de l'individu en question, que ne l'est le moment de son immatriculation dans les registres consulaires.

On se rendra compte que, en présence d'un tel nombre d'objections sérieuses contre l'argumentation de la sentence interlocutoire précitée, il m'est absolument impossible de m'y conformer, quelque regret et quelque hésitation que j'éprouve à devoir me départir de l'opinion d'une personnalité de la distinction de mon honorable collègue chilien.

16. — Dans ces conditions, force m'est de me frayer mon propre chemin au travers des opinions contradictoires multiples. Dans ce but, je me propose d'examiner d'abord, s'il existe quelque principe général de droit international qui régisse la solution de la controverse; de tirer ensuite mes conclusions des précédents de l'arbitrage international, et de terminer en dressant le bilan des arguments pour le cas spécial du jugement des réclamations françaises contre le Mexique pour dommages causés par les révolutions, ainsi que pour le cas de l'espèce.

Si l'on examine les différents points de vue adoptés en matière de preuve de la nationalité, on aperçoit bientôt qu'on se trouve en présence de trois systèmes différents: le premier, laissant aux arbitres la libre appréciation des preuves produites et ne restreignant en rien, en principe, leur faculté, pour admettre comme preuves toutes sortes de documents; le deuxième, affirmant que la preuve de la nationalité doit être administrée conformément à la loi de l'Etat demandeur; le troisième, attachant une importance égale, ou même décisive, à la loi de l'Etat défendeur.

Le premier système, qui laisse tout au bon sens, à la conscience et aux conceptions juridiques des arbitres, paraît être celui qui a été adopté, implicitement ou en termes exprès, par la plupart des tribunaux arbitraux, autorisés, ou non, à cet effet par une disposition spéciale du compromis d'arbitrage ou du règlement de procédure, arrêté soit par les parties litigantes, soit par le tribunal lui-même. Suivant ce système, nombre de tribunaux d'arbitrage ou de commissions mixtes ont, après examen des pièces justificatives, ou bien admis, ou bien rejeté toutes sortes de preuves produites par les intéressés, de caractère officiel, semi-officiel ou tout à fait privé. Malheureusement, il y a bien des cas où la question de la preuve de la nationalité des réclamants a été soulevée devant un tribunal d'arbitrage, mais où celui-ci n'a pas statué sur le point, parce qu'il préférait rejeter la réclamation pour des motifs empruntés au fond de l'affaire. Ce dernier a été le cas, par exemple, des réclamations dites "Hawaiian claims", jugées par la Commission mixte constituée en vertu du compromis d'arbitrage anglo-américain du 18 août 1910, où il s'agissait précisément de l'immatriculation consulaire des réclamants [1], ainsi que de différentes affaires résolues au fond par le tribunal anglo-chilien de 1894-1896,

[1] Cmp.: *American and British Claims Arbitration under the Special Agreement of August* 18 1910 *(Report of Fred. K. Nielsen)*, Washington, Government Printing Office, 1926, p. 154-159, affaires Rawlins, Levey, Kenyon, Bailey, dans lesquelles l'agent américain avait attaqué la réclamation pour le motif suivant: "It is stated in the Memorial that Bailey is a British subject by birth, and that he was registered at the British Consulate at Honolulu.—However, no certificate of registration is produced, and no information is furnished as to the effect of such a certificate as evidence of British nationality. As in the other cases heretofore discussed, the allegations in the Memorial as to the British citizenship of claimant are unsupported, and the United States contends that H. M. Government have no standing to press this claim before the Tribunal." Le tribunal n'a pas pris de décision sur ce point; mais l'argumentation américaine par elle-même démontre qu'il s'agissait d'un cas où le certificat d'immatriculation n'avait pas même été produit, et que le représentant des Etats-Unis supposait la possibilité pour le Gouvernement britannique de lui démontrer encore par des informations supplémentaires la force probante d'un tel certificat selon le droit anglais, c'est-à-dire conformément au deuxième système mentionné dans le texte.

sur la base de la convention du 26 septembre 1893 et du règlement de procédure du 16 novembre 1894 [1].

Mais, même au cours de ce dernier arbitrage, ainsi que dans un grand nombre d'autres procédures arbitrales, la question controversée a trouvé une solution dans le sens du premier système. Je ne mentionne ici spécialement, comme exemples, que deux arbitrages dans lesquels le Mexique lui-même a été ou est encore intéressé, à savoir celui devant la Commission de 1868 et celui devant la Commission générale de 1923, qui toutes deux et avec la collaboration du commissaire mexicain, ont décidé qu'elles étaient qualifiées pour admettre toutes sortes de preuves qui leur paraîtraient suffisantes pour démontrer la nationalité des réclamants. En effet, la Commission de 1868 a, sur la base de l'article 2 (c) de son Règlement de procédure du 10 août 1869 et de son "acuerdo" complémentaire du 21 janvier 1870, reconnu l'admissibilité de toutes sortes de documents, tout en se réservant d'en apprécier la force probante dans chaque cas particulier; ainsi fut admis, par exemple, comme preuve de la nationalité mexicaine du réclamant, un certificat délivré par le Consul général du Mexique à New-York, dans le cas Ramón Garay, cité ci-dessus (cmp. pour les détails: *Reclamaciones internacionales de México y contra México sometidas a arbitraje*, 1899, t. I, p. 197 et ss., 217; *Moore, International Arbitrations*, t. III, p. 2532). Et à son tour, la Commission générale de 1923 a, sur la base de l'article III du compromis et de l'article VIII, alinéa 1er, de son Règlement de procédure de 1924, décidé, à l'unanimité, comme suit dans l'affaire William Parker: "Under these provisions of the Treaty and the rules of this Commission, the affidavits of the claimant himself, his brother, and his friend, are clearly admissible in evidence in this case. Their evidential value—the weight to be given them—is for this Commission to determine... An unsworn statement may be accepted in evidence, but the weight to be given it will be deter-

[1] Cmp.: *Reclamaciones presentadas al Tribunal anglo-chileno* (1894-1896), Santiago de Chile, 1896, 4 tomes, par exemple, t. 1, p. 92 et suiv. (réclamation de W. Edwards Egerton), notamment la duplique à la page 104, où l'agent chilien fait observer que "Los certificados, *affidavits*, anexos al memorial carecen de todo merito para cualquier efecto, y particularmente, para el efecto de acreditar la nacionalidad del señor Egerton. La nacionalidad no se prueba con testigos, *de visu*, sino con documentos autorizados, expedidos al efecto por funcionarios competentes", en laissant de côté le point de savoir si peut-être les certificats d'immatriculation consulaire pourraient être admis comme tels.

Dans d'autres cas, où le tribunal a rendu une décision expresse sur la suffisance des documents présentés à l'appui de la nationalité britannique du réclamant, il a rejeté comme insuffisantes des déclarations de témoins faites sous serment devant un consul britannique (cmp. entre autres le cas de Carlos Eger, *loc. cit.*, t. I, p. 504), mais admis comme suffisants un certificat de baptême et des certificats du Chargé d'affaires britannique au Chili, délivrés par ordre du Ministre des Affaires Etrangères, donc par le Gouvernement réclamant lui-même (cmp., entre autres, les cas de Thomas Thompson, t. I, p. 578, et de John Barker, t. I, p. 658). Dans ces dernières sentences on trouve les considérants suivants, correspondant parfaitement au premier système mentionné dans le texte: "Que la Convención de 26 de Septiembre de 1893, ni el Reglamento de Procedimientos imponen a los reclamantes la obligación de comprobar su estado civil con documentos taxativamente enumerados o en conformidad a los medios de prueba prescritos por las diversas legislaciones positivas modernas; que el art. III de la Convención de Arbitraje al declarar, especialmente, que el Tribunal puede dar acogida *a todos los medios probatorios* que fueren conducentes al mejor esclarecimiento del estado y carácter neutral del reclamante, según el criterio y recto discernimiento de sus miembros, ha conferido al Tribunal Arbitral la facultad absoluta de apreciar y aceptar todo medio probatorio, directo o indirecto, que se produzca para establecer la nacionalidad inglesa del reclamante, con el propósito de decidir de su competencia."

mined by the circumstances of the particular case... In those jurisdictions where the local laws require registration of births a duly certified copy of such registration is evidence of birth in establishing either American or Mexican nationality by birth; but such evidence is not exclusive... While the nationality of an individual must be determined by rules prescribed by municipal law, still the facts to which such rules of municipal law must be applied in order to determine the fact of nationality must be proven as any other facts are proven." Les précédents mexicains en matière d'arbitrage sont, par conséquent, décidément en faveur du premier système.

17. — Le deuxième système, qui veut appliquer à la preuve de la nationalité du réclamant la loi de l'Etat demandeur, part de la thèse tacite, mais bien discutable, que, si la loi nationale du pays demandeur est la seule compétente pour fixer les conditions générales de l'acquisition et de la perte de sa nationalité, cette loi doit également être la seule compétente pour fixer les règles qui régiront les moyens de prouver qu'un individu déterminé remplit effectivement les conditions nécessaires pour tomber sous le coup des dispositions générales. Or, il va de soi qu'aucune loi, autre que celle du pays demandeur, ne peut fixer les conditions dont dépend la possession de l'état légal de ressortissant de l'Etat en question, mais cette vérité incontestable n'implique pas du tout que les faits, auxquels les dispositions légales nationales en matière d'acquisition et de perte de la nationalité doivent être appliquées, ne puissent être prouvés par d'autres moyens de preuve que ceux que prescrit éventuellement, pour l'ordre juridique interne du pays, la même législation nationale. Non seulement, d'autres moyens de preuve sont parfaitement possibles en bien des cas, mais encore l'admission d'autres moyens n'empiète en rien sur le pouvoir souverain du pays en question de fixer les règles sur l'acquisition et la perte de sa nationalité. Si la règle qui est à la base du deuxième système devait nécessairement trouver application dans les tribunaux internationaux, il s'ensuivrait que, par exemple dans le cas des conventions analogues des réclamations, conclues par le Mexique, vis-à-vis du même Etat défendeur, les exigences de la preuve de la nationalité des réclamants différeraient selon la législation, la jurisprudence et la doctrine en vigueur ou prévalant dans chacun des Etats demandeurs. Il s'ensuivrait également, au point de vue pratique, que dans le cas, par exemple des sujets de protectorats français ou britanniques, la Commission en question pourrait se trouver dans la nécessité d'étudier, non seulement des textes législatifs, des décisions judiciaires, etc., mais encore toutes sortes de documents, actes de baptême, de naissance, etc., en langues turque, arabe, annamite, malaise, etc.; en effet, l'agence mexicaine a déjà commencé, à propos des réclamations introduites par des Syriens et des Libanais, dont traitera une sentence postérieure, No 30-A, à invoquer la législation turque en matière de nationalité et elle désirerait peut-être presser la Commission de prescrire la production d'actes de baptême, etc., en langue turque ou arabe.

Mais en supposant même que pour un tribunal international les règles du droit interne de l'Etat demandeur en matière de preuve de sa nationalité soient les seules décisives, à quelles règles faudrait-il alors que pareil tribunal s'en tint? Pour ne pas étendre trop loin l'examen de cette controverse, je me borne à me référer ici à la législation française, en faisant, en outre, abstraction pour le moment et autant qu'il n'est pas nécessaire de les invoquer, de cas exceptionnels, tels que celui de naturalisation, où le décret de naturalisation, et ceux de cession, d'annexion etc., où le traité international y relatif constitueraient les titres sur lesquels la nationalité française se fonderait. Je me propose donc de n'examiner ici que les cas normaux, qui constituent la grande majorité de toutes les hypothèses possibles, à savoir ceux des enfants nés de parents

français, le cas de la femme mariée aboutissant toujours, en fin de compte, au même problème probatoire.

Aux termes de la première conclusion de la sentence interlocutoire en cause Karl Klemp analysée ci-dessus, "la nacionalidad de una persona es parte integrante de su estado civil y debe ser acreditada en la forma establecida en el derecho interno del país cuya nacionalidad el interesado invoque, principio... que está de acuerdo con la doctrina general de derecho internacional". Cette conclusion *sub 1.* commence par une thèse qui, se présentant comme axiome, se révèle, regardée de près, comme une simple pétition de principe et elle se termine par une autre thèse, qui n'est nullement appuyée par les citations des ouvrages de Borchard et de Ralston sur lesquelles elle prétend se fonder. Car si, pour faire d'abord justice, en quelques mots, de la dernière thèse, on relit attentivement lesdites citations, on se rend compte tout de suite qu'elles n'ont point la portée que veut leur attribuer la conclusion *sub 1.*, mais qu'elles se rapportent simplement à la vérité, formulée ci-dessus, que tout Etat est en principe, compétent pour fixer souverainement les conditions dont dépendront l'acquisition et la perte de sa nationalité et que tout tribunal international doit naturellement (sauf le cas de restrictions posées à la souveraineté des Etats litigants par le droit international écrit ou coutumier) acquiescer aux réglementations qu'ont fixées les Etats en question. Les citations invoquées n'ont, par suite, rien à faire avec la question de la preuve.

Et ensuite, que dire de la thèse-axiome que "la nacionalidad de una persona es parte integrante de su estado civil", et qu'elle doit, par conséquent, être prouvée par les mêmes moyens de preuve que le droit national prescrit pour établir les autres éléments qui déterminent l'état civil d'un individu, tels que: naissance et filiation, mariage et divorce, reconnaissance et légitimation? A mon avis, l'axiome incriminé représente la situation d'une manière quelque peu simpliste, car en réalité, le "fait" de la nationalité (qui, soit dit incidemment, n'est pas du tout un "fait", mais plutôt une relation ou une situation juridique, qui n'est guère susceptible de preuves directes) est beaucoup plus compliqué. D'abord, la thèse que la nationalité d'un individu fait partie intégrante de son état-*civil*, doit être entendue *cum grano salis;* car s'il est vrai que le point de savoir si quelqu'un est national ou étranger, a conservé toujours de l'importance pour l'application de la loi civile, il n'en est pas moins vrai que, à la suite de l'assimilation croissante des deux catégories de personnes quant au droit privé, la distinction a perdu beaucoup de son intérêt dans ce domaine et que, en tous cas, son importance principale est située dans le domaine du droit public. Par conséquent, on peut dire à bon droit que la nationalité d'un individu, au lieu de faire exclusivement partie intégrante de son état-civil, fait en même temps, et peut-être en tout premier lieu, partie intégrante de son "état public" ou "politique". Cela est si vrai que par exemple le droit néerlandais a connu pendant de longues années deux nationalités néerlandaises, l'une de droit civil selon le Code civil, l'autre de droit public selon une loi spéciale, deux nationalités dont les conditions d'acquisitions ne coïncidaient pas, et que maintenant la matière de la nationalité aux Pays-Bas, comme déjà en grand nombre de pays, et comme je suis convaincu que le fera également, à l'avenir, la France, est absolument séparée du Code civil et censée faire partie du droit public. La nationalité, correctement définie, est, par conséquent, un lien juridique entre l'individu et l'Etat, essentiellement de droit public, mais qui produit ses contrecoups dans le droit privé, et dont l'existence dépend soit de faits régis par le droit privé, soit de faits appartenant au droit public ou au droit international.

Car, abstraction faite de cette observation préliminaire sur le caractère juridique de la nationalité, qu'est-ce que veut dire la thèse qu'elle doit être prouvée "en la forma establecida en el derecho interno del país cuya nacio-

nalidad el interesado invoque"? Suivant la conclusion *sub* 2. de la même sentence interlocutoire, "el estado civil se prueba con las actas del registro civil". Or, en réfléchissant un peu sur cette exigence posée à la preuve de la nationalité, on aperçoit tout de suite qu'en bien des cas cette "partie intégrante de l'état-civil d'une personne" ne peut absolument pas être prouvée par de pareils moyens de preuve du droit privé, mais qu'elle doit nécessairement être démontrée par d'autres documents, souvent de droit public ou international. Comment par exemple prouver par des actes du registre civil, la nationalité d'un individu, acquise à la suite, soit d'une naturalisation, soit d'une option, soit du fameux fait d'avoir "adquirido bienes raíces en la República", soit du fait, également fameux, d'avoir laissé passer l'année suivant la majorité, sans faire certaines déclarations, etc.? Par conséquent, la portée de la thèse se restreint de nouveau, pour dire que dans les cas où la nationalité d'un individu dépend de faits qui se prêtent à être prouvés, entièrement ou en partie, par des actes du registre civil, tels que: naissance de parents d'une nationalité déterminée (dans les pays où prévaut le *jus sanguinis)*, respectivement naissance dans un lieu déterminé (dans les pays où prévaut le *jus soli)*, mariage, divorce, décès (dans le cas de femmes mariées devenant veuves), reconnaissance, adoption ou légitimation d'enfants, etc., ces actes du registre civil doivent, en principe, constituer les seuls moyens de preuve admissibles.

Or, une nouvelle observation s'impose. L'agence mexicaine attache une importance primordiale aux actes de naissance des réclamants. Mais qu'est-ce que prouve réellement un acte de naissance d'un individu, par rapport à sa nationalité? Dans les pays du *jus soli*, auxquels, à proprement parler la France, ni (n'en déplaise à une affirmation à cet effet dans quelques documents mexicains) le Mexique n'appartiennent que fort subsidiairement, l'acte de naissance prouve directement que le lieu de la naissance a revêtu le nouveau-né de la nationalité du pays où il a vu le jour. Mais dans les pays du *jus sanguinis*, que prouve-t-il? Il prouve le lieu de la naissance, mais cela n'a, en principe, aucune importance. Il en prouve la date; ceci peut avoir de l'importance, par exemple au point de vue du droit transitoire. En plus il prouve que le père (ou éventuellement la mère) était un tel; mais que ce "tel" lui-même fut ressortissant de l'Etat en question, c'est ce que l'acte de naissance ne prouve point, l'officier de l'état-civil ne l'examinant pas et n'ayant pas non plus, d'ailleurs, faculté pour le constater avec force probante. Donc il faut remonter jusqu'à une époque plus reculée, notamment dans des pays qui ne connaissent pas, par exemple, la "règle de la troisième génération", consistant à dire que les petits-enfants acquièrent dès leur naissance la nationalité du pays, si leurs grands-parents, de quelque nationalité qu'ils fussent, y ont été domiciliés. En France, la situation légale a subi des modifications importantes dans un sens analogue par la loi du 26 juin 1889, mais cette loi ne vise que ceux qui sont nés en France et, en outre, ne s'applique pas, naturellement, à ceux qui sont nés, même en France, avant son entrée en vigueur. Dans ces conditions, il faudrait, en droit strict, remonter en bien des cas du père au grand-père, du grand-père à l'arrière-grand-père et de ce dernier éventuellement au trisaïeul ou au quadrisaïeul, pour trouver enfin quelque ancêtre, qui vécût dans un temps où la France connaissait encore le *jus soli*, et pour pouvoir pêcher dans quelques archives poussiéreuses un témoignage quelconque, que cet ancêtre naquit réellement, au XVIIIe siècle, dans le territoire français, tel qu'il était circonscrit à cette époque de son histoire. Si je pousse ainsi *ad absurdum* les conséquences de la thèse dans toute sa rigueur, je le fais pour en tirer tout de suite la conclusion raisonnable que même le partisan le plus enthousiaste et le plus endurci du deuxième système se verra quelquefois dans la nécessité de faire des concessions. Naturellement, l'agence mexicaine a judicieusement fait

les siennes, dans le cas présent de M. Georges Pinson, né de parents français hors de France et avant la loi du 26 juin 1889, où elle s'est contentée de l'acte de naissance du réclamant, complété plus tard par l'agent français lui-même, par l'acte de naissance du père du réclamant, né en 1832. Pourquoi l'agence mexicaine a-t-elle fait cette concession? Vraisemblablement pour la raison que, pour éviter une *probatio diabolica* en matière de nationalité, il est absolument nécessaire qu'on agrée jusqu'à un certain point l'admissibilité de preuves tirées de la "possession d'état" de Français. L'agence mexicaine a évidemment compris qu'elle ne pouvait pas ne pas se contenter du fait que le père de M. Georges Pinson possédait en son pays, avant son départ pour le Mexique, "l'état" de sujet français. Mais, si cette possession d'état peut, de l'avis de l'agence mexicaine elle-même, suppléer à des imperfections de la preuve stricte de la nationalité du père d'un réclamant, pourquoi ne saurait-elle pas également entrer en ligne de compte, quand il s'agit de déterminer plus directement la nationalité du réclamant lui-même? Or, cette possession d'état — situation essentiellement de fait — découle indubitablement de la position de nombre de réclamants dans la colonie française — association de personnes dont la composition est assez bien connue à Mexico, ainsi que j'ai pu le constater à la lecture de différents articles de presse à propos de la célébration de la fête française du 14 juillet dernier, — est attestée par le certificat d'immatriculation consulaire et confirmée — témoignage difficilement récusable! — par leur inscription au registre des étrangers, tenu par le Gouvernement du Mexique lui-même.

Ecoutons, après ces remarques, quelques passages que l'auteur français bien connu *Valéry* consacre à la preuve de la nationalité française, dans son ouvrage sur le droit international privé (p. 329 et ss.), et desquels il résulte avec toute la clarté désirable, que cet auteur, exposant le droit français en matière de preuve de la nationalité, attache une importance particulière précisément à cette possession d'état et que lui, considère également insuffisants, en droit strict et par eux-mêmes tant l'acte de naissance, favori de l'agence mexicaine, que le certificat d'immatriculation, privilégié, pour l'agence française.

"La partie sur laquelle pèse la charge de la preuve, peut la faire, en principe, de deux manières différentes, à savoir en produisant un titre qui confirme ses assertions, ou bien en établissant l'existence de faits d'où il découle qu'elles sont exactes. Mais, s'il s'agit de prouver que telle personne est *Française*, la preuve par titres ne sera guère possible que pour la nationalité *acquise* (p. 330)... Il en va autrement pour la nationalité d'*origine;* elle s'acquiert, en effet, d'une manière tacite, en dehors de l'intervention de tout représentant de l'Etat. Vainement invoquerait-on, pour l'établir, l'acte de naissance de l'intéressé, acte qui énoncerait, par exemple, que l'enfant qu'il concerne est le fils légitime d'un père français. Comme cette mention ne figure pas au nombre de celles que l'acte doit contenir (art. 57 c. civ.), comme, en outre, l'officier de l'état civil n'a pas qualité pour constater la nationalité des parents, l'indication ainsi donnée n'a aucune valeur par elle-même; tout au plus peut-elle servir à corroborer d'autres éléments de preuve. Il faut en dire autant des mentions contenues dans un certificat d'immatriculation délivré par un de nos Consuls à l'étranger, ou dans un acte de notoriété, ou dans un certificat délivré par un officier ou fonctionnaire public quelconque (p. 331)... Comment une personne pourra-t-elle donc prouver qu'elle est Française dès le jour de sa naissance, et comment, au besoin, cette même preuve pourra-t-elle être faite à son encontre? Le procédé normal consistera à démontrer que les conditions exigées par la loi pour conférer la nationalité française se trouvent réunies... Quant à l'enfant légitime, il devra établir qu'au moment de sa naissance son père était Français. La preuve ainsi exigée pourrait soulever les mêmes difficultés que celle de la

nationalité de l'intéressé lui-même, si elles n'étaient pas écartées, dans la plupart des cas, par les dispositions de la loi du 26 juin 1889 (p. 332) (voir *supra*)... La seule hypothèse où cette question de preuve est embarrassante est celle qui se présente lorsqu'il s'agit d'un individu né dans un pays étranger, mais, à ce qu'on affirme, de parents français. Rigoureusement il serait nécessaire, en pareil cas, de démontrer ou bien qu'un de ses ancêtres dans la ligne paternelle était né en France avant la promulgation du Code civil, et était donc Français puisqu'à cette époque la naissance sur le sol du royaume conférait la qualité de régnicole, et que ni cet ancêtre ni aucun de ses descendants intermédiaires n'a perdu la nationalité française; ou bien, ce qui sera beaucoup plus simple, que le père de l'intéressé avait toujours été considéré comme Français. En effet, la possession d'état, que Marcadé (*Explication du Code Napoléon*, t. I, No 680) définit si bien "le droit résultant de la notoriété que produit un ensemble de faits tendant tous à prouver la qualité dont une personne jouit dans la famille et dans la société", étant admise par la loi comme moyen de preuve du mariage et de la filiation (art. 191, 320, 321, C. civ.) il n'y a aucune raison pour qu'elle ne puisse être invoquée afin d'établir les autres éléments de l'état et notamment la nationalité. (Dans le même sens, entre autres: *Aubry et Rau*, 69, No 9; *Baudry-Lacantinerie et Houques F.*, No 582). De là cette conséquence importante que, d'une manière générale, tout individu doit être présumé avoir la nationalité que la possession d'état dont il jouit tend à lui faire attribuer. Cette possession d'état lui sera donc opposable, de même qu'il pourra s'en prévaloir, aussi longtemps que la présomption qu'elle engendre n'aura pas été combattue victorieusement (p. 333)."

Si le droit français, tel qu'il se trouve exposé dans la citation ci-dessus, permet la preuve de la nationalité moyennant l'invocation de la possession d'état de Français, on ne s'explique pas pourquoi ne serait pas suffisante, devant un tribunal international, au moins *prima facie*, la production d'un certificat d'immatriculation consulaire, attestant non seulement la possession d'état de Français au Mexique, mais encore, dans la grande majorité des cas, les bases légales sur lesquelles, après examen des documents présentés, l'immatriculation se fonde.

18. — Pour terminer par le troisième système, qui considère comme décisive la seule loi de l'Etat auquel on réclame, ou qui la considère au moins comme équivalente, à cet égard, à celle de l'Etat demandeur, j'avoue ne me rappeler que quelques décisions ou opinions doctrinales isolées qui le soutiennent. Cependant, parmi ces décisions se trouvent quelques précédents, que mon honorable collègue chilien paraît n'avoir pas connus, mais qui méritent pourtant de n'être pas passés sous silence dans un examen de la force probante des certificats consulaires, puisqu'ils sont de date récente et proviennent d'un tribunal de haute compétence, à savoir d'un tribunal de trois arbitres, formé dans le cadre de la convention de La Haye de 1907 relative à la Cour permanente d'Arbitrage, et puisque deux d'entre ces décisions s'occupent directement de la question controversée des certificats consulaires.

Les décisions auxquelles je fais allusion sont dix-huit des dix-neuf sentences rendues par ledit tribunal le 4 septembre 1920, et se réfèrent toutes à des propriétés de personnes se présentant à titre de nationaux espagnols et saisies par le Gouvernement Portugais à la suite de la proclamation de la République en 1910. Dans quinze de ces dix-neuf affaires (Nos 1-3, 5-9, 11-13, 15-17 et 19) le réclamant n'avait rapporté aucune preuve de sa nationalité; dans une (No 4) on avait produit un certificat de baptême d'un curé espagnol, dans deux autres (Nos 14 et 16), un certificat d'immatriculation, délivré par un consul d'Espagne au Portugal; la dernière affaire (No 10) constate seulement

une renonciation à la réclamation. Des dix-huit réclamations jugées, dix-sept ont été déclarées non-recevables, pour le motif que la nationalité des réclamants n'était pas dûment prouvée; une seule (No 14) a été déclarée recevable, mais rejetée au fond.

Ce qui, dans cette série de sentences analogues, attire l'attention, c'est, d'une part, la manière dont le tribunal les "motive", si l'on peut appliquer ce mot aux quelques lignes qu'il consacre à la question de la recevabilité, et d'autre part, la manière dont en particulier les certificats d'immatriculation sont traités.

L'argumentation de toutes ces sentences est bien curieuse. Pour mieux comprendre la citation qui va suivre, il est nécessaire de se rappeler que les sentences susmentionnées, ainsi que deux autres, comprenant respectivement un groupe de réclamations françaises et un groupe de réclamations britanniques contre le Portugal, ont toutes été rendues en vertu d'un seul et même compromis, signé à Lisbonne entre les Gouvernements français, britannique et espagnol, d'une part et le Gouvernement portugais, de l'autre. Si je prends comme exemple l'argumentation donnée dans la sentence No 2 et qui dans une forme égale ou analogue, se retrouve dans toutes les autres, sauf le No 14, j'y lis les considérants suivants:

"Attendu que le Gouvernement Portugais, tout en concluant à l'irrecevabilité de la réclamation au fond, objecte que le réclamant ne rapporte pas la preuve de sa nationalité; — attendu que le Gouvernement Espagnol a eu connaissance de cette exception par le contre-mémoire portugais et n'a formulé aucune observation; — attendu que le réclamant se dit Espagnol, mais n'a en effet pas établi sa nationalité; — attendu que le Tribunal est chargé, en vertu de l'article premier du Compromis, de statuer sur des réclamations relatives aux biens de ressortissants de l'Espagne, de la France et de la Grande-Bretagne, mais que le réclamant ne prouve pas, *de la manière qui est prescrite tant par le Code civil espagnol que par le Code civil portugais, qu'il appartient à une des nationalités susdites: . . .*"

Cette citation démontre que le tribunal est partisan du troisième système, qui attribue à la législation de l'Etat défendeur une valeur au moins égale à celle de l'Etat demandeur, en ce qui concerne la façon de prouver la nationalité du réclamant. Mais la sentence ne motive cette égalisation par aucun mot, et en outre l'argumentation est quelque peu étrange. Car quel sens faut-il attribuer aux mots que j'ai soulignés? "Une des nationalités susdites" peut signifier, soit les nationalités espagnole, française et britannique, soit les nationalités espagnole et portugaise, soit les nationalités espagnole, française, britannique et portugaise. Dans la première hypothèse, on ne s'explique pas pour quelles raisons le tribunal s'attend à ce qu'un réclamant, qui prétend être Espagnol, aille démontrer, conformément soit à la loi espagnole, soit à la loi portugaise, qu'il est sujet français ou britannique. Dans la deuxième hypothèse, la situation est encore plus curieuse: figurez-vous un réclamant se présentant devant le tribunal comme Espagnol et qui, par exemple conformément à la loi espagnole, va démontrer qu'il est Portugais et que, par conséquent, il n'est pas qualifié pour se prévaloir de la protection espagnole! Dans la troisième hypothèse, la situation est la même que dans les deux autres.

Mais si je fais abstraction de cette argumentation, pour me borner aux deux cas où le réclamant avait invoqué un certificat d'immatriculation consulaire (Nos 14 et 16), je constate ce qui suit. Dans le premier cas relatif à la demande présentée en faveur de Doña Tómasa Rocatallada y Escartín, la demande fut déclarée recevable, pour le motif que le Gouvernement défendeur, bien qu'observant que la demanderesse n'avait pas prouvé sa nationalité parce qu'elle n'avait pas fourni son acte de naissance, avait pourtant consenti à ne pas se

prévaloir de ce moyen, parce que la demanderesse avait produit un certificat du Consulat d'Espagne, considéré comme suffisant. En d'autres mots, un certificat "considéré comme suffisant" est néanmoins décliné en même temps comme insuffisant. Cela revient à dire que le Gouvernement portugais, bien que convaincu de la nationalité espagnole de la réclamante, se croyait néanmoins en droit d'invoquer éventuellement le manque de preuve de ladite nationalité selon le droit strict, tel qu'il l'interprétait. Je me sens obligé de déclarer dès à présent que, dans un cas pareil, je n'éprouverais aucune hésitation à dire que la conviction du gouvernement défendeur vaut plus que l'appel éventuel fait au manque d'observation de prétendues strictes règles de preuve, étant donné que le droit international, plus que toute autre branche du droit, a besoin, pour pouvoir se maintenir dans la lutte constante entre les peuples pour l'existence ou pour une position égale ou privilégiée, de l'appui, de la bonne foi, libre de considérations opposées de caractère formel et sans fondement équitable. — Dans le second cas, relatif à la demande de Doña Magdalena Rodríguez y Laplana, la demande fut déclarée non-recevable, pour le motif que, la réclamante n'ayant remis, pour prouver sa nationalité, qu'un certificat délivré par le Consul général d'Espagne au Portugal, "n'avait pas rapporté la preuve de nationalité espagnole telle que la prescrivent les articles 327 du Code civil espagnol et 2441 du Code civil portugais" [1]. Il n'appert pas des deux sentences citées, pour quelles raisons le Gouvernement portugais a considéré comme suffisant le premier, mais comme insuffisant le second certificat d'immatriculation; vraisemblablement, les détails mentionnés dans le premier lui semblaient plus convaincants, ou la forme du second n'offrait pas, à son avis, de garanties suffisantes. Dans cette hypothèse, la force probante des certificats d'immatriculation dépendrait de leur contenu ou de leur régularité quant à la forme, critères qui, en effet, paraissent raisonnables.

D'ailleurs, il faut répéter ici ce que je viens de faire observer à propos du deuxième système, à savoir que le droit national du pays défendeur peut admettre, lui aussi, toutes sortes de preuves, en dehors des actes du registre civil, et qu'ici encore, la possession d'état d'étranger peut valoir, ou même être d'une importance majeure que des preuves documentaires.

19. — Après avoir indiqué, dans les pages précédentes, les différentes bases théoriques sur lesquelles le problème de la preuve de la nationalité peut être résolu en général, je veux maintenant dire encore quelques mots sur les précédents de la jurisprudence arbitrale, en plus des remarques que j'ai déjà faites à leur égard au cours de mon exposé général. Si l'on dresse le bilan desdits précédents, en ce qui concerne la force probante des certificats consulaires d'immatriculation dans les registres des nationaux à l'étranger ou de documents analogues, l'on semble justifié à conclure que les tribunaux arbitraux ou commissions mixtes en ont plus souvent admis que décliné la force probante. Je regrette de n'avoir été en mesure de consulter à Mexico qu'un nombre restreint de recueils de sentences arbitrales et de ne pouvoir, par conséquent, baser mes conclusions que sur un nombre limité de précédents de la jurisprudence internationale, pas beaucoup plus grand que celui qu'a eu sous les yeux mon honorable collègue chilien M. Cruchaga Tocornal. En formulant ma conclusion, je tiens à répéter ici ma remarque que, parmi les précédents, il y en a qui, bien que pouvant être cités à l'encontre de la force probante *absolue* de certains documents, en supportent, au contraire, la force probante

[1] Une décision analogue fut rendue dans l'affaire No. 4 de Doña Concepción Barrenechea y Manterola, qui avait produit seulement un certificat de baptême du curé d'une église paroissiale en Espagne.

prima facie et sous réserve de preuves contraires (cmp. notamment le cas *Medina contre Costa Rica*, analysé ci-dessus, § 15), et il me faut, en outre, faire observer qu'il serait erroné de prendre au sérieux tous les documents qui, dans l'histoire de l'arbitrage, se sont présentés comme "certificats consulaires". Par exemple, le précédent invoqué par M. Cruchaga et relatif à l'affaire *Brockway*, jugée par le surarbitre Thornton contrebalancé d'ailleurs par la sentence du même surarbitre, non mentionnée par M. Cruchaga, relative à l'affaire *Ramón Garay* (voir *supra*, § 15) paraît, lorsqu'on l'analyse, se rapporter à un cas, où un consul américain établi à Mazatlán avait incidemment et sur la simple déclaration sous serment des intéressés, fait mention de la nationalité américaine de certains individus qui, après avoir été faits prisonniers sur un navire américain dans un port mexicain, étaient, pendant leur voyage de Californie par Guaymas, arrivés à Mazatlán. Il va de soi qu'un tel document, dit certificat consulaire, n'a pas beaucoup de valeur et est de nature tout autre que ceux délivrés par des consuls en due forme, conformément à des dispositions légales ou administratives de leurs pays, dans le but spécial de constater la nationalité de l'intéressé, après un examen sérieux. La même observation s'applique à la décision du surarbitre Bertinatti dans le cas *Gilmore et autres (A. de Lapradelle et N. Politis, Recueil des arbitrages internationaux, t. II, p. 164)*, où il s'agissait également d'une mention incidente de la nationalité, sous serment, dans une protestation devant un consul; dans ce cas-ci, le surarbitre lui-même a pris soin de souligner la différence fondamentale qui existe entre les différentes déclarations consulaires possibles, en disant qu'il "observe que (dans le cas actuel) le consul ne certifie pas la nationalité comme connue de lui ou établie devant lui, mais reçoit la déclaration de nationalité comme une partie de la protestation que le comparant fait et affirme sous serment". Il ne semble pas trop téméraire d'inférer de ce passage, que le surarbitre aurait rendu une décision tout autre, s'il s'était agi d'un véritable certificat consulaire dans le sens de ceux présentés par l'agence française devant la Commission franco-mexicaine des réclamations et il serait en tous cas trompeur de citer un cas pareil à l'encontre de la force probante des certificats consulaires d'immatriculation.

Si l'on met en ligne de compte les observations précédentes, en voyant, pour ainsi dire dans leur perspective et dans leur valeur réelle les décisions citées successivement par M. Cruchaga et celles que j'y ai déjà ajoutées ou y ajouterai encore dans la suite, on arrive à dresser le bilan suivant des précédents de la jurisprudence arbitrale.

De véritables certificats consulaires relatifs à la nationalité d'une personne ont été admis comme preuves de nationalité, entre autres, par la Commission mixte hispano-vénézuélienne dans tous les cas normaux et par son surarbitre Gutiérrez-Otero même dans le cas particulier et douteux de Miguel Esteves (*Venezuelan Arbitrations of 1903*, Washington, 1904, p. 922 et 923); par le surarbitre dans la Commission mixte italo-péruvienne prévue par le compromis du 25 novembre 1899 (*Borchard, Diplomatic protection of citizens abroad*, p. 667, note 3); en faveur du Mexique lui-même et appuyé par un autre document, par le surarbitre Thornton dans la Commission mexicano-américaine de 1868 (*Moore, International Arbitrations*, III, p. 2532) et par le Portugal dans l'affaire de Doña Tómasa Rocatallada y Escartín, jugée par la Cour permanente d'arbitrage en 1920 (*Compromis, Protocoles des séances et Sentences du Tribunal d'Arbitrage constitué en vertu du compromis signé à Lisbonne le 31 juillet 1913 entre la Grande-Bretagne, l'Espagne, la France et le Portugal*, La Haye, 1920, p. 68).

Le seul cas que je connaisse et dans lequel un pareil certificat ait été déclaré insuffisant, est le cas de Doña Magdalena Rodríguez y Laplana devant la même Cour de La Haye (*loc. cit.*, p. 75 et 76).

En plus, on peut dire que, par analogie, la décision du surarbitre Bertinatti dans le cas *Medina contre Costa Rica* (*Moore, International Arbitrations*, III, p. 2588) appuie la thèse de la force probante *prima facie* de documents officiels d'un Etat attestant la nationalité d'un individu, et *a contrario*, l'on peut dire la même chose de la décision du même surarbitre dans le cas *Gilmore et autres* (*loc. cit.* p. 2539).

En outre, on peut encore citer le cas de la Commission mixte anglo-chilienne de 1894, qui, malgré la résistance de l'agent chilien, a admis la force probante de déclarations sur la nationalité des réclamants, présentées par le Chargé d'Affaires anglais au Chili par ordre du Ministre britannique des Affaires étrangères (cmp. ci-dessus, 16, note 2).

Heureusement, toutefois le droit international est autre chose que le simple résultat d'une addition et soustraction arithmétiques de précédents. C'est pourquoi je n'attache pas d'importance décisive aux fameux "précédents", pas même en leur appliquant le sage conseil de ne pas seulement les additionner, mais surtout de les peser.

20. — Quelles sont maintenant les conclusions qu'il faut, à mon avis, tirer des observations précédentes, notamment pour le cas spécial d'un arbitrage entre la France et le Mexique, et relatif aux dommages révolutionnaires?

Personnellement, je ne vois pas de motifs décisifs pour prescrire, comme règle fondamentale devant être observée dans les tribunaux d'arbitrage ou les commissions mixtes, l'administration de la preuve de la nationalité des réclamants individuels en stricte conformité des règles insérées éventuellement dans la législation nationale de l'Etat demandeur, mais que l'on peut souvent déduire seulement de sa jurisprudence ou de sa doctrine nationale, moins encore pour exiger l'observation des moyens de preuve prescrits par la législation, la jurisprudence ou la doctrine de l'Etat défendeur. A mon avis, un tribunal international a le devoir de déterminer la nationalité des réclamants d'une façon telle, que pour lui ladite nationalité est certaine, indépendamment, en principe, de ce que prescrit le droit national de chaque réclamant individuel. Les dispositions nationales ne sont pas pour lui sans valeur, mais il ne se trouve pas lié par elles; il peut poser des exigences plus rigoureuses que la législation nationale, par exemple pour pouvoir démasquer des naturalisations obtenues *in fraudem legis*, mais il peut également se contenter d'exigences moins sévères, dans des cas où raisonnablement, il ne lui paraît pas nécessaire, afin de former son opinion, de mettre en action l'appareil entier de preuves formelles. Et je ne vois aucune raison convaincante, pour laquelle un tribunal international, comme celui saisi des réclamations britanniques, espagnoles et françaises contre le Portugal, pour cause de confiscation des biens ecclésiastiques, appelé à connaître de demandes de nationaux de plusieurs Etats, serait obligé de former son opinion sur la nationalité des réclamants de chaque groupe sur la base de dispositions légales, d'une jurisprudence ou d'une doctrine chaque fois différentes; à mon avis, il est beaucoup plus logique de ne lier le tribunal à aucun système national de preuves, mais de lui laisser la liberté parfaite d'apprécier les preuves produites selon les circonstances. En d'autres mots, je me déclare partisan du premier système, qui jouit aussi de l'appui de la majorité des tribunaux internationaux.

Envisagés au point de vue de ce premier système, les certificats d'immatriculation à titre de ressortissant français, délivrés par les consulats de France au Mexique, en conformité avec la législation spéciale régissant la matière, ont pour moi une force probante telle, que je les accepte comme pleinement suffisants à asseoir ma conviction que le porteur du document est de nationalité française, sauf indices contraires dans des cas exceptionnels. Et en aucun cas

je ne saurais souscrire à la thèse tacite qui est impliquée dans l'attitude purement négative de l'agence mexicaine, et selon laquelle, pour barrer la route à toute réclamation introduite, il lui suffit de nier la nationalité française du réclamant, même après présentation par l'agence française, d'un certificat consulaire, indiquant comme bases sur lesquelles il se fonde, soit un acte de naissance de parents français, un livret militaire, un diplôme, une décoration, etc. qui ne peuvent légalement être distribués qu'à des Français, soit le fait que, dans le groupe social dont il fait partie, il jouit de la "possession d'état" de Français. A cet égard, je me range absolument à l'avis de mon compatriote M. C. van Vollenhoven, ancien président de la Commission générale des réclamations entre le Mexique et les Etats-Unis, avis du reste, qui a trouvé l'approbation de son collègue mexicain, à savoir qu'un tribunal international ne peut se contenter d'une attitude purement négative à cet égard de l'Etat défendeur (affaire William A. Parker, dossier No 127, *Opinions of Commissioners under the Convention concluded September 8, 1923, between the United States and Mexico, February 4, 1926, to July 23, 1927*, p. 38). L'agence mexicaine doit être convaincue que, lorsqu'il se présente le moindre doute sur la véracité du certificat, ou lorsqu'il existe des raisons spéciales de ne pas l'admettre *in concreto*, la Commission est toute disposée à examiner le bien-fondé de sa critique, mais je ne puis aller jusqu'à dénier toute force probante même à des certificats, vis-à-vis desquels l'agence mexicaine ne fait autre chose que de prendre une attitude purement négative, sans invoquer aucun argument de fond.

Notamment les deux motifs de caractère positif, qui, à côté de la crainte de voir acceptés comme suffisants des certificats délivrés d'une façon trop légère, et à côté de l'attrait incontestable des avantages aisés d'une attitude purement négative, semblent avoir déterminé cette attitude de l'agence mexicaine, à savoir la possibilité qu'un réclamant, bien qu'immatriculé comme Français, ait perdu la nationalité qu'il peut avoir possédée, et la possibilité d'une nationalité double, qui a toujours embrouillé les discussions, sont également dénués de valeur comme arguments à l'encontre de la force probante *prima facie* des certificats d'immatriculation. Car, ainsi que j'ai déjà eu l'occasion de le faire observer en d'autres termes, à propos de la sentence interlocutoire en cause Karl Klemp, même la production d'une série ininterrompue d'actes de naissance ou de baptême remontant au XVIIIe siècle ne résisterait pas au contre-argument que l'intéressé ou un de ses ascendants a perdu à un moment donné sa nationalité française d'origine; et jamais on ne pourrait charger l'agence française du fardeau de prouver que cette perte ne s'est pas produite, ni l'obliger à fournir à l'agence mexicaine les éléments nécessaires pour prouver, de sa part, que cette perte s'est réellement produite. Et, d'autre part, comme j'ai déjà dû l'observer également, la possession de la nationalité française et la preuve de cette possession n'ont en règle générale, rien à faire avec la possession simultanée de la nationalité mexicaine; et en aucun cas, la Commission ne serait en droit de prescrire à l'agent français, la présentation de documents supplémentaires, qu'elle considère elle-même comme superflus, dans le seul but de mettre l'agence mexicaine en état d'en tirer les preuves indispensables de sa thèse que le réclamant est en même temps Mexicain.

J'ai été heureux de pouvoir mettre les observations précédentes à l'essai à propos du cas concret de conflit entre les deux agences qui s'est révélé à propos de la nationalité de M. Georges Pinson. Quelles leçons peut-on tirer de cette affaire? D'abord, que le certificat consulaire relatif audit réclamant a paru être pleinement digne de foi et correspondre parfaitement à la situation légale de l'intéressé. Ensuite que, après avoir pris connaissance de l'acte de naissance du réclamant, l'agence mexicaine s'en est servie, en combinaison avec le certificat consulaire du père du réclamant, également produit par l'agence française,

pour en tirer l'argument, que j'examinerai ci-après, que ledit père aurait perdu sa nationalité d'origine, déjà avant la naissance du réclamant. Et enfin, que la production du même acte de naissance et du livret militaire lui a fourni les éléments nécessaires pour pouvoir utilement mettre en avant une série d'arguments que j'analyserai également ci-après et qui se rapportent aux conditions dans lesquelles le réclamant aurait acquis dès sa naissance ou ultérieurement la nationalité mexicaine, ou aux conditions dans lesquelles celui-ci aurait éventuellement perdu, ou n'aurait pas perdu, cette nationalité.

D'ailleurs, le fait que dans presque aucun des cas plaidés jusqu'ici devant la Commission, et dans lesquels l'agent français, à la demande de son collègue mexicain, a produit les actes de naissance, ce dernier n'a pu persister dans sa négation de la nationalité française du réclamant, et le fait que dans le cas actuel, elle n'a pu édifier son vaste système de défense qu'à l'aide d'arguments situés en dehors des faits que lesdits actes étaient destinés à attester, sont, par eux-mêmes, une confirmation de la thèse à laquelle je déclare adhérer, à savoir que, dans le cadre du premier système mentionné ci-dessus, les certificats d'immatriculation comme ressortissant français [1], délivrés par les consuls de France en conformité des prescriptions légales et administratives qui régissent la matière, et qui offrent en général toutes les garanties désirables qu'ils sont véridiques et basés sur des données correctes et satisfaisantes, sont pleinement suffisants à asseoir la conviction d'un tribunal international que, sauf indices en sens contraire, le réclamant a qualité, pour se présenter devant lui en tant que Français.

21. — Mais quand bien même on serait d'avis que soit la législation de l'Etat demandeur, soit celle de l'Etat défendeur doit, en bonne justice, décider des moyens de preuve admissibles devant un tribunal international — systèmes qui ne me paraissent pas justifiés —, il me semble que l'admissibilité des certificats consulaires comme preuves ne saurait être niée, ni sous le coup du système légal de France, ni sous celui du Mexique.

Quant à la législation française, j'ai déjà fait remarquer ci-dessus que, ainsi que l'accorde la doctrine française, l'acte de naissance par lui-même ne prouve, dans la grande majorité des cas, qu'un seul des éléments qui doivent coïncider pour qu'une personne puisse être reconnue comme Française, notamment dans des cas où il s'agit de naissances antérieures à la loi de 1889 modifiant le Code civil français. L'acte de naissance d'un individu n'a donc, en droit strict, qu'une portée restreinte dans l'administration de la preuve de sa nationalité française et doit nécessairement, en bien des cas, être complété par d'autres éléments, tels que: les conditions de la naissance des parents de l'intéressé, la "possession d'état" de Français, dont soit lui-même, soit son père jouit ou jouissait dans le milieu social dans lequel il vit ou vivait. En se contentant de l'acte de naissance, l'agence mexicaine agrée, par suite, un document qui ne prouve presque jamais, par lui-même, la nationalité française du réclamant, suivant la législation de France. Or, pour quelle raison l'agence mexicaine accepte-t-elle comme satisfaisant un document si insuffisant, en droit strict, que l'est l'acte de naissance du réclamant, pour rejeter absolument comme insuffisant un document, tel que le certificat d'immatriculation consulaire, qui, à mon avis, a, en bien des cas, une force convaincante beaucoup plus grande que l'acte de naissance si privilégié? "Une force convaincante beaucoup plus grande", puisqu'il constate souvent que le consul a eu sous les yeux, non seulement l'acte de naissance de l'intéressé, mais encore, par exemple, un livret militaire,

[1] Quant aux certificats d'immatriculation comme protégé français — question beaucoup plus compliquée —, voir la sentence No 30 A.

le diplôme d'une décoration nationale, etc., ou que l'intéressé est connu comme Français de la colonie française, c'est-à-dire qu'il possède l'état de Français, élément de preuve taxé si haut par la doctrine légale française. Le certificat consulaire fournit donc souvent des éléments supplémentaires, ou d'une force probante plus directe que l'acte de naissance, abstraction faite encore de l'observation que, si un consul a délivré avant 1889 un certificat en faveur d'un Français établi dans son ressort à l'étranger, ce fait démontre que l'intéressé a certifié son "esprit de retour" et n'a donc pas perdu sa nationalité d'origine pour cause d'établissement à l'étranger sans cet esprit, — détail que l'acte de naissance ne peut jamais prouver. Le seul point de vue auquel le certificat, sans doute, le cède à l'acte de naissance, c'est que ce dernier prouve directement la naissance, tandis que le premier n'en est qu'une preuve indirecte, dérivée, de seconde main. En effet, cette infériorité est incontestable. Mais à mon avis, cette infériorité n'a aucune importance réelle. Car, d'une part, le consul est, lui aussi, un fonctionnaire public, dont les actes font foi de ce qu'ils constatent, et ce qu'ils constatent, c'est que le consul a eu sous les yeux un acte de l'officier de l'état civil qui atteste la naissance de l'intéressé à telle et telle date, en tel et tel lieu, de tels et tels parents; l'éventualité que le consul insère dans son certificat des déclarations fausses, ou qu'il commet des erreurs en transcrivant dans le certificat les données de l'acte de naissance, n'est certes pas absolument exclue, mais elle est tellement éloignée, qu'elle ne préjuge en rien la force convaincante *prima facie* des certificats en général et que l'admission de la preuve contraire suffit à la neutraliser. Et d'autre part, en bien des cas l'infériorité signalée ci-dessus, est amplement contre-balancée par la considération qu'en acceptant un individu comme Français, souvent sur la base d'autres éléments de conviction indiqués ci-dessus, le consul donne une garantie complémentaire et souvent de valeur très réelle, que l'intéressé est, en effet, ressortissant français.

Dans le système légal de France, il faut donc tenir compte, d'une part, du fait que la "possession d'état" joue, d'après le droit civil, un rôle à soi, dont l'importance capitale en matière de nationalité ne saurait être niée, et d'autre part, du fait qu'à côté des officiers de l'état civil appelés à certifier certains faits se rattachant à la vie privée des individus, et qui influent en même temps sur leur nationalité, il y a d'autres fonctionnaires chargés de certifier, entre autres, dans le domaine public et sur la base des actes établis par les premiers, qu'un individu remplit les conditions dont dépend sa nationalité française. Ce faisant, on n'attribue pas au consul le rôle d'un "juge", pas plus que l'on attribue ce rôle à l'officier de l'état-civil; on le charge seulement d'attester, après examen de faits et de documents, et en conformité avec des dispositions légales assez détaillées, que l'intéressé lui a présenté tous les éléments nécessaires pour pouvoir invoquer le droit d'être considéré comme Français. Admettre de pareilles attestations consulaires comme preuves de nationalité *prima facie*, me paraît parfaitement en harmonie avec l'ensemble du droit privé et public français, puisque, à mon avis, on commettrait une grave erreur, si l'on oubliait pour la fameuse force probante exclusive des registres de l'état civil, non seulement toutes les autres dispositions légales du droit civil et public, mais encore le caractère très compliqué de la nationalité.

Et il n'en est pas autrement de la législation mexicaine. Ici encore, l'on trouve, à côté des dispositions concernant le registre civil, d'autres dispositions faisant partie du droit public, qui démontrent que la législation mexicaine elle-même ne considère pas et n'a pas considéré antérieurement comme des formalités vaines et dépourvues de tout effet juridique, l'établissement de registres consulaires et la délivrance de certificats consulaires, mais qu'elle leur a assigné un rôle assez important. Ce rôle ne se limite pas aux ressortis-

sants mexicains à l'étranger, mais s'étend également aux ressortissants étrangers au Mexique.

En ce qui concerne le premier point, le Mexique connaît lui-même, déjà depuis de longues années, l'institution de l'enregistrement consulaire des Mexicains à l'étranger (voir les articles 51-57 du "Reglamento del Cuerpo Consular Mexicano" du 16 septembre 1871) et ne la considère certes pas comme servant seulement de passe-temps à ses agents consulaires; il y attache un intérêt réel, partie à des fins statistiques, partie pour avoir une base officielle pour la protection diplomatique qu'il est de son droit et de son devoir de prêter à ses sujets à l'étranger. Il veut que ses consuls prennent leur tâche au sérieux et que le contenu de leurs registres soit conforme à la vérité. Il s'attend à bon droit à ce que l'Etat étranger admette ses registres consulaires comme attestant *prima facie* et sous réserve, naturellement d'objections motivées contre leur contenu, la qualité de Mexicain de ceux qui s'y trouvent inscrits. Il désire tout naturellement que ses consuls prennent soin de ne pas inscrire dans leur registre des personnes qui ne sont pas des sujets mexicains, mais comme corollaire, il désire à bon droit que ceux qui y sont inscrits soient considérés par les Etats étrangers comme lui ressortissant. Déjà en 1869, le Mexique a invoqué devant la Commission mixte de Washington un certificat de son Consul général à New-York que certain réclamant était Mexicain, et il eut gain de cause. Or, il n'est qu'équitable que, pour la confiance en ses registres à laquelle il s'attend de la part de Gouvernements étrangers, il rende à ces derniers confiance en leurs registres. C'est par cette voie que peut se réaliser peu à peu la reconnaissance réciproque et générale des registres consulaires, telle que la désirent le Comité d'experts de la Société des Nations pour la codification progressive du droit des gens et la Grotius Society. Et c'est aussi pourquoi je me vois dans l'impossibilité d'approuver par ma sentence une attitude de l'agence mexicaine que déjà la Commission générale des réclamations entre le Mexique et les Etats-Unis, avec l'appui du commissaire mexicain, a condamnée, lorsqu'elle déclarait, dans l'affaire William A. Parker, ne pas pouvoir se contenter de ce que "the Mexican Government offers no evidence, in rebuttal, but relies on the insufficiency of (the) proof" et de ce qu'il se limite à "insist that (the claimant) pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting".

En ce qui concerne l'enregistrement des étrangers au Mexique, on ne peut pas perdre de vue que le Mexique a, déjà pendant de très longues années, attaché une grande importance aux certificats consulaires d'immatriculation. Ainsi que je l'ai déclaré déjà antérieurement (§ 14), je ne puis considérer la Commission franco-mexicaine comme liée, en quoi que ce soit, par la disposition de l'article 25 du Règlement national des réclamations du 24 décembre 1917, disant que, pour ne pas courir le risque d'être considérés comme Mexicains, les réclamants étrangers doivent nécessairement produire, comme preuve de leur nationalité étrangère, un des documents suivants: le passeport visé par la Légation ou le Consulat, le certificat de naturalisation, ou le certificat d'immatriculation. Mais ce qu'on peut fort bien inférer de cette disposition réglementaire, c'est que, aux yeux du Gouvernement mexicain lui-même, les certificats consulaires ne sont pas de simples chiffons de papier, dénués de toute valeur juridique et de toute force probante, mais qu'ils constituent, au contraire, la base régulière et digne de foi, sur laquelle la nationalité étrangère d'un individu peut et doit être admise. L'agence mexicaine s'est donnée beaucoup de peine pour écarter cette disposition, comme n'étant qu'une prescription de caractère exceptionnel et motivée uniquement par le peu d'intérêt que la distinction entre nationaux et étrangers aurait sous le coup de la loi nationale des réclamations. Mais cette observation, non sans valeur lorsqu'on la restreint

aux normes de droit substantiel applicables aux deux catégories de réclamants dans la Commission nationale, n'empêche pas que, selon la loi nationale des réclamations, le droit d'interjeter appel des décisions de la Commission nationale devant une des Commissions mixtes à instituer ultérieurement, dépendrait précisément de l'observation de cette prescription, présentée maintenant comme insignifiante. Et d'ailleurs, il n'est pas exact, au point de vue historique, que la disposition, que l'agence mexicaine prend ainsi à la légère, ne soit qu'une disposition incidente, exceptionnelle, écrite pour le seul cas d'une Commission composée, suivant la manière de l'agence mexicaine de présenter les choses, de personnes sans aucune notion juridique et n'étant guère capables d'accomplir leur tâche difficile que sous le harnais de toutes sortes de dispositions coactives qui les empêchent de s'écarter le moins du monde du droit chemin. Car, bien au contraire, la disposition, presque niaise selon l'opinion de l'agence mexicaine, représente une tradition nationale assez constante en cette matière, que j'ai pu rechercher jusqu'au décret du Président Benito Juarez, en date du 16 mars 1861, relatif à l'établissement d'un registre des étrangers dans le Secrétariat des affaires étrangères [1] et selon lequel: (article 1er) "Con el fin de que todos los extranjeros residentes en la República puedan hacer constar su nacionalidad, y gozar de los derechos de extranjería que les conceden las leyes y tratados con las respectivas naciones, se abrirá en la Secretaria de Estado y del Despacho de Relaciones exteriores un registro, a fin de que en él se matriculen", (article 7) "Ninguna autoridad, oficina o funcionario público reconocerá como extranjero el que no presentare el correspondiente certificado de matrícula, expedido por el Ministerio de Relaciones" et (article 11) "Los extranjeros, para obtener aquel documento, comprobarán su nacionalidad con el pasaporte con que ingresarón a la República, o con un certificado del agente diplomático o consular de su nación, sin que para obtener el referido certificado de matrícula, tengan que hacer solicitud alguna por escrito al Ministerio de Relaciones". (*Manuel Dublán y José María Lozano, Legislación Mexicana*, t. IX, p. 123 et ss.). Dans ces conditions, l'argument de l'agence mexicaine qu'il serait inique envers son pays d'admettre les certificats consulaires comme preuves suffisantes, n'a pour moi aucune valeur.

22. — Si après les observations précédentes de caractère général sur les méthodes de prouver la nationalité des réclamants individuels et sur la force probante des certificats d'immatriculation consulaire, j'examine encore brièvement la teneur de l'écrit spécial de l'agence mexicaine relatif au même sujet et présenté à la Commission à la date du 14 mai 1928, je constate que les raisons pour lesquelles ladite agence ne pouvait se contenter de la production des seuls certificats consulaires étaient les suivantes:

D'abord, l'agence mexicaine estime indispensable et croit avoir droit à la production de toutes les pièces justificatives qui ont servi de base à l'enregistrement de l'intéressé dans les matricules consulaires, puisque, sans cela, elle aurait "la obligación ineludible de dar crédito absoluto a las afirmaciones de los cónsules, cualesquiera que fuesen las circunstancias en que hubiesen sido expedidos los certificados", et que, si on l'obligeait à les accepter "sans objection et sans examen", le résultat serait que les fonctionnaires français

[1] C'est sur la base de dispositions légales de ce même caractère que se fondent les "noticias de la sección de Cancillería de la Secretaría de Relaciones Exteriores relativas a los cambios ocurridos en el estado civil de los extranjeros residentes en los Estados Unidos Mexicanos", que j'ai trouvé publiées en bien des numéros du "Diaro Oficial" de la Fédération, et qui démontrent que le Gouvernement mexicain lui-même ne met aucunement en doute le caractère étranger des personnes, dont son agence devant la Commission franco-mexicaine a prétendu nier ledit caractère.

seraient arbitres de la nationalité de chaque réclamant. Ensuite, elle nie que les consuls soient des fonctionnaires dont les actes fassent foi et affirme que beaucoup de certificats ont paru contenir des données contraires à la vérité. En outre, l'agence mexicaine ne serait pas à même, sans présentation préalable des pièces justificatives par l'agent français, de remplir son devoir de répondre "précisément et clairement à chacun des points du mémoire" (article 14 du Règlement de procédure), devoir qui distinguerait fondamentalement son rôle de celui de la Commission nationale des réclamations. Et enfin, elle allègue l'argument que l'expérience faite au cours des audiences, aurait démontré que l'agent français, malgré la présentation du certificat d'immatriculation, se soit vu dans la nécessité d'exhiber les pièces justificatives, dans le but de prouver que ledit certificat a été dûment établi.

Je regrette de ne pouvoir attacher à aucun de ces arguments, pas même dans leur ensemble, assez de force convaincante pour ébranler ma conviction, motivée ci-dessus, que, entre la France et le Mexique, les certificats consulaires sont, en règle générale, dignes de foi comme preuves, au moins *prima facie*, de la nationalité du réclamant. Appréciant succinctement la valeur des arguments, résumés ci-dessus, dans l'ordre inverse, je constate ce qui suit.

Je ne me rappelle aucun cas, dans lequel l'agent français se serait trouvé dans la nécessité de produire des pièces justificatives supplémentaires, pour prouver la nationalité d'un réclamant français. S'il en a produit postérieurement, cela a été pour obtempérer aux désirs de son collègue mexicain. Et s'il s'est appuyé sur des pièces justificatives présentées dans ces conditions, cela n'a jamais été pour prouver la nationalité française du réclamant, déjà suffisamment établie, à son avis, par le certificat consulaire, mais toujours soit pour réfuter l'affirmation mexicaine que le réclamant aurait acquis, à côté de sa nationalité française, la nationalité mexicaine, soit pour démontrer que, si le réclamant avait acquis la dernière nationalité, il l'aurait perdue postérieurement, notamment par suite d'un service militaire en France. Je ne veux pas insister ici sur le cas tout spécial des Syriens et des Libanais, qui fera l'objet d'une sentence séparée, sous le numéro 30A.

L'argument tiré de l'article 14 du Règlement de procédure n'a aucune force convaincante, étant donné que l'agence mexicaine eût très bien pu répondre, dans son contre-mémoire, qu'elle acceptait la nationalité française du réclamant comme prouvée par le certificat d'immatriculation, admis comme pièce officielle et justificative par différentes dispositions légales du Mexique lui-même. Si elle eût cru nécessaire, le cas échéant, d'alléguer, à part cela, la nationalité mexicaine simultanée du réclamant, elle aurait pu joindre cet argument à sa réponse; mais évidemment, cet appel à une nationalité double n'a rien à faire avec la force probante du certificat, en ce qui concerne la nationalité française; si l'on a rattaché tout de même le point de double nationalité à la force probante des certificats consulaires, cela ne s'explique que par une erreur logique, que j'ai déjà signalée ci-dessus.

Je ne me rappelle pas non plus que l'expérience aurait démontré que beaucoup de certificats consulaires contiennent des affirmations fausses; au contraire et en écartant absolument, dans ce contexte aussi, le cas tout particulier des réclamants syriens et libanais, j'ai l'impression fondée que toutes les pièces justificatives produites ultérieurement n'ont fait que confirmer pleinement la teneur des certificats consulaires, et que, s'il s'est présenté certain doute sur l'exactitude de cette dernière, le point n'a jamais laissé d'être éclairci d'une façon parfaitement satisfaisante par les explications postérieures. Et c'est précisément pour ces cas exceptionnels que je réserve à l'agence mexicaine pleine liberté d'alléguer tous les arguments qu'elle jugerait nécessaires pour combattre dans un cas concret la force probante d'un certificat déterminé. Mais cette

réserve ne comporte aucunement que, en général, les certificats consulaires ne seraient pas dignes de foi. Au contraire, il n'y a aucune raison de croire qu'ils n'en soient pas dignes. Tout comme la législation consulaire du Mexique lui-même, la législation française en matière d'immatriculation consulaire est très stricte et contient toutes les garanties possibles que le consul n'immatricule pas des personnes qui ne possèdent pas la nationalité de son pays. Dans ces conditions, on ne saurait se passer de faire application au cas présent du principe, tant de fois et à bon droit invoqué par nombre de tribunaux internationaux, à savoir qu'une présomption de droit milite en faveur de l'accomplissement de leur devoir officiel par tous les fonctionnaires publics de la régularité de tous actes publics. Ce principe sera, je n'en doute pas un instant, invoqué également par le Gouvernement mexicain en faveur des actes officiels de ses propres fonctionnaires, en conformité de la règle établie, par exemple, par la Commission mixte franco-vénézuélienne des réclamations de 1902, dans l'affaire Friedrich et Comp. (*Report of French-Venezuelan Mixed Claims Commission of 1902*, établi par MM. Ralston et Sherman Doyle, *Senate Document 533, 59th Congress, 1st session*, Washington, 1906, p. 31 et 42). C'est selon ce même critérium que, à mon avis, devra être résolu le point de savoir si la Commission franco-mexicaine est obligée d'entrer dans un examen des documents, qui constatent l'acceptation par le Gouvernement intéressé d'une option de nationalité, faite par un individu à la suite et en vertu d'une convention internationale, réglant les conséquences d'une cession de territoire ou d'un autre titre quelconque de "succession d'Etats" (voir à ce sujet la sentence No 30A, relative à la recevabilité de demandes en indemnisation, introduites par des Syriens et des Libanais).

Dans ces conditions, il n'y a pas non plus lieu de reconnaître le bien-fondé de l'exigence de l'agence mexicaine d'être mise en possession de toutes les pièces justificatives avant servi de base à l'enregistrement de l'intéressé, pour pouvoir les contrôler une à une, d'autant moins que le motif principal sur lequel cette exigence se base, part de la supposition erronée que la Commission serait disposée à accepter comme des "décisions" inébranlables les documents établis par les fonctionnaires consulaires de France.

Pour les raisons exposées dans les pages précédentes, je me vois obligé de répéter que, en règle générale, les certificats d'immatriculation délivrés par les consuls et autres fonctionnaires consulaires de France, sont dignes de foi, *prima facie*, comme preuves de la nationalité française des réclamants, sous réserve de la faculté de l'agence mexicaine d'en attaquer la force probante dans des cas particuliers, où le certificat prête à des doutes, par exemple pour la raison qu'il n'a pas été établi conformément aux dispositions légales, ou pour un autre motif raisonnable quelconque.

La production de l'acte de naissance peut, en certains cas, renforcer un peu cette preuve, mais elle n'est aucunement indispensable pour pouvoir admettre la nationalité française d'un réclamant. Bien au contraire, s'il me fallait choisir entre le certificat d'immatriculation consulaire et l'acte de naissance, je préférerais le premier.

2. *Objections spéciales dans le cas présent*

23. — De la conclusion précédente, il s'ensuit que le certificat consulaire produit par l'agent français à l'appui de la nationalité française du réclamant actuel, et constatant son immatriculation dans le registre du Consulat de France à Mexico à la date du 7 mars 1911, sur la base de trois pièces justificatives, à savoir son passeport, son acte de naissance et un dossier relatif à

sa qualité de Chevalier de la Légion d'honneur, est pleinement suffisant à prouver *prima facie* sa nationalité française.

Cependant, dans le cas actuel, l'agence mexicaine a usé de son droit incontestable de combattre tout de même la nationalité française du réclamant, et cela pour les raisons exposées ci-après, et dont il faut, par suite, examiner maintenant le bien-fondé.

L'agent français ayant ultérieurement, à la demande de son collègue mexicain, produit, non seulement l'acte de naissance du réclamant M. Victor-Louis-Henri Georges Pinson (en date du 6 février 1875, constatant sa naissance à Mexico, le 25 janvier précédent), mais encore un extrait des registres des actes de l'état-civil de la commune de Tréton (France) pour l'année 1835, constatant la naissance du père du réclamant, M. Auguste-Eugène Pinson, à la date du 30 juin 1835, l'agent mexicain s'est déclaré convaincu de la filiation du réclamant d'un père qui, lui, naquit comme ressortissant français et qui avait conservé cette nationalité d'origine au moins jusqu'à la date de son départ de son pays natal pour le Mexique en 1864. Le réclamant étant né à Mexico en 1875, lorsqu'était encore en vigueur la disposition de l'article 10 primitif du Code civil français de 1804, par laquelle était Français tout enfant né d'un Français, en pays étranger, l'agence mexicaine n'eût pas mis en doute la nationalité française du réclamant, si ce n'était du fait que son père, en 1864, avait quitté son pays natal "sans esprit de retour — circonstance, qui, d'après l'article 17 primitif du même Code civil, avant les modifications y apportées par la loi du 26 juin 1889, lui aurait fait perdre sa nationalité d'origine, dès avant la naissance de ses enfants. Dans ces conditions, le seul point à examiner est précisément celui de savoir si M. Pinson père, en partant pour le Mexique en 1864, a, en effet perdu la qualité de Français "par son établissement fait en pays étranger sans esprit de retour" (art. 17, *sub* 3., primitif du Code civil français de 1804).

Or, dans cet ordre d'idées, il faut faire remarquer tout d'abord que M. Pinson père est venu s'établir au Mexique dans le but d'y faire le commerce et que l'ancien article 17, *sub* 3. du Code civil de 1804 avait pris soin de dire en termes exprès que "les établissements de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour". "Il est naturel, en effet" — comme le fait observer Weiss (*Traité théorique et pratique de droit international privé*, t. I, 1892, p. 499 et s.) — "de supposer que le Français qui fonde une maison de commerce à l'étranger ne s'est expatrié que dans l'espoir d'arriver à la fortune, et que, le jour où cet espoir sera réalisé, il reviendra jouir de ses richesses sur le territoire de son pays natal. A cette considération qui reposait sur la volonté présumée du Français émigré, on pouvait joindre une raison d'utilité générale: c'est que le commerce est international de sa nature, et que le Français qui s'y livre sur une terre étrangère travaille, en même temps qu'à ses propres intérêts, à la grandeur de son pays, dont il maintient et propage la suprématie commerciale. La France doit donc le considérer d'un œil favorable; et elle ne saurait le dépouiller de sa nationalité première, tant que ses actes ne témoignent pas formellement de la volonté d'en changer". Et plus tard (*op. cit.*, p. 502): "Au surplus, si avant 1889, l'absence d'esprit de retour impliquait chez le Français expatrié l'intention de renoncer à sa patrie d'origine et suffisait par suite à entraîner sa dénationalisation, il importait qu'une conséquence aussi importante ne put se produire qu'autant qu'il ne subsistait dans l'esprit du juge aucun doute sur la question de savoir si le Français avait conservé ou perdu l'esprit de retour. L'émigré était protégé par une présomption, et c'est à celui qui lui contestait la qualité de Français qu'il incombait de la faire tomber en articulant et en prouvant les faits de nature à l'infirmer."

Dans le cas de M. Pinson père, les faits prouvent péremptoirement — et les considérations présentées au cours des audiences par l'agence mexicaine ne sont point de nature à en diminuer la force probante — qu'il n'a jamais eu la volonté d'abandonner sa nationalité d'origine. Bien au contraire, tout ce qu'il a fait depuis son arrivée au Mexique, le 11 février 1864, jusqu'à sa mort en 1884, démontre qu'il a conservé toujours l'intention d'entretenir les relations qui l'unissaient à sa patrie. Si cela ne résulte pas déjà d'une façon convaincante du fait que dans les actes successifs de naissance de ses enfants, il s'est toujours fait désigner comme étant de nationalité française, cela s'ensuit sans le moindre doute d'une ensemble de circonstances dont je ne mentionne ici que différents séjours en France, l'éducation de ses fils en France, la gestion de diverses agences de maisons de commerce françaises et son immatriculation dans le registre consulaire de France à Mexico. C'est notamment ce dernier fait qui, d'après la législation française elle-même, met hors de doute la volonté de M. Pinson père de conserver sa nationalité d'origine, l'article 1er de l'ordonnance française du 28 novembre 1833 sur l'immatriculation dans les chancelleries diplomatiques et consulaires des Français résidant à l'étranger, indiquant en termes exprès l'immatriculation auxdits registres comme un moyen pour les Français de justifier de leur esprit de retour. M. Pinson père n'a donc jamais perdu sa nationalité d'origine, car, ainsi que le formule Valéry (*Manuel de droit international privé*, p. 270), au cours d'une brève étude de droit comparé relative à cette matière, "pour qu'il en soit ainsi, il faut que l'intéressé n'ait pas manifesté la volonté de conserver sa nationalité primitive, soit expressément, en se faisant immatriculer au consulat de sa nation, soit tacitement, en conservant des rapports constants avec sa patrie et en venant y faire, de temps à autre, des séjours." (Cpr. Tribunal civil de la Seine, 13 août 1903, *Journal Clunet*, 1904, p. 166).

Déjà la Commission mixte franco-américaine de 1871 a décidé dans le même sens dans l'affaire Parrenin (*Moore, International Arbitrations*, t. III, p. 2572).

Dans ces conditions, la nationalité française du père du réclamant à la date de la naissance de ce dernier est incontestable et, par conséquent, le réclamant lui-même doit être reconnu, conformément aux données contenues dans les certificats d'immatriculation consulaire, comme étant né Français, en vertu de l'article 10 primitif du Code civil français de 1804. La loi du 26 juin 1889 ayant supprimé définitivement comme cause de perte de la nationalité française l'établissement en pays étranger sans esprit de retour, la même question ne peut plus s'élever par rapport au fils, né en 1875; aussi, l'agence mexicaine s'est-elle abstenue de la soulever au préjudice du réclamant lui-même.

Par les motifs exposés ci-dessus, je décide que les arguments allégués par l'agence mexicaine pour détruire la force probante du certificat consulaire, attestant la nationalité française du réclamant, sont sans fondement, et que, par conséquent, la dite nationalité, tant à la date du dommage qu'à la date de la présentation de la réclamation devant la Commission franco-mexicaine, est établie.

B. — Nationalité mexicaine du réclamant

1. *Hypothèse de double nationalité.*

24. — A côté de la question traitée *sub* a) §§ 14-23, l'agence mexicaine a soutenu la thèse, amplement motivée au cours de différentes audiences successives, que le réclamant possède la nationalité mexicaine et que, par conséquent, quand bien même sa nationalité française serait reconnue, la Commission franco-mexicaine devrait se déclarer incompétente pour connaître de la réclamation, ou bien déclarer cette dernière non-recevable.

L'argumentation mexicaine s'appuie sur la doctrine assez généralement admise en droit des gens et évidemment considérée par l'agence mexicaine comme ne comportant aucun doute, ni aucune restriction, selon laquelle un Etat n'est pas qualifié à se prévaloir de son droit de protéger ses ressortissants par la voie diplomatique, dans les cas où les ressortissants à protéger possèdent en même temps le *status* de nationaux de l'Etat vis-à-vis duquel ledit droit de protection devrait être mis en action.

Tout en reconnaissant le bien-fondé de cette doctrine pour les cas où l'individu en question est *effectivement* considéré et traité comme sujet par chacun des deux Etats en cause, et ce en vertu de dispositions légales qui ne dépassent pas les bornes que leur trace le droit international public écrit ou coutumier, je crois pourtant devoir formuler certaines réserves quant à son admissibilité dans les cas où l'une ou l'autre de ces deux conditions ne se trouverait pas remplie. Car si, dans la seconde hypothèse, c'est l'Etat défendeur qui, dans sa législation nationale, n'observe pas les restrictions posées par le droit international à sa souveraineté nationale, la prétention de double nationalité du réclamant ne tiendrait pas debout devant un tribunal international. De même, il serait très difficile d'admettre l'exception de double nationalité dans la première hypothèse; car il serait évidemment contraire à l'équité de permettre à un Etat de traiter constamment comme sujet étranger un individu déterminé, mais de lui opposer, après, sa nationalité double, dans le seul but de se défendre contre une réclamation internationale.

Bien que les considérations ci-dessus formulées aient été effleurées dans le courant des discussions orales, il me semble superflu d'y insister ici, étant donné que l'assertion de l'agence mexicaine que le réclamant possède le *status* légal de ressortissant mexicain me paraît insoutenable et que j'aurai l'occasion, dans la suite, de revenir encore en quelques mots sur les deux conditions dont, à mon avis, doit dépendre l'admissibilité de l'exception de double nationalité.

2. *Système de défense mexicain*

25. — Pour pouvoir soutenir la nationalité mexicaine du réclamant, l'agence mexicaine a élaboré un système ingénieux de défense, qui peut être résumé comme suit.

Indépendamment du point de savoir si le père du réclamant a perdu, ou non, la nationalité française, à la suite de son établissement au Mexique en 1864, il a, en tout cas, acquis la nationalité mexicaine, en vertu de l'article 30, *sub* III, de la Constitution de 1857, déclarant que: "Son mexicanos: I...; III. Los extranjeros que adquieran bienes raíces en la República o tengan hijos mexicanos, siempre que no manifiesten la resolución de conservar su nacionalidad". Le premier fils de M. Pinson père naquit à Mexico en 1872; par ce fait même, le père acquit la nationalité mexicaine; car la simple mention dans l'acte de naissance de ce fils aîné, de la nationalité française du père ne suffisait pas à "manifester la résolution de conserver sa nationalité". M. Pinson père ayant acquis la nationalité mexicaine, son second fils, Georges, réclamant dans la présente affaire, naquit Mexicain en 1875, en vertu de l'article 30, *sub* I, de la même Constitution, déclarant Mexicains: "Todos los nacidos dentro o fuera del territorio de la República, de padres mexicanos." Il est vrai que la "Ley sobre extranjería y naturalización" du 28 mai 1886 a développé la disposition constitutionnelle de l'article 30, *sub* III, dans ce sens que les étrangers à qui naissent des enfants au Mexique n'acquièrent pas automatiquement par ce fait la nationalité mexicaine, mais qu'ils doivent encore remplir certaines formalités avant d'être admis dans la communauté nationale; ce fait n'a, toutefois, aucune importance, vu, d'une part, que ladite loi est

postérieure à la naissance du réclamant et, d'autre part, qu'une loi organique ne saurait jamais déroger à une disposition constitutionnelle.

Mais quand même l'argumentation ci-dessus ne serait pas soutenable, le réclamant devrait être considéré comme sujet mexicain par son propre fait, à savoir, d'avoir négligé la disposition de l'article 2, *sub* II, de la "Ley sobre extranjería y naturalización" qui, après avoir déclaré "extranjeros": "los hijos de padre extranjero..., nacidos en el territorio nacional hasta llegar a la edad en que, conforme a la Ley de la nacionalidad del padre..., fuesen mayores", ajoute la disposition suivante: "Transcurrido el año siguiente a esa edad, sin que ellos manifiesten ente la autoridad política del lugor de su residencia que siguen la nacionalidad de sus padres, serán considerados como mexicanos". Le fait que, dans l'année fatale, le réclamant se trouvait d'abord en France et après dans l'Afrique française au service militaire de la France, ne constituait pas un cas de force majeure et même s'il en avait été ainsi, la force majeure n'aurait pas tenu en échec le jeu de la disposition légale mexicaine.

Même à part cela, le réclamant n'a pu échapper au droit constitutionnel du Mexique, puisque, en 1904, son épouse a donné naissance à un "hijo mexicano", — événement qui, en dépit des dispositions relatives de la loi de 1886, contraires en ce point à la Constitution de 1857, a automatiquement revêtu de la nationalité mexicaine le père du nouveau-né [1].

Enfin, cette nationalité mexicaine du réclamant, d'origine ou doublement acquise, n'a pas été anéantie par le fait de deux services militaires sous le drapeau français, le premier en 1895 et 1896, le second en 1914 et les années suivantes, nonobstant que la loi "sobre extranjería y naturalización" (art. 2, *sub* VI) considère le fait de "servir oficialmente a Gobiernos extranjeros en cualquier empleo político, administrativo judicial, militar o diplomático" comme motif légal pour considérer comme "extranjero" la personne dont il s'agit. Car, d'abord, la disposition légale invoquée ne saurait déroger à la disposition constitutionnelle correspondante (art. 37, *sub* II, de 1857), qui ne fait perdre au Mexicain, par suite d'un service à l'étranger, que "la calidad de ciudadano", bien distincte de "la calidad de mexicano". Ensuite, cette disposition constitutionnelle, interprétée d'une façon raisonnable, ne proclamerait pas une véritable perte, mais plutôt une simple suspension de la "qualité de citoyen", tant que le service étranger dure. Enfin, quand bien même ces arguments ne suffiraient pas à appuyer la thèse mexicaine, les services militaires en France n'auraient pas pourtant fait perdre au réclamant la nationalité mexicaine d'origine ou acquise, vu que ni le premier ni le second service n'étaient de ceux que la législation mexicaine a l'intention de punir de la perte de la nationalité, — thèse appuyée sur une argumentation extrêmement subtile et trop détaillée pour être résumée ici.

26. — Après mûre réflexion et après examen de tous les documents et ouvrages disponibles concernant le droit public mexicain, j'en suis venu à la

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[1] Autant que je me rappelle, l'agence mexicaine, au cours de ses explications orales très détaillées, ne s'est pas appuyée, en termes exprès, sur ce dernier argument. Elle voudra bien me permettre de l'alléguer quand même, comme une dernière pierre angulaire qui, à mon avis, manque encore à son édifice juridique.

L'agence mexicaine ne s'est pas basée non plus sur le fait que le réclamant était le propriétaire d'un "bien raíz" au Mexique, — circonstance qui lui aurait permis d'invoquer également la première partie du No III de l'article 30 de la Constitution de 1857, cité ci-dessus dans le texte. Je ne sais pas si cette lacune dans l'argumentation s'explique par une simple inadvertance, ou bien par le souvenir des sentences défavorables des arbitres Dr. Lieber et Thornton dans la Commission mixte mexicano-américaine de 1868, ou enfin par le contenu de l'acte d'acquisition du bien immeuble. En tout cas, je crois pouvoir m'abstenir d'entrer dans ce détail, attendu qu'il serait entièrement couvert par mon opinion concernant les "hijos mexicanos".

conclusion que l'argumentation résumée ci-dessus est, en effet, *speciosior quam verior* et que, regardée de près, elle paraît être dénuée de fondement solide.

Je regrette infiniment de m'être trouvé dans la nécessité un peu pénible de fonder mes conclusions définitives relatives aux diverses questions de droit public mexicain mises en avant par l'agence mexicaine, sur des textes constitutionnels et légaux quelquefois ambigus, dissemblables ou même contradictoires et sur une doctrine extrêmement chancelante et divergente, sans l'appui de sentences rendues par les juridictions mexicaines, qui paraissent être restées muettes à cet égard, et sans avoir été à même d'examiner un document, qui, peut-être, aurait pu répandre plus de lumière sur le système controversé de la Constitution de 1857, c'est-à-dire les procès-verbaux de la Commission préparatoire de ladite Constitution, procès-verbaux qui, selon le témoignage de *Montiel y Duarte* (*Derecho público mexicano*, t. IV, p. 43), doivent avoir été rédigés, en vertu d'une résolution de la "Comisión de Constitución" sous la présidence de M. Arriaga (février 1856) de "llevar un libro de actas para tomar notas de sus discusiones". Dans ces conditions, force m'a été de chercher, dans la pénombre d'une documentation officielle présentant de regrettables lacunes, à frayer moi-même mon chemin au travers du labyrinthe de textes d'opinions doctrinales contradictoires. Dans cette entreprise, m'ont servi de guides les documents et ouvrages cités dans la note [1].

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[1] *Constitución de los Estados Mexicanos* expedida por el Congreso General Constituyente el día de 6 Febrero de 1857 con sus adiciones y reformas, leyes orgánicas y reglamentarias, texto vigente de la Constitución. México, Imprenta del Gobierno Federal, 1911.

Código Federal de Procedimientos Civiles.

Código Penal (reformado) para el Distrito y Territorios Federales.

Diario Oficial del Supremo Gobierno de la República Mexicana, 1856.

Actas de las sesiones públicas del Soberano Congreso Constituyente, instalado el día 18 de febrero de 1856 (Volume écrit original), conservé dans la bibliothèque de la Cámara de Diputados; s'étendant seulement jusqu'au 11 décembre 1856).

Diario de los debates del Congreso Constituyente, t. I y II, México, 1917.

José M. Gamboa, Leyes constitucionales de México durante el siglo XIX, México, 1901.

Isidro Antonio Montiel y Duarte, Derecho público mexicano, t. I-IV, México, 1871.

Manuel Dublán y José María Lozano, Legislación mexicana o colección completa de las disposiciones legislativas expedidas desde la independencia de la República. México. Edición oficial.

Luis Martínez López, Leyes Constitucionales. La Constitución Federal con todas sus reformas y Leyes Agraria, de Petroleo. "Extranjería". "Monopolios", "Amparo" y Cultos, con todas sus reformas y adiciones hasta julio de 1928. México, 1928.

Francisco Zarco, Historia del Congreso Extraordinario Constituyente de 1856 y 1857, t. I et II. México, 1857 (Con guia para consultar la obra citada, formada por *Basilio Pérez Gallardo*, 1878).

Exposición de motivos del proyecto de Ley sobre extranjeria y naturalización, que por encargo de la Secretaría de Relaciones Exteriores ha hecho el *Sr. Lic. D. Ignacio L. Vallarta*, y ley relativa, México, 1890.

Ricardo Rodríguez, Código de extranjería (Contiene la historia legislativa de México sobre la condición jurídica de los extranjeros, preceptos constitucionales, ley actual de extranjería de 28 de mayo de 1886, su comentario en presencia de las legislaciones extranjeras de la época presente, legislación comparada). México, 1903.

Manuel Azpíroz, Código de extranjería de los Estados Unidos Mexicanos. Ensayo de codificación. México, 1876.

José C Gertz, La nacionalidad y los derechos de los extranjeros en México, 1927.

José Algara, Lecciones de derecho internacional privado.

Castillo de Bobadillo, Apuntes para el estudio del derecho constitucional.

Luis Pérez Verdia, Tratado elemental de derecho internacional privado. Guadalajara, 1908.

Juan M. Vásquez, Curso de derecho público. México, 1879.

Tout d'abord, il me faut faire observer que, ainsi qu'il apparaîtra plus clairement dans la suite, et abstraction faite de quelques observations de moindre importance, l'agence mexicaine n'a pu édifier son système subtil de défense qu'en usant des expédients suivants:

a) Accuser d'inconstitutionnalité, pour pouvoir les éliminer, au moins deux dispositions de la loi "sobre extranjería y naturalización", en en déclarant l'article 1er, *sub* XI, contraire à l'article 30, *sub* III, de la Constitution de 1857 et l'article 2, *sub* VI, à l'article 7 *sub* II, de ladite Constitution, et cela, nonobstant que la loi ait été en vigueur pendant plus de quarante ans, sans qu'aucun tribunal en ait jamais prononcé l'inconstitutionnalité;

b) Ignorer, au contraire, l'inconstitutionnalité dont on pourrait avec le même droit accuser l'article 2, *sub* II, de la loi, qui a introduit une cause d'acquisition de la nationalité mexicaine qu'exclut l'article 33, mis en rapport avec l'article 30, de la Constitution, et baser précisément sur cette disposition légale, un des principaux chefs de la défense;

c) Représenter le cours de la législation mexicaine en matière de nationalité comme très vacillant, en déclarant que certain système légal, adopté en 1854, aurait été abandonné en 1857, pour être remis en vigueur en 1886, mais renié de nouveau en 1917, dans l'attente, peut-être, d'une volte-face nouvelle, quand le temps sera venu, pour donner exécution à la prescription de l'article transitoire final (16) de la Constitution de 1917.

Un système de défense qui s'appuie sur un ensemble d'arguments, si peu solides et en même temps si sévères pour les autorités législatives du pays, se condamne lui-même. En tout état de cause, je ne puis suivre l'agence mexicaine sur ce terrain et préfère chercher à interpréter la législation mexicaine d'une manière plus logique, tant que cela paraît possible. Or, cette possibilité existe, en effet.

3. *Droit applicable*

27. — Pour mieux comprendre la situation légale, en ce qui concerne la prétendue nationalité mexicaine du réclamant, il faut avoir présentes à l'esprit les dates suivantes:

30 janvier 1854, date de la première loi sur la nationalité mexicaine et la qualité d'étranger, de validité contestée après le triomphe de la révolution de Ayutla, qui renversa l'administration du dictateur Santa Anna [1].

5 février 1857, date de la Constitution fédérale des Etats-Unis Mexicains, sanctionnée par le Congrès Constituant de 1856-1857;

11 février 1864, arrivée de M. Pinson père au Mexique;

Cuestiones Constitucionales. Votos del C. Ignacio L. Vallarta, Presidente de la Suprema Corte de Justicia, en los negocios más notables resueltos por este tribunal, desde mayo de 1878 a 16 de noviembre de 1881, t. I-IV. México, 1879.

Francisco J. Zavala, Elementos de derecho internacional privado. Avec Apéndice: *examen y exposición de la ley de extranjería de 28 de mayo de 1886.* México, 1889, Compendio de Derecho internacional privado, 3a. edición. México, 1903.

F. R. Dareste, Les constitutions modernes, 3e éd. Paris, 1910.

Bisocchi, Acquisito e perdita della nazionalità nella legislazione comparata e nel diritto internazionale. Milan, 1906.

Augusto Carmana de la Fuente, Examen critico y comparativo de la nacionalidad y de la ciudadania y sus derivados, 1925 (Chili).

Lehr. De la nationalité et des diverses manières dont elle s'acquiert dans les principaux Etats du Globe. La Haye et Paris, 1908.

Zeballos, La nationalité au point de vue de la législation comparée et du droit privé humain, 2 vol., 1914.

[1] A ce sujet, voir *infra*, § 30.

14 septembre 1872, naissance du fils aîné de M. Pinson père;

25 janvier 1875, naissance du réclamant, M. Georges Pinson;

28 mai 1886, date de la "Ley sobre extranjería y naturalización", actuellement en vigueur;

21 octobre 1895, première entrée du réclamant dans le service militaire français (à Besançon);

25 janvier 1896, date à laquelle le réclamant arriva à la majorité;

30 août 1896, continuation du service militaire à Alger;

21 octobre 1898, fin du premier service militaire du réclamant;

15 mai 1904, naissance du fils du réclamant à Mexico;

7 mars 1911, immatriculation du réclamant dans le registre consulaire;

13 août 1914, départ du réclamant pour la France, par suite de la guerre;

13 février 1915, occupation de l'"Establo Higiénico" par les forces combattantes;

16 juin 1915, notification du dommage par la Légation de France au Secrétariat des Relations Extérieures;

31 janvier, 5 février 1917, date de la Constitution nouvelle;

31 janvier 1921, introduction de la réclamation devant la Commission nationale des réclamations.

De cet aperçu chronologique, il résulte que la naissance du fils aîné de M. Pinson père et celle du réclamant se sont produites sous la vigueur de la loi de 1854 et de la Constitution de 1857, donc avant la promulgation de la loi de 1886; que, par contre, le réclamant est pour la première fois entré dans le service militaire français et a atteint la majorité sous l'empire de la Constitution de 1857 et de la loi de 1886; que, lorsque le fils du réclamant naquit et que le réclamant lui-même entra pour la seconde fois dans le service militaire français, étaient encore en vigueur les mêmes Constitution et loi; que l'immatriculation consulaire du réclamant s'est faite bien avant les faits de 1915, qui ont causé les dommages faisant l'objet de la réclamation, et qu'enfin cette dernière, après avoir été présentée au gouvernement mexicain par la voie diplomatique en 1915, a été introduite par le réclamant, tant à la Commission nationale qu'à la Commission franco-mexicaine, sous la vigueur de la loi de 1886 et de la Constitution nouvelle de 1917.

Il faut donc, d'abord, fixer la situation juridique à la lumière:

a) Des principes admis en matière de droit transitoire, et

b) Des principes qui régissent les rapports réciproques qui existent, d'une part, entre une loi antérieure et une Constitution postérieure et d'autre part, entre une Constitution antérieure et une loi postérieure.

28. — *Ad* a). Quant aux principes de droit transitoire qui régissent le cas, il semble que la solution est parfaitement claire et ne comporte aucun doute, en ce sens que, d'après le droit constitutionnel mexicain, aucune loi ne peut avoir d'effet rétroactif. En effet, la Constitution de 1857 disait, à l'article 14, que "No se podrá expedir ninguna ley retroactiva" et la Constitution nouvelle de 1917 dit également à l'article 14, que "A ninguna ley se dará efecto retroactivo en perjuicio de persona alguna" [1]. Par conséquent, il est incontestable, au point de vue du droit constitutionnel mexicain:

[1] L'addition au texte de 1857 des mots "en perjuicio de persona alguna" pourrait, dans le domaine où nous nous trouvons, faire surgir la question délicate suivante. Supposez qu'une nouvelle loi sur la nationalité mexicaine vienne réduire les causes d'acquisition, ou bien étendre les causes de perte de ladite nationalité, avec effet rétroactif. Pareille loi serait-elle contraire, ou non, à l'article 14 de la Constitution de 1917? Lorsqu'on considère, d'une part, que la dignité nationale interdit de considérer la nationalité du pays comme une charge, au lieu d'un

Que les effets juridiques de la naissance du fils aîné de M. Pinson, en 1872, par rapport à la nationalité de ce dernier, doivent être jugés conformément à la loi de 1854 et à la Constitution de 1857 (sur la loi de 1854, voir ci-après § 30);

Qu'il en est de même, en ce qui concerne la nationalité du réclamant lui-même, par le seul fait de sa naissance à Mexico en 1875;

Qu'au contraire, les effets juridiques du premier service militaire prêté par le réclamant à la France, de même que ceux résultant du fait, par le réclamant, d'arriver à la majorité pendant ce service militaire, doivent s'apprécier selon la Constitution de 1857 et de la loi de 1886;

Qu'il en est de même des conséquences légales qui découlent pour le réclamant des faits d'avoir engendré un fils au Mexique et d'avoir pris du service militaire en France à l'occasion de la grande guerre européenne;

Qu'enfin, l'appréciation de la nationalité du réclamant au moment de l'introduction de la réclamation formelle ne dépend en rien de la Constitution de 1917, étant donné que cette dernière ne contient aucune disposition transitoire qui lui reconnaisse, en matière de nationalité, effet rétroactif.

29. — *Ad* b). Restent à déterminer les rapports mutuels qui existent selon le droit constitutionnel mexicain, entre des dispositions constitutionnelles et des dispositions légales, soit antérieures, soit postérieures. A cet égard, la situation juridique paraît être un peu plus douteuse qu'à l'égard du point traité *sub* a).

Non que la doctrine et la jurisprudence mexicaines laissent subsister le moindre doute sur le point de savoir si, en cas de contradiction entre une disposition constitutionnelle et une disposition légale postérieure, la première ou la dernière doit l'emporter dans les tribunaux du Mexique. En effet, conformément au système légal prévalant aux Etats-Unis d'Amérique et contrairement à celui admis en beaucoup de pays d'Europe, le droit public mexicain reconnaît aux tribunaux du pays compétence pour juger la constitutionnalité des lois, ou, en d'autres termes, pour dénier à des dispositions légales toute valeur juridique, pour cause de contradiction avec la Constitution du pays.

Les raisons de douter se rapportent plutôt aux deux points suivants:

1. La doctrine qui vient d'être constatée, doit-elle trouver application également dans les tribunaux internationaux d'arbitrage, de sorte qu'eux aussi, seraient compétents pour apprécier les lois nationales des Etats litigants à la lumière de leur droit constitutionnel?

2. Quels sont les rapports réciproques entre une disposition légale antérieure et une disposition constitutionnelle postérieure?

Ad 1). — La doctrine du droit public mexicain qui prescrit aux tribunaux du pays de laisser hors d'application une loi ou une disposition légale réputée contraire à la Constitution, peut être expliquée de deux façons différentes. Ou bien elle revient à dire que pareille loi ou disposition légale doit être considérée comme

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privilège, et d'autre part, que toute loi mexicaine s'adresse avant tout au peuple mexicain, la réponse à la question formulée ci-dessus ne saurait être qu'affirmative, puisque toute réduction des causes d'acquisition et toute extension des causes de perte de la nationalité mexicaine avec effet rétroactif doivent nécessairement priver de leur nationalité un nombre plus ou moins grand de Mexicains. Pareille loi ne saurait donc profiter pas même à un ressortissant étranger, comme le réclamant actuel, qui, aux fins de la défense contre l'exception de double nationalité, prétendrait l'invoquer pour se débarrasser de la nationalité mexicaine bien que, pour lui personnellement, *dans sa qualité de réclamant français*, la disposition attribuant effet rétroactif à la loi nouvelle, comporterait un avantage, au lieu d'un "perjuicio". Cette question n'a, d'ailleurs, autant que je vois, pas d'importance pour le cas présent.

ayant été nulle dès le début, de sorte que les tribunaux ne font qu'en constater la nullité (effet déclaratif de la sentence), ou bien elle en présuppose la validité jusqu'à ce que le pouvoir judiciaire l'ait invalidée (effet constitutif, cassatoire de la sentence); dans le premier cas, la sentence opère *ex tunc*, dans le dernier, *ex nunc*. Dans la dernière hypothèse, on pourrait argumenter que, le droit national ayant chargé une autorité nationale déterminée de mettre fin à la force obligatoire de lois contraires à la Constitution, aucune autre autorité, ni nationale, ni internationale, ne saurait être considérée comme qualifiée pour remplir cette fonction. Dans la première hypothèse, il s'agirait plutôt de la constatation judiciaire d'une nullité préexistante, nullité qui découle directement de l'ensemble du droit public de l'Etat en question et qui peut aussi bien être constatée par tout autre tribunal appelé à appliquer les dispositions dudit droit, notamment par une commission mixte ou un tribunal d'arbitrage internationaux.

Au point de vue théorique, j'ai éprouvé des doutes assez graves sur l'attitude à prendre par la Commission franco-mexicaine vis-à-vis de la question soulevée de l'inconstitutionnalité de la loi de 1886. Non que je mette sérieusement en doute que le pouvoir de prononcer éventuellement l'inconstitutionnalité d'une loi ou d'un décret mexicains rentre dans ses attributions. Car en effet, pareil doute aurait été effacé par la réflexion que, d'une part, dans le cas actuel, l'invocation de la nullité de certaines dispositions légales par l'agence mexicaine ne saurait s'expliquer que dans l'hypothèse visée ci-dessus en premier lieu, c'est-à-dire d'un examen aboutissant à un jugement déclaratif, et que, d'autre part, c'est le Gouvernement mexicain lui-même qui, en la personne de son agent, a pressé la Commission d'examiner et de condamner la législation de son pays à la lumière du droit constitutionnel.

Les raisons de mon doute étaient de tout autre ordre et se rapportaient plutôt à la situation singulière, créée par le fait qu'un Gouvernement, sans prendre aucune initiative, soit de faire abroger ou modifier par le pouvoir législatif du pays une loi nationale, soit d'en faire juger la constitutionnalité ou inconstitutionnalité par le pouvoir judiciaire, en invoque pourtant la nullité devant un tribunal international, situation d'autant plus curieuse dans le cas actuel, où il s'agit d'une loi qui est restée en vigueur pendant plus de quarante ans après sa promulgation, sans que jamais aucune sentence judiciaire ne paraisse en avoir contesté la validité au point de vue constitutionnel. Dans ces conditions, j'ai sérieusement pensé à ignorer absolument l'appel fait par l'agence mexicaine à la prétendue inconstitutionnalité de la loi de 1886, considérant que, si le Gouvernement mexicain en considère simplement douteuse la validité, il eût mieux valu provoquer sur ce point une sentence de la Cour Suprême de la Fédération, au lieu de soumettre, après quarante ans, cette question importante à l'avis d'un tribunal international, et que, si ledit Gouvernement est réellement convaincu de l'inconstitutionnalité de la loi, il n'eût pu se soustraire au devoir d'en proposer au Congrès la modification.

Si, malgré ma conviction que la Commission franco-mexicaine eût été pleinement justifiée à ne pas s'engager du tout dans la voie d'un examen de la constitutionnalité de la loi de 1886, en censeur de la législation mexicaine, je me suis résolu tout de même à entreprendre cet examen, c'est qu'il peut avoir encore quelque utilité pour l'avenir et que sans cela, les discussions vives et détaillées devant la Commission n'eussent entraîné qu'une perte de temps précieux.

Ad 2). — Les difficultés que fait surgir la question des rapports entre une disposition légale antérieure et une disposition constitutionnelle postérieure consistent en ceci, que les dispositions d'une Constitution présentent souvent un caractère moins précis que celle d'une loi ordinaire, qu'elles se bornent

maintes fois à formuler des règles d'un caractère fondamental et que, du reste, elles prescrivent ou présupposent une loi postérieure organique qui en met en pratique les principes généraux. C'est pourquoi, en cas de modification de la loi fondamentale d'un pays, des articles transitoires disposent souvent que les lois organiques promulguées sous l'empire de la Constitution ancienne conservent leur force obligatoire jusqu'à ce que le pouvoir législatif ait donné exécution aux dispositions, de caractère global et fondamental, de la Constitution nouvelle. En fût-il autrement, la situation juridique entre la promulgation de la Constitution nouvelle (ou des modifications de la Constitution) et celle de la nouvelle loi organique serait très incertaine et précaire; sur quelques points, on pourrait constater une contradiction manifeste entre les nouvelles dispositions constitutionnelles et les prescriptions plus détaillées de l'ancienne loi organique; sur d'autres, il n'existerait aucune antinomie; sur d'autres encore, on ne saurait fixer avec précision les effets que les modifications apportées au système juridique de la Constitution peuvent avoir produits sur les détails de la législation organique.

Pour les raisons alléguées, je crois devoir admettre comme thèse générale de droit public, à moins qu'une Constitution déterminée ne stipule expressément le contraire, qu'en cas de modifications dans la loi fondamentale, l'on ne saurait admettre une supplantation automatique des dispositions légales en vigueur par les nouvelles dispositions constitutionnelles, que dans la seule hypothèse où se trouverait remplie la triple condition suivante: que ces dernières aient une précision telle, qu'elles se prêtent à une application directe, sans l'intermédiaire nécessaire de dispositions légales détaillées qui en doivent assurer l'exécution et déterminer la portée exacte; que leur tendance soit évidemment contraire à celle de la législation existante, et que la suppression automatique de cette dernière ne produise pas un vide légal, intolérable dans tout Etat bien organisé. En outre, il va sans dire que la Constitution postérieure peut aussi ajouter des dispositions nouvelles au droit légal en vigueur, lesquelles opéreront par le seul fait de leur promulgation, pourvu qu'elles satisfassent à la première des trois conditions qui viennent d'être formulées.

A la lumière des considérations qui précèdent, je résume comme suit les conclusions plus précises qui s'en dégagent pour les questions soulevées par l'agence mexicaine et relatives au droit mexicain en matière de nationalité.

Les effets juridiques de la naissance du fils aîné de M. Pinson père en 1872 sur la nationalité de ce dernier et les conséquences juridiques pour le réclamant d'être né à Mexico en 1875 doivent s'apprécier conformément à la loi de 1854, à moins que: *a)* cette loi ne doive être considérée comme ayant été abrogée à la suite de la révolution de Ayutla, et *b)* la Constitution de 1857 ne l'ait supplantée automatiquement selon le triple critérium que je viens de formuler. Dans chacune de ces deux hypothèses, l'on ne pourrait se fonder que sur la seule Constitution de 1857, à moins qu'on ne désire remonter jusqu'à la loi du 14 avril 1828, abrogée par l'article 22 de la loi du général Santa Anna.

Par contre, les effets juridiques du premier service militaire du réclamant en France en 1895, du fait par le réclamant d'arriver à la majorité en 1896, de la naissance de son fils en 1904 et de son second service militaire en France depuis 1914, doivent être jugés conformément à la loi de 1886, à moins que cette loi ne doive être considérée comme étant contraire à la Constitution de 1857.

4. *Possibilités d'acquisition de la nationalité mexicaine*

30. — Abordons maintenant, avec ce point de départ, l'appréciation des arguments allégués avec tant de détail par l'agence mexicaine.

Je fais remarquer d'abord, que ladite agence, bien qu'elle ait quelquefois cité, au cours de ses exposés oraux, la loi de 1854, s'est abstenue, tant de l'invoquer comme base légale de son argumentation, que d'en invoquer la non-existence juridique, à la suite de la révolution de Ayutla. En effet, elle l'a à peu près niée, sans qu'il apparaisse pour quelle raison elle l'a passée sous silence.

Bien qu'il y ait des raisons de croire que la loi du Général Santa Anna du 30 janvier 1854 n'ait pas survécu au triomphe de la révolution de Ayutla, qui mit fin à la dictature de son auteur, je suis d'avis que la réalité des événements postérieurs les a suffisamment neutralisées. S'il est vrai que ladite révolution a formellement abrogé toutes les lois et dispositions édictées par le dictateur, il n'en est pas moins vrai que la loi sur la nationalité est effectivement restée en vigueur, à défaut d'une autre loi régissant la matière (loi du 14 avril 1828 ayant été abrogée par celle de 1854 et étant au surplus parfaitement surannée), et que les tribunaux du pays, de même que les autorités administratives en ont constamment admis la force juridique. (Cpr. entre autres les renseignements fournis à ce sujet par *Ricardo Rodríguez, Código de Extranjería,* 1903, p. 25 et 26.) Dans ces conditions, il faut attacher plus d'importance à la situation de fait qui certifie l'opinion commune des autorités du pays, qu'à certaines proclamations de caractère général datant d'une période troublée de révolution. Par ces motifs, j'admet sans hésitation que, la loi de 1854 ayant été considérée par les organes officiels du pays comme étant restée en vigueur après la révolution de Ayutla, c'est à la lumière de cette loi que doivent s'apprécier les événements qui, entre 1854 et 1886, ont pu comporter des effets juridiques en matière de nationalité.

Cette conclusion est, toutefois, subordonnée à la seconde condition que j'ai formulée ci-dessus, à savoir que la Constitution de 1857 n'ait pas supplanté, modifié ou supprimé *ipso facto* les dispositions de la loi de 1854 qui régissent le cas actuel. En outre, il se peut que des dispositions nouvelles de ladite Constitution soient venues amplifier ou compléter les dispositions légales en vigueur.

Or, qu'est-ce que la loi de 1854 et la Constitution de 1857 respectivement prescrivent par rapport aux deux faits particuliers qui tombent sous leur coup, à savoir le fait, par M. Pinson père, d'avoir eu, en 1872, un "hijo mexicano", et le fait, par le réclamant lui-même, d'être né à Mexico en 1875?

La loi de 1854 ne contient aucune disposition dont on puisse inférer, pas même par la voie d'une interprétation extensive, qu'elle revêt de la nationalité mexicaine un étranger à qui un enfant est né au Mexique; elle est parfaitement muette à cet égard. Cette loi n'a donc jamais pu imposer à M. Pinson père la nationalité mexicaine à la suite de la naissance de son fils aîné. Par conséquent, le second fils, le réclamant actuel, tombait, lors de sa naissance en 1875, sous le coup de l'article 1er, *sub* II ou III de la loi, disant que: "Son extranjeros para los efectos de las leyes: II. — Los hijos de extranjeros nacidos en el territorio nacional hasta la edad de veinticinco años, si se mantuvieron bajo la patria potestad; III. — Los mismos hijos de que trata el párrafo anterior, cuando emancipados declarasen ante la autoridad política del lugar de subresidencia y dentro del año siguiente al de su emancipación, que no quieren naturalizarse." Il ne me paraît pas nécessaire de tâcher d'élucider ici la portée exacte de ces deux dispositions peu précises, puisque le réclamant n'a pas été émancipé conformément à la disposition *sub* III et que l'effet de la disposition *sub* II n'eût, en aucun cas, pu se faire sentir avant l'année 1900 époque où la loi de 1854 n'était plus en vigueur. Des considérations précédentes, il s'ensuit donc qu'en vertu de la loi de 1854, ni M. Pinson père, ni le réclamant ne sont jamais devenus Mexicains.

En est-il autrement sous l'empire de la Constitution de 1857?

Il est curieux de constater que, par rapport aux deux faits dont il s'agit de déterminer ici les conséquences juridiques, ladite Constitution diffère totalement de la loi de 1854. D'une part, elle introduit, à l'article 30, *sub* III, une nouvelle cause d'acquisition de la nationalité mexicaine, contenue dans la formule un peu énigmatique: "Son mexicanos... III. — Los extranjeros que (adquieran bienes raices en la República o) tengan hijos mexicanos, siempre que no manifiesten la resolución de conservar su nacionalidad." D'autre part, elle ne fait plus la moindre allusion à ce que les fils de pères étrangers acquerraient la nationalité mexicaine, en atteignant l'âge de vingt-cinq ans, mais se borne à dire, à l'article 33, que: "Son extranjeros los que no posean las cualidades determinadas en el art. 30", c'est-à-dire tous ceux qui ne sont pas nés de parents mexicains (I), qui n'ont pas été naturalisés au Mexique (II) et qui ne sont pas devenus Mexicains en vertu de l'alinéa III cité plus haut.

De ces différences, quelles conclusions juridiques faut-il tirer?

Tout d'abord, il faut en déduire que, contrairement à ce qui doit être inféré de la loi de 1854, M. Pinson a acquis la nationalité mexicaine par le fait de la naissance de son fils aîné, si, comme le prétend l'agence mexicaine, la disposition de l'article 30, *sub* III, lui est réellement et directement applicable.

Et ensuite, il s'en dégagerait la conclusion ultérieure que le réclamant lui-même doit être considéré comme Mexicain ou étranger, selon la réponse à donner à la question de l'applicabilité de ladite disposition. En cas de réponse affirmative, sa nationalité mexicaine découlerait directement de l'article 30, *sub* I, de la Constitution. En cas de réponse négative, il se trouverait étranger en vertu de l'article 33. Et dans ce cas-ci, il n'a même pu être menacé, pendant les onze premières années de sa vie (entre 1875 et 1886), par l'épée de Damoclès forgée par l'article 1er, *sub* II et III, de la loi de 1854 attendu que la Constitution de 1857, en ne faisant plus mention d'aucun effet juridique résultant, pour les mineurs, du fait d'arriver à l'âge de vingt-cinq ans, doit être considérée comme ayant abrogé la disposition légale de 1854 y relative.

31. — Après mûre réflexion, j'en suis arrivé à la conclusion que la disposition de l'article 30, *sub* III, de la Constitution de 1857 ne justifie en aucune manière les conclusions que l'agence mexicaine prétend en tirer pour le cas actuel.

Si l'on prend à la lettre ledit alinéa III, disant que: "Son mexicanos... Los extranjeros que adquieran bienes raíces en la República o tengan hijos mexicanos, siempre que no manifesten la resolución de conservar su nacionalidad", il s'ensuivrait que le seul fait d'acquérir des biens immeubles au Mexique ou d'avoir des "hijos mexicanos" imposait, selon la Constitution de 1857, aux intéressés la nationalité mexicaine, automatiquement et sans aucune formalité complémentaire. Cette interprétation littérale de l'alinéa comporterait des conséquences que le Congrès de 1857 ne peut guère avoir voulues; car il en résulterait par exemple, que les Etats-Unis Mexicains n'auraient plus de défense contre l'acquisition de la nationalité mexicaine par des éléments indésirables, qui ne seraient, certes, pas admis à la naturalisation formelle, mais qui pourraient entrer à la dérobée par une voie détournée relativement facile à prendre. En outre, pareille interprétation comporterait en bien des cas la conséquence fâcheuse d'imposer, par surprise, à des étrangers non prévenus une nationalité étrangère qu'ils ne désirent pas, conséquence peu digne d'un pays qui peut se glorifier de tant de traditions libérales. C'est pourquoi le bon sens de plusieurs auteurs nationaux, aussi bien que l'intelligence de deux arbitres internationaux ont tout de suite compris que la disposition constitutionnelle ne saurait être prise à la lettre, mais qu'elle doit nécessairement être interprétée sous certaines réserves raisonnables.

Ainsi que le constate Ricardo Rodríguez (*Código de extranjería*, p. 127 et 128), "la generalidad del precepto reclamaba su reglamentación (réalisée plus tard dans la loi de 1886, voir *infra*)..., a fin de que la ley constitucional puede surtir sus efectos, los que el legislador había previsto, y no aquellos que indebidamente se le han atribuido objetando de absurdas sus disposiciones, pretendiéndose que basta que el extranjero posea determinado inmueble, para naturalizarlo mexicano contra su voluntad. Otra es la interpretación quo nuestros más renombrados jurisconsultos han dado al precepto en cuestión, y esto aun antes de que la ley de extranjería (de 1886) viniera a reglamentarlo, fijando su alcance y sus términos". Et ce qui est dit ici de l'acquisition de biens immeubles, s'applique également au fait d'avoir "hijos mexicanos": "precepto que también ha sido objeto de injustificables censuras; porque tambien se deja al extranjero el derecho de opción de la nacionalidad mexicana si tiene hijos nacidos en el país: y, por lo tanto, en absoluta libertad para hacer uso de aquel derecho conforme a sus intereses o convicciones, puesto que en toda esta materia nuestra ley está inspirada en el principio proclamado en el Derecho Romano, "que nadie sea ciudadano contra su voluntad", que es el que hoy informa en cuestiones de nacionalidad, las legislaciones de la época actual".

En effet, ce serait faire outrage à la législation d'un pays civilisé de vouloir en interpréter les prescriptions, sans une stricte nécessité, dans le sens contraire. C'est pourquoi je me refuse à penser que le législateur ait voulu imposer à un étranger une nationalité qu'il ne désirait pas acquérir, et le punir du fait de n'avoir pas "manifesté la résolution de conserver sa nationalité" dans une forme expresse, mais seulement dans une forme implicite. Car, il n'y a pas de doute possible qu'en faisant insérer dans l'acte de naissance de son fils aîné, la mention de sa nationalité française, M. Pinson père a manifesté d'une façon parfaitement claire que, nonobstant sa paternité nouvelle, il était et voulait rester Français. Un petit détail historique vient confirmer que l'interprétation rigoureuse et formelle que l'agence mexicaine a prétendu donner à la disposition en question, est contraire à l'esprit de la Constitution, à savoir le fait que, au cours des discussions sur le projet de Constitution dans le Congrès Constituant de 1856-1857, le mot "expresamente" qui se trouvait encore, après le mot "manifiesten", dans le texte de l'article 30, (alors 35), *sub* III, projeté, a été supprimé, évidemment dans le but d'admettre aussi des manifestations d'un caractère moins formel (Cpr. *Francisco Zarco, Historia del Congreso extraordinario constituyente de 1856 y 1857*, t. II. p. 231).

L'interprétation raisonnable que plusieurs jurisconsultes mexicains ont donnée à la disposition invoquée par l'agence mexicaine a été confirmée, en outre, par différentes décisions consécutives de deux arbitres internationaux, MM. les Drs Lieber et Thornton, qui, à propos de la disposition analogue relative à l'acquisition de "bienes raíces" au Mexique par des étrangers, dans la Commission mixte de réclamations mexicano-américaine de 1868 ont décidé, eux aussi, qu'il ne pouvait s'agir que d'un bénéfice accordé par la loi fondamentale mexicaine, et non pas d'une pénalité. Le Dr Lieber s'est prononcé comme suit (affaire de Anderson et Thompson, *Moore, International Arbitrations*, t. III, p. 2480):

"Anderson and Thompson became citizens, it is asserted, of Mexico by acquiring land; for there is a law of the Mexican Republic converting every purchaser of land into a citizen unless he declares, at the time, to the contrary. This law clearly means to confer a benefit upon the foreign purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case) merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred

remaining American citizens, as they were by birth—one of the very strongest of all ties",

et l'arbitre Thornton décida plus tard dans le même sens disant que:

"The claimants must be taken to be citizens of the United States, although holding land in Mexico. He is of opinion that the part of the Constitution of Mexico which says that those are citizens who hold land is permissive and not obligatory; and as the claimants did not take any steps to avail themselves of that permission, that in itself was sufficient proof that they did not wish to do so" *(loc. cit.*, p. 2482; dans le même sens: affaires Willis, Bowen, Costanza et Wenkler).

Si MM. Lieber et Thornton se sont prononcés en ce sens dans des cas où les intéressés n'avaient en aucune manière "manifesté la résolution de conserver leur nationalité" et à une époque où le législateur mexicain n'avait pas encore donné exécution aux dispositions constitutionnelles, à plus forte raison je me crois autorisé à le faire dans le cas actuel où l'intéressé a bien manifesté sa résolution, quoique dans une forme non expresse, et à l'époque actuelle où est en vigueur, déjà depuis une quarantaine d'années, la loi de 1886, qui est venue élaborer et préciser les articles fondamentaux de la Constitution et qui s'est parfaitement ralliée au point de vue formulé par les deux arbitres (voir l'article 1er, *sub* X et XI, comparé avec l'article 19 de ladite loi). Par surcroît, je fais encore remarquer que telle avait déjà été l'intention de l'article 8 du décret du président Comonfort, en date du 1er février 1856.

Par les motifs exposés ci-dessus, je crois devoir formuler les conclusions suivantes:

En supposant que, conformément à ce qui a été exposé plus haut, l'article 30, *sub* III, de la Constitution de 1857 puisse être considéré comme une disposition d'une précision telle qu'elle soit directement applicable, sans l'intermédiaire d'une loi organique qui en développe le principe général — ce qui est douteux, eu égard à la nécessité que le législateur mexicain a toujours éprouvée de développer par une loi organique le noyau constitutionnel, — l'article doit en tous cas être interprété dans le sens que lui ont prêté la plupart des auteurs de droit constitutionnel mexicain et les sentences arbitrales de MM. les Drs Lieber et Thornton, c'est-à-dire d'une disposition en faveur des individus qui se trouvent dans les conditions y stipulées, et non d'une prescription qui les frappe de conséquences juridiques qu'ils n'ont nullement désirées. Envisagée à ce point de vue, la disposition ne laisse aucun doute sur le caractère inadmissible de la thèse de l'agence mexicaine, selon laquelle M. Pinson aurait, en 1872, encouru la pénalité de l'acquisition d'une nationalité nouvelle, pour la seule raison de n'avoir pas en termes exprès, mais seulement dans une forme implicite, exprimé le désir de rester Français.

Ces conclusions sont, je le répète, en parfait accord avec la façon dont, plus tard, le pouvoir législatif du Mexique lui-même a entendu les dispositions constitutionnelles. Et enfin, cet esprit libéral est beaucoup plus digne de la grande nation mexicaine que l'esprit étroit dans lequel le critique bien connu de la loi de Vallarta de 1886, M. Francisco J. Zavala, a cru devoir interpréter la disposition en question, lorsqu'il dit, à la page 256-257 de son ouvrage de 1889, *Elementos de derecho internacional privado, Apéndice, examén y exposición de la ley de extranjería de 28 de mayo de 1886*): "Mexico en sus angustias para libertarse de esas extorsiones (c'est-à-dire de nations étrangères) recurre, siempre que puede, a negar la extranjería del reclamante, y para ello le aprovecha mucho más, que el estranjero quede naturalizado, como lo manda la Constitución, que soborear la dulce vanidad de imponer difíciles condiciones para la adquisi-

ción de su ciudadanía [1]. Este es el origen de esa fracción..." Bien que toute l'argumentation de l'agence mexicaine reflète d'une façon surprenante le désir, si franchement exprimé par M. Zavala, de "recurrir, siempre que puede, a negar la extranjería del reclamante", je me fais un devoir de ne pas admettre ce désir comme critérium loyal d'interprétation de la législation du pays par un tribunal international et de rendre plutôt au Mexique le service de me ranger à l'avis de mes deux prédécesseurs de la Commission de 1868, en repoussant encore une fois la thèse mexicaine, condamnée il y a déjà plus de quarante ans par le pouvoir législatif du pays lui-même.

32. — Dans ces conditions, je peux me dispenser d'examiner la question effleurée au § 24, de savoir si la disposition constitutionnelle invoquée par l'agence mexicaine serait à l'abri de tout reproche de contradiction avec le droit des gens, si elle prétendait, en effet, imposer à l'étranger, par surprise et contre son gré, la nationalité mexicaine. Car s'il est vrai que, en règle générale, tout Etat est souverain pour déterminer quelles personnes il considérera comme ses ressortissants, il n'en est pas moins vrai, que ainsi que l'a constaté la Cour permanente de Justice internationale dans son avis consultatif concernant les décrets de nationalité, promulgués au Maroc et en Tunisie, que cette souveraineté peut être limitée par des règles du droit des gens, règles qui peuvent s'enraciner non seulement dans des traités formels, mais encore dans une *communis opinio juris* sanctionnée par le droit coutumier.

A un examen de pareil ordre ne saurait éventuellement faire obstacle, ni l'assertion qu'un tribunal arbitral international n'est pas compétent pour apprécier le droit national d'un pays à la lumière du droit international, ni la prétention qu'en cas de conflit entre la Constitution d'un pays et le droit des gens, écrit ou coutumier, la première devrait prévaloir.

La première assertion est insoutenable par le motif qu'il est incontestable et incontesté que le droit international est supérieur au droit "interne" (Politis) et que, ainsi que la Cour permanente de Justice internationale l'a si simplement formulé dans son arrêt No 7 relatif à certains intérêts allemands en Haute Silésie polonaise (fond), p. 19: "Au regard du droit international et de la Cour qui en est l'organe, les lois nationales sont de simples faits", de sorte que tout tribunal international, de par sa nature, est obligé et autorisé à les examiner à la lumière du droit des gens, thèse, d'ailleurs, qui a été maintes fois soutenue et appliquée par différentes juridictions internationales.

La seconde prétention est insoutenable, pour le même motif de la supériorité du droit international au droit national des Etats. La thèse que le surarbitre à bon droit, a formulée dans l'affaire Montijo (*Moore, Digest of International Arbitrations*, p. 1440), à savoir qu'un traité est "superior to the constitution, which latter must give away" et que "the legislation of the republic must be adapted to the treaty, not the treaty to the laws", a une valeur égale pour les rapports mutuels entre la Constitution et le droit international non écrit. Dans cet ordre d'idées, je crois devoir faire les réserves les plus expresses à l'égard de la thèse mexicaine, soutenue à la page 56 de la collection de documents citée ci-dessus § 6, sur *La cuestión internacional mexicano-americana, durante el Gobierno del Gral. Don Alvaro Obregón*, et que l'agence mexicaine m'a obligé à étudier d'un bout à l'autre à savoir que "si acaso legara a existir (una Constitución en el sentido de ordenar la confiscación de derechos de propiedad extranjeros), como ella sería la Ley Suprema del país tendría que acatarse por encima de los Tratados, pues éstos no pueden tener mayor fuerza que la misma Constitución". Cette thèse, absolument contraire aux axiomes mêmes du droit

[1] Je fais remarquer ici incidemment, que cet auteur aussi se sert du mot "ciudadanía", pour indiquer le lien juridique de la "nacionalidad" (voir *infra*, 35 et suiv.).

international, ne s'explique que par une regrettable confusion entre deux hypothèses bien différentes, à savoir: celle de la préexistence d'une disposition constitutionnelle qui interdit au Gouvernement de conclure ou de ratifier à l'avenir des traités d'une portée déterminée, ou au Parlement de les approuver, et celle de la promulgation d'une disposition constitutionnelle qui se met en contradiction avec un traité ou une norme de droit international coutumier préexistants. Si, dans le premier cas, il est extrêmement douteux qu'un pareil traité, conclu en dépit de la disposition prohibitive de la Constitution, puisse être considéré comme juridiquement valable, attendu que les organes constitutionnels auraient dépassé les limites que la Constitution trace à leur pouvoir de représenter l'Etat dans l'acte de contracter l'engagement international en question, la situation est essentiellement différente, dans le dernier cas. Car dans l'hypothèse de la préexistence de traités ou de règles de droit coutumier, ce fait même empêcherait absolument l'Etat de promulguer valablement des dispositions constitutionnelles, contraires auxdits traités ou règles: l'existence de ces derniers comporte par elle-même une restriction correspondante de la souveraineté de l'Etat. En outre, il ne faut jamais perdre de vue que cette question d'importance fondamentale ne se pose pas de la même façon pour un tribunal international et pour une juridiction nationale. En effet, la dernière, émanation de la souveraineté de l'Etat, peut se trouver obligée par son droit national de faire application de la Constitution, sans en examiner la conformité au droit international et quand bien même elle devrait en reconnaître la non-conformité audit droit. Ce point de vue est, toutefois, parfaitement étranger aux tribunaux internationaux.

33. — Par conséquent, si le père du réclamant n'a pas acquis la nationalité mexicaine, en vertu de la loi de 1854, il ne l'a pas acquise davantage en vertu de la Constitution de 1857, et le réclamant lui-même, comme étant le fils d'un étranger dans le sens du droit public mexicain, est né étranger et l'est resté au moins jusqu'à 1886, quand la loi actuelle "sobre extranjería y naturalización" entra en vigueur.

Reste à examiner le point de savoir quelles dispositions de cette loi et quelles dispositions de la Constitution de 1857 ont pu faire acquérir au réclamant, après 1886, la nationalité mexicaine que le système constitutionnel et légal de 1854 et 1857 ne lui avait pas imposée avant 1886.

L'agence mexicaine a invoqué à cet effet la disposition de l'article 2, *sub* II, et l'article 1er des "disposiciones transitorias" de la loi de 1886, la première se rapportant au réclamant lui-même, le dernier ayant toujours trait, à ce qu'il paraît, à M. Pinson père. Mais elle a négligé d'invoquer, quoique dans son système de défense elle eût dû le faire, la disposition de l'article 1er, *sub* XI, de la loi, envisagé à la lueur de l'article 30, *sub* III, de la Constitution de 1857, en l'appliquant cette fois, non pas à M. Pinson père, mais au réclamant lui-même.

Examinons la valeur des arguments tirés des dispositions citées ci-dessus.

L'ordre logique est d'examiner d'abord l'effet de l'article 1er des dispositions transitoires, puis de l'article 2, *sub* II, et enfin de l'article 1er, *sub* XI.

a) *Article 1er des dispositions transitoires*, dont voici la teneur:

"Los extranjeros que hayan adquirido bienes raíces, tenido hijos en México o ejercido algún empleo público y de quienes hablan las fracciones X, XI, y XII del art. 1. de esta ley, quedan obligados a manifestar dentro de seis meses de su publicación (délai prolongé plus tard, par décret du 30 mai 1887), siempre que no lo ayan hecho anteriormente, a la autoridad política del lugar de su residencia, si desean obtener la nacionalidad mexicana o conservar la extranjera. En el primer caso deberán luego pedir su certificado de naturalización

en la forma establecida en el artículo 19 de esta ley. Si omitiesen hacer la manifestación de que se trata serán considerados como mexicanos, con excepción de los casos en que haya habido declaración oficial sobre este punto."

Le but dans lequel l'agence mexicaine a tenu à invoquer cette disposition transitoire n'est pas parfaitement clair. Car dans son système de défense, l'article 30, *sub* III, de la Constitution de 1857 doit prévaloir sur les articles 1er, *sub* X et XI, et 19 de la loi de 1886, c'est-à-dire: quelles que soient les dispositions légales qui règlent les conditions dont dépendra l'acquisition définitive de la nationalité mexicaine dans les cas de "bienes raíces", et de "hijos mexicanos", elles ne peuvent en aucun cas tenir en échec les effets immédiats et automatiques de l'article 30, *sub* III, de la Constitution. Dans cet ordre d'idées, l'appel fait à la disposition transitoire ne peut guère avoir d'autre sens que celui d'un argument par surcroît, ou tout à fait subsidiaire, pour le cas où la Commission admettrait comme juridiquement valables les dispositions légales, malgré leur prétendue contradiction avec la Constitution de 1857.

Comme je l'exposerai encore ci-dessous, je crois, en effet, que la validité des dispositions en question de la loi de 1886 ne saurait être niée et, dans cette hypothèse, la portée exacte de l'article transitoire a une importance plus grande que dans le système de l'agence mexicaine. Si j'estime, tout de même, pouvoir me passer d'un examen de ce point de détail, ce n'est pas seulement pour ne pas rendre cette sentence trop longue, mais surtout pour les deux raisons suivantes qui, à mon avis, sont pleinement suffisantes à écarter ici l'opération dudit article transitoire. D'abord, M. Pinson père n'avait plus à manifester aucune résolution relative à la nationalité qu'il désirait suivre, puisqu'il avait déjà antérieurement manifesté son désir. Et puis, quand même cette manifestation antérieure n'aurait pas été suffisante, l'article transitoire ne saurait être considéré comme lui étant applicable, pour la raison qu'à l'admonestation de l'article transitoire n'aurait pu répondre qu'une voix d'outre-tombe, M. Pinson père étant décédé en 1884.

b) *Article 2, sub II, de la loi*, dont voici la teneur:

"Son extranjeros: ... II. Los hijos de padre extranjero ... nacidos en el territorio nacional, hasta llegar a la edad que conforme a la ley de la nacionalidad del padre... fueren mayores. Transcurrido el año siguiente a esa edad sin que ellos manifiesten ante la autoridad política del lugar de su residencia que siguen la nacionalidad de sus padres, serán considerados como mexicanos."

Il n'est pas sans importance de faire remarquer tout d'abord, qu'il est un peu curieux de voir cette disposition invoquée par l'agence mexicaine, qui, à d'autres égards, est si soucieuse de descendre dans l'arène en champion de la Constitution de 1857. Car il n'est pas nécessaire d'approfondir les questions multiples que fait naître le droit public mexicain en matière de nationalité, pour se rendre compte que, dans l'ordre d'idées strict et rigoureux de l'agence mexicaine, la disposition de l'article 2, *sub* II, de la loi de 1886 doit être qualifiée comme directement contraire à ladite Constitution. En effet, cette dernière, après avoir énuméré, à l'article 30, qui sont Mexicains, ajoute à l'article 33, que tous les autres sont étrangers. Or l'article 30 ne fait aucune mention de ceux qui, nés au Mexique comme enfants d'étrangers, arrivent à la majorité et négligent de faire la déclaration de vouloir rester étrangers; par conséquent, la Constitution les considère comme étrangers.

Je ne fais cette observation que dans le but de démontrer incidemment combien l'argumentation de l'agence mexicaine est inconstante: selon les besoins de la démonstration, elle interprète dans un sens extensif ou restrictif, ou traite comme constitutionnels ou inconstitutionnels les articles qu'elle trouve sur sa route. Je n'ai pas, d'ailleurs, l'intention de la suivre dans cette voie,

parce que, à mon avis, la Constitution d'un pays doit être envisagée d'un point de vue plus élevé que celui d'un examen minutieux et quelque peu étroit de ses expressions littérales.

Une Constitution est, avant tout, une loi fondamentale qui trace les grandes lignes de l'organisation et du fonctionnement étatiques. En plusieurs matières, les principes qu'elle formule ne sont qu'une ébauche globale du droit public de l'Etat. Il ne faut donc pas trop s'attacher à la lettre d'une pareille loi fondamentale, ni lui appliquer la même mesure stricte d'interprétation que l'on applique à des dispositions légales d'un caractère plus concret. En outre, une Constitution est l'expression de certaines idées et conceptions fondamentales qui, à un moment donné, dominent les esprits mais qui, comme toutes les idées de l'humanité, évoluent et se transforment sans cesse. Destinée à former la base du droit public de l'Etat et présentant en même temps un plus haut degré de stabilité que la législation ordinaire qui peut être modifiée plus aisément, la Constitution, pour ne pas perdre le contact nécessaire avec la vie étatique d'où elle prend sa source, doit nécessairement plus ou moins s'adapter dans son interprétation aux transformations des idées dont elle constituait à un moment donné l'expression adéquate. C'est pourquoi le droit constitutionnel de plusieurs Etats présente ce phénomène curieux que, sans qu'aucune lettre de la loi fondamentale soit modifiée, néanmoins son interprétation subit de temps en temps des changements notables, sinon de véritables révolutions. C'est que le droit est une force vivante et que notamment le droit constitutionnel ne peut jamais être tenu captif dans les chaînes de certaines expressions littérales.

Dans cet ordre d'idées, on comprend parfaitement pourquoi je n'attache pas beaucoup d'importance au reproche d'inconstitutionnalité que l'agence mexicaine a lancé contre certaines dispositions légales, qu'il lui fallait absolument écarter, pour pouvoir édifier son système de défense, ni à l'inconstitutionnalité d'autres dispositions légales qu'elle aurait pu invoquer également mais que, par un manque d'esprit de suite très explicable, elle a passées sous silence. A mon avis, aucune des dispositions de la loi de 1886 ne saurait, à bon droit, être accusée d'inconstitutionnalité, ni l'article 1er *sub* X et XI, ni l'article 2, *sub* II, cités plus haut, ni l'article 2, *sub* V et VI, dont j'aurai encore à examiner l'effet dans la suite. Aucune de ces dispositions légales ne se met en contradiction manifeste avec la Constitution et dans ces conditions elles doivent être acceptées comme en constituant l'interprétation autorisée et en quelque sorte authentique, même dans le cas où l'on pourrait démontrer (ce qui me semble impossible) que l'intention primitive du texte ait été autre.

En acceptant donc, avec l'agence mexicaine, la validité de l'article 2, *sub* II, de la loi de 1886, j'admets comme cause légale d'acquisition de la nationalité mexicaine le fait, par un enfant d'étrangers né au Mexique, de laisser passer l'année suivant sa majorité, sans faire la déclaration prescrite par ledit article mais, contrairement à la thèse mexicaine, je suis d'avis que l'article en question n'a pu opérer dans le cas présent, et cela à cause du service militaire du réclamant en 1896. Attendu que cet élément de la situation juridique m'oblige à pénétrer encore dans le domaine de la perte de la nationalité mexicaine, je préfère faire d'abord justice, en quelques mots, de la troisième disposition que l'agence mexicaine eût pu invoquer pour fonder la nationalité mexicaine du réclamant, à savoir:

c) *Article I, sub XI, de la loi, envisagé à la lumière de l'article 30, sub III, de la Constitution de 1857*

Dans le système de défense de l'agence mexicaine, ce n'est pas seulement M. Pinson père, mais encore M. Pinson fils, le réclamant, qui a acquis la natio-

nalité mexicaine par le seul fait d'avoir un "hijo mexicano". Car, lui-même aussi tombait sous le coup de l'article 30, *sub* III, quand en 1904 son fils naquit au Mexique. Entre la situation de 1872 et celle de 1904, il n'existe que cette différence: que la première se présenta sous l'empire de la loi de 1854, sous réserve des modifications ou additions y apportées éventuellement par la Constitution de 1857 tandis que la dernière se produisit sous l'empire de ladite Constitution, élaborée et amplifiée par la loi de 1886.

Cependant, pour l'appréciation de la situation juridique de l'espèce, cette différence n'a guère d'intérêt, puisque la loi de 1886 doit être reconnue comme ayant donné à la disposition constitutionnelle l'interprétation raisonnable qui lui convient et que j'ai appliquée ci-dessus au cas de 1872. L'argument d'inconstitutionnalité ne saurait donc être retenu et, par conséquent, la naissance du fils du réclamant n'a pu opérer à son préjudice l'acquisition de la nationalité mexicaine.

5. *Effets des services militaires en France*

34. — Je reviens maintenant à la situation légale créée par le fait qu'en 1896, lorsque le réclamant arriva à la majorité et que, par conséquent, la disposition de l'article 2, *sub* II, de la loi de 1886 allait s'appliquer, il se trouvait au service militaire d'un pays autre que le Mexique, circonstance qui, selon la Constitution de 1857 et la loi de 1886, produit des effets sérieux au préjudice des Mexicains [1].

Si je résume ici la partie ingénieuse du système de défense de l'agence mexicaine qui se rapporte à ce point spécial, elle se présente sous la forme suivante.

Pour échapper aux effets de la disposition dudit article 2, *sub* II, le réclamant avait la stricte obligation de manifester à l'autorité politique (mexicaine) du lieu de sa résidence, dans l'année postérieure à sa majorité, son désir de rester Français.

Le fait que, lorsque cette période allait expirer, il se trouvait en Algérie, ne constituait pas un cas de force majeure parce qu'il aurait pu trouver auparavant en France, et en tous cas aurait dû trouver plus tard quelque part dans les contrées de l'Afrique du Nord une autorité mexicaine quelconque qui satisfît à la définition légale; mais quand même il aurait été question d'un cas de force majeure dans le sens strict du mot, l'effet de l'article n'eût pas cessé. N'ayant pas rempli les conditions légales, le réclamant est donc devenu Mexicain à minuit, le 24-25 janvier 1897 [2], dans sa garnison algérienne.

L'opération de la disposition de l'article 2, *sub* II, de la loi de 1886 ainsi fixée, n'a nullement été neutralisée ou contrebalancée par le fait que le récla-

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[1] A côté des services militaires, il y a le fait, par le réclamant, d'avoir accepté, sans licence préalable du Congrès fédéral mexicain, la décoration française de Chevalier de la Légion d'Honneur, fait qui aurait affecté également sa nationalité mexicaine (article 2, sub VII de la Ley sobre extranjería y naturalización de 1886). Vu toutefois, d'une part, que les observations que je ferai dans le texte au sujet des effets juridiques d'un service militaire à l'étranger s'appliquent également, en substance et *mutatis mutandis*, à l'acceptation de décorations étrangères, et d'autre part, que la décoration du réclamant date d'une époque à laquelle il ne pouvait plus être question de nationalité mexicaine, je n'insiste pas sur ce détail dans la présente sentence.

[2] Minuit, temps mexicain ou temps français? Ce "problème de relativité" juridique, paraît peut-être trop subtil, pour trouver place ici. Tout de même, il pourrait avoir de l'intérêt pratique pour la solution de la question si controversée dans le procès actuel et traitée ci-après, de savoir quels ont été les effets légaux combinés des dispositions de l'article 2, *sub* II et V, de la loi de 1886, dont la première allait conférer peut-être à M. Georges Pinson la nationalité mexicaine au même instant

mant s'est trouvé au service militaire de la France, du 21 octobre 1895 jusqu'au 21 octobre 1898. La Constitution et la loi mexicaines frappent, il est vrai, de certaines conséquences préjudiciables les Mexicains qui servent un gouvernement étranger, mais ces dispositions n'ont pas fait perdre au réclamant la nationalité mexicaine acquise en Algérie. D'abord, un service militaire étranger ne prive jamais aucun Mexicain de sa nationalité; il le prive tout au plus de sa "calidad de ciudadano", conformément à la Constitution de 1857 (article 37); si la loi de 1886 (article 2, *sub* VI) dit autre chose, elle est inconstitutionnelle. Ensuite, quand bien même l'effet d'un service étranger serait de priver le Mexicain de sa nationalité, ce ne serait qu'une suspension qui prendrait fin avec le service; si la Constitution de 1857 et la loi de 1886 toutes deux disent le contraire, cela doit être une erreur. Enfin, en supposant même que la nationalité se perde définitivement par suite d'un service étranger, le service en question n'aurait pas eu cette conséquence, attendu que: *a)* il n'était pas volontaire; *b)* il n'était pas permanent; *c)* il était commencé à une époque où le réclamant était encore mineur, donc incapable, et il ne pouvait plus être rompu le jour où le réclamant arriva à la majorité; *d)* il ne présentait point le caractère diffamant et préjudiciable à la patrie mexicaine que, seul, la législation mexicaine a voulu frapper de la pénalité de la perte, respectivement de la suspension de la qualité de Mexicain, respectivement de citoyen.

En effet, l'agence mexicaine a réussi à accumuler dans l'argumentation reproduite ci-dessus toutes les raisons qu'il est humainement possible d'imaginer pour éliminer le jeu des dispositions constitutionnelles et légales mexicaines relatives au service étranger. Je regrette, toutefois, de devoir constater que même cet effort suprême ne suffit pas à atteindre le but poursuivi.

35. — A la base de l'argumentation se trouve une thèse que l'agence mexicaine a soutenue avec une énergie extraordinaire et qui, à première vue, paraît trouver un fondement solide dans la Constitution de 1857, à savoir: que cette dernière, contrairement à la loi sur la nationalité de 1886, ferait une distinction très nette et fondamentale entre la qualité de "mexicano" et celle de "ciudadano mexicano" et que cette distinction dominerait également la matière de la perte de la nationalité. En effet, au premier abord, une simple comparaison des dispositions constitutionnelles de 1857 et légales de 1886 semble accuser des différences notables entre les premières et les dernières.

Le système de la Constitution de 1857 en matière de nationalité peut se résumer comme suit. Le titre 1er traite successivement, dans ses sections II, III et IV, "de los mexicanos", "de los extranjeros" et "de los ciudadanos mexicanos". Après avoir défini, dans la section II, qui sont Mexicains et quelle est, à grands traits, leur situation juridique, et après avoir consacré une section analogue (III) aux étrangers, il s'occupe, dans sa section IV, des citoyens mexicains, en définissant d'abord (article 34) quelles personnes possèdent cette qualité, en énumérant ensuite les prérogatives (article 35) et *les obligations* (article 36) des citoyens, pour terminer par les articles suivants:

(Art. 37) "La calidad de ciudadano se pierde:

I. Por naturalización en país extranjero.

II. Por servir oficialmente el gobierno de otro país, o admitir de él condecoraciones, títulos o funciones sin previa licencia del Congreso federal...".

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où la dernière allait l'en priver, c'est-à-dire au moment de sa majorité. S'il fallait conclure que les moments où il devint majeur pour l'application de chacune des deux dispositions, ne coïncidaient pas, la solution se trouverait de nouveau compliquée. C'est pourquoi je déclare dès à présent admettre le caractère décisif du temps observé à l'endroit où se trouve la personne dont il s'agit de déterminer l'âge.

(Art. 38) "La ley fijará los casos y la forma en que se pierden o suspenden los derechos de ciudadano y la manera de hacer la rehabilitación".

Le système de la loi "sobre extranjería y naturalización" de 1886 est tout autre. Ses quatre chapitres principaux traitent successivement: "de los mexicanos y de los extranjeros", "de la expatriación", "de la naturalización" et "de los derechos y obligaciones de los extranjeros". Le chapitre 1er ne fait pas de mention expresse des citoyens; il distingue seulement entre les "mexicanos" énumérés à l'article 1er, et les "extranjeros" énumérés à l'article 2. Il ne mentionne pas non plus séparément les causes de perte de la nationalité ou de la "ciudadanía", mais fait simplement rentrer sous les "extranjeros" énumérés à l'article 2, *sub* V: "Los mexicanos que se naturalicen en otros países", et *sub* VI: "Los que sirvieren oficialmente a gobiernos extranjeros en cualquier empleo político, administrativo, judicial, militar o diplomático sin licencia del Congreso".

La comparaison des deux systèmes fait ressortir que, dans le cas de service en pays étranger, la Constitution fait perdre la "calidad de ciudadano", mais que, par contre, la loi fait perdre la "calidad de mexicano", attendu qu'elle déclare étranger tout Mexicain qui sert un gouvernement étranger, entre autres dans une fonction militaire. Par conséquent, tandis que, aux termes de la loi de 1886, pareil Mexicain rompt tous les liens qui l'unissaient à sa patrie et ne retient aucun droit ni aucune obligation vis-à-vis de son ancien pays, ni en qualité de citoyen mexicain, ni en celle de simple Mexicain, la Constitution semble lui réserver cette dernière qualité.

Cette différence entre la Constitution de 1857 et la loi de 1886, qui, si elle devait être reconnue comme réelle, rendrait inconstitutionnelle et, par conséquent, nulle la disposition légale correspondante, existe-t-elle en réalité?

36. — A l'appui de sa thèse que l'article 37 de la Constitution de 1857 ne vise, en effet, que la perte de la qualité de citoyen mexicain, l'agence mexicaine a invoqué notamment les trois arguments suivants: *a)* la lettre de la disposition et son insertion dans la section sur les "ciudadanos mexicanos"; *b)* la doctrine du droit public latino-américain, représentée par l'auteur chilien Aug. Carmana de la Fuente; *c)* l'intention évidente du Congrès constituant de 1856-1857 de changer, en cette matière, le système en vigueur jusque-là.

Si je commence par faire quelques observations sur ces trois arguments, il me faut reconnaître, à propos de l'argument *sub* a), que les termes de l'article et la place où il se trouve militent sans aucun doute en faveur de la thèse mexicaine; il semble, en effet, que la Constitution ait voulu conserver au Mexicain naturalisé dans un autre pays et au Mexicain qui sert officiellement un gouvernement étranger, leur nationalité mexicaine, tout en leur ôtant leur qualité de citoyen.

Par contre, l'argument *sub* b) a une valeur très douteuse. Invoquer des citations d'un caractère général à l'appui d'une thèse juridique concrète peut, certes, être justifié, quand même l'on cite un auteur étranger, dans l'espèce un auteur chilien, en faveur d'une thèse, de caractère particulier, de droit public mexicain. Mais pour avoir force probante, il faut alors, entre autres et sans parler des différences possibles entre les différents systèmes légaux, que les citations aient trait à la question spéciale en discussion. Or, abstraction faite de la valeur intrinsèque desdites citations, où se trouvent des observations qui me semblent manquer du discernement juridique nécessaire, je ne crois pas qu'elles visent l'hypothèse qui nous occupe. Il va sans dire qu'il existe une distinction très nette entre le ressortissant d'un Etat qui est en pleine jouissance de ses droits politiques, et celui qui, pour quelque raison que ce soit (minorité politique, indignité, condition d'assisté, etc.) n'en jouit pas, et l'on

pourrait lui consacrer d'intéressantes considérations. Mais cette distinction, qui se retrouve, dans une forme quelconque, dans le droit public de tous les Etats et qui n'a rien de spécifiquement mexicain ou latino-américain, se rapporte au droit public interne et n'a, en règle générale, rien à faire avec la question tout autre de savoir par quels faits la nationalité (dans le sens de: qualité de sujet ou de ressortissant d'un Etat, Staatsangehörigkeit, sudditanza, onderdaanschap et d'autres équivalents en d'autres langues) s'acquiert et se perd; ces deux questions se trouvent sur des plans tout à fait différents. A la lueur des relations internationales, la distinction entre les sujets qui se trouvent en pleine jouissance de leurs droits politiques et ceux qui ne s'y trouvent pas disparaît comme négligeable et les deux catégories se confondent en une seule vis-à-vis de l'étranger. C'est pourquoi en beaucoup de langues les individus qui, dans leur ensemble, constituent la nation sont indiqués indifféremment par: sujets, ressortissants ou citoyens; subjects ou citizens; Staatsangehörige ou Staatsbürger; sudditi ou cittadini; súbditos ou ciudadanos; onderdanen ou burgers, etc. Et qu'il n'en soit pas autrement des Latino-Américains, cela résulte précisément du fait qu'un autre savant chilien, dont l'agence mexicaine ne mettra, certes, pas en doute l'autorité, à savoir M. Cruchaga, lorsqu'il reproduit certaine argumentation de l'agence mexicaine, se sert indifféremment des deux termes "nacionalidad" et "ciudadanía" dans sa sentence No 1 relative à la réclamation du sujet allemand Karl Klemp (cpr. p. 9, lignes 5 et 1 d'en bas). Tout en reconnaissant la distinction entre les deux groupes d'individus pour le droit public interne, je ne lui attribue donc pas d'importance pour le domaine du droit international.

37. — L'argument *sub* c) enfin m'a causé le plus de difficultés. L'agence mexicaine ayant émis avec une hardiesse particulière, mais sans aucun argument, la thèse que l'autorité constitutionnelle de 1856-1857 a eu la ferme intention de rompre, en matière de nationalité, avec le système en vigueur jusque-là j'ai éprouvé la nécessité impérieuse de combler par un examen personnel les lacunes d'argumentation que présentait la thèse de l'agence mexicaine. Bien que cet examen ait été sérieusement contrarié par le fait que ni la Bibliothèque Nationale, ni les Archives générales de la Nation, ni la bibliothèque de la Chambre des Députés, ni le journal officiel de la Fédération ne semblent, ou ne semblent plus, contenir les procès-verbaux des séances de la commission préparatoire de la Constitution de 1857, qui auraient pu peut-être jeter une lumière plus claire sur les intentions de l'autorité constitutionnelle, et que mon honorable collègue mexicain n'a pas non plus été en mesure de me fournir cette documentation manquante, j'en suis tout de même arrivé à la conclusion que non seulement la prétendue intention de changer de système ne peut être prouvée, mais encore que tout porte à croire que pareille intention n'a nullement existé. Cette conviction s'appuie sur les considérations suivantes.

Le seul document que j'aie trouvé publié par la commission préparatoire de la Constitution de 1857, à savoir son rapport définitif au Congrès, accompagnant et commentant son projet de Constitution (cpr, *Zarco*, *Historia del Congreso Extraordinario Constituyente de 1856 y 1857*, t. I, p. ... et ss.; *Montiel y Duarte*, *Derecho público mexicano*, t. IV, p. 45 et ss.), fait peu de cas des dispositions sur la nationalité et la "ciudadanía", mais les quelques mots qu'il leur consacre prouvent suffisamment qu'il n'est jamais entré dans l'esprit de la Commission et de la Constitution d'apporter des changements de principe. En effet, ce qu'elle dit à ce sujet (*Zarco*, *loco cit.*; *Montiel y Duarte*, *loco cit.*, p. 57) revient au passage suivant: "En los artículos que tienen por objeto fijar la condición de los mexicanos y de los ciudadanos de la República, sus derechos, prerogativas y obligaciones, no se encontrará más que la repetición

de los principios comunes del derecho público y las prevenciones que nuestros códigos y leyes han admitido..." Cette seule citation paraît déjà contenir un démenti formel de la thèse de l'agence mexicaine.

Mais il y a plus. Les discussions dans le Congrès Constituant lui-même semblent établir que l'on n'a pas attaché beaucoup d'importance à la lettre de l'article 37 (alors 43) projeté, évidemment pour le motif que, quelle qu'en fût la rédaction précise, l'on était d'accord sur sa portée. Pour ne pas me fier trop exclusivement à la relation des événements telle que l'a donnée un des témoins les plus compétents, M. Zarco (*loc. cit.*, t. II, p. 286 et 287), j'ai pris soin de consulter davantage les procès-verbaux du Congrès que j'ai rencontrés dans leur forme originale, écrite, dans un volume intitulé: *Actas de las sesiones públicas del Soberano Congreso Constituyente, instalado el dia 18 de Febrero de 1856* et conservé dans la bibliothèque de la Cámara de Diputados, volume qui, à mon regret, paraissait contenir seulement les procès-verbaux jusqu'à la séance du 11 décembre 1856 et qui, par conséquent, laisse dans l'ombre les événements postérieurs. Il n'est pas davantage possible de reconstruire d'après les ouvrages de Zarco et de Montiel y Duarte et lesdits procès-verbaux le cours exact des faits, parce qu'ils présentent entre eux des différences dont il n'est plus possible de rechercher l'origine. Mais si je les considère dans leur ensemble, en ayant présent à l'esprit le rôle important que M. Zarco a joué dans la genèse de la Constitution, je m'imagine que les événements se sont déroulés comme suit.

Pendant les discussions sur l'article 43 projeté (l'article 37 actuel), on y a apporté quelques modifications, tendant notamment à supprimer comme cause de perte de la qualité de ressortissant ou de citoyen mexicain le fait, par un Mexicain ou un citoyen mexicain, d'établir en pays étranger une résidence permanente et volontaire avec ses biens et sa famille, et au cours de ces débats le début de l'article a été modifié, presque sans que l'on s'en aperçût, dans le sens indiqué dans les ouvrages de Zarco et de Montiel y Duarte, c'est-à-dire: "La calidad de mexicano (au lieu de: "ciudadano") se pierde..." Cette substitution du mot "mexicano" au mot "ciudadano" du texte primitif n'avait vraisemblablement, dans l'idée de ses auteurs, aucune importance, parce que, conformément à tous les textes antérieurs (voir *infra*), il allait de soi qu'en cas de naturalisation en pays étranger ou de service étranger, militaire et autre, les deux qualités se perdaient à la fois; toutefois, la substitution attira l'attention de M. Castañeda, qui recommanda à la commission de faire une classification plus claire, distinguant entre la qualité de Mexicain et celle de citoyen mexicain. Il n'appert pas des documents disponibles quelle suite a été donnée à cette suggestion et quel a été exactement le cours ultérieur des affaires. Les seuls faits qu'on puisse y puiser sont que, à la fin de la session permanente qui a duré du 28 jusqu'au 31 janvier 1857, les membres du Congrès étaient si impatients d'arrêter le texte définitif de la Constitution qu'ils ont entendu, sans dire mot, "les légères corrections" que M. Guzmán, "como único individuo de la comisión de estilo", avait apportées en quelques articles, et qu'ils se sont même refusés à attendre l'impression de la minute de la Constitution, avant d'en arrêter le texte final (cpr. *Zarco, loco cit.*, II, p. 888 et 889; *Montiel y Duarte, loco cit.*, IV, p. 921). Il m'a paru impossible de vérifier si les modifications ultimes se sont aussi rapportées à l'article 37.

Mais en tous cas, les événements me font croire que le Congrès Constituant, aussi bien que la commission préparatoire de la Constitution, ont considéré tacitement que celui qui se fait naturaliser en pays étranger, ou qui sert officiellement un gouvernement étranger cesse par cela d'être sujet mexicain. La seule chose qui reste douteuse est le point de savoir pour quelle raison précise le Congrès ou "le seul individu de la commission de rédaction" a finalement cru devoir ou pouvoir maintenir ou rétablir le texte primitif du projet qui

stipulait la perte de la qualité de "ciudadano"? Est-ce pour la raison indiquée par *Eduardo Ruiz*, dans son ouvrage *Curso de derecho constitutional y administrativo* (1888), t. I, p. 342, que la perte de la "ciudadanía" n'est que la conséquence nécessaire du fait qu'en se faisant naturaliser à l'étranger, ou en servant officiellement un gouvernement étranger, on renie nécessairement sa nationalité ancienne, et que, par suite, la perte de la qualité de citoyen présuppose la perte de la nationalité? Ou bien est-ce pour la raison que si, dans le droit public interne, les qualités de Mexicain et de citoyen mexicain se distinguent nettement et ont un sens différent, cette distinction perd toute son importance dès qu'il s'agit de la situation internationale d'un individu, et que, par conséquent, on s'est rendu compte, on a eu l'intuition en 1856, que, dans un article qui se rapporte au côté international de la question (la perte de la qualité de ressortissant mexicain), le terme par lequel on indiquait cette qualité n'avait guère d'intérêt? Ou bien est-ce parce que, si l'on avait maintenu à l'article 37 la modification du début: "La calidad de mexicano se pierde...", l'enchaînement des sections II, III et IV du chapitre Ier eût été troublé et que, pour éviter cela, il eût été nécessaire de placer l'article 37 à la section II, en changeant en même temps le numérotage des articles? Dans cette dernière supposition, il serait parfaitement vraisemblable de supposer que l'on préféra aux inconvénients d'un déplacement ou d'un placement mauvais de l'article, maintenir la rédaction primitive, du reste parfaitement défendable, parce que le terme "ciudadanía" a un sens plus large dès qu'il n'est plus question de la situation d'un individu à l'intérieur de l'Etat, mais vis-à-vis de l'étranger. Ou est-ce enfin qu'on a estimé pouvoir maintenir la rédaction primitive, par le motif qu'elle exprime en tous cas *id quod plerumque fit*, étant donné que tant la naturalisation formelle en pays étranger, que le service officiel d'autres gouvernements ou l'acceptation de décorations, de titres ou de fonctions étrangers sont des éventualités qui, en règle générale, ne peuvent regarder que des majeurs ayant d'honnêtes moyens d'existence, c'est-à-dire des individus qui sont "ciudadanos" en vertu de l'article 34 de la Constitution, de sorte que le cas dans lequel un Mexicain non-citoyen pourrait perdre sa nationalité à la suite des faits énumérés à l'article 37, est presque inconcevable?

Je regrette de n'avoir pas réussi, malgré mes efforts et à défaut d'une documentation suffisante, à éclaircir d'une façon satisfaisante ce point important. Quoi qu'il en soit, l'examen approfondi auquel je me suis livré, m'a amené à la conviction absolue que la thèse de l'agence mexicaine relative à un changement de système bien délibéré qui aurait été apporté en 1856 aux dispositions concernant la nationalité, repose sur une erreur.

La conclusion à laquelle j'en suis arrivé est confirmée par deux "démonstrations par l'absurde".

D'abord, s'il était vrai que le Congrès de 1856 ait voulu changer de système, il s'ensuivrait, comme j'ai déjà eu l'occasion de le faire observer ci-dessus (§ 26), que la législation mexicaine, en matière de nationalité, a été essentiellement peu constante et contradictoire, attendu que la loi de 1886 est venue rétablir le système de 1854, prétendûment abandonné en 1857, et que la Constitution de 1917 a de nouveau rétabli le système de 1857. La dignité du Mexique interdit d'admettre une interprétation qui rend pareille conclusion inévitable.

En outre, si véritablement la Constitution de 1857 privait uniquement de sa qualité de "ciudadano mexicano" le Mexicain qui avait été naturalisé dans un pays étranger, ou qui lui rendait officiellement service dans une fonction quelconque, quelles conclusions faudrait-il en tirer, quant à la situation juridique d'un tel individu, notamment de celui qui avait délibérément sollicité une nationalité étrangère? Il s'ensuivrait, dans l'idée de l'agence mexicaine,

qu'un tel individu, quoique délivré de toutes les obligations constitutionnelles et légales des citoyens envers le Mexique, pourrait toujours prétendre à la protection diplomatique de son pays qu'il a renié de propos délibéré, qu'il pourrait acquérir des biens immeubles dans les zones-frontière et côtières, fermées dans des buts de sûreté nationale aux étrangers, et qu'il pourrait éventuellement se prévaloir de la situation privilégiée que l'article 27, *sub* I, de la Constitution de 1917 réserve aux Mexicains. Conclusion bien curieuse et illogique! Car il va sans dire que ce n'est certes pas pour leur garantir ces prérogatives que la Constitution mexicaine aurait réservé aux Mexicains naturalisés en pays étranger le *status* légal de Mexicain, et qu'en outre, en voulant étendre sa protection diplomatique à de pareils "Mexicains", le gouvernement du Mexique se mettrait tout de suite en contradiction manifeste avec l'attitude de son agence devant la Commission franco-mexicaine, consistant précisément à dénier à la France le droit de protection diplomatique de ses sujets qui auraient en même temps la nationalité mexicaine.

Pour fonder le mieux possible mes conclusions juridiques, j'ai étudié toutes les Constitutions et tous les projets de Constitutions et de réformes antérieurs à la Constitution de 1857 et tous ces documents, sans exception aucune, m'ont confirmé dans la conviction que je viens de motiver. La première des "Leyes constitucionales" du 29 décembre 1836 (*Montiel y Duarte*, t. II, p. 34 et ss.), art. 5; le projet de réforme du 30 juin 1840 (*ib.*, p. 106 et ss.), art. 12; le premier "proyecto constitucional" du 25 août 1842 (*ib.*, p. 214 et ss.), art. 17; le projet de Constitution du 26 août 1842 (*ib.*, p. 250 et ss.), art. 2; le second projet du 2 novembre 1842 (*ib.*, p. 273 et ss.), art. 5; le troisième projet du 20 mars 1843 (*ib.*, p. 322 et ss.), art. 28, et les "Bases orgánicas de la República Mexicana" du 12 juin 1843 (*ib.*, p. 429 et ss.), art. 16, sont tous d'accord pour attacher à la naturalisation ou au service étrangers la conséquence juridique de la perte de la qualité de ressortissant mexicain. Je tiens à citer ici notamment le texte de deux articles du premier "proyecto constitucional" du 25 août 1842, qui définissent la situation juridique d'une façon très claire, en disant, le premier (article 17): "Se pierde la calidad de mexicano: I. por naturalizarse en país extranjero; II. por servir bajo las banderas de una potencia que esté en guerra con la República", et le second (art. 25): "Los derechos de ciudadanos se pierden: I. perdiéndose la calidad de mexicano..."

Même l'"Estatuto orgánico provisional de la República Mexicana", promulgué le 15 mai 1856 par le Président intérimaire Ignacio Comonfort, en vertu des pouvoirs que lui concédait le plan de Ayutla, réformé à Acapulco, le seul document qui ait pris soin de prendre certaines mesures de caractère défensif contre les Mexicains qui se faisaient naturaliser en pays étranger sans le consentement préalable du gouvernement, ne les considérait comme restant Mexicains qu'en ce qui concerne leurs obligations, et maintenait le système antérieur (perte de la "calidad de mexicano") dans les autres cas de naturalisation et notamment aussi dans le cas qui nous occupe: "por servir bajo la bandera de otra nación sin licencia del Gobierno". Dans ces conditions, il faut des indices plus forts que les seuls mots de l'article 37, contredits par l'exposé des motifs de la commission préparatoire et de valeur très douteuse à la lueur des discussions de 1856, pour pouvoir admettre un brusque changement fondamental du système.

Même le critique le plus sévère de la loi "sobre extranjería y naturalización" Francisco J. Zavala (*Apéndice: examén y exposición de la ley de extranjería de 28 de Mayo de 1886*, de son ouvrage *Elementos de derecho internacional privado*, de 1889) qui en réprouve comme inconstitutionnels les Nos X et XI de l'article 1er, et comme illogique le système adopté à l'article 2, à côté de l'article 1er, en accepte sans aucune critique pour cause d'inconstitutionnalité et comme allant de soi,

les numéros V et VI de l'article 2, relatifs à la perte de la nationalité mexicaine en cas de naturalisation en pays étranger et de service étranger, en rattachant à bon droit le No V au principe libéral de l'article 6, consacrant "el derecho que tiene todo hombre a cambiar de patria", au lieu d'être considéré encore un peu comme *glæbae adscriptus* dans l'esprit de conceptions plusieurs fois séculaires. Et il n'en est pas autrement de *M. José C. Gertz*, auteur d'une monographie récente (1917) sur *La nacionalidad y los derechos de los extranjeros en México*, qui, à la page 144 de son étude, déclare ce qui suit: "Las fracciones V, VI y VII (del artículo 2.) repiten casi a la letra las disposiciones contenidas en las fracciones I y II del artículo 37 de la Constitución, y por su sencillez no ameritan comentario."

Ajoutons, pour conclure, les trois faits suivants.

En exposant les motifs de l'alinéa V (alors VII) de l'article 2 de la loi de 1886, M. Vallarta s'est borné à dire ce qui suit: "Poco hay que decir respecto de los mexicanos que se naturalizan en otros países, y en apoyo de la frac. VII del art. 2. del proyecto que los declara extranjeros. "El efecto de la naturalización, dice un publicista *(Cockburn, Nationality or the law relating to subjects and aliens,* p. 208), es según la ley de las Naciones, borrar y poner fin a la nacionalidad de origen, y esto aunque el expatriado haya violado la ley de su propio país y pueda quedar sujeto a castigo cuando vuelva a él." Si además de esto se considera que lo que esta parte del artículo dispone, no es más que el precepto de la fracción I del art. 37 de la Constitución, se comprende que nada más es preciso añadir para dejar fundada esa disposición." *(Vallarta, loco cit.*, p. 69.) S'il était vrai que ces explications étaient en manifeste contradiction avec le "système" de la Constitution de 1857, une tempête parlementaire aurait dû s'élever contre ces passages. Mais bien au contraire, personne ne les a attaqués et la disposition correspondante de la loi a été adoptée à l'unanimité! Par conséquent, quand bien même il serait possible de prouver l'intention contraire du Congrès de 1857, l'on se trouverait ici dans le cas, auquel j'ai fait allusion ci-dessus, § 33, *sub* b), et nullement rare dans l'histoire du droit public, que, sans aucune modification du texte constitutionnel l'évolution des idées nationales aurait abouti à lui donner tacitement un sens, tout autre que celui dont il était revêtu primitivement.

Ensuite, la législation mexicaine elle-même démontre que les termes "Mexicanos" et "ciudadanos mexicanos" — bien distincts dans le domaine du droit public interne — se confondent constamment, dès qu'il s'agit de leur application aux rapports internationaux. En étudiant toutes sortes de lois et de décrets mexicains, j'en ai trouvé de nombreux exemples, dont je me borne à en citer un, tiré du "Reglamento del Cuerpo Consular Mexicano" du 16 septembre 1871, relatif, entre autres, à l'immatriculation consulaire des Mexicains à l'étranger (articles 51-57), et dans lequel on trouve les dispositions suivantes:

"(Art. 51) Matricularán en un libro .... las personas que se les presenten como *mexicanos*...."

"(Art. 54) Si el agente consular tuviere razón suficiente para creer que el solicitante no es *ciudadano mexicano*...."

Et enfin, mon attention a été frappée par le fait que dans la traduction espagnole de la Convention générale mexicano-américaine des réclamations, préparée par mon honorable collègue mexicain, d'accord avec son co-délégué *(La cuestión internacional mexicano-americana*, etc. p. 239), le droit de réclamer contre les Etats-Unis est réservé aux "*ciudadanos* mexicanos". Est-ce à dire que le Mexique a consciemment voulu renoncer aux réclamations que tous les ressortissants mexicains autres que les *citoyens* mexicains pourraient faire valoir contre les Etats-Unis, ou est-ce plutôt que l'identité des termes "nacionalidad" et "ciudadanía" dans le domaine des relations internationales est

tellement courante qu'elle a dupé même la délégation mexicaine, et que .... quelquefois même Homère sommeille? La même terminologie (ciudadanos de la República Mexicana) se trouve déjà dans la convention des réclamations américano-mexicaine du 4 juillet 1868 et dans le Règlement de procédure du 10 août 1869.

38. — Pour tous les motifs allégués ci-dessus, je dois rejeter la thèse mexicaine qu'il existe une contradiction entre la loi de 1886 et la Constitution de 1857, en ce qui concerne l'étendue des effets juridiques qu'entraîne la naturalisation ou le service officiel en pays étranger; l'une et l'autre font perdre à l'individu intéressé, non seulement la "ciudadanía" dans le sens strict du droit public interne, mais encore dans le sens plus ample du droit international.

Et tous les deux la lui font perdre définitivement. L'agence mexicaine, non contente de se cramponner à la lettre de l'article 37 de la Constitution pour en déduire la conclusion que je viens de repousser, se retranche, au contraire, derrière le prétendu esprit de l'article, absolument contraire à la lettre, pour argumenter que, quand bien même l'article ferait perdre à l'intéressé la nationalité mexicaine, cette perte n'aurait qu'un caractère temporaire, ne serait, en réalité, qu'une suspension tant que le service étranger dure. Ici encore, la thèse est insoutenable. A cet égard, l'agence mexicaine ne peut même pas invoquer l'inconstitutionnalité de la loi de 1886; bien au contraire, en ce point la Constitution et la loi concordent admirablement, de sorte que force est à l'agence mexicaine de chercher à détruire en même temps les deux dispositions. Mais ceci encore est impossible. Si l'agence mexicaine examine les précédents du droit constitutionnel mexicain que j'ai invoqués plus haut, § 37, elle verra que tous les documents antérieurs ont toujours considéré le service étranger comme cause de perte et non pas de suspension de la nationalité mexicaine, et il n'en est pas autrement des législations étrangères, notamment la française, que l'agence mexicaine a constamment invoquée comme moyen auxiliaire d'interprétation de la loi mexicaine. Et le seul auteur national qui fasse des observations dans le sens de la thèse mexicaine, à savoir *Ricardo Rodríguez*, dans son ouvrage *Código de extranjería*, fait précisément une exception pour le cas de service militaire, qu'il considère comme présentant un caractère trop grave pour pouvoir admettre dans ce cas une simple suspension de la nationalité mexicaine pendant la durée du service *(loco cit.*, p. 162).

39. — Si donc le service officiel étranger fait perdre au Mexicain intéressé la qualité de ressortissant mexicain il ne reste qu'à examiner quelles sortes de service militaire les dispositions constitutionnelle et légale ont voulu frapper. Consultant dans ce but l'exposé des motifs de la loi de 1886, qui n'est pas accusée d'inconstitutionnalité à ce point de vue, l'on constate que son auteur, M. Ignacio L. Vallarta, invoque, d'une part, l'exemple commun de tous les pays civilisés, tels que la France, l'Italie, le Portugal, etc., et, d'autre part, la doctrine des publicistes qui fondent la prohibition de service étranger "en la razón de que nadie puede llenar los deberes que la fidelidad impone tratándose de dos patrias, cuando sus derechos, intereses y leyes pueden ponerse en pugna; supuesto que el servicio público de un país puede llegar a ser hasta la negación de esos deberes en el otro". (*Exposición de motivos del proyecto de Ley sobre extranjería y naturalización que por encargo de la Secretaría de Relaciones Exteriores ha hecho el Señor D. Ignacio L. Vallarta, y Ley relativa*, 1890, p. 69 et 70).

A la lumière de la jurisprudence et de la doctrine françaises, tant de fois invoquées par l'agence mexicaine, faute de jurisprudence nationale, la dénationalisation pour cause de service militaire étranger est encourue dans les cas où se trouvent remplies les quatre conditions suivantes (cpr. entre autres:

Weiss, Traité théorique et pratique de droit international privé, 1892, *t. I, p. 478 et ss.*, *Valéry, Manuel de droit international privé;* § 224 et ss.):

a) Capacité de changer de patrie; *b)* caractère volontaire du service; *c)* incorporation dans une armée régulière; *d)* défaut d'autorisation des autorités du pays.

Il n'est pas douteux que, dans le cas actuel, les conditions *sub* c) et d) se trouvent remplies. Mais l'agence mexicaine prétend qu'il n'en est pas de même des conditions *sub* a) et b) et qu'en outre, il faut, en plus de ce qu'exige assez unanimement la doctrine française, que: *e)* le service soit permanent, et *f)* qu'il présente un caractère diffamant et préjudiciable à la patrie mexicaine.

Ces deux conditions supplémentaires manquent de tout fondement.

Quant à celle formulée *sub* e), je fais remarquer que les raisons pour lesquelles les législations des principaux pays du monde ont frappé de dénationalisation les nationaux qui prennent du service militaire en pays étranger (impossibilité de servir à la fois deux pays; défense de se mettre hors d'état de remplir ses obligations envers sa patrie au moment où elle pourrait en avoir besoin; défense d'accepter des fonctions qui pourraient aboutir à obliger de prendre les armes contre la patrie, etc.), s'appliquent également aux cas de service temporaire et permanent. En outre, la loi ne fait pas même la moindre allusion à cette restriction interprétative, qui priverait la disposition de ses effets dans la grande majorité des cas où elle devrait trouver application. Ensuite, l'agence mexicaine elle-même a soutenu, dans un autre contexte, que la disposition ne vise qu'une suspension temporaire de la nationalité, ce qui en présuppose justement l'applicabilité à des services temporaires, autre considération qui met en lumière les graves fissures logiques que présente le vaste système de défense construit par ladite agence. Et enfin, en alléguant cet argument, elle se met en contradiction évidente avec l'exposé des motifs de M. Vallarta qui, lui aussi, admet comme axiome l'applicabilité de la disposition à des services non permanents en citant comme exemple de situations dans lesquelles "la honra, los intereses o la conveniencia de la República aconsejen que alguno de sus hijos se ponga al servicio de un gobierno extranjero" et dans lesquelles, par conséquent, le Congrès doit être autorisé à accorder dispense de la prohibition légale, le cas célèbre de Lafayette, combattant temporairement dans les rangs militaires des jeunes Etats-Unis d'Amérique.

Cette dernière citation fait en même temps justice de la condition supplémentaire *sub* f), imaginée par l'agence mexicaine. Car, s'il est vrai que le législateur de 1886, conformément à la Constitution de 1857, ait voulu faire exception au principe de la dénationalisation pour des cas exceptionnels comme celui de Lafayette que je viens de rappeler, il n'en est pas moins vrai que c'est précisément pour ces cas de caractère exceptionnel qu'on a inséré la réserve de la "previa licencia del Congreso federal". Cela présuppose donc que même dans ces cas d'enthousiasme pour un idéal étranger la disposition ne cesse pas, en principe, d'être applicable. A plus forte raison, il faut conclure que la disposition domine tous les autres cas, où il n'est pas question de pareilles situations tout à fait exceptionnelles.

Restent les conditions *sub* a) et b).

Pour apprécier pleinement la force des arguments qui sont impliqués dans ces deux conditions, il faut les rapprocher de la situation de fait dans laquelle se trouvait, en 1895-1896, le réclamant, M. Georges Pinson, ainsi que de la disposition de l'article 2, *sub* II, de la loi de 1886, l'épée de Damoclès qui menaçait cette personne aux approches de sa majorité.

Sans y être déjà légalement obligé selon la loi française, le réclamant, mineur encore à cette époque, avait pris du service dans l'armée de sa patrie d'origine en 1895, d'abord à Besançon, ensuite à Alger. Lorsqu'il arriva à la majorité,

il se trouvait encore en France, mais sept mois plus tard il partit pour l'Algérie, où il est resté jusqu'à et après l'expiration de l'année dans laquelle il eût dû trouver sur le territoire français une autorité mexicaine quelconque, qualifiée pour accepter sa manifestation de vouloir rester Français, manifestation, d'ailleurs, qui était impliquée, de toute évidence, dans le fait, par le réclamant, d'aller prendre du service régulier dans l'armée française précisément vers l'âge où il devrait choisir pour ou contre la nationalité mexicaine.

Je ne veux pas insister ici sur la question de fait de savoir s'il aurait pu trouver quelque part en Algérie l'autorité politique mexicaine que, sans de nouvelles exceptions d'incompétence, l'agence mexicaine aurait admise comme l'autorité prévue par l'article 2, *sub* II, de la loi — je ne le crois pas et l'agence mexicaine a négligé de dire qui aurait pu être cette autorité —, ni approfondir les questions juridiques de savoir quelle influence l'absence de toute autorité compétente au lieu de la résidence algérienne de M. Pinson et l'opportunité qu'il avait eue peut-être de la trouver lorsqu'il se trouvait encore en France, auraient pu avoir sur le jeu de la disposition légale.

Je me borne à déclarer qu'à la lumière de la législation française constamment invoquée par l'agence mexicaine comme faisant autorité dans l'interprétation de la loi du Mexique, notamment de l'article 8, 4. du Code civil [1], il me semble au moins douteux que la loi mexicaine, en prescrivant à une certaine catégorie d'adolescents certaine manifestation "ante la autoridad política del lugar de su residencia", n'ait pas eu l'intention, de portée restreinte, de reconnaître la nationalité mexicaine uniquement aux ex-mineurs qui, à l'époque de leur majorité, avaient leur résidence ou domicile au Mexique. Il y a des raisons de le croire, mais je m'abstiens de formuler une opinion définitive sur ce point, par le motif, qui me paraît décisif, que dans le cas présent le jeu de l'article 2, *sub* II, a été tenu en échec par le fait qu'à l'époque fatale le réclamant actuel se trouvait dans un service militaire, autre que celui du Mexique, c'est-à-dire dans une situation incompatible, aux termes dudit article 2, *sub* II, avec la qualité de Mexicain. La situation n'est donc pas telle que le réclamant serait devenu Mexicain en 1897 pendant quelques instants [2], pour perdre tout

[1] Dont voici la teneur: "Est Français tout individu né en France d'un étranger et qui, à l'époque de sa majorité, est domicilié en France, à moins que, dans l'année qui suit sa majorité, telle qu'elle est réglée par la loi française, il n'ait décliné la qualité de Français... etc."

[2] Cette acquisition éventuelle de la nationalité mexicaine pour quelques instants n'aurait, en aucun cas, pu rétroagir jusqu'à la naissance du réclamant. En France, la question de l'effet rétroactif du fait, par un mineur né en France de parents étrangers et y domicilié, d'arriver à la majorité et d'acquérir par cela la nationalité française (art. 8 *sub* 4. du Code civil), est très controversée. Pour la législation mexicaine, au contraire, chaque raison de doute est exclue. En effet, l'article 26 de la loi de 1886, figurant dans le chapitre 3 relatif à la naturalisation (formelle et facilitée), dispose en termes exprès que: "El cambio de nacionalidad no produce efecto retroactivo. La adquisición y rehabilitación de los derechos de mexicano no surten sus efectos sino desde el día siguiente a aquel en que se ha cumplido con todas las condiciones y formalidades establecidas en esta ley para obtener la naturalización." Et l'exposé des motifs de M. Vallarta (p. 135 et 136 de l'édition de 1890) met hors de doute que cette disposition prend son origine précisément dans le désir du législateur mexicain de trancher par la négative cette question de l'effet rétroactif, tellement controversée dans la jurisprudence et la doctrine françaises.

La disposition de l'article 26 met obstacle, non seulement à la rétroactivité de l'acquisition de la nationalité mexicaine jusqu'à la naissance de l'intéressé, mais encore à son effet rétroactif du moment de l'expiration de l'année fatale jusqu'à la date de la majorité. C'est aussi pourquoi, dans le cas de M. Pinson, le service militaire français de l'intéressé a commencé de barrer la route à l'acquisition de la nationalité mexicaine déjà un an avant que cette acquisition pût se réaliser.

de suite la nationalité nouvellement acquise, mais son service militaire l'a empêché absolument de l'acquérir même pendant une partie infinitésimale d'une seconde. En d'autres mots, le service militaire étranger n'a pas fonctionné, dans ce cas particulier, comme cause de perte de la nationalité mexicaine, mais plutôt comme obstacle légal d'incompatibilité, barrant la route au jeu de l'article 2, *sub* II, de la loi mexicaine.

Or, à ce raisonnement, l'agence mexicaine a cru pouvoir opposer les deux arguments cités ci-dessus *sub* a) et b), à savoir que, pour produire ces effets, il aurait fallu que le service militaire eût été pris par un majeur et qu'il eût présenté le caractère volontaire, conditions qui, dans l'espèce, ne seraient pas remplies.

A propos de la première objection, il convient de faire remarquer que, s'il est vrai que M. Georges Pinson est entré dans l'armée française pendant sa minorité, il y est resté, après avoir atteint la majorité. Par conséquent, quand même il faudrait embrasser la doctrine, de valeur douteuse et controversée, que le mineur entrant légalement dans un service étranger, avec l'autorisation de son père ou de celui ou de celle qui le remplace, n'encourt pourtant pas les effets dénationalisants de ce service, par le motif qu'il n'est pas encore capable de vouloir renoncer à sa nationalité, le réclamant se serait trouvé, en tous cas, dans la situation qui est si bien formulée pour le droit français par *Weiss* (*loc. cit.*, p. 480) dans le passage suivant: "Toutefois si, bien qu'entré au service pendant sa minorité, le Français y est encore le jour où il devient majeur aux termes de la loi française, à ce moment même il perd sa nationalité primitive, à moins qu'une autorisation, survenue en temps utile, ne la lui conserve. Le fait de rester soldat étranger après sa majorité équivaut à un engagement et suffit à lui rendre applicable la disposition de l'article 17, 4. (du Code civil français)."

Voir dans le même sens les décisions de la Cour de Douai du 9 juillet 1894 (affaire Werquin; *Journal Clunet*, 1895, p. 112), du Tribunal de Grenoble du 18 mai 1894 (affaire Forain; *Journal Clunet*, 1897, p. 1.038) et de la Cour de cassation (civile) du 15 janvier 1912 (affaire Parenté, présentant une ressemblance très grande avec le présent cas, *Journal Clunet*, 1912, p. 863). Appliquée au cas présent, cette opinion veut dire que même si le service militaire de M. Pinson n'avait pas encore pu opérer comme obstacle légal au jeu de l'article 2, *sub* II, de la loi de 1886, tant qu'il était mineur, cet article commença à opérer comme tel dans l'instant même où allait jouer ledit article 2, *sub* II.

Reste l'objection du prétendu caractère non volontaire du service militaire de M. Pinson. A cet égard il ne faut pas perdre de vue que la condition relative formulée par la doctrine française n'a pas été écrite en vue du cas particulier de double nationalité. Elle se rapporte à des cas où le soldat en question est enrôlé contre sa volonté dans une armée étrangère, situation dans laquelle il serait évidemment injuste de lui faire encourir, en conséquence, la dénationalisation. Mais le caractère volontaire d'un service militaire n'est nullement exclu par le seul fait que ce service est en même temps obligatoire, comme c'est précisément le cas dans les hypothèses de double nationalité. Dans l'espèce, il ne s'agit point, comme le veut faire croire l'agence mexicaine, de l'antithèse: caractère volontaire — caractère obligatoire du service, car ces deux peuvent très bien coïncider, ainsi que le prouve d'une façon convaincante, la conduite de M. Pinson en 1895. Il s'agit plutôt de l'antithèse: service volontaire — incorporation de l'intéressé contre son gré. Dans le cas actuel, il n'était pas question d'un enrôlement de l'intéressé dans une armée étrangère malgré lui; bien au contraire, il s'agissait d'une incorporation volontaire, bien qu'en même temps obligatoire selon la loi française, d'un individu dans une armée qui, certes, était une armée étrangère dans le sens de la loi mexicaine, mais qui,

pour l'intéressé lui-même, était l'armée de sa patrie, à laquelle il était venu se joindre de tout son cœur et déjà avant que sa loi nationale ne le lui commandât. En se faisant enrôler, l'intéressé démontrait, on ne peut plus clairement, que le pays qu'il considérait comme sa véritable patrie, n'était pas le Mexique, mais la France. Vouloir appliquer à pareille situation la condition *sub* b), reviendrait à commettre une erreur.

De tout ce qui précède, il résulte que le service militaire français de M. Pinson en 1896-1897 a mis obstacle au jeu de l'article 2, *sub* II, de la loi mexicaine de 1886 et que, par conséquent, le réclamant n'est pas non plus devenu Mexicain le 24-25 janvier 1897.

40. — Dans ces conditions, je crois avoir écarté en même temps l'argument dont s'est encore servie avec ampleur l'agence mexicaine, à savoir que la perte de la nationalité mexicaine ne serait pas un effet résultant *ipso facto*, automatiquement, du service étranger, mais qu'elle ne se produirait qu'en vertu d'une sentence judiciaire, de sorte que la Commission franco-mexicaine n'aurait pas compétence pour déclarer un Mexicain déchu de sa qualité de sujet mexicain. S'il avait été nécessaire de trancher ce point, j'aurais, de nouveau, dû repousser l'argument, puisqu'il repose, à mon avis, sur une confusion des cas dans lesquels la perte ou la suspension des droits de citoyen (et non pas de la qualité, y compris les obligations, de citoyen) est infligée à un Mexicain comme pénalité, conformément à l'article 38 de la Constitution et à la loi qui en doit régler l'exécution et les détails, et les cas tout à fait différents, dans lesquels la loi sur la nationalité déclare étrangers les Mexicains qui tombent sous le coup de certaines de ses dispositions, ou, en d'autres termes, sur une confusion entre le jugement déclaratif de nationalité ou d'"extranjería", dont fait mention l'article 643 du Código de Procedimientos civiles, et le jugement de condamnation rendu par une cour criminelle.

41. — Cette dernière question aurait également eu de l'intérêt pour le cas où il eût été nécessaire d'examiner si le second service militaire du réclamant en 1914 et dans les années suivantes lui aurait fait perdre la nationalité mexicaine, s'il l'avait acquise à une époque antérieure quelconque. La réponse à cette dernière question, qui a joué un rôle important dans les plaidoiries devant la Commission, se trouve impliquée dans les considérations qui précèdent. La loi de 1886 interprétée à la lueur de l'exposé des motifs de M. Vallarta, ne laisse pas le moindre doute sur ce point. Elle part de l'idée que la prescription de la Constitution n'est pas tellement rigide qu'elle n'admettrait pas de cas exceptionnels; elle reconnaît qu'il peut y avoir des hypothèses dans lesquelles — comme dans le fameux cas du citoyen français Lafayette — l'honneur, les intérêts ou la convenance du pays exigent ou recommandent de permettre à des Mexicains de prendre du service dans une armée étrangère, sans encourir la perte de leur nationalité mexicaine, mais même pour ces cas la loi ne lève son interdiction qu'en vertu d'une licence préalable du Congrès fédéral.

Ce n'est pas ici le lieu d'apprécier les raisons qui, à propos de la grande guerre, paraissent avoir amené les autorités mexicaines à appliquer les dispositions constitutionnelles et légales dans un sens beaucoup plus souple et de n'exiger des Mexicains qui sont allés combattre sous le drapeau des Alliés ni la licence préalable, ni même, à ce qu'il semble, la "ratihibitio" postérieure du Congrès. Car toujours est-il que cette attitude est contraire à la lettre ainsi qu'à l'esprit de la loi, quelles que soient les raisons de haute valeur morale ou politique dont elle puisse s'être inspirée. En tout état de cause, cette pratique ne saurait être suivie par un tribunal international appelé à envisager au seul point de vue du droit les questions de droit soumises à son jugement,

d'autant moins que l'observation par cette Commission des mêmes considérations d'ordre politique et moral dont s'est inspiré le Gouvernement mexicain pourrait produire pour les réclamants des conséquences désastreuses, à savoir e rejet de leur réclamation *in limine litis*, pour cause de double nationalité, admise contrairement au droit.

C. — Conclusions finales

42. — Ma conclusion finale relative à la question de la nationalité du réclamant, M. Georges Pinson, se résume donc en les deux thèses suivantes, à savoir que sa nationalité française est prouvée, mais que sa nationalité mexicaine doit être niée.

Cette conclusion cadre, d'ailleurs, parfaitement avec la situation de fait, attendu que tous les éléments d'information que j'ai eu l'occasion de me procurer (tels que: inscriptions sur la liste électorale et au registre des étrangers) concordent pour confirmer ma conviction que les autorités mexicaines n'ont jamais, avant le présent procès international, considéré le réclamant comme sujet mexicain, mais qu'elles l'ont toujours regardé comme ressortissant français. La conclusion à laquelle je suis arrivé à la suite d'une analyse scrupuleuse des arguments multiples de nature *juridique* allégués par les deux agences, s'accorde donc parfaitement avec celle que j'aurais pu tirer, soit du "dictamen" de la Commission Nationale des réclamations, soit du certificat d'immatriculation consulaire, soit enfin de la "possession d'état" du réclamant, tant dans la colonie française que dans la société mexicaine.

Cette dernière constatation que, autant que j'ai pu m'en convaincre par tous les moyens à ma portée, les autorités mexicaines n'ont jamais, avant ce procès international, considéré M. Georges Pinson comme Mexicain, et que, par conséquent, elles n'ont commencé de le faire que maintenant, dans le seul but d'éviter une réclamation internationale, en se retranchant derrière l'exception de sa prétendue nationalité double, me ramène encore un instant à l'observation que j'ai faite ci-dessus (§ 24) au sujet des conditions dont dépend le bien-fondé de pareille exception. En supposant même que le résultat négatif de l'examen de la nationalité mexicaine du réclamant n'eût pas été si certain qu'il ne l'est en réalité, j'aurais éprouvé des hésitations très sérieuses à reconnaître, dans le cas actuel, le caractère fondé de l'exception de double nationalité. Donner et retenir ne vaut.

Je m'excuse après cette longue argumentation détaillée, d'avoir tellement abusé de la patience du lecteur et de m'être risqué si loin dans le domaine du droit public mexicain, que j'eusse préféré réserver à la jurisprudence de la Cour Suprême de Justice de la Fédération. Si je m'y suis hasardé tout de même et presque à contre-cœur, c'est que l'acharnement de la défense de l'agence mexicaine, d'une part, et le manque presque total de sentences judiciaires, ainsi que le défaut d'une doctrine nationale de droit public faisant autorité, de l'autre, m'y ont contraint.

Je suis heureux de pouvoir constater, comme résultat de mes recherches, que la vigoureuse attaque que le Gouvernement mexicain, en la personne de son agence, a cru nécessaire de diriger contre la législation de son pays, en s'efforçant, par tous les moyens d'interprétation possibles, d'en faire prononcer l'inconstitutionnalité par un tribunal international, a parfaitement échoué, par manque de fondement solide.

Enfin je me flatte de l'espoir que ma modeste contribution à l'interprétation du droit public mexicain puisse encore avoir quelque utilité à l'avenir, pour d'autres cas qui pourraient se présenter devant cette Commission, ou pour

d'autres tribunaux qui auront à s'occuper de la matière extrêmement compliquée de la nationalité mexicaine.

PREUVE DE LA MATÉRIALITÉ DES FAITS

43. — Après avoir admis, dans les pages précédentes, la recevabilité de la réclamation, comme ayant été introduite par un ressortissant français, il s'agit de constater les faits et de fixer les responsabilités.

a) *Conditions de la preuve en général*

Au cours des audiences, bien des heures ont été consacrées à des considérations d'ordre général sur les conditions auxquelles devront satisfaire les preuves à apporter à la Commission à l'appui des réclamations. Les principales questions discutées sont les suivantes. La Commission franco-mexicaine a-t-elle, ou non, liberté entière d'admettre ou de rejeter différents moyens de preuve et d'en juger la valeur, ou est-elle liée par des prescriptions quelconques de droit international ou national? Si elle est liée par la législation mexicaine, par exemple, en vertu du principe de l'applicabilité de la *lex loci* ou *lex fori*, doit-elle donner la préférence à la législation générale du pays, notamment au Código federal de procedimientos civiles et aux codes semblables des différents Etats de la Fédération, ou plutôt aux dispositions de caractère spécial, formulées dans les lois et décrets concernant les réclamations pour cause de dommages révolutionnaires? Si elle n'est pas liée par le droit national mexicain, soit général, soit spécial, l'équité n'exige-t-elle pas, tout de même, que la Commission franco-mexicaine applique aux réclamations portées devant elle, les mêmes règles de preuve que la législation nationale en matière de réclamations pour cause de dommages révolutionnaires a établies pour l'administration de la preuve devant l'instance nationale? Et si la question de la preuve se pose par rapport à des réclamations déjà jugées par la Commission nationale, la Commission internationale a-t-elle ou non le devoir de contrôler si les preuves apportées à la première ont, à bon droit, été admises, comme étant conformes aux dispositions légales et réglementaires, qui régissent l'activité de ladite Commission? Enfin, pour le cas où cette dernière question devrait être résolue par l'affirmative, les deux agences ont amplement discuté sur la conformité ou non-conformité des preuves apportées à la Commission nationale avec les dispositions légales mexicaines, de caractère général et spécial, notamment celles relatives à la faculté des intéressés de recueillir des informations testimoniales par la voie de la juridiction volontaire.

Bien que, au cours des débats oraux et à propos de questions pertinentes posées par la Commission aux deux agences, celles-ci aient fini, non sans une certaine résistance, par lui reconnaître le droit illimité d'admettre tous moyens de preuve qu'elle considère en conscience comme suffisants et nécessaires pour asseoir sa conviction et d'en déterminer dans chaque cas particulier la force probante, sans être liée par des prescriptions obligatoires, de quelque nature qu'elles soient, il n'en reste pas moins vrai qu'elles n'ont jamais abandonné tout à fait leurs thèses primitives, consistant à dire, la thèse mexicaine, que le principe de l'équité mentionné à l'article II de la convention ne joue pas de rôle spécial en matière de preuve, que la Commission est, par suite, obligée d'apprécier les preuves sur la base du droit et que c'est, en principe, le droit général mexicain de procédure civile qui doit être appliqué; la thèse française, que l'administration et l'appréciation de la preuve tombent, d'après ledit article II, sous le coup direct du principe de l'équité et que ce principe veut que la Commission franco-mexicaine n'impose pas à l'agence

française, en représentation des intérêts des réclamants individuels, des exigences plus rigoureuses que ne l'ont fait la législation et la Commission nationale du Mexique.

44. — Etant personnellement partisan de la thèse de la parfaite liberté de la Commission franco-mexicaine, selon le droit international, de juger souverainement l'admissibilité des différents moyens de preuve et leur valeur, je ne saurais admettre intégralement ni la thèse française, ni la thèse mexicaine. Sans insister trop sur des explications générales et théoriques relatives à la question en discussion, je me crois tout de même obligé, après les vifs et amples débats qui se sont déroulés au cours des audiences, d'énoncer ici succinctement mon point de vue personnel en la matière et d'indiquer jusqu'à quel point chacune des deux thèses opposées me semble exacte.

Il est constant que la convention franco-mexicaine ne contient aucune prescription concernant le point en discussion. Les seules choses qu'elle dit au sujet des preuves sont (à l'article II) que les bonnes dispositions du Mexique à indemniser les victimes des guerres civiles dépendent de la preuve que le dommage allégué a été subi et qu'il est dû à quelqu'une des causes énumérées à l'article III, et (à l'article IV) que l'Agent et les Conseils de chaque Gouvernement présenteront à la Commission, oralement ou par écrit, les preuves qu'ils jugeront bon d'invoquer à l'appui des réclamations ou contre elles. Si notamment cette dernière disposition permettait, malgré son vague, quelque conclusion concrète, cela ne saurait être que celle-ci, que la Commission elle aussi doit raisonnablement avoir le droit d'admettre ou de rejeter, comme elle jugera bon, les preuves que l'Agent et les Conseils jugeront bon de lui présenter. Mais en tous cas, la Convention ne limite en rien le pouvoir de la Commission de juger l'admissibilité et la valeur des preuves. Dans ces conditions, elle doit être réputée avoir une parfaite liberté d'appréciation, une restriction de cette liberté ne résultant pas non plus d'un principe général quelconque du droit international public en matière d'arbitrage. Notamment, il n'y a pas lieu d'appliquer en cette matière comme la seule admissible la *lex loci* ou *lex fori*, quel qu'en puisse être le rôle dans les rapports du droit international privé.

Dans son Règlement de procédure, la Commission elle-même ne l'a pas entendu d'une autre façon. S'il est vrai que ledit Règlement fait mention de la loi du lieu à l'article 35, où il s'agit de dépositions de témoins sur commission rogatoire, cela s'explique aisément par la considération qu'il n'existe aucun motif de ne pas suivre la voie régulière indiquée par la loi du lieu, pour entendre des témoins qui ne peuvent pas comparaître en personne devant la Commission. Mais cette prescription spéciale n'implique aucunement ni que la Commission soit liée par la loi mexicaine dans le choix des moyens de preuve, l'appréciation de leur valeur ou les formalités à observer, lorsqu'elle décide, au cours des audiences, d'admettre la production de nouvelles preuves à la requête des agents, ou d'en recueillir elle-même, ni qu'elle soit obligée d'apprécier les preuves produites pendant la procédure écrite au seul point de vue de la loi du lieu. En effet, le Règlement a déjà réglé d'une manière beaucoup plus souple que ne le fait le Code fédéral de procédure civile, la manière dont aura lieu l'audition de témoins devant elle (articles 31 et 32); il reconnaît comme preuve les déclarations faites par le demandeur (article 33) et rien n'empêche la Commission d'admettre des moyens de preuve, autres que ceux mentionnés dans le Règlement, après ou sans modification préalable de ce dernier.

J'admets donc comme principe fondamental de procédure en matière de preuves, la parfaite liberté de la Commission franco-mexicaine d'admettre

tels moyens de preuve qu'elle jugera bon d'admettre et d'en apprécier souverainement la valeur dans chaque cas particulier, sans être liée, en quoi que ce soit, par des dispositions légales en vigueur au Mexique. Ce faisant, je me range, sans aucune réserve, à l'avis unanime de la Commission générale mexicano-américaine des réclamations, exprimé dans sa sentence relative à la réclamation de William A. Parker contre les Etats-Unis Mexicains, et aux termes duquel (*Opinions of Commissioners under the convention concluded September 8, 1923 between the United States and Mexico, February 4, 1926, to July 23, 1927*, p. 38-39):

"For the future guidance of the respective Agents, the Commission announces that, however appropriate may be the technical rules of evidence obtaining in the jurisdiction of either the United States or Mexico as applied to the conduct of trials in their municipal courts, they have no place in regulating the admissibility of, and in the weighing of evidence before this international tribunal... The Commission expressly decides that municipal restrictive rules of adjective Law or of evidence cannot be here introduced and given effect by clothing them in such phrases as "universal principles of law", or "the general theory of law", and the like. On the contrary, the greatest liberality will obtain in the admission of evidence before this Commission with the view of discovering the whole truth with respect to each claim submitted."

Dans ce contexte, je ne puis m'empêcher d'ajouter à la décision précédente de principe, la déclaration que je suis également disposé à me ranger absolument à l'avis de la même Commission concernant le fardeau de la preuve, déjà formulé à l'article 75 de la (Ie) Convention de La Haye de 1907 pour le règlement pacifique des conflits internationaux, et selon lequel, d'une part:

"When the claimant has established a *prima facie* case and the respondent has offered no evidence in rebuttal, the latter may not insist that the former pile up evidence to establish its allegations beyond a reasonable doubt without pointing out some reason for doubting" — principe, dont j'ai déjà fait application ci-dessus, §20, en ce qui concerne la preuve de la nationalité des réclamants, — et d'autre part:

"The parties before this Commission are sovereign Nations who are in honor bound to make full disclosure of the facts in each case, so far as such facts are within their knowledge, or can reasonably be ascertained by them. The Commission, therefore, will confidently rely upon each Agent to lay before it all of the facts that can reasonably be ascertained by him concerning each case, no matter what their effect may be. In any case where evidence which would probably influence its decision is peculiarly within the knowledge of the claimant or of the respondent Government, the failure to produce it, unexplained, may be taken into account by the Commission in reaching a decision" (*loco cit.*, p. 39-40).

En effet, les relations internationales sont d'une importance telle, et l'observation de la justice dans leur développement est tellement nécessaire, que ce serait un crime contre l'humanité de vouloir abaisser les procès internationaux de leur plan élevé sur le niveau où se déroulent malheureusement tant de procès entre particuliers. D'ailleurs, j'ai la conviction absolue que déjà l'honneur de leur pays empêcherait tant l'agence française que l'agence mexicaine, d'agir en contradiction avec les principes énoncés dans les passages ci-dessus.

Si donc la Commission franco-mexicaine ne saurait être censée liée par aucune disposition légale spéciale, il s'ensuit que la législation mexicaine ne peut lui servir que de guide et dans les seuls cas où elle en reconnaît la raison et l'équité. Pour ces motifs, je ne puis admettre, ni le bien-fondé de la thèse française, soutenant l'applicabilité de la législation mexicaine sur les réclamations devant la Commission franco-mexicaine, ni celui de la thèse mexicaine,

soutenant plutôt l'applicabilité de la législation générale mexicaine. S'il me fallait choisir entre ces deux législations, je n'hésiterais aucun instant à donner la préférence, conformément au point de vue français, à la législation spéciale non seulement pour le motif que l'on peut nommer un principe général de droit, que toute règle de droit spéciale et postérieure a la tendance naturelle de déroger aux règles de droit générales et antérieures, mais encore pour la raison que, notamment dans l'espèce, la justice ordonne que la preuve d'événements ayant eu lieu dans des conditions anormales et pénibles de graves troubles révolutionnaires, qui, même de l'aveu des autorités mexicaines, ont désorganisé la justice en beaucoup de régions du pays, soit facilitée et ne demeure pas sous le coup de dispositions légales écrites pour des temps normaux. J'accepte donc, sans réserve, la règle formulée à l'article 8, *sub* III, de la Loi des réclamations du 30 août 1919 et d'après laquelle "Podrá admitir la Comisión cualquier medio de prueba que a su juicio sea humanamente bastante para producir convicción en el caso concreto aunque ese medio sea distinto de los specificados en las leyes de procedimientos o no tengan fuerza probatoria, conforme a éstas, quedado sujeto a su apreciación al criterio racional de los Comisionados", — pas pour le motif que je me crois lié, en quoi que ce soit, par cette règle, mais parce qu'elle énonce d'une manière très heureuse le principe qui, indépendamment d'elle, régit déjà le présent arbitrage.

Par contre, en ce qui concerne l'appel fait par l'agent français à l'équité comme norme exclusive d'appréciation de la preuve, en vertu de l'article II de la convention, je ne puis que donner raison, en principe, à l'agence mexicaine. Ainsi que je l'ai déjà fait observer ci-dessus (§ 10), l'agent français a poussé trop loin, à mon avis, le rôle de l'équité dans le présent arbitrage. Cette observation s'applique aussi à la question actuelle de l'administration et de l'appréciation de la preuve. Le principe de l'équité, tel qu'il se trouve défini à l'article II, veut que, abstraction faite des règles strictes du droit international sur la responsabilité des Etats pour dommages révolutionnaires, etc., la Commission condamne le Mexique à indemniser les lésés de pareils dommages, pourvu que deux choses soient prouvées, à savoir la matérialité des dommages et leur imputabilité à certains auteurs. Ni au point de vue grammatical et logique, ni au point de vue de l'équité elle-même, la clause de l'article II ne peut être interprétée dans le sens d'avoir substitué, en principe, l'équité aux règles de droit, aussi en ce qui concerne l'appréciation des preuves; bien au contraire, afin que le principe équitable de vouloir *ex gratia* indemniser les lésés, bien que, peut-être, le Mexique n'y soit pas obligé en droit strict, puisse trouver application, la convention prescrit clairement que certains éléments doivent être prouvés, et cette preuve doit, en principe, être administrée conformément au droit international. Mais étant donné que le droit international n'a jamais élaboré de règles précises sur les conditions auxquelles doit satisfaire la preuve devant les tribunaux internationaux, et que ceux-ci ont généralement bénéficié d'une grande liberté, qui leur permet d'apprécier les preuves selon les circonstances, normales ou anormales, dans lesquelles il a fallu les recueillir, l'équité y rentre, tout de même, par une voie détournée. Quoique, par conséquent, l'arbitrage actuel doive, en ce qui concerne la preuve des événements qui ont entraîné les dommages et des dommages eux-mêmes, être considéré comme un arbitrage, non sur la base exclusive de l'équité, en tant que principe opposé au droit strict, mais sur celle du droit, l'équité doit pourtant y jouer un rôle important, comme faisant partie intégrante du contenu du droit international en cette matière. Si l'usage du mot "équité" dans ce contexte se heurte à des objections, je suis tout disposé à le remplacer par "liberté d'apprécier les preuves selon les circonstances concomitantes".

45. — Les conclusions pratiques qui découlent de ces observations de caractère général, doivent ensuite être considérées à la lueur de la circonstance que, dans une partie des cas soumis au jugement de la Commission franco-mexicaine, cette dernière fait fonction de commission de révision. Cette circonstance ne laisse pas d'exercer son influence sur la question des preuves. Dans les cas où la réclamation n'a pas encore fait l'objet d'une sentence antérieure de la Commission nationale des réclamations, les principes formulés ci-dessus n'ont besoin, à mon avis, d'aucune explication ultérieure. Par contre, l'autre hypothèse, dans laquelle un "dictamen" de la Commission nationale est intervenu, présente des traits particuliers sur lesquels je tiens à insister encore quelques moments dans ce contexte, en me référant aux observations que je viens de faire à ce même sujet dans une partie antérieure de cette sentence (§ 8, *in fine*).

La Commission franco-mexicaine, en tant que commission de révision ou de seconde instance, ne sera, en règle générale, invoquée que dans les cas où le réclamant n'a pu se résigner au "dictamen" de la Commission nationale [1]. Cette non-conformité du réclamant avec le "dictamen" de l'instance nationale peut trouver son explication, soit dans le fait que cette dernière instance ne l'aurait pas reconnu comme Français ou comme protégé français, soit qu'elle n'aurait pas accepté la présentation des faits donnés par le réclamant, soit qu'elle n'aurait pas admis l'imputabilité des dommages à un des groupes d'auteurs énumérés dans la loi nationale, soit qu'elle aurait nié une négligence, etc., des autorités compétentes, soit enfin que le réclamant n'est pas satisfait du montant de l'indemnité allouée. La première hypothèse, qui ne se présentera guère, peut être écartée dans ce contexte, la nationalité ne pouvant être considérée comme un "fait" et n'étant donc jamais, sans l'intervention de règles juridiques, susceptible d'une "preuve" directe, dans le sens que l'on attribue à ce concept lorsqu'il s'agit de "faits" proprement dits. La troisième hypothèse se présentera toujours, soit exclusivement, soit principalement, comme une question d'applicabilité de la loi, c'est-à-dire comme une question juridique — compliquée par la controverse sur l'identité ou non-identité des énumérations de la loi et de la convention —, qui n'est pas non plus susceptible de "preuve" dans le sens normal, bien que, ici encore, puissent entrer en ligne de compte des faits propres à être prouvés. La quatrième hypothèse présente également un caractère mixte, le refus d'admettre une négligence, etc. des autorités compétentes pouvant aussi bien trouver son origine dans des défectuosités de la preuve, que dans l'interprétation de mots, tels que: négligence, autorités compétentes, etc.; dans ces conditions, il vaut mieux ne pas insister non plus ici sur cette hypothèse, d'autant moins que l'identité des deux énumérations, légale et conventionnelle, est controversée. Restent, par conséquent, la deuxième et la cinquième hypothèses, se rapportant respectivement au cas dans lequel la Commission nationale aurait déclaré ne pas admettre comme prouvée la réalité des faits allégués par le réclamant, et à celui dans lequel elle lui aurait alloué une indemnité insuffisante, pour autant que cette dernière question n'est pas, à son tour, mêlée avec des appréciations juridiques. Or, il va de soi que dans les deux dernières hypothèses, le caractère de tribunal de revision dont, dans ces cas, est revêtue la Commission franco-mexicaine, comporte comme tâche principale l'examen des preuves apportées déjà antérieurement, ou à apporter encore dans la nouvelle instance.

[1] Je passe ici sous silence le cas toujours possible, où un réclamant s'adresse à la Commission franco-mexicaine dans le seul but de faire confirmer le "dictamen" de la Commission nationale, favorable à sa réclamation, par l'instance internationale. Si ce cas se présentait, il devrait être jugé à la lumière de considérations particulières, qu'il n'est pas le temps de développer maintenant.

Tout de même, la question de la preuve de la matérialité des faits ou des dommages et de leur montant peut s'élever également dans les trois autres hypothèses, dans lesquelles le "dictamen" de la Commission nationale, favorable au réclamant en ce qui concerne ladite preuve, est attaqué pour d'autres raisons, ainsi que dans l'hypothèse où, la matérialité des faits étant reconnue, la seule question controversée est celle du montant du dommage. En effet, ainsi que je l'ai déjà fait observer plus haut (§ 7), la façon dont la procédure arbitrale devant la Commission franco-mexicaine a été réglée dans la Convention et dans le Règlement de procédure, exclut l'admissibilité de la thèse française, selon laquelle la Commission n'est pas autorisée à entrer dans un nouvel examen des points sur lesquels la Commission nationale a rendu une décision en faveur du réclamant, et contre lesquels celui-ci n'a pas interjeté "appel". Si donc un réclamant désire provoquer un examen nouveau de sa réclamation par l'instance internationale, il court le risque de voir rouverts les débats, même sur les points sur lesquels il eut déjà gain de cause devant la Commission nationale, toutes les fois que l'agence mexicaine croit devoir s'opposer aux conclusions de cette dernière. Naturellement le respect naturel dû aux organes nationaux chargés d'une tâche spéciale et qui, eux, remplissent cette tâche de la même façon consciencieuse dont l'agence mexicaine s'acquitte de sa tâche à elle, la retiendra de mettre en doute le bien-fondé des conclusions de ladite Commission favorables au réclamant, dans un plus grand nombre de cas qu'elle estime absolument inévitable. Tout de même, il se peut qu'il y ait des cas spéciaux dans lesquels l'agence mexicaine ne se croit pas justifiée à admettre que les faits allégués par les réclamants, confirmés par des témoignages contemporains ou datant de peu de temps après lesdits faits, et reconnus par la Commission nationale, après examen de sa part, comme s'étant produits en conformité des affirmations de l'intéressé, se soient réellement passés, ou se soient passés ainsi que le réclamant les a décrits, et dans ces cas spéciaux l'agence mexicaine a parfaitement le droit d'apporter des preuves convaincantes à l'encontre des conclusions favorables de la Commission nationale. Mais attendu que de pareilles conclusions ont déjà par elles-mêmes, pour tout observateur impartial, une force convaincante fort considérable, il va de soi que, pour être plus convaincantes que lesdites conclusions, les preuves contraires doivent être tellement puissantes qu'il ne reste pas de doute raisonnable sur le caractère erroné des conclusions de l'instance inférieure.

Pour ces raisons, j'estime que dans les cas — vraisemblablement très nombreux — dans lesquels l'agence mexicaine accepte sans plus la force convaincante d'un "dictamen" de la Commission nationale reconnaissant, après un examen indépendant de sa part, la véridicité des affirmations du réclamant, il n'y a pas lieu pour la Commission franco-mexicaine d'entrer dans un nouvel examen des événements, et que dans les cas — vraisemblablement rares — dans lesquels ladite agence estime avoir des motifs suffisants pour attaquer pareil "dictamen", les preuves contraires doivent présenter un caractère fort convaincant, pour pouvoir renverser les conclusions de la Commission nationale, instituée précisément dans le but de vérifier les assertions à la base des réclamations.

46. — Au cours des audiences, on a encore beaucoup discuté sur le point de savoir si certaines informations testimoniales rendues devant certaines juridictions satisfont, ou non, aux conditions requises par la législation générale et spéciale du Mexique, notamment à propos des objections mexicaines que lesdites informations, au lieu d'être rendues par devant un "juez federal", ont été rendues par devant un "juez común", et non en présence d'un représentant du Ministère public fédéral, mais seulement d'un agent du Ministère public du

"fuero común", et que lesdites informations, malgré la disposition de l'article 19 du Décret sur les réclamations en date du 24 décembre 1917, n'ont pu légalement être prises en considération, comme ayant été rendues en contradiction avec la disposition de l'article 804 du Código de procedimientos civiles, prescrivant que "nunca se practicará diligencia alguna de jurisdicción voluntaria de que pueda resultar perjuicio a la hacienda pública", — thèse qui a conduit à des discussions, encore plus éloignées de la matière des réclamations que les autres, sur les attributions de la Cour Suprême de Justice, à propos de certain avis émis par elle à ce sujet en 1923 et publié dans le "Seminario Judicial de la Federación". Quelque intéressant qu'il eût été, après mes voyages d'exploration à travers le droit constitutionnel du Mexique, d'entreprendre une randonnée dans le vaste domaine du droit relatif à l'organisation judiciaire et à la procédure civile de la Fédération, comme préparation à ma descente aux enfers du droit fiscal, à laquelle l'agence mexicaine dans la cruauté de me condamner également, en rapport avec certaines objections contre les errements de sociétés réclamantes, j'ai estimé devoir résister à l'attrait de sa suggestion, pour le motif que toutes ces discussions m'ont paru être sans intérêt aucun pour le point en question, et que pareil examen n'aurait, selon toute vraisemblance, abouti qu'à la constatation de nouvelles controverses d'interprétation de la législation nationale, — querelle juridique que, cette fois, je suis heureux de pouvoir laisser aux jurisconsultes mexicains, pour la vider entre eux.

b) *Appréciation des preuves dans le cas présent*

47. — En venant maintenant à la question concrète de la preuve des événements allégués comme base de la présente réclamation, à la lueur des observations précédentes de caractère général, je constate ce qui suit:

Ainsi que je l'ai indiqué au § 1er, le mémoire français impute les dommages soufferts par le réclamant pour une partie peu importante aux zapatistes et pour le reste aux troupes carrancistes, qui, le 14 février 1915, ont pris la localité de Coyoacán, D. F., occupée avant par des forces faisant partie de l'"Ejército Libertador". Dès le début, l'épouse du réclamant, qui, lui, était en France, quand les faits se produisirent, a pris le soin de faire avérer, autant que possible, par des témoins le cours des événements, mais naturellement ses tentatives ont été sérieusement entravées par l'état d'agitation dans lequel se trouvait la région de son domicile, situé entre les deux groupes combattants.

D'après l'énumération qu'en donne l'annexe III du mémoire français, les forces combattantes auraient enlevé 5 mules, 10 vaches hollandaises importées, un taureau hollandais importé, un petit cheval, 2 harnais neufs et 2 courroies de transmission. Cette énumération est empruntée à la première pièce justificative qui a été rédigée à la suite des événements, à savoir une information testimoniale, rendue par 5 personnes devant le juge de première instance de Tlálpam, les 22 et 28 mai 1915, avec l'assistance de l'Agent du Ministère public, et protocolisée le 2 juin 1915 par Me Juan Rodríguez, faisant fonction de notaire à Tlálpam (annexe II des conclusions de l'agent français, en date du 9 décembre 1926).

La réclamation de M. Georges Pinson a fait l'objet d'un examen minutieux de la part de la Commission nationale, qui a chargé son Agent des investigations, M. J. Chávez, de lui faire rapport. Sur la base de ce rapport (annexe III des conclusions de l'agent français du 9 décembre 1926), dont l'auteur, à la suite d'investigations personnelles, n'a pu faire autre chose que confirmer les assertions du réclamant sur la réalité des dommages soufferts, la Commission des réclamations a rendu son "dictamen" du 5-25 janvier 1924 (annexe II du mémoire français) qui, quant à la preuve de la matérialité des faits, était

favorable au réclamant. De ce "dictamen", il résulte que la Commission avait commencé par prendre des informations chez le Président Municipal de Coyoacán, les Trésoriers municipaux de Coyoacán et de Tlálpam et l'Agent percepteur des contributions à Tlálpam et Ixtapalapa, mais en vain, car ces fonctionnaires ne pouvaient plus lui donner aucune information sûre. Enfin, l'Agent des investigations avait réussi, par des recherches personnelles, à s'assurer de la matérialité des dommages, mais sans pouvoir, lui non plus, vérifier avec toute la précision désirable, laquelle des deux forces combattantes en était responsable.

Au cours de la procédure écrite, l'agent mexicain a soumis à une critique rigoureuse, tant l'information testimoniale quintuple, que le rapport de M. Chávez et le "dictamen" de la Commission nationale, en joignant à son "alegato" du 31 décembre 1926 des déclarations récentes de fonctionnaires publics et de témoins, et il a répété sa critique au cours des audiences, tâchant de démontrer le caractère insuffisant, illégal et contradictoire des différentes preuves. Enfin, les deux agences ont, à la demande de la Commission (décision No 6, en date du 24 avril 1928), procédé à une nouvelle audition de deux témoins, dont le résultat lui fut présenté dans un écrit commun en date du 14 mai 1928, écrit auquel le réclamant a répondu par une lettre adressée, à la date du 21 mai suivant, à l'agent français. Cette dernière audition de témoins a eu pour résultat qu'il doit être considéré comme constant que le taureau hollandais et une vache de bonne race furent enlevés par les forces carrancistes et que 4 mules, un petit cheval et deux courroies de transmission furent emportés par les forces zapatistes, mais qu'on ne sait pas exactement ce qui s'est passé pour les autres vaches qui, suivant un des témoins, étaient restées dans l'étable. Que ces vaches eussent déjà disparu, lorsque M^me^ Pinson retourna à Coyoacán, cela me semble incontestable, à la lumière des différents éléments d'information fort plausibles, mais ce qui ne résulte pas avec toute la clarté désirable des dépositions des témoins, c'est laquelle des deux forces opposées est responsable de leur disparition. A cet égard les recherches nouvelles n'ont pas pu jeter sur le cours des événements de février 1915 une lumière plus claire que ne l'ont pu faire antérieurement le rapport de l'Agent des investigations et le "dictamen" de la Commission nationale des réclamations.

Dans ces conditions, je n'ai pas lieu de ne pas m'en tenir, en ce qui concerne la matérialité des dommages, au "dictamen" de la Commission nationale. Comme je l'ai fait observer ci-dessus (§ 45) il faudrait des contre-preuves très convaincantes pour admettre, dans l'instance de révision devant la Commission franco-mexicaine, le mal-fondé de conclusions de la Commission nationale, ayant reconnu, sur la base d'informations testimoniales fournies sous serment et peu après les événements à des autorités publiques du pays, et contrôlées plus tard par d'autres autorités mexicaines, que certains événements se sont passés, ou que certains dommages ont été soufferts, en conformité avec les affirmations des réclamants. Pour me convaincre, dans un cas concret, de la correction de ma thèse générale et de la valeur intrinsèque des "dictámenes" de la Commission nationale ayant déclaré prouvés certains faits allégués par les réclamants, j'ai été heureux de pouvoir recueillir, à propos de cette première réclamation, les nouvelles dépositions de témoins et de pouvoir examiner et confronter avec les preuves antérieures les documents nouveaux produits par l'agence mexicaine. En effet, ces documents démontrent toute la faiblesse des tentatives faites pour infirmer par des renseignements et des témoignages nouveaux de dates récentes, les conclusions de la Commission nationale et les informations testimoniales antérieures sur lesquelles elles se fondent.

Par ces motifs, je déclare n'avoir aucune raison de douter de la matérialité des dommages que, d'après sa réclamation, le réclamant a soufferts, mais n'être,

moi non plus, dans la possibilité de constater avec une certitude absolue quelle partie en doit être imputée aux forces constitutionnalistes et quelle aux forces zapatistes.

Cette dernière conclusion complique considérablement la question de savoir si les dommages sont, ou non, imputables à quelqu'une des forces énumérées à l'article III de la convention, question qu'il faut, par suite, aborder maintenant.

La classification des gouvernements et des forces visés à l'article III de la convention

48. — Ce n'est pas le moment d'entreprendre dans cette sentence une classification systématique de tous les auteurs des dommages qui forment l'objet de réclamations devant la Commission franco-mexicaine, en les faisant entrer dans un des groupes énumérés sous les nos 1 à 5 de l'art. III de la convention. Tout de même il me semble indispensable de fixer dès maintenant les grandes lignes de l'interprétation qui, à mon avis, doit être donnée aux dispositions en question, puisque, sans cela, l'application de la convention dans ce premier cas soumis à la décision de la Commission revêtirait un caractère trop accidentel et isolé et que la portée exacte de l'article III ne peut être déterminée qu'en en examinant les dispositions dans leur ensemble.

A mon avis, l'énumération contenue à l'article III de la convention est assez claire, lorsqu'on l'examine isolément; aussi, les difficultés principales de son application ne trouvent-elles pas tant leur origine dans certaines obscurités du texte que dans les circonstances de fait, d'ordre historique, dans lesquelles les événements révolutionnaires se sont déroulés.

C'est pourquoi je regrette de devoir constater que l'agence mexicaine a admirablement réussi à obscurcir la clarté du texte, en invoquant, d'une part, certaines intentions que, lors de la rédaction de l'énumération de l'article III, aurait eues le Gouvernement mexicain, et d'autre part, certaines interprétations des dispositions en question, propres à en détruire la portée évidente.

Commençons par reproduire ici le texte de la partie de l'article III qui se rapporte aux auteurs des dommages:

"Les pertes ou dommages dont il est question dans le présent article sont ceux qui ont été causés pendant la période comprise entre le 20 novembre 1910 et le 31 mai 1920 inclus, par quelqu'une des forces ci-après énumérées:

1. Par les forces d'un gouvernement *de jure* ou *de facto;*
2. Par les forces révolutionnaires qui, à la suite de leur triomphe, ont établi des Gouvernements *de jure* ou *de facto* ou par les forces révolutionnaires qui leur étaient opposées;
3. Par les forces provenant de la désagrégation de celles qui sont définies à l'alinéa précédent, jusqu'au moment où le Gouvernement *de jure* aurait été établi à la suite d'une révolution déterminée;
4. Par les forces provenant de la dissolution de l'armée fédérale;
5. Du fait de mutineries ou soulèvements, ou par des forces insurrectionnelles autres que celles qui sont indiquées aux alinéas 2, 3 et 4 ci-dessus, ou par des brigands, à condition que, dans chaque cas, il doit établi que les autorités compétentes ont omis de prendre des mesures raisonnables pour réprimer les insurrections, soulèvements, mutineries ou actes de brigandage dont il s'agit, ou pour en punir les auteurs, ou bien qu'il soit établi que lesdites autorités ont été en faute de quelque autre manière.

La Commission connaîtra aussi des réclamations relatives aux pertes ou dommages dus aux actes autorités civiles, à condition que ces actes aient leur

cause dans des événements ou des troubles révolutionnaires survenus dans la période prévue ci-dessus et qu'ils aient été exécutés par quelqu'une des forces définies aux alinéas 1, 2 et 4 du présent article."

A la demande de la Commission, les deux agences lui ont présenté, chacune de son côté, un aperçu du classement, tel qu'il leur paraît découler des termes de l'article III, des différents Gouvernements et forces qui ont joué un rôle actif dans les révolutions mexicaines successives et les actes desquels donnent lieu à une demande en indemnité. Pour bien comprendre les divergences d'opinion qui existent entre les agences et que ces deux sommaires ont révélées, il est nécessaire de les confronter. Bien que les deux aperçus ne suivent pas le même modèle, la comparaison en est assez aisée.

L'aperçu du représentant du Gouvernement français est composé de la manière suivante. Il divise l'époque révolutionnaire comprise entre les dates nommées dans la convention en sept périodes, dont la première embrasse les mois de la révolution contre le Président Porfirio Díaz, commençant le 20 novembre 1910 et prenant fin le 25 mai 1911, date de la démission de ce dernier et de l'entrée en fonction du Président provisoire Francisco de la Barra; la deuxième, ladite Présidence provisoire, jusqu'au 30 novembre 1911; la troisième, la Présidence de Francisco I. Madero, jusqu'à la date du coup d'Etat de Victoriano Huerta, du 19 février 1913; la quatrième, la Présidence de celui-ci jusqu'à sa démission, le 15 juillet 1914, et la Présidence provisoire de Francisco Carbajal jusqu'au 13 août 1914, date à laquelle ce dernier a abandonné le pouvoir; la cinquième, les trois mois écoulés entre le 13 août et le 14 novembre 1914, date à laquelle, suivant la version officielle, la Convention s'est détachée du premier Chef de l'armée constitutionnaliste, période au cours de laquelle la Convention s'est réunie à Mexico (le 1er octobre 1914) et déplacée à Aguascalientes (10 octobre 1914); la sixième, la lutte entre les forces constitutionnalistes et conventionnistes, la période dite préconstitutionnelle, jusqu'à la victoire définitive des premières, marquée par l'élection de Venustiano Carranza à la Présidence de la République survenue le 1er mai 1917; la septième, cette dernière Présidence jusqu'au 21 mai 1920, date de l'assassinat du Président Carranza, après quoi l'agent français aurait encore pu mentionner une brève huitième période embrassant les derniers dix jours de mai 1920, comprenant le début de la Présidence intérimaire de Adolfo de la Huerta. Pour chacune des périodes ainsi délimitées, l'aperçu indique les forces etc., qui ont causé des dommages et des actes desquelles, selon l'opinion française, le Mexique est responsable, ainsi que, pour chacune de ces forces, la disposition, non seulement de la convention, mais aussi de la législation mexicaine, sur laquelle cette responsabilité se fonde.

L'aperçu du représentant du Gouvernement mexicain, au contraire, est présenté de telle façon qu'il énumère, pour chacun des alinéas 1-5 de l'article III, les forces qui, à son avis, tombent sous le coup de la disposition respective, et cela par ordre chronologique des événements.

Attendu que, pour plus d'intelligence des controverses existantes, il importe de pouvoir consulter les deux exposés antagonistes, à la lueur tant de la convention franco-mexicaine que de la législation nationale, je joins à la présente sentence, en annexes, les deux textes, international et national, mis en regard (annexe I) et suivis d'un résumé de la genèse de chacun des deux textes (annexe II, A et B), ainsi que les deux aperçus, français et mexicain (annexe III, A et B).

A. *Principales controverses entre les deux agences*

49. — Lorsqu'on examine les sommaires des agences et que l'on étudie les comptes rendus sténographiques des débats oraux devant la Commission,

on est frappé notamment par les trois différences fondamentales suivantes entre les points de vue français et mexicain:

a) Tandis que le Gouvernement français réclame des indemnités pour les pertes et dommages causés par tous les Gouvernements qui ont effectivement régné pendant la période révolutionnaire et par toutes les forces qui ont effectivement contribué aux combats dans les guerres civiles du Mexique, le Gouvernement mexicain, par l'organe de son agence, s'est efforcé de restreindre, autant que possible, la responsabilité du Mexique, en prétendant qu'il n'a jamais voulu assumer la responsabilité d'actes, autres que ceux commis par des Gouvernements légitimes et des forces qui ont réussi à remporter la victoire dans les luttes révolutionnaires;

b) Contrairement à la thèse française, selon laquelle l'énumération des auteurs des dommages donnant droit à indemnité, d'après la législation mexicaine, est au fond identique à celle de l'article III de la convention, l'agence mexicaine nie l'admissibilité de cette identification et affirme qu'elles sont tout à fait étrangères l'une à l'autre;

c) Par opposition à la thèse défendue par l'agent français, suivant laquelle le principe de l'équité et la promesse mexicaine d'égalité de traitement comportent que les mêmes concessions que la législation et la Commission nationales ont faites aux intéressés qui ressortissent au Mexique, ou qui se sont présentés devant elle, doivent profiter aux réclamants français qui se sont présentés devant la Commission franco-mexicaine, l'agence mexicaine soutient la thèse que j'ai déjà analysée ci-dessus (§ 11), et selon laquelle, la responsabilité de dommages révolutionnaires, librement assumée par le Mexique, étant une exception au droit des gens commun, qui n'admet pas de responsabilité juridique de ce chef, la convention franco-mexicaine doit être interprétée dans un sens aussi restreint que possible, conformément à l'adage fameux du droit romain.

Les conclusions pratiques qui, de ces différences d'opinion de caractère général, se dégagent pour l'interprétation et l'application des différents alinéas de l'article III, se manifestent, par exemple, dans les trois points suivants, à savoir: que l'agence mexicaine dénie au gouvernement de Victoriano Huerta, non seulement le caractère de gouvernement *de jure* ou *de facto*, mais encore la qualité de gouvernement révolutionnaire, en lui déniant ainsi l'existence même; qu'elle ne reconnaît pas que les forces de la Convention puissent avoir conservé, après leur séparation des forces constitutionnalistes, le caractère de forces révolutionnaires; et qu'elle ne sait évidemment pas exactement que faire des forces carrancistes, estimant que celles-ci doivent être considérées en même temps comme révolutionnaires jusqu'au 1er mai 1917 (article III, *sub* 2) et comme forces d'un gouvernement de fait déjà dès la chute du Président Madero en février 1913 lorsqu'elles ne se trouvaient encore qu'au début de la longue guerre civile (article III, *sub* 1). Ces conclusions mexicaines sont appuyées par d'autres thèses, toujours adaptées aux conditions spéciales des révolutions mexicaines, telles que: l'impossibilité grammaticale, logique et juridique de qualifier de "révolution" un mouvement insurrectionnel qui, quelque force qu'il puisse avoir déployée, a fini par échouer; ou bien l'impossibilité de l'existence simultanée dans un même pays de deux mouvements révolutionnaires qui se distinguent — non pas par deux programmes distincts, ce qui serait parfaitement possible — mais par l'antagonisme de deux chefs ou groupements directeurs; ou bien l'assertion que la qualification de gouvernement de fait ou de mouvement révolutionnaire ne saurait trouver application qu'après coup, selon le sort définitif échu au gouvernement ou mouvement révolutionnaire en question. En édifiant son système de défense, l'agence mexicaine s'est constamment retranchée, dans l'interprétation de l'article III,

derrière les conceptions politiques du présent Gouvernement du Mexique, sans entrer dans un examen du sens que ledit article peut avoir dans son contexte de document international, et a, en outre, invoqué quelquefois les pourparlers avec les Etats-Unis, pour presser la Commission d'accepter certaines interprétations du texte que ce texte lui-même ne ferait certes pas soupçonner.

En présence de toutes ces thèses, qui ont fini par embrouiller sans nécessité le texte joliment clair de l'énumération contenue à l'article III, je tiens à formuler, dès à présent et en quelques propositions concises, les principes qui, à mon avis, doivent présider à l'interprétation dudit texte, comme d'ailleurs d'autres clauses de la convention, ainsi que les interprétations concrètes que l'application desdits principes comporte pour la matière en question, tout en me réservant d'exposer dans la suite les motifs qui m'ont amené à ces conclusions.

B. *Conclusions générales relatives à l'interprétation de la Convention*

50. — En ce qui concerne: *a)* les principes généraux d'interprétation applicables, je crois devoir formuler les thèses suivantes:

1. Autant que le texte de la convention est clair par lui-même, il n'y a pas lieu d'en appeler à de prétendues intentions contraires de ses auteurs, sauf le cas exceptionnel dans lequel les deux parties litigantes reconnaîtraient que le texte ne correspond pas à leur intention commune.

2. Autant que le texte n'est pas suffisamment clair, il est loisible de recourir aux intentions des parties contractantes. Si, dans ce cas, les intentions sont claires et unanimes, elles doivent prévaloir sur toute autre interprétation possible. Si, au contraire, elles divergent ou ne sont pas claires, il faut chercher l'interprétation qui, dans le cadre du texte, correspond le mieux, soit à une solution raisonnable de la controverse, soit à l'impression que l'offre de la partie qui a pris l'initiative a raisonnablement et de bonne foi dû faire sur l'autre partie.

3. Pour fixer le sens du texte conventionnel ou les intentions des parties contractantes, les négociations diplomatiques qui ont conduit à la conclusion de la convention peuvent être prises en considération, à moins que les parties contractantes n'aient fini par adopter un texte incompatible avec la teneur des négociations, ou qu'elles n'aient consciemment renoncé à invoquer les éléments d'interprétation que les pourparlers diplomatiques pourraient fournir.

4. Toute convention internationale doit être réputée s'en référer tacitement au droit international commun, pour toutes les questions qu'elle ne résout pas elle-même en termes exprès et d'une façon différente.

5. En cas de doute sur la portée d'une stipulation conventionnelle, elle doit être entendue dans un sens qui en assure la possibilité d'application, tandis que, en cas d'impossibilité de fixer son sens exact, elle doit être interprétée en faveur de la partie qui a contracté l'engagement.

51. — En ce qui concerne: *b)* les interprétations elles-mêmes, mes conclusions générales sont les suivantes:

1. Conformément au principe formulé *sub a)*, 4. du paragraphe précédent, les dispositions de l'article III, autant qu'elles ne contiennent pas de solutions contraires, s'entendent dans la supposition tacite de la reconnaissance du principe de droit international commun, selon lequel l'Etat qui accorde à ses nationaux des indemnités pour pertes et dommages causés par des mouvements insurrectionnels, doit accorder au moins les mêmes indemnités aux étrangers qui se trouvent dans des conditions égales ou analogues.

2. La question de savoir si un gouvernement a été, ou non, un gouvernement *de jure*, est du domaine exclusif du droit constitutionnel de l'Etat en

question, notamment du droit constitutionnel étant en vigueur à l'époque des événements dont il s'agit de déterminer le caractère juridique, sans que puisse entrer en ligne de compte, en quoi que ce soit, ni la reconnaissance *de jure* dont il a pu bénéficier de la part d'un ou de plusieurs gouvernements étrangers, ni le refus éventuel, par des gouvernements postérieurs du pays, pour des motifs d'ordre politique, de le reconnaître comme gouvernement *de jure*. C'est uniquement à ce point de vue, c'est-à-dire à la lueur du droit constitutionnel et abstraction faite de toute considération d'ordre politique, que doit éventuellement être jugé le caractère légal ou illégal de gouvernements qui sont entrés en fonction dans des circonstances anormales ou irrégulières, comme cela a été le cas des gouvernements de Francisco de la Barra après la chute de Porfirio Díaz, de Victoriano Huerta après son coup d'Etat "de la dizaine tragique", de la Convention après sa réunion à Mexico et sa rupture avec le Premier Chef de l'Armée Constitutionnaliste, de Venustiano Carranza dans ses deux fonctions successives, "préconstitutionnelle" et constitutionnelle, et de Adolfo de la Huerta, à la suite du plan révolutionnaire d'Agua Prieta et de l'assassinat de Venustiano Carranza. Dans un examen de cet ordre jouera un rôle important le point de savoir si, comme le prétend, par exemple, l'auteur mexicain T. Esquível Obregón *(México y los Estados Unidos ante el derecho internacional*, 1926, p. 96 et 114-115) à propos de la Présidence de Victoriano Huerta, et comme on l'a souvent considéré dans des cas de révolutions de palais, il suffit que les formes constitutionnelles aient été observées, ou bien si les circonstances concomitantes de fond, telles que: trahison, contrainte ou assassinat du Président en fonctions, vaine apparence de liberté d'élection de son successeur, etc., doivent également être prises en considération, ainsi que l'a décidé la Commission générale des réclamations entre le Mexique et les Etats-Unis, dans sa sentence relative à la réclamation de George W. Hopkins *(Claims Commission United States and Mexico. Opinions of Commissioners under the Convention concluded September 8, 1923, etc...*, 1927, p. 43-44). D'ailleurs, pour qu'un Gouvernement puisse être reconnu comme Gouvernement *de jure*, il n'est pas strictement nécessaire qu'il soit entré en fonctions, dès le début, dans les conditions de fond et de forme requises par le droit constitutionnel; mais il se peut aussi que, bien qu'ayant assumé le pouvoir dans des circonstances irrégulières et inconstitutionnelles, il ait, après coup, acquis l'assentiment général ou de la majorité de la nation, ou la sanction d'un droit constitutionnel nouveau.

3. Par contre, la question de savoir si un gouvernement a été un gouvernement *de facto*, est une simple question de fait, qui ne dépend, ni du droit constitutionnel de l'Etat en question, ni du droit international, et qui, elle non plus, ne saurait être préjugée, ni par l'attitude que des gouvernements postérieurs ont prise envers un tel gouvernement, ni par la reconnaissance (ou éventuellement, le refus de reconnaissance), *de facto* ou même *de jure*, dont il a pu faire l'objet de la part d'un ou de plusieurs gouvernements étrangers, étant donné que c'est un fait notoire que la pratique internationale à souvent abusé de la reconnaissance internationale *de facto*, ou du refus de pareille reconnaissance, dans des buts politiques [1]. L'attitude des gouvernements étrangers peut tout au

[1] Cf. sur ce point l'article excellent du professeur J. L. Kunz concernant "Staatsgewalt *de facto*" dans le *Wörterbuch des Völkerrechts und der Diplomatie*, t. II, p. 605 et ss., notamment p. 609: "Die neuerdings bemerkbare Praxis (gegenuber Mexiko und Sowjet-Russland) die Frage der Anerkennung effektiver de facto-Regierungen zu einem politischen Instrument, zu einem diplomatischen Zwangsmittel zu machen, und dadurch auf die Politik dieser de facto-Regierung einzuwirken, ist nicht nur politisch-praktisch nicht einwandfrei, da häufig durch die fortgesetzte Verweigerung der Anerkennung absurde Situationen geschaffen werden, sondern auch völkerrechtlich bedenklich, da in einem solchen Vorgehen leicht ein Handeln *in*

plus servir de moyen auxiliaire de prouver certaine situation de fait. Au surplus, on ne saurait émettre la thèse ci-dessus que sous réserve d'un examen plus approfondi du cas particulier et exceptionnel, dans lequel l'Etat réclamant, dans une phase antérieure des relations internationales, aurait dénié à certain groupe politique la qualité de gouvernement *de facto*, en conformité avec l'opinion, prévalant au moment des réclamations, du gouvernement de l'Etat à qui le premier réclame [1]. D'ailleurs, il se peut très bien qu'à un moment donné un pays se permette le luxe d'avoir deux ou même plusieurs gouvernements *de facto* locaux, en l'absence d'un gouvernement central généralement reconnu, hypothèse dont je fais mention ici, sans décider déjà le point de savoir si elle est comprise dans le numéro 1) de l'article III de la convention. En outre, il ne faut pas perdre de vue que les conditions dans lesquelles la question de la reconnaissance de certaines autorités civiles ou militaires comme Gouvernement *de facto* peut se poser, diffèrent sensiblement entre elles et qu'il va de soi que cette qualification s'applique beaucoup plus vite à des hommes, même usurpateurs, qui se sont emparés du pouvoir central, par exemple moyennant une révolution de palais, et qui commencent par continuer la gestion du gouvernement régulier supplanté, qu'à des révolutionnaires qui commencent par exercer le pouvoir sans aucune organisation légale, et qui doivent encore établir tout l'organisme dont dispose déjà le gouvernement né d'un coup d'Etat. Et enfin il se peut également qu'un gouvernement incontestablement *de jure* n'ait pourtant plus, à une époque déterminée, aucun pouvoir *de facto*.

4. Le terme "révolution" n'a pas de contenu précis en droit international. Dans la convention franco-mexicaine notamment, il ne fait pas contraste avec le terme "insurrection", celui-ci indiquant plutôt une notion plus générale, dont la "révolution" n'est qu'une espèce. La question de savoir si, dans l'esprit de la convention, un mouvement insurrectionnel ou une guerre civile est, ou non, une "révolution" ou un "mouvement révolutionnaire", ne dépend, en aucun cas, ni de son résultat final de s'emparer du pouvoir, ni du caractère plus ou moins moral de ses initiateurs ou de l'élévation des idéals politiques ou sociaux dont ils s'inspirent, ni de la généralité ou localisation du mouvement, ni de la reconnaissance des insurgés comme belligérants, soit par le gouvernement régulier, soit par l'étranger.

Doivent être considérées comme "forces révolutionnaires", à mon avis, toutes forces qui ont coopéré à un mouvement révolutionnaire, c'est-à-dire: à un mouvement armé et plus ou moins organisé, qui, inspiré soit d'un programme politique ou social, soit de l'ascendant d'une ou de plusieurs personnalités déterminées, soit même du seul mécontentement général du régime politique dominant dans le pays, a eu pour but, soit de renverser un Gouvernement particulier, soit de provoquer un changement de la forme même du Gouvernement.

5. L'hypothèse prévue à l'alinéa 2) de l'article III, *in fine*, couvre précisément le cas de la longue lutte acharnée des Conventionnistes contre les Consti-

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fraudem legis gegenüber der die Intervention verbietenden Völkerrechtsnorm liegen kann."

D'autre part, le fait qu'un Gouvernement usurpateur n'a été reconnu par personne, ne fait aucunement obstacle à ce qu'il doive néanmoins être considéré comme ayant constitué un Gouvernement *de facto*, ainsi que le prouve, par exemple, le cas du pouvoir temporaire de Bela Kun en Hongrie, visé à l'article 232, II du traité de paix de Trianon.

[1] Voir à ce sujet par exemple § 15 de la sentence de la Commission générale mexicano-américaine des réclamations dans l'affaire George W. Hopkins (*Opinions of Commissioners under the convention concluded September 8, 1923 between the United States and Mexico*, February 4, 1926, to July 23, 1927, p. 42 et ss.). En sens contraire: Borchard, *Diplomatic protection of citizens abroad*, p. 210.

tutionnalistes, la défense de l'agence mexicaine qu'il ne peut exister en même temps deux mouvements révolutionnaires qui se distinguent uniquement par l'antagonisme entre leurs chefs, manquant de tout fondement et ne cadrant, d'ailleurs, pas davantage avec la situation de fait au Mexique. La tendance, fort plausible et justifiable, du Gouvernement actuel du Mexique de ne vouloir attribuer le titre honorifique de "révolution" qu'à la grande Révolution constitutionnaliste, ne justifie point la prétention de transférer cette appréciation nationale de caractère politique au domaine du droit international. Dans le sens de la Convention des réclamations, le mouvement conventionniste n'est pas moins un mouvement révolutionnaire que ne l'est le mouvement constitutionnaliste. Les tentatives d'expliquer les mots finaux dudit alinéa 2) dans un autre sens, dans le but d'écarter précisément l'hypothèse qu'ils ont tout particulièrement en vue, manquent de toute force convaincante, d'autant plus que l'agent du Mexique et mon honorable collègue mexicain ont cru nécessaire de faire, chacun d'eux, une tentative différente d'interpréter la clause dangereuse et que je regrette de devoir constater que ces interprétations sont toutes deux aussi invraisemblables. Ces interprétations recherchées reviennent un peu à embrouiller d'abord un texte clair, pour tirer ensuite de la prétendue ambiguïté du texte la conclusion que lui est applicable le principe que toute stipulation conventionnelle doit, en cas de doute, être interprétée en faveur de celui qui s'est engagé. Du reste, en exprimant cette opinion sur la guerre civile mexicaine de 1914 et des années suivantes, je ne veux pas être censé me prononcer déjà sur la durée de la période, pendant laquelle cet état de guerre civile entre deux partis révolutionnaires doit être considéré avoir existé, à la lumière de l'article III de la convention.

52. — Je préfère, dans le cas actuel, ne considérer ni les forces constitutionnalistes (carrancistes), ni les forces conventionnistes (zapatistes, villistes, etc.) au point de vue éventuel de forces d'un Gouvernement *de facto*. Evidemment, la distinction exacte entre un Gouvernement *de facto* et les chefs d'un mouvement révolutionnaire est très difficile à faire, les meneurs d'une sédition évoluant insensiblement en Gouvernement *de facto* avec le développement et le renforcement de leur mouvement révolutionnaire. Les événements de Coyoacán dont M. Georges Pinson a été la victime, s'étant produits en février 1915, c'est-à-dire trois mois seulement après la séparation de la Convention d'avec l'Armée constitutionnaliste et son Premier Chef, le pays se trouvait à cette époque en pleine guerre civile, dont l'issue définitive était encore impossible à prévoir; dans ces conditions il me semble parfaitement justifié d'envisager la situation au point de vue exclusif de forces révolutionnaires luttant les unes contre les autres pour la victoire dans la guerre fratricide. Si l'on considérait, déjà, pendant cette période révolutionnaire, l'administration de Carranza comme un gouvernement *de facto* ou *de jure* et que l'on admît, en même temps, avec l'agence mexicaine, que seules les autorités constitutionnalistes aient été des "autorités compétentes", dans le sens de l'article III, *sub* 5) de la convention, l'on arriverait à des résultats absurdes, notamment pour l'application du dit alinéa 5) à toutes les régions du pays où le régime carranciste ne trouvait aucun appui.

D'ailleurs, je constate que les agences, elles aussi, ont toutes deux eu conscience de la difficulté. En effet, l'agence française a présenté à la Commission l'alternative de considérer tant les forces constitutionnalistes que les forces conventionnistes, soit toutes deux comme forces d'un Gouvernement *de facto* (article III, *sub* 1), soit les premières comme forces révolutionnaires, qui, à la suite de leur triomphe, ont établi un Gouvernement *de jure* ou *de facto*, les dernières comme forces révolutionnaires qui étaient opposées aux premières (articles III, *sub* 2). De son côté, l'agence mexicaine a donné à la Commission

le choix entre les deux classements suivants, à savoir de faire rentrer les forces constitutionnalistes, ou bien dans la catégorie de forces d'un Gouvernement *de facto* (article III, *sub* 1), ou bien dans celle de forces révolutionnaires, qui, à la suite de leur triomphe, ont établi un Gouvernement *de facto* ou *de jure* (article III, *sub* 2), en reléguant, dans l'une et dans l'autre hypothèse, les forces conventionnistes au numéro 5) de l'article III, comprenant entre autres des soulèvements ou des insurrections autres que celles indiquées aux numéros précédents du même article. Je n'insiste donc plus, dans cette sentence, sur les interprétations générales que je viens de donner ci-dessus *sub b*), 2. et 3. du § 51 relativement à la portée des termes "Gouvernement *de facto*" et "Gouvernement *de jure*" pour me borner dans la suite à amplifier un peu mes conclusions formulées *sub b)*, 1., 4. et 5.

53. — Ce faisant, je commence par quelques explications relatives à ma conclusion *sub b)*, 4. concernant le sens du terme "forces révolutionnaires" figurant à l'alinéa 2) de l'article III de la convention des réclamations.

Ainsi que je l'ai fait observer ci-dessus (§ 51) la doctrine et la pratique du droit international n'attachent point au mot "révolution" un sens bien déterminé. Si les auteurs et les tribunaux internationaux tâchent de classer un peu les différents mouvements qui peuvent mettre en péril l'ordre public dans un Etat, tels que: émeutes, troubles, désordres, soulèvements, séditions, insurrections, révoltes, rébellions, révolutions, guerres civiles, guerres intestines, etc., et leurs équivalents également nombreux en d'autres langues, ou bien ils ne mentionnent pas du tout spécialement les révolutions, ou bien ils ne font pas de distinction nette entre celles-ci et les autres troubles, ni entre ces derniers entre eux, pour se borner à la remarque générale que tous ces mouvements forment, pour ainsi dire, une échelle de désordres, ascendante selon leur caractère plus ou moins grave pour l'ordre public.

Naturellement, il ne peut être question de passer ici en revue toute la littérature et toute la jurisprudence arbitrale relatives à la matière en discussion; aussi, mes citations doivent-elles nécessairement se borner à un nombre très restreint d'ouvrages et de sentences.

Un des auteurs qui traitent le plus amplement des nuances de terminologie en cette matière est William Beach Lawrence dans sa note 171, aux pages 522 et suivantes de sa 2e édition du fameux ouvrage de Henry Wheaton, *Elements of international law* (Boston, 1863): si l'on consulte cette note, on verra que cet auteur ne fait pas même mention expresse des révolutions et qu'il distingue seulement entre émotion populaire, sédition, soulèvement, guerre civile et rébellion, qu'il tâche de définir tous le mieux possible.

Le Dr Karl Strupp, dans sa monographie sur *Das völkerrechtliche Delikt*, dans *Handbuch des Völkerrechts, Dritter Band, Erste Abteilung a*, p. 97, note 1), dit, à propos de son exposé relatif à la responsabilité de l'Etat pour dommages causés à des ressortissants étrangers par le fait de troubles, d'émeutes ou de guerres civiles (Tumulten, Aufruhr, Bürgerkrieg), que les désordres intérieurs (innere Unruhen) "abgestuft behandelt werden" (sont généralement traités par gradation), comme émeute, insurrection, guerre civile (Aufruhr, Aufstand, Bürgerkrieg), mais que, dans cette matière, la distinction n'a aucune importance. D'autre part, dans le § 13, *sub* II, consacré à la responsabilité de l'Etat des actes d'un Gouvernement *de facto* (p. 89 et ss.) il parle indifféremment de "siegreiche Revolutionäre" (révolutionnaires victorieux) et de "siegreiche Insurgenten" (insurgés victorieux).

Edwin M. Borchard, dans son ouvrage sur *The diplomatic protection of citizens abroad*, dit à la page 228: "The question of terminology need not detain us long. Publicists have distinguished between sedition, insurrection and civil war;

but for present purposes these may be regarded as different degrees of a political uprising of part of a civilized society against the lawfully constituted authorities", et ensuite il traite, sous l'en-tête général de "Civil war injuries", du cas d'une "successful revolution" (§ 96), estimant aussi possible, évidemment, une "unsuccessful revolution".

Il n'en est pas autrement dans la monographie de Dionisio Anzilotti, *La responsabilité internationale des Etats à raison des dommages souffert par des étrangers*, p. 47 et ss., qui ne fait mention que d'émeutes et de guerres civiles, et dans celle de Antoine Rougier, *Les guerres civiles et le droit des gens*, qui tâche. il est vrai, de classer les désordres en trois groupes: émeutes, insurrections et guerres civiles, d'après leur gravité, mais qui en admet le caractère incertain, et dont je ne cite ici que les passages suivants: "Toutes nos *révolutions* (françaises) ne furent que des *émeutes*... L'émeute, lorsqu'elle provoque ainsi un changement de régime, est dite révolutionnaire; elle échappe naturellement à toute pénalité et est même glorifiée par les partisans du régime nouveau" (p. 36); et "Le gouvernement *insurrectionnel victorieux* ne pourra donc pas annuler les conventions internationales conclues par son rival... Les emprunts contractés par le gouvernement légal, notamment, sont annulables, exactement comme ceux contractés par les *rebelles*" (p. 545). Et ainsi de suite.

Particulièrement riche est la terminologie dont se sert, dans un article dans le *American Journal of International law*, t. VIII, p. 802 et ss., l'auteur Julius Goebel Jr., traitant de *The international responsibility of States for injuries sustained by aliens on account of mob violence, insurrections and civil wars;* il use sans distinction de toutes sortes d'expressions, telles que civil wars, insurrections, revolutions, rebellions, civil uprisings, revolutionary upheavals, internal strifes, etc. A la page 818, il écrit: "In case the *insurgent* government should become the *de jure* government (c'est-à-dire, dans le cas d'une "successful *revolution*"), the responsibility for acts of *rebels* is clear."

Ce ne sont, parmi des centaines de citations disponibles, que quelques exemples isolés que je viens d'alléguer, pour appuyer mon opinion que la thèse, suivant laquelle le mot "révolution" aurait, en droit international, un sens bien déterminé, nettement distinct de tous les autres termes en circulation, notamment de "insurrection", est sans fondement. Et il n'est pas plus exact que la convention des réclamations fasse une distinction nette entre une "révolution" et une "insurrection", attendu que, après avoir mentionné à l'article III, *sub* 2) et 3), deux groupes de "forces révolutionnaires", elle fait mention, *sub* 5), de "forces insurrectionnelles autres que celles qui sont indiquées (antérieurement)", en attachant ainsi au terme "insurrection" un sens plus ample, comprenant aussi la révolution. Il en est de même, d'ailleurs, dans le décret du Président Obregón du 29 juillet 1924, qui, *sub* VI, énumère "fuerzas insurrectas distintas de las anteriores".

54. — Est également dépourvue de tout fondement la thèse d'après laquelle par "forces révolutionnaires" ne sauraient être désignées que des forces qui ont coopéré à un mouvement révolutionnaire victorieux. Il me faut bien insister sur quelques-uns de ces points parce que mon honorable collègue mexicain a, déjà dans son opinion personnelle sur les différentes questions de droit soulevées à propos des cas de "Santa Isabel", énoncé quelques assertions catégoriques sur le sens du terme "révolution", qui, si elles ne sont pas démenties, peuvent laisser l'impression qu'elles sont fondées, bien que, en réalité, elles manquent de toute base solide. S'appuyant sur deux définitions de dictionnaires, mon honorable collègue formule la conclusion suivante (p. 74 de sa réponse à l'interrogatoire du premier Président de la Commission spéciale des réclamations avec les Etats-Unis): "Gramaticalmente, pues, una revolución

tiene dos caracteres: 1. El cambio fundamental de la organización política del gobierno o de la constitución. 2. Que el *resultado de esa revolución* sea que un gobierno sea substituido por otro". Je ne puis m'empêcher de souligner dans cette thèse quelques mots qui démontrent de toute évidence que, dans sa tentative de donner une définition bien tranchée d'une "révolution", mon honorable collègue a déjà échoué sur l'usage commun du mot "révolution", avant même d'avoir terminé l'énoncé de sa définition. Car d'après la définition, une "révolution" dans le sens *a* doit avoir eu certains résultats pour être une "révolution" dans le sens *b*, et si la révolution dans le sens *a* ne comporte pas ce résultat, "esa revolución" n'est, selon la définition elle-même, pas du tout "une révolution" dans le sens *b* [1]. Si je me vois forcé de faire cette remarque, c'est dans le seul but de démontrer que même mon honorable collègue mexicain, dans sa définition d'importance fondamentale pour son argumentation, n'a pas réussi à se dégager de l'usage commun du mot, qui, loin d'accentuer *l'issue* du mouvement révolutionnaire, en a plutôt en vue le *but final*, abstraction faite du résultat. C'est pourquoi une "révolution" peut très bien, et a souvent fini par échouer; c'est pourquoi on est parfaitement autorisé à dire qu'une "révolution" a éclaté, bien du temps avant qu'on ne puisse prédire avec la moindre certitude, si elle aura ou non cause gagnée; c'est pourquoi les auteurs sont d'accord pour distinguer entre "successful" et "unsuccessful revolutions". Le terme "révolution" est, par suite, équivalent tantôt à un mouvement ayant eu pour but un changement fondamental de la constitution du pays ou le renversement d'un Gouvernement déterminé, et ayant effectivement atteint ce but, tantôt à un mouvement du même caractère, abstraction faite du résultat final; mais c'est toujours le but, et non le résultat final, sur lequel tombe l'accent. Et quand bien même il faudrait dire, avec mon honorable collègue mexicain, que, seule, est une véritable "révolution" celle qui atteint le but que ses initiateurs se sont proposé, cela n'impliquerait aucunement que, seul, ce soit un "mouvement révolutionnaire", ni que seules, ce soient des "forces révolutionnaires", celui ou celles qui auraient réussi à en venir à leurs fins. Au point de vue grammatical, on serait, même dans cette hypothèse, parfaitement justifié à dire que, sont des "forces révolutionnaires", des forces qui auront coopéré à un mouvement ayant comme but final le renversement de la constitution ou du Gouvernement existant [2].

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[1] Je ne comprends pas exactement ce qu'a voulu dire mon honorable collègue. Pris au pied de la lettre, les deux "caractères" d'une révolution semblent se confondre: le changement fondamental de l'organisation politique du gouvernement ou de la constitution se produira-t-il jamais sans la substitution d'un gouvernement à un autre?

Si je me hasarde à lui proposer un amendement à sa définition, c'est pour éclaircir que vraisemblablement cette définition veut dire que:

"Gramaticalmente una revolución tiene dos caracteres: 1. *Que los iniciadores del movimiento tengan el objeto de conseguir* un cambio fundamental de la organización política del gobierno o de la Constitución; 2. Que el resultado *de este movimiento* sea que un gobierno sea substituido por otro."

D'ailleurs, il est bien curieux de voir que la définition est immédiatement suivie d'une citation de Halleck, "(llamando) guerras de revolución a las que *tienen por objeto* (je souligne) obtener la libertad de un estado o de una de sus fracciones".

[2] Pour appuyer cette conclusion, s'il est encore nécessaire, par quelques citations empruntées à la jurisprudence arbitrale, je me réfère notamment à nombre de sentences rendues par les commissions mixtes instituées à la suite de la période révolutionnaire au Venezuela (*Venezuelan arbitrations of 1903, Sen. Doc. 316 58th Congr., 2nd session*, par Ralston and Sherman Doyle, Washington, 1904), et qui font constamment mention de "successful and unsuccessful revolution(ist)s" (*loco cit.*, p. 458, 489, 810), "acts of a revolution becoming successful" et "successful revolu-

Ce qui, toutefois, est le plus curieux de tout dans la définition d'une "révolution", donnée par mon honorable collègue mexicain et envisagée à la lueur de l'ensemble des appréciations officielles des événements de 1913 et des années suivantes, c'est que, en appliquant la définition aux événements, il faut nécessairement arriver à la conclusion que la Grande Révolution constitutionnaliste n'a pas du tout été une révolution. En effet, elle n'a aucunement poursuivi le but d'un "changement fondamental de l'organisation politique du Gouvernement", ayant été, au contraire, aux termes mêmes — par exemple — du décret de Monclova, un mouvement populaire tendant à "la restauración del orden constitucional", temporairement interrompu seulement, par le coup d'Etat de l'usurpateur Victoriano Huerta. Par conséquent, le coup d'Etat de ce dernier n'aurait pas été une révolution, parce qu'elle n'a constitué qu'une usurpation temporaire sans résultat durable; le mouvement constitutionnaliste ne l'aurait pas été, parce qu'il n'a pas poursuivi le but d'un renversement, mais, bien au contraire, celui d'une restauration de l'ordre constitutionnel; et le mouvement conventionniste ne l'aurait pas été, parce que sa cause n'a pas été couronnée de succès.

C'est pourquoi, au cours des débats oraux, l'agence mexicaine, tout en persistant à nier toute existence réelle *de facto*, légale ou illégale, au Gouvernement "usurpateur" de Victoriano Huerta, contre lequel la révolution constitutionnaliste peut être censée avoir éclaté, s'est efforcée de sauver d'une autre façon la qualification de "révolution" donnée toujours et avec l'assentiment général au mouvement constitutionnaliste. En effet, selon elle, doit être qualifié comme telle tout soulèvement armé populaire, tendant soit à renverser, *soit à maintenir* l'ordre constitutionnel, dans le sens de l'article 128 de la Constitution de 1857 et qui a été couronné de succès. Sans insister sur l'objection qu'alors le sens grammatical du terme "révolution" serait violé, à moins que ledit soulèvement "à l'appui de l'ordre constitutionnel" ne soit considéré comme s'étant dirigé tout de même contre un adversaire réel, *de facto*, cette interprétation comporterait de nouveau l'objection que, si le mouvement carranciste eût échoué et eût été refoulé par la force des armes, la "révolution" commencée en vertu dudit article 128, eût paru après coup n'avoir pas été du tout une révolution et l'"usurpateur" Huerta eût dû être reconnu après coup comme révolutionnaire.

Et, enfin, s'il n'était loisible d'associer le terme "révolution" qu'à un mouvement révolutionnaire ayant eu succès, ne faudrait-il pas alors également mettre en ligne de compte le fait que le chef Carranza lui-même a été renversé, après son triomphe, par une nouvelle "révolution", organisée par ses anciens collaborateurs, en combinaison avec ses anciens adversaires conventionnistes jamais domptés, et que le triomphe final n'a pas été remporté par le carrancisme, mais par un constitutionnalisme composé de différents éléments ci-avant carrancistes, renforcés par les forces de l'ancienne Convention?

55. — Mais, après tout, ces recherches grammaticales sans espoir poursuivent, à leur tour, un but, un peu caché, il est vrai, mais qui se révèle bientôt à celui qui tâche de pénétrer dans la véritable portée de l'argumentation. Et

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tionary armies" (*loco cit.*, 7), "services rendered in support of an unsuccessful revolution" (p. 145), etc. Et à la page 668: "The "civil war" in Venezuela, in which the revolutionary troops have never been recognized as belligerents, and the "insurrectional events" are nothing more nor less than the revolution." Quelquefois les troupes qui ont combattu aux côtés d'un chef révolutionnaire qui a dû quitter la partie, sont indiquées tout naturellement par les mots "revolutionary troops" (p. 686), précisément équivalents au terme "forces révolutionnaires", figurant à l'article III de la convention franco-mexicaine et des articles correspondants des autres conventions analogues.

alors, il faut dire d'avance que, pas plus que dans mainte "révolution", le but poursuivi ne peut être atteint. Car quelle est la tendance apparente de ce tour de force grammatical? Celle de lier, au moyen de paraphrases de dictionnaires, l'énumération contenue à l'article III de la convention des réclamations, à la thèse prévalant dans la doctrine et la pratique du droit des gens, et à laquelle j'ai déjà fait allusion ci-dessus (§ 11), à savoir que, en général, un Etat qui a traversé l'épreuve d'un mouvement révolutionnaire, ne peut être réputé responsable des actes juridiques et des actes illégaux des révolutionnaires que si ledit mouvement a fini par avoir le dessus. Pour attester cette thèse, je ne cite ici que quelques passages d'auteurs:

Borchard, *The diplomatic protection of citizens abroad*, p. 241: "A successful revolution stands on an entirely different basis. The government created through its efforts is liable for the acts of the revolutionists as well as for those of the titular government it has replaced. Its acts are considered as at least those of a general *de facto* government, for which the state is liable from the beginning of the revolution, on the theory that the revolution represented *ab initio* a changing national will, crystallizing in the final successful result. Thus the government created through a successful revolution becomes liable for all services rendered to the revolutionists. The unlawful acts of successful revolutionists render the government equally liable. The successful revolutionists appear to be bound from the beginning of the revolution by the stipulations of national treaties, for the violation of which they will be held liable as successors to the titular government."

Strupp, *Das völkerrechtliche Delikt*, p. 92: "Wenn — was unzweifelhaft feststeht — die Staaten ganz allgemein haftbar gemacht werden für völkerrechtswidrige Handlungen der siegreichen Insurgenten vom Augenblick der Revolution an...".

J. L. Kunz dans *Wörterbuch des Völkerrechts und der Diplomatie*, voir "*Staatsgewalt de facto*", t. II, p. 605 et ss., notamment p. 614: "Gelingt es aber der lokalen de facto-Regierung, die de jure-Regierung im ganzen Staate vollig zu verdrängen, dann wird sie eben von diesem Zeitpunkt an allgemeine de facto-Regierung und es gilt bezüglich der Gültigkeit ihrer Akte, bezüglich der Verbindlichkeiten der nun verdrängten de jure-Regierung, — et précisément le même doit être dit, en ce qui concerne la responsabilité de délits internationaux perpétrés par le gouvernement révolutionnaire avant son entrée au pouvoir, — der "transmission de responsabilité", das früher bezüglich der allgemeinen de facto-Regierung Gesagte", c'est-à-dire que l'Etat est obligé de reconnaître les actes des révolutionnaires et d'en répondre après leur victoire, avec effet rétroactif jusqu'au début de la révolution [1].

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[1] D'ailleurs, il ne manque pas d'auteurs qui affirment la responsabilité de l'Etat pour les actes de tous les insurgés. Voir par exemple A. Rougier, *Les guerres civiles et le droit des gens*, p. 476-478, qui n'admet l'irresponsabilité de l'Etat que dans le seul cas de reconnaissance de belligérance par le Gouvernement légal. En effet, il argumente comme suit:

"On a vivement discuté ce dernier point (c'est-à-dire: la responsabilité de l'Etat des faits délictueux, commis par les insurgés et leurs agents). La responsabilité des actes des insurgés, a t-on dit, ne doit pas peser sur le Gouvernement. Les faits délictueux ont été commis par des individus entièrement étrangers à son autorité, sur lesquels il n'a ni possibilité de contrôle, ni moyens d'action. Tout ce qu'on peut demander à l'Etat, c'est de les punir.

Raisonner ainsi, c'est oublier que l'Etat peut, quand il le veut, se décharger de cette responsabilité en reconnaissant les insurgés comme belligérants. S'il ne le fait pas, c'est qu'il considère toujours les révoltés comme ses ressortissants, qu'il

Comp. aussi différentes sentences rendues par les commissions mixtes de réclamations instituées à la suite de la période révolutionnaire au Venezuela: *Venezuelan arbitrations of 1903. (Ralston and Sherman Doyle), Senate Document 316, 58th Congress, 2nd session,* Washington, 1904, p. 7, 17, 145, 458, 489, 810, ainsi que les §§ 4 et 5 de la sentence de la Commission générale mexicano-américaine de 1923, dans l'affaire de la United Dredging Company (dossier No 483). (*Claims Commission United States and Mexico. Opinions of Commissioners, February 4, 1926, to July 23, 1927,* p. 395 et 396.)

Cette thèse de la responsabilité juridique de l'Etat des actes de révolutionnaires victorieux trouverait un appui particulier dans le droit public du Mexique lui-même, si devait être reconnue comme correcte la thèse soutenue à plusieurs reprises et avec certaine emphase par l'agence mexicaine, à savoir que ledit droit admet la révolution comme institution constitutionnelle. En effet, dans ce cas, les actes des organes d'une révolution (victorieuse) au Mexique devraient être considérés, d'après le dit droit constitutionnel mexicain lui-même, comme engageant directement la responsabilité internationale de la Fédération, sur le même pied et au même titre que ceux commis par les organes réguliers en temps normaux. Je mets, toutefois, en doute que l'agence mexicaine ait pesé toutes les conséquences de sa thèse dangereuse, que, d'ailleurs, je considère personnellement comme si carrément contraire aux idées fondamentales même de tout droit constitutionnel, qu'il m'est impossible de l'adopter.

56. — Si donc l'arbitrage actuel était un arbitrage basé sur les principes généraux du droit international, et que la Commission franco-mexicaine dût juger les réclamations à ce seul point de vue, il se pourrait très bien qu'il lui fallût rejeter en bloc toutes les réclamations qui se basent sur des actes illégaux commis par des forces opposées à l'armée constitutionnaliste qui a fini par remporter la victoire dans la guerre civile.

Cependant, l'arbitrage actuel ne présente pas les traits supposés ci-dessus; bien au contraire, les Commissaires ont la stricte obligation de ne pas juger les réclamations au point de vue des principes généraux du droit international, mais à celui de l'équité, défini dans la convention elle-même et paraphrasé plus amplement dans une partie antérieure de cette sentence (§§ 10-12). Dans ces conditions, la doctrine du droit des gens affirmée par les quelques citations ci-dessus, ne peut profiter au Mexique, quelque respect que je ressente pour les efforts suprêmes faits par l'agence mexicaine, afin de détourner de son pays une responsabilité financière d'actes perpétrés par des forces et administrations révolutionnaires qui, par l'issue de la lutte, se sont révélées comme n'ayant pas été suffisamment appuyées par le sentiment général du pays, et qui, par conséquent, pour elle et suivant son appréciation politique et morale, n'ont été que des "gobiernos espúreos" et des révolutionnaires qui ont trahi la grande cause nationale. Si je regrette vivement, envers l'agence mexicaine, de devoir imposer tout de même silence à mon sentiment de sympathie pour sa répugnance respectable à voir sa patrie chargée du fardeau d'une responsabilité financière pour des faits commis par des politiciens, des généraux et des troupes qu'elle ne peut considérer, en conscience, que comme des infidèles, c'est que ma propre conscience et mon sentiment profond de la grande responsabilité qui m'incombe,

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prétend avoir autorité sur eux comme sur les autres citoyens: la logique la plus élémentaire veut alors qu'il accepte la responsabilité de leurs actes."

Je regrette de ne pas être accessible à cette "logique la plus élémentaire" et d'incliner à la doctrine exposée dans le texte, au moins en ce qui regarde le droit international positif, tout en accordant que *de jure constituendo* de puissants motifs pratiques peuvent militer en faveur de la doctrine opposée.

en présence des opinions contraires de mes deux collègues français et mexicain, m'interdisent d'admettre le bien-fondé de la thèse mexicaine relative à cette controverse centrale et fondamentale sur la portée de la convention, et que, heureusement, le Gouvernement du Mexique lui-même, en la personne de feu le Général Obregón, m'a aplani le chemin, par son décret du 29 juillet 1924, qui m'a rendu définitivement impossible de repousser la responsabilité du Mexique des actes des forces conventionnistes, laquelle, d'ailleurs, je me fusse cru obligé d'admettre, quand bien même ledit décret ne me l'eût pas facilité.

Il est bien curieux de constater que, pendant toute la durée des discussions orales et détaillées et si approfondies, n'a joué qu'un rôle très modeste l'article 11, alinéa 3, du traité franco-mexican d'amitié, de commerce et de navigation, en date du 27 novembre 1886 (De Clercq, *Recueil des traités de la France*, t. XVII, p. 280 et ss.; de Martens, *Nouveau Recueil général de Traités*, 2e série, t. XV, p. 840 et ss.), dont voici la teneur:

"Il est en outre convenu entre les Parties contractantes, que leurs gouvernements respectifs, excepté les cas dans lesquels il y aura faute ou manque de surveillance de la part des autorités du pays ou de ses agents [1], ne se rendront pas réciproquement responsables pour les dommages, oppressions ou exactions que les nationaux de l'une viendraient à subir sur le territoire de l'autre en temps d'insurrection ou de guerre civile de la part des insurgés..."

Cette disposition conventionnelle peut être conçue de deux façons différentes: ou bien comme reconnaissant comme principe de droit international coutumier la thèse de l'irresponsabilité, ou bien comme impliquant, sinon une dérogation au principe contraire, et censé acquis, de la responsabilité, au moins une élimination expresse du point controversé. Même en admettant comme correcte la première des deux interprétations possibles, comme étant la plus favorable au Mexique, on ne peut pas ne pas se rendre compte que la disposition de l'article 11 précité n'exclut la responsabilité que pour les dommages que les nationaux de l'un viendraient à subir sur les territoires de l'autre *de la part des insurgés*, et qu'elle ne stipule donc rien au sujet des dommages qui ont une autre origine. Ne tombent donc point sous le coup de l'article 11, d'abord les dommages causés par les troupes gouvernementales pendant leur lutte contre les insurgés. Mais étant donné que le Gouvernement mexicain est d'avis que le droit international fait une distinction très nette entre les "insurgés" et les "révolutionnaires" et que ces deux groupes constituent des catégories bien distinctes, il faut conclure que l'article 11 ne couvre pas non plus, de l'avis du Mexique, les dommages causés par des troupes révolutionnaires (victorieuses).

Si le principe de l'irresponsabilité ne se trouve donc consacré par l'article 11 du traité franco-mexicain que pour les dommages causés par les insurgés, il est parfaitement loisible d'en déduire que, dans l'esprit de ses auteurs, pour les autres dommages, notamment pour ceux causés par les forces du Gouvernement, et tout au moins en ce qui concerne le Mexique, également pour ceux causés par des troupes révolutionnaires (victorieuses), le principe de la responsabilité est resté intact. Si cela est réellement le cas, la thèse mexicaine, consistant à dire que l'article III de la convention des réclamations ne peut avoir en vue que les dommages causés par les Gouvernements légitimes et les révolutionnaires victorieux, se révèle comme doublement insoutenable. Car dans ce cas sa thèse reviendrait à dire que le Mexique n'aurait reconnu, dans la convention des réclamations de 1924, que comme une obligation morale ou comme

[1] Autre argument en faveur de ma thèse qu'il est absolument erroné de vouloir qualifier de gratuites toutes les indemnités énumérées à l'article III de la convention des réclamations. Les indemnités visées à l'alinéa 5) du dit article sont précisément identiques à celles que l'article 11, alinéa 3, du traité de 1886 reconnaît comme obligatoires.

une promesse gratuite, et que la France aurait accepté comme telle, une obligation ou une promesse, qui a été reconnue déjà par le traité de 1886 comme étant sanctionnée par le droit international. Ceci est inadmissible au point de vue de la logique, et est, en outre, incompatible avec l'esprit évident de la convention des réclamations, dans laquelle le Gouvernement du Mexique, selon son propre aveu *(La cuestión internacional mexicano-americana durante el Gobierno del Gral don Alvaro Obregón*, p. 39) et de sa propre initiative, a inséré la formule relative à la base équitable du présent arbitrage, dans le but exprès de résoudre les réclamations "con un simple espíritu de equidad, — *criterio éste más amplio y favorable a los reclamantes*".

Mais même si la conclusion *a contrario* du texte de l'article 11 du traité de 1886 allait trop loin, à savoir que pour les dommages causés par les troupes gouvernementales et révolutionnaires (victorieuses) le principe de la responsabilité est resté intact, et qu'il fût seulement permis d'en tirer la conclusion que la question de la responsabilité pour ces deux groupes de dommages a été laissée en suspens, il s'ensuivrait pourtant une déduction très importante pour l'interprétation de l'article II de la convention des réclamations, à savoir que ledit article ne peut absolument pas avoir la tendance que lui attribue l'agence mexicaine, de qualifier de gratuites toutes les promesses contenues à l'article III, mais que, bien au contraire et à la lueur de l'article 11 du traité de 1886, la question juridique de la responsabilité est, une fois de plus, laissée indécise, — déduction à laquelle j'étais déjà arrivé par des voies tout autres.

C. *Historique des promesses d'indemnisation*

57. — Pour motiver ma décision, d'importance capitale pour l'application de la convention des réclamations, je ne veux pas toutefois me borner aux observations précédentes, basées sur le sens des termes employés et sur des considérations juridiques d'ordre général, et détachées en quelque sorte de la genèse des dispositions conventionnelles et de leur fond politique. C'est pourquoi je me vois obligé de retracer encore dans les pages suivantes l'historique des promesses d'indemnisation, tel qu'il résulte du résumé schématique que j'en ai fait dans les annexes I et II de cette sentence.

Si l'on passe en revue les différentes forces que les Gouvernements successifs du Mexique ont eues en vue dans les promesses réitérées qu'ils ont faites aux Gouvernements étrangers, au cours et à la suite de la "dizaine tragique" d'années de guerres civiles dont la Convention des réclamations s'occupe, on ne peut pas ne pas se rendre compte que ces forces n'ont pas toujours été les mêmes et que l'évolution des événements est successivement venue, tantôt restreindre, tantôt étendre l'ensemble des forces dont les actes donneraient lieu à indemnité.

Dans *la loi du 31 mai 1911*, la première loi sur les réclamations pour dommages révolutionnaires, il ne pouvait naturellement être question que des dommages causés, soit par les troupes du Gouvernement du Président Porfirio Díaz, soit par celles de la révolution suivant le plan de San Luis Potosí du 5 août 1910.

Le décret de Monclova du 10 mai 1913 avait en vue ces mêmes dommages, plus — en faveur des seuls étrangers, qui allaient occuper par cela une situation juridique privilégiée — les dommages soufferts par le fait de forces révolutionnaires ou de groupes armés entre le 31 mai 1911 (date de la première loi sur les réclamations, promulguée quelques jours seulement après l'entrée en fonctions comme Président intérimaire de la République, après la démission du Président Porfirio Díaz, du Secrétaire des relations extérieures Francisco de la Barra, en vertu du décret du 25 mai 1911, *Diario Oficial* du 5 juin 1911, t. CXIV, No 31)

et le 19 février 1913 (date du coup d'Etat de Victoriano Huerta), ainsi que, en faveur des nationaux et des étrangers tous deux, "los daños que hayan sufrido y que sigan sufriendo durante la presente lucha, o sea desde el 19 de febrero del corriente año (1913), hasta la restauración del orden constitucional". Etant donné que, à ce moment-là, le schisme révolutionnaire n'existait pas encore, le dit décret ne peut donner aucun indice sur les intentions du Premier Chef relatives aux dommages causés par des forces qui ne se soustrairaient que postérieurement à son autorité. Tout de même, les termes tout à fait généraux de l'article 2 du décret permettent la conclusion que le Premier Chef a voulu promettre une réparation pécuniaire à tous ceux qui avaient déjà été, ou seraient encore à l'avenir, victimes de la lutte entre le Gouvernement de Victoriano Huerta et l'Armée constitutionnaliste sous son commandement suprême, indépendamment de la question de savoir par lequel de ces deux partis en lutte les dommages leur avaient été ou seraient encore infligés, tout comme cela avait été le cas de la loi de 1911, qui, elle aussi, regardait les dommages causés par les forces de l'un et de l'autre des deux partis opposés. Aussi, la lettre du 29 septembre 1914, par laquelle, en sa qualité de Secrétaire des relations extérieures du Gouvernement constitutionnaliste, après la défaite de Victoriano Huerta, mais encore avant le schisme révolutionnaire produit par la Convention, M. Fabela transmit entre autres au Chargé d'Affaires de la République française à Mexico, une copie dudit décret de Monclova, ne contient-elle ni la moindre allusion à une restriction des promesses de dédommagement aux seuls dommages causés par les adversaires victorieux du gouvernement usurpateur de Victoriano Huerta, en se référant, par contre, en termes très généraux, "a los extranjeros que hayan sufrido perjuicios en sus intereses durante las revoluciones habidas desde 1910, hasta el presente año".

Au cours des débats oraux, l'agence mexicaine a nié à plusieurs reprises, que telle puisse avoir été l'intention du décret de Monclova et des promesses successives faites aux Gouvernements étrangers, et affirmé constamment que le Premier Chef ne peut jamais avoir eu en vue que les dommages causés ou encore à causer par ses propres forces, et nullement ceux imputables aux forces de l'adversaire "usurpateur". Le texte du décret, toutefois, ne présente pas le moindre point de contact pour cette thèse et si, comme je le ferai observer ci-après, il est vrai qu'en 1917 le Président Carranza paraît avoir restreint dans sa loi sur les réclamations, les indemnités, promises par le Premier Chef Carranza, il n'en est pas moins vrai que, après la chute du régime carranciste, le Gouvernement successeur s'est de nouveau joint, dans ses invitations cordiales aux Gouvernements étrangers, aux promesses primitives faites par le décret de Monclova et la lettre de M. Fabela du 29 septembre 1914 (voir *infra*, § 60).

58. — D'ailleurs parallèlement au décret de Monclova édicté par son adversaire, Venustiano Carranza, le Gouvernement du Président Victoriano Huerta avait fait, lui, des promesses semblables aux représentants des Puissances étrangères à Mexico, en ce qui concerne la France, par une lettre du Secrétaire des relations extérieures, M. Carlos Pereyra, en date du 24 juillet 1913, adressée au Ministre de France, M. Paul Lefaivre, et qui, elle aussi, parlait en termes tout à fait généraux, de "reclamaciones por daños que ha originado la revolución". Je ne veux pas entrer, en ce moment, dans un examen de la question, délicate et difficile, de savoir si et jusqu'à quel point une promesse officielle faite par le Gouvernement de Victoriano Huerta aux Puissances étrangères en juillet 1913, c'est-à-dire à une époque où il dominait encore effectivement une grande partie du pays, et où il avait été reconnu par quelques-unes de ces Puissances, lie les Etats-Unis Mexicains, parce qu'une réponse à cette question extrêmement compliquée me ramènerait dans un examen de

la qualification juridique qu'il faut donner à ce gouvernement de courte durée. S'il doit être considéré comme Gouvernement *de jure* — comme quoi il a été reconnu précisément par la France — il n'est pas douteux que ses actes officiels ont engagé la Fédération, quoi qu'en disent les Gouvernements postérieurs du pays. S'il peut seulement être reconnu comme Gouvernement *de facto* général qui pendant quelque temps a régné au Mexique, il n'en est pas autrement, d'après l'opinion dominante qui se trouve exprimée dans la sentence de la Cour Permanente d'arbitrage de La Haye, de 1921, relative à certaines réclamations françaises contre le Pérou, à propos d'actes officiels du dictateur péruvien de Pierola, déclarés nuls par une loi péruvienne postérieure, mais reconnus par ladite Cour comme base valable de certains droits d'étrangers. S'il n'est pas même possible de le reconnaître comme gouvernement *de facto* général, mais qu'il faille le qualifier, soit de gouvernement *de facto* purement local, soit de chef d'un simple mouvement révolutionnaire, la situation de droit pourrait être celle que je viens d'effleurer ci-dessus (§ 55), à propos de la controverse sur la "transmission de responsabilité" dans le cas d'une révolution qui a échoué. Et si, enfin, est correcte la thèse de l'agence mexicaine, selon laquelle le Gouvernement de Huerta n'a été ni Gouvernement *de jure*, ni Gouvernement *de facto* général ou local, ni Gouvernement révolutionnaire et qu'il ne puisse, par conséquent, être considéré que comme usurpateur (la qualité d'usurpateur n'excluant, d'ailleurs, point du tout le caractère de Gouvernement *de facto*), ou comme insurgé ou rebelle (contre qui? contre l'ordre constitutionnel personnifié? ou contre un Gouverneur d'Etat s'étant érigé, de sa propre initiative, en défenseur dudit ordre, mais qui, lui, à ce moment, n'était revêtu d'aucune autorité constitutionnelle? ou contre feu le Président Madero, déjà tombé victime d'un vil assassinat?), il ne saurait être question d'aucune "transmission de responsabilité" dans le domaine international.

La seule raison pour laquelle je tenais à citer la lettre du Ministre des relations extérieures dans le cabinet de Victoriano Huerta, était pour faire ressortir que, quel qu'ait pu être l'antagonisme entre l'"usurpateur" et le "Premier Chef", ils ont été d'accord pour promettre aux Puissances étrangères la réparation des dommages que leurs ressortissants auraient soufferts, ou souffriraient encore, pendant la révolution, sans distinction aucune entre les auteurs desdits dommages, soit carrancistes, soit huertistes.

59. — Suit *la loi des réclamations du 24 novembre 1917*, promulguée après la restauration définitive de l'ordre constitutionnel, à la suite de la défaite infligée par les troupes du Premier Chef aux troupes conventionnistes de toutes nuances. Entré dans le pouvoir constitutionnel suprême de la République, le Premier Chef de l'Armée constitutionnaliste, rebaptisé désormais en Président constitutionnel des Etats-Unis Mexicains, embrasse d'un coup d'œil rétrospectif toute l'histoire de sa grande Révolution, et alors se glisse, dans le projet de dédommagement des victimes des luttes fratricides acharnées, le point de critère politique, qui, au début, lui avait été étranger. Ce ne seront plus, dorénavant, tous les dommages causés par la révolution, mais seulement ceux causés par la Révolution. C'est-à-dire: l'idée fondamentale de 1913 subit un changement considérable: ce ne seront plus tous les dommages causés par la guerre civile que le Mexique réparera, mais les seuls dommages causés par les forces qui ont remporté la victoire dans cette guerre intestine. La Fédération répondra seulement des actes qu'ont commis les partisans de la grande Révolution, sous la direction du "Premier Chef" Carranza, et non de ceux dont pourraient s'être rendus coupables tous ces autres individus inférieurs, qui ne méritent désormais que le nom de "rebelles", par le fait d'avoir été les adversaires du Premier Chef, — qui, à ce moment, certes, ne prévoyait pas encore, que, quelque temps plus tard, son tour viendrait d'être éliminé.

C'est ainsi que le décret-loi du 24 novembre 1917 ne mentionne plus que les dommages causés par des forces révolutionnaires qui méritent cette qualification aux yeux de l'ex-Premier Chef et par les Gouvernements légitimes eux-mêmes dans leur lutte contre les "rebelles", du genre de Victoriano Huerta et des généraux de la Convention. D'ailleurs même ce décret-loi prévoit la reconnaissance comme forces révolutionnaires, de forces qui ne l'ont pas été dans le sens restreint de ce terme. Et la situation ne change en rien sous le coup de *la nouvelle loi des réclamations du 30 août 1919*, sauf que les actes des rebelles donneront lieu, à l'avenir, à indemnités, dans le cas où les autorités légitimes pourraient être accusées à bon droit d'un acte, d'une indulgence ou d'une omission quelconques.

60. — Ce ne fut qu'après la promulgation de cette législation nationale, que, sous une forte pression politique, due à l'état des relations avec les Etats-Unis, le Gouvernement Mexicain prit l'initiative d'un accomplissement définitif de ses promesses antérieures aux Puissances étrangères, et transmit à tous les Gouvernements étrangers intéressés son "*invitation cordiale*" *en date du 12 juillet 1921*. Cette invitation ne dit pas un mot sur la limitation des dommages à réparer à ceux causés par les forces constitutionnalistes; au contraire, elle rétablit les termes généraux de la promesse primitive, en annonçant un règlement "a fin de indemnizar *ex-gratia* a aquellos de (los) nacionales (extranjeros) que hayan sufrido daños por causa de las revoluciones acaecidas en México desde 1910 hasta la fecha". Le Président Carranza avait, entre temps, été assassiné et, après une brève Présidence intérimaire de Adolfo de la Huerta, remplacé dans la Présidence de la République par le Général Obregón, autre chef du grand mouvement révolutionnaire constitutionnaliste.

Or, sous quelle forme cette invitation définitive a-t-elle pris corps dans les conventions des réclamations? *Le premier projet mexicain* fut celui *du 19 novembre 1921*, présenté au Chargé d'affaires des Etats-Unis; dans ce projet, l'énumération des forces dont les actes donneraient lieu à indemnité, ressemblait beaucoup à celle contenue dans la loi nationale, tout en présentant quelques différences notables. En les confrontant, on voit que les énumérations étaient conçues dans les termes suivants (cf. aussi les tableaux synoptiques A et B, contenus dans l'annexe II de cette sentence):

A. *Dans la législation nationale:*	B. *Dans le premier projet de convention:*
I. Forces révolutionnaires ou reconnues comme telles par les Gouvernements légitimes qui se sont établis dans la République à la suite du triomphe de la révolution respective.	1. Forces révolutionnaires qui ont établi, à la suite du triomphe de leur cause, un gouvernement de fait ou de droit. 2. Forces provenant de la désagrégation de celles mentionnées *sub* 1. jusqu'au moment où le Gouvernement de droit a été établi à la suite de la révolution respective.
II. Forces de ces mêmes Gouvernements dans l'exercice de leurs fonctions durant la lutte contre les rebelles.	
III. Forces dépendantes de l'ancienne armée dite fédérale jusqu'à sa dissolution.	3. Forces de l'Armée fédérale dissoute.
IV. (Suit un alinéa sur les brigands ou les rebelles, avec la condition indiquée ci-dessus.)	4. (Suit un alinéa correspondant, se rapportant aux mutineries et aux actes de brigandage.)

Tandis que, par conséquent, la législation nationale ne faisait pas de mention spéciale des forces révolutionnaires en désagrégation, le projet de convention, au contraire, ne disait mot des forces gouvernementales dans leurs opérations contre les rebelles. De ces différences, s'ensuit-il que le Gouvernement mexicain ait voulu faire quelque volte-face de principe? Je ne le crois pas, bien que ce changement continuel des bases de la responsabilité du Mexique ne laisse pas de provoquer certain doute sur la fermeté des projets du Gouvernement mexicain et suscite des difficultés considérables à l'interprète de toutes ces dispositions légales et conventionnelles.

Mais en somme, ce ne sont pas ces différences de détail, à mon avis, et certes pas de principe que fait ressortir une confrontation des deux textes cités ci-dessus, qui sont d'un intérêt spécial pour l'interprétation des intentions ayant présidé à la genèse des conventions des réclamations. Une importance beaucoup plus grande revient aux modifications qui, au cours des conférences de Bucareli entre les délégués américains et mexicains, ont été apportées au texte du projet mexicain primitif. En effet, parmi ces modifications, il y en a deux, qui ont étendu sensiblement l'ensemble des forces dont les actes donneraient lieu à indemnité, à savoir (cf. à ce sujet le tableau synoptique, contenu sous la lettre B dans l'annexe II de cette sentence): 1) l'insertion d'un nouvel alinéa, devenu le premier, se référant aux forces d'un Gouvernement *de jure* ou *de facto*, c'est-à-dire de tout Gouvernement, légitime ou illégitime, qui a régné effectivement au Mexique pendant la période révolutionnaire; et 2) l'adjonction, à l'alinéa sub 1. du texte primitif, maintenant devenu l'alinéa 2, des mots: "ou forces révolutionnaires qui leur étaient opposées".

Le fait de ces deux amplifications simultanées du texte du projet primitif est, par lui-même, très significatif, attendu qu'elles semblent attester que l'on a définitivement abandonné le point de vue politique, indiqué ci-dessus, de ne vouloir reconnaître la responsabilité du Mexique que des actes de Gouvernements considérés comme légitimes par les Gouvernements postérieurs, et des forces révolutionnaires constitutionnalistes, en admettant également dorénavant sa responsabilité d'actes de Gouvernements *de facto*, même illégitimes, et de forces révolutionnaires opposées à l'Armée constitutionnaliste et à son Premier Chef, c'est-à-dire des forces hétérogènes de la Convention. Mais dans ce contexte, c'est particulièrement la seconde amplification du texte primitif qui nous intéresse, parce que, à mon avis, l'addition des mots "ou des forces révolutionnaires qui leur étaient opposées" est d'une importance décisive pour la solution de la controverse relative aux forces de la Convention.

61. — Pour expliquer ces mots ajoutés au texte primitif, d'une façon qui permette d'échapper aux conséquences que comporterait l'interprétation naturelle et primesautière indiquée ci-dessus, on a imaginé deux autres interprétations, dont l'une a été présentée à la Commission par l'agent mexicain, tandis que la paternité de l'autre revient à mon honorable collègue mexicain.

D'après l'explication que l'agent mexicain a prétendu donner des mots "ou des forces révolutionnaires qui leur étaient opposées", "deben considerarse como fuerzas revolucionarias contrarias a otros revolucionarios que establecieron gobiernos *de jure* o *de facto*, es decir, contrarias a las especificadas en la sección 2 que antecede, todas aquellas que hubiesen organizado *una revolución distinta* de la de las fuerzas mencionadas". L'agent mexicain croit que les mots ajoutés au No 2, ont été insérés dans la convention pour embrasser, en termes généraux, les cas de différentes révolutions simultanées, pour le cas où les faits historiques apparaîtraient susceptibles de pareille interprétation. Selon sa construction ingénieuse, toutefois, le fait qu'une partie des forces révolutionnaires qui obéissent à un chef suprême déterminé de la révolution, se sépare

d'avec ce chef et commence à lutter contre lui sous le commandement d'autres chefs, ne saurait être conçu comme l'organisation d'une autre révolution, mais seulement comme un acte d'insubordination militaire.

Or, cette tentative d'interprétation, quelque ingénieuse qu'elle soit, est absolument insoutenable. D'abord, l'agent mexicain doit concéder lui-même que, au Mexique, l'on n'a jamais admis l'existence de deux révolutions distinctes à la fois, de sorte que, dans son interprétation, la fraction en question ne peut trouver application [1]. Cette conclusion se mettrait en contradiction manifeste avec le principe d'interprétation que j'ai cru devoir formuler ci-dessus (§ 50, *sub* 5), et selon lequel l'interprète ne doit pas accepter l'interprétation d'une clause qui en rend l'application impossible, aussi longtemps qu'il y a des interprétations raisonnables qui en assurent la possibilité d'application. Ensuite je n'estime pas exact, au point de vue historique, que dans le cas de la Convention, il se soit agi uniquement d'un antagonisme purement personnel entre quelques chefs militaires, puisque, à la suite de la séparation d'avec le Premier Chef, la Convention a institué, elle aussi, un Gouvernement et que naturellement ce Gouvernement s'est aussi inspiré de motifs politiques, autres que de simples rivalités entre généraux. Au surplus, ce que l'opposition a reproché au Premier Chef, c'est précisément, entre autres, que "nunca había querido redactar ni siquiera un mezquino programa revolucionario" et que, par conséquent, "la revolución caminaba a ciegas, poseída de enorme fuerza, pero incapaz de definir sus propósitos" (José Vasconcelos, *Los últimos cincuenta años*, No 30). Mais quand même l'opposition de la Convention d'Aguascalientes se serait inspirée uniquement de rivalités personnelles entre des chefs militaires, cela ne mettrait pas obstacle à ce que l'action de la Convention soit qualifiée de mouvement révolutionnaire, étant donné que la thèse, selon laquelle il ne peut exister en même temps deux mouvements révolutionnaires se distinguant uniquement par l'antagonisme entre leurs chefs, est tout à fait arbitraire et sans fondement. Dans l'histoire des révolutions, il s'est présenté bien des cas d'insurrections parallèles ou successives qui présentent ledit caractère, témoins par exemple les troubles révolutionnaires qui viennent d'ébranler la République chinoise au cours des dernières années, à la suite, entre autres, de l'antagonisme continuel entre les différents gouverneurs militaires des provinces. Au surplus, s'il était vrai que le fait, par un ou plusieurs chefs révolutionnaires, de refuser l'obéissance à leur chef suprême commun, fasse perdre aux premiers le caractère de révolutionnaires, de sorte qu'il ne s'agirait plus que d'une simple insubordination militaire, ne faudrait-il pas dire alors exactement, ou à plus forte raison, la même chose du cas d'un mouvement révolutionnaire militaire, dirigé non contre un autre chef révolutionnaire, mais contre le Gouvernement légitime du pays? Alors, toutes les révolutions militaires, telles

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[1] D'ailleurs, force m'est de faire observer incidemment, que la thèse défendue par l'agence mexicaine devant la Commission franco-mexicaine n'est pas seulement contraire à celle soutenue par le Commissaire mexicain, mais encore à celle défendue par cette agence devant la Commission américano-mexicaine. En effet, ce qu'on lit à ce sujet à la page 15 de la publication officielle: *Alegato verbal del Lic. Aquiles Elorduy, Agente mexicano, ante la Comisión especial de reclamaciones entre México y Estados Unidos de América (versión taquigráfica). "Casos de Santa Isabel"* (1927), c'est le passage suivant:

"...cuando se interprete la fracción II de la Convención, donde se precisa que es necesario comprobar que el daño ha sido causado por una fuerza militar determinada, sea la revolucionaria que llegó a constituir un Gobierno de facto o de jure *sea la parte de aquella misma fuerza que después se opone a la primera* (je souligne), sea...".

Je me trouve donc en présence de différentes contradictions.

qu'elles se sont produites tant de fois contre le pouvoir légitime, au Portugal, en Grèce, en Turquie et dans bien des républiques latino-américaines, devraient être qualifiées, contrairement à l'usage commun, comme de simples insubordinations militaires. Et il faudrait alors qualifier ainsi ces dernières à plus forte raison, parce que, dans le cas d'une révolution militaire contre le pouvoir constitutionnel, il s'agit d'une insurrection ou insubordination contre les autorités légales du pays, tandis que, dans le cas du mouvement conventionniste au Mexique, il se serait simplement agi d'une insubordination contre un chef qui, lui-même, n'était qu'un révolutionnaire; qui, en tous cas, n'était investi, à ce moment-là, d'aucune autorité constitutionnelle qui lui permît d'exiger légalement des autres une obéissance absolue, et dont l'autorité finale a dépendu, pendant le gouvernement de Victoriano Huerta, uniquement du succès de ses opérations militaires. (Cmp. aussi: José Vasconcelos, *Los últimos cincuenta años*, No 31).

62. — Et que dire de l'autre tentative, cette fois de mon honorable collègue mexicain, d'échapper au coup menaçant des mots finaux de l'alinéa 2) de l'article III? Je rappelle que, si l'agent mexicain ne veut pas considérer les forces conventionnistes comme forces révolutionnaires, pour le motif principal qu'elles n'avaient pas, selon lui, de programme politique distinct et qu'elles étaient de simples troupes "insubordonées", mon honorable collègue leur dénie la qualité de révolutionnaires avant tout pour la raison tout autre, invoquée aussi par l'agence mexicaine, qu'elles n'ont pas eu de succès dans leur entreprise téméraire, un mouvement insurrectionnel empruntant sa qualification de révolutionnaire, non pas à son caractère ou à son programme, mais à son succès final. Dans cet ordre d'idées, on se verrait dans la nécessité de conclure que, si par hasard les forces conventionnistes l'avaient emporté sur leurs adversaires carrancistes, ces derniers eussent été les rebelles et les premières les révolutionnaires. Si, dans ce cas, les Commissions mixtes prévues dans le décret de Monclova eussent pu commencer leurs travaux tout de suite après sa promulgation, ces Commissions se fussent trouvées dans la situation curieuse de devoir, au cours de leurs travaux, changer de jurisprudence, selon le résultat vraisemblable de la guerre civile, ou bien eussent dû différer leurs sentences jusqu'au moment où elles sauraient définitivement quelles forces il leur fallait considérer comme révolutionnaires, les unes ou les autres.

Je ne veux pas entrer plus avant dans cette base théorique de la thèse incriminée, pour me borner ici à examiner encore brièvement l'interprétation que, sur la base indiquée, mon honorable collègue a tâché d'accréditer, afin de parer le coup que l'agence française infligeait au Mexique avec l'arme que lui fournissaient les mots finaux de l'alinéa 2). De l'avis de mon honorable collègue, les dits mots n'auraient d'autre but que de prévoir les cas spéciaux d'une lutte entre deux groupes appartenant à la même force révolutionnaire et reconnaissant le même chef suprême, pour une question accidentelle ou locale. Mais d'abord, est-il vraisemblable que les mots finaux aient été ajoutés au texte pour couvrir rien que des cas tellement spéciaux, et qui, au surplus, étaient déjà entièrement couverts par la clause primitive du texte? Et ensuite, s'il y a lieu de réputer le Mexique responsable des conséquences de luttes éventuelles entre deux groupes de la même révolution pour des causes accidentelles et locales, pour quelle raison faudrait-il nier sa responsabilité des conséquences, beaucoup plus désastreuses, de luttes entre deux groupes de la même révolution pour cause d'antagonisme entre des chefs militaires? Il m'est impossible de trouver une explication raisonnable de cette appréciation différente des deux hypothèses. En outre, si la clause en question n'avait réellement en vue que des combats mutuels pour des motifs accidentels ou locaux, le choix des mots pour

définir ce cas spécial serait fort peu adéquat à l'hypothèse supposée. En effet, dans cette hypothèse, il ne s'agirait pas du tout de deux groupes de forces révolutionnaires, dont l'un aurait établi, à la suite de son triomphe, un Gouvernement *de jure* ou *de facto* et l'autre pas, et il ne serait pas même possible de dire, lequel des deux groupes l'aurait établi, l'un et l'autre faisant partie du même mouvement révolutionnaire victorieux. Mais avant tout, est-il vraisemblable que les délégués américains aient attaché aux dits mots un sens tellement restrictif et si loin recherché, au lieu du sens clair, naturel et simple, que je viens d'indiquer ci-dessus comme le seul raisonnable, particulièrement lorsqu'on considère que cette interprétation artificielle aurait pour résultat de priver les ressortissants américains de tout droit à indemnité pour cause d'actes d'une combinaison révolutionnaire, qui a joué un rôle si important dans la grande guerre civile? On ne saurait guère le croire de négociateurs expérimentés et habitués à des pourparlers diplomatiques. On a dit qu'en effet, les mots finaux du numéro 2) de l'article III ont été insérés sur la demande des représentants américains et qu'ils ont eu en vue des combats accidentels et locaux entre deux groupes constitutionnalistes. Je ne suis pas à même de le contrôler, n'ayant à ma disposition aucune information officielle détaillée sur le cours des pourparlers. Mais même si cela a réellement été le cas, on ne saurait l'expliquer qu'en admettant que la délégation américaine a considéré les Conventionnistes comme étant, déjà à un autre titre, compris dans l'énumération des auteurs de dommages donnant droit à indemnité; aussi, comme il a paru plus tard, la thèse américaine a-t-elle été de considérer Villa comme le chef d'un gouvernement *de facto*, dans le sens du numéro 1) de l'article III.

Dans ces conditions, il ne me reste qu'à rejeter comme invraisemblable et comme contraire au sens naturel et clair des mots finaux de l'alinéa 2), l'interprétation restreinte que tâche d'accréditer mon honorable collègue mexicain, mais qui paralyserait parfaitement une disposition qui, de toute évidence, est destinée à avoir une importance réelle et puissante pour le règlement des réclamations pour cause de dommages révolutionnaires. Le nœud de la difficulté consiste en ce que la politique mexicaine est allée attacher aux mots "révolution" et "révolutionnaires" un sens tout particulier, restreint et idéalisant, qui, quelle que puisse être sa justification au point de vue politique national, est en tout cas absolument étranger aux sens commun et technique des termes et qui, par conséquent, ne saurait être mis à la base de l'interprétation du texte d'une convention internationale.

Au cours des discussions orales, l'agence mexicaine a invoqué plusieurs fois, pour appuyer son argumentation en faveur d'une interprétation aussi restreinte que possible de la convention des réclamations, "l'idéologie révolutionnaire". Tout en respectant cette croyance politique, je ne puis m'empêcher de déclarer ici que des questions d'interprétation de traités internationaux et des points controversés de droit international ne peuvent se résoudre par de pareilles idéologies et que, en outre, tous les arguments sur lesquels je base mon opinion portent à croire que l'idéologie révolutionnaire invoquée par l'agence mexicaine ne se trouve pas incorporée dans la convention des réclamations ni même dans la dernière rédaction de la législation nationale.

Aux observations précédentes, je tiens encore à ajouter, pour finir cette partie de mon argumentation, que, envisagée à la lueur de la logique, toute interprétation, autre que celle que je viens d'indiquer, doit être condamnée. La simple lecture du paragraphe 2) de l'article III suffit à gagner la conviction qu'il fait une distinction très nette entre des forces révolutionnaires victorieuses et des forces révolutionnaires qui ont eu le dessous. Si l'on reconnaissait comme correcte l'interprétation selon laquelle, seules, sont des forces révolutionnaires celles qui l'ont emporté dans une guerre civile, les mots "forces révolution-

naires, qui, à la suite de leur triomphe, ont établi des gouvernements *de jure* ou *de facto*", constitueraient un pléonasme inexcusable et inexplicable. Et si l'on ne veut pas admettre ce pléonasme, il ne reste que la conclusion que les premières forces révolutionnaires figurant au paragraphe 2) sont les révolutionnaires victorieux, et les secondes les groupes révolutionnaires vaincus.

63. — Aussi, quand plus tard, à savoir le 30 juin 1924, un second projet de convention contenant la même clause double de l'article III, *sub* 2), fut soumis au Gouvernement de France, celui-ci n'a-t-il pu attacher à ladite clause, qui présentait une différence considérable avec la clause correspondante du premier projet du 19 mai 1923, que le sens naturel défini ci-dessus, et jamais le sens vide qui lui resterait dans l'interprétation de l'agent mexicain, ni le sens artificiel, illogique et invraisemblable qu'a prétendu lui donner le Commissaire mexicain, — sens l'un et l'autre, qu'il aurait été même très difficile au Gouvernement français de découvrir jamais, sans leur enseignement détaillé.

En effet, la teneur entière de la correspondance diplomatique, postérieure à "l'invitation cordiale" du 12 juillet 1921, n'a eu d'autre tendance que de faire croire au Gouvernement français, et ne permet même aucun doute sur le fait, que le Gouvernement mexicain de 1921 et des années suivantes a réellement voulu indemniser les victimes étrangères des troubles révolutionnaires, indépendamment des conceptions politiques qui semblent avoir prévalu lors de la promulgation de la loi sur les réclamations du 24 novembre 1917, et dont l'agence mexicaine devant la Commission franco-mexicaine s'est de nouveau faite l'interprète. Si l'on en veut des preuves, je me borne aux citations suivantes, qui n'ont pas besoin de commentaire:

Lettre du Secrétaire des Affaires Etrangères du Mexique, M. Aarón Sáenz, au Ministre de France à Mexico, en date du 29 mars 1924:

"En debida contestación me es grato manifestar a Vuestra Excelencia que el Gobierno de México, consecuente con el ofrecimiento que hizo el 15 de julio de 1921, está dispuesto a reanudar las negociaciones para la celebración de una convención que cree una Comisión Mixta de Reclamaciones que conozca de los daños causados a los franceses *durante la revolución*... Respecto, etc..., me permito indicarle que, siendo el deseo del Gobierno Mexicano indemnizar a todas las personas que sufrieron daños *a causa de la revolución*..."

Lettre du même Secrétaire au même Ministre, en date du 3 juillet 1924 (quelques semaines seulement avant le décret du Général Obregón du 29 du même mois):

"Ese fundamento no es otro que el de la sola buena voluntad de México hacia todos los extranjeros que se hallen sobre su territorio, pues en la mayoria de los casos de *daños o pérdidas causadas por las últimas guerras civiles*, México no sería responsable de acuerdo con los principios de Derecho Internacional... El Gobierno Mexicano... reitera desde luego, que la responsabilidad que se ha impuesto de indemnizar a los extranjeros *perjudicados por las guerras civiles* acaecidas en la República, es una responsabilidad únicamente moral, y no basada en el Derecho Internacional [1] ... Desde el principio de la revolución, el Primer Jefe de ella expidió un Decreto fijando la voluntad de México de resarcir a los damnificados por *los daños que les causara la guerra civil*..."

Notamment, l'usage réitéré du terme "guerre(s) civile(s)" qui présuppose deux ou plusieurs forces opposées, démontre, de toute évidence, que l'idée de limiter les indemnités aux dommages causés par une seule des parties dans la

[1] Sur cette thèse, d'ailleurs en contradiction avec la thèse formulée dans la phrase précédente, cmp. §§ 11, 55 et 70 de cette sentence.

guerre civile a été étrangère à l'esprit du Gouvernement du Président Obregón, d'autant plus que l'appel réitéré fait au caractère gratuit des promesses mexicaines, s'explique parfaitement, en ce qui concerne les dommages causés par des révolutions qui ont échoué, mais est d'une valeur beaucoup plus douteuse et en tout cas d'une portée beaucoup plus restreinte, en ce qui concerne les dommages causés par des révolutions "légitimes".

Et quand même on supposerait que le Gouvernement du Général Obregón n'ait pas voulu assumer la responsabilité des dommages causés par les Conventionnistes, la conclusion pratique pour l'interprétation de la convention n'en serait pas différente, étant donné que l'intention intime du contractant doit céder le pas à l'énonciation dans laquelle cette intention, peut-être par erreur, a pris corps.

64. — Si donc l'on se demande laquelle des deux thèses opposées des agences française et mexicaine sur l'identité ou le manque d'identité entre l'énumération contenue dans la loi nationale des réclamations et celle contenue dans la convention des réclamations, est correcte, il me semble que, en ce qui concerne la situation juridique au moment auquel j'en suis venu jusqu'ici dans mon exposé historique, à savoir le 30 juin 1924, l'on ne puisse conclure qu'à la non-identité des deux énumérations, en d'autres termes, au caractère plus ample de l'énumération insérée dans la convention. Ici se révèle combien sont sujettes à caution toutes thèses générales, telles que les deux agences les ont souvent soutenues au cours de leurs exposés écrits et oraux. En effet, l'agent français a assez constamment défendu la thèse de l'identité essentielle des deux énumérations, légale et conventionnelle, tandis que l'agence mexicaine y a constamment opposé une vive résistance: tout de même, quant au moment où nous en sommes arrivés maintenant, dans notre exposé historique, il eût été favorable à l'agent mexicain de soutenir la thèse française, et inversement. Car, appliquer à la situation juridique, créée par la remise officielle du second projet de convention au Ministre de France à Mexico, la thèse de l'identité des deux énumérations, fût revenu à dire que l'adjonction au texte du premier projet des clauses relatives aux Gouvernements *de facto* et aux forces opposées à celles qui ont établi, à la suite de leur triomphe, un Gouvernement *de jure* ou *de facto*, n'eût changé en rien l'idée fondamentale du Gouvernement mexicain de ne vouloir accorder des indemnités que pour les seuls dommages causés par les gouvernements légitimes à ses yeux et par les troupes constitutionnalistes. En détachant consciemment l'énumération de la convention de celle de la loi nationale, l'agence mexicaine s'est, de son propre fait, privée d'un argument en faveur de ladite idée fondamentale. D'ailleurs, ce n'est aucunement mon intention de le combattre avec sa propre thèse, puisque, s'il est vrai que l'agent mexicain a vivement nié toute identité entre les deux énumérations, son Gouvernement a, d'une manière aussi catégorique, soutenu le contraire, en disant dans sa lettre du 3 juillet 1924 au Ministre français, qu'à la suite de l'invitation cordiale de 1921, "para la formación de convenciones creando las Comisiones Mixtas, pero, naturalmente, de acuerdo con las bases fijadas por la misma República Mexicana", les Etats-Unis avaient été les premiers à accepter l'invitation et la convention respective avait été négociée et signée, "sin que en nada se apartara de los principios establecidos por la ley mexicana". Les deux assertions de l'agence mexicaine et de son Gouvernement se contredisent donc carrément et dans ces conditions, je préfère les éliminer toutes deux, pour m'en tenir seulement au texte et à la genèse de la convention. Si j'ai cru tout de même ne pas devoir passer ce point sous silence, c'est pour démontrer le caractère vain de certaines thèses générales défendues au cours des audiences et pour appeler l'attention sur la position curieuse qu'ont prise

le gouvernement et l'agent mexicains, non seulement ce dernier niant ce que le premier avait affirmé, mais encore chacun des deux agents s'appuyant sur une thèse générale qui, à certains égards, était précisément favorable à la partie adverse.

65. — Mais quoi qu'il en soit de la thèse de l'identité des deux énumérations existantes au moment de la présentation du second projet de convention, — thèse que, ainsi que je viens de le motiver, je dois personnellement repousser, — la question a perdu beaucoup de son intérêt depuis *le décret du Président Obregón du 21 juillet 1924*. En effet, dès lors, l'identité des énumérations doit, du moins pour ce qui concerne les forces révolutionnaires, être considérée comme ayant été établie ou rétablie dans le sens indiqué ci-dessus, c'est-à-dire comprendre, l'une et l'autre, les forces conventionnistes de toutes nuances. Car, de deux choses l'une: ou bien, l'énumération de la convention conclue avec les Etats-Unis et du second projet de convention à conclure avec la France était déjà plus ample que l'énumération de la loi, à l'effet d'inclure aussi les forces zapatistes, villistes et autres, et alors le décret du Président Obregón est seulement venu amplifier l'énumération de la loi dans le même sens; ou bien, les énumérations étaient primitivement identiques, au moins d'après la conception mexicaine, mais alors la portée de l'énumération de la convention doit être réputée avoir été amplifiée automatiquement à la suite des conceptions nouvelles incorporées dans ledit décret, en vertu du principe de droit international, suivant lequel un Etat qui reconnaît des indemnités à ses ressortissants pour cause de dommages produits par des troubles, émeutes, insurrections, etc..., est obligé d'en reconnaître de semblables aux étrangers dans son territoire.

Avant d'invoquer encore quelques arguments en faveur de cette conclusion, il me faut faire justice d'une dernière tentative que l'agence mexicaine a faite pour repousser la responsabilité du Mexique des actes perpétrés par les forces conventionnistes, consistant à restreindre indûment la portée du décret du 29 juillet 1924, en lui faisant dire quelque chose que, en réalité, il ne dit point du tout. Pour l'intelligence de ce qui suit, j'en transcris les passages essentiels:

"Considerando:

"*Primero.* — Que al expedirse la Ley de Reclamaciones de 30 de agosto de 1919, no se consideraron como fuerzas revolucionarias las que sirvieron al llamado Gobierno de la Convención, desde que ésta desconoció a la Primera Jefatura del Ejército Constitucionalista y que, por lo mismo, las reclamaciones presentadas por daños causados por tales fuerzas quedaron comprendidas en las previsiones generales de la fracción IV del artículo 3. de la citada Ley, que se refiere a los causados por foragidos o rebeldes, y no en la fracción I, del propio artículo, relativa a los daños consumados por fuerzas revolucionarias o reconocidas como tales por Gobiernos legítimos; y

"*Segundo.* — Que las fuerzas que sirvieron al llamado Gobierno Convencionista que disgregadas se mantuvieron en rebeldía contra el Gobierno Preconstitucional y la Administración próxima pasada, cooperaron con los elementos revolucionarios que proclamaron el Plan de Agua Prieta y, por lo mismo, deben considerarse como fuerzas revolucionarias para el efecto de calificar en justicia los daños que se causaron;

. . . . . .

"Decreto:

"Artículo primero. — Se adiciona el artículo 3. de la Ley de 30 de agosto de 1919, con las fracciones siguientes:

"V. — Por fuerzas que sirvieron al llamado Gobierno de la Convención desde que ésta desconoció a la Primera Jefatura del Ejército Constitucionalista, hasta el 30 de junio de 1920.

"VI. — . . . . . .

"*Transitorios.*

Primero. — Esta Ley comenzará a regir desde el día de 1. de agosto del año en curso..."

De cet extrait du décret susmentionné, il résulte de toute évidence, que le Gouvernement du Général Obregón, pour des motifs politiques que je ne puis que conjecturer, a estimé devoir reconnaître, encore quelques années après le plan de Agua Prieta, auquel il est, selon ses termes mêmes, intimement lié, comme révolutionnaires, même pour l'ordre juridique interne, les forces de la Convention considérées jusque-là comme rebelles, et ce pour la durée entière de la période comprise entre le 14 novembre 1914, date de la séparation de la Convention d'avec l'Armée Constitutionnaliste, jusqu'au 30 juin 1920.

Toute la teneur du décret démontre, on ne peut plus clairement, que, pour les motifs officiels énoncés dans les considérants, les forces conventionnistes, auparavant qualifiées de rebelles, seraient désormais reconnues, avec effet rétroactif jusqu'au 14 novembre 1914, comme révolutionnaires, non seulement en ce qui concerne les dommages causés aux nationaux, mais encore en ce qui concerne ceux causés aux étrangers, le décret ne faisant aucune distinction à cet égard. L'agence mexicaine s'est efforcée de détruire la portée de ce décret. en affirmant que les considérants n'étaient pas des considérants, mais plutôt des conditions d'applicabilité, de sorte que, pour tomber sous le coup du décret. les réclamants auraient à prouver, dans chaque cas, que les auteurs conventionnistes de dommages déterminés ont effectivement coopéré plus tard au plan d'Agua Prieta. Mais une simple lecture du décret suffit pour venir à la conclusion que cette affirmation est dénuée de tout fondement et que, pour quelque motif que ce fût, le décret a voulu faire rentrer en bloc dans la catégorie des forces révolutionnaires, dans le sens de la législation sur les réclamations, toutes les forces conventionnistes, tant pour la période avant, que pour celle après la restauration de l'ordre constitutionnel en 1917. Abstraction faite du texte parfaitement clair et de la portée évidente du décret, il aurait presque été impossible de régler les choses de la manière suggérée par l'agence mexicaine, étant donné qu'alors l'application des dispositions nouvelles eût conduit à la nécessité de faire des distinctions odieuses et à de grandes difficultés de preuve, et qu'alors la pacification du pays n'eût été atteinte qu'incomplètement.

A part cela et en contradiction évidente avec ce qui précède, l'agence mexicaine a aussi argumenté que le décret n'a jamais pu avoir d'effet rétroactif jusqu'à une date antérieure à celle du plan d'Agua Prieta, c'est-à-dire le 3 avril 1920, mais cette assertion est aussi insoutenable que l'affirmation précédente. D'abord elle est en contradiction absolue avec le nouveau paragraphe V, cité ci-dessus. Ensuite, elle comporterait la conséquence singulière, que le décret ne produirait ses effets que pour la période de quelques semaines entre le plan d'Agua Prieta et le 30 juin 1920. Et enfin, elle ne saurait être appuyée par la thèse que la Constitution dénie aux lois tout effet rétroactif, attendu que cet effet rétroactif n'est exclu, par l'article 14 de la Constitution de 1917, que "en perjuicio de persona alguna", qu'on ne s'explique pas pourquoi un effet rétroactif jusqu'au plan d'Agua Prieta serait plus conforme à

la Constitution que la rétroactivité jusqu'à la rupture entre la Convention et le Premier Chef, et que le décret de 1924 a l'effet rétroactif en commun avec tous les autres décrets relatifs aux dommages révolutionnaires, y compris ceux de Venustiano Carranza.

A mon avis, il n'existe donc pas même le moindre doute sur la portée juridique du décret de 1924, à savoir de comporter une réhabilitation postérieure en bloc de toutes les forces de la Convention, même en ce qui concerne leur opposition continuée après le rétablissement de l'ordre constitutionnel en 1917.

D. *Conclusion finale*

66. — Dans ces conditions, il est impossible d'en décider autrement sous le coup de la convention des réclamations, notamment de son article III, *sub* 2). Quand bien même ma conclusion serait incorrecte que déjà le texte de cet alinéa par lui-même, envisagé à la lumière des données historiques alléguées ci-dessus, met hors de doute que les forces de la Convention doivent être réputées rentrer dans la catégorie de celles dont les actes donnent lieu à indemnité; l'on ne saurait en aucun cas maintenir le contraire après la promulgation du décret, d'autant moins que celui-ci a été édicté antérieurement à la conclusion de la convention franco-mexicaine et que, par conséquent, si le Gouvernement français eût encore eu quelques raisons de doute sur la portée exacte des mots finaux de l'alinéa 2) de l'article III — que, raisonnablement, il ne peut guère avoir eues, — tout doute eût été définitivement effacé par le décret du Gouvernement mexicain lui-même. Vouloir prétendre, comme l'a effectivement prétendu l'agence mexicaine, que ce décret n'a d'importance que pour l'ordre juridique interne du pays, c'est-à-dire, dans la pratique, pour les nationaux mexicains, reviendrait à mettre le Mexique en contradiction manifeste avec le principe du droit international public qui veut que, si les nationaux sont dédommagés, les ressortissants étrangers le soient également. Il est presque superflu d'appuyer par des citations ce principe équitable et incontesté, que, tout de même, l'agence mexicaine a prétendu ignorer. Comparez déjà, par exemple, la déclaration de Lord Palmerston en 1836, à propos de la révolution belge, et d'après laquelle: "As long as the Belgian Government took no steps to indemnify its own subjects for similar losses, His Majesty's Government did not feel justified in pressing for a decision in favour of British subjects, who could only be entitled to be placed on the same footing as Belgian subjects" (Baty, *International Law*, 1909, p. 97). Cette dernière thèse est, implicitement ou en termes exprès, admise comme une des bases incontestables du droit international en matière de responsabilité pour cause de dommages causés par toutes sortes de troubles, émeutes, insurrections, guerres civiles, etc., même par les auteurs qui rejettent résolument l'idée d'une responsabilité internationale en faveur des seuls étrangers. Et elle ne peut donc pas ne pas être mise à la base d'une interprétation raisonnable d'un traité international.

Pour tous les motifs allégués ci-dessus, j'ai gagné la conviction qu'il est raisonnablement hors de doute que l'énumération des dommages figurant à l'article III, *sub* 2) de la convention comprend ceux causés par les forces de la Convention et qu'il serait contraire à la teneur et à l'esprit de la convention de les considérer comme de simples rebelles, mutins ou insurgés, compris dans l'alinéa 5) de l'article III. Pour ces raisons, je me suis abstenu, dans les pages précédentes, d'entrer dans un examen des conditions d'applicabilité dudit alinéa 5, qui fera l'objet de sentences suivantes.

Je n'ai pas non plus cru nécessaire d'aborder dans cette sentence certaines questions soulevées dans d'autres procès, et se rapportant aux conditions dont

dépend l'applicabilité *in concreto* de l'alinéa 2) de l'article III, notamment celles de savoir si des militaires isolés peuvent engager la responsabilité du Mexique, si cette dernière doit être affirmée même dans les cas où les actes délictueux présentent le caractère d'actes de brigandage, ou n'ont aucun rapport avec les fins de la révolution, etc. En effet, dans le cas présent, il s'agit évidemment de réquisitions faites par des forces organisées et dans des buts militaires.

Des considérations précédentes, il résulte que le "dictamen" de la Commission nationale des réclamations dans la présente affaire, lequel n'a reconnu d'indemnité que pour les dommages censés avoir été causés par les troupes constitutionnalistes, et qui, du reste, date d'une époque antérieure au décret du Général Obregón du 29 juillet 1924, doit être réformé en ce sens que non seulement la partie des dommages imputable aux forces constitutionnalistes, mais encore celle imputable aux forces zapatistes, donne lieu à indemnité.

Montant des dommages

67. — Après avoir fixé dans les pages précédentes la responsabilité du Mexique, suivant l'article III de la convention, de la totalité des dommages subis par le réclamant, il faut maintenant en fixer le montant.

Au cours des débats oraux, la question de l'évaluation des dommages a, elle aussi, fait l'objet de considérations d'ordre général. L'agence mexicaine a saisi cette occasion pour accentuer tout particulièrement le fait que, à son avis, dans bien des cas, la preuve des événements et celle de la préexistence et de la valeur des biens volés, détruits ou réquisitionnés sont tellement défectueuses que, en échange de sa bonne volonté d'admettre quand même la matérialité des faits et les dommages, les sommes à allouer à titre d'indemnité doivent, selon les principes de l'équité et du "*do ut des*", être réduites au minimum. L'agence française, de son côté, a également invoqué l'équité, pour argumenter que, la preuve de la préexistence et de la valeur des objets disparus ou détruits se heurtant naturellement à de très grands obstacles dans les conditions anormales dans lesquelles le pays se trouvait pendant la période révolutionnaire, les indemnités doivent être fixées dans un esprit de bienveillance envers les victimes de la révolution et sans attacher trop d'importance à la défectuosité de la preuve selon le droit strict. En outre, l'agence mexicaine a avancé, dans ce contexte comme dans d'autres, sa thèse que, la promesse mexicaine d'indemnisation des victimes étant essentiellement une promesse *ex-gratia*, tout doute sur la matérialité des faits et sur la préexistence et la valeur des objets perdus doit être escompté en faveur du Mexique. A part cela, les deux agences ont discuté sur les circonstances particulières qui, dans des cas concrets, peuvent amoindrir ou augmenter la responsabilité du Mexique, telles que: manque de précaution du lésé, caractère arbitraire des errements des auteurs des dommages, etc. Un rôle spécial a été joué pendant ces discussions par la "Ley de pagos" du 13 avril 1918, dont l'agence mexicaine a soutenu l'applicabilité aux réclamations introduites devant la Commission franco-mexicaine. Et enfin, on a délibéré sur les questions générales de savoir la valeur de quel moment doit être remboursée, et quelle valeur, celle correspondant au prix de revient ou au prix de vente, ou au prix de remplacement ou de reconstruction, etc.

Parmi ces arguments de différents ordres, il y en a qui ne sont pas admissibles. Ainsi il en est, par exemple, de la thèse qui rattache le montant de l'indemnité à allouer au caractère plus ou moins défectueux de la preuve que les événements se sont déroulés conformément aux affirmations de l'intéressé, ou que les auteurs des dommages ont réellement été des personnes rentrant dans un des groupes visés à l'article III de la convention. Car de deux choses l'une: ou bien, la Commission ne gagne pas la conviction que les faits ont eu

lieu et qu'ils sont imputables aux auteurs énumérés à l'article III, et alors elle n'est autorisée à allouer aucune indemnité; ou bien, elle en gagne la conviction, mais alors il n'y a aucune raison pour ne pas allouer au réclamant la totalité de l'indemnité juste qu'elle croit correspondre aux pertes et dommages subis (article VI de la convention). Si l'on suivait la suggestion de l'agence mexicaine, on retomberait dans une grave confusion et on retournerait au système judiciaire suranné et en effet parfaitement injustifié, qui a jadis été d'usage en matière pénale, à savoir de faire dépendre la sévérité de la peine du degré plus ou moins grand de conviction dans l'esprit du juge relativement à la culpabilité de l'accusé. — Par contre, on est parfaitement justifié, à mon avis et faute d'une méthode plus raisonnable, à proportionner le montant de l'indemnité à la certitude plus ou moins grande que, notamment dans les cas de destruction d'un magasin ou d'une fabrique, les différents objets dont la valeur est réclamée ont tous préexisté, et quels en ont été l'état et la valeur.

La thèse, selon laquelle l'indemnité doit toujours être réduite au minimum, pour le motif que la promesse mexicaine d'indemnisation est essentiellement gratuite, ne me paraît pas non plus acceptable, d'abord pour la raison exposée ci-dessus (§ 11), que, parmi les dommages visés à l'article III, il y en a qui sont, sans aucun doute, dus d'après le droit international, et ensuite pour la raison que, même dans le cas d'indemnités promises *ex-gratia*, il n'existe pas de motifs puissants pour chercher toujours à réduire l'indemnité à un minimum. La Commission n'est, certes, pas en droit d'envisager la question au seul point de vue du Mexique et de l'équité qui milite en sa faveur, sans tenir compte des considérations d'équité, qui peuvent militer en faveur des victimes des révolutions. La vraie équité qui doit inspirer les sentences de la Commission ne pourra consister qu'à tenir en équilibre, autant que possible, les considérations d'équité invoquées par les deux agences, chacune en faveur des intérêts dont la gestion lui est confiée.

Quant à la "Ley de Pagos", il n'y a pas non plus lieu, dans la grande majorité des cas, d'en faire application dans l'arbitrage actuel, étant donné que cette loi, d'après sa teneur même, vise des cas tout à fait étrangers au cas des réclamations actuelles, et que la seule question qui ait de l'intérêt pour notre Commission est celle de savoir quel a été le dommage effectif causé par les vols, destructions, réquisitions, contributions forcées, etc. On ne saurait faire application de ladite loi que dans les cas où les objets enlevés ont consisté, ou ont été évalués par les réclamants eux-mêmes, en papier-monnaie, déprécié au moment de l'enlèvement.

68. — Dans le cas présent, il s'agit de fixer le dommage subi par le réclamant par suite de l'enlèvement (réquisition) des objets suivants: un taureau hollandais, dix vaches hollandaises, un petit cheval, cinq mules, deux harnais neufs et deux courroies de transmission.

Par son "dictamen" en date du 5-25 janvier 1924, la Commission nationale des réclamations a, sur la proposition de son expert, l'agent des investigations, fixé la valeur des animaux et objets susmentionnés à un chiffre de $4,165 — au lieu de celui de $7,550 demandé par le réclamant. Etant donné, d'une part, que dans le cas actuel, l'information testimoniale permet une conclusion certaine relative au prix d'achat du taureau enlevé, et que d'autre part, les valeurs indiquées par le réclamant pour les animaux et objets compris dans la réclamation ne sont aucunement invraisemblables, la réduction du chiffre réclamé de $7.550 — à $4,165 — paraît exagérée. Attendu toutefois, que les preuves produites dans la présente affaire ont laissé subsister quelque doute notamment sur l'état dans lequel les vaches se trouvaient, la Commission ne s'est pas crue autorisée à allouer le montant réclamé, mais elle est tombée d'accord sur un chiffre de $5,500.

INTÉRÊTS DES SOMMES À ALLOUER

69. — Reste la question de savoir si la somme à allouer à titre d'indemnité doit être augmentée d'intérêts, et éventuellement à partir de quelle date et à quel taux.

Envisageant encore cette question à un point de vue plus général, je constate que le principe du paiement d'intérêts dans cet arbitrage est aussi contesté que tous les autres points traités jusqu'ici. L'agent français réclame des intérêts de toutes les indemnités réclamées déjà antérieurement au Gouvernement du Mexique, sauf celles allouées pour des dommages personnels, et ce à partir du jour où le dommage fut porté à la connaissance du Gouvernement mexicain ou fait l'objet d'une réclamation devant la Commission nationale des réclamations, au taux de 6 % par an. Au contraire, l'agence mexicaine s'oppose à tout paiement d'intérêts, sauf dans le cas éventuel de dettes contractuelles, tout en hésitant pour le cas de prêts forcés.

La thèse française prétend se fonder sur l'équité et sur des précédents de l'arbitrage international. La thèse mexicaine invoque exactement les mêmes arguments et se fonde, en outre, sur certains principes du droit privé et sur le silence de la convention des réclamations.

Pour commencer par ce dernier point, j'estime que le silence de la convention n'a, par lui-même, aucune importance décisive. Ce fait peut, il est vrai, constituer un indice que les Hautes Parties Contractantes n'ont pas voulu comprendre le paiement d'intérêts dans les indemnités à allouer, mais il peut aussi bien être interprété comme un renvoi implicite aux règles générales du droit international, tel qu'il résulte notamment des précédents de l'arbitrage. Ce silence de la convention ne deviendrait expressif que dès le moment ou l'on devrait reconnaître, soit que la pratique arbitrale a fixé la règle que, sans stipulation expresse dans le compromis, les intérêts ne sont pas dus, soit que l'équité, ou bien le caractère spécial du présent arbitrage, comme étant basé sur une promesse d'indemnisation *ex-gratia*, exclut l'idée d'intérêts.

Quant aux principes du droit privé, je ne crois pas non plus pouvoir y attacher un intérêt décisif, ou même un intérêt quelconque direct, pour la solution de la question des intérêts dans le domaine des obligations internationales, cette dernière question s'étant développée dans des conditions tout à fait indépendantes et essentiellement différentes de celles dans lesquelles a évolué depuis bien des siècles la doctrine des intérêts moratoires du droit privé.

Ce qu'il faut examiner, c'est, par suite, d'une part, l'état du droit international coutumier, tel qu'il résulte notamment des précédents de l'arbitrage international, invoqués en sa faveur par chacune des deux Parties litigantes, et d'autre part, la portée de l'équité appliquée au présent arbitrage de caractère particulier. Lesdits deux éléments de l'examen sont liés entre eux par la question de savoir si, dans l'espèce, les principes de l'équité diffèrent des principes de droit sanctionnés par la pratique arbitrale, et à l'avantage de laquelle des deux Parties cette divergence éventuelle devrait être censée tourner.

Tandis que, au cours des discussions orales de caractère général, l'agence mexicaine a affirmé que l'équité ne joue, dans le présent arbitrage, qu'un rôle secondaire et que, en général, toutes les questions litigieuses doivent être résolues à la seule lumière du droit des gens positif, elle fait une exception pour la question des intérêts, prétendant que c'est précisément la seule équité, et aucunement les règles positives du droit coutumier, qui doit être mise à la base de la solution de cette question controversée; et à son avis, l'équité plaide en faveur du Mexique, étant donné que la base unique des indemnisations

consisterait dans une promesse spontanée et gratuite [1] de sa part. Par contre, l'agent français est parfaitement conséquent, en invoquant, dans cette matière comme dans les autres, l'équité comme norme de décision de la Commission; et à son avis, l'équité exige précisément que la question des intérêts soit tranchée en faveur des intéressés français.

Ainsi que je l'ai déclaré et motivé dans une partie antérieure de cette même sentence (§§ 10-12), le texte de la convention ne permet pas, à mon avis, de soutenir que, en principe, l'équité, et non pas le droit international positif, doit être décisive pour la solution de toutes les questions controversées, et je ne vois pas de raison spéciale de lui assigner un rôle particulier, en ce qui concerne le paiement d'intérêts des sommes à allouer à titre d'indemnité. La genèse de la convention démontre, à mon avis, que la mention faite de l'équité dans le texte de l'article II a pour but d'écarter, comme base de décision, tout examen de la responsabilité du Mexique des dommages causés à des intérêts français durant les révolutions mexicaines entre 1910 et 1920, au point de vue des principes généraux du droit international, pour leur substituer certains principes équitables formulés aux articles II et III de la convention. Mais la portée de l'équité dans l'application de la convention ne va pas plus loin, et notamment on ne saurait l'invoquer pour argumenter que la question des intérêts, elle aussi, doit être résolue à la lueur de l'équité, concept qui ne trouve dans la convention aucune explication, pour ce qui regarde cette question spéciale. Si donc l'article II de la convention stipule qu'"il suffira ... de prouver que le dommage allégué a été subi et qu'il est dû à quelqu'une des causes énumérées à l'article III de la présente convention, pour que le Mexique se sente, *ex gratia*, décidé à indemniser", le point de savoir si cette indemnisation comprend des intérêts, doit, à son tour, être résolu en conformité des principes admis par le droit international. Je conclus donc que le curieux appel simultané fait par l'une et l'autre agence à l'équité, comme norme de décision de la question des intérêts, me paraît erroné et que j'adhère, dans cette matière comme dans les autres, à la thèse générale de l'agence mexicaine, abandonnée par elle pour ce cas spécial, à savoir que, pour autant que la convention elle-même n'élimine pas, explicitement ou implicitement, les principes généraux du droit international, pour leur substituer certains principes équitables (articles II et VI), ce sont les premiers qu'il faut appliquer aux réclamations introduites. Dans ces conditions j'échappe, bien qu'involontairement, à la nécessité, qui se présenterait à moi dans le cas contraire, à savoir de décider laquelle des deux équités contraires invoquées par les deux agences devrait prévaloir, l'équité patronne des victimes innocentes des révolutions mexicaines, ou l'équité ange tutélaire du fisc mexicain.

70. — Si donc il me faut décider la question des intérêts à la lumière du droit international, plutôt qu'à la lueur crépusculaire de l'équité, force m'est de recourir, pour résoudre cette question *accessoire*, aux mêmes principes généraux du droit international, relatifs à la responsabilité des Etats pour dommages révolutionnaires, que l'article II de la convention a pris soin d'éliminer en termes exprès pour la question *principale*. Car s'il peut y avoir lieu à l'allocation d'intérêts, cela ne peut raisonnablement être le cas que des indemnités qui, comprises dans les termes de l'article III, sont en même temps du nombre de celles qui sont dues d'après le droit international. Une indemnité qui n'est pas due d'après le droit international ne peut pas, à mon avis, rapporter d'intérêts sans stipulation expresse, sauf dans le cas de retard indu du paiement;

[1] Pendant les discussions au Sénat de la Fédération le terme *ex-gratia* a été interprété, avec l'assentiment du Secrétaire des relations extérieures, comme équivalent à "spontanément", et non à "gratuitement".

quant à cette catégorie d'indemnités, le silence de la convention doit, par conséquent, être réputé comme expressif, dans le sens qu'il n'y a pas lieu, en général, d'allouer des intérêts en dessus du montant de la valeur de la réclamation proprement dite. Mais il en est autrement, c'est-à-dire: le silence de la convention doit être interprété d'une façon différente, en ce qui concerne les indemnités pour des dommages dont les Etats-Unis Mexicains sont responsables d'après le droit international et qui se trouvent en même temps énumérés à l'article III de la convention: ici le silence équivaut plutôt à un renvoi tacite au droit international.

Envisagée à ce point de vue, la question controversée des intérêts doit, par suite, amener à un classement des indemnités visées dans l'énumération de l'article III en deux groupes, le premier comprenant celles qui sont dues suivant le droit international, le second comprenant celles dont le paiement est gratuit. Sur les dernières, aucun paiement d'intérêts ne peut être ordonné, sauf dans le cas de retard indu du paiement. Sur les premières, il peut y avoir lieu au paiement d'intérêts, mais dans les seuls cas où le développement du droit international a donné naissance à une règle, qui le prescrit.

Or, comme je l'ai déjà fait entrevoir ci-dessus (§ 55), une responsabilité internationale du chef de dommages causés par des mouvements révolutionnaires, ne saurait être reconnue, à mon avis, pour ce qui concerne les actes juridiques ou délits de forces révolutionnaires qui ont échoué, le droit international ne grevant pas, ou pas encore, l'Etat des effets juridiques de pareils actes ou délits. Et quant aux actes des Gouvernements *de jure* ou *de facto*, ou des forces révolutionnaires qui l'ont emporté dans la guerre civile, il ne peut non plus être question de responsabilité internationale de l'Etat des dommages causés par lesdits actes que dans les cas où il s'agit, soit d'actes de caractère purement contractuel tels que: prêts, achats, etc., soit de ceux qui appartiennent au domaine intermédiaire entre le droit privé et le droit public, ou d'actes juridiques émanant directement du pouvoir public de l'Etat, tels que: expropriations, réquisitions, prêts forcés, etc., soit d'actes qui rentrent dans la catégorie des délits internationaux, tels que: pillages de propriétés étrangères, destructions de biens étrangers sans nécessité militaire, confiscations de possessions étrangères, bombardements de villes non défendues, qui ont causé la mort d'étrangers, et d'autres actes délictueux, formellement qualifiés comme tels entre autres par le Règlement concernant les lois et coutumes de la guerre sur terre de 1907. Au contraire, le simple fait que, pour supprimer des émeutes ou des révolutions, le Gouvernement légitime s'est trouvé dans la nécessité impérieuse de prendre des mesures militaires nuisibles à des ressortissants étrangers, n'engendre pas de responsabilité internationale de ce chef [1].

C'est donc aux trois principaux groupes de cas de responsabilité (ou de "transmission de responsabilité") internationale sus-indiqués que, en tout état de cause, se restreint la possibilité théorique d'intérêts considérés comme dus. Est-ce à dire que dans toutes ces hypothèses le droit international reconnaît, avec l'obligation d'indemnisation, celle de payer des intérêts en plus du montant de l'indemnité? Je ne le crois pas. S'il y a sans doute bien des précédents

[1] Cette dernière thèse est acceptée même par les auteurs qui poussent très loin la responsabilité de l'Etat pour dommages révolutionnaires, tels que A. Rougier, *Les guerres civiles et le droit des gens*, p. 477-478: "Il n'est pas question d'ailleurs de mettre à la charge du gouvernement l'obligation de réparer *tous* les dommages causés par les rebelles; les conséquences des opérations militaires, par exemple, bombardements et autres, sont toujours des cas de force majeure, que les canons soient gouvernementaux ou révolutionnaires. L'Etat répond seulement des abus de pouvoir commis par les autorités rebelles, et dans la mesure où il répond des actes de ses préposés."

de l'arbitrage international qui ont reconnu dans une plus large mesure le droit à intérêts, j'estime que jusqu'ici le droit international se borne à le reconnaître seulement dans une mesure assez restreinte. Après avoir pesé le pour et le contre des arguments allégués de part et d'autre, ainsi que les précédents du droit international, j'estime devoir formuler les règles suivantes:

Quant aux dettes contractuelles liquides, portant sur un montant fixé, et qui pourraient éventuellement rentrer dans la catégorie des dommages révolutionnaires, ainsi qu'aux prêts et emprunts forcés (interdits, en outre, en termes exprès par l'article 7 du traité franco-mexicain d'amitié, de commerce et de navigation en date du 27 novembre 1886), portant de par leur nature sur un montant fixe, j'estime qu'il y a lieu d'allouer des intérêts. Il pourrait être douteux, à compter de quelle date ces intérêts doivent être censés dus, soit de la date à laquelle la dette révolutionnaire fut contractée, ou le prêt exigé, soit de celle de la mise en demeure de l'Etat débiteur. Etant donné que l'agent français a choisi comme date initiale la dernière date visée dans le dilemme ci-dessus, la Commission ne saurait allouer d'intérêts à partir d'une date antérieure.

Quant aux réquisitions, au contraire, que je ne suis pas disposé à réfuter sans plus comme des actes délictueux [1], je ne suis pas prêt à admettre une obligation de payer des intérêts sur la valeur des objets réquisitionnés, soit à partir du moment de la réquisition, soit à partir de celui de la notification officielle de la réclamation au Gouvernement de l'Etat débiteur. Je ne crois pas qu'il y ait des raisons suffisantes pour considérer le paiement d'intérêts inclus dans "le paiement des sommes dues", dont il s'agit à l'article 52, alinéa 3, du Règlement concernant les lois et coutumes de la guerre sur terre, annexé à la IVe Convention de La Haye de 1907, et si les règles de droit concernant la guerre sur terre ne prescrivent pas le paiement d'intérêts, il n'y a pas non plus lieu, à mon avis, de considérer comme dus des intérêts de sommes allouées à titre d'indemnité de réquisitions effectuées au cours d'une guerre civile.

Et il n'en est pas autrement des cas dans lesquels il s'agit de délits internationaux commis soit par des Gouvernements *de jure*, soit par des Gouver-

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[1] En sens contraire: A. Rougier, *loc. cit.*, p. 476: "(L'existence d'une guerre civile *non reconnue*) ne justifie pas davantage sur terre l'emploi des réquisitions militaires. — Ce dernier abus est très fréquent; dès qu'une révolution un peu grave oblige les troupes gouvernementales à entrer en ligne, celles-ci n'hésitent pas à réquisitionner les objets qui leur sont utiles, à s'emparer des propriétés privées pour faciliter leurs opérations, et croient régulariser leur action en distribuant des reçus en forme aux individus expropriés. L'exercice du droit de réquisition même contre reçu, n'est légitime que dans une guerre civile *reconnue*. Tant que la paix n'a pas été troublée, ou est censée n'avoir pas été troublée, ces pratiques constituent un abus de pouvoir, qui engage la responsabilité de l'Etat."

Je considère cette thèse comme incorrecte et crois devoir reconnaître en général à tout Gouvernement le droit de réquisition, même sans reconnaissance préalable des insurgés comme belligérants, à condition d'indemnité adéquate. Dans le cas spécial des relations franco-mexicaines, la correction de cette dernière conclusion de caractère général pourrait paraître douteuse, à la lueur de l'article 7 du traité franco-mexicain d'amitié, de commerce et de navigation en date du 27 novembre 1886, stipulant que "les Français dans les Etats-Unis du Mexique et les Mexicains en France seront exempts ... de toutes réquisitions ou contributions de guerre, des prêts et emprunts forcés". En effet, bien que l'article semble viser notamment l'état de guerre entre l'une des parties contractantes et une Puissance tierce, il est parfaitement raisonnable de le considérer également applicable aux réquisitions ou contributions en temps de guerre civile. Mais même s'il en était ainsi, cela n'influerait en rien sur la solution de la question des intérêts, puisqu'alors le cas tomberait sous le coup de la règle relative aux actes délictueux.

nements *de facto*, soit par des forces révolutionnaires victorieuses. Bien que je ne puisse nier qu'il s'est présenté bien des précédents dans lesquels des tribunaux arbitraux ou des commissions mixtes ont alloué des intérêts, dans des cas où la responsabilité se fondait sur un délit international de l'Etat défendeur, je ne crois pourtant pas que cette pratique puisse déjà être considérée comme ayant trouvé la sanction du droit international, témoins deux précédents récents, l'un de la Cour permanente de Justice internationale, l'autre de la Commission générale américano-mexicaine des réclamations. En effet, ladite Cour s'est, dans sa décision du 17 août 1923 relative à l'affaire du vapeur *Wimbledon*, refusée à allouer les intérêts réclamés à partir du 21 mars 1921, date à laquelle l'Allemagne avait indûment refusé audit vapeur l'accès et le libre passage du canal de Kiel, ou d'une des dates postérieures auxquelles le Gouvernement français et la Conférence des Ambassadeurs ont protesté contre ledit refus près le Gouvernement de Berlin. D'autre part, la Commission générale américano-mexicaine a refusé l'allocation d'intérêts dans tous les cas de délits internationaux, n'en allouant que dans les cas de dettes contractuelles [1].

Si donc la demande d'intérêts à partir de la date à laquelle les réquisitions réclamées ou les actes délictueux commis ont été portés à la connaissance du Gouvernement mexicain ou ont fait l'objet d'une réclamation devant la Commission nationale, doit être rejetée, il en est autrement dès le moment de la sentence de la Commission franco-mexicaine ou de sa notification aux agents. A cet égard, je me range parfaitement à l'avis de la Cour permanente de Justice internationale dans l'affaire du *Wimbledon* (cas de délit international), qui, relativement à la demande d'intérêts, a décidé ce qui suit (*Publications de la Cour permanente de Justice internationale*, Série A, No 1, p. 32): "Ces intérêts, cependant, doivent courir non pas à compter du jour de l'arrivée du *Wimbledon* à l'entrée du Canal de Kiel, suivant la réclamation des demandeurs, mais bien de la date du présent arrêt, c'est-à-dire du moment où le montant de la somme due a été fixé et l'obligation de payer établie." En effet, depuis ce moment la réclamation internationale se transforme en le droit d'exiger une somme déterminée, et ce montant liquide doit commencer à porter des intérêts. Cette solution lève certaines objections de l'agence mexicaine, dont le principal chef d'opposition consistait précisément dans le fait que, avant la sentence, le montant de l'indemnité n'était pas encore fixé. Dans les circonstances actuelles et tenu compte de la productivité du capital au Mexique, le taux demandé de 6 % n'est point exagéré. Il me faut seulement réserver mon opinion concernant le paiement d'intérêts dans le cas particulier de réclamations pour cause d'attentats ou de lésions personnelles.

71. — Pour me résumer, je crois devoir formuler, dès à présent, quelques principes généraux, pouvant servir de gouvernes pour la solution de la controverse relative au paiement d'intérêts des sommes à allouer à titre d'indemnité, tout en faisant observer que, n'ayant eu sous les yeux qu'un nombre restreint

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[1] Voir l'exposé de M. C. van Vollenhoven, ancien Président de la Commission générale des réclamations, dans le *Bulletin de l'Institut Intermédiaire international*, t. XVII, p. 263 (*La jurisprudence de la Commission générale de réclamations entre les Etats-Unis d'Amérique et le Mexique, en mars-juillet 1927*): "Après la deuxième sentence prononcée dans l'affaire No 73, la Commission ne s'est plus départie du système d'accorder des intérêts par rapport à ce qui est dû par suite d'un contrat certain' et de ne pas en allouer s'il s'agit d'autres actes (par exemple d'actes illégaux internationaux); voir Venable, No 603, §§ 27 et 32 de l'avis du président, § 1 de l'avis de M. Fernández; Davies, No 1232, § 13; Francisco Mallen, No 2935, § 15 de l'avis du président."

de réclamations, je n'ai pu embrasser par ces principes-gouvernes toutes les hypothèses possibles.

a) Les intérêts ne seront pas dus sur les indemnités auxquelles le Mexique n'est pas tenu d'après le droit international et qui reposent simplement sur une promesse gratuite de sa part, sous réserve toutefois de son obligation de les payer dans un délai raisonnable, à fixer de commun accord par les deux Gouvernements intéressés, lors de la conclusion de leur accord ultérieur prévu dans les notes échangées entre eux le 25 septembre 1924, et relatif aux modalités de paiement des indemnités allouées. Ce délai expiré, des intérêts seront dus, au taux de 6 % par an.

b) Sur les indemnités pour cause de réquisitions et de délits internationaux, des intérêts seront dus, au taux de 6 % par an, en principe à compter de la date de la sentence. Attendu, toutefois, que les différentes réclamations à juger par la Commission franco-mexicaine forment un ensemble et que d'une part, la fixation de plusieurs dates successives est peu pratique, d'autre part l'ordre fortuit dans lequel les réclamations seront jugées ne doit pas profiter aux uns et nuire aux autres, je considère comme équitable d'accepter, comme point de départ des intérêts, une date fixe, située environ au milieu de l'époque au cours de laquelle la Commission rendra ses sentences, à savoir le 1er mai 1929.

c) Sur les indemnités pour cause de dettes contractuelles éventuelles pour un montant certain et de prêts forcés, des intérêts seront dus au taux de 6 % par an, à compter de la date à laquelle la réclamation a été portée à la connaissance du Gouvernement mexicain, ou a fait l'objet d'une action devant la Commission nationale des réclamations.

Appliquant ces règles au présent cas, où il s'agit de faits qui rentrent dans la catégorie de réquisitions militaires effectuées par deux groupes de forces opposées, et adoptant comme raisonnable la solution de la Commission nationale, consistant à attribuer, par manque de preuves certaines à ce sujet les dommages causés aux forces constitutionnalistes et conventionnistes pour parts égales, je conclus que la moitié du montant de l'indemnité adjugée, correspondant à la partie approximative des dommages imputable aux forces révolutionnaires constitutionnalistes, victorieuses dans la guerre civile, portera des intérêts à raison de 6 % l'an, à partir du 1er mai 1929, et que l'autre moitié ne portera pas d'intérêts, sauf le cas de retard indu du paiement.

DISPOSITIF

72. — Etant donné la diversité des questions de caractère fondamental traitées dans la présente sentence, il n'est pas surprenant que les trois commissaires n'ont pu tomber d'accord sur toutes ces questions. Dans ces conditions, le dispositif suivant est la résultante de délibérations, qui ont révélé à certains égards l'unanimité, à certains autres rien qu'une majorité et à un seul égard l'existence de trois opinions divergentes, dont, d'après l'article IV de la convention des réclamations, celle du Président doit prévaloir.

Pour les motifs exposés ci-dessus:

La Commission jugeant contradictoirement,

I. Déclare recevable la réclamation de M. Georges Pinson, comme appartenant à un Français;

II. Confirme, en instance de révision, le "dictamen" de la Commission nationale des réclamations en date du 5/25 janvier 1924, en tant qu'il a déclaré prouvée la matérialité des faits allégués par le réclamant à l'appui de sa réclamation;

III. Réforme le dit "dictamen" en ce sens que non seulement la partie des dommages imputable aux forces constitutionnalistes, mais encore celle imputable aux forces zapatistes rentre dans les catégories des dommages donnant lieu à indemnité, et que le montant de cette dernière doit être majoré;

IV. Evalue les dommages subis par le réclamant à la somme de *cinq mille cinq cents pesos or national*, à laquelle doivent s'ajouter des intérêts à 6 % par an sur la moitié de cette somme, à partir du 1er mai 1929, et des intérêts au même taux sur l'autre moitié, dans le cas où cette moitié n'aurait pas été payée dans un délai raisonnable, à fixer par les deux Gouvernements intéressés, dans leur accord ultérieur sur les modalités de paiement des indemnités allouées.

Cette sentence devant être rédigée en français et en espagnol, c'est le texte français qui fera foi.

Fait et jugé à Mexico, le dix-neuf octobre mil neuf cent vingt-huit, en deux exemplaires, qui seront transmis aux agents de la Partie demanderesse et de la Partie défenderesse, respectivement.

ANNEXE I

Bases de la responsabilité des Etats-Unis mexicains, pour cause de dommages causés dans la période révolutionnaire de 1910 à 1920

A. *D'après la législation mexicaine*	B. *D'après les conventions de réclamations*
a) Loi du 31 mai 1911, mentionnée aux articles 7 du décret-loi *sub b)* et 16 du décret-loi *sub c)*. *b)* Décret-loi du Président Venustiano Carranza, en date du 24 novembre 1917, articles 1er et 5, révisés par le *c)* décret-loi du même Président, en date du 30 août 1919, articles 1er et 3, le premier modifié de nouveau par le *d)* décret-loi du Président substitué Adolfo de la Huerta, en date du 4 septembre 1920, article 1er, — et le dernier complété par le *e)* décret-loi du Président Alvaro Obregón, en date du 24 juillet 1924, article 1er.	Textes identiques des conventions: américano-mexicaine, en date du 10 septembre 1923; franco-mexicaine, en date du 25 septembre 1924; germano-mexicaine, en date du 16 mars 1925; hispano-mexicaine, en date du 25 novembre 1925; anglo-mexicaine, en date du 19 novembre 1926; italo-mexicaine, en date du 13 janvier 1927.
Période révolutionnaire, d'après l'article 1er du décret-loi *sub d)*: du 20 novembre 1910 jusqu'au 30 juin 1920 inclus.	Période révolutionnaire, d'après l'article III de la convention franco-mexicaine: du 20 novembre 1910 jusqu'au 31 mai 1920 inclus.
Enumération des auteurs de dommages dont les actes donnent droit à indemnité, d'après l'article 3 du décret *sub c)*, complété par celui *sub e)*:	Enumération des auteurs de dommages dont les actes donnent droit à indemnité, d'après l'article III susdit:

c) No II. Fuerzas de los Gobiernos legítimos que se hayan establecido en la República al triunfo de la revolución respectiva, en ejercicio de sus funciones durante la lucha contra los rebeldes

1) Les forces d'un gouvernement *de jure* ou *de facto*.

c) No I. Fuerzas revolucionarias o reconocidas como tales por los Gobiernos legítimos que se hayan establecido en la República al triunfo de la revolución respectiva.

2) Les forces révolutionnaires, qui, à la suite de leur triomphe, ont établi des gouvernements *de jure* ou *de facto;*

e) No V. Fuerzas que sirvieron al llamado Gobierno de la Convención desde que esta desconoció a la Primera Jefatura del Ejército Constitucionalista, hasta el 30 de junio de 1920.

ou les forces révolutionnaires qui leur étaient opposées.

3) Les forces provenant de la désagrégation de celles qui sont définies *sub* 2), jusqu'au moment où le gouvernement *de jure* aurait été établi à la suite d'une révolution déterminée.

c) No III. Fuerzas dependientes del antiguo ejército federal hasta su disolución.

4) Les forces provenant de la dissolution de l'armée fédérale.

c) No IV. Foragidos o rebeldes, siempre que se compruebe que el daño causado se consumó a consecuencia de algún acto, lenidad u omisión imputables a las autoridades legítimas encargadas de dar garantías. No habrá lugar a indemnización en el caso a que se refiere este inciso, si el paciente del daño hubiere ejecutado actos voluntarios significativos de un reconocimiento expreso de la autoridad de los rebeldes o foragidos o la intención de ayudarlos contra las autoridades legítimas encargadas de dar garantías.

5) Mutineries ou soulèvements, ou forces insurrectionnelles autres que celles qui sont indiquées *sub* 2), 3) et 4) ci-dessus, ou par des brigands, à condition que, dans chaque cas, il soit établi que les autorités compétentes ont omis de prendre des mesures raisonnables pour réprimer les insurrections, soulèvements, mutineries, ou actes de brigandage dont il s'agit, ou pour en punir les auteurs, ou bien qu'il soit établi que les dites autorités ont été en faute de quelque autre manière.

e) No VI. Motines, tumultos o fuerzas insurrectas distintas de las anteriores, desde el 20 de noviembre de 1910 hasta el 30 de junio de 1920, siempre que se compruebe que las autoridades competentes omitieron dar garantías al reclamante u obraron con lenidad.

(Alinéa final.) Les actes des autorités civiles, à condition que ces actes aient leur cause dans des événements ou des troubles révolutionnaires survenus dans la période prévue ci-dessus et qu'ils aient été exécutés par quelqu'une des forces définies *sub* 1), 2) et 3).

B. *Historique des conventions de réclamations*

I. *Premier projet mexicain* [1], *joint au mémorandum confidentiel du Secrétaire des Relations Extérieures du Gouvernement mexicain, adressé au Chargé d'affaires des Etats-Unis, en date du 19 novembre 1921.*

Article III.

Forces révolutionnaires, ayant causé des dommages entre le 30 novembre 1910 et le 31 mai 1920:

1. Forces révolutionnaires qui ont établi, à la suite du triomphe de leur cause, un gouvernement de fait ou de droit;

2. Forces provenant de la désagrégation de celles mentionnées *sub* 1. jusqu'au moment où, à la suite de la révolution respective, le gouvernement de droit a été établi;

II. *Rédaction définitive de la Convention spéciale conclue avec les Etats-Unis, le 10 septembre 1923* [2].

Article III.

Forces ayant causé des dommages pendant les révolutions et troubles au Mexique entre le 20 novembre 1910 et le 31 mai 1920:

1. *Forces d'un Gouvernement de jure ou de facto;*

2. Forces révolutionnaires qui ont établi, à la suite du triomphe de leur cause, des gouvernements de jure ou de facto, *ou forces révolutionnaires qui leur étaient opposées;*

3. *idem.*

III. *Projets et rédaction définitive de la Convention franco-mexicaine.*

Le premier projet mexicain, remis par M. Pani au représentant français le 19 mai 1923, était identique au projet *sub* I.

Le second projet mexicain, communiqué à la légation de France à Mexico à la date du 30 juin 1924, c'est-à-dire quelques semaines avant le décret du Président Obregón du 19 juillet 1924, était, sauf quelques légères différences de rédaction, identique au texte définitif *sub* II.

Le texte final de la Convention franco-mexicaine mentionne les mêmes catégories 1-5 de celui *sub* II, et en plus, dans un alinéa nouveau, la disposition suivante:

[1] Ce projet a été discuté par les délégués américain (M. Warren) et mexicain (González Roa) à la conférence de Bucareli, entre le 2 et le 18, et entre le 23 et le 26 juillet 1923 arrêté par la conférence plénière le 27 juillet 1923, déclaré accepté par les deux gouvernements le 15 août 1923, et signé le 10 septembre 1923.

[2] Les modifications du texte primitif sont imprimées en italiques.

3. Forces de l'Armée fédérale dissoute;

4. Mutineries ou actes de brigandage, à condition qu'il soit établi une omission, indulgence ou (autre) cause imputable aux autorités.

4. Forces fédérales qui ont été dissoutes;

5. Mutineries, *troubles ou forces insurrectionnelles distinctes de celles mentionnées sub* 2. 3. *et* 4. ou brigands, à condition que, *dans chaque cas*, il soit établi que les autorités compétentes ont omis de prendre les mesures appropriées à réprimer les insurgés, troubles ou brigands, ou qu'elles les ont traités avec indulgence, ou qu'elles ont été négligentes à d'autres égards.

Les actes des autorités civiles, à condition que ces actes aient leur cause dans des événements ou des troubles révolutionnaires survenus dans la période du 20 novembre 1910 jusqu'au 31 mai 1920 et qu'ils aient été exécutés par quelqu'une des forces définies *sub* 1. 2. et 3.

ANNEXE II

Evolution historique des énumérations insérées dans la législation mexicaine et dans les conventions des réclamations respectivement

A. *Historique de la législation mexicaine*

	Loi du 31 mai 1911	*Décret de Monclova du 10 mai 1913* [1]	*Décret Loi du 24 nov. 1917*	*Décret-Loi du 30 août 1919*	*Décret-Loi du 4 sept. 1920*	*Décret-Loi du 24 juillet 1924*
	—	—	—	—	—	—
Auteur	Le Congrès dans les premiers jours de la Présidence intérimaire de Francisco de la Barra.	Venustiano Carranza, en qualité de Premier Chef de l'Armée Constitutionnaliste.	Le Président constitutionnel Venustiano Carranza.	Le Président constitutionnel Venustiano Carranza.	Le Président constitutionnel substitut Adolfo de la Huerta.	Le Président constitutionnel Alvaro Obregón.
Période	Du 21 nov. 1910 jusqu'au 31 mai 1911.	Du 21 novembre 1910 jusqu'à la restauration future de l'ordre constitutionnel.	De 1910 jusqu'à 1917.	Du 21 novembre 1910 jusqu'à la fin de l'état de révolte, toujours existant dans quelques régions du pays.	Du 21 nov. 1910 jusqu'au 30 juin 1920.	Pas de modification.
		Articles 1-3	*Article 5*	*Article 3*		*Article 1er*
Auteurs des dommages dont les actes donnent droit à indemnité	La loi ne spécifie pas, mais fait seulement mention de "daños causados por la última revolución".	Le décret ne donne pas encore d'énumération précise d'auteurs, mais reconnaît le droit de réclamer des indemnités: *Aux nationaux:* — *Aux étrangers:* Art. 1: Pour les dommages soufferts pendant la révolution de 1910, c'est-à-dire dans la période entre le 21 novembre 1910 et le 31 mai 1911. — *Idem.*	I. Forces révolutionnaires ou reconnues comme telles par les Gouvernements légitimes qui se sont établis dans la République, à la suite du triomphe de la révolution respective. II. Forces de ces mêmes Gouvernements dans l'exercice de leurs fonctions et durant la lutte contre les rebelles	I. *Idem.* II. *Idem* (avec suppression du mot "et").	Pas de modifications.	Pas de modifications.

Auteurs des dommages dont les actes donnent droit à indemnité

Art. 2:

Pour les dommages soufferts ou encore à souffrir depuis le 19 février 1913 jusqu'à la restauration de l'ordre constitutionnel.

Art. 3:

Pour les dommages soufferts par le fait de forces révolutionnaires ou groupes armés, entre le 31 mai 1911 et le 19 février 1913.

Idem.

III. Forces dépendantes de l'Armée dite fédérale jusqu'à sa dissolution.

III. Forces dépendantes de l'ancienne armée fédérale jusqu'à sa dissolution.

IV. Brigands ou rebelles, à condition qu'il soit établi que le dommage causé s'est effectué en conséquence d'un acte, d'une indulgence ou d'une omission quelconques imputables aux autorités légitimes chargées de donner des garanties.

Additions

V. Forces qui ont servi le soi-disant gouvernement de la Convention depuis que cette dernière a renié la "Primera Jefatura del Ejército Constitucionalista" jusqu'au 30 juin 1920.

VI. Mutineries, soulèvements (tumultos) ou forces insurgées différentes de celles énumérées ci-dessus, du 21 novembre 1910 jusqu'au 30 juin 1920, à condition qu'il soit établi que les autorités compétentes ont omis de donner des garanties au réclamant ou qu'elles ont agi avec indulgence.

Nota — Le premier projet mexicain d'une convention spéciale des réclamations à conclure avec les Etats-Unis d'Amérique, date du 19 novembre 1921; ladite convention fut signée le 10 septembre 1923, c'est-à-dire avant le décret du Président Obregón du 24 juillet 1924. Par contre, les négociations diplomatiques avec la France, bien qu'également commencées avant ledit décret, à savoir le 19 mai 1923, n'ont été terminées qu'après sa promulgation.

1. Parallèlement au décret de Monclova, le Secrétaire des Relations Extérieures dans le Ministère de Victoriano Huerta, M. Carlos Pereyra, a fait, les 22-24 juillet 1913, des offres analogues d'indemniser les ressortissants étrangers de "daños que ha originado la revolución".

ANNEXE III

CLASSEMENT DES FORCES AYANT CAUSÉ DES DOMMAGES DU 20 NOVEMBRE 1910 AU 31 MAI 1920

A. — *Aperçu de l'agent français*

Première période. — *Présidence de* PORFIRIO DÍAZ (20 novembre 1910-25 mai 1911)

Dommages donnant droit à indemnité.	Classement d'après la *convention franco-mexicaine.*	Classement d'après la *loi nationale des réclamations.*
—	—	—
Causés par		
1. Forces de l'armée fédérale.	*Art. III*, par. 1: Forces d'un gouvernement *de jure*.	*Art. 3*, par. III: Fuerzas del antiguo ejército federal.
2. Forces révolutionnaires groupées suivant le Plan de S. Luís Potosí (5 août 1910), comprenant: Madéristes. Zapatistes. Orozquistes.	*Art. III*, par 2: Forces qui, à leur triomphe, ont établi un gouvernement *de jure* ou *de facto*.	*Art. 3*, par. I: Fuerzas revolucionarias.
3. Soulèvements, mutineries, comme les événements de Pachuca le 15 mai 1911.	*Art. III*, par. 5: Mutineries, soulèvements, forces insurrectionnelles ou brigands.	*Art. 3*, par. IV et VI. (Loi de 1917; modifiée en 1919 et 1924): Foragidos, o rebeldes, motines, tumultos, fuerzas insurrectas.

Deuxième période. — *Présidence provisoire de* FRANCISCO DE LA BARRA (25 mai 1911-30 novembre 1911)

1. Forces fédérales.	*Art. III*, par. 1: Forces d'un gouvernement *de jure*.	*Art. 3*, par. III: Fuerzas del antiguo ejército federal.
2. Forces révolutionnaires de la période précédente non-désagrégées.	*Art. III*, par. 2: Forces révolutionnaires qui, à leur triomphe ont établi un gouvernement *de jure* ou *de facto*.	*Art. 3*, par. I de la loi de 1917: Fuerzas revolucionarias;
Cependant Zapata s'est séparé en juillet 1911.	et forces révolutionnaires qui leur étaient opposées.	et *Art. 3* du décret de Monclova (applicable aux seuls étrangers): Fuerzas revolucionarias y grupos armados du 31 mai 1911 au 19 juin 1913.

Troisième période. — *Présidence de* FRANCISCO I. MADERO
(30 novembre 1911-19 février 1913)

1. Forces fédérales (anciennement madéristes).	*Art. III*, par. 1: Forces d'un gouvernement *de jure*.	*Art. 3*, par. III: Fuerzas del antiguo ejército federal.
2. Forces révolutionnaires de: *a) Zapata* — suivant le plan d'Ayala (toute la période). *b) Orozco* — suivant proclamation du 25 mars 1912 (mai 1912-fév. 1913).	*Art. III*, par. 2: Forces révolutionnaires opposées aux forces révolutionnaires qui ont établi un gouvernement *de jure*.	*Art. 3*, par. I de la loi de 1917: Fuerzas revolucionarias
	ou	et
c) Felix Díaz (oct. 1912-fév. 1913).	*Art. III*, par. 3: forces révolutionnaires provenant de la désagrégation des forces qui ont établi un gouvernement *de jure* ou forces qui leur étaient opposées.	*Art. 3* du décret de Monclova (applicable aux seuls étrangers): Fuerzas revolucionarias o grupos armados du 31 mai 1911 au 19 juin 1913.
3. Evénements de la dizaine tragique à Mexico — forces fédérales et révolutionnaires.	*Art. III*, par. 1, 2 et 3: (forces visées ci-dessus).	(Articles visés ci-dessus).

Quatrième période. — *Présidence de* VICTORIANO HUERTA
(22 février 1913-15 juillet 1914)
et *Présidence provisoire de* FRANCISCO CARBAJAL (15 juillet-13 août 1914)

1. Forces fédérales (dans lesquelles sont incorporées celles de Orozco).	*Art. III*, par. 1: Forces d'un gouvernement *de jure*. Le Gouv. de Huerta a été reconnu par le Gouv. français.	Ces forces ne sont pas visées dans la loi mex. parce que le Gouv. de Huerta n'a pas été considéré comme un Gouv. légitime.
2. Forces révolutionnaires constitutionnalistes groupées sous le Premier Chef V. Carranza, conformément au décret du 19 fév. 1913 et au plan de Guadalupe du 26 mars 1913 comprenant: Div. du Nord: Gral. VILLA. Div. du Nord-Ouest: Gral. OBREGÓN.	*Art. III*, par. 2: Forces révolutionnaires qui ont établi un gouvernement *de facto* ou *de jure*.	*Art. 3*, par. I: Fuerzas revolucionarias.

Div. du Nord-Est: Gral. Pablo González.
Ejército Libertador: Gral. Emiliano Zapata.

Cinquième période. — Venustiano Carranza et *la Convention* (13 août 1914-14 novembre 1914)

1. Forces fédérales dissoutes du 12 août 1914 au 13 mai 1920.	*Art. III*, par. 4: Forces provenant de la dissolution de l'armée fédérale.	Il n'y a rien dans la loi nationale, mais beaucoup de ces forces ont été incorporées dans les forces conventionnistes.
2. Forces révolutionnaires constitutionnalistes (les mêmes que dans la période précédente): Les villistes avec Fco. Villa se sont séparés de Carranza en sept. 1914 et supportent la Convention dès son arrivée le 10 oct. à Aguascalientes.	*Art. III*, par. 2: Forces révolutionnaires qui ont établi un gouv. *de jure* ou *de facto* et forces qui leur étaient opposées.	*Art. 3*, par. I (Décret de 1917): Fuerzas revolucionarias o reconocidas como tales por los Gobs. legítimos. *Art. 3*, par. V (Décret du 19 juil. 1924): Por fuerzas que sirvieron al llamado gobierno de la Convención desde que ésta ha desconocido la primera jefatura del Ejército Constituc. hasta el 30 de junio de 1920.
3. Forces révolutionnaires de la Convention (bien qu'elles ne fussent pas considérées comme détachées des forces carrancistes avant le 14 nov. 1914, d'après la jurisprudence de la Commission nationale de Réclamations).	*Art. III*, par. 2: Forces révolutionnaires opposées aux forces révolutionnaires qui ont établi un gouv. *de jure* ou *de facto*.	*Art. 3*, par. V (déc. du 19 juil. 1924): Por fuerzas que sirvieron al llamado gobierno de la Convención desde que ésta ha desconocido la primera jefatura del Ejército Constitucionalista, hasta el 30 de junio de 1920.

Sixième période. — Venustiano Carranza et *la Convention* (14 novembre 1914-1er mai 1917)

1. Forces fédérales dissoutes (du 12 août 1914 au 13 mai 1920).	*Art. III*, par. 4: Forces provenant de la dissolution de l'armée fédérale.	Il n'y a rien dans la loi nationale, mais beaucoup de ces forces ont été incorporées dans les forces conventionnistes.

2. Forces constitutionnalistes. Le gouv. de Carranza est établi à Vera-Cruz du 25 nov. 1914 au 11 oct. 1915 (date du retour à Mexico). Forces réparties sous les commandements suiv.: Armée d'opérations: OBREGÓN (contre les villistes). Armée du Sud-Est: ALVARADO (contre forces du Yucatán). Armée d'Orient: PABLO GONZÁLEZ (contre les zapatistes). Armée du Nord-Est: JACINTO TREVINO.	*Art. III*, par. 2: Forces révolutionnaires qui ont établi un gouvernement *de facto* ou *de jure*. et *Art. III*, par. 1: Forces d'un gouvernement *de jure* ou *de facto*. Après le 4 déc. 1915, date de la reconnaissance par le Gouvernement franç. comme Gouvernement *de facto*.	*Art. 3*, par. 1: Fuerzas revolucionarias.
3. Forces de la Convention qui a eu son siège à Mexico, Cuernavaca, Mexico et Toluca, où elle s'est dispersée en septembre 1915. Ces forces étaient composées de: Villistes, Zapatistes, et diverses.	*Art. III*, par. 2: Forces révolutionnaires opposées aux forces qui ont établi un gouv. de fait. ou *Art. III*, par. 3: Forces provenant de la désagrégation desdites forces révolutionnaires ou opposées.	*Art. 3*, par. V (Décret du 19 juil.1924): Por fuerzas que sirvieron al llamado gob. de la Conv. desde que ésta ha desconocido la primera jefatura del Ejército Constitucionalista hasta el 30 de junio de 1920.
4. Forces de l'Etat souverain de Oaxaca ou forces révolutionnaires de Chiapas.	*Art. III*, par. 2: Forces révolutionnaires opposées aux forces qui ont établi un gouvernement de fait.	*Art. 3*, par. IV ou VI.

Septième période. — *Présidence de* VENUSTIANO CARRANZA
(1er mai 1917-21 mai 1920)

1. Armée nationale.	*Art. III*, par. I: Forces d'un gouv. *de facto*, puis d'un gouv. *de jure* à partir du 13 mai 1919 (remise des lettres de créance de M. Pani).	*Art. 3*, par. 1: Fuerzas revolucionarias.

2. Forces de la Convention, Villistes Zapatistes et autres, qui, dès le milieu de 1919, ont répondu à l'appel du général Obregón et ont coopéré ensuite au plan d'Agua Prieta, qui a abouti au renversement de Carranza. Le général Obregón les a par suite reconnues comme forces révolutionnaires, dont les dommages donnent droit à indemnité, entre le 14 nov. 1914 et le 30 juin 1920; et il a publié à cet effet le Décret du 19 juil. 1924.	*Art. III*, par. 2: Forces révolutionnaires qui ont établi un gouvernement *de facto* ou *de jure*.	*Art. 3*, par. V (Décret du 19 juil. 1924): Por fuerzas que sirvieron al llamado gobierno de la Convención desde que ésta ha desconocido la primera jefatura del Ejército Constitucionalista hasta el 30 de jun. de 1920.

B. — *Aperçu de l'agent mexicain*

FRACCIÓN I. — "*Fuerzas de un gobierno de jure ou de facto*"

1. Deben considerarse como *fuerzas de un gobierno de jure*, en el período de 20 de noviembre de 1910 a 31 de mayo de 1920, las siguientes:

a) Las del gobierno del General Porfirio Díaz (20 de nov. de 1910 a 25 de mayo de 1911).

b) Las del gobierno del Lic. Francisco de la Barra (25 de mayo de 1911 a 30 de nov. de 1911).

c) Las del gobierno de don Francisco Madero (1. de diciembre de 1911 a 18 de febrero de 1913, fecha en que quedó preso).

d) Las del gobierno de D. Venustiano Carranza (1. de mayo de 1917 a 21 de mayo de 1920, en que murió Carranza).

e) Las del gobierno de don Adolfo de la Huerta (24 de mayo de 1920 a 31 de mayo de 1920).

2. Deben considerarse como *fuerzas de un gobierno de facto*, durante el período de 20 de noviembre de 1910 a 31 de mayo de 1920, las siguientes:

Las constitucionalistas o carrancistas, desde 19 de febrero de 1913 hasta 30 de abril de 1917, en que se convierte Carranza en gobierno *de jure*.

FRACCIÓN II. — "*Fuerzas revolucionarias que hayan establecido al triunfo de su causa gobiernos de jure o de facto, o fuerzas revolucionarias contrarias a aquellas*"

1. Deben considerarse como fuerzas revolucionarias que establecieron gobiernos *de jure* en el mismo período, de 20 de noviembre 1910 a 31 de mayo 1920, las siguientes:

a) Las que se levantaron contra el gobierno del General Díaz (20 de nov. de 1910 a 25 de mayo de 1911, en que cayó Díaz).

b) Las que apoyaron a Carranza hasta convertirlo en gobierno *de jure* (19 de feb. de 1913 a 30 de abril de 1917).

c) Las que secundaron el plan de Agua Prieta (9 de abril de 1920 a 21 de mayo de 1920, en que murió Carranza).

2. Deben considerarse como fuerzas revolucionarias que establecieron gobiernos *de facto* en el tantas veces referido período, las siguientes:

Las constitucionalistas o carrancistas (19 de febrero de 1913 a 30 de abril de 1917).

3. Deben considerarse como fuerzas revolucionarias contrarias a otras revolucionarias que establecieron gobiernos *de jure* o *de facto*, es decir, contrarias a las especificadas en la sección 2 que antecede, todas aquellas que hubiesen organizado *una revolución distinta* de la de las fuerzas mencionadas. Como en México nunca se ha admitido la existencia de dos revoluciones a la vez, la fracción que se está comentando no tiene aplicación desde este punto de vista.

Nosotros creemos que la frase "fuerzas revolucionarias contrarias a aquellas", se puso en la convención, para abarcar, en términos generales, los casos de varias revoluciones simultáneas por si los hechos históricos fueren susceptibles de esa interpretación, lo que, repetimos, nunca se ha aceptado.

El hecho de que una parte de las fuerzas revolucionarias que obedecen a determinado jefe supremo de la revolución se separe de ese jefe y comience a hostilizarlo, no se puede tomar como la organización de otra revolución sino como un acto de insubordinación militar.

La explicación que dió el señor Comisionado González Roa sobre la frase aludida, de que se refiere al caso de lucha entre dos grupos pertenecientes a la misma fuerza revolucionaria, por cuestión accidental o local, es aceptable también como siendo el espíritu de la frase.

FRACCIÓN III. — "*Fuerzas procedentes de la disgregación de las que se mencionan en el parrafo precedente, hasta el momento en que el gobierno de jure hubiera sido establecido después de una revolución determinada*"

Habiendo sentado la tesis de que las fuerzas que se separen de la Primera Jefatura Militar de una revolución, son insubordinadas, es decir, meros insurrectos, no puede admitirse que esta fracción se refiera a esa clase de fuerzas. En consecuencia, la única interpretación posible es esta: unas fuerzas revolucionarias se convierten en gobierno *de facto;* y, antes de que ese gobierno se convierta en gobierno *de jure*, una parte de las fuerzas que estaban bajo ese gobierno *de facto*, diseminadas en diferentes lugares, cometen depredaciones, pero no en actitud hostil contra el gobierno *de facto*. En otras palabras: la frase "fuerzas procedentes de la disgregación de los revolucionarios que *hubiesen triunfado*" debe entenderse como refiriéndose a grupos de fuerzas no contrarias a las triunfantes sino formando parte de estas mismas, pero que, por no haber ya lucha, han quedado disgregadas del núcleo de mando, en cierto modo, sin control por la Primera Jefatura Militar.

Esta interpretación es evidente porque, si se tratara de fuerzas hostiles a las triunfantes, lo habría dicho la fracción.

FRACCIÓN IV. — "*Fuerzas procedentes de la disolución del ejército federal*"

Deben considerarse dentro de esta fracción las partidas de fuerzas federales que hubiesen cometido depredaciones a partir del 1. de agosto de 1914 (Pacto de Teoloyucan, hasta 31 de mayo de 1920).

FRACCIÓN V. — "*Fuerzas insurrectas distintas de las mencionadas en las fracciones 2, 3 y 4*"

Deben considerarse como fuerzas insurrectas a todas aquellas que, perteneciendo a una revolución, se han separado de esta antes del triunfo *sin que en ese momento estuviere ya organizada otra revolución distinta de la que abandonen.* El hecho de que, después de separarse y hostilizar a la Jefatura revolucionaria, pretenden ostentarse como elementos de otra nueva revolución no les quita su carácter de insurrectos si la revolución que abandonaron es la que llega a triunfar. Esto es lo que ha sucedido en México de 1910 a 1920.

Son, pues, fuerzas insurrectas las siguientes:

a) Las de Zapata contra el gobierno de de la Barra y Madero (desde julio de 1911 hasta febrero de 1913).

b) Las de Orozco, contra el gobierno de Madero (desde mayo 1912 hasta mayo de 1917).

c) Las de Felix Díaz contra Madero (en octubre de 1912 y febrero de 1913).

d) Las de Villa y Zapata contra Carranza (noviembre de 1914 hasta 1920).

Intencionalmente se ha omitido el *período de Huerta* porque para nosotros la facción huertista constituye un grupo de rebeldes, con lo agravante de traidores y asesinos.

Naturalmente el único criterio que debe tenerse en cuenta para juzgar de la calidad de tales o cuales tropas es el del Gobierno porque el Gobierno es el representante del pueblo.

Los Gobiernos que han reconocido el derecho de reclamar por indemnizaciones son el de Madero, el de Carranza y el de Obregón, ya sea al expedir las leyes de la Comisión Nacional, ya al firmar las Convenciones. — En consecuencia, esos gobiernos son los que han debido opinar sobre la calidad del huertismo. Ahora bien, esos gobiernos nunca han dado al huertismo los caracteres de gobierno de hecho ni mucho menos *de jure*. En consecuencia no puede entrar dentro de la fracción primera del art. III de la Convención.

Por otra parte, tampoco pueden entrar las fuerzas huertistas dentro de la fracción IV porque ella dice que se pagará por los daños causados por tropas federales *después de su disolución;* y como durante el huertismo no se había disuelto el ejército federal, no hay lugar a la applicación de esa fracción'

PABLO NÁJERA (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No 30-A, October 19, 1928, concurring opinion by French Commissioner, October 20, 1928, dissenting opinion by Mexican Commissioner, November 2, 1928. Pages 156-202. Annexes omitted.)

TREATIES, EFFECT OF NON-REGISTRATION OF *Compromis* WITH SECRETARIAT OF LEAGUE OF NATIONS PURSUANT TO ARTICLE 18 OF THE COVENANT. The fact that the claimant Government, member of the League of Nations, has not proved the registration of the *compromis* with the Secretariat of the League of Nations pursuant to Article 18 of the Covenant may not be invoked by respondent Government, a non-member, in support of a motion to dismiss. Any such failure to register may be invoked as between members of the League but is of no consequence with respect to a non-member.

FRENCH PROTÉGÉS AS PARTIES CLAIMANT.—NATIONALITY, EFFECT OF OPTION FOR LEBANESE NATIONALITY. Claimant was born in Lebanon in 1860, opted for Lebanese nationality November 5, 1926, and acceptance of such option

by Lebanese Government was notified to the French and Mexican consular authorities December 29, 1927. Claimant's memorial was filed before the tribunal June 15, 1926. The forms for signifying exercise of the option stated that it would not take effect until registered with the Lebanese Government and consented to by the French Government. *Held*, claimant is included within the term "French protégés" under article III of the *compromis*. His Lebanese nationality and right to French protection under the terms of the League Mandate is established, and, while the effective date of such right to protection may have been subsequent to the date of the filing of his memorial, he is nevertheless to be considered as a "protégé" under the system of protection preceding the establishment of the Mandate.

Cross-references: Annual Digest, 1927—1928, pp. 52, 256.

Comments: Manley O. Hudson, "Legal Effect of Unregistered Treaties in Practice, under Article 18 of the Covenant", Am. J. Int. Law, Vol. 28, 1934, p. 548.

1. — Par un mémorandum enregistré par le secrétariat sous le numéro 198 et suivi d'un mémoire déposé le 15 juin 1926, l'agent du Gouvernement français a présenté à la Commission une réclamation contre les Etats-Unis Mexicains, pour cause de pertes et dommages subis en 1916 par le Libanais M. Pablo Nájera.

D'après le mémoire français, ladite réclamation se base sur le fait que, le 6 novembre 1916, des forces révolutionnaires sous le commandement du général Villa ont saccagé le magasin que le réclamant exploitait à Hidalgo del Parral, sous le nom de "La Balanza Mercantil".

M. Pablo Nájera a présenté, le 14 novembre 1921, une réclamation devant la Commission nationale qui, par son "dictamen" du 25 juillet 1923, l'a rejetée, parce que, à la date de ce "dictamen", les forces villistes étaient considérées comme rebelles et non comme révolutionnaires.

L'indemnité réclamée se monte à un total de $62.000 sans intérêts.

Dans cette affaire, l'agence mexicaine, avant d'entrer dans la discussion au fond, a proposé quelques exceptions aux fins de non-recevoir, par voie de déclinatoire, en conformité de l'article 18 du Règlement de procédure, de sorte que la procédure relative au fond a été suspendue, conformément à l'article 19 dudit Règlement.

Les discussions orales sur les exceptions proposées par la partie défenderesse ont eu lieu dans les audiences des 2, 7, 9 et 12 juillet 1928. Malgré cela, les débats n'ont pu être déclarés clos que le 9 octobre 1928, puisque quelques documents supplémentaires promis par les agences n'ont été présentés à la Commission que le 19 septembre et le 5 octobre dernier, respectivement.

2. — Le motif par lequel, selon la teneur des pièces fondamentales, l'agence mexicaine prie la Commission de rejeter *in limine* la présente réclamation consiste à dire que la Commission franco-mexicaine n'aurait pas compétence pour en connaître, pour la raison triple suivante:

1) Le réclamant n'ayant présenté, à l'appui de sa qualité pour se présenter devant la Commission franco-mexicaine, qu'un certificat d'immatriculation consulaire français, constatant sa naissance au Liban, n'a pas par cela dûment prouvé sa nationalité syrio-libanaise [1].

2) Quand bien même cette nationalité pourrait être considérée comme dûment prouvée, la qualité de Syrio-libanais ne ferait pas rentrer le récla-

[1] Ainsi que je le ferai observer plus loin dans le texte, une nationalité syrio-libanaise n'existe pas du tout: en effet, il n'existe que des nationalités syrienne et libanaise distinctes. C'est pourquoi, dans le présent cas, je ne parlerai que de la nationalité libanaise du réclamant.

mant dans la catégorie des protégés français mentionnés à l'article III de la Convention, étant donné que le terme "protégé français" équivaut à "sujet d'un protectorat français" et que les pays sous mandat ne constituent pas de protectorats.

3) Même accordé que le réclamant puisse être réputé "protégé français" à l'heure actuelle, il ne l'était, en aucun cas, le 6 novembre 1916, date à laquelle les dommages ont été essuyés.

La défense triple, reproduite ci-dessus et complétée au cours des audiences par une série d'arguments nouveaux, démontre, par son système même, que l'agence mexicaine est d'avis que, pour tomber sous la protection que l'article III de la Convention accorde aux "protégés français", il est de rigueur que le réclamant ait appartenu, déjà à l'époque des dommages, à une nation qui, à cette même époque, était un protectorat de la France, dans le sens technique du mot.

En réfutant les arguments allégués à l'encontre de la recevabilité de la réclamation, l'agence française a suivi le système de défense de l'agence mexicaine, tout en niant que la qualité du réclamant pour se présenter devant la Commission franco-mexicaine doive être jugée à la lueur de la thèse triple soutenue par la partie adverse.

A mon avis encore, la thèse mexicaine contenue dans les trois propositions reproduites ci-dessus, part d'une présupposition dont le bien-fondé est douteux et constitue donc une pétition de principe. Pour cette raison, je crois devoir suivre dans cette sentence un autre ordre de traitement des arguments présentés de part et d'autre, en examinant d'abord:

a) Quel est le sens du terme "protégés français" envisagé par lui-même et à la lumière des éléments d'explication que fournit éventuellement la genèse de la disposition en question; ensuite

b) Si les arguments allégués à l'encontre des conclusions tirées du texte et de la genèse de l'articlesont de nature à amener à une conclusion différente et enfin

c) Si les documents produits par le réclamant suffisent à attester sa qualité de "protégé français" dans le sens qui revient à ce terme.

Tout d'abord, il convient de faire précéder ce triple examen de quelques observations sur la remarque faite par l'agence mexicaine au cours des débats oraux et tirée du défaut de preuve, par l'agence française, que la Convention franco-mexicaine des réclamations ait été dûment enregistrée au Secrétariat de la Société des Nations, conformément à l'article 18 du Pacte, et d'y ajouter quelques observations sur le ou les moments auxquels la qualité de "protégé français" doit avoir existé (3e thèse mexicaine).

Enregistrement de la convention franco-mexicaine des réclamations par le Secrétariat de la Société des Nations

3. — Parmi les arguments allégués par l'agence mexicaine au cours des audiences, il s'en trouve un qui se réfère à l'article 18 du Pacte de la Société des Nations, disant que:

"Tout traité ou engagement international conclu à l'avenir par un Membre de la Société devra être immédiatement enregistré par le Secrétariat et publié par lui aussitôt que possible. Aucun de ces traités ou engagements internationaux ne sera obligatoire avant d'avoir été enregistré."

L'exposé de l'agence mexicaine n'a pas fait ressortir avec toute la clarté désirable quelle est la portée de cet appel fait audit article 18. A mon avis, il ne peut avoir que deux sens intelligibles, ou bien que la Commission franco-mexicaine n'est autorisée à considérer la Convention des réclamations comme

obligatoire à aucun égard, ou bien que son caractère obligatoire doit être nié seulement en ce qui concerne les réclamations des Syriens et des Libanais. Dans le premier cas, on ne saurait s'expliquer pourquoi l'agence mexicaine a passé sous silence cet argument au cours des discussions relatives aux affaires traitées antérieurement devant la Commission (cas Pinson; Bourillon, Jacques y Cía; Lombard Hermanos y Cía; Compañía Azucarera Paraíso Novillero), puisque le même argument eût pu être invoqué alors dans ces affaires. Dans le dernier cas, ce silence antérieur s'expliquerait, mais il resterait absolument dans l'ombre quels rapports particuliers existent entre la situation des pays sous mandat et l'article 18 du Pacte de la Société des Nations. Bien que, par conséquent, la portée de l'argument soit tout à fait incertaine, de sorte qu'il y aurait lieu de ne pas en faire cas dans cette sentence, pour des motifs alliés à la fameuse *exceptio obscuri libelli*, je tiens à ne pas le laisser de côté, étant donné qu'il touche à des questions de principe et que l'arbitrage actuel est, que je sache, le premier dans lequel la portée de l'article 18 ait été discutée en ce qui concerne les relations juridiques entre un Etat membre de la Société et un Etat non membre. Ce faisant, j'entendrai l'argument dans le premier sens, vu que je n'ai pas été à même de saisir le moindre point de contact spécial entre l'enregistrement des traités prescrit par l'article 18 et la Syrie et les autres pays sous mandat.

Evidemment, l'argument tiré de l'article 18 doit avoir été entendu par l'agence mexicaine en supposant tacitement:

1) qu'un tribunal arbitral ou commission mixte qui ne dépend en rien de la Société des Nations, ni ne lui est lié en quoi que ce soit, est tout de même autorisé à en faire application, voire même y est obligé;

2) que le simple fait par la Partie défenderesse de dire que la Partie demanderesse a négligé de prouver l'enregistrement, suffit à barrer la route à l'application de la convention en question;

3) que l'article produit des effets juridiques même dans les rapports entre un Etat membre et un Etat non membre de la Société;

4) que l'Etat non membre peut, en vertu d'un droit propre, l'invoquer en sa faveur, notamment devant un tribunal indépendant de la Société des Nations.

4 (Ad 1). — Il ne peut, naturellement, être question d'entrer dans une récapitulation et un examen critique de toutes les doctrines auxquelles l'article 18 du Pacte a donné naissance. Quand bien même je serais personnellement d'un autre avis, — ce qui n'est pas le cas, — j'éprouverais une grande hésitation à défendre dans cette sentence une opinion qui diffère de celle qui, après de longues discussions au sein de la Société des Nations elle-même, a été admise comme correspondant le mieux à la portée évidente de la disposition dans le cadre du droit international traditionnel; dans des cas pareils, où une disposition conventionnelle se prête à différentes interprétations, il doit exister de très graves doutes sur la correction de l'interprétation courante, ou de très graves raisons de la modifier, pour ne pas accepter comme acquise l'interprétation qu'en a fixée le groupe d'Etats dont elle est destinée à régir les rapports mutuels. J'admets, par suite, l'interprétation acquise, selon laquelle l'article 18 — sans porter atteinte à la force obligatoire, entre les Parties contractantes, de la convention dûment ratifiée, mais pas enregistrée, de sorte qu'elles ne peuvent plus se rétracter unilatéralement, ni conclure avec d'autres Puissances des conventions incompatibles avec la première — empêche tout de même que les Parties contractantes en fassent valoir les stipulations en justice, l'une envers l'autre, non seulement devant les organes de la Société des Nations, notamment l'Assemblée et le Conseil, et devant la Cour permanente de Justice internationale, créée par ladite Société, mais encore devant tout autre tribunal

appelé à fixer les rapports juridiques entre les deux Etats en question — interprétation qui revient à attribuer aux engagements résultant de la convention non enregistrée une valeur juridique analogue aux obligations dites "naturelles" du droit privé, et à l'article 18 lui-même, le caractère d'une règle de droit à laquelle il n'est pas libre aux Etats, membres de la Société des Nations, de déroger par des stipulations particulières, entre eux (*jus cogens)* Dans cette interprétation, la Commission franco-mexicaine serait donc, non seulement autorisée, mais même obligée, à faire application de la seconde phrase de l'article 18, comme dominant toutes les relations conventionnelles des Etats membres de la Société des Nations, si les suppositions *sub* 2), 3) et 4) étaient correctes.

5 (Ad 2). — Dans quelles conditions un tribunal arbitral doit-il se refuser à appliquer une convention, pour des motifs empruntés audit article 18? Est-il strictement nécessaire que la partie contractante qui veut s'en prévaloir commence par en invoquer et démontrer l'enregistrement, de sorte que, si elle le néglige, le tribunal doit considérer la convention comme non-obligatoire? Ou cela n'est-il pas strictement nécessaire et incombe-t-il au tribunal lui-même de vérifier, obligatoirement et d'office, dans chaque cas particulier, si l'enregistrement s'est effectué ou non? Ou est-ce que même cette vérification n'est pas de rigueur, de sorte que le tribunal peut se contenter de s'assurer de l'enregistrement dans les seuls cas où lui-même en doute? Ou enfin, le tribunal est-il obligé de considérer la convention comme obligatoire, à moins que la Partie vis-à-vis de laquelle elle est invoquée ne lui ait démontré que l'enregistrement n'a pas eu lieu?

Si l'on se rend compte, d'une part, que l'enregistrement est un fait public, constaté dans un registre public, et d'autre part, qu'il est permis de supposer que tout Etat, membre de la Société des Nations, remplit ses engagements résultant de l'article 18, la première exigence serait exagérée. Si au contraire, l'on se rend compte du but et du caractère obligatoire de l'enregistrement, la dernière thèse devient inadmissible: car, admettre l'obligation du tribunal de donner effet à une convention, toutes les fois que la Partie défenderesse n'en invoque pas le défaut d'enregistrement, pourrait équivaloir à sanctionner une fraude à l'article 18, en attribuant aux traités secrets des effets juridiques que le Pacte a voulu exclure, et cela par la conspiration des deux Parties contractantes. Le choix doit donc porter sur la deuxième ou la troisième thèse. Etant donné qu'en règle générale, les traités conclus par les membres de la Société sont régulièrement enregistrés et que leur enregistrement est de notoriété commune, j'estime qu'un tribunal international est en droit d'admettre comme la règle la plus raisonnable celle que j'ai formulée ci-dessus en troisième lieu, et consistant à dire que le tribunal peut se borner à exiger la preuve de l'enregistrement dans le seul cas, où il n'en est pas convaincu [1]. Or, dans le cas présent, l'agence mexicaine a simplement avancé que l'enregistrement n'était pas dûment prouvé devant la Commission, sans prétendre qu'il n'aurait

[1] Il est incontestable que cette règle peut laisser échapper à l'attention du tribunal un cas, dans lequel une convention n'a, en réalité, pas été enregistrée. En effet, la Cour permanente de Justice internationale a, une fois, donné application à une convention non enregistrée, à savoir dans son avis consultatif No 11, basé sur la convention polono-dantzicoise de Varsovie du 24 octobre 1921. Ce fait — s'il ne s'explique pas précisément par le motif qu'il s'agissait d'un traité conclu entre un Etat membre et un Etat non membre, bien qu'intimement lié avec la Société, — peut toutefois trouver son explication également dans le caractère particulier des rapports polono-dantzicois, ou dans la situation juridique de la Ville Libre. Malheureusement, l'avis consultatif laisse ce point absolument dans l'ombre.

pas eu lieu; de son côté, l'agent français a déclaré officiellement que, non seulement en ce qui concerne la convention primitive du 25 septembre 1924, mais encore en ce qui concerne la convention additionnelle du 12 mars 1927 la formalité requise par l'article 18 du Pacte a été observée. Dans ces conditions il n'y a pas lieu, à mon avis, d'insister davantage sur ce point.

6 (Ad 3). — L'article 18 produit-il des effets juridiques en dehors du groupe d'Etats composant la Société des Nations? Il n'est pas douteux que l'article 18 n'a aucune importance pour le cas de conventions conclues entre deux Etats non membres de la Société: ceux-ci sont parfaitement libres de conclure des traités secrets, ou de ne pas faire enregistrer leurs traités publics, et aucun tribunal, pas même la Cour permanente de Justice internationale, ne saurait éventuellement dénier force obligatoire à une convention conclue entre de pareilles Parties, et non enregistrée.

La question devient plus compliquée, dès qu'il s'agit de conventions conclues entre un Etat membre et un Etat non-membre de la Société. D'une part, le membre a l'obligation de faire enregistrer ses traités avec des Etats non-membres, mais cette obligation est un engagement pris vis-à-vis des autres membres de la Société et de cette dernière elle-même. D'autre part, la règle de l'article 18 constitue une innovation vis-à-vis du droit coutumier traditionnel et ne saurait donc être considérée comme liant les Etats qui, n'ayant pas souscrit au Pacte de la Société, ni n'y étant entrés plus tard, vivent toujours sous le coup de cet ancien droit coutumier, qui ne connaît aucune obligation d'enregistrement. Aussi, le passage qui se trouve dans le *Traité de droit international public* de P. Fauchille, t. 1er, 3e partie, p. 339: "un Etat non membre qui a conclu un traité avec un Etat membre de la Société, doit avoir le droit d'exiger l'enregistrement, puisque à défaut de cet enregistrement le traité resterait dépourvu de force obligatoire", me semble-t-il contenir une grave erreur.

A mon avis, la situation juridique à cet égard est la suivante. Même pour les traités conclus entre Etats membres et non-membres de la Société la prescription de l'article 18 du Pacte n'est pas sans intérêt. Le membre qui ne fait point enregistrer un traité, conclu avec un non-membre manque à ses devoirs envers la Société des Nations et il ne serait pas qualifié pour invoquer la convention non enregistrée devant l'Assemblée, le Conseil, ou une commission ou organisation quelconque de ladite Société. Par contre, l'Etat non-membre est tout à fait étranger à l'engagement contracté par les membres; pour lui n'est obligatoire que la règle du droit international commun, d'après laquelle la force obligatoire d'un traité résulte généralement de l'échange des ratifications. Par conséquent, si la France avait omis de faire enregistrer la convention par le Secrétariat de la Société des Nations, et qu'elle l'invoquât quand même, par exemple devant le Conseil de la Société, ce dernier ne serait pas, à mon avis, qualifié pour la considérer comme obligatoire. Et peut-être, pourrait-on dire la même chose, pour le cas où la France invoquerait une telle convention devant la Cour permanente de Justice internationale, bien que celle-ci ne soit pas, dans le même sens que le Conseil, un organe de la Société des Nations, et qu'elle soit investie du pouvoir souverain d'apprécier la situation juridique en parfaite indépendance. Au contraire, le Mexique serait en droit d'invoquer la convention (par exemple, la troisième clause de l'article VIII) devant tout tribunal international, y compris la Cour permanente de Justice internationale, sans que le défaut d'enregistrement pût lui être opposé.

7 (Ad 4). — Est-ce à dire, enfin, que le Mexique, de son côté, serait qualifié pour opposer à la France, en vertu d'un droit propre, le défaut d'enregistrement d'un traité conclu avec elle, notamment devant un tribunal arbitral ou une commission mixte indépendante de la Société des Nations? Point du

tout. Le Mexique n'étant pas lié, en quoi que ce soit, par la disposition de l'article 18, et cette disposition ne pouvant, par suite, lui nuire à aucun égard, il ne saurait, à l'inverse, non plus en tirer des arguments en sa faveur, pour se soustraire à des engagements internationaux qu'il a pris par une convention qui, pour ce qui le concerne, est pleinement valable. Le Mexique ne saurait donc en aucun cas se retrancher, en vertu d'un droit propre, derrière le défaut éventuel d'enregistrement de pareille convention par la France.

La seule question qui me paraisse douteuse, et qui eût obtenu une importance capitale dans la Commission franco-mexicaine, si le Mexique eût pu démontrer le défaut d'enregistrement de la Convention, est celle de savoir, si même cette Commission, bien qu'indépendante de la Société des Nations, aurait été obligée d'ignorer la convention, en vertu de l'article 18 du Pacte. S'il m'eût fallu décider cette question, je l'aurais résolue par la négative.

La raison pour laquelle, entre membres de la Société des Nations, une convention non enregistrée ne saurait être considérée comme obligatoire, pas même par un tribunal international indépendant de la Société (voir ci-dessus, ad 1), consiste en ceci que les Parties contractantes sont, l'une et l'autre, liées par la même règle de droit impérative *(jus cogens)*, qui prévaut sur leur liberté d'agir en matière de traités internationaux. Mais cette raison n'existe pas, en ce qui concerne les traités conclus entre un Etat membre et un Etat non membre, et non enregistrés. Il va de soi qu'un tribunal international indépendant n'a pas, comme les organes de la Société des Nations, la mission de coopérer *ex officio* à l'accomplissement, par les membres de ladite Société, de leurs obligations vis-à-vis de celle-ci, et d'en frapper l'inobservation par des sanctions, qui ne découlent pas également des principes généraux du droit. Or, il me paraît impossible d'interpréter la sanction prévue à l'article 18 du Pacte, comme constituant l'application d'un principe général de droit. Cela pourrait être le cas, si la disposition dudit article 18 impliquait une *capitis deminutio* des membres de la Société des Nations, en ce sens que, après la naissance de celle-ci, ses membres seraient limités dans leur capacité juridique traditionnelle de contracter des engagements internationaux (internationale Handlungsfahigkeit), comme c'est le cas, par exemple, d'Etats souverains entrés dans une fédération, ou s'étant soumis au protectorat d'un autre Etat. Mais évidemment, pareille situation ne se présente pas ici. L'article 18 ne limite en rien ladite capacité juridique. Il frappe seulement d'une sanction nouvelle, une règle de droit nouvelle qui ne produit ses effets, *erga omnes*, et notamment vis-à-vis d'un tribunal arbitral indépendant, qu'entre membres de la Société, mais qui, entre un Etat membre et un Etat non membre, ne les produit qu'en ce qui concerne la seule Société et ses organes.

Mais quand bien même la Commission franco-mexicaine eût donné effet à la sanction juridique formulée à l'article 18 du Pacte, elle n'eût en aucun cas, pu le faire pour le motif que l'Etat non membre aurait un droit propre d'invoquer en sa faveur l'article 18 du Pacte, qui pour lui est *res inter alios acta*, mais seulement pour le motif que l'Etat membre se serait barré la route vers le tribunal par son propre fait ou sa propre négligence.

En éliminant ainsi le jeu de la sanction de l'article 18 entre un Etat membre et un Etat non membre de la Société dans un tribunal international indépendant de cette dernière, la Commission franco-mexicaine aurait évité en même temps la conséquence fâcheuse de placer l'Etat membre dans une situation procéduriale moins favorable que celle de l'Etat non membre, car, quelle serait, dans le cas contraire, la situation juridique, notamment dans l'hypothèse d'un traité contenant des obligations réciproques? L'Etat membre ne saurait l'invoquer en sa faveur devant aucun tribunal vis-à-vis de l'Etat non membre, mais il ne saurait de son côté exciper du défaut d'enregistrement, pour se

défendre contre une demande de ce dernier. Inversement, l'Etat non membre pourrait se prévaloir d'un pareil traité devant tout tribunal, sans que le défaut d'enregistrement pût lui nuire en quoi que ce fût. Cette inégalité de situation procédurale se justifierait parfaitement devant les organes de la Société des Nations; en effet, l'Etat en défaut ne saurait l'imputer qu'à lui-même, puisque, ayant pu et ayant dû faire enregistrer le traité en vertu de ses obligations vis-à-vis de la Société des Nations, il a manqué à son devoir. Mais il n'y a pas, à mon avis, de motifs suffisants de créer la même situation défavorable à l'Etat membre, devant un tribunal qui n'a rien à faire avec la Société des Nations.

Le sens du terme "protégés français" dans l'article III de la Convention envisagé à la lueur des négociations diplomatiques

8. — Lorsqu'on fait abstraction, pour le moment, des pourparlers diplomatiques qui ont amené à la conclusion de la convention des réclamations, on se trouve en présence de deux thèses, la française, qui attache au terme "protégés" un sens ample, à savoir de tous ceux que, selon le droit international, la France est obligée et (ou) en droit de protéger par la voie diplomatique, et la mexicaine, selon laquelle "protégés" est équivalent à "sujets d'un protectorat". L'agence mexicaine a négligé de confirmer cette interprétation du terme par des citations d'auteurs, de conventions ou de sentences arbitrales qui l'appuient, ce qui trouve son explication naturelle dans le fait que, autant que je sache, aucun auteur, aucun texte conventionnel, aucune sentence n'attache au mot "protégés" le sens "technique" restreint que l'agence mexicaine prétend lui donner. Bien au contraire, la doctrine et la pratique du droit international public sont d'accord pour dire que les "protégés" d'un Etat forment un ensemble hétérogène de personnes, dont les sujets d'un protectorat de l'Etat en question ne constituent qu'un seul groupe.

En veut-on des exemples? Si la thèse de l'agence mexicaine était correcte, la fameuse convention de Madrid du 3 juillet 1880, basée elle-même sur une convention antérieure de 1863, et qui a joué un rôle notable dans l'évolution du conflit franco-allemand relatif au Maroc, serait un non-sens. Car dans cette convention, un nombre d'Etats, dont la plupart n'avaient pas du tout de protectorats internationaux (comme l'Allemagne, l'Autriche-Hongrie, l'Espagne, les Etats-Unis, l'Italie, les Pays-Bas, le Portugal, la Suède) "ayant reconnu la nécessité d'établir sur des bases fixes et uniformes l'exercice du droit de protection au Maroc", ont fixé des règles sur leurs "protégés" dans ce pays. Autre exemple: article 32 de l'Acte général de la Conférence antiesclavagiste de Bruxelles du 2 janvier 1892 [1], interprété par la Cour permanente d'arbitrage de La Haye dans sa sentence relative aux boutres de Mascate, et comprenant, d'après cette interprétation, en ce qui concerne les pays de capitulations, quatre groupes de "protégés" dont les sujets d'un pays sous le protectorat de la Puissance dont ils invoquent la protection, ne constituent qu'un seul groupe, les trois autres étant formés par les personnes qui, soit en vertu de traités particuliers, soit d'une loi ottomane de 1863, soit d'une situation de fait ayant existé déjà avant 1863, jouissent de la protection d'une Puissance étrangère.

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[1] D'après ledit article 32:

"L'autorité d'arborer le pavillon d'une desdites Puissances ne sera accordée à l'avenir qu'aux bâtiments indigènes qui satisfont à la fois aux trois conditions suivantes:

"1. Les armateurs ou propriétaires devront être sujets ou protégés de la Puissance dont ils demandent à porter les couleurs;

"2. . . . . , etc.".

Et si l'on consulte, comme troisième exemple de l'emploi du terme controversé, le *Handbuch des deutschen Konsularwesens* de B. W. von König (8e édition, p. 66 et ss.), on voit que, là aussi, le terme "Schutzbefohlene" ou "Schutzgenossen" est pris dans un sens beaucoup plus ample que le prétendu sens "technique" qui, selon la thèse mexicaine, doit être attaché au terme "protégés". Il n'est donc pas douteux que cette thèse, d'après laquelle le mot "protégé" en droit international équivaut à "sujet d'un protectorat international", est absolument dénuée de fondement.

9. — Quelles personnes sont, alors, comprises dans ce terme? Il n'est guère possible de donner à cette question une réponse catégorique et qui prétende embrasser tous les cas particuliers, dans lesquels la question puisse être soulevée. D'après l'interprétation contenue dans la sentence relative aux boutres de Mascate, citée ci-dessus, la situation de "protégé" peut découler non seulement de lois nationales de pays vivant sous le régime des capitulations et de traités spéciaux, comme celui de 1844 conclu entre la France et le Sultanat d'Oman, mais même de situations de fait créées sans aucun titre juridique déterminé. L'agence mexicaine a quelques moments voulu tirer de ladite sentence un argument en faveur de sa thèse que, en tout cas, les sujets de pays sous mandat ne peuvent être considérés comme "protégés", lesdites personnes ne se trouvant pas énumérées dans la liste établie par la Cour permanente d'arbitrage. Mais sans parler même de la circonstance que ladite sentence fut rendue bien des années avant que personne ne pût prévoir la création des mandats à la suite d'une conflagration mondiale, l'argument ne serait pas exact, puisque parmi les groupes de "protégés" figurant dans ladite sentence, se trouvent précisément les personnes qui ont été reconnues comme "protégées" par un traité particulier, comme c'est le cas des sujets de tous les pays sous mandat.

En effet, aux termes de l'article 3 du mandat pour la Syrie et le Liban — article qui se trouve dans tous les mandats —, "les ressortissants de la Syrie et du Liban se trouvant hors des limites de ces territoires relèveront de la protection diplomatique et consulaire du Mandataire". Cette disposition non seulement confère à la France le *droit*, mais encore lui impose le *devoir* de veiller aux intérêts des ressortissants de la Syrie et du Liban à l'étranger, au moyen de sa protection diplomatique et consulaire, conformément au fameux adage d'un des maîtres de la science allemande du droit public, selon lequel "öffentliches Recht ist öffentliche Pflicht". Il s'agit donc, bien sûr, d'un titre international de protection dont la France peut se prévaloir, pour assumer la sauvegarde des intérêts des Syriens et des Libanais à l'étranger, et ne pas les prendre équivaudrait à un grave manquement, de la part de la France, à ses engagements internationaux. C'est pourquoi la manière de l'agence mexicaine de représenter les choses, comme si la France, en prenant la défense desdits intérêts sans une autorisation spéciale de la Société des Nations, usurperait en quelque sorte des droits qui reviendraient à cette dernière, est absolument erronée. La situation est presque identique, à cet égard, à celle des ressortissants de la Ville Libre de Dantzig, placés sous la protection diplomatique de la République polonaise, bien que ce petit Etat libre ne soit pas non plus un protectorat de la Pologne.

D'ailleurs, je m'abstiens pour le moment d'entrer dans un examen du point de savoir si, comme l'a affirmé l'agent français, la France n'a pas le droit de protection diplomatique des ressortissants de la Syrie et du Liban en vertu d'autres titres plus anciens et de beaucoup antérieurs au régime du mandat.

Si donc, d'une part, il ne peut exister aucun doute sur ce que le terme "protégé" en droit international a un sens plus large que ne lui attribue

l'agence mexicaine, et que, d'autre part, l'étendue exacte du terme dépend du contexte dans lequel il se trouve et de l'intention des Etats contractants, il convient de consulter avant tout les éléments d'interprétation que fournissent les pourparlers diplomatiques entre la France et le Mexique, ainsi que la situation de fait au Mexique.

10. — Pour effleurer d'abord ce dernier point, il est notoire qu'il n'y a dans ce pays, ni n'y avait pendant la période révolutionnaire dont s'occupe la convention des réclamations, ni de Marocains, ni de Tunisiens, ni de Cambodgiens, ni d'Annamites, de sorte que, si le terme de "protégés" devait effectivement être conçu dans le prétendu sens "technique" défendu par l'agence mexicaine, les mots "ou de protégés français" et "ou sous la protection française" figurant à l'article III de la convention, se révéleraient vides de sens; or, pareille interprétation semble tout de suite se heurter à la règle d'interprétation *sub a*, 5) que j'ai formulée au paragraphe 50 de ma sentence dans l'affaire G. Pinson (No 1), à savoir que, en cas de doute sur la portée d'une stipulation conventionnelle, elle doit être entendue dans un sens qui en assure la possibilité d'application. Or, les mots "ou des protégés français", qui ne pourraient trouver aucune application dans l'interprétation mexicaine, obtiennent un sens très clair, dès que l'on les rattache au fait également notoire qu'il existe, au contraire, au Mexique, et qu'il y existait déjà pendant la période révolutionnaire, un nombre assez grand de Syriens et de Libanais, jouissant ici, comme partout dans le monde, de la protection diplomatique de la France.

Cette vraisemblance, cette presque-certitude que les parties contractantes n'ont, par conséquent, pu avoir en vue que les Syriens et les Libanais placés sous la protection diplomatique française, trouve-t-elle sa confirmation dans la correspondance diplomatique qui a précédé la conclusion de la convention des réclamations? En effet, les pourparlers diplomatiques la confirment pleinement. Même l'agence mexicaine n'a pas contesté que les seules personnes que les mots "ou les protégés français" puissent avoir eues en vue, sont précisément les Syriens et les Libanais. Ce que ladite agence conteste, ce n'est donc pas que la correspondance diplomatique s'est toujours et même exclusivement rapportée à ces deux catégories d'étrangers, mais que le Mexique aurait concédé que lesdites catégories d'étrangers puissent être comprises sous le terme de "protégés français". Pour apprécier la valeur de cet argument, il faut pénétrer dans les intentions des parties.

11. — Or, au cours des discussions orales, auxquelles notamment l'agence mexicaine a dépensé une force d'arguments pénétrants et subtils, sont venues se dessiner sur le fond des argumentations respectives, trois interprétations possibles de la teneur des négociations diplomatiques. Pour bien comprendre la portée de la controverse, il est indispensable de reproduire ci-après les passages des lettres échangées entre les représentants des deux Gouvernements, qui ont trait aux mots "ou de protégés français" dans l'article III de la Convention.

Dans le projet de convention primitif, remis par M. Pani à M. Blondel, Chargé d'affaires de France au Mexique, le 19 mai 1923, les protégés français ne figuraient pas encore. Ce ne fut qu'après certain entretien du nouveau Ministre de France, M. Périer, avec M. Aarón Sáenz, que le premier fit parvenir au dernier, à la date du 21 mars 1924, une lettre dans laquelle se trouvent les passages suivants:

"Toutefois c'est le projet remis par M. Pani à M. Blondel le 19 mai 1923 qui servira de base pour la convention à conclure; mais ce projet devrait être modifié et complété de façon à ce que les intérêts français et les intérêts des protégés français syrio-libanais reçussent le traitement de la nation la plus favorisée d'Amérique ou d'Europe.... Votre Excellence et moi avons, en effet,

été d'avis qu'avant de poursuivre les négociations en question il était indispensable de constater d'abord, par un échange de lettres, le bon accord de principe qui vient de s'établir entre nous à ce sujet."

A cette lettre, M. Aarón Sáenz a répondu, à la date du 29 mars 1924, dans les termes suivants:

".... Añade Vuestra Excelencia que, para las negociaciones que se piensan iniciar a este respecto, desea tomar como base el proyecto entregado por el Sr. Ingeniero Pani al señor Blondel el 19 de mayo de 1923, modificándolo de manera que comprenda tanto a los nacionales franceses como a los protegidos sirio-libaneses, concediéndoles, al mismo tiempo, el tratamiento de la nación más favorecida que Vuestra Excelencia pide para los nacionales y protegidos franceses. A este respecto me permito indicarle que, siendo el deseo del Gobierno Mexicano, indemnizar a todas las personas que sufrieron daños a causa de la revolución, pero de manera completamente voluntaria y *ex-gratia*, tendrá que dispensar a todos los quejosos sin distinción de nacionalidades, un tratamiento completamente igual."

A la suite de cette réponse, M. Périer remit à M. Aarón Sáenz, le 12 juin 1924, un contre-projet de convention,

".... calqué sur celui qui avait été remis à M. Blondel par M. Pani le 19 mai 1923 et qui a été seulement modifié et complété de façon à faire donner aussi aux intérêts français et aux intérêts des protégés français syrio-libanais le traitement qui vient d'être accordé, par le Gouvernement mexicain, aux ressortissants d'un autre pays".

La disposition y relative était conçue dans les termes suivants:

"La Commission connaîtra de toutes les réclamations contre le Mexique à raison de pertes ou dommages subis par des Français ou des protégés français ou par des sociétés, compagnies, associations ou personnes morales françaises ou sous la protection française...."

Le nouveau projet modifié que le Secrétaire des Relations Extérieures du Mexique a communiqué à la Légation de France à la date du 30 juin 1924, contenait de nouveau les mots "o protegidos franceses" et "o sujetos a la protección francesa"; dans cette forme la disposition définitive a été arrêtée.

Voyons maintenant les trois interprétations possibles.

L'agence française a invoqué l'échange de lettres visé ci-dessus pour en tirer la conclusion que le Gouvernement mexicain a consenti à faire juger par la Commission franco-mexicaine les réclamations des Syriens et des Libanais. Au contraire l'agence mexicaine a commencé par en conclure le contraire, à savoir que le Gouvernement de son pays a repoussé cette idée. Plus tard, elle a changé sa position, à l'effet de dire que le Gouvernement du Mexique, tout en niant, en ce qui le concernait, l'applicabilité des mots "protégés français" aux Syriens et aux Libanais, a voulu charger la Commission franco-mexicaine de décider ce point.

La première interprétation se base sur le fait que, d'une part, le Gouvernement français n'a jamais laissé subsister le moindre doute sur son intention de comprendre les Syriens et les Libanais dans le terme "protégés français", voire même n'a jamais visé par ce terme de personnes autres que précisément lesdits deux groupes d'étrangers, et que, d'autre part, le Gouvernement mexicain n'a jamais énoncé son inconformité avec cette thèse française. S'il est vrai que le Gouvernement du Mexique, après avoir reproduit les termes de la lettre du Ministre de France en date du 21 mars 1924, n'a pas répété, dans sa lettre du 29 mars suivant, en réponse à celle du Ministre de France, les mots "protégés français syrio-libanais", mais s'est borné à mentionner "los protegidos franceses", ce fait n'a aucune importance, étant donné que si le Gouvernement mexicain eût voulu exprimer son inconformité avec cette qualification fran-

çaise, il aurait dû le faire en termes exprès et pas par un silence, que le représentant et le Gouvernement français n'ont jamais pu interpréter dans un sens autre que celui d'une acceptation tacite des Syriens et des Libanais comme "protégés français". En tout cas, les autorités françaises n'ont jamais pu le comprendre autrement; aussi, l'argumentation mexicaine est-elle pour elles une parfaite surprise.

La deuxième interprétation se basait sur la thèse que le Gouvernement français eût dû comprendre que le Gouvernement mexicain, en ne répétant pas, dans sa lettre du 29 mars 1924, les mots "protégés français syrio-libanais", mais en leur substituant "protegidos franceses", voulait, bien que ne le disant pas, exclure les dits Syriens et Libanais du terme "protégés français" et, par conséquent, du jeu de la convention, et que la France ne l'ayant pas compris doit subir les conséquences du manque de perspicacité de la part de ses représentants. Cette thèse, en effet insoutenable, ayant été abandonnée par l'agence mexicaine elle-même, ne doit plus nous occuper. Interpréter de cette façon le simple fait d'un silence me paraît incompatible avec une bonne gestion des relations diplomatiques, d'autant plus que le Gouvernement mexicain a de nouveau laissé sans aucune contradiction la même qualification des Syriens et des Libanais, figurant dans la lettre du Ministre de France en date du 12 juin 1924, donc postérieure au prétendu rejet de la thèse française par la rédaction purement accidentelle de la réponse du 29 mars 1924.

Reste la troisième interprétation, consistant à dire que, bien que ne le disant pas non plus, le Gouvernement mexicain, en remplaçant les mots "protégés français syrio-libanais" par "protegidos franceses", a eu l'intention de laisser indécis le point de savoir si les Syriens et les Libanais peuvent être compris dans le terme "protégés français" et de déférer ce point à la Commission mixte à créer. L'agence mexicaine a négligé d'alléguer aucune indication que cette intention tacite a été saisie par le représentant diplomatique ou le Gouvernement de France et l'étude scrupuleuse du dossier ne m'a pas non plus amené sur la trace d'aucune indication dans ce sens.

12. — En présence des interprétations contradictoires exposées ci-dessus, la Commission a tenu à attendre les informations complémentaires offertes par l'agence mexicaine, et dans lesquelles M. Aarón Sáenz, Gouverneur constitutionnel de l'Etat de Nuevo León, ancien Secrétaire des Relations Extérieures du Mexique, expliquerait le cours des négociations diplomatiques relatives aux protégés français et les intentions qu'il a eues lors desdites négociations. Ces explications n'ont été fournies à la Commission que le 13 septembre 1928, sous la forme d'un échange de lettres entre l'agent mexicain et M. Aarón Sáenz, dont voici la teneur:

Lettre de l'agent mexicain à M. Aarón Sáenz, en date du 24 août 1928:

...."En la Comisión de Reclamaciones entre México y Francia se ha discutido ampliamente sobre la interpretación del Art. III de la Convención, en lo relativo a la frase "protegidos franceses". Es decir, la Agencia francesa sostiene que en esa frase están incluidos los Sirio-libaneses y la Agencia Mexicana sostiene que no están: en primer lugar, porque los Sirio-libaneses no son protegidos franceses a la luz del Derecho Internacional y en segundo lugar, porque si se hubiera tratado de incluir a los Sirio-libaneses en la Convención no se habría puesto "protegidos franceses" sino Sirio-libaneses.

El Agente francés ha aducido que de la correspondencia cruzada entre usted, como Secretario de Relaciones Exteriores, y el señor Ministro de Francia se desprende que usted estuvo conforme en que los Sirio-libaneses quedaran incluidos en el expresado Art. III a título de protegidos franceses. Por mi parte

ofrecí a la Comisión dirigirme a Ud., en solicitud de su opinión sobre el particular y a ese efecto, le suplico muy atentamente se sirva explicarme los antecedentes que hubiera habido sobre la situación de los Sirio-libaneses en relación con dicha Convención y muy particularmente sobre los compromisos contraidos por la Secretaría de Relaciones respecto a esos Sirio-libaneses durante el tiempo en que fué usted Secretario encargado de dicho Ministerio...."

Réponse de M. Aarón Sáenz à l'agent mexicain, en date du 11 septembre 1928.

..."En respuesta me es grato manifestar a Usted que durante los primeros pasos de las negociaciones, el Sr. Ministro de Francia me indicó el deseo de que se hiciera alguna modificación al proyecto de Convención, calcado sobre el de los Estados Unidos, en el sentido de comprender a los protegidos sirio-libaneses. Me limité a contestarle que estaba conforme con comprender en el Tratado a los protegidos y no dije nada sobre los Sirio-libaneses *(a)*

En el proyecto de Tratado ya con las modificaciones indicadas por el señor Ministro, no se mencionaron para nada los Sirio-libaneses y por lo mismo el asunto no volvió a tratarse *(b)*. La Convención fué al Senado sin que se dijera algo relativo a los Sirio-libaneses *(c)*.

Después de firmada la Convención, el señor Ministro me dirigió una comunicación *(d)*, pidiéndome el tratamiento de la nación más favorecida para los franceses y protegidos sirio-libaneses. Le contesté refiriéndome a los franceses y protegidos franceses en vista de que varias reclamaciones quedaban fuera de la Convención *(e)*.

Después el señor Ministro tuvo conferencias verbales conmigo solicitando que hiciera la Secretaría una declaración expresa sobre que los Sirio-libaneses están comprendidos en la Convención. Me ví obligado a rehusarme por el triple motivo de que en mis comunicaciones yo había mencionado sólo a los protegidos, de que no habían sido mencionados en el Tratado los Sirio-libaneses, y de que el Senado había aprobado la Convención tal como fué modificado el primitivo proyecto, en vista de las observaciones del señor Ministro, es decir, sin mencionar a los Sirio-libaneses y sólo a los protegidos franceses *(f)*.

La Secretaría nunca hizo estudiar la situación de los sirio-libaneses por considerar que la condición de las negociaciones no lo requería *(g)*.

Les lettres reproduites ci-dessus semblent attester, bien que d'une façon très vague, une interprétation intermédiaire entre la deuxième et la troisième interprétation résumées au § 11. En effet, d'une part, la réponse de M. Aarón Sáenz souligne qu'il n'a jamais concédé que la Convention comprendrait les Syriens et les Libanais, mais seulement les protégés français, et, d'autre part, elle déclare que le Secrétariat des Relations Extérieures n'a jamais fait étudier la situation des Syrio-libanais, de sorte qu'il n'a jamais non plus pu se rendre compte de leur classement exact d'après le droit international [1].

[1] Dans la lettre de M. Aarón Sáenz, reproduite ci-dessus, j'ai inséré les lettres *(a)* jusqu'à *(g)* pour faire les brefs commentaires suivants:

ad *(a)*. — La portée exacte de cette limitation n'est pas claire. Le Ministre français ayant demandé l'extension de la Convention aux seuls Syrio-libanais, à titre de protégés français, la réponse ne peut avoir eu en vue des protégés, autres que les Syrio-libanais, qui, au surplus, n'existaient pas au Mexique. La réponse semble donc ne pouvoir être conçue que dans l'un des deux sens suivants: ou bien comme une acceptation pure et simple de la demande française, ou bien comme impliquant une réserve, quant à la qualification juridique des Syrio-libanais. Mais dans cette dernière hypothèse, la réserve était si tacite, qu'il n'est pas étonnant que la réponse ait laissé le Ministre de France dans l'illusion d'un accord parfait.

ad *(b)*. — S'il est vrai que dans le projet de convention du 12 juin 1924, les Syrio-

13. — Bien qu'attachant personnellement au silence absolu du Gouvernement mexicain vis-à-vis de la qualification expresse et réitérée des Syriens et des Libanais comme "protégés français" par le Gouvernement français, une portée presque identique à celle défendue par l'agent français (première interprétation résumée au § 11), je préfère néanmoins me mettre sur la base de la troisième interprétation, pour démontrer que même dans cette hypothèse la thèse mexicaine, selon laquelle la Commission franco-mexicaine n'aurait pas compétence pour connaître des réclamations des Syriens et des Libanais, est absolument insoutenable. J'admets donc, aux fins de la présente argumentation, que le Gouvernement mexicain a voulu laisser à la Commission le soin de décider si les Syriens et les Libanais peuvent, d'après le droit international, être censés compris dans le terme "protégés français". Et j'admets également, par hypothèse, que, avec plus de sagacité, le représentant diplomatique et le Gouvernement français eussent pu saisir l'intention inexprimée du Secrétaire des Relations Extérieures, et que l'intention tacite du Gouvernement mexicain, quoique pas comprise par les représentants français, doit être censée prévaloir sur la conception que ceux-ci se sont réellement formée de l'attitude du Gouvernement du Mexique relative aux intérêts syriens et libanais. Dans toutes ces suppositions la situation se présenterait donc comme suit:

Le Gouvernement français a exprimé, sans aucun équivoque et plus d'une fois, son opinion que l'insertion des mots "protégés français" visait spécialement les Syriens et les Libanais. Le Gouvernement mexicain n'y a opposé aucune déclaration contraire, mais s'est borné à remplacer par "protégés français" les mots primitifs "protegidos franceses sirio-libaneses"; ce faisant, il a tacitement exprimé sa restriction mentale de ne pas considérer lui-même comme "protégés français" lesdits étrangers, mais de vouloir s'en référer, à ce sujet, à l'avis de la Commission franco-mexicaine, de sorte que les Syriens et les Libanais doivent tomber sous le coup de la Convention, si la Commission décide que ces groupes d'étrangers peuvent, en effet, être considérés comme étant compris dans le terme "protégés français".

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libanais ne se trouvaient plus expressément mentionnés, il n'en est pas moins vrai que la lettre d'envoi du même projet les mentionnait de nouveau, comme étant naturellement et seuls visés par le terme "protégés français". Cette mention n'eût pas dû être laissée sans contradiction, si le Gouvernement mexicain avait voulu y faire objection.

ad *(c)*. — S'il est vrai que la Convention fut soumise au Sénat sans aucune explication du terme "protégés français", il n'en est pas moins vrai que les Syrio-libanais ont été mentionnés dans la séance du Sénat. Voir ci-après dans le texte.

ad *(d)*. — Ce passage pourrait laisser une impression inexacte. Ce qui s'est passé juridiquement ce ne sont pas trois faits successifs: la signature de la Convention, l'envoi subséquent d'une lettre par le Ministre français au Secrétaire des Relations Extérieures du Mexique et l'envoi, encore plus tard, d'une réponse à cette lettre par ce dernier au premier, mais plutôt deux actes juridiques, bilatéraux, simultanés et intimement liés, à savoir: la conclusion de la Convention et l'échange de deux notes diplomatiques identiques préparées à l'avance. Naturellement le dernier acte, secondaire, a suivi le premier, primaire, étant donné qu'il est matériellement impossible de poser deux signatures à la fois, mais cela n'empêche pas que, dans le sens juridique, il y a eu simultanéité.

ad *(e)*. — Cette communication aussi manque de précision; car, en effet, la réponse se référait aussi bien aux réclamations tombant sous le coup de la Convention qu'à celles qu'elle ne vise pas.

ad *(f)*. — Cette argumentation triple part de l'*a priori* erroné que les Syrio-libanais ne peuvent être qualifiés comme protégés français. Quant au Sénat, voir plus loin dans le texte.

ad *(g)*. — Si cela a été le cas, il a été prématuré de vouloir prétendre que les Syrio-libanais n'étaient pas des protégés français.

Or, comme je l'ai fait remarquer plus haut (§§ 8 et 9), il n'existe pas le moindre inconvénient pour considérer comme "protégés" d'un Etat dans le sens juridique international du mot, des personnes, comme les Syriens et les Libanais, qui, en vertu d'un titre international spécial, se trouvent placées sous la protection diplomatique de cet Etat. Pareille interprétation est d'autant plus raisonnable lorsqu'on considère, d'une part, que ledit terme a toujours eu un sens assez ample et que la France n'a laissé planer aucun doute sur son interprétation du terme, et d'autre part, que le sens "technique" que l'agent mexicain a prétendu lui donner, n'est pas du tout technique, mais parfaitement arbitraire, le sens technique du mot étant plutôt celui de "personne bénéficiant, en vertu d'un titre juridique quelconque, de la protection diplomatique d'un Etat". On ne doit pas oublier que la France n'a pas seulement le droit, mais encore l'obligation de protéger par la voie diplomatique les personnes ressortissant aux pays placés sous son mandat, de sorte que, si elle déclare en termes exprès à un Gouvernement étranger de vouloir étendre certain règlement auxdits ressortissants, l'usage du terme "protégés" ne saurait en aucun cas lui être opposé plus tard. Il ne faut pas non plus oublier que l'article III de la Convention mentionne, à côté des protégés français, des sociétés, etc. sous la protection française, et qu'il faut bien beaucoup de "technicité" pour interpréter ces mots dans le sens de sociétés ayant leur siège dans un Etat protectorat de la France, ou constituées suivant les lois d'un tel Etat. Enfin je ne fais que rappeler ici que ni le Gouvernement français ni le Gouvernement mexicain ne connaissent la présence au Mexique pendant la période révolutionnaire de personnes, moins encore de sociétés commerciales marocaines, tunisiennes, annamites ou cambodgiennes, si bien que la clause entière serait, dans l'interprétation mexicaine, dépourvue de tout sens intelligible, conclusion que l'on ne saurait admettre que dans le cas d'impossibilité absolue d'y attacher un sens raisonnable.

La condition dont le Gouvernement mexicain, en la personne de son Secrétaire des Relations Extérieures, a voulu faire dépendre l'application de la convention franco-mexicaine aux Syriens et aux Libanais, à savoir, qu'ils puissent, selon le droit international, être compris dans le terme "protégés français", se trouve, par conséquent, pleinement remplie, et le Gouvernement mexicain peut être parfaitement tranquille qu'en acceptant cette conclusion, elle ne prête aucune assistance à un empiétement quelconque de la France sur les droits de la Société des Nations, — bien au contraire, qu'il l'aide à remplir une de ses obligations les plus délicates vis-à-vis de cette Société, qui, elle-même, l'a chargée de la protection diplomatique des sujets de ces pays sous régime juridique tout à fait spécial.

D'ailleurs, le Sénat de la Fédération paraît ne l'avoir pas compris dans un sens différent. La lettre de M. Aarón Sáenz du 11 septembre 1928 — et il en a été de même de la plaidoirie de l'agence mexicaine — veut accréditer la conclusion que le Sénat, n'ayant pu lire dans la convention qu'une mention des protégés français, n'a aucunement pu penser aux Syriens et aux Libanais. Sans insister sur le point embarrassant de savoir à quelles personnes il a pu raisonnablement penser alors, je me borne à faire observer que, bien au contraire, le Sénat a parfaitement compris de quels étrangers il s'agissait ici. En effet, le Sénateur Laguna leur a consacré quelques observations expresses, évidemment dans la supposition tacite qu'eux étaient visés par le terme "protégés français" et ni aucun membre du Sénat, ni même le Secrétaire des Relations Extérieures, qui était présent aux discussions, n'a contredit le Sénateur. Dans ces conditions on n'est pas justifié à dire que le Sénat ne puisse pas avoir, ni n'ait en effet, eu en vue les Syriens et les Libanais.

ARGUMENTATION MEXICAINE À L'ENCONTRE DES CONCLUSIONS PRÉCÉDENTES

14. — Dans les conditions exposées ci-dessus, il ne me semble pas nécessaire de consacrer encore un examen détaillé à la profusion d'arguments techniques allégués par l'agence mexicaine, pour infirmer les conclusions tirées de la genèse et du texte de l'article III de la Convention et de la terminologie traditionnelle du droit des gens. Il m'a déjà fallu en réfuter plusieurs au cours des observations qui précèdent, et il ne m'est pas possible d'entrer dans une appréciation de tous les autres, dont aucuns révoquent en doute la validité même du mandat français sur la Syrie et le Liban, reconnue pratiquement par le monde entier; dont d'autres se rapportent à la fameuse controverse sur la question de savoir si la Société des Nations, ou les Principales Puissances alliées et associées eussent dû attribuer les mandats en vertu de l'article 22 du Pacte de la Société des Nations, et dont d'autres encore ont trait à la disposition plus ou moins grande de la Syrie et du Liban, ou des Syriens et des Libanais individuels à l'étranger, à se soumettre au mandat ou à la protection de la France.

Je crois pouvoir me borner à déclarer que notamment deux points concrets invoqués par l'agence mexicaine à l'encontre de la validité de la clause relative aux intérêts des Syrio-libanais et des sociétés syrio-libanaises au Mexique, sont erronées, à savoir: *a)* que la Convention franco-mexicaine aurait dû contenir une mention spéciale de pleins pouvoirs, soit des Etats syriens et du Liban eux-mêmes, soit du Conseil de la Société des Nations, à l'effet d'autoriser la France à agir au nom des pays sous mandat, et *b)* que ladite Convention eût dû être approuvée par ledit Conseil.

La première assertion applique à la gestion des affaires internationales des règles et usages particuliers au droit privé et étrangers aux rapports internationaux. Pour pouvoir agir au nom d'un autre pays, un Etat a, certes, besoin d'un titre international, sur lequel se fonde son habilité à le faire. Ce titre peut être soit une convention spéciale, telle qu'une convention établissant une union douanière entre deux Etats souverains (Zollverein allemand, unions douanières polono-dantzicoise et belgo-luxembourgeoise), soit un traité de subordination internationale, tel qu'un traité de protectorat, soit un mandat de tutelle internationale, depuis l'entrée en vigueur du Pacte de la Société des Nations (article 22). Mais cela n'implique nullement qu'un traité conclu en vertu d'un pareil titre juridique soit entaché de nullité par le seul fait de ne pas faire mention expresse dudit titre ou de pleins-pouvoirs spéciaux du pays représenté ou de son "subrogé tuteur". Dans l'espèce, le titre international contenu en l'article 3 du mandat pour la Syrie et le Liban, approuvé par le Conseil de la Société des Nations dans sa séance du 29 novembre 1923 ("Les relations extérieures de la Syrie et du Liban, ainsi que la délivrance des *exequatur* aux consuls des Puissances étrangères, seront du ressort exclusif du Mandataire. Les ressortissants de la Syrie et du Liban se trouvant hors des limites de ces territoires relèveront de la protection diplomatique et consulaire du Mandataire") est un titre de caractère général, et absolument suffisant pour rendre juridiquement valable tout traité international conclu par la France avec une Puissance étrangère, soit pour la Syrie et le Liban, soit en faveur de Syriens et de Libanais individuels, n'importe dans quelle forme ce traité ait été rédigé.

La seconde assertion repose sur une simple erreur. L'Agence mexicaine a prétendu, par analogie, tirer de l'article 12 du mandat [1] la conclusion que la

[1] Le Mandataire devra adhérer, pour le compte de la Syrie et du Liban, aux conventions internationales générales, conclues ou à conclure, avec l'approbation de la Société des Nations, sur les sujets suivants: traite des esclaves, trafic des stupé-

convention franco-mexicaine des réclamations eût, à côté de l'enregistrement visé à l'article 18 du Pacte, dû être approuvée par la Conseil de le Société des Nations, pour ce qui concerne les réclamations syriennes et libanaises. L'assertion est dénuée de tout fondement, parce que même l'article 12 ne prescrit aucunement l'approbation par le Conseil de l'adhésion par le Mandataire, pour le compte des pays sous mandat, aux conventions internationales générales, relatives à la traite des esclaves, au trafic des stupéfiants, etc., mais bien au contraire, impose précisément à la France l'obligation d'adhérer à certaines conventions collectives d'intérêt général, qui, elles, ont été ou seront conclues avec l'approbation de la Société des Nations.

Suffisance des documents produits à l'appui de la qualité de protégé français

15. — Pour prouver la qualité de "protégé français" du réclamant, l'agent français a produit un certificat d'immatriculation consulaire, daté à Mexico le 21 mai 1926 et constatant que l'intéressé est né à Bekfaya (Liban) en 1860, qu'il a opté pour la nationalité libanaise le 5 novembre 1925, que son dernier domicile à l'étranger a été le Liban et que l'immatriculation s'est faite sur le témoignage de deux témoins, ayant également opté pour la nationalité libanaise, M. Seguib Chami et Alexandre Gabriel. Plus tard, l'agent français a encore produit deux autres documents, à savoir un exemplaire de l'acte d'option du réclamant et copie d'une lettre du Gouvernement français constatant l'acceptation de l'option par le Gouvernement du Liban.

L'agence mexicaine a commencé par attaquer la force probante du certificat d'immatriculation consulaire pour des raisons d'ordre général, qu'elle a également invoquées à l'encontre de la force probante de tous les autres certificats d'immatriculation; ensuite elle a fait quelques objections de caractère spécial, contre le certificat en question; et enfin, elle a affirmé que pareil certificat ne saurait en aucun cas servir de preuve dans le cas compliqué des Syrio-libanais étant donné que la nationalité de ces groupes de personnes dépend d'une série de conditions, formulées dans le traité de Lausanne et que la Commission franco-mexicaine ne saurait se soustraire à l'obligation d'examiner elle-même, si cet ensemble de conditions se trouve rempli dans l'espèce. Cependant, dans le cas des Syriens et des Libanais, le Gouvernement mexicain a, d'une façon non douteuse, fait connaître son point de vue officiel, en répondant, par l'organe du Secrétariat des Relations Extérieures, au Président de la Commission nationale des réclamations, en date du 13 janvier 1923, ce qui suit:

"Por lo que respecta a los Sirio-libaneses, están en la actualidad bajo el patronato de la República Francesa, y, en consecuencia, son las autoridades consulares francesas las únicas capacitadas para extender los certificados de nacionalidad y de matrícula consular de los Sirio-libaneses, teniendo dichos certificados toda su fuerza legal como si se tratara de individuos de nacionalidad francesa",

déclaration que je ne puis passer sous silence. Accordant toutefois, que l'énonciation citée ci-dessus ne lie pas juridiquement les Etats-Unis mexicains, et ne voulant, par conséquent, la citer que comme une indication très forte de la conviction juridique du Gouvernement mexicain, je n'y insiste plus, pour

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fiants, trafic des armes et munitions, égalité commerciale, liberté de transit et de navigation, navigation aérienne, communications postales, télégraphiques ou par télégraphie sans fil, protection littéraire, artistique ou industrielle.

entreprendre maintenant l'examen des documents produits par l'agent français à l'appui de la qualité de "protégé français" du réclamant.

16. — Or, une question préliminaire s'impose: quel doit être l'objet de la preuve? Est-il nécessaire de prouver que le réclamant possédait, au moment de la réclamation devant la Commission franco-mexicaine, la nationalité libanaise (et que, en conséquence, il était, en ce moment, "protégé français"), ou suffit-il d'administrer la preuve de sa qualité de "protégé français", indépendante de sa nationalité? Car, ainsi que j'ai eu l'occasion de le faire remarquer ci-dessus (§§ 8 et 9), ladite qualité peut résulter de plusieurs titres bien différents. *Ou bien*, elle peut découler du fait de ressortir à un Etat, qui, lui, est le protectorat d'un autre Etat (Maroc, Tunisie), est placé sous le régime moderne de mandat-tutelle (royaume d'Iraq, émirat de Transjordanie), ou est soumis, comme Etat-vassal, à la suzeraineté d'un autre Etat (Tibet), ou du fait de ressortir à un Etat qui, bien que n'étant placé ni sous le protectorat, ni sous le mandat, ni sous la suzeraineté d'un autre Etat, a néanmoins dû confier la gestion de ses relations extérieures ou la seule protection de ses nationaux à un autre Etat (Dantzig); dans tous ces cas, la qualité de "protégé" de l'Etat A est la conséquence directe du lien juridique de la nationalité qui lie l'individu avec l'Etat B. *Ou bien* ladite qualité de "protégé" présente un caractère plus individuel, comme c'est le cas, par exemple, des "protégés" suivant la convention collective de Madrid, en date du 30 juillet 1880, citée ci-dessus (§ 8); dans ce cas, la qualité de protégé est plus directement personnelle et n'a nullement besoin de s'appuyer sur la base juridique du fait de ressortir à un Etat déterminé.

Les Syriens et les Libanais ont toujours occupé, à cet égard, une position en quelque sorte intermédiaire, l'Empire Ottoman ayant tenu en principe, entre ses propres mains la protection de ses nationaux à l'étranger, la qualité de sujet ottoman ne comportant aucunement, par elle-même, la qualité de "protégé" étranger, comme c'est, *ipso jure*, le cas des sujets du Sultan du Maroc, du Bey de Tunisie, du Roi d'Iraq, etc. D'autre part, une nationalité syrio-libanaise, syrienne ou libanaise n'existait pas encore avant la formation définitive des Etats autonomes dans cette partie du monde, à la suite de la grande guerre. La qualité de "protégés français" ne résultant donc ni de la nationalité ottomane, ni d'une nationalité syrio-libanaise, non existante, des personnes en question, ne pouvait, par conséquent, se baser que sur d'autres éléments, d'origine ou de race, de caractère personnel.

Dans ces conditions, la situation des Syriens et des Libanais, par rapport à l'application de la convention franco-mexicaine des réclamations, se présente sous un jour un peu autre que se présenterait, par exemple, sous le coup de la convention anglo-mexicaine, celle des sujets du jeune royaume d'Iraq, les habitants de la Mésopotamie n'ayant jamais été placés auparavant sous une protection étrangère, britannique ou autre, comparable à celle dont ont joui traditionnellement les habitants de la Syrie ou du Liban. En effet, pour ce qui concerne ces derniers, deux nuances de "protection" se sont succédées: la première, traditionnelle, séculaire, plutôt de fait que de droit, reconnue par le Gouvernement ottoman et exercée antérieurement par la France au Mexique même et sans objections de la part du Gouvernement mexicain (voir ci-après § 19); la seconde, récente, moderne, strictement juridique et pratiquement reconnue par le monde civilisé entier. Ces deux périodes de la protection française des individus originaires de la Syrie et du Liban se trouvent parfaitement dans le prolongement l'une de l'autre, la dernière n'étant que l'évolution historique et politique de la première. Mais ces deux phases de la protection française sont séparées par une période de transition, pendant laquelle, d'une part, l'état temporaire de guerre existant entre la France et la Turquie a

ébranlé les rapports normaux, et d'autre part, s'est produite l'évolution graduelle des territoires turcs de la Syrie et du Liban en Etats autonomes. Vouloir exciper de ces conditions, tout à fait anormales, s'étant présentées dans une période marquée d'évolution, sinon de révolution, politique de caractère mondial, pour leur appliquer certaines règles traditionnelles du droit des gens coutumier, qui n'ont jamais eu en vue de situations tellement exceptionnelles, serait méconnaître absolument la force écrasante des événements politiques, qui joue un rôle si important dans l'évolution des relations internationales et du droit des gens lui-même. C'est pourquoi ni l'interruption temporaire des rapports diplomatiques entre la France et la Turquie par suite de la guerre mondiale et ses effets éventuels, selon certaines règles normales du droit international, sur la protection traditionnelle française, ni le fait que l'élaboration du régime juridique des pays sous mandat, la préparation d'une législation sur la nationalité des originaires desdits pays et l'application des dispositions du traité de Lausanne relatives à l'option des Syriens et des Libanais ont nécessairement dû laisser subsister une période de situations juridiques embrouillées et inachevées, ne peuvent, à mon avis, être invoqués pour ôter entre-temps aux Syriens et aux Libanais la qualité de "protégés français", dans le sens traditionnel du mot.

17. — Dans les conditions exceptionnelles auxquelles je viens de faire allusion, et si l'on veut s'en tenir, quand même, à la règle assez généralement observée par les tribunaux d'arbitrage, à savoir, que le caractère de ressortissant ou de protégé de l'Etat réclamant dans le chef de l'individu lésé doit être certain, aussi bien au moment des dommages, qu'à celui où, soit la convention des réclamations fut signée, soit la réclamation introduite, soit la sentence rendue — à cet égard, la pratique arbitrale présente des nuances très notables — (sur cette règle voir ci-après, § 19), je suis d'avis que la protection de droit sur la base du mandat, déjà parfaite ou encore en voie de naissance, doit être prise en considération dès le moment où elle est venue remplacer la protection traditionnelle, et que cette dernière doit fournir le critérium pour tout moment antérieur.

Or, la protection nouvelle exercée en faveur des Syriens et des Libanais par la France, à titre de Puissance mandataire, ayant supplanté l'ancienne protection traditionnelle, est nécessairement subordonnée désormais à la condition que l'individu en question ressortisse, à titre de national, soit au Liban, soit à un des Etats Syriens, la France ne pouvant plus, à mon avis, exercer encore à l'avenir sa protection diplomatique traditionnelle, en faveur de personnes qui, bien qu'étant originaires du territoire d'un de ces Etats et remplissant aussi toutes les autres conditions requises par le traité de Lausanne pour pouvoir exercer le droit d'option pour la nationalité syrienne ou libanaise, n'ont pas effectivement opté, dans le délai prévu, pour une desdites nationalités. Quant à ces individus, la protection française traditionnelle a pris fin et la situation juridique internationale a subi une novation définitive. J'admets donc comme parfaitement correcte la thèse mexicaine selon laquelle, pour pouvoir encore exercer son droit de protection diplomatique en faveur de Syriens et de Libanais après l'établissement du mandat et l'élaboration d'une loi sur la nationalité, la France doit prouver la nationalité syrienne ou libanaise de l'intéressé. Mais contrairement aux affirmations mexicaines, je suis d'avis que l'agent français a prouvé que le réclamant est actuellement de nationalité libanaise.

Dans l'espèce et même abstraction faite des données erronées qu'il contient (voir ci-après), le certificat d'immatriculation consulaire ne suffit pas en effet, à lui seul, à attester la nationalité libanaise du réclamant, pour la raison qu'il

a été établi à un moment antérieur à la date à laquelle la déclaration d'option du 5 novembre 1925 fut transmise au Haut-Commissaire de France en Syrie et Liban, aux fins d'acceptation par le Gouvernement du Liban, c'est-à-dire avant que ladite déclaration ne pût produire ses effets définitifs. Ce que le certificat prouve c'est la condition de protégé français dans le sens ancien, traditionnel du terme. Mais ainsi que je viens de le faire observer, cette condition ne suffit plus après la novation de la situation juridique de la population de la Syrie et du Liban, à la suite de la réorganisation politique du Proche Orient; les originaires du Liban et de la Syrie qui ne se sont pas prévalus du droit d'option pour la nationalité libanaise ou syrienne, sont définitivement restés sujets turcs, et je ne suis pas disposé à admettre encore à leur égard un droit de protection diplomatique à exercer par la France. Pour que la France soit qualifiée pour les "protéger" encore après l'établissement de l'ordre nouveau des choses, il est donc strictement nécessaire qu'elle démontre l'acquisition par l'intéressé de la nationalité syrienne, respectivement libanaise, nouvellement créées. "La nationalité syrienne, respectivement libanaise", car, ainsi que je l'ai constaté plus haut (§ 2, note), l'organisation des pays sous mandat a comporté, avec la création d'un Etat libanais à côté de différents Etats syriens, la formation de deux nationalités distinctes et non pas d'une nationalité unique syrio-libanaise (voir à ce sujet les deux arrêtés du 30 août 1924 et les deux arrêtés postérieurs du 19 janvier 1925, cités à la page 44 du Rapport du Ministère des Affaires étrangères de France à la Société des Nations sur la situation de la Syrie et du Liban pour l'année 1925).

Aux termes de l'article 24 du Traité de paix de Lausanne en date du 24 juillet 1923:

"Sous réserve des accords qui pourraient être nécessaires entre les Gouvernements exerçant l'autorité dans les pays détachés de la Turquie et les Gouvernements des pays où ils sont établis, les ressortissants turcs âgés de plus de 18 ans, originaires d'un territoire détaché de la Turquie en vertu du présent traité, et qui, au moment de la mise en vigueur de celui-ci, sont établis à l'étranger, pourront opter pour la nationalité en vigueur dans le territoire dont ils sont originaires, s'ils se rattachent par leur race à la majorité de la population de ce territoire, et si le Gouvernement y exerçant l'autorité y consent. Ce droit d'option devra être exercé dans le délai de deux ans, à dater de la mise en vigueur du présent traité."

Les conditions que l'article cité, reproduit dans les arrêtés du 30 août 1924, requiert pour une option valable de la nationalité libanaise sont, par conséquent, au nombre de sept, à savoir: 1), nationalité turque; 2), âge d'au moins dix-huit ans; 3), être natif du Liban; 4), résidence habituelle à l'étranger; 5), affinité de race avec la majorité libanaise; 6), consentement du Gouvernement exerçant le pouvoir au Liban; 7), observation du délai de deux ans. Il n'est pas douteux que, dans l'espèce, les conditions *sub* 2), 3), 4) et 7) se trouvent remplies, bien qu'il ait existé certain doute sur l'âge et le lieu de naissance précis du réclamant [1]. Après la production par l'agent français de la lettre du Gouvernement français adressée au Consul de France à Mexico, en date du 29 décembre 1927, et constatant l'acceptation par les Gouvernements intéressés de toutes les déclarations d'option souscrites au Mexique, la condition *sub* 6) paraît également remplie. Restent les conditions *sub* 1) et 5). A cet égard, l'agent mexicain a prétendu que la Commission franco-mexicaine soit obligée de contrôler elle-même si le réclamant était, en effet, au moment

[1] A cet égard l'acte d'option a paru contenir les données exactes: naissance à Djodeibah (Liban), le 14 avril 1885.

de l'entrée en vigueur du traité de Lausanne, ressortissant turc, et si, par conséquent, il était autorisé à opter pour la nationalité libanaise. Je fais, toutefois, observer que l'agence mexicaine s'est abstenue d'avancer la même prétention, en ce qui concerne l'affinité de race, mentionnée *sub* 5). Admettre la première prétention eût nécessité un examen de l'ancienne législation turque, basée sur le *jus sanguinis* — circonstance qui rappelle toutes les difficultés de la preuve de la nationalité dans les pays où ledit système est en vigueur (comp. les observations faites à ce sujet dans la sentence No 1, dans l'affaire Pinson, § 17) — et éventuellement l'étude d'actes de baptême ou d'autres documents semblables, s'il y en a, en langue arabe, ou turque. Et admettre la dernière, — il n'y a, en effet, aucune raison pour ne pas l'admettre, dès que l'on admet la première, — eût rendu nécessaire un examen linguistique et anthropologique, afin de vérifier la correction de l'assertion du réclamant qu'il appartient à la même race que la majorité de la population du Liban. Pareille vérification de toutes les conditions dont dépend, d'après le traité de Lausanne, le droit d'opter pour la nationalité libanaise, serait impraticable et n'est, au surplus, aucunement nécessaire, étant donné qu'ici, comme dans beaucoup d'autres hypothèses, intervient la règle, formulée au § 22 de ma sentence relative à la réclamation Pinson, à savoir qu'une *praesumtio juris* milite en faveur de la régularité de tous actes officiels de fonctionnaires publics. Si le Gouvernement du Liban a accepté la déclaration d'option du réclamant, cela signifie que, après examen des pièces produites, il a reconnu le droit de l'intéressé d'être reçu dans la nation libanaise, et la Commission franco-mexicaine ne peut entreprendre un examen nouveau de toutes les conditions résumées ci-dessus. J'admets donc comme règle générale qu'un tribunal international, se trouvant en présence d'options de nationalité acceptées par le Gouvernement intéressé, est parfaitement justifié à considérer ces options comme régulières et à ne pas entrer dans un examen indépendant des conditions dont leur validité dépend.

Dans ces conditions, la nationalité libanaise actuelle du réclamant à la suite de l'acceptation de sa déclaration d'option par le Gouvernement intéressé, et, par conséquent, sa qualité de "protégé français", sur la base de l'article 3 du mandat pour la Syrie et le Liban, sont déclarées prouvées.

Moment auquel la qualité de protégé doit avoir existé

19. — Le mémoire dans la présente affaire ayant été déposé le 15 juin 1926, il est douteux que l'option déclarée le 5 novembre 1925, qui n'a été remise, aux fins d'examen et d'approbation, au Haut Commissaire de France en Syrie et Liban que le 9 juin 1926, et dont l'acceptation par le Gouvernement intéressé n'a été notifiée aux autorités consulaires de France au Mexique que le 29 décembre 1927, puisse être considérée comme ayant conféré à l'intéressé la nationalité libanaise, déjà avant la première date mentionnée ci-dessus (15 juin 1926). Cette observation nous amènerait dans la matière controversée des effets juridiques d'une option de nationalité, à la suite d'une cession de territoire ou d'un autre titre quelconque de "succession d'Etats". Le plus souvent la question se pose par rapport à des options qui ont l'effet de ne pas faire acquérir à l'habitant d'un territoire cédé la nationalité de l'Etat cessionnaire, malgré le transfert de la souveraineté. Une telle option produit-elle ses effets *ex nunc*, ou doit-elle être considérée comme rétroactive jusqu'à la date à laquelle la souveraineté nouvelle a remplacé l'ancienne? A mon avis, c'est, en général, la dernière solution qui doit prévaloir, par le motif théorique que, en dernière analyse, l'option normale à la suite d'une cession de territoire fonctionne comme condition résolutoire, dont la réalisation neutralise le jeu

de la règle qui veut que la cession entraîne automatiquement, avec le transfert de la souveraineté, le changement de nationalité de tous les habitants (ou originaires) du territoire cédé, ainsi que pour le motif pratique, que, dans le cas contraire, l'individu intéressé devrait être censé changer de nationalité par deux fois successives dans un bref laps de temps.

Dans le cas actuel, la déclaration d'option ne suffisait pas et devait être complétée par une acceptation de l'option par le Gouvernement intéressé. En outre, l'option ne servait pas, dans l'espèce, comme dans le cas de l'article 31 du traité de Lausanne, à neutraliser l'effet automatique de changement de nationalité, mais bien au contraire, était indispensable à revêtir l'intéressé de la nationalité de son pays d'origine, érigé en Etat autonome. Dans un cas pareil, deux effets rétroactifs pourraient entrer en ligne de compte: la rétroactivité de l'acceptation de l'option jusqu'à la date de l'option, et la rétroactivité de l'option jusqu'à la date du transfert de la souveraineté territoriale. Je ne serais en aucun cas disposé à admettre l'effet rétroactif dans le dernier sens, mais il pourrait être douteux que l'effet rétroactif doive également être dénié à l'acceptation de l'option, jusqu'à la date de l'option elle-même. Etant donné toutefois que le Gouvernement français lui-même, dans le modèle des déclarations d'option à signer par les Syrio-libanais, a inséré la clause que "la présente déclaration entraînera acquisition de la nationalité libanaise à compter du jour où, du consentement du Gouvernement de la République Française, elle aura été enregistrée par le Gouvernement libanais", aucun effet rétroactif ne saurait être admis dans l'espèce, de sorte que M. Nájera n'a acquis la nationalité libanaise qu'après l'introduction de sa réclamation, et que, par conséquent, il n'a pas encore pu réclamer à titre de ressortissant libanais.

Cette conclusion ne porte, toutefois, aucune atteinte à ma conclusion sur la recevabilité de la réclamation, puisqu'alors, la nationalité libanaise n'ayant pas encore été définitivement acquise, la situation juridique au moment de la déposition du mémoire devrait toujours être appréciée à la lumière de la protection traditionnelle, encore en train d'évoluer en la protection nouvelle à titre de mandat. Cette protection traditionnelle a été reconnue antérieurement par le Gouvernement mexicain lui-même, comme par d'autres Gouvernements, ainsi que le prouvent les données y relatives fournies par l'agent français. Et elle existait dès avant l'époque des dommages, de sorte que, si la qualité de protégé français doit avoir existé aussi à ladite époque, cette condition de recevabilité doit être censée remplie.

Mais dans l'espèce ce dernier point se présente sous un jour particulier. Lorsque les deux Gouvernements correspondaient au sujet des Syrio-Libanais ou des protégés (et il est *in confesso* que même le Gouvernement mexicain, en se servant de ce terme, n'a pas pu penser à d'autres personnes que précisément ces Syrio-Libanais), ils savaient que tous les dommages auxquels se référaient les négociations avaient été causés pendant une période dans laquelle la qualité de "protégé français" ne pouvait encore être appréciée à la lumière de la nouvelle situation juridique du Liban et de la Syrie, et des Libanais et des Syriens. Ils savaient qu'un changement fondamental de la situation politique et juridique de ces régions était en train de se produire et que ce changement comporterait des conséquences juridiques pour les Syriens et les Libanais émigrés au Mexique. Ils pouvaient prévoir que la situation juridique de ces individus paraîtrait avoir changé entre l'époque des dommages et celle de l'introduction de la réclamation. Si, dans ces conditions, ils ont étendu quand même les bénéfices de la convention aux étrangers en question, sous la condition tacite que la Commission mixte à créer reconnaîtrait qu'ils peuvent être compris dans le terme "protégé", il ne me semble pas loisible d'appliquer après

coup aux réclamations de ces étrangers des règles techniques strictes, comme celles auxquelles je viens de faire allusion, ni d'exciper du fait qu'à l'époque des dommages ils étaient des sujets ottomans. L'intention évidente des Parties a été de faire bénéficier des avantages de la Convention des personnes originaires de Syrie et du Liban, qui auraient subi des dommages pendant les révolutions, pour autant que la France serait autorisée à les faire bénéficier de sa protection. De ces deux éléments, celui de l'origine syrienne ou libanaise de l'intéressé était un facteur constant et invariable; ce qui n'était pas constant, c'était l'élément de la protection, celle-ci pouvant, non seulement changer d'aspect, mais encore prendre fin. Mais si cette protection, dans une forme ou dans une autre, continuait seulement jusqu'à la date de l'introduction de la réclamation, les individus en question pourraient, selon l'intention apparente des Parties contractantes, se prévaloir de la convention. Le cas présent diffère essentiellement des hypothèses dans lesquelles un individu, ressortissant de l'Etat A à l'époque des dommages, devient après cette époque et avant la date de la réclamation, ressortissant de l'Etat B de son propre fait [1]. Dans le cas de changements collectifs de nationalité en vertu d'un titre de succession d'Etats, la situation juridique doit être appréciée d'une manière beaucoup moins rigide que ne le fait généralement la pratique arbitrale dans les hypothèses normales de changement individuel de nationalité par le fait volontaire de l'intéressé. D'ailleurs, dans la présente hypothèse, l'on ne saurait raisonnablement nier que la qualité de "protégé français" existait, non seulement à la première, mais encore à la seconde date décisive.

Pour ces motifs:

La Commission jugeant contradictoirement,

I. — Rejette le déclinatoire proposé et déclare recevable la réclamation de M. Pablo Nájera, à titre de protégé français;

II. — Ordonne la remise du contre-mémoire au fond dans les trente jours de la présente sentence.

Fait et jugé à Mexico, le dix-neuf octobre mil neuf cent vingt-huit, en deux exemplaires, qui seront transmis aux Agents de la Partie demanderesse et de la Partie défenderesse, respectivement.

Le Président de la Commission,
J. H. W. VERZIJL

Opinion du Commissaire français

J'approuve les conclusions de la sentence signée par le Président de la Commission dans l'affaire No 198, Pablo Nájera et concluant à la recevabilité de cette demande, que je considère comme rentrant dans la compétence de la Commission conformément aux termes de la Convention du 25 septembre 1924, aux négociations préliminaires et aux intentions des Hautes Parties contractantes. J'approuve également les considérations qui motivent directement cette sentence, sans qu'il me paraisse nécessaire de formuler mon opinion personnelle sur la question de l'enregistrement des traités par la Société des Nations, question que l'agence mexicaine ne paraît avoir soulevée qu'incidemment.

Mexico, le vingt octobre mil neuf cent vingt-huit.

V. AYGUESPARSSE

[1] Sur les différentes solutions admises dans ce cas, voir la sentence du surarbitre *Parker* dans la commission mixte américano-allemande, instituée après la grande guerre.

Opinion dissidente du Commissaire mexicain [1]

L'arbitre mexicain soussigné a le regret de ne pouvoir approuver la sentence rendue par la majorité de la Commission et, en conséquence, il expose ci-après son opinion dissidente:

Historique

L'Agent du Gouvernement français a présenté une réclamation contre les Etats-Unis du Mexique, pour cause de pertes et dommages subis, en 1916, par Pablo Nájera, qu'il considère comme Libanais.

L'Agent mexicain estime que cette réclamation doit être rejetée *in limine* parce que l'Agent de la France n'a pas apporté de preuves suffisantes de la qualité de Libanais du réclamant; parce que les Syro-libanais ne sont pas visés par la Convention et enfin parce que, même en supposant qu'ils le soient, sous le nom de protégés français, le réclamant n'était pas protégé au moment où le dommage a été subi.

Les commissaires de la majorité donnent, dans leur sentence, entièrement raison à l'Agent de la France, parce qu'à leur avis la nationalité libanaise de Nájera est prouvée par un certificat d'immatriculation consulaire qui a été produit; parce que l'expression "protégé français" employée dans le texte du Traité vise les Syriens et les Libanais; enfin parce que la Convention produit effet rétroactif à l'égard des Syriens et des Libanais.

Il convient de faire remarquer que l'Agent mexicain a déclaré que toute sentence de la Commission, qui élargirait la portée de la Convention à des individus qu'elle ne vise pas, équivaudrait à un excès de pouvoir de la Commission, étant donné que, dans ce cas, elle statuerait *ultra vires*.

Juridiction de la Commission

La juridiction du Tribunal est strictement limitée du fait qu'elle est née du consentement des deux Hautes Parties contractantes qui ont signé la Convention. En conséquence, il convient d'examiner dès l'abord si, en vertu de la Convention elle-même, la Commission mixte peut connaître des réclamations des Syriens et des Libanais. Du résultat de cet examen dépend la validité d'une sentence rendue sur un cas particulier. Les principes applicables sont parfaitement clairs. Pour citer un auteur (le soussigné, ne jouissant pas personnellement d'une autorité suffisante, s'efforce de s'appuyer sur celle d'un jurisconsulte éminent), nous nous permettrons de citer MM. Capitant et Trotabas, qui, dans leur étude sur l'excès de pouvoir du Tribunal arbitral mixte qui a statué dans l'affaire des optants hongrois, ont déclaré:

Une sentence internationale n'a d'autorité que si elle a été rendue dans les limites de la compétence attribuée au tribunal dont elle émane. Il n'y a pas de juridiction internationale de droit commun; toute juridiction internationale est d'exception, et, par conséquent, ne possède la qualité de juge que dans l'exercice des pouvoirs qui lui ont été expressément accordés; si elle excède ses pouvoirs, elle cesse d'être juge, et sa décision n'a aucune force obligatoire pour les parties.

C'est en se prévalant de ce principe que la Roumanie a refusé de s'incliner devant les jugements du T.A.M. roumano-hongrois. La légitimité de son attitude dépend donc de l'existence d'un excès de pouvoir commis par le tribunal, et il est dès lors nécessaire de préciser la notion d'excès de pouvoir en matière de juridiction internationale.

[1] The translation of the opinion of the Mexican Commissioner is by the United Nations Secretariat.

La compétence d'un tribunal international est limitée à un double point de vue. D'une part, le tribunal peut connaître de certaines réclamations, à l'exclusion des autres; d'autre part, il doit appliquer certaines règles de droit à l'exclusion des autres. Dans la *Revue du droit public*, 1927, page 47, MM. Jules Basdevant, Gaston Jèze et Nicolas Politis déclarent: "Le Tribunal international est toujours un tribunal doublement exceptionnel: 1. il ne peut juger que les affaires mises dans sa compétence; 2. il ne peut juger ces affaires qu'en appliquant les règles de droit qui lui ont été prescrites par le Traité ou la Convention." Ainsi un tribunal international dépasse les limites de sa compétence dans deux hypothèses: 1. il excède ses pouvoirs s'il reçoit à sa barre une affaire dont il ne doit pas connaître; 2. il excède également ses pouvoirs lorsqu'il s'érige en gardien de règles dont il n'a pas reçu mission d'assurer le respect.

Ce dernier point a été mis particulièrement en évidence lors du projet de création d'une Cour internationale des prises: c'est faute de s'être mis d'accord sur la règle de droit à faire appliquer par cette cour que celle-ci n'a pas pu être constituée. On ne saurait mieux montrer la subordination nécessaire du juge international à une règle de droit strictement précisée. (*Revue générale de droit international public*, janvier, février et mars 1928, No 1, pages 35 et 36.)

La raison pour laquelle la majorité de la Commission estime que les Syriens et les Libanais sont visés par la Commission est tirée de l'article III qui, dans la partie qui nous intéresse, déclare:

La Commission connaîtra de toutes les réclamations contre le Mexique à raison des pertes ou dommages subis par des Français ou des protégés français, ou par des sociétés, compagnies, associations ou personnes morales françaises ou sous la protection française; ou des pertes ou dommages causés aux intérêts de Français ou de protégés français, des sociétés, compagnies, associations ou autres groupements d'intérêts, pourvu que l'intérêt du lésé, dès avant l'époque du dommage ou de la perte, soit supérieur à 50 pour 100 du capital total de la société ou association doit il fait partie, et qu'en outre ledit lésé présente à la Commission une cession consentie à son profit, de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir ladite société ou association.

La Commission déclare que la Syrie et le Liban étant placés sous mandat de la France, les Syriens et les Libanais sont protégés français et que, de ce fait, la Convention leur est applicable.

Situation des Syriens et des Libanais sous régime du mandat

Le Traité de Versailles a décidé d'appliquer à certaines colonies et à certains territoires un régime spécial appelé mandat, régi par les dispositions de l'article 22 de sa première partie, qui vise à établir le Pacte de la Société des Nations. Ledit article déclare:

Article 22. — Les principes suivants s'appliquent aux colonies et territoires qui, à la suite de la guerre, ont cessé d'être sous la souveraineté des Etats qui les gouvernaient précédemment et qui sont habités par des peuples non encore capables de se diriger eux-mêmes dans les conditions particulièrement difficiles du monde moderne. Le bien-être et le développement de ces peuples forment une mission sacrée de civilisation, et il convient d'incorporer dans le présent Pacte des garanties pour l'accomplissement de cette mission.

La meilleure méthode de réaliser pratiquement ce principe est de confier la tutelle de ces peuples aux nations développées qui, en raison de leurs ressources de leur expérience ou de leur position géographique, sont le mieux à même

d'assumer cette responsabilité et qui consentent à l'accepter; *elles exerceraient cette tutelle en qualité de mandataires et au nom de la Société.*

Le caractère du mandat doit différer suivant le degré de développement du peuple, la situation géographique du territoire, ses conditions économiques et toutes autres circonstances analogues.

Certaines communautés, qui appartenaient autrefois à l'Empire ottoman, ont atteint un degré de développement tel que leur existence comme nations indépendantes peut être reconnue provisoirement, à la condition que les conseils et l'aide d'un mandataire guident leur administration jusqu'au moment où elles seront capables de se conduire seules. Les vœux de ces communautés doivent être pris d'abord en considération pour le choix du mandataire.

Le degré de développement où se trouvent d'autres peuples, spécialement ceux de l'Afrique centrale, exige que le mandataire y assume l'administration du territoire à des conditions qui, avec la prohibition d'abus, tels que la traite des esclaves, le trafic des armes et celui de l'alcool, garantiront la liberté de conscience et de religion, sans autres limitations que celles que peut imposer le maintien de l'ordre public et des bonnes mœurs, et l'interdiction d'établir des fortifications ou des bases militaires ou navales et de donner aux indigènes une instruction militaire, si ce n'est pour la police ou la défense du territoire et qui assureront également aux autres membres de la Société des conditions d'égalité pour les échanges et le commerce.

Enfin, il y a des territoires, tels que le Sud-Ouest Africain et certaines les du Pacifique austral, qui, par suite de la faible densité de leur population, de leur superficie restreinte, de leur éloignement des centres de civilisation, de leur contiguïté géographique au territoire du mandataire, ou d'autres circonstances, ne sauraient être mieux administrés que sous les lois du mandataire, comme une partie intégrante de son territoire, sous réserve des garanties prévues plus haut dans l'intérêt de la population indigène.

Dans tous les cas, le mandataire doit envoyer au Conseil un rapport annuel concernant les territoires dont il a la charge.

Si le degré d'autorité, de contrôle ou d'administration à exercer par le mandataire n'a pas fait l'objet d'une convention antérieure entre les membres de la Société, il sera expressément statué sur ces points par le Conseil.

Une commission permanente sera chargée de recevoir et d'examiner les rapports annuels des mandataires et de donner au Conseil son avis sur toutes questions relatives à l'exécution des mandats.

La Syrie et le Liban figurent parmi les pays qui, ayant appartenu autrefois à l'Empire ottoman, ont atteint un degré de développement tel qu'ils font partie, estime-t-on, des pays soumis au régime du mandat dans les conditions les plus favorables à leur indépendance, c'est-à-dire au mandat désigné par la lettre A.

La première observation que l'on peut faire, c'est que les ressortissants des pays soumis au régime du mandat se trouvent dans une situation spéciale, qui se différencie de toutes les autres, pour la simple raison que le mandat se différencie lui-même des autres institutions. Voici ce qu'écrit le marquis d'Olivart dans son ouvrage *El derecho internacional público en los últimos veinticinco años:*

"L'institution des mandats est une nouveauté en droit des gens, imaginée par le Pacte de la Société des Nations, et il convient de bien la définir, en faisant ressortir les différences qui séparent la notion de mandat des institutions internationales analogues, de la notion du droit privé à laquelle elle a emprunté son nom. Les mandats ne sont pas des annexions déguisées et, comme le dit Hatschek avec une certaine ironie, ils ne doivent pas l'être. D'après la lettre du Traité, la souveraineté demeure réservée à la Société des Nations. Ce ne sont pas non plus des protectorats, dont ils diffèrent en ce que l'Etat protecteur

est irresponsable et arbitre suprême dans l'exercice de son autorité, alors que le mandataire doit rendre compte de sa gestion et que, en vertu du Pacte, il n'exerce pas un droit, mais s'acquitte d'un devoir. Le mandat se différencie encore du mandat de droit civil en ce que le mandant choisit librement le mandataire, alors qu'ici le mandant, c'est-à-dire la Société des Nations, doit se conformer à la proposition des principales Puissances alliées, comme nous le verrons plus tard, et que, de plus, tandis qu'en droit civil le mandant peut, à un moment quelconque, révoquer le mandat et exiger des comptes, les mandats internationaux sont irrévocables et la forme de la reddition de comptes est déterminée et limitée par le Pacte de la Société des Nations" (pages 169 at 170).

Les spécialistes du droit international ne sont pas les seuls à soutenir que la situation de ceux qui sont placés sous mandat est tout à fait spéciale. Cette opinion est aussi celle de la Société des Nations, comme il ressort de l'étude de P. Lampué, intitulée: "De la nationalité des habitants des pays à mandat de la Société des Nations", publiée au volume 52, première livraison, 1925, du *Journal de droit international* (de Clunet). On y lit:

"Mais alors, faut-il les considérer (les ressortissants des pays à mandat) comme apatrides et dépourvus de toute nationalité? Ou faut-il admettre qu'ils *occupent une situation toute nouvelle dans le droit international*, sans analogie avec aucune autre, et qu'ils ne peuvent rentrer dans aucune catégorie existante? C'est bien cette dernière solution qui semble avoir triomphé (dans l'avis demandé par la Société des Nations, page 37)."

Si les individus soumis au mandat se trouvent dans une situation absolument spéciale, il semble étrange que, lorsqu'il s'agit d'une juridiction limitée comme l'est celle de la Commission, on l'applique à des individus dont la situation diffère de celle de quiconque, et pour la seule raison que l'on trouve dans la Convention une expression générale applicable à des sujets qui se trouvaient dans une situation juridique déterminée avant la constitution des mandats. La juridiction des tribunaux arbitraux est limitée et précise, et, en cas de doute, il convient toujours de s'en tenir à une interprétation limitative et de ne pas en adopter une qui permette aux commissions internationales de statuer au-delà des termes du compromis qui a constitué le tribunal. Selon le texte célèbre de Heffter, ce qui n'a pas été offert clairement ne doit pas être tenu pour offert. Le Mexique n'a pas offert expressément de soumettre à un tribunal arbitral les réclamations pour dommages subis par les individus soumis aux mandats et, par conséquent, ces derniers n'ont pas le droit d'être demandeurs devant la Commission par l'intermédiaire de l'agent de la France.

Si l'on voulait soumettre à la Commission les réclamations des Syro-libanais, rien n'était plus simple que de le dire d'une manière expresse. Dans le Traité conclu entre la France et les Etats-Unis, au sujet de la partie du Togo placée sous mandat français, il est stipulé, à l'article VI, que les traités et conventions d'extradition, en vigueur entre la France et les Etats-Unis, seront applicables au territoire sous mandat. On n'a pas estimé qu'il suffisait qu'il existât des traités d'extradition visant les Français et les protégés français, et l'on a eu recours à une stipulation claire et absolument spéciale.

Nature du statut de dépendance du pays soumis au mandat

Sans vouloir faire une étude du mandat, en dehors de ce qui intéresse notre sujet, il semble que l'on puisse tenir pour certaines les propositions suivantes:

I. — Les pays ottomans soumis au mandat sont reconnus comme Etats indépendants, à condition que les conseils d'un mandataire guident leur administration, jusqu'au moment où ils pourront se conduire seuls. En conséquence,

il ne semble pas qu'il y ait limitation de la souveraineté de l'Etat sous mandat. Voici ce que dit M. Diena:

"Wright remarque aussi que les auteurs du Traité de Versailles, en formulant l'article 22 du Pacte, et les principales Puissances alliées et associées, en assignant à mandat certains territoires cédés sous les termes de cet article, ont démontré expressément ou implicitement qu'elles n'avaient eu l'intention d'attribuer la souveraineté sur ces territoires à aucun Etat; il conclut que nulle théorie abstraite sur la nécessité d'une souveraineté indivise ne peut légalement prévaloir sur la véritable intention des Parties contractantes."

D'autres juristes soutiennent que le mandat international est un moyen d'administration qui diffère de tout autre, comme par exemple le protectorat, la vassalité, les zones d'influence, les protectorats déguisés et toute espèce de contrôle politique, pour le motif que le mandat, au lieu de constituer un droit ou une prérogative pour le mandataire, constitue pour celui-ci un devoir ou une mission dans l'intérêt des populations qui en sont l'objet. (*Recueil des Cours*, tome IV, 1924, No 5, pages 240 et 241.)

II. — Aux termes du Traité de Versailles, toute limitation imposée au pays sous mandat bénéficie à la Société des Nations. "Selon la lettre du Traité, déclare le marquis d'Olivart (tome I, page 169, ouvrage cité), la souveraineté demeure toujours réservée en faveur de la Société des Nations." Ceux-là mêmes qui assimilent le mandat à un protectorat (sans toutefois le déclarer identique) considèrent qu'il est exercé par la Société des Nations et non pas par le mandataire. Dans son ouvrage *Derecho International Público*, page 151, tome III, Antokoletz déclare:

"Nature: Les mandats A confèrent aux mandataires le droit d'aider et de conseiller, *ce qui les assimile à un protectorat international*, bien qu'il leur manque le caractère de contrat conclu avec le pays administré. Le mandataire n'est qu'un représentant de la Société des Nations, de sorte que le protectorat appartient à cette dernière qui l'exerce par l'intermédiaire d'un mandataire."

Mais cette action de la Société des Nations demeure elle-même douteuse, puisque la Cour suprême de l'Union Sud-Africaine ne l'a pas admise:

"Une décision de la Cour suprême de l'Union Sud-Africaine prononcée relativement à un individu qui avait participé à un acte de révolte et était accusé de haute trahison. Or le défenseur objectait qu'on ne peut accomplir un acte de rébellion que contre un pouvoir souverain, tandis que le mandataire n'avait pas ce caractère sur le territoire à mandat. La Cour, dans son arrêt, admet que le mandataire n'a pas un droit de souveraineté et qu'il s'agit d'une situation nouvelle dans le droit international, réglée pour la première fois par l'article 22. La Cour écarte aussi la souveraineté des principales Puissances alliées et associées et celle de la Société des Nations. La Cour reconnaît cependant que l'Union Sud-Africaine, sur la base de l'article 22 et des termes du mandat et du fait que cette Union est un des signataires indépendants du pacte, possède une souveraineté interne suffisante à fonder l'accusation de haute trahison."

III. — Le mandataire pour la Syrie et le Liban est tenu de rendre compte de son administration, dans un rapport annuel au Conseil de la Société des Nations, sur les mesures prises au cours de l'année, pour l'exécution du mandat en question.

Par conséquent, si le pays sous mandat est complètement indépendant et si sa souveraineté n'est en rien diminuée, et, au cas où elle le serait, si elle ne l'est aux termes du traité qu'en faveur de la Société des Nations, on ne saurait expliquer que la nation qui exerce le mandat, en les qualifiant simplement de protégés et sans conclure de pacte exprès en la matière, accorde des droits et

impose des obligations à des individus qui ne sont pas soumis à sa souveraineté. La seule chose qu'elle puisse faire, c'est leur donner des conseils. Elle ne peut leur imposer des traités sans tenir aucun compte du Gouvernement local du pays sous mandat, même si elle est chargée de ses relations extérieures.

Limites du mandat

Le mandataire n'est nullement libre de faire ce que bon lui semble, ni par conséquent de conclure, à son gré, des traités pour les territoires sous mandat. Les termes mêmes du mandat pour la Syrie et le Liban, confié à la France par la Société des Nations, limitent les pouvoirs du mandataire. Qu'il suffise d'en rappeler quelques points:

I. La République française s'engage à exercer le mandat au nom de la Société des Nations.

II. Le mandataire élaborera un statut organique pour la Syrie et le Liban, d'accord avec les autorités indigènes.

III. Le mandataire assurera l'adhésion de la Syrie et du Liban aux mesures d'utilité commune qui seraient adoptées par la Société des Nations. (Le texte ne dit pas que le mandataire considérera le territoire sous mandat comme tenu d'adhérer sans aucun droit d'intervention.)

IV. Le mandataire est tenu de présenter chaque année le texte des lois et règlements promulgués. (Le texte ne dit pas que le mandataire devra présenter aussi le texte des traités, sans doute parce qu'il n'a pas le droit de les conclure.)

V. Le consentement du Conseil de la Société des Nations sera nécessaire pour toute modification à apporter aux termes du mandat.

VI. Le mandataire devra adhérer, pour le compte de la Syrie et du Liban, aux traités conclus ou à conclure, avec l'approbation de la Société des Nations, sur la traite des esclaves, le trafic des stupéfiants, le trafic des armes et des munitions, l'égalité commerciale, la liberté de transit et de navigation, la navigation aérienne, les communications postales, télégraphiques ou par télégraphie sans fil, la protection littéraire, artistique ou industrielle (le texte ne stipule pas que la Syrie et le Liban seront considérés comme compris dans les traités conclus par la France, mais que la France devra y adhérer pour le compte de la Syrie et du Liban; il ne dit pas non plus que le mandataire pourra le faire de son chef; l'approbation de la Société des Nations est nécessaire). Il est hors de doute qu'il s'agit là d'une restriction importante, étant donné les termes mêmes employés pour rédiger la disposition, ce que confirme M. Diena lui-même quand il met cet article au nombre des restrictions imposées à la liberté d'action des Puissances mandataires dans les territoires sous mandat. Si on a établi l'obligation pour le mandataire d'adhérer, pour le compte de la Syrie et du Liban, à certaines conventions conclues ou à conclure avec l'approbation de la Société des Nations, il est évident que l'on a voulu l'obliger à y adhérer pour le compte des territoires sous mandat et non l'autoriser à les inclure purement et simplement aux territoires pour lesquels les traités sont conclus sans faire la moindre allusion à la Syrie et au Liban; il est non moins évident que le mandataire n'est pas autorisé à adhérer, pour le compte des pays sous mandat, à d'autres traités, conclus ou à conclure, et encore moins à le faire sans l'approbation de la Société des Nations. Admettre que le mandataire est entièrement libre de conclure toute espèce de traités, sans même mentionner les pays sous mandat, équivaut à détruire les principes fondamentaux du mandat.

Non-reconnaissance du mandat par le Mexique

A propos de l'enregistrement des traités, on a fait justement valoir que le Mexique n'a pas le droit d'exiger cet enregistrement parce que, du moment où il n'a pas signé le Pacte de la Société des Nations, ce dernier est un accord *inter alios acto* et, par conséquent, l'enregistrement reste sans effet pour le Mexique. De ce point de vue, le raisonnement est clair, mais ce qui est étrange, c'est que la Commission considère notre pays comme lié par un acte auquel il n'a pas pris part. Le Mexique ne fait pas partie de la Société des Nations et, par conséquent, aucune des décisions prises par la Société n'a force obligatoire pour lui. Les Etats non membres de la Société ne peuvent reconnaître les pouvoirs accordés par le mandat sans reconnaître par là même que les décisions de la Société sont obligatoires pour eux. Il ne peut en être autrement que si un traité spécial renferme la reconnaissance, par un Etat non membre de la Société des Nations, du mandat qu'elle a confié à un autre Etat.

Dans les cas où les Etats-Unis ont jugé à propos de reconnaître un mandat confié à un autre Etat par la Société des Nations, ils l'ont fait par un traité conclu avec l'Etat mandataire, comme celui qu'ils ont signé avec la Belgique pour reconnaître le mandat confié à la Belgique sur l'ancienne colonie allemande constituée sur le territoire du Ruanda-Urundi. Quand les Etats-Unis ont reconnu le mandat français sur le Togo, ils l'ont fait conditionnellement sous réserve de diverses clauses qui réservaient certains privilèges aux Etats-Unis et à leurs ressortissants et ils sont même allés jusqu'à exiger que la Puissance mandataire leur adresse un rapport annuel identique à celui qu'elle devait présenter en application de l'article X du mandat.

Ce n'est pas que le Mexique veuille manifester contre la constitution de mandats une opposition qui serait tout à fait déraisonnable, mais le fait est que, tout comme les Etats-Unis, il n'a pas ratifié le Traité de Versailles et n'est pas de ce fait membre de la Société des Nations. Il a donc, lui aussi, le droit de reconnaître ou non un nouvel état de choses quand ses propres intérêts sont en jeu.

Sens du terme "protégé"

La question essentielle, si l'on refuse de tenir compte des considérations déjà indiquées bien qu'elles militent de façon décisive en faveur de la doctrine exposée, consiste à déterminer le sens du terme "protégé".

Considère-t-on comme "protégés" les ressortissants des pays sous mandat A? La Grande-Bretagne qui a conclu avec l'Irak un traité d'alliance n'a jamais considéré les habitants de ce pays comme "protégés". Quand elle a demandé au Gouvernement mexicain l'extension du traité d'extradition à des territoires sur lesquels elle exerce un mandat (il convient de noter qu'elle a demandé une déclaration formelle), elle n'y a, en aucune façon, fait entrer les territoires sous mandat A, reconnaissant sans doute qu'il s'agissait d'Etats indépendants.

Ceci semble d'ailleurs en parfait accord avec la tradition britannique. Voici l'opinion émise par Robert Kiefe dans un ouvrage publié après la guerre, au chapitre II, relatif au statut des ressortissants des Etats protégés et qui traite également de la naturalisation dans les territoires sous mandat:

L'institution du protectorat, qui est assez floue en droit international, a fait naître de nombreux problèmes: l'un des plus délicats est relatif à la situation des sujets des Etats protégés au point de vue de la protection que leur accorde l'Etat souverain.

Nous allons passer en revue l'opinion de quelques auteurs anglais relativement à cette question. Voyons d'abord ce que dit le rapport de la Commission

internationale de 1901 (par. 2): "Dans l'application du principe que tout individu né dans les *British Dominions*, dans l'étendue de la domination britannique, est un sujet britannique, quel est le sens précis et la portée exacte qu'il convient de donner à l'expression *British Dominions?* Est-elle applicable seulement aux pays qui font partie du territoire ou comprend-elle aussi quelques-uns des pays ou tous les pays dans lesquels Sa Majesté exerce sa juridiction ou son autorité à un degré plus ou moins grand, tels que les protectorats ou les sphères d'influence? Il semble que le principe ne peut s'appliquer qu'aux pays qui sont devenus des parties du territoire britannique par conquête, cession ou occupation, et qu'il ne s'applique pas à des pays qui ne font pas partie réellement du territoire britannique, quelque étendus que puissent être les pouvoirs d'administration et de juridiction de la Couronne par traités, *capitulations*, successions, usages, tolérances, ou tout autre moyen de droit *(Foreign Jurisdiction Act, 1980; 53 et 54 Victoria, c. 37, s. I)* (p. 169-170, *La nationalité des personnes dans l'Empire britannique*, Robert Kiefe).

Or, il existe encore un argument beaucoup plus fort, puisé dans les décisions du Gouvernement français lui-même qui rendent parfaitement inexplicable le fait que l'Agent français ait pu soutenir que les Syriens et les Libanais sont protégés français.

La Société des Nations ayant procédé auprès des divers gouvernements intéressés à une enquête sur la façon dont il fallait considérer les ressortissants des pays sous mandat, le Gouvernement français ne les a pas considérés comme protégés. Voici ce que dit M. Lampué dans l'étude déjà citée:

Le Conseil de la Société des Nations ayant décidé, le 12 mai 1922, de soumettre la question à la Commission permanente des mandats, celle-ci fit prendre des informations auprès des gouvernements intéressés, par une sous-commission. Le Gouvernement britannique et les Gouvernements de Nouvelle-Zélande et d'Australie déclarèrent que les indigènes étaient des "personnes bénéficiant de la protection britannique".

Ce terme de protégés ne pouvait être adopté par le Gouvernement français, car il possède dans notre droit colonial un sens très précis: les "protégés français" sont les indigènes des pays de protectorat de Tunisie, du Maroc et d'Indochine, dont la situation ne peut être confondue avec celle des habitants des pays à mandat. Comme ils ne sont pas davantage sujets français, il a fallu imaginer un nouveau terme, et le gouvernement, sur l'avis d'une commission interministérielle, s'est rallié à celui d'"administrés français".

Il n'est donc plus question d'une nationalité quelconque et l'on se contentera d'une détermination assez claire et précise pour caractériser ce statut nouveau. On n'exige même plus une loi spéciale de la Puissance mandataire pour consacrer cette expression, et il suffira que la pratique administrative l'établisse. Notre droit colonial s'est donc enrichi de la situation nouvelle des "administrés français" (pages 57, 58 et 59).

Il en résulte clairement que l'administration française, par un acte de caractère international, a été invitée à définir sa position. La France a considéré que n'avaient pas la qualité de "protégés" non seulement les Syriens et les Libanais qui constituent des nations indépendantes dont la France n'est que conseillère, mais encore les ressortissants des pays dont toute l'administration est confiée à la France comme s'ils étaient des pays coloniaux. Il est impossible d'un côté d'invoquer leur qualité de protégés et, de l'autre, de la leur refuser et de les considérer comme constituant une catégorie distincte. Le soussigné refuse d'admettre que l'on puisse dire qu'il s'agit en l'espèce de *res inter alios acta* et que le Mexique est tenu de faire ce qui lui nuit sans pouvoir revendiquer ce qui est à son avantage.

Les considérations sur le manque de précision des textes, les comparaisons avec la ville de Dantzig (qui, d'après des auteurs comme Olivart, est évidemment soumise à un protectorat puisque la Société des Nations qui l'exerce a des pouvoirs illimités) ou avec d'autres cas analogues, que l'on ne peut utilement invoquer, n'ont donc aucune importance dans l'affaire qui nous occupe.

L'argument des négociations

On a dit qu'au cours des négociations, les Syro-Libanais ont été mentionnés comme protégés français. Il est très facile de réfuter cet argument, étant donné qu'il n'en a pas été fait mention dans le traité, le Gouvernement français n'ayant pas insisté sur ce point, et que, par conséquent, le problème a été écarté.

La déclaration du Ministre des relations extérieures qui a négocié la Convention, M. Aáron Sáenz, n'a laissé subsister aucun doute sur ce point. En effet, à une question que lui avait posée à cet égard l'Agent mexicain, M. Sáenz a répondu de façon tout à fait catégorique. Voici le texte des pièces importantes:

Lettre de l'Agent Aquiles Elorduy:

"On a longuement discuté devant la Commission franco-mexicaine des réclamations l'interprétation qu'il convenait de donner à l'article III de la Convention, à propos de l'expression "protégés français". L'Agent français soutient que ces mots visent les Syro-Libanais et l'Agent mexicain soutient qu'elle ne les désigne pas, en premier lieu parce que les Syro-Libanais ne sont pas protégés français au sens du droit international et, en second lieu, parce que si l'on avait voulu comprendre les Syro-Libanais dans la Convention, on n'aurait pas parlé des "protégés français", mais des Syro-Libanais.

"L'Agent français a ajouté que de la correspondance échangée entre vous-même, en votre qualité de Secrétaire aux relations extérieures, et Monsieur le Ministre de France, il ressort que vous avez admis que les Syro-Libanais sont visés par l'article III en tant que protégés français. Pour ma part, j'ai offert à la Commission de vous demander votre opinion sur ce point et c'est pourquoi je vous prie de bien vouloir me faire connaître ce qui a été dit à propos de la situation des Syro-Libanais aux termes de ladite Convention et, en particulier, à propos des engagements contractés par le Secrétariat aux relations extérieures à l'égard des Syro-Libanais alors que vous étiez le Secrétaire chargé du Ministère."

Réponse de M. Aarón Sáenz:

"Je me réfère à la lettre par laquelle vous me demandez quelques éclaircissements sur la situation des Syro-Libanais en vertu de la Convention conclue avec la République française, pour le jugement des réclamations formulées par des ressortissants français contre le Mexique, et, en particulier, sur les engagements contractés par le Secrétariat d'Etat aux relations extérieures à l'égard des Syro-Libanais alors que j'étais chargé du Ministère.

"En réponse, j'ai l'honneur de vous faire savoir qu'au cours des premières négociations, le Ministre de France m'a fait part de son désir de voir modifier quelque peu le projet de convention, calqué sur la convention avec les Etats-Unis, de façon à y inclure les protégés syro-libanais. Je me suis borné à lui répondre qu'il était normal d'inclure les protégés dans le traité mais je n'ai rien dit des Syro-Libanais.

"Dans le projet de traité auquel on a apporté les modifications demandées par le Ministre de France, il n'a été fait aucune mention des Syro-Libanais, et la question n'a plus été soulevée. La Convention a été soumise au Sénat sans qu'il soit question des Syro-Libanais.

"Après la signature de la Convention, le Ministre de France m'a adressé une communication me demandant le traitement de la nation la plus favorisée pour les Français et les protégés syro-libanais. Je lui ai répondu en parlant des Français et des protégés français, pour lesquels certaines réclamations restaient en dehors de la Convention. Par la suite, pour avoir eu, le Ministre et moi, des entretiens au cours desquels il a demandé que le Secrétariat précise, par une déclaration expresse, que les Syro-Libanais étaient inclus dans la Convention. Je me suis vu dans l'obligation de refuser pour trois raisons: tout d'abord, dans mes communications, je n'avais mentionné que les protégés, d'autre part les Syro-Libanais n'avaient pas été mentionnés dans le Traité et enfin le Sénat avait approuvé la Convention dans le texte du premier projet modifié à la suite des observations du Ministre de France, c'est-à-dire sans mention des Syro-Libanais et avec la seule mention des protégés français.

"Le Secrétariat n'a jamais fait étudier la situation des Syro-Libanais, car il estimait que l'état des négociations ne l'exigeait pas."

Devant un témoignage aussi irréfutable, que l'Agent français n'a pas démenti, aucun doute n'est possible sur les faits, bien que la sentence veuille faire dire au texte le contraire de ce qu'il dit.

L'argument selon lequel, au cours des débats sur la Convention qui se sont d'ailleurs déroulés en séance secrète et dont les comptes rendus sténographiques n'ont pas été publiés, un sénateur aurait consacré quelques observations aux Syro-Libanais, est dénué de valeur. En effet, le soussigné a demandé à consulter ces comptes rendus, le Président y ayant fait allusion, sans qu'on les ait présentés à titre de preuve et il s'est convaincu que si l'on en a parlé, c'est pour manifester la bonne volonté de la France de régler, de la façon la plus libérale possible, tous les litiges en suspens. Chacun sait d'ailleurs que le Gouvernement mexicain, non seulement accorde libre accès à la Commission nationale à tous les étrangers sans distinction, mais encore s'efforce de régler de façon extra-judiciaire toutes les réclamations qui ne rentrent pas dans le cadre de la Convention et, sans nul doute, il accepterait d'examiner celle des Syriens et des Libanais sans pour cela se croire obligé d'accepter la création d'un précédent de caractère international de nature à lui porter préjudice, puisqu'il s'agirait d'une décision de ce tribunal.

Arbitrage sur la nature du mandat

L'article XX du mandat stipule que le mandataire accepte que tout différend, quel qu'il soit, qui viendrait à s'élever entre lui et un autre Membre de la Société des Nations, relatif à l'interprétation ou à l'application des dispositions du mandat et qui ne serait pas susceptible d'être réglé par des négociations, soit soumis à la Cour permanente de Justice internationale. La sentence, en parlant de l'enregistrement des traités, considère que le Mexique ne doit pas se trouver dans une situation privilégiée du fait qu'il n'a pas signé le Pacte de la Société des Nations. Il est au moins de la plus élémentaire équité que, si on lui applique ce principe, il ne se trouve pas dans une situation plus mauvaise que celle d'un Etat qui aurait signé le Pacte. Il n'est pas juste de lui appliquer partiellement deux systèmes opposés. Ou bien on considère que le Mexique est lié par les actes de la Société des Nations et, alors, il faut lui appliquer le système tout entier et, en cas de différends, faire en sorte que l'affaire soit réglée par le Tribunal d'arbitrage déjà indiqué, ou bien les actes de la Société des Nations sont sans effet pour lui (et c'est le cas) et alors, pour le Mexique, les mandats n'existent pas.

L'aveu du Gouvernement mexicain

On a prétendu appliquer au Gouvernement mexicain l'adage selon lequel qui ne dit mot consent, en se fondant sur le fait que par deux fois le Ministre de France a parlé des protégés syro-libanais dans des notes antérieures au projet français de convention, lequel n'est d'ailleurs qu'une reproduction du projet américain. Cet argument n'a ici aucune valeur. Il est de règle en droit civil, en cas de silence de l'une des parties, de faire la distinction suivante, admise par les auteurs: "Qui ne dit mot est présumé donner son consentement si l'acte lui procure un avantage. Si l'acte lui est préjudiciable, son silence ne peut valoir consentement." C'est la règle qu'a admise le droit romain.

De plus, le Gouvernement mexicain n'a pas consenti, car il n'a été fait mention que des protégés et la question n'a pas été réglée puisque l'expression "Syro-Libanais" n'a pas été employée dans le Traité et que la note ultérieure du Ministre de France et la réponse du Ministre des affaires étrangères mentionnent uniquement les protégés français sans qu'il soit nulle part question des Syro-Libanais, comme en témoignent les copies certifiées conformes de la correspondance diplomatique qui ont été communiquées à la Commission.

Donc, le soussigné se permet de déclarer que, dans le cas présent, il n'y a eu aucun aveu international, puisqu'il a déjà été démontré que les notes n'en contiennent pas.

Quant au fait que le Mexique aurait admis l'intervention diplomatique du Gouvernement français en faveur des Syriens et des Libanais, le soussigné doit faire remarquer que le Mexique a également admis la protection d'autres pays. La correspondance diplomatique des Etats-Unis (*Foreign Relations of the United States*, 1915), pages 1072 à 1087, montre qu'au moment même où le besoin de cette protection se faisait le plus sentir pour les Syro-Libanais, du fait que le Mexique subissait une violente crise intérieure et que la Turquie se trouvait isolée par suite de la guerre européenne, les Syro-Libanais furent d'abord placés sous la protection des autorités allemandes, puis sous celle des autorités des Etats-Unis. Auparavant, ils avaient été accidentellement et indistinctement sous la protection non seulement de la France, mais aussi d'autres pays. Qui veut trop prouver ne prouve rien. Si l'on admet ce raisonnement, l'Allemagne et les Etats-Unis auraient autant de raisons que la France pour réclamer au nom des Syro-Libanais.

Si pour la Commission nationale des réclamations on a admis que les Syro-Libanais étaient placés sous le patronage (et non pas sous la protection) de la France, c'est uniquement parce que le Mexique a accepté que la France exerce ce patronage à titre provisoire, comme il a accepté que d'autres pays le fassent.

D'autre part, les décisions relatives à la Commission nationale des réclamations ne constituent pas un aveu international et, par là même, elles n'obligent pas le Mexique.

Le soussigné se permet d'exposer ici la doctrine applicable en matière d'aveu devant un tribunal international, étant donné que la sentence n'a pas traité ce point important.

La sentence, pourtant si détaillée à d'autres égards, ne s'arrête pas à l'étude de la question extrêmement délicate des effets d'un aveu interne devant un tribunal international. La question s'est posée pour la première fois devant le Sénat de Hambourg, qui s'est prononcé en faveur du pays contre lequel l'aveu était invoqué. Plus tard, dans l'affaire des compagnies de la baie de Hudson et du Puget Sound, la Commission mixte anglo-américaine a refusé également d'accorder aucune valeur à un aveu extra-judiciaire de la partie défenderesse qui, prétendait-on, était allée jusqu'à offrir une somme d'argent en paiement.

Le soussigné ne croit pas qu'il soit impossible de prétendre que, dans des conditions données, l'aveu interne puisse avoir des effets juridiques devant un tribunal international, lorsque cet aveu est intervenu au cours d'une discussion ayant pour objet de mettre fin à une réclamation, lorsque l'intention a été exprimée d'une manière claire et nette à propos de l'affaire en litige et en des termes qui laissent clairement entendre la nature de l'engagement pris, mais la doctrine internationale ne va pas si loin. Dans l'affaire Croft déjà citée, le Sénat de Hambourg a énoncé de façon indiscutable la doctrine selon laquelle pour que l'aveu puisse être invoqué il faut qu'il ait un caractère international, c'est-à-dire qu'il soit fait par un Etat à un autre; car si cet aveu n'est pas fait directement et en connaissance de cause par l'Etat défendeur à l'Etat demandeur, et si on ne le trouve que dans un acte interne, qui n'a pas été porté officiellement à la connaissance du pays demandeur, cet aveu est totalement inopérant. Voici les termes de la sentence du Sénat de Hambourg dans l'affaire Croft qui opposait l'Angleterre au Portugal:

"On ne saurait davantage trouver dans le décret du 3 janvier 1852 l'acceptation d'une nouvelle obligation de la part du Gouvernement portugais vis-à-vis du Gouvernement britannique, car ce ne serait possible que s'il contenait une promesse ou bien occasionnait un dommage à M. Croft. *Si à un moment quelconque le Gouvernement portugais ou son représentant légal avait donné au Gouvernement britannique, suivant les formes usitées dans les rapports internationaux, la promesse que M. Croft obtiendrait satisfaction ou serait indemnisé avec son appui, il n'y a pas de doute qu'un droit parfaitement valable eût pris naissance* à l'effet d'obtenir satisfaction ou réparation du Gouvernement portugais, parce que telles sont les formes constitutionnelles et internationales, dans lesquelles se contractent les obligations d'un Etat vis-à-vis d'un autre. *Mais on ne peut pas prétendre qu'il en soit ainsi quand il n'y a qu'un ordre adressé par un gouvernement à ses propres autorités en faveur d'un sujet étranger,* alors qu'aucune promesse n'en a été préalablement faite au gouvernement dont relève cet étranger. Si, dans ce cas, l'ordre donné rencontre des obstacles constitutionnels qui en rendent l'exécution impossible, *on ne peut pas, d'après le droit international, former valablement une réclamation contre le gouvernement en raison des dommages occasionnés par l'inexécution de son ordre.*"

En conséquence, il n'y a eu aucun aveu du Gouvernement mexicain.

Le consentement à la protection accidentelle

J'ai déjà établi que les ressortissants d'un pays sous mandat ne peuvent être considérés comme protégés. Je voudrais maintenant donner une définition positive de ce que l'on appelle "protégé" et je l'emprunterai à un ouvrage postérieur à la guerre, qui, naturellement, tient compte des divers mandats. C'est l'ouvrage de Karl Strupp, intitulé dans sa traduction française: *Eléments du droit international public universel européen et américain.* D'après cet ouvrage, les protégés se répartissent en trois catégories: premièrement, les individus soumis à une protection en vertu d'un traité; deuxièmement, les individus favorisés dans un cas spécial et, troisièmement, les sujets *de facto* dans les pays de capitulations, qui sont en nombre limité et ne comprennent pas tous les ressortissants de ces pays.

"Les protégés sont des personnes soumises en vertu d'un traité, soit d'une manière générale, soit à la suite d'un cas spécial (rupture des relations diplomatiques, guerre) à la protection d'un autre Etat avec l'assentiment de l'Etat dans lequel elles se trouvent. Ou des sujets *de facto* dans les pays de capitulations qui jouissent de la protection d'une Puissance à laquelle elles appartenaient autrefois ou avec laquelle elles sont entrés en relation, par exemple comme interprètes ou seulement par une lettre de protection. Voir liste 168

et Fleischmann, Affaire de Mascate, Werk wom Haag, 2ème série, tome I, page 425", (page 82).

Dans quelle catégorie convient-il de classer les Syro-Libanais? Du moment que l'Agent français considère que tous les ressortissants sont soumis à la protection française, et du moment qu'elle fait remonter les effets de la Convention à une époque antérieure à la date où le dommage a été subi, il lui faut les classer, comme elle l'a fait d'ailleurs, dans la première catégorie.

L'Agent français ne classe pas les Syro-Libanais dans la deuxième catégorie, c'est-à-dire parmi ceux qui sont protégés d'une façon accidentelle et transitoire, du fait qu'il n'y a pas de représentant de leur propre pays, parce que, pour qu'un étranger puisse prendre soin de leurs intérêts, il faudrait, comme Strupp l'a affirmé, le consentement permanent du pays où réside le réclamant. De plus il ne serait pas possible que la France réclamât seule, puisque divers pays, entre autres l'Allemagne et les Etats-Unis, ont assuré la protection des Syro-Libanais et que ce sont même ces pays qui l'assuraient au moment où le dommage a été subi.

En outre, le Gouvernement français ne veut pas classer les Syro-Libanais dans la troisième catégorie, c'est-à-dire celle des protégés dans les pays de capitulations, classification qui serait la plus facile à défendre rationnellement, puisque si l'on voulait appliquer la Convention à ces individus, elle serait appliquée à un groupe de personnes jouissant d'un statut déterminé au moment où le dommage a été subi. Il serait naturel que le Gouvernement français cherchât à les protéger, comme on l'a soutenu dans l'affaire des boutres de Mascate et, en cas de doute, on comprendrait quelle était l'intention de Monsieur le Ministre de France, lorsqu'il a parlé des protégés syro-libanais; en effet, s'il avait voulu parler non d'un groupe déterminé de personnes, mais des ressortissants de tout un pays, il aurait parlé des Syriens et des Libanais qui sont membres de deux nations, comme le déclare le Président, et qui sont régis par des lois de nationalité distinctes.

La nationalité d'après le Traite de Lausanne

Le changement de nationalité des populations syro-libanaises s'est effectué en vertu du Traité de Lausanne.

Or, aux termes du Traité de Lausanne, un accord est nécessaire avec certains pays où résident les sujets ottomans qui ont changé de nationalité.

Voici l'article en question du Traité de Lausanne:

"Sous réserve des accords qui pourraient être nécessaires entre les gouvernements exerçant l'autorité dans les pays détachés de la Turquie et les gouvernements des pays où ils sont établis, les ressortissants turcs âgés de plus de 18 ans, originaires d'un territoire détaché de la Turquie en vertu du présent Traité et au qui, moment de la mise en vigueur de celui-ci, sont établis à l'étranger, pourront opter pour la nationalité en vigueur dans le territoire dont ils sont originaires, s'ils se rattachent par leur race à la majorité de la population de ce territoire, et si le gouvernement y exerçant l'autorité y consent. Ce droit d'option devra être exercé dans le délai de deux ans à dater de la mise en vigueur du présent Traité."

Or, la Constitution mexicaine conteste la nationalité de certains Syro-Libanais qui ont acquis des biens-fonds ou qui ont eu des enfants au Mexique, puisque ces personnes domiciliées au Mexique doivent être considérées comme ayant la nationalité mexicaine. La sentence passe toute cette question sous silence. Plus encore, elle ne semble pas exiger une nationalité primitive turque, non plus que la condition de race; elle se borne à faire état des options, puisqu'elle considère comme soumis à la protection, des individus originaires des

territoires placés auparavant sous la souveraineté ou le protectorat d'autres Puissances, ou les sujets d'un territoire détaché de la Turquie (ce qui est le cas pour les Syriens et les Libanais classés dans la catégorie distincte de personnes soumises à la protection); sur le vu seulement des options et des certificats d'immatriculation consulaires.

La protection dans les pays d'Orient

En plus du protectorat exercé sur certains pays déterminés, il existe, comme cela a déjà été indiqué, un système de protectorat exercé seulement sur certains groupes d'individus d'un pays donné. Ce système, qui se pratique en Orient, s'applique seulement à une partie des ressortissants et il tend à être de plus en plus limité. On pourrait citer n'importe quel auteur de droit international pour définir la situation juridique qui en découle et que la sentence a omis d'exposer alors qu'il serait tout à fait naturel de penser que c'est eux que le Ministre de France visait lorsqu'il a fait mention des protégés syro-libanais.

Dans son ouvrage *The Diplomatic protection of Citizens abroad*, M. Borchard écrit aux pages 468 et 249:

"Cette protection des étrangers ne s'étend pas seulement, avec les limitations qu'elle comporte, aux sujets des pays du monde occidental; l'un de ses traits caractéristiques est qu'elle protège certaines catégories d'indigènes. En général, ces indigènes ont un lien officiel quelconque avec les consulats ou les légations des Etats-Unis ou bien, en Chine, il peut s'agir d'employés de ressortissants américains. L'étendue de la protection accordée à ces personnes, que l'on désigne généralement sous le nom de "protégés", n'est pas la même dans tous les pays qui reconnaissent l'extra-territorialité. Dans l'Empire ottoman, le système des protégés s'appliquant à la fois à des protégés étrangers et à des protégés indigènes a jadis donné lieu à de nombreux abus. Des étrangers de nationalités diverses et un grand nombre de sujets indigènes pouvaient jouir de cette protection en se faisant simplement inscrire dans un consulat. Cette doctrine, dite d'assimilation, qui avait cours surtout au Levant, a été petit à petit limitée par le Gouvernement ottoman, avec le concours des Puissances étrangères, les Etats-Unis et la Grande-Bretagne ayant joué un rôle prépondérant dans cette limitation. La protection des protégés indigènes est aujourd'hui limitée à un nombre restreint de drogmans, de gardes et de kavas, ainsi qu'aux serviteurs, leur femme et leurs enfants mineurs, aussi longtemps qu'ils sont réellement au service du consulat ou de la légation."

Dans la sentence rendue au sujet des boutres de Mascate par le Tribunal d'arbitrage de La Haye, le sens de l'expression "protégé" dans les pays orientaux a été parfaitement défini de la manière suivante:

"Considérant que depuis la restriction que le terme "protégé" a subie en vertu de la législation de la Porte ottomane en 1863, 1865 et 1869, spécialement de la loi ottomane du 23 sefer 1280 (août 1863), implicitement acceptée par les Puissances qui jouissent du droit de capitulations, et depuis le traité conclu entre la France et le Maroc en 1863, auquel ont accédé un grand nombre d'autres Puissances et qui a obtenu la sanction de la Convention de Madrid du 30 juillet 1880, le terme "protégé" n'embrasse par rapport aux Etats à capitulations que les catégories suivantes: 1. les personnes, sujets d'un pays qui est sous le protectorat de la Puissance dont elles réclament la protection; 2. les individus qui correspondent aux catégories énumérées dans les traités avec le Maroc de 1863 et de 1880 et dans la loi ottomane de 1863; 3. les personnes qui, par un traité spécial, ont été reconnues comme "protégés", telles que celles énumérées par l'article 6 de la Convention franco-mascataise de 1844; et 4. les individus qui peuvent établir qu'ils ont été considérés et traités

comme protégés de la Puissance en question avant l'année dans laquelle la création de nouveaux protégés fut réglée et limitée, c'est-à-dire avant l'année 1863, ces individus n'ayant pas perdu leur *status* une fois légitimement acquis."

En conséquence, seuls les groupes de personnes protégées aux termes de l'énumération qui précède peuvent être couverts par la Convention. Or, dans le cas présent, il ne s'agit pas d'individus qui rentrent dans le champ d'application de la loi ottomane de 1863, ni d'individus à qui un traité spécial a reconnu la qualité de protégés, ni d'individus qui, avant l'année 1863, ont joui des prérogatives de protégés. Dans l'affaire des boutres de Mascate, il n'est pas question de la protection d'un pays et il n'y a pas lieu d'en parler maintenant, le soussigné se référant seulement aux groupes d'individus soumis au régime spécial de la protection en Orient.

Si le terme de protégé syro-libanais s'applique à certains groupes d'individus et ne peut s'appliquer aux ressortissants de pays entiers, le soussigné estime qu'il est parfaitement rationnel que seuls les premiers soient couverts, en définitive, par la Convention.

L'application rétroactive de la Convention

La doctrine juridique parfaitement claire qui s'impose à propos de la date d'acquisition de la nationalité, est celle selon laquelle cette époque ne doit pas être postérieure à celle du préjudice subi pour que la réclamation soit recevable. Sans mentionner la jurisprudence internationale qui, sur ce point, peut être considérée comme uniforme, le soussigné prend la liberté de citer la jurisprudence française qui est résumée dans le passage suivant de Piller:

161. *Les cessions de territoire ne sont pas rétroactives.* Certains auteurs ont soutenu que lorsqu'un territoire fait l'objet d'une cession, il doit être considéré comme ayant toujours appartenu à l'Etat cessionnaire. La Chancellerie a adopté ce système comme règle générale, notamment à propos de l'annexion de la Savoie, afin de faire considérer comme nés en France les individus nés en Savoie avant l'annexion, Mais notre jurisprudence a condamné cette rétroactivité de la façon la plus définitive. Cf. Cass. Civ., 17 février, 1903. Clunet, 1904, page 170, avec les conclusions de M. le Procureur général Baudoin; Trib. civ. Saint-Julien, 27 mars 1918. *Revue Lapradelle,* 1921, page 528. Cf. ce que nous disons *supra*, No 44, page 78.

Cette dernière solution nous paraît seule admissible. La rétroactivité est une fiction qu'on ne peut étendre à une matière de droit public telle que la nationalité et il est singulier de faire remonter l'effet de l'annexion à une date antérieure à celle que le traité fixe pour le changement de souveraineté (*Manuel de droit international privé*, page 201).

En reconnaissance de ces principes, le modèle des déclarations d'option que les autorités françaises exigent des Syriens et des Libanais contient la disposition suivante: "La présente déclaration entraînera l'acquisition de la nationalité (libanaise) à compter du jour où, du consentement du Gouvernement de la République française, elle aura été enregistrée par le Gouvernement libanais."

Ce qui précède étant établi, il est manifestement impossible que le demandeur Nájera et tous ceux qui se trouvent dans la même situation aient le droit de présenter une réclamation puisqu'ils ont acquis la qualité d'administrés français en 1924, après la signature du Traité de Lausanne, c'est-à-dire après avoir subi les dommages.

Néanmoins, la sentence rédigée par le Président de la Commission, statuant malgré une disposition expresse, tente de tourner l'obstacle en donnant effet

rétroactif à la Convention, sur la base de deux arguments, à savoir: en premier lieu, il n'y a au Mexique d'autres protégés français que les Syro-Libanais; en second lieu, la France exerçait sur la Syrie et le Liban (non seulement sur certains de leurs habitants) un protectorat *de facto* avant même que les dommages ne fussent subis.

Du premier argument, il faut bien dire qu'il est complètement dénué de valeur parce que d'abord, nul ne sait s'il y a ou non des protégés français (non des administrés français) au Mexique et, ensuite, parce que, avant la Convention, le Gouvernement mexicain ignorait absolument si d'authentiques protégés français présenteraient ou non des réclamations. La Convention elle-même parle de personnes morales françaises (en plus des sociétés, compagnies, etc.) et aucune n'a formulé de réclamation. La Convention elle-même parle aussi de certaines sociétés dans lesquelles les protégés français auraient des intérêts, mais il ne s'est encore présenté aucun actionnaire pour réclamer. Si cet argument était valable, il faudrait rechercher les personnes morales d'autres nationalités afin que la Convention puisse produire ses effets. L'argument selon lequel, comme l'allègue la sentence, le système de l'exclusion aurait tendu à donner aux négociations un caractère tendancieux n'a guère de poids, étant donné la cordialité des conversations et la spontanéité avec laquelle le Mexique a fait son offre. En outre, un argument aussi faible et fondé sur une simple supposition ne saurait servir de justification pour imposer une obligation de caractère international qui n'a pas été contractée. Cette argumentation fragile a si peu de valeur que le Président lui-même, quand il traite (dans un autre cas) des arguments, qu'il prétend sans fondement, invoqués par l'Agent mexicain au sujet de l'application de la règle *locus regit actum* pour prouver la nationalité, fait valoir la thèse contraire puisqu'il se fonde, pour les réfuter, sur l'impossibilité d'appliquer les législations des pays protégés par la France, du fait que les documents sont en langue arabe ou turque, c'est-à-dire qu'il admet là qu'il puisse exister d'autres protégés.

Quant au deuxième argument, qui est celui du protectorat de fait sur toute la Syrie et tout le Liban, je dois dire qu'il est absolument inadmissible.

La sentence rendue dans l'affaire déjà citée des boutres de Mascate établit clairement qu'à propos de la Turquie, les Puissances ont renoncé à exercer un protectorat sur tous les ressortissants de l'Empire ottoman et ne l'ont conservé qu'à l'égard de certains individus:

"Considérant que, quoique les Puissances n'aient renoncé *expressis verbis* à l'exercice du prétendu droit de créer des protégés en nombre illimité que par rapport à la Turquie et au Maroc, néanmoins l'exercice de ce prétendu droit a été abandonné de même par rapport aux autres Etats orientaux, l'analogie ayant toujours été reconnue comme un moyen de compléter les dispositions écrites très défectueuses des capitulations, en tant que les circonstances sont analogues."

On peut considérer le Liban comme un pays auquel le Gouvernement français a manifesté plus d'intérêt qu'à la Syrie. Néanmoins, jamais on n'a considéré que la province fût placée sous protectorat français. La question est résolue par le règlement du 6 septembre 1864 et un arbitrage récent a tranché dans ce sens la question du statut de dépendance de la province par rapport à l'Empire ottoman:

"Du texte du règlement de 1864, il apparaît avec évidence que le Liban n'avait pas d'existence politique distincte: c'était une province de l'Empire ottoman et ses rapports financiers avec le Trésor central ne se bornaient pas au paiement du tribut, mais offraient, par contre, un caractère de réciprocité. Dans ces conditions, il aurait été impossible de libérer le Liban de la participation à la dette ottomane."

Le "règlement du Liban" du 6 septembre 1864, non seulement ne stipule aucune cession expresse de la souveraineté sur le Liban par l'Empire ottoman mais encore il contient un grand nombre d'articles qui indiquent qu'aucune cession de cette nature n'était envisagée. Qu'il suffise de rappeler les articles 1 et 15. Aux termes de ces articles, le Gouvernement du Liban était nommé par la Sublime Porte et directement responsable devant elle. Le Gouverneur désignait les divers fonctionnaires en vertu des pouvoirs que le Sultan lui conférait et, enfin, le Gouvernement ottoman devait combler tous les déficits budgétaires et, d'autre part, tous les excédents devaient lui être versés. (*Les effets des transformations des Etats sur leurs dettes publiques*, A. N. Sack, page 134.)

En outre, et comme si cela ne suffisait pas, le mémoire présenté par le Secrétaire général de la Société des Nations au Conseil a établi qu'en dehors du droit d'acquisition, les Puissances alliées (la France notamment) ne possédaient aucun droit avant la signature du traité avec la Turquie.

Nonobstant toutes les déclarations officielles et tous les discours parlementaires, il demeure vrai de dire que, *jusqu'à la ratification du susdit traité ou d'un autre venant le remplacer, la situation des Puissances à l'égard des territoires ayant appartenu à la Turquie découle uniquement du droit d'occupation.*

Cette affirmation est corroborée aussi par le paragraphe 7 du mémorandum cité plus haut (Mémorandum présenté par le Secrétaire général de la Société au Conseil) qui dit: "*En ce qui concerne les mandats pour des territoires ayant appartenu à l'ancien Empire ottoman, il est clair que la Société ne peut rien faire avant que le traité avec la Turquie soit définitivement signé.*"

Cela est confirmé par ce qu'écrit M. Nicolas, professeur à l'Ecole de droit de Beyrouth, dans son étude sur la nationalité en Syrie et au Liban:

"La loi ottomane sur la nationalité est restée en vigueur dans les pays sous mandat français jusqu'au moment de la ratification des Actes de Lausanne en août 1924. Des arrêtés du Haut-Commissaire ont à cette date consacré le changement de nationalité des ressortissants ottomans visés aux articles 30 à 36 du traité, et plus tard, abrogeant la loi ottomane de 1285, édicté des dispositions nouvelles sur les nationalités syrienne et libanaise."

Mais avant la date de ratification du traité, pendant cette longue période qui va d'octobre 1918 à août 1924, des événements importants se sont produits, sans la connaissance desquels bien des dispositions des lois actuelles sur la nationalité demeureraient obscures.

Pendant toute cette période, les ressortissants locaux étaient en droit des sujets ottomans, habitant une province ottomane occupée par la France. Cette situation très nette au début ne tarda pas cependant à se modifier, à mesure que, se prolongeant, le détachement des provinces occupées apparaissait comme plus certain, en même temps que s'affirmait comme plus durable le rôle de la France et le sens de son intervention. Après San-Remo et après la signature du Traité de Sèvres, des Etats "provisoirement indépendants" étaient constitués, et appelés à vivre de leur vie propre avec l'aide et les conseils de la France.

L'indépendance du Grand-Liban fut proclamée le 1er septembre 1920. Les Etats de Damas, d'Alep furent constitués, puis ceux des Alaouites et du Djebel Druse. Enfin une Fédération des Etats de Syrie fut organisée le 28 juin 1922 entre les Etats de Damas, d'Alep et des Alaouites (*Revue de droit international privé*, No XXI, No 4, 1926, page 482).

Ces commentaires témoignent non seulement des changements de nationalité survenus jusqu'en 1924, mais encore de l'existence d'une situation intermédiaire, avant le mandat qui a été confié à la France le 24 juillet 1922, et qui est entré en application après l'expiration du délai fixé par la Convention (31 mai 1920), puisque le Traité de Sèvres a été signé le 20 août 1920, date

jusqu'à laquelle on pouvait considérer qu'il y avait des raisons de reconnaître à la France, en fait, un droit de regard sur les provinces de Syrie et du Liban.

C'est donc une erreur fondamentale que de soutenir qu'il existait un protectorat avant la signature des traités avec la Turquie, à moins que l'on considère une simple occupation comme un protectorat.

Sur quoi peut donc se fonder la sentence du Président pour affirmer que ce protectorat existait *de facto?*

Le soussigné se voit dans l'obligation de rappeler les précédents dans ce domaine, parce que les conséquences en sont extrêmement dangereuses pour l'indépendance des petites nations et constitueraient, si on les acceptait, un important recul du droit international qui reviendrait par là à un état moins évolué que celui qui était le sien avant que Grotius n'écrivît son ouvrage célèbre sur le droit de la guerre et de la paix.

Mérignhac, étudiant, au chapitre III du tome premier de son *Droit public international*, les causes qui exercent une influence absolue ou relative sur la destinée des Etats, cite la question d'Orient qui, selon lui, est "le résumé et le résultat des diverses interventions des Puissances européennes dans les affaires de l'Empire ottoman". Il rappelle ensuite l'intervention de 1860 en Syrie et le fait que l'on a exigé que l'administration du Liban soit réorganisée selon un projet conçu par des Puissances étrangères.

Enfin, d'après le même auteur, la protection s'exerce sur des individus déterminés qui se trouvent dans une situation donnée, sur certains sanctuaires et en dernier lieu sur les étrangers qui ne bénéficient pas du régime des capitulations. Je reproduis ci-après quelques passages de l'auteur en question:

"... Enfin la France était reconnue comme protectrice toute spéciale de la religion catholique en général; sa protection s'étendait sur les fidèles, les religieux et les communautés religieuses, principalement dans les *Lieux saints*." (*Droit public international*, A. Mérignhac, page 73.)

"En vertu des capitulations, nous l'avons dit, la France protégeait non seulement ses nationaux, mais encore les ressortissants chrétiens étrangers. La protection française fut d'abord acceptée avec joie par les autres nations qui, grâce à elle, voyaient leur condition dans l'Empire ottoman largement améliorée. Mais, avec le temps, elles songèrent à s'affranchir d'une condition d'infériorité évidente et à conclure pour leur propre compte des traités de protection en faveur de leurs nationaux. Les Puissances de l'Europe occidentale qui, comme la France, ne s'étaient point heurtées aux Turcs et ne pensaient qu'à se créer des débouchés commerciaux sur le territoire de ces derniers commencèrent à agir en ce sens; la Grande-Bretagne obtient des capitulations en 1579, 1583, 1619, 1641, 1675, 1679, confirmées par le traité du 5 janvier 1809 et les traités de commerce de 1838 et du 29 avril 1861. Les capitulations hollandaises sont de 1598 et 1613; elles ont été renouvelées jusqu'en 1680 et confirmées par les traités de commerce de 1840 et de 1862." (*Droit public international*, A. Mérignhac, pages 78-79.)

"Dès lors, les nationaux étrangers que pourrait protéger la France, comme n'appartenant pas à un pays ayant des traités avec la Porte ottomane, seraient exclusivement les sujets suisses, si même l'usage ne s'était établi de partager cette protection avec l'Allemagne et l'Italie, suivant la langue parlée par les protégés helvétiques. Donc les nationaux des Etats qui n'ont pas conclu de capitulations avec l'Empire ottoman ont, en somme, liberté absolue de se faire inscrire au consulat qu'il leur plaît de choisir; et il semble, en tout cas, impossible d'obliger, malgré lui, un sujet étranger à accepter la protection française. C'est ainsi que les Etats-Unis de l'Amérique du Nord, l'Espagne et le Portugal se partagent la protection des nationaux des diverses républiques américaines, en nombre, du reste, infiniment restreint.

"Le protectorat européen s'exerce, en dehors des sujets européens, sur certains sujets ottomans, tels que les drogmans ou interprètes de nationalité ottomane. Des abus s'étaient produits à cet égard, les législations accordaient des patentes de protection à des personnes qui n'y avaient aucun droit. On a donc été obligé d'établir, sur ce point, des règles fort nettes; et, le 9 août 1863, est intervenu un règlement fixant d'une manière absolument limitative quels indigènes auraient droit à la protection. Ces protégés sont assimilés aux nationaux de la Puissance protectrice.

"Enfin, en vertu des capitulations et de la tradition, la France exerce un protectorat religieux d'une grande importance au point de vue international; nos agents représentent, devant les autorités ottomanes, les intérêts de toutes les communautés religieuses latines de toute nationalité; les capitulations sont, à cet égard, absolument précises dans leur texte et leur esprit." (*Droit public international*, A. Mérignhac, pages 80-82.)

"La protection religieuse exercée par la France a pour but de sauvegarder les intérêts généraux de l'Eglise catholique, en assurant le libre exercice du culte dans l'Empire ottoman, en garantissant aux communautés religieuses la jouissance des privilèges à elles accordés par les traités, firmans et usages, notamment ceux consistant dans l'exemption des droits de douane, la tenue d'écoles, la reconnaissance du pavillon de Jérusalem et la possession des *Lieux saints*. Les *Lieux saints* ne sont pas absolument la Terre sainte, mais "les lieux où le Christ est né, a été crucifié, où il a été enseveli, et où, dès les premiers siècles de notre ère, ont été élevées des églises commémoratives de ces grands événements". Malheureusement, les capitulations ne donnent pas l'énumération des sanctuaires protégés; d'autre part, la Porte en a concédé la jouissance, par des firmans successifs et contradictoires, aux représentants des principales confessions chrétiennes catholiques latines, grecs, orthodoxes, arméniens orthodoxes, coptes orthodoxes, syriens jacobites." (*Droit public international*, A. Mérignhac, pages 82-83.)

"Toutefois, pour pouvoir invoquer le protectorat religieux, il est indispensable que le Saint-Siège appuie les revendications françaises. Sans doute, comme l'a fort bien dit M. Bienvenu-Martin, Ministre de l'instruction publique et des cultes, à la séance de la Chambre française du 4 avril 1905, nos droits résultent d'accords directs conclus avec le Gouvernement ottoman. Mais en pratique, la mise en œuvre de la protection religieuse n'est possible qu'avec la collaboration du Saint-Siège et grâce aux instructions qu'il donnera aux religieux placés sous notre protectorat. A cet égard, l'intervention des souverains pontifes s'est très utilement exercée en notre faveur, spécialement sous le pontificat de Léon XIII. Ce n'est pas, en effet, sans doute, aux papes qu'est dû l'établissement du protectorat catholique en Orient, mais c'est à eux qu'en est dû, en grande partie, le maintien." (*Droit public international*, A. Mérignhac, pages 85-86.)

Il s'ensuit que, dans le cas qui nous occupe, il ne s'agit pas de l'exercice d'un protectorat. Il est inadmissible qu'on puisse prétendre fonder un droit sur les églises et sur certains individus et les faire échapper à la juridiction de l'Empire ottoman parce qu'ils sont chrétiens, et encore moins peut-on justifier l'existence d'un protectorat par des privilèges de cette nature. Prétendre que les interventions d'un pays dans les affaires intérieures d'un autre entraînent la constitution d'un protectorat *de facto*, dont découle un droit, c'est défendre une doctrine beaucoup plus dangereuse que celle du droit de conquête, puisque celle-ci, si injuste soit-elle, repose sur des traités. Or, fonder un droit sur une intervention, c'est jeter les bases d'une doctrine extrêmement périlleuse. Le Mexique a toujours affirmé que l'intervention était illégale et a présenté au Congrès de juristes tenu à Rio-de-Janeiro pour préparer la sixième Conférence

panaméricaine, le vœu ci-après, soutenant que tout gouvernement qui défendait la légalité de l'intervention commettait un acte illicite et que l'Etat occupant était tenu de réparer tous les dommages causés à l'Etat occupé ou aux tiers:

"Aucun Etat ne pourra, à l'avenir, occuper, ni directement ni indirectement, et pour quelque motif que ce soit, même à titre temporaire, une partie du territoire d'un autre Etat. Le consentement de ce dernier ne légitimera pas l'occupation et l'occupant sera responsable de tous les faits qui résulteront de l'occupation, tant à l'égard de l'Etat occupé qu'à l'égard des tiers."

Le soussigné ne saurait s'écarter en aucune manière de cette doctrine et repousse la doctrine contraire avec la plus grande énergie parce qu'il la considère comme désastreuse pour l'Amérique et pour le monde entier, surtout si l'on songe que certains auteurs se sont risqués à estimer que certains Etats américains peuvent se considérer comme soumis à des conditions restrictives de leur souveraineté.

Pour ces motifs, le soussigné, sans vouloir retenir d'autres exceptions dilatoires, estime que la Commission est incompétente pour connaître de la réclamation de Pablo Nájera.

Mexico, D.F., le 2 novembre 1928
(Signé) FERNANDO GONZÁLEZ ROA

DECISION No. 17

(October 19, 1928.)

SUSPENSION OF PROCEEDINGS OF COMMISSION. In view of the impossibility for the Presiding Commissioner to stay longer in Mexico, the proceedings of the Commission are suspended from October 20, 1928.

RECOMMENDATION TO GOVERNMENTS TO EXTEND THE COMMISSION'S TERM. The Commission makes a recommendation to the Governments to extend its term of office in accordance with Article I of the Supplementary Convention of March 12, 1927, [1] so that the Commission may be convened again in the course of 1929.

RECOMMENDATION TO AGENTS TO SETTLE IN THE MEANTIME AS MANY CLAIMS AS POSSIBLE.—PROCEDURE. The Commission makes a recommendation to the Agents to settle in the meantime by mutual agreement as many claims as possible and to submit their agreements to the Commission for homologation through the National Commissioners. In cases in which no agreement is reached, the Commission suggests to the Agents that they dispense with oral argument and instead submit a written statement.

MODIFICATION OF RULES OF PROCEDURE. The Commission modifies article 1 and article 42 of its Rules of Procedure.

(Text of decision omitted.)

[1] See Feller, p. 421.

HÉLÈNE BIMAR (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 31 of October 19, 1928.)

PROOF OF LOSS. Documentary and oral testimony *held* sufficient proof that claimant suffered damage by acts of Constitutionalist forces, whose character as such was also a matter of common knowledge.

RESPONSIBILITY FOR ACTS OF FORCES. Looting of residence and storehouse, outrage and violence against claimant, and expelling claimant by threats with death by Constitutionalist forces *held* covered by Article III of the Convention.

DAMAGES. The absence of precise data concerning the value of the looted goods, and the lack of precaution on the part of the claimant who at the approach of the revolutionary forces kept jewels and securities in her countryhouse are taken into account in assessing damages.

ALLOWANCE OF INTEREST. The French Commissioner having proposed to allow interest at a rate of three per cent per annum running from the day of the termination of the Commission's activities, and the Mexican Commissioner having agreed with this proposal, without prejudice, however, to his observations on the subject in the *Pinson* Case, the Presiding Commissioner, making the same reservation, declares that he will conform henceforth on this point to the opinion of the majority. [1]

Cross-reference: Annual Digest, 1927-1928, p. 280.

(Text of decision omitted.)

DECISION No. 20

(March 5, 1929. Decision by President and French Commissioner only. R.G.P.C., 1936, Part 2, page 10.)

ENDING OF TERM OF TRIBUNAL.—ABSENCE OF ONE OF MEMBERS OF TRIBUNAL.—STATUS OF CLAIMS PREVIOUSLY ARGUED AND DECLARED CLOSED.—JURISDICTION OF TRIBUNAL COMPOSED OF MAJORITY OF MEMBERS TO DECIDE UPON CLAIMS PREVIOUSLY ARGUED.—REOPENING OF PROCEEDINGS. Under Article VII, final paragraph, of the *compromis*, the tribunal was required to decide upon each claim presented to it within six months from the closing of oral arguments on such claim. In view of the nearing expiration of such term, *held*, by a majority of the members of the tribunal and in the absence of the Mexican Commissioner, that claims previously argued and declared closed shall be reopened for argument and examination.

Comments: Carlston, The Process of International Arbitration (New York, 1946). sec. 13.

Le Commissaire Président de la Commission franco-mexicaine et le Commissaire de la République française, réunis à Paris, en vue d'examiner la

[1] For the opinions concerning the question of the interest expressed by the Mexican Commission and by the Presiding Commissioner in the *Pinson* Case, see above, p. 327 *et seq.*

situation créée par l'expiration éventuelle du délai de 6 mois visé à l'article VII (dernier alinéa) de la Convention franco-mexicaine des réclamations du 25 septembre 1924, concernant une série d'affaires plaidées et déclarées closes au cours de la première période des sessions, prévue dans la Convention additionnelle du 12 mars 1927, et,

Considérant qu'à ce jour les Commissaires soussignés, n'ont pas reçu l'opinion de leur collègue mexicain relative à aucune des affaires déclarées closes et que par déférence pour lui ils désirent ne pas rendre de sentence à la majorité, avant que ce dernier ait pu donner son avis,

Considérant qu'un supplément d'information paraît nécessaire sur les affaires déjà plaidées et qu'il n'a pas été possible de l'obtenir dans les délais voulus,

Considérant qu'à ce jour les Commissaires soussignés ne savent pas si les deux périodes de neuf mois prévues dans la Convention du 12 mars 1927 seront séparées par une interruption de plusieurs ou si, au contraire, aucune solution de continuité n'est à envisager,

Considérant que dans l'éventualité où aucune interruption des travaux de la Commission ne serait admise, le délai prévu à l'article VII arrive à expiration à la date du 6 de ce mois pour deux affaires et dans les jours suivants pour plusieurs autres réclamations et que par conséquent les Commissaires soussignés ne peuvent plus différer leur résolution,

En conséquence, les Commissaires soussignés, vu l'article 39 du Règlement de procédure et se prononçant à la majorité en l'absence de leur collègue mexicain,

Décident de rouvrir les débats et poursuivre l'examen de la cause dans toutes les affaires déjà plaidées et déclarées closes et dans lesquelles une sentence n'est pas encore intervenue.

DECISION No. 21

(June 3, 1929. Decision by President and French Commissioner only. R.G.P.C., 1936, Part 2, pages 10-11.)

EXTENSION OF TERM OF TRIBUNAL.—AUTHORITY OF PRESIDENT OF TRIBUNAL TO FUNCTION DESPITE UNILATERAL REVOCATION OF SUCH AUTHORITY BY ONE OF THE PARTIES. The term of the tribunal, as extended by the Convention of March 12, 1927, expired December 26, 1928, but, on April 17, 1927, by exchange of notes provided for in such convention, such term was further extended for a term of nine months. On May 2, 1929, M. Verzijl, in his capacity as President of the tribunal, received a communication from the Mexican Government requesting a postponement of the session of the tribunal because of the inability of the Mexican Commissioner to attend. On May 7, 1929, the Mexican Government requested the French Government to select a third arbitrator in view of the asserted expiration of the functions of M. Verzijl, as President, on December 26, 1928. On May 24, 1929, M. Verzijl, as President, convoked the tribunal to meet on May 29, 1929. *Held*, by a majority of the members of the tribunal, the Mexican Commissioner not participating, that M. Verzijl has not ceased to be and remains President and that the tribunal is regularly convened.

Cross reference: Annual Digest, 1929-1930, p. 424.

Comments: Carlston, The Process of International Arbitration (New York, 1946), sec. 13.

La Commission franco-mexicaine des réclamations, à la suite d'un premier échange de vues à la date du 29 mai dernier, après convocations régulièrement faites:

Considérant que, d'accord avec le Commissaire français, le Président de la Commission a, tout d'abord, le 23 mars 1929, proposé au Commissaire mexicain la date du 13 mai pour l'ouverture de la nouvelle session, et ensuite, en l'absence de toute réponse du Commissaire mexicain, a convoqué officiellement la Commission pour le 16 mai 1929,

Considérant que le Gouvernement mexicain, qui à la date du 20 avril 1929 avait adressé une communication à M. Verzijl en sa qualité de Président, a demandé le 2 mai 1929 par voie diplomatique à M. Verzijl toujours considéré comme Président, d'ajourner la réunion de la Commission vu l'empêchement du Commissaire mexicain,

Considérant que, étant donné l'état des travaux en suspens, le Président n'a pas estimé possible de déférer à ce désir et que, dès son arrivée à Mexico, le 15 mai 1929, il a demandé au Gouvernement mexicain de lui indiquer la personnalité désignée pour remplacer M. González Roa,

Considérant que, aucune réponse n'ayant été faite à cette demande à date du 24 mai 1929, le Président a définitivement convoqué la Commission pour le 29 mai, convocation notifiée, d'une part, au Secrétariat des relations extérieures et au Ministre de France, et, d'autre part, au Commissaire français, aux agents et aux Secrétaires,

Considérant qu'en réponse à cette communication M. Verzijl a reçu, d'une part, une lettre du Ministre de France donnant sa conformité et déclarant qu'il inviterait le Commissaire, l'Agent et le Secrétaire français à se rendre à cette convocation et, d'autre part, une lettre du Ministère des relations extérieures lui faisant connaître qu'il ne le considérait plus comme Président depuis le 26 décembre 1928 et qu'en conséquence l'Agent et le Secrétaire mexicain seraient invités à ne pas se rendre à sa convocation, sans faire allusion au Commissaire mexicain;

Considérant que, devant les deux réponses contradictoires, M. Verzijl estime que la Commission ne saurait reprendre ses travaux sous sa présidence qu'après avoir examiné la question et s'être prononcée,

Considérant que, de l'examen des conditions dans lesquelles M. Verzijl a été nommé tiers arbitre, il ressort que, ayant été désigné, en février 1927, par le Président du Conseil d'administration de la Cour permanente d'arbitrage à La Haye et ayant accepté alors cette fonction, mais sans l'avoir effectivement remplie par suite de l'expiration de la Convention d'arbitrage du 25 septembre 1924, M. Verzijl a été invité, vers la fin de 1927, par des notes identiques des Représentants diplomatiques des deux Gouvernements à La Haye, à continuer à se charger de cette fonction prévue par la Convention additionnelle du 12 mars 1927.

Considérant que s'il est exact que deux périodes de neuf mois sont prévues par ladite Convention additionnelle pour l'achèvement des travaux de la Commission, aucune modification dans la composition de la Commission à la fin de la première n'est stipulée et qu'aucune réserve à ce sujet n'a été faite non plus dans les notes d'invitation conjointe ci-dessus visées.

Considérant que le désir manifesté par le Gouvernement mexicain de ne pas laisser d'intervalle entre les deux périodes des sessions a eu pour conséquence d'amener le Gouvernement français à insister auprès de M. Verzijl, Président, pour l'amener à hâter son retour à Mexico,

Considérant que l'échange des lettres de prorogation entre les deux Gouvernements, à la date du 17 avril 1929, a été également pur et simple, sans aucune allusion à un changement de Président,

Considérant que, postérieurement encore, le Gouvernement mexicain s'est adressé deux fois, les 20 avril et 2 mai 1929, à M. Verzijl en sa qualité de Président, la dernière communication contenant la demande officielle de différer la convocation de la Commission,

Considérant que c'est seulement le 7 mai, dans une note communiquée au Président le 27 mai, que le Gouvernement mexicain a demandé au Gouvernement français de choisir un autre tiers arbitre, alors que M. Verzijl était sur le point d'arriver à Mexico;

Considérant que si une telle demande aurait pu s'expliquer le 26 décembre 1928 à la fin de la première période, ou même le 17 avril 1929 au moment de l'échange des lettres de prorogation, cette demande faite le 7 mai et qui fixe la fin des fonctions de M. Verzijl au 26 décembre 1928, est incompatible avec la demande adressée, cinq jours auparavant, le 2 mai, par le Gouvernement mexicain, et officiellement, à M. Verzijl en sa qualité de Président,

Considérant que jusqu'à ce jour le Gouvernement français n'a pas accédé à la demande du Gouvernement mexicain de remplacer le tiers arbitre,

Considérant que, si on ne peut nier à un Gouvernement le droit de proposer à tout moment le remplacement du tiers arbitre en fonctions, une telle proposition ne peut produire d'effet juridique tant qu'elle n'a pas été acceptée par l'autre gouvernement et tant qu'une décision conjointe n'est pas intervenue, et, par suite une destitution unilatérale ne saurait être que nulle et de nul effet,

Considérant que, en effet, la désignation conjointe d'un tiers arbitre est un acte juridique international bilatéral, ayant les effets d'une Convention internationale et comportant notamment l'engagement réciproque des Etats de conserver le tiers arbitre dans ses fonctions jusqu'à ce que se soit manifestée la volonté commune des deux Parties de le destituer,

Pour ces motifs, la Commission, statuant à la majorité des membres de la Commission et à l'unanimité des Commissaires présents,

Décide de déclarer que, M. Verzijl n'ayant pas cessé d'être Président de la Commission, la convocation de la Commission faite par lui en cette qualité est valable et la présente réunion est régulière.

DECISION No. 22

(June 3, 1929. Decision by President and French Commissioner only. R.G.P.C., 1936, Part 2, pages 11-12.)

JURISDICTION OF TRIBUNAL TO RENDER AWARDS IN CLAIMS PREVIOUSLY ARGUED DESPITE ABSENCE OF MEXICAN COMMISSIONER. Claims previously argued and declared reopened by Decision No. 20 now declared closed and jurisdiction of tribunal composed of majority of members, with Mexican Commissioner absent, to render awards in such claims, *sustained.*

Cross-reference: Annual Digest, 1929-1930, p. 424.

Comments: Carlston, The Process of International Arbitration (New York, 1946), Sec. 13.

La Commission franco-mexicaine des réclamations,

Vu la décision No 21, constatant la régularité de la présente session,

Vu les conclusions présentées par l'Agent du Gouvernement français, le 15 mai 1929, relativement aux réclamations plaidées au cours de la troisième session;

Vu l'article VII de la Convention franco-mexicaine, fixant un délai de six mois pour rendre des sentences sur les affaires dont les débats ont été déclarés clos,

Considérant qu'au cours de la troisième session de la Commission, un certain nombre d'affaires ont été plaidées, que, pour la plupart, les débats ont déjà été déclarés clos et que, pour les autres, ils peuvent encore l'être sans inconvénient,

Considérant qu'il avait été entendu entre les Commissaires, avant l'interruption des travaux en octobre dernier, que les Commissaires français et mexicain feraient parvenir aussitôt que possible au Président leurs opinions respectives, et si possible communes, sur chaque affaire déclarée close,

Considérant que le Commissaire français a effectivement remis ses opinions, sous la forme de projets de sentence, aux Secrétaires le 20 décembre 1928, pour être communiquées au Commissaire mexicain, et qu'ultérieurement, le 22 février 1929, lesdites opinions ont été notifiées au Président,

Considérant que le Président, de son côté, a fait connaître aux Secrétaires, par lettre en date du 25 décembre 1928, qu'il avait lui-même préparé ses opinions sur toutes les affaires plaidées, mais qu'à cette date il n'avait encore reçu aucune opinion de ses deux collègues et que, pour ce motif, il différait encore l'expédition des sentences,

Considérant que, malgré une lettre adressée au Commissaire mexicain par le Président le 15 décembre 1928, ledit Commissaire n'a ni envoyé, ni manifesté ses opinions,

Considérant qu'en mars 1929, étant donné l'incertitude existant sur la date de la reprise des débats, et en l'absence de toute opinion du Commissaire mexicain, il a paru nécessaire au Président et au Commissaire français, afin de remplir l'obligation faite à la Commission de rendre des sentences dans un certain délai tout en permettant au Commissaire mexicain de faire encore connaître son opinion, de prendre, en date du 5 mars 1929, à Paris, une décision (No 20), tendant à rouvrir les débats déclarés clos précédemment,

Attendu que tous les délais ayant été effectivement interrompus entre le 27 décembre 1928 et le 17 avril 1929, date à laquelle les deux Gouvernements ont échangé des notes au sujet de la prorogation de neuf mois prévue par la Convention additionnelle du 12 mars 1927, la décision ci-dessus est sans utilité pratique, le délai de six mois visé à l'article VII n'étant pas épuisé,

Attendu que, conformément à l'article 44 du règlement de procédure, la Commission est libre de fixer le mode de préparation des sentences, et qu'elle se trouve en présence actuellement des opinions du Commissaire français déjà communiquées au Commissaire mexicain et qui constituent une base de discussion pour la rédaction définitive des sentences,

Attendu que ni l'abstention du Commissaire mexicain de faire connaître ses opinions, ni la non-représentation du Mexique dans la Commission après la reprise des travaux ne mettent d'obstacle juridique à rendre des sentences à la majorité sur les affaires plaidées antérieurement en présence des trois Commissaires,

Vu les articles 42 et suivants du règlement de procédure,

La Commission, à l'unanimité des membres présents et à la majorité des Commissaires:

Décide:

1. de considérer les débats sur les affaires plaidées au cours de la troisième session et visées dans la décision No 20 comme définitivement clos, en tant que besoin, les déclarer à nouveau clos;

2. de déclarer clos les débats sur les autres affaires plaidées au cours de la troisième session;

3. de rendre en conséquence, dans les délais prévus par la convention, et en tant que les circonstances le permettront, des sentences sur toutes les affaires plaidées, qui seront notifiées non seulement aux Secrétaires, mais encore (en copies certifiées conformes) aux Agents et aux Gouvernements.

TH. GENDROP (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 32, June 7, 1929, majority opinion, dissenting opinion, if any, by Mexican Commissioner, not printed. Pages 203-205. Annexes at page 206 omitted.)

RESPONSIBILITY FOR ACTS OF FORCES.—EQUALITY OF TREATMENT OF NATIONALS AND ALIENS. Claim for damages caused by forces opposed to Constitutionalist forces *allowed.* Additional documents produced by Mexican Agent relative to responsibility for various categories of forces examined and *held* not to affect conclusions reached. The tribunal must, in the granting of claims, extend at least as favourable a treatment to aliens as Mexico itself extends in this regard.

Par un mémoire enregistré par le Secrétariat le 15 juin 1926 sous le numéro 197, l'Agent du Gouvernement français près la Commission franco-mexicaine lui a présenté une réclamation contre les Etats-Unis mexicains, au nom de M. Théophile Gendrop, pour pertes et dommages subis par ce dernier au cours des années 1914 et 1915 et évalués à la somme de $ 3,709.50 (sans intérêts).

D'après l'exposé fait par l'Agent français, M. Théophile Gendrop, qui est né à Paris le 3 novembre 1854, possédait une petite propriété agricole appelée "Los Fresnos" située à proximité de Tlalnepantla (District fédéral). Les 18 et 25 novembre 1914 des troupes de la brigade de Lucio Blanco, et les 10 et 15 mars 1915 des troupes constitutionnalistes dépendant du général Obregón pénétrèrent dans la propriété de M. Gendrop et s'emparèrent de divers animaux d'étable et de basse-cour, de plusieurs hectolitres d'orge et de maïs et de divers objets qui se trouvaient dans la maison.

L'Agence mexicaine n'a pas persisté à contester la nationalité française de M. Gendrop, mais elle a soulevé un certain nombre d'objections, concluant notamment au défaut de preuves, au fait que les forces auteurs des premiers dommages n'étaient pas des forces révolutionnaires dans le sens de l'article III de la convention des réclamations, enfin à l'exagération de l'indemnité réclamée.

Considérant, quant aux preuves produites:

que les témoins cités et entendus par la Commission, en vertu de sa décision No 14, dans son audience du 21 septembre 1928, ont produit des déclarations suffisamment précises et concordantes pour que les Commissaires soient convaincus de la réalité des événements successifs, à qualifier comme des réquisitions militaires, ainsi que de la préexistence des animaux et autres objets dérobés, et du fait qu'ils appartenaient au réclamant.

Considérant ce qui suit, en ce qui concerne les auteurs des dommages:

Il est de notoriété publique que Lucio Blanco avec sa brigade, après la rupture entre la Convention et le Premier Chef de l'Armée constitutionnaliste, s'est joint aux forces de la Convention opposées audit Premier Chef.

Les premiers dommages s'étant produits quelques jours seulement après la rupture visée ci-dessus, il n'existe aucun doute que leurs auteurs rentrent dans l'énumération de l'article III, *sub* 2, de la convention des réclamations, en conformité des observations faites à ce sujet aux § 52 et ss. de la sentence No 1 (G. Pinson).

Ce n'est qu'après la rédaction définitive du texte de ladite sentence, que l'Agence mexicaine a présenté à la Commission, le 19 octobre 1928, quelques documents supplémentaires relatifs à la classification des différentes troupes militaires, révolutionnaires et autres, d'après les conceptions du Gouvernement mexicain. De ces documents, qui se trouvent annexés à la présente sentence, pour compléter l'aperçu donné dans les annexes à la sentence No 1 (G. Pinson), il résulte avec toute la clarté désirable, que les informations complémentaires fournies par l'Agence mexicaine au dernier moment et trop tard pour être prises en considération dans la rédaction de la première sentence fondamentale, ne font que confirmer, après coup, les conclusions juridiques que la Commission a cru devoir tirer des éléments d'information disponibles.

En effet, lesdits documents font ressortir que le Président des Etats-Unis mexicains, par son décret en date du 3 décembre 1925 (annexe I), a commencé par donner au décret du général Obregón du 19 juillet 1924, mentionné dans la sentence No 1, une interprétation identique à celle que l'Agence mexicaine a tâché d'accréditer devant la Commission franco-mexicaine, et qu'il a fallu à la Commission rejeter comme absolument incompatible avec les termes et l'esprit du décret de 1924 (§ 65 de la sentence No 1). Mais ils font ressortir également que le même Président a reconnu plus tard le caractère insoutenable de sa première interprétation et qu'il a fini par révoquer lui-même, par son décret postérieur du 2 septembre 1926 (annexe II), l'interprétation erronée de 1925, en justifiant ainsi parfaitement l'interprétation que, sans savoir ces détails, la Commission avait donnée du décret du général Obregón dans la sentence No 1. Les documents produits par l'Agence mexicaine à la dernière heure démontrent, par conséquent, que les arguments et interprétations des décrets nationaux invoqués par elle devant la Commission, avaient déjà trouvé leur réfutation dans le droit public mexicain lui-même, le Président de la Fédération en ayant reconnu déjà antérieurement le caractère erroné.

Enfin, l'échange de lettres entre l'Agence mexicaine et le Secrétaire des Finances et du Crédit public en date des 5-15 octobre 1928 et reproduit ci-après (annexe III), prouve également que la responsabilité du Mexique des dommages causés par les forces de la Convention, avec effet rétroactif jusqu'à la date de la rupture entre celle-ci et le Premier Chef de l'Armée constitutionnaliste, soutenue au même § 65 de la sentence No 1, est incontestable d'après la législation mexicaine elle-même. Et en ce qui concerne la classification des forces en "révolutionnaires" et autres, la terminologie est évidemment si flottante, que le Président constitutionnel des Etats-Unis mexicains lui-même, dans son "acuerdo" du 3 décembre 1925 (annexe I), a qualifié de "fuerzas revolucionarias" les forces prévues dans le considérant *Segundo* du décret du général Obregón de 1924, et "que sirvieron al llamado Gobierno de la Convención". S'il est vrai que cette qualification a disparu dans l'"acuerdo" du 2 septembre 1926 (annexe II), il n'en est pas moins vrai que ce dernier "acuerdo" n'a porté aucune atteinte au décret primitif de 1924, aux termes duquel (considérant *Segundo*) "las fuerzas que sirvieron al llamado Gobierno Convencionista.... deben considerarse como fuerzas revolucionarias para el efecto de calificar en justicia los daños que se causaron". Mais quand bien même il faudrait s'en tenir aux qualifications officielles contenues dans la lettre du 15 octobre 1928 (annexe III), force est à la Commission de répéter ici que de pareilles classifications subtiles de caractère politique ne sauraient servir de

critérium d'interprétation d'une convention internationale, d'autant moins que, d'après les observations précédentes, le droit public mexicain lui-même a dû concéder la responsabilité de la Fédération pour les dommages causés par toutes les forces conventionnistes et pendant toute la période révolutionnaire comprise entre la rupture de 1914 et le mouvement révolutionnaire nouveau d'Agua Prieta de 1920, et que, par conséquent, la thèse de l'Agence mexicaine reviendrait à dénier aux étrangers des indemnités à allouer par la Commission franco-mexicaine, que la législation nationale reconnaît, non seulement aux Mexicains, mais encore et sur le même pied aux mêmes étrangers dans l'instance nationale.

En ce qui concerne les dommages subis par le réclamant au mois de mars 1915, il n'est pas contesté qu'ils rentrent dans l'énumération de l'article III, sous 2, de la convention des réclamations.

Considérant, quant au montant réclamé:

que même après l'audition des témoins, ce montant ne paraît pas suffisamment fondé, et que l'Agent français n'ayant pas réclamé d'intérêts dans le cas présent, la Commission n'est pas autorisée à en allouer quand même.

Pour ces motifs:

La commission, statuant à la majorité,

Vu sa décision No 22 en date du 3 juin 1929, relative au jugement des affaires plaidées pendant la troisième session;

Décide:

I. — que les dommages subis par M. Théophile Gendrop au mois de novembre 1914, aussi bien que ceux qu'il a soufferts au mois de mars 1915, sont le fait de forces spécifiées à l'article III, *sub* 2, de la convention des réclamations;

II. — que l'indemnité à accorder du chef des dommages subis par le réclamant doit être évaluée à la somme de deux mille piastres or national ($2,000.—), sans intérêts.

Cette décision devant être rédigée en français et en espagnol, c'est le texte français qui fera foi.

Fait et jugé à Mexico, le 7 juin 1929, en deux exemplaires, qui seront remis à la Partie demanderesse et à la Partie défenderesse, respectivement.

ESTATE OF JEAN-BAPTISTE CAIRE (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 33, opinion by Presiding Commissioner, June 7, 1929, concurring opinion by French Commissioner, June 7, 1929, dissenting opinion, if any, by Mexican Commissioner, not printed. Pages 207-226.)

PROCEDURE.—LITISPENDENCE NOT A PRELIMINARY OBJECTION. Questions of competence, such as the nationality of the claimant, should be considered before an objection of litispendence.

LITISPENDENCE. Claimant had filed her claim before the Mexican National Claims Commission, which had disallowed the same. Claimant had then

made her declaration of disagreement with such decision and had thereafter presented her claim to this tribunal. *Held,* the objection of litispendence was inapplicable. Nevertheless, the fact that a claim may be pending before a national tribunal will not preclude an international tribunal from exercising jurisdiction. Fact noted that French Agent had agreed to withdraw from the domestic commission any claim of which the international tribunal had taken jurisdiction.

NATIONALITY.—DUAL NATIONALITY.—NATIONALITY OF MARRIED WOMEN.—MEXICAN BORN WIDOW OF FRENCH NATIONAL. Claimant was born in Mexico, and married a French national, who thereafter died. *Held,* in absence of proof by Mexican Agent that claimant had elected to resume her Mexican nationality, it is to be presumed she retained her French nationality by marriage.

RESPONSIBILITY FOR ACTS OF FORCES.—INCORPORATION OF CRIMINALS IN ARMY. The fact that members of a certain military force may have had criminal antecedents does not of itself bring such a force within the class of bandits under the *compromis.*

DIRECT RESPONSIBILITY.—FORCES UNDER COMMAND OF OFFICERS. The fact that Villista forces who executed claimant's husband were under the command of officers renders unnecessary any proof of fault on the part of the competent authorities.

LACK OF AUTHORITY NO DEFENCE TO INTERNATIONAL RESPONSIBILITY. If a State agency acts under the cover of its capacity as an organ of the State and uses the means at its disposition by virtue of such capacity, the plea of lack of competence of such agency may not be raised. Nor will the plea avail that the act in question did not serve a revolutionary purpose.

DAMAGES, EFFECT TO BE GIVEN DECISION OF DOMESTIC CLAIMS BODY. The tribunal will not be bound by a decision on damages of the Mexican National Claims Commission, neither in the sense that it will become the minimum allowable nor in the sense that the tribunal must follow the same means of calculation, based on national law, which the commission followed.

MEASURE OF DAMAGES, WRONGFUL DEATH. In allowing damages in a claim for wrongful death, the tribunal will take into consideration the age and state of health of the decedent, the composition of his family, particularly the number and age of his children, his income, occupation, and economic status.

Cross-reference: Annual Digest, 1929-1930, p. 146, *passim.*

Par un mémoire enregistré par le Secrétariat de la Commission franco-mexicaine sous le numéro 259, le 14 juin 1925, l'Agent du Gouvernement français a introduit une réclamation contre les Etats-Unis mexicains, pour cause de pertes et dommages subis par Mme María Gómez et ses enfants, par le fait de l'assassinat de son mari, M. Jean-Baptiste Caire, dans le village de San Bártolo Naucálpam (Edo. de Mexico), vers la fin de 1914.

D'après l'exposé qu'en donne le mémoire français, ladite réclamation se base sur les faits suivants:

Le 11 décembre 1914, M. Jean-Baptiste Caire se trouvait au No 179 de la 8a calle de Mina, lorsque le commandant (mayor) Everardo Ávila, dépendant de la brigade du général Tomás Urbina de la division du Nord, qui était logé dans cette maison, se présenta, avec deux soldats armés, et exigea $ 5,000 en or national. M. Caire ne put les lui donner, parce qu'il ne les possédait pas. Alors le commandant Ávila, aidé du capitaine (capitán primero) Maurilio

Muñoz de la même brigade, le conduisirent à la caserne située dans les rues del Puente de Alvarado et Ponciano Arriaga. M. Caire resta dans cette caserne jusqu'à sept heures du soir, et il fut alors conduit à nouveau à sa maison; on exigea, pour la seconde fois, avec menace de le fusiller, ladite somme, de $ 5,000. M. Caire proposa de donner tout ce qu'il possédait en papier-monnaie, c'est-à-dire $ 200. Les deux officiers ramenèrent alors M. Caire à la caserne. Là il fut dépouillé de ses vêtements, et dans le plus simple appareil et sans chaussures, il fut conduit en automobile à l'hacienda de "El Prieto" dépendant du village de San Bártolo Naucálpam, où, entre 11 heures du soir et minuit, il fut fusillé avec M. Rafael Flores, qui était intervenu en sa faveur.

L'assassinat de M. Caire a été porté par la Légation de France à la connaissance du Secrétariat des Relations Extérieures le 21 avril 1915, et le 30 novembre 1922 la veuve de l'assassiné a présenté une réclamation à la Commission nationale. Celle-ci a approuvé, le 2 février 1923, un "dictamen" dont copie est jointe au mémoire de l'Agent français (annexe III), et dans lequel ladite Commission déclare prouvé que la mort de M. Caire doit être imputée à des individus des forces conventionnistes qui occupaient alors Mexico, et que le chiffre de $ 78,000 d'indemnité pourrait être pris en considération, mais que, l'énumération des auteurs des dommages dans la loi sur les réclamations du 30 août 1919 étant limitative, et les forces conventionnistes ne rentrant pas dans la catégorie des forces révolutionnaires visées par ladite loi, la Commission n'était pas en droit d'allouer une indemnité, la réclamante n'ayant pas démontré une négligence ou une omission quelconque du Gouvernement constitutionnaliste. La réclamante, qui a manifesté son "inconformité" avec le dictamen de la Commission nationale (le 15 février 1923), n'a pas présenté à nouveau sa réclamation à la Commission nationale après les modifications apportées à la loi de 1919 par le décret du général Obregón en date du 19 juillet 1924.

L'indemnité réclamée devant la Commission franco-mexicaine se monte au chiffre de $ 75,000, sans intérêts.

Dans la présente affaire, l'Agence mexicaine s'est abstenue de proposer le déclinatoire à l'effet de suspendre la procédure au fond jusqu'à ce que la Commission rende sa sentence sur quelques exceptions ou fins de non-recevoir proposées par ladite Agence et de nature préliminaire. Dans ces conditions, les exceptions et le fond seront jugés ensemble dans cette sentence.

Opinion du Commissaire Président

La défense de l'Agence mexicaine de caractère préalable, telle qu'elle se trouve exposée dans sa "contestación al memorial" en date du 24 juin 1926, consiste en les trois affirmations suivantes:

1. La réclamante n'ayant pas démontré qu'elle a manifesté son accord ou désaccord avec le dictamen de la Commission nationale, n'est pas qualifiée pour se présenter devant la Commission franco-mexicaine.

2. Mexicaine d'origine, la réclamante n'a pas prouvé qu'elle ait jamais acquis la nationalité française, le certificat d'immatriculation consulaire de feu M. Caire ne faisant pas la preuve de la nationalité française de ce dernier.

3. Quand bien même cette nationalité serait prouvée, la réclamante aurait récupéré, après la mort de son mari, sa nationalité d'origine.

La défense quant au fond consiste à dire:

1) que les auteurs de l'exécution de M. Caire étaient deux bandits ayant les pires antécédents, et qui ne sauraient, par conséquent, être classés que dans la catégorie de "brigands", dont fait mention le paragraphe 5 de l'article III de la convention des réclamations;

2) que, même si le meurtre devait être considéré comme ayant été commis par des militaires comme tels, ces militaires ne sauraient être censés avoir fait partie d'une des forces énumérées *sub* 1-4. mais seulement des "autres forces insurrectionnelles", visées *sub* 5 dudit article III;

3) que, dans l'un et l'autre cas, il n'est pas "établi que les autorités compétentes (aient) omis de prendre des mesures raisonnables pour réprimer les insurrections.... ou actes de brigandage dont il s'agit, ou pour en punir les auteurs, ou que lesdites autorités (aient) été en faute de quelque autre manière" (article III, *sub* 5);

4) que, même si les auteurs du meurtre devaient être considérés comme faisant partie de "forces d'un Gouvernement *de facto*" ou de "forces révolutionnaires" dans le sens des Nos 1 ou 2 de l'article III, la responsabilité du Mexique serait exclue par les faits suivants:

a) les auteurs du crime n'étaient que des militaires isolés;

b) ils ont agi, non seulement à l'insu du chef des troupes villistes, mais encore à l'encontre d'un mandat exprès de mise en liberté;

c) le crime n'avait rien à faire avec les fins et les nécessités révolutionnaires;

5) qu'en tous cas, le montant réclamé est injustifié, étant donné:

a) qu'il est calculé sur une base foncièrement erronée;

b) qu'il ne tient pas compte du fait que l'assassiné a manqué de précaution en recevant dans sa pension les officiers criminels.

Dans cette affaire, comme dans certaines autres, l'Agent français a formulé une série de conclusions (primaires, subsidiaires et d'ordre général), au sujet de la plupart desquelles la Commission a déjà pris une décision dans la sentence No 1 relative à la réclamation de M. G. Pinson, et qui pour le reste seront examinées dans la suite.

Tout d'abord, il faut faire remarquer qu'il s'agit, dans l'espèce, d'un cas dans lequel la Commission franco-mexicaine fait fonction de tribunal de révision, dans le sens et aux effets précisés au § 8 de la sentence No 1 (G. Pinson). Cependant, dans le cas présent, cette constatation ne comporte guère de conséquences pratiques, attendu que, d'une part, l'Agent mexicain, bien qu'exprimant certains doutes sur le caractère suffisant des preuves des événements, a fini par en reconnaître la matérialité, et que, d'autre part, il incombe à la Commission franco-mexicaine d'examiner indépendamment des conclusions et solutions de la Commission nationale, tant la nationalité du défunt et de la réclamante, que les limites juridiques de la responsabilité du Mexique selon la convention des réclamations et les bases de l'indemnisation dans les cas d'assassinat ou d'autres lésions personnelles.

A. — Exceptions préliminaires

1. *Défaut de preuve de déclaration de non-conformité*

Ainsi qu'il appert de la lettre de la Commission nationale des réclamations en date du 14 mars 1923, dont copie se trouve annexée à la réplique de l'Agent français présentée le 28 juillet 1926, la réclamante a, en effet, manifesté, le 15 février 1923, son désaccord avec le dictamen de ladite Commission, de sorte que la première exception préliminaire manque de base. Dans ces conditions, il n'y a pas lieu d'insister ici longuement sur les conséquences juridiques qu'aurait éventuellement comportées soit la négligence de la réclamante de faire en temps utile sa déclaration d'"inconformité", soit l'omission ou le refus par l'Agent français de prouver l'existence de pareille déclaration. Etant donné, toutefois, que, tout en retirant son exception pour le cas actuel, l'Agent mexicain a persisté, dans son "alegato" du 8 mars 1927, à maintenir ses thèses

générales relatives à la litispendance, il convient de faire à ce sujet les brèves observations suivantes, sous réserve de développement ultérieur, s'il y a lieu, dans une sentence postérieure.

Tout d'abord, je fais remarquer qu'il eût mieux valu, dans l'espèce, ne pas proposer du tout l'exception de défaut de déclaration d'"inconformité". Car, même abstraction faite de l'attitude fondamentale de l'Agence mexicaine consistant à ignorer entièrement, à d'autres égards, les dispositions de la législation nationale en matière de réclamations et tous rapports entre les deux Commissions, nationale et internationale, ladite exception eût en tous cas dû se limiter aux réclamations par rapport auxquelles la déclaration d'"inconformidad" aurait paru faire réellement défaut, circonstance que ladite Agence était parfaitement en mesure de vérifier elle-même chez les autorités mexicaines (cmp. aussi les articles 26-30 du décret sur les réclamations en date du 24 décembre 1917).

Mais même la négligence de la réclamante de notifier directement à la Commission nationale son désaccord avec le dictamen rendu n'eût pas suffi, par elle-même, à faire périmer, selon la législation nationale, le recours à la Commission internationale, attendu que cette législation (article 11 de la loi du 30 août 1919) prévoit également la possibilité d'objections à présenter par la voie diplomatique.

Cependant l'objection de l'Agence mexicaine a une portée beaucoup plus large, puisqu'elle se rattache expressément à la doctrine juridique relative à la litispendance. Non que ladite Agence, en se référant aux dispositions des codes nationaux de procédure civile, prétende contester la compétence de la Commission franco-mexicaine de connaître de réclamations encore pendantes, en quelque forme que ce soit, devant les instances nationales appelées par la législation mexicaine à en juger (Commission nationale des réclamations, Secrétariat des Finances et du Crédit Public, Président de la République), en voulant obliger les réclamants à continuer la poursuite de leur action devant les instances nationales, une fois invoquées. Mais toujours est-il qu'elle s'oppose à ce que notre Commission en connaisse avant que les réclamants ne se soient désistés de leur demande présentée aux organes nationaux, et qu'elle la presse à les mettre à la porte, jusqu'à ce qu'ils aient obtempéré aux désirs exprimés par le représentant du Gouvernement mexicain.

A cette exception de pseudo-litispendance, l'Agent français ne peut utilement opposer, à mon avis, l'argument qu'il prétend tirer de l'article VI, alinéa 1er de la Convention des réclamations, disant que "la Commission ne devra écarter ou rejeter aucune réclamation pour le motif que les recours légaux n'auraient pas été épuisés avant présentation de ladite réclamation". En effet, cette clause ne vise pas, à mon avis, le cas de litispendance, mais doit être interprétée dans le sens restreint d'éliminer le jeu du principe de droit international formulé dans la fameuse "clause Calvo" (cmp. § 10 de la sentence No 1 dans l'affaire G. Pinson). Mais d'autre part, l'Agence française n'a nullement besoin d'un texte formel et positif d'un traité pour faire triompher son point de vue, étant donné que — contrairement à l'hypothèse prévue audit article VI, alinéa 1er, de la Convention — elle n'a rien à craindre d'une règle ou principe de droit international coutumier qui pût utilement lui être opposé dans l'hypothèse actuelle. En effet, le droit international n'oblige point un tribunal international de s'abstenir, dans des conditions telles qu'elles se présentent dans les cas des présentes réclamations, de connaître d'un litige international, par le motif que le même différend est pendant devant un autre tribunal.

Notamment dans le cas présent, où la nationalité française de la réclamante est contestée par l'Agent mexicain, l'exception de pseudo-litispendance est

insoutenable, en tant qu'elle prétend — ainsi que l'ont démontré, en effet, les discussions orales dans les audiences des 16 et 17 mai 1928 — provoquer le retrait de toute réclamation de la Commission nationale ou de l'instance devant le Président de la République, avant que la Commission franco-mexicaine n'ait reconnu la recevabilité de la réclamation, comme appartenant à un ressortissant français. Adjuger, dans un cas pareil, à l'Agence mexicaine ses conclusions à l'encontre de la nationalité française du réclamant, équivaudrait, en effet, à reconnaître implicitement que la réclamation est, soit du domaine exclusif de la Commission nationale, soit du domaine de celle-ci, concurremment avec une autre Commission mixte parallèle. Avant que ce point ne soit décidé par la Commission franco-mexicaine, toute autre question de recevabilité de la réclamation doit n'être pas touchée. Car, en entrant dans un examen de l'exception de litispendance, sans avoir préalablement statué sur la nationalité du réclamant, la Commission se mêlerait d'un incident de procédure surgissant dans un procès dont elle peut n'avoir pas du tout le droit de s'occuper. L'exception tirée du prétendu défaut de preuve de la nationalité française ou de double nationalité du réclamant est donc, pour ainsi dire, préalable à toutes les autres questions préalables. Elle a logiquement et de par sa nature le pas, notamment sur l'exception de pseudo-litispendance. Vouloir, comme l'a voulu, en essence, l'Agence mexicaine, donner la priorité à la dernière, reviendrait à renverser l'ordre logique des choses. En d'autres termes, la compétence de la Commission franco-mexicaine de connaître de la réclamation, en tant que réclamation d'un ressortissant ou d'un protégé français, devrait, en tout état de cause, être certaine, avant que ladite Commission ne puisse entrer dans un examen des autres questions préalables, notamment celle de la (pseudo-)litispendance. Cette observation tend, par suite, à faire une distinction nette entre la question de la compétence de la Commission franco-mexicaine de connaître de la réclamation à raison de la nationalité du réclamant, et celle de sa recevabilité devant cette Commission, une fois reconnue, ou s'étant déclarée compétente.

Mais est-ce à dire que dans les cas où, après reconnaissance préalable de la compétence de la Commission, comme s'agissant de la réclamation d'un Français, d'un protégé français ou d'une société, association, etc., française, l'exception de pseudo-litispendance est proposée, cette exception doit être retenue?

Aucunement. La difficulté de procédure dont il s'agit ici, trouve son origine exclusivement dans une imperfection de la législation mexicaine, consistant dans le manque d'adaptation de cette dernière aux conditions nouvelles créées par l'entrée en vigueur des conventions des réclamations. En organisant les juridictions appelées à connaître des réclamations des étrangers pour cause de dommages causés par les révolutions, en conformité des lignes générales tracées par le décret de Monclova, d'abord par la promulgation de la législation nationale en matière de réclamations, et ensuite par la conclusion successive des différentes conventions internationales, l'on ne s'est évidemment pas rendu un compte suffisant de la corrélation entre les deux groupes de stipulations, national et international. En maintenant dans la législation nationale les dispositions relatives au recours aux Commissions internationales, sans les adapter à la situation nouvelle créée par l'article VII de la Convention franco-mexicaine et les articles correspondants des autres conventions semblables, on a provoqué en quelque sorte les présentes difficultés. L'article VII de la Convention prescrit un délai de neuf mois à partir d'un jour fixe (14 mars 1925, date de la première réunion de la Commission) pour la présentation de toutes les réclamations françaises. Cette fixation de délai ne présentait aucun inconvénient pour les cas de réclamations à porter devant la Commission mixte

en première et unique instance, mais elle allait en produire d'assez considérables pour les autres cas, dans lesquels la Commission mixte aurait, suivant la législation nationale, à connaître de réclamations en instance de révision. Pour faire bien fonctionner les juridictions dans ces derniers cas, il eût été indispensable de faire partir le délai de présentation des réclamations à la Commission internationale, non pas d'une date fixe qui ne tenait pas compte de l'état actuel des travaux de la Commission nationale, mais tout au moins en ce qui concerne les réclamations pas encore jugées par la Commission nationale, de la date de la décision de cette dernière. Cependant, il va de soi que cette solution se serait heurtée à l'obstacle qu'alors le progrès des travaux de la Commission internationale serait en partie devenu subordonné à celui de la Commission nationale. Dans ces conditions, il eût fallu édicter d'autres dispositions légales pour régler le cas, non prévu par la législation existante, qu'une réclamation serait encore pendante devant la Commission nationale au moment de la présentation de la même réclamation à la Commission internationale; car, dans ces cas, non seulement la réalisation du projet primitif de Monclova, visant deux instances successives, devenait impossible, mais encore il devenait nécessaire de tenir compte de l'éventualité de deux actions parallèles et simultanées devant deux commissions différentes. En manquant d'effectuer cette adaptation de la législation nationale à la situation conventionnelle, le Mexique est lui-même la cause des difficultés invoquées par son Agence. Bien que je sois heureux de ne m'être pas trouvé dans la nécessité de souscrire, à beaucoup d'autres points de vue, à la critique sévère que ladite Agence, au cours des audiences, a cru bon d'exercer, à plusieurs reprises, contre la législation de son pays en matière de réclamations, force m'a été de reconnaître que le défaut total de règlement du cas de deux réclamations simultanées devant les deux Commissions constitue une imperfection technique assez grave.

Mais reconnaître les inconvénients résultant de la coexistence des deux Commissions, qualifiées toutes deux pour connaître de la même réclamation, n'équivaut nullement à dire que la Commission internationale doit reculer devant la juridiction nationale, ou qu'elle doit se considérer, comme l'a fait la Commission hispano-mexicaine, comme autorisée à priver les réclamants qui se présentent devant elle, de droits légaux qui lui reviennent d'après la législation mexicaine. En effet, ce qu'a cru pouvoir faire cette dernière commission par sa résolution du 29 mars 1928 [1], me paraît inadmissible. D'abord, les termes du texte étant tout à fait généraux, comprennent aussi les cas dans lesquels l'Agence mexicaine contestera avec succès la nationalité (espagnole, dans l'espèce) du réclamant, et dans lesquels il serait non seulement injuste, mais encore incorrect au point de vue juridique technique, d'avoir d'avance privé le réclamant de son droit de demander une indemnité devant la Commission nationale. Injuste, parce que, convaincu de bonne foi de sa nationalité (espagnole, dans l'espèce) et de ne pas posséder d'autre nationalité, mais désirant en avoir la certitude avant d'abandonner d'autres voies de droit, il verrait à la fois barrée la route vers les deux commissions, internationale et nationale. Et incorrect au point de vue juridique technique, pour la raison indiquée ci-dessus, à savoir qu'une Commission internationale qui déclare expressément manquer de juridiction pour le motif qu'elle ne peut pas admettre la nationalité

[1] "I. — Esta Comisión considera que por la presentación de un Memorándum, et reclamante se estima totalmente desistido o por la parte en que tuviere interés, de cualquiera reclamación que se hubiese presentado por los mismos hechos ante la Comisión Nacional de Reclamaciones, quedando así eliminada la posibilidad de que se hagan valer ante esa misma Comisión Internacional, excepciones de litispendencia, motivadas por existir reclamaciones ante otro Tribunal.
"II. — ....."

(espagnole, dans l'espèce) du réclamant, paraîtrait, malgré cela, avoir commencé par priver cet individu de droits qui découlent en sa faveur d'une loi mexicaine et dont elle ne peut à aucun titre disposer. Une pareille décision reviendrait à un empiétement illogique et injustifié sur les droits légitimes de Mexicains ou de ressortissants d'une Puissance tierce, qui naturellement ne reconnaîtrait pas la décision, et même les pauvres sans-patrie ne méritent pas d'être dépouillés de leurs droits légitimes avant d'être mis à la porte.

Mais même après la rectification impérieuse indiquée ci-dessus, la résolution ne cesserait pas de conserver pour moi son caractère inadmissible, étant donné que la Commission franco-mexicaine n'est revêtue d'aucune autorité juridique pour dépouiller de ses droits selon la législation mexicaine, même un réclamant qui se présente devant elle comme Français ou comme protégé français, et qu'elle reconnaît comme tel. L'autorité qui, seule, est qualifiée pour l'en priver, si elle le croit juste et compatible avec ses engagements internationaux, c'est le pouvoir législatif du Mexique. Aussi longtemps que la législation du Mexique reconnaît aux étrangers le droit de faire valoir devant une Commission nationale des réclamations leurs droits à indemnité, sans dire mot sur le cas d'introduction postérieure par les mêmes étrangers d'une réclamation ayant le même objet dans la Commission internationale, cette législation doit rester décisive pour la détermination des droits qu'ils possèdent dans l'ordre juridique interne du pays, et il n'appartient pas à la Commission internationale d'en compléter, modifier ou abroger les dispositions par la voie déguisée d'une sentence à cet effet. Elle ne saurait le faire sans porter atteinte à la souveraineté du Mexique en matière législative.

Et il n'y a pas non plus lieu pour elle de reculer devant la juridiction nationale, ainsi qu'elle serait obligée de le faire, si elle admettait devant son tribunal les effets stricts de l'exception de litispendance selon la procédure civile. Si l'on réfléchit sur la matière de la litispendance dans les rapports internationaux, on se rend bientôt compte que, dans ce domaine, il peut s'agir de trois hypothèses bien différentes. En effet, la litispendance peut exister entre deux tribunaux arbitraux, cours de justice ou autres organes judiciaires ou pseudo-judiciaires de la communauté des Etats, ou bien entre un tribunal arbitral, une cour de justice ou autre organe (pseudo-) judiciaire de ladite communauté et un tribunal national, ou bien entre les tribunaux de deux Etats différents. La dernière hypothèse appartient essentiellement au droit international privé et peut être écartée ici. La première hypothèse n'a pas eu beaucoup d'occasion de se présenter dans le passé, pour la simple raison qu'il n'existait pas beaucoup de tribunaux ou autres organes internationaux dont l'activité simultanée pût donner lieu à des décisions divergentes ou contradictoires; mais il en est devenu autrement dans les derniers temps où un grand nombre de conflits est devenu possible, entre la Cour permanente de Justice internationale et un tribunal arbitral ou le Conseil de la Société des Nations, entre les deux organes de ladite Société, le Conseil et l'Assemblée, entre un tribunal arbitral mixte institué par les traités de paix et le Conseil ou la Cour permanente, etc. La pratique internationale en a fait déjà une expérience assez fréquente, qui forcera la doctrine du droit des gens à lui frayer un chemin au travers de la forêt encore vierge de ce domaine inexploré du droit international. La deuxième hypothèse, enfin, qui est celle dont il s'agit dans le procès actuel, n'a, que je sache, pas davantage donné lieu au développement d'une doctrine quelque peu précise et mûrie sur les conditions dans lesquelles un tribunal international doit ou ne doit pas s'abstenir de connaître d'un différend porté devant lui, par le motif que le même différend est pendant devant un tribunal de l'un des Etats litigants.

Ici encore, les hypothèses peuvent être très différentes: il se peut qu'une seule et même réclamation ait été portée devant les deux juridictions, comme

c'est le cas des réclamations d'indemnités pour cause de dommages révolutionnaires introduites par des Français individuels; il se peut que les réclamations ne soient pas identiques, mais intimement liées, comme c'est le cas des réclamations de la même catégorie, introduites, dans l'une des deux commissions, par une société française et dans l'autre, par des associés individuels; il se peut que la réclamation internationale ne puisse utilement être jugée qu'après solution d'une question préliminaire ou incidente, pendante devant un tribunal national, soit criminel, soit civil ou commercial, comme dans le cas supposé par la Commission mixte mexicano-américaine de 1868 (*Reclamaciones internacionales de México y contra México sometidos a arbitraje*, 1899, t. II, p. 277) etc. Précisément comme conséquence de cette diversité considérable des hypothèses possibles, la question n'a trouvé, jusqu'ici et autant que je sache, que des réponses isolées et incidentes. Dans ces conditions, il s'explique aisément que l'Agence mexicaine, en insistant sur son exception, se soit limitée à invoquer certaines observations de caractère général empruntées aux règles des codes de procédure civile et aux rapports qui se présentent dans le droit interne de l'Etat, tout en négligeant la disparate qui sépare ces rapports d'avec ceux dans lesquels, soit un tribunal international et un tribunal national, soit deux tribunaux internationaux se trouvant en jeu, et pourquoi moi-même, je ne me hasarderai pas à développer ici, incidemment, une théorie sur la litispendance en droit international. Ce que je veux démontrer, dans ce contexte, c'est seulement que, en rejetant l'exception soulevée par l'Agence mexicaine dans les procès actuels, — par les motifs coïncidents, que décider en sens contraire comporterait une injustice pour les réclamants, notamment pour ceux qui voient contestée par l'Agence mexicaine leur nationalité française exclusive, serait en contradiction avec les droits de la France, tels qu'ils se trouvent définis dans la convention des réclamations, ne serait pas justifié après l'offre gracieuse de l'Agent français relatif au retrait éventuel des réclamations dans la Commission nationale après leur admission par la Commission franco-mexicaine, et se réduirait à presser cette dernière à remédier à une imperfection de la législation mexicaine, — non seulement je ne me mets pas en contraste avec un principe quelconque du droit international, mais encore je ne fais que me conformer à la jurisprudence récente de la Cour permanente de Justice internationale.

La jurisprudence que j'ai en vue, est celle formulée dans l'arrêt No 6 relatif à certains intérêts allemands en Haute-Silésie polonaise (compétence), — affaire dans laquelle ladite Cour se trouvait en présence d'un cas curieux de trois actions parallèles, introduites, une devant elle, une autre devant le tribunal arbitral mixte germano-polonais, et la troisième devant un tribunal de justice ordinaire polonais, de sorte que, dans cette affaire, coïncidaient les deux hypothèses de "litispendance internationale" visées ci-dessus et appartenant au droit international public. La requête introductive d'instance du Gouvernement allemand, déposée au Greffe le 15 mai 1925, concluait à ce qu'il plût à la Cour dire et juger, entre autres, que certaines dispositions légales polonaises constituaient des mesures prohibées de liquidation et que l'attitude du Gouvernement polonais vis-à-vis de certaine société allemande, propriétaire d'une usine d'azote à chaux, sise à Chorzów, n'était pas conforme à certaines dispositions de la convention germano-polonaise de Genève relative à la Haute-Silésie. A l'époque à laquelle cette requête fut introduite, le tribunal arbitral mixte germano-polonais se trouvait saisi, depuis le 10 novembre 1922, d'une requête de la même société, toujours pendante, tendant à condamner le Gouvernement polonais à restituer ladite usine, tandis que le tribunal civil de Kattowitz (Pologne) avait encore à statuer sur une requête, toujours de la même société, tendant également, entre autres, à la restitution à la deman-

deresse de certaines propriétés faisant partie de l'usine. Dans ces conditions, le Gouvernement polonais avait fait valoir l'exception de (pseudo-) litispendance, en concluant à l'irrecevabilité provisoire de la requête introductive devant la Cour permanente. Cependant celle-ci a, par son arrêt en date du 25 août 1925, rendu à l'unanimité des onze juges ordinaires (les deux juges nationaux *ad hoc* étant divisés), rejeté l'exception, par les motifs suivants (*Publications de la Cour permanente de Justice internationale, Série A, Recueil des arrêts*, No 6, page 20):

"... Il est évident que les éléments essentiels qui constituent la litispendance ne se rencontrent pas ici. Il ne s'agit pas de deux demandes identiques; la requête encore pendante devant le Tribunal arbitral mixte germano-polonais de Paris poursuit la restitution à une société privée de l'usine dont celle-ci prétend avoir été indûment dépouillée; ce qui d'autre part, est demandé à la Cour permanente de Justice internationale c'est l'interprétation de certaines clauses de la Convention de Genève. Les plaideurs ne sont pas les mêmes. Enfin, les tribunaux arbitraux mixtes et la Cour permanente de Justice internationale ne sont pas des juridictions du même ordre; et cela serait vrai, à plus forte raison, de la Cour et du Tribunal civil polonais de Kattowice."

Laissant de côté certaines observations et réserves que j'ai moi-même cru devoir formuler par rapport à l'argumentation de la Cour [1], je n'éprouve aucune hésitation à me conformer aux conclusions unanimes de la haute juridiction de La Haye, notamment en ce qui concerne l'hypothèse de deux actions simultanées pendantes, l'une, devant un tribunal international, l'autre, devant un tribunal national. Dans l'espèce, aucun principe de droit international ne s'oppose à ce que la Commission franco-mexicaine connaisse d'une réclamation portée devant elle en vertu d'une convention internationale qui ne limite en rien sa compétence à cet égard, mais qui est, par hasard, et par suite de certaines imperfections de la législation nationale, encore pendante devant un tribunal national mexicain, faisant fonction de tribunal de première instance. Il n'existe, pour ladite Commission, ni la moindre obligation de céder le pas, dans ces procès, à la Commission nationale et se déclarer elle-même incompétente, ni le droit ou l'obligation de poser aux réclamants des conditions de recevabilité de leur demande que la Convention ne connaît pas, ni le droit de déclarer désistés, *ipso facto*, de leur action dans la Commission nationale les réclamants qui se sont présentés devant elle-même. Pour éviter des malentendus, je crois, toutefois, devoir réserver expressément les cas particuliers, dans lesquels, par exemple, la Commission franco-mexicaine se trouverait en présence de questions préliminaires du droit civil, pendantes devant les tribunaux ordinaires mexicains, et dont la solution serait d'importance décisive pour la réclamation en indemnité devant la Commission franco-mexicaine (question préjudicielle de savoir si un bien immeuble appartient en propriété à une personne dont les droits de propriété sont contestés devant un tribunal civil mexicain, mais qui, entre-temps, a présenté à ladite Commission une réclamation en indemnité pour cause de destruction de ce même bien immeuble, etc.).

En me prononçant ainsi en sens général, sur l'admissibilité devant cette Commission de l'exception de litispendance ou de pseudo-litispendance, je tiens, du reste, à prendre acte de la promesse formelle de l'Agent français de vouloir garantir le retrait de toute réclamation pendante dans la Commission nationale, et dont la Commission franco-mexicaine aura définitivement prononcé la recevabilité dans l'instance internationale.

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[1] Dans la *Zeitschrift für Völkerrecht*, XIII, p. 509-511 (*Die Rechtsprechung des Ständigen internationalen Gerichtshofes 1922 bis Mai 1926, ib.* p. 489 et ss.).

2. *Défaut de preuve de la nationalité française de l'assassiné*

Attendu que l'Agence mexicaine a abandonné, au cours de la procédure écrite, sa résistance contre l'admission de la nationalité française du défunt à la suite des documents nouveaux produits par l'Agence française, il n'y a plus lieu d'appliquer ici les principes généraux formulés à ce sujet dans la sentence No 1, ni d'examiner la force probante de chacun des documents présentés à l'appui de cette nationalité. Toutefois, il convient de faire observer que, dans l'espèce, le certificat d'immatriculation consulaire a paru contenir une déclaration erronée, à savoir concernant la date de naissance et, par conséquent, l'âge du défunt (10 janvier 1853, au lieu de 17 avril 1870).

3. *Recouvrement de sa nationalité mexicaine d'origine par la veuve du défunt*

A cet égard aussi, l'Agence mexicaine n'a pas maintenu jusqu'à la fin son moyen de défense, tiré de l'article 2, *sub* IV, de la Ley de Extranjería, dont voici la teneur:

"Son extranjeros:

. . . . . .

IV. Las mexicanas que contrajeron matrimonio con extranjero, conservando su carácter de extranjeras aún durante su viudez. Disuelto el matrimonio, la mexicana de origen puede recuperar su nacionalidad, siempre que además de establecer su residencia en la República, manifieste ante el juez del estado civil de su domicilio su resolución de recobrar esa nacionalidad.

La mexicana que no adquiera por el matrimonio la nacionalidad de su marido, según las leyes del país de éste, conservará la suya.

. . . . . "

Il n'est pas contesté, dans l'espèce, que la réclamante a acquis, selon la loi française, la nationalité de son mari et que, selon l'article cité ci-dessus de la loi mexicaine, elle a perdu, par suite de son mariage, sa nationalité mexicaine d'origine. Par conséquent, la question de nationalité doit être décidée sur la base de l'alinéa premier du paragraphe IV, cité ci-dessus. Je n'insiste plus ici sur le fait que, envisagée à la lumière des observations de caractère fondamental faites par l'Agence mexicaine dans l'affaire Pinson sur l'inconstitutionnalité de différentes dispositions de la Ley de Extranjería, la disposition ci-dessus eût dû être également accusée d'inconstitutionnalité par ladite Agence, étant donné que la Constitution de 1857 ne dit mot, ni sur la perte de la nationalité mexicaine par la femme mexicaine qui épouse un étranger, ni sur le recouvrement de cette nationalité par la veuve après la mort de son mari. Ayant déjà fait justice de ces observations aux paragraphes 26, 29 et 33 de la sentence No 1, je n'y reviendrai plus.

En somme, la défense mexicaine basée sur l'article 2, *sub* IV, de la loi "de extranjería" consiste à dire que la réclamante n'ayant jamais quitté son pays d'origine après son mariage, et la première condition du paragraphe IV de ladite disposition légale étant, par conséquent, plus que remplie, une présomption, sinon légale, au moins logique, milite en faveur de la thèse que la réclamante aura aussi rempli la seconde condition, à savoir de manifester pardevant l'officier de l'état civil sa résolution de recouvrer la nationalité mexicaine. En effet, la réclamante a officiellement déclaré n'avoir pas rempli cette seconde condition et n'avoir pas recouvré sa nationalité d'origine; l'Agence mexicaine, de sa part, a négligé d'invoquer aucun autre indice, à côté de sa présomption logique, contraire à l'idée fondamentale de la loi sur l'"extran-

jería". Dans ces conditions, il ne me reste qu'à conclure que la veuve a, en effet, conservé sa nationalité française acquise, d'autant plus que l'Agent mexicain eût été beaucoup mieux à même de prouver péremptoirement l'existence d'une déclaration devant le juge de l'état civil à l'effet de reprendre la nationalité mexicaine, que la réclamante n'est à même d'en prouver péremptoirement la non-existence.

B. — Défense quant au fond

1) *Qualification des auteurs de l'assassinat comme bandits ou brigands*

Si ce chef de défense veut dire que celui qui se comporte en bandit ou scélérat ne peut, par cela même, être considéré comme faisant partie de "forces" gouvernementales ou révolutionnaires, il est évidemment sans fondement, puisque le groupement des auteurs des dommages d'après l'article III de la Convention des réclamations ne se base point sur le caractère plus ou moins criminel desdits auteurs ou de leurs actes, mais uniquement sur le fait d'appartenir, ou non, à certaines forces militaires, limitativement énumérées audit article. Le fait que les auteurs de l'exécution de M. J.-B. Caire ont pu être deux individus ayant les pires antécédents n'est donc pas de nature à les faire rentrer dans la catégorie des "brigands" visés à l'alinéa 5) de l'article III, s'il est certain qu'ils ont tout de même appartenu à l'une des forces militaires énumérées aux alinéas 1-4 dudit article. En outre, c'est un fait inconsté et avéré par l'histoire des guerres, qu'il n'y a guère de conflit armé qui ne donne lieu à des excès criminels de la part de militaires organisés. Dans ces cas, les actes ne cessent pas d'être commis par des forces armées, la seule question étant de savoir jusqu'à quel point incombe à l'Etat dont ces forces relèvent la responsabilité internationale de pareils actes.

2) *Incorporation des auteurs du crime à l'une des "forces" énumérées aux alinéas* 1-4 *de l'article III de la Convention*

Il faut donc constater avant tout si les auteurs de la mort de M. J.-B. Caire ont réellement fait partie, ou non, de l'une des forces armées dont il s'agit aux alinéas 1-4 de l'article III. A la lueur des documents versés au dossier, j'admets comme prouvé, avec la Commission nationale des réclamations, dont les conclusions ne sont plus contestées, d'ailleurs, par l'Agence mexicaine, que l'exécution de M. Caire a été le fait de deux officiers de l'armée villiste, à savoir d'un "mayor" et d'un "capitán primero" dépendant de la brigade du général Tomás Urbina de la Division du Nord, qui, à l'époque du meurtre (décembre 1914), occupaient la ville de Mexico. Etant donné que la division du Nord, à ce moment-là, ne se distinguait en rien, quant à son rôle dans le mouvement révolutionnaire de 1913 et des années suivantes, de l' "Ejército Libertador" de Emiliano Zapata dont il a été question dans la sentence No 1 relative à la réclamation Pinson, l'assassinat de M. Caire doit également et par les mêmes motifs être attribué à des forces révolutionnaires opposées à celles qui, à la suite de leur triomphe, ont établi un Gouvernement *de jure*, aux termes de l'article III, *sub* 2) de la Convention des réclamations.

Dans ces conditions, je n'ai pas lieu d'entrer dans un examen de la question *sub* 3) de savoir, s'il y a eu, dans l'espèce, *une omission ou faute quelconque des autorités compétentes*.

4) *Responsabilité du Mexique pour des faits de militaires isolés, agissant sans mandat ou contre la volonté de leurs supérieurs et sans rapports avec les nécessités et les fins révolutionnaires*

Ainsi que j'ai déjà eu l'occasion de le constater en termes généraux au § 12 de la sentence No 1 (G. Pinson), les questions de responsabilité internationale visées ci-dessus doivent être résolues, sous le coup de la convention, à la lueur des règles et principes généraux du droit international positif, conventionnel ou coutumier. S'il était constant que les règles applicables à la guerre internationale sur terre s'appliquent également aux guerres civiles, la solution des controverses serait assez simple, l'article 3 de la Convention No IV de la Deuxième Conférence internationale de la paix, en date du 18 octobre 1907, concernant les lois et coutumes de la guerre sur terre, déclarant en toutes lettres que "(La Partie belligérante qui violerait les dispositions du Règlement annexé à la Convention) sera responsable de tous actes commis par les personnes faisant partie de sa force armée." Si, au contraire, le principe énoncé dans ce dernier article est de caractère exceptionnel et ne s'applique qu'au guerres internationales sur terre, il n'existe aucune disposition de traité qui régisse le cas des guerres civiles, et les controverses indiquées ci-dessus ne peuvent être tranchées que sur la seule base du droit commun coutumier.

Or, bien que les motifs qui, en 1907, ont porté le Gouvernement allemand à proposer et les autres Gouvernements à accepter le principe de responsabilité mentionné ci-dessus, soient également propres à justifier *de lege ferenda* l'acceptation du même principe pour l'hypothèse des guerres civiles, je crois tout de même devoir admettre que les Etats, en s'accordant sur le principe pour la guerre internationale, l'ont considéré encore comme un principe nouveau, d'application restreinte, et qu'ils n'ont point voulu en reconnaître l'applicabilité générale dans tous les cas où la responsabilité internationale pour les actes d'une force armée serait en jeu [1].

Si donc les actes commis par des militaires pendant une guerre civile ne peuvent encore être censés tomber sous le coup du principe énoncé en 1907 pour la guerre internationale, la solution des questions litigieuses ne saurait être entreprise qu'à la lueur des principes généraux qui régissent les conditions de la responsabilité internationale des Etats pour les actes de leurs fonctionnaires publics en général. Cette constatation s'entend, toutefois, sous réserve des trois observations suivantes:

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[1] Voir dans le même sens: rapport de M. L. Strisower à l'Institut de droit international, en date du 8 février 1926, dans *Annuaire de l'Institut*, 1927, t. I, p. 455 et ss., notamment p. 462-463, où l'auteur réserve la question de la responsabilité de l'Etat à raison des actes contraires au droit de guerre, commis par des militaires dans une guerre internationale, en faisant observer que l'article 3 de 1907 lui "semble constituer une exception en ce qu'elle rend l'Etat *absolument* responsable des actes des personnes appartenant à sa force armée, donc même si elles ne se prévalent pas de leur caractère de militaires ou si l'acte n'a aucun rapport avec les tâches qui peuvent incomber à un militaire." Voir aussi p. 44: "Deshalb gilt diese Vorschrift auch nur im Kriege, während in Friedenszeiten, auch etwa bei Aufständen, für Militärpersonen die normale Regelung Platz greift."

L'ancien Président de la Cour permanente de Justice internationale, Dr Max Huber, rapporteur sur différentes réclamations britanniques dans la zone espagnole du Maroc, en vertu de l'accord anglo-espagnol du 29 mai 1913, semble aller plus loin, lorsqu'il dit (à la page 58 de son Rapport, La Haye, mai 1925): "Sans doute cette convention n'est directement applicable à aucune des situations, dont le rapport doit s'occuper, mais le principe qu'elle établit mérite d'être retenu également en ce qui concerne l'éventualité d'une action militaire en dehors de la guerre proprement dite."

a) Les caractères spéciaux qui distinguent les militaires des fonctionnaires civils ne peuvent pas ne pas influer sur les conditions et l'étendue de la responsabilité que leurs actes engagent. En effet, comme le fait observer le Dr Max Huber dans son rapport cité dans la note à la page 219 (*loc. cit.* p. 58): "Il faut .... reconnaître que l'Etat doit être considéré comme tenu à exercer une vigilance d'un ordre supérieur en vue de prévenir les délits commis, en violation de la discipline et de la loi militaires, par des personnes appartenant à l'armée. L'exigence de cette vigilance qualifiée n'est que le complément des pouvoirs du commandement et de la discipline de la hiérarchie militaire." [1]

b) La Convention franco-mexicaine des réclamations statuant une responsabilité des Etats-Unis mexicains même à raison de dommages causés par des actes qui, par leur nature, n'y donneraient pas lieu selon le droit strict (p. ex.: mesures légitimes de défense militaire du Gouvernement constitutionnel), les mêmes principes généraux de droit international doivent nécessairement s'appliquer aux questions de détail que cette responsabilité *ex gratia* fait naître.

c) Le Mexique ayant également assumé la responsabilité à raison de dommages causés par des forces militaires qui, selon le droit strict, ne l'engageraient pas (p. ex.: par des révolutionnaires qui ont eu le dessous), lesdits principes généraux ne peuvent non plus être laissés hors d'application, lorsqu'il s'agit, non de forces gouvernementales, mais de toutes les troupes révolutionnaires dont les actes donnent lieu à indemnité, comme si elles étaient des forces militaires à la solde du Gouvernement légitime.

En abordant l'examen des questions visées *sub* 4 à la lueur des principes généraux que je viens d'indiquer, je déclare tout d'abord interpréter lesdits principes dans le sens de la doctrine qui professe, en cette matière, la "responsabilité objective" de l'Etat, c'est-à-dire une responsabilité pour les actes commis par ses fonctionnaires ou organes, qui peut lui incomber malgré l'absence de toute "faute" de sa part. Il est notoire que, dans ce domaine, les conceptions théoriques ont beaucoup évolué dans les derniers temps et que notamment l'œuvre novatrice de Dionisio Anzilotti a frayé le chemin aux idées nouvelles qui ne subordonnent plus à une "faute" quelconque de l'Etat sa responsabilité pour les actes de ses fonctionnaires [2]. Sans entrer ici dans un examen du point de savoir si ces idées nouvelles, peut-être trop absolues, n'ont pas besoin de certaines corrections, par exemple dans le sens indiqué par le Dr Karl Strupp [3], je les considère en tout cas comme parfaitement correctes, en tant qu'elles tendent à grever l'Etat, en matière internationale, de la responsabilité pour tous les actes commis par ses fonctionnaires ou organes et qui constituent des actes délictueux au point de vue du droit des gens,

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[1] Voir aussi la Commission générale des réclamations américano-mexicaine de 1923, statuant à l'unanimité dans l'affaire *Thomas H. Youmans* (*Opinions of Commissioners, February 4, 1926, to July 23, 1927*, p. 157 et ss, notamment p. 159): "Soldiers inflicting personal injuries or committing wanton destruction or looting always act in disobedience of some rules laid down by superior authority. There could be no liability whatever for such misdeeds if the view were taken that any acts committed by soldiers in contravention of instructions must always be considered as personal acts."

[2] D'abord dans sa monographie de 1902: *Teoria generale della responsabilità dello Stato nel diritto internazionale*, p. 153 et ss., plus tard la *Revue générale de droit international public*, XIII p. 290 et ss. Dans le même sens: Diena, Ansaldi, Schön, et autres.

[3] Dans son ouvrage *Das völkerrechtliche Delikt*, p. 48 et ss. Strupp fait une exception expresse pour les "Unterlassungsdelikte", c'est-à-dire pour les actes délictueux d'un Etat qui consistent, non dans un acte positif quelconque de ses organes ou fonctionnaires, mais dans une omission de leur part.

n'importe que le fonctionnaire ou l'organe en question ait agi dans les limites de sa compétence ou en les excédant. "On est unanimement d'accord", dit à juste titre M. Bourquin [1], "pour admettre que les actes commis par les fonctionnaires et agents de l'Etat engagent la responsabilité internationale de ce dernier, même si leur auteur n'avait point compétence pour les accomplir. Cette responsabilité ne trouve point sa justification dans les principes généraux, j'entends ceux qui régissent l'organisation juridique de l'Etat. En effet, l'acte d'un fonctionnaire n'est juridiquement érigé en acte d'Etat que s'il est compris dans la sphère de compétence de ce fonctionnaire. L'acte d'un fonctionnaire incompétent n'est pas un acte étatique. Il ne devrait donc pas, en principe, affecter la responsabilité de l'Etat. Si l'on admet, en droit international, qu'il en est autrement, c'est pour une raison propre au mécanisme de la vie internationale; c'est parce qu'on estime que les rapports internationaux deviendraient trop difficiles, trop compliqués et trop peu sûrs, si l'on obligeait les Etats étrangers à tenir compte des dispositions juridiques, souvent complexes, qui fixent les compétences à l'intérieur de l'Etat. Dès lors, il est manifeste que dans l'hypothèse considérée la responsabilité internationale de l'Etat a un caractère purement *objectif* et qu'elle repose sur une idée de *garantie*, où la notion subjective de faute ne joue aucun rôle".

Mais pour pouvoir admettre cette responsabilité, dite objective, de l'Etat pour les actes commis par ses fonctionnaires ou organes en dehors des limites de leur compétence, il faut qu'ils aient agi au moins apparemment comme des fonctionnaires ou organes compétents, ou que, en agissant, ils aient usé de pouvoirs ou de moyens propres à leur qualité officielle. Aussi, l'Institut de droit international n'a-t-il admis, dans sa session de Lausanne en août-septembre 1927, le principe de la responsabilité de l'Etat pour les actes de ses organes ou fonctionnaires incompétents que dans la forme suivante, qui, à mon avis, correspond à la conviction juridique de la communauté internationale actuelle:

(Article premier de la Résolution relative à la responsabilité internationale des Etats à raison des dommages causés sur leur territoire à la personne et aux biens des étrangers).

"L'Etat est responsable des dommages qu'il cause aux étrangers par toute action ou omission contraire à ses obligations internationales, quelle que soit l'autorité de l'Etat dont elle procède: constituante, législative, gouvernementale ou judiciaire.

Cette responsabilité de l'Etat existe, soit que ses organes aient agi conformément, soit qu'ils aient agi contrairement à la loi ou à l'ordre d'une autorité supérieure.

Elle existe également lorsque ces organes agissent en dehors de leur compétence, en se couvrant de leur qualité d'organes de l'Etat, et en se servant des moyens mis, à ce titre, à leur disposition.

. . . . . .

C'est pourquoi le principe contraire, formulé par le sous-comité du Comité d'experts pour la codification progressive du Droit international, composé de

[1] Voir ses observations sur le rapport de M. L. Strisower à l'Institut de droit international, insérées dans l'*Annuaire* dudit Institut de 1927, tome I, p. 501 et ss., notamment p. 507-508. Dans le même sens Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, p. 167: "Due cose si possono ritenere per certe: la prima, che un atto di questo genere non è in alcun modo un atto dello Stato, ma un puro atto individuale; l'altra, che il diritto internazionale positivo afferma in modo non dubbio la responsabilità dello Stato per i fatti illeciti dei funzionari, anche quando sono stati compiuti illegalmente e fuori della respettiva competenza."

MM. Guerrero et Wang Chung-Hui (Document de la Société des Nations C. 46.M.23 1926. V.), dans sa conclusion *sub* 4 ne saurait, à mon avis, servir de base à la codification prochaine de cette importante matière de droit international, cette codification devant s'inspirer plutôt du principe que le fait par un fonctionnaire d'agir en dehors de sa compétence n'exempte pas l'Etat de sa responsabilité internationale, toutes les fois que ce fonctionnaire s'est autorisé de sa qualité officielle, l'Etat n'étant pas responsable dans le seul cas où l'acte n'a eu aucun rapport avec la fonction officielle et n'a été, en réalité, qu'un acte d'un particulier.

Si j'applique les principes énoncés ci-dessus au cas présent, et en tenant compte du fait que les auteurs de l'assassinat de M. J.-B. Caire ont été des militaires revêtus des rangs de "mayor" et de "capitán primero", et assistés par quelques soldats, je constate que les conditions de responsabilité formulées ci-dessus se trouvent pleinement remplies dans l'espèce. Les officiers en question, quels qu'aient pu être leurs antécédents, se sont constamment présentés en qualité d'officiers de la brigade du général villiste Tomás Urbina; en cette qualité, ils ont commencé par exiger la remise de certaines quantités d'argent et continué par faire emmener la victime à une caserne des troupes d'occupation, et c'est évidemment pour cause du refus de M. Caire de satisfaire à la réquisition répétée, qu'ils ont fini par le fusiller. Dans ces conditions, il ne reste aucun doute que les deux officiers, même s'ils doivent être censés avoir agi en dehors de leur compétence, ce qui n'est nullement certain, et même si leurs supérieurs ont lancé un contre-ordre, ont engagé la responsabilité de l'Etat, comme s'étant couverts de leur qualité d'officiers et servis des moyens mis, à ce titre, à leur disposition.

Par ces motifs, je n'éprouve aucune hésitation à dire que, d'après la doctrine la plus autorisée et appuyée par nombre de sentences arbitrales, les événements du 11 décembre 1914, qui ont entraîné la mort de M. J.-B. Caire, rentrent dans la catégorie des actes dont la responsabilité internationale incombe à l'Etat auquel les auteurs du dommage ressortissent. Il ne pourrait en être autrement, dans l'espèce, que si la défense mexicaine était correcte, selon laquelle le Mexique, en signant la convention des réclamations, aurait eu l'intention de limiter sa responsabilité aux cas dans lesquels les actes incriminés de ses forces armées auraient servi aux fins révolutionnaires. Cette dernière assertion n'a rien à faire avec la doctrine exposée ci-dessus et relative aux limites de la responsabilité de l'Etat pour les actes commis par ses fonctionnaires ou organes en dehors de leur compétence, étant donné que la même défense s'appliquerait aux cas dans lesquels la compétence des auteurs du dommage serait exempte de tout doute. Il y a lieu, par conséquent, d'examiner cette question isolément et sans rapport avec l'hypothèse de prétendu défaut de compétence, ou de conduite parfaitement arbitraire, des auteurs de l'acte dommageable.

Or, cette dernière question de principe ne saurait, elle non plus, être résolue dans un sens qui donne satisfaction au point de vue de l'Agence mexicaine, et ce pour plusieurs raisons différentes. Le texte de l'article III de la convention des réclamations ne dit mot sur pareille limitation des dommages révolutionnaires à réparer; bien au contraire, l'article III n'exige que la preuve double que le dommage allégué a été subi et qu'il est dû à certaines causes limitativement énumérées, sans qu'il fasse soupçonner le moins du monde que le dommage doive avoir été causé au profit de la révolution respective. La genèse de la convention ne le fait pas soupçonner non plus; au contraire, tous les éléments d'information fournis par les négociations diplomatiques portent à croire que la limitation invoquée maintenant par l'Agence mexicaine n'est jamais entrée dans l'esprit du Gouvernement du Mexique lors de la rédaction des promesses d'indemnisation et des conventions internationales. Envisagée à la

lumière du droit commun, la question ne permet pas une réponse différente: la responsabilité internationale des Etats n'a jamais été subordonnée aux fins qui peuvent avoir motivé les actes dommageables; bien au contraire, s'il y a lieu de restreindre les cas de responsabilité, il serait plutôt dans le sens d'exclure cette responsabilité toutes les fois où les actes ont été impérieusement requis par la situation de nécessité que l'Etat traversait, et aucunement dans les cas où les fins étatiques ou révolutionnaires ne les nécessitaient point du tout. Et enfin, l'admission de la thèse soutenue par l'Agence mexicaine, comporterait des conséquences inacceptables; en effet, elle exclurait toute responsabilité des Etats dans des hypothèses où tout le monde crierait expiation par un simple sentiment de justice et d'équité naturelles, par exemple dans le cas hypothétique où le commandant en chef des forces armées d'un Gouvernement légitime ou le généralissime des forces révolutionnaires victorieuses aurait commandé le bombardement de villes non défendues, déclaré qu'il ne serait pas fait de quartier, ou attenté à des hôpitaux, etc. Par tous ces motifs, l'affirmation à l'effet de déclarer les Etats-Unis Mexicains irresponsables des dommages, quelque arbitraires qu'ils soient, qui n'auraient pas été nécessaires aux fins révolutionnaires, me paraît absolument dénuée de fondement juridique et, en outre, directement contraire à l'esprit d'équité qui doit présider aux travaux de la Commission.

5) *Montant de l'indemnité*

Si donc, pour les raisons indiquées ci-dessus, la responsabilité du Mexique doit être admise sur la base de la Convention des réclamations, il ne reste qu'à fixer le montant de l'indemnité à allouer.

Ainsi que je l'ai fait observer plus haut, la présente réclamation tend à faire reviser par la Commission franco-mexicaine un "dictamen" de la Commission nationale des réclamations en date du 2 février 1923, lequel, bien que n'ayant pu accorder pour d'autres raisons l'indemnité réclamée, contient cependant quelques indications précieuses au sujet du montant éventuel de cette dernière. D'après ledit "dictamen", la somme alors réclamée de 100.000 pesos était trop élevée, puisque le calcul basé, puisque le calcul basé, d'une part, sur la moyenne des revenus mensuels du défunt, et d'autre part, sur son âge et la durée probable de sa vie, ne donnait qu'un montant de 78.600 pesos, "que sería lo que en todo caso procedía consultar", si les auteurs de l'assassinat eussent pu être reconnus comme des révolutionnaires dans le sens de la législation nationale des réclamations. C'est pourquoi l'Agent français, en présentant sa réclamation à la Commission franco-mexicaine, s'est borné à réclamer la somme de 75.000 pesos, un peu inférieure à celle calculée par la Commission nationale.

De ce qui précède, il résulte que, à proprement parler, il n'existe pas de décision expresse de la Commission nationale relative au montant de l'indemnité, mais qu'elle a bien fait connaître son opinion à cet égard. Cette opinion se base sur les dispositions de la législation nationale en matière de réclamations, d'une part, et sur certains éléments de fait indiqués dans son "dictamen", d'autre part. En me référant aux observations de caractère général insérées dans la sentence No 1 dans l'affaire Pinson, notamment aux paragraphes 7-9 de ladite sentence, je crois tout d'abord devoir formuler la conclusion suivante relativement à la situation juridique dans l'affaire actuelle. Quand bien même la Commission nationale aurait statué dans le dispositif de son "dictamen" sur le montant de l'indemnité due, la Commission franco-mexicaine ne serait pas liée par pareille décision, ni en ce sens qu'elle serait obligée d'accepter la somme calculée par la première comme un minimum

inattaquable qu'elle ne pourrait éventuellement qu'augmenter, ni en ce sens qu'elle serait obligée de mettre à la base de sa décision exactement les mêmes méthodes détaillées d'évaluation que la Commission nationale paraît avoir appliquées assez constamment aux réclamations pour cause d'assassinat, sur la base de la législation nationale. D'autre part, la Commission franco-mexicaine se trouve, elle aussi, en présence de cette même législation nationale, dans laquelle le Mexique lui-même a indiqué les directives qu'il juge applicables aux cas de dommages pour lésions personnelles, et elle ne peut pas ne pas tenir compte du fait que ces directives semblent être plus favorables aux réclamants que celles que l'Agence mexicaine lui a recommandées comme étant les seules équitables.

Il va sans dire que le Gouvernement mexicain peut difficilement, par l'organe de son Agence, qualifier de déraisonnable ou d'inéquitable une méthode d'évaluation que le Mexique lui même a déposée dans sa législation nationale. Or, aux termes de l'article 6 de la loi sur les réclamations du 30 août 1919:

"... La estimación de los daños y perjuicios causados por muerte se hará por la Comisión conforme a las leyes y disposiciones del Código penal del Distrito Federal, teniendo en consideración la edad, estado civil, género de ocupación, estado de salud y bienes de fortuna de la víctima."

Evidemment, cette référence au Code pénal vise les articles 318 et suivants, figurant au chapitre II du livre second dudit Code, relatif à la "computación de la responsabilidad civil". A mon avis, une pareille méthode d'évaluation, basée sur l'idée d'une pension alimentaire à capitaliser, et nuancée suivant les éléments d'appréciation supplémentaires indiqués par l'article 6 de la loi nationale ci-dessus cité, est tout à fait équitable. J'estime donc que la Commission, sans formuler des règles fixes et rigides, devra tenir compte dans chaque cas particulier, de l'âge et de l'état de santé de l'assassiné, de la composition de sa famille, notamment du nombre et de l'âge de ses enfants, de ses revenus et du genre de travail dont il s'occupait, de sa situation économique, etc., afin de fixer sur la base de ces différents facteurs d'appréciation des indemnités aussi équitables que possible, et qui soient, entre elles, autant que possible en équilibre.

Prenant en considération que, dans l'espèce, l'assassiné a laissé une femme et trois enfants en bas-âge, qu'il exploitait une pension, laquelle sa veuve, bien qu'avec de grandes difficultés, a pu continuer à exploiter, qu'il est mort à l'âge de 44 ans et que sa veuve a dû dépenser une somme importante pour pouvoir dévoiler le mystère de sa disparition, j'estime qu'une somme de 20.000 pesos serait une indemnité équitable.

En fixant cette somme, je n'ai pu attribuer aucune force convaincante à l'argument invoqué par l'Agence mexicaine et consistant à dire que l'assassiné aurait manqué de précaution en recevant dans sa pension les officiers criminels. A mon avis, les refuser aurait pu entraîner les mêmes risques.

Opinion personnelle du Commissaire français

Tout en me réservant de formuler une opinion détaillée sur la question de litispendance au cas où, dans d'autres affaires, elle viendrait à discussion, j'estime cependant que ladite exception de litispendance ne saurait être examinée avant que ne soit résolue préalablement la recevabilité d'une demande.

En ce qui concerne les autres questions posées dans la présente réclamation J.-B. Caire, je déclare m'associer à l'opinion exprimée par le Commissaire Président notamment en ce qui concerne la nationalité d'une femme, Mexicaine de naissance, mariée avec un Français et veuve de celui-ci; la qualification des auteurs des dommages, en l'espèce des villistes; la responsabilité d'un

Gouvernement, pour actes de militaires isolés, le mode de calcul de l'indemnité à allouer en cas d'assassinat.

Je tiens à ajouter que j'ai été surpris de voir le Commissaire mexicain, dans son opinion personnelle sur l'affaire No 1 (Pinson) s'efforcer de rendre difficile la solution ultérieure des autres réclamations en tirant argument de la modération de mon opinion sur ladite affaire No 1. En raison de l'attitude de mon H. Collègue mexicain, je me vois donc dans l'obligation de préciser mon opinion ainsi que les raisons ayant motivé mon vote dans ladite affaire Pinson.

En ce qui concerne les liens existant entre la Convention franco-mexicaine et la Commission nationale, je n'avais pas estimé nécessaire de les préciser, mais devant le doute émis par mon H. collègue mexicain, je n'ai pas de difficulté à déclarer que, ainsi qu'il ressort de la présente sentence J.-B. Caire, les affaires ayant déjà été jugées par la Commission nationale viennent devant la Commission franco-mexicaine en instance de revision.

Au sujet de la compétence de la Commission, de l'administration de la preuve et de la classification des dommages, j'avais estimé que les articles II et III de la Convention étaient suffisamment clairs, mais afin qu'aucun doute ne subsiste dans l'esprit de mon H. collègue mexicain je déclare être conforme avec l'interprétation de ces articles donnée par le Commissaire Président.

En ce qui concerne la question des intérêts sur les indemnités allouées, je ne crois pas nécessaire d'expliquer davantage mon opinion à ce sujet, car elle me semble au plus haut degré équitable, puisqu'elle tente de concilier les droits et les désirs des réclamants français avec les possibilités et les intérêts du Mexique.

POUR CES MOTIFS:

LA COMMISSION, statuant à la majorité,

Vu sa décision No 22 en date du 3 juin 1929, relative au jugement des affaires plaidées pendant la troisième session;

DÉCIDE:

par réformation du dictamen de la Commission Nationale des réclamations en date du 2 février 1923:

. — que l'assassinat de M. Jean-Baptiste Caire est le fait de forces visées à l'article III, alinéa 2, seconde partie, de la Convention;

II. — que l'indemnité à accorder à la succession de M. J.-B. Caire doit être fixée à la somme de vingt mille piastres or national, sans intérêts.

La présente sentence devant être rédigée en français et en espagnol, c'est le texte français qui fera foi.

ESTATE OF HYACINTHE PELLAT (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 34 of June 7, 1929, by Presiding Commissioner and French Commissioner only.)

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—BURDEN OF PROOF. Before international tribunals the burden of proof is not to be strictly divided between the parties. (Reference made to decision No 1 in *Pinson* Case.)

INTERNATIONAL RESPONSIBILITY OF FEDERAL STATE FOR ACTS OF MEMBER STATES. A Federal State is considered responsible for acts of Member States causing damage to citizens of other States, even when the constitution denies to the Central Government the right to control the Member States or the right to demand that they conform their conduct to the prescriptions of international law.

JUDICIAL DETERMINATION OF ACKNOWLEDGED RESPONSIBILITY. Where a Member State has ackowledged the Federal State's responsibility but no reparation has been made, the claimant is not debarred from requesting the Commission to determine the Federal State's responsibility.

FORCED LOANS BY CIVIL AUTHORITIES. Forced loans by civil authorities after joining a revolutionary movement and in the interest of a military organization *held* not to be requisition by a civil authority but by revol utionary forces.

Cross-reference: Annual Digest, 1929-1930, p. 145, *passim.*

Par deux mémorandums enregistrés par le Secrétariat sous les numéros 155 et 156, et suivis d'un mémoire déposé le 15 juin 1926, l'Agent du Gouvernement français a présenté à la Commission franco-mexicaine une réclamation contre les Etats-Unis mexicains, pour cause de pertes et dommages subis par M. Hyacinthe PELLAT en 1913, 1915 et 1916 à Arizpe (Sonora).

M. PELLAT lui-même étant décédé le 20 mars 1921, le mémoire a été valablement signé par sa veuve, Madame María Garcia de Pellat, déclarée "albacea" de la succession de son mari d'après un acte en date du 6 octobre 1921, passé devant le Juge de première instance d'Arizpe.

La nationalité française du défunt n'a pas été contestée par l'Agence mexicaine.

D'après l'exposé de l'Agent français, la réclamation se base sur quatre groupes de faits, consistant respectivement en:

1. prêts forcés, effectués au mois de mars 1913 par le Gouvernement de l'Etat de Sonora, pour solde des volontaires d'Arizpe, et se montant aux sommes de $300,—, de $69,25 et de $75,—;

2. réquisitions de vivres, vêtements et autres objets faites en avril 1915 par le chef d'escadron Angel Camargo de l'Armée constitutionnaliste, et évaluées à la somme de $1.372,50;

3. le sac de l'établissement commercial (magasin de nouveautés et d'épiceries) et de la maison d'habitation du défunt, lors de l'entrée à Arizpe des forces villistes, au nombre de cinq à six mille hommes, sous le commandement du général Mora, du 25 au 27 novembre 1915, et ayant entraîné, suivant les chiffres des inventaires, une perte de $44.889,93;

4. réquisitions exigées aux mois de juin et de juillet 1916 pour les forces constitutionnalistes, qui partaient en campagne contre les forces de l' "expédition de punition" américaine, et se montant à la somme totale de $269,30.

Les dommages et pertes, énumérés ci-dessus, et se montant à la somme totale de $46.975,98, ont été portés par la Légation de France à la connaissance du Secrétariat des relations extérieures le 13 mars 1920, date à partir de laquelle l'Agent français réclame des intérêts à 6 % par an.

Etant donné le caractère divergent des différents chefs de la réclamation, il y a lieu de les traiter ci-après séparément.

I. — *Prêts forcés*

Dans les pièces fondamentales de procédure et au cours des discussions orales, la responsabilité des Etats-Unis mexicains pour les prêts forcés visés

ci-dessus a été niée, ou la recevabiblité de cette partie de la réclamation a été contestée par l'Agence mexicaine pour les quatre raisons suivantes:

a) les documents produits à l'appui de la réclamation ne prouvent ni le paiement des prêts forcés, ni l'affirmation française que la dette, si elle a existé, n'a pas été acquittée;

b) s'il en était autrement, il ne saurait plus être question d'une réclamation devant la Commission franco-mexicaine, la dette ayant été reconnue par le Gouvernement de l'Etat de Sonora;

c) les prêts forcés ont été exigés, non par des forces révolutionnaires, mais par un Gouvernement civil; les conditions requises aux termes de l'alinéa dernier de l'Article III de la Convention ne se trouvant pas remplies dans l'espèce;

d) en tous cas, tout rapport direct entre les prêts en question et les fins révolutionnaires fait défaut.

Quant à ces différents chefs de défense, la Commission fait remarquer ce qui suit.

Ad a). A son avis, les lettres de la Trésorerie générale et du Secrétaire général intérimaire du Gouvernement de l'Etat de Sonora, annexées *sub* III au mémoire français, font preuve complète des prêts forcés. Bien qu'il ne soit pas loisible d'admettre dans les procès internationaux une stricte division du fardeau de la preuve, à l'instar de celle généralement admise en matière de procédure civile (comp. § 44 de la sentence No 1 dans l'affaire G. Pinson), l'autre argument, tiré du prétendu défaut de preuve du non-acquittement de la dette, ne saurait non plus être retenu. Si le Gouvernement demandeur et la réclamante étaient mieux à même de prouver le défaut de paiement de la dette, que le Gouvernement défendeur d'en prouver l'acquittement, il pourrait y avoir lieu de leur imposer cette preuve. Mais évidemment pareille hypothèse est injustifiée dans l'espèce; aussi, le Gouvernement défendeur n'ayant produit aucun document de nature à appuyer sa supposition de remboursement, ne reste-t-il qu'à admettre l'existence de la créance.

Ad b). Il n'est pas parfaitement clair quelle est la portée de ce deuxième chef de la défense. Veut-il dire que l'Etat de Sonora, membre de l'Etat fédéral mexicain, ayant reconnu sa responsabilité, il ne saurait plus être question de responsabilité de la Fédération tout entière? On veut-il dire que l'Etat demandeur n'est plus en droit de faire fixer la responsabilité de l'Etat défendeur par un tribunal international, toutes les fois que les organes de ce dernier Etat, ou les collectivités plus ou moins autonomes qui exercent sur son territoire des fonctions publiques, ont déjà reconnu cette responsabilité?

Dans le premier cas, l'argument méconnaîtrait le principe de la responsabilité internationale, souvent dite indirecte, d'un Etat fédéral pour tous les actes des Etats particuliers qui donnent lieu à des réclamations d'Etats étrangers. Cette responsabilité indirecte ne saurait être niée, pas même dans les cas où la Constitution fédérale dénierait au Gouvernement central le droit de contrôle sur les Etats particuliers, ou le droit d'exiger d'eux qu'ils conforment leur conduite aux prescriptions du droit international.

Dans le second cas, l'argument paraît également manquer de fondement. La tâche qui incombe à la Commission franco-mexicaine consiste à juger du bien-fondé d'une série de réclamations nettement définies, à la lumière d'une disposition conventionnelle détaillée. Il n'existe pour elle aucune raison d'écarter de son examen des réclamations rentrant dans cette série, mais dont le bien-fondé a été, déjà antérieurement, reconnu, d'une façon implicite, ou plus ou moins expresse, par les organes ou les collectivités dépendant de l'Etat défendeur, à moins qu'elle ne puise dans les preuves produites la conviction que la dette en question a été acquittée et que, par conséquent, tout droit de réclamer est éteint. Dans le cas actuel, la prétendue reconnaissance de la dette par

l'Etat de Sonora, survenue il y a maintenant plus de seize ans, paraît n'avoir jamais été suivie d'acquittement. Dans ces conditions, le fait que certaine dette a été reconnue antérieurement par les organes de l'Etat défendeur, n'est pas de nature à soustraire la réclamation y relative à la connaissance de la Commission et, par conséquent, à la force de la chose jugée qui revient à ses sentences.

Ad c). Le principal chef de défense consiste à dire qu'il s'agit, dans l'espèce, d'un prêt exigé par un Gouvernement civil et que, par conséquent, le dommage rentrerait, non pas dans une des catégories de dommages énumérées dans l'alinéa premier, mais plutôt dans celle définie dans l'alinéa dernier de l'article III.

Il est incontesté que les prêts forcés en question ont été exigés au profit des volontaires d'Arizpe, organisation militaire qui existait déjà antérieurement à la révolution constitutionnaliste, et qui dépendait alors du Gouvernement de l'Etat de Sonora. Il est également incontesté que ce n'est pas ladite organisation militaire elle-même, mais le Gouvernement de l'Etat de Sonora qui les a exigés. Enfin il est incontesté que les prêts forcés dont il s'agit, ont été effectués à des dates postérieures à la proclamation de la révolution constitutionnaliste par le Gouverneur et le Congrès constitutionnels de l'Etat de Coahuila (19 février 1913) et à la résolution du Congrès local de l'Etat de Sonora de faire cause commune avec la révolution de Venustiano Carranza, après l'abdication du Gouverneur Maytorena (décret du 5 mars 1913).

Par conséquent, il s'agit seulement de savoir si, dans ces conditions, les dommages résultant des prêts forcés doivent être considérés comme étant "dus aux actes d'autorités civiles", ou bien comme ayant été causés "par des forces révolutionnaires".

Or, à cet égard, il faut reconnaître que, si les réquisitions en question eussent été exigées en temps normal, elles seraient attribuables à un Gouvernement civil. Etant donné, toutefois, que l'autorité civile qu'était le Gouvernement de l'Etat de Sonora avant la proclamation de la révolution, s'est transformée en groupement révolutionnaire par le fait même de sa jonction au grand mouvement militaire inaugurée par le Gouverneur de Coahuila — également autorité civile avant ladite proclamation — et que les réquisitions en question ont été exigées par ledit Gouvernement en sa qualité d'organisation révolutionnaire, dans des buts nettement militaires et pour aider la révolution, la Commission ne saurait retenir la thèse qu'il s'agirait ici d'une réquisition faite par une autorité civile.

Ad d.) Ainsi qu'il a été décidé déjà dans la sentence No 33 relative à la réclamation de la succession de M. J.-B. Caire, *sub* B, 4, *in fine*, le défaut éventuel d'un rapport direct entre l'acte dommageable et les fins révolutionnaires ne mettrait nullement obstacle à admettre la responsabilité du Mexique. D'ailleurs, de l'avis de la Commission, ce rapport est incontestable, dans l'espèce.

II et IV. *Réquisitions*

La matérialité de ces réquisitions exigées par des forces constitutionnalistes ayant été reconnue par l'Agence mexicaine, il n'y a pas lieu d'y insister. Seulement, le montant réclamé de ce chef doit être rabaissé.

III. *Sac du magasin*

Il est incontesté que ce sac a été effectué par des forces villistes vers la fin du mois de septembre 1915. Conformément aux sentences antérieures, les dommages sont dus, par conséquent, à des forces rentrant dans l'alinéa 2, seconde partie de l'article III de la Convention des réclamations.

Etant donné, toutefois, que l'inventaire produit à l'appui de ce chef de la réclamation, date du mois de mai 1915, alors que le sac ne s'est effectué qu'à la fin de novembre 1915, et qu'il n'existe pas d'autres preuves du contenu du magasin et de sa valeur approximative à l'époque du sac, il convient de réduire sensiblement le montant de l'indemnité réclamée.

Pour ces motifs,

La Commission, statuant à la majorité,

Vu sa décision No 22, en date du 3 juin 1929, relative au jugement des affaires plaidées pendant la troisième session;

Décide:

I. — Que les dommages subis par M. Hyacinthe Pellat sont le fait de forces spécifiées à l'article III, alinéa 2, de la Convention;

II. — Que l'indemnité à accorder à la succession de M. Hyacinthe Pellat doit être fixée à la somme totale de dix mille piastres-or national, dont mille cinq cents piastres pour prêts forcés et réquisitions et huit mille cinq cents pour les autres dommages;

III. — Que les intérêts suivants seront dus:

a) des intérêts à 6 % sur la somme de quatre cent cinquante piastres ($450,—) pour prêts forcés, à compter du 10 mars 1913;

b) des intérêts à 3 % sur la somme de mille cinquante piastres ($1.050,—) pour réquisitions, à compter de la date de la clôture des travaux de la Commission;

c) des intérêts à 3 % sur la somme de huit mille cinq cents piastres dans le cas où cette somme n'aurait pas été payée dans un délai raisonnable, à fixer par les deux Gouvernements intéressés dans leur accord ultérieur sur les modalités de paiement des indemnités allouées.

EDOUARD MÉRINIAC (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 35 of June 10, 1929, by Presiding Officer and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of apartment by group of soldiers belonging to Constitutionalist forces who made claimant prisoner *held* covered by Article III of the Convention.

(Text of decision omitted.)

ANTOINE TALAVERO (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 36 of June 10, 1929, by Presiding Officer and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of hotel-restaurant by group of soldiers belonging to Constitutional forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

PIERRE LAMBRETON (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 37 of June 10, 1929, by Presiding Officer and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of apartment and factory and destruction of factory by Constitutional forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

ALBERT A. PRADEAU (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 38 of June 10, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of *hacienda* and destruction of movables by Yaqui Indians incorporated in Constitutionalist forces *held* covered by Article III of the Convention. The fact that Indians temporarily left the Constitutionalist forces did not alter their status as members of such forces.

(Text of decision omitted.)

ANDRÉ CHAURAND (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 39 of June 10, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of shop, forced loans and requisitions by Constitutionalist forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

GUSTAVE CAIRE (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 40 of June 13, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of shop by Zapatist forces *held* covered by Article III of the Convention. The possibility for claimant to evacuate part of his stock to Mexico before the damage occurred is taken into account in assessing damages.

(Text of decision omitted.)

DR. PIERRE PIETRI (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 41 of June 13, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting by Zapatist forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

BARTOLOMÉ TURIN (FRANCE) *v.* UNITED MEXICAN STATES [1]

(Decision No. 42 of June 13, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of wool weaving-mill by Zapatist forces, forced loans, destruction of workshops, residence and garden, and forcing claimant to operate the mill for them using raw materials found in the mill *held* covered by Article III of the Convention.

(Text of decision omitted.)

ESTATE OF MARIE BEAURANG (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 43 of June 13, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of two *haciendas* by Constitutionalist forces and, later, by troops of the "Ejército Libertador" *held* covered by Article III of the Convention.

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[1] Cf. decision No 12.

REVISION.—DECISION OF NATIONAL CLAIMS COMMISSION REVERSED, SLIGHTLY HIGHER AMOUNT ALLOTTED.

(Text of decision omitted.)

MARCEL GOMES (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 44 of June 15, 1929, by Presiding Commissioner and French Commissioner only.)

PROOF OF LOSS. Uncorroborated declaration by the claimant *held* insufficient to establish theft.

MENTAL SUFFERING. Mental suffering from imprisonment without proof of physical injury *held* to give no claim for damages.

Par un mémoire enregistré par le Secrétariat de la Commission franco-mexicaine le 15 juin 1926 sous le No 235, l'Agent du Gouvernement français a introduit une réclamation contre les Etats-Unis mexicains au nom de M. Marcel Gomes, pour dommages subis par ce dernier à la fin de l'année 1914 et au commencement de 1915.

D'après l'exposé de l'agent français, M. Marcel Gomes, né à Louvemont (Haute-Marne) le 9 décembre 1872, exploitait en 1914 une petite propriété agricole appelée "La Esmeralda" et située à proximité de Tuxpan (Veracruz). Le 4 décembre 1914, en se rendant de Tuxpan à Tampico, où il avait l'intention de s'embarquer pour la France pour rejoindre son régiment, conformément à l'ordre général de mobilisation du Gouvernement français, il fut attaqué par un groupe de soldats constitutionnalistes et complètement dévalisé. Plus tard, il fut fait et gardé prisonnier par d'autres forces armées, conventionnistes, sous le commandement du général Manuel Pelaez, jusqu'au mois de mai 1915. Le montant des dommages est évalué par l'intéressé à la somme de $2.000,00 (deux mille piastres) — sans intérêts — dont $300 pour pertes matérielles et $1.700 pour détention arbitraire et illégale.

L'Agence mexicaine n'a pas contesté la nationalité française de M. Gomes, mais ladite Agence a soulevé un certain nombre d'objections concluant notamment au défaut de preuves concernant la matérialité des faits, à ce que les forces auteurs des dommages n'étaient pas des forces visées à l'article III de la Convention; enfin à ce que l'indemnité réclamée était arbitraire.

La Commission, statuant à la Majorité,
après avoir examiné tous les arguments présentés contradictoirement et,

Considérant, d'une part, qu'elle ne se croit pas justifiée à admettre la matérialité d'un vol, sur la simple déclaration de l'intéressé, non appuyée par aucune preuve documentaire ou testimoniale;

Considérant, d'autre part, qu'il n'est pas prouvé que la détention de 5 mois imposée au réclamant lui ait causé un préjudice matériel et que, s'il est exact que M. Gomes a subi un préjudice moral du fait de sa détention en laissant croire à tous les siens qu'il avait définitivement disparu, il n'est pas moins certain, de son aveu même, qu'il n'a subi aucun mauvais traitement;

Vu sa décision No 22 en date du 3 juin 1929 relative au paiement des affaires plaidées pendant la troisième session;

Décide:

Que la réclamation de Monsieur Gomes doit être rejetée comme n'étant pas suffisamment fondée.

LOUIS AND JOSEPH FEUILLEBOIS (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 45 of June 15, 1929, by Presiding Commissioner and French Commissioner only.)

PROOF OF LOSS. Documents and written testimony submitted by claimants *held* sufficient proof that claimants suffered damage. Bill of lading as proof of special item.

RESPONSIBILITY FOR ACTS OF FORCES AND ARMED ROBBERS.—EFFECT OF REQUESTS FOR HELP AGAINST ROBBERS AND OF SPECIAL CIRCUMSTANCES (EQUITY). Looting of farmhouse, destruction of furniture, burning of barn and stored furniture, taking of animals and agricultural produce, and expelling the Feuillebois family by threats with death by Conventionist forces and by armed robbers *held* covered by Article III of the Convention. Responsibility for acts of robbers based upon immediate and repeated requests for help made to civil and military authorities, but extent of responsibility mitigated by special circumstances in accordance with equity.

DAMAGES.—LOST CROP: LUCRUM CESSANS AND DAMNUM EMERGENS.—ALLEGED LACK OF PRECAUTION OF CLAIMANTS WHO FLED. Though loss of standing crop is a *damnum emergens* and not *lucrum cessans,* dangers menacing every standing crop have to be taken into account. In the uncertain and perilous circumstances of the case, there is no lack of precaution in the claimants' fleeing from the farm.

REVISION.—DECISION OF DOMESTIC CLAIMS BODY REVERSED.

Cross-reference: Annual Digest, 1929-1930, p. 203.

Par un mémoire enregistré par le Secrétariat de la Commission franco-mexicaine le 15 juin 1926 sous les Nos 17 et 18, l'Agent du Gouvernement français a introduit une réclamation contre les Etats-Unis mexicains au nom de MM. Louis et Joseph Feuillebois pour pertes et dommages subis par eux en 1915.

D'après l'exposé de l'Agent français, M. Louis Feuillebois, né à Decize (Nièvre) le 2 février 1848, est propriétaire d'une exploitation agricole appelée "Tabla" située dans la municipalité d'Acatlán de Pérez Figueroa, district de Tuxtepec (Oaxaca).

M. Joseph Feuillebois, son fils, né à Commentry (Allier) le 18 juillet 1872, exploitait avec son père la même propriété.

Dans la première moitié de l'année 1915, des groupes armés qui dominaient la région de Tuxtepec, et qui en partie étaient des bandes villistes, en partie ne peuvent être qualifiés que de brigands, firent, à six reprises différentes, irruption dans la propriété en question, saccagèrent la maison, détruisirent les meubles, emportant tous les objets, livres, ustensiles de ménage qu'elle contenait. Puis ils incendièrent un hangar où se trouvaient plusieurs caisses conte-

nant les meubles de M. Feuillebois fils, s'emparèrent de plusieurs animaux et des divers produits de la propriété. Enfin en raison des menaces de mort proférées contre elle, la famille Feuillebois dut abandonner sa propriété et se réfugier dans la ville voisine.

Le montant des préjudices qu'il a subis est évalué, par M. Louis Feuillebois à la somme de $17.408,00, à laquelle l'Agent français demande à la Commission d'ajouter des intérêts à 6 % à compter du 31 janvier 1921. De son côté M. Joseph Feuillebois évalue ceux qui lui ont été causés à la somme de $12.668,00, cette dernière sans demande d'intérêts.

Une réclamation a été présentée antérieurement par M. Louis Feuillebois à la Commission nationale qui, toutefois, l'a rejetée par son dictamen du 20 mars 1924, pour le motif que le réclamant n'avait pas fait la preuve d'une faute, omission ou négligence des autorités légales, conformément à la législation nationale.

L'Agence mexicaine n'a pas persisté à nier la nationalité française de MM. Feuillebois père et fils, mais elle a soulevé un certain nombre d'objections concluant notamment au défaut de preuves, concernant la matérialité des faits, à ce que les auteurs des dommages ne faisaient pas partie d'une quelconque des forces révolutionnaires visées à l'article III de la Convention, ni qu'aucune négligence des autorités compétentes n'est prouvée, enfin à l'exagération des indemnités réclamées.

La Commission, statuant à la majorité,

après avoir examiné attentivement tous les documents fournis par les deux agences et pesé les arguments présentés contradictoirement et

Considérant que les documents produits par les réclamants et les déclarations des témoins certifiées par le Président Municipal d'Acatlán sont suffisamment précis et concordants pour que la Commission doit convaincue que les réclamants ont réellement subi différents dommages, réserve faite pour leur montant exact;

Considérant que, pour autant que les dommages ont été causés par des forces qui occupaient à cette époque la région de Tuxtepec-Córdoba-Tierra Blanca, ces forces étaient des forces conventionnistes, notamment villistes, et que par conséquent et vu l'époque à laquelle ils ont été causés, ces dommages rentrent dans le No 2 (seconde partie) de l'article III de la convention, conformément à ce qui a été décidé à ce sujet dans la sentence No 1 dans l'affaire G. Pinson (§§ 51, *sub* 5, 54-66);

Considérant, quant aux autres dommages, causés par des brigands armés, que, d'une part, le réclamant, M. Feuillebois père, a constamment et sans délai invoqué l'aide des autorités, soit municipales d'Acatlán, soit militaires, soit civiles de Córdoba, mais sans aucun résultat satisfaisant, si bien que la Commission considère comme remplie, dans l'espèce, la condition de responsabilité requise au No 5 de l'article III de la convention;

Mais que, d'autre part, la situation anormale du pays à l'époque des événements requiert, à la lueur de l'équité, une certaine modération, tant en ce qui concerne la fixation des indemnités à allouer, qu'en ce qui concerne la question des intérêts;

Considérant que, pour ce qui concerne les meubles et objets qui appartenaient à M. Joseph Feuillebois, et qui étaient contenus dans les 19 caisses qui furent incendiées en même temps que le hangar, l'intéressé n'a pu fournir les factures d'achat, mais qu'il a produit seulement les connaissements de la compagnie maritime qui avait transporté lesdites caisses;

Considérant, en ce qui concerne le chef de la réclamation qui se rapporte à la destruction de récoltes, que, s'il est vrai que la perte des récoltes sur pied

ne saurait être considérée comme un simple *lucrum cessans*, mais doit être qualifiée comme un *damnum emergens*, il n'en est pas moins vrai que les récoltes sur pied se trouvent exposées à tant de vicissitudes qu'il convient d'observer une grande modération dans l'évaluation de pareils dommages;

Considérant, du reste, que, dans l'espèce, ne saurait être retenu le bien-fondé de la défense mexicaine consistant à imputer aux réclamants un manque de précaution, pour avoir abandonné leur propriété dans les conditions très incertaines et périlleuses de l'époque et du lieu;

Vu sa décision No 22, en date du 3 juin 1929, relative au jugement des affaires plaidées pendant la troisième session;

Décide,

pour ce qui concerne la réclamation de M. Louis Feuillebois, par réformation du dictamen de la Commission nationale en date du 20 mars 1924;

I. — Que les dommages subis par MM. Louis et Joseph Feuillebois sont en partie le fait de forces spécifiées à l'article III, *sub* 2, de la Convention; et en partie le fait de simples brigands, mais survenus dans les conditions définies au No 5 du même article;

II. — Que l'indemnité à accorder à M. Louis Feuillebois doit être fixée à la somme de six mille piastres-O.N. et que l'indemnité à accorder à M. Joseph Feuillebois doit être fixée à la somme de mille piastres-O.N.;

III. — Que des intérêts à 3 % par an sur les sommes sus-indiquées ne devront commencer à courir que dans le cas où elles n'auraient pas été payées dans un délai raisonnable, à fixer par les deux Gouvernements intéressés dans leur accord ultérieur sur les modalités de paiement des indemnités allouées.

ETIENNE ALBRAND (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 46 of June 15, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Looting of residence by revolutionary forces opposed to Constitutionalist forces *held* covered by Article III of the Convention.

REVISION.—DECISION OF DOMESTIC CLAIMS BODY REVERSED.

(Text of decision omitted.)

ESTATE OF ANTOINE BELLON (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 47 of June 18, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Killing of Mr. Bellon by two members of Constitutionalist forces, even though on leave, *held* covered by Article III of the Convention.

Cross-reference: Annual Digest, 1929-1930, p. 171.

(Text of decision omitted.)

ESTATE OF CASIMIR ESTRAYER (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 48 of June 18, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Killing of Mr. Estrayer, looting of his house and destruction of movables by Constitutionalist forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

CASIMIR MAURIN (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 49 of June 18, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES.—LACK OF PRECAUTION BY VICTIM. Killing of claimant's brother by Zapatist and Constitutionalist forces *held* not covered by Article III of the Convention, as victim could have saved his life by following a route not under fire from the troops.

ADMISSIBILITY OF CLAIMS FILED IN THE INTEREST OF COLLATERALS OF VICTIMS OR IN THE INTEREST OF PERSONS OTHER THAN HEIRS OF VICTIMS, AND OF CLAIMS BASED UPON MENTAL SUFFERING. The victim's death caused mental suffering and material damage rather to the Mexican woman with whom he lived than to the claimant, who is his brother. Claim dismissed without prejudice to the question whether in general claims filed in the interest of collaterals of victims or in the interest of persons other than heirs of victims, or whether claims based upon mental suffering, are admissible.

Cross-reference: Annual Digest, 1929-1930, p. 199.

Par un mémoire enregistré par le Secrétariat de la Commission franco-mexicaine le 15 juin 1926 sous le No 266, l'Agent du Gouvernement français a introduit une réclamation contre les Etats-Unis mexicains au nom de M. Casimir Maurin, à l'occasion du meurtre de M. Justin Maurin, frère du réclamant.

D'après l'exposé de l'Agent français, le 5 mars 1915, M. Justin Maurin, employé comme chef veilleur à la fabrique de tissus "La Hormiga" située à Tizapán (D.F.), fut assassiné à San Angel (D.F.), tandis qu'il se rendait de Coyoacán à La Hormiga et qu'il passait précisément entre les avant-postes des deux groupes révolutionnaires (Zapatistes et Yaquis constitutionnalistes) en présence.

Le réclamant a antérieurement introduit une demande en indemnité à la Commission nationale des réclamations, qui, toutefois, l'en a débouté pour le motif principal que la mort de M. Justin Maurin n'était pas dûment prouvée avoir été causée par des forces dont les actes engageaient la responsabilité des Etats-Unis mexicains selon la législation nationale (dictamen en date du 11 mars 1925).

Le montant de l'indemnité réclamée par M. Casimir Maurin devant la Commission franco-mexicaine s'élève à la somme de dix mille piastres, sans intérêts.

L'Agence mexicaine n'a pas persisté à contester la nationalité française de M. J. Maurin, mais elle a soulevé un certain nombre d'objections concluant notamment au caractère mal fondé de la réclamation, à cause du défaut de preuves, de l'imprudence de M. Justin Maurin et du fait que le réclamant, frère de la victime, n'était pas son héritier, et en tous cas, à l'exagération de l'indemnité réclamée.

La commission, statuant à la majorité,

après avoir examiné tous les documents produits par les deux Agences, entendu quelques témoins, et pesé les arguments présentés contradictoirement, et prenant acte des regrets exprimés par l'Honorable Agent du Gouvernement Mexicain au nom dudit Gouvernement, au sujet de cet assassinat;

Considérant que d'après les déclarations des témoins le défunt vivait depuis plusieurs années avec une femme de nationalité mexicaine; que par suite l'assassinat de M. Justin Maurin a surtout causé un préjudice moral et matériel à cette dernière et non pas à M. Casimir Maurin, le réclamant, qui, s'il a jamais été aidé pécuniairement par son frère, semble avoir aidé ce dernier quelquefois à son tour;

Considérant au surplus qu'au dire des témoins le défunt aurait pu, pour se rendre de Tizapán à Coyoacán, suivre une route à l'abri du feu des troupes en présence;

Vu sa décision No 22 en date du 3 juin 1929 relative au jugement des affaires plaidées pendant la troisième session,

Décide:

d'ailleurs sans préjudice quant à la recevabilité en général de réclamations introduites par des collatéraux ou des non-héritiers, ou pour des dommages moraux, que la réclamation de M. Casimir Maurin doit être rejetée, comme n'étant pas suffisamment fondée et que, par conséquent, il n'y a pas lieu de réformer le dictamen de la Commission nationale dans le sens d'allouer au réclamant une indemnité.

ESTATE OF J. S. C. ESCLANGON (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 50 of June 20, 1929, by Presiding Commissioner only.)

PRELIMINARY OBJECTION.—FORMAL OMISSION IN MEMORIAL: NO MENTION MADE OF CAPACITY OF *Albacea* (TESTAMENTARY EXECUTRIX), IN WHICH CAPACITY ESTATE LIQUIDATED BY WIDOW, SOLE HEIR OF DEAD HUSBAND.—PRIVATE INTERNATIONAL LAW. By a will of 1911, Mr. Esclangon, partner in a firm established in Mexico, made his wife his sole heir and "albacea" (testamentary executrix) of his estate. Mr. Esclangon died in 1914. In her capacity of "albacea" his widow liquidated his estate and turned the proceeds of it over to herself as sole heir. In 1915 the firm was dissolved. In 1926, Mrs. Esclangon named a mandatory charging him with the filing before the Mixed Claims Commission on her behalf of a claim for damages, the firm of her husband having been subjected to forced loans and requisitions in 1913 and 1914. The mandatory's memorial failed to mention expressly Mrs. Esclangon's capacity of "albacea," which only appeared from the will of 1911 (annexed to the memorial). Though, according to Article 11 *(e)* of the Commission's Rules of Procedure [1], the memorial has to state by

[1] For the text of Article 11 *(e)* see Feller, p. 434.

whom and on whose behalf a claim is presented, *held* that before an international tribunal it would be excessive formalism to require that express mention be made of the capacity in which, twelve or fourteen years ago, Mr. Esclangon's estate was liquidated by his widow, even if private international law referred to such requirement in Mexican law.

PRELIMINARY OBJECTION.—ALLOTMENT BY MR. ESCLANGON'S FORMER PARTNER TO HIS WIDOW OF PROPORTIONATE RIGHT TO DAMAGES AGAINST MEXICO. —INFLUENCE OF HOMOLOGATION OF AGREEMENTS BY THE PARTIES IN IDENTICAL CASES.—PRELIMINARY OBJECTION AND MERITS.—COMPETENCE AND ADMISSIBILITY.—ROMAN LAW AND CIVIL LAW: *Actio Nata.* According to Article III of the Convention, in case of a suit brought in the interest of a person who, at the time at which a damage occurred, was a partner in a non-French company, a deed has to be exhibited recording the allotment by the company to this partner of his share in the company's right to damages. Notwithstanding a number of homologated agreements by the parties, in cases identical with the present one, no *consensus* exists between parties about the nature of this allotment, this question having been evaded in those agreements. Therefore, as the Presiding Commissioner was unable when homologating the agreement of the parties to recognize the correctness of the reasons stated by the parties themselves for such agreements, the Presiding Commissioner has to consider what was meant by the allotment in Article III of the Convention. In his opinion, a simple transfer of the partner's share in the company's right to damages is sufficient. In particular, it is not necessary that an amount be specified in the deed, nor that the partner's share in the society's balance after liquidation be mentioned in it, both of these questions being related to the merits of the case and not to the admissibility of the suit (in the Presiding Commissioner's provisional opinion the partner's right to damages obviously has not to be calculated on the basis of his share in the society's balance after liquidation—quoting judgment No. 6 of the Permanent Court of International Justice in the case concerning certain German interests in Polish Upper Silesia, substituting, *inter alia*, the word "irrecevabilité" for the word "incompétence"). The same principle applies to suits brought not in the interest of a partner, but in that of his assignee. In the latter event, the proportionate right to damages may be transferred either to the partner himself, or to the assignee. No suit can be brought in the interest of someone, or of the assignee of someone, who, at the time at which the damage occurred, was not a partner. Dissolution of the company before the allotment cannot prevent the Commission from applying Article III of the Convention. No importance is to be attached to the argument taken from civil law that any suit brought by an individual partner is inadmissible as long as the company has not been liquidated, for lack of *actio nata:* international law has long ago emancipated itself from Roman law and civil law—moreover, this principle has nothing to do with the special rule of Article III of the Convention.

Cross-reference: Annual Digest, 1929-1930, p. 191.

Par un mémorandum enregistré par le Secrétariat le 15 juin 1926 sous le numéro 227, l'Agent du Gouvernement français près la Commission franco-mexicaine a présenté une réclamation contre les Etats-Unis mexicains au nom de la succession J.-S.-C. Esclangon, pour dommages subis par la société en nom collectif "José Esclangon y Cía.". pour prêts forcés et réquisitions exigés de ladite société en 1913 et 1914, et s'élevant à la somme de $ 8,435.93.

La société, qui, à cette époque, exploitait à Huetamo de Núnez un établissement commercial appelé "Las fábricas de Francia", avait été constituée par acte en date du 20 janvier 1910, dressé par maître Manuel Menendez, juge de première instance à Huetamo de Núnez (annexe II au mémoire de l'Agent français). Elle comprenait comme seuls associés M. Joseph Esclangon, de nationalité française, et M. Ignacio Santibanez, de nationalité mexicaine. D'après les articles 5 et 6 de l'acte précité M. Joseph Esclangon a apporté un capital de $ 9.000,00 et M. Santibanez un capital de $ 2.300,00, tandis que, d'après l'article 11, les pertes et bénéfices seraient répartis par parts égales.

M. Joseph Esclangon mourut le 21 juin 1914, laissant deux filles mineures et, comme unique héritière, en vertu d'un testament dressé le 3 février 1911 (annexe III au mémoire de l'Agent français), sa veuve Mme Marie-Louise-Lucie Brunet, constituée par le même testament comme "albacea". — La Société "José Esclangon y Cía." fut dissoute par acte en date du 10 novembre 1915, qui a été produit par l'Agent du Gouvernement mexicain le 5 octobre 1928.

Pour être recevable conformément à l'article III de la convention franco-mexicaine, une réclamation à raison de pertes ou dommages causés aux intérêts de Français dans une société non française, doit satisfaire aux deux conditions suivantes:

a) Que l'intérêt du lésé, dès avant l'époque du dommage ou de la perte, soit supérieur à 50 % du capital total de la société dont il fait partie;

b) Que ledit lésé présente à la Commission une cession, consentie à son profit, de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir ladite société.

En outre, l'article 11 du Règlement de procédure prescrit, *sub e*, que le mémoire expose, entre autres, "par qui et au nom de qui la réclamation est présentée; et, si la personne qui la présente agit à titre de mandataire, la preuve de sa qualité". Dans l'espèce, la réclamation a été introduite par M. Paul Brunet, en qualité de mandataire de Mme veuve Esclangon, agissant tant en son nom personnel que comme tutrice légale de ses deux filles encore mineures, comme quoi il a été constitué par un acte notarié en date du 30 mars 1926 (annexe IV au mémoire de l'Agent français).

Par application de l'article 18 du Règlement de procédure, l'Agent du Gouvernement mexicain a proposé, par voie de déclinatoire, une exception ou fin de non-recevoir double, consistant à dire que la réclamation ne satisfait ni à la seconde des deux conditions de recevabilité formulées à l'article III de la Convention, ni à la formalité prescrite par l'article 11, *sub e*, du Règlement de procédure, le troisième chef du déclinatoire (manque de preuve de la nationalité française de feu M. Esclangon) ayant été retiré au cours de la procédure écrite.

L'exception tirée de l'article 11, *sub e*, du Règlement de procédure ne saurait être retenue. En effet, l'acte du 30 mars 1926 atteste que le signataire du mémoire, M. Paul Brunet, est le mandataire de Mme veuve Esclangon, notamment à l'effet de réclamer au Gouvernement mexicain la réparation des dommages révolutionnaires, tandis que l'acte du 3 février 1911 atteste la constitution de ladite Mme Esclangon comme héritière unique et universelle de feu M. Esclangon, et en même temps comme son "albacea". S'il est vrai que le mandat du 30 mars 1926 ne mentionne pas en termes exprès cette dernière qualité, il n'en est pas moins vrai que la mandante a cumulé en effet les deux qualités; que, en sa qualité d'"albacea", elle a liquidé la succession de feu son mari et, en sa qualité d'unique héritière, s'en est approprié le solde; et que, quand bien même les principes du droit international privé prescriraient dans l'espèce, où il s'agit de la transmission héréditaire de créances,

l'observation des dispositions légales mexicaines — ce qui est douteux — il serait en tous cas un excès de formalisme d'exiger, comme indispensable dans une pièce de procédure devant un tribunal international, la mention expresse de la qualité d'albacea d'une succession liquidée par l'unique héritière à son profit personnel, il y a douze ou quatorze ans.

De ce qui précède, il résulte que la réclamation a été régulièrement présentée.

Par contre, l'Agent mexicain a invoqué à bon droit le manque d'observation de la seconde condition de recevabilité de la réclamation à la lumière de l'article III de la Convention.

Au cours des discussions orales, les représentants des Parties ont, à propos d'autres réclamations de sociétés, longuement disserté sur la portée de la "cession" prévue audit article III, à savoir "une cession consentie (au) profit (du lésé), de la proportion qui lui revient dans les droits à indemnité dont peut se prévaloir la société ou association (dont il fait partie)".

Pendant les conférences préparatoires tenues par les deux agences avant d'introduire les premières pièces fondamentales importantes, l'agence française a tâché de se mettre d'accord avec son collègue mexicain sur la teneur exacte que les "cessions" devraient avoir dans les différents cas possibles de sociétés dissoutes, de sociétés continuées dans une composition nouvelle et de sociétés persistant sous leur forme primitive. Malheureusement ces tentatives n'ont conduit à aucun résultat palpable, insuccès qui a provoqué dans la suite un véritable torrent de documents de procédure, dans lesquels ont été présentées, de la part de l'Agent français, comme satisfaisant aux conditions requises par l'article III, mais constamment déclinées par l'Agent mexicain, comme n'y satisfaisant pas, toutes sortes d'écritures, sous seign public et privé, de dissolution, d'assignation, de cession, etc. La seule chose sur laquelle les deux agences paraissent avoir effectué un accord consiste en ceci, qu'elles sont convenues de considérer que le mot "cession" qui figure à l'article III ne doit pas nécessairement être conçu dans son sens strict et technique du droit privé. En acceptant cette interprétation commune des deux Agents comme correspondant à l'intention des Hautes Parties contractantes, je constate que, au reste, les débats oraux ont démontré la persistance du désaccord le plus parfait entre les deux agences sur les conditions auxquelles doit satisfaire un document déterminé, pour être admissible comme la "cession" prévue par l'article III. Ce n'est que beaucoup plus tard, à savoir le 5 septembre 1928, que, moyennant une série d'accords homologués par la Commission le 11 septembre 1928 (sentences Nos 2A—29A), les représentants des Parties, au lieu de trancher la controverse, se sont résolus à l'évader. En effet, lesdits accords, tendant à déclarer la presque-totalité des réclamations de sociétés (ou plutôt des intéressés français dans des sociétés) non françaises recevables, ne font plus aucune mention expresse de la seconde condition de recevabilité relative à la présentation d'une "cession", et si vivement débattue au cours des discussions orales précédentes.

Pareil accord ne s'étant pas effectué par rapport à la réclamation présente, force m'est d'entrer ici dans un bref examen de la question litigieuse, d'autant plus que, lors de l'homologation des accords précités, il m'a fallu déclarer que, tout en acceptant le résultat des pourparlers entre les deux agences, je n'étais pas à même de reconnaître la correction des motifs sur lesquels lesdits accords déclaraient se fonder. En effet, ces motifs sont évidemment insuffisants à appuyer la conclusion pratique à laquelle les accords aboutissent.

Aux termes des accords homologués sous forme de sentences de la Commission, les réclamations visées dans les sentences Nos 2A—29A ont été déclarées recevables, "attendu que, dès avant l'époque des dommages et au moment desdits dommages, plus de 50 % du capital social appartenait à des Français" (ou une rédaction équivalente), c'est-à-dire: pour le motif que l'une des

deux conditions de recevabilité requises par l'article III de la Convention des réclamations se trouvait remplie, et malgré que la controverse sur la portée de la "cession" fut toujours restée sans solution.

L'élimination totale de la seconde condition de recevabilité peut s'expliquer de deux façons différentes, à savoir ou bien par le fait que les accords en question, au lieu d'interpréter et d'appliquer la convention, en constituent, en réalité, une modification autorisée par les Gouvernements intéressés; dans ce cas, il s'agirait simplement de la suppression de la seconde condition de recevabilité par accord supplémentaire entre les Hautes Parties contractantes; ou bien par le fait que, pour évader une solution expresse de la controverse, les Agents ont préféré passer le point litigieux sous silence; dans ce cas, l'insuffisance des motifs des accords du 5 septembre dernier est incontestable, et ces accords eux-mêmes n'ont aucune valeur interprétative pour la solution de la question de recevabilité de la réclamation actuelle. Etant donné, d'une part, qu'une modification de la convention, base de l'activité de la Commission, ne saurait être supposée sans indications positives et d'autre part, que les Agents ont préféré ne pas donner suite à ma demande d'informations plus précises au sujet des accords en question, je crois devoir constater que ces accords ne permettent d'autre conclusion que celle à laquelle j'ai déjà fait allusion ci-dessus, c'est-à-dire, qu'en effet les deux agences, afin d'éviter une renonciation expresse à leur point de vue respectif, ont sacrifié la logique des sentences projetées et la correction des motifs à leur désir commun de parvenir à un accord, nonobstant la persistance de leurs différences d'opinion sur des points capitaux. Evidemment mon rôle de Président de la Commission m'interdit de les suivre dans cette voie de compromis vagues et défectueusement motivés.

Pour les motifs indiqués ci-dessus, je ne puis m'empêcher de tâcher d'interpréter dans les paragraphes suivants la seconde condition de recevabilité des réclamations de Français (ou de protégés français) intéressés dans des sociétés, compagnies, associations ou autres groupements d'intérêts de nationalité non française, notamment mexicaine, envisagée à la lumière du contexte de l'article III de la Convention des réclamations, et d'appliquer les résultats de cet examen à la réclamation actuelle.

Aux termes de l'article III, "le lésé" doit avoir eu, dès avant l'époque du dommage ou de la perte, un intérêt supérieur à cinquante pour cent du capital total de la société dont il faisait partie, et présenter, en outre, à la Commission la "cession" de la proportion qui lui revient dans les droits à indemnité de la société. L'article semble supposer tacitement que la personne lésée par les événements dommageables est toujours la même que celle qui finit par présenter sa réclamation à la Commission franco-mexicaine; si cela est le cas, la situation est très simple. Attendu, toutefois, que l'introduction de la réclamation n'a pu être effectuée en aucun cas plus tôt qu'environ cinq ans après les événements, et qu'en bien des cas le délai a nécessairement été beaucoup plus long, jusqu'à plus de quatorze ans, il va de soi que souvent l'intéressé primitivement lésé n'est plus celui qui finit par s'adresser à la Commission franco-mexicaine, soit que l'associé lésé par les événements soit décédé après, soit qu'il ait transféré à des personnes tierces ses droits à indemnité. Dans ces cas, une application de la disposition de l'article III de la Convention au pied de la lettre n'est pas possible; alors l'esprit de l'article exige que le réclamant devant la Commission franco-mexicaine puisse être une personne autre que celle qui a primitivement subi les pertes ou dommages, et qui soit autorisée à se présenter devant elle comme ayant droit de ce dernier, soit en qualité d'héritier, soit en celle de cessionnaire, actionnaire, etc. C'est ce que d'ailleurs, suppose tacitement l'article 11, *sub f*, du Règlement de procédure. Mais c'est toujours, en principe, l'associé ou actionnaire primitif, qui faisait partie de la société, compagnie,

association ou autre groupement d'intérêts à l'époque du dommage, qui est le véritable réclamant, et ceux qui se présentent plus tard pour faire valoir les droits à indemnité au lieu de ce dernier, ne sauraient jamais le faire à titre indépendant, mais uniquement à titre d'ayants cause de l'associé ou actionnaire du moment des dommages. C'est pourquoi, en cas de modification de la composition de la société, compagnie, etc. après l'époque du dommage, les associés ou actionnaires nouveaux n'ont, comme tels, aucun droit à se prévaloir des droits à indemnité dont peut se prévaloir la société, compagnie, etc. à cause de ce dommage antérieur. Naturellement, il se peut, notamment dans le cas de sociétés anonymes, que le transfert de l'action doive être censé impliquer le transfert de la proportion dans les droits à indemnité de la société, mais dans ce cas encore, l'actionnaire postérieur fait valoir rien qu'un droit dérivé.

Ce que, à la lueur des observations précédentes, l'article III de la Convention exige comme conditions de recevabilité d'une réclamation devant la Commission franco-mexicaine dans les cas où "le lésé" de l'époque des dommages n'est plus à même de se présenter personnellement devant elle, c'est que la personne qui finit par faire valoir les droits dérivés: *a)* démontre que la personne de laquelle elle dérive ses droits avait, dès avant l'époque du dommage ou de la perte, un intérêt supérieur à cinquante pour cent du capital total de la société, etc., dont elle faisait partie, et *b)* présente à la Commission une cession, consentie au profit soit de la personne primitivement lésée, soit de ses ayants cause, de la proportion qui revenait à la première dans les droits à indemnité dont peut ou pouvait se prévaloir ladite société, etc. Car, en interprétant l'article III, on ne peut pas ne pas avoir présente à l'esprit la circonstance que la Convention des réclamations est de 4 à 14 ans postérieur aux événements, et que, par conséquent, les intéressés n'ont pu satisfaire aux conditions requises par ledit article qu'après coup et souvent à une époque où la société primitive n'existait plus, ou avait subi des modifications telles que l'application littérale de l'article n'était plus possible. C'est aussi pourquoi l'admissibilité des "cessions" présentées à la Commission doit être jugée dans un esprit large qui donne pleine satisfaction aux conditions particulières propres à chaque cas spécial.

En outre, il faut faire observer que, dans les cas où le réclamant définitif n'est pas la même personne que le "lésé" primitif, la nationalité des *dramatis personae* joue un rôle plus compliqué que dans les cas plus simples, puisque alors il se peut, non seulement que l'ayant droit primitif n'ait pas possédé la nationalité française, mais encore que les ayants cause ne la possèdent pas. Il se pourrait même que, par une personne de nationalité non-française, le droit proportionnel à indemnité se fût transféré d'un Français à un autre Français.

Si, après ces remarques générales sur les cas dans lesquels le réclamant devant la Commission franco-mexicaine n'est plus la même personne que celle qui a primitivement souffert les dommages, à titre d'associé ou d'actionnaire dans une société ou compagnie, je passe à la portée de la seconde condition de recevabilité, se rapportant à la "cession", je constate tout d'abord que les deux agences se sont montrées divisées sur l'interprétation exacte de cette condition, notamment à deux points de vue, l'Agent mexicain ayant avancé, en premier lieu, que la "cession" doit contenir, non seulement l'indication, en termes généraux, d'une certaine proportion dans laquelle le lésé était intéressé dans la société ou compagnie, mais encore un montant déterminé, et en second lieu, que la "cession", pour être acceptable, ne peut se borner à céder une part proportionnelle du droit à indemnité dont peut ou pouvait se prévaloir la société, mais qu'elle doit porter sur une part proportionnelle du solde de liquidation de la société dès avant les dommages.

Cette thèse double, notamment le second chef de défense, a été sensiblement compliquée, d'une part, par le fait que l'Agent mexicain, au cours des débats oraux, a déclaré appuyer ses objections, non seulement sur l'article III de la Convention, mais encore sur la règle de procédure formulée à l'article 11, *sub b*, du Règlement, et d'autre part, qu'une étude minutieuse des accords susmentionnés du 5 septembre 1928 m'a convaincu d'une notable volte-face dans le système de défense mexicain.

Il n'y a plus lieu, à mon avis, après les accords relatifs aux réclamations pour cause de dommages soufferts par des sociétés non-françaises, d'entrer dans les détails des controverses résumées ci-dessus. Puisque, toutefois, les brèves explications fournies par les deux agences dans l'affaire actuelle reflètent toujours l'ancienne controverse restée sans solution définitive, et qu'une sentence motivée de la Commission sur la recevabilité ou irrecevabilité de la présente réclamation, en conformité de la prescription expresse de l'article 43 du Règlement de procédure, n'est pas possible, sans interprétation préalable de la portée de l'article III de la Convention, il me semble indispensable d'indiquer ici les grandes lignes de l'interprétation qui, à mon avis, revient à la seconde condition formulée audit article III, la première ne donnant pas lieu, dans l'espèce, à des différences d'opinion.

L'article III suppose le cas d'une société, etc., qui peut se prévaloir du droit à indemnité d'après la législation nationale, mais qu'elle ne peut pas faire valoir devant la Commission franco-mexicaine, parce qu'elle est, elle-même, de nationalité non française, ou mexicaine. Si, dans pareille société, les intérêts français sont supérieurs à cinquante pour cent du capital total, les intéressés français sont, individuellement autorisés à s'adresser à la Commission franco-mexicaine, pourvu que la société leur ait consenti la cession de la part proportionnelle qui leur revient dans lesdits droits, et que les intéressés en présentent la preuve à la Commission.

Le but évident de cette disposition est d'éviter que la société de composition mixte ne puisse faire valoir plus de 100 % de l'indemnité devant deux instances distinctes, et de fixer les proportions respectives qui reviennent aux associés ou actionnaires français et aux associés ou actionnaires non français, respectivement. L'article ne dit mot, ni n'a en vue de dire mot, sur la quantité qui revient à chacun de ces deux groupes d'associés ou d'actionnaires, ni sur les méthodes à appliquer pour déterminer cette quantité. La question de savoir à quel montant les intéressés français paraîtront avoir droit, est essentiellement une question de fond, qui ne touche en rien à la question préliminaire de la recevabilité de la réclamation des intéressés français d'après l'article III. Cette question de fond devra nécessairement être résolue à l'aide des documents probants visés *sub b* de l'article 11 du Règlement de procédure, mais ces derniers documents n'ont rien à faire avec l'exigence de la présentation de la "cession" prévue à l'article III de la Convention, et le point de savoir si les documents ainsi produits sont suffisants pour appuyer la réclamation et pour mettre la Commission à même d'en juger le bien-fondé et d'en déterminer le montant justifié, ne saurait, en bien des cas, trouver sa réponse qu'exactement lors de l'examen du fond.

Dans ces conditions, la thèse, selon laquelle la "cession" doit nommer un montant précis, ne trouve aucun appui, pas même dans un prétendu esprit de la disposition en question, à admettre en dehors de son texte, qui est parfaitement clair et ne prescrit que l'indication d'une *proportion* dans les droits à indemnité de la société elle-même, dont il est précisément la tâche de la Commission de fixer le montant exact.

Et il en est de même, en ce qui concerne l'autre thèse, selon laquelle la "cession" doit porter, non sur une part proportionnelle dans les droits à

indemnité qui reviennent à la société, mais sur une proportion dans le solde de liquidation de la société. D'abord, cette thèse se trouve en contradiction manifeste avec la teneur de la disposition y relative. Ensuite, l'appel fait au précédent de l'affaire Kunhardt & Co. devant la Commission mixte américano-vénézuélienne de 1903 [1] est hors de propos, attendu que, d'une part, le protocole d'arbitrage ne définissait point les conditions de recevabilité de réclamations d'actionnaires américains dans des sociétés non-américaines, et que, d'autre part, il ne s'agissait pas, comme dans l'espèce, de la réparation de dommages matériels, de par leur nature tout à fait indépendants de la situation financière de la société lésée, mais bien au contraire, d'une indemnisation pour retrait d'une concession, dont la valeur réelle dépendait précisément des résultats financiers de l'entreprise commerciale qui l'exploitait. En outre, admettre la thèse incriminée, reviendrait, à mon avis, à attribuer une portée incorrecte à l'idée, judicieusement formulée par l'Agence mexicaine et parfaitement justifiée par elle-même, d'une bifurcation de l'action en cas de dommages soufferts par des sociétés mexicaines. Si le Mexique a consenti, sous certaines conditions, à bifurquer les demandes en indemnité de sociétés mexicaines à capitaux étrangers, cette bifurcation doit logiquement être conçue dans le sens d'une scission de la réclamation en raison des proportions respectives revenant aux associés ou actionnaires étrangers et aux associés ou actionnaires mexicains dans le capital social, et aucunement en ce sens que les associés étrangers ne seraient autorisés à réclamer que leur part proportionnelle du solde de liquidation et la société elle-même tout le reste. Notamment dans le cas de sociétés mexicaines dont le capital social se trouverait entièrement entre les mains de ressortissants français, une bifurcation pareille se révélerait comme très singulière. — La seconde condition de recevabilité formulée à l'article III a évidemment pour but de donner au Mexique la garantie que la société mexicaine s'est effectivement désistée de la partie de la réclamation qui correspond aux parts proportionnelles revenant aux associés individuels en faveur desquels, en qualité de ressortissants ou de protégés français, est ouvert l'accès à la Commission internationale, et que ces parts proportionnelles ont été fixées ou attestées par la société elle-même, la seule personne qualifiée pour s'en désister. En effet, sans cela le Mexique ne se trouverait pas préservé contre une demande simultanée ou postérieure de la société elle-même pour les mêmes parts proportionnelles. Quand bien même la thèse mexicaine primitive sur le fond devrait être admise et que, par conséquent, les associés individuels n'auraient droit qu'à une part proportionnelle du solde de liquidation — point sur lequel il n'est pas l'heure d'émettre une opinion definitive dans la présente phase préliminaire de la procédure — cela n'impliquerait pas que la même thèse doive, par anticipation, être admise comme critérium d'appréciation du caractère suffisant on insuffisant des "cessions" produites par l'Agent français, conformément à l'article III de la convention des réclamations. Cela est si vrai que, si lesdites cessions eussent porté seulement sur la part proportionnelle du solde de liquidation, les réclamations eussent dû être déclarées non-recevables, comme ne satisfaisant pas aux conditions requises par ledit article. Car en tous cas la part, proportionnelle à la participation de chaque associé au capital social, du droit total à indemnité dont peut se prévaloir la société, constitue le maximum auquel l'associé individuel peut jamais avoir droit. Si donc l'Agent français eût produit des cessions qui, contrairement aux termes mêmes de l'article III, n'eussent porté que sur la proportion dans le solde de liquidation, inférieure peut-être audit maximum, la Commission n'eût pu les accepter, pour le motif qu'il se pourrait que, lors de l'examen du fond, elle crût devoir allouer

[1] Venezuelan Arbitrations of 1903, 63; Morris Report, 202.

aux réclamants, associés français, ce maximum et que, dans ce cas, les "cessions" n'eussent pas contenu la garantie à laquelle j'ai fait allusion ci-dessus, à savoir que la société ne se trouve plus dans la possibilité juridique de faire valoir elle-même, à l'encontre du Mexique, des droits de réclamation que la Commission internationale aurait déjà adjugés aux associés individuels. En outre, la présentation de "cessions" portant sur une proportion dans les droits intégraux à indemnité dont peut se prévaloir la société, comme condition préalable de recevabilité des réclamations, ne peut jamais nuire au Mexique, attendu que ces cessions n'obligent en rien la Commission franco-mexicaine d'accorder aux réclamants une indemnité correspondant aux parts cédées.

Au cours des discussions orales de caractère général, l'Agence mexicaine a, au mois de mai 1928, illustré sa thèse en citant, comme exemple de solution, l'hypothèse d'une réclamation introduite par les Français intéressés dans une société mexicaine qui, dès avant l'époque des dommages, présentait l'aspect financier suivant:

L'*actif* de la société se composait de:		Le *passif* se composait des éléments suivants:	
marchandises. . . .	$ 90.000,00	capital social. . . .	$ 20.000,00
créances	$ 10.000,00	dettes	$ 80.000,00

La totalité des marchandises ayant été détruite ou réquisitionnée par des forces révolutionnaires, la société elle-même aurait droit à une indemnité de $ 90.000,00. Or, quel est, dans cette hypothèse, le montant du droit à indemnité que la France pourrait faire valoir contre le Mexique devant la Commission franco-mexicaine, au nom des associés individuels français, représentant, par exemple, 75 %, respectivement 100 % du capital social?

D'après la thèse mexicaine primitive, le Gouvernement français ne serait pas autorisé à réclamer devant cette Commission 75 %, respectivement 100 % de la somme de $ 90.000,00, qui, à titre d'indemnité, revient à la société elle-même, mais seulement 75 %, respectivement 100 % de l'actif, déduction faite du montant des dettes, — excédent égal, dans l'espèce, au capital social des $ 20.000,00; le reste de l'indemnité due, se montant à ($ 90.000,00 — 75 % de $ 20.000,00), respectivement à ($ 90.000,00 — $ 20.000,00), ne saurait être réclamée que par la société elle-même et devant la Commission nationale. — Si, dans l'hypothèse visée ci-dessus, le montant des dettes baissait au-dessous du chiffre supposé de $ 80.000,00, le montant de la réclamation française devant la Commission franco-mexicaine augmenterait en raison inverse, jusqu'à atteindre 75 %, respectivement 100 % du maximum de ($ 20.000,00 — $ 70.000,00), correspondant à la valeur des marchandises détruites. — Si, au contraire, le montant des dettes s'élevait au-dessus de $ 80.000,00, les associés français ne pourraient pas même prétendre à réclamer devant ladite Commission leur proportion dans le capital social, mais n'auraient d'autre moyen que de saisir la Commission nationale par l'intermédiaire de la société dont ils font partie.

La thèse exposée ci-dessus a été soutenue par l'Agence mexicaine pour le motif que dans les cas supposés, où la perte des marchandises transformerait l'excédent social en un déficit et comporterait, par conséquent, la faillite de la société, les véritables lésés seraient, non pas les associés français réclamants, mais plutôt les créanciers — motif, d'ailleurs, qui s'appliquerait également, *mutatis mutandis*, à la réclamation de la société elle-même, en sa qualité de personne morale, devant la Commission nationale — et sans tenir compte, d'une part, de la responsabilité financière personnelle et solidaire des associés individuels dans certaines sociétés commerciales pour les dettes sociales, et

d'autre part, du fait que, parmi les créanciers de la société, paraîtront souvent figurer, non seulement des compatriotes des associés, mais encore ces associés eux-mêmes, liés par des contrats de prêt à la personne morale qu'est la société — hypothèse, en vue de laquelle l'Agence mexicaine a même commencé par dénier aux associés français le droit de réclamer également en leur qualité de créanciers de leur société.

Sur la base des interprétations résumées ci-dessus, et qui, à mon avis, se rapportent plutôt au fond des réclamations, l'Agence mexicaine a émis la thèse que déjà les "cessions" à produire par l'Agent français, selon la prescription expresse de l'article III de la Convention, doivent répondre auxdites interprétations, et qu'elles doivent contenir, ou être accompagnées de balances d'inventaire et de comptes de liquidation, qui permettent de se former une idée exacte de la situation financière de la société en question.

Je regrette de ne pouvoir me ranger, à cet égard, à l'avis de l'Agence mexicaine. Quoi qu'il soit du bien-fondé des thèses soutenues par la Partie défenderesse sur le fond, et quelles que puissent être les conséquences juridiques éventuelles du fait que les documents probants présentés par l'Agent français, conformément au Règlement de procédure, à côté de la "cession" prescrite par l'article III de la Convention, seraient insuffisants à appuyer la réclamation, je suis d'avis que la solution de la question de fond ne saurait être entreprise qu'après solution de la question préliminaire de la recevabilité de la demande à la lumière dudit article III. Or, en décidant de l'exception préalable, ainsi réduite dans ses limites naturelles de question litigieuse préliminaire de recevabilité de la réclamation, pour pouvoir être admise à l'examen du fond, la Commission franco-mexicaine se trouve en présence de la même difficulté devant laquelle s'est trouvée placée tant de fois, au cours des années dernières, la Cour permanente de Justice internationale, à savoir que souvent les questions préliminaires et de fond sont si intimement liées, qu'il est presque impossible de statuer sur les premières, sans effleurer en même temps les dernières. Dans cette hypothèse, il faut faire application des thèses judicieuses et déjà justement devenues classiques, que ladite Cour a formulée dans son arrêt No 6 relatif à certains intérêts allemands en Haute-Silésie polonaise, aux termes suivants (page 15):

"... (La Cour) constate d'abord que l'exception (d'incompétence) soulevée par le Gouvernement (polonais) lui a été présentée à un moment où aucune pièce de procédure relative au fond n'avait été déposée, et que, par suite de la présentation de l'exception, la procédure sur le fond a été suspendue. Dans ces conditions, et bien que (la Pologne) n'ait pas elle-même évité de puiser dans le fond du litige certains des arguments allégués par elle en faveur de son exception, la Cour ne saurait décliner (sa compétence) par ce seul fait, car ainsi elle ouvrirait la porte à la possibilité pour une Partie de donner à une exception (d'incompétence), ne pouvant être jugée sans avoir recours à des éléments puisés dans le fond, un caractère péremptoire, simplement en le présentant *in limite litis*, ce qui est inadmissible.

Dès lors, la Cour, en vue de la décision qui lui est demandée, estime devoir aborder l'examen visé ci-dessus, quand même cet examen devrait l'amener à effleurer des sujets appartenant au fond de l'affaire, étant bien entendu, toutefois, que rien de ce qu'elle dit dans le présent arrêt ne saurait limiter sa complète liberté d'appréciation, lors des débats sur le fond, des arguments éventuellement apportés de part et d'autre sur ces mêmes sujets."

Que l'on remplace dans la citation ci-dessus les mots "polonais" et "la Pologne" par "mexicain" et "le Mexique", et que l'on substitue, à la rigueur, aux mots "d'incompétence" les mots "d'irrecevabilité" — l'exception actuelle, si elle peut aussi être qualifiée d'exception d'incompétence, pouvant peut-être

plus proprement être qualifiée d'exception de non-recevabilité de la réclamation — et l'on a exactement la situation juridique qui se présente dans le cas de la présente exception.

Sans me prononcer définitivement sur les questions litigieuses indiquées ci-dessus, et notamment sans exprimer une opinion définitive sur la solution de la question, appartenant au fond, de savoir si, en statuant sur les réclamations d'intéressés français dans des sociétés mexicaines, la Commission doit tenir compte de la situation financière desdites sociétés, tout à fait indépendante du montant des dommages, je me borne à résumer ici les conclusions auxquelles, indépendamment de ces questions de fond, l'examen de la fin de non-recevoir proposée par l'Agence mexicaine m'a amené, à savoir que, si l'intérêt que le réclamant représente est un intérêt d'associé, et que le document qu'il présente comme "cession", fasse preuve du fait que la société dont il fait ou faisait partie, ou dont le lésé primitif faisait partie, s'est désistée en sa faveur de la proportion qui revenait à cet associé ou ancien associé dans les droits à indemnité dont elle peut ou pouvait se prévaloir elle-même, il est incontestable que la réclamation est recevable à la lumière de la seconde condition formulée à l'article III de la Convention, sans qu'il soit nécessaire de joindre à ce document des balances d'inventaire, des comptes de liquidation, etc., ces derniers documents pouvant éventuellement paraître indispensables lors de l'examen de la réclamation, quant au fond. — D'ailleurs, la teneur exacte des actes de "cession" prescrits par l'article III dépend de tant de circonstances, propres à chaque cas particulier, qu'il ne semble pas prudent de préciser dès à présent les conditions de leur admissibilité.

Mes conclusions précédentes ne sont ébranlées en rien par certaines observations faites au cours des audiences et empruntées au droit civil, selon lesquelles la réclamation de l'associé individuel ne serait recevable avant la liquidation de la société, faute de *actio nata*. A ces observations, je me borne à répondre que le droit international s'est émancipé, déjà depuis longtemps, du droit romain et du droit civil — que la condition de nature spéciale, formulée à l'article III de la Convention n'a absolument rien à faire avec le principe invoqué, et que la vérité juridique que peut contenir ledit principe, peut éventuellement être examinée lors de la procédure sur le fond.

Si je procède maintenant à appliquer les observations faites ci-dessus, à la réclamation présentée pour cause des dommages subis par la société José Esclangon y Cía., je constate ce qui suit.

Le fait que la réclamante n'est pas la même personne que celle qui fut primitivement lésée par les événements révolutionnaires, ne fait pas obstacle à la recevabilité de la réclamation. En effet, la réclamante s'est légitimée comme héritière unique du lésé défunt et, par conséquent, comme son ayant cause à titre universel, tandis que la nationalité française, tant du défunt que de la réclamante, est incontestée.

Il est également incontesté que l'intérêt du lésé, qui, dans l'espèce, était un intérêt à titre d'associé, était, à l'époque du dommage et en raison des apports respectifs des deux associés, supérieur à 50 % du capital total de la société dont il faisait partie.

Il ne reste donc qu'à examiner si la réclamante a rempli la condition de présenter à la Commission une cession, consentie soit à son profit, soit au profit de l'ayant droit primitif, de la proportion qui revenait à ce dernier dans les droits à indemnité dont pouvait se prévaloir, avant sa dissolution, la société José Esclangon y Cía., dans le sens exposé ci-dessus.

Or, l'Agent français a, en effet, présenté à la Commission un document qui, envisagé par lui-même, pourrait être pris en considération comme constituant la "cession", prévue à l'article III, à savoir un acte sous seing privé, en

date à Mexico du 25 octobre 1926. aux termes duquel l'ex-associé mexicain, M. Santibánez, reconnaît que les droits à réclamation de la société contre le Gouvernement fédéral pour les dommages subis sont, pour la part correspondant à l'apport de feu M. Joseph Esclangon, de la propriété exclusive de Mme Vve Esclangon et seront à son bénéfice exclusif, ladite part des droits à indemnité étant expressément séparée de l'actif de la société.

Puisqu'il s'agit, dans l'espèce, d'une société dissoute il y a plus de dix ans, pareil acte tendant à remplir après coup la condition formulée à l'article III de la Convention, pourrait être admis comme constituant la "cession" prescrite par ledit article, si ce n'était que l'acte en question tend évidemment à remédier aux conséquences d'un acte de dissolution antérieur, produit par l'Agence mexicaine, et que l'admission de cet acte postérieur reviendrait à permettre à un ressortissant mexicain de transférer son droit, définitivement acquis, de faire valoir les droits à indemnité revenant à la société, à une personne de nationalité française, afin de mettre cette dernière à même d'invoquer ces mêmes droits devant une Commission internationale. En effet, l'acte de dissolution, auquel je viens de faire allusion, en date du 10 novembre 1915, démontre clairement que l'associé mexicain, M. Santibánez, a pris entièrement en charge tout l'actif et le passif de la société et que la veuve de l'autre associé ne s'est réservé aucun droit.

Dans ces conditions, le document sous seing privé produit par l'Agent français ne saurait être reconnu comme attestant une cession valable. Cette conclusion se base, toutefois, non pas sur la considération, invoquée par l'Agence mexicaine dans l'audience du 3 octobre 1928, et suivant laquelle ne saurait être admise comme "cession" que "el documento que acreditara el daño individual sufrido por el señor Esclangon", tel que "balances que demuestren el estado del capital", mais sur la considération tout autre, que le document produit par l'Agent mexicain prouve que le document postérieur produit par l'Agent français, qui par sa nature eût très bien pu faire fonction d'acte de "cession", n'est, dans l'espèce, qu'une tentative de transférer à une personne française des droits définitivement acquis antérieurement par un sujet mexicain.

Pour ces motifs, je suis d'avis que la présente réclamation n'est pas recevable.

JEAN-BAPTISTE FABRE (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 51 of June 20, 1929, by Presiding Commissioner and French Commissioner only.)

ADMISSIBILITY OF SUIT.—TAKING OVER BY PARTNER OF THE WHOLE OF COMPANY'S ASSETS AND LIABILITIES. The taking over by a French partner in a company established in Mexico of the whole of its assets and liabilities constitutes the allotment required by Article III of the Convention. (Reference made to Decision No. 50.)

RESPONSIBILITY FOR ACTS OF FORCES.—Requisition of an automobile and destruction of a window by Constitutionalist forces *held* covered by Article III of the Convention.

(Text of decision omitted.)

BOURILLON, JACQUES, LÉAUTAUD AND ESMENJAUD (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 2B of June 22, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES PROBABLY HELPED BY MOB. Looting of storehouse by Constitutionalist forces probably helped by mob *held* covered by Article III of the Convention. The help probably lent by populace *held* a typical example of a case in which No. 5 of Article III is applicable.

(Text of decision omitted.)

JOSEPH AND AIMÉ LOMBARD *v.* UNITED MEXICAN STATES

(Decision No. 3B of June 22, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES PROBABLY HELPED BY MOB. Looting and burning of storehouse by Constitutionalist forces probably helped by mob ... (See Decision No. 2B).

(Text of decision omitted.)

COMPANIA AZUCARERA DEL PARAISO NOVILLERO (FRENCH INTERESTS IN—) *v.* UNITED MEXICAN STATES

(Decision No. 4B of June 22, 1929, by Presiding Commissioner and French Commissioner only.)

RESPONSIBILITY FOR ACTS OF FORCES. Requisitions, forced loans and burning of sugar crop by revolutionary forces, which first were opposed to the Constitutionalist forces and then adhered to the plan of Agua Prieta [1] *held* covered by Article III of the Convention.

(Text of decision omitted.)

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[1] See Feller, p. 157.

MANUEL REYNAUD (FRANCE) *v.* UNITED MEXICAN STATES

(Decision No. 52A of June 22, 1929, by Presiding Commissioner and French Commissioner only.)

EVIDENCE.—REOPENING OF THE CASE. As the Commission without having at its disposal certain document relating to the looting of certain vehicles cannot render a definite decision, the case is reopened and the production of this document ordered.

(Text of decision omitted.)

DECISION No. 23

(June 24, 1929. Decision by President and French Commissioner only. R.G.P.C., 1936, Part 2, page 12.)

JURISDICTION OF TRIBUNAL TO RENDER AWARDS IN ABSENCE OF A NATIONAL COMMISSIONER.—SUSPENSION OF PROCEEDINGS OF TRIBUNAL. Although a majority of the members of the tribunal is of the opinion that the tribunal is not ousted of jurisdiction by the breach of international obligations by the Mexican Government under article I of the *compromis*, in failing to send its Commissioner to participate in the work of the tribunal, *held* that the sessions of the tribunal be suspended until the tribunal's membership is duly completed.

Cross-reference: Annual Digest, 1929-1930, p. 424.

Comments: Carlston, The Process of International Arbitration (New York, 1946), section 13.

La Commission franco-mexicaine des réclamations,

Vu la décision No 21, constatant la régularité de la présente session,

Vu les lettres adressées par le Gouvernement mexicain à M. Verzijl comme Président de la Commission,

Considérant que le Gouvernement mexicain n'a pas désigné de Commissaire en remplacement de M. González Roa,

Considérant que dans ces conditions l'agent du Gouvernement français demande à la Commission, au nom de son Gouvernement, de constater officiellement que l'absence du Commissaire mexicain met la Commission dans l'impossibilité de fonctionner et qu'il la prie de déclarer la session en cours interrompue jusqu'à ce que, soit par voie diplomatique, soit autrement, le tribunal ait pu être régulièrement complété.

Dans ces conditions

Opinion du Commissaire Français:

Le Commissaire français se déclare favorable à l'interruption de la session en cours en raison du refus trois fois réitéré du Gouvernement mexicain de reconnaître M. Verzijl comme Président et de l'abstention manifeste du Commissaire mexicain.

Opinion du Commissaire Président:

Le Commissaire Président se déclare également favorable à l'interruption de la session en cours, mais non sans avoir exprimé, dans l'intérêt de l'arbitrage

international en général, son opinion que, malgré l'attitude doublement illégitime du Gouvernement mexicain ci-dessus signalée, la Commission serait parfaitement en droit de continuer à remplir sa mission,

Attendu en effet que:

d'une part le refus unilatéral de reconnaître un tiers arbitre régulièrement désigné et étant régulièrement en fonctions, ainsi que l'a constaté la décision No 21, est contraire au droit international et ne saurait mettre d'obstacle juridique au fonctionnement régulier de la Commission;

d'autre part, que le refus d'envoyer un Commissaire siéger dans la Commission constitue un manquement des Etats-Unis Mexicains à leur engagement international découlant de l'article 1er de la Convention du 25 sept. 1924; que si, dans ces conditions, une Commission internationale d'arbitrage se déclarait incompétente, par suite de la défaillance de l'une des Parties, pour continuer à remplir la mission que les deux Parties lui ont confiée conjointement, elle porterait une grave atteinte à l'institution de l'arbitrage international en méconnaissant le principe général de droit suivant lequel personne ne saurait se prévaloir en sa faveur du non-accomplissement de ses obligations juridiques; que, par conséquent, aucune impossibilité juridique ne s'opposerait à la continuation des travaux.

Pour ces motifs,

La Commission,

statuant à la majorité de ses membres et à l'unanimité des Commissaires présents:

Décide:

que la session en cours est interrompue à la date de ce jour, jusqu'à ce que, soit par voie diplomatique, soit autrement, la Commission ait pu être régulièrement complétée.

PART III

GERMAN-MEXICAN CLAIMS COMMISSION

HISTORICAL NOTE

The German-Mexican Claims Commission functioned during a period of four years from March 6, 1926, to March 5, 1930. Decisions were rendered in respect of seventy-two claims, the amounts awarded aggregating the sum of 508,912.50 pesos. [1]

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[1] Memoria, 1929-1930, pp. 598 *et seq.*

BIBLIOGRAPHY

Convention of March 16, 1925: L.N.T.S., Vol. 52, p. 94; State Papers, Vol. 122, 1925, p. 686; de Martens, 3d Ser., Vol. 15, p. 83.

Convention of December 20, 1927: L.N.T.S., Vol. 79, p. 230; State Papers, Vol. 127, 1927, Pt. 2, p. 572; de Martens, 3d Ser., Vol. 23, p. 720.

Convention of December 15, 1928: A. H. Feller, p. 454.

Convention of August 14, 1929: A. H. Feller, p. 455.

Other references: Memoria, 1925-1926, p. 49; Memoria, 1926-1927, p. 210; Memoria, 1927-1928, p. 532; Memoria, 1928-1929, Vol. 2, p. 712; Memoria, 1929-1930, Vol. 1, p. 598.

Feller, A. H., "The German-Mexican Claims Commission", Am. J. Int. Law, Vol. 27, 1933, p. 62.

Conventions

CONVENTION BETWEEN GERMANY AND THE UNITED MEXICAN STATES RELATING TO THE COMPENSATION TO BE GRANTED TO GERMAN NATIONALS FOR DAMAGE SUFFERED ON THE OCCASION OF THE REVOLUTIONARY DISTURBANCES IN MEXICO

Signed at Mexico, March 16, 1925 [1].

The President of the German Reich, of the one part, and the President of the United States of Mexico, of the other part, acting on behalf of their respective countries, have decided, in view of the voluntary proposal made by the latter to the German Government on July 14, 1921, with a view to the pecuniary compensation of German nationals for damage and loss suffered by reason of revolutionary acts committed between November 20, 1910 and May 31, 1920, inclusive, to conclude an Arrangement on this question. For this purpose they have appointed as their Plenipotentiaries:

The President of the German Reich: M. Eugen Will, Envoy Extraordinary and Minister Plenipotentiary in Mexico;

The President of the United States of Mexico: M. Aarón Sáenz, Secretary of State and Minister for Foreign Affairs;

Who, having communicated their full powers found in good and due form, have agreed upon the following provisions:

Article I

All the claims specified in Article IV of the present Arrangement shall be submitted to a Commission consisting of three members, to be appointed, one by the President of the German Reich, another by the President of the United States of Mexico and the third, who shall preside over the Commission, jointly by the two Presidents. Should the latter not reach an agreement upon this matter within two months reckoned from the date of the exchange of the instruments of ratification, the Chairman of the Commission shall be appointed by the President of the Governing Body of the Permanent Court of Arbitration at The Hague. The request for such appointment must be addressed by the two Presidents to the President of the above-mentioned body within a month; after the expiry of this period it must be addressed by the President more immediately concerned. In no case may the third arbitrator be a German or a Mexican or a national of a country which has claims against Mexico such as form the subject of the present Arrangement.

In the event of the death of a member of the Commission, or should a member be prevented from discharging his duties, or for some reason abstain from doing so, he shall immediately be replaced in accordance with the same procedure as is followed in his appointment.

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[1] Source: L.N.T.S., Vol. 52, 1926, p. 105. Translation by the Secretariat of the League of Nations.

Article II

The members of the Commission thus appointed shall meet at Mexico City within four months of the exchange of the instruments of ratification of the present Arrangement. Before entering upon his duties, each member of the Commission shall make a solemn signed declaration in which he undertakes to examine carefully all claims submitted and to give an impartial decision in conformity with the principles of equity, taking into account the fact that Mexico desires to compensate the victims of her own accord, and not because any obligation to do so could be derived from the provisions of Article XVIII of the Treaty of Friendship, Commerce and Navigation in force between the German Reich and the United States of Mexico. It shall, therefore, be sufficient to prove that the alleged damage has been suffered and that it may be attributed to one of the causes mentioned in Article IV of the present Arrangement for Mexico to be prepared voluntarily to accord compensation.

The foregoing declaration shall be included in the Minutes of the Commission.

The Commission shall fix the date and place of its subsequent meetings.

Article III

The German Reich appreciates the friendly attitude adopted by the United States of Mexico in consenting to its responsibility being fixed for the purposes of the present Arrangement only, in accordance with the principles of equity, and in refraining from basing a dismissal of these claims on Article XVIII of the Treaty of Friendship, Commerce and Navigation now in force between the two countries and signed on December 5, 1882, at Mexico City. Accordingly, the German Reich solemnly declares that it agrees that the present Arrangement shall not modify the Treaty in question either wholly or in part or either tacitly or expressly, and that it undertakes not to refer to the present Arrangement as a precedent.

Article IV

The Commission shall recognize all claims against Mexico for loss or damage which German nationals or companies, undertakings, associations or German legal persons shall have suffered, and for loss or damage which shall have been suffered by German nationals in companies, associations or other grouped interests, provided that in this case the share of the victim in the total capital of the company or association to which he belonged prior to the time at which the damage or loss was incurred, amounted to more than 50 per cent., and provided also that the Commission is furnished with evidence of the surrender of the claimant's proportionate share in the loss or damage as a member of such company or association. The loss or damage referred to in the present Article must have been caused between November 20, 1910 and May 31, 1920 inclusive, by the following forces:

(1) By the forces of a *de jure* or *de facto* Government;

(2) By revolutionary forces which as the result of victory have established a *de jure* or *de facto* Government, or by counter-revolutionary forces;

(3) By forces constituting scattered remnants of the troops mentioned in the previous paragraph, up to the time when the *de jure* Government was established through the termination of a revolution;

(4) By disbanded forces of the Federal Army;

(5) By insurrections or uprisings or by other revolutionary forces than those mentioned in paragraphs 2, 3 and 4 of the present Article or by robber bands, if it can be proved in each case that the competent authorities omitted to

take reasonable measures to suppress such insurrections, uprisings, mutinies or acts of brigandage, or to punish the offenders, or if it is proved that the authorities were responsible for some other act of omission.

The Commission shall also recognize claims for loss or damage caused by acts of the civil authorities, but only if they can be attributed to revolutionary events and disturbances occurring in the period referred to in the present Article and if they can be attributed to one or other of the forces mentioned in paragraphs 1, 2 and 3 of the present Article.

Article V

The Commission shall fix its own rules of procedure within the limits of the provisions of the present Arrangement.

Each Government may appoint a representative as well as advisers, who may submit to the Commission verbally or in writing such evidence and material as they may consider necessary to adduce in support of claims or against them.

The Commission shall take its decisions by a majority vote. The Chairman shall have a casting vote.

Spanish or English shall be employed both in the proceedings of the Commission and in its decisions.

Article VI

The Commission shall keep an exact record of all claims and cases submitted to it and also of the Minutes of their proceedings with corresponding dates.

For this purpose each Government shall appoint a Secretary. The said Secretaries shall be subordinate to the Commission and comply with its instructions.

Each Government may also appoint and employ any assistant secretaries that it may deem necessary. The Commission may also appoint and employ any auxiliary personnel which it may require in order to discharge its mission.

Article VII

In view of the fact that the Mexican Government desires to arrive at a friendly settlement of the claims specified in Article IV and to accord to the claimants fair compensation for the damage and loss which they have suffered, it is decided that the Commission shall not dismiss or reject a claim simply for the reason that the legal remedies had not all been sought before the claim was submitted.

For the purpose of determining the amount to be granted as compensation for material damage, the basis taken shall be the value given by the persons concerned to the fiscal authorities, except in very special cases deemed to be such by the Commission.

The amount of compensation for personal damage shall not exceed the largest compensation granted by Germany in similar cases.

Article VIII

All claims must be submitted to the Commission within six months from the date of its first meeting, except in certain special cases, when the majority of the members of the Commission consider the reasons given for the delay satisfactory; the period within which these exceptional claims may be submitted must not exceed the ordinary time-limit by more than two months.

The Commission shall hear, examine and decide upon all claims submitted to it within two years of the date of its first meeting.

Three months after the first meeting of the members of the Commission, and every two months subsequently, the Commission shall submit to each Government a report setting forth in detail the work that has been accomplished and containing a list of the claims submitted, dealt with and decided upon.

The Commission shall give its decision upon each claim submitted to it within six months of the date on which the proceedings regarding the said claim are concluded.

Article IX

The High Contracting Parties undertake to regard the Commission's decisions upon each claim dealt with as final and to give full legal effect to each separate decision. They also agree that the result of the work of the Commission shall be regarded as a full, comprehensive and final settlement of all claims against the Mexican Government, on whichever of the grounds enumerated in Article IV of the present Arrangement these claims may have been based. Finally, they agree that from the moment the Commission has concluded its work, any claim of the kind mentioned, whether submitted to the Commission or not, shall in future be regarded as finally and irrevocably settled, provided, however, that those claims submitted to the Commission have actually been examined and decided upon.

Article X

The form in which the Mexican Government shall pay compensation shall be fixed by the two Governments as soon as the Commission has concluded its work. Payments shall be made by the Mexican Government to the German Government in gold or in an equivalent currency.

Article XI

Each Government shall pay the salaries of its own member of the Commission and of its personnel.

The general expenses of the Commission and the salary of the third member shall be borne by the two Governments in equal shares.

Article XII

Claims submitted by German nationals to the National Claims Commission in accordance with the Decree of August 30, 1919, and the regulations in execution thereof, shall be subject to the following provisions:

I. In so far as they have been decided upon and not disputed by the claimants within the time-limit fixed by law, they shall come under Article IX of the present Arrangement and their payment shall be regulated in accordance with the terms of Article X.

II. In so far as they have been decided upon but have been disputed by the claimants in virtue of Article XII of the said Decree, they shall, in execution of that Decree, be submitted for confirmation, modification or annulment of the decision to the Commission appointed in accordance with the present Arrangement.

III. In so far as they are under consideration and not yet decided upon they shall be submitted to the Commission established by the present Arrangement and be subject to the terms of this Arrangement.

Article XIII

The present Arrangement shall be drawn up in German and Spanish and it is agreed that, if any doubt arises regarding its interpretation, the Spanish text shall be authentic.

Article XIV

The High Contracting Parties shall ratify the present Arrangement in conformity with their Constitutions. The exchange of the instruments of ratification shall take place at Mexico City as soon as possible, and the Arrangement shall enter into force on the publication of the exchange of the instruments of ratification.

In faith whereof, the respective Plenipotentiaries have signed the present Arrangement and have thereto affixed their seals.

Done in duplicate at Mexico City, March the sixteenth, nineteen hundred and twenty-five.

(Signed) EUGEN WILL
(Signed) AARÓN SÁENZ

CONVENTION BETWEEN GERMANY AND THE UNITED MEXICAN STATES

Signed December 20, 1927[1]

The German Reich and the United States of Mexico, considering that the Commission appointed in conformity with the Arrangement of March 16, 1925, has been unable to complete its work within the period provided for by the aforesaid Arrangement, have agreed to conclude the present supplementary Agreement, and have for this purpose appointed as their Plenipotentiaries:

The President of the German Reich: Herr Eugen Will, Envoy Extraordinary and Minister Plenipotentiary at Mexico City;

The President of the United States of Mexico: Don Genero Estrada, Under-Secretary of State and Head of the Secretariat for Foreign Affairs;

Who, having communicated their full powers found in good and due form, have agreed upon the following Articles:

Article 1

In virtue of the present Agreement, the Commission shall, within a period of nine months as from March 6, 1928, hear, examine and settle the claims forming the subject of the Arrangement dated March 16, 1925, which have been submitted in conformity with Articles VIII and XII of the aforesaid Arrangement and upon the conditions laid down therein.

Article 2

All the provisions of the Arrangement dated March 16, and of the Regulations of Execution dated March 6, 1926, shall, in as far as they are not modified by the provisions of the present Supplementary Agreement, remain in force.

[1] Source: L.N.T.S., Vol. 79, 1928, p. 232. Translation by the Secretariat of the League of Nations.

Article 3

The present Agreement shall be drafted in German and Spanish. It shall be understood that, in case of doubtful interpretation, the Spanish text shall be authentic.

Article 4

The High Contracting Parties shall ratify the present Agreement in conformity with the provisions of their respective Constitutions.

The exchange of the instruments of ratification shall take place at Mexico City as soon as possible, and the Agreement shall enter into force as from the exchange of the aforesaid instruments.

In faith whereof the Plenipotentiaries of the two Parties shall sign the present Agreement and shall affix thereto their seals.

Done in duplicate at Mexico City, the twentieth day of December, one thousand nine hundred and twenty-seven.

(L. S.) EUGEN WILL
(L. S.) G. ESTRADA

CONVENTION BETWEEN GERMANY AND THE UNITED MEXICAN STATES

Signed December 15, 1928 [1]

The United States of Mexico and the German Reich, considering that the Commission has been unable to complete its work within the period provided for under Article 1 of the Supplementary Convention of 20 December 1927, have agreed to conclude the present Convention and have for this purpose appointed as their Plenipotentiaries:

The President of the United States of Mexico: Señor Genaro Estrada, Under-Secretary for Foreign Affairs, in charge of the Department;

The President of the German Reich: Mr. Eugen Will, Envoy Extraordinary and Minister Plenipotentiary in Mexico;

Who, having communicated their full powers found in good and due form, have agreed upon the following Articles:

Article 1

The Supplementary Convention to the Claims Convention between the United States of Mexico and the German Reich dated 16 March 1925 is hereby extended for a period of nine months as from 6 December 1928, and all the provisions of the said Supplementary Convention which are not modified by the present Convention shall remain in force.

Article 2

The present Convention is drafted in both German and Spanish, and it is agreed that in case of doubt regarding its interpretation the Spanish text shall be authentic.

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[1] Source: A. H. Feller, pp. 454-455. Translation by United Nations Secretariat.

Article 3

The High Contracting Parties shall ratify the present Convention in conformity with the provisions of their respective Constitutions.

The exchange of the instruments of ratification shall take place at Mexico City as soon as possible, and the Convention shall enter into force as from the exchange of the aforesaid instruments of ratification.

In witness whereof the respective Plenipotentiaries shall sign the present Convention, affixing thereto their seals.

Done in duplicate at Mexico City, the fifteenth day of December, one thousand nine hundred and twenty-eight.

(L.S.) G. ESTRADA
(L.S.) EUGEN WILL

CONVENTION BETWEEN GERMANY AND THE UNITED MEXICAN STATES

Signed August 14, 1929 [1]

The United States of Mexico and the German Reich, considering that the Commission has been unable to complete its work within the period provided for under Article 1 of the Supplementary Convention of 15 December 1928, have agreed to conclude the present Convention and have for this purpose appointed as their Plenipotentiaries:

The President of the United States of Mexico: Señor Genaro Estrada, Under-Secretary for Foreign Affairs, in charge of the Department;

The President of the German Reich: Mr. Erwin Poensgen, German *Chargé d'affaires;*

Who, having communicated their full powers found in good and due form, have agreed upon the following Articles:

Article 1

The Supplementary Convention to the Claims Convention between the United States of Mexico and the German Reich dated 16 March 1925 is hereby extended for a period of six months as from 6 September 1929, and all the provisions of the said Supplementary Convention which are not modified by the present Convention shall remain in force.

Article 2

The present Convention is drafted in both German and Spanish, and it is agreed that in case of doubt regarding its interpretation the Spanish text shall be authentic.

Article 3

The High Contracting Parties shall ratify the present Convention in conformity with the provisions of their respective Constitutions.

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[1] Source: A. H. Feller, pp. 455-456. Translation by United Nations Secretariat.

The exchange of the instruments of ratification shall take place at Mexico City as soon as possible.

In witness whereof the respective Plenipotentiaries of the two Parties shall sign the present Convention, affixing thereto their seals.

Done in duplicate at Mexico City, the fourteenth day of August, one thousand nine hundred and twenty-nine.

(L.S.) G. ESTRADA

(L.S.) ERWIN POENSGEN

PARTIES: Germany, United Mexican States.

SPECIAL AGREEMENT: March 16, 1925.

ARBITRATORS: Miguel Cruchaga Tocornal (Chile), Presiding Commissioner, Siegfried Hofman, German Commissioner, F. Iglesias Calderón, Mexican Commissioner.

REPORT: Memoria de la Secretaría de Relaciones Exteriores, 1926-1927 (Mexico, 1927.)

Decision

CARLOS KLEMP (GERMANY) *v.* UNITED MEXICAN STATES

(Opinion of Mexican Commissioner, January 19, 1927, opinion and judgment of Presiding Commissioner, April 11, 1927. Memoria de la Secretaría de Relaciones Exteriores, 1926-1927 (Mexico, 1927), pages 213-220 and 221-235, respectively.)

NATIONALITY, PROOF OF. Nationality is a fact which, if denied by respondent Government, must be proved.

DUAL NATIONALITY. A claimant possessing the nationality of both the espousing and respondent Governments has no standing.

CONSULAR CERTIFICATE OF REGISTRATION AS PROOF OF NATIONALITY. A consular certificate of registration has probative force only in the country of the consul that issues it and then only in accordance with its law. While upon occasion such a certificate may under domestic law constitute *prima facie* proof of nationality, it is not controlling upon an international tribunal which has an independent duty to determine for itself the nationality of claimants.

NATIONALITY TO BE PROVEN IN ACCORDANCE WITH LOCAL LAW. The nationality of a person is a part of his civil status and must be proven in the manner established by the local law of the country whose nationality the person in question claims. In the instant case, claimant was shown by the consular certificate of registration to have been born in Germany, whereas, under German law, the *jus sanguinis* applied and birth in Germany was without legal effect upon German nationality. *Held*, nationality of claimant not proven pursuant to German law. Claim *disallowed*.

Cross-reference: Annual Digest, 1931-1932, p. 247.

INTERLOCUTORY JUDGMENT

OPINION OF THE MEXICAN COMMISSIONER [1]

First Finding

On 23 August 1926 the German Agent presented Memorial No. 1 containing the claim of Señor Carlos Klemp for damages alleged to have been sustained in the town of San Gregorio Atlapulco, D.F.

Attached to the Memorial as the sole documentary evidence to prove that Señor Carlos Klemp was German was a certificate issued on 26 May 1926 by order of the German Minister in Mexico, worded as follows:

"The German Legation hereby certifies that Mr. Ludwig Karl Klemp, born at Bochum on the 29th day of November 1884, was enrolled in the register of this Legation on the 15th day of December 1905. ... It also declares that Mr. Klemp has always retained his German nationality.—Mexico, D.F.—26 May 1926, by order of the German Minister.—(Seal.) Signed:—Trompke—Vice Consul."

[1] The translation of the opinion of the Mexican Commissioner is by the United Nations Secretariat.

Second Finding

In a note dated 18 October 1926 the Mexican Agent raised the dilatory objection that the Tribunal had no jurisdiction, on the ground that the German nationality of the claimant was not proved, said Agent contending that the certificate presented by the other party was insufficient because documents intended to prove acquisition of nationality must be presented in the original for the Commission itself to examine and appraise, and estimates of them by officials of the Government of the claimant were insufficient.

Third Finding

On 11 November 1926 the German Agent presented a written Reply to the effect —

(a) That neither the Convention nor the Rules of Procedure of the Commission contained provisions concerning the nature or value of evidence, so that the Commissioners were therefore free themselves to weigh the evidence;

(b) That this was in accordance with the practice of most former international commissions, in particular that of 1868 between Mexico and the United States, which had accepted a declaration or oath of the claimant himself as sufficient evidence of nationality;

(c) That the certificate presented was an official document and should be accepted as conclusive evidence;

(d) That the objection should be disallowed, as the certificate proved the German nationality of Señor Klemp.

Fourth Finding

On 4 December last the Mexican Agent presented a rejoinder stating that the authenticity of the certificate was not questioned but that it proved only that Señor Klemp was enrolled in the register of the Legation, which was inadequate proof of nationality, because the fact of registration was not recognized by international law as a means of acquiring nationality and, furthermore, the registration would at most only indicate that the official responsible for it was satisfied of the nationality of the applicant for registration, but that in the Arbitration Commission the Commissioners themselves must be satisfied by examination of the documentary evidence of acquisition of nationality.

Fifth Finding

At the session of the Commission held on 10 and 11 January 1927, the two Agents agreed to dispense with the oral hearing referred to in article 19 of the Rules as the final stage of a dilatory objection. The case has therefore reached the point at which the following interlocutory judgment can be pronounced.

First Consideration

The question of the nationality of claimants is of fundamental and primary importance, as it determines whether the Arbitration Commission has jurisdiction. Commissioners are obliged to examine and settle this question first, because otherwise they would run the risk of giving a judgment *ultra vires*, which would be null for having exceeded the terms of the *compromis* which limits the jurisdiction of the Tribunal to claims "for loss or damage sustained by *German citizens*".

Moreover, conformably to the objection, it is the duty of the Commissioners carefully to examine all the documents presented by the parties, and above all to satisfy themselves that each of the claimants is in fact German.

For these reasons, the value of documents purporting to prove acquisition of nationality by claimants must be assessed by the Commissioners personally, and they cannot divest themselves of this duty or rely upon the examination of these documents by consuls, ministers or other officials or agents of the government of a claimant. Otherwise a matter of fundamental importance, the issue of nationality, would be withdrawn from the jurisdiction of the Commission and left to the discretion of the claimant state to settle, which could not be permitted.

The jurisdiction of Arbitration Commissions in this important matter has been so extended that it is now recognized that they may consider the substance of judgments on naturalization pronounced by courts of countries which have submitted to arbitration, even when there has been no appeal against such judgments and, by the jurisprudence of the country concerned, they are considered final. Ralston, in his work *International Arbitral Law and Procedure*, page 166 [1], cites various cases, among them that of Medina and another, in which the American Commissioner Lowndes and the Spanish Commissioner the Marquis de Potestad laid down this principle in unequivocal terms.

Second Consideration

It is not enough for the claimant government to state that a given person has this or that nationality, in order that the Arbitration Tribunal shall accept the statement without scrutiny. That principle has been consistently maintained. It will suffice to quote the opinions of Ralston and Borchard.

In the case of the heirs of Maninat, which was brought before the Franco-Venezuelan Commission of 1902, Count Peretti de la Rocca, the French Commissioner, stated the following opinion: "I am in the position to hold in justice that if the French Government considers an individual as French and grants him a certificate of French nationality, then that individual fulfils the conditions entitling him to protection under the provisions of the Protocol of 19 February 1902." Subsequently the Umpire of the Commission, Mr. Jackson H. Ralston, a well-known United States authority on international arbitration, decided the point as follows:

"The Umpire maintains that the burden of proof of this essential fact rests upon the claimant; that nationality may not be presumed or conjectured, but must be proved. There is no need to cite authority for any of these propositions; they are elementary." (*Report*, page 44). In other words, the Umpire upheld the competence of the Court to inquire into the question of nationality and not to accept the mere affirmation of the French authorities.

Edwin, L. Borchard, in his work *Diplomatic Protection of Citizens Abroad*, pages 486 and 487, states: "There has been some expression of opinion in the Department of State to the effect that the presentation of a claim, on behalf of a claimant alleged to be an American citizen, to an international commission should preclude all examination by the commission into the citizenship of the claimant, on the ground that the Department's determination should be considered final. International commissions, however, have freely assumed the right to pass upon the citizenship of a claimant, testing it in first instance by the municipal law of the claimant's country. For example, when Sir Edward Thornton became Umpire of the Mixed Claims Commission between the United States and Mexico under the Treaty of July 4, 1868, he acted on the principle that the term 'citizenship' in the convention meant citizenship according to the law of the contracting parties and declined to recognize a declaration of intention or domicile, singly or together, as conferring citizenship."

[1] Translator's note. *The Law and Procedure of International Tribunals*, revised edition (Stanford, 1926), p. 176-177 (?).

Third Consideration

It is settled international law that nationality is a fact which must be proved, and that the burden of such proof is on the claimant. This will be seen from the following opinions:

Holtzendorf, in his *Elements of International Law*, section 31, states that "it is necessary that there should be no doubt concerning the nationality of the claimant against a wrong; and that if any question concerning it does arise, the *onus probandi* rests upon the claimant".

The Anglo-Chilean Commission (1884-1887), in judgments Nos. 6 and 86, decided that evidence of nationality of claimants must be presented as a condition precedent to the hearing of the claim.

The Italo-Chilean Tribunal decided similarly in judgments Nos. 26, 30, 31, 32, and especially in No. 47, which contains several important Considerations, the last of which establishes that the Tribunal may itself hold, without a motion by the party concerned, that it has no jurisdiction.

Fiore, in his *Private International Law*, Vol. II, section 354, says: "Citizenship, like any other legal incident, must be proved, and the person interested in asserting and establishing that a certain citizenship should be attributed to him must prove it as a fact."

Fourth Consideration

Concerning proof of the nationality of claimants, the rule laid down by Fiore, based on the universally recognized principle of *locus regit actum*, should be accepted. This rule, accepted by the German Agent in his Reply, establishes that "nationality must be proved according to the law of the country in which the party concerned claims to have acquired citizenship when proof of acquisition of citizenship is required, and according to the law of the country of origin when proof of loss of citizenship is required". (Fiore, *loc. cit.*)

The certificate presented by Mr. Carlos Klemp proves that he is enrolled in the register of the German Consulate. Therefore, inquiry should be made whether by German law enrolment in a Consular register is conclusive proof of acquisition of German nationality.

According to the principles of international law Mr. Carlos Klemp can have acquired German nationality only by birth within German territory, or by being the son of German parents and opting for German nationality, or by naturalization. In the two former cases the issue is his civil status.

According to the German Civil Code, the civil status of an individual is proved by entries in the Register of Civil Status, and no German law has been cited by the Agent of the claimant Government according to which the civil status of persons can be proved in German courts by consular registration certificates.

Naturalization must be proved by presentation of the original document issued for the purpose by the Government concerned, in accordance with the principles of international law, for in this case also the German Agent cited no law obliging German courts to accept consular registration certificates as proof of naturalization.

Furthermore, there is no known German law stating that nationality is acquired by the mere fact of registration at a consulate or legation of the German Republic.

It must therefore be concluded that the certificate accompanying Memorial No. 1 is insufficient proof of the German nationality of Señor Carlos Klemp.

Fifth Consideration

Concerning the arguments adduced by the German Agent in his written Reply, the following points should be noted:

It is true that neither the Convention nor the Rules of Procedure of the Commission contain provisions concerning the nature or value of evidence; but this does not mean that the Commissioners have absolute discretion to estimate the value of evidence, for such cases are governed by international law, which is true equity and which, where proof of nationality is involved, invokes the national law of the claimant country.

It is true that the Mexican-United States Commission set up in 1868 established by an Order of 21 January 1870 rules for proving nationality or citizenship, which stated that a declaration on oath by the claimant, indicating the place and date of his birth, sufficed. But it is equally true that the Order of 21 January 1870, or rather, all the rules approved by the 1868 Commission concerning evidence and the authenticity of documents, were revoked by the Commission itself because it was not empowered or entitled to make rules on these matters. Consequently the references made by the German Agent to the 1868 Commission are valueless, the more so as, the Mexico-German Commission having established no special rules concerning proof of nationality, there is no analogy between the cases.

The 1868 Commission made many awards rejecting claims on the ground that the proof of the nationality of the claimants by indirect means, such as consular certificates, was insufficient. The following are instances, *inter alia: Tomás Warner* v. *United States of America* (*Moore*, pages 2533 and 2539); *Spencer* v. *Mexico* (*Moore*, page 2778); *Barrios* v. *United States of America;* and the opinion of Borchard, who states in paragraph 212 of the above-mentioned work that the Claims Commission, under the Treaty of 4 July 1868 between Mexico and the United States, held that "recognition of citizenship by a consul or a certificate from a consul, or aid furnished by the American Minister, were held each as insufficient evidence of citizenship". In addition, Wadsworth, the American Commissioner on the 1868 Commission, in casting his vote concerning the negotiations following raids by bandits, stated that the Commission had been excessively strict in regard to nationality. In the case of *Brockway* v. *Mexico*, Umpire Thornton rejected a consular certificate as inadequate proof of nationality (*Moore*, page 2534).

Sixth Consideration

With regard to consular certificates in particular, it should be stated that, generally speaking, they have been considered insufficient proof of nationality, not only because they constitute indirect evidence inadmissible by commissions arbitrating on matters of so great importance, but also because admission of certificates of this kind might give rise to insoluble conflicts in cases of dual citizenship. Both the doctrine and the jurisprudence in these cases have been to reject the claims and, since it is necessary to prove positively the existence of dual citizenship, and that cannot be done without a thorough inquiry into nationality, which cannot be made if the only evidence is in the form of consular certificates presented by each party claiming a given nationality.

Consequently, the doctrine most nearly conforming to universal jurisprudence supports the decision that the German Agent may not confine himself to presenting a certificate issued by the diplomatic or consular authority of his nation, but must exhibit to the Commission the actual documents in virtue of which the diplomatic or consular authorities registered the claimant as a national and issued the appropriate certificate to him.

On page 8 of his written Reply, the German Agent cites the Decree of 6 July 1871 for the purpose of interpreting the German Constitutional Act of 8 November 1867 with regard to the reorganization of the Federal consulates. The Decree provides that "before making an entry in the register, the consul must be satisfied that the person in question possesses the nationality of the German Reich or of one of the Federal States of Germany. This can be proved only by presenting a valid national passport or a *Heimatschein* (certificate of origin). If doubts arise concerning the validity of these documents, the Chancellor of the German Reich or the government of the State concerned must be consulted and enrolment in the register postponed until their reply is received".

This proves that, even for mere enrolment in the register, documents must be presented to prove the origin and nationality of the person requesting enrolment. Those are the documents which must be presented to this Commission for examination, provided that they contain direct proof of acquisition of German nationality by the claimant—for instance, a birth certificate issued by the official in charge of the Civil Register. When these documents required by consuls for enrolment in their registers do not directly prove acquisition of nationality—e.g., a passport—they are no sufficient evidence of the nationality of claimants before this Arbitration Tribunal, even though sufficient for consuls, as the latter, in case of doubt, may consult the Chancellor of the German Reich and postpone enrolment in the register, whereas this Commission cannot consult either of the two claimant Governments or postpone its decisions.

Seventh Consideration

Registers are kept at Legations or Consulates mainly for statistical purposes and in order to have at hand a record for rapid consultation in cases where persons are in urgent need of protection. (Borchard, *op cit.*, page 516, final paragraph.) It is easily understandable that such matters being less important and fundamental than the examination of the nationality of claimants before a Mixed Commission of Arbitration seeking indemnities from a foreign Government, similarly the evidence of nationality required by consuls for registration will necessarily also be much slighter.

While the fact of enrolment in the register of a consulate might be considered equivalent to a declaration of intention to acquire nationality, arbitration tribunals have uniformly decided that declarations of intention are insufficient for acquiring and proving nationality (Ralston, *The Law and Procedure of International Tribunals*, page 166, section 300).

Eighth Consideration

As the German nationality of the claimant is not proved, the Court is not competent to deal with the claim presented on behalf of Señor Carlos Klemp in accordance with Articles I and IV of the Convention of 16 March 1925 between Mexico and the German Republic.

In view of all the foregoing considerations, the undersigned considers that the objection based on lack of jurisdiction should be upheld and that the Mexican Agent is not obliged to reply to Memorial No. 1 presented by the German Agent on behalf of Señor Carlos Klemp.

Mexico City, 19 January 1927

(Signed): FERNANDO IGLESIAS CALDERÓN

Opinion and Decision of the Presiding Commissioner [1]

ANTECEDENTS

Memorial No. 1 of the German Agent submits the claim of Señor Carlos Klemp for damages which he alleges to have suffered in the town of San Gregorio, Atlapulco, D.F.

The Mexican Agent has entered a dilatory exception, that the Mixed Commission is without power to act in the absence of proof of the German nationality of the claimant. He qualifies as insufficient proof of nationality the certificate that accompanies the Memorial, and which was executed by the German Vice-Consul in Mexico; a certificate in which it is stated that Klemp, born in Bochum, November 29, 1884, was inscribed in the Register of the German Legation on December 15, 1905, and in which it is also stated that he has always preserved his German nationality. The Mexican Agent maintains that the original documentary proof of nationality must be presented direct to the Commission in order that the Commission may consider it and pass upon its legal value, the estimation by the functionaries of the complaining government not being sufficient. (Brief of the Mexican Agent of October 18, 1926.)

In his Reply, the German Agent observes that, in the absence of rules, in the Claims Convention as well as in the Regulations of the Mixed Commission, governing the submission of proof of nationality, the Commission is to judge the merits of the proof that is adduced and that, inasmuch as the Consular Certificate presented is a public document, the Commission must give it complete probatory value. (Reply of the German Agent of November 11, 1926.)

In his Answer, the Mexican Agent observes that, without doubting the authenticity of the certificate, it only proves that Klemp is inscribed in the Register of the Legation, which in itself is not sufficient proof of nationality, not only because the act of registering is not the means recognized by international law for acquiring nationality, but also, because, in the best of cases, such registration would only indicate that the functionary, charged with its keeping, is convinced of the nationality of the applicant for registration; and before the Mixed Commission such a conviction must give way to that formed by the Commissioners through an examination of the documents that prove the acquisition of nationality. (Answer of the Mexican Agent of December 9, 1926.)

The parties having waived the oral hearing provided for in article 19 of the Regulations by which the Mixed Commission is governed, it is necessary to pass upon the dilatory exception that has been entered. The German and Mexican Commissioners having failed to reach an agreement upon the Resolution, which should be made in this instance, it therefore corresponds to the undersigned to render such verdict.

OPINION OF THE GERMAN COMMISSIONER

Although various international mixed commissions have decided that, in the absence of suspicious circumstances, the mere presentation of the claim by the Agent is sufficient to prove the nationality of the claimant, the German Commissioner does not adhere to such conception.

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[1] The following portion of the translation is from Am. J. Int. Law, Vol. 24, 1930, pp. 611-624.

After establishing that the question of nationality must be decided according to the local law of the country of the claimant, and considering that the probative merit of the inscription in the Register is denied, the German Agent has made, in his Opinion and Award, an examination of the principal German laws concerning the matter. (Draft of Resolution of the German Commissioner.)

The German legislation applies the system of *Lex sanguinis* in contraposition to the system of *Lex soli*. In consequence, he says, the fact that a person was born in German territory does not establish that he is of German nationality, but such nationality can only be accredited when the person dealt with was born of German parents, no matter whether the birth took place in German or foreign territory. (Article 39 of the Nationality Law.)

German legislation has provided for the *Heimatschein*, a certificate of origin, intended for use "during a sojourn in a foreign country". The high administrative authorities authorized to issue it, always before so doing, must make the necessary investigations as to the lineage and the nationality of the parents and of the ancestors of the solicitant.

There have been established also, since 1867, the Consular Registries, and the Regulation of 1871 provides that the Consuls, before making the registration, must assure themselves that the registrant is a German, and this fact can only be accredited upon the submission of a valid passport or of a *Heimatschein*.

According to the German Commissioner, the following are the rules that must control in the matter of nationality:

(a) German nationality, always, when not based on naturalization, marriage with a German, or the legitimization of an illegitimate child of a German, is based on origin from German parents, and not on the fact of having been born in German territory.

(b) Those coming within the exceptions indicated in the previous paragraph must exhibit their certificates of naturalization, marriage, or legitimization, as the case may be.

(c) In those cases in which the nationality is connected with the lineage of the individual, the proof of said nationality is made, with either the *Heimatschein* issued by the superior administrative authorities, or with the Certificate of Registration executed by the German Consuls, "in which, generally, an entry must only be made upon the presentation of a certificate of origin" *(Heimatschein)*. (Draft of Resolution of the German Commissioner.)

In the judgment of the German Commissioner, the Consular Certificate of Registration has the probative force of a public instrument, because such character is given it by paragraph 15 of the German Law of November 8, 1867, concerning the Consular Service. The German Commissioner adds, that the certificate is sufficient proof of nationality because, the matter of nationality being within the province of and confined to the internal law of the country of the claimant, it must be considered proven when it is so under the law of the country of which the claimant is a national.

The German Commissioner also bases his Opinion and Award upon, the benevolent practice that has been observed, in this respect, by previous mixed commissions. He cites the decisions reported by Moore *(International Arbitrations*, III, pp. 2155 and 2332), in which they accept, as sufficient proof of nationality, simply the affidavit of the claimant, or the mere certificate by the Governor of a Mexican State, notwithstanding the lack of authority of this latter functionary to issue documents of such a nature. (Moore, *International Arbitrations*, III, p. 2532.)

He invokes, finally, the doctrines supported in the works of König, *Handbuch des Deutschen Konsularwesens* (8th ed., pp. 251 *et seq.*); Borchard, *The Diplomatic Protection of Citizens Abroad* (New York, 1925, pp. 515 *et seq.*), and the

article of Jordan "*Des preuves de la Nationalité et de l'Immatriculation*", *(Revue de Droit International et de Législation Comparée*, 1907, pp. 267 to 295).

And concludes, after acknowledging that the "prima facie" authority of the certificate can be nullified by better evidence to the contrary, adduced by the Agent of the objecting country, that it is his opinion and judgment that the dilatory exception must be rejected.

OPINION OF THE MEXICAN COMMISSIONER

The probative documents of nationality of the claimants must be weighed, by the Commissioners, personally, for such is their unavoidable obligation, and they cannot abide by the examination that has been made by the Consuls, Ministers and other functionaries and agents of the complaining government. (Interlocutory Resolution.)

The privative jurisdiction of mixed commissions has been carried to the extreme of establishing their right of reviewing the decisions upon naturalization rendered by the tribunals of the countries that are parties in the arbitration. (See: Ralston, *Law and Procedure of International Tribunals*, Ed. 1926, pp. 176 and 177.)

The Mexican Commissioner supports his opinion that a declaration to such effect by the complaining government is not sufficient proof of nationality by citing the findings of Umpire Ralston, in the case of the heirs of Maninat (French-Venezuelan Commission of 1902, Rapport, p. 44); of Umpire Thornton *(Mixed Commission between Mexico and the United States of 1868*, Borchard, pp. 486 and 487), of this same Umpire in the *Brockway* case (Moore, *op. cit.*, p. 2534), and analogous decisions in the cases of *Warner* v. *United States of America*, *Spencer* v. *Mexico*, *Barrios* v. *United States of America* (Moore, *op. cit.*, pp. 2533, 2535, 2539 and 2778.)

Applying the rule of *locus regis actum* it is found that the certificate exhibited by the claimant Klemp, proves that he is inscribed in the Consular Register; but examination must be made whether, according to the laws of Germany, this registration is proof of German nationality. The Mexican Commissioner maintains that no German law gives to the registration the character of proof of nationality. The civil status is proved, according to the Civil Code of Germany, by the acts of the Registry of the civil state.

The Mexican Commissioner calls attention to the fact that the consular certificates are not sufficient proof, not only because they constitute an indirect means, inacceptable to arbitral commissions, but because such acceptance might permit conflicts, impossible of solution, to arise in cases of double citizenship. The claims of an individual who has double citizenship, of the complaining country and of the defending country, have been constantly rejected, and mixed commissions could not do so unless they had the right to completely study the basic question of nationality.

The Mexican Commissioner adds, that the citation by the German Commissioner of the stipulation of the Regulation of the Consular Law providing that the Consul cannot proceed to inscribe in the Registry until there has been exhibited to him by the solicitant, either a passport or a *Heimatschein*, strengthens his conviction that such documents must be presented to the Mixed Commission for their examination.

On the other hand, the consular registrations of nationals residing abroad are principally for statistical purposes, and are utilized in urgent cases of protection. (Borchard, *op. cit.*, p. 516.) Feeling those objects to be of less importance than the submission of a claim to a government before an international mixed commission, it is readily comprehended that the examination of nationality,

and of the proof required by the Consul before proceeding to register, is very cursory.

Upon these considerations, the Mexican Commissioner is of the opinion, and decides, that the dilatory exception of incompetence must be allowed.

Opinion of the Presiding Commissioner

Precedents established by other tribunals

In determining cases similar to this, Arbitral Commissions have adopted entirely divergent criterions. It has not been possible to find any decision which, by its reasoning and amplitude, may be considered as setting a precedent in the matter.

In view of such a situation, the Umpire has deemed it useful to review in this opinion those precedents, opinions and legal precepts which are most applicable to the case at hand.

In the Spanish-Venezuelan Mixed Commission, the Umpire decided, in the case of Esteves, a naturalized Spaniard, that the enrolment in consular registries of Spanish residents, and the certificate that evidences it "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". In reaching this decision he took into consideration: (1) that the Spanish Law, 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 agents," who will enrol them in the Register of Spanish Residents, and (2) that the Spanish Consular Regulation, articles 26 and 32, empower the Spanish Consuls 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. (*Esteves* v. *Venezuela*, *Venezuelan Arbitrations of 1903*, Washington, 1904, pp. 922-923.)

In the General Claims Commission between the United States and Mexico *(Parker* v. *Mexico)* it was established that the birth certificate "should be admissible, and while desirable, it should not constitute an exclusive proof. The fact of nationality should be proven as any other fact".

Citizenship must be alleged in the Memorial and, in each case, if denied, it must be proven. (Ralston, *op. cit.*, p. 173.)

When there is no dispute or cause for suspicion, the mere presentation of the claim by the Agent of the complaining country has been considered as satisfactory. (*Tipton* v. *Venezuela*, Ralston.—*op. cit.* p. 173.) Nevertheless, in the Tipton case, Umpire Thornton held that "the commission has certainly a right to expect more positive proof of citizenship than the memorial signed by Tipton and others, and the circumstance of the United States Minister's having helped them in their difficulties". (Ralston.—*op. cit.*, p. 174.)

The general rule adopted by mixed commissions has been the following: When the claimant is a citizen of both countries (complainant and defending) the claim has no place because neither country has the power of imposing its laws on the other to establish a right. When the rights are equal the claim cannot proceed. (Ralston, *op. cit.*, p. 172.)

Nevertheless, the British-American Mixed Commission of 1871, in the Halley case, decided, contrary to the vote of the American Commissioner, that an American-born child of an English father was able, as the last beneficiary, to recover against the United States. (Moore, *op. cit.*, p. 2241.)

In the *Brissot* case, United States and Venezuelan Mixed Claims Commission, the Venezuelan Commissioner Andrade established the following principles: Every independent State has the right to determine who is to be considered as citizen or foreigner within its territory, and to establish the manner, conditions, and circumstances, to which the acquisition, or loss of citizenship, are to be subject. But for the same reason that this is a right appertaining to every sovereignty and independence, no one can pretend to give an extraterritorial authority to its own laws regarding citizenship, without violence to the principles of international law, according to which the legislative competence of each State does not extend beyond the limits of its own territory. Otherwise, anyone could be at the same time a citizen of two States, which is as inadmissible as not to be a citizen of any State at all. (Moore, *op. cit.*, p. 2457.)

In the *Brockway* case, the American Umpire Thornton held that a Consular Certificate that credited a claimant with American citizenship was insufficient proof. (*Brockway* v. *Venezuela*, Moore, *op. cit.*, p. 2334.)

A simple certificate of baptism was also held insufficient evidence of nationality because it was not proved that, although the person baptized had the same name as the claimant, that this certificate pertained to the claimant. (*Suarez* v. *Mexico*, Moore, *op. cit.*, p. 2449.) It has been decided, repeatedly, that a certificate of naturalization is not conclusive proof of citizenship before a court.

In the Fluties case, the American-Venezuelan Commission ruled that, although he was regularly naturalized, he had had no right to the naturalization and had, therefore, perpetrated a fraud upon the court which had naturalized him. The certificate of naturalization, it was added, is not conclusive, because the United States was not a party to the act. (*Venezuelan Arbitrations of 1903*, pp. 44 and 45.)

It was declared in this case, that the commission is an independent judicial tribunal possessed of all the powers, and is endowed with all the properties which should distinguish a court of high international jurisdiction, alike competent, in the jurisdiction conferred upon it, to bring under judgment the decisions of the local courts of both nations, and beyond the competence of either government to interfere with, direct, or obstruct its deliberations. (Moore, *op. cit.*, p. 2599.)

In the *Medina* case, Umpire Bertinatti said, "to admit this (the certificates as absolute proof) would give those certificates in a foreign land or before an international tribunal an absolute value which they have not in the United States, where they may eventually be set aside, while Costa Rica, not recognizing the jurisdiction of any tribunal in the United States, would be left with no remedy. Moreover, this commission would be placed in an inferior position, and denied a faculty which is said to belong to a tribunal in the United States." (*Medina* v. *Costa Rica*, Moore, *op. cit.*, p. 2588.)

OPINIONS, LEGAL PRECEPTS AND JUDICIAL DECISIONS

The authority to maintain a Registry of Nationals has been granted to the Consuls only by certain nations, and although they are numerous, it cannot be said that this is a universal practice and, in consequence, a rule of international law.

Some countries have granted this authority to its consular functionaries recently. The United States instituted Registers of Nationals in its Consulates abroad only since 1907 (Borchard, *op. cit.*, p. 667), which gives greater force to what has been said in the previous paragraph.

The power of consular registration and of issuing copies of the entry must be taken in connection with the power of issuing certificates of matrimony, because both refer to acts of the civil status and to the exercise of administrative functions.

Marriages cannot be performed in consulates and legations but when the law of the country of the Consul or Agent permits it to be done; but the validity of marriages, in countries other than that of the Agent or Consul, depends upon general practice and the understanding these countries have of the doctrines of international law.

According to Westlake (*Traité de Droit International*, Oxford, 1924, page 302). "The general recognition of the international validity of marriages performed at consulates or legations finds no place among these doctrines."

The above-cited construction is confirmed by the Rules established in 1887 by the Institute of International Law, to govern the conflict of laws in matters of matrimony and divorce. In them, after declaring that it is enough, and is necessary, for the marriage to be valid everywhere, that the forms prescribed by the law of the place of celebration have been observed, they add that "it is desirable to admit, as a pretended exception, the validity of diplomatic and consular marriages, in the case where both contractants belong to the country of the Consulate or Legation." (*Institut de Droit International*, by James Brown Scott, 1920, p. 115.)

The League of Nations, Committee of Experts for the Progressive Codification of International Law, designated, in 1926, a sub-committee charged with considering the problems relative to nationality and with proposing solutions. Speaking of the proof of nationality, this sub-committee said in its report:

> Among others, there are some questions of form relative to proof of nationality which are of great practical importance in international relations and urgently require solution in order to improve the position—often a very precarious one—of persons required to furnish certificates constituting official and absolute proof of nationality. The system of registration, which is provided for by the laws of several countries (Belgium and Italy; and of the idea of a *casier civil* proposed in France) might be generalized by an international agreement; although it would not remove all difficulties, it would to some extent mitigate them. There could be no doubt of the practical importance of such a reform, which would have to be introduced into the internal law of each State. (Special Supplements to the *American Journal of International Law*, Vol. 20, July and October, 1926, p. 44.)

Article 12 of the Draft of a Convention that closes the report reads as follows:

> As between the contracting parties, nationality shall be proved by a certificate issued by the competent authority and confirmed by the authority of the State. The certificate shall show the legal grounds on which the claim to the nationality attested by the certificate is based. The contracting parties undertake to communicate to each other a list of the authorities competent to issue and to confirm certificates of nationality. (*Ibid.*, p. 48.)

The preceding shows clearly that, in the judgment of the sub-committee reporting, the Certificates of Consular Registration do not constitute proof of nationality. In order to constitute such proof, they need the confirmation of the authority of the State, and must contain the legal reasons on which the document is based. The simple copy of the entry inscribed in the Register does not constitute absolute proof.

The Grotius Society has recommended and suggested rules regarding compulsory registration, maintaining that by this means, the uncertainties at present obtaining in international relations would necessarily disappear. The recommendation alluded to says:

Registration only fixed nationality with regard to the State which introduces it. Were all States to adopt it, there would be a foundation for an international solution of all difficulties which exist at any uncertainty and universal agreement and practical uniformity. (*Transactions of the Grotius Society*, Vol. IV, "Report of the Committee on Nationality and Registration", p. 52.)

The system recommended by the Grotius Society has been adopted by English law in section I, 1. b. V. of the British Nationality and Status of Aliens Act, 1914, 1922.

On their part, the States that previously formed a part of the Austro-Hungarian Empire dealt with the problem in article 2 of the draft of a convention signed at Rome:

As between the high contracting parties, nationality shall be proved by a certificate issued by the authority competent under the law of the State concerned and countersigned by the authority to which the said authority is responsible. This certificate shall state on what legal basis the claim to the nationality which the certificate is intended to prove rests. Each of the high contracting parties shall, however, be entitled, whenever it considers it necessary, to require that the contents of the certificate shall be confirmed by the central authority of the State. (Draft Convention between the Austro-Hungarian Succession States, signed April 6, 1922.)

The international probative force of the acts of a notary, or other functionary that, according to the laws of his country, has the powers of a notary, must be considered in connexion with the arrangements of international conventions if there [are] any, and in the absence thereof, by the *lex fori*, without prejudicing that the form of such acts be considered by the *lex loci*. (*Institut de Droit International*, Scott, 1920, p. 225.)

In consequence of the preceding rules, consular certificates do not have, by themselves, sufficient probative force in countries other than that of the Consul that issues them, and even in the latter, are subject to such credit as may be given to them by its prevailing law.

By way of example, may be cited the faculty of the Consuls to license sailors. The certificate that they issue must contain the provisions upon which they are based, to indicate that their action is official and that they have jurisdiction. (Puente, *The Foreign Consul*, Chicago, 1926, p. 62.)

This certificate can be disputed before the courts because the Consul "has no power to authorize an illegal act". *Hall* v. *Cappell* (7 Wall. (U.S.) 553): *The Amado*, Newberry Adm. 400. (Puente, *op cit.*, p. 63.)

It may also be recalled, that a Consular Certificate has no weight before an Admiralty Court, because International Law only recognizes Consuls in commercial transactions, and not as functionaries invested with the authority of authenticating judicial proceedings. (*Catlett* v. *Pacific Insurance Company*, 1 Paine 394, Fed. Cas. 2,517, Puente, *op. cit.*, p. 63.)

In reviewing an appeal from the action of an inferior tribunal, the Court of Appeals of Kentucky reversed the judgment of the lower court and held, that a passport, issued by a United States Consul, only entitled the bearer to that courtesy and respect which are due to a citizen of the United States from foreign governments, through whose territories he might pass. "It was for that purpose alone they were given, and for no other purpose can they

be legitimately used. They certainly cannot, we think, be used as evidence in a court of justice, for the purpose of proving facts, of the character they were admitted to prove in this case.

"These facts, from their nature, were susceptible of being established by the testimony of witnesses, upon oath; and it is a settled rule, that for the establishment of facts of this sort, the sanction of an oath is indispensable; and, of course, the *ex parte* statement or certificate of any one, not upon oath, whatever may be his character or station, cannot be admitted as evidence of the truth of such facts. A consul, by the law of nations, is, no doubt, possessed of high and extensive powers; but he is not, properly speaking, a judicial officer; and it is accordingly held, that his certificate is not only not entitled to the character of a judgment, but that it ought not to be admitted as evidence of the fact therein stated." (Stowell, *Consular Cases and Opinions*, ed. 1909, p. 163.)

In some legislation this probative merit is restricted as occurs, for example, in the United States, where the passports are considered as intended for identification and protection in foreign countries, and not to facilitate entry into the United States, that matter being under the supervision of the Department of Labor. (Borchard, *op. cit.*, p. 510.) The instructions concerning passports prescribed by the Department of State, December 21, 1914, decrees that emergency passports and consular registration certificates should not be accepted as conclusive evidence of citizenship. (Borchard, *op. cit.*, p. 512), and it seems worthy of mention that even the passports that are issued by the State Department, after very careful consideration, have been held by local courts of the United States as insufficient judicial evidence of citizenship. (Borchard, *op. cit.*, p. 489.)

The Consular Certificates of Registration provide the registree a means of summarily proving his nationality to the authorities of the place where he is residing (Borchard, *op. cit.*, p. 516); but they cannot be considered as sufficient to prove nationality before an International Mixed Commission that takes jurisdiction independent of the territorial jurisdiction of the countries that subscribe to the pact of Arbitration. (Borchard, *op. cit.*)

Certificates of Consular Registration do not have the same effect in all countries which have authorized their issuance. Their fundamental purpose is to give the government of the consul information respecting the number and residence of its nationals abroad, and to permit the registree to manifest his desire to retain and maintain his original citizenship, and to afford an official record of his identity and political status to the consul and to the local authorities. (Borchard, *op. cit.*, p. 667.)

As evidence that the probative value of consular certificates is not incorporated among the accepted principles of international law, the circumstance must be cited that some treaties explicitly authorize such character of proof. Thus, the Treaty of 1863 between Spain and the Republic of Argentine provides in article 7 that the simple inscription in the Register of Nationals of the Legation or Consulate of either country will be sufficient formality to make the respective nationality certain.

OPINION OF THE PRESIDING COMMISSIONER

Whereas,

1. The nationality of a person is an integral part of his civil status and must be proven in the manner established by local law of the country whose nationality the interested party claims, is a principle accepted by both parties to the present claim and is in accord with the general doctrine of International

Law. (Fiore, *Derecho Internacional Privado*, Sec. 354; Borchard, *Diplomatic Protection of Citizens Abroad*, p. 486; Ralston, *The Law and Procedure of International Tribunals*, 1926 ed., p. 160.)

2. In accordance with the most frequent provisions of different laws [of Germany], the civil status is proven with the Records of the Civil Registry.

3. The German Law of Nationality, of June 1, 1870, provides in paragraph 2, that citizenship in a Federal State is acquired only through origin, legitimization, marriage, by acceptation—for a German—by naturalization—for an alien; without there appearing, among these exclusive manners of acquiring nationality, the registration in the German Consular Registries abroad.

4. The Law of 1867, prior to the Nationality Law of 1870, organized a Consular Service, and in Paragraph 12 provided that "each Consul must maintain a Register of nationals that are resident in his official district, and who present themselves to him for that purpose"; and the regulatory Decree of this Law, dated July 6, 1871, provided that "Before making an entry in the register, the Consul must convince himself that the person referred to possesses the nationality of the German Empire, or the nationality of one of the German Federal States. The proof of this can only be credited by the presentation of a valid national passport, or by a certificate of origin *(Heimatschein)*. If doubts arise as to the validity of these documents, the Chancellor of the German Empire or the Government of the respective State must be consulted, and suspend the entry in the Register until the receipt of the decision . . .

"Concerning the entry in the Register, they must issue to the solicitant at his request a certificate in the form usual to the place . . .

"A cancellation in the Register must be made when the person registered dies; or leaves the consular district; or when he loses the nationality of the German Empire, or the nationality of one of the Federal States; and besides, when the registree so requests."

5. According to the preceding, the Consuls must demand, of the solicitants for registration, the documents proving their nationality, which can be no other, by mandate of the Law, than a valid national passport of a *Heimatschein*, namely, the certificate of origin that corresponds to the respective entry in the Civil Register, in those countries that have established such a service under denomination.

6. The circumstances; 1st, of the Consuls being obliged to examine the documents presented by the solicitant and not being permitted to proceed with the entry without convincing themselves that the solicitant possesses German nationality; and, 2nd, of being, in cases in which the validity of the documents presented is doubted, obliged to consult the Chancellor of the Government of the respective Federal State and to suspend the entry until the receipt of the superior decision; show that, in the very intention of the German Law, the nationality is proven precisely by means of the documents of the civil status, which give, to the consular inscription based upon them, the legal merit that corresponds to it by law, without it constituting a definite proof of nationality.

7. The Consular Certificates of Registration summarily evidence a presumption of nationality, being subject to cancellation in those cases provided for by the Law (paragraph 12); to which must be added, that such certificates can be annulled or revoked, as well when the Consul is convinced that the entry was made through error or a mistaken interpretation of the documents

that were taken into consideration in making it, as when the superior authorities of Germany or of the Federal State so determine in cases of revision or of civil or criminal processes that may concern them.

8. The Consular Certificates of Registration establish nationality only for purposes of statistics; of complying with the laws of compulsory military service; of payment of taxes upon income from an estate a national, resident abroad, may have in his own country; of acquisitions of property, of inheritances or legacies; or of pensions and maintenances, etc.

9. Such Consular Certificates of Registration are of domestic nature as *prima facie* proof of nationality, and can serve and be utilized in an exigency to establish the presumption that the bearer has the right to protection; as in the case of arbitrary acts of the local police or molestation to the person or property, if the local law authorizes such protections; but they are not sufficient evidence of nationality in claims against the State for alleged damages or injuries, especially when these claims are prosecuted before a mixed commission or tribunal of international arbitration whose initial duty it is to consider the true nationality of the claimant.

10. If the Consul is obliged to be convinced of the effective nationality of whoever applies for registration, before proceeding to inscribe him, yet more imperative is the duty of the international mixed commission to study and decide upon such nationality; because in this right and duty have great importance to the Consul, as an act that will affect the internal law of his country, they weigh with much more force upon the mixed commission, because of it being an act that will determine presumptions and effects upon the external law, since that pertains to the international relations between two countries.

11. To grant to the Consul the absolute power of appreciating and deciding upon the documentary evidence submitted by a solicitant for registration, would be tantamount to creating him a Judge to determine the right to submit claims to an international mixed commission, thus trespassing upon the essential obligation of the Commission to ascertain the nationality of the claimants, on which they base the very right to claim before it.

12. The duty of the Commission to establish, by itself, the nationality of the claimants, before granting or denying them the right to initiate their actions is, by its very nature, not delegatable, and it would be a delegation of such primary power and duty, to compel it to recognize as immovable, or sufficient, the mere record of the consular registration.

13. The preceding conclusions become still more evident, if we take into consideration the difficulties that are presented by cases of dual nationality or of conflicts of nationality, arising from the doctrines of *jus soli* and *jus sanguinis*. If the consular registration is sufficient proof of nationality, it would follow that the registree, in spite of having double nationality, is a national of the country with which he is registered, thus preventing any attempt which the other country might make of having him considered as its own national. In cases of dual nationality, the consular certificate would decide upon which is the proper nationality and, if the criterion taken by the Consul is that imposed by the law of *jus sanguinis*, the criterion imposed by the law of *jus soli* would be, through his own act and volition, ignored. The Consul would decide, in this manner, not subject to appeal, a question in which the sovereignty of two countries is involved; in effect, for example, a child of a German, born in Mexico, is a German, according to German Law, and could be entered in the German consular registries in Mexico; but, this child, born in Mexico of a

German father, is a Mexican, and the certificate of registration as a German would have no weight with the Mexican authorities.

14. A similar difficulty occurs in the case of a married woman. There are laws that provide that a married woman acquires the nationality of her husband, others that provide that a female national who marries an alien retains her original nationality, and there is one that attributes to the alien the nationality of the woman he marries. A claimant who attempts to initiate his action before a mixed commission, invoking his character as an alien by means of a consular certificate of a country that extends to the married woman the nationality of her husband, should not be heard.

15. Equal difficulty presents itself in cases involving laws that, in specific instances, revoke the citizenship of nationals who reside for a certain number of years abroad, or who accept honors or employment from foreign governments, without permission from their own. The certificate of consular registration, in such cases, would lose all its value.

16. It is not juridical to attribute to the Consul, who is a functionary of a merely administrative and commercial character, the power of passing upon nationality in cases that require, each one of them, a special examination into the circumstances and the respective national laws; for identical reasons consular certificates of registration must not be considered as sufficient proof of nationality.

17. Germany, a country of *jus sanguinis*, considers as a German, the son of a German, even when born on alien territory, the fact of his birth in Germany having no influence upon the acquisition of nationality.

18. The certificate, which is presented in this case, records that the claimant, Klemp, born in Bochum (Germany), is entered in the Consular Registries. The fact of having been born on German territory does not impress upon him the character of a German national; from which it follows that, the very document invoked as exclusive proof of the nationality of the claimant, shows that it is not proven pursuant to German Law.

Decision of the Presiding Commissioner

Therefore,

Upon these considerations, in view of the opinions, legal precepts and judicial decisions heretofore cited, and after hearing the divergent opinions of the Commissioners of the parties, the Umpire, forming a majority with the Mexican Commissioner, decides that the proposed dilatory exception is pertinent and is allowed, without prejudicing the right of the German Agent to present other proof of the nationality of the claimant.

Washington, D.C., April 11, 1927.

Miguel Cruchaga,
Presiding Commissioner.

TABLE OF CASES

(Part I, Sections I and II)

Pages

Adams, F., and C. Th. Blackmore, No. 69 216
Adams, F., No. 99 261
Anzures Land Co. (Ltd.), The, No. 62 207
————, No. 70 218
Ayton, E. F., No. 82 240

Bacis Gold and Silver Mining Co. (Ltd.), The, No. 94 256
Baker, Webb, Woodfin and Poxon, *see* Mexico City Bombardment Claims
Bartlett, J. F., No. 37 151
Beales, R. H., No. 51 175
Blackmore, C. Th., *see* Adams, F.
Blunt, Capt. C. D. M., *see* New Parral Mines Syndicate
Bowerman, W. E., and Messrs. Burberry's (Ltd.), No. 18 . . 104
————, No. 25 135
Bromly, A. H., No. 81 238
Buckingham, L., No. 109 . . . 286
Buena Tierra Mining Co. (Ltd.), The, No. 91 247
Burberry's (Ltd.), Messrs., *see* Bowerman, W. E.
Burne, C. A., No. 48 170

Cameron, V. L., No. 2 27
Carmichael, H., No. 35 148
Central Agency (Ltd.), Glasgow, No. 7 53
————, No. 90 246
Clapham, G. H., No. 59 . . . 201

D'Etchegoyen, Sarah Bryant, Countess, No. 126 305
Delamain, G. C., No. 77 . . . 229

Pages

Eagle Star and British Dominions Insurance Co. (Ltd.) and Excess Insurance Co. (Ltd.), The, No. 31 139
El Oro Mining and Railway Co. (Ltd.), No. 55 191
————, No. 75 223
El Palmar Rubber Estates (Ltd.), The, No. 107 281
Engleheart, A., No. 40 155
Eschauzier, M. S., No. 64 . . . 207
Excess Insurance Co., Ltd., *see* Eagle Star and British Dominions Insurance Co., Ltd.

Flack, F. W., No. 10 61
Francis, A. H., No. 15 99
Fraser, J. M., No. 105 275

Gibb, *see* Stevens, J. R. A.
Gill, J., No. 44 157
Gleadell, Capt. W. H., No. 4 . 44
Grant, P., No. 9 60
————, No. 67 213
Grave, F., and Jones, G. A., No. 89 246

Hale, M., No. 28 138
————, No. 87 243
Hall, A. P., and Woon, R. J. C., No. 124 305
Hambleton, J. W., No. 106 . . 277
Harvey, T., *see* Mackenzie, A.
Henderson, J. H., No. 30 . . . 139
————, No. 104 274
Henderson, R., on behalf of the Estate of V. Henderson, No. 113 291
Henry, A. F., No. 56 199
Henry, E., No. 61 204
————, No. 102 268

	Pages
Honey, C. D., No. 23	133
Howard, J. H., No. 24	133
———, No. 78	232
Interoceanic Railway of Mexico (Acapulco to Veracruz) (Ltd.), the Mexican Eastern Railway Co. (Ltd.), and the Mexican Southern Railway Company, The, No. 22	133
———, No. 53	178
Jantha Plantation, No. 80	236
Jones, G. A., *see* Grave, F.	
Kelly, J., *see* Mexico City Bombardment Claims	
Kennedy, W. A., No. 84	240
Kidd, A. B. G., No. 3	41
———, No. 32	142
King, R. E., No. 58	201
Le Bas and Co., E., No. 5	52
———, No. 36	151
Leigh, J. C. G., No. 43	156
Lundholm, C. O., No. 34	147
Lynch, R. J., No. 1	17
———, No. 47	169
Mackenzie, A., and Harvey, T., No. 71	218
———, No. 95	260
MacNeill, D. G. C., No. 27	135
———, No. 85	242
Madera Co. (Ltd.), The, No. 41	156
———, No. 79	233
Mallard, T. P., No. 88	243
Mariposa Co., The British Shareholders of the, No. 103	272
Mazapil Copper Co. (Ltd.), No. 16	101
———, No. 83	240
McFadden, C. E., No. 20	115
McNeill, W., No. 46	164
Merrow, F. S., No. 117	295
Mexican Eastern Railway Co., Ltd., and The Mexican Southern Railway Co., *see* Interoceanic Railway of Mexico (Acapulco to Veracruz), Ltd.	
Mexican Southern Railway Co., *see* Interoceanic Railway of Mexico (Acapulco to Veracruz), Ltd.	
Mexican Tramways Co., The, No. 65	212
———, No. 121	304
———, No. 125	305
Mexican Union Railway (Ltd.), No. 21	115
Mexico City Bombardment Claims, No. 12	76
New Parral Mines Syndicate, Debenture Holders of, and Blunt, Capt. C. D. M., No. 97	261
New Sabinas Co. (Ltd.), The, No. 98	261
Norcross and Taylor, Messrs., *see* Taylor, J.	
Odell, W. A., No. 39	153
Oldenbourg, C. L., No. 11	74
———, No. 60	204
Palmarejo and Mexican Gold Fields (Ltd.), The, No. 118	298
Patton, C., No. 76	224
Payne, H., No. 50	174
Raeburn, R. M., No. 38	153
———, No. 123	305
Read, G. R., No. 57	200
Renaud, R. O., No. 52	175
Roy, D., No. 33	144
———, No. 68	216
Russel, W. J., No. 116	294
Russell, D. B., No. 96	260
Salinas of Mexico (Ltd.), The, No. 74	223
San Marcos and Pinos Co. (Ltd.), The Debenture Holders of, No. 54	191
Santa Gertrudis Jute Mill Co. (Ltd.), No. 19	108
Santa Isabel Claims, The, No. 119	302
———, No. 124	305
Santa Rosa Mining Co. (Ltd.), The, No. 92	252
Scrope, G., No. 93	254
Shone, J., No. 17	104
Sonora (Mexico) Land and Timber Co. (Ltd.), The, No. 63	207
———, No. 100	263
Spillane, Messrs. D. J. and D., and Co., No. 42	156
Spillane, D. J. and D., No. 112	289

	Pages
Stacpoole, F. W., No. 14	95
Stevens, J. R. A., and Mrs. Gibb, No. 66	212
———, No. 110	289
Suchi Timber Co. (1915) (Ltd.), The, No. 86	242
Taylor, J. (Messrs. Norcross and Taylor), No. 101	267
Tomnil Mexican Mining Co. (Ltd.), The, No. 108	284
Tracy, N. T., No. 13	90
Tynan, D. J., *see* Mexico City Bombardment Claims	
Urmston, Capt. A. B., No. 115	291
Ventanas Mining and Exploration Co. (Ltd.), No. 73.	223
Veracruz (Mexico) Railways (Ltd.), The, No. 72	221
Veracruz Telephone Construction Syndicate, No. 8	57
———, No. 120	303
———, No. 122	304
Walker, J., No. 26	135
Ward, A. M., No. 49	173
Watson, J., No. 45	162
Welbanks, W., No. 29	139
———, No. 114	291
White, F. S., No. 111	289
Williams, A. R., No. 6	52
Woon, R. J. C., *see* Hall, A. P.	

(Part II)

Albrand, E., No. 46	544
Beaurang, M., Estate of, No. 43	540
Bellon, A., Estate of, No. 47	544
Bimar, H., No. 10	326
———, No. 31	509
Bourillon, Jacques, Léautaud and Esmenjaud, No. 2B	558
Caire, G., No. 40	540
Caire, J.-B., Estate of, No. 33	516
Chaurand, A., No. 39	539
Compañía Azucarera del Paraiso Novillero, No. 4B	558
Decision No. 4	325
———, No. 9	325
———, No. 17	508
———, No. 20	509
———, No. 21	510
———, No. 22	512
———, No. 23	559
Esclangon, J. S. C., Estate of, No. 50	546
Estrayer, C., Estate of, No. 48	545
Fabre, J.-B., No. 51	557
Feuillebois, L. and J., No. 45	542
Gendrop, Th., No. 14	326
———, No. 32	514
Gomes, M., No. 44	541
Lambreton, P., No. 37	539
Lombard, J. and A., No. 3B	558
Maurin, C., No. 15	326
———, No. 49	545
Mériniac, E., No. 35	538
Nájera, P., No. 30A	466
Pellat, H., Estate of, No. 34	534
Pietri, Dr. P., No. 41	540
Pinson, G., No. 1	327
———, No. 6	325
Pradeau, A. A., No. 38	539
Reynaud, M., No. 52A	559
Talavero, A., No. 36	539
Turin, B., No. 12	326
———, No. 42	540

(Part III)

Klemp, C. 579

INDEX

(PARTS I. II and III)

A

ABANDONMENT, Forced: 170, 175, 199, 281, 298

ABSENCE OF MEXICAN COMMISSIONER, Jurisdiction of tribunal to render awards in claims previously argued despite: 509, 512, 559

ACT OF:
Amnesty, Effect of: 247
Agency of Respondent Government, Failure to furnish corroborating evidence caused by: 305
Bandits, Responsibility for: 142
Civil Authorities, Responsibility for: 135
Forces, Responsibility for: 90, 101, 104, 108, 115, 133, 147, 151, 169, 175, 224, 229, 232, 233, 238, 242, 243, 246, 247, 256, 261, 263, 267, 268, 272, 274, 275, 277, 281, 284, 286, 289, 291, 294, 298, 306, 328, 509, 514, 517, 538, 539, 540, 544, 545, 557, 558

Actio nata, Roman law and civil law: 547

ACTS, Military: 147, 169, 243, 246

ACTS OF INDIVIDUALS, Responsibility for: 261

ADMINISTRATIVE DECISIONS, Power of tribunal to render: 327

ADMISSIBILITY OF:
Claims (of suit): 325, 557
Claims based upon mental suffering: 545
Evidence: 328
Suit: 557

ADMISSIBILITY OF CLAIMS, Competence and: 547

ADMISSIBILITY OF CLAIMS FILED IN THE INTEREST OF COLLATERALS OF VICTIMS OR IN THE INTEREST OF PERSONS OTHER THAN HEIRS OF VICTIMS: 545

AFFIDAVITS AS EVIDENCE: 27, 76, 90, 95, 104, 151, 155, 156, 157, 169, 170, 173, 174, 175, 200, 201, 229, 240, 247, 260, 261

AGENTS:
Direct settlement of claim between: 115, 201, 223, 240, 289, 304, 305, 325, 508
Role of: 327
Submission of questionnaires: 326
Witnesses to be examined by: 325

Albacea: 546

ALIENS, Equality of treatment of nationals and: 329

ALLOTMENT OF PROPORTIONATE RIGHT TO DAMAGES: 178, 207, 212, 216, 547, 557

ALLOWANCE OF DAMAGES, Equity as a basis for: 157

ALLOWANCE OF INTEREST: 329, 509

AMENDMENT OF CLAIM: 254, 289

AMNESTY, Effect of act of: 247

APPLICATION OF MEXICAN LAWS OF NATIONALITY: 328

ARREST, Illegal: 165

ASSIGNMENT OF CLAIM: 104

AUTHORITIES, Dilatory action by: 277
Necessity of notice to: 108, 224, 229, 247, 284
Responsibility for acts of civil: 135

AUTHORITY OF PRESIDENT OF TRIBUNAL TO FUNCTION DESPITE UNILATERAL REVOCATION OF SUCH AUTHORITY BY ONE OF THE PARTIES: 510

AUTHORITY TO PRESENT CLAIM: 53, 207

AWARD, Equity as a basis for: 272, 289

AWARDS, Currency in which payable: 162

AWARDS IN ABSENCE OF A NATIONAL COMMISSIONER, JURISDICTION OF TRIBUNAL TO RENDER: 559

AWARDS, Jurisdiction of tribunal to render, in claims previously argued, despite absence of Mexican Commissioner: 512

B

BANDITS, Responsibility for acts of: 142

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY: 17, 175

BIRTH CERTIFICATE AS PROOF OF NATIONALITY: 41, 327

BRIGANDAGE COMMITTED BY REVOLUTIONARY FORCES: 224

BURDEN OF PROOF: 76, 328, 534

C

CALVO CLAUSE: 115, 135, 178, 191, 221, 327

CAPACITY:
Claim in representative: 28, 44, 52, 61, 74, 139, 153, 201, 269
Proof of permanent loss of earning: 165
Proof of representative: 101

CASE, Motion to reopen: 302, 303, 304, 559

CAUSE, Proximate: 165, 294

CERTIFICATE:
Baptismal: 17, 175
Birth: 41, 327
Consular: 17, 41, 139, 327, 579

CERTIFICATE OF NOTARY PUBLIC: 135, 148

CIVIL AUTHORITIES:
Forced loans by: 535
Responsibility for acts of: 254, 289

CIVIL LAW, Roman law and: *actio nata:* 547

CLAIM:
Amendment of: 254, 289
Assignment of: 104
Authority to present: 53, 207
Continuing nationality of: 44, 61, 74, 207, 212
Expenses incurred in preparation of: 108
National character of: 44, 52, 74, 139, 207, 212
Nationality of corporate: 207
Ownership of: 61, 213
Partnership: 74, 135, 156, 204, 212, 216, 267
Pursuance of: 295

CLAIM BETWEEN AGENTS, Direct settlement of: 115, 201, 240, 289, 304

CLAIM FOR PERSONAL INJURIES, Effect of death of claimant upon: 277

CLAIM IN REPRESENTATIVE CAPACITY: 28, 44, 52, 61, 74, 139, 153, 201, 269

CLAIMANT:
Death of: 277, 295
Identity of: 151, 175
Lessee as: 212

CLAIMANTS, Insurers as: 139

CLAIMS PREVIOUSLY ARGUED AND DECLARED CLOSED: Status of: 509

CLAIMS PREVIOUSLY ARGUED, Jurisdiction of tribunal to render awards in despite absence of Mexican Commissioner: 509, 512, 559

COMPETENCE AND ADMISSIBILITY: 547

Compromis, Effect of non-registration of, with Secretariat of League of Nations: 466

CONCENTRATION ORDER: 281

CONFISCATION: 236, 252

CONFLICTING STATEMENTS BY CLAIMANT CONCERNING NATIONALITY: 27

CONSULAR CERTIFICATE AS PROOF OF NATIONALITY: 17, 41, 139, 327, 579

CONTEMPORANEOUS EVIDENCE: 254

CONTINUING NATIONALITY OF CLAIM: 44, 61, 74, 207, 212

CONTRACT CLAIMS: 133

CORPORATE CLAIM:
Nationality of: 207
Ownership of when corporation was dissolved subsequent to loss: 61

CORPORATE CLAIMS: 53, 207, 218, 263

CORPORATION:
Proof of nationality: 53, 61, 156, 178
Proof required to establish national interest in Mexican corporation: 207

COVENANT, ARTICLE 18, Effect of non-registration of *compromis* with Secretariat of League of Nations pursuant to: 466

CREDITORS' CLAIMS: 191

CRIMINALS IN ARMY, Incorporation of: 517

CRUEL AND INHUMANE IMPRISONMENT: 165
CURRENCY IN WHICH AWARDS PAYABLE: 162

D

Damages:
Damnum emergens: 542
Effect of absence of precise data and lack of precaution: 509
Effect of insurance upon right to: 109
Effect to be given decision of domestic claims body: 517
Equity as a basis for allowance of: 157
Loss of profits *(lucrum cessans):* 263, 542
Measure of: 108, 165, 201, 517
Measure of, for death: 269, 517
Measure of, for physical injury: 165
Place of equity in determination of: 329
Proof of: 76, 95, 104, 157, 162, 173, 213, 240, 256, 277, 289, 291, 295
Punitive: 277

Damnum emergens: 542

DANGEROUS CONDITIONS, Duty to give warning of: 286

DEATH:
Measure of damages for: 269, 517
Survival of claims for wrongful: 52

DEATH OF CLAIMANT:
Effect of, upon claim for personal injuries: 277
Pursuance of claim: 295

DELAY IN JUDICIAL PROCEEDINGS, Undue: 191

DEMURRER: 139, 156

DENIAL OF JUSTICE: 99, 178, 191

DEPRECIATION IN VALUE OF PROPERTY: 291

DETENTION: 165

DILATORY ACTION BY AUTHORITIES: 277

DIRECT RESPONSIBILITY: 517

DIRECT SETTLEMENT OF CLAIM BETWEEN AGENTS: 115, 201, 223, 240, 289, 304, 305, 508

DOMESTIC CLAIMS BODY, Effect of judgments of: 216, 218, 242, 327, 517

DOMESTIC CLAIMS BODY DECISION REVERSED: 542, 544

DOMESTIC LAW GOVERNING PAYMENTS, Effect of: 329

DOMESTIC LEGISLATION GOVERNING CLAIMS, Effect of: 327, 329

DUAL NATIONALITY: 74, 133, 216, 328, 517, 579

DUTIES, Import: 298

DUTY TO GIVE WARNING OF DANGEROUS CONDITIONS: 286

DUTY TO PROTECT IN REMOTE TERRITORY: 151, 229, 286

E

ENDING OF TERM OF TRIBUNAL: 509

EQUALITY OF TREATMENT OF NATIONALS AND ALIENS: 329, 514

EQUITY: 157, 272, 289, 327, 329, 542

EVIDENCE:
Admissibility of: 328
Affidavits as: 27, 76, 90, 95, 104, 151, 155, 156, 157, 169, 170, 173, 174, 175, 200, 201, 229, 240, 247, 260, 261
Baptismal certificate as: 17, 175

EVIDENCE AFTER CLOSE OF PLEADINGS, Submission of: 302

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS: 27, 101, 139, 153, 162, 165, 242, 243, 252, 254, 261, 289, 291, 305, 328, 534

EVIDENCE, Birth certificate as: 218
Burden of proof: 76, 328, 534
Certificate of notary public as: 135, 148
Consular certificate as: 17, 41, 139, 327, 579
Contemporaneous: 254
Corroborating evidence, necessity of: 90, 153, 156, 169, 170, 174, 175, 200, 240, 243, 260, 261, 295, 305
Effect of non-production of evidence by respondent government: 104, 108, 157, 164, 263
Execution of decision: 104
Failure to furnish corroborating evidence caused by acts of agency of respondent government: 305
Notary public's certificate of nationality as: 135, 148
Prima facie: 76, 104
Receipts for requisitioned property: 101, 291
Reopening of the case: 559
Submission of after close of pleadings: 302

EXAMINATION OF WITNESSES: 325, 326

EXECUTION OF DECISION: 104

Ex gratia PAYMENT: 329

EXHAUSTION OF LOCAL REMEDIES: 115, 191, 327

EXPENSES INCURRED IN PREPARATION OF CLAIM: 108

EXPENSES IN PRESERVING PROPERTY: 281

EXTENSION OF TERM OF COMMISSION: 508, 510

EXTENSION OF TIME-LIMITS: 325

F

FAILURE TO FURNISH CORROBORATING EVIDENCE CAUSED BY ACTS OF AGENCY OF RESPONDENT GOVERNMENT: 305

FAILURE TO PROTECT: 99, 268, 286, 306

FAILURE TO SUPPRESS OR PUNISH: 99, 104, 108, 142, 151, 157, 164, 224, 229, 238, 247, 261, 263, 268, 274, 275, 277, 284

FEDERAL STATE, International responsibility of—for acts of Member States: 535

FORCED ABANDONMENT: 170, 175, 199, 281, 298

FORCED LOANS: 535

FORCED OCCUPANCY: 133, 169, 232, 240

FORCED PAYMENT: 256

FORCES:
Meaning of terms "Revolutionary": 328
Responsibility for acts of: 90, 101, 104, 108, 115, 133, 147, 151, 169, 175, 224, 229, 232, 235, 238, 242, 243, 246, 247, 256, 261, 263, 267, 268, 272, 274, 275, 277, 281, 284, 286, 289, 291, 294, 298, 306, 328, 509, 514, 517, 538, 539, 540, 544, 545, 557, 558

FORCES UNDER COMMAND OF OFFICERS: 517

FORMAL OMISSION IN MEMORIAL: 546

FRENCH PROTÉGÉS AS PARTIES CLAIMANT: 467

G

GOODS SOLD TO REVOLUTIONARY FORCES: 242

H

HOMOLOGATION OF AGREEMENT BETWEEN THE PARTIES: 325, 547

I

IDENTITY OF CLAIMANT: 151, 175

ILLEGAL ARREST: 165

IMPORT DUTIES: 298

IMPRISONMENT:
Cruel and inhumane: 165
Illegal, mistreatment: 165
Mistreatment during: 165

INCORPORATION OF CRIMINALS IN ARMY: 517

INDIVIDUALS, Acts of: 261

INSURANCE, Effect of upon right to damages: 109

INSURERS AS CLAIMANTS: 139

INTEREST, Allowance of: 329, 509

INTERNATIONAL RESPONSIBILITY, Lack of authority no defence to: 517

INTERNATIONAL RESPONSIBILITY OF FEDERAL STATE FOR ACTS OF MEMBER STATES: 535

J

JUDGMENTS OF DOMESTIC CLAIMS BODY, Effects of: 327, 517

JUDICIAL DETERMINATION OF ACKNOWLEDGED RESPONSIBILITY: 535

JUDICIAL PROCEEDINGS, Undue delay in: 191
JURISDICTION: 133, 135
JURISDICTION OF TRIBUNAL TO RENDER AWARDS IN CLAIMS PREVIOUSLY ARGUED DESPITE ABSENCE OF MEXICAN COMMISSIONER: 509, 512, 559
JUSTICE, Denial of: 99, 178, 191

L

LAWS OF NATIONALITY, Mexican, application of: 328
LEAGUE OF NATIONS, Effect of non-registration of *compromis* with Secretariat of: 466
LESSEE AS CLAIMANT: 212
LITISPENDENCE (Mexican National Claims Commission): 252, 327, 516
LOANS, Forced: 535
LOCAL REMEDIES, Exhaustion of: 115, 325
LOSS, Proof of: 328, 509, 541, 542
LOSS OF EARNING CAPACITY, Proof of permanent: 165
LOSS OF PROFITS: 263, 281, 542
Lucrum cessans: 263, 281, 542

M

MAJORITY, Jurisdiction of tribunal composed of—of members to decide upon claims previously argued: 509, 512, 559
MARRIED WOMEN, Nationality of: 517
MEANING OF TERMS "REVOLUTIONARY FORCES" AND "REVOLUTION": 328
MEASURE OF DAMAGES: 108, 165, 201, 517
MEASURE OF DAMAGES FOR DEATH: 269
MEASURE OF DAMAGES FOR PHYSICAL INJURY: 165
MEMBER STATES, International responsibility of Federal State for acts of: 535
MENTAL SUFFERING: 541, 545
MERITS, Preliminary objection and: 547
MEXICAN CORPORATION, Proof required to establish British national interest in: 207
MILITARY ACTS: 147, 169, 243, 246
MISTREATMENT DURING IMPRISONMENT: 165
MOB VIOLENCE: 135, 284, 294
MODIFICATION OF RULES OF PROCEDURE: 325, 508
MOTION TO DISMISS: 52, 60, 204, 212
MOTION TO REOPEN CASE: 302, 303, 304, 559

N

NATIONAL CHARACTER OF CLAIM: 44, 52, 74, 139, 207, 212
NATIONAL INTEREST IN MEXICAN CORPORATION, Proof required to establish: 207
NATIONALITY:
Application of Mexican laws of: 328
Baptismal certificate as proof of: 17, 175
Birth certificate as proof of: 41, 327

Conflicting statements by claimant concerning: 27
Consular certificate as proof of: 17, 41, 139, 327, 579
Dual: 74, 133, 216, 328, 517, 579
Effect of option for Lebanese nationality: 467
Mexican-born widow of a French national: 517
Notary public's certificate of as evidence of: 135, 148
Proof of: 17, 27, 41, 61, 135, 138, 139, 148, 175, 218, 327, 579
Proof of, local law: 579
Proof of, of corporation: 53, 156

NATIONALITY OF:
Claim, continuing: 44, 61, 74, 207, 212.
Corporate claim: 207
Married women: 517

NATIONALS AND ALIENS, Equality of treatment of: 329, 514

NON-REGISTRATION OF *compromis* WITH SECRETARIAT OF LEAGUE OF NATIONS, Effect of: 466

NOTARY PUBLIC'S CERTIFICATE OF NATIONALITY AS EVIDENCE: 135, 148

NOTICE TO AUTHORITIES, Necessity of: 108, 224, 229, 247, 284

O

OCCUPANCY, Forced: 133, 169, 232, 240

OMISSION, Formal, in Memorial: 546

OPTION FOR LEBANESE NATIONALITY, Effect of: 467

ORDER, Concentration: 281

OWNERSHIP, Proof of: 151

OWNERSHIP OF CLAIM: 213

OWNERSHIP OF CORPORATE CLAIM WHEN CORPORATION WAS DISSOLVED SUBSEQUENT TO LOSS: 61

P

PARTIES CLAIMANT, French protégés as: 467

PARTNERSHIP CLAIM: 74, 135, 156, 204, 212, 216, 267

PAYMENT:
Effect of domestic law governing: 329
Ex gratia: 329
Forced: 256

PERMANENT LOSS OF EARNING CAPACITY, Proof of: 165

PHYSICAL INJURY, Measure of damages for: 165

PLEADING, Submission of evidence after close of: 302

PRECAUTION, Lack of: 542, 545

PRELIMINARY OBJECTION: 546, 547
Litispendence not a: 516

PRELIMINARY OBJECTION AND MERITS: 547

PRELIMINARY OBJECTIONS, Extension of time-limits to discuss certain: 325

PREPARATION OF CLAIM: Expenses incurred in: 108

PRESERVATION OF PROPERTY, Expenses of: 281, 291, 298

Prima facie CASE (— evidence): 76, 104

PRIVATE INTERNATIONAL LAW: 546

PROCEDURE:
Demurrer: 139, 156
Modification of rules of: 325, 508
Motion to dismiss: 52, 60, 204, 212
Motion to reopen case: 302, 303, 304
Power of tribunal to render administrative decisions: 327
Right to amend: 133

PROCEEDINGS:
Reopening of: 509
Undue delay in judicial: 191

PROCEEDINGS OF TRIBUNAL, Suspension of: 508, 559

PROFITS, Loss of: 263, 281, 542

PROOF, Burden of: 76, 328, 534

PROOF OF DAMAGES: 76, 95, 104, 157, 162, 173, 213, 240, 256, 277, 289, 291, 295

PROOF OF LOSS: 328, 509, 541, 542

PROOF OF NATIONALITY: 17, 27, 41, 61, 104, 135, 138, 139, 148, 175, 218, 289, 327, 579
Baptismal certificate as: 17, 175
Birth certificate as: 41, 327
Certificate of notary public as: 135, 148
Consular certificate as: 17, 41, 139, 327, 579

PROOF OF NATIONALITY OF CORPORATION: 61, 156

PROOF OF OWNERSHIP: 151

PROOF OF PERMANENT LOSS OF EARNING CAPACITY: 165

PROOF OF REPRESENTATIVE CAPACITY: 101

PROOF REQUIRED, Degree of: 233

PROOF REQUIRED TO ESTABLISH BRITISH NATIONAL INTEREST IN MEXICAN CORPORATION: 207

PROPERTY:
Depreciation in value of: 291
Expenses in preserving: 281, 291, 298
Seizure of: 90, 101

PROTECTION, *see* "Failure to protect", "Duty to protect in remote territory": 151, 229, 286

PROTÉGÉS, French as parties claimant: 467

PROXIMATE CAUSE: 165, 294

PUNITIVE DAMAGES: 277

PURSUANCE OF CLAIM: 295

Q

QUESTIONNAIRES, Submission of—by Agents: 326

R

RECEIPTS FOR REQUISITIONED PROPERTY: 101, 291

REMISSION OF TAXES: 281

REMOTE TERRITORY, Duty to protect in: 151, 229, 286

REOPENING OF CASE: 302, 303, 304, 509, 559

REPRESENTATIVE CAPACITY, Claim in: 28, 44, 52, 61, 74, 101, 139, 153, 201, 269

REQUESTS FOR HELP, Effect of: 542

REQUISITION: 252

Res judicata (Mexican National Claims Commission): 144, 216, 218, 242, 327

RESPONSIBILITY:
Acknowledged, judicial determination of: 535
Direct: 517

RESPONSIBILITY FOR ACTS OF:
Bandits: 142
Civil authorities: 135
Forces: 90, 101, 104, 108, 115, 133, 147, 151, 169, 175, 224, 229, 232, 233, 238, 242, 243, 246, 247, 256, 261, 263, 267, 268, 272, 274, 275, 277, 281, 284, 286, 289, 291, 294, 298, 306, 328, 509, 514, 517, 538, 539, 540, 544, 545, 557, 558
Forces, degree of proof required: 233
Forces and armed robbers: 542
Forces probably helped by mob: 558
Individuals: 261

RESPONSIBILITY, Lack of authority no defence to international: 517

RESPONSIBILITY OF FEDERAL STATE FOR ACTS OF MEMBER STATES, International: 535

RESTITUTION OF TAXES: 298

REVISION (Mexican National Claims Commission): 327, 541, 542, 544

REVOLUTIONARY FORCES, Brigandage committed by: 224

"REVOLUTIONARY FORCES" AND "REVOLUTION", Meaning of terms: 328

RIGHT TO AMEND: 133

ROLE OF AGENTS: 327

ROMAN LAW AND CIVIL LAW: *actio nata:* 547

RULES OF PROCEDURE, Modification of: 325, 508

S

SEIZURE OF PROPERTY: 90, 101

SETTLEMENT OF CLAIM BETWEEN AGENTS, Direct: 115, 201, 223, 240, 289, 304, 305, 508

Stare decisis: 221

STATUS OF CLAIMS PREVIOUSLY ARGUED AND DECLARED CLOSED: 509

SUBMISSION OF EVIDENCE AFTER CLOSE OF PLEADINGS: 302

SUBMISSION OF QUESTIONNAIRES BY AGENTS FOR EXAMINATION OF WITNESSES: 326

SURVIVAL OF CLAIMS FOR WRONGFUL DEATH: 52

SUSPENSION OF MOTION TO DISMISS: 52

SUSPENSION OF PROCEEDINGS OF TRIBUNAL: 508, 559

T

TAXES:
Remission of: 281
Restitution of: 298

TERM OF TRIBUNAL:
Ending of: 509
Extension of: 508

TERRITORY, Duty to protect in remote: 151, 229, 286

TIME-LIMITS, Extension of: 325

TREATIES, Effect of non-registration of *compromis* with Secretariat of League of Nations: 466

TRIBUNAL:
Authority of president of to function despite unilateral revocation of such authority by one of the parties: 510
Ending of term of: 509
Extension of term of: 508
Power of to render administrative decisions and procedure: 327
Suspension of proceedings of: 508, 559

TRIBUNALS, Evidence before international: 27, 101, 139, 153, 162, 165, 242, 243, 252, 254, 261, 289, 291, 305, 328, 534

U

UNDUE DELAY IN JUDICIAL PROCEEDINGS: 191

V

VALUE OF PROPERTY, Depreciation in: 291

VIOLENCE, Mob: 135, 284, 294

W

WARNING, Duty to give, of dangerous conditions: 286

WITNESSES TO BE EXAMINED BY AGENTS: 325

WRONGFUL DEATH, survival of claims: 52