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FOREWORD

The *Reports of International Arbitral Awards* publication was originally conceived in order to provide a systematic collection of arbitral awards and similar decisions in the absence of any such collection and due to the importance of these awards and decisions. As noted in the foreword to the first volume of this publication:

> International arbitral and judicial awards are of considerable importance for they are a "subsidiary means for the determination of the rules of law" as provided in Article 38 of the Statute of the International Court of Justice. They are also important from the point of view of the progressive development of international law, a task which Article 13 of the Charter places under the responsibility of the General Assembly of the United Nations.

At the time of the preparation of the first volume of *Reports of International Arbitral Awards* in 1948, the decision was made not to include arbitral awards contained in highly authoritative collections which were easily accessible at the time. However, with the passage of time, the accessibility of the awards in these collections has diminished. It was therefore decided to publish some of these older awards in volumes XXVIII and XXIX of this publication.

Volume XXIX of *Reports of International Arbitral Awards* consists of a collection of awards and similar decisions issued from the early nineteenth century to the mid-twentieth century which were not included in previous volumes. This volume contains awards and similar decisions handed down in 24 different dispute-settlement procedures on various topics of international law. While these awards and decisions do not necessarily reflect current international law, they have a continuing historical and legal significance.

The awards and decisions included in these volumes are reproduced without change (other than minor technical corrections) and should be read in the historical context in which they were rendered. In order to preserve the accuracy of the awards the historical names of the Parties at the time of the awards have been retained, even though the names of the States may have subsequently changed.

As in the preceding volume, some of the awards included in the present volume have been reproduced from authoritative secondary sources when the original awards were not available, as indicated in explanatory notes accompanying the texts of the awards. It should be noted that, in some instances, additional historical background information may also be available in the secondary sources.

In accordance with the practice followed in this series, the awards are given in chronological order. Awards in English or French are published in the original language, as long as the original language text was available. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat of the United Nations. In

order to facilitate consultation of the awards, headnotes have been prepared in both English and French.

This volume, like volumes IV to XXVIII, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le *Recueil des sentences arbitrales* a été conçu à l'origine pour fournir une collection systématique des sentences arbitrales et décisions assimilées, en l'absence de telle collection et en raison de l'importance de ces sentences et décisions. Comme il a été souligné dans l'avant-propos du premier volume de cette publication :

> Les décisions arbitrales et judiciaires rendues entre États présentent une importance considérable, d'une part comme "moyen auxiliaire de détermination des règles du droit" international, ainsi que le prévoit l'Article 38 du Statut de la Cour internationale, et d'autre part en vue du développement progressif du droit international, développement que l'Article 13 de la Charte place sous la responsabilité de l'Assemblée générale des Nations Unies.

Au moment de la préparation du premier volume du *Recueil* en 1948, la décision avait été prise de ne pas inclure les sentences arbitrales contenues dans des collections de référence facilement accessibles à l'époque. Néanmoins, avec le temps, la possibilité d'accéder à ces collections a diminué. Il a par conséquent été décidé de publier certaines de ces sentences plus anciennes dans les volumes XXVIII et XXIX de cette publication.

Le volume XXIX du *Recueil* est constitué d'une collection de sentences et décisions assimilées, prononcée entre le début du dix-neuvième siècle et le milieu du vingtième qui n'ont pas été incluses dans les volumes précédents. Ce volume reproduit des sentences rendues par 24 instances différentes et traitant de divers sujets de droit international. Bien que ces sentences et décisions ne reflètent pas nécessairement le droit international actuel, leur intérêt juridique et historique persiste.

Les sentences et décisions incluses dans ces volumes ont été reproduites sans modification (excepté des corrections techniques mineures) et doivent être lues dans le contexte historique dans lequel elles ont été rendues. Afin de préserver l'exactitude des sentences, le nom historique des Parties lors du prononcé de la sentence a été conservé, même lorsque le nom d'un État aurait par la suite été modifié.

A l'instar du volume précédent, certaines sentences incluses dans le présent volume ont été reproduites de sources de référence secondaires lorsque la sentence originale n'était pas disponible, comme cela est expliqué dans les notes accompagnant les textes des sentences. Il faut noter que, dans certains cas, des informations additionnelles sur le contexte historique de l'affaire peuvent également être disponibles dans les sources secondaires.

Conformément à la pratique, le présent *Recueil* reproduit les sentences par ordre chronologique. Les sentences rendues en anglais ou en français sont publiées dans la langue originale, dès lors que le texte dans cette langue originale était disponible. Celles qui ont été rendues en anglais et en français ont été reproduites dans une des deux langues originales. Le *Recueil* fournit une version anglaise des sentences rendues dans d'autres langues en spécifiant, le cas

échéant, dans une note de bas de page, si la traduction émane du Secrétariat de l'Organisation des Nations Unies. Pour faciliter autant que possible la consultation de ces sentences, on les a fait précéder de notes sommaires rédigées à la fois en anglais et en français.

A l'instar des volumes IV à XXVIII, le présent volume a été préparé par la Division de la codification du Bureau des affaires juridiques.

PART I

Dispute between the United States of America and Great Britain about the interpretation of the first article of the Treaty of Ghent of 24 December 1814

Award of the Emperor of Russia of 22 April 1822

Différend entre les États-Unis d'Amérique et la Grande-Bretagne concernant l'interprétation de l'article premier du Traité de Gand du 24 décembre 1814

Sentence de l'Empereur de Russie du 22 avril 1822

Dispute between the United States of America and Great Britain about the interpretation of the first article of the Treaty of Ghent of 24 December 1814

Différend entre les États-Unis d'Amérique et la Grande-Bretagne concernant l'interprétation de l'article premier du Traité de Gand du 24 décembre 1814

Award of the Emperor of Russia of 22 April 1822*

Sentence de l'Empereur de Russie du 22 avril 1822**

Treaty interpretation—literal and grammatical interpretation requested by the Parties—general principles of law and of maritime law used only as subsidiary means of interpretation.

Indemnification—just indemnification limited to private property originating from territories and places the restitution of which was stipulated by the treaty, including slaves carried away from said territories and places.

Implementation of award—offer of the arbitrator to serve as mediator in the negotiations required by the implementation of the award.

Interprétation des traités—interprétation littérale et grammaticale requise par les Parties—utilisation des principes généraux de droit et du droit maritime comme moyens d'interprétation subsidiaires uniquement.

Indemnisation—juste indemnisation limitée à la propriété privée émanant des territoires et des lieux dont la restitution est conventionnellement prévue, y compris les esclaves emportés desdits territoires et lieux.

Mise en œuvre de la sentence—proposition de l'arbitre de servir de médiateur dans les négociations requises par la mise en œuvre de la sentence.

* * * * *

* Reprinted as translated in John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 359.

** Est ici reproduite la traduction figurant dans John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 359.

Count Nesselrode to Mr. Middleton

[*Translation*]

The undersigned, Secretary of State, directing the Imperial Administration of Foreign Affairs, has the honor to communicate to Mr. Middleton, Envoy Extraordinary and Minister Plenipotentiary of the United States of America, the opinion which the Emperor, his master, has thought it his duty to express upon the subject of the differences which have arisen between the United States and Great Britain, relative to the interpretation of the first article of the treaty of Ghent.

Mr. Middleton is requested to consider this opinion as the award required of the Emperor by the two Powers.

He will doubtless recollect that he, as well as the Plenipotentiary of His Britannic Majesty in all his memorials, has principally insisted on the grammatical sense of the first article of the treaty of Ghent, and that, even in his note of the 4th (16th) November, 1821, he has formally declared that it was on the *signification of the words in the text of the article as it now is* that the decision of His Imperial Majesty should be founded.

The same declaration being made in the note of the British Plenipotentiary dated 8th (20th) October, 1821, the Emperor had only to conform to the wishes expressed by the two parties, by devoting all his attention to the examination of the grammatical question.

The above-mentioned opinion will show the manner in which His Imperial Majesty judges of this question; and in order that the Cabinet of Washington may also know the motives upon which the Emperor's judgment is founded, the undersigned has hereto subjoined an extract of some observations upon the literal sense of the first article of the Treaty of Ghent.

In this respect the Emperor has confined himself to following the rules found in the words employed in drawing up the act, by which the two Powers have required his arbitration, and defined the object of their difference.

His Imperial Majesty has thought it his duty, exclusively, to obey the authority of these rules, and his opinion could not but be the rigorous and necessary consequence thereof.

The undersigned eagerly embraces this occasion to renew to Mr. Middleton the assurances of his most distinguished consideration.

NESSELRODE

St. Petersburg, 22d April, 1822

His Imperial Majesty's Award

[*Translation*]

Invited by the United States of America and by Great Britain to give an opinion, as Arbitrator, in the differences which have arisen between these two

Powers, on the subject of the interpretation of the first article of the treaty which they concluded at Ghent, on the 24th December, 1814, the Emperor has taken cognizance of all the acts, memorials, and notes in which the respective Plenipotentiaries have set forth to his administration of foreign affairs the arguments upon which each of the litigant parties depends in support of the interpretation given by it to the said article.

After having maturely weighed the observations exhibited on both sides:

Considering that the American Plenipotentiary and the Plenipotentiary of Britain have desired that the discussion should be closed;

Considering that the former, in his note of the 4th (16th) November, 1821, and the latter, in his note of the 8th (20th) October, of the same year, have declared that it is *upon the construction of the text of the article as it stands*, that the Arbitrator's decision should be founded, and that both have appealed, only as a subsidiary means, to the general principles of the law of nations and of maritime law;

The Emperor is of opinion "that the question can only be decided according to the literal and grammatical sense of the first article of the Treaty of Ghent."

As to the literal and grammatical sense of the first article of the Treaty of Ghent:

Considering that the stipulation upon the signification of which doubts have arisen, is expressed as follows:

> All territory, places, and possessions whatsoever, taken by either party from the other during the war, or which may be taken after the signing of this treaty, excepting only the islands hereinafter mentioned, shall be restored without delay, and without causing any destruction or carrying away any of the artillery or other public property *originally captured in the said forts or places, and which shall remain therein upon the exchange of the ratifications of this treaty*, or any slaves, or other private property; and all archives, records, deeds, and papers, either of a public nature, or belonging to private persons, which, in the course of the war, may have fallen into the hands of the officers of either party, shall be, as far as may be practicable, forthwith restored and delivered to the proper authorities and persons to whom they respectively belong.

Considering that, in this stipulation, the words *originally captured, and which shall remain therein upon the exchange of ratification*s, form an incidental phrase, which can have respect, *grammatically*, only to the substantives or subjects which precede;

That the first article of the Treaty of Ghent thus prohibits the contracting parties from carrying away from the places of which it stipulates the restitution, only the public property *which might have been originally captured there, and which should remain therein upon the exchange of the ratifications*, but that it prohibits the carrying away from these same places *any private property* whatever;

That, on the other hand, these two prohibitions are solely applicable to the places of which the article stipulates the restitution;

The Emperor is of opinion:

"That the United States of America are entitled to a just indemnification, from Great Britain, for all private property carried away by the British forces; and as the question regards slaves more especially, for all such slaves as were carried away by the British forces, from the places and territories of which the restitution was stipulated by the treaty, in quitting the said places and territories;

"That the United States are entitled to consider, as having been so carried away, all such slaves as may have been transported from the above-mentioned territories on board of the British vessels within the waters of said territories, and who, for this reason, have not been restored;

"But that, if there should be any American slaves who were carried away from the territories of which the first article of the Treaty of Ghent has not stipulated the restitution to the United States, the United States are not to claim an indemnification for the said slaves."

The Emperor declares, besides, that he is ready to exercise the office of mediator, which has been conferred on him beforehand by the two states, in the negotiations which must ensue between them in consequence of the award which they have demanded.

Done at St. Petersburg 22d April, 1822

Count Nesselrode to Mr. Middleton

[*Translation*]

The undersigned, Secretary of State, directing the Imperial Administration of Foreign Affairs, has, without delay, laid before the Emperor, his master, the explanations into which the Ambassador of His Britannic Majesty has entered with the Imperial Ministry, in consequence of the preceding confidential communication which was made to Mr. Middleton, as well as to Sir Charles Bagot, of the opinion expressed by the Emperor upon the true sense of the 1st article of the Treaty of Ghent.

Sir Charles Bagot understands that, in virtue of the decision of His Imperial Majesty, "His Britannic Majesty is not bound to indemnify the United States for any slaves who, coming from places which have never been occupied by his troops, voluntarily joined the British forces, either in consequence of the encouragement which His Majesty's officers had offered them, or to free themselves from the power of their master—these slaves not having been carried away from places or territories captured by His Britannic Majesty during the war, and, consequently, not having been carried away from places of which the article stipulates the restitution."

In answer to this observation, the undersigned is charged by His Imperial Majesty to communicate what follows to the Minister of the United States of America:

The Emperor having, by the mutual consent of the two Plenipotentiaries, given an opinion founded solely upon the sense which results *from the text of the article* in dispute, does not think himself called upon to decide here any question relative to what the laws of war permit or forbid to the belligerents; but, always faithful to the grammatical interpretation of the 1st article of the Treaty of Ghent, His Imperial Majesty declares, a second time, that it appears to him according to this interpretation:

"That, in quitting the places and territories of which the Treaty of Ghent stipulates the restitution to the United States, His Britannic Majesty's forces had no right to carry away from these same places and territories, absolutely, any slave, by whatever means he had fallen or come into their power.

"But that if, during the war, American slaves had been carried away by the English forces, from other places than those of which the Treaty of Ghent stipulates the restitution, upon the territory, or on board British vessels, Great Britain should not be bound to indemnify the United States for the loss of these slaves, by whatever means they might have fallen or come into the power of her officers."

Although convinced, by the previous explanations above mentioned, that such is also the sense which Sir Charles Bagot attaches to his observation, the undersigned has nevertheless received from His Imperial Majesty orders to address the present note to the respective Plenipotentiaries, which will prove to them, that, in order the better to justify the confidence of the two Governments, the Emperor has been unwilling that the slightest doubt should arise regarding the consequences of his opinion.

The undersigned eagerly embraces this occasion of repeating to Mr. Middleton the assurance of his most distinguished consideration.

NESSELRODE

St. Petersburg, 22d April, 1822

PART II

Commission established under the Convention concluded between the United States of America and Great Britain on 8 February 1853

Commission établie en vertu de la Convention conclue entre les États-Unis d'Amérique et la Grande-Bretagne le 8 février 1853

Commission established under the Convention concluded between the United States of America and Great Britain on 8 February 1853

Commission établie en vertu de la Convention conclue entre les États-Unis d'Amérique et la Grande-Bretagne le 8 février 1853

Case of Messrs. T. and B. Laurent *v.* the United States of America, opinions of the Commissioners and decision of the Umpire, Mr. Bates, dated 20 December 1854[*]

Affaire concernant Messieurs T. et B. Laurent c. les États-Unis d'Amérique, opinions des Commissaires et décision du Surarbitre, M. Bates, datée du 20 décembre 1854[**]

United States Commissioner

Treaty interpretation—intention of the Parties.

Nationality under international law—individual domiciled in another country regarded as subject of such country for all civil purposes—*Migrans jura amittat ac privilegia et immunitates domicilii prioris*—interpretation of the term *subjects* in the Convention of 8 May 1854 as meaning persons actually and effectually under the rule and government of a country—absence of recognition of dual nationals.

Forfeiture of rights—placing themselves in the position of alien enemies during the war, the claimants forfeited their right to protection on the part of their government, which was neutral in this conflict.

International protection—under the Convention of 8 February 1853, persons domiciled abroad are to be protected by their country of residence.

British Commissioner

Treaty interpretation—interpretation of treaties according to international law—no unvarying meaning prescribed by international law to particular words for the construction of treaties—interpretation shall discover and give effect to the intention of parties, collected from the language of the agreement and taken in connection with surrounding circumstances—differentiation between the *letter* and the *spirit* of the Convention.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 2677.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 2677.

Residence abroad in time of war—right of belligerents to consider and treat as enemy the foreigners domiciled in the other belligerent country.

Residence abroad and nationality—a subject residing abroad is not deprived of the protection of his government—certain rights of citizenship and certain liabilities may result from residence abroad, but original national character cannot be divested.

Diplomatic protection—practice of governments to extend their protection to their citizens domiciled abroad and successfully to insist upon redress for injuries—consuls and diplomatic agents especially instructed to protect the subjects of their country.

Umpire

Locus standi before the Commission—*locus standi* restricted to British subjects or citizens of the United States.

Treaty interpretation—Convention of 8 May 1854 interpreted in accordance with the law of nations and not with the municipal law of England.

Nationality of claimants—according to international law and for the purposes of the Commission, claimants being long-time residents in Mexico with the intention to stay there are to be regarded as Mexican citizens and not British subjects.

Commissaire des États-Unis

Interprétation des traités—intention des Parties.

Nationalité en vertu du droit international—un individu domicilié dans un autre pays que son pays de nationalité est considéré comme sujet de ce pays pour toutes affaires civiles—*Migrans jura amittat ac privilegia et immunitates domicilii prioris*—interprétation du terme *sujets* dans la Convention du 8 mai 1854 comme signifiant toutes les personnes soumises réellement et effectivement à la loi et au gouvernement d'un pays—absence de reconnaissance des binationaux.

Perte de droits—en se positionnant volontairement en tant qu'étrangers ennemis pendant la guerre, les requérants ont perdu leur droit à être protégés par leur gouvernement resté neutre dans ledit conflit.

Protection internationale—en vertu de la Convention du 8 février 1853, les personnes domiciliées à l'étranger doivent être protégées par leur État de résidence.

Commissaire britannique

Interprétation des traités—interprétation des traités conformément au droit international—absence de signification immuable imposée par le droit international à certains termes pour l'interprétation des traités—l'interprétation doit révéler et donner effet à l'intention des Parties, elle-même dégagée du langage de l'accord et mise en relation avec les circonstances environnantes—différenciation entre la *lettre* et *l'esprit* de la Convention.

Résidence à l'étranger en temps de guerre—droit des belligérants de considérer et traiter comme ennemis les étrangers domiciliés dans l'autre État belligérant.

Résidence à l'étranger et nationalité—un sujet résidant à l'étranger n'est pas privé de la protection de son gouvernement—certains droits de citoyenneté et certaines

responsabilités peuvent découler d'un domicile à l'étranger, mais le caractère national d'origine ne peut être supprimé.

Protection diplomatique—pratique des gouvernements d'étendre leur protection à leurs citoyens résidant à l'étranger et d'insister avec succès pour la réparation de leurs préjudices—les agents diplomatiques et consulaires sont spécialement chargés de protéger les sujets de leur pays.

Surarbitre

Locus standi devant la Commission—*locus standi* limité aux sujets britanniques et aux citoyens américains.

Interprétation des traités—Convention du 8 mai 1854 interprétée selon le droit des gens et non selon le droit national anglais.

Nationalité des requérants—selon le droit international et au vu des objectifs de la Commission, les requérants résidant depuis longtemps au Mexique avec l'intention de s'y établir doivent être considérés comme des citoyens mexicains et non comme des sujets britanniques.

* * * * *

Opinion of Mr. Upham, United States Commissioner

The first article in the convention provides "that all claims of corporations, companies, or private individuals, *subjects* of Her Britannic Majesty, upon the Government of the United States, and all claims of *citizens* of the United States against the British Government" from the year 1814 to the present time, shall be submitted to the decision of this commission.

It is quite clear to me that the correlative terms "*citizens*" and "*subjects*" were used by the contracting parties in the convention in contrast with and exclusive of each other; and that it was not contemplated by them that subjects of Great Britain could be regarded, at the same period of time, as *citizens* of the United States, or that citizens of the United States might in the same manner have the additional character of *subjects* of Great Britain.

If, however, we affix to the term British subjects the meaning established by the municipal laws of England in their statutes, it will include vast numbers of American citizens, embracing not only all the emigrants from Great Britain who have become settled and naturalized citizens of the United States since the Revolution, but their children and grandchildren who may have been born there. (See 7 Anne, ch. 5 4 Geo. II. ch. 21, and 13 Geo. III. ch. 21.)

Thus, under this construction, every officer in the American Government might be entitled to enforce before this commission claims, as British subjects,

against their own government, as their grandfathers may have been subjects of Great Britain. . . .

It is possible that Great Britain may keep this provision upon her statute book in order that the children and grandchildren of emigrants from that country who may choose to return again to her jurisdiction shall be received at once into full fellowship as subjects; but in the decisions of her courts, in her international contracts, in her construction of the rights of actual subjects, and the disabilities of aliens, she holds, without exception, that a person going to a foreign country and becoming domiciled there, in the legal sense of that term, is to be regarded, for all civil purposes, as a subject and citizen of such country, entitled to the rights and subject to the disabilities arising from his domicil.

There never has been any international difference of opinion between the two governments as to who are actual citizens and subjects of either power in their dealings and relations with each other, and there can be no doubt that this well-understood international meaning was adopted and used in this convention in reference to the terms citizens and subjects of either country. . . .

The decisions of England and the United States, as well as those of every other nation, are uniform to the point that an individual going to another country and becoming domiciled there for purposes of trade, is, by the law of nations, to be considered a subject of such country for all civil purposes, whether such government be a hostile or a neutral power.

Authorities to this effect will be found in *Wilson* v. *Marryat* (8 Term Rep. 31); *M'Connel* v. *Hector* (3 Bos. & Pull. 113); *The Indian Chief* (3 Rob. Rep. 12); *The Anna Catherina* (4 Rob. Rep. 107; *Danous,* note, 255); *The President* (5 Rob. Rep. 277); *The Matchless* (1 Hagg. Ad. Rep. 103); *The Odin*, Hall, master (1 Rob. Rep. 296); *Bell* v. *Reid* (1 Maule & Selw. 726).

American authorities to the same point will be found in the case of *The Sloop Chester* (2 Dallas, 41); *Murray* v. *Schooner Betsey* (2 Cranch, 64); *Maley* v. *Shattuck* (3 Cranch, 488); *Livingston* v. *Maryland Insurance Company* (7 Cranch, 506); *The Venus* (8 Cranch, 253); *The Frances* (8 Cranch, 363); *Los Dos Hermanos* (2 Wheat. 76). These authorities, with various others, are cited and approved by Chancellor Kent in 1 Kent's Commentaries, 75; and he alleges that the doctrine sustained by them "is founded on the principles of international law, and accords with the reason and practice of all civilized nations."

All writers on international law concur in these views and adopt the maxim, "*Migrans jura amittat ac privilegia et immunitates domcilii prioris.*" (Voet, tome 1, 347; Grotius, book 3, p. 56, ch. 2, sec. 2; book 3, ch. 4, sec. 6; Vattel, book 1, ch. 19, sec. 212; Wheaton's International Law, part 4, ch. 1, secs 17 &19.)

The same principles are declared by public announcement of the present English ministry in reference to the existing war with Russia "as the settled law and practice of nations," and that, "by such law and practice, a belligerent has a right to consider as enemies all persons who reside in a hostile country, or maintain commercial establishments therein, whether such persons are by birth neutrals, allies, enemies, or fellow-subjects."

And in conformity with this declaration and the previous decisions on this subject it was adjudged by the admiralty court a short time since, in the case of *The Abo*, that "in time of war a person must be considered as belonging to the nation where he resides and carries on his trade, so far as the principles and rules of law are concerned, whether he resides in the enemy's or a neutral country." (*The Times*, July 22, 1854.)

The English authorities which have been cited expressly declare that a person domiciled in another country "is to be taken as a subject of such country." These are the words of Lord Stowell in the case of *The President*, above cited. And, in making such decision, he does not mean to be understood that such a person may be a citizen of another country and at the same time a British subject, as is contended before us; but he expressly declares, in *The Ann* (1 Dod. Ad. Rep. 224) that this can not be, because he says "he can not take advantage of *both characters at the same time*."

The owner of *The Ann* was a British-born subject, and his wife and child resided in Scotland, but he himself personally was domiciled in the United States. He was therefore clearly a British subject by the *municipal laws* of England, but Sir William Scott (Lord Stowell) held that, as regarded his *international intercourse and character*, he was not a British subject or entitled to redress as such, and his property was condemned accordingly, notwithstanding the decree in council declared "that all property of British subjects," seized under like circumstances, "should be restored."

The international definition of "subject" is also recognized and adjudged in *Drummond's case* (2 Knapp's Privy Council Reports, 295), where it was holden that though an individual might be formally and literally by the law of Great Britain a British subject, still there was a question beyond that, and that was whether he was a British subject within the meaning of the treaty then under consideration, and it was there contended that all treaties must be interpreted according to the law of nations, and that where a treaty speaks of the subjects of any nation it means those who are actually and effectually under its rule and government, and not those who for certain purposes under the mere municipal obligations of a country may be held to maintain that character.

And in *Long's case* (2 Knapp's Privy Council Reports, 51) it was holden that a corporation, composed of British subjects, existing in a foreign country, and under the consent of a foreign government, must be considered as a foreign corporation, and is not therefore entitled to claim compensation for the loss of its property under a treaty giving the right of doing so to *British subjects*.

In the same manner, and on the same principle, the converse of the proposition was holden in the *Countess of Conway's case* (2 Knapp's Privy Council Reports, 364), that a French native-born subject, residing in England, had the character of a British subject, and was entitled to claim compensation as such, against *his own country*, for losses under a treaty providing compensation to be made "to British subjects."

These cases seem to me to be sound in principle and explicit in authority; and I am surprised, after these well-established and adjudicated decisions, that the doctrine is still contended for, that in the interpretation of the term *subject*, in this convention, we are to be confined to the meaning affixed to it by the English statute.

It is desirable, before giving to it this construction, we should ascertain precisely what it means.

By applying this construction to the convention, the second article would be made to read as follows: "That all claims against the United States, of corporations, companies, or private individuals, resident subjects of Her Britannic Majesty, and of all native-born citizens of Great Britain, who may have emigrated to the United States since the revolution, and of their children and grandchildren who may have been born there, and all claims of citizens of the United States against the British Government, shall be submitted to the decision of the board of commissioners, whose decision shall be final," etc.

It seems to me that such an interpolation in the terms of this convention, or such a construction of it, would strike no persons with more surprise than its negotiators.

It is said, however, in order to obviate the evident difficulty of regarding the treaty in this light, that a person holding the statute relation of *subject* to England may appear before this commission and prosecute his claim as such, but if he is domiciled in another country his case is to be adjudged and determined by the commission as though he were a citizen of that country.

But I regard this as an erroneous and untenable position for any court or tribunal to take.

Suppose, for instance, that an American citizen whose grandfather was born in England should come before this commission armed with the power and authority of the British Government to enforce his claim here against his own country, will it answer for this commission to say that by the law of England he is a British *subject*, and as such we must *hear him*, but we will adjudge his case precisely as though he were a *citizen of the United States*? Surely not. Like any other citizen of the United States, he must pursue his remedy before the ordinary constituted tribunals of his country or before Congress. It would be a futile attempt in us to undertake to make any award on the merits of his case, as it can not be supposed that either nation would sanction such an extraordinary assumption of power.

This tribunal was not constituted to pass upon any such claim; neither was it constituted to pass upon the claim of any British-born subject who may have domiciled himself in Mexico, and who continued to reside there during a war between the United States and that country "carrying on", in the words of the legal authorities, "trade there, paying the taxes, and employing the people of the country, and expending his industry and capital in her service."

"Such a person," says Lord Chief Justice Alvanly, "who resides in a hostile country, is a subject of such country. He is to all civil purposes as much an alien enemy as if he were born there, and to hold to a different conclusion would be to contradict all the modern authorities on the subject." (*M'Connel* v. *Hector*, 3 Bos. & Pull. 114.)

This foreign character, however assumed, is a substantial recognized civil relation, as much as the prior subsisting relation with England. The Messrs. Laurent, in this case, are citizens of Mexico, and their claim against the United States is a Mexican claim. Such a claim can only be adjudicated between the two governments where it originated. They alone are the national parties to it. And neither Mexico nor the United States is here with the necessary papers and evidence for its adjustment, for the reason that neither of those governments has delegated to us any such authority, and an attempt by us to bind them in the decision of such claims would be wholly nugatory.

It is suggested in the argument in "this case that the claim of English *subjects* can not extend to every case in which a British subject has been a party, but would only extend to claims upon the United States Government, preferred by persons who had not by their acts *forfeited their right* to appeal to the English Government for its interposition."

What would constitute a forfeiture of such right of a British subject is not stated; whether the act of the father would bar the son of his right as a British subject, or whether being born in a foreign country, where his father was domiciled, would have such effect. Many such questions would arise under such a mode of determining the national character. If, however, the question whether an individual is to be regarded as a subject of Great Britain is to depend upon the fact whether he has, *by his own acts*, forfeited the right to appeal to the English Government for protection, it seems to me this case is clearly of that character.

The injury of which the Messrs. Laurent complain arose from their placing themselves in the position of *alien enemies* of the United States in the war with Mexico. They thereby forfeited their right to protection on the part of England, whose government was *neutral*, and could neither aid, abet, nor countenance any of its subjects in such acts of hostility. They could only, on this principle, be regarded as British subjects while holding the position of the British nation, and when they departed from such position and became alien enemies of the United States they *forfeited the protection of England* and their right to appear before this commission.

The United States has no remedy against Great Britain for the *conduct* of the Messrs. Laurent while domiciled in a foreign country as her *subjects*; and they, as British subjects, have no claim to redress against the United States, or to appear before this tribunal in that character.

Domicil, under all circumstances, stamps upon the individual the character of *foreigner*, *neutral* or *alien*, as the case may be. Chancellor Kent says it is "*the test of national character*"; and that the only limitation upon the principle of determining character from residence laid down in any authority is that the party, so far as regards his own country, must not take up arms against it. (1 Kent's Com., 76.)

The municipal relation of *subject* is, for the time being, wholly subordinate to the new relation impressed upon the individual, and can not exist as an *international relation*. His original right, as subject, may revive or revert if he returns to his native country, but it is otherwise inoperative.

Each nation may well claim of other governments that its own native-born citizens, who are domiciled with them, should be equally protected by law with the native-born citizens of other countries. Invidious distinctions in this respect would manifest a spirit of hostility against the parent country that could not be overlooked. But when individuals leave their own land, and have become domiciled in another country, and enjoy there the protection and the benefit of availing themselves of its laws, courts, tribunals, and appeals to its general government, as fully and freely as the native-born citizens of that country, for the protection of their rights and the business in which they are engaged, the original government of such persons has no claim to interfere in their behalf. Such persons become, by the settled adjudications of all countries, and the judgment of all writers on public law, in an international point of view, citizens of such country, as to all matters arising from such business and residence, and the treaties and conventions between foreign states are framed on this basis.

An attempt on the part of this commission to overrule or revise the decisions of British or American courts as to the business matters, transactions, or liabilities of persons thus domiciled in either country, or to pass upon them while such courts were fully open for their hearing and decision, would be an utter perversion of the powers granted by this convention.

Persons thus domiciled have the rights and the disabilities, under this convention, of the country under whose protection they have chosen to reside. An American native born citizen who has taken up his residence in London, and engaged in business there, has the same rights under this convention against the United States, for any claims arising from his business there, as any other citizen of London, but his claim is as a *British subject*; his domicil, by the settled construction of public law, affixes on him that character. The same is the case with an English native-born subject resident in New York; his claims under this convention can be those only of an American citizen, so far as regards the business of his elected domicil, or any adjudications upon it.

And where an individual is domiciled in another country, different from that of either of the contracting parties to this convention, as in Mexico, for instance, his claim arising from acts connected with and partaking of such domicil is not included in a convention for the adjustment of the claims of British subjects and American citizens.

Such a claim must be prosecuted through conventions made between the country of his adoption, under whose protection his business was carried on and his claim arose, and the United States. As regards any powers confided to us, he is to be holden as a Mexican citizen. Such a decision in no manner conflicts with or infringes on any international right of England as regards her subjects.

For these reasons, I am of opinion that the exception taken to our jurisdiction over the claim of the Messrs. Laurent, as presented to us, is sustained, and that no authority has been delegated to this commission to adjudicate upon it.

Opinion of Mr. Hornby, British Commissioner

It is not disputed that the Messrs. Laurent are British-born subjects, nor pretended that, except in so far as their character of British subjects may be affected by *mere* residence abroad, they have done anything to divest themselves of this character. They have not been naturalized in Mexico; on the contrary, they have annually taken out a permission to reside in Mexico, in which permission they have been uniformly designated as British subjects, and generally they have, so far as lay in their power, preserved their English character. This being so, and having, as they conceive, some ground of complaint against the United States Government, they have appealed to the English Government for its interposition on their behalf with that of the United States. It appears therefore to me that this case comes within the *letter* of the convention, and is *prima facie* within our jurisdiction.

But it is contended by the learned agent of the United States that though within the *letter*, the case is not within the *spirit* of the convention; submitting that the term "British subjects," used in the treaty, is not to be interpreted according to English law, but according to international law, and that by the latter a person *can only* be regarded as a citizen or subject of the country in which he is for the time being domiciled. I do not, however, understand it to have been assumed by the agent of Her Majesty's government that the claimants, being "British subjects" within the terms of a British statute, are therefore *necessarily* "British subjects" within the meaning of the convention. It is clearly not the statute law of England which is to give the rule of interpretation, but the obvious intention of the parties to the treaty.

Now, it is undoubtedly true that treaties are to be interpreted according to international law, but international law does not affix an unvarying meaning to particular words, or prescribe any rule for the construction of treaties, other

than that applicable to the interpretation of all written documents, namely, to discover and give effect to the intention of the contracting parties, which intention is to be collected from the language of the instrument of agreement, taken in connection with surrounding circumstances to which it has reference.

The cases which have been cited by the American agent are authorities for the well-known principle of international law that foreigners, domiciled in an enemy's country can not set up a *neutral* character as against an invading force on account of their *foreign* origin, so as to entitle them to immunity from the ordinary consequences of war; and with this undoubted principle, the declarations of the English ministers in reference to the present war with Russia, as well as the recent decision of the admiralty court in the case of *The Abo*, cited by the learned agent of the United States, are in strict conformity. It may be also, when we come to consider the *merits* of the Messrs. Laurent's claim, that this principle will be found to govern the decision which we shall have to give for or against the claimants; but upon examination of the cases cited, it is clear they do *not* establish the principle which they have been supposed to prove, viz, that the term "British subject," as used in this treaty, can not, under *any circumstances whatever*, be intended to apply to British subjects domiciled out of Her Majesty's dominions.

Several cases which were decided under the treaty of 1814 between France and England have been referred to.

The object of that treaty was to provide compensation for all "British subjects" whose property had been confiscated by the revolutionary government of France. If the construction which is *now* contended for by the American agent had been put upon the language of that treaty, it would have followed that no person domiciled in France could have been admitted to claim compensation under the title of "British subjects," and such a construction would have gone far to defeat the very object for which the treaty was entered into, as it is a matter of history that the property of many persons, established as merchants or otherwise in France at the time of the revolution, was seized upon the very ground that the owners were British subjects, which shows that mere domicil does not settle the question; and, moreover, on reference to the cases, I can not discover that the construction contended for by the learned agent was put upon the French and English treaty.

Genessee's case, reported in the 2d volume of Knapp's Reports, p. 345, is one in which it distinctly appears that Messrs. Boyd and Kerr, the claimants, were established as bankers at Paris. Now, if the present objection were valid, it would have been a sufficient answer to that claim to have said Messrs. Boyd and Kerr had established themselves for commercial purposes and were domiciled in France; that they had voluntarily divested themselves of the character of British, and had assumed that of French subjects, and can not, therefore, claim the benefit of a treaty which was intended for the protection of those British subjects only who had not quitted their own country. Messrs. Boyd and Kerr, however, were held to be clearly entitled to compen-

sion as British subjects, and by the decision of the same eminent judge, Sir William Scott, whose judgments in other cases have been quoted in opposition to the admissibility of the claim of Messrs. Laurent in the present case. Drummond's case, decided under the same convention, has been especially relied on. The reasons, however, which are expressly given for the decision in that case, show it was *not* determined on the mere fact of the claimant being domiciled in France, *but that* from special circumstances—such as accepting military employment under the French crown—he had voluntarily taken upon himself the character of a French subject, and having done so, the new French Government had a right to treat him as such, and consequently that he was not entitled to indemnity.

If there had been analogous circumstances in the present case I might have felt bound to hold that the Messrs, Laurent were not entitled to resume at pleasure, for their advantage, the character of British subjects, which, for their advantage, they had voluntarily renounced; but in the entire absence of such circumstances, I am of opinion that mere residence abroad does not deprive them of all title to the protection of the British Government, or can preclude that government from taking steps to procure for them redress if they have suffered an injury in violation of the law of nations, or absolve the American Government from the liability to redress such an injury.

In the case of the *Ann*, a British subject, who had been domiciled in the United States during the war between that country and Great Britain, sought to be admitted to the benefit of the orders in council which were intended to provide compensation for those British subjects who had been inadvertently injured in the course of the war by the English cruisers. The claimant, having adhered to the enemy, was plainly not one of the class of persons for whose relief the orders in council were issued. The injury he sustained was, under these circumstances, in no way wrongful. The decision therefore was not, as we are now asked to decide, that the claimant, being domiciled abroad, could not, under any circumstances, be entitled to the character of British subject; but that he was not a British subject, within the meaning of the instrument then under consideration, entitled to redress. The *Indian Chief*, reported in 3 Rob. Rep. 12, as well as the *President*, in 5 Rob. Rep. 107, are both cases in which the claimants had acquired a hostile character against their own country, and as enemies had sustained losses which were rightfully inflicted on enemies. It was impossible, therefore, for them to establish a claim *against this country* upon the ground that they were British subjects in the face of the fact of their having been in a position of hostility to Great Britain. In these cases, however, the *merits* and justice of the claim were in question, and they did not depend, nor were they decided, upon a mere question of domicil. It does not appear to me necessary to examine the other cases in detail, inasmuch as none of them, in my judgment, show that the term 'British subject' necessarily excludes every person domiciled out of the British dominions. And it becomes our duty to ascertain, from the object and language of the

present convention, the sense in which the words in question were employed by the contracting parties.

The object of the convention is stated to effect "a speedy and equitable settlement" of certain claims pending and which had become the subject of discussion between the two governments; and it is not merely for the settlement of the claims themselves, but rather to remove them from the arena of discussion between the two governments, that the present tribunal has been erected; and it is therefore provided that all claims, etc., which may have been or might be presented to either government for its interposition with the other should be referred to this commission.

It is a *fact* that the applications to the English and American governments for their interposition, one with the other, have not been confined to citizens or subjects domiciled in their own country, but the claims of persons domiciled abroad have in several instances become the subject of correspondence between the two governments, it appears to me, therefore, that if the sense in which, the term "British subject" or "American citizen" is to be construed be sought in the context of the convention, it will be found that the contracting parties contemplated American citizens or British subjects, wherever resident, whose claims had actually been or might properly become the subject of the interposition of the one government with the other.

If, then, this be a correct mode of stating the question which we have to determine, it can not be denied that the *practice* of governments has been to extend their protection to such of their citizens as may be domiciled abroad, and to insist upon, and with success, redress for injuries. Instances in which the American Government has so extended its protection and demanded compensation have been mentioned, and the case of Don Pacifico shows that the English Government has considered itself entitled to interfere on behalf of an Englishman, though domiciled abroad. And many other instances might be collected from the history of recent times.

Having regard, therefore, to the fact that both the English and American governments have from time to time interposed in respect to their subjects or citizens domiciled out of their respective countries, and that such interposition has in some instances led to the preferment of claims by the one government on the other which were pending at the time that the present convention was entered into, it is clear to me that the high contracting parties in entering into the present treaty intended to provide a tribunal for the settlement of all claims, whether preferred on behalf of subjects domiciled in the British dominions or elsewhere, and consequently that the claim of the Messrs. Laurent is admissible before us.

I can not find any force in the argument, that if the Messrs. Laurent are admitted under this convention as British subjects, thousands of American citizens by birth having claims against the American Government, might also have presented them before the commissioners as British subjects by descent. If I am right in the rule of interpretation which I have adopted, it is clear that

they could not, for it would be ridiculous to suppose that either of the contracting parties intended this international tribunal to adjudicate upon the claims of acknowledged citizens or subjects upon their own governments. The effect also of acquiescence in the interpretation to be given to the words "British subjects" in the treaty contended for by the learned agent of the United States, would be that henceforth no merchant residing in a foreign country could ever claim the assistance and protection of the government of the country of which he was a native, and to which country he owes allegiance. Thus an English merchant residing in France, or an American merchant residing in England, is to be considered as barred from appealing to England or America for protection and assistance.

Mr. Everett, in his correspondence with Lord Aberdeen on the rough rice question, incidentally maintains the same view of the law and practice of nations which I have already expressed, although he carries it somewhat further than is necessary for the purposes of the argument in the present case. The American minister there insisted on his right to interfere under the treaty of commerce between Great Britain and the United States on behalf of an English firm, claiming compensation for pecuniary damage done in consequence of a nonobservance of the treaty, because one of the members of that firm was an American citizen, *domiciled* in England. If in this case *domicil* in England had ousted the American partner of his right to appeal to the United States Government for protection, or for its interference in obtaining for him the compensation due for an injury thus done to him, Mr. Everett was wrong in claiming the right to interfere, and Lord Aberdeen was wrong in admitting it.

My judgment is founded on the following conclusions, at which, after a careful consideration of the arguments that have been advanced on either side, I have arrived. To recapitulate them, they are shortly as follows:

That the Messrs. Laurent are admitted to be—whatever else they may also be—British subjects.

That mere residence in a foreign country, in time of peace or war, does not deprive a merchant of his original citizenship or of the right to call for the protection of the government of his native country; although his continued residence in the country in time of war gives the right to the enemies of that country to consider and treat him as an enemy.

That although such residence may clothe him with certain rights of citizenship and involve certain liabilities, it does not divest him of his original national character.

That the practice and usage of nations sanction the interference of a government on behalf of its subjects or citizens resident abroad, as well as at home.

That consuls and diplomatic agents are especially instructed to watch over and protect the subjects of the countries of their respective governments resident in the countries to which they may be accredited.

That such being the usage and practice of nations, the words used in this treaty are to be interpreted in connection with and by the aid of such usage and practice.

That, consequently, it was the intention of the contracting parties to the convention of 1853, that the commissioners appointed under it should decide according to justice and equity upon the claims of individuals in the position of the Messrs. Laurent.

Decision of the Umpire, Mr. Bates

The claim by the Messrs. Laurent is for damage which, they allege, they received in the year 1847, from the conduct of the United States general, Scott, who captured the city of Mexico in that year. The treaty of peace between the United States and Mexico settled all claims of Mexican citizens against the United States. The Messrs. Laurent present their claim as British subjects. It is quite clear that none but British subjects or citizens of the United States can have any *locus standi* before this commission.

It is denied, on behalf of the United States, that the Messrs, Laurent can claim to be British subjects within the meaning of the words "British subjects" as used in the convention by virtue of which this commission was appointed; and this seems to me to be the correct view of the case, both on principle and with reference to the reported authorities on the subject.

According to the municipal law of England, the Messrs. Laurent may be, for some purposes, still British subjects, but the language of the convention must be construed in accordance with the law of nations, and not according to the laws of any one nation in particular; and it is sufficiently clear that by the rules of international law and for the purposes of this commission, the Messrs. Laurent were, for the time being at least, Mexican citizens and not British subjects.

There are many authorities which bear on this question. Lord Stowell, in giving judgment in the case of the *Matchless*, (1. Haggard, page 97), said:

> Upon such a question it has certainly been laid down by accredited writers on general law, and upon grounds apparently not unreasonable, *that if a merchant expatriates himself as a merchant to carry on the trade of another country, exporting its produce, paying its taxes, employing its people, and expending his spirit, his industry, and, his capital in its service, he is to be deemed a merchant of that country, notwithstanding he may in some respects be less favored in that country than one of its native subjects*. Our own country, which is charged with holding the doctrine of unextinguishable allegiance more tenaciously than others, is no stranger to this rule. Its highest tribunals which adjudicate the national character of property taken in war apply it universally. They privilege persons residing in a neutral country to trade as freely with the enemies of Great Britain in war as the native subjects of that neutral country, although our own resident merchants can not without special permission of the crown.

The words of Lord Stowell apply exactly to the case of the Messrs. Laurent. They as far as in them lay, had expatriated themselves; they had resided twenty years in Mexico carrying on their business, and with every intention of remaining there, as is sufficiently evidenced by their wishing to buy the freehold of the house in which they were living; and, according to Lord Stowell's judgment, ought to be considered Mexican citizens.

In the case of the *President* (5 Robinson, 277), which vessel was captured on a voyage from the Cape of Good Hope to Europe, and claimed by Mr. J. Elmslie, as a citizen of the United States, it appeared that he had been a British-born subject who had gone to the Cape during the last war, and had been employed as American consul at that place. In giving judgment, Sir William Scott said:

> This court must, I think, surrender every principle on which it has acted in considering the question of national character if it was to restore this vessel. The claimant is described to have been for many years settled at the Cape, with an established house of trade, and as a merchant of that place, and must be taken as a subject of the enemy's country. (The Dutch being then at war with England.)

In a recent case, the *Aina*, decided in the admiralty court in June last: The claimant was a native of the free Hanse town of Lubec, and consul of His Majesty the King of the Netherlands, at Helsingfors, in Finland; he had lent money, before the war with Russia, on bottomry on the ship, which ship was captured by the British fleet in the Baltic. Dr. Lushington, in giving judgment, is reported to have said:

> Two questions have arisen with respect to the present claim; first, as to the national character of the claimant, whether he is to be considered an enemy or a neutral. With reference to this question, it is stated that he is a citizen of the free Hanse town of Lubec, and consul of His Majesty the King of the Netherlands, at Helsingfors, in Finland. Upon this I can put but one construction—that he is a resident in Finland, and carrying on business there. I take it to be a point beyond controversy that where a neutral, after the commencement of the war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and is disqualified from claiming as a neutral altogether.

I am unable to see why the principle laid down so fully in these cases (and many more might be cited) should not be applied to that of the Messrs. Laurent. They had, as before observed, long been residents in Mexico, they had a fixed home there, with apparently every intention of continuing to reside there, insomuch that they endeavored to buy a portion of the soil of Mexico.

I think, therefore, that for the purposes of this commission they were Mexican citizens and not British subjects, and that the commissioners do not form a tribunal competent to entertain their claims.

Case of the *Enterprise v.* Great Britain, opinions of the Commissioners and decision of the Umpire, Mr. Bates, dated 23 December 1854;[*] case of the *Hermosa v.* Great Britain, decision of the Umpire, Mr. Bates;[**] and case of the *Creole v.* Great Britain, decision of the Umpire, Mr. Bates[***]

Affaire *Enterprise* c. Grande-Bretagne, opinions des Commissaires et décision du Surarbitre, M. Bates, datée du 23 décembre 1854;[****] Affaire *Hermosa* c. Grande-Bretagne, décision du Surarbitre, M. Bates;[*****]et Affaire *Creole* c. Grande-Bretagne, décision du Surarbitre, M. Bates[******]

United States Commissioner

Rights of navigation—free and absolute right to navigate the ocean, common highway of nations—exclusive jurisdiction on the high seas of the laws of each country over its vessels—obligation for every ship to carry a flag and have a declared nationality under penalty of being treated as a pirate—right of all nations to freely use the ocean, except for the portion of sea immediately contiguous to the land—right of passage through this protected portion—limitation of jurisdiction of coastal State to certain fiscal and protection purposes over the waters immediately adjoining its territory—the use of coastal waters viewed as incidental right to the use of the land.

Right of refuge in case of distress—absolute right to seek shelter in a foreign harbour because of weather distress—right of refuge viewed as an incidental right to the navigation of the ocean—all incidental rights are based on necessities arising from the prior and original right—a right to the end uniformly carries with it a right to the means required to attain that end—vessels exempted from liabilities to local law when driven by distress within the ordinary jurisdiction of another country—entitlement to compensation for property seized in this context by the authorities of the foreign port.

Slavery as a legal institution under international law—question of the extraterritoriality of the abolition of slavery throughout British dominions—forced liberation of slaves of another government considered as an illegal interference of one nation with another, and in conflict with their own right of self-government and the established relations of their country—slave trade not considered as criminal traffic by the laws

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 4350.

[**] *Ibid*., p. 4374.

[***] *Ibid*., p. 4375.

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[*****] *Ibid*., p. 4374.

[******] *Ibid*., p. 4375.

of nations—law viewed as a question of fact without basis in morality or justice—legitimate compensation of forced liberation of slaves.

British Commissioner

Right of navigation—absolute exemption of jurisdiction from foreign laws for vessels at sea—limited exemption of jurisdiction from local laws for vessel in foreign ports, even if brought by reason of distress—a cargo of vessel considered legal under United States laws but illegal according to British law considered as liable to confiscation if brought within British jurisdiction, exempted from penalty under circumstances of necessity.

Slavery under international law—recognition by American law itself of an essential difference between property in slaves and property in things—institution of slavery depending solely upon laws of each individual State in which it is allowed—a municipal law forbidding slavery, being in strict harmony with the law of nature, does not violate the law of nations.

Conflict of municipal laws under international law—no nation can be called upon to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments—international law viewed as an equal arbitrator between nations—international law cannot compel one country to reject the law of nature and its own law in favour of a foreign local law in opposition to both.

Umpire

Slavery under international law—slavery existing by law in several countries could not be considered contrary to the law of nations.

Rights of navigation—right to navigate the ocean and to seek shelter in case of distress—right to retain the application of the law of the vessel's own country over the ship, her cargo and her passengers—violation of the laws of nations and the laws of hospitality by authorities of British dominions—shortage of provision and water considered as distress situation.

Commissaire des États-Unis

Droits de navigation—droit absolu de naviguer librement sur l'océan, voie commune de toutes les nations—compétence exclusive des lois de chaque État sur ses navires naviguant en haute mer—obligation pour chaque navire d'arborer un pavillon et d'avoir une nationalité déclarée sous peine d'être considéré comme un navire pirate—droit de toutes les nations d'utiliser librement l'océan, excepté la portion de mer immédiatement contigüe à la terre—droit de passage à travers cette portion protégée—limitation à certaines finalités de protection et de fiscalité de la compétence de l'État côtier sur les eaux immédiatement adjacentes à son territoire—utilisation des eaux côtières considérée comme un droit accessoire de l'utilisation de la terre.

Droit de refuge en cas de détresse—droit absolu de chercher refuge dans un port étranger en cas de mauvaises conditions météorologiques—droit de refuge considéré comme un droit accessoire à la navigation sur les océans—tous les droits accessoires sont fondés sur des nécessités découlant du droit antérieur et originel—un droit de

finalité implique également les moyens requis pour atteindre cette finalité—exemption des responsabilités selon le droit local pour les navires entraînés sous la juridiction ordinaire d'un État étranger par leur état de détresse—droit à compensation pour les biens saisis dans ce contexte par les autorités d'un port étranger.

Légalité du régime d'esclavage en droit international—question de l'extraterritorialité de l'abolition de l'esclavage à l'ensemble des dominions britanniques—la libération forcée d'esclaves dépendants d'un autre gouvernement est considérée comme une interférence illégale par une autre nation et comme étant en conflit avec la souveraineté de ce gouvernement et les relations établies entre ces États—le commerce d'esclaves n'est pas considéré comme un trafic illicite selon le droit des gens—le droit est vu comme une question de fait non fondée sur la morale ou la justice—compensation légitime pour la libération forcée d'esclaves.

Commissaire britannique

Droit de navigation—immunité absolue de juridiction des lois étrangères sur les navires en mer—immunité restreinte de juridiction des lois locales sur les navires stationnés dans les ports étrangers, même s'ils y sont arrivés en raison de leur état de détresse—une cargaison de navire considérée comme légale en vertu des lois américaines mais illégale en vertu du droit britannique est réputée comme passible de confiscation si elle est saisie sous juridiction britannique, excepté dans les cas de nécessité.

Esclavage en droit international—reconnaissance par le droit américain lui-même de la différence entre la propriété d'esclaves et la propriété d'objets—le régime juridique de l'esclavage dépend uniquement des lois de l'État individuel qui l'autorise—une loi interne interdisant l'esclavage, en parfaite harmonie avec le droit naturel, ne saurait violer le droit de gens.

Conflit de lois internes en droit international—il ne peut être exigé d'aucune nation que celle-ci permette que des lois étrangères s'appliquent sur son territoire alors que ces dernières vont à l'encontre de ses intérêts ou son sens moral—droit international considéré comme un arbitre équitable entre les nations—le droit international ne peut obliger un État à rejeter le droit naturel et ses propres lois au profit d'une loi nationale étrangère contraire aux deux derniers.

Surarbitre

Esclavage en droit international—l'esclavage existant en droit dans plusieurs pays, il ne peut être considéré comme contraire au droit des gens.

Droits de navigation—droit de naviguer sur l'océan et de chercher refuge en cas de détresse—droit de maintenir l'application du droit du pays d'origine sur le navire, sa cargaison et ses passagers—violation du droit des gens et des lois de l'hospitalité par les autorités des dominions britanniques—la pénurie de provisions et d'eau est considérée comme un cas de détresse.

* * * * *

Opinion of Mr. Upham, United States Commissioner, in the case of the *Enterprise*

In March, 1840, resolutions were submitted to the United States Senate relative to this claim, by Mr. Calhoun, which were adopted by that body, and which briefly set forth the principles on which the claim is based.

These principles are:

> That a vessel on the high seas, in time of peace, engaged in a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that, if such vessel is forced, by stress of weather or other unavoidable circumstance, into the port of a friendly power, her country, in such case, loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board.

It was contended that the *Enterprise* came within these principles, and that the seizure and liberation of the negroes on board of her, by the authorities of Bermuda, was a violation of these principles and of the law of nations. . . .

I shall endeavor to ascertain what this law is. Before proceeding, however, to give my views fully on this subject, I shall advert briefly to the various points taken in the argument addressed to us by the learned counsel for the British Government.

These points are:

1. "That laws have no force, in themselves, beyond the territory of the country by which they are made."

My reply is that this is usually the case; but it is subject to the important addition that the laws of a country are uniformly in force, beyond the limits of its territory, over its vessels on the high seas, and continue in force in various respects within foreign ports, as we shall hereafter show.

2. It is contended "that by the comity of nations the laws of one country are, in some cases, allowed by another to have operation within its territory; but, when it is so permitted, the foreign law has its authority in the other country from the sanction given to it there and not from its original institution."

3. "That every nation is the sole judge of the extent and the occasions on which it will permit such operation, and it is not bound to give such permission where the foreign law is contrary to its interests or its moral sentiments."

As to these points, I concede that there are many laws of a foreign country, in reference to its own citizens or their obligations, that another nation may enforce or not, where the citizens of such a country voluntarily come within its borders in order to place themselves under its jurisdiction. But there are cases where persons are forced by the disasters of the sea upon a foreign coast, where, as I contend, a nation has fundamental and essential rights within the ordinary local limits of another country, of which it can not be deprived, and that are operative and binding by a sanction that is wholly above and beyond the mere assent of any such state or community.

Such rights are defined by jurists as the absolute international rights of states. I might also add, it is not now a question whether the doctrines of international law shall prevail either in England or America.

"International law," says Blackstone, "has been adopted in its full extent by the common law of England; and whenever any question arises which is properly the subject of its jurisdiction, it is held to be a part of the law of the land." (Black. Com. vol. 4, p. 67.)

International law is also recognized by the Constitution of the United States, and it is made the duty of Congress to punish offenses against it.

4. It is contended "that England does not admit within its territory the application of any foreign laws establishing slavery, having abolished the *status* of slavery throughout its dominions."

This position is open to the exception taken to the second and third propositions, and is subject to the same reply.

5. It is contended "that the condition of apprenticeship, as permitted to remain in the West India Islands by the act of 3 and 4 Wm. IV. ch. 73, is no exception to the abolition of slavery throughout the British dominions;" because, it is said, the system is entirely different from slavery in point of fact, and because, however near a resemblance it may bear to it, it could afford no justification for an English court to hold that another sort of slavery was valid.

Our reply to this is, that slavery does not necessarily depend on the length of time the bondage exists, but on its character.

The apprenticeship system continued, as to a portion of those to whom it was applicable, for twenty-one years; and few persons can calculate on a lease of life for a longer time.

Apprentices also were liable to be bought and sold or attached for debt. The system therefore had all the worst characteristics of slavery.

Further, the act abolishing slavery acknowledged the legality and validity of slavery as an institution, as it rendered compensation for the liberation of slaves according to their respective valuations, and also gave to the owners of slaves the benefit of a term of intermediate service. If it was not considered right to liberate *British* slaves except on these conditions, how can it be right to compel the liberation of American slaves, casually thrown within the country, when no such compensation has been made or term of service secured to their owners?

This forced liberation of the slaves of another government without compensation is placed on the ground of the universal "abolition of slavery throughout the British dominions." Such abolition, however, was not effected by this act, as the sixty-fourth section provides "that nothing in the act contained doth or shall extend to any of the territories in the possession of the East India Company, or to the Island of Ceylon, or to the Island of St. Helena." It was merely enjoined on the East India Company by Parliament at the same

session "that they should forthwith take into consideration the means of mitigating slavery in their possessions, and of extinguishing it as soon as it should be practicable and safe," and slavery was not abolished in those provinces for some years subsequent to that period.

It is also said "that the provincial government of Bermuda, after the passage of the general act abolishing slavery, abolished the apprenticeship system prior to the liberation of the slaves on board the *Enterprise*," but such abolition was not made till, under the general law, they had received compensation for their slaves.

6. "The principle on which the right of everyman to personal liberty within British territory is attached is that some law must be appealed to to justify the restraint of liberty; and that neither the apprentice law nor any other law can be appealed to to justify the restraint of these negroes."

To this we reply that the law of the country from which the vessel comes, as sustained and enforced by the law of nations, can as well be appealed to on this subject as on any other. It is expressly admitted in the argument that the law of nations may be appealed to, as exempting property, other than slaves, in cases of shipwreck and disaster, and exempting vessels of war from ordinary municipal jurisdiction; and this is done by giving to the law of nations, in such case, the force and effect of municipal law, which is all that is asked to be done in this case.

7. It is contended "that slavery is not a relation which the British Government, by the comity of nations, is bound to respect."

But such is not the doctrine of the British courts. They hold themselves bound, by the comity of nations, to respect both slavery and the slave trade; and they uphold and sustain it in their decisions, where the rights of other nations are concerned.

In 3 Barn. & Ald. 353, *Maddrazzo* v. *Willes*, Chief Justice Abbott says "it is impossible to say that the slave trade is contrary to the law of nations"; and Lord Stowell says, in *Le Louis*, 2 Dodson's Admiralty Reports, 210, "that the slave trade is not piracy or crime by the law of nations, and is therefore not a criminal traffic by such law; and every nation, independent of treaty relations, retains a legal right to carry it on." . . .

I shall now proceed, as I proposed, to state my views as to the principles of international law applicable to cases of this description. They are . . . :

I. That each country is entitled to the free and absolute right to navigate the ocean as the common highway of nations, and while in the enjoyment of this right retains over its vessels the exclusive jurisdiction of its own laws.

The Emperor Antoninus said "though he was the lord of the world, the law only was the ruler of the sea."

Grotius says "that the sea, whether taken as a whole or as to its principal parts, can not become property. For the magnitude of the sea is so great it is

sufficient for all peoples' use. There is a natural reason which prevents the sea from being made property, merely because occupation can only be applied to a thing which is bounded. Now, fluids are unbounded and can not be occupied except as they are contained in something else, as lakes and ponds are occupied, and rivers as far as their banks; but the sea is not contained by the land, being equal to the land, or greater, so that the ancients say the land is bounded by the sea." (Grotius, book 2, ch.2, sec. 3.)

Vattel says "that the right of navigating the open sea is a right common to all men; and the nation that attempts to exclude another from that advantage does her an injury, and furnishes her with sufficient grounds for commencing hostilities." And "that nation which arrogates to itself an exclusive right to the sea does an injury to all nations, and they are justified in forming a general combination against it, in order to repress such an attempt." (Vattel, book 1, ch. 23, secs. 282, 283.)

Indeed, the free right of each nation to navigate the ocean is now nowhere contested, and it carries with it, as a necessary result, the exclusive jurisdiction on the high seas of the laws of each country over its own vessels.

Phillimore, in his recent work on International Law, Vol. I. p. 352, says that "all authorities combine, with the reason of the thing, in declaring that for all offenses on the high seas the territory of the country to which the vessel belongs is to be considered as the locality of the offence, and that the offender must be tried by the tribunals of his country;" and "it matters not," he says, "whether the injured person, or the offender, belongs to a country other than that of the vessel." The rule is applicable to all on board. It is further well declared that this right to navigate the ocean is a national one, and can not be exercised by an individual except under the patronage and protection of his government. Thus it is holden "that every ship is bound to carry a flag, and to have on board ship's papers indicating to what nation it belongs, whence it sailed, and whither it is bound, under the penalty of being treated as a pirate." (I. Phill. Internat. Law, 216.)

A vessel, wherever she is borne on the high seas, is bound, therefore, to have a national character, and is part and parcel of a recognized government.

It is contended—

II. That a vessel impelled by stress of weather, or other unavoidable necessity, has a right to seek shelter in any harbor, *as incident to her right to navigate the ocean*, until the danger is past and she can proceed again in safety.

This position I propose to sustain on three grounds: By authority; by the concession of the British Government in similar cases; and by its evident necessity as parcel of the free right to navigate the ocean, and therefore a necessary incident of such right.

1. The effect of stress of weather in exempting vessels from liabilities to local law, when they are driven by it within the ordinary jurisdiction of another country, is well settled by authority in various classes of cases, viz, in

reference to the blockade of harbors and coasts; of prohibited intercourse of vessels between certain ports that are subject to quarantine regulations; intercourse between certain countries, or sections of countries, which is interdicted from motives of mercantile policy, and in cases of liability to general customs duties. (Authorities on these points will be found in the *Frederick Molke*, 1 Rob. Rep. 87; the *Columbia*, id. 156; the *Juffrow Maria Schroeder*, 3 Rob. 153; the *Hoffnung*, 6 id. 116; the *Mary*, 1 Gall. 206; *Prince* v. *U. S.*, 2 Gall. 204; *Peisch* v. *Ware*, 4 Cranch, 347; Lord Raymond, 388, 501; Reeves's Law of Shipping, 203; the *Francis and Eliza*, 8 Wheaton, 398; Sea Laws, arts. 29, 30, and 31, and the *Gertrude*, 3 Story's Rep. 68.)

In the last-named case the learned judge remarks "that it can only be a people who have made but little progress in civilization that would not permit foreign vessels to seek safety in their ports, when driven there by stress of weather, except under the charge of paying impost duties on their cargoes, or on penalty of confiscation where the cargo consisted of prohibited goods." (See also Kent's Commentaries, 145, and authorities there cited.)

The authority of writers on international law is also directly in point. Vattel holds to the free right of all nations to the use of the ocean, with the exception that a portion of the ocean, immediately contiguous to the land, is subject to each government for the purposes essential to its protection. Even here, however, he says: "Other nations have a right of passage through such portions of the sea when not liable to suspicion, and in cases of necessity the entire right of the government ceases, as, for instance, where a vessel is obliged to enter a road in order to shelter herself from a tempest. In such case she may enter wherever she can, provided she cause no damage, or repair any damage done. This is a remnant of his primitive freedom of which no man can be supposed to have divested himself; and the vessel may lawfully enter, in spite of such foreign government, if she is unjustly refused admission." (Vattel, book 1, ch. 23, sec. 288.)

Again, he says in another section, "a vessel driven by stress of weather has a right to enter, even by force, into a *foreign port*." (Vattel, book 2, ch. 9, sec. 123; Puffendorf, book 3, ch. 3, sec. 8.)

Vattel thus considers this an absolute right that may be asserted at any hazard, and not a right resting in comity or dependent on a license that may be modified or revoked. In the resort to force for the preservation of such rights he is sustained by Phillimore and other modern writers on international law who hold that the violation of rights *stricti juris*, or the absolute rights of nations, "may be redressed by forcible means." (Phill. International Law, sec. 143.) Grotius, Puffendorf, and other writers lay down as a general principle the rule which is applicable to this case: "That, in extreme necessity, the primitive right of using things revives, as if they had remained in common, and that such necessity in all laws is excepted." (Grotius, book 2, ch. 2, sec. 6; Puffendorf, book 2, ch. 6, secs. 5 and 6; Vattel, book 2, ch. 9, secs. 119 and 120; Bowyer's Commentaries on Public Law, p. 357.)

2. The principles of law laid down by these various writers are also sustained by admissions of the British Government, and by the allowance and adjustment of claims of precisely the same character as the one before us.

In the correspondence between the two governments in reference to this claim, it is admitted by Lord Palmerston, "that where a ship, containing irrational animals or things, is driven by stress of weather into a foreign port, it would be highly unjust that the owner should be stripped of what belongs to him, through the application of the municipal law of the state to which he had not voluntarily submitted himself."

This is an admission of the high injustice of seizing all property, except in slaves; but the British Government have in other cases conceded the application of the same principle to slaves.

This was done in the case of the *Comet*, to which I have before alluded, which was similar, in all essential particulars, to this case. The *Comet* sailed from the District of Columbia in 1830, for New Orleans, having a number of slaves on board; she was stranded on one of the false keys of the Bahamas, and the crew and persons on board were taken by the wreckers into the port of Nassau, where the slaves were seized by the authorities of the island and liberated.

The case of the *Encomium* is of the same description. She sailed from Charleston in 1834, with slaves on board; was stranded in the same place, and the crew and persons on board were taken into the same port, where the slaves were seized and liberated by the authorities.

Claim was presented for redress for these injuries, and after full discussion of the subject, compensation was made by the British Government for the slaves thus liberated; and this compensation was rendered solely on the principle now contended for, that where a vessel is forced by stress of weather into a foreign port, she carries with her her rights existing on the high seas as to the vessel, property, and personal relations of those on board, as sustained by the laws of her own country.

That such was the ground on which these claims were allowed and paid is manifest, because they were slaves of a foreign country, brought within the limits of the British Government, but not held there in bondage by any British law.

So far was this from being the case, that the statute of 5 Geo. IV. ch. 113, then in force, expressly prohibited bringing slaves from other countries into places within British jurisdiction, or retaining them there, under heavy penalties; and all persons offending against this law were declared to be felons, and were liable to be transported beyond sea, or to be confined and kept at hard labor for a term of not less than three, nor more than five years.

There was, then, no British law in existence by which these slaves could be holden; and the claim to compensation rested solely on the laws of the United States, which were holden to be rightfully operative, and in force against the

persons claimed as slaves, under the circumstances in which the vessel was driven into port.

This result it is impossible to avoid, and the principle asserted is fully sustained by these cases. I am aware that the claim of the *Enterprise*, which was pending at the same time, was disallowed, on the ground of a subsequent change in the local law in reference to slavery. The slaves of the *Comet* and the *Encomium*, however, were not holden by any of the local laws of the island, but were there in violation of them. The repeal of such local law, therefore, can in no manner affect the principle of the decision.

3. A further reason assigned for the point now under consideration is its evident necessity as a part of the free right of each nation to navigate the ocean, and as a necessary incident of such right.

Writers on public law, we have seen, assert a right to enter a foreign port, when driven there by stress of weather, on the ground of necessity. This necessity arises from perils on the deep, to which all navigation on the ocean is subject; and if such perils from this cause give the right of refuge, it becomes necessarily what I claim for it—an incidental right to the navigation of the ocean.

It is a necessity essential to the enjoyment of a clear and undeniable right; and whatever is essential to the enjoyment of a right, or is a necessary means of its use, is, *ex vi termini*, a necessary incident of such right.

This connection I have not seen adverted to; and it is not laid down by the writers cited, as it was not essential to their purpose to follow out the origin or causes from which the necessity arose. It is clearly embraced, however, in their propositions, and is important in this case, as it determines the true character of the rights arising from this necessity in a manner that admits of no question or controversy.

The claim is thus an incident to an absolute and essential right of nations, and is not a claim to the mere favor of any people, which they may give or deny at pleasure, out of any supposed exclusive jurisdiction of their own.

All incidental rights are based on necessities arising from the prior and original right. A right to the end uniformly carries with it a right to the means requisite to attain that end, or, as is stated by Mr. Wheaton, "draws after it the incidental right of using all the means which are necessary to the secure enjoyment of the thing itself." (Wheat, part 2, ch. 4, secs. 13 and 18.)

Further, incidental rights, of a similar character and attended with precisely the same result as to entry within the territorial jurisdiction of another government, have been asserted in connection with the right to navigate the ocean, and are holden as undoubted law. Thus the right to navigate the ocean is holden to give the right, *as incidental to it*, to persons inhabiting the upper sections of navigable rivers to pass by such rivers through the territory of other governments in order to reach the ocean, and thus participate in the commerce of the world.

Great Britain claimed and exercised this right with all its incidents against Spain in the navigation of the Mississippi; and when a Spanish governor undertook at one time to forbid it, and cut loose vessels fastened to the shores, it is asserted by Mr. Wheaton that a British vessel moored itself opposite New Orleans, and set out guards, with orders to fire on persons who disturbed her moorings. The governor acquiesced in the right claimed, and it was afterwards exercised without interruption. (Wheaton, part 2, ch. 4, sec. 18; Grotius, book 2, ch. 2, secs. 12 and 13; ch. 3, secs. 7-12; Vattel, book 2, ch. 9, secs. 126-130; ch. 10, secs. 132-134; Puffendorf, book 3, ch. 3, secs. 3-6.)

The right to the use of navigable rivers, further, is holden to draw after it, as a means necessary to its enjoyment, the right to moor vessels to the banks of such rivers within another country, and the very right we here contend for—"to land in case of distress," and, where a vessel is damaged, to deposit her cargo on the shore until the vessel can be repaired and it can proceed in safety. (Wheaton's Internat. Law, Part 2, ch. 4, secs. 13-18; Grotius, Book 2, ch. 2, secs. 11-15; Puffendorf, Book 3, ch. 3, secs. 3-8; Vattel, Book 1, ch. 9, sec. 104; Book 2, ch. 9, secs. 123-139.)

It is holden also in civil law that the use of the shores of navigable rivers and of the ocean is incident to the use of the water. (Inst. Book 2, title 1, secs. 1-5.)

For the convenient use of navigable rivers by nations bordering upon them, treaties have been usually made, specifying rules and regulations in reference to their use; but it is well settled that such treaties recognize and sustain the right of use, and do not originate it.

It may be said that the right of shelter from the land, which is claimed as an incident to the use of the ocean, can not be set up at the same time with the right over the ocean, which is admitted to a certain extent as incident to the land. But these rights do not conflict with each other. The right of a state bordering on the ocean to a given extent over the waters immediately adjoining attaches for certain fiscal purposes and purposes of protection. But the jurisdiction thus obtained is by no means exclusive. Sovereignty does not necessarily imply all power, or that there can not coexist with it, within its own dominions, other independent and coequal rights.

Indeed, the exception taken furnishes a strong argument in favor of the principle we contend for, because the same rule of justice that gives for certain purposes jurisdiction over the waters, as incident to the use of the land, extends, for like reasons, a right over the land for temporary use and shelter, as incident to the use of the ocean. The rule operates with equal validity and justice both ways, and its application in the one case sustains and justifies it in the other. If either right must give way there seems to be no good reason why the older and better right of the nations to the free navigation of the ocean, with its incidents, should be surrendered to the exclusive claims of any single nation on its borders. But this is not necessary, as both rights in their full perfection may exist together.

I now come to the third proposition.

III. That as the right of shelter, by a vessel, from storm and inevitable accident, is incident to her right to navigate the ocean, it necessarily carries with it her rights on the ocean, so far as to retain over the vessel, cargo, and persons on board the jurisdiction of the laws of her country.

This is clearly the necessary result of the prior position. It is laid down, as an elementary proposition, by Vattel, "that where an obligation gives a right to things without which it can not be fulfilled, each absolute, necessary, and indispensable obligation produces, in this manner, rights equally absolute, necessary, and indefeasible." (Vattel, Book 2, ch. 9, sec. 116.)

Wherever the use of a minor sheet of water may be claimed as incident to that of a larger, it is, while in use, a substitute for it, and draws after it, as of course, all the rights and privileges connected with the enjoyment of the principal right itself.

The entrance of a vessel into a foreign harbor, when compelled by stress of weather, is a matter of right. She goes there on a highway which, for the time being, is her own. She is, as when on the ocean, part and parcel of the government of her own country, temporarily forced, by causes beyond her control, within a foreign jurisdiction. Her presence there under such circumstances need not excite anymore feeling than when on the ocean. It is a part of her voyage, temporarily interrupted by the vicissitudes of the sea, but carrying with it the protection of the sea, and the property and relations of the persons on board can not, in such case, be interfered with by the local Jaw, so as to obstruct her voyage or change such relations, so long as they do not conflict with the law of nations.

These positions do not seem to be contested, as a general rule; but it is said that, since the abrogation of slavery in England, the principles thus laid down will not apply to slave property. And this brings me to the fourth point to be considered.

IV. That the act of 3 and 4 Wm. IV, ch. 73, abolishing slavery in Great Britain and her dependencies, could not have the effect to overrule the rights laid down in the foregoing propositions.

It has been contended that the law abolishing slavery overruled the law of nations, on the ground that slavery is contrary to natural right, and is, in fact, beyond the protection of all law. Authorities have been cited as tending to sustain this doctrine, going back to the earliest adjudged case in France where the question was elaborately examined, and it was held that the institution of slavery, in the absence of specific law could not be sustained under any subsisting usage or custom of that country, as it was contrary to the laws of nature and humanity, and slaves could not breathe in France.

Long after this, the Somerset case, sustaining the same principle, came up in England, and from that time this has been considered the leading case on the subject; and the declaration founded upon it, "that slaves can not breathe

in England," has been usually regarded as a sentiment; peculiarly applicable to British soil and institutions.

The doctrine of the Somerset case, and the expressions of numerous distinguished English and American jurists sustaining it, including Chief Justice Marshall, Mr. Justice Story, and Chief Justice Shaw, have been fully cited in this case, "that slavery is against the law of nature;" "has no foundation in natural or moral right;" "is odious," etc. . . .

I see no occasion to dissent from the full effect of the adjudications cited or the sentiments expressed; but they do not settle any question of international right arising in this case, or define any line of limitation betwixt conflicting jurisdictions, or sustain at all the point to which they are cited—that slavery can not subsist by valid law.

What is law is a question of fact; and though its original institution may have been of doubtful morality or justice, it is still law. It is a dangerous doctrine that all law, not originally conceived and promulgated in *abstract right*, is invalid, or is to be instantly overthrown.

This is readily shown by extending the inquiry to other subjects. By what *abstract* or *natural* right, I might ask, is one man born to rule over another or one set or class of men by birth to become legislators for others? There is no such natural inequality. There is no principle of abstract right to sustain such an order of things. But we must deal with institutions as they are and relations as they subsist. Reforms must advance gradually. The time will doubtless come when all things not founded in right will cease; when there will be no privileged classes by birth; no compulsory support of one religions sect by another to which it is conscientiously opposed; no sales of religious presentations; no slavery.

But these Gordian knots that have been compacted for centuries and are intertwined and bound up in all the relations of men are not to be severed at a blow. Each nation must deal with them in its own time and manner. Such measures of reform can not be promoted by the illegal interference of one nation with another or by forcing upon shipwrecked individuals temporarily thrown within the limits of another land laws in conflict with their own right of self-government and the established relations of their country.

These views are sustained by the concurrence of some of the ablest English jurists and the settled adjudications of English law. Thus it has been holden, though the slave trade is declared to be contrary to the principles of justice and humanity, that no state has a right to control the action of any other government on the subject, (The *Amedie*, 1 Dod. 84 n; the *Fortuna*, 1 Dod. 81; the *Diana*, 1 Dod. 101), and that no nation can add to the law of nations by its own arbitrary ordinances {*Pollard* v. *Bell*, 8 Term Rep. 434; 2 Park on Insurance, 731), or privilege itself to commit a crime against the law of nations by municipal regulations of its own (*Le Louis*, 2 Dod. 351).

It is also holden that a foreigner, in a British court of justice, may recover damages in respect of a wrongful seizure of slaves. (*Maddrazzo* v. *Willes*, 3

Barn. & Ald. 353; the *Diana*, 1 Dod. 95.) And in the case of *Le Louis*, 2 Dod. 238, above cited, Sir Willam Scott (Lord Stowell) says, though the slave trade is unjust and condemned by the laws of England, it is not, therefore, a criminal traffic by the laws of nations; and every nation, independent of its relinquishment by treaty, has a legal right to carry it on. "No one nation," he says, "has a right to force the way to the liberation of Africa by trampling on the independence of other states, or to procure an eminent good by means that are unlawful, or to press forward to a great principle by breaking through other great principles that stand in the way."

And when pressed in the same case with the inquiry, "What would be done if a French ship laden with slaves should be brought into England?" he says, "I answer without hesitation, restore the possession which has been unlawfully divested; rescind the illegal act done by your own subjects, and leave the foreigner to the justice of his own country."

The doctrine that slavery can not be sustained by valid law must be set at rest by these authorities.

There is but one other ground on which it can be contended that the act of 3 and 4 Will. IV. ch. 73, overrules the principles I have laid down, and that is that the municipal law of England is paramount to the absolute rights of other governments when they come in conflict with each other. Such a position virtually abolishes the entire code of international law. If one state can at pleasure revoke such a law any other state may do the same thing, and the whole system of international intercourse becomes a mere matter of arbitrary will and of universal violence.

It appears to me, from a full examination of the law applicable to the case, that the *Enterprise* was entitled, under the immediate perils of her condition, to refuge in the Bermudas; that she had a right to remain there a sufficient time to accomplish the purpose of her entry and to depart as she came; that the local authorities could not legally enter on board of her for the purpose of interfering with the condition of persons or things as established by the laws of her country, and that such an exercise of authority over the commerce and institutions of a friendly state is not warranted by the laws of nations.

For these reasons I am of opinion that the claim before the commission is sustained and that the owners of slaves on board the *Enterprise* are entitled to compensation for the illegal interference with them by the authorities of Bermuda.

Opinion of Mr. Hornby, British Commissioner, in the case of the *Enterprise*

The facts in this case are, shortly, as follows: During the early part of the year 1835, the American brig *Enterprise*, having on board a large number of slaves, while on her voyage from Alexandria, in the District of Columbia, to Charleston, in South Carolina, was driven from her course by prevailing con-

trary winds, and *being, by the delay thus occasioned, in want of provisions, put into the port of Hamilton*, in the Bermudas. On her arrival she was boarded by the colonial authorities and taken possession of on the ground of having slaves on board. Possession, however, was given up on the authorities being informed of the circumstances under which the vessel had put in.

Before, however, the ship could leave the harbor a writ of *habeas corpus* was obtained at the instance of an association of free blacks in the island and served upon the captain, requiring his appearance before the court and the production of the slaves still remaining on board. Upon the argument of the case the court declared that there was no law authorizing the detention of the slaves, and they were accordingly set at liberty.

Under these circumstances the United States Government claim compensation at the hands of the British Government in respect of the loss sustained by the owners of the slaves by their release, basing their demand on the following propositions: "That a vessel on the high seas, in time of pence, engaged on a lawful voyage, is, according to the law of nations, under the exclusive jurisdiction of the state to which she belongs; and that *if such vessel is forced, by stress of weather or unavoidable circumstance*, into the port of a friendly power, her country in such case loses none of the rights appertaining to her on the high seas, either over the vessel or the personal relations of those on board."

Mr. Webster, in his letter to Lord Ashburton on the 1st of August 1842 states the second of these propositions in somewhat different language. He says: "If a vessel be driven by stress of weather into the port of another nation it would hardly be alleged by anyone that by the mere force of such arrival within the waters of the state the law of that state would so attach to the vessel as to affect existing rights of property between persons on board, whether arising from contract or otherwise. The local law would not operate to make the goods of one man to become the goods of another man; nor ought it to affect their personal obligations or existing relations between themselves."

It is undoubtedly true, as a general proposition, that a vessel driven by a stress of weather into a foreign port is not subject to the application of the local laws, so as to render the vessel liable to penalties which would be incurred by having voluntarily come within the local jurisdiction. The reason of this rule is obvious. It would be a manifest injustice to punish foreigners for a breach of certain local laws unintentionally committed by them, and by reason of circumstances over which they had no control.

Thus, to cite one of the most ordinary instances in which the rule is applied: A storm drives a vessel, having a perfectly legal cargo according to the laws of the country from which it sailed, or to which it is bound, into the port of a country where such a cargo is illegal and contraband. To subject this cargo to the same penalty as if it were clandestinely smuggled would be unjust. Our law, therefore, says: "The laws of the country which gives you a national character shall be considered as protecting you, and if it is not an illegal cargo in your own country it shall not be so considered in the country into

which you have been involuntarily brought." And this is precisely what was done in the case of the *Enterprise*. The cargo was legal according to the laws of America, illegal according to the laws of England, and if brought within British jurisdiction it rendered the vessel liable to confiscation. It was brought within that jurisdiction, but under circumstances which exempted it from the penalty, and accordingly so far the rule of international law was admitted and allowed to prevail. But more is demanded, for the claim is for indemnity, because the cargo had, by mere act and operation of natural law and of English law, resumed a character denied it by American law. While the vessel is to the extent alluded to free from the operation of local laws, it by no means follows that it is entitled to absolute exemption from the local jurisdiction; as, for example, it can scarcely be contended that persons on board the vessel would not be subject to the local jurisdiction for crimes committed within it. If acts of violence were committed on board against subjects of the country to which the port belonged, or if a subject should be wrongfully detained on board, the local tribunals would be entitled to interfere to preserve the peace or protect the injured person This position may be illustrated by the law applicable to the case of vessels of war entering a foreign port. It is admitted by most, if not all, of the writers on international law that national vessels are exempt from the local law. (See the case of the *Santissima Trinidad*, 7 Wheaton, 352; Wheaton's International Law, Vol. I. p. 115; Phillimore's Comm. on International Law, pp. 368, 373.) They are, as it were, entitled to a species of extraterritoriality; yet it has been held by the Executive of the United States, on the authority of two Attorneys-General, that a foreign vessel of war entering its harbor is not entitled to absolute exemption from its jurisdiction. . . .

This explanation of the law of nations shows that when a vessel is in a foreign port under such circumstances as entitle it to exemption from the application of the local law, the exemption can not be put on the same ground as the immunity from interference of a vessel on the high seas, for there in time of peace it is absolute. There is no right on the part of a foreign court even to inquire into the legality of anything-occurring in the vessel of another country while at sea; but within the territories of a country the local tribunals are paramount, and have the right to summon all within the limits of their jurisdiction, and to inquire into the legality of their acts and determine upon them according to the law which may be applicable to the particular case. It appears to me, therefore, that it can not with correctness be said "that a vessel forced by stress of weather into a friendly port is under the exclusive jurisdiction of the state to which she belongs in the same way as if she were at sea." She has been brought within another jurisdiction against her will, it is true, but equally against the will and without fault on the part of the foreign power; she brings with her (by the law of nations) immunity from the operation of the local laws for some purposes, but not for all, and the extent of that immunity is the proper subject of investigation and adjudication by the local tribunals. Let us consider, then, the principles which ought to guide the local courts in this investigation.

It is true that by what is termed the "comity of nations" the laws of one country are, in some cases, allowed by another to have operation; but in those cases the foreign law has its authority in the other country from the sanction, and to the extent only of the sanction, given to it there, and not from its original institution. On this subject Vattel observes: "It belongs exclusively to each nation to form its own judgment of what its conscience prescribes to it—of what it can or can not do, of what is proper or improper for it to do; and of course it rests solely with it to examine and determine whether it can perform any office for another nation without neglecting the duty which it owes to itself; and for any other state to interfere, to compel her to act in a different manner, would be an infringement of the liberty of nations." (Story's Conflict of Laws, chap. 2, sec. 37, citing Vattel, Prelim. Diss. pp. 61, 62, sec. 14, 16; Story's Conflict of Laws, chap. 2, sec. 25; and see also sec. 24.)

From these principles it results that no nation can be called upon, or ought, to permit the operation of foreign laws within its territory when those laws are contrary to its interests or its moral sentiments. . . .

The question then resolves itself into this: In what cases and to what extent does the law of nations require that the local law shall admit the application of the rules of the foreign law instead of its own? It is conceded that the foreign law must be admitted to regulate the rights of property (properly so called) concerning chattels on board the vessel, and for some other purposes; but the question we have now to determine is whether the law of nations requires that the local law, which ignores and forbids slavery, shall admit within its jurisdiction the foreign, which maintains slavery.

Now, the two fallacies which appear to me to pervade the whole of the argument in support of the claim and deprive it of its whole force are these: First, that slaves are property in the ordinary sense of the word; and, secondly, that international law requires that the right of the master to the person of his slave, derived from local law, shall be recognized everywhere.

It is true that by the municipal law of particular countries slaves may be treated as, and may even be declared to be, property, and this has, in past times, been the case in some portions of the English dominions; but there is an essential difference between the rights of owners in their slaves and ordinary property. This difference is clearly laid down by an eminent American judge in the case of the *Commonwealth* v. *Aves*, 18 Pickering's Reports, 216. Chief Justice Shaw there says, "That it is not speaking with strict accuracy to say that a property can be acquired in human beings by local laws. Each State may, for its own convenience, declare that slaves shall be deemed property, and that the relations and laws of personal chattel shall be deemed to apply to them; but it would be a perversion of terms to say that such local laws do *in fact* make them personal property *generally*; they can only determine that the same rules of law shall apply to them as are applicable to property, and this effect will follow only as far as such laws *proprio vigore* can operate."

Mr. Webster, however, does not hesitate to place the relation of slavery on the same footing with that of marriage and parental authority; but the answer to this attempted comparison consists in this, that all nations and societies acknowledge marriage and parental authority. They are, indeed, the very foundation of society; they may vary in form, but the essence remains the same; they can not so much be said to be in conformity with the law of nature as to be themselves natural laws. This is not the case with slavery, which is contrary to the law of nature, and, so far from being acknowledged by all nations, is now repudiated by almost all. Property in things, however, being recognized in all countries, it follows that in case of shipwreck "the local law would not operate to make the goods of one man to become the goods of another." But to make this dictum an authority for the principle contended for, it must first be established that there is no distinction between property in man and property in beasts and things.

In the case of *Jones* v. *Vanzandt* (2 McLean, 596) it was held that no action could be maintained at common law for assisting a slave to escape, or harboring him after his escape into a free State, and that damages were only recoverable in such a case by virtue of the Constitution of the United States. In giving judgment in that case Mr. Justice McLean observed: "The traffic in slaves does not come under the constitutional power of Congress to regulate commerce among the several States. *In this view the Constitution does not consider slaves as merchandise.* This was held in the case of Grooves and Slaughter. (18 Peters.) The Constitution nowhere speaks of slaves as property. . . . The Constitution treats of slaves as persons." "The view of Mr. Madison, who thought it wrong to admit in the Constitution the idea that there could be property in man, seems to have been carried out in this most important instrument. Whether slaves are referred to in it as the basis of representation, as migrating, or being imported, or as fugitives from labor, they are spoken of as persons." "What have we to do with slavery in the abstract? It is admitted by almost all who have examined into the subject to be founded in wrong, in oppression, in power against right."

There is yet another case which affords a further striking illustration of the fact that American law recognizes an essential difference between property in slaves and property in things, so as to affect the rights of the owner independently of his will. The second section of the fourth article of the Constitution protects every slave owner from loss of his slaves by means of their flying into a free State; it gives him aright to follow the slave and seize him wherever he may find him. Yet, in the case of *The Commonwealth* v. *Holloway (2 Sergt. and Rawle, 304)*, it was held that where a female slave fled into Pennsylvania, and there gave birth to a child, though she herself might be reclaimed by the owner, her child could not but remain free by virtue of the law of the State, which declared that "no man or woman of any nation shall at any time hereafter be deemed, adjudged, or holden within the territories of this commonwealth, as slaves or servants for life, but as free men and women." Now, it is obvious that if the property in the female slave were regarded in the same light as property in an animal, the ordi-

nary rule of law, "*partus sequitur ventrem*," referred to by the learned agent of the British Government, would have been applicable. In that case, as in the present, the slave owner might have said as he now says: "It was not by my consent that that which by the laws of my country I am entitled to claim as my property has been brought within the operation of your laws. My slave and her increase are mine; am I to be deprived of that increase because it has been by misadventure cast away upon your soil." But the American law, in the case before me, as the English law, answers: "It may be that in your own State you would have had the right you claim; but we do not acknowledge that you have a right of property in this human being as you could have in a horse or dog; if you had, your consent alone would be considered in the matter; but as it is, here is an intelligent being who is entitled to be dealt with by our law, which we sit here to administer, and not yours, as a man, and by that law it is declared that no man shall be a slave." In the case also of *Prigg* v. *The Commonwealth of Pennsylvania* (16 Peters, 608), it was again held that the offspring of a fugitive slave could not be reclaimed by the owner. On the authority, then, of these cases, it may be considered as settled that by the law of the United States the presence or absence of consent or voluntariness on the part of the owner has nothing whatever to do with the question of whether his slave, when within the territory of a State, no matter how brought, which does not acknowledge slavery, shall be free or not. The answer that must be given by the local tribunals, when called upon, must depend upon the positive law of the place. In the United States, the Constitution has provided an answer in the fourth article; but when the circumstances are such that the letter of that enactment or some other is not applicable, the American law declares, like the English law, that it does not recognize property in man, but regards them all alike, whether black or white, as entitled to be free.

Mr. Justice Story thus distinctly explains the general principle of public law on this subject, and the modifications which have been introduced by the United States Constitution: "By the general law of nations *no nation is bound to recognize the state of slavery as to foreign slaves found within its territorial dominions*, when it is in opposition to its own policy and institutions, in favor of the subject of other nations where slavery is recognized. If it does, it is a matter of comity and not a matter of international right. The state of slavery is deemed to be a municipal regulation, founded upon and limited, to the range of territorial laws. This was fully recognized in Somersett's case. It is manifest, then, from this consideration of the law that if the Constitution had not contained this clause, every nonslaveholding State in the Union *would have been at liberty to have declared free all slaves coming within its limits and to have given them entire immunity and protection against the claims of their masters*." And again he says: "The duty to deliver up fugitive slaves, in whatever State of the Union they may be found, and of course the corresponding power in Congress to use the appropriate means to enforce the duty, *derive their sole* validity and obligation exclusively from the Constitution of the United States, and are there for the first time recognized and established in that peculiar character." (See also, id. ch. iv. sec. 96, pp. 165-6, of 3d edit.)

That foreign nations, then, are not bound by any rule of international law to recognize slaves as property, and award to their owners the immunity which by the comity of nations is usually granted in respect of ordinary chattels, is clear from the course of legislation pursued by the United States; for, if they could be so bound, no law or action of the United States would have been necessary to compel one State denying the right and existence of property in a slave to deliver up a fugitive to another State admitting and maintaining the right, and for this reason that the law of nations, being as binding between State and State as between the United States and foreign countries, would have been sufficient for the purpose, and no special law would have been necessary. By what right, then, or by force of what argument, can the United States insist that Great Britain is to be bound by the law of nations to do that which, by its own legislation, it has proved beyond all question the separate States were not and could not be bound to do?

It is evident, therefore, from a view of the American authorities alone, that the institution of slavery depends solely upon the laws of each individual State in which it is allowed, and that from its very nature it is only coextensive with the territorial limits of such laws. An American writer thus describes it: "It is an institution," says he, "in which the slave has no voice. It operates *in invitum*. The slave is no party, either practically or theoretically, to the law under which he lives in servitude. It is, moreover, an exceptional law; one which depends solely for its observance on the *continuance of the power* who made it. *The moment that power ceases, the objects of it are free to exercise their natural rights, which revive to them, because they were held only in subjection or abeyance by superior force*, but which could not be disturbed, alienated, or forfeited, except for some crime, springing as they do from the immutable and eternal principles of nature and justice."

It appears to me then to be clearly established by all the authorities on the subject, that nations or states are not bound to recognize the relation of master and slave which may be enacted by foreign law.

In the case of *Forbes* v. *Cochrane* (2 B. and C. 448) Mr. Justice Holroyd says: "A man can not found his claim to slaves upon any general right, because by the English law such right can not be considered as warranted by the general law of nations; and if he can claim at all, it must be by virtue of some right which he had acquired by the law of the country where he was domiciled; that when such rights are recognized by law, they must be considered as founded not upon the law of nature, but upon the particular law of that country, and must be coextensive, and only and strictly coextensive, with the territories of that state; but when the party gets out of the territory where it prevails, no matter under what circumstances, and under the *protection of another power, without any wrongful act done by the party giving the protection*, the right of the master, which is founded on the municipal law of the place only, *does not continue*."

The fallacy contained in the argument in opposition to this view of the law consists in ignoring the slave as a man, and in supposing him to be possessed of no rights, as against the individual endeavoring to keep him in slavery, which a foreign nation is justified in taking into consideration.

As a man, the slave is as much entitled to appeal to the protection of our laws as his owner, and his claim must be adjudicated upon in conformity with the same principles. In the country whence he came, his voice could not be heard in the local courts, to assert the rights which he derived from nature, as against the municipal laws of the place where he was domiciled. When he is driven, together with his so-called owner, to the shores of this country or its colonies, those rights of his master which are founded on natural law, such as property, marriage, etc., etc., are respected. Why then are we to be deaf to the appeal of the slave, when he also asks to have his rights, which are equally founded on natural law, respected ? We have to choose between the natural law, supported by our own law, and foreign municipal law in direct opposition to both.

The choice is none of our seeking, it is cast upon us by chance. It would be to make international law a partial tyrant rather than an equal arbitrator between nations—to hold that one country can be bound under any circumstances, without fault of its own, to reject the law of nature and its own law, in favor of a foreign local law in opposition to both. . . .

Lord Palmerston, in effect, states the principle thus announced when, with the concurrence of those eminent men who now fill the highest judicial seats in the country, viz, the present lord chancellor, the lord chief justice of England, and the judge of the admiralty court, he declares that a distinction exists between laws bearing upon the personal liberty of man and laws bearing upon the property which man may claim in irrational animals or in inanimate things.

"If a ship," says his lordship in a dispatch upon this subject, "containing such animals or things, were driven by stress of weather into a foreign port, the owner of the cargo would not be justly deprived of his property by the operation of any particular law which might be in existence in that port, because in such a case there would be but two parties interested in the transaction—the foreign owner and the local authority; and it would be highly unjust that the former should be stripped of what belongs to him through the forcible application of the municipal law of a state to which he had not voluntarily submitted himself.

"But in a case in which a ship so driven into a foreign port by stress of weather contains men over whose personal liberty another man claims to have an acquired right, there are three parties to the transaction—the owner of the cargo, the local authority, and the alleged slave; and the third party is no less entitled than the first to appeal to the local authority for such protection as the law of the land may afford him. But if men who have been held in slavery are brought into a country where the condition of slavery is unknown and forbidden, they are necessarily, and by the very nature of

things, placed at once in the situation of aliens who have at all times from their birth been free.

"Such persons can in no shape be restrained of their liberty by their former master any more than by any other person.

"If they were given up to such former master they would be aggrieved, and would be entitled to sue for damages. But it would be absurd to say that when a state has prohibited slavery within its territory, this condition of thing must arise, namely, that as often as a slave ship shall take refuge in one of the ports of that state, liability must necessarily be incurred, either to the former owner of the slaves, if the slaves be liberated, or to the slaves themselves, if they are delivered up to the former owner.

"If, indeed, a municipal law be made which violates the law of nations, a question of another kind may arise. But the municipal law which forbids slavery is no violation of the law of nations. It is, on the contrary, in strict harmony with the law of nature; and therefore, when slaves are liberated according to such municipal law, there is no wrong done and there can be no compensation granted."

I have hitherto considered this case upon general principles, because, as other cases may occur, it is important to lay down general rules; but the special circumstances of the case would disentitle the claimants to compensation.

One ground, if indeed it be not the chief ground, upon which this claim has been rested is that the *Enterprize* was compelled by *necessity* to put into the port of Bermuda, and that on this account the owners of the slaves were entitled to claim exemption from the operation of English law. I do not think, however, that any such case of necessity has been made out as would give rise to the exemption contended for, if under any circumstances it could arise. It is not pretended that the *Enterprize* was forced by storm into Bermuda. All that is asserted is that her provisions ran short by reason of her having been driven out of her course. No case of pressing, overwhelming need is shown to have existed; but, to avoid the inconvenience of short rations (and, considering the nature of the cargo, it was an inconvenience which a very slight delay was likely to occasion), the master put into an English harbor to procure supplies. These facts do not certainly disclose that paramount case of necessity which has been insisted on throughout the argument, and which alone (if any circumstances could give rise to the exemption upon which this claim is supported) could form the basis of such an appeal as the present. If a mere scarcity of provisions, which might arise from so many causes, is to be considered not only as a sufficient excuse for the entrance of a vessel into a British port with a prohibited cargo but is also to entitle it to an exemption from the operation of the English law, it is impossible to say to what the admission of such a principle might lead, or what frauds on the part of slave speculators it might induce.

With respect to the cases of the *Comet* and *Encomium* it has been insisted that they are not distinguishable in principle from that of the *Enterprize*, and that, as the English Government granted compensation in these cases, we are bound by the precedent thus made. Those vessels, however, were driven into English ports, and the slaves on board were set free before the passing of the act abolishing slavery. There was, therefore, no importation within the meaning of the act (5 Geo. IV. ch. 113) which declared it illegal to import slaves and made it a felony to do so, and consequently there was no breach of the English law. Being then in an English port, the only question was whether there was any law which prevented their owners retaining possession of them. At that time there was not. Slavery was then in full force in the Bahamas, and of the same kind as that to which the American slaves were subject. The possession of the slaves was not therefore unlawful, nor was the relation between them and their masters liable to be dissolved by the mere accidental arrival of both in the colony. But at the time when the *Enterprize* was brought into the port of Hamilton, Great Britain had utterly and forever abolished the status of slavery throughout the British colonies and plantations abroad (see act of 3 and 4 Wm. IV. ch. 73, sec. 9), and by the act of the colonial legislature the apprenticeship system, created by the act of William IV was dispensed with. Slavery therefore, in no form whatever, was known in the Bermudas at the time the *Enterprize* entered the port. It was impossible, therefore, that any judge called upon to administer the law within these islands could, for any purpose or under any circumstances, recognize the relation of master and slave as subsisting within the reach of his authority.

Under these circumstances I am clearly of opinion that the claim of the owners of the slaves on board the *Enterprize* at the time she put into Port Hamilton can not be sustained and that it ought, upon every principle of law to be rejected.

Decision of the Umpire, Mr. Bates, in the case of the *Enterprise*

This claim is presented on behalf of the Charleston Marine Insurance Company of South Carolina, and of the Augusta Insurance Company in Georgia, for the recovery of the value of seventy-two slaves, forcibly taken from the brig *Enterprize*, Elliot Smith, master, on the 20th of February 1835, in the harbor of Hamilton, Bermuda. The following are the facts and circumstances of the case. The American brig *Enterprize*, Smith, master, sailed from Alexandria, in the District of Columbia, in the United States, on the 22d of January 1835, bound for Charleston, South Carolina. After encountering head winds and gales, and finding their provisions and water running short, it was deemed best by the master to put into Hamilton, in the island of Bermuda, for supplies. She arrived there on the 11th of February. Having taken in the supplies required, and having completed the repair of the sails, she was ready for sea on the 19th with the pilot on board. During the repairs no one from the shore was allowed to communicate with the slaves. The vessel was kept at anchor in the harbor,

and was not brought to the wharf. Being thus ready for sea, Captain Smith proceeded, with his agent, to the custom-house to clear his vessel outward. The collector stated that he had received a verbal order from the council to detain the brig's papers until the governor's pleasure could be known.

The comptroller and a Mr. Tucker then went to the other public offices, and on their return to the custom-house the comptroller, after consulting for a few minutes with the collector, declared that he would not give up the papers that evening, but would report the vessel out the next morning as early as the captain might choose to call for the papers.

In consequence of this decision, the captain immediately noted his protest in the secretary's office against the collector and comptroller for the detention of his ship's papers, and informed the officer of the customs he should hold them responsible; that he (the captain) feared the colored people of Hamilton would come on board his vessel at night and rescue the slaves, as they had threatened to do.

The collector then replied there was no danger to be apprehended, that the colored people would not do anything without the advice of the whites, and they knew the laws too well to disturb Captain Smith. At 20 minutes to 6 o'clock p.m., the chief justice sent a writ of *habeas corpus* on board, and afterwards a file of black soldiers armed, ordering the captain to bring all the slaves before him, the chief justice, which Captain Smith was obliged to do. On the slaves being informed by the chief justice that they were free persons, seventy-two of them declared they would remain on shore, which they did, and only six of them returned on board to proceed on the voyage.

This is believed to be a faithful sketch of the case, from which it appears that the American brig *Enterprize* was bound on a voyage from one port in the United States to another port of the same country which was lawful according to the laws of her country and the law of nations. She entered the port of Hamilton in distress for provisions and water. No offence was permitted against the municipal laws of Great Britain or her colonies, and there was no attempt to land or to establish slavery in Bermuda in violation of the laws.

It was well known that slavery had been conditionally abolished in nearly all the British dominions about six months before, and that the owners of slaves had received compensation, and that six years' apprenticeship was to precede the complete emancipation, during which time apprentices were to be bought and sold as property and were to be liable to attachment for debt.

No one can deny that slavery is contrary to the principles of justice and humanity, and can only be established in any country by law At the time of the transaction on which this claim is founded, slavery existed by law in several countries, and was not wholly abolished in the British dominions. It could not, then, be contrary to the law of nations, and the *Enterprize* was as much entitled to protection as though her cargo consisted of any other description of property The conduct of the authorities at Bermuda was a violation of the laws

of nations, and of those laws of hospitality which should prompt every nation to afford protection and succor to the vessels of a friendly neighbor that may enter their ports in distress.

The owners of the slaves on board the *Enterprize* are therefore entitled to compensation, and I award to the Augusta Insurance and Banking Company or their legal representatives the sum of sixteen thousand dollars, and to the Charleston Marine Insurance Company or their legal representatives, the sum of thirty-three thousand dollars, on the fifteenth of January 1855.

Decision of the Umpire, Mr. Bates, in the case of the *Hermosa*

The umpire appointed agreeably to the provisions of the convention entered into between Great Britain and the United States on the 8th of February 1853, for the adjustment of claims by a mixed commission, having been duly notified by the commissioners under the said convention that they had been unable to agree upon the decision to be given with reference to the claim of H. N. Templeman against the Government of Great Britain; and having carefully examined and considered the papers and evidence produced on the hearing of the said claim; and having conferred with the said commissioners thereon, hereby reports that the schooner *Hermosa,* Chattin, master, bound from Richmond, in Virginia, to New Orleans, having thirty-eight slaves on board belonging to H. N. Templeman, was wrecked on the 19th October 1840 on the Spanish key Abaco.

Wreckers came alongside and took off the captain and crew and the thirty-eight slaves, and, contrary to the wishes of the master of the *Hermosa,* who urged the captain of the wrecker to conduct the crew, passengers, and slaves to a port in the United States, they were taken to Nassau, New Providence, where Captain Chattin carefully abstained from causing or permitting said slaves to be landed, or to be put in communication with any person on shore, while he proceeded to consult with the American consul, and to make arrangements for procuring a vessel to take the crew and passengers and the slaves to some port in the United States.

While the vessel in which they were brought to Nassau was lying at a distance from the wharves in the harbor, certain magistrates wearing uniform, who stated themselves to be officers of the British Government, and acting under the orders of the civil and military authorities of the island, supported by soldiery wearing the British uniform, and carrying muskets and bayonets, took forcible possession of said vessel, and the slaves were transported in boats from said vessel to the shore, and thence, under guard of a file of soldiers, marched to the office of said magistrates, where after some judicial proceedings, they were set free, against the urgent remonstrances of the master of the *Hermosa* and of the American consul.

In this case there was no attempt to violate the municipal laws of the British colonies. All that the master of the *Hermosa* required was that aid and assistance which was due from one friendly nation to the citizens or subjects

of another friendly nation, engaged in a business lawful in their own country, and not contrary to the law of nations.

Making allowance, therefore, for a reasonable salvage to the wreckers, had a proper conduct on the part of the authorities at Nassau been observed, I award to the Louisiana State Marine and Fire Insurance Company and the New Orleans Insurance Company (to which institutions this claim has been transferred by H. N. Templeman), or their legal representatives, the sum of sixteen thousand dollars, on the fifteenth -January 1885, viz, eight thousand dollars to each company.

Decision of the Umpire, Mr. Bates, in the case of the *Creole*

This case having been submitted to the umpire for his decision, he hereby reports that the claim has grown out of the following circumstances:

The American brig *Creole,* Captain Ensor, sailed from Hampton Roads, in the State of Virginia, on the 27th October 1841, having on board one hundred and thirty-five slaves, bound for New Orleans. On the 7th of November, at 9 o'clock in the evening, a portion of the slaves rose against the officers, crew and passengers, wounding severely the captain, the chief mate, and two of the crew and murdering one of the passengers. The mutineers, having got complete possession of the vessel, ordered the mate, under threat of instant death should he disobey or deceive them, to steer for Nassau, in the island of New Providence, where the brig arrived on the 9th of November 1841.

The American consul was apprised of the situation of the vessel and requested the governor to take measures to prevent the escape of the slaves and to have, the murderers secured. The consul received reply from the governor stating that under the circumstances he would comply with the request.

The consul went on board the brig, placed the mate in command in place of the disabled master, and found the slaves all quiet.

About noon twenty African soldiers, with an African sergeant and corporal, commanded by a white officer, came on board. The officer was introduced by the consul to the mate as commanding officer of the vessel.

The consul on returning to the shore was summoned to attend the governor and council, who were in session, and who informed the consul that they had come to the following decision:

1st. That the courts of law have no jurisdiction over the alleged offenses.

2d. That as an information had been lodged before the governor charging that the crime of murder had been committed on board said vessel while on the high seas, it was expedient that the parties implicated in so grave a charge should not be allowed to go at large, and that an investigation ought therefore to be made into the charges, and examination taken on oath; when, if it should appear that the original information was correct, and that a murder had actually been committed, that all parties implicated in such crime or other acts of violence should be detained here until reference could be

made to the Secretary of State to ascertain whether the parties should be delivered over to the United States Government; if not, how otherwise to dispose of them.

3d. That as soon as such examinations should be taken, all persons on board the *Creole* not implicated in any of the offences alleged to have been committed on board that vessel must be released from further restraint.

Then two magistrates were sent on board. The American consul went also. The examination was commenced on Tuesday the 9th, and was continued on Wednesday the 10th, and then postponed until Friday on account of the illness of Captain Ensor. On Friday morning it was abruptly, and without any explanation, terminated.

On the same day a large number of boats assembled near the *Creole,* filled with colored persons armed with bludgeons. They were under the immediate command of the pilot who took the vessel into the port, who was an officer of the government, and a colored man. A sloop or larger launch was also towed from the shore and anchored near the brig. The sloop was filled with men armed with clubs, and clubs were passed from her to the persons in the boats. A vast concourse of people were collected on shore opposite the brig.

During the whole time the officers of the government were on board they encouraged the insubordination of the slaves.

The Americans in port determined to unite and furnish the necessary aid to forward the vessel and negroes to New Orleans. The consul and the officers and crews of two other American vessels had, in fact, united with the officers, men, and passengers of the *Creole* to effect this. They were to conduct her first to Indian Key, Florida, where there was a vessel of war of the United States.

On Friday morning the consul was informed that attempts would be made to liberate the slaves by force, and from the mate he received information of the threatening state of things. The result was that the attorney-general and other officers went on board the *Creole.* The slaves identified as on board the vessel concerned in the mutiny were sent on shore, and the residue of the slaves were called on deck by direction of the attorney-general, who addressed them in the following terms: "My friends," or "my men, you have been detained a short time on board the *Creole* for the purpose of ascertaining what individuals were concerned in the murder. They have been identified and will be detained. The rest of you are free and at liberty to go on shore and wherever you please."

The liberated slaves, assisted by the magistrates, were then taken on board the boats, and when landed were conducted by a vast assemblage to the superintendent of police, by whom their names were registered. They were thus forcibly taken from the custody of the master of the *Creole* and lost to the claimants.

I need not refer to authorities to show that slavery however, odious and contrary to the principles of justice and humanity, may be established by law in any country; and, having been so established in many countries, it can not be contrary to the law of nations.

The *Creole* was on a voyage, sanctioned and protected by the laws of the United States, and by the law of nations. Her right to navigate the ocean could not be questioned, and as growing out of that right, the right to seek shelter or enter the ports of a friendly power in case of distress or any unavoidable necessity.

A vessel navigating the ocean carries with her the laws of her own country, so far as relates to the persons and property on board, and to a certain extent retains those rights even in the ports of the foreign nations she may visit. Now, this being the state of the law of nations, what were the duties of the authorities at Nassau in regard to the *Creole?* It is submitted the mutineers could not be tried by the courts of that island, the crime having been committed on the high seas. All that the authorities could lawfully do was to comply with the request of the American consul, and keep the mutineers in custody until a conveyance could be found for sending them to the United States.

The other slaves being perfectly quiet, and under the command of the captain and owners, and on board an American ship, the authorities should have seen that they were protected by the law of nations, their rights under which can not be abrogated or varied, either by the emancipation act or any other act of the British Parliament.

Blackstone, 4th volume, speaking of the law of nations, states: "Whenever any question arises which is properly the object of its jurisdiction, such law is here adopted in its full extent by the common law."

The municipal law of England can not authorize a magistrate to violate the law of nations by invading with an armed force the vessel of a friendly nation that has committed no offense, and forcibly dissolving the relations which by the laws of this country the captain is bound to preserve and enforce on board.

These rights, sanctioned by the law of nations—viz, the right to navigate the ocean and to seek shelter in case of distress or other unavoidable circumstances, and to retain over the ship, her cargo, and passengers the laws of her own country—must be respected by all nations, for no independent nation would submit to their violation.

Having read all the authorities referred to in the arguments on both sides, I have come to the conclusion that the conduct of the authorities at Nassau was in violation of the established law of nations, and that the claimants are justly entitled to compensation for their losses. I therefore award to the undermentioned parties, their assigns or legal representatives, the sums set opposite their names, due on the 15th of January 1855.

Case of the *Washington v.* Great Britain, decision of the Umpire, Mr. Bates, dated 23 December 1854[*]

Affaire *Washington* c. Grande-Bretagne, décision du Surarbitre, Mr. Bates, datée du 23 décembre 1854[**]

Treaty interpretation—treaties regulating fisheries rights of British and American fishermen—restriction of the application of the new British doctrine of headlands to bays with mouths not exceeding ten miles in width—definition of these bays following an imaginary line drawn along the coast from headland to headland, with exclusive jurisdiction of the coastal state extending three marine miles outside of this line.

Interprétation des traités—traités réglementant les droits de pêcherie des pêcheurs britanniques et américains—restriction de l'application de la nouvelle doctrine britannique sur les promontoires pour ce qui est des baies ayant des embouchures n'excédant pas dix miles de large—délimitation de ces baies d'après une ligne imaginaire tracée le long de la côte, allant de promontoire en promontoire, l'État côtier bénéficiant d'une compétence exclusive s'étendant à trois miles marins au delà de cette ligne.

* * * * *

The schooner *Washington* was seized by the revenue schooner *Julia*, Captain Darby, while fishing in the Bay of Fundy ten miles from the shore, on the 10th of May 1843, on the charge of violating the treaty of 1818. She was carried to Yarmouth, Nova Scotia, and there decreed to be forfeited to the Crown by the judge of the vice admiralty court, and with her stores ordered to be sold. The owners of the Washington claim for the value of the vessel and appurtenances, outfits, and damages, $2,483, and for eleven years' interest, $1,638, amounting together to $4,121. By the recent reciprocity treaty, happily concluded between the United States and Great Britain, there seems no chance for any future disputes in regard to the fisheries. It is to be regretted that in that treaty provision was not made for settling a few small claims, of no importance in a pecuniary sense, which were then existing, but as they have not been settled they are now brought before this commission.

The *Washington*, fishing schooner, was seized, as before stated, in the Bay of Fundy, ten miles from the shore, off Annapolis, Nova Scotia.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 4342.

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It will be seen by the treaty of 1783, between Great Britain and the United States, that the citizens of the latter, in common with the subjects of the former, enjoyed the right to take and cure fish on the shores of all parts of Her Majesty's dominions in America used by British fishermen; but not to dry fish on the island of Newfoundland, which latter privilege was confined to the shores of Nova Scotia in the following words: "And American fishermen shall have liberty to dry and cure fish on any of the unsettled bays, harbours, and creeks of Nova Scotia, but so soon as said shores shall become settled it shall not be lawful to dry or cure fish at such settlements without a previous agreement for that purpose with the inhabitants, proprietors, or possessors of the ground."

The treaty of 1818 contains the following stipulations in relation to the fishery: "Whereas differences have arisen respecting the liberty claimed by the United States to take, dry, and cure fish on certain coasts, bays, harbors, and creeks of His Britannic Majesty's dominions in America, it is agreed that the inhabitants of the United States shall have, in common with the subjects of His Britannic Majesty the liberty to fish on certain portions of the southern, western, and northern coast of Newfoundland, and also on the coasts, bays, harbors, and creeks from Mount Joly, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, and that American fishermen shall have liberty to dry and cure fish in any of the unsettled bays, harbors, and creeks of said described coasts until the same become settled and the United States renounce the liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry, or cure fish on or within three marine miles of any of the coasts, bays, creeks, or harbors of His Britannic Majesty's dominions in America not included in the above-mentioned limits; *Provided, however*, That the American fishermen shall be admitted to enter such bays or harbors for the purpose of shelter and of repairing damages therein, of purchasing wood, and of obtaining water, and for no other purpose whatever. But they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them."

The question turns, so far as relates to the treaty stipulations, on the meaning given to the word "bays" in the treaty of 1783. By that treaty the Americans had no right to dry and cure fish on the shores and bays of Newfoundland, but they had that right on the coasts, bays, harbors, and creeks of Nova Scotia; and as they must land to cure fish on the shores, bays, and creeks, they were evidently admitted to the shores of the bays, etc. By the treaty of 1818 the same right is granted to cure fish on the coasts, bays, etc., of Newfoundland, but the Americans relinquished that right and the right to fish within three miles of the coasts, bays, etc., of Nova Scotia. Taking it for granted that the framers of the treaty intended that the word "bay" or "bays" should have the same meaning in all cases, and no mention being made of headlands, there appears no doubt that the *Washington*, in fishing ten miles from the shore, violated no stipulations of the treaty.

It was urged on behalf of the British Government that by coasts, bays, etc., is understood an imaginary line, drawn along the coast from headland to headland, and that the jurisdiction of Her Majesty extends three marine miles outside of this line; thus closing all the bays on the coast or shore, and that great body of water called the Bay of Fundy against Americans and others, making the latter a British bay. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain of 2d August 1839, in which "it is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."

The Bay of Fundy is from 65 to 75 miles wide and 130 to 140 miles long. It has several bays on its coasts. Thus the word bay, as applied to this great body of water, has the same meaning as that applied to the Bay of Biscay, the Bay of Bengal, over which no nation can have the right to assume the sovereignty. One of the headlands of the Bay of Fundy is in the United States, and ships bound to Passamaquoddy must sail through a large space of it. The islands of Grand Menan (British) and Little Menan (American) are situated nearly on a line from headland to headland. These islands, as represented in all geographies, are situate in the Atlantic Ocean. The conclusion is, therefore, in my mind irresistible that the Bay of Fundy is not a British bay, nor a bay within the meaning of the word as used in the treaties of 1783 and 1818.

The owners of the *Washington*, or their legal representatives, are therefore entitled to compensation, and are hereby awarded not the amount of their claim, which is excessive, but the sum of three thousand dollars, due on the 15th January 1855.

PART III

Différend opposant la Grande-Bretagne et le Portugal dans l'affaire Yuille, Shortridge & Cie.

Sentence prononcée par le Sénat de la Ville libre de Hambourg le 21 octobre 1861

Dispute between Great Britain and Portugal in the case of Yuille, Shortridge & Cie.

Award rendered by the Senate of the Free City of Hamburg on 21 October 1861

Différend opposant la Grande-Bretagne et le Portugal dans l'affaire Yuille, Shortridge & Cie.

Dispute between Great Britain and Portugal in the case of Yuille, Shortridge & Cie.

Sentence prononcée par le Sénat de la Ville libre de Hambourg le 21 octobre 1861*

Award rendered by the Senate of the Free City of Hamburg on 21 October 1861**

Appréciation du caractère définitif d'une décision de justice nationale—inadmissibilité de l'examen, par le gouvernement, du caractère juste d'une sentence définitive en vertu du principe de l'indépendance de la justice—exception à l'interdiction d'intercéder dans le cas d'un déni de justice ou d'un simulacre de formes.

Interprétation du traité—appréciation de la portée d'un traité conformément aux dispositions souscrites par les parties—impossibilité de donner au traité une portée différente des termes précis dans lesquels il est conçu.

Succession de traités—traités de 1654, 1810 et 1842 entre le Portugal et la Grande-Bretagne—responsabilité du gouvernement d'abroger expressément un traité ou d'en suspendre l'usage en vue de sa non-application—le silence des traités postérieurs ne permet pas de conclure à l'extinction des clauses de l'ancien traité qui ont été omises.

Relation entre traités et lois nationales—les obligations contractées par le gouvernement ne sont pas altérées par l'élaboration de lois nationales—non-application des lois postérieures contraires aux dispositions d'un traité sans le consentement tacite des Parties.

Responsabilité étatique—indemnisation du préjudice causé par la non-reconnaissance du caractère définitif d'un jugement—prise en compte des principes d'équité dans la détermination du montant des dommages et intérêts—pas de réparation des préjudices indirects tels que les inconvénients et la perte de temps entraînés par le litige.

Arbitrage—les arbitres ne sont pas aussi strictement liés par les formes juridiques que les tribunaux ordinaires.

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* Reproduite de La Fontaine, *Pasicrisie internationale*, Berne, 1902, Imprimerie Stämpfli & Cie., p. 378.

** Reprinted from La Fontaine, *Pasicrisie internationale*, Bern, 1902, Imprimerie Stämpfli & Cie., p. 378.

Assessment of the final nature of a judicial decision—in view of the principle of judicial independence, a government is not entitled to consider the just character of a final sentence—exception to the prohibition to intercede in case of denial of justice or a travesty of proceedings.

Treaty interpretation—assessment of the scope of a treaty according to the provisions agreed to by the Parties—impossible to give to a treaty a scope that is different from the specific terms under which it is conceived.

Succession of treaties—treaties of 1654, 1810 and 1842 between Portugal and Great Britain—responsibility of government to explicitly repeal a treaty or suspend its application in order to prevent its implementation—the silence of subsequent treaties does not allow the conclusion that provisions from the older treaty that have been omitted are extinguished.

Relationship between treaties and municipal laws—obligations agreed upon by the government cannot be altered by the enactment of municipal laws—subsequent laws in contradiction with the provisions of a treaty cannot be applied without the express consent of the Parties.

State responsibility—indemnification of the damage caused by the non-recognition of the final nature of a judgment—the principle of equity should be taken into account in the determination of the amount of compensation—no compensation for indirect damages such as inconveniences and waste of time implied by the litigation.

Arbitration—arbitrators are not as strictly bound by legal forms as ordinary courts.

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Dans l'affaire de compromis entre le Gouvernement royal de la Grande-Bretagne et le Gouvernement royal de Portugal, touchant les réclamations élevées par le premier en faveur de ses sujets Yuille, Shortridge & Cie., la commission, désignée par le Sénat de la Ville libre et hanséatique de Hambourg à l'effet de prononcer une sentence arbitrale, a statué en droit : que le Gouvernement royal de Portugal est obligé envers le Gouvernement royal de la Grande-Bretagne de veiller à ce que le jugement prononcé le 1er décembre 1838 par le Tribunal de commerce de première instance de Lisbonne dans la cause du sieur Manuel José d'Oliveira contre Murdoch, Shortridge & Cie. soit traité comme définitif et exécutoire, ainsi que de payer les dommages-intérêts dus aux susdits sujets anglais en indemnisation du préjudice résultant de ce que le susdit jugement n'a pas été traité comme définitif (final), savoir : 20,296 £., 0 sh., 2 d., soit : Livres Sterling vingt mille deux cent quatre-vingt-seize et deux pence suivant le mode de paiement fixé par le compromis.

Pour ce qui regarde les frais, chacun des deux Gouvernements supportera ceux qu'il aura faits de son côté pour amener ce procédé de compromis. Ceux de la commission, se montant à Ctf 420,12, seront remboursés de moitié par chaque gouvernement.

Motifs

Le Gouvernement royal de la Grande-Bretagne soutient que le jugement du Tribunal de commerce de seconde instance de Lisbonne du 1er décembre 1838 doit être regardé comme un arrêt vidant et terminant le procès entre Oliveira et la raison anglaise de Murdoch, Shortridge & Cie. En conséquence il signale comme injuste toute la procédure commencée par le recours en cassation et continuée en vertu de l'arrêt de renvoi, et exige que le susdit jugement soit reconnu avoir force de chose jugée, ainsi que l'indemnisation de ses sujets de tout dommage résultant pour eux de la non-reconnaissance.

A l'appui de cette assertion il invoque :

1. le traité de 1654, art. 7 et la convention de 1810, art. 10 ;

2. le fait que le décret du 7 mai 1835 a été émis sans l'assentiment des Cortes : dont il est inféré que l'art. 1116 du Codigo commercial (que ce décret abrogeait en partie) est resté en vigueur : la Cour de Relação avait été, aussi par cette raison, incompétente dans ce procès ;

3. la criante injustice du jugement du 15 novembre 1840 prononcé par la Cour de Relação.

Il y avait donc : I. à examiner la question, sous les trois rapports indiqués ci-dessus, si le jugement du 1er décembre 1838 devait être regardé comme définitif ; II. dans l'affirmative à déterminer les conséquences de l'affirmation de cette question.

En ce qui touche Ad I.

A. La prétendue « criante injustice » du jugement du 15 novembre 1840. Ce motif des réclamations du Gouvernement royal de la Grande-Bretagne doit être rejeté :

1. Tout en admettant sans hésiter que ce jugement est incorrect (erroné). La reversale de A. Wardrop, du 31 décembre 1812, se rapporte (de l'aveu même d'Oliveira dans sa lettre à Yuille du 26 janvier 1827) à une dette privée de Wardrop à Oliveira, née en partie d'une créance de ce dernier sur la maison de Madère, en partie, de lettres de change remises par Oliveira à Wardrop. Il est même très probable que cette créance et les £ 6000 (environ) dont Oliveira était crédité en 1810, 30 juin, sur les livres de la raison et lesquelles (témoins ces livres mêmes), par suite du transfert sur le compte privé de Wardrop, furent portées au débit d'Oliveira le 30 juin 1810, étaient identiques. Si cela était constaté, la susdite lettre d'Oliveira prouverait directement que cette dette de la raison fut convertie en dette privée de Wardrop avec l'assentiment d'Oliveira, et même dans le cas de non-accomplissement de la reversale du 31 décembre 1812 la dette de la raison n'aurait aucunement pu revivre. Car l'art. 693, n° 4, du Codigo commercial n'y peut guère faire exception par la seule raison qu'il n'est pas applicable à l'espèce, puisqu'ils s'agit ici de la substitution d'un nouveau débiteur à la place du précédent, sans aucune condition quelconque, et ce n'est que deux ans après que le nouveau débiteur et le créancier s'entendent sur le mode de paiement. La bonification d'intérêt

sur £ 10,000 (faite par la raison à Oliveira) portée sur un extrait de compte du 31 janvier 1813, isolée comme elle est, et en contradiction avec l'extrait de compte fait par A. Wardrop pour les années de 1806—1826, ne prouverait rien quand même cet extrait ne serait pas falsifié. Quant au capital de £ 4000, qui ne figure nulle part sur les livres comme dette de la raison, le titre d'Oliveira manquerait de base même dans la supposition que le transfert des £ 6000 se soit effectué sans son consentement. Mais, quoi qu'il en soit, il est constant du moins que Oliveira, en appuyant, en première ligne, son action sur la reversale de 1826, a par cela, même reconnu indubitablement l'identité de cette créance qu'il fait valoir et de la dette reversale. La conséquence évidente c'est que tous les arguments décisifs tendant à dépouiller la reversale de toute vertu obligatoire par rapport à la raison prouvent en même temps que l'action entière contre la raison est insoutenable.

L'absence de toute vertu obligatoire de la reversale de 1826 pour la raison est tellement mise en évidence, par l'extrait de la correspondance joint au dossier, par les arguments développés dans la sentence arbitrale et celle du Tribunal de commerce (première instance) et par sa reconnaissance énoncée dans le jugement du 15 novembre 1840 même, qu'il serait inutile d'appuyer davantage sur ce point.

Mais si, par les raisons ci-dessus alléguées, le jugement du 15 novembre 1840 peut être regardé comme erroné,

2. Ce défaut de justesse ne suffit pas pour justifier les prétentions du Gouvernement royal de la Grande-Bretagne.

Il serait de toute injustice de demander compte au Gouvernement royal de Portugal des fautes commises par les Tribunaux du pays. En vertu de la constitution du royaume de Portugal, ces Tribunaux sont parfaitement indépendants du gouvernement qui par conséquent ne peut exercer aucune influence sur leurs décisions ; on ne peut donc pas lui en imposer la responsabilité. Le Gouvernement royal de la Grande-Bretagne ne saurait se refuser à reconnaître cette vérité sans refuser en même temps de reconnaître toute l'organisation du Portugal comme celle d'un État policé—ce qui, évidemment, est loin de la pensée du Gouvernement royal de la Grande-Bretagne.

Ceci est reconnu par tous les écrivains sur le droit des gens. Voir Vattel : Droit des gens, livre 2, chap. 7, parag. 84 :

> C'est à la nation ou à son Souverain de rendre la justice dans tous les lieux de son obéissance. . . . Les autres nations doivent respecter ce droit. Et comme l'administration de la justice exige nécessairement que toute sentence définitive, prononcée régulièrement, soit tenue pour juste et exécutée comme telle, dès qu'une cause dans laquelle des étrangers se trouvant intéressés a été jugée dans les formes, le Souverain de ces plaideurs ne peut écouter leurs plaintes. Entreprendre d'examiner la justice d'une sentence définitive c'est attaquer la juridiction de celui qui l'a rendue.

Or, cet auteur admet en effet une exception à cette interdiction d'intercéder "dans le cas d'un déni de justice ou d'une injustice évidente et palpable ou d'une violation manifeste des règles et des formes ou enfin d'une distinction odieuse faite au préjudice de ses sujets."

Mais ces suppositions ne pourront être regardées comme réalisées qu'au cas de déni de justice, ou d'un simulacre de formes pour masquer la violence. C'est dans ce sens aussi qu'il faut interpréter le cas d'injustice palpable et évidente», puisque autrement le gouvernement étranger pourrait prétendre relativement à toute sentence reconnue erronée, que c'était "une injustice palpable et évidente", ce qui mènerait tout droit à cette "examination de la justice d'une sentence" qu'on vient de déclarer inadmissible.

Or, il est clair que dans le procès en question il ne s'agit ni d'un déni de justice ni d'un simulacre de formes, puisque c'est la Cour de Relação qui a jugé et que dans son jugement elle a suivi des principes de droit, quoique mal appliqués aux faits.

Au reste, ces doctrines ne sont justes qu'avec la restriction indiquée par Martens, Droit des gens, parag. 96, savoir : "l'impossibilité de combattre une sentence évidemment erronée par les moyens ordinaires de procédure en justice." Mais les lois portugaises admettaient non seulement, dans le cas d'une injustice palpable, une requête en révision contre le jugement du 15 novembre 1840 (Codigo, art. 1116), mais, si les circonstances s'y était prêtées, une action contre les juges (Action de syndicat). Or, puisque cette dernière n'a pas été intentée et que la requête a été rejetée comme mal fondée, le Gouvernement royal de la Grande-Bretagne ne peut aucunement être admis à revenir aujourd'hui sur l'examen de l'injustice du jugement en question.

Les mêmes considérations mènent :

B. Au rejet du second moyen (argument) sur lequel le Gouvernement royal de la Grande-Bretagne appuie sa demande.

La question de savoir si le décret du 7 mai 1835, pour avoir été émis sans l'assentiment des Cortes, ne pouvant être regardé comme obligatoire en droit, ne devait pas non plus servir de base à la décision de la Cour suprême, est de nature à ne pouvoir être résolue sur-le-champ. Le Gouvernement royal de Portugal, pour soutenir la validité du décret, fait valoir ces deux arguments : d'abord, qu'il avait été regardé comme légal par toutes les autorités et tous les tribunaux : puis, qu'il n'avait servi qu'à supprimer une disposition du Codigo commercial qui se trouvait en contradiction avec la charte constitutionnelle et avec le décret qui instituait la Cour de cassation et en définissait les facultés.

Mais quoi qu'on pense de la justesse de cette argumentation, il faudra toujours convenir que la Cour suprême, en renvoyant la cause à la Cour de Relação a sanctionné la validité du décret.

Ce renvoi à la Cour de Relação, n'est donc pas une conséquence du décret du 7 mai 1835, mais de ce que la Cour suprême regardait ce décret comme obligatoire. Aussi faut-il revenir pour cela aux mêmes principes qui viennent d'être

discutés par rapport au premier chef de la demande (plainte) et ces principes, ici comme auparavant, amènent également le rejet de ce (second) chef.

Il ne reste donc maintenant que :

C. D'examiner le troisième chef. L'assertion que, d'après les traités de 1654, art. 7, et de 1810, art. 10, le jugement du 1er décembre 1838 devait être regardé comme définitif, est-elle juste? A cette question il faut répondre affirmativement.

L'interprétation du traité de 1654 de la part du Portugal se trouve en flagrante contradiction avec les propres termes du traité. La disposition : "*a Judice Conservatore nulla dabitur provocatio nisi ad Relationis Senatum ubi controversae artœ interpositis appellationibus intra quattuor mensium spatium ad summum finiantur*", est parfaitement claire et doit certainement s'interpréter dans ce sens que : 1. l'unique remède admissible contre les décisions du Juiz Conservator, c'est l'appel au Relationis Senatum, et 2. devant celui-ci les causes seraient *mises à fin* dans le terme de quatre mois.

Ainsi, quand même le Gouvernement royal de Portugal aurait raison de dire que la première de ces dispositions n'aboutissait qu'à exclure les exceptions (admises alors par la jurisprudence portugaise) de la règle suivant laquelle les appellations des jugements de première instance devaient se diriger à une Cour de Relação, la seconde disposition n'en serait pas moins incompatible avec l'admission d'un remède ultérieur contre le jugement de la Cour de Relação.

Que si, à l'époque du traité, le remède de la révision était déjà sous certaines conditions admis contre les jugements de la seconde instance, cela ne servirait qu'à confirmer cette interprétation, attendu que c'est une raison de plus, pour supposer que le mot "finiantur" tendait à exclure tout procédé ultérieur.

On ne peut pas non plus faire valoir contre des termes si précis la garantie d'une décision juste que devait offrir le recours en révision et qu'on n'aurait pas probablement voulu écarter dans un traité fait exprès pour assurer aux Anglais une bonne administration de justice ; puisque, surtout pour l'époque du traité (ainsi qu'en général), on pourrait alléguer bien des raisons pour démontrer que le recours à la justice est tout aussi sûr et, par la prompte terminaison des procès, aussi conforme à l'intérêt des plaideurs, avec un nombre restreint d'instances qu'avec l'admission d'une série interminable de remèdes contre les jugements.

Le Gouvernement royal de Portugal en appelle aussi à une pratique maintenue pendant de longues années et offrant des exemples innombrables de recours en révision, mais d'abord, à l'égard du procès entre M. Croft et Oliveira qu'elle évoque, cet appel porte à faux, puisqu'il n'était pas question d'un procès devant un Juiz Conservador.

En résumé, il est évident que tout cela ne saurait donner au traité une portée différente des termes précis dans lesquels il est conçu. De ce seul fait

(s'il est exact) il s'ensuit tout au plus que dans beaucoup d'occasions les sujets britanniques n'ont pas tiré parti du droit que leur attribuait le traité.

Néanmoins, de ce que plusieurs Anglais (quel que soit leur nombre) n'ont pas voulu invoquer leur privilège, on ne saurait déduire un préjudice pour les autres qui le revendiquent. Ceux-là n'ont pas le droit d'établir un usage que ceux-ci seraient forcés d'accepter comme obligatoire. La question changerait de caractère si le Gouvernement royal de la Grande-Bretagne avait réitérativement refusé l'intercession par la raison que le traité était tombé en désuétude, ou qu'il eût renoncé à une intercession intentée par la même raison. Car il est certain qu'il appartient aux Gouvernements d'abroger expressément ou de suspendre l'usage d'un traité, ce qui devra être regardé par leurs sujets comme une désuétude dérogeant au traité.

Mais ce non-usage devrait émaner du Gouvernement et se manifester par le refus d'intercéder nonobstant les requêtes de ses sujets à cet effet, ou par l'abandon d'une intercession intentée, par suite de réclamations de la part du Portugal fondées sur la nullité du traité.

Cependant dans ce cas même on ne devrait admettre la vertu suspensive de l'usage relativement au traité qu'avec une extrême précaution. Car dans les cas ou de la violation du traité il ne résulterait que peu ou point de préjudice pour les sujets britanniques, l'intercession de leur Gouvernement serait oiseuse et une impolitesse gratuite envers un Gouvernement ami : s'en abstenir serait donc une courtoisie et non une renonciation. Mais le Gouvernement royal de Portugal n'invoque pas ce non-usage. On ne pourra donc pas prétendre, non plus, qu'un usage contraire avait dérogé à l'art. 7 du traité de 1654. Les autres arguments produits contre son application actuelle ne sont pas plus concluants.

Il va sans dire que les édits des souverains portugais ou les lois promulguées en Portugal ne peuvent en rien altérer les obligations contractées de la part du Gouvernement de Portugal. Cela résulte de la nature du traité, c'est-à-dire d'une convention qui astreint les contractants à son accomplissement. Il est vrai que rien n'empêche le Gouvernement royal du Portugal de se mettre dans le cas de ne pouvoir exécuter le traité sans violer les lois de son pays. Mais cela n'affecte aucunement les droits stipulés en faveur de l'autre partie contractante.

Les édits, les décrets ou les lois portugais ne seront donc pris en considération que lorsqu'il serait prouvé que ces lois s'opposent réellement au traité et que le Gouvernement royal britannique y avait déféré expressément ou tacitement.

Ni l'une ni l'autre de ces suppositions ne se rencontre dans les décrets invoqués ; ils ne sauraient donc rien décider en faveur du Gouvernement royal de Portugal.

On prétend que l'Alvará du 16 septembre 1665 déclarait que les Anglais seront sujets au Tribunal fiscal dans toutes les affaires du ressort de ce dernier. Il n'est pas constaté que cette disposition ait été acceptée par l'Angleterre et, quand même, cela ne tirerait guère à conséquence relativement aux autres causes et, par suite, à celle en litige.

L'Alvará du 31 mars 1790, à la requête des sujets anglais, modifie les formalités (procédés) relativement aux griefs proférés contre les décisions du Juiz Conservador en remplaçant l'appellation par le remède de 1' "caggravo ordinario para a Casa da Supplicação". Mais cela n'affecte aucunement le traité et change uniquement les formes de la procédure, la "Casa da Supplicação" étant également une Cour composée de Sénateurs, une des Cours de Relação, par conséquent ce même Relationis Senatus (Paschalis Josephi Mellii Freirii Institutiones Juris Civilis Lusitani, Lissabon, 1789, lib. 1, tit. 20, parag. 257 : lib. IV, tit. 23, parag. 22, 23).

Le susdit décret n'altère pas même la disposition qui prescrit la décision dans le terme de quatre mois, et quand même il serait censé le faire par son silence à cet égard, on n'en pourrait tirer aucune conclusion relativement aux autres dispositions de l'art. 7.

Le Codigo commercial n'y a rien changé non plus. Ceci parait, en effet, un point épineux : puisque ni le Gouvernement royal britannique, ni les défendeurs n'ont fait aucune opposition, lorsque au lieu d'appeler du jugement du Juiz Conservador directement au Tribunal de commerce de seconde instance, on a, conformément aux dispositions du Codigo, porté l'appellation d'abord au Tribunal de commerce de première instance (qui ne se compose pas de Sénateurs) et seulement de celui-ci au Tribunal de commerce de seconde instance, comme une Tribunal voulu par l'art. 7 du traité. Néanmoins, le raisonnement du Gouvernement royal de Portugal que quiconque accepte le Codigo pour une de ses parties, ne pourrait en récuser l'autorité pour les autres, est erroné, quoiqu'on ait accepté quelques dispositions qu'en vertu du traité il aurait fallu repousser. Et cela par la raison que ces dispositions au fond n'excluaient pas la jouissance du privilège accordé par le traité, la substitution d'un autre Tribunal n'altérant en rien la juridiction du Tribunal indiqué par le traité. On a donc, il est vrai, permis que l'appellation n'arrivât au Tribunal du traité que par un détour, mais par là, on ne s'est aucunement engagé à regarder le jugement de ce Tribunal comme susceptible de remèdes ultérieurs.

Enfin l'omission des stipulations touchant l'appellation dans les traités de 1810 et 1842 ne justifierait pas la supposition que ces stipulations aient été regardées comme impraticables. Pour le traité de 1842 qui abrogeait la juridiction privilégiée, il n'y avait aucun motif de faire mention particulière du privilège des remèdes contre les jugements des Juizes Conservadores parce qu'avec leur abrogation ce privilège tombait de lui-même. Et dans le traité de 1810 il n'est dit nulle part qu'il devait former la source des droits des Anglais par rapport à leur juridiction : il n'annule point le traité de 1654 et ne contient aucune disposition contraire.

En revanche on y trouve que : "These Judges shall try and decide all causes brought before them by British subjects *in the same manner as formerly*", et le passage : "The laws, decrees and customs of Portugal respecting the juridiction of the Judge Conservator are declared to be recognised and received by the

present treaty" ne se rapporte aucunement aux remèdes contre les décisions de ces juges.

Ainsi, s'il faut supposer que le traité de 1654, art. 7. devait être interprété dans le sens des Anglais et qu'a l'époque décisive il était encore en vigueur, il s'ensuit que le privilège des Anglais fondé sur ce traité fut lésé par le recours en révision contre le jugement du 1er décembre 1838. Car le Tribunal de commerce de seconde instance est d'un caractère analogue au Relationis Senatus du traité (Codigo commercial, art. 1004, 1005) et le raisonnement que la Cour de cassation, attendu qu'elle casse et ne juge pas, ne forme point une troisième instance et quoi par conséquent son intervention ne dérogeait pas à la disposition du traité qui en prescrivait seulement deux, est parfaitement insoutenable, d'autant plus qu'il est parfaitement incompatible avec le mot "finiantur" du traité.

Il pourrait paraître plus difficile de répondre à la question si, par leur acquiescement, sans protêt, à un litige ultérieur, après le jugement du Tribunal de commerce de première instance du 1er décembre 1838, Murdoch, Shortridge & Cie. ont renoncé à leur droit d'invoquer le traité.

Si Murdoch, Shortridge & Cie., dès l'ouverture des nouveaux débats devant la Cour de cassation, avaient, en vertu des traités en vigueur, requis l'intervention du Gouvernement britannique, on leur aurait répondu avec raison : attendez pour voir si les Tribunaux du pays vous léseront : ce n'est que dans ce cas que le Gouvernement anglais peut intervenir.

La Cour de cassation ayant renvoyé la cause à la Cour de Relação, c'est le jugement rendu par cette dernière qui fournit au Gouvernement royal britannique des motifs légitimes de griefs.

A cela s'ajoute, que l'évidente injustice des jugements subséquents des Tribunaux portugais (comme il a été démontré plus haut) pouvait bien former, en faveur de Murdoch, Shortridge & Cie., un titre à une "in integrum restitutio" contre cette omission, d'autant plus que des arbitres ne peuvent être considérés aussi strictement liés aux formes juridiques que les tribunaux ordinaires.

Le Gouvernement royal de la Grande-Bretagne devait donc être censé, en vertu du traité de 1654, avoir le droit d'exiger de la part du Gouvernement royal de Portugal, de reconnaître pour définitif le jugement du Ier décembre 1838 ; il fallait donc prononcer comme cela s'est fait dans le jugement (la sentence) : que le Gouvernement royal de Portugal est obligé envers le Gouvernement royal de la Grande-Bretagne de veiller à ce que le jugement prononcé le 1er décembre 1838 par le Tribunal de commerce de première instance de Lisbonne, dans la cause du sieur Manoel José d'Oliveira contre Murdoch, Shortridge & Cie., soit traité comme définitif (final) et exécutoire.

Mais de là s'ensuit de soi-même Ad II : son obligation de payer les dommages-intérêts en indemnisation du préjudice résultant de ce que le susdit jugement n'a pas été traité jusqu'ici comme tel, pour les sujets britanniques.

Il semblait répondre aux intentions de l'acte de compromis de fixer dès à présent la somme à laquelle s'élèveraient d'après les calculs ces dommag-

es-intérêts. Et quoique, avec les données actuelles, il soit impossible de les préciser rigoureusement, on croyait ne pas devoir différer cette tâche, attendu qu'il sera toujours difficile de supputer les conséquences de procédures vicieuses, et que, en fin de compte, on sera toujours réduit à consulter les principes d'équité dans l'évaluation des dommages-intérêts même avec de plus amples données.

Ce qu'il y avait d'abord d'irrécusable, c'était :

A. La restitution des frais déboursés ; par les défenseurs jusqu'au jugement du 1er décembre 1838. Parce que cette restitution aurait eu lieu dès lors, en vertu de ce jugement, qui condamnait le demandeur aux dépens, si, comme de raison, le procès avait été regardé comme terminé.

Le Gouvernement royal de Portugal n'est pas seulement tenu à garantir subsidiairement le paiement actuel de ces frais par les héritiers du demandeur. En effet, on ne saurait de bonne foi imposer aux défendeurs, qui à l'époque indiquée auraient indubitablement recouvré les frais, la tâche ingrate d'affronter toutes sortes de désagréments en essayant d'obtenir ce paiement de la part des héritiers du demandeur aujourd'hui, c'est-à-dire, lorsque, par le décès du demandeur et par les disputes nées depuis relativement à la succession, les procédures seraient infiniment plus compliquées. Il faut au contraire abandonner au Gouvernement royal de Portugal le soin de soutenir ses droits vis-à-vis des héritiers d'Oliveira ; de même que la présente sentence qui en vertu du traité de 1654 établit pour ce Gouvernement l'obligation de la restitution n'exclut nullement son droit de prendre à partie Oliveira, respectivement ses héritiers, ou tel autre auteur de ces procédures irrégulières, pour en avoir satisfaction.

Les susdits frais n'étant pas contestés, *in quanto*, de la part du Gouvernement portugais il y avait d'abord la somme de £.2589, 14, 1 à mettre en ligne de compte. Il paraît également équitable d'adjuger au Gouvernement royal de la Grande-Bretagne les intérêts sur ce montant, de 6% à partir de 1839. Cependant puisque, suivant le droit commun, seul applicable à cette question, le cumul des intérêts arriérés s'arrête, lorsqu'ils arrivent à la hauteur du capital (D. de conditione indebiti 12,6 ; C. de usuris IV, 32), il fallait restreindre les intérêts dus au Gouvernement royal britannique, sur cette partie, à £2589,14,1.

B. En ce qui touche les frais déboursés depuis 1838, la somme exigée de £5400,8 (non plus contestée de la part du Portugal), par des raisons ci-dessus développées, doit également être mise à la charge du Gouvernement royal de Portugal.

Les intérêts de cette somme comptés par le Gouvernement royal britannique depuis le mois de juillet de 1852 lui sont adjugés par £.2916,4.

Enfin restait à déterminer :

C. Le titre et l'importance des dommages-intérêts dus aux défendeurs en compensation du préjudice porté à leur commerce par la poursuite du procès. A cet égard

1. il y avait à considérer que la partie perdante n'est pas tenue de réparer le dommage causé à un plaideur par les inconvénients et la perte de temps qu'entraîne le litige, ce dommage devant être considéré comme un préjudice indirect, et qu'en général, la restitution des frais par le perdant satisfait toutes les prétentions de la partie victorieuse. Néanmoins

2. on ne pouvait disconvenir que dans le procès en question, par la suite de la procédure viciée, les défendeurs ont dû essuyer des préjudices directs dont l'équité exige la réparation.

Il est en effet hors de doute que l'existence d'une sentence finale, entraînant le paiement de £ 25,000 ne pouvait manquer de compromettre sérieusement le crédit et le commerce des défendeurs ; et bien qu'on ne saurait soutenir que ce fâcheux effet n'étant dû qu'à des circonstances particulières et individuelles, ne devait pas être pris en considération ; attendu qu'il est évident que tout autre établissement de l'étendue et de la nature de celui des défendeurs, aurait subi les mêmes conséquences. Que si en considération de cet effet de la procédure il y avait une compensation à accorder, il fallait toutefois.

3. se rappeler qu'une demande en indemnisation n'est légitime qu'en tant que le préjudice éprouvé serait une conséquence réelle et inévitable des procédures judiciaires illégalement continuées ; relativement à quoi, il y a trois points à discuter :

a) que, comme il résulte des actes, les procédures judiciaires ont été mises à fin au commencement de l'année 1848, d'où il suit que la supposition des dommages-intérêts ne doit pas s'étendre au delà de ce terme ;

b) que les effets préjudiciables des procédures n'ont pas pu commencer avant la fin de 1840, parce que c'est seulement alors que fut prononcé le jugement condamnatoire de la Cour de Relação lequel par son caractère extraordinaire justifie l'adjudication de dommages-intérêts, tandis que la procédure depuis le 1er décembre 1838 jusqu'au 15 novembre 1840 n'offre rien de particulier qui pût justifier une déviation du principe établi sub 1 ;

c) qu'il est constant, qu'avec le procès d'autres causes concouraient, pour réduire les bénéfices du commerce des défendeurs. Tout en admettant, à cet égard, qu'une de ces causes concourantes indiquée par le Gouvernement britannique (savoir l'absence de l'associé Shortridge par suite de son séjour à Lisbonne) était motivée par le procès et par conséquent digne de considération et même en écartant la réflexion que la décadence du crédit des défenseurs doit s'attribuer en partie aux lettres de Shortridge à J. Denyer, lesquelles à l'occasion du procès furent généralement connues ; il n'en est pas moins vrai que la conjoncture de l'époque a dû porter un préjudice considérable au commerce des défenseurs. On en voit la preuve spéciale pour le point en question, dans les pièces à l'appui du "Report from the Select Comittee of the House of

Commons" sur l'affaire en question, fait en 1854. On a consulté ce rapport avec d'autant plus de confiance pour la sentence, qu'il renferme des documents exhibés par MM. Yuille, Shortridge & Cie. eux-mêmes. Tels sont les comptes de gain et de pertes dans l'appendice N° 2 sub A et B. On voit par le compte sub B, que les mauvais résultats de certaines consignations de vins ainsi que la décadence de la production entraînaient pendant les années de 1839 à 1852 des pertes considérables qui, certes, doivent s'attribuer plutôt à la situation générale des affaires qu'au procès. La même pièce atteste que certaines dépenses faites à Londres ont englouti des sommes considérables sans qu'on puisse découvrir de quelle manière elles se rattachent au procès.

Il va sans dire que des pertes dues à la conjonction générale des affaires et à d'autres causes étrangères ne pouvaient entrer dans la supputation des dommages-intérêts ;

4. restait à déterminer d'après quel principe devait se former le compte des dommages-intérêts.

Il fallait d'abord rejeter celui qu'avait adopté le Gouvernement royal de la Grande-Bretagne, savoir : qu'on devait tenir compte de la valeur des immeubles et de l'établissement au moment de la vente en 1839, d'autant plus qu'il n'y a aucune raison de supposer que, sans le procès, l'établissement eût été réellement vendu. Mais quand même on prendrait cette valeur pour base du calcul, il faudrait d'autre part envisager la valeur qu'aurait eu l'établissement en 1848, époque où, comme on le voit plus haut, le procès fut mis à fin. Mais il n'y a aucun document pour éclairer ce point. On ne peut non plus supposer avec le Gouvernement de la Grande-Bretagne que les immeubles estimés en 1839 à £ 10,000, aient été sans valeur ou même d'une valeur considérablement réduite en 1848 (époque déterminante pour la supputation des pertes) et cela par suite du procès : parce qu'il n'y a aucune pièce à l'appui et qu'on ne saurait admettre une pareille supposition sans preuve. Enfin, il parait que la perte de la clientèle ne devrait être comptée qu'en tant que, pendant les années de 1840 à 1848 (les seules qu'il faille prendre en considération ici), elle aura contribué à réduire le revenu annuel, parce que, plus tard, c'était à l'activité des défendeurs de réparer ces pertes qui ne se rattachent que très indirectement au procès. D'après tout ce qui vient d'être exposé ci-dessus il n'y avait que la différence des bénéfices nets des années antérieures à 1838 d'avec celles de 1840 à 1848 qui put servir de base au calcul.

Suivant le relevé du Gouvernement royal de la Grande-Bretagne le chiffre moyen des bénéfices annuels depuis 1830 jusqu'à 1838 était de £ 1931,15 sh.

et plus tard (£ 5768 en 14 ans) de 412,—

D'ou il résulte qu'il y eu une baisse de £ 1519,15 sh.

Eu égard à toutes les considérations alléguées ci-dessus on prendra sur cette somme £ 500 (ce qui ne paraît pas un chiffre trop bas) pour frais de procédure, ce qui pour les sept années depuis la fin de 1840 jusqu'au commencement de 1848, porte le total des pertes en affaires à £ 3,500.—sh.,—d.

plus les intérêts à 6%, savoir :

1re année, fin de 1841 jusqu'au milieu de 1861 (sur £ 500, 19 ½ ans).	£ 500			
Report	£ 500	£ 3,500,	—sh.	— d.
2e année, fin de 1842 jusqu'au milieu de 1861 (sur £ 500, 18 ½ ans).	500			
3e année, fin de 1843 jusqu'au milieu de 1861 (sur £ 500, 17 ½ ans). (Par les raisons indiquées sub II, les intérêts de ces trois années ne pouvaient se porter à un taux d'intérêt plus élevé) :	500			
4e année, fin de 1844 jusqu'au milieu de 1861 (sur £ 500, 16 ½ ans)	495			
5e année, fin de 1845 jusqu'au milieu de 1861 (sur £ 500, 15½ ans)	465			
6e année, fin de 1846 jusqu'au milieu de 1861 (sur £ 500, 14 ½ ans).	435			
7e année, fin de 1847 jusqu'au milieu de 1861 (sur £ 500, 13 ½ ans)	405			
		£ 3,300	sh.	d.
de sorte que cette partie s'élève à un total de		6,800	—	—
En résumé :				
1. Frais de procédure jusqu'en 1838 avec intérêts.		5,179	08	02
2. Frais de procédure après 1838 avec intérêts		8,316	12	—
3. Pertes en affaires avec intérêts		6,800	—	—
	Total	£ 20,296,	—sh.	2d

que le Gouvernement royal de Portugal a dû être condamné à payer.

Par suite de la réduction nécessaire des prétentions du demandeur il a fallu prononcer sur les frais du compromis comme on le voit dans la sentence.

Hambourg, 21 octobre 1861.

PART IV

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

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

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

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

Case of Crisanto Medina & Sons *v.* Costa Rica, decision of the Umpire, Commander Bertinatti, dated 31 December 1862*

Affaire concernant Crisanto Medina et fils c. le Costa Rica, décision du Surarbitre, Commandant Bertinatti, datée du 31 décembre 1862**

Naturalization—certificate of naturalization obtained from a New York court without compliance with the five years of residence required by the naturalization law—residence viewed as the place where a man abides with his family, or himself, making it the chief seat of his affairs and interests.

Effect of judgments in foreign countries—judgments given in the United States are not binding in Costa Rica without being declared executable there according to a treaty—no particular privilege for a declaration of naturalization to be admitted there as an absolute truth.

Competence of the Commission to examine the veracity of the naturalization certificates—Commission cannot be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by a municipal law—presumption of truth must yield to truth itself.

Naturalisation—certificat de naturalisation obtenu auprès d'un tribunal de New York sans respecter la condition des cinq ans de résidence requise par la loi de naturalisation—la résidence s'entend du lieu où un homme demeure seul ou avec sa famille, y établissant ainsi le siège principal de ses affaires et intérêts.

Effets des jugements dans les pays étrangers—les jugements rendus aux États-Unis ne sont pas contraignants au Costa Rica s'ils n'y ont pas été déclarés exécutoires

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2586.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2586.

conformément à un traité—une déclaration de naturalisation ne bénéficie pas de privilège particulier pour y être admise en tant que vérité absolue.

Compétence de la Commission pour examiner l'authenticité des certificats de naturalisation—la Commission ne peut être empêchée d'examiner la valeur intrinsèque d'un acte présenté comme preuve par une quelconque restriction ou objection externe résultant d'une question de forme établie par le droit interne—la présomption de vérité doit céder le pas à la vérité en tant que telle.

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This claim comes before me first on the preliminary objection by which the claimants are denied the quality of citizens of the United States. They admit that they are not native-born citizens, but allege to have been naturalized, and present the naturalization papers as evidence which can not be controverted.

The circumstance that naturalization in the United States is granted by a general law of Congress to all who prove before certain courts that they have complied with the conditions of the same law, has led the claimants to regard the record of the declaration of naturalization as a real sentence, namely, the act of a court endowed with power to judge between contending parties—*contentiosa jurisdictio*—judging in the last resort, and having special jurisdiction to decide a question of status when it is raised, to which sentence, thus considered as definitive, may properly be applied the well-known principle, *res judicata pro veritate habetur*, in regard to those who were parties to the judgment.

If this principle should be applied to the present case, it would lead to erroneous consequences. The judgments given in the United States are not binding in Costa Rica, without being declared executable there according to a treaty, in the manner prescribed by the same. A declaration of naturalization, even if it were a definitive sentence, could not claim a particular privilege of being admitted there as an absolute truth, though its intrinsic falsity might be evident.

An act of naturalization be it made by a judge *ex parte* in the exercise of his *voluntario jurisdictio*, or be it the result of a decree of a king bearing an administrative character; in either case its value, on the point of evidence, before an international commission, can only be that of an element of proof, subject to be examined according to the principle—*locus regit actum*, both intrinsically and extrinsically, in order to be admitted or rejected according to the general principles in such a matter.

To attack such an act because obtained by *obseptio* as it has been alleged by Costa Rica, showing that truth was concealed and falsity alleged, in order to evade the law of the United States, far from being an offense against their territorial sovereignty, denying it the power of giving naturalization to foreigners, is on the contrary an homage to the same sovereignty; because it could never

be the intention of the legislator, either in a kingdom or in a republic, that his laws may be violated or evaded with impunity.

Moreover, the question in this case is not as to the right of the United States to naturalize a foreigner, though he may not have complied with the conditions prescribed by their law. The claimants have alleged to have been naturalized by complying with said law; and they must prove their allegation to the commission which is to judge, first of their quality of citizens of the United States, and afterward of their claim.

The certificates exhibited by them 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.

It has been alleged in behalf of the claimants that even admitting that their acts of naturalization are intrinsically void, it is not in the power of this commission to reject them as proof, if they are not first set aside as fraudulent by the same tribunal from which they were obtained.

To admit this 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.

If we examine this question with a view to the law of the United States, and if in the matter under consideration we establish a contrast between the powers of a tribunal of one of the States and the powers of the federal constitution, of treaties and of other acts which the executive can make in virtue of his faculty of treating with foreign nations, and so also with the powers of this joint commission, which precisely is the result of the exercise of that faculty, there can be no doubt as to which of the two shall be the supreme law of the land.

Consequently this commission judges according to truth and justice, and can not be prevented from examining the intrinsic value of an act exhibited as evidence by any limitation or extrinsic objection arising from a matter of form established by the municipal law of the United States. The claimants having chosen to place themselves under the jurisdiction of this commission, must bring before it proofs which are really true and not merely considered so by a fiction introduced by the municipal law of the United States.

Now, the proofs offered by Costa Rica and the admission made by the claimants themselves have established that the two sons were *minors* and could have been naturalized only by the naturalization of their father, Crisanto Medina; but when he received his certificate of naturalization from the court of common pleas of New York in 1859, he had not been a resident of the United States for the term of five years, which the law requires as a period of proba-

tion and a proof of a determined and constant intention to become a *bona fide* citizen of the United States.

"The residence of a man", says Hon. Judge Daly, "is the place where he abides with his family, or abides himself, making it the chief seat of his affairs and interests." Now, the residence of Crisanto Medina for many years previous to 1856 had been, no doubt, at Costa Rica, where he abode with his family and made it the seat of his business. During that year he visited New York, declared there his intention to become a citizen of the United States, and immediately went back to Costa Rica, where he continued to abide and to have the seat of his business. Moreover, he engaged there in business requiring his presence for many years to come, and accepted the office of consul resident for Ecuador.

Three years after that declaration the said claimant made another visit to New York, took out his naturalization papers and went back to reside in Costa Rica. That he left or did not leave his family in New York or in any other part of the United States during those three years between 1856 and 1859 is immaterial. In fact, he did not reside in the United States either five years or three years; nor even one year in the State of New York. Had this been represented to Hon. Judge Daly, he could not have granted the certificate of naturalization; and should the case be legally brought now before that learned judge he could not hesitate a moment to set aside that certificate. . . .

In conclusion, my opinion is that the claimants have no standing before this commission, and therefore, without prejudice to their rights and actions against the Government of Costa Rica, to be asserted before the ordinary tribunals, I hereby dismiss their demand.

Case of Accessory Transit Company *v.* Costa Rica, decision of the Umpire, Commander Bertinatti, dated 31 December 1862[*]

Affaire concernant l'Accessory Transit Company c. le Costa Rica, décision du Surarbitre, Commandant Bertinatti, datée du 31 décembre 1862[**]

Recognition of government—new government of Nicaragua, born from a revolution and piratical in its origin, became the only *de facto* government of that State—recognition by the United States of the *de facto* government as belligerent and as the regular government of Nicaragua.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. II, Washington, 1898, Government Printing Office, p. 1560.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. II, Washington, 1898, Government Printing Office, p. 1560.

Nature of the war—war of Costa Rica against the *de facto* government was a public and regular war which was fought as such on both sides and according to the civilized usages of warfare with the mutual recognition of all rights of belligerents.

Treaty interpretation—meaning of "belligerent" under the Convention of 2 July 1860—treaty provisions showed that negotiators acknowledged that the war between Costa Rica and Nicaragua was a public war—once concluded the Convention formed a *jus constitutum*.

Jure bellicum—destruction and capture of wharf and steamers used in a war, regardless of the owners' nationality, considered as necessary operation of war.

Reconnaissance de gouvernement—le nouveau gouvernement du Nicaragua, issu d'une révolution et d'origine irrégulière, est devenu le seul gouvernement *de facto* de cet État—reconnaissance par les États-Unis du gouvernement *de facto* comme belligérant et comme gouvernement régulier du Nicaragua.

Nature de la guerre—la guerre du Costa Rica contre le gouvernement *de facto* était une guerre publique et régulière qui a été menée comme telle par les deux parties, en conformité avec les usages civilisés de la guerre et dans la reconnaissance mutuelle de tous les droits des belligérants.

Interprétation des traités—signification du terme "belligérant" dans le cadre de la Convention du 2 juillet 1860—les dispositions conventionnelles démontrent que les négociateurs reconnaissaient que la guerre entre le Costa Rica et le Nicaragua représentait un conflit public—une fois conclue, la Convention constituait un *jus constitutum*.

Jure bellicum—la destruction et la capture d'embarcadères et de bateaux à vapeur utilisés pour la guerre sont considérées comme une opération militaire nécessaire, quelle que soit la nationalité de leurs propriétaires.

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In this case the original demand was for $68,000 and interest, damages arising from the burning of a wharf at Virgin Bay in Nicaragua. Very lately an additional demand was presented to the commission for $305,000 and interest, damages derived from the capture of fourteen steamers on the river San Juan and on the Lake Nicaragua. The commissioner for Costa Rica rejected both demands, while the other commissioner thought of awarding the claimant, for damages and interest, the total of $493,542, declaring at the same time that he had been unable to discuss, as he had desired all the points, in consequence of the case having been submitted to the commission only thirty-six hours before its time expired. Called by the disagreement of the commissioners to decide this case, I have carefully examined all the documents, briefs, and observations which were presented; given opportunity to both parties for new observations, in order to make up for the shortness of time complained of by the commissioner for the United States, and read the new briefs presented

to me by the parties, which were communicated to each other by me, as also to the commissioners, both of whom I have heard on the controverted points. The claimant is a citizen of the United States, but appears as a receiver of the "Accessory Transit Company", which was a corporation created by and under the law of the Government of Nicaragua by corporators who were qualified in the charter as "all citizens of the United States".

It appears that many and serious difficulties existed between the said company and the Government of Nicaragua in 1854, and that the party then in power was "distinguished for its hostility to the citizens of the United States." That company saw with satisfaction a revolution which overthrew that government and established a new one by the aid of a small band of adventurers commonly called "filibusters"; they were almost all citizens of the United States, led by a William Walker, he also a citizen of the United States.

The Atlantic and Pacific mail and passenger steamers, in connection with the transit route of said company, continually carried aid of men, arms, and ammunition to the filibusters, contributing greatly to their success. The complicity of the "Accessory Transit Company" with the filibusters from the beginning of their enterprise in Nicaragua, is satisfactorily proven in this case.

The new government of Nicaragua, commonly called Rivas-Walker, was inaugurated in October 1855, and, though illegitimate and piratical in its origin, it was in fact and continued long to be the only government of that state. At the beginning of March 1856 Costa Rica declared war against that government, with a view to drive the filibusters out of Central America and save herself from impending danger.

Whatever may have been the language adopted by Costa Rica in regard to Nicaragua, Rivas-Walker and the filibusters, the fact, which is more eloquent than words, shows that it was a *public war and a regular war*, fought as such on both sides according to the civilized usages of warfare, during about two years, which witnessed victories and reverses on both sides, as also the mutual recognition of all the rights of belligerents. In the mean time the United States recognized the Rivas-Walker government, not only as *belligerent*, but as the regular government of Nicaragua. To make new investigations, as was done in the two briefs last submitted to me, about the character of the war between Costa Rica and Nicaragua, in order to know if it was *public* or of other kind, and deduce from the knowledge this or that consequence in favor of the claimant, seems to me all lost work. It is enough to read the convention of July 2, 1860, and take it in connection with the rules of interpretation laid down by the best publicists, and forcibly applied by the learned and distinguished Crittenden in regard to the meaning of the phrases used in a public treaty (see official opinions of the Attorneys-General, vol. 5, p. 331 and seq.), in order to see that the question has there been resolved. The high contracting parties, before concluding the convention and when the matter was *de jure constituendo*, were at liberty to investigate the nature of that war, inquiring if it was public or if it was just, in order to give it an appropriate character; they could also have

investigated the causes of that war, considered it from a political or military point of view, established the nationality of the combatants and showed the final object of the same war. This was the work for the negotiators of the said convention, and the matter for their discussions. What may have been the practical result of such investigations, what may have been the conclusions of the negotiators, in regard to the legal and international consequences of the same war, it can be inferred, now that the treaty has been concluded, forming a *jus constitutum*, only from the words used in that instrument. These .words are quite clear: "No claim," says the proviso of the 1st article, "of any citizen of the United States who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica *or the exercise of authority* by the latter within the territory of the former, shall be considered as one proper for the action of the board of commissioners herein provided for." The expression "belligerent," with the consequences depending upon it; the expression "occupation by forces"—*occupatio bellica*—with the rights belonging to the military occupant; the acknowledgment of the authority of Costa Rica in the territory of Nicaragua; the penalty against the belligerent consisting in depriving him of action for indemnity before this commission, all concur to show that the negotiators acknowledged the war between Costa Rica and Nicaragua as a *public war* and a *just war* on the part of Costa Rica, and thus acknowledged also the rights arising from the same. Consequently Costa Rica has no question of right to discuss with the *belligerent*, in accordance with said convention. For her the proof of the fact of belligerency is enough in order to oppose [*i.e.*, set up] the want of any right of action, and say that the claimant has *no locum standi in judicio*.

Now it being shown by Costa Rica that the burning of the wharf complained of was a necessary operation of war, and that such also was the capture of the steamers, I find it useless to discuss here the effects of the *domicil* in Nicaragua in regard to this claim; for either as a corporation existing only as a moral being assimilated to a natural person in the state of Nicaragua, or as an *actual belligerent* there against Costa Rica, said company has no standing before this commission. It is alleged, however, in behalf of claimant that the "Accessory Transit Company," as a Nicaraguan corporation, ceased to exist in February 1856, when the Rivas-Walker government of Nicaragua revoked its charter, seized its property and sold it for the benefit of the state to another company, which took out a new charter and continued the business on its own account. It was this new company that made itself liable to the charge of belligerency during the occupation of Nicaragua by Costa Rica. It seems that Costa Rica ignored that mysterious transaction, by which the old company was dissolved and a new one formed by the members of the first, without any apparent change, except more determined efforts in favor of the filibusters. It was immaterial, however, for Costa Rica to know who were the owners of the wharf and steamers used in a war against her; she destroyed the first and captured the others *jure bellico*.

Apart from other considerations, if it be true that the wharf when burnt and the steamers when captured did not belong to the "Accessory Transit Company," because this did not exist and they had been disposed of to another company, I can not see how an action for damages can be maintained in the name of the extinct company, if it is not against those members of the old company who formed the new one and bought the said property. Upon them would fall the responsibility, if the justice of the transaction could not be sustained before a competent tribunal. Costa Rica has nothing to do with that question. I can not see also how the theory of the things retaken by neutrals from a pirate can be applied to this case. First of all, the wharf was not retaken, but burnt, and the steamers also mostly perished in the continued struggle for their possession, what remained of them would hardly pay the expense of capture. Second, as I have observed before, the Rivas-Walker government was the only one existing at Nicaragua, and was recognized as a regular government. Third, the proceedings of that government against the "Accessory Transit Company" were not acts of violence or open injustice; on the contrary they were marked by a show of strict legality and accompanied by an exposé of motives making a strong case in favor of that government.

In regard to the steamers, however, it is alleged by the claimant that President Mora, of Costa Rica, agreed to capture them with his own forces and then deliver them to Cornelius Vanderbilt, president of the "Accessory Transit Company." I deem it useless to investigate the effects which this unilateral convention might have had; for its existence is not proved. Vanderbilt says that he dispatched an agent to aid in the capture of said steamers, with the idea of coming to some arrangement afterward, and this agent says that when he requested President Mora to give up the captured steamers, he gave first an evasive answer and afterward declined, though showing an inclination to treat, probably, for their sale when the war should be over. Costa Rica had sufficient motive to capture those steamers even without the invitation of Vanderbilt, and perfect right to do so without his consent. Now, if Vanderbilt cooperated by his agent with Costa Rica, he may at all events be entitled to a compensation, which seems to have already been paid to his agent. It seems beyond probability that President Mora should have agreed to deliver those lawful prizes to Vanderbilt while the war continued to rage and the possession of those steamers was all important to obtain victory.

Another obstacle to the admission of the demand relative to the steamers arises from the fact that it was presented too late. The jurisdiction of this commission has been limited to the claims which were duly presented before July 2d, 1860. In conclusion, my opinion is that the "Accessory Transit Company," by David Colden Murray, receiver, has no standing before this joint commission, and I hereby dismiss the demand in this case.

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

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

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

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

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

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

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

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

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

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. II, Washington, 1898, Government Printing Office, p. 1564.

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

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

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

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

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

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

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

PART V

Différend opposant le Brésil et la Grande-Bretagne dans l'affaire relative au *Forte*

Sentence rendue par le Roi des Belges le 18 juin 1863

Dispute between Brazil and Great Britain in the case of the *Forte*

Award rendered by the King of the Belgians on 18 June 1863

Différend opposant le Brésil et la Grande-Bretagne dans l'affaire relative au *Forte*

Dispute between Brazil and Great Britain in the case of the *Forte*

Sentence rendue par le Roi des Belges le 18 juin 1863*

Award rendered by the King of the Belgians on 18 June 1863**

Relations diplomatiques—arrestation d'officiers britanniques en l'absence d'indice portant sur leur qualité—arrestation non constitutive d'une offense envers la Marine Britannique dans les circonstances de l'affaire.

Diplomatic relations—arrest of British officers in the absence of any indication of their status—in the circumstances of the present case, the arrest does not constitute an offence against the British Navy.

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Nous, Léopold, Roi des Belges, ayant accepté les fonctions d'arbitre qui nous ont été conférées de commun accord par la Grande Bretagne et par le Brésil, dans le différend qui s'est é1evé entre ces États au sujet de l'arrestation, le 17 Juin 1862, par le poste de la police Brésilienne situé à la Tijuca, de 3 officiers de la Marine Britannique, et des incidents qui se sont produits à la suite et à l'occasion de cette arrestation;

Animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les dits États nous ont témoignée;

Ayant à cet effet dûment examiné et mûrement pesé tous les documents qui ont été produits de part et d'autre;

Voulant, pour remplir le mandat que nous avons accepté, porter à la connaissance des hautes parties intéressées le résultat de notre examen, ainsi que

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* Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. V, Washington, 1898, Government Printing Office, p. 4927.

** Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. V, Washington, 1898, Government Printing Office, p. 4927.

notre décision arbitrale sur la question qui nous a été soumise dans les termes suivants, à savoir;

Si dans la manière dont les lois Brésiliennes ont été appliquées aux officiers Anglais il y a eu offense envers la Marine Britannique;

Considérant qu'il n'est nullement démontré que l'origine du conflit soit le fait des Agents Brésiliens, qui ne pouvaient raisonnablement pas avoir de motifs de provocation;

Considérant que les officiers lors de leur arrestation n'étaient pas revêtus des insignes de leur grade, et que dans un port fréquenté par tant d'étrangers ils ne pouvaient prétendre à être crus sur parole lorsqu'ils se déclaraient appartenir à la Marine Britannique, tandis qu'aucun indice apparent de cette qualité ne venait à l'appui de leur déclaration; que, par conséquent, une fois arrêtes ils devaient se soumettre aux lois et règlements existants et ne pouvaient être admis à exiger un traitement différent de celui qui eut été appliqué dans les mêmes conditions à toutes autres personnes;

Considérant que, s'il est impossible de méconnaître que les incidents qui se sont produits ont été désagréables aux officiers Anglais et que le traitement auquel ils ont été exposés a dû leur paraître fort dur, il est constant toutefois que, lorsque par la déclaration du vice consul Anglais la position sociale de ces officiers eut été dûment constatée, des mesures ont aussitôt été prises pour leur assurer des égards particuliers, et qu'ensuite leur mise en liberty pure et simple a été ordonnée;

Considérant que le fonctionnaire qui les a fait relâcher a prescrit leur élargissement aussitôt que cela lui a été possible, et qu'en agissant ainsi il a été mû par le désir d'épargner à ces officiers les conséquences fâcheuses qui aux termes des lois devaient forcément résulter pour eux d'une suite quelconque donnée à l'affaire;

Considérant que, dans son rapport du 6 Juillet 1862, le préfet de police n'avait pas seulement à faire la narration des faits, mais qu'il devait rendre compte à l'autorité supérieure de sa conduite et des motifs qui l'avaient porté à user de ménagements;

Considérant qu'il était, dès lors, légitimement et sans qu'on puisse y voir aucune intention malveillante, autorisé à s'exprimer comme il l'a fait;

Nous sommes d'avis que, dans la manière dont les lois Brésiliennes ont été appliquées aux officiers Anglais, il n'y a eu ni préméditation d'offense, ni offense, envers la marine Britannique.

Fait et donné en double expédition, sous notre sceau royal, au Château de Lachen, le 18me jour du mois de Juin 1863.

Leopold I.

PART VI

Mixed Commission of Peru and the United States of America established under the Convention of 12 January 1863

Commission mixte entre le Pérou et les États-Unis d'Amérique établie par la Convention du 12 janvier 1863

Mixed Commission of Peru and the United States of America established under the Convention of 12 January 1863

Commission mixte entre le Pérou et les États-Unis d'Amérique établie par la Convention du 12 janvier 1863

Case of Sartori *v.* Peru, award of the Umpire, General Herrau, dated 24 November 1863[*]

Affaire relative à Sartori c. Pérou, sentence du Surarbitre, General Herrau, datée du 24 novembre 1863[**]

Laws of war—obligation of neutrality of foreigners during civil war—right of governmental army to arrest a foreigner suspected of assisting rebels and to bring him to justice.

Breach of treaty obligations—delay of judicial process and denial of justice.

Responsibility of government—any non-compliance with treaty obligations shall entail responsibility—responsibility principle ensures confidence in the good faith of the parties.

Reparation—equitable and reasonable reparation ought to be made in cases where responsibility is incurred, however small it may be—no reparation for loss resulting from claimant's voluntary actions.

Lois de la guerre—obligation de neutralité des étrangers lors d'une guerre civile—droit de l'armée gouvernementale d'arrêter un étranger suspecté d'assistance aux rebelles ainsi que de le traduire en justice.

Violations des obligations d'un traité—retard dans la procédure judiciaire et déni de justice.

Responsabilité du gouvernement—toute inobservation des obligations du traité engage la responsabilité—le principe de responsabilité garantit la confiance en la bonne foi des parties.

Réparation—une réparation équitable et raisonnable devrait être accordée, aussi minime soit-elle, dans les cas où la responsabilité est engagée—aucune réparation pour la perte résultant d'actions volontaires du demandeur lui-même.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3122.

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Whereas, the mixed commission of Peru and the United States has not been able to decide the claim of Edmund W. Sartori, a citizen of the United States, against the Peruvian Government for injuries and damages which he alleges to have suffered by his imprisonment, and the said commission not having been able to decide the said claim, it has been submitted to me in the following terms: "Were the stipulations of the treaty between the United States and Peru of 1851 respected in reference to the proceedings of the authorities, in the case of Edmund W. Sartori? If not, in what amount is the Government of Peru responsible for indemnification of injuries and damages sustained by Edmund W. Sartori?"

The town of Arequipa being besieged by the Peruvian Government in consequence of its being occupied by the principal portion of the forces then at war with the government; Sartori passed from the town to the besieging army and demanded a passport to continue his journey to Chile, *via* the port of Islai, a town in the hands of the party at war with the government. He was asked whether he was the bearer of dispatches from the enemy, and having answered in the affirmative, he immediately gave up the papers in his possession, together with $100,000 in bonds, payable to the bearer, issued by the revolutionary government. Sartori was placed in confinement and brought to trial, but four months later, without judgment having been passed on his case, he was set at liberty.

The honor and interests of the two republics represented in the joint commission require them to give proofs of the good faith with which each of the two countries fulfills the stipulations of the public treaty that binds them and requires that neither government shall allow the citizens so to abuse the protection and guarantees conceded to them by the treaty as to consider them a species of immunity under which they may infringe the laws.

Such are the rules I must observe in deciding the claim, which embraces three cardinal questions.

1st. Whether the general in chief of the besieging army had a right to arrest Sartori.

2nd. In the subsequent proceedings were the stipulations of the treaty between the United States and Peru observed; and,

3rd. Whether the Peruvian Government is responsible for the injuries and damages for which the claimant demands indemnity.

First. From the fact that Sartori had gone out of a city in a state of siege where the chief of the revolutionary government and the greater part of his army were stationed, carrying written communications and $100,000 in paper money, the property of the enemy of the Government of Peru, toward a port occupied by their troops, the general in chief of the besieged army had the right to prevent Sartori from continuing his journey and to bring him to judg-

ment. In so doing he acted according to the laws of war, and did not violate the guarantees which the citizens of the United States enjoy in Peru, according to the stipulations of the treaty celebrated between the two countries; and it seems to me this opinion is implicitly expressed in the note which Mr. Clay, minister of the United States, addressed, under date of September 13, 1857, to the Government of Peru, where he said "the letters may have been merely recommendatory and the *vales* Mr. Sartori's own property. If so, the destruction of the *vales* and an imprisonment of thirty-five days would seem to me sufficient punishment." (See original document.)

Second. Sartori's declaration ought to have been taken within twenty-four hours from the time of his arrest; and although it appears that when he presented himself in the camp of the besieging army he was verbally examined, the spirit of the treaty requires, as I understand it, that a formal declaration be taken. He ought to have been tried before some judge or tribunal to arrive at some decision, after his defense should have been heard, as to whether the charges brought against him were sustained; but, inasmuch as he was not tried, the charges remained without the sanction of the judiciary, whose province it was to decide if Sartori had violated the neutrality which as a foreigner he ought to have maintained in the country. If this sentence had been in the nature of an aquittal the Government of Peru would not be responsible for his imprisonment and detention, inasmuch as it had the right to bring him to judgment in the same manner as a Peruvian citizen under similar circumstances; and the accused would have had the means of justifying himself, and, had he been condemned, the charges which might have been proved would have become facts, acknowledged as incontrovertible.

I am of opinion, therefore, that the Government of Peru is responsible for the delay of forty-eight hours in taking the formal declaration of Sartori, and for not having brought him to judgment.

There is no circumstance leading to the belief that this omission was intentional on the part of the Peruvian Government. Far from this, proofs exist that they were not influenced by bad will or the spirit of persecution, and that it was their desire to give no cause of complaint to the United States; but on the principle that reparation ought to be made in cases where responsibility is incurred, however small it may be, for noncompliance with the treaty, in order that each government may place entire confidence in the good faith of the other, it seems to me that an equitable and reasonable indemnity ought to be granted to Mr. Sartori.

Third. The sum which Sartori claims by way of damages amounts to $114,252, and I shall proceed to state the reasons which lead me to believe that the Government of Peru should not pay this sum.

The depositions which have been presented to prove the losses incurred are not based on sufficient evidence, and the causes to which said losses are attributed are in the nature of improbable conjectures. The Government of Peru is not responsible for the rumor which was spread in Valparaiso to the

effect that Sartori had been shot, for his life was not threatened; nor was it likely that, in a country where cases of arbitrary executions during civil wars have been of very rare occurrence, such an outrage should have been committed with a foreigner who had not taken up arms in the strife. One of the items in the claim is $22,000 alleged to have been lost by Sartori for the dissolution of his copartnerslip with Robert and John Walker. This claim is against the partners of Sartori, who took advantage of the unfortunate condition in which be was placed to deprive him of his property. The declaration which one of them and other persons have rendered to maintain this charge against Peru would be sufficient ground to condemn said partner to the payment thereof before a righteous tribunal. Another item is for $33,000, for "losses arising from the absconding of Alijandro Jose Perez, Sartori's agent." Peru is not responsible for the fact that Mr. Sartori should have absented himself from Valparaiso, leaving his affairs in the hands of an agent in whose good faith he could place no reliance. Another item is $6,000, for "losses of his right to the mines of Santa Rosa de Belezario and of Gallozo, in consequence of not having found himself in Valparaiso in December 1857." Mr. Sartori absented himself from said port of his own will; he went to Arequipa during the time that the city was occupied by revolutionary troops; he remained there while the dangers of the siege approached, and his detention in Sachaca was in consequence of his voluntary act, viz**,** the receiving of dispatches and *vales* which were delivered to him in Arequipa and of which he became the bearer. For this reason he incurred of his own accord the danger of losing the mines and of suffering the other losses, which without proper proof are attributed to his absence from Valparaiso. Two other items, together amounting to $38,552, for exchange and interest on the sums above stated, are not valid, inasmuch as the items to which they refer are disallowed. The last item of the claim of Mr. Sartori is $15,000, for compensation of personal suffering in Sachaca. In my opinion what may be conceded is a compensation for the delay of forty-eight hours in taking his declaration, and for not having passed judgment in his case.

Therefore I decide that the Government of Peru pay to Mr. Edmund W. Sartori the sum of $5,000 in current money of the country, with interest at the rate of six per cent per annum from the 29th day of September 1857.

PART VII

Commission established under the Convention concluded between the United States of America and Ecuador on 25 January 1862

Commission établie par la Convention conclue entre les États-Unis d'Amérique et l'Equateur le 25 janvier 1862

Commission established under the Convention concluded between the United States of America and Ecuador on 25 January 1862

Commission établie par la Convention conclue entre les États-Unis d'Amérique et l'Equateur le 25 janvier 1862

Cases of the *Good Return* and the *Medea,* opinion of the Commissioner, Mr. Hassaurek, of 8 August 1865[1]

Les affaires *Good Return* et *Medea*, opinion du Commissaire, M. Hassaurek, du 8 août 1865[2]

Non-recognition of the obligation of a commission to follow a decision of another commission in an identical case.

Obligations of the commissioners—they should be bound by their own conscience and the oath they have taken—they should not consider themselves as the attorneys for either country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice—they should not be bound by the actions their Governments may have taken on former occasions in each individual case.

Obligation of the party who asks for redress to present itself with clean hands—its cause of action must not be based on an offence against the Government to whom it appeals for redress—contrary to public morality and legislative policy for a State to uphold or endeavour to enforce a claim founded on a violation of its own laws and treaties.

Recognition of neutrality laws as reiterations of a principle of natural law.

Consequences of the neutrality of a nation for its citizens—limits of national protection and rejection of claims for lack of jurisdiction by an international commission if citizens of neutral nations violated the observance of neutrality.

Recognition of a citizen of a neutral State, acting as a privateer for the belligerent nation conducting a war against the State with whom the neutral State is at peace, as a pirate liable to be prosecuted and punished.

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[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2731.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2731.

Determination of the captain's nationality, as far as the captain's claim regarding the captures as a privateer is concerned, by the captain's commission and by the flag of the belligerent under which the captain fought.

Recognition of a rule stipulating that the title to a prize originally vests in the Government represented by the captor during war, whose rights are subsequently ascertained by judicial decisions

Non-reconnaissance d'une obligation pour la commission de se conformer à la décision d'une autre commission dans une affaire identique.

Obligations des commissaires—ils doivent être liés par leur propre conscience et le serment qu'ils ont prêté—ils ne doivent pas se considérer comme les avocats d'un quelconque pays, mais comme des juges nommés afin de décider des questions qui leur ont été soumises, de façon impartiale, en application du droit et de la justice—pour chaque cas particulier, ils ne doivent pas être liés par les actions entreprises par leurs gouvernements à d'autres occasions.

Obligation de la partie qui demande réparation de se présenter avec les mains propres—la cause de sa demande ne doit pas être fondée sur une offense à l'encontre du gouvernement auquel elle fait appel pour obtenir réparation, le soutien ou la tentative de réalisation par un État d'un droit à réparation fondé sur une violation de ses propres lois et traités est contraire à la moralité publique et à la politique législative.

Reconnaissance du droit de la neutralité comme réitération d'un principe de droit naturel.

Conséquences de la neutralité d'une nation pour ses citoyens—limites de la protection nationale et rejet de réclamations pour défaut de compétence par une commission internationale lorsque les citoyens de nations neutres n'ont pas respecté la neutralité.

Citoyen d'un État neutre, agissant en tant que corsaire pour une nation belligérante en guerre contre un État avec lequel l'État neutre est en paix, considéré comme pirate passible d'être poursuivi et puni.

Détermination de la nationalité du capitaine par sa commission ainsi que le pavillon du belligérant sous lequel le capitaine combattait, dans la mesure où il s'agit de la réclamation du capitaine concernant sa capture en tant que corsaire.

Reconnaissance d'une règle prévoyant que le droit de prise revient initialement au gouvernement représenté par le ravisseur en temps de guerre, dont les droits sont établis par des décisions judiciaires ultérieures.

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On the 17th of November 1817, John Clark, a native citizen of the United States of America, entered into the service of the Banda Oriental Republic, now Uruguay, which was then engaged in her war of independence against Spain and Portugal, to each of which two powers a portion of her territory belonged.

John Clark obtained a commission as captain in the Banda Oriental Navy, and a patent authorizing him, as the commander of a private armed vessel, *La Fortuna,* to cruise against the vessels and property of the subjects of Spain and Portugal. These letters of marque were issued by General José Artigas, who was then the chief executive of that country, and they were to continue in force for and during the term of eighteen months from the departure of *La Fortuna* from Buenos Ayres.

The United States, it is hardly necessary for me to add here, was neutral in the war between Spain and Portugal and their colonies in America.

Clark left Buenos Ayres with his vessel on the 5th of March 1818, and after cruising for several months, proceeded to Baltimore "for the purpose", as it appears from the statement of one of the claimants, and the testimony in the case, "of procuring provisions and men". Having succeeded in this he left Baltimore on the l5th of September 1818, and in November of the same year captured the Spanish brig *Medea,* with a valuable Spanish cargo, and placed a prize master and crew on board of her, with instructions to take her to the neutral port of St. Bartholomew, to be held there subject to his orders. On the l9th of November the *Medea,* while on her way to St. Bartholomew, was seized by the Venezuelan man-of-war *Espartana,* under the orders of Commodore Joly of the Venezuelan navy, who sent her to the Island of Marguerita, where she was condemned on the 26th of November 1818 as a prize of the *Espartana,* on the ground that her capture by Clark was illegal.

Subsequently (on the 15th November I8I8) *La Fortuna,* captured the Portuguese ship *La Reina de los Mares,* bound from Bahia, Brazil, to Lisbon, with a valuable cargo on board, which, for greater safety, as it is alleged, was transferred by Clark to the *Good Return,* said to be an American ship chartered expressly for the occasion. Whether the latter vessel had accompanied Clark on his cruise, or how it was that she suddenly made her appearance, where she came from, whither she was bound, and who her owners were, does not appear from the papers presented to this commission. The *Good Return* was also taken possession of by Commodore Joly, of the Venezuelan navy, who demanded the value of one-third of the goods on board as ransom, and compelled the captain of the *Good Return* to place her cargo in the hands of the Venezuelan agent at St. Bartholomew, to be sold at auction there, under the most unfavorable circumstances. A cargo of $80,000, it is alleged, was thus sacrificed to make up the sum of $26,000 demanded by Joly, and the proceeds of the sale, being about $24,000, were retained and distributed by the commodore.

The grounds on which these acts of lawlessness were justified by the Venezuelan authorities were: 1st, that General Artigas had no right to grant letters of marque, being a usurper and a rebel against the legitimate authorities of Buenos Ayres; and 2d, that the privateer *La Fortuna* left Buenos Ayres in March 1818, after having arrived at that port in January of the same year as a Buenos Ayres vessel, under the name of *Patriota,* commanded by Captain Taylor, whereas the patent to Captain Clark had been issued on the 15th of

November 1817; that consequently she was navigated under another name and another flag, and commanded by another captain, two months after the issuing of the patent to Captain Clark.

In December 1819 the Republic of Venezuela was united to the former colony of New Granada under the name of the Republic of Colombia. Captain Clark presented his claim to the Colombian Government, and asked for indemnification, but in vain. In 1830 the Republic of Colombia ceased to exist by being constituted into three independent governments—New Granada, Venezuela, and Ecuador—and it is said that payment to the heirs of Clark has been made, through the agency of the United States, by Venezuela, of her proportion of the claim.

By a convention entered into by the three republics on the 23d of December 1834, it was agreed that the debts which they had acknowledged or contracted, while they were united and constituted into one, should be paid by them in the following proportion: 50 per centum by New Granada, 28 1/2 by Venezuela, and 21 1/2 by Ecuador.

Clark died several years ago, and the interest in his claims passed by will to his heirs and devisees, who, with a certain assignee, all of whom are residents and citizens of the United States of America, are the present claimants.

The claim was presented by them to the United States and New Granada mixed commission for the adjustment of claims established by the convention of 1857, and, the commissioners having been unable to agree, an award was made by the umpire, Judge N. G. Upham, of Connecticut (*sic),* in favor of the claimants, for New Granada's proportion of the claim. The case is now presented to this commission in order to fix the responsibility of Ecuador for her share of the original amount and interest thereon up to date.

The decision of a mixed commission like our own, in an identical case, is certainly entitled to great respect, but it can not be considered as an authority which we are necessarily bound to follow; and if, upon a careful examination of the law and the facts, it should appear to us that the decision was erroneous, we are bound by our own conscience and the oath we have taken as members of this commission, to follow our own convictions of right and justice, however sorry we may be to dissent from the opinion of gentlemen for whose ability, conscientiousness, and integrity we entertain the highest regard. The establishment of mixed commissions for the settlement of international claims is evidently an important step, suggested by the humane spirit of the age, in the direction of universal peace and civilization. But to realize the true benefits which the high contracting parties are entitled to expect from such commissions, the commissioners should consider themselves not the attorneys for either the one or the other country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favorably or unfavorably.

Considering myself bound, in the present case, to dissent from the opinion of the umpire and the American member of the United States and New Granada mixed commission on claims, justice to the claimants and to my own country requires that I should state my reasons in full, so as to leave them open to the scrutiny of those to whom I am responsible for my official conduct.

Before entering upon a discussion of the merits of the case, a preliminary but highly important question presents itself. It is whether this is a claim which can properly be preferred and enforced against Ecuador by the Government of the United States.

I grant that the conduct of the Venezuelan squadron and the decisions of the Venezuelan prize court were unjustifiable upon any principle of international law, and that a great outrage was committed on the sovereign rights and interest of Uruguay; but what is that to the United States? Whatever losses and damages Captain Clark sustained in the premises he sustained not in his character as a citizen of the United States, but as an officer in the service of the Banda Oriental Republic, cruising under her flag, for her benefit, and against her enemies. If, therefore, the spoliations committed by the Venezuelan navy, and sanctioned by the Venezuelan courts, entitle him to indemnification, this indemnification must be claimed by the Banda Oriental Republic, now the Republic of Uruguay, and not by the United States. In the war with Uruguay, and Spain and Portugal the United States were neutral; not so Captain Clark. Although a native citizen of the United States, he had identified himself with one of the belligerents, in violation, as I shall presently show, of the laws and treaties of his own native country. He was cruising under the Uruguay flag, against the commerce of two nations with which the country of his birth was at peace. He must therefore abide by the consequences. If, in the course of his career as an Uruguay privateer, any wrong was done to or any outrage committed upon him, it is to Uruguay he must look for protection and not to the United States.

It is not my intention to enter into an examination of the questions discussed by counsel, whether, by his entering into the service of one of the belligerents, while our country was at peace with both of them, he forfeited his national character as an American citizen; and whether, upon his final return to the United States, his native character reverted, and by thus reverting entitled him to have his claim enforced by his native government. I believe that these questions are immaterial to the decision of this case. Whether Captain Clark was by birth an American, Englishman, Frenchman, or Spaniard, as long as he commanded an Uruguay cruiser, under the Uruguay flag in the service of the Republic of Uruguay, and in the exercise of active hostilities against the enemies of Uruguay and the friends of the United States, he was to all practical intents and purposes an Uruguayan; but especially as to all questions of prize law and maritime warfare. If the Uruguayan Government was either unable or unwilling to protect him in the realization of his prizes, it was his misfortune, with which the United States have no concern. Captain Clark had not yet acquired an individual title to the vessels and cargoes captured by him. The title to a prize origi-

nally vests in the government represented by the captor. The rights of the captor are subsequently ascertained and fixed by judicial decisions. It is true, as alleged by claimant's counsel, that at the time his prizes were taken away from him he had at least a right of possession to them; but, again, I must say that that right he had, not in his character as an American citizen, but by virtue of his commission from one of the belligerents. The captain of an Uruguay cruiser represents Uruguay, wherever he may have been born. To Uruguay he is responsible, and Uruguay is responsible for him. If his prizes are taken away from him by third parties, he must complain to those from whom he derived his authority, and not to neutrals, who have nothing to do with the business one way or the other. Had he been in command of an American vessel and had that vessel been taken away from him by the Colombian navy, and justice been denied to him by the Colombian authorities, it would have been the right and duty of our government to protect him, and to see that he was fully indemnified. But why should the United States, while at peace with all the world, interfere in a controversy between Uruguay and Venezuela, with reference to certain Spanish and Portuguese vessels captured by privateers of the former, when neither the vessels nor the cargoes, nor any part thereof, were American? The United States will protect American interests; but why should they protect Uruguay interests, and take up a quarrel which Uruguay herself seems to have ignored, merely because one of the parties concerned in it, the commander of a foreign privateer, happened to be born in the United States? Captain Clark's nationality, *as far as his claim is concerned,* is determined by his commission and by the flag under which he fought. Any departure from this rule would soon involve us in troublesome questions with the whole world, if, in time of war, the Government of the United States should undertake to insure the captures of every American citizen, who, in violation of our neutrality laws and treaties, may see fit to enter the naval service of a foreign power, or to assume the command of a foreign privateer under a foreign flag.

The conclusion therefore seems to me irresistible, that, although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures; and that any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent.

But I am referred to a document executed by the Uruguay Government, relinquishing all its rights in the premises and authorizing the individual parties interested in the question to proceed "as they may find convenient." The original of this document is not before us. I must therefore rely on a translation given in the opinion of the umpire of the United States and New Granada mixed commission on claims. Said translation reads as follows:

Department of Foreign Relations,

Montevideo, 10th December 1846.

The undersigned, Minister of Foreign Relations, has received the communication dated November 25 last, which Mr. Hamilton, consul of the United States of America, thought fit to address him; asking in the name of his Government that this Republic should declare that it will make no claim in future against the Governments of Venezuela, New Granada, and Ecuador, for the recapture of the vessels which had been taken by the cruisers *Irresistible, La Fortuna,* and *Constancia.*

The undersigned is directed to say in reply that, to satisfy the wishes of the United States, the Republic has no difficulty in declaring that the Oriental Republic of Uruguay has no claim to make on the part of her treasury, in her character as a nation, on account of the aforesaid vessels; but with respect to the rights of individuals, she leaves them to such action as they can sustain at the time of the declaration solicited, and consequently those interested may exercise those rights as they find convenient.

Francisco Magarinos

To Mr. Hamilton
Consul of the United States of North America

The authority of the consul of the United States to negotiate for such a declaration does not appear. There is nothing before us to show that he was ever instructed by the State Department to request the Uruguayan Government for such a disclaimer. From the mere fact of his having been a consul, no diplomatic authority can be inferred in his favor. To clothe him with the character of a negotiator special authority would be required, which, if ever conferred, it would be an easy task to prove by transcripts from the records and correspondence of the State Department. But there is no such evidence before us. We are left in darkness as to what authority, if any, had been conferred on the consul, and to what communication the above declaration is an answer.

Why should the United States have requested Uruguay to cede her legal rights in the premises, and why should Uruguay have complied with this request, without having received the slightest consideration for such a compliance?

Umpire Upham states in his decision that the above declaration was made by Uruguay "*at the request of the representatives of the claimant,* they prosecuting the claim as citizens of the United States." In the absence of all other evidence I am inclined to believe that this is a correct supposition, and that the above declaration was the result of a private arrangement effected between the claimant and the government of Uruguay, through the good offices of the United States consul at Montevideo, an arrangement with which the United States Government had nothing to do.

It is equally clear that such a document does not better the case of the claimants. It casts away the only legal remedy they had without giving them another. It is not a cession of Uruguay's rights to the United States, nor

does it confer any authority on the United States to prosecute the claim for the benefit of Uruguay or for the benefit of the individual claimants. And, even if it were a cession or an assignment, it is very questionable whether such a cession or assignment would or could have been accepted by the Government of the United States.

And this leads us to the consideration of the question whether it would be right and proper on the part of the United States to father such foreign claims. Article 14 of the treaty of 1795 between the United States and Spain (confirmed with the exception of a few articles by the treaty of 1819) provides as follows:

> Art. 14. No subject of His Catholic Majesty shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United States, or against the citizens, people, or inhabitants of said United States, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war.
>
> Nor shall any citizen, subject, or inhabitant of the said United States apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of His Catholic Majesty or the property of any of them, from any Prince or State with which the said King shall be at war. And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.

But not only in what he did, but also in the manner of doing it, John Clark violated the laws of his country whose interference and assistance he now invokes to realize the profits of his piracy. By augmenting the force of his armed vessels at the port of Baltimore he plainly and directly offended against the act of Congress passed in 1794, and revised and reenacted in 1819, by which it is declared to be a misdemeanor for any person within the jurisdiction of the United States *to augment the force of any armed vessel* belonging to one foreign power at war with another power, with whom the United States are at peace; or to prepare any military expedition against the territory of any foreign nations with whom they are at peace; or to hire or enlist troops or seaman for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them, &c, &c.

The principle which underlies such enactments and treaty stipulations was forcibly stated by Mr. Thomas Jefferson, in his letter of 17 June 1793 to Mr. Genet: "By our treaties," he says, "with several of the belligerent powers, which are a part of the laws of our land, we [the United States] have established a state of peace with them. But without appealing to treaties, we are at peace with them all by the law of nature; for, by nature's law, man is at peace with man, till some aggression is committed, which, by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the

Executive . . . as much against the laws of the land as to murder or rob, or combine to murder or rob, its own citizens." (See Lawrence's Wheaton, p. 728.)

What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit.* He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality. He has committed depredations against two nations with which we were at peace. He has made himself liable to be prosecuted and punished as a pirate; and now he presents himself before our government with the request to collect for him the proceeds of his misdemeanors. Will our government, by doing so, offer a reward to evil doers for the violation of its own laws and treaties? What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? I agree with the attorneys for the claimants that it would perhaps not become Colombia to make this defense, after having committed an outrage against the rights of Captain Clark. But I do not look upon Colombia as interposing these objections. I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. As an Uruguayan claim, this case would be entitled to the most favorable consideration of the then Colombian republics. But it is not and can not be an American claim. As the American commissioner, I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. *Quod directo fieri prohibetur etiam dicitur prohibitum per indirectum.* He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose. But that is his own risk; he can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended. For this reason it is the customary practice of nations nowadays, upon the breaking out of a war between two foreign countries, to warn their subjects not to take part in it, on either side, as by doing so they would forfeit their right to the protection of their home government. Such neutrality laws and proclamations are but reiterations of a plain principle of natural law.

It is alleged, however, that the Government of the United States has made this claim its own by presenting it on former occasions to the three Colombian republics and urging its recognition. Granting this to be so, I do

not believe that the members of this commission are bound by what action their governments may have taken on former occasions in each individual case. If it were so, there would have been no need of establishing a mixed commission, instead of which the two governments should have referred these claims at once to the arbitration of a third party. Governments, like individuals, are not infallible, and if the Government of the United States ever encouraged or adopted this claim, I have no doubt it would reconsider the view it then took of the question, if the case should again be submitted to its examination. The present policy of the United States toward their Spanish-American neighbors is one of the most scrupulous good faith and justice. While ever ready and vigilant to protect the rights and interests of American citizens wheresoever or against whomsoever it may be, the United States will not oppress their sister republics with extravagant demands or unjust exactions. The spirit which, in times now passed, occasionally led to misunderstandings between the republic of the North and those of the Latin race has since died away and its revival has been rendered impossible by the removal of its cause through the great events of the last four years.

These observations I have deemed it necessary to add, as great stress has been laid by the attorneys for the claimants on the action of former administrations with reference to this and similar cases. With this, I believe, I have sufficiently explained the reasons why in my opinion, our decision should be against the claimants.

Case of the Atlantic and Hope Insurance Companies *v.* Ecuador (case of the schooner *Mechanic*), opinion of the Commissioner, Mr. Hassaurek[1]

Affaire concernant Atlantic and Hope Insurance Companies c. Ecuador (affaire de la goélette *Mechanic*), opinion du Commissaire, M. Hassaurek[2]

Denial of justice regarding the seizure of goods during war—obligation to respect the principle of "free ships, free goods" established by a treaty—obligation to respect enemy's property covered by the flag of the party to the treaty as neutral property, excepting contraband of war.

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[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3221.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3221.

Recognition of a fundamental principle of international law stipulating that a State would never lose its rights, nor would it be discharged from its obligations, by a change in the form of its civil government—by analogy, on the creation of a new State by a division of its territory, the treaties by which it was bound as a part of the whole State would remain binding on it and its subjects until the new State enters into new treaties.

Déni de justice concernant la saisie de marchandises en temps de guerre—obligation de respecter le principe "navires libres, marchandises libres" établi par un traité—obligation de respecter la propriété de l'ennemi en tant que propriété neutre si celle-ci est couverte par le pavillon de la partie au traité, à l'exception de la contrebande de guerre.

Reconnaissance d'un principe fondamental du droit international selon lequel un État ne perd jamais ses droits, ni n'est déchargé de ses obligations, en raison de la modification de la forme de son gouvernement civil—par analogie, lors de la création d'un nouvel État issu de la division de son territoire, l'État ainsi que ses sujets restent liés par les traités qu'il a conclus lorsqu'il faisait partie de l'État dans son intégralité, jusqu'à ce que le nouvel État conclue de nouveaux traités.

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This case has been before the mixed commission for the settlement of claims between the United States of America and the Republic of New Granada, and an award was made, both commissioners concurring, in favor of the claimants.

The claimants now apply to this commission for an award of 21 1/2 per cent of the original amount as the proportion of the old Colombian debt, for which Ecuador made herself liable on the disintegration of the Republic of Colombia.

The following are the facts of the case:

In April 1824 the American schooner *Mechanic,* Humphrey Taber, master, sailed from Havana with a general cargo bound for Tampico, Mexico (via Key West). After having made the latter port, and being on her way to her ultimate destination, she was on the 6th of May boarded by the Colombian privateer *General Santander,* Captain Chase, and detained for carrying enemy's goods. It must be borne in mind that the Republic of Colombia was then at war with Spain, a war in which the United States were neutral. Captain Chase took out of the *Mechanic* the supercargo, two passengers, one of whom was Mr. Joaquin Hernandez Soto, and four of the crew, and sent the schooner to Laguayra in charge of a prize crew for adjudication. Proceedings were instituted against the cargo of the *Mechanic,* and, with the exception of a few packages belonging to the supercargo, who was an American citizen, the entire cargo was condemned as enemy's (Spanish) property by the court sitting at Puerto Cabello, on the

9th of June 1824. The schooner was restored to the captain, to whom freight was allowed on the cargo.

It also appears that a large portion of the goods on board the *Mechanic* belonged to Joaquin Hernandez Soto, who claimed to be a citizen of the United Provinces of Mexico, with which the Republic of Colombia was then at peace. Soto was a native of Spain, but had lived in Mexico since 1819, at San Luis de Potosi, where his family resided, and where he was established in business as a merchant. Under these circumstances it is claimed that his property was neutral property, and, having been found on board of a neutral vessel, should not have been condemned.

The cargo shipped by Soto at Havana was insured against all risks for the sum of $19,000, as follows: $12,000 in the Atlantic Insurance Company and $7,000 in the Hope Insurance Company of New York; and in consequence of its condemnation by the Colombian prize courts, the said insurance companies had to pay to Soto, through his agents, Goodhue & Co., in New York, the following sums: The Atlantic Insurance Company, $12,000, and the Hope Insurance Company, inclusive of interest from 3d January 1825 to the 2d of June 1825, $7,175.

The former payment was made on the 3d January 1825, the latter on the 2d June 1825.

In the same year a claim was presented on behalf of said insurance companies by the American minister at Bogotá to the Colombian Government, and lengthy discussions followed which had led to no result when they were terminated by the dissolution of the Republic of Colombia. The point of discussion between the Colombian Government and the Hon. R. C. Anderson, the American minister, was the insufficiency of the evidence and the erroneous grounds on which the court of admiralty at Puerto Cabello had declared the property of Soto to be Spanish property. Soto, it was claimed by the American representative, even if he had not renounced his Spanish allegiance, which he swears he did, by becoming a Mexican citizen, was by the law of nations a Mexican merchant, and his property, if captured by the armed vessels of Spain, would have been liable to confiscation as Mexican property.

The same view is presented to this commission by Mr. Amos B. Corwine, the attorney for the claimants. But it does not seem necessary to us to enter upon a discussion of a mere question of fact, which after all is not the question on which this case should be decided. Even if Soto had been a Spaniard, and his property Spanish, and consequently enemy's property, it should not have been condemned. Having been found on board of an American vessel, it was protected by the neutral flag by the express terms of a treaty, which, in our opinion, Colombia was bound to respect.

The principle of "free ships free goods" had been established by the treaty of 1795 between Spain and the United States. Article XV of said treaty contains the following provision:

> It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several; and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either, contraband goods being always excepted. It is also agreed that the same liberty be extended to persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers in actual service of the enemies.

When this treaty was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.

That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.

The authorities in support of this proposition are numerous, but I will only cite the following:

> And so (says Chancellor Kent) if a state should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled by all the parts in common. (Kent's Commentaries, vol. 1, p. 25).

Bello says:

> Even if a state should be divided into two or more, neither its rights nor its obligations are thereby impaired, but must be enjoyed or fulfilled in com-

> mon or apportioned among the new states by mutual agreement. Bynkershoek censures the conduct of England for denying to Holland the rights of fishery established by treaty between Henry III of England and Philip, Archduke of Austria, on the ground that said treaty had been concluded with an Archduke and not with the states general. He also censures the bad faith of Denmark in refusing to keep with those states the compact of Espira, concluded with the Emperor Charles V, in favor of the Belgians. (Principios de Derecho Internacional, 2 edition, p. 20.)
>
> Phillimore says:
>
> If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts. (Commentaries on International Law, Vol. 1, Part II. chap. 7, secs. 137, 158.)
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> Contra evenit, (says Grotius) ut quae una civitas fuerat dividatur, aut consenso mutuo, aut vi bellica, sicut corpus im-perii Persici divisum est in Alexandri successores; quod cum fit, plura pro uno existunt summa imperia, cum suo jure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum. (Grotius, II. c. IX. s. 10, p. 327.)

The United States availed themselves of the very first opportunity to notify the Republic of Colombia that they must consider her bound by the obligations imposed on her by the treaty of 1795, said treaty having been concluded prior to her separation from the mother country. On the 27th of May 1823 Mr. Adams, then Secretary of State, in his instructions to Mr. Anderson, the first American minister appointed to Colombia, said:

> It is asserted that by her declaration of independence Colombia has been entirely released from all her obligations by which, as part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and justice.

He refers by way of illustration to the treaties of 1795 and 1819, between the United States and Spain. To the stipulations of the former, Colombia is bound as by an express compact made when she was a Spanish colony. As to the latter, this treaty having been made after the territories now composing the Republic of Colombia had ceased to acknowledge the authority of Spain, they are not parties to it, but their rights and duties in relation to the subject-matter remain as they had existed before it was made. (British and Foreign State Papers, 1825, C., p., 480.)

The same principle has been continually invoked by the republics of Ecuador, New Granada, and Venezuela, which formerly constituted the Republic of Colombia. Until, for the treaties between Colombia and foreign nations, they had substituted treaties of their own, they claimed to be entitled to all the

rights granted and bound to the fulfillment of all the obligations imposed by the treaties of Colombia.

In 1861 complications arose between Ecuador and Peru, threatening to lead to a serious rupture between the two countries. One of the principal points in controversy was an old boundary question affecting the title to the so-called Oriental or Napo province on the eastern side of the Ecuadorian Andes, a question which had already on former occasions produced a great deal of ill feeling between the two sister states. The Peruvian Government found fault with a new Ecuadorian election law, dividing the country into districts, one or more of which comprised the territory claimed by Peru; and on account of this and other unpleasant questions then pending, war was considered imminent. The Ecuadorian Government in arguing the boundary question chiefly relied on a treaty concluded on the 22d September 1829, between the old Republic of Colombia and Peru, which provided for the appointment of a joint commission to fix the boundary line, and for a reference of the dispute, in case the commissioners should be unable to agree, to the arbitration of a friendly power. Ecuador, as a former part of Colombia, took it for granted that said treaty still continued to be in force, notwithstanding the dissolution of one of the contracting parties; and Dr. Carvajal, then minister of exterior relations, must have considered such an assumption to rest on self-evident principles of public law, for he did not even consider it necessary to support it by argument. On the 6th of October 1861 he wrote to J. F. Melgar, then Peruvian minister of foreign relations, as follows:

> Such a law would not prejudice the rights of Peru and could not prejudice or decide the territorial question at issue between the two countries, because a law is obligatory only in the country where it is made, as your excellency has well said, and moreover because there is a superior law existing which equally binds both countries. I mean the treaty of 22nd of September 1829, a treaty which settles this question by prescribing the manner and form in which the boundaries of the two republics should be determined.
>
> In conformity with that treaty, therefore, the undersigned does not hesitate to repeat what he has said in one of his other notes to your excellency, transmitted with this, that his government is ready to appoint the commission, which jointly with that to be appointed by the government of your excellency is to ascertain the boundary lines between the two countries, and that he proposes to leave to the arbitration of Chile any question or questions on which the said commissioners should be unable to agree.

And in another paragraph of the same note Dr. Carvajal says:

> The said treaty of 1829 being in full force, whereas on the other hand its provisions for ascertaining the boundary lines have not yet been complied with, the undersigned can not discover the reason why your excellency should have claimed as Peruvian territory the territories of Jaen, Napo, Canelos, and Quijos, which have already been and are now in possession of Ecuador.

That the Ecuadorian Government considered said old Colombian treaty still valid and binding, although made by Colombia and not, strictly speaking, by Ecuador, is evidenced by the additional fact that in a publication of the treaties in force between the Republic of Ecuador and foreign powers, which publication was made in 1862, by order of the Ecuadorian Government, the above treaty is not only reproduced, but even occupies the first place.

Ecuador, therefore, having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honor and good faith deny the principle when it imposed an obligation.

It seems to be clear, therefore, that Colombia was bound by the treaty of 1795 to respect enemy's property covered by the American flag as neutral property only excepting contraband of war. The treaty concluded on the 3d October 1824 between the United States and the Republic of Colombia reiterated the same principle, and although that treaty was made subsequent to the transaction now under examination, it gives an additional sanction to a principle established and recognized long before.

Hence, after a careful examination of the question, we are constrained to hold that the condemnation of Soto's goods was a wrongful act for which Colombia is responsible.

The condemnation of the rest of the cargo of the *Mechanic* as enemy's property was equally wrongful, but as no claim is preferred by the other parties in interest, that part of the case need not be considered.

We have come to the conclusion, therefore, that an award should be entered in favor of the claimants for 21 1/2 per cent of the original sum of $19,000, being $4,085, on which sum interest must be calculated for 40 years and 7 months at the established rate of 5 per cent, making $8,289.15, which, added to the principal, will give a new principal of $12,374.15.

Having already adopted 25 per cent premium as the normal rate of exchange between this country and the United States, we will make an addition of $3,093.54, and enter an award for $l5,467.69 of Ecuadorian currency.

PART VIII

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

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

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

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

Recognition of the principle of exhaustion of local remedies as a pre-condition for the invocation by foreigners of the intervention of their Government to obtain for them indemnity.

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

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

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

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

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

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

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The umpire rendered the following decision:

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

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

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

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

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

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

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

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

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

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

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

Frederick W. A. Bruce
British Legation,
Washington, May 9, 1866.

Cases of *La Constancia, Good Return* and *Medea,* opinion of the Umpire, Sir Frederick Bruce, dated 14 May 1866*

Affaires *La Constancia, Good Return* et *Medea*, opinion du Surarbitre, Sir Frederick Bruce, datée du 14 mai 1866**

Consequences of the neutrality of a nation for its citizens—limits of national protection and rejection of claims for want of jurisdiction by an international commission if citizens of neutral nations violated the observance of neutrality—non-binding nature of a presentation of a claim by a diplomatic agent for the agent's Government.

Consequences of a voluntary offer of the foreign nation to compensate the citizen of a neutral nation, not having been accepted on behalf of the other parties interested, both for the rights of the foreign nation and for the other parties.

Conséquences de la neutralité d'une nation pour ses citoyens—limites de la protection nationale et rejet de réclamations par une commission internationale pour défaut de compétence si les citoyens de nations neutres n'ont pas respecté la neutralité—nature non contraignante de la présentation d'une réclamation par un agent diplomatique pour le gouvernement de ce dernier.

Conséquences, pour les droits de la nation étrangère ainsi que pour les autres parties, d'une offre d'indemnisation faite volontairement par la nation étrangère en faveur du citoyen d'une nation neutre et qui n'a pas été acceptée au nom des autres parties intéressées.

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Sir Frederick Bruce delivered the following opinion:

These claims for the proceeds of captures made by American citizens commanding privateers under commissions given them by Artigas, the chief of the Banda Oriental, and of which they were violently deprived by the authorities of Venezuela, are presented under the convention as claims of American citizens against the United States of Colombia. The nationality of the parties is not disputed; but a question of great importance arises as to the jurisdiction of this commission to entertain them under the peculiar circumstances of their origin

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2740.

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as "claims of American citizens" in the sense in which these words are used in the convention. Upon this preliminary point I proceed to give my opinion.

It is to be borne in mind that the commanders of these vessels did not wage war by virtue of any right they possessed as American citizens to engage in hostile operations. On the contrary the United States of America were neutral in the conflict. No commission or authority was or could have been given to them by the United States to carry on hostilities against Spain and Portugal, and as American citizens they would have been liable to a charge of piracy or robbery on the high seas if they had not been able, by producing the commission of a belligerent power, to justify the captures they had made on the high seas of vessels belonging to the countries with which that power was at war. The neutrality of a nation in a war waged between other powers renders obligatory according to the law of nations, the observance of neutrality on every citizen forming part of its body politic, however difficult it may be for its government to enforce, by municipal statutes, on the individual members of the community a conformity with the duties thus assured by it. The acts, therefore, out of which these claims arise can not be considered by an international commission in any other light, when committed by citizens of the United States as such, than as unjustifiable outrages on the persons and property of the subjects of friendly nations, and the quality of American citizenship, which it is necessary to invoke in order to bring these claims within the scope of the constitution, operates as a fatal bar to their admission.

I may observe further that as these captures were made under the flag of the Banda Oriental, and by virtue of the authority conferred on the captors by the commissions they held from that republic, the titles to the prizes vested in that republic, the ultimate disposal of the proceeds being a matter of contract between her and the officers she employed in capturing them. The insult and injury complained of were done to her flag and to her authority as a legitimate belligerent. She was responsible to the world for the proceedings of these privateers, and upon her exclusively devolved the right of protecting them in the exercise of their rights as recognized vessels of war. The Government of Venezuela could not have resisted a demand for redress, put forward by her in these cases, by alleging that the commanders of these privateers were not natives of the Banda Oriental, nor did that fact in any degree weaken *her* right to demand restitution or indemnity, or *their* right to their share in the indemnity when obtained from the government which had seized the prizes without legitimate cause. Had Clark or Danels been natives of the Banda Oriental, they would have had no other channel for redress of the acts complained of but that afforded by the government of that republic. Considering, however, the light in which privateering expeditions, organized in neutral countries, are looked upon, the recognition of the right of these par-ties to claim as American citizens would lead to what would seem a singular and startling result. An officer in arms for his native country would have no redress except through his national authority for the violation of his rights in waging war; whereas a

foreigner, taking part in a contest which did not concern him, would be able to invoke *first* the assistance of the government he served and from which he derived his authority and *secondly,* if it failed or was unable to obtain satisfaction for him, he might claim the protection and support of his own government in making good his demands, although he had been engaged in defiance of its declarations founded on the clearest obligations of international law in carrying on war against nations with whom that government was at peace.

It is sought, however, to remedy this defect as to jurisdiction by a reference to the correspondence of the chargé d'affaires of the United States at Bogota, and to the proposed agreement entered into by Mr. King for the settlement of the Danels claim. In estimating the precise weight to be given to the dispatches of the United States chargé d'affaires, it is to be recollected that the claimants are undoubtedly American citizens, and that upon the facts stated in their memorials a case of injustice and wrong is made out on their behalf. It is the habit of diplomatic agents under these circumstances, influenced by a natural feeling for their countrymen, and by equitable considerations, to bring such cases to the notice of the government liable, and to lend their aid in the settlement of them. But it is impossible to maintain that the mere presentation of a claim by a diplomatic agent binds his own government to insist upon it by all the means which on behalf of a claim recognized as valid and unobjectionable it is authorized to employ; still less can the reception of these notes by the government to which they are addressed be construed into an admission of the validity of a claim, or into a waiver of any objections to it, that may exist on the ground of jurisdiction or otherwise.

The articles of agreement entered into by Mr. King, chargé d'affaires of the United States, and Mr. Prata, secretary for foreign relations of New Granada, contain an offer on the part of New Granada to compensate Danels, an American citizen, for such proportionate part of his losses as is assumed by her in virtue of the repartition of common debt between the republics, and acknowledge her obligation to pay $50,000 to him in certain public stocks. This agreement, which was in the nature of a voluntary offer to settle a claim admitted by New Granada for the sake of peace and for the preservation of harmony and good understanding between the two countries, not having been accepted on behalf of the other parties interested, can not be held to confer upon them any new right or to debar New Granada in the present discussion of this claim from taking advantage of such objections as are suggested by the circumstances of the case to the admission of it by this commission. Had the agreement been completed and a perfect contract created, or a compromise accepted for political considerations entirely extraneous to this commission, the fulfilment of which was afterwards resisted, the commission would have been bound to examine whether the new title thus constituted in favor of Danels had been carried out, and would have been relieved from going behind it to examine into the merits of the case or into the principles on which the liability of New Granada had been sustained. But in the absence of any such

contract or compromise I am clearly of opinion that the correspondence cited and the part taken by the Government of the United States in endeavoring to effect a settlement of the claims of its citizens arising out of the unjustifiable proceedings of the Venezuelan authorities against the sovereign rights and interests of the Banda Oriental are insufficient to absolve the commission from examining whether, consistently with the principles of international law they can or not assume jurisdiction over them.

Nor does the renunciation executed by the Republic of Uruguay which is confined to the waiver of any fiscal interests she might claim, affect the rights of these parties to her support or confer upon the United States any further title as against the offending republic than she previously possessed.

In conclusion, I may state that it is a matter of great satisfaction to me in rejecting these claims for want of jurisdiction, to observe that the contrary conclusion, arrived at by my distinguished predecessor under the first commission, is expressed in terms which show that his mind was by no means free of doubt on the question; while, on the other hand, I am supported on the general question of principle by the decision of Mr. Hassaurek, delivered in the cases of the *Medea* and the *Good Return,* presented to him by the Ecuadorian commission, whose most able exposition of the principles of public law, which should guide a mixed commission in such cases, I beg to incorporate with this opinion, as expressing more in detail and in far better language than my own the grounds of my conclusion.

PART IX

Alabama claims of the United States of America against Great Britain

Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871

Réclamations des États-Unis d'Amérique contre la Grande-Bretagne relatives à l'Alabama

Sentence rendue le 14 septembre 1872 par le tribunal d'arbitrage constitué en vertu de l'article I du Traité de Washington du 8 mai 1871

Alabama claims of the United States of America against Great Britain

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Sentence rendue le 14 septembre 1872 par le tribunal d'arbitrage constitué en vertu de l'article I du Traité de Washington du 8 mai 1871**

Effects of neutrality—proclamation of neutrality entails rights and duties—obligation of due diligence in the performance of neutral obligations—entitlement of a party prejudiced by a violation of neutrality to be indemnified.

Neutral obligations—construction, equipment and armament of a vessel, as well as free admission of vessels in ports of colonies, viewed as a violation of neutrality—admission of a war vessel in the port resulting in an augmentation of the force on board viewed as a breach of the duties of neutrality—insufficient legal means cannot justify failure of due diligence.

Privileges and immunities—extraterritoriality of war vessels not an absolute right under the law of nations, but a proceeding founded on the principle of courtesy—tenders or auxiliary vessels to be viewed as accessories that must follow the lot of their principals and be submitted to the same decisions.

Costs of pursuit of enemy's vessels viewed as indistinguishable from the overall cost of war—no entitlement to be indemnified for such costs.

Equitable compensation for damages—necessity to set aside double claims for the same loss—allowing interest at a reasonable rate viewed as just and reasonable.

Effets de la neutralité—la déclaration de neutralité entraîne des droits et des devoirs—obligation de diligence dans l'exécution des obligations de neutralité—droit d'une partie lésée par la violation de la neutralité à être indemnisée.

Obligations de neutralité—la construction, l'équipement et l'armement d'un navire, ainsi que la libre admission de navires dans les ports coloniaux, sont considérés

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 653.

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comme des violations de la neutralité—l'admission de navires de guerre dans un port entraînant l'accroissement de la force à bord est considérée comme une violation des devoirs de neutralité—l'insuffisance de moyens juridiques ne peut justifier le non-respect de l'obligation de diligence.

Privilèges et immunités—l'extraterritorialité des navires de guerre n'est pas un droit absolu en vertu du droit des gens, mais une procédure fondée sur le principe de courtoisie—ravitailleurs et embarcations auxiliaires doivent être considérés comme des accessoires qui suivent le sort de leur principal et doivent être soumis aux mêmes décisions.

Coûts de poursuite des navires ennemis considérés comme indissociables du coût total de la guerre—aucun droit à l'indemnisation de tels coûts.

Indemnisation équitable des dommages—nécessité d'écarter les doubles réclamations pour la même perte—octroi d'un intérêt à un taux raisonnable considéré comme juste et raisonnable.

* * * * *

The United States of America and Her Britannic Majesty having agreed by Article I of the treaty concluded and signed at Washington the 8th of May 1871, to refer all the claims "generically known as the Alabama claims" to a tribunal of arbitration to be composed of five arbitrators named:

One by the President of the United States,

One by Her Britannic Majesty,

One by His Majesty the King of Italy,

One by the President of the Swiss Confederation,

One by His Majesty the Emperor of Brazil;

And the President of the United States, Her Britannic Majesty, His Majesty the King of Italy, the President of the Swiss Confederation, and His Majesty the Emperor of Brazil having respectively named their arbitrators, to wit:

The President of the United States, Charles Francis Adams, esquire;

Her Britannic Majesty, Sir Alexander James Edmund Cockburn, baronet, a member of Her Majesty's privy council, lord chief justice of England;

His Majesty the King of Italy, His Excellency Count Frederick Sclopis, of Salerano, a knight of the Order of the Annunciata, minister of state, senator of the Kingdom of Italy;

The President of the Swiss Confederation, M. James Stämpfli;

His Majesty the Emperor of Brazil, His Excellency Marcos Antonio d'Araujó, Viscount d'ltajubá, a grandee of the Empire of Brazil, member of the council of H. M. the Emperor of Brazil, and his envoy extraordinary and minister plenipotentiary in France.

And the five arbitrators above named having assembled at Geneva (in Switzerland) in one of the chambers of the Hôtel de Ville on the 15th of December, 1871, in conformity with the terms of the second article of the Treaty of Washington, of the 8th of May of that year, and having proceeded to the inspection and verification of their respective powers, which were found duly authenticated, the tribunal of arbitration was declared duly organized.

The agents named by each of the high contracting parties, by virtue of the same Article II, to wit:

For the United States of America, John C. Bancroft Davis, esquire;

And for Her Britannic Majesty, Charles Stuart Aubrey, Lord Tenterden, a peer of the United Kingdom, companion of the Most Honorable Order of the Bath, assistant under-secretary of state for foreign affairs;

Whose powers were found likewise duly authenticated, then delivered to each of the arbitrators the printed case prepared by each of the two parties, accompanied by the documents, the official correspondence, and other evidence on which each relied, in conformity with the terms of the third article of the said treaty.

In virtue of the decision made by the tribunal at its first session, the counter-case and additional documents, correspondence, and evidence referred to in Article IV of the said treaty were delivered by the respective agents of the two parties to the secretary of the tribunal on the 15th of April, 1872, at the chamber of conference, at the Hôtel de Ville of Geneva.

The tribunal, in accordance with the vote of adjournment, passed at their second session, held on the 16th of December, 1871, re-assembled at Geneva on the 15th of June, 1872; and the agent of each of the parties duly delivered to each of the arbitrators, and to the agent of the other party, the printed argument referred to in Article V of the said treaty.

The tribunal having since fully taken into their consideration the treaty, and also the cases, counter-cases, documents, evidence, and arguments, and likewise all other communications made to them by the two parties during the progress of their sittings, and having impartially and carefully examined the same,

Has arrived at the decision embodied in the present award:

Whereas, having regard to the VIth and VIIth articles of the said treaty, the arbitrators are bound under the terms of the said VIth article, "in deciding the matters submitted to them, to be governed by the three rules therein specified and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case;"

And whereas the "due diligence" referred to in the first and third of the said rules ought to be exercised by neutral governments in exact proportion to the risks to which either of the belligerents may be exposed, from a failure to fulfil the obligations of neutrality on their part;

And whereas the circumstances out of which the facts constituting the subject-matter of the present controversy arose were of a nature to call for the exercise on the part of Her Britannic Majesty's government of all possible solicitude for the observance of the rights and the duties involved in the proclamation of neutrality issued by Her Majesty on the 13th day of May, 1861;

And whereas the effects of a violation of neutrality committed by means of the construction, equipment, and armament of a vessel are not done away with by any commission which the government of the belligerent power, benefited by the violation of neutrality, may afterwards have granted to that vessel; and the ultimate step, by which the offense is completed, cannot be admissible as a ground for the absolution of the offender, nor can the consummation of his fraud become the means of establishing his innocence;

And whereas the privilege of exterritoriality accorded to vessels of war has been admitted into the law of nations, not as an absolute right, but solely as a proceeding founded on the principle of courtesy and mutual deference between different nations, and therefore can never be appealed to for the protection of acts done in violation of neutrality;

And whereas the absence of a previous notice can not be regarded as a failure in any consideration required by the law of nations, in those cases in which a vessel carries with it its own condemnation;

And whereas, in order to impart to any supplies of coal a character inconsistent with the second rule, prohibiting the use of neutral ports or waters, as a base of naval operations for a belligerent, it is necessary that the said supplies should be connected with special circumstances of time, of persons, or of place, which may combine to give them such character;

And whereas, with respect to the vessel called the Alabama, it clearly results from all the facts relative to the construction of the ship at first designated by the number "290" in the port of Liverpool, and its equipment and armament in the vicinity of Terceira through the agency of the vessels called the "Agrippina" and the "Bahama," dispatched from Great Britain to that end, that the British government failed to use due diligence in the performance of its neutral obligations; and especially that it omitted, notwithstanding the warnings and official representations made by the diplomatic agents of the United States during the construction of the said number "290," to take in due time any effective measures of prevention, and that those orders which it did give at last, for the detention of the vessel, were issued so late that their execution was not practicable;

And whereas, after the escape of that vessel, the measures taken for its pursuit and arrest were so imperfect as to lead to no result, and therefore cannot be considered sufficient to release Great Britain from the responsibility already incurred;

And whereas, in despite of the violations of the neutrality of Great Britain committed by the "290," this same vessel, later known as the confederate

cruiser Alabama, was on several occasions freely admitted into the ports of colonies of Great Britain, instead of being proceeded against as it ought to have been in any and every port within British jurisdiction in which it might have been found;

And whereas the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed:

Four of the arbitrators, for the reasons above assigned, and the fifth for reasons separately assigned by him,

Are of opinion—

That Great Britain has in this case failed, by omission, to fulfill the duties prescribed in the first and the third of the rules established by the Vlth article of the Treaty of Washington.

And whereas, with respect to the vessel called the "Florida", it results from all the facts relative to the construction of the "Oreto" in the port of Liverpool, and to its issue therefrom, which facts failed to induce the authorities in Great Britain to resort to measures adequate to prevent the violation of the neutrality of that nation, notwithstanding the warnings and repeated representations of the agents of the United States, that Her Majesty's government has failed to use due diligence to fulfil the duties of neutrality;

And whereas it likewise results from all the facts relative to the stay of the "Oreto" at Nassau, to her issue from that port, to her enlistment of men, to her supplies, and to her armament, with the co-operation of the British vessel "Prince Alfred," at Green Cay, that there was negligence on the part of the British colonial authorities;

And whereas, notwithstanding the violation of the neutrality of Great Britain committed by the Oreto, this same vessel, later known as the confederate cruiser Florida, was nevertheless on several occasions freely admitted into the ports of British colonies;

And whereas the judicial acquittal of the Oreto at Nassau cannot relieve Great Britain from the responsibility incurred by her under the principles of international law; nor can the fact of the entry of the Florida into the confederate port of Mobile, and of its stay there during four months, extinguish the responsibility previously to that time incurred by Great Britain:

For these reasons,

The tribunal, by a majority of four voices to one, is of opinion—

That Great Britain has in this case failed, by omission, to fulfil the duties prescribed in the first, in the second, and in the third of the rules established by Article VI of the treaty of Washington.

And whereas, with respect to the vessel called the "Shenandoah," it results from all the facts relative to the departure from London of the merchant-vessel the "Sea King," and to the transformation of that ship into a confederate

cruiser under the name of the Shenandoah, near the island of Madeira, that the government of Her Britannic Majesty is not chargeable with any failure, down to that date, in the use of due diligence to fulfil the duties of neutrality;

But whereas it results from all the facts connected with the stay of the Shenandoah at Melbourne, and especially with the augmentation which the British government itself admits to have been clandestinely effected of her force, by the enlistment of men within that port, that there was negligence on the part of the authorities at that place:

For these reasons,

The tribunal is unanimously of opinion—

That Great Britain has not failed, by any act or omission, "to fulfil any of the duties prescribed by the three rules of Article VI in the treaty of Washington, or by the principles of international law not inconsistent therewith," in respect to the vessel called the Shenandoah, during the period of time anterior to her entry into the port of Melbourne;

And by a majority of three to two voices, the tribunal decides that Great Britain has failed, by omission, to fulfil the duties prescribed by the second and third of the rules aforesaid, in the case of this same vessel, from and after her entry into Hobson's Bay, and is therefore responsible for all acts committed by that vessel after her departure from Melbourne, on the 18th day of February 1865.

And so far as relates to the vessels called—

The Tuscaloosa, (tender to the "Alabama",)

The Clarence,

The Tacony, and

The Archer, (tenders to the Florida,)

The tribunal is unanimously of opinion—

That such tenders or auxiliary vessels, being properly regarded as accessories, must necessarily follow the lot of their principals, and be submitted to the same decision which applies to them respectively.

And so far as relates to the vessel called Retribution,

The tribunal, by a majority of three to two voices, is of opinion—

That Great Britain has not failed by any act or omission to fulfil any of the duties prescribed by the three rules of Article VI in the treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called—

The Georgia,

The Sumter,

The Nashville,

The Tallahassee, and

The Chickamauga, respectively,

The tribunal is unanimously of opinion—

That Great Britain has not failed, by any act or omission, to fulfil any of the duties prescribed by the three rules of Article VI in the treaty of Washington, or by the principles of international law not inconsistent therewith.

And so far as relates to the vessels called—

The Sallie,

The Jefferson Davis,

The Music,

The Boston, and

The V. H. Joy, respectively,

The tribunal is unanimously of opinion—

That they ought to be excluded from consideration for want of evidence.

And whereas, so far as relates to the particulars of the indemnity claimed by the United States, the costs of pursuit of the confederate cruisers are not, in the judgment of the tribunal, properly distinguishable from the general expenses of the war carried on by the United States:

The tribunal is, therefore, of opinion, by a majority of three to two voices—

That there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas prospective earnings cannot properly be made the subject of compensation, inasmuch as they depend in their nature upon future and uncertain contingencies:

The tribunal is unanimously of opinion—

That there is no ground for awarding to the United States any sum by way of indemnity under this head.

And whereas, in order to arrive at an equitable compensation for the damages which have been sustained, it is necessary to set aside all double claims for the same losses, and all claims for "gross freights," so far as they exceed "net freights";

And whereas it is just and reasonable to allow interest at a reasonable rate;

And whereas, in accordance with the spirit and letter of the Treaty of Washington, it is preferable to adopt the form of adjudication of a sum in gross, rather than to refer the subject of compensation for further discussion and deliberation to a board of assessors, as provided by Article X of the said treaty:

The tribunal, making use of the authority conferred upon it by Article VII of the said treaty by a majority of four voices to one, awards to the United States

a sum of $15,500,000 in gold, as the indemnity to be paid by Great Britain to the United States, for the satisfaction of all the claims referred to the consideration of the tribunal, conformably to the provisions contained in Article VII of the aforesaid treaty.

And, in accordance with the terms of Article XI of the said treaty, the tribunal declares that "all the claims referred to in the treaty as submitted to the tribunal are hereby fully, perfectly, and finally settled."

Furthermore it declares, that "each and every one of the said claims, whether the same may or may not have been presented to the notice of, or made, preferred, or laid before the tribunal, shall henceforth be considered and treated as finally settled, barred, and inadmissible."

In testimony whereof this present decision and award has been made in duplicate, and signed by the arbitrators who have given their assent thereto, the whole being in exact conformity with the provisions of Article VII of the said treaty of Washington.

Made and concluded at the Hôtel de Ville of Geneva, in Switzerland, the 14th day of the month of September, in the year of our Lord one thousand eight hundred and seventy-two.

Charles Francis Adams

Frederick Sclopis

Stämpfli

Vicomte D'Itajubá

PART X

American-British Commission established by Article XII of the Treaty of Washington of 8 May 1871 to deal with claims arising out of acts committed against persons or property during the American Civil War

Commission américano-britannique de requêtes, établie par l'article XII du Traité de Washington du 8 mai 1871 pour traiter des requêtes émanant d'actes commis contre des sujets ou des biens pendant la Guerre de sécession américaine

American and British Claims Commission, established by Article XII of the Treaty of Washington of 8 may 1871 to deal with claims arising out of acts committed against persons or property during the American Civil War

Commission américano-britannique de requêtes, établie par l'Article XII du Traité de Washington du 8 mai 1871 pour traiter des requêtes émanant d'actes commis contre des sujets ou des biens pendant la Guerre de sécession américaine

Case of Edward Alfred Barrett *v.* the United States of America, decision of 14 December 1871*

Affaire concernant Edward Alfred Barrett c. les États-Unis d'Amérique, décision du 14 décembre 1871**

State liability—no liability of the parent State for the payment of debts contracted by a rebel authority that failed to establish a new State—belligerent right to crush the rebel movement and seize all its assets and property—persons having voluntarily contracted with rebels assume the risk of their possible failure.

Responsabilité de l'État—absence de responsabilité de l'État parent pour les dettes contractées par une autorité rebelle qui a échoué dans l'établissement d'un nouvel État—droit du belligérant d'écraser le mouvement rebelle et de saisir la totalité de ses biens et avoirs—les personnes ayant volontairement contracté avec les rebelles assument le risque de leur possible échec.

* * * * *

The commission is of opinion that the United States is not liable for the payment of debts contracted by the rebel authorities.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2901.

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The rebellion was a struggle against the United States for the establishment in a portion of the country belonging to the United States of a new state in the family of nations, and it failed. Persons contracting with the so-called Confederate States voluntarily assumed the risk of such failure, and accepted its obligations, subject to the paramount rights of the parent state by force to crush the rebel organization, and seize all its assets and property, whether hypothecated by it or not to its creditors.

Such belligerent right of the United States, to seize and hold was not subordinate to the rights of creditors of the rebel organization, created by contract with the latter; and when such seizure was actually accomplished, it put an end to any claim of the property which the creditor otherwise might have had.

We are therefore of opinion that after such seizure the claimant had no interest in the property, and the claim is dismissed.

Cases of Charles M. Smith, later John C. Ferris, administrator *v.* the United States of America; and Agnes Pollock, later J. B. Halley, administratrix, *v.* the United States of America, decision of 25 September 1873 and dissenting opinion[*]

Affaires concernant Charles M. Smith, par la suite John C. Ferris, administrateur c. les États-Unis d'Amérique; et Agnes Pollock, par la suite J. B. Halley, administratrice, c. les États-Unis d'Amérique, décision du 25 septembre 1873 et opinion dissidente[**]

Authority to present a claim—right of administrators of deceased British claimants to fill claims regardless of their own nationality.

Dissenting opinion

Treaty interpretation—literal interpretation—restrictive interpretation to effectuate the intention of both States parties.

Recognition of nationality under international law—question of diplomatic protection of dual nationals—question of admission of claims by dual nationals.

Qualité pour présenter une réclamation—droit des administrateurs des requérants britanniques décédés de présenter une réclamation sans égard à leur propre nationalité.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2239.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2239.

Opinion dissidente

Interprétation des traités—interprétation littérale—interprétation restrictive afin de donner effet aux intentions des deux États parties.

Reconnaissance de la nationalité en droit international—question de la protection diplomatique des binationaux—question de l'admissibilité des réclamations de binationaux.

* * * * *

First part of the decision

No. 109—Charles M. Smith, later John C. Ferris, administrator, No. 212, v. *The United States*

Agnes Pollock, later J.B. Halley, administratrix, No. 205, v. *The United States*

Charles M. Smith, a minor, filed his claim on the 24th of February 1872. He claimed compensation for property destroyed, carried off, and occupied by the armies of the United States, at Athens, Alabama, during the war. The said property belonged to his father, John Donohue Smith, who died on the 9th of April 1870. He prosecuted the claim as heir at law and distributee of the said J. B. Smith, deceased, through J. R. Dillin, his attorney, empowered by J. C. Ferris, the administrator of the said Smith, deceased.

The United States agent on the 9th of March 1872 filed a motion to dismiss the claim on the ground that the memorialist, being a minor, could not prosecute the claim in person or by attorney, but must proceed by guardian or next friend, and that the said claim should be prosecuted in the name of the administrator of the said J. D. Smith, deceased.

On the 19th of March 1872 the case was dismissed by the commissioners, and on the next day the same claim was filed again in the name of J. C. Ferris, administrator of the estate of the deceased, J. D. Smith. Shortly after the filing of the new memorial the defense filed another demurrer on the following grounds:

1. That neither the claimant, administrator, nor his alleged *cestui que* trust, C. M. Smith, was alleged to be a British subject.
2. That it appeared that J. D. Smith died prior to the conclusion of the treaty of Washington, and that said claim ever since was not a claim of a subject of Her Britannic Majesty upon the United States, but was claim of a citizen of the United States.

Agnes Pollock, the petitioner in the second claim to be reported under this head, filed her memorial on the 20th of March 1872 as widow of James Pollock, deceased, claiming compensation for property carried off by the United States armies in Itawamba County, Mississippi, in the years 1862, 1863,

and 1864, belonging to said James Pollock. Both man and wife were British subjects by birth.

On the 3d of May 1872 the United States agent demurred to the memorial on the ground that it showed no title in the claimant to said property, or to any claim for the avails thereof; and on the 17th of June of the same year, and before said demurrer had been acted on by the commissioners, a new memorial was filed, putting the claim in the name of James B. Halley, administrator of the estate of James Pollock, deceased.

J. B. Halley described himself as of Tishomingo County, Mississippi.

On the 2d of July 1872 the defense filed a motion to dismiss this latter memorial because it had been filed after the expiration of the six months allowed by the treaty for the filing of memorials from the time of the first meeting of the commission; on the same day a demurrer to the claim was also filed by the defense, which was almost identical with the one filed in the case of J. C. Ferris, above cited.

In the arguments filed by the United States agent in the support of these demurrers he held:

1. That in the absence of any allegations to the contrary, the claimants, and all persons interested in the estate of the deceased, are to be taken as not being British subjects, and no claim can be prosecuted for the benefit of American citizens according to the twelfth article of the treaty.
2. That a person, who had been a British subject at the time of the injury complained of, but had become a naturalized United States citizen before presenting his claim, had no standing before the commission.
3. That if a British subject had assigned his claim absolutely to a person of another country, the assignee could not prosecute the same, at least in his own name.
4. That a sole legatee, made likewise a sole executor by will of a British subject, if an American citizen, could have no standing before the tribunal.
5. That it was only on behalf of Her Majesty's subjects, and while they remained such subjects, that Her Majesty's government assumed to intervene.
6. That it was evident that in case of involuntary transfer of title by death and operation of law, the rule must be the same.

Her Majesty's counsel in his brief stated:

1. That Charles Smith, the beneficiary in the case of J. C. Ferris, administrator, No. 212, was the son of John D. Smith, a British subject, and was therefore also a subject of Her Britannic Majesty.

2. That the United States counsel would no doubt contend that children born in the United States of British parents were citizens of the United States as well as British subjects, and could have no benefit under the treaty; but supposing that the fact of birth alone gave them American nationality, that fact would not deprive them of their rights as British subjects under the laws of Great Britain, and the treaties made by that power; nor could the United States impress upon infant heirs the character of American citizens to the extent and for the sole purpose of shutting them out from the benefits of the treaty of Washington.
3. That the twelfth article of said treaty was intended to provide for all claims in their character British, and in respect of which there was a right or duty on the part of the British Government to obtain redress; and that it was sufficient that the claim itself in its nature and all its essential attributes was a British claim, as treated by recognized principles of international law.
4. That by the laws of the United States, their consuls in foreign countries (if the laws of such countries permit) were bound to collect the personal property of American citizens dying there, in the absence of any legal representative; to collect and pay debts due to them or by them, and to settle their estates, and to remit the balance to the Treasury of the United States. This is done irrespective of the nationalities of the legatees or distributees of the deceased.
5. That manifest injustice would be done, if the commissioners deemed it necessary that all the beneficiaries of a claim be British subjects, and Her Majesty's counsel cites several cases as illustrations of how such injustice would be committed.
6. That any award made in the name of an administrator would be paid to him, and would have to be distributed by him under the orders of an authorized tribunal, which would utterly disregard all questions of nationality.
7. That the nationality of an administrator is unimportant and not at all material to the commission.

Second part of the decision

No. 205, James B. Halley, administrator; No. 212, John C. Ferris, administrator, v. *The United States*

These demurrers are overruled; the majority of the commissioners being of opinion that where the claim is prosecuted by an administrator in respect of injury to property of an intestate who was exclusively a British subject, and the beneficiaries are British subjects as well as American citizens, the claim may be prosecuted for their benefit.

The commissioners are all of opinion that the particular nationality of the administrator does not affect the question.

Dissenting opinion to the first part of the decision by Mr. Frazer, United States Commissioner

By the very words of the treaty (article 12) the claim must be, first, for an act done to the "person or property of" a British subject; second, it must be made "on the part of" a British subject. Distinctly, then, these two things must concur to give us jurisdiction. This is too plain to admit of controversy. The treaty is the language of both governments, and must be construed to effectuate not the intent of *one* only, but of *both*. If any of its terms have one sense in Great Britain and another in the United States by reason of their respective laws, neither of these senses can fairly be taken; another, though limited, sense must be sought, common to both countries. There is such a restricted sense of the language employed here. In Alexander's case I expressed myself on this branch of the present question. One born in the United States of British parents residing here would be protected by the United States as fully as any American against wrongs from other countries, Great Britain probably not excepted. And Great Britain would not, as against the United States, intervene in his behalf, though she would claim him as her subject, and hold him to accountability as such if found bearing arms against her. And if born here of British parents during a temporary sojourn, but afterwards domiciled in England and never residing here, the United States would practically treat him as not an American, refusing to intervene in his behalf against any other government, though she, too, would hold him to accountability as a citizen if found in arms against her. And so of persons born in Great Britain of American parents. The treaty is the product of diplomacy, providing this international tribunal for the amicable settlement of claims concerning which each power could lawfully claim redress as it saw fit, not of claims for which it would have no right to claim redress.

Alexander's case was a little different. He had estates and a domicil in both countries; was born in the United States of British parents domiciled here, but claiming only British nationality. This would be an interpretation of the treaty which would maintain our jurisdiction in all cases in which the complaining government would, by international law, have been at liberty to demand redress. It would settle all such cases, and thus effectuate the purpose of the treaty which was to terminate our diplomatic differences. The principles above stated, it seems to me, apply quite as fully where the person beneficially interested in the claim made before us is of both nationalities as where the person originally injured, being also of both nationalities, is still living and makes claim. To entertain the claim in either case is to assume that each government has by the treaty recognized its responsibility to the other for injuries done to those who are by its laws its own citizens or subjects. This construction, it seems to me, is utterly inadmissible. I can not possibly bring myself to believe that either government intended any such thing.

Case of John H. Hanna *v.* the United States of America, decision of 25 September 1873 and separate opinion*

Affaire concernant John H. Hanna c. les États-Unis d'Amérique, décision du 25 septembre 1873 et opinion individuelle**

State liability—no liability arising for the State from acts performed by rebels in arms against the State, as the State could not exercise control over them or prevent their acts.

Separate opinion

Effect of recognition of the rebel authority as a belligerent—recognition by a government is deemed conclusive upon the nationals of the State concerned.

State liability—principle of liability of a government for wrongs committed upon foreign subjects—possible liability for acts of a government *de facto* having displaced the government *de jure*—absence of liability of the lawful government existing under the Constitution for lawless and criminal acts of rebels having failed to establish a government *de facto*.

Responsabilité de l'État—absence de responsabilité de l'État pour des actes accomplis par des rebelles armés alors que l'État ne pouvait contrôler ceux-ci ni empêcher leurs actes.

Opinion individuelle

Effet de la reconnaissance de l'autorité rebelle comme belligérant—une telle reconnaissance par un gouvernement est considérée comme irréfutable par les nationaux de l'État concerné.

Responsabilité étatique—principe de responsabilité du gouvernement pour les fautes commises à l'égard de sujets étrangers—responsabilité envisageable pour les actes d'un gouvernement *de facto* ayant remplacé le gouvernement *de jure*—absence de responsabilité du gouvernement légal existant en vertu de la Constitution pour les actes illégaux et criminels commis par des rebelles ayant échoué dans l'établissement d'un gouvernement *de facto*.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2985.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2985.

The commission unanimously sustained the demurrer in the following award:

> The claim is made for the loss sustained by the destruction of cotton belonging to the claimant by men who are described by the claimant as rebels in arms against the Government of the United States.
>
> The commissioners are of opinion that the United States can not be held liable for injuries caused by the acts of rebels over whom they could exercise no control, and which acts they had no power to prevent.
>
> Upon this ground, and without giving any opinion upon the other points raised in the case, which will be considered hereafter in other cases, the claim of John Holmes Hanna is therefore disallowed.
>
> This was among the earliest of the decisions of the commission, and it is understood that in consequence of it a large number of claims of similar character awaiting presentation were never presented to the commission.

Separate Opinion

Mr. Frazer, the United States Commissioner, read the following separate opinion:

This is a claim for the destruction of 819 bales of cotton belonging to the claimant by rebels in arms against the United States. The property was destroyed in Louisiana and Mississippi in 1862 by the Confederate forces with the concurrence of the rebel authorities of Louisiana, one of the Confederate States so-called. Her Britannic Majesty had recognized the so-called Confederate States as a belligerent and the contest of arms then prevailing as a public war. After such recognition by the sovereign, the subject of such sovereign can not, in his character as such subject, aver that the fact was not so. The act of his government in that regard is conclusive upon him.

Aside from this recognition by Her Majesty, it is public history of which this commission will take notice without averment or proof, that the Confederate forces were engaged at the time in a formidable rebellion against the Government of the United States. It may not be important to the question in hand, therefore, that Her Majesty had taken the action already stated.

It should be further observed that the particular "State of Louisiana," which, concurred and participated in the destruction of the claimant's property was a rebel organization, existing and acting as much in hostility to the Government of the United States as was the Confederate States, so called. It was in form and fact a creature unknown to the Constitution of the United States, and acting in hostility to it. It was an instrumentality of the rebellion. Its agency, therefore, in the spoliation of this cotton can not be likened to the act of a State of the American Union claiming to exist under the Constitution; and any argument tending to show that under international law the national government is liable to answer for wrongs committed by such a State upon the subjects of a foreign power, can have no application to the matter now

under consideration. The question presented is simply whether the Government of the United States is liable to answer to a neutral for the acts of those in rebellion against it under the circumstances stated, who never succeeded in establishing a government. It is not deemed necessary in this case to inquire whether the claimant, having a commercial domicil in Louisiana at the time, is to be deemed a "subject of Her Britannic Majesty" in the sense of Article XII of the treaty which creates this commission. That question is argued by counsel, but it is thought better to meet the question above stated for the reason that the case will thereby be determined more distinctly upon its merits.

The statement of the question would seem to render it unnecessary to discuss it. It is not the case of a government established *de facto*, displacing the government *de jure*. But it is the case merely of an unsuccessful effort in that direction, which, for the time being, interrupted the course of lawful government without the fault of the latter.

Its acts were lawless and criminal, and could result in no liability on the part of the Government of the United States.

PART XI

Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868

Commission mixte constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Mexique le 4 juillet 1868

Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868

Commission mixte constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Mexique le 4 juillet 1868

Case of Maria J. Dennison, administratrix *v.* Mexico (Case of the *Archibald Gracie*), decision of the Umpire, Sir Edward Thornton[*]

Affaire concernant Maria J. Dennison, administratrice c. Mexique (Affaire *Archibald Gracie*), décision du Surarbitre, Sir Edward Thornton[**]

Authority to act as Government's agent—organization of unauthorized expedition viewed as piratical—lawful seizure of vessel carrying Mexican flag and exercising rights of a Mexican man-of-war without authorization—no indemnification for losses resulting from acts accomplished with the knowledge that they were in violation of United States law.

National protection—United States has the right to expect that its citizens, even when accused of a crime against the laws of Mexico, should receive proper treatment at the hands of its authorities.

Due process—delay in beginning and concluding of trial viewed as unnecessary and illegal—compensation granted for lengthened imprisonment, ill treatment and unnecessary loss of time.

Pouvoir d'agir en tant qu'agent du gouvernement—organisation d'une expédition non autorisée considérée comme un acte de piraterie—saisie légale d'un vaisseau battant pavillon mexicain et exerçant les droits d'un navire de guerre mexicain sans autorisation—aucune indemnisation pour pertes résultant d'actes exécutés en toute connaissance de leur illégalité en vertu du droit des États-Unis.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2766.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2766.

Protection nationale—les États-Unis ont le droit de s'attendre à ce que leurs citoyens, même s'ils sont accusés de crimes à l'encontre des lois du Mexique, soient traités convenablement lorsqu'ils sont détenus par les autorités mexicaines.

Jugement en bonne et due forme—retard dans le commencement et la clôture du procès considéré comme inutile et illégal—compensation accordée pour emprisonnement prolongé, mauvais traitement et perte inutile de temps.

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In the case of *Maria J. Dennison* v. *Mexico*, No. 213, it appears that one Roderick Matheson, of San Francisco, was authorized in 1855 by General Alvarez, not in the character of the head of the Mexican Government, but as the leader of a revolution against that government, to negotiate a loan for the purpose of contributing to the success of that revolution. This loan was to be guaranteed by the State of Guerrero. The umpire does not find that any authority was given to Matheson or to those who assumed to act with him as agents for Alvarez and Comonfort, to purchase a vessel for the use of the Mexican Government, together with the necessary supplies, for he does not believe in the authenticity of the letter of Rodrigo de la Torre, dated "Texca, August 17, 1855." Such a letter could not have been written by anyone whose native language was Spanish.

But whatever the contract was which Samuel L. Dennison made with Matheson, it was entered into voluntarily on his part, and it was not therefore one the fulfillment of which by the Mexican Government that of the United States was called on to enforce.

It further appears to the umpire that Dennison was cognizant of and a party to the fitting out of the *Archibald Gracie*, and of the enlisting of men at San Francisco, for hostile purposes in violation of the laws of the United States and of international law.

Before the *Archibald Gracie* arrived at La Paz, Lower California, the Mexican Government had been informed by certain diplomatic agents accredited to it, of whom the United States minister was one, that a piratical expedition had left San Francisco under the command of Zerman. Before arriving at La Paz, a Mexican vessel, with which the *Archibald Gracie* had fallen in, had been compelled to deviate from its course to accompany the expedition. Under these circumstances, the Mexican authorities were justified in seizing a vessel which had without any authority assumed to carry the Mexican flag and to exercise the rights of a Mexican man-of-war, forcing a Mexican vessel to deviate from its course. Nor can the United States Government call upon Mexico to indemnify Dennison for a vessel which with his knowledge was fitted out in violation of the United States law.

The umpire is therefore of opinion that the Mexican Government can not be held responsible for any pecuniary losses suffered by Dennison in consequence of the seizure of the *Archibald Gracie*.

But although Dennison brought upon himself these losses by acts which were in contravention of United States and international law, the umpire considers that the United States have a right to expect that one of their citizens, even when accused of crime against the laws of Mexico, should receive proper treatment at the hands of its authorities. In the present instance there was unnecessary and illegal delay in beginning and concluding the trial of Dennison, and after his arrest at La Paz he was treated with undue severity and even cruelty.

For the lengthened imprisonment and ill treatment suffered by Dennison and the unnecessary loss of time to which he was forced to submit, the umpire considers that the sum of one thousand dollars ($1,000) in gold will be a fair compensation; and he therefore awards that this sum, without interest, in gold coin of the United States, be paid by the Mexican Government for Maria J. Dennison, as administratrix for the aforesaid Samuel L. Dennison.

Case of Fernando M. Ortega *v.* the United States of America, decision of the Umpire, Sir Edward Thornton, dated 11 July 1876[*]

Affaire relative à Fernando M. Ortega c. les États-Unis d'Amérique, décision du Surarbitre, Sir Edward Thornton, datée du 11 juillet 1876[**]

Competence of the Commission—question of the *locus standi* of a Mexican claimant arrested by the United States authorities upon accusations of treason against Mexico.

State responsibility—arrest by the United States viewed as a matter of comity towards a friendly government—duty under international law to prevent a breach of neutrality.

Compétence de la Commission—question du *locus standi* d'un demandeur mexicain arrêté par les autorités des États-Unis sur accusation de trahison à l'encontre du Mexique.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4027.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4027.

Responsabilité de l'État—arrestation par les États-Unis considérée comme un acte de courtoisie envers un gouvernement ami—obligation en vertu du droit international d'empêcher une violation de la neutralité.

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In the case of *Fernando M. Ortega* v. *The United States,* No. 560, the claim arises out of the arrest of the claimant by United States military authorities on November 3, 1866, at Brazos de Santiago, Texas, and of his imprisonment till the 10th of December. The arrest and imprisonment are not denied by the defense, and there is no doubt that the arrest was due to information furnished by the Mexican Government through its accredited minister at Washington, which information, as coming from a friendly sovereign recognized by the United States, the government of the latter was bound to believe. The Mexican Government denounced the claimant as a deserter, a traitor, engaged in a dangerous conspiracy to subvert the Mexican Government.

If the military authorities in Texas, then under martial law committed a violation of the laws of the United States, it was in the power of the claimant as transient through that State to appeal to the courts of justice and obtain redress. But when the Republic of Mexico has concluded a treaty with the United States for the settlement of claims of her citizens arising from injuries by the authorities of the United States, it seems to the umpire very questionable whether a person who was denounced as a traitor by the Mexican Government, and was arrested and imprisoned on account of that denunciation, can now present himself to the commission as a Mexican citizen and claim on account of that arrest and imprisonment.

But apart from this question the umpire is of opinion that as a matter of comity towards a friendly government the Government of the United States was not only justified under the circumstances in ordering the arrest and imprisonment of the claimant, but that it was its duty by taking that course to prevent the success of a conspiracy against the Mexican Government, which there was sufficient evidence to prove that the claimant and his companions were endeavoring to carry out under shelter of the neutral territory of the United States. It is also to be observed that the measure of arrest and imprisonment was forced upon the United States military by the refusal of the claimant and his companions to retire to a point in the United States where their object could not so easily have been carried out, and where there would have been less danger of a breach of neutrality. The umpire is of opinion that the Government of the United States can not be called upon to make compensation for the acts of their officers above referred to.

Case of John Friery *v.* Mexico, opinion of the Commissioner, Mr. Wadsworth*

Affaire relative à John Friery c. Mexique, opinion du Commissaire, M. Wadsworth**

Conduct of hostilities—any person residing in an enemy place considered as enemy during assault—officers' duty to restrain pillage and protect life and property after the capture of an enemy place.

State responsibility—right of government to assail and capture a town held by its enemies—no responsibility for unauthorized acts committed against enemies' property or persons, which were impossible to restrain—disorders viewed as hazard of war.

Conduite des hostilités—toute personne résidant dans un lieu ennemi est considérée comme un ennemi pendant l'agression—obligation des officiers de limiter le pillage et de protéger la vie et les biens après la capture d'un lieu ennemi.

Responsabilité de l'État—droit du gouvernement d'attaquer et de capturer une ville tenue par ses ennemis—absence de responsabilité pour les actes illicites commis à l'encontre des biens ou personnes ennemis—émeutes considérées comme risques de guerre.

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A body of armed men of all nations and colors, acting under the orders of leaders deriving their authority from the Mexican Government, through General Carvajal, instigated by General Escobedo, and assisted by Governor De Leon, assaulted and captured Bagdad on the morning of the 5th January I866. The town at the time was within the lines of the French and the Imperialists, and garrisoned and held by a body of their troops, which were taken prisoners by the assailants.

As war was raging at the time between the Government of Mexico and the French, and all persons residing in the town of Bagdad were enemies of the Mexican Government, without distinction, they can not complain of injuries received from the assailing party while the assault was in progress. It is true

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4036.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4036.

that after the capture of the place by the Mexican forces, it was the duty of the officers commanding to restrain pillage and protect life and property so far as in their power.

I am too familiar with the facts attending the scandalous affair not to know that in the earlier hours of the attack it was out of the power of Read and Governor De Leon (who commanded) to restrain the disorders and that this could not be done until Escobedo borrowed from the United States commander, on the opposite bank, a portion of his troops for the purpose.

In the mean time pillaging went on, all parties taking a hand in it—the assailants, the garrison, and the mob. The disorders were disgraceful enough, but just such as are incident to the assault upon a town held by troops, and made in the darkness and crowned with success. I can not deny the right of the Government of Mexico to assail and capture a town held by its enemies, and do not see how the government is to be made responsible for the disorders which accompany a successful assault upon such a town, committed upon persons or against the property of persons who are at the time enemies, when I am sure it was impossible for the parties in command to restrain these disorders.

These were the hazards of war, and claimant, residing in the town where the contest rages, must share the fortunes of the rest of the inhabitants. His small effects were plundered in the earlier moments of the capture of the place, and before the authorities possessed the means or had the time to restore order and preserve discipline. We can not tell who did the mischief; it certainly was not ordered by the officers or countenanced by them, so far as the proof speaks. It would not be just to hold a belligerent responsible for such unauthorized acts committed in an armed town just taken by assault. Claimant's own fellow-townsmen, or his Imperialist defenders may have committed them for aught we know. But even if some of the assailing party made a spoil of his goods it would be going a great way to affirm responsibility on the part of the government.

I think the case must be dismissed, and so it is ordered accordingly.

Case of Bernardino and Francisco Garcia Muguerza *v.* the United States of America, decision of the Umpire, Sir Edward Thornton[*]

Affaire concernant Bernardino et Francisco Garcia Muguerza c. les États-Unis d'Amérique, décision du Surarbitre, Sir Edward Thornton,[**]

Conduct of hostilities—intervention of United States force to preserve order after the attack is not viewed as taking part in the attack.

State responsibility—United States not responsible for the fact that some Mexican officers were dressed in United States uniforms—no responsibility for the participation of some American soldiers in the attack, without the knowledge of their officers.

Conduite des hostilités—l'intervention de la force armée des États-Unis pour maintenir l'ordre après l'attaque n'est pas considérée comme une participation à l'attaque.

Responsabilité de l'État—les États-Unis ne sont pas responsables pour le fait que certains officiers mexicains aient vêtu l'uniforme des États-Unis—absence de responsabilité pour la participation de certains soldats américains à l'attaque, à l'insu de leurs officiers.

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After a careful examination and study of the voluminous evidence submitted on both sides in the case of *Bernardino and Francisco Garcia Muguzea* v. *The United States,* No. 139, the umpire is fully satisfied and convinced that the party who on the morning of the 5th of January 1866 attacked and captured the town of Bagdad in Mexico, did so at the instigation primarily of General Escobedo, commander in chief of the Mexican army of the north, and secondarily of R. Clay Crawford, and that in the attack upon the town the party was under the immediate command and leadership of Read, McDonald, Lambertson, and others. It is evident that General Escobedo had on the part of the Government of Mexico authorized Crawford to enlist men in the United States for the service of

[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. I, Washington, 1898, Government Printing Office, p. 4037.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. I, Washington, 1898, Government Printing Office, p. 4037.

Mexico, and to organize the attack upon Bagdad with men so enlisted, and that Crawford entrusted Read with the preparation and carrying out of the attack.

General Escobedo, in his letter of the same day to General Weitzel, accepted and assumed the responsibility of the act, and stated that "the forces under my [his] command have taken the post of Bagdad." Indeed, it is far from probable that the same general on the same day would have applied to Colonel Moon for a United States force to preserve order in Bagdad if he had supposed that he was entitled to complain that a portion of the same force had attacked and plundered Bagdad.

It is evident that none of the leaders above mentioned were officers of the United States Army they appear to have been dressed in United States uniforms, but that was an act for which the United States Government was in no way responsible. The leaders were in the service and under the orders of the Mexican Government. The umpire can not discover that any United States officer was present or gave any order during the attack and capture of Bagdad.

There is no doubt that there were some colored soldiers in United States uniforms, and belonging to a United States regiment stationed at Clarksville, who took part in the attack, but it is pretty clear that they did so without the knowledge or consent of their own officers, and that as soon as the latter became acquainted with the fact they ordered the arrest of those soldiers. The umpire does not even consider that it is shown that there was a want of due diligence on the part of the United States officers in not preventing these men from joining the expedition. General Escobedo had authorized a violation of the United States laws in encouraging the enlistment of men in the United States to fight against the French, and preparing the attack upon Bagdad from the United States. If there was a want of due diligence on the part of the United States authorities in not discovering that such violations of the law were being committed and in not preventing them, it is possible that the commanders of the French forces might have been justified in remonstrating against it; but certainly the Mexican Government, in whose interest, and by the authority of the commander in chief of whose army of the north, Americans were engaged as Mexican officers, men were enlisted, and the attack on Bagdad was organized in the United States territory and United States soldiers were seduced from their duty was not in a position to protest against the consequences of the infractions committed by its own officers of the laws of the United States.

It does not appear that much plundering, except perhaps of spirituous liquors, was done by the United States armed soldiers. The greater and more valuable part of the goods were undoubtedly carried off by the leaders of the expedition. But whether these acts were committed by the one or the other, the umpire considers that the Mexican Government alone is responsible for the acts of its own officers, and that General Escobedo both knew and assumed the responsibility and for that very reason asked for the assistance of the United States troops to prevent the pillage which was being

committed by persons who must have formed part of "the forces under his command," which, in the language of his letter of January 5th, 1866, had "taken the post of Bagdad."

The umpire is therefore forced into the conclusion that the Government of the United States can in no way be held responsible for the abovementioned claim, and he accordingly awards that it be dismissed.

Case of Joseph Cooper & Co. *v.* Mexico, decision of the Umpire, Sir Edward Thornton*

Affaire concernant Joseph Cooper & Co. c. Mexique, décision du Surarbitre, Sir Edward Thornton**

Rules of war—no rule that a belligerent shall be held responsible for the seizure or destruction of property belonging to residents of a place previously occupied by and captured from the enemy—respect of the property of private persons viewed as a mere civilized practice without a binding nature.

State responsibility—no responsibility found for general and indiscriminate pillage and destruction having occurred in the absence of officers—such losses viewed as inevitable consequence of war.

Règles de la guerre—aucune règle ne prévoit qu'un belligérant soit tenu pour responsable de la saisie ou de la destruction de biens appartenant à des résidents d'un lieu préalablement occupé et capturé par l'ennemi—le respect de la propriété de personnes privées est considéré comme une simple pratique civilisée dépourvue de tout caractère contraignant.

Responsabilité de l'État—absence de responsabilité pour pillage général et indiscriminé et destructions qui se sont produits en l'absence d'officiers—de tels dommages sont considérés comme une conséquence inévitable de la guerre.

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In the case of *Joseph Cooper* & *Co.* v. *Mexico,* No. 565, the claim arises out of alleged losses and destruction of property suffered by the claimant at the

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4039.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4039.

hands of Mexican troops during an attack upon Bagdad in Mexico, where the claimants resided and were engaged in business. It appears that Bagdad was occupied by French, or Imperialists, troops when on the 5th of January 1866 it was attacked by a Mexican force, or at least by a force which was acknowledged by the Mexican military chiefs to be acting under their orders. During the disorder and confusion which is almost always consequent upon an attack of this nature, a quantity of property belonging to the claimant was robbed and carried off by some of the attacking force, or at least by armed men.

According to the strict rules of war, a belligerent can not be held responsible for the value of property belonging to residents, whether natives or foreigners, which has been seized or destroyed in a place previously occupied by and captured from the enemy; and though it is more in accordance with the rules of modern and more civilized warfare to respect the property of private persons, whether natives or neutral foreigners, it is doubtful whether an international claim can be sustained on account of the violation of these rules. In the present instance the umpire is of opinion that the principal portion of the claim arises from the inevitable cause of war. The pillage and destruction were general and seem to have been directed against natives as well as foreigners. Neither is the umpire of opinion that there is any proof of the charge that the commanders and officers of the force countenanced or participated in the plundering of the claimants' property. On the contrary, it would appear that there was no discipline whatever and that the plunderers were under no control. One of the claimants, Joseph Cooper himself, declares that he went to his office in the morning of the attack and "on entering the yard he saw a crowd of soldiers and civilians, all armed." At that time no officer seems even to have been present. He subsequently returned to his house and found it in possession of a number of soldiers under the command of Captain St. Clair, "who claimed to be an officer of the army of the Republic of Mexico." But there is no proof that this officer countenanced or encouraged the work of destruction. The plundering, however, and destruction of claimants' property seems all to have been done during a few hours immediately succeeding the capture of the town. It is also to be observed that the greater part of the plundered property was carried across in vessels belonging to the claimants to the Texas side of the river, and that, though a force of United States troops was stationed there, they did not interfere to save the property from the plunderers nor prevent it from being carted away from the store, so that it would seem to be partly owing to their nonintervention that the property was lost.

The umpire is of opinion that, however deplorable it may be for the sufferers, and however much to be regretted that such proceedings should not be prevented, the Mexican Government can not under the circumstances be made responsible for the losses to which the claimants were subjected. With regard to the seizure some time after the capture of Bagdad of 42 bales of hay and 98 bales of India bagging belonging to the claimants, which it was said were to be used for purposes of defense, the facts are not sufficiently proved

to justify the umpire in making an award for their value. There is only the evidence of one of the claimants to show that they were taken for that purpose by the order of the Mexican officer in command.

One of the claimants, Joseph Cooper, swears that he was born in New Orleans, but he has not complied with the rule of the commission by stating the date of his birth, nor does he bring any other proof that he is a citizen of the United States.

For the above-mentioned reasons the umpire considers that the Mexican Government can not be held responsible for the losses suffered by the claimants, and he therefore awards that the claim be dismissed.

Case of Charles J. Jansen *v.* Mexico, opinion of the Commission delivered by the United States Commissioner, Mr. Wadsworth[*]

Affaire relative à Charles J. Jansen c. Mexico, opinion de la Commission rendue par le Commissaire américain, M. Wadsworth[**]

State responsibility—principle of responsibility of the successor government for wrongful acts committed by a former government *de facto*—absence of responsibility for wrongful acts committed by a so-called empire resulting from foreign intervention and never recognized as a government *de facto*.

Government *de facto*—popular support and possession of territory viewed as imperative for the recognition of a government *de facto*—government *de facto* not created by a temporary interference of foreign authorities—government *de facto* viewed as equivalent to government *de jure*, outside of the field of moral considerations.

Responsabilité de l'État—principe de la responsabilité du gouvernement successeur pour les faits illicites commis par un gouvernement *de facto* précédent—absence de responsabilité pour faits illicites commis par un soi-disant empire résultant d'une intervention étrangère et jamais reconnu comme gouvernement *de facto*.

Gouvernement *de facto*—soutien populaire et possession du territoire considérés comme impératifs pour la reconnaissance d'un gouvernement de fait—un gouvernement *de facto* ne se constitue pas par l'interférence temporaire d'autorités étrangères—un gouvernement *de facto* est considéré comme équivalent à un gouvernement *de jure*, en dehors de toutes considérations morales.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p.2902.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2902.

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This claim is for the value of the bark *Francis Palmer,* etc.

The bark, an American vessel, owned by claimant, an American citizen, was seized at Port Angel, Lower California, in July 1866, by some Mexican soldiers, taken into the port of Guaymas, and libeled on a charge of violating Mexican law. Before any judicial determination of the guilt or innocence of the vessel, and on the night of the 13th September 1866, she was sailed out of the port by the Mexican customs and other officials and lost to the owner.

The seizure of the vessel, in the first instance, and the judicial proceedings against her were acts proceeding from the authorities of the so-called empire and adhering to the cause of the late Archduke Maximilian. The officials who were guilty of the robbery of the vessel also adhered to the same party, and seized the vessel to facilitate their escape from the hands of the troops of the Mexican republic.

The French naval forces, supporting the war of the intervention in Mexico and the pretensions of the Archduke, took possession of Guaymas on the 29th of March 1865 and held it till it was evacuated, on the 13th of September 1866.

There can be no doubt of the fact, therefore, that this aggravated injury was inflicted by the authorities and officials of the so-called empire, supported and countenanced by the French naval forces.

The American consul at Guaymas, in his letter of 20th September 1866 to the Assistant Secretary of State, speaks of the affair as "proceedings of the officers of the defunct empire."

The question is now, therefore, directly presented for our consideration whether indemnity for injuries inflicted by the officials of the Maximilian government upon American citizens has been provided for in the convention between the United States and Mexico?

The language of the convention confines indemnity to injuries arising from acts of "authorities of the Mexican Republic." Since it was the direct aim of the French intervention and the Maximilian empire, so called, to overthrow the republican form of government in Mexico and substitute a monarchy in its place, it will not be allowable to consider, in any literal sense, the officials of the monarchical experiment as "authorities of the Republic of Mexico."

It may well be doubted whether the language of the convention was not designedly employed to exclude all claims against Mexico growing out of the pretensions of the monarchy. But if the United States can hold the republic of Mexico to responsibility for injuries inflicted by the agents of the so-called empire, it must be upon the ground that the latter, at the date of such injuries, was a government *de facto,* and that the former, as its successor, can not escape responsibility for the acts of the government for the time being in possession.

It will be proper, therefore, to inquire whether it was such a government, and whether, if it was, the United States is at liberty to assume that ground in view of the history of that remarkable chapter in the life of the New World which is known as the French intervention in Mexico.

That intervention was born out of the opportunity presented by the war of the rebellion in the United States—was an attack upon the popular institutions and republican form of government so deeply embedded in the affections of the people of the United States, and designed to check the growth and undermine the power and influence of the United States, the principal guaranty of the security and liberties of the people of Mexico and of every other republic in the Americas against the monarchies of Europe.

If these propositions be true, it will be seen that the war of the intervention in Mexico was also a war against the United States, and that the firm, complete, and permanent possession of the Government of Mexico by the so-called empire only was possible in the event of the success of the rebellion in the United States and the destruction of the power and influence of that republic.

Thus the United States, on the one hand warring against the rebellion, and Mexico, on the other, resisting the intervention of the foreigner leagued with the traitor, were fighting a joint battle for themselves and all others, the republics of this continent.

That this is true is evident from the spontaneous and cordial manner in which the people of the two republics exchanged sympathies during the trials to which they were subjected, respectively, by rebellion and intervention, and by the friendly anxiety with which the other American republics watched the progress of the struggle. Moreover, as the rebellion in the United States precipitated the intervention upon Mexico, so the suppression of the former, by expelling the army of the French, terminated the latter.

In view of these prominent facts we would not expect to find that the government and people of the United States regarded the fugitive rule of the Austrian prince with any favor, gave it any recognition, or contemplated the possibility of holding the government of the Mexican republic responsible for *its* injustice.

To make the position of the United States plain upon this important subject, and to show how truly it accorded with the principles and sympathies of the people of that country, it is needful to rehearse a few of the prominent facts of Mexican history for the last few years.

The long contest in Mexico between conservatism, represented by the church and the army aspiring to a restoration of the monarchical form of government and the perpetuation of the old ideas and abuses, and liberalism, representing the masses of the people, firmly attached to the republican form, and incessantly struggling to sweep away the ideas which belonged to a past age, and to liberate themselves from great oppressions, culminated in 1855, when

the liberals, under "the plan of Ayutla," overthrew the party of the monarchy and expelled Santa Anna.

This notorious man, on the 1st July 1854, commissioned Senor Gutierrez Estrada (the same who afterward offered the crown to Maximilian) to negotiate in Europe for the establishment of a monarchy in Mexico. The following extract from this commission is interesting in view of subsequent events:

> I confer upon him (Senor Estrada) by these presents the full powers necessary to enter into arrangements and make the proper offers at the courts of London, Paris, Madrid, and Vienna to obtain from those governments, or from any one of them, the establishment of a monarchy derived from any of the royal races of those powers, under qualifications and conditions to be established by special instructions.

The revolution under the "plan of Ayutla" called the aged and patriotic Alvarez to the presidency. Two measures signalize his brief administration and characterize the liberal movement; "The law of Jaurez," November 22, 1855, organizing and reforming the administration of justice, but chiefly celebrated for its abolition of the.privileges of the clergy and the army (military and ecclesiastical *fueros),* and the proclamation of 17th October 1855, summoning a constituent congress "for the purpose of reconstituting the nation under the form of a popular representative democratic republic."

This constituent body met on the 18th February 1856 and continued its labors till the 5th of February 1857, when it proclaimed the constitution of that date. This instrument, in all substantial effects, is closely modeled on that of the United States. It divides, limits, and distributes the powers of the government, purely republican in form; it guarantees the political and personal rights of the citizen; it abolishes the *fueros* and secures the equality of the citizen; it proclaims a cordial fraternity with foreigners; the abolition of judicial costs; *the freedom of religion and of the press*; and the equal responsibility of all persons and classes of persons to the same impartial laws and tribunals.

I need not be more specific. The instrument embodies the most liberal principles of free, responsible, popular government known to modern society.

Ignacio Comonfort was the first president elected under this constitution. He took the oath to support it, and was inaugurated December 1, 1857.

On the 17th of the same month the President betrayed the people who had honored him with their confidence, and uniting with Zuloaga in the interest of the church party or *reactionaires,* pronounced against the constitution and made himself dictator. On the 11th of January 1858 Zuloaga and the church party abandoned Comonfort, and on the 20th of the same month drove him from the capital and country.

On the 22d of January Zuloaga convoked in the capital a junta of twenty-eight persons of his own choice, and these named him president. This revolution is known as "the plan of Tacubaya." As the long and bloody struggle which followed, including the war of the intervention, was a contest between the

principles of the constitution of 1857 and the party of the republic on the one hand, and "the plan of Tacubaya" and the party of the monarchy on the other, I will briefly state some of the points of this plan, as follows, viz:

1. The inviolability of church property and revenues, and the reestablishment of old ecclesiastical exactions.

2. The reestablishment of the *fueros,* or the special ecclesiastical and military tribunals, with exclusive civil and criminal jurisdiction of all matters affecting the army and clergy.

3. The restoration of a state religion, sole and exclusive.

4. The censorship of the press.

5. The restoration of the system of interior duties *(alcavala)* and of special monopolies.

6. The exclusive system of emigration from Catholic countries.

7. The old central dictatorship in the interest of the *reaccionaires.*

8. The monarchy under European patronage.

By the constitution of 1857, in default of a president, it is provided that "the president of the supreme court of justice shall enter upon the exercise of the functions of president." (Article 79.)

At the time of this notable "default" of Comonfort the office of "president of the supreme court of justice" was held by Benito Juarez, a native-born Mexican citizen, and the presidency was devolved on him by the constitution. He raised the standard of the constitution and the republic at Guanajuato on the 19th of January 1858, and, supported by the States and the people, he maintained the contest against the reaction with varying fortunes, but with a fortitude and constancy under great difficulties worthy of the virtues of his private character and his zeal for reform and republican institutions. His cause triumphed; the liberals entered the capital on the 25th December 1860, the president and his cabinet on the 11th February following.

Miramon, with other chiefs of the monarchical party, military and ecclesiastical, left the country to invite the intervention of Europe, while their adherents at home confined all armed resistance to the government to predatory excursions by roving bands under such leaders as Marquez, "the butcher of Tacubaya."

The ministers of France, England, and other European powers resident in Mexico, two days after the expulsion from the capital of Comonfort by Zuloaga, recognized the government of the latter. Five days after the American minister (Mr. Forsyth) followed their example; but his government practically repudiated his act by making haste to establish, relations with the government of President Juarez, continued through all subsequent trials, so far as possible to the present time.

A perusal of the official correspondence (Mexican document 1861–1862) leaves no doubt of the real sympathy of the French, English, and Spanish cabi-

nets with the cause represented by Zuloaga and Miramon, and the partiality of the Government of the United States with the cause sustained by Juarez.

The hesitation shown by the English cabinet to recognize the constitutional government after its complete triumph is in significant contrast with the immediate recognition of Zuloaga, an insurgent, holding nothing but the capital. (Lord J. Russell to Sir C. Wyke, No. 1, March 30, 1861.) Although "the final triumph of the liberal party" is here admitted, the recognition of a government *de jure* and *de facto* both, is to be upon conditions; the constitutional government must first admit its responsibility for the wrongs and crimes of Zuloaga and Miramon.

The character of this government thus regarded with disfavor is contrasted with that of the insurgents in these words by the British representative subsequently displaced by Sir Charles Wyke:

"However faulty and weak the present government may be, they who witnessed the murders, the acts of atrocity and of plunder, almost of daily occurrence, under the government of General Miramon and his counselors, Senor Diaz and General Marquez, can not but appreciate the existence of law and justice. Foreigners, especially, who suffered so heavily under that arbitrary rule and by the hatred and intolerance toward them, which is a dogma of the church party in Mexico, can not but make a broad distinction between the past and the present." And, again:

"I do not believe it possible that the church party or that the former rule of intolerance and of gross superstition can ever be restored to power; so far, at least, has been secured by the result of the last civil war—the first contest for principles, it may be remarked, in this republic." (Mr. Matthews to Lord J. Russell, May 12, 1861.)

The successor of Mr. Matthews (Sir Charles L. Wyke) brought different views and sympathies to inspire his labors near the Government of Mexico. He viewed President Juarez and his liberal government with disfavor, distrust—almost disgust. He had no confidence in its intentions, ability, or stability. The church party, though beaten, he did not (or would not) regard as subdued. His only hope was "in the small moderate party," who perhaps might step in before all was lost "to save their country from impending ruin." In one of his earliest dispatches this diplomatist calls for foreign force as the only remedy. He says:

"Such is the actual state of affairs in Mexico, and your lordship will perceive, therefore, that there is little chance of justice or redress from such people except by the employment of force to exact that which both persuasion and menaces have hitherto failed to obtain." (Sir C. Lennox Wyke to Lord J. Russell, May 27, 1861.)

Later dispatches marking the progress of Sir Charles's opinions prove that he had been enlisted or deceived into the support of the intrigue at the capital of Mexico fomented by those pecuniary and political interests to be finally

ruined unless the party of Miramon, under some form, should be restored to power. October 28, 1861, he writes:

"Every day's experience tends to prove the utter absurdity of attempting to govern the country with the limited powers granted to the executive by the present ultra-liberal constitution, and I see no hope of improvement unless it comes from a foreign intervention or the formation of a rational government composed of the leading men of the moderate party who, however, at present are void of moral courage and afraid to move unless with some material support from abroad." (Dispatch to Lord J. Russell.)

September 29 previous he was of opinion that an occupation of the Mexican ports by the British naval forces, by its moral power, would enable "the moderate and respectable party", to turn out the Juarez administration and form a government willing to treat, etc. The next step to armed intervention for the overthrow of an "ultra-liberal constitution" and the formation of a government with a strong executive was easy.

In these efforts to disparage the government of the Liberals and procure its overthrow by foreign force Sir Charles Wyke was preceded or zealously seconded by the French chargé, M. de Saligny, and the bishops and military chiefs of the church party—part of them at the courts of Spain and France and part intriguing in the capital of Mexico. It would be interesting to set forth the principal reasons for this combined hostility against the government of the Liberals. Apart from political considerations, which were allied with a sympathy with the church party and the reactionary ideas it represented, there were large pecuniary interests to be compromised by the overthrow of the Miramon government. Not to speak of the reclamations for the massacres of foreigners and the plunder of their effects, the bonds which Mr. Jecker held or had put in circulation amounted to $15,000,000, and the whole of them were likely to be lost if the Liberal government was suffered to consolidate its power uninfluenced by foreign coercion. Against these combinations, therefore, of political and pecuniary interests, supported by powerful influences within and without the state, the government of President Juarez had no defense except in the confidence of the Mexican people and the sympathy of the government and people of the United States—the one exhausted by a civil war just ending, the other paralyzed by a similar struggle just beginning.

The civil war in Mexico had exhausted the resources of the country, and the government was bankrupt. Bands of marauders under the chiefs of the church party, the same which had massacred the wounded prisoners and beardless boys at Tacubaya, and the foreign surgeons who humanely attended them (which chiefs the intervention afterward took into its alliance), ravaged the country, filling it with murders and nameless crimes. The illustrious patriot, Ocampo, retired to private life, among others was ruthlessly put to death.

The only available resources of the government in such an emergency were the customs revenue. *Seventy-seven per cent* or more of these were pledged

for the regular payment of the interest and principal of the debt due English, French, and Spanish subjects.

On the 17th of July 1861 the Congress suspended for two years all payments, "including the assignments for the loan made in London, and for the foreign conventions," and recovered the complete product of the federal revenues into the treasury. The government placed this suspension upon the ground of necessity, imperious by reason of the perils of society.

This deplorable measure furnished the English and French ministers (the representative of Spain had been expelled) an occasion to break off diplomatic relations with the Liberal government, which they promptly and without reluctance embraced, July 25, 1861.

In the mean time the Mexican exiles (headed by Almonte, Miramon, Padre Miranda, etc.), assisted by the pecuniary interests compromised by the overthrow of the Miramon government, were laboring at European courts for intervention in support of a monarchy in Mexico to be founded on the conservative elements represented to be powerful in that country. The time was propitious. The progress of the rebellion in the United States induced a hasty belief among the partisans of monarchy in Europe in the destruction of the American Union, and the consequent failure of republican government. The embarrassments of the Government of the United States and the dangers which encompassed it suggested and encouraged European pretensions in the affairs of this continent. Santo Domingo and Mexico presented irresistible enticements. Both, it was thought, offered opportunities to limit the growth of the United States and secure existing European dependencies on this continent whether the rebellion in that country succeeded or failed.

Moreover, let us add to this, that Spain, France, and England had grievances against Mexico to redress, more or less serious, and some of them very just. Accordingly, Spain, probably hearing by "the fine ear of Europe", that France and England contemplated a combined movement against Mexico, herself took the lead, issued orders for the reinforcement of the garrison at Havana, and for the preparation of an expedition to be directed against Vera Cruz and Tampico, and then invited the co-operation of the other two powers. (Earl Cowley to Lord Russell, September 5, 1861; and same to same, September 10, 1861, and September 17, 1861; also, Sir J. Crampton to Lord J. Russell, September 13, 1861, and September 16, 1861.)

A complete unison of action in Mexican affairs between the cabinets of London and France was earnestly desired by M. Thouvenel as early as September 5, 1861, and that early he wished to obtain the opinion of Lord Russell as to whether the association of the Spanish Government in the affair might not be advisable.

The views of the different signatories to the subsequent treaty of London, in the beginning, were rather ill-defined or purposely obscured.

One is very much puzzled to ascertain the real purpose of Spain in the beginning—Spain that took the lead, and furnished the largest force, first to reach Vera Cruz, and first to leave it.

She started full of dreams born of ancient recollections, and perhaps saw in the distance a prince of the house of Bourbon on the throne of Mexico, but finally fell into the views of the English cabinet; still, however, down to the conferences at Orizaba expecting something to "turn up" for her advantage. When, however, at Orizaba she saw the French Emperor (having reinforced his military contingent) leading the Austrian prince by the hand, she embarked her troops, decimated by disease, and returned to Havana.

England hesitated in the beginning, but as the affair progressed her views narrowed and became more distinct.

M. Thouvenel, after communicating to Lord Russell through the Count de Flahault his views in reference to several contingencies that might be realized, proceeds to say that he "is, however, of opinion that the two governments should carry their common understanding still further, and devise means for promoting the political reorganization of Mexico," etc.

In reply the English minister says: "With respect to the measures to be taken for the future peace and tranquillity of Mexico, Her Majesty's government are ready to discuss the subject with France, Spain, and the *United States.* But it is evident that much must depend on the actual state of affairs at the time when our forces may be ready to act on the shores of Mexico." (Lord J. Russell to Earl Cowley, September 23, 1861.)

Afterward, however, the cabinet of London seems to have reduced its views to the very well-defined objects set forth in the treaty of October 31 following.

The government of His Majesty the Emperor, from the first, knew what it wished to accomplish by intervention, and, without giving its ulterior designs too much prominence, explained them to its allies with sufficient frankness.

On the 11th October 1861, while the means of combining the action of the two governments were under discussion, M. Thouvenel, in a dispatch to Count Flahault, rehearses a conversation had with the ambassador from England, and of which the latter was to give an account to his government.

Her Majesty's government, it seems, was ready to sign a convention with France and Spain to the end of obtaining redress by force from Mexico for certain grievances, etc., provided it should be declared in said convention that the forces of the three powers were not to be employed in any ulterior object whatever it should be, and above all not to interfere with the interior government of Mexico.

M. Thouvenel was perfectly agreed that the grievances of the respective governments, together with the means of redressing them, and of preventing them in the future, constituted alone the object of an "ostensible convention." He admitted, also, without difficulty, that the contracting parties might

bind themselves not to derive any political or commercial advantage to the exclusion of each other, or of any other power; *but, beyond this, to interdict in advance the eventual exercise of a legitimate participation in the events which their joint operations might originate, seemed to him of no use.*

M. Thouvenel was of opinion also that it was evidently to the interest of France and England (Spain is not here in his thought) to see established in Mexico a state of things that would secure the interest existing already, and favor a development of the exchanges of the two countries with a land so richly endowed. The events just then taking place in the United States, M. Thouvenel thought, added new importance and (he was pleased to say) *urgency* to these considerations. He was led to suppose that, if the issue of the contest between the North and South should accomplish their definitive separation (a different eventuality seems not to have been contemplated) both confederations would naturally look to Mexico for compensations. The only obstacle which would prevent such an event, not indifferent to England, in the opinion of the Emperor's government, would be the constitution of a government in Mexico strong enough to redress wrongs and stop interior dissolution. The interest of France and England in the regeneration of Mexico would not allow them to neglect any symptom giving hope of the success of an attempt. As to the form of government, England and France had not any preference, provided it afforded sufficient guaranties. But if the Mexicans themselves, tired of trials, decided to react—should come back, and, consulting the instinct of their race, find in monarchy the repose and prosperity which in vain they looked for in republican institutions, M. Thouvenel did not think the two governments ought absolutely to refuse to aid them, if there was a chance, bearing, nevertheless, in mind that they were perfectly free to choose whatever means they might think best to attain their object.

The respect shown for the principle of nonintervention and the will of the people in the foregoing by the Emperor's government is only equalled by the disinterestedness and prevision of what follows. Says M. Thouvenel:

"In developing these ideas in the form of an intimate and confidential conversation, I added that in case my prevision was to be realized, the government of the Emperor, disengaged from all preoccupation, rejected, in advance, the candidature for any prince of the imperial house; and that, desirous to treat gently all susceptibilities, it would see with pleasure that the election of the Mexicans and the assent of the powers should fall on some prince of the house of Austria."

Summing the whole up, M. Thouvenel said, in a word, to Her Majesty's minister, that in drawing up the convention they should say what they would do, but not what they would not do.

We learn also from this interesting dispatch that it was the wish of the English cabinet that the United States should become a party to the convention. M. Thouvenel, however, could not then have desired such a result.

These opinions of the French minister seem to have been heartily concurred in by the Spanish minister, M. Calderon Collantes, who even thought it better to abstain from going to Mexico at all than to go under the conditions proposed by the English project. (Barrot to M. Thouvenel, October 21, 1861. See also dispatch from same to same, November 6, 1861.)

Even after the treaty was signed the Duke of Tetuan unhesitatingly adhered to the opinion of the government of the Emperor. He authorized the French minister to inform his government that very "elastic" instructions would be given the Spanish commander.

At all events, the English cabinet placed its views in the treaty, and the three powers signed it on the 31st October 1861 at London, none of them deceived (I most surely believe) as to the purposes of the intervention, unless it was Spain.

The English cabinet was entirely possessed of the Emperor's purpose to avail himself of eventualities (and to create them, for that matter) for the purpose of introducing a monarchy into Mexico; and was not unwilling to see the experiment tried at the cost and upon the responsibility of the French.

The contingency of a march on the City of Mexico was foreseen by the English minister, but he was careful to instruct his plenipotentiary that while he had nothing to say against "the measures in contemplation", nevertheless, the 700 marines, constituting the whole of Her Majesty's forces co-operating, were not to join in such expedition. (Lord Russell to C. Wyke, November 15, 1861.)

In the mean time the United States Government was not an unconcerned observer of this combination against its neighbor. That government conceived itself so far interested that it offered to the cabinets of London, Paris, and Madrid to guarantee the interest upon the debts of Mexico secured by conventions with these powers, including the London loan, for five years, provided they would refrain from the employment of force against their helpless debtor. (Mr. Seward to Mr. Adams, August 24, 1861, No. 71; same to Mr. Corwin, same date; Lord Lyons to Earl Russell, September 10, 1861; Mr. Adams to Mr. Seward, September 28, 1861.)

In reference to this proposition M. Thouvenel observed to the English minister resident at Pans: It might not be possible to prevent the United States from offering money to Mexico, or to prevent Mexico receiving money from the United States, but neither England nor France ought in any way to recognize the transaction. (Earl Cowley to Lord J. Russell, September 24, 1861.)

Lord Russell put the proposition aside by remarking to Mr. Adams that the offer was not co-extensive with their demands. Yet it is certain both England and France broke off diplomatic relations with Mexico on account of the law of July 17, 1861, suspending for two years the payments on these debts. To prosecute a war against the constitutional government of Mexico, at the moment exhausted by the civil war, for the remainder of their pecuniary claims would seem to be not only cruel, but unwise on the part of these governments. Few

of the wrongs complained of could be attributed to the government of Jaurez, while nearly all had been inflicted, sometimes with savage barbarity, by the party of Zuloaga and Miramon.

The loan by the United States to Mexico of $2,000,000 a year would have recovered the customs into the Mexican treasury, and have enabled the government to restore its finances and settle all just demands. The acceptance of it by the allies would have given peace to a distracted land and spared it all those miseries which for five years were poured out on it, to no end except the enduring disgrace of the European intervention.

We now know that the offer of the United States was rejected because the objects sought by the allies were not simply pecuniary; and, above all, did not contemplate an increase of the influence of the United States.

This government, the moment it was apprised of the conference looking to a combined intervention, sought explanations of the powers, expressing its considerable alarm and deep concern. (Mr. Seward to Mr. Adams, September 24, 1861; same to Mr. Dayton, November 4, 1861; Lord Russell to Earl Cowley September 27, 1861; Mr. Seward to Mr. Adams, October 10, 1861; Mr. Schurz to Mr. Seward, September 7, 1861.)

The answers were uniformly reassuring, and disavowed any designs upon the territory or independence of Mexico, or any purpose to intervene in the internal affairs of the country.

Such, however, was the friendly concern of the United States for its neighbor republic, and its conception of its own interest in this alarming movement of the powers, that it communicated to the cabinets of London and Paris its willingness to enlarge its offer of pecuniary assistance to Mexico, if this might dispense with the use of force against that republic; but no notice seems to have been taken of this offer, the cause having already been judged. (Mr. Seward to Mr. Adams, October 10, 1861; Lord Lyons to Lord J. Russell, October 14, 1861.)

The treaty of London was signed October 31, 1861, and by its terms the United States was to be invited to become a party.

It seems probable that the allies would never have decided to discuss and settle by themselves the stipulations of a treaty naturally so interesting to the United States, and to which that power was to be invited to affix its signature, only after everything had been arranged, except for the prevalence of the civil war in that country.

The treaty was communicated to the Government of the United States by the ministers at Washington of the allies, by a joint note, November 30, 1861, inviting the United States to accede to it.

Mr. Seward declined this invitation by a reply dated December 4, in which he admitted that the United States had claims to urge against Mexico, but that the President deemed it inexpedient to seek satisfaction of those claims at that time through an act of accession to the convention. For this declension two reasons were urged, the first founded on traditions derived from Washington,

the father of his country, who recommended that entangling alliances with foreign nations should not be made. The second was couched in these words:

"Mexico being a neighbor of the United States on this continent, and possessing a system of government similar to our own in many of its important features, the United States habitually cherish a decided good will toward that republic, and a lively interest in its security, prosperity, and welfare. Animated by these sentiments the United States do not feel inclined to resort to forcible remedies for their claims at the present moment, when the Government of Mexico is deeply disturbed by factions within, and war with foreign nations. And, of course, the same sentiments render them still more disinclined to allied war against Mexico."

Upon the 17th of December following, the commander of the Spanish forces took possession of Vera Cruz, and the castle of San Juan de Ulloa.

The 23d of November previous the law of 17th July 1861, suspending payments had been repealed, and payments according to the convention ordered.

The French and English armaments arrived subsequent to the Spanish, and on the 10th of January the plenipotentiaries issued their proclamation to the Mexicans from Vera Cruz. This emphatically denied plans of conquest and restoration, and purposes of interfering in the politics or the government of the country. The Mexicans were invited to the work of regeneration, over which spectacle the allies were to preside impassively. Even the supreme government of Juarez was addressed.

On the 17th of January the government of the Emperor, dissatisfied with the precipitation of his Spanish ally and deeming it inevitable that the allied forces must march into the interior of Mexico, informed the English Government of its intention to reinforce the French troops in Mexico.

The preliminaries of Soledad followed, February 19. It was a negotiation with the government of Juarez, acknowledging its strength and stability, resting on public opinion, and protesting the purpose of the allies not to attempt anything against the independence, sovereignty, and integrity of the territory of the republic, and providing for the opening of negotiations at Orizaba.

These preliminaries were condemned by all the allied governments; severely so, at first, by the Spanish, and uniformly and unqualifiedly so by the French Government.

Moreover, a difference had developed itself among the plenipotentiaries with reference to the French ultimatum. The French claims had swollen to twelve million piasters, leaving others of more recent date to be ascertained and added, and for the first time the Jecker bonds were brought forward by M. de Saligny. General Prim and Sir Charles Wyke were rather indignant; the affair wore the aspect of an intrigue and of oppression. The spirit manifested boded no good for the future. The commissioners, however, with fresh advices

from Europe, proceeded toward the conference of Orizaba, set for the 15th of April, but a final rupture took place on the 9th of that month.

General Miramon had before made his appearance, with Padre Miranda and others, at Vera Cruz. Sir Charles Wyke, remembering the plunder of the English legation of six hundred and sixty thousand piasters, denounced Miramon as a robber, and demanded his expulsion from the allied camp. But now at Orizaba, General Almonte, direct from the court of the Emperor and the palace of Miramar, made his entry, and spoke of a march on the capital in the name of the monarchy and Maximilian. He said he had the Emperor's license, "the confidence of the French Government, and came to re-establish monarchy in Mexico in favor of an Austrian prince."

In effect the English and Spanish argument was: "We have all assumed the attitude of people coming to negotiate; how can we take that of people having in their camp a leader of insurrection?" This was quite true, and the French admiral could not gainsay it, and M. de Saligny did not pretend to conceal the fact that *he* had never wished to negotiate with Juarez, and that he had always been of the opinion that a monarchy should be substituted for the republic.

The Spanish and English plenipotentiaries required the expulsion of Almonte. M. Jurien de la Gravière, without repeating M. de Saligny's declaration for a monarchy, said that he had *orders;* that General Almonte had the confidence of his government, and that they could not compel him to leave the ranks of the French army. The French declined to await the 15th of April, with a view to an effort to treat with Juarez, but marched out of the position assigned under the preliminaries of Soledad, and the English and Spanish went home.

From this time forward the intervention is relieved from all obscurity. Its design is set forth in a dispatch from Earl Cowley to Earl Russell, dated May 2, 1862, in these words:

"I would deceive your lordship if I concealed from you my personal conviction that there exists a fixed determination, though not avowed, to overturn the government of Juarez whatever may be the consequences of that act, and whether civil war results from it or not."

General Prim, in his letter dated Orizaba, April 14,1862, and published in the Spanish newspapers shortly afterward, says:

"The triple alliance no longer exists. The soldiers of the Emperor remain in this country to establish a throne for the Archduke Maximilian—what madness—while the soldiers of England and Spain withdraw from Mexican soil." He could not support this radical change in the treaty of London, and the political system of Mexico, (being "a Spaniard,") "*if a prince of the Austrian monarchy was to be imposed on it.*"

However, His Majesty the Emperor of the French makes his designs on Mexico clear from the beginning by his letter to General Forey dated Fontainebleau, July 3, 1862. This historical document contains specific instructions. The French army was to march on the capital. When this was reached

General Forey was to have an understanding with the *notable* persons of every shade of opinion who might have espoused the *French* cause. Those notables, in pursuance to such understanding, should organize a provisional government, which would submit to the Mexican people the question of the form of political rule which should be definitely established, etc. But the Emperor himself, always ruling by virtue of the popular will, is careful to respect this principle. He says, therefore:

"The end to be obtained is not to impose upon the Mexicans a form of government which will be distasteful to them, but to aid them to establish, in conformity to their wishes, a government which may have some chance of stability and will assure to France the redress of the wrongs of which she complains."

Possibly some absurd persons may be found who will ask General Forey why the Emperor should spend men and money to establish a regular government in Mexico, and to such the Emperor furnishes an answer. He says:

"In the present state of the world's civilization Europe is not indifferent to the prosperity of America, for it is she which nourishes our industry and gives life to our commerce. It is our interest that the Republic of the United States shall be powerful and prosperous, but it is not at all to our interest that she should grasp the whole Gulf of Mexico, rule thence the Antilles, as well as South America, and be the sole dispenser of the products of the New World. . . . If, on the contrary Mexico can preserve its independence and maintain the integrity of its territory, if a stable government be there established with the aid of France, we shall have restored to the Latin race on the other side of the ocean its force and its prestige; we shall have guaranteed the safety of our own and the Spanish colonies in the Antilles; we shall have established our *benign* influence in the center of America, and this influence, while creating immense outlets for our commerce, will procure the raw material which is indispensable to our industry."

Added to all this, the gratitude of regenerated Mexico would always favor the beneficent source of her blessings. Such was the programme and such the reasons in support sketched by the hand of a man then supposed to be the ablest politician in Europe. This, however, was before the days of Sedan; well, it was even before the noble Carlotta lost her reason and Maximilian his life.

It will be seen that the Emperor sent the treasures and the brave soldiers of France to Mexico not merely to enforce violated rights, but, as M. Billaut, minister without portfolio, in a debate in the French Chambers, February 1863, after some admirable declamation about the Crimea, Italy, China, etc., observed with great effect, glancing next toward Mexico, "There, also, great political vistas are open to clear-sighted eyes; diverse interests come in contact, and it is not opportune to neglect them."

What the clear sight of the Emperor beheld as the fruits of the intervention, therefore, were these:

1. A pecuniary redress of wrongs suffered by Frenchmen, including payment under the conventions.

2. The regeneration of Mexico under a stable monarchy with an Austrian prince.

3. An insurmountable barrier to the too great expansion of the Anglo-Saxon race in the New World, represented by the United States, by restoring the power and prestige of the Latin race.

4. A benign French influence in the center of America, founded on the gratitude of Mexico, and creating immense outlets for French commerce.

After a long delay, some disasters to the French arms, and a resistance not foreseen by the Emperor and his advisers, General Forey, largely reinforced from France, entered Mexico on the 10th of June 1863. Almost the entire Mexican nation, including all parties, were in arms or in opposition to the intervention. Only one shade of political opinion sustained the French cause. General Forey at once proceeded to organize the Emperor's benevolent plan of government in order that the Mexican people might freely manifest their wishes as to their form of rule; and, as the Mexican nation was, with singular unanimity, outside the French lines, supporting the constitutional government, it was not General Forey's fault that his choice of a body of notables was limited to a small area and number of persons compared with the whole territory and population.

The indefatigable M. de Saligny took upon himself the whole labor of digesting a plan of government for the Mexican people and selecting its agents. He made a lucid and able report to General Forey, June 16, 1863, which was adopted by that distinguished officer and the same day carried out by a decree signed "Forey, General of Division, Senator of France, Commander-in-Chief of the Expeditionary Corps in Mexico."

This decree provided that a special decree should designate a superior junta of government, composed of thirty-five Mexican citizens, according to the recommendation of the Emperor's minister. This junta should nominate three Mexican citizens, charged with the executive power, and two substitutes for these high functions. (The archbishop was still absent in Europe.) The junta should choose from the Mexican citizens, without distinction of rank or class, 245 members, and these, associated with the junta, should constitute the assembly of notables. This assembly should occupy itself especially with the form of the permanent government of Mexico. The sessions of the junta and notables should not be public; in short, they were to be secret. Other minor particulars of this decree may be omitted.

Two days afterward General Forey, by special decree, named the thirty-five persons who were to constitute the superior junta. They all belonged to the defeated party of Zuloaga and of Miramon, Sir Charles Wyke's robber, recently expelled by the allies from Vera Cruz. This junta named for the executive functions:

First. His Excellency Don Juan N. Almonte, general of division.

Second. The most illustrious Senor Don Pelagio Antonio de Labastida, archbishop of Mexico.

Third. His Excellency Don Mariano Salas, general of division.

The substitutes were Ormaechea, bishop elect of Tulancingo, and Pavon, president of the supreme court.

Forey by proclamation, sanctioned, the assumption of executive power by this triumvirate, to date from 24th June.

The notables, nominated from the population of the city, assembled, and on the 10th July 1863 adopted and promulgated this decree. Its importance on the question under investigation requires its insertion entire:

> The assembly of notables, in virtue of the decree of the 16th ultimo that it should make known the form of government which best suited the nation, in use of the full right which the nation has to constitute itself, and as its organ and interpreter, declares with absolute liberty and independence as follows, viz:
>
> 1. The Mexican nation adopts as its form of government a limited hereditary monarchy, with a Catholic prince.
>
> 2. The sovereign shall take the title of Emperor of Mexico.
>
> 3. The imperial crown of Mexico is offered to His Imperial and Royal Highness the Prince Ferdinand Maximilian, Archduke of Austria, for himself and his descendants.
>
> 4. If, under circumstances which can not be foreseen, the Archduke of Austria, Ferdinand Maximilian, should not take possession of the throne which is offered to him, the Mexican nation relies on the good will of His Majesty Napoleon III., Emperor of the French, to indicate for it another Catholic prince.
>
> Given in the hall of sessions of the assembly on the 10th of July 1863.
>
> Teodosio Lares
> *President, etc.*

The next day the notables completed their labors by vesting the regency of the empire, until the arrival of the sovereign, in the executive triumvirate already theretofore created.

Here was a slight departure, it must be confessed, from the programme laid down in the Emperor's letter to General Forey. This, in terms, provided that the provisional government to be established by an understanding between Forey and the notables should "submit to the Mexican people the question of the political *régime* which is to be definitely established."

The notables knew the futility and the impossibility of submitting their work to approval and ratification by the people of Mexico. Nevertheless M. Drouyn de l'Huys, not insensible to public opinion, to say nothing of the committals of the Emperor, wrote on the 17th of August following to General Bazaine, then

in command of the French forces in Mexico, that it was indispensable that the scheme of the notables should be ratified by the popular will, and he was directed to collect the suffrages in such a manner that no doubt should hang over the expression. The mode of ascertaining this will was left to the general, but this essential point was commended to his constant care by the Emperor.

The reply made by the Archduke in October following (the 3d) to the deputation, headed by Senor Estrada, which offered him the crown, made known that his acceptance of the offered throne must depend upon the result of the vote of the whole country.

These instructions were very embarrassing to General Bazaine. In point of fact, he could not carry them out. He had under his control a very small part of the Mexican people and soil. Even his lines (incessantly penetrated by a hundred guerrilla bands) embraced but about one-eighth of the population and one-thirtieth of the territory. The Emperor surely had not looked at a map of Mexico. Bazaine might overawe the 700,000 people in reach of his arms, but outside 7,000,000 sustained the government of Juarez. There was no remedy for it but a campaign against the Mexicans in order to collect their votes.

The military results of that campaign in 1863–64 will appear when I come to describe the territory occupied by the French troops in June following, the date of the entry of Maximilian into the capital.

Just exactly how Marshal Bazaine collected the suffrages, in obedience to the particular charge given him by the French Emperor through his minister, M. Drouyn de l'Huys, it is difficult to determine, for after a patient search I have nowhere been able to find his official report.

This much is certain, that the decree of the assembly of notables was never submitted to any vote of even that part of the people subject to the control of the French arms.

What seems to have been done in obedience to the orders of the great champion of universal national suffrage, and to satisfy the scruples of the coy prince at Miramar, was simply this: A circular dated December 2, 1863, under the orders of the regency, was issued by the subsecretary of state and government dispatch, José Maria Gonzalez de la Vega, directed to a few political prefects appointed and upheld by the French, notifying them that private letters and reports addressed to the regency by "reliable persons" assured that as soon as the empire is recognized by four or five principal departments of the interior his Illustrious and Royal Highness the Archduke Ferdinand Maximilian would commence his march; and these prefects are directed to procure this recognition.

In response to this circular the prefects of Pachuco, of the first district of Mexico, and of Puebla, and perhaps a few others, under date 4th December 1863, certify that it being beyond doubt that the departments mentioned in the circular will be occupied by the French forces in a few days, the inhabitants will joyfully manifest their adhesion. One even reports, as already held, on the 29th November, *a fête champêtre,* under the auspices of the French officers, at

which the inhabitants, in a delirium of joy, rang bells, fired off rockets, and sent up two balloons with the names of the Emperor and Empress upon them.

It is probable that a number of municipalities within the territory overrun by the French arms, and completely, by appointment or otherwise, in the French interest or under its control, signified their adhesion to the decree of the notables.

Both Maximilian and Mejia, in their defense before the court martial at Queretaro, relied alone upon the vote of the notables, and "the adhesion of many municipalities remitted to the Emperor-elect." (Mexican Documents, 1867, page 53 [40th Congress, 1st session, S. Ex. Doc. No. 20], published by the United States Government, and extract from the defense of General Mejia annexed hereto.)

I append hereto some translations of these prefect reports from the *Periodico Oficial,* published at the City of Mexico December 15, 1863.

In this reckless manner the French general and his government paltered with their solemn pledges and the sacred right of a people to form and regulate their own internal government.

Maximilian, furnished with such evidences of the popular will, "began his march" from Miramar on the 11th of April, and entered the City of Mexico on the 12th day of June 1864, accompanied by that excellent, amiable, and most unfortunate princess, Carlotta.

At this date only so much of the extensive territory of Mexico as was occupied by the French troops owned the rule of the new Emperor.

The only States then wholly occupied by the invaders and their few and feeble Mexican allies were Mexico and Yucatan. In Vera Cruz they held the port and the towns on the line to the City of Mexico. The rest of the State, including over twenty towns, adhered to the constitutional government, and was defended by several thousand troops.

In Puebla the only point held by the French was the capital of the State. The rest of its territory was in the armed possession of the state and federal governments. In Michoacan, Morelia and the towns on the line to Mexico were occupied. The state government at Pastcuaro and Rivas Palacio (of excellent fame), with federal troops, dominated the rest of that State. So in Guanajuato the French held the capital and the town of Leon alone. The rest of that important State adhered to the republic.

In San Luis Potosi the French likewise held the capital, but the state government and federal forces, five thousand strong and well disciplined, held the remainder of the territory.

In Tamaulipas only the port of Tampico was occupied.

In Jalisco the enemy was confined to the capital by a force ten thousand strong under General Uraga. In Zacatecas and Toluca the French likewise held the capitals.

The constitutional government held undisputed sway over the States of Nueva Leon, Coahuila, Chihuahua, Sonora, Sinaloa, Oajaca, Chiapas, Guerro, Durango, Tabasco, Lower California, Colima, and Tehuantepec. From this perhaps we must except the ports of Acapulco and Mazatlan, on the Pacific.

If, now we consult a map and table of population, we will see that the French held on the 12th June 1864 about one-thirtieth of the Mexican territory and less than one-tenth of the population. Outside of the French lines was an inflamed, united, and hostile people.

The new Emperor was without an army or a fleet. His revenues were pledged in advance for debts which they were unable to carry. His only real military support was the French expeditionary corps, and his only pecuniary resource a fragment of a loan raised under French patronage at a most usurious rate. The support given by the party which "brought the Moors into Spain", was not only feeble, but treacherous. Under such circumstances the young Austrian began the desperate adventure of subduing and pacifying the country, and founding a monarchy in Mexico. The result is now known. His rule was as wide and his power as ample the day he entered the capital as at any future period.

The party of the republic was led by a man of no ordinary endowments. He was a republican and a reformer who had laid the ax to the root of the tree. He believed in his cause and his countrymen. He was upright, patriotic, temperate, patient, resolute—for that matter, obstinate. Difficulties never deterred, defeats never discouraged him. Supported by the best and bravest of Mexico, he carried the flag of national independence and republican self-government from the capital to the remotest border of the land, until, by the unaided efforts of his countrymen, he brought it back to the ancient city in triumph.

Substantially the whole Mexican people supported the constitutional government. There was no party of the monarchy that deserved the name. The presence of a victorious French army failed to develop such a party.

Says General Prim, in his letter to the French Emperor, dated Orizaba, March 17, 1862:

"I have, moreover, the profound conviction that the partisans of monarchy are very few in this country. . . . The vicinity of the United States, and their severe reprobation of monarchy, has contributed to create a hate for it here. . . . For these reasons and others that can not escape the attention of your Imperial Majesty, you will understand that the general opinion of this country is against monarchy. If logic does not demonstrate it, facts prove it, for during the two months that the flags of the allied powers floated over Vera Cruz, and now that we occupy Cordoba, Orizaba, and Tehuacan, important towns where there is no Mexican force, the partisans of monarchy have made no demonstrations to tell of their existence."

General Prim's appreciation of the real truth appears where he says:

"You can easily carry Maximilian to Mexico and crown him king, but the King will find no adherents in the country but conservative chiefs," etc.

This is literal. The people were almost unanimous in their hatred of monarchy and foreign intervention; only defeated chiefs and a despoiled hierarchy were the support of the new monarch. If the late French Emperor, in his unfortunate exile, should again read the letter of his former friend, General Prim, fallen, too, in a world of changes, he will be struck with these words—

"A few rich men are willing to receive a foreign monarch who comes supported by your Majesty's soldiers, but the monarch will have nothing to sustain him when the time shall come for your soldiers to withdraw, and he will fall from the throne, as others will fall, when the mantle of your Imperial Majesty shall cease to protect and defend them."

In like manner Sir Charles Wyke as late as March 27, 1862, with ample opportunities of observation, and no faith in republican government, was of opinion that a party in Mexico "did not exist" favorable to monarchy (dispatch to Lord Russell); and although this gentleman had no partiality for President Juarez, he expressed the opinion in the final conference between the Spanish, French, and English plenipotentiaries, at Orizaba, April 9, 1862, that a majority of the Mexican people was favorable to the existing government, and that it would be difficult to find partisans of a monarchy.

Earl Russell also communicates to Earl Cowley, British minister resident at Paris, June 14, 1862, his information "that the majority of the Mexican people were liberal and republican, and that it would be impossible for the French troops to establish monarchy in Mexico with any chance of stability."

The opinion of the American Government, equally enlightened, emphatic, and sound, never underwent any change or modification from the beginning of the intervention until its final eclipse in the blood of the victim of the French Emperor. March 3, 1862, Mr. Seward addressed these weighty words to the American ministers at London and Paris:

"The President, however, deems it his duty to express to the allies, in all candor and frankness, the opinion that no monarchical government which could be founded in Mexico, in the presence of foreign navies and armies in the waters and upon the soil of Mexico, would have any prospect of security or permanency. . . . Under such circumstances the new government must speedily fall unless it could draw into its support European alliances, which, relating back to the present invasion, would, in fact, make it the beginning of a permanent policy of armed European monarchical intervention injurious and practically hostile to the most general system of government on the continent of America, and this would be the beginning rather than the ending of revolution in Mexico."

The same minister, in a dispatch to Mr. Dayton of 26th September 1863, expressing the solicitude of the Government of the United States awakened by the progress of the war of intervention, says: "This government knows full well

that the inherent normal opinion of Mexico favors a government there republican in form and domestic in its organization in preference to any monarchical institutions to be imposed from abroad."

And again, as late as December 6,1865, Mr. Seward, in a dispatch to the French minister in Washington, holds this language: "Having thus frankly stated our position, I leave the question for the consideration of France, sincerely hoping that that great nation may find it compatible with its best interests and its high honor to withdraw from its aggressive attitude in Mexico within some convenient and reasonable time, and thus leave the people of that country to the free enjoyment of the system of republican government which they have established for themselves, and of their adherence to which they have given what seems to the United States to be *decisive and conclusive, as well as very touching proofs.*"

This accumulated testimony is rendered conclusive by the subsequent history of this attempt to found a monarchy in Mexico. The people and government of that country never ceased their armed resistance to this invasion of the foreigner. Hundreds of combats were fought and many thousand brave Mexicans laid down their lives for their native land and well-derived rights. The contest raged in every State where the invading foe was found; even the line from the capital to Vera Cruz was incessantly assailed, and frequently cut; the empire consisted only so to speak, of the ground upon which stood the feet of foreign soldiers. *These* were the empire; when these were withdrawn, as General Prim had assured his Imperial Majesty the Emperor of the French, the costly but unsubstantial fabric which he had erected fell, and the poor play ended.

At the time Maximilian entered his capital the rebellion in the United States was drawing to a close. The organized power of that republic at that moment was grinding to pieces on the fields of Virginia that great revolt which may be truly styled the enemy of the whole continent, since it had revived the alliance of kings against America, an alliance in a former age baffled by President Monroe.

As soon as the United States had ended its formidable domestic troubles it brought its powerful influence to bear to procure the withdrawal of the French army from Mexico. The efforts of Mr. Seward to this end were unceasing, adroit, and resolute. He had steadily refused to recognize the Maximilian government, and had uniformly made known to the French and other European cabinets that the United States maintained the most friendly relations with the republican government of President Juarez. October 23, 1863, he writes Mr. Dayton; "M. Drouyn de l'Huys should be informed that the United States continue to regard Mexico as the theater of a war which has not yet ended in the subversion of the government long existing there, with which the United States remain in the relation of peace and sincere friendship; and that for this reason the United States are not now at liberty to consider the question of recognizing a government which in the further chances of war may come into its place."

So, again, on the anniversary of the entry by the new Emperor into his capital, June 12, 1864, Mr. Seward writes the United States chargé at Paris: "It is already known to the government of France that the United States are not prepared to recognize a monarchical and European power in Mexico, which is yet engaged in a war with a domestic republican government and a portion of the Mexican people."

On the 30th of the same month, writing to the same official, Mr. Seward says: "What we hold in regard to Mexico is that France is a belligerent there, in war with the Republic of Mexico."

On the 6th of November following he writes: "The United States still regard the effort to establish permanently a foreign and imperial government in Mexico as disallowable and impracticable. . . . They are not prepared to recognize, or to pledge themselves hereafter to recognize, any political institutions in Mexico which are in opposition to the republican government with which we have so long and so constantly maintained relations of unity and friendship." (Same to same.)

This dispatch adroitly presses the removal of the French forces as a means of preserving "the inherited relations of friendship" between the two countries.

The dispatch of December 16, 1865, from the same minister to Mr. Bigelow, is particularly in point on the question in this case. There in answer to an invitation from His Majesty's government to recognize the institution of Maximilian in Mexico as a *de facto* government, as the price of the withdrawal of the French intervention, Mr. Seward replies, "that the recognition which the Emperor has thus suggested can not be made."

Previously, on the 6th December, Mr. Seward, writing to the French minister in Washington, in answer to the same suggestion from the Emperor, had, with regret, felt "obliged to say that the condition the Emperor suggests is one which seems quite impracticable."

Pressing the withdrawal of the French troops, Mr. Seward insists that "the real cause of our national discontent is that the French army which is now in Mexico is invading a domestic republican government there which was established by her people, with whom the United States sympathize most profoundly, for the avowed purpose of suppressing it and establishing on its ruins a foreign monarchical government, whose presence there, so long as it should endure, could not but be regarded by the people of the United States as injurious and menacing to their chosen and endeared republican institutions."

In reply to this dispatch, M. Drouyn de l'Huys, in a letter addressed to the French minister at Washington January 9, 1866, after seeking to reconcile the proceedings of the Emperor in Mexico with the principle of nonintervention by labored arguments, which have been nowhere more criticised and condemned than in France, announces *that the French Government is hastening to make arrangements with the Emperor Maximilian which, while satisfying its interest and dignity, allows it to consider the part of its army on Mexican soil at an end.*

On the 12th February following Mr. Seward, addressing the Count de Montholon, replies at length to this dispatch. He lays down the position of the American Government on the whole subject with distinctness and much emphasis. He affirms that the proceedings in Mexico adopted by a class of persons to found a monarchy on the ruins of the republic were without authority and prosecuted against the will and opinions of the Mexican people, and that, in supporting these proceedings in derogation of the inalienable rights of the people of Mexico, the original purposes of the French expedition seem to have become subordinate to a political revolution, which would not have occurred had not France forcibly intervened, and which could not be maintained if that intervention should cease; that the United States had not seen any satisfactory evidence that the people of Mexico had called into being or accepted the so-called empire; that they are of opinion that such acceptance could not have been freely procured or lawfully taken at any time in the presence of the French army; that this government, therefore, recognizes and must continue to recognize in Mexico only the ancient republic, and can not consent, directly or indirectly, to involve itself in relation with or recognition of the institution of the Prince Maximilian in Mexico.

Mr. Seward says: This is held without one dissenting voice by his countrymen, and that the judgment of the United States thus expressed has been adopted by every state on the American hemisphere; and that thus the presence of European armies in Mexico, maintaining a European prince with imperial attributes, without her consent and against her will, is deemed a source of apprehension and danger by the United States and all the independent and sovereign republican states on the American continent and its adjacent islands; and he denies that foreign nations can rightfully intervene by force to subvert republican institutions in any one of those states. Seeking relief of the Mexican embarrassments without disturbing the amicable relations of the United States with France, Mr. Seward presses for definitive information of the time when French military operations may be expected to cease in Mexico.

This, in effect, closes the correspondence, for M. Drouyn de l'Huys, in reply, addressing the French minister in Washington April 5, 1866, confines himself to announcing that the Emperor has decided that the French troops should evacuate Mexico in three detachments, the first to depart in the month of November 1866, the second in March 1867, and the third in November of the same year. By a subsequent change of programme the whole force was withdrawn at once, and in the month of February 1867.

While this negotiation was in progress a treaty was arranged between the prince, Maximilian, and the Emperor of Austria for the enlistment of troops in Austria for service in Mexico. Mr. Seward, in a series of dispatches dating from March 19 to April 30,1866, stimulated the American minister in Vienna, Mr. Motley (who seemed to hesitate), to an energetic protest, and, in the event that troops were allowed to depart before an answer to the protest, he was even

ordered to retire from Vienna. In this last dispatch (April 30) Mr. Seward states the real conviction of the people of the United States in a sentence, as follows:

"The European war against the Republic of Mexico has been from the beginning a continual menace against this government, and even against free institutions throughout the American continent."

The protest, however, was effectual, and Count Mensdorff, in his reply dated May 20, assured the United States Government that no troops would be allowed to depart for Mexico.

This practically closed the romantic enterprise in Mexico. The French troops withdrawn, all hope of new recruits from Europe cut off, the empire fell into cureless ruin.

In anticipation of the departure of the foreign troops, the whole people of Mexico rose in arms. The officials and adherents of the so-called empire were seized with a panic and hastened to provide the means of escape from the justice and the vengeance of their outraged countrymen. On the night of September 13, 1867, these guilty betrayers of their country, at Acapulco seized the bark *Francis Palmer,* claimant's vessel, and sailed away after their sole security, the withdrawing French. So it was in every part of the country. The French evacuation was followed by the flight of the imperialistic families, and the liberal forces hung on the retreating rear of the French columns, occupying every evacuated town.

On the 1st of February 1867 Miramon was defeated by General Escobedo at San Jacinto. The second of the same month Colima surrendered to General Corona. On the 5th, the French marched out of the City of Mexico. On the 13th, Maximilian marched for the fatal City of Queretaro. On the 21st, President Juarez, with his ministers, entered the city of San Luis Potosi amidst the joy and acclamations of the inhabitants.

Queretaro and Puebla were speedily invested by the liberal troops. Puebla was taken by storm on the 4th of April by Porfirio Diaz. On the 10th, Marquez, the assassin of Tacubaya, but the lieutenant-general and main prop of the crumbling empire, was defeated and driven into the City of Mexico. Diaz began the siege of the capital with twenty thousand men on the 17th. On the 15th of May Queretaro fell, and Maximilian, with Generals Miramon and Thos. Mejia and his entire force of eight thousand men surrendered at discretion. On the 14th of June, a court-martial, constituted under the orders of the constitutional government and sitting in the theater of Iturbide, at Queretaro, condemned Maximilian, Miramon, and Mejia to be shot. The sentence was approved by the commanding general, Escobedo, and the government, and was carried into execution on the morning of the 19th of June. On the 20th the City of Mexico with its garrison surrendered to General Diaz, but the infamous Marquez had already disappeared and made his escape.

This brief recapitulation of facts, which have now become history, will demonstrate that the empire in Mexico, introduced by the visionary politician, who

then, also, was preparing France for destruction, was sustained only by his bayonets, and fell by the uprising of the people of Mexico the moment these bayonets were withdrawn under the pressure of public opinion in France, and the growing discontent and impatience of the people and government of the United States.

It is believed that in no event would the monarchical substituted for the republican form of government in any state of this hemisphere by armed European intervention ever be recognized by the United States or any other American republic so long as such intervention continued. The United States has been pledged against such intervention for fifty years.

In considering the question of government *de facto,* it will be observed that it was attempted in Mexico, not only to change the person of the ruler, but the form of government, and in a direction opposed to the history, tendencies, and prejudices of every republic in North and South America.

Such a change, in fact, could only be accomplished by invasion from without or revolution within the state. In the former case the force must accomplish a secure and permanent conquest. In the latter the change must be supported by the mass of the people and rest upon their consent. Should foreign intervention aid this change we can never regard the fact as accomplished or as resting upon the favor of the people unless the new government is strong enough to maintain itself after the foreign aid shall be withdrawn.

Here, a French conquest of Mexico was never desired or aimed at.

On the contrary, the government of his Imperial Majesty uniformly declared that there was no purpose of intervention on his part in the internal affairs of Mexico. Having grounds of war against that country the occasion was to be embraced to extend an opportunity to its inhabitants, assumed to be ready to accomplish their own regeneration. In point of fact, the French Emperor, deceived by the Mexican exiles and betrayed by persons near him whom he trusted, but who were interested in Mexican bonds, lands, and mines, overestimated the strength, of the conservatives of that country and the influence of the church, whose power he understood in France. Add to this he miscalculated the result of the rebellion in the United States. His scheme for restoring the Latin race in Mexico (where it never existed) and increasing "immensely" French power and commerce, at best visionary and romantic, would have been simply insane had he not believed the people of Mexico willing to support or accept the monarchy once established by his arms.

A change in the form of government in Mexico as a fact, therefore, never existed, because it never rested for a moment upon the popular consent, and the Emperor never expected to accomplish it by the permanent armed occupation of the country.

However this may be, there can be but one government in the same state at the same time. The French found a government in Mexico when they came there, and recognized it at Soledad; when they left, it was still there, stronger than when they found it; it is there now, stronger than any government Mexico

ever had, having put down all enemies under its feet, the monarchical party crushed by the weight of its crimes and the odium attached to responsibility for foreign invasion.

This government, elected according to the constitution and laws, always in possession of much the largest portion of its territory, was sustained against domestic treason and foreign levies throughout its long and severe trials by the Mexican masses, and upheld by the sympathy of every republican state in the Americas.

But, waiving these considerations, it is impossible for the United States successfully to claim that the so-called empire was a government *de facto.* The government of that country uniformly and expressly refused to regard it as such, when the inducements to do so were strong and the danger of refusing great. On the contrary it recognized the republic and maintained relations of amity and friendship with it to the close, as it had done from the beginning of its trials. This fact must oppose an insuperable barrier to any and all reclamations by the United States against the Republic of Mexico for the acts of the Maximilian authorities, so called. There could be but one government at a time, as a matter of fact, and the United States has determined the question between the two contending parties for itself.

Wisely, the decision could not have been otherwise. The government and people of the United States understood and heartily approved the cause for which the people and government of Mexico fought and suffered; the plan of Ayutla and the constitution of 1857; equal rights secured by a government of all the people; resistance to military and ecclesiastical oppressions; a free religion and a free press; cordial fraternity with the people of all nations.

The anarchy in Mexico of which Europe complains was made by the friends of class privileges, state religions, and monarchy, conservatives of the dregs of old Spanish colonial policy, and abuses founded on ideas which belong only to past ages.

Says Mr. Seward to the Marquis de Montholon, February 12, 1866; "We can not deny that all the anarchy in Mexico of which Mr. Drouyn de l'Huys complains was necessarily and even wisely endured in the attempts to lay sure foundations of broad republican liberty."

But the people of the United States also understood what the intervention in Mexico meant for themselves: the destruction of the republican form; a monarchy on their borders to endanger their peace, menace their institutions, and check their growth; a speculation in their downfall at the hands of the rebellion then raging. A government in the United States that had shown any sympathy with such an enterprise would have sunk beneath the power of public opinion.

Moreover, the people of the United States knew the monarchical attempt in Mexico would fail. They believed the people of that country would crush it; but, in any event, they were of one mind on the subject, and intended, when the hour came, it should fail.

Yet more, the trials of their neighbors, borne so bravely and patiently, had their fullest sympathy. They were too near the scenes of suffering and cruelty to be deaf to the cries of patriots dying for their native soil and national independence. If Europe heard the guns which shot Prince Maximilian to death, Americans, however shocked by their report, yet heard the groans of the victims of his folly and ambition. On the 20th of October 1865, at Uruapan, under a presumptuous and barbarous decree of the pretended Emperor of the 3d of that month, were shot to death prisoners by the fortune of war, Generals Arteaga and Salazar, Colonels Diaz Paracho, Villa Gomez, Perez Milicua, and Villanos, five lieutenant-colonels, eight commanders, and a number of subordinate officers. Hear them a moment, for they were men and brethren.

General Arteaga writes to his mother, Dona Apolonia Magallanes:

"Adored Mother: I was taken prisoner on the 13th instant, and to-morrow I am to be shot. . . . Mama, in spite of all my efforts to aid you, the only means I had I sent you in April last; but God is with you, and He will not suffer you to perish, nor my sister Trinidad, *the little Yankee.*"

And Salazar to another mother:

"Adored Mother: I go down to the tomb at thirty-three years of age, without a blot upon my name. Weep not, but be comforted, for the only crime your son has committed is the defense of a holy cause—the independence of his country. For this I am to be shot. . . . Direct my children and my brothers in the path of honor, for the scaffold can not attaint loyal names."

And Gomez to a father:

"My Dear Father: I employ my last moments in writing to you. . . . I would like to leave an honored name to my family. I have worked for it, defending the cause I embraced; but I could not succeed. Patience!"

Patience did its perfect work at last, and the national cause triumphed for which these martyrs bled. The ashes of Salazar may now repose in peace by the side of his children in his mother's town.

To-day the Liberals of Mexico, in possession of the blessings of national independence and the right of self-government, won at the price of such costly blood, have the opportunity to prove that it was not shed in vain, by union among themselves, moderation toward their opponents, and justice toward all men.

It results from the foregoing investigation that the so-called empire was not a government *de facto*; because, lacking the element of popular support or of habitual obedience from the mass of the people, it rested alone on the assistance of foreign force, which contemplated and extended only a temporary interference, and because another government, disputing successfully its pretensions, bore rule in Mexico as a fact, in possession of much the largest part of the territory, and sustained by the mass of the people.

It further results that the United States, at least, is not now at liberty to claim a government *de facto* for the Prince Maximilian, having always during the contest in Mexico recognized the republic and repudiated the empire—committed no less by the sympathies of its people with the people of Mexico in their arduous struggle for the republican form (endeared to the people of the United States) and liberal principles (which they also cherish) than by their appreciation of the fact that the European intervention attacked the United States and every other republican state in America.

I have said nothing about governments *de jure,* because, outside of the field of moral considerations, a government *de facto* is also a government *de jure.*

I feel assured, moreover, that the Government of the United States can not desire to hold the Republic of Mexico responsible for the acts of the so-called empire by obtaining awards here, which must condemn the stand taken by that government in behalf of republican institutions in its hour of trial and danger; but that this case has found its way here in the name of that government, in pursuance of a purpose to acquit itself of responsibility to claimants, by the final judgment of this impartial tribunal.

For my part, I cheerfully accept the responsibility thus imposed and the labor which belongs to it.

Claimant may have a remedy for the wrong which he has sustained; but he must look elsewhere than to the government of the Republic of Mexico.

It is therefore considered by this commission that the Republic of Mexico is not responsible for the injury complained of herein, and this claim is rejected and disallowed.

Case of Salvador Prats *v.* the United States of America, opinions of the Commissioners[*]

Affaire concernant Salvador Prats c. les États-Unis d'Amérique, opinions des Commissaires[**]

Commissioner of the United States

Civil war—conflict to be governed by the laws of war—question of the recognition by foreign States of the belligerent rights of insurgents—non-recognition by a foreign State does not deprive the United States of any right of war or immunity against this foreign State.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2886.

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State responsibility—question of responsibility of the government for injuries committed by rebel enemies against aliens in time of civil war—non-responsibility resulting from the fact of the belligerency itself and not the recognition of the belligerency of the rebel enemy by foreign States—principle of non-responsibility for acts of rebel enemies having withdrawn themselves from the control and jurisdiction of the sovereign.

Estoppel—having conceded to the United States the exercises of its right of war against it, Mexico was estopped to deny the fact of war or to ignore the changes which the war introduced into the relations between the two governments.

Treatment of foreigners during civil war—special protection to be given to foreigners, viewed as an engagement to treat foreigners equally with citizens and not as granting them a further protection—foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars—after the beginning of the war, no obligation for the government, by treaty or the law of nations, to protect the property of aliens situated inside the enemy country.

Commissioner of Mexico

State responsibility—no responsibility without fault (*culpa*) and no fault (*culpa*) for having failed to do what was impossible—the fault is essentially dependent upon the will, but the will disappears before the force whose action cannot be resisted.

Recognition of rebel forces—foreign governments bound to respect denomination of rebels inflicted on the Confederates by federal authorities.

Treaty interpretation—the term "special protection" shall not be construed as qualifying the protection due to foreign residents in comparison with the one accorded to native residents, but as a superlative tending to ascertain a perfect degree of protection—foreigners not entitled to greater protection than citizens.

Due diligence—duty limited by practical possibility: *ad impossibile nemo tenetur.*

Commissaire des États-Unis

Guerre civile—conflit régi par les lois de la guerre—question de la reconnaissance des droits des insurgés belligérants par les États étrangers—l'absence de reconnaissance par un État étranger ne prive pas les États-Unis de tout droit à la guerre ni de l'immunité envers cet État étranger.

Responsabilité de l'État—question de la responsabilité d'un gouvernement pour les dommages causés aux étrangers par les insurgés en temps de guerre civile—l'absence de responsabilité résulte de l'état de guerre en tant que tel et non de la reconnaissance de belligérance des insurgés par les États étrangers—principe de non-responsabilité pour les actes des insurgés s'étant soustraits au contrôle et à la juridiction de l'État souverain.

Estoppel—ayant concédé aux États-Unis l'exercice de son droit à la guerre contre lui, le Mexique a été empêché de nier l'état de guerre ou d'ignorer les changements intervenus dans les relations entre les deux gouvernements du fait de la guerre.

Traitement des étrangers durant une guerre civile—la protection spéciale accordée aux étrangers est considérée comme un engagement à traiter les étrangers de la même façon que les citoyens, et non comme l'octroi d'une protection supplémen-

taire—les étrangers domiciliés dans un pays belligérant partagent avec les citoyens de ce pays les aléas de leurs guerres—une fois la guerre déclenchée, le gouvernement n'est soumis à aucune obligation de protéger les biens situés sur le territoire du pays ennemi appartenant à des étrangers, que ce soit en vertu d'un traité ou du droit des gens.

Commissaire du Mexique

Responsabilité de l'État—pas de responsabilité sans faute (*culpa*) et pas de faute (*culpa*) pour ne pas avoir réussi à réaliser l'impossible—la faute dépend uniquement de la volonté, mais la volonté cède face à la force dont l'action ne peut être contrée.

Reconnaissance des forces rebelles—les gouvernements étrangers doivent respecter la qualification de rebelles attribuée aux Confédérés par les autorités fédérales.

Interprétation des traités—le terme "protection spéciale" ne doit pas être interprété comme qualifiant la protection due aux résidents étrangers par rapport à celle accordée aux autochtones, mais en tant que superlatif tendant à affirmer un degré complet de protection—les étrangers ne peuvent prétendre à une protection plus importante que les citoyens.

Obligation de diligence—obligation limitée en pratique : *ad impossibile nemo tenetur.*

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Opinion of Mr. Wadsworth, Commissioner of the United States

The commercial house of Prats, Pujol & Co., doing business in the city of New Orleans, on the 2d of April or 7th of January 1862 (the dates are in conflict), shipped on a quasi British brig, the *M. A. Stevens,* 213 bales of cotton, to be delivered at the port of Havana; the brig not to sail, however, until the port of New Orleans should be opened by the United States: so claimant asserts.

This vessel with her cargo and passengers (including a member of said firm) was lying at Barataria when, on the morning of the 27th of April 1862, two days after the capture of New Orleans by the fleet of the United States, commanded by the renowned Admiral Farragut, a naval force in the service of the so-called Confederate States of America, coming up from Fort Livingston, under command of one Henry Wilkinson, burned the brig and cotton to prevent their capture by the vessels of the United States.

Claimant, asserting ownership to one-half the cotton, as a member of said firm and as a Mexican citizen, demands an award in his favor for half the gold value of said 213 bales of cotton at the price then current in the port of Havana.

He claims in his memorial to be by birth a Mexican citizen, always domiciled at Campeachy. The only evidence of domicil offered by him is his own

affidavit, in which he states that he had resided for many years in the city of New Orleans, where he *seems* to have been residing at the time of the loss.

At the time of the destruction of this cotton a civil war was raging between the United States and a portion of its citizens styling themselves "the Confederate States of America"; and this war, conducted both by land and sea on the part of the United States, had then lasted over a year, attaining to large dimensions. Numerous battles between large armies had been fought, and a blockade of the entire coast and all the ports of the so-called Confederate States, including New Orleans, had been proclaimed and made effective by a competent naval force of the United States. Two days before the losses complained of the Confederates held, by force of arms, the entire State of Louisiana, with the city of New Orleans, together with an extensive territory reaching from the confines of Mexico almost to the capital of the United States.

The subsequent history of the contest shows how truly it must be characterized as war and be governed by its laws, although carried on within the State. It required a period of four years on the part of the United States to bring this war to a successful close; employed a million of men in arms, and exhausted several thousand millions of treasure.

It is true that, while other nations prior to the event now under review had made haste to accord to the insurgents belligerent rights, Mexico, animated by friendly sentiments toward the government and people of the United States, withheld such recognition. Nevertheless, the fact remains fixed and undisputed that on the 27th of April 1862 civil war existed, and of the magnitude we have indicated.

The question, then, most prominently presented by this claim of Salvador Prats for our decision is that of the responsibility of a government for injuries committed by its rebel enemies against aliens in time of civil war.

It is attempted in the argument for claimant, however, to vary this question on two grounds, viz:

1st. That since, by the fourteenth article of the treaty of 1831 between the United States and Mexico, each government engages to give its "special protection" to the persons and property of the citizens of the other, transient or dwelling in its territory, etc., each government has thereby contracted to guarantee the safety of such persons and property.

2d. That, as neither the United States nor Mexico ever recognized the so-called Confederate States as a belligerent, the former government is not at liberty to rely upon the fact of belligerency to exonerate itself from responsibility for injuries committed by the insurgents to citizens of the latter, however the question may be changed as to the subjects of those powers who recognized the belligerent rights of the Confederates.

The argument for claimant treats this stipulation for special protection as a guaranty of security under all circumstances; but we do not take that

view of it. The most literal interpretation of special protection can not make an insurance.

The whole article defines the character of this protection and shows that the government merely designed to place aliens, transient or dwelling within their territory, on an equality with citizens in this respect. Herein consists this special protection. Indeed, it stipulates no more than every just government must undertake in behalf of its own citizens within its own jurisdiction. We do not think by this article either of the governments has agreed to afford any more or further protection to strangers within its borders than is justly due to its own citizens, or meant to establish any inequality between subjects and strangers either in the matter of protection or in the mode or measure of redress for injuries to persons or property. Each government *has* given special protection to all having a right to invoke it whenever it does all in its power to enforce *its* laws, repress and punish violence, and put down by force of arms armed revolt.

In these particulars, for aught that here appears, the United States is blameless so far as claimant is concerned. He makes no charge against the United States for failure to enforce her laws before they were overthrown at New Orleans by war; and after the war broke out it will be difficult to deny the magnitude of the sustained exertions of the United States or the sacrifices incurred by that government to suppress and put down the violence of the insurgents.

So, also, we dissent from the view taken of the consequences of the refusal by Mexico to recognize the rebel enemies of the United States as a belligerent power, and placing it thereby on an equality of belligerent rights with the parent government inside the jurisdiction of Mexico. Such refusal did not deprive the United States of the exercise of any right of war or any immunity resulting from a state of war; but merely refused, in a spirit friendly to the United States, to extend those rights to the insurgents.

Nonresponsibility on the part of the United States for injuries by the Confederate enemy within the territories of that government to aliens did not result from the recognition of the belligerency of the rebel enemy by the strangers' sovereign. It resulted from the *fact* of belligerency itself, and whether recognized or not by other governments. But the proclaimed recognition of the fact by a government is conclusive evidence of the fact, and, so to speak, an *estoppel* as to that government. This, probably, is all Mr. Adams meant in his dispatch to Mr. Seward (quoted in an argument, June 11,1861, Diplomatic Correspondence, 105.) If responsibility on the part of the United States in the absence of such recognition is intimated, we do not concur with that distinguished minister, for had Great Britain never recognized the Confederates as belligerents at all, the consequences of the state of war as a fact to Great Britain, as to all other neutral powers, would have been the same: such as the liability of their vessels on the high seas to search and seizure as prize by the armed cruisers of the United States, and to capture for

attempts to violate the blockade. These rights the United States exercised against Mexico and all other nations, and did it in virtue of the fact of war, and not because of the recognition of the belligerency of the insurgents by those powers or any of them. Mexico conceded to the United States the exercise of these rights of war against her, and is equally estopped now with other nations to deny the *fact* or to ignore the changes which the war introduced into the relations between the two governments.

The existence of a civil war the United States could not and did not deny. The whole of it is, that government denied the necessity or propriety of the recognition of its rebel citizens as a belligerent power, when first accorded, at that time and under the circumstances. While such a recognition did not create or change the fact of war, it increased the opportunities of the rebel enemy without increasing or diminishing the rights of the United States growing out of the existence of war.

So far, therefore, as the responsibility of the United States to Mexico in this case is concerned, it is in nowise increased or diminished by the failure of the latter to accord belligerent rights to the Confederates.

The naked question therefore remains: Is the United States responsible for injuries committed during the late civil war within the arena of the struggle by the armed forces of the so-called Confederate States to the property of aliens, "transient or dwelling?"

We have no difficulty in answering that question in the negative.

The Confederate armed forces were in no sense "authorities of the United States" within the meaning of the convention under which we are assembled.

If we admit for the moment that, under the convention, the United States is liable for neglect of a duty stipulated by treaty or imposed by the law of nations, and if such a duty in the present instance be postulated it would be difficult to show such neglect, in view of the history of the late civil war, and particularly of the capture of New Orleans. But no such duty, in fact, rested on the United States after the commencement of the war. That government was under no obligation, by treaty or the law of nations, to protect the property of aliens situate inside the enemy country against the enemy. The international duty of the United States or its engagements by treaty to extend protection to aliens, transient or dwelling, in its territories, ceased inside the territory held by the insurgents from the time such territory was withdrawn by war from the control of that government, and until her authority and jurisdiction were again established over it.

The principle of non-responsibility for acts of rebel enemies in time of civil war rests upon the ground that the latter have withdrawn themselves by force of arms from the control and jurisdiction of the sovereign, putting it out of his power, so long as they make their resistance effectual, to extend his protection within the hostile territory to either strangers or his own

subjects, between whom, in this respect, no inequality of rights can justly be asserted.

Rutherforth has placed it upon this ground in his valuable work. Speaking of the duty of a nation to prevent its citizens from offending against the subjects of other states, and the consequences of neglect in this particular, he says: "But such neglect does not make a nation accessory to the acts of subjects that are in a state of rebellion and have renounced their allegiance, or that are not within its territories, for in these circumstances the subjects, whatever they may be of right, are not under its jurisdiction in fact. (Institutes, p. 509, Second American Edition.)

Aliens residing and trading inside the rebel territory acted at their peril. Indeed, the fact of residence and trade constituted them enemies of the United States in common with the rest of the inhabitants whose "spirit and industry" contributed to the resources of the enemy. The house of Prats, Pujol & Co., conducting business in New Orleans in 1862, was engaged in commerce injurious to the United States. Shipping cotton by that house to Havana from New Orleans, while the latter port was held by the enemy whether blockaded or not, subjected the property to capture on the high seas as prize of war. The fact that one of the house was an alien, even if domiciled in Campeachy would not exempt his share.

We are at a loss, therefore, to perceive on what ground aliens resident in the hostile territory could claim the protection of a power lawfully exercising the rights of war against that territory and all its inhabitants.

It is certain, if the forces of the United States, in the course of their operations to reduce the forts of the enemy below New Orleans and to capture the city, had destroyed the vessel and cotton, that government would not thereby have incurred any responsibility to claimant's government.

This doctrine was affirmed in the strongest terms by Mr. Marcy in answer to M. De Sartiges, claiming indemnity for losses suffered by French merchants during the bombardment of Greytown. (S. Ex. Doc. No. 9, pp. 4–7, 35 Cong. 1 sess.)

The American Secretary asserts, as a principle never doubted, that "foreigners domiciled in a belligerent country must share with the citizens of that country in the fortunes of their wars." In the debate on this subject in the British Parliament Mr. Marcy's position was justified. Lord Palmerston said: "Those who go and settle in a foreign country must abide the chances which befall that country." The Attorney-General, speaking for the law officers of the crown, said: "The principle which governed such cases was, that citizens of foreign states who resided within the arena of war had no right to demand compensation from either of the belligerents for losses or injuries sustained." (Hansard, Parl. Deb. 3d Series, Vol. 146, pp. 37–49.)

The French and English claims in this case were abandoned, and no compensation was ever made to American merchants.

If, therefore, persons residing within the arena of the struggle have no right to demand compensation from either of the belligerents, much less can such persons rightly demand indemnity from one belligerent for losses inflicted by the other.

This question arose out of the trouble in Italy in 1849, on the occasion of the demand of the English Government for injuries suffered by her subjects from acts of war at Florence and Naples, in which Austria was also implicated. Prince Schwartzenberg distinctly repelled the claim for the Austrian cabinet, that of Florence being willing to refer the question to the Government of Russia. The latter country declined the umpirage on the ground that the acceptance of such an office would admit that the question was involved in doubt, or rested on some foundation, and, under the advice of Count Nesselrode, Her Majesty's government desisted from its pretensions.

We are not aware of an instance where such claims have ever been conceded by any nation able to protect itself, or at liberty to refuse such unjust demands.

The nonresponsibility of the United States for the acts of its late rebel enemies, while forcibly withdrawn from the jurisdiction of that government, must have been generally conceded by other nations; for, although many citizens of American and European states were resident in the hostile territory during the struggle, and suffered losses common to all inhabitants of the arena of war, no nation has made a demand upon the United States for indemnity (unless the present case forms the exception), while it is certain that that government would promptly repel all such demands.

To admit the principle would place just governments, driven to the employment of arms for the suppression of wicked attempts at their overthrow under serious disadvantages, and very much strengthen and embolden the cause of insurrection. It is not likely therefore, soon to find a place in the code of nations.

The claimant's case is not free from grave suspicions, and might be rejected on other grounds, but we finally disallow and reject, his claim on the ground that the United States Government is not responsible for the destruction of his cotton by the naval forces of the so-called Confederate States of America during the late civil war.

The motion to dismiss and disallow the claim is granted.

Opinion of Mr. Palacio, Commissioner of Mexico

This is a claim for the value of a number of cotton bales destroyed by an officer and twenty men of the navy of the so-called Confederate States during the war of the secession.

Before determining whether the United States are or not bound, in consequence of this fact, to indemnify the claimant, it is necessary

to examine whether the same fact can be duly considered as an *injury* made *by the authorities of said States.*

It is well known that these injuries arise either from an act of positive and direct violation of the rights of the injured, or from the condemnable neglect of extending the necessary protection to said rights.

It is, in my opinion, self-evident that, in the present case, there was not any aggressive and direct action on the part of authorities of the United States, because the authors of the fact, which has given origin to the claim, are neither *de facto* nor *de jure* authorities of the United States, nor of any of the States of the Union. It is sufficient to prove it—the consideration that those who acted as the authorities of the so-called confederation had been declared rebels and traitors by the supreme federal authorities, and that whatever question may arise within the United States in regard to the propriety or legitimacy of that declaration, the foreign nations can not but accept it and acknowledge the power of pronouncing it, which the Constitution has vested in the President and the Congress of the United States, the supreme rulers of the nation. So the denomination of rebels inflicted on the Confederates by the explicit declaration of those powers, against whom they were in arms, ought to be considered out of question by the foreign governments. It was not the province of said governments to investigate whether the political movements of the so-called Confederate States were or not legitimate and in accordance with their local legislations. They are bound, on the contrary to respect the action of the President and Congress of the United States, who deprived those States of their participation in the National Government and declared them enemies of the nation until, by their submission, they might lose such a character and be restored into the Union. In the mean time, those States could not enjoy the political *status* to which, in another case, the Constitution framed would have entitled them; nor constitute an independent nationality whose acts and resolutions were to be considered by the international law as perfectly valid, and emanated from a legal source entirely distinct from the Federal Government. In consequence of this the authorities appointed or elected by said States can not be considered as legitimate, nor their official capacity as such authorities recognized as far as the relations with the foreign governments are concerned.

As for the responsibility arising from the neglect of due and efficient protection, the following is to be considered:

It is the duty of the governments to protect in an efficient manner, against all kinds of unjust aggression, all persons residing within their jurisdiction and under the shelter of their laws. To this protection the alien residents are no less entitled than the citizens, but it would be wrong, however, to pretend a better right to it in the former case than in the latter-and the reason is very clear, because the supposition that a government is obliged to protect in a more efficient manner the foreign residents than the natives would

be equivalent to admit that the duty of said government is not to secure in the highest degree, and in the most practicable manner permitted by law, the same protection to the persons and property of its own citizens. And, in fact, if anything would be done in favor of the aliens which would have been omitted in favor of the citizens, these would undoubtedly be entitled to claim against the government that failed to employ for their protection the efficient means it had in its power. The duty of the government is not to omit any practicable measure tending to that purpose; and hence we are forced to conclude, either that something impracticable is pretended in favor of the aliens, or that something practicable and efficient has been omitted in the protection of the citizens. These are entitled to *all* that is possible in the matter, and consequently there remains *nothing* to add in regard to the aliens.

It is, therefore, a wrong construction of the word *especial,* used by the convention to qualify the protection due to foreign residents, to suppose that it means something more accurate and scrupulous than what is due to the native. It is simply a great mistake, because such a construction would involve a legal impossibility and an absurdity. That word *especial* can only be construed as a *superlative,* tending to ascertain so perfect a protection as to make it impossible to have it better. It can never be understood as a *comparative,* tending to establish a distinction between the foreign and the native residents, favorable to the former and unfavorable to the latter.

It being thus ascertained that the duty of protection on the part of the government, either by the general principles of international law or by the especial agreements of the treaties, only goes as far as permitted by possibility, the following question arises: What is the degree of diligence required for the due performance of this duty? And the answer will be very obvious—that diligence must be such as to render impossible any other, better or more careful and attentive, so as not to omit anything, practical or possible, which ought to have been done in the case. Possibility is, indeed, the last limit of all the human obligations: the most stringent and inviolable ones can not be extended to more. The purpose of trespassing this limit should be equivalent to pretend an impossibility; and so the jurists and law writers, in establishing the maxim *ad impossibile nemo tenetur,* have merely been the interpreters of common sense.

The same truth will be expressed in a more practical language by saying that the extent of the duties is to be commensurate with the extent of the means for performing the same, and that he who has employed all the means within his reach has perfectly fulfilled his duty, irrespective of the material result of his efforts. To ask of him some other thing, would be the same as to pretend an action *ultra posse,* which is positively an absurdity.

Let us see, now, what are the means that a government can employ for the protection of foreign and native residents against all kinds of injuries to their persons and property.

In the regular course of social events the protection of the rights of the inhabitants of a state, either citizens or aliens, is commended to the courts of justice, which are vested with sufficient authority to redress the grievances and to punish the criminals. And the government that has done its best for the capture of a wrongdoer, and brings him to trial before a court of justice, has perfectly fulfilled its duty, either in case the injured resident is a foreigner, or when he is a native citizen. As for the courts, they will have also fulfilled their duty by fairly applying and enforcing the laws, whatever they may be in relation to the case.

Let us suppose, however, that the wrongdoers resist the legitimate authorities and oppose against them military forces enough to check their efforts and make impossible the capture and punishment they attempted. Let us suppose that the ordinary agents of the authority to which the capture of the offenders has been committed find them in arms and protected by numerous bodies of men; that they are able to oppose a battalion to a company, a division to a brigade, or a strong *corps d'armée* to a division, sent against them to enforce the laws. What else can be done by the authorities for the perfect fulfillment of their duties? It is clear that the only means the legitimate authorities possess to preserve order and maintain the empire of law consist in raising the military forces required to subdue the rebels, in obtaining from the national representative the pecuniary resources necessary to meet the expenses of the war, in calling around them all the good citizens and leading them to fight against the disobedient; in declaring, in fine, that these are rebels and enemies of the nation whose legal and moral existence they have attacked by their resistance. There is no doubt that all these measures have created a new situation and changed the legal *status* of some persons, as well as the character of public affairs. If we are willing to call everything by its own name we shall be bound to admit that the *state of peace* in which every law is enforced and obeyed without resistance and the duties of public officers performed without obstacle has been replaced by a *state of war*, in which the nation can not make justice for herself but by means of arms. We shall also be bound to admit that those who commenced by merely being offenders, who were to be submitted to the action of the judicial authorities, have become rebels, and ought to be treated as the enemies of the nation. A *state of war* being thus *de facto* and undeniably existent, the duty of the government must be measured in accordance with it, and its responsibility must be determined without losing sight of that important fact. The state of war exists irrespective of the recognition of other nations. No written declaration, no legal fiction, can be sufficient to destroy this fact, as palpable as positive, "that the nation pursues the rebels by means of the armies because she is unable to bring them before the courts."

Under such a state of things it is not in the power of the nation to prevent or to avoid the injuries caused or intended to be caused by the rebels, either to the foreign residents or to the native citizens of the country; and

as nobody can be bound to do the impossible, from that very moment the responsibility ceases to exist. There is no responsibility without *fault (culpa)*, and it is too well known that there is no *fault (culpa)* in having failed to do what was impossible. The *fault* is essentially dependent upon the will, but as the will completely disappears before the force, whose action can not be resisted, it is a self-evident result that all the acts done by such force, without the possibility of being resisted by another equal or more powerful force, can neither involve a fault nor an injury nor a responsibility.

It must not appear strange to speak of violence *(vis major)* when the question is of nations, and even of very powerful ones. It is not impossible that said nations, although perfectly able to obtain at last an easy and final victory over their enemies, on account of their overwhelming superiority, should not display the same resources in all the acts of the war, and always and everywhere provide, at the opportune moment, what was required to prevent the injury.

Nobody has thus far believed that the duty of governments was to indemnify their citizens for the losses and injuries sustained by cause of war; and it is not easy to perceive the reason why an alien might be entitled to claim what is refused to the citizen. Nations can and must afford protection, and prevent and punish the offenses, by all the means they have within their reach; but none has had the temerity to maintain as a principle of public law the duty of indemnifying for losses and injuries caused by *the enemy*.

The propriety with which we employ this word when we speak of civil wars can be easily perceived. Enemies are all those against whom the nation has been compelled to employ the public force and to put itself, for its own conservation, on a footing of war. It matters little that the other nations may or may not recognize the position of the rebels as belligerents. Such a recognition can entail certain liabilities and duties to the government that deems proper to make it; but neither a new obligation can be imposed on account of it upon the contending parties, nor much less any alteration introduced in the diplomatic intercourse with the foreign powers who have not made the recognition.

For this reason it is very easy to disclose the fallacy of the argument presented in favor of the claimant, and based on the ground that the American Government refused to England the right of claiming, as the logical consequence of her recognition of belligerency of the Southern States. It is said that England has no right because she recognized the rebels as belligerents; and hence it is concluded that Mexico, who did not make that recognition, is perfectly entitled to claim and obtain remuneration. This argument, *a contrario sensu,* as the scholars used to say, fails in the present case by want of an essential requisite. The reason assigned in the first part of the argument is not the only one to be considered, and consequently the conclusion is not right. If the refusal made to Great Britain of any right to claim against the acts of the Confederates should be based exclusively on the ground of their

recognition as belligerents, perhaps it would be proper to conclude that the other nations, who never recognized the rebels as belligerents, are fully entitled to claim. But this is not the case. Mr. Adams did not say to Lord John Russell that England had no right only on account of said recognition. This reason was one among many others, and perhaps it was employed only on account of its conclusive character when applied to England. Arguments *ad hominem* of this kind are much in favor among diplomatists.

It is certain that such an argument can not be used against Mexico. The government of this republic, as a good friend of the United States, always refused to recognize the rebels as belligerents. But this recognition is not the *only* reason existing to reject the claim. We can not conclude from the fact that Mexico did not recognize the belligerency of the Southern Confederacy, that the United States have contracted a responsibility which is in fact inconsistent with the state of things above described.

It is natural and proper that a nation carrying on a war, whether foreign or civil, should endeavor, for the sake of duty and convenience, to prevent her enemies from causing the mischiefs which they might attempt to commit. If, in this respect, she does all in her power, and all that can be accomplished by means of her resources, it can be said that she fulfills the whole of her duties, both toward her own citizens and the citizens of foreign countries. The evils which it was not possible to avoid constitute a calamity for which she can not be responsible; and there is not a shadow of reason in pretending that either a nation or an individual should be bound to do in behalf of others more than he has done in his own defense. If the nation herself could not avoid suffering incalculable losses, it is clear that she could not possibly avoid those sustained by others. Her only duty was to cause the war to be as short and exempt from disasters as possible; and if she endeavored to do this and employed all the means within her reach, she can not be blamed for omission or neglect of duty and consequently can not have any responsibility. The United States fulfilled that duty nobly and worthily, and the immense magnitude of its efforts, which everybody knows, shows that the sufferings occasioned by the gigantic struggle could not be possibly avoided.

The claimant argues that the act of which he complains was not an act of war, perpetrated by the enemies of the United States, but rather a crime committed by its subjects within its jurisdiction. The natural consequence of this aspect of the case should be that the complainant ought to have applied to the courts and prosecuted before them all his legal resources until exhausting them. Should the compliance with his just pretensions have been refused, then he would have been able to exact the responsibility of the country which had not done him justice. If in response to this it is said that there were no tribunals to which one might have applied, or that their action had no sufficient efficacy against the authors of the crime, this would only prove the fact that the country was in a state of war; that

its authorities were not recognized or obeyed by the rebels; that the government was almost unable to try and punish them; and that, it being engaged in the important task of defending its existence and its prerogatives with arms, it had to try the transgressors of the laws, not as authors of private wrongs, but considering them as public enemies. The alternatives of the following dilemma are both equally conclusive. There were tribunals with sufficient power to punish the delinquents, or there were not. If there were any then the claimant ought to have applied to them, that the American nation might have fulfilled the duty of doing him justice. If there were not, the existence of delinquents in a country against whom the ordinary tribunals and authorities are impotent, and against whom it is necessary to employ force, is a conclusive proof, both of the state of war and of the character of enemies of those who committed the offense. It is, no doubt, possible that the regular action of the courts should fail at times to be as effective and efficacious as usual, and that a crime should remain unpunished but the national responsibility can not exist, nor can the government of the complainant prefer any claim unless he should prove that he diligently exercised all his legal resources, and the rendering of justice to him was deliberately refused.

The argument offered by the claimant, founded on a doctrine of Chitty, is likewise destitute of importance in this case. However worthy of respect that doctrine may be, it can not have application in the present question. Said doctrine refers to the obligation of indemnifying those who have to perform some act in favor of others, when they have failed to do it, even in fortuitous cases, or in cases of force.

If we were to make a full exposition of that doctrine we should find its origin in the Roman law with reference to the contracts *stricti juris,* the extension given by the pretor to those denominated *bona fide* and *prescriptis verbis,* its introduction into the common law first, and then into the jurisprudence of the courts of equity; but it is not necessary to enter into such an exposition to be able to perceive that said doctrine of indemnification only refers to the case of the nonfulfillment of a specified obligation relative to a concrete fact nominally promised. It will be very easy for anyone versed in the science of law to perceive the difference existing between that kind of obligations and those which arise from a mere principle of justice, indeterminate in its extension, susceptible of infinite variety in the cases of its application, of an immense latitude in its construction, and of a very ample discretion in the selection of the proper and adequate means of making it effective; but to perfectly understand the point in question it is sufficient for us to direct our attention toward the foundation upon which the said doctrine rests. If it establishes the responsibility of the promiser, even in fortuitous cases, it is in consideration of the omission of him who bound himself without limitation and without making an exception of such cases. Such omission can only exist in those cases in which an express contract or

stipulation has been made, and in which the object of said stipulation is to be executed according to the limits and conditions established by the promiser; but obligations of a general character, whose fulfillment can be demanded in a thousand fortuitous cases, are confined within the limits fixed by their own nature and the reasons of universal justice. To that kind of obligations belongs that which a government has of protecting the residents of the country, both foreign and native. Its limitation, by means of a contract, that it might not be exacted in fortuitous cases and in cases of force, would only be necessary when determinate and well-defined facts should have been promised, since the one who offers to perform such facts is the only one entitled to decide not to perform it, and to receive in its default the payment of indemnification.

The irresponsibility of the government for the mischiefs caused by the rebels in a civil war has in its favor the opinions and decisions of eminent statesmen. The English Government, which is not in all cases the best guide in international questions, when seeking to enforce the rights of its subjects, has, on several occasions, run the risk to be censured by the public opinion in its own country, as well as by foreign cabinets, and this on account of its obstinacy in exacting indemnifications for damages sustained in the civil wars of other countries.

The case of D. Pacifico is very well known, in which Great Britain compelled the Grecian Government to pay indemnification for damages suffered in consequence of a mutiny, which said government resisted and succeeded in repressing. Greece, unable, on account of its weakness, to oppose the demands of the British cabinet, yielded to them; but she protested that her submission was only due to force, and that she was persuaded of the great injustice of which she was the object. That same opinion was expressed by the French envoy, Baron de Gros, to his government, and the cabinet of St. Petersburg also expressed it to the English Government in terms extremely severe. It also happened that both houses in England condemned the course followed by the ministry, and its members were obliged to resign.

On another similar occasion England demanded from the imperial Government of Austria the payment of a certain indemnification for damages sustained by some of its subjects in consequence of revolutionary movements in Tuscany and Naples, and it was agreed to submit the question to the decision of the Czar of Russia, who, as soon as he acquainted himself with the case, declined to act as arbitrator, for the reason that it was not proper for him to decide about so evident a case, it being clear and beyond doubt that England was not right in the least. There are not, undoubtedly many instances like this, in which a sovereign should have condemned in such severe terms the pretensions of another with whom he is not at war.

The American Government also had occasion to decide this question. In a riot which occurred in New Orleans in 1859, in consequence of the excitement created by the news of the shooting of several Americans in the Island of Cuba,

some Spanish subjects suffered insults and damages. When the Government of Spain made the claim, the American Secretary of State, the illustrious Daniel Webster, while expressing the sorrow his government felt at what had happened, and while promising to punish the delinquents, peremptorily declined all responsibility and the payment of indemnification. The Spanish Government subsequently declared that it was completely satisfied.

After these precedents it is painful to see the claimant cite in support of his pretension the course followed by England, France, and Spain in making the celebrated tripartite convention of London concluded in October 1861 for the purpose of claiming indemnity for the alleged damages sustained by the subjects of said powers in Mexico at the time of the civil wars. Everybody knows what was the real and true design of those three governments, and that they did not succeed in their enterprise. On the other hand, it was very strange that such precedents should be invoked by a Mexican, and in a claim supposed to be made in the name of the same government which considered itself highly offended by the conduct alluded to.

This is my opinion on this question, which induces me to concur with my distinguished colleague in the point that the claim preferred by D. Salvador Prats against the United States before this commission ought to be rejected.

Case of McManus Brothers *v.* Mexico, opinion of the Umpire, Sir Edward Thornton, dated 26 November 1874[*] and case of Francis Rose *v.* Mexico, decision of the Umpire, Sir Edward Thornton, dated 13 September 1875[**]

Affaire concernant les frères McManus c. Mexique, opinion du Surarbitre, Sir Edward Thornton, datée du 26 novembre 1874,[***] et Francis Rose c. Mexique, décision du Surarbitre, Sir Edward Thornton, datée du 13 septembre 1875[****]

Tax imposition on foreigners–forced loans levied in accordance with the law shall be equally distributed amongst all inhabitants, whether natives or foreigners–forced

[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3415.

[**] *Ibid*., p. 3421.

[***] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3415.

[****] *Ibid*., p. 3421.

loans not considered as equivalent to seizure of property–enforcement of payment of a forced loan should be by judicial proceeding and not by menace, arrest and detention.

Treaty interpretation–practice in other treaties to have qualified exemptions for payment of forced loan–silence of the treaty viewed as allowing such forced loan.

Imposition fiscale des étrangers–les emprunts forcés prélevés conformément à la loi doivent être repartis également entre tous les habitants, qu'il s'agisse d'autochtones ou d'étrangers–les emprunts forcés ne sont pas considérés comme équivalents à la saisie de biens–exécution du paiement d'un emprunt forcé par voie de procédure judiciaire et non par le biais de la menace, l'arrêt ou la détention.

Interprétation du traité–la pratique relative à d'autres traités fait état d'exonérations qualifiées du paiement d'emprunts forcés–un tel emprunt forcé est considéré comme autorisé en cas de silence du traité.

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Opinion of the Umpire in the case of McManus *v.* Mexico

The case of *McManus Brothers* v. *Mexico,* No. 348, involves two claims, one for what are called in the memorial "involuntary" contributions, and the other for forced loans, levied upon the claimants by Mexican authorities. With regard to the first of these the two commissioners appear to be agreed that the claimants are not entitled to compensation, and no observations are therefore needed from the umpire.

The second question is whether forced loans could properly be exacted from citizens of the United States by the Mexican authorities. The principal argument of the claimant is that treaty stipulations between the United States and Mexico exempt them from the payment of forced loans. The umpire, after examination of the treaties between the two countries, can find no mention of forced loans and no stipulation which accords or implies the exemption of United States citizens from their payment.

Article VIII of the treaty of 1831 stipulates that the "citizens of neither of the contracting parties shall be liable to any embargo." This can not imply the nonpayment of forced loans; and further, "nor shall their vessels, cargoes, merchandise, or effects be detained for any military expedition, nor for any public or private purpose whatsoever, without corresponding compensation." If it were possible to imagine that "the detention of effects" implied the payment of forced loans, these could not be exacted without corresponding compensation. But the compensation could only be either the immediate return of the money, which would be absurd, or its repayment at some future date. Now, there is no evidence that the claim—ants ever

made any application to the Mexican Government or were refused repayment. The defensive evidence asserts that those who applied were repaid, and the claimants do not rebut this assertion.

Article IX of the same treaty stipulates that "the citizens of both countries, respectively, shall be exempt from compulsory service in the army or navy; nor shall they be subjected to any other charges, or contributions, or taxes, than such as are paid by the citizens of the States in which they reside." Forced loans may well be included in "charges, or contributions, or taxes", and the clear inference is that if the citizens of the State were subjected to forced loans, hard and impolitic as they might be, citizens of the United States were not exempt from them.

For it appears by the evidence, and the claimants do not deny, that these forced loans were distributed amongst the whole of the inhabitants, whether native or foreign, of the republic or of the particular State.

In the treaties, then, between Mexico and the United States, there seems to be no mention of forced loans. But in certain treaties made by the former with some other nations there is a stipulation with regard to them. If, however, this stipulation implies an exemption from their payment, it is a qualified exemption. In the treaty with Great Britain it is stipulated that "no forced loan shall be levied upon them," whilst the Spanish version is that "no forced loans shall be levied specially upon them." A stipulation precisely similar to the treaty with Great Britain is to be found in the treaties with the Netherlands, Denmark, Chile, Peru, Prussia, the Hanse towns, and Austria. The umpire considers that it implies that forced loans may be levied upon the citizens and subjects of the contracting parties, provided they be not levied especially upon them without at the same time and in the same proportion being levied upon all the other inhabitants of the respective countries, whether natives or foreigners.

The umpire also observes that the claimants made continuous payment on account of forced loans for several years; yet there is no evidence that during that time they made any representation upon the subject to their government, or, if they did so, that the United States Government addressed any remonstrance to the Mexican Government against the exaction of these forced loans; it possibly felt that the terms of its treaties with Mexico would not justify such a remonstrance.

The agent of the United States in his argument before the umpire in the case of *Francis Rose* v. *Mexico*, No. 344, has stated that the liability of Mexico for the forced loans must be regarded as settled by the old precedents of decision in this commission, and, as he thinks, by the case of *Geo. Pen Johnson* v. *Mexico*, No. 357. With regard to his own opinion in that case, the umpire must be allowed to observe that he expressed none as to the right of the Mexican authorities to impose forced loans upon United States citizens. He did not enter into that question, because in that case he found that there was not suf-

ficient proof that the "forced loans" were actually paid, or if so paid, that they were not refunded afterward.

In the memorial in the case now before the umpire, it is stated that one of the claimants, George L. McManus, was arrested and imprisoned because he refused to pay a forced loan. The umpire does not consider that this is the proper way of enforcing the payment of any tax, and it might have entitled the claimant to compensation, but of this fact there is no evidence but that of the claimant, which the umpire does not consider sufficient.

The umpire is therefore of opinion that in the case of *McManus Brothers* v. *Mexico*, No. 348, the claim on account of forced loans and of the arrest and imprisonment of G. W. McManus must be disallowed.

Decision of the Umpire in the case of Francis Rose *v.* Mexico

With regard to the case of *Francis Rose* v. *Mexico,* No. 344, as the question of forced loans has been so earnestly discussed the umpire thinks it right to make some further observations. But he can not see that there is any force in the argument that his predecessor has given different decisions upon such questions. He regrets that it should be so, but if these matters are to be settled entirely by such precedents the umpire does not understand why, where there has been a decision upon the matter by a previous umpire, the question should be referred to the present umpire at all. It can only be with the intention that he should express his unbiased opinion upon the matter.

The umpire has already expressed his opinion in other cases that United States citizens residing in Mexico are not by treaty exempt from forced loans. This opinion he maintains. But he must explain his understanding of a forced loan. A forced loan is a loan levied in accordance with law. It is equally distributed amongst all the inhabitants of the country, whether natives or foreigners. It is a tax which becomes smaller or greater according as it is repaid sooner or later, partially or not at all. If the foreigner is reimbursed at the same time as the native, or if neither of them are reimbursed at all, the foreigner has no ground for remonstrance. As long as the foreigner is placed upon the same footing as the native he can not complain. But if there be unfairness in the distributing of the loan or in its repayment, and if any preference be shown to the native, the foreigner has good ground for complaint. A forced loan equitably proportioned amongst all the inhabitants is a very different thing from the seizure of property from a particular individual.

In the case now under consideration it is not shown that there was any partiality shown against the claimant or that Mexicans were not in as bad a position as himself. Indeed, although witnesses alleged that the claimant was made to pay a forced loan of $550, no receipt is shown for that amount, and there is no proof that he was not reimbursed.

With regard to the other sums which are stated to have been exacted as forced loans, and for a portion of which receipts are shown, no proof is even given that they were really forced loans, the receipts themselves purporting that the money was freely given.

But the mode employed by the authorities of enforcing the payment of the forced loan of $550 the umpire does not think justifiable. If the forced loan was legally imposed, there must have been means of enforcing its payment by judicial proceedings, and the arrest and subsequent detention of the claimant, though it is not proved that the latter was of long duration, and the menaces to which he was subjected, were not justifiable and entitled him, in the opinion of the umpire, to some small compensation.

The umpire therefore awards that there be paid by the Mexican Government on account of the above claim the sum of five hundred Mexican gold dollars ($500).

PART XII

Mixed Commission on claims of citizens of the United States of America against Spain established under the Agreement of 12 February 1871

Commission mixte de réclamations des citoyens des États-Unis d'Amérique à l'encontre de l'Espagne constituée en vertu de l'Accord du 12 février 1871

Mixed Commission on claims of citizens of the United States of America against Spain established under the Agreement of 12 February 1871

Commission mixte de réclamations des citoyens des États-Unis d'Amérique à l'encontre de l'Espagne constituée en vertu de l'Accord du 12 février 1871

Cases of C. H. Campbell *v.* Spain, No. 94, and A. A. Arango *v.* Spain, No. 95, decision of the Umpire, Baron Blanc, dated 9 December 1879[*]

Affaires concernant C. H. Campbell c. Espagne, N° 94, et A. A. Arango c. Espagne, N° 95, décision du Surarbitre, Baron Blanc, datée du 9 décembre 1879[**]

Seizure of ship and its cargo, where the cargo, consisting of arms, ammunitions and other military supplies, was for the benefit of the insurgents and the ship was allowed, either willfully or negligently by the claimant, to fall into the hands of the insurgents.

Forfeiture of claimant's rights to protection—estoppel.

Case not to be treated as a case of the United States against Spain with an objective of pursuing suitable reparation for the offended dignity of its flag.

Saisie du navire et de son chargement, lequel, composé d'armes, munitions et autres fournitures militaires, a profité aux insurgés, le demandeur ayant, délibérément ou par négligence, permis la prise de ce navire par les insurgés.

Déchéance des droits du demandeur à la protection—estoppel.

Affaire ne devant pas être traitée comme une affaire introduite par les États-Unis à l'encontre de l'Espagne dans l'objectif d'obtenir une réparation adéquate pour l'atteinte à la dignité de son pavillon.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2774.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2774.

In the cases of the American citizens Charles H. Campbell and Augustin A. Arango against Spain, I may, as is claimed in behalf of the United States, assume for the purposes of the controversy submitted to me that the capture of the brig *Mary Lowell* and cargo by Spanish force on the high seas was unauthorized by international law. Yet, as the cargo, consisting of arms, ammunition, and other military supplies, was admittedly intended by its owner, Augustin A. Arango, for the benefit of the insurgents against the Spanish Government, and as the brig was allowed by Charles H. Campbell, either willfully or negligently, to fall into the hands of parties actively interested in promoting the insurrection, the claimants forfeited their right to the protection of the American flag, and are estopped from asserting any of the privileges of lawful intercourse in times of peace and any title to individual benefit of indemnity as against the acts of the Spanish authorities done in self-defense.

The claims are therefore dismissed.

Consideration by the Umpire of the motion for a rehearing made by the United States

The cases of *C. H. Campbell* v. *Spain* and *A. A. Arango* v. *Spain* again come before the American and Spanish Commission on a motion for a rehearing. Besides the fact that the motion is not presented to the umpire through the authorized channels, he considers it a matter of very serious doubt whether he possesses the power to reopen a case after his decision is made and filed. While there is great plausibility in the theory that with the filing of his decision his function ends, it certainly can not be disputed that the power, even if the umpire possesses it, should be exercised with caution, and only when evidence and reasons are offered by the moving party which were not before the umpire when he rendered his decision. The umpire has very carefully looked for, and failed to find, such evidence and reasons in the brief for a rehearing filed in the acts of the commission. It may be due to the parties, however, that he should now state his views upon the whole case more fully than he has heretofore done, in order that no misapprehension as to the real character of his decision may exist.

As matter of fact, it has been established that the arms and ammunition shipped on the *Mary Lowell* were admittedly intended for delivery, even by illegal means, to the Cuban insurgents. It has been established in regard to the *Mary Lowell* that, even it be doubtful on the proofs that her ostensible destination for Vera Cruz had been simulated from the departure from New York, she was abandoned at the Bahamas by her captain and crew, they alleging unwillingness to participate in a descent upon the Cuban coast; that she was thereupon left by her proprietor under the command of one of the members of a body of men, organized as a military company, which had come from Jacksonville with C. H. Campbell on another ship belonging to C. H. Campbell himself; that the allegation that the *Mary Lowell* was afterward placed in the custody of a British official is inconsistent with the positive declarations of the British Government; that the aforesaid company was manifestly engaged in

the initiation, at least, of an attempt to make a descent upon the Cuban coast in aid of the insurrection; and that before the capture of the *Mary Lowell* by the Spanish forces the vessel and cargo had passed into the possession and under the control of the insurgents, whatever may be the weight properly attributable to the assertion that the claimants had lost and the insurgents had acquired ownership of the property.

As matter of law, the umpire is of opinion that prior to the capture of the *Mary Lowell*, and independently of the circumstances of the capture itself, the vessel and cargo were being used by the act or through the negligence of their respective owners in an unlawful enterprise and placed outside the conditions of lawful intercourse in time of peace; that this illegality was of such a character as to carry with it forfeiture of the protection of the United States flag and as to subject the property to such eventual action as might be deemed proper by the United States and by Spain according to the mutual rights and duties of the two governments; that such abnormal situation of the owners of the ship and cargo toward Spain, and indeed toward the United States themselves, could not be covered by the alleged infraction of international law involved in the subsequent capture of the *Mary Lowell* and cargo by the Spanish forces; and that on those principles of equity which the umpire does not feel at liberty to disregard he is bound to decide that the owners of the ship and cargo are, as such, estopped in their present claim to indemnity for the consequences of their unlawful venture. It is, then, irrelevant under the circumstances of this case to state how far, if at all, the acts of the Spanish forces, done in self-defense, were unauthorized by international law and such as to create a claim on the part of the United States against Spain in behalf of the offended sovereignty of their flag. It is accordingly unnecessary for the determination of the personal rights of the claimants before this commission to ascertain the facts on which the regularity of the capture, as to the rights of the United States, depends, namely: Has the *Mary Lowell* set herself right as to the allegation of Spain that she was, at the moment of the capture, without a captain and without the necessary papers to justify her flag; that she was pursuing an unjustified course, etc.?

The umpire must be understood as applying the rule of estoppel only against the private claims of C. H. Campbell and A. A. Arango, as claimants of an indemnity for their own individual account, in which private claims the question, *Was the capture of the Mary Lowell and cargo unlawful?* is subordinate to the other question, viz, *Were the Mary Lowell and cargo engaged in a lawful enterprise?* The umpire can not be legitimately called upon to treat this as a case of the United States against Spain having for its direct object a suitable reparation for the offended dignity of their flag. In such a case the regularity of the capture would constitute the principal question to be considered, the personal situation of the owners of the property becoming subordinate; but no case of the U*nited States* v. *Spain* has been or could, in the opinion of the umpire, properly be presented to this tribunal.

The umpire therefore finds nothing to justify a reversal of his decision. While leaving entirely untouched the capture of the *Mary Lowell* in its relations to international law and in its consequences upon such rights as the United States and Spain may respectively possess in the premises, he must adhere to the dismissal of these claims, C. *H. Campbell* and *A. A. Arango* v. *Spain,* and deny the applications for a rehearing.

Case of Pedro D. Buzzi *v.* Spain, No. 22, decision of the Umpire, Count Lewenhaupt, dated 18 April 1881*

Affaire Pedro D. Buzzi c. Espagne, N° 22, décision du Surarbitre, Count Lewenhaupt, datée du 18 avril 1881**

Nationality under international law—right for every country to confer, by general or special legislation, the privilege of nationality upon a person born out of its own territory—no person without nationality—according to international law, a person without nationality by descent or by birth shall be considered to have the nationality of the birth place.

Recognition of naturalization—not the duty of the Commission to examine whether the requirements of the American law of naturalization have been fulfilled but just to determine whether there has been naturalization in good faith as against Spain—criterion of uninterrupted residence of five or more years.

Nationalité en vertu du droit international—droit de tout pays d'accorder, par le biais d'une législation générale ou spéciale, le privilège de la nationalité à une personne née en dehors de son territoire—aucune personne ne peut être dépourvue de nationalité—en vertu du droit international, une personne ne disposant pas de nationalité par descendance ou naissance devrait être considérée comme ayant la nationalité du lieu de naissance.

Reconnaissance de la naturalisation—il ne relève pas du devoir de la Commission d'examiner si les conditions posées par le droit américain de la naturalisation sont remplies, mais juste de déterminer s'il y a eu une naturalisation opposable de bonne foi à l'Espagne—critère de la résidence ininterrompue durant cinq ans ou plus.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2613.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2613.

The arbitrators, having been unable to agree upon the question whether they should recognize the quality of American citizen in the claimant, said question has been referred to the umpire.

The claimant, who was born in Trinidad de Cuba about 1833, states that he is an American citizen by descent, but he supports this allegation only by a copy of a declaration of intention made by his father in 1824, and by a statement that he has always understood from older members of his family that his father had completed his naturalization. He claims further that, not knowing this alleged fact at the time other- wise than as mere impression or belief, he procured in 1869 a certificate of naturalization, issued by the judge of Baltimore city court July 28, 1869. He produces also a declaration of intention made by himself in 1850, at the age of sixteen or seventeen, before the superior court of New York. He came from Cuba to New York at six years of age, but according to his own statement he returned to Cuba some time before he became twenty-one, or about 1854, and thereafter he did not come back to the United States before 1869. Between 1864 and 1869 he was United States consular agent at Zuza, Cuba.

The father of the claimant was born in Milan, Italy, in the year 1799. It is contended that he was a native-born Austrian, but that he had become by naturalization an American citizen, but the only documents furnished in this connection are the following certificates:

EXHIBIT P. D. B. NO. 1.

(Duplicate.)

CITY OF NEW YORK

Report of Pietro Buzzi, an alien, of himself, made to the clerk of the marine court of the city of New York, on the 26th day of October, in the year 1824.

Name, Pietro Buzzi; sex, male; place of birth, Milan, in Italy; age, twenty-five years; nation and allegiance, German. Gulian, the Emperor of Germany; places whence emigrated, London; conditions or occupations, physician; places of actual or intended residence, city of New York.

Pietro Buzzi

John G. Lardy, Clerk.

(Duplicate.)

Tuesday, October 26, 1824

The marine court of the city of New York

Present, Justice Hegeman.

I, Pietro Buzzi, at present of the city of New York, physician, do declare on oath, before the marine court of the city of New York, that it is bona fide my intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the Emperor of Germany, of whom I am a subject.

Pietro Buzzi

The umpire is of opinion that there is no proof to which nationality the claimant's father belonged at the time of his death; that there is no proof that the claimant had a nationality by descent; that according to Spanish law existing at the time he would not have become a Spaniard only in consequence of the locality of birth, if he had had a nationality by descent, but that inasmuch as no person can be without nationality, he must, according to international law, be considered and held a Spanish subject by birth, as, besides, stated by himself in 1850, before the superior court of New York, and in 1869, before the city court of Baltimore, and that therefore the remaining question to be considered in this case is, whether, being a native-born Spanish subject, the claimant has a right to appear before this commission as a naturalized citizen of the United States.

According to the agreement between the United States and Spain of February 11, 1871, it is the duty of the umpire to impartially determine this question to the best of his judgment and according to public law and the treaties in force between the two countries and the stipulations of said agreement.

The umpire is of opinion that according to international law every country has a right to confer, by general or special legislation, the privilege of nationality upon a person born out of its own territory; but in the absence of special consent or treaty such naturalization has, within the limits of the country of origin, no other effect than the government of said country chooses voluntarily to concede. If the emigrant's wife and children remain in the old country it depends upon the law of the land whether their condition be affected by the foreign naturalization of the emigrant. The same principle applies to property of any kind which the emigrant leaves behind him, and if the emigrant returns himself he may become as amenable as any other subject to any laws which may be in force.

As the laws concerning nationality and naturalization differ in almost every country, it follows that very frequently persons may have more than one nationality; for instance, one by locality of birth, one by descent, and one by naturalization. Such cases can not be avoided, except by special treaty stipulations.

It is not contended that the various treaties between the United States and Spain concluded prior to the agreement of 1871 throw any light upon the present question.

Article 5 in the agreement of 1871 contains the following stipulation:

> No judgment of a Spanish tribunal disallowing the affirmation of a party that he is a citizen of the United States shall prevent the arbitrators from hearing a reclamation presented in behalf of said party by the United States Government; nevertheless, in any case heard by the arbitrators the Spanish Government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required. The commission having recognized the quality of American citizens in the claimants, they will acquire the rights accorded to them by the present stipulations as such citizens.

There is a great difference between the parties concerning the true interpretation of this stipulation.

The advocate for the United States says:

> It will be remarked as perfectly clear that without the existence of this clause in the treaty Spain could not be heard to deny the quality of citizenship in anyone whom the Government of the United States recognized and presented before the commission as invested with that character. But under the agreement Spain may deny the fact of citizenship. (Brief, October, 1878, p. 2.)
>
> The decree which changes the status of an individual and converts him from the citizenship of one country to that of another is known as a judgment *in rem*, and such judgment by public law is of universal obligation. . . .
>
> The right which the agreement of 1871 extends to Spain to traverse the allegation of citizenship is a substantial privilege by the exercise of which Spain can deny the authenticity of any certificate of naturalization offered by the United States; for example, Spain may deny that there existed such a court as the certificate declares admitted the alien to citizenship, or may allege that the signature of the clerk or attesting officer, or the seal of the court is forged, as it occurred in the United States and Mexican Commission. . . .Such is the whole extent of the signification of the terms "traverse the allegation of American citizenship," found in the agreement. (Appendix, p. 13.)

The advocate for Spain says:

> It is denied at the outset that this is an extraordinary privilege, only to be claimed under the special sanction of the express terms of the convention. (Reply of Spain, December, 1878, p. 2.)
>
> I have already indicated the nature of the evidence that Spain offers to meet the claims of the naturalized Cubans. It is that they obtained naturalization without that residence in the United States which the laws of that country required. (Views, p. 59.)
>
> The question in the case is not whether the United States can confer American nationality but whether the United States can destroy Spanish nationality. (Brief for Spain, February 1881.)

The advocate for the United States contends that a Spaniard lawfully naturalized in the United States has thereby lost his prior nationality. The advocate for Spain contends that a Spaniard naturalized in the United States, without the consent of Spain, has a double nationality.

In order to decide between these conflicting interpretations, it is necessary to examine what persons both the United States and Spain, according to the correspondence preceding the agreement, intended should be regarded as citizens of the United States within the meaning of the agreement.

This act grew out of remonstrances and complaints urged by the Government of the United States upon that of Spain in relation to wrongs and injuries said to have been committed in Cuba in violation of certain privileges con-

ferred upon American citizens in Spain by the treaty between the two nations of October 27, 1795.

On the 24th of June 1870 Mr. Fish instructed Mr. Sickles, the minister of the United States in Madrid, to bring the whole subject to the notice of the Spanish Government.

On the 26th of July Mr. Sickles executed this order and transmitted a list of cases, giving names of parties and grounds of complaint.

On the 12th of September Mr, Sagasta, minister of foreign affairs in Madrid, replied to Mr. Sickles that the good faith of the United States Government had been imposed upon by worthless men; that the greater portion of the natives of Cuba who had given allegiance to the American flag had done so with the studied intention of making use of it at some future day as a shield for their criminal designs. To this Mr. Sickles answered, on the 14th of October, by a note containing the following assurance:

> . . . The Government of the United States will not be found disposed to extend its protection to persons who have not the right to invoke it. It is to be presumed, unless the presumption is overcome by proof, that aliens who have deliberately renounced, after an uninterrupted residence of five or more years within the territory of the Union, all allegiance to any other government, and have thereupon become citizens of the United States, are sincere in their solemnly avowed purpose. If it shall be made to appear that any one of the claimants in whose behalf the Government of the United States intervenes is not a citizen thereof, or, having been naturalized in conformity with its laws, has by any act of his own forfeited his acquired nationality or that he has voluntarily relinquished it, your excellency may rest assured that the case of such claimant will be dismissed from the further consideration of the American Government.

In the opinion of the umpire, this correspondence shows that by neither party was the convention intended for the benefit of other in the United States naturalized Spaniards than those who had been naturalized in good faith; and conformably to the proposal of Mr. Sickles it was agreed that naturalization after an uninterrupted residence of five or more years should be considered as a conclusive test. The umpire is of opinion that Article V of the agreement, interpreted in the light of the correspondence, and only with reference to the present case, stipulates that the Spanish Government may traverse the allegation that the claimant has acquired American citizenship in good faith, and thereupon proof satisfactory to the commission will be required of an uninterrupted residence in the United States during the five years immediately preceding the naturalization.

The umpire has been unable to find any indication in either the agreement or in the correspondence that, as contended by Spain, the commission ought to examine whether the requirements of the American law of naturalization have been fulfilled. In such case the umpire would have to examine, in the present case, not only the question of five years' residence, but also whether

the declaration of intention made in 1850 was legal or not; whether it could be replaced by the declaration of intention made by the claimant's father in 1824; whether the claimant resided one year in Maryland, where he was naturalized; whether he conducted himself as a man of good moral character; whether he was attached to the principles of the Constitution, etc. It is not probable that when the question was to determine naturalization in good faith as against Spain, either party intended an examination of these questions, because it seems entirely indifferent to Spain whether the claimant abjured his allegiance only once at the end of five years, or whether he made also a similar oath two years previously; whether in case of five years' residence he resided one year in Maryland or the whole time in other parts of the United States.

The umpire is further of opinion that the claimant in this case during the five years immediately preceding his naturalization resided about four years and a half in Cuba; and the umpire hereby decides that the claimant has no right to appear as an American citizen before this commission.

PART XIII

Commission established under the Convention concluded between the United States of America and the French Republic on 15 January 1880

Commission constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et la République française le 15 janvier 1880

Commission established under the Convention concluded between the United States of America and the French Republic on 15 January 1880

Commission constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et la République française le 15 janvier 1880

Case of Pierre S. Wiltz *v.* the United States of America, decision of 19 January 1882*

Affaire concernant Pierre S. Wiltz c. les États-Unis d'Amérique, décision du 19 janvier 1882**

Claim of a deceased French citizen for the destruction of his property and imprisonment—competence of the legal representatives to appear and prosecute a claim in case of death of the claimant, without reference to the nationality of the representatives.

Jurisdiction of the Commission in the case of the death of the original claimant—requirement for citizenship of the country at the time the loss occurred or the injury was sustained—the real and beneficial claimants (i.e. heirs or legatees) to possess the same citizenship as the claimant and to appear and present the case themselves.

Rejection of the motion by the administrator to appear for the heirs of the claimant instead of the heirs appearing for themselves.

Réclamation d'un citoyen français décédé pour destruction de sa propriété et emprisonnement—compétence des représentants légaux pour comparaître et soumettre une réclamation en cas de décès du demandeur, sans aucune référence à la nationalité des représentants.

Compétence de la Commission en cas de décès du demandeur initial—nationalité exigée au moment où le préjudice survient ou au moment où le dommage est éprouvé—les demandeurs bénéficiaires (c'est-à-dire les héritiers ou les légataires) doivent avoir la même nationalité que le demandeur, comparaître et soumettre l'affaire personnellement.

Rejet de la demande de l'administrateur tendant à ce qu'il comparaisse pour les héritiers du demandeur, en lieu et place de leur comparution en personne.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2246.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2246.

Washington, January 19, 1882

Leon R. Delrieu, a French citizen, died at New Orleans, April 15th, 1879. He was the original owner of this claim. He was a French citizen both at the time he suffered the loss and at the time he died.

Pierre S. Wiltz, of New Orleans, files this claim as the duly appointed administrator of Delrieu. He states in the memorial that the present beneficial owners of the claim are the creditors and heirs of said Delrieu, "who are legally represented by your memorialist."

He does not state that the creditors and heirs of Delrieu, or any of them, are French citizens.

The counsel of the United States demurs on the ground "that it does not appear from the memorial that the alleged beneficial owners of the claim are, or ever were, citizens of France". He claims that this commission has no jurisdiction of a claim unless at least some one of the beneficial owners is a French citizen. He admits that the nationality of the administrator is of no account, for he has no beneficial interest and merely represents the real claimants.

The counsel of France claims that as Delrieu was a French citizen at the time he suffered the loss, and so continued up to the time of his death, the administrator of his estate has the right to present and recover for the claim although none of his creditors and heirs are French citizens.

This is a question of jurisdiction.

In deciding it we must be governed by the language and meaning of the convention.

We think it was not enough that the deceased was a French citizen when he suffered the loss and when he died, and that his administrator presents the claim. It should further appear that the real and beneficial claimants, who will ultimately receive the amount that may be allowed, are French citizens; and they must appear and present their claims. This appears to us to be the plain meaning of the first and second articles of the convention. They do not, in our judgment, admit of any other construction.

We do not think it necessary, at this time, to make any further statement of the reasons for this decision.

The demurrer is therefore sustained, and the claim is disallowed.

PART XIV

Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885

Commission de réclamations constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Venezuela le 5 décembre 1885

Claims Commission established under the Convention concluded between the United States of America and Venezuela on 5 December 1885

Commission de réclamation constituée en vertu de la Convention conclue entre les États-Unis d'Amérique et le Venezuela le 5 décembre 1885

Case of Elizabeth B. Scott *v.* Venezuela, opinion of the Commissioner, Mr. Little[*]

Affaire concernant Elizabeth B. Scott c. Venezuela, opinion du Commissaire, M. Little[**]

Admission of a claim—definition of claim within the meaning of the treaty—existence of a right and an obligation under the treaty—necessity to allege active or passive wrongful conduct—necessity to allege injury or damage resulting from that conduct and to request its indemnification.

Admission d'une réclamation—définition d'une réclamation au sens du traité—existence d'un droit et d'une obligation en vertu du traité—nécessité d'alléguer une conduite illicite, active ou passive—nécessité d'alléguer un préjudice ou un dommage résultant de cette conduite et d'exiger son indemnisation.

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The *expediente* sets forth in substance—

That in 1812 Alexander Scott, a citizen of the United States, residing in Washington, having been appointed a political agent by President Madison to proceed to Venezuela, then at war with Spain for independence, to look after the commercial and other interests of the United States in that quarter, delayed his departure from some time in March till late in May, in order to secure the

[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4392.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4392.

aid of his country toward relieving the distress and suffering of the people of Caracas and vicinity, caused by the then recent disastrous earthquake in that part of South America; that he "obtained its consent and authority for purchasing and transporting" fifty thousand dollars' worth of provisions "to the city of Caracas for the relief and sustenance of the suffering inhabitants"; that the provisions (which arrived in June and July) were gratefully received by Venezuela "with many flattering demonstrations of respect and gratitude toward" Mr. Scott; that owing to heavy personal expenses incurred during and in consequence of this service (which continued till January, 1813), he was reduced from affluence to straitened circumstances. He died in 1839. Elizabeth B. Scott, his widow, who had accompanied him and shared the labor and privations of the undertaking, in 1855 sent her memorial, embodying these statements substantially, to the Venezuelan Government through the American legation at Caracas, asking, to use her own language, "at the hands of a high-minded and honorable country such a return of reciprocal kindness as they may think fit to bestow in view of the sacrifices made."

No sum was named either of the expenses or losses incur red or of indemnity desired. Afterwards letters from time to time were forwarded in her behalf through said legation to that government, in one of which $25,000 were suggested as a proper sum to be paid for the services rendered. The letters, while depicting in strong colors the great benefits to Venezuela of Mr. Scott's mission, and the needs of the petitioner, claimed as a consequence from his sacrifices for that country, disclose no new material fact.

This claim was presented to the former commission by the American minister at Caracas May 14, 1868. That was the first time the United States Government or its agency took or was asked to take cognizance of it further than to forward the matter as above stated.

To "this claim" Venezuela by her counsel demurs, "upon the ground that it is based entirely on the supposed right to an exercise of gratitude by Venezuela, and does not allege any breach of contract or wrong cognizable by a tribunal of justice, this without admitting the claim of special gratitude."

As we understand it, a "claim" within the meaning of the treaty implies a *right* on the one hand and an *obligation* on the other. It has reference to some alleged wrongful conduct of the government upon which it is made. That conduct may have been active or passive; the government may have done what it ought not to have done, or refused or neglected to do what it ought to have done in respect to the subject-matter of the claim. And injury or damage must be alleged to have resulted from that conduct to the claimant under circumstances giving him the right under the treaty through his own government to demand, and imposing on the delinquent government the obligation to allow indemnity therefor.

This claim is not of that character. No wrongful conduct is or can be imputed to Venezuela in respect to its subject-matter. All she did was thankfully to receive a gift of provisions sent by the Government of the United States

to her people in distress. The claim, if otherwise good on the face of the papers, would be obnoxious to an objection for delay in presentation for reasons stated in No. 36. The demurrer will be sustained and the case dismissed.

It may be worth while to add a few facts about this case obtained from the public records. Having been commissioned in 1811 to go to Venezuela as agent for the Government of the United States, Mr. Scott started in March, 1812, and got as far as Baltimore, where he found there were no vessels going to Venezuela because of the then recent embargo. While thus detained in Baltimore, Congress passed the act of May 8, 1812, "for the relief of citizens of Venezuela," authorizing the President to purchase $50,000 worth of provisions and "to tender the same in the name of the Government of the United States to that of Venezuela for the relief of the citizens who have suffered by the late earthquake." He was directed by President Madison to proceed to that country in one of the vessels carrying the provisions and aid in their distribution. He was paid by the United States, as its agent, for his services, including $700 paid him while detained in Baltimore, $4,115, and thereafter employed in its service.

Case of Melville E. Day and David E. Garrison, as surviving executors of Cornelius K. Garrison *v.* Venezuela, decision of the Commissioner, Mr. Findlay[*]

Affaire concernant Melville E. Day et David E. Garrison, en tant qu'exécuteurs testamentaires de Cornelius K. Garrison c. Venezuela, décision du Commissaire, M. Findlay[**]

Contract between citizens and a State—principle of continuity of treaties upon any succeeding government—right for a government *de facto* to contract private obligations—contract viewed as a lawful emanation of power.

State—distinction between a State and its government—existence of the State not affected by changes of governments—principle of continued responsibility of the State for wrong and injuries—duty of the State to respect its international obligations notwithstanding domestic changes.

Government *de facto*—equivalency of the legal effect for acts made by a government *de facto* or *de jure*—a government *de facto* viewed as a government submitted to by the great body of people and recognized by others States.

Arbitration clause—question of the validity of the arbitration clause for any differences or difficulties after the annulment of the contract.

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[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3548.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 3548.

Contrat entre des citoyens et un État—principe de continuité des traités à l'égard de tout gouvernement successeur—droit d'un gouvernement *de facto* de contracter des obligations privées—contrat considéré comme une émanation légale du pouvoir.

État—distinction entre un État et son gouvernement—l'existence d'un État n'est pas affectée par des changements de gouvernements—principe de continuité de la responsabilité étatique pour faits illicites et dommages—devoir d'un État de respecter ses obligations internationales malgré les changements internes.

Gouvernement *de facto*—équivalence entre l'effet juridique des actes accomplis par un gouvernement *de facto* ou *de jure*—un gouvernement *de facto* est considéré comme un gouvernement auquel se soumet le corps du peuple et qui est reconnu par d'autres États.

Clause d'arbitrage—question de la validité de la clause d'arbitrage pour tout différend ou toute difficulté survenant après l'annulation du contrat.

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After several revolutions in Venezuela, continued at intervals of greater or less duration from 1848, leaving the country in an unsettled and almost chaotic condition, General Paez assumed the dictatorship on the 29th of August 1861, and from that time to the ratification of the so-called treaty of Coche, on the 22d of May 1863, held possession of the capital at Caracas. During the period of his government, however, outside of the province of Caracas, the country was by no means pacified, but in one part or another of its extensive territory was embroiled in civil tumult and insurrection aimed against the ruling power, by the faction which it had succeeded in displacing. This state of affairs was terminated by the treaty referred to, and in consequence of it General Falcon succeeded Paez, who abdicated his dictatorship, and became the President of the Republic on the_____day of July 1863, and was confirmed in his place by a constitutional convention which assembled on the 21st of December 1863. The United States refused to recognize the Paez government, and disavowed the act of its minister, Mr. Culver, in attempting to do so.

This being the condition of the government and the country, a Colonel Nobles, in the winter and early spring of 1863, while on a visit to Caracas for the purpose, succeeded in obtaining, through the aid of his associate, Dr. Beales, a power of attorney from General Paez to Simon Camacho, then, consul of Venezuela in New York, authorizing him to enter into contracts with the said Nobles and Beales for the establishment of a steamship service between New York and La Guayra, and also for the "establishment of a constant current of immigration to the Republic of Venezuela." To carry these enterprises into due effect, "the said consul will act without any limitation," so the power recites,

"only following as far as possible the instruction to be communicated to him by my secretary general." For fear that this broad grant of power might be restrained or limited by some unforeseen construction, the general proceeds to add, "and, to remove at once any objections which might be urged against the validity of the terms in which this authority is granted, I, José Antonio Paez, Supreme Chief of the Republic of Venezuela, hereby approve *now and for all times whatever may be contracted* for by Simon Camacho, consul of Venezuela in New York, with respect to the said contracts for the establishment of a line of steamships between New York and La Guayra, and the immigration and colonization scheme."

Under this power Camacho, on the 1st of May 1863, contracted for the establishment of the steamship line, by the terms of which the first steamer was to sail within one hundred days from the date of the contract, which time was afterward, on the 4th of June, extended to eight months in addition—that is, say, eleven months in all. And which extension, by the way, was contrary to the direction of the Secretary, and opposed to one of the principal objects of the scheme. Other steamers were to follow as they could be made ready, and they were to be suitable for carrying the mails, twenty-five passengers and six hundred tons merchandise. Preference was to be given to the effects, articles, and properties of the Government of Venezuela over all other cargoes and passengers, to be paid for, however, at the usual rates charged to merchants or private individuals. Officers and troops of the government were to be carried at reduced rates. Two young men, to be selected by the government, were also to be earned free of expense, in order that they might receive practical instruction in navigation and the management of steam machinery. Other provisions were made for the carriage free of seeds, plants, etc., not exported for profit. For these services and some others Camacho agreed that Venezuela should pay $50,000 in gold coin of the United States yearly, payable in monthly instalments of $4,166.66, to be deducted from the 40 per cent duty belonging to the government on the *imports* and *exports carried* by the steamers, but this limitation was removed by the 12th article of the contract, which expressly stipulated that any deficiency on this account occurring during any month should be made good by the receipts of the next month, although the company was to bear the loss on any deficiency at the end of the year. The thirteenth article then provides that this payment of $50,000 shall continue for three years only from the date of the contract, after which time the sum of $30,000 shall be paid for the period of twenty-seven years, as provided in the fourteenth article.

The eighteenth article then stipulates for submission to arbitration at Caracas: "Any doubts, *differences, difficulties,* or misunderstandings that may arise from, or have any connection with, or in any *manner relate* to this contract, *directly* or *indirectly*," and then, after providing that the opinion of the two arbitrators or the decision of the umpire, should there be one, shall be considered as a judgment," etc., goes on to say, "and, *therefore,* this contract shall *never, under any pretext or reason whatever, be cause for any international*

claims or demands." This provision is found in both contracts. It has already been observed that Messrs. Beales and Nobles, who alone sign this contract, put themselves under no pecuniary obligation whatever for the due performance of its stipulations, except an ineffectual and meaningless pledge of person and property; but it is now to be observed that these parties do not contract in behalf of themselves at all, but "*in behalf of the stock company to be formed* upon the following terms and conditions," etc.

Accordingly this imaginary company without a name, which appears only by reference to it as a body yet to be formed, is put forward by Beales and Nobles as the party agreeing to the terms of a contract which they in its behalf bind themselves and their successors to perform. Beales and Nobles, except as becoming security in the way mentioned for the company, don't agree to anything. Each article in the contract begins with a recital that "*the company* agrees and binds itself." It is too clear for argument that the contract was made by Beales and Nobles in behalf of a company which was yet to be created, and that, treating themselves as members of the said company, as if it had already been established, sign, as "*members* of *said* company, for themselves and their successors," accompanying the signature with the pledge of their persons and properties before referred to. Treating it as a contract, however, in the absence of any bond for performance, Venezuela could only look in case of failure to Beales and Nobles. The company which had no existence certainly could not be responsible.

This being the character of a contract which was to run for thirty years, made under a discretionary power of this kind, the question arises whether General Paez, as the lawful *de facto* authority of the state, had the right in its name to grant such a power. If he had, of course the contracts executed in pursuance of the power would be valid and binding upon any succeeding government, and any attempt to annul them, without compensation to the parties injured by the revocation, would be unjustifiable and illegal. In stating the proposition in this way it will be observed that we are assuming that the contracts are a lawful emanation of the power, although on careful analysis it will be perceived that, in the very conception of his authority, Mr. Camacho exceeded his power. His power was "to contract with *either* Dr. J. C. Beales or Colonel W. H. Nobles, or with both, or with any other person or company of acknowledged responsibility." He did neither or any of these things as far as the steamship contract is concerned. He entered into a contract, as we have before shown, with Beales and Nobles, not in behalf of themselves, but in behalf of a company yet to be organized. This was not a contract with either Beales or Nobles severally, or with both jointly, nor yet was it a contract with any other person or company of acknowledged responsibility. It was a contract in behalf of a company *in futuro,* the responsibility of which, of course, could not be ascertained, and whose very existence was speculative and conjectural. But waiving this, and recurring to the question as to whether the Paez government

had the right to grant the power to Camacho, it may be well enough to make one or two general observations on the subject of *de facto* governments.

There is a well-recognized distinction between a state and a government or the governing body. The state is a person in law, and when once admitted into the family of states, preserves its identity as an international person, until it is lost by absorption in some other state, or by the continuance of anarchy so prolonged as to render reconstitution impossible or, in a very high degree, improbable. (Halleck's International Law, p. 29.) As a person invested with a will which is exerted through the government as the organ or instrument of society, it follows as a necessary consequence that mere internal changes which result in the displacement of any particular organ for the expression of this will, and the substitution of another, can not alter the relations of the society to the other members of the family of states as long as the state itself retains its personality. The state remains, although the governments may change; and international relations, if they are to have any permanency or stability, can only be established between states, and would rest upon a shifting foundation of sand if accidental forms of government were substituted as their basis. *Idem enim est populus Romanus sub regibus, consulibus, imperatoribus*, says Grotius, as an argument for the continued responsibility of the state, although the particular character of responsibility he is speaking of is an obligation to respect treaties. (Grotius, I. II. chap, ix., v 8.) All leagues and treaties are national and will bind legal princes though made with usurpers. (Tindall on Law of Nations; 1 Phillimore, p. 174.) It is a clear position of the law of nations, says Kent, that treaties are not affected nor positive obligations of any kind with other powers or with creditors weakened by internal changes in the form of government. The body politic is the same although it may have a different organ of communication. (Kent, vol. 1, pp. 25–26.) A state is responsible for the wrongs done to the government or subjects of another state notwithstanding any intermediate change in the form of government or in the persons of its rulers. Treaties of amity, commerce, and real alliance remain in force; *public* debts, either to or from the state, are neither canceled nor affected. (Halleck, p. 77.)

A state subject to periodical changes in the form of its government or in the persons of its rulers has a deeper interest, perhaps, in the maintenance of this doctrine than another more securely rooted in the principles of social order, but it is absolutely necessary to the whole family of states, as the only possible condition of intercourse between nations. If it was not the duty of a state to respect its international obligations, notwithstanding domestic changes, either in the form of the government or in the persons who exercise the governing power, it would be impossible for nations to deal with each other with any assurance that their agreements would be carried into effect, and the consequences would be disastrous on the peace and well-being of the world. It may also be stated, with great confidence, that a government *de facto,* when once invested with the powers which are necessary to give it that character, can bind the state to the same extent and with the same legal effect as what is

styled a government *de jure*. Indeed, as Austin has pointed out, every government, properly so called, is a government *de facto*. A government *de jure* but not *de facto,* says he, is that which *was* a government, and which, according to the view of the speaker *ought* still to be a government, but, in point of fact, is not. (Austin, Juris, vol. 1, 336.)

As to what constitutes a government *de facto* is a question that must necessarily depend somewhat upon the facts and circumstances in the particular case to which it is proposed to apply the principle. Austin speaks of it as a government which presumably commands the habitual respect and obedience of the bulk of the people. Halleck, when speaking of the power of a *de facto* government to dispose of the public domain or other property, describes it as a government submitted to by the *great* body of the people and *recognized* by other states. Both these conditions are essential to the lawful cession of the public domain of a state under the control of a *de facto* government. (Halleck, p. 127.) Sir Matthew Hale only consented to act as judge under a government established and *recognized* by other governments and in full possession, *de facto,* of the records and power of the kingdom, after Cromwell had declared he would rule by red gowns rather than by red coats. (Hale's Hist. Com. Law, p. 14.) It has been held in England, that the courts of that country will not take notice of a foreign government not recognized by the Government of Great Britain. (City of Berne *v.* The Bank of England, 9 Ves. 347.) The Supreme Court of the United States in noting the features by which a government *de facto* is to be discriminated, mentions as one of these recognition by a foreign power. (Thorington, *v.* Smith, 8 Wal. p. 9.) So by the same court it was held that a foreign government, in possession of a portion of the territory of the United States, over which it exercised undisputed dominion for the time being, was a government *de facto* as far as the place occupied was concerned, and entitled to demand and receive from the inhabitants local allegiance. (U. S. *v.* Price, 4 Wheat, p. 253.) A government *de facto,* said Justice Nelson, delivering the opinion of the court, is a government in the possession of the supreme power of the district of country over which its jurisdiction extends. (Mauran *v.* Ins. Co. 6 W p. 137.) And this power has been elsewhere styled "the ruling," the "supreme power" of the country. (Nesbitt *v.* Lushington, 4 Term. 763).

While it has been uniformly held by all the writers upon this subject that the substitution of one form of government for another, or a mere change in the person of the ruling power, will not affect the validity of state action, the application of this rule seems to have been confined in the main to the maintenance of treaty obligations, and responsibility for wrongs and injuries, or torts, and where it has been extended to claims contractual in their character, appears to have been limited to public debts owing by one state to the citizens of another. It has been the uniform practice of the United States almost without exception to refuse intervention in behalf of its citizens claiming for breach of contract against the government of a foreign power, and wherever it has interfered, to restrict the character of its interference to good offices, which

were defined by Secretary Fish as mere personal unofficial recommendations. (2 Whar. 233, p. 664.) While this has been the practice of Great Britain in similar cases, the Government of Her Majesty has been careful to maintain that the refusal to intervene has been largely governed by considerations of a domestic character, and not upon any notion that a breach of contract between a subject of that country and a foreign power, was not a wrong which might be redressed by diplomatic intervention whenever the government in its discretion saw fit to interfere. (Lord Palmerston's circular to British representatives in 1848. Hall's Note, p. 257.)

It would be difficult, if not impossible, to assign a good reason why, on principles of abstract right and justice, an injury to a citizen arising out of a refusal of a foreign power to keep its contractual engagements, did not impose an obligation upon the government of his allegiance to seek redress from the offending country, quite as binding as its recognized duty to interfere in cases involving wrongs to person and property. (Hall, p. 257.) The reasons assigned by our Secretaries of State for refusing any relief, except the mere tender of personal good offices, in cases of breach of contract, seem with some exceptions to be placed upon the broad ground that the government has no *right* to compel another power to perform its contracts made with citizens of the United States. (See Mr. Adams's instructions, April 29, 1823, cited 2 Whar. p. 644.) Mr. Fish, as late as 1870, declares that the reason of this policy is that claims based on contract are supposed to stand upon a very different footing from those which arise from injuries to person and property. (Whar. 2, p. 656.)

But however this question may stand on principle it can not be doubted that if the present claim was valid in other respects it would be the duty of this commission, under the convention between the United States and Venezuela, to make an allowance of damages sufficient to compensate for the wrong, notwithstanding the fact that it originated in a breach of private contract between a citizen of one state and the government of another.

Conceding now that a *de facto* government can bind the state in a matter of private contract between it and the citizens of another state, and that good faith as between nations binds the state as a personality to fulfill the terms of its private contracts, or pay damages for their non-fulfillment, notwithstanding any subsequent change in the ruling powers, the question first to be determined here is whether the government of Paez was such a government. Before answering the question, however, it is proper that we should state some of the provisions of the second contract relating to the colonization scheme and executed by Camacho under the same power given by Paez. By this contract Camacho cedes to the contracting parties, their associates and assigns, those public lands which until now have not been ceded, in the parts of the republic which they may select and in the quantities hereinafter explained. The second article provides that "the cession shall be made of 1,000 English acres for each person in them during the first year of the cession, the contractors being obliged to have for each 1,000 acres two persons in the second year, three in

the third, four in the fourth, and so successively one person for each year up to the number of ten in the space of ten years, so that for each 1,000 acres there shall be ten persons within ten years from this date" (date of contract 5th of May 1863). To enable the contractors to carry out this provision they are given "the right every year to select in the part of the republic where they may see fit 100,000 square acres of land, either in one parcel or in divided portions . . . provided that within two years from the date of such selection of lands the contractors shall have placed two colonists for each 1,000 square acres."

By the tenth article it is stipulated that the mines which may be found in the lands ceded to this colonization enterprise shall belong in fee to the contractors, and in the generic term mines are to be included, not only those of metal but also those of petroleum, asphaltum, marble, coal, and others. Lawful possession of the lands occupied is provided for, and provision is also made for the selected lands. "The titles shall be given in favor of the contractors the day the colonists arrive at a Venezuelan port," while the colonists, who are to acquire in no case more than fifty acres each, must wait a year before they receive a conveyance of title. If at the end of ten years the contractors shall not have introduced the required number of colonists to entitle them to the number of acres of land as to which they have already received the initial right of selection, the privilege of purchasing the vacant lands within the limits of the cession, at the rate of fifty cents an acre, is granted, on the single condition that the contractors pay the expenses of the survey.

The eleventh article further provided that if within the limits ceded to the colony, and before the introduction of the colonists in the number and manner stipulated, the contractors desire to buy the vacant lands, "they shall have the choice to do so, being previously measured by the surveyors of the government, paying half a dollar Venezuelan currency per acre, the expense of the measurements of the lands to be paid by the contractors." By this contract then there was a deed of cession of a large portion of the territory of Venezuela, to be increased indefinitely, at the rate of 100 acres for every immigrant, good, bad, or indifferent, introduced into the country, along with the conveyance, of what is usually reserved in such donations, of a fee-simple title to all the mines within the limits of the cession, including therein everything of value that attaches to or is found in the soil, with no obligation whatever on the contractors to supply a single immigrant, and with the right to purchase vacant lands within the limits of the cession at fifty cents per acre.

Drawn up in solemn form, acknowledged before a notary, and sealed, too, this instrument has all the exterior legal requisites, both at the civil and common law, to protect it from criticism and assault for want of consideration, but it is in fact no contract mutually binding upon the parties; but the concession of a privilege by Venezuela to be availed of or not, and when or never, as Messrs. Beales and Nobles in their discretion saw fit.

Such being the character of this immigration contract, it is to be observed that the commissioner, Mr. Camacho, exceeded his power in this case as well

as in the execution of the steamship contract. Under the power he had authority to contract for the establishment of a *constant current* of immigration into Venezuela, and he had no right to contract for anything else. For the first year of the cession it will be remembered that the planting of one colonist entitled the contractors to one thousand acres of land for the first colonist settled, two thousand for the second, and so on. If at the end of two years they had succeeded in planting two colonists they were then entitled to select one hundred thousand acres of land, mines, and all as defined by the contract; and if at the end of ten years, they had not furnished ten emigrants, but only the half of that number they were at liberty to buy, at the rate of fifty cents an acre, the excess of land remaining over and above the number of emigrants agreed to be supplied. Not only so, but if they saw fit to introduce no emigrants at all; if they believed that the purchase of all the lands within the limits ceded to the colony at a half dollar an acre in Venezuelan currency, would pay them better than the turning of a "constant stream of immigration" into Venezuela, they were at liberty to abandon the colonization scheme altogether, and turn the contract into a land speculation pure and simple.

It is obvious from this statement that the contract did not *provide* for *a constant current* of immigration, and even if that result had been an accidental consequence of what was provided for the terms of the power would not have been gratified.

It was not its intention to leave anything to accident or to a choice between two lines of conduct, as the one or the other might seem best designed to promote the interests of the contractors, but to impose upon Camacho an imperative and absolute obligation, to exact compliance with this condition, as the sole and paramount object of the power. Failure in this, whatever else may have been accomplished, is failure in everything.

Recurring now to the question of the lawfulness of the power it may be more than doubted whether Paez, if he had been supreme chief, both *de facto* and *de jure,* could have granted such a power. It appears that the constitution of the 31st of December 1858, was in force when he assumed this character. Title IX of this constitution concerns the power of *congress,* and among these powers, as prescribed in article 64, is the power to decree what may be convenient for the administration, preservation, and alienation of national property, to assist in the immigration and colonization of foreigners, and to encourage by means of legislation and by contracts the navigation and canalization of rivers, the opening of roads, and other works, provided they be of national utility (sections 13, 16, 30). This is a clear devolution of the authority exercised by Paez upon the legislative department of the government, and unless we assume that the supreme chief for the time being in the possession of the capital and of the province of Caracas, had supplanted completely the constitution, and could exercise in his own person the functions of the executive as well as the legislative department, it is very clear that the authority granted to Camacho was an excess of power in itself as to both contracts.

We have already, in a general way, referred to the distracted condition of affairs at the time he assumed control of the government, and now as a matter of more historical than legal interest, perhaps, it may not be out of place to quote the preamble of the decree of the 10th of September 1861, under which he took possession of the government as supreme chief of Venezuela:

> The people of *Caracas,* to whom entire liberty was left to deliberate in the use of their sovereignty, spontaneously ratified this vote (that of the defenders of society within the *province* of Caracas), and appointed me civil and military chief of the republic, with full power to pacify and reconstruct it under the popular republican form. At La Victoria I was met by the commission sent to present me the vote of the capital (Caracas) and to request my acceptance. But I feel satisfied, fully satisfied, with the uniformity of the vote of Caracas and of this province (Caracas). I am still ignorant of the will of the republic. National opinion is, and has always been, the guide of my conduct.

Venezuela at that time was composed of twenty-one provinces, Caracas, of course, being the principal one, as the seat of the capital, but there is no inference to be drawn from the mere possession of the capital as to the established character of a government *de facto* claiming to be such. One faction may have possession of the capital to-day, another to-morrow, while the authority of neither is recognized and established as the supreme power of the country over which its jurisdiction extends, or rather over the district [over which] each is attempting to extend its jurisdiction. This government lasted about twenty months, and was succeeded by the Falcon administration, which was also in possession of the capital when the contracts were annulled. How much of the habitual respect of the bulk of the people outside of the province of Caracas it managed to acquire before its overthrow we have no means of knowing, but, if the preamble of the decree just quoted affords any reliable evidence of the condition of affairs at that time, there is not much ground for believing that the Paez government was founded on any tenure more reliable than the ability to maintain its authority for a limited period within a circumscribed district of the country.

Such being the internal condition of the country and the war of factions with varying success, the United States, while maintaining relations of intercourse with the state itself, through whatever organ of government might, for the time being, have the ascendancy and occupy the capital, refused to recognize the government of Paez as the *de facto* government of the state, rebuked its minister for attempting to do so, and promptly repudiated his act. This treatment of the Paez government was in strict accordance with the settled policy of the United States from the organization of the government. All questions, said President Jackson, relative to the government of foreign nations, whether of the Old or New World, have been treated by the United States as questions of *fact* only, and they have continuously abstained from deciding on them until the clearest evidence was in their possession to enable them to decide correctly.

(Message to Congress, 21st December, 1836. Repeated by Mr. Forsyth in his answer to the Texan Envoy in 1837.)

It is a rule of our courts that the judicial department of the government in such cases is bound by the action of the political or executive department, the same rule which was laid down by the Lord Chancellor of Great Britain in the case of the City of Berne *v.* The Bank of England, before cited. When a civil war, says Chief Justice Marshall, rages in a foreign nation, one part of which separates itself from the old established government, the courts of the Union must view such newly constituted government as it is viewed by the legislative and executive departments of the Government of the United States. (U S. *v.* Palmer, 3 Wheat, p. 644, Rose v. Himely, 4 C. p. 272.) Besides the case of the City of Berne, this doctrine has been recognized in England in several cases directly growing out of transactions with the South American republics. In the case of Jones *v.* Garcia del Rio, where a bill had been filed by subscribers to a Peruvian loan for an account, the answer to which admitted that no such government as the Peruvian Government had been recognized by His Majesty's government, Lord Eldon said, "What right have I as the king's judge to interfere upon the subject of a contract with a country which he does not recognize?" (Turn, and Rus. 1, p. 299; Taylor *v.* Barclay, 2 Sim. p. 213; The Colombian Government *v.* Rothschild, 1 Sim. p. 100; 3 Bing. p. 432.)

But if it be replied to this that the question of a *de facto* government in its relations to recognition by other governments is a large question to be determined on considerations of grave public policy, and without straining analogy can not be associated with the narrower question of private contractual obligations, entered into by a government purporting to be such, as they come for adjudication before an international tribunal like this, which is not bound by the rule of policy referred to, it may nevertheless be answered, that the question of fact involved in the determination of the lawfulness of such a government when its authority is disputed, is a question absolutely necessary to be established before a correct judgment as to the law can be pronounced. While the failure or refusal of the United States to recognize the government of Paez is not binding upon us as a court in determining the question whether that government was a government *de facto* or not, the necessity of determining that question, in someway as an essential prerequisite absolutely vital to the correct determination of the main issue involved, is just as binding and imperative, as it would be upon any other tribunal empowered to adjudicate the question. In the absence of presumptions, which, in the condition the country was at the time, can not be made in favor of the lawfulness of the government, resort must be had to evidence to establish its true character, as any other fact in doubt is required to be proved, and on this question of *fact* the failure of the United States to recognize the Paez government is a fact which can not be ignored.

The argument of the learned counsel for the United States and the claimants was addressed largely to establishing the proposition that a government

de facto was invested with the same authority to conclude binding contracts as a government *de jure,* and having succeeded in this, then proceeded upon the pure assumption of the petition that the Government of Venezuela was a government *de facto*, when this power was granted; but this, it is not necessary to say, is not only the very question at issue, but the duty of establishing the affirmative rests upon the petitioner. Ordinarily the authority of the ruling power in a state, when the instrument of evidence is once duly authenticated, would not be drawn in question for the reason, as already given, that states are immortal, and in the course of time, according to varying degrees of stability, acquire a fixed personal status like that of an individual, with a capability of binding themselves with a like freedom from question and suspicion. No one would question an authority given under the great seal of Great Britain or the United States, and no one would question the lawfulness of a power emanating from the United States of Venezuela under the happier conditions of government which now prevail in that country. But in a case like this, where no assistance can be derived from presumptions, the petition must be treated as if it had averred in terms that the power, in virtue of which these contracts were executed, was itself a deed, not only duly authenticated, as an instrument passing from the hands of its apparent maker, but also as the medium through which the undisputed authority of the state was conveyed, and by which it was bound. A man claiming under a deed must prove it, and if there is any question as to the power of the grantor to do the deed he must establish that also. The mere fact of execution is a matter of formal evidence, but the right to do the act, of which the paper instrument usually called the deed supplies the proof, is the essential issue in controversies of this character. Treating this petition, then, as setting up not merely the paper power to Camacho, but as asserting the actual authority of Paez to issue such a power, as the foundation stone on which this claim is erected, we are confronted by the general denial which Venezuela has interposed to the petition, and which, under our rules, puts in issue every essential constituent of the petitioner's claim. The question is thus raised whether, conceding that a *de facto* government, according to Austin's definition, has the same authority to bind the state as a government d*e jure,* the Paez government can lay claim to such a character, and on this question the burden of proof is on the claimants.

It would be enough to say that they have not discharged this obligation, but from the references we have made to the origin and character of this government it would seem reasonably clear that if the claimants had assumed to carry such a burden they must have failed in the undertaking.

But, passing this, it is further to be observed that the clause in both of the contracts providing for arbitration at Caracas clearly shows that neither of them, on any pretest, was ever to be made cause for an international claim. It is true that it has been urged in answer to this, that both contracts were struck down by the decrees annuling them, and that the arbitral clause fell with them. But that argument is more specious than real. It is conceded, of course, that

one party to a contract can not break it at his pleasure and without the consent of the other, but when both parties agree, as in this case, that any doubts, differences, difficulties, or misunderstandings of any class or nature whatever that may arise from, or have any connection with, or in any manner relate to the contract shall be referred to arbitration, and one of the parties declares that he is not bound by the contract and attempts to annul it, then the attempt to revoke, of necessity, if language has any meaning, being a "difficulty" relative to the contract, must be one of the questions agreed to be submitted. If these contracts had been good and valid in other respects, and the Messrs. Beales and Nobles had demanded that the "difficulty" growing out of their annulment should be referred to arbitration as provided, and the government at Caracas had refused its assent to the submission, then a question might have arisen whether there was not such a denial of justice on the part of that government as would have warranted the interposition of the good offices of the United States in behalf of the injured parties. No such demand appears to have been made, but the case was submitted to the old commission under the convention of 1866, and was decided by the umpire upon the assumption just stated, that the decrees annulled the provision as to arbitration, and thus produced the very result of converting into cause for an international claim a difficulty relating to the contract which by its terms expressed in the most solemn manner was never to be made such on any *pretext* whatever. A distinction was made in argument between a reference of differences or misunderstandings arising out of the construction of the contracts, and a difficulty as to the existence of the contract itself, it being admitted that a controversy of the first kind was legitimate matter for arbitration, but the second was not, or rather could not be made so, because when the contract was annulled there was no longer any provision for arbitration. But that assumes the right to annul without making the revocation a subject of arbitral decision, and such assumption can not be made without the further assumption that a difficulty *relative* to the contract does not and was not intended to include a question as to whether there was such a contract. The case seems to us too clear for doubt, and on this ground alone, if there was no other, we should reject the claim.

1. On the whole our conclusions are that by the constitution of Venezuela the lawful and undisputed government of that country could not, by its executive department alone, have granted the power in question, and therefore the grant by Paez was without lawful authority, even if the *de facto* character of his government had been established, as to which there is not only a failure of proof but the evidence seems the other way.

2. That both the contracts purporting to have been made in pursuance of the power contain provisions and stipulations clearly in excess of its terms, and where drawn within the limitations of the power have failed to conform to the prescribed requirements as to the parties with whom the contracts were authorized.

3. That the contracts provide a mode of settlement by arbitration for any differences or difficulties that may arise as to their legal validity which is inconsistent with any attempt to make them cause for an international claim on any pretext whatever.

4. That there is no evidence satisfactory to us that the petitioners' testator was interested to the extent of one-third of the claim for the damages alleged to have been suffered by the annulment of the said contracts, or that he ever expended any money or incurred any liability, or did anything in execution of the said contracts; and, treating the petitioners representing their testator as original claimants, we can discover no ground on which to base an award in their favor.

5. That the evidence seems to indicate very strongly that the petitioners' testator came into possession of a single certificate, which was found among his papers, by purchase, hypothecation, or some other channel than his interest in the original claim, and if the petitioners are to be regarded as claiming derivatively in the right of *bona fide* holders for value under the 9th section of the treaty, the claim must be rejected, because for the reasons stated the original claim itself is without merit, and falls therefore within the purview of the first article of the supplementary convention. The claim is accordingly disallowed, and the petition dismissed.

Cases of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole and Narcisa de Hammer *v.* Venezuela (the steamer *Apure* case), opinions of the Commissioners*

Affaires concernant Amelia de Brissot, Ralph Rawdon, Joseph Stackpole et Narcisa de Hammer c. Venezuela (cas du vapeur *Apure*), opinions des Commissaires**

First Commissioner

State responsibility—obligation of Venezuela to protect the life and property of the citizens of the United States—international responsibility of governments for the acts of their officers—extent of the responsibility varies according to whether acts emanated from agents appointed by the government or from officers who are not under its immediate direction and control—obligation to indemnify damages caused to another State or its citizens by persons under its dependence and for whom it is accountable.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2949.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2949.

Imputability—imputability of acts to the State and its government—State responsible only for acts of its officers which occurred in circumstances that may morally be imputable to States.

Second Commissioner

State responsibility—ultimate responsibility not dependent upon the States' form of government or the domestic distribution of its powers—responsibility and liability are to be determined and measured by the State's conduct in ascertaining and bringing to justice the guilty parties.

Third Commissioner

State responsibility—no responsibility for not anticipating and preventing an outbreak of violence and surprise attack—responsibility for wrongs inflicted upon citizens of another State when the offender is permitted to go at large without honest endeavour made for his arrest and punishment—the relations *inter sese* between the constituent parts of a federal State cannot play part in determining the responsibility of the State for wrongs inflicted by any of these parts or within their jurisdiction.

State of war—no right superior to the doing and appropriating of whatever is necessary to success—attackers not considered to be belligerents recognized as *a de facto* government beyond the jurisdiction and control of the State—no evidence of a state of war that could be accepted as an excuse for the attack in the present case.

Premier Commissaire

Responsabilité de l'État—obligation du Venezuela de protéger la vie et les biens des citoyens des États-Unis—responsabilité internationale des gouvernements pour les actes de leurs organes—l'étendue de la responsabilité varie selon que les actes émanent d'agents nommés par le gouvernement ou d'individus qui n'étaient pas sous son contrôle et sa direction directs—obligation d'indemniser les dommages causés à un autre État ou à ses citoyens par les personnes sous le contrôle de l'État et pour lesquelles il est responsable.

Imputabilité—imputabilité des actes à l'État et son gouvernement—l'État est uniquement responsable des actes de ses organes qui ont été perpétrés dans des circonstances susceptibles d'être moralement imputables aux États.

Deuxième Commissaire

Responsabilité de l'État—la responsabilité ne dépend pas de la forme du gouvernement de l'État ou de la répartition interne des pouvoirs en son sein—la responsabilité doit être établie et mesurée à l'aune de la conduite de l'État dans la détermination et l'assignation en justice des parties coupables.

Troisième Commissaire

Responsabilité de l'État—absence de responsabilité pour ne pas avoir anticipé ou prévenu une éruption de violence et une attaque surprise—responsabilité pour les torts infligés aux citoyens d'un autre État lorsque le coupable est autorisé à rester en liberté sans qu'une tentative sérieuse de l'arrêter et de le punir ne soit entreprise—les relations *inter sese* entre les parties constituantes d'un État fédéral ne peuvent entrer en compte

dans la détermination de la responsabilité de l'État pour les torts infligés par l'une des ses parties constituantes ou sous la juridiction de celles-ci.

État de guerre—pas de droit supérieur à celui de faire et de s'approprier ce qui est nécessaire au succès—les attaquants ne sont pas considérés comme étant des belligérants reconnus comme gouvernement *de facto* placé hors de la compétence et du contrôle de l'État—pas de preuve de l'état de guerre qui aurait pu être acceptée dans le cas présent comme une excuse à l'attaque.

Opinion of the Commissioner, Mr. Andrade

The Government of Venezuela granted in May 1849 to E. A. Turpin and Frederick Anthony Beelen, citizens of the United States of America, and to their associates and successors, an exclusive privilege to navigate the rivers Orinoco and Apure, for eighteen years, running from the date of the aforesaid concession.

To work the said privilege, a corporation was legally organized in New York in October of the same year, 1849, under the name of "The Orinoco Steam Navigation Company of New York".

It appears that this company went so far as to put four steamers in actual service, three of which, the *Meta*, the *Apure*, and the *Barinas*, were still running in 1856 and 1857, and only two of them, the *Apure* and the *Guayana*, from 1858 to 1861; only one, the *Apure*, existed about 1865.

The *Apure* left Ciudad Bolivar on the 9th of October 1865 on one of her ordinary trips, carrying on board a very light cargo and a small number of passengers for Nutrias, the extreme point of her journey, and the intermediate ports. On her way through she touched at San Fernando, capital of the State of Apure, where, on the morning of the 17th, the passage fares agreed on having been paid, she took on board the president of the State, General Juan Bautista Garcia, and a small military force (about 9 officers and 50 men), to land them at a point on the upper Apure within his jurisdiction which General Garcia would opportunely designate. On the night of the 18th, the steamer being moored at the port of Apurito, one of her usual landing places, for which she carried some freight, she was suddenly attacked by a force of rebels against the government of General Garcia, who had been advised in advance of the presence of said general on board the steamer with an armed force.

The origin and cause of the above-mentioned four claims are to be found in this regrettable event, since during the seven hours' fight of that night the captain of the steamer, John W. Hammer, and chief engineer, Julius de Bnssot, whose wives' claims are for $50,000 and $30,000, respectively, were killed; Joseph Stackpole, another engineer, claiming $15,000 indemnity, was wounded; and in consequence thereof The Orinoco Steam Navigation Company suffered damages which its secretary, Ralph Rawdon, estimates at $100,000. . . .

Let the liability of Venezuela for these claims be now carefully examined from other points of view. Here is the reasoning of the claimants.

General Garcia caused the conflict that occurred at Apurito on the night of October 18, 1865, by placing his officers and troops on board the steamer and requiring Captain Hammer to undertake a service for Venezuela, the performance of which he knew would place their lives in peril, and which was under taken by Captain Hammer reluctantly, under protest, if not under military coercion; by requiring Captain Hammer to proceed to Apurito; by not leaving the steamer with his officers and men when informed by the spy that hostile forces were in the plaza; by sending a squad ashore from the steamer and when it was fired upon and routed, allowing it to take refuge in the steamer; by refusing to debark with his officers and men, and by making the steamer a shelter for himself and men. General Garcia was the president and chief executive of the State of Apure, one of the States of the Republic of Venezuela. The obligation rested upon Venezuela to protect the lives and property of the citizens of the United States. It was the duty of General Garcia, who was one of the civil as well as military officers of the republic, to see that this protection was afforded them. He not only failed to give them this protection, but required them under compulsion to perform a perilous service in behalf of Venezuela. Then Venezuela caused the conflict and is liable therefor. Though the cause could not be imputed to her directly she should always be held subject to responsibility according to the principle set down by Wharton, that—

> The sovereign is responsible to alien residents for injuries they receive on his territories from belligerent action, or from insurgents whom he could control or whom the claimant government has not recognized as belligerents.

General Garcia was in fact, as it appears, president of the State of Apure, of the Republic of Venezuela, and as such the natural chief of the military forces of that State; but it can not be concluded therefrom that he was a civil or military officer or agent of the government of the republic. Quite to the contrary. The federal constitution of 1864 provided:

> Art. 1. The provinces of Apure, Aragua, Barcelona, Barinas, Barquisimeto, Carabobo, Caracas, Cojedes, Cumaná, Guárico, Guayana, Maracaibo, Maturin, Mérida, Margarita, Portuguesa, Táchira, Trujillo, and Yaracuy, *are declared independent states,* and they unite themselves to form a free and sovereign nation under the name of the United States of Venezuela.

The State of Apure was, therefore, an autonomous state, and its government was independent of the Government of the United States of Venezuela. General Garcia was not an officer or agent of the republic, but of the public authority of the State of Apure, and hence, though he had really been the originator or efficient cause of the Apurito event, it would be contrary to sound logic to deduce therefrom the consequence that said event had been caused by Venezuela.

The same thing may be said of the so-called compulsory service required from Captain Hammer by General Garcia; that it was not a service for Venezuela, but for the State of Apure. This distinction does not lack importance, because the international responsibility of governments for the acts of their

officers, its extent and quantity and the rules by which it is to be determined, vary according as the act or acts out of which the liability may arise have emanated from agents appointed by the government, and dependent upon it for their functions, or from officers not appointed by the government, or who are not under its immediate direction and control. In the first case, the acts of the official representative are one with those of the government under the authority of which he has acted, and are imputable to it. In the second case, the question of the imputability is more complex.

The responsibility of governments, in general, for damages caused to foreigners, is founded on the ground that the state being a moral person endowed to a certain degree with the same capacity and liberty as are enjoyed by the citizens who compose it, is bound as such to account for its own acts when they cause some injury to another state, or to the citizens of another state. For the same reason it is held bound to indemnify the damages caused by the persons under its dependence, and for whom it is accountable.

But in the state a double juridical person is to be recognized—the civil person, inasmuch as it is the possessor of its patrimony and has the capacity to administer it, and the political person, so far as it is a political, independent, and sovereign entity charged with the preservation of the public order and the protection of the citizens. Considered in the first aspect, its responsibility toward the foreigners damnified or injured by the acts of its officers is purely moral, and only in the case of complicity or of manifest denial of justice, could it become international. In this aspect it is contemplated by Cushing, when, speaking of the two classes of officers employed in the administration of public affairs, he says:

> But for the acts of the latter, no government holds itself pecuniarily responsible. It provides means to make them personally responsible, or to punish them for malfeasance in office, and in so doing it does all which the people have by their constitution and laws required of the government.

And in the same aspect Calvo regards it when he writes:

> Within the circle of jurisdictional limits, all the agents of the authority are personally and solely responsible for their acts in the measure established by the internal public law of each state. When they fail to fulfil their duties, exceed then-powers, or violate the law, they create according to circumstances, in behalf of those whose rights they injure, a legal remedy in conformity with administrative or judicial procedure; but in relation to third parties, natives or aliens, the responsibility of the government that has appointed them is purely moral, and it could not become direct and effective but in the case of complicity or of manifest denial of justice.

With regard to the political personality, the international responsibility of the state for the acts of its officers in the exercise of public authority is subject to clear and well-known rules. Such responsibility is admitted, but only in the case that upon an examination of the circumstances, the fact which has pro-

duced the damage to foreign interests may morally be imputable to the state. Fiore and Calvo concur in subordinating it to four conditions, to wit:

1. That the government may have known in due time to prevent it, the illegal act which its officer intended to commit, and did not prevent it.

2. That it, having been enabled to revoke in time the act of its officer, did not revoke it.

3. That the ignorance of the act intended by the officer may by its circumstances, be judged as malicious or criminal.

4. That having been advised of the facts, it had not pressed itself to blame the acts of its agent, nor to take the proper measures to prevent in future the repetition of the same faults.

Now, supposing for the sake of argument, that General Garcia had been an officer of the federal government, and his embarcation in the steamer *Apure* an illegal act, did the government know it in time to prevent him from committing it? Could the government know it? Could its ignorance be attributed to malice? Would it be just to impute it to the government? It seems sufficient to set down these questions in order to observe that they can not be solved otherwise than by the negative. The Apure arrived at San Fernando on the 16th of October, and on the 17th, at 6 o'clock a.m., left that port, having on board General Garcia with his officers and troops. Between San Fernando and Caracas there is a distance of over 200 miles by land (by water much greater), and at that epoch there was no other telegraphic line in Venezuela than the one from Caracas to La Guayra and Valencia. The same thing may be said regarding the event of Apurito. How could the Government of Caracas have known it before it was accomplished, if even after its consummation it took one month to come into possession of the first news about it, through the note of Mr. Wilson of November 13, 1865?

As to the inactivity which is attributed to the government after it was informed of the occurrence, it is well to recall the diligence shown by General Arismendi, president of the State of Guayana, in his engagement to have the truth duly ascertained through a judicial inquiry by the court of first instance of Ciudad Bolivar, since November 9, the date of the arrival there of the steamer Apure with the most recent account thereof. The meeting of the consuls and other foreigners, held at that town on the 12th of November, passed a vote of thanks to His Excellency General José L. Arismendi, "for his prompt and energetic measures toward a thorough examination into the details of this outrage;" and if the pretended blamable action of the president of Apure is placed as a debt to the account of Venezuela, justice requires that the praiseworthy action of the president of Guayana be equally placed to her account as a credit.

Besides that examination, among the documents are to be found, as evidence of what was done by the Government of Venezuela to speedily obtain official information about the occurrence at Apurito, several notes exchanged, from November 16 to a later date, between the minister of foreign relations at Caracas, and those of the interior and justice, and of war and navy; a report

from the military commander of the State of Apure to the minister of war and navy, of November 29; another from the national attorney at San Fernando to the minister of the interior and justice, dated January 9, 1866; another from the new president of the State of Apure, addressed also to the minister of the interior and justice, under date of January 10, 1866, and, finally an investigation instituted on the 13th of the same month of January before the circuit court of Lower Apure by the national attorney in the State. This suffices to demonstrate that Venezuela did not neglect on that occasion to adopt the means and measures proportionate to the gravity of the case, and is sufficient to withdraw from her the charge of voluntary omission of diligence, which is brought to-day against her. Governments are not bound in such cases to show an extraordinary activity.

> It would be an excessive and unreasonable pretension to demand that a government, occupied as it ought to be in the fulfillment of its multiple functions and duties, should work in all times and circumstances with mechanical precision. (Fiore.)

That was, furthermore, what the political institutions in force allowed her to do. The States of the Venezuelan Union were, as it has been said, independent and maintained in all its fullness the sovereignty not expressly delegated to the federal power. They possessed the exclusive right of civil and criminal legislation within their own territory and their courts of justice were independent. Their officers of every category were held responsible only before their own jurisdiction. The government of the Union could not maintain therein any other resident officers vested with jurisdiction and authority than those of the State itself, except those of the treasury and of the national fortresses, parks, navy-yard, etc., who had jurisdiction only over the affairs belonging to their respective offices, and within the precinct of the fortresses and barracks, being on all other matters subject to the general laws of the State in which they resided. Nor could it station in any State troops or military chiefs with command, even of the State itself, without the permission of the State. Nor could the federal executive interfere by force of arms in the domestic contentions of a State; the only thing permitted to it was the offer of its good offices with a view to bring about a peaceful solution. (Constitution of 1864.)

However imperfect or inefficacious to protect the rights of foreigners that constitution may be judged to be to-day it is not known of any foreign government having ever made the slightest remark to the Venezuelan Government in that regard, and it is presumed that those foreign citizens who, after its enactment, remained in Venezuela, carrying on their commercial business and navigation privileges, voluntarily submitted to it. All that could be demanded from the government of the republic was its loyal and faithful observance in relation to them.

> If a government had adopted, with perfect loyalty and good faith, all the measures at its disposal to obviate an inconvenience; if it had employed all the legal proceedings to prevent and punish him who had caused an injury

to a friendly state, *it would not be just or equitable to declare it responsible for not having employed means incompatible with the spirit of the political institutions, or for having been unable to modify the imperfect system of laws which it found established.* (Fiore.)

Mr. Dalton, the United States consul at Ciudad Bolivar, was no doubt mistaken when, in his protest of November 21, 1865, he holds the Republic of Venezuela liable *for the disasters and murders attendant upon the attack of Apurito, for its neglect of its relations with the State of Apure, one of its constituent portions, inasmueh as the president of the said State of Apure, Juan B. Garcia, a general in the army of the republic, was in actual revolt against its supreme authority. . . .*

General Arismendi was undoubtedly not less mistaken when, alluding to his position and that of General Garcia in his reply to the consuls at Ciudad Bolivar, he expressed his belief that according to the legal system of Venezuela the government of the Union alone could decide such cases, and that with regard to his public acts General Garcia had no other superior than the national executive.

And the learned counsel for the United States before this commission falls into the same error to-day in asserting that the offenders, so called by him, were all under the jurisdiction and authority of the federal government of Venezuela, all officers in the service of the Venezuelan Republic.

The truth is, that according to the constitutional law of Venezuela in 1865, General Garcia, the legal president of the State of Apure, was responsible only to the legislature of the said State, and that the federal government had not the legal power to punish him or even to treat him as a rebel, except by the law of war when it had subdued him by force. But it is not shown that he was in revolt at the time against the federal government. It may be that he did not want to recognize the national attorney appointed by that government for the State of Apure, on account, perhaps, of regarding it contrary to the right of independence of the State; but that was a question of law, not of war.

At all events, within the limits of the exercise of public power, Venezuela seems to have done all that she was bound to do in behalf of her international duties toward the United States. Yet it is important to add that the merit of the evidence affords no ground for imputing to General Garcia any fault whatever.

In view of the insurrection of Generals Sosa and Mendez, Garcia, in his capacity of president of the State, and in the interest of public order, had the right under the law of nations to detain the steamer Apure on her arrival at San Fernando, and to employ her for the transportation of troops and articles of war, without any other condition than previously to settle and pay the price for the service required, and without further responsibility than for the material damages suffered by the steamer on account of her detention, or of her departure from the regular and usual course of her voyage, or the loss of cargo, etc.

> In cases of civil troubles or foreign war, the interest of self-defense or security may impose upon a state the moral obligation of temporarily interfering with commercial transactions, of stopping the movement of merchant vessels, and even of seizing them for the transportation of troops and ammunition, or for any other military operation. State reason surpasses here private interest, whether national or foreign, and legitimates the adoption of these extreme means.
>
> The exercise of these two rights, especially the latter (the requisition of a merchant vessel for any public service), is extremely delicate, and requires great regard for the private foreign interests that it sometimes affects. . . . On the other hand, by taking possession of her (the vessel) for a public use, by employing her in military operations, which necessarily are of a hostile nature, it destroys her neutrality, exposes her to risks and dangers of capture or detention, which equity demands that she be insured against, since she has not been able to avoid them. The rule universally recognized on this subject is, therefore, that any government which may be compelled by the circumstances to resort to such appropriation to public uses, is responsible not only for the material consequences to the vessel made the object thereof, but is also held bound before enforcing her requisition, to settle with the interested parties and pay the indemnity due for the service demanded. (Calvo.)

But General Garcia did not make use of that right, as it appears. The assertion that the service rendered by the steamer Apure was compulsory, has no foundation. The officers and crew say in their protest entered early in the morning of October 19, on the very spot of the combat:

> On the 17th instant at 6 o'clock a. m., after Captain Hammer *had agreed*, with the general-in-chief, Juan Bautista Garcia, president of the sovereign State of Apure, for the transportation of fifty soldiers and his officers, their passage and freight having been paid in advance, both more fair than the customary, as provided in the treaty with the national government, we started for the port of San Fernando.

And the foreign consuls residing at Ciudad Bolivar, in their manifesto of November 12, say:

> At this place General Juan B. Garcia, the president of the State of Apure, *demanded* transportation for himself, seven officers, and fifty-one soldiers, with the military material, to be taken at the usual rates of passage and freight, stipulated for in the charter. . . .

And Consul Dalton, in his letter to Ralph Rawdon, of November 25, writes:

> She (the steamer) arrived at San Fernando, midway on the route up the river, where *she was applied to by the legal authorities* to carry some military forces, about 60 soldiers.

And the secretary-general of the executive of the State of Apure, in his certificate of January 18, 1866:

> On the 16th of the same month (October 1865) the steamer arrived at San Fernando, and immediately General Garcia *contracted* with her captain, citizen John Hammer, for passage for himself, for myself, several officers, and fifty soldiers.

And the secretary of General Garcia, in his deposition before the circuit court of Lower Apure, January 1866:

> I know that President Juan B. Garcia, who acted as such about October 16 of last year, *contracted* on said date with the captain of the steamer *Apure*, Mr. John Hammer, for the passage of a force, with their officers.

And the president of the State of Apure, who succeeded General Garcia, in his note of January 10, 1866, addressed to the minister of the interior and justice:

> General Garcia, who was acting at the time as president of the State, *contracted* with the captain of the steamer, John Hammer, for passage for himself, several officers, and fifty soldiers.

No allusion is made in any of these references to the two protests which Mr. Wilson, minister resident of the United States, speaks of in his note of February 25, 1867 to Senor Seijas, nor to any other sign of opposition or reluctancy nor to the absence of Captain Hammer during the steamer's stay at San Fernando, and of which General Garcia is said to have taken advantage to place his troops on board. Probably such absence did not occur, as the steamer arrived there on the 16th and left again early on the 17th. Surely Captain Hammer was not two days refusing to grant the passage applied for by General Garcia, since the steamer did not remain even a whole day at San Fernando. All the probabilities are that such refusal did not exist. Were it not so, Salom, the secretary of the steamer, who received the money for the passage and ought to know all the circumstances of the affair, would have mentioned it in his protest of Apurito, expressly intended to protect the company against all responsibility, and to secure its right to be indemnified for the losses and damages suffered the preceding night. Were it not so, Mr. Dalton would have been careful enough to give prominence to that circumstance in his interrogatory to the witnesses before the court of first instance of Ciudad Bolivar, where he appeared so eager to find General Garcia guilty and to justify the conduct of the officers of the steamer. Were it not so, finally, the same Mr. Dalton would have no doubt called that fact to the attention of Ralph Rawdon, in his letter of November 25, 1865, in which he simply says that the legal authorities of San Fernando had applied to the steamer, etc.

The same thing may be said about the declaration, attributed to General Garcia, of not permitting the steamer to leave, unless she took him with his officers and troops on board. Mr. Wilson"s statement is, perhaps, the only foundation for such incident. Probably Captain Hammer had no motive to refuse transportation to General Garcia. He knew that the State was in revolt since some days before; he was cognizant of it before leaving Ciudad Bolivar, and, besides, that was public and notorious at San Fernando. But General Gar-

cia was the legal president of the State, and the boats of the Orinoco Steam Navigation Company were, by article 10 of their charter, to serve at anytime as transports to the government, and, in fact, they had been serving as such during the whole revolutionary period of Venezuela, from 1849 to 1863, the five years of the Federal war inclusive; not only without any prejudicial accident, but with large profits to the company; in the sole year 1860 the government of the republic had paid them for that service $86,487. General Garcia was not going to encounter the enemy; the scanty number of his force was the best proof of his inoffensive design. He did not take passage for a determined point, but for some place in Upper Apure, within his jurisdiction, which he would designate later on, he had not the intention, perhaps, to land at any place whatever, but to remain in the river on board the skiffs he took with him at San Fernando, together with the other force that went to meet him in the steamer the night of the fight. His passage and that of his small expeditionary force would leave to the company a benefit of over $300, without any danger. Why not accept it?

In the arrival at Apurito, which perhaps is to be considered as the real occasion of the peril which the steamer met with on the night of the I8th October 1865, General Garcia does not seem to have had any participation, he had nothing to attend to there. Apurito was, like San Fernando, one of the ordinary ports of the steamers of the company on their regular course from Ciudad Bolivar to Nutrias, and the *Apure* called there this time, as usual, to land a portion of her cargo. In regard to this particular there is no doubt or contradiction. Where is General Garcia's fault?

He is accused of not having permitted the steamer to be unfastened and held off, in order to prevent the attack, on learning that the enemy was in the town. This charge rests on no proof whatever; nor can the interest be perceived that General Garcia could have, in not taking advantage of that means to save himself, by saving the steamer, from the danger to which they had been unexpectedly exposed; he had not left San Fernando under an aggressive attitude, and probably he was not prepared to fight against an enemy whose force and situation were unknown to him. Such a charge, but with stronger reason, perhaps, could be made against Captain Hammer, did it not appear, as it does appear, that he gave the order to cast off, and that if it was not complied with, *it was because the enemy did not permit it.*

> At any rate, there can be no doubt that the losses of life and property which occurred at Apurito might have been avoided if General Garcia had chosen to prevent them; for all the facts show that if he and his officers and men had behaved with the ordinary courage and discipline of soldiers, and had left the vessel, *as they should have done when they found that she was in danger,* or if he had permitted the steamer to be cast loose from the shore, when the attack began, *nothing serious* would have happened.
>
> Whatever view may be accepted of his action in taking this passenger steamer for the hazardous service in which he proposed to use her, it is unques-

tionable that his conduct, after she reached Apurito, was in violation of every duty he owed to the property and persons under his protection. (Brief of the counsel for the United States.)

It has already been shown that General Garcia *did not take the steamer* by right of authority, as he could have done, *nor did he propose to use her in an extraordinary service*; but like any other passenger, took passage therein for a certain point in Upper Apure, near which she had to pass on her regular course to Nutrias. Transported on the way to Apurito, where the steamer had to call, he found himself, by accident, placed within the enemy's camp.

It is probable that if he had landed then with his guard, nothing serious would have happened to the steamer or her officers, for all the facts show that the attack was not directed against the vessel but against the president of the State and his military force that she had on board. Nevertheless, it would be contrary to the facts to contend that *nothing serious* would have also happened to General Garcia and his troop; the fate which the squad that he sent on shore met with, negatives such contention. Thus, what the claimants should have endeavored to prove was that, on such an occasion, the protection due by Venezuela to the citizens of the United States and their private property, imposed upon the president of the State of Apure the obligation to offer in sacrifice himself, his officers and men, and above all, the social interests represented by them. Will it be necessary to recall that in the conflict of rights, the one of more important concern and of more universal order and more evident title, or in other words, the stronger one, is to be by natural reason preferred to the less important, of less universal order and less evident title, or to the weaker one, and that the social or public right, in other terms, the right of the state, is stronger than the individual, private right, or right of the citizen? Where is, therefore, the fault of General Garcia?

At least it seems just to recognize that General Garcia's conduct at Apurito did not violate any duty of Venezuela's toward the United States. The right and duty of self-preservation and defense, as well as the laws of war, entitled him to continue occupying in that emergency the steamer, which a combination of casual circumstances had put under his martial law. His duties as the president of the State of Apure obliged him to act so, if he believed it necessary to protect the possession of his authority attacked and the welfare of the community confided to his care. The legal duties of persons in the position of General Garcia are strict and imperative; if they fail to do all that they are required by the circumstances to do, they incur solemn responsibility, legal and moral, and everybody can value the importance that the actual occupancy of the steamer ought to have had for him, were it only to prevent her from falling into the enemy's power. The defense of the party attacked is always just, because it is conformable to moral order, and gives a right to the adequate means for securing that end, and also to the spontaneous help of all those who are in a condition apt to furnish him assistance, because every man is bound to cooperate to the preservation of the others, and from this obligation springs the right to obtain

his help. These are rules of natural justice imposing obedience, especially with respect to heads of government, whose loss is supposed ordinarily to produce disorder and confusion in the societies governed by them.

It is true that the very right of defense, notwithstanding its perfect accordance with natural justice, is, however, limited to *necessity*. But General Garcia could not be justly charged with having exceeded that limit. On the contrary, by his moderation and prudence, he seems to have supplied a motive to be accused of want of courage and discipline. His action in sending to shore a squad as soon as he knew the impossibility of casting off from the port, does not prove that he had changed his condition of the party attacked for that of aggressor. Sometimes the true aggressor is not he who attacks the first, but he who has put his adversary in the necessity of attacking to defend himself. This is doctrine of natural justice.

Even admitting, then, the general rule of public law recognized in the message of the executive, General Falcon, presented to the Venezuelan Congress, February 26, 1867, that "it is the *central power* that represents the interests of the federation in the great society of nations, to which *it alone is amenable for all the acts violating the principles of international law, which are committed by any state whatever*"; even admitting that, according to that rule "the United States might have the right to look to the federal government of Venezuela for redress for wrongs done to their citizens by the authorities of any State of the Venezuelan federation"; yet in the case of Apurito, the United States seems to have not that right, for there was not any wrong act of the State of Apure for which Venezuela could be amenable.

As the losses of life and property which occurred at Apurito were the natural consequence of an act of war, in which the part of General Garcia was purely defensive, and the aggressors were not officers or troops either of the Government of Venezuela or of the State of Apure, but of a political party in a state of rebellion against the legal authority of the latter, it is evident that this case does not fall either in the division of acts of public officers, or in that of acts of private citizens, for which governments may, under certain circumstances, be held internationally responsible. According to the evidence submitted, this is clearly a case of losses and damages suffered by foreign citizens in times of internal troubles or civil wars. Is Venezuela amenable in such a case?

Relying upon her own laws, certainly not. Since 1854 (6th of March) her Congress had enacted a law to the effect of defining her responsibility in such cases:

> ART. No foreigner has any action to claim of the government of the republic, by way of indemnity or redress, the damages and losses that their interests may suffer in consequence of political commotions, or any other cause, *when such damages and losses shall not have been committed by lawful authority.*

Some passages of diplomatic correspondence have been alleged by counsel for the claimants, in proof of the opinion that the said law of Venezuela was

enacted without any due sense of the obligations of the government of that republic to other governments, pursuant to public law and to treaties.

With respect to treaties, it does not appear that Venezuela has ever recognized in her treaties with European or American nations any principle contrary to the one enforced in the law before quoted; at least in that of 1860 with the United States she did not. Far from it; in her treaty of recognition and amity of 1845 with Spain both parties accepted in principle the doctrine of the Venezuelan law of 1854, in reciprocally declaring that they would not make any claim for damages or losses caused by the war (Art. 11), and the same doctrine was afterward, in 1858, formally admitted in the treaties with Sardinia, and with the former Hanse towns.

Pursuant, now to public law are governments responsible, or are they not, for the losses and damages resulting from such cause?

> This question has been discussed at length, and at the end solved in a negative sense.
>
> To admit in such cases the responsibility of governments, that is to say the principle of indemnity would be to create an exorbitant and lamentable privilege, essentially favorable to powerful states, and injurious to weak nations, and to establish an unjustifiable inequality betwixt natives and aliens. On the other hand, by sanctioning the doctrine which we impugn, a strong though, not direct attempt would be made against one of the constitutive elements of the independence of nations, that of territorial jurisdiction, such is, in fact, the real scope, the true meaning of that so frequent resorting to the diplomatic course to solve questions which, by their nature and the circumstances in which they are produced, belong to the exclusive province of the ordinary tribunals.
>
> Summing up now our views on this subject, we feel compelled to conclude:
>
> > 1st. That the principle of indemnity and of diplomatic intervention in favor of foreigners, by reason of damages suffered in cases of civil war, *has not been, and is not, admitted by any nation of Europe or America*.
> >
> > 2d. That the governments of the powerful nations exercising or imposing this pretended right against states, relatively weak, *commit an abuse of power and force that nothing could justify, and as contrary to their own legislations* as to international usages and to political conveniences." (*Calvo*.)
>
> A nation which would not prevent its subjects from causing damages to foreigners would engage its responsibility because, the natives being under its authority, it must look after them in order that they may not cause damages to others. *But such negligence does not render a nation responsible for the acts of those among its subjects who have put themselves in a state of insurrection and have broken their bonds of loyalty, or who are no longer within the limits of its territory*. Under such circumstances, and whatever the character attributed to their acts and conduct may be, *those citizens cease to be in fact under the jurisdiction of their government*." (Rutherforth.)

> States are not bound to allow indemnities for losses and damages suffered by aliens or natives resulting from internal troubles or civil war. (Bluntschli.)
>
> As to damages suffered in case of war or revolution, foreigners have no right to be indemnified by the state where they reside; that would be to demand for the persons residing in another country advantages which the natives do not enjoy. When a person establishes himself in a foreign state, he is bound to bear the consequences. The claim of England against Naples and Tuscany, in 1848, was rejected, and not only that, but the Russian Government, having been invited by the two Italian states to act as umpire, refused the arbitration on the ground that the English demand seemed to it so groundless that to accept the part of umpire would have been to admit doubts which did not exist. Just so in 1851, the United States refused to indemnify the Spaniards murdered by the mob at New Orleans, and did not grant reparation for damages, except to the Spanish consul, who had been insulted, and who on account of his official character was especially placed under the protection of the government. (Heffter, Note G.)

The aforesaid opinions are entirely in accordance with the law and practice observed by the various nations of Europe and by the United States in their mutual relations, and also with the Venezuelan law of 1854. Certainly not with the rule that they have pretended to impose upon the other American states in general, that aliens are more entitled to protection and have right to greater and stronger privileges than the natives of the country where they reside. But can the general principles of international law be changed according as to the places where they are to be applied? Can they be deprived in South America of the virtual justice which they possess in Europe and North America? Is the principle of exception just? To these questions Calvo answers as follows:

> This principle is intrinsically contrary to the law of the equality of nations and most disastrous in its practical consequences. In its absolute claim against the American states, it is not only noxious to the maintenance of relations of good harmony, but it is, above all, highly unjust, inasmuch as the European governments do not adopt it as the invariable rule of conduct; among themselves. Every law, in order to become acceptable and respectable, ought to rest on the basis of equality, to protect the weak as well as the strong; to defend the rights and interests of each one without discrimination; in one word, to weigh equitably upon all. The moral bonds which unite the peoples are of the same order, and imply an absolute character of solidarity. A state, therefore, could not claim among the other states a privileged situation which it would not be ready to grant them at its turn, nor claim for its subjects advantages superior to that which constitutes the common law of the inhabitants of the country.

And Bluntschli:

> The maritime powers that have acted otherwise and forced the smaller states to allow indemnities have taken advantage of the superiority of their forces.

And Fiore:

> Protection is illicit and unjustifiable where it has for its purpose to secure in favor of the citizens residing abroad a privileged position.
>
> Strong and powerful governments must not take advantage of their superiority and exaggerate the duty of protection by exercising pressure upon weak governments, in order to compel them to favor their citizens and exempt them from certain obligations, or grant them privileges of any nature whatever.

And Cushing:

> As to the exceptions to the general rule, they have grown up chiefly in Spanish America in consequence of the unsettled condition of the new American republics. Great Britain, France, and the United States have each occasionally assumed, in behalf of their subjects or citizens in those countries, rights of interference, which neither of us would tolerate at home; in some cases from necessity, in others with very questionable discretion or justification, so as greatly to aggravate the evils of misgovernment therein, as will plainly appear on a careful study of the internal condition of the Spanish American Republics.
>
> It seems to me that considerations of expediency concur with all sound ideas of public law to indicate the propriety of a return to more reserve in all this matter, as between the Spanish American republics and the United States; *that is, to abstain from applying to them any rule of public law which we do not admit to have applied to us; to do only as we would be done by and to consult their well-being and cultivate their friendship by adhering to the impartial assertion, whether in claim or in rejection of claim, of the established rules of the international jurisprudence of Christendom*.

In view of so numerous and creditable opinions, the conclusion *that the principle of the nonresponsibility of states for the losses and damages suffered by foreigners in times of internal trouble or civil wars*, is the true principle of international law, applicable to Venezuela in the case of the Apurito conflict, seems wholly warranted by truth and justice. International relations can not properly exist but between sovereign and sovereign; that is, between individuals of the same species, equal in independence. Before the law of nations all nations are equal, and if the wish of the powerful ones to cultivate relations of justice with the weak is sincere, and if the time and thought and labor which they devote to foster relations of friendship and commerce with them is with a view to valuable returns, they must behave toward them as they behave toward each other.

Summarizing, with regard to all the points of view from which this case has been considered, the claimants have failed to establish their right to be indemnified for the alleged losses and damages suffered by them in consequence of that regrettable conflict; and while this inference is true, in general, as to all of them, it seems to be so still more, in particular, with respect to Ralph Rawdon, as representative of "The Orinoco Steam Navigation Company."

Firstly, because the tarrying of the steamer at Apurito, on her way to Nutrias, which may be regarded as the proximate cause of the said conflict, was in the interest of the company.

Secondly, because according to the charter of the company "the officers and troops of the government and articles of cargo of whatever kind they may be, belonging to the government, shall likewise be transported in said steamers at reasonable prices for passage and freight, to be agreed upon with the competent authorities." Whatever the influence of the presence of General Garcia and his officers and troops on board may have been in bringing about the conflict, this was a peril to which the company had voluntarily subjected itself, as per article 10 of its charter. As to the doubt, whether such obligation was extendible or not to the transportation of officers and troops belonging to the governments of the States, the fact of Cap-tam Hammer having agreed with General Garcia upon his passage and that of his officers and men on terms conformable to said obligation, seems to have resolved it in favor of Venezuela. If it is not so, that question should have been determined by the authorities and according to the laws of Venezuela, in compliance with article 12 of the said charter, and should have never been the subject of an international claim.

Consequently, I am of the opinion that these four claims of Amelia de Brissot, Ralph Rawdon, Joseph Stackpole, and Narcisa de Hammer, should be decided against the claimants.

In deference, however, to the judgment of my colleagues, I will sign an allowance for $5,000 each in cases No. 28 and No. 29, in addition to the amounts the claimants have already received therein.

Opinion of the Commissioner, Mr. Little

. . . The evidence does not show nor history chronicle that there was a state of war in Venezuela at the time of this disaster. The occurrence can not be viewed, therefore, from that standpoint. The ultimate responsibility of Venezuela for these wrongs is in nowise dependent upon her form of government; or the domestic distribution of her powers. For redress of injuries done her citizens, the United States must look to Venezuela, and not to any of her political subdivisions.

The question, then, is: Wherein and how was Venezuela derelict in duty if at all, in respect of this tragedy? The theory that General Garcia unlawfully or unwarrantably boarded the *Apure* with his troops, took military control of the boat, precipitated the attack at Apurito, and held the noncombatants on the vessel in the fight, is not only not supported by the evidence, but against its decided weight. If these claims depended upon the establishment of anything like such a state of fact they would have to be dismissed, for the facts and circumstances point quite to the contrary.

Garcia's embarkation was lawful and without coercion. The attack at Apurito was a surprise to him as much as to the master of the vessel. The

simple truth seems to be that he disembarked his little squad of militia in the dark in an ambuscade of conspirators to hunt down and suppress whom, not improbably, he had started, and got this far on his trip up the river, though he is spoken of as being on a tour of observation. They bided their time, waited till the vessel was fastened, to prevent his escape, and then, on the appearance of his force, opened fire. The confusion and demoralization of his troops under the circumstances is not strange, or attributable to any fault of his. The criminals were the conspirators upon the shore.

Venezuela's responsibility and liability in the matter are to be determined and measured by her conduct in ascertaining and bringing to justice the guilty parties. If she did all that could reasonably be required in that behalf, she is to be held blameless; otherwise not. Without entering upon a discussion of the investigation instituted and conducted by her, it seems there was fault in not causing the leaders, at least, of this lawless band to be arrested. It was notorious who they were. It does not seem that any attempt was made before any local authority to bring them or any of the band to justice. Had there been a well-directed effort of that kind, or had the government's investigation disclosed their innocence, and failed to discover those actually guilty its responsibility would perhaps have ended, assuming the investigation, as I do, was a fair and just one.

But neither of these things appears to have occurred. It is true the evidence is not fall and clear on this point. There is consequently some doubt about it. On the whole, however, considering the heinous character of the offense, it may fairly be said that Venezuela here fell short of her entire duty. And such may perhaps be inferred to have been the view, from acts and declarations, of her executive and Congress. But her failure was not flagrant, and the allowance should be tempered with the doubt.

The damage to the vessel was not great. The consequential damages claimed by the company are not satisfactorily shown, if indeed they are not too remote. It is difficult to believe that this company, which had endured the storms of civil war for fifteen years after its formation and entrance on business, was driven from the Orinoco by this one calamity, tragic and appalling as it was. Stackpole's injury was not disabling or severe.

The allowances should not, however, in such a case, be confined to actual losses. The violated majesty of the law and regard for human life should have consideration. Remembering that the sum of $12,000 has already been paid the widows to whom we can grant no relief, and who, of course, were the greatest sufferers, we have concluded to allow $5,000 without interest in each of the two cases in addition to what has already been received. The entry may therefore be for $20,000 in case No. 28, and $7,250 in case No. 29, less what has been received under the former treaty.

Opinion of the Commissioner, Mr. Findlay

. . . After reading the record and carefully considering the arguments, which have been very full and exhaustive, on both sides, it does not seem to me that any case has been made out against Venezuela, except that she did not go as far as she ought in bringing the offenders to justice. She surely had no means of knowing or anticipating such a murderous outbreak as that which occurred at Apurito. As I understand the testimony, General Garcia and his detachment of troops on board the *Apure* were entirely unprepared to meet the assault; and whatever may have been their expectations as to trouble somewhere on the route, certainly do not appear to have apprehended any difficulty at this particular point. The attack was in the nature of an ambuscade and complete surprise. It would be wholly unwarranted, therefore, to hold Venezuela responsible for not anticipating and preventing an outbreak, of which the persons most interested in knowing and the very actors on the spot had no knowledge. A state, however, is liable for wrongs inflicted upon the citizens of another state in any case where the offender is permitted to go at large without being called to account or punished for his offense, or some honest endeavor made for his arrest and punishment.

I can not accept the theory of war as affording an excuse for Venezuela in this case. Of course, if war existed, it would not be worth while to inquire further, for in such a state there is but one law recognized, and that is the law of force, meliorated and modified somewhat in actual practice by the more refined and humaner instincts of modern times; but still, in its ugliest moods, the assertion of a power which recognizes no right superior to the doing and the appropriating of whatever is necessary to success. Had such a condition of belligerency existed, it could not be claimed that the attack upon the Apure, having on board a battalion of the enemy, was not justified by the laws of war, although civilian passengers happened to be on board at the same time, and the assault partook of the nature of an ambuscade, and was made under cover of the night; but where is the evidence that a state of war existed?

As I read the record, General Garcia, then president of Apure, started out from San Fernando with a small body of troops on a tour of observation. He only had fifty men in all, and with such a force it is apparent that the resistance which he expected to overcome, whatever it was, could not have been very formidable. It appears that he took small boats with him, and that would indicate an intention to explore some waters, tributaries to the Orinoco, which were not navigable by the steamer. The record is not clear, however, as to the object of his expedition, but as I understand it, fails entirely to disclose any evidence of a state of war, such as could be accepted as an excuse for the attack which ensued. It was urged in argument that the conditions were somewhat similar to those the United States was confronted with by the insurrection in the Southern States; but there is a wide difference between the cases. The South, as it was called, was a recognized belligerent *de facto* government, beyond the jurisdiction and control of the United States for the time being, and for this reason the

United States could not be held responsible to foreign powers for acts done by the Confederates; but in this case Zamora occupied no such status, and besides Apure, in my opinion, can not, with respect to Zamora, be placed in the same relation as the United States with the Southern Confederacy. The constitution of the United States of Venezuela, adopted in 1864, has been quoted by Commissioner Andrade for the purpose of showing that Venezuela was really composed at this time of a number of separate independent States, each autonomous and supreme as to all matters of internal jurisdiction, and only related to a common federal head, through the fiscal and war departments.

He says in the very learned and elaborate opinion which he has filed, that Apure was, in effect, a sovereign independent State, although an integral part of a body composed of several other States, equally sovereign and independent, called the United States of Venezuela, governed by a central administration, which was limited, however, to the power of making war and to the collection of revenues necessary for this purpose and the general welfare, and that under this decentralized system which was created in fact as the result of the long contention between the unionists and their antagonists for the express purpose of embodying and giving effect to the federal, as opposed to the national, idea of government, Apure was responsible for whatever was done by her authority and Venezuela must be exonerated. To this notion of Venezuela and her exterior responsibility I can not give an assent for a moment. Not only do I regard the question as closed by the principles laid down in the case of the *Caroline*, but if it was to be deemed as *res nova*, I should have no difficulty whatever in holding that whatever may be the relations inter sese between the constituent parts of a federative body, admitted as such into the family of nations, they can play no part in determining the liability of the body by its own distinctive name to other nations for wrongs inflicted by any of the parts or within the domestic jurisdiction of the same.

Apure has no flag recognized among the national flags of the world; she has no power to make war on other nations; she can make no treaties, and she can break none; and as far as her relations with foreign powers are concerned her existence is completely veiled in the sovereignty of the United States of Venezuela, which, by the necessity of the status, must be responsible in any proper case for whatever is done within the limits of its jurisdiction. Conceding, then, that Zamora was in revolt against Apure, and the insurrection had swollen to such a head as to relieve the parent state from responsibility, still, in my opinion, other things being equal, Venezuela could not be excused because Apure was not liable, but only because she was not responsible herself. There are nine States in Venezuela, and if the doctrine of the learned commissioner is accepted, instead of looking to one responsible head for redress for international wrongs, the state seeking a remedy would have to look to these different sovereignties, according to the particular jurisdiction within which the offense may happen to have been committed. As these matters are usually attended to by the diplomatic representatives accredited to the country in what capacity

would the minister of the United States to Venezuela address the government of Apure, for instance?

How would the State Department conduct the correspondence? And if redress were refused, against whom would reprisals be taken or war declared, in any case of sufficient magnitude to justify such extreme measures? Could the rest of Venezuela be at peace while Apure was engaged in war with a foreign power asserting the rights of its citizens? These questions answer themselves, and I can never assent, therefore, to the doctrine that as between the members of the family of nations any third party can be recognized and treated as responsible for an international offense, simply by reason of internal relations to some federal head.

Case of Amos B. Corwin *v.* Venezuela (the schooner *Mechanic* case), decision of the Commissioner, Mr. Little*

Affaire concernant Amos B. Corwin c. Venezuela (Affaire de la goélette *Mechanic*), décision du Commissaire, M. Little**

Prize law in the context of war—seizure of a neutral vessel and its cargo considered to amount to an act of piracy—in front of prize courts, the *onus probandi* of a neutral interest rests on the claimant—exclusive right of the State to which the captors belong to examine the conduct of its own members before becoming answerable for what they have done—in practice, prize courts judgments respected as much as judgments of municipal courts despite their summary proceedings.

State responsibility—denial of justice resulting from its prize courts' judgments—State's liability begins only when the court of last resort has acted on it—no right for subjects of a neutral State to apply to their own State for a remedy against an erroneous sentence until the final appeal.

Standing of an insurance company in front of the Claims Commission—standing in its own right—in case of abandonment of property and the subsequent payment of the entire loss, the insurer succeeds to all the rights of the insured respecting the property—competence of the Commission to assess whether the proceedings and judgment of the prize court were manifestly and certainly wrong.

Droit de prise dans un contexte de guerre—saisie d'un navire neutre et de son chargement réputée équivalente à un acte de piraterie—devant un tribunal des prises,

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 3210.

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l'*onus probandi* de l'intérêt neutre est à la charge du plaignant—droit exclusif de l'État dont relèvent les geôliers d'examiner la conduite de ses propres membres, avant de répondre de leurs actes—en pratique, en dépit de leur procédure sommaire, les jugements des tribunaux des prises sont tout autant respectés que les jugements des tribunaux nationaux.

Responsabilité étatique—déni de justice résultant des jugements de ses tribunaux des prises—la responsabilité de l'État intervient uniquement lorsque la Cour de dernière instance a statué sur ce point—pas de droit pour les sujets d'États neutres de contester dans leur propre État une sentence erronée, avant l'ultime appel.

Locus standi d'une compagnie d'assurance devant la Commission de réclamations—*locus standi* pour faire valoir son propre droit—en cas d'abandon des biens et du paiement subséquent de l'intégralité des pertes, l'assureur succède à l'ensemble des droits de l'assuré pour ce qui est desdits biens—compétence de la Commission d'évaluer si la procédure et le jugement du tribunal des prises sont manifestement et assurément erronés.

*****

The *Mechanic*, an American schooner, flying the flag of the United States, Taber, master, sailed from Havana, April 17, 1824, with a general cargo, bound for Tampico, Mexico, via Key West. A part of the cargo consisted of goods valued at near $20,000, shipped from the Cuban port by Joaquin Hernandez Soto, "by order and on account and risk of Robert Barry of Baltimore, an American citizen," and consigned to "Ant. M. Miranda, Pueblo Viejo, Mexico, or his assigns, he or they paying freight on the said goods."

The vessel, with Soto aboard, arrived at Key West in due course and departed therefrom May 4, with her sea papers in proper form. Two days out she was captured by a privateer, the *General Santander,* Chase, master, under commission of the Republic of Colombia against Spain, and detained under a charge of carrying enemy goods, Colombia being then at war with Spain for independence. Soto, with some eight others, being taken from the vessel she was sent in charge of a prize crew to a Colombian port for adjudication of the goods seized before the proper tribunal. In due season libel proceedings were instituted against the cargo before the Colombian prize court at Puerto Cabello, and on the 9th of July, after hearing, the Soto invoice was found to be enemy property and condemned as good prize.

May 14, Barry procured insurance on the goods against all loss, including loss by capture, past and prospective, occurring during that trip, in two New York companies, to wit: $12,000 in the Atlantic Insurance Company and $7,000 in the Hope Insurance Company, of that city. In January 1825 the Atlantic paid its policy in full and in June following the Hope paid its, with $175 interest, making in all $19,175, covering the full value of the goods.

Soto made a formal assignment about this time of all and singular his rights pertaining to said goods, and growing out of the capture thereof, to the insurance companies.

It does not appear that he made any exertion to save them from capture by the assertion of ownership as a neutral, either then or afterward, in the prize court. It seems he abandoned them at capture. A year later, when the insurance companies were preparing their case for presentation before the Colombian Government, he made affidavit that he was a native of Spain, but a citizen of Mexico engaged in mercantile business there, and had been since 1819 that he invoiced the goods in the name of Barry for safety and that no Spanish subject had any interest whatever in them at the time of shipment or after ward, they being his sole and exclusive property.

In 1826 the Government of the United States presented the claim of the insurance companies for indemnity in the premises against the Government of Colombia, it being alleged that the goods were neutral, and not, as found by the court, enemy property. But nothing was allowed by that government.

After—upward of twenty-five years after—the dissolution of Colombia (1830) and the adjustment of her liabilities between the constituent States, fifty per centum thereof falling to New Granada, the insurance companies assigned that portion of the claim which was against that State, namely one-half of it, to the present claimant, Amos B. Corwin.

He prosecuted the portion so assigned against that government before the mixed commission under the treaty between New Granada and the United States of 1857, and secured an award for the amount thereof, to wit, the half of $19,175, with interest to the date of the allowance, 1862, amounting in all to $_____.

In 1863, the American minister at Caracas asked the Venezuelan Government in behalf of Corwin to pay its proportion of the insurance claim, to wit, 28 1/2 per centum.

The claim for that proportion was presented to the Caracas commission of 1867–68, which awarded him $15,629.87. It is now made before us and amounts with interest to near $30,000.

It is well settled that where there is abandonment of property under circumstances like these and the entire loss is paid, the insurer succeeds to all the rights of the insured, of whatever kind, respecting the property as of the time of abandonment. (Phillips on Ins., § 1712 *et seq.* Hollbrook, adm'r, *v.* United States, 21st Ct. Claims 438.) The conveyance by Soto to the insurance companies, in 1825, was therefore quite superfluous. The companies were subrogated to his rights and to them only. A question suggests itself, whether, in respect to this treaty supposing Soto to have been a Mexican, the companies do not succeed simply to the rights which he would have, if living, but for the payment of the insurance. If so, they can not claim here, for he, not being a citizen of the United States, would have no standing

under the treaty. We think, however, that it is not their *status.* To hold so, would be to say there may be invasion of neutral rights without remedy. Mexico refuses to interfere in Soto's behalf, for he is indemnified, it refuses the companies, for they are Americans. The United States refuses them, because they have only the rights of Soto, and he has no claim on its services, for he is a Mexican.

The true view as it seems to us, is that the companies are to be regarded as having succeeded to Soto's rights at the seizure of the goods, May 6, and of course *cum onere.* If the capture was wrongful, the wrong was consummated and then first made apparent by the judgment of the prize court, and consummated *as against them.* They therefore stand in respect of the wrong, not in Soto's shoes but in their own.

They consequently have a standing here in their own original right.

Are they bound by the judgment of the prize court?

It has been suggested in argument whether, as indeed it seems to have been claimed by the American minister at Bogota in 1824–1827 that Colombia, having been Spanish territory at the time, was bound as to the United States by the treaty between the latter and Spain of 1795, which embodied the doctrine that "free ships make free goods," making its violation an act of piracy and that such obligation continued during her struggle for independence. Mr. Chief Justice Marshall, 9 Cranch, 191, said. "The United States having formed a part of the British Empire, their prize law was ours; and when we separated it continued to be ours, so far as adapted to our circumstances, and was not varied by the power which was capable of changing it."

It is likewise probably true that the Spanish prize law, impressed, it may be, with such conventional modifications as to particular states as were from time to time made, became the prize law of the Spanish-American colonies, subject to the qualifications named. Conceding its operation as to Colombia at independence, it continued under the principle stated, only so long as adapted to her condition, and she, of course, was the judge of that. The very act of sending out privateers to prey upon Spanish commerce was at once a determination that the Spanish prize law with its conventional modifications as to the United States (if before in force), was not adapted to her circumstances, and at the same time a decree "varying it by her power," in conformity with international law.

The question arose in the case of the *Senora,* a Spanish vessel captured by a Carthagenian privateer, and taken again by an American cruiser, supposing it British, during the war of 1812. The Supreme Court of the United States said. "The treaty with Spain can have no bearing on the case, as this court can not recognize such captors [the Carthagenians] as pirates;

and the capture was not made within our jurisdictional limits. In those two cases only does the treaty enjoin restitution." (4 Wheaton, 497)

Said the same court in case of the *Pastora,* a Spanish vessel captured by a privateer under the flag of La Plata, 4 Wheaton, 63, *per* Marshall, C. J. "The case of the United States v. Palmer, 3 Wheaton, 610, establishes the principle that the government of the United States having recognized the existence of a civil war between Spain and her colonies, but remaining neutral, the courts of the Union are bound to consider as lawful those acts which war authorizes, and which the new governments of South America may employ against their enemy."

It seems to us, therefore, clear that Spain's engagements to the United States, under the treaty of 1795, did not extend to and bind Colombia in respect of the doctrine stated, at least at the time of this capture, and that the law of nations in this regard was then her only guide, she not as yet having bound herself contrary wise by treaty

The seizure by the *Santander* of the *Mechanic,* and the sending of her to Puerto Cabello for authoritative decision as to her cargo, under a claim of its being enemy (Spanish) property and the adjudication there by the Colombian prize court of the question, were, as is conceded, authorized by the law of nations. But it is contended the court found that Soto was a Spaniard, when he was in fact a Mexican, and that its judgment being predicated on that error of fact, is not binding on these companies as respects their demands against the government of the captor.

Undoubtedly a wrong done by a government through its prize courts is redressible in a proper case the same as if done through its other courts or agencies. But the wrong must be shown. Although a prize court is summary in proceeding, acting in time of war when impartiality in procedure and decision is not in *practice* generally thought to be attained, yet its judgments are in the eyes of the public law respected much as judgments of municipal courts are. Mr. Wheaton says: "The *theory* of public law treats prize tribunals established by and sitting in the belligerent country exactly as if they were established by and sitting in the neutral country, and as if they always adjudicated conformably to the international law common to both."

The Supreme Court of the United States declared a prize tribunal "a court of the law of nations, and takes neither its character nor its rules from the municipal law." (Schooner *Adeline,* 9 Cranch, 244.)

When the United States complained to Denmark because of the sentences of her prize courts affecting citizens of the United States during the war between that power and Great Britain, it was not that those sentences were against the weight of the evidence and probably wrong; but that they, being affirmed by the court of last resort, amounted to "*a denial of justice.*"

Mr. Wheaton, quoting with approval from the notable report of Sirs George Lee, Dudley Ryder, Dr. Paul, and Mr. Murray to the British Government, 1753, on the reprisals by Prussia on account of captures by British cruisers and condemnations by British admiralty courts, says it plainly shows: "That in the opinion of the eminent persons by whom that paper was drawn up, *if justice be denied in a clear case by all the tribunals,* and afterward by the prince, it forms a lawful ground of reprisals against the nation by whose commissioned cruisers and tribunals the injury is committed." It is only says Vattel, "in cases where *justice is refused or palpable and evident injustice is done,* or rules and forms openly violated" that definitive sentences should not be respected. "The British court," he says, "established this maxim with great strength of evidence on the occasion of the Prussian vessels seized and declared lawful prizes during the last war." (See Crousden et al. *v.* Leonard, 4 Cranch, 404 Vattel, Bk. 2, § 84, *The Mary*, 9 Cranch, 142, 1 Wheaton, 238, *Santisima Trinidad*, 1 Brock, affirmed in 7 Wheat. 283.)

Says Bluntschli:

> The belligerent which constituted the prize courts is always responsible to neutral states for every *manifest* violation of international law committed to the prejudice of the neutrals by that court.

We do not understand the doctrine announced by the commissioners under the treaty of 1794, between the United States and Great Britain, to be at variance with the foregoing. While they refused acquiescence to the contention that a prize sentence affirmed by the lords commissioners was conclusive on the parties (except as to the *rem),* they seemed to place it (otherwise) along with other judgments. They said: "A sovereign is as much liable for wrongful action of prize courts as he is for the wrongful action of any other court." Their insistence may be condensed in almost their exact words—prize jurisdiction must be *rightfully* used by the state that claims it. From this no one will dissent.

Counsel for Venezuela, then, is quite right in saying, "the question for us is not whether upon the facts before the prize court we would have come to a different conclusion." It is whether the proceedings and judgment of that court were *manifestly and certainly* wrong, to the prejudice of the claimant.

We are not convinced of their wrongfulness.

The Colombian prize court was duly established in pursuance of a law of the Colombian Congress passed October 14, 1821. That law authorized the executive power to establish prize courts in the republic, and promulgated rules and regulations for their procedure and government. This was done by executive decree, March 30, 1822, in which the rights and duties of parties and officers in prize matters are set forth fully and with precision, and, so far as we are advised, in conformity with the requirements of the public law and the usages of nations in this regard.

The prize court consisted of the senior commandant of the department, with an *asesor* learned in the law. An appeal lay from its decision to the supreme court of justice. We see in these laws no basis for the complaint, therefore, of one of the insurance companies, to Mr. Clay, in 1825, against the Colombian "ordinance" establishing the court.

The proceedings before the tribunal seem to have been regular and in accordance with usage. On the hearing, July 9, 1824, before the "senior commandant-general of the second marine department, finding himself associated with his *asesor* in the hall of the tribunal," to quote the language of the record, the following proofs as appears from the record, giving its terms, were offered:

> Documents are recapitulated Nos. 1 to 8.
>
> No. 8. Ten signed letters, which state that all the cargo is Spanish property which it was endeavored to protect beneath the American flag.

No. 9. Four declarations relating to the act of detention by the consignee captain [master (?)], passengers, supercargo, and pilot.

> Captain [master] declares that the only articles which he knows to be American property are those belonging to Mr. Gousche, supercargo.
>
> Joaquin Hernandez Soto, underconsignee and passenger, declared himself to be a native of the kingdom of Castile, in Spain; that he did not know who are the owners of the cargo, although in part owner and consignee himself, which portion he shipped on board an American vessel for greater security thereof.
>
> The captain of the schooner *Mechanic* makes the following representation: That the act of having detained this schooner, evinced that the cargo she had on board was not considered to be American property, except that part belonging to Gousche, for all the rest was shipped by merchants of Havana, and he believes it is their exclusive property; that he knows that almost all the merchants of Havana endeavor to guard their interests under the American flag, in order to escape capture by the Colombian privateers; that he has nothing to state in favor of said cargo, and judges that it is good prize.

What the supercargo or the passengers said is not intimated, and there is nothing in the case to show. The letters are not here, nor all the eight (ship) documents, and all we know of their contents is stated in the record. From this fragmentary showing, all that has come to us, so far from finding the prize judgment manifestly wrong, it seems to us justified.

The letters were said to show *all* the cargo was Spanish. The captain said it was shipped by merchants of Havana. He supposed it Spanish property and good prize. He knew those merchants were accustomed to send their merchandise under the American flag. Soto claimed to be a native of Spain, but did not pretend to anyone on board to be a Mexican; and disclaimed knowledge of the ownership of the goods. There was no showing of neutral property before the court, aside from the small amount acquit-

ted, and under the law the burden was upon him who asserted neutrality of property to prove it. The conduct of Soto was singular, to say the least. If he were a Spaniard one can readily see why he shipped the property in Barry's name and disowned it on the ship. But why should he do either, if he were a Mexican? There would be a reason for this if the property had been subject to capture in an American vessel by a Spanish cruiser, for Mexico was also at war with Spain. But under the treaty of 1795 it was not so subject to capture. To attempt it would have been an act of piracy subjecting the captors to execution, and their government to full indemnification.

His explanation, therefore, of shipment in Barry's name for greater safety does not explain, *if* he was a Mexican citizen. The circumstances all point to his being a Spanish subject.

Apropos to the question of the regularity and sufficiency of this proof, attention is directed to this passage in the opinion of Judge Story in the case of the *Isabella* (6 Wheaton, 1), decided not many years before 1824: "It is to be recollected," he said, "that by the settled rule in prize courts the *onus probandi* of a neutral interest rests on the claimant. This rule is tempered by another, whose liberality will not be denied, that the evidence to acquit or condemn shall in the first instance come from the ship papers and the passengers on board."

This judgment was, in our opinion, in accordance with the public law. Soto, other owners of the cargo, and the insurance companies through the master of the ship, were parties to the proceedings and bound by them unless involving manifest injustice. (Case of *Mary, supra, C*rousden et al. *v.* Leonard, 4 Cranch, 34.) The naked affidavit of Soto, a year afterward, can not avail against it.

And that affidavit taken at its face was at least of questionable sufficiency under the doctrine laid down in the case of *Thirty Hogsheads of Sugar* (9 Cranch, 328), by Chief Justice Marshall, quoting a like enunciation by Sir William Scott. In that case Bentzon was a subject and resident of Denmark, owning and operating a plantation in Santa Cruz island, then in possession of the British. Thirty hogsheads of sugar manufactured from the products of said plantation by Bentzon's agents and for him were shipped from the island on a British vessel, consigned to a house in London for account of Bentzon. On their way (during the war of 1812) the vessel was captured by an American privateer and brought to Baltimore, where it and the cargo were libeled as enemy property. Both were considered as good prize, although the United States was at peace with Denmark. The ground of the decision as to the sugar was that it took its character *not* from that of the owner, but from that of the soil on which the cane was produced. How far or whether the goods of Soto may have been of his own manufacture in Cuba, arising from products grown there on his own land, there is nothing to indicate.

There is still another objection to this claim, even if the prize sentence was erroneous. This is not a case, it may be premised, where its principles

have been settled by the court of last resort, and where an affirmance would follow as a matter of course because of such former judicial settlement. There was involved a simple question of fact, to wit: Whether the Soto invoice was enemy property.

It is thoroughly well settled that in such a case—as indeed is true of judicial sentences generally where appeals are reasonably attainable—a state's liability begins only when the court of *last resort,* accessible by reasonable means, has acted on it.

The doctrine is well stated by Rutherforth (Inst. vol. 2, ch. 9, § 19), quoted approvingly as a part of his own text by Mr. Wheaton, p. 465. He says:

> In order to determine when their right to apply [those injured by wrongful sentence of prize court] to their own state begins, we must inquire when the exclusive right of the other state to judge in this controversy ends. As this exclusive right is nothing else but the right of the state to which the captors belong to examine the conduct of its own members before it becomes answerable for what they have done, such exclusive right can not, and, until their conduct has been thoroughly examined, natural equity will not allow that the state should be answerable for their acts, until those acts are examined by all the ways which the state has appointed for this purpose. Since, therefore, it is usual in maritime countries to establish not only inferior courts of marine, to judge what is and what is not lawful prize, but likewise superior courts of review to which the parties may appeal if they think themselves aggrieved by the inferior courts; the subjects of a neutral state can have no right to apply to their own state for a remedy against an erroneous sentence of an inferior court till they have appealed to the superior court, or to the several superior courts, if there are more courts of this sort than one, and till the sentence has been confirmed in all of them. For these courts are so many means appointed by the state, to which the captors belong, to examine into their conduct: and till their conduct has been examined by all these means the state's exclusive right of judging continues.

The law of Colombia provided for appeals from its prize courts to the supreme court of the republic, as seen, yet there was no attempt at appeal. In fact, the captain of the vessel seemed to acquiesce in the sentence—at least, he thought, as he stated to the court, the goods condemned good prize. There is no reason to suppose he acted dishonestly or collusively. The conduct of Soto was sufficient, with the other facts stated, to justify his remark. If Soto abandoned the goods to their fate, why should the captain further litigate? He of course knew nothing of this particular insurance, for it was effected eight days after the capture.

Still he would reasonably assume insurance, and the law made him, being the master of the ship, the agent of the companies, in their absence, to protect

their interests in this regard. His failure to appeal, if such under the circumstances became his duty, was not the fault of Colombia.

There is still, apparently another objection to this claim as it is presented on the papers transmitted to us. It is prosecuted by Corwin. The papers here fail to show that he ever had other interest in the insurance demands than the portion prosecuted against New Granada.

The transfer to him by the Atlantic Company was, to wit:

> For the proportion of loss said government [New Granada] is liable to pay by reason of the seizure of the cargo of the schooner *Mechanic* in 1824 by the Colombian privateer *General Santander*, the said State of New Granada being liable to pay the one-half part of the loss sustained by said company by reason of such seizure, of the sum of about $6,000, with interest. To have and to hold the said hereby sold and assigned premises unto said Amos B. Corwin, his heirs, and assigns, forever.

The transfer by the Hope Company, made at the same time, is in substantially the same terms, save as to the amount of the interest transferred. But this half so assigned to him was allowed entire by the Bogota commission in 1862, and, so far as appears, settled by New Granada. Corwin's presentation through Minister Culver of a claim in his behalf upon the Venezuelan Government, in 1863, for her 28 1/2 per cent of the insurance, was not based upon any interest held by him, so far as disclosed here. He was not a claimant of that portion of the alleged indebtedness within the meaning of the treaty so far as appears. It is proper to say, however, that we should not be disposed to rest the decision upon the present showing in this regard without further inquiry, if the claim were good otherwise. It may be the diplomatic correspondence would supply the deficiency.

Again, even if the Corwin demand in 1863 could be shown to have been authorized, it seems to us it came too late, under our announcement in case No. 36, if that was its first presentation. Venezuela had then been a state thirty-three years. The demand was thirty-nine years old. It had been presented to the old republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had, presumably passed away and other means of defense become dissipated. But owing to the possible incompleteness of the record in this regard, we prefer to base our conclusion upon the other grounds stated, assuming proper and timely presentation of the claim against Venezuela.

The claim is disallowed.

Case of the Representatives of Captain John Clark *et al.* *v.* Venezuela, opinion of the Commissioner, Mr. Findlay*

Affaire concernant les Représentants du Capitaine John Clark *et al.* c. Venezuela, opinion du Commissaire, M. Findlay**

Standing before the Commission—nationality of the claimant—estoppel.

Nationality—recognition of dual nationality—contradiction between obligations and rights implied by the two different nationalities alleged by the claimant—presumption of nationality of the country of birth—burden of proof of expatriation and change of nationality on the claimant.

War—breach of duties of neutrality—right of capture of belligerent vessels under the commission of a belligerent State—elementary principle of law: when nations are at peace all their citizens and subjects are at peace and vice versa—right to make war vested in the sovereignty and taken away from the individual—an offence which is not merely a breach of municipal law within the reach of the pardoning power of the Executive but is essentially and distinctively an offense against the law of nations is beyond the competence of any power to pardon or condone.

Effect of wrongdoing of claimant—no man may invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing—contract fraught with illegality and turpitude is utterly null and void, conferring no rights or obligations sustainable by any court of law or equity—duty of court to apply the prohibition against such claims sua sponte whenever the record discloses that it is applicable.

Locus standi devant la Commission—nationalité du plaignant—estoppel.

Nationalité—reconnaissance de la double nationalité—contradiction entre les obligations et les droits impliqués par les deux nationalités invoquées par le plaignant—présomption de la nationalité du pays de naissance—charge de la preuve de l'expatriation et du changement de nationalité incombant au plaignant.

Guerre—violation du devoir de neutralité—droit de capturer les navires belligérants en vertu du mandat d'un État belligérant—principe élémentaire du droit : tous citoyens et sujets de nations vivant en paix vivent en paix et vice versa—droit de faire la guerre conféré à la souveraineté et retiré à l'individu—infraction n'étant pas seulement une violation du droit interne relevant du droit de grâce de l'Exécutif, mais étant de manière essentielle et spécifique une infraction au droit des gens, ne relevant du droit de grâce ou d'excuse d'aucun pouvoir.

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* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2743.

** Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2743.

Conséquences des méfaits du plaignant—nul individu habilité à invoquer ou recevoir l'assistance de quelque tribunal que ce soit, interne ou international, pour le recouvrement des fruits de ses propres méfaits—contrat entaché d'illégalité et de turpide étant absolument nul et non avenu, ne conférant aucun droit ni aucune obligation que quelque tribunal puisse reconnaître, en droit ou en équité—devoir du tribunal d'appliquer d'office l'interdiction de telles demandes dès lors que cette interdiction est applicable au regard du dossier.

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The great question in these cases is whether, assuming the lawfulness of Captain Clark's commission, issued by the Oriental Banda, and the unjustifiable snatching of the prey from his talons by Commander Joly of the Colombian navy, the claim can be supported before a tribunal like this, and restitution decreed, without a violation of the principles of sound international law and morality. It is admitted that the courts of the United States would have been bound to order a restitution of the vessels to their proper owners had they been brought within the jurisdiction of that country This was the ruling in many similar cases of contemporaneous date, most of which are cited in the brief of the learned counsel for the last-mentioned claimants, but the law of which was laid down with great clearness and force by the Supreme Court in the earlier case of *Talbot* v. *Jansen,* in 3 Dal. p. 133.

While, however, it is conceded that the courts of the United States would be bound to respect and enforce the neutral obligations of the country, in any case of seizure arising out of the acts of one of its citizens, under color of a foreign commission, it is contended that when a controversy originates in a trespass of this kind, but does not concern the neutral who has been injured, but only the wrongdoer in his relations to a third party, who quoad him is a tort feasor also, then the principle does not apply, and there would be no impropriety in the United States enforcing the claim; although in doing so it must necessarily sanction a breach of its own laws and the law of nations and violate solemn treaty stipulations.

It is to be observed that this is not the view of the learned counsel who represents the United States in these cases, and who seeks to establish the responsibility of Venezuela upon the ground that she has recognized and admitted the claim and is estopped from disputing its validity or claiming exoneration by reason of the turpitude of the original seizure. With these elements out of the case we did not understand him as contending that the United States could prosecute a claim of this character without at the same time involving itself in the admission that a violation of its laws and of the international law founded upon the strict observance of neutrality as the groundwork of the peace of nations, were matters not worth considering in such a controversy.

It will be admitted that Venezuela has no concern with the question whether the United States holds a strict or a slack rein in the enforcement of its laws in any matter between it and some third party or its own citizens, and that it does not lie in her mouth to set up as against one of these citizens a plea of turpitude founded on a breach of these laws, and especially as an excuse for the nonpayment of money which, as between her and that citizen, she had no right to appropriate in the first instance and has no right now to withhold.

Captain Clark was either a citizen of the United States or a citizen of the Oriental Banda, or he was a citizen of both countries. To have any standing before this commission he must have been a citizen of the United States. If he was a citizen of the United States, however, he could not have been a citizen of the Oriental Banda, unless he can claim a double citizenship of both countries.

Treating him as a citizen of the United States pure and simple, he was clearly a violator of its laws and the law of nations when he captured on the high seas the property of persons who were at peace with the United States, and as such violator could have no hearing in the courts of the United States, and certainly can have none before this tribunal.

As a citizen of the Oriental Banda, disentangled from other ties of allegiance, he is excluded from presenting his claim here by the express terms of the treaty, which only covers claims of citizens of the United States. Unless, therefore, a man may lawfully, at one and the same time, be a citizen of two countries, with the right to claim the protection of either, in consideration of the allegiance he owes to each, without regard to the contradictions and absurdities which such an anomalous dual relation involves, the case of Captain Clark must be dismissed. The petition of E. J. D. Cross, adm'r *d.b.n., c. t. a.,* of the estate of John Clark, alleges substantially that he was a naturalized citizen of the Oriental Banda. It is a concession in the case that he was born a citizen of the United States. Now, could he be both—a citizen of the Oriental Banda for the purpose of escaping a penalty, prescribed by the law of the country of his nativity, for a violation of its neutrality, and at the same time a citizen of that same country after the very offense was committed—for the purpose of giving him a standing before a commission organized to hear claims of its citizens with the ulterior purpose of obtaining the fruits of his wrong doing? Upon this hypothesis he leaves the United States with no intention of renouncing his allegiance, and yet at the same time with the intention of doing so. He becomes a naturalized citizen of the one country with the full purpose and determination of remaining a native citizen of the other. He expatriates himself and yet does not expatriate himself; he is naturalized and yet not naturalized. He bears a commission which the Oriental Banda has a right to issue, but in what character, as citizen of that country or of the United States?

When he captured the *Medea* and the *Reina de dos Mares,* was he a citizen of the United States, or of the Oriental Banda, or both? If he was a citizen of the United States it would have been its duty to protect him in

his captures and wrest them out of the possession of Commander Joly, and wrest them, too, not for the purpose of restoring them to their owners, but to establish the right and possession of Captain Clark. In doing so, if such a thing were conceivable, the United States would have protected an offender against its laws, and at the same time involved itself in war with both Spain and Portugal. No one pretends that any attempt on the part of the United States to support the claim of Captain Clark at the time would have involved it in absurdities and serious consequences less extreme. On the other hand, if the captain was a citizen of the Oriental Banda, proceeding under a letter of marque regularly and lawfully issued by that country, then it is clear that the United States owed him no duty and that he must look to the country of his adoption for whatever protection he required. The idea that at one and the same time he could accept and hold this commission as a citizen of both countries is simply preposterous.

Again the burden of proof is on Captain Clark, or those claiming under him, to establish the fact of his expatriation, as a man must be a citizen of some country, and cannot be an irresponsible nondescript, such as a citizen of the world, without the rights and corresponding obligations which spring from an established political status. He will be presumed to be a citizen of the country which has given him birth until he has established by satisfactory evidence the fact of his naturalization and adoption as a citizen of some other country. Until this is done, and the fact of his expatriation satisfactorily demonstrated, he can not escape the consequences of the violation of the laws of the country from which he has emigrated, nor can that country escape responsibility for his acts. He may go so far as to take an oath of allegiance to another sovereignty and then accept its commission, and yet not lose his character as citizen of the United States, so as to be amenable to its laws. *(Talbot* v. *Jansen.)* Now, in this case it is contended, on the one hand, by the representatives of Adams, the assignee of one-fourth of this claim, that Clark was born a citizen of the United States, made the captures as such, and died still bound by the ties of allegiance to his native country. On the other hand, to escape the consequences of this dilemma, his own immediate representatives set up the claim that he was a citizen of the Oriental Banda; but in doing so, plainly put themselves out of court, or rather erect an insuperable bar that prevents them from getting in. The difference in the attitude of the respective claimants is, that one class secure a *locus standi,* by the requisite jurisdictional averment, but in the course of the proceedings commit suicide, whereas, the other class do not so much as cross the threshold of the court.

It was contended that the United States had adopted this claim, and in a long course of diplomatic correspondence maintained its validity against Venezuela, and that by so doing, whatever turpitude affected the original transaction as between it and Clark, had been cleansed and condoned, and as it was the only party which could justly complain of his acts, the condonation had

the effect of a full pardon and restored him to all his rights, more especially as against Venezuela, which had appropriated his property by the strong hand and without the slightest color of claim. Put the case, then, in its strongest light and assume that Clark, on his return to the United States, had been prosecuted for a violation of its neutrality laws in accepting a commission to depredate upon the commerce of a country with which the United States were at peace, and after conviction had been pardoned, could this commission award restitution to the claimants as prayed[5] Clearly not. This is not a United States court, in which the pardon of the President under the seal of the United States could be pleaded. The offense in this case was not a mere breach of the municipal law of the United States within the reach of the pardoning power of the Executive, but was essentially and distinctively an offense against the law of nations, beyond the competence of any power to pardon or condone. It is an elementary principle of this law that when nations are at peace all their citizens and subjects are at peace, and *vice versa.* War involves all alike in a common hostility. As a necessary deduction from this principle the right to make war is vested in the sovereignty and is taken away from the individual

To permit the individual citizen to make war upon a foreign citizen or subject whenever he considered himself aggrieved, would be destructive of the peace of nations, just as in the same sense, though on a much more limited scale, to permit each member of society to take the law in his own hands, would subvert the very foundations of social order. Treaties and municipal laws which recognize this principle are only declaratory or expository of the law itself, which is founded in international necessity.

When Captain Clark, therefore, sailed in the *La Fortuna,* under a commission which authorized him to prey upon the commerce of Spain and Portugal, he still retaining his citizenship of the United States, which was at peace with both of these countries, he was embarked on a cruise which, if it did not constitute him a pirate, was at least a continuing trespass in violation, not only of the law of his own country and the treaty with Spain, but of the law of nations.

Had he been arrested and taken into custody by the Spaniards his defense, doubtless, would have been that he was a citizen of the Oriental Banda, and as such protected by his letter of marque. He certainly would have made no attempt to defend upon the ground that he was a citizen of the United States, for the moment he did so he would have been punishable as a pirate for the offense against Spain under the treaty between that country and the United States. For his own protection, as well as the peace of nations, it was absolutely necessary that his status should have been defined with absolute precision.

It is conceded that in the state of the law with respect to expatriation, when Captain Clark left the United States it would have been impossible for him to have renounced his allegiance to that country in accordance with any prescribed statutory mode, for the reason that Congress had never legislated on the subject. And yet, still, if he had left his own country for a lawful pur-

pose, and with the deliberate design of being naturalized in another, and in good faith, evidenced by continued residence, had become a citizen of the country to which he had emigrated, it is not doubted that as to all acts subsequent to his naturalization he would be treated as a citizen of the country of his adoption. But he not only failed to demonstrate his expatriation by such open and accepted tokens as were available to him, but the claim now set up by his representatives is, that it was not his intention to expatriate himself at all; that he never removed his family from the United States; that they continued to reside in the city of Baltimore, and that he also resided there except when holding a commission in a foreign service. The brief of the learned counsel for the Adams claimants says, on p. 17, that—

> It is incontestable that Captain Clark was a native citizen of the United States residing in Baltimore all his lifetime except for the two brief periods before referred to, and the time he was on the high seas under a commission from President Artigas.

Then, for the purpose of showing that he was treated as a citizen of the United States, notwithstanding his acceptance of service under another flag, the case of the *Bello Corunnes in* 6 W. p. 152, is cited. In that case there was another Baltimorean, Captain Barnes, who commanded the privateer, the *Puyerredon,* bearing the flag of the Buenos Ayrean Republic. He had assumed the character of a citizen of the power that had commissioned him; captured the *Bello Corunnes,* a vessel belonging to Spaniards, off the southwest coast of Cuba, and which, in a pretended endeavor to reach a port in the United States, was stranded on Block Island. There were three classes of claimants who intervened in the proceeding instituted in the United States court for the condemnation of the vessel for a violation of the trade laws of the United States.

These were, the Spanish consul for the owners; the salvors; and Captain Barnes, as the captor; and the court, in speaking of the latter's claim, after showing that the *Puyerredon* was American owned, says: "But they are also of the opinion that she must be held to be American commanded, since even if the doctrine could be admitted that a man's allegiance maybe put off with his coat, it is very clear that Mr. Barnes's citizenship is altogether in fraud of the laws of his own country."

Then is added the paragraph quoted in the brief: "His family has never been removed from Baltimore, and his home has been always either there or upon the ocean."

It will be observed that Captain Barnes, clearly perceiving that his claim to recovery could only be founded on his citizenship of Buenos Ayres, claimed in that character and right only just as in the present case the immediate representatives of Captain Clark, differing from the representatives of his assignee, Adams, claim that their ancestor was a citizen of the Oriental Banda. In all probability the cases of Clark and Adams, with respect to citizenship, were precisely the same. Both were citizens of the United States by birth, and both had a merely colorable citizenship of another country, and both, to repeat the

language of the court just cited, were making use of it, "in fraud of the laws of their own." The argument of the learned counsel is addressed altogether to the point of establishing Clark's citizenship of the United States, and in this connection he says that it is "hardly worth an argument to demonstrate the absurdity of the contention . . . that a citizen of the United States forfeits his citizenship by a violation of its laws."

Having established this point, and brought Clark within the letter of the treaty he seems to forget that in administering justice, which is the prime function of this commission, there is a more important question to be examined than Clark's citizenship, and that is the character of the claim itself. It is just because Clark was a citizen of the United States, and in that character committed acts of hostility against the citizens of another country, with which his own was at peace, that presents us from considering his claim. It would be very absurd indeed to hold that a citizen forfeited his citizenship by a violation of the neutrality of his country but it is quite true and proper to maintain that no man shall invoke or receive the aid of any court, municipal or international, in recovering the fruits of his own wrongdoing.

If authority is needed on so obvious a proposition, founded alike on sound law and sound morality, it can be found in the case of the *Bello Corunnes* just cited.

The fact that the defendant against whom reclamation is sought is a wrongdoer also does not alter, but only serves to give point to the principle. Admitting to the fullest extent that Venezuela or Commander Joly was a flagrant trespasser in depriving Clark of his captures, that the commission he received was regular and lawful in all respects, and that the Oriental Banda, under whose flag he sailed, was invested with full belligerent rights, among which privateering was unquestionably one at the time of these occurrences, the stubborn fact still remains that Clark himself, the party through whom these claimants derive title, was a flagrant trespasser also, if indeed a harsher term might not be justly applied in characterizing his spoliations. It is not necessary for Venezuela to make the defense; it is the duty of the court, *sua sponte,* to apply the principle whenever the record discloses a fit case for its application. *(Oscanyàn* v. *Arms Co.,* 103 U.S., p. 261.)

As between Venezuela and the claimants, outside of the duty to make restitution to the owners in the case of the vessel belonging to Portugal, with which Venezuela was not at war when the capture was made, there is a strong equity appealing for relief. Venezuela or Colombia was at war with Spain, and so far she was embarked in a common cause with the Oriental Banda; and crippling the commerce of the common enemy helped the cause of both. The seizure of the *Medea,* a Spanish vessel, by Joly under these circumstances was an ungenerous act, and the refusal of Venezuela to refund the value of this capture, after the Oriental Banda had waived whatever claims it had in favor of Clark, would have been dishonorable. But Venezuela, it appears, has actually paid the full amount of both claims, although the parties to whom payment

was made, and some other circumstances connected with her conduct in the matter, have been made the subject of severe animadversion by the representatives of the United States at Caracas. With the view we take of the main question it is not necessary to discuss this branch of it. Whether payment was made, or not, or whether Venezuela is bound to pay what, as to a part of the claim, "might be considered a debt of honor," are questions quite apart from any matters which, we think, are proper for us to consider. Captain Clark was a citizen of Maryland, as well as of the United States, and although his rights and duties with reference to other countries are to be ascertained and established by his character as a citizen of the United States, which is the sovereignty of external communication in that dual republic, yet still, the law of his own State, as expounded by its highest court in a case similar to his own, ought not to be without significance and effect. The case of *Gill, Trustee,* v. *Oliver's Executors* has been referred to and is cited by counsel in his brief, p. 27. It is reported in 11 H. p. 520, and came up on writ of error from the court of appeals of Maryland. The question involved was, whether a trustee in insolvency should have the proceeds of a certain award made by the Mexican commission under the convention of 1839, in favor of one Goodwin, or whether they should go to the executors of Oliver, to whom he had made an assignment of the claim.

The claim originated in the supply of muskets and munitions of war under a contract with General Miña by the Baltimore Mexican Company, executed in Maryland in 1816. Goodwin became insolvent in 1817, and Gill was appointed trustee in 1837. Under the laws of Maryland all the property, rights, and credits of the insolvent, of whatever kind, passed to the trustee. The Mexican commission made its award in the Goodwin case in trust for the parties interested, in 1839. In the mean time Goodwin had sold the claim to Oliver, and died. At the time of the award, therefore, there was an outstanding transfer of all Goodwin's property as of the date 1837 in Gill, trustee, and a sale of the Mexican claim to Oliver, and the question was, as stated, Who should have the money, the trustee, or the executors of Oliver, who had died before the case got into the courts?

For some reason the Maryland court failed to have the case reported; but in a subsequent case, involving the same questions, which went up to the Supreme Court from the circuit court of the United States, it appears that that court had the record of the former case, which contained the decree of the Maryland court, before them, and quote from it as follows:

> They (that is, the court of appeals of Maryland) are of the opinion that the entire contract (the Miña contract) upon which the claim of the appellee (Gill, the trustee) is founded, is so fraught with illegality and turpitude as to be utterly null and void, conferring no rights or obligations upon the contracting parties which can be sustained or countenanced by any court of law or equity in this State; that it has no moral obligation to support it, and that, therefore, under the insolvent laws of Maryland, such claim does not pass to or vest in the trustee of the insolvent debtor.

It would be difficult to employ much stronger language, and yet every word is applicable to the present claim, because the court finds all this illegality and turpitude to flow from a breach of neutral duty. The case referred to is the case of *McBlair* v. *Gibbs* (17 H.249; 21 Curtis, p. 479). The original case of Grill, trustee, etc., in 11 H., was dismissed for want of jurisdiction, because the court did not find that there was any question involved under the judiciary act on which a writ of error could be founded. The decision of the Maryland court was thus left to stand, and he would be a bold man who would undertake to maintain that it can be shaken, either on principle or authority.

It is well known that the chief justice (Taney) did not agree with his brethren as to the jurisdiction of the Supreme Court, and afterward filed an elaborate dissenting opinion, in which he reviewed the controversy growing out of the Mexican claims at great length. In the course of this opinion, in speaking of the action of the commission in allowing the claims, he says:

> Of course it was their duty not to allow any claim for services rendered to Mexico or money advanced for its use by American citizens in violation of their duty to their own country or in disobedience to its laws. For the Government would have been unmindful of its own duty to the United States if it had used its power and influence to enforce a claim of that description or had sanctioned it by treaty. (*Williams* v. *Gibbs,* 17 H. 262; 21 Curtis, 492).

We do not understand that the observations of Justice Grier, quoted in the brief, are at all in conflict with this opinion of the chief justice. Doubtless the risks taken by the Mexican company, in Baltimore, in furnishing military supplies to General Mina ought to have enhanced the justice and equity of its claims against the *new government of Mexico,* which had its origin in the revolution begun by Mina. The court, as we understand it, besides making what was an extrajudicial utterance, the case having gone off on a point of jurisdiction, only means to say that the Mexican Government in 1825 did a very proper and honorable thing in recognizing the justice of these claims.

So here we might express our individual opinions that Venezuela is in honor bound to make restitution, provided, of course, she has not already done so, by an appropriation for not only this claim, but also that arising out of the seizure of the Portuguese vessel. But we have said enough on this subject, and whatever may be the duty of Venezuela, being strongly of the opinion that the claimants have no standing before this commission, their petitions will be dismissed and claims rejected.

Case of John H. Williams *v.* Venezuela, decision of the Commissioner, Mr. Little*

Affaire concernant John H. Williams c. Venezuela, décision du Commissaire, M. Little**

Prescription—applicability of the doctrine of prescription as between States.

Prescription—applicabilité de la doctrine de la prescription entre États.

*****

It appears from the papers transmitted us that in 1841 John H. Williams, a merchant in New York, sold and delivered in that city to an agent of the Venezuelan Government certain mirrors with mountings for the government house at Caracas for $2,489.11, which were duly forwarded and received.

On the 24th day of April 1868, Mr. Williams presented the account against that government before the former commission for these articles as of the date of November 9, 1841, and verified it under oath, claiming an award, including interest at 7 per cent, of $7,019.11. The account had before been sent to the United States legation at Caracas for collection, but how long before does not appear. It had not, previous to 1868, been brought to the attention of the Venezuelan authorities from any source, so far as shown, and no reason or explanation is given for delay in presentation.

Venezuela claims the goods were paid for at the time of purchase. On the issue of fact thus made she was (1868) and is placed at a disadvantage by the long lapse of time as to the matter of personal testimony, some, if not all, her witnesses to the transaction having before then died.

The question with some collateral ones is thus presented whether time, figuratively stated, testifies in these adjudications. This case could perhaps be disposed of upon other grounds and in comparatively few words; but as the same question with like resulting ones is involved in other cases argued and submitted, we have concluded to treat it with some fullness and dispose of the

* Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. IV, Washington, 1898, Government Printing Office, p. 4181

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case from this standpoint, in view of the fact that the general question appears to be a somewhat mooted one with each government.

It thus appears then the claim was not brought to the attention of the Venezuelan Government until twenty-six years after its inception. Its ownership, nature, and amount were such as would have made a delay in presentation to the debtor for a single three months a matter of surprise. By lapse of time the means of defense have been impaired, and there is total want of excuse for the long delay by claimant. Under such circumstances what does the law require at our hands?

It is a well-settled principle in common law jurisdictions, and a recognized one in civil law countries, that obligations are to be enforced according to the *lex loci fori* which here is the treaty and the public law. Beyond the requirement that its decisions must be according to justice, the treaty furnishes no guide to the commission respecting the operation of the lapse of time in extinguishing obligations. It is left to the direction of international law on the subject. Does that recognize the doctrine of such extinguishment as between states in controversies like these? The question has been argued with exceptional force and ability by counsel for the respective governments.

It will, perhaps, not be amiss to group extracts from the deliverances (italics ours) of some of the leading authorities upon the general doctrine of prescription and pertinent principles. We present them as they have been consulted, and without reference to any special order. It may be well preliminarily to note that, while individual interests are involved, these controversies, as elsewhere seen, are between states in some sense, and stand much as if so originating; and, further, that while the texts will be seen largely to relate to territorial acquisitions the principles announced comprehend the acquisition and loss of personal property, and pertain to other rights as well.

Says Wheaton:

> The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called prescription, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it is called the uninterrupted possession of territory *or other property* for a certain length of time by one state excludes the claim of every other; *in the same manner as by the law of nature, and the municipal code of every civilized nation, a similar possession of one individual excludes the claim of every other person to the article of property in question.* This rule is founded upon the supposition, confirmed by constant experience, that every person will naturally seek to enjoy that which belongs to him; and the inference fairly to be drawn from his silence and neglect of the original defect of his title, or his intention to relinquish it. (Elements Int. L. 6th ed. 218.)

Vattel:

> It is asked whether usucaption and prescription take place between independent nations and states. . . . Now, to decide the question we have pro-

posed we must first see whether usucaption and prescription are derived from the law of nature. Many illustrious authors have asserted and proven them to be so. . . . It is impossible to determine by the law of nature the number of years required to found a prescription; this depends on the nature of the property disputed and the circumstances of the case.

. . .

After having shown that usucaption and prescription are founded in the law of nature, it is easy to prove that they are equally a part of the law of nations and ought to take place between different states. For the law of nations is but the law of nature applied to nations in a manner suitable to the parties concerned. And so far is the nature of the parties from affording them an exemption in the case, that usucaption and prescription are much more necessary between sovereign states than between individuals. (Law of Nations, Book 2, ch. 11.)

"Prescription," this author defines in the same connection, "is the exclusion of all pretensions to right—an exclusion founded on the length of time during which that right has been neglected."

Phillimore:

This [prescription of public law] is in principle very much the same as the prescription of the private law, which indeed may be said to be modeled upon the usage of the public law, *and which usage grew out of the reason of the thing.* . . . Does there arise between nations, *as* between individuals, and *as* between the state and individuals, a presumption from long possession of a territory, *or of a right,* which must be considered as a legitimate source of international acquisition? . . . The effect of the lapse of time upon the property *and right* of one nation relative to another is the real subject for our consideration. And if this be borne steadily in mind it will be found on the one hand, in the highest degree, irrational to deny that prescription is a legitimate means of international acquisition; and it will, on the other hand, be found both inexpedient and impracticable to attempt to define the exact period within which it can be said to have become established, or, in other words, to settle the precise limitation of time which gives validity to the title of national possessions. (Int. Law, 1, pp. 272–275.)

Hall:

The principle upon which, it [international prescription] rests is essentially the same as that of the doctrine of prescription which finds a place in every municipal law, although in its application to beings for whose disputes no tribunals are open some modifications are necessarily introduced. (Int. Law, 100.)

Polson:

How far prescription may be considered as operating upon nations jurists do not appear to have agreed; but the uniform practice of nations shows that they recognize the long and uninterrupted possession of a territory as excluding the claims of all other nations, *and that this principle,* whose expo-

> sition fills so large a head in municipal jurisprudence, *is equally recognized, as reason dictates it should be, in international l*aw. (Law of Nations, 28.)
>
> Calvo:
>
> May usucaption and prescription be considered in regard to peoples and states as regular and normal means of acquiring property? If it is admitted that these two ways of acquiring are legitimate and based on natural law, one is logically bound to admit that they are equally conformable to the principles of the law of nations, and are to be applied to nations. Usucaption and prescription are even more necessary between states than between individuals. In fact the differences between nations have a much greater importance than individual contentions; these may be settled by tribunals, whilst international conflicts frequently end in war. (Droit International, vol. 1, § 171.)
>
> Vico:
>
> The inert, the incautious, the negligent, the luxurious, are punished in the injury they do to themselves by the loss of their interests and their rights through usucapio and prescriptio? (De Uno Universi Juris, etc. p. 331.)

Grotius, while seeming to indorse Vasquius in denying usucaption a place both in public and private international law, except as established by municipal law, is at pains to point out its national recognition from the earliest times. Among other instances he tells that, to the demand of the King of the Ammonites for the restoration of certain lands between the Arnon and the Jabbok, and from the deserts of Arabia to the Jordan, the leader of Israel opposed a three hundred years' possession, and demanded to know of the king why he and his forefathers had been quiescent so long. Also, that "the Lacedaemonians, according to Isocrates, laid it down as a most certain rule, acknowledged among all nations, that public possessions as well as private are so confirmed by length of time *(multo tempore)* that they can not be taken away. By which *natural law* (*quo jure)* they refused those who were seeking the recovery of Messina." (De Jure Belli ac Pacis, Lib. 2, cap. 4.)

> Taparelli:
>
> Hence the law of prescription—a necessary and just law—by means of which society stops, through certain limitations, all inquisitions of ancient rights.
>
> . . .
>
> Most reasonable is, therefore, the law of prescription in the natural order, although nature itself does not overtly establish its strict necessity nor fix its proper limitations. This is to be performed by society as it grows more and more perfect; and it is as much the more its office as it is therefrom and therein that the social complaint requiring such a remedy takes its rise. (Natural Law, vol. 2, 979.)
>
> Sala:
>
> 1. By using anything with just title and good faith the right of possessing it is likewise acquired; but this manner of acquiring is considered to be civil, because of its being at first view resisted by natural reason that does not

> allow anybody to be deprived of his possession without his fault or consent, although it does not cease to have great equity, as it is grounded on the requisitions of public good; so that we have no great objections to say that it can also be referred to the secondary law of nations.
>
> 2. To this manner of acquiring the Roman laws gave the name of usucaption or prescription, . . . and it is but acquisition of *dominium* by continued possession during the time determined "by the law." Its introduction was made necessary from public utility and the tranquillity of the republic, because, in default of it, possessors of things would be subject to unlimited disputes, which their long possession, even though acquired by sale or any other legitimate title, would not be enough to prevent. Any one would be enabled to claim that the thing belonged to his ancestors, and never to him who sold it, and possession would keep uncertain and the state subject to the grievances that may be easily conceived. With reason did Cicero call it the end of solicitude and disputes." (Illustration of Spanish Law, vol. 1, book 2, title 2.)

The Supreme Court of the United States, in Rhode Island *v.* Massachusetts (4th Howard, 639) said:

> No human transactions are unaffected by time. Its influence is seen over all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, *whether of states or of individuals,* long possession under the claim of title is protected.

And again, in Wood *v.* Carpenter (101 U.S. 139), although the question was as to a statutory bar, the observations of the court apply as well to the grounds of prescription. Said Mr. Justice Swayne:

> Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate activity and punish negligence. *While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary.* Mere delay extending to the limit prescribed is itself a conclusive bar. The law and the antidote go together.

Lord Coke, while declaring limitation of actions to be by force of statutes, wrote:

> But they have said that there is also another title by prescription that was at the common law before any estatute of limitations, and inasmuch as such title by prescription was at the common law, *ergo* it *abideth* as it was at the common law.

Bracton, who wrote long before the first English progressive limitations act (1540) and before Parliament named events as bounds of limitation even, said:

We must see also in what manner an obligation is got rid of; and it is known it is likewise got rid of sometimes by an exception in various ways, as if a person should claim and another should show he has discharged it. . . . Likewise, by an exception of a prescription on account of defect of proof because, as time is a mode of bringing in an obligation, so it is a mode of getting rid of it through dissimulation and negligence, which is limited under certain times, for *time runs against the indolent and those who are careless of their right.* (Twiss's Bracton, vol. 2, p. 123.)

Sir Henry Maine:

It was a positive rule of the old Roman law—a rule older than the Twelve Tables—that commodities which had become uninterruptedly possessed for a certain period become the property of the possessor. (Ancient Law, 280.)

Brocher declares:

Prescription is as much a necessity to society as is inheritance to a family. We can not conceive of the second without the first. Without such a sanction, nothing would be secure. (Droit Int. Priv. 321.)

Domat:

The use of prescription is wholly natural in the state and condition we are in.

The same reason which makes that long possession acquires the property and strips the ancient proprietor, makes likewise that all sorts of rights and acquisitions are acquired and lost by the effect of time. Thus a creditor who has omitted to demand what is due to him within the time regulated by law, has lost his debt and the debtor is discharged from it. . . . And, in general, *all sorts of pretensions and rights of all lands whatsoever are acquired and lost by prescription,* unless they be such as the laws have particularly excepted. Thus we have two effects of prescription, or rather two sorts of prescription. One which acquires to the possessor the property of what he possesses, and which divests the proprietor of his right because of his not possessing; and the other by which all other kinds of rights are acquired or lost; whether there be any possession of them—as in the case of the enjoyment of a service, or whether there be no possession of them at all—*as in the loss of a debt* for not demanding it.

All sorts of prescription by which rights are acquired or lost are grounded upon this presumption, that he who enjoys a right is supposed to have some just title to it, without which he had not been suffered to enjoy it so long; that he who ceases to exercise a right has been divested of it for some just cause; *and that he who has tarried so long a time without demanding his debt, has either received payment of it, or been convinced that nothing was due him.*

We must distinguish two sorts of rules relating to prescription. Those which concern the different manners in which the laws have regulated the times of prescribing, and those which respect the nature of prescriptions. . . . These are the natural rules of equity, but those which make the time of prescrip-

> tion only arbitrary laws. For nature does not fix what time is necessary for prescribing. (Civil and Public Law Strahan's Ed. (1732) 483–484.)
>
> Burke:
>
> If it were permitted to argue with power, might not one ask these gentlemen whether it would not be more natural, instead of wantonly mooting these questions concerning their property, as if it were an exercise in law, to found it on the solid rock of prescription—the soundest, the most general, the most recognized title between man and man that is known in municipal or in *public* jurisprudence; a title in which not arbitrary institutions, but the eternal order of things gives judgment; a title which is not the creature but the master of positive law; a title which, though not fixed in its term, is rooted in its principles in the law of nature itself, and is indeed the original ground of all known property; for all property in soil will always be traced back to that source, and will rest there. . . . These gentlemen know as well as I that in England we have always had a prescription or limitation, *as all nations have against each other.* (Letter to Son: Works, vol. 6, p. 412. See also speech on English Constitution, vol. 7, p. 94.)

We add expressions on the subject from two of the great departments of the United States Government, that of State and that of Justice. Mr. Bayard, Secretary of State, in a note to Mr. Muruaga, December 3, 1886, said:

> The same presumption maybe almost as strongly drawn from the delay in making application to this Department for redress. Time, said a great modern jurist, following therein a still greater ancient moralist, while he carries in one hand a scythe by which he mows down vouchers by which unjust claims can be disproved, carries in the other hand an hourglass which determines the period after which, for the sake of peace and in conformity with sound political philosophy, no claims whatever are permitted to be pressed. *The rule is sound in morals as well as in law.* (Wharton, Int. L. Appendix, vol. iii. See Crallé *infra.)*

The Government of the United States was indebted to Reside upon a judgment. The Secretary of the Treasury in1858 undertook to withhold a part of it, because of an alleged indebtedness of Reside to the government of twenty-three years' standing. The question of his right to do so was referred to Attorney-General Black, and the following is a part of his answer to the President under date July 21, 1858:

> It is a decisive answer to say that the claim is based on transactions which are twenty-three years old. It is a rule of common sense and reason as well as law that when a party has lain by with a claim until the evidence concerning it has ceased to exist, and then produces it, the other party is not bound to explain it. It is presumed that he could explain it if his witnesses were alive and his papers preserved, and that presumption shall stand in place of all the proof which might have been demanded when the matter was fresh.
>
> I admit that the statutes of limitation can not be pleaded against the Government as a technical bar. I do not speak of that conclusive *legal* presumption which would be created in six years against an individual; but the Govern-

> ment is bound, like anybody else, by the rules of evidence and by the *natural* presumptions arising from the facts of the case. In some countries there are no statutes of limitation; in all countries there are large classes of cases to which such statutes do not apply. But it is one of the rules of every civilized code that a certain length of time, generally about twenty years, shall be regarded as evidence that a claim is either unjust or satisfied, and such lapse of time proves that fact as fully as if it had been attested by credible witnesses.
>
> The experience of all mankind has shown that the evidence thus furnished by time is true and reliable. The judge who disregards it would decide against the original honesty of the case ninety-nine times in a hundred. . . . When time testifies against the sovereign it is heard with as much respect as any other witness would be.

This is to be read in the light of the principles recognized in the case of The United States *v.* R. R. Co., 118 U S. 120, with which, it is believed, properly considered, it does not conflict.

It is pertinent to note, in this connection, that the late Dr. Wharton, quoting Mr. Crallé, formerly Assistant Secretary of State, in the first edition of his Digest of International Law (1886), issued from the United States State Department, employed this language (§ 239):

> There is no statute of limitation as to international claims, nor is there any presumption of payment or settlement from the lapse of twenty years. Governments are presumed to be always ready to do justice, and whether a claim be a day or a century old, so that it is well founded, every principle of natural equity, of sound morals, requires it to be paid.

While in his second edition, issued therefrom a year after, are found these remarks (Appendix to 3d vol.):

> While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitations are based. A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence.

The opposition (perhaps as strenuous now as at any former period) to international prescription among modern writers (instance Pomeroy's Int. L. 126) seems to us to arise in good measure from confusion of terms, and to be therefore largely apparent, rather than real. In other words, the difference between the two schools, as we conceive, partly at least, "lies in the terms." Prescription is confounded with limitation; not strangely either, considering the history of the terms carrying the two ideas, the common purpose to be

attained, and the consequent extent of their indiscriminate use. As the distinction is to be sharply marked in reaching a correct conclusion on the question under consideration, we briefly note that history and some distinguishing features between the two.

Under the Theodosian code, which required certain actions to be brought within a stated period after the cause of action arose, a plea that the action was begun too late was called "praescriptio" by the Roman lawyers, just as it is now called by the English a plea of the statute of limitation. Title and rights by this means—enjoyment for the defined period—were secured or maintained.

Usucapio indicated ownership acquired by enjoyment through long though undefined lapse of time.

Subsequently, under Justinian's code, usucapio was dropped and praescriptio used to express both ideas; and thus the latter term has come down to us, its derivative carrying the two meanings with modifications engrafted on it, in the course of the centuries. In the changes wrought prescription seems to have yielded its own meaning to that of the disused word, and found expression in some nations for its old signification in a distinct term.

Mr. Markby, from whose lectures on the Elements of Law we have freely drawn, says:

> In France and Italy, whether a man claims that ownership is transferred to him by possession, or whether he defends himself on the ground that the action is brought too late, he calls it prescription.
>
> In Germany the acquisition of ownership by possession is called "Ersitzung," and the bar to the action "Verjahrung." We use in England the terms prescription and limitation. And inasmuch as the two things are really different it is better to have the two names. In England the word "prescription" (as defined by Lord Coke) signifies the acquisition of title by length of time and enjoyment. This would serve as a general description of usucapio. (Elements of Law, ch. 13.)

While statutes of limitation are doubtless in good part aimed to be, as they are often alluded to as, expressions of prescription, they are, nevertheless, inaccurate expressions, because, for one thing, of their rigidity and want of adaptation to varying conditions and circumstances.

It would be a bold assertion to say they are correct embodiments of true presumptive evidence, when, for instance, in the States of this Union the statutory periods within which actions of ejectment may be brought range all the way from five to forty years, and those upon promissory notes from two to twenty years.

A conclusive legal "presumption," such as is said to arise under these statutes, is *not* a rule of inference, but one attaching itself to a given state of facts upon grounds of public policy. (Greenleaf, Ev. § 32.) It does not postulate the truth of the facts, except in a general sense, or the furtherance of justice in *every* instance. For example:

> "It does not assume," says Greenleaf, "that all simple contract debts of six years' standing are paid, nor that every man quietly occupying land twenty years as his own has a valid title by grant; but it deems it expedient that claims, opposed by such evidence as the lapse of those periods, should not be countenanced, and that society is more benefited by a refusal to entertain such claims than by suffering them to be made good by proof."

On the contrary, prescription *is* a "rule" of inference; not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that *something* at least has transpired which, in the *natural order*, as the Civilians say, forms a basis and demand for its operation. It is no more the creature of legislative will than is any other induction. That the lapse of time, variant according to circumstances, needed to raise a rational presumption of a past occurrence happens to coincide in a particular case with the statutory period in that behalf does not make prescription and statutory limitation one. They are always distinct. The former relates to substance, is the same in all jurisdictions, and aims at justice in every case, while the latter pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional individual injustice. Lord Coke, as seen, thought prescription "abideth" at common law notwithstanding the "estatute."

The supreme court of California mark the distinction thus:

> They [statutes of limitation] essentially differ from the civil law doctrine of prescription, as they act simply upon and defeat the remedy, while the latter defeats the right also.

And again in a later case:

> No presumption is to be raised either as to payment or otherwise from the mere lapse of the *statutory* period, any more than would naturally arise as to any other stale demand.

And such is the generally accepted modern view.

Prescription has been denied a place in the public law because it has "no definite fixed limit" (Pomeroy, *supra),* which is very like objecting to it because it is not limitation.

As before seen, prescription was recognized when limitation was yet unknown. Bracton knew of it at common law before the English statutes on the subject. Courts of equity, where limitation acts do not apply, have invariably given lapse of time due weight in adjudications. They have always refused to enforce stale demands without undertaking to fix precise times for imparting the infirmity. Each case is left, under general principles, to be adjudged, as to time, according to its own character and circumstances. And the doctrine has been applied to the state acting for its citizens. In The United States *v.* Beebee, McCreary J., in a suit where the United States Government sought (in the interest of certain patentees) to recover land adversely held for a long period under color of title, held:

> Although the general rule is that statutes of limitation do not run against the state, yet when the state resorts to equity for relief it must come on the same condition with other suitors, and a stale claim by the state maybe rejected for that reason, as it might when presented by an individual. (17 C. L. J. 77.)

On appeal the Supreme Court of the United States (127 U. S., 346), while disavowing imputation of *laches* to government for negligence of officers in matters of state concern, affirmed the judgment, and said:

> Courts of equity refuse to interfere to give relief where there has been negligence in prosecuting the claim, or where the lapse of time has been so long as to afford a clear presumption that the witnesses to the original transaction are dead, and the other means of proof have disappeared.

One had as well essay to bound memory, or the occurrences that constitute negligence, by exact limits of duration, as to attempt to define just what shall be time's efflux to establish true prescriptive rights. Parties, subject-matter, habits, conditions, circumstances, enter into the problem. It is one thing to forget or be able to show how one came by a farm, and another how one came by some animal on the farm. The fact that a nation obtained a particular territory by devastating-war will be treasured in memory long after every vestige of the transactions by which the implements of war were procured shall have been obliterated, and long after the titles of its bountied soldiers shall have been lost in oblivion.

To withhold causelessly a demand for goods sold until the witnesses to the transaction and other usual means of ascertaining the facts have, in ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity may not be. It is true experience teaches that such and such things are apt to occur ordinarily in about such and such times in the affairs of men, but it also recognizes the impossibility of prescribing exact periods for the occurrences, as well as the certainty of occasional departures from the general rule.

If today A have a watch of B procured ten years ago, and both, in the multiplicity of their mutual dealings and exchanges, have forgotten the circumstances of such procurement, and all means of determining the true ownership are lost, whose watch does it become? A's. His title arises out of the necessity of the situation, or as Pothier says of prescription, it is founded in the ordinary course of things. If in less complex transactions a like situation should arise only at the end of twenty years the result would then be the same. All know that continued possession by A and disregard or neglect of his property by B will ultimately so terminate. But no earthly power can prescribe just what lapse of time will be necessary to create that situation. To decree when such a condition shall be *deemed* to exist is another thing. That can be done by legislation or by treaty stipulation, and when done constitutes limitation—not prescription.

It is this prescription which underlies, varies from, antedates, and, as Phillimore says, forms the model for municipal limitation regulations that the

writers asserting the existence of the doctrine in the international law refer to and treat of.

On careful consideration of the authorities on the subject, much of whose discussion is only remotely applicable to the question as it is presented to us, we are of opinion that by their decided weight—we might say by very necessity—prescription has a place in the international system, and is to be regarded in these adjudications.

True, but few of them make reference to individual claims or to debts by one state on account of transactions with citizens of another state. But the principles recognized are general. Founded in nature, their application is imperative and broad as human transactions. They reach to debts necessarily, as Domat shows.

If an article be paid for when bought and the money left as a special deposit with the purchaser, time, under the doctrine, will run against a claim for it. *A fortiori* does it run, where the money is not segregated from, but left with the common fund of the buyer. Besides, the right to defend against is as substantial as the right to assert a demand. Its impairment is an injury. One whose act or negligence results in such injury must be charged in justice with its consequences. The causeless withholding of a claim against a state until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defense essentially curtailed, is in effect an impairment of the right to defend. The public law in such cases, where the facts constituting the claim are disputed and disputable, presumes a defense. But where there is valid reason for the withholding the case is different. The presumption is referable to some fault of the claimant. Incapacity, disability, want of legal agencies, prevention by war, well-grounded fear, and the like are not faults. Abandoned or neglected property or rights only are prescriptible.

Vattel says:

> As prescription can not be grounded on any but an absolute or lawful presumption, it has no foundation if the proprietor has not really neglected his right.

Again:

After showing that "immemorial prescription" confers an indefeasible title because it is founded upon a possession the origin of which is lost in oblivion, he adds:

> In cases of ordinary prescription the same argument can not be used against a claimant who alleges just reasons for his silence, as the impossibility of speaking, or a well-founded fear, etc., because there is then no longer any room for a presumption that he has abandoned his right. It is not his fault if people have thought themselves authorized to form such a presumption, nor ought he to suffer in consequence. He can not, therefore, be debarred the liberty of clearly proving his property.

It is "ordinary prescription" subject to be rebutted, with which we are especially concerned. How is one in practice to know in a given case when it

arises, it may be inquired, since it has no fixed periods, and no analogies to guide one arising from limitation acts, such as obtain in courts of equity. A definitive answer it would be difficult to frame. But in general we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defense are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in "danger of mistaking the truth," a basis for the presumption exists. If such situation be fairly imputable to a claimant's *laches* in withholding his demand, or, in Vattel's phrase, "when by his own fault he has suffered matters to proceed to such a state that there would be danger of mistaking the truth," prescription operates and resolves such facts against him; but if not so imputable, what the finding must be becomes a question of the preponderence of testimony merely, leaving each party to the misfortune time may have wrought for him in the support or in the defense of the claim.

While prescription names and can name no particular periods, since Sir Matthew Hale's enunciation to that effect twenty years have been looked upon as about the time, in the ordinary run of affairs, required to give rise to the presumption. And the general acceptance of that time is evidence of its reasonable foundation. Still it must be said the constantly increasing multiplicity of business transactions and intercourse tends to suggest a shorter period.

In this case it is not shown when the claim was first brought to the attention of the United States; and we have not sought to ascertain, for, in the view we take, it is immaterial. Whenever so brought, it came *cum onere.* It has been held that statutes of limitation can be pleaded against the state in an action upon an assigned claim. (United States *v.* Buford, 3 Peters, 30.) The principle applies here, and continues to operate until time ceases to run against the claim, so to speak. When does it so cease to run?

It has been urged with plausibility that this occurs on the claimant invoking the aid of his government, because then he ceases to have control of his claim. But notice to the plaintiff state is of itself no protection to the defendant state. The latter's means of defense may be dissipated while the claim lies in the archives of the former, and thus its right to defend impaired in the sense above indicated. If it be said the plaintiff state is an interested party and time should not begin to run against it till its discovery of the injury, it may be answered that where one of two states is liable to be placed at a disadvantage by the conduct of a citizen it should be that one whose citizen he is. We think the due notification to the debtor government marks the proper date. This puts that government on notice, and enables it to collect and preserve its evidence and prepare its defense.

Of course time's work of obscuration, effacement, and destruction goes constantly on under all circumstances. "Time and tide wait for no man." And all, we apprehend, is meant by its failing or its ceasing to run against a claim is that in such event that work is not to be imputed to the *laches* of the claimant. Delays are therefore harmful. Honest claims and honest defenses suffer

by them; only dishonest ones profit. And so it is a delayed demand naturally excites criticism, even where it escapes the ban of suspicion, and the greater the delay the stronger the tendency in this direction.

In a recent case, the claim of Carlos, Butterfield & Co., of New York, against the Government of Denmark, Sir Edmund Monson, the British minister in Athens, the arbitrator under a treaty (1888) between the United States and Denmark, where it appeared that a lapse of less than six years intervened between the occurrences (1854–55) complained of (being acts of the public authorities of the Island of St. Thomas in regard to claimants' ships, and of which the government at Washington had prompt notice) and the official notification of the claim to the Danish Government, said, while denying the insistence of Denmark that such delay constituted a conclusive objection to the validity of the claim, that neither claimants nor the United States Government used due diligence, "*and have thereby exposed themselves to the legitimate criticism, of the Danish Government on their dilatory action.*"

It is said there are old claims about which there is and can be no dispute as to the facts. It is enough to say as to such, that the present holding does not stand in their way. The statement of Mr. Crallé, Acting Secretary of State, to which our attention has been directed, namely, "Governments are presumed to be always ready to do justice; and whether a claim be a day or a century old, so that it as well founded, every principle of natural equity and of sound morals requires that it should be paid," may not in itself perhaps be opposed to prescription. Conceded that a claim "is well founded," there would seem to be no occasion for prescriptive or other evidence in regard to it. The objection to the remark, in the connection in which it was employed, is, that it assumed the truth of the matter in controversy, to wit, the validity of the claim, for the ascertainment of which the principle was invoked. As to any admitted or indisputable fact, the public law, not resting "upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality," we are inclined to think, would not oppose the lapse of time, except for the protection of intervening rights, should there be such, even where municipal prescription might.

The contention urged with force, we should have before observed, that the plaintiff government conclusively adjudges the question of *laches* on the part of claimants as against the defendant government is not, we think, tenable. It is only another form of denying prescription. If both governments are not bound by the principle, it is not the law. If it be the law, as we hold, neither can determine the occasion of its application for the other. By the same title the United States decides a claim is not, Venezuela may declare it is, barred. Of course, in their diplomatic discussions each government must determine the law for itself.

And the decisions of each, we may remark on the other hand, on such questions are entitled to high respect. Such decisions are not to be taken, as has been suggested, as persuasive arguments in support of or against claims in the ordinary acceptation. The state or foreign affairs department of a govern-

ment always commands the services of the most learned, able, and experienced statesmen and jurisconsults the country affords. From every consideration affecting it, its purpose must always be to conform its decisions to the public law in international matters. It is, of course, apparent that such decisions are sometimes not the law, since they are occasionally in conflict as between two countries. They are, nevertheless, one of its important sources.

In some of the cases argued long periods have intervened after due notifications of claims by the United States Government to that of Venezuela, in which no official mention of them is made by either government. It is urged that such lapses should, on general principles, be held to operate peculiarly against claimants. Though the question is not involved in this case, we have considered it, and have thought it worth while here to say we are unable to find authority or a satisfactory footing for this insistence as a general-proposition. There are so many things that may induce one government not to press pending demands against another, disconnected with the demands themselves, consideration for the condition and welfare of the debtor state itself being prominent among them, that we are disposed to think the true and, so far as we are advised, the usual way is to regard time in such cases, in the absence of circumstances evincing abandonment, as no respecter of persons.

Upon these principles, too lengthily discussed, without awaiting further proof called for in defense from Venezuela, we disallow claim No. 36. It was withheld too long. The claimants' verification of the old urgent account of 1841, twenty-six years after its date, without cause for the delay, supposing it to be competent testimony, is not sufficient under the circumstances of the case to overcome the presumption of settlement.

Case of Ann Eulogia Garcia Cadiz (Loretta G. Barberie) *v.* Venezuela, opinion of the Commissioner, Mr. Findlay[*]

Affaire concernant Ann Eulogia Garcia Cadiz (Loretta G. Barberie) c. Venezuela, opinion du Commissaire, M. Findlay[**]

Limitation and prescription—great lapse of time to produce certain inevitable results such as the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed—in such circumstances, impossible to accomplish exact or even approximate justice—time itself is an unwritten statute of repose,

[*] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 4199.

[**] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. IV, Washington, 1898, Government Printing Office, p. 4199.

a principle which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy.

Prescription—un grand laps de temps produit certains résultats inévitables, tels que la destruction ou l'obscurcissement des preuves, troublant ou supprimant ainsi l'égalité entre les parties—dans de telles circonstances, il est impossible de rendre une justice exacte ou même approximative—le temps lui-même constitue une limitation non écrite, un principe qui n'est propre à aucun code ou système judiciaire interne, mais qui est aussi vaste et universel dans son application que l'éventail de la controverse humaine.

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At the threshold of this case there is a jurisdictional question which might give rise to serious difficulty if the claim was well founded in other respects. By the terms of the treaty we are only at liberty to pass upon such claims as were presented to the Government of the United States or to its legation at Caracas *before* the 1st day of August 1868. The papers in this case were submitted by the legation to the old commission on the 1st of August 1868, but there is no positive proof that they had been presented to the legation prior to that date, and by the strict terms of the language above quoted would be excluded. It appears, however, that they were mailed from New York on the 22d of June 1868 to D. M. Talmage, the commissioner of the United States, then engaged in the discharge of his official duty at Caracas, and in due course ought to have reached him in time to have been filed with the legation before the 1st of the following August. Had they been transmitted to the legation instead of Mr. Talmage we might have been willing to presume that they were received in time to come within the terms of the present submission; but, sent as they were, there is no presumption to be made in favor of their timely receipt. The question, however, is not a very important one, because on examining the papers and proofs submitted we must reject the claim upon other grounds which go to its merits. The petition alleges that José Felix Garcia Cadiz was a citizen of the United States, and that he acted as agent for an agent of the Government of Venezuela to purchase arms for her forces then engaged in the war for independence, and that in the performance of this service he was caused to suffer a pecuniary loss which is variously stated, and in such a loose and unsatisfactory manner that we can neither discern the precise nature of his injury nor the extent of his losses. The contract under which it is claimed he was acting is not among the papers, nor do they supply the evidence by which we can ascertain its terms. It appears, however, to adopt the language of the petition,

> that during the years 1810, 1811, 1812, *and thereabouts*, the said Cadiz was the agent of the Venezuelan Government in the United States, acting by request and under the direction of Don Juan Vicente Bolivar, then agent of

> Venezuela in the United States of America, and as such purchased arms, in the *neighborhood* of five thousand muskets, for the Venezuelan Government, at twelve (12) dollars each, for which he was obliged to pay in part, and on which he advanced considerable of his own money, and for which the said Bolivar as agent for the said Venezuelan Government agreed that he should be paid.

Reference is then made to a petition of his brother, Don Ramon Garcia, dated July 28, 1811, and the papers thereto annexed, as supplying the evidence which supports the averments of fact as above quoted. An examination of these papers shows that they consist of a letter addressed to some one as "Most Puissant Sir," and who, from the context, would appear to have been a person in high authority in Venezuela, particularly as the writer expects a great deal from the equity of this individual, whom, in the closing paragraph, he styles "Your Highness." This letter is dated "Caracas, *July 28, 1811*," and, although apparently written by Don Ramon Garcia, is not signed by anybody. This is the foundation of the claim, and it rests, therefore, upon an unsigned letter addressed to nobody. The claim, in fact, like an air plant, seems to draw sustenance from every source except its roots. On examining it, however, we find that the case made does not accord fully with the facts as alleged in the petition. The case as presented by the letter represents Joseph Cadiz as being exposed to an action by the manufacturers for breach of contract, and as certain to suffer in credit by the failure of Venezuela to take all the muskets ordered, besides suffering a direct pecuniary loss by the advance of $3,000 on account of muskets and the payment of as much more on account of Bolivar, who had agreed to advance it, but failed.

There is no mention made of any loss suffered by the claimant in consequence of the difference between the price paid for the muskets and the proceeds of the sales of coffee for which they were bartered.

Appended to this letter, however, is a statement of account, under date of *July 12, 1823*, purporting to have been made by Joseph Cadiz, and which is entitled "A statement of the debt and its interests of Don Juan Vicente Bolivar, agent of Venezuela in the United States of America, during the year 1811." In this account Cadiz charges for $10,851, with eleven years' interest on the same, $6,161, as a sum of money due him on 3,617 muskets at $12.50 apiece, explaining the item as follows: "These muskets were bartered for coffee at the rate of 100 lbs. of coffee for each musket; and, the coffee having been sold in Philadelphia at $9 per 100 lbs. to meet the manufacturers' claims, etc., there was a difference as above stated against the accountant of the principal sum of $10,851.

Here, then, is a claimant who, through his brother and agent in 1811, is alleged to have complained to some anonymous body in Venezuela that he had been injured by the refusal of the agent of that government in the United States to carry out a contract with respect to the purchase of muskets, and yet who fails to mention what in eleven years afterwards, according to an account

then made up by him, becomes one of the principal items of his loss. Not only so, but the claimant himself, in making up this account, does it so loosely that he makes an error of $1,808.50 in the 3,617 muskets item, charging for them $43,404, at $12.50 per musket, which at that rate would yield $45,212.50. It is true this error is against him, but as an evidence of the looseness with which the account is stated it matters not on which side of the column it occurs. A man with a *bona fide* claim and a reasonable expectation of having it paid does not usually fall into such errors. There is another thing to be noticed in connection with this account. The lot of 583 muskets complete with bayonets is mentioned as having been "taken along with him"; that is, Bolivar. The other lot of 3,617 is called "the remainder received from the manufacturers," and would appear to have been paid for in coffee, which fell short of the agreed price by $10,851. Were these muskets received by Venezuela or not? The letter of Don Ramon Garcia before referred to, under date of July 28, 1811, and which constitutes the first presentation of the claimant's case, in its general tenor would seem to very pointedly indicate that the 5,000 muskets bargained for in some way by Cadiz and Bolivar had not been delivered. The language of Don Ramon is as follows: "But on asking of the above-mentioned agent, Don Juan Vicente Bolivar, the amount which was to be paid as first installment, the agent refused to pay it, and Don José Felix (meaning Cadiz) was left to pay the debt" (that is, as we understood it, the first installment). The writer then goes on to say: "And as about that time Don Telesforo Orea succeeded Mr. Bolivar in the agency and authority of the same, when the time for the fulfillment of the contract for the 5,000 muskets was up Don José Felix (that is, Cadiz) called on Bolivar, who told him to see Orea about the matter. He did so, but Orea sent him back to Bolivar; *therefore* (italics ours) the brother of the undersigned (although, as we have before stated, the letter is signed by nobody) is greatly exposed to be ruined *if, as it seems natural, the manufacturers sue him and take possession of his goods*" (italics again ours).

From this statement it would appear that the muskets were not delivered, and that what excited the fraternal solicitude of Don Ramon was the fear that his brother would be sued for a breach of contract. Besides, it may be accepted as a fact which requires no proof that the manufacturers would not have parted with their property until they were either paid or secured. But, again, the letter goes on to say "the undersigned can not forbear regretting, in the first place, the detriment caused to this province and its confederates *by not having secured* the considerable number of arms which were bargained at such a good price, considering that the Government of the United States pay 50 cents more for each musket." If this language has any significance at all, it can only mean that Don Ramon, in 1811, in the possession of letters recently received, as he states in this same letter before quoted, from his brother in the United States, complaining of the course of Bolivar, understood the cause of grievance to be that the claimant had made a bargain for muskets which he was not able to fulfill, and that his liability to a suit for breach of contract, together with certain money he had advanced in part payment for the muskets, constituted his claim. In 1823 the claimant, as we have

shown, appears to have enlarged his claim, and it then appears as if the muskets had been delivered, but he failed to realize in full what was agreed to be paid for them, by reason of the coffee which was taken in exchange not bringing as much per pound as had been anticipated.

There is not the slightest evidence in the papers that this anonymous letter and this account, neither of them sworn to, and constituting the grounds of claim, were ever presented by anybody to anybody. There is a minute at the bottom of the letter, also unsigned, which reads as follows: "The executive power ordered Don Telesforo Orea to fulfill the contract, provided that its terms were not very unreasonable. This was substantially the decision, and the order was sent to him thereupon." From this it would appear, however, that the contract had not been fulfilled, and the muskets not delivered, and the relief desired and obtained by the claimant was the escape from liability for a breach of the contract.

The claimant appears to have left the United States shortly after these occurrences and taken up his abode in different parts of South America, not returning, however, to Venezuela. He finally settled in Santiago de Chile, from which place it would seem from an indorsement on the account before mentioned, he communicated with his brother Don Ramon, then in Caracas, concerning his claim. He accordingly sent this account, together with all the papers in his case, to this brother, with full power of attorney, under date of the 3d of May 1823, to collect and receive "all the amounts due to him in the *Republic of Colombia*, and specially that he may demand and collect the amount specified in the documents attached to this power of attorney." What was done with the claim, and under this power, appears from the affidavit of the present claimant, daughter of Mr. Cadiz, made in New York on February 28, 1890, in which she says "that according to deponent's best knowledge, information, and belief, the family of Ramon, from 1823 to about 1866, all of which time they had charge and possession of the papers on which this claim is founded, never collected nor received anything on account of the claim in question, *and never endeavored or undertook to collect the said claim*." . . . So it slumbered for more than forty years, until the papers were sent to Mr. Talmage in the summer of 1868, as before described, and having been disallowed by the commission of which he was a member, because it "was not filed with the United States legation previous to the organization of the commission," it now comes before us, after the lapse of nearly eighty years from the origin of the claim. Both the original claimant and his brother Ramon, to whom the power of attorney was given, appear to have died in 1823, but while the power was thus revoked, there is no reason why the parties interested should not have presented the claim, either in the tribunals of Venezuela or through the good offices of the United States, and not having done so when the circumstances in which it originated were comparatively recent, not even *endeavoring or undertaking* to collect it, but sleeping on their rights for nearly a half century, we are of opinion that the consideration of such a case, even if we could ascertain with reasonable certainty

what it was, would do violence to every principle of sound policy and open the door for the admission of any claim, however stale and obscure. It is true that this commission is an international tribunal and in some sense is not fettered by the narrow rules and strict procedures obtaining in municipal courts, but there are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed, and, as a consequence, renders the accomplishment of exact or even approximate justice impossible. *Time itself is an unwritten statute of repose.* Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it can not escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed. The treaty under which it is sitting requires that its decisions shall be made in conformity with justice, without defining what is meant by that term. We are clearly of the opinion that in no sense in which the term is used would it be just for us to make an award which would require the levying of a tax on the whole present population of Venezuela to pay a claim which originated before nearly all of the oldest of them were born, and which is presented at a time when it is impossible to say whether it is well founded or not, the delay being without excuse or justification; and we accordingly reject the claim and dismiss the petition.

PART XV

Commission for the Settlement of Claims under the Convention of 7 August 1892 concluded between the United States of America and the Republic of Chile

Commission pour le règlement des réclamations en vertu de la Convention du 7 août 1892 conclue entre les États-Unis d'Amérique et la République du Chili

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Case of Charles G. Wilson *v.* Chile, No. 11, decision of 10 April 1894[1]

Affaire concernant Charles G. Wilson c. Chili, N° 11, décision du 10 avril 1894[2]

Declaration of intention to become citizen of a State does not have the effect of its author acquiring rights of citizenship—power of States to determine the conditions and qualifications of citizenship, including naturalization.

Une déclaration d'intention de devenir citoyen d'un Etat n'entraîne pas l'acquisition par son auteur des droits liés à la nationalité dudit État—pouvoir des États de déterminer les conditions et qualifications de la nationalité, y compris la naturalisation.

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The memorialist represents that he was born in Stockholm, Sweden, on the 7th day of February 1834, and emigrated to the United States, and resided in Brooklyn, N.Y., during the years 1869, 1870, and 1871, and resided later on at several places in the western part of the United States, that while residing in Brooklyn, New York, on the 23d day of July 1869, he renounced his allegiance to the Government of Sweden and declared under oath his intention to become a citizen of the United States of America, and having complied with the law, applied for citizenship, and on the 11th day of October 1893, said application for citizenship was perfected by the superior court of the city of New York, in

[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2553.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2553.

the State of New York; that he is advised that his protection as a citizen of the United States relates back to and began on the day of his declaration to become a citizen of the United States, to wit, the 23d day of July 1869; that his present residence is Iquique, Chile, and at the time when the acts complained of herein occurred he resided at that place. He further represents that on the 20th of January 1891 he was engaged in business at Iquique, Chile, and was the owner of valuable buildings at that place; that in the conflict of arms which took place between the troops of Balmaceda, in command of Colonel Jose Maria Soto, and the Congressional troops and war vessels, in command of Merino Jarpa and Jorge Montt, on the 19th day of February 1891, all of said buildings, with the furniture, merchandise, account books, and other property contained therein, amounting to the sum of $124,498, were totally destroyed.

The republic of Chile, through its agent, has filed a general demurrer to the memorial. We are of opinion that according to the showing made by the memorialist himself this commission can not take jurisdiction of his claim. By the express terms of the convention under which this commission has been created its jurisdiction is confined to claims on the part of citizens of the two governments respectively. The wrongs and injuries complained of were committed on the 19th of February 1891. At that time the claimant was not a citizen of the United States, and did not become such until the 11th day of October 1893. It is true that on the 23d of July 1869, he declared his intention to become a citizen of the United States, but that declaration did not make him a citizen. It was only an incipient step in that direction. Among other attributes of sovereignty exercised by governments is the right to determine the conditions and qualifications of citizenship, and to decide who shall be deemed citizens. In a case decided under the treaty between the United States and Mexico of July 4, 1868, very similar in its provisions to the treaty under which this commission has been organized, Dr. Francis Lieber, the eminent publicist, who was acting as umpire at that time, coincided in the following views expressed by the counsel of the United States:

1st. That every state exercises the power of determining who shall enjoy the right of membership of the political society or body politic of which it consists.

2d. That those who are invested by the municipal constitution and laws of a country with this quality or character, and *none others,* are citizens of the state.

3d. That nations proceed in their municipal legislation upon the idea that the citizens of other countries have the right to change their nationality and incorporate themselves with new political societies.

4th. That all nations provide by their laws the terms and conditions upon and in pursuance of which this change of nationality may be and is effected.

5th. That except in pursuance of those laws, and upon the terms and conditions so provided, no member of any political society can incorporate himself with a new state and become a citizen or subject of such state.

6th. That until a change of nationality is thus effected the old relation subsists, unless the individual has done some act which under the laws of the state of his origin has the effect of denationalizing him.

If these views be accepted as correct, it only remains to inquire: What are the terms and conditions prescribed by the Government of the United States under which a citizen or subject of another country can become a citizen of this country? The first section of the fourteenth amendment of the Constitution of the United States declares: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." How can a person become naturalized? This is a matter of national and not of international arrangement, except in cases where it is regulated by treaty. Accordingly we find that the laws of the United States prescribe the method of naturalization in this country. Section 2165 of the Revised Statutes of the United States provides:

> An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:
>
> *First.* He shall declare on oath before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is *bona fide* his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.
>
> *Second.* He shall, at the time of his application to be admitted, declare, on oath before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.
>
> *Third.* It shall be made to appear to the satisfaction of the court admitting such alien that he has resided within the United States five years at least, and within the State or Territory where such court is at the time held one year at least; and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same; but the oath of the applicant shall in no case be allowed to prove his residence.

It thus appears that according to the plain and explicit provisions of law, both constitutional and statutory, the claimant was not a citizen of the United States at the time he sustained the damages and losses complained of. Nor could the United States recognize him as such without violating a solemn treaty stipulation made with the Government of Sweden. Article I. of the convention, relative to naturalization, between the President of the United States of America and His Majesty the King of Sweden and Norway, proclaimed January 12, 1872, reads as follows:

> Citizens of the United States of America who have resided in Sweden or Norway for a continuous period of at least five years, and during such residence have become and are legally recognized as citizens of Sweden and Norway, shall be held by the Government of the United States to be Swedish or Norwegian citizens, and shall be treated as such. Reciprocally citizens of Sweden or Norway who have resided in the United States of America for a continuous period of at least five years, and during such residence have become naturalized citizens of the United States, shall be held by the Government of Sweden and Norway to be American citizens, and shall be treated as such. *The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of citizenship legally acquired.*

We are sustained in our views on this subject by the decisions of similar commissions that have existed under treaties between the United States and other countries. (See the leading case of *Joseph Napoleon Perche* v. *The United States,* decided by the French and American Claims Commission.)

It also appears from the diplomatic correspondence of the State Department that the Government of the United States has uniformly held that a mere declaration of intention to become a citizen is not sufficient to clothe a person with the rights of citizenship in the United States. In a letter from Mr. Marcy, Secretary of State, to Mr. Buchanan, April 13, 1854, he says:

> If a person has been here and declared his intention to become a citizen and afterwards leaves this country, goes to another and there takes up his permanent abode, his connection with the United States is dissolved, and consequently his intention to become a citizen thereof must be adjudged to have been abandoned. By such a course of conduct his previous declaration ceases to be available for any purpose whatever, and our ministers and functionaries abroad would not be warranted in such case to do any act to give it effect.

See to the same effect the letter of Mr. Marcy, Secretary of State, to Mr. Siebels, May 27, 1854; also a letter of Mr. Bayard, Secretary of State, to Mr. Mackey August 5, 1885; and of Mr. Bayard, Secretary of State, to Mr. Williams, October 29, 1885.

Inasmuch as the memorial does not show that the claimant was a citizen of the United States on the 19th day of February 1891, when the alleged losses occurred, we decide that the demurrer should be sustained and the claim disallowed for want of jurisdiction.

Case of Grace Brothers & Co. *v.* Chile, Nos. 16, 19, 20, 21, 22, and 29, decision of 10 April 1894[1]

Affaire concernant Grace Brothers & Co. c. Chili, N^os^ 16, 19, 20, 21, 22, et 29, décision du 10 avril 1894[2]

Parties who have given voluntary aid and comfort to the enemy of the respondent State may not appear in the Commission (Article I of the Convention)—access to arbitration is a purely conventional privilege and the contracting Parties decide who can appear and what class of claims may be presented in the arbitration.

Voluntary aid and comfort exist in cases where the articles furnished would be seized as contraband of war if captured at sea or where the supply of articles would involve the crime of high treason if provided to the enemy—commerce of neutrals outside this scope not subject to any restriction other than that which may be imposed thereon by the usages of nations.

Acts need not be intentionally committed on behalf of one belligerent and against the other to be considered voluntary—acts which were forced upon the parties to be considered involuntary—the willingness to give aid and comfort can be established if the person committing the acts in his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other.

Existence of contract previous to the commencement of the war is an inadmissible excuse—the state of war is a case of superior force which suspends, modifies or alters all contracts, returning to the contracting parties the liberty they had compromised in the time of peace.

Scope of contraband of war—articles of contraband are those which serve for the war directly and indirectly—the former always subject to confiscation whereas the latter only confiscated when it is shown that there was an intention to increase the strength of the adversary—articles to be considered contraband of war if and whenever administered directly to a hostile fleet.

Claims dismissed for want of jurisdiction based on the fact that the claimants have given voluntary aid and comfort to the enemies of Chile.

Dissenting opinion (Mr. Goode)

Claimants not to be charged with giving aid and comfort unless they have violated the neutrality laws in dealing with Peru—subjects of neutral State entitled to continue their ordinary trade and to the right to sell even contraband of war, subject only to the right of seizure.

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[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2781.

[2] Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2781.

Les parties qui ont volontairement assisté et soutenu l'ennemi de l'État défendeur ne peuvent comparaître devant la Commission (article I de la Convention)—l'accès à l'arbitrage représente un privilège purement conventionnel et les Parties contractantes décident des personnes admises à comparaître ainsi que des prétentions qui peuvent être présentées dans le cadre de l'arbitrage.

Constituent des cas d'assistance et de soutien volontaires les cas dans lesquels les articles fournis feraient l'objet d'une saisie en tant que contrebande de guerre s'ils étaient interceptés en mer ou dans lesquels la fourniture d'articles impliquerait un crime de haute trahison si elle était au bénéfice de l'ennemi—le commerce effectué par des Parties neutres en dehors de ce cadre ne peut être soumis à aucune restriction autre que celle qui peut être imposée en vertu des usages des nations.

Il n'est pas nécessaire que les actes soient commis intentionnellement au nom d'un belligérant et à l'encontre de l'autre pour qu'ils puissent être considérés comme volontaires—les actes imposés aux parties sont considérés comme involontaires—la volonté de fournir de l'assistance et du soutien peut être établie si la personne qui commet les actes avec discernement peut et doit savoir que de tels actes renforcent la puissance de l'un des belligérants au détriment de l'autre.

La conclusion d'un contrat avant le début de la guerre ne constitue pas une excuse admissible—l'état de guerre représente un cas de force majeure qui suspend, modifie ou altère tout contrat, réintégrant les parties contractantes dans la liberté qu'elles avaient compromise en temps de paix.

Portée de la contrebande de guerre—les articles de contrebande sont ceux qui profitent directement ou indirectement aux efforts de guerre—les premiers font toujours l'objet d'une confiscation, alors que les seconds ne sont confisqués qu'en cas d'intention manifeste d'accroître la puissance de l'adversaire—articles à considérer comme contrebande de guerre chaque fois qu'ils sont fournis directement à une flotte hostile.

Réclamations rejetées pour défaut de compétence puisque les demandeurs ont volontairement assisté et soutenu les ennemis du Chili.

Opinion dissidente (M. Goode)

Les demandeurs ne peuvent être accusés de fournir assistance et soutien tant qu'ils n'ont pas contrevenu aux lois de neutralité en traitant avec le Pérou—les sujets d'un État neutre ont le droit de poursuivre leur commerce ordinaire et même le droit d'écouler de la contrebande de guerre, sous réserve uniquement du droit de saisie.

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The honorable agent of the respondent government has filed a motion setting forth that the memorialists, having given voluntary aid and comfort to the Government of Peru during the war between that country and Chile, have no right to present their claims before this commission pursuant to the express provisions of Article I of the convention of Santiago, of August 7, 1892.

In support of the motion, the respondent government has produced duly authenticated extracts from the account current of the house of W. R. Grace & Co. with the Government of Peru, and several communications exchanged between the heads of the claimant firms and the said government and its agents, from which it appears that the said firms during the war between Chile and Peru were the official purveyors of the Peruvian Government; that they furnished it and charged to its account the coal for the ship *Andrew Johnson,* on January 15, 1881; that they furnished and charged on account the supplies for the Peruvian navy (December 31, 1880, and January 15, 1881); that they provided and charged on account the electric wires and batteries intended for the reserve of the Peruvian army (October 31, 1880, and December 18, 1881); that they guaranteed Mr. Charles E. Pettie the sum he asked for the remodeling of Remington rifles, old style, belonging to the Peruvian Government (January 17, 1881); that they advanced to Mr. Bogardus, agent of Peru in the United States, and charged on account, the sum of $10,994 for the purchase of arms in the latter country (February 17, 1881); that they advanced sums of money to the Peruvian consul-general in San Francisco to defray the expenses of the embargo of certain Chilean vessels which had arrived there laden with nitrate (June 25, 1880, and December 28, 1881).

The account current and the correspondence aforesaid corroborate these facts and are to be found collated in the pamphlet entitled Documentary Evidence on Behalf of Respondent Government. The agent of Chile maintains that all these facts, in connection with the items inserted in the account current and other documents, constitute aid and comfort voluntarily given by the memorialists to the enemies of Chile, which deprives them of access to this commission.

The memorialists deny these allegations and recapitulate their arguments in the document entitled Statement and Brief of Claimants in Answer to the Motion of the Respondent Government to Dismiss the Claim, in the manner following:

> 1st. That the payments made by W. R. Grace & Co. to Peru were made out of funds in their hands belonging to the Peruvian Government. The fact that that government was at war with Chile did not release the claimants from their obligation to pay their debt to Peru, either directly or on the order of the government of that country.
>
> 2d. That the funds in the hands of W. R. Grace & Co. arose from commercial transactions between it and the Government of Peru prior to the breaking out of the war between Peru and Chile. Such state of war could not alter the commercial relation between the parties.
>
> 3d. That all of the articles complained of were furnished by claimants to Peru in compliance with a contract entered into between them and the Government of Peru prior to the breaking out of hostilities between Chile and Peru, and their contractual obligation to perform that contract continued notwithstanding such war.

4th. That the articles complained of and mentioned in the schedules and the documents of respondent were not contraband of war.

5th. That the claimants being neutral citizens of the United States, a friendly country to both Chile and Peru, had a right to carry on their commercial business with the government or citizens of either of the belligerents without molestation.

6th. That even though the articles were contraband, the only penalty was the peril of seizure if captured *in transitu* by the Chilean Government. That the penalty did not go beyond the contraband goods and attach in any way to the person of the neutrals or to their goods not contraband.

7th. That the evidence shows that claimants were not only willing but actually did sell the same articles to the Republic of Chile during the war, after the occupation of Lima.

8th. That General Lynch, being military commander of the Chilean forces of occupation in Callao, charged the house of Grace Bros. & Co. with having given aid and comfort to the Peruvians, and threatened to confiscate certain of their property as being enemies of Chile, but upon an investigation of the charge not only revoked his threat, but returned the property to them, and afterward paid them for the property which he seized and used in military operations. That by the conduct of the commander of its armies the Government of Chile is estopped from setting up a breach of neutrality on the part of the claimants.

9th. That the account current on which the agent of the respondent government relies to establish the aid and comfort to the enemies of Chile was made out long after the capture of Lima by Chile, and when the war had definitely ended.

In view of these antecedents we must ascertain what voluntary aid and comfort means, and whether the memorialists have really given such aid and comfort voluntarily to the enemies of Chile.

The principle of aid and comfort in the matter of claims is a modern creation in international law; it rests upon the fact that access to courts of arbitration is a purely conventional privilege; that it is the contracting parties who should decide the character of persons who can appear before these courts, and what class of claims may be presented thereto.

According to the terms of Article I of the convention of Santiago, among others, no parties may appear who have given voluntary aid and comfort to the enemy of the respondent state. The question here is not an imputed crime, harmful to certain claimants, but a conventional stipulation which limits the field of action of the commission, founded on the very just principle that it would not be proper for the state that has suffered through the acts of persons who have given aid and comfort to its enemy to be bound to grant to these the advantages it has accorded to those who have preserved a strict neutrality. Upon establishing this limitation, the contracting parties have not had in view any penalty for acts violative of international practices; they only and simply

refuse to accord a privilege to those whose voluntary acts have tended to favor their enemies.

The difficulty is, then, to formulate a rule that shall determine when aid and comfort has been given, and in what measure neutrals, who, as a general rule, have the right to maintain commercial relations with the belligerents, are to be excluded from the benefits aimed at by the treaty from which this commission derives its authority, because of the fact of having continued their habitual commercial transactions with the enemy and even those growing out of contracts. In other words, to what restrictions is the trade of a neutral subject who later on may find himself in the necessity of appearing before a commission of arbitration established under conditions similar to those the convention of Santiago provides, if he does not wish to see himself deprived of the privileges of such convention in consequence of a motion such as that made by the agent of the respondent government?

The precedents that may serve for the proper solution of this point are not numerous. On the 3d of March 1863 a law of the United States was enacted entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts of the United States". Section 3 thereof provides that "Any person claiming to have been the owner of such abandoned or captured property may . . . prefer his claim to the Court of Claims, and on proof . . . that he has never given any aid or comfort to the present rebellion."

Another official act, which is an international agreement, is the treaty concluded between France and the United States on the 15th of January 1881, which contains, in its first article, some dispositions absolutely the same as those of the convention of Santiago of August 7, 1892.

In the interpretation of the law of the 3d of March 1863 and of the convention of January 15, 1881, the jurisconsults and the arbitrators who have been called upon to decide the question of aid and comfort given the enemy have frequently started from different bases, and, at times very strict, excluding from the legal or conventional benefits claims of persons who have given the enemy really slight, unconscious, and accidental aid and comfort. There is, therefore, since modern publicists have not occupied themselves in determining this question, room to indicate under what circumstances the aid and comfort furnished by a neutral to one of the belligerents will deprive him of the prospective redress for acts committed by the civil or military authorities of the other belligerent to which otherwise he would be entitled.

In the absence of precise rules in this matter, it is necessary to attempt to establish the limits within which commercial transactions may constitute the *exceptio pacti* contemplated by Article I of the convention of Santiago.

In all cases where the aid to the enemy has been furnished in flagrant violation of international laws or the rules established by the belligerent in interest *(blocus par ex.)* it is undeniable that there has been aid and comfort. In the

second place, in all cases in which the acts committed would have involved the crime of high treason, if they had been committed by the subjects of a nation in behalf of the enemies thereof, we would have to admit that aid and comfort in the sense established by Article I of the convention of Santiago has existed.

The same rule should be applied to cases wherein the alleged acts refer to the furnishing of articles which should be considered as contraband of war and subject, therefore, to confiscation had they been seized and been the subject of trial at the proper time.

Outside of these limits, which determine the cases in which access to this commission may be refused, it is undeniable that the commerce of neutrals is not subject to any restriction other than that which may be imposed thereon by the usages of nations. The neutral who may have furnished one of the belligerents articles that may be considered as contraband, has given aid and comfort thereto, since the furnishing and transporting to the enemy of articles which by their nature may serve directly or indirectly in the war is considered as illegal. The neutral, *in fine*, who has committed an act the natural consequences of which would be to increase the strength of one of the belligerents to the prejudice of the other, has given aid and comfort, because, if, instead of acting in his neutral character, the acts committed by him had been in behalf of the enemy of his own country, he would have made himself liable for the crime of high treason.

Aid and comfort, according to the terms of Article I of the before-cited convention, must be voluntary.

In order that voluntary aid and comfort may exist, it is not necessary that the acts should have been intentionally committed in behalf of one belligerent and against the other. There may be a voluntary act without a hostile intention, as a hostile act may also be done involuntarily. So, in the case before us, the agent of the Government of Chile has incorrectly accused the claimants of the act of having furnished voluntarily ten launches to the Peruvian Government. This furnishing was done by order of that government, and the claimant houses, though not desiring to do it, were forced into that loan, and the fact that they did not protest before their diplomatic representative for this violation of their neutral character can not be invoked against them. They submitted to the conditions of the stronger. It is the same as if the magistrates of a city, threatened with death, should reveal the place where the national funds were secreted; or a countryman who, under the same circumstances, should have given aid and comfort to the enemy by showing him the topography of the country. We believe further that the planter who has accepted the price of forage furnished the enemy has not given it voluntary aid and comfort because if he had declined the money he could not thereby have prevented the enemy on the march from taking what he needed for the supply of the troops or the train of his army. In other words, the willingness to give aid and comfort to the enemy without assuming a hostile character towards the other party, can be considered as established in all cases in which he who commits those acts in

his sound senses can and must know that such acts involve an increase of the strength of one of the belligerents to the detriment of the other.

In their reply the claimants have maintained that the acts charged against them should be excused by reason of the contracts which existed previous to the commencement of the war. Those contracts, in their judgment, had restricted their liberty obliging them to carry out during the whole period of the hostilities what they had engaged to do before the commencement thereof. Under the point of view of the voluntary aid and comfort contemplated by the terms of Article I of the convention of Santiago, that excuse is inadmissible. The state of war is a case of superior force which suspends, modifies, or alters all contracts, returning to the contracting parties the liberty they had compromised in time of peace. If, after the commencement of hostilities, the contracting party persists in giving aid and comfort to one of the belligerents he can not invoke, as regards the consequences of his acts, the restriction of his free action through contracts existing previous to the commencement of the hostilities. This principle can and must be admitted if the analogy of the cases of contraband and high treason are admitted. As a fact, a neutral who, in time of peace, should promise to furnish a foreign state a quantity of arms, ammunition, field telegraphs, for example, or provisions, he could not prevent the confiscation thereof, should they be seized, on the ground that they were articles that he had agreed to furnish to one of the belligerents pursuant to contracts made previous to the outbreak of hostilities. Precisely the same thing occurs in the case of high treason. No previous contract would protect one who, to the prejudice of the interests of his country, furnishes the enemy money for the purchase of arms or to increase his financial resources.

These principles established, we will enter upon the examination of the grounds of the motion of the respondent government and the arguments of the memorialists, viewed in the light of these principles.

We have shown that voluntary aid and comfort exist in cases where the articles furnished would constitute and would be seized as contraband of war if they were captured on the sea, and in cases in which the resources supplied would involve the crime of high treason had they been furnished to the enemy of a nation by a citizen thereof. Within these propositions the fact that what constitutes contraband of war is frequently vague, variably laid down by the publicists, and often the subject of agreements may give rise to controversy.

On this subject no treaty between the United States and Chile changes the general principles established by science relative to contraband of war. It is necessary, then, to accept, so as to determine the principle governing this point, the opinions of the most impartial jurisconsults representing the most liberal modern ideas. Rivier, for example, in his *Lehrbuch über das Volkerrecht,* section 68, gives the following definition of contraband of war: "Articles of contraband are those which serve directly for the war—that is to say, arms of all kinds, materials and ammunition for firearms, explosive material, army supplies, articles of equipment, clothing, and uniforms. Next follow articles

which serve indirectly for war, such as iron in bulk, lumber for construction, the rigging, sails, and materials which after preparation may be used in the war, also pitch, tar, and horses. While the first of these articles may be always confiscated, the latter will only be when the circumstances *shall be of such a nature as to show the intention to increase the strength of the adversary.*

"Articles of food and money are not to-day considered as articles of contraband. The exception must be admitted that articles of food must be considered as contraband of war when they are furnished directly to a hostile fleet. It is the same with coal furnished a fleet. Dispatches carried to an enemy the conveyance of men, war vessels, and transports are also contraband."

This definition would by itself be sufficient to determine whether the houses of Grace & Co. have been guilty of acts which, considered in the light of contraband of war, constitute, an *exceptio pacti* pursuant to the provisions of Article I of the convention of Santiago; without going into a simultaneous consideration of whether the acts charged would have also constituted the crime of high treason if they had been committed by the citizens of a state in behalf of the enemies thereof. Reconsidering some of the allegations made by the memorialists and denied by the respondent government, it appears to us undeniable that, according to the declarations of John W. Grace, partner in the house (pages 18 to 22 of the claimants' depositions), the house of Grace Bros. & Co. "were purveyors of naval supplies for the Peruvian squadron, and that the articles that it sold embraced all kinds of articles necessary to a ship, from a needle to an anchor, all sorts of supplies, food, rope, sails, pitch, anchors, chains, and other articles."

In accordance with the principles expressed by Rivier, pursuant to those recognized by modern science, and in conformity with the terms of the formal and textural declaration of one of the heads of the claimants' houses, the latter have furnished anchors, pitch, tar, sails, all articles of contraband. Would a citizen furnishing the enemy of his country such articles be punishable or not?

The house of W. R. Grace & Co. has furnished:

December 31, 1880. Provisions and naval supplies to the squadron in December 1880	$35,796.88
January 15, 1881. Provisions and naval supplies for the squadron during the first fortnight of January 1881, as per annexed receipt	14,806.36

According to Rivier and all modern writers, provisions should be considered as articles of contraband whenever administered directly to a hostile fleet, which has been done in this case. The voluntary supplies given by a citizen to the enemy of his country would constitute a *corpus delicti* in a trial for high treason. We have no doubt whatever that the said houses have given the Government of

Peru, to the detriment of that of Chile, articles intended to directly assist in the prosecution of military operations, as may be proven by the following items:

October 31, 1880. For electric wire and batteries intended for the use of the reserve corps of the army, as per invoice	$6,690.81
December 18, 1881. To amount of the following invoices for electric wire and batteries embarked by order and at the expense of the supreme government, less product of the sale of said articles returned to New York, as per statement of sale herewith . . .	2,752.47

See with regard to cables intended for military operations, Calvo, *Droit International,* sections 2721 and 2722, and Martens, *Volkerrecht II.* sec. 132; and also the report of Mr. Renault in the *Annuaire de l'Institut de Droit International,* Vol. 1. 1879-1880, p. 370.

Would not the furnishing of such articles by a neutral be considered as contraband of war? And if it were done in behalf of the enemy of his country, would not the citizen so doing suffer all the force of the law?

As regards the charge in the account current mentioned above:

March 18, 1881. To salary to the mechanic Charles E. Pettie, under contract for remodeling Remington rifles, old style	$450.00

Mr. Edward Eyre, one of the heads of the houses of W. R. Grace & Co. and Grace Brothers & Co., has not wavered in acknowledging (p. 43 of claimants' depositions) that there was no money in the country (Peru) other than the paper money issued by the dictator, and that they (the said houses) were requested by the Government of Peru to guarantee to this man (Pettie) that he would receive the $450, and that they (Grace) paid him with a draft on New York. The mechanic objected to doing the work and accept Peruvian money. Would not a Chilean citizen who should guarantee the payment of such work, done in behalf of the Peruvian Government during the war with the Government of Chile, render himself liable to be tried by the courts of his country?

Let us also note that W. R. Grace & Co. spontaneously loaned the consul-general of Peru the funds necessary to attach the Chilean cargoes of nitrate while the proceeds of the sale of those cargoes constituted for the Government of Chile a valuable resource for the continuation of the war.

Note the items of the account current:

December 28, 1881. To payment to the consul-general in San Francisco to continue his efforts to embargo the nitrate laden in Tarapacá by the Chileans	$300

June 25, 1880. Payment to the consul-general at San Francisco for instituting prosecution and attachment of the nitrate embarked at Tarapacá by the Chilean authorities 500

Finally let us cite the following charge:

February 17, 1881. Payment of the bills of the special commissioner for the purchase of arms in the United States—Mr. G. Bogardus $10,994.02

And in connection with this item the letter written by W. R. Grace & Co. to the minister of war of Peru, in which he tells him with respect to this advance for the purchase of arms: " In this case, Mr. Minister, as in all the others, we came forward in all willingness with our services and money."

We believe that the voluntary aid and comfort are proven in a clear and conclusive manner, and that the efforts of the claimants, when they affirm (Recapitulations 1 and 2 of the statement and brief of claimants in answer to the motion of the respondent government) that the payments were made out of funds belonging to the Government of Peru cut no figure, since from their own spontaneous declaration and the confessions set forth on pages 56 and 57 of the depositions for the claimants, it appears that the house of W. R. Grace & Co. advanced funds of its own to Peru to carry out its obligations, in the hope of reimbursing itself later on from the proceeds of the sales of nitrate. And it even appears that the voluntary advances overbalanced the sum proceeding from said sales, a considerable balance resulting in favor of W. R. Grace & Co.

From the facts established it can not be doubted that the houses of W. R. Grace & Co. and Grace Bros. & Co. have given voluntary aid and comfort to the enemies of Chile, and therefore it is held that the motion of the agent of the respondent government be granted, and that claims Nos. 16, 19, 20, 21, 22, and 29 be dismissed for want of jurisdiction.

Dissenting opinion of Mr. Goode

The agent of the Republic of Chile has submitted a motion to dismiss these cases for the reason that Grace Brothers & Co. and William R. Grace & Co. are justly chargeable with having given aid and comfort to the enemies of Chile during the years 1880, 1881, and at other times. In support of this motion he has produced certain documentary evidence, consisting of extracts from the general account current of W. R. Grace & Co. with the Government of Peru, presented to said government in 1886, and copies of correspondence between the parties in relation to some of the items charged in said account.

In opposition to said motion the agent of the United States has filed the depositions of Robert T. Clayton, Edward Eyre, Alberto Falcon, O. G. H. E. Kehrhahn, John B. Mulloy, and Henry J. Schenck.

The first item in the general account current relied upon by the Republic of Chile is the following: "January 15, to balance due by the supreme government on the price of the cargo of coal on the ship *Andrew Johnson,* as per vouchers annexed."

The testimony of John W. Grace, Henry J. Schenck, and Edward Eyre proves that this cargo of coal was offered for sale in open market and bought by the Government of Peru as the highest bidder; that it was sold by the claimants in the ordinary course of business upon commission, and that they had no other interest in the transaction whatever.

The next two items are the following: "December 31, 1880. To provisions and naval supplies furnished the squadron in 1880.—January 15, 1881. To provisions and naval supplies furnished the squadron during the first fortnight of January 1881, as per vouchers annexed."

The testimony shows that the provisions and naval supplies referred to were such as were furnished by the claimants to all their customers alike in their general business as ship chandlers.

. . .

The next item reads as follows: " October 31, 1880. To balance of the invoices for insulated wire, electric batteries for the reserve corps of the army."

The testimony shows that the wire and batteries were shipped by W. R. Grace & Co. to the Government of Peru by its orders and at its expense; that they were paid for with the money of Peru in the hands of the claimants; and that claimants did not know at the time of the transaction, and have never known, what use was intended to be made of them.

. . .

The next item reads as follows: "March 18, 1881. To salaries to the mechanic Charles E. Pettie, under contract to remodel Remington minie rifles."

In regard to this item the testimony shows that Pettie, a mechanic and American citizen, had been employed by the Peruvian Government to repair some old rifles; that at that time there was no money in the country except paper issued by the dictator, and that the claimants were asked to guarantee that this man would receive $450, which was paid to him by a draft on New York, and out of the funds of the Peruvian Government.

As to this item, if the claimants are justly chargeable with having given aid and comfort to anybody, an American citizen, and not the Government of Peru, was the beneficiary.

Another item in the general account current is the following: "July 30, 1880. To value of three launches loaned the supreme government and lost in the blockade of Callao, as per record herewith."

It appears from the testimony that ten launches, including the three in question, were forcibly seized by the Government of Peru and used for defensive purposes. As to the seizure of these launches, Mr. Eyre testifies as follows:

> The next item is for the value of three launches. The Government of Peru decided that it was advisable—somewhere in 1880—to make use of all the lighters that were in the bay of Callao for a defense around the discharging dock, or Darsena, as it is called. The chief naval authority in the port notified all the owners of lighters, including the Pacific Steam Navigation Company, the Discharging Dock Company, Grace Brothers & Co., and others, that they would require the lighters, and proceeded to take them. I wish to explain here that the lighters were taken by the authorities, and were not voluntarily tendered or offered by any of the owners. When the Chilean authorities took possession of the port, and we went to find our lighters, we found that three of them had disappeared or been lost. And when the government—Peruvian Government—was re-established, I personally presented petition asking for payment of the lighters that had been lost, and after some trouble in proving the loss and value of the lighters succeeded in getting a decree recognizing the obligation on the government's part.

In this statement he is fully sustained by the testimony of Kehrhahn, Schenck, Falcon, John W Grace, and Mulloy.

I have thus noticed the most important items in the general account current between the claimants and the Government of Peru. It would be impossible to refer to all of them without extending this paper beyond reasonable limits.

After careful examination of all the testimony introduced on both sides, I think the facts may be fairly stated as follows: That long anterior to the war, and as far back as the year 1868, the claimants had furnished the Peruvian Government with naval supplies and provisions; that in the year 1877 they entered into contract with Peru; under which they continued to furnish the same articles; that after the declaration of war in April 1879, and until the capture of Lima in January 1881, the claimants continued to carry out their contract with Peru, that after the Chilean fleet had taken possession of the port of Callao and the Peruvian navy had ceased to exist, the claimants entered into a similar contract with Chile, by which they furnished similar stores and provisions to the Chilean navy; that the claimants, as general merchants and ship-chandlers, were engaged in legitimate trade and commerce with Peru and Chile, and with no purpose of extending aid and comfort to either belligerent; that the claimants had a mercantile house in Peru and in the city of New York; that they had a contract with Peru for the sale of its nitrate in the United States and Canada, and for furnishing naval stores and supplies; that in keeping the account current the claimants charged themselves with the proceeds of the sale of the nitrate and credited themselves with the prices of the articles furnished at the request and by order of Peru. In other words, that the various items of which complaint is made were paid for not with the money of the claimants, but with the money of Peru in the hands of the claimants and subject to the order of Peru. That the claimants observed strict neutrality between the belligerents is abundantly shown by the testimony.

. . .

Certain communications from the claimants addressed to the Peruvian minister of state are adduced for the purpose of sustaining the charge of aid and comfort. These communications are couched in polite and complimentary terms, such as are usually employed in diplomatic intercourse, and were evidently written for the purpose of making pleasant impression upon the Peruvian minister and securing his favorable action upon the subject under discussion, but they are not sufficient to establish the fact that the claimants have given aid and comfort to the enemies of Chile.

In the case of the United States *v.* Lumsden *et al.* (1st Bond's Reports, page 5), in which the defendants were tried for the attempted violation of the neutrality laws of the United States, the court said:

> No proposition can be clearer than that some definite act or acts of which the mind can take cognizance must be proved to sustain the charges against these defendants. Mere words, *written* or spoken, though indicative of the strongest desire and the most determined purpose to do the forbidden act, will not constitute the offense.

No case can be found in which the mere words or expressions of sympathy for one belligerent have been held by any court to constitute a breach of neutrality towards the other belligerent. What is the law applicable to the facts, as disclosed by the testimony in this case? Article I. of the convention under which the commission has been organized provides that:

> All claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Chile, arising out of acts committed against the persons or property of citizens of the United States not in the service of the enemies of Chile, or voluntarily giving aid and comfort to the same, by the civil or military authorities of Chile, . . . shall be referred to three commissioners, etc.

What is the meaning of the words "aid and comfort," as here employed? It is to be presumed that they were used by the treaty-making power with reference to the well-established principles of international law. Unless there be a breach of neutrality there can be no giving of aid and comfort to a belligerent. If the claimants, citizens of the United States, have done any act that amounts to breach of neutrality towards Chile in her war with Peru, they have given aid and comfort to the enemies of Chile, but not otherwise. In other words, the claimants can not be charged with giving aid and comfort unless they have violated the neutrality laws in their dealings with Peru. Have they done so? I think not. If the claimants in the regular course of trade had sold to Peru arms and munitions of war, the transaction would have been entirely legitimate. In the case of the *Santissima Trinidad* (7 Wheaton, 340) Mr. Justice Story, in delivering the opinion of the Supreme Court of the United States, says:

> There is nothing in our laws or in the law of nations that forbids our citizens from sending armed vessels, as well as munitions of war to foreign ports for sale. It is a commercial venture which no nation is bound to prohibit, and which exposes the persons engaged in it to the penalty of confiscation.

In Wheaton's *International Law,* Boyd's 3d edition, page 595, the same doctrine is stated as follows:

> A neutral government is bound not to assist a belligerent in any way. On the other hand, the subjects of the neutral are entitled to continue their ordinary trade, and when that trade consists in exporting arms, or ships of war, there arises conflict between the rights of a belligerent and the rights of neutral subjects. A government may not in any case sell munitions of war to a belligerent, but its subjects may provided they sell indifferently to both parties in the war, and provided the trans-action is purely commercial one, and not done with the intent of assisting in the war, *animo adjuvandi,* but simply for purposes of gain. The right which war gives to a belligerent is that of seizing such goods as are contraband, when on their way from the neutral state to his adversary.

Conceding, therefore, for the sake of the argument, that some of the articles sold by the claimants to Peru were contraband of war, I submit that they had the right to sell them, subject only to the right of seizure *in transitu* by the Chilean Government. (See Kent's Commentaries, part 1st, vol. 1, and 11th volume of Opinions of Attorneys-General, page 451.)

But in my opinion the documentary evidence relied upon by the respondent is insufficient to show that any of the goods sold by the claimants to Peru were contraband. They are not found in the list of prohibited articles enumerated in the treaties between the United States and Chile, Peru, or any of the South American republics. The manifest object of those treaties was to promote and encourage free and unrestricted commerce. They only prohibited the transportation and sale of such articles as are actually used in war. The articles mentioned in the documentary evidence referred to were not of that character, and if they had been, the only penalty would have been confiscation in the event of their seizure by Chile while *in transitu* between the United States and Peru.

The learned counsel for the Republic of Chile in support of their contention have cited decisions of the Court of Claims and the Supreme Court of the United States. In my opinion, those decisions have no application whatever to the question now under consideration. They involve the construction of the nonintercourse act of Congress, approved July 13, 1861. They were based upon law of Congress and not upon the law of nations; they involved the question of loyalty and not the question of neutrality. There is a very broad distinction between the two. It is altogether illogical to say that the claimants have given aid and comfort to Peru because they may have done something for which as citizens of the United States they might have been convicted of treason in the late war between the United States and the Confederate States. The phrase "aid and comfort" is comparatively new in international law, and no well-defined meaning has been given, to it by international law writers. It was first employed, I believe, in the treaty between France and the United States establishing a commission for the settlement of French and American claims.

That commission decided that the Le Mores, two French citizens, were not chargeable with giving aid and comfort to the enemies of the United States, although the evidence proved that they had delivered 609 bales of gray cloth to the Confederate authorities under a contract with the Quartermaster's Department to supply the cloth for the army of the Confederate States. This is a very important decision, rendered by an international tribunal under a convention containing the same provision in regard to aid and comfort and should be accepted as strongly persuasive authority in these cases.

In view of the facts and circumstances, I feel convinced that the dismissal of these cases will operate as a great hardship upon the claimants. They have done nothing that good faith did not require in the fulfillment of their contract with Peru, made before the commencement of hostilities with Chile; they have done nothing in violation of the laws of nations which prescribe the duties of neutrals toward belligerents; they have made no discrimination whatever in their dealings with Chile and Peru, and have treated both belligerents alike. If Chile thought proper to declare war against Peru she had the right to do so, but she had no right to interdict legitimate trade between Peru and a neutral American citizen, she had no right to stop the wheels of commerce and thereby inflict loss upon an unoffending neutral. The rights of neutrals should be respected as well as those of belligerents.

If the views of my honorable colleagues are correct, a neutral can only deal with a belligerent at his peril. A declaration of war by one nation against another involves not only the destinies of the two belligerents, but the rights and interests of the rest of mankind. No trade can be carried on with one belligerent without giving aid and comfort to enemies of the other. According to my understanding, such is not a fair construction of the phrase "aid and comfort" used in the first article of the treaty; and I feel constrained to dissent from the decision which has been rendered.

Case Frederick H. Lovett *et al. v.* Chile, No. 43, decision of 10 April 1894[1]

Affaire concernant Frederick H. Lovett *et al.* c. Chile, N° 43, décision du 10 avril 1894[2]

Government responsible for the offense committed in its territory only when the claimant government can furnish the proof that that government was able to prevent

[1] Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party,* vol. III, Washington, 1898, Government Printing Office, p. 2990.

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the act which caused the damage, but intentionally neglected to do so—governments not liable for acts committed by persons in rebellion against the government or who have broken their relation of allegiance.

Gouvernement responsable d'une infraction commise sur son territoire uniquement lorsque le gouvernement plaignant peut fournir la preuve que le gouvernement défendeur était en mesure de prévenir l'acte à l'origine du dommage, mais a intentionnellement négligé de le faire—les gouvernements ne répondent pas des actes commis par des personnes se rebellant contre le gouvernement ou qui ont rompu tout lien d'allégeance.

*****

It appears that Benjamin G. Shaw was the owner of the American bark *Florida,* under command of Captain Charles H. Brown, and that this vessel was charted by the Republic of Chile to convey about seventy prisoners, together with Chilean officers and soldiers, to the penal colony at Sandy Point, in the Straits of Magellan. The Government of Chile agreed to pay the sum of $1,600 for the transportation of the convicts and their guards. On the morning of November 27,1851, Captain Brown prepared to disembark the prisoners and sent a boat with six men ashore to see the governor of the colony, Muñoz Gamero. Immediately after landing, the men were seized and made prisoners by the convicts on shore, who had, before the arrival of the vessel, revolted and were in the possession of the colony. These convicts seized the vessel, made prisoners of Shaw, Brown, and others and thrust them into prison. Subsequently Shaw, with several others, was shot. On the 2d of January 1852, one Cambiaso, the leader of the revolted convicts, compelled Brown, under threat of death, to navigate the vessel, and ordered him to sail westward. Subsequently Captain Brown, with some of the American sailors, succeeded in obtaining control of the vessel and a large amount of treasure that Cambiaso had taken from an English vessel, the *Eliza Cornish,* and placed on board of the *Florida.* Brown then sailed for Valparaiso, and on the 14th of February 1852 anchored his vessel in the harbor of San Carlos, Chile, where the prisoners were turned over to the Chilean authorities.

On the 23d day of February, Captain Brown, having arrived at Valparaiso, abandoned his vessel to the Chilean authorities, as is alleged, but subsequently, as stated, he sold her for money to pay the expenses that had been incurred. It is alleged, further, that the treasure carried by the *Florida,* and which had been taken from the British vessel *Eliza Cornish,* was seized in the port of San Carlos by a British steamer.

The question is, Is the Government of Chile to be held answerable for the acts complained of, committed by persons who were in rebellion against the authority of the Government of Chile and had killed the governor and garrison, at Sandy Point? All the authorities on international law are a unit as regards the principle that an injury done by one of the subjects of a nation is not to be considered as done by the nation itself. (Vattel II. 73.)

Calvo (Dictionnaire, Responsabilité, II. 172) expresses himself in the same sense and sustains the principle that a government is answerable for the offense committed in its territory only when the claimant government can furnish the proof that the other government was able to prevent the act which caused the damage, but intentionally neglected to do so (. . . que l'État devait ou pouvait l'empêcher et a volontairement negligé de le faire).

Also Martens (Volkerrecht, I. 428) is of the same opinion.

But also in case a government fails to prevent its citizens or subjects from causing damage to citizens of foreign countries, in which case a government would be answerable, Rutherforth (Confere Calvo, Droit International, sec. 363) avers that even such a failure does not make the nation answerable for the acts committed by those of its subjects in rebellion and who have broken off their relation of allegiance. In such cases, and the case of the convicts on Sandy Point is in line therewith, those citizens cease in part to be under the jurisdiction of their government.

In the case of the *Florida* the memorialist admits that a rebellion against the Chilean Government had taken place, and had been successful; that the Chilean Government and also the Chilean citizens suffered great damage in consequence of said rebellion, as the governor and the garrison at Sandy Point had been killed by the convicts. At the time these events occurred the Chilean Government had no power to prevent, in the interest of the bark *Florida,* the consequences of a rebellion entirely unknown to it, and did, therefore, in no way fail to perform its international duties for the protection of foreign citizens residing in Chile or landing at Sandy Point.

Therefore the Chilean Government can not be held responsible for acts committed by revolted convicts, and the demurrer of the respondent government should be, and is, sustained.

Case of South American Steamship Co. *v.* the United States of America, No. 18, decision of 17 June 1901[1]

Affaire concernant le South American Steamship Co. c. les États-Unis d'Amérique, N° 18, décision du 17 juin 1901[2]

Right of the vessel's owner (South American Steamship Co.) to maintain its claim for any damages done to the vessel itself, which was under the temporary possession of the provisional government of Chile.

Illegality of the seizure of a Chilean steamship by the authorities of the United States in Chile, after pursuit on the high seas and surrender under duress, for alleged violation of the neutrality law of the United States—territorial limitation of State legislations and State authorities—specific rights of sovereignty, including the power to seize for the infraction of its laws, to be exercised within the territory of the sovereign—recognition of claims for extraordinary repairs of machinery and boilers made necessary by the long voyage caused by the seizure.

Droit du propriétaire du vaisseau (South American Steamship Co.) de maintenir sa réclamation pour tout dommage infligé au vaisseau lui-même, qui se trouvait en possession temporaire du gouvernement provisoire du Chili.

Illégalité de la saisie d'un navire à vapeur chilien par les autorités des États-Unis au Chili, après poursuite en haute-mer et reddition forcée, pour violations alléguées du droit de neutralité des États-Unis—limitation territoriale des législations nationales et autorités étatiques—droits spécifiques de souveraineté, y compris le droit de saisie de l'État souverain en cas d'infraction à ses lois, à exercer sur son territoire—reconnaissance de réclamations pour les réparations extraordinaires des machines et chaudières nécessitées par le long voyage découlant de la saisie.

*****

The questions raised by the demurrer in this case are very important, and have been argued with unusual zeal and ability by the learned counsel on both sides. At present we deem it only necessary to decide whether the steamship *Itata* was the property of the claimant at the time the acts complained of were committed, and whether her alleged seizure by the Government of the United

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States was illegal. As to the question of ownership, there is a distinct allegation in the memorial that the vessel belonged to the memorialist. That allegation is admitted by the demurrer to be true in so far as it is not contradicted or controlled by the accompanying documents. After a careful examination of those documents, we find nothing inconsistent with the allegation of the memorialist as to ownership; on the contrary, we think they fully sustain its claim. They show that at the time of its seizure the steamship *Itata* was in the temporary possession of the provisional government of Chile. It is immaterial to inquire whether that possession was acquired under a charter party or by virtue of the authority given by the laws of Chile enacted on the 29th of December 1883 and the 1st of February 1888. If the possession was only temporary and the general ownership of the vessel remained in the company, it has, beyond all question, we think, the right to maintain an action *for any damage done to the vessel itself.* It appears that when the libel or information against the *Itata* was filed in the district court of the United States for the southern district of California the captain, in the navy of the Republic of Chile, who commanded her at the time of the seizure, made the following claim:

> That he is the commander and in possession of the steamship *Itata,* her tackle, apparel, and furniture, for the Government and Republic of Chile, as charterer thereof under the laws of said republic from the South American Steamship Company, owner of said steamship. Wherefore this claimant prays that this honorable court will be pleased to decree a restitution of the same to him as such commander in possession, and otherwise right and justice to administer in the premises.

But it also appears that Charles R. Flint, intervening as agent for the interest of the South American Steamship Company in the said steamship *Itata,* appeared before the court and made claim to the said steamship and averred:

> That said company was the owner of the said steamship at the time of the attachment thereof, and that the said company is the true and *bona fide* owner of the said steamship, and that no other person is the owner thereof.

The record of the suit also shows that there was no contest made by the counsel representing the steamship company and the provisional government of Chile as to the ownership of the said vessel. It seems they were in perfect accord on that subject, and that by an agreement entered into between them and announced in open court the vessel was delivered to the representatives of the provisional government of Chile. Under these circumstances we are unable to assent to the proposition that the South American Steamship Company has forfeited its right to appear before this commission and assert its claim. It may or may not be true that the said company has a valid claim against Chile, and that Chile has a valid claim against the United States, growing out of the seizure of the *Itata.* We do not feel called upon to express any opinion upon that subject. We only decide at present that the memorialist, *as the owner of the steamship "Itata," is entitled to maintain its claim for any damage done to the vessel itself, if such damage has been occasioned by any unjustifiable action*

of the United States. Did the Government of the United States, by the seizure of the *Itata* for an alleged infraction of its neutrality laws, incur any legal liability? The record of the suit referred to shows that the district court of the United States for the southern district of California, after full consideration of all the evidence, documentary and oral, ordered and decreed that the United States should recover nothing by reason of the libel against the steamship *Itata,* and that said libel should be dismissed. The United States took an appeal from this decree, and it was affirmed by the circuit court of appeals, the three judges of that court being unanimously of the opinion that the evidence adduced was not sufficient to justify a decree of forfeiture. It is true they pronounced the seizure to have been justifiable under the circumstances, but as the question of probable cause was not involved in the determination of the question before the court, we do not feel bound by the dictum of the judges on that subject. In view of the occurrences that took place after the original seizure of the *Itata,* we do not deem it necessary at this time to decide whether there was probable cause for that seizure or not.

After stating that on or about the 6th of May 1891, while lying in the harbor of San Diego, the said steamship was boarded by a person who alleged himself to be one Spaulding, an officer of the United States, and in such pretended capacity assumed to take possession of said vessel; that the said Spaulding was unable to exhibit any authority as an officer of the United States, and the officers of the said *Itata,* believing him to be falsely impersonating an officer of the United States, set him on shore, and said *Itata* put to sea, the memorialist proceeds as follows:

> Meanwhile the Government of the United States, or the duly authorized and responsible officers thereof, had taken cognizance of the presence of the said *Itata* within the jurisdiction of the United States and the fact of her departure therefrom, and for reasons unknown to your memorialist directed certain of its naval officers to proceed with vessels of war in pursuit of the said *Itata;* to intercept her by force if found on the high seas, and to cause her to return to San Diego.
>
> It became known to the provisional government of Chile, or its duly authorized and empowered representatives, through the medium of the public press, that the steamship *Itata* was charged by the Government of the United States, or by certain of its officers, with an infraction of the neutrality laws of the said United States; that a portion of the United States naval forces were then *en route* to the port of Iquique for the purpose of securing the said *Itata,* and said reports were confirmed by a note to Mr. Isidoro Errázuriz, minister of foreign relations, from Admiral W. P. McCann, in which the latter, in his official capacity as commander in chief of the United States naval forces on that station and as the representative of his government, solemnly asserted and declared without qualification that, in his opinion, the said *Itata,* in procuring her cargo within the waters of the United States, was guilty of a violation of said neutrality laws. Upon these representations of Admiral McCann, made in the manner aforesaid, and because of the demands of the

> Government of the United States, accompanied as they were by the presence of a large naval force, the said *Itata,* with her cargo, was surrendered under duress to the representatives of the United States.
>
> The said *Itata* was accordingly taken possession of by said Admiral McCann on the 4th day of June 1891, and departed from Iquique on the 13th day of June 1891, under convoy of the U. S. S. *Charleston,* Captain George C. Remey commanding, by whom she was placed in the custody of the United States marshal at San Diego on or about the 6th day of July 1891.

We find nothing at variance with these statements in the documents accompanying the memorial or in any public document to which we may properly make reference. Assuming it to be true that after the departure of the *Itata* from the port of San Diego she was pursued by the naval authorities of the United States upon the high seas into Chilean waters, induced to surrender by a display of superior force, and brought back under duress, the question arises whether or not such action on the part of the United States was allowed by the laws of nations. After an examination of many authorities on international law and numerous decisions of courts, we are of opinion that the United States committed an act for which they are liable in damages and for which they should be held to answer. Mr. David Dudley Field, in his International Code, sec. 626, says:

> "An inmate of a foreign ship who commits an infraction of the criminal law of a nation within its territory can not be pursued beyond its territory into any part of the high seas."
>
> In the case of the *Apollon,* reported in 9 Wheaton, p. 361, it was decided—
>
> "That the municipal laws of one nation do not extend in their operation beyond its own territory except as regards its own citizens, and that a seizure for a breach of municipal laws of one nation can not be made within the territory of another."
>
> Mr. Justice Story, in delivering the opinion of the court, says:
>
> "It would be monstrous to suppose that our revenue officers were authorized to enter into foreign ports and territories for the purpose of seizing vessels which had offended against our laws. It can not be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."

In the case of Rose *v.* Himely, reported in 4 Cranch, p. 239, Chief Justice Marshall, speaking for a majority of the court, says:

> "It is conceded that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the specific rights of sovereignty must be exercised within the territory of the sovereign. If these propositions be true, the

> seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign can not authorize. The person who makes this seizure, then, makes it on a pretext which, if true, will not justify the act, and is a marine trespasser."

In view of these authorities and others that might be cited, we are of opinion that the South American Steamship Company *has a claim for extraordinary repairs of machinery and boilers made necessary by the long voyages to and from San Diego.* We do not deem it necessary at this time to examine the other items of the damages claimed. If any single item in the list constitutes a valid claim for damages, the demurrer can not be sustained.

We therefore decide that it should be overruled and the respondent required to answer.

PART XVI

Claims of Charles Oberlander and Barbara M. Messenger against the Government of Mexico (United States of America/Mexico)

Award rendered by Don Vicente G. Quesada, envoy extraordinary and minister plenipotentiary of the Argentine Republic, on 19 November 1897

Réclamations de Charles Oberlander and Barbara M. Messenger contre le Gouvernement du Mexique (États-Unis d'Amérique/Mexique)

Sentence prononcée par Don Vicente G. Quesada, envoyé extraordinaire et ministre plénipotentiaire de la République Argentine, le 19 novembre 1897

Claims of Charles Oberlander and Barbara M. Messenger against the Government of Mexico (United States of America/Mexico)

Réclamations de Charles Oberlander and Barbara M. Messenger contre le Gouvernement du Mexique (États-Unis d'Amérique/Mexique)

Award rendered by Don Vicente G. Quesada, envoy extraordinary and minister plenipotentiary of the Argentine Republic, on 19 November 1897*

Sentence prononcée par Don Vicente G. Quesada, envoyé extraordinaire et ministre plénipotentiaire de la République Argentine, le 19 novembre 1897**

Challenge to the legality of an American deputy sheriff's arrest in Mexican territory—compensation for the arrest should be sought before Mexican courts—the failure to bring criminal and civil actions before the courts of Mexico implies renunciation of the right to ask for an indemnity.

Indemnification of individuals for harm caused by agents of another State—personal responsibility of agents acting beyond their powers—legal right of harmed individuals to appeal for compensation through the executive or judicial channels—purely moral responsibility of the State—responsibility can be made direct and effective only in case of complicity or denial of justice by that State.

Res judicata—the decision of Mexican courts is valid in the territory of the United States—no diplomatic claim has the power to revise the decision—statements of witnesses made in foreign countries and not guaranteed by procedures in courts of justice cannot be accepted as having the extraterritorial legal force to annul the legal validity of *res judicata*—incompetence of witnesses with interest in the case.

Diplomatic claims—only two categories of cases can form the basis of international claims on the ground of an injury done to a citizen—case of injury done by so high an authority that no remedy is provided in the laws of the State—case where existing remedy has been tried and has produced no effect—no ground for an international claim if no sovereign and irresponsible action by the supreme power nor any denial of justice occurred—established precedents in the United States to reject diplomatic claims on behalf of foreigners demanding indemnity should now be enforced against the United States.

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* Reproduced from *Foreign Relations of the United States*, 1897, p. 382.

** Reproduit de *Foreign Relations of the United States*, 1897, p. 382.

Contestation de la légalité d'une arrestation sur territoire mexicain d'un sheriff adjoint américain—l'indemnisation de cette arrestation doit être poursuivie devant les tribunaux mexicains—l'omission d'intenter des actions civiles et pénales devant les tribunaux du Mexique équivaut à une renonciation au droit de demander une indemnité.

Indemnisation d'individus pour des préjudices causés par les agents d'un autre État—responsabilité personnelle des représentants du gouvernement ayant agi au-delà de leurs compétences—droit des individus lésés de faire appel par les voies exécutives ou judiciaires—responsabilité purement morale de l'État—responsabilité directe et effective uniquement en cas de complicité ou de déni de justice par cet État.

Res judicata—la décision des tribunaux mexicains est valide sur le territoire des États-Unis—aucune réclamation diplomatique n'est à même de réviser cette décision—les déclarations de témoins faites à l'étranger et ne bénéficiant pas de la garantie des procédures judiciaires ne peuvent être acceptées comme produisant l'effet juridique extraterritorial d'annuler la validité juridique de la *res judicata*—incompétence des témoins ayant des intérêts dans l'affaire.

Réclamations diplomatiques—seules deux catégories d'affaires peuvent former la base de réclamations internationales en raison d'une violation commise à l'encontre d'un citoyen—cas d'un dommage infligé par une autorité si élevée que la législation de l'État ne prévoit aucun recours—cas dans lequel un recours a été tenté, sans produire de résultat—aucune base pour une réclamation internationale si aucune action souveraine et irresponsable n'a été commise par l'autorité suprême, et si aucun déni de justice ne s'est produit—les précédents établis par les États-Unis de rejeter les réclamations diplomatiques au nom d'étrangers demandant une indemnité doivent leur être opposés dans le cas présent.

I, Don Vicente G. Quesada, envoy extraordinary and minister plenipotentiary of the Argentine Republic, having been appointed sole arbitrator by the high Governments of the United States of America and the United States of Mexico, as appears from the agreement concluded in the city of Washington on the 2d day of March, 1897, by their representatives, Hon. Richard Olney, Secretary of State of the United States of America, and Don Matias Romero, envoy extraordinary and minister plenipotentiary of the United States of Mexico, by which agreement the high contracting parties define the matter which is to be submitted to arbitration and the course to be pursued by the arbitrator in the discharge of his functions in passing a final decision concerning the claims presented by Mr. Charles Oberlander and Mrs. Barbara M. Messinger against the Government of Mexico through the Secretary of State of the United States of America and through the diplomatic channel:

Being actuated by a sincere desire to acknowledge, by an impartial and unbiased decision, the great honor that has been conferred upon me;

Having duly examined and carefully studied the documents and statements which have been laid before me by the legations of those high Governments at this capital which is the place designated for the rendering of my award within the time fixed, which time has been extended by agreement of the high contracting parties;

Whereas it appears, as regards the facts:

That Charles Oberlander, in the memorial which he addressed to the President of the United States of America on the 10th of January, 1893, presented as a document in support of his claim, among others, the statement made by him before a notary public of the United States of America, whereby he confesses that his object, when he crossed over into the territory of Mexico, was to procure evidence for use in a criminal case, *i.e.*, that of Crossthwaite *v.* The Mexican Cruz, who was charged with kidnapping, and consequently for the furtherance of a private interest;

That he was arrested on the 20th of May, 1892, at Tijuana, in Mexican territory, as is admitted by Mr. Ryan, United States minister in Mexico by a telegram addressed to Mr. Blaine, Secretary of State, on the 24th of May of that year;

That the vice-consul of the United States at Ensenada, Mexico, under date of May 27 of the aforesaid year, in an official note, reproduces the telegram sent by him to the United States minister in Mexico, informing him that Oberlander has been arrested in Mexican territory, without any doubt whatever, which assertions are of an official and conclusive character;

That Oberlander held, at that time, the office of deputy sheriff at San Diego, and was a police officer of Upper California, and had in his pocket the warrant of arrest issued by the township judge in the case of the Mexican Donaciano Cruz, who was accused by the very person in whose interest Oberlander had gone to Mexico in quest of evidence;

That he was arrested by the Mexican authorities in Mexican territory, for having endeavored, it is said, to effect the arrest of Cruz, in obedience to the warrant of which he was the bearer;

That when he was arrested and searched by the territorial authorities, the aforesaid warrant of arrest; a pistol and cartridges were found in his possession;

That the nickel handcuffs which are put upon the hands of prisoners, both in Mexico and in some States of the American Union, are used by police officers to secure persons under arrest, but in nowise for the purpose of torturing them;

That Oberlander, if he thought his arrest illegal, ought to have brought a criminal and civil charge before the territorial courts, asking for the punishment of the guilty parties, and for indemnity on account of the injuries done him, having failed to do which, he renounced his right;

That instead of taking legal steps before the courts of the country, he admitted, in the declaration made by him at Tijuana May 25, 1892, before the Mexican judge, which declaration, in view of the nature of the facts, was a charge or

accusation, "that on the night of Saturday, between 7 and 8 o'clock, he sent a man named Melon Santos, whom he did not know, and who was acting as his custodian or guard, to buy some cigars, he remaining with a Frenchman who also guarded him, and availing himself of that opportunity he ran out of the room, giving the Frenchman a push and thus making his escape toward the line; that owing to the precipitancy of his flight he fell on the road and received the scratches which he has on his body." Second, as to his capture, he said "that they seized him and brought him back under arrest;" "that they maltreated him in prison;" "that in addition to the aforesaid scratches he hit his head in trying to get out of a window of the room in which he was imprisoned;"

That the escape by means of force and violence used against the guard set over him by the judicial authorities of Mexico constitutes in itself an additional crime which aggravates the offense for which he was arrested, even if his arrest was originally unjust and illegal.

That this declaration of Oberlander was made subsequently to the issuance of the permit to absent himself, which was given him by the judge of first instance of Ensenada, on his mere promise that he would return to make his declaration, he crossing to the Territory of California, where he remained for twenty-four hours, and thence returned to that of Mexico, as he had promised to do, without compulsion or fears that his life would be threatened by those who arrested him, and made his declaration before the territorial judge;

That a man who was at liberty to make his declaration before the territorial judge and who could do so in safety was also at liberty to bring criminal and civil action against those who had arrested him;

That before the territorial judge, who was the only magistrate competent to take cognizance of and decide concerning the arrest and the matters connected therewith, he did not specify the acts of violence to which he had been subjected, or state who had tortured him, as he has since endeavored to show by unofficial specific charges, or designating any persons, he rendered it impossible to elicit the truth and to punish the guilty parties, if any such there were;

That he claims that, on the night of his escape, he reached the territory of the United States of America, and that there, in Messenger's house, "his pursuers entered and took him prisoner," which facts it was incumbent upon him to prove (and this proof was admissible and legal before the Mexican judge only who had charge of the case against his captors), since there was no impossibility or force that prevented him from doing so;

That before said judge, and in the same declaration which recognizes as "the true declaration" because "he could tell the truth without danger'.' (Mr. Olney to Minister Ransom, November 23, 1895), the aforesaid Oberlander adds, "that on the way they took him in a carriage and he suffered no ill treatment;"

That he stated, in the same instrument, "that Messenger's wife did not see the way in which they took him;"

That the witness Joseph Messenger is not a competent witness, owing to the interest which he has in the case, since his wife and he, as the owners of the house, claim an indemnity of $50,000; that his statement is liable to exception for that legal reason, according to the laws of Mexico, and that it is, moreover, of no value, since he states "that he does not know in what way Oberlander was arrested, or for what reason;"

That the witness Mrs. Messie Mosser says that "Oberlander spoke with a son of deponent at the door; that she does not know at what hour or in what way the aforesaid Oberlander was arrested."

That the witness Sirl states "that he saw some men nearby, whom he did not know, coming down the hill; that he saw their figures only; that he does not know how the occurrence took place or in what way Oberlander was arrested."

That the judge of Ensenada de Todos Santos thought that there was no reason why Oberlander should be detained any longer, and from the evidence obtained on the occasion of the preliminary examination he ordered the preliminary arrest of the persons who were charged with arresting Oberlander in United States territory, turning them over to the district judge of Lower California, as being presumably guilty of the offense against the external security of Mexico.

That a warrant of arrest is, in its nature, a document that is not final, and that an appeal may be had from it.

That, it having been affirmed by the circuit court of Mexico, the accused parties availed themselves of the right granted them by the laws of the country to apply for release on bail, while the criminal case was continued;

That, the case being continued in the second district court of Lower California, the judge ordered a discontinuance of proceedings in the case of the first one of those accused, and acquitted the four others;

That this decision was affirmed by the circuit court of Mexico, after the proceedings had been held which are provided for by the law of the country;

That, Oberlander being charged by Donaciano Cruz with an attempt to kidnap in Mexican territory, and Cruz and others being charged by Oberlander with kidnaping in the territory of the United States of America, the territorial judge received the evidence in both cases, the same Oberlander making his statement or charge, and the judge decided and enforced the territorial law according to what had been alleged and proved, and this decision was affirmed and remained valid;

That, finally, it is alleged on the part of Mexico that Charles Oberlander was arrested in pursuance of a judicial warrant at Brewerton, eight years ago, being charged with the crime of robbery, whereupon he fled to California;

That he was afterwards accused of endeavoring to obtain the consent of two young girls named, respectively, Katie Kehse and Louisa Hawing, for an

immoral purpose, and of outraging a girl named Nellie Dagwell, all of whom were inmates of the orphan asylum at Mount Tabor;

That in that criminal case, application was made judicially for the appointment of a commission of physicians, it being supposed that Oberlander had lost his reason;

That Judge Row, of New York, appointed three physicians, and Drs. Kauffman and Walsh, as witnesses, stated that they had known Oberlander since his childhood; that he was not in his right mind, and that his conduct had always been that of a person whose mental faculties were unsound;

That in virtue of the evidence furnished in the aforesaid case, the district attorney and Oberlander's counsel held that Oberlander's insanity began in his childhood, it having been observed while he attended school, and having afterwards continued without interruption; that the form of insanity from which he suffered was the persecution monomania;

That the conclusions reached by the experts in their report were that "Oberlander is suffering from a mental disease which is specially developed in persons who inherit a disordered mind, and which continues during their lifetime, it being known as a form of dementia called paranoia;"

That, in view of these antecedents, Judge Row declared that Oberlander was not responsible for the offenses with which he was charged, and ordered that he should be removed to the insane asylum at Utica, and not to the asylum for insane criminals at Matteawan.

Whereas it appears, in respect to Mrs. Barbara M. Messenger, that, by a note from the United States legation in Mexico, bearing date of April 9, 1895, addressed by Mr. Butler to the minister of foreign relations of the United States of Mexico, it is positively declared that "the Department of State is prepared to admit the correctness of the opinion expressed by the Mexican Government that, as to the illness of Mrs. Messenger, it was caused not so much by the forcible entrance of her house as it was by her own conduct in pursuing the kidnapers, and that she is therefore probably not entitled to the large indemnity that she claims; but it (the Department of State) considers it certain that the fact that her house, or that of her husband, was forcibly entered, and that her guest was removed therefrom by force, undoubtedly entitles them to demand an adequate indemnity."

That, in view of the foregoing limitation of the demand, it is not pertinent to examine the statements made with regard to Mrs. Messenger's alleged illness;

That, in the statement made by the department of foreign relations of Mexico, July 15, 1895, and officially sent to the United States legation with a note of July 16, of the same year, it is said, in connection with this claim :

> As regards Barbara Messenger's demand, it is a subject of satisfaction that the United States Government has agreed with that of Mexico that the illness of this woman was caused not so much by the alleged forcible entrance of her house as it was by her own conduct in pursuing the so-called kidnappers,

and that she is consequently not entitled to the indemnity which she claims. It then states, however, that the fact that her house or that of her husband was forcibly entered and her guest removed therefrom by force entitled them to demand an adequate indemnity;

That the Government of Mexico denies that the house was forcibly entered, and therefore this fact, which is differently stated by the two high parties, is fundamental, and should be juridically appreciated in the award;

That Mr. Ransom, United States minister in Mexico, in a note addressed to Mr. Mariscal, minister of foreign relations of the United States of Mexico, dated December 11, 1895, positively states that the demand of his Government is based upon the aforesaid note of Mr. Butler, and, that sent by him with its inclosure; consequently, the basis of the two claims, on the merits of which the award is to be pronounced, is clearly established;

That it is a doctrine of international law that: "within the jurisdictional limits of every sovereign State, the representatives of authority are personally responsible to the extent established by the internal public law of each State. When they fail to perform their duty by going beyond their powers or violating the law they create, according to the circumstances, for those whose rights have been disregarded, a legal right of appeal through the executive or judicial channels; but, with respect to third parties, whether native or foreign, the responsibility of the Government that has appointed them is a purely moral one, and can only be made direct and effective in case of complicity or denial of justice." (Calvo, International Law, Vol. III, p. 120.)

That in the present case the demanding Government has declared "that it has no complaint to make of the proceedings taken against those who arrested Oberlander, if such proceedings are considered as a purely domestic matter" (Mr. Richard Olney, Secretary of State, to Mr. Ransom, United States minister in Mexico, Washington, Nov. 30, 1895); that, in view of this recognition of the demanding Government, there was no complicity or denial of justice, and therefore the decision of the territorial judges which declares that it has not been shown that Oberlander's arrest took place in territory belonging to the United States, was legal and valid in Mexican territory, in virtue of such being the legal truth, against which neither the executive nor the legislative branch of a government can take action without committing an outrage upon the independence of the judicial branch;

That, although the demanding government denies that the claim of *res judicata*, raised by that against which the demand is made, has no extraterritorial power to exclude a civil action, in the present case it is not questioned that that decision of the Mexican courts is valid in the territory of the United States, but, on the contrary, that there is no diplomatic claim having annulling power to revise that decision and to claim, diplomatically, that, within the sphere of the sovereignty of the courts, information must be accepted that is designed to overthrow the juridical effect of the *res judicata*, and to dispose of the taxes paid by the inhabitants (which is a "domestic matter" in its very nature) for the

benefit of foreigners who have been unwilling, through bad faith, or owing to ignorance or what they consider expediency, to have recourse to the courts of the country in order to assert their alleged rights, as it was their duty to do;

That, it would be offensive to the independence and sovereignty of nations if the statements of witnesses made before notaries in a foreign country, without being subject to any of the guaranties and safeguards established by the laws of procedure in courts of justice, such statements being freely produced at different times, the husband declaring in favor his wife, the son in favor of his mother, the servant of her mistress, and the interested parties themselves in their own favor, could be presented, diplomatically, as a basis to give them extra-territorial legal force, annulling the legal validity of the *res judicata*;

That, it is a doctrine of international law "that all that other nations can ask of a government is that it shall show that it is actuated by a deep feeling of justice and impartiality; that it shall remind its subjects, by all the means in its power, of the respect which they owe to international obligations, and that it shall not leave unpunished such transgressions as may have been committed by them; finally, that it shall act in everything with good faith and in accordance with the precepts of natural 1aw; to go farther than this would be to raise a private injury to the height of a public offense, and to impute to a whole nation an offense committed by one of its members"; (Calvo, op. cit., p. 134, Vol. III);

That, it is a doctrine of international law "that the moral bounds which unite nations are of the same order, and imply an absolute character of solidarity; a State could legitimately neither claim among others a privileged situation which it was not prepared to allow foreigners to enjoy, nor could it claim for its own subjects advantages greater than those allowed by the common law of the inhabitants of the country" (op. cit.);

That the high contracting parties have recognized as principles of international law those clearly stated by the mixed commission which sat at Washington in pursuance of the treaty of July 4,1868, which, in deciding the case of the town (people?) of Cenecu, laid down as a doctrine of conventional law between the United States and Mexico the following:

> The following matters can alone form the basis of a claim of one nation against another: Offenses or acts of injustice committed by the supreme authority of a country against which no recourse can be had to any other authority of the same country; or such as, having been originally committed by subordinate authorities, have not been made good by the superior authority whose duty it was to do so when so requested, in the manner provided by the local laws. The cases in which an injury done to a citizen of a country may furnish grounds for an international claim are, then, reduced to two categories: either the injury has been done by so high an authority that there is no remedy provided in the laws of the country to furnish redress for its acts, or to prevent the damage that may arise therefrom; or the remedy exists, it has been tried and has produced no effect, because those who ought to correct the error affirm it or refuse to correct

> it, thereby making it irremediable. Where there has been no sovereign and irresponsible action in the country of the supreme power, nor any denial of the justice for which application has been diligently made, there is no ground for an international claim.

That, in the present case, both Oberlander, who complained of the act by a statement made before the territorial judge, and Mrs. Messenger, whose husband made, freely and spontaneously, a statement before the same judge, did not bring the criminal and civil actions which they had a right to bring before the courts of the country, but had recourse to diplomacy without any good cause to do so, and without having any privilege or right to claim that exceptional proceedings should be taken in their cases, in violation of the doctrines of international law above quoted;

That the demanding Government has established precedents in this matter by rejecting the claims of foreigners who demanded indemnity, being protected and supported by a diplomatic claim, as appears in the case of President Cleveland in his message to Congress of May 6, 1886, relative to the claims presented by the legation of Great China. Mr. Cleveland refused to accept diplomatic intervention, although he admitted that "scandalous occurrences had taken place at Rock Springs, in Wyoming Territory," and added that the facts in evidence were: "That a number of Chinese subjects in September last (1885) were murdered at Rock Springs, that many others were wounded, and that all were robbed of their property, after the unfortunate survivors had been driven from their homes;"

That in that document President Cleveland declared that the United States Government was not under obligations to pay an indemnity for the losses caused by these crimes, thus disregarding the claim of the Chinese legation;

That the words of President Cleveland in his message are clear and decisive, where he says:

> When the Chinese minister, in virtue of his instructions, shall make these the basis of an appeal to the principles and convictions of humanity, there is no ground for any redress. But when he goes further, and, taking as a precedent the action of the Chinese Government in past cases, in which the property of American citizens in China has been injured, maintains that there is a reciprocal obligation on the part of the United States to indemnify the Chinese subjects who were injured at Rock Springs, it becomes necessary to refute this argument, and most emphatically to deny the conclusions which the minister seeks to reach with respect to the existence of similar responsibility and to the right of the Chinese Government to insist upon it.

That, in view of what has been officially stated by the President of the United States, and in the foregoing considerations, that is the doctrine of international law which should be enforced in the present case; on these grounds, finally deciding;

I declare that the Government of the United States of Mexico is under no obligation to pay indemnity of any kind to Mr. Charles Oberlander or to Mrs. Barbara M. Messenger.

Done at Madrid, this 19th day of November, 1897, in two copies, the contents of which are the same.

Vicente G. Quesada

PART XVII

Convention consulaire turco-hellénique

Décision arbitrale rendue par les Ambassadeurs d'Autriche-Hongrie, d'Italie, d'Allemagne, de Russie, d'Angleterre et de France à Constantinople, les 20 mars et 2 avril 1901

Consular Convention between Turkey and Greece

Award rendered by the Ambassadors of Austria-Hungary, Italy, Germany, Russia, England and France in Constantinople, on 20 March and 2 April 1901

Convention consulaire turco-hellénique

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Award rendered by the Ambassadors of Austria-Hungary, Italy, Germany, Russia, England and France in Constantinople, on 20 March and 2 April 1901**

Régime des capitulations—privilèges et immunités accordés aux civils hellènes résidant dans l'Empire Ottoman en vertu des conventions consulaires—la validité du Protocole n'est pas affectée par la guerre entre les deux États Parties—l'octroi d'immunités ne doit pas empêcher la bonne administration de la justice dans le cadre des différends entre citoyens hellènes et ottomans.

Établissement des offices consulaires—une personne du pays ne peut être nommée fonctionnaire consulaire—les exemptions, honneurs, immunités et privilèges accordés aux fonctionnaires consulaires, nécessaires à l'accomplissement de leurs devoirs, doivent être garantis par les autorités locales—pas d'exemption fiscale pour ce qui est des immeubles possédés à titre privé par les fonctionnaires consulaires—pas d'obligation de se présenter comme témoin devant les tribunaux locaux—inviolabilité des archives et bâtiments consulaires.

Fonctions consulaires—droit des consuls de protéger les droits et intérêts de leurs nationaux devant les autorités locales—fonctions consulaires relatives aux affaires civiles de leurs nationaux—assistance consulaire accordée aux citoyens hellènes devant les tribunaux ottomans—les décisions judiciaires rendues par les tribunaux ottomans à l'encontre des citoyens hellènes doivent être mises en œuvre par les fonctionnaires consulaires hellènes.

Capitulations regime—privileges and immunities granted to Hellenic civilians living in the Ottoman Empire by consular conventions—validity of Protocol not affected by war between the two States Parties—grant of immunities shall not prevent good administration of justice in disputes between Hellenic and Ottoman citizens.

Establishment of consular offices—no local can be appointed as consular official—exemptions, honors, immunities and privileges granted to consular officials, necessary to accomplish their duties, shall be guaranteed by local authorities—no tax exemption relating to buildings owned privately by consular officials—no obligation

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* Reproduit de *British and Foreign State Papers*, vol. 95, p. 939.

** Reprinted from *British and Foreign State Papers*, vol. 95, p. 939.

to appear as witness before local tribunals—inviolability of consular buildings and archives.

Consular functions—right of consuls to protect rights and interests of their nationals before local authorities—consular functions relating to civil matters concerning their nationals—consular assistance granted to Hellenic citizens before Ottoman tribunals—judicial sentences rendered by Ottoman tribunals against Hellenic citizens are to be executed by Hellenic consular officials.

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Les Soussignées, Ambassadeurs d'Autriche-Hongrie, d'Italie, d'Allemagne, de Russie, d'Angleterre et de France à Constantinople ;

Considérant l'Article III des Préliminaires de Paix signés entre les Grandes Puissances et l'Empire Ottoman, le 6/18 Septembre, 1897, ainsi conçu :

> Sans toucher au principe des immunités et privilèges dont les sujets Hellènes jouissaient avant la guerre sur le même pied que les nationaux des autres États, des arrangements spéciaux seront conclu en vue de prévenir l'abus des immunités Consulaires, d'empêcher les entraves au cours régulier de la justice, d'assurer 1'exécution des sentences rendues et de sauvegarder les intérêts des sujets Ottomans et étrangers dans leurs différends avec les sujets Hellènes, y compris les cas de faillite ;

Considérant l'article V, § b, des dits Préliminaires, qui préscrit la conclusion entre l'Empire Ottoman et le Royaume de Grèce d'une "Convention Consulaire dans les conditions prévues par 'l'Article III';"

Considérant l'Article IX des Préliminaires de Paix ainsi conçu :

> En cas de divergence dans le cours des négociations entre la Turquie et la Grèce, les points contestés pourront être soumis, par 1'une ou l'autre des Parties intéressées, à l'arbitrage des Représentants des Grandes Puissances à Constantinople, dont les décisions seront obligatoires pour les deux Gouvernements. Cet arbitrage pourra s'exercer collectivement ou par désignation spéciale des intéressés, et soit directement, soit par l'entremise de Délégués spéciaux. En cas de partage égal des voix, les arbitres choisiront un surarbitre ;

Considérant que, par une lettre adressée aux Représentants des Grandes Puissances à Constantinople, le 1/13 Mai, 1900, les Délégués Hellènes, d'ordre de leur Gouvernement, ont invoqué l'arbitrage sur les points au sujet desquels une entente n'a pu s'établir dans le cours des négociations sur la dite Convention Consulaire ;

Considérant que les Représentants des Grandes Puissances, dûment autorisés par leurs Gouvernements respectifs, ont, par leurs notes du 4 Juin, 1900, accepté le mandat collectif d'arbitrage sollicité sur les points contestés ;

Considérant les demandes des deux Parties et les Mémoires présentés à l'appui de ces demandes ;

Considérant que l'Article III des Préliminaires maintient et confirme le principe des immunités et privilèges dont les sujets Hellènes jouissaient avant la guerre, et qu'il n'est pas besoin de spécifier dans la Convention Consulaire tous les droits qui découlent de ce principe relativement aux attributions administratives et judiciaires des Consulats Helléniques ;

Considérant que les stipulations du Traité de Canlidja, conclu entre l'Empire Ottoman et le Royaume de Grèce le 27 Mai, 1855, restent en vigueur, en tant qu'elles ne sont pas modifiées par les décisions arbitrales ci-dessous ;

Considérant que la validité du Protocole annexé à la Loi Ottomane du 7 Séfer, 1284 (18 Juin, 1867), et signé par la Grèce le 12/24 Février, 1873, n'a pas été atteinte par l'état de guerre entre 1'Empire Ottoman et le Royaume de Grèce ;

Considérant qu'il n'y a lieu d'arbitrer que sur les points contestés, qui ont trait aux arrangements spéciaux prévus par 1'Article Ill des Préliminaires de Paix ;

Décident :

Les dispositions suivantes, qui règlent les points contestés entre Les Délégués Ottomans et Hellènes chargés de la négociation de la Convention Consulaire, ou qui constatent leur accord sur un certain nombre d'autres points où la question de durée était seule litigieuse, entreront en vigueur à l'expiration d'un délai de six mois à compter de la signification de la présente Décision Arbitrale à chacune des deux Parties.

Art. I. Chacune des deux Hautes Parties Contractantes aura la faculté de nommer des Consuls-Généraux, Consuls et Vice-Consuls dans tous les ports, villes et localités des États de l'autre Partie, à l'exception de ceux où le Gouvernement territorial verrait inconvénient à admettre de tels Agents.

Cette réserve, toutefois, ne sera pas appliquée dans les localités ou se trouveraient des offices Consulaires d'autres Puissances.

Protocole-Annexe.—Il est entendu que les deux Hautes Parties Contractantes auront pleinement la faculté de maintenir les offices Consulaires qui, reconnus d'un commun accord, auraient fonctionné au moment de la rupture des relations diplomatiques en 1897 entre les deux pays ou à une date antérieure ne remontant pas au delà de l'année 1890.

Les Agents honoraires cesseront leurs fonctions et les deux Hautes Parties Contractantes se réservent de les remplacer par des fonctionnaires de carrière.

II. Aucun sujet Hellène ne pourra être nommé Consul-Général, Consul ou Vice-Consul de Turquie en Grèce, ni aucun sujet Ottoman ne pourra être nommé Consul-General, Consul ou Vice-Consul de Grèce en Turquie.

Ces fonctionnaires Consulaires seront choisis de part et d'autre parmi ceux de carrière, c'est-à-dire, qu'ils seront des Agents rétribués s'occupant exclusivement de leur mission Consulaire.

Toutefois, les sujets Ottomans et les sujets Hellènes pourront être employés comme drogmans et cavass (huissiers) par les Consuls Ottomans et Hellènes, suivant les règlements en vigueur dans les pays respectifs, et jouiront du traitement y établi, en tant qu'il n'y serait pas dérogé par la présente Convention.

III. Les Consuls-Généraux, Consuls et Vice-Consuls des deux Hautes Parties Contractantes seront réciproquement admis et reconnus, après avoir présenté leurs provisions, selon les règles et formalités établies dans les pays respectifs.

L'exequatur ou Berats et Firmans ou autres pièces nécessaires pour le libre exercice de leurs fonctions leur seront délivrés sans frais, et, sur la production des dites pièces, l'autorité supérieure du lieu de leur résidence prendra immédiatement les mesures voulues pour qu'ils puissent s'acquitter des devoirs de leur charge et qu'ils soient admis à la jouissance des exemptions, honneurs, immunités et privilèges qui leur reviennent.

IV. Les Consuls-Généraux, Consuls et Vice-Consuls jouiront spécialement de l'exemption des logements et des contributions militaires, ainsi que de toutes contributions directes, personnelles, mobilières ou somptuaires, imposées par une autorité quelconque des pays respectifs.

Il est entendu que les dits fonctionnaires ne seront aucunement exempts des impôts sur les immeubles qu'ils posséderaient dans le pays ou ils résident.

V. Les Consuls-Généraux, Consuls ou Vice-Consuls ne seront pas tenus de comparaître comme témoins devant les Tribunaux du pays où ils résident.

Quand la justice locale aura à recevoir d'eux quelque déposition, elle devra se transporter à leur domicile ou déléguer, à cet effet, un fonctionnaire compétent pour y dresser, après avoir recueilli leurs déclarations orales, le procès-verbal nécessaire, ou bien elle leur demandera une déclaration par écrit.

VI. Les Consuls-Généraux, Consuls et Vice-Consuls de chacune des Hautes Parties Contractantes jouiront réciproquement, dans les États de l'autre Partie—en ce qui concerne leurs personnes, leurs fonctions et leurs habitations—des mêmes honneurs et égards, privilèges et immunités, droits et protection, qui sont accordés aux fonctionnaires Consulaires du même rang des nations les plus favorisées, mais, bien entendu, dans les limites de la présente Convention.

VII. Seront exempts des droits d'entrée, après vérification douanière, les effets et objets importés à l'adresse et destinés à l'usage personnel ou de la famille du chef d'un Consulat-General d'un Consulat ou d'un Vice-Consulat Hellène établi en Turquie, en tant quele droit d'importation ne dépasse pas 2,500 piastres or par an.

Il en sera de même pour les effets ou objets importés à l'adresse et destinés à l'usage personnel ou de la famille d'un fonctionnaire Consulaire Hellène, quand ces objets et effets sont introduits lors de la première installation de ce fonctionnaire ou de sa famille en Turquie.

D'autre part, les Consuls-Généraux, Consuls et Vice-Consuls de Turquie jouiront, en Grèce, des mêmes franchises de droit que les fonctionnaires du même rang et de la même qualité des autres Puissances.

Protocole-Annexe.—En ce qui concerne l'Article VII, il est entendu que les autorités douanières ne percevront aucun droit sur les registres, papiers à en-tête, cahiers à souche, passeports, passavants, certificats, timbres et autres documents publics, ainsi que sur toute fourniture officielle de bureau, expédiés à l'adresse des fonctionnaires. Consulaires respectifs, ou envoyés par eux aux administrations de leur pays.

VIII. Les Consuls-Généraux, Consuls et Vice-Consuls pourront placer au-dessus de la porte extérieure de la maison Consulaire leur écusson national avec une inscription indiquant leur caractère officiel.

Ils pourront également arborer le pavillon de leur pays sur la maison Consulaire aux jours de solennités publiques, ainsi que dans d'autres circonstances d'usage.

IX. En cas d'empêchement, d'absence ou de décès des Consuls-Généraux, Consuls ou Vice-Consuls, le Chancelier ou l'un des Secrétaires, sujet de l'État qui l'a nommé, qui aura antérieurement été présenté en la dite qualité aux autorités respectives, ou, a défaut d'un Chancelier ou Secrétaire, un autre fonctionnaire Consulaire de carrière envoyé comme remplaçant, sera admis de plein droit à exercer, par intérim et d'une manière provisoire, les fonctions Consulaires, sans que les autorités locales puissent y mettre obstacle.

La gérance intérimaire de ce fonctionnaire de carrière, envoyé comme remplaçant, ne devra pas dépasser le délai de six mois.

Ces fonctionnaires jouiront, pendant la durée de leur gestion intérimaire, de tous les droits, immunités et privilèges qui appartiennent aux titulaires.

X. Les Chancelleries et archives Consulaires seront inviolables en tout temps. Les autorités locales ne pourront les envahir sous aucun prétexte ni, dans aucun cas, visiter ou saisir les papiers qui y seront enfermés.

XI. Les Consuls des deux Hautes Parties Contractantes auront le droit de s'adresser aux autorités compétentes de leur circonscription Consulaire pour réclamer contre toute infraction aux Traités et Conventions existant entre la Turquie et la Grèce et pour protéger les droits et les intérêts de leurs nationaux.

S'il n'était pas fait droit à leur réclamation, les dits Agents pourront recourir à leurs Légations respectives.

XII. Les Consuls des deux Parties Contractantes, ainsi que leurs Chanceliers et Secrétaires, auront le droit de recevoir, dans leurs Chancelleries,

au domicile des parties et à bord des navires de leur nation, les déclarations que pourront avoir à faire les capitaines, les gens de l'équipage, les passagers, les négociants et les autres sujets de leur pays.

Ils seront également autorisés à recevoir :

1. Les dépositions testamentaires de leurs nationaux et tous actes de droit civil qui les concernent et auxquels on voudrait donner une forme authentique ;

2. Tous les contrats par écrit et actes conventionnels passés entre leurs nationaux ou entre ces derniers et d'autres personnes du pays ou ils résident, et, de même, tout acte conventionnel concernant les sujets de ce dernier pays seulement, pourvu, bien entendu, que les actes susmentionnés aient rapport à des biens situés ou à des affaires à traiter sur le territoire de la Partie Contractante qui a nommé les dits fonctionnaires ;

3. Dans la mesure de la législation du pays de leur résidence, tous actes notariés destinés à l'usage dans ce pays, passés soit entre leurs propres nationaux, soit entre ces nationaux et d'autres étrangers.

Les déclarations et attestations contenues dans les actes ci-dessus mentionnés, qui auront été reconnus authentiques par les dits fonctionnaires et revêtus du sceau du Consulat-Général, Consulat, et Vice-Consulat, auront en justice, dans le territoire de l'Empire Ottoman comme en Grèce, la même force et valeur que si ces actes avaient été passés par devant d'autres employés publics de l'une ou de l'autre des Parties Contractantes, pourvu qu'ils aient été rédigés dans les formes requises par les lois de l'État qui a nommé les fonctionnaires Consulaires, et qu'ils aient ensuite été soumis au timbre et à l'enregistrement, ainsi qu'à toutes les autres formalités qui régissent la matière dans le pays ou l'acte doit recevoir son exécution.

Dans les cas ou l'authenticité d'un document public enregistré à la chancellerie de 1'une des autorités Consulaires respectives serait mise en doute, la confrontation du document en question avec l'acte original ne sera pas refusée à. la personne y intéressée, qui en ferait la demande et qui pourra, si elle le juge utile, assister à cette confrontation.

Les Consuls pourront légaliser toute espèce de documents émanant des autorités ou fonctionnaires de leur pays et en faire des traductions, qui auront, dans le pays où ils résident—en tant que les lois des États respectifs le permettent—la même force et valeur que si elles avaient été faites par les fonctionnaires compétents du pays de leur résidence.

XIII. Les sujets de l'un des États Contractants établis dans les États de l'autre seront réciproquement affranchis de toute espèce de service militaire, tant sur terre que sur mer, et seront exempts de l'impôt militaire et de toute prestation pécuniaire ou matérielle imposée par compensation pour le service personnel, tout comme des réquisitions militaires, à l'exception de celles des logements et des fournitures pour les militaires de passage, qui seraient également exigées, selon l'usage du pays, des sujets indigènes et des étrangers.

XIV. Les effets et valeurs appartenant aux marins et passagers, sujets de l'une des Parties Contractantes, morts à bord d'un navire de l'autre Partie, seront envoyés au Consul de la nation respective, pour être remis a qui de droit, conformément aux lois en vigueur dans les pays respectifs.

XV. En cas de naufrage sur une des côtes des territoires des Hautes Parties Contractantes, d'un navire Ottoman ou Hellène, les Consuls respectifs jouiront de toutes les prérogatives accordées aux Consuls des autres Puissances en matière de sauvetage des navires de leur pavillon.

Les navires abandonnés, dragues, embarcations, bouées, &c., dont la nationalité Ottomane ou Hellène est apparente et qui auraient été trouvés en mer et consignés aux autorités locales, seront remis, dans le port de remorque, entre les mains du Consul Ottoman ou Hellène le plus proche, s'il en fait la demande. Il est bien entendu, toutefois, que le dit fonctionnaire Consulaire aura à verser à qui il appartient, avant d'entrer en possession des navires, embarcations ou autres susénoncés, les droits de sauvetage et remorque, conformément aux lois et règlements en vigueur dans les États des Hautes Parties Contractantes.

XVI. Les Consuls des deux Hautes Parties Contractantes auront à exercer une stricte surveillance pour empêcher, au besoin par des représentations à qui de droit, le changement du pavillon des navires de leur nation contre le pavillon de l'autre État, s'il est prouvé que ce changement a pour but de frustrer les droits des créanciers sujets de la nation qui a nommé le Consul.

XVII. Les Consuls respectifs pourront aller personnellement ou envoyer des délégués à bord des navires de leur pays, après leur admission à la libre pratique, interroger le capitaine et l'équipage, examiner les papiers de bord, recevoir les déclarations sur le voyage, la destination du bâtiment et les incidents de la traversée, dresser les manifestes et faciliter 1'expédition du navire.

XVIII. En cas de décès d'un sujet Ottoman en Grèce ou d'un sujet Hellène dans les États de Sa Majesté Impériale le Sultan, 1'autorité Consulaire, de la juridiction de laquelle dépendra le décédé, prendra possession de la succession de celui-ci pour la transmettre à ses héritiers. En l'absence de 1'autorité Consulaire sur les lieux, le juge compétent de la localité sera tenu de transmettre l'inventaire et le produit de la succession à 1'autorité Consulaire la plus proche, sans réclamer aucun droit.

La succession aux biens immobiliers sera régie par les lois du pays dans lequel les immeubles sont situés, et la connaissance de toute demande ou contestation concernant les successions immobilières appartiendra exclusivement aux Tribunaux de ce pays.

Pour ce qui concerne les successions mobilières laissées par les sujets de l'une des deux Parties Contractantes dans le territoire.de l'autre Partie, soit qu'à l'époque du décès ils y fussent établis ou simplement de passage, soit qu'ils fussent décédés ailleurs, les réclamations, reposant sur le titre d'hérédité ou de

legs, seront jugées par les autorités ou Tribunaux compétents du pays auquel appartenait le défunt et conformément aux lois de ce pays.

XIX. Les sujets Ottomans auront en Grèce le même droit que les nationaux de posséder toute espèce de propriété immobilière, de l'acquérir et d'en disposer par vente, échange, donation, testament ou de toute autre manière, sans payer de taxes ou impôts autres ou plus élevés que les nationaux.

XX. Les droits de juridiction des Consuls Hellènes en Turquie en matière civile, commerciale et pénale, ainsi que les autres immunités et privilèges dont les Consuls et sujets Hellènes jouissaient en Turquie avant l'année 1897, sont maintenus, conformément aux stipulations des Préliminaires de Paix signés entre les Grandes Puissances et l'Empire Ottoman le 6/18 Septembre, 1897, et à celles du Traité de Paix définitif signé entre la Turquie et la Grèce le 22 Novembre/4 Décembre 1897 ; et ce, en tant que les dits droits de juridiction et les dits immunités et privilèges ne sont pas modifiés par la présente Convention.

XXI. Les intérêts des créanciers Ottomans ou étrangers dans les faillites des sujets Hellènes en Turquie seront représentés par un ou deux Syndics, tant provisoires que définitifs. L'autorité Consulaire Hellénique, compétente pour le règlement des dites faillites, nommera ces Syndics sur la désignation qui lui en sera faite par les créanciers susdits, Ottomans ou étrangers.

XXII. L'assistance Consulaire devant les autorités et Tribunaux Ottomans étant maintenue pour les sujets Hellènes, les Consuls Hellènes sont tenus d'envoyer avec toute diligence leur délégué devant les autorités et Tribunaux compétents.

En cas d'absence de ce délégué, les Tribunaux surseoiront à l'examen de l'affaire et enverront une nouvelle invitation par écrit. Si, nonobstant cette seconde invitation, le Délégué Consulaire s'abstient de paraitre, ils auront dans ce cas la faculté de ne plus attendre sa présence et pourront rendre leur jugement, sentence ou arrêt.

XXIII. Les pièces judiciaires ou extrajudiciaires, destinées à être signifiées aux sujets Hellènes en Turquie, seront remises contre récépissé à l'autorité Hellénique compétente, qui devra pourvoir à leur signification et devra retourner en temps utile l'acte de signification dûment signé par le destinataire. A cet effet, les dites pièces devront contenir des indications suffisantes pour qu'il ne puisse y avoir erreur sur la personne à laquelle l'acte est destiné ; à défaut de quoi, la pièce pourra être retournée à l'autorité Ottomane pour être complétée.

Dans le cas ou l'acte de signification dûment signé par le destinataire ne serait pas restitué à l'autorité Ottomane dans un délai de quinze jours à partir de la remise de la pièce à l'autorité Consulaire Hellénique, la signification sera considérée comme faite à la partie elle-même, à moins que l'autorité Consulaire ne prévienne l'autorité Ottomane que la personne à laquelle la pièce était destinée ne se trouve pas dans sa circonscription Consulaire.

XXIV. Les autorités Consulaires Helléniques procéderont en toute diligence à l'exécution des jugements, sentences ou arrêts rendus, en observation des droits reconnus aux autorités Consulaires, contre les sujets Hellènes par les autorités et les Tribunaux compétents Ottomans.

Si l'autorité Consulaire refusait de mettre à exécution les dits jugements, sentences, ou arrêts dans un délai maximum de deux mois, les autorités compétentes Ottomanes auront la faculté de procéder elles-mêmes à cette exécution, en prévenant au préalable et par écrit l'autorité Consulaire du jour et de l'heure où elles procéderont à la dite exécution.

XXV. En cas de perquisition, descente ou visite dans la demeure d'un sujet Hellène, les fonctionnaires et agents de police à ce commis aviseront le Consulat Hellénique et lui feront connaître les motifs de la mesure, à l'effet qu'il envoie sans retard un délégué.

S'il s'écoule plus de six heures entre l'instant ou le Consulat aura été prévenu et l'instant de l'arrivée du délégué, les fonctionnaires et agents de police Ottomans procéderont à leur commission et aviseront ensuite le Consulat, en lui communiquant une copie légalisée du procès-verbal constatant l'absence du délégué Consulaire.

XXVI. En cas de visite à bord des navires Helléniques autres que les visites de la santé, les autorités Ottomanes attendront le délégué Consulaire Hellénique pendant un délai de trois heures à compter du moment de la remise de l'avis au Consulat, et si le délégué se refuse ou tarde à venir, elles procéderont à leur commission et aviseront le Consulat, en lui communiquant une copie légalisée du procès-verbal, constatant l'absence du dit délégué.

XXVII. En cas de flagrant délit, les autorités Ottomanes pourront procéder à l'arrestation d'un sujet Hellène sans attendre l'arrivée du délégué Consulaire requis à cet effet, mais elles devront aviser sans délai l'autorité Consulaire Hellénique. Fait à Constantinople, le 20 Mars/2 Avril 1901.

(L.S.) Calice
(L.S.) Pansa
(L.S.) Baron de Marschall
(L.S.) Zinoview
(L.S.) N. E. O'Conor
(L.S.) Constans

PART XVIII

Sentences arbitrales relatives au différend entre la Grande-Bretagne et la France, rendues par le Baron Lambermont à Bruxelles le 15 juillet 1902

Arbitral awards relating to the dispute between Great Britain and France, given by Baron Lambermont in Brussels on 15 July 1902

Sentences arbitrales relatives au différend entre la Grande-Bretagne et la France, rendues par le Baron Lambermont, à Bruxelles le 15 juillet 1902

Arbitral awards relating to the dispute between Great Britain and France, given by Baron Lambermont in Brussels on 15 July 1902

Sentence arbitrale relative à l'affaire de Waima*

Arbitral Award concerning the Waima Incident**

Arbitrage—Convention d'arbitrage du 9 avril 1901—distinction entre le paiement pour services rendus à la Nation et l'indemnisation des blessures—l'indemnisation couvre également les soldats indigènes blessés.

Responsabilité étatique—indemnisation des victimes lors d'une bataille s'étant produite involontairement entre les Parties.

Arbitration—Arbitration Convention of 9 April 1901—distinction between payment for services rendered to the Nation and compensation for damages—compensation shall also cover injured indigenous soldiers.

State responsibility—compensation for casualties during a battle having occurred unintentionally between the Parties.

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Ayant accepté, avec l'agrément du Roi, les fonctions d'Arbitre que le Gouvernement de Sa Majesté Britannique et le Gouvernement de la République Française nous ont fait l'honneur de nous conférer au sujet de la rencontre qui s'est produite à Waima en 1893, entre une troupe Anglaise et un détachement Français ;

Animé du désir de répondre par une décision scrupuleuse et impartiale à la confiance qui nous est témoignée ;

Et ayant à cet effet dûment examiné les documents produits par les deux Hautes Parties ;

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* Reproduit de *British and Foreign State Papers*, vol. 95, p. 136.

** Reproduced from *British and Foreign State Papers*, vol. 95, p. 136.

Nous avons décidé et décidons ce qui suit :

Considérant qu'aux termes de la Convention compromissoire conclue le 3 Avril, 1901, entre le Gouvernement de Sa Majesté Britannique et le Gouvernement de la République Française, l'Arbitre est chargé de prononcer définitivement sur le chiffre de l'indemnité à payer par le Gouvernement Français pour les victimes Britanniques de l'affaire de Waima ;

Considérant que le principe de l'indemnité est admis par le Gouvernement Français, mais que les deux Hautes Parties ne sont d'accord ni quant à l'appréciation des circonstances dans lesquelles a eu lieu la rencontre de Waima, ni quant au taux de la prestation pécuniaire à fournir par la France ;

Considérant, en conséquence, qu'il y a lieu d'envisager d'abord les traits principaux de l'événement et de procéder ensuite à la détermination du chiffre de l'indemnité :

Les Circonstances de la Rencontre

En 1893 la guerre existait entre les possessions Françaises du Soudan et Samori, le Chef des Sofas, les opérations de ces indigènes atteignant parfois les territoires de la Colonie Anglaise de Sierra Leone.

Au cours de cette campagne une colonne de troupes Anglaises, partie de la côte, était arrivée à Waima, place située vers la frontière séparant les possessions Anglaises et Françaises, tandis qu'un détachement Français, venant du Soudan, s'approchait du même point.

Le Lieutenant Maritz, Chef de la force Française, croyant Waima occupé par les Sofas, attaqua cette place dans la nuit du 23 Décembre, 1893.

Une note adressée le 4 Mars, 1892, par M. Ribot, Ministre des Affaires Étrangères de France, au Représentant de Sa Majesté Britannique à Paris, stipulait qu'au cas où la frontière entre la Colonie de Sierra Leone et les territoires Français se prolongerait au delà de Tembi Counda, la ligue de démarcation suivrait le 13e degré de longitude ouest de Paris.

Il est articulé dans le Mémoire Anglais que si cette déclaration avait été portée par le Gouvernement Français à la connaissance des autorités dont le Lieutenant Maritz tenait ses instructions, l'attention de cet officier aurait été plus particulièrement attirée sur la situation des régions qu'il parcourait, par rapport au 13e méridien, et que les chances d'éviter une déplorable méprise en auraient été accrues.

D'après le Mémoire Français, l'indication contenue dans la note de M. Ribot était seulement destinée à guider les Commissaires délimitateurs Français et Anglais en vue de la prolongation éventuelle de la frontière au delà de Tembi Counda. Le Gouvernement Britannique a néanmoins maintenu sou appréciation.

Il est rapporté dans le Mémoire Français que c'est des rangs anglais que sont partis les premiers coups de feu dont l'effet a été d'ouvrir hâtivement une collision qui aurait peut-être pu encore être évitée si les sentinelles Anglaises avaient crié "qui vive" ou fait entendre un avertissement analogue.

Or, la surprise n'a pas existé seulement pour la troupe Française ; elle était la même pour les sentinelles Anglaises ; l'obscurité aussi était naturellement égale des deux côtés ; pour les sentinelles Britanniques, le premier et le plus pressant devoir était d'avertir leurs propres troupes qui dormaient encore, et le moyen le plus certain et le plus prompt d'assurer ce résultat était de faire feu ; on ne connaît aucun règlement militaire qui, en pareil cas, ferait un devoir à des sentinelles de commencer par parlementer avec l'ennemi.

Dans leur ensemble, les circonstances autorisent à penser que sans prévoir la présence possible d'une troupe Anglaise, l'officier Français, dont la bonne foi n'est pas contestée, a cédé avant tout à la préoccupation d'atteindre et de disperser les bandes de Sofas qui par leur jonction pouvaient menacer la sécurité des possessions Françaises.

Nous concluons de cet exposé que, dans l'appréciation des responsabilités, une certaine part doit être faite à un malheureux concours de circonstances qui a amené une rencontre entre deux expéditions opérant à l'insu l'une de l'autre contre un ennemi commun ; mais que si la responsabilité du Gouvernement Français est atténuée par ce fait, la réparation n'en doit pas moins se régler dans un large esprit d'équité.

Chiffre de l'Indemnité

Le Mémoire Français évalue à 95,970 fr. l'indemnité à payer par le Gouvernement de la République, tandis que la somme réclamée par le Gouvernement Britannique se monte à 10,000 *l.*, ou 250,000 fr.

L'indemnité offerte par le Gouvernement Français représente seulement la somme capitalisée des pensions et gratifications que les autorités Anglaises ont, au lendemain de l'affaire de Waima, allouées aux familles d'un officier et d'un sous-officier appartenant à leur armée et tués dans cette rencontre.

Le Gouvernement Français considère ces pensions et gratifications, basées sur les Règlements Militaires Anglais, comme une limite au delà de laquelle sa responsabilité pécuniaire ne saurait être étendue.

Attendu que ce mode d'estimation peut être sérieusement contesté quant à sa base et quant au nombre des ayants droit :

Quant à la base, parce que la Convention compromissoire ne l'impose pas à l'Arbitre et qu'en principe la rémunération de services rendus au pays ne doit pas se confondre avec la réparation d'un dommage ;

Et quant au nombre des appelés, parce que le compromise vise - "les victimes de l'affaire de Waima" sans limitation de nombre ;

Attendu, en conséquence, que c'est sans motif suffisant que la proposition Française n'accorde aucune compensation aux blessés et à leurs familles et qu'elle exclut le Lieutenant Wroughton, ainsi que les soldats indigènes qui ont péri à Waima ;

Attendu que la même conclusion s'applique au cas du Capitaine Lendy et des gendarmes tombés sous des balles Anglaises ou Françaises, puisque ce malheureux sort leur eût été épargné si Waima n'avait pas été attaqué par l'expédition Française ;

Attendu que le compromis n'assigne pas de limites entre lesquelles le chiffre de l'indemnité pourrait se mouvoir ;

Attendu que le Gouvernement Britannique, en demandant la compensation des pertes subies par ses troupes, n'a point démontré par le détail que cette compensation doive exactement atteindre le chiffre précis de 10,000 *l.* qu'il réclame ;

Attendu que les considérations et les faits exposés ci-dessus sollicitent le rehaussement de l'indemnité offerte par le Gouvernement Français et limitée par celui-ci à 95,970 fr. ;

Attendu que cette allocation ne visant que deux des cas appelés à bénéficier de l'indemnité, il y a lieu de mettre le chiffre total de celle-ci en proportion avec le tableau des victimes Anglaises de l'affaire de Waima tel qu'il est tracé plus haut ;

Pour ces motifs :

Nous estimons que l'indemnité à payer par le Gouvernement Français pour les victimes de l'affaire de Waima doit équitablement s'élever à la somme de 9,000 *l.* et nous la fixons à ce chiffre.

Fait à Bruxelles, en triple original, le 15 Juillet, 1902.

Baron Lambermont

Sentence arbitrale relative à l'affaire du *Sergent Malamine*[*]

Arbitral award concerning the case of the *Sergent Malamine*[**]

Responsabilité étatique—Convention d'arbitrage du 9 avril 1901—responsabilité pour la saisie illégale d'un navire—l'indemnité doit couvrir le prix du navire et une partie des subventions postales.

Liberté de navigation—Acte général de la Conférence de Berlin sur la liberté de navigation sur le fleuve Niger—égalité de traitement de chaque État—absence de discrimi-

[*] Reproduit de *British and Foreign State Papers*, vol. 95, p. 139.

[**] Reproduced from *British and Foreign State Papers*, vol. 95, p. 139.

nation à des fins d'imposition—principe de liberté de passage pour les navires et leur chargement—distinction entre trafic et passage—trafic soumis aux taxes douanières.

Commerce d'armes—Acte de la Conférence de Bruxelles du 2 juillet 1890—embargo sur l'importation d'armes dans certaines régions d'Afrique—exceptions admises à titre individuel—la fourniture d'armes aux sultans par la Mission française est considérée comme une violation de l'esprit de l'Acte de Bruxelles.

State responsibility—arbitration Convention of 9 April 1901—responsibility for the illegal seizure of a vessel—indemnity shall cover the price of the vessel and part of the postal subventions.

Freedom of navigation—General Act of the Berlin Conference on the freedom of navigation on the river Niger—equality of treatment of each State—non-discrimination for taxation purposes—principle of freedom of passage for vessels and their cargo—differentiation between traffic and passage—traffic subjected to customs taxes.

Arms trade—Act of the Brussels Conference of 2 July 1890—ban on arms importation in some African regions—exceptions granted on an individual basis—supply of arms to sultans by the French Mission viewed as breaching the spirit of the Brussels Act.

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Ayant accepté, avec l'agrément du Roi, les fonctions d'Arbitre que le Gouvernement de Sa Majesté Britannique et le Gouvernement de la République Française nous ont fait l'honneur de nous conférer dans un différend auquel ont donné lieu le passage d'une Mission Française dans les bassins du Niger et de la Benoué en 1893, et la saisie par les autorités Britanniques d'un navire Français le *Sergent Malamine* et de sa cargaison ;

Animé du désir de répondre par une décision scrupuleuse et impartiale à la confiance qui nous est témoignée ;

Et ayant à cet effet dûment examiné les documents produits par les deux Hautes Parties ;

Nous avons décidé et décidons ce qui suit :

Considérant que le mandat de l'Arbitre est ainsi défini dans la Convention compromissoire signée le 3 Avril, 1901, entre les deux Gouvernements :

"L'Arbitre prononcera définitivement sur le chiffre de l'indemnité à payer par le Gouvernement Britannique pour la perte du *Sergent Malamine* ; ce chiffre ne devra être ni inférieur à 5,000 *l.* ni supérieur à 8,000 *l.*" ;

Considérant que, d'après le Mémoire et le contre-Mémoire fournis par le Gouvernement Français, l'indemnité devrait se calculer en tenant compte de la valeur du bateau, d'une partie d'une subvention postale perdue par les

armateurs, et enfin de la valeur de la cargaison, tandis que, suivant le Mémoire du Gouvernement Britannique, l'indemnité ne devrait correspondre qu'à la seule valeur du navire ;

Considérant que, sous des aspects divers et sans jamais aboutir à une solution, le différend a pris place dans les négociations qui, durant une série d'années, se sont poursuivies entre les deux Gouvernements en vue de régler l'ensemble de leurs relations en Afrique ;

Considérant que les documents présentés par les Parties à l'appui de leur cause respective reviennent sur diverses phases du litige :

Nous jugeons nécessaire d'éclairer le terrain sur lequel devront se placer nos conclusions, et, à cette fin, de consulter le droit conventionnel et de rechercher les responsabilités, sans rentrer dans des controverses restées sans résultat.

La Conférence de Berlin a proclamé et réglé la libre navigation du Niger et de ses affluents : égalité de tous les pavillons ; point de traitement différentiel ; point de péage basé sur le seul fait de la navigation, des taxes ayant le caractère de rétribution pour services rendus à la navigation même pouvant seules être perçues ; transit libre pour les navires et les marchandises qu'ils transportent ; règlements d'exécution conformes à l'esprit de ces stipulations—telles sont les principales garanties assurées à la navigation du Niger et de ses affluents.

Mais l'Acte Général de Berlin ne confond pas le trafic avec le transit. I1 n'étend pas aux territoires qu'arrosent le Niger et ses affluents l'Article 4, qui affranchissait de droits d'entrée les marchandises importées dans le bassin conventionnel du Congo. Les marchandises introduites dans les territoires du Niger et de ses affluents ou exportées des mêmes territoires peuvent, si elles ne se bornent pas à transiter par le fleuve ou ses affluents, être soumises à des droits d'entrée ou de sortie. Des ports sont exclusivement ouverts à ces opérations.

Tout régime douanier a pour sanction des pénalités atteignant les contraventions.

Quant au commerce des armes, il est, en principe, prohibé. Des exceptions ne sont admises que dans des cas déterminés.

Le système ainsi résumé, il y a lieu de rechercher si l'autorité Britannique avait qualité pour l'appliquer et si l'autre Partie y a contrevenu.

L'Acte Général de Berlin soumet à deux conditions la prise de possession d'un territoire nouveau ou d'un Protectorat : notification aux autres Puissances Signataires de l'Acte Général, existence d'une autorité suffisante pour faire respecter les droits acquis.

Ces règles, ne concernant que les territoires situés sur les côtes du Continent Africain, ne liaient pas l'autorité Britannique sur le cours de la Benoué. Néanmoins, le Protectorat Britannique sur les rives de la Benoué jusqu'à Ibi a été notifié le 5 Juin, 1885.

Une autre notification, datée du 18 Octobre, 1887, visait, en s'y référant, la charte octroyée à la Société Royale du Niger.

La même notification déclarait sous le Protectorat Britannique les territoires du Niger ou de ses affluents qui étaient, ou pouvaient être, soumis au gouvernement de la Compagnie du Niger.

Celle-ci exerçait en 1893 sur le cours de la Benoué, et jusqu'à Yola, une autorité pourvue des moyens nécessaires pour assurer l'accomplissement de sa tâche. Cela ressort de l'expérience même qu'a faite l'expédition Française.

Ni la publicité ni les moyens d'exécution n'ont fait défaut à ce régime.

D'autres stipulations visaient encore la situation de l'autorité Britannique dans ces mêmes régions :

A la charte de la Compagnie du Niger notifiée le 18 Octobre, 1887, était annexée une liste des Chefs indigènes avec lesquels la Société avait conclu des Traités. Le Sultan du Moury était compris dans l'énumération.

Le 5 Août, 1890, il est intervenu entre le Gouvernement Français et le Gouvernement Britannique un Arrangement, aux termes duquel une ligue tracée de Say, sur le Niger, passant le long de la frontière septentrionale du Sokoto jusqu'à la ville de Barroua, sur le Lac Tchad, séparait les sphères d'action des deux pays. Il n'y était fait aucune exception quant à la Benoué, sur laquelle sont situés le Moury et une partie considérable de l'Adamoua. On était devant ce fait en 1893, à l'époque de l'expédition Française.

Quant aux Traités conclus par le Lieutenant Mizon avec l'Émir de l'Adamoua et le Sultan du Moury, il y a lieu de constater qu'ils ont été signés alors qu'existait déjà sur la Benoué le régime ci-dessus décrit.

L'expédition Française s'est mise en opposition avec ce régime en pratiquant des opérations commerciales en des points qui n'étaient pas ouverts au trafic ou en se refusant à acquitter les droits d'entrée ou de sortie prévus par les dispositions eu vigueur.

La Conférence de Bruxelles s'est occupée avec une sollicitude particulière du commerce des armes. "L'expérience de toutes les nations qui ont des rapports avec l'Afrique," dit l'Article VIII de l'Acte du 2 Juillet, 1890, "a démontré le rôle pernicieux et prépondérant des armes à feu dans les opérations de Traite et dans les guerres intestines entre tribus indigènes, et cette même expérience a prouvé manifestement que la conservation des populations Africaines, dont les Puissances ont la volonté expresse de sauvegarder l'existence est, une impossibilité radicale si des mesures restrictives du commerce des armes à feu et des munitions ne sont établies."

En conséquence, l'importation des armes à feu, et spécialement des armes rayées et perfectionnées, a été interdite dans une zone dont fait partie le bassin de la Benoué. Une exception a été admise à titre individuel, en faveur des personnes offrant une garantie suffisante que l'arme et les munitions qui leur seraient délivrées ne seront pas données, cédées, ou vendues à des tiers,

et pour les voyageurs munis d'une déclaration de leur Gouvernement constatant que l'arme et ses munitions sont exclusivement destinées à leur défense personnelle.

C'est dans ce sens qu'étaient conçues les déclarations faites par l'Ambassadeur de France à Londres et par le Chef de l'expédition lui-même.

Or, les armes transportées par la Mission Française ont été cédés à titre gracieux aux Sultans du Moury et de l'Adamoua.

Ce procédé ne peut se concilier avec l'esprit de l'Acte de Bruxelles. Le cas serait doublement sérieux si le cadeau avait servi de moyen de négociation avec les Chefs indigènes, chez qui les armes perfectionnées sont l'objet d'ardentes convoitises.

De cet exposé il résulte, d'une part, qu'en se livrant au commerce dans le bassin de la Benoué sans tenir compte du régime douanier qui y était établi, l'expédition Française s'exposait aux conséquences . pénales de ses contraventions, et, d'autre part, qu'en livrant des armes perfectionnées à deux Chefs indigènes elle allait à l'encontre des dispositions de l'Acte Général de Bruxelles.

Mais, dans l'examen des responsabilités, il est impossible de ne pas tenir compte des temps et des milieux dans lesquels se sont produits les faits qui viennent d'être passés en revue. Lorsque le centre de l'Afrique a cessé d'être une tache blanche sur la carte, les regards se portèrent avec un surcroît d'intérêt sur l'échiquier politique et économique qui se révélait au monde. Les explorations, les expéditions sous des enseignes diverses, se multiplient et se croisent. Les prises de possession se réalisent sous des formes variées : la souveraineté, le protectorat, la sphère d'influence. En, 1893 l'on était encore dans la période qui rendait parfois difficile une perception distincte et à l'abri de controverse du doit et avoir de chaque Puissance dans le domaine Africain. Si de telles considérations relèvent de l'ordre politique, elles ne peuvent toutefois être négligées quand il s'agit d'apprécier des actes accomplis sous leur influence.

II faut d'ailleurs se rappeler que le but du compromis est de clore l'incident soumis à l'arbitrage dans un sens conforme aux sentiments d'équité et de conciliation qui animent les deux Gouvernements.

L'on ne peut enfin perdre de vue que le principe d'une indemnité est admis par la Convention du 3 Avril, 1901, la divergence portant sur l'étendue de son application.

C'est en tenant compte de tous ces points de vue qu'il y a lieu d'envisager les divers éléments appelés à entrer dans le calcul définitif de l'indemnité.

1. Le Navire

Attendu que le Gouvernement Britannique a offert de restituer le bateau et, après que celui-ci eût sombré, d'en rembourser la valeur ;

Attendu dès lors qu'il ne reste, quant au navire, qu'à en supputer le prix ;

Attendu que le Mémoire Français évalue les frais de construction du *Sergent Malamine* à 151,833 fr. 75 c, et, calculant l'amortissement à 5 pour cent, estime à 125,267 fr. 80 c. le prix du bateau à l'époque de la saisie ;

Attendu que si le prix de la construction peut être admis comme exact, l'on n'a pas suffisamment considéré, en fixant le taux de la dépréciation, qu'il s'agissait d'un bâtiment naviguant à la côte occidentale d'Afrique, dans les eaux du Niger et de ses affluents, et n'ayant point pour se radouber les facilités qu'offrent les ports Européens :

Dans ces conditions nous jugeons que l'amortissement doit être porté à 7 pour cent.

2. L'exception opposée par le Mémoire Britannique touchant les Subventions Postales et la Cargaison

Attendu que le Mémoire Britannique n'admet comme base de l'indemnité que la seule valeur du navire, à l'exclusion de tout autre élément tel que la perte des subventions postales ou de la cargaison ;

Attendu que l'autorité judiciaire Britannique a prononcé à la fois la confiscation du *Sergent Malamine* et celle de marchandises appartenant à l'expédition Française ;

Attendu que postérieurement à cette mesure est intervenue la Convention du 3 Avril, 1901, stipulant une indemnité pour la perte du *Sergent Malamine* ;

Attendu que cet acte diplomatique ne détermine ni ce qu'il faut entendre par la perte du *Sergent Malamine*, ni quels sont les intéressés appelés à bénéficier de l'indemnité ;

Attendu que si le teste de la Convention prête à l'ambiguïté, les deux Parties Contractantes sont également responsables de ce défaut de clarté ;

Nous estimons qu'il n'y a pas lieu d'écarter *a priori* les demandes relatives aux subventions et à la cargaison ;

Et nous jugeons que la question d'interprétation soulevée par le Mémoire Britannique doit, en ordre principal, se régler d'après les considérations développées ci-dessus, en traitant des responsabilités.

3. Les Subventions Postales

Attendu que la Compagnie des Chargeurs Réunis ; propriétaire du *Sergent Malamine*, recevait du Gouvernement Français une subvention postale annuelle de 38,475 fr., correspondant à douze voyages par an ;

Que le *Sergent Malamine* a été, avec le consentement du Gouvernement Français, mis à la disposition de la Compagnie de l'Afrique Française pour le terme d'un an, terme qui expirait le 15 Octobre, 1893 ;

Que ce terme étant arrivé sans que le *Sergent Malamine* fût de retour, la Compagnie des Chargeurs Réunis conclut avec le Gouvernement Français un

nouveau contrat, en vertu duquel le nombre des voyages était réduit de douze à six, et la subvention diminuée de moitié, à partir du 1er Février, 1894 ;

Attendu que la Partie demanderesse réclame deux indemnités :

(a.) Une indemnité pour la période comprise entre le jour où expirait le congé du *Sergent Malamine* et le jour où entrait eu vigueur le nouveau contrat avec l'Administration des Postes Françaises ;

(b.) Une indemnité pour la période allant de l'entrée en vigueur du nouveau contrat jusqu'à la signature de la Convention d'Arbitrage, soit du 1er Février, 1894, au 17 Juillet, 1901.

(a.) Période du 15 Octobre, 1893, au 1er Février, 1894

Attendu que les armateurs sont restés étrangers aux actes et aux responsabilités se rattachant à la saisie et à la détention du *Sergent Malamine* :

Nous jugeons équitable de les dédommager du préjudice qu'ils ont souffert par suite de l'absence du *Sergent Malamine* à cette époque, perte que le Mémoire Fiançais estime à 11,221 fr. 88 c. Toutefois, nous sommes d'avis que l'allocation réclamée de ce chef doit subir une réduction, les subventions postales ne constituant pas pour les entrepreneurs un bénéfice pur et simple, mais étant, pour une part, qui peut aller jusqu'à la moitié de leur chiffre, destinées à couvrir les risques et les charges de services publics dont les Gouvernements désirent stimuler ou soutenir l'établissement.

(b.) Période du 1er Février, 1894, au 17 Juillet, 1901

Attendu qu'en vertu de son nouveau contrat avec l'Administration des Postes françaises la Compagnie des Chargeurs Réunis n'était tenue d'exécuter que la moitié des voyages primitivement stipulés et qu'elle conservait la subvention postale correspondant à cette moitié ;

Attendu, quant à l'autre moitié, que le même contrat ne peut avoir eu pour effet de supprimer la charge et de maintenir le droit à la rétribution ;

Nous jugeons que la demande d'une indemnité du chef de cette seconde période n'est pas fondée.

4. La Cargaison

Attendu que, d'après son contrat avec la Compagnie des Chargeurs Réunis, la Société Française de l'Afrique Centrale dirigeait seule la marche et les opérations du *Sergent Malamine* ;

Que les conditions dans lesquelles elle a exercé le commerce dans le bassin de la Benoué ont engagé sa responsabilité ;

Qu'elle est, en conséquence, passible des contraventions qu'elle a encourues ;

Mais que les considérations exposées plus haut et propres à atténuer dans une certaine mesure les responsabilités lui sont applicables ;

Nous estimons qu'une disposition allégeant en partie la perte qu'elle a éprouvée serait suffisamment motivée.

En conséquence, et pour l'ensemble des motifs successivement déduits ;

Nous fixons l'indemnité totale à payer par le Gouvernement Britannique à la somme de 6,500 l.

Fait à Bruxelles, en triple original, le 15 Juillet, 1902.

BARON LAMBERMONT

PART XIX

Injury to property in the State of Washington by reason of the drifting of fumes from the smelter of the Consolidated Mining and Smelting Company of Canada, in Trail, British Columbia

Report and recommendations of the International Joint Commission established by the Treaty concluded between the United States of America and Canada on 11 January 1909, signed at Toronto on 28 February 1931

Dommages causés aux biens dans l'État de Washington par les émanations de la fonderie de la compagnie Consolidated Mining and Smelting Company of Canada, à Trail, Colombie Britannique

Rapport et recommandations de la Commission mixte internationale établie par le Traité conclu entre les États-Unis d'Amérique et le Canada le 11 janvier 1909, signé à Toronto le 28 février 1931

Injury to property in the State of Washington by reason of the drifting of fumes from the smelter of the Consolidated Mining and Smelting Company of Canada, in Trail, British Columbia

Dommages causés aux biens dans l'État de Washington par les émanations de la fonderie de la compagnie Consolidated Mining and Smelting Company of Canada, à Trail, Colombie Britannique

Report and recommendations of the International Joint Commission established by the Treaty concluded between the United States of America and Canada on 11 January 1909, signed at Toronto on 28 February 1931[*] [**]

Rapport et recommandations de la Commission mixte internationale établie par le Traité conclu entre les États-Unis d'Amérique et le Canada le 11 janvier 1909, signé à Toronto le 28 février 1931[***] [****]

Competence of the Joint Commission—determination of the territory affected by the fumes—determination of the amount of indemnity for past damages—assessment of probable future damages—method of providing adequate indemnity—recommendations for the reduction of fumes drifting into the United States.

Concept of damage—compensation for damage to property owned by the county, but no indemnity for alleged loss of taxes—no indemnity for alleged loss of trade by business men, loss of clientele or income by professional men—indemnity to be deposited in a trust fund established for persons having suffered damages.

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[*] Reproduced from *American Journal of International Law*, 25 (1931), p. 540.

[**] Subsequent proceedings between the Parties were held under special agreement resulting in awards issued in 1938 and 1941. *Trail smelter case (United States, Canada)*, Awards of 16 April 1938 and 11 March 1941, United Nations, *Reports of International Arbitral Awards*, vol. III, pp. 1905-1982.

[***] Reproduit de *American Journal of International Law,* 25 (1931), p. 540.

[****] Des procédures ultérieures eurent lieu entre les Parties en vertu d'un accord spécial et résultèrent dans l'émission de sentences en 1938 et 1941. *Trail smelter case* (*United States, Canada*), sentences des 16 avril 1938 et 11 mars 1941, Nations Unies, *Recueil des sentences arbitrales*, vol. III, pp. 1905-1982.

Compétence de la Commission mixte—détermination du territoire affecté par les émanations—détermination du montant des indemnités pour les dommages antérieurs—estimation des dommages futurs probables—méthode pour allouer une indemnisation adéquate—recommandations pour réduire les émanations pénétrant aux États-Unis.

Concept de dommage—compensation pour les dommages occasionnés à la propriété du comté, mais aucune indemnisation pour les pertes de taxes invoquées—aucune indemnisation pour les présumées pertes commerciales subies par les hommes d'affaires ou les pertes de clientèle ou de revenus subies par les professionnels—l'indemnisation doit être déposée dans un fonds d'affectation établi pour les per-sonnes ayant subi des dommages.

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In the matter of the reference relating to damage in the State of Washington caused by fumes from the smelter at Trail, British Columbia, operated by the Consolidated Mining and Smelting Company of Canada, Limited, hereinafter called the company, the Commission begs to report that the following are respectively the questions submitted to it by the Governments of the United States and the Dominion of Canada, and its findings thereon.

1. *(1) Extent to which property in the State of Washington has been damaged by fumes from smelter at Trail, British Columbia*

The territory affected is to be found within the three zones shown on the map accompanying this report and for the purpose of identification marked with the letter A.

(2) The amount of indemnity which would compensate United States interests in the State of Washington for past damages

In view of the anticipated reduction in sulphur fumes discharged from the smelter at Trail during the present year, as hereinafter referred to, the Commission therefore has deemed it advisable to determine the amount of indemnity that will compensate United States interests in respect of such fumes, up to and including the first day of January, 1932. The Commission finds and determines that all past damages and all damages up to and including the first day of January next, is the sum of $350,000. Said sum, however, shall not include any damage occurring after January 1, 1932.

(3) Probable effect in Washington of future operations of smelter

Provided that the company having commenced the installation and operation of works for the reduction of such fumes, proceeds with such works and carries out the recommendation of the Commission set forth in answer to Question (5), the damage from such fumes should be greatly reduced, if not entirely eliminated, by the end of the present year.

(4) Method of providing adequate indemnity for damages caused by future operations

Upon complaint of any person claiming to have suffered damage by the operations of the company after the first day of January, 1932, it is recom-

mended by the Commission that in the event of any such claim not being adjusted by the company within a reasonable time, the Governments of the United States and Canada shall determine the amount of such damage, if any, and the amount so fixed shall be paid by the company forthwith.

(5) Any other phase of problem arising from drifting of fumes on which Commission deems it proper or necessary to report and make recommendations in fairness to all parties concerned

(a) The Commission deems it proper and necessary in fairness to all parties concerned to report and make recommendations with reference to the reduction of the amount and the concentration of SO_2 fumes drifting from the smelter of the company into the United States.

The company has erected and put in operation the first of three sulphuric acid units, each with a capacity of 112 tons per day, which it proposes to erect for the purpose of reducing such fumes.

The company has represented to the Commission that said units, together with a pilot plant with a capacity of 35 tons per day, which has been in operation for some time, will produce 147 tons of acid per day thereby reducing the amount of sulphur discharged from the stacks of said smelter by 49 tons per day.

The company has further represented to the Commission that it will have a second 112-ton sulphuric acid plant in operation in or about the month of May, 1931, and a third unit of like capacity in or about the month of August, 1931, and that when said units are completed as aforesaid, they, together with said pilot plant, will be using 123.6 tons of sulphur extracted from said fumes, thereby extracting approximately 35 per cent of the total sulphur content of the fumes discharged from said stacks.

The company has further represented that the plants and works constructed and contemplated by it as aforesaid will necessitate the expenditure of a sum in excess of $10,000,000, the greater part of which has already been expended.

The Commission therefore reports and recommends that, subject to the provisions hereinafter contained, the company be required to proceed as expeditiously as may be reasonably possible with the works above referred to, and also to erect with due despatch such further sulphuric acid units and take such further or other action as may be necessary, if any, to reduce the amount and concentration of SO_2 fumes drifting from its said plant into the United States until it has reduced the amount by some means to a point where it will do no damage in the United States.

(b) The Commission further recommends that the Governments of the United States and Canada appoint scientists from the two countries to study and report upon the effect of the works erected and contemplated by the company as aforesaid, on the fumes drifting from said smelter into the United States, and also to report from time to time to their respective governments in regard to such further or other works or actions, if any, as such scientists may

deem necessary on the part of the company to reduce the amount and concentration of such fumes to the extent hereinbefore provided for.

(c) When the company has reduced the amount and concentration of SO_2 fumes emitted from its plant at Trail, British Columbia, and drifting into the territory of the United States, to a point where it claims it will do no damage in the United States, then it shall so notify the Government of Canada, which shall thereupon forthwith notify the Government of the United States, which may then take up the matter with the Government of the Dominion of Canada for investigation and consideration to determine whether or not it has so reduced the amount and the concentration of SO_2.

(d) The question of whether or not the company is proceeding with expedition as aforesaid may be taken up at any time by the Government of the United States with the Government of Canada for further consideration.

(e) This finding and recommendation under Question (5) must be read in connection with Questions (1), (2), (3) and (4); that is to say, if these conditions as above stated, under Question (5) are fully met, there will be no future indemnity to pay, that being included in the amount of damages embraced under Question (2), except as hereinafter provided.

(f) Any future indemnity will arise only if and when these conditions and recommendations stated under Question (5) are not complied with and fully met, and then only in respect of any damage done after the first day of January, 1932, as hereinafter provided.

(g) The word "damage" as used in this document shall mean and include such damage as the Governments of the United States and Canada may deem appreciable, and for the purposes of paragraphs (a) and (c) hereof, shall not include occasional damage that may be caused by SO_2 fumes being carried across the international boundary in air pockets or by reason of unusual atmospheric conditions. Provided, however, that any damage in the State of Washington howsoever caused by said fumes on and after January 1, 1932, shall be the subject of indemnity by the company to any interests so damaged, and shall not be considered as included in the answer to Question (2) of the reference, which answer is intended to include all damage of every kind up to January 1, 1932.

2. It is further recommended that the amount of the indemnity specified in Question (2) shall be paid into the Treasury of the United States and shall be held as a trust fund for the use and benefit of persons having suffered damage as hereinbefore mentioned; and upon the appointment by the Governor of the State of Washington of a responsible and bonded administrator, or such other person as may be appointed, he shall confer and advise with the members of the United States Section of this Commission, and shall have access to all claims and other information in the custody of said section, and such administrator or other person shall make a detailed list of awards to the various persons damaged by said fumes, and he shall allot to each individual

claimant that part of the total sum of $350,000 to which such individual is entitled. Said administrator or other person shall be the sole and final judge of all questions referred to him, and no appeal shall lie from his decisions; and having perfected his list of awards as aforesaid, he shall distribute the fund by cheque drawn against said trust fund, and take and accept proper receipts therefor, which said receipts shall be a full and complete release of the parties signing the same to all claim upon said fund.

The said sum of $350,000 does not include any allowance for indemnity for damage to the lands of the Government of the United States. No claim was presented to the Commission in respect thereof, and counsel for the Government of the United States at the last public hearing announced that any claim in connection with such lands was withdrawn. The Commission, therefore, finds that any claim of the Government of the United States for past damages in respect of said lands has been waived.

The Commission further finds and recommends that Stevens County is entitled to compensation for damage to property owned by it within said zones, but that said county is not entitled to indemnity for alleged loss of taxes by reason of such fumes, such claim being regarded by the Commission as too remote and indefinite to permit of adjudication herein.

The Commission does not recommend any indemnity for alleged loss of trade by business men or loss of clientele or income by professional men resident in the City of Northport, within the said zones, such claims being regarded by the Commission as too remote and indefinite to permit of adjudication herein.

Signed in the City of Toronto, on Saturday, February 28, 1931.

C. A. Magrath — P. J. McCumber

John H. Bartlett — George W. Kyte

W. H. Hearst — A. O. Stanley

PART XX

British-Italian Conciliation Commission established pursuant to the Peace Treaty signed on 10 February 1947 between the Allied and Associated Powers and Italy

Commission de conciliation anglo-italienne établie par le Traité de paix signé le 10 février 1947 entre les Puissances alliées et associées et l'Italie

British-Italian Conciliation Commission, established pursuant to the Peace Treaty, signed on 10 February 1947 between the Allied and Associated Powers and Italy

Commission de conciliation anglo-italienne établie par le Traité de paix signé le 10 février 1947 entre les Puissances alliées et associées et l'Italie

Case of the Gassner claim (the motor yacht *Gerry*), decision of 11 December 1954*

Affaire relative à la requête Gassner (le yacht à moteur *Gerry*), décision du 11 décembre 1954**

Admissibility of claim—waiver of rights under the Peace Treaty must be unequivocal to be recognized—distinction between claims made under municipal law and claims made under international law—remedies for loss or damages to property.

Treaty interpretation—interpretation of the Declaration of 6 February 1948—literal interpretation—intention of the Parties.

Admissibilité de la réclamation—une renonciation aux droits découlant du Traité de Paix doit être sans équivoque afin d'être reconnue—distinction entre les réclamations présentées en vertu du droit national et celles présentées en vertu du droit international—réparation pour les biens perdus ou endommagés.

Interprétation des traités—interprétation de la Déclaration du 6 février 1948—interprétation littérale—intention des parties.

*****

[It is contended on behalf of the Italian Government] in the first place that the claimants have waived their rights and that the claim is therefore not admissible. That contention is based on a declaration in the *procès verbal* of February 6, 1948, hereinbefore mentioned. The Commission cannot uphold this contention. A waiver cannot be assumed unless the intention of the claimants to waive their rights under the Treaty is quite unequivocal. For interpreting the scope of the declaration in the *procès verbal* of February 6, 1948, it is necessary to consider the declaration in its connection with the correspond-

* Reproduced from *International Law Reports* 22 (1955), p. 972.

** Reproduit de *International Law Reports* 22 (1955), pp. 972

ence which prior to it was exchanged between Mr. Neill and the Comando Marina Militare of Genoa.

A claim had been made by the salvors to Mr. Neill to pay the salvage expenses and, in the letter in which the Comando Marina Militare requested Mr. Neill to take over the yacht, the Comando Marina had asked for payment of the watchman's expenses. In his reply dated December 13, 1947, Mr. Neill pointed out that he would not be able to take possession of the wreck on behalf of the owner until he was able to pay the salvors the charges due to them for the refloating of the yacht and that he would be able to do that only after the sale of the vessel and the collection of the proceeds. The same was to be said for the watchman's expenses. He further wrote that he would be grateful to the Comando if they would clarify whether their intervention was due to the fact that the yacht at the time it was sunk was under requisition by the Italian Navy, in order that he might know how to act with regard to the submission of a claim for compensation for damage in accordance with the Peace Treaty.

In their answer dated December 27, 1947, the Comando explained that the *Gerry* was held in custody by the Naval authorities, that the Comando Marina had intervened because the Salvage Company had asked for help in tracing the owner, that the vessel was never requisitioned by the Italian authorities, that the Comando was not in a position to furnish any further information, and that if Mr. Neill failed to take over the vessel for the owners by January 14, 1948, the Comando would be obliged to abandon the custody of the yacht.

In view of this correspondence it is a reasonable assumption that Mr. Neill made a distinction between the claims lying against the vessel under municipal law for salvage and other charges for custody and maintenance and the claims which his clients were entitled to make under international law in accordance with the Peace Treaty; that he intended to settle the former separately, reserving the latter to be dealt with later; and that in the declaration of February 6, 1948, he envisaged only the claims under municipal law. Such a conclusion is supported by the fact that a local branch of the Italian naval administration was not the proper authority with whom to settle a claim under the Peace Treaty; moreover, no reason has been advanced why Mr. Neill should give up his clients' rights under the Treaty, nor can it be said that it was made clear that the treaty rights were envisaged. As in these circumstances the declaration of February 6, 1948, cannot be regarded as meaning that Mr. Neill intended to waive his client's rights under the Treaty, the objection raised by the Italian Government fails and the Commission declares the claim admissible.

On the merits of the case it is contended on behalf of the Italian Government that as it has not been proved that the yacht was brought into Italian waters by Italian authorities or subjected to control measures taken by Italian authorities, the case cannot come under Article 78, para. 9(*c*). It is further contended that the general rules of Article 78 are likewise not applicable since,

according to para. 1 of this Article, which governs the whole Article, they require that the property should have existed in Italy on June 10, 1940.

On behalf of the British Government it was originally alleged that the seizure of the vessel was made by the Italian authorities in the port of Cannes in 1943 and that therefore Article 78, para. 9(*c*), was applicable. There were also reasons to presume that the seizure was made by the Italian authorities at the time, since the Italian forces occupied the city of Cannes. At the hearing, the Italian Government Agent produced certain correspondence which was exchanged between the German and Italian authorities before the seizure. Briefly, this correspondence showed that, at the request of the German authorities, the Italian authorities declared that they had no objection to the German Navy seizing the *Gerry* in order to use her as an auxiliary vessel. This destroys the force of the aforementioned presumption and creates, on the contrary, a presumption that the seizure was made by the German Navy. It has not therefore been proved that conditions existed which could bring the case under Article 78, para. 9(*c*). It must consequently be examined whether the case falls within the general rules of Article 78 as they are laid down. This paragraph reads in the English text as follows:

> 1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

The Commission has already had the opportunity (see its decision of March 4, 1952, in *The Gin and Angostura*) to consider the implications of the date of June 10, 1940, mentioned in para. 1, especially in connection with para. 9(*c*). In that case also, the Italian Government pleaded, in so far as is here of interest, that Article 78, para. 1, had in view only such property of the United Nations or their nationals as existed in Italy on June 10, 1940, and that, since the field of application of Article 78 was precisely determined in its first paragraph, para. 9(*c*), which merely defines some expressions used in the preceding paragraph, could not have effect in respect of property which, like the yacht *Gin and Angostura*, was not in Italy on June 10, 1940. The Commission did not consider that it could accept these arguments, at any rate not to the extent to which the Italian Government maintained them. In developing its views, the Commission pointed out, inter alia, that the date June 10, 1940, literally referred only to the restoration of legal rights and interests but did not refer to the restitution of property; that it is permissible to assume that the date of June 10, 1940, in para. 1 is only the starting-point of the period of Italian responsibility; that there was no reason whatsoever why the Treaty should exclude Italy's responsibility for property acquired in Italy by the United Nations or their nationals after June 10, 1940; that the United Nations could not allow one United Nations national to be treated worse than a fellow national who possessed property in Italy on June 10, 1940; that the inclusion of the words "in Italy", which occur in the two parts of para. 1 of Article 78 as

well as in the title of Section 1 of Part VII of the Treaty, could not be taken to preclude [the interpretation] that in the following paragraphs the Treaty puts Italy under an obligation with regard to property existing originally outside Italy in so far as such property, having been brought to Italy before the Treaty came into force, acquired the character of property "*appartenant en Italie*" to the United Nations and their nationals. The Commission therefore concluded that, within the framework of para. 1 of Article 78, a special provision dealing with property not existing in Italy on June 10, 1940, but brought there after such date, would not have been necessarily required in the succeeding paragraphs. However the Commission found that such a special provision is given in the second part of para. 9(*c*) relating to ships, and the Commission further went on to analyze the meaning of that provision.

There is no reason why the Commission should depart from the general views on para. 10f Article 78 thus taken by them in *The Gin and Angostura*. The only question that requires further examination is whether the fact that in Article 78, para. 9(c), there is a special provision regarding property brought into Italy after June 10, 1940, or any other provision of the Treaty, can have the effect of giving to Article 78, para.1, the limited scope which is claimed for it on behalf of the Italian Government.

It seems very unlikely that para. 9(c), which, though in the form of a definition, is in fact a provision for a very special case, should have been meant to have this effect; and that meaning seems quite excluded by the fact that the provision is preceded by the express reservation: "Without prejudice to the generality of the foregoing provisions". Had the meaning claimed for it been intended, that would have had to be specially stated. In this connection it has been suggested that Article 78 could not be applied because the restitution of the property in question could have been claimed under Article 75, which refers to "all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations". The Commission cannot accept this view, either. A claim made under Article 75 might have had the effect of preventing a claim under Article 78 while the former was pending, but if such a claim has not been made within the time-limit fixed in Article 75, para. 6, or if the claim has been abandoned, there is nothing in the text either of Article 75 or of Article 78 which has the effect of excluding a claim under Article 78. On the other hand, to exclude, contrary to the quite general wording of Article 78, para. 1, such a claim on the assumption that the governing idea of the framers of the Peace Treaty was to submit property removed from the territory of any of the United Nations and property existing in Italy on June 10, 1940, to two different, mutually exclusive, sets of rules, it would have been necessary for this idea to be manifested in a sufficiently clear way to be accepted. As has already been explained, however, no clear distinction is made between these two groups of property, since Article 78 neither refers expressly only to property existing in Italy on June 10, 1940, nor can it be interpreted in that sense. Moreover, the

fact that Article 75 refers to a special kind of property and outlines a special procedure for its recovery is not in itself a reason for excluding another procedure in respect of property which meets the conditions required to come under that procedure. The framers of the Treaty may very well have wished to provide several remedies for the recovery of property. In this case that is to be regarded as being so much more likely seeing that when the property clauses of the Treaty were being drafted it must have been the general and dominating tendency to give the interests of the United Nations and their nationals satisfactory protection. In the light of this general tendency there is no reason why property removed by the Axis Powers to Italy from the territory of any of the United Nations should not come within the scope of Article 78, para. 1, at least when a claim under Article 75 has not been made or has been abandoned.

It can, no doubt, be said that with such an interpretation the Treaty will, in respect of certain cases, seem to be illogical or irrational, but that would be the case with any other interpretation that might be placed upon the text. Such deficiencies in the system of the Treaty are not surprising in view of the circumstances in which the Treaty was made and they can in any case not be allowed to import into the Treaty principles which are warranted neither by the text nor by other relevant data of interpretation.

On the grounds hereinbefore developed, the Commission considers that in respect of the yacht *Gerry* a claim under Article 78 of the Treaty lies against the Italian Government. The owner is entitled under para. 4(*a*) of that Article to restoration to complete good order of the yacht, and as in the circumstances of the case it must be assumed that the yacht was damaged and sunk as a result of bombardment from the air, he can claim redress under the second sentence of this paragraph. In respect of that remedy, however, it is rightly contended on behalf of the Italian Government that the latter is responsible only for the damage which actually occurred in Italy. As liability under the Treaty is based on the existence of the property in Italy, it cannot extend to loss or damage suffered before the property came to Italy.

Case of the Raibl-Società Mineraria del Predil S.p.A. *v.* Italy (Raibl Claim), decision of 19 June 1964[*]

Affaire relative à Raibl-Società Mineraria del Predil S.p.A. c. Italie (requête Raibl), décision du 19 juin 1964[**]

Treaty interpretation—interpretation of Article 78 of the Treaty of Peace between Italy and Great Britain—reference to other languages—reference to other international arbitral decisions and jurisprudence—reference to general principles of law recognized by civilized nations.

[*] Reproduced from *International Law Reports* 40 (1970), p. 263.

[**] Reproduit de *International Law Reports*, 40 (1970), p. 263.

Property—definition of property under the Treaty of Peace—concession considered a property—property considered a subjective patrimonial right.

Compensation for war damages—compensation of loss suffered by larcenous exploitation—definition of loss of profit, excluded from compensation—assessment of damages.

Interprétation des traités—interprétation de l'article 78 du Traité de Paix entre l'Italie et la Grande-Bretagne—référence à d'autres langues—référence à d'autres sentences arbitrales et décisions jurisprudentielles—référence aux principes généraux de droit reconnus par les nations civilisées.

Propriété—définition de la propriété en vertu du Traité de Paix—la concession est considérée comme une propriété—la propriété est considérée comme un droit patrimonial subjectif.

Réparation des dommages de guerre—compensation des pertes subies du fait d'une exploitation illicite—définition de la perte de profit, exclue de la réparation—estimation des dommages.

The British-Italian Conciliation Commission, established in pursuance of Article 83 of the Peace Treaty, signed on 10 February 1947 between the Allied and Associated Powers and Italy, its members being M. Antonio Sorrentino, honorary President of Section of the Council of State, as representative of Italy, Mr. A. S. Brooks, as representative of Great Britain, and M. Paul Guggenheim, Professor at the University of Geneva and at the Institut Universitaire de Hautes Études Internationales at Geneva, as Third Member appointed by the British and Italian Governments by common consent, in the dispute relating to the claim for compensation put forward by the Agent of the Government of Her Britannic Majesty on behalf of the Predil Mining Company (Raibl, I, II and III)

Take note of the following facts:

1. On 25 February 1949 the British Embassy presented to the Ministry of Foreign Affairs of the Italian Republic a Note asserting a claim to compensation for war damage to movable and immovable property, and damage to all rights and interests, which Raibl-the Predil Mining Company Ltd. (Raibl I, II and III) had suffered. This concerned a mining company which, on 10 April 1933, had obtained a mining concession in the Italian provinces of Udine and Gorizia, and was sequestrated by the Italian authorities on 16 July 1940 on the ground that all the shares in the company were the property of British subjects. The claimant company asserted that it had suffered loss in the sum of 1,518,428,702 lire. Furthermore, the company maintained that it had disbursed the sums of 2,189,732 lire and 82,408 lire in expenses and costs of the sequestration. The total sum claimed therefore amounted to 1,520,700,842 lire.

The Minister of Foreign Affairs acknowledged receipt of the claim in a *Note Verbale* dated 2 March 1949 and addressed to the British Embassy in Rome.

2. On 1 April 1954, the claimant company presented a further claim directly to the Italian Government for loss caused to the mines by larcenous exploitation by the German occupants. This loss was assessed at 961,597,746 lire.

3. An Italian inter-ministerial sub-committee examined the British claims and in consequence, in the interests of a friendly compromise, offered the claimant company a sum of 100,000,000 lire. This sum was refused by the representatives of the company. The unofficial negotiations were consequently broken off.

4. Later, however, the British Embassy in Rome was informed by a Note from the Ministry of the Treasury, dated 21 July 1959, that the claim had been submitted to an inter-ministerial committee (of which the committee mentioned above was an organ) established under Article 6 of Law No. 908 and charged with the examination of claims based on Article 78 of the Treaty of Peace. The inter-ministerial committee took the view, in a legal opinion of 3 July 1959, that this case involved public property established during the period of the Austrian regime and which had passed to Italy under the Treaty of Peace of 1919; that the exercise of the concession had been regulated by a Convention dated 10 July 1933 for a duration of thirty years (up to 30 June 1963); and that the Ministries of Corporations and of Finance, on the one hand, and the Raibl Company, on the other hand, were parties to this Convention. Since the Convention provided that, at the moment when the contract expired, everything appertaining to the concession ("plant, buildings, machinery, galleries, etc") should be restored to the State without charge, the claimant company could not be regarded as the owner of the mine nor as having suffered loss in the sense of Article 78 of the Treaty of Peace, which excluded compensation for "loss of profit." In these circumstances, it was necessary to exclude compensation under Article 78 of the Treaty of Peace in respect of "immovables, machinery, plant, furnaces, galleries and, in general, the property which constituted the mine and which would have had to be restored to the State Administration at the end of the Convention". Only loss apart from the mines should be taken into account for the purposes of compensation. For these reasons, the loss due to larcenous exploitation by the German occupying forces could not be taken into account for the purpose of compensation. The total indemnity would consequently amount to only 29,600,476 lire, reduced by a third to 19,733,650 lire, and further reduced to 18,933,650 lire by deduction of a payment on account of 800,000 lire which had been paid to the Raibl company on 9 April 1948. In addition, 1,066,350 lire must be granted in respect of the costs of the claim. The total would therefore be 20,000,000 lire.

5. In a *Note Verbale* of 10 October 1959 the British Embassy in Rome informed the Italian Government that the British Government could not accept the Italian offer. The Government of Her Britannic Majesty considered that a dispute had arisen between the United Kingdom and Italy within the terms of Article 83 of the Treaty of Peace with Italy. No reply was made to this

Note. The British Government considers, however, that it can be deduced from the Note of 21 July 1959 from the Italian Minister of the Treasury (mentioned above) that the following questions are involved in this dispute:

(*a*) Is the question whether the claimant company is the tenant or the concessionaire of the mines relevant to the right to compensation for injury or loss due to the war provided for in Article 78 of the Treaty of Peace?

(*b*) Should the loss due to larcenous exploitation of the mines and the damage caused to the installations be characterized as "loss of profit" in the meaning given to this concept, by Article 78, paragraph 4 (*d*), of the Treaty of Peace, and should the Italian Government consequently be relieved from liability to pay an indemnity ?

(*c*) If the reply to either or both questions is favourable to the company, what is the amount of the indemnity for each head of damage?

(*d*) What is the sum which should be awarded to the claimant company for reasonable expenses incurred in Italy in establishing the claim?

6. Of the undisputed facts which led to the claims for compensation made by the company, the following, in the opinion of the Conciliation Commission, appear particularly important:

(*a*) The concession agreement of 10 April 1933, mentioned above, provides that the company must produce at least 30,000 tons of zinc and lead per year, and pay to the Italian State both a fixed rent and a variable royalty in proportion to the quantity of minerals extracted.

(*b*) By a Decree dated 16 July 1940 the claimant company was sequestrated in accordance with war legislation. The Italian Mineral Metal Companies were appointed as Sequestrator.

(*c*) On 8 September 1943 the German military authorities occupied the mines and continued to exploit them larcenously. The German occupation lasted until 7 May 1945. From this date the area was occupied by Yugoslav partisans, who, in their turn, committed acts of destruction.

(*d*) After some days, the mines were placed under the control of the Anglo-American forces and of the Allied Control Commission in Italy. The Anglo-American authorities immediately ordered the measures necessary to put the mines into a state of production.

7. (*a*) The British Government considers that the claimant company can assert a claim for compensation, since Article 78, paragraph 9 (*c*), provides that "all movable or immovable property, whether tangible or intangible . . . as well as all rights *or interests of any kind in property*" belonging to United Nations nationals who suffered loss due to injury or damage may be the subject of compensation. Now this wide concept of "property" would comprehend not only tangible property but also intangible property, as well as all rights and interests whatever in such property.

In the opinion of the British Government, the term "injury" refers in particular to intangible property, including all rights or interests of any kind in property. "Damage", on the other hand, refers to tangible property.

Although under Article 826 of the Italian Civil Code the mines form part of the inalienable patrimony of the Italian State, under the 1933 Convention the operation of the mines was granted to the Raibl company. This was in accordance with Article 14 of the Italian Mining Law, under which the concessionaire has the right to "exploit the mines". In this regard, the concessionaire would have certain obligations in connection with the rational exploitation of the mines, as is provided in Article 4 of the 1933 Convention; these duties correspond exactly to Article 26 of the Mining Law. The Raibl company must pay the Italian Government both a fixed rent and a variable royalty (Article 5 of the 1933 Convention and Article 25 of the Mining Law). At the date of expiry of the concession all the installations must be transferred in perfect condition and without charge to the Italian State (Article 1.3 of the Convention and Articles 34 *et seq*. of the Mining Law).

The British Government, on examination of the nature of the interest granted to the concessionaire, arrived at the conclusion that, although the State did not transfer ownership of the mine to the concessionaire, the right of exploitation which was granted has the character of a real right. In fact, the right of the concessionaire could be protected *erga omnes* by means of a possessory action. The concession was consequently susceptible of possession (Article 1145 of the Italian Civil Code). The intangible nature of the right of the concessionaire followed from Article 22 of the Law, which in its reasonable and ordinary meaning guarantees concessionaires an interest in the mines while the mines themselves, being the inalienable property of the State, cannot be legally transferred.

Moreover, mines can be mortgaged (Article 22). In these circumstances the interest of a concessionary which can be mortgaged is intangible in character. Futhermore, the mine could be expropriated (Article 30 of the Mining Law). The object of expropriation would not then be the mine as such, but rather the intangible interest of the concessionary in such a manner that "the expropriation succeeds to the rights and duties appertaining to the expropriated concessionaire".

The fact that concession agreements, their abrogation and their expiry must be registered (Articles 18 and 24) also shows their character as real rights, since these are characteristic methods of publication to inform third persons of the legal situation. Finally, the taxes on registration submit acts of transfer relating to rights of exploitation to the same taxation as is applicable to the sale of immovable property (Royal Decree of 30 December 1923, No. 3269).

The interest of the claimant company should then be assimilated to a real immovable right, and thus be included among the rights provided for in Article 78, paragraph 9 (*c*), of the Treaty of Peace. There is therefore no analogy, as the Italian Government maintains, with the right of an agricultural tenant, who can enjoy only the fruits of the property but not touch the substance, as, on the other hand, a concessionary exploiting a mine can. It follows that the concessionary enjoys complete ownership of the minerals found underground

within the area of the concession. Another difference between the agricultural tenant, and the concessionary consists in the fact that in the former situation the immovable objects and the equipment in general belong to the holding, while the immovable equipment and the installations of the mine are constructed by the concessionary and become the property of the State granting the concession only after the expiry of the concession (see in this particular case Article 13 of the 1933 Convention).

In any case, it must be considered that for the duration of the concession all immovable and movable objects and installations belong to the company, and all war damage, must be compensated in the same way as the injuries done to the company with respect to its immovable rights of exploitation of the mine in consequence of larcenous exploitation.

(*b*) In regard particularly to the larcenous exploitation of mines by the Germans, the British Government seeks to refute the Italian argument, developed in the Note of 21 July 1959, according to which the only consequence of the exploitation was a "loss of profit", that is, that the increase in the cost of exploitation of the mines resulted in a decrease in the expected profit, given that the claimant company was not required to exploit the concession since it could be relieved of this obligation by the fact described by the Ministry of the Treasury as *force majeure*.

This argument does not appear to the British Government to be correct for various reasons. The most important seems to be that the claimant company had the right, under the 1933 Convention, to extract 30,000 tons of minerals per year for a period of thirty years. Now the damage due to the German larcenous exploitation forced the company to re-establish the productive capacity of the installations in order to exercise its right to exploit the mines. The British Government emphasizes in this context that the company has not claimed compensation for the loss which it suffered during the period of executing repairs, in so far as this constituted a "loss of profit." Even if the 1933 concession were regarded as a lease, the Italian State should re-imburse the costs of extraordinary repairs done by the lessee (Articles 1150 and 1621 of the Italian Civil Code).

The British Government draws attention, moreover, to the fact that it was recognized that the impossibility of profitable operation could be compensated under Article 78 of the Treaty of Peace by the decision of the Italian-French Conciliation Commission of 6 July 1954 (*Schappe Spinning Mill* case: *Receuil des Décisions*, Part 5, p. 5, esp. p. i08[1]), and that Article 78, paragraph 4 (a), recognizes that United Nations nationals should not receive less favourable treatment with respect to compensation than that accorded to Italian nationals. Now, Article 37 (*c*) of the Italian Law relating to war damage, No. 968 dated 22 December 1955, affords compensation to Italians for destruction of stocks of merchandise.

The British Government also emphasizes that the Raibl mines are inalienable property under Italian legislation (see, in particular, the Ministerial

Decree of 24 August 1940). Exploitation of the mine was therefore not granted by an act of private law (such as a lease), but by a Convention for the best utilization of public property. The Convention was assimilable to a concession in the sense of the Italian mining legislation of 1927. As the report on the Law which approved the Convention of 10 April 1933 states, the Convention had the objective of ensuring employment to a significant number of workers in the area.

The British Government maintains, moreover, that the assimilation of the 1933 Convention to a concession was also admitted by the Avvocatura Generale of the Italian State in argument before the Arbitral Tribunal which gave its award on 27 June 1958 in the case between Raibl against the Ministry of Finance relating to the interpretation and application of the criteria for the calculation of the variable royalty to be paid by the company for exploitation of the mine (see p. 52 of the arbitral award, where it is stated explicitly:

> It (the *Avvocatura*) maintains that the Convention of 10 April 1933 contains a real and proper concession of public property, that is, the mines included in the category of property constituting the inalienable patrimony of the State, designated as State property in the strict sense, for the satisfaction of the needs of the public interest.

In the view of the British Government, the Avvocatura Generale could not put forward a diametrically opposite argument before an international tribunal.

8. Regarding the amount of the indemnity due to the claimant company, the British memorial [*la requête introductive d'instance*] contains itemized claims. This case involves only the larcenous exploitation of the mines by the Germans. With regard to this, the claimant company maintains that, on re-taking possession of the mine, it was forced to undertake certain work preparatory to operation and also research, which the Germans, exploiting the mine in order to extract the greatest possible amount of material in the shortest possible time, had omitted. On the basis of a calculation made by the mining authorities of Trieste in August 1958, and completing this with its own technical report, the British Government presents the following claims:

Costs of re-conditioning.	423,018,005 lire
Interest up to 31 December 1959 . .	234,945,947 lire
	657,963,952 lire

The British Government further claims, in accordance with Article 78, paragraph 5, that all the reasonable expenses incurred in Italy in establishing the claim, including the assessment of loss and damage, should be borne by Italy. It considers that these costs should be fixed at 10 per cent, of the loss and damage suffered by the company and recognized by the Commission.

9. On 29 September 1960, the Italian Government filed its memorial in reply with the Commission.

According to the Italian argument, which has already been referred to above, a concessionary has a personal right. He is the lessee of the mine. In these circumstances, the Raibl company cannot assert "interests" in property under Article 78, paragraph 9 (c), of the Treaty of Peace. Moreover, the nature of the damage caused by larcenous exploitation by the Germans is an "economic deterioration" of a productive process and not the destruction or loss of an object. There had been no diminution in the substance of the minerals, since the mines themselves had not been destroyed.

10. Before the Italian memorial was filed, the Conciliation Commission in its normal membership (a British member and an Italian member) named, on 11 July 1960, an expert, in the person of the engineer Salvatore Amoroso, to assist the Commission in the examination of the technical matters at the basis of the British claim.

By a decision of 24 October 1960 the Agents of the two Governments requested the expert to investigate at that time only the damage which was not caused by larcenous exploitation. Following this investigation, the Agents of the two Governments agreed, on 22 December 1961, on a partial, conciliatory decision [No. 191]. The contents of this decision are as follows:

> (1) An indemnity equal to 51,500,000 lire . . . net shall be paid by the Italian Government to the 'Raibl-Società Mineraria del Predil-Società per Azioni' in partial settlement of the claim presented by that company in respect of war damage to its property in Italy, in pursuance of Article 78 of the Treaty of Peace;
>
> (2) Payment of this sum shall be made direct to 'Raibl-The Predil Mining Company Ltd.' in the person of its legal representative for the time being or of its special attorney within the space of 60 days running from the date of notification of the present decision. This sum is understood to be net of any deduction, levy or other charge, in accordance with the provisions of Article 78, paragraph 4 (*c*), of the Treaty of Peace.
>
> (3) With respect to the other heads of damage, as to which agreement has not been reached—the losses due to the so-called larcenous exploitation of the mine and the expenses—the Conciliation Commission reserves its decision.
>
> (4) The present partial decision is binding. Its execution falls to the Italian Government.

A second partial decision was made on 8 November 1962. This decision declares:

> (1) An indemnity of 20,000,000 lire net shall be paid by the Italian Government to the 'Raibl company-The Predil Mining Company-Ltd.' in partial settlement of the claim presented by this company in respect of war damage to its property in Italy, in pursuance of Article 78 of the Treaty of Peace, in respect, of the following heads which were excluded from partial decision No. 191 referred to above:
>
> 1. Fencing

2. Hydrochloric acid
3. Central [Bretto-] Turbine
4. Damage of currency nature
5. Costs of the sequestratory administration
6. Electric plant
7. Ore washing plant
8. Repairs to the underground plant.

(2) Payment of this sum shall be made direct to "Raibl-The Predil Mining Company-Ltd." in the person of its legal representative for the time being or of its special attorney within the space of 60 days running from the date of notification of the present decision. This sum is understood to be net of any deduction, levy or other charge, in accordance with the provisions of Article 78, paragraph 4 (*c*), of the Treaty of Peace.

(3) With respect to the other heads of damage, as to which agreement has not been reached, that is, the damage due to the so-called "larcenous exploitation" of the mine, and the expenses, the Conciliation Commission reserves its decision.

(4) The present partial decision is binding. Its execution falls to the Italian Government.

11. After re-asserting the real character of the immovable rights conferred by the 1933 Convention (which is proved by, inter alia, the fact that rights in the mine can be expropriated and mortgaged) the British Government declares in its Reply of 1 February 1961 that it has always been recognized that war damage suffered by United Nations nationals who were holders of concessionary rights may be compensated under the Treaty of Peace. Reference is made to the *Collas* & *Michel* case, decided by the Franco-Italian Conciliation Commission under the presidency of its third member (Bolla), and rendered on 21 January 1953 (partial decision No. 166 of 21 January 1953 and the following decision No. 164 of 21 November 1953 (*Recueil des décisions*, Part 4, pp. 134 *et seq*. and 277 *et seq*.).

Finally, the British Government maintains that the sequestration of the company by Decree of 16 July 1940 could not have taken place unless the real character of the rights of the company were admitted. In fact, the war legislation of 18 July 1938 provides in Article 295 that only property *belonging* to enemy subjects may be placed under sequestration. In order to have such possession—the condition precedent for sequestration—the legal relationship between the subject and the object susceptible of being placed under sequestration must be of a real nature. The war legislation could not have been applied if the Raibl company had simply been the lessee of the mine.

12. With respect to the larcenous exploitation by the Germans and the resulting damage, the British Government, in refutation of the contention that it is claiming for loss of profit, refers to the case-law of the Italian-British Conciliation Commission in the *Currie-Pertolani* case of 31 [13] March 1954, in which, with the concurrence of the third member (Bolla), it was decided

that "the putting into perfect condition" provided for by Article 78, paragraph 4 (*a*), of the Treaty of Peace does not include improvements made in the course of repair (p. 9).

The same decision, moreover, provided that the indemnity must be calculated taking into account that the property will be returned and that this restitution must be made in complete good order.[4] The British Government adds that it has not claimed compensation for all the losses resulting from the larcenous exploitation by the Germans. It has not claimed for the loss due to diminution of production in consequence of the work of restoring the galleries to their former condition, even though this relates to events resulting from the war. Consequently, the claim is not for *lucrum cessans*, but solely for indemnification of the costs incurred to permit the renewed exploitation of the mines.

With respect to the statement by the Italian Government that Raibl could have abandoned the mines and freed itself of its obligations on the ground of *force majeure*, and that Raibl would then have lost only the expected benefit from exploiting the concession during the remainder of its duration, the British Government maintains that such an attitude would have been contrary to the obligations which the company had undertaken by the 1933 Convention, which gave all powers of supervision to the public administration, such as, for example, the suspension and reduction of work (Article 4). When the company was able to fulfil its obligations under this Convention it did so, and also regularly paid the rent and royalties to the Italian Government, in accordance with the arbitral award of 26 June 1958.

13. The British Government, in claiming only reimbursement of the expenses of putting the mines into operation after the larcenous exploitation by the Germans, that is, compensation for the diminution in the property only, consequently does not claim compensation for the reduced operations of the mines following that larcenous exploitation. Consequently, it is not (negative) loss of profit that is claimed, but the *positive* loss suffered.

14. With regard to the measure of damages, the British Government restricts itself to repeating its claim for a sum based on the report made in August 1959 by the Mining District of Trieste for reimbursement of the expenses disbursed to put the mines back into their former condition (see above, paragraph 8), that is:

Costs of re-conditioning.	423,018,005 lire
Interest to 31 December 1959 . .	234,945,947 lire
Total . .	657,963,952 lire

Reduced by a third, this amounts to 438,642,634 lire.

The British Government declares that it agrees to remit to expert examination the fixing of the sum of damages on the basis of the guide-lines set out above.

With respect to the expenses incurred in establishing the claim (Article 78, paragraph 5, of the Treaty of Peace), the British Government suggests that, in view of the peculiar complexity of the claim, 10 per cent, of the amount settled, reduced by one-third, should be awarded.

The British Government makes the following submission with respect to damages:

> With respect to the damages for larcenous exploitation: (*a*) (to reject all the preliminary objections to the admissibility of compensation and to receive the claim for settlement to the extent of 438,642,634 lire [*salvo conguaglio*]; (*b*) subsidiarily, and as a preliminary measure, to request the expert examination of the technical report made by the Mining District of Trieste in August 1958 and of the comments of the Raibl company, in order to ascertain the exact sum of liquidated damages due under the above head;
>
> With respect to the other damages: (*c*) to receive the claim for settlement to the extent of 172,147,090 lire [*salvo conguaglio*]; (*d*) subsidiarily, and as a preliminary measure, to set a time-limit for the counter-observations on the reply to the questions which will be given by the expert with respect to these damages;
>
> With respect to the costs: (*e*) to provide for the settlement of the damages in accordance with the claim or according to equity ; (*f*) to take any other measure requested in the memorial and considered appropriate to the ends of justice.

15. On 10 March 1962, the Agent of the Italian Government filed with the Conciliation Commission the Italian Rejoinder:

(*a*) With respect to whether the right of the concessionary is real or not, the Italian Government maintains that there are only a limited number of real rights. The Mining Law does not apply; it is to the Civil Code that reference must be made. This does not recognize a real right of mining exploitation, but recognized a contractual obligation of leasing. The property in question is inalienable; this means that the administration can neither sell nor give the property; in question, and the administration cannot establish with respect to the mine a *jus in re aliena* (nor a conveyance, nor a "*constitutiva*" alienation). The mere concession of the use of an object is not the subject of a real right, but a legal relationship deriving from the law of contract. The owner of an immovable who cedes the use of it to a third person does not cease to be the owner and does not create a real right over it.

The Agent of the Italian Government maintains, moreover, that the legal status created by the Mining Law of 1927 and that created by the 1933 Convention relating to the Raibl mines are distinct. The former has the purpose of defining the subject-matter of the concession; it is the mine, and the concession has an element of a real right. The latter relates exclusively to the exploitation of the mine. In these circumstances the company must be legally regarded as lessee of the mine. A lessee cannot be considered an owner in the sense of Article 78 of the Treaty of Peace.

(*b*) With regard to the loss of profits, the company utilizes property belonging to others. The loss suffered resulted in an increase in the costs of production owing to war damage. Only loss due to a change in the economic structure which entails the need to modernize the enterprise could be regarded as a loss which was not a loss of profit.

For all these reasons, the Italian Government maintains its original submissions, which are in the following terms:

> "(*a*) to declare the claim inadmissible [*di cui in epigrafe*], or in any case reject it on the merits, in so far as it relates to damages for larcenous exploitation;
>
> "(*b*) to decide according to justice on the results of the investigation, if it is considered necessary, of the other heads which form the subject of the claim for indemnity.
>
> "The right to add to and vary these submissions is reserved."

16. As the British and Italian representatives were not able to come to an agreement on certain questions which had not been resolved by the partial decisions of 22 December 1961 and 8 November 1962, which were referred to above, on 19 November 1962 the British Government and the Italian Government requested M. Paul Guggenheim, Professor in the Faculty of Law of the University of Geneva and of the Institut Universitaire de Hautes Études Internationales in Geneva, to accept the functions of Third Member of the Commission to examine the undecided points of the dispute.

Professor Guggenheim accepted this office by a letter of 23 November 1962. At the same time the following questions were presented to the Third Member by the Agents; they related to larcenous exploitation of the mines by the Germans:

> 1. Is the interest of the claimant company in the Raibl Mines on the basis of the Convention of April 10, 1933, between the Italian State and the claimant company, "property" as defined in Article 78 (4) (*c*) of the Treaty of Peace with Italy?
>
> 2. Does the damage which is alleged to have been caused by the exploitation of the mines by the Germans (indicated in the written pleadings as "larcenous exploitation") represent:
>
> (*a*) all or partly a loss of profit; and
>
> (*b*) a loss as a result of the war by reason of injury or damage to property in Italy, for which the claimant company has full or partial right to receive compensation from the Italian Government in accordance with Article 78 (4) (*b*) of the said Treaty ?
>
> 3. If the answer to point 2 (*b*) is in the affirmative, what is the extent of the damage suffered and what is therefore the amount of compensation in lire which the claimant company has the right to receive from the Italian Government in order to provide—in accordance with Article 78 (4) (*b*) and (*d*)—two-thirds of the sum necessary at the date of payment to purchase similar property or to make good the loss suffered ?

4. If the Third Member decides in favour of the claimant company, what amount should be paid by the Italian Government—in accordance with Article 78 (5)—for reasonable expenses incurred in Italy in establishing the claim, including the assessment of loss or damage ?

These questions were not, however, such as to modify the submissions of the parties which were referred to above. In the opinion of the Conciliation Commission, they are simply questions to which neither the Third Member nor the Commission is obliged to reply.

On 15 November 1963 the Conciliation Commission, including the Third Member, heard the Agents for the parties, Messrs. F. C. S. Bayliss and Vitaliono Lorenzoni for the United Kingdom, and Sig. Agro for Italy. The Agent of the British Government and the Agent of the Italian Government raised no fresh arguments. The two Agents limited themselves to essentials: the examination of the position of the concessionary company of the mine in Italian administrative and civil law, and, as has been done in the written proceedings, the question whether the interest of the company has the character of a real right or a contractual right. Moreover, they fully examined whether the repairs done in consequence of the pillage of the mine should be defined as loss of profit and consequently excluded from indemnification.

The Conciliation Commission considers that it is appropriate to point out that the Agents of the British Government referred to three decisions of the Franco-Italian Commission in support of the British argument:

(*a*) Pertusola (*Recueil des décisions*, Part 3, p. 67)

(*b*) Collas & Michel (*Recueil des décisions*, Part 4, p. I34)

(*c*) Ousset (*Recueil des décisions*, Part 5, especially at pp. 42 and 50).

Considering in law

I

1. Since the mines are situated in Italy and the injured party is a United Nations national, the question arises whether the Italian Government is liable for the "loss" suffered by the claimant company. Neither the memorial nor the submissions of the British Government contain precise indications as to the basis of the claim. In the oral pleadings of the British Agents both paragraph 4 (*a*) and paragraph 4 (*d*) of Article 78 of the Treaty of Peace were invoked. The Conciliation Commission is of opinion that it makes no difference to the result whether the examination of the question in dispute is made on the basis of Article 78, paragraph 4 (*a*), or on the basis of Article 78, paragraph 4 (*d*), of the Treaty of Peace. Article 78, paragraph 4 (*b*), is irrelevent, since the Predil Mining Company is a corporation incorporated in Italy, the whole of the share capital of which belongs to British subjects and, as will be shown below, it is itself assimilable to a United Nations national under Article 78, paragraph 9 (*a*). Both Article 78, paragraph 4 (*a*), and Article 78, paragraph 4 (*d*), deal with loss resulting from injury or damage to property, which in the present

case is situated in Italy. The Raibl mines were subjected to special measures during the war in the sense of Article 78, paragraph 4 (*d*) (the sequestration on 16 July 1940), but they also suffered injury and damage independent of the measures of sequestration, in particular by the larcenous exploitation of the mines, which in the opinion of the Conciliation Commission was not a *direct* consequence of sequestration.

The fact that Article 78, paragraph 4 (*d*), explicitly excludes loss of profit from compensation, while Article 78, paragraph 4 (*a*), does not mention such a restriction of the extent of liability for compensation of loss, has no practical significance in this case, as the Conciliation Commission will show below in greater detail. In fact, the consistent case-law of the Franco-Italian Conciliation Commission, which the Italo-British Conciliation Commission wishes to take into account, has correctly held, when applying Article 78, paragraph 4 (*a*), of the Treaty of Peace, that due compensation for loss resulting from injury or damage to property in Italy does not extend to loss of profit. (See the *Pertusola* case, Franco-Italian Conciliation Commission, Decision No. 95 of 8 March 1951, [*Recueil des decisions*] Part 3, p. 85 (paragraph 6), p. 90 (paragraph 9); the *Schappe Spinning Mill* case, [*ibid.*] Part 3 (pp. 143 *et seq.*); *Collas & Michel*, [*ibid.*] Part 4 (pp. 134 *et seq.*, especially at p. 141). Moreover, the British Government has explicitly excluded from its claim any demand in respect of loss of profit. In these circumstances, the Conciliation Commission does not believe that it is necessary to enter into a detailed examination of the question whether either or both the provisions of Article 78, paragraph 4 (*a*), and Article 78, paragraph 4 (*d*), are applicable.

2. In order to determine whether the British claim is admissible, the Conciliation Commission must now reply to the following question: Can the claimant company be regarded as or assimilated to a United Nations national in the sense of Article 78, paragraph 9 (*a*), of the Treaty of Peace?

This question was not in fact discussed by the parties during' the proceedings before the Commission. It is, however, indisputable that this company, which was incorporated under Italian law, was treated as enemy under the legislation in force in Italy during the war. Consequently, Article 78, paragraph 9 (*a*), is applicable to it.

3. The second question in this context to which the Commission must reply is whether the interest of the claimant company in the Raibl mines on the basis of the Convention of 10 April 1933 can be regarded as "property" susceptible of restitution and compensation in the sense in which "property" is defined in Article 78, paragraph 9 (c), of the Treaty of Peace with Italy.

In this context the Conciliation Commission makes the following observations:

The public mines of Raibl I, II and III were granted to the claimant company as a concession, and the relationship between the claimant company and the Italian Government is governed by the Convention of 10 April 1933

between the State and the company. The conclusion of this Convention was approved by the Italian Government in a Ministerial Decree of 19 June 1933. By Decree of 16 July 1940 the Ministry of Corporations, in agreement with the Ministry of Finance, placed the Predil Mining Company [now Raibl-Società Minieraria del Predil-S.p.A.] under sequestration, in pursuance of the provisions of the Italian war legislation, since it was composed of enemy capital. From 8 September 1943 to 7 May 1945, also during the war, the German military authorities occupied the mines, and exploited and pillaged them.

The two parties are in dispute as to whether the concession can be characterized as "property" in the sense of Article 78, paragraph 9 (*c*), of the Treaty of Peace. However, at this point a preliminary question arises. This is whether the term "property", as it is used in the Treaty of Peace, and to which the owner maintains that he has suffered loss or damage by reason of injury or damage during the war, must be regarded as "property" in the sense of the municipal judicial system in which it was constituted, or whether it is rather "property" defined directly by international law.

Neither Article 78, paragraph 9 (*c*), nor the preparatory work of the Paris Peace Conference which led to the conclusion of the Treaty of Peace with Italy, deals with this question (see in particular the *Collection of Documents of the Peace Conference*, Vol. IV, pp. 445 *et seq*., where the economic provisions of the draft Treaty of Peace are to be found). Article 78, paragraph 9 (*c*), does not contain any explicit or implicit reference to Italian internal law, and, moreover, itself defines the term "property". The Conciliation Commission must therefore examine the question whether the definition in the Treaty of Peace is sufficient to characterize the concession granted to the company as "property" involving compensation by the Italian Government, or whether, in this context, it is necessary to consider the meaning of "property" in Italian law.

The definition of the term "property" given in Article 78 of the Treaty of Peace has, like most concepts of international law, its historical origin in municipal law and in particular in (Roman) private law. The term "*bien*" as used in French law means, according to Planiol, *Traité élémentaire de droit civil*, vol. I (11th ed., 1928), p. 707, "things . . . when they are appropriated". In Anglo-Saxon law the term "property" (used for "*bien*" in the English text of the Treaty of Peace) means sometimes (in a non-technical sense) the entire estate of a person, sometimes particular goods which make up his estate and, finally, sometimes the interests which a person has in these goods (*cf.* Martin Wolff in Arminjon, Nolde and Wolff, *Traité de droit comparé*, vol. III (1952), pp. 7 *et seq*.).

4. The Treaty of Peace with Italy, like other conventional instruments with the purpose of regulating the same question, [1] gives the term "property" a more precise definition. In fact, Article 78, paragraph 9 (*c*), declares that the term "property" means "all . . . property . . . as well as all rights or interests of any kind in property".[2] The tripartite formula "property, rights and interests" adopted in the Treaty of Peace with Italy, as also in certain other international legal instruments, to indicate the objects susceptible of restitution and compensation under the head of war damage, is therefore definitive.

5. The formula "property, rights and interests" gives the widest possible definition of patrimonial rights. "Property", which is not synonymous with the French "*bien*", does not therefore correspond to property in the sense of the real right of continental legal systems, but must be regarded as "a subjective patrimonial right", comprehending claims based on the law of contract.[3]

6. It is in this manner that the formula "property, rights and interests" has also been interpreted by those mixed arbitral tribunals which have had the task of resolving disputes relating to the protection and the settlement of enemy private rights under the peace treaties which terminated the First World War. Thus, for example, the Franco-German Mixed Arbitral Tribunal, under the presidency of M. Asser, made the following pronouncement in the case of *Pierre Cognard* v. *German State*, a case which concerned the revocation of a concession (*Recueil des décisions*, vol. II, p. 299):

> whereas although the revocation of the concession . . . must be considered as a measure distinct (from the internment), taken by reason of the war and affecting the *right* of the claimant . . . and Article 297 in referring to "property, rights and interests" does not include only *tangible* property, but also *intangible* property, indicated by the phrase rights and interests.

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[1] *Cf.* Treaty of Peace of Versailles, 1919, Article 297 (*b*). Right at the beginning of this provision "property, rights and interests" are referred to: "La question des biens, droits et intérêts privés en pays ennemi recevra sa solution conformément aux principes posés dans la présente section et aux dispositions de l'annexe ci-jointe." The English text speaks of "private property, rights and interests". The Treaty between the Principal Allied and Associated Powers and Germany of 1952, on the Settlement of Matters Arising out of the War and the Occupation provides in Chapter V, Article 3 for the establishment of an Arbitral Commission on "Biens, Droits et Intérêts en Allemagne", which has the task of examining disputed questions relating to restitution and compensation. See also Article 4: the words "Biens, droits et intérêts" are translated into English as "Property, Rights and Interests".

[2] The original draft of the Treaty of Peace used a slightly different formula, but this was a matter of drafting, not of substance: "Le terme 'biens' désigne tous les biens ainsi que tous droits et intérêts dans des biens de nature quelconque."

[3] *Cf.* Isay, *Die privaten Rechts und Interessen im Friedensvertrag* (3rd ed., 1923), pp. 91 *et seq*., with references to English writers. See particularly Roxburgh, "German Property in the War and the Peace", in *Law Quarterly Review*, 37 (1921), p. 46, and Scholz, "*Liquidation deutscher ermogen nach dem Versailler Friedensvertrag* (1919) ", in *Zeitschrift für Volkerrecht*, XI (1920), p. 508. See also Grau, *Wörterbuch des Völkerrechts*, Vol. Ill (1st ed.), p. 59, who speaks of "*Vermögensinteresse*".

The same arbitral tribunal, under the same President, declared in the case of *Société du Carburateur Zenith* v. *German State* (*Recueil des décisions*, vol. III, p. 669):

> Regarding the plea that Article 297 (*e*) of the Treaty of Peace, in referring to "property, rights and interests", did not only envisage the case where the property of the claimants was damaged by an exceptional war measure, but whereas, on the contrary, the phrase "property, rights and interests" is wide enough *to comprehend all the cases* where, directly or indirectly, the patrimony of an allied subject has suffered damage.

7. The Conciliation Commission therefore comes to the conclusion that the "property, rights and interests" of United Nations nationals, which carry the right to compensation for injury or damage under Article 78, paragraph 4 (*a*) or (*d*), of the Treaty of Peace or of both provisions concurrently, is defined in the Treaty of Peace itself and this definition does not require completion by Italian legal concepts. The extremely wide formula adopted in Article 78, paragraph 9 (*c*),[1] entails the inclusion of rights deriving from the operation of a concession, when nationals of one of the United Nations suffered loss.

8. The content of concessions may vary, as was correctly pointed out, with copious references . . . in the arbitral award of 23 August 1958 between Saudi Arabia and the Arabian-American Oil Company (Aramco), under the presidency of Professor G. Sauser-Hall. (See also Mosler, *Wirtschaftskonzessionen bei Aenderung der Staatshoheit* (1948), especially pp. 171 *et seq*.) However, since the purpose of a concession is the exploitation of resources belonging to the State and public property or of private property, and it necessarily entails the progressive destruction of the property—that is, in the present case, the mine—over and above ordinary use, such exploitation must indisputably be characterized as an injury to the patrimonial rights of the concessionary. Mining concessions, whatever be their particular national regime, are therefore included in the very wide category in Article 78, paragraph 9 (*c*), "rights or interests of any kind in property" which may be the object of injury by war damage requiring compensation.

9. Whatever opinion one may have regarding the legal character of the concession granted to the claimant company in 1933—whether it is regarded as a real interest in an immovable, according to the English contention, or as a right deriving from an agricultural lease, according to the Italian contention—in either case it involves for the claimant company the exercise of rights and interests of a patrimonial character which exactly fulfils the requirements of Article 78, paragraph 9 (*c*), of the Treaty of Peace. In the opinion of the Conciliation Commission, the present case concerns intangible property in the wide sense of this concept, that is to say, "*d'un élément de fortune ou de richesse* susceptible d'appropriation au profit d'un individu ou d'une collectivite" (*cf.*

[1] " 'Property' means all . . . property . . . as well as *all rights or interests of any kind in property*".

Planiol, *op cit*., p. 708) ["of an element of fortune or wealth capable of appropriation for the benefit of an individual or group"].

10. In these circumstances, the Conciliation Commission sees no need for the purposes of this dispute to examine deeply the legal nature of the right or interest granted to the claimant company. It is sufficient that the claimant company had a "right" and an "interest" to exploit the mines and the right to try to get a material profit from them. This point of view, moreover, is in accordance not only with the case-law of the Franco-German Mixed Arbitral Tribunal above-mentioned, but also with that of the Italo-French Conciliation Commission, also referred to above, in the case of *Collas* & *Michel*, under the presidency of Professor Plinio Bolla (partial decision No. 146 of 21 January 1953 and the following decision No. 164 of 21 November 1953, already cited [above, p. 271, para. 11]). This Commission has recognized that the concessionary contract may give rise to compensation in favour of the concessionaire in case of war damage. In the second decision (see *Recueil des décisions*, pp. 280 *et seq*.) the Commission made the following pronouncement:

> The Conciliation Commission is of the opinion that, in the case of installations constructed for the exploitation of a concession from the State, "loss and damage" by reason of their destruction cannot be assessed at the cost of reconstruction alone; one must seek, in each individual case and in accordance with equitable criteria and taking into account the circumstances of the concession, the most suitable method to determine the indemnity.

The Italo-French Conciliation Commission thus admitted the duty of compensation without entering into an examination of the question whether the right deriving from the concession had or had not a real character under Italian law. This approach is in accordance with the letter and spirit of Article 78, paragraph 9 (*c*), of the Treaty of Peace. It must therefore be adopted in the present case. The Conciliation Commission, as it has just explained, consequently sees no need to examine the legal nature of the concession in question in the context of municipal law—in this case, Italian law. It is sufficient to state that mining concessions granted over public or private property give rise in all civilized States to patrimonial rights of the type which are protected by Article 78, paragraph 9 (*c*).

II

1. The following is the second question put to the Conciliation Commission:

Does the loss due to the German exploitation of the mines, which was described in the written pleadings as larcenous exploitation, represent a "loss of profit" which does not require the payment of compensation (see Treaty of Peace, Article 78, paragraph 4 (*d*), and the case-law referred to above at p. 276), or is it not rather a loss caused by the war for which the claimant company has the right to receive a full or partial indemnity from the Italian Government,

in pursuance of Article 78, paragraph 4 (*a*) or (*d*), of the Treaty of Peace with Italy?

2. The Agent of the Italian Government does not deny that the claimant company should be considered, within certain limits, as entitled to an indemnity in consequence of the damage done to it. Consequently, the damage to its property gave rise to compensation under the two partial decisions referred to above. However, according to the Italian argument, the destruction effected entails, apart from the loss requiring compensation, both an increase in the costs of production and a reduction in profits, the consequence of which is a loss of profit which need not be compensated under Article 78, paragraph 4 (*d*), and the established case-law on the application and interpretation of Article 78, paragraph 4 (*a*). See also on this question the decision of 31 July 1953 by the Greek-Italian Conciliation Commission on the interpretation of certain points of Article 78 of the Treaty of Peace with Italy, at p. 3, which regards the exclusion of loss of profit from paragraph 4 (*a*) as unnecessary, declaring correctly that:

> once it is established that the indemnity must correspond to two-thirds of the sum needed to acquire equivalent property, the principle is also established that compensation is only for the damage done.

3. Neither the Treaty of Peace with Italy, in Article 78, paragraph 4 (*d*), nor the case-law relating to Article 78, paragraph 4 (*a*), give a definition of the concept of "loss of profit". It is therefore necessary to examine the question of loss of profit in the context of general international case-law and theory. In theory, "loss of profit" has given rise to a distinction between direct damage, the unavoidable consequence of an act entailing liability, and possible, but indirect and indefinite, damage.[1] Also, international arbitral and judicial decisions contain pronouncements on the calculation of the indemnity for loss of profit.[2] On the other hand, the distinction between a loss suffered (*damnum emergens*) and loss of profit (*lucrum cessans*) has not been examined by international case-law and writers independently of municipal law. In these circumstances, the Conciliation Commission must have reference to the general principles of law recognized by civilized nations in the sense of Article 38, paragraph 1 (*c*), of the Statute of the International Court of Justice, and examine the common legal theories of civilized States. According to this theory, loss of profit is characterized by the fact that the *patrimony*, the estate of the person entitled, has not been increased, although the estate would have been increased if the loss which occurred had not prevented it. On the other

[1] *Cf.* Politis in the Third Commission of the Codification Conference at The Hague in 1930: *Acts*, Vol. IV, p. 132.

[2] *Cf.* Reizer, *La réparation comme conséquence de l'acte illicite en droit international*, a thesis at Geneva (1938), pp. 189 *et seq.*

hand, loss suffered (*damnum emergens*), in contrast to loss of profit, entails a *diminution* of the patrimony in consequence of an act which caused loss.[*]

The Conciliation Commission arrives at the conclusion that the value of the mines was diminished after the larcenous exploitation by the Germans, in comparison with their value before pillage. A net loss suffered is therefore involved, not a loss of profit. In fact, at the time when the allied troops occupied the Raibl mines (7 May 1945), they found an inefficient mine, since the German occupants had extracted the greatest possible quantity of minerals in the least possible time. They had done nothing for the maintenance of the mine and its equipment. The British claim is therefore not a demand for compensation for the diminution in the sales of minerals in consequence of the German larcenous exploitation, but for indemnification of the costs disbursed to get the mine working again after this pillage, and indemnification for the diminution of the property resulting from this pillage. The injury and damage caused to the mines may be described as injury and damage caused to "rights and interests of any kind in property" in the sense of Article 78, paragraph 9 (*c*), of the Treaty of Peace. Since this loss is not a loss of profit but a diminution of the property independent of the non-augmentation of the value of the property as such, it must be compensated. In these circumstances the claimant company is within the terms of the compensation provided for by the Treaty of Peace in respect of compensation for the loss resulting from the fact that during the five years of re-conditioning the mine, extraction of minerals and their sales were significantly reduced.

5. A further question arises, however, in the present case.

The Italian Government, in its Counter Memorial, maintained that the claimant company could have freed itself of all the costs of re-conditioning the mine by invoking the war as *force majeure*. In these circumstances, the claimant company would have lost only the expectation of profits from the remaining period of exploiting the concession, and, once freed from its contractual obligations, would not have had any obligation to exploit the mines.

The Conciliation Commission does not share this reasoning. The claimant company was placed under certain obligations by the Convention of 1933, which it was obliged to respect once it was restored to the operation of the mines. The claimant company, in placing itself on the plane of the obligation to operate the mine, had to take the measures necessary for the fulfilment of its obligations,

[1] See, for example, von Tuhr (*Algemeiner Teil des Schweiz Obligationenrechts*, 1st part (1924), pp. 67 *et seq.*) who defines *damnum emergens* (loss suffered) in the following manner: "Ein Schaden kann nur darin bestehen, dass ein Aktivum des Vermögens wegfallt oder eine Wertverminderung erleidst {*z.B*, durch Zerstorung oder Beschadigung einer Sache)." ("There can be a loss only when an active part of the estate is abandoned or when the estate suffers some diminution, for example, the destruction or damage of an object.") The statement made by Planiol (*Droit Civil*, Vol. 11, pp. 92 *et seq.*) is identical. Ennecerus, *Lehrbuch des Bürgerlichen Rechts*, *Recht der Schuldverhältnisse*, 15, 17 (1926), pp. 30 *et seq.*

which was also recognized in the arbitral award of 26 June 1958. The war damage had to be repaired in order to fulfil this obligation. In these circumstances, the claimant company could not invoke *force majeure* and thereby abandon its rights of exploitation under the Convention of 1933. The contract had to be given its ordinary effects, and this was incompatible with the invocation of *force majeure* by the claimant company, which would have involved an unlawful act on its part since it would have been contrary to its obligations to the Italian Government which had granted the concession to the company.

III

1. In these circumstances, there is no doubt in the opinion of the Conciliation Commission that the claimant company has suffered loss in consequence of injury or damage caused to its property in accordance with Article 78, paragraph 4 (*a*) and (*d*), of the Treaty of Peace with Italy. The Italian Government must, therefore grant the claimant company the indemnity provided for in these two provisions of the Treaty of Peace, that is, two-thirds of the sum necessary at the date of payment "to purchase similar property or to make good the loss suffered" (Article 78, paragraph 4 (*a*)) or "to compensate them for the loss or damage due to special measures applied to their property during the war" (Article 78, paragraph 4 (*d*)).

2. The task of assessing both the particular loss due to larcenous exploitation by the German troops and the reasonable expenses incurred in Italy in establishing the claim, including the assessment of the losses and damage for which Italy is liable (see Article 78, paragraph 5, of the Treaty of Peace with Italy), is also entrusted to the Conciliation Commission.

3. The Conciliation Commission is not yet able to reach a decision on these points, and, moreover, the British Government itself has declared that it agrees to refer to experts the examination of the assessment of the sum of damages on the basis of the indications furnished by the various documents referred to above, in particular taking into account the information given by the claimant company for the compiling of the report made in August 1959 by the Mining District of Trieste on the technical questions posed by the Ministry 01 the Treasury (see the first British Reply, of 1 February 1961, pp. 35 *et seq.* and 50 *et seq.*).

4. The sum claimed by the claimant company and supported by the British Government was composed as follows:

—for reimbursement of costs of reconditioning	423,018,005 lire
—for interest to 31 December 1959 [salvo conguaglio]	234,945,947 lire
	657,963,952 lire
reduced by one-third to give a total of	438,642,634 lire

5. The expert will have the task of examining whether the amount claimed by the British Government is what was needed to put the mine into "complete good order" (Article 78, paragraph 4 (*a*) and (*d*)), or whether it also includes other things done at the same time as the repairs, such as, for example, improvements increasing the value of the property in question and going beyond the restitution provided for in Article 78, paragraph 4 (*a*) and (*d*), of the Treaty of Peace.

6. In order to set in motion the expert examination provided, or perhaps to replace it with an agreement between the claimant Government and the defendant Government, the Conciliation Commission declares:

(*a*) that the Agents of the two parties have made attempts to arrive at an agreement on the sum of the indemnity and on the sun of reasonable expenses to be paid by the Italian Government to the claimant company to compensate the damage caused by the larcenous exploitation of the mines by the German troops in 1945.

(*b*) However, these attempts have not been crowned with success. In these circumstances, the Italo-British Conciliation Commission has decided to issue an Order dated on the same date as this decision and having the following contents:

> Whereas the Conciliation Commission agrees to hold that the claimant Company (Société anonyme des Caves du Predil (Raibl)) has suffered loss in consequence of injury or damage caused to its property within the terms of Article 78, paragraph 4 (*a*) and (*d*), of the Treaty of Peace with Italy;
>
> Whereas on this account the Italian Government must grant the claimant company the indemnity provided for in this provision of the Treaty of Peace, that is to say, two-thirds of the sum necessary, at the date of payment, to purchase similar property, or to make good the loss suffered, or to compensate them for the loss or damage due to special measures applied during the war;
>
> Whereas the task of assessing the particular damage caused by pillage (larcenous exploitation) by German troops, and the reasonable expenses incurred in Italy in establishing the claim, including the assessment of loss and damage for which Italy is liable, has also been entrusted to the Conciliation Commission;
>
> Whereas the Commission is not yet able to decide these questions and the two Governments, Italian and British, have agreed to refer to expert examination the assessment of the total sum of damages, and the sum claimed by the claimant company being composed as follows:

–for reimbursement of costs of re-conditioning	423,018,005 lire
–for interest to 31 December 1959 [*salvo conguaglio*]	234,945,947 lire
	657,963,952 lire
which when reduced by one-third gives a total of	438,642,634 lire

Whereas the attempts by the Agents of the Italian Government and the British Government have not resulted in agreement on the sum of the indemnity and the sum of the reasonable expenses to be paid by the Italian Government to the claimant company in compensation for the damage referred to above;

Whereas in order to accelerate the course of the proceedings, the Conciliation Commission has decided to make this Order, which will form an integral part of the partial decision which the Conciliation Commission has taken on the same date and which is binding and final.

Decides

1. The Conciliation Commission decides that the following questions shall be put to the experts named by this Commission for the purpose of the final assessment of the sum owed by the Italian Government to Raibl-Società Mineraria del Predil-S.p.A. for the loss suffered by reason of injury or damage to its property:

(*a*) What are the "*preparazioni*"[1] to be carried out in a normal operation of a mine;

(*b*) what was the extent of such "*preparazioni*" at the time of the sequestration and at the moment of the handing over of the mine;

(*c*) what is the extent of the "*preparazioni*" which is considered to be necessary for normal working of the mine;

(*d*) how long it took to make the "*preparazioni*";

(*e*) how the work for the "*preparazioni*" indispensable to rehabilitate the mine was distributed throughout the years;

(*f*) what was the cost of the "*preparazioni*" considering these by linear metre and year by year;

(*g*) finally, what was the total expense to rehabilitate the mine, with the exclusion of the improvement works in the mine during the execution of the hereinabove referred to works.

The Conciliation Commission, having thus laid down the future course of the proceedings, *decides*:

(*a*) Raibl-Società Mineraria del Predil-S.p.A. has suffered loss to its property by the larcenous exploitation of mines of which it was concessionaire by the German military authorities between 8 September 1943 and 7 May 1945.

(*b*) The claimant company is entitled to make a claim for indemnity under Article 78, paragraph 4 (*a*) and (*d*), of the Treaty of Peace, and also for reasonable expenses incurred in Italy in establishing the claim, including the assessment of loss and damage for which the Italian Government is liable.

(*c*) The amount of the indemnity to be awarded to Great Britain is that necessary to put the mines into complete good order.

[1] Such as galleries and other mine works.

(*d*) In order to fix the amount of the indemnity, the Commission refers to the Order reproduced above, which forms an integral part of this decision.

(*e*) The present decision is binding."

On 1 August 1965 the Commission rendered a final decision, of which the following is the text:

The Anglo-Italian Conciliation Commission constituted in accordance with Article 83 of the Treaty of Peace signed on 10 February 1947 between the Allied and Associated Powers and Italy, consisting of:

Antonio Sorrentino	—Honorary President of Section of the Council of State, Representative of Italy
E. A. S. Brooks	—Representative of Great Britain
and	
Paul Guggenheim	—Professor of the University of Geneva and the Institut Universitaire de Hautes Études Internationales at Geneva. Third member appointed by agreement between the British and Italian Governments

in the dispute arising out of a claim for compensation presented by the Agent of H.B.M.'s Government in the interest of Raibl-Società Mineraria del Predil S.p.A. (Raibl I, II and III). Having considered the facts and juridical considerations set out in the decision of 10 June 1964 (No. 211) with reference to the subsequent procedure foreseen in the said decision, and in particular to the questions put to the expert appointed by this Commission to establish finally the amount due from the Italian Government to Raibl-Società Mineraria del Predil S.p.A. for the loss suffered as a result of injury or damage to its property.

Having seen the Agreement of 19 June 1965 between the Agent of the Italian Government and the Deputy Agent of the British Government which contains the following considerations:

"That the Anglo-Italian Conciliation Commission by its decision of 10 June 1964 given in the dispute initiated by the Agent of the British Government in the interests of Raibl-Società Mineraria del Predil S.p.A. has recognized

(*a*) that Raibl-Società Mineraria del Predil S.p.A. has suffered a loss of property caused by the larcenous exploitation by the German troops between 8 September 1943 and 7 May 1945 of the mines Raibl I, 11and III of which it was the concessionnaire;

(*b*) that in consequence the claimant Company can substantiate a claim for compensation in accordance with Article 78, paragraph 4 (*a*) and (*d*), of the Treaty of Peace as well as the reasonable expenses incurred in Italy in compiling the claim, including the assessment of loss or damage to be borne by the Italian Government;

(*c*) that the amount of compensation to be awarded to Great Britain is that which is necessary to put the mines into complete good order;

Considering

that with a view to fixing the amount of compensation the Conciliation Commission by an Ordinance made on the said 10 June 1964 nominated an expert in the person of Ing. Enzo Beneo with the task of presenting a report to the said Commission;

that the expert Ing. Beneo presented such report on 26 November 1964;

that by Ordinance dated 24 December 1964 the two Governments were invited to comment on the said report and to inform the Commission thereof by 30 March 1965, a date subsequently extended at the request of the Italian Agent;

that comment on the Beneo report would have necessitated the submission of the opposing conclusions of the parties to a further technical opinion with a further prolongation of the dispute;"

[and which Agreement of 19 June 1965 contains] the following conclusions:

1. May it please this Honourable Anglo-Italian Conciliation Commission to declare that the Italian Government should pay to the British Government, in accordance with Article 78 of the Treaty of Peace, the sum of 240,000,000 lire as compensation for the damage suffered by Raibl-Società Mineraria del Predil S.p.A. to its mines of Raibl I, II and III for the heads of damage mentioned in the said decision of 10 June 1964.

2. The expenses of the presentation of the claim to be determined by agreement at 12,000,000 lire.

3. That, with the decision to be issued, all disputes between the Italian Government and the British Government relating to the application of Article 78 of the Treaty of Peace in connection with the claim (No. 150) presented by the British Government, in accordance with Article 83 of the Treaty of Peace, for compensation for war damage of all kinds suffered by the said mines Raibl I, II and III in concession to Raibl-Società Mineraria del Predil S.p.A., shall be considered to be finally settled.

Decides

1. That the Italian Government shall pay to the Società 'Raibl' -Società Mineraria del Predil S.p.A., in accordance with Article 78 of the Treaty of Peace, the sum of 240,000,000 lire as compensation for the damage suffered by Raibl—Società Mineraria del Predil S.p.A. to the said mines Raibl I, II and III for the heads of damage mentioned in the said decision of 10 June 1964.

2. That by agreement the expenses of the presentation of the claim are determined at 12,000,000 lire.

3. That with this decision all disputes between the Italian Government and the British Government relating to the application of Article 78 of the Treaty of Peace in connection with the claim (No. 150) presented by the British Government, in accordance with Article 83 of the Treaty of Peace, for

compensation for war damage of all kinds suffered by the said mines Raibl I, II and III in concession to Raibl-Società del Predil S.p.A. shall be considered finally concluded.

4. That the fee to be paid in equal shares by the British and Italian Governments to Ing. Beneo for his report dated 28 November 1964 is fixed at 1,000,000 lire.

5. That the present decision is obligatory.

PART XXI

Arbitral Tribunal for the Agreement on German External Debts, signed at London on 27 February 1953

Tribunal arbitral pour l'Accord sur les dettes extérieures allemandes, signé à Londres le 27 février 1953

Arbitral Tribunal for the Agreement on German External Debts, signed at London on 27 February 1953

Tribunal arbitral pour l'Accord sur les dettes extérieures allemandes, signé à Londres le 27 février 1953

Case of the Swiss Confederation *v.* the German Federal Republic (No. I), award of 3 July 1958[*]

Affaire concernant la Confédération suisse c. la République fédérale d'Allemagne (N° I), sentence du 3 juillet 1958[**]

Competence of the Arbitral Tribunal—exclusive competence of the Tribunal to interpret the Debt Agreement and its annexes—no resort to the International Court of Justice—conflicting decisions—principle of *perpetuatio fori*—competence to adjudicate disputes between governments which have arisen out of private disputes—reference to the jurisprudence of the International Court of Justice in the *Nottebohm* case of 1953.

Exhaustion of local remedies—rule of international law existing without need to be expressly stipulated in the treaty—rule applicable only in connection with claims relating to the responsibility of a State for infringement of rights in respect of a national of the claimant State—jurisprudence of the International Court of Justice in the case concerning *Certain Norwegian Loans* of 1957.

Treaty interpretation—interpretation of an annex to the Agreement on German External Debts of 1953—meaning of "place of payment"—meaning of "specific foreign character"—reference to the jurisprudence of the International Court of Justice—interpretation to be based on the normal, natural and unstrained meaning of words.

Compétence du Tribunal arbitral—compétence exclusive du Tribunal pour interpréter l'Accord sur les Dettes et ses annexes—pas de recours à la Cour internationale de Justice—conflit de décisions—principe de la *perpetuatio fori*—compétence pour statuer sur des différends entre gouvernements qui résultent de différends privés—référence à la jurisprudence de la Cour internationale de Justice dans l'affaire *Nottebohm* de 1953.

Épuisement des voies de recours internes—règle de droit international qui existe sans devoir être expressément stipulée dans un traité—règle applicable uniquement en relation avec les réclamations relatives à la responsabilité d'un État pour la violation de droits à l'égard d'un national de l'État réclamant—jurisprudence de la Cour internationale de Justice dans l'affaire de *Certains emprunts norvégiens* de 1957.

Interprétation des traités—interprétation d'une annexe à l'Accord sur les Dettes extérieures allemandes de 1953—signification du "lieu de paiement"—signification

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[*] Reproduced from *International Law Reports* 25 (1958-1), p. 33.

[**] Reproduit de *International Law Reports* 25 (1958-1), p. 33.

du "caractère étranger spécifique"—référence à la jurisprudence de la Cour internationale de Justice—l'interprétation doit être fondée sur le sens habituel et naturel des termes.

*****

The Aargauische Hypothekenbank, a company limited by shares *(Aktiengesellschaft),* whose head office is at Brugg in Switzerland, had acquired a plot of land situated in Stuttgart at a forced auction sale in order to safeguard a mortgage on this land registered in its name. It then sold the land by a contract dated July 31, 1931 to the merchants Max and Moriz Lindauer in Stuttgart. A postponement of the payment of the balance of the purchase price amounting to Goldmarks 300,000 was granted to the purchasers; in order to secure this claim a mortgage on the purchased land was registered in favour of the "Aargauische Hypothekenbank, Aktiengesellschaft, at Brugg, Switzerland". The provisions of the contract of sale which are relevant for the present dispute read as follows:

§1. The Aargauische Hypothekenbank, with its head office at Brugg, remained the highest bidder at the forced auction sale of the land located within the boundaries of Stuttgart and entered in the Land Register, Stuttgart, Volume No. 1996, Part I, No. 1, in the name of the firm J. Mack, Stuttgart,

Boundaries of Stuttgart			
Building No. 65 Konigstrasse			
Dwellinghouse	—:	2 a	17 qm
Yard	—:		14 qm
Corner shared with Building No. 2 Poststrasse	—:		07 qm
	—:	2 a	38 qm

and the said land was allotted to it by a decision announced on July 14, 1931, by Bezirksnotar Küstner, Stuttgart.

§2. The Aargauische Hypothekenbank with its head office at Brugg hereby sells the land described in §1 of this minute to Messrs. Max Lindauer, merchant of Stuttgart, and Moriz Lindauer, merchant of Stuttgart, who acquire the land to hold jointly in undivided moieties.

§5. Interest is payable on the total purchase price from October 1, 1931, at 6½ per cent, annually. The interest is to be paid at the end of each calendar quarter and for the first time on December 31, 1931, free of charge to the vendor or to a pay office *(or* "payee", in German "*Zahlstelle")* to be specified by it; the same applies to the payment of the purchase price and the several instalments.

The creditor has not specified a pay office.

The merchants Lindauer sold the land by contracts of sale and transfer of November 16, 1937, to the Kommanditgesellschaft Conrad Tack & Cie, shoe factory, with its seat then at Berlin-Tempelhof, now at Weinheim a. d. Bergstrasse. The Tack firm took over as debtor the mortgage claim entered on behalf of the Aargauische Hypothekenbank as a set-off against the purchase price. Conrad Tack & Cie, GmbH, at Weinheim a. d. Bergstrasse, is also liable for the mortgage claim; it has been entered in the Land Register as owner since May 9, 1956. After repayment of an instalment on November 26, 1940, the mortgage debt has amounted to Goldmarks 220,000.

After the Agreement on German External Debts of February 27, 1953 (hereinafter referred to as "the Debt Agreement"), came into force, the creditor requested the firm of Tack & Cie to settle the mortgage debt as a debt with a specific foreign character on the basis of a conversion rate of 1 : 1. The firm of Tack & Cie thereupon addressed themselves, in a correspondence extending over years in which the creditor also intervened, to the authorities competent to pass upon such an agreement for settlement (Bank deutscher Länder, now Deutsche Bundesbank, Oberfinanzdirektion Karlsruhe, Ministry of Finance of Baden-Württemberg) in order to secure the indemnity envisaged in §§ 52 *et seqq.* of the Federal Law of August 24, 1953, for the Implementation of the Agreement of February 27, 1953, on German External Debts *(Bundesgesetzblatt,* I, p. 1003) in case of an admission of the conversion rate of 1 : 1. The Deutsche Bundesbank refused to take position on the question of the conversion rate so long as an agreement for settlement had not been reached between the creditor and the debtors. The Finance Authority did not maintain its original objection that the amount owed, being a debt for a balance of purchase money, did not have a specific foreign character, but it expressed the opinion that the contract of July 31, 1931, did not contain an express agreement on a place of payment abroad and that the Goldmark claim secured by mortgage did not have a specific foreign character.

On February 27, 1957, the Swiss Legation at Cologne addressed the following *Note Verbale* to the Foreign Office at Bonn:

> Differences have arisen between Swiss creditors and German Finance Authorities with regard to the fundamental question whether the so-called unpaid balance of a purchase price arising out of the purchase of German land, when postponed over many years and secured by mortgage, can be considered a debt resulting from a financial transaction of the nature of a loan. Thus the Aargauische Hypothekenbank, of Brugg/Switzerland, is of the opinion that its claim against the firm of Tack, of Weinheim a.D. Bergstrasse, for the balance of purchase money is of a specific foreign character within the meaning of Annex II in conjunction with Annex VII to the London Debt Agreement. The enclosed Opinion of *Rechtsanwalt* Miller [of] Düsseldorf, contains exhaustive information regarding the facts of the case and the legal position.
>
> The negotiations undertaken up to now by the creditor with the debtors, the Bank deutscher Länder, as well as with the Finance Authorities of the *Land*

of Baden-Württemberg, have been without result. Pursuant to the letter of December 13, 1956, a photostat copy of which is enclosed, the Ministry of Finance at Stuttgart have finally adopted the view "that the claim of the Aargauische Hypothekenbank of Brugg/Switzerland against the firm of Tack is not of a specific foreign character within the meaning of the London Debt Agreement and that, therefore, the firm of Tack is not entitled to claim compensation from the *Land,* in pursuance of the Law implementing the London Debt Agreement".

As, on the one hand, the Aargauische Hypothekenbank is not prepared to accept the negative decision quoted and, on the other hand, the Swiss Federal Council are prepared to accept the creditor's legal interpretation as their own, the Legation request the Foreign Office to obtain, as soon as possible, the comments of the Government of the Federal Republic of Germany on the point in dispute.

On July 22, 1957, the Foreign Office, in a *Note Verbale,* informed the Swiss Embassy of the following:

The Foreign Office have the honour to refer to their *Note Verbale* No. 72/57 of 30. 4. 1957 regarding the liability of the firm of Tack & Cie GmbH, towards the Aargauische Hypothekenbank at Brugg, and to confirm to the Swiss Embassy that the Federal Minister of Justice supports the view expressed in the letter from the Oberfinanzdirektion, Karlsruhe, dated 12. 4. 1957, with regard to the opinion on the specific foreign character of the disputed Goldmark claim. The Federal Minister of Justice bases his view—agreeing, in essence, with the other Authorities concerned—on the wording of § 5 of the contract of sale, which reads as follows:

> The interest is to be paid at the end of each calendar quarter and for the first time on December 31, 1931, free of charge to the vendor or to a pay office (*or* payee) to be specified by it; the same applies to the payment of the purchase price and the several instalments.

As this clause determines merely to whom but not where the payments are to be made, it cannot be regarded as an agreement on the place of payment. In a case like this, the question of the place of payment (place of performance—*Leistungsort)* can be determined only in accordance with legal provisions. Even if this should mean a place of payment abroad—which would not be the case if German law were applied—it would not suffice, in view of Annex VII, Section I, para. 2 *(a),* to affirm the specific foreign character. Even if interpretation were to show that the clause of agreement mentioned contains a stipulation of the place of payment, this could, in any case, not be regarded as an "express" agreement within the meaning of Annex VII to the Debt Agreement. This being the position in law, the Federal Minister of Justice has not examined further the question whether, in the case presented, the claim for an unpaid balance of purchase price is of a specific foreign character within the meaning of Annex VII to the Debt Agreement.

In August 1957, the Tack firm brought an action against the *Land* Baden-Württemberg before the *Landgericht,* Karlsruhe, by submitting the application:

> that the Plaintiff, in the settlement of its debt owed to the Aargauische Hypothekenbank, Brugg/Switzerland, amounting to GM 220,000, which is entered in the Land Register of Stuttgart, Volume No. 1996, Part III, No. 19, as a mortgage charge in favour of the Aargauische Hypothekenbank, is entitled to an indemnity under §§ 63 and 66 of the Law implementing the London Debt Agreement.

This proceeding was suspended *sine die* upon the request of both parties at the hearing of November 12, 1957 "because of the proceeding pending before the Arbitral Tribunal at Koblenz".

The Swiss Confederation, whose Government is a Party to the Debt Agreement, has now resorted to the Arbitral Tribunal requesting that

> the Arbitral Tribunal render the following decision:
>
> > that, within the meaning of Annex VII, Section I, para. 2 *(a),* to the Agreement on German External Debts of February 27, 1953, it has expressly been agreed by the contract of July 31, 1931, between the Aargauische Hypothekenbank Aktiengesellschaft and Messrs. Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the contract was situated abroad.

The Federal Republic of Germany, whose Government is also a Party to the Debt Agreement, requested as Respondent that the Application of the Swiss Confederation be dismissed as inadmissible.

In case this request should not be complied with, the Respondent has requested that the Application of the Swiss Confederation be rejected as unfounded.

The contract of July 31, 1931, concerns, as is undisputed, a debt relationship which is subject to settlement pursuant to Annex II to the Debt Agreement. According to Article V, para. 3, of said Annex, "such financial debts and mortgages, expressed in Goldmarks or in Reichsmarks with a gold clause, as had a specific foreign character shall be converted into Deutsche Mark at the rate of 1 Goldmark, or 1 Reichsmark with a gold clause, = 1 Deutsche Mark."

The criteria constituting a specific foreign character in the case of such pecuniary debts are determined pursuant to Annex VII to the Debt Agreement. The provision of Annex VII which is relevant in this connection is the provision contained in Section I, para. 2 *(a),* which, in so far as it has bearing on the present dispute, reads as follows:

> In respect of the claims and rights specified below it is recognized that they have a specific foreign character within the meaning of the above-mentioned provisions:
>
> 1. . . .

> 2. Claims expressed in Goldmarks, or in Reichsmarks with a gold clause or a gold option, arising from other loans or advances resulting from financial transactions and raised abroad by German debtors, including claims of this kind secured by mortgage charges; if
>
> > *(a)* it was expressly agreed under the original written debt arrangements that the place of payment or the competent court is situated abroad or foreign law is applicable.

The introductory sentence of this quotation refers to the provisions now contained in Sub-Annex D to Annex I, No. 2, in Article V, para. 3, of Annex II and in Article 6, para. (2), of Annex IV.

In order to substantiate their submissions, the parties used the following arguments.

The Applicant expressed the opinion that §§ 1, 2 and 5 of the contract of July 31, 1931, contained an express agreement, within the meaning of Annex VII, Section 1, para. 2 (*a*), to the Debt Agreement, that the place of payment was to be situated abroad, *viz.* in Brugg/ Switzerland, the head office of the creditor. It was the general legal opinion that the conception of an express agreement of a place of payment abroad within the meaning of Annex VII, as well as the remaining provisions of that Annex, must be given a wide interpretation according to the sense emerging from the text and from their origin. With regard to the conception of an express agreement of a place of payment abroad within the meaning of Annex VII to the Debt Agreement, the Applicant invoked Section 244, para. 1, of the German Civil Code as well as a number of legal opinions and court decisions, including the decision of the Mixed Commission of November 27, 1956, in the case of *Bodenkreditbank in Basel* v. *Gebrüder Rohrer GmbH*. The Applicant furthermore pointed out that the "head office at Brugg" was mentioned twice in the contract; it maintained that it emerged from this fact as well as from the provision of the contract that the purchase price, the instalments thereof and interest were to be paid free of charge to the vendor or to a pay office (*or* payee) to be specified by it, that Brugg had been expressly agreed upon as the place of payment.

In the opinion of the Applicant, the Arbitral Tribunal has jurisdiction under Article 28, para. (2), of the Debt Agreement because the dispute which had arisen between the Applicant and the Respondent concerning questions of interpretation of Annex VII could not be settled by negotiation. Nor, in the opinion of the Applicant, was the jurisdiction of the Arbitral Tribunal excluded in the present case by Article 28, para. (5), of the Debt Agreement since the Arbitration and Mediation Committee envisaged under Article IX of Annex II to the Debt Agreement had not yet been established.

The Respondent in the first place contested the competence of the Arbitral Tribunal and argued as follows:

The prerequisites for a resort to the Arbitral Tribunal did not exist in the present case if only because, according to a generally accepted rule of

international law, the private parties whose interests are involved in the case must themselves first have exhausted unsuccessfully the remedies open to them before the courts competent under national law for the prosecution and enforcement of their interests, before resort can be had to an international arbitral tribunal competent to decide disputes between States. The Respondent pointed out in this connection that the private party in question in the present case, *viz.,* a Swiss bank as creditor, had not only not exhausted the remedies before the courts at its disposal but had not even begun to do so. It relied in this connection on a number of decisions of international courts and on the views of certain authors.

The Respondent furthermore expressed the opinion that the competence of the Arbitral Tribunal could not be deduced from Article 28 of the Debt Agreement in cases like the present. The nature of the Applicant's request alone excluded the jurisdiction of the Arbitral Tribunal under Article 28 of the Debt Agreement, since it could not be the task of the Arbitral Tribunal to decide a dispute which, by its nature, was a dispute between two private parties, merely because it had been clothed with the appearance of an international dispute between States by the Application of the Applicant. The Respondent argued that the jurisdiction of the Arbitral Tribunal, as set out in Article 28, para. (2), of the Debt Agreement and in so far as it concerned the application of the Agreement, covered only claims against a Party to the Agreement, as, *e.g.,* claims resulting from the obligations which the Federal Republic of Germany had assumed in Articles 7, 8 and 10 of the Debt Agreement. Furthermore, the jurisdiction of the Arbitral Tribunal which might exist was excluded by Article 28, para. (2), if the dispute concerned a question of interpretation or application of an Annex to the Debt Agreement, and an arbitral body established pursuant to such Annex was competent to decide a dispute concerning the interpretation or application of that Annex. In the present case the dispute concerned the interpretation or application of Annex VII to the Debt Agreement which, in so far as it was applicable to the present case, was relevant only in conjunction with Annex II to the Debt Agreement and constituted only a Sub-Annex to that Annex. The arbitral body competent to decide disputes concerning the interpretation or application pursuant to Annex II to the Debt Agreement, *viz.,* the Arbitration and Mediation Committee envisaged in Article IX of Annex II to the Debt Agreement, had in the meantime been established and was able to take up its functions at any time.

In order to substantiate its alternative request that the Application of the Swiss Confederation be rejected as unfounded, the Respondent maintained that with regard to the debt in question there was no agreement at all on the place of payment. It contradicted the opinion of the Applicant according to which such an agreement could be deduced from the mention of the "head office at Brugg" or from the provision of § 5 of the contract of July 31, 1931. It went into lengthy explanations regarding the conception of the place of payment in general and, in particular, within the meaning of Annex VII to the

Debt Agreement. Setting out from the principle that the place of payment is the place where the debtor has to take the action necessary for the satisfaction of the pecuniary debt, the Respondent explained Sections 269 and 270 of the German Civil Code to mean that, according to German law, pecuniary debts are either callable debts (place of payment is the residence of the debtor) or deliverable debts (place of payment is the residence of the creditor) or transmissible debts (place of payment is the residence of the debtor who is, however, obliged to transmit the money owed at his cost and risk to the creditor). A number of foreign legal opinions were also cited in this connection which, the Respondent maintained, showed that this legal situation had also been recognized abroad. The Respondent argued that in the present case the debt was transmissible (place of payment is the residence of the debtor) and that § 5 of the contract of sale of July 31, 1931, did not contain a place-of-payment clause but a typical transmission clause. The place of payment therefore was, in any case, Stuttgart. The fact that the place of payment must be determined according to German law resulted also from the rule of German private international law, which was generally accepted in legal science and jurisprudence, and according to which the applicable law was determined by the centre of gravity of the debt relationship. This centre of gravity was situated in Germany, for the case concerned the sale of land situated in Germany to a German. The sale was authenticated by a German notary public, the purchase price was specified in German currency and secured by a mortgage on a German plot of land.

The applicant made detailed observations in reply to the objections of the respondent to the admissibility of the proceeding and to the competence of the Arbitral Tribunal. It argued, in particular, that in the present case the dispute concerned the interpretation of not only one, but several, Annexes to the London Debt Agreement and that, therefore, the Arbitral Tribunal was competent under Article 28, para. (2), of the Agreement, irrespective of the establishment of the Arbitration and Mediation Committee under Annex II. Nor was it a private dispute disguised as a dispute between States, because the individual foreign creditor was confronted not by the individual German debtor but by the latter's State and its authorities as his true opponents whenever these authorities denied the specific foreign character of the debt, so that every such case became a "State affair". The Applicant countered the objection of the non-exhaustion of local remedies by arguing that the Debt Agreement, as a self-contained *lex specialis,* did not permit the application of the rule of the exhaustion of local remedies. Furthermore, pursuant to Article 17, para. 1 (*a*), of the Debt Agreement in conjunction with § 2, para. 1, of the German Law implementing the Debt Agreement, the foreign creditor had the right, but not the duty, to resort to German courts and to submit himself definitively to this jurisdiction.

In the substantive dispute concerning the question of the place of payment abroad the applicant argued in detailed observations that the conception of the place of payment within the meaning of the Debt Agreement could only be taken from the Agreement itself, and in accordance therewith the place of

payment was the place where, pursuant to the written arrangements, the creditor was actually to receive payment of his pecuniary claim, *i.e.,* in the present case Brugg (Switzerland). Moreover, the express agreement on the place of payment abroad resulted both from the document of July 31, 1931, and from the attendant circumstances.

The parties set out their contradictory legal opinions, the principal points of which have been reproduced above, in exhaustive pleadings, basing themselves on numerous decisions, legal opinions and statements of public authorities.

The question asked by some members of the Arbitral Tribunal as to how the respective debtors had effected the interest payment due on December 31, 1931, and all subsequent interest payments was answered by the parties as follows:

The Applicant submitted: The debtors Lindauer had transferred interest for the total debt of Goldmarks 300,000 in quarterly instalments to the head office of the creditor at Brugg (Switzerland) in the period from December 31, 1931, to September 30, 1933. After September 30, 1933, only the interest on the free capital part of Goldmarks 220,000 had been transferred by the debtors Lindauer in quarterly instalments directly to the head office of the creditor, while the interest on the capital part of Goldmarks 80,000 had been transferred to the creditor through the German-Swiss clearing system *via* the Conversion Office for German External Debts. The Tack firm had continued this mode of payment. They had also transferred the interest on the free capital part of Goldmarks 220,000 through their bank connection, the Deutsche Bank at Berlin, freely and directly, and the interest on the remaining part through the Conversion Office for German External Debts to the head office of the creditor. After repayment of a capital part of further Goldmarks 79,089.84 to a blocked account of the creditor with the Deutsche Bank at Berlin, interest payment on the remaining capital part of Goldmarks 220,000 had continued to be effected in quarterly instalments to the head office of the creditor. The last interest payment before the end of the war had been made on June 30, 1944. Additional interest payments which had been made had not been received by the creditor.

The Respondent submitted: No statements could be made regarding the manner of interest payment for the time prior to November 16, 1937, the day of the purchase of the land by the Kommanditgesellscahft Conrad Tack & Cie. So far as the time after November 16, 1937, was concerned, interest had been transferred either through the bank connection of the debtor or, in so far as the amounts due were not freely convertible, through the Conversion Office. The transfers had been effected in such a manner that the Deutsche Bank had received orders to transfer the transferable interest to a Swiss bank at Basle or Zurich for the account of the creditor or to pay the amounts in question to the Conversion Office.

On the merits (by five votes to four—Barandon, Wolff and von Caemmerer, Members, and Makarov, Additional Member, dissenting): that the request of the applicant must succeed. The term "place of payment" as used in Annex VII to the Agreement on German External Debts "should be inter-

preted as denoting the place where the creditor was entitled actually to receive his money, whether directly from the debtor or by transmission through the post or by any other agency". In the present case the creditor was entitled to receive payment in Switzerland. Thus it must be concluded that "within the meaning of Annex VII, I, 2 (*a*), to the Agreement on German External Debts of February 27, 1953, it was expressly agreed in the contract of July 31, 1931, between the Aargauische Hypothekenbank AG. and Herren Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the said contract was situated abroad."

I. On the question of Competence

I

Pursuant to Article 6 of the Charter of the Arbitral Tribunal (Annex IX to the Debt Agreement), the Arbitral Tribunal must, in the interpretation of the Agreement and the Annexes thereto, apply the generally accepted rules of international law. There can be no doubt that the rule of the exhaustion of local remedies *(Grundsatz der Erschöpfung der landesrechtlichen Instanzen; règle de l'épuisement des instances internes)* is also a generally accepted rule of international law and must, therefore, be applied by the Arbitral Tribunal in its decisions concerning the interpretation of the Debt Agreement and the Annexes thereto. The rule of the exhaustion of local remedies, as a generally accepted rule of international law, is applicable to the interpretation of an international treaty also in cases in which that treaty does not expressly stipulate the observation of this rule (see the criticism voiced in Guggenheim, *Lehrbuch des Völkerrechts,* Basle 1951, Vol. II, in Note 2 on p. 531, of the opinion expressed by Judge van Eysinga in his Dissenting Opinion to the decision of the Permanent Court of International Justice in the case of the *Panevezys-Saldutiskis Railway).* It is true, however, that the application of the rule of the exhaustion of local remedies may also be expressly excluded in a bilateral or multilateral agreement, which is not the case here.

The question is, however, whether in view of the internationally generally accepted content of the rule of the exhaustion of local remedies the Respondent can in the present case invoke this rule in order to prove its contention that the Arbitral Tribunal is not competent to deal with and to decide this case.

In legal text-books and decisions by the Permanent Court of International Justice and the International Court of Justice, as well as in treaty practice, the application of the rule of the exhaustion of local remedies has always been taken into consideration only in connection with a discussion of the question of the international responsibility of a State for an unlawful act *(Unrecht; L'acte contraire au droit)* committed on its territory against a national of another State and for a refusal to grant reparation of this unlawful act, *viz.,* a denial of justice *(Rechtsverweigerung; déni de justice).* The invocation of the rule of the exhaustion of local remedies as a generally accepted rule of international law is justified only if a claim is made against a State, in particular a claim for reparation or

damages, and such claim is based on the fact that a national of the State which makes the claim has been impaired in his rights in violation of international law, if the State against which the claim is made can be held responsible therefor under international law and the person whose rights have been infringed has not exhausted the remedies legally available to him in the State against which the claim is made, in order to assert the infringement of his rights.

As far as legal text-books are concerned, special reference may be made in this connection to Dionisio Anzilotti, *Corso di Diritto Internazionale* (Volume I of the complete edition of the works), Padua 1955, pp. 384 *et seqq.,* 423; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals,* London 1953, pp. 163 *et seqq.,* 170 *et seqq., 177 et seqq.;* Frede Castberg, *Folkerett,* Oslo 1948, pp. 150 *et seqq.*; Louis Cavaré, *Le droit international public positif,* Paris 1951, Volume II, pp. 270 *et seqq.,* 292 *et seqq.;* J. E. S. Fawcett in *The British Year Book of International Law,* 1954, pp. 452 *et seqq.,* Note: 'The Exhaustion of Local Remedies: Substance or Procedure?'; Paul Guggenheim, *Traité de Droit international public,* Genève 1954, Volume II, pp. 1 *et seqq.,* 12 *et seq.,* 21 *et seqq.;* Charles Cheney Hyde, *International Law,* Boston 1951, Volume II, pp. 909 *et seqq.;* Franz von Liszt, *Das Völkerrecht,* 12th edition, edited by Max Fleischmann, Berlin 1925, pp. 279 *et seqq.,* 283; Lord McNair, *International Law Opinions,* Cambridge 1956, pp. 293 *et seqq.,* 311 *et seqq.;* L. Oppenheim, *International Law,* 8th edition, edited by Sir H. Lauterpacht, London, New York, Toronto 1955, Volume II, p. 361; Alf Ross, *Lehrbuch des Völkerrechts,* German translation of the Danish original, Stuttgart and Cologne 1951, pp. 231 *et seq.,* 240 *et seqq.,* 250 *et seqq.;* Georg Schwarzenberger, *International Law,* 2nd edition, London 1949, Volume I, pp. 233 *et seq.,* 235 *et seq.;* Paul Schoen, "Haftung, völkerrechtliche der Staaten", in Strupp's *Wörterbuch des Völkerrechts und der Diplomatie,* Volume I, Berlin and Leipzig 1924; Halvar G. F. Sundberg, *Folkrätt,* Stockholm 1950, pp. 211 *et seqq.*; Alfred Verdross, *Völkerrecht,* 3rd edition, Vienna 1955, p. 308, p. 329.

Nor does a different interpretation of the rule of the exhaustion of local remedies emerge from the Judgments of the Permanent Court of International Justice cited by the Respondent in the proceeding instituted by Estonia against Lithuania concerning the *Panevezys-Saldutiskis Railway,* of the International Court of Justice in the proceeding instituted by France against Norway concerning *Certain Norwegian Loans*, or from the decision of the Arbitrator, Algot Bagge, in the dispute between Finland and Great Britain concerning the use of various *Finnish ships* during the First World War.

So far as the Lithuanian-Estonian dispute is concerned, the issue was that the Lithuanian Government was charged with having refused to recognize rights of the owners and concessionaries of the railway line Panevezys-Saldutiskis and to grant compensation for the illegal seizure and use of this railway line. Consequently, a claim for damages was made against the Lithuanian Government. The Permanent Court of International Justice decided in its Judgment of February 28, 1939, that the application submitted by the Estonian

Government was inadmissible and that the objection of the non-exhaustion of local remedies raised by the Lithuanian Government was well founded. See . . . "Publications de la Cour Permanente de Justice Internationale" Serie A/B No. 6, in particular p. 5 and p. 22.

In the dispute between France and Norway the question was whether the gold clause contained in certain loans which had been issued by the Norwegian State and by two Norwegian banks, for which the Norwegian State had assumed a full guarantee, should continue to be observed. The French Government supported this view by reasoning that the loans in question were international loans and that it followed from the nature of such loans that payments to the foreign owners of bonds of such loans had to be effected without any discrimination. The Norwegian Government, on the other hand, relied primarily on the declarations made by the litigating parties of November 16, 1946, and of March 1, 1949, which contained a restriction of the obligatory jurisdiction of the International Court of Justice. It, furthermore, invoked a Norwegian Law of December 15, 1923, by virtue of which the servicing of loans expressed in gold had been modified in a certain manner—further details are not interesting in this connection. Lastly, it also argued that the bondholders, on whose behalf the French Government thought it was justified in resorting to an international court, had not exhausted local remedies in Norway. The decision of the International Court of Justice is dated July 6, 1957. The Court considered itself not competent, in view of the declaration of the French Government of March 1, 1949, which, in the opinion of the Court, contained a reservation with regard to the obligatory jurisdiction of the Court and upon which the Norwegian Government could rely from the point of view of reciprocity. The Court, therefore, did not deem it necessary to deal with the further objections raised by the Norwegian Government. For details, see "Report of Judgments, Advisory Opinions and Orders", Judgment of July 6th, 1957; "Recueil des Arrêts, Avis Consultatifs et Ordonnances", Arrêt du 6 Juillet 1957, in particular pp. 13, 16, 17, 19 and 27.

Consequently, there is in this case no decision of the International Court of Justice concerning the applicability of the rule of the exhaustion of local remedies. It is true, however, that the Judge Sir Hersch Lauterpacht dealt with the question of the applicability of this rule in his very exhaustive Separate Opinion, which differs from the decision of the Court. With reference to the rule in question, he said: "It is a rule which international tribunals have applied with a considerable degree of elasticity". (Page 39 of the publication of the decisions of the International Court of Justice in the above-mentioned official Reports.) But whether this opinion is correct or not, the fact remains that the observations of Sir Hersch Lauterpacht refer only to the dispute submitted to the International Court of Justice in which the French Government charged the Norwegian Government with an infringement of rights and made a claim based on this alleged infringement because Norway had not treated the owners of an international loan impartially. Moreover, Sir Hersch Lauterpacht's

observations on the "elasticity" in the application of the rule of the exhaustion of local remedies do not concern the question whether and when this rule is applicable, but the question of the method of its application, *i.e.,* the question how the rule is to be applied in each case.

The dispute between Finland and the United Kingdom of Great Britain and Northern Ireland, which was decided by the Arbitrator, Algot Bagge, in 1931, concerned a claim for damages made by Finland against the United Kingdom. This claim was based on the fact that during the First World War Finnish ships had first been requisitioned by Russia and had then been taken to British ports where they were taken over by British authorities. The Finnish shipowners had requested compensation for this (see Schwarzenberger, *op. cit.* p. 235, as well as Bin Cheng, *op. cit.* p. 911, Note 9, and p. 917). In this case, too, the claim for damages was based on the contention that there had been an infringement of rights for which the State against which the action was brought was legally responsible.

It is in accord with the opinion of the various international arbitral bodies, as reflected in the above-mentioned decisions, that in the *Ambatielos* case (Greece versus the United Kingdom of Great Britain and Northern Ireland), the Commission of Arbitration which had been established pursuant to an agreement between the litigants, in its decision of March 6, 1956 (Her Majesty's Stationery Office, London, 1956, see in particular p. 27), formulated the rule of the exhaustion of local remedies as follows:

> It means that the State against which an international action is brought for injuries suffered by private individuals has the right to resist such an action if the persons alleged to have been injured have not first exhausted all the remedies available to them under the municipal law of that State.

In international treaty practice, too, the rule of the exhaustion of local remedies has always been applied only in the same sense in which legal textbooks and international decisions termed it a generally accepted rule of international law. The more recent treaties cited by the Respondent do not speak against the assumption, as remains to be shown in a different context.

But the opinions quoted by the Respondent, as they have of late been expressed in international bodies on the rule of the exhaustion of local remedies, also merely confirm that the rule can only be valid as a generally accepted rule of international law as formulated above and in connection with the responsibility of States for infringements of rights. The Respondent itself mentions that the Rapporteur of the International Law Commission of the United Nations, Garcia Amador, made his observations on the problem of the Exhaustion Rule in connection with the question of "International Responsibility". The resolution adopted at the meeting of the Institut de Droit International at Granada (April 1956) also proceeds from the assumption that a State contends "*que la lésion subie par un de ses ressortissants dans sa personne ou dans ses biens a été commise en violation du droit international*" and that in that case any diplomatic or judicial intervention is inadmissible if the national

legislation of the State which is alleged to have committed the injury provides remedies which had been available to the injured person and which would probably also have been effective and sufficient, and if and so long as the use of these remedies has not been exhausted. In connection with this resolution, reference may also be made to the *travaux préparatoires* of the Granada meeting and to the particularly illuminating remarks on the questionnaire of the Rapporteur, J. H. W. Verzijl, by the Rapporteur himself as well as by Alf Ross, Roberto Ago, Paul Guggenheim and Alfred Verdross *(Annuaire de l'Institut de Droit International,* Session de Granade 1956, pp. 14 *et seqq.,* 21 *et seqq.,* 24 *et seqq.,* 31 *et seqq.,* 47 *et seq.).*

This is not a case in which the rule of the exhaustion of local remedies, in so far as it is to be considered a generally accepted rule of international law in accordance with the above observations, could be applied.

In certain circumstances, however, the rule of the exhaustion of local remedies could also be effectively invoked in a proceeding concerning the interpretation or application of the Debt Agreement or the Annexes thereto before the Arbitral Tribunal. This would be the case if a creditor country alleged that one of its nationals had been refused the enforcement of his rights pursuant to Article 17 of the Debt Agreement before the German courts by not having his complaint entertained at all; this could then constitute a dispute which would be subject to the jurisdiction of the Arbitral Tribunal. In that, presumably purely theoretical, case the Arbitral Tribunal could only be resorted to once the creditor country had proved that its national had tried in vain, by exhausting all the remedies at his disposal, to bring an action against the debtor which was admissible under Article 17 of the Debt Agreement. If, however, the German courts have dealt with the action in due form and if only the creditor's contention that the debt due to him had a specific foreign character within the meaning of Annex VII to the Agreement has remained unsuccessful after he has exhausted all remedies at his disposal under German law, the State of which the creditor is a national could nevertheless not resort to the Arbitral Tribunal and possibly bring an action for damages against the Federal Republic. For the declaration of the German courts that a claim does not have a specific foreign character would, at the most, represent a legal error for which the Federal Republic would not be responsible under international law, and it would never be a violation of international law or a denial of justice for which the Federal Republic would have to bear the international responsibility. The present case, however, as has been said before, is not such as to make possible the application of the rule of the exhaustion of local remedies, at any rate not in so far as it has been generally accepted as a binding rule of international law in what may be termed its classical form, as described above. The Applicant has not made a claim for damages against the Federal Republic. The Applicant makes no claim whatsoever, but merely requests a decision of the Arbitral Tribunal on the interpretation and application of Annex VII in conjunction with Annex II to the Debt Agreement in a particular dispute.

In the present case, therefore, the lack of jurisdiction of the Arbitral Tribunal cannot be alleged by invoking the rule of the exhaustion of local remedies in the form more precisely defined above—and only in that form, as has been explained previously has it been recognized as a generally binding rule of international law.

The Respondent, however, as can be deduced in particular from its arguments in the oral proceedings, also tried to show that there are obvious tendencies in the more recent development of international law which amount to an extension of the applicability of the rule of the exhaustion of local remedies. In this connection, the Respondent refers in particular to the observations made by the Judge Sir Hersch Lauterpacht in his Separate Opinion to the decision of the International Court of Justice in the dispute between France and Norway concerning *Certain Norwegian Loans* of July 6, 1957, as well as to some recent treaties in which, in the opinion of the Respondent, the rule has been applied in a wider sense than hitherto. It mentions, in this connection, the Pact of Bogotá of April 30, 1948—American Treaty on Pacific Settlement—(printed in *United Nations Textbook,* Leiden 1954, p. 385), the Agreement between the Federal Republic of Germany and the Austrian Republic concerning the Facilitation of Frontier Clearance for Transport by Rail, Road and Waterways of September 14, 1955 *(Bundesgesetzblatt,* 1957, II, Vol, I, p. 582), the Agreement between the Federal Republic of Germany and the Austrian Republic concerning the Regulation of the Frontier Crossing of Railways of October 28,1955 *(Bundesgesetzblatt,* 1957, II, Vol. I, p. 599), and the Agreement between the Federal Republic of Germany and the Kingdom of Sweden concerning German Property in Sweden of March 22, 1956 *(Bundesgesetzblatt,* II, Vol. I, p. 811).

The observations by Lauterpacht to which the Respondent refers have already been dealt with above. They are also based on the opinion that the invocation of the rule of the exhaustion of local remedies is, at any rate, subject to a claim having been made by one State against another which is based on an infringement of rights. This follows also from the formulation which Sir Hersch Lauterpacht himself has given of the rule in the newly edited textbook on International Law by Oppenheim (Oppenheim-Lauterpacht, *International Law,* 8th edition, 1955, London, New York, Toronto). It is said therein on p. 361 in § 162 a:

> It is a recognised rule that an international tribunal will not entertain a claim put forward on behalf of an alien on account of alleged denial of justice unless the person in question has exhausted the legal remedies available to him in the State concerned.

In the Pact of Bogotá which, as is made clear by its official title, "American Treaty on Pacific Settlement", was a political treaty, the rule of the exhaustion of local remedies is to be found in Article 7. According to the formulation of this provision, the impression might be created that a somewhat more extensive applicability of the rule of the necessity to exhaust local remedies before taking diplomatic steps or resorting to international jurisdiction was to be

admitted in inter-American relations, as compared with the former practice of international law. In the opinion of the Arbitral Tribunal, however, this is not the case either. On the contrary, the words used in Article 7 of the Pact of Bogotá "in order to protect their nationals" make it clear that the American States, too, which concluded the Pact, proceeded from the assumption that it is possible to invoke the rule of the exhaustion of local remedies only if the State which wishes to invoke this rule is held responsible for an unlawful act committed on its territory and if claims resulting therefrom are being made against it. Nor is it to be assumed that precisely when concluding a purely political treaty concerning the general relationship of the American States to one another, such as the Pact of Bogotá, the contracting Parties had the intention of creating an extension, binding on the Contracting States, to the field of applicability of the rule in question.

Nor can it be deduced from the Agreements which the Federal Republic recently concluded with Austria and Sweden that international law is about to admit the possibility of applying the rule of the exhaustion of local remedies also in cases in which no claim based on an infringement of rights is made against the State which wishes to invoke this rule. The Treaties cited merely contain the provision customary in recent treaties that in the case of differences of opinion between the Contracting Parties resort shall be had to an arbitral tribunal, and they lay down details as to the composition of this arbitral tribunal. The Treaties do not say anything about the question under what further conditions the arbitral tribunal can be resorted to in the case of disputes concerning their interpretation and application.

Nor is it evident from international decisions that there might be tendencies in international law from which an application of the rule of the exhaustion of local remedies more extended than hitherto practised could be concluded. It is certainly true that the International Court of Justice has, with regard to the establishment of its jurisdiction, always adopted a very cautious attitude towards the objection that local remedies had not been exhausted. This attitude, however, does not concern the substantive prerequisites for the application of the rule of the exhaustion of local remedies in accordance with the general principle of international law, but merely the question whether, assuming the applicability of this rule, the local courts had, in fact, rendered a final decision or not (see Sir Hersch Lauterpacht, *The Development of International Law by the International Court,* London 1958, pp. 100 to 102). Consequently, the International Court of Justice also remains of the opinion that the above-mentioned rule can be applied only "in the field of State responsibility" for an international unlawful act (see Sir Hersch Lauterpacht, *op. cit.,* p. 350).

But even if the recent development of international law showed the tendencies alleged by the Respondent with regard to the application of the rule of the exhaustion of local remedies, this would nevertheless not mean that a generally accepted rule of international law has already evolved which the Arbitral Tribunal, too, would have to take into account when rendering its decisions.

Under Article 6 of its Charter (Annex IX to the Debt Agreement), it is bound only by the generally accepted rules of international law. The rule of the necessity to exhaust local remedies before the opening of diplomatic negotiations or the resort to international jurisdiction is valid as a generally accepted rule of international law only in the formulation contained in the resolution of the Institut de Droit International as adopted at the Granada meeting in April 1956, which was also quoted by the Respondent. (See *Annuaire de l'Institut de Droit International,* 1956, p. 358.)

If, therefore, the resort to the Arbitral Tribunal in disputes like the present is not subject to a prior exhaustion of the remedies which were available for the settlement of the civil suit forming the basis of the dispute, it is not necessary to examine what possibilities the creditor would have had of enforcing its claims against the debtor; whether, *e.g.,* the special requirements for a resort to the German courts by a foreign creditor laid down in Articles 15 and 17 of the Debt Agreement existed in the present case. Nor is it relevant, therefore, whether, as the Applicant contends, the debtor made an offer of settlement pursuant to Article 15 of the Debt Agreement and was willing to recognize the specific foreign character of the debt in question provided the indemnity to which it is entitled under §§ 63 *et seqq.* of the German Law implementing the Debt Agreement and which is to be paid by the *Land* [of] Baden-Württemberg was secured, or whether, as the Respondent contends, an agreement between creditor and debtor regarding the terms of settlement had not, in fact, been reached.

II

If, therefore, the objection of the Respondent which is based on the rule of the exhaustion of local remedies fails, the question must now be examined whether any other circumstances following from the Debt Agreement itself might exclude the jurisdiction of the Arbitral Tribunal in the dispute pending before it.

The decisive point, consequently, is what, according to the wording, sense and context, Article 28, para. (2), in conjunction with Article 28, para. (5), of the Debt Agreement provides with regard to the jurisdiction of the Arbitral Tribunal. The jurisdiction of the Arbitral Tribunal pursuant to Article 28, para. (3) (jurisdiction of the Arbitral Tribunal to decide questions regarding Annex IV which are of fundamental importance for the interpretation of that Annex and which are submitted to it by any Party to the Agreement), and pursuant to Article 28, para. (4) (jurisdiction of the Arbitral Tribunal in appeals from decisions of the Mixed Commission), may be disregarded in this connection.

According to Article 28, para. (2), in conjunction with Article 28, para. (5), of the Debt Agreement, the Arbitral Tribunal has exclusive jurisdiction in all disputes between two or more of the Parties to the Agreement regarding the interpretation or application of the Agreement, or the Annexes thereto, which the Parties are not able to settle by negotiation, unless a dispute concerns solely

the interpretation or application of an Annex to the Agreement if an arbitral body established pursuant to such Annex is competent to decide the question of interpretation or application concerned.

The jurisdiction of the Arbitral Tribunal under these provisions is exclusive. This means that, for a decision in disputes between two or more of the Parties to the Debt Agreement regarding the interpretation or application of the Agreement or the Annexes thereto, no resort can be had to other international arbitral bodies, such as the International Court of Justice at The Hague or the Arbitration Tribunal established under Article 9 of the Convention on Relations between the Three Powers and the Federal Republic of Germany of May 26, 1952 (in the version of the Protocol of October 23, 1954). The term "exclusive" in Article 28, para. (2), of the Agreement has obviously no other meaning.

According to Article 28, para. (2), of the Debt Agreement, the dispute must be one which the Parties concerned have not been able to settle by negotiation. By means of the above-mentioned exchange of Notes, an attempt has been made to settle by negotiation a dispute which had arisen between the Swiss Confederation and the Federal Republic of Germany out of an individual case regarding the interpretation of Annex VII to the Debt Agreement. Originally, the dispute concerned only the question whether claims for a balance of purchase money must also be considered "loans or advances resulting from financial transactions" within the meaning of the provision contained in Section I, para. 2, of Annex VII to the Debt Agreement or whether they must at least be placed on the same footing as such loans or advances. In the *Note Verbale* of the Foreign Office of July 22, 1957, however, it was then said that the Federal Minister of Justice had not further examined this point at issue; for he was of the opinion that the specific foreign character of the claim of the Swiss creditor had to be negatived if only for the reason that no place of payment abroad had been expressly agreed in the relevant contract of sale of July 31,1931. The Swiss Embassy did not reply to this *Note Verbale* but instead submitted to the Arbitral Tribunal the Application of October 19, 1957, concerning which a decision must now be reached. The Respondent thinks that the diplomatic exchange of views as to the question what the requirement of an express agreement on a place of payment abroad must be taken to mean, according to the sense and purpose of Annex VII to the Debt Agreement, might possibly have led to agreement if it had been continued. The Arbitral Tribunal, however, is not of the opinion that, in order to establish its competence to decide a dispute between two or more of the Parties to the Agreement, diplomatic negotiations must always have reached a point where the litigating Parties have stated expressly that they have not succeeded in settling the dispute by negotiation. It suffices, on the contrary, that it can be assumed from the circumstances that a continuation of the diplomatic exchange of letters will not make possible the settlement of the dispute. This is the case here. As follows from the subsequent attitude of the litigants, the legal opinion held by the Federal Minister of Justice with regard to the meaning of the clause contained

in Annex VII to the Debt Agreement concerning the necessity of an express agreement on a place of payment abroad, which was communicated to the Swiss Embassy in the *Note Verbale* of the Foreign Office of July 22, 1957, was of such fundamental importance precisely for the Swiss creditors that it was not to be expected that the Swiss side would eventually adopt this legal opinion. It is thereby established, within the meaning of Article 28, para. (2), or the Debt Agreement, that the dispute which has arisen between the Parties out of the present case between individuals concerning the interpretation of Annex VII to the Debt Agreement could not be settled by negotiation.

If the Arbitral Tribunal is to be competent to decide a dispute between two or more of the Parties to the Debt Agreement, the subject of the dispute, according to Article 28, para. (2), of the Debt Agreement, must be the interpretation or application of the Debt Agreement or the Annexes thereto. This could also apply if a claim is made against the Federal Republic of Germany on the basis of the Debt Agreement, *e.g.,* on the basis of Article 2 or Article 10. This would, in fact be a case in which there is a dispute concerning the application of the Debt Agreement.

However, as follows also from Article 28, para. (2), of the Debt Agreement, the jurisdiction of the Arbitral Tribunal is not limited to disputes in which a claim of some kind is made against the Federal Republic of Germany. But, irrespective of the cause of the dispute and irrespective of whether a claim is made against the Federal Republic of Germany or not, the Arbitral Tribunal is, in any event, competent, only if the interpretation or application of the Agreement or the Annexes thereto is in question.

The dispute to be decided in this case concerns primarily a question of the interpretation of the Debt Agreement and the Annexes thereto within the meaning of Article 28, para. (2), of the Agreement, *viz.,* a question of the interpretation of Annex VII in conjunction with Annex II. The question for decision is what this Annex means when it provides that, for the recognition of the specific foreign character of a claim in cases like the present, a place of payment abroad must have been expressly agreed in the original written debt arrangements. It is only in the second place, *i.e.,* after the question of interpretation as formulated above has been decided, that the question arises whether an express agreement on a place of payment abroad has been made within the meaning of this decision in the relevant contract of sale of July 31, 1931. It is, therefore, not correct that the real subject of the dispute is merely the interpretation of a contract under private law and that, as the Respondent contends, the Arbitral Tribunal is thus not competent because it could not be its task to decide a dispute which, by its nature, is a dispute between two private parties, *viz.,* between a Swiss bank as creditor and a German firm as debtor, but which the Applicant had clothed in the appearance of an international dispute between States by the Application it submitted to the Arbitral Tribunal. On the contrary, in the circumstances of the case this is a dispute between States

which can be decided only by the Arbitral Tribunal pursuant to Article 28, para. (2), of the Debt Agreement.

Nor can it be deduced from Article 28, para. (5), of the Debt Agreement that the Arbitral Tribunal is not competent to decide the present dispute. The said provision excludes the jurisdiction of the Arbitral Tribunal only if a dispute concerns exclusively the interpretation of an Annex to the Debt Agreement and if an arbitral body established pursuant to such Annex is competent to decide the question of interpretation concerned. It is true that the dispute has arisen out of a private dispute which was concerned with the claim of a Swiss creditor falling under the settlement provided in Annex II to the Debt Agreement. However, the dispute does not concern a question of the interpretation of provisions of Annex II itself, but a question of the interpretation of Annex VII which (the Respondent is quite right on that point) also constitutes a Sub-Annex supplementing Annex II. At the same time, however, it is a Sub-Annex which supplements Annexes I and IV, as is shown by the editorial remark on the letter addressed by the head of the German Delegation for German External Debts, Hermann J. Abbs, and the chairman of Negotiating Committee B at the Conference on German External Debts, N. Leggett, to the chairman of the Tripartite Commission on German External Debts of November 21, 1952. The provisions of Annex VII are, therefore, relevant for the settlement of Goldmark loans of German municipalities under Annex I to the Debt Agreement (see Sub-Annex D to Annex I) as well as for the settlement of debts expressed in Goldmarks or in Reichsmarks with a gold clause or a gold option, which fall under Annex II and Annex IV. Moreover, as results from their wording and context, the Annexes to the Debt Agreement cannot be interpreted separately but must be interpreted in the light of their interrelation and in conjunction with the Debt Agreement itself so that this will, in many cases, restrict the jurisdiction of the arbitral bodies provided [for] in the various Annexes. Annex VII, in particular, concerns several Annexes, *viz.*, as has already been mentioned, Annexes I, II and IV, and it is, consequently, also of importance for the whole Debt Agreement. Therefore, this is not a case envisaged in Article 28, para. (5). On the contrary, the Arbitral Tribunal is competent without restriction under Article 28, para. (2).

For this reason, too, it is therefore irrelevant whether the attitude of the debtor towards the creditor after the coming into force of the Debt Agreement must be considered to reflect a readiness in principle to settle the claim on the basis of Annex II to the Debt Agreement.

It also follows therefrom that the Arbitral Tribunal is competent to decide the present dispute irrespective of whether the Arbitration and Mediation Committee under Annex II has been established or not.

If it were otherwise, there would be no judicial body the resort to which could eliminate the possibility of conflicting decisions on the interpretation of Annex VII by the arbitral bodies established pursuant to Annexes II and IV. Nor would there be anything to prevent the Arbitration and Mediation

Committee competent under Annex II from answering the question of the specific foreign character of a claim owned by a foreign creditor in the negative, while the Mixed Commission competent under Annex IV affirms the question of the specific foreign character of another claim, owned by the same creditor, although this claim had been created in the same manner and in the same conditions as the claim the character of which had to be decided by the Arbitration and Mediation Committee. Such differences in the appreciation of identical legal situations would result, in particular, from the fact that the line of demarcation between claims which must be settled under Annex II and those which are subject to settlement under Annex IV has been drawn more or less arbitrarily in Article III of Annex II and in Article 2 of Annex IV, and in many cases depends on purely external circumstances (amount of the original debt, period of the loan). However, once conflicting decisions have been rendered by the two arbitral bodies competent under Annexes II and IV, respectively, it would no longer be possible to restore uniformity. It is true that a Party to the Debt Agreement could appeal to the Arbitral Tribunal from a decision pursuant to Article 31, para. (7), of the Debt Agreement if it were of the opinion that the Mixed Commission was wrong in assuming the specific foreign character of the claim, by basing this appeal on the ground that the decision concerned a question of general or fundamental importance. If the Arbitral Tribunal then confirmed the decision of the Mixed Commission, the decision of the Arbitral Tribunal would, pursuant to Article 28, para. (10), of the Debt Agreement, thenceforth be binding also on the Arbitration and Mediation Committee competent under Annex II to the Debt Agreement. However, the decision of the latter, which is final and binding on the private litigants according to Article IX, Section 1, para. (2), first sentence, of Annex II to the Debt Agreement, would not have been annulled.

The conflict between the two decisions of the Mixed Commission and the Arbitration and Mediation Committee would, therefore, continue to exist. It must therefore be possible, by means of a resort to the Arbitral Tribunal, to prevent conflicting decisions by the arbitral bodies in question concerning the interpretation of an Annex to the Debt Agreement even before such decisions have been pronounced, thus guaranteeing a uniform and identical treatment of a disputed question of interpretation. This was obviously also the tendency in the discussions which the Tripartite Commission for German Debts had with the German Delegation for External Debts in London in the period from September 16, 1952, to February 26, 1953, regarding the formulation of the various provisions of the Debt Agreement (see the minutes of the meetings of December 12, 1952, No. 1 *et seqq.,* p. 112, and of February 11, 1953, No. 9 *et seqq.,* p. 171, as well as No. 32 *et seqq.,* p. 173).

However, even if it were assumed that in the present case only the interpretation of one Annex to the Debt Agreement, *viz.,* the interpretation of Annex VII in conjunction solely with Annex II, was at issue, the Arbitral Tribunal would be competent to pronounce a decision on the Application

submitted by the Swiss Confederation. At the institution of the proceeding, the Arbitration and Mediation Committee under Annex II was undoubtedly not yet established. The Respondent submitted only shortly before the beginning of the oral proceedings that it had now been established. According to the principle of *perpetuatio fori,* the jurisdiction of the Arbitral Tribunal in the present case remains unaffected by the establishment, after the institution of the proceeding, of the Arbitration and Mediation Committee under Annex II to the Debt. Agreement to which the creditor might have resorted. In the *Nottebohm* case (dispute between Liechtenstein and Guatemala) the International Court of Justice made the following observations on the validity of the principle of *perpetuatio fori* in its decision of November 18, 1953 *{Reports of Judgments, Advisory Opinions and Orders* [1953, p. 111]—see in particular pp. 122 and 123):

> . . . the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits. An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.

This refers to the principle, which is generally valid, at any rate in proceedings before international arbitral bodies, that, once the competence of the arbitral body has been established by the submission of the application for a decision, extrinsic facts and circumstances no longer affect this competence. This principle must also be valid for the competence of the Arbitral Tribunal in the present case, which has already been established by the submission of the Application of the Swiss Confederation. Therefore, the invocation by the Respondent of Article 28, para. (5), of the Debt Agreement is unfounded also in this respect.

Nor is it correct that, as the Respondent maintains, a jurisdictional rule, as deduced from Article 28 of the Debt Agreement according to the above observations, would establish the competence of the Arbitral Tribunal also for the decision of disputes between individuals, for which the Debt Agreement precisely envisages special arbitral bodies, *viz.,* those of Annexes II and IV. Nor can it be said that the Debt Agreement does not, under any circumstances, offer a choice between a creditor bringing an action against his debtor before the competent ordinary German court or the arbitral bodies provided in the Debt Agreement for disputes between creditors and debtors and the creditor country as such, *i.e.,* as a Party to the Debt Agreement, making the case the subject of a dispute between States before the Arbitral Tribunal. It is true that in general there will be no such alternative. According to the text and meaning of Article 28 of the Debt Agreement, the Arbitral Tribunal is, of course, not qualified to decide disputes between creditors and debtors. However, in certain circumstances a dispute may exist which either the private parties concerned

would have to resolve by resorting to one of the arbitral bodies provided in Annexes II and IV to the Debt Agreement (in the case of a resort to the Mixed Commission pursuant to Article 16 of Annex IV in conjunction with Article 31 of the Debt Agreement, possibly with the participation of the Government of the creditor country or of the debtor country or both) or which would have to be taken to the Arbitral Tribunal as a dispute between Parties to the Debt Agreement. This would be the case in particular if, as in the present dispute, the question at issue is not how a contract is to be interpreted in the light of an Annex to the Debt Agreement, but two Parties to the Debt Agreement have entered into a dispute regarding the interpretation of a provision which is contained in several Annexes; that is, in particular if, again as in the present case, the point at issue is the interpretation of Annex VII, which contains several provisions supplementing other Annexes. In such cases it is possible, pursuant to Article 28, para. (2), of the Debt Agreement, for a Party to the Agreement to resort to the Arbitral Tribunal, primarily in order to secure uniform decisions by the arbitral bodies which are competent for the interpretation or application of the Annexes in question. In those cases, the dispute need not first be submitted by the private party to one of the arbitral bodies provided for in the relevant Annex. On the contrary, such a case will then call for a decision in a dispute between two Parties to the Debt Agreement as defined in Article 28, para. (2), of that Agreement, although it will have arisen out of a dispute between individuals, which will be the rule, at least when the decision of the Arbitral Tribunal is requested concerning the interpretation of Annexes to the Debt Agreement. But even if a Party to the Debt Agreement formulated its Application for a decision by the Arbitral Tribunal in a theoretical form, *i.e.,* without naming the private parties concerned, the dispute would have arisen out of an individual case or a group of individual cases and the Arbitral Tribunal would have to examine the disputed question of the interpretation of the Annexes in the light of this individual case or group of individual cases, according to the jurisdiction conferred upon it by the Debt Agreement.

Lastly, it is also not correct that, as the Respondent contends, the provision of Article 28, para. (11), of the Debt Agreement, according to which the Arbitral Tribunal can be requested to render advisory opinions regarding the interpretation or application of the Debt Agreement (except with respect to the interpretation or application of Article 34 of the Agreement), also reflects the obviously highly restrictive view of the Debt Agreement in the question of the jurisdiction of the Arbitral Tribunal. This contention fails to recognize the relation existing between the provisions of paras. (2) and (11) of Article 28 of the Debt Agreement. The fact that the Arbitral Tribunal is competent to decide disputes between two or more of the Parties to the Debt Agreement not only in the case of international disputes in the traditional sense, follows already from the above observations. Disputes between Governments which have arisen out of private disputes can also be the subject of the jurisdiction of the Arbitral Tribunal and, as has already been remarked, will normally be its subject if the dispute, as defined in Article 28, para. (2), of the Debt Agreement, concerns the

interpretation or application of the Debt Agreement or the Annexes thereto, and if Article 28, para. (5), of the Debt Agreement does not exclude the jurisdiction of the Arbitral Tribunal. The request that the Arbitral Tribunal render a non-binding advisory opinion pursuant to Article 28, para. (11), will be made only as long as there is, as yet, no dispute between two or more of the Parties to the Debt Agreement, in particular, *e.g.,* if a Party to the Debt Agreement makes this request in order to come to a conclusion on the question whether it wishes to raise an issue of interpretation or application which it will then submit to the Arbitral Tribunal for its decision.

For these reasons the Arbitral Tribunal unanimously declares: The Arbitral Tribunal is competent to adjudicate upon the present dispute.

2. *On the Merits*

The question which has been submitted by the Swiss Federal Council for decision by the Tribunal, is whether, within the meaning of Section I, 2 (*a*) of Annex VII to the Debt Agreement, it was expressly agreed under the original written debt arrangements *(i.e.,* the contract of sale of July 31, 1931) that the place of payment is situated abroad.

This question is twofold:

(a) What meaning is to be assigned to the words in Annex VII "it was expressly agreed under the original written debt arrangements that the place of payment . . . is situated abroad ?"

(b) Is this requirement fulfilled in the contract of sale between the Aargauische Hypothekenbank and Max and Moriz Lindauer?

In order to answer question *(a)* it is necessary first to ascertain what method of interpretation should be employed. The problem is of especial relevance in connection with the meaning to be assigned to the term in Annex VII, I, 2 *(a)* "place of payment" (in the German text "*Zahlungsort*", in the French text "*que le paiement serait fait à l'étranger*") which has a significance varying according to the rule of interpretation which is applied.

It has been contended by the Respondent, that the correct method is to find the proper law applicable to each contract and then to interpret the above-cited provision of Annex VII in accordance with this law.

It is the opinion of the Tribunal that the use of this method presents certain grave inconveniences. In the first place, contracts of precisely the same wording would be interpreted differently according to the law which is applicable to them. In the second place—and this is a more serious objection—there would in every case be a preliminary problem requiring solution before the criteria contained in Section I, 2 *(a)* of Annex VII could be applied, namely, the ascertainment of the proper law of the contract. This is often a matter of great complexity giving rise to protracted legal proceedings. Indeed, the very method to be employed for its ascertainment has been the subject of conflicting legal theories and judicial decisions. On the one hand it has been laid down that the law which the parties intended to apply must be sought for; on the

other hand it has been decided that the proper criterion is what law the parties, as reasonable men, should have intended to apply, had they addressed their minds to the question. That law has been held to be the law of the country with which the contract has the more substantial links. See "The Significance of *The Assunzione*" by G. C. Cheshire, *(British Year Book of International Law,* 1955/56, page 123). The solution of this problem might require a resort to one of the arbitral bodies set up under the Agreement or to a German court or other tribunal, and might give rise to a subsidiary dispute as to what tribunal is competent to decide the question of the proper law of the contract.

The possibility of such controversies arising would frustrate the object which the parties to the agreement contained in Annex VII had in mind, which was to provide a guide to the easy recognition of a claim with a specific foreign character as referred to in Annexes I, II and IV of the Debt Agreement. For these reasons, preference should be given to a method of interpretation which can be simply and uniformly applied.

The rule commonly applied to the interpretation of Treaties should be applied to the interpretation of Annex VII. According to the practice of the International Court of Justice, words and phrases are to be given their normal, natural, and unstrained meaning in the context in which they occur.

The practice of the International Court of Justice coincides with the resolution of the Institut de Droit International passed at Granada at the Session of April 1956 *(Annuaire,* p. 349):

Article premier

1) L'accord des parties s'étant realisé sur le texte du traité, il y a lieu de prendre le sens naturel et ordinaire des termes de ce texte comme base d'interprétation. Les termes des dispositions du traité doivent être interpretés dans le contexte entier, selon la bonne foi et à la lumière des principes du droit international.

2) Toutefois, s'il est établi que les termes employés doivent se comprendre dans un autre sens, le sens natural et ordinaire de ces termes est ecarté.

The word "*Zahlungsort"* in the German text of Annex VII is not to be found in sections 269 and 270 of the German Civil Code *(Bürgerliches Gesetzbuch,* BGB). According to the dictionary "*Der Grosse Brockhaus",* the word "*Zahlungsort"* signifies "*Erfüllungsort für eine Geldschuld"* (the place of liquidation of a money debt).—Section 270, first paragraph, of the German Civil Code provides: "*Geld hat der Schuldner im Zweifel auf seine Gefahr und seine Kosten dem Gläubiger an dessen Wohnsitz zu übermitteln."* The English translation is: "In case of doubt the debtor has to send the money at his own risk and expense to the creditor at the latter's residence."—However, the fourth paragraph of Section 270 provides: "*Die Vorschriften über den Leistungsort bleiben unberhürt."* In English: "The provisions relating to the place of performance remain unaffected."

The fourth paragraph of Section 270 signifies that the provisions of Section 269 of the German Civil Code concerning the place of performance of obligations in general, "*Leistungsort",* are to be applied when nothing to the contrary has been agreed. It is not necessary to examine the wording of Section 269 as according to German jurisprudence and nearly unanimous German theory the word "*Leistungsort"* means the place of performance also for money debts, where nothing else has been agreed, and is the place of the residence of the debtor, also when the residence of the creditor is at another place. According to German law, however, this does not signify that the creditor has got what is due to him and that the money debt has been extinguished if the creditor has not actually received the money. If through no fault of the creditor he does not actually receive the money, the debtor has to pay again. However, the debtor is not liable in damages for delay or failure on the part of his bank or the postal service in transferring the money for him to the creditor, since, strange as it may look, the bank and the post are not, according to German conception, considered as the debtor's representatives (agents) in the abovementioned cases.

What is of importance for the Tribunal is that, in spite of the particular technical meaning of the word "*Leistungsort",* even under German law the creditor is not considered as having actually received what is due to him and the debt is therefore not extinguished until the creditor has actually received the money or, in case of postal or bank transfers, until his account has been finally credited with the remittance. (Palandt: *Bürgerliches Gesetzbuch,* 17th edition, p. 221, Erman: *Handkommentar zum Bürgerlichen Gesetzbuch,* 2nd edition, 1958, p. 333).

The word "*Zahlungsort"* in the German text of Annex VII is not necessarily synonymous with the word "*Leistungsort"* used in Sections 269 and 270 of the BGB. The word "*Leistungsort"* is a more general term than the word "*Zahlungsort"* —the latter concerning only money debts—and has in German law a particular and absolutely technical meaning.—Some German jurists are even of the opinion that according to Section 270 of the German Civil Code the place of performance ("*Leistungsort")* of money debts may be at the residence of the debtor; but that this does not affect the "place of payment" or "place of fulfilment" ("*Zahlungsort"* or "*Erfüllungsort"),* which is determined by the residence of the creditor, because no payment has been finally executed and the debt extinguished before the creditor has actually received the money due to him (either in cash or by final statement of credit from the creditor's bank or his post office). (Franz Leonhard: *Schuldort und Erfüllungsort* (1907), and *Allgemeines Schuldrecht des BGB* (1929), p. 232; Arwed Koch: *Die Allgemeinen Geschäftsbedingungen der Banken* (Jena, 1932), p. 241.)

On the other hand, in English and American law the term "place of payment" is not a term of art; it is interpreted in its natural meaning, namely, the place where the creditor is entitled actually to receive payment.

The difference between the German and the English and American conceptions is well illustrated by the following passages from pp. 174 and 175 of the second edition of *The Legal Aspect of Money, with Special Reference to Comparative, Private and Public International Law,* by F. A. Mann:

> 2. It is not unlikely that the meaning to be attached to the term "place of payment" may not be the same in all countries. Although there is no direct English authority on the point, it is suggested that in English law the place of payment is the place where, according to the express or implied terms of the contract, payment ought to be made, not the place where payment is actually made. Moreover, in English law the conception "place of payment" connotes the place at which the creditor is entitled actually to receive the money due to him, not the place from which the money is to be dispatched to him or at which any other step preparatory to payment must be taken.
>
> It it is desired to ascertain the equivalent, in a foreign legal system, of the place of payment in the English sense, it is, accordingly, necessary to ask where, in the eyes of the foreign law, the creditor is entitled to the money contractually due to him. It would be dangerous to stop short at what the foreign law calls the place of payment.
>
> It is the function, not the terminology, that matters. Thus, German law provides that the place of the debtor's residence at the time of the contract usually is the place of performance, but the debtor must transmit the money at his risk and expense to the place where the creditor resides. This, therefore, is the place where, under German law, the creditor is entitled to be paid, and is the equivalent of the English conception of the place of payment. It is irrelevant that German law calls it the place of destination or delivery and describes the place of the debtor's residence at the time of the contract as the place of performance.

The following passage from Nussbaum, "*Money in the Law, National and International",* at pages 147 *et seqq.* is also relevant:

> The Central European Codes therefore distinguish between the place of performance ("*Erfüllungsort")* or more specifically place of payment *("Zahlungsort"),* which in case of doubt is the place of the debtor's domicile, and the "place of destination" ("*Bestimmungsort")* which ordinarily is the place of the creditor's domicile. Normally the debtor has to "pay" at his own domicile with the concomitant obligation of sending the money at his cost and risk to the creditor's domicile. By this artificial device the law favours the debtor with regard to jurisdictional and Conflict-of-Laws requirements, but favours the creditor with regard to the risks of payment. The price paid for this solution, which to a certain extent may be explained historically, is a complete distortion of the place-of-payment conception, nothing being actually "paid" at the place since the real payment is made at the place of "destination". This has led to considerable confusion.
>
> While the Latin legal systems, by contrast with the Central European, have refrained from overemphasizing the place-of-payment concept, they still cling to the traditional rule that the debtor's domicile is in doubtful cases

> the proper place of payment. This adherence to tradition, however, has not prevented the French *Cour de Cassation* from imposing upon the debtor the risk involved in sending money to a creditor abroad.
>
> In more recent times both common law and civil law courts have resorted, in Conflict-of-Laws situations, to the criterion of the place of payment. The results reached are frequently, if not in the majority of cases, unsound. As long as money was actually transported for outside payments, the place of payment carried a certain weight. But under modern banking conditions this is no longer true. Suppose a London debtor has to pay a New Yorker in dollars. If for one reason or another (probably jurisdictional) London was stipulated as the place of payment the debtor will send the creditor a check on London or make a remittance on a London bank unless he simply pays by check on New York.
>
> All [things] considered, the place of payment is in our day no more than a matter of postal or banking facilities. While in some situations it furnishes a helpful criterion, its value has been greatly exaggerated in the practice and doctrine of private international law.

The French text of Annex VII, I, 2 *(a),* reads "*qu'il ait été expressément convenu dans les accords initiaux écrits relatifs à la dette que le paiement serait fait à l'étranger . . . ".*

Since Article 1247 of the French Civil Code lays down that, in the absence of a contrary agreement, a debt is payable at the residence of the debtor, although the *Cour de Cassation* has imposed upon the debtor the risk of sending the money to a creditor abroad (Cass., March 30, 1925, DP 1927 I 168), it might be argued that the term employed in the French text has a technical meaning. Nevertheless, the words of the French text of Annex VII, "*le paiement serait fait à l'étranger",* are equally susceptible of the natural interpretation that the payment should actually be made and received abroad.

The parties have discussed the rules of law in various other countries also concerning the place at which the debtor is obliged to pay his money debt in the absence of any agreement. Since, however, the application of the Swiss Government is necessarily based upon an allegation of the existence of an agreement on this point, these rules are irrelevant except in so far as they may be thought to throw light upon the meaning of the word "payment". It is therefore sufficient to mention that, whereas in Germany, France and Belgium, in the absence of agreement the so-called place of performance of a money debt is fixed as the debtor's residence, in England, Switzerland, the United States of America, the Netherlands, Italy, Greece, Hungary and the Scandinavian countries the place of payment is the place where the creditor resides.

It is noteworthy that the International Law Association at its 47th Conference held at Dubrovnik in 1956 considered a Revised Draft Convention concerning the payment of foreign money liabilities in which the term "place of payment" is used in several Articles. In order to eliminate the ambiguity attaching to this term the draftsmen inserted Article 10, which reads as fol-

lows: "The place of payment referred to in the preceding Articles shall be the place where payment is due."—The French text of this Article reads: "*Le lieu de paiement au sens des articles qui précèdent est le lieu où le paiement est dû.*"—This definition does not, however, cure the ambiguity since there is no definition of "the place where payment is due". This was recognized by the Committee on Monetary Law, since in paragraph 18 of their Report they write:

> The words "place of payment" are ambiguous in that they may contemplate the place where payment ought to be made or the place where payment is in fact made. Art. 10 suggests that the expression should be given the former meaning.
>
> *(Report of the Forty-Seventh Conference of the International Law Association,* Annexes I and II, pp. 287 to 289.)

The Tribunal is of the opinion that the natural meaning of "place of payment", *"Zahlungsort", "que le paiement serait fait à l'étranger",* contained in Annex VII is to be preferred to the technical and artificial meaning advanced by the Respondent. This is even more evident when it is borne in mind that Annex VII does not use the technical term *"Leistungsort"* found in Sections 269 and 270 of the German Civil Code.

The Tribunal is confirmed in this opinion when it examines both the origin of Annex VII to the Debt Agreement as it emerges from the preparatory documents to the Debt Agreement and its Annexes which were published in connection with the Agreement, and the legal position of the creditors as it was at the time of the London Conference. But although the parties to this case have referred to what they claim occurred during the negotiations between representatives of debtors and creditors at the London Conference and during the subsequent special negotiations resulting in Annex VII, the Tribunal does not feel that in interpreting Annex VII it can give any evidential value to such assertions, based as they are on no published record, even should the parties agree as to their accuracy.—At any event, in so far as the so-called material referred to bears on the substance of such negotiations it permits of no compelling conclusion to the effect that the terms *"Zahlungsort",* "place of payment", *"que le paiement serait fait à l'étranger"* were to have the narrow and technical meaning asserted by the Respondent and were thus to lead to an extraordinary and inequitable denial of "specific foreign character" to claims [such] as the one discussed. The whole history of the origin of the London Debt Agreement also contradicts any such narrow interpretation.

By Article XVI (16) of Military Government Law No. 63 (Conversion Law) of June 27, 1948, it was provided that, in principle, Reichsmark claims (which for the purpose of that Law were defined to include claims expressed in Goldmarks) were to be so converted into Deutsche Mark claims that the debtor should be obliged to pay to the creditor one Deutsche Mark for every ten Reichsmarks due. But by Article XV (15) of that Law, as amended by Articles 1 and 2 of Law No. 46 of the Allied High Commission *(Bundesanzeiger* No. 31 of February 14, 1951), it was provided, in effect, that the provision for con-

version should not apply to debts owing to United Nations nationals whenever a creditor refused to agree to payment in accordance with Article XVI (16). Accordingly, at the date of the Conference on German External Debts held in London from February to August 1952, the United Nations creditors arrived at the conference table with their claims to be paid in accordance with the gold clause unimpaired by the provisions of the Conversion Law. The fact that the present case concerns a Swiss claim and not one of a United Nations national is irrelevant since the plan of the London Conference for the settlement of external debts comprised the totality of these debts (except those owed to Eastern Europe), and the principle underlying this plan was that of non-discrimination (see Article 8 of the Debt Agreement).

The Conference set up among other committees four negotiating Committees to deal with the following categories of debts (see paragraph 8 of the Report of the Conference which is reproduced as Appendix B to the Debt Agreement):

Committee A.—*Reich* debts and other debts of public authorities;

Committee B.—Other medium and long-term debts;

Committee C.—Standstill debts;

Committee D.—Commercial and miscellaneous debts.

The recommendations of these Committees, which were appended to the Report of the Conference adopted on August 8, 1952, appear as Annexes I to IV to the Debt Agreement. That part of the Report of the Conference which deals with the gold clause appears in paragraph 30 and reads as follows:

> 30. On the question of the gold clause in general the Tripartite Commission informed the Conference that, as part of the arrangements agreed on in order to make a comprehensive settlement of the German debt problem possible, the Governments of France, the United Kingdom and the Unites States of America had decided that, in so far as the German debt settlement was concerned, gold clauses should not be maintained but might be replaced by some form of exchange guarantee.
>
> With respect to the Young Loan, they of course regarded it as essential that the equality of treatment for the different issues of that Loan provided for under the loan contract should be maintained. The representatives of the European bondholders have expressed their regret at the decision to depart from the contractual right of the bondholders of this international Loan to payment in their own currencies on a gold basis. They have inserted in the "Agreed Recommendations for the Settlement of *Reich* debts and debts of other public authorities" (Appendix 3) the provision there included solely in view of this Governmental decision.
>
> Corresponding provisions had been included in other reports where appropriate.'

These "corresponding provisions" are those contained in paragraphs (1), (2) and (3) of Sub-Annex D to Annex I (dated November 19, 1952), paragraphs

2 and 3 of Article V of Annex II and Articles 6 to 8 of Annex IV, which cover both Foreign Currency Debts with gold clauses and German Currency Debts with gold clauses. With regard to the latter, the principle was accepted that such debts (claims) and mortgages, expressed in Goldmarks or in Reichsmarks with a gold clause, as had a specific foreign character should be converted into Deutsche Mark at the rate of 1 Goldmark, or 1 Reichsmark with a gold clause, = 1 Deutsche Mark. The Annexes continue:

> The definition of the criteria constituting the specific foreign character of the above indebtedness shall be the subject of further negotiation. Both sides reserve their position as to the question in which cases and in which way the above principle can be implemented . . .

The present dispute involves a loan which falls within the provisions of Annex II. Article V of that Annex prescribes the terms of settlement, and paragraph 1 thereof states: "There shall be no reduction in the outstanding principal amount." This statement would have been more accurate if it referred to the outstanding "nominal" amount, since by agreeing to the non-application of provisions in original contracts calling for repayment in terms of gold or currency of equivalent gold value the London Debt Conference in effect resulted in a substantial loss to some foreign creditors.

Article V of Annex II deals with two principal categories of debts. In respect of "*Foreign* Currency Debts with Gold Clauses" it provides that

> . . . debts expressed in gold dollars or gold Swiss francs . . . shall be computed on the basis of 1 currency dollar equalling 1 gold dollar and 1 currency Swiss franc equalling 1 gold Swiss franc . . .

and that in the case of other non-German currencies with gold clauses

> the amounts due shall be payable only in the currency of the country in which the loan was raised . . . the amount due being computed as the equivalent at the rate of exchange when the amount is due for payment of a sum in U.S. dollars "reached" by converting the amount of the obligation expressed in the currency of issue into U.S. dollars at the rate of exchange ruling when the loan was raised . . .

provided, however, that the amount of currency issue so reduced shall not be less than

> if it were computed at the rate of exchange current on 1st August 1952.

In all non-German currency debts with gold clauses, therefore, the principle of repayment in depreciated foreign currencies (including U.S. dollars and Swiss francs) is established regardless of the original gold clauses, and equality of treatment is maintained.

The other category of debts covered by Article V is "*German* Currency Debts with Gold Clauses". Here a similar principle is followed, namely, that such of these debts as have "specific foreign character" shall be settled on the basis of 1 Deutsche Mark (which is the same as 1 currency Deutsche Mark) for each Goldmark or Reichsmark with a gold clause, just as one depreciat-

ed currency dollar and one depreciated currency Swiss franc were made the equivalent, for settlement purposes, of one gold dollar and one gold Swiss franc respectively. But since debts expressed in Goldmarks or Reichsmarks with a gold clause do not *prima facie* possess foreign character, special safeguards had to be introduced to ensure that such German currency debts be genuine external debts. These safeguards were established in paragraph 3 of Article V of Annex II, which provides that German currency debts with gold clauses must have a "specific foreign character" to entitle the creditor to repayment at the rate of 1 Deutsche Mark for each Goldmark or Reichsmark with a gold clause. (The Deutsche Mark, though, is of lesser value than were the Goldmark or Reichsmark.)

The criteria for determining the "specific foreign character" of debts covered by Annexes I, II and IV are set forth in Annex VII, which incorporates the agreement reached on November 21, 1952, after a month of negotiations between the German Delegation for External Debts and a delegation of British, American, Swiss and Netherlands creditor representatives.

The task of the negotiators was not an easy one; its purpose was, as far as possible, not to place foreign creditors of foreign loans expressed in German currency with a gold clause in a more unfavourable position than creditors of foreign loans expressed in non-German currencies with a gold clause, provided, of course, that there was no *mala fide* acquisition of rights. It cannot be assumed that the Signatories of the London Debt Agreement could have intended to single out for discriminatory further loss foreign creditors having claims expressed in German currencies with a gold clause.

In this respect the Tribunal believes the Respondent has been led astray by a wrong interpretation of the German word "*Zahlungsort*" in the German text of Annex VII. Considering only German law, the word "*Zahlungsort*" in the German text may well conjure up in the mind of a German jurist the special technical significance with which German law and custom have endowed the word "*Leistungsort*". As shown above, however, the Tribunal regards that interpretation as too limited and not consistent with the clear purpose of the relevant Annexes to the London Debt Agreement.

In this connection it should also be mentioned that the Governments Signatory to the Debt Agreement made amongst others the following declarations in its Preamble:

> . . .
>
> Considering that, for about twenty years, payments on German external debts have not, in general, conformed to the contractual terms . . . and that the Federal Republic of Germany desires to put an end to this situation;
>
> Considering that . . . the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America were prepared to make important concessions with respect to . . . their claims for post-war economic assistance . . . on condition that a satis-

factory and equitable settlement of Germany's pre-war external debts was achieved;

Considering that such a settlement of German external debts could be achieved only by a single overall plan which would take into account the relative positions of the various creditor interests, the nature of various categories of claims and the general situation of the Federal Republic of Germany;

. . .

The application of the principle of interpreting treaties according to the natural sense of the words is therefore particularly appropriate to this case, where the natural meaning seems to coincide with the intention of the parties as deduced from the circumstances of the case. For all these reasons the Tribunal is of the opinion that the terms "place of payment", "*Zahlungsort*", "*que le paiement serait fait à l'étranger*", should be interpreted as denoting the place where the creditor was entitled actually to receive his money, whether directly from the debtor or by transmission through the post or by any other agency.

There remains to be decided the question whether, in the contract of sale of July 31, 1931, it was "expressly agreed" that the place of payment, as defined above, was situated abroad.

Much has been said on behalf of both Parties as to the effect to be given to the terms "expressly agreed", "*ausdrücklich festgelegt*", "*expressément convenu*", as used in Annex VII. On the one hand it is contended that these words are equivalent to "*expressis verbis*" and that the agreement must therefore state in express words that the place of payment is abroad. On the other hand it is contended that it is sufficient that there should be a written agreement which clearly and unambiguously establishes that the place of payment is situated abroad.

To apply the term "*expressis verbis*" to the English text would do violence to the meaning. The English words are "expressly agreed", not "agreed in express terms" (the equivalent of "*expressis verbis*").

Moreover, there are decisions of the highest German Courts to the effect that the term "*ausdrücklich*" as used in Section 244 of the German Civil Code requires only unambiguous evidence of the intention of both parties.

Thus in the case of *D. Bank & Disk. Ges., Filiale D.* v. S. *Rh. Giro-Zentrale und Prov.-Bank* reported at p. [384] of volume 153 (1937) of the "*Reichsgerichtsentscheidungen in Zivilsachen*", the German Supreme Court held, following earlier decisions of the same Court, that where the plaintiff had opened a credit in foreign currency in favour of the defendant "by way of loan" ("*leihweise*"), that expression implied "effective" repayment in foreign currency. Consequently, the effective repayment in foreign currency had in the opinion of the Court been "expressly stipulated for" ("*ausdrücklich bedungen*") within the meaning of Section 244, para. 1, of the German Civil Code, and it was not necessary for the word "effective" to be used.

In a case decided by the Federal Supreme Court (*Bundesgerichtshof)* on January 25, 1954 (Lindenmaier-Möhring No. 5 to Section 275 of the German Civil Code), the plaintiff bank had obtained from its client, the defendant, a promissory note (*eigener Wechsel)* for the like principal amount in the same effective currency as the amount of the credit granted to the plaintiff bank by a London bank. This procedure was laid down in paragraph 7 (1) *(a)* (i) of the German Credit Agreement of 1939 made between a committee representative of banking, commercial and industrial concerns in Germany, and the Reichsbank and the Deutsche Golddiskontbank on the one hand, and several committees representative of banking institutions in the United States of America, Belgium, England, France, Holland and Switzerland on the other hand. The Court of Appeal had held that, although the German Credit Agreement only affected the relations of banks to each other, yet it should be applied *mutatis mutandis* to the obligation of the defendant towards the plaintiff as there was a specific reference to the Credit Agreement. This reference was a sufficient contractual stipulation that the loan was to be repaid in foreign currency. This being so, the payment in foreign currency had been expressly made a part of the contract.

In its judgment the Federal Supreme Court said:

> According to the jurisprudence of the *Reichsgericht,* which is adopted, repayment of a credit in foreign currency will only be "expressly stipulated for" if the intention of both parties as to an effective payment in foreign currency is unambiguously evident to a special degree. In this connection the word "effective" need not be used (RGZ 158, 383 (385) and note). The Court of Appeal regards the reference to the Credit Agreement in particular as constituting such evidence. That can legally not be contested. The Court of Appeal has stated that the arrangement which is contained in the Credit Agreement, and was binding only on the banks which were parties to it, was also applicable *mutatis mutandis* to the obligation of the defendant, whose attention has specifically been called to the Credit Agreement. Thus, it bases itself decisively upon the fact that the credit was granted, according to the written confirmation, "within the scope of the Credit Agreement" and therefore considers that the payment in £-currency was expressly stipulated for. This conclusion is logically possible.

The English case of *Charlton* v. *Lings* (1868) L.R.C.P. 374 deals with the word "expressly", the Court stating:

> The difficulty, if any, is created by the use of the word *"expressly".* But that word does not necessarily mean "expressly excluded by words" . . . The word "expressly" often means no more than plainly, clearly, or the like, as will appear on reference to any English dictionary.

The words "expressly agreed", "*ausdrücklich festgelegt",* and "*expressément convenu"* are words found in an international multilateral agreement. As pointed out earlier, the usual practice in interpreting words and phrases in a treaty is to give them a reasonable, as distinguished from a restricted or technical, meaning.

In this connection, one may refer to Hackworth's *Digest of International Law* (Washington 1927) on page 223 of Volume V, where it is said:

> . . . courts have usually held that where treaties are open to two constructions, one restricting the rights which may be claimed under it and the other enlarging those rights, the more liberal interpretation is to be preferred, bearing in mind the purpose of the treaty and the fact that diplomatic relations between nations require the utmost good faith.

"Reasonable" as distinguished from "restricted or technical" meanings of the English words "expressly agreed" and their French equivalent can be found in dictionary definitions. Among other definitions, the *Oxford English Dictionary* (Oxford 1933) defines "express" as "definite, unmistakable in import" and the word "expressly" as "in direct or plain terms; clearly, explicitly, definitely, distinctly, positively". Bouvier's *Law Dictionary* (West Publishing Co., 1914) defines "express" as "stated or declared, as opposed to implied. That which is made known and not left to implication". *Larousse Universel* (Paris, 1948) defines "*expressément*" both as "*en termes exprès*" and "*d'une façon nette, précise, claire*".

The Tribunal is of the opinion that the language of Annex VII becomes unclear or obscure only when there is imported into the meaning of the word "*Zahlungsort*" in the German text the unique and restricted definition given under German law to the word "*Leistungsort*". There was no "express" or even implied agreement in the contract of July 31, 1931, as to "*Zahlungsort*" in the strictly German sense of the word "*Leistungsort*", but there was "express" agreement defined as "clear", "definite", "unmistakable in import" as to the place where the creditor was entitled actually to receive the money due to him.

The Tribunal finds that the terms "expressly agreed", "*ausdrücklich festgelegt*" and "*expressément convenu*" as used in Annex VII mean agreed "clearly" or "definitely" or "distinctly" or "unmistakable in import", and that to fulfil the requirement of Annex VII in this respect it was not necessary for a place of payment to have been in specific terms geographically located in the contract of July 31, 1931. It is sufficient that the place where the creditor was entitled to receive the money due to him was clearly and unmistakably set forth in the text of the contract as being situated abroad.

The Aargauische Hypothekenbank is incorporated under Swiss law, having its head office in Brugg, Switzerland, and with branch offices elsewhere in Switzerland. Neither at the date of the contract nor thereafter has the bank had a branch office in Germany. Whenever the Aargauische Hypothekenbank is mentioned in the contract by name (twice), the name is coupled with the phrase "with its head office at Brugg" ("*mit Hauptsitz in Brugg*"); elsewhere the bank is called the vendor. Article 5 of the contract provides for payment of principal and interest to be made to the vendor *(an die Verkäuferin)* The Respondent has asserted that this calls for payment *to* a person but not *at* an agreed place, and that the words "with its head office at Brugg" ("*mit Hauptsitz in Brugg*") are significant only in so far as they state "the address to which the

debtor had to transmit the amounts due 'free of charge' ", that is, that Article 5 establishes "to whom, but not where the debtor has to discharge his obligation 'free of charge' ".

In the light of its interpretation of Annex VII the Tribunal does not accept this contention. If the debtors are obliged to make payments *to* the *"Aargauische Hypothekenbank mit Hauptsitz in Brugg"* they are no less obliged to make those payments *in* Switzerland, since that is the only country where the Aargauische Hypothekenbank is located. In this case the "to whom" and "where" are clearly connected. If it was "expressly agreed" under the 1931 contract "to whom" the payments due were to be made—and that cannot be disputed—it was no less "expressly agreed" that the "place of payment", namely, the place at which the creditor was entitled actually to receive payment, was in Switzerland. Moreover, the German debtor could not, without the consent of the Swiss creditor, have discharged his liability by making a payment into an account of the creditor in a German bank even assuming the creditor had such an account, since this would leave the creditor with nothing but a foreign claim (Enneccerus, *Recht der Schuldverhältnisse* 1954, § 61, II; v. Tuhr-Siegwart, *Allgemeiner Teil des Schweizerischen OR,* Vol. II, p. 439).

Finally, it should be noted that according to a formal statement by the creditor the Reichsmark interest payments made by the debtors from 1931 to 1944 were transferred with the authorization of the German foreign exchange authorities and paid to the creditor in Brugg in Swiss francs.

For these reasons the Arbitral Tribunal, by five votes to four, declares: that, within the meaning of Annex VII, I, 2 *(a),* to the Agreement on German External Debts of February 27, 1953, it was expressly agreed in the contract of July 31, 1931, between the Aargauische Hypothekenbank AG. and Herren Max and Moriz Lindauer that the place of payment of the Goldmark claim created by the said contract was situated abroad.

PART XXII

Arbitral Commission on Property, Rights and Interests in Germany established by the Convention on the Settlement of Matters Arising out of the War and the Occupation, signed at Bonn on 26 May 1952

Commission d'arbitrage sur les biens, les droits et les intérêts en Allemagne établie en vertu de la Convention sur le règlement de questions issues de la guerre et de l'occupation, signée à Bonn le 26 mai 1952

Decisions of the Arbitral Commission on Property, Rights and Interests in Germany

Décisions de la Commission d'arbitrage sur les biens, les droits et les intérêts en Allemagne

Case of the Government of the Kingdom of Greece (on behalf of Apostolidis) *v.* the Federal Republic of Germany, decision of the Second Chamber of 11 May 1960*

Affaire concernant le Gouvernement du Royaume de Grèce (au nom d'Apostolidis) c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 11 mai 1960**

Convention on Settlement of Matters Arising out of the War and the Occupation—war damages—conditions for compensation and restitution.

Proceedings of the Commission—question of its competence to review the decision of a domestic court—impossibility to increase the claim for compensation in the middle of the proceedings.

Treaty interpretation—teleological interpretation—resort to the preparatory work—discretion of the Commission to resort to the preparatory work and to assess the evidential value of the preparatory work for disclosing the intent of the parties—precedence of *leges speciales* over general and customary international law—interpretation of treaty cannot be contrary to *leges speciales*—reference to antecedent procedures—reasonable meaning.

Compensation claim—claim of compensation for removed property—compensation only in respect of property that should have been restituted after identification—identification viewed as a legal concept applied in the restitution procedure—compensation considered to be a substitute for a failed restitution.

Convention pour le règlement des questions résultant de la guerre et de l'occupation—dommages de guerre—conditions pour le dédommagement et la restitution.

Procédures de la Commission—question de sa compétence pour réviser la décision d'une cour nationale—impossibilité de réévaluer à la hausse une requête en dédommagement en cours de procédure.

Interprétation des traités—interprétation téléologique—recours aux travaux préparatoires—le recours aux travaux préparatoires et l'appréciation de la valeur

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* Reproduced from *International Law Reports* 34 (1967), p. 219.

** Reproduit de *International Law Reports* 34 (1967), p. 219

probante de ceux-ci pour établir l'intention des parties sont laissés à la discrétion de la Commission—prévalence des *leges speciales* sur le droit international général et coutumier—référence aux procédures antérieures—sens raisonnable.

Requête en dédommagement—requête de dédommagement pour les biens saisis—seuls les biens qui auraient dû être restitués après identification peuvent être dédommagés—l'identification est considérée comme un concept juridique qui s'applique dans la procédure de restitution—le dédommagement est considéré comme substitut d'une restitution manquée.

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By complaint of December 6, 1956, filed with the Registry of the Arbitral Commission on December 12, 1956, the Greek firm of Alexandra P. Apostolidis, mines and minerals, of Volos in Greece (called the claimant), through its representative, the lawyer Dr. Constant, requested review of decision GR52–3486/56 of the *Bundesamt für aussere Restitutionen* [Federal Office for External Restitution] (called Bundesamt) of November 8, 1956, which was served upon it on November 10, 1956, for the purpose of obtaining from the Federal Republic of Germany compensation for the value of the chrome ore removed during the war and not restituted.

By letter of December 14, 1956, received at the Registry of the Commission on December 18, 1956, the Royal Embassy of Greece in Germany forwarded to the Registry of the Commission a copy of the pleading constituting the initial complaint of the claimant, pointing out that the decision GR52–3486/56 of November 8, 1956, of the Bundesamt was served upon the Greek Government (called the complainant) by *note verbale* of the Federal Ministry of Foreign Affairs on November 23, 1956, and declaring that the Greek Government "adopts the said appeal in full and makes it its own".

As to the merits, the pleas of the complainant are formulated in the pleading of the firm of Apostolidis of December 6, 1956, and in the application of the Royal Greek Embassy of December 14, 1956, with the modifications contained in the letter of April 17, 1957, from the representative of the applicant according to which it is requested:

> That the Government of the Federal Republic of Germany be ordered to pay to the firm of Alexandre P. Apostolidis, Volos, Greece, as claimant, compensation for:
>
> (1) 40,000 tons of chrome ore at a price of 63 U.S. Dollars per ton plus legal interest;
>
> (2) alternatively, 5,246 tons of chrome ore at a price of 63 U.S. Dollars per ton, plus legal interest.

At the end of the proceedings, the complainant expressly confirmed the conclusions set forth in its Reply of November 1, 1957, and requested the Commission to:

(1) dismiss the objections of the Federal Government as inadmissible and not well founded;

(2) exclude from the discussions in the present case the papers and documents produced by the Federal Government which relate to the *travaux préparatoires* of the Bonn/Paris Convention;

(3) declare admissible the claims of Apostolidis and of the Greek Government;

(4) allow the claim on its merits.

The defendant requested the rejection of the claim.

A. *Facts.*—(2) The facts on which the claim is based are the following:

The firm of Alexandre P. Apostolidis at Volos owns two chrome mines which are situated in Greece. During the occupation of this country by German forces in April 1941, these mines were requisitioned by the Occupying Power. The management of the enterprise was entrusted to a German mining engineer and supervised by the German authorities. The Greek owner of the firm was deprived of the right to exploit his mines and to dispose of their products; the exploitation was effected for the account of the German *Reich,* and the chrome was delivered to various German industrial enterprises. The price of the ore was fixed by German offices and was scarcely sufficient to cover the cost of the mining operation. The head of the firm of Apostolidis was forced to leave the headquarters of his firm at Volos and had no further connection with the mines until the occupying forces evacuated the country in November 1944.

The claimant states that, during the period of requisition, more than 40,000 tons of chrome ore of diverse qualities were removed from its mines, approximately 20,000 tons from each of them. At the end of hostilities, 5,931 tons of ore were still in Germany, distributed among various firms (claimant's application of December 6, 1956, page 3). The claimant fixes the total of the chrome ore to be restituted at 5,246 tons. In its opinion, this ore is of Greek origin, and it asserts that this entire amount was identified as being the property of the firm of Apostolidis. In view of the well-known inadequacy of the raw material supply in Germany at the end of the war, it must be taken for certain that the ore which could not be restituted was utilised by German industry.

Basing its opinion on the claims which the complainant addressed to the Allied Authorities which during the occupation of Germany were in charge of restitution of property removed during the war from the territories occupied by German forces, the Arbitral Commission holds that the amount in question actually totals approximately 4,000 tons of chrome ore, 3,931.245 tons, to be exact. This figure is based on the more precise data contained in details in the application of the claimant and which can be considered as corresponding to the facts.

The complainant and the claimant have computed the amount in the three following claims:

(1)	Claim 163/7012			3,050 tons
(2)	Claim 1055/7015 from which are to be deducted for		2,189.974 tons	
	(a) restitution	424.980 tons		
	and			
	(b) seized by the French	1,314.974 tons		
	Total		1,739.954 tons	
			balance	450.020 tons
(3)	Claim 590/14–15/R		689.315 tons	
	from which are to be deducted for restitution		258.090 tons	
			balance	431.225 tons
			Total	3,931.245 tons

To obtain the figure of 5,246 tons, the claimant adds 1,314.974 tons of chrome ore seized by the French authorities to the 3,931.245 tons indicated above which makes a total of 5,246.219 tons.

(4) In fact, a thorough examination of the various claims submitted leads to the following:

(a) Claim 163/7012 covering 3,050 tons of chrome ore was submitted by the Greek Restitution Mission to the Allied Occupation Authorities on June 28, 1948. Pursuant to General Order No. 6 of Military Government in Germany, the Gesellschaft für Elektrometallurgie [Electric Metallurgy Company] at Weisweiler had reported on April 30, 1947, that it had received this quantity of ore during the war, that is to say after October 28, 1940 (records of the *Bundesamt,* p. 35). But by letter of October 13, 1948, it opposed the restitution claim, stating that the 3,050 tons comprised two items: one of 2,019 tons delivered by the firm of Possehl, of Lübeck, in three lots, the first of 369, the second of 58 and the third of 1,565 tons; the other of 1,031 tons delivered by Eisenerz G.m.b.H. [Iron Ore Limited] of Berlin (records of the *Bundesamt,* pp. 31 and 35), in two lots, one of 403 and the other of 628 tons.

The firm of Possehl asserted that the chrome ore which it had received came from the firm of Apostolidis in execution of normal contracts voluntarily concluded by the Greek firm with the German firm which freed it from the obligation to restitute (letter of February 2, 1949, to the Greek R.D.R. Mission, Annex 10 to claimant's application).

The origin of the ore acquired by Eisenerz G.m.b.H. at Berlin cannot be determined with certainty. According to a letter of December 14, 1948 (records of the *Bundesamt,* p. 47) from this firm to the Gesellschaft fur Elektrometallurgie the ore came from three different sources in Greece, namely the Union Minière [Mining Union], the firm of Scalistieri and the firm of Apostolidis; the destruction of the archives of Eisenerz G.m.b.H. by air raids during the

war prevents it from stating in detail the quantities of ore which it imported. Consequently, only part of the 1,031 tons possessed by this firm came from the mines of the firm of Apostolidis; the exact amount is not known and can no longer be ascertained.

On November 29, 1948, the 3,050 tons the subject of claim 163/7012, were reduced to 1,662 as a consequence of the utilisation of the chrome for the benefit of German industry as authorised by the Allies. In a letter from the Ministry of Economy at Düsseldorf to the *Bundesamt* of May 17, 1956, it is stated that, according to a communication of November 29, 1948, from the Gesellschaft für Elektrometallurgie at Weisweiler, the chrome ore located was stored in the following dumps:

at Weisweiler	810 tons
with the firm of Krauss at Cologne	391 tons
with the firm of Neske at Duisburg	461 tons
Total:	1,662 tons

This figure included the 403 tons coming from Eisenerz G.m.b.H.; the rest had been acquired by the firm of Possehl and came thus from the firm of Apostolidis (records of the *Bundesamt,* p. 25).

According to the investigation report of the Reparation Deliveries and Restitution Division, Detmold (called R.D.R. Division, Detmold) of December 4, 1948, part of the claimed quantities was identified, at most 1,662 tons; it is observed therein that the ore came from normal imports executed in continuation of pre-war deliveries, and that the Greek claim was contested (records of the *Bundesamt,* p. 49).

(b) Claim 1055/7015 was submitted by the Greek Restitution Mission by letter of August 31, 1948, and covered 2,189.974 tons of chrome ore, distributed in three items between the different western zones of occupation of Germany: the first of 425 tons, the second of 450 tons and the third of 1,314 tons.

By letter of November 13, 1948, to the German Restitution Office the Gesellschaft für Elektrometallurgie raised objections and declared that only the items of 425 and 450 tons fell within the restitution claim. The first item of 425 tons was of Greek origin and had been imported by Eisenerz G.m.b.H. of Berlin; the second item of 450 tons came from Macedonia and had been imported by Wacker G.m.b.H. of Munich. The purchases were made on a normal commercial basis and were only the continuation of imports made before the war. These two items were deposited in dumps with another quantity of Bulgarian chrome ore amounting to 37 tons in round figures making a total of 912.633 tons of mixed chrome ore in possession of the firm of Johann Krauss of Cologne.

As to the item of 1,314 tons, it had been shipped, with 195 tons of chrome of a different origin, on lighters which were sunk in the Rhine off Mayence in the spring of 1945; the ore had been subsequently recovered, however, by the

French Military Government which seized it; thus it has not been the subject of identification.

(c) Claim 590/14–15/R was first submitted on May 14, 1948, by the Greek Military Mission to the R.D.R. Division, Detmold, for an amount of 689.315 tons of chrome ore (records of the *Bundesamt,* p. 65). Pursuant to General Order No. 6, the Farbenwerke Bayer [Bayer Dye Factories] had reported in 1946 that they had acquired a total of 589.213 tons of this ore divided in two items: one of 329.569 tons from Wacker G.m.b.H. of Munich, the other of 259.644 tons from Eisenerz G.m.b.H. of Berlin.

After the subsequent communications from this firm, by letter of November 2, 1948 (records of the *Bundesamt,* p. 66), the item of 329.569 tons was of Bulgaro-Macedonian origin, and only the item of 259.644 tons came from Greece. The firm submitted a new rectification of its declarations in January 1949, asserting that the first item was of Yugoslav origin (application of the claimant, p. 127, and Reply of October 12, 1957, p. 30).

(5) The decisions taken by the Allied Occupation Authorities in respect of these three claims show differences:

(a) As regards claim 163/7012, the R.D.R. Division, Detmold, decided to reject it entirely on the ground that the acquisition of the chrome ore was only the continuation of business relations which had already been established between the sellers and buyers before the occupation of Greece by the German army. This decision was notified to the Greek R.D.R. Mission on December 13, 1948, and confirmed by the R.D.R. Branch, Restitutions, Düsseldorf, by letter of November 8, 1949, to the Greek R.D.R. Mission (records of the *Bundesamt,* pp. 50 and 51).

(b) As regards claim 1055/7015, the British Occupation Authorities first decided on December 6, 1948, to reject the restitution claim of the Greek Government, on the ground that this was also a case of pre-war business relations; but the complainant having submitted new evidence, this decision was suspended. Finally, on September 13, 1949, after a new investigation of the matter, the R.D.R. Division, Detmold, granted the authority for release of approximately 425 tons which had been identified on November 25, 1948, and which were covered by the Greek claim 1055/7015 (records of the *Bundesamt,* pp. 60 and 61). The negative decision of December 6, 1948, was overruled, and on the same day the German Restitution Office was informed of the reasons for this second decision. This lot was delivered at Hamburg between November 15 and 18, 1949.

According to the investigation report, the item of 450 tons was Yugoslav ore and that of 1,314 tons was claimed by Yugoslavia; it was observed, however, that this amount of ore had been sunk at Mayence in 1945, then removed by the French Authorities; the authority for release of September 13, 1949, does not contain any express decision concerning these two items, and it does not appear from the other documents of the file that any decision was taken in respect of these two items.

(*c*) As regards claim 590/14–15/R, it formed the subject during the proceedings before the Allied Occupation Authorities of an investigation report of January 13, 1949 (records of the *Bundesamt,* p. 67) concerning 689.315 tons of chrome ore and bears the notation "not identified "and the observation that there are considerable stocks of chrome ore, which are stored together with ore of other origin. It is stated there that I.G. Farben reported, pursuant to General Order No. 6, two lots of chrome totalling 589.213 tons, and that doubtless 329,569 tons are of Yugoslav origin, and not restitutable to Greece. The rest, *i.e.,* 259,744 tons, is of Greek origin, but it is impossible to establish how this amount was imported, all relevant documents having been lost as a result of war damage in Berlin. The said firm asserts, however, that it purchased this ore in the normal course of business and that the importer obtained from the Greek exporter telegraphic confirmation that prior to the war substantial sales of chrome ore had been concluded. These were thus normal imports in continuation of pre-war business relations. It is not possible to establish how Greece arrived at the figure of 689.315 tons as stated in its claim.

On the basis of this investigation report, the authority for release was granted on September 13, 1949, for 259.644 tons considered identified and covered by the Greek restitution claim 590/14–15/R. The authority expressly points out that "the remaining quantities are not of Greek origin" (Records of the *Bundesamt,* p. 68).

In this connection, the R.D.R. Division, Detmold, addressed to the German Restitution Office on September 13, 1949, a communication similar to that concerning case 1055/7015 (records of the *Bundesamt,* p. 69).

(6) The compensation claim, which was first submitted to the Allied Occupation Authorities in Germany, was then filed with the *Bundesamt* at Hamburg. On November 8, 1956, the *Bundesamt* confirmed the decisions of the Allied Occupation Authorities in respect of the three claims submitted by the Greek Government and by the firm of Apostolidis itself, which claimed restitution of the removed property or compensation.

Accordingly, it decided in the three cases to reject the claim for restitution of removed property because the claimed property does not fall within the categories listed in Article 1 of Chapter Five of the Settlement Convention.

The *Bundesamt* also rejected the claim for compensation in the three cases for the following reasons:

(a) As to claim 163/7012, the chrome ore had been identified in part, but this identification necessarily involved only the 1,662 tons which, according to the letter of the Gesellschaft für Elektrometallurgie at Weisweiler of November 29, 1948, still existed when the Allied Occupation Authorities based their negative decision on the finding that the Greek items had been imported in the course of normal business transactions. No new evidence having been produced, in application of Article 3, paragraph 3, of Chapter Five of the Settlement Convention, the *Bundesamt* held that it could not reach any other decision.

(b) As to the claim 1055/7015, the *Bundesamt* stated that the lot of 425 tons had already been restituted to Greece in execution of the authority for release of September 13, 1949; it refused to allow the submissions of the Greek Government in respect of the lots of 450 tons and 1,314 tons, not only because these goods had not been identified in Germany, but also because the investigations made by the Allied Occupation Authorities had revealed that this ore was not of Greek origin.

(*c*) As to the last claim 590/14–15/R, the *Bundesamt* found that 259.644 tons had already been restituted to Greece and that it had already been established that the remaining quantity was not of Greek origin.

The negative decision on the claim was contested by the complainant Government as well as by the claimant both of which applied to the Arbitral Commission for a review of the decision.

The central issue of the dispute was the interpretation of Article 4, paragraph 1, of Chapter Five of the Convention on the Settlement of Matters Arising out of the War and Occupation, 1952–1954, in other words, the conditions under which compensation should be paid if restitution became impossible. According to the said provision, claims for restitution gave rise to claims to compensation only if the property, which was removed by Germany from countries occupied by her during the war and which formed the subject of a restitution claim, had been identified in Germany but, before return to the party entitled to it, disappeared for one of the reasons enumerated in Article 4, paragraph 1. Part of the chrome ore (1,259 tons) the restitution of which had been duly claimed was identified in Germany, but its restitution later became impossible. The Federal Republic of Germany must pay compensation for this ore to the complainant. All other claims for compensation were unfounded and, therefore, dismissed.

The Commission said:

B. *Procedure.*—(7) The Greek Government, through its Embassy at Bonn, submitted to the *Bundesamt* on October 26, 1955, an application bearing the number 52 in which it is expressly mentioned that it concerns "app. 4,000 tons of chrome", "property of a firm A. Apostolidis, Volos". It also refers expressly to the former applications 163/7012 (June 28, 1948), 1055/7015 (August 31, 1948) and 590/14–15 (May 14, 1948) which correspond to the three claims listed in the statement of facts.

This application was filed within the time-limit of six months after the entry into force, on May 5, 1955, of the Settlement Convention, as required by Article 4, paragraph 3, of Chapter Five, and it requested restitution of the property of the firm of Apostolidis, alternatively, payment of compensation. On April 14, 1956, the Embassy of Greece, referring directly to the property of the firm of Apostolidis at Volos, forwarded to the *Bundesamt* a memorandum dated March 28, 1956, which was accompanied by long lists of shipments of

chrome ore of this firm to Germany during the years 1942 and 1943 (records of the *Bundesamt,* pp. 10 to 20).

The compensation claims had been submitted by the Greek Government even before the entry into force of the Settlement Convention, namely by letter of October 14, 1949, of the Greek R.D.R. Mission to the R.D.R. Division, Detmold (records of the *Bundesamt,* p. 85). Thus the Greek Government is unquestionably entitled to litigate the present case, first before the *Bundesamt,* and then before the Arbitral Commission, pursuant to Article 4, paragraph 3, and to Article 7, paragraphs 2 and 3 (first sentence), of Chapter Five of the Settlement Convention. The competence of the Arbitral Commission to decide on the present application for review of the decision of the *Bundesamt* of November 8, 1956, is unquestionable and has not given rise to any controversy between the parties to the case.

(8) The proceedings before the Commission are characterised by the fact that they were divided in two parts and gave rise to two actions.

(a) The first application was submitted by the firm of Apostolidis, for it was on its representative, the lawyer Dr. Constant, that the decision of the *Bundesamt* had been served on November 10, 1956 (records of the *Bundesamt,* pp. 74 and 106). The application for review of this decision, dated December 6, 1956, and dispatched on December 8, was not received at the Registry of the Commission until December 12, 1956, after the expiry of the time-limit of thirty days as laid down in Article 7, paragraph 3, of Chapter Five of the Convention (Rule 23 of the Rules of Procedure).

The defendant raised a preliminary objection of preclusion in its Answer of June 5, 1957, by reason of the belated receipt of the application for review of the firm of Apostolidis.

In the same pleading, it raised a second preliminary objection contesting the capacity of the firm of Apostolidis to sue, on the ground that the firm cannot be considered a "party concerned" within the meaning of Article 7 of Chapter Five of the Settlement Convention, and that, moreover, only the Greek Government had been a party to the proceedings before the *Bundesamt.*

(b) The second application was submitted by the Greek Government after the decision of the *Bundesamt* had been served upon it through the Federal Ministry of Foreign Affairs on November 23, 1956; the application dated December 14, 1956, was filed with the Registry of the Commission within the time-limit prescribed by the Settlement Convention, *i.e.,* on December 18, 1956; it contains the following declaration:

> The Royal Embassy of Greece declares that the Greek Government, concurring wholly in the complaints contained in the appeal in question (that of the firm of Apostolidis) against the above-mentioned decision (of the *Bundesamt)* adopts the said appeal in full and makes it its own.
>
> Capetanides
> Ambassador of Greece

In its pleadings of June 5, 1957, the defendant extended its preliminary objections to this appeal, which it considered to be irregular as to form and which it requested be rejected as inadmissible.

(9) The three preliminary objections of preclusion, of claimant's incapacity to sue and of defect in form, which were raised by the defendant, gave rise to an exchange of lengthy pleadings between the parties.

By Order of September 9, 1957, the Commission decided to join the said preliminary objections to the merits, subject to the right of the Commission, provided by Rule 62 of its Rules of Procedure, to decide separately one or more of the issues raised by the parties.

Before considering the merits of the case, it is advisable to inquire whether these preliminary objections can be accepted at all; the Commission holds that it must first examine the one concerning the invalidity as to form of the application submitted by the Greek Government on December 18, 1956.

The unusual feature of this proceeding, namely the reference to and adoption as its own of the legal action of a private person, is to be explained by the fact that the Rules of Procedure of the Arbitral Commission had not been fully drafted at that date, and that they did not enter into force until April 1, 1957.

But the declaration contained in the letter from the Greek Government of December 14, 1956, is not only, as the complainant maintained in its Reply of August 28, 1957 (p. 137), an application of Article 11, paragraph 3, of the Charter of the Commission which provides that "any government agent shall be authorized to present orally and in writing arguments and submissions in cases to which a national or resident of his State is a party," a provision which is repeated in Rule 51 of the Rules of Procedure. It has much more far-reaching consequences because of the implied and declared will of the Greek Government and constitutes a truly independent claim which incorporates that of the firm of Apostolidis.

It implicitly has this character for it cannot be presumed that the Greek Government intended to subordinate its claim to that of its national to the point of sharing all its risks so that the barring of the national's claim could be pleaded against the Government. On the contrary, it is found that the Greek Government intervened in order to avoid this risk, which proves that it really had the intention of not making its claim dependent on that of the firm of Apostolidis.

It has the character of an independent claim because of the declared will of the Greek Government, which,

> by taking up the case of one of its subjects and by resorting to . . . international judicial proceedings on his behalf, . . . is in reality asserting its own rights—its right to ensure, in the person of its subjects, respect for the rules of international law *(P.C.I.J.,* Series A, No. 2, p. 12, *Mavrommatis Case,* Judgment of August 30, 1923).

The Greek Government clearly demonstrated its intention to become a party to the case. In its Reply of August 28, 1957 (p. 11), it declared that the contents of the claim of the firm of Apostolidis have become "an integral part of its own claim which must consequently be considered to contain the same text as the claim to which it refers". A proceeding having been carried on before the Commission over several years, this Government once more confirmed this point of view during the oral proceedings of January 20, 1959, through its agent who declared textually that

> the Greek Government adopts and takes up all the documents and all the submissions presented for discussion by the R. S. Apostolidis, including the claims asserted and the evidence or grounds invoked as well as the documents produced as far as they serve to support the claim and the submissions of this Government.

From this it follows that the problem of whether or not the claim of the Greek Government is admissible from the procedural point of view must be solved without taking into consideration the question of the admissibility of the claim submitted by the firm of Apostolidis.

It is clear that the Greek Government cannot be precluded, its application having been submitted within the time-limit of thirty days provided by Article 7, paragraph 3, of Chapter Five of the Settlement Convention; the text of this application fulfils the requirements of Rules 26 and 27 of the Rules of Procedure; the preliminary objection concerning the complainant which was raised by the defendant cannot be accepted.

In view of the action instituted by the Greek Government, the claim of the firm of Apostolidis has no longer any significance of its own, for it is completely absorbed by the former. The Commission points out that from the written application of the Greek Government of December 14, 1956, as well as from its Reply of August 28, 1957 (p. 12) it follows that compensation might possibly have to be paid to the firm of Apostolidis. The judgment of the Arbitral Commission on the merits could, therefore, in any case only have the same tenor and have the effect stipulated in Article 7, paragraph 5, of Chapter Five of the Convention. Any decision concerning the claim of the Greek Government will render nugatory the claim of the firm of Apostolidis so that the Commission can take up the merits without rendering a decision on the other preliminary objections of procedural law. In fact, the two actions deal with a review of the same decision of the *Bundesamt*. Although the *Bundesamt* had deemed it necessary to serve its decision not only on the Greek Government, which had properly brought an action before it, but also on the firm of Apostolidis which had declared itself a party concerned within the meaning of Section 5, paragraph 2, of the Annex to Chapter Five of the Settlement Convention, by letter of its representative dated June 9, 1956, forwarded to the *Bundesamt* by the Greek Embassy, but without having actually taken part in the proceedings before this German authority (records of the *Bundesamt,* pp. 74, 79 and 107),

any decision of the Commission on the application for review of the Greek Government will inevitably have consequences for the claimant firm.

It is on the basis of the property, rights and interests of the firm of Apostolidis that all former proceedings and the present proceedings have taken place, because by virtue of Articles 3 and 4, paragraphs 1 and 3, of Chapter Five, only the persons injured may claim compensation if the conditions laid down by the Settlement Convention are fulfilled even if the assertion of their claims forms the subject of an action brought by their national Government.

It is correct that on October 14, 1949, the Greek Government submitted through the Greek R.D.R. Mission to the R.D.R. Division, Detmold, a list containing several restitution claims for which it reserved the right to claim compensation (records of the *Bundesamt,* p. 85). But this first diplomatic *démarche* only proves, in compliance with the provisions of Article 4, paragraph 3, of Chapter Five of the Settlement Convention, that claims falling within the scope of paragraph 1 of this article have been filed with an agency of one of the Three Powers before the entry into force of the Convention and that they may thus be referred by that Power to the *Bundesamt* or directly filed with the latter by the claimant Government. But the claims of a particular claimant must have formed the subject of a separate claim before the *Bundesamt,* which has to examine whether there is a preclusion on account of non-observance of the time-limit of six months provided by the said article, and then to decide whether the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention were fulfilled, subject always to the possibility of a direct application to the Commission by the party concerned if the *Bundesamt* had not rendered its decision within the period of one year after submission of the claim, as provided by Article 7, paragraph 3, of the said Chapter Five.

(10) All requests of the Greek Restitution Mission to the Allied Authorities of June 28, August 31 and May 14, 1948, as well as the application of the Greek Government to the *Bundesamt* of October 26, 1955, concern restitution of, alternatively, compensation for, approximately 4,000 tons of chrome ore owned by the firm of Apostolidis. No reservation as to the claimed quantities appears in the records, and the firm of Apostolidis, which maintains the contrary in its pleading of October 12, 1957 (p. 29), did not prove the accuracy of its assertion. On the contrary, on May 4, 1956, the *Bundesamt* drew the attention of the Greek Embassy to its claim for restitution of, alternatively compensation for, 4,000 tons of chrome ore, stating specifically that it would recognise this to be the subject of the litigation "unless you adopt another point of view" (records of the *Bundesamt,* p. 21).

In view of its letters of June 11, June 25 and October 1, 1956, it must be conceded that the Greek Embassy fixed its claim at an amount of 4,000 tons of chrome ore, relying on an application for compensation dated June 9, 1956, from the representative of the firm of Apostolidis and sent to the *Bundesamt* by the Embassy (records of the *Bundesamt,* pp. 73, 74, 78, 79).

The letters of the representative of the claimant constantly speak of a claim covering 4,000 tons, and the figure of 40,000 tons appears for the first time in the application of December 6, 1956, of the firm of Apostolidis to the present Commission. The assertion of the claimant that the restriction of its claim to 4,000 tons is nothing but the consequence of a typing error (application of the claimant of December 6, 1956, p. 19) is by no means supported in the records.

The defendant also enlarged its preliminary objections to include the inadmissibility of submitting to the Commission claims higher than those submitted to the *Bundesamt* and on which the latter had been requested to decide and had actually rendered a decision. This objection was included in the Order of September 9, 1957, of the Commission which decided to join all the objections to the merits, subject to Rule 62 of the Rules of Procedure. In its Rejoinder of February 1, 1958, the defendant, without presenting a precise submission, suggested to the Commission that, to simplify the proceedings, a separate decision be rendered rejecting the claim in the amount of 34,754 tons, *i.e.,* 40,000 tons less the 5,246 tons which constitute the alternative claim of the complainant. The Commission did not deem it appropriate to follow this suggestion, since this point does not present special difficulties and may be settled in the final judgment.

The Commission holds that the claims submitted to it by the parties cannot be higher than those presented to the *Bundesamt*. This is true because higher claims constitute new claims which were not previously submitted for approval to the *Bundesamt* or a German court and which, consequently, do not fulfil the conditions or Article 7, paragraph 2, of Chapter Five of the Settlement Convention, pursuant to which only final decisions of the *Bundesamt* pursuant to Articles 1, 2 or 4, or of a German court pursuant to Article 3 or 4 are subject to review by the Arbitral Commission, unless no decision has been rendered by the *Bundesamt* or the German court within the year following the submission of the claim, which is not the case here. Any increase of the compensation claim would, moreover, be barred by a peremptory objection of preclusion in that it could no longer be submitted after the expiry of the time-limits fixed in Article 4, paragraph 2, of the said Chapter Five.

(11) The written proceedings were continued between the parties by the Reply of the claimant in two pleadings of October 9 and 12, 1957, and the Reply of the complainant of November 1, 1957, then by the submission of the Rejoinder of the defendant of February 1, 1958.

In its pleading of April 17, 1957, the complainant Government requested the hearing of several witnesses as to the removal of the chrome ore and its identification; it withdrew this request by letter of May 11, 1957. In its Answer of October 12, 1957 (pp. 21 and 28), however, it renewed its request for the hearing of these witnesses as well as of some others, particularly in order to determine the meaning of Article 4 of Chapter Five. The Commission did not deem it appropriate to grant this request, since the removal of approximately

4,000 tons of ore, the subject of the action, appeared sufficiently established, and since the question of identification and the interpretation of the Settlement Convention raise problems of law and not of fact which the Commission is entitled to settle independently.

It must also be mentioned that on September 4, 1957, the Italian Government, without claiming it was intervening in the proceedings of the case *sub lite,* suggested, with regard to the interest which the questions submitted to the Commission had for Italy, the granting of priority to the appeals involving test-cases; but the parties did not succeed in coming to an agreement on those which would have to be treated with priority so that the proceedings in each of the pending cases took their course.

The oral hearings took place on January 19 and 20, 1959, and the Greek Government requested the Commission to exclude by a preliminary decision the papers and documents produced by the Federal Government which related to the *travaux préparatoires* of the Settlement Convention, relying on Rule 62 of the Rules of Procedure, which confers on the Commission the right, in order to facilitate the proceedings, to hear and decide separately one or more issues raised by the parties.

The defendant requested the rejection of this application for a preliminary decision.

The Arbitral Commission did not allow this application of the complainant, since it did not consider pertinent the reasons invoked by the latter for obtaining a preliminary decision and since the application of Rule 62 of the Rules of Procedure is at the discretion of the Commission.

After the close of the oral hearings, the Commission by letters of April 21, 1959, again invited the parties to submit a variety of documents. In their answers of May 15, 1959, the parties complied with this request only in part, the Greek Government not having been able, in spite of its search of the records of the Apostolidis case, to find the documents requested.

C. The law

I. The limits of compensation pursuant to Article 4 *of Chapter Five of the Settlement Convention*

(12) The dispute primarily turns on the interpretation to be given to Article 4, paragraph 1, of Chapter Five of the Settlement Convention of October 23, 1954, which has the following tenor:

> If property to be restituted has, after identification in Germany, either been utilised or consumed in Germany before return to the claimant or been destroyed, stolen or otherwise disposed of before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, the Federal Republic shall compensate claimants who would otherwise be entitled to restitution under Article 1 or 3 of this Chapter, or who, at the entry into force of the present Convention, have had their claims for restitution approved by one of the Three Powers.

The present case also raises various problems concerning the meaning and the scope to be attributed to some related provisions of the said Chapter Five, especially Articles 3 and 5.

The interpretation of Article 4, paragraph 1, of Chapter Five of the Settlement Convention constitutes the central issue of the disputes which have arisen between the two Governments.

The restitution claims which did not fulfil the conditions laid down by these provisions do not give rise to any compensation if they cannot be satisfied. The Arbitral Commission holds that this point is absolutely beyond doubt. Entrusted by the Powers Signatory to the Settlement Convention with the mission of applying this Convention, the Commission considers itself, pursuant to the Charter which determines its functions, to be bound by the provisions of the Convention, which are of an imperative character, among which are the rules postponing the final settlement of all reparation for war damage caused by Germany until the conclusion of the peace. It should be recalled in this connection:

(a) Article 1 of Chapter Six of the Settlement Convention, which states concisely:

> The problem of reparation shall be settled by the peace treaty between Germany and its former enemies or by earlier agreements concerning this matter, and

(*b*) Article 1, paragraph 6, of Chapter Ten of the same Convention, which has a general bearing and which stipulates very clearly:

> The provisions of this Article are not intended to cover compensation for loss or damage to property, rights or interests due to discriminatory treatment or resulting indirectly or directly from the war by any other means, but shall not affect the right of any of the United Nations to advance during negotiation for a peace settlement any claim for compensation of this nature with respect to its own or its nationals' property, rights or interests.

This principle has already been applied in several prior agreements, expressly reserved by the Settlement Convention, namely:

(a) in the Paris Inter-Allied Reparation Agreement of January 14, 1946, Part I, Article 2A, of which provides that all claims against the former German Government and its agencies resulting from the war will be covered by the respective shares of German reparations attributable to the signatory States;

(b) in the Potsdam Agreement of August 5, 1945, Section IV, paragraph 2, of which, in conjunction with section B of the Treaty between Poland and the U.S.S.R. of August 16, 1945, stipulates that reparation claims of Poland against Germany will be settled through German reparations for the benefit of the Soviet Union;

(*c*) by the Peace Treaties of February 10, 1947, concluded between the Allied Powers, on the one hand, and, on the other hand, Italy (Article 77, paragraph 4), Hungary (Article 30, paragraph 4), Bulgaria (Article 26, paragraph 4),

and Rumania (Article 28, paragraph 4), which stipulate that these four States waive on their own behalf and on behalf of their nationals all claims against Germany outstanding on May 8, 1945, especially all claims for loss and damage arising during the war;

(d) in the London Agreement on German External Debts of February 27, 1953, which stipulates in Article 5, paragraph 2, that the consideration of claims arising out of the war against the *Reich* and its agencies shall be deferred until the settlement of the problem of reparation.

In the light of these texts which, as *leges speciales,* created between the signatory States a legal position which takes precedence over general and customary international law as well as over the Regulations regarding the Laws and Customs of War on Land annexed to the Fourth Hague Convention of 1907 and over declarations of a political nature, such as the London Declaration of the Allied and Associated Powers of January 5, 1943, and Resolution VI of the Conference of Bretton Woods of July 22, 1944, the Arbitral Commission refuses to accept the responsibility of giving to Chapter Five of the Settlement Convention an interpretation contrary to all these treaty provisions establishing, in the relations with the Federal Republic of Germany, an exceptional set of rules for the reparation of war damages.

(13) The elliptical wording of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is due to the fact that the provisions contained therein are actually founded on a former procedure which was familiar to the negotiators of the Convention, but which is not explained explicitly although there are several allusions to it in the text.

Thus it is said there that the property to be restituted must form the subject of an "identification in Germany" and that, to give rise to compensation, it must have been utilised or consumed in Germany "before return to the claimant," or destroyed, stolen or otherwise disposed of "before receipt by the claimant Government, or by an appropriate agency of one of the Three Powers for despatch to the claimant'; the obligation to compensate imposed on the defendant concerns either claimants "who would otherwise be entitled to restitution "or claimants "who", at the entry into force of the Convention, "have had their claims for restitution approved by one of the Three Powers". It should be added that paragraph 3 of the said Article 4 provides that "claims falling within the scope of paragraph 1 filed with an agency of any of the Three Powers before the entry into force of the present Convention "may be referred by this Power to the *Bundesamt;* moreover, Article 3, paragraph 3, and Article 4, paragraphs 1 and 4, of Chapter Five attribute conclusive power, either relative or absolute, depending on the case, to decisions of an agency of one of the Three Powers rejecting or approving claims for restitution of removed property.

In the opinion of the Commission, all these expressions presuppose a prior restitution and identification procedure, namely, a claimant requesting restitution or a claimant Government or an appropriate agency of one of the Three Powers charged with the delivery of the property to be restituted, *i.e.,*

property the restitution of which had been ordered, a designation of the beneficiaries who "would otherwise be entitled to restitution", the approval or rejection of a restitution claim by one of the Three Powers at the latest on the entry into force of the Convention, distinctions still to be made between the claims submitted to an agency of one of the Three Powers before the entry into force of the Convention and those which were submitted later, finally an obligation of the *Bundesamt* to recognise restitution claims approved by one of the Three Powers before the entry into force of the Convention, as well as certificates by one of them which establish that the property which forms the subject of a restitution claim was not received by an appropriate agency of the Power which had approved it, for despatch to the claimant.

There are thus numerous and obvious references to antecedent procedures; they cannot be disregarded when interpreting the Convention, which is shown by the fact that the Powers occupying Germany exercised and retained the authority in restitution matters until May 5, 1955.

During this period of ten years the accomplishment of restitution met with difficulties on account of the general shortage of replacement and consumer goods which made many goods located in Germany indispensable for the Occupation Powers, on the one hand, and for the maintenance of a German minimum economy, on the other hand, which these Powers had decided to guarantee to Germany. Restitution was subject to special provisions in the different zones of occupation, and it was carried out with the collaboration of agencies of the Occupation Powers, German agencies and Restitution Missions of the other Allied and Associated Governments.

(14) It would be impossible to give a reasonable meaning to these expressions by following the Greek theory which is based on the point of view that Germany is obliged to pay compensation once it has been proved that property was removed from Greek territory between October 28 1940, and May 1945 (Article 5 of Chapter Five of the Settlement Convention), that it was brought to Germany where its presence was ascertained, in any way and at any time, and that it was then consumed, utilised, destroyed or stolen or otherwise disposed of.

The complainant borrows from Article 3, paragraph 1, of Chapter Five the concept of "property to be restituted" used in Article 4 of that Chapter and maintains that Article 4 adopted the definition contained therein, with the result that any property which, notwithstanding provisions of German law to the contrary, may be the subject of a claim for restitution against its present possessor by "any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders)" is property to be restituted which may give rise to compensation on the part of Germany if the conditions of Article 4 are fulfilled.

The defendant opposes the Greek argument by maintaining that "property to be restituted" within the meaning of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is a much more restricted concept. It asserts that it is not sufficient that property fulfils in an abstract way the conditions of Article 3, paragraph 1, of Chapter Five in order to give rise to possible compensation. If such had been the intention of the Signatory Powers, they would not have used the expression "property to be restituted" in Article 4, but the more direct one of "property removed in the circumstances specified in Article 3".

According to the German theory, "property to be restituted" within the meaning of Article 4 is property which was removed from a country under German military occupation and brought to Germany during the war, found there and claimed for restitution. It is thus property which could have been restituted and which should have actually been despatched to the person entitled after the formal ascertainment of its identity with the property claimed during a restitution procedure in Germany, if, before its restitution to the claimant or its receipt by the claimant Government or an appropriate agency of one of the Three Powers, it had not disappeared as a consequence of the events mentioned in the said Article 4 which prevented such restitution. It is necessary that the property should first have been found in Germany and qualified as property removed from territories occupied by the German armed forces, and that its restitution should subsequently have been ordered by the appropriate authorities of the Allies during the occupation of Germany; it is further necessary that the property to be restituted should still have existed at the moment when the restitution claim was filed, otherwise restitution in kind would have been obviously impossible, any action for restitution would have to be suspended and in these circumstances the Settlement Convention does not create a right of compensation in favour of the claimant (German Answer of June 25, 1957, p. 33).

It follows from this point of view that the words "property to be restituted" denote property the restitution of which has been ordered, *i.e.,* a specific identified object and not any object the restitution of which could be claimed in application of Article 3 of Chapter Five of the Settlement Convention, because it had been taken illegally by the German forces or authorities or their individual members in countries occupied by Germany during the war.

(15) The concept of identification of removed property within the meaning of Article 4, paragraph 1, of Chapter Five of the Settlement Convention caused particularly vigorous disputes during the present proceedings.

Pursuant to this provision, property to be restituted, in order to give rise to compensation, must have disappeared for one of the reasons stated therein, but after its identification in Germany and before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant.

None of the High Parties to this case denies the necessity of this identification in Germany itself, which is clearly laid down by the Settlement Conven-

tion, but they disagree on the question whether this expression must be given a special technical meaning or whether one should keep to its usual meaning since the Convention has not defined it.

(a) The Greek Government confers on the condition of "identification in Germany" an extremely broad meaning. It insists that Chapter Five of the Settlement Convention does not contain any precise provision as to a special identification procedure and as to the date at which it must have taken place, and concludes that this expression has no special technical meaning in the Convention and that it simply means that during a compensation proceeding the *Bundesamt* must examine whether the object for which compensation is claimed is identical with that which was removed by German forces during the occupation of Greece under the conditions indicated in Article 3 of the said Chapter. Consequently, it maintains that this identification can be proved by any means and at any moment before or after the disappearance of the claimed property. Since this disappearance by utilisation, consumption, destruction, theft or other act of disposal must have taken place before the return of the property to be restituted to the claimant, to the claimant Government or to the agency of one of the Three Powers, under the terms of Article 4, paragraph, 1 of Chapter Five, the complainant Government recognises that this requirement presupposes the actual existence of the claimed property in the territory of the Federal Republic of Germany after October 28, 1940, and it deduces therefrom that it is sufficient for the purpose of identification that it be proved that the property forming the subject of a compensation claim comes from territories in Greece which were once under military occupation and that it was removed and transported to Germany; in its opinion, the property, if it is not restituted, gives rise to compensation provided that it has been or can still be identified in one way or another. In this connection it accepts as sufficient evidence for identification the declarations of the firms and individuals in Germany which, subject to severe penalties, were obliged by General Order No. 6 of April 30, 1946 (published in the *Gazette of the Military Government in Germany,* British Zone, p. 206) to declare in writing the property and materials acquired during the war, coming from occupied countries and still in their possession at the moment when they made these declarations at the end of the war. A contrary interpretation of the requirement of "identification in Germany" would, in its opinion, solely serve the purpose of freeing the defendant from paying any compensation for property which was removed during a war-time occupation regime and was not transported to Germany (application of the claimant of December 6, 1956, pp. 4, 8 to 10; Reply of the claimant of October 12, 1957, pp. 11, 17 and 19; Reply of the complainant Government of November 1, 1957, pp. 11, 12, 19).

(b) In rebuttal of this argument, the Agent of the defendant maintains that the identification in Germany of property which was removed during the war-time occupation and which can be restituted in kind is a historical concept known to the Greek authorities, defined and specified in a practice of seven occupation years of Germany by the Three Powers and applied in one way or

another in thousands of precedents, on the basis of rules enforced by these Powers. The provisions of the Settlement Convention on compensation to be paid in certain contingencies to persons claiming restitution which, although ordered, could not be effected for the reasons listed in Article 4, paragraph 1, of Chapter Five, are closely connected with this practice, for they seek to terminate the restitution problem by ruling out cases which could not be settled during the occupation regime in Germany. The concept of identification was made the basis of this regulation.

The defendant points out that, pursuant to the said Article 4, paragraph 1, the complainant can only obtain compensation if the property restitution of which is requested had been subjected to a preliminary examination for the purpose of identification which led to the conclusion that restitution was possible but could not be carried out either because of the utilisation or consumption of the claimed property in Germany or because of its destruction, theft or other disposal.

It maintains that identification consists not only of the possibility of ascertaining the identity of the claimed object with the object to be restituted, but of the whole of the process of ascertaining this identity within the framework of a proceeding instituted for this purpose (German Answer of June 25, 1957, p. 28).

The Allied Control Council took a fundamental resolution concerning this matter which was entitled "Procedure of the Four Powers in the Matter of Restitution" on April 17, 1946 (Schmoller-Maier-Tobler, *Handbuch des Besatzungsrechts,* § 52, pp. 25–26), which specifies in Chapter I, paragraph 4, that the missions of the claimant countries are charged with inspecting the property on the spot and examining it with a view to its identification (*ibid.,* p. 28). This regulation was incorporated, with few modifications, in all the procedures adopted later in the various zones of occupation in Germany.

It is maintained that identification then implies a procedure in the course of which it is officially established by the competent authorities that the claimed property is still physically existent in Germany and that it is identical with the existing object so that its restitution is still possible; Germany's obligation to compensate arises only if the property is utilised or lost after the establishment of these facts.

In its opinion identification necessarily postulates that the property has been found in Germany, that it has been subjected to physical investigation with regard to its quality, nature and quantity, and that it has been recognised as corresponding to the claimed property. Identification is thus a legal concept constantly applied in the restitution procedure by the competent authorities of the Three Powers during the occupation of Germany, and it was taken over from this procedure when the Settlement Convention was negotiated. Compensation is not envisaged for property which is simply identifiable, the preliminary and actual ascertainment of its identity being indispensable. The unilateral declarations made pursuant to General Order No. 6 by German

firms and individuals that were in possession of property removed from the regions occupied by the German armed forces during the war cannot be and have never been equivalent to identification *(ibid.,* p. 31; German Reply of February 1, 1958, pp. 32–34).

(16) Neither of the two views set forth above finds any decisive support in the text of Article 4 of Chapter Five of the Settlement Convention.

The view maintained by the complainant Government is not conclusive since the right to compensation for non-executed restitution is subjected by the said Article 4 to the double condition that the utilisation, destruction or disappearance of the claimed property must have taken place after its identification in Germany and before its return to the claimant or to the claimant Government or to the appropriate agency of one of the Three Occupation Powers in Germany for despatch to the claimant. Evidently it must be property which existed in the territory of the Federal Republic at the time when it was claimed and which could have been physically restituted if the events listed in Article 4, paragraph 1, of Chapter Five which made restitution impossible had not occurred. The assertion of the Greek Government that compensation was due for any property which had been stolen, on the sole condition that its transport to Germany was proved, cannot thus be accepted by the Commission, for it is incompatible with the provisions of this Chapter, which concern only "external restitution "and under which the obligation to restitute can relate only to property existing and identified at the moment when restitution is granted. The same is true of compensation, which serves as substitute for the property restitution of which failed. Only within these limits is compensation envisaged by the Settlement Convention and any claim going beyond them falls within the general concept of reparation, the settlement of which is deferred by the same Convention to the conclusion of the peace treaty or of special agreements.

Nor can the Arbitral Commission admit that it would be compatible with the literal and grammatical meaning of Article 4, paragraph 1, of Chapter Five that the identification of the removed property could be effected at any time and in any way nor that it can result in particular from the declarations made in compliance with General Order No. 6 by the firms or individuals in Germany that held property removed from the countries occupied by this Power during the war. This interpretation would also lead to imposing on the Federal Republic of Germany obligations going beyond the scope of restitution and falling within the general concept of reparation the settlement of which has been postponed.

In fact, on the one hand the Settlement Convention unquestionably limits compensation to property removed and transported to Germany, which has disappeared after identification in that country but before restitution to the claimant or before receipt by the claimant Government or by the appropriate agency of one of the Three Powers for despatch to the claimant, *i.e.,* before one of those entitled to it became personally responsible for it, which necessarily implies a variety of measures, investigations and examinations established

by orders and regulations adopted by the Occupation Powers in Germany in execution of the Resolution of the Allied Control Council of April 17, 1946, concerning the procedure in the matter of restitution. Compensation being, even in the opinion of the complainant Government itself, a measure intended to take the place of restitution which had become impracticable, it is quite evident that it can only be paid if it is certain that restitution was authorised, this authorisation in turn depending on the identification of the claimed property; therefore, identification cannot take place at any time or in any way. The restitution measures, practically all of which took place before the entry into force of the Settlement Convention, have never been left without control by the Powers occupying Germany to the discretion of the claimants.

On the other hand, the declarations of the holders of the removed property in Germany have no probative value for establishing the identity of the claimed property because very often these holders were unable to ascertain it. Their declarations were always checked by the competent authorities of the Allied Powers in Germany. In practice they could only give rise to a presumption, which, moreover, was frequently approximative or even incorrect, as to the national origin of the property to be restituted. The Settlement Convention, moreover, does not contain any reference to the probative value of these declarations.

The Commission must recognise, however, that the German argument is not based on any absolutely clear text of the Settlement Convention laying down how, by what authorities and at what moment the identification of the property for which a substituted compensation is claimed must be effected. In this respect, Article 4 of Chapter Five of this Convention contains lacunae and obscurities which can only be filled in or removed by resorting to means of investigation other than the literal and grammatical interpretation of the text of the Convention; the natural meaning of the terms used by the Parties does not permit the unequivocal establishment of what they had in mind; it is therefore necessary to inquire into their common intent when they adopted Chapter Five of the Settlement Convention.

II. The travaux préparatoires

(17) It is universally admitted in international law that a teleological interpretation of international conventions may be resorted to in order to give them the full efficacy which the Parties meant them to have in the light of the purpose which they intended to achieve, this purpose being the common and reasonable purpose of the Convention at the time of its conclusion and not the purpose which each Party desired to achieve for its part and still less the purpose which the States subsequently acceding to the Convention might visualise.

The Commission must investigate whether the purpose which the Parties wished to achieve by the complicated text of Article 4, paragraph 1, of Chapter Five of the Settlement Convention can be elucidated by studying the *travaux préparatoires* for Articles 3 and 4 of this Chapter; by letter of December 11, 1957, it asked the High Contracting Parties to furnish these documents,

a request with which the latter complied by producing material relating especially to these articles. This selection consists of twelve documents, which were communicated to the complainant by letter of the Commission of September 18, 1958, and to the claimant on September 26, 1958.

The Commission is of the opinion that these documents suffice to disclose the meaning to be given to Articles 3 and 4 of Chapter Five of the Settlement Convention and that they are such as to bring out their *occasio legis,* by permitting the determination with certainty of the common purpose of the Contracting States when they adopted these provisions.

During the present proceedings the Greek Government, however, flatly opposed the taking into consideration of the *travaux préparatoires* by citing a rule of international law according to which the preparatory documents of a multilateral treaty cannot be invoked against the Parties which did not take part in their drafting and which were not in a position to acquaint themselves with these papers because they were not accessible to them.

The Settlement Convention undeniably is a multilateral treaty and, by virtue of Article 17, paragraph 3, of the Charter of the Commission, Greece became a principal Party to the agreement contained in Chapters Five and Ten of the Settlement Convention by acceding to the Charter. Not having taken part in the negotiations which led to the drafting of these two Chapters, however, the complainant maintains that these preparatory documents, which were neither published nor brought to its knowledge before its accession, cannot be set up against it, and requested the Commission in its Reply of November 1, 1957, "to exclude from the proceedings the papers and documents produced by the Federal Government which relate to the *travaux préparatoires* of the Bonn/Paris Convention".

The Commission examined this point of international law at great length in its decision of November 14, 1959, concerning Case No. 34 between the Italian Republic and the Federal Republic of Germany (*Decisions of [the Arbitral Commission],* vol. Ill, No. 70). It can only confirm the long argumentation contained in this decision and confines itself to pointing out that it is not an absolute rule of international law—which, moreover, does not contain any rule of customary law concerning the interpretation of treaties between States—that the *travaux préparatoires* of a multilateral treaty cannot be set up against a State which acceded to it without having taken part in the negotiations or without having had access to these *travaux préparatoires* (Oppenheim-Lauterpacht, *International Law,* 7th ed., § 553, p. 857). Its correctness was contested by Sir Hersch Lauterpacht in his Report on "*Interprétation des traités",* submitted to the Institut de Droit International at its Bath session of 1950; Judge van Eysinga, when he was a member of the Permanent Court of International Justice, also regretted that the Court is often unable to have available the records of the meetings in which conventions have been perfected because the Governments often consider them secret documents (Dissenting Opinion in the *Oscar Chinn Case, P.C.I.J.,* Series A/B, No. 63, p. I36).

The Commission shares the opinion of the Institut de Droit International which, in its Resolution adopted at the Granada session of April 19, 1956, brought about a decisive advance in international law by deciding that the problem of resorting to the *travaux préparatoires* of a multilateral treaty, even if they had not been published or made accessible to one of the Parties, must be left to the discretion of the judge and solved according to the special circumstances of the case at issue *(Annuaire,* 1956, p. 347).

It thus rests with the Commission in the exercise of its power of judgment to decide whether the *travaux préparatoires* should be used for the interpretation of Article 4, paragraph 1, of the Settlement Convention although Greece did not take part in the preparation of this diplomatic instrument and although it had no knowledge of these documents prior to its declaration of accession, or whether, on the contrary, they should be excluded from the proceedings by virtue of the special circumstances of the case before it, since the consideration of the said *travaux préparatoires* might lead it either to confirm or to invalidate the interpretation given by the complainant to the provision in question of the Convention (see, to this effect, Guggenheim, *Traité de droit international public* (1953), vol. I, p. 137).

(18) The twelve documents which were communicated to the Arbitral Commission by the Powers Signatory to the Settlement Convention as *travaux préparatoires* and most of which had previously been submitted with the Answer of the defendant of June 25, 1957, cover a period from August 5, 1950, to May 5, 1952; some of them were written before the beginning of the negotiations between the Three Powers and the Federal Republic of Germany which, according to the statements of the latter (Answer, p. 9), did not start until July 1951. The three documents (dated August 5, 1950, December 21, 1950, and April 12, 1951) therefore are not preparatory documents *stricto sensu,* such documents being limited to those in which all signatories to the treaty have taken part jointly during the negotiations and before the signing of the treaty (definition of Lord McNair in *Annuaire de l'Institut de Droit International,* 1952, vol. II, p. 367), and their evidential value for disclosing the intent of the Parties may be freely estimated by the Commission, even considering the Greek point, of view that the preparatory documents which were not available to it at the time of its accession to the Convention cannot be set up against an acceding State. These documents, however, which may be described as preliminary documents, already initiate the discussion on the questions which afterwards formed the subject of Article 4 of Chapter Five of the Convention and are linked directly with the documents exchanged after the official opening of the negotiations. The Commission considers this special situation a first reason for not removing from the files of the present case the preparatory documents themselves, for it cannot place reliance upon a documentation which would not enable it to know the complete development of the exchange of views between the High Contracting Parties.

A second reason is held by the Commission to be the fact that the complainant Government well knew, even before the conclusion of the Settlement Convention, what essentially would be the solutions which the Three Powers contemplated introducing with regard to the limited range of the indemnification to be required from Germany in respect of property removed which in certain circumstances could no longer be restituted. In fact, the Military Government Regulations (title 19, restitutions) copy of which is deposited in the files (Annex 9 to the Answer of June 5, 1957) show in the following terms that collaboration with the missions set up by the claimant States was envisaged:

> The Office of Military Government of each *Land* will render suitable cooperation to such missions of claimant nations as may be authorized by the Office of Military Government for Germany (U.S.) to visit the location of restitutable property for purposes of identification, examination, supervision of packing and snipping and signing of necessary receipts and other documents. (Original text.)

Foreign Missions, so-called Investigation and Restitution Missions, were accredited by numerous States—including the Greek Government—which had restitution rights to assert with the military commanders of each zone of occupation in Germany; they closely co-operated with each other and kept each other reciprocally informed as to any information obtained by them, as was established in the judgment of the Commission of November 14, 1959, in Case No. 34 between the Italian Republic and the Federal Republic of Germany (section 20). It appears from this judgment that on August 30,1949, the Allied Occupation Authorities sent a letter to all Investigation and Restitution Missions announcing their plan to deal with the question of compensation for restitutable property which could not be restituted since it had been used for the German economy under authority of Military Government officials, or destroyed, stolen or disposed of in other ways after receipt of the claim and identification. All the guiding ideas which were subsequently introduced in Article 4, paragraph 1, of Chapter Five of the Settlement Convention can already be found in this letter.

The Commission cannot encourage an interpretation of the Settlement. Convention which would lead to distinguishing between the Signatory Parties against whom the *travaux préparatoires* may undoubtedly be set up, and the Acceding Parties who, according to the view of the complainant Government, should be granted the right to oppose any resort to these *travaux préparatoires* for determining the rights and obligations resulting from their accession to the Convention. It considers such a duality of interpretation contrary to the principle of equal status of the States parties to the Convention and liable to create injustice; it is evident that the Acceding States can have under the Settlement Convention, Chapters Five and Ten, no other rights, and particularly no more far-reaching rights, than those granted to the Three Powers which concluded it with Germany. The Commission holds that any other interpretation would be incompatible with the tenor of Article 17, paragraph 3, of its Charter

which provides that "*tout État accédant à la présente Charte sera considéré de ce fait comme partie à l'accord conclu entre les États Signataires contenu dans les Chapitres Cinquième et Dixième de la Convention*", the English and German texts being even more categorical in providing that the Acceding State "shall be deemed a principal party", and that this State "*gilt damit voll als Partei*". These terms signify that the States which acceded to the Charter must be, as far as Chapters Five and Ten of the Convention are concerned, put on exactly the same footing as the Signatory States, and that, since the rights and obligations of the latter can be determined by consulting the *travaux préparatoires,* the same applies to the Acceding States.

The Arbitral Commission considers it superfluous to inquire whether the rule that *travaux préparatoires* cannot be invoked against a State acceding to a multilateral Convention in the drafting of which it had not taken part and to the *travaux préparatoires* of which it had no access could be justified if, by unpublished reservations, one or several of the Contracting Parties had assured to themselves a dominant position or special privileges as compared with the Acceding States, since it was neither alleged during the proceedings nor consequently proved that the provisions contained in the Settlement Convention would not be the same or that they would have a different significance and application for the Occupation Powers and for the Acceding States.

For these various reasons, the Commission decides that there is no occasion for excluding from the present case the documents described as *travaux préparatoires,* for they are of a nature to show the objective of the Contracting States when adopting Article 4 of Chapter Five of the Settlement Convention and to interpret it in conformity with the actual and common intent of these States.

(19) In its judgment of November 14, 1959, in Case No. 34 between the Italian Republic and the Federal Republic of Germany, the Arbitral Commission proceeded to a detailed analysis of the contents of these *travaux préparatoires* in connection with the origin of Articles 3 and 4 of Chapter Five and certain general provisions of the Settlement Convention; it reached the following results which it considers equally applicable to the present case, but which it has supplemented and adapted to meet the special features of this case, without, however, quoting, *brevitatis causa,* all the texts which were fully and lengthily cited in the said judgment.

It is obvious that the origin of Article 4, paragraph 1, of Chapter Five of the Settlement Convention is to be found in the communication from the Allied High Commission in Germany of August 5, 1950 (AGSEC [50] 1664], the contents of which largely correspond to the letter of the Allied Occupation Authorities dated August 30, 1949, to all Foreign Investigation and Restitution Missions. These two letters start from the assumption that a liability for compensation cannot be based alone on the impossibility of restituting property which had been removed and brought to Germany, and the letters from the outset limited the liability to be imposed on Germany, this limitation having

been stated in detail as follows in the later exchange of correspondence with the German authorities on this subject:

> 'By letter of April 12, 1951 (AGSEC [51] 629), the Allied High Commission pointed out once more that the compensation envisaged concerned only those goods which had been found and identified, but which, although judged restitutable, could not be returned because they consisted of
>
> (*a*) expendable raw materials utilized by the German economy, or
>
> (*b*) items which had been destroyed, stolen or otherwise disposed of.'

The Allied High Commission then specified that these compensation claims were chiefly based on the provisions of paragraph 19, section VI, of Proclamation No. 2 of the Control Council dealing with the additional requirements to be imposed on Germany, and added that in such cases the granting of compensation was justified by the general legal principles which are applicable whenever one party makes use of property over which another party has rights *(Travaux préparatoires,* No. 3).

The Federal Government of Germany having pointed out, in its memorandum of July 11, 1951, that property removed which can no longer be restituted gives rise to a reparation claim falling within the provisions of the Paris Agreement on Reparation (Annex letter F), which defer payment thereof until after the conclusion of peace *(Travaux préparatoires,* No. 5, paragraph 3), the Allied High Commission replied by memorandum of July 31, 1951, drawing attention to the previous exchange of correspondence (AGSEC [50] 1664 and [51] 629) in which it was clearly stated that the obligation to compensate concerned only property which disappeared or was utilised "after identification and before return to the claimant" *(Travaux préparatoires,* No. 6, paragraph 8).

It follows from these documents, which use the same expressions as Article 4 of Chapter Five of the Settlement Convention, that this article is the result of an effort to draw up in as condensed a form as possible the solutions which had been examined in the diplomatic correspondence between the High Contracting Parties and the perfecting of which was entrusted to an expert commission composed of one national of each of the Signatory Powers.

The goal which these experts set themselves is clearly apparent. It was not a question of providing for compensation for all property illegally removed by the German forces during the occupation of Allied countries and brought to Germany, whenever this property could not be restituted since it had been utilised, consumed, destroyed, lost, stolen or otherwise disposed of, for the right of the victorious States to obtain reparations was and still is reserved, but can only be settled upon the conclusion of a peace treaty with Germany.

The Commission has satisfied itself that the purpose of Article 4 of Chapter Five of the Settlement Convention is to meet an unusual situation, temporary in nature, which arose out of the termination of the military occupation of Western Germany, that of restitution which failed ("*vereitelte Restitutionen*"),

order to wind up the thorny problem of restitution. On the date of the signature of the Settlement Convention there was only a relatively small number of pending claims for restitution, and for those which might be submitted belatedly the provisions of ordinary German law concerning the restitution of removed or lost objects seemed sufficient.

The Signatory Parties introduced into the Settlement Convention a special provision covering cases where restitution could not be effected. Compensation is envisaged only for property removed from countries occupied during the war by German forces as laid down in Article 3, which had been found in Germany, which formed the subject of a restitution claim there and which was identified there, but which could not be restituted, since after this identification in Germany, but before return to the claimant or receipt by the claimant Government or the appropriate agency of one of the Three Powers for despatch to the claimant, it disappeared for one of the reasons listed in Article 4, paragraph 1, of Chapter Five of the Settlement Convention. All other claims for restitution which cannot be executed do not give rise to compensation before the conclusion of the peace treaty.

The firm belief of the Commission is moreover supported by the letter of May 5, 1952, which the *rapporteur* for the Settlement Convention, Mr. Debevoise, of the Office of the United States High Commission for Germany, addressed to Professor Kaufmann in his capacity as counsel for the defendant and to which special importance should be attached because it refers directly to the text of Article 4 of Chapter Five, including the few modifications of the wording which it underwent during the *travaux préparatoires.* After a summary of the said Article 4, this letter adds that "it provides for compensation, *inter alia,* when claimants have had their claims for restitution approved by one of the Three Powers prior to the entry into force of the Convention" *{Travaux préparatoires,* No. 12).

In vain does the claimant maintain that the text of this letter contemplates compensation in cases other than those where the claims have previously been approved within the framework of a special procedure, since the words "*inter alia*" imply exceptions (Reply of the claimant of October 12, 1957, p. 21). This observation is obviously the result of confusion. On the one hand, the letter envisaged only one of the prerequisites for compensation contained in Article 4 of Chapter Five, and the words "*inter alia*" were necessary to cover those cases where the claimant was entitled to restitution, but where his claim had not been approved before the entry into force of the Convention. On the other hand, the letter referred to the suggestion made by the Federal Republic of Germany to permit a re-opening of certain proceedings which had resulted in restitution cases decided by one of the Three Powers, without the Federal Government having had the opportunity of participating therein, or its nationals having been able to become a party to these proceedings. The Three Powers refused to contemplate a review of restitution cases approved by their agencies before the entry into force of the Settlement Convention, but were prepared to allow exchanges of

view between experts appointed by both parties concerning the lists of restitution claims sent to the defendant Government, as may be seen from the text of the letter (*Travaux préparatoires,* No. 12).

III. Correlation between the Settlement Convention and the restitution procedure

(20) Undeniably there is a close correlation between the rules adopted in the Settlement Convention for restitution which was not effected and the restitution procedure followed by the Allied Authorities during the occupation of Germany, of which the correspondence between Mr. Debevoise and Professor Kaufmann is a typical manifestation.

The restitution of removed property formed the subject of a regulation of the Four Powers promulgated on April 17, 1946, by the Reparations Deliveries and Restitution Directorate of the Allies and communicated to the Commanders of the four zones of occupation in Germany in order to co-ordinate their practice in this field (Schmoller, *op. cit.,* § 52, pp. 25–28).

It required, in chronological order and including some former texts:

(a) a compulsory declaration of all property in Germany which had been removed, stolen or looted in the territories of any of the United Nations occupied by German forces during the war (Control Council Proclamation No. 2, of September 1945, paragraph 19 [*a*] to [*c*], and General Order No. 6 of April 30, 1946);

(b) submission of a claim for restitution by the Government of a State which considered itself entitled to restitution, or by its authorised representative;

(c) investigations for the purpose of locating the claimed property and leading to its identification;

(d) either an authority for release, if the result of the investigations was favourable for the claimant, for part or the whole of the claimed property, or, on the contrary, the rejection of the claim, if the result of the investigations was negative.

The right to compensation is directly connected with this procedure since pursuant to Article 4, paragraph 1, of Chapter Five of the Settlement Convention it only arises in the case of utilisation, consumption or disappearance of the claimed property after its identification in Germany but before return to the claimant or to the claimant Government or the agency of one of the Three Powers for despatch to the claimant.

Identification therefore constituted one of the essential parts of this procedure. In doubtful or controversial cases, the investigation report of the agencies competent for restitution did not suffice, and the identification was definitively carried out only upon a positive decision of the Occupation Authorities to the effect that the property removed and claimed was identical with the property found in Germany. This procedure could also lead to a negative conclusion as a consequence of mixing, adding, transforming, specifications, etc., of the prop-

erty. The question whether the requirements of Article 3, paragraph 1, of Chapter Five for a claim for restitution of an object removed were fulfilled was not included in the identification procedure; it led to different solutions on the part of the Occupation Powers in Germany which finally admitted a presumption *juris tantum* that any person who, during the occupation of territories of the Allied and Associated Powers, had been dispossessed of his property by the forces or authorities of Germany or its Allies or by their individual members, had been dispossessed by larceny or by duress, with or without violence, the proof of the contrary lying with the German possessor, *e.g.* when he alleged that his acquisition was the result of normal business transactions, a proof which was only admitted on the basis of written documents (Schmoller, *op. cit.,* § 52, p. 15).

(21) The Commission has no doubt that Article 4, paragraph 1, of Chapter Five, in its description of restitution which could not be carried out, refers to claims for restitution which had already been instituted and which had reached a certain stage of development, but which, for the special reasons mentioned therein, had not led to the restitution of the claimed article. This statement corresponds to the declarations of intent which were addressed to the Federal Government by the Allied High Commission and which were notified to the complainant by the competent Agencies of the Occupation Powers, either as general communications or as relating to particular cases, as well as to the text of this provision of the Settlement Convention itself which necessarily implies that the property to be restituted must already have formed the subject of restitution proceedings which had not been brought to completion. The reasons themselves which might lead to the failure of restitution presuppose that external facts have interfered with restitution proceedings already in progress and have prevented their successful completion.

The same applies to the conditions requiring the Federal Republic of Germany to pay compensation for non-restituted property; the claimants have to prove that they would have been entitled to restitution under Article 3 of the said Chapter Five, or that at the entry into force of the Settlement Convention the claims for restitution had been "approved by one of the Three Powers "and that the re-opening of the proceedings which had already led to an approval of restitution had been refused. These conditions are incomprehensible if one does not take into account restitution proceedings which have been instituted and which have reached a certain stage of development. This is the only interpretation corresponding to the text of Article 4 of Chapter Five as well as to the *travaux préparatoires* of the Settlement Convention.

The complainant Government, however, tries to deduce the needlessness of any previous application for restitution from the terms of Article 4, paragraph *2,* second sentence, of Chapter Five which defines as follows the meaning of paragraph 1 of the same article of the Settlement Convention:

> The court stipulated in Article 3 shall, upon suit brought by the claimant otherwise entitled to restitution, render a decision on the compensation claim

> in respect of property the restitution of which could have been requested under Article 3 . . .

The complainant infers from this use of the conditional mood that the Settlement Convention does not require that the claim for restitution precede the claim for compensation and that it is sufficient that it fulfils the requirements for being filed; it thus concludes that the restitution proceeding, important for the proof of the removal of property, is not a legal condition for compensation.

This reasoning is not conclusive. The words "the claimant otherwise entitled to restitution" are meant to indicate the injured parties who would have been entitled to restitution if the property had not been utilised, consumed or destroyed after its identification in Germany, but whose restitution claims had not yet been approved by the Allied authorities, as against those who, in possession of such binding and definitive approval on the entry into force of the Settlement Convention, are entitled to substituted compensation without the defendant Government being able to request a review of this claim (Article 4, paragraph 1, *in fine,* of Chapter Five).

Moreover, the necessity for an application filed with the competent authorities is confirmed by the last sentence of Article 4, paragraph 2, of Chapter Five which provides:

> The filing of the application and the bringing of the suit must take place not later than one year after the entry into force of the present Convention or one year after notification to the claimant that the property is not available for restitution, whichever is later.

This provision quite obviously presupposes a former application for restitution which must be made in all cases to make it possible to decide whether or not there is a preclusion depending on whether the *dies a quo* is fixed at the entry into force of the Convention or at the date of the notification, especially if this latter took place after the entry into force of the Convention.

The Commission intends to leave open the question of compensation in cases which if they actually occurred would only be exceptions, restitution proceedings having virtually come to an end in 1951, where no restitution claim had been filed before the entry into force of the Settlement Convention, since this situation does not exist in the dispute presently under consideration.

(22) The expression "identification in Germany" used in Article 4, paragraph 1, of Chapter Five of the Settlement Convention means that there must be physical ascertainment by the senses and particularly by ocular perception that the property restitution of which is claimed is the same as that which had been removed under the conditions indicated in Article 3 of Chapter Five.

The Settlement Convention does not state, however, how this identification procedure is to be carried out. The Commission holds that this verification must, always form a restitution proceeding. The term "identification" which is used in the said Article 4, paragraph 1, of Chapter Five cannot have a meaning other than that of a proceeding which has led to the ascertainment,

by physical perception, that the property located is identical with the property claimed. This concept corresponds to the analysis which was given by the Board of Review of Herford in its judgment of January 28, 1952 *(Rechtsprechung zum Wiedergutmachungsrecht,* vol. III, 1952, pp. 110–111), part of which is quoted in the judgment of November 14, 1959, of this Commission (Case No. 34 between the Italian Republic and the Federal Republic of Germany, section 29—*Decisions of the Arbitral Commission,* vol. III, No. 70).

The Commission has thus reached the conclusion that the meaning of the word "identification" implies the possibility of ascertaining the identity of an object, and that, if this possibility itself does not exist, the identification must fail, as, *e.g.,* when the object no longer exists, or cannot be found at the moment when identification is to take place, or when it has lost its essential characteristics so that it is no longer identifiable. Thus the requirements for identification in Germany necessarily imply the existence of the article the ascertainment of which results from an application for the restitution of removed property which has led to investigations permitting the finding of the claimed object. A preliminary proceeding is thus indispensable for the realisation of the identification. The "identification" is by no means an abstract operation of description without the active meaning of a physical operation for the ascertainment of identity, but one which defines the condition of the removed property found in Germany at the end of hostilities and which must be restituted to the person entitled.

(23) The indubitable requirement, under the terms of Article 4, paragraph 1, of Chapter Five of the Settlement Convention, of identification in Germany itself before utilisation or loss of the article, only confirms the concept of property to be restituted, as has been stated by the Commission in its judgment of November 14, 1959 (Case No. 34) and in its present decision. Such property is not property which must be restituted because it fulfils only the conditions of Article 3 of Chapter Five, but property which could actually be restituted because it had been the subject of "identification in Germany"; compensation by payment of the replacement value is granted only for a claim for restitution which is recognised as justified and which ought to have led to actual return of the property in kind, had not the facts laid down in Article *4,* paragraph 1, of this Chapter interfered before its return to the claimant. The text of the Settlement Convention admits of no other interpretation, the less so as it corresponds to the intention of the Contracting Parties shown subsequently.

It is beyond doubt that the Parties signatory to this Convention did not intend to provide for payment of compensation in all cases in which the property removed could not be restituted in kind. The Greek Government cannot claim, on the basis of this Convention, to have more rights or other rights than those which the Three Powers secured for themselves.

From this the Arbitral Commission finds inadmissible complainant's reasoning which attempts to assert that it is always possible to proceed with the identification of property no longer existent, and that the identification has to

be considered as having been achieved when it has been proved, even long after the article has been utilised, destroyed, stolen or has disappeared and before any claim for restitution has been filed, that the property to be identified had been removed from occupied territories in Greece after October 28, 1940, and that it reached Germany, without a direct and physical ascertainment of its existence and even without a claim for restitution being necessary.

IV. The case of Apostolidis (No. 215)

(24) The meaning of Article 4 of Chapter Five of the Settlement Convention having been determined by the Commission, it should be examined whether or not the application for payment of compensation by the Greek Government is well-founded. It comprises three claims:

(a) Claim 163/7012, concerning 3,050 tons

As shown by the statement of facts, the identification procedure did not cover this total amount, but only the 1,662 tons which remained on December 4, 1948, when the investigation report of the R.D.R. Division, Detmold, was drawn up, after the authorised deduction of some chrome for the benefit of German industry. Anything thus used and consumed before this date cannot form the subject of compensation on the basis of Article 4 of Chapter Five of the Settlement Convention, which provides for compensation only for property which disappeared after its identification in Germany for one of the reasons listed there. In its decision of November 8, 1956, the *Bundesamt* admitted that 1,662 tons still existed on December 4, 1948, and this statement, which is not contrary to the records, must be recognised by the Commission.

The investigation report, however, states that only part of these 1,662 tons were identified as being the property of the firm of Apostolidis. Only the 403 tons are doubtful which came from Eisenerz G.m.b.H. of Berlin, which had received the ore from three different sources in Greece, and only a part of it, which cannot be defined exactly, from the firm of Apostolidis; for these 403 tons, identification has thus failed, and only the remainder, 1,662 less 403, *i.e.,* 1,259 tons, can be considered as identified and can give rise to compensation since this ore was not returned to its dispossessed owner after identification and since its consumption by the German economy can be considered the more certain as the Elektro-Werk of Weisweiler which had reported the 1,662 tons had already been granted a general authorisation by the Metallurgy Branch at Düsseldorf on December 10, 1947, to utilise the chrome ore in its possession for its purposes (records of the *Bundesamt,* pp. 37 and 43).

The Allied Occupation Authorities rejected the restitution claim for the sole reason that the chrome ore had been delivered to the firm of Possehl of Lübeck in execution of regular contracts with the firm of Apostolidis, which the latter contests categorically.

The complainant Government maintains that the rejection of its claim on this ground is unjustified, and it invokes the following circumstances:

The firm of Apostolidis and the firm of Possehl had entertained business relations already before the Second World War. But at the beginning of the war the firm of Apostolidis broke them off. The German firm had tried to renew them by letter of April 2, 1947, in which it stated that the imports of chrome ore to Germany were under official control at that time and that it would be able to obtain the permits necessary for importing it. On November 22, 1948, it sent to the telegraphic address of the firm of Apostolidis the following cable without stating the reason why it needed the information requested:

> Chrome Volos. On request of authority please confirm by cable that you made regular chrome deliveries to us before the war. Stop. Thanks in anticipation Erzpossehl. (Reply of the claimant of October 12, 1957, p.34).

On November 24, 1948, the firm of Apostolidis answered as follows:

> Confirm having made large consignments of chrome ore to you before the war—Chrome.

According to the complainant, the firm of Possehl forwarded this cable to the Gesellschaft für Elektrometallurgie of Weisweiler, which used it for obtaining from the Allied Authorities the authority to dispose freely of the chrome ore in its possession, maintaining that it was the result of transactions made before the war. The Occupation Authorities were thus misled, as shown by the letter written on February 2, 1949, by the firm of Possehl to the Greek Restitution Mission in which it recognises that the amount in question (2,019 tons) concerned the execution of a contract concluded with the firm of Apostolidis in 1943. A continuation of the pre-war contract was out of the question, since at that time the mines of this firm were requisitioned and exploited by the German Occupation Authorities in Greece; the contracts had been concluded in the name of Apostolidis, without this firm having been able to exert any influence on the conclusion of this contract (complaint of December 6, 1956, p. 14). Although the firm of Apostolidis had transactions with the firm of Possehl before the war, they had nothing to do with the ore which forms the subject of claim 163/7012, since it was removed illegally during the occupation of Greece by the German forces. The Greek firm invokes as evidence several communications written by the German Occupation Authorities in Greece, a certificate of the mayor of Rodiari of August 27, 1945, and the affidavits of several persons.

It appears from two letters of the firm of Possehl to the representative of the claimant firm of July 8, 1957, and August 29, 1957 (Reply of the claimant of October 12, 1957, Annexes 1 and 2) that these were not deliveries in execution of contracts entered into by the firm of Apostolidis before the war. The Allied Occupation Authorities had indicated that compensation was to be envisaged for 3,050 tons removed. No final decision was rendered, however, since the British Occupation Authorities were being dissolved.

In these circumstances, the complainant requests the Commission to examine the decisions of the British Military Government rejecting the claim for restitution of 3,050 tons of chrome ore taken away from the firm of Apostolidis, by applying by analogy Article 3, paragraph 3, of Chapter Five of the

Settlement Convention (Reply of the claimant of October 12, 1957, pp. 33 and 35). The defendant opposes this request.

(25) This request of the complainant raises the question whether the decision of the R.D.R., Detmold, of December 13, 1948, rejecting the restitution claim is legally binding upon the Arbitral Commission.

Concerning the probative force of the decisions of the Allied Occupation Authorities in Germany in the matter of restitution of property removed and brought to Germany during the war, Chapter Five contains some provisions for particular cases which are not all governed by the same rules. Property other than jewellery, silverware, antique furniture and cultural property is settled by Article 3, paragraph 3, which reads as follows:

> No restitution claim may be asserted if, prior to the entry into force of the present Convention, a request by a Government on behalf of the claimant for restitution of the property concerned was rejected as not well founded by an agency of one of the Three Powers, except in a case where evidence which could not previously be presented is adduced.

This provision relates only to restitution, and not to compensation claims. Article 4 of the said Chapter which settles the latter also contains some provisions concerning the binding effect of decisions taken by one of the Three Powers before the entry into force of the Settlement Convention; they relate also to restitution; paragraph 1, *in fine,* and paragraph 4, first sentence, provide that the Federal Republic is bound by restitution claims which have been approved by one of the Three Powers, and that the *Bundesamt* shall recognise them; moreover, paragraph 4, last sentence, stipulates that the *Bundesamt*

> shall . . . accept as conclusive a certificate by any one of the Three Powers that the property which was the subject of the claim has not been received by an appropriate agency of that Power for despatch to the claimant.

It follows from these provisions that the Settlement Convention does not concede exactly the same effects to the different decisions of the Allied Authorities in the matter of restitution; the negative decisions which lead to the rejection of a restitution claim are granted a relative probative value in that they may be reversed through the submission of new evidence; the positive decisions which imply an authority for release capable of giving rise to compensation if the property has disappeared after its identification, but before its return, pursuant to Article 4, paragraph 1, are granted an absolutely obligatory probative power against which new evidence is not admitted.

Article 4 of Chapter Five, which deals with compensation for restitution which was not effected, does not contain any rule concerning the probative force of a decision of the Allied Authorities in this matter, since actually it is not necessary, these authorities being incompetent to grant compensation, something which only the *Bundesamt* or a regular German court may do subject to the possibility of all their final decisions being submitted to the Arbitral Commission, pursuant to Article 4, paragraphs 3 and 4, and Article 7, para-

graph 2, of Chapter Five of the Settlement Convention. It is therefore superfluous to resort to an application by analogy of Article 3, paragraph 3.

When examining whether a compensation claim is well-founded, the Commission is inevitably required to make the following distinctions :

(*a*) on the one hand, it must examine whether or not the restitution claim is well-founded, *i.e.,* whether the conditions of Article 3, paragraph 1, are fulfilled;

(*b*) on the other hand, it must examine whether compensation is justified, *i.e.,* whether the conditions of Article 4, paragraph 1, are fulfilled, namely whether restitution which was ordered can no longer be executed because the property, after its identification in Germany, has been utilised or consumed before its return to the claimant, or destroyed or stolen or otherwise disposed of before receipt by the claimant Government or by the appropriate agency of one of the Three Powers for despatch to the claimant.

The Settlement Convention has clearly laid down the extent to which the Commission is bound by the decisions of the Allied Authorities:

(a) If a compensation claim is founded on a negative decision of the restitution claim by the Allied Authorities, considered erroneous by the claimant, the Commission is competent to examine whether, on the basis of evidence which had not been furnished before, this decision must be maintained or reversed, but it is bound by the probative value inherent in these decisions in the absence of new evidence. This conclusion evidently imposes itself, since it cannot be imagined how the Commission could revise a decision of the *Bundesamt* or of a German court which strictly corresponded to Article 3, paragraph 3, and Article 4, paragraph 4, of Chapter Five concerning the probative power of the decisions of the Allied Occupation Authorities.

(b) If a compensation claim is based on a restitution claim approved by the authorities of one of the Three Allied Powers, the Commission is not competent to revise this decision and must grant compensation amounting to the replacement value of the property in question, even if the defendant points out that the approval was unfounded, since it is the common intent of the Contracting Parties not to re-open proceedings for claims on which a decision in favour of the claimant has been rendered (Article 4, paragraph 4, of Chapter Five); it can only refuse compensation if the conditions of Article 4, paragraph 1, are not fulfilled (to this effect *cf.* the decision of the First Chamber of the Commission of April 29, 1960, Cases No. 346, 347, 348 and 349—*Decisions of the Arbitral Commission,* vol. III, No. *77).*

As to the question whether there is new evidence permitting the setting aside of a negative decision on a restitution claim rendered by an agency of the Three Powers, it can only be answered *in concreto,* in respect of particular cases, by interpreting this concept very strictly, in the interest of legal certainty, for in several cases it is no longer possible to know for certain the reasons on which this or that decision of the Allied Occupation Authorities are based.

(26) To justify a review of the negative decision of December 13, 1948, concerning claim 163/7012, the complainant Government mainly invoked the circumstances under which the firm of Apostolidis was induced to send its cable of November 24, 1948, to the firm of Possehl and the abusive use which the latter made of it; the claimant did not know these circumstances until after the negative decision which, part of the property having been identified by the Allied Authorities, was based on the absence of dispossession against the will of the owner, since in their opinion this chrome ore had already before the war formed the subject of deliveries which were continued during the hostilities between Greece and Germany.

These arguments are not based on new evidence, but they prove that the telegram in question was misunderstood by the Allied Occupation Authorities, since it does not indicate that the deliveries made during the war to the firm of Possehl were the result of pre-war contracts, nor that the firm of Apostolidis continued its business relations with the German firm during the war. The reasons given in the negative decision therefore seem to be erroneous. The Commission does not consider the fact relevant that the firm of Apostolidis was not clearly aware of what use the German firm concerned would make of its cable of November 24, 1948, and it is not proved that the Allied Authorities were deceived. It therefore does not consider the reasons advanced by the complainant to be new evidence within the meaning of Article 3, paragraph 3, of Chapter Five of the Settlement Convention.

On the other hand, the Commission finds that the negative decision on claim 163/7012 is in flagrant contradiction with the reasons indicated subsequently in the authority for release of September 13, 1949, for 424.980 tons of chrome ore, the subject of claim of the firm of Apostolidis, as well as those given in the decision of the same date concerning claim 590/14–15/R covering 258.090 tons.

In these two cases it is found that

> The Greek mines were under control during the occupation and the distribution and prices were ordered by the German authorities. The transport of ore from Greece during the occupation was exclusively a German undertaking and cannot be considered normal business dealings. The property is restitutable. (Records of the *Bundesamt,* pp. 62 and 69.)

These decisions bear the signature of the same British officer (Denison) who signed the rejection of December 13, 1948, of claim 163/7012 (records of the *Bundesamt,* p. 50). It is strange, too, that the latter decision was also confirmed by letter of November 8, 1949, that is after the decisions of September 13, 1949, concerning claims 1055/7015 and 590/14–15/R by the British officer who signed for the director of the R.D.R. Branch, Düsseldorf. The attitude of the British Authorities is thus obviously contradictory.

The Commission considers the authorities for release of September 13, 1949, which are doubtless correct, to be evidence which could not be furnished when the negative decision of December 13, 1948, was rendered,

and not even after that during the occupation of Germany, because restitution could no longer be obtained, the ore having already been utilised by the German economy, and because compensation for restitution which was not effected was not envisaged before the Settlement Convention. Recourse to this evidence in the case of claim 163/7012 was thus useless during the occupation; this is probably why the British Authorities did not proceed to a review of their decision concerning this claim when rendering a contrary decision on claims 1055/7015 and 590/14–15/R.

The Commission holds that it is competent to proceed to this review and finds that, the conditions for restitution laid down in Article 3, paragraph 1, of Chapter Five of the Settlement Convention being fulfilled and the property having been identified, to the amount of 1,259 tons before its utilisation, the compensation claim for this amount complies with the requirements of Article 4, paragraph 1, of Chapter Five of the said Convention.

(27) *(b) Claim 1055/7015*

In this case the Commission has to decide on a quantity of 450.020 tons of chrome ore only, as shown by the statement of facts. According to the investigation report of the Allied Occupation Authorities of November 25, 1948, this amount is expressly described as being of Yugoslav origin (records of the *Bundesamt,* p. 58). These authorities did not expressly reject the Greek restitution claim covering this amount; they did so only implicitly in the authority for release of September 13, 1949, concerning claim 1055/7015 in restricting their approval to another lot of 425 tons (records of the *Bundesamt,* p. 61). Consequently, the question arises whether the Commission is bound by the tacit rejection of a restitution claim, subject to the production of new evidence which could not previously be presented. The question can be left open for two reasons: first, because the letters of the Greek Restitution Mission of October 23, 1950, and January 12, 1951, to the R.D.R. Representative Office at Wahnerheide (of which only the second was inserted in the records), and the letter of the Eisenerzgesellschaft m.b.H. of August 21, 1950, communicated to the Commission during the oral hearings on January 20, 1959, by the complainant in order to prove that the 425 tons of ore came from Greece and that the firm of Wacker purchased during the war chrome ore of Greek origin, do not establish new facts and cannot be considered to be new evidence within the meaning of Article 3, paragraph 3, of Chapter Five. Moreover, it would be very risky to admit that no other decision could be taken on account of the fact that the Allied Occupation Authorities were being dissolved, for this dissolution did not take place until after the entry into force of the Settlement Convention in 1955, *i.e.,* several years after this correspondence; secondly and principally, because the identification of the 450 tons in question is not proved by the investigation report of November 25, 1948, which does not state that the ore found is identical with the ore claimed by the firm of Apostolidis, and since this identification can no longer be effected because the ore no longer exists.

As to the 1,314 tons of chrome ore which were likewise claimed by Yugoslavia, it is repeated that they were shipped on lighters which were sunk in the Rhine off Mayence in 1945, and that they were subsequently recovered by France which seized them; this ore has never been identified and cannot be identified at present, so that it does not fulfil the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention and cannot form the subject of compensation. This item of 1,314 tons could not be acted upon by the Commission in any case, on the ground that if it were added to the other Greek claims these would by far exceed the amount of approximately 4,000 tons on which the Commission can decide by virtue of its competence.

(28) (*c*) *Claim 590/ 14–15/R*

Pursuant to the investigation report of January 13, 1949, mentioned in the statement of facts (records of the *Bundesamt,* p. 67), this claim covers 589.213 tons of which 259.644 could be restituted to Greece by virtue of the authority for release of September 13, 1949, the remainder, *i.e.,* 329.569 tons, not being of Greek origin. The complainant contests the correctness of this latter statement, asserting that the contradictory declarations of the firm of I.G. Farben are not reliable, for the ore had been imported from Greece which was proved by the fact that it had never been returned to Yugoslavia. The complainant maintains that the matter ought to have been taken up again by the British Authorities but that it could no longer form the subject of a new decision on their part (letter of the R.D.R. Division to the Greek Restitution Mission of December 12, 1949, submitted by the complainant during the oral hearings of January 20, 1959).

These assertions, however, are not supported by any new evidence and cannot serve as the basis of a review by this Commission of the negative decision of the restitution claim recorded in the statement in the authority for release of September 13, 1949, for 259.644 tons of chrome ore that the "remaining quantities are not of Greek origin" (records of the *Bundesamt,* p. 68). It follows therefrom that the 329.569 tons in question have not been identified, that they no longer can be identified, and that, consequently, the conditions laid down in Article 4, paragraph 1, of Chapter Five of the Settlement Convention for obtaining compensation are not fulfilled.

(29) Since the Arbitral Commission concludes that payment of compensation to the complainant is justified, in the interest of the claimant firm, the firm of Apostolidis of Volos, for chrome ore which disappeared after having been identified in Germany, the sum shall be fixed "in the amount of the replacement value of the property concerned as of the date of the award" (Article 4, paragraph 5, Chapter Five, of the Settlement Convention). This value must be determined according to today's price of chrome in Germany according to expert opinion. The claim of the complainant for interest is not supported in any way by this article, since it would imply an increase of the compensation for which it provides, which cannot be granted in the absence of an express provision in the Settlement Convention.

Pursuant to Article 7, paragraph 4, Chapter Five, the present case should be remanded to the *Bundesamt* which has to fix the amount of the compensation due in accordance with the present instructions.

For these reasons, the Arbitral Commission decides:

(1) The objections of inadmissibility raised by the defendant against the claim of the claimant, the firm of Apostolidis, are purpose- less, and the objections of defect in form and inadmissibility raised by the defendant against the claim of the Greek Government are rejected as not well-founded.

(2) The Federal Republic of Germany is ordered to pay to the complainant Government, in the interest of the firm of Apostolidis, Volos, claimant, compensation for part of the chrome ore the restitution of which became impossible after its identification in Germany, *i.e.,* for 1,259 tons. All other submissions for compensation of the complainant are declared unfounded and are dismissed.

(3) The present case is remanded to the *Bundesamt* for the determination of the sum of compensation corresponding to the replacement value of 1,259 tons of chrome ore, pursuant to the instructions contained in the present decision and subject to the right of each party to appeal to the Arbitral Commission.

(4) The parties shall bear half of the court costs each.

Case of the Government of the Kingdom of Greece (on behalf of Karavias) *v.* Federal Republic of Germany, decision of the Second Chamber of 28 June 1960[*]

Affaire concernant le Gouvernement du Royaume de Grèce (au nom de Karavias) c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 28 juin 1960[**]

Compensation claim—Convention on Settlement of Matters Arising out of the War and the Occupation—request for revision of judgment of the German Higher Prize Court—request for compensation for absence of restitution of a seized steamship—only claimants entitled to restitution can be compensated.

State sovereignty—sovereignty of State over its merchant fleet on the open sea—open sea cannot be assimilated to occupied territory.

International law of naval warfare—right of visit of neutral States vessels by belligerent States—seizure of the steamship on the open sea considered to be lawful.

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[*] Reproduced from *International Law Reports* 34 (1967), p. 267.

[**] Reproduit de *International Law Reports* 34 (1967), p. 267.

Requête en dédommagement—Convention sur le règlement des questions résultant de la guerre et de l'occupation—demande en révision d'un jugement du plus haut Tribunal des prises allemand—demande de dédommagement pour l'absence de restitution d'un vapeur saisi—seuls les plaignants ayant droit à restitution peuvent être dédommagés.

Souveraineté étatique—souveraineté de l'État sur sa flotte marchande en haute mer—la haute mer ne peut être assimilée à un territoire occupé.

Droit international de la guerre navale—droit des États belligérants d'inspecter les navires d'États neutres—la saisie d'un vapeur en haute mer est considérée comme légale.

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(1) On August 22, 1957, the complainant Government (respectively the Greek ship-owner Emmanuel Karavias) instituted before the Arbitral Commission an action against the defendant for revision of the decision of the *Bundesamt für äussere Restitutionen* [Federal Office for External Restitution] (called *Bundesamt)* of July 27, 1957, served upon it on July 29, 1957, concerning payment of compensation for restitution, which failed, of the steamship *S/S Marietta Nomikos,* and for revision of the judgment of the German Higher Prize Court, Berlin, of April 7, 1941 (file OPH/E/5/40).

A. *The facts*

(2) The facts underlying this claim are the following:

The Greek steamship *S/S Marietta Nomikos,* which was going from Stockholm to Alexandria in Egypt with a load of timber, was held up in the night of October 25/26, 1939, on the open sea, in the Baltic, by the German navy in the exercise of the right of visit recognised by the international law of war, and was conducted to the German port of Pillau on the Baltic Sea, where it was sequestrated and placed under German command on October 29, 1939.

(3) By judgment of February 16, 1940, the Hamburg Prize Court decreed the liberation of the steamship on the ground that its cargo did not constitute war contraband and that its place of destination was not in enemy country, Greece being at that time still a neutral country and Egypt, although it had broken off its diplomatic relations with Germany, not being at war with this country.

An appeal having been lodged against this decision, the steamship was not immediately liberated and the Higher Prize Court at Berlin, by judgment of April 7, 1941, rendered after the commencement of the war between Greece and Germany, finally decreed the capture of the steamship and its cargo for the benefit of the German *Reich* (file OPH/E/5/40), so that the S/S *Marietta Nomikos* remained in the possession of Germany; it sailed under the German flag, henceforth bore the name of *Drau,* and was sold by the *Reich* to Ludwig

Müller, probably of the shipping-firm of Leth & Co. at Hamburg, on January 31, 1945.

After the capitulation of the German army and navy in 1945, the British Occupation Power sequestrated the steamship which, by order of the Naval Control Service, Flensburg, put out to sea on October 11, 1948, and was sunk, with a load of ammunition, in the North Sea; it is no longer possible today to determine the place and date of this action.

(4) In its request of November 4, 1955, to the *Bundesamt,* the complainant Government declared to make the request addressed to this Office on November 1, 1955, by . . . [counsel] Dr. Constant, Hamburg, on behalf of the ship-owner Emmanuel Karavias, its own; relying on Articles 3 and 4 of Chapter Five of the Settlement Convention, it claimed restitution and, possibly, compensation for frustrated restitution of the steamship in question.

By decision of July 27, 1957, the *Bundesamt* rejected the application which had thus been submitted to it by the Hellenic Government and on the following July 29 only served it upon the Royal Greek Embassy, but not on the ship-owner Karavias, who was not considered a party to the proceedings by this Office.

(5) On May 5, 1956, the agent of the ship-owner Karavias, *Rechtsanwalt* Dr. Constant, on his part instituted an action against the Federal Republic before the *Landgericht* [District Court], Bonn, First Civil Chamber (file No. 10 [66/56]), applying for restitution of the steamship S/S *Marietta Nomikos,* possibly for payment of compensation for its value, which was fixed at 3,000,000 DM.

Reproaching the *Landgericht* at Bonn for not having decided on this claim within one year after filing of the application, . . . Dr. Constant, on behalf of the ship-owner Karavias, also brought his claim before the Commission by letter of June 3, 1957. This application for revision was taken up by the Hellenic Government and incorporated in its complaint of August 22, 1957, before the Commission.

B. *The procedure*

(6) On the basis of these facts, the Commission has before it two actions which, although relating to the same object, namely the steamship *S/S Marietta Nomikos,* and the same damage suffered by the ship-owner Karavias, must nevertheless be clearly distinguished, because they are based on different reasons of law and governed by procedures peculiar to each of them.

(a) The action instituted by the complainant Government aims, first of all, at obtaining the revision of the decision of the *Bundesamt* of July 27, 1957, and at payment of a compensation equal to the replacement value of the steamship which was seized by the German forces and not restituted, plus legal interest, on the basis of Articles 3 and 4 of Chapter Five of the Settlement Convention (Application of August 22, 1957, page 2).

(b) In its brief of complaint, the complainant Government furthermore requested the revision of the judgment of the German Higher Prize Court of

April 7, 1941, in application of Articles 5 and 12, paragraph 3, of Chapter Ten of the Settlement Convention.

In the application which he addressed to the Commission on June 3, 1957, the ship-owner Karavias, too, made submissions to this effect, the wording of which is as follows:

(a) that the judgment of the Higher Prize Court (OPH/E/5/40) of April 7, 1941, ordering confiscation of the steamship in question which belongs to the complainant, be annulled;

(b) that the defendant be ordered to pay to the complainant by virtue of Article 3 in conjunction with Article 4, paragraph 1 and paragraph 2, second sentence, of Chapter Five of the Settlement Convention, a compensation corresponding to the replacement value.

(7) In respect of this second action, the Commission states that the Hellenic Government, in its brief of complaint of August 22, 1957, first demanded that the two actions be joined; however, in the latter's Note of November 20, 1958, it specified that it referred to the pleading of Mr. Emmanuel Karavias only inasmuch as it concerned and tended to support, on the law and on the facts, the application of this Government to the *Bundesamt für äussere Restitutionen* and that part of the appeal of August 22, 1957, to the Arbitral Commission which deals with the application in question.

As regards the application, filed by virtue of Article 5 of Chapter Ten of the Settlement Convention, for revision of the judgment of April 7, 1941, of the German Higher Prize Court, this application was filed by Mr. Emmanuel Karavias personally with the Court of first instance at Bonn and afterwards transferred to the Commission by virtue of Article 12, paragraph 3, of Chapter Ten of the Convention. In this action, the Hellenic Government is not a party to the proceedings, nor does it intend to intervene. The complainant submits that it leaves it to the discretion of the Court to decide whether it will join the two actions.

In its Answer of September 26, 1958, the defendant opposed the joining of the two actions, without raising a preliminary objection at the beginning of the proceedings on the basis of Rule 58 of the Rules of Procedure, and in its Rejoinder of January 14, 1959, interprets the above-quoted declaration of the complainant Government of November 20, 1958, to mean that the application for joining the actions has been abandoned.

The Commission is also of opinion that, in view of the clearness of this latter declaration, the Hellenic Government can no longer be considered a party to the action concerning the revision or annulment of the judgment of April 7, 1941, of the German Higher Prize Court and consequently decides that this action should be decided separately.

(8) It is appropriate to specify also the legal position, from the point of view of procedure, of the Greek ship-owner Karavias in the present action,

which thus only concerns compensation for restitution which has failed on the basis of Articles 3 and 4 of Chapter Five of the Settlement Convention.

The Commission states, as did the defendant (Answer of September 26,1959), that the question of the qualification of the shipowner Karavias to act by virtue of Articles 3 and 4 of Chapter Five of the Settlement Convention has no practical significance in the pending case since his interests are wholly safeguarded by the intervention of the Hellenic Government, the *locus standi* of which before the Commission has not been contested.

Since the complainant Government has filed its application for revision within thirty days after service of the decision of the *Bundesamt* pursuant to Article 7, paragraph 3, of Chapter Five of the Settlement Convention, the competence of the Arbitral Commission to deal with it is unquestionable. The whole part of the appeal of the ship-owner Karavias which relates to the application for compensation for restitution which failed is absorbed by the application of the Hellenic Government of August 22, 1957, and, under these circumstances, the Commission must hold that the defendant's objections with regard to the capacity to act of the ship-owner Karavias are devoid of any practical significance.

(9) On the merits, the defendant requests that the Commission be pleased to reject the application as inadmissible, alternatively as unfounded.

(10) By declaration of January 6 and 8, 1960, the parties to the proceedings have agreed to abstain from oral proceedings, and the Commission decides that they be dispensed with and that the case is now ready to be judged.

C. *The law*

(11) The action of the complainant Government for compensation for the frustrated restitution of the steamship *S/S Marietta Nomikos* is based on Articles 3 and 4 of Chapter Five of the Settlement Convention; it does not fulfil the conditions for the application of these articles as defined at length by the Commission in its two judgments of November 14, 1959 (Case No. 34 between the Italian Republic and the Federal Republic of Germany) and of May 11, 1960 (Case No. 215 between the Hellenic Government and the Federal Republic of Germany): *cf. Decisions [of the Arbitral Commission],* vol. III, Nos. 70 and 78.

Article 4, paragraph 1, of Chapter Five of the Settlement Convention obliges the Federal Republic to compensate claimants who would otherwise be entitled to restitution under Articles 1 and 3 of this Chapter only in the case of certain property which should have been restituted but the restitution of which was prevented after its identification in Germany but before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, because it had been utilised by the German economy with the authorisation of the Occupation Powers or because it has been consumed or has disappeared owing to destruction, larceny or any other act of disposal.

The compensation provided by this provision does not fall within the concept of reparation for loss or damage resulting directly or indirectly from the war, the right of any of the United Nations to advance during negotiation for a peace settlement between the former belligerents any claim for compensation for its own or its nationals' property, rights or interests having been formally reserved by Article 1, paragraph 6, of Chapter Ten and by Article 1 of Chapter Six of the Settlement Convention and having already been dealt with in several special agreements the conclusion of which is expressly reserved by this Convention.

(12) In the present case, none of the conditions which would oblige the Federal Republic to compensate the claimant has been fulfilled.

Under the terms of Article 3 of Chapter Five of the Settlement Convention, it must be a case of property of which a person, or his predecessor in title, has been dispossessed by larceny or by duress (with or without violence) by the forces or authorities of Germany or their individual members (whether or not pursuant to orders) during the occupation of a territory.

The seizure of the steamship *S/S Marietta Nomikos* does not meet these requirements. The Commission cannot assimilate this seizure to a dispossession in a territory occupied by the German forces during the war. Although the authors of international law often describe the trading vessel on the open sea as "floating territory" of the State under whose flag it sails, this is merely a metaphorical expression to signify that, under these circumstances, the vessel remains under the sovereignty of that State. But that it cannot really be a part of its territory has been luminously demonstrated by Verdross when stating that this "floating territory" cannot be surrounded by any territorial waters and that it cannot have the effect, either in respect of height or of depth, of extending the sovereignty of such State over the air-space above the vessel or over the portion of the sea underneath it *(cf.* Verdross, *Volkerrecht,* 4th ed., 1959, p. 217 *et seq.).* Besides, international law provides several exceptions to the sovereignty of a State over its merchant fleet on the open sea; one of them concerns the exercise of the right of visit in time of war which permits belligerent States to hold up neutral vessels on the open sea, to dictate to them a route to be followed, to conduct them to their ports to be searched there for the purpose of ascertaining whether they have any war contraband on board and, if necessary, to subject them to a prize procedure.

In holding up the *S/S Marietta Nomikos* on the open sea on October 25/26, 1939, at a time when Greece was still a neutral State, in conducting this steamship to a German port and in declaring it to be a lawful prize after that State entered the war, the German authorities followed the rules of international law concerning naval warfare; these measures were, moreover, taken on the open sea with regard to the orders of stopping and of prescription of a route for the purpose of visit and search, and then in German territorial waters with regard to the capture effected at Pillau and then the confiscation of the steamship by decision of the German Higher Prize Court. The fundamental condition

for the damage resulting from these measures to be repaired in application of Article 4 of Chapter Five is lacking, for there is no question of property removed in occupied territories during the war and brought to Germany; a confiscation ordered by a prize court having its seat in Germany cannot be assimilated to a removal of property by German forces occupying territories considered hostile during the war.

Contrary to what is stated in the decision of July 27, 1957, of the *Bundesamt,* the complainant, by the production of the correspondence exchanged between the Royal Greek Embassy and the British High Commission, on September 3, 1954, September 8, 1954 and March 4, 1955, has succeeded in proving that he had already addressed an application for restitution and payment of compensation to the appropriate authorities of one of the Three Powers, *in specie* Great Britain, but this application could not lead to a favourable result for the ship-owner because, at that time, the steamship had already been destroyed for nine years without having been the subject of a decision of delivery to the Hellenic Government. This destruction occurred almost ten years before the entry into force of the Settlement Convention, at a time when the execution of restitutions had not even begun. The complainant's affirmation that the steamship had been delivered to the British authorities for the purpose of restitution to Greece or one of its nationals is not only wholly unsupported by the records but also very unlikely.

Thus the Commission cannot admit that the conditions of Article 4, paragraph 1, of Chapter Five of the Settlement Convention have been fulfilled, considering that there has been no removal of property in Greek territories occupied by the German forces and that the destruction of the S/S *Marietta Nomikos,* without restitution proceedings ever having even started, took place under circumstances which do not permit to grant the complainant the compensation provided in Chapter Five of the Settlement Convention in cases of restitution which has failed.

For these reasons, the Arbitral Commission decides:

(1) The dispensation with oral proceedings requested by the parties is allowed;

(2) The application is declared unfounded and its submissions are rejected;

(3) The court fee shall be borne by the complainant Government.

Case of Holländisches Frachtenkontor *v.* Federal Republic of Germany (appeal), decision of 15 June 1960 and dissenting opinion*

Affaire concernant le Holländisches Frachtenkontor c. la République fédérale d'Allemagne (appel), décision du 15 juin 1960 et opinion dissidente**

Rules of Procedure of the Commission—admissibility of claim—claim barred by the time-limit—Commission's power to admit an appeal after the time-limit fixed by a convention—gross negligence of the complainant.

Interpretation of a convention—need to respect the intention of the Signatory States—strict application of a provision limited by the purpose of a convention.

Non liquet—remedy to an error of procedure—admissibility of exception when rules lead to injustice—absence of relevant provision to interpret a convention—obligation to use the general principles of international law and of justice and equity.

Règles de procédure de la Commission—admissibilité de la requête—requête exclue par le délai de prescription—compétence de la Commission d'admettre un appel après la période de prescription fixée par une convention—négligence grave du requérant.

Interprétation d'une convention—nécessité de respecter l'intention des États signataires—application stricte d'une disposition limitée par le but de la Convention.

Non Liquet—réparation d'une erreur de procédure—admissibilité d'une exception quand l'application des règles débouche sur une injustice—absence de disposition pertinente pour interpréter une convention—obligation de se servir des principes généraux du droit international et des principes de justice et d'équité.

*****

In the present case, the complainant claims the benefit of the provisions of Article 6 of Chapter Ten of the Settlement Convention in relation to the assessment of property levy. The complainant's objection to the assessment of the tax was rejected by the *Finanzamt* [Treasury Office], Duisburg-Nord, by decision dated November 14, 1956. The complainant's appeal from that decision was rejected by the *Finanzgericht* [Treasury Court], Düsseldorf, on

* Reproduced from *International Law Reports* 29 (1966), p. 292.

** Reproduit de *International Law Reports* 29 (1966), p. 292.

June 11, 1958. The judgment of the *Finanzgericht* was served upon the complainant on July 9, 1958.

In a pleading of August 4, 1958, the complainant appealed from that judgment to the Commission. This pleading was sent to the *Finanzgericht* where it was received on August 5, 1958, that is to say, within the statutory time-limit of 30 days. From there it was forwarded to the Registry of the Commission but was not received there until September 19, 1958.

In its answer, the defendant raised the objection of inadmissibility on the ground that the appeal had been lodged too late.

The Third Chamber of the Commission considered separately the question of admissibility and, by Judgment of June 23, 1959, declared the appeal to be inadmissible *(Decisions,* Vol. II, No. 58).

This Judgment having been served upon the complainant on June 26, 1959, the latter filed an application for leave to appeal on July 16, 1959.

By Order of October 30, 1959, the Commission in plenary session granted this application for leave to appeal.

On November 7, 1959, the complainant filed its appeal from the Judgment of the Third Chamber.

The parties having exchanged further pleadings, the oral hearing took place on March 18, 1960, in the course of which the plenary session heard the parties.

The provisions which confer a right of appeal to the Commission from decisions of the German finance courts of first instance under Article 6 of Chapter Ten of the Settlement Convention are to be found in Article 12 of the said Chapter. The relevant provisions of the last-mentioned Article read as follows:

> The following decisions may be appealed to the Arbitral Commission . . . upon application to the Commission by the party concerned within thirty days after the service thereof.
>
> Gegen die nachstehenden Entscheidungen kann auf Antrag der beteiligten Partei innerhalb von dreiBig Tagen nach Zustellung Berufung an die . . . Schiedskommission . . . eingelegt werden.
>
> Les décisions suivantes sont susceptibles d'appel devant la Commission Arbitrale . . . sur demande adressée dans les trente jours de la notification de la décision.

A strict interpretation of these provisions, above all of those of the German text, leads to the conclusion that it is at the Registry of the Commission that the appeal must be received within the specified time. This point of view corresponds also to the provisions of Rule 23 (*a)* of the Rules of Procedure of the Commission, which runs as follows:

> When a pleading or other document is to be filed by a specified date or within a specified time, the date of the receipt of the pleading in the Registry will be regarded as the effective date.

A strict application of these provisions would lead to the conclusion that the complainant's appeal from the judgment of the *Finanzgericht* was filed too late.

The Settlement Convention does not contain any provisions as to the possibility in certain cases of admitting an appeal submitted after the expiry of the time-limit fixed by the Convention. Thus the question arises whether the Commission has the power to do so.

Paragraph *(d)* of Rule 23 of the Rules of Procedure of the Commission which entered into force on April 1, 1957, reads as follows:

> If, after giving the other party an opportunity of stating his views, the Commission is satisfied that a failure to comply with a time-limit is not attributable to the default or negligence of the party himself, it may decide that any step taken after the expiry of the time-limit in question shall be valid.

At its plenary session of November 30, 1957, the Commission agreed to replace this paragraph (*d*) by the following new paragraph (*d*):

> The Commission may declare as valid any step taken after the expiration of a time-limit in respect of which the President could have granted an extension under the preceding paragraph.

It should be stated:

that although the terms of the old paragraph seem to authorize the Commission to declare valid, in certain circumstances, any step taken after the expiry of a time-limit, even of one fixed by the Settlement Convention, this was not the intention of the Commission during the drafting of the Rules of Procedure;

that the replacement of the old paragraph by the new one was made partly to avoid the possibility of such an interpretation; and

that the Commission always intended to reserve the examination of the problem in question to its own decision pursuant to Rule 77 of the Rules of Procedure which provides:

> Any points of procedure not covered by these Rules or by the Charter shall be decided by the Commission when occasion arises.

The problem of the authority of the Commission in respect of the point in question must depend on the intention of the Signatory States as disclosed by the provisions of the Charter of the Commission.

Paragraph 2 of Article 14 of the Charter authorizes the Commission, in general terms, to determine rules of procedure subject only to the qualification that they shall be consistent with the provisions of the Charter. As paragraph 1 of Article 6 of the Charter refers to Article 12 of Chapter Ten of the Settlement Convention, the rules of procedure must also be consistent with the provisions of the last-mentioned article. The question is thus to determine whether the

Signatory States really intended that the time-limit of 30 days provided in the said Article 12 shall apply in all possible circumstances, no matter what injustice might result therefrom. In the opinion of the Commission, it is unlikely that, in a convention essentially designed to remedy injustices, the Signatory States should have intended to exclude the possibility of remedying an error of procedure which might be considered to be excusable and which would lead to injustice. The opinion appears to be confirmed by the provisions of Article 8 of the Charter of the Commission which runs as follows:

> In arriving at its decisions, the Commission shall apply the provisions of the Convention and of legislation made applicable thereby.
>
> Where necessary to supplement or interpret such provisions, or in the absence of any relevant provisions, it shall apply the general principles of international law and of justice and equity.

The terms of the second sentence of this article are wider than would be necessary if it had been intended that they should apply only to cases where it would be necessary to avoid a *non liquet,* and the Commission is of opinion that in reliance upon these provisions it can, in certain cases, admit an appeal submitted to the Registry of the Commission after the expiry of the time-limit fixed by the Settlement Convention.

The Commission must thus examine whether, in the case at issue, the circumstances are such as to induce it to apply this principle.

The judgment of the *Finanzgericht* contains the following instructions as to the various means of appeal against the judgment :

> Against this judgment an appeal *(Rechtsbeschwerde)* is admissible when . . .
>
> The "*Rechtsbeschwerde*" shall be lodged *(ist einzulegen)* with the Registry of the above-mentioned *Finanzgericht* within the month following the service of the judgment . . .
>
> Against this judgment, appeal *(Berufung)* is also possible to the Arbitral Commission on Property, Rights and Interests in Germany at Koblenz, Schloss.
>
> The appeal shall be lodged *(ist einzulegen)* within 30 days after the service of the judgment.
>
> The instruction on this special means of appeal *(das besondere Rechtsmittel)* is based on Article 12 of Chapter Ten of the Settlement Convention.

It is true that the complainant, if it had examined these instructions and the above-mentioned Article 12 with the greatest attention, ought to have understood that it had to lodge its notice of appeal with the Registry of the Commission within the specified time, but the error which it committed by sending it to the *Finanzgericht,* Düsseldorf, is explicable and may be considered excusable.

Pursuant to § 249 of the German *Reich* Tax Code *(Reichsabgabenordnung)* of May 22, 1931, appeals in tax proceedings may always be lodged with the authority which rendered the contested decision. This principle has been adhered

to in the present case, which concerns a tax matter, by the complainant which obviously thought that it applied also to the appeal to the Commission. Its error is due not only to the fact that it followed the routine way without examining the above-mentioned instructions with the necessary care, but also to the fact that these instructions do not make it absolutely clear that the notice of appeal must be lodged with the Registry of the Commission. That other persons more qualified in this matter than the complainant can fall into the same error appears from a letter of November 27, 1958, invoked by the complainant, in which the President of the Second Chamber of the *Finanzgericht* Karlsruhe—in relation to another case submitted to the Commission (No. 305)—came to the conclusion that appeals from decisions of German finance courts to the Commission are regular if lodged with the finance court in due time.

Furthermore, the complainant rightly referred to German text books and judicial decisions on tax procedure indicating the general flexibility of all procedure in tax matters. In this connection, the Commission agrees with the following passages from Hübschmann-Hepp-Spitaler, *Kommentar zur Reichsabgabenordnung und den Nebengesetzen,* 1st-3rd editions, § 86, note 2:

> . . . the character of taxation procedure calls for a more generous and less formal application . . . Authorities should not judge too severely but should enable the appellant to pursue his rights, unless more important principles or legal provisions oppose it. Especially when taxes are high, we consider this to be in accordance with the principle of the rule of law.

Finally, it should be pointed out that the notice of appeal reached the *Finanzgericht,* Düsseldorf—an authority of the defendant—so early that, if the measures required by the circumstances had been taken, it could have been forwarded by the *Finanzgericht* to the Commission early enough to be received before the expiry of the time-limit.

For the foregoing reasons, the Commission holds that the appeal from the judgment of the *Finanzgericht* should be admitted.

For these reasons, the Arbitral Commission decides: (1) the complainant's appeal from the judgment of the Third Chamber of June 23, 1959, is substantiated; (2) the judgment of the Third Chamber is set aside; (3) the appeal from the judgment of the *Finanzgericht,* Düsseldorf, dated June 11, 1958, is admissible; (4) the case is remanded to the Third Chamber for continuation of the proceedings and for decision on the merits and on the costs.

Dissenting opinion of Messrs. Euler, Arndt and Phenix

The facts are simple and not disputed. In our opinion the controlling fact is that the applicant failed to comply with the provisions of Article 12 of Chapter Ten of the Bonn Settlement Convention. His appeal from a decision "of the finance courts of first instance under Article 6" was not made "upon application to the Commission . . . within thirty days after the service thereof".

The thirty-day limit expired on August 8, 1958; the appeal application was received by the Commission on September 19, 1958.

The Commission has no power, either express or implied, under either the Convention or its Charter to consider the reasons for failure to observe time-limits prescribed by the Convention; it can concern itself only with the question whether the relevant time-limit has been observed; if a specific time-limit has not been observed, the Commission has no authority to extend it and thus clothe itself with jurisdiction over appeals excluded by the terms of the Convention. The Signatory Powers conferred no discretion on the Commission in such matters. The time-limit for all appeals to the Commission, whether under Article 12 of Chapter Ten, as in the instant case, or under Article 7 of Chapter Five, is fixed by the Convention at thirty days. Even if the strict application of the thirty-day limit could, in some cases, result in undeserved hardship—a consideration absent in the instant case since any hardship to the complainant results from its seemingly complete ignorance of the provisions of the Convention and of the Commission's Rules of Procedure—the Convention does not recognize hardship as a justification for the Commission to indulge in what is sometimes called judicial legislation.

Admission of the applicant's appeal in the present case is open to the further objection that it violates the provisions of the Commission's Charter. Article 8 of the Charter requires the Commission to "apply the provisions of the Convention" in arriving at its decisions. It reads:

> In arriving at its decisions, the Commission shall apply the provisions of the Convention and of legislation made applicable thereby. Where necessary to supplement or interpret such provisions, or in the absence of any relevant provisions, it shall apply the general principles of international law and of justice and equity.

The Convention permits appeals against decisions such as that involved in the present case only

> upon application to the Commission by the party concerned within thirty days after the service thereof
>
> auf Antrag der beteiligten Partei innerhalb von dreissig Tagen nach der Zustellung . . . an die . . . Schiedskommission
>
> sur demande adressée à la Commission par la partie intéressée dans les trente jours de la notification de la decision.

This provision is clear, complete and unambiguous. There is no "absence of any relevant provisions" regarding the time-limit for appeal, nor is the express thirty-day provision one which it is in any way "necessary to supplement or interpret". Even assuming that applicable "general principles of international law and of justice and equity" existed, the conditions precedent for their application are not present.

Since, however, the majority opinion construes the Convention to mean that it does not exclude the possibility that in certain circumstances an appeal

would be admissible after the expiration of the time-limit prescribed in the Convention and that an express authorization therefor derives from the second sentence of Article 8 of the Chapter, it is not inappropriate to examine this doctrine with considerable care. It can be accepted in the present case only by disregarding completely the first sentence of Article 8 of the Charter of the Commission and the thirty-day time-limit stipulated in Article 12 of Chapter Ten of the Settlement Convention and thereby creating that necessity "to supplement or interpret" the provisions of the Convention and that "absence of any relevant provisions" which alone empower the Commission to "apply the general principles of international law and of justice and equity". At this point it is necessary to consider whether there are any "general principles of international law" or "of justice and equity" which, disregarding the significance of the first sentence of Article 8 of the Charter, would justify the Commission in admitting the complainant's appeal.

1. *International Law*

There are very few precedents to be found in the international field and those that exist do not support the majority doctrine. Witenberg, *L'organisation judiciaire, la procédure et la sentence international* (1937), states on pp. 128 and 129 that an international judge has the power to grant restoration of the *status quo ante* in exceptional cases and adds that this is a standard practice. However, according to his previously expressed opinion (p. 124) such power cannot be exercised in respect of time-limits fixed by the agreement of the parties concerned, for there he says: "*la tendance sera très nette à sanctionner de l'irrecevabilité la méconnaissance des règles procédurales ayant leur source dans l'accord des parties, . . .".* As a matter of fact no decisions of an international tribunal can be found which deviate from this tendency (see Maarten Bos, *Les conditions du procès en droit international public* (1957), pp. 243 *et seq.,* 261 to 263; Hudson, *International Tribunals,* pp. 85, 86).

Simpson and Hazel Fox, *International Arbitration* (1959), p. 123, reads as follows: "Treaties have imposed express time-limits barring claims not made or presented within a certain time . . . "and in Note 62 they cite as an example Chapter Five of the Settlement Convention which "sets up an elaborate system of limitations".

The extensive judicial holdings of the Mixed Arbitral Courts established under the Peace Treaties following World War I cannot be adduced for comparison because the time-limits involved in those cases were not laid down by the Treaties themselves but by the rules of procedure of the Arbitral Courts concerned.

The United States Court of Restitution Appeals of the Allied High Commission for Germany held in three cases that the Court could not admit appeals in respect of cases where claims had not been filed within the prescribed time-limit. In *Erna Fingerhut* v. *Deutsches Reich* (Opinion No. 259, Vol. Ill, p. 541) the Court said:

> The learned trial court rightly found that there had not been compliance with the period of limitation in Article 56 and the Implementing Regulation No. 1 issued thereunder which provide that such a claim must be filed with the Central Filing Agency in Bad Nauheim on or before December 31, 1948. Also without error was the finding that filing with the office of the Property Division in Wiesbaden did not comply with the mandate as contained in Article 56, Law 59, which plainly prescribes the only place for filing and within the stated period. We have discussed this issue in our Advisory Opinion No. 1. The time-limit set forth in Article 56 is one of prescription and the claimant's late filing can only be excused if she fell within the provisions of Regulation No. 5, Paragraph 1 (Paragraph 2 being inapplicable), under Military Government Law 59 (which the court found she did not) . . . Validation cannot be had for a court cannot toll the statute.

The above decision was cited in *Schneider* v. *Franz Eher Verlag Nachfolger GmbH et al.* (Opinion No. 366, Vol. IV, p. 384) and in *Deutsches Reich et al.* v. *Loewenthal et al.* (Opinion No. 464, Vol. V, p. 343). In the former case the Court held:

> Compliance with the period of limitation is mandatory and this Court is powerless to validate a late filing.

In the latter case the Court held:

> However, under Law 59, the Restitution Authorities have jurisdiction to process only those claims which have been filed in accordance with the time-limit fixed by Law 59. The Restitution Authorities have no jurisdiction to entertain claims filed after the time set by Article 56, paragraph 1, and Regulation No. 5 of Law 59.

The Plenary Session of the Arbitral Commission has not heretofore admitted a late appeal. In the case of *Western Machinery* v. *Federal Republic of Germany* the Third Chamber held *(Decisions,* Vol. I, No. 5):

> While we are quite convinced of the *bona fides* of complainant's claimed ignorance and confusion over the change-over from the occupation laws to the Settlement Convention, we do not deem such ignorance to constitute adequate grounds for restoring complainant to its *status quo ante* before the running of the 30 day period.

The Plenary Session held (*Decisions,* Vol. I, No. 21):

> The Third Chamber was right, therefore, in finding that the notice of appeal was lodged too late.
>
> As an alternative motion, the complainant applied for reinstatement, basing itself on its ignorance of the establishment of the Commission, of the time-limit for appeals and of the office with which the appeal should have been lodged.
>
> Even if the Commission had the power to order such a measure, it would not be justified in the present case since the complainant lodged its notice of appeal more than four months after service of the contested decision, although it could have acquired the necessary information with little effort

by studying the *Bundesgesetzblatt* and the *Bundesanzeiger* and in any case by inquiry at the German Patent Office, the German Foreign Office or at any of the Embassies of the three other Signatory States.

In the case of *E. I. du Pont de Nemours & Company* v. *Federal Republic of Germany* (AC/3/J[59]3) the Third Chamber said:

> While it is true, as argued by the complainant, that under Article 12, paragraph I (*f*), of the Settlement Convention the Arbitral Commission is empowered to hear appeals from any decisions of the last instance of the German Patent Office or its Grand Senate under Allied High Commission Law No. 8 . . . the jurisdiction of the Commission in such cases is limited by a further provision in the same Article, namely, that the decisions appealed from must be the subject of application to the Commission by the party concerned within thirty days after the service thereof. In the instant case the record does not show the date when the contested decision of the Appeal Senate was served on the complainant but it is indisputable that such service must . . . have been made prior to . . . a date about ten months prior to June 3, 1955, when complainant's appeal was received at the address of the Arbitral Commission. The appeal is therefore barred by the above-quoted provision of Article 12 of Chapter Ten of the Settlement Convention.

The complainant applied for leave to appeal from the judgment of the Third Chamber and the applicant was referred to the Plenary Session which, on June 20, 1959 (AC/P/O[59]7), rejected the application.

In the case of *Mercedes Büromaschinen-Werke v. Federal Republic of Germany (Decisions,* Vol. I, No. 6) the complainant was served in April 1953 with the contested decision of Appeal Senate Ia. On June 3, 1955, complainant appealed to the Arbitral Commission. The Third Chamber said:

> Article 8, paragraph 2, of Chapter Ten of the Convention, upon which complainant relies for submission of its appeal, plainly provides that an appeal may be taken in accordance with the provisions of Article 12 of this Chapter . . . Article 12 then defines the decisions which may be appealed to the Commission under Chapter Ten, and expressly provides that such decisions may be appealed upon application to the Commission by the party concerned within thirty days after the service thereof . . .
>
> Complainant asks the Commission to give it relief despite the clear time prescription of the Convention . . .
>
> and found
>
> . . . that no other course is properly open to us but to apply the clear language and intention of the governing Treaty.

The appeal was dismissed and on May 10, 1958, the Plenary Session rejected an application for leave to appeal. This case presents one particularly interesting feature. One of the grounds suggested by the complainant in support of its appeal from the decision of Appeal Senate Ia was Rule 23 *(d)* of the Commission's Rules of Procedure. This rule read at that time:

> If, after giving the other party an opportunity of stating his views, the Commission is satisfied that a failure to comply with a time-limit is not attributable to the default or negligence of the party himself, it may decide that any step taken after the expiry of the time-limit in question shall be valid.

The Chamber recognized that the Rule afforded a certain flexibility "in the enforcement of the Commission's procedural rules" but held that

> The discretion that rests in the rule does not extend, however, to time-limits which are fixed in the Settlement Convention or by the Charter of the Arbitral Commission.

The Plenary Session subsequently amended Rule 23 *(d),* effective January 1, 1958, to read as follows:

> The Commission may declare as valid any steps taken after the expiration of a time-limit in respect of which the President could have granted an extension under the preceding paragraph.

The preceding paragraph (Rule 23 (*c*)) authorizes the President to

> extend the time-limits fixed by the Commission or by these Rules other than the time-limits which are fixed by the Charter and repeated in these Rules.

The Plenary Session has, therefore, already formally recognized that the Commission cannot, through its Rules of Procedure, extend time-limits "fixed by the Charter". No other conclusion could be reached. Article 14 of the Charter provides that "The Commission shall determine rules of procedure consistent with the present Charter"; Article 8 of the Charter requires the Commission to "apply the provisions of the Convention" in arriving at its decisions; one of the provisions of the Convention is the requirement of Article 12 of Chapter Ten that appeals be submitted to the Commission "within thirty days after the service" of the contested decision. If appeals which are barred by reason of the thirty-day time-limit fixed by the Convention cannot be made admissible by a more liberal provision in the Commission's Rules of Procedure, they cannot be made admissible by decision of a Chamber or of the Plenary Session in an individual case. Time-limits fixed by the Convention cannot legally be disregarded by the Commission in arriving at its decisions any more than in formulating its Rules of Procedure.

We do not feel that the reason given by the majority for admitting the appeal, namely, that it was filed in due time but at the wrong address takes the case out of the scope of the above-stated rules.

2. Justice and Equity

There is no such uniformity in the various national jurisdictions as to rules regarding the admission of late appeals as would justify the Commission in disregarding the 30-day limitation imposed by the Convention. There are some national jurisdictions which do not recognize the admission of late appeals in the absence of specific statutory authorization.

In France, for example, Article 445 of the French *Code de Procédure Civile* provides: "*Le délai d'appel emportera déchéance.*" If there are decisions of French courts admitting an exception in cases where the appellant was prevented by *force majeure* (Dalloz, Note 1 to Article 445), they concern a special case of impossibility of action and thus, as in cases of hindrance caused by fraudulent conduct on the part of the opponent, justify the exception. Such situations, however, are not presented by the instant case.

Provisions are to be found in Swiss Law which prohibit reinstatement of legally established time-limits for appeals (see Code of Civil Procedure for the Canton of Berne, Article 288; also *Commentary* by Leuch, 3rd edition, 1956, Note 2 to Article 288; also "*Gesetz des Kantons Basellandschaft betr. die Gerichts- und Prozessordnung",* Article 221, and Guldener, *Schweizerisches Zivilprozessrecht* (1958), p. 221, Note 40).

In German law, too, there are time-limits which cannot be restored if they have not been observed, and the non-observance of which thus entails preclusion, *e.g.* periods of limitation and periods for bringing special actions, such as the action for contesting the legitimacy of a child (§§ 203, 206, 1594, 1596 of the German Civil Code). In such cases, exceptions are only allowed in case of *force majeure,* a suspension of the administration of justice or legal incapacity of a party. These exceptions are without any importance in the case at issue.

Rule 34 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, entitled "Computation and enlargement of time". Paragraph 2 of that rule defines as follows the powers of a justice of the court to extend time-limits fixed for appeals to the court:

> Whenever any justice of this court *is empowered by law* or under any provision of these rules *to extend the time* within which a party may petition for a writ of certiorari or file in this court his record on appeal or any brief or paper, *an application seeking such extension shall be timely if it is presented to the clerk within the period sought to be extended. The clerk will refuse to receive any application for extension sought to be presented after expiration of such period.* (Emphasis supplied.)

In two earlier cases the Supreme Court held: (1) that failure to docket an appeal in time was not excused by the fact that the clerk below agreed to file the record with the clerk of the Supreme Court *(Fayolle* v. *Texas Pac. Ry. Co.,* 124 U.S. 519); and (2) that appeals not docketed in time are inoperative *(Radford* v. *Folsom,* 123 U.S. 725). It would be imprudent, therefore, to describe a general refusal to admit late appeals as unjust or equitable.

There are, however, jurisdictions where the courts follow more lenient rules wherever such leniency is specifically authorized by law. Leniency is permitted, for example, where the delay was not caused by the fault of the appellant. Since the instant case has its origin in German tax legislation it is not inappropriate to cite § 86 of the German tax code which provides:

> Leniency for the non-observance of a time-limit for appeal . . . may be applied for by anyone who had been prevented from observing the time-

limit through no fault of his own. The fault of an authorized representative or agent shall be considered equal to the fault of the applicant.

The non-observance of the time-limit for appeal in the present case was due to the fault, based on ignorance, of the complainant's authorized representative; it was therefore the fault of the complainant under § 86 and leniency would therefore not be in order under that Law.

The complainant had the choice of two different legal remedies against the judgment of the *Finanzgericht,* Düsseldorf, of June 11, 1958, which had rejected its appeal against the decision of the *Finanzamt:* appeal to the *Bundesfinanzhof* [Federal Treasury Court] which in German tax law is called "*Rechtsbeschwerde*" and the "appeal" to the Arbitral Commission. There can be no doubt that it is the provisions of the German Tax Code which alone are decisive for the lodging of a "*Rechtsbeschwerde*" with the *Bundesfinanzhof,* and that the provisions of the Settlement Convention alone are decisive for the lodging of appeals with the Arbitral Commission.

In accordance with the provisions of the German Tax Code valid for lodging a "*Rechtsbeschwerde*" (§ 249, paragraph 3), the "*Rechtsbeschwerde*" is "*anzubringen*" (to be lodged) with the *Finanzgericht* which corresponds to the term "to be filed". It may also be filed with the *Bundesfinanzhof.* Article 12 of Chapter Ten of the Settlement Convention applies to appeals to the Arbitral Commission. The instruction on remedies contained in the judgment of the *Finanzgericht,* Düsseldorf, informed the complainant of both these remedies although the *Finanzgericht* was under no duty to mention the possibility of an appeal to the Commission. It clearly distinguished between the "*Rechtsbeschwerde*" and the "appeal to the Arbitral Commission" and the instruction was divided into two distinct parts by virtue also of the different types of print and the specification in two separate paragraphs. Whereas the first part states that the "*Rechtsbeschwerde*" shall be filed with the office of the *Finanzgericht,* the second part states that "an appeal also lies to the Arbitral Commission on Property, Rights and Interests in Germany, Koblenz, Schloss". The complainant could not assume from these instructions that it had to lodge with the *Finanzgericht* the appeal intended for the Arbitral Commission. We are not of the opinion that these instructions were such as to cause the complainant to fall into error. In any case its error is not excusable because at the end of the judgment, where the "special legal remedy" of appeal to the Arbitral Commission is referred to, its attention was called to the above-mentioned provision of the Settlement Convention. The complainant, a trading company represented by legal experts, was thus able, upon consulting the Settlement Convention, to acquire exact information concerning the provisions valid for proceedings before the Arbitral Commission. It could particularly be expected to do so since the appeal to the Commission constituted a "special" remedy based on an international convention. The complainant could not simply assume, therefore, that it was entitled to file the appeal to the Arbitral Commission, an international judicial body, with the German *Finanzgericht* as laid down in the

German tax provisions for cases of "*Rechtsbeschwerde*" to the *Bundesfinanzhof*. This is particularly true since, by consulting Article 12 of Chapter Ten of the Settlement Convention, to which the judgment of the *Finanzgericht* made express reference, it would have found that an appeal under this provision lies to the Arbitral Commission also from decisions of other German instances, *e.g.,* the regular courts, whose law of procedure provides for appeals to be filed only with the court which is to decide on the appeal.

Examination of Article 12 of Chapter Ten of the Settlement Convention will show that the appeals provided for therein shall be filed with the Arbitral Commission itself and not with the court whose decision is contested:

Firstly, this Article lays down that the decisions of German courts specified therein may be appealed to the Arbitral Commission upon application by the party concerned, (French text ". . . *sur demande adressée à la Commission . . .")* . . . "in accordance with the provisions of its Charter". The wording of this provision alone rebuts the assumption that the appeal should be filed with the lower court.

Secondly, sentence 1 of Article 10 of the Charter of the Commission, to which the said Article 12 makes express reference, reads as follows:

> Proceedings before the Commission shall be instituted by a written complaint which shall contain a statement of the facts giving rise to the dispute and the arguments put forward by the complainant.
>
> Das Verfahren von der Kommission wird eingeleitet durch Einreichung einer Klageschrift, die eine Darlegung der Tatsachen, die dem Streite zugrunde liegen und Rechtsausführungen des Klagers enthalt.
>
> Les litiges sont portés devant la Commission par une requête écrite contenant un exposé des faits qui donnent lieu au litige ainsi que les arguments invoqués par le demandeur.

The Charter here requires a written complaint for all cases in which the Commission may be appealed to. Both the use of the words "written complaint", as well as the remaining text, are inconsistent with the conception that the document with which proceedings before the Commission are instituted, could with legal effect be submitted to any other agency, such as the German court whose decision is contested.

At the same time the decisive provisions quoted above show that the effective date for the lodging of an appeal is the date on which the appeal is received by the Commission, and that consequently the time-limit of 30 days laid down in Article 12 of Chapter Ten of the Settlement Convention has not been observed simply by virtue of the fact that the brief of appeal was dispatched in due time.

Other provisions of the Settlement and of the Charter, which are not applicable in the present case, *e.g.* Article 7, paragraph 3, of Chapter Five of the Convention and Article 13, paragraph 5, of the Charter, also permit no other

interpretation in respect of the cases there defined of resort to the Arbitral Commission.

In conformity with the above, Rule 25 of the Rules of Procedure of the Commission clearly and unequivocally provides:

> A case shall be brought before the Commission by a written complaint transmitted to the Registrar at the seat of the Commission.
>
> Eine Sache wird von der Kommission durch eine Klageschrift anhängig gemacht, die bei dem Sekretär am Sitz der Kommission einzureichen ist.
>
> Une affaire portée devant la Commission sera présentée sous la forme d'une demande écrite transmise au Greffier au siège de la Commission.

and Rule 23 *(a)* states equally clearly:

> When a pleading or other document is to be filed by a specified date or within a specified time, the date of the receipt of the pleading in the Registry will be regarded as the effective date.
>
> Wenn ein Schriftsatz oder ein Schriftstück bis zu einem bestimmten Zeitpunkt oder innerhalb einer bestimmten Frist eingereicht sein muss, so ist der Tag des Einganges im Sekretariat massgebend.
>
> Lorsqu'une pièce de la procédure ou un document doit être déposée avant une date determinée ou dans un délai fixe, c'est la date de la réception de la pièce au Greffe qui est à considérer comme la date dont il sera tenu compte.

In view of these facts, the complainant showed gross negligence in submitting the notice of appeal to the registry of the *Finanzgericht*.

The foregoing considerations lead us inescapably to the conclusion that even if the first sentence of Article 8 of the Charter of the Commission did not exist and that Article merely authorized the Commission in its discretion to "apply the general principles of international law and of justice and equity", there are no such general principles the application of which would justify the admission of the complainant's appeal.

In conclusion, to hold that the *Finanzgericht,* Düsseldorf, was under a legal duty to forward the complainant's appeal papers to the Arbitral Commission in Koblenz is not to hold either that it was a duty to be performed at all costs or that its failure to perform that duty prior to the expiration of the 30-day time-limit excuses the error of the complainant and requires the Commission to admit the appeal. If the *Finanzgericht* was under such legal duty, the failure of the Third Chamber to take that legal duty into consideration could be regarded as an error in law properly the subject of an appeal to the Plenary Session. If that is the judgment of the Plenary Session it should, it seems to us, remand the case to the Chamber with instructions to examine the facts and determine whether it was reasonably possible for the *Finanzgericht* to have acted in time. This would require evidence as to the exact addressee on the envelope, as to the hour on Tuesday, August 5, 1958, when the document reached the *Finanzgericht,* as to the date and hour when the document reached an official competent to deal with the matter, as to the date and hour when,

considering his other duties, he could reasonably have been expected to decide whether the document was one of two copies of the same appeal, the other copy having been sent direct to the Commission, and, in case his decision was that it was not such a copy but an original intended for the Commission, the date and hour when it could reasonably be expected that the necessary letter of transmittal could be prepared, signed and placed in the mail. Only if all these facts, when determined, prove that the *Finanzgericht,* Düsseldorf, could, with the exercise of reasonable efforts, have forwarded the appeal to the Commission so as to arrive prior to the expiration of the 30-day period on Friday August 8, 1958, could it be held that the *Finanzgericht* in fact had not done what was legally required of it. Not until this question of fact has been decided affirmatively would it be proper for the Plenary Session to consider whether such failure by the *Finanzgericht* to comply with the provisions of German law can be recognized by the Arbitral Commission as justifying an admission of the appeal notwithstanding the clear 30-day limitation imposed by the Convention.

The appeal of the complainant should be dismissed.

Case of Heirs of Reuter *v.* Federal Republic of Germany, decision of the Second Chamber of 16 January 1961*

Affaire relative aux héritiers de Reuter c. la République fédérale d'Allemagne, décision de la Deuxième Chambre du 16 janvier 1961**

Competence of the Arbitral Commission—restitution or restoration claim—seizure of property and securities—examination of the possible discriminatory treatment made to complainants' property—Commission not competent to order other measures of restoration than those envisaged in the Settlement Convention—no extraterritorial competence of the Commission.

Discriminatory treatment—assessment of the discriminatory character of a domestic measure—no discriminatory character of a measure applied regardless of nationality, race or religion—discriminatory application of a measure which is not discriminatory.

Diplomatic relations—free discretion of States to engage in diplomatic actions.

Compétence de la Commission d'arbitrage—requête en réparation ou restitution—confiscation de biens et de titres—examen d'éventuels traitements discriminatoires infligés aux biens des requérants—Commission non compétente pour ordonner

* Reproduced from *International Law Reports* 42 (1971), p. 401

** Reproduit de *International Law Reports* 42 (1971), p. 401

des mesures de restitution autres que celles envisagées par la Convention de règlement—Commission dépourvue de compétence extraterritoriale.

Traitement discriminatoire—évaluation du caractère discriminatoire d'une mesure interne—les mesures imposées sans égard à la nationalité, à la race ou à la religion n'ont pas un caractère discriminatoire—mise en œuvre discriminatoire d'une mesure non discriminatoire.

Relations diplomatiques—faculté discrétionnaire des États d'entreprendre des démarches diplomatiques.

*****

(1) By pleading of 12 September 1958, M. Antoine Saint-Germier, the representative of the Reuter heirs, submitted to the Arbitral Commission an application for review of the decision of the *Bundesamt fur die Prüfung ausländischer Rückgabe- und Wiederherstellungsansprüche* (called *Bundesamt)* [Federal Office for Examination of Foreign Restitution Claims] dated 13 August 1958 (No. BA/Pr. 62/55) in the case of the heirs of the late Rudolf Florian Reuter at Baden-Baden, dismissing the latter's claim for restitution of their property and restoration of their rights and interests in the territory of the Federal Republic.

A. Facts

(2) On 28 July 1891 the Austrian national Rudolf Florian Reuter concluded before [a] notary public with the municipality of Baden-Baden a contract of deposit and donation which is incorrectly called "foundation "in the complainants' pleading and which was governed at the time of conclusion by Articles 913, 920, 915, 1930, 1984 and 1991 of the Baden Civil Code *(Badisches Landrecht).*

By virtue of this contract, he handed over to the said municipality 6,500 3% Austrian South Railway debentures which were subsequently exchanged for 6,500 3.6 to 4.5% debentures (at variable interest) of the Danube-Save-Adriatic Railway Corporation; these securities were inalienable, and if they fell mature by lot they had to be replaced; the inalienability was made manifest by double stamping of the securities. Under this contract, the municipality had over these securities rights and obligations of custody and administration; it had undertaken vis-à-vis the depositor and donor to use the yield of these assets in compliance with the stipulations of the said contract which it accepted without reservations, after having obtained the necessary administrative authorisations such as were required at that time by the law of the Grand Duchy of Baden.

Pursuant to § 3 of the contract, the municipality of Baden-Baden had to distribute among ten poor families of Baden-Baden the yield of 308 securi-

ties after deduction of its administration fees; pursuant to § 4, the yield of the remaining 6,192 securities had to be paid, during his life-time, to the donor and depositor and after his death to his four children as well as to their possibly surviving spouses; after the death of these first beneficiaries the capital should be distributed, if there were any grandchildren of Rudolf Florian Reuter, in the proportion of 1/10 to the municipality of Baden-Baden and 9/10 to the grandchildren; if there were no grandchildren the capital should be shared out to the municipality of Baden-Baden and a foundation, "Emil Reuter, Neuendorf "(in Prussia), at the rate of 1/3 for the former and 2/3 for the latter.

(3) Rudolf Florian Reuter died in 1930, leaving four children of French nationality and residing in France; they are all dead by now. The widow [of] Josef Saint-Germier, born Mathilde-Ludovica Reuter, the last surviving of the children of Rudolf Florian Reuter, died on 2 March 1956, after the institution of proceedings before the *Bundesamt;* she it was who since 1930 distributed the yields among the persons entitled, and it is her son, M. Antoine Saint-Germier, who presently represents the grandchildren of the donor, all of them heirs and beneficiaries of the contract of deposit and donation of 28 July 1891, and most of them of French, one of German and one of Russian nationality.

(4) Until 1939, the municipality of Baden-Baden strictly fulfilled the obligations which it had assumed under the contract. Since 1942, the said municipality found it impossible to transfer the coupons of the securities which it had to administer, on account of the following circumstances:

By public announcement *(Bekanntmachung)* of 22 October 1942 *(Reichsanzeiger* 1942, No. 257), the Reich Minister of Economy and the Board of Directors of the *Reichsbank* requested the holders of bearer debentures of the Danube-Save-Adriatic Railway Corporation to offer these securities to the *Reichsbank* in compliance with the Law of 12 December 1938 concerning the *Devisenbewirtschaftung* (§§ 51 and 60) and of the second implementing ordinance of this Law of 16 March 1939, to the extent to which

(a) these securities were owned by persons who, under foreign currency law, were German nationals, "*Inländer", (Deviseninländer)*;

(b) these securities were entrusted directly or indirectly to the custody of "*Inländer"* and were owned by persons who, under foreign currency law, were emigrants, "*Auswandere" (Devisenauswanderer).*

Considering it its duty to follow this request, the municipality of Baden-Baden delivered to the *Reichsbank* agency at Baden-Baden on 24 November 1942 all the debentures, *i.e.*, 6,494, which it held at that time on behalf of the Reuter heirs, and received the counter-value of these securities, namely 259,740 RM, which were paid into an account with the Baden-Baden Savings Bank and which were reduced to 16,733.25 DM during the currency reform.

The 6,494 debentures of the Danube-Save-Adriatic Railway Corporation thus transferred to the *Reichsbank* disappeared. The numbers of these securities had been noted, however, and could be made known to the Baden-Baden

agency of the *Reichsbank,* which acknowledged on 25 November 1942 having taken delivery of these securities; the French Committee of the holders of debentures of the said Corporation declared on 10 June 1958 that these 6,494 debentures were part of a lot of 866,674 debentures which were returned to this Railway Corporation by the German Reich in 1943, and confirmed this information by a letter served on the Arbitral Commission on 18 July 1960.

The debentures of the Danube-Save-Adriatic Railway Corporation had formed the subject of the Rome Agreement concluded on 29 March 1923 between Austria, Hungary, Italy, Serbia and the Corporation. This Agreement was replaced by the Brioni Agreement concluded during World War II on 10 August 1942 between the German Reich, Italy, Croatia and Hungary; the face value of these debentures was decreased from 112.50 gold francs to 22.50 gold francs; under this Agreement, the Signatory States had undertaken to pay to the Corporation annuities, and Article 11 stipulated that

> any State holding debentures issued under the old Rome Agreement or overdue coupons shall have the right to use them for reducing his own undertakings in respect of payment of the debts, by handing them over to the Corporation within the three months following the entry into force of the present Agreement . . . The Corporation will immediately annul the debentures and coupons transferred in compliance with this paragraph.

The Brioni Agreement was subsequently declared null and void by the Peace Treaties of 10 February 1947 with Italy (Annex XIV, paragraph 15) and with Hungary (Article 26, paragraph 10) as well as by the Treaty with Austria of 15 May 1955 (Article 25, paragraph 10). The representative of the heirs, M. Antoine Saint-Germier, admits in his letter of 17 July 1947 that the securities of the Reuter heirs transferred to the *Reichsbank* and then to the Corporation by the German Reich have been destroyed, which statement is supported by the obligation imposed on the Corporation by the Brioni Agreement to annul immediately the debentures and overdue coupons which it received (Article 11, mentioned above) and also by the notice of 22 July 1956 published by the Committee of debenture holders with its headquarters in Paris, where it is declared that the 866,674 Danube-Save-Adriatic debentures were physically destroyed in 1943.

B. Procedure

(5) On 27 December 1955 the widow Saint-Germier submitted to the *Bundesamt* on behalf of the Reuter heirs an application based on Article 1, paragraph 1, of Chapter Ten of the Settlement Convention, requesting the restoration of the legal and financial situation of the interested parties comprised under the collective expression "Reuter Foundation", such as it existed on 24 November 1942, the date on which the securities had been delivered by the custodian, the municipality of Baden-Baden.

After several inquiries during which both the municipality of Baden-Baden and the Federal Ministry of Finance were given the opportunity of setting forth their arguments, the *Bundesamt,* by decision of 13 August 1958,

dismissed the application of the Reuter heirs; on 30 August 1958, this decision was served upon the representative of the interested parties in Paris who submitted a complaint to the Arbitral Commission on 15 September 1958, i.e., within the thirty day time-limit fixed by Article 12 of Chapter Ten of the Settlement Convention, thus regularly bringing the matter before the Arbitral Commission.

After an exchange of pleadings on both sides, the oral hearings took place on 19 February 1960, at the close of which the complainants made the following submissions:

> That the Commission set aside the decision rendered and, deciding again, declare the complaint of the joint heirs Reuter to be admissible and well-founded since the rights and interests of the latter in the Reuter Foundation have suffered discriminatory treatment through an injustified requisition; declare that the German Federal Republic is obliged to restore the Florian Reuter Foundation (comprising 6,494 Danube-Save-Adriatic debentures), the choice of diplomatic negotiations or other means for reaching this aim being left to the Federal Republic.

In its Answer of 17 December 1958, the defendant requested that the complaint be dismissed as unfounded; it upheld this request in its Rejoinder of 27 January 1959 and at the close of the oral hearings.

(6) Before the opening of the oral hearings, the municipality of Baden-Baden submitted to the Commission on 4 May 1959 a pleading in which it supports the claim of the Reuter heirs, without presenting an application for intervention in compliance with Rules 51 and 52 of the Rules of Procedure or submissions to this effect, restricting itself to asking the Commission to allow the application of 27 December 1955 by setting aside the decision rendered, following the application for review of 12 September 1958. This document, which does not contain any new element of fact or of law, was communicated for information purposes to the complainants and the defendant; the latter did not deem it appropriate to answer this pleading.

The Law

(7) The claim of the Reuter heirs is based on Article 1, paragraph 1, of Chapter Ten of the Settlement Convention, the first sentence of which reads as follows:

> Insofar as this has not already been done, the Federal Republic will take all steps necessary to ensure that the nations, persons and companies referred to in paragraph 3 of this Article shall be able to secure the return of their property in its present condition, and the restoration of their rights and interests, in the Federal territory to the extent to which such property, rights or interests suffered discriminatory treatment.

The concept of discriminatory treatment is given in paragraph 4 of this Article, which provides:

> The term "discriminatory treatment" as used in this Article shall mean action of all kinds applied between 1 September 1939 and 8 May 1945 to any property, rights or interests, as a result of any exceptional measures which were not applicable generally to all non-German property, rights or interests, and giving rise to prejudice, deprivation or impairment without the free consent of the interested parties and without adequate compensation.

The Arbitral Commission, set up by the High Parties Signatory to the Settlement Convention for ensuring its application, is therefore competent in the present proceedings to examine whether the property of the complainants suffered discriminatory treatment and whether restitution or restoration of this property is possible in the Federal territory.

(8) All parties to the present action agree that the public announcement of 22 October 1942 of the Reich Minister of Economy and the Board of Directors of the *Reichsbank (Reichsbankanzeiger* 1942, No. 257) has no discriminatory character since it applied, regardless of nationality, race, religion or ideology, to all Germans and to all foreigners in Germany who under foreign currency law were "*Inländer*" [local nationals], and also to all Germans and all foreigners in Germany who were, directly or indirectly, custodians of securities of the Danube-Save-Adriatic Railway Corporation owned by emigrants, "*Auswanderer*", under German foreign currency law. The Reuter heirs, all but one of non-German nationality, and all of them living outside Germany, did not fall within the group of persons considered "*Inländer*" or "*Auswanderer*" under the German law on foreign currency (§ 5 *Devisenbewirtschaftungsgesetz),* for it was not the nationality of the owner which was determining, but, from the point of view of the German law on foreign currency, their domicile or their residence. Unquestionably they were thus not subject to the obligation to declare their securities and to offer them to the *Reichsbank,* and possibly to deliver them if the latter accepted the offer, nor were they obliged to conclude to this effect a sales contract with the latter *(Kontrahierungszwang).*

The complainants assert, however, that they suffered a discriminatory application of these provisions, which in themselves were not discriminatory, in that their securities were offered by the municipality of Baden-Baden to the *Reichsbank* which actually took delivery of them. They believe that in reality their securities were requisitioned and that this requisition answers all the requirements of Article 1, paragraph 4, of Chapter Ten of the Settlement Convention for discriminatory treatment. They state:

(1) that the seizure of their securities by the *Reichsbank* took place during the crucial period laid down in the said Article, *i.e.*, between 1 September 1939 and 8 May 1945;

(2) that their securities were not subject to the requisition envisaged in the public announcement of 22 October 1942, that they were delivered to and accepted by the *Reichsbank* in compliance with the order contained in the announcement, and that this measure of requisition indeed constituted an exceptional treatment, since it was not applicable generally to non-German

rights and interests, and was by no means applicable to the rights and interests of the Reuter heirs;

(3) that the Reuter heirs, the owners of the securities and the only interested parties, never freely consented to their securities being delivered to the *Reichsbank;*

(4) that they were never paid adequate compensation, since the sum of 259,740 RM assigned to them, which does not take into account that the debentures were made out in gold francs and that the coupons were paid in dollars and which has in reality to be reduced to 16,773.25 DM, did not correspond to the real value of the securities so that the Reuter heirs had suffered a loss in the order of 240,000 new French francs.

For these various reasons, the complainants consider themselves entitled to complete restoration, in a way which to the defendant appears realisable, if necessary by diplomatic negotiations with the States which signed the now lapsed Brioni Agreements, or with the Danube-Save-Adriatic Railway Corporation, and emphasise that they request neither the actual restitution of their securities nor compensation which they themselves consider impossible.

(9) The question whether the transfer of the securities by the municipality of Baden-Baden, which was merely a custodian, to the *Reichsbank* and the latter's seizure of these securities in application of a Law which did not relate to them since they were owned by foreigners domiciled outside Germany, constitute discriminatory measures within the meaning of Article 1, paragraph 4, of Chapter Ten of the Settlement Convention, may be left open, since admittedly the Law itself does not have a discriminatory character and since it is only its application which is criticised and criticisable.

As has been stated in the contested decision of the *Bundesamt* of 13 August 1958, the public announcement *(Bekanntmachung)* of 22 October 1942 of the Reich Minister of Economy and of the Board of Directors of the *Reichsbank* ordering the requisition of the securities of the Danube-Save-Adriatic Railway Corporation was in fact wrongfully applied to the complainants since they were domiciled abroad.

The transfer of the securities by the municipality of Baden-Baden and their seizure by the *Reichsbank* being thus equally unjustified, the dispossession of the Reuter heirs is altogether irregular.

Even supposing that the seizure of the securities by the *Reichsbank* and their being used by the Reich for paying its debts to the Danube-Save-Adriatic Railway Corporation by virtue of Article 11 of the Brioni Agreement, which was, moreover, declared null and void by the Peace Treaties of 1947 between the Allied Powers and Italy, Hungary and Austria, falls within the discriminatory measures defined by the Settlement Convention, the submissions of the complaint of the Reuter heirs could not be supported by the Commission.

(10) Under Article 1 of Chapter Ten of the Settlement Convention the Commission is only authorised to remedy the damage resulting from discriminatory action in either of the two following ways:

(a) by ordering the return of the property in its present condition ;

(*b*) by ordering the restoration of the injured rights and interests in the Federal territory.

Both the complainants' application itself concerning the facts alleged by them and the facts ascertained by the Commission show that the seizure of the securities took place in the Federal territory, but that they were destroyed by the company by which they had been issued, the Danube-Save-Adriatic Railway Corporation, which has its headquarters outside the territory of the Federal Republic.

On the one hand, the return of the securities is therefore physically impossible, and, on the other hand, the restoration requested could only take place at the headquarters of the company, *i.e.,* in territory outside the Federal Republic.

The Commission is not competent to order other measures of restoration than those envisaged in the Settlement Convention. It is not entitled to charge the Federal Republic of Germany with an obligation to initiate diplomatic negotiations or to try to come to an agreement with the Danube-Save-Adriatic Railway Corporation, since decisions of this kind cannot bind States not designated by the complainants, which have not taken part in the present proceedings, or a company which was no party to the proceedings either, quite apart from the fact that an obligation imposed on the defendant to act through diplomatic channels would be very unusual, since it is universally admitted in international law that it is natural to any diplomatic action that it is left to the free discretion of the States.

As to the restoration of the rights and interests of the Reuter heirs in the Federal territory, which could be justified only if the destroyed securities were replaced by new securities by way of substitution of things following negotiations contemplated by the Peace Treaties of 10 February 1947, which to this day have not been realised, it is impracticable in this form; on the other hand, any form of compensation by the purchase of new equivalent securities or by payment of a sum corresponding to the value of the property on 24 November 1942 is excluded by paragraph 6 of Article 1 of Chapter Ten of the Settlement Convention, as recognised also by the complainants.

For these reasons

The Arbitral Commission decides:

(1) to reject as unfounded the application of the Reuter heirs for review of the decision of the *Bundesamt* of 13 August 1958;

(2) to confirm this decision and to dismiss all contrary submissions of the complainants ;

(3) to impose the court costs on the complainants.

PART XXIII

Anglo-Japanese Property Commission established pursuant to the Agreement concluded between the Allied Powers and the Government of Japan on 12 June 1952

Commission anglo-japonaise des biens, établie en vertu de l'Accord conclu entre les Puissances Alliées et le gouvernement du Japon le 12 juin 1952

Anglo-Japanese Property Commission established pursuant to the Agreement concluded between the Allied Powers and the Government of Japan on 12 June 1952

Commission anglo-japonaise des biens, établie en vertu de l'Accord conclu entre les Puissances Alliées et le Gouvernement du Japon le 12 juin 1952

Decision of 30 November 1960 in the case United Kingdom *in re* Struthers and others *v.* Japan[*]

Décision du 30 novembre 1960 dans l'affaire Royaume-Uni *in re* Struthers *et al.* c. Japon[**]

Treaty of peace between the United Kingdom and Japan of 1951—treaty interpretation—intention of the parties—meaning of "property"—inability of States to restrict treaty obligations through national law.

Arbitral proceeding—principle of *stare decisis* following from judicial comity and desirability of certainty and consistency in the interpretation of treaties—freedom to reach a different conclusion than other commissions in case of error.

War damages—assessment of compensation—compensation for loss.

Traité de paix entre le Royaume-Uni et le Japon de 1951—interprétation des traités—intention des parties—signification de la notion de "biens"—impossibilité pour un État de restreindre ses obligations conventionnelles par son droit national.

Procédure d'arbitrage—principe du *stare decisis* découlant de la courtoisie judiciaire et du désir de certitude et de constance dans l'interprétation des traités—faculté de parvenir à une conclusion différente de celles adoptées par les autres commissions en cas d'erreur.

Dommages de guerre—estimation des dédommagements—compensation des pertes.

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[*] Reproduced from *International Law Reports* 29 (1966), p. 389.

[**] Reproduit de *International Law Reports* 29 (1966), p. 389.

The claims relate to the interests of Allied Nationals as shareholders in Japanese companies and are made under Article 15 *(a)* of the Peace Treaty and the Compensation Law mentioned therein. The Commission decided to consider all four cases together since the same issues of law are involved in each, and the pleadings incorporate the General Reply and General Counter Reply, dealing with the same issues and filed by the two Governments concerned in the minority shareholders cases before the United States-Japanese Property Commission.

The Agents for the British and Japanese Governments then presented to this Commission a statement of the issues arising in these four cases, together with certain arguments additional to those appearing in the pleadings. On November 22, 1960, the Commission indicated to the Agents the opinions which, subject to further consideration, it was disposed to formulate on these issues.

The Agents then presented figures based upon their application of the views expressed by the Commission on the material available to them. The figures brought into sharper relief the measure of discrepancy between the information supplied to the Japanese Government by some of the companies concerned and that given to the United Kingdom Government by these companies.

After stating the facts, the Commission gave their original views on the issues arising:

The views thus expressed included the following statements.

A. *Interpretation of the meaning of property in Japan at the beginning of the War as used in the Compensation Law, so as to determine whether the conception of inventory as a separate entity should be recognized*

The issue has already been considered by the United States-Japanese Commission which has given a considered determination of the point in its decision No. 4, dealing with some ten claims then pending before it. In that decision the U.S.-Japanese Commission concluded that the commercial concept of inventory as a separate, albeit continually changing, entity should be recognized and that the Government of Japan is responsible for damage to inventory, not exceeding in value the inventory on hand at the commencement of the war, even though the items constituting the inventory at the time of their destruction were not the precise items that were in existence at the beginning of the war.

This decision was given on the Treaty and the Law now before us, after a very full and thorough consideration of the factors involved. We are, of course, not bound by that decision and are quite free to reach a different conclusion if we think that the U.S.-Japanese Commission was in error, but judicial comity and the desirability of certainty and consistency in the interpretation of treaties and the Law, which has led to the establishment of the principle of *stare decisis* in so many countries, clearly indicate that we should not take a different course unless we have strong and cogent reasons for dissenting from the view of the Commission which has just completed its work. Having carefully considered the arguments put before us and whilst acknowledging the

force and weight of much of the argument advanced by the Japanese Agent, we, nevertheless, do not find sufficient reason to differ from the view taken by the U.S.-Japanese Commission and we, also, have reached the conclusion that the concept of "inventory", which plays so important a role in commercial activities, particularly in regard to matters such as insurance, mortgages, etc., should be recognized in the interpretation of the Peace Treaty and the Compensation Law, Law No. 264 of 1951.

We do not think we can accept the further contention of the Japanese Agent that where the inventory remaining after war damage exceeded that of 1941 there would be no damage to the 1941 inventory capable of attracting compensation. In our view, where damage had occurred but the inventory had been kept up to strength or increased by other additions, that damage would, nevertheless, be capable of attracting compensation.

It is not the maintenance of value that provides the continuity in this instance but the quality of belonging to a particular category of a company's assets, a category which continues to exist as a whole though the identity of individual items in it may change. This category can suffer injury just as a man or a house may suffer injury requiring reparation and survive. The fact that reparation has been made from other resources does not mean that the injury did not occur.

B. Interpretation of Article 12 (3) of the Compensation Law

It appears that the intention of Article 12 (3) was to take into account and deduct from the compensation payable the net increase in value of additional items of property acquired by the company after the commencement of the war. Whilst we do not think that these should properly include items which merely replace those that were worn out, discarded or otherwise disposed of for reasons unconnected with war damage, it seems reasonable to conclude that, where claims are being made in respect of war damage to articles which have been replaced, the profits accruing from the enhanced value of articles replacing war damaged articles should be taken into account in the calculation of that damage.

C. Subsidiary issues

(1) Having regard to the provisions of Article 5 and Article 16 of the Compensation Law, we are disposed to take the view that, in determining the deduction under Article 12 (3), the basis for calculation is the time prescribed for restoration under the Treaty or the date of coming into force of the Treaty, whichever is the later, and that the figure so reached must be multiplied by the proper magnification factor.

(2) In dealing with fixed assets, the value of materials, expenses for engineering and architect's fees, and advance payments to contractors should be included among the fixed assets in existence at the beginning of the war only to the extent to which they were, at that time, reflected in physical structures or constructive work physically undertaken.

(3) To apply the rates of depreciation indicated in the Ministry of Finance Ordinance No. 50 of May 31, 1951, an Ordinance dealing with the Durable Years of Fixed Assets, merely because they appear in that Ordinance would be a breach of the recognized principle that a Government cannot properly restrict or control, by is own domestic law, the obligations which it has undertaken in an international treaty. The depreciation rates applied to fixed assets should, in each case, be reasonable and, in our view, the rates adopted by the companies themselves at the relevant times should be followed unless there are good and cogent reasons for departing from those rates. No such reasons appear to exist in the present cases.

(4) The magnification factors should, we think, be based on the appropriate category in the economic statistics tables published by the Bank of Japan. When no more specific category is relevant we think the general wholesale category should be used.

(5) As already indicated in other cases, we do not think that the term "other measures of the Japanese Government and its agencies", used in Item (2) of the first, paragraph of Article 4 of the Compensation Law, is limited to measures "toward the enemy", but includes measures taken for the purpose of mobilizing the Japanese resources for the more effective prosecution of the war or disposing of those resources in a manner dictated by the necessities of war, as, for example, the demolition or removal of buildings for the purposes of air defence.

(6) In determining the acquisition cost under Article 12 (3) of the Compensation Law we think that the proper cost to be deducted is the original cost itself, and not the cost, reduced by a factor designed to bring it down to the equivalent of the remaining value of the property as at the time of destruction.

(7) In calculating the damage to fixed assets we think the depreciation should be calculated up to the time of the commencement of the war.

Thereafter the Agents presented us with figures based on their application of the views just expressed to the material available to them. These figures brought into sharper relief the measure of discrepancy between the information supplied to the Japanese Government by some of the companies concerned and that given to the British Government by these companies.

In pursuance of Article 16 (2) of the Commission's Rules of Procedure we then entered into discussions with the Agents as to the appropriate compensation in each case.

Having, thereafter, given further consideration to the views expressed on November 22, the conclusion has been reached that these views should be modified in two respects.

(1) By including in the amount to be deducted under Article 12 (3) the profits that accrued from items replacing those which had suffered war damage the Commission would, so far as the Allied shareholders are concerned, be

asking the companies concerned to meet the cost of war damage from profits which would carry no such burden when accruing to companies that had suffered no war damage. On further reflection, it seems to a majority of the Commission that this would be incompatible with the general purposes of a Law intended to provide compensation for war damage. It has accordingly been decided that such profits will not be deducted.

(2) The view adumbrated on subsidiary issue C (1) should be modified by omitting the reference to the time prescribed for restoration under the Treaty. The basis for calculation should in all cases be the date of coming into force of the Treaty, but it is understood that this modification makes no material difference to the figures presented to the Commission.

Bearing in mind the first of these modifications as well as the discrepancy to which reference has already been made, and having regard to the discussions with the Agents, the Commission has decided that compensation should be paid to the claimants as follows:

Mrs. Struthers	¥ 69,000
Brigadier J. O. E. Vandeleur	¥ 280,000
The Executors of John Duncan Fraser	¥ 3,800,000
The Union Insurance Society of Canton	¥ 4,730,000

This Decision is definitive and binding, and its execution is incumbent on the Government of Japan.

PART XXIV

Investigation of certain incidents affecting the British trawler *Red Crusader*

Enquête portant sur certains incidents ayant affecté le chalutier britannique *Red Crusader*

Investigation of certain incidents affecting the British trawler *Red Crusader*

Enquête portant sur certains incidents ayant affecté le chalutier britannique *Red Crusader*

Report of 23 March 1962 of the Commission of Enquiry established by the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark on 15 November 1961

Rapport du 23 mars 1962 de la Commission d'enquête créée le 15 novembre 1961 par le Gouvernement du Royaume-Uni de Grande Bretagne et d'Irlande du Nord et le Gouvernement du Danemark

Competence of the Commission—determination of facts concerning the position of boats and respective movements—evaluation of techniques and means to determinate the positions of the boats—reliance on the evidence and information received from experts.

Illegal fishing—fishing vessel in the area governed by the Exchange of Notes dated 27 April 1959—arrest of vessel—firing without warning and creating danger to human life on board without proved necessity exceeded legitimate use of force.

Compétence de la Commission—détermination des faits relatifs à la position des bateaux et à leurs mouvements respectifs—évaluation des techniques et des moyens pour déterminer les positions des bateaux—crédit accordé aux preuves et informations obtenues des experts.

Pêche illégale—navire de pêche dans la zone réglementée par l'Echange de notes daté du 27 avril 1959—arrestation du navire—ouverture de feu sans mise en garde et mise en danger de vies humaines à bord en l'absence de nécessité établie excédant l'usage légitime de la force.

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REPORT OF THE COMMISSION OF ENQUIRY

The Commission of Enquiry has been established by Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Denmark (Exchange of Notes, London, 15th November, 1961) to investigate certain incidents affecting the British trawler "Red Crusader" which occurred in the period of the 29th to the 31st of May, 1961. The Commission was accordingly constituted on the 21st of November in The Hague, with Professor Charles De Visscher, President, Professor André Gros and Captain C. Moolenburgh, Members.

At this first meeting of the Commission it was agreed, in presence of the Agents, Mr. B. Jacobsen for the Danish Government, Mr. F. A. Vallat, C.M.G., Q.C. for the United Kingdom Government, that Memorials would be exchanged in London and deposited in The Hague on December 5th with one copy to each Member of the Commission and to the Court of Arbitration Registry and that Counter-Memorials would be exchanged and deposited in the same manner on January 16th, 1962. It was then decided that oral proceedings would begin on March 5th in the following order: Danish evidence—British evidence—Danish oral statements—British oral statements followed by Danish and British replies, if required. Each witness would be examined, cross-examined and, if necessary, re-examined. The statements should be made upon an "engagement of honour", oaths not being administered. The written procedure would be in English; additional documents would be admitted upon reasonable notice. The Danish witnesses and experts would have the possibility of expressing themselves in Danish; simultaneous translation would be provided for and, if necessary, consecutive translation. The President of the Commission would consult with the Secretary-General of the Permanent Court of Arbitration about the appointment of a Registrar for the Commission and the general administration of the sessions of the Commission. Mr. Malcolm Eliot Long was appointed Registrar to the Commission and acted as such during the oral proceedings and deliberations of the Commission.

The Exchange of Notes of the 15th November, 1961 requests the Commission to investigate and report to the two Governments:

(1) the facts leading up to the arrest of the British trawler, "Red Crusader", on the night of the 29th of May, 1961, including the question whether the "Red Crusader" was fishing, or with her fishing gear not stowed, inside the blue line on the map annexed to the Agreement between the two Governments concerning the Regulation of Fishing around the Faroe Islands constituted by the Exchange of Notes of the 27th of April, 1959;

(2) The circumstances of the arrest; and

(3) the facts and incidents that occurred thereafter before the "Red Crusader" reached Aberdeen.

On March 3rd, 1962, the questions of internal procedure of the Commission and material arrangements were discussed privately by the Commission with the Agents of the Parties and settled.

The Commission held its first official meeting for the oral proceedings on March 5th at 10.00 hours at the Peace Palace in the rooms of the Permanent Court of Arbitration.

Thereafter the Commission held two meetings every day, at 10.00 hours and 16.00 hours, and one meeting on Saturday mornings at 10.00 hours. The oral proceedings ended on March 16th.

The Government of Denmark was represented by:

Mr. Bent Jacobsen, Agent, assisted by

Professor Max Sørensen, LL.D., Mr. Otto Borch, Mr. P. Michaelsen, Captain E. J. Saabye, Lt. Cdr. Harald Rossing, and Mr. Hans Sørensen.

The Government of the United Kingdom of Great Britain and Northern Ireland was represented by:

Mr. F. A. Vallat, C.M.G., Q.C., Agent, assisted by

The Rt. Hon. Sir Reginald Manningham-Buller, Bart., Q.C., M.P., Attorney-General, as Counsel, Mr. Eustace Roskill, Q.C., Mr. B. Sheen, Mr. N. H. Marshall, Mr. C. Sim, and Lt. Cdr. J. C. E. White, R.N.

The Commission first heard the Danish witnesses and experts, at the meetings of March 5th, 6th, 7th, 8th and 9th, The witnesses were:

Lieutenant Max Andersson, Royal Danish Navy, Navigating Officer on the "Niels Ebbesen"; Mr. Arne Tausen, Skipper of the Danish fishing vessel "Johanne Ott"; Lieutenant P. C. Skule, Royal Danish Navy, Officer on the "Niels Ebbesen"; Lieutenant O. Bertelsen, Royal Danish Navy, Officer on the "Niels Ebbesen"; Lieutenant H. S. T. Bech, Royal Danish Navy, Fisheries Officer on the "Niels Ebbesen"; Rating M. Hansen, Royal Danish Navy, Range-Taker on the "Niels Ebbesen"; Captain E. T. Sølling, Royal Danish Navy, Commanding Officer of the "Niels Ebbesen"; Chief Petty Officer S. A. Hansen, Royal Danish Navy, on board the "Niels Ebbesen"; Corporal O. A. J. Kropp, Royal Danish Navy, Signal Trainee on board the "Niels Ebbesen".

The experts were:

Mr. T. A. Nielsen, Service Department, Telecommunications Division of the Royal Danish Navy; Mr. K. Møller Gregersen, Chief Engineer, Electronics Department, Royal Danish Navy.

After examination by the Danish Agent the witnesses were cross-examined by British Counsel and, in some cases, re-examined.

From March 10th, the British witnesses were heard by the Commission:

Mr. A. E. Wood, Skipper of the "Red Crusader"; Commander T. A. Q. Griffiths, R.N., Commanding Officer of H.M.S. "Troubridge"; Lt.Cdr. R. G. Perchard, R.N., Officer on H.M.S. "Troubridge".

One expert was called by the British Delegation:

Mr. George John MacDonald, Technical Manager, Marconi International Marine Communications Company Limited.

After examination by the British Counsel and by Mr. Eustace Roskill, Q.C. the witnesses and the expert were cross-examined by the Danish Agent and, in some cases, re-examined.

The oral statements and replies took place from March 14th to March 16th, 1962.

The Commission decided to divide the presentation of evidence into three Chapters, to facilitate its work:

(a) facts leading up to the arrest of the "Red Crusader",

(b) events between the arrest of the "Red Crusader" and the meeting with the British naval vessels;

(c) facts and incidents from that moment up to the arrival of the "Red Crusader" in Aberdeen.

The same division is followed in the present Report.

CHAPTER ONE

Facts leading up to the arrest of the "Red Crusader" and circumstances of the arrest

It will be noted that this first phase of the presentation of evidence corresponds to both sub-paragraphs 1 and 2 and paragraph (b) of the Exchange of Notes (quoted hereinbefore). The Commission considers that the following events took place on May 29th before the stopping and the arrest of the trawler.

On that day, May 29th, at 17.37 hours, the Faroe Island Naval District sent a signal to the "Niels Ebbesen" in code, communicating to that vessel, one of the vessels in .charge of Fisheries Inspection, that Myggenaes Coast Guard Station had reported four trawlers which could be inside the limit described in the Exchange of Notes of April 27th, 1959, between the Danish and United Kingdom Governments relating to the temporary regulations of fishing around the Faroe Islands, as "the blue line" shown on a map annexed to the Agreement (Cmnd. 776). It has never been contested between the Parties that this Exchange of Notes governs the fishing in the area where the incident of May 29th took place, nor that any vessel registered in the United Kingdom is, under this Agreement, excluded from fishing in the area between the coast of the Faroe Islands and the blue line (paragraph I of the Exchange of Notes of April 27th, 1959). According to the Exchange of Notes of November 15th, 1961,

the Commission has to decide whether the "Red Crusader" was fishing or with her fishing gear not stowed inside the blue line on the night of the 29th of May, 1961 and to elucidate the circumstances of the arrest.

In this first Chapter two matters will be successively examined:

1. Positions of the ships.
2. Movements of the ships.

1. Positions

Having studied the sketches and what is written about the Faeroes in the "North Sea Pilot, Part 1", 1960 Edition, and "Den Faerøske Lods", 1957 Edition, and having seen a number of photographs of the rocks, cliffs and headlands on which double-angle measurements and radar distances-and-bearings were taken, the Commission did not think it necessary to visit the scene where the arrest of the trawler "Red Crusader" took place.

Accurate position fixes can be made by the double-angle measurement method on these landmarks and therefore the double-angle measurements taken by two Officers on the bridge of "Niels Ebbesen" are to be accepted as giving the true positions of the said frigate at the times indicated.

With great accuracy the positions based on the measured angles, as reported in Exhibit 3, were put on the Danish Chart No. 82, and later, when the plotting on Chart No. 82 was finished, also on a photostatic copy of the Danish Chart No. 81 on an enlarged scale. (The Commission is aware of the fact that on an enlargement the errors of the original chart are also enlarged, but for construction purposes it preferred a larger scale than that of Chart No. 81.) For this purpose the station pointer No. 163 made by Andersson and Sørensen in Copenhagen was used. Furthermore, all these positions were checked by construction on the chart. The Commission wishes to add that the blue line was not drawn on its Chart No. 82 until all plottings of the positions of "Niels Ebbesen" and "Red Crusader" had been made. The positions of "Niels Ebbesen" on both Charts, prepared by the Commission in this way, are exactly the same as those on the Chart plotted on behalf of the Commission by one of its Members on Monday afternoon, March 5th, in the presence of the nautical experts of both Delegations and also the same as those on the reconstruction made on board "Niels Ebbesen" (Exhibit 7) on the evening of May 29th, 1961, after the arrest of the trawler.

In connection with the observations made during the oral hearings on the cutting of the two circles of the double-angle position at 22.29 hours, the Commission wishes to state that construction of the double-angle position at 22.07 hours on Myggenaes, Baret and Slettenaes shows a nearly rectangular cutting of the two circles. As the ships were stationary at 22.07 hours and were still stationary at 22.29 hours and 22.36 hours, the Commission is of the opinion that the accuracy of the 22.29 and 22.36 double-angle measurements on Myggenaes, Gaasholm and Slettenaes is certainly sufficient for the use made

of the 22.29 fix, especially as the two cutting circles are almost parallel to the North side of Baret on which at that time the distance was measured by radar to check the error of the radar sets used.

Having obtained a number of accurate positions of "Niels Ebbesen" on the chart, the Commission interpolated the positions on which radar distances to land— marks were taken at other times. These calculated positions were checked with the radar distances and bearings mentioned in Exhibit 4 at the same times.

The reason for which the radar positions given in Exhibit 4 were not accepted as being equally accurate as the positions deducted from the double-angle measurement fixes is the following:

Up to now, ship-borne navigational radar sets cannot be considered as completely accurate. They are certainly much more accurate for measuring distances than optical range finders, but nevertheless ship-borne navigational radar sets are not yet precision instruments. The Commission is informed that modern port radar equipment, on which an accuracy of about 10 metres would be desirable, has a range accuracy as follows:

The recently designed and constructed large shorebased radar sets for safe navigation in fog, et cetera, on the river Weser and the mouth of the Elbe, have a range accuracy of plus or minus 20 metres plus 1/4 % of the maximum range on the scale in use. The shore-based radar sets designed six years earlier for safe navigation in fog, et cetera, on the New Rotterdam Waterway have a range accuracy of plus or minus 25 metres plus 1/2 % of the maximum range on the scale in use. These figures show what progress in range accuracy has been made in six years on the large shore-based radar installations.

The accuracy of ship-borne radar sets cannot yet be compared with the accuracy of the above-mentioned shore-based radar sets. For normal navigation purposes, such a great accuracy is not needed, but this implies that to all observations made on ship-borne sets a rather wide margin must be given.

In order to determine the width of this margin, the specifications to which the radar sets have been made must be taken into consideration. It must be assumed that every set of a type-approved marine radar complies with the specifications under which it has been manufactured. It should never be less accurate; it can be much more accurate. However, this cannot be said before experience has been obtained.

The radar sets Decca 12 and Marconi Marine Radio Locator IV, both manufactured in Great Britain, have been made and tested under the Marine Radar Performance Standards 1948. It is a fact that the Decca Radar 12 is about six years older than the Marconi Radio Locator IV on board the "Red Crusader", but the latter, which was constructed in October 1957, was still tested under the Marine Radar Performance Standards 1948 (the Marine Radar Performance Standards 1957 were not applied before 31st December, 1958.) In the Performance Specification 1948 it is written of range accuracy that—"The

set shall provide means of estimating directly the range of any object with an error not greater than ± 5 % of the maximum range obtainable on the scale in use."

The Commission noted that the manufacturers of the Decca 12 radar sets claim a maximum range accuracy of plus or minus 2 % of the maximum range in use. The Marconi International Marine Communications Company Ltd. claim a range accuracy better than plus or minus 2 % of the maximum range in use. Having heard the evidence of the radar experts during the oral hearings and having also been informed by other independent sources, the Commission has accepted a range accuracy of plus or minus 2 % of the range scale in use of both navigational radar sets just mentioned.

On the tape-recording of "Niels Ebbesen" (Exhibit 16) there is an entry at 21.23 hours of three radar distances at the time of a double-angle fix. Comparison of these measured distances on Decca radar and the distances on the chart from the double-angle position to the cliffs to which the radar distances were measured, shows an error within the 2 % of the range scale in use (10 miles), which corresponds with the opinion of all the experts concerned.

Concerning the radar set 293, the situation is somewhat more complicated. This type was developed during the last War, for use in British and Allied warships, at a time when no Performance Standards had yet been published. The Commission therefore had to rely on the evidence of the radar experts who appeared as witnesses and on the information it received from other experts on this type of radar.

The Commission regrets that the information received from the latter source is not exactly the same as that stated by the Danish witnesses who gave their opinion on this type of radar.

Having considered all available information on the radar 293, the Commission is of the opinion that it is necessary to take into account a range accuracy of plus or minus 5 % of the maximum range being used, in addition to a fixed correction dependant on the way in which the installation has been installed.

As a general remark, the Commission wishes to add that the accuracy of all radar sets involved greatly depends on the quality of the components and the way in which the instruments are maintained.

It has been informed that the standard of the maintenance in the Danish Naval Workshop is very high indeed. Though it is of course not possible to check any more the accuracy with which the radar sets were working on the evening of May 29th, 1961, the Commission is convinced that, within the margins in distance mentioned above, it is in a position to answer positively on the question put to it on the actual position of "Red Crusader" that evening.

Considering all the information received, the Commission thought it proper to conclude that the radar plottings, as far as the distances on the 10

mile range are concerned, are accurate on the Decca 12 and Marconi Radio Locator IV sets within a belt 0.4 mile wide.

For the radar 293 on board "Niels Ebbesen" the Commission accepts a fixed correction of plus 0.35 mile and a plus or minus correction of 5 % of the maximum range on the scale in use.

The bearing accuracy of the navigation radar sets on a moving ship should not be considered greater than 2 degrees, although the Performance Specifications 1948, and also the manufacturers, claim that the bearings on objects at the maximum range in use should be accurate to 1 degree.

These considerations cause the Commission to state that on the basis of the radar distances and bearings of "Red Crusader" from "Niels Ebbesen", one can be certain that the position of the trawler was inside a zone 0.4 mile wide (Decca 12) with a maximum top-angle of 4° from the position of "Niels Ebbesen" or, as the case may be, with much less accuracy, within a zone 2 miles wide (radar 293) also with a maximum top-angle of 4° from the position of "Niels Ebbesen".

In order to avoid all complications which might arise from using the data on Exhibit 5, although the Commission is of the opinion that this document is a correct copy of the lost original as far as distances and bearings are concerned, the Commission began by using only the distances and bearings of "Red Crusader" from "Niels Ebbesen" which are reported in Exhibit 16—the tape-recording.

On the tape-recording there are two entries, at 21.14 hours and 21.27 hours, which are also entered on Exhibit 5.

The plotting of these two positions, obtained by Decca radar, from the position of "Niels Ebbesen" at the times mentioned shows that at 21.27 hours the "Red Crusader"-zone was completely outside the blue line, and that at 21.14 hours the zone in which the "Red Crusader" must have been was inside the blue line, except for a very small area at the NNW corner.

The original documents, Exhibits 6 and 8, and also the reconstruction of the plottings, with the aid of the original Exhibits 3 and 4 and with the original or a copy of Exhibit 5 on board "Niels Ebbesen", on Chart No. 82 (Exhibit 7) show clearly that the earlier positions of "Red Crusader" were further inside the blue line than her position at 21.14 hours.

Skipper Wood stated that at about 21.15 hours he shot his trawl and then steamed to the North-North-West. This statement gives very little proof of the exact time. It is a known fact, and this was confirmed by Skipper Wood, that a trawler must be stationary in order to be able to lower her trawl and boards into the water, before shooting the gear. From Exhibit 8 it can easily be deducted that the shooting started at the end of the stationary period, which ended at the latest at 21.03 hours.

The Commission has been informed that the wind on the evening of May 29th, 1961 was from an Easterly direction. As a trawler always puts her gear

overboard on the luff side, it is logical that the range-taker on board "Niels Ebbesen" saw the starboat side of the trawler at which he had trained his powerful instrument with its 32 times magnification. She then had to change course to starboard to allow her to proceed in the shortest time in a North-North-Westerly direction, the trawl over starboard helping her to make a rather short and quick turn. This manoeuvre may have given the impression of "zig-zagging" on the plotting table in "Niels Ebbesen".

The Commission is aware of the advice printed on "Close's Fishermen's Chart", 1958 edition, in the area in question—"Tow E by N and W by S". In accordance with this advice, "Red Crusader" and also "Millwood" and "Admiral Hawk" stated that they had been trawling in Easterly and Westerly directions until the moment when "Niels Ebbesen" appeared on the scene.

It is also known to the Commission that fishermen of the different countries fishing in the North and Irish Seas, et cetera, have their own code for warning their countrymen, when a fishery protection cruiser appears on the scene. The general practice of the trawler skippers who are warned by such a code word, and who generally plot their positions not very accurately during their tows, which may make them feel somewhat doubtful about their actual positions, is to take no risks and to steam as quickly as they can in a course nearly perpendicular to the fishery limit, away from the exclusive fishery zone.

In many cases they pay out some 100 fathoms extra from their back fishing-line, which makes their trawl collapse and gives them the opportunity to reach a higher speed.

The Commission is aware of Skipper Wood's evidence, that he would never make such a manoeuvre, as it would break his gear into two parts.

The Commission is unable, however, to accept this evidence, knowing the general practice of trawl-skippers, who prefer to risk damage to their gear to the chance of having their gear and catch confiscated. This also explains why the speed of "Red Crusader" on her North-North-Westerly course was about 2 knots higher than her normal trawling speed, which would be round about 2.5 knots, according to the Skipper.

In this Chapter the Commission has so far dealt with the double-angle fixes and the radar readings.

At several places in the tape-recording (Exhibit 16) distances from "Niels Ebbesen" to "Red Crusader" taken by range finder are also mentioned.

The Commission was informed that those distances were not used in the Danish evidence prepared for the Court in Thorshavn, nor in the Memorial with Exhibits for the Commission, as it was known that the range finder on board "Niels Ebbesen" was not properly adjusted and had a play in the transversal transmission of the movable range mark.

Therefore the Commanding Officer of "Niels Ebbesen", Captain E. T. Sølling, eliminated the observations of the range-taker on board his ship in

judging the positions of "Red Crusader". The Commission thinks this a proper decision; it bases this opinion on the following:

The range finder, which is a stereoscopic instrument with a 4 m. base, was for the last time before the incident occurred on May 29th, 1961, readjusted and checked by the Danish Naval Dockyard in February 1959. When it was examined again by the Danish Gunnery Department in June 1961, it was found that:

(1) a great difference existed between the adjustment set on the range finder and the correct setting which should be used for taking measurements;

(2) a certain play in the transversal transmission of the central sight would have made it necessary to use the movable range mark as well as the fixed range marks.

The latter cause most probably would increase the measuring errors by about 1—3 theoretical errors, for a trained range-taker. These theoretical errors depend on the base of the instrument, the magnification and the range. In accordance with the letter of the Danish Gunnery Department of July 19th, 1961, No. J.11–1/1282, annexed to the letter of the Danish Agent of March 8th, 1962, to the President of the Commission, the Commission is of the opinion that 4—5 additional theoretical errors may be expected, while the ship is under way.

This means that a maximum of 8 theoretical errors could be expected in this case, provided that the adjustment knob had been properly set.

The wrong setting of the adjustment may cause any completely unpredictable error.

As stated in the evidence of the range-taker and the Gunnery Officer, the range-taker on board "Niels Ebbesen", who was trained on a 4 m. base instrument only for a period of two months, had not adjusted the instrument before he had to use it on the evening of May 29th, 1961. Therefore the errors which could be expected from the readings on his instruments were unpredictable and the range-taker's observations—as far as the distances were concerned—could not be relied upon.

The Commission is therefore of the opinion that all deductions made on the basis of the range-taker's observations should be left out of its considerations.

2. Movements

About one hour after the Commanding Officer of "Niels Ebbesen" received a signal from Faroe Island Naval District, that four British fishing vessels had been reported by Myggenaes Lighthouse-keeper at 4—7 miles distance on the fishing grounds at 17.25 hours on May 29th, 1961, his ship left Thorshavn to investigate the report.

Steaming through Vestmannasund, "Niels Ebbesen" passed Sydregjov at 20.34 hours and came into the open between Mulen and Slettenaes at about 20.55 hours flying her ensign and fishery pennant.

The first echoes she saw on the radar 293 screen at bearings 292—298 were at 9 miles distance. Without correction this would mean that the vessels which caused the echoes were certainly inside the blue line.

Taking into account the necessity of the fixed correction of plus 0.35 miles and a plus or minus 5 % correction of the maximum range on the scale in use, the Commission is, on the basis of this information only, unable to say with certainty that these vessels were inside at that time.

A few moments later, the nearest echo was reported at 8.6 miles distance, bearing 294. The same that has been said above applies to this observation on the radar 293 screen.

In the meantime, "Niels Ebbesen" was heading for the ships on the horizon in bearing ± 294 °, steering a course of 292 °, which after some time was changed into 299 ° and later into 308 °, when the bearing to the nearest ship became more Northerly.

The positions of "Niels Ebbesen" were fixed by the double-angle method and by taking radar distances and bearings on the Decca 12 radar to conspicuous corners and headlands on the coast.

The distances and bearings from "Niels Ebbesen" to the nearest vessel were measured on the radar sets and plotted on the Danish Chart No. 81 and the plotting table.

As has been mentioned in this Chapter, with regard to the positions, the Commission is certain that at 21.14 hours the nearest echo on the Decca radar screen indicates the position of a vessel most probably inside the blue line, possibly just on or just outside that line.

Combining this finding with the data on the original Exhibits Nos. 6 and 8, the Commission fully understands and shares the view of the Commanding Officer of "Niels Ebbesen", that the nearest fishing vessel had been inside.

The Commission has noticed in the tape-recording (Exhibit 16) that on board "Red Crusader" between about 21.55 hours and 22.09 hours the gear came up and the trawl-net was taken in. As shown on the radar plot (Exhibit 8) the speed of the trawler from, at the latest 21.09 hours to 21.48 hours was constantly too great to stream the net and the boards, i.e. to lower the net and the boards into the water, but not too great to proceed with the trawl in the water. This means that at least during the period from 21.09 hours until 21.14 hours "Red Crusader" was with her gear in the water inside the blue line.

With regard to the signals, "Niels Ebbesen" gave from 21.39 hours onwards several stop-signals, by siren and searchlight, to which the trawler paid no attention until a blank 40 mm. shot was fired across her bows.

Though Skipper Wood agreed that naval signalmen are properly trained, he stated that he had been unable to understand the signals given by the Danish frigate. Skipper Wood's evidence with regard to signals, showed that he

was not at all certain of the signals that must be given in circumstances which often occur at sea.

Therefore the Commission is unable to accept the Skipper's statements with regard to the siren signals given by "Niels Ebbesen".

His statement that he was unable to read the flash signal given to him by searchlight, as the searchlight was not properly trained, is not in agreement with other evidence. On the tape-recording it can be seen that "Niels Ebbesen" changed course to starboard before the signal by searchlight was sent. This brought the trawler on 2 points on the port bow. It is therefore logical that the searchlight on the port side was used, and the evidence given by Skipper Wood, that he would have seen the searchlight signals from starboard much better than those from port is not justified.

Skipper Wood's suggestion that these signals were meant for "Millwood" is unfounded. The searchlight was trained by an experienced Chief Petty Officer, who had to aim the apparatus on "the blue trawler", which proved to be "Red Crusader". The Commission is unable to accept that this experienced naval man trained the searchlight at the black hull of the "Millwood", when the dark blue "Red Crusader" was nearer to his ship.

During the proceedings it was submitted that if the "Red Crusader" had been inside the blue line for a certain period, this was unintentional and caused by drifting in a South-Easterly direction during a necessary repair of the trawl.

In view of the evidence submitted, the Commission cannot accept that an accident to the trawl has been established as a fact.

As a result of its investigation on Chapter One, the Commission finds:

(1) that no proof of fishing inside the blue line has been established, in spite of the fact that the trawl was in the water inside the blue line from about 21.00 hours until 21.14 hours on May 29th, 1961;

(2) that the "Red Crusader" was with her gear not stowed inside the blue line from about 21.00 hours until 21.14 hours on May 29th, 1961;

(3) that the first signal to stop was given by "Niels Ebbesen" at 21.39 hours and that this signal and the later stop-signals were all given outside the blue line.

CHAPTER TWO

Events between the arrest of the "Red Crusader" and the meeting with the British naval vessels

It will not be necessary to deal at great length with some parts of this period, the facts of which have been agreed upon by both Parties.

The Captain of "Niels Ebbesen" sent Lieutenant Bech, Fishery Officer, and Corporal Kropp, Signalman, on board the "Red Crusader" by a boat launched at about 22.19 hours. Lieutenant Bech stayed aboard the "Red Crusader" for

approximately twenty minutes (arriving back on "Niels Ebbesen" at about 22.40 hours), during which time the distance of the "Red Crusader" to Baret Head was checked on the radar of the trawler. Lieutenant Bech measured 8.95 miles and the Skipper 8.9 miles. At the same time, 22.28 hours, Lieutenant Andersson checked both radars on board "Niels Ebbesen" and observed 8.4 miles on the display unit of Decca 12 and 8.0 miles on that of radar 293. By a double-angle fix taken at 22.29 hours the distance was found to be 8.6 miles on Chart No. 81 (Exhibit 6); confirmation of the distance was requested from "Red Crusader" and the reply was the same, 8.9 miles to Baret Head. At the time, on Skipper Wood's chart no positions or indications relevant to the incident of May 29th were plotted.

Immediately after the arrival of Skipper Wood and Lieutenant Bech on board "Niels Ebbesen" a conference was held in Captain Sølling's cabin, which lasted until just before 23.20 hours, when the Skipper was taken back to "Red Crusader".

During that conference Captain Sølling informed Skipper Wood that his trawler was under arrest and gave the reasons which, in his view, justified such arrest. Skipper Wood denied that he had ever been fishing inside the blue line.

There cannot have been any doubt left in Skipper Wood's mind at the end of this conference: he was ordered to follow the "Niels Ebbesen" and to go to Thorshavn to be examined and tried by a Faroese Court immediately on arrival there. The Skipper did not refuse to accept the order but, on the contrary, obeyed it by receiving on board the "Red Crusader" an officer and rating of the "Niels Ebbesen", in accordance with the normal procedure which he knew to be used by Danish Fishery Protection vessels in similar cases; there could not be any misunderstanding concerning the significance of the presence on board the trawler of the Danish officer and rating.

Skipper Wood, having returned to his trawler at 23.22 hours with Lieutenant Bech and Corporal Kropp, followed the "Niels Ebbesen" towards Thorshavn at full speed, about one mile astern. Radio-telephone communication was established between "Niels Ebbesen" and Lieutenant Bech on "Red Crusader" and it was agreed to call every half-hour.

There can be no other explanation of Skipper Wood's change of mind than his own. He thought that he had not been fishing illegally and that a trial at Thorshavn would not give him a fair chance.

At 02.58 hours Skipper Wood asked Lieutenant Bech to send a message to "Niels Ebbesen" reporting that he was not going to enter Thorshavn, and at 03.05 hours Lieutenant Bech sent another message to the "Niels Ebbesen" saying that he was locked up. Both these messages indicate the time when Skipper Wood decided to put his plan into operation.

The Commission will examine successively two matters:

(a) the situation of the Danish officer and rating on board the "Red Crusader";

and

(b) the firing.

(a) The Commission finds that the situation of Lieutenant Bech and Corporal Kropp on the "Red Crusader" was as follows:

On his own admission, Skipper Wood wanted to keep Lieutenant Bech off the bridge to avoid not only any interference in the direction of the trawler but also any altercation with him, at the very moment when he attempted to escape from the "Niels Ebbesen". This could only be achieved by an effective seclusion and not by an illusory or apparent one.

Skipper Wood has admitted his intention to break away and to proceed back to Aberdeen, discussing it with his crew out of the hearing of Lieutenant Bech and Corporal Kropp and making plans accordingly.

There is, therefore, neither any reason whatsoever to think that, having locked the door leading from the passage outside the Skipper's cabin into the wheelhouse, to achieve the two purposes mentioned above, Skipper Wood left open the other exit from his quarters, nor to believe that Lieutenant Bech, if he had found that exit open, would not have taken the opportunity of regaining his freedom.

The Commission finds that Lieutenant Bech was thus kept effectively locked up inside the Skipper's quarters in "Red Crusader" for about an hour before 04.08 hours, when the Skipper reopened the door from the wheelhouse to his quarters and let him out.

The measures taken against Corporal Kropp were different. It was not necessary for Skipper Wood, in order to realize his double purpose, to lock him up. Neither his rank, nor his age, made the same degree of coercion necessary. But it is quite clear that the "invitation" to go down aft, where he was escorted by members of the crew, was equivalent to an order. He was kept there for a period of about one hour under the courteous but efficient guard of some members of the crew.

(b) The facts concerning the firing are as follows:

At 03.22 hours one round of 127 mm. gun-shot was fired astern and to the right of the trawler, at a distance estimated at 2.100 metres with the elevation 24/r25.

At 03.23 hours the first stop-signals were given by steamwhistle—signal K.

At 03.25 hours one round of 127 mm. gun-shot was fired ahead and to the left, at the same estimated distance with the elevation 24/1 20.

At 03.26 hours the signal K was repeated by steamwhistle.

It is established that no signal by radio, steamwhistle, blank shot or otherwise was attempted earlier than 03.23 hours and it is also clear that these two shots, as well as the first two machine-gun shots astern, fired at 03.40 hours,

were intended to be warning shots to stop and were not aimed to hit the "Red Crusader".

The distance between the two ships had decreased to 0.9 miles at 03.30 hours and to 0.45 miles at 03.38 hours, when the Captain of "Niels Ebbesen" gave the order to fire at the "Red Crusader".

At 03.40 hours a warning was given by portable loud-hailer to the "Red Crusader", as well as the order to stop, which appear in full in the tape-recording (Exhibit 16) with the indication of the firing of two shots in the middle of the recording (the two machine-gun shots referred to above).

It was from this time only that firing was directed at the "Red Crusader" in the following manner:

03.40 hours	8 machine-gun shots at the "Red Crusader" 's scanner, by single shot (Exhibit 16 to the Danish Memorial, page 20); Two hits verified later.
03.41 hours	New hailing to "Red Crusader" and order to stop.
03.42 hours	21 machine-gun shots at "Red Crusader" 's mast, also by single shot—no hits found later.
03.44 hours	1 round of 40 mm. gun at masthead light—no hit.
03.47 hours	1 round of 40 mm. gun at mast—no hit.
03.47 hours	New hailing to "Red Crusader": "Stop, or I have to shoot you in your hull".
03.51 hours	2 rounds of 40 mm. gun at stem—one hit a little abaft of nameplate.
03.53 hours	1 round of 40 mm. gun at stem—no hit.

The firing, which took place in Danish territorial waters, then ceased by order of Captain Sølling. It is agreed that the gun-shots fired were solid shots but not explosive shells.

No slowing down of the "Red Crusader" is indicated in any evidence and the trawler did not stop before the meeting with the British naval vessels.

As a result of its investigation on Chapter Two, the Commission finds:

(1) that the "Red Crusader" was arrested. This conclusion is established by Captain Sølling's declarations as well as by the evidence given by Skipper Wood. Even if the Skipper formally denied his guilt, his answers clearly implied that he considered at the time that he had been duly arrested for illegal fishing. Notes made in the Skipper's red pocket-book (Annex 12 to the British Counter-Memorial) and the "Red Crusader" 's log-book also leave no doubt on that point.

(2) that Skipper Wood, after having obeyed for a certain time the order given him by Captain Sølling, changed his mind during the trip to Thorshavn and put into effect a plan concerted with his crew, whereby he attempted to

escape and to evade the jurisdiction of an authority which he had at first, rightly, accepted.

(3) that, during this attempt to escape, the Skipper of the "Red Crusader" took steps to seclude Lieutenant Bech and Corporal Kropp during a certain period and had the intention to take them to Aberdeen.

(4) that, in opening fire at 03.22 hours up to 03.53 hours, the Commanding Officer of the "Niels Ebbesen" exceeded legitimate use of armed force on two counts:

(a) firing without warning of solid gun-shot;

(b) creating danger to human life on board the "Red Crusader" without proved necessity, by the effective firing at the "Red Crusader" after 03.40 hours.

The escape of the "Red Crusader" in flagrant violation of the order received and obeyed, the seclusion on board the trawler of an officer and rating of the crew of "Niels Ebbesen", and Skipper Wood's refusal to stop may explain some resentment on the part of Captain Sølling. Those circumstances, however, cannot justify such a violent action.

The Commission is of the opinion that other means should have been attempted, which, if duly persisted in, might have finally persuaded Skipper Wood to stop and revert to the normal procedure which he himself had previously followed.

(5) that the cost of the repair of the damage caused by the firing at and hitting of the "Red Crusader" submitted by the British Government has been considered reasonable by the Danish Agent.

CHAPTER THREE

Events after the meeting with the British naval vessels

In an Aide-Memoire of the Danish Government dated June 2nd, 1961, as well as in the Danish Counter-Memorial, certain naval officers of Her Majesty's Navy were criticized for interfering with the lawful authority exercised by the "Niels Ebbesen" over **a** trawler legally arrested by that vessel. The imputations related first to the circumstances of the return to the "Niels Ebbesen" of the boarding party put on the "Red Crusader" and secondly to the question of interference by H.M.S. "Troubridge" with an attempt by the "Niels Ebbesen" to return the boarding party to the "Red Crusader". On both points the Commission notes that the Danish Counter-Memorial had reserved final conclusions until presentation of evidence during the oral proceedings.

The Commission has taken note of the withdrawal by the Danish Delegation of any charges concerning the question of the return of Lieutenant Bech and Corporal Kropp to the "Niels Ebbesen" and of any implication which could, at a certain moment in the proceedings, have resulted from these charges. It will simply be recorded that some misunderstanding arose on board the

"Red Crusader" at the moment of embarking in H.M.S. "Troubridge" 's boat. The reasons of this misunderstanding are somewhat difficult and in any case useless to define, taking into consideration the declarations made by the Danish Delegation at the meetings of March 13th, 15th and 16th, 1962.

Moreover, the Commission feels that the return of the boarding party to "Niels Ebbesen", whatever its cause, was in fact the best solution; nothing would have been gained by the taking to Aberdeen of a Danish naval officer and a Danish rating on board a British trawler which had escaped from the jurisdiction of Danish and Faroese authorities.

The second imputation was the existence or non-existence of interference by H.M.S. "Troubridge" with a possible attempt by the "Niels Ebbesen" to put back the boarding party on "Red Crusader". The Commission on this second point also has only to take note of the withdrawal of any allegation by the Danish Government relating to that question.

As a result of the proceedings in connection with Chapter Three, the Commission finds:

that Commander Griffiths and the other Officers of the British Royal Navy made every effort to avoid any recourse to violence between "Niels Ebbesen" and "Red Crusader". Such an attitude and conduct were impeccable.

The Hague, the twenty-third day of March, one thousand nine hundred and sixty-two.

[*Signed*] Ch. De Visscher
President of the Commission
[*Signed*] André Gros
[*Signed*] C. Moolenburgh
Members of the Commission