

GUTIERREZ-OTERO, *Umpire*:

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

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

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

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

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

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

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

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

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

Therefore the umpire decides:

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

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

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

The umpire considers:

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

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

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

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