PADRÓN CASE

GUTIERREZ-OTERO, *Umpire:*

With respect to record No. 4, made up by the claim of the Spanish subject María García de Padrón, in whose favor payment of 1,300 bolivars is demanded, to indemnify her for the price of the rent of her house in Naiguatá occupied by the forces of the Government, and those of the revolution, from the month of September, 1899, to May, 1900; for the sum which she expended in repairing it on account of the damages which the occupants caused it, and the value of

a shed destroyed by them, the commissioners because of difference of opinion have pronounced no judgment, and therefore the decision of the case has been left to the umpire.

The Venezuelan Commissioner has declared in his opinion relative thereto that he absolutely disallows the claim, and the Spanish Commissioner has stated that, in his opinion, the Government of Venezuela ought to be held responsible for the damages caused by the revolution and that the claimant has a right to the amount that she demands.

In the written memoranda [1] which the Commissioners have made to support their opinions, are explained the absolute opinion given by the Venezuelan Commissioner supporting the principle of irresponsibility of States for acts done by troops, or bands in rebellion against, or separated, in any way from, obedience to the constituted authorities; and on his part, the Spanish Commissioner holds that responsibility of States is not avoided by reason of internal or external changes, that it extends to injuries caused by political factions that strive to acquire power; and that if the Spanish subjects in Venezuela were not protected by indemnity for damages which the revolution has caused them, they would be in an oppressive position, and at the mercy of the misfortunes that it caused them, without resources on the one hand to prevent them, and on the other without a right to recover therefor.

This manner of arguing shows how the commissioners have forced the issue and drawn it into a state of absolute difference of opinion, indicated by the Venezuelan Commissioner in contending that States are not responsible for damages which insurgents cause foreigners, and in deducing from this statement or general rule that the claim made in this particular case should be disallowed.

And the strictness of the principle which has been brought out in its application by the one invoking it, has been followed to such a point that he has not taken into account for the purpose of making a distinction the circumstance which the claimant alleges, and concerning which she produced proofs, that the damages were caused her not only by forces of the revolution, but also by those of the Government; and concerning this point, the Commissioner of Venezuela claims that the extreme vagueness of the expression *troops of the Government*, which is used, makes it impossible to determine if regular forces are meant whose acts could affect the responsibility of the nation.

Thus the decision asked of the umpire has been understood to be with respect to this particular case of which we are treating, whether as a consequence of the application of the general principle which the Venezuelan Commissioner cites, who, in order to strengthen it and show that practically it has been accepted in the relations of his nation with Spain, refers to the convention of 1861,[2] made by both powers concerning some Spanish claims, and in which it was agreed that Spanish subjects injured by revolutions are obliged to prove the negligence of the constituted authorities in the adoption of the proper measures to protect their interests and persons, or to punish or reprimand those at fault; and that this provision, and the others that the convention contains, shall serve as invariable rules after it may be formally and explicitly ratified in the pending negotiations and those that may arise in the future.

The umpire will endeavor to render his judgment clearly and minutely, giving scrupulous attention to the important nature of said points, and the others he may have to touch on.

It is true that, with respect to international law, it is admitted that it em-

[1] Opinions of the commissioners not reported.
[2] British Foreign and State Papers, vol. 53, p. 1050.

braces certain principles and rules, deduced, more or less from its various aspects, but as Calvo remarks (preface to fifth edition, q. v):

Il n'existe point de code universel applicable aux questions et aux conflits de toute nature qui surgissent entre les Etats. Cette absence de loi suprême, de règle commune, est la source de nombreuses hésitations parmi les publicistes, de contradictions infinies dans la jurisprudence et la pratique des peuples, de désaccords sans cesse renouvelés dans les relations internationales, qui, n'obéissant point à des principes nettement définis et invariables, s'inspirent quelquefois plutôt de l'arbitraire que de la justice, de la force que de l'action du droit.

The same author remarks how difficult, if not impossible, it is to give a complete definition of international law, among other reasons because its signification changes or is modified according to the advances of civilization, which is what has suggested to Wheaton the following very general formula:

International law, as understood among civilized nations, may be defined as consisting of those rules of conduct, *which reason* deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may be established by general consent. (Boyd's Wheaton, sec. 14, p. 22.)

It is unquestionable that this lack of a universal code common to all nations, and the necessity of deducing the principles and rules of international law from the various sources which constitute their origin, impress upon these principles and rules, as expounded and considered, be it by the states themselves in the relations of their governments; be it by local or international tribunals when they resolve questions of this sort; be it by the publicists in designating and explaining them, converting them into a doctrine; not the character of a written law, which no one has the power to give them, but necessarily the exclusive character of technical or scientific conclusions, rationally founded, capable of more or less contradiction, according to the force and clearness of their premises; more or less firm according as they are immediately or mediately deduced, and more or less general, more or less subject to modifications and exceptions, according to the subject-matter to which they refer.

This precise explanation having been made, it may be admitted as an established truth, that after a much debated discussion concerning the responsibility of states for damages which revolutionists cause to the persons and properties of foreigners residing in their territory, a negative solution has predominated and been accepted among the rules and principles, to which the umpire has heretofore alluded, that no right to demand indemnity for such damages exists; a principle, on the other hand, to which there have been pointed out various — we may say, numerous — exceptions which it is not necessary to state for the purposes of this decision.

Now, then, does this principle govern the case of María García de Padrón in such an absolute manner that it should be decided upon this point exclusively?

The protocol of April 2 of the current year, signed at Washington by the plenipotentiaries of Spain and Venezuela, and to which this Commission owes its origin, provides that *each claim* be examined and decided, and textually orders that —

The Commissioners, or in case of their disagreement, the umpire, shall decide all claims *upon a basis of absolute equity* without regard to objections of a *technical nature* or the provisions of local legislation.

There have, therefore, been imposed on the said commissioners and on the umpire the three following rules of an imperative nature, and from which, in order not to place themselves in conflict with the instrument which gives them

jurisdiction and confers on them their only powers, it is not permissible for them to depart:

First. Each claim must be specially and separately examined, without it being permissible to pronounce an abstract resolution conceived in general terms by which it might be supposed that, overlooking said consideration and decision of each case, different claims would simultaneously be decided. Therefore, in order to comply with the protocol, in each case the proper attention shall be paid to the general and special considerations which may be fitting and proper; and if it be necessary, the influence which is owed to the former shall be accorded them.

Second. In exercise of the right which nations naturally enjoy when they agree to create tribunals of arbitration, to establish the principles which must guide them in the decision of the disputed points which they submit to them, it has been made binding with respect to the members of this Commission *that they must found their decision upon a basis of absolute equity*.

Third. In order to dispel the least shadow of a doubt with respect to the scope of the preceding rule, and letting it be known that this Commission was created as a tribunal of equity only, it was provided, finally, that objections of a technical nature or provisions of local legislation should not govern or be taken into account as against the spirit and rule that their decisions should be reached in that sense.

The last of these rules would suffice to make it clear that the principle of the irresponsibility of states for damages which insurgents cause is incapable, unless we attribute to it an absolute force, to determine by itself the decision in the case of María García de Padrón.

This principle, like any other similar one, does not support any except a technical objection, and those of this nature are precluded by the protocol, in so far as they are opposed to the criterion of equity which must be the basis of their decisions.

Moreover, conceding to said principle any abstract force or merit desired, there is still room to inquire what the concrete force or merits that it has are in a case which must be decided by this tribunal of absolute equity.

In tribunals of internal arbitration the principle of equity holds a most important place, and it is to be borne in mind and applied by all of them, whether rules for pronouncing their judgments have been conventionally fixed, since in the many difficulties which may arise they shall resort to the principles of law moderated by equity to decide them, or if no rules have been prescribed for them.

Because with the soundest reason they can appeal to equity when the *compromis* is mute, says Mérignhac, concerning the principles on which they should rely, or finally if absolute liberty has been allowed them, since, in that case, as the author cited repeats, no rule restrains them in principle and they are free to render judgment in accordance with their personal conscience. (Mérignhac, l'Arbitrage International, No. 305 et seq., p. 297.)

To the *provisions* which leave the arbitrator at entire liberty, as the same author continues further on, belong those which permit him " to decide according to justice and equity." This vague expression operates in effect so as to leave him at absolute liberty.

The creation of tribunals of equity in which the arbitrator decides according to his conscience has been frequently put into practice; and it has been considered so regular and convenient that the Institute of International Law included in it the rules of August, 1875, which it proposed and recommended for States when they sought to negotiate agreements for arbitration. Article 18 runs as follows:

Le tribunal arbitral juge selon les principes du droit international, à moins que le compromis ne lui impose des règles différentes ou ne remettre la décision à la libre appréciation des arbitres. (Revue de Droit International, 1875, p. 281.)

For this reason, referring to the varied nature of tribunals of international arbitration, M. Lafayette, cited by Calvo and Tchernoff, says:

Quand c'est d'après leur conscience, les sentiments d'équité ou les principes de droit naturel, que les arbitres doivent rendre leur sentence, ils constituent un *tribunal d'équité;* si, au contraire, c'est d'après les principes de droit formulés dans la convention ou d'après les principes déjà établis du droit international, l'on a un tribunal de justice. Les uns comme les autres forment de véritables corporations judiciaires et, en cette qualité, jouissent d'une entière indépendence vis-à-vis des parties dont ils tiennent leurs pouvoirs. (Cited by Calvo, Inter. Law, Vol. III, p. 464, Note I. Tchernoff, Protection des Nationaux, p. 378.)

And this character of tribunals of equity is especially adapted to mixed commissions, which are almost always constituted nowadays to decide cases of protection, since amongst other considerations proper for an intimate appreciation of justice, in which that character places them, is found the one that enables them to take into consideration those claims which the States refuse to recognize as not touching the principle nor the pecuniary debt, confusing the two things in the same opposition; an opposition which becomes so profound, as one of the authors just cited remarks:

que l'Etat y persiste même quand il se trouve en face d'un individu dont la situation mérite incontestablement une attention particulière. (Tchernoff, Protection des Nationaux, p. 382.)

Pursuing the logical order of ideas concerning the nature of mixed commissions the Institute of International Law agreed at its session of September, 1900, after having adopted a resolution concerning the responsibility of States on account of damages caused to foreigners during an insurrection or civil war, to unite to it this recommendation: [1]

Recourse to international commissions of investigation and to international tribunals is in general recommended for all differences that may arise because of damages suffered by foreigners in the course of a revolt, an insurrection, or a civil war. (Annuaire de l'Institut de Droit International, Vol. XVIII, pp. 254, et seq.) [2]

In discussing this recommendation thus definitely drafted at the request of Mr. Lyon Caen, and as appears in the record of the 10th of September, attention was called to the fact that damages suffered by foreigners could be of two kinds, " those caused by the authorities and those caused by individuals." It was then further suggested that if the text did not comprise the second class it would be better to say " injuries caused *in the suppression* and not *during the course* of a revolt." The person who drew up the project and he who made the foregoing observation both expressly declared that the object was to exclude indemnities for damages caused by individuals; and after the declaration of the ideas of Mr. Descamps, asserting that while the institute was considering the proceeding and the conclusion it did not intend to exclude responsibility for damages which individuals might cause; and the explanations which the writer, Mr. Brusa, repeated, stating that by making no distinction the Commission had intended to include damages caused by individuals as well as the others, the proposal, such as it was and is drafted, was adopted and approved.

The institute relied evidently upon the principle that the tribunals to which they would be referred would be tribunals of equity.

[1] See *supra*, p. 561 for fuller extract.

[2] For translation of all of these recommendations, see p. 561.

In a case which occurred years ago, that is in 1892, and as to which the United States of Venezuela agreed with the United States of America to constitute a mixed commission of arbitration, to which they accorded the attributes of justice and equity, so that in accordance with these and the principles of international law it might decide the claim of the Venezuelan Steam Transportation Company; and Mr. Seijas, representative of the first of these powers, being aware of what the inclusion of equity among the considerations of the judgment signified, proposed, at the conference of July 1 of the year mentioned, that " the word ' equity ' be stricken out, not only because of the conflict that existed between the doctrines of justice and equity, *but also to prevent the commissioners from believing themselves arbiters and not arbitrators in law, which is what Venezuela intended to name.*"

The American plenipotentiary did not consent to the change, and replied " that, in his opinion, the use of the word ' equity ' would result more favorably than adversely to Venezuela, because it would *enable the commissioners* to better take into consideration all the circumstances of the case." Thus the protocol was drawn, and accepted as such, the concept of *equity* admitted as a rule to decide in a mixed commission, it permits it to do so without conforming to the law, which is what essentially characterizes arbiters.

And concerning this difference, between what the law does not exact and equity may nevertheless allow, there exists an example most important in its scope, which is the reparation by the State, because of the internal law, of damages caused by revolts or civil wars.

This example, which has been followed by several nations, emanates from France, where, in consequence of the revolution of 1848, the decree of December 24, 1851, was made, which in the pertinent portion reads as follows (Calvo 5th ed., Vol. III, p. 152, note):

> Considering that according to the terms of the law of the tenth of Vendemaire, year 4 (October 1, 1797), communities are responsible for wrongs committed by violence in insurrections, as also for the damages and actions to which they may give rise; * * *
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> * * * Considering that even if the State *is not subject to any legal obligation*, it is in conformity to the rules of *equity* and of sound politics to repair unmerited misfortunes and obliterate, as far as may be possible, the sad recollections of our civil discords;
>
> It is decreed:
>
> ARTICLE I. That there be opened in the ministry of the interior a credit * * * to pay the indemnities for damages occasioned by the revolution.

In that case, as well as in the others of reparation after the war with Germany the insurrection, and commune, said equitable reparations were affected without distinction as to damages inflicted by the authorities or the insurgents, and as well to nationals as to foreigners.

The foregoing is more than sufficient to show what are the points and attributes of international tribunals of equity, of which sort this Mixed Commission is, created by a protocol that does honor to the powers that signed it, in doing which they not only gave evidence of a lofty spirit, cutting off recourse from both to any principle or rule which smothers the inspirations of an upright and lofty conscience, but also of the most ardent desire that they show practically to foster the Institution of International Arbitration, conceding to it a broadness of scope that increases its efficacy and augments the number of cases intrusted to its cognizance and decision.

The umpire, therefore, believes it to be incontrovertible that classifying, as may be desired, the general principle of irresponsibility of States for damages which insurgents cause — that is to say, as a doctrine which gives rise to tech-

nical arguments, or as an inflexible rule of law — it can not govern in a positive way the case of María García de Padrón; and it being far from obligatory to decide it in accordance with the terms thereof, the positive duty of this Commission consists in deciding without taking into account a necessity which does not exist, resting upon a basis of absolute equity.

The preceding conclusion is in no way weakened by the circumstance that in the convention made in 1861 [1] between Spain and Venezuela relative to Spanish claims, it was agreed that subjects of that nationality injured by revolutions were obliged to prove the negligence of the lawful authorities, and that this rule should be unalterable in the pending negotiations and those that might arise in the future, since if it be true that it was so agreed at that time it is also true that both powers retained the natural and absolute power to agree upon a different course whenever they might desire, and as they have in effect done by means of their above-cited protocol of the 2d of April of this year, which they negotiated for the settlement of the other claims which in their *entirety* must be decided *equitably*.

" The commissioners," says the protocol, " or, in case of their disagreement, the umpire, *shall decide all claims upon a basis of absolute equity*." Thus it is that the application of the rule of 1871 as a requisite in order that the claims, for the decision of which this Commission was established, might prevail and be decided favorably, is clearly incompatible with the principle of equity exclusively and imperatively set down for its judgments.

Having arrived at this point the occasion also appears to have arisen for the umpire, in accordance with the foregoing principles which he has established, to pronounce the decision which he believes equitable and fitting concerning the claim; but, as he understands that it was the intention of the commissioners to consider the case anew, if the umpire did not disallow it because of its revolutionary origin; and it is to be desired that in effect they may do so since they will once more evince their intelligence and impartiality, of which they have given so many proofs, the undersigned decides:

That this record return to the examination of the commissioners so that they may be pleased to decide the claim presented on behalf of María García de Padrón, considering that the principle of irresponsibility of States for damages which insurgents cause does not govern it, since it is not submitted for judg-ment on any other basis than that of absolute equity.