ANTOINE FABIANI CASE [1]

[1] EXTRACT FROM THE MINUTES OF THE SESSION OF MAY 30, 1903.

The claim of Antoine Fabiani was then taken up.

Doctor Paúl rejects it as having already been judged by the arbitral court of Berne, the award of which, in his opinion, has decided definitely on all the points of indemnity presented by M. Fabiani.

M. de Peretti, on the other hand, claims that the Swiss arbitrator has brushed aside all the points represented to-day by M. Fabiani as not being covered by the agreement of arbitration signed the 24th of February, 1891, by the two Governments. The President of the Swiss Confederation has, then, declared himself incompetent to examine the aforesaid points, which by this very fact have found themselves reserved for the examination of the commission instituted by the protocol of Paris. Consequently M. de Peretti admits the demand of M. Fabiani, which he recognizes to be well founded, and accords to him the sum which he claims.

Doctor Paúl declares that the decision taken by M. de Peretti, according to M. Fabiani the sum which he claims, has not been preceded by any discussion between the arbitrators upon the amount of the claim, which Doctor Paúl rejects for the reason already expressed namely, that all the claims newly presented by M. Fabiani have become res judicata.

This claim will then be submitted to the examination of the umpire.

OPINION OF THE VENEZUELAN COMMISSIONER

Antonio Fabiani has presented before this commission a demand of indemnity amounting to 9,509,728.30 bolivars, for losses and damages comprised in the items which, he says, were eliminated by the Swiss arbitrator in his award rendered in the French-Venezuelan suit called the " Fabiani controversy," on the 30th of December, 1896, and by which award the Government of the United States of Venezuela was condemned to pay to Fabiani, by way of indemnity, in the terms of the protocol of the 24th of February, 1891, including all expenses, the total sum of 4,346,656.57 bolivars, with interest at the rate of 5 per cent a year from the date of the award.

Fabiani argues that the Swiss arbitrator deliberately subtracted from his decision, because they were not comprised in the terms of the protocol, certain sums demanded by him in his claim presented to said arbitrator and partly contained in seven separate tables, under the letters A, B, C, D, E, F, and G,

which he presented to the arbitrator when the demand was formulated. These tables, as said by Fabiani himself, in his statement, page 629, had for their object to facilitate the investigations of the arbitrator and corresponded to the situation that had been created to him in Venezuela by the series of prejudicial acts on which he based his claim, and he adds, on that account, the following consideration:

> Although the whole links together without solution of continuity, we have thought that it was convenient to keep a certain chronological order and take into consideration the time when the damages were caused and when they exercised their influence on our fate and on the destinies of our commercial establishments.

The demand entered by the Government of the French Republic, plaintiff, against the Government of Venezuela, defendant, before the President of the Swiss Confederation, appointed arbitrator by a protocol signed in Caracas on the 24th of February, 1891, referred to the decision of said arbitrator the question as to whether —

> according to the laws of Venezuela the general principles of the law of nations and the convention (of the 26th November, 1885) in force between the two contracting powers *the Venezuelan Government was responsible for the damages which Fabiani claimed he sustained through denials of justice,*

and the arbitrator was also charged with the duty of determining —

> in case this responsibility was recognized, *as to all or part of the claims in question,* the amount of the pecuniary indemnity that the Venezuelan Government ought to pay into the hands of M. Fabiani, which payment would be made in funds of the Venezuelan 3 per cent diplomatic debt. (Arbitration protocol of 1891.)

The demand was entered to obtain the reparation of damages caused by denials of justice through acts imputed to the administrative and judicial authorities of the Republic of Venezuela, for which damages the state ought to be responsible and which comprised:

First. The reparation of the damage sustained;

Second. The gain frustrated;

Third. The interest calculated from the date of the damageable acts;

Fourth. The compound interest;

Fifth. The sacrifices made by the injured party for the maintenance of his industry;

Sixth. The prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;

Seventh. The damages to be considered as the necessary consequence of the offenses;

Eighth. The damage done by the privation of work in the future; and

Ninth. The reparation of the moral prejudice.

The demonstrative table of the claims of Fabiani was annexed to the demand with determination of the several items for capital and capitalized interest, amounting to the total sum of 46,944,563.17 francs.

The Swiss arbitrator, in determining the object of the demand referred to his decision, fixed the reach that he considered necessary to attribute to the words " denial of justice," construing that the powers which signed the compromise had given to said words their widest meaning and had meant by them —

> *all the acts of judicial authorities which might imply a direct or disguised refusal to do justice*

Said arbitrator determinately says in the award in question: The duty of the arbitrator precisely consists in deciding whether Venezuela —

is responsible for the damages which Fabiani says to have sustained through denials of justice. * * * Thus the *object of the controversy* and its origin are acknowledged by the parties; it was on account of the refusal of the execution of the award of the 15th December, 1880, which Fabiani possessed against two debtors domiciled in Venezuela or on account of the default of execution owing to the admission of illegal recourses that France took the interests of her native into her hands.

The Swiss arbitrator also declares that —

Venezuela does *not incur any responsibility* according to the protocol, on account of facts foreign to the judicial authorities of the respondent Government.

Fabiani now maintains, more than six years after the sentence of Berne became affirmed, that the Swiss arbitrator deliberately eliminated the *faits du prince*, because he considered them excluded from the terms of the protocol. It does not appear from the careful examination of that sentence that the arbitrator had eliminated any fact directly or indirectly connected with the fundamental *cause* of the suit and with *its object*, namely, *the denials of justice and the claims that Fabiani had presented*, pretending that the Government of the Republic was responsible for all of them. The arbitrator eliminated some of those claims, because the facts on which they were based did not make Venezuela incur any responsibility, as they were strange to the judicial authorities of the respondent state. The arbitrator expressly declares that some —

of those claims based on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from his decision, wherefore he eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

And the Swiss arbitrator adds thereupon, in the motives of the sentence, the following declaration:

It is certainly the denials of justice committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, *and the eventual appreciation of their pecuniary consequences* that form the object of the present litigation. It is, however, necessary to remove another objection of the petition.

The judicial position of Fabiani in Venezuela was first liquidated by the compromise of the 31st of January, 1873. After a series of incidents Fabiani renounced the benefit of this act and signed the compromise that gave birth to the award of 1880. The plaintiff has stated that he adhered to this compromise under the empire of main force and that it did not cover *the prior denials of justice*. But he (the plaintiff) recognizes without hesitation (petition, p. 142, et seq) that Fabiani, who could have had the compromise annulled by the French courts, preferred to reserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani thus contented himself with the state of things created by the acceptance of the arbitrators' jurisdiction, and, besides, from that moment his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motive drawn from the *vis major*, which would have affected the compromise of 1880 and would remove farther back the starting point of *the denials of justice* comprised in the present instance can not be taken, therefore, into consideration. Denials of justice in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator could not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for the *exequatur* entered before the high federal court.

The arbitrator has not, therefore, admitted besides the *faits du prince* any of the facts foreign to the nonexecution and to the effects of the nonexecution of the sentence above referred to to be proved.

It is seen from the foregoing insertion that the arbitrator, exercising his wide

powers of appreciation, left out of consideration any fact, whether a denial of justice, prior to the 7th of June, 1881, when the demand of execution of the sentence of Marseilles was entered before the high federal court, or those called *faits du prince*, that he could not reserve with a view to prove other concluding and connected facts relating to denials of justice. That elimination of proofs and allegations concerning facts entirely strange to the mission of the arbitrator, which precisely consisted in deciding —

whether Venezuela was responsible for the damages which Fabiani claimed he sustained through denials of justice,

does not constitute, on any reason of law or of procedure, a declaration of incompetence or of want of jurisdiction on the part of the arbitrator, with regard to some particulars of the demand, but only establishes that some of those particulars or the facts upon which they rested, were destitute of the conditions necessary for their being accepted *as the consequence of denials of justice*, and, therefore, for their being admitted by the arbitrator as elements of appreciation tending to cause Venezuela to be declared responsible for the damages that Fabiani claimed as the consequence thereof and as the object of the demand.

The Swiss arbitrator did not fail to appreciate some of those *faits du prince* which, while not establishing an intimate connection with the acts of denial of justice, contributed in the mind of the arbitrators to form appreciations as to the extent of the guilt and the amount of the damages recognized in favor of Fabiani. Such is collected from the motives of the sentence of the arbitrator, contained in page 30:

Different indications make one believe that the respondent Government openly hostilized Fabiani and that this position might incite or encourage the judicial authority, at least in the provinces distant from the capital and without the control of a watchful public opinion, *to ignore the rights of a foreign plaintiff*, to whom influential persons of the state would not conceal their hostility. Such is the official approval of the 21st August, 1883, given to the cession, consented by B. Roncayolo, of the contract of the La Ceiba Railway, *although it was notorious in Venezuela that that cession had for its object to diminish or annihilate the pledges of a creditor (faits du prince)*. Such appears also to be the modification adopted by the legislation of the state of Falcón in articles 5 and 7 of the organic law of the judicial power in January, 1883 *(faits du prince); such was* also the withdrawal of the towing service which under the circumstances and at the time it was decided had to be interpreted as an act of reprisal directed against Fabiani *(faits du prince)*.

It is not possible to fail to recognize, according to a sound logic, that the Swiss arbitrator gave those *faits du prince* all the importance that he was permitted to give them within the terms of the arbitration compromise; that he consciously appreciated them, inferring from them serious consequences to the extent of considering them as a *manifestation of the fact that the government openly antagonized Fabiani; encouraging and inciting the judicial authority* to perform the acts considered by the arbitrator as denials of justice, and finally that they (the *faits du prince*) under the circumstances they occurred had to be considered as acts of reprisal directed against Fabiani.

In virtue of that appreciation the Swiss arbitrator established that the responsibility of Venezuela for the acts properly called of denial of justice was tantamount to, at least, the one deriving from " offenses and *quasi delicts*" and that it obliged Venezuela to compensate all the damage that might reasonably be considered as a direct or indirect consequence (*damnum emergens et lucrum cessans*); and it was in virtue of that appreciation that the arbitrator, when declaring the respondent Government responsible for all the consequences of denials of justice imputable to the judicial authorities of Venezuela, determined

the extent of those consequences in the widest manner, liquidating the return of damages and prejudices presented by the claiming government in the manner determined by chapter 6 of the award, page 42, estimating the direct damage and the moral prejudice, the indirect damage, the compound interest, the gain frustrated, the execution expenses, and the costs of the instance.

To prove, furthermore, with the very arguments of Fabiani that the actual purpose of the arbitration process at Berne, determined by the general terms of the compromise of the 24th of February, entered into between France and Venezuela, was to have the question decided as to *whether there had been any denial of justice*, for which decision the arbitrator had to appreciate *all the facts and all the incidents connected* with the suit, and, if there had been any, to fix the amount of the pecuniary indemnity corresponding to all or some of the claims presented by Fabiani, it suffices to reproduce the very statement presented by the claimant to the Swiss arbitrator, most properly determining the object of the suit. In page 4 of the *réplique* to the answer of the Government of Venezuela, Fabiani copies the statement of motives presented by the French Government concerning the demand of indemnity. Said insertion, taken from the note addressed by the legation of France in Caracas to the Government of Venezuela, runs as follows:

> In the opinion of the French Government, the reparation ought to comprise' at least, in the first place, the amount of the sums, in capital and interest, the collection of which would have been assured by the execution in due time of the sentences and, besides, the restitutions ordered by the judges and which would represent about one million five hundred thousand francs (1,500,000 francs), and, in the second place, damages and prejudices, *the figure of which would have to be discussed, for the damage caused to Fabiani in his credit and in his commerce.*

These three points are those comprised in Tables A, B, C, D, and E of the petition (pages 644, 747, 797, and 817 of the statement).

The French note adds (page 3 of the defense):

> As to the rest of his pretensions, a serious contradictory examination ought to determine in what measure they are grounded.

What are these pretentions? Fabiani proceeds. The affairs of the tugboats and of the La Ceiba Railway:

> What was the reason of so much reserved a formula? Why those reticences? The explanation thereof will be found in the last paragraph of page 527 of our report. * * * That *as to the object of the litigation—that is to say, the claims of M. A. Fabiani that the Government of the United States of Venezuela and the Government of France have agreed to refer* to an arbitrator. (Treaty of Caracas of the 24th of February, 1891.)

In page 6 of the Réplique Fabiani says:

> We shall only point out, 1st, that the note on the opening of the negotiations designates *all the commercial prejudices* that are now the object of Tables A, B, D, and E of the Report; 2d, that the same note makes known that the *rest of the pretensions* of Fabiani must be submitted to a serious and contradictory examination; 3d, that the amounts are *undetermined for all our* claims except for account A, the amount of which indicated under the reservation of the word "approximately" has not undergone other modifications than the increase of interest, the reparation of an omission (No. 7 of Table A), and the incorporation of dotal annuities.

In page 11 of the same Réplique:

> It is important to observe that the word *claims*, twice enunciated *in the protocol, applies to the pecuniary claims and only to them.*

In page 13:

They shall have to decide, 1st, whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government *is responsible for the damages which Fabiani says to have sustained* through denial of justice; 2d, to fix, in case this responsibility should be recognized *for all or part of the claims in* question, the amount of the pecuniary indemnity which the Government of Venezuela ought to pay into the hands of M. Fabiani, which payment will be made in bonds of the Venezuelan 3 per cent diplomatic debt.

Such are the terms of the protocol. They are so clear and precise that they require no interpretation. They give the arbitrator the right to search out the denial of justice, *to point out to it where he may find it and disallow our* demand, if the denial of justice does not exist. *There is no more tedious a task than to have at every moment to demonstrate what is evident.*

In the same page:

Certainly the refusal of execution of the sentence exists in the process *as an important element* among the numerous denials of justice that we denounce against Venezuela; but the resistances of the Cabinet of Caracas, unwarranted both as to their form and reasons, its absolute refusal to agree to friendly negotiations, have led our Government not to sacrifice anything for the sake of peace and *to demand an express compromise conceived in general terms in order to protect all the rights, all the interests of the French citizen who asked for its protection.*

In page 16:

In our judgment the question may be considered from another point of view, that of the terms of the protocol, general terms which authorize the arbitrator to appreciate any denial of justice duly proved, and permit Fabiani to *present all the pecuniary claims relative* to damages sustained through *denials of justice.*

(The pecuniary reparation is the effect, the denial of justice is the cause.)

If Fabiani formulates *claims* having *another cause than* the denial of justice, *or if it should not clearly appear that they are imputable to a denial of justice, the arbitrator shall purely and simply disallow them, because they will be without the limits of the protocol,*

that is to say, without the law and not without his competence; the protocol was the law);

and, if he recognizes the responsibility of Venezuela he will point out, in the proportions *his conscience may suggest him,* all the damages he may judge to be the direct and immediate consequence of the infractions committed by Venezuela.

It will be permitted to us to add that, even if the protocol instead of being conceived in general terms should have established *all the details of the litigious points,* it would not be necessarily inferred therefrom that every motive or claim that was not expressly enunciated in the protocol should be set aside, without any discussion, as being without the terms of that protocol.

If no other difference is the question, *or if the question is a difference posteriorly occurred between the parties;* if the new motives of demand, although they are not expressly specified in the protocol, *are found therein,* however, *virtually comprised, whether as an integral part of the litigious points designated,* or as a consequence thereof; if the source of those motives is found in the compromise; if the demand *is not different* from those which the compromise has foreseen and *the settlement of which it has had in view;* and, finally, if the motives they pretended to have set aside might later give place to the *same debates* as those enunciated in the protocol, *the arbiter may appreciate the merits of those motives and include them in his decision.*

The new Denizart arbitration No. 10 is not less precise. The arbitrators may take cognizance of the accessories of the instance and of all those incidents in such a manner connected with the case, that it would happen, if the judgment thereof were omitted, that the parties would always be divided by the *same question* that had been the object of the protocol.

Therefore, when *motives* of demand not expressly enunciated in the protocol are connected with the case itself in such a manner, that, if the judgment thereof were omitted, the parties would be left *in the presence of the same* litigation, the arbitrators are competent to take cognizance thereof. Might it not be added that, if they were openly set aside, the decision might be considered as rendered without the terms of the protocol?

It appears to us to be very difficult to imagine an arbitration in which *the motives* of demand, which they *pretend to have set aside under the pretext that the same are without the protocol*, may exhibit a greater connection with the facts that are found expressly enunciated therein. Not only they would be supported in this judgment on the same means and would require the same debates *as the motives*, the admissibility of which is not discussed, but it could not be ignored that *it would be impossible to soundly appreciate the merits of the other motives*, if the first denials of justice, *the causes which have been the motive and the purpose of the denials of justice and are*, therefore, *the essential part*, the ground of the suit, were not, after having constantly drawn the attention of the judge, to be considered as one of the litigious points submitted to his decision.

The evident purpose of the arbitration, which purpose is justified by the general terms of the treaty of the 24th of February, 1891, has been to decide *whether there has been denials of justice; to fix, if there has been any, the damages imputable to the denial of justice, not some damages, but all the damages that Fabiani claims to have sustained; to determine the amount of the reparation and to put a definitive end to the difference arisen between France and Venezuela.*

It is important that the decision to be rendered may, conformably to the noble and pacific formula of the peace tribunals, declare any new claim of Fabiani for denial of justice *inadmissible.*

Everything tends, therefore, to prove that the identity of the nature of the demand, the absolute similitude of the motives invoked, the links of absolute connection uniting the alleged new motives with all the others would recommend, if the protocol offered any obscurity, *that questions the inadvisibility of which appears proved by all the circumstances of the suit should not be separated.*

In the statement of Fabiani, he says, in page 615, when dealing with the extent and justification of the damages and losses, the following:

If the arbitrator, after having examined and analyzed *our different motives of claim*, should be induced to recognize *that all those motives are justified* and that we have valued our damages without any exaggeration, Venezuela could congratulate itself at its insistence in having a little equitable mode of payment accepted, since the sums it would be obligated to deliver to us would not represent the actual amount of the indemnity that may be adjudged to us by the award; so that it would not be exact to say that the author of the infraction has paid and we have obtained the amount of the damage fixed by the arbitrator. And if it should be admitted that the judge, acting *either by way of elimination or by way of reduction*, should find that there is a reason *to restrict the measure of our damages*, valued in specie, when taking into consideration its conversion into 3 per cent bonds, at the price of those values, he could not, even if he should allow to us the whole of our demand in bonds, assure to us an integral restitution unless his valuations, *determined absolutely according to his conscience*, cause our claims to undergo a strong reduction.

Now, therefore, in short, if the arbitrator finds that our valuations have been made justly, measuring the damage sustained, he will regret when rendering his sentence not to be able to assure to us a restitution *in integrum*. And if he considers it equitable to make us sustain a reduction *in some of our claims, or even if he holds that some of them must be set aside*, he will find himself, despite of his taking into consideration the quotation of the bonds, in the presence of a true lesion, unless he considers himself to be in the case of reducing, *in a notable proportion*, the amount of our claim.

In page 622 of his statement, Fabiani, as if he prejudged the decision of the Swiss arbitrator, and as if he himself were dictating the award that this commission of arbitration must render upon his present claim, states the following:

The arbitrator being, as every tribunal, vested with a sovereign right of appreciation, with a real discretional power to fix the amount of the reparation without the obligation of expressing the motives that may induce him to give this sum instead of another, the arbitrator, we say, in allowing a lump sum is not obligated to render his award in accordance with the proofs furnished by the parties or to indicate the details of the various elements serving to determine the just measure of the damage. The compromise purely and simply vests him with the duty of *fixing the amount of the indemnity, if the responsibility of Venezuela is found to be grounded.*

The arbitrator acts with the plenitude of his independence, having no other guide than his lights and his love for justice, *he inquires; whether such a prejudice or such a damage* has been *the direct and necessary consequence of the infractions that have engaged the responsibility of the defendant;* from the moment his judgment and his conscience give him the conviction *that the prejudices and damages can not* be separated from the reproached infractions, *that they can not* have had other causes, he is dispensed with deviating into the labyrinth of more or less immediate or more or less remote consequences, and especially in our affair it will be easy for him *to convince himself that no intermediate fact* has come to divide *responsibilities;* that no occurrences alienate from the reproachable facts imputed to the author of the infraction *can have exercised or has exercised any influence, however small it may be,* on the disastrous *consequences of the facts charged.* It is those acts, namely, the illegal obstacles *opposed to the exercise* of our rights, the *faits du prince,* in the most brutal acceptation of this word, that constitute the *only cause of the losses we have sustained,* and it is impossible even to suggest that other causes would have produced the same losses and the same disastrous effects, if those *obstacles* and those *faits du prince* had not existed.

It may be that *the study of our affair, and the detailed examination of the numerous items of our claims* suggest to the arbitrator either the opinion that some of our claims *have no direct and immediate connection with the infractions* denounced, or the opinion that certain damages indicated by us *must be fixed at a less high figure. That is the right of the arbitrator, and the exercise of that right is subordinated only to the inspirations of his conscience.*

After these clear avowals and clear statement made by Fabiani of the object of the demand decided by the Swiss arbitrator, of the connection of all the points of the claim, of the possibility that some of those items of the claim might not have a direct or indirect connection with the infractions constituting denials of justice, of the power recognized in the arbitrator to proceed, by *elimination or reduction,* to fix the amount that Venezuela was to pay, in case its responsibility were established, setting aside everything that might not be considered as grounded within the general terms of the protocol, in order to arrive, *by accepting all or part of the claims in question,* at an end of the difference or demand between France and Venezuela, we can only regard as a chimera the pretention that the award of Berne left without a definitive decision any of the claims of Fabiani against Venezuela that were the subject of the suit. The grand total of the claim that Fabiani made amount to the sum of 46,944,563.17 francs, and the Swiss arbitrator fixed at the sum of 4,346,656.51 francs, was the object of the suit, the subject-matter of the analysis, the proofs and debates, as to what the arbitrator was to allow for denials of justice, if these were proved. *The facts debated* were all those that Fabiani alleged as the grounds of the different items of the claim; the powers of the arbitrator to judge and decide, those that the arbitration protocol of the 24th of February, 1891, conferred upon him, without limitations of appreciation; the law or norm to which he was to conform his judgment and the decisions of his conscience, the denial of justice on the part of Venezuela, duly established; the effect or result of that judgment and of that sentence being *the object of the demand,* the determination of the amount of the indemnity, recognizing *all or part of the claims in question* or declaring Venezuela exempted from responsibilities.

The arbitrator, exercising his sovereign powers of appreciation, eliminated,

when fixing the amount of the indemnity, *points* or sums of the claim of Fabiani, because he considered them as absolutely excluded from his decision, as they rested on facts alien to the denial of justice. In making this elimination, *he judged, rejected, eliminated or disallowed them* (these are synonymous words), because they did not represent effects or consequences of denials of justice, *the only cause which, according to the protocol, made Venezuela incur responsibilities.*

Amply exercising also his powers of appreciation, he considered some facts as denials of justice, he considered the responsibility of Venezuela aggravated by the existence of certain *faits du prince,* as indications of the hostile attitude of Venezuela against Fabiani and motives of incitation for the judicial authorities to the denial of justice; and he made use of the means of proofs and allegations with the purpose to establish the existence of other concluding and connected facts relating to the denials of justice.

By the proceeding of elimination and reduction of the several sums to which Fabiani made his claim amount, the arbitrator fixed, as the total indemnity that Venezuela was to deliver to Fabiani, the sum of 4,346,656.51 francs for the following respects:

	Francs
1. Roncayolo's debt	424,177.55
2. Income for pilot service for December, 1877, to the 15th of July, 1882	68,312.45
3. Income for towing service from 1880, 1881, to the 15th of July, 1882	254,166.51
4. Expenses for the execution of the sentences, including interest	200,000.00
5. Material and moral damage caused Fabiani by his bankruptcy	1,800,000.00
6. Indirect damage, compound interest, and an indemnity for the profit that Fabiani might have derived in his business from the investment of the sums 2 and 3, taking into consideration the realization of a mortgage for 120,000 francs	1,500,000.00
7. Costs of the international instance	100,000.00
Total	4,346,656.51

It is evidenced by the foregoing demonstration that the Swiss arbitrator decided all the connected points of the claim of Fabiani that are minutely determined in the nine paragraphs comprising the object of the demand, according to the classification made by the arbitrator in page 11 of the sentence, namely:

First, the reparation of the damage sustained;

Second, the gain frustrated;

Third, the interest calculated from the date of the damageable acts;

Fourth, the compound interest;

Fifth, the sacrifices made by the injured party for the maintenance of his industry;

Sixth, the prejudice deriving from the expense made and from the time lost to arrive at the execution of the sentences;

Seventh, the damages to be considered as the necessary consequences of the offenses;

Eighth, the damage done by the privation of work in the future, and

Ninth, the reparation of the moral prejudice.

The sentence of the Berne tribunal fixes the amount of the indemnity for all the aforesaid causes in a less sum than that established by Fabiani, the arbitrator using in this point his free power of appreciation, but admitting in principle all the conclusions of the demand.

Such is expressly declared by the sentence in its final paragraph C, Part VI, page 47, running as follows:

As to the cost of the present instance, the arbitrator, making it to appear that

the conclusions of the petition are adjudged in principle, but that the exaggeration of the claims put forward has occasioned useless expense, charges the respondent Government with the expense of the claiming government, liquidated at the sum of 100,000 francs, and compensates between the parties the expense of the arbitration.

For all the reasons above expressed the arbitrator for Venezuela is of opinion that, as there exists an award passed and affirmed on all and every one of the points comprised in the demand decided by the Swiss arbitrator, and originated by the claims of Antonio Fabiani against the Government of Venezuela, in accordance with the compromise entered into between said Government and the Government of France, on the 24th of February, 1891, every new demand of indemnity on the part of Fabiani referring or confined to the same claims that were the object of that protocol and of the subsequent suit and sentence, tried and rendered by the tribunal of arbitration at Berne, is inadmissible.

He, therefore, absolutely rejects the demand of indemnity which has given a motive for this opinion.

CARACAS, *May 30, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER

The French arbitrator was of opinion that, as there was no sentence passed and affirmed on the points of this claim, he admitted it for its integral amount, and consequently, as appears from the records of the proceedings, it was referred to the decision of the umpire.

OPINION OF THE FRENCH COMMISSIONER

Doctor Paúl has, without examining it deeply nor discussing the figures submitted by the claimant, rejected the claim presented by M. Antoine Fabiani as

having already been decided by the court of arbitration of Berne, the sentence of which has, in his opinion, passed definitely upon all the leading points of the indemnity presented by M. Fabiani.

The Venezuelan arbitrator considers that the President of the Swiss Confederation has eliminated a certain number of the points of the claim because the facts upon which these are founded, being foreign to the judicial authorities of the respondent State, do not make Venezuela responsible. This elimination does not constitute in his eyes a declaration of want of jurisdiction based upon the terms of the agreement of the 24th of February, 1891, but it would establish that these facts are not of a nature to justify the demands for indemnity. It is upon this theory that M. Lachenal would have definitely put them aside. Consequently M. Fabiani could not, according to Doctor Paúl, be admitted to present before the court of arbitration appointed by the protocol of the 19th of February, 1902, a new claim, his cause having been already entirely and definitely settled. Finally, my honorable colleague observes incidentally that M. Fabiani has waited six years since the award of Berne has been effective for setting up his new claim. On the contrary, from the reading of the award rendered the 30th of December, 1896, by the President of the Swiss Confederation, I have concluded that the arbitrator had set aside all the points renewed to-day by M. Fabiani, not because they could not in anyway place the responsibility upon Venezuela, but only because they are not in accord with the agreement of arbitration signed the 24th of February, 1891, by the two Governments. M. Lachenal has then contended himself, in my opinion, to declare himself incompetent to examine the said claims, which by this very fact find themselves reserved for the examination of the court of arbitration instituted by the proto-

col of February 19, 1902. He has in no way decided that these main points, upon which he has refused to render a decision, could not form the object of any demand for indemnity. After having said in fact, on page 22 of the award:

It results, from the evidence of the very text of the agreement and from the *ensemble* of the facts of the case, that the respondent Government is sued solely by reason of the nonexecution by the Venezuelan authorities of the arbitral award rendered at Marseilles on the date of the 15th December, 1880, between Antoine Fabiani on one part, Benoit and André Roncayolo on the other part.

M. Lachenal adds, on page 25:

In return Venezuela does not incur any responsibility, according to the agreement, on account of facts foreign to the judicial authority of the defendant State. The claims which the petition bases upon *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely withdrawn from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he could not reserve them to establish other concluding and connected facts relative to the denials of justice

In his desire to state very precisely the object of the litigation following the agreement, M. Lachenal even fixed the date (June 7, 1881) after which the denials of justice ought to be produced in order that by their act it might be possible according to the agreement to again hold Venezuela to responsibility. Is this to say that for every denial of justice previous to this date M. Fabiani would not have been able to demand indemnity from the Venezuelan Government before any tribunal had it, like this one, the most extended jurisdiction? It would not be more unreasonable and more unjust to pretend that to refuse to M. Fabiani the right of a compensation from the fact of the main point of the claim which he raises again before this new court. The declaration of want of jurisdiction of the arbitrator is clear, but it does not constitute in any way a patent of irresponsibility for Venezuela because of arbitrary acts of its government prejudicial to M. Fabiani, who remained free to demand reparation before a court of which the jurisdiction would not be limited, as that of the court of Berne, by the terms of a restrictive compromise. Such is the case of the court of arbitration instituted by the protocol of the 19th of February, 1902, which regards in a general way, of whatever nature they may be, all the demands for indemnities presented by Frenchmen and founded on acts anterior to May 23, 1899.

This time the Venezuelan Government can not maintain, as in 1891, that only denials of justice of a special character can fix the responsibility upon Venezuela. Besides, a great number of claims presented to the courts of arbitration which sat last year at Caracas had precisely for a foundation, not denials of justice chargeable to the judicial power, but to *faits du prince* analogous to those of which M. Fabiani has been the victim, and there resulted for the Venezuelan Government condemnations to very extensive pecuniary reparations. Besides, one can not allege a grievance against M. Fabiani for having waited to present his new claim until a court of arbitration should have been formed to judge it. One knows, in fact, that the decision of the arbitrator of Berne, on the one hand, bears the date of the 30th of December, 1896, and, on the other, from 1895 to 1903 all the claims of the French against the Venezuelan Government have remained in suspense, the diplomatic relations between these two countries being themselves suspended. I consider in consequence that the plea of *res judicata* can not reasonably be invoked.

The main points of the claim presented by M. Fabiani have not been adjudged by the arbitrator of Berne. He has not been able then to declare that they did not permit absolutely any demands for indemnity. M. Lachenal has not raised

the facts by reason of which M. Fabiani demands to-day some indemnities except as indications of the ill will of the executive power. He has thereby recognized their existence and established their injurious character. M. Fabiani then only uses a legitimate right in reclaiming before this new jurisdiction with unlimited power in whatever concerns the French claims previous to the 23d of May, 1899, an equitable reparation for the large damages which these acts have caused him.

In referring to the memoirs prepared by the interested party one is seized with astonishment at the multitude of arbitrary acts of every kind which M. Fabiani proves by his invincible arguments and authentic documents he has had to suffer since his establishment at Venezuela. During my sojourn in this country I have found, whether at Caracas or at Maracaibo, among established foreigners and the Venezuelans that no attachment with the Government prevents from being impartial, a unanimous agreement in recognizing that M. Fabiani had been pursued for long years by the hatred of the executive power of which the evident end was to strip him of his capital and the fruits of his labors without anything in the conduct and attitude of this foreigner justifying or even explaining such animosity. I have read with attention the memoir and the conclusions remitted by M. Fabiani. I have not found therein any inaccuracy nor any exaggeration. I have found to the contrary, as in the dossier of the proofs furnished in support, the constant care to be minutely precise. As moreover none of his demands have been contested in the foundation and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.

Doctor Paúl has insisted on having stated in the minutes of the meetings of the commission that my decision had not been preceded by any discussion between the arbitrators upon the amount of the claim which he rejected for an interlocutory reason. It is really because my colleague has not discussed the figures presented by M. Fabiani that I have been under the obligation of accepting them as a whole. They have not seemed to me exaggerated, and the interested party has naturally not furnished me with the means of contesting them. I am, moreover, far from believing, if I may judge by the defense remitted to the arbitrator of Berne, that the Venezuelan Government has not been sorry to intrench itself behind the plea of *res judicata* by means of an interpretation of the award which seems to me inadmissible. Conscientiously, then, I judge that the Venezuelan Government ought to turn over to M. Fabiani as an indemnity a sum of 9,509,728.30 francs.

In conclusion, I think I ought to submit two considerations to the particular attention of the umpire.

First, one can notice in running through the memoir presented by M. Fabiani to the arbitrator of Berne and the award of M. Lachenal that all the figures asked by the claimant and retained by the arbitrator as comprised in or receiving their source in the award of Marseilles have been recognized as exact and admitted by M. Lachenal without any reduction. This observation is not without value and ought to remain present in the mind while one examines the figures presented in course of this claim. It is honorable for M. Fabiani, whose example in this is very rarely followed by foreigners who enter complaint against Venezuela.

Moreover, it is to be considered that according to the terms of the protocol indemnity ought to be paid in bonds of the diplomatic debt and not in gold. Thanks to this concession, granted by the French Government to the Venezuelan Government in order to allow it to pay its debts with greater ease, the amount of the indemnity becomes singularly reduced in reality. The bonds

issued by the Government of Caracas have a real value, which is always very much less than their nominal value. In May, 1903, they reached a depreciation of 30 per cent. In December, 1903, they sank to 70 per cent of their value. For some months their real value seems to have stopped at 40 per cent of the nominal value. It would be, then, if the umpire should partake of the sentiment of the French arbitrator, a little less than 4,000,000 bolivars in gold which Fabiani would receive and the Government of Venezuela would have to remit.

August 2, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

Before preparing the opinion I submitted at the sitting of May 30, 1903, which I submit herewith, translated into English, rejecting the claim filed by A. Fabiani against the Government of Venezuela for the amount of 9,509,728.30 francs, I made a complete investigation of the facts upon which the claimant bases his contention. It was after becoming thoroughly acquainted with the peculiar circumstances of the case and based on the reason contained in my opinion as aforesaid that I rendered the following decision:

That because there existed a condition of *res judicata* covering each and every one of the points contained in the case decided by the Swiss arbitrator, originating in the claims of Antoine Fabiani against the Government of Venezuela, in accordance with the convention made between the latter Government and that of France on February 24, 1891, any new claim for indemnification made by Fabiani is inadmissible if referring to or containing the same contentions which originated said agreement and the subsequent hearing of the case and sentence passed by the Arbitration Court of Berne.

The French commissioner, at the session above referred to, did not go beyond stating his opinion that the Swiss commissioner had laid aside all the points originating the claim entered anew by Fabiani as not included in the arbitration agreement signed on February 24, 1891, by the two Governments, and that the President of the Swiss Confederation having declared himself disqualified to examine the several complaints on the same grounds above mentioned, such contentions were therefore a proper subject of investigation by the commission created by the Paris protocol. M. de Peretti ended by admitting Fabiani's claim, acknowledging its sound basis, and granting the full amount of the claim.

In order to be able to fully understand the points relating to the convention made on February 24, 1891, between the French and the Venezuelan Governments, the object of said convention, the ends both Governments endeavored to attain, the extent of the arbitration agreement entered into, the claims that were to be properly admitted to the examination and decision of the umpire at Berne, and in order to properly establish if M. Fabiani may or may not introduce before this commission a new claim embracing facts and circumstances antedating said convention, but included in the arbitration agreement and submitted to examination and decision at Berne in compliance with the protocol of 1891, it becomes necessary to bring before us the precise language of said convention and the antecedents or official communications passed through diplomatic channels preceding such convention and which sufficiently explain the causes originating the arbitration agreement, the nature and circumstances of the facts or claims entered by M. Fabiani, and the action the French Government deemed proper to enter against the Government of Venezuela *in order to safeguard all the rights and all the interests* of the French citizen who had invoked its protection.

I beg to submit herewith Spanish and English copies of the convention made

in Caracas on February 24, 1891, between the representatives of the French and the Venezuelan Governments, the first paragraph of which contains the following language:

> The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an umpire *the claims* of M. Antonio Fabiani against the Venezuelan Government.

It is not possible to find in any convention of like nature a clearer exposition or a wider scope as regards the object of the arbitration. The agreement was to submit to an umpire the claims of M. Antonio Fabiani — that is, the claims of M. Fabiani against the Government of Venezuela up to the date of the convention — and no doubt whatever can exist as regards this conclusion, as otherwise the object for which the convention was made would be defeated.

No limitation was placed upon any claims M. Fabiani might have had against the Venezuelan Government, nor can it be supposed that, the object of the convention being to finally close a long diplomatic process during which France had most energetically maintained the necessity of Venezuela submitting to arbitration Fabiani's claims, a protocol should be concluded between both countries, the terms of which, while agreeing to arbitration proceedings, should except certain portions of claims which kept their friendly relations disturbed. A foreign office as important and enlightened as that of France can not father such absurdities.

The first paragraph of the convention of February 24, 1891, having determined the original object of the arbitration — i.e., *Fabiani's claims* — Article I, which immediately follows, makes the following stipulation:

> The umpire shall * * * determine if in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for *the damages* which M. Fabiani *alleges to have suffered because of denial of justice.*

The clear and precise language of this article shows how far did both Governments consider it necessary to impress upon the umpire's mind in unequivocal terms that *the claims or damages* — that is, those to be submitted for his investigation — which M. Fabiani *alleged* to have suffered through denial of justice. were to be determined in conformity with the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, in order to *fix the responsibility of the Venezuelan Government* according to such laws, principles, and convention.

" *The damages which M. Fabiani alleges to have suffered.*" According to such language, what is that which Fabiani alleges to have suffered? Common sense will say " the damages." For what cause does Fabiani allege to have suffered such damages? Because of the denial of justice. How is the umpire to view the denials of justice which Fabiani alleges have originated the damages suffered. now submitted to the umpire's decision? According to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two powers. It is thus seen that the above-quoted article clearly specifies the three elements which constitute the object of the arbitration — i.e., the damages suffered by Fabiani in Venezuela, submitted to the umpire in the shape of claims, the cause of such claims or damages which Fabiani made solely dependent upon the denials of justice, and the standard which the umpire must follow to find out whether or not there has been a denial of justice as the fundamental and only basis of the claims or damages alleged by Fabiani at the time of the convention.

Article II of the convention reads as follows:

To fix, should such liability be found, for *the whole of the claims in question or any portion thereof*, the amount of the pecuniary indemnification that the Venezuelan Government must make to M. Fabiani, which shall be paid in 3 per cent bonds of the diplomatic debt.

According to this article, the Berne umpire was to fix at a certain sum the amount of the pecuniary indemnification should it be found that Venezuela was liable for the *whole of the claims or any portion thereof* entered by Fabiani. That portion of the claim for which the umpire found Venezuela to be responsible, fixing the amount at 4,346,656.57 francs, was delivered to M. Fabiani in compliance with said Article II in 3 per cent bonds of the diplomatic debt. That portion of the claim for which the umpire found that Venezuela was not liable was rejected; and he also adjudged that there was no denial of justice as alleged by Fabiani to be the cause of damages of that portion of the claim rejected, and also declared that the amounts claimed for the justified damages were grossly exaggerated. He so declares in a conclusive manner in final Paragraph C, Part VI, page 47 of the original award, which reads as follows:

As regards the expenses in this appeal, the umpire, *while declaring that the conclusions in the case are admitted in principle*, but that *the exaggeration of the claims made* has caused unnecessary expenses, estimates the liquidated expenses of the claimant Government against the respondent Government in the sum of 100,000 francs and divides between the two the arbitration expenses.

Such declaration, which the Berne umpire found indispensable to make, irrevocably fixes the true condition of Fabiani's claims, which were the subject of arbitration, in respect to the Government of Venezuela. The conclusions in the case were admitted in principle, but there was exaggeration in the claims made. Fabiani won the case, obtained a *gain de cause* as regards the liability of Venezuela as found by the umpire growing out of denials of justice which constituted the main cause of the claims Fabiani endeavored to establish against Venezuela, but the claims made were found by the umpire to be exaggerated, so he reduced them to the amount given in the award.

The claims Fabiani has again presented to have examined by this commission are the same as those submitted to the Berne tribunal, the umpire then accepting in principle the conclusions in the case, but finding that the claims *were exaggerated*. My argument in regard to this issue is more fully expressed in my opinion of May 30, 1903.

I also beg to submit with this additional opinion copy of the diplomatic correspondence passed between the Governments signatory to the convention of February 24, 1891, in the years 1889 and 1890, preceding such convention, wherein it is shown that both Governments were animated by the purpose of definitively settling Fabiani's claims by means of the arbitration agreement made in 1891. I beg to call the honorable umpire's attention to the following paragraphs:

His excellency M. Blanchard de Farges, minister of France in Caracas, to Mr. P. Casanova, minister of foreign relations, note of December 31, 1889:

To judge from the very particular interest taken in France to settle this matter (Fabiani's claim) and the regrettable turn which unhappily has been formerly given to your excellency's administration and my arrival in Caracas, I hold the certainty that my Government would see in the manifestation of more favorable dispositions *as regards said claim* the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

Mr. P. Casanova, minister of foreign relations to his excellency M. Blanchard de Farges, note of January 14, 1890:

After the consideration of your excellency's note of December 31, ultimo, wherein, while referring to the interviews we have held in regard to several pending matters between the two Governments, but without expressing the grounds the French Republic may have to insist upon the *Fabiani claim*, rejected from its origin by Venezuela, your excellency proposes to have it submitted to arbitration, the President, desirous of exhausting all efforts in behalf of the desired good harmony between both countries, has directed me to state to your excellency that he is willing to accept such in principle, providing the umpire chosen be selected from the Presidents of the Latin-American Republics; that the question to be decided be "if this is the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885;" and that in case Venezuela *should be condemned to pay any indemnification, in view of the legal proofs adduced in favor of the claimant*, such agreement to be submitted to the National Congress as provided by law, such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

M. Blanchard de Farges to M. Marco Antonio Saluzzo, minister of foreign relations, note of May 20, 1890:

I have the honor to acknowledge receipt of your note dated on the 14th instant in reply to the one I delivered to your excellency on the 1st, regarding *Fabiani's claim.* * * *

As regards the second part of the communication I now have the pleasure to answer, I notice with pleasure that the Venezuelan Government does not further insist upon the condition that the election of the umpire to be appointed could not be made but in the person of the President of one of the Latin-American Republics.

In the matter of your refusal to agree in the condition which my Government now proposes through me asking *that the umpire's award shall deal only with the amount of the indemnity to be fixed for M. Fabiani*, I can not but earnestly deplore that you do not think you can grant us this point, and that you should permit that in this manner there should be perpetuated between the two countries an *element of dissension* to the obliteration of which I am satisfied I have done everything in my power.

Dr. Modesto Urbaneja, minister of Venezuela in Paris, to the minister of foreign relations of Venezuela, note of July 22, 1890:

Consequently, for greater clarity and to prevent that M. Fabiani should misconstrue the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:

That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris;* first, to decide if this be the case provided for in article 5 of the French-Venezuelan convention of November 26, 1885; and, second, should the umpire decide that such is the case provided for in article 5, then the umpire is to *fix the sum that must be paid to M. Fabiani* in 3 per cent bonds of the diplomatic debt.

I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees in the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would, to a certain extent, be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically* through diplomatic channels.

M. Blanchard de Farges to the minister of foreign relations of Venezuela, note of August 12, 1890:

Referring to the last communications passed between us dated May 14 and 20, ultimo, relating to the Fabiani matter, I have the honor to submit to your approval the inclosed draft of a statement which I have just received from the minister of foreign relations of the French Republic to serve as a basis to the arbitration already agreed upon "in principle" between the Venezuelan and French Governments.

In the event this draft, which is entirely in conformity, as I believe, with the last

statements your excellency has made me in the name of your Government, should, as I have reasons to expect, be favorably accepted and that *forthwith an agreement should be entered definitively establishing arbitration under the terms which both parties should deem proper*, I have the pleasure to inform your excellency that I am authorized to withdraw the note M. St. Chaffray addressed to the Caracas cabinet as a consequence of the instructions sent him under date of December 24, 1888.

The draft mentioned in the foregoing note is couched in the same language as paragraph 1 and articles 1 and 2 of the convention signed by France and Venezuela on February 24, 1891. See the draft of statement at the foot of the note of M. de Farges.

The minister of foreign relations of Venezuela to M. de Farges, note of August 14, 1890:

I had the honor to receive your excellency's communication, dated day before yesterday, wherein, in reference to the *claim of M. Fabiani*, a draft of a statement which the Government of the French Republic has transmitted to you is submitted to the Government of Venezuela.

It is very satisfactory to the President of the Republic to learn that the Government of France, as was to be expected from its enlightened views and good will, accepts the employment of arbitration *to decide upon the foundation of such claim* and has authorized your excellency to withdraw the note of M. St. Chaffray, as Venezuela has urged as earnestly as was consistent with its desire to clear the relations of both countries of the embarrassing position created by the purport of its contents.

The Government of Venezuela, on the other hand, has no difficulty in subscribing to the statement transmitted, with the understanding, however, that the final agreement resulting therefrom shall express, according to the proposition of Venezuela, *that to fix the amount of the indemnity*, should there be any, the umpire will rest his decision on the legal proofs *of the damages M. Fabiani claims to have suffered*; that such payment is to be made in the 3 per cent bonds of the diplomatic debt, as promised, and that the agreement is to be subject to the approval of the Congress of Venezuela.

Finally, your excellency can not fail to admit the necessity *to indemnify M. Fabiani, not for the damages he avers to have sustained and which he estimates at an extravagant figure, but for such damages as he has actually suffered*, the estimation of which does not depend upon his word devoid of all proof. The burden of the proof rests on him as the claimant.

As a complement to such important notes which give sufficient light on the question of the agreement for arbitration, showing besides that such agreement embodied all the claims of M. Fabiani existing at the time it was concluded, as it did not have any other original grounds except the so-called Fabiani claim, that the owner thereof made to the amount of an extravagant figure which was reduced to about one-tenth by the award of the Swiss umpire, I reproduce herebelow the argument (*exposición de motivos*) made by the French Government in regard to the claim for indemnification entered in behalf of Fabiani, addressed on August 3, 1887, by the French legation in Caracas to the Venezuelan Government (Answer of A. Fabiani before the Swiss umpire, page 4):

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sums, both principal and interest, the collection of which would have been insured by the execution of the sentence in due and proper time, besides the restitutions ordered by the judges, amounting to about one million and three hundred thousand francs, and, in the second place, damages and interest, *the amount of which is to be discussed, for the wrongs made to Fabiani in his credit and in his business.*

As regards his other pretensions, a searching investigation and discussion should determine how far they are well founded.

The foregoing suffices to convince that the only and actual object of the arbitration agreement and of the subsequent investigation and sentence was no other than the claims of M. A. Fabiani, existing at the time of the agreement, which the Government of Venezuela and the Government of France agreed to submit to the Berne umpire for him to fix, should he find Venezuela's liability *for the whole of the claims or any portion thereof*, the amount of the pecuniary indemnity.

I do not deem it necessary to further dwell in this additional opinion on points so clearly and so well supported by evidence on the part of both Governments, that it is really inconceivable that M. Antoine Fabiani should pretend, after due execution of the award made by the Berne tribunal, by means of the payment made by Venezuela of 4,346,656.57 bolivars, since 1896 in bonds of the diplomatic debt, and its interest at the rate fixed of 3 per cent per annum, not to be compensated for the damages which in 1891 he claimed the Venezuelan authorities had caused him to suffer, and which since 1888 gave rise to the active diplomatic correspondence passed between the two Governments and finally ending in the convention of February 24, 1891.

I close these statements reaffirming in all its particulars my opinion of May 30, 1903, by which I rejected the claim entered anew by M. A. Fabiani, based upon the same grounds originating the claim for indemnification which produced the arbitration agreement between France and Venezuela in the year 1891.

ADDENDUM

I submit herewith the English translation of the award of the President of the Swiss Confederation in the claims of A. Fabiani, made by Dr. Delicio Abzueta, sworn interpreter in Venezuela, whose competency is well known to the honorable umpire.[1]

NORTHFIELD, VT., *February 6, 1905.*

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

After having read the additional memoir presented by my honorable colleague, I can only maintain the conclusions of the prior memoir, which sums up the proper conclusions of the claimant in that which concerns the plea of the *res judicata*. They are based upon this precise declaration of the arbitrator of Berne, of which my colleague presents an exact translation:

> In return Venezuela does not incur any responsibility according to the compromise (agreement) on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on *faits du prince*, which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proofs relating thereto as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

I think I ought to formulate, however, some observations which are suggested to me by the considerations set forth in this additional memoir.

In the first place, Doctor Paúl supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which preceded this, in order to demonstrate that the intention of the two Governments was really to deter-

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[1] A copy of the original text of the award appears on pp. 4878-4915, vol. 5, *Moore's History and Digest of International Arbitrations*.

mine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agreement in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representative of the Venezuelan Government at Berne who, hoping to find in the terms of the convention, unfortunately ambiguous, the possibility for Venezuela eluding a part of her responsibilities, combatted this broad interpretation in several instances, and substituted for it a restrictive interpretation. In fact, while the conclusions of M. Fabiani, supported by the representative of the French Government — conclusions having in mind the denials of justice of the Venezuelan magistrates and, above all, the arbitrary acts (*faits du prince*) and the denials of justice imputable to the Federal executive — comprehended all the losses and all the injuries which had been caused him by the political, administrative, and judicial powers of Venezuela, the cabinet of Caracas in its " defense " presented a plea tending to restrict the sense and scope of the agreement, and develop this plea in bar on pages 1, 2, 3, 4, 5, 17, 86. 85, 101, and 102. Also to the precise conclusions of the *réplique* of M. Fabiani on the *faits du prince* the cabinet of Caracas opposed anew its plea in its rejoinder.

It is absurd and monstrous, from a judicial point of view, to maintain that the party signatory of an agreement, or one of them, have had in view to settle a question outside of the agreement. The arbitrator can examine and retain only that which forms the object of the agreement.

Further:

As long as the signers of the agreement have not given to this accord a more extended scope, the only denial of justice that the arbitrator ought to examine is that which the cabinet at Paris says was committed after the 6th of June, 1882, mentioned in article I of the protocol. Every other question is foreign to the agreement, and it can have no discussion upon the point of the departure of the litigation submitted to arbitration.

Can he who interpreted the agreement thus now pretend that all the claims of M. Fabiani have been definitely settled, seeing that it is precisely this restrictive interpretation which the arbitrator of Berne adopted? Consequently M. Lachenal has declared briefly in the quotation cited above, that he is incompetent according to the agreement to judge all the points which M. Fabiani submits to-day to the examination of this commission. The French Government had only to submit, since the sentence of the sovereign arbitrator, although one might consider it as not having been inspired by the spirit which had presided over the diplomatic negotiations, could not, however, be attacked as contrary to the letter of the protocol. But in execution of the arbitral award itself, M. Fabiani conserved the faculty of representing the leading points thus laid aside for want of jurisdiction, and not adjudicated before every new court of arbitration instituted by a protocol " more extended," to use the term exployed by the cabinet of Caracas itself. This protocol with a more extended scope is exactly the protocol of the 19th of February, 1902, of which M. Fabiani has been obliged, in the absence of diplomatic relations between France and Venezuela, to await the signing in order to present his new claim.

In the second place, Doctor Paúl has thought he ought, in order to make plain the sense of the protocol of the 24th of February, 1891, to present the diplomatic correspondence exchanged before the signing by the two Governments. I receive a double impression from the reading of these documents: First, I should be much astonished to judge them by the interpretation which he has given to the protocol, that M. Lachenal knew about this correspondence

which did not form a part of the dossier, since I had not read it myself, then I state that the only necessity of recourse to this correspondence, to make plain the text of the compromise, determines clearly that this text was not sufficiently plain, and that from its ambigious terms one could reasonably draw two different interpretations. I note, besides, anew that it is the Venezuelan Government which has not remained faithful to the spirit which presided over the negotiation, and that upon this point it received an advantage with the Swiss arbitrator. The same Government is desirous of pushing aside now the natural consequences of this restrictive interpretation of the protocol.

In the third place, my honorable colleague concluded with a quotation from the sentence of arbitration that, concerning the " exaggeration of the claims formulated," all the claims of M. Fabiani outside the main points recognized as admitting of indemnities have been definitely rejected by M. Lachenal. It suffices to read this phrase in order to notice that it concerns only the expenses of the proceeding. One could not rest himself upon an incidental expression, the sole end of which is to explain that useless expenses have been engaged in by demands arising from the framework of the protocol to try to reveal in the mind of the arbitrator intentions contrary to those which he has clearly expressed in the preamble of his award. Finally, Doctor Paúl thinks to find a last argument against the demand of M. Fabiani in the text of a letter written the 3d of August, 1887, three years and a half before the signing of the protocol by the legation of France at the ministry of foreign affairs of Venezuela. M. Fabiani has addressed to me on this subject a note, herewith attached, which I received at New York the 30th of last January, the conclusions of which I approve, and which I beg the umpire to kindly take into consideration.[1]

The affair Fabiani, such as it now exists, rests entirely upon arbitrary acts, denials of justice, and the fraudulent resolutions of the executive power of Venezuela which have caused injury to the plaintiff or created by the complete destruction of his only lien insurmountable obstacles to the collection of his enormous debts. The Swiss arbitrator, interpreting the convention of arbitration of February 24, 1891, has limited his jurisdiction to the denials of justice imputable to the judicial authorities of Venezuela on account of the nonexecution by said authorities of the award rendered at Marseilles December 15, 1880. He has consequently eliminated from the procedure as being outside the protocol and he has not admitted proof of the arbitrary *faits du prince*, as also all the acts foreign to the inexecution and to the effects of the inexecution of the sentence before mentioned, acts and deeds which the claimant government had considered as coming within the terms of the protocol above cited. This decision of the arbitrator, rendered contrary to the conclusions of the French Government and conformable to the conclusions of the United States of Venezuela, is of a startling clearness as to everything leading to the determination of the object of the litigation and consequently of the object of the judgment. We have besides been able to odserve the precautions taken by the judge in order to anticipate every epuivocation and to reserve the rights of the claimant party for all the matters and points subtracted from his cognizance by his interpretation of the terms of the protocol. The conclusions of Fabiani upon the plea of *res judicata* have superabundantly demonstrated that these matters and points, founded upon facts foreign to the judicial authorities of the respondent state and to the nonexecution by the said authorities of the arbitral award of Marseilles, form the only object of the present litigation, and that they all refer to arbitrary *faits du prince* and to the losses and injuries which

[1] Exhibit to memoir of the French commissioner.—Letter from M. Fabiani.

have been the consequence. But in the support of his restrictive interpretation of the agreement the Swiss arbitrator makes mention of a note from the French legation of August 3, 1887, cited by the respondent state, and that he has considered, right or wrong, as being able to give the measure of the points included by the protocol of 1891, although this may be anterior to this protocol by three and a half years. But this note of 1887, in reserving the surplus of the claims of Fabiani, would suffice to have the exception of the plea *res judicata* rejected if the decisive conclusions of the plaintiff could allow the least doubt in this regard to subsist. In fact, not only has the Swiss arbitrator abstained from passing upon the surplus reserved by the note of the 3d of August, 1887, and of which Fabiani, who attributed to the agreement of 1891 a much larger scope, had made the principal object of his memoir, but he has expressly eliminated it from the procedure and not offered proof, for reason that the said agreement had submitted to arbitration only the denials of justice imputable to the judicial authorities of Venezuela and the nonexecution by these authorities of the arbitral sentence of Marseilles.

To appreciate all the value of the reserves contained in the note of the French legation of August 3, 1887, it is sufficient to notice that these reserves concern the *faits du prince* and that at this time the President of Venezuela was still Gen. Guzmán Blanco, the responsible author of the ruin of Fabiani. If we add that his minister of foreign affairs was the too celebrated Diego Bautista Urbaneja, the advocate and accomplice of the adversaries of the plaintiff, we shall understand that, in taking care, in view of an amiable agreement, to indicate the *ensemble* of the credits of Fabiani against the Roncayolos, the note of the 3d of August, 1887, may have correctly reserved in the following terms the rights of the plaintiff:

> As for the surplus of his claims (which the dictamen translated thus: exceso de pretensiones, p. 106) a serious and analytical examination will alone determine just on what points they are founded.

What were the claims? Here is the reply of Fabiani in his *réplique*. The Venezuelan arbitrator having omitted in his mutilated citation the essential passages of the said response, one may judge it useful to reproduce them as a whole, *italicizing* that which has been cut out — that is to say, almost all:

> What are these claims of Fabiani? The affair of the towage and that of the railroad. What was the cause of such a reserved formula? Why this reticence? One will find the explanation of it in the last paragraph of page 527 of our memoir. *The affairs of the towage and that of the railroad (that is to say, all the arbitrary acts— the denials of justice and faits du prince which these two affairs have created) could not even be indicated, Guzmán Blanco ruling. But our Government, anxious to reconcile the duty of protecting its nationals, with its eager desire to avoid a new rupture and grave complication, had forbidden, with our loyal assent, making allusion to denials of justice imputable to the chief of the executive power, reserving to us the free exercise of our rights if the propositions of an amiable settlement were repulsed. These reserves result from the paragraph quoted as to the surplus of the claims, etc.*

All the passage *italicized* has been omitted in the dictamen of the Venezuelan arbitrator. This suppression has had for a result to conceal that it was a question of arbitrary acts or *faits du prince* and to allow to be ignored the serious motive, which, for facilitating an amiable settlement, had caused in 1887 the reserving of the surplus, of which the Swiss arbitrator has refused to take note, because he was deeply possessed with the idea that the protocol of 1891 was affected by the same reservation.

These elisions once indulged in, the dictamen is restrained to reproduce the phrase which begins thus:

There is for the object of the litigation, etc.

It is without any practical utility in the present affair, since, like all declarations relative to the losses and injuries of Fabiani, it expressed the opinion of the demandant Government on the sense and extent of the words *denials of justice* inserted in the agreement of February 24, 1891. But one is not ignorant that, upon the formal reply of Venezuela, these conclusions of the demand were put aside by the arbitrator of Berne, who, after having determined the *object of the litigation* and fixed the matter really submitted to his jurisdiction by the agreement cited, has eliminated from the procedure and has not admitted proof of as being outside the terms of the protocol just this *surplus of claims of Fabiani*, which comprehended the arbitrary acts and the denials of justice or "*faits du prince*" upon which the present examination is founded; that is to say, all the facts foreign to the *judicial* authorities of Venezuela and to the non-execution by the said authorities of the arbitral award of Marseilles. The State of Venezuela had itself twice proclaimed in its answer that these main points of the claim did not constitute the *matter of the litigation* remitted to the decision of the Swiss arbitrator, and in its rejoinder, that these same points foreign to the protocol, might form the object of a later examination, whenever the two Governments would sign a more extended protocol, which was realized on February 19, 1902. It is this reasoning which has convinced the arbitrator of Berne and which has led him to pronounce upon the above-mentioned points a declaration of want of jurisdiction, by which the rights now under discussion were safeguarded. It is not without interest to fill in another gap in the dictamen and to call, respectfully, the attention of the arbitrators to the last paragraph of page 527 of the memoir, which the Venezuelan arbitrator has not deigned to reproduce, although page 5 of the *réplique* has signalized it as being necessary to furnish explanation of the reserve made, as to the surplus of the claims of Fabiani. Here is the paragraph:

Our exposé has made known our complaints; the questions already so grave and so clear of denials of justice, of the refusal of execution of award, of the violent acts of agents of all classes, turn pale beside the acts, perfidious, malevolent, interested and contrary to all the principles of international law, of which we make with good right the whole responsibility to rest upon Gen. Guzmán Blanco, President of the United States of Venezuela. These numerous successive acts which did not spring from civil or penal justice and which for this same reason remain without the provisions of article 5 of the convention of 1885 — these acts which constitute bold denials of justice ought we to pass them by in silence at the risk of compromising the sacred interests which we have the mission of safeguarding? Who would have dared to counsel us thus? It was then necessary to speak, to set forth the facts, to make them precise, above all to characterize them, to demonstrate the intention to injure. It was necessary to put in relief the interested passion, the blind hatred, the *faits du prince*, the culpable reticence which ought, following the theory and practice of the retaliation of faults caused us, to allow some vindictive interest. Very well! But here one sees the Venezuelan delegate jump; we see him compelled to squander the proofs of his loyalty for the name of the chief of state is Guzmán Blanco, and his minister of foreign affairs, specially chosen *ad hoc*, is no other than his famous uncle Diego Bautista Urbaneja!

This passage of the exposé explains clearly the surplus of claims of Fabiani. It has been explained since that the dictamen has passed it over in silence, because this surplus relative to the *faits du prince* was formally eliminated from the procedure by the Swiss arbitrator as foreign to the judicial authorities of the respondent State, and that the *ensemble* of the sentence of Berne, by the precautions taken in order to leave no doubt as to what was really judged, demonstrates that the said sentence has considered this surplus reserved as

capable of forming and bound to form the object of a new litigation. The surplus of the claims of Fabiani, as page 527 of the memoir demonstrates, has reference to the *faits du prince*, and, more particularly, to the arbitrary acts which have so sadly marked the two grave affairs of the towage and the railroad. This surplus then included all the arbitrary acts, all the denials of justice, and the fraudulent resolutions "*du prince*" — that is to say, all that comprises the object of the present examination. Pages 49 to 67 of the conclusions of the plaintiff prove this beyond peradventure. This long series of civil wrongs, intentionally injurious, has created insurmountable obstacles and of the nature of *force majeure* to the recovery of the credits of Fabiani. Independent of the arbitral award of Marseilles this unhappy work has been completed by the fraudulent annihilation of the strong and only lien of the creditor, and by the withdrawal of the service of the towage, by this abuse of right, veritable act of reprisal of a venal and passionate chief of state against a mandate of justice. These unheard of and wrongful deeds call for a restitution proportionate to the gravity of all these infractions.

In these conditions, in presence of the demonstration that the main point of the demand, eliminated from the procedure of Berne, as outside the terms of the protocol, concern the arbitrary acts, the denials of justice, *lato sensu*, or the *faits du prince*, which are the peculiar object of the present litigation; and finally, in presence of the decision of the Swiss arbitrator, so clearly ordered to the manifest end of preventing every equivocation, as to the object of the litigation and as to what was really adjudged, one is led to recognize once more that the plea of *res judicata* is no less inadmissible than badly founded.

Convinced, moreover, that in order to know what was really adjudged by the arbitrator of Berne, it is necessary, first of all, to possess one's self of the contestation, such as the plea of the defendant determined it, confirmed by the judgment, then to consult the judgment which has sustained the plea, and which, by the interpretation of the protocol, has limited the object of the litigation and the jurisdiction of the judge, following the conclusions of the respondent State (denial of justice, committed since the 6th of June, 1882, by the judicial authorities of Venezuela) Fabiani can in all confidence rely upon his conclusions of the 24th of June, 1904, which have demonstrated indubitably that the object of the litigation determined by the arbitrator, conformably to the conclusions of the defendant and contrary to the conclusions of the prosecutor, and the decisions so clear and so precise of the Berne award, touching the matter of litigation thus determined, have refuted, in advance, for all and for each of the leading points of the present contest the plea of *res judicata* developed in the dictamen of the Venezuelan arbitrator.

The arbitrator of Berne has passed judgment upon the acts imputable to the judicial authorities of Venezuela in the course of the procedure of execution of the arbitral decision of Marseilles, and upon these acts only. It belongs, then, to the arbitrators to decide in their turn upon the arbitrary acts, the denials of justice, the *faits du prince*, and upon the losses and damages which have resulted therefrom.

OPINION OF THE UMPIRE

The case of Antoine Fabiani came to the umpire because of the inability of the honorable commissioners for France and Venezuela to agree, as hereinafter stated more in detail.

His claim had been presented by the concerted action of these two Governments to the arbitrament and award of the honorable President of the Swiss Federation by virtue of and according to the terms of a compromise

had by and between these honorable Governments, which was concluded February 24, 1891, and is of the language following:

Re Fabiani's claims:

The Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be the duty of the arbitrator:

First, to decide whether, according to the laws of Venezuela, the general principles of the law of nations and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani says to have sustained through denial of justice.

Second, to fix, in case such responsibility is recognized, as to all or part of the claims in question, the amount of the pecuniary reparation that the Venezuelan Government must deliver to M. Fabiani, and which will be paid in bonds of the 3 per cent diplomatic debt of Venezuela.

The two Governments have agreed to request the President of the Swiss Confederation to kindly take charge of this arbitration.

The present declaration will be submitted to the approval of the Congress of Venezuela.

Done in duplicate at Caracas, the 24th of February, one thousand eight hundred and ninety-one.

The " convention in force between the two contracting powers " was the treaty of November 25, 1885, by and between these two Governments; and, so far as the same has bearing or value in aid of the compromise above set forth, is here set out as follows:

CONVENTION

The Government of Venezuela and the Government of the French Republic, being desirous of reestablishing between the two countries the friendly relations interrupted since 1881, have appointed to be their respective plenipotentiaries the following:

The President of the United States of Venezuela, Gen. Guzmán Blanco, envoy extraordinary in Paris, etc.

The President of the French Republic, the Count Tristan de Montholon, minister plenipotentiary of the second class in charge *ad int.* of the duties of the director of political affairs in the ministry of foreign affairs, etc.

Who, after having exchanged their respective powers, found in good and due form, have agreed upon the following articles: * * *

ARTICLE 5TH

In order to avoid in future everything that might interfere with their friendly relations the high contracting parties agree that their diplomatic representatives will not interfere in the matter of claims or complaints of private individuals or on affairs cognizable by the civil or penal justice, according to the local laws, unless the question is a denial of justice or judicial delays contrary to use or to law, the noncompliance with a definitive sentence, or, finally, cases in which in spite of the exhaustion of legal remedies there is an evident infraction of the treaties or of the rules of the law of nations.

The claims presented before the honorable arbitrator of Berne on behalf of M. Fabiani aggregated 46,994,563.17 francs, extended over the years from 1878 to 1893, were assembled under the general term of denial of justice and included such as were imputable to the judicial authorities of Venezuela, its administrative authorities, and to damages suffered by him through the fault of its public powers, claiming for him both the direct and indirect damages under each head.

December 30, 1896, the award was made for 4,346,656.51 francs with interest at the rate of 5 per cent per annum from that date. The honorable arbitrator arrives at this sum in the manner hereinafter set forth.

The decision of the honorable arbitrator, together with his reasons therefor, was rendered in writing, which award reciting the essential facts, as well as the reasons of the honorable arbitrator, appears on pages 4878-4915, volume 5, Moore's History and Digest of International Arbitration.

The sum of 42,647,906.66 francs represents that part of the total claim of M. Fabiani which was not allowed by the honorable arbitrator of Berne, and which was denied for the reasons given in his award.

It is claimed by M. Fabiani before this commission that of the sums denied allowance by the honorable arbitrator of Berne there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this commission, aggregating 9,509,728.30 francs.

The reasons given by Fabiani before this present commission for ascribing present vitality to the claims now before this commission are, in substance, as follows:

> The decision of the arbitral statement of Berne is, in effect, that all the chief points of the actual demands and the arbitrary acts "*faits du prince*" have been expressly formally eliminated by the Swiss arbitrator as subtracted from his decision by his interpretation of the terms of the protocol passed between the Government of the French Republic and the Government of Venezuela;
>
> That the interpretation of the treaty of February 24, 1891, given by the said arbitrator, has placed the limit of the questions which the judge had the power to resolve, upon which he was authorized to decide, and which alone ought to make and which has made the object of his judgment;
>
> That by the formal decision which has eliminated the cause and the object of the actual demand as not being included in the matter submitted to his jurisdiction the arbitrator [of Berne] has recognized that he had not the right to pass judgment upon the "*faits du prince*" and upon all the points by him eliminated from the procedure as not included in the terms of the protocol;
>
> That in declaring them subtracted from his decision according to the protocol the arbitrator has passed judgment upon his own jurisdiction and has determined its limit;
>
> That the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law;
>
> That the "*faits du prince*" and all the points of the present instance [have] been expressly eliminated from the procedure by the decision of the arbitrator of Berne, because they were not included by the terms of the protocol, and consequently were subtracted from its competence; * * *
>
> That he has eliminated it as not making a part of the matter remitted to his decision, and that he would not have been able to retain it without violating his own interpretation of the treaty of February 24, 1891; * * * The most scrupulous examination of the arbitral decision of December 31, 1896, determines that the arbitrator has strictly conformed to his interpretation of the protocol, and that he has not passed judgment by way of the declaration of right and responsibility upon any of the matters eliminated by him as subtracted from his right to judge by the terms of the protocol;
>
> That consequently these matters not having been, and not having been able to be, the object of a decision upon the bases of law one could not pretend that

they are

> *res judicata;*
>
> That to be convinced of it it is sufficient to refer to the procedure before the President of the Swiss Confederation to the plea proposed by the defendant party

against the actual demand as arises from the terms of the protocol, then to the former and reiterated decision which the arbitrator [of Berne] had rendered in giving to the protocol of February 24, 1891, the sense claimed by the United States of Venezuela and in eliminating from the procedure as subtracted from his decision — that is to say, from his jurisdiction — the "*faits du prince*" and all the points foreign to the inexecution and of the effects of the inexecution by the tribunals of Venezuela of the arbitral sentence of Marseilles of December 15, 1880 — that is to say, precisely all the points upon which the arbitrators authorized by the treaty of February 19, 1902, are called upon to decide,

In execution of the protocol, whose terms gave, in Fabiani's opinion, plenitude of jurisdiction to the arbitrator [of Berne] and conferred upon him the right to decide upon all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts or "*faits du prince*" attributable to the Federal executive) and upon all the damages which Fabiani *says* to have suffered through the fault of the public powers of this country, the French Government charges the claimant to present the demand before the President of the Swiss Confederation.

Fabiani established the general table of losses and prejudices of damages and interests, the responsibility of which he imputed to the public powers of Venezuela; but the defendant party, for reasons easy to suspect, preferred a solution which would leave the parties always divided by the difference which the French Republic had proposed to avoid in a complete fashion.

Fabiani, as results from the *ensemble* of his exposé before the arbitrator of Berne, had always considered the arbitrary acts and the denials of justice "*faits du prince*" imputable to the administrative authorities as the principal cause of his misfortunes in Venezuela.

Of the 505 pages of the said exposé of facts, more than two-thirds treated of the direct interference of the Federal executive in a conflict between foreigners, notably the following pages: 41 to 50, 52 to 55, 57 to 60, 69, 92 to 98, 100 to 103, 108 to 115, 123 to 124, 129, 131 to 139, 158 to 165, 174 to 178, 181, 183, 199 to 204, 206, 207, 242, 255, 259, 261 to 267, 272 to 274, 276, 284 to 290, 294, 297, 298, 300, 304, 305, 312 to 320.

It is Fabiani's —

conviction that the term "denial of justice," employed in the protocol included all denials of justice, those of the judicial authorities, and, above all, those imputable to the administrative and political authorities of Venezuela.

The Swiss arbitrator —

has given his interpretation of the terms of the protocol, determined exactly the object of the difference submitted to arbitration, and has expressly eliminated from the procedure, as subtracted from his decision, and consequently from his competency, all of the allegations and means of proof relative to claims founded upon the arbitrary acts of the executive powers or upon the "*faits du prince*" and upon all the *faits* foreign to the inexecution of the arbitral sentence of Marseilles of December 15, 1880.

In further support of his contention that the claims specified by him are still of vitality and force and competent to be passed upon by this commission, he quotes several passages from his exposé.

Page 542:

If we do not possess the formal and written avowal of our implacable enemy, we have, aside from his official acts, which bring prejudice to us, the acts, also official, perfidiously calculated to strangle us between two doors, if, trusting to false appearances of justice, we thought to make our rights of value.

The executive power coming to the aid of the judicial power to condemn us to powerlessness by the aid of fraudulent maneuvers, which resulted in the spoliation of October 26, 1885, is an undeniable fact which will not escape the scrutinizing eye of the judge.

Page 545:

The *ensemble* of our grievances against Venezuela engages the responsibility of the judges and of the public powers of this country. The judges have been guilty; they have surpassed themselves in the art of adapting the laws to the annulment of justice; the public powers have been unworthy; in any civilized country they would not have been able to escape chastisement; but in the long run we would have been able, perhaps, to triumph over their venality and ill-will if we had not been forced to struggle against the personal and interested hostility of the chief of state. This personal hostility, a veritable "*fait du prince,*" has established before us the case of *force majeure.*

Page 552:

The acts for which we reproach Gen. Guzmán Blanco are of the resort neither of the civil justice nor of penal justice of his country. These acts, veritable denials of justice, have been committed by the President of the Republic in this quality.

The laws of Venezuela, conformable, moreover, to the general principles of public law, authorize no action against the chief of state save in one of the three cases provided for by the constitution. But if these acts escape all civil or penal jurisdiction, this does not signify in any way that they engender no responsibility and that this responsibility can never produce its results. According to the law of nations, there is a responsibility which substitutes itself for the personal responsibility of the chief of state; it is that of the country which he represents, when the acts of the executive power constitute with regard to a foreign nation or its dependents, violations of the principles of public international law.

Pages 553 to 554:

But in our unfortunate affair, the "*faits du prince,*" which have constituted denials of justice, are well established. We have no need to refer to them, nor even to group them, in order to enlighten the conscience of the arbitrator. Our general exposé relieves us from insisting. All these facts, taken together or separately, establish the direct intervention of the chief of state in a conflict between individuals to prepare, to consummate, a great injustice. If these considerations, which we believe in perfect harmony with the theory and practice of the law of nations among civilized countries, are accepted by the arbitrator, the iniquity of the judges, their denials of justice, and the question of retroactivity, relegated to the second place, will no longer offer anything but a secondary interest.

We have furnished all the proofs of the malevolent action of the chief of state, now direct, now indirect, continued for more than six years, striking us in front and behind, raising themselves before us as an insurmountable obstacle to paralyse us, when, in spite of his venality, justice was impressed for continuing his guilty work. If the arbitrator retains the "*faits du prince,*" as these *faits* have had, as a consequence, a series of denials of justice, he will find, in these evident violations of the principles of the law of nations, the direct reply to the arguments of the cabinet of Caracas and the juridical elements of a decision which will retain the responsibility of Venezuela without its being even necessary to refer to the complicity of the judicial and administrative authorities of the country. And we are persuaded that this decision, having reference to all the *faits* since the origin of our troubles, and retaining all the violences of which we have been the object, will proportion the reparation of the prejudice caused to the premeditation, to the gravity, to the tenacity, and to the extent of the offense. However, need we insist upon the infractions and upon the denials of justice which, exclusive of the "*faits du prince,*" might be of the resort of the civil or penal justice?

Fabiani follows these quotations with the statement that —

these extracts offer the advantage of determining the sense which he attaches to the words "denials of justice" according to the protocol, which in his opinion, included not only denials of justice imputable to the judicial authorities, but still, and above all, denials of justice imputable to the Federal executive and all the arbitrary acts connected. That, in effect, if the plaintiff (Fabiani) recognized,

as he still recognizes, the right of the sovereign appreciation of the judge, he counted that this right would be exercised upon the *ensemble* of his demand, and more especially upon the arbitrary acts of "*faits du prince*," denials of justice imputable to the Federal executive; that if the arbitrator (of Berne) has disposed of them otherwise, if he has interpreted the protocol in a way to limit and determine the object of the difference submitted to his decision, he has thereby still reserved the rights of the plaintiff (Fabiani) for all the matters which he has declared stranger to the object of the litigation and which he has eliminated from the procedure as subtracted, etc.

In signalizing the denials of justice of the magistrates of Venezuela in all that which had reference to the inexecution of the sentence of Marseilles, the demand for damage, and interest was founded especially upon the injurious results of the arbitrary acts and denials of justice of the Federal executive.

In these conditions it is natural that the plaintiff (Fabiani) should have anticipated an adjudication *en bloc*.

Fabiani urges that the honorable arbitrator of Berne, in proceeding to set forth his reasons and to separate the claims allowed from those disallowed, has "in effect" proceeded "contrary to custom, not to an adjudication *en bloc*, but to a detailed adjudication clear and precise," and —

has evidently held to anticipate every equivocation, to cut short all chicanery, and to reserve to the demandant party the free exercise of all his rights for all the matters and for all sums which he had just declared subtracted from his decision.

To elucidate the meaning, force, and effect of the acts of the honorable arbitrator of Berne and to bring out more clearly, as he would contend, the elimination and subtraction suggested, and to show that the reason therefor is as claimed by Fabiani, he quotes from the defense of the respondent Government made before the honorable President of the Swiss Federation, stating that such defense begins as follows:

The demandant party gives itself up continually from the beginning of its exposé to the interminable digressions which have no relation to the affair under discussion, in the diplomatic discussion maintained by the cabinets of Caracas and Paris upon the subject of the Fabiani claim. The object of this claim and its points of departure have been determined. The object is the denial of justice alleged by Fabiani for the nonexecution, according to him, of the arbitral sentence rendered in his favor at Marseilles December 15, 1880, analogous to the civil tribunal of the first instance and confirmed by the court of appeal of Aix, and the point of departure can not be any other than the decree by which on the date of June 6, 1882, the high Federal court of Venezuela gave executory force in the country to the sentence of the court of appeal of Aix.

Page 4:

That which is important to fix now is that all which is anterior to the decision of the high Federal court of the date of June 6, 1882, and the other digressions which the plaintiff has added to his exposé, do not constitute the matter of actual litigation. * * *

Moreover, the diplomatic discussion having determined that the Fabiani claim, which was about to be submitted to arbitration, was the claim presented and supported by the French Government, and not the claims which Fabiani should present ulteriorly, the compromise between the two Governments has for an end only the facts relating to the pretended denials of justice beginning from 1882.

In Fabiani's *réplique* to the defense of Venezuela, from which the following quotations are taken, he vigorously opposed this claim of Venezuela, and again explained the sense which he attached to the words "denials of justice."

Page 62:

Our voluminous memoir is occupied principally with Mr. Guzmán Blanco, whose name finds itself repeated on each page several times. The denials of justice, the violences, excesses. by us denounced in the memoir, are attributed to this cause almost exclusively — the passionate and interested hostility of Mr. Guzmán Blanco.

The judges who receive the price of their venality, the officials who harass us without ceasing, are represented by us as mere instruments of the chief of executive power.

On almost every page our accusations are very precise. We explain the numerous and grievous facts. We make known the prime mover, his financial dickerings with our adversaries, his acts of direct hostility, his fraudulent manœuvers to injure us, his odious outrages, his repeated denials of justice to conserve for his associates and himself the profits of the railroad. Guzmán Blanco (ex-Ceiba) and the cabinet of Caracas maintains a religious silence. Save in two citations, from our memoir it does not pronounce even once the name of Mr. Guzmán Blanco

Page 63:

We understand the embarrassment of the cabinet of Caracas. The subject was rugged and the way very slippery. * * *

We retain in this debate not certainly Mr. Guzmán Blanco, whom international law defends against our investigations, but the chief of the executive power whose acts have engaged the responsibility of his country.

Venezuela ought to take account of the "*faits du prince*" and denials of justice imputable to its former master, as well as the denials of justice anticipated by the convention of November 26, 1885, in the affairs which are the resorts of the civil or penal justice.

The personal acts of the chief of executive power are, moreover, grave as the denials of justice imputable to a district judge, and even to a court of cassation.

The flagrant violation of the law of nations by the chief executive power of a country offers another interest for the peace of nations than the injury brought to the rules of international law by the brutality or the venality of some graduates of the University of Caracas.

Page 65:

The faithful executor of the constitution was held to demand without delay the respect of the Federal compact, and his calculated inaction constituted a denial of justice. In refusing to intervene and in shifting upon the high Federal court the obligation which was strictly incumbent upon him the executive power committed knowingly and with premeditation a denial of justice, the consequences of which have been decisive, and this denial of justice has had for an end to safeguard the personal interests of the chief of state.

Page 78:

If the denial of justice which we impute to the chief of executive power of Venezuela is established, the gravity of this infraction will occupy with good right the attention of the arbitrator. In fact more than half our memoir concerns the acts and deeds of Mr. Guzmán Blanco.

From these copious excerpts it is easily seen that the demandant, Fabiani, came before the Mixed Commission, sitting at Caracas in 1903, under the convention of February 19, 1902, with the claim that the act of the honorable arbitrator of Berne in dismissing the greater part of his case, was solely a jurisdictional decision, leaving unaffected, as though never presented to him, the claims thus dismissed.

The honorable commissioner for Venezuela rejected the case as presented in all and every part, for the reason that, in effect, the entire Fabiani controversy was submitted to the final and conclusive arbitrament and award of the honor-

able arbitrator of Berne by the high contracting parties in their protocol at Caracas of date February 24, 1891, and that when the controversy was submitted under said protocol and the honorable arbitrator of Berne had assumed and accomplished his important trust the entire Fabiani contention was at an end.

Since the honorable commissioner for Venezuela had not consented to discuss the figures presented by M. Fabiani, the honorable commissioner for France has regarded himself as " under the obligation of accepting them as a whole." The honorable commissioner for France also states:

> As, moreover, none of his (Fabiani's) demands have been contested in the foundation and in the figures by the respondent Government, it has not appeared possible to me to put them aside or to reduce the amount. I have consequently accorded to M. Fabiani the indemnity which he claims.[1]

The honorable commissioners, finding themselves hopelessly in disagreement, reserve this claim for the consideration and determination of the umpire, to whom it has been submitted with the very helpful opinions rendered by each, setting forth very clearly the points for and against the claims of Fabiani and his right thereon to be heard again before an arbitral tribunal.

First to be determined is the issue whether there is or is not aught to be produced before this tribunal of the matters once submitted to the arbitrament and award of the honorable arbitrator of Berne under the protocol effected by the two nations at Caracas, February 24, 1891.

An analysis of this treaty discloses, in its first paragraph, that —

> the Government of the United States of Venezuela and the Government of the French Republic have agreed to submit to an arbitrator the claims of M. Antonio Fabiani against the Venezuelan Government.

It will be observed, then, that the matter to be submitted for arbitration is the " *claims* " of Fabiani — not certain claims of Fabiani, not a *part* of his claims, but his *claims*, which clearly and definitely includes *all his claims* against the respondent Government. It would not be more sure, more precise, had it been written " all of the claims of M. Antonio Fabiani," etc. This is the position taken by M. Fabiani himself, who presented all of his claims against the respondent Government to the honorable arbitrator of Berne, and urged upon him that it was his right and duty to consider, pass upon, and allow them as all coming within the terms of the protocol; and who, consistent with his former position, but respectful to an adverse decision, still insists that such was its true scope and spirit. Had nothing posterior to this first paragraph been written, the way of the claimant would have been easy and the hearing unrestricted. Such, however, was not the agreement of the two honorable Governments. Restrictions are imposed and must be heeded. When understood they must be respected and obeyed, for they are to the honorable arbitrator of Berne and to all who come after him the supreme law of his tribunal.

Two principal duties were presented to the arbitrator by the protocol of February 24, 1891.

He was, first, to decide under certain limitations, hereinafter to be stated, whether the Venezuelan Government was responsible for the damages which Fabiani claims to have sustained at its hands.

This was the logical course of procedure had no direction been given, but it is made obligatory and imperative by the terms of the convention. It is not permitted that the honorable arbitrator shall make his decision without the definitive aid of the high contracting powers. They do not consent that he pursue his own course and use his own tests in arriving at his conclusions upon

[1] *Supra*, page 96.

the question thus submitted; neither do they admit that the honorable arbitrator may classify and designate the quality and character of the claims which are submitted to his decision; on the contrary, they assume positively and finally to make for themselves and for him a definition which shall cover and include the claims of Fabiani, which, by agreement of the two parties, had been and then were before them, and were by this protocol to be passed into the hands of the honorable President of the Swiss Federation as arbitrator, and the phrase thus used by them for his guidance was neither obscure nor indefinite, but was one common to the tongues of nations, viz., " denials of justice". It did not comport with the wishes and purposes of these two Governments nor with the treaty relations then existing between them that this phrase should be interpreted and applied unaided by the terms of the convention constituting the tribunal. The arbitrator was directed to call to his aid and submit himself to the government and control of and was to render his decisions thereon according to —

the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers.

Through these three sources of information the arbitrator was to determine the responsibility of the respondent Government in the Fabiani controversy. This compelled an interpretation by the arbitrator of article 5 of the convention of November 26, 1885, which was the treaty then in force between the two contracting powers. When thus interpreted it settle its meaning finally and conclusively, as applied to the Fabiani controversy, and in that respect and to that extent, at least, it has conclusive and final force upon the question pending before the umpire. This is true because he was expressly directed and empowered to make this interpretation by the two powers whose treaty it was. His interpretation, thus made, determined for this case the scope and depth, the spirit and purpose, the meaning and effect of the limitations self-imposed by these two nations in their high compact regulating and defining the right of diplomatic intervention. It also effected a similar decision concerning the term " denials of justice," which term was employed in said treaty in connection with the limitation, by their own agreement, placed upon their future action in reference to the claims and claimants of each nation. This limitation upon diplomatic action was stated by the high contracting parties to be in the interest of peace, harmony, and concord between them, evidently believing, on their part, that such injuries and damages as might befall their respective nationals in the land of the other, which were not included in the terms of the convention were better ignored than pursued; that the general and common welfare of the two nations was of chief importance, and could not wisely be jeopardized through international differences and diplomatic contentions not resting upon or growing out of the causes specifically assigned. For these laudable reasons and motives this restriction was solemnly declared to be the settled conviction, purpose, and future policy of these two nations.

The protocol of February 24, 1891, was made not only in view of the existing treaty, but that there might be no question in the mind of the honorable arbitrator as to their purpose scrupulously to regard and be governed by its provisions in its application to the case in hand, the compromise incorporated its terms and made them fast to his conscience and judgment. Examination of his award and a careful review of his reasons therefor indicate clearly his thorough appreciation of the language and spirit of the compromise and the scope and purview of his trust.

Coincident with his interpretation of article 5 of the convention of November 26, 1885, correlated thereto and commingled therewith, there came the duty to interpret the meaning of the protocol of February 24, 1891, when it defined his

limit of action to be within such circumscribed bounds as are contained in the laws of Venezuela and the general principles of the law of nations, as well as in the terms of article 5, above alluded to. He must determine whether the denials of justice, to be operative in the case before him, must be such as respond to each one of these tests; in other words, such as are not contrary to any one of them, or if responsive to any one, although opposed to the others, it is sufficient. He must determine the breadth of the reference to the laws of Venezuela, and, giving the reference its proper significance and limitations, must seek out and apply to the case before him the Venezuelan laws which he has held to be within the meaning of the reference, and he must summon before him and apply to the elucidation of the question so much of the law of nations as he deems applicable thereto.

The second line of action assigned him necessarily followed, depended upon, and was limited by his disposition of the first duty placed in his charge. If he found no responsibility in Venezuela for the damages claimed by Fabiani because of denials of justice, then his duty was done and the arbitration was closed when he made his declaration of such finding.

He can arrive at this conclusion by one of two ways, or by the meeting of both. It is one way if he finds there have been in fact no denials of justice. It is the other way if he finds denials of justice, but also finds that they are not such as attached responsibility to Venezuela. Either finding absolves Venezuela. If he holds Venezuela responsible in any part, it must be upon the bases that in his sound judgment there are denials of justice and that they are of a character to fix responsibility upon Venezuela. A concurrence of these two conditions must exist or the award must always be for Venezuela, and to the extent that there is nonconcurrence the award must be for Venezuela.

Examination of the award of the honorable arbitrator of Berne, and a study of the reasons he sets forth to justify his findings, discloses that he entered upon the discharge of his high duty with thorough appreciation of the character and the importance of his trust.

On page 22 of his award he said:

> In the very first place it is important exactly to determine *the object of the controversy* submitted for arbitration. According to the compromise of the 24th of February, 1891, the question at issue is that of knowing whether, according to the laws of Venezuela, the principles of the law of nations and the convention of the 26th of November, 1885, in force between the two contracting powers, the Venezuelan Government is responsible for the damages which Fabiani says to have sustained for denials of justice. Even independently of the intention of the parties manifested during the negotiations to which the Franco-Venezuelan Convention of 1885 gave rise it evidently appears from the very text of the compromise and from the union of the facts of the case that the respondent Government is proceeded against only on account of the nonexecution by the Venezuelan authorities of the award rendered at Marseilles on the 15th of December, 1880, between Antonio Fabiani on the one hand and B. and A. Roncayolo on the other. The claimant Government even appears to acknowledge that the initial denial of justice is the decision of the 11th of November, 1881 (réplique, p. 2); and, as will hereinafter be seen, it is useless to investigate whether one must consider the decision of the 11th of November, 1881, rather than that of the 6th of June, 1882, as the starting point of the eventual responsibilities incurred in the sense of the compromise.

He decides that the act must be considered a denial of justice if it be such under the laws of Venezuela, the law of nations, or the convention of the 26th of November, 1885. He holds that the " absolute concordance of these juridical sources " is not necessary. This is a liberal construction and is very favorable to the claimant Government. After a careful study and an assembling of the laws of Venezuela, which he considers in point, and as a result of his study of

them he holds that there is no essential or even notable difference between any of the three juridical sources and the others on this subject. He further holds that the convention of 1885 settles the right of diplomatic intervention between the two nations; that —

in fact an international act substituted on this point a purely national law (see Article X of the Venezuelan Constitution of 1881); and although the compromise reserves the application of the Venezuelan laws it only refers to such of those laws as are opposable to the claimant Government; now that of 1873 was modified for the French citizens in its Article V, at least, by a posterior convention, binding for the two States that sign a compromise.

His study of this branch of the case leads him to conclude and to hold that —

the only definition which it is possible to take into consideration in the Venezuelan law is that of articles 282 and 288 of the penal code of 1873, which assimilate with the denial of justice any act of a *judicial authority* constituting a refusal to execute a sentence rendered executory, an illegal delay in the dispatch of business, a default to render orders and sentences within the terms established, an undue extension or reduction of the terms established by the law or any delay in the determination of a process. The refusals of execution, the inobservance of peremptory terms, and the illegal delays with which the judges may be reproached in the exercise of their duties are therefore the three orders of facts characterizing the denial of justice in the legislation of Venezuela.

He then proceeds to consider and define the meaning of the phrase " denials of justice " and in that connection employs the language and reaches the decision which appears in a quotation taken from page 24 of his printed award, viz:

A direct definition of the denial of justice is not given by Article V of the French-Venezuelan convention. This text points it out only among the causes for diplomatic intervention, and one might even believe that it distinguishes it, in a certain way, from the other causes of intervention — delays, nonexecution of a definitive sentence, etc., or that it distinctly separates it from them. But without any necessity for examining whether the parties employed in the compromise the expression " dénégation de justice " as the exact equivalent of the expression " déni de justice," which is generally adopted by legislation, jurisprudence, and doctrine, it is permitted to affirm that Article V above mentioned fully assimilates with the " déni de justice " as to their effects, the illegal delays of the proceeding, the nonexecution of definitive sentences, the flagrant violations of the law committed under the appearance of legality. In all these cases the diplomatic intervention is declared admissible, provided the question may be any affair falling within the " competence of the civil or penal justice". The condition established by the decree of 1873, of the exhaustion of the legal resources before the courts, is not recalled in the convention of 1885, and it would be excessive to say that Article V *in fine* of this international act (" notwithstanding the compliance with all the legal formalities ") refers to the actions for responsibility directed against the guilty authorities; these " legal formalities " mean those to the observation of which is subjected the performance of the judicial act that may have determined a denial of justice or one of the other causes for the diplomatic intervention; they are, therefore, prior to the denial of justice itself.

By reference to the general principles of the law of nations on the denial of justice, i.e., to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.

After citing numerous authorities to sustain his position the honorable arbitrator proceeds to say further concerning this same subject-matter, as found on pages 24 and 25, as follows:

In truth, the compromising powers appear to have desired to give the words "dénégations de justice" their widest extent *(justitia denegata vel protracta)* and include therein all the acts of judicial authorities implying a direct or disguised refusal to administer justice. Instead of textually reproducing the terms of the convention of 1885, they chose a general formula comprising within the limits of said convention the complaints for judicial grievances of Fabiani against Venezuela, which complaints, if they are valid, have, partially, at least, the extent of denials of justice, both according to Article V of this international act and according to the Venezuelan law and the law of nations. It was, in effect, the claims of Fabiani, communicated to his government, that must have inspired the wording of the compromise, and the duty of the arbitrator precisely consists in deciding whether Venezuela "is responsible for the damages which Fabiani says to have sustained for denials of justice".

It is not doubtful that at the time the compromise was signed the claims of Fabiani rested, i.e., both upon denials of justice *sensu stricto* and upon other facts, such as the denials of justice *sensu lato,* indicated in the convention of 1885.

In all of these findings he accepts and adopts the broadest and most liberal construction permissible under either of the juridical sources given him for guidance. In all this his holdings are very favorable to the claimant government and give the controversy of Fabiani its widest possible application within the terms of the convention.

On page 25 the honorable arbitrator discusses, determines, and settles once for all the origin and the object of the Fabiani controversy, and he bases his decision upon the fact found by him that the object and origin were acknowledged by the parties — i.e., by "France and Venezuela" — to be as held by him. This is the finding referred to:

> Thus, the object of the controversy and its origin are acknowledged by the parties. It was on account of the refusal of the execution of the award of the 15th of December, 1880, which Fabiani possessed against the two debtors domiciled in Venezuela, or on account of the default of execution owing to the admission of illegal means, that France took the interests of her native into her hands. The Venezuelan Government contests the right of its adversary to proceed against it for responsibility, not because it did not regard the judicial facts alleged by Fabiani, if they were true, as implying denials of justice, but because it sees the absence of denials of justice in the inaccuracy of these facts or in the desertion of the proceeding before the exhaustion of the legal resources. The parties, supporting themselves in the treaty of arbitration on the convention of 1885, have considered, although they only spoke, in the protocol, of "denials of justice," that the arbitrator could reserve as elements of the suit the facts falling within the scope of the above-mentioned convention and constituting denials of justice both according to the Venezuelan law and to the law of nations. In the judgment of the parties concerned, therefore, and according to the applicable texts, "denials of justice," in the sense of the protocol, mean all the direct or disguised refusals to judge, all illegal delays in the proceedings and nonexecutions of definitive sentences, provided the facts concern *affairs of the civil or penal justice,* are imputable to judicial authorities of Venezuela, and have taken place in spite of the compliance with all the legal formalities by the prejudiced party.

On page 26 of his award, he says:

> It is certainly the denials of justice, committed in the course of the proceeding for the execution of the award of the 15th of December, 1880, and the eventual appreciation of their pecuniary consequences that form the object of the present litigation.

The claimant contended before the honorable arbitrator of Berne that Fabiani might go back of the award of December 15, 1880, to marshal his demands for indemnity, because, it was urged, he signed the compromise at Caracas under the dominion of *force majeure* and that it did not cover the prior

denials of justice. But the honorable arbitrator considers this contention ill founded, holding, on page 26 of his award, that —

Fabiani, who could have had the compromise annulled by the French courts, preferred to conserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani contented himself with the state of things created by the acceptance of the arbitrator's jurisdiction, and, besides, from that moment, his judicial efforts in Venezuela only tended to the execution of the judgment of the 15th of December, 1880. The motives drawn from the *vis major*, which would have affected the compromise of 1880, and would remove further back the starting point of the denials of justice comprised in the present instance, can not be taken, therefore, into consideration. Denials of justice, in virtue of which it would be possible to proceed against Venezuela for responsibility before the arbitrator, can not have taken place before the introduction of the proceeding for the execution of the award of the 15th of December, 1880, or before the 7th of June, 1881, the date of the petition for *exequatur*, entered before the high federal court.

Similarly, the honorable arbitrator proceeds to dispose of the contention that there were denials of justice in reference to the award of December 15, 1880, and its execution from, substantially, June 18, 1881, and determines, after all, from the proper union of the facts and law, that there were no denials of justice until after June 6, 1882, the day on which such award was made executory in Venezuela by the decision of the high federal court of that country.

In regard to this he says:

The series of denials of justice begins almost from the very moment Fabiani endeavored to obtain at Maracaibo the execution of the award provided thenceforward by an order of *exequatur* in due form.

Notwithstanding the terms of the convention of February 24, 1891, wherein and whereby the high contracting parties invoked as an aid to the arbitrator the provisions of the convention then in force between them, the claimant Government raised before the honorable arbitrator of Berne the claim that Article V of said convention was not applicable to the Fabiani controversy, because all of his claims for indemnity had arisen before November 26, 1885, and that to apply it in such a case would be to give it retroactive effect, which is contrary to fundamental principles in the administration of justice. This contention the honorable arbitrator held to be ineffective for the reasons stated by him on pages 23 and 24 of his award, viz:

But in the present instance it is not Fabiani personally who is a party in the issue. The arbitration was concluded not between him, but between the French Republic and Venezuela. The claimant state is bound by the above-mentioned international act for all the international interventions to come. For the rest, it is expressly acknowledged that the convention is applicable to the present contestation by the compromise of the 24th of February, 1891; it is a law as between the two countries.

The nonresponsibility of Venezuela, as established by the honorable arbitrator of Berne, so far as and to the extent which he found such nonresponsibility, is clearly set forth by him on pages 25 and 26 of his award, viz:

In return Venezuela does not incur any responsibility, according to the compromise, on account of facts strange to the judicial authorities of the respondent State. The claims that the petition bases on "*faits du prince*," which are either changes of legislation or arbitrary acts of the executive power, are absolutely subtracted from the decision of the arbitrator, who eliminates from the procedure all the allegations and means of proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

In another place, on page 26, after having set the earliest limit when denials of justice could have place before him, as against the respondent Government, he says:

> The arbitrator has not, therefore, admitted, besides the "*faits du prince*," all of the facts strange to the nonexecution and to the effects of nonexecution of the sentence above referred to, to be proved.

Having determined in his award in what particulars denials of justice consisted, and when they began, and how they arose, he proceeds to fix the measure of responsibility attaching to Venezuela therefor; and then to measure and assess the damages which had occurred because of such denials of justice.

On the 30th day of December, 1896, the honorable arbitrator of Berne renders his award and delivers the same in writing, with his reasons therefor, to the respective representatives of the claimant and the respondent Governments.

Following the award and its publication, the respondent Government entered upon the discharge of the requirements thereof and has fully complied therewith. The amounts so awarded and so paid have been accepted by M. Fabiani under the implied consent and approval of his government. No evidence is adduced, no suggestion is made, that, following the award, the Government of France, on its part, has filed with the Government of Venezuela any dissent to or protest against the decision of the honorable arbitrator, or has in any manner addressed itself to the respondent Government to ask a rehearing, a further hearing, or the opening of said cause in whole or in any part, or to manifest the unacceptability of the award as made or to express or to intimate any dissatisfaction therewith, or any purpose or desire on its part to have the Fabiani controversy regarded by the two governments as a pending and open question in any particular or in any part. In all respects, and in every respect, so far as appeared before the umpire, there has been apparent assent to, acceptance of, and acquiescence in the award on the part of the Government of France, and, on its part, an apparent treatment of the Fabiani incident and controversy as satisfactorily, finally, and conclusively closed. Such, also, has appeared to be the position of the Government of Venezuela in relation thereto. Neither does it appear before the umpire that Fabiani, prior to the sitting of the honorable commission at Caracas, had evidenced to the Government of Venezuela through his own Government or otherwise, that he regarded the decision at Berne as setting at rest a part only of his claim or that he asked of his Government or expected of his Government further intervention on his behalf in reference to the same. Nothing appears in the case to indicate that the Fabiani controversy has been treated or considered diplomatically between the two governments, as to any phase thereof, since the award at Berne, nor that the same was referred to as such when the convention of February 19, 1902, was in progress or under consideration; and the umpire understands the claim to be that it is within the terms of that convention solely because, and only because, of the unrestricted character of those terms; because, and only because, this commission is said to be open to the claims of Frenchmen, without having any words of definition or restriction other than the nationality of the claimant and the time of its origin.

The umpire is compelled respectfully to dissent from the proposition made by Fabiani that such parts of his claims as were not allowed by the honorable arbitrator were not allowed through the lack of competency to dispose of them through lack of jurisdiction over them. It is the opinion of the umpire that the honorable arbitrator had complete and absolute dominion over the whole Fabiani controversy; that it was given him by the purposed and carefully

considered concordant action of the two Governments by their compromise of February 24, 1891, in order that a matter which for some years had vexed and troubled them might thereby attain eternal rest and be no longer a disturbing element, a serious cause of dissension between them.

Concerning this the honorable commissioner for France in his supplementary opinion has said: [1]

> In the first place Doctor Paúl supports himself upon the text of the convention of the 24th of February, 1891, which is the agreement of arbitration, and upon the exchange of diplomatic correspondence which has preceded this, in order to demonstrate that the intention of the two Governments was really to determine definitely all the claims of M. Fabiani against Venezuela. I do not deny this. I even add that the French Government, faithful to the spirit which had inspired the negotiations, did not cease to maintain this interpretation of the agreement in the course of the discussions which were engaged in before the Swiss arbitrator. It was, to the contrary, the representatives of the Venezuelan Government at Berne who, hoping to find in the terms of the convention unfortunately "ambiguous," the possibility for Venezuela of eluding a part of her responsibilities, combated this broad interpretation in several instances and substituted for it a restrictive interpretation.

There is, then, no disagreement between the parties that the purpose of the compromise of February 24, 1891, was to settle the whole matter contained in the Fabiani controversy. The contention before the umpire rests upon a different basis. The respondent Government claims that not only was the purpose of the compromise as stated, but also that this purpose was effected and the Fabiani incident closed.

Fabiani claims that because of the holding of the honorable arbitrator of Berne that denials of justice as such applied to matters judicial; that in the case before him denials of justice were only found in the nonexecution of the sentence of Marseilles; that they began after June 6, 1882; that there was no recourse by Fabiani to judicial tribunals other than those connected with this sentence, and hence no other opportunity for denials of justice; that such "*faits du prince*" as bore so immediately or approximately upon the execution of said sentence as to have an appreciable effect thereon, were the only "*faits du prince*" to be considered under the compromise; that because of these decisions the purpose entertained by the two Governments at the time of their convention of February 24, 1891, to thereby settle through the arbitration there provided for all of the Fabiani controversy was frustrated, and that the honorable arbitrator, in effect, at least, eliminated and subtracted all else as not being within his competency under the protocol, and thereby especially reserved all these for the use of Fabiani under some later convention, the terms of which should be more liberal.

To the contrary, the honorable commissioner for Venezuela holds the opinion that in making the decisions referred to the honorable arbitrator proceeded strictly in accordance with the terms of the protocol, which, while submitting all the claims of Fabiani to his conclusive and final determination, required and permitted an award against the Government of Venezuela for such of those claims only as resulted from or grew out of the denials of justice, and for such of these only as found responsibility in such Government. He alleges as truth that the claimant Government before the Swiss arbitrator pressed with vigor and to the end that every item presented in Fabiani's tables of claims was properly classed as a denial of justice and was a just demand against the re-

[1] *Supra*, page 102.

spondent Government under the terms of the protocol, and in general that the reparation to be made by the responding Government should be found by the arbitrator to comprise —

all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts of *faits du prince* attributable to the Federal executive), and all the damages which Fabiani says to have suffered through the fault of the public powers of Venezuela,

and strenuously urges upon the arbitrator that he was given " plenitude of jurisdiction " to determine all of these questions. He also admits as truth that the responding Government, while insisting that the whole controversy of Fabiani was before the arbitrator for his final disposition and while denying emphatically that there had been " any denial of justice or any cause of resort to diplomatic intervention," asserts affirmatively that denials of justice are limited to judicial proceedings and do not at all include administrative, legislative, or executive acts.

It is thus the two Governments clash; it is thus they contend before the honorable arbitrator of Berne. But it is not over the question of jurisdiction; it is not over the question of his competency. Both admit his jurisdiction; both adhere to his competency. The contest is, first, over the right of the claimant Government to demand any sum in damages of the respondent Government on behalf of Fabiani under the protocol which involved two inquiries — first, the inclusiveness of the term " denial of justice " chosen concordantly to define the claims which are in dispute; second, the responsibility of the respondent Government. When this question of right was decided then the measure of damages came to be allowed, if any.

When in the course of his decision the honorable arbitrator of Berne sets aside a claim of Fabiani or eliminates it, it is because in principle and in law the arbitrator has first disallowed it and adjudged against it, through his sovereign power to decide the basic question submitted to him and over which the contest has been made. When he decides this basic question he settles the fate of and effectually determines a large part of the claims of Fabiani. He did not extract them from the *case*, he did not subtract them; he decided against them and disposed of them adversely, not in detail, but as not being claims for which, in principle, Venezuela was responsible under the terms of the protocol. He eliminated them from his consideration only when he reached the question of damages. Up to that point they had been before him and had been passed upon by him. Examination of the arbitrator's award shows that nothing escaped his attention, that everything submitted was carefully considered and adjudged. He allowed some things and disallowed others, over all of which he had rightful and exclusive dominion and sovereignty. He did just what Fabiani assured him he ought to do, and to the doing of which Fabiani, in advance of the arbitrator's action, bowed in assent.

That he may do Fabiani no injustice by this statement, the umpire will present a few excerpts from the *réplique* of Fabiani before the honorable arbitrator of Berne, and later from his exposé before the same person, and first from page 16 of his *réplique*:

In our opinion the question can be considered under another aspect, that of the terms of the protocol — general terms which authorize the arbitrator to retain all denials of justice *duly established*, and which permit Fabiani to present all pecuniary claims relative to damages sustained for *denial of justice*.

If Fabiani formulates claims *which have another cause than the denial of justice* or the *imputability of which to the denial of justice should not appear certain, the arbitrator will reject them, purely and simply as proceeding from the terms of the protocol*, the same as if he

recognizes the responsibility of Venezuela he will retain in the proportions which his conscience shall dictate to him, all the damages which he shall judge to be a direct and immediate result of infractions committed by Venezuela.

It will be permitted us to add that even if the protocol, instead of being conceived in general terms, had given the full detail of all the litigious points, it would not be necessary to conclude from it that the whole motive of the claim not expressly enumerated in the compromise ought to have been brushed aside without discussion as being found outside the terms of the protocol.

If it is not a question of another difference, or of a difference arising posteriorly between the parties; if the new motives of claim although they may not be expressly specified in the protocol, find themselves, nevertheless, virtually included in it, whether as an integral part of the litigious points designated, or, as a consequence, if some of these motives of demand are found in the protocol; if the demand is no other than that which the protocol has foreseen and has had for a purpose to settle, and, finally, if the motives which one would wish to have set aside should later give place to the same debates as the motives set forth in the protocol, the arbitrator can appreciate the merit of these new motives and include them in his decision.

On page 615 of Fabiani's exposé he says:

In this situation if the arbitrator, after having examined and analyzed our different motives of claims, were led to recognize that all these motives are justified and that we have estimated our damages without any exaggeration, Venezuela would be able to felicitate herself upon her insistency in causing a mode of payment hardly equitable to be accepted, etc.

And if it should be admitted that the judge, proceeding *either by way of elimination* or by way of reduction, considers that there is reason to restrain the measure of our damages estimated by him upon the usual but converted monetary basis, etc.

On pages 616 and 617 of his exposé Fabiani says in part:

And if he considered it equitable to make a reduction in any of our claims *or if he considers that certain of them ought to* be laid aside, he will find himself, in spite of the taking into consideration the course of the bonds in the presence of a certain lesion, unless he is led to diminish in notable proportions the total amount of our claims.

On page 622 of his exposé Fabiani says in part:

The compromise confers upon him purely and simply the mission of fixing the amount of the *indemnity if he considers Venezuela responsible.* The arbitrator acts in the plenitude of his independence, having no other guide than his intelligence and his love for justice. He asks himself if such a prejudice or such a damage has been the direct and necessary consequence of the infractions which have engaged the responsibility of the defendant party.

On page 624 of his exposé Fabiani says:

It may be, however, that the study of our affair and the detailed examination of the numerous items of our claims suggest to the arbitrator either the opinion *that some of our claims have no direct and immediate connection with the infractions set forth* or the opinion that certain prejudices declared by us ought to be reduced to a lower figure. That is the right of the arbitrator, a right whose exercise is subordinate only to the inspirations of his conscience. We have not to prejudge his decision. We know that it will be conformable to justice and equity, but we are convinced that if some of our demands appear to him subject to a reduction the arbitrator, taking account both of the manner of payment and of the circumstances of the case, will accord to us by title of supplement of indemnity exemplary damages.

Fabiani urges the nonretroactivity of the treaty of 1885 through many pages of his exposé and claims that this date is thirty days after the last of the acts of violence upon which his claims rest. On page 522 of his exposé he declares that Article V of the convention of 1885 governs the future only; that Article

III of the same convention is the one governing the past. In the course of this discussion Fabiani is appreciative of the magnitude and persistency with which Venezuela had opposed his claim, and of the possibility that if he had pressed his claim through the treaty of 1885 it might have been an insurmountable obstacle to the reestablishment of the good relations between the two countries and that therefore no treaty could have been consummated.

On page 526 of his exposé he begins a discussion of his claims in reference to the mixed commission which was provided for by the convention of November 26, 1885, to determine the liability of Venezuela for acts posterior to 1867-68 and anterior to the date of the convention, and in this communication he uses the following language:

> Our claim having reference to acts posterior to 1867-68 and anterior to November 26, 1885, we evidently had the right to appear before the mixed commission. Why did we not do so? And, moreover, why did not the Venezuelan Government in the presence of the intervention of the minister of foreign affairs of the French Republic itself demand the sending to this mixed commission, which did not begin to do business until two years after? Let us examine the first and latter point. Venezuela, represented by Guzmán Blanco opposed an absolute non possumus. It denied formally the possibility of a claim on our part, and it contested even the existence of our right, pushed it aside without examination and with the most remarkable bad faith. The mixed commission, then, would not have been able to occupy itself with our affair. There is then arbitracio, because the discussion bears upon the admissibility, the extent, or the reality of the damages. When the right is litigable, and, above all, when it is absolutely contested, there is arbitrium. It is a case of arbitration, properly called, or of mediation.
>
> In the matter of damages the mediator generally takes upon himself to give his opinion upon the question of right and leaves to the mixed commission the care of deciding upon the extent of damage. The mission of the arbitrator is determined by the protocol, and more often he is charged with the pronouncing upon the right and upon the act. We do not suppose that these rules can be seriously contested.

In discussing on page 529 of his exposé the convention of November 26, 1885, and in insisting upon the nonretroactivity of the terms of Article V, he says:

> If, finally, the words and the intention did not lend to each other a mutual assistance for protesting against the idea of retroactivity, one would find himself in a strange situation. On the one hand a Government which stipulates in good faith and which for causes which are useless to refer to ignores that, during the rupture of international relations one of its nationals has been on a large scale the unfortunate victim of the hostility of the public powers of Venezuela, the Turk's head of an incensed chief of state, * * * is it necessary to recall that mental reservations ought to be energetically laid aside? In that which concerns us we have suffered too much in Venezuela not to protest against this attempt to make an attack upon the principle of the nonretroactivity of the laws. We hold essentially to prove to Mr. Blanco that his last blow has not succeeded. He has failed in discernment when he has not considered the convention of November 26, 1885, as his supreme work, destined to serve his anger and to create for us new difficulties. The conscientious study of our affair leaves no doubt upon the intention; * * * personal interest made him lose all interest in truth and justice. His diplomatic instrument came thirty days too late. And, besides, even had he signed it earlier our sad and venal enemy would not have been able to get any profit out of it. Our affair entered into all the cases reserved, and there is not a single one of our grievances which is outside the provision of Article V, as one may be convinced by the study of our exposé of facts.

On page 559 Fabiani says:

> We believe that we have sufficiently demonstrated in our general exposé tha whether by "*faits du prince*" or by insurmountable obstacles opposed by the judge

and the public power to the execution of our sentences or by the successive denials of justice or by the numerous acts contrary to the right of nations, the responsibility of Venezuela finds itself directly engaged. There can be no divergences upon the *extent* of the power of the arbitrator in respect to all that which has reference to the appreciation of the circumstances and of the facts which ought to determine his conviction in favor of one or the other party. In that which concerns us we recognize this sovereign faculty, submitting ourselves without mental reservations to the intelligence, the prudence, and the conscience of our judge. We have full faith in the justice of our cause, in the reality and exactness of the facts which we have maintained, but we shall hold for true and just that which the judge shall recognize as true and just.

We leave, then, to the arbitrator to consider the facts which are submitted to him, according to the light of reason and justice, aided by the knowledge of the right and general duties of administration which his long practice in public or international affairs has given him. He knows that in virtue of principles admitted by doctrine and jurisprudence of all people he must in such a matter move in the plenitude of the independence of the judge who conforms only to his conscience.

In another part he says:

This part of our work being exclusively reserved for juridical development we are forbidden from entering into a discussion or even an indication of figures. We place the principles; if the arbitrator accepts them his experience and his proud intelligence in affairs will suggest to him the application which he ought to make to the different points of our pecuniary claim.

On page 575 of his exposé Fabiani says:

It will belong to the arbitrator to extend his judgment upon what shall appear to him legitimate or illegitimate, just or excessive, in the claims which we produce. * * * His intelligence, his prudence, his conscience will be the most sure guide for him, a guide formally provided for and authorized by the legislation of the two countries.

We know well that the party of which we demand the damages and interest will endeavor to diminish the amount of them. We see no inconvenience in accepting the discussion. We are, on the contrary, pursuaded that in going to the depths of things we shall win ground instead of losing it. The essential thing was to localize this discussion, to avoid theoretical controversies on the kind of damage, to prescribe in this affair at the beginning a distinction between direct and indirect damages, and to constrain the adverse party to confine itself exclusively to proving the exaggeration of our demand. It does not enter into our intention to examine here the different points of our claim. We have made in this regard a separate work, which will come before the eyes of the arbitrator. No figures ought to disturb a discussion of right already too long and which we are in haste to terminate. It is evident that *if the responsibility of Venezuela be retained* no doubt could be raised as to the absolute legitimacy of our claims in that which concerns the liquidation of our sentences in the sums of which the instance formed before the French tribunals ought to assure the recovery. * * * The *principle of the responsibility once admitted* it will belong to the arbitrator to scrutinize, to analyse our claims upon these three points *and to retain only the losses or the damages which shall appear to be justified.*

On page 794 of his exposé Fabiani says:

The arbitrator has the right of *sovereign appreciation.* We do not suppose that this principle can be contested. Without doubt an impartial and intelligent judge admits only that which appears to him legitimate; he *rejects the damages* which in his opinion have not a *direct lien* with the incriminating facts.

The intervention of France on behalf of Fabiani began not long after the treaty of 1885, and the first reference which is of importance, perhaps, contains the following statement by the French Government in regard to its claims for indemnification on account of Fabiani, addressed by the French legation in Caracas to the Venezuelan Government, on August 3, 1887:

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sum, both principal and interest, the collection of which would have insured the execution of the sentence in due form and proper time, besides the restitutions ordered by the judges, amounting to about 1,300,000 francs; and, in the second place, damages and interest, the amount of which is to be discussed, for the wrongs done to Fabiani in his credit and in his business.

As regards his other pretensions, a searching investigation and discussion *should determine* how far they are *well founded*.

Perhaps the first explicit reference thereto on the part of Venezuela is found in the letter of Gen. Guzmán Blanco to his Government, of date November 14, 1889, in which, after referring to other matters with which he had been employed in his office as plenipotentiary, he says:

In that which has reference to the Fabiani claim, with which the Government has charged me recently, I have been able to do nothing to the day of my resignation, because I had not yet received the information which is necessary to the defense of our rights. The point is so grave that it implies *almost the annulment* of the treaty of 1885. The French Government demands that Fabiani be indemnified for something which remains due to him from his father-in-law, Roncayolo, in the liquidation of personal affairs in which they were associated. *Having opened thus* the breach in the treaty, we shall lose all the progress which we have made with it.

By his statement that the point is so grave that it almost implies the annulment of the treaty of 1885, and by the further statement that —

a breach being thus opened in the treaty, we shall lose all the progress which we have made with it —

it is quite evident that the claims presented covered more than denials of justice as understood by him, because these were recognized in the treaty referred to.

Reference to this claim next appears in the correspondence between the two Governments, beginning December 31, 1889, and continuing to August 14, 1890, which is set out in the additional memorandum of the honorable commissioner for Venezuela, accompanying his opinion to the umpire, from which it is learned that the Government of France had particular interest to settle the claim; that —

my Government would see, in the manifestation *of more favorable dispositions as regard said claim*, the clearest evidence of the desire of the eminent President of the Republic of Venezuela and of yourself to establish between the two countries a cordiality toward which all my efforts are bent.

This is from a communication from His Excellency, Mr. Blanchard de Farjes, minister of France in Caracas, to Mr. P. Cassanova, minister of foreign relations for Venezuela, of date December 31, 1889. It is further learned, from a study of the correspondence referred to, that France proposed arbitration; that Venezuela declared to France that it *rejected the Fabiani claim from its origin*, but that the President was desirous of exercising all efforts in behalf of the *desired good harmony* between both countries, and therefore accepted the proposal to arbitrate, *in principle*, providing the umpire be one of the Presidents of the South American Republics and that the question to be decided be —

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885, and that, in case Venezuela should be condemned to pay any indemnification, in view of the legal proofs adduced in favor of the claimant, * * * such indemnity to be paid in 3 per cent bonds of the diplomatic debt.

Subsequently the President receded from his requirement that the arbitrator be a President of the Latin-American Republics. France asked that the award of the umpire deal only with the amount of indemnity to be fixed for M. Fabiani; in other words, that Venezuela concede the right to some indemnity, and urged upon Venezuela, inferentially, that by her refusing to consent to this proposition Venezuela was perpetuating an element of dissension between the two countries. This was the status in May, 1890. In July of the same year the minister of Venezuela in France informed the minister of foreign relations in Venezuela as follows:

> Consequently, for greater clarity and to prevent M. Fabiani from misconstruing the agreement, thus creating new difficulties, I told the minister (M. Ribot) that I was going to inform the Venezuelan Government of the agreement precisely in the following language:
>
> "That the French Government is willing to accept *that the question relative to M. Fabiani* be submitted to the President of the Federal Council of Switzerland as *arbitro juris*, first, to decide if this be the case provided for in Article V of the Franco-Venezuelan convention of November 26, 1885, and, second, should the umpire decide that such is the case provided for in Article V, then the umpire is to *fix the sum that must be paid to M. Fabiani* in the 3 per cent bonds of the diplomatic debt. I have discussed the matter with the director of the cabinet, who has told me that, although the French Government agrees to the substance of the two points mentioned, it is not desired that they should be stated in such terms, because these would to a certain extent be little satisfactory to the French Government, *which has decidedly supported M. Fabiani's claim, entering it energetically through* diplomatic channels."

It will be especially noted that, according to this communication, France agreed in substance to the two propositions as stated, but opposed their being submitted in the language suggested.

August 12, 1890, the minister of France at Caracas forwarded to the minister of foreign relations for Venezuela a draft of the protocol —

> to serve as the basis of the arbitration already agreed upon "in principle" between the Venezuelan and French Governments —

which draft, in the language chosen by France, the umpire is assured by the honorable commissioner for Venezuela, is Articles I and II of the convention of February 24, 1891, as finally accepted by the two Governments.

Having thus brought upon the record the matters essential to the development of this claim, it is now ready to be considered in all its bearings for the final determination of the umpire upon its merits.

In the judgment of the umpire, the case may properly turn upon the answer to be given the inquiry, Was it the intent and purpose of the high contracting parties, in their agreement of February 24, 1891, by and through its terms to submit to the honorable arbitrator of Berne the entire Fabiani controversy?

When France intervened in behalf of her national, the claims of Fabiani were no longer individual and private claims; they became national. The right to intervene exists in the indignity to France through her national. Thenceforward it is national interests, not private interests, that are to be safeguarded. It is the national honor which is to be sustained. It is the national welfare also which must be considered. In protecting Fabiani and his interests the general welfare must be kept in the foreground. To the extent that his interests and the common welfare of France are in accord his particular claims can be pressed, but no further. If at any time the general good of France requires a surrender of all his claims, such surrender it is expected France will make, and after that if Fabiani has a claim it is against his own Government, not against Venezuela. From the time her intervention began it was undoubtedly

the constant purpose of France to remove as quickly and as effectually as possible this occasion of international dissension. It is not to be believed that France would consent to submit to arbitration a part only of a national's claim, leaving large and important portions of it undisposed of and to be still matters of international intervention. Nothing, nationally, is gained thereby. The dignity of the tribunal thus invoked, the eminent character of the parties litigant, the importance to these countries, greater than any possible interests of the national, that peace and harmony be the assured result of their action — all these considerations forbid the contemplation even of such a thought. Such is the approach to this question through the medium of general considerations. When view is had of this particular contention, the parties and the protocol, there is added light. Both of the high contracting parties affirm it to be their purpose to close the controversy by the arbitration. The protocol in effect so states. As it seems to the umpire, the honorable arbitrator so understood the scope, purpose, and intent of the protocol. The text of his award charged him with the duty —

first, to decide whether, according to the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers, the Venezuelan Government is responsible for the damages which M. Fabiani claims he sustained through denial of justice.

This duty was placed upon the honorable arbitrator for one of two reasons — either that his determination might end the controversy or simply as an academic proposition. The latter reason needs only to be stated to be denied.

It is also impossible for the umpire to accredit the two nations with the purpose and intent to consider such of the claims as the honorable arbitrator fails to recognize responsibility for in Venezuela as simply eliminated, subtracted, and reserved from the effect of the protocol, to remain as vital claims in the hands of France as a continuing cause of discussion and dissension between the two Governments, or to believe that Venezuela should have consented to arbitrate these points of difference, knowing that when the award was made all of Fabiani's claims not held to be well founded were to be pending against her; knowing that for such as were held to be denials of justice she must make reparation *then* and for all such as were not so held she must oppose, or pay, or arbitrate at some later time.

It is impossible for the umpire to appreciate the reason for the prolonged diplomatic controversy over the terms of the protocol, the anxiety of France, on the one hand, that Venezuela should admit her liability in principle and arbitrate only the damages to be assessed, and, on the other hand, the tenacity with which Venezuela clung to her early offer to submit first this question —

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885 —

had either of these Governments understood that the arbitration proposed was only a preliminary skirmish to feel the enemy's lines in order to prepare the way for the real battle which was to come after, or if both these Governments had not been controlled by a settled conviction that the award to be rendered was the end of the Fabiani controversy.

It can not be gainsaid that if the honorable arbitrator of Berne had accepted as correct the full contention of France before him he would have amerced the Government of Venezuela in the sum of 46,994,563.17 francs. This was her hazard when she trusted her cause to the arbitrator. If such had been his award, there was for Venezuela no redress. It can not be claimed that if the honorable arbitrator had included every item to the extent demanded that Venezuela had relief before any tribunal or that for her there could have been

by any tribunal subtracted from the sum total a single figure or a single centime. If the present contention of Fabiani is correct, that there is a relief for him before this tribunal, then the respondent Government in an arbitration takes a hazard peculiar to itself of paying the award to the extent of the entire demand of the claimant Government, if such be the award, or a part thereof if successful in preventing an award for all, and then resisting at some later day or paying or arbitrating such elements of the claims as it had been successful in opposing before the first tribunal; while the claimant Government enjoys the privilege, peculiar to itself of consenting to such restrictions in the protocol as it can not avoid if it is to obtain arbitration, and later presenting to a tribunal not hampered by such restrictions the elements of its claim refused, because of the restrictions in the protocol at the first hearing.

If the judgment of the honorable arbitrator of Berne had been that under the protocol the Government of Venezuela had no responsibility, would it have resulted *that all the claims of Fabiani were left unsettled by his decision* and were restored to their primal state of existing claims for which the Government of France could intervene? If not, then what claims would be held to be settled and what still pending? If the position of Fabiani is correct, which is the better result for the respondent Government in an arbitration, to defend successfully in part or in all or to lose in all or in part? Rather, which makes the respondent Government suffer most and longest, since in such a case there is for the defendant Government no surcease?

These inquiries have value only in the fact that by considering them one is irresistibly impelled to the sane and safe conclusion that, in every international controversy of like import with this, the two Governments honestly and carefully seek a common meeting point, which is to be gained usually, as in this case, by mutual concession and mutual remission of matters which *can yield*, and, when that common ground of consent is reached, to submit it as the *whole controversy;* or *as being all that both parties will admit is the controverted question*, and that this mutual point of agreement *is as much a matter of agreement* between the high contracting parties *as is the covenant to arbitrate itself is an integral part of that covenant gives it its final character and provides for it its name — which is compromise.* The process by which this agreement is reached being concessions by each, each concession cancels the other, so that, outside the protocol, of the original contention *there is left nothing. All of the original controversy* is found finally resting in the protocol *or in oblivion.* Thus, when Venezuela and France first compared their views on the Fabiani matter, France claimed that there was unquestioned liability on the part of Venezuela, and during the discussion named in general, at least, the grounds thereof, and the amount, in part, at least, that she should receive. Venezuela denied all liability in every particular. As they pursued their efforts to reach an agreement France admitted that there might be a question as to amounts, but no question as to the fact of responsibility, and proffered to Venezuela arbitration of the *amount.* Venezuela consented to arbitrate, provided that the arbitrator might be a President of a South American Republic, and provided also that the *question of liability* be the *first question* determined.

Later Venezuela tendered a recession from her demand that the arbitrator must be the President of a South American Republic and consented that the President of the Swiss Federation might take charge of such arbitration, but insisted that the arbitrator be asked to decide, first, if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885. Finding that arbitration could only be had by conceding this last point France made the concession in principle, but asked that it be not thus worded and in the end submitted for the acceptance of the Government of Venezuela the

compromise substantially as it was when it became the treaty between them. *Nothing on either side of the claims thus conceded survived.*

They were all *mutually agreed* to be *perpetually abandoned.* It matters not that each of the agreeing parties believes that much, perhaps all, of its early contention is still left, and is comforted in the thought that nothing has been, in fact, conceded, and that all really exists under the terms agreed upon. This, however, remains *certain* that they have agreed to submit the *whole question* to the arbitrator. They may contend before him, on the one hand, that all is included, and, on the other hand, that nothing can be found under its terms. Concerning the meaning, form, and effect of their agreement, they may essentially and antipodally disagree, but that *they have agreed that their contention is all included within the terms of the protocol, is not, and never can be, a matter of disagreement.* That the compromise has been made in order that the arbitrator shall make a *final* and *conclusive* award upon the *whole* of the *original controversy* " not buried in mutual concession," *is the most solemn covenant of all.*

If France had made the award at Berne the subject of diplomatic protest before the convention of February 24, 1902, or, in connection with that event, had submitted its grievance, there would have been an opportunity for Venezuela to make answer through the same channels. If, after such diplomatic interchange of opinion, it had seemed best to resubmit the question which had once been heard, or any part thereof, it would come before the tribunal then constituted to hear it, with the knowledge on its part that the hearing had been consented to by both of the Governments involved therein. This protest it did not make. There is nothing to indicate that it desired so to do, or had aught to say why it should not accept as final and conclusive the award of the honorable arbitrator of Berne, unless it be found in the fact that Fabiani is permitted to present his claims, in the manner he has presented them, before this Mixed Commission. So far as the umpire is advised the Government of France has not assumed responsibility for, or attempted to dictate as to, the claims which might come before this tribunal. So far as he is advised, the actual relation of France is found in the fact that it has sought and obtained a tribunal where its nationals may be heard, but has not passed at all upon the claims, sought to refuse, or to limit, the presence of any who considered that they had an international grievance for which the Government of Venezuela had responsibility. It is believed by the umpire that this accounts for the presence of this claim before this tribunal. The large intelligence, the high honor, the scrupulous integrity, the sensitive perceptions of the diplomats of France are assurances to the umpire either that they have carefully and purposely presented this claim, regarding it as entirely outside of the attributes and relations given it by the umpire, or that it is wholly the work of an individual, who had presented his claim on his own initiative, because he feels that in the decision at Berne he suffered a too serious diminution in his honest damages by the application of the rule established by the honorable arbitrator, and who hopes that there may be a chance for revision and reimbursement before the present tribunal.

The umpire holds further that the honorable Governments, in establishing the standard of measurement which was to be used by the honorable arbitrator of Berne in fixing the responsibility of the respondent Government, established at the same time the measure which, when applied by the arbitrator, was to determine alike the extent and the limit of Fabiani's claims. When, therefore, the honorable arbitrator made use of this standard, so provided him, the claims of Fabiani, by their own weight, fell within or without the line of demarcation so drawn. The honorable arbitrator, on his own initiative, eliminated nothing, subtracted nothing, from these claims; there was left for him nothing but first

to settle the meaning of the protocol, and then to observe its effect, and to point out which of the claims came within, and which without, the *action* of the *rule* agreed upon and prescribed to him by the two honorable Governments. In other words, when he seems to eliminate or to subtract from the claims of Fabiani, or mayhap, so states in his arbitral decision, he is in fact simply pointing out and designating the different elements of the Fabiani controversy, which, in effect, the high contracting parties had agreed to eliminate and subtract in order to reach an agreement that permitted the protocol and the arbitration. The moment the honorable arbitrator of Berne settles the pivotal question of the protocol, by defining the term "denial of justice," around which the storm clouds of conflict quickly gathered and the battle was fiercely waged, these claims fell into the lethe prepared for all such by the two Governments when they agreed to and accepted the protocol of February 24, 1891.

It is also true that this was not the beginning of such eliminations and subtractions by and between these honorable Governments. They began Novembe 26, 1885, in the solemn compact then made between them, and thenceforward these nations rested upon their valued agreement to include within their diplomatic cognizance and intervention the same matters only as are accepted in the protocol of 1891, which substantially, even emphatically, reaffirms this previous convention and applies it to the concrete case in hand, hence if there were any difficulty in understanding the protocol when standing alone, by the light of the treaty of 1885, such difficulties are all removed, and one is permitted to pass within the veil and catch the genuine spirit which inspired it, as we hear the thoughtful plenipotentiaries declare on the part of their respective Governments that it is done —

in order to avoid in the future *everything* which might interfere with their *friendly relations*.

What they agreed to in order to avoid in the future a disturbance of friendly relations was done February 24, 1891, in order to avoid and to remove the very thing, which, until removed, did disturb the friendly relations of the two Governments; and in the agreement which was merged in the protocol such concessions a. wer made on the part of both Governments were the price which each paid for the restoration and continuance of friendly relations, so essential to the highest welfare of both nations. So far as these concessions affected the pecuniary interests of Fabiani they were the especial tribute required of him by his Government to conserve its general good. How great was this price was not known until the judgment of the arbitrator was obtained, defining the inclusiveness of the standard agreed upon. When that was known, in so far, if at all, as this limited his claims within what he could have obtained under an unrestricted submission, the draft had been made upon him in the interest of the common weal of his nation, which draft it was patriotic duty to honor, and thereafterwards, toward the respondent Government, to seek no recourse.

The umpire may be permitted at this time to refer to decisions made in the courts and international tribunals and to the opinion of Count Lewenhaupt and to quote from the reasons given for the judgments rendered and the opinions held, the subject-matter being similar in many aspects to the present case. They illustrate and support the positions taken by the umpire and are, in his judgment, ample in principle and precedent.

There is the Machado claim before the mixed commission of the United States of America and Spain, of February 12, 1871, presented by memorial in 1871, being No. 3 of the claims before said commission. It was dismissed for want of prosecution December 20, 1873 —

the commission reserving to itself the right to reinstate the said case on motion

by the advocate for the United States, sufficient causes being shown in support thereof.

In 1879 he filed another memorial, being No. 129 upon the docket. March, 1880, the advocate for Spain moved to strike it from the docket on the ground that it was the same case as No. 3. The advocate for the United States contended that the claim was different, and claimed that the motion of the advocate for Spain might be dismissed.

The arbitrators being unable to agree, the question was referred to the umpire Lewenhaupt, who, on July 12, 1880, rendered the following decision:

The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim, No. 129, is a new one or the same as No. 3 does not depend upon whether the items included be the same in both cases, but the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being a part of an old claim, can not be presented as a new claim in a new particular. For these reasons the umpire decides that this case, No. 129, be stricken from the docket.

This case is found in Moore's Int. Arb. 2193. See also decisions similar in principle, Danford Knowlton & Co., and Peter V. King & Co., before the same commission, found in Moore's Int. Arb. 2193-2196. See Delgado case, Moore Int. Arb. 2196.

See the case of McLeod, Moore Int. Arb. 2419.

McLeod, a British subject, set up a claim against the United States of America for his arrest and imprisonment in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline* in the port of Schlosser in that State on December 29, 1879. This claim was presented by the British agent to the commission under the convention between the United States and Great Britain on February 8, 1853. The agent of the United States maintained that the case was finally settled between the two Governments by Lord Ashburton and Mr. Webster in 1842. The British commission thought that the adjustment made between the two Governments was merely a settlement of certain national grievances and that any claim on the part of McLeod must be considered as one of the unsettled questions existing at the date of the convention of February 8, 1853. Mr. Upham, commissioner for the United States, was of a different opinion, and, among other things, says that two questions arise in the case:

I. Whether the settlement made by the Governments precludes our jurisdiction over the claim now presented.

II. Whether, independently of such exception, the facts show a ground of claim against the United States.

* * * No claims can be sustained before us except those which the Governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

A settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claims of individuals arising under such controversies against the Government of the other country, unless they are especially excepted, as each Government by so doing assumes, as principal, the adjustment of the claims of its own citizens and becomes itself solely responsible for them. * * *

These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, " that these truly unfortunate events might thenceforth be *buried in oblivion*." * * *

In my view, the entire controversy, with all its incidents, was then ended; and if the citizens of either Government had grievances to complain of they could have

redress only on their own governments, who had acted as their principals and taken the responsibility of making the whole matter an international affair and had adjusted it on this basis.

The umpire, Mr. Bates, sustained the position of the commissioner for the United States and rejected the claim.

John Emile Houard was arrested in Cuba and imprisoned without right, as it always appeared. Spain voluntarily released Mr. Houard and restored his property to him, requesting of the United States, as a condition of the pardon and restoration, that an end should thereby be put to all discussion concerning this case. This proposition was accepted by the United States. Mr. Houard came before the international commission between the United States and Spain and claimed damages for the wrong done him through his imprisonment and the consequences naturally flowing therefrom. The umpire made the decision as follows:

> The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by conditional pardon granted as the result of an international agreement, should now be reopened. (Moore's Int. Arb., 2429.)

See Bours' case, Sir Edward Thornton umpire, Moore's Int. Arb., 2430.

Illustrative of the position which the United States Government has taken in reference to the finality and conclusiveness of awards by commissions and by arbitration, reference may be had to the action of that Government with Mexico under the convention of April 11, 1839. Under said commission three claims were rejected by the commissioners on their merits and four on the ground of jurisdiction. The umpire rejected five claims on their merits and six on jurisdictional grounds. After the termination of the commission attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants strongly objected to such a course.

The Government of the United States determined to treat as final and conclusive the decisions that had already been rendered and to enter into negotiations for the adjustment of the unfinished business. Under this decision there was a new claim convention of November 20, 1843, which by its first article provided that all claims of the citizens of Mexico against the United States and all claims of citizens of the United States against Mexico —

> which for whatever cause were not submitted to nor considered nor finally decided by the commission nor by the arbiter — (Moore's Int. Arb., p. 1249, note.)

under the convention of 1839 should be referred to a board of four commissioners.

Under the commission of 1839, wherein it was agreed that the decision of the umpire should be final and conclusive, and wherein the United States agreed forever to exonerate the Mexican Government from any further accountability for claims which would either be rejected by the board or by the arbitrator, or which, being allowed by either, should be provided for by the said Government in the manner before mentioned, there was presented the claim of Manuel de Cala, growing out of his imprisonment and the confiscation of his vessel and cargo. The American commissioner of 1839 allowed $52,000, the Mexican commissioner nothing, the umpire $5,867. It was alleged before the commission of 1849 that this award was made solely on account of the confiscation of the vessel and the imprisonment of de Cala, and that the value of the cargo was by some unaccountable oversight wholly overlooked by the umpire. The commission ruled against it, saying:

This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of de Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico should be held responsible. * * * The board is of opinion that the decision of the umpire was final and conclusive, and that, by the terms of the convention of 1839, Mexico was released from any further claim or liability growing out of the transactions upon which it was founded. (Moore Int. Arb., 1274.)

See the Leggett case, Moore Int. Arb., 1276 *et seq.*

In Moore Int. Arb., 1408, Sir Frederick Bruce says:

In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred. * * *

I am of opinion that these claims must be submitted *de novo* to the actual commission, with a view to a fresh reexamination and decision on their merits.

Under the United States and Venezuela Claims Commission of 1868 gross frauds were alleged to be perpetrated, and a protest of the Venezuelan Government was filed with the Secretary of State for the United States of America February 12, 1869, alleging irregularity of the umpire and fraud in the proceedings and findings. After careful inquiry by the United States Government it was found that there had been fraud. The decisions were rejected and a new commission was formed by the joint action of both countries to rehear all of the cases.

Moore Int. Arb., 1660-1675.

Where a party, with full knowledge of the facts on which he relies for the impeachment of the award, has nevertheless accepted and executed the award, it will not be set aside because of the objections made by him. (2 Am. and Eng. Encycl. of Law, 789.)

A valid award creates a complete obligation, and need not be ratified by the parties in order to give it operative force. (Id., 806.)

But where an award is voidable, either because the arbitrators have exceeded their authority or because all matters submitted have not been considered by them, or for any other reason, the parties may ratify it expressly or by implication arising from their acts, and after such ratification they will be estopped from objecting to it. (Id., 806.)

The acceptance of the benefits of an award, as accepting the performance from the other party to the submission of the obligations imposed by the award, is a ratification and estops the party so accepting from afterwards denying its validity. (Id., 807, note.)

Acquiescence in an award has the effect of a ratification. (Id., 807.)

In a case before the Supreme Court of the United States entitled United States *ex. rel.* Lutzarda Angarica de la Rua, executrix of Joaquín García de Angarica, deceased, plaintiff in error *v.* Thomas F. Bayard, Secretary of State (127 U.S., 251 (L. R., 32, 159)), there appears, in the course of the decision, this quotation from the answer of the Secretary of State for the United States:

And this respondent, further answering, saith that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the Government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the Government of the United States and entirely beyond the control of the said petitioner's testator.

On July 4, 1868, a convention was concluded between the United States of America and Mexico for the adjudication of claims of citizens of either country upon the Government of the other. Article II of the treaty contains this clause:

> The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. (15 Stat. L., 682.)

And also in Article V there appeared the following:

> The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible. (15 Stat. L. 684.)

This was a case of petition for mandamus, entitled United States *ex rel.* Sylvanus C. Boynton, plaintiff in error, *v.* James G. Blaine, Secretary of State. (U.S. Sup. Court Reports, 139, 306; L.R. 35, 183.)

The payment of the sum awarded had been withheld by the Government of the United States because that Mexico, while complying with the terms of the award and paying in accordance therewith, had solemnly protested to the Government of the United States that deliberate fraud had been practiced upon the commission and that without it there would have been no award against Mexico and asking that the United States Government consent to reopen the case and to set aside the award. This petition was brought to compel the Secretary of State to make payment of the sums due to the relator, notwithstanding the situation suggested.

President Hayes caused the charges of fraud to be investigated, and Mr. Evarts, then Secretary of State and a profound lawyer and eminent jurist, made a careful examination of all the matters concerned and submitted his conclusions to the President, of which we quote in part:

> That neither the principles of public law nor considerations of justice and equity required or permitted, as between the United States and Mexico, that the award should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same; * * * that the honor of the United States required that these two cases should be further investigated by the United States to ascertain whether this Government had been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud. (139 U.S. pp. 306-326; L. R. vol. 35 p. 186.)

In August, 1880, Secretary Evarts —

> having been notified through the Mexican legation of the intention of the Mexican Government to commence suits to impeach and set aside the two awards, objected to such a proceeding as in contradiction to the whole purpose of the convention, as well as of explicit provisions thereof; and accordingly no further steps were taken in that direction. (Id. ibid.)

Chief Justice Fuller delivered the opinion of the court, and we quote briefly therefrom:

> The Government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it.

The Chief Justice makes reference to Frelinghuysen *v.* Key (110 U.S., 63) in the following language:

In Frelinghuysen *v.* Key, while conceding the essential value of international arbitration to be dependent upon the *certainty and finality of the decision*, the court adjudged that this Government need not therefore close its doors against an investigation into the question whether its influence had been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award, and the receipt of money thereon, were necessarily subject to such modification as circumstances might require.

Cornelius Comegys and Andrew Pettit, plaintifs in error, *v.* Ambrose Vasse, defendant in error, before the United States Supreme Court, and reported in volume 26, page 193 (L.R. 7, 108), was a case growing out of the award of commissioners constituted under the treaty of the United States of America with Spain on the 22d of February, 1819. In the ninth article of the treaty it provides that the high contracting parties —

reciprocally renounce all claims for damages or injuries which they, themselves, as well as their respective citizens and subjects, may have suffered until the time of signing of this treaty. (8 Stat. L. 258.)

and they then proceed to enumerate in separate clauses the injuries to which the renunciation extends.

The eleventh article provides that the United States, exonerating Spain from all demands in future on account of the claims of their citizens to which these renunciations extended —

and considering them entirely *cancelled*, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. (8 Stat. L. 260.)

To ascertain the full amount and validity of these claims a commission, to consist of three commissioners, was appointed, which within three years from the time of its first meeting should —

receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. (Id. ibid.)

There seems to be no especial agreement or covenant concerning the finality and conclusiveness of the awards, and they seem to stand upon the common basis ascribed to awards in general. Mr. Justice Story of the Supreme Court delivered its opinion. Among other things decided by the court there appears this:

The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is *conclusive and final.* If they pronounce the claim valid or invalid, if they ascertain the amount, *their award* in the premises *is not reexaminable.* The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. *A rejected claim can not be brought again under review*, in any judicial tribunal; an amount once fixed, is a *final* ascertainment of the damages or injury. This is the obvious purport of a language of the treaty.

See the case familiarly quoted as Frelinghuysen *v.* Key, found in the United States Supreme Court Reports 110, p. 63 (L.R. 28, p. 71), where the Supreme Court decided the awards to be final and conclusive as between the United States and Mexico until set aside by agreement between the two Governments, or otherwise, and that the United States had right to treat with Mexico for a retrial for particular awards because of the alleged fraudulent character of the proof given in their support, and that the President of the Senate might con-

clude another treaty with Mexico in respect to any claims allowed by the commission. Mr. Chief Justice Waite delivered the opinion of the Supreme Court, in which opinion we find and quote the following:

No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claim to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexcico against the United States as well. * * * Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one Government to the other on account of the demands of their respective citizens.

See also United States *v.* Throckmorton, 98 U.S. Sup. Court Reports, 61 (L.R. 25: 93); U.S. Appt. *v.* Diekelman, 92 U.S. Supreme Court Reports, 520 (L.R. 23: 742); Choctaw Nation, appellant, *v.* U.S., 119 U.S. Sup. Ct., 1(L.R. 30: 306).

Chapter 18, Book 2, of Vattel on the Law of Nations, Chitty's Edition, treats of the mode of terminating disputes between nations, and the entire chapter is referred to by the umpire as furnishing, in his judgment, a basis for this case. The umpire will quote but limitedly. Section 326 says in part:

If neither of the nations who are engaged in a dispute thinks proper to abandon her right or her pretensions, the contending parties are, by the law of nature, which recommends peace, concord, and charity, bound to try the gentlest methods of terminating their differences. * * * Let each party coolly and candidly examine the subject of the dispute, and do justice to the other; or let him whose right is too uncertain, voluntarily renounce it. There are even occasions when it may be proper for him who has the clearer right, to renounce it, for the sake of preserving peace — occasions which it is the part of prudence to discover.

Section 327 is entitled " Compromise," concerning which he says:

Compromise is a second method of bringing disputes to a peaceable termination. It is an agreement, by which, without precisely deciding on the justice of the jarring pretensions, the parties recede on both sides, and determine what share each shall have of the thing in dispute, or agree to give it entirely to one of the claimants on condition of certain indemnifications granted to the other.

Section 329 is entitled " Arbitration." Concerning this he says, in part:

When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement. When once the contending parties have entered into articles of arbitration, they *are bound* to abide by the sentence of the arbitrators. *They have engaged to do this;* and the faith of treaties should be religiously observed. * * * For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators. * * * In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrator; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have them-

selves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts that it was the offspring of corruption or flagrant partiality.

Mr. Bayard, Secretary of State for the United States of America, a very eminent and able lawyer, acting in his office aforesaid, gave this official opinion on May 12, 1886:

Motions to open or set aside international awards are not entertained unless made promptly, and upon proof of fraudulent concoction or of strong after-discovered evidence. Wharton's Int. Law Digest, sec. 316, vol. 3, page 81.

The award not having been vacated, opened, or set aside during the lifetime of the former commission, and the claimant having done nothing since to waive his rights thereunder, it was further ruled that such award should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada. Wharton's Int. Law Digest, sec. 328, vol. 2, page 672.

Mr. Seward, Secretary of State for the United States, in correspondence July 17, 1868, referring to the *Alabama* claims and to an effort to adjust them which had been made by both Governments and reviewing the situation, says:

In the first place, Her Majesty's Government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's Government upon reconsideration proposed to entertain them for the purpose of referring them to arbitration, but insisted upon making them subject of special reference, excluding from the arbitrators' consideration certain grounds which the United States deem material to a just and fair determination of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed. Id., sec. 221, vol. 2, p. 568.

On page 569 of the same volume there is a statement by Mr. Frelinghuysen, Secretary of State, to Mr. Rosecrans, October 17, 1883, as to the action of the United States concerning arbitration, the finality of the decisions, and the solemnity of the agreement which authorizes the arbitration.

Mr. Fish, Secretary of State for the United States, to Minister Russell, of Venezuela, June 4, 1875, says in part:

That if a State, after having submitted a controversy regarding claims and debts due to individuals, to arbitration, whether by another State or by a commission, refuses to pay the award, it loses credit and leaves no alternative with other powers than that of refusing intercourse, or of an ultimate resort to war. Id., sec. 220, vol. 2, p. 550.

Mr. Frelinghuysen, Secretary of State for the United States, February 11, 1884, says in part:

The claims presented to the French commission are not private claims but governmental claims, growing out of injuries to private citizens or their property, inflicted by the government against which they are presented. As between the United States and the citizen, the claim may in some sense be regarded as private, but when the claim is taken up and pressed diplomatically, it is as against the foreign government a national claim.

Over such claims the prosecuting government has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. Several instances where this has been done will occur to you, notably the case of the so-called " French spoliation claims". The rights of the citizen for diplomatic redress are as against his own not the foreign government. * * * The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights. Id., sec. 220, vol. 2, p. 558.

Should the Government of the United States, either by its neglect in pressing a claim against the foreign government or by extinguishing it as an equivalent for concessions from such government, impair the claimant's rights, it is bound to duly compensate such claimant. Id., sec. 220, vol. 2, p. 566.

On a careful review of the history of this claim from its origin to this day, enlightened by study and reflection, fortified in principle, and controlled by reason, responsive to his conscientious conception of duty, the judgment of the umpire is clear and positive that the compromise arranged between the honorable Governments February 24, 1891, followed by the award of the honorable President of the Swiss Federation, December 15, 1896, were, "acting together," a complete, final, and conclusive disposition of the entire controversy on behalf of M. Antoine Fabiani. Therefore the claim presented before this tribunal, and, on disagreement of the honorable commissioners, coming to the umpire, and there entitled "Antoine Fabiani No. 4," is disallowed, and the award will be prepared accordingly.

NORTHFIELD, *July 31, 1905.*

EXHIBIT IN FABIANI CASE AWARD UNDER CONVENTION OF 1891

(Exhibit not reproduced. For the original text of the award under Convention of 1891 see Moore's *History and Digest of International Arbitrations*, Vol. V, pp. 4878-4915.)