ARBITRATION BETWEEN GREAT BRITAIN AND COSTA RICA.

OPINION AND AWARD OF WILLIAM H. TAFT, SOLE ARBITRATOR.

Washington, D.C., October 18, 1923.

This is a proceeding under a treaty of arbitration between Great Britain and Costa Rica. The ratifications of the treaty were exchanged on March 7, 1923. The scope of the questions to be decided is to be gathered from two recitals and Article I of the treaty. The two recitals are as follows:

> Whereas there has arisen between their respective governments a difference as to the application of Law No. 41 of the 21st of August, 1920, to two cases in which British corporations are interested, to wit: to the concession granted by the Aguilar-Amory contract of the 25th June, 1918, of which the "Central Costa Rica Petroleum Company" is owner, and the delivery to the Royal Bank of Canada of 998,000 colones in notes of 1,000 colones each in payment of a cheque drawn by the Tinoco administration against the Banco Internacional de Costa Rica, which cheque was deposited in the government's account with the said Royal Bank; and
>
> Whereas the claims and contentions of the two governments in regard to these points have been set forth, on the part of His Britannic Majesty's Government, in the notes which His Britannic Majesty's Minister addressed to the Costa Rican Ministry for Foreign Affairs on the 13th of July and the 8th November, 1921, and in antecedent correspondence; and, on the part of the Costa Rican Government, in their notes in reply relative to the present diplomatic controversy and especially in the Congressional resolution of the 13th December of that same year.
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> Article I. A single arbitrator, appointed by mutual agreement, taking into consideration existing agreements, the principles of public and international law, and in view of the allegations, documents and evidence which each of the two governments may present to him, shall decide:
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> 1. Whether the demand of His Britannic Majesty's Government is well founded ;
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> 2. Or whether on the contrary the Government of Costa Rica is justified in not recognizing the said claims by maintaining the declaration of nullity contained in Law 41.
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> The arbitrator shall have the necessary jurisdiction to establish procedure and to dictate without any restriction whatsoever other resolutions which may arise as a consequence of the question formulated, and which, in conformity with his judgment, may be necessary or expedient to fulfil in a just and honorable manner the purposes of this convention; and he shall determine what one party may owe the other for the expenses of the claim. The arbitrator shall also decide with regard to the payment of the expenses of the arbitration.

A reservation in respect to the foregoing provision was made by the Congress of Costa Rica after the signing of the treaty, and this was accepted by Great Britain, as follows:

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Article 2. The approval given in the preceding article to the treaty is done with the understanding that nothing in the treaty would prevent that Costa Rica shall bring into play all means of defense enumerated in the Congressional resolution on the 13th of December, 1921, to which reference is made in the preamble of the treaty and that the arbitrator shall base his award in all or any of the said means of defense.

In January, 1917, the Government of Costa Rica, under President Alfredo Gonzalez, was overthrown by Frederico Tinoco, the Secretary of War. Gonzalez fled. Tinoco assumed power, called an election, and established a new constitution in June, 1917. His government continued until August, 1919, when Tinoco retired, and left the country. His government fell in September following. After a provisional government under one Barquero, the old constitution was restored and elections held under it. The restored government is a signatory to this treaty of arbitration.

On the 22nd of August, 1922, the Constitutional Congress of the restored Costa Rican Government passed a law known as Law of Nullities No. 41. It invalidated all contracts between the executive power and private persons, made with or without approval of the legislative power between January 27, 1917, and September 2, 1919, covering the period of the Tinoco government. It also nullified the legislative decree No. 12 of the Tinoco government, dated June 28, 1919, authorizing the issue of the fifteen million colones currency notes. The colon is a Costa Rican gold coin or standard nominally equal to forty-six and one-half cents of an American dollar, but it is uncoined and the exchange value of the paper colon actually in circulation is much less. The Nullities Law also invalidated the legislative decree of the Tinoco government of July 8, 1919, authorizing the circulation of notes of the nomination of 1,000 colones, and annulled all transactions with such colones bills between holders and the state, directly or indirectly, by means of negotiation or contract, if thereby the holders received value as if they were ordinary bills of current issue.

The claim of Great Britain is that the Royal Bank of Canada and the Central Costa Rica Petroleum Company are Britain corporations whose shares are owned by British subjects; that the Banco Internacional of Costa Rica and the Government of Costa Rica are both indebted to the Royal Bank in the sum of 998,000 colones, evidenced by 998 one thousand colones bills held by the Bank; that the Central Costa Rica Petroleum Company owns, by due assignment, a grant by the Tinoco government in 1918 of the right to explore for an exploit oil deposits in Costa Rica, and that both the indebtedness and the concession have been annulled without right by the Law of Nullities and should be excepted from its operation. She asks an award that she is entitled on behalf of her subjects to have the claim of the bank paid, and the concession recognized and given effect by the Costa Rican Government.

The Government of Costa Rica denies its liability for the acts or obligations of the Tinoco government and maintains that the Law of Nullities was a legitimate exercise of its legislative governing power. It further denies the validity of such claims on the merits, unaffected by the Law of Nullities.

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It is convenient to consider first the general objections to both claims of Great Britain, urged by Costa Rica, and then if such general objections cannot prevail, to consider the merits of each claim and Costa Rica's special defenses to it.

Coming now to the general issues applicable to both claims, Great Britain contends, first, that the Tinoco government was the only government of Costa Rica *de facto* and *de jure* for two years and nine months; that during that time there is no other government disputing its sovereignty, that it was in peaceful administration of the whole country, with the acquiescence of its people.

Second, that the succeeding government could not by legislative decree avoid responsibility for acts of that government affecting British subjects, or appropriate or confiscate rights and property by that government except in violation of international law; that the act of Nullities is as to British interests, therefore itself a nullity, and is to be disregarded, with the consequence that the contracts validly made with the Tinoco government must be performed by the present Costa Rican Government, and that the property which has been invaded or the rights nullified must be restored.

To these contentions the Costa Rican Government answers: First, that the Tinoco government was not a *de facto* or *de jure* government according to the rules of international law. This raises an issue of fact.

Second, that the contracts and obligations of the Tinoco government, set up by Great Britain on behalf of its subjects, are void, and do not create a legal obligation, because the government of Tinoco and its acts were in violation of the constitution of Costa Rica of 1871.

Third, that Great Britain is stopped by the fact that it did not recognize the Tinoco government during its incumbency, to claim on behalf of its subjects that Tinoco's was a government which could confer rights binding on its successor.

Fourth, that the subjects of Great Britain, whose claims are here in controversy, were either by contract or the law of Costa Rica bound to pursue their remedies before the courts of Costa Rica and not to seek diplomatic interference on the part of their home government.

Dr. John Bassett Moore, now a member of the Permanent Court of International Justice, in his *Digest of International Law,* Volume I, p. 249, announces the general principle which has had such universal acquiescence as to become well settled international law:

> Changes in the government or the internal policy of a state do not as a rule affect its position in international law. A monarchy may be transformed into a republic or a republic into a monarchy; absolute principles may be substituted for constitutional, or the reverse; but, though the government changes, the nation remains, with rights and obligations unimpaired. . . .
>
> The principle of the continuity of states has important results. The state is bound by engagements entered into by governments that have ceased to exist; the restored government is generally liable for the acts of the usurper. The governments of Louis XVIII and Louis Philippe so far as practicable indemnified the citizens of foreign states for losses caused by the government of Napoleon; and the King of the Two Cicilies made compensation to citizens of the United States for the wrongful acts of Murat.

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Again Dr. Moore says:

> The origin and organization of government are questions generally of internal discussion and decision. Foreign powers deal with the existing *de facto* government, when sufficiently established to give reasonable assurance of its permanence, and of the acquiescence of those who constitute the state in its ability to maintain itself, and discharge its internal duties, and its external obligations.

The same principle is announced in Professor Borchard's new work on *The Diplomatic Protection of Citizens Abroad:*

> Considering the characteristics and attributes of the *de facto* government, a general government *de facto* having completely taken the place of the regularly constituted authorities in the state binds the nation. So far as its international obligations are concerned, it represents the state. It succeeds to the debts of the regular government it has displaced and transmits its own obligations to succeeding titular governments. Its loans and contracts bind the state and the state is responsible for the governmental acts of the *de facto* authorities. In general its treaties are valid obligations of the state. It may alienate the national territory and the judgments of its courts are admitted to be effective after its authority has ceased. An exception to these rules has occasionally been noted in the practice of some of the states of Latin America, which declare null and void the acts of a usurping *de facto* intermediary government, when the regular government it has displaced succeeds in restoring its control. Nevertheless, acts validly undertaken in the name of the state and having an international character cannot lightly be repudiated and foreign governments generally insist on their binding force. The legality or constitutional legitimacy of a *de facto* government is without importance internationally so far as the matter of representing the state is concerned. (Bluntschli, Sects. 44, 45, 120; Holtzendorff, II, Sect. 21; Pradier-Fodéré, Sect. 134, 139; Rivier, II, 131, 440; Rougier, 481; *France* v. *Chile*, Franco Chilean Arbitration, Lausanne, p. 220.)

The same views are expressed by Chancellor Kent (1 Comm. 14th ed., p. 25), by Mr. Wheaton (Wheaton's *International Law*, Philippson's 5th Eng. ed., p. 37), and by Mr. Hall (*International Law*, 6th ed., J. B. Attay, 1909, pp. 20, 21), and by Dr. Woolsey in his *Introduction to the Study of International Law* (ed. 1873, pp. 32, 52, 53, 171, 172).

First, what are the facts to be gathered from the documents and evidence submitted by the two parties as to the *de facto* character of the Tinoco government?

In January, 1917, Frederico A. Tinoco was Secretary of War under Alfredo Gonzalez, the then President of Costa Rica. On the ground that Gonzalez was seeking reelection as President in violation of a constitutional limitation, Tinoco used the army and navy to seize the government, assume the provisional headship of the Republic and become Commander-in-Chief of the army. Gonzalez took refuge in the American Legation, thence escaping to the United States. Tinoco constituted a provisional government at once and summoned the people to an election for deputies to a constituent assembly on the first of May, 1917. At the same time he directed an election to take place for the Presidency and himself became

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a candidate. An election was held. Some 61,000 votes were cast for Tinoco and 259 for another candidate. Tinoco then was inaugurated as the President to administer his powers under the former constitution until the creation of a new one. A new constitution was adopted June 8, 1917, supplanting the constitution of 1871. For a full two years Tinoco and the legislative assembly under him peaceably administered the affairs of the Government of Costa Rica, and there was no disorder of a revolutionary character during that interval. No other government of any kind asserted power in the country. The courts sat, Congress legislated, and the government was duly administered. Its power was fully established and peaceably exercised. The people seemed to have accepted Tinoco's government with great good will when it came in, and to have welcomed the change. Even the committee of the existing government, which formulated and published a report on May 29, 1920, directing the indictment of President Tinoco for the crime of military revolution and declaring the acts of his regime as null and void and without legal value, used this language:

> Without having a constitution to establish the office of President and determine his functions, and even to indicate the period for which he was to be elected, the election was held by the sole will of the person who was violently exercising the executive power. And as was natural, the election fell to the same Mr. Tinoco, and, sad to relate, the country applauded! The act, therefore, of decreeing that said election should be held under such conditions is contrary to the most rudimentary principles of political law.

The quotation is only important to show the fact of the then acquiescence of the people in the result. Though Tinoco came in with popular approval, the result of his two years administration of the law was to rouse opposition to him. Conspiracies outside of the country were projected to organize a force to attack him. But this did not result in any substantial conflict or even a nominal provisional government on the soil until considerably more than two years after the inauguration of his government, and did not result in the establishment of any other real government until September of that year, he having renounced his Presidency in August preceding, on the score of his ill health, and withdrawn to Europe. The truth is that throughout the record as made by the case and counter case, there is no substantial evidence that Tinoco was not in actual and peaceable administration without resistance or conflict or contest by anyone until a few months before the time when he retired and resigned.

Speaking of the resumption of the present government, this passage occurs in the argument on behalf of Costa Rica:

> Powerful forces in Costa Rica were opposed to Tinoco from the outset, but his overthrow by ballot or unarmed opposition was impossible and it was equally impossible to organize armed opposition against him in Costa Rican territory.

It is true that action of the supporters of those seeking to restore the former government was somewhat delayed by the influence of the United States with Gonzalez and his friends against armed action, on the ground that military disturbances in Central America during the World War would be prejudicial to the interests of the Allied Powers. It is not important, however, what were the causes that enabled Tinoco to carry

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on his government effectively and peaceably. The question is, must his government be considered a link in the continuity of the Government of Costa Rica? I must hold that from the evidence that the Tinoco government was an actual sovereign government.

But it is urged that many leading Powers refused to recognize the Tinoco government, and that recognition by other nations is the chief and best evidence of the birth, existence and continuity of succession of a government. Undoubtedly recognition by other Powers is an important evidential factor in establishing proof of the existence of a government in the society of nations. What are the facts as to this? The Tinoco government was recognized by Bolivia on May 17, 1917; by Argentina on May 22, 1917; by Chile on May 22, 1917; by Haiti on May 22, 1917; by Guatemala on May 28, 1917; by Switzerland on June 1, 1917; by Germany on June 10, 1917; by Denmark on June 18, 1917; by Spain on June 18, 1917; by Mexico on July 1, 1917; by Holland on July 11, 1917; by the Vatican on June 9, 1917; by Colombia on August 9, 1917; by Austria on August 10, 1917; by Portugal on August 14, 1917; by El Salvador on September 12, 1917; by Roumania on November 15, 1917; by Brazil on November 28, 1917; by Peru on December 15, 1917; and by Ecuador on April 23, 1917.

What were the circumstances as to the other nations?

The United States, on February 9, 1917, two weeks after Tinoco had assumed power, took this action:

> The Government of the United States has viewed the recent overthrow of the established government in Costa Rica with the gravest concern and considers that illegal acts of this character tend to disturb the peace of Central America and to disrupt the unity of the American continent. In view of its policy in regard to the assumption of power through illegal methods, clearly enunciated by it on several occasions during the past four years, the Government of the United States desires to set forth in an emphatic and distinct manner its present position in regard to the actual situation in Costa Rica which is that it will not give recognition or support to any government which may be established unless it is clearly proven that it is elected by legal and constitutional means.

And again on February 24, 1917:

> In order that citizens of the United States may have definite information as to the position of this Government in regard to any financial aid which they may give to, or any business transaction which they may have with those persons who overthrew the constitutional Government of Costa Rica by an act of armed rebellion, the Government of the United States desires to advise them that it will not consider any claims which may in the future arise from such dealings, worthy of its diplomatic support.

The Department of State issued the following in April, 1918:

> The Department of State has received reports to the effect that those citizens of Costa Rica now exercising the functions of government in the Republic of Costa Rica have been led to believe by those persons who are acting as their agents, that the Government of the United States was considering granting recognition to them as constituting the Government of Costa Rica.

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> In order to correct any such impression which is absolutely erroneous, the Government of the United States desires to state clearly and emphatically that it has not altered the attitude which it has assumed in regard to the granting of recognition to the above mentioned citizens of Costa Rica and which was conveyed to them in February, 1917, and further that this attitude will not be altered in the future.

Probably because of the leadership of the United States in respect to a matter of this kind, her then Allies in the war, Great Britain, France and Italy, declined to recognize the Tinoco government. Costa Rica was, therefore, not permitted to sign the Treaty of Peace at Versailles, although the Tinoco government had declared war against Germany.

The merits of the policy of the United States in this non-recognition it is not for the arbitrator to discuss, for the reason that in his consideration of this case, he is necessarily controlled by principles of international law, and however justified as a national policy non-recognition on such a ground may be, it certainly has not been acquiesced in by all the nations of the world, which is a condition precedent to considering it as a postulate of international law.

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.

Second. It is ably and earnestly argued on behalf of Costa Rica that the Tinoco government cannot be considered a *de facto* government, because it was not established and maintained in accord with the constitution of Costa Rica of 1871. To hold that a government which establishes itself and maintains a peaceful administration, with the acquiescence of the people for a substantial period of time, does not become a *de facto* government unless it conforms to a previous constitution would be to hold that within the rules of international law a revolution contrary to the fundamental law of the existing government cannot establish a new government. This cannot be, and is not, true. The change by revolution upsets the rule of the authorities in power under the then existing fundamental law, and sets aside the fundamental law in so far as the change of rule makes it necessary. To speak of a revolution creating a *de facto* government, which conforms to the limitations of the old constitution is to use a contradiction in terms. The same government continues internationally, but not the internal law of its being. The issue is not whether the new government assumes power or conducts its administration under constitutional limitations established by the people during

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the incumbency of the government it has overthrown. The question is, has it really established itself in such a way that all within its influence recognize its control, and that there is no opposing force assuming to be a government in its place? Is it discharging its functions as a government usually does, respected within its own jurisdiction?

Reference is further made, on behalf of Costa Rica, to the Treaty of Washington, December 20, 1907, entered into by the Republics of Central America, in which it was agreed that

> The governments of the contracting parties will not recognize any one who rises to power in any of the five republics in consequence of a coup d'état or by a revolution against a recognized government until the representatives of the people by free elections have reorganized the country in constitutional form.

Such a treaty could not affect the rights of subjects of a government not a signatory thereto, or amend or change the rules of international law in the matter of *de facto* governments. Their action under the treaty could not be of more weight in determining the existence of a *de facto* government under Tinoco than the policy of the United States, already considered. Moreover, it should be noted that all the signatories to the treaty but Nicaragua manifested their conviction that the treaty requirement had been met in the case of the Tinoco government, by recognizing it after the adoption of the constitution of 1917 and the election of Tinoco.

Third. It is further objected by Costa Rica that Great Britain by her failure to recognize the Tinoco government is estopped now to urge claims of her subjects dependent upon the acts and contracts of the Tinoco government. The evidential weight of such non-recognition against the claim of its *de facto* character I have already considered and admitted. The contention here goes further and precludes a government which did not recognize a *de facto* government from appearing in an international tribunal in behalf of its nationals to claim any rights based on the acts of such government.

To sustain this view a great number of decisions in English and American courts are cited to the point that a municipal court cannot, in litigation before it, recognize or assume the *de facto* character of a foreign government which the executive department of foreign affairs of the government of which the court is a branch has not recognized. This is clearly true. It is for the executive to decide questions of foreign policy and not courts. It would be most unseemly to have a conflict of opinion in respect to foreign relations of a nation between its department charged with the conduct of its foreign affairs and its judicial branch. But such cases have no bearing on the point before us. Here the executive of Great Britain takes the position that the Tinoco government which it did not recognize, was nevertheless a *de facto* government that could create rights in British subjects which it now seeks to protect. Of course, as already emphasized, its failure to recognize the *de facto* government can be used against it as evidence to disprove the character it now attributes to that government, but this does not bar it from changing its position. Should a case arise in one of its own courts after it has changed its position, doubtless that court would feel it incumbent upon it to note the change in its further rulings.

Precedents in American arbitrations are cited to show that an estoppel like the one urged does arise. They are Schultz's case (Moore, *Inter-*

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national Arbitrations, Vol. 3, 2973), Janson's case (ibidem, 2902), and Jarvis's case (Ralston, *Venezuela Arbitrations*, 150). In the opinions of these cases delivered by American commissioners, there are expressions sustaining the view that the bar of an estoppel exists, but an examination shows that no authorities are cited and no arguments are made in support of the view. Moreover, the array of facts in the cases was conclusive against the existence of a *de facto* government, and the expressions were unnecessary to the conclusion. In Schultz's case the claim of an American citizen was against the Juarez government for loss of goods by fire between the lines of battle waged by Miramon's forces against Juarez's government. The claim against Juarez's government was plainly not sustainable, first because it occurred in the train of war and, second, because the Miramon forces never had in fact constituted a *de facto* government. The Janson case before the same tribunal was for the value of an American bark seized by Miramon's soldiers to escape out of the country from the victorious army of Juarez. The commissioner devotes many pages to a résumé of evidence to show that neither Miramon nor Maximilian, with whom he acted, had ever had a *de facto* government; that Juarez was always in control of the greater part of Mexico and always resisting. The truth is that the language of the decisions should be more properly construed to emphasize the great and overwhelming weight to be given to the recognition of Juarez by the United States and its non-recognition of Miramon as evidence against the *de facto* character of the government of the latter, than to uphold the theory of a bar by estoppel.

In Jarvis's case the facts were that Paez, a Venezuelan citizen, was an insurgent against the existing government of Venezuela in 1849, and enlisted in his conspiracy Jarvis, the American claimant, who furnished him a ship and arms and ammunition. This was a crime against the United States on Jarvis's part, because the United States was on terms of amity with Venezuela. The expedition failed. In 1861, thirteen years later, however, when Paez was in Venezuela, a sudden outbreak placed him in power. In 1863, just as he was about to retire with the collapse of his government, he issued bonds to Jarvis to repay him for his outlay in the unsuccessful insurrection of 1849, twelve years before. The commissioner held that there was no lawful consideration for the bonds. Certainly this was a righteous conclusion. It was a personal obligation of Paez, if it was an obligation at all. It was not a debt of Venezuela. It was invalid and unlawful because of its vicious origin, both by the laws of the United States and the laws of Venezuela. The commissioner also by way of additional but unnecessary support to his conclusion said the United States was estopped to urge the claim.

These are, so far as I am advised, the only authorities to be found either in decided cases or in text writers applying the principles of estoppel to bar a nation seeking to protect its nationals in their rights against the successor of a *de facto* government.

I do not understand the arguments on which an equitable estoppel in such case can rest. The failure to recognize the *de facto* government did not lead the succeeding government to change its position in any way upon the faith of it. Non-recognition may have aided the succeeding government to come into power; but subsequent presentation of claims based on the *de facto* existence of the previous government and its dealings does not work an injury to the succeeding government in the nature of a fraud or breach of faith. An equitable estoppel to prove the truth must rest on

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previous conduct of the person to be estopped, which has led the person claiming the estoppel into a position in which the truth will injure him. There is no such case here.

There are other estoppels recognized in municipal law than those which rest on equitable considerations. They are based on public policy. It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, that a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations in such a rule. Without this, it cannot be applied here as a principle of international law.

It is urged that the subjects of Great Britain knew of the policy of their home government in refusing to recognize the Tinoco régime and cannot now rely on protection by Great Britain. This is a question solely between the home government and its subjects. That government may take the course which the United States has done and refuse to use any diplomatic offices to promote such claims and thus to leave its nationals to depend upon the sense of justice of the existing Costa Rican Government, as they were warned in advance would be its policy, or it may change its conclusion as to the *de facto* existence of the Tinoco government and offer its subjects the protection of its diplomatic intervention. It is entirely a question between the claimants and their own government. It should be noted that Great Britain issued no such warning to its subjects as did the United States to its citizens in this matter.

The fourth point made on behalf of Costa Rica against the claims here pressed is that both claimants are bound either by their own contractual obligation entered into with the Government of Costa Rica, or by the laws of Costa Rica, to which they subscribed, not to present their claims by way of diplomatic intervention of their home government, but to submit their claims to the courts of Costa Rica. This is in effect a plea in abatement to the jurisdiction of the arbitrator, which, under the terms of the arbitration, Costa Rica has the right to advance.

So far as the Amory concession, and the claim of the Petroleum Company is concerned, the plea turns on two provisions of the concession. One is on Article XIX, as follows:

> The present contract shall elapse, and the government may so declare by an Executive Order, in the following cases only:
>
> 6. If the contractor has recourse to diplomatic action in connection with any dispute or litigation as to the rights and privileges granted by this contract, but the forfeiture of this concession shall not be pronounced by the government without having given to the concessionaire the opportunity to defend himself nor without having submitted the point to arbitration.

Article XXI:

> Any dispute arising between the parties in respect to the interpretation or execution of this contract which cannot be compromised, shall be submitted to arbitration and decided according to the laws of

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Costa Rica. If the parties fail to agree on one arbitrator, each shall appoint one, and the two arbitrators in case of disagreement shall choose a third as umpire.

These two limitations do not seem to include within their scope such a question as the power of the Tinoco government to grant the concession, or the obligation of the present government of Costa Rica to recognize it. They cover the interpretation and construction of the contract rather than the fundamental question of its existence.

With respect to the Royal Bank, the facts are somewhat different. The bank obtained the right to establish a branch or agency in Costa Rica under the following order:

DEPARTMENT OF TREASURY AND COMMERCE.
No. 437.

SAN JOSE, *August* 7, 1915.

Whereas it is recorded in the documents previously inserted that the Royal Bank of Canada, a society domiciled in Montreal, Province of Quebec, in the Dominion of Canada, is organized in accordance with the laws of that country; that said society has resolved to establish a branch or agency in Costa Rica, and that it has appointed in that country a representative clothed with sufficient power to manage the affairs of the branch or agency.

The President of the Republic

Resolves:

That it is in order to enter in the Mercantile Register the constitutive deed of the Royal Bank of Canada, as well as the additional one relating to the branch in this country, under the understanding that, in accordance with the provisions contained in Articles 11 and 12 of the Banking Law, the branch or agency shall not invoke its status as a foreign corporation, with respect to matters or operations of the bank, which in all cases be decided by the law courts of Costa Rica, and in entire subjection to the laws of that Republic.

Let it be published.

GONZALEZ.

Assistant Secretary of State in Charge of the Treasury and Commerce.

JORGE GUARDIA.

Articles 11 and 12 referred to in this banking law are as follows:

Article 11. Companies organized abroad for the establishment of banks of any kind within the Republic shall subject themselves for effective organization to the provisions of this law and the banks, as well as their shareholders, shall be impressed with the character of Costa Rica citizenship to the extent of being denied the power to invoke the laws of any foreign country in matters relating to the affairs or operations of such banks; such matters must be decided by the tribunals of Costa Rica and in entire conformity with the laws of the Republic.

Article 12. Banks established in the country as branches of foreign banks shall be equally subject to the provisions of the preceding article.

It is doubtful whether these restrictions upon the bank by their terms go so far as to forbid its appeal for diplomatic intervention in protection of its rights. They show clearly that the powers conferred by the government

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of its origin cannot enlarge its banking powers in Costa Rica and that its rights are to be decided by Costa Rican courts and according to Costa Rican law. But to carry this to a denial of the right to a diplomatic intervention by its own government to avoid legislative nullification of its rights without a hearing would be going far.

It has been held in a number of important arbitrations, and by several foreign secretaries, that such restrictions are not binding upon a home government and will not prevent it from exercising its diplomatic functions to protect its nationals against the annulment of the rights secured to them by the laws of the country in force when the obligations arose. Wharton's *Digest*, II, p. 612, Sect. 230; Moore's *Digest*, III, 307; Ralston's *Report*, I, p. 819; *Am. Foreign Relations*, 1887, p. 99; *American Foreign Relations*, 1902, pp. 870, 871; Moore, *Intern. Arbitrations*, 1644; Ralston, *Intern. Arbitral Law*, p. 48; Borchard, *Diplomatic Protection of Citizens Abroad*, 293.

However this may be, these restrictions upon each claimant would seem to be inapplicable to a case like the present where is involved the obligation of a restored government for the acts or contracts of a usurping government. The courts of the restored government are bound to administer the law of the restored government under its constitution and their decisions are necessarily affected by the limitations of that instrument. This may prevent the courts from giving full effect to international law that may be at variance with the municipal law which under the restored constitution the national courts have to administer. It is obvious that the obligations of a restored government for the acts of the usurping *de facto* government it succeeds cannot, from the international standpoint, be prejudiced by a constitution which, though restored to life, is for purposes of this discussion, exactly as if it were new legislation which was not in force when the obligations arose.

Nor is it an answer to this, to suggest that in the case here under consideration, the restored constitution may be construed not to prevent the Costa Rican courts from giving effect to the principles of international law, already stated. It is enough that the restored constitution is the controlling factor in the exercise of any jurisdiction to be exercised by those courts, and that other nations may object to a tribunal which must give consideration to legislation enacted after the fact, in reaching its decision.

This is not an exceptional instance of an essential difference between the scope and effect of a decision by the highest tribunal of a country and of an international tribunal. The Constitution of the United States makes the Constitution, laws passed in pursuance thereof, and treaties of the United States the supreme law of the land. Under that provision, a treaty may repeal a statute, and a statute may repeal a treaty. The Supreme Court cannot under the Constitution recognize and enforce rights accruing to aliens under a treaty which Congress has repealed by statute. In an international tribunal, however, the unilateral repeal of a treaty by a statute would not affect the rights arising under it and its judgment would necessarily give effect to the treaty and hold the statute repealing it of no effect.

Another and conclusive answer to this plea in abatement to the jurisdiction here is found in the fact that the provisional government of Barquero, succeeding that of Tinoco, which subsequently and peaceably and in due course merged into the existing government, took away the power of the then courts of Costa Rica to hear the suit of the Royal Bank already instituted, or to entertain any suit involving rights against the government, decreed a moratorium for a year of the claims of this character, and forbade the issue of any mesne or final execution upon the property of the Banco

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Internacional or of the state in satisfaction of such claims. It is true that all these acts of the provisional government were repudiated by a legislative decree of the present government in August of 1920, some ten months after its accession. This was at a time when the Law of Nullities had already passed Congress and was only delayed by the veto of the President. In a few days it was made into law by its passage over his veto. The Law of Nullities was a legislative decree without any hearing declaring invalid the rights which the bank claimed to have against the Banco Internacional and against the government. It was merely a continuation of the legislative policy begun in different form by the provisional government for defeating these claims.

It is true that the bank might then have continued its litigation and have contested the validity of the Law of Nullities before the courts of Costa Rica, but it would have had to do so before a court that was elected by the same Congress which passed the Law of Nullities, the previous court having been reorganized by the Congress. Without in any way implying a criticism of the new court, or a doubt as to its spirit of judicial inquiry, I think the previous course of the provisional government, the enactment of the Law of Nullities, and the constitutional limitation upon the scope of the decision of Costa Rican courts, already referred to, so changed the situation with respect to the rights of the bank when it began its suit that the restored government must be held to have waived the enforcement of any limitation upon the right of the bank to invoke the protection of its home government under the circumstances.

The same views must apply in favor of the concessionaire under the Amory concession if the restrictions of its concession are to be construed as limiting the power of the concessionaire to invoke diplomatic intervention without a resort to the courts.

A consideration of the issues before us, therefore, recurs to the merits of the two claims. The decision of them must be governed by the answer to the question whether the claims would have been good against the Tinoco government as a government, unaffected by the Law of Nullities, and unaffected by the Costa Rican Constitution of 1871.

It is suggested on behalf of Great Britain that the scope of the arbitration does not involve an examination by the arbitrator into the merits of the claims after the general principles applying to the Law of Nullities and its validity shall have been decided. I cannot yield to this suggestion. The recitals of the treaty show that the demand and claims of Great Britain and of Costa Rica in this arbitration are to be determined from the "notes which His Britannic Majesty's Minister addressed to the Costa Rican Ministry for Foreign Affairs on July 13 and November 8, 1921, and in antecedent correspondence, and on the part of the Costa Rican Government, in their notes in reply relative to the present diplomatic controversy, and especially in the Congressional resolution of the 13th of December of that same year". An examination of these references leaves no doubt that not only was the validity of the Law of Nullities in defeating the claim of the bank and the Amory concession involved, but also the merits of the claim of the bank and of the concession, assuming the Law of Nullities to be itself a nullity.

Coming now to the merits of the Royal Bank claim, the facts, so far as I can gather them from the exhibits and evidence produced by both parties, are:

The Banco Internacional de Costa Rica was established as a bank to be conducted by private persons under the immediate supervision of the execu-

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tive power, and on October 14, 1914, was given authority to issue notes to the amount of four million colones, in accordance with the banking law of Costa Rica and the amendments thereto. The issue was to be secured by Treasury bonds. This law continued in force under the Tinoco régime. On June 29, 1919, the Chamber of Deputies by law provided that the Banco Internacional should be authorized to make a new issue of notes of 15,000,000 colones. The notes were to be given the same legal tender quality as attached to the bills then in circulation under the law of 1914. Of the sum thus to be issued, ten million colones were to be applied to the interests of the government for its public administration. The remaining amount was to be distributed, 2,500,000 colones to increase the emergency fund and the borrowing capacity of the Banco Internacional de Costa Rica for private loans, 1,500,000 colones to be devoted to rural loans to future farmers, veterans of the army, and 1,000,000 colones to be invested in construction and repair of national roads. All revenues from postal, telegraph and stamped paper sources were pledged to the state to secure this issue. After June, 1920, the principal administration of state revenues was to pay to the bank the total amount derived from the revenues, and the bank was then to devote this amount, taking up and withdrawing from circulation all bills authorized by the present law and to destroy them. Article VI provided that the Government should, after the proclamation of the law, make a deposit in American gold or drafts of the United States in the Banco Internacional, to be operated in the form of a revolving credit, to be used exclusively by the bank to sell bills of exchange to merchants and private persons at a fixed maximum rate of exchange. The executive power was authorized to make rules and regulations necessary for the proper enforcement of the law. On July 10, 1919, the law just described was amended by providing that the bills to be issued should bear a clear statement of their value by means of letters and numbers, together with a statement of the obligation of the bank to pay them at sight to bearer in national gold money, and they were to be issued in the denominations which included a denomination of 1,000 colones. By an order of the President, and because of the absence of the usual forms of colones bills, it was directed on July 10, 1919, that there might be a provisional issue to the value of 2,500,000 colones of "*Bonos sobre especies fiscales*" of the value of 1,000 colones each. These had been bonds prepared for issue but which had not been placed in circulation, and it was directed that they should be known and treated as bills of the Banco Internacional de Costa Rica, and should bear on their left margin the impression of the seal of the Ministry of the Treasury.

On the 16th of July, there was deposited in the Royal Bank of Canada, to the credit of the Costa Rican Government, a check drawn by Jimenez, Minister of the Treasury, against the Banco Internacional de Costa Rica for 1,000,000 colones. On the stub of the check was a memorandum that it was payable in provisional bills of 1,000 colones. The face of the check contained the words "Supreme Government Law No. 12 of June 28, 1919". The check was presented to the Banco Internacional, which accordingly delivered in payment thereof, to the Royal Bank, one thousand 1,000 colones bills of the form above given.

Thereafter the Minister of Finance, after a conversation with the manager of the Royal Bank, in which he explained that the circulation of such irregularly prepared bills might produce confusion, wrote under date of July 17, 1919, as follows:

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Dear Sir:

With reference to the deposit made yesterday at your bank for one million (1,000,000) colones in notes of one thousand (1,000) colones each, which you agreed to withhold from circulation, I hereby confirm our verbal agreement, as follows:

That this Ministry will pay interest at the rate of 10 per cent. per annum on the amount of the deposit that is utilized and that before September 15 next, the notes of this deposit will be replaced by current issues.

Yours truly,

FRANKLIN JIMENEZ,
Minister of Finance.

It is alleged on behalf of Great Britain that the Government of Costa Rica then drew against this account for governmental purposes, and that the bank honored the checks, some twenty in number, which exhausted the deposit. Subsequently the Royal Bank succeeded in circulating two of the 1,000 colones notes, receiving their face value, and reducing the amount of notes held by it to 998,000 colones.

Upon these facts rests the claim that the Costa Rican Government and the Banco Internacional must recognize the validity of the thousand colones bank notes still held by the Royal Bank, and make them good, or pay to it the money which it expended in honoring the checks drawn against the million colones deposit for governmental purposes.

The account, showing the ultimate application of the deposit, as presented by Great Britain, from the books of the Royal Bank, is as follows:

1919			Debit	Credit
July	16.	To International Bank	C 1,000,000.00	
July	17.	For the Royal Bank of Canada Revolving Credit		C 900,000.00
	17.	To Royal Bank of Canada Revolving Credit	450,000.00	
	17.	For Public Debt Service		5,000.00
	26.	For Foreign Relations Dept.		45,000.00
Aug.	2.	For War and Police M. Dept.		1,500.00
	2.	For Royal Bank of Canada Revolving Credit		225,000.00
	4.	For Bank of Costa Rica Cur. Act.		135,000.00
	4.	For Bank of Costa Rica Cur. Act.		202.95
	4.	To purchase of drafts	51,750.00	
	4.	For War and Police M. Dept.		40,000.00
	5.	For Bank of Costa Rica Cur. Act.		116,355.17
	6.	For Bank of Costa Rica Cur. Act.		7,177.50
	7.	To French Loan Service	26,000.00	
	8.	For Bank of Costa Rica Cur. Act.		56,000.00
	8.	To Purchase of Drafts	35,200.00	
	9.	For Bank of Costa Rica Cur. Act.		18,898.70
	13.	For Bank of Costa Rica Cur. Act.		1,500.00
Dec.	27.	Balance		155.68
			C 1,562,950.00	C 1,562,950.00

In its effort to secure evidence explaining or impeaching this account, Costa Rica filed a demand before a local court in Costa Rica for the production of evidence, including the following:

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> 1. The accounts in American gold and in colones which do now exist or which may have existed in the past in the name of the government of this republic or of the Minister or of the Secretary of the Treasury, and that the entries made both in the ledger and the journal be duly certified. 2. All the accounts which may have any connection with those indicated in the immediately preceding number, and that such entries made both in the ledger and the journal as may be connected with those which are mentioned in No. 1 above, be duly certified.

The agent of the Royal Bank denied the jurisdiction of the court to require their production, but used the following language:

> Whether obliged or not to do it the Royal Bank of Canada is ready and willing to produce, as soon as it is ordered to do so, all its accounts and any other documents within its powers which the high arbitrator may need, and it is to be observed that the bank has already sent to its New York office, for the purpose of being presented, in case of need, a part of the documents which have been asked for.

The Costa Rican Government in its counter case says that it "is unwilling to agree to the *ex parte* production of these accounts before the arbitrator, after it is too late for a full discussion of them by the Government of Costa Rica, and also without an opportunity of ascertaining that what is produced is really a full and reliable disclosure of all the transactions, especially in view of their admission, above quoted, that the documents in New York are only 'a part of the documents which have been asked for' ".

In its counter case the Government of Costa Rica does present additional accounts between the Royal Bank of Canada and the government, taken from the books of the government entered during the Tinoco régime. This certified account includes not only the account of the Royal Bank of Canada with the government, already introduced, on behalf of the Royal Bank, which is said to appear on the ledger—folio 669 and 691, but also an account on folio 678 and 690, which is as follows:

THE ROYAL BANK OF CANADA REVOLVING CREDIT CURRENT ACCOUNT GOLD.

1919			Debit	Credit
July	5.	To Sundries	$64,447.95	
	7.	For War and Police M. Dept.		$60,000.00
	17.	To Sundries	200,000.00	
	17.	For Sundries		100,000.00
Aug.	2.	To Sundries	50,000.00	
	2.	To International Bank	50,000.00	
	2.	For Foreign Relations Dept.		200,000.00
	9.	For Regular Export Duties Sundries		200.00
	11.	For Treasury Dept.		4,247.95
			$364,447.95	$364.447.95

Then follow journal entries relating to the two foregoing accounts:

Journal entry of July 16th, in explanation of the million dollar colones deposit was as follows:

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Entry No. 1538 F — July 16, 1919.

	Debit	Credit
The Royal Bank of Canada Special Account	C 1,000,000.00	
To International Bank		C 1,000,000.00
Account of check No. A 109755 drawn on the same to the order of the Royal Bank of Canada payable in provisional bills of C 1,000, which shall be exchanged for current bills before the 15th of September next as per agreement with the Minister of the Treasury. Interest at 10 per cent. per annum shall be paid to it on the sums which the Minister of the Treasury shall use from the said deposit.		

Following that is a journal entry No. 1546 F, as follows:

July 17, 1919.

		Debit	Credit
The Royal Bank of Canada Revolving Credit Account Equivalent in colones at 500 per cent. exchange of $200,000.00 deposited today in said Bank for the purposes of Article G of Law No. 12 of the 28th of June ultimo.	C	1,000,000.00	
To The Royal Bank of Canada Amount of the following, checks drawn yesterday from said Bank and from John M. Keith's the $200,000.00 deposited to the order of the Ministry of the Treasury, upon the reimbursement of the equivalent in colones at 450 per cent. exchange, as per contract with Enrique R. Clare of the 26th of June ultimo.			C 900,000.00
No. 79501 to the order of the Royal Bank of Canada	C	742,500.00	
No. 79502 to the order of John M. Keith		157,500.00	
To Pending Accounts			100,000.00
Enrique Clare Sum paid to Clare on the 26th of June ultimo, as per the contract above referred to, by check No. A, 109,248 on the International Bank.			

Another journal entry No. 1717 F is as follows:

Entry No. 1717 F — August 2, 1919.

		Debit	Credit
Foreign Relations Dept. Emergency Equivalent in colones at 423 per cent. exchange of $100,000.00 to the order of the Minister of Foreign Relations and $100,000.00 to the order of Jose Joaquin Tinoco, the former for expenses of representation of the Chief of the State in his approaching trip abroad, and the latter, value of four annuities of salaries and office expenses of the Legation of Costa Rica in Italy which has been put in charge of Mr. Tinoco.	C	846,000.00	

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To the Royal Bank of Canada Current Account in Gold Equivalent at 215 per cent. exchange of $200,000; amount of the following checks drawn upon the same: No. 304 to the order of Jose Joaquin Tinoco $100,000.00 No. 305 to the order of the Minister of Foreign Relations 100,000.00	C 430,000.00
To Difference in Exchange Difference between 423 per cent. and 215 per cent. exchange.	416,000.00

In addition to this, there is in evidence a letter written by the Manager of the Royal Bank of Canada, under date of July 27, 1921, which further explains the payment of the checks Nos. 304 and 305. It is as follows:

Sir: Referring to your communication dated the 25th instant, I have the pleasure to inform you that cheques numbers 304 and 305 drawn by the Ministry of the Treasury on the 2nd of August, 1919, for $100,000 each, and against the account of the Government in this Bank, were paid with bills of exchange on the solicitation and to the satisfaction of the bearer of each one of said cheques as follows:

Cheque No. 304 drawn by the Minister of the Treasury (Franklin Jimenez), in favor of Jose Joaquin Tinoco, and dated August 2, 1919, endorsed by Jose Joaquin Tinoco. The cheque was exchanged for $100,000 in Bill of Exchange on New York; this transaction was effected by Jaime Esquivel as follows:

No.	Date	Against	In favor of	Amount	Paid
5783	Aug. 2, 1919	Royal Bank of Canada, New York	Jaime Esquivel	$10,000	Sept. 27, 1919
5784	,,	,,	,,	10,000	,,
5785	,,	,,	,,	10,000	,,
5786	,,	,,	,,	10,000	,,
5787	,,	,,	,,	10,000	,,
5788	,,	,,	,,	10,000	,,
5789	,,	,,	,,	10,000	,,
5790	,,	,,	,,	10,000	,,
5791	,,	,,	,,	10,000	,,
5792	,,	,,	,,	10,000	,,

Cheque No. 305 drawn by the Minister of the Treasury (Franklin Jimenez), in favor of the Minister of Foreign Relations, dated August 2, 1919, endorsed by the Minister of Foreign Relations (Guillermo Vargas). This cheque was exchanged for $100,000 in Bills of Exchange on New York and which transaction was effected by Jaime Esquivel as follows:

No.	Date	Against	In favor of	Amount	Paid
5788	Aug. 2, 1919	Royal Bank of Canada New York	Frederico Tinoco	$20,000	Aug. 26, 1919
5781	,,	,,	,,	20,000	Aug. 22, 1919
5782	,,	,,	,,	20,000	Aug. 26, 1919
325131	,,	Chase National Bank of New York	,,	5,000	Sept. 26, 1919
325132	,,	,,	,,	5,000	Sept. 26, 1919
325133	,,	,,	,,	5,000	Aug. 26, 1919
325134	,,	,,	,,	5,000	Aug. 26, 1919
325135	,,	,,	,,	5,000	Sept. 26, 1919
325136	,,	,,	,,	5,000	Sept. 26, 1919
325137	,,	,,	,,	5,000	Aug. 26, 1919
325138	,,	,,	,,	5,000	Aug. 26, 1919

I am, dear Sir, Very faithfully yours,

The Royal Bank of Canada,
T. J. REARDON, *Manager*.

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These accounts taken from the Treasury Department were furnished by Costa Rica to the other side before this arbitration began, so that the Royal Bank has been long advised of their existence and contents. The failure of the bank to produce any further statements of accounts from its own books in explanation of the accounts thus appearing on the government books not only makes these government accounts competent evidence, but also justifies inferences therefrom in the absence of explanation which the coincidence of dates and the circumstances shown by other evidence make inevitable.

It is evident from the exhibits that in the spring of 1919 the popularity of the Tinoco régime had disappeared, and that the political and military movement to end that régime was gaining strength. Supporters of the former government invaded the northern part of Costa Rica and the Tinoco government found it necessary to suspend the guarantees of personal liberty and establish martial law, beginning early in 1919, for periods of thirty days continuously renewed until its fall in September. The sinking credit of the Tinoco government and the expenses of the maintenance of the army raised in its defense, had produced a stress in its finances which led to the legislation authorizing the issue of the fifteen millions of colones. The emergency was illustrated in the use of the very irregular form of the notes of issue by the Banco Internacional de Costa Rica authorized by the legislation of June and July of 1919, and by a sale of the deposit of silver coin held in reserve by the Bank of Costa Rica, which acted as the national treasury. It became perfectly clear from the mob violence and disturbances in June and the evidences of the unpopularity of the Tinoco régime, that it was in a critical condition, and an agent of the Royal Bank testifies that the retirement of the Tinocos "was known as a positive thing about to take place when the silver transaction was carried out on the 5th of July, when the account in American gold for the value of the coined silver was opened on the 5th of July, and when the million dollar colones deposit was made on the 16th of July". In the light of these circumstances, it is not difficult to infer from the figures set forth in the foregoing account that there is an identity between the million colones deposit of July 16th and the $200,000 credit of July 17th to the government in the so-called gold revolving credit account set forth above.

The language of the entry No. 1546 F, of date July 17, 1919, and its reference to Article 6 of Law No. 12, shows that this whole deposit was to be transferred to the Revolving Credit Account Gold of the Royal Bank in the amount of $200,000. It was accomplished by three checks, one to the order of the Royal Bank itself, one to the order of John M. Keith, and one to the order of Enrique Clare. The account presented by the British Government on behalf of the Royal Bank, lumps first two checks in an item of 900,000 colones, debiting the Royal Bank Revolving Credit Account, thus showing the destination of both. Without explanation, it may be difficult to fix the exact details of this transaction, but the amounts, the dates, and the result leave no doubt in my mind that the deposit of the 1,000,000 on July 16th, the check for 900,000 colones also deposited in the Bank, the credit to the government of $200,000 on the 17th in the Revolving Credit Current Account Gold, and the withdrawal of $200,000 on August 2nd, were all part of the same transaction intended to secure to the two Tinocos the drafts for $100,000 each, shown by journal entry 1717 F, and by the letter of January 27, 1921, from the Manager of the Royal Bank.

It thus appears that the present claim of the bank rests on its payment of $200,000 to the Tinocos, $100,000 to Frederico Tinoco, "for expenses of

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representation of the Chief of State in his approaching trip abroad", and $100,000 to Jose Joaquin Tinoco, as Minister of Costa Rica to Italy for four years' salary and expenses of the Legation of Costa Rica in Italy, to which post the latter had been appointed by his brother. The Royal Bank cannot here claim the benefit of the presumptions which might obtain in favor of a bank receiving a deposit in regular course of business and paying it out in the usual way upon checks bearing no indication on their face of their purpose. The whole transaction here was full of irregularities. There was no authority of law, in the first place for making the Royal Bank the depositary of a revolving credit fund. The law of June 28th authorized only the Banco Internacional to be made such a depositary. The thousand dollar colones bills were most informal and did not comply with the requirements of law as to their form, their signature or their registration. The case of the Royal Bank depends not on the mere form of the transaction but upon the good faith of the bank in the payment of money for the real use of the Costa Rican Government under the Tinoco régime. It must make out its case of actual furnishing of money to the government for its legitimate use. It has not done so. The bank knew that this money was to be used by the retiring president, F. Tinoco, for his personal support after he had taken refuge in a foreign country. It could not hold his own government for the money paid to him for this purpose.

The case of the money paid to the brother, the Secretary of War, and the appointed Minister to Italy, is much the same. The government book entry charges him with this as a payment for expenses to be incurred in the establishment of a legation in Italy. It includes the salaries and expenses for four years. To pay salaries for four years in advance is a most unusual and absurd course of business. All the circumstances should have advised the Royal Bank that this second draft, too, was for personal and not for legitimate government purposes. It must have known that Jose Joaquin Tinoco in the fall of his brother's government, which was pending, could not expect to represent the Costa Rican Government as its Minister to Italy for four years, that the reasons given for the payment of the money were a mere pretense and that it was only, as in the case of his brother Frederico, an abstraction of the money from the public treasury to support a refugee abroad.

The 100,000 colones remaining of the deposit of 1,000,000 colones of July 16th, paid in a check to Enrique R. Clare, as shown by journal entry No. 1546 F of July 17, 1919, is a credit to "Pending Accounts", and is accompanied by the memorandum "Sum paid to Clare on the 26th of June ultimo as per the contract above referred to, by check No. A 109,248 on the International Bank". From the memorandum against the credit of 900,000 colones in the same entry this contract seems to have been an arrangement for exchange and may have been the amount needed to transfer the whole 1,000,000 colones deposit into $ 200,000 gold. Whatever it was, it is so closely connected with this payment for obviously personal and unlawful uses of the Tinoco brothers that in the absence of any explanation on behalf of the Royal Bank, it cannot now be made the basis of a claim that it was for any legitimate governmental use of the Tinoco government.

The claim of the Royal Bank against the Costa Rican Government has, however, been given a better status than as decided above, to the extent of one-half of it, by the act of the existing Government of Costa Rica in December, 1922. Jose Joaquin Tinoco was killed in the streets of the capital during the disturbance on August 10, 1919, which occurred in protest against

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the continuance of the Tinoco government. The present Government of Costa Rica prosecuted a suit for $100,000 against Joaquin Tinoco's estate in a Costa Rican Court, based on the payment by the Royal Bank of this sum to him. The suit was compromised by a mortgage given by his widow upon two estates of his for a full $100,000, of date December 21, 1922, the same to be paid within five years. The Government of Costa Rica in repudiating any obligation to the Royal Bank for paying $100,000 to Jose Joaquin Tinoco, of course, deprived itself of any just claim to real ownership of the mortgage upon his estates for that amount. This should enure to the benefit of the Royal Bank. Proceeding in this matter *ex æquo et bono*, therefore, I must hold that the bank is subrogated to the title of Costa Rica in the mortgage and that as a condition of the award against the bank, as to the whole 998,000 colones claimed by it, Costa Rica should transfer and assign the mortgage to the bank for its benefit, together with any interest which may have been meantime collected thereon.

The Amory concession was in the form of a contract between Aguilar, Minister of Public Works, authorized by the President of the Republic, as party of the first part, and Miguel D. Ferrer, as the attorney of John M. Amory and Son, of 52 Broadway, New York, as party of the second part. The Chamber of Deputies of the Tinoco government approved the contract June 26, 1918. The concession is now owned by the Central Costa Rica Petroleum Company, Ltd., of Canada, and all its stock is owned by the British Controlled Oil Fields, Ltd. The concessionaire was given the right during twelve years to prospect or cause to be prospected the territories of the provinces of Cartago, Alajuela, Heredia and San Jose, constituting four of the eight provinces of Costa Rica, comprehending half her territory, in order to find deposits of petroleum, hydrocarbons and allied substances. On his finding them, the concessionaire was granted the exclusive right to locate all of the deposits discovered. At the end of twelve years, any territory that might remain unexplored, or of which the concessionaire did not present topographical and geographical plans to the government, might be otherwise disposed of by the government for the mining of petroleum, hydrocarbons and allied substances. The concessionaire was granted the exclusive right during fifty years to develop and exploit the deposits located by him; to establish pipe lines and pumping stations; to erect refineries and bore wells; to build aqueducts, roads, railways, transmission lines and all other works necessary for the extracting, warehousing and handling of petroleum and allied substances; to use the national and public highways and the unoccupied land for such purpose; to utilize the rivers, springs, and water courses which may cross the national, municipal or private lands; to install hydraulic or electrical plants required by the company for the generating of electric power for this purpose; to cut and fell timber on national lands free of payment, and stone, slate, lime, clay, and other things that may be necessary for the operation of the enterprise, and to locate and mine such coal deposits as he might discover in his exploration. The enterprise was declared to be a public utility under the protection of the government so as to enable the concessionaire to exercise the right of expropriation for the purpose of the grant. He was given the right to export the petroleum and hydrocarbon products and by-products, or to sell the same within the republic.

The grant was made on condition that the concessionaire should spend $20,000 American gold in exploration during the first two years, and to deposit $25,000 in the public treasury to secure this expenditure; invest in

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the three years following the two years, not less than $125,000 gold in an investigation and exploitation of the petroleum deposits, and secure this action by the deposit of 40,000 colones in internal bonds of Costa Rica in the treasury at San Jose or in a bank in England or in the United States, and during seven years succeeding the previous five, invest a sum of not less than one million colones, to continue the work of investigation and exploitation, and deposit, as security for this, in the treasury of the republic, or in a bank of England or of the United States, 30,000 colones of the interior debt of Costa Rica; commence explorations within four months; use the best kind of machinery and methods for doing the work; organize a company called the Central Costa Rica Petroleum Company; transfer all the rights of the concessionaire to that company, as well as the obligations of the latter to Costa Rica, and organize the company within four years with a capital paid up of not less than one million dollars in United States currency.

The considerations for this concession are contained in Articles VII, VIII and X.

The concessionaire, by Article VII, agrees to pay 25 cents, American currency, on every ton of crude petroleum or other hydrocarbon products exported or sold in the republic, deducting what he may use in his work of production, refining and transport. By Article VIII he undertakes to supply gratuitously all fuel and lubricating oil needed to run the present government railways and extensions thereof, provided that the total net output from the petroleum fields shall be at least 1,000 tons a day, the storage and transportation to be at the expense of the government. By Article X, it is provided as follows:

> With the exception of the oil supplied as provided by Article VIII hereof, the royalty of 25 cents referred to in Article VII, shall be the only tax or duty payable by the concessionaire to the Government of the Republic or to the local governments or municipalities in respect to this concession; but the concessionaire shall not be exempted from any national taxes payable by the public in general at the present rates. The government exempts the concessionaire from the payment of general or partial taxes which may be levied hereafter, unless they be for public services established or conducted by the government and of which the concessionaire shall make regular use, or by which he may directly and permanently benefit.

The first objection to an award in favor of the Amory concession in this proceeding by the British Government, is that it was granted to an American firm and that there is no evidence that British subjects were interested in it until after it had been repudiated, so that they acquire nothing but a law suit. It is urged that Great Britain may not protect her subjects in prosecuting a claim acquired from American owners after it had become the subject of controversy. The British case, presenting the Amory claim separately, says that British capital was engaged in the concession from the first, and that Amory & Son were only agents of a large English Company known as the British Controlled Oil-fields, Limited, and that all the capital has been furnished by that company since the concession was granted and work done under it. No formal proof is made of this. In a letter of the Secretary of State of Costa Rica to a representative of the British Government, of September 29, 1920, he says:

> When the Amory contract was being negotiated, assurance was given that the responsible firm was North American and documents presented

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to the Department of Public Works show that the transfer provided by the contract was made to a concern domiciled in the State of Delaware of the United States of America. In spite of this, and in view of the repeated assertions contained in the notes to which this is a reply, we now have no doubt that a part at least of the capital is English or of English origin, and that the interest that moves you to intervene in the matter is born of that circumstance.

No objection of this kind by Costa Rica was made in the Congressional resolution of the 13th of December. 1921, or, so far as I can discover, in previous correspondence. It appears for the first time in the counter case. Had it been clearly made in previous correspondence, the failure to make proof might have raised the question of law urged, but in view of the admission above and the lack of distinct challenge previous to the counter case, I cannot regard it as substantial.

Nor do I deem it necessary to go in detail into the question of performance. It seems to me that substantially everything was done by the concessionaires or their assignee required by the contract in the way of an advance of one million dollars of capital, of the security to be given, and of considerable expenditure to be made. The accounts show the actual outlay of at least 200,000 colones in exploration in Costa Rica, and of 300,000 colones in importation into the country of machinery and other preparation enough certainly to manifest good faith and to appeal for equitable treatment in case this concession cannot be sustained as a contract.

The most serious objection to the concession is that it was granted by a body without power to grant it. Its validity is, as I have already said, to be determined by the law in existence at the time of its granting; and that means the law of the Government of Costa Rica under Tinoco. This concession was granted, with the approval of the President, by the Chamber of Deputies of Costa Rica. By the constitution of June 8, 1917, established under Tinoco, the Government of the Republic was vested in three different powers independent of each other, to be known as the legislative, the executive and the judicial powers. The legislative power was vested in a congress composed of two chambers, one of Senators and the other of Deputies, whose members in both were elected by the citizens and might be reelected indefinitely. By Article 76, the Congress was to meet as a single body and exercise ten powers, which were within its exclusive jurisdiction. The tenth power was as follows:

10. To approve or disapprove laws, fixing, enforcing or changing direct or indirect taxes.

The Chamber of Deputies was given the power to decree the alienation of property of the nation, or the application thereof for public uses; and especially to empower the executive to negotiate loans or to enter into other contracts upon mortgage security of the national revenue. The Senate was given the power to approve or disapprove the loan contracts which might be entered outside of the country, after the contract had been approved by the Chamber of Deputies; to approve or disapprove the contracts which the government might enter into, when on account of the nature and importance of the subject matter the executive power of the Chamber of Deputies, at the request of one-third of the members present, considered necessary the sanction of the Senate.

It is contended that this concession is a contract which the Chamber of Deputies might validly make and bind the government unless the executive

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or one-third of the members present should consider the sanction of the Senate necessary, and that as neither the executive power nor one-third of the votes of the members of the Chamber indicated its view that the sanction of the Senate was necessary to this concession, it was valid.

The recital of the concession shows that an important part of it dealt with the future taxes to be paid by the concessionaire and made very especial provision in reference thereto. He was to pay a revenue tax of 25 cents United States currency on every ton of crude petroleum to be exported from Costa Rica or sold within its limits. This was called a revenue tax. In addition to this the concessionaire undertook to supply the government with combustible and lubricating oil for the existing railways or for any extension within the provinces named, if the product of the enterprise was not less than 1,000 tons per day within a given period. Article X limited the taxes to be paid to the royalty of 25 per cent. and exempted the company from the payment of taxes to local governments or municipalities, and from all national taxes except those payable by the public in general at the rates existing at the time of the concession. It exempted the concessionaire from the payment of other general or partial taxes levied thereafter unless they were for public benefits furnished by the government of which the concessionaire should make regular use, or by which he might directly or indirectly benefit, *i.e.*, unless they were special assessments for actual benefits. Considering the very heavy burden to which but for these exemptions the company might have been subjected in the event of successful exploitation, they were a valuable part of the concession. It is evident that it was the hope and expectation of both parties that oil would be discovered and that upon its discovery the company would develop a large production, refining and transmission of oil, involving the expenditure of large capital and the investing of it in plants of millions of value. The protection which these clauses afforded against the heavy reduction of dividends by increased future taxes, was one of the great factors of value in the contract. It seems to be impossible to escape the conclusion that the power to grant such exemptions and to limit future taxation could only be exercised under the constitution of 1917 by Congress in a single body. The granting of this concession certainly involved the power to approve laws fixing, enforcing or changing direct or indirect taxes. As the Chamber of Deputies was expressly excluded from exercising this power alone, Article X was invalid.

It is urged that under the practical construction of the Tinoco constitution, the Chamber of Deputies did grant tax exemptions and five instances are cited from the official *Gazette* to show this. These were cases in which the customs duty on machinery introduced into the country was waived. They could hardly be held to amount to an amendment of the fundamental law by practice, or such a construction of it as to justify an exception by the Chamber of Deputies of *ad valorem* taxation, general and local, on the plant and property of the concessionaire for fifty years. My conclusion is supported by the action of President Tinoco himself in vetoing a law granting future exemptions from taxation to an insurance company enacted by the Senate, on the ground that only the Congress as a single body could grant them under its exclusive power to fix, enforce, or change direct or indirect taxes.

It is impossible to reject the Article X and hold the remainder of the concession valid. That article is too vital an element in its value. The contract cannot be made over by this tribunal for the parties.

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The result is that the government of Tinoco itself could have defeated this concession on the ground of a lack of power in the Chamber of Deputies to approve it.

It is finally contended that the present Government of Costa Rica has recognized the Amory concession and thus given it validity. The argument rests upon correspondence between the attorney for the concessionaire and the Minister of Finance and Commerce in 1919 and 1920, in which the concessionaire was permitted to bring in certain machinery, duty free, for the exploration under the concession. Such permission was given but it was accompanied with the express reservation that the permission should not ratify the concession or affect the right of the government to declare a nullification of the franchises if deemed convenient.

My award, therefore, is that the Law of Nullities in its operation upon the validity of the 998 one thousand colones bills and the claim in behalf of the Royal Bank, will work no injury of which Great Britain can complain, if Costa Rica assigns all her interest in the mortgage for $100,000 upon Jose Joaquin Tinoco's estate executed by his widow, together with all interest paid thereon to the Royal Bank, and that, upon Costa Rica's executing this assignment and delivering the mortgage, the Royal Bank should deliver to the Government of Costa Rica the 998 one thousand colones bills held by it.

My award further is that the Law of Nullities in decreeing the invalidity of the Amory concession worked no injury to the Central Costa Rica Petroleum Company, Ltd., the assignee of the concession, and the British Controlled Oil Fields, Ltd., its sole stockholder, of which Great Britain can complain, because the concession was in fact invalid under the Constitution of 1917.

Article one of the treaty, under which this arbitration proceeds, provides that "the arbitrator shall determine what one party may owe the other for the expenses of the claim, and decide with regard to the payment of the expenses of the arbitration". Under the award, which is partly in favor of one and partly in favor of the other, I think it fair to require that each party pay its own expenses in maintaining its claims.

So far as the payment of the expenses of the arbitration is concerned, I know of none for me to fix. Personally, it gives me pleasure to contribute my service in the consideration, discussion and decision of the questions presented. I am glad to have the opportunity of manifesting my intense interest in the promotion of the judicial settlement of international disputes, and accept as full reward for any service I may have rendered, the honor of being chosen to decide these important issues between the high contracting parties.

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