

Because of the holding by the umpire that Pedro Maninat is a Venezuelan, it results necessarily that nothing can be considered in his behalf on account of failure of justice or denials of justice, if such occurred, succeeding the death of Juan and personal to him or to the mother of his wife, who attempted to assist him.

In naming one only of the Maninat heirs as competent to present a claim under the protocol of February 19, 1902, no inequity is done the other heirs. It does them no harm that she is not a Venezuelan, but of French nationality only. The laws of France governing the distribution of estates are not involved in this decision, neither are they invaded nor disturbed. This tribunal has no part in the final allotment or distribution of the sum which by the award herein is made payable to France, through the personality of Justina de Cossé, for whom that country has right of intervention. Over the proceeds of the award here made France has absolute dominion, so far as this tribunal is concerned, and in the perfect justice and equity of her procedure there can be complete content.

It is the judgment of the umpire that a just compensation which covers both aspects of this case is 100,000 francs, and the award will be prepared for that amount.

NORTHFIELD, *July 31, 1905.*

ANTOINE FABIANI CASE ¹

This claim came to the umpire after having been once heard and determined by the honorable President of the Swiss Federation, being submitted to him under the protocol of February 19, 1891, the first paragraph of which reads:

“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.”

Against the proposition that such an arbitrament and award is conclusive upon all parties the claimant urges that the Swiss arbitrator held that he had not jurisdiction over a large part of the claims and therefore was incompetent to consider and to pass upon them; that the Swiss arbitrator in fact extracted and subtracted from those claims such as he held were without his jurisdiction and only awarded concerning the rest.

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.

- The umpire holds, however, that no jurisdictional questions were before the Swiss arbitrator, none were urged by either party, and none in fact were determined; that all claims of Fabiani were in fact submitted by the protocol to the decision of the Swiss arbitrator and all were in fact decided by him.
- That there were certain restrictions placed upon the Swiss arbitrator in the protocol which had the effect to limit the scope of the claims left undisposed of by the two Governments for decision by the Swiss arbitrator.
- That under the protocol the Swiss arbitrator must first determine whether the Venezuelan Government was responsible for any damages to Fabiani; that this responsibility must be determined in view of the limitations of the protocol which were to the Swiss arbitrator his supreme law. These limitations were essentially that the decision was to be reached in accordance with "the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers."
- The convention then in force between the two nations was that of November 26, 1885, and had especial reference to article 5 thereof. The force and effect of article 5 of said treaty was considered and determined by the Swiss arbitrator, and his interpretation thereof is conclusive, so far as the claim of Fabiani is concerned.
- In order to determine the scope, depth, and breadth of that treaty, the Swiss arbitrator had to define the meaning of the expression "denials of justice" found in said treaty. His definition is conclusive upon the claim of Fabiani.
- When the Swiss arbitrator decided the principles governing the claim submitted to him, he had decided affirmatively or negatively the different claims made in Fabiani's behalf, not in detail but in principle.
- When France intervened in behalf of her national, his claim was no longer individual and private, but national.
- Thenceforward it was national interests, not private interests, that were to be safeguarded. It was the national welfare and national honor which were to be considered. Should the general good of France at any time during the negotiations with Venezuela require a surrender of all of Fabiani's claims, France may make such surrender, or it may surrender a part thereof, and for such surrender Fabiani, if he has a claim anywhere, has it against his own Government.
- When a nation intervenes in behalf of her national and finally consents to arbitration of the difference, the primary purpose of such arbitration is to remove the vexed question from the arena of diplomatic dissension and controversy. It is not to be considered that France would consent to submit to arbitration a part only of her national's claim, leaving large and important parts of it undisposed of, and to remain as vexatious questions between the two Governments.
- Neither is it to be considered that Venezuela intelligently entered upon an arbitration of a question in dispute between the two Governments understanding that the effect of the agreement to arbitrate would be to hold her to make reparation for such an amount as might be held to be denials of justice by the arbitrator, while for all not so held she would later be compelled to again oppose them or to pay them or to arbitrate them.
- Venezuela did not enter this arbitration by the Swiss arbitrator with the understanding that if he decided everything against Fabiani all that had originally been claimed would be left unsettled by his decision, and be restored to their primal state of existing claims for which the Government of France could intervene. Equally certain is it that she did not enter into the arbitration with the understanding that if any part of the claim were decided in her favor that part might yet be brought before another arbitral tribunal.

In that and in every similar international controversy the two Governments seeking an agreement look well for a common meeting point which is usually to be gained only by mutual concession and mutual remission of matters which *can yield* and when that common meeting point is reached to submit it to the arbitrator as the whole controversy; or as being all that which both parties will admit is the controverted question. Which mutual point of agreement is as much a matter of agreement between the high contracting parties as is the covenant to arbitrate itself and is an integral part of that covenant.

Each concession so made by one party cancels the one made by the other, so that outside the terms of the convention there is nothing left of the original contention. All which is excluded is concluded by the high contracting parties themselves. What is not found of the original controversy to be resting in the compromise is in oblivion.

Just how much is conceded and how much is retained is left for the determination of the arbitrator. It may be contended on the one hand there is nothing conceded, on the other hand that nothing is left, but the arbitrator is to decide how much is included and how much is excluded, and, when he decides, that decision is *final and conclusive upon the whole of the original controversy*.

That which Fabiani claims to have been a subtraction by the Swiss arbitrator is in fact merely designating the different elements of his controversy which in effect the high contracting parties had agreed to eliminate and subtract in order to reach an agreement of arbitration.

So far as these concessions approaching and permitting an agreement to arbitrate finally affected the pecuniary interests of Fabiani they were in effect the especial tribute required of him by his Government to conserve its general good.

The honorable arbitrator of Berne on his own initiative eliminated nothing, subtracted nothing, and there was left for him nothing except 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, settle the damages on what remained, and make award accordingly.

It follows that the protocol arranged between the honorable Governments of France and Venezuela February 24, 1891, succeeded 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 Fabiani.

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 hostile to 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 pretensions? 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 inadvisability 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 discretionary 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 acceptance 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.*

Amplly 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:

	<i>Francs</i>
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-