

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

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

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

CARACAS, *May 30, 1903.*

NOTE BY THE VENEZUELAN COMMISSIONER

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

OPINION OF THE FRENCH COMMISSIONER

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

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

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

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

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

M. Lachenal adds, on page 25:

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

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

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

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

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

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

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

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

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

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

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

August 2, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

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

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

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

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

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