

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

August 2, 1904.

ADDITIONAL OPINION OF THE VENEZUELAN COMMISSIONER

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

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

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

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

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

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

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

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

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

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

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

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

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

Article II of the convention reads as follows:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ADDENDUM

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

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

ADDITIONAL OPINION OF THE FRENCH COMMISSIONER

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

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

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

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

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