

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*.

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

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

Further:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

There is for the object of the litigation, etc.

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

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

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

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

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

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

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

OPINION OF THE UMPIRE

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

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