

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

had by and between these honorable Governments, which was concluded February 24, 1891, and is of the language following:

Re Fabiani's claims:

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.

It will be the duty of the arbitrator:

First, to decide 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 M. Fabiani says to have sustained through denial of justice.

Second, to fix, in case such responsibility is recognized, as to all or part of the claims in question, the amount of the pecuniary reparation that the Venezuelan Government must deliver to M. Fabiani, and which will be paid in bonds of the 3 per cent diplomatic debt of Venezuela.

The two Governments have agreed to request the President of the Swiss Confederation to kindly take charge of this arbitration.

The present declaration will be submitted to the approval of the Congress of Venezuela.

Done in duplicate at Caracas, the 24th of February, one thousand eight hundred and ninety-one.

The "convention in force between the two contracting powers" was the treaty of November 25, 1885, by and between these two Governments; and, so far as the same has bearing or value in aid of the compromise above set forth, is here set out as follows:

CONVENTION

The Government of Venezuela and the Government of the French Republic, being desirous of reestablishing between the two countries the friendly relations interrupted since 1881, have appointed to be their respective plenipotentiaries the following:

The President of the United States of Venezuela, Gen. Guzmán Blanco, envoy extraordinary in Paris, etc.

The President of the French Republic, the Count Tristan de Montholon, minister plenipotentiary of the second class in charge *ad int.* of the duties of the director of political affairs in the ministry of foreign affairs, etc.

Who, after having exchanged their respective powers, found in good and due form, have agreed upon the following articles: * * *

ARTICLE 5TH

In order to avoid in future everything that might interfere with their friendly relations the high contracting parties agree that their diplomatic representatives will not interfere in the matter of claims or complaints of private individuals or on affairs cognizable by the civil or penal justice, according to the local laws, unless the question is a denial of justice or judicial delays contrary to use or to law, the noncompliance with a definitive sentence, or, finally, cases in which in spite of the exhaustion of legal remedies there is an evident infraction of the treaties or of the rules of the law of nations.

The claims presented before the honorable arbitrator of Berne on behalf of M. Fabiani aggregated 46,994,563.17 francs, extended over the years from 1878 to 1893, were assembled under the general term of denial of justice and included such as were imputable to the judicial authorities of Venezuela, its administrative authorities, and to damages suffered by him through the fault of its public powers, claiming for him both the direct and indirect damages under each head.

December 30, 1896, the award was made for 4,346,656.51 francs with interest at the rate of 5 per cent per annum from that date. The honorable arbitrator arrives at this sum in the manner hereinafter set forth.

The decision of the honorable arbitrator, together with his reasons therefor, was rendered in writing, which award reciting the essential facts, as well as the reasons of the honorable arbitrator, appears on pages 4878-4915, volume 5, Moore's History and Digest of International Arbitration.

The sum of 42,647,906.66 francs represents that part of the total claim of M. Fabiani which was not allowed by the honorable arbitrator of Berne, and which was denied for the reasons given in his award.

It is claimed by M. Fabiani before this commission that of the sums denied allowance by the honorable arbitrator of Berne there are certain portions so disposed of by him as to be still in force against the respondent Government under the general terms of the protocol constituting this commission, aggregating 9,509,728.30 francs.

The reasons given by Fabiani before this present commission for ascribing present vitality to the claims now before this commission are, in substance, as follows:

The decision of the arbitral statement of Berne is, in effect, that all the chief points of the actual demands and the arbitrary acts "*faits du prince*" have been expressly formally eliminated by the Swiss arbitrator as subtracted from his decision by his interpretation of the terms of the protocol passed between the Government of the French Republic and the Government of Venezuela;

That the interpretation of the treaty of February 24, 1891, given by the said arbitrator, has placed the limit of the questions which the judge had the power to resolve, upon which he was authorized to decide, and which alone ought to make and which has made the object of his judgment;

That by the formal decision which has eliminated the cause and the object of the actual demand as not being included in the matter submitted to his jurisdiction the arbitrator [of Berne] has recognized that he had not the right to pass judgment upon the "*faits du prince*" and upon all the points by him eliminated from the procedure as not included in the terms of the protocol;

That in declaring them subtracted from his decision according to the protocol the arbitrator has passed judgment upon his own jurisdiction and has determined its limit;

That the doctrine and jurisprudence are for a long time unanimous upon this incontestable principle that a declaration of incompetency can never produce the effect of *res judicata* upon the foundation of the law;

That the "*faits du prince*" and all the points of the present instance [have] been expressly eliminated from the procedure by the decision of the arbitrator of Berne, because they were not included by the terms of the protocol, and consequently were subtracted from its competence; * * *

That he has eliminated it as not making a part of the matter remitted to his decision, and that he would not have been able to retain it without violating his own interpretation of the treaty of February 24, 1891; * * * The most scrupulous examination of the arbitral decision of December 31, 1896, determines that the arbitrator has strictly conformed to his interpretation of the protocol, and that he has not passed judgment by way of the declaration of right and responsibility upon any of the matters eliminated by him as subtracted from his right to judge by the terms of the protocol;

That consequently these matters not having been, and not having been able to be, the object of a decision upon the bases of law one could not pretend that

they are

res judicata;

That to be convinced of it it is sufficient to refer to the procedure before the President of the Swiss Confederation to the plea proposed by the defendant party

against the actual demand as arises from the terms of the protocol, then to the former and reiterated decision which the arbitrator [of Berne] had rendered in giving to the protocol of February 24, 1891, the sense claimed by the United States of Venezuela and in eliminating from the procedure as subtracted from his decision — that is to say, from his jurisdiction — the “*faits du prince*” and all the points foreign to the inexecution and of the effects of the inexecution by the tribunals of Venezuela of the arbitral sentence of Marseilles of December 15, 1880 — that is to say, precisely all the points upon which the arbitrators authorized by the treaty of February 19, 1902, are called upon to decide,

In execution of the protocol, whose terms gave, in Fabiani’s opinion, plenitude of jurisdiction to the arbitrator [of Berne] and conferred upon him the right to decide upon all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts or “*faits du prince*” attributable to the Federal executive) and upon all the damages which Fabiani says to have suffered through the fault of the public powers of this country, the French Government charges the claimant to present the demand before the President of the Swiss Confederation.

Fabiani established the general table of losses and prejudices of damages and interests, the responsibility of which he imputed to the public powers of Venezuela; but the defendant party, for reasons easy to suspect, preferred a solution which would leave the parties always divided by the difference which the French Republic had proposed to avoid in a complete fashion.

Fabiani, as results from the *ensemble* of his exposé before the arbitrator of Berne, had always considered the arbitrary acts and the denials of justice “*faits du prince*” imputable to the administrative authorities as the principal cause of his misfortunes in Venezuela.

Of the 505 pages of the said exposé of facts, more than two-thirds treated of the direct interference of the Federal executive in a conflict between foreigners, notably the following pages: 41 to 50, 52 to 55, 57 to 60, 69, 92 to 98, 100 to 103, 108 to 115, 123 to 124, 129, 131 to 139, 158 to 165, 174 to 178, 181, 183, 199 to 204, 206, 207, 242, 255, 259, 261 to 267, 272 to 274, 276, 284 to 290, 294, 297, 298, 300, 304, 305, 312 to 320.

It is Fabiani’s —

conviction that the term “denial of justice,” employed in the protocol included all denials of justice, those of the judicial authorities, and, above all, those imputable to the administrative and political authorities of Venezuela.

The Swiss arbitrator —

has given his interpretation of the terms of the protocol, determined exactly the object of the difference submitted to arbitration, and has expressly eliminated from the procedure, as subtracted from his decision, and consequently from his competency, all of the allegations and means of proof relative to claims founded upon the arbitrary acts of the executive powers or upon the “*faits du prince*” and upon all the *faits* foreign to the inexecution of the arbitral sentence of Marseilles of December 15, 1880.

In further support of his contention that the claims specified by him are still of vitality and force and competent to be passed upon by this commission, he quotes several passages from his exposé.

Page 542:

If we do not possess the formal and written avowal of our implacable enemy, we have, aside from his official acts, which bring prejudice to us, the acts, also official, perfidiously calculated to strangle us between two doors, if, trusting to false appearances of justice, we thought to make our rights of value.

The executive power coming to the aid of the judicial power to condemn us to powerlessness by the aid of fraudulent maneuvers, which resulted in the spoliation of October 26, 1885, is an undeniable fact which will not escape the scrutinizing eye of the judge.

Page 545:

The *ensemble* of our grievances against Venezuela engages the responsibility of the judges and of the public powers of this country. The judges have been guilty; they have surpassed themselves in the art of adapting the laws to the annulment of justice; the public powers have been unworthy; in any civilized country they would not have been able to escape chastisement; but in the long run we would have been able, perhaps, to triumph over their venality and ill-will if we had not been forced to struggle against the personal and interested hostility of the chief of state. This personal hostility, a veritable "*fait du prince*," has established before us the case of *force majeure*.

Page 552:

The acts for which we reproach Gen. Guzmán Blanco are of the resort neither of the civil justice nor of penal justice of his country. These acts, veritable denials of justice, have been committed by the President of the Republic in this quality.

The laws of Venezuela, conformable, moreover, to the general principles of public law, authorize no action against the chief of state save in one of the three cases provided for by the constitution. But if these acts escape all civil or penal jurisdiction, this does not signify in any way that they engender no responsibility and that this responsibility can never produce its results. According to the law of nations, there is a responsibility which substitutes itself for the personal responsibility of the chief of state; it is that of the country which he represents, when the acts of the executive power constitute with regard to a foreign nation or its dependents, violations of the principles of public international law.

Pages 553 to 554:

But in our unfortunate affair, the "*faits du prince*," which have constituted denials of justice, are well established. We have no need to refer to them, nor even to group them, in order to enlighten the conscience of the arbitrator. Our general exposé relieves us from insisting. All these facts, taken together or separately, establish the direct intervention of the chief of state in a conflict between individuals to prepare, to consummate, a great injustice. If these considerations, which we believe in perfect harmony with the theory and practice of the law of nations among civilized countries, are accepted by the arbitrator, the iniquity of the judges, their denials of justice, and the question of retroactivity, relegated to the second place, will no longer offer anything but a secondary interest.

We have furnished all the proofs of the malevolent action of the chief of state, now direct, now indirect, continued for more than six years, striking us in front and behind, raising themselves before us as an insurmountable obstacle to paralyse us, when, in spite of his venality, justice was impressed for continuing his guilty work. If the arbitrator retains the "*faits du prince*," as these *faits* have had, as a consequence, a series of denials of justice, he will find, in these evident violations of the principles of the law of nations, the direct reply to the arguments of the cabinet of Caracas and the juridical elements of a decision which will retain the responsibility of Venezuela without its being even necessary to refer to the complicity of the judicial and administrative authorities of the country. And we are persuaded that this decision, having reference to all the *faits* since the origin of our troubles, and retaining all the violences of which we have been the object, will proportion the reparation of the prejudice caused to the premeditation, to the gravity, to the tenacity, and to the extent of the offense. However, need we insist upon the infractions and upon the denials of justice which, exclusive of the "*faits du prince*," might be of the resort of the civil or penal justice?

Fabiani follows these quotations with the statement that —

these extracts offer the advantage of determining the sense which he attaches to the words "denials of justice" according to the protocol, which in his opinion, included not only denials of justice imputable to the judicial authorities, but still, and above all, denials of justice imputable to the Federal executive and all the arbitrary acts connected. That, in effect, if the plaintiff (Fabiani) recognized,

as he still recognizes, the right of the sovereign appreciation of the judge, he counted that this right would be exercised upon the *ensemble* of his demand, and more especially upon the arbitrary acts of "*faits du prince*," denials of justice imputable to the Federal executive; that if the arbitrator (of Berne) has disposed of them otherwise, if he has interpreted the protocol in a way to limit and determine the object of the difference submitted to his decision, he has thereby still reserved the rights of the plaintiff (Fabiani) for all the matters which he has declared stranger to the object of the litigation and which he has eliminated from the procedure as subtracted, etc.

In signaling the denials of justice of the magistrates of Venezuela in all that which had reference to the inexecution of the sentence of Marseilles, the demand for damage, and interest was founded especially upon the injurious results of the arbitrary acts and denials of justice of the Federal executive.

In these conditions it is natural that the plaintiff (Fabiani) should have anticipated an adjudication *en bloc*.

Fabiani urges that the honorable arbitrator of Berne, in proceeding to set forth his reasons and to separate the claims allowed from those disallowed, has "in effect" proceeded "contrary to custom, not to an adjudication *en bloc*, but to a detailed adjudication clear and precise," and —

has evidently held to anticipate every equivocation, to cut short all chicanery, and to reserve to the demandant party the free exercise of all his rights for all the matters and for all sums which he had just declared subtracted from his decision.

To elucidate the meaning, force, and effect of the acts of the honorable arbitrator of Berne and to bring out more clearly, as he would contend, the elimination and subtraction suggested, and to show that the reason therefor is as claimed by Fabiani, he quotes from the defense of the respondent Government made before the honorable President of the Swiss Federation, stating that such defense begins as follows:

The demandant party gives itself up continually from the beginning of its exposé to the interminable digressions which have no relation to the affair under discussion, in the diplomatic discussion maintained by the cabinets of Caracas and Paris upon the subject of the Fabiani claim. The object of this claim and its points of departure have been determined. The object is the denial of justice alleged by Fabiani for the nonexecution, according to him, of the arbitral sentence rendered in his favor at Marseilles December 15, 1880, analogous to the civil tribunal of the first instance and confirmed by the court of appeal of Aix, and the point of departure can not be any other than the decree by which on the date of June 6, 1882, the high Federal court of Venezuela gave executory force in the country to the sentence of the court of appeal of Aix.

Page 4:

That which is important to fix now is that all which is anterior to the decision of the high Federal court of the date of June 6, 1882, and the other digressions which the plaintiff has added to his exposé, do not constitute the matter of actual litigation. * * *

Moreover, the diplomatic discussion having determined that the Fabiani claim, which was about to be submitted to arbitration, was the claim presented and supported by the French Government, and not the claims which Fabiani should present ulteriorly, the compromise between the two Governments has for an end only the facts relating to the pretended denials of justice beginning from 1882.

In Fabiani's *réplique* to the defense of Venezuela, from which the following quotations are taken, he vigorously opposed this claim of Venezuela, and again explained the sense which he attached to the words "denials of justice."

Page 62:

Our voluminous memoir is occupied principally with Mr. Guzmán Blanco, whose name finds itself repeated on each page several times. The denials of justice, the violences, excesses, by us denounced in the memoir, are attributed to this cause almost exclusively — the passionate and interested hostility of Mr. Guzmán Blanco.

The judges who receive the price of their venality, the officials who harass us without ceasing, are represented by us as mere instruments of the chief of executive power.

On almost every page our accusations are very precise. We explain the numerous and grievous facts. We make known the prime mover, his financial dickerings with our adversaries, his acts of direct hostility, his fraudulent manœuvres to injure us, his odious outrages, his repeated denials of justice to conserve for his associates and himself the profits of the railroad. Guzmán Blanco (ex-Ceiba) and the cabinet of Caracas maintains a religious silence. Save in two citations, from our memoir it does not pronounce even once the name of Mr. Guzmán Blanco.

Page 63:

We understand the embarrassment of the cabinet of Caracas. The subject was rugged and the way very slippery. * * *

We retain in this debate not certainly Mr. Guzmán Blanco, whom international law defends against our investigations, but the chief of the executive power whose acts have engaged the responsibility of his country.

Venezuela ought to take account of the "*faits du prince*" and denials of justice imputable to its former master, as well as the denials of justice anticipated by the convention of November 26, 1885, in the affairs which are the resorts of the civil or penal justice.

The personal acts of the chief of executive power are, moreover, grave as the denials of justice imputable to a district judge, and even to a court of cassation.

The flagrant violation of the law of nations by the chief executive power of a country offers another interest for the peace of nations than the injury brought to the rules of international law by the brutality or the venality of some graduates of the University of Caracas.

Page 65:

The faithful executor of the constitution was held to demand without delay the respect of the Federal compact, and his calculated inaction constituted a denial of justice. In refusing to intervene and in shifting upon the high Federal court the obligation which was strictly incumbent upon him the executive power committed knowingly and with premeditation a denial of justice, the consequences of which have been decisive, and this denial of justice has had for an end to safeguard the personal interests of the chief of state.

Page 78:

If the denial of justice which we impute to the chief of executive power of Venezuela is established, the gravity of this infraction will occupy with good right the attention of the arbitrator. In fact more than half our memoir concerns the acts and deeds of Mr. Guzmán Blanco.

From these copious excerpts it is easily seen that the demandant, Fabiani, came before the Mixed Commission, sitting at Caracas in 1903, under the convention of February 19, 1902, with the claim that the act of the honorable arbitrator of Berne in dismissing the greater part of his case, was solely a jurisdictional decision, leaving unaffected, as though never presented to him, the claims thus dismissed.

The honorable commissioner for Venezuela rejected the case as presented in all and every part, for the reason that, in effect, the entire Fabiani controversy was submitted to the final and conclusive arbitrament and award of the honor-

able arbitrator of Berne by the high contracting parties in their protocol at Caracas of date February 24, 1891, and that when the controversy was submitted under said protocol and the honorable arbitrator of Berne had assumed and accomplished his important trust the entire Fabiani contention was at an end.

Since the honorable commissioner for Venezuela had not consented to discuss the figures presented by M. Fabiani, the honorable commissioner for France has regarded himself as "under the obligation of accepting them as a whole." The honorable commissioner for France also states:

As, moreover, none of his (Fabiani's) 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.¹

The honorable commissioners, finding themselves hopelessly in disagreement, reserve this claim for the consideration and determination of the umpire, to whom it has been submitted with the very helpful opinions rendered by each, setting forth very clearly the points for and against the claims of Fabiani and his right thereon to be heard again before an arbitral tribunal.

First to be determined is the issue whether there is or is not aught to be produced before this tribunal of the matters once submitted to the arbitrament and award of the honorable arbitrator of Berne under the protocol effected by the two nations at Caracas, February 24, 1891.

An analysis of this treaty discloses, in its first paragraph, that —

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.

It will be observed, then, that the matter to be submitted for arbitration is the "*claims*" of Fabiani — not certain claims of Fabiani, not a *part* of his claims, but his *claims*, which clearly and definitely includes *all his claims* against the respondent Government. It would not be more sure, more precise, had it been written "all of the claims of M. Antonio Fabiani," etc. This is the position taken by M. Fabiani himself, who presented all of his claims against the respondent Government to the honorable arbitrator of Berne, and urged upon him that it was his right and duty to consider, pass upon, and allow them as all coming within the terms of the protocol; and who, consistent with his former position, but respectful to an adverse decision, still insists that such was its true scope and spirit. Had nothing posterior to this first paragraph been written, the way of the claimant would have been easy and the hearing unrestricted. Such, however, was not the agreement of the two honorable Governments. Restrictions are imposed and must be heeded. When understood they must be respected and obeyed, for they are to the honorable arbitrator of Berne and to all who come after him the supreme law of his tribunal.

Two principal duties were presented to the arbitrator by the protocol of February 24, 1891.

He was, first, to decide under certain limitations, hereinafter to be stated, whether the Venezuelan Government was responsible for the damages which Fabiani claims to have sustained at its hands.

This was the logical course of procedure had no direction been given, but it is made obligatory and imperative by the terms of the convention. It is not permitted that the honorable arbitrator shall make his decision without the definitive aid of the high contracting powers. They do not consent that he pursue his own course and use his own tests in arriving at his conclusions upon

¹ *Supra*, page 96.

the question thus submitted; neither do they admit that the honorable arbitrator may classify and designate the quality and character of the claims which are submitted to his decision; on the contrary, they assume positively and finally to make for themselves and for him a definition which shall cover and include the claims of Fabiani, which, by agreement of the two parties, had been and then were before them, and were by this protocol to be passed into the hands of the honorable President of the Swiss Federation as arbitrator, and the phrase thus used by them for his guidance was neither obscure nor indefinite, but was one common to the tongues of nations, viz., "denials of justice". It did not comport with the wishes and purposes of these two Governments nor with the treaty relations then existing between them that this phrase should be interpreted and applied unaided by the terms of the convention constituting the tribunal. The arbitrator was directed to call to his aid and submit himself to the government and control of and was to render his decisions thereon according to — the laws of Venezuela, the general principles of the law of nations, and the convention in force between the two contracting powers.

Through these three sources of information the arbitrator was to determine the responsibility of the respondent Government in the Fabiani controversy. This compelled an interpretation by the arbitrator of article 5 of the convention of November 26, 1885, which was the treaty then in force between the two contracting powers. When thus interpreted it settle its meaning finally and conclusively, as applied to the Fabiani controversy, and in that respect and to that extent, at least, it has conclusive and final force upon the question pending before the umpire. This is true because he was expressly directed and empowered to make this interpretation by the two powers whose treaty it was. His interpretation, thus made, determined for this case the scope and depth, the spirit and purpose, the meaning and effect of the limitations self-imposed by these two nations in their high compact regulating and defining the right of diplomatic intervention. It also effected a similar decision concerning the term "denials of justice," which term was employed in said treaty in connection with the limitation, by their own agreement, placed upon their future action in reference to the claims and claimants of each nation. This limitation upon diplomatic action was stated by the high contracting parties to be in the interest of peace, harmony, and concord between them, evidently believing, on their part, that such injuries and damages as might befall their respective nationals in the land of the other, which were not included in the terms of the convention were better ignored than pursued; that the general and common welfare of the two nations was of chief importance, and could not wisely be jeopardized through international differences and diplomatic contentions not resting upon or growing out of the causes specifically assigned. For these laudable reasons and motives this restriction was solemnly declared to be the settled conviction, purpose, and future policy of these two nations.

The protocol of February 24, 1891, was made not only in view of the existing treaty, but that there might be no question in the mind of the honorable arbitrator as to their purpose scrupulously to regard and be governed by its provisions in its application to the case in hand, the compromise incorporated its terms and made them fast to his conscience and judgment. Examination of his award and a careful review of his reasons therefor indicate clearly his thorough appreciation of the language and spirit of the compromise and the scope and purview of his trust.

Coincident with his interpretation of article 5 of the convention of November 26, 1885, correlated thereto and commingled therewith, there came the duty to interpret the meaning of the protocol of February 24, 1891, when it defined his

limit of action to be within such circumscribed bounds as are contained in the laws of Venezuela and the general principles of the law of nations, as well as in the terms of article 5, above alluded to. He must determine whether the denials of justice, to be operative in the case before him, must be such as respond to each one of these tests; in other words, such as are not contrary to any one of them, or if responsive to any one, although opposed to the others, it is sufficient. He must determine the breadth of the reference to the laws of Venezuela, and, giving the reference its proper significance and limitations, must seek out and apply to the case before him the Venezuelan laws which he has held to be within the meaning of the reference, and he must summon before him and apply to the elucidation of the question so much of the law of nations as he deems applicable thereto.

The second line of action assigned him necessarily followed, depended upon, and was limited by his disposition of the first duty placed in his charge. If he found no responsibility in Venezuela for the damages claimed by Fabiani because of denials of justice, then his duty was done and the arbitration was closed when he made his declaration of such finding.

He can arrive at this conclusion by one of two ways, or by the meeting of both. It is one way if he finds there have been in fact no denials of justice. It is the other way if he finds denials of justice, but also finds that they are not such as attached responsibility to Venezuela. Either finding absolves Venezuela. If he holds Venezuela responsible in any part, it must be upon the bases that in his sound judgment there are denials of justice and that they are of a character to fix responsibility upon Venezuela. A concurrence of these two conditions must exist or the award must always be for Venezuela, and to the extent that there is nonconcurrence the award must be for Venezuela.

Examination of the award of the honorable arbitrator of Berne, and a study of the reasons he sets forth to justify his findings, discloses that he entered upon the discharge of his high duty with thorough appreciation of the character and the importance of his trust.

On page 22 of his award he said:

In the very first place it is important exactly to determine *the object of the controversy* submitted for arbitration. According to the compromise of the 24th of February, 1891, the question at issue is that of knowing whether, according to the laws of Venezuela, the principles of the law of nations and the convention of the 26th of November, 1885, in force between the two contracting powers, the Venezuelan Government is responsible for the damages which Fabiani says to have sustained for denials of justice. Even independently of the intention of the parties manifested during the negotiations to which the Franco-Venezuelan Convention of 1885 gave rise it evidently appears from the very text of the compromise and from the union of the facts of the case that the respondent Government is proceeded against only on account of the nonexecution by the Venezuelan authorities of the award rendered at Marseilles on the 15th of December, 1880, between Antonio Fabiani on the one hand and B. and A. Roncayolo on the other. The claimant Government even appears to acknowledge that the initial denial of justice is the decision of the 11th of November, 1881 (*réplique*, p. 2); and, as will hereinafter be seen, it is useless to investigate whether one must consider the decision of the 11th of November, 1881, rather than that of the 6th of June, 1882, as the starting point of the eventual responsibilities incurred in the sense of the compromise.

He decides that the act must be considered a denial of justice if it be such under the laws of Venezuela, the law of nations, or the convention of the 26th of November, 1885. He holds that the "absolute concordance of these juridical sources" is not necessary. This is a liberal construction and is very favorable to the claimant Government. After a careful study and an assembling of the laws of Venezuela, which he considers in point, and as a result of his study of

them he holds that there is no essential or even notable difference between any of the three juridical sources and the others on this subject. He further holds that the convention of 1885 settles the right of diplomatic intervention between the two nations; that —

in fact an international act substituted on this point a purely national law (see Article X of the Venezuelan Constitution of 1881); and although the compromise reserves the application of the Venezuelan laws it only refers to such of those laws as are opposable to the claimant Government; now that of 1873 was modified for the French citizens in its Article V, at least, by a posterior convention, binding for the two States that sign a compromise.

His study of this branch of the case leads him to conclude and to hold that —

the only definition which it is possible to take into consideration in the Venezuelan law is that of articles 282 and 288 of the penal code of 1873, which assimilate with the denial of justice any act of a *judicial authority* constituting a refusal to execute a sentence rendered executory, an illegal delay in the dispatch of business, a default to render orders and sentences within the terms established, an undue extension or reduction of the terms established by the law or any delay in the determination of a process. The refusals of execution, the inobservance of peremptory terms, and the illegal delays with which the judges may be reproached in the exercise of their duties are therefore the three orders of facts characterizing the denial of justice in the legislation of Venezuela.

He then proceeds to consider and define the meaning of the phrase “denials of justice” and in that connection employs the language and reaches the decision which appears in a quotation taken from page 24 of his printed award, viz:

A direct definition of the denial of justice is not given by Article V of the French-Venezuelan convention. This text points it out only among the causes for diplomatic intervention, and one might even believe that it distinguishes it, in a certain way, from the other causes of intervention — delays, nonexecution of a definitive sentence, etc., or that it distinctly separates it from them. But without any necessity for examining whether the parties employed in the compromise the expression “*dénégation de justice*” as the exact equivalent of the expression “*déni de justice*,” which is generally adopted by legislation, jurisprudence, and doctrine, it is permitted to affirm that Article V above mentioned fully assimilates with the “*déni de justice*” as to their effects, the illegal delays of the proceeding, the nonexecution of definitive sentences, the flagrant violations of the law committed under the appearance of legality. In all these cases the diplomatic intervention is declared admissible, provided the question may be any affair falling within the “competence of the civil or penal justice”. The condition established by the decree of 1873, of the exhaustion of the legal resources before the courts, is not recalled in the convention of 1885, and it would be excessive to say that Article V *in fine* of this international act (“notwithstanding the compliance with all the legal formalities”) refers to the actions for responsibility directed against the guilty authorities; these “legal formalities” mean those to the observation of which is subjected the performance of the judicial act that may have determined a denial of justice or one of the other causes for the diplomatic intervention; they are, therefore, prior to the denial of justice itself.

By reference to the general principles of the law of nations on the denial of justice, i.e., to the rules common to most legislations or taught by doctrines, one comes to decide the denial of justice comprises not only the refusal of a judicial authority to exercise its duties, and especially to render a decision on the petitions submitted to it, but also the obstinate delays on its part in rendering its sentences.

After citing numerous authorities to sustain his position the honorable arbitrator proceeds to say further concerning this same subject-matter, as found on pages 24 and 25, as follows:

In truth, the compromising powers appear to have desired to give the words "dénégations de justice" their widest extent (*justitia denegata vel protracta*) and include therein all the acts of judicial authorities implying a direct or disguised refusal to administer justice. Instead of textually reproducing the terms of the convention of 1885, they chose a general formula comprising within the limits of said convention the complaints for judicial grievances of Fabiani against Venezuela, which complaints, if they are valid, have, partially, at least, the extent of denials of justice, both according to Article V of this international act and according to the Venezuelan law and the law of nations. It was, in effect, the claims of Fabiani, communicated to his government, that must have inspired the wording of the compromise, and the duty of the arbitrator precisely consists in deciding whether Venezuela "is responsible for the damages which Fabiani says to have sustained for denials of justice".

It is not doubtful that at the time the compromise was signed the claims of Fabiani rested, i.e., both upon denials of justice *sensu stricto* and upon other facts, such as the denials of justice *sensu lato*, indicated in the convention of 1885.

In all of these findings he accepts and adopts the broadest and most liberal construction permissible under either of the juridical sources given him for guidance. In all this his holdings are very favorable to the claimant government and give the controversy of Fabiani its widest possible application within the terms of the convention.

On page 25 the honorable arbitrator discusses, determines, and settles once for all the origin and the object of the Fabiani controversy, and he bases his decision upon the fact found by him that the object and origin were acknowledged by the parties — i.e., by "France and Venezuela" — to be as held by him. This is the finding referred to:

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 of December, 1880, which Fabiani possessed against the two debtors domiciled in Venezuela, or on account of the default of execution owing to the admission of illegal means, that France took the interests of her native into her hands. The Venezuelan Government contests the right of its adversary to proceed against it for responsibility, not because it did not regard the judicial facts alleged by Fabiani, if they were true, as implying denials of justice, but because it sees the absence of denials of justice in the inaccuracy of these facts or in the desertion of the proceeding before the exhaustion of the legal resources. The parties, supporting themselves in the treaty of arbitration on the convention of 1885, have considered, although they only spoke, in the protocol, of "denials of justice," that the arbitrator could reserve as elements of the suit the facts falling within the scope of the above-mentioned convention and constituting denials of justice both according to the Venezuelan law and to the law of nations. In the judgment of the parties concerned, therefore, and according to the applicable texts, "denials of justice," in the sense of the protocol, mean all the direct or disguised refusals to judge, all illegal delays in the proceedings and nonexecutions of definitive sentences, provided the facts concern *affairs of the civil or penal justice*, are imputable to judicial authorities of Venezuela, and have taken place in spite of the compliance with all the legal formalities by the prejudiced party.

On page 26 of his award, he says:

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.

The claimant contended before the honorable arbitrator of Berne that Fabiani might go back of the award of December 15, 1880, to marshal his demands for indemnity, because, it was urged, he signed the compromise at Caracas under the dominion of *force majeure* and that it did not cover the prior

denials of justice. But the honorable arbitrator considers this contention ill founded, holding, on page 26 of his award, that —

Fabiani, who could have had the compromise annulled by the French courts, preferred to conserve the future of his commerce in Venezuela by exhausting all means of conciliation. Fabiani contented himself with the state of things created by the acceptance of the arbitrator's 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 motives drawn from the *vis major*, which would have affected the compromise of 1880, and would remove further 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, can 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 *exequatur*, entered before the high federal court.

Similarly, the honorable arbitrator proceeds to dispose of the contention that there were denials of justice in reference to the award of December 15, 1880, and its execution from, substantially, June 18, 1881, and determines, after all, from the proper union of the facts and law, that there were no denials of justice until after June 6, 1882, the day on which such award was made executory in Venezuela by the decision of the high federal court of that country.

In regard to this he says:

The series of denials of justice begins almost from the very moment Fabiani endeavored to obtain at Maracaibo the execution of the award provided thenceforward by an order of *exequatur* in due form.

Notwithstanding the terms of the convention of February 24, 1891, wherein and whereby the high contracting parties invoked as an aid to the arbitrator the provisions of the convention then in force between them, the claimant Government raised before the honorable arbitrator of Berne the claim that Article V of said convention was not applicable to the Fabiani controversy, because all of his claims for indemnity had arisen before November 26, 1885, and that to apply it in such a case would be to give it retroactive effect, which is contrary to fundamental principles in the administration of justice. This contention the honorable arbitrator held to be ineffective for the reasons stated by him on pages 23 and 24 of his award, viz:

But in the present instance it is not Fabiani personally who is a party in the issue. The arbitration was concluded not between him, but between the French Republic and Venezuela. The claimant state is bound by the above-mentioned international act for all the international interventions to come. For the rest, it is expressly acknowledged that the convention is applicable to the present contestation by the compromise of the 24th of February, 1891; it is a law as between the two countries.

The nonresponsibility of Venezuela, as established by the honorable arbitrator of Berne, so far as and to the extent which he found such nonresponsibility, is clearly set forth by him on pages 25 and 26 of his award, viz:

In return Venezuela does not incur any responsibility, according to the compromise, 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 proof relating thereto, as long as he can not reserve them to establish other concluding and connected facts relating to the denials of justice.

In another place, on page 26, after having set the earliest limit when denials of justice could have place before him, as against the respondent Government, he says:

The arbitrator has not, therefore, admitted, besides the "*faits du prince*," all of the facts strange to the nonexecution and to the effects of nonexecution of the sentence above referred to, to be proved.

Having determined in his award in what particulars denials of justice consisted, and when they began, and how they arose, he proceeds to fix the measure of responsibility attaching to Venezuela therefor; and then to measure and assess the damages which had occurred because of such denials of justice.

On the 30th day of December, 1896, the honorable arbitrator of Berne renders his award and delivers the same in writing, with his reasons therefor, to the respective representatives of the claimant and the respondent Governments.

Following the award and its publication, the respondent Government entered upon the discharge of the requirements thereof and has fully complied therewith. The amounts so awarded and so paid have been accepted by M. Fabiani under the implied consent and approval of his government. No evidence is adduced, no suggestion is made, that, following the award, the Government of France, on its part, has filed with the Government of Venezuela any dissent to or protest against the decision of the honorable arbitrator, or has in any manner addressed itself to the respondent Government to ask a rehearing, a further hearing, or the opening of said cause in whole or in any part, or to manifest the unacceptability of the award as made or to express or to intimate any dissatisfaction therewith, or any purpose or desire on its part to have the Fabiani controversy regarded by the two governments as a pending and open question in any particular or in any part. In all respects, and in every respect, so far as appeared before the umpire, there has been apparent assent to, acceptance of, and acquiescence in the award on the part of the Government of France, and, on its part, an apparent treatment of the Fabiani incident and controversy as satisfactorily, finally, and conclusively closed. Such, also, has appeared to be the position of the Government of Venezuela in relation thereto. Neither does it appear before the umpire that Fabiani, prior to the sitting of the honorable commission at Caracas, had evidenced to the Government of Venezuela through his own Government or otherwise, that he regarded the decision at Berne as setting at rest a part only of his claim or that he asked of his Government or expected of his Government further intervention on his behalf in reference to the same. Nothing appears in the case to indicate that the Fabiani controversy has been treated or considered diplomatically between the two governments, as to any phase thereof, since the award at Berne, nor that the same was referred to as such when the convention of February 19, 1902, was in progress or under consideration; and the umpire understands the claim to be that it is within the terms of that convention solely because, and only because, of the unrestricted character of those terms; because, and only because, this commission is said to be open to the claims of Frenchmen, without having any words of definition or restriction other than the nationality of the claimant and the time of its origin.

The umpire is compelled respectfully to dissent from the proposition made by Fabiani that such parts of his claims as were not allowed by the honorable arbitrator were not allowed through the lack of competency to dispose of them through lack of jurisdiction over them. It is the opinion of the umpire that the honorable arbitrator had complete and absolute dominion over the whole Fabiani controversy; that it was given him by the purposed and carefully

considered concordant action of the two Governments by their compromise of February 24, 1891, in order that a matter which for some years had vexed and troubled them might thereby attain eternal rest and be no longer a disturbing element, a serious cause of dissension between them.

Concerning this the honorable commissioner for France in his supplementary opinion has said: ¹

In the first place Doctor Patùl 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 has preceded this, in order to demonstrate that the intention of the two Governments was really to determine 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 representatives of the Venezuelan Government at Berne who, hoping to find in the terms of the convention unfortunately "ambiguous," the possibility for Venezuela of eluding a part of her responsibilities, combated this broad interpretation in several instances and substituted for it a restrictive interpretation.

There is, then, no disagreement between the parties that the purpose of the compromise of February 24, 1891, was to settle the whole matter contained in the Fabiani controversy. The contention before the umpire rests upon a different basis. The respondent Government claims that not only was the purpose of the compromise as stated, but also that this purpose was effected and the Fabiani incident closed.

Fabiani claims that because of the holding of the honorable arbitrator of Berne that denials of justice as such applied to matters judicial; that in the case before him denials of justice were only found in the nonexecution of the sentence of Marseilles; that they began after June 6, 1882; that there was no recourse by Fabiani to judicial tribunals other than those connected with this sentence, and hence no other opportunity for denials of justice; that such "*faits du prince*" as bore so immediately or approximately upon the execution of said sentence as to have an appreciable effect thereon, were the only "*faits du prince*" to be considered under the compromise; that because of these decisions the purpose entertained by the two Governments at the time of their convention of February 24, 1891, to thereby settle through the arbitration there provided for all of the Fabiani controversy was frustrated, and that the honorable arbitrator, in effect, at least, eliminated and subtracted all else as not being within his competency under the protocol, and thereby especially reserved all these for the use of Fabiani under some later convention, the terms of which should be more liberal.

To the contrary, the honorable commissioner for Venezuela holds the opinion that in making the decisions referred to the honorable arbitrator proceeded strictly in accordance with the terms of the protocol, which, while submitting all the claims of Fabiani to his conclusive and final determination, required and permitted an award against the Government of Venezuela for such of those claims only as resulted from or grew out of the denials of justice, and for such of these only as found responsibility in such Government. He alleges as truth that the claimant Government before the Swiss arbitrator pressed with vigor and to the end that every item presented in Fabiani's tables of claims was properly classed as a denial of justice and was a just demand against the re-

¹ *Supra*, page 102.

spondent Government under the terms of the protocol, and in general that the reparation to be made by the responding Government should be found by the arbitrator to comprise —

all the denials of justice, whether they were imputable to the judicial authorities or to the administrative authorities of Venezuela (these latter naturally including the arbitrary acts of *faits du prince* attributable to the Federal executive), and all the damages which Fabiani says to have suffered through the fault of the public powers of Venezuela,

and strenuously urges upon the arbitrator that he was given “plenitude of jurisdiction” to determine all of these questions. He also admits as truth that the responding Government, while insisting that the whole controversy of Fabiani was before the arbitrator for his final disposition and while denying emphatically that there had been “any denial of justice or any cause of resort to diplomatic intervention,” asserts affirmatively that denials of justice are limited to judicial proceedings and do not at all include administrative, legislative, or executive acts.

It is thus the two Governments clash; it is thus they contend before the honorable arbitrator of Berne. But it is not over the question of jurisdiction; it is not over the question of his competency. Both admit his jurisdiction; both adhere to his competency. The contest is, first, over the right of the claimant Government to demand any sum in damages of the respondent Government on behalf of Fabiani under the protocol which involved two inquiries — first, the inclusiveness of the term “denial of justice” chosen concordantly to define the claims which are in dispute; second, the responsibility of the respondent Government. When this question of right was decided then the measure of damages came to be allowed, if any.

When in the course of his decision the honorable arbitrator of Berne sets aside a claim of Fabiani or eliminates it, it is because in principle and in law the arbitrator has first disallowed it and adjudged against it, through his sovereign power to decide the basic question submitted to him and over which the contest has been made. When he decides this basic question he settles the fate of and effectually determines a large part of the claims of Fabiani. He did not extract them from the *case*, he did not subtract them; he decided against them and disposed of them adversely, not in detail, but as not being claims for which, in principle, Venezuela was responsible under the terms of the protocol. He eliminated them from his consideration only when he reached the question of damages. Up to that point they had been before him and had been passed upon by him. Examination of the arbitrator's award shows that nothing escaped his attention, that everything submitted was carefully considered and adjudged. He allowed some things and disallowed others, over all of which he had rightful and exclusive dominion and sovereignty. He did just what Fabiani assured him he ought to do, and to the doing of which Fabiani, in advance of the arbitrator's action, bowed in assent.

That he may do Fabiani no injustice by this statement, the umpire will present a few excerpts from the *réplique* of Fabiani before the honorable arbitrator of Berne, and later from his *exposé* before the same person, and first from page 16 of his *réplique*:

In our opinion the question can be considered under another aspect, that of the terms of the protocol — general terms which authorize the arbitrator to retain all denials of justice *duly established*, and which permit Fabiani to present all pecuniary claims relative to damages sustained for *denial of justice*.

If Fabiani formulates claims *which have another cause than the denial of justice* or the *imputability of which to the denial of justice should not appear certain*, the arbitrator will reject them, purely and simply as proceeding from the terms of the protocol, the same as if he

recognizes the responsibility of Venezuela he will retain in the proportions which his conscience shall dictate to him, all the damages which he shall judge to be a direct and immediate result of infractions committed by Venezuela.

It will be permitted us to add that even if the protocol, instead of being conceived in general terms, had given the full detail of all the litigious points, it would not be necessary to conclude from it that the whole motive of the claim not expressly enumerated in the compromise ought to have been brushed aside without discussion as being found outside the terms of the protocol.

If it is not a question of another difference, or of a difference arising posteriorly between the parties; if the new motives of claim although they may not be expressly specified in the protocol, find themselves, nevertheless, virtually included in it, whether as an integral part of the litigious points designated, or, as a consequence, if some of these motives of demand are found in the protocol; if the demand is no other than that which the protocol has foreseen and has had for a purpose to settle, and, finally, if the motives which one would wish to have set aside should later give place to the same debates as the motives set forth in the protocol, the arbitrator can appreciate the merit of these new motives and include them in his decision.

On page 615 of Fabiani's exposé he says:

In this situation if the arbitrator, after having examined and analyzed our different motives of claims, were led to recognize that all these motives are justified and that we have estimated our damages without any exaggeration, Venezuela would be able to felicitate herself upon her insistency in causing a mode of payment hardly equitable to be accepted, etc.

And if it should be admitted that the judge, proceeding *either by way of elimination* or by way of reduction, considers that there is reason to restrain the measure of our damages estimated by him upon the usual but converted monetary basis, etc.

On pages 616 and 617 of his exposé Fabiani says in part:

And if he considered it equitable to make a reduction in any of our claims *or if he considers that certain of them ought to be laid aside*, he will find himself, in spite of the taking into consideration the course of the bonds in the presence of a certain lesion, unless he is led to diminish in notable proportions the total amount of our claims.

On page 622 of his exposé Fabiani says in part:

The compromise confers upon him purely and simply the mission of fixing the amount of the *indemnity if he considers Venezuela responsible*. The arbitrator acts in the plenitude of his independence, having no other guide than his intelligence and his love for justice. He asks himself if such a prejudice or such a damage has been the direct and necessary consequence of the infractions which have engaged the responsibility of the defendant party.

On page 624 of his exposé Fabiani says:

It may be, however, 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 set forth* or the opinion that certain prejudices declared by us ought to be reduced to a lower figure. That is the right of the arbitrator, a right whose exercise is subordinate only to the inspirations of his conscience. We have not to prejudge his decision. We know that it will be conformable to justice and equity, but we are convinced that if some of our demands appear to him subject to a reduction the arbitrator, taking account both of the manner of payment and of the circumstances of the case, will accord to us by title of supplement of indemnity exemplary damages.

Fabiani urges the nonretroactivity of the treaty of 1885 through many pages of his exposé and claims that this date is thirty days after the last of the acts of violence upon which his claims rest. On page 522 of his exposé he declares that Article V of the convention of 1885 governs the future only; that Article

III of the same convention is the one governing the past. In the course of this discussion Fabiani is appreciative of the magnitude and persistency with which Venezuela had opposed his claim, and of the possibility that if he had pressed his claim through the treaty of 1885 it might have been an insurmountable obstacle to the reestablishment of the good relations between the two countries and that therefore no treaty could have been consummated.

On page 526 of his exposé he begins a discussion of his claims in reference to the mixed commission which was provided for by the convention of November 26, 1885, to determine the liability of Venezuela for acts posterior to 1867-68 and anterior to the date of the convention, and in this communication he uses the following language:

Our claim having reference to acts posterior to 1867-68 and anterior to November 26, 1885, we evidently had the right to appear before the mixed commission. Why did we not do so? And, moreover, why did not the Venezuelan Government in the presence of the intervention of the minister of foreign affairs of the French Republic itself demand the sending to this mixed commission, which did not begin to do business until two years after? Let us examine the first and latter point. Venezuela, represented by Guzmán Blanco opposed an absolute non possumus. It denied formally the possibility of a claim on our part, and it contested even the existence of our right, pushed it aside without examination and with the most remarkable bad faith. The mixed commission, then, would not have been able to occupy itself with our affair. There is then arbitracio, because the discussion bears upon the admissibility, the extent, or the reality of the damages. When the right is litigable, and, above all, when it is absolutely contested, there is arbitrium. It is a case of arbitration, properly called, or of mediation.

In the matter of damages the mediator generally takes upon himself to give his opinion upon the question of right and leaves to the mixed commission the care of deciding upon the extent of damage. The mission of the arbitrator is determined by the protocol, and more often he is charged with the pronouncing upon the right and upon the act. We do not suppose that these rules can be seriously contested.

In discussing on page 529 of his exposé the convention of November 26, 1885, and in insisting upon the nonretroactivity of the terms of Article V, he says:

If, finally, the words and the intention did not lend to each other a mutual assistance for protesting against the idea of retroactivity, one would find himself in a strange situation. On the one hand a Government which stipulates in good faith and which for causes which are useless to refer to ignores that, during the rupture of international relations one of its nationals has been on a large scale the unfortunate victim of the hostility of the public powers of Venezuela, the Turk's head of an incensed chief of state, * * * is it necessary to recall that mental reservations ought to be energetically laid aside? In that which concerns us we have suffered too much in Venezuela not to protest against this attempt to make an attack upon the principle of the nonretroactivity of the laws. We hold essentially to prove to Mr. Blanco that his last blow has not succeeded. He has failed in discernment when he has not considered the convention of November 26, 1885, as his supreme work, destined to serve his anger and to create for us new difficulties. The conscientious study of our affair leaves no doubt upon the intention; * * * personal interest made him lose all interest in truth and justice. His diplomatic instrument came thirty days too late. And, besides, even had he signed it earlier our sad and venal enemy would not have been able to get any profit out of it. Our affair entered into all the cases reserved, and there is not a single one of our grievances which is outside the provision of Article V, as one may be convinced by the study of our exposé of facts.

On page 559 Fabiani says:

We believe that we have sufficiently demonstrated in our general exposé whether by "*faits du prince*" or by insurmountable obstacles opposed by the judge

and the public power to the execution of our sentences or by the successive denials of justice or by the numerous acts contrary to the right of nations, the responsibility of Venezuela finds itself directly engaged. There can be no divergences upon the *extent* of the power of the arbitrator in respect to all that which has reference to the appreciation of the circumstances and of the facts which ought to determine his conviction in favor of one or the other party. In that which concerns us we recognize this sovereign faculty, submitting ourselves without mental reservations to the intelligence, the prudence, and the conscience of our judge. We have full faith in the justice of our cause, in the reality and exactness of the facts which we have maintained, but we shall hold for true and just that which the judge shall recognize as true and just.

We leave, then, to the arbitrator to consider the facts which are submitted to him, according to the light of reason and justice, aided by the knowledge of the right and general duties of administration which his long practice in public or international affairs has given him. He knows that in virtue of principles admitted by doctrine and jurisprudence of all people he must in such a matter move in the plenitude of the independence of the judge who conforms only to his conscience.

In another part he says:

This part of our work being exclusively reserved for juridical development we are forbidden from entering into a discussion or even an indication of figures. We place the principles; if the arbitrator accepts them his experience and his proud intelligence in affairs will suggest to him the application which he ought to make to the different points of our pecuniary claim.

On page 575 of his exposé Fabiani says:

It will belong to the arbitrator to extend his judgment upon what shall appear to him legitimate or illegitimate, just or excessive, in the claims which we produce. * * * His intelligence, his prudence, his conscience will be the most sure guide for him, a guide formally provided for and authorized by the legislation of the two countries.

We know well that the party of which we demand the damages and interest will endeavor to diminish the amount of them. We see no inconvenience in accepting the discussion. We are, on the contrary, persuaded that in going to the depths of things we shall win ground instead of losing it. The essential thing was to localize this discussion, to avoid theoretical controversies on the kind of damage, to prescribe in this affair at the beginning a distinction between direct and indirect damages, and to constrain the adverse party to confine itself exclusively to proving the exaggeration of our demand. It does not enter into our intention to examine here the different points of our claim. We have made in this regard a separate work, which will come before the eyes of the arbitrator. No figures ought to disturb a discussion of right already too long and which we are in haste to terminate. It is evident that *if the responsibility of Venezuela be retained* no doubt could be raised as to the absolute legitimacy of our claims in that which concerns the liquidation of our sentences in the sums of which the instance formed before the French tribunals ought to assure the recovery. * * * *The principle of the responsibility once admitted* it will belong to the arbitrator to scrutinize, to analyse our claims upon these three points *and to retain only the losses or the damages which shall appear to be justified.*

On page 794 of his exposé Fabiani says:

The arbitrator has the right of *sovereign appreciation*. We do not suppose that this principle can be contested. Without doubt an impartial and intelligent judge admits only that which appears to him legitimate; he *rejects the damages* which in his opinion have not a *direct lien* with the incriminating facts.

The intervention of France on behalf of Fabiani began not long after the treaty of 1885, and the first reference which is of importance, perhaps, contains the following statement by the French Government in regard to its claims for indemnification on account of Fabiani, addressed by the French legation in Caracas to the Venezuelan Government, on August 3, 1887:

It is the opinion of the French Government that the indemnity must embrace, at least in the first place, the amount of the sum, both principal and interest, the collection of which would have insured the execution of the sentence in due form and proper time, besides the restitutions ordered by the judges, amounting to about 1,300,000 francs; and, in the second place, damages and interest, the amount of which is to be discussed, for the wrongs done 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.

Perhaps the first explicit reference thereto on the part of Venezuela is found in the letter of Gen. Guzmán Blanco to his Government, of date November 14, 1889, in which, after referring to other matters with which he had been employed in his office as plenipotentiary, he says:

In that which has reference to the Fabiani claim, with which the Government has charged me recently, I have been able to do nothing to the day of my resignation, because I had not yet received the information which is necessary to the defense of our rights. The point is so grave that it implies *almost the annulment* of the treaty of 1885. The French Government demands that Fabiani be indemnified for something which remains due to him from his father-in-law, Roncayolo, in the liquidation of personal affairs in which they were associated. *Having opened thus the breach in the treaty, we shall lose all the progress which we have made with it.*

By his statement that the point is so grave that it almost implies the annulment of the treaty of 1885, and by the further statement that —

a breach being thus opened in the treaty, we shall lose all the progress which we have made with it —

it is quite evident that the claims presented covered more than denials of justice as understood by him, because these were recognized in the treaty referred to.

Reference to this claim next appears in the correspondence between the two Governments, beginning December 31, 1889, and continuing to August 14, 1890, which is set out in the additional memorandum of the honorable commissioner for Venezuela, accompanying his opinion to the umpire, from which it is learned that the Government of France had particular interest to settle the claim; that —

my Government would see, in the manifestation of *more favorable dispositions as regard 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.

This is from a communication from His Excellency, Mr. Blanchard de Farjes, minister of France in Caracas, to Mr. P. Cassanova, minister of foreign relations for Venezuela, of date December 31, 1889. It is further learned, from a study of the correspondence referred to, that France proposed arbitration; that Venezuela declared to France that it *rejected the Fabiani claim from its origin*, but that the President was desirous of exercising all efforts in behalf of the *desired good harmony* between both countries, and therefore accepted the proposal to arbitrate, *in principle*, providing the umpire be one of the Presidents of the South American Republics and that the question to be decided be —

if this is the case provided for in Article V 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 indemnity to be paid in 3 per cent bonds of the diplomatic debt.

Subsequently the President receded from his requirement that the arbitrator be a President of the Latin-American Republics. France asked that the award of the umpire deal only with the amount of indemnity to be fixed for M. Fabiani; in other words, that Venezuela concede the right to some indemnity, and urged upon Venezuela, inferentially, that by her refusing to consent to this proposition Venezuela was perpetuating an element of dissension between the two countries. This was the status in May, 1890. In July of the same year the minister of Venezuela in France informed the minister of foreign relations in Venezuela as follows:

Consequently, for greater clarity and to prevent M. Fabiani from misconstruing 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 V of the Franco-Venezuelan convention of November 26, 1885, and, second, should the umpire decide that such is the case provided for in Article V, then the umpire is to *fix the sum that must be paid to M. Fabiani* in the 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 to 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.*"

It will be especially noted that, according to this communication, France agreed in substance to the two propositions as stated, but opposed their being submitted in the language suggested.

August 12, 1890, the minister of France at Caracas forwarded to the minister of foreign relations for Venezuela a draft of the protocol —

to serve as the basis of the arbitration already agreed upon "in principle" between the Venezuelan and French Governments —

which draft, in the language chosen by France, the umpire is assured by the honorable commissioner for Venezuela, is Articles I and II of the convention of February 24, 1891, as finally accepted by the two Governments.

Having thus brought upon the record the matters essential to the development of this claim, it is now ready to be considered in all its bearings for the final determination of the umpire upon its merits.

In the judgment of the umpire, the case may properly turn upon the answer to be given the inquiry, Was it the intent and purpose of the high contracting parties, in their agreement of February 24, 1891, by and through its terms to submit to the honorable arbitrator of Berne the entire Fabiani controversy?

When France intervened in behalf of her national, the claims of Fabiani were no longer individual and private claims; they became national. The right to intervene exists in the indignity to France through her national. Thenceforward it is national interests, not private interests, that are to be safeguarded. It is the national honor which is to be sustained. It is the national welfare also which must be considered. In protecting Fabiani and his interests the general welfare must be kept in the foreground. To the extent that his interests and the common welfare of France are in accord his particular claims can be pressed, but no farther. If at any time the general good of France requires a surrender of all his claims, such surrender it is expected France will make, and after that if Fabiani has a claim it is against his own Government, not against Venezuela. From the time her intervention began it was undoubtedly

the constant purpose of France to remove as quickly and as effectually as possible this occasion of international dissension. It is not to be believed that France would consent to submit to arbitration a part only of a national's claim, leaving large and important portions of it undisposed of and to be still matters of international intervention. Nothing, nationally, is gained thereby. The dignity of the tribunal thus invoked, the eminent character of the parties litigant, the importance to these countries, greater than any possible interests of the national, that peace and harmony be the assured result of their action — all these considerations forbid the contemplation even of such a thought. Such is the approach to this question through the medium of general considerations. When view is had of this particular contention, the parties and the protocol, there is added light. Both of the high contracting parties affirm it to be their purpose to close the controversy by the arbitration. The protocol in effect so states. As it seems to the umpire, the honorable arbitrator so understood the scope, purpose, and intent of the protocol. The text of his award charged him with the duty —

first, to decide 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 M. Fabiani claims he sustained through denial of justice.

This duty was placed upon the honorable arbitrator for one of two reasons — either that his determination might end the controversy or simply as an academic proposition. The latter reason needs only to be stated to be denied.

It is also impossible for the umpire to accredit the two nations with the purpose and intent to consider such of the claims as the honorable arbitrator fails to recognize responsibility for in Venezuela as simply eliminated, subtracted, and reserved from the effect of the protocol, to remain as vital claims in the hands of France as a continuing cause of discussion and dissension between the two Governments, or to believe that Venezuela should have consented to arbitrate these points of difference, knowing that when the award was made all of Fabiani's claims not held to be well founded were to be pending against her; knowing that for such as were held to be denials of justice she must make reparation *then* and for all such as were not so held she must oppose, or pay, or arbitrate at some later time.

It is impossible for the umpire to appreciate the reason for the prolonged diplomatic controversy over the terms of the protocol, the anxiety of France, on the one hand, that Venezuela should admit her liability in principle and arbitrate only the damages to be assessed, and, on the other hand, the tenacity with which Venezuela clung to her early offer to submit first this question —

if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885 —

had either of these Governments understood that the arbitration proposed was only a preliminary skirmish to feel the enemy's lines in order to prepare the way for the real battle which was to come after, or if both these Governments had not been controlled by a settled conviction that the award to be rendered was the end of the Fabiani controversy.

It can not be gainsaid that if the honorable arbitrator of Berne had accepted as correct the full contention of France before him he would have amerced the Government of Venezuela in the sum of 46,994,563.17 francs. This was her hazard when she trusted her cause to the arbitrator. If such had been his award, there was for Venezuela no redress. It can not be claimed that if the honorable arbitrator had included every item to the extent demanded that Venezuela had relief before any tribunal or that for her there could have been

by any tribunal subtracted from the sum total a single figure or a single centime. If the present contention of Fabiani is correct, that there is a relief for him before this tribunal, then the respondent Government in an arbitration takes a hazard peculiar to itself of paying the award to the extent of the entire demand of the claimant Government, if such be the award, or a part thereof if successful in preventing an award for all, and then resisting at some later day or paying or arbitrating such elements of the claims as it had been successful in opposing before the first tribunal; while the claimant Government enjoys the privilege, peculiar to itself of consenting to such restrictions in the protocol as it can not avoid if it is to obtain arbitration, and later presenting to a tribunal not hampered by such restrictions the elements of its claim refused, because of the restrictions in the protocol at the first hearing.

If the judgment of the honorable arbitrator of Berne had been that under the protocol the Government of Venezuela had no responsibility, would it have resulted *that all the claims of Fabiani were left unsettled by his decision* and were restored to their primal state of existing claims for which the Government of France could intervene? If not, then what claims would be held to be settled and what still pending? If the position of Fabiani is correct, which is the better result for the respondent Government in an arbitration, to defend successfully in part or in all or to lose in all or in part? Rather, which makes the respondent Government suffer most and longest, since in such a case there is for the defendant Government no surcease?

These inquiries have value only in the fact that by considering them one is irresistibly impelled to the sane and safe conclusion that, in every international controversy of like import with this, the two Governments honestly and carefully seek a common meeting point, which is to be gained usually, as in this case, by mutual concession and mutual remission of matters which *can yield*, and, when that common ground of consent is reached, to submit it as the *whole controversy*; or *as being all that both parties will admit is the controverted question*, and that this mutual point of agreement *is as much a matter of agreement between the high contracting parties as is the covenant to arbitrate itself is an integral part of that covenant gives it its final character and provides for it its name — which is compromise*. The process by which this agreement is reached being concessions by each, each concession cancels the other, so that, outside the protocol, of the original contention *there is left nothing*. *All of the original controversy is found finally resting in the protocol or in oblivion*. Thus, when Venezuela and France first compared their views on the Fabiani matter, France claimed that there was unquestioned liability on the part of Venezuela, and during the discussion named in general, at least, the grounds thereof, and the amount, in part, at least, that she should receive. Venezuela denied all liability in every particular. As they pursued their efforts to reach an agreement France admitted that there might be a question as to amounts, but no question as to the fact of responsibility, and proffered to Venezuela arbitration of the *amount*. Venezuela consented to arbitrate, provided that the arbitrator might be a President of a South American Republic, and provided also that the *question of liability* be the *first question* determined.

Later Venezuela tendered a recession from her demand that the arbitrator must be the President of a South American Republic and consented that the President of the Swiss Federation might take charge of such arbitration, but insisted that the arbitrator be asked to decide, first, if this is the case provided for in Article V of the French-Venezuelan convention of November 26, 1885. Finding that arbitration could only be had by conceding this last point France made the concession in principle, but asked that it be not thus worded and in the end submitted for the acceptance of the Government of Venezuela the

compromise substantially as it was when it became the treaty between them. *Nothing on either side of the claims thus conceded survived.*

They were all *mutually agreed to be perpetually abandoned*. It matters not that each of the agreeing parties believes that much, perhaps all, of its early contention is still left, and is comforted in the thought that nothing has been, in fact, conceded, and that all really exists under the terms agreed upon. This, however, remains *certain* that they have agreed to submit the *whole question* to the arbitrator. They may contend before him, on the one hand, that all is included, and, on the other hand, that nothing can be found under its terms. Concerning the meaning, form, and effect of their agreement, they may essentially and antipodally disagree, but that *they have agreed that their contention is all included within the terms of the protocol, is not, and never can be, a matter of disagreement*. That the compromise has been made in order that the arbitrator shall make a *final and conclusive* award upon the *whole* of the *original controversy* "not buried in mutual concession," *is the most solemn covenant of all*.

If France had made the award at Berne the subject of diplomatic protest before the convention of February 24, 1902, or, in connection with that event, had submitted its grievance, there would have been an opportunity for Venezuela to make answer through the same channels. If, after such diplomatic interchange of opinion, it had seemed best to resubmit the question which had once been heard, or any part thereof, it would come before the tribunal then constituted to hear it, with the knowledge on its part that the hearing had been consented to by both of the Governments involved therein. This protest it did not make. There is nothing to indicate that it desired so to do, or had aught to say why it should not accept as final and conclusive the award of the honorable arbitrator of Berne, unless it be found in the fact that Fabiani is permitted to present his claims, in the manner he has presented them, before this Mixed Commission. So far as the umpire is advised the Government of France has not assumed responsibility for, or attempted to dictate as to, the claims which might come before this tribunal. So far as he is advised, the actual relation of France is found in the fact that it has sought and obtained a tribunal where its nationals may be heard, but has not passed at all upon the claims, sought to refuse, or to limit, the presence of any who considered that they had an international grievance for which the Government of Venezuela had responsibility. It is believed by the umpire that this accounts for the presence of this claim before this tribunal. The large intelligence, the high honor, the scrupulous integrity, the sensitive perceptions of the diplomats of France are assurances to the umpire either that they have carefully and purposely presented this claim, regarding it as entirely outside of the attributes and relations given it by the umpire, or that it is wholly the work of an individual, who had presented his claim on his own initiative, because he feels that in the decision at Berne he suffered a too serious diminution in his honest damages by the application of the rule established by the honorable arbitrator, and who hopes that there may be a chance for revision and reimbursement before the present tribunal.

The umpire holds further that the honorable Governments, in establishing the standard of measurement which was to be used by the honorable arbitrator of Berne in fixing the responsibility of the respondent Government, established at the same time the measure which, when applied by the arbitrator, was to determine alike the extent and the limit of Fabiani's claims. When, therefore, the honorable arbitrator made use of this standard, so provided him, the claims of Fabiani, by their own weight, fell within or without the line of demarcation so drawn. The honorable arbitrator, on his own initiative, eliminated nothing, subtracted nothing, from these claims; there was left for him nothing but first

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. In other words, when he seems to eliminate or to subtract from the claims of Fabiani, or mayhap, so states in his arbitral decision, he is in fact simply pointing out and designating the different elements of the Fabiani controversy, which, in effect, the high contracting parties had agreed to eliminate and subtract in order to reach an agreement that permitted the protocol and the arbitration. The moment the honorable arbitrator of Berne settles the pivotal question of the protocol, by defining the term "denial of justice," around which the storm clouds of conflict quickly gathered and the battle was fiercely waged, these claims fell into the lethe prepared for all such by the two Governments when they agreed to and accepted the protocol of February 24, 1891.

It is also true that this was not the beginning of such eliminations and subtractions by and between these honorable Governments. They began November 26, 1885, in the solemn compact then made between them, and thenceforward these nations rested upon their valued agreement to include within their diplomatic cognizance and intervention the same matters only as are accepted in the protocol of 1891, which substantially, even emphatically, reaffirms this previous convention and applies it to the concrete case in hand, hence if there were any difficulty in understanding the protocol when standing alone, by the light of the treaty of 1885, such difficulties are all removed, and one is permitted to pass within the veil and catch the genuine spirit which inspired it, as we hear the thoughtful plenipotentiaries declare on the part of their respective Governments that it is done —

in order to avoid in the future *everything* which might interfere with their *friendly relations*.

What they agreed to in order to avoid in the future a disturbance of friendly relations was done February 24, 1891, in order to avoid and to remove the very thing, which, until removed, did disturb the friendly relations of the two Governments; and in the agreement which was merged in the protocol such concessions as were made on the part of both Governments were the price which each paid for the restoration and continuance of friendly relations, so essential to the highest welfare of both nations. So far as these concessions affected the pecuniary interests of Fabiani they were the especial tribute required of him by his Government to conserve its general good. How great was this price was not known until the judgment of the arbitrator was obtained, defining the inclusiveness of the standard agreed upon. When that was known, in so far, if at all, as this limited his claims within what he could have obtained under an unrestricted submission, the draft had been made upon him in the interest of the common weal of his nation, which draft it was patriotic duty to honor, and thereafterwards, toward the respondent Government, to seek no recourse.

The umpire may be permitted at this time to refer to decisions made in the courts and international tribunals and to the opinion of Count Lewenhaupt and to quote from the reasons given for the judgments rendered and the opinions held, the subject-matter being similar in many aspects to the present case. They illustrate and support the positions taken by the umpire and are, in his judgment, ample in principle and precedent.

There is the Machado claim before the mixed commission of the United States of America and Spain, of February 12, 1871, presented by memorial in 1871, being No. 3 of the claims before said commission. It was dismissed for want of prosecution December 20, 1873 —

the commission reserving to itself the right to reinstate the said case on motion

by the advocate for the United States, sufficient causes being shown in support thereof.

In 1879 he filed another memorial, being No. 129 upon the docket. March, 1880, the advocate for Spain moved to strike it from the docket on the ground that it was the same case as No. 3. The advocate for the United States contended that the claim was different, and claimed that the motion of the advocate for Spain might be dismissed.

The arbitrators being unable to agree, the question was referred to the umpire Lewenhaupt, who, on July 12, 1880, rendered the following decision:

The umpire is of opinion that the question whether case No. 3 may be reopened has not been referred; that the question whether this claim, No. 129, is a new one or the same as No. 3 does not depend upon whether the items included be the same in both cases, but the test is whether both claims are founded on the same injury; that the only injury on which claim No. 129 is founded is the seizure of a certain house; that this same injury was alleged as one of the foundations for claim No. 3, and that in consequence claim No. 129, as being a part of an old claim, can not be presented as a new claim in a new particular. For these reasons the umpire decides that this case, No. 129, be stricken from the docket.

This case is found in Moore's Int. Arb. 2193. See also decisions similar in principle, Danford Knowlton & Co., and Peter V. King & Co., before the same commission, found in Moore's Int. Arb. 2193-2196. See Delgado case, Moore Int. Arb. 2196.

See the case of McLeod, Moore Int. Arb. 2419.

McLeod, a British subject, set up a claim against the United States of America for his arrest and imprisonment in the State of New York on a charge of murder committed at the destruction of the steamer *Caroline* in the port of Schlosser in that State on December 29, 1879. This claim was presented by the British agent to the commission under the convention between the United States and Great Britain on February 8, 1853. The agent of the United States maintained that the case was finally settled between the two Governments by Lord Ashburton and Mr. Webster in 1842. The British commission thought that the adjustment made between the two Governments was merely a settlement of certain national grievances and that any claim on the part of McLeod must be considered as one of the unsettled questions existing at the date of the convention of February 8, 1853. Mr. Upham, commissioner for the United States, was of a different opinion, and, among other things, says that two questions arise in the case:

I. Whether the settlement made by the Governments precludes our jurisdiction over the claim now presented.

II. Whether, independently of such exception, the facts show a ground of claim against the United States.

* * * No claims can be sustained before us except those which the Governments can rightly prefer for our consideration. With matters settled and adjusted between them, we have nothing to do.

A settlement by the Governments of the ground of international controversy between them, *ipso facto*, settles any claims of individuals arising under such controversies against the Government of the other country, unless they are especially excepted, as each Government by so doing assumes, as principal, the adjustment of the claims of its own citizens and becomes itself solely responsible for them. * * *

These subjects of difficulty and controversy between the two countries were thus fully and finally adjusted, so that the able and patriotic statesmen by whom this settlement was effected trusted, in the words of Lord Ashburton, "that these truly unfortunate events might thenceforth be buried in oblivion." * * *

In my view, the entire controversy, with all its incidents, was then ended; and if the citizens of either Government had grievances to complain of they could have

redress only on their own governments, who had acted as their principals and taken the responsibility of making the whole matter an international affair and had adjusted it on this basis.

The umpire, Mr. Bates, sustained the position of the commissioner for the United States and rejected the claim.

John Emile Houard was arrested in Cuba and imprisoned without right, as it always appeared. Spain voluntarily released Mr. Houard and restored his property to him, requesting of the United States, as a condition of the pardon and restoration, that an end should thereby be put to all discussion concerning this case. This proposition was accepted by the United States. Mr. Houard came before the international commission between the United States and Spain and claimed damages for the wrong done him through his imprisonment and the consequences naturally flowing therefrom. The umpire made the decision as follows:

The umpire does not deem it consistent with the character of his office, nor required by the interests of either party, that the questions involved in the sentence, thus disposed of heretofore and intended to be closed by conditional pardon granted as the result of an international agreement, should now be reopened. (Moore's *Int. Arb.*, 2429.)

See Bours' case, Sir Edward Thornton umpire, Moore's *Int. Arb.*, 2430.

Illustrative of the position which the United States Government has taken in reference to the finality and conclusiveness of awards by commissions and by arbitration, reference may be had to the action of that Government with Mexico under the convention of April 11, 1839. Under said commission three claims were rejected by the commissioners on their merits and four on the ground of jurisdiction. The umpire rejected five claims on their merits and six on jurisdictional grounds. After the termination of the commission attorneys for claimants whose demands had been rejected asked that the convention and all the proceedings under it be declared null and void, while the attorneys for the more fortunate claimants strongly objected to such a course.

The Government of the United States determined to treat as final and conclusive the decisions that had already been rendered and to enter into negotiations for the adjustment of the unfinished business. Under this decision there was a new claim convention of November 20, 1843, which by its first article provided that all claims of the citizens of Mexico against the United States and all claims of citizens of the United States against Mexico —

which for whatever cause were not submitted to nor considered nor finally decided by the commission nor by the arbiter — (Moore's *Int. Arb.*, p. 1249, note.)

under the convention of 1839 should be referred to a board of four commissioners.

Under the commission of 1839, wherein it was agreed that the decision of the umpire should be final and conclusive, and wherein the United States agreed forever to exonerate the Mexican Government from any further accountability for claims which would either be rejected by the board or by the arbitrator, or which, being allowed by either, should be provided for by the said Government in the manner before mentioned, there was presented the claim of Manuel de Cala, growing out of his imprisonment and the confiscation of his vessel and cargo. The American commissioner of 1839 allowed \$52,000, the Mexican commissioner nothing, the umpire \$5,867. It was alleged before the commission of 1849 that this award was made solely on account of the confiscation of the vessel and the imprisonment of de Cala, and that the value of the cargo was by some unaccountable oversight wholly overlooked by the umpire. The commission ruled against it, saying:

This board has no means of knowing upon what grounds the decision of the umpire was made, nor has it any power of correcting his errors, mistakes, or omissions, even if there was clear evidence of the existence of such errors or omissions. The whole claim of de Cala was submitted to the umpire, and in his decision he recapitulated minutely the several items allowed by the American commissioners, and immediately states the amount for which, in his opinion, Mexico should be held responsible. * * * The board is of opinion that the decision of the umpire was final and conclusive, and that, by the terms of the convention of 1839, Mexico was released from any further claim or liability growing out of the transactions upon which it was founded. (Moore Int. Arb., 1274.)

See the Leggett case, Moore Int. Arb., 1276 *et seq.*

In Moore Int. Arb., 1408, Sir Frederick Bruce says:

In civil courts an appeal lies to a superior tribunal; in international courts, which recognize no superior judge, fresh negotiations are opened, and a fresh commission appointed, to which the disputed cases are referred. * * *

I am of opinion that these claims must be submitted *de novo* to the actual commission, with a view to a fresh reexamination and decision on their merits.

Under the United States and Venezuela Claims Commission of 1868 gross frauds were alleged to be perpetrated, and a protest of the Venezuelan Government was filed with the Secretary of State for the United States of America February 12, 1869, alleging irregularity of the umpire and fraud in the proceedings and findings. After careful inquiry by the United States Government it was found that there had been fraud. The decisions were rejected and a new commission was formed by the joint action of both countries to rehear all of the cases.

Moore Int. Arb., 1660-1675.

Where a party, with full knowledge of the facts on which he relies for the impeachment of the award, has nevertheless accepted and executed the award, it will not be set aside because of the objections made by him. (2 Am. and Eng. Encycl. of Law, 789.)

A valid award creates a complete obligation, and need not be ratified by the parties in order to give it operative force. (Id., 806.)

But where an award is voidable, either because the arbitrators have exceeded their authority or because all matters submitted have not been considered by them, or for any other reason, the parties may ratify it expressly or by implication arising from their acts, and after such ratification they will be estopped from objecting to it. (Id., 806.)

The acceptance of the benefits of an award, as accepting the performance from the other party to the submission of the obligations imposed by the award, is a ratification and estops the party so accepting from afterwards denying its validity. (Id., 807, note.)

Acquiescence in an award has the effect of a ratification. (Id., 807.)

In a case before the Supreme Court of the United States entitled *United States ex. rel. Lutzarda Angarica de la Rua, executrix of Joaquín García de Angarica, deceased, plaintiff in error v. Thomas F. Bayard, Secretary of State* (127 U.S., 251 (L. R., 32, 159)), there appears, in the course of the decision, this quotation from the answer of the Secretary of State for the United States:

And this respondent, further answering, saith that the said petition proceeds upon a ground which wholly ignores certain grave international elements and considerations that entered into the claim of the petitioner's testator so soon as the Government of the United States began and assumed to urge and prosecute the same, and that thenceforth the said claim became, in contemplation of law, subject to the will of the Government of the United States and entirely beyond the control of the said petitioner's testator.

On July 4, 1868, a convention was concluded between the United States of America and Mexico for the adjudication of claims of citizens of either country upon the Government of the other. Article II of the treaty contains this clause:

The President of the United States of America and the President of the Mexican Republic hereby solemnly and sincerely engage to consider the decision of the commissioners conjointly, or of the umpire, as the case may be, as absolutely final and conclusive upon each claim decided upon by them or him, respectively, and to give full effect to such decisions without any objection, evasion, or delay whatsoever. (15 Stat. L., 682.)

And also in Article V there appeared the following:

The high contracting parties agree to consider the result of the proceedings of this commission as a full, perfect, and final settlement of every claim upon either Government arising out of any transaction of a date prior to the exchange of the ratifications of the present convention; and further engage that every such claim, whether or not the same may have been presented to the notice of, made, preferred, or laid before the said commission, shall from and after the conclusion of the proceedings of the said commission, be considered and treated as finally settled, barred, and thenceforth inadmissible. (15 Stat. L. 684.)

This was a case of petition for mandamus, entitled *United States ex rel. Sylvanus C. Boynton, plaintiff in error, v. James G. Blaine, Secretary of State.* (U.S. Sup. Court Reports, 139, 306; L.R. 35, 183.)

The payment of the sum awarded had been withheld by the Government of the United States because that Mexico, while complying with the terms of the award and paying in accordance therewith, had solemnly protested to the Government of the United States that deliberate fraud had been practiced upon the commission and that without it there would have been no award against Mexico and asking that the United States Government consent to reopen the case and to set aside the award. This petition was brought to compel the Secretary of State to make payment of the sums due to the relator, notwithstanding the situation suggested.

President Hayes caused the charges of fraud to be investigated, and Mr. Evarts, then Secretary of State and a profound lawyer and eminent jurist, made a careful examination of all the matters concerned and submitted his conclusions to the President, of which we quote in part:

That neither the principles of public law nor considerations of justice and equity required or permitted, as between the United States and Mexico, that the award should be opened and the cases retried before a new international tribunal, or under any new convention or negotiation respecting the same; * * * that the honor of the United States required that these two cases should be further investigated by the United States to ascertain whether this Government had been made the means of enforcing against a friendly power claims of our citizens based upon or exaggerated by fraud. (139 U.S. pp. 306-326; L. R. vol. 35 p. 186.)

In August, 1880, Secretary Evarts —

having been notified through the Mexican legation of the intention of the Mexican Government to commence suits to impeach and set aside the two awards, objected to such a proceeding as in contradiction to the whole purpose of the convention, as well as of explicit provisions thereof; and accordingly no further steps were taken in that direction. (Id. *ibid.*)

Chief Justice Fuller delivered the opinion of the court, and we quote briefly therefrom:

The Government assumed the responsibility of presenting his claim, and made it its own in seeking redress in respect to it.

The Chief Justice makes reference to *Frelinghuysen v. Key* (110 U.S., 63) in the following language:

In *Frelinghuysen v. Key*, while conceding the essential value of international arbitration to be dependent upon the *certainly and finality of the decision*, the court adjudged that this Government need not therefore close its doors against an investigation into the question whether its influence had been lent in favor of a fraudulent claim. It was held that no applicable rule was so rigid as not to be sufficiently flexible to do justice, and that the extent and character of any obligation to individuals, growing out of a treaty, an award, and the receipt of money thereon, were necessarily subject to such modification as circumstances might require.

Cornelius Comegys and Andrew Pettit, plaintiffs in error, *v. Ambrose Vasse*, defendant in error, before the United States Supreme Court, and reported in volume 26, page 193 (L.R. 7, 108), was a case growing out of the award of commissioners constituted under the treaty of the United States of America with Spain on the 22d of February, 1819. In the ninth article of the treaty it provides that the high contracting parties —

reciprocally renounce all claims for damages or injuries which they, themselves, as well as their respective citizens and subjects, may have suffered until the time of signing of this treaty. (8 Stat. L. 258.)

and they then proceed to enumerate in separate clauses the injuries to which the renunciation extends.

The eleventh article provides that the United States, exonerating Spain from all demands in future on account of the claims of their citizens to which these renunciations extended —

and considering them entirely *cancelled*, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. (8 Stat. L. 260.)

To ascertain the full amount and validity of these claims a commission, to consist of three commissioners, was appointed, which within three years from the time of its first meeting should —

receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. (Id. *ibid.*)

There seems to be no especial agreement or covenant concerning the finality and conclusiveness of the awards, and they seem to stand upon the common basis ascribed to awards in general. Mr. Justice Story of the Supreme Court delivered its opinion. Among other things decided by the court there appears this:

The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is *conclusive and final*. If they pronounce the claim valid or invalid, if they ascertain the amount, *their award in the premises is not reexaminable*. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. *A rejected claim can not be brought again under review*, in any judicial tribunal; an amount once fixed, is a *final* ascertainment of the damages or injury. This is the obvious purport of a language of the treaty.

See the case familiarly quoted as *Frelinghuysen v. Key*, found in the United States Supreme Court Reports 110, p. 63 (L.R. 28, p. 71), where the Supreme Court decided the awards to be final and conclusive as between the United States and Mexico until set aside by agreement between the two Governments, or otherwise, and that the United States had right to treat with Mexico for a retrial for particular awards because of the alleged fraudulent character of the proof given in their support, and that the President of the Senate might con-

clude another treaty with Mexico in respect to any claims allowed by the commission. Mr. Chief Justice Waite delivered the opinion of the Supreme Court, in which opinion we find and quote the following:

No nation treats with a citizen of another nation except through his government. The treaty, when made, represents a compact between the governments and each government holds the other responsible for everything done by their respective citizens under it. The citizens of the United States having claims against Mexico were not parties to this convention. They induced the United States to assume the responsibility of seeking redress for injuries they claim to have sustained by the conduct of Mexico, and as a means of obtaining such redress the convention was entered into, by which not only claims of citizens of the United States against Mexico were to be adjusted and paid, but those of citizens of Mexico against the United States as well. * * * Thus, while the claims of the individual citizens were to be considered by the commission in determining amounts, the whole purpose of the convention was to ascertain how much was due from one Government to the other on account of the demands of their respective citizens.

See also *United States v. Throckmorton*, 98 U.S. Sup. Court Reports, 61 (L.R. 25: 93); *U.S. Appt. v. Diekelman*, 92 U.S. Supreme Court Reports, 520 (L.R. 23: 742); *Choctaw Nation, appellant, v. U.S.*, 119 U.S. Sup. Ct., 1 (L.R. 30: 306).

Chapter 18, Book 2, of Vattel on the Law of Nations, Chitty's Edition, treats of the mode of terminating disputes between nations, and the entire chapter is referred to by the umpire as furnishing, in his judgment, a basis for this case. The umpire will quote but limitedly. Section 326 says in part:

If neither of the nations who are engaged in a dispute thinks proper to abandon her right or her pretensions, the contending parties are, by the law of nature, which recommends peace, concord, and charity, bound to try the gentlest methods of terminating their differences. * * * Let each party coolly and candidly examine the subject of the dispute, and do justice to the other; or let him whose right is too uncertain, voluntarily renounce it. There are even occasions when it may be proper for him who has the clearer right, to renounce it, for the sake of preserving peace — occasions which it is the part of prudence to discover.

Section 327 is entitled "Compromise," concerning which he says:

Compromise is a second method of bringing disputes to a peaceable termination. It is an agreement, by which, without precisely deciding on the justice of the jarring pretensions, the parties recede on both sides, and determine what share each shall have of the thing in dispute, or agree to give it entirely to one of the claimants on condition of certain indemnifications granted to the other.

Section 329 is entitled "Arbitration." Concerning this he says, in part:

When sovereigns cannot agree about their pretensions, and are nevertheless desirous of preserving or restoring peace, they sometimes submit the decision of their disputes to arbitrators chosen by common agreement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators. *They have engaged to do this*; and the faith of treaties should be religiously observed. * * * For if it were necessary that we should be convinced of the justice of a sentence before we would submit to it, it would be of very little use to appoint arbitrators. * * * In order to obviate all difficulty, and cut off every pretext of which fraud might make a handle, it is necessary that the arbitration articles should precisely specify the subject in dispute, the respective and opposite pretensions of the parties, the demands of the one and the objections of the other. These constitute the whole of what is submitted to the decision of the arbitrator; and it is upon these points alone that the parties promise to abide by their judgment. If, then, their sentence be confined within these precise bounds, the disputants must acquiesce in it. They can not say that it is manifestly unjust, since it is pronounced on a question which they have them-

selves rendered doubtful by the discordance of their claims, and which has been referred, as such, to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestable facts that it was the offspring of corruption or flagrant partiality.

Mr. Bayard, Secretary of State for the United States of America, a very eminent and able lawyer, acting in his office aforesaid, gave this official opinion on May 12, 1886:

Motions to open or set aside international awards are not entertained unless made promptly, and upon proof of fraudulent concoction or of strong after-discovered evidence. Wharton's Int. Law Digest, sec. 316, vol. 3, page 81.

The award not having been vacated, opened, or set aside during the lifetime of the former commission, and the claimant having done nothing since to waive his rights thereunder, it was further ruled that such award should be treated by our Government as a valid and conclusive ascertainment of his claim against New Granada. Wharton's Int. Law Digest, sec. 328, vol. 2, page 672.

Mr. Seward, Secretary of State for the United States, in correspondence July 17, 1868, referring to the *Alabama* claims and to an effort to adjust them which had been made by both Governments and reviewing the situation, says:

In the first place, Her Majesty's Government not only denied all national obligation to indemnify citizens of the United States for these claims, but even refused to entertain them for discussion. Subsequently Her Majesty's Government upon reconsideration proposed to entertain them for the purpose of referring them to arbitration, but insisted upon making them subject of special reference, excluding from the arbitrators' consideration certain grounds which the United States deem material to a just and fair determination of the merits of the claims. The United States declined this special exception and exclusion, and thus the proposed arbitration has failed. *Id.*, sec. 221, vol. 2, p. 568.

On page 569 of the same volume there is a statement by Mr. Frelinghuysen, Secretary of State, to Mr. Rosecrans, October 17, 1883, as to the action of the United States concerning arbitration, the finality of the decisions, and the solemnity of the agreement which authorizes the arbitration.

Mr. Fish, Secretary of State for the United States, to Minister Russell, of Venezuela, June 4, 1875, says in part:

That if a State, after having submitted a controversy regarding claims and debts due to individuals, to arbitration, whether by another State or by a commission, refuses to pay the award, it loses credit and leaves no alternative with other powers than that of refusing intercourse, or of an ultimate resort to war. *Id.*, sec. 220, vol. 2, p. 550.

Mr. Frelinghuysen, Secretary of State for the United States, February 11, 1884, says in part:

The claims presented to the French commission are not private claims but governmental claims, growing out of injuries to private citizens or their property, inflicted by the government against which they are presented. As between the United States and the citizen, the claim may in some sense be regarded as private, but when the claim is taken up and pressed diplomatically, it is as against the foreign government a national claim.

Over such claims the prosecuting government has full control; it may, as a matter of pure right, refuse to present them at all; it may surrender them or compromise them without consulting the claimants. Several instances where this has been done will occur to you, notably the case of the so-called "French spoliation claims". The rights of the citizen for diplomatic redress are as against his own not the foreign government. * * * The commission is not a judicial tribunal adjudging private rights, but an international tribunal adjudging national rights. *Id.*, sec. 220, vol. 2, p. 558.

Should the Government of the United States, either by its neglect in pressing a claim against the foreign government or by extinguishing it as an equivalent for concessions from such government, impair the claimant's rights, it is bound to duly compensate such claimant. *Id.*, sec. 220, vol. 2, p. 566.

On a careful review of the history of this claim from its origin to this day, enlightened by study and reflection, fortified in principle, and controlled by reason, responsive to his conscientious conception of duty, the judgment of the umpire is clear and positive that the compromise arranged between the honorable Governments February 24, 1891, followed 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 M. Antoine Fabiani. Therefore the claim presented before this tribunal, and, on disagreement of the honorable commissioners, coming to the umpire, and there entitled "Antoine Fabiani No. 4," is disallowed, and the award will be prepared accordingly.

NORTHFIELD, *July 31, 1905.*

EXHIBIT IN FABIANI CASE — AWARD UNDER CONVENTION OF 1891

(Exhibit not reproduced. For the original text of the award under Convention of 1891 see Moore's *History and Digest of International Arbitrations*, Vol. V, pp. 4878-4915.)

PIERI DOMINIQUE & Co. CASE ¹

Prevention by the chief of the custom-house at Carúpano of the beneficial use of the tramway enterprise by the claimant was without right and the injuries resulting are properly chargeable to the respondent Government.

Suspension of the tramway traffic by order of the municipal council of Carúpano is equally without right, and the injuries resulting are properly chargeable to the respondent Government through this municipal division thereof.

Suspension of the tramway traffic by order of the municipal council of Carúpano that the private aqueduct company might use its streets to lay the pipe lines of the company whereby serious injury resulted to the claimant must be met with a proper recompense by the city and is here properly chargeable to the claimant Government through and because of said municipality.

¹ EXTRACT FROM THE MINUTES OF THE SITTING OF MAY 12, 1903

The arbitrators proceeded then to the examination of the claim presented by Messrs. Pieri and Nasica, of which the different parties are the object of the following decisions:

The claim of Mr. Nasica, amounting to 1,500,000 bolivars, is rejected by the commission; the claim of the Messrs. Pieri & Co., amounting on the one hand to 3,730,000 bolivars and on the other for acts posterior to May 23, 1899, to 280,400 bolivars, is accepted in its *ensemble* for 600,000 bolivars by M. de Peretti.

The French arbitrator considers that the continual hindrances brought by the municipal authorities of Carúpano to the exploitation of the line of tramways have rendered the latter so difficult that the rescission of the contract ought to be pronounced. In exchange for the indemnity which he demands for the concessionary the city of Carúpano will remain in possession of the line, of the depot, and of the cars which constitute the actual material existing.

M. de Peretti adds that he has been able during his trip to Carúpano to prove that the last war had completely stopped the exploitation; the line, of which the rails have been torn up in several places, is cut in two by four barricades; the depot, which has served as a military hospital, is partly demolished and the cars have almost all been put out of service.

(Continued on p. 140.)