法伯尔案

张帆

[案件导读]

本案是德国政府代表其国民法伯尔在德国-委内瑞拉国际混合委员会向委内瑞拉提起的索赔案件。[1] 法伯尔居住在哥伦比亚，利用从哥伦比亚经委内瑞拉通向大西洋的水道开展进出口贸易。委内瑞拉政府为阻止其国内反叛力量在哥伦比亚和委内瑞拉之间往来，颁布法令关闭其境内港口，从而阻断了法伯尔等德国商人的贸易通道。混合委员会中的德国委员主张，德国商人在经委内瑞拉通海的水道上享有自由航行权，委内瑞拉无权禁止；委内瑞拉委员则主张，国际河流自由航行权理论并未被接受为国际法上的一般规则。首席仲裁员认为本案涉及的并非限制内河航运的问题，而是主权国家对商业航运进行管理的问题，因此无需以国际河流自由航行权为裁决依据。首席仲裁员裁定，委内瑞拉有权在其认为对本国国民的和平、安全与便利有必要的情况下关闭其主权管辖范围内的港口以中止航运。首席仲裁员在裁决最后对国际河流自由航行权进行了理论上的探讨。他系统梳理了国际河流自由航行权的理论根源以及后世法学家对它的批判，在此基础上指出：国际河流自由航行权的理论前提是不真实的；基于需求创制权利的理论是不合逻辑的；将国际河流自由航行权定义为“不完全权利”也是不恰当的。

[关键词]

国际河流，通海水道，自由航行权，航运管理权，商业航行，自然权利，无害通过，无害使用，不完全权利

一、争端的起源与发展

哥伦比亚和委内瑞拉是南美洲北部的两个相邻国家。在本案争议发生的历史阶段，它们之间的边界始于马拉开波湾（Gulf of Maracaibo）西岸的帕雷特（Peret），沿佩里哈山脉（Sierra of Periga）向南行至库库塔（Cúcuta）以南不远处，然后向东到奥里诺科河（Orinoco），最后沿奥里诺科河向南延伸至巴西

[1] *Faber Case*, Reports of International Arbitral Awards, Vol. X, p. 444.

的北部边界。

委内瑞拉西部的卡塔通博河（Catatumbo）经马拉开波湖（Lake Maracaibo）流入马拉开波湾，是一条重要的通海商业水道。苏利亚河（Zulía）发源于哥伦比亚-委内瑞拉边境的哥伦比亚一侧，它向东穿越两国边界进入委内瑞拉国境后，在恩孔特拉多斯（Encontrados）附近汇入卡塔通博河。卡塔通博河适于吃水深度 5 英尺的船只航行，而苏利亚河的一般深度仅 2 英尺，只适于小型蒸汽船只、驳船和独木舟航行。

哥伦比亚的内陆省份桑坦德省（Santander）毗邻委内瑞拉，该省的进出口贸易主要依赖委内瑞拉境内的通海水道。从桑坦德省首府库库塔市到大西洋的货运一般通过以下方式完成：首先用铁路将货物运送到苏利亚河上的哥伦比亚边境海关所在地维拉米扎尔港（Villamizar），使用吃水深度不超过 2 英尺的小型蒸汽机船、驳船或独木舟装载，经苏利亚河运至它与卡塔通博河的交汇处，然后在委内瑞拉边境海关所在地恩孔特拉多斯港换装到较大船只上，经卡塔通博河进入马拉开波湖，最后在马拉开波港换装到出海船舶上。此外，一条名为乌雷尼亚的高速公路（Urena road）可将货物从库库塔市直接运送到马拉开波港出海。

19 世纪末，委内瑞拉的卡塔通博河与苏利亚河附近地区经历了相当长时间的政治动乱，同时委内瑞拉和哥伦比亚之间的关系也变得十分紧张，因为委内瑞拉指责哥伦比亚成为委内瑞拉国内反叛力量获得精神与物质支持的大本营。为了阻止反叛力量在哥伦比亚和委内瑞拉之间往来，委内瑞拉于 1900 年 9 月 11 日颁布法令，暂停恩孔特拉多斯港向上下游的所有航运，从而中断了从哥伦比亚经苏利亚河与卡塔通博河通往大西洋的进出口贸易。

经这条通海水道开展的贸易相当大部分由德国公司经营或有德国资本参与，因此德国政府对委内瑞拉提出了抗议：“关闭苏利亚河与卡塔通博河妨碍了德国和哥伦比亚之间的商业，从而违反了国际法原则，因此德国政府保留要求委内瑞拉对上述行为所致损失承担责任的权利。”（1901 年 2 月 4 日）

作为答复，委内瑞拉主张其作为独立的主权国家，颁布上述法令是合乎国际法的。（1901 年 2 月 16 日）但委内瑞拉还是对原法令进行了修改，以“不出现新的公共秩序动乱威胁”为前提，允许采用驳船或独木舟进行商业航运，仅禁止使用蒸汽机船。（1901 年 3 月 4 日）

1901 年 7 月，兰赫尔•戈比拉斯将军（Rάngel Garbiras）从哥伦比亚境内发动起义，他的部分军队经苏利亚河和卡塔通博河进入委内瑞拉。于是委内瑞拉在 1901 年 7 月 29 日撤销了对驳船和独木舟航运的许可，恢复了 1900 年 9 月 11 日颁布的第一项法令，再次中断了恩孔特拉多斯港的所有航运。

1902 年 6 月 14 日，委内瑞拉“暂时允许使用库库塔与马拉开波之间的乌雷尼亚高速公路。”1903 年 1 月 15 日，委内瑞拉再次颁布法令，其中第一条撤销了 1901 年 7 月 29 日法令对恩孔特拉多斯港与维拉米扎尔港之间航运的绝对禁止，第二条恢复了对驳船和独木舟航运的许可，第三条允许在马拉开波港和恩孔特拉多斯港之间使用蒸汽船只和帆船为哥伦比亚运送进口货物。1903 年 4 月 3 日，委内瑞拉颁布了与本案相关的最后一条法令，废止了 1903 年 1 月 15 日法令的第二条。综上，到仲裁之时，桑坦德省可以借由委内瑞拉领土进行通海贸易的范围仅包括：在马拉开波港与恩孔特拉多斯港之间使用蒸汽船和帆船运送进口货物（1903 年 1 月 15 日法令第三条），以及在库库塔与马拉开波之间经乌雷尼亚高速公路往来运送货物（1902 年 6 月 14 日法令）；而从桑坦德省经苏利亚河与卡塔通博河通海的出口贸易仍然无法开展。

德国政府认为，委内瑞拉的“商业封锁”对法令颁布以前长期利用“苏利亚河-卡塔通博河-马拉开波湖”从事进出口贸易的德国商人利益造成了严重损害，因此代表这些德国国民诉诸德国-委内瑞拉国际混合委员会（International Mixed Commission），对委内瑞拉提起了一系列索赔请求。其中，本案申请人乔治•法伯尔（George Faber）在哥伦比亚的库库塔市居住和营业，其它索赔申请人则都在委内瑞拉的马拉开波市居住和营业。

德国-委内瑞拉国际混合委员会是依据《华盛顿议定书》（Washington Protocol）成立的仲裁庭。它由三名成员组成，其中德国和委内瑞拉各有一位委员（Commissioner）代表本国立场，还有一位首席仲裁员（Umpire）居中裁断。

德国委员在其对本案陈述的意见中指出：

> “首先要承认主权国家对其河流和水道位于其边界以内的部分享有绝对权力。但这条原则在两种意义上受到国际法的限制。如果一条河流构成另一国或该国一部分领土的唯一交通途径且对其生存而言不可或缺，那么就不能完全禁止该河流的使用。此外，如果对可航河流的使用

是为了与其它友好人民通航，且通过独立国家时并无冒犯，那么这种使用不能被禁止。”[2]

他据此主张委内瑞拉无权禁止其国内河流与哥伦比亚港口之间的商业航运，并请求首席仲裁员“在原则上确认委内瑞拉对因其商业封锁对德国国民造成的损失应当承担的责任。”[3] 委员会于受案当年（1903 年）对本案做出了裁决。

二、委员会对本案争议的管辖权

委内瑞拉委员主张，德国以库库塔的德国商人利益受损为借口介入委内瑞拉与哥伦比亚之间的争端，强迫委内瑞拉开放苏利亚河航线，是一种不合理、不合法的第三方干涉。他认为这是委内瑞拉与哥伦比亚之间的问题，如果要解决，只能由这两个国家自己决定。同时他指出，根据《华盛顿议定书》，德国无权就任何可能有损委内瑞拉主权的事项提出争议，或就委内瑞拉对其河流与湖泊享有绝对主权的法律地位提出争议，然而：

“为支持库库塔商人的索赔请求而要求苏利亚河对国际商业开放，是偷偷将关于委内瑞拉主权的问题引入了一个遵循绝对平等原则负责事实审查的仲裁庭，这类问题需要另一类研究和另一种裁决标准，因此当然应被排除在本委员会管辖范围以外。”[4]

德国委员则否认德国政府代表其国民提出仲裁请求是在哥伦比亚-委内瑞拉两国的争端中偏帮哥伦比亚，他强调不干涉其它国家之间的争议是德国的一贯原则，德国仅要求委内瑞拉为其商业封锁损及德国利益的部分负责。为了不损及委内瑞拉主权，德国委员认为：

“委员会的适当做法是不宣布委内瑞拉政府要求商业封锁的法令无效，而只确定委内瑞拉是否应当赔偿德国公司因其商业封锁遭受的损失。”[5]

首席仲裁员肯定了委员会对本案争议的管辖权，他认为：

“虽然委员会的任何决定都可能会对哥伦比亚与委内瑞拉之间的争

[2] Reports of International Arbitral Awards, Vol. X, p. 444.
[3] Reports of International Arbitral Awards, Vol. X, p. 446.
[4] Reports of International Arbitral Awards, Vol. X, p. 457.
[5] Reports of International Arbitral Awards, Vol. X, p. 452.

端产生直接影响，但如果德国国民因为委内瑞拉的行为被剥夺财产或财产权，那么本委员会就对这位德国国民的仲裁请求有管辖权。本委员会并不裁决委内瑞拉和哥伦比亚之间的争端。在委员会的实体裁决中，可能会附带对两国间的问题表达意见。虽然委内瑞拉和哥伦比亚可能会援引其中对自己有利的观点，但这些观点并没有权威效力，而仅基于其论证逻辑具有说服力。”[6]

首席仲裁员还指出，虽然除法伯尔以外，其它索赔申请人都在委内瑞拉的马拉开波市居住和营业，但考虑到他们共同的德国国籍，在对本案的讨论中，并不需要区分“哥伦比亚居民”和“委内瑞拉居民”而适用不同的规则。[7]

三、委内瑞拉对内河航运的管理权

首席仲裁员认为本案裁决应当基于委内瑞拉管理其内河航运的权利，而不是对国际河流自由航行权国际法地位或适用条件的判断。

首席仲裁员首先强调了一个双方均无异议的事实：委内瑞拉的法令并没有切断直接的通海航运。受地理条件限制，所有经苏利亚河和卡塔通博河通往大西洋的船只都必须在马拉开波港停船换装，所以哥伦比亚并不享有经委内瑞拉领土直接通海的便利。因此在首席仲裁员看来，本案并不存在外国人被委内瑞拉法令剥夺了直接通海水道使用权的情形。首席仲裁员认为委内瑞拉实际上从未试图限制这种权利，因为她允许外国人在自然条件允许的范围内使用船只运送货物进入她的领土。本案申请人认为，因为委内瑞拉法令不允许他在委内瑞拉领土上进行两次货物换装，所以他遭受了损失。首席仲裁员认为他主张的并不是自然条件允许下的自由航行权，而是“经委内瑞拉内水运送货物，并依水深变化的要求一次又一次把货物换装到较小船只上”的权利。首席仲裁员指出：

“显然这是非常不同的一件事。第一，它必然涉及对委内瑞拉土地的使用，这不仅是航运的附带使用，而是要在委内瑞拉河岸上完成重新装船、运输和货物处理。第二，它将河流上的自由航行主张延伸到一种新的情况，而这种情况我从未见过任何先例……这似乎是一个对商业进

[6] Reports of International Arbitral Awards, Vol. X, p. 459.
[7] Reports of International Arbitral Awards, Vol. X, p. 467.

行管理的问题，而不是限制内河航运的问题。”[8]

此外，委内瑞拉法律要求在其内河港口间航行的船只及其船长都必须拥有委内瑞拉国籍。首席仲裁员认为这种规定并未超过委内瑞拉适当行使主权的范围。

最后，首席仲裁员回顾了委内瑞拉 1900 至 1903 年间一系列法令出台的历史背景。他指出，委内瑞拉在 1900 年 9 月 11 日颁布第一个禁航法令前经历了相当长时间的政治动乱，而且在委内瑞拉看来，哥伦比亚领土已成为委内瑞拉革命者的安全基地。显然委内瑞拉的一系列法令都是为了控制船只（尤其是蒸汽船只）在哥伦比亚和委内瑞拉之间通行，以阻止敌对力量在两国之间往来。

首席仲裁员认为，本案中的具体问题，是在上述地理和政治条件下，委内瑞拉是否有权关闭其主权管辖范围内的港口以中止航运。首席仲裁员对这个问题给出了肯定的答案：

> “关于国家对通海河流进行管理的权利，以及在对其国民的和平、安全与便利有必要的情况下暂时禁止河流航运的权利，没有任何学者提出实质性的反对意见。至于什么是对其国民的和平、安全与便利有必要的情况，应由该国自己判断。在首席仲裁员看来，似乎很清楚，在任何需要她做出这种判断的情形下，她的决定都是终局性的。”[9]

四、国际河流自由航行权理论

德国委员与委内瑞拉委员就国际河流自由航行权的国际法地位展开了激烈的争论。德国委员认为，当河流及其支流流经多个国家时，它的全部可航河段对商业航行而言都应是自由的，这被视为一条国际法原则（international doctrine）。[10] 委内瑞拉委员则认为，国际河流自由航行权理论并未被接受为国际法上的一般规则。[11] 首席仲裁员虽然认为本案无需以国际河流自由航行权为裁决依据，但还是对其进行了理论上的探讨：

（一）国际河流自由航行权的理论根源

1.保留自然权利理论

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[8] Reports of International Arbitral Awards, Vol. X, p. 462.
[9] Reports of International Arbitral Awards, Vol. X, p. 463.
[10] Reports of International Arbitral Awards, Vol. X, p. 444.
[11] Reports of International Arbitral Awards, Vol. X, p. 449.

国际河流自由航行权的理论根基是格劳秀斯（Grotius）提出的“保留自然权利理论”。[12] 首席仲裁员对格劳秀斯的这种理论进行了概括：

> “他（格劳秀斯）认为分割财产权是根据协议从人类最初的共同财产权中发展起来的，而在这一过程中，一部分既有的自然权利因为公共利益被保留下来，其中就包括通过领土的权利，不论是经由陆地还是水域，也不论是为商业目的在河流上航行，还是军队通过中立国，他都认为是无害使用，并认为国家无权拒绝许可这种通过。”[13]

基于这一理论，很多国际法学家对国际河流自由航行权原则表示支持，但也提出了不同的限定条件。有的学者认为无害使用权仅限于和平时期，有的学者认为只有河流流经国的居民享有无害使用权，还有的学者认为国家有权为其境内河流的使用制定必要和适当的规则。首席仲裁员介绍了其中的代表性观点：[14]

格若诺维斯（Gronovius）和巴贝拉克（Barbeyrac）在他们对格劳秀斯理论的注释中考虑了航行许可征税权，这似乎暗示着国家有禁止航行的权利。美国最高法院在对彩票案（lottery case）的判决中，也判定商业管理权包含禁止权。

布伦茨奇利（Bluntschli）大体上认为流入海洋的河流以及与海洋相连的通航河流应当对所有国家的商业航行开放，但他认为这种权利仅限于和平时期。

卡尔沃（Calvo）认为，当一条河流流经两个及以上国家领土时，其*河岸上的所有居民*都享有航行权和经商权；但如果一条河流完全位于一国境内，那么该国对这条河流享有排他性主权。他将这种主权的行使限定于财政管理，但似乎他认为财产权从属于航行权。费奥雷（Fiore）基本同意卡尔沃的观点，认为如果河流只流经一国，那么该国有权选择关闭河流入口。在这一点上，要区分通海河流与不通海河流是很困难的。

赫夫特（Heffter）指出，河流所在国有权管理河流的使用，而享有河流使用权的仅限本国居民，但至少在原则上，他还是赞同格劳秀斯、普芬道夫（Puffendorf）和 瓦特尔（Vattel）的观点，即，为了全世界的商业利益，不应绝对拒绝给予一个国家及其国民无害使用河流的优待（privilege）。

惠顿（Wheaton）宣称，对于穿过不同国家领土的河流，*位于河岸不同部分*

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[12] Hall’s Treatise on International Law, p. 137.
[13] Reports of International Arbitral Awards, Vol. X, p. 464.
[14] Reports of International Arbitral Awards, Vol. X, pp. 464-465.

*的国家*都享有商业目的航行权。但他称这种权利为“不完全权利（imperfect right)”，认为行使这种权利必然要服从于受影响国家的*安全和便利*，只有通过双边条约的规制，这种权利的行使才能得到有效保证。[15]

哈利克（Halleck）同样认为，在可航河流*河岸上的所有国家*都享有商业目的航行权，但应当接受受影响国家为保障其*安全和便利*而制定的必要规定。

马登斯（De Martens）认为，每个国家基于对自己领土享有的排他性权利，有权拒绝他国居民入境，这是一条一般规则；但是他认为不应拒绝他国居民的无害通过。他承认，主权国有权自己判定什么样的通过是“无害的”，但似乎他认为另一国的地理位置能够赋予它一种权利，即为商业目的可以要求（demand）通过，甚至在需要时可以强求（force）通过。

伍尔西（Woolsey）指出，当一条河流发源于一国境内而在另一国流入海洋，国际法仅允许上游国对河流航行提出道义上的主张或享有不完全权利。

菲利莫尔（Phillimore）就英国拒绝向美国无条件开放圣劳伦斯河的决定做出这样的评价:“似乎很难否认，大英帝国可以为其拒绝找到严格法（strict law）上的理由，但同样难以否认的是，她执行了一项极端而严苛的法律（extreme and hard law)，与其在密西西比河上的做法不一致。”

克虏伯（Kluber）强调，在对水道行使权利时，要特别注意国家的独立性，而且，“如果一个国家禁止所有他国船只在自己的水道上航行，那么不能指责它是不公正的。”

推斯（Twiss）宣称，“一个国家如果享有一条河流的两岸，那么它在法律上就享有河岸中的这部分河道，并且有权随其意愿禁止任何其它国家使用自己领土上的水道。”

2.无害使用理论

格劳秀斯还提出了另一种支持自由航行权的理论，即，将河流航行定性为一种“不会造成损害的使用（*utilitatis innoxiæ*)”。瓦特尔这样表述这种理论：

> “河流对于所有者的价值不会因为他人的无害使用而造成任何减损，只要这种使用是非消耗性的（inexhaustible)。”[16]

基于这种理论，格劳秀斯和瓦特尔认为一个国家通过其它国家领土的权利是

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[15] Elements of International Law, pt. 2. Ch. 4, par. 11, Lawrence’s ed.
[16] Reports of International Arbitral Awards, Vol. X, p. 465.

严格法律上的权利，而不是基于礼让的权利，这种权利涉及的范围包括海滩、湖泊、河流，甚至陆地。但首席仲裁员强调，从瓦特尔开始，权威学者一般都认为河流所在国是对“无害使用”的唯一裁判者。

3.人类共同利益理论

支持自由航行权的第三种理论是：一个国家对其境内河流享有的所有权应当服从于人类共同利益，就如同在有组织的社会中，个体的所有权受制于共同利益的要求。首席仲裁员援引了著名法学家哈尔（Hall）关于这个问题的论述：

> “为他国商业活动开放水道对人类的重要性，就和个人牺牲个体权利对公民社会的重要性一样。”[17]

（二）对国际河流自由航行权理论的批判

1.“保留自然权利理论”的前提是不真实的

首席仲裁员认为，格劳秀斯关于国际河流自由航行权的理论“没有被最好的国际法注解者采纳。”[18] 他赞同哈尔的观点：“它（指格劳秀斯的理论）已不再被接受为论证的起点。”[19] 菲利莫尔甚至把格劳秀斯的理论前提称为“这位伟大人物相信的一种假想（fiction）”：

> “因为这一观点的基础已经被普遍认为是一种假想，而它的论证是基于其假设的前提是一种事实，所以这种论证是无效的。”[20]

2.需求不能创制法定权利

首席仲裁员指出，大多数对河流无害使用权的支持者都曾提出这样一个理由：河岸居民对于河流的其它部分享有一种特殊的权利，因为这种使用对他们来说是非常有利的（highly advantageous）。首席仲裁员基于哈尔的论述，阐明了这种观点的不合逻辑性：

> “如果一个人所处的位置决定了他使用他人财产会对自己特别有利，他就可以以此为依据享有要求使用他人财产的权利，这真是一种新奇的主张。一个人的权利不会因为他的需要（want）甚至必需（necessities）而被创制或决定。一个挨饿的人拿了别人的面包，在法律上仍然是个小偷，虽然这种行为的不道德性非常轻微。个体的需要或

[17] Hall’s Treatise on International Law, p. 139.
[18] Reports of International Arbitral Awards, Vol. X, p. 465.
[19] Hall’s Treatise on International Law, p. 139.
[20] Phillimore’s Com. on International Law, p. 190, Sec. CLVII.

必需不能为他们创制法律权利，或者影响他人的既有权利。”[21]

3.“不完全权利”理论

要证明自由航行权是严格法上的权利是非常困难的。虽然自由航行权的支持者们并不明确承认，但大多数都默认这一点。于是，瓦特尔、惠顿和伍尔西等学者将这种权利定义为“不完全权利”，即认为它要受制于河流所在国的权利，而且河流所在国对于某种使用是否属于“无害通过”拥有专属决定权。但首席仲裁员认为这种理论是不恰当的，他援引哈尔的描述揭示了“不完全权利”概念的荒谬之处：

> “一种权利被宣称是存在的，但它是不完全的，因此它的享有要受制于财产受影响国决定要求的条件，而且，如果有充分理由，它还可以被完全否认。”[22]

（三）国际河流自由航行权理论在本案中的适用性

1.苏利亚河并非桑坦德省的唯一出海通道

德国委员提出，如果一条河流构成另一国或该国一部分领土的唯一交通途径且对其生存而言不可或缺，那么依据国际法，该河所在的主权国家就不能完全禁止其使用。他认为“苏利亚河-卡塔通博河-马拉开波湖”是哥伦比亚桑坦德省出海的唯一通道，因此委内瑞拉无权禁止其商业航行。

但首席仲裁员指出，哥伦比亚的通海条件其实比委内瑞拉更为有利。该国的商业水道主要是马格达莱纳河（Magdalena）与其主要支流考卡河（Cauca），以及梅塔河（Meta）和瓜维亚雷河（Guaviare）。马格达莱纳河与考卡河由南向北几乎贯穿整个哥伦比亚，最后注入加勒比海。梅塔河和瓜维亚雷河从西向东流入哥伦比亚-委内瑞拉的界河奥里诺科河，并经由奥里诺科河入海。此外，哥伦比亚北临大西洋（加勒比海），西濒太平洋，拥有绵长的海岸线。具体到苏利亚河对桑坦德省的意义，首席仲裁员认为：

> “说苏利亚河对桑坦德省的生存不可或缺，或它是桑坦德省通向海洋的唯一通道，都是不准确的。为哥伦比亚大部分富饶地区提供入海航道的马格达莱纳河可通航至位于维拉米扎尔港以南一百多英里处的宏达

[21] Hall’s Treatise on International Law, p. 149.
[22] Hall’s Treatise on International Law, p. 140.

（Honda），且从宏达到河流入海口都可供大吨位船只航行。”[23]

2.委内瑞拉拥有“无害通过”的判定权

首席仲裁员通过对不同法学家观点的梳理，发现他们似乎都同意，船只通过的国家应当是判断这种通过是否无害的唯一裁判者（sole judge）。首席仲裁员认为，从这个角度来说，即使通海船只在苏利亚河与卡塔通博河上享有自由航行权，委内瑞拉仍然有权颁布她在本案中被诉及的那些法令。[24]

3.小结

首席仲裁员承认，如果本案必须依据这个国际法上的一般问题（指国际河流自由航行权问题）来解决，他倾向于支持委内瑞拉对卡塔通博河和苏利亚河享有完全的控制权。但他也强调，本案无需在此基础上裁决，因为关于委内瑞拉管理内河航运的权利，和在对其国民的和平、安全与便利有必要的情况下完全禁止河流航运的权利，理论上不存在任何争议；而且，关于什么是“对其国民的和平、安全与便利有必要的情况”，委内瑞拉做出的判断不受本委员会或任何其它法庭或仲裁庭的审查，委内瑞拉对此享有自由裁量权。

[23] Reports of International Arbitral Awards, Vol. X, p. 461.
[24] Reports of International Arbitral Awards, Vol. X, p. 466.

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Faber Case

1903

VOLUME X pp. 438-467

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10,772.24 bolivars, for the reasons stated in his opinion in the case of Christern & Co., No. 50.[1]

Item C of the claim for 19,749.24 bolivars, in the opinion of the Commissioner for Germany, should be allowed at its full amount, but he gives no reason for that opinion. The Commissioner for Venezuela, without giving any reasons therefor, is of the opinion that this item should be disallowed. It appears from the expediente that the Government of Venezuela on the 16th of February, 1903, imposed an export duty of 2 bolivars on each 50 kilograms of coffee and 4 bolivars on each 46 kilograms of hides. It is not contended by the claimant that this duty in and of itself would have been injurious to them or was an unlawful exercise of power by the Government; but they claim that because of the closure of the river by the Government decree of the 15th of January, 1903, the duties fell upon coffee which would otherwise have been exported prior to the date of the decree. This claim, therefore, depends for its allowance upon the decision of the question of the liability of Venezuela for closing the River Zulia, and is disallowed for the reasons stated in the opinion in the case of Faber, No. 53.[2]

The remaining items of the claim — namely, D, E, F, and G — for injury to coffee and hides caused by the prolonged storage of the same, and interest on the capital lying idle during the closure, and loss caused by the suspension of mail service, and loss on account of salaries, rent, etc., also depend on the decision of the same question, and are disallowed.

The claim is therefore allowed at the sum of 12,186.54 bolivars, which includes interest to December 31, 1903.

FABER CASE

(By the Umpire:)

Consular certificates admissible as evidence.[3]
International mixed commissions not bound by strict technical rules of evidence.

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[1] *Supra*, p. 423.

[2] See below.

[3] The question as to what papers are receivable in evidence before international commissions was extensively discussed by counsel for the claimant and respondent governments before the United States and Chilean Claims Commission of 1897, the briefs being summarized as follows:

The position of counsel for the United States upon this question is:

(1) That this Commission must receive *as evidence all* written documents and statements which are presented by either Government and must consider them in arriving at its conclusions.

(2) That these documents and statements are to be given such weight as they seem to be entitled to, both intrinsically and in view of surrounding circumstances and other facts proven in the case; and

(3) That the mere fact that they are *ex parte* may possibly affect their *weight* when contradicted by other proof, but can not possibly affect their *admissibility* as legal evidence.

Reliance was placed upon Article V of the treaty, stating that—

They (the Commission) *shall be bound* to *receive* and *consider* all written documents or statements which may be presented to them in behalf of the respective Governments in support of or in answer to any claim.

The United States counsel conceded that the civil law upon this subject was not as strict as the common law, as might be seen in the following citations:

French Civil Code, articles 1317-1333; Code of Civil Procedure (in force in Spain, Cuba, Porto Rico, and the Philippines), articles 577, 595, 601; Mexican Code of Civil Procedure, article 289; Colombian Civil Code, articles 1758-1766; Chilean Civil Code, articles 1699-1707; Louisiana Civil Code, articles 2234 (2231) to 2251; Walton's Civil Law in Spain and Spanish America, pages 346-348.

States through the territory of which navigable streams flow, although these streams rise in the territory of other States, have the right to close these rivers to navi-

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Footnote 3 *(continued)*

It was, however, contended further that all Government reports were so closely related to the claims as to be almost part of the res gestæ.

Citations were made from the Claims Treaty of 1794 with Great Britain. Treaties and Conventions between the United States and Other Powers, pages 383 and 384; the treaty of 1819 with Spain (Ibid., 1020); treaty of 1834 with Spain (Ibid., 1024); treaty of 1853 with Great Britain (Ibid., 446); claims convention of 1868 with Mexico (Ibid., 701); treaty of 1857 with New Granada (Ibid., 211); claims convention of 1866 with Venezuela, and that of 1885 providing for a rehearing (28 Stat. L., 1057), and claims convention of 1880 with France, act of Congress approved March 3, 1849, to settle claims of American citizens against Mexico (9 Stat. L., 393), and act of June 19, 1878, authorizing the Court of Claims to take jurisdiction of the Caldera claims (20 Stat. L., 172), for the purpose of showing that the universal diplomatic rule was that the commissioners should receive all documents or statements which might be presented to them on behalf of their respective Governments. Reference was had to the Caldera case, 15 Court of Claims Reports, 546-606, for the purpose of showing that—

International tribunals are not bound by local restraints. They always exercise great latitude in such matters (Meade's case, 2 Court of Claims Reports, 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

The Meade's case, above cited, was quoted as authority for the fact that the adjustment of international claims should not and could not be subjected to the narrow technical rules of ordinary tribunals.

The Treaty of Washington of May 8, 1871, Article XXIV, was cited to show that the Commissioners "shall be bound to receive such oral or written testimony as either government shall present," and that, as appears by Moore, page 728, the Commission decided that ex parte affidavits should be admitted.

Moore, pages 1435 and 1753, was cited as equally conclusive, the first reference being to the Montijo case and the second being to the claims of Pelletier and Lazare.

To the third point attention was called to the convention between the United States and Chile of November 10, 1858 (Moore, p. 4690), where the decision was of necessity made solely upon ex parte testimony.

Reliance was placed upon the Walker case in the Chilean Commission. All such letters as were introduced were strictly ex parte, and a decision of the Commission, dated December 22, 1897, was to the effect that a lengthy affidavit by Bacigalupi was evidence, and in the Levek case Chile had introduced a letter.

Reference was made to the fact that some question arose before the former Chilean Commission, as shown by pages 152 to 155 of the agent's report, being raised in the Murphy case, and the Commission ruled that it was "at liberty to take affidavits into consideration and to attribute to them a limited value or no value whatever, according to circumstances," and to the fact that in the Read case, No. 13, agent's report, general affidavits were accepted as the foundation for an award.

Upon the same subject-matter, the agent for Chile filed a brief, in which, after citing the opinion of Mr. Hale, agent of the United States before the Anglo-American Commission, as shown on page 4 of his report, with relation to the disadvantage of the Government in defending claims, he maintained:

First. That the officers before whom the various affidavits filed in those cases were taken were not duly authorized to certify to the affidavits, and

Second. That affidavits can not be considered as evidence by this Commission. The Commission is governed by the rules of law existing in the two countries, which in this case are in harmony in regard to the nature of the evidence by which claims may be supported or refuted.

His brief further cited Article V of the convention of August 7, 1892, authorizing the Commissioners to decide "upon such evidence information only as shall be furnished by or on behalf of the respective government," arguing that this emphasized the evidential character of the information to be furnished. He further cited the seventh article of the rules of procedure of the Commission established in 1893, showing that the claimant "shall be required to establish" all the material allegations

gation at their discretion, and no appeal will lie therefrom. This doctrine would seem to apply even though these rivers emptied directly into the sea instead of

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Footnote 3 (continued)

of the petition "by legal and sufficient evidence." He relied upon Article XV of the rules of 1893, as follows:

The rules of evidence as to the competency, relevancy, and effect of the same shall be determined by the Commission, with reference to the convention under which it is created, the laws of the two nations, the public laws, and these rules.

From this he argued that the claimants should support the facts upon which their allegations were founded with legal and sufficient evidence. He argued against the propriety of accepting affidavits taken before ministers of the United States, secretaries of legation, or consuls, citing Calvo, Droit International, section 612, third edition; Heffter, Le Droit International Public, section 216, No. 2; Bluntschli, Le Droit International Codifié, article 221, and Field's International Code, article 172.

As fortifying the opinion that ex parte proofs should have no legal weight, the Chilean agent quoted Greenleaf, volume 1, chapter 3, section 446, page 541, and as showing the necessity for notification to the other side, so that the witnesses might be cross-examined, he cited the Laws of Chile, Prontuario de los Juicios, law xxiii, title 16, paragraph 3.

As indicating the little weight to be given to ex parte evidence and the necessity for cross-examination are cited People *v.* Cole, 43 New York, 508; Revised Statutes, United States, chapter 17, title "Evidence;" Foster's Federal Practice, second edition, pages 502 and 1267; Greenleaf's Evidence, section 321, page 414; volume 1, section 164; Best on Evidence, page 83; Wharton's Law of Evidence, section 177; Wharton's Book 3, section 110, chapter 13, and sections 872, 873, 875, 879, 881, and 882 of the New York Code of Procedure; as also A. 425, A.426, A. 430, A. 434 of the Code of Procedure of Louisiana, and section 2033 of the Code of Procedure of California.

As showing that affidavits are not receivable in the Court of Claims, section 1083 of the Revised Statutes is cited, and 2 Court of Claims, 345, as well as the rules of procedure of that court.

As showing that ex parte affidavits were excluded by the Court of Claims, citation is made of Main *v.* U. S., 21 Court of Claims Reports, page 54.

Attention is called to the Shrigley case before the prior Commission (Moore, 3711), in which depositions, not taken in accordance with the rules of the Commission, were suppressed, and showing that there was no appearance on the part of the claimant or notice for taking depositions.

The case of Murphy (Moore, 2262) was relied upon as showing that the kind of evidence under discussion should be received "not as evidence but only as elements which in certain cases may contribute to a limited extent, collateral or secondary, to confirm or strengthen a conviction appearing to be based on proofs of a more conclusive character," and the decision in the Thorndike case (Moore, p. 2274) is referred to as indicating the opinion of the Commission that such evidence lacked sufficient legal weight to warrant a decision against the respondent.

The French-American Commission, sitting in Washington from 1881 to 1884, it is said, citing from the Murphy case, adopted the same principle.

The agent admitted that official communications written in the discharge of official business should necessarily be admitted in evidence.

The agent for the United States replied to the foregoing brief, contending that the following propositions had been established:

1. The Commission is "bound to receive and consider all written documents or statements" presented by either Government as evidence.

2. This ipso facto makes all such writings, whether affidavits or mere letters, *legal evidence*, no matter what the ordinary rules of law may be concerning them, but leaves it open for the Commission to attach such weight to them as they intrinsically seem to deserve.

3. This rule, as established by the convention, is different (and is conceded by both sides to be different) from the rule either of the common or the civil law upon the subject, although the civil law seems to be much more liberal in this respect than the common law, as witness the case cited in the preceding brief from 159 United States Reports, page 204.

debouching into an inland lake, as in the case under consideration, wholly within the territory of the State seeking to control the navigation of these rivers. This doctrine being applicable to the inhabitants of the State at the headwaters of the streams is all the more applicable to domiciled foreigners.[1]

GOETSCH, *Commissioner:*

The Department of Santander of the Republic of Colombia, with its capital at San José de Cúcuta, has been very poorly endowed by nature, since it lacks means, which pass exclusively through Colombian territory, to establish commercial communication with the ocean. The commercial traffic of the Department with the rest of the world can not be effected except through the port of Maracaibo — that is to say, by passing over Venezuelan territory. The traffic from the capital, San José, to the Atlantic Ocean takes place in the

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Footnote 3 (continued).

4. The rule now contended for by the United States is the only rule in diplomatic settlements, and the usual rule in commissions such as this, as witness the authorities, decisions, and citations from the proceedings of other commissions, and of the Court of Claims set out in the former brief.

5. The former commission under the present convention held in the Murphy case that ex parte affidavits were admissible, and in fact *used them as evidence*, but considered that the ones on file in that case were intrinsically improbable, and therefore a majority of the commission declined to permit their judgment to be controlled by them. In the Reed case, afterwards decided by the same commission, they *unanimously* treated similar documents as evidence, and believed the statements contained in them, and decided the case accordingly.

6. It is manifest, therefore, that the objection now made by the agent for Chile can not properly avail to destroy the effect of all affidavits and writings as evidence. It is likewise manifest that all such papers must be considered by the Commission, and each one weighed as to its individual merits and inherent probability.

Referring to the French-American Commission, he stated that upon verifying the reference all that appears is as follows:

The affidavit of Philibert Rozier referred to in the motion of the United States assistant counsel is stricken from the record.

He argued that it did not appear officially why it was so stricken out.

He further contended that letters and telegrams sent from one official to another were literally ex parte statements, and that all writings submitted by either Government should be received in evidence, carefully weighed as to their convincing force, and permitted to influence its decision much or little, or not at all, according as that convincing force is found to be present or absent in each particular case.

A majority of the commission made an award on the evidence in question in favor of the claimant.

[1] For a very interesting and exhaustive discussion of this question we refer to an article by Ernest Nys, published in the Revue de Droit International et de Législation Comparée, 1903, 2d series, Vol. V, p. 517, stating the limitations of the doctrine as laid down by the umpire, and citing:

Revue de Droit International et de Législation comparée, 1901, Vol. III, 2d ser.; Magnette, *Joseph II et la liberté de l'Escaut*, 1897, pp. 17, *et seq.*, 46; Charles de Martens, *Causes Celèbres du Droit des Gens*, 2d ed., Vol. III, p. 338 *et seq.*; Henry Wheaton, *Hist. of the Progress of the Law of Nations in Europe and America*, Vol. II, p. 192; Grandgaignage, *Histoire du péage de l'Escaut*, pp. 88, 89; Ed. Engelhardt, *Du Régime Conventionnel des Fleuves Internationaux*, pp. 24, 25, 27, 172, 182, 219; E. Carathéodory, *Le Droit International concernant les Grands Cours d'eau*, 1861, pp. 107, 116, 117; Wheaton, *Elements of International Law*, Vol. II, p. 86; Crommelin, *De Verplichtingen van Nederland als Neutrale Mogendheid ten Opzicht der Schelde*, p. 71; *Revue de Droit International et de Législation Comparée*, 1886, Vol. XVIII, p. 159, *et seq.*; *Annuaire de l'Institut de Droit International*, Vol. VIII, p. 272; Pierre Orban, *Etude du Droit Fluvial International*, 1896, p. 140; Baron Guillaume, *L'Escaut Depuis* 1830, Vol. I, pp. 353, 400; Bonfils, *Manuel de Droit International Public*, 2d ed., No. 524; Bluntschli, *Le Droit International Codifié*, art. 769; Piédelièvre, *Précis de Droit International Public ou Droit des Gens*, Vol. II, p. 375. See also Rivier, *Principes du Droit des Gens*, Vol. I, pp. 221, 225.

following manner: From Cúcuta to the Colombian port Villamizar by rail (the frontier custom-house upon the Zulia River); from Villamizar by the navigable river Zulia to its mouth in the Catatumbo River, near Encontrados (the frontier custom-house of Venezuela); from Encontrados continuing along the Catatumbo River as far as its mouth, in Lake Maracaibo; thence by Lake Maracaibo to the city of Maracaibo. A few leagues farther down from the port of Villamizar the Zulia River crosses the frontier line of Venezuela. At the Venezuelan railroad station El Guayabo the railroad from Uracá to Encontrados touches. The Lake Maracaibo and the Catatumbo River as far as Encontrados are navigable by steamers of considerable draft, while the river Zulia from Encontrados to the port of Villamizar only permits the passage of small steamers of a slight draft and other lighter vessels.

From time immemorial the Department of Santander has used that highway for the exportation of its national products, principally coffee and hides, and for the importation from abroad of those necessities which it is not able to produce. The importance of the commercial traffic by this route is shown by the fact that the commerce duties of Colombia received in Villamizar amount to from 680,000 to 800,000 bolivars.

A very considerable portion of this commercial traffic is carried on by German firms and German capital. We are treating here of the firms of Van Dissel & Co., Brewer, Moller & Co., Beckman & Co., Steinworth & Co., and Faber & Co., of Hamburg, respectively, from Maracaibo and San José de Cúcuta, besides the German stores in Maracaibo. This last enterprise is an exclusively German house, and performs its navigation by the lake and the rivers, with proper steamers and steel lighters, and in company with another transportation company, in which the firm of Brewer, Moller & Co. have an interest of 50 per cent, while all the other German firms, which almost all have their principal houses in Hamburg, busy themselves with the exportation of coffee and other products from Santander and the importation of merchandise to said Department. The German capital in these enterprises amounts to many millions of marks. These commercial relations, existing from very remote periods, were destroyed at a blow by an executive decree of the Government of Venezuela dated September 11, 1900. The decree is of the following tenor:

> Commencing upon the day of the promulgation of this decree, the clearance of vessels which carry on river commerce along the Zulia and Catatumbo rivers is suspended in the coastwise custom-house at the port of Encontrados.

Because of this prohibition of the clearance of all vessels the commercial blockade with respect to the Department of Santander was established de facto. No vessel could thereafter pass by Encontrados either going up or coming down the river. Commerce was totally destroyed.

The Government of the German Empire has protested before the Government of Venezuela against said measure, which very seriously injured German interests. The officer at the imperial legation at Caracas, under the date of February 4, 1901, protested, as is seen by the following extract:

> Mr. Minister EDUARDO BLANCO, etc.:
> From an order received, I have the honor to notify your excellency that, according to the interpretation of the Imperial Government, the closing of the Catatumbo and Zulia rivers, because it interrupts the German commerce with Colombia, is contrary to the principles of international law, and that therefore the German Government should reserve to itself the right to hold Venezuela liable for the injuries resulting on account of said measure.

In his answer, dated February 16, 1901, the minister of foreign relations in Venezuela has upheld the legality of this measure, alleging the sovereignty

of Venezuela as an independent state, but has agreed upon the existence of the commercial blockade as such, as follows:

Upon the stopping, temporarily, of the passage of commerce upon the Zulia and Catatumbo. * * *

To this the German legation replied, under date of February 19, 1901, repeating the protest already quoted.

Upon the 4th of March, 1901, the Government of Venezuela modified said decree as follows:

River commerce is permitted upon the rivers Zulia and Catatumbo, but only in lighters or canoes, and while new fears of disturbance of the public order should not require the contrary.

But after a few days the primitive state was restored by a decree of July 29, 1901, and by it the commercial blockade was restored by the decree of July 29, 1901, and reestablished in its full extent. The decree reads as follows:

The decree of March 4, 1901, which permitted river commerce along the Zulia and Catatumbo rivers from Encontrados by lighters and canoes, is rovoked, the decree of September 11, 1900, remaining in its full force and effect.

Under date of June 14, 1902, the following decree was issued:

Until the definite reopening of the port of Encontrados the way of Urena is temporarily open for the passage of merchandise between Cúcuta and Maracaibo, and vice versa, the way of Encontrados being open only for the coastwise service.

Finally, what follows was ordered by a decree of January 13, 1903:

ARTICLE 1. The decree of July 29, 1901, by which traffic between Encontrados and Puerto Villamizar was absolutely forbidden, is revoked.

ART. 2. The decree of March 4, 1901, which permitted traffic between Puerto Villamizar and Encontrados by means of lighters and canoes only, is made effective.

The traffic by lighters and canoes, to which the foregoing article refers, shall be carried on by Guayabo, transporting by rail the merchandises which are exported.

ART. 3. Navigation of steam and sailing vessels, carrying merchandises in transit for Colombia, shall hereafter be permitted only by the ports of Maracaibo and Encontrados in accordance with the laws which are in force in the premises.

Lastly, another decree, under date of April 3, 1903, was issued, the second article of which reads as follows:

The effects of article 2 of the decree of January 15, already cited, are revoked with relation to the importation of merchandise in transit for Colombia by said route, until the causes which make said transportation undesirable may be removed.

This state has continued until the present day.

By the commercial blockade established there, which now can not be considered as totally removed, but which in any case was maintained in full force for about two years, the interests of German firms and those of German commerce have suffered serious injury, as has already been shown.

The damages consisted principally in the following: The crops of coffee bought of German houses in Cúcuta could not be exported during the time of the blockade, which lasted two years. The coffee had to undergo a long storage in Villamizar, exposed to the warm climate and extreme humidity, which occasioned a loss of a part of it and the payment of high rates of insurance. The capital invested in coffee ceased to produce interest, thus also the capital invested in German houses in Cúcuta could not be utilized later on and could not produce profit, while the general expenses continued to run, such as the salaries of employees, the rent of the commercial establishments, etc. The

imported merchandise from Europe and the United States suffered like injury, which could not be transported from Maracaibo to Santander, these latter remaining stored in Maracaibo, where they suffered deterioration in part, and later it was necessary to sell them at a loss. A part of the general expense of the business of Maracaibo was disbursed without return. The vessels and steel lighters belonging to the transportation companies of German houses, which carried the commerce to Villamizar, could not fulfill their object, and remained loaded, without being used, and were injured to some extent by the brackish water of Lake Maracaibo. All these injuries are immediate consequences of the stoppage of the commercial traffic.

Let us pass on to prove how Venezuela may be made liable for them.

(*a*) In the first place it is undeniable that a sovereign state holds absolute authority over its rivers and water courses until these touch the frontiers of other states. This principle is nevertheless limited in two senses by international law. When a river constitutes the only way of communication, indispensable for the subsistence of another nation, or part of it, its use can not be entirely prohibited. (See Heffter's International Law of Europe, Berlin, 1867, sec. 77.) Besides, the use of navigable rivers for traffic with other friendly peoples when they cross independent states can not be prohibited when their use is not offensive. After all a state can not deny to another nation the inoffensive use of routes by land or water within its territory without committing an act of hostility, and no State can exclude another from commercial communication with the market of a third without committing an offense and injury unless the latter desires and puts in force the exclusion. (See Heffter, p. 63; Puffendorf, T.N., III, 3, 6; Groot, T., 2, 13; Vattel, II, 123, 132-134.) These international maxims are the creation of close association between nations. They have been applied in treaties of distinct periods. (Treaty of peace of Paris, 1814, art. 5; the official record of the Congress of Vienna, art. 8, 117-118; art. 15 of the treaty of peace of Paris, dated March 30, 1856; art. 1 of the provision of navigation for the Danube, dated November 7, 1857; treaty between Spain and Portugal, August 13, 1835, concerning the free navigation of the Duero; treaty of reciprocity between Canada and the United States dated June 5, 1850; art. 4 of the treaty of the Republic of Argentina with other powers dated July 10, 1853; and others.)

On account of everything that has been said it is considered as an international doctrine that the navigation of rivers which flow through portions of several States together with their affluents shall be free from the point where they first become navigable to where they empty into the sea, so far as commerce is concerned — provided this latter be in itself free — should not be denied to anybody; besides, each riparian state shall exercise its authority within the limits of its fluvial domain, impeding as little as possible the liberty of navigation. (See with respect to this Phillimore, pp. 189, 191, 192, 195, 204, 207, 209, et seq; Grotius, Book II, chap. 2, sec. 12; Wheaton, Pt. II, chap. 4, sec. 11; Heffter, pp. 63, 147; Carathéodory, International Law Concerning Large Water Courses, pp. 155-158; Moore, 1718.)

As there was no war between Colombia and Venezuela the latter had no right to prohibit the foreign commerce with a Colombian port.

The principles above stated have not been limited to the territory of European states, but have found application in states and circumstances outside of Europe. It was especially the part of England at a former time to make this principle respected and to defend it energetically against Spain with respect to the traffic on the Mississippi. (Phillimore, sec. 170.) Thus also the United States of America have invoked against England the application of the principles above set forth and attained their recognition with respect to the commerce of

the St. Lawrence River, the mouth of which is situated exclusively in Canadian territory. It is true that England maintained at first an interpretation of the expression of natural right should not be given to the principles of the treaty of Vienna but that they should be considered as the conventional arrangement of an exceptional privilege granted by the contracting parties, and the enjoyment of which did not belong to a third noncontracting party. Nevertheless this attitude of England was not in harmony with her own opinion in the claim of the Mississippi (see Phillimore, sec. 170), and it was also rejected by the United States with reason and success. Secretary of State Clay, in Washington, ordered the American minister, Gallatin, under date of June 15, 1826, in London, to oppose the following to the English pretension (see Mr. Secretary Clay's letter to Mr. Gallatin, American minister in London, June 19, 1826, session 1827-28, No. 43, Am. State Papers, For. Rel., vol. 6, p. 764); that the provisions of the treaties should not be considered as of a merely conventional character, since ordinarily it would be necessary to give them a positive and natural right in order to settle differences; that the right to navigate the ocean had also been the subject of rules and divers treaties; that the provisions of Vienna and other similar ones should rather be considered as an homage which men render to the great Lawgiver of the Universe by which His works should be free from the chains that human caprice strive to put upon them. Also, among other German publicists this opinion prevails. Thus Wurm (see Five Letters upon Free River Navigation), has called the treaties abovementioned a concentration of the great principles which are gradually illuminating the reason of nations. (See also Carathéodory, pp. 139-141.) England was compelled to yield, although only after some years, by a treaty signed on June 5, 1854, by Lord Elgin, which recognized in article 4 the freedom of navigation upon the St. Lawrence River. (Treaties and Conventions between the United States and Other Powers, p. 451.) The Argentine Republic took a similar course upon another occasion by confirming by a treaty of July 18, 1853, the freedom of navigation of the Paraná and the Uruguay for the ships of all nations.

If these principles are applied to the present case, it follows that the blockade of commercial traffic upon the navigable rivers Catatumbo and Zulia, which cross the territories of Venezuela and Colombia, was an act contrary to the law of nations, and therefore illegal. As is seen from the correspondence exchanged with the German legation, Venezuela based her proceeding upon the declaration that her relations with Colombia were at that time strained and that the closing of the rivers was a necessary measure for the national safety. Nevertheless, this excuse is not admissible. There has not existed a true state of war between Colombia and Venezuela, and Venezuela herself (November 20, 1901), in answer to an inquiry of England, expressly stated that a state of war did not exist. (See the English blue book of Venezuela, No. 1, 1903, p. 55.) But neither should there have occurred, even in the case of a state of war or the probability of warlike complications, a complete commercial blockade, or say, total interruption of neutral commerce upon navigable rivers. (See Wurm, Freedom of River Navigation, p. 55, et seq.; art. 131 of the convention between the German and French Governments upon the control of the navigation of the Rhine, dated August 15, 1804; the Clayton-Bulwer treaty between the United States and England; art. 6 of the treaty between Argentina and the United States of America, England, and France, dated July 10, 1853.)

Venezuela, if she had the right to control the commerce upon the Zulia and Catatumbo, as her safety required in view of the strained relations with the neighbor Republic, could have inspected and regulated the commerce of merchants — the first in order to prevent the transporting of Venezuelan

revolutionists or Colombian troops, and the second in order to submit to register vessels suspected of transporting arms or contraband.

To exercise greater control, she could compel vessels or steel lighters to be accompanied by constabulary or troops as far as the Venezuelan frontier, and to receive them there again upon their homeward journey. The absolute blockade, or, say, the prohibition thereby resulting to the exportation of coffee, which was German property, and to the importation of German merchandise, appears to be an act not justified by the circumstances, and therefore inadmissible and illegal according to international law.

(*c*) The Government of the German Empire, because of what has been said, was entirely right in protesting to the Government of Venezuela against the commercial blockade, and to reserve to herself the right of enforcing an indemnity, since a state which, by an illegal act, injures the legal interests of foreign subjects should make reparation for the damage caused.

The Government of Venezuela has expressly recognized its liability in the protocol of peace for claims presented up to that date, and therefore also for claims arising out of the commercial blockade. Because of what precedes the German Commissioner asks of the honorable umpire that he fix the liability of Venezuela in principle for such damages as may be proved to have been suffered by subjects of the German Empire because of the commercial blockade.

ZULOAGA. *Commissioner:*

In the extreme west of the Republic of Venezuela is the lake of Maracaibo, a beautiful sheet of fresh water, entirely surrounded by Venezuelan territory. The lake communicates with the port of Maracaibo, or the Gulf of Venezuela, by a narrow channel, about 1,500 meters wide, which forms the two islands of Zapara and San Carlos. In the eastern extremity of the latter is situated the fortress of San Carlos, which guards and defends the entrance to the lake. Although it is not provided yet with modern pieces of artillery, it serves its purpose when necessary, and up to now no other ships except those which the master of the country has seen fit to allow to enter have plowed the lake. The whole of Lake Maracaibo belongs absolutely to Venezuela, and it has not occurred to any nation to throw doubt upon this.

The navigation of this lake, which is interior navigation, has never been done except by Venezuelan ships. On the northern part of it is found the city of Maracaibo, the only port of that region equipped for foreign commerce. Here only foreign ships touch, which must not have more than 10 feet draft, without running a great risk of stranding on the bar. There at the foot of the lake toward the south the river Catatumbo empties, which river belongs almost exclusively to Venezuela, since only a small portion of it belongs to Colombia. The Catatumbo has, generally speaking, in Venezuelan territory a depth of 5 feet. It has never been navigated except by Venezuelan river boats. At a distance of about 100 kilometers from its mouth in Lake Maracaibo the Catatumbo receives the waters of the Zulia, a river which rises in Colombia, in the State of Santander, which ordinarily has not more than 2 feet of water, especially in Colombia, and in summer still less. This river has never been navigated in Venezuelan territory except by Venezuelan vessels (boats or small steam launches).

The commerce which Colombia carries on upon this river has had a certain development since 1875, when the wagon road from Cúcuta to Villamizar was built, and later, during the years 1881 to 1882, when the railroad was built between the same places. Colombia has never been able to consider that she has a perfect right to carry on commerce through the Zulia and Catatumbo, since at present she has no treaty with Venezuela, and Venezuela has not

recognized that right directly or indirectly. By Law XXIII of the Code of Hacienda, Venezuela has allowed commerce in transit from Colombia, but in a precarious manner as to the latter Republic, because article 1 of that law expressly says that the passage of merchandise by the port of Maracaibo destined for Catatumbo is *permitted.*

Transitory commerce can therefore be prohibited by Venezuela at any time, as she is not obliged by any treaty to permit it. That commerce in transit Venezuela regulates in a detailed manner, and the importation of foreign merchandise through the port of Maracaibo is subject (art. 2, Law XXIII, cited) to all the formalities required and penalties established in the law of the government of customs for merchandise coming from foreign countries destined for Venezuela and to the provisions which are therein set forth. This commerce in transit is carried into the interior of Venezuela by two roads, either by the river Catatumbo, and later shipped over the railroad of Táchira, or in barges or small steam launches on the Zulia, which in reality can not properly be done except in the rainy season, when the river is sufficiently deep.

Venezuela, as a sovereign nation, regulates this commerce in transit in its territory as it sees fit; it determines the roads which must be used; it establishes the rules and prescriptions which it believes proper for its security or its interests. It is a matter exclusively its own, concerning which it has to give account to nobody. In the exercise of its right by virtue of necessities of public safety and order, well recognized and well appreciated by this Commission, the Venezuelan Government has issued a series of decrees regulating this transit, especially concerning the navigation on the Zulia. These decrees are those of September 11, 1900; March 4, 1900; July 29, 1901; June 14, 1902; January 15, 1903, and April 3, 1903. By virtue of them commerce upon the river as far as Colombia has sometimes been stopped. Other times it has been permitted by barges and canoes, but not by steam launches. This happened especially after the invasion of Rangel Garbiras with Colombian troops on the 25th of July, 1901, and because of the necessity to guard this road, so important to the defense of the territory.

Colombia at first sought to obtain from Venezuela the revocation of the decree that prohibited traffic upon the Zulia, but Venezuela answered her that she could not allow this traffic while the motives of public order which had given rise to the decree existed. After that the breaking off of diplomatic relations between Venezuela and said Republic took place, and such a serious aspect was assumed that the frontiers were guarded by armies of the respective States, and only the civil war which existed in both countries avoided, perhaps, the great calamity of a war being declared between the two sister nations. The matter of commerce in transit between the two nations is still complicated, on account of questions of boundary not yet settled, and it occupies the attention of both countries.

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route, under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela nor put in dispute her present legal status which

gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to the umpire, a precedent which would be a very singular one in the relations between the two republics, whichever way it might be decided.

But in this matter there can be no controversy. The right of Venezuela is clear, and the action of Germany appears to tend towards nothing less than to make Venezuela tributary to Columbia by virtue of supposed principles of international law concerning the navigation of rivers.

I reject, therefore, expressly and catagorically, all this argument of the German Commissioner as unfounded, and since the question of George Faber has been submitted to the umpire, I maintain that he has no jurisdiction to take cognizance of the matter in the form which the Commissioner of Germany contends, because this Commission has no power to overlook the rights of Venezuela.

Venezuela exercising her right has regulated, in the manner which it has considered proper, the commerce in its territory in its passage to Colombia. Therefore no liability of the State ensues for consequent damages which an individual might suffer by virtue of these general provisions. If some Germans have suffered material damages, perchance Venezuela and its Government have suffered greater ones in enforcing decrees which it judges necessary for the moment. When the German Empire, by virtue of its political policy, curtails amicable relations with any nation said measure of reprisal undoubtedly injures individual interests, and I do not believe that thereby it is obligated to make any reparation.

To the argument of the German Commissioner sustaining the claim of George Faber, who says that he has been injured by the decrees which have regulated the commerce in transit, it is sufficient for me to set up the right of Venezuela to enforce laws and regulations in her territory as she sees fit.

Nevertheless, in order to show to what extent the argument of the Commissioner of Germany is without foundation and to what extent the condition set up by Germany is unjustly oppressive, I am going to make some general observations.

That argument has as a foundation that, in accordance with the principles of international law, the navigation of international rivers is free, and that Venezuela in shutting off the commerce on the portion of the river flowing into the ocean (at the mouth of the river) has violated the law of nations.

In order that this reasoning might have any force it would be necessary in the first place for the river Zulia to be considered as an international river, but this river does not flow into any open sea — an essential condition in the case — but into the Catatumbo River and the Catatumbo into Lake Maracaibo exclusively the territory of Venezuela, and closed in accordance with international law to international commerce. It would be necessary, in the second place, that the river should, properly speaking, be navigable, and such a thing could never be said of a river which has a depth of 2 feet, and even less, in the dry season.

The Rhine has a depth at Bazel of from $1\frac{1}{2}$ to 3 meters, and it is only, properly

speaking, navigable from that place. The depth farther down is several meters. The Danube has, even in Donauwerth, a depth of 2 meters and 2.35 meters, and nearly 50 meters in the port of Hierro. These rivers are, properly speaking, navigable. Lastly, it would be necessary that Germany should have been navigating the Zulia with German vessels, in order to carry on commerce with Colombia, and this is not only not alleged, but is not physically possible, because a trans-Atlantic steamer could not navigate even the Catatumbo. The pretense therefore narrows itself down to holding that Venezuela is obliged to carry on with *Venezuelan vessels* the commerce in transit with Colombia upon the river Zulia because there are in Cúcuta and in Maracaibo some merchants to whom this would be convenient, and therefore Germany demands it of Venezuela, making her liable in case she does not agree to it.

The theory that navigable international rivers are free to navigation has not been admitted as a general rule of the law of nations. No nation up to now has recognized this absolute principle or this obligation as a perfect one, and in the cases where it has been agreed to by nations it has always been by virtue of special treaties by which free commerce, such as the Commissioner of Germany desires to establish, has never been admitted. Not even in the Danube does such a rule appear to have been established, since in accordance with the treaty of Vienna of 1837 the free navigation does not exist except with vessels which enter from the sea to the Danube, or if they come from the Danube to the sea. (Bluntschli, International Law codified, sec. 314; Pradier-Fodéré, vol. 2, p. 295.)

To admit, as the greater part of the authorities do,

says Pradier-Fodéré,

that navigable rivers which are in communication with the open sea

(which is not so in this case)

or which separate or traverse various states are to-day open in the time of peace to the ships of all nations would be to accept hope for reality. The reality is that absolute freedom of rivers, that which is based upon the equality of all nations and which comprises all the direct tributaries of the sea, is not only not generally recognized and adopted, but it is still in dispute. (Pradier-Fodéré, vol. 2, p. 300, sec. 749.)

And Fiore, after discussing the diverse and contradictory opinions of the authors, says:

These few citations suffice to show how divergent the opinions of the authors are, who in a large part are our contemporaries, with respect to the navigation of rivers, and how little the theory can serve to regulate the practice. They recognize the right to use the navigable river for the interests of commerce, but they declare this right to be imperfect, and they accord to states through whose territory they pass the right to declare themselves proprietors of that portion of the river which has its bed in their territory and to dictate conditions to those who desire to navigate it.[1]

The theory of free navigation of rivers (which strictly can not be understood to be what has been asserted in this case) is not, therefore, recognized as a principle of international law, and, in any case, Venezuela has not recognized it with respect to Colombia, and it is proper to bear in mind here the ideas of the Hon. Mr. Duffield, umpire of this Commission, in one of his former opinions:[2]

[1] Sec. 773.
[2] *Supra*' p. 397.

International law is not law in its usually defined sense. It is not a rule of conduct prescribed by a sovereign power. It is merely a body of rules established in custom or by treaty by which the intercourse between civilized nations is governed. Its principles are ascertained by the agreement of independent nations upon rules which they consider just and fair in regulating their dealings with each other in peace and in war. They reach this agreement by comparing the opinions of text writers and in precedents in modern times, and these ultimately appeal to the principles of natural reason and morality and common sense. It therefore rests solely upon agreement. Obedience to it is voluntary only, and can not be enforced by a common sovereign power. Any nation has the power and the right to dissent from a rule or principle of international law, even though it is accepted by all the other nations. Its obedience to the rule can only be compelled by an appeal to its reason and love of justice, or by the superior force of the particular nation or nations whose interests are involved.

In conclusion we must say that the theory of the free navigation of rivers is in no way applicable to the case under consideration, and that it is a measure of interior order of Venezuela which the latter has decreed in her territory by virtue of her sovereignty. To overlook this right is to do her an injury, and it is then not *Venezuela* who has violated the law of nations, closing the passage of the Zulia, which many motives of political well-being dictate, but *Germany* overlooking the legitimate rights of a sovereign nation. (Bluntschli, International Law Codified, art. 81 and art. 472.)

The obligation of observing justice with respect to other nations, at all times and under all circumstances, constitutes for a state one of those perfect and imperative duties which none can deny. (Calvo, Mutual Duties of States.)

The liberty of commerce has been invoked, but "the liberty of commerce is not an absolute principle; it may be subject to various restrictions." It is not possible, for example, *to seek to carry on commerce in the territory of a state against its will;* and the exercise of the right to carry on commerce necessarily presupposes the express or tacit consent of the state in whose territory one proposes to institute traffic by way of land or sea. The internal political policy of each state dictates means that must be taken. Should it open its territory freely to foreign commerce? Should it make this commerce subject to justified conditions on account of considerations of public interest, and to limitations, for example, established on account of a fiscal interest or an object of safety and health, etc.? It is impossible not to admit that every state has the right to regulate every class of commerce in accordance with its intention, and it is necessary to conclude that it is entirely free to establish every measure that it may believe conducive to this end. The territorial sovereign may prohibit the injurious branches of commerce; subject the traffic of foreigners to certain rules; *close places or provinces to foreign commerce*; impede the importation or exportation of certain merchandise; favor the national products, imposing upon foreign products different duties; raise or lower the tariff as it believes proper; determine the way of importation or exportation; map out the road which foreign products must follow into its territory, submit them to the necessity of bond; decide of the desirability to favor foreign duties by treaty, by the creation of free ports or like establishments; to accept for itself certain relations which do not affect either the right of independence or the progress of interior development of the state, etc. In its turn each state which carries on commerce itself or by means of its nationals outside of its boundaries ought to submit itself to the restrictions which that sovereign may make upon the liberty of commerce. To respect the rights of others is to assure the respect of one's own rights. *Not to trample upon the liberty of others is to give more force to one's own liberty.*

The case that is submitted to the umpire is the claim of George Faber, of Cúcuta. (In the claims of the firms in Maracaibo the claim is even more unjust, if possible, since they are individuals domiciled in Venezuela and subject to all provisions of public order.) Is it worth while for me to make an examination of the proof of the claimant Faber, when I reject the principle upon which it is based? Since the Commissioner of Germany appears to accept the truth of the facts, I shall make some passing observations concerning them.

The claim is proved by the declaration of two witnesses of Cúcuta, who say that they have seen the books of the house of Faber, and that the data upon which the claim is based is in accord with these books, and that the estimates which are made correspond, according to their understanding, to the truth. The books of merchants are evidence against them, but not in their favor. (1273, Venezuelan Code of Commerce.) This is a general principle of law, and it is natural, since it is not possible to believe that a person can make proof alone. Amongst merchants their books are of value, because each one presents his own; but in a particular case their books can not be presented in opposition to the state, and still less in opposition to a foreign state. I do not know who Faber is, and whether this proof is or is not ad hoc. Besides, the consul is not the legitimate authority in Colombia to certify to an acknowledgment. The local authorities are such, and we do not even know who these witnesses are who say they have seen the books. For my part, I consider this a claim which has been submitted absolutely without proofs, and it might be said that it is not, properly speaking, a claim in form, as it evidently is not. With respect to several items, such as one which refers to the correspondence which is said to have been withheld, I do not believe it worth while to make a further examination; but I should observe that if the road through Villamizar was closed, there were others, and therefore the fact itself upon which the claim is sought to be sustained is false.

GOETSCH, *Commissioner* (second opinion):

The German Commissioner believes that he has exhausted the question of international law in his opinion, which is in the hands of the honorable umpire, and it only remains for him to answer the opinion of the Commissioner of Venezuela, as follows: The fact that Lake Maracaibo is exclusively within Venezuelan territory in no way changes its condition as a natural continuation of the rivers Zulia and Catatumbo, the waters of which, accompanied by the vessels which float thereon, lead to the ocean. The question as to whether by international law a foreign flag is authorized to use a lake or river, when there is no question of coastwise trade, is not to be decided here. Rather there is under discussion only the question of the right to restrict neutral commerce from passing thereby to a part of Colombia which has no other means of communication.

The depths of the waters of both rivers is a matter of small importance so long as their courses shall be considered as navigable in international law, as is undoubtedly so, since small steamers navigate them as far as Port Villamizar in Colombia. This international river route which unites two independent states has been considered before as such by Venezuela, and upon it commerce and traffic from time immemorial have had a right to pass, as is seen from the report delivered to the honorable umpire, published by Venezuela, at Madrid, 1884, page 10.

It is seen, moreover, from the Yellow Book, likewise in the hands of the Hon. General Duffield (Caracas, 1900, correspondence of the legation of Colombia, pp. 3, 4, 7, 13, 14, 15, 16, 23, 25, 27, 29, 42, 51), that the least doubt

does not exist on the part of the Colombian Government with respect to the judicial question, and that it has always contended for itself the right of free river navigation.

From the right which Venezuela has to supervise and regulate commerce in transit with Colombia in the interest of her own safety, and because of her traffic, as is provided in the code of Hacienda, the right to decree the complete commercial blockade can not be deduced.

The insinuation that Germany in representing the respective claims of her subjects is partial in favor of Colombia and proposes to take the chestnuts out of the fire for that Republic should be disputed. If a measure directed in the first place against Colombia injures German interests — and it *does* injure them seriously — it is only duty which compels the German Empire, and which the constitution imposes upon the Imperial Government, to secure protection of the rights of its subjects abroad. From a note of protest upon the matter in question, addressed to the Government of Venezuela by the Imperial Legation, it will be seen, moreover, that Germany only desired to make Venezuela liable for the blockade in so far as injuries to German commerce and interest might result therefrom. It has always been a political principle of the German Empire not to interfere in differences of two foreign nations.

With respect to the objection to the jurisdiction made by the Commissioner of Venezuela, it is proper for this Commission not to annul the decrees of the Government of Venezuela which order the commercial blockade, but to submit to a determination whether Venezuela shall pay the damages which the German firms claiming because of the blockade have suffered.

These claims are of the same character as all the others. They are demands for indemnity directed against the Republic. By article III of the protocol of February 13 of the present year there were submitted to this Commission for its decision German claims against Venezuela which were not made special exceptions.

The Government of His Majesty the Emperor of Germany, long before the conclusion of the treaty in question, had called the attention of the Government of Venezuela to the injuries suffered by German interests because of the commercial blockade and to the prospective claims. The contracting parties therefore ought to have further limited in the protocol the jurisdiction of this Commission in order that the objection to the jurisdiction made by the Commissioner of Venezuela could be considered justified. The Commissioners, therefore, and the umpire, because they have not reached an agreement, have the right and are bound to determine the claims in question in order to bring within the scope of their deliberations the admissibility of the acts of the Government of Venezuela.

In order to substantiate his opinion the Commissioner of Venezuela makes reference to an opinion rendered in another case by the honorable arbitrator in accordance with which international law is not a law nor a rule which can be imposed upon a state whose opinion differs from general international law. This in itself will not be disputed, but since Germany and Venezuela have agreed to adjust the claims of the subjects of Germany by means of arbitration, it is the duty of this Commission to apply to the different cases the law of nations, such as the Commission and not Venezuela understands it to be. By the treaty Venezuela has renounced the right to decide the claims in such a manner as she understands international law. Let it be further considered that equity is to serve as a rule for the decisions of this Commission. The German claims are equitable, since the claimants have suffered serious injury, because of the governmental measure adopted exclusively in the interest of Venezuela.

The fact that Germany is not a riparian state of the rivers Zulia and Cata-

tumbo appears of little importance, since the commerce upon international rivers is open for all nations, according to the opinions of the best known jurists in international law. Besides, the German claimant firms are located in Colombia and Venezuela. All the firms in Maracaibo have branches in Cúcuta. There is question, therefore, of the rights of the inhabitants of the riparian states, since foreigners enjoy the same rights as Venezuelans and Colombians with respect to commercial law and navigation in Colombia and Venezuela. The common neutral use of the waterways which unite Venezuela and Colombia can not be denied them, a right which on the part of Colombia has been exercised since time immemorial and which Colombia has claimed for herself even after the decree of the commercial blockade.

To the final objection of the Venezuelan Commissioner, that there remained open to the firms an overland route. answer should be made that the same objection was made without success by England with respect to the United States of America, upon the opening of the St. Lawrence River. Overland communication is not a river route. By the report, a copy of which is presented herewith, it is seen, moreover, that freights overland were not open except by a decree of June 14, 1902, and they were so high that the adoption of this means of communication was equivalent to a complete stoppage.

With respect to the claim itself of G. Faber, it is seen, from the nature of the matter, that the damages suffered by German firms because of the commercial blockade could be individually proved and judicially substantiated only with difficulty. The principal proofs would consist of the books of the houses and the declarations of the claimants, and to give credit to these is a right which the supplemental convention gives to the Commission, as the honorable umpire has decided upon various occasions. The firm of Faber & Co. is a respectable German house of Cúcuta, the head of which is the consul of Germany. The items contained in its books merit entire belief, since it can not be supposed that the firm would have falsified its books for the purpose of presenting a possible future claim. The exactness of the data furnished by the firm upon which the amount of indemnity is based has been certified to by two experts, after an examination of the books. The German Commissioner, therefore, does not doubt that the facts upon which the estimation of the damage is based are true. The Venezuelan Commissioner objects that, according to the laws of Venezuela, the books of a commercial establishment are only regarded as proof when they serve to give evidence against the merchant. In accordance with the supplemental convention, Venezuelan legislation shall not be considered. Besides, by virtue of the principle of free estimation of proof, which no doubt also serves as a rule for a Venezuelan judge, it ought to be denied that in no case can the books of commercial houses be presented as means of arriving at the truth in favor of merchants. Everything depends upon the circumstances of the particular case. The judge *may* give credit to the items of the books; he *must* do so in so far as they militate against the merchant.

I. With respect to the different parts of the claim, I reject the first part, not because I consider the demand unjust, but because it is impossible to determine approximately that a portion of the labor of the employees was superfluous because of the commercial blockade.

II. What has been said with respect to item 1 is also applicable to item 5. It can not be calculated or estimated that part of the stores could not be utilized because of the blockade.

III. I consider item No. 3 well founded. The loss of interest upon money invested in crops of coffee which existed before the blockade was made effective is a true damage occasioned by the blockade, which must have resulted and

ought to have been foreseen. The blockade had as an object the damaging of the Colombian exportation to force this State to make concessions in the question of boundaries and other matters. The injury arising for this reason and occasioned to German property ought, therefore, to be repaired. As the claimant asserts, and as it is also well known, money in Venezuela and Colombia can only be procured at the rate of 12 per cent, and the loss of interest estimated at 12 per cent does not seem exaggerated.

IV. The extension of insurance against fire upon the coffee held in Puerto Villamizar, an extension which was made necessary by the commercial blockade, ought likewise to be considered as a direct damage occasioned by the Venezuelan attitude, and therefore to be satisfied.

V. The same is true of the damage which the claimant house suffered from the storing of green coffee in Villamizar. The truth of the facts is moreover proved by the certificates of the Chamber of Commerce of Maracaibo and well-known merchants of that place. Reference is made for the present to the respective documents in the record relative to the claims of Beckman & Co., Brewer, Moller & Co., and Van Dissel & Co.

VI. What has been said under III is also true with respect to part VI and VII of the claim.

VIII. The duty of exportation upon coffee seems to me to be established with the object of burdening coffee which came from Colombia for exportation after the special reopening of the traffic upon the Zulia and Catatumbo rivers. It is clear also that if this Colombian coffee could have been exported in time, which was not possible because of the commercial blockade, it would not have had to pay the Venezuelan duty, since the duty was not established until February of the present year. I believe, therefore, that this claim can be maintained also. Nevertheless, if the honorable umpire considers it as a remote damage, I shall be obliged to agree in the rejection of the demand.

IX. The stoppage of all postal correspondence coming from and going to Cúcuta is the direct consequence of the commercial blockade, and, like it, is an illegal act. The stoppage of the mail, which is more clearly proven by the certificate of the German consul in Maracaibo under date of August 14 of the present year, is in violation of the treaty of the Universal Postal Union, to which Venezuela and Colombia are parties. The fact does not require any proof that commercial interests must have suffered serious injury because of this stoppage. I have attempted to obtain from the claimants detailed specifications of this damage and the Imperial German consul has answered me as follows:

> After having conferred with the interested parties with respect to the proof of the amount of damage occasioned by the interruption of the postal services, I take the liberty of communicating to you their opinion * * * that it is very hard, and perhaps impossible, to obtain it in any concrete form. Once of them lost one or more credits abroad, which were withdrawn because dispatches could not be sent to cover them, nor * * * could he even answer the letters of demand and warning * * * which did not reach his hands. Another, who had a branch house or friendly relations along the coast, found himself obliged to satisfy at a great loss the demands of his creditors and was hardly able thus to preserve his credit. From a third proofs and valuable documents were stolen. Under these circumstances the interested parties believe that the umpire ought to decide this point, taking into consideration all circumstances possible, the importance and extent of the commercial enterprises and each one of the commercial houses, as a civil judge does in cases of a demand for indemnity for a wanton killing or for the loss of a member of any house because of negligence. It would, for example, be nearly impossible to prove the exact value of a man's arm.

These remarks contain a great deal of truth. As a member of a tribunal

of equity I believe that I am authorized to allow to the claimant a round sum, which I estimate according to my best endeavor and understanding at 10,000 bolivars, for the illegal stoppage of the commercial correspondence contrary to the treaty of the Universal Postal Union.

Because of what has been set forth, I ask the honorable umpire that he allow the claimant the following sums, together with the usual interest, that is to say 21,724.76 bolivars, 1,200 bolivars, 10,112 bolivars, 14,211 bolivars, 5,182.23 bolivars, 16,103.38 bolivars, and 10,000 bolivars.

ZULOAGA, *Commissioner* (second opinion):

Articles 1 and 2 of Law XIV of the Code of Hacienda fixes what ports in Venezuela are opened for foreign commerce, exportation and importation, and those opened for exportation. In the western part of the Republic the port so qualified is Maracaibo. In article 10 of that law the National Executive is authorized to suppress and to remove these custom-houses already set up, which, by reason of contraband trade, or for any other causes prejudicial to the public treasury, may make it necessary in his opinion to adopt this measure.

Law XVIII regulates coastwise commerce — that is, interior maritime or coastwise commerce. This can not be carried on in conformity with article 1 of that law except in national vessels.

The interior commerce of the country along its navigable rivers is not, properly speaking, regulated; since these rivers are considered public highways, it is governed by the general laws of transportation (code of commerce).

The commerce which is carried on on Lake Maracaibo is coastwise commerce (art. 28, Law XXVIII), and therefore it can not be effected except in national vessels. The port of Encontrados is a coastwise port. (Art. 3, Law XIV.)

The rules concerning the register of vessels as national are those which appear in Law XXXIII. Foreigners (art. 24) may own national vessels, but the captain must be Venezuelan (art. 10), and for no reason can they make claims which could not be made by any Venezuelan owner and master of vessels. (Art. 24, above cited.)

The coastwise commerce of the Catatumbo is carried on in the manner and form which the Government of Venezuela considers proper, since it has its own interior commerce. There is this circumstance, that communication by the river Zulia as far as Colombia does not appear by the laws of Venezuela to be the most approved, but that of San Antonio does. The National Government, because of reasons of public order, can naturally regulate all the interior commerce, and respecting all other matters relating to the frontier the National Executive has the power which No. 14 of law 89 of the constitution gives him " to preserve the nation from every foreign attack."

The decrees which the Government has issued closing to the commerce of Colombia the way along the upper part of the Zulia are not only the exercise of its own right, but also, as has been shown many times to this Commission, a duty imposed by the circumstances. Venezuela had been fearing an invasion from Colombia, and the way of the Zulia is particularly dangerous in case of an invasion. If river commerce were permitted, the steam launches and lighters which carry on this commerce could go over to Colombia, and at a given moment might serve very efficiently for invasion, taking possession in the first place of the railroad of Táchira in Encontrados, and later threatening the lake. The Government, according to the circumstances and the gravity of the situation, has forbidden all traffic, or has only permitted it to be carried on in lighters or has permitted launches to ascend. It has tried to reconcile the interest which commerce might have with the public safety. Besides the protest

of the Government after the revolution of Rángel Garbiras, I find in the record of one of the claims a letter of Gen. Celistino Castro, chief of the volunteers, to one of the claimants, which I present with this argument, showing clearly the situation with respect to Colombia during the past months.

It is inexplicable that the measures adopted by the Government in these circumstances could give rise to the least objection, and for my part it seems still more inexplicable that the claimants should strive to prove that Venezuela was closed to commerce in transit with Colombia (which was certainly her right) when precisely the contrary appears; that is, that the Government had attempted to facilitate the passage of commerce, and that it had always done so in one way or another. The key to all this has been made plain to me at last by the study of two claims — that of the German warehouses and that of the navigation company of the lake and Catatumbo River. The claimants, because the Zulia was closed to traffic, are interested in these enterprises, and the foundation in reality has no other cause than the direct interest of these companies in the navigation of the Zulia.

In the claim of Faber, who is not domiciled in Venezuela, I have already stated the considerations which I believed pertinent. In the claim of Beckman & Co., of Maracaibo, I should further call attention to the fact that this is an individual domiciled in Venezuela, and therefore subject to its police laws and decrees of public safety.

I do not accept that distinction or difference which the Commissioner of Germany wishes to establish with respect to the *German* commerce of Cúcuta and the *German* commerce of Maracaibo, from which it would not appear that both places were German colonies. The commerce of Cúcuta is *Colombian* commerce, no matter what the nationality of some of the merchants there may be, just as the commerce of Maracaibo is *Venezuelan*. There are no colonies in this country. The injustice of the claims of Faber and Beckman submitted to the umpire is flagrant, and a further explanation is unnecessary.

Germany considered it proper in diplomatic notes to protest against the closure of traffic by the Zulia, and Venezuela answered, setting up her entire right to govern her own territory as she might consider proper. Venezuela does not need to concern herself in this Commission with a protest of powerful Germany. The greater the power of the nation may be the greater should be its justice, which is the very essence of modern civilization, and it is just this impartiality and justice which constitutes the honor of the international tribunal and elevates the mission of the umpire. Nevertheless, I must doubt that the Government of the Empire had an exact knowledge of the facts, since if they had been revealed to it in such a definite manner as they appear before this Commission, it is not to be believed that it would have assumed the attitude which it adopted.

I do not believe that I ought to concern myself in any way with the proofs presented by the claimants. If I did so briefly in my first opinion I did so only with the object of showing how strange it is that a claim should be sustained which has no foundation in law or fact. The right of Venezuela to reject these claims is too clear for me to occupy myself in discussing their amount.

There remains for me one last consideration. In his first opinion the German Commissioner insisted that these claims ought to be considered as admitted by Venezuela by virtue of article I of the protocol. This is to return to the question already decided by the umpire contrary to the opinion sustained by the German Commissioner.

The umpire agrees in opinion with the Venezuelan Commission that the fair construction of Article I, in which the Venezuelan Government " recognizes in principle the justice of claims of German subjects ' presented ' by the Imperial

German Government," is to restrict it to claims which had been presented at the time of the execution of the protocol. This is its literal wording, and Article II restricts the claims to " those originating from the Venezuelan civil wars of 1898 to 1900 " and provides for their payment modo et forma.[1]

There are 22 records of claims for injuries already paid. Those of Faber and Beckman were not among them, and they could not have appeared before this Commission. It appears useless to continue to argue further upon a point already decided.

Faber makes, moreover, a claim for supposed damages because of the interruption of his correspondence. If Venezuela had prevented this postal correspondence with Colombia (which does not appear), it is her right (Bluntschli, Droit International Codifié, art. 500), and she need not render account to individuals, and if any sack of mail of other countries might have been lost in this territory it is a subject to be treated of by the respective postal offices. It is not the business of individuals, and I understand that there is in the treaty of the Postal Union no clause to make an office liable in case of loss. There are many causes which might occasion it.

DUFFIELD, *Umpire:*

This is one of several claims which grow out of the suspension of river traffic on the river Zulia by Executive decrees of Venezuela in 1900, 1901, and 1902. The claimant Faber is a German subject who resides and has his place of business in Cúcuta, in Colombia.

The Commissioners radically disagree as to the liability of Venezuela. The Commissioner for Venezuela first objects to the jurisdiction of the Commission or the power of the umpire to decide the question of Venezuela's right to control and, if in her judgment necessary, to suspend the navigation of the rivers in question. After explaining the discussion of this question between the two Republics, as shown by the published official diplomatic correspondence, and pointing out that the matter is additionally complicated by disputed questions of boundary in the territory tributary to these rivers, he says:

In this condition of affairs Germany intervened and pretends to assume for herself the cause of Colombia and force Venezuela to open the Zulia route under the pretext that there are some German merchants in Cúcuta who are injured by the Venezuelan decrees. It is impossible to imagine intervention by a third party more unreasonable and unlawful.

The question is between Venezuela and Colombia, and if decided can only be decided by those two countries alone and exclusively, and I must emphatically deny the allegation of the Commissioner for Germany, and affirm that it is entirely contrary to the tenor and spirit of the Washington protocol and the powers vested by it in this Commission; that, according to this treaty Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela, nor put in dispute her present legal status which gives her exclusive sovereignty over her rivers and lakes. To sustain a claim for injuries to Cúcuta merchants with the reasons adduced, to the effect that the river Zulia must be opened to international commerce, is to surreptitiously introduce questions as to the sovereignty of Venezuela into a tribunal which is called upon to take cognizance only of matters of fact, in conformity with absolute equity, which precisely supposes the exclusion of those questions which exact another kind of study and another standard of judgment.

If there should possibly be a controversy between Venezuela and Colombia in regard to the matter, the consequence of this surreptitious intervention of Germany would lead to a legal precedent being found in the question which is submitted to

[1] *Supra*, p. 395.

the umpire — a precedent which would be a very singular one in the relations between the two Republics, whichever way it might be decided.

He also, without waiving in the least, but reiterating his objection and protest to the jurisdiction of the Commission over the claim, contends that the decree is a lawful exercise by Venezuela of sovereignty over that which is in her own territory and under her absolute dominion. He claims that under the recognized principles of international law governing such cases Venezuela has a general right to regulate and control the use of those portions of any rivers which are in her territory, even though they may come from or flow into the domain of another nation.

In addition, he contends that the laws of Venezuela confine river navigation to Venezuelan boats, and that such legislation is a lawful exercise of sovereignty by Venezuela; that neither the Zulia nor the Catatumbo has ever been navigated by German boats; that the draft of water in the Zulia River in only 2 feet, and in summer much less, until it flows into the Catatumbo, which has a normal depth of 5 feet about 100 kilometers above Lake Maracaibo; that Lake Maracaibo " is absolutely Venezuelan, and it has occurred to no nation to doubt it."

He also insists that the proofs are insufficient, because they consist of the testimony of two witnesses, of Cúcuta, who say that they have seen the books of Faber's house; " that the data on which the claim is supported agree with those books, and that the appraisals made, in their opinion, correspond with the truth; " that under article 1293 of the código civil the —

> books of merchants are evidence against them, and not in their favor, [and] that this is a general principle of law also, that a consul is not a proper authority in Colombia to legalize documents, which can be done only by the local authorities, and that no official can certify conclusions of law, and that the claim is absolutely without proof.

Taking up these objections in their inverse order, the objection to the inadmissibility of the consular certificate because of want of authority in that office to certify documents or copies thereof, is not well taken. It was decided by the Mixed Commission under the treaty of Ghent that a certificate of a British consul, or any British functionary, should be received in evidence.

It is true this was done in the formulating of rules of procedure and in specifying what the Commission would receive as evidence. It is well known to be the settled practice of consuls to certify copies of documents and private agreements.

The other objection to the admissibility and effect of the certificate, that it certifies to conclusions of law only, and not to facts, and that the only proof of the claimant consists in the testimony of two witnesses who say that they have seen the books of Faber's house, and testify to their conclusions therefrom, raises a more difficult question.

The language of the protocol commands the Commission —

> to receive and carefully examine all evidence presented to them by the Imperial German minister at Caracas and the Government of Venezuela. [And] In particular they shall be authorized to receive the declaration of claimants or their respective agents and to collect the necessary evidence.

If the word " evidence " as used in the protocol is to be interpreted in its usually accepted legal sense in law, namely, such testimony as is admissible under the rules of either the civil or common law, the objection of the Commissioner is well taken. It has been held, however, by a former justice of the Supreme Court of the United States, in the case of Pelletier (Moore, p. 1752), that the technical rules of the common law in respect to evidence were not

adapted to the proceedings before a mixed commission, and that " he would feel disposed to act upon whatever evidence satisfied his mind as to the actual facts."

Judge J. C. Bancroft Davis said, in Caldera cases (15 C. Cls. R. 546):[1]

> In the means by which justice is to be attained the court is freed from the technical rules of evidence imposed by the common law, and is permitted to ascertain truth by any method which produces *moral conviction.*
>
> This proposition is self-evident. * * *
>
> In its wider and universal sense it [evidence] embraces all means by which any alleged fact, the truth of which is submitted to examination, may be established or disproved. (1 Green. Ev., sec. 1.)
>
> International tribunals are not bound by local restraints; they always exercise great latitude in such matters (Meade's case, 2 C. Cls. R., 271), and give to affidavits, and sometimes even to unverified statements, the force of depositions.

In deference to these decisions, and because of the character of the conclusions of fact which the consul and the witnesses erroneously substitute for copies of the papers, and because of the provision in the protocol requiring the Commissioners to disregard objections of a technical nature, and, further, because there is no doubt in the mind of the umpire as to the truth or correctness of these conclusions, which do not involve any question of law, the umpire will accept the same as proof.

Coming now to the main objection of the Commissioner for Venezuela, first, the umpire is unable to sustain the claim that —

> the question is between Venezuela and Colombia, and if decided can only be decided by those countries alone and exclusively, and that according to the protocol Germany is not authorized to put in dispute any matter which may compromise the sovereignty of Venezuela.

While it would be regrettable that any decision of the Commission might have a direct bearing upon an international dispute between Colombia and Venezuela, certainly if a case arose in which a German subject had been deprived of property or rights of property by an act of Venezuela the jurisdiction of this Commission over his claim would be as complete as its jurisdiction over any other claim. This Commission does not decide the dispute between Venezuela and Colombia. Incidental to its decision on the merits of the claim it may have to express its opinion on the question between them. While it is true that such opinion would probably be quoted by the State in whose favor it would happen to be, it would have no authoritative force, and be only entitled to such consideration as the logic of its reasoning might give.

As to the main objection of the Commissioner for Venezuela that her acts in closing the ports in question were fully within the attributes of her sovereignty, the Commissioner for Germany insists to the contrary. In the course of a very able discussion of the question, to which he has brought great research, he maintains:[2]

> To begin, it can not be denied that a sovereign state possesses absolute authority over its rivers and water courses as far as the boundary lines of other states. This principle is nevertheless limited in two ways in international law. When a river is the only route of communication and indispensable to the existence of another state or part of it, its use can not be entirely prohibited. (Citing Heffter, Int. Law of Europe, Berlin, 1857, p. 147.)

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[1] Dissenting opinion, p. 606.

[2] See *supra*, p. 443.

He also cites Heffter, Puffendorf, Groot, and Vattel, that a state can not deny to another nation without committing an act of hostility, and no state can prevent another from getting its commerce to the market of a third without giving offense and inflicting injury, and he claims that " these international maxims whose object is to draw nations together have been at different times embraced in treaties," a number of which he cites, and concludes:

> It must be considered as an international doctrine that the navigation of rivers passing through the territory of several states together with all their affluents, must be free from the point where they begin to be navigable to the point where they empty into the sea.[1]

The respect due the Government of Germany, which presents the claim as a proper one in case the facts alleged in support of it are proven, and the rights of the claimant in the large amount involved, together with those of others in like situation (2,401,685 marks), calls for the most careful consideration by the umpire of the respective opinions of the Commissioners, each of whom has filed responding opinions, and necessitates a discussion of their different contentions.

The general subject of the free use of rivers running to the sea has been very much discussed by writers on international law from the earliest times.

The territory of the Republic of Colombia encompasses the Republic of Venezuela on the north, west, and south. Its boundary begins at Point Peret, on the western shore of the Gulf of Maracaibo, thence running in a southerly direction along the Sierra of Periga to a little south of San José de Cúcuta, where it turns and continues in an easterly direction to the Orinoco; thence up the Orinoco, which for this distance forms the boundary between the two Republics; and thence in a generally southern direction to the northern boundary of Brazil.

The principal commercial waterways, domestic and oceanic, of Colombia are the Magdalena and its main affluent, the Cauca, which flow almost the entire length of Colombia northward to the sea, and the rivers Meta and Guaviare, rising in the oriental Cordilleras and flowing eastward until they reach the Orinoco, on the boundary line between Venezuela and Colombia, and thence by that stream through the territory of Venezuela to the sea. In addition, Colombia possesses a great extent of coast line, on both the Atlantic and Pacific oceans.

Venezuela is not so well equipped by nature for ocean commerce. Its main arteries east of the Andes Mountains and north of the numerous sierras on the boundary of Brazil are the Orinoco river and its affluent, the Apure. In the western portion of the Republic the only avenue of oceanic commerce is through the Gulf of Maracaibo, the western shore of which as far into the gulf as Calabozo Bay is Colombian territory, thence through Lake Maracaibo and the Catatumbo River, which is only navigable for vessels of 5 feet draft of water, to about 6 miles above Encontrados, at or near which point the Zulia River flows into the Catatumbo. The Zulia has normal depth of water of 2 feet, and is navigable for small steam vessels and lighters and canoes as far up as Port Villamizar.

The Catatumbo River rises in Colombia a short distance from the Venezuelan boundary. Thereafter it continues in the territory of the latter exclusively until it discharges into Lake Maracaibo. The Gulf of Maracaibo is from 250 to 300 miles east of the mouth of the Magdalena River. The western shore of the Gulf of Maracaibo, from Point Gallinas to Calabozo Bay, is Colom-

[1] *Supra*, p. 444.

bian territory. The point at which Lake Maracaibo empties into the Gulf of Maracaibo is, however, entirely within Venezuelan territory. The depth of water at this point is 10½ feet. The bar at the point where the Catatumbo River enters Lake Maracaibo has a normal depth of but 5 feet. The Catatumbo River from Lake Maracaibo to Lake Encontrados has a normal depth of not to exceed 5 feet. It is not accurate, therefore, to say that the Zulia River is indispensable to the existence of Santander, or that it is the only route of communication of Santander through the Republic of Colombia to the sea. The Magdalena River, which furnishes a route to the sea for most of the fertile part of Colombia, is navigable to Honda, a point more than a hundred miles south (inland) of the latitude of the port of Villamizar, and is navigable from Honda to the ocean for larger-draft vessels.

Normal physical conditions require freight from San José de Cúcuta and the Caribbean Sea to be carried as follows: From Cúcuta to Puerto Villamizar on the Zulia River, by Colombia Railroad, the termini of which are Puerto Villamizar and a point in Colombia on the Táchira River, opposite San Antonio. At Puerto Villamizar it must be reshipped onto small stern-wheel steamers of not more than 2 feet draft of water; or lighters, with a capacity of 400 quintals, called *bongos*, which are propelled by poling; or canoes, and carried to Encontrados. Here it is reshipped onto lake-going vessels, which carry it to Maracaibo, where it is again reshipped onto seagoing vessels.

There are two railroads which can be made use of in the carriage of freight for the territory tributary to the Zulia and Catatumbo rivers — the Táchira Railroad, which is entirely within Venezuela, with its termini at Encontrados and Uraca and La Fria; the Cúcuta Railroad, above mentioned, which is entirely in Colombia, with its termini at Cúcuta and Puerto Villamizar; also, a highway called the Urena road, leading from Colombia into Venezuela and crossing the boundary of the two Republics near Urena, in Venezuela.

The effect of the several decrees of Venezuela, translations of which are appended, was as follows:

The decree of September 11, 1900, suspended all river traffic above Encontrados, whether bound up or down; that of March 4, 1901, modified this suspension so as to permit "commerce to be carried on on the rivers Zulia and Catatumbo," but only by means of lighters and canoes, so long as new fears of public troubles do not exist to the contrary, "but did not permit the use of steam vessels;" that of July 29, 1901, "revoked the decree of the 4th of March, 1901, and revived the decree of September 11, 1900," suspending all river traffic above Encontrados. This condition of affairs continued until the decree of June 14, 1902, which "temporarily permitted transportation of merchandise over the Urena road between Cúcuta and Maracaibo, and vice versa, the Encontrados way being left open for river trade only."

The decree of January 15, 1903, however, by —

Article I, revoked the absolute prohibition of traffic between Encontrados and Puerto Villamizar prescribed by the decree of July 29, 1901;

Article II, revived the permission of traffic by means of lighters (bongos) and canoes, but limited it to the El Guayabo, whence it must be by rail;

Article III, permitted steam and sailing vessels to carry merchandise en route for Colombia only between Maracaibo and Encontrados.

Finally, the decree of April 3, 1903, by —

Article II, abrogated the provisions of Article II of the decree of January 15, 1903, in respect to the importation of merchandise en route for Colombia "until the objections to said importations are removed." This decree has not at any time been modified and is still in force. The present situation, therefore, only permits navigation of steam and sailing vessels en route for Colombia between

Maracaibo and Encontrados (Art. III of decree of January 15, 1903) and the transportation of merchandise over the Urena road between Cúcuta and Maracaibo (decree of June 14, 1902).

There had been in the year 1899 much discussion between the two Republics as to their respective rights on the Orinoco River. It terminated without reaching any satisfactory understanding, and is still unadjusted. The situation of the Orinoco River, however, is materially different from the Catatumbo and Zulia. The former river rises in Brazil and forms the boundary line between Venezuela and Colombia, as above stated, and thence runs entirely in Venezuelan territory, to the sea. The two Republics, as to that portion of it which forms their boundaries, about 200 miles in length, are coriparian proprietors, a relation they do not at any point sustain as to either the Catatumbo or Zulia rivers.

The Catatumbo, so far as it is navigable, is entirely within the boundaries of Venezuela after the confluence of the Zulia with it.

On account of these and other differences in the situation and the physical conditions of the two rivers and those of the Orinoco, this decision is not intended to, and must not be considered as even intimating any opinion in respect to the Orinoco River.

We are met on the threshold of the discussion with the fact that no direct oceanic navigation was interrupted. Physical limitations deprive Colombia of the enjoyment of direct oceanic traffic through Venezuelan territory. No seagoing vessels can thus pass into Colombian territory. All must stop at Maracaibo, where all ocean freight must be reshipped. The case, therefore, is not one in which a foreigner is deprived by the act of Venezuela of the use of waters to which nature has given him direct access. That right Venezuela has not attempted to restrict. She permits him to carry his goods in the vessel in which they entered her territory as far as nature permits him. But the claimant insists that because of the nature of his business he suffers damage because goods are not permitted to be twice reshipped in the territory of Venezuela and thus transported into Colombia. Obviously this is a very different matter. First, it of necessity involves the use of land of Venezuela not incidental to navigation merely, but for the transshipment, carriage, and handling of freight on her shores. Second, it extends the claim of free navigation of rivers to a new case, for which I have found no precedent.

It is one thing for a foreigner to claim, " I have a right to navigation for my vessels wherever natural conditions permit, and Venezuela can not restrict it." But it is quite another thing to claim, " I have a right to send my goods over the inland waters of Venezuela, reshipping them into smaller and smaller vessels as often as the lessening depth of water may require." The question seems to be one of regulating commerce, rather than restricting internal navigation. It also appears that the laws of Venezuela with reference to internal navigation over its rivers and lakes require a nationalization of the vessels engaged therein. They also define interior maritime commerce of coast or river trade to be that which is established between ports and points on the banks of the rivers or shores of Venezuela in national boats with foreign merchandise which has paid duty, or fruits or other productions of the country. Another provision of law requires captains of vessels engaged in this trade to be Venezuelan citizens.

That these provisions were within the proper exercise of Venezuela's sovereignty can not be doubted. It results, therefore, that in the lawful exercise of such sovereignty she has excluded from her internal commerce boats of other nationalities and required even the boats of Venezuelan nationality to be commanded by Venezuelans.

For a considerable period before the decree of September 11, 1900, was issued there were internal political disturbances in the territory tributary to the Catatumbo and Zulia rivers. The relations between Venezuela and Colombia were at the same time seriously strained, and the former complained that revolutionist plans and movements found moral and material support on Colombian territory, which afforded a secure base of operations for them.

In this state of affairs the various decrees complained of were promulgated. It is evident that their purpose was to control the passage of vessels, especially steamers, to and fro between Colombia and Venezuela. The language of some of the decrees intimate fears of hostile forces entering Venezuela in that way. In July, 1901, Gen. Rángel Garbiras had begun his insurrection, which at one time seemed threatening, from Colombia. A part of his forces came into Venezuela by way of the Zulia and Catatumbo rivers. It may be reasonably presumed that this was the cause of the decree of July 29, 1901, revoking the permission given in that of March 4, 1901.

The concrete question, therefore, in the case is whether, under these physical and political conditions, Venezuela had the right to suspend the traffic on these rivers by the closing of these ports. She was in full possession of them and they were actually under her sovereignty. This distinguishes the case from that of the Orinoco Asphalt Company, just decided.[1]

As has been shown above, there is no substantial contradiction of authorities as to the rights of a state to regulate, and, if necessary to the peace, safety, and convenience of her own citizens, to prohibit temporarily navigation on rivers which flow to the sea. What is necessary to peace, safety, and convenience of her own citizens she must judge, and it seems to the umpire quite clear that in any case calling for an exercise of that judgment her decision is final. That a case for the exercise of this discretion did exist at the dates of the various decrees complained of is obvious, and in the opinion of the umpire the decision of Venezuela in the premises can not be reviewed by this Commission or any other tribunal. Being of the opinion that the closing of the ports of the Catatumbo and Zulia rivers under the circumstances which existed at the time was a lawful exercise of sovereignty by the Republic of Venezuela, the claim is disallowed.

A complete examination of the question leads back to the differing theories of the true source of natural law. It would extend this opinion to too great a length to discuss them, but a brief statement of them is pertinent.

Some philosophers, while admitting that human ideas of right spring solely from revelation, do not agree that natural law is but the consequence of revelation of divine or moral law. (Statel. Rechts philosophie, V. I.)

Others derive their idea of natural law from the most abstract theories of reason, without taking into account the continual changes of social relations, which, being the practical basis of that law, necessarily exert an influence on the idea itself. (Grotius-Kant.)

While others, still, putting aside both the abstract and objective idea of a Supreme Being, discuss the source of natural law in the supreme and absolute faculty of the abstraction they call *esprit du monde.* (Hegel.) They construct the moral and material world by the dialectic process of an abstract idea, and define the state as the realization of God in the world. The consequence is the complete absorption of the citizen in the state and the individual in the "pantheistic chaos of universal reason," which, on the other hand, has no conscience of its own. Still another school recognizes natural law as the science which

[1] See *supra*, p. 424.

exhibits the first principles of right founded in the nature of man and conceived by reason. (Ahrens.)

But when the crucial question comes, from what authority natural law is derived, each publicist seeks to solve it in his own way.

The theory of Grotius was that on the establishment of separate property which he conceived grew by agreement out of an original community of goods, there were reserved for the public benefit certain of the preexisting natural rights, and that one of these was the passage over territory, whether by land or by water, and whether in the form of navigation of rivers for commercial purposes, or of an army over neutral ground, which he held to be an innocent use, the concession of which it was not competent to a nation to refuse.

It is on this doctrine that some writers on international law uphold the principle of the freedom of river navigation.

Gronovius and Barbeyrac, in their notes to Grotius, consider the right of levying dues for permission to navigate rivers. This would seem to imply the right to prohibit navigation. It has been decided by the Supreme Court of the United States in the lottery cases that the right to regulate commerce includes the right to prohibit.

Bluntschli (par. 314) broadly states that water courses which flow into the sea, and navigable rivers which are in communication with an independent sea, are open to the commerce of all nations, but he restricts the right to the time of peace.

Calvo holds that where a river traverses more than one territory the right of navigation and of commerce on it is common to all who *inhabit its banks*, but when it is wholly within the territory of a single state it is considered as within the exclusive sovereignty of that state, He limits the exercise of that sovereignty to fiscal regulations, but seems to subordinate the right of property to that of navigation.

Fiore (758-768) agrees in the main with Calvo, that in the case of a river flowing through one state only, that state may close the river if it chooses.

It is difficult to sustain the distinction of a navigable river running into the sea.

Heffter, paragraph 77, says that each of the proprietors of a river flowing through several states, the same as the sole proprietor of a river, can, stricti jure, regulate the proper use of the waters, and restrict it to the inhabitants of the country and exclude others. But, on the other hand, he agrees with Grotius, Puffendorf, and Vattel, at least in principle, that the privilege of innocent use should not be refused absolutely to any nation and its subjects in the interest of universal commerce.

Wheaton (Elements of International Law, pt. 2, ch. 4, par. 11, Lawrence's ed.) declares that the right of navigation, for commercial purposes, of a river which flows through the territories of different states, is common to all the nations inhabiting *the different parts of its banks*. But this right of innocent passage being what the text writers call an *imperfect right*, its exercise is necessarily modified by the *safety and convenience* of the state affected by it, and can only be effectively secured by mutual convention regulating the mode of its exercise, citing Grotius, Vattel, and Puffendorf.

Halleck says (vol. 1, p. 147, chap. 6, sec. 23) that the right of navigation for commercial purposes is common to *all the nations inhabiting the banks of* a navigable river, subject to such provisions as are necessary to secure the *safety and convenience* of the several states affected.

De Martens, Précis, paragraph 84, recognizes, as a general rule, that the exclusive right of each nation to its territory authorizes a country to close its entry to strangers, but that it is wrong to refuse them innocent passage. It is

for the state to judge what passage is innocent. But he seems to think that the geographical position of another state may give it a right *to* demand, and in case of need to *force, a passage* for its commerce.

Woolsey, paragraph 62, says:

> When a river rises within the bounds of one state and empties into the sea in another, international law allows to the inhabitants of the upper waters only a moral claim or imperfect right to its navigation.

Phillimore, in speaking of the refusal of England to open the St. Lawrence unconditionally to the United States, says (pt. 1, Par. CLXX):

> It seems difficult to deny that Great Britain may have grounded her refusal on strict law; but it is at least equally difficult to deny that by so doing she put in force an extreme and hard law,

not consistent with her conduct with respect to the Mississippi.

Klüber, paragraph 76, considers that the independence of the states is to be particularly noted in the free and exclusive usage of the right over water courses — at least in the territory of the state in which the water course flows into the sea, navigable rivers, channels, and lakes are situate. * * *

And that —

> a state can not be accused of injustice *if it forbids all passage of foreign vessels on its water courses*,

flowing to the sea, rivers, channels, or lakes in its territory.

Twiss, Volume I, section 145, page 233, second edition, declares that —

> a nation having physical possession of both banks of a river is held to be in juridical possession of the stream of water contained within its banks, and may rightfully exclude at its pleasure every other nation from the use of the stream whilst it is passing through its territory.

It is to be observed that distinctions are drawn by some of the above text writers, some declaring that the right of innocent use is confined to time of peace; others that only the inhabitants of those countries through which the river passes have the right of innocent use, while still others sustain the right without any limitation, save the right of the state to make necessary and proper regulations in respect to the use of the stream within its boundaries.

The theory of Grotius, mentioned above, has been said to be the " root of such legal authority as is now possessed by the principle of the freedom of river navigation." (Hall's Treatise on International Law, p. 137.) It does not appear to have been adopted by the best annotators on international law. Hall says: " It can no longer be accepted as an argumentative starting point." (Hall's Treatise on International Law, p. 139.)

Phillimore speaks of it as a "fiction which this great man believed," and says:

> But as the basis of this opinion clearly was, and is now universally acknowledged to be a fiction, this reason, built upon the supposition of its being a truth, can be of no avail. (Phillimore's Com. on International Law, p. 190, Sec. CLVII.)

The other theory, also of Grotius, was because the use of rivers belonged to the class of things " *utilitatis innoxiæ*," the value of streams being in no way whatever diminished to the proprietors by this innocent use of them by others, inasmuch as the use of them is inexhaustible. (Vattel, Bk. I, chap. 23.)

This right of mere passage by one nation over the domain of another, whether it be an arm of the sea, or lake or river, or even the land, is considered by him as one of strict law, and not of comity. It is said on the other hand that it is

not founded on any sound or satisfactory reason, and is at variance with that of almost all other jurists. (Phillimore, *ubi sup.*)

The same view was taken by Grotius, but the great weight of authority since Vattel is that the state through which a river flows is to be the sole judge of the right of foreigners to the use of such river. (Wheaton's International Law, Vol. I, p. 229, cited from Wharton, Vol. I, sec. 30, p. 97.)

Still another ground is asserted as a basis for this free use of rivers, viz., that conceding the proprietary rights of the state over that portion of the river within its boundaries, nevertheless these should be subordinated to the general interests of mankind, as the proprietary rights of individuals in organized communities are governed by the requirements of the general good. It is pertinently remarked by an eminent jurist that this —

involved the broad assertion that the opening of all waterways to the general commerce of nations is an end which the human race has declared to be as important to it as those ends to which the rights of the individual are sacrificed by civil communities, are to the latter. (Hall, p. 139.)

Most of the advocates of the innocent use of rivers base their claim upon the grounds that the inhabitants of lands traversed by another portion of the stream have a special right of use of the other portions because such use is highly advantageous to them. If the proprietary right of the state to the portion of the river within its boundaries be conceded, as it must be generally, there can be no logical defense of this position. It certainly is a novel proposition that because one may be so situated that the use of the property of another will be of special advantage to him he may on that ground demand such use *as a right.* The rights of an individual are not created or determined by his wants or even his necessities. The starving man who takes the bread of another without right is none the less a thief, legally, although the immorality of the act is so slight as to justify it. Wants or necessities of individuals can not create legal rights for them, or infringe the existing rights of others. (Hall, p. 149.)

It seems difficult upon principle to support the right to the free use of rivers as a right stricti juris. While this is not expressly admitted, it is tacitly conceded by nearly all the advocates. They define this right of use as an "imperfect right." The term is an anomaly. The fallacy is thus aptly stated by a learned authority on international law:

A right, it is alleged, exists; but it is an imperfect one, and therefore its enjoyment may always be subjected to such conditions as are required in the judgment of the state whose property is affected, and for sufficient cause it may be denied altogether. (Hall, p. 140.)

Woolsey terms it "only a moral or imperfect right to navigation."

However, it is no longer to be doubted that the reason of the thing and the opinion of other jurists, spoken generally, seem to agree in holding that the *right* can only be what is called (however improperly) by Vattel and other writers imperfect, and that the state through whose domain the passage is to be made "*must be the sole judge* as to whether it is innocent or injurious in its character." (Phillimore, CLVII, citing Puffendorf, Wheaton's Elements of International Law, Hesty's Law of Nations, Wolff's Institutes, Vattel.)

From this review of the authorities it seems that even in respect of rivers capable of navigation by sea-going vessels carrying oceanic commerce the weight of authority sustains the right of Venezuela to make the decrees complained of. But in the opinion of the umpire there are other considerations which control the decision in this case.

If the case before the umpire turned upon this general question of inter-

national law, the umpire is inclined to the opinion that he would be compelled to sustain the right of Venezuela to the complete control of navigation of the Catatumbo and Zulia rivers. In his opinion it is not necessary to decide the case on this ground. As has been shown above, there is no contradiction of authority as to the right of Venezuela to regulate, and, if necessary to the peace, safety, or convenience of her own citizens, to prohibit altogether navigation on these rivers. It is also equally without doubt that her judgment in the premises can not be reviewed by this Commission or any other tribunal. That a case for the exercise of discretion did exist is obvious.

The other claimants who ask damages for the closing of these ports are all residents of and doing business in Maracaibo, in Venezuela. There was suggestion in the discussion of the case that there might be different rule as between a Venezuelan resident and a resident of Colombia, but in the opinion of the umpire, given a common German nationality, there is no such difference.

PLANTAGEN GESELLSCHAFT CASE

Evidential value of letters and unauthenticated receipts.[1] Valentiner case affirmed.[2]

DUFFIELD, *Umpire:*

This claim is for 387,143.39 marks, and is founded on the alleged injuries to the haciendas of the claimants during the last civil wars. It appears that these haciendas were in the neighborhood of active military operations and the scene of considerable fighting. Part I of the claim in the amount of 369,968 marks and Part II in the amount of 7,354 marks are almost entirely made up of claims for consequential damages — loss of crops already planted, prevention of planting of other crops, inability to protect the growing crops from birds which destroyed them because of the impossibility of working and the frequent drafting of the laborers.

The Commissioners disagree as to the liability of Venezuela for these damages, and the case is governed by the decision of the umpire in the case of Hugo Valentiner No. 12 (see p. 403).

The Commissioner for Germany, however, is of the opinion that there are certain "direct injuries proven, and although their value is not fixed, he leaves it to the umpire for reasons of equity to grant to the claimant an indemnification amounting in round figures to 20,000 bolivars." In the opinion of the umpire there is proof of very considerable injuries to the property of the claimant, for which the umpire would certainly have allowed him damages if he adduced any proof as to the amount of values. In the absence, however, of such proof, notwithstanding the hardship of the case, the umpire sees no legal or legitimate way of arriving at the sum of 20,000 bolivars. There is the testimony, however, of two witnesses, Oropeza and another, as to the destruction of 231,230 4-year-old coffee plants, a fair valuation of which, in the opinion of the umpire, is 20,000 bolivars, and this sum will be allowed the claimant.

Of Part III of the claim, 9.820.45 marks, the Commissioner for Venezuela allows 1,472 marks for property taken from a driver of the claimant company on the January 4, 1903, but denies the liability of Venezuela for the remainder of the part. His reasons therefor are as follows:

That the item of 5,504 marks is only proven by the letter or statement of

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[1] See *supra*, p. 438, and note.
[2] *Supra*, p. 403.