

HISTORY AND DIGEST

OF THE

INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY,

TOGETHER WITH

APPENDICES CONTAINING THE TREATIES RELATING TO SUCH
ARBITRATIONS, AND HISTORICAL AND LEGAL NOTES ON
OTHER INTERNATIONAL ARBITRATIONS ANCIENT AND
MODERN, AND ON THE DOMESTIC COMMISSIONS
OF THE UNITED STATES FOR THE ADJUST-
MENT OF INTERNATIONAL CLAIMS.

BY

JOHN BASSETT MOORE,

*Hamilton Fish Professor of International Law and Diplomacy, Columbia University,
New York; Associate of the Institute of International Law; sometime Assist-
ant Secretary of State of the United States; author of a work on
Extradition and Interstate Rendition, of American
Notes on the Conflict of Laws, etc.*

IN SIX VOLUMES.

VOLUME II.

WASHINGTON:

GOVERNMENT PRINTING OFFICE.

1898.

CHAPTER XXXIII.

CLAIMS AGAINST COSTA RICA: CONVENTION BETWEEN THE UNITED STATES AND COSTA RICA OF JULY 2, 1860.

**Provisions for
Arbitration.**

By a convention concluded at San José, July 2, 1860, it was agreed that "all claims of citizens of the United States, upon the Government of Costa Rica, arising from injuries to their persons, or damages to their property, under any form whatsoever, through the action of the authorities of the Republic of Costa Rica, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State at Washington, or to the diplomatic agents of the said United States at San José, of Costa Rica," up to the date of the signature of the convention, should be referred to a board of two commissioners, one to be appointed by the Government of the United States and the other by the Government of Costa Rica. The terms of submission were, however, qualified by the proviso, "That no claim of any citizen of the United States, who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority, by the latter, within the territory of the former, shall be considered as one proper for the action of the board of commissioners herein provided for."

The commissioners were required to meet in Washington within ninety days from the exchange of the ratifications of the convention, and before proceeding to business each to "exhibit a solemn oath, made and subscribed before a competent authority," that they would "carefully examine into, and impartially decide, according to the principles of justice and of equity, and to the stipulations of treaty, upon all claims laid before them, under the provisions of this convention, by the Government of the United States, and in accordance with such

evidence as shall be submitted to them on the part of said United States and of the Republic of Costa Rica, respectively.”

After having exhibited this oath, which was to be entered upon the record of their proceedings, the commissioners were directed to proceed to name an umpire, and in case they should be unable to agree on one the appointment was to be made by the Belgian minister in Washington.

The convention contained various other stipulations relating to the mode of procedure of the commissioners, the furnishing of papers by the two governments, and the payment of indemnities and expenses.

The duration of the commission was limited to nine months from and including the day of its organization, but a period of sixty days from the final adjournment of the commissioners was allowed to the umpire for the decision of any claims which might then be pending before him.¹

The commissioners met in Washington on February 8, 1862, and after examining and exchanging their commissions, which were found to be in due form, ordered them, together with the oaths prescribed by the convention, to be entered upon the journal of their proceedings.²

¹ For correspondence in regard to the claims embraced in the convention, see Mr. Cass, Secretary of State, to Mr. Lamar, October 1, 1858, and Mr. Black, Secretary of State, to Mr. Dimitry, January 19, 1861; as to the ratification of the convention, note of Mr. Seward, Secretary of State, to Mr. Riotte, June 26, 1861; as to forwarding proofs under the convention, same to same, April 26, 1862: MSS. Dept. of State.

² The oath of Mr. Rexford was taken before James H. Causten, a notary public for the District of Columbia. Mr. Molina, who held the position of envoy extraordinary and minister plenipotentiary of the republic of Costa Rica to the Government of the United States, as well as the post of commissioner under the claims convention, seems to have sworn himself. His oath was as follows:

“En la ciudad de Washington, capital de los Estados Unidos á los siete dias del mes de Febrero de mil ochocientos sesenta y dos, el infrascrito Enviado Extraordinario y Ministro Plenipotenciario de la República de Costa Rica cerca del Gobierno de los Estados Unidos habiendo sido nombrado comisionado, por el Gobierno de aquella República en conformidad con lo dispuesto en la convencion de dos Julio de mil ochocientos sesenta, hace solemne juramento de examinar cuidadosamente y fallar con imparcialidad, en equidad y justicia, y con arreglo á las estipulaciones del Tratado y á las pruebas que se produzcan por los interesados todas las reclamaciones que fueren presentadas ante la Comision que al efecto se constituye en la ciudad y fecha antes mencionadas. En fé de lo cual firma por si y ante si.

The commissioner on the part of the United States was Benjamin F. Rexford, of New York; on the part of Costa Rica, Luis Molina.

The commissioners appointed Charles W. Davis to act as secretary *pro tempore*, and directed him to inform Mr. Seward, Secretary of State, of the board's organization.

Having thus effected an organization, the commissioners adopted rules and ordered them to be printed, and then adjourned till the 12th of March.

Mr. James Mandeville Carlisle appeared as counsel for Costa Rica.

On a subsequent day Judge Peabody appeared for the Government of the United States in behalf of claimants not otherwise represented.

When the commissioners reassembled on the Session of March 12. 12th of March, they heard and granted motions in several cases for an extension of time for filing memorials, for reasons stated in each case. In most cases the allowance of additional time was specific; but in that of Charles Mahoney, who was then absent, leave was granted to file a memorial and papers when he returned to the United States, subject to the condition that the documents should be filed within a certain period.

Papers were received from the Department of State in relation to thirteen claims.

The board made the following order:

“Ordered, That Charles W. Davis, at present secretary pro tempore, be and is hereby appointed secretary of this commission and custodian of the papers, with the salary of two thousand dollars for the nine months; and Hanson A. Risley, of Dunkirk, Chautauqua County, New York, be appointed clerk, at the rate of one hundred dollars per month; and Hampton West messenger, at thirty-five dollars per month.”

April 1, 1862, the commissioners addressed a joint note to the Chevalier Joseph Bertinatti, Italian minister at Washington, offering him the post of umpire.

They then took a recess till 7 o'clock in the evening, when, on reassembling, they received a communication from the Chevalier Bertinatti accepting the trust. His commission, signed by the two commissioners, was immediately sent to him by the secretary, Mr. Davis, by the board's direction.

On the 18th of October the secretary was directed to address a letter to the umpire, inviting him to attend the sessions of the commission and to be present at the discussions by counsel of the various questions involved in the cases pending before the board. This invitation was accepted; and on the 21st of October the umpire appeared, filed a solemn declaration in substantially the same terms as the oath of the commissioners, and took his seat at the board. It is subsequently noted in the journal of several days' sessions that the umpire was present.

**Transaction of
Business.**

At its session on Monday, October 20, 1862, the board ordered that on the following Wednesday the calendar should be called peremptorily, and that all cases which should not then be ready for trial should be placed at the foot. On the 22d of October the calendar was called accordingly, and the cases in which counsel were not prepared were placed at the foot of the calendar, except where satisfactory explanations of the failure of preparation were offered.

On the 5th of November counsel for Costa Rica announced the reception of certain evidence from that country in a case pending before the board. Counsel for the claimant opposed its reception, and the board after consultation declined to receive it.

On the same day the board made an order allowing the umpire \$2,500 for his services.

Adjournment. 1862. The commissioners filed their opinions in the cases in which they disagreed, and

ordered the secretary to send to the umpire their opinions, the briefs of counsel, and all other papers relating to such cases.

The secretary was directed to facilitate the labors of the umpire in making his decisions; to keep open the office of the commission and retain the custody of such records as the umpire might suggest, and to pay the expenses of the commission from the funds at his disposition.

The secretary was authorized to allow claimants and counsel to examine the papers and the opinions of the commissioners in their respective cases.

The commissioners then adjourned *sine die*.

On the day of their adjournment the commissioners signed a report to Mr. Seward, as Secretary of State of the United States. This

Commissioners' Report.
report was as follows:

"OFFICE OF THE JOINT COMMISSION OF
"UNITED STATES AND COSTA RICA,
"Washington, November 6, 1862.

"SIR: The undersigned, commissioners appointed under the convention between the United States and Costa Rica, signed at San José, July 2, 1860, respectfully report that on this day our labors cease, in compliance with the fifth article of said convention, nine months having expired since our organization.

"The whole number of cases presented for our consideration is 34, of which we have rejected those entered in Schedule A, hereto annexed.

"We regret that in the cases entered in Schedule B we have not been able to agree. We have, in compliance with article 2 of the convention above referred to, directed our secretary to forward said cases, with all the papers, arguments of counsel, and opinions of the commissioners in relation thereto, to His Excellency Chevalier Joseph Bertinatti, umpire of the commission, for his decision.

"The undersigned have the honor to subscribe themselves, with high considerations of respect,

"Your obedient servants,

"LUIS MOLINA,
"Costa Rican Commissioner.

"BENJAMIN F. REXFORD,
"United States Commissioner.

"CHAS. W. DAVIS,
"Secretary."

"SCHEDULE A.

"The following cases were rejected by the commissioners under the convention between the United States and Costa Rica:

George O. Lamson	\$70,000.00
Wm. C. Hipp	30,000.00
Theron Wales	10,000.00
J. G. Kendrick	20,315.00
Wm. Lee	550.00
J. T. Molone	215.00
John C. McGuigan	1,459.50
Dr. Earl Flint	406.60
Wm. D. Emmons	5,181.90
John W. Bourn	12,000.00

Claudio Curbelo	\$10,000.00
Charles Davis	2,105.00
H. Zur, Lippe & Co.	382,000.00
	<hr/>
	\$544,233.00

"SCHEDULE B.

"Cases submitted to the umpire.

Isaac Harrington	\$20,000.00
Donald McBean	20,000.00
Matthew L. Masten	20,000.00
Wm. W. Wise	20,000.00
Lyman A. Hoover	3,000.00
G. H. Bowley & Co.	72,199.48
John E. Hollenbeck	12,157.00
Thomas Townsend	20,950.00
Michael Mullone	43,538.13
Sam'l S. Wood & Son	2,079.25
Volney R. Bristol	20,000.00
Thomas Gilmore	25,000.00
E. W. High	5,000.00
Geo. M. Harras	215.00
Fuvel Belcher	66,540.00
Lester Bushnell	51,500.00
James Dunn	6,807.00
C. Medina & Sons	700,000.00
Accessory Transit Co	68,000.00
John Vredenburg	20,000.00
Charles Mahoney	25,885.00
	<hr/>
	1,222,870.86

¹ The commissioners did not concur in the allowance of any claim. From their journal the following information is gathered as to the grounds on which their disallowance of claims proceeded: The claims of W. C. Hipp, Theron Wales, and J. G. Kendrick were rejected October 29, 1862, for want of proof. November 4 the claim of John C. McGuigan was rejected for the same cause, while that of Claudio Curbelo was dismissed because the claimant was not a citizen of the United States. Other claims were rejected without statement of the reason. In the case of H. Zur, Lippe & Co., which claim was rejected for want of proof, Mr. Molina entered the following observations in the record:

"The claim of Herman Zur, Lippe & Co. against Costa Rica for the large amount of \$382,000 on the pretended ground of denial of justice is an extraordinary one. It is rejected for the utter want of proof. There being no possibility of transforming it into a North American concern, it has no standing before this commission, but it presents a striking attempt at fraud, which must not pass unnoticed.

"The company, represented to have been formed by the above-mentioned and his cousin, Dr. Adolphus Lippe, is not only not proved, but the proofs of Costa Rica show that at the required time the claimants had for years known nothing of the whereabouts of each other and had had no correspondence whatever."

December 31, 1862, the umpire, Mr. Bertinatti, transmitted a report to Mr. Seward.

The Umpire's Report. After recapitulating the claims submitted to him, as set forth in the foregoing Schedule B to the report of the commissioners, he said:

"After due consideration of the above cases, I have concluded that the nine following cases have not been proved as valid against the republic of Costa Rica, and have accordingly rejected them:

"Accessory Transit Company, D. Colden Murray, receiver; George H. Bowley & Co.; Lester Bushnell; Crisanto Medina & Sons; James Dunn; Lyman A. Hoover; Thomas Gilmore; E. W. High; George M. Harras.

"The following cases I have found to be valid, and awarded in each of them the sums indicated:

Donald McBean, administrator of David McBean.....	\$1, 000. 00
David Ogden, administrator of Isaac Harrington.....	1, 000. 00
Matthew L. Masten.....	1, 000. 00
William W. Wise.....	1, 000. 00
Volney R. Bristol.....	800. 00
John Vredenburgh.....	600. 00
Charles Mahoney.....	1, 296. 80
Michael Mullone, for himself.....	500. 00
Michael Mullone, administrator of Peter Mullone.....	5, 000. 00
John E. Hollenbeck.....	7, 269. 75
Thomas Townsend.....	5, 359. 68
Samuel S. Wood and A. M. C. Wood.....	627. 93
Fuvel Belcher.....	250. 00
Total.....	25, 704. 14

"I have filed written opinions in each of the cases submitted to me, and have had prepared proper certificates for the benefit of the claimants, all of which I have the honor to forward to you through the secretary of the late commission.

"I have the honor to be, sir, very respectfully, your obedient servant,

"JOSEPH BERTINATTI, *Umpire.*"

Records of the Commission.

By the act of February 20, 1861,¹ passed to carry the convention into effect, all the papers of the commission were at the close of its labors required to be deposited in the Department of State, except that the commissioner on the part of Costa Rica might deposit certified copies or duplicates of the papers filed on behalf of his government instead of the originals. Mr. Bates, attorney-general, held that translations, even though certified, were not copies or duplicates, in the sense of the act. This

¹ 12 Stats. at L. 145.

opinion was given upon a note which Mr. Molina, after the close of the commission, wrote in his capacity as Costa Rican minister, a note in which he asked to withdraw all the original papers filed on behalf of Costa Rica before the commission, and after its termination deposited in the Department of State, leaving only the translations filed in her behalf. He said he had received instructions to return the papers to San José, where occasion would not be wanting to refer to them.¹

**The Belligerency
Question.**

We have seen that by Article I. of the convention it was provided that "no claim of any citizen of the United States, who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica, or the exercise of authority by the latter, within the territory of the former," should be "considered as one proper for the action of the board of commissioners." The meaning of the term "belligerent" was principally discussed in the case of David Colden, receiver of the Accessory Transit Company, a corporation composed of citizens of the United States, but chartered under the laws of Nicaragua, for the purpose of carrying passengers and merchandise across the Nicaraguan Isthmus, by means of steamers on the San Juan River and Lake Nicaragua, and by land carriage from the lake to the Pacific. On February 28, 1856, said the commissioner of the United States, Mr. Rexford, in his opinion, "the freebooter government of William Walker and his associates pretended to annul the charter of this company, seized upon all its property, and retained the possession of all of it that it did not destroy until about the 27th day of December 1856, when all the steamers and the other property which had not been destroyed were seized by the Costa Ricans and retained by them." October 9, 1856, Sylvanus M. Spencer, acting under a power of attorney from the company, proceeded to San José, Costa Rica, where he obtained forces from that government. With these troops, said Mr. Rexford, he proceeded to San Juan "and captured all the steamers in the river, there being fourteen in all," only twelve of which, however, belonged to the company. In this enterprise "Spencer was the agent of that company only and had no commission from Costa Rica, but the troops that were with him were under his control, the regularly commissioned officers of the expedition having re-

¹ 10 Op. 450.

ceived orders from their government to obey his directions." Continuing, Mr. Rexford said:

"After the steamers were thus seized, the Costa Rican troops obtained possession of them for a time, the said Spencer still having control of both the officers and the forces, who used them in vanquishing the freebooters and in driving them from Nicaragua. June 5, 1857, Spencer, by the authority of the company, called upon the President of Costa Rica, presented his authority to him, and for the company demanded their steamers, which demand was refused, Mora, the said President, saying he thought it best for Costa Rica to retain possession of the steamers until some arrangement could be made with the company in regard to the route, and that he would send commissioners to New York to make such an arrangement, which he never did, and the steamers were never delivered to the company, but were, after the said demand, disposed of by Costa Rica as she saw fit.

"These facts, it is understood, are not in any particular denied by Costa Rica; but it is claimed by her that these steamers, being in the possession of these freebooters, and being used by them for warlike and hostile purposes, at the time of their capture, no one could make a claim against her for the property—that she has a right to hold it as her own, and that, although it has been seized by the freebooters, in a raid made by them into Nicaragua, yet that such piratical seizure divested the true owners of their title, although they might not have been belligerents in any manner, and, on the contrary, were friendly, or at least neutral, toward Costa Rica. This argument would allow the person who had captured property from the thief or pirate who had stolen it to retain it as his own, because he found it in the thief's or pirate's hands!

* * * But, further, these steamers were seized by the Costa Ricans, acting in connection with and under the direction of the agent of the company; it must for this reason be held that she acted in the matter for the benefit of that company, so far as to wish to restore its property to it, and to take measures for that purpose, as well as for her own benefit, for in so assisting the company she was aiding herself, by depriving the freebooters of the use of the vessels not only, but also by having the use of them herself as instruments against the enemy."

The company also claimed for the loss of a wharf, burned by the Costa Ricans at Virgin Bay.

The Costa Rican commissioner opposed the claim on the following grounds:

"The company had lost the possession of the property to which the claim refers, and Costa Rica rightfully seized or destroyed the same while it was possessed by and under the

absolute control of her enemy, who employed it in the operations of the war, and therefore was enemy's property in the strictest sense. The company and their property were Nicaraguan by nationality, according to the principles of international law. They were most active accomplices and employed in the service of the filibusters. And there is no proof or plausibility in the allegation of an agreement between Costa Rica and the company by which it is supposed the former undertook to rescue the property on behalf of the latter."

Commander Bertinatti rendered the following decision:

"In this case the original demand was for \$68,000 and interest, damages arising from the burning of a wharf at Virgin Bay, in Nicaragua. Very lately an additional demand was presented to the commission for \$305,000 and interest, damages derived from the capture of fourteen steamers on the river San Juan and on the Lake Nicaragua. The commissioner for Costa Rica rejected both demands, while the other commissioner thought of awarding the claimant, for damages and interest, the total of \$493,542, declaring at the same time that he had been unable to discuss, as he had desired all the points, in consequence of the case having been submitted to the commission only thirty-six hours before its time expired. Called by the disagreement of the commissioners to decide this case, I have carefully examined all the documents, briefs, and observations which were presented; given opportunity to both parties for new observations, in order to make up for the shortness of time complained of by the commissioner for the United States, and read the new briefs presented to me by the parties, which were communicated to each other by me, as also to the commissioners, both of whom I have heard on the controverted points. The claimant is a citizen of the United States, but appears as a receiver of the 'Accessory Transit Company,' which was a corporation created by and under the law of the Government of Nicaragua by corporators who were qualified in the charter as 'all citizens of the United States.'

"It appears that many and serious difficulties existed between the said company and the Government of Nicaragua in 1854, and that the party then in power was 'distinguished for its hostility to the citizens of the United States.' That company saw with satisfaction a revolution which overthrew that government and established a new one by the aid of a small band of adventurers commonly called 'filibusters;' they were almost all citizens of the United States, led by a William Walker, he also a citizen of the United States.

"The Atlantic and Pacific mail and passenger steamers, in connection with the transit route of said company, continually carried aid of men, arms, and ammunition to the filibusters, contributing greatly to their success. The complicity of the 'Accessory Transit Company' with the filibusters from the beginning of their enterprise in Nicaragua, is satisfactorily proven in this case.

The new government of Nicaragua, commonly called Rivas-Walker, was inaugurated in October 1855, and, though illegitimate and piratical in its origin, it was in fact and continued long to be the only government of that state. At the beginning of March 1856 Costa Rica declared war against that government, with a view to drive the filibusters out of Central America and save herself from impending danger.

"Whatever may have been the language adopted by Costa Rica in regard to Nicaragua, Rivas-Walker and the filibusters, the fact, which is more eloquent than words, shows that it was a *public war and a regular war*, fought as such on both sides according to the civilized usages of warfare, during about two years, which witnessed victories and reverses on both sides, as also the mutual recognition of all the rights of belligerents. In the mean time the United States recognized the Rivas-Walker government, not only as *belligerent*, but as the regular government of Nicaragua. To make new investigations, as was done in the two briefs last submitted to me, about the character of the war between Costa Rica and Nicaragua, in order to know if it was *public* or of other kind, and deduce from the knowledge this or that consequence in favor of the claimant, seems to me all lost work. It is enough to read the convention of July 2, 1860, and take it in connection with the rules of interpretation laid down by the best publicists, and forcibly applied by the learned and distinguished Crittenden in regard to the meaning of the phrases used in a public treaty (see official opinions of the Attorneys-General, vol. 5, p. 331 and seq.), in order to see that the question has there been resolved. The high contracting parties, before concluding the convention and when the matter was *de jure constituendo*, were at liberty to investigate the nature of that war, inquiring if it was public or if it was just, in order to give it an appropriate character; they could also have investigated the causes of that war, considered it from a political or military point of view, established the nationality of the combatants and showed the final object of the same war. This was the work for the negotiators of the said convention, and the matter for their discussions. What may have been the practical result of such investigations, what may have been the conclusions of the negotiators, in regard to the legal and international consequences of the same war, it can be inferred, now that the treaty has been concluded, forming a *jus constitutum*, only from the words used in that instrument. These words are quite clear: 'No claim,' says the proviso of the 1st article, 'of any citizen of the United States who may be proved to have been a belligerent during the occupation of Nicaragua by the troops of Costa Rica or the exercise of authority by the latter within the territory of the former, shall be considered as one proper for the action of the board of commissioners herein provided for.' The expression 'belligerent,' with the consequences depending upon it; the expression 'occupation by forces'—*occupatio bellica*—with the rights belonging to the military occupant;

the acknowledgment of the authority of Costa Rica in the territory of Nicaragua; the penalty against the belligerent consisting in depriving him of action for indemnity before this commission, all concur to show that the negotiators acknowledged the war between Costa Rica and Nicaragua as a *public war* and a *just war* on the part of Costa Rica, and thus acknowledged also the rights arising from the same. Consequently Costa Rica has no question of right to discuss with the *belligerent*, in accordance with said convention. For her the proof of the fact of belligerency is enough in order to oppose [i. e., set up] the want of any right of action, and say that the claimant has no *locum standi in judicio*.

"Now it being shown by Costa Rica that the burning of the wharf complained of was a necessary operation of war, and that such also was the capture of the steamers, I find it useless to discuss here the effects of the *domicil* in Nicaragua in regard to this claim; for either as a corporation existing only as a moral being assimilated to a natural person in the state of Nicaragua, or as an *actual belligerent* there against Costa Rica, said company has no standing before this commission. It is alleged, however, in behalf of claimant that the 'Accessory Transit Company,' as a Nicaraguan corporation, ceased to exist in February 1856, when the Rivas-Walker government of Nicaragua revoked its charter, seized its property and sold it for the benefit of the state to another company, which took out a new charter and continued the business on its own account. It was this new company that made itself liable to the charge of belligerency during the occupation of Nicaragua by Costa Rica. It seems that Costa Rica ignored that mysterious transaction, by which the old company was dissolved and a new one formed by the members of the first, without any apparent change, except more determined efforts in favor of the filibusters. It was immaterial, however, for Costa Rica to know who were the owners of the wharf and steamers used in a war against her; she destroyed the first and captured the others *jure bellico*.

"Apart from other considerations, if it be true that the wharf when burnt and the steamers when captured did not belong to the 'Accessory Transit Company,' because this did not exist and they had been disposed of to another company, I can not see how an action for damages can be maintained in the name of the extinct company, if it is not against those members of the old company who formed the new one and bought the said property. Upon them would fall the responsibility, if the justice of the transaction could not be sustained before a competent tribunal. Costa Rica has nothing to do with that question. I can not see also how the theory of the things retaken by neutrals from a pirate can be applied to this case. First of all, the wharf was not retaken, but burnt, and the steamers also mostly perished in the continued struggle for their possession; what remained of them would hardly pay the expense of capture. Second, as I have observed before, the Rivas-Walker

government was the only one existing at Nicaragua, and was recognized as a regular government. Third, the proceedings of that government against the 'Accessory Transit Company' were not acts of violence or open injustice; on the contrary they were marked by a show of strict legality, and accompanied by an exposé of motives making a strong case in favor of that government.

"In regard to the steamers, however, it is alleged by the claimant that President Mora, of Costa Rica, agreed to capture them with his own forces and then deliver them to Cornelius Vanderbilt, president of the 'Accessory Transit Company.' I deem it useless to investigate the effects which this unilateral convention might have had; for its existence is not proved. Vanderbilt says that he dispatched an agent to aid in the capture of said steamers, with the idea of coming to some arrangement afterward; and this agent says that when he requested President Mora to give up the captured steamers, he gave first an evasive answer and afterward declined, though showing an inclination to treat, probably, for their sale when the war should be over. Costa Rica had sufficient motive to capture those steamers even without the invitation of Vanderbilt, and perfect right to do so without his consent. Now, if Vanderbilt cooperated by his agent with Costa Rica, he may at all events be entitled to a compensation, which seems to have already been paid to his agent. It seems beyond probability that President Mora should have agreed to deliver those lawful prizes to Vanderbilt while the war continued to rage and the possession of those steamers was all important to obtain victory.

"Another obstacle to the admission of the demand relative to the steamers arises from the fact that it was presented too late. The jurisdiction of this commission has been limited to the claims which were duly presented before July 2d, 1860. In conclusion, my opinion is that the 'Accessory Transit Company,' by David Colden Murray, receiver, has no standing before this joint commission, and I hereby dismiss the demand in this case."

When the steamers of the company were captured by the forces of Costa Rica the captains who had "made themselves prominent in favoring the filibusters were pardoned by Costa Rica and allowed to leave the country." The crews and subordinate officers remained, and from among them Costa Rica chose new captains.¹ Some of these captains appeared before the commission as claimants for damages for being compelled to serve in the war against the filibusters. The typical case of this kind was that of Isaac Harrington, No. 2. It was alleged that he was compelled to accept the position of captain of one

¹ *Isaac Harrington v. Costa Rica*, No. 2, opinion of Commander Bertinatti.

of the steamers and to receive a regular monthly salary during six months. Costa Rica denied the compulsion, but in the conflict of testimony the umpire said that the truth seemed to be "that the claimant willingly accepted the employment, under condition, however, that the steamer should not be used in war, which condition not having been observed he wanted to leave the service and was prevented from doing so." "I believe," continued the umpire, "that Costa Rica had no right thus to restrain the liberty of a citizen of a friendly power. Had he been an *actual belligerent* Costa Rica might have dealt with him according to the laws of war. But she does not pretend that he was compelled to serve as a punishment, and by promoting him and giving him an employment of great responsibility, which employment he might have easily abused had he been unfriendly, has in fact given up the right to consider him as an enemy, whatever his previous conduct might have been. There is no evidence, however, of the *belligerency* of the claimant, and he can not be said to have had a real *domicil* in Nicaragua. He did not go there to make war, or to trade, or to reside, but only for reason of his employment of aiding in the navigation of a steamer; and while thus serving he had but little occasion to know the relations of the owners and agents with the filibusters or with Costa Rica."

The objection of domicile was, however, very strongly and persistently urged on the part of Costa Rica, whose commissioner prepared a long opinion on the subject. It was urged that Harrington and various other claimants before the board must be considered as having had at least a belligerent domicile in Nicaragua, and in this relation special stress was placed on the note of Mr. Marcy, Secretary of State, to Count Sartiges, French minister, of February 27, 1857, denying any liability on the part of the United States for the destruction of the property of aliens in the bombardment of Greytown. With reference to these contentions, the Commander Bertinatti said:

"In all cases of claimants who were residents of Nicaragua, when the *actual belligerency* is not proved, a *constructive belligerency* arising from *domicil* or other like source has been opposed in behalf of Costa Rica as sufficient in order to exclude the claimants from the benefits of the 3d article of the convention of July 2d, 1860. I do not find the theory applicable to the cases to be decided under said convention. 'Neither the one nor the other of the parties interested in the contract having a right to interpret the deed or treaty according to his own

fancy' (says Vattel, chap. 17, sec. 265), it becomes my duty to interpret said convention according to reason and in conformity with the principles in *subjecta materia*, with the same simplicity and candor shown by that great publicist in the research of the rules which regulate the intercourse of nations. 'It is not to be presumed,' says the Swiss publicist, 'that sensible persons in treating together, or transacting any other serious business, mean that the result of their proceedings should prove a mere nullity. The interpretation, therefore, which would render a treaty null and inefficient can not be admitted. It must be interpreted in a manner that it should not be vain and illusory.' (Vattel, chap. 17, sec. 283.) Admitting these principles, we need not inquire whether the Ministers Carazo, Dimitry, and Yglesias, who negotiated the said convention, meant to make a serious act or not; but we must inquire only if they knew beforehand the *hindrances* which could be opposed to the instrument which they signed, either in reference to the strict principles of public law—*summum jus*—or to the often quoted note of Mr. Marcy, well known to all the cabinets, in order to render vain and illusory the result of their negotiations.

"Combining the general expressions of the first article of said convention with the *proviso* which limits them, and with the second article where it is said 'they (the commissioners) will carefully examine into, and impartially decide, according to the principles of justice and equity, and to the stipulations of treaty upon all the claims laid before them,' and adding to all this the third article of the same convention contemplating the case in which the commissioners 'may agree to award an indemnity,' we must conclude that the negotiators, in regard to those claimants whose *actual belligerency* should not be proved, intended to create a special and particular right which was the result of the convention itself; otherwise all the claimants being excluded by a *constructive belligerency* according to the note of Mr. Marcy, quoted by Costa Rica, the said convention would have no serious object or result.

"Had Mr. Marcy been bound by any similar convention to those foreign governments whose subjects were made to suffer serious damages in consequence of the bombardment of Greytown, he certainly would not have been able to invoke the rigor of the absolute principles laid down in that elaborate note, in order to oppose a *hindrance* to the claimants. His note then would have been based upon other principles. That jurist, who was Secretary of State under President Pierce, would have easily perceived that it was necessary to modify the general right by the particular right; the absolute right by the relative right; the *summum jus*, laid down by the publicists when they treat of the terrible rights derived from the state of war, by the conventional right, such as established in the convention, which can not be regarded but as an act of reparation. Mr. Marcy consequently would have based his note not upon the theory of authors, and upon examples which

history has judged, but he would have taken his inspirations from those generous and high minded considerations which a government never puts aside, when it is the matter of alleviating the calamities resulting from war; and he would have mitigated, if I am allowed the expression, the unbending rigor of the *Decemviral* laws by the equity of the *edict* of the *Pretor*.

"This order of ideas in the interpretation of the convention of July 2d, 1860, is suggested by the impartial examination both of its letter and of its spirit. No other interpretation can be admitted if we will not render that convention vain and illusory. To make use of the *proviso* in order to derive from it the right to exclude the *actual belligerents* not only, but also those who are innocent, no belligerency being proved against them, is the same as to make use of the exception in order to overthrow the rule. To interpret the whole of the convention without paying attention to the proviso, is the same as to accept the general principle and overlook the limitation. It is in equity, then, that we must judge the cases of those claimants who are not proved to have been *actual belligerents*; and the amount of indemnity must be regulated by the same principle of equity.

"As for the general principles quoted in the briefs, their value can not be denied; but they are not applicable to the cases submitted to my decision. The Government of Costa Rica may invoke those principles against all the governments to which it is not bound by a special convention; and will also be able to assert the same principles even against the Government of the United States after that the convention of July 2, 1860, whose term expires with my office of umpire, shall have obtained its object. Such seems to me to have been the conciliative thought of the two governments in making the aforesaid international convention; and the interpretation which answers their thought and their duty is at the same time the only rational interpretation, without which the convention would be illusory, because null and without effect.

"For the reasons above explained, I find it just and equitable to give the claimant Isaac Harrington an indemnity. In measuring the damages to be awarded, the commission has been advised to take the stand on the high ground of national indignity, of violated treaty, of breach of trust, of the oppression of a citizen of a nation by the rulers of another. But the commissioner for the United States, who could not ignore that the republic of Costa Rica, placed in jeopardy of its existence and making war for its defense, had no interest or wish to provoke by outrages the great and powerful republic of the United States, has adopted for damages an equitable measure. And the commissioner for Costa Rica having invariably rejected all demands, I will be guided by said equitable measure in this as well as in all other cases in which I find that an indemnity is due. Consequently, I hereby award to said David Ogden,

as administrator of Isaac Harrington, deceased, the sum of \$1,000."¹

Only one of the captains who were in command of the steamers when they were captured by the forces of Costa Rica appeared before the board as a claimant. This was Lyman A. Hoover, who demanded \$3,000 for having been bound and kept a prisoner for three hours on board of a steamer, exposed to the wind and rain. The umpire dismissed the claim, saying:

"He [Hoover] was an *actual belligerent* in command of a steamer used in war against Costa Rica during the occupation of Nicaragua by her forces. In this case there does not occur any circumstance to show that the claimant may have ignored his position of hostility to Costa Rica, as in the case of Harrington. Nor did Costa Rica afterward take into her service the claimant Hoover, as she did with Harrington, showing she did not consider him an enemy."

Awards were made by the umpire in favor of three persons who were working as mechanics in the construction of the company's wharf at Virgin Bay, when it was destroyed by the forces of Costa Rica April 7, 1856. One of them was killed by a volley fired by the Costa Ricans on their first arrival, and in his case \$5,000 was allowed. Another was slightly wounded and was imprisoned for a short time. He received an award of \$200. The third was made a prisoner and held as such for a month, and for this was allowed \$500. No charge of "actual belligerency" was, said the umpire, made against any of these three persons.

In the case of George H. Bowley, No. 8, the claimant demanded damages for the destruction of merchandise by Costa Rican forces at Rivas and elsewhere. Costa Rica, while admitting the destruction of a part of the merchandise, alleged that the claimant was a "belligerent." It appeared (1) that when the Costa Ricans approached San Juan del Sur, where

¹ The amount of Harrington's original demand was \$160,000, but he afterwards reduced it to \$20,000. On the principle applied in his case, the umpire also awarded \$1,000 each to William W. Wise, Matthew L. Masten, and Donald McBean. To Volney R. Bristol, who was an assistant engineer, and who was compelled to serve only four months, the umpire allowed \$800. To John Vredenburgh, who served as a captain, but for a shorter time than Harrington, an award was made for \$600. Charles Mahoney, who was compelled to serve for a time as a captain, was allowed \$400 for himself and \$200 for his wife, who "also was detained during said time, and subjected to much inconvenience."

claimant was engaged in business, he took the greater part of his merchandise for safety to Rivas, which city was then held by the filibusters; (2) that when the Costa Ricans approached Rivas he left his merchandise in care of a servant and went, as he alleged, "to travel in the interior," returning to Rivas when it was reoccupied by the filibusters; (3) that he had in the service of the filibusters a schooner, which was captured and held as a prize by the Costa Ricans; (4) that in November 1856, being then in San Juan del Sur, he fled on the reapproach of the Costa Ricans and took refuge on board of the *San José*, a vessel in the service of the filibusters. Referring to Bowley's denial that he was a "belligerent," the umpire, after reviewing the facts, said:

"The presumption is against him. The proofs by which he endeavored to corroborate his deposition are all of a negative character and not all of them free from bias. Costa Rica, on the contrary, has exhibited positive depositions of witnesses speaking of their own knowledge, and naming the time and place when and where they saw him with the filibusters. The objection that those witnesses were not native born, but only residents, I do not consider of much weight. Those depositions are also confirmed by others, and by the general conduct of the claimant from the beginning of the occupation of Nicaragua by the troops of Costa Rica. A thorough examination of the case has convinced me that the claimant was an actual belligerent according to the terms of the proviso of the first article of the convention July 2d, 1860."¹

¹ A claim was made by a certain person for having been twice imprisoned without cause. It appeared that on one of the occasions in question he was merely directed to leave his abode and retire with other persons to a place of safety while an attack by the filibusters was expected. On the other occasion, being drunk at San Carlos, he was taken on board of a steamer and carried to his home, and afterwards "dreamed of having been a prisoner." The umpire dismissed the claim. (*James Dunn v. Costa Rica*, No. 26.)