

REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Commission established under the Convention concluded between the
United States of America and Ecuador on 25 January 1862

**Case of the Atlantic and Hope Insurance Companies v. Ecuador (case of the schooner *Mechanic*),
opinion of the Commissioner, Mr. Hassaurek**

Commission établie par la Convention conclue entre les
États-Unis d'Amérique et l'Équateur le 25 janvier 1862

**Affaire concernant Atlantic and Hope Insurance Companies c. Ecuador (affaire de la goélette
Mechanic), opinion du Commissaire, M. Hassaurek**

VOLUME XXIX, pp.108-114



NATIONS UNIES - UNITED NATIONS
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not believe that the members of this commission are bound by what action their governments may have taken on former occasions in each individual case. If it were so, there would have been no need of establishing a mixed commission, instead of which the two governments should have referred these claims at once to the arbitration of a third party. Governments, like individuals, are not infallible, and if the Government of the United States ever encouraged or adopted this claim, I have no doubt it would reconsider the view it then took of the question, if the case should again be submitted to its examination. The present policy of the United States toward their Spanish-American neighbors is one of the most scrupulous good faith and justice. While ever ready and vigilant to protect the rights and interests of American citizens wheresoever or against whomsoever it may be, the United States will not oppress their sister republics with extravagant demands or unjust exactions. The spirit which, in times now passed, occasionally led to misunderstandings between the republic of the North and those of the Latin race has since died away and its revival has been rendered impossible by the removal of its cause through the great events of the last four years.

These observations I have deemed it necessary to add, as great stress has been laid by the attorneys for the claimants on the action of former administrations with reference to this and similar cases. With this, I believe, I have sufficiently explained the reasons why in my opinion, our decision should be against the claimants.

**Case of the Atlantic and Hope Insurance Companies v. Ecuador
(case of the schooner *Mechanic*), opinion of
the Commissioner, Mr. Hassaurek¹**

**Affaire concernant Atlantic and Hope Insurance Companies c.
Ecuador (affaire de la goélette *Mechanic*), opinion du
Commissaire, M. Hassaurek²**

Denial of justice regarding the seizure of goods during war—obligation to respect the principle of “free ships, free goods” established by a treaty—obligation to respect enemy’s property covered by the flag of the party to the treaty as neutral property, excepting contraband of war.

¹ Reprinted from John Bassett Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 3221.

² Reproduit de John Bassett Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. III, Washington, 1898, Government Printing Office, p. 3221.

Recognition of a fundamental principle of international law stipulating that a State would never lose its rights, nor would it be discharged from its obligations, by a change in the form of its civil government—by analogy, on the creation of a new State by a division of its territory, the treaties by which it was bound as a part of the whole State would remain binding on it and its subjects until the new State enters into new treaties.

Déni de justice concernant la saisie de marchandises en temps de guerre—obligation de respecter le principe “navires libres, marchandises libres” établi par un traité—obligation de respecter la propriété de l’ennemi en tant que propriété neutre si celle-ci est couverte par le pavillon de la partie au traité, à l’exception de la contrebande de guerre.

Reconnaissance d’un principe fondamental du droit international selon lequel un État ne perd jamais ses droits, ni n’est déchargé de ses obligations, en raison de la modification de la forme de son gouvernement civil—par analogie, lors de la création d’un nouvel État issu de la division de son territoire, l’État ainsi que ses sujets restent liés par les traités qu’il a conclus lorsqu’il faisait partie de l’État dans son intégralité, jusqu’à ce que le nouvel État conclue de nouveaux traités.

This case has been before the mixed commission for the settlement of claims between the United States of America and the Republic of New Granada, and an award was made, both commissioners concurring, in favor of the claimants.

The claimants now apply to this commission for an award of 21 1/2 per cent of the original amount as the proportion of the old Colombian debt, for which Ecuador made herself liable on the disintegration of the Republic of Colombia.

The following are the facts of the case:

In April 1824 the American schooner *Mechanic*, Humphrey Taber, master, sailed from Havana with a general cargo bound for Tampico, Mexico (via Key West). After having made the latter port, and being on her way to her ultimate destination, she was on the 6th of May boarded by the Colombian privateer *General Santander*, Captain Chase, and detained for carrying enemy’s goods. It must be borne in mind that the Republic of Colombia was then at war with Spain, a war in which the United States were neutral. Captain Chase took out of the *Mechanic* the supercargo, two passengers, one of whom was Mr. Joaquin Hernandez Soto, and four of the crew, and sent the schooner to Laguayra in charge of a prize crew for adjudication. Proceedings were instituted against the cargo of the *Mechanic*, and, with the exception of a few packages belonging to the supercargo, who was an American citizen, the entire cargo was condemned as enemy’s (Spanish) property by the court sitting at Puerto Cabello, on the

9th of June 1824. The schooner was restored to the captain, to whom freight was allowed on the cargo.

It also appears that a large portion of the goods on board the *Mechanic* belonged to Joaquin Hernandez Soto, who claimed to be a citizen of the United Provinces of Mexico, with which the Republic of Colombia was then at peace. Soto was a native of Spain, but had lived in Mexico since 1819, at San Luis de Potosi, where his family resided, and where he was established in business as a merchant. Under these circumstances it is claimed that his property was neutral property, and, having been found on board of a neutral vessel, should not have been condemned.

The cargo shipped by Soto at Havana was insured against all risks for the sum of \$19,000, as follows: \$12,000 in the Atlantic Insurance Company and \$7,000 in the Hope Insurance Company of New York; and in consequence of its condemnation by the Colombian prize courts, the said insurance companies had to pay to Soto, through his agents, Goodhue & Co., in New York, the following sums: The Atlantic Insurance Company, \$12,000, and the Hope Insurance Company, inclusive of interest from 3d January 1825 to the 2d of June 1825, \$7,175.

The former payment was made on the 3d January 1825, the latter on the 2d June 1825.

In the same year a claim was presented on behalf of said insurance companies by the American minister at Bogotá to the Colombian Government, and lengthy discussions followed which had led to no result when they were terminated by the dissolution of the Republic of Colombia. The point of discussion between the Colombian Government and the Hon. R. C. Anderson, the American minister, was the insufficiency of the evidence and the erroneous grounds on which the court of admiralty at Puerto Cabello had declared the property of Soto to be Spanish property. Soto, it was claimed by the American representative, even if he had not renounced his Spanish allegiance, which he swears he did, by becoming a Mexican citizen, was by the law of nations a Mexican merchant, and his property, if captured by the armed vessels of Spain, would have been liable to confiscation as Mexican property.

The same view is presented to this commission by Mr. Amos B. Corwine, the attorney for the claimants. But it does not seem necessary to us to enter upon a discussion of a mere question of fact, which after all is not the question on which this case should be decided. Even if Soto had been a Spaniard, and his property Spanish, and consequently enemy's property, it should not have been condemned. Having been found on board of an American vessel, it was protected by the neutral flag by the express terms of a treaty, which, in our opinion, Colombia was bound to respect.

The principle of "free ships free goods" had been established by the treaty of 1795 between Spain and the United States. Article XV of said treaty contains the following provision:

It shall be likewise lawful for the subjects and inhabitants aforesaid, to sail with the ships and merchandises aforementioned, and to trade with the same liberty and security from the places, ports, and havens of those who are enemies of both or either party, without any opposition or disturbance whatsoever, not only directly from the places of the enemy aforementioned to neutral places, but also from one place belonging to an enemy to another place belonging to an enemy, whether they be under the jurisdiction of the same prince or under several; and it is hereby stipulated that free ships shall also give freedom to goods, and that everything shall be deemed free and exempt which shall be found on board the ships belonging to the subjects of either of the contracting parties, although the whole lading, or any part thereof, should appertain to the enemies of either, contraband goods being always excepted. It is also agreed that the same liberty be extended to persons who are on board a free ship, so that although they be enemies to either party, they shall not be made prisoners or taken out of that free ship, unless they are soldiers in actual service of the enemies.

When this treaty was made, the subsequent Republic of Colombia was part of the Spanish Empire, and the public laws and treaties of Spain were binding on all her subjects, whether in Europe or America. From the obligations that treaty imposed on the whole Spanish nation the Republic of Colombia could not and did not free herself by her subsequent declaration of independence. Third parties had acquired rights and interests under the treaty which Colombia was not at liberty to disregard, and the United States had a right to expect that the Colombian cruisers and prize courts would respect the property covered by the American flag.

That a state never loses any of its rights, nor is discharged from any of its obligations, by a change in the form of its civil government, is one of the fundamental principles of international law. It applies, by analogy, to cases such as the one before us, where one part of a nation separates itself from the other. It is evident that on the creation of a new state, by a division of territory, that new state has a sovereign right to enter into new treaties and engagements with other nations; but until it actually does, the treaties by which it was bound as a part of the whole state will remain binding on the new state and its subjects.

The authorities in support of this proposition are numerous, but I will only cite the following:

And so (says Chancellor Kent) if a state should be divided in respect to territory, its rights and obligations are not impaired, and if they have not been apportioned by special agreement, those rights are to be enjoyed, and those obligations fulfilled by all the parts in common. (Kent's Commentaries, vol. 1, p. 25).

Bello says:

Even if a state should be divided into two or more, neither its rights nor its obligations are thereby impaired, but must be enjoyed or fulfilled in com-

mon or apportioned among the new states by mutual agreement. Bynkershoek censures the conduct of England for denying to Holland the rights of fishery established by treaty between Henry III of England and Philip, Archduke of Austria, on the ground that said treaty had been concluded with an Archduke and not with the states general. He also censures the bad faith of Denmark in refusing to keep with those states the compact of Espira, concluded with the Emperor Charles V, in favor of the Belgians. (*Principios de Derecho Internacional*, 2 edition, p. 20.)

Phillimore says:

If a nation be divided into various distinct societies, the obligations which had accrued to the whole, before the division, are, unless they have been the subject of a special agreement, ratably binding upon the different parts. (*Commentaries on International Law*, Vol. 1, Part II. chap. 7, secs. 137, 158.)

Contra evenit, (says Grotius) ut quae una civitas fuerat dividatur, aut consensu mutuo, aut vi bellica, sicut corpus imperii Persici divisum est in Alexandri successores; quod cum fit, plura pro uno existunt summa imperia, cum suo jure in partes singulas. Si quid autem commune fuerit, id aut communiter est administrandum, aut pro ratis portionibus dividendum. (Grotius, II. c. IX. s. 10, p. 327.)

The United States availed themselves of the very first opportunity to notify the Republic of Colombia that they must consider her bound by the obligations imposed on her by the treaty of 1795, said treaty having been concluded prior to her separation from the mother country. On the 27th of May 1823 Mr. Adams, then Secretary of State, in his instructions to Mr. Anderson, the first American minister appointed to Colombia, said:

It is asserted that by her declaration of independence Colombia has been entirely released from all her obligations by which, as part of the Spanish nation, she was bound to other nations. This principle is not tenable. To all engagements of Spain with other nations affecting their rights and interests, Colombia, so far as she was affected by them, remains bound in honor and justice.

He refers by way of illustration to the treaties of 1795 and 1819, between the United States and Spain. To the stipulations of the former, Colombia is bound as by an express compact made when she was a Spanish colony. As to the latter, this treaty having been made after the territories now composing the Republic of Colombia had ceased to acknowledge the authority of Spain, they are not parties to it, but their rights and duties in relation to the subject-matter remain as they had existed before it was made. (*British and Foreign State Papers*, 1825, C., p., 480.)

The same principle has been continually invoked by the republics of Ecuador, New Granada, and Venezuela, which formerly constituted the Republic of Colombia. Until, for the treaties between Colombia and foreign nations, they had substituted treaties of their own, they claimed to be entitled to all the

rights granted and bound to the fulfillment of all the obligations imposed by the treaties of Colombia.

In 1861 complications arose between Ecuador and Peru, threatening to lead to a serious rupture between the two countries. One of the principal points in controversy was an old boundary question affecting the title to the so-called Oriental or Napo province on the eastern side of the Ecuadorian Andes, a question which had already on former occasions produced a great deal of ill feeling between the two sister states. The Peruvian Government found fault with a new Ecuadorian election law, dividing the country into districts, one or more of which comprised the territory claimed by Peru; and on account of this and other unpleasant questions then pending, war was considered imminent. The Ecuadorian Government in arguing the boundary question chiefly relied on a treaty concluded on the 22d September 1829, between the old Republic of Colombia and Peru, which provided for the appointment of a joint commission to fix the boundary line, and for a reference of the dispute, in case the commissioners should be unable to agree, to the arbitration of a friendly power. Ecuador, as a former part of Colombia, took it for granted that said treaty still continued to be in force, notwithstanding the dissolution of one of the contracting parties; and Dr. Carvajal, then minister of exterior relations, must have considered such an assumption to rest on self-evident principles of public law, for he did not even consider it necessary to support it by argument. On the 6th of October 1861 he wrote to J. F. Melgar, then Peruvian minister of foreign relations, as follows:

Such a law would not prejudice the rights of Peru and could not prejudice or decide the territorial question at issue between the two countries, because a law is obligatory only in the country where it is made, as your excellency has well said, and moreover because there is a superior law existing which equally binds both countries. I mean the treaty of 22nd of September 1829, a treaty which settles this question by prescribing the manner and form in which the boundaries of the two republics should be determined.

In conformity with that treaty, therefore, the undersigned does not hesitate to repeat what he has said in one of his other notes to your excellency, transmitted with this, that his government is ready to appoint the commission, which jointly with that to be appointed by the government of your excellency is to ascertain the boundary lines between the two countries, and that he proposes to leave to the arbitration of Chile any question or questions on which the said commissioners should be unable to agree.

And in another paragraph of the same note Dr. Carvajal says:

The said treaty of 1829 being in full force, whereas on the other hand its provisions for ascertaining the boundary lines have not yet been complied with, the undersigned can not discover the reason why your excellency should have claimed as Peruvian territory the territories of Jaen, Napo, Canelos, and Quijos, which have already been and are now in possession of Ecuador.

That the Ecuadorian Government considered said old Colombian treaty still valid and binding, although made by Colombia and not, strictly speaking, by Ecuador, is evidenced by the additional fact that in a publication of the treaties in force between the Republic of Ecuador and foreign powers, which publication was made in 1862, by order of the Ecuadorian Government, the above treaty is not only reproduced, but even occupies the first place.

Ecuador, therefore, having fully recognized and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honor and good faith deny the principle when it imposed an obligation.

It seems to be clear, therefore, that Colombia was bound by the treaty of 1795 to respect enemy's property covered by the American flag as neutral property only excepting contraband of war. The treaty concluded on the 3d October 1824 between the United States and the Republic of Colombia reiterated the same principle, and although that treaty was made subsequent to the transaction now under examination, it gives an additional sanction to a principle established and recognized long before.

Hence, after a careful examination of the question, we are constrained to hold that the condemnation of Soto's goods was a wrongful act for which Colombia is responsible.

The condemnation of the rest of the cargo of the *Mechanic* as enemy's property was equally wrongful, but as no claim is preferred by the other parties in interest, that part of the case need not be considered.

We have come to the conclusion, therefore, that an award should be entered in favor of the claimants for 21 1/2 per cent of the original sum of \$19,000, being \$4,085, on which sum interest must be calculated for 40 years and 7 months at the established rate of 5 per cent, making \$8,289.15, which, added to the principal, will give a new principal of \$12,374.15.

Having already adopted 25 per cent premium as the normal rate of exchange between this country and the United States, we will make an addition of \$3,093.54, and enter an award for \$15,467.69 of Ecuadorian currency.