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

Cases of the *Good Return* and the *Medea*, opinion of the Commissioner, Mr. Hassaurek, of 8 August 1865

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

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Non-recognition of the obligation of a commission to follow a decision of another commission in an identical case.

Obligations of the commissioners—they should be bound by their own conscience and the oath they have taken—they should not consider themselves as the attorneys for either country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice—they should not be bound by the actions their Governments may have taken on former occasions in each individual case.

Obligation of the party who asks for redress to present itself with clean hands—its cause of action must not be based on an offence against the Government to whom it appeals for redress—contrary to public morality and legislative policy for a State to uphold or endeavour to enforce a claim founded on a violation of its own laws and treaties.

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Recognition of a citizen of a neutral State, acting as a privateer for the belligerent nation conducting a war against the State with whom the neutral State is at peace, as a pirate liable to be prosecuted and punished.

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[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. 2731.

[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. 2731.

Determination of the captain's nationality, as far as the captain's claim regarding the captures as a privateer is concerned, by the captain's commission and by the flag of the belligerent under which the captain fought.

Recognition of a rule stipulating that the title to a prize originally vests in the Government represented by the captor during war, whose rights are subsequently ascertained by judicial decisions

Non-reconnaissance d'une obligation pour la commission de se conformer à la décision d'une autre commission dans une affaire identique.

Obligations des commissaires—ils doivent être liés par leur propre conscience et le serment qu'ils ont prêté—ils ne doivent pas se considérer comme les avocats d'un quelconque pays, mais comme des juges nommés afin de décider des questions qui leur ont été soumises, de façon impartiale, en application du droit et de la justice—pour chaque cas particulier, ils ne doivent pas être liés par les actions entreprises par leurs gouvernements à d'autres occasions.

Obligation de la partie qui demande réparation de se présenter avec les mains propres—la cause de sa demande ne doit pas être fondée sur une offense à l'encontre du gouvernement auquel elle fait appel pour obtenir réparation, le soutien ou la tentative de réalisation par un État d'un droit à réparation fondé sur une violation de ses propres lois et traités est contraire à la moralité publique et à la politique législative.

Reconnaissance du droit de la neutralité comme réitération d'un principe de droit naturel.

Conséquences de la neutralité d'une nation pour ses citoyens—limites de la protection nationale et rejet de réclamations pour défaut de compétence par une commission internationale lorsque les citoyens de nations neutres n'ont pas respecté la neutralité.

Citoyen d'un État neutre, agissant en tant que corsaire pour une nation belligérante en guerre contre un État avec lequel l'État neutre est en paix, considéré comme pirate passible d'être poursuivi et puni.

Détermination de la nationalité du capitaine par sa commission ainsi que le pavillon du belligérant sous lequel le capitaine combattait, dans la mesure où il s'agit de la réclamation du capitaine concernant sa capture en tant que corsaire.

Reconnaissance d'une règle prévoyant que le droit de prise revient initialement au gouvernement représenté par le ravisseur en temps de guerre, dont les droits sont établis par des décisions judiciaires ultérieures.

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On the 17th of November 1817, John Clark, a native citizen of the United States of America, entered into the service of the Banda Oriental Republic, now Uruguay, which was then engaged in her war of independence against Spain and Portugal, to each of which two powers a portion of her territory belonged.

John Clark obtained a commission as captain in the Banda Oriental Navy, and a patent authorizing him, as the commander of a private armed vessel, *La Fortuna,* to cruise against the vessels and property of the subjects of Spain and Portugal. These letters of marque were issued by General José Artigas, who was then the chief executive of that country, and they were to continue in force for and during the term of eighteen months from the departure of *La Fortuna* from Buenos Ayres.

The United States, it is hardly necessary for me to add here, was neutral in the war between Spain and Portugal and their colonies in America.

Clark left Buenos Ayres with his vessel on the 5th of March 1818, and after cruising for several months, proceeded to Baltimore "for the purpose", as it appears from the statement of one of the claimants, and the testimony in the case, "of procuring provisions and men". Having succeeded in this he left Baltimore on the l5th of September 1818, and in November of the same year captured the Spanish brig *Medea,* with a valuable Spanish cargo, and placed a prize master and crew on board of her, with instructions to take her to the neutral port of St. Bartholomew, to be held there subject to his orders. On the l9th of November the *Medea,* while on her way to St. Bartholomew, was seized by the Venezuelan man-of-war *Espartana,* under the orders of Commodore Joly of the Venezuelan navy, who sent her to the Island of Marguerita, where she was condemned on the 26th of November 1818 as a prize of the *Espartana,* on the ground that her capture by Clark was illegal.

Subsequently (on the 15th November I8I8) *La Fortuna,* captured the Portuguese ship *La Reina de los Mares,* bound from Bahia, Brazil, to Lisbon, with a valuable cargo on board, which, for greater safety, as it is alleged, was transferred by Clark to the *Good Return,* said to be an American ship chartered expressly for the occasion. Whether the latter vessel had accompanied Clark on his cruise, or how it was that she suddenly made her appearance, where she came from, whither she was bound, and who her owners were, does not appear from the papers presented to this commission. The *Good Return* was also taken possession of by Commodore Joly, of the Venezuelan navy, who demanded the value of one-third of the goods on board as ransom, and compelled the captain of the *Good Return* to place her cargo in the hands of the Venezuelan agent at St. Bartholomew, to be sold at auction there, under the most unfavorable circumstances. A cargo of $80,000, it is alleged, was thus sacrificed to make up the sum of $26,000 demanded by Joly, and the proceeds of the sale, being about $24,000, were retained and distributed by the commodore.

The grounds on which these acts of lawlessness were justified by the Venezuelan authorities were: 1st, that General Artigas had no right to grant letters of marque, being a usurper and a rebel against the legitimate authorities of Buenos Ayres; and 2d, that the privateer *La Fortuna* left Buenos Ayres in March 1818, after having arrived at that port in January of the same year as a Buenos Ayres vessel, under the name of *Patriota,* commanded by Captain Taylor, whereas the patent to Captain Clark had been issued on the 15th of

November 1817; that consequently she was navigated under another name and another flag, and commanded by another captain, two months after the issuing of the patent to Captain Clark.

In December 1819 the Republic of Venezuela was united to the former colony of New Granada under the name of the Republic of Colombia. Captain Clark presented his claim to the Colombian Government, and asked for indemnification, but in vain. In 1830 the Republic of Colombia ceased to exist by being constituted into three independent governments—New Granada, Venezuela, and Ecuador—and it is said that payment to the heirs of Clark has been made, through the agency of the United States, by Venezuela, of her proportion of the claim.

By a convention entered into by the three republics on the 23d of December 1834, it was agreed that the debts which they had acknowledged or contracted, while they were united and constituted into one, should be paid by them in the following proportion: 50 per centum by New Granada, 28 1/2 by Venezuela, and 21 1/2 by Ecuador.

Clark died several years ago, and the interest in his claims passed by will to his heirs and devisees, who, with a certain assignee, all of whom are residents and citizens of the United States of America, are the present claimants.

The claim was presented by them to the United States and New Granada mixed commission for the adjustment of claims established by the convention of 1857, and, the commissioners having been unable to agree, an award was made by the umpire, Judge N. G. Upham, of Connecticut (*sic),* in favor of the claimants, for New Granada's proportion of the claim. The case is now presented to this commission in order to fix the responsibility of Ecuador for her share of the original amount and interest thereon up to date.

The decision of a mixed commission like our own, in an identical case, is certainly entitled to great respect, but it can not be considered as an authority which we are necessarily bound to follow; and if, upon a careful examination of the law and the facts, it should appear to us that the decision was erroneous, we are bound by our own conscience and the oath we have taken as members of this commission, to follow our own convictions of right and justice, however sorry we may be to dissent from the opinion of gentlemen for whose ability, conscientiousness, and integrity we entertain the highest regard. The establishment of mixed commissions for the settlement of international claims is evidently an important step, suggested by the humane spirit of the age, in the direction of universal peace and civilization. But to realize the true benefits which the high contracting parties are entitled to expect from such commissions, the commissioners should consider themselves not the attorneys for either the one or the other country, but the judges appointed for the purpose of deciding the questions submitted to them, impartially, according to law and justice, and without reference to which side their decision will affect favorably or unfavorably.

Considering myself bound, in the present case, to dissent from the opinion of the umpire and the American member of the United States and New Granada mixed commission on claims, justice to the claimants and to my own country requires that I should state my reasons in full, so as to leave them open to the scrutiny of those to whom I am responsible for my official conduct.

Before entering upon a discussion of the merits of the case, a preliminary but highly important question presents itself. It is whether this is a claim which can properly be preferred and enforced against Ecuador by the Government of the United States.

I grant that the conduct of the Venezuelan squadron and the decisions of the Venezuelan prize court were unjustifiable upon any principle of international law, and that a great outrage was committed on the sovereign rights and interest of Uruguay; but what is that to the United States? Whatever losses and damages Captain Clark sustained in the premises he sustained not in his character as a citizen of the United States, but as an officer in the service of the Banda Oriental Republic, cruising under her flag, for her benefit, and against her enemies. If, therefore, the spoliations committed by the Venezuelan navy, and sanctioned by the Venezuelan courts, entitle him to indemnification, this indemnification must be claimed by the Banda Oriental Republic, now the Republic of Uruguay, and not by the United States. In the war with Uruguay, and Spain and Portugal the United States were neutral; not so Captain Clark. Although a native citizen of the United States, he had identified himself with one of the belligerents, in violation, as I shall presently show, of the laws and treaties of his own native country. He was cruising under the Uruguay flag, against the commerce of two nations with which the country of his birth was at peace. He must therefore abide by the consequences. If, in the course of his career as an Uruguay privateer, any wrong was done to or any outrage committed upon him, it is to Uruguay he must look for protection and not to the United States.

It is not my intention to enter into an examination of the questions discussed by counsel, whether, by his entering into the service of one of the belligerents, while our country was at peace with both of them, he forfeited his national character as an American citizen; and whether, upon his final return to the United States, his native character reverted, and by thus reverting entitled him to have his claim enforced by his native government. I believe that these questions are immaterial to the decision of this case. Whether Captain Clark was by birth an American, Englishman, Frenchman, or Spaniard, as long as he commanded an Uruguay cruiser, under the Uruguay flag in the service of the Republic of Uruguay, and in the exercise of active hostilities against the enemies of Uruguay and the friends of the United States, he was to all practical intents and purposes an Uruguayan; but especially as to all questions of prize law and maritime warfare. If the Uruguayan Government was either unable or unwilling to protect him in the realization of his prizes, it was his misfortune, with which the United States have no concern. Captain Clark had not yet acquired an individual title to the vessels and cargoes captured by him. The title to a prize origi-

nally vests in the government represented by the captor. The rights of the captor are subsequently ascertained and fixed by judicial decisions. It is true, as alleged by claimant's counsel, that at the time his prizes were taken away from him he had at least a right of possession to them; but, again, I must say that that right he had, not in his character as an American citizen, but by virtue of his commission from one of the belligerents. The captain of an Uruguay cruiser represents Uruguay, wherever he may have been born. To Uruguay he is responsible, and Uruguay is responsible for him. If his prizes are taken away from him by third parties, he must complain to those from whom he derived his authority, and not to neutrals, who have nothing to do with the business one way or the other. Had he been in command of an American vessel and had that vessel been taken away from him by the Colombian navy, and justice been denied to him by the Colombian authorities, it would have been the right and duty of our government to protect him, and to see that he was fully indemnified. But why should the United States, while at peace with all the world, interfere in a controversy between Uruguay and Venezuela, with reference to certain Spanish and Portuguese vessels captured by privateers of the former, when neither the vessels nor the cargoes, nor any part thereof, were American? The United States will protect American interests; but why should they protect Uruguay interests, and take up a quarrel which Uruguay herself seems to have ignored, merely because one of the parties concerned in it, the commander of a foreign privateer, happened to be born in the United States? Captain Clark's nationality, *as far as his claim is concerned,* is determined by his commission and by the flag under which he fought. Any departure from this rule would soon involve us in troublesome questions with the whole world, if, in time of war, the Government of the United States should undertake to insure the captures of every American citizen, who, in violation of our neutrality laws and treaties, may see fit to enter the naval service of a foreign power, or to assume the command of a foreign privateer under a foreign flag.

The conclusion therefore seems to me irresistible, that, although Captain Clark individually may have been an American citizen, his captures, while in command of an Uruguay privateer, were Uruguay captures; and that any claim to be preferred against Colombia, on account of the spoliations committed by the Venezuelan navy, must be preferred by Uruguay and can not possibly be made or enforced by the United States. That Clark's family resided in the United States, that he returned to the country of his birth and died there, does not change the aspect of the case, which is not determined by the nativity of the individual, but by the flag of the belligerent.

But I am referred to a document executed by the Uruguay Government, relinquishing all its rights in the premises and authorizing the individual parties interested in the question to proceed "as they may find convenient." The original of this document is not before us. I must therefore rely on a translation given in the opinion of the umpire of the United States and New Granada mixed commission on claims. Said translation reads as follows:

Department of Foreign Relations,

Montevideo, 10th December 1846.

The undersigned, Minister of Foreign Relations, has received the communication dated November 25 last, which Mr. Hamilton, consul of the United States of America, thought fit to address him; asking in the name of his Government that this Republic should declare that it will make no claim in future against the Governments of Venezuela, New Granada, and Ecuador, for the recapture of the vessels which had been taken by the cruisers *Irresistible, La Fortuna,* and *Constancia.*

The undersigned is directed to say in reply that, to satisfy the wishes of the United States, the Republic has no difficulty in declaring that the Oriental Republic of Uruguay has no claim to make on the part of her treasury, in her character as a nation, on account of the aforesaid vessels; but with respect to the rights of individuals, she leaves them to such action as they can sustain at the time of the declaration solicited, and consequently those interested may exercise those rights as they find convenient.

Francisco Magarinos

To Mr. Hamilton
Consul of the United States of North America

The authority of the consul of the United States to negotiate for such a declaration does not appear. There is nothing before us to show that he was ever instructed by the State Department to request the Uruguayan Government for such a disclaimer. From the mere fact of his having been a consul, no diplomatic authority can be inferred in his favor. To clothe him with the character of a negotiator special authority would be required, which, if ever conferred, it would be an easy task to prove by transcripts from the records and correspondence of the State Department. But there is no such evidence before us. We are left in darkness as to what authority, if any, had been conferred on the consul, and to what communication the above declaration is an answer.

Why should the United States have requested Uruguay to cede her legal rights in the premises, and why should Uruguay have complied with this request, without having received the slightest consideration for such a compliance?

Umpire Upham states in his decision that the above declaration was made by Uruguay "*at the request of the representatives of the claimant,* they prosecuting the claim as citizens of the United States." In the absence of all other evidence I am inclined to believe that this is a correct supposition, and that the above declaration was the result of a private arrangement effected between the claimant and the government of Uruguay, through the good offices of the United States consul at Montevideo, an arrangement with which the United States Government had nothing to do.

It is equally clear that such a document does not better the case of the claimants. It casts away the only legal remedy they had without giving them another. It is not a cession of Uruguay's rights to the United States, nor

does it confer any authority on the United States to prosecute the claim for the benefit of Uruguay or for the benefit of the individual claimants. And, even if it were a cession or an assignment, it is very questionable whether such a cession or assignment would or could have been accepted by the Government of the United States.

And this leads us to the consideration of the question whether it would be right and proper on the part of the United States to father such foreign claims. Article 14 of the treaty of 1795 between the United States and Spain (confirmed with the exception of a few articles by the treaty of 1819) provides as follows:

> Art. 14. No subject of His Catholic Majesty shall apply for or take any commission or letters of marque, for arming any ship or ships to act as privateers against the said United States, or against the citizens, people, or inhabitants of said United States, or against the property of any of the inhabitants of any of them, from any Prince or State with which the said United States shall be at war.
>
> Nor shall any citizen, subject, or inhabitant of the said United States apply for or take any commission or letters of marque for arming any ship or ships to act as privateers against the subjects of His Catholic Majesty or the property of any of them, from any Prince or State with which the said King shall be at war. And if any person of either nation shall take such commissions or letters of marque, he shall be punished as a pirate.

But not only in what he did, but also in the manner of doing it, John Clark violated the laws of his country whose interference and assistance he now invokes to realize the profits of his piracy. By augmenting the force of his armed vessels at the port of Baltimore he plainly and directly offended against the act of Congress passed in 1794, and revised and reenacted in 1819, by which it is declared to be a misdemeanor for any person within the jurisdiction of the United States *to augment the force of any armed vessel* belonging to one foreign power at war with another power, with whom the United States are at peace; or to prepare any military expedition against the territory of any foreign nations with whom they are at peace; or to hire or enlist troops or seaman for foreign military or naval service; or to be concerned in fitting out any vessel to cruise or commit hostilities in foreign service against a nation at peace with them, &c, &c.

The principle which underlies such enactments and treaty stipulations was forcibly stated by Mr. Thomas Jefferson, in his letter of 17 June 1793 to Mr. Genet: "By our treaties," he says, "with several of the belligerent powers, which are a part of the laws of our land, we [the United States] have established a state of peace with them. But without appealing to treaties, we are at peace with them all by the law of nature; for, by nature's law, man is at peace with man, till some aggression is committed, which, by the same law, authorizes one to destroy another, as his enemy. For our citizens, then, to commit murders and depredations on the members of nations at peace with us, or to combine to do it, appeared to the

Executive . . . as much against the laws of the land as to murder or rob, or combine to murder or rob, its own citizens." (See Lawrence's Wheaton, p. 728.)

What right, under these circumstances, has Captain Clark, or his representatives, to call upon the United States to enforce his claim on the Colombian republics? Can he be allowed, as far as the United States are concerned, to profit by his own wrong? *Nemo ex suo delicto meliorem suam conditionem facit.* He has violated the laws of our land. He has disregarded solemn treaty stipulations. He has compromised our neutrality. He has committed depredations against two nations with which we were at peace. He has made himself liable to be prosecuted and punished as a pirate; and now he presents himself before our government with the request to collect for him the proceeds of his misdemeanors. Will our government, by doing so, offer a reward to evil doers for the violation of its own laws and treaties? What would be the object of enacting penal laws, if their transgression were to entitle the offender to a premium instead of a punishment? I agree with the attorneys for the claimants that it would perhaps not become Colombia to make this defense, after having committed an outrage against the rights of Captain Clark. But I do not look upon Colombia as interposing these objections. I hold it to be the duty of the American Government and my own duty as commissioner to state that in this case Mr. Clark has no standing as an American citizen. A party who asks for redress must present himself with clean hands. His cause of action must not be based on an offense against the very authority to whom he appeals for redress. It would be against all public morality, and against the policy of all legislation, if the United States should uphold or endeavor to enforce a claim founded on a violation of their own laws and treaties, and on the perpetration of outrages committed by an American citizen against the subjects and commerce of friendly nations. As an Uruguayan claim, this case would be entitled to the most favorable consideration of the then Colombian republics. But it is not and can not be an American claim. As the American commissioner, I could not sanction, uphold, and reward indirectly what the law of my country directly prohibits. *Quod directo fieri prohibetur etiam dicitur prohibitum per indirectum.* He who engages in an expedition prohibited by the laws of his country must take the consequences. He may win or he may lose. But that is his own risk; he can not, in case of loss, seek indemnity through the instrumentality of the government against which he has offended. For this reason it is the customary practice of nations nowadays, upon the breaking out of a war between two foreign countries, to warn their subjects not to take part in it, on either side, as by doing so they would forfeit their right to the protection of their home government. Such neutrality laws and proclamations are but reiterations of a plain principle of natural law.

It is alleged, however, that the Government of the United States has made this claim its own by presenting it on former occasions to the three Colombian republics and urging its recognition. Granting this to be so, I do

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. Hassaurek[1]

Affaire concernant Atlantic and Hope Insurance Companies c. Ecuador (affaire de la goélette *Mechanic*), opinion du Commissaire, M. Hassaurek[2]

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.

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[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.

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