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The Oriental Navigation Company (U.S.A.) v. United Mexican States

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House, delivery of the cargo in question could only take place on the exportation duties being calculated on the basis of the gross tonnage of the vessel instead of on the basis of measurements of the logs to be exported.

Decision

The claim of the United States of America on behalf of Northern Steamship Company, Inc., is disallowed.

Commissioner Nielsen, dissenting.

The principal reasons why I dissent from the opinion of my associates in this case are stated in the dissenting opinion which I wrote in the case of the *Oriental Navigation Company*, Docket No. 411, and I consider it to be unnecessary to make any further statement.

THE ORIENTAL NAVIGATION COMPANY (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928, dissenting opinion by American Commissioner, undated. Pages 23-47.*)*

BLOCKADE OF PORT IN CONTROL OF INSURGENTS. Although a Government does not have the power to interfere with neutral trade on the high seas destined for ports in the control of insurgents, when one of its public vessels finds a neutral vessel in such a port without proper clearance documents, *held* it may order such vessel to discontinue loading and leave the port. Claim for loss of cargo *disallowed.*

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 434; Annual Digest, 1927-1928, p. 531; British Yearbook, Vol. 11, 1930, p. 220.

The Presiding Commissioner, Dr. Sindballe, for the Commission:

On April 15, 1924, the steamship *Gaston*, owned by the Southgate Marine Corporation, and, according to a time charter dated February 28, 1924, operated by The Oriental Navigation Company, an American Corporation, cleared the port of New Orleans with a cargo of general merchandise consigned to Frontera, Tabasco, Mexico. When this cargo was unloaded, the vessel was to load a cargo of bananas, consisting of fifteen or sixteen thousand bunches, which had been purchased by agents of The Oriental Navigation Company and was to be transported from Frontera to New Orleans for the purpose of sale at the latter place for the Company's account.

At that time the port of Frontera and some other Mexican ports were in the hands of insurgents. The Government of the United Mexican States had decreed that those ports should be closed to international trade, and had officially informed the Government of the United States of America about the closure. In reply the Government of the United States of America had declared that it felt obliged to respect the requirements of international law according to which a port in the hands of insurgents can be closed by an effective blockade only, and, further, that

it felt obliged to advise American citizens engaged in commerce with Mexico that they might deal with persons in authority in such ports with respect to all matters affecting commerce therewith.

The *Gaston* arrived at Frontera on April 20, and anchored in the roadstead. The following day the unloading of her cargo was begun. In the afternoon the Mexican gunboat *Agua Prieta* was noticed cruising in the offing and ordering the *Gaston* to put to sea. On April 22 this order, accompanied by some random shots, was repeated, and subsequently the *Gaston*, having communicated with the *U. S. S. Cleveland* and the *U. S. S. Tulsa*, put to sea, having unloaded only part of her cargo, and without having loaded any part of the cargo of bananas. The vessel went back to New Orleans, where the rest of her cargo was unloaded. The cargo of bananas became a total loss.

On behalf of The Oriental Navigation Company the United States of America are now claiming that the United Mexican States should indemnify the Company for the loss suffered by it from the action of the gunboat *Agua Prieta*. The loss is alleged to amount to $15,400.91, which sum is claimed with the allowance of interest thereon.

The respondent government refers to the fact that the belligerency of the insurgents in question had been recognized by no foreign power. It follows therefrom, the respondent government contends, that the Federal Government of Mexico, notwithstanding the revolution, was vested with full and undivided sovereignty over all her territory, so that it was a question solely dependent upon domestic Mexican law whether or not the Federal Government was entitled to close a Mexican port. But according to the General Customs Regulations of Mexico, whenever a port is occupied by rebels, it will be deemed closed to legal traffic, no Federal Consul or other official will authorize shipment of merchandise to it, and persons violating this law will be liable to the punishment prescribed for smugglers.

In the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera. In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war.

Now, it has been submitted by the respondent government that the law protecting neutral commerce is not the same after the world war 1914-19 as it was before. The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of

the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the old rule of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation. The Commission is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war. It is true that, according to that law, the trading of the *Gaston* to the port of Frontera was perfectly lawful. The Federal Mexican authorities would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it. Neither would a Mexican warship have a right to interfere, if, for example on the high seas, it met with a neutral vessel bound for a port in the hands of insurgents. But, on the other hand, the authorities do not show, and the Commission is of the opinion that it cannot be assumed that the Federal Mexican authorities should be obliged to permit the unloading and the subsequent loading of a neutral vessel trading to an insurgent port without such clearance documents as are prescribed by Mexican law, even in case control of the port should have been obtained again by those authorities before the arrival of the vessel to the port or be reobtained during her stay there. Now, in the present case, it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place. It was in fact partly commanded by the *Agua Prieta*. That being the case, and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance. can hardly be challenged.

Decision

The claim of the United States of America on behalf of the Oriental Navigation Company is disallowed.

Commissioner Nielsen, dissenting.

This case raises an issue whether under international law authorities of a Government may properly by some domestic enactment in the form of an executive decree or legislation close a port in the possession of revolutionists, without preventing ingress or egress by means of an effective blockade, as that term is understood in international law and practice. The issue in the instant case may be more specifically stated to be whether, in the absence of a legal blockade, the interference by the Mexican war vessel, *Agua Prieta*, with the steamship *Gaston*, resulting in loss to those operating the latter, entails responsibility under international law on the respondent Government.

In behalf of the United States it is contended that responsibility exists. and contentions to this effect are grounded on assertions found in opinions of international tribunals and in diplomatic exchanges and in connection

with precedents in other forms. As illustrative of the general tenor of these the following passage may be quoted from a statement made in the House of Commons on June 27, 1861, by Lord John Russell, Secretary of State for Foreign Affairs of Great Britain, in regard to an announcement made in that year by the Government of New Granada concerning the closure of certain ports in possession of persons engaged in a civil war:

"The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that would be a violation of international law with regard to blockades." (Moore, *Digest of International* Law, Vol. VII, p. 809. For other precedents see op. cit., pp. 803-820; Borchard, *Diplomatic Protection*, p. 181; Ralston, *The Law and Procedure of International Tribunals*, pp. 406-408.)

The burden of the argument made in behalf of the Government of Mexico is a forceful presentation in the brief and in oral argument of the view that the closure of a port under the conditions revealed by the record in the present case, without the institution of a blockade, could properly take place through the legal exercise of sovereign rights recognized by international law, since a distinction must be made between the closure of a port occupied by insurgents possessing a status of belligerency and the closure of a port occupied by revolutionists who have not the status of belligerents. It was pointed out that neither the Mexican Government nor any other government had recognized the belligerency of the de la Huerta forces. Some contention seems also to have been made in the Mexican brief and in the course of oral argument to the effect that the measures taken to close the port of Frontera satisfied the requirements of international law with respect to the exercise of the right of blockade.

Without discussion at this point of the soundness of that contention, it may be pointed out that the argument seems inconsistent with the principal contention upon which the defense is grounded. To be sure it is permissible to plead consistent defenses. However, in the Mexican brief, as well as in the oral argument, it was clearly contended that there was no blockade at Frontera, and that the legal situation of that port was such that the law of blockade could not apply to it. The measures employed to interrupt intercourse with the port of Frontera could not be both a blockade and not a blockade. And it therefore seems to me that unwarranted emphasis is placed in the opinion of my associates on what I may call the secondary ground of defense presented by the Mexican Government, namely, that the action of the Mexican authorities might be regarded as proper in the light of rules of international law with respect to blockade. I shall discuss first and mainly the principal contention upon which, it seems to be clear, the Mexican Government rests its case, namely, that a distinction must be made between the closure of a port in the control of insurgents to whom a status of belligerency has been accorded and the closure of a port occupied by revolutionists not having that status.

On the point whether this distinction exists in the law, information with regard to the precedents cited in the American brief and in the

Mexican reply-brief is incomplete. That information does not reveal the nature of the revolutionary movements to which the precedents cited relate, except as regards the American Civil War, the legal status of which is of course well known. In the early stages of that struggle a state of belligerency was recognized by several Governments. and at least impliedly by the parent Government. Nor was any such information furnished by the United States in a counter-brief after the development of the issue in the Mexican counter-brief.

To my mind no definite conclusion can be drawn from the citations in the brief of each Government as to the existence or nonexistence of a rule of international law *specifically applicable to the case of a closure of a port occupied by insurgents who do not possess the status of belligerents*. It would seem that some Governments have not acquiesced in the principle underlying declarations similar to those made by Lord John Russell. It is therefore important to consider whether it is possible to invoke rules or principles of law which are applicable to the issue raised in the instant case and which can be shown by the evidence of international law to have received the general assent which is the foundation of that law.

I am of the opinion that there are two aspects of this case in the light of which responsibility on the part of the respondent Government should be fixed, even though it may logically be said that responsibility may be determined solely in the light of the principles stated by Lord John Russell. Established principles of international law with regard to blockade were not observed, and a ship engaged in trading in a manner which it is stated in the opinion of my associates "was perfectly lawful" was the victim of an interference which to my mind was an invasion, or it might be said, a confiscation, of property rights.

In my opinion this case does not reveal any arbitrary act on the part of the Mexican Government in the sense that Mexican authorities deliberately ignored international law in declaring the port of Frontera closed. On the other hand, I do not consider that the charterers of the *Gaston* had any intention of flouting a proper Mexican law. They unquestionably suffered loss as a result of the action of Mexican naval authorities, and if that action, which it is explained was taken pursuant to Mexican legislation, did not square with international law, the claimants should receive compensation. If the action was justifiable under international law, the claimants of course must bear the loss they sustained.

I am of the opinion that judicial and administrative officials who have frequently asserted the broad principle embraced by the statement of Lord John Russell, that it is not competent for a Government to close ports in the hands of insurgents except by effective blockade measures, have made no distinction between the closure of ports occupied by revolutionists to whom the status of belligerents has been accorded by some affirmative act, and ports occupied by forces not so recognized as having that status. In my judgment they have logically refrained from making such a distinction, because such a recognition of belligerency is not a sound and practical standard by which to determine the propriety or impropriety of the closing of a port. The consideration of this specific point seems to require an examination into the nature of belligerency and the evidence by which a judicial tribunal might be guided in reaching a conclusion with respect to the existence or non-existence of that status.

Evidence of this nature would not in all cases be such as could warrant sound conclusions of law.

The recognition of a new state, that is, the acceptance by members of the family of nations of a new member, an international person, is regarded by Governments as a political question, although the act of recognition should of course be grounded on a sound legal basis. The same is true—it may perhaps be said more particularly true—with regard to what is sometimes spoken of as a recognition of a change in the headship of a state, or in the form of government of a state; an act that may perhaps be more properly described as a determination on the part of an established Government to have diplomatic relations with a new set of authorities who come into control of a State following an insurrection. This of course is not a case of the recognition of an international person. So it seems to me that the recognition of a state of belligerency, so-called, on the part of governments involves very largely political considerations.

Judge John Bassett Moore has said that the "only kind of war that justifies the recognition of insurgents as belligerents is what is called 'public war'; and before civil war can be said to possess that character the insurgents must present the aspect of a political community or *de facto* power, having a certain coherence, and a certain independence of position, in respect of territorial limits, of population, of interest, and of destiny." And he has added as an additional element essential to a proper recognition of a state of war "the existence of an emergency, actual or imminent, such as makes it incumbent upon neutral powers to define their relations to the conflict." In other words, interests of neutral powers must be affected before they are justified in acting. *Forum*, Vol. 21, p. 291.

Dr. Oppenheim says that "in every case of civil war a foreign State can recognize the insurgents as a belligerent Power if they succeed in keeping a part of the country in their hands, set up a government of their own, and conduct their military operations according to the laws of war." *International Law*, 3rd ed., Vol. I, p. 137. Such a situation existed following the outbreak of the American Civil War in 1861, which has been referred to in the briefs of both Governments. After President Lincoln had issued a proclamation of blockade by the Federal Government, other Governments were doubtless justified, from a legal standpoint, in taking affirmative action to give recognition to the existence of a state of belligerency between the northern states and the southern states, and some Governments did this by issuing declarations of neutrality. See Moore, *International Law Digest*, Vol. I, p. 185. But in a case in which no such action is taken by a parent Government the situation may be much less simple. Governments are guided by different considerations of policy or expediency as to the conditions and times of recognition either of new states or of a status of belligerency. And it seems to be doubtful that it can be accurately said that such a status in law is necessarily dependent upon some such affirmative acts. A parent Government may not choose to take such action and other Governments may likewise refrain from doing so. Yet the situation described by Dr. Oppenheim may nevertheless exist. The same writer, while asserting, in disagreement with some other writers, that a state becomes an international person through recognition only, observes that international law does not say that a State is not in existence as long as it is not recognized. A new régime or Government may gain control of a country and be the *de facto*, and from the standpoint

of international law therefore the *de jure* Government, even though other Governments may not choose to "recognize" it, as is often said, or as might probably better be said, to enter into diplomatic relations with it. And it seems to me that the same political situation may exist with respect to a state of belligerency, when the term is used to connote simply the fact of the existence of war. Of course I do not mean to suggest that the recognition of belligerency by a parent Government or by other Governments does not entail important consequences. The rights and obligations of revolutionists that are derived from the state of belligerency under international law are well defined. See on this point and on the subject of the conditions warranting recognition of belligerency, Moore, *International Law Digest*, Vol. I, pp. 164-205.

It is interesting to consider in connexion with this question the citation made by counsel for the United States of the opinion of this Commission in the case of the *Home Insurance Company*, Docket No. 73, *Opinions of the Commissioners*, 1927. *U. S. Government Printing Office, Washington*, p. 51. He quoted from the conclusions of the Commission with regard to the nature of the revolutionary movement in Mexico in 1923 and 1924, as follows:

"The de la Huerta revolt against the established administration of the Government of Mexico—call it conflict of personal politics or a rebellion or a revolution, what you will—assumed such proportions that at one time it seemed more than probable that it would succeed in its attempt to overthrow the Obregón administration. The sudden launching of this revolt against the constituted powers, the defection of a large proportion of the officers and men of the Federal Army, and the great personal and political following of the leader of the revolt, made of it a formidable uprising. President Obregón himself assumed supreme command. Through the vigorous and effective measures taken by the Obregón administration what threatened at one time to be a successful revolution was effectually suppressed within a period of five months from its initiation."

I accept the conclusions of the Commission in regard to the facts stated in this opinion in which I did not participate. Counsel argued that, Mexico not having been held responsible for the acts of insurrectionists in this case, because control over those acts was beyond the power of the Mexican authorities, the Mexican Government should be held responsible in the instant case under international law for improper interference with a ship trading with a port in control of the same forces for whose acts Mexico was held not to be liable in the *Home Insurance Company* case.

If the observations which I have made with regard to considerations that may prompt recognition or non-recognition of belligerency by governments are correct, it would not seem to be logical to attempt to make any distinction between the closure of a port held by insurrectionists who by some affirmative acts have been recognized as belligerents, and a port in the hands of revolutionists to whom such a status has not in this manner been accorded. And since it would appear to be impracticable in all cases to make that distinction, there would seem to be a good reason why it has not been made, as it apparently has not. It is not my purpose to attempt to state any principles as to what constitutes a state of belligerency or justification for recognition of belligerency, nor principles as to the effect of affirmative acts of recognition or of the absence of such acts, but merely to indicate that in my opinion the distinction contended

for by the Mexican Government has not been made by governments or by international tribunals that have dealt with this question of the closure of ports without the enforcement of the closure by blockade measures, and that the distinction is not a logical one.

If this view be correct, it disposes of the Mexican Government's defense, unless account be taken of what I have spoken of as a secondary defense in support of which it was contended that the port of Frontera was blockaded, although it was also contended that the port was not blockaded, and that the legal situation of the port was such that there could be no blockade. If the distinction made by the Government of Mexico has no basis in law, then there is not before the Commission any special situation, but a case governed by applicable, reasonably well established principles of international law with respect to the exercise of the right of blockade. We have not a case governed solely by domestic law, or a case involving a consideration of rules or principles of law which are distinct from those relating to blockade by virtue of some theory that the latter are applicable only in times of international war, or in the case of a civil war when a state of belligerency on the part of insurgents has been recognized by the parent Government or by some other Government. Mexico has adhered to the Declaration of Paris of 1856 which asserts the rule that a blockade to be binding must be effective. It seems to me scarcely to be necessary to say anything to show that no blockade was established and maintained at Frontera in accordance with international law.

I do not consider it to be necessary, although I deem it to be proper, to ground my views with regard to the responsibility of Mexico in the instant case solely on principles of law with respect to the exercise of belligerent rights in relation to blockade. In the Mexican brief and in oral argument it was contended that Article VI of the Mexican customs laws is not repugnant to international law. This Commission on several occasions has had under consideration acts of authorities of a government violative of personal rights, also the standing in international law of domestic laws destructive of property rights. It seems to me that this Article of the customs laws, if given the interpretation put upon it by counsel for Mexico in the Mexican brief and in oral argument, according to which interference with the claimant's vessel is justified, must be regarded as legislation of that kind. The Article reads as follows:

"When the place in which a maritime or border custom house is located secedes from the obedience of the Federal Government, or is occupied by forces in revolt, legal traffic therewith shall be held immediately as closed and, from that time, no Federal office shall authorize the despatch of merchandise for the point which has withdrawn from Federal authority, nor shall it receive merchandise coming from such place until it shall return to obedience of the Federal power. Goods en route to the closed custom house may be imported through another custom house as provided by this law. The violators of this provision shall be punished as stipulated by this ordinance for smugglers, without prejudice to applying other penalties corresponding to the case." (Translation.)

In sweeping terms the law purports to close all insurgent ports without reference to any specific port. Let it be assumed for the purpose of discussion—at variance with the contention made in behalf of the United States—that a Government may properly under international law by some form of legal enactment close a given port without effectively by proper blockade impeding ingress and egress. Such action would assuredly

be entirely different from action taken pursuant to a law which closes ports without specifically mentioning the ports closed. The operators of a vessel accustomed to enter a given port might discover as it entered that the place had been occupied by revolutionists on the very day of entry and might find themselves in the position of law-breakers. Doubtless it may be properly stated as a general principle that penal legislation involving punishment by confiscation of property must be framed so as to give some notice of proscribed acts. This principle is obviously entirely distinct from the general principle that ignorance of law is no excuse for violation of the law. A different kind of a law would be one providing for the closing of ports in the hands of insurrectionists following some public pronouncement in a given case with respect to a designated port coming under the control of revolutionists. Such a pronouncement could have the effect of law. The notice sent to the Government of the United States by the Mexican Ambassador under date of December 18, 1923, with regard to the closing of the port of Frontera was not in my opinion any such law. A similar notice might be very important in the case of a proclamation of blockade, that is, of course, if it had the effect of announcing a blockade. But the notice given can not be considered as a law of which the owner of a vessel should take cognizance. And one Government can not expect that its domestic legislation or decrees or orders shall be carried out by another Government through some form of restraint imposed on the vessels belonging to the latter.

I have indicated the view that the interference with the operations of the steamship *Gaston*, which it is said took place pursuant to Article VI of the Mexican customs laws, was destructive of property rights. In the opinion of my associates it is said that "the trading of the *Gaston* to the port of Frontera was perfectly lawful". I agree with that view. If the *Gaston* was engaged in lawful operations when it was prevented from taking on its cargo, which became a total loss as a result of the action taken by the *Agua Prieta*, I am unable to perceive that this action can be regarded as a proper one, entailing no responsibility on the part of the Mexican Government. It does not seem to me that the majority opinion of the Commission justifies the interference by the war vessel with the pursuit of a lawful avocation by the merchant vessel.

It is interesting to consider by the way of analogy in connection with this point an opinion rendered by Mr. Justice Hughes of the Supreme Court of the United States in the case of *Truax* v. *Raich*, 239 U. S. 33. In that case the contention was made that a law of the State of Arizona, restricting the employment of aliens by employers in that State, was violative of the Fourteenth Amendment to the Federal Constitution, in that it involved a denial of the equal protection of the laws. The contention was sustained. The "right to earn a livelihood" said Mr. Justice Hughes "and to continue in employment unmolested by efforts to enforce void enactments" is one which a court of equity should protect. And he declared that it required no argument to show that "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure."

With respect to the argument made in behalf of the Government of Mexico that Article VI of the customs laws is not in derogation of international law, it seems to be pertinent to take account of another aspect

of that enactment, in the light, of course, of the construction put upon it by counsel. Under that construction the closure of any place which has seceded or which may be occupied by forces in revolt is authorized. No distinction is made in the terms of the law between a port in the hands of revolutionists whose belligerent status has been recognized by some affirmative act, and a port controlled by forces not so recognized. In the Mexican brief the argument seems to be made that, only in the case of international war must the closure of ports be effected by measures of blockade, yet, in oral argument counsel for Mexico evidently took the correct position that, in the case of civil war when a status of belligerency is accorded to insurrectionists, international law requires that the closure of ports in the hands of insurrectionists must be enforced by blockade.

In giving application to law, a judicial tribunal is not concerned with questions with respect to the propriety or the advantages or disadvantages of a rule of law that neutrals have a right to carry on trade with insurgent ports, unless they are prevented from doing so by methods prescribed by international law. The principle underlying the rule may perhaps be said to have something in common with that which has frequently been asserted, to the effect that the right of aliens to deal with insurgents in control of a given territory must be recognized, and that if the aliens are required to pay duties or taxes to insurgents, a Government which regains control of the territory should not exact double payments. See Moore, *International Law Digest*, Vol. VI, pp. 995-996.

By an Act of Congress of the United States of July 13, 1861, the President was authorized to proclaim the closure of ports of the southern Confederacy. However, this enactment seems to have been construed by the Government of the United States as a measure conferring on the Executive authority, if that should be deemed to be necessary, to close these ports. And they were closed by a formal proclamation and the maintenance of a blockade. Moore, *International Law Digest*, Vol. VII, pp. 806-812; Oppenheim, *International Law*, 3rd ed., Vol. 2, p. 515.

I am not certain that I understand the precise ground on which Mexico is absolved from responsibility in the opinion of the majority of the Commissioners. It is said that in "the opinion of the Commission it cannot be said to depend solely on domestic Mexican law whether or not the Government of the United Mexican States was entitled to close the port of Frontera". And the view is indicated that "in time of civil war, when the control of a port has passed into the hands of insurgents", application must be given to international law. It would appear therefore that the majority opinion rejects the Mexican Government's contention that the closing of the port of Frontera, conformably to Article VI of the customs laws, was consistent with international law. The view seems further to be made clear by the statement, to which reference has already been made, that "the trading of the Gaston to the port of Frontera was perfectly lawful", although it was contended in behalf of Mexico that the action of the vessel was a violation of Article VI of the customs laws. If this statement is correct—and I am of the opinion that it is, in the light of international law—it would appear that in the opinion of all three Commissioners Article VI of the customs laws, as construed by counsel for Mexico, is at variance with international law. The further conclusion must therefore follow that in accordance with international law the closure of the port could properly be effected only by a blockade.

The majority opinion proceeds to a discussion of some predictions made in the Mexican brief with regard to the future of international law relative to the exercise of belligerent rights. It is said in the brief that the "modern blockade can no longer be attempted to be subjected to the condition of effectiveness"; that "a blockade will not be established merely by vessels stationed or by cruisers operating in the vicinity of the enemy's coast"; that it will be established "by stationing war vessels in all seas, at every point in the globe, on commercial routes, which will stop all vessels whose destination to the territory declared to be blockaded may be proven or presumed, or by constituting zones of war more or less extensive in the jurisdiction of that territory, in which zones mines will be placed or submarines will cruise". The argument appears further to be made in the brief that the action taken with respect to the closing of the port of Frontera, including the action of the *Agua Prieta*, may be justified in the light of "the new international theories which arose by reason of the War of 1914-1919".

I am unable, as I have already indicated, to reconcile contentions of this kind with statements in the brief (probably not altogether adhered to in oral argument) to the effect that no question of blockade could arise in connexion with the closing of the port pursuant to sovereign rights exercised in accordance with Article VI of the customs laws. As illustrative of statements of this character, attention may be called to the following:

"The first thing to observe in this connection is that the belligerency of the revolutionary movement in question was never recognized by any foreign country and much less by the United States of America. We are, then, before a case where there are no belligerents, where there are no neutral powers and where, therefore, the simple basic elements of the right of blockade are lacking. This shows that the revolution with which we are dealing, cannot be governed by those rules of international law which apply to blockades. But said revolution must be governed by some laws and if the latter are not those of international sanction relative to blockades, they necessarily have to be the laws of Mexico, inasmuch as the unity of this nation and the sovereignty of her only recognized Government were not interrupted for a single moment."

. . . . . .

"Summarizing: in case of civil war, while the belligerency of the faction opposed to the Government has not been recognized, the municipal laws of the country continue to be applicable and international law is not applicable."

The views expressed in the Mexican brief with respect to the change and the future of international law appear to find some support in the following passage found in the opinion of my associates:

"The old rules of blockade were not followed during the war, and they cannot, it is submitted, be considered as still obtaining. Indeed, this seems to be the view of most post-war authors. They point to the fact that the use of submarines makes it almost impossible to have blockading forces stationed or cruising within a restricted area that is well known to the enemy. On the other hand, they argue, it cannot be assumed that there will be no economic warfare in future wars. Is it not a fact that Article 16 of the Covenant of the League of Nations even makes it a duty for the Members of the League, under certain circumstances, to carry on economic war against an enemy of the League? But the economic warfare of the future, it must be assumed, will apply means that are entirely different from the classical blockade, and the

old rules of the Paris declaration of 1856 will have to yield to the needs of a belligerent state subjected to modern conditions of naval war.

"If the view above set forth were accepted, there would seem to be little doubt that the rather moderate action of the *Agua Prieta*, consisting in simply forcing off the port a neutral vessel without doing any harm to the vessel or her crew, must be considered to be lawful. The Commission, however, deems it unnecessary to pass an opinion as to the correctness of that view, which, at any rate, for obvious reasons could not be adopted without hesitation."

Of course custom, practice, and changed conditions have their effect on international law as well as on domestic law. However, it need not be observed that a violation of law is not equivalent to a modification or abolition of law. The fact that new instrumentalities of warfare make it inconvenient for a belligerent in control of the sea in a given locality to act in conformity with established rules of law does not *ipso facto* result in a change of the law or justify disregard of the law. And if we indulge in speculation, it would not be a rash conjecture, in the light of experience, that the same belligerent, should his position be changed by a loss of control of the sea, would insist strongly on the observance of established rules and principles. It seems to be probable that among those who have given serious thought to the breakdown of the system of international law with regard to the exercise of belligerent rights on the seas and to the possibility of formulating rules that will be respected, there may be some who would not complacently vision a system of promiscuous seizure of and interference with neutral merchant vessels, or the promulgation of edicts with regard to forbidden mine-planted zones in the high seas in which the nations have a common right. Indeed it may be suggested that some might find it a more proper solution of the problem that the high seas should be maintained as the common highways in time of war, as in times of peace, and that to that end, interference with neutrals might be restricted to belligerent waters only.

A rule of law is put to a test whether it means something when honorable respect for it involves inconvenience or material sacrifice, or whether it is to become farcical by being flouted under some theory of plasticity or changed conditions, theories similar to the somewhat dangerous doctrine of *rebus sic stantibus* with respect to treaties. It is an elementary principle that the propriety of an act is governed by the law in force at the time the act is committed. International law is a law for the conduct of nations grounded on the general assent of the nations. It can be modified only by the same processes by which it is formulated. A belligerent can not make law to suit his convenience. An international tribunal can not undertake to formulate rules with respect to the exercise of belligerent rights, or to decide a case in the light of speculations with regard to future developments of the law, thought to be foreshadowed by derogations of international law which unhappily occur in times of war. Members of the League of Nations doubtless have entered into certain obligations under Article 16 of the Covenant of the League, but it must not necessarily be presumed that they must carry out their contractual obligations in violation of international law. It should rather be assumed that any action taken in fulfillment of such obligations will be executed in a manner consistent with that law. In the agony of great international conflict, resort may be had to expedients to circumvent law, but the law remains. As was said by Acting Chief Justice Sir Henry Berkeley in the case of the *Prometheus:*

"A law may be established and become international, that is to say binding upon all nations, by the agreement of such nations to be bound thereby, although it may be impossible to enforce obedience thereto by any given nation party to the agreement. The resistance of a nation to a law to which it has agreed does not derogate from the authority of the law because that resistance cannot, perhaps, be overcome. Such resistance merely makes the resisting nation a breaker of the law to which it has given its adherence, but it leaves the law, to the establishment of which the resisting nation was a party, still subsisting. Could it be successfully contended that because any given person or body of persons possessed for the time being power to resist an established municipal law such law had no existence? The answer to such a contention would be that the law still existed, though it might not for the time being be possible to enforce obedience to it." (Supreme Court of Hongkong, 2 Hongkong Law Reports, 207, 225.)

The majority opinion, after discussing views with regard to the possible law of the future, states that it is unnecessary to pass an opinion with regard to those views, and that the Commission "is of the opinion that the action of the *Agua Prieta* can hardly be considered as a violation of the law obtaining before the world war." The reasoning of the opinion up to this point evidently is that the port of Frontera could not be closed by some order or decree pursuant to a domestic law, and that international law was applicable in considering the measures that might properly be employed. Those measures it is concluded were in harmony with international law existing prior to the World War with regard to the exercise of the right of blockade. I disagree with that view. A belligerent is accorded the right to obstruct trade with a port both, as regards ingress and egress, by virtue of the physical power to effect the obstruction and of the exercise of that power. I think that it is unnecessary to enter into any detailed discussion of the meaning of an effective blockade in order to show that none existed at Frontera—even if considerable allowance be made for speculation concerning recent changes in established principles of law.

It appears from the record that the steamship *Stal*, with respect to which a claim was argued in connection with the instant case, had been in port for ten days when the *Agua Prieta* arrived in the locality of Frontera, and that the *Gaston* arrived one day previous to that time. From evidence presented by Mexico it appears that Mexican authorities had undertaken to close several ports on the Pacific, the Gulf and the Atlantic coasts, including the port of Frontera. The coast line along which the Gulf ports and the Caribbean ports were closed, is approximately 900 miles in length. From evidence filed by the Mexican Government it appears that one gunboat, the *Agua Prieta*, and two revenue cutters were engaged in carrying out what is called a blockade in a communication sent by a Mexican naval commander to his Government under date of April 25, 1924. It appears from the record that one of the purposes of the *Agua Prieta* was to conduct an inspection of lighthouses. From a report made by the Commander of the *Agua Prieta* it appears that, due to trouble with the engine, his vessel was able to travel only at approximately two miles an hour. The brief visit of the *Agua Prieta* to the waters outside of Frontera was not an effective blockading of ingress and egress. The communication sent to the Government of the United States with respect to the closing of the port of Frontera which made no mention of blockade was neither notice nor proclamation of blockade. In the written and in the oral argument in behalf of Mexico it was suggested, presumably on the theory that notice was required, that that communication might be considered

as notice of blockade. The firing of some shots in the direction of the *Gaston* lying in the harbor and the signals sent to it ordering it to depart were not a proper substitute for capture or prize court proceedings or warning.

By way of comparison, mention was made in the record of the blockade measures employed during the American Civil War. The coast of the Confederate States to the extent of 2,500 nautical miles was blockaded by about 400 Federal cruisers. Oppenheim, *International Law*, Vol. II, 3rd ed., p. 525. At the single port of Charleston there were stationed in July of the year 1863 twenty-three vessels. *Proceedings of the United States Naval Institute*, Marine International Law, Commander Henry Glass, U. S. N., Vol. XI, p. 442. Possibly a single vessel might have satisfied the requirement of the situation at Frontera, but the visit of the *Agua Prieta* in my opinion did not.

Towards the close of the majority opinion are some observations which would seem to be at variance with the view expressed in a preceding portion to the effect that, in spite of the provisions of Article VI of the Mexican customs laws, and the closure of that port pursuant to that Article, the trading of the *Gaston* with the port of Frontera was perfectly lawful; that domestic law alone was not determinative of the right of the Mexican Government to close the port; and that Federal authorities "would not be justified in capturing or confiscating the vessel, or in inflicting any other penalty upon it." These views it seems to me must be grounded on the theory that the port was out of the control of the Mexican authorities; that therefore international law and not domestic law governed the right of a ship to enter and to leave the port; and that according to international law capture, confiscation or the infliction of any other penalty on the *Gaston* would have been improper. However, it is said in the majority opinion that "it cannot fairly be said that the port of Frontera was in the hands of insurgents at the time when the events in question took place"; that that port was "in fact partly commanded by the *Agua Prieta*; and that this being the case, "and none of the authorities invoked by the claimants bearing upon a situation of this nature, the Commission holds that the lawfulness of the action taken by the *Agua Prieta* in forcing off the *Gaston*, which had not applied to the Mexican Consul at New Orleans for clearance, can hardly be challenged." As I have just observed, this view seems to me to be at variance with the reasoning of other portions of the opinion, and it appears to be equally at variance with the contentions of the Mexican Government, and with the facts disclosed by the record.

In the notice of December 18, 1923, sent by the Ambassador of Mexico to the Department of State at Washington it is stated that the port of Frontera had been removed "from the action of the constituted legitimate authorities." In the Mexican Answer in the case relating to the *Stal*, it was stated that the order of closure was a proper one to prevent that any local or international trade be carried on with the port which because of sedition "has been temporarily wrested from the control of the legitimate authorities as has been in fact the situation with the port of Frontera at the time when the said vessel (the *Stal*) arrived". In a notice sent by the Mexican Legation in Havana to the Secretary of State of Cuba, under date of May 31, 1924, it was stated that the port of Frontera had again "come under the control of the constitutional authorities". In a com-

munication among the records of the de la Huerta insurrection found in the archives of the Department of Foreign Relations of Mexico, it is stated that the ports of the Gulf of Mexico and the Caribbean Sea with the exception of Tampico "are out of the control of the Government". In a message sent by Rear Admiral H. Rodríguez Malpica to the Secretary of Foreign Relations of Mexico, it is stated that the former "effected blockade" in the port of Frontera and other ports "held by rebels".

It is possible to conceive of an interesting situation in which land forces of insurgents might be in control of a seaport town and yet not in complete control of the port, because entry might be commanded by regular forces on an island or promontory from which the mouth of the harbor could be commanded. But in my opinion the casual visit of the *Agua Prieta* for a day in the vicinity of the port of Frontera in the manner disclosed by the record does not justify the conclusion that the port was in fact partly commanded by the *Agua Prieta*. The visit occurred, as has been pointed out, ten days after the *Stal* entered the port and one day subsequent to the entry of the *Gaston*. I do not believe that a single, brief visit of a war vessel in the vicinity of a port occupied by insurgents is tantamount to a control or command of the port that would relieve a government of the obligation to maintain a blockade as required by international law for the purpose of effecting a closure of the port.

As I have indicated, I am of the opinion that international law with regard to the exercise of the right of blockade is applicable to the situation existing at the port of Frontera when the *Gaston* was subjected to interference and consequent loss. I do not think there is any distinction in international law and practice, or in logic, between a port held by insurgents whose belligerency has been recognized by some affirmative act and a port occupied by insurgents to whom that status has not been accorded in that manner. I therefore disagree with the contention upon which the Mexican Government's defense is based with respect to this distinction. And I accordingly must therefore also disagree with a somewhat similar distinction which seems to be made in the American brief in which it is said that "the laws of war, and therefore the laws of blockade, had and could have no application to the situation under discussion, for it does not appear that either the Government of Mexico or the Government of the United States had recognized a status of actual belligerency as existing in Mexico at this time." In the course of oral argument counsel for the United States seemed to depart from that view.

The American brief seems to treat the closing of a port held by insurgents whose belligerency had not been recognized by some government as a kind of special case to which the law of blockade is not applicable. If this view be correct, and if international law with regard to blockade is not applicable in such a case, then a parent government would seem to be impotent, if it can not close a port by domestic enactment, to close the port at all, in the absence of some action by the parent government distinct from a blockade or following some form of recognition by other governments each of which might in behalf of its own vessels solely, or in behalf of the vessels of another country, legalize a blockade. I do not agree with such a view.

President Lincoln did not defer issuing a proclamation of blockade of the ports of the Confederate States until he had by some other affirmative act "recognized a state of actual belligerency" of the seceding states.

The establishment of the blockade has generally been considered to be the recognition of a state of war and has been so regarded by American courts. Prize Cases, 2 Black 635. Nor did President Lincoln before establishing a blockade await some affirmative acts of recognition of belligerency by other governments. Their acts followed the establishment of the American blockade and generally took the form of declarations of "neutrality". Moore, *International Law Digest*, Vol. 1, pp. 184-185.

Insurgent ports can be closed by effective blockade measures. The pronouncements of Governments, the opinions of international tribunals and the writings of authorities, in my opinion, all support the views that effective blockade is necessary to close an insurgent port, and that no distinction such as that for which the Mexican Government contends exists. This view is not at variance with the contention advanced in behalf of Mexico that Mexican sovereignty continued to exist in the territory occupied by insurgents. The Mexican Government was not able to exercise governmental functions in that territory, but I take it that *from the standpoint of international law and relations* the sovereignty of a nation over territory occupied by insurgents is not destroyed until insurrectionists have established their independence.

Some precedents cited by counsel might seem to be at variance with the principles asserted by Lord John Russell to which reference has been made, but on examination I think it will be found that they are not.

With regard to the dispute between Spain on the one hand and Germany and Great Britain on the other hand concerning the closing of ports in the Sulu Archipelago, it should be observed that an examination of the diplomatic correspondence with respect to this controversy shows that both Germany and Great Britain took the position that Spain did not possess sovereignty in the Sulu Archipelago and of course therefore not control. *British and Foreign State Papers*, Vol. 73, pp. 932-996.

In the case of the brig *Toucan*, it appears that Brazilian authorities detained this vessel at São Joze do Norte, where it stopped to discharge a portion of its cargo, and that they refused to let it proceed to Porto Alegre. (Moore, *International Arbitrations*, Vol. V, p. 4615.)

Commissioner Fisher, appointed under an Act of Congress of the United States to distribute the indemnity under the Convention of January 27. 1849, between the United States and Brazil, said that the "preventing of the *Toucan* and other vessels by the Brazilian authorities from going up to an interior port which had been closed on account of a civil insurrection existing there at the time, was but the exercise of a right incident to a sovereign state." If the decision of Commissioner Fisher rejecting a claim made in behalf of the *Toucan* should be considered to be in conflict with opinions of international tribunals to the effect that ports in the hands of insurgents can properly be closed only by a blockade, there would seem to be no reason to attribute to that particular opinion greater weight than to the others. On the other hand, Commissioner Fisher's opinion should probably not be construed to be at variance with the views expressed by the Government of the United States and the Government of Great Britain and by international tribunals and writers on international law, that international law does not sanction the closing of such ports merely by a decree or a domestic legislative enactment. Commissioner Fisher seems to have grounded his opinion mainly if not entirely on treaty provisions between the United States and Brazil. Further-

more, it would seem that much can be said in favor of the view that a Government might, in the proper exercise of sovereignty, refuse to clear a ship from within its jurisdiction, at one of its own ports, for an inland port within its dominions, temporarily occupied by insurgents.

In a somewhat similar situation it may be doubted that it would be in derogation of international law for authorities of a government to refuse to clear foreign vessels from one of its seaports to another seaport within its territory. However, a different view seems to have been expressed by Commissioners under the Convention of September 26, 1893, between Great Britain and Chile in the case of the bark *Chépica*. In 1891 authorities of the port of Valparaiso refused to permit this vessel to sail for Tocopilla, because the latter port was occupied by revolutionary forces. In an opinion rendered on December 12, 1895, this action seems to have been condemned by the British Commissioner and the Belgian Commissioner as violative of international law, although the claim made in behalf of the vessel was dismissed on a jurisdictional point. Moore, *International Arbitrations*, Vol. V, p. 4933. For a discussion of the refusal of Chilean authorities to grant clearance under such conditions, see Moore, *International Law Digest*, Vol. VII, pp. 815-817.

In oral argument counsel for Mexico cited an author, Dr. N. Politis, who appears to sustain the distinction which counsel for Mexico undertook to make. After referring to blockade in an international war and blockade in a civil war, Dr. Politis says:

"So long as the insurrection has not assumed through the recognition of the insurgents in the capacity of belligerents an international character, and remains a purely domestic conflict, the legally constituted government may close all or part of the ports of the country in the exercise of authority, by police measure, without establishing, properly speaking, a blockade."[1] *(Recueil Des Cours*, 1925, Vol. 1, pp. 94-95.)

However, the author cites no legal authority for this view and gives no reasons for the distinction he makes. In my opinion a correct statement of the law is found in the following passages from an article by Professor George Grafton Wilson found in Volume 1 of the *American Journal of International Law*, 1907, pp. 55, 58:

"The legitimate government cannot in any way throw the burden of executing its decrees upon a foreign state. Even its decrees of closure in time of insurrection must be supported by sufficient force to render them effective....

"Attempts have also been made by the parent State to obtain advantages of a blockade without the obligations of war through a proclamation declaring ports held by insurgents closed. Foreign States have, however, usually taken the position that such decrees are of no effect and the ports in the hands of the insurgents are closed only to the extent to which an effective force may physically prevent entrance....

"If ports in the possession of the insurgents could be closed by decree, there would be a close analogy to the old idea of a paper blockade. The principle has come to be generally recognized that in time of insurrection closure to be respected must be by effective force."

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[1] "Tant que l'insurrection n'a pas pris par la reconnaissance des insurgés en qualité de belligérants, un caractère international et reste une lutte purement interne, le gouvernement légal peut fermer tout ou partie des ports du pays par voie d'autorité, par mesure de police, sans y établir, à proprement parler, un blocus."

The above quoted statements appear to be of particular interest in connection with the question under consideration, since the author's article is largely concerned with the distinction between war in connection with which there has been a "recognition of belligerency by a state" and war which exists without such recognition. The latter the author for the purposes of his discussion apparently designates as "insurrection".

Of similar particular interest are some references in the message of December 8, 1885, sent by President Cleveland to the Congress of the United States. He referred to "a question of much importance" presented by decrees of the Colombian Government, proclaiming the closure of certain ports then in the hands of insurgents, and declaring vessels held by the revolutionists to be piratical and liable to capture by any power. The President explained that the United States could assent to "neither of these propositions"; that "effective closure of ports not in the possession of the government, but held by hostile partisans, could not be recognized"; and that the "denial by this Government of the Colombian propositions did not, however, imply the admission of a belligerent status on the part of the insurgents." *Foreign Relations of the United States*, 1885, p. v.

G. L. SOLIS (U.S.A.) *v.* UNITED MEXICAN STATES

(October 3, 1928. Pages 48-56).

EVIDENCE BEFORE INTERNATIONAL TRIBUNALS.—AFFIDAVITS AS EVIDENCE. Affidavits *held* admissible as evidence.

NATIONALITY, PROOF OF. Although nationality of a claimant must be determined in the light of the law of the claimant Government, local law as to evidence sufficient to establish nationality *held* not binding on an international tribunal. Nevertheless, such local law will not be ignored.

BAPTISMAL CERTIFICATE AS PROOF OF NATIONALITY. Baptismal certificate dated May 1, 1883, of child born September 13, 1882, together with two supporting affidavits of third parties, *held* sufficient proof of nationality.

DUAL NATIONALITY. Claim will not be rejected on ground claimant possessed dual nationality solely by virtue of fact claimant's name appeared to be of Spanish origin.

FAILURE TO PROTECT. Evidence of failure to protect against acts of revolutionary forces *held* insufficient.

RESPONSIBILITY FOR ACTS OF SOLDIERS.—DIRECT RESPONSIBILITY. Claim for taking of property by soldiers, presumed to be under command of officers, *allowed*.

Cross-references: Am. J. Int. Law, Vol. 23, 1929, p. 454; Annual Digest, 1927-1928, pp. 242, 483; British Yearbook, Vol. 11, 1930, p. 220.

Commissioner Nielsen, for the Commission:

Claim is made in this case by the United States of America in behalf of G. L. Solis to obtain compensation for cattle said to have been taken