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Eastern Extension, Australasia and China Telegraph Company, Ltd. (Great Britain) v. United States

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Passing to the question of damages, it is plain that the islands forming the subject matter of this claim had only a speculative and precarious value. Nobody had ever taken the trouble to occupy and settle upon them. There is no evidence of any improvements. In their natural state they apparently formed only a fishing ground for turtle. The chart indicates that they were little more than reefs or points of rock. Their value apparently rested entirely upon a rumour of buried treasure. The original purchase for a fantastic consideration paid in gold pieces is explainable on no other theory. The subsequent dealings were clearly based upon the same speculative consideration. The treasure tradition evidently persisted and the same fictitious valuation is reflected in the purchase by Brower of a half interest for £ 30, and in the purported transfer of that interest to the Valentines for £ 100. With the lapse of time the islands as such did not assume any real value, for as late as 1898, Mr. Allardyce, the Colonial Secretary and Receiver-General, made the following report upon them:

"These are six small islands of the Ringgold group. They are mere islets with a few cocoanut trees on them. They are situated in a remote portion of the Colony at a distance of about 180 miles from Suva. If put up to auction, I doubt if there would be a single bid for them" (answer, p. 11).

In these circumstances, we consider that notwithstanding our conclusion on the principle of liability, the United States must be content with an award of nominal damages.

Now, therefore:

The Tribunal decides that the British Government shall pay to the United States the nominal sum of one shilling.

EASTERN EXTENSION, AUSTRALASIA AND CHINA TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 73-81.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW, COMMUNICATIONS OVER HIGH SEAS, NEUTRALS, CONTRABAND, BLOCKADE. Destruction by United States naval authorities on May 2, 1898, in Manila Bay, during Spanish-American War, of submarine cables owned by neutral company *held* legitimate. Unlimited right of destruction in time of war recognized by article 15 of International Convention for the Protection of Submarine Cables of 1884. Such right also based upon general principle of international law entitling belligerent to deprive enemy of communications over high seas, whether or not communications kept up by neutrals (contraband, blockade).

NECESSARY WAR LOSSES.—REQUISITION, EXPROPRIATION, ANGARY, SEIZURE OF NEUTRAL-OWNED CARGO.—NEUTRALITY AND PUBLIC SERVICE.—INTERNATIONAL CHARACTER OF SUBMARINE CABLES.—EQUITY, COMITY, AWARENESS OF RISK, DISCRIMINATION BETWEEN (1) ALIENS, (2) OWN NATIONALS AND ALIENS. Destruction in time of war of neutral-owned submarine cables *held* not to give rise to legal right of compensation. No analogy with requisition, expropriation, or exercise of right of angary. No analogy either with seizure

of neutral-owned cargo: the Company, operating as a Spanish public service under the authority of the Spanish Government, cannot be regarded as a neutral. For the same reason, the Company's cables lack international character.

No compensation due on the ground of equity, the Company having been well aware of its own risk. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which it refused to subjects of other Governments or to reserve to its own subjects treatment which is not afforded to foreigners.

APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Duty of Tribunal is not to lay down new rules.

Cross-references: Am. J. Int. Law, vol. 18 (1924), pp. 835-842; Annual Digest, 1923-1924, pp. 415-419.

Bibliography: Nielsen, pp. 40-72; Annual Digest, 1923-1924, p. 419.

This is a claim presented by His Britannic Majesty's Government on behalf of the Eastern Extension, Australasia and China Telegraph Company, Limited, a British corporation, for a sum of £ 912. 5s. 6d., being the amount which this company had to expend upon the repair of the Manila-Hong Kong and the Manila-Capiz submarine telegraph cables which had been cut by the United States naval authorities during the Spanish-American War in 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and dated, respectively, December 14, 1878, and April 14, 1897, the Eastern Extension Company had laid down certain submarine telegraph cables connecting Manila and Hong Kong and Manila and Capiz, which the Company was operating in 1898.

In April, 1898, war broke out between the United States and Spain, and on May 1, 1898, the United States naval forces, under the command of Commodore afterwards Admiral, Dewey, entered Manila Bay and destroyed or captured the Spanish warships lying in that harbour. On the same day (United States answer, p. 14, exhibit 5) Commodore Dewey, through the British consul at Manila, proposed to the Spanish Captain General that both the United States and the Spanish authorities should be allowed to transmit messages by cable to Hong Kong. That proposition having been refused, on the morning of the following day, viz., on May 2, 1898, the Manila-Hong Kong cable was cut by order of the American Commodore, this cutting being effected within Manila Bay and consequently within the territorial waters of the enemy.

On May 10 the Company, acting on a formal order of the Spanish Government under the provisions of the concession above referred to, sealed the end of the cable at Hong Kong, thereby preventing any use of the cable by the United States forces. Subsequently, the United States Navy Department proposed to the Company to re-establish cable communication between Manila and Hong Kong, and the Company refused, informing the American Navy Department that the Company was under the orders of the Spanish Government and that the transmission of messages from the Philippine Islands to Hong Kong had been prohibited by that Government (United States answer, p. 12, exhibit 2). Furthermore, as appears from the oral argument on behalf of His Britannic Majesty's Government (notes of the 11th sitting, p. 251), the British Government themselves, acting in the interest of shipping, subsequently asked the Madrid Government if they would consent to the reopening of the cables; but the Spanish Government refused to accede to this request except on terms which the United States could not accept.

On May 23 the Manila-Capiz cable was cut, also inside Manila Bay.

These facts are not contested; and further it is admitted on behalf of Great Britain that the severance of the cable between Manila and Hong Kong, as well as between Manila and Capiz, was a proper military measure on the part of the United States, taken with the important object of interrupting communication whether with other parts of the Spanish possessions in the Philippine Islands or with the Spanish Government and the outside world.

The question is whether or not the United States Government is bound to pay to the Company, as damages, the cost incurred by the Company in repairing the cables.

The British Government admits that there was not in existence in 1898 any treaty or any rule of international law imposing on the United States the legal obligation to pay compensation for the cutting of these cables, but they contend that, under article 7 of the Special Agreement establishing this Tribunal, such compensation may be awarded on the ground of equity, and that the United States Government, having paid compensation to some other foreign cable company for similar cuttings during the same war, is therefore legally bound to compensate the British company, and, finally, that in the absence of any rule of international law on the point, it is within the powers, if it be not the duty, of this Tribunal to lay down such a rule.

The United States Government contends that the cutting of the cables by its naval authorities was a necessity of war giving rise to no obligation to make compensation therefor; that the United States were entitled to treat the said cables as having the character of enemy property, on the ground that their terminals were within enemy territory and under the control of the enemy's military authorities, and that the sealing of the terminal at Hong Kong, on neutral territory, was a hostile act of itself impressing this cable with enemy character. Further, the United States Government contends that there is no rule of international law imposing any legal liability on the United States, but that, on the contrary, the action of the United States naval authorities and the refusal to pay compensation are justified by international law and that the United States Government is not bound to pay compensation to the British company merely because more favourable treatment was meted out to another foreign company, the facts underlying whose claim were, in any case, different. Further, the United States Government say that it is not the duty, nor within the power, of this Tribunal to lay down any new rule of international law, but only to construe and apply such rules or principles as existed at the time of the cutting of these cables.

It may be said that article 15 of the International Convention for the Protection of Submarine Cables of 1884, enunciating the principle of the freedom of Governments in time of war, had thereby recognized that there was no special limitation, by way of obligatory compensation or otherwise, to their right of dealing with submarine cables in time of war. In our opinion, however, even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case of the cutting of cables by belligerents, it can not be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find—exactly as in the mathematical sciences—the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved

in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.

Now, it is almost unnecessary to recall that principle of international law which recognizes that the legitimate object of sea warfare is to deprive the enemy of those means of communication, which the high seas, in their character as *res nullius* or *res communis* afford to every nation. The user by the enemy of that communication by sea, every belligerent, if he can, is entitled to prevent, subject to a due respect for innocent neutral trade; he is even entitled to prevent its user by neutrals, who use it to afford assistance to the enemy either by carrying contraband, by communicating with blockaded coasts, or by transporting hostile despatches, troops, enemy agents, and so on. In such cases the neutrals do not, properly speaking, lose their neutral character; but their action itself loses that character, such action being, as it is said, impressed with a hostile character. Thus it may be said that a belligerent's principal object in maritime warfare is to deprive the enemy of communication over the high seas while preserving it unimpeded for himself.

It is difficult to contend in the same breath that a belligerent is justified by international law in depriving the enemy of the benefit of the freedom of the high seas, but is not justified in depriving him of the use of the seas by means of telegraphic cables.

Not only does the cutting of cables appear not to be prohibited by the rules of international law applicable to sea warfare, but such action may be said to be implicitly justified by that right of legitimate defence which forms the basis of the rights of any belligerent nation.

It is contended, however, that the cutting, however legitimate, may create an obligation to compensate the neutral owner of the cable; and various instances are, or may be, given of legitimate acts which, it is said, do create such an obligation. We do not think that the instances given furnish a just analogy. In those instances, the right is not absolute but limited, and is in reality only itself acquired in consideration of the payment of compensation, and has no existence as a right apart from the obligation to make compensation. Such is the case in respect of requisition, either for the purposes of ownership or user; of expropriations, or, to take a case from maritime law, of the exercise of the right of angary.

Reference has been made to certain opinions (Dupuis, Revue générale du droit international public, vol. 10, p. 546) which seem to suggest that in the case of cables which connect enemy and neutral territories and are the property of neutrals, the right of a belligerent to cut ought to be exercised subject to the obligation to pay compensation, since it is not certain that the transmission of messages by the enemy over the cable has the consent of the neutral owner, against whom the belligerent is acting, and who may in fact be innocent. In such a case, it is suggested, the neutral owner of a cable is in the same position as the neutral owner of cargo which may or may not be used for warlike purposes and against whom there is no evidence of intention to assist the enemy, and who, if such cargo be seized, must be paid for it. In the first place, it is a matter of controversy whether or not such rule as to the neutral owner of such cargo in fact exists; secondly, such a rule, if it does exist, is in practice inapplicable to submarine cables, having regard to their peculiar character; thirdly, the facts postulated for the application of the suggested rule do not exist in this case.

The cables in this case were laid and operated, not only by permission or concession granted to a neutral by the Spanish Government, but they were, under those concessions, legally to be considered from the Spanish point of view as "works of public utility" (Schedule of Conditions of March 28, 1898, article 3). The Spanish Government expressly reserved to itself "the right of

organizing over the cable service such a system of supervision as it deems best" (*ibidem*, article 4; Schedule of Conditions of December 14, 1878, article 8). The receiving and transmitting stations had to be situated in the offices of the State (Conditions of 1878, article 6). The Spanish Government had reserved the right, belonging in any case to any State over its own national telegraph lines, and recognized by international telegraph conventions, of suspending the transmission of messages dangerous to the security of the State (Conditions of 1878, article 12); and it was expressly stipulated that the operation of the cable was to be carried out at the risk of the Company, which received in exchange certain privileges, a certain monopoly, and certain exemptions from taxes and imports (Conditions of 1898, article 3). Finally, the order given to the Company to seal the terminal at Hong Kong and the mere fact that the Company considered itself legally bound to obey that order, notwithstanding the fact that this terminal was in a neutral country, the refusals of the Company and the Spanish Government, made respectively to the United States Government and to the British Government, to reopen the lines, appear to be conclusive evidence that the Company was in reality operating, not in the character of a private neutral commercial undertaking subject only to certain local regulations, but as an actual Spanish public service, as completely under the authority of the Spanish Government as would have been any State service. In such circumstances it does not seem possible to regard this Company as ignorant of, or as not having consented to, the use of the cable for military purposes by the Spanish military authorities, or as entitled to avail itself of neutral character in order to claim compensation for the cutting of its cables. The fact is that this Company could not act as a neutral, without violating its concession.

It has been said (see the opinion of Sir Robert T. Reid and Mr. Henry Sutton, British memorial, pp. 12 and 13) that if the cables had been the ordinary property of neutrals, that fact, under the ordinary rule, would have been fatal to this claim, but that the ordinary rule does not apply to such property as these cables, which are of an international character. But it seems difficult to concede such international character to these cables which were under the absolute control and authority of a particular State. If they afforded communication between different countries and nations and in that sense, were international, they were not more international than a packet boat or any other ship trading between various countries.

According to the terms of the concessions, these cables possessed the character of Spanish works of public utility, and if, as private ordinary property, they were subject to destruction without compensation in case of necessity of war, *a fortiori* they were so as an enemy public utility undertaking.

As to the contention that, having regard to the terms of article 7 of the Special Agreement providing for the settlement of these claims, this Tribunal is to decide, "in accordance with treaty rights and with the principles of international law and of equity", compensation in this case should be paid on the ground of equity, the following observations may be made:

If the strict application of a treaty or of a specific rule of international law conducts to a decision which, however justified from a stricty legal point of view, will result in hardship, unjustified having regard to the special circumstances of the case, then it is the duty of this Tribunal to do their best to avoid such a result, so far as it may be possible, by recommending for instance some course of action by way of grace on the part of the respondent Government.

In this case it is to be observed that the Eastern Extension Company was well aware of its own risk in Spanish territory. As has been shown, their concessions expressly provided for it. The various advantages, privileges, exemptions and

subsidies accorded them by the Spanish Government form the consideration in exchange for which the Company assumed the risk of being treated in time of war as a Spanish public service with all the consequences which that position implied.

In the opinion of this Tribunal there is no ground of equity upon which the United States should be adjudged to pay compensation for the materialization of this risk in the form of an act of war the legitimacy of which is admitted.

The British Government contend that, as a matter of right, the Eastern Extension Company is entitled to receive compensation because some other foreign cable company, viz., La compagnie française des câbles télégraphiques, working cables between the United States of America, Haiti, and Cuba, received from the United States Government compensation for the cutting of its cables. It is urged that, when acts of war by a belligerent have resulted in personal injury to individuals in certain territory or in damage to their property in that territory, if the Government of that territory pays the claims of the nationals of one country, it must also pay the claims of the nationals of other countries without discrimination (oral argument, pp. 261 and 262); and further, as the argument would seem to imply (oral argument, p. 264), that if it be established that a Government has paid compensation to its own citizens, then it is bound to pay compensation to foreigners whose person or property was damaged; and authority is said to be found for the last proposition in cases arising out of the Mexican insurrection.

Whether viewed as a general principle, or in its particular application to the facts of this claim, such a proposition appears to us to be impossible of acceptance. It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination. We do not know that the provisions of the French or Belgian law, reserving to their own nationals a right to reparation for war losses, gave rise, or could give rise, to any protest by resident foreigners, any more than could the fact that, by special agreement, the Belgians in France and the French in Belgium have been reciprocally admitted to the same treatment in their respective countries. An instance of such discrimination is furnished by the proclamation of Lord Kitchener of Khartoum, dated May 31, 1902, on the final surrender of the Boer forces. In that instrument it is provided (paragraph 10) that a commission would be appointed for the purpose of assisting the restoration of the people to their homes and helping those who, owing to war losses, were unable to provide for themselves; and that for that purpose a sum of money should be placed at the disposal of the commission. The final clause of that paragraph provides as follows:

"No foreigner or rebel will be entitled to the benefits of this clause".

It appears from the documents in this case that the repairs of the French cables in question had been effected with all expedition and at the express request of the United States authorities and for American strategic purposes (Senate document No. 16, 58th Congress, 2nd session, pp. 22 and 23); that, unlike the British cables, the French cables were used by the American naval authorities and had afforded them direct communication with President McKinley *(ibidem)*; and that the French cable company had rendered the United States valuable services during the operations of 1898 (letters from the French Embassy at Washington, November 15, 1901; November 28, 1902; February 19, 1903; March 12, 1903).

There is no evidence that the Eastern Extension Company can avail itself of a similar plea. The French case is a good example of the payment of compensation, on grounds of equity and comity. which did not exist in the British case.

From these considerations it does not appear that the contention of the British Government on this point is in any way justified.

As to the contention of the British Government that, in the absence of any rule governing the matter of cable cutting, it is the duty of this Tribunal to frame a new rule, we desire to say:

First, the duty of this Tribunal, in our opinion, under article 7 of the Special Agreement, is not to lay down new rules. Such rules could not have retroactive effect, nor could they be considered as being anything more than a personal expression of opinion by members of a particular Tribunal, deriving its authority from only two Governments;

Secondly, in any case this Tribunal, as has been already stated, is of opinion that the principles of international law, applicable to maritime warfare, existing in 1898, are sufficient to enable us to decide this case.

Now, therefore:

The Tribunal decides that the claim of His Britannic Majesty's Government be disallowed.

CUBA SUBMARINE TELEGRAPH COMPANY, LIMITED (GREAT BRITAIN) *v.* UNITED STATES

(November 9, 1923. Pages 82-84.)

SEA WARFARE.—DESTRUCTION OF PRIVATE PROPERTY IN TIME OF WAR.—SUBMARINE CABLES, INTERNATIONAL CONVENTION FOR THE PROTECTION OF—, GENERAL PRINCIPLE OF INTERNATIONAL LAW.—NECESSARY WAR LOSSES.—DISCRIMINATION BETWEEN: (1) ALIENS, (2) OWN NATIONALS AND ALIENS.—APPLICABLE LAW, FRAMING OF NEW RULES BY TRIBUNAL. Destruction by United States naval authorities on May 11 and July 11, 1898, at the entrance of Cienfuegos Harbour and in San Juan Channel, Cuba, during Spanish-American War. of submarine cables, and of cable house on land. Reference made to decision in Eastern Extension case, see p. 112 *supra.*

NEUTRALITY AND PUBLIC SERVICE, EQUITY, AWARENESS OF RISK. Character of Company as Spanish public service more apparent than in Eastern Extension case. *Held* that destruction was fully justified and that equity was on the side of the United States in its refusal to pay damages.

Cross-reference: Am. J. Int. Law, vol. 18 (1924), pp. 842-844.

Bibliography: Nielsen, pp. 40-72.

This is a claim presented by His Britannic Majesty's Government on behalf of the Cuba Submarine Telegraph Company Limited, a British corporation, for a sum of £ 8,174. 17s. 9d., being the amount which this Company had to expend upon the restoration of the submarine cables, connecting various places on the island of Cuba, which had been cut by the United States naval authorities during the Spanish-American war of 1898.

The facts are as follows:

Under concessions granted by the Spanish Government and respectively dated December 31, 1869, and September 29/30, 1895, the Cuba Submarine