REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

Compañia de Navegación Nacional (Panama) v. U.S

29 June 1933

VOLUME VI pp. 382-386

NATIONS UNIES - UNITED NATIONS
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here it is even more clear that the claim belongs in its entirety to the Government of Panama.

As to the merits of the claim the considerations are identical with those in the Caselli case. The Commission holds that the claim is unfounded on the authority of its decision in that case.

The Commission decides that the claim must be disallowed.

Dissenting opinion of Panamanian Commissioner

For the same reasons set forth in the case of Panama as substitute for Caselli, Registry No. 16, I am not in agreement with this decision.

COMPAÑÍA DE NAVEGACIÓN NACIONAL (PANAMA) *v.* UNITED STATES

(June 29, 1933, dissenting opinion of Panamanian Commissioner, undated. Pages 812-815.)

TERRITORIAL WATERS OF PANAMA CANAL ZONE: THREE-MILE LIMIT, ORDINARY RULES FOR DELIMITATION, RULE OF INNOCENT PASSAGE, CIVIL ARREST OF MERCHANT VESSELS IN TERRITORIAL WATERS.—EVIDENCE: PROOF OF EXCEPTIONS TO GENERAL RULES OF INTERNATIONAL LAW. Collision on May 11, 1923, between steamer *Yorba Linda*, belonging to General Petroleum Corporation, and steamer *David*, belonging to claimant. Action brought on September 16, 1925, by General Petroleum Corporation before United States District Court for Canal Zone on the ground that collision took place in United States territorial waters and was caused by *David's* negligence. Arrest on September 18, 1925, of *David* by United States marshal off Flamenco Island. *David* released on bond next day. Validity of arrest sustained by Judge of United States District Court on October 27, 1925. Settlement between parties on April 25, 1927. Claim for damages brought before Commission on ground, *inter alia*, that arrest of *David* was beyond jurisdiction of United States District Court and, therefore, illegal. *Held* that article 2, Canal Treaty of 1903, merely fixes boundaries between Panamanian and Canal Zone territorial waters, and not seaward limit of the latter, which is left to operation of rules of international law; and that *David* was arrested at point within three-mile limit according to ordinary rules for measuring territorial waters. *Held* also that rule of innocent passage does not prohibit sovereign from arresting on civil process merchant ships passing through territorial waters: no clear authority to support such exception to clearly established general rule of extension of sovereignty over three-mile zone. Claim disallowed.

Cross-references: Am. J. Int. Law, vol. 28 (1934), pp. 596-599; Annual Digest, 1933-1934, pp. 137-139; Comisión General de Reclamaciones entre Panamá y Estados Unidos de América, Reclamación de la República de Panamá en su propio nombre y en representación de la Compañía de Navegación Nacional, Registro No. 26. (Publicación Oficial, Panamá, 1934.)

Bibliography: Hunt, Report, pp. 819-820, and "The United States-Panama General Claims Commission", Am. J. Int. Law, vol. 28 (1934), p. 62; Borchard, "The United States-Panama Claims Arbitration", Am. J. Int. Law, vol. 29 (1935), pp. 103-105; Friede, "*Die Entscheidungen* . . .", Z.a.ö.R.u.V., Band V (1935), pp. 463-465; Annual Digest, 1933-1934, p. 139.

This is a claim on behalf of the Compañía de Navegación Nacional for 27,932.78 balboas, with interest. The claimant is a Panamanian national.

On May 11, 1923, the steamer *Yorba Linda*, belonging to the General Petroleum Corporation, collided with the steamer *David*, belonging to the Compañía de Navegación Nacional.

On June 20, 1924, the Compañía de Navegación Nacional started suit against the General Petroleum Corporation in the First Circuit Court of Panama, claiming that the collision was caused by the *Yorba Linda's* negligence. The General Petroleum Corporation was not a resident of Panama, and apparently had no property in Panama. The suit was not begun by personal service but through service by publication under articles 470-473 of the Judicial Code of Panama. The Petroleum Company never appeared. The Panamanian Court designated an attorney to represent it. The case was tried. Evidence of negligence and of damages was submitted by the plaintiff. No evidence was put in by the defendant, although an argument on the law was made by the attorney appointed to represent it by the court. A judgment was given in favor of the Navegación Company. On September 1, 1925, this judgment was affirmed by the Supreme Court of Panama, the damages being fixed at 27,103.50 balboas, plus attorneys' fees of 383.10 balboas. The judgment was never satisfied. It is conceded that the proceedings which resulted in this judgment, including the method of service, were entirely regular and proper under the law of Panama and that the judgment was valid under that law. It is clear, however, on account of the nature of the service, that the judgment was not valid in the Canal Zone.

On September 16, 1925, fifteen days after the Supreme Court decision in the Panamanian suit, the Petroleum Company filed a libel against the Navegación Company in the United States District Court for the Canal Zone, alleging that the collision took place in territorial waters of the United States and that it was caused by the *David's* negligence. This was a proceeding *in rem*. There was, of course, no personal service.

The filing of the libel was followed on September 18, 1925, by the arrest of the *David* by the United States marshal. On the following day a stockholder of the Navegación Company gave a bond in the sum of $30,000, and the *David* was released. A hearing was held before Judge Martin of the United States District Court regarding the validity of the *David's* arrest. On October 27, 1925, Judge Martin handed down an opinion sustaining the arrest.

The suit proceeded in a leisurely way until, on April 25, 1927, the parties arrived at a settlement agreement. Under this agreement the Petroleum Company paid to the Navegación Company $16,250, the Canal Zone suit was dismissed, the obligation under the Panamanian judgment was canceled, and releases were exchanged.

The claimant before this Commission asserts that the arrest of the *David* was illegal and beyond the jurisdiction of the United States District Court and that this illegal arrest and the resulting necessity of giving a bond and defending the suit in the Canal Zone forced the claimant into a settlement which it would not otherwise have made, and inflicted damages upon it comprising not only the difference between the amount of the Panamanian judgment and the amount of the payment under the settlement agreement, but also the expenses of litigation and the injury to the company's standing resulting from the Canal Zone suit.

The assertion that the arrest was beyond the jurisdiction of the District Court is based upon two theories, first, that the arrest took place outside of the territorial waters of the Canal Zone and, second, that the *David* was exercising

the right of innocent passage and was therefore immune from arrest, even if within Canal Zone waters.

A preponderance of the evidence before the United States District Court showed that the arrest of the *David* was effected within a few hundred yards of Flamenco Island and probably between that island and San José Rock off the Pacific entrance of the Panama Canal.

The claimant contends that the extent of the territorial waters of the Canal Zone was fixed by the treaty of 1903, the executive agreement of 1904, and the treaty of 1914, which respectively cede, delimit and modify the delimitation of the Canal Zone. Article 2 of the treaty of 1903 defines the Canal Zone as extending into the Pacific Ocean to a distance of 3 marine miles from mean low watermark, and then goes on to make a specific grant of the Islands of Perico, Naos, Culebra and Flamenco, from which the claimant concludes that Flamenco must have been considered as outside of the territorial waters previously defined, and that since the arrest of the *David* occurred on the seaward side of Flamenco, that arrest must have occurred outside of territorial waters.

The Commission cannot follow this reasoning. While the treaties undoubtedly fix the boundary between Panamanian territorial waters and the territorial waters of the Canal Zone, it is clear that they do not purport to fix the seaward limit of the territorial waters of the Zone. That is left to the operation of the rules of international law. Both the Island of Flamenco and the point at which the *David* was arrested are within the 3-mile limit according to the ordinary rules for measuring territorial waters, without considering the question of whether the Island of Flamenco, which appears to be a fortified point guarding the entrance of the Canal, would not itself carry its own 3-mile zone clearly including the *situs* of the arrest.

We now turn to the question raised by the assertion that the *David* should have been exempted from arrest under the rule of innocent passage. An exhaustive research was made into the authorities upon this question by the Agents, and the point was argued with great thoroughness. The general rule of the extension of sovereignty over the 3-mile zone is clearly established. Exceptions to the completeness of this sovereignty should be supported by clear authority. There is a clear preponderance of authority to the effect that this sovereignty is qualified by what is known as the right of innocent passage, and that this qualification forbids the sovereign actually to prohibit the innocent passage of alien merchant vessels through its territorial waters.

There is no clear preponderance of authority to the effect that such vessels when passing through territorial waters are exempt from civil arrest. In the absence of such authority, the Commission cannot say that a country may not, under the rules of international law, assert the right to arrest on civil process merchant ships passing through its territorial waters.

Incidentally it may be said that the evidence and maps submitted to the Commission raise a real question as to whether the point at which the *David* was arrested was not in fact a roadstead subject to the rules which pertain to harbors rather than those which pertain to ordinary coastal waters within the 3-mile zone.

The Commission decides that the arrest of the *David* was not in excess of jurisdiction and therefore that the claim must be disallowed.

Dissenting opinion of Panamanian Commissioner

I am not in agreement with the decision of the majority of the Commission. This claim, as set forth in the decision, is based upon two points: the first

that the arrest of the *David* took place outside the territorial waters of the Canal Zone, and the second that, although it is admitted that it took place within such waters, the *David* was in the exercise of the right of innocent passage and was therefore exempt from arrest by the coastal authorities.

The decision of the majority sets aside the first contention by affirming that the place where the arrest took place was within the jurisdictional waters of the Canal Zone; the second by maintaining the theory that although the right of innocent passage exists and even when it is admitted that this right constitutes a limitation of coastal sovereignty, this right of passage does not make the ship exercising it immune to civil arrest.

I am not in accord with either conclusion and I shall take them up separately.

The marginal sea of the Canal Zone in the Pacific was defined by the Canal treaty of 1903 which established that it extended 3 marine miles beginning at mean low watermark. Due to the proximity of territorial waters of the Zone with those of the port of Panama, a specific agreement became necessary to determine the dividing line between the waters of both. This was accomplished by the boundary treaty of 1914. The resultant line fixed the northern boundary of the Canal Zone's marginal sea. But inasmuch as the aforesaid treaty did not attempt to establish the seaward limit of said territorial waters, it is clear that the determination thereof should be made according to the rules of international law, that is, by a line which, in the sea itself, follows as far as possible the sinuosities of the coast.

The Canal Zone District Court did not follow this rule. What Judge Martin did was to take the most salient points of the coast (among them a reef called Pulperia which, at low tide, reaches nearly a mile into the sea) and from these points draw lines parallel to the route of the Canal and run them out 3 miles. Then the Court joined their termini by drawing *straight lines* to the end of the northern boundary fixed by the treaty of 1914. Of course, by using this method the point where the marshal said that he had arrested the *David* was within the territorial waters of the Zone.

The method employed by the court is contrary to international law and also contrary to the application made in practice under the Canal treaty in matters dealing with the territorial waters of the Zone.

It is proper to point out that although there exists the general rule that the acts of the authorities are presumed to be correct, such a presumption does not appear to be tenable when these authorities have taken as a basis for their acts a method contrary to law. The fact that the court undertook the task of delimiting all the marginal sea of the Canal Zone—which was not necessary to decide a case which depended upon the simple fact of whether the point of arrest was more than 3 miles from the coast—and the fact that in doing so it used a method contrary to international law, far from serving as a basis for a presumption in favor of the official so doing, rather lead to the presumption that the place of the arrest would have been found to be beyond his jurisdiction if the correct method had been followed.

Let us pass now to the second question, the so-called right of innocent passage. The opinion of the majority admits, as I have said, the existence of that right; it admits that it constitutes a limitation of territorial sovereignty and that the sovereign cannot impede said passage, but it denies that it carries with it exemption from civil arrest by the territorial authorities.

I am not in accord with this conclusion of the majority which is contrary to the very nature of the right of innocent passage and which considerably abridges it and does not seem to be based upon creditable authorities in international law. It is not necessary to enter into an extended study of the right of innocent passage, as the Agents have already exhausted the subject in the

hearings. Suffice it to say that this right, as is seen from the many citations of authorities made by both parties, has been considered as a necessary appendage to the freedom of navigation on the high seas. To subject a merchant ship sailing coastwise within the 3-mile limit to civil arrest by coastal authorities, violently interrupts such passage and notably abridges the freedom of the seas referred to. There are, on the other hand, authorities of high standing in international law, who expressly establish the lack of jurisdiction by littoral authorities in such cases. See for example the resolutions adopted in 1894 by the Institute of International Law and especially the juridical investigation carried out by the most prominent American international jurists (Research in International Law, Harvard Law School) which served as a basis for the Hague Conference on the Codification of International Law.

It is proper to point out also that the claimant does not maintain that absolute immunity exists from the jurisdiction of the littoral authorities; that it does not allege, for example, lack of jurisdiction in the case of an offense committed within territorial waters in the course of innocent passage, although some writers deny jurisdiction even in such cases; the claimant also accepts that the ship is obliged to comply with orders and maritime regulations which contribute to the safety of navigation, or that are of a sanitary or police character. The claimant maintains only that in case of a civil action growing out of a collision occurring previously beyond the jurisdiction of the littoral authorities, the latter were without jurisdiction later to interfere with the passage of the same ship by means of a civil suit not affecting in any way territorial sovereign interests.

But another important reason obliges me to dissent at this point. An examination of the Canal Treaty of 1903 indicates that with respect to the Canal Zone (including naturally territorial waters) Panama did not grant to the United States absolute sovereignty but only those functions of sovereignty which were necessary for the construction, use, maintenance, and sanitation of the Canal. All authority not included within these functions corresponds to the Republic of Panama by implicit reservation. In my opinion the authority exercised in the case of the *David* has no relation whatsoever with the functions mentioned. Moreover, I believe that the right of passage which pursuant to international law exists in favor of all nations should be applied *a fortiori* when treating of the nation which made the grant in terms which implied a conveyance of relative sovereignty, not absolute, and in circumstances in which the right invoked is vital to the state making the grant, as it cut in two its own territory and left itself obliged to cross territorial waters of the state receiving the grant in order to carry on its coastwise trade.

I am therefore of the opinion that the *David* was arrested outside of the territorial waters of the Zone and, in any case, in violation of the right of innocent passage; that serious damage was sustained by the Compañía de Navegación Nacional as a direct consequence of the arrest, which the United States is obligated to indemnity.