ARBITRAL AWARD RENDERED ON 14 JANUARY 1945 [1]

1. On 29 December 1944, the Government of Spain and the Government of the United States of America concluded an Agreement, to which the Government of the United Kingdom and the Royal Italian Government acceded, undertaking to refer to the undersigned jurist for examination and settlement the case of the Italian warships, hereinafter specified, which entered Spanish ports soon after the signing of the Armistice between Italy and the United Nations and were interned by the Spanish authorities on the expiry of twenty-four hours from the time of their arrival. They further agreed to accept the report of the Referee as an arbitral award.

Immediately after the said Armistice, on 10 September 1943, the cruiser *Attilio Regolo* and the destroyers *Mitragliere*, *Fuciliere* and *Carabiniere* dropped anchor in the harbour of Mahon and on the same day the destroyers *Orsa*, *Impetuoso* and *Pegaso* entered the roadstead of Pollensa.

The commanders of the *Impetuoso* and the *Pegaso* decided to remove their ships from the harbour before twenty-four hours had elapsed, and scuttled them at sea. The other ships were interned. The Spanish authorities received and succoured the wounded and survivors in their territory.

The Spanish naval authority effected the internment by communicating to the commander-in-chief of the flotilla and the commanders of the individual ships, in the presence of the Italian consul, an order interning the ships on the ground that the time-limit of twenty-four hours from their arrival in the port had expired.

The commanders of the ships undertook to comply with this decision and to facilitate the implementation of any measures taken by the naval authorities, in accordance with international regulations, to render the ships incapable of taking the sea. At the same time, they expressed their objection to the internment decision, contending that their ships were covered by the provision for extension of the duration of stay contained in article 19 of The Hague Convention of 1907.

Some days later, the landing craft *M.Z. 780* and the Red Cross launch *R.A.M.A.* entered the harbour of Mahon and landing craft *M.Z. 778* and *M.Z.* 800 entered the port of Barcelona; all these were also interned within twenty-four hours after dropping anchor.

2. In notes verbales addressed to the Spanish Minister for Foreign Affairs, dated 13, 15 and 27 September 1943 respectively, the United States, United Kingdom and Italian Embassies at Madrid claimed that the ships had entered Spanish ports in order to disembark wounded and to refuel *en route* for Allied ports in compliance with article 4 of the Conditions of Armistice signed on 3 September 1943 between the representatives of General Eisenhower and Marshal Badoglio. The text of the article reads as follows:

Immediate transfer of the Italian fleet and Italian aircraft to such points as may be designated by the Allied Commander-in-Chief, with details of disarmament to be prescribed by him.

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[1] Spanish text in: *Revista Española de Derecho Internacional*, II, 1949, p. 908. (Translation by the Secretariat of the United Nations.) English text in: *Annual Digest and Reports of Public International Law Cases*, 1947, p. 319.

The complainant Governments, on the basis of this clause, expressed the hope that the Spanish Government would do nothing to impede the departure of the said Italian vessels for Allied ports in compliance with the Armistice and would provide them with the fuel required for that purpose.

3. In his notes verbales of reply to the three Embassies, dated 6 October 1943, the Minister for Foreign Affairs of Spain stated that he was unable to grant this request. The ships were, he contended, subject to internment for having failed to put to sea within twenty-four hours after their arrival because, so far as neutrals were concerned, such an armistice was a *res inter alios acta*, the observance or non-observance of which was without legal effect on them. Moreover, since an armistice was a mere cessation of hostilities and not peace, the general principles, rights and duties of neutrality still held good for neutrals. As to fuelling, the Minister considered that under The Hague Convention XIII such a service was optional and must be kept within the limits imposed by neutrality.

4. When the positions of both sides had been thus defined and diplomatic negotiations had been carried on with a view to a just and impartial settlement of the case, the central point at issue proved to be the interpretation of article 19 of The Hague Convention XIII, which regulates fuelling and the duration of the stay of belligerent ships in neutral ports.

The Agreement of 29 December 1944, which laid down a legal procedure for the settlement of the dispute by prescribing compliance with this report, summed up the issue in the following terms:

Do the provisions of article 19 of The Hague Convention XIII of 1907 impose on the neutral State an obligation to co-operate actively in ensuring supplies of fuel to belligerent warships anchored in its waters, or, on the other hand, does refuelling constitute a right of the said ships which, if they cannot exercise it in good time, does not preclude a strict application of the twenty-four hours rule?

The entire dispute revolves round this question, and the decision ending the dispute depends on how it is answered.

The fact that not all the Powers that have signed or acceded to the Agreement under which this report is rendered have subscribed to The Hague Convention XIII of 1907 need raise no question regarding its legally binding character, since the said Convention concerning the Rights and Duties of Neutral Powers in Naval War served merely to codify the customary rules in force at the time of the Second Peace conference held at The Hague in 1907, and the rule applicable to all the Powers which have signed or acceded to the Agreement of 29 December 1944 lies in the article aforementioned, on whose application, to whatever effect, the settlement of the case depends.

5. The terms of article 19, which are to be interpreted in this report, make it clear that the neutral State is bound to set limits to the provision of supplies to a belligerent ship which calls at its ports.

Belligerent warships, states the article, *may only revictual* in neutral ports or roadsteads to bring up their supplies to the peace standard.

Similarly, the article goes on to state, these vessels *may only ship* sufficient fuel to enable them to reach the nearest port in their own country. *They may*, on the other hand, fill up their bunkers built to carry fuel, when in neutral countries which have adopted this method of determining the amount of fuel to be supplied.

If, in accordance with the law of the neutral Power, the ships are not supplied with coal within twenty-four hours of their arrival, the permissible duration of their stay is extended by twenty-four hours.

To be properly understood, article 19 must be read in conjunction with articles 12 and 20 of the same Convention. Article 12 provides that:

In the absence of special provisions to the contrary in the legislation of a neutral Power, belligerent war-ships *are not permitted* to remain in the ports, roadsteads or territorial waters of the said Power for more than twenty-four hours, except in the cases covered by the present Convention.

Article 20 provides that:

Belligerent warships which have shipped fuel[1] in a port belonging to a neutral Power may not within the succeeding three months replenish their supply in a port of the same Power.

The texts quoted bring out very clearly (1) the restrictive character of the rules they contain with regard to supplies and permitted duration of stay, and (2) the recognition that the neutral State has the right to grant larger supplies or to extend the duration of stay, always subject to the rights and duties prescribed by the same Convention for neutral powers in naval war.

Nothing in article 19 or in the related articles lays on the neutral State an obligation to co-operate actively in ensuring fuel supplies to a belligerent warship where, of its own volition, that State grants the said warship access to one of its ports instead of deciding to refuse it admission.

In no sense — grammatical, logical or legal — does the article under examination lay on the neutral State a duty of active co-operation in making supplies available. Any such duty, moreover, is inconsistent with the conception of the State which prevailed in 1907; in those days the State was considered to be remote from commercial activities and to be exclusively an organ of law, whose specific duty as a neutral, under the system we are now examining, was merely to exercise control and supervision in order to prevent belligerent warships admitted to its waters from using them as a base of operations and thus compromising the neutrality of the host State.

The same conclusion is reached by the jurist Balladore Pallieri in his book *La guerra,* which is perhaps the most exhaustive of those published in Italy — the country to which the interned ships belong — in the years preceding the present world conflict.

Since warships are frequently granted access to neutral waters, he writes, various general restrictions have been laid down which, in conjunction with the exceptions mentioned, make it more and more difficult for warships to use, and more and more unlikely that they will use, neutral waters for purposes connected with military operations . . . All States have regulations on the subject, and the fact that international incidents have arisen where restrictions were lax proves conclusively that States are under an obligation to impose such restrictions, always with the same end in view: namely, to prevent warships from being granted shelter for a purpose incompatible with the duties of neutrality. Beyond that, however, the international system leaves States a certain freedom of decision, with the result that legislation may vary in severity from one State to another. Furthermore, all neutral States have special regulations restricting the repairs which belligerent warships may carry out and the victuals and fuel which they may ship; but no definite rule of international law has been laid down in this connexion either, and therefore we cannot go beyond the general restrictions outlined above . . . (Balladore Pallieri:

[1] *Translator's note:* The Arbitrator renders the words of the original French text, "*qui ont pris du combustible*", by "*que hayan carboneado*" and explains in parenthesis: "The use of this term reflects the fact that coal was the only fuel used for ships at the time."

La guerra, vol. III of the *Trattato di Diritto Internazionale*, compiled in collaboration by various authors under the direction of the late Fedozzi and de Santi Romano. *Cedam*, Padua, 1935, page 415.)

This establishes the absence of rules laying any kind of active obligation on the neutral State with regard to the supply of fuel, as well as the scope of the freedom which the neutral State enjoys within the general limits of the Convention.

6. It is no less true that the developments taking place between 1907 and the present day in response to new social needs have resulted in the extension of State activity to economic spheres hitherto restricted wholly to individuals, and in the appearance of the machinery of controlled and mixed economic systems.

The latter category includes the semi-official, semi-private body which operates the oil monopoly in Spain.

This corporation has now taken the place of the private trader in supplying fuel to belligerent warships. So long as it keeps within the limits set by The Hague Convention, there is no infringement of the State's neutrality.

Furthermore, the abnormality of present-day conditions often make it necessary to adopt a quota system for commodities vital to national survival, including fuel oils. In this case, before the distributing agency can supply belligerent warships with fuel it will require a special Government permit, which the State may refuse to grant at the dictates of its neutral status or of its own domestic requirements. Both grounds for refusal are justified, the first by the international duties which neutral status imposes and the second by the right of self-preservation to which oil is now so vital, especially where the neutral State has no domestic deposits and must import oil at a time of universal shortage caused by war.

7. There remains the question of the permissible duration of stay.

The United States Embassy, in its note verbale of 12 October 1943, claimed that it would be inequitable to apply a time-limit of twenty-four or forty-eight hours so long as the ships had not been supplied with the fuel required to enable them to put sea — thus arguing on a basis of equity rather than the letter of the law.

The legal question of substance having been examined in sections 4 and 5, it now remains to consider the procedural aspect.

The objection entered by the commander-in-chief of the flotilla and the commanders of the ships when the internment order was made, and the notes which the complaining Embassies immediately addressed to the Spanish Ministry of Foreign Affairs, raised, as soon as the ships were interned, an international issue concerning article 19 of The Hague Convention on neutrality in naval war. That article was drafted in different circumstances from those of today and since the Powers concerned disagreed about its meaning the decision was taken to such a settlement through this report.

The aforementioned objection and complaints interrupted the expiration of the recognized right of the anchored ships to refuel, and the Governments subscribing to the Agreement could not have supposed that that right had already expired. Otherwise article 19 would be, if not inoperative, at any rate impossible to apply precisely when the Powers concerned deemed it to be in force and declared it to be the rule governing the case which these proceedings were instituted to settle; the sole purpose of these proceedings is to construe the article in question. If it were otherwise, there would be no basis for the agreement to resort to arbitration.

The interruption of the expiration of the twenty-four hour period, as established by the foregoing considerations had the effect of suspending the final settlement, and the said period must accordingly run from the time when this

report, which has the force of an arbitral award, is communicated to the High Parties signatories of the Agreement of 29 December 1944.

CONCLUSIONS

For the foregoing reasons, the undersigned returns the following answer to the double question on which he was asked to report:

I. *Do the provisions of article 19 of The Hague Convention XIII of 1907 lay on the neutral State an obligation to co-operate actively in ensuring supplies of fuel to belligerent warships anchored in its waters?*

Article 19 of The Hague Convention XIII of 1907 prescribes the limits which the neutral State must apply to the provision of supplies in free market conditions to such belligerent warships as it may permit to enter its ports or roadsteads.

That article does not lay on the neutral State any specific obligation to co-operate actively in ensuring supplies of fuel.

II. *Does refuelling constitute a right of the said ships which, if they cannot exercise it in good time, does not preclude a strict application of the twenty-four hours rule?*

(*a*) Fuelling constitutes a right which the belligerent warship may exercise by having recourse to the market.

It is understood that, when this right is exercised under a mixed economy system, the bodies responsible for fuel distribution take the place of private traders as they do in other branches of supply formerly operated by private firms.

If a quota and rationing system is in operation in the neutral State, the distributing agency will need a special Government permit before it can release supplies.

Whatever the economic system governing the distribution and sale of fuel in the neutral country, the provision of supplies to belligerent warships in neutral waters is always subject to two kinds of restrictions: firstly, the general duties inherent in neutrality, which are expressly defined, so far as naval war is concerned, by The Hague Convention XIII of 1907; and, secondly, the right of self-preservation and the vital necessities of the neutral State.

(*b*) Since the expiration of the prescribed period was interrupted by the lodging of objections and complaints, the appropriate procedure in the present case is to apply the twenty-four hours rule from the time when this report, as an arbitral award, is communicated by its author to the Spanish Ministry of Foreign Affairs and to the Embassy of the United States of America at Madrid.

Madrid, 14 January 1945.

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