COSTA RICA *v.* NICARAGUA

The decision of the Central American Court of Justice concerning the complaint of the Republic of Costa Rica against the Republic of Nicaragua rendered on September 30, 1916, is of singular interest from the point of view of international law.

A restatement of the facts in the case is perhaps not required in view of the editorial on the subject in the April number of this Journal, 1916, page 344. The main question at issue was the right of Nicaragua to negotiate and enter into agreements with the United States concerning matters of direct or indirect interest to the other Republics of Central America. The complaint of Costa Rica was not based on international law, but on the alleged violation of her rights to be consulted by Nicaragua in any negotiations affecting Costa Rican interests, as determined by the Cañas-Jerez Treaty of 1858, and the arbitral award of President Cleveland, of 1888, interpreting that treaty. Costa Rica specifically protested against the Bryan-Chamorro Treaty between Nicaragua and the United States, of August 5, 1914, granting the latter the exclusive right to construct a canal across Nicaragua, a naval base in the Gulf of Fonseca, and ceding Great Corn Island and Little Corn Island in the Caribbean. As a co-riparian state on the San Juan River, Costa Rica claimed the right under the Cañas-Jerez Treaty to be consulted in any negotiations affecting the appropriation of its waters for the purposes of an interoceanic canal. It was asserted that the Bryan-Chamorro Treaty constituted, not the cession of an option on the canal, but an actual sale of ownership rights. Costa Rica further claimed that the rights of commerce and navigation mutually granted by the Republics of Central America for the period of ten years under the Washington Convention of 1907, effectually incapacitated Nicaragua from making any cessions which might endanger these rights. This rather extreme claim virtually amounted to the assertion of a commercial servitude.

The decision of the Central American Court of Justice — the representative of Nicaragua, Judge Navas, alone dissenting — completely sustained the main contentions of Costa Rica. On the principle *res inter alios acta alteri nocere non debet* the court held that Nicaragua was legally incapacitated from entering into the Bryan-Chamorro agreement. In view of the fact that the United States was not subject to the jurisdiction of the court, it expressly refused to

declare this treaty null and void. Such a conclusion, however, is the unavoidable inference of this decision which, as regards the United States, amounts to something more than a mere *caveat emptor*.

The United States, in the light of this decision, finds itself therefore in the embarrassing situation of having become party to a contract made in apparent violation of the rights of Costa Rica as clearly defined by President Cleveland in his award of 1888. The United States Senate evidently sensed the anomalous aspects of this situation in accompanying its consent to the ratification of the Bryan-Chamorro Treaty with the following resolution dated February 18, 1916:

> *Provided*, That whereas Costa Rica, Salvador, and Honduras have protested against the ratification of said convention in the fear or belief that said convention might in some respect impair existing rights of said states, therefore it is declared by the Senate that in advising and consenting to the ratification of the said convention as amended, such advice and consent are given with the understanding to be expressed as part of the instrument of ratification that nothing in said convention is intended to affect any existing rights of any of the said named states.

In commenting on this resolution, the Court pertinently observes that: "The intention here indicated is most noble and of high importance, since it establishes an obligation on the United States, but it is without efficacy in so far as it deals with the legal relations between the nations in litigation. . . ." The suggestion has been privately brought forward that the United States should in turn submit to arbitration the question of the validity of the Bryan-Chamorro Treaty.

Though the decision deals primarily with questions of treaty interpretation, it involves also questions of international law of more than ordinary interest. Incidentally, it should be noted that Nicaragua denied the competency of the court to hear the case on the ground that it could not adjudicate concerning questions arising prior to its establishment in 1907. Nicaragua also argued that:

> As sole sovereign over the territory in which said canal was to be constructed, and as absolute owner of the benefits that she might derive in compensation for the favors and privileges to be conceded by her government, she would not permit them to be made the subject of judicial determination, since the award [President Cleveland's], by its very nature, is not subject to revision or interpretation by any arbitral tribunal.

This was equivalent to saying, of course, that the Nicaraguan interpretation of the award was the only correct interpretation.

Arguing that the Bryan-Chamorro Treaty did not constitute a sale, but merely an option for the construction of a canal, Nicaragua denied the right of Costa Rica to present any formal complaint until there should have been an actual violation of her rights. In other words, there is no international right of injunction, of friendly warning, or *caveat* to prevent an anticipated injury. Such an argument, though also used by Secretary Knox in his otherwise extremely able reply to the original representations of Great Britain concerning the Panama Tolls Act, finds little support either in the light of reason or practice.

The Nicaraguan Government, holding views of this character, declined to present its case before the Court at Cartago. Its interests, however, were represented by Judge Navas, the Nicaraguan member of the tribunal. In acknowledging the court's notification, the Government of Nicaragua protested against the decision and declared that it was not disposed to abide by it. (See reply of the Court to Nicaragua's protest, printed in Supplement to this Journal, p. 5.)

The most significant point of international law raised by this whole controversy is the right of a state in its sovereign capacity to negotiate as a free agent with another sovereign state concerning matters of vital interest to other neighboring states. Costa Rica was the sole complainant in this case; but the other Republics of Central America are likewise interested. Any act by one of these states giving to the United States special privileges in Central America is of obvious concern to the remaining states. This becomes most apparent in the special provision of the Bryan-Chamorro Treaty for the cession to the United States of a naval base on the Gulf of Fonseca, where the maritime limits of Nicaragua, Honduras, and Salvador meet and blend. The available deep-water anchorage in these waters is very restricted, and all three republics consequently have a common interest in their use and control. Moreover, the size and formation of the gulf is such that any naval base within its limits would necessarily control the whole body of water.

It is true that the question of the cession of the naval base was barely touched upon by the Court at Cartago. It was ably presented, however, by Mr. Salvador Rodriguez Gonzalez in an article entitled "The Neutrality of Honduras and the Question of the Gulf of Fonseca" which appeared in the July issue of this Journal, 1916, page

509. The interest of Salvador and Honduras as sovereign states in any transfer of maritime jurisdiction in the Gulf of Fonseca was fully demonstrated. It was furthermore claimed that the neutrality of Honduras which was proclaimed and guaranteed by the Washington Conventions of 1907, to which the United States was morally bound, effectually forbade the cession of a naval base in waters held practically in common by Honduras, Nicaragua, and Salvador, and accordingly neutralized to all intents and purposes.

Without attempting to weigh these arguments, we may emphasize, however, the significance of the fundamental question at issue, namely, the freedom of a state as a sovereign entity, what the French publicists term *l'autonomie de la volonté*. The United States has not hesitated to deny the sovereign right of another state to dispose of its territory in such a way as to menace American interests. This was conspicuously shown in the Senate resolution of July, 1912, concerning Magdalena Bay. (See editorial in this Journal, October, 1912 (Vol. 6), p. 937.) On the other hand, the United States, in its dealings with certain countries, notably the former Kingdom of Hawaii, and the other nations of this continent, has recognized the existence of neighborhood interests which permit, and even require, mutual considerations and privileges not due more remote nations. This has been particularly true in Central America, where the five republics have in many practical ways recognized the close identity of their interests.

When, therefore, in such a controversy as that raised by the Bryan-Chamorro Treaty, we are faced by the claims of absolute sovereignty, it would seem as if we had the choice of two alternatives. We must, on the one hand, recognize the shock and the irreconcilable claims of contending sovereignties. On the other hand, we must recognize the necessity of at least a partial surrender of the claims of absolute sovereignty. The former alternative does not conduce to international peace and order. The latter would seem to offer the only hopeful solution of the antagonisms and contentions of nations. In other words, the theory of sovereignty is found to be unworkable: it constitutes a positive menace to the great constructive task of regulating the peaceful relations of nations. We need to recognize, in place of the archaic theory of sovereignty, the great principle, the fundamental reality of the mutual dependence, the common interests of the nations of the world.

Whatever may be the ultimate issue of the particular controversy raised by the treaty under discussion, we may be confident that the United States, in its championship of generous, progressive principles in international affairs, will not fail to stand always for a liberal interpretation and development of the law of nations on this continent.

PHILIP MARSHALL BROWN

THE RIGHT TO ATTACK UNARMED SUBMARINE MERCHANTMEN

THE arrival at Baltimore, in July last, of the *S. S. Deutschland*, an unarmed submarine merchantman, with a valuable cargo for sale in the United States, and the subsequent departure of the vessel from that port for Bremen, raised inquiry whether principles established for the regulation of attacks upon surface craft of a belligerent could be applied with equal justice with respect to merchantmen capable of taking refuge within the depths of the sea.

The unarmed submersible merchantman, like that which is obliged to remain on the surface, obviously cannot open fire upon an enemy ship. It serves also a useful purpose as a carrier of persons and property. It is unique, however, with respect to its mode of and facility in eluding pursuit as well as signals to surrender. It may be doubted whether this circumstance alone suffices to place the submarine in a less favorable position. A surface craft of extraordinary speed, enabling it to outdistance every pursuer and to keep beyond the range of signals, would not for that sole reason be exposed to attack at sight. Refusal to obey a reasonable signal to come to should doubtless subject an undersea vessel to the same penalties as a surface craft. The peculiar ability of the former to disregard such a signal with impunity does not, however, justify the failure to make one, unless it can be shown that the right of capture is an absolute one unfettered by the dictates of humanity. Such is not the case in the normal situation where the merchantman is not primarily devoted to the public service, or until guilty of reprehensible conduct.

At the present time an unarmed enemy surface craft, such as a trans-Atlantic liner, of great tonnage and high speed, although designed and employed primarily for the transportation of passengers and mail, is still capable of rendering incidentally substantial military service as a carrier of war material. Its speed may enable the vessel to outdistance any pursuer and to keep beyond range of a