REPORTS OF INTERNATIONAL ARBITRAL AWARDS

RECUEIL DES SENTENCES ARBITRALES

VOLUME XI

United Nations publication

Sales No.: 61. V. 4

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UNITED NATIONS — NATIONS UNIES

FOREWORD

The present volume is the eleventh volume of the *Reports of International Arbitral Awards* the first eight volumes of which contain awards handed down between 1920 and 1941. It is the third and last volume in a series covering the period from 1902 to 1920.

As in previous volumes, the awards in the present volume are printed in chronological order. The particular form of presentation of the collection of awards published in this and the two preceding volumes has been as much the result of the relationship between certain of the awards as the outcome of the exigencies of publication. Thus, in volume IX of the *Reports* — the first of the series of three volumes covering the period from 1902 to 1920 — it was decided to reproduce the award rendered on 22 February 1904 in the Venezuelan Preferential Case immediately before the awards handed down in the Venezuelan Arbitrations on 1903-1905. This was done because the Venezuelan Preferential Case was clearly linked with the Venezuelan Arbitrations of 1903-1905, the texts of which were printed in volumes IX and X without a break in continuity. The present volume contains the remaining awards handed down in 1904 which were not reproduced in the two preceding volumes. It also contains a number of other awards rendered between 1904 and 1920.

The awards and the *compromis* or arbitration agreements are printed in English or French, whichever was the language of the original.

In order to facilitate consultation of the awards, head-notes have been prepared in both English and French. Short historical notes and bibliographical references have also been added.

As with volumes IV to X, this volume has been prepared by the Codification Division of the Office of Legal Affairs of the Secretariat of the United Nations.

AVANT-PROPOS

Le présent volume constitue le onzième volume du Recueil des Sentences arbitrales dont les huit premiers contiennent des sentences rendues entre 1920 et 1941. Il est le troisième et le dernier d'une série couvrant la période qui s'étend de 1902 à 1920.

Dans le présent volume, comme dans les volumes précédents, les sentences sont présentées dans l'ordre chronologique. Quant à la présentation de l'ensemble des sentences publiées dans le présent volume ainsi que dans les deux volumes précédents, elle est conçue d'une manière particulière due tant aux liens existant entre certaines de ces sentences qu'aux exigences de la publication. Ainsi, dans le volume IX du Recueil qui inaugure la série couvrant la période entre 1902 et 1920, on a jugé approprié de reproquire, immédiatement avant les arbitrages vénézueliens de 1903-1905, la sentence rendue le 22 février 1904 dans l'affaire du traitement préférentiel de réclamations contre le Venezuela, cette affaire étant en relation étroite avec lesdits arbitrages, dont on a pris soin d'insérer le texte de façon ininterrompue dans le volume en question ainsi que dans le volume suivant. Le présent volume contient le reste des sentences rendues en 1904 qui n'ont pas été reproduites dans les deux volumes précédents; il contient également d'autres sentences prononcées entre cette date et 1920.

En principe, les sentences, ainsi que les compromis ou les accords d'arbitrage sont reproduits dans la langue originale, en anglais ou en français selon le cas.

Pour faciliter autant que possible la consultation des sentences, on a fait précéder celles-ci de notes sommaires rédigées à la fois en anglais et en français. Des aperçus ou notes historiques, ainsi que des références bibliographiques ont été également ajoutées.

Le présent volume, comme les volumes IV à X, a été préparé par la Division de la Codification du Service juridique du Secrétariat de l'Organisation des Nations Unies.

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APERÇU

Les événements qui se déroulèrent dans le Cauca en 1885 étaient à l'origine d'une controverse qui s'éleva entre la Colombie et l'Italie à propos de certaines réclamations pécuniaires de la part de plusieurs sujets italiens contre la Colombie. Les négociations diplomatiques n'ayant pas abouti à une solution, le Gouvernement espagnol offrit sa médiation qui fut acceptée par les deux Parties. Le Protocole signé à Paris le 24 mai 1886 par la Colombie et l'Italie fixait les bases de cette médiation. D'une part, selon le paragraphe 2 du Protocole, toute réclamation, de quelque nature que ce soit, pendante entre le Gouvernement de la Colombie et celui de l'Italie, devait être soumise à la médiation du Gouvernement espagnol. D'autre part, le paragraphe 3 du Protocole précisait qu'au cas où il résulterait de ladite médiation que la Colombie devrait payer des indemnités, le montant de ces indemnités ainsi que les modalités, les termes et les garanties du paiement feraient l'objet d'un jugement arbitral déféré à une Commission Mixte composée du représentant d'Italie à Bogota, un délégué du Gouvernement colombien et un représentant d'Espagne à Bogota.

Le gouvernement médiateur était saisi de plusieurs affaires. Il formula, en date du 26 janvier 1888, des propositions sur l'affaire Cerruti[1]. Le 15 juin 1900, il formula des propositions [2] concernant cinq autres affaires dont celle de Vicente Spadafora[3].

Vicente Spadafora était victime d'expropriation de marchandises. A la suite des démarches qu'il entreprit auprès des autorités centrales colombiennes, celles-ci émirent à son profit un ordre de paiement représentant la valeur des marchandises expropriées. Cependant les autorités constituées dans le Cauca se refusèrent à réaliser cet ordre de paiement. Le gouvernement médiateur estima que la Colombie devait payer au réclamant la somme de 1693 pesos 60, correspondant à la valeur des marchandises expropriées, conformément aux lois colombiennes, aux décisions des autorités colombiennes légalement constituées et à la stricte équité. Il considéra en outre qu'il appartenait à la Commission Mixte, prévue au paragraphe 3 du Protocole de Paris de 1886, de se prononcer sur la somme que la Colombie devait payer au réclamant à titre de dommages-intérêts.

La Colombie et l'Italie acceptèrent la proposition du gouvernement médiateur et signèrent à Bogota le 21 avril 1902 un protocole [4] par lequel elles ont convenu de « Proroger d'un commun accord la réunion de la Commission

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[1] W. Evans Darby, *International Tribunals*, London, 1904, « Cerruti Claim » pp. 810 et 899. Voir également l'Affaire Cerruti, *infra*.

[2] Pour le texte de ces propositions voir la publication intitulée « Proposición del Gobierno de Su Majestad Católica en las cuestiones surgidas entre los de Italia y Colombia sometidas a su mediación en virtud del Protocole firmado en París el 24 de mayo de 1886 y de la convención italo-colombiana de 27 de octubre de 1892 » qui se trouve à « Harvard Law Library » No. 143-193 (« Library of Ramon de Dalman y de Olivart, Marqués de Olivart »).

[3] Les quatre autres affaires étaient respectivement celles de Valle Biglia, Panza, Ruffoni et Pascuale Crispino.

[4] Voir *infra*, p. 7.

Mixte prévue au paragraphe 3 du Protocole signé à Paris le 24 mai 1886, à six mois après la date à laquelle l'ordre public sera déclaré rétabli en Colombie ». En fait, la Commission Mixte ne put rendre sa sentence dans l'affaire de Vicente Spadafora que le 9 avril 1904. La sentence confirmait la somme fixée par le gouvernement médiateur au profit de Vicente Spadafora, en déterminait les intérêts et indiquait le montant des dommages, préjudices et frais du litige à payer au réclamant. Elle fixait, en outre, les modalités et les garanties de paiement.

PROTOCOLE DESTINÉ À RÉGLER D'UN COMMUN ACCORD PAR MÉDIATION LES QUESTIONS PENDANTES ENTRE LES DEUX PAYS, SIGNÉ À PARIS LE 24 MAI 1886 [1]

Les Gouvernements d'Italie et de Colombie, ayant réglé au moyen de notes diplomatiques les questions pendantes entre les deux pays, qui étaient placées hors de la médiation amicale que le Gouvernement de S.M. Catholique leur a offerte, et désirant, pour ce qui concerne les autres questions, fixer d'une manière claire, précise et positive les bases que les deux Parties accepteraient d'un commun accord pour la dite médiation,

S. Exc. le général comte Menabrea, marquis de Valdora, Ambassadeur extraordinaire et plénipotentiaire de S.M. le Roi d'Italie près le Gouvernement de la République française, d'une part,

et S. Exc. D. Francisco de Paula Matéus, Envoyé extraordinaire et ministre plénipotentiaire de Colombie près le Gouvernement de la dite République, de l'autre,

à ce dûment autorisés, ont signé *ad referendum* le présent protocole, destiné à être soumis, aussitôt après approbation de leurs Gouvernements, au Gouvernement de S.M. Catholique:

1° Aussitôt après l'approbation de ce protocole, le Gouvernement de la République de Colombie rendra au sujet italien M. Ernest Cerruti, ou à ses représentants, les, biens-immeubles lui appartenant, situés sur le territoire de la dite République qui lui ont été saisis par les autorités de l'Etat de Cauca, ou par d'autres autorités quelconques de la nation colombienne, pendant la dernière guerre civile;

2° Toute autre réclamation, de quelque nature que ce soit, actuellement pendante entre le Gouvernement de S.M. le Roi d'Italie et le Gouvernement de Colombie, dans l'intérêt du sieur Cerruti ou d'autres sujets italiens, reste soumise à la médiation du Gouvernement de S.M. Catholique, par devant lequel les deux Gouvernements présenteront leurs preuves et documents respectifs.

Les questions principales que le médiateur aura à résoudre sont les suivantes [2]:

Le sieur Cerruti, ou d'autres sujets italiens, ont-ils, oui ou non, perdu, en Colombie, leur qualité d'étrangers neutres?

Ont-ils, oui ou non, perdu les droits, les prérogatives et les privilèges que le droit commun et les lois de Colombie accordent aux étrangers?

La Colombie doit-elle, oui ou non, payer des indemnités au sieur Cerruti ou à d'autres sujets italiens?

3° S'il résulte de la dite médiation que la Colombie doit payer des indemnités, le montant de ces indemnités, ainsi que les modalités, les termes et les

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[1] G.-F. de Martens, *Nouveau Recueil général de traités*, 2e série, t. XVIII, 1893, p. 659.

[2] Le médiateur donna son opinion dans l'affaire Cerruti le 26 janvier 1888. Voir: J. B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, Vol. II, p. 2117; *American Journal of International Law*, vol. 6, 1912, p. 1003.

garanties du paiement formeront, sans appel ni réserve quelconque, l'objet d'un jugement arbitral que les deux Gouvernements conviennent dès aujourd'hui de déférer à une commission mixte ainsi composée: le Représentant d'Italie à Bogota, un délégué du Gouvernement colombien, le Représentant d'Espagne à Bogota. Le travail de la Commission Mixte doit être achevé dans les six mois après la notification, par le Gouvernement espagnol, de ses conclusions, aux Représentants des deux Parties à Madrid. Cette même Commission Mixte aurait à statuer dans le cas où une contestation s'élèverait sur l'étendue des biens immeubles appartenant à M. Cerruti, lesquels, d'après l'article 1er, devront lui être rendus dans toute l'extension qu'ils avaient au moment de la saisie;

4° Sauf les conclusions, quelles qu'elles soient, de la médiation, il est expressément entendu que M. Cerruti ne pourra jamais être ultérieurement, ni d'aucune façon, molesté à raison de tout acte qu'il serait accusé d'avoir accompli, jusqu'à la date du présent protocole;

5° Les rapports diplomatiques et de bonne amitié seront considérés comme repris dès le jour où le présent protocole sera approuvé par les deux Gouvernements. Le Gouvernement de Colombie accréditera, aussitôt que possible, un représentant auprès de Sa Majesté le Roi. Aussitôt après l'approbation du présent protocole, et comme gage du rétablissement des rapports amicaux entre les deux pays, le Gouvernement du Roi accréditera de nouveau un représentant de Sa Majesté en Colombie. Ce dernier, se rendant à Bogota, sera conduit par un bâtiment de la marine royale au port de Cartagena, où, après avis préalable, on échangera alternativement des saluts par vingt-et-un coups de canon entre le bâtiment et les batteries de terre;

6° Le présent protocole sera soumis à l'approbation des deux gouvernements. L'approbation doit être mutuellement notifiée, par l'organe des Représentants respectifs à Paris, dans le délai de trois mois, ou plus tôt si faire se peut.

FAIT à Paris, en double exemplaire, le vingt-quatre mai 1886.

[L.S.] L. F. MENABREA.

[L.S.] F. DE P. MATÉUS.

PROTOCOLE RELATIF À LA RÉUNION ET AUX OPÉRATIONS DE LA COMMISSION MIXTE APPELÉE À SE PRONONCER SUR DES RÉCLAMATIONS DE PLUSIEURS SUJETS ITALIENS CONTRE LA COLOMBIE, SIGNÉ À BOGOTA LE 21 AVRIL 1902 [1]

Les Gouvernements de Colombie et d'Italie, après avoir soumis leurs contestations au sujet des réclamations de plusieurs sujets italiens à la médiation du Gouvernement de Sa Majesté Catholique et avoir accepté la proposition du Médiateur, du 15 juin 1900, rendue en vertu du Protocole signé à Paris le 24 mai 1886[2], et de la Convention Italo-Colombienne du 27 octobre 1892[3], étant représentés, le Gouvernement de Colombie par S.E.M. Felipe F. Paul, Ministre des Relations Extérieures de la République, et le Gouvernement Italien par S.E.M. George E. Welby, Ministre Résident de Sa Majesté Britannique en Colombie, Chargé des intérêts italiens, sont convenus de ce qui suit:

1° Reconnaître que pour remplir les obligations mentionnées dans le paragraphe 3 du Protocole de Paris, ci-dessus mentionné, il est nécessaire que les Parties intéressées soient en mesure de produire devant la Commission Mixte les preuves qui servent de base aux prétentions respectives des uns et des autres, ce qui dans la situation anormale que traverse actuellement la République de Colombie est absolument impossible à cause de l'insécurité des communications, résultat de la lutte à main armée qui dévaste le pays depuis déjà deux ans; et

2° Proroger d'un commun accord la réunion de la Commission Mixte prévue au paragraphe 3 du Protocole signé à Paris le 24 mai 1886, à six mois après la date à laquelle l'ordre public sera déclaré rétabli en Colombie.

EN FOI DE QUOI ils ont signé et scellé en double exemplaire le présent Protocole, à Bogota, le 21 avril mil neuf cent deux.

Felipe F. PAUL.

George E. WELBY.

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[1] Le Baron Descamps et Louis Renault, *Recueil international des traités du XX^e siècle*, 1902, p. 408. Pour le texte espagnol, voir *ibid.*

[2] Voir *supra*, p. 5.

[3] V. ce texte: G.-F. de Martens, *op. cit.*, 2^e série, t. XXII, p. 308.

SENTENCE DE LA COMMISSION MIXTE ITALO-COLOMBIENNE DANS L'AFFAIRE DE M. VICENTE SPADAFORA, RENDUE À BOGOTA LE 9 AVRIL 1904 [1]

Confiscation in Colombia of goods belonging to a number of Italian nationals, including Vicente Spadafora — Claim of the Italian Government on behalf of its injured nationals — Mediation of the Spanish Government — Determination by the Mediator of the question whether Colombia ought to pay an indemnity — Determination by an Italian-Colombian Mixed Commission of the amount of the indemnity.

CONSIDÉRANT que les autorités constituées dans le Cauca n'ont pas réalisé en temps utile l'ordre de payement donné au profit du sujet italien Vicente Spadafora, et que, dans l'intervalle de tant d'années, la valeur de la plata de 0,835, notre monnaie légale en Colombie, a baissé considérablement (voir le certificat de la Banque de Colombie) relativement à la monnaie ayant cours au jour (Art. 1 de la Loi 33 de 1903);

CONSIDÉRANT que l'argent qui représentait ledit ordre de payement aurait dû produire un intérêt annuel pour le réclamant s'il l'avait effectivement touché lorsque l'autorité constituée du Cauca l'a ordonné;

CONSIDÉRANT que les marchandises ont été expropriées d'une manière si violente, dans une forme si inusitée et avec une perte totale si inattendue que le réclamant a droit à une juste compensation pour dommages et préjudices ainsi que pour les frais du litige qu'il s'est vu obligé de suivre par suite de la non réalisation de l'ordre en question; que tous ces chefs ont été justement appréciés dans la Sentence arbitrale de Sa Majesté Catholique [2];

CONSIDÉRANT que l'intérêt de l'argent au taux actuel dans ce Pays est inadmissible, tant parce que ledit taux a varié dans les vingt dernières années (époque de laquelle datent les intérêts de la réclamation) que parce qu'il serait en dehors des lois de l'équité;

CONSIDÉRANT qu'il n'est pas équitable de surcharger la Colombie de frais au delà de ce qu'elle peut actuellement payer comptant, sans admettre aucun bon nominal, eu égard à la pénurie du Trésor public après de longues guerres qui ont épuisé le Pays et alors qu'il entre dans la voie de la reconstitution de sa fortune;

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[1] Le Baron Descamps et Louis Renault, *Recueil international des traités du XX^e siècle*, 1904, p. 820.

[2] Il s'agit de la médiation du Gouvernement espagnol du 15 juin 1900 (voir ci-dessus, aperçu, p. 3).

La Commission Mixte, se fondant sur l'équité la plus parfaite et la plus stricte justice, et se conformant en tout à l'Article 3 du Protocole de Paris du 24 mai 1886[1], à la Convention Italo-Colombienne du 27 octobre 1892 [2] et à la Sentence arbitrale rendue par Sa Majesté Catholique le 15 juin 1900[3], décide:

1° Que le Gouvernement de la République de Colombie doit payer au sujet italien Vicente Spadafora:

a) 1,253 pesos or 27 centavos, faisant en monnaie courante (d'après la Loi 33 de 1903) la somme de 1,693 pesos 60 fixée par la Sentence arbitrale [3] susénoncée.

b) 751 pesos or 80 centavos pour intérêts à 3 pour cent l'an durant vingt ans.

c) 401 pesos or représentant 20 pour 100 de la somme antérieure pour dommages, préjudices et frais du litige; au total, 2,406 pesos or 7 centavos.

2° Que le Gouvernement Colombien devra réaliser le payement de cette somme franche de tous droits, contributions, etc., etc., dans le plus bref délai possible et au plus tard dans le délai non prorogeable de soixante jours à compter de la signature de la présente décision.

3° Bien que l'Article 3 du Protocole sus-nommé de Paris laisse à l'appréciation de la Commission Mixte le soin de déterminer les garanties du payement précité, elle considère comme suffisante la bonne foi dont s'inspire toujours le Gouvernement de Colombie, si dignement représenté dans ladite Commission Mixte.

(*Signé*) Julian María del Arroyo.

(*Signé*) George E. Welby.

(*Signé*) José María Quijano Wallis.

Le Secrétaire, Fernando Restrepo Briceño.

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[1] Voir *supra*, p. 5.

[2] V. ce texte: G.-F. de Martens, *op. cit.*, 2e série, t. XXII, p. 308.

[3] Il s'agit de la médiation du Gouvernement espagnol (voir ci-dessus, aperçu, p. 3).

THE GUIANA BOUNDARY CASE

PARTIES: Brazil, Great Britain.

COMPROMIS: Treaty and Declaration of 6 November 1901.

ARBITRATOR: Victor-Emmanuel III, King of Italy.

AWARD: 6 June 1904.

Determination of the extent of the territory which may lawfully be claimed by either of the two Parties, and delimitation of the boundary line between the Colony of British Guiana and the United States of Brazil—Application to the case of certain principles of International Law governing the acquisition of the sovereignty over *terra nullius*.

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A. de Lapradelle et N. Politis, « L'arbitrage anglo-brésilien de 1904 », *Revue du droit public et de la science politique*, vol. 22, p. 241.

SYLLABUS [1]

The dispute regarding the boundary between British Guiana and Brazil, which had been dragging on since 1842, and in connection with which the British proposal of Arbitration was accepted by the Brazilian Government on 8 March 1899, was formally submitted to the Arbitration of the King of Italy, by Article I of a Convention, signed at London, on 6 November 1901.

The award, rendered on 6 June 1904, was in favour of Great Britain. The line fixed in the award was said to have been the one proposed by Lord Salisbury in 1891, and rejected by Brazil.

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[1] W. Evans Darby, *International Tribunals*, 4th ed., London, 1904, p. 900.

TREATY AND DECLARATION BETWEEN GREAT BRITAIN AND BRAZIL, FOR REFERRING TO ARBITRATION THE QUESTION OF THE BOUNDARY BETWEEN BRAZIL AND BRITISH GUIANA, SIGNED AT LONDON, 6 NOVEMBER 1901 [1]

His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India, and the President of the United States of Brazil, being desirous to provide for an amicable settlement of the question which has arisen between their respective Governments concerning the boundary between the Colony of British Guiana and the United States of Brazil, have resolved to submit to arbitration the question involved, and, to the end of concluding a Treaty for that purpose, have appointed as their respective Plenipotentiaries:

His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India, the Most Honourable Henry Charles Keith Petty Fitz-Maurice, Marquess of Lansdowne, Earl Wycombe, Viscount Caln and Calnstone, and Lord Wycombe, Baron of Chipping Wycombe, Baron Nairne, Earl of Kerry, and Earl of Shelburne, Viscount Clanmaurice and Fitzmaurice, Baron of Kerry, Lixnaw, and Dunkerron, a Peer of the United Kingdom of Great Britain and Ireland, a Member of His Britannic Majesty's Most Honourable Privy Council, Knight of the Most Noble Order of the Garter, etc., His Majesty's Principal Secretary of State for Foreign Affairs;

And the President of the United States of Brazil, Senhor Joaquim Aurelio Nabuco de Araujo, Envoy Extraordinary and Minister Plenipotentiary of Brazil to His Britannic Majesty;

Who, having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following Articles:—

Art. I. His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India, and the President of the United States of Brazil, agree to invite His Majesty the King of Italy to decide as Arbitrator the question as to the above-mentioned boundary.

II. The territory in dispute between the Colony of British Guiana and the United States of Brazil shall be taken to be the territory lying between the Takutu and the Cotinga and a line drawn from the source of the Cotinga eastward following the watershed to a point near Mount Ayangcanna, thence in a south-easterly direction, still following the general direction of the watershed, as far as the hill called Annai, thence by the nearest tributary to the Rupununi, up that river to its source, and from that point crossing to the source of the Takutu.

III. The Arbitrator shall be requested to investigate and ascertain the extent of the territory which, whether the whole or a part of the zone described in the preceding Article, may lawfully be claimed by either of the High Contracting

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[1] *British and Foreign State Papers*, Vol. XCIV, p. 23. For the Portuguese text, see *ibid.*

Parties, and to determine the boundary line between the Colony of British Guiana and the United States of Brazil.

IV. In deciding the question submitted, the Arbitrator shall ascertain all facts which he deems necessary to a decision of the controversy, and shall be governed by such principles of international law as he shall determine to be applicable to the case.

V. The printed Case of each of the two Parties, accompanied by the documents, the official correspondence, and other evidence on which each relies, shall be delivered in duplicate to the Arbitrator, and to the Government of the other Party, within a period not exceeding twelve months from the date of the exchange of the ratifications of this Treaty.

VI. Within six months after the Case shall have been delivered in the manner provided in the preceding Article, either Party may in like manner deliver in duplicate to the Arbitrator and to the Government of the other Party a Counter-Case and additional documents, correspondence, and evidence in reply to the Case, documents, correspondence, and evidence as presented by the other Party.

If in the Case or Counter-Case submitted to the Arbitrator either Party shall have specified or alluded to any report or document in its own exclusive possession, without annexing a copy, such Party shall be bound, if the other Party thinks proper to apply for it, to furnish that Party with a copy thereof; and either Party may call upon the other, through the Arbitrator, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within forty days after the delivery of the Case or Counter-Case, and the original or copy so requested shall be delivered as soon as may be within a period not exceeding forty days after the receipt of notice.

VII. Within four months after the expiration of the time fixed for the delivery of the Counter-Case on both sides, each Party shall deliver in duplicate to the Arbitrator and to the Government of the other Party a printed Argument showing the points and referring to the evidence upon which each Government relies; and the Arbitrator may, if he desires any further elucidation with regard to any point in the Argument of either Party, require a further written or printed statement or argument upon it; but in such case the other Party shall be entitled to reply by means of a similar written or printed statement or argument.

VIII. The Arbitrator may, for any cause deemed by him sufficient, extend the periods fixed by Articles V, VI, and VII, or any of them, by the allowance of thirty days additional.

IX. The High Contracting Parties agree to request that the decision of the Arbitrator may, if possible, be made within six months of the delivery of the Argument on both sides.

They further agree to request that the decision may be made in writing, dated, and signed, and that it may be in duplicate; one copy to be handed to the Representative of Great Britain for his Government, and the other copy to be handed to the Representative of the United States of Brazil for his Government.

X. The High Contracting Parties engage to accept the decision pronounced by the Arbitrator as a full, perfect, and final settlement of the question referred to him.

XI. The High Contracting Parties agree that the Indians and other persons living in any portion of the disputed territory, which may by the award of the Arbitrator be assigned either to the Colony of British Guiana or to the United

States of Brazil shall, within eighteen months of the date of the award, have the option of removing into the territory of Brazil or of the Colony, as the case may be, themselves, their families, and their movable property, and of freely disposing of their immovable property, and the said High Contracting Parties reciprocally undertake to grant every facility for the exercise of such option.

XII. Each Government shall provide for the expense of preparing and submitting its Case. Any expenses connected with the arbitral proceedings shall be defrayed by the two Parties in equal moieties.

XIII. The present Treaty, when duly ratified, shall come into force immediately after the exchange of ratifications, which shall take place in the city of Rio de Janeiro within four months from this date, or sooner if possible.

IN FAITH WHEREOF WE, the respective Plenipotentiaries, have signed this Treaty and have hereunto affixed our seals.

DONE in duplicate at London, the 6th day of November, 1901.

[L.S.] LANSDOWNE.

[L.S.] Joaquim NABUCO.

DECLARATION

The Plenipotentiaries on signing the foregoing Treaty declare, as part and complement of it and subject to the ratification of the same, that the High Contracting Parties adopt as the frontier between the Colony of British Guiana and the United States of Brazil the watershedline between the Amazon basin and the basins of the Corentyne and the Essequibo from the source of the Corentyne to that of the Rupununi, or of the Takutu, or to a point between them, according to the decision of the Arbitrator.

[L.S.] LANSDOWNE.

[L.S.] Joaquim NABUCO.

AWARD OF HIS MAJESTY THE KING OF ITALY WITH REGARD TO THE BOUNDARY BETWEEN THE COLONY OF BRITISH GUIANA AND THE UNITED STATES OF BRAZIL. GIVEN AT ROME, JUNE 6, 1904 [1] [2]

Détermination de l'étendue du territoire qui peut être à bon droit réclamée par quelqu'une des deux Parties, et fixation de la ligne frontière entre la colonie de la Guyane anglaise et des Etats-Unis du Brésil—Application à l'affaire de certains principes du droit international régissant l'acquisition de la souveraineté sur un territoire *nullius*.

We, Victor Emmanuel, by the grace of God and the will of the people, King of Italy, Arbitrator in the matter of deciding the question of the frontier between British Guiana and Brazil.

His Majesty the King of the United Kingdom of Great Britain and Ireland, Emperor of India, and the President of the United States of Brazil, having, in the Treaty concluded between them in London on the 6th November, 1901, decided to invite Us as Arbitrator, to settle the question of the frontier of British Guiana and Brazil, We have accepted the task of defining the limits of the frontier.

The High Contending Parties having undertaken, in the above-mentioned Treaty which was ratified at Rio de Janeiro on the 28th January, 1902, to accept our arbitral decision as a complete, perfect, and definitive settlement of the question referred to Us, We, wishing to act in a manner corresponding to the trust reposed in Us by the said Parties, have examined carefully all the memoranda and all the documents produced to Us, and have weighed and duly considered the reasons on which each of the High Contracting Parties founds its claim.

Having taken due note of everything, We have considered:—

That the discovery of new channels of trade in regions not belonging to any State cannot by itself be held to confer an effective right to the acquisition of the sovereignty of the said regions by the State whose subjects the persons who in their private capacity make the discovery may happen to be;

That to acquire the sovereignty of regions which are not in the dominion of any State, it is indispensable that the occupation be effected in the name of the State which intends to acquire the sovereignty of those regions;

That the occupation cannot be held to be carried out except by effective, uninterrupted, and permanent possession being taken in the name of the State, and that a simple affirmation of rights of sovereignty or a manifest intention to render the occupation effective cannot suffice;

That the effective possession of a part of a region, although it may be held to confer a right to the acquisition of the sovereignty of the whole of a region which constitutes a single organic whole, cannot confer a right to the acquisition

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[1] *Parliamentary Paper*, Brazil No. 1 (1904).

[2] *British and Foreign State Papers*, Vol. XCIX, p. 930.

of the whole of a region which, either owing to its size or to its physical configuration, cannot be deemed to be a single organic whole *de facto*:

That consequently, all things duly considered, it cannot be held that Portugal in the first instance, and Brazil subsequently have effectively taken possession of all the territory in dispute, but that it can only be recognized that they have possession of some places in the same, and have there exercised their sovereign rights.

On the other hand, We have had under our consideration —

That the arbitral Judgment of the 3rd October, 1899,[1] delivered by the Anglo-American Tribunal, which, when deciding the boundary between Great Britain and Venezuela, adjudged to the former the territory which constitutes the subject of the present dispute, cannot be cited against Brazil, which was unaffected by that Judgment;

That, however, the right of the British State as the successor to Holland, to whom the Colony belonged, is based on the exercise of rights of jurisdiction by the Dutch West India Company, which, furnished with sovereign powers by the Dutch Government, performed acts of sovereign authority over certain places in the zone under discussion, regulating the commerce carried on for a long time there by the Dutch, submitting it to discipline, subjecting it to the orders of the Governor of the Colony, and obtaining from the natives a partial recognition of the power of that official;

That like acts of authority and jurisdiction over traders and native tribes were afterwards continued in the name of British sovereignty when Great Britain came into possession of the Colony belonging to the Dutch;

That such effective assertion of rights of sovereign jurisdiction was gradually developed and not contradicted, and, by degrees, became accepted even by the independent native tribes who inhabited these regions, who could not be considered as included in the effective dominion of Portuguese, and later on of Brazilian, sovereignty;

That in virtue of this successive development of jurisdiction and authority the acquisition of sovereignty on the part of Holland first, and Great Britain afterwards, was effected over a certain part of the territory in dispute;

That it does not appear from the documents produced to Us, which have been weighed and duly considered, that there are historical and legal claims on which to found thoroughly determined and well-defined rights of sovereignty in favour of either of the contending Powers over the whole territory in dispute, but only over certain portions of the same;

That not even the limit of the zone of territory over which the right of sovereignty of one or of the other of the two Parties may be held to be established can be fixed with precision;

That it cannot either be decided with certainty whether the right of Brazil or of Great Britain is the stronger.

In this condition of affairs, since it is our duty to fix the line of frontier between the dominions of the two Powers, We have come to the conclusion that, in the present state of the geographical knowledge of the region, it is not possible to divide the contested territory into two parts equal as regards extent and value, but that it is necessary that it should be divided in accordance with the lines traced by nature, and that the preference should be given to a frontier which, while clearly defined throughout its whole course, the better lends itself to a fair decision of the disputed territory.

For these reasons, We decide:—

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[1] *Ibid.*, Vol. XCII, p. 160.

The frontier between British Guiana and Brazil is fixed by the line leaving Mount Yakontipu; it follows eastwards the watershed as far as the source of the Ireng (Mahu); it follows the downward course of that river as far as its confluence with the Takutu; it follows the upward course of the Takutu as far as its source, where it joins again the line of frontier determined in the Declaration annexed to the Treaty of Arbitration concluded in London by the High Contending Parties on the 6th November, 1901.

In virtue of this declaration every part of the zone in dispute which is to the east of the line of frontier shall belong to Great Britain, and every part which is to the west shall belong to Brazil.

The frontier along the Ireng (Mahu) and Takutu is fixed at the " thalweg " and the said rivers shall be open to the free navigation of both conterminous States.

Wherever the watercourse may be divided into more than one branch, the frontier shall follow the " thalweg " of the most eastern branch.

GIVEN at Rome on the 6th June, 1904.

VICTOR EMMANUEL.

SAN DOMINGO IMPROVEMENT COMPANY CLAIMS

PARTIES: Dominican Republic, United States of America.

COMPROMIS: Protocol of 31 January 1903.

ARBITRATORS: Arbitral Commission: John G. Carlisle, Manuel de J. Galvan, George Gray.

AWARD: 14 July, 1904.

Arbitration arising out of financial difficulties in the relations between the Government of the Dominican Republic on the one hand and the *San Domingo Improvement Company* and other allied American companies on the other hand — Claim of the United States Government on behalf of the American companies — Conclusion of a protocol of arbitration according to which the Parties agreed on the withdrawal from the Republic of the American companies in consideration of a fixed indemnity for the relinquishment of the property rights and interests of these companies, and also on the constitution of an arbitral commission charged with the task of deciding the method of payment of the indemnity — Determination by the award of the time of the delivery of the properties in question, of the rate of interest, and of the amount of the monthly instalments and the security and mode of their collection.

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SYLLABUS [1]

The San Domingo Improvement Company with its allied companies (hereinafter referred to as " the Company ") was incorporated in 1892 under the laws of New Jersey to assume the functions of fiscal agents of the Dominican Republic then exercised by Westendorp and Co., of Amsterdam. The status of the Company was confirmed by the Dominican Republic in March 1893 and supplemented between then and January 1901 by numerous transactions between the Company and the Republic. All manner of operations connected with bond issues on behalf of the Dominican Republic were conducted by the Company which administered the servicing of the public debt of the Republic.

In July 1899 measures of fiscal reorganization were under consideration as a result of the inadequacy of the source of revenue established for the service of the debt. At that time a number of difficulties and differences of a financial nature affected relations between the Dominican Republic and the Company. Attempts to improve matters by the negotiation in April 1900 and March 1901 of revised contractual arrangements proved unsuccessful. After inconclusive efforts to agree upon terms for the withdrawal of the Company from the Dominion Republic, during which the assistance of the United States Government was sought by the Company, agreement was reached between the Governments of the Dominican Republic and the United States by the signature of a Protocol at San Domingo on 31 January 1903.

Provision was made in the Protocol for the indemnification of the Company by the Dominican Republic for the relinquishment of all the rights, properties and interests of the Company for the round sum of $4,500,000, and for the referral to an arbitral commission of the question of determining the terms under which such relinquishment and indemnification should be effected.

In accordance with article 1 of the Protocol, the arbitral commission consisted of three arbitrators: John G. Carlisle, named by the President of the United States; Don Manuel de J. Galvan, named by the Dominican Republic; and G. Gray, a member of the United States Circuit Court of Appeals, as third arbitrator, by nomination of the President of the Dominican Republic.

The arbitrators met in Washington in December, 1903, and rendered their award on 14 July, 1904.

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[1] Jacob H. Hollander, "Debt of Santo Domingo ", 1905, pp. 20-22.

PROTOCOL OF AN AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE DOMINICAN REPUBLIC, FOR THE SUBMISSION TO ARBITRATION OF CERTAIN QUESTIONS AS TO THE PAYMENT OF THE SUM HEREINAFTER AGREED TO BE PAID BY THE DOMINICAN GOVERNMENT TO THE GOVERNMENT OF THE UNITED STATES ON ACCOUNT OF THE CLAIMS OF THE SAN DOMINGO IMPROVEMENT COMPANY OF NEW YORK, A CORPORATION UNDER THE LAWS OF THE STATE OF NEW JERSEY AND A CITIZEN OF THE UNITED STATES AND ITS ALLIED COMPANIES, SIGNED AT SANTO DOMINGO CITY, 31 JANUARY 1903 [1]

WHEREAS, differences exist between the Dominican Government and the " San Domingo Improvement Company " and its allied companies; and

WHEREAS, as the result of those differences, the interests of the Improvement Company and its allied companies, viz: " The San Domingo Finance Company of New York ", " The Company of The Central Dominican Railway ", both being corporations created under the laws of New Jersey, and the National Bank of San Domingo, a company originally organized under a French charter, the two latter companies being owned and controlled by the San Domingo Finance Company, are seriously affected; and

WHEREAS, it is agreed, as the basis of the present settlement, that the Improvement Company and its allied Companies shall withdraw from the Dominican Republic, and that they shall be duly indemnified by the latter for the relinquishment of their rights, properties and interests.

The United States of America and the Dominican Republic through their respective representatives, W. F. Powell, Chargé d'Affaires, and Juan Fco. Sánchez, Secretary of State for Foreign Relations, have agreed upon the following articles:

I

It being hereby agreed that the Dominican Government shall pay to the Government of the United States the sum of $4,500,000 (four millions five hundred thousand dollars), in American gold, on terms to be fixed by the arbitrators, said payment to be made and accepted as full indemnity for the relinquishment by the companies above-mentioned of all their rights, properties and interests, and in full settlement of all accounts, claims and differences between the Dominican Government and the said companies; the terms on which the indemnity thus agreed upon shall be paid shall be referred to a board of three arbitrators, one to be named by the President of the United States, one by the President of the Dominican Republic, and the third by the President of the United States and the President of the Dominican Republic jointly; but

[1] *Papers Relating to the Foreign Relations of the United States*, December 6, 1904, Washington, Government Printing Office, 1905, p. 270.

if, within sixty days after the signature of the present protocol, the third arbitrator shall not have been so named, he shall then be selected by the Dominican Government from members of the United States Supreme Court or the United States Circuit Court of Appeals, from names presented.

In case of the death, absence or incapacity of any arbitrator, or in the event of his ceasing or omitting to act, the vacancy shall be filled in the same manner as the original appointment, the period of sixty days to be calculated from the date of the happening of the vacancy.

II

The arbitrators shall meet in the city of Washington, within sixty days after the date of the appointment of the third arbitrator.

The vote of the majority shall suffice for the decision of all questions submitted to the tribunal, including the final award.

III

Within six months after the signature of this protocol, each party shall present to the other and to its agent, and also to each of the arbitrators, two printed copies of its case, accompanied with the documents and evidence on which it relies, together with the affidavits of their respective witnesses.

Within a further period of two months, either party may, in like manner, present a counter-case, with additional documents and evidence and affidavits, in reply to the case, documents and evidence of the other party.

If the other party shall, in its case or counter-case, refer to any document in its exclusive possession without annexing a copy, it shall, upon the request of the other party, furnish the latter with a copy; and either party may call upon the other through the arbitrators, to produce the originals or certified copies of any papers adduced as evidence.

IV

Within two months after the expiration of the term allowed for the filing of counter-cases, each Government may, by its agent, as well as by additional counsel, argue its cause before the arbitrators, both orally and in writing. Each side shall furnish to the other copies of any written arguments, and each party shall be at liberty to make a written reply, provided that such reply be submitted within the two months specified.

V

The Companies above mentioned shall cede and transfer to the Dominican Government, and the latter shall acquire from the Companies, the properties mentioned herein, the times, terms and conditions of the delivery of which shall be fixed by the arbitrators:

1. All the rights and interests which they may possess in the section of the Central Dominican Railway already constructed, as well as all rights and interests which they may have in the extension of the railways from Santiago to Moca, and from Moca to San Francisco de Macoris.

2. All rights and interests which they may have in the National Bank.

3. All bonds of the Republic of which they may be the holders, the amount of which shall not exceed £850,000, nominal (eight hundred and fifty thousand

sterling pounds), and shall be no less than £825,000 (eight hundred and twenty five thousand sterling pounds nominal).

It is understood that all these bonds are of the class bearing four per cent, annual interests excepting as to £24,000 (twenty four thousand sterling pounds) two and three-quarter per cent bonds, which shall be accepted at the rate of sixteen 2¾% bonds for eleven 4% bonds. A list of the bonds shall accompany the case of the United States.

VI

It is agreed, as the basis of the award to be made by the arbitrators, that the sum specified in Article I hereof shall be paid in monthly instalments, the amount and manner of collection of which shall be fixed by the tribunal. The award shall bear interest from the date of its rendition at the . . . . . .[1]

The Dominican Government having, in its recent negotiations with the American Companies, proposed to pay, on account of its indebtedness to them, a minimum sum of $225,000 (two hundred and twenty five thousand dollars) per annum, which was to be increased on a sliding scale, it is agreed that the Dominican Government shall, pending the present arbitration, and beginning with the 1st of January 1903, pay to the Government of the United States for the use of the American Companies, the sum of $225,000 (two hundred and twenty five thousand dollars) per annum, in equal monthly instalments, the aggregate amount so paid, at the date of the award, to be taken into account by the arbitrators.

VII

The award of the tribunal shall be rendered within a year from the date of the signature of the present protocol. It shall be in writing, and shall be final and conclusive.

VIII

Reasonable compensation to the arbitrators for their services and all expenses incident to the arbitration, including the cost of such clerical aid as may be necessary, shall be paid by the Governments in equal moieties.

DONE in quadruplicate, in English and Spanish, at San Domingo City, this 31st day of January 1903.

[SEAL] Jno. Fco. SÁNCHEZ
Ministro de Relaciones Exteriores

[SEAL] W. F. POWELL
Chargé d'Affaires

AGREEMENT TO THE NAMING OF ARBITRATORS

It is hereby agreed, on the part of the Dominican Government, through Juan Francisco Sánchez, Secretary of State for Foreign Relations, and the

[1] In the Award given at Washington on July 14, 1904, it was provided (Article 2) that the principal sum, and any and all balances thereof, should bear interest at the rate of 4 per cent, per annum. See *infra*, p. 37.

Chargé d'Affaires of the United States of North America, in the person of W. F. Powell, each acting for his respective Government, agree that neither of the signatory parties to this Protocol for International Arbitration, to which has been referred certain disagreements existing between the Dominican Government on the one side, and the Santo Domingo Improvement Company on the other, shall name its Arbitrator as stated in said Protocol, until after a period of ninety (90) days from the date of signing the same, in order to allow the Dominican Government to come to an agreement with the Santo Domingo Improvement Company, and the date referred to in the appointment of the third Arbitrator shall bear same as that expressed above.

To the above we agree, and with good faith to carry the same into effect, have hereunto affixed our names and attached thereto the Seals of our respective Offices.

DONE this 31st Day of January, 1903

[SEAL] JNO. FCO. SÁNCHEZ
Secertary of State for Foreign Relations
of the Republic of San Domingo

[SEAL] W. F. POWELL
Chargé d'Affaires of the United States of North America

AWARD OF THE COMMISSION OF ARBITRATION UNDER THE PROVISIONS OF THE PROTOCOL OF JANUARY 31, 1903, BETWEEN THE UNITED STATES OF AMERICA AND THE DOMINICAN REPUBLIC, FOR THE SETTLEMENT OF THE CLAIMS OF THE SAN DOMINGO IMPROVEMENT COMPANY OF NEW YORK AND ITS ALLIED COMPANIES, 14 JULY 1904 [1]

Arbitrage ayant pour origine des difficultés d'ordre financier survenues entre le gouvernement dominicain et la *San Domingo Improvement Company* ainsi que d'autres compagnies américaines, alliées de celle-ci — Réclamation du gouvernement des Etats-Unis d'Amérique pour le compte des compagnies américaines — Conclusion d'un protocole d'arbitrage par lequel les Parties conviennent du retrait des compagnies américaines de la République dominicaine, moyennant une indemnité déterminée pour l'abandon que ces compagnies font de leurs droits de propriété et intérêts, ainsi que de la constitution d'une commission arbitrale chargée de décider du mode de payement de cette indemnité — Détermination par la sentence de l'époque de la remise des propriétés, de la quotité de l'intérêt, du montant des versements mensuels et des garanties et forme de la perception.

WHEREAS, by a Protocol of Agreement between the United States of America and the Dominican Republic, concluded at Santo Domingo City, January 31, 1903, it was agreed that the Dominican Government should pay to the Government of the United States the sum of four million, five hundred thousand dollars ($4,500,000) in American gold, as full indemnity for the relinquishment by The San Domingo Improvement Company of New York, The San Domingo Finance Company of New York, The Company of the Central Dominican Railway and the National Bank of San Domingo, of all their rights, properties and interests and in full settlement of all accounts, claims and differences between the Dominican Government and the said Companies, and that the terms, on which the indemnity thus agreed upon should be paid, should be referred to a board of three arbitrators, one to be named by the President of the United States, one by the President of the Domincian Republic and the third by the President of the United States and the President of the Dominican Republic jointly, or, in case they should fail to so name him, by the President of the Dominican Republic from certain specified members of the United States Supreme Court or the United States Circuit Court of Appeals;

WHEREAS, for the purpose of carrying into effect the said Protocol, the undersigned arbitrators were appointed, viz: By the President of the United States, John G. Carlisle; by the President of the Dominican Republic, Don. Manuel de J. Galvan; and, as third arbitrator, by nomination of the President of the Dominican Republic, George Gray, one of the specified members of the United States Circuit Court of Appeals; and

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[1] *Papers Relating to the Foreign Relations of the United States*, December 6, 1904, Washington, Government Printing Office, 1905, p. 274.

WHEREAS, the said arbitrators, duly organized under the said Protocol as a Board of Arbitration, have received and considered the cases and countercases and the arguments filed thereunder by the contracting parties through their respective agents and counsel;

The Board of Arbitration does now adjudge and award, as the terms on which the indemnity above mentioned shall be paid and the times, terms and conditions on which the aforesaid Companies shall relinquish all their rights, properties and interests, mentioned in Article V of said Protocol, and withdraw from the Dominican Republic, thus constituting a full settlement of all accounts, claims and differences between the Dominican Government and the said Companies, the following:—

Article 1. Time of Delivery of Properties

(*a*) Within ninety days from the making of this award, all rights and interests which the said Companies have in the National Bank of San Domingo, consisting of Six thousand three hundred and thirty-eight (6,338) shares of the capital stock thereof, shall be delivered by said Companies to the Dominican Government, on said Government giving to the Companies a release by the Bank of all claims against them.

(*b*) When the Dominican Government shall have paid to the United States the sum of One Million Five hundred thousand dollars ($1,500,000), part of said principal debt, the said Companies shall deliver to the Dominican Government all the shares of the Company of the Central Dominican Railway, which shall represent, include and carry, all the rights and interests in said Railway referred to in paragraph 1 of Article V of said Protocol, and will simultaneously deliver over the full possession of said Railway, which shall be free of all debts, fixed or floating, of the said Companies, and which shall be at least in as good condition physically as it now is, less wear and tear and damage by accident or acts of God or public disturbance or the foreign enemy.

The cost of restoring the Railway from damage occurring in the meantime from any of such causes, shall be first chargeable upon the net profits of the year, and any excess of such cost shall be paid by the Dominican Government out of its Treasury in the same manner as hereinafter described in Article 4.

If such payment of One Million Five hundred thousand dollars ($1,500,000), or any part thereof, shall be made by the Government, other than by the monthly instalments hereinafter provided, such monthly instalments shall nevertheless continue as herein provided.

(*c*) When the principal of said debt of Four Million Five hundred thousand dollars ($4,500,000) shall have been reduced to Two Million Seventy-six thousand Six hundred and thirty-five dollars ($2,076,635), then shall begin the delivery of the bonds of the Dominican Republic mentioned in paragraph 3 of Article V of the Protocol of the amount of Eight hundred and thirty thousand Six hundred and fifty-four pounds sterling (£830,654). The bonds to be delivered shall not include any of the Three hundred and fifty-one thousand Four hundred pounds sterling (£351,400) of Unified Scrip, admitted by the Companies to be the property of the Dominican Republic and heretofore tendered by the Companies to the Dominican Government, under the provisions of Article 6 of the contract of April 18, 1900; and the said Three hundred and fifty-one thousand Four hundred pounds sterling (£351,400) of Unified Scrip shall be delivered to the Dominican Government within thirty days from the date of this Award. With regard to the delivery of the amount of Eight hundred and thirty thousand Six hundred and fifty-four pounds sterling

(£830,654) of bonds, exclusive of the Three hundred and fifty-one thousand Four hundred pounds sterling (£351,400) admitted to be the property of the Dominican Republic, this is understood to constitute a guarantee on the part of the Companies that there are outstanding not more than One Million One hundred and forty-eight thousand Six hundred pounds sterling (£1,148,600) of 4 per centum obligations, including French-American Reclamation Consols (stamped and unstamped), Unified 4 per centum Scrip, and the 4 per centum bonds embraced in the Eight hundred and thirty thousand Six hundred and forty-four pounds sterling (£830,654) of bonds to be delivered under this award, and that, if any bonds of the issues of 1888, 1890, or 1893, shall hereafter be presented for conversion, the Companies will protect the Dominican Government. The delivery of the bonds by said Companies to the Dominican Government shall be in monthly installments *pro rata* to the payments of principal made to the United States, so that One thousand dollars ($1,000) or Two hundred pounds sterling (£200) of bonds shall be delivered for each Five hundred dollars ($500) of principal debt paid.

Article 2. Rate of Interest

The principal sum of Four Million Four hundred and eighty-one thousand Two hundred and fifty dollars ($4,481,250) and any and all balances thereof due and payable to the United States by the Dominican Government shall bear interest from the date of this award, at the rate of four per centum per annum. All payments made shall be applied first to the interest accrued.

Article 3. Amount of Monthly Instalments

Said principal and interest shall be payable in monthly instalments of Thirty-seven thousand Five hundred dollars ($37,500) each, during the first two years, and of Forty-one thousand Six hundred and sixty-six dollars and sixty-six cents ($41,666.66) each, thereafter, to the Financial Agent of the United States, on the first day of each month, beginning with the month of September, 1904, and shall be made in gold coin or currency of the United States, or in such good bills of exchange as shall be acceptable to said Agent. In the former case, the cost of shipment to New York, and in the latter case the discount to maturity and charges incident to the collection of such bills of exchange, shall be added to the amount of the monthly instalment.

The net profits of the operation of said Railway, until its delivery under Article I hereof, during each year, beginning from the first day of July, 1904, as shall annually be stated by its General Manager, shall be and constitute a further credit upon said principal debt.

Article 4. Security and Mode of Collection

Security: The said debt and interest and the monthly payments thereof, as herein determined, shall be secured as follows:—

The Customs Revenues and Port Dues of the ports of entry or custom houses of Puerto Plata, Sánchez, Samaná and Montecristy, and of all other ports of entry or custom houses now existing or which may hereafter be established, on the coast or in the interior, north of eighteen degrees and forty-five minutes of North Latitude, and east of the Haitian boundary, are hereby assigned and designated as security for the payment of the debt and interest herein mentioned.

Until payment of said debt and interest, the tariff of Customs Duties and Port Dues now prevailing shall not be reduced in any case or to any person more than twenty per centum, without the consent of the United States.

The said debt and interest shall also constitute a first lien upon the Central Dominican Railway, until its delivery to the Dominican Republic as provided in this award.

Mode of Collection: The United States shall appoint a Financial Agent, who shall establish an office in the Dominican Republic.

In case of failure to receive during any month the sum then due, the said Financial Agent shall have full power and authority by himself or by his appointees, to forthwith enter into possession of the Custom House at Puerto Plata in the first instance, and to assume charge of the collection of the Customs Duties and Port Dues at that port, and, to that end, shall fix and determine those Duties and Dues and enforce their payment, possessing and exercising all the present powers of the " Interventor de Aduana " and of the " Administrador de Hacienda " and of all other officials authorized by law to participate in the collection and determination of Duties and Dues and the enforcement of their payment.

Said Financial Agent shall have power from time to time to appoint subordinate officials and employees. The Customs Duties and Port Dues shall be paid to him or to his appointees directly by the exporters and importers or other persons liable therefor in cash or in *pagarés* drawn to the order of said Financial Agent or his appointees, and such payment, and such payment alone, shall operate as a release of the goods and as a discharge of such importers and exporters and other persons from the liability for payment of such Customs Duties and Port Dues.

The Dominican Government may appoint such officials as it may deem proper for the purpose of inspecting the collection of duties.

Out of the sums collected by the Financial Agent and his appointees the said Agent shall pay in the following order:

(*a*) The expenses of collection.

(*b*) The Special Apartados, as follows: —

Port of Puerto Plata:

Wharf Concession;
Freight Concession;
Personal duties;
Old Foreign Debt, one and one-half ($1^1/_2$) per centum of import duties;
Colon, one-half ($^1/_2$) per centum of import and export duties.

Port of Samaná:

Wharf Concession;
Old Foreign Debt, one and one-half ($1^1/_2$) per centum of import duties;
Colon, one-half ($^1/_2$) per centum on import and export duties.

Port of Sánchez:

Wharf Concession;
Samaná-Santiago railway concession, seven (7) per centum of import duties;
Macoris branch railway concession, two (2) per centum of customs receipts;
Old Foreign Debt, one and one-half ($1^1/_2$) per centum of import duties;
Colon, one-half ($^1/_2$) per centum import and export duties.

Port of Montecristy:

Improvement River Yaque Concession;
" Gobernación ";
Old Foreign Debt, one and one-half ($1^1/_2$) per centum of import duties;
Colon, one-half ($^1/_2$) per centum of import and export duties.

(*c*) The sums due under this Award.

(*d*) " Deuda Flotante Interior " and " Deuda Flotante Vicini," each five (5) per centum.

The excess, if any, after said payments, shall be paid over by said Financial Agent to the Minister of Hacienda of the Dominican Government at the time recognized by the United States or to his order. And the said Financial Agent shall render monthly an account of his collections and disbursements to the said Minister of Hacienda. He shall not be obstructed in the peaceful exercise of his duties under this Award.

In case the sums collected at Puerto Plata shall at any time be insufficient for the payment of the amounts due hereunder, or in case of any other manifest necessity, or if the Dominican Government shall so request, the said Financial Agent or his appointees shall have and exercise at Sánchez, Samaná and Montecristy, and at any or all of the ports of entry or custom houses within the territorial limits above described, all the rights and powers vested in him or them by this Award in respect of the port of Puerto Plata.

This possession, power and duty shall continue until six months after all arrears hereunder shall have been paid, and further, until the Dominican Government requests the restoration of the *status quo ante*; but said Financial Agent and his appointees shall re-enter said custom houses and resume the exercise of all the powers and authority as above described, at any subsequent time when a like default in payment shall be made by the Dominican Government.

To the end that the capacity of the Dominican Republic punctually to make the payments required by this Award shall not hereafter be impaired, the Financial Agent herein mentioned shall act as Financial Adviser to the Dominican Government, in all matters affecting its ability to pay this Award.

Article 5

In the month of January in each year the Dominican Government shall make up, in accord with the Financial Agent herein mentioned, a statement showing the total fiscal revenues of the Republic for the preceding year.

Article 6

The salaries and necessary traveling and other expenses of the Financial Agent and his appointees shall be paid by the Dominican Government in monthly instalments in the same manner and with the same security as the monthly instalments of debt provided herein by Article 4.

Article 7

In addition to the monthly instalment of Thirty-seven thousand five hundred dollars ($37,500) provided for in Article 3, there shall be paid to the Financial Agent, during the month of August, 1904, a sum sufficient to pay an equal moiety of the compensation of the arbitrators, and an equal moiety of all expenses of this arbitration, being the amount for which the Dominican Republic is liable, under Article VIII of the Protocol, which amounts shall be certified to the Dominican Government by the Department of State of the United States of America.

And in case of the failure to pay said amount, or any part thereof, during the said month of August, the Financial Agent shall have and exercise in the collection thereof, the same powers as hereinbefore conferred upon him in

case of default in the payment of the said monthly instalments on the principal and interest of said debt.

This Award is given and rendered at Washington, on this fourteenth day of July, in the year one thousand nine hundred and four.

IN WITNESS WHEREOF, we have hereunto affixed our hands and seals.

[SEAL] Geo. GRAY
President

[SEAL] John G. CARLISLE

[SEAL] Manuel DE J. GALVAN

AFFAIRE DE L'IMPOT JAPONAIS SUR LES BATIMENTS

PARTIES: Allemagne, France, Grande-Bretagne et Japon.

COMPROMIS: Protocoles du 28 août 1902.

ARBITRES: Cour permanente d'arbitrage: Gregers Gram; Louis Renault; Itchiro Motono.

SENTENCE: 22 mai 1905.

DOCUMENTS ADDITIONNELS: Traités de commerce et de navigation en date des 16 juillet 1894, 4 avril 1896 et 4 août 1896.

Interprétation des dispositions pertinentes des traités ainsi que d'autres engagements internationaux en vigueur entre les Parties.

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APERÇU [1]

Cette affaire eut son origine dans la juridiction extraterritoriale maintenue à l'égard des ressortissants de nations étrangères ayant résidé au Japon avant 1894. En vertu des traités conclus avec la Grande-Bretagne, l'Allemagne et la France, portant respectivement les dates du 16 juillet 1894 [2], du 4 avril 1896 [3], et du 4 août 1896 [4], cette coutume fut abandonnée, le Japon consentant à destiner, pour les louer à bail perpétuel aux citoyens ou aux sujets de nations étrangères, certains terrains situés dans divers ports ouverts. Il fut stipulé qu'aucune obligation, autre que les obligations contenues dans les baux, ne devait être imposée aux propriétés de cette nature. En conséquence, aucun impôt ou charge, autre que ceux expressément mentionnés dans les baux, ne fut payé pour des usages municipaux ou autres, pendant une série d'années après la conclusion des traités. Toutefois, les Japonais adoptèrent finalement l'opinion que les baux n'avaient rapport qu'aux terrains nus, et qu'ils ne comprenaient pas les bâtiments et les autres travaux d'amélioration. Les Gouvernements intéressés refusèrent d'accepter les vues du Japon et la question fut soumise, en vertu du compromis du 28 août 1902 [5], à un tribunal composé de membres de la Cour permanente d'arbitrage de La Haye: M. Grègers Gram, de Norvège, M. Louis Renault, de France, et M. Itchiro Motono, du Japon. Les séances commencèrent le 21 novembre 1904, et furent terminées le 15 mai 1905. La sentence fut rendue le 22 mai 1905. En raison d'une décision obtenue par la majorité des voix, et signée par les membres français et norvégien, le Tribunal déclara:

Les dispositions des traités et autres engagements mentionnés dans les protocoles d'arbitrage n'exemptent pas seulement les terrains possédés en vertu des baux perpétuels concédés par le Gouvernement japonais, ou en son nom, mais elles exemptent les terrains et les bâtiments de toute nature construits ou qui pourraient être construits sur ces terrains, de tous impôts, taxes, charges, contributions, ou conditions quelconques autres que ceux expressément stipulés dans les baux en question.

Le membre japonais du Tribunal d'Arbitrage constata son dissentiment au sujet de cette décision, et maintint les prétentions de son Gouvernement.

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[1] J. B. Scott, Dotation Carnegie pour la Paix Internationale, *Les Travaux de la Cour permanente d'arbitrage de La Haye*, New-York, Oxford University Press, 1921, p. 79.

[2] Voir *infra*, p. 56.

[3] Voir *infra*, p. 57.

[4] Voir *infra*, p. 58.

[5] Voir *infra*, p. 47.

PROTOCOLE [1] ENTRE LA FRANCE ET LE JAPON POUR SOUMETTRE À UN ARBITRAGE CERTAINES QUESTIONS CONCERNANT L'INTERPRÉTATION DES TRAITÉS AVEC LE JAPON RELATIVEMENT AUX BAUX À PERPÉTUITÉ, SIGNÉ À TOKYO LE 28 AOÛT 1902 [2]

ATTENDU qu'un désaccord s'est produit entre le Gouvernement du Japon d'une part, et les Gouvernements de France, d'Allemagne et de Grande-Bretagne d'autre part, touchant le sens réel et la portée des dispositions suivantes des Traités respectifs et autres engagements existant entre eux, c'est-à-dire:

Paragraphe 4 de l'Article XVIII du Traité de Commerce et de Navigation du 4 avril 1896 entre le Japon et l'Allemagne: « Sobald diese Einverleibung erfolgt » [c'est-à-dire: quand les divers quartiers étrangers qui existent au Japon auront été incorporés dans les Communes respectives du Japon], « sollen die bestehenden, zeitlich unbegrenzten Ueberlassungverträge, unter welchen jetzt in den gedachten Niederlassungen Grundstücke besessen werden, bestätigt und hinsichtlich dieser Grundstücke sollen keine Bedingungen irgend einer anderen Art auferlegt werden, als sie in den bestehenden Ueberlassungsverträgen enthalten sind » [3], et paragraphe 3 de la communication complémentaire de même date du Secrétaire d'État des Affaires Etrangères de l'Empire d'Allemagne au Ministre du Japon à Berlin: « 3. dass, da das Eigenthum an den im Artikel XVIII des Vertrages erwähnten Nierderlassungsgrundstücken dem Japanischen Staate verbleibt, die Besitzer oder deren Rechtsnachfolger für ihre Grundstücke ausser dem kontraktmässigen Grundzins Abgaben oder Steuern irgend welcher Art nicht zu entrichten haben werden » [4], et l'alinéa suivant de la réponse du Ministre du Japon de même date à la précédente communication: « dass die darin unter Nummer 1 bis 4 zum Ausdruck gebrachten Voraussetzungen, welche den Erwerb dinglicher Rechte an Grundstücken, die Errichtung von Waarenhäusern, dir Steuerfreiheit der Grundstücke in den Fremdenniederlassungen und die Erhaltung wohlerworbener Rechte nach Ablauf des Vertrages zum Gegenstande haben, in allen Punkten zutreffend sind; » [5]

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Recueil des actes et protocoles concernant le litige entre l'Allemagne, la France et la Grande-Bretagne, d'une part, et le Japon, d'autre part*, etc., p. 9.

[2] Des protocoles analogues entre la Grande-Bretagne et le Japon, et entre l'Allemagne et le Japon furent également signés le 28 août 1902 (*ibid.*, p. 5 et 13).

[3] Pour le texte de l'article XVIII de ce traité, voir *infra*, p. 57.

[4] *Traduction:* Que, vu que la propriété des quartiers mentionnés à l'article XVIII du dit traité reste au Gouvernement du Japon, les propriétaires ou leurs successeurs légitimes ne sont tenus de payer ni d'impôts ni de taxes d'aucune espèce, sauf la rente foncière contractuelle (J. B. Scott, Dotation Carnegie pour la Paix Internationale, *Les travaux de la Cour Permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 89).

[5] *Traduction:* Que les explications y insérées sous les numéros 1-4, qui traitent de l'acquisition des droits réels quant aux propriétés foncières, de la construction de

Paragraphe 4 de l'Article XXI du Traité revisé du 4 août 1896 entre le Japon et la France: « Lorsque les changements ci-dessus indiqués auront été effectués » [c'est-à-dire: lorsque les divers quartiers étrangers qui existent au Japon auront été incorporés aux Communes respectives du Japon et feront dès lors partie du système municipal du Japon; et lorsque les Autorités Japonaises compétentes auront assumé toutes les obligations et tous les devoirs municipaux, et que les fonds et biens municipaux qui pourraient appartenir à ces quartiers auront été transférés aux dites autorités], « les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés, et les propriétés de cette nature ne donneront lieu à aucuns impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dans les baux en question »;

Paragraphe 4 de l'Article XVIII du Traité revisé du 16 juillet 1894 entre le Japon de la Grande-Bretagne: « When such incorporation takes place » [c'est-à-dire: quand les divers quartiers étrangers qui existent au Japon auront été incorporés aux Communes respectives du Japon], « existing leases in perpetuity under which property is now held in the said Settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property »; [1]

ATTENDU que le litige n'est pas susceptible d'être réglé par la voie diplomatique;

ATTENDU que les Puissances en désaccord, co-Signataires de la Convention de La Haye pour le règlement pacifique des conflits internationaux, ont résolu de terminer ce différend, en soumettant la question à un arbitrage impartial suivant les stipulations de la dite Convention;

Les dites Puissances ont, dans le but de réaliser ces vues, autorisé les Représentants ci-dessous désignés, à savoir:

Le Gouvernement Français: M. G. Dubail, Ministre Plénipotentiaire, Chargé d'Affaires de la République Française;

Le Gouvernement Allemand: M. le Comte d'Arco Valley, Envoyé Extraordinaire et Ministre Plénipotentiaire de Sa Majesté l'Empereur d'Allemagne, Roi de Prusse;

Le Gouvernement de Grande-Bretagne: Sir Claude Maxwell MacDonald, G.C.M.G., K.C.B., Envoyé Extraordinaire et Ministre Plénipotentiaire de Sa Majesté le Roi de Grande-Bretagne;

Le Gouvernement du Japon: M. le Baron Komura Jutaro, Ministre des Affaires Etrangères de Sa Majesté l'Empereur du Japon:

à conclure le Protocole suivant:

I. Les Puissances en litige décident que le Tribunal Arbitral auquel la question sera soumise en dernier ressort sera composé de trois membres pris parmi les Membres de la Cour Permanente d'Arbitrage de La Haye et qui seront désignés de la manière suivante:

Chaque Partie, aussitôt que possible, et dans un délai qui n'excédera pas deux mois à partir de la date de ce Protocole, devra nommer un Arbitre, et les deux Arbitres ainsi désignés choisiront ensemble un sur-Arbitre. Dans le cas où les deux Arbitres n'auront pas, dans le délai de deux mois après leur désignation, choisi un sur-Arbitre, Sa Majesté le Roi de Suède et Norvège sera prié de nommer un sur-Arbitre.

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magasins, de l'exemption de taxe dans les quartiers étrangers et du maintien des droits dûment acquis après l'expiration du traité, sont à tous égards convenables (*ibid*).

[1] Pour le texte de l'Article XVIII de ce traité, voir *infra*, p. 56.

II. La question en litige sur laquelle les Parties demandent au Tribunal Arbitral de prononcer une décision définitive est la suivante:

Oui ou non, les dispositions des Traités et autres engagements ci-dessus mentionnés, exemptent-elles seulement les terrains possédés en vertu des baux perpétuels concédés par le Gouvernement Japonais ou en son nom, ou bien exemptent-elles les terrains et les bâtiments de toute nature construits ou qui pourraient être construits sur ces terrains, de tous impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dans les baux en question?

III. Dans le délai de huit mois après la date de ce Protocole, chaque Partie devra remettre aux différents membres du Tribunal et à l'autre Partie, les copies complètes, écrites ou imprimées, de son Mémoire contenant toutes pièces à l'appui et arguments produits par elle au présent Arbitrage. Dans un délai de six mois au plus après cette remise, une communication semblable sera faite des copies manuscrites ou imprimées, des Contre-Mémoires, pièces à l'appui et conclusions finales des deux Parties: il est bien entendu que ces répliques, documents additionnels et conclusions finales devront se limiter à répondre au Mémoire principal et aux argumentations produites précédemment.

IV. Chaque Partie aura le droit de soumettre au Tribunal Arbitral comme instruments à faire valoir, tous les documents, Mémoires, correspondances officielles, déclarations ou actes officiels ou publics se rapportant à l'objet de l'Arbitrage et qu'elle jugera nécessaire. Mais si, dans les Mémoires, Contre-Mémoires ou arguments soumis au Tribunal, l'une ou l'autre Partie s'est référée ou a fait allusion à un document ou papier en sa possession exclusive dont elle n'aura pas joint la copie, elle sera tenue, si l'autre Partie le juge convenable, de lui en donner la copie dans les trente jours qui en suivront la demande.

V. Chacune des Parties peut, si elle le juge convenable, mais sous la réserve d'un droit de réponse de la part de l'autre Partie, dans un temps qui sera fixé par le Tribunal Arbitral, présenter, à telles fins que celui-ci jugera utiles, un état de ces objections aux Contre-Mémoires, instruments additionnels, et conclusions finales de l'autre Partie, dans le cas où ces documents ou l'un d'eux n'auraient pas trait à la question, seraient erronés ou ne se limiteraient pas à répondre strictement au Mémoire principal et à son argumentation.

VI. Ni papiers, ni communications, soit écrites, soit orales, autres que ceux prévus par les paragraphes III et V de ce Protocole ne devront être acceptés ou pris en considération dans le présent Arbitrage à moins que le Tribunal ne demande à l'une ou l'autre Partie une explication ou information supplémentaire qui devra être donnée par écrit. Dans ce cas, l'autre Partie aura le droit de présenter une réponse écrite dans un délai à fixer par le Tribunal.

VII. Le Tribunal se réunira en un lieu indiqué plus tard par les Parties, aussitôt que possible, mais ni avant deux mois, ni plus tard que trois mois à dater de la remise des Contre-Mémoires prévue au Paragraphe III de ce Protocole; il procédera avec impartialité et soin à l'examen et au jugement du litige. Le jugement du Tribunal sera prononcé autant que possible dans le délai d'un mois après la clôture par le Président des débats de l'Arbitrage.

VIII. Dans cet Arbitrage, le Gouvernement Japonais sera considéré comme étant l'une des Parties, et les Gouvernements Français, Allemand, et de la Grande-Bretagne conjointement comme étant l'autre Partie.

IX. En tout ce qui n'est pas prévu par le présent Protocole, les stipulations de la Convention de La Haye pour le règlement pacifique des conflits internationaux seront appliquées à cet Arbitrage.

FAIT à Tokio le 28 août 1902, correspondant au 28e jour du 8e mois de la 35e année de Meiji.

(Signé) G. DUBAIL

(Signé) Jutaro KOMURA

SENTENCE DU TRIBUNAL D'ARBITRAGE, CONSTITUÉ EN VERTU DES PROTOCOLES SIGNÉS À TOKYO LE 28 AOÛT 1902 ENTRE LE JAPON D'UNE PART ET L'ALLEMAGNE, LA FRANCE ET LA GRANDE-BRETAGNE D'AUTRE PART, 22 MAI 1905 [1]

ATTENDU qu'aux termes de Protocoles, signés à Tokyo le 28 août 1902, un désaccord s'est produit, entre le Gouvernement du Japon d'une part et les Gouvernements d'Allemagne, de France et de Grande Bretagne d'autre part, touchant le sens réel et la portée des dispositions suivantes des traités respectifs et autres engagements existant entre eux, c'est-à-dire:

Paragraphe 4 de l'Article XVIII du Traité de Commerce et de Navigation du 4 avril 1896 entre le Japon et l'Allemagne: « Sobald diese Einverleibung erfolgt » [c'est-à-dire: quand les divers quartiers étrangers qui existent au Japon auront été incorporés dans les communes respectives du Japon] « sollen die bestehenden, zeitlich unbegrenzten Ueberlassungsverträge, unter welchen jetzt in den gedachten Niederlassungen Grundstücke besessen werden, bestätigt und hinsichtlich dieser Grundstücke sollen keine Bedingungen irgend einer anderen Art auferlegt werden, als sie in den bestehenden Ueberlassungsverträgen enthalten sind »; — et paragraphe 3 de la communication complémentaire de même date du Secrétaire d'Etat des Affaires Etrangères de l'Empire d'Allemagne au Ministre du Japon à Berlin: « 3. dass, da das Eigenthum an den im Artikel XVIII des Vertrages erwähnten Niederlassungsgrundstücken dem Japanischen Staate verbleibt, die Besitzer oder deren Rechtsnachfolger für ihre Grundstucke ausser dem kontraktmässigen Grundzins Abgaben oder Steuern irgend welcher Art nicht zu entrichten haben werden, » et l'alinéa suivant de la réponse du Ministre du Japon de même date à la précédente communication: « dass die darin unter Nummer 1 bis 4 zum Ausdruck gebrachten Voraussetzungen, welche den Erwerb dinglicher Rechte an Grundstücken, die Errichtung von Waarenhäusern, die Steuerfreiheit der Grundstücke in den Fremdenniederlassungen und die Erhaltung wohleworbener Rechte nach Ablauf des Vertrages zum Gegenstande haben, in allen Punkten zutreffend sind »;

Paragraphe 4 de l'Article XXI du Traité revisé du 4 août 1896 entre le Japon et la France: « Lorsque les changements ci-dessus indiqués auront été effectués, » [c'est-à-dire: lorsque les divers quartiers étrangers qui existent au Japon auront été incorporés aux communes respectives du Japon et feront dès lors partie du système municipal du Japon; et lorsque les autorités japonaises compétentes auront assumé toutes les obligations et tous les devoirs municipaux, et que les fonds et biens municipaux qui pourraient appartenir à ces quartiers auront été transférés auxdites autorités] « les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés, et les propriétés de cette nature ne donneront lieu à aucuns impôts,

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Recueil des actes et protocoles concernant le litige entre l'Allemagne, la France et la Grande-Bretagne, d'une part, et le Japon, d'autre part*, etc., p. 43.

taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dans les baux en question »;

Paragraphe 4 de l'Article XVIII du Traité revisé du 16 juillet 1894 entre le Japon et la Grande Bretagne: « When such incorporation takes place, » [c'est-à-dire: quand les divers quartiers étrangers qui existent au Japon auront été incorporés aux communes respectives du Japon] « existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property »;

ATTENDU que les Puissances en litige sont tombées d'accord pour soumettre leur différend à la décision d'un Tribunal d'Arbitrage,

Qu'en vertu des Protocoles susmentionnés,

Les Gouvernements d'Allemagne, de France et de Grande Bretagne ont désigné pour Arbitre Monsieur Louis RENAULT, Ministre Plénipotentiaire, Membre de l'Institut de France, Professeur à la Faculté de droit de Paris, Jurisconsulte du Département des Affaires Etrangères, et

Le Gouvernement du Japon a désigné pour Arbitre Son Excellence Monsieur Itchiro MOTONO, Envoyé Extraordinaire et Ministre Plénipotentiaire de Sa Majesté l'Empereur du Japon à Paris, Docteur en droit,

Que les deux Arbitres sus-nommés ont choisi pour Surarbitre Monsieur Gregers GRAM, ancien Ministre d'Etat de Norvège, Gouverneur de Province;

ATTENDU que le Tribunal ainsi composé a pour mission de statuer, en dernier ressort, sur la question suivante:

Oui ou non, les dispositions des traités et autres engagements ci-dessus mentionnés exemptent-elles seulement les terrains possédés en vertu des baux perpétuels concédés par le Gouvernement Japonais ou en son nom, — ou bien exemptent-elles les terrains et les bâtiments de toute nature construits ou qui pourraient être construits sur ces terrains, — de tous impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dan les baux en question?

ATTENDU que le Gouvernement Japonais soutient que les terrains seuls sont, dans la mesure qui vient d'être indiquée, exemptés du paiement d'impôts et autres charges,

Que les Gouvernements d'Allemagne, de France et de Grande Bretagne prétendent, au contraire, que les bâtiments, construits sur ces terrains, jouissent de la même exemption,

ATTENDU que, pour se rendre compte de la nature et de l'étendue des engagements contractés de part et d'autre par les baux à perpétuité, il faut recourir à divers arrangements et conventions intervenus, sous le régime des anciens traités, entre les autorités japonaises et les représentants de plusieurs Puissances,

ATTENDU que de ces actes et des stipulations insérées dans les baux il résulte:

Que le Gouvernement Japonais avait consenti à prêter son concours à la création de quartiers étrangers dans certaines villes et ports du Japon, ouverts aux ressortissants d'autres nations,

Que, sur les terrains désignés à l'usage des étrangers dans les différentes localités, le Gouvernement Japonais a exécuté, à ses frais, des travaux en vue de faciliter l'occupation urbaine,

Que les étrangers n'étant pas, d'après les principes du droit japonais, admis à acquérir la propriété de terrains situés dans le pays, le Gouvernement leur a donné les terrains en location à perpétuité,

Que les baux déterminent l'étendue des lots de terre loués et stipulent une rente annuelle fixe, calculée à raison de l'espace loué,

Qu'il fut convenu qu'en principe les quartiers étrangers resteraient en dehors du système municipal du Japon, mais qu'au reste, ils n'étaient pas soumis à une organisation uniforme,

Qu'il était arrêté, par voie de règlements, comment il serait pourvu aux diverses fonctions de l'administration et qu'il était prescrit que les détenteurs des terrains seraient tenus de subvenir partiellement aux frais de la municipalité à l'aide de redevances dont le montant et le mode de perception étaient déterminés,

ATTENDU qu'on s'expliquerait bien le soin apporté dans la rédaction des dits actes en vue de préciser les obligations de toute nature incombant aux étrangers vis à vis du Gouvernement Japonais, s'il était entendu que la rente annuelle représentât, non seulement le prix de la location, mais aussi la contre partie des impôts dont les preneurs eussent été redevables à raison de la situation créée à leur profit par les baux et que, par conséquent, ils n'auraient, en cette qualité, à supporter que les impôts et charges qui étaient expressément mentionnés dans les dits baux,

ATTENDU qu'au reste, il n'est pas contesté que ce ne soit là le véritable sens de ces actes, en tant qu'il s'agit des terrains, mais que le Gouvernement Japonais allègue que les baux n'avaient pour objet que les terrains nus et qu'il n'admet pas que les constructions, élevées sur les terrains, fussent comprises dans les stipulations sur lesquelles l'exemption des impôts serait fondée,

Qu'il a allégué que les terrains seuls appartenaient au Gouvernement, les constructions étant, au contraire, la propriété des preneurs, et qu'en conséquence l'immunité dont il est question ne pouvait s'étendre qu'aux immeubles qui n'étaient pas sortis du patrimoine de l'Etat,

ATTENDU que, toutefois, la question qu'il s'agit de décider est celle de savoir si, au point de vue fiscal, les constructions élevées sur les terrains loués étaient, de commun accord, considérées comme accessoires de ces terrains, ou non, et que la solution de cette question ne dépend pas de distinctions tirées d'une prétendue différence quant à la propriété des immeubles,

Que le Tribunal ne saurait donc s'arrêter à la discussion engagée à ce sujet et fondée sur les principes du droit civil,

ATTENDU que les terrains étaient loués pour y construire des maisons, ce qui est indiqué, à la fois, par la situation des immeubles et par la nature des aménagements effectués par le Gouvernement Japonais,

Que l'obligation d'ériger des bâtiments était, dans certaines localités, imposée sous peine de déchéance, que les baux contenaient souvent une clause, aux termes de laquelle les bâtiments, qui se trouveraient sur les terrains, deviendraient la propriété du Gouvernement Japonais, au cas où le preneur aurait manqué à ses engagements,

ATTENDU qu'il faut admettre que les circonstances qui viennent d'être relatées offrent des arguments à l'encontre de la prétention que le sol et les constructions constituent, dans les relations entre les parties et au point de vue fiscal, des objets entièrement distincts,

ATTENDU qu'en intervenant aux dits actes, le Gouvernement du Japon a agi, non seulement en propriétaire des terrains donnés en location, mais aussi comme investi du pouvoir souverain du pays,

ATTENDU que la volonté des parties faisait, par conséquent, la loi en la matière et que, pour établir comment les actes ont été réellement interprétés, il faut s'en rapporter au traitement auquel les détenteurs des terrains ont été, au point de vue des impôts, soumis, en fait, dans les différentes localités,

ATTENDU, à cet égard, qu'il est constant que, suivant une pratique qui n'a pas varié et qui a existé durant une longue série d'années, non seulement les terrains en question, mais aussi les bâtiments élevés sur ces terrains, ont été exemptés de tous impôts, taxes, charges, contributions ou conditions autres que ceux expressément stipulés dans les baux à perpétuité,

ATTENDU que le Gouvernement du Japon soutient, il est vrai, que cet état de choses, de même que l'immunité fiscale dont jouissaient en général les étrangers dans le pays, n'était dû qu'à la circonstance que les tribunaux consulaires refusaient de donner la sanction nécessaire aux lois fiscales du pays,

ATTENDU que, toutefois, cette prétention est dépourvue de preuves et qu'il n'est pas même allégué que le Gouvernement Japonais ait jamais fait, vis à vis des Gouvernements d'Allemagne, de France et de Grande Bretagne, des réserves à l'effet de maintenir les droits qu'il dit avoir été lésés,

Que, bien qu'il ait été allégué que l'immunité dont les étrangers jouissaient, en fait, au point de vue des impôts, sous le régime des anciens traités, était générale et qu'elle s'étendait aux étrangers résidant en dehors des concessions en question, il résulte pourtant des renseignements fournis au sujet de détenteurs d'immeubles — terrains et maisons — à HIOGO, que ladite règle n'a pas été d'une application universelle,

Que, dans tous les cas, la situation de fait n'est pas douteuse, de quelque façon qu'on l'explique,

ATTENDU, au point de vue de l'interprétation des dispositions des nouveaux traités au sujet desquelles il y a contestation entre les Parties,

Que la rédaction de l'article 18 du traité entre la Grande Bretagne et le Japon — traité antérieur aux deux autres — avait été précédée de propositions tendant à mettre les étrangers, détenteurs de terrains, sur le même pied que les sujets japonais, tant au point de vue de la propriété des immeubles qui leur avaient été concédés en location que pour ce qui concerne le paiement de taxes et d'impôts, mais qu'on est ensuite tombé d'accord sur le maintien du régime qui jusqu'alors avait été pratiqué,

Que le Gouvernement Japonais prétend, il est vrai, que la question de maintenir le *status quo* ne se rapportait qu'aux terrains, mais que cette prétention ne se trouve pas justifiée par les expressions employées au cours des négociations.

Qu'au contraire, le représentant du Gouvernement Japonais qui a pris l'initiative pour arriver à un accord dans ce sens s'est borné à proposer le maintien du *status quo* dans les concessions étrangères (*maintenance of the status quo in the foreign settlements*),

Qu'il n'est pas à présumer que le délégué de la Grande Bretagne, en présentant un projet élaboré sur la base de ladite proposition, ait entendu faire une restriction concernant les constructions, que cela ne résulte, ni des mots insérés dans le procès-verbal, ni du contenu de l'article par lui proposé,

Que, pour maintenir intégralement le *status quo*, il ne suffirait pas d'admettre que l'immunité fiscale, qui jusqu'à cette époque s'étendait, tant sur les terrains que sur les constructions, dans les quartiers étrangers, serait maintenue pour le sol seulement et qu'elle cesserait d'exister pour ce qui concerne les maisons,

Qu'il doit surtout en être ainsi lorsqu'on considère que, pour se conformer à ce qui était convenu, les Parties ne se sont pas bornées à formuler une disposition au sujet de la confirmation des baux, mais qu'elles ont ajouté qu'aucunes conditions, sauf celles contenues dans les baux en vigueur, ne seront imposées relativement à une telle propriété (*no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property*),

Que cette dernière clause est rédigée d'une façon encore plus explicite dans le traité avec la France,

ATTENDU qu'au surplus, dans les clauses dont il s'agit, les Puissances n'ont pas parlé de terrains, comme elles auraient dû nécessairement le faire si l'immunité, contrairement à ce qui avait été pratiqué jusque là, avait dû être restreinte aux terrains,

Qu'elles ont, au contraire, employé des expressions assez larges pour comprendre dans son ensemble la situation faite par les baux aux preneurs,

ATTENDU que le Tribunal ne saurait, non plus, admettre que les notes échangées entre les Gouvernements d'Allemagne et du Japon, au moment de la conclusion du nouveau traité, contiennent des explications de nature à placer l'Allemagne dans des conditions moins avantageuses que les deux autres Puissances,

Que le Gouvernement du Japon a surtout voulu tirer argument de ce que le Gouvernement Allemand a fondé l'immunité fiscale sur ce qu'il est interdit aux étrangers d'acquérir la propriété de terrains situés au Japon, mais qu'à cet égard il faut considérer qu'en fait les constructions avaient toujours eu le caractère de dépendances des terrains au point de vue des impôts, et qu'il n'est pas à présumer que le Gouvernement Allemand ait entendu renoncer aux avantages consentis en faveur de la Grande Bretagne par le nouveau traité, ce qui serait d'ailleurs en contradiction avec la clause assurant à l'Allemagne le traitement de la nation la plus favorisée,

PAR CES MOTIFS,

LE TRIBUNAL D'ARBITRAGE, À LA MAJORITÉ DES VOIX, DÉCIDE ET DÉCLARE:

Les dispositions des traités et autres engagements mentionnés dans les protocoles d'arbitrage n'exemptent pas seulement les terrains possédés en vertu des baux perpétuels concédés par le Gouvernement Japonais ou en son nom, mais elles exemptent les terrains et les bâtiments de toute nature construits ou qui pourraient être construits sur ces terrains, de tous impôts, taxes, charges, contributions ou conditions quelconques autres que ceux expressément stipulés dans les baux en question.

FAIT à La Haye, dans l'Hôtel de la Cour permanente d'Arbitrage, le 22 mai 1905.

(Signé) G. GRAM

(Signé) L. RENAULT

Au moment de procéder à la signature de la présente Sentence arbitrale, usant de la faculté que me confère l'article 52, alinéa 2, de la *Convention pour le règlement pacifique des conflits internationaux*, conclue à La Haye le 29 juillet 1899, je tiens à constater mon dissentiment absolu avec la majorité du Tribunal, en ce qui concerne les motifs comme le dispositif de la Sentence.

(Signé) I. MOTONO

DOCUMENTS ADDITIONNELS

TREATY[1] OF COMMERCE AND NAVIGATION BETWEEN GREAT BRITAIN AND JAPAN, SIGNED AT LONDON, JULY 16, 1894[2]

. . .

Article XVIII. Her Britannic Majesty's Government, so far as they are concerned, give their consent to the following arrangement: —

The several foreign Settlements in Japan shall be incorporated with the respective Japanese Communes, and shall thenceforth form part of the general municipal system of Japan.

The competent Japanese authorities shall thereupon assume all municipal obligations and duties in respect thereof, and the common funds and property, if any, belonging to such Settlements, shall at the same time be transferred to the said Japanese authorities.

When such incorporation takes place the existing leases in perpetuity under which property is now held in the said Settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property. It is, however, understood that the Consular authorities mentioned in the same are in all cases to be replaced by the Japanese authorities.

All lands which may previously have been granted by the Japanese Government free of rent for the public purposes of the said Settlements shall, subject to the right of eminent domain, be permanently reserved free of all taxes and charges for the public purposes for which they were originally set apart.

Article XIX. The stipulations of the present Treaty shall be applicable, so far as the laws permit, to all the Colonies and foreign possessions of Her Britannic Majesty, excepting to those hereinafter named, that is to say, except to —

India, The Dominion of Canada, Newfoundland, The Cape, Natal, New South Wales, Victoria, Queensland, Tasmania, South Australia, Western Australia, New Zealand.

Provided always that the stipulations of the present Treaty shall be made applicable to any of the above-named Colonies or foreign possessions on whose behalf notice to that effect shall have been given to the Japanese Government by Her Britannic Majesty's Representative at Tokio within two years from the date of the exchange of ratifications of the present Treaty.

Article XX. The present Treaty shall, from the date it comes into force, be substituted in place of the Conventions respectively of the 23rd day of the 8th month of the 7th year of Kayei, corresponding to the 14th day of October, 1854, and of the 13th day of the 5th month of the 2nd year of Keiou, corresponding to the 25th day of June, 1866, the Treaty of the 18th day of the 7th month of the 5th year of Ansei, corresponding to the 26th day of August, 1858, and all Arrangements and Agreements subsidiary thereto concluded or

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[1] Extract.

[2] *British and Foreign State Papers*, vol. 86, p. 39.

existing between the High Contracting Parties; and from the same date such Conventions, Treaty, Arrangements, and Agreements shall cease to be binding, and, in consequence, the jurisdiction then exercised by British Courts in Japan, and all the exceptional privileges, exemptions, and immunities then enjoyed by British subjects as a part of or appurtenant to such jurisdiction, shall absolutely and without notice cease and determine, and thereafter all such jurisdiction shall be assumed and exercised by Japanese Courts.

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TREATY[1] OF COMMERCE AND NAVIGATION BETWEEN GERMANY AND JAPAN, SIGNED AT BERLIN, APRIL 4, 1896[2]

. . .

Article XVIII. The Contracting Parties have agreed upon the following arrangement: —

The several foreign settlements in Japan shall be incorporated with the respective Japanese communes, and shall thenceforth form integral parts of the Japanese communes.

The competent Japanese authorities shall thereupon assume all municipal obligations and duties in respect thereof, and the common funds and property, if any, belonging to such settlements, shall at the same time be transferred to the said Japanese authorities.

When such incorporation takes place the existing leases in perpetuity under which property is now held in the said settlements shall be confirmed, and no conditions whatsoever other than those contained in such existing leases shall be imposed in respect of such property.

The proprietary rights in the lands belonging to these settlements may in the future be granted to natives or foreigners by their proprietors free of charge and without the consent of the Consular or Japanese authorities, as had hitherto been required in certain cases.

The functions, however, attached according to the original leases to the Consular authorities, shall devolve upon the Japanese authorities.

All lands which may previously have been granted by the Japanese Government free of rent for the public purposes of the said settlements shall, subject to the right of eminent domain, be permanently reserved free of all taxes and charges for the public purposes for which they were originally set apart.

Article XIX. The stipulations of the present Treaty shall be applicable to the territories which now, or shall in future, form a Customs Union with one or other of the Contracting Parties.

Article XX. The present Treaty shall, from the date it comes into force, be substituted in place of the Treaty of the 20th February, 1869, and all Arrangements and Agreements subsidiary thereto concluded or existing between the High Contracting Parties. From the same date these earlier Conventions shall cease to be binding, and, in consequence, the jurisdiction till then exercised by German Courts in Japan, and all the exceptional privileges, exemptions, and immunities then enjoyed by German subjects as a part of or appurtenant to such jurisdiction, shall absolutely and without notice cease and determine. Thereafter all such jurisdiction shall be assumed and exercised by Japanese Courts.

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[1] Extract.

[2] *British and Foreign State Papers*, vol. 88, p. 582.

TRAITÉ[1] DE COMMERCE ET DE NAVIGATION ENTRE LA FRANCE ET LE JAPON, SIGNÉ À PARIS, LE 4 AOÛT, 1896[2]

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Article XXI. Le Gouvernement de la République Française donne, en ce qui le concerne, son adhésion à l'arrangement suivant:

Les divers quartiers étrangers qui existent au Japon seront incorporés aux communes respectives du Japon et feront dès lors partie du système municipal du Japon.

Les autorités Japonaises compétentes assumeront en conséquence toutes les obligations et tous les devoirs municipaux qui résultent de ce nouvel état de choses, et les fonds et biens municipaux qui pourraient appartenir à ces quartiers seront, de plein droit, transférés aux dites autorités Japonaises.

Lorsque les changements ci-dessus indiqués auront été effectués, les baux à perpétuité en vertu desquels les étrangers possèdent actuellement des propriétés dans les quartiers seront confirmés, et les propriétés de cette nature ne donneront lieu à aucuns impôts, taxes, charges, contributions, ou conditions quelconques autres que ceux expressément stipulés dans les baux en question. Il est entendu toutefois qu'aux autorités Consulaires dont il y est fait mention seront substituées les autorités Japonaises.

Les terrains que le Gouvernement Japonais aurait concédés exempts de rentes, vu l'usage public auquel ils étaient affectés, resteront, sous la réserve de droits de la souveraineté territoriale, affranchis d'une manière permanente de tous impôts, taxes, et charges; et ils ne seront point détournés de l'usage auquel ils étaient primitivement destinés.

Article XXII. Les dispositions du présent Traité sont applicables à l'Algérie. Il est entendu qu'elles deviendraient en outre applicables aux Colonies Françaises pour lesquelles le Gouvernement Français en réclamerait le bénéfice. Le Représentant de la République Française à Tôkiô aurait à cet effet à le notifier au Gouvernement Japonais dans un délai de deux ans à dater du jour de l'échange des ratifications du présent Traité.

Article XXIII. A dater de la mise en vigueur du présent Traité seront abrogés le Traité du 9 Octobre, 1858, la Convention du 25 Juin, 1866, et en général tous les arrangements conclus entre les Hautes Parties Contractantes existant antérieurement à cette date. En conséquence, la juridiction Française au Japon et les privilèges, exemptions, ou immunités dont les Français jouissaient en matière juridictionnelle seront supprimés de plein droit et sans qu'il soit besoin de notification, du jour de la mise en vigueur du présent Traité; et les Français seront dès lors soumis à la juridiction des Tribunaux Japonais.

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[1] Extrait.

[2] *British and Foreign State Papers*, vol. 88. p. 530.

THE BAROTSELAND BOUNDARY CASE

PARTIES: Great Britain, Portugal.

COMPROMIS: Declaration of 12 August 1903.

ARBITRATOR: Victor-Emmanuel III, King of Italy.

AWARD: 30 May, 1905.

Determination of the limits of the territory of the Barotse Kingdom, within the meaning of Article IV of the Treaty of 1891 — Dependence of one tribe on another.

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SYLLABUS [1]

The question of determining the western boundary of the Kingdom of Barotseland in South Africa was submitted in March 1903 to an Anglo-Portuguese Commission. Provision was made for reference of the matter to an Umpire, if the British and Portuguese members of the Commission were unable to agree. The King of Italy accepted the office of Arbitrator to which he was appointed under the terms of a Declaration signed at London on 12 August 1903. The procedure to be adopted for the Arbitration was decided by the Commission sitting in London. Cases and counter-cases were prepared by each party and exchanged in the early part of 1904. The final submissions of the respective Governments were presented by 1 June 1904.

The Award, rendered on 30 May 1905 in Italian and translated officially into French, contained in its concluding passage a delimitation of the western boundary of the Kingdom of Barotseland.

[1] See: W. Evans Darby, *International Tribunals*, 4th ed., London, 1904, p. 904.

DECLARATION BETWEEN GREAT BRITAIN AND PORTUGAL, RESPECTING THE SUBMISSION OF THE BAROTSE BOUNDARY QUESTION TO AN ARBITRATOR, SIGNED AT LONDON, AUGUST 12, 1903 [1] [2]

On 11th June, 1891,[3] a Treaty was signed between Her late Majesty the Queen of Great Britain and Ireland, Empress of India, and His Most Faithful Majesty the King of Portugal and the Algarves, Article IV of which Treaty is as follows: —

" It is agreed that the western line of division separating the British from the Portuguese sphere of influence in Central Africa shall follow the centre of the channel of the Upper Zambezi, starting from the Katima Rapids up to the point where it reaches the territory of the Barotse Kingdom.

" That territory shall remain within the British sphere; its limits to the westward, which will constitute the boundary between the British and Portuguese spheres of influence, being decided by a Joint Anglo-Portuguese Commission, which shall have power in case of difference of opinion to appoint an Umpire.

" It is understood on both sides that nothing in this Article shall affect the existing rights of any other State. Subject to this reservation, Great Britain will not oppose the extension of Portuguese Administration outside of the limits of the Barotse country."

In place of the procedure contemplated in this Article, the two Governments have decided to have recourse to the arbitration of His Majesty the King of Italy in the manner provided in the following Articles: —

Art. I. The Arbitrator shall be asked to give a decision, which shall be accepted as final by both Parties, on the question: What are, within the meaning of the above-quoted Article of the Treaty of 1891, the limits of the territory of the Barotse Kingdom?

For the purposes of the arbitration the expression " the territory of the Barotse Kingdom " shall mean the territory over which the King of Barotse was paramount ruler on the 11th June, 1891.

II. In order to enable the Arbitrator to pronounce his decision, each of the two Parties shall, on or before the 1st January next, furnish him with a Memorandum on the question submitted to him.

III. After the date fixed in Article II, each of the Parties shall have a period of three months within which to furnish the Arbitrator, if it is considered necessary, with a reply to the allegations made by the other Party.

IV. Within two months after the lapse of the period mentioned in the preceding Article, each of the Parties shall be at liberty to furnish the Arbitrator with a counter-reply.

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[1] Signed also in Portuguese.
[2] *British and Foreign State Papers*, Vol. XCVII, p. 504.
[3] *Ibid.*, Vol. LXXXIII, p. 27.

V. The Arbitrator shall have the right to ask for such explanations from the Parties as he may deem necessary, and shall decide any questions of procedure not foreseen by this Declaration and any incidental points which may arise.

VI. The costs of the arbitration, as fixed by the Arbitrator, shall be equally divided between the Parties.

VII. The Memorandum, and, as the case may be, the reply and the counter-reply of each Party, as well as any documents annexed to them, shall be printed, shall be in French, or accompanied by a French translation, and shall be delivered in duplicate to the Arbitrator and simultaneously to the other Party.

VIII. The Arbitrator may, for any cause deemed by him sufficient, allow an extension of time in regard to any of the matters mentioned in Articles II, III, and IV.

In faith of which the Undersigned, duly authorized by their respective Governments, have signed the present Declaration, and have affixed thereto the seal of their arms.

DONE in duplicate at London, the 12th August, 1903.

[L.S.] LANSDOWNE

[L.S.] SOVERAL

SENTENCE ARBITRALE POUR TRANCHER LA QUESTION RELATIVE AUX LIMITES OCCIDENTALES DU TERRITOIRE DU ROYAUME DU BAROTSE, RENDUE À ROME, LE 30 MAI 1905 [1]

Détermination, dans le sens de l'article IV du Traité de 1891, des limites du territoire du Royaume du Barotse — Condition de dépendance d'une tribu vis-à-vis d'une autre.

Nous, Victor Emmanuel III;
Par la grâce de Dieu et la volonté de la nation Roi d'Italie;
Arbitre dans la question entre la Grande-Bretagne et le Portugal relativement aux limites occidentales du territoire du Royaume du Barotse, telles qu'elles étaient le 11 Juin, 1891;

Sa Majesté Edouard VII, Roi du Royaume-Uni de la Grande-Bretagne et d'Irlande, Empereur des Indes, et Sa Majesté Très-Fidèle Charles I, Roi du Portugal et des Algarves, voulant définir la question survenue entre les deux Etats relativement à la frontière de leurs sphères d'influence respectives dans l'Afrique Centrale, moyennant Déclaration signée à Londres le 12 Août, 1903, Nous ont chargé de décider comme Arbitre la dite question par sentence définitive sans appel.

Nous, Roi d'Italie, voulant correspondre à la confiance que les Hautes Parties ont voulu Nous accorder, Nous avons accepté et Nous prononçons la Sentence suivante: —

En fait:

La Grande-Bretagne et le Portugal, afin de déterminer leurs respectives sphères d'influence d'Afrique Centrale, avaient conclu à Lisbonne le Traité du 11 Juin, 1891 [2], et par l'Article IV du dit Traité elles avaient convenu en ce qui suit:

« Il est entendu que la ligne qui sépare à l'ouest la sphère d'influence de la Grande-Bretagne dans l'Afrique Centrale de celle du Portugal suivra le centre du chenal du Haut-Zambèze, en partant des Rapides de Katima jusqu'au point où elle touche au territoire du Royaume des Barotse. »

Les dites Hautes Parties, n'ayant pu dans la suite déterminer d'accord les limites occidentales du territoire du Royaume du Barotse, signèrent à Londres, le 12 Août, 1903, la Déclaration par laquelle elles Nous ont déféré de décider la question qu'elles formulèrent elles-mêmes dans les termes suivants:

« Article I. The Arbitrator shall be asked to give a decision, which shall be accepted as final by both Parties, on the question: What are, within the meaning of the above-quoted Article of the Treaty of 1891, the limits of the territory of the Barotse Kingdom?

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[1] Traduction officielle française: *British and Foreign State Papers*, vol. XCVIII, p. 382.
[2] *Ibid.*, vol. LXXXIII, p. 27 et 890.

« For the purposes of the arbitration the expression « the territory of the Barotse Kingdom » shall mean the territory over which the King of Barotse was Paramount Ruler on the 11th June, 1891. »

La question ayant été ainsi formulée, Nous avons considéré que Nous sommes appelés à déterminer le territoire sur lequel le Roi du Barotse régnait comme chef Suprême (« was Paramount Ruler ») le 11 Juin, 1891.

Nous avons aussi considéré que, puisque Nous devons décider la question qui Nous a été soumise en Nous référant au 11 Juin, 1891, Nous ne pouvions pas tenir compte des faits survenus après cette date.

Nous avons ensuite examiné attentivement les Mémoires, les répliques, les contre-répliques, et les documents à l'appui que chacune des Hautes Parties nous a présentés.

En droit:

ATTENDU que le tribut ne peut, comme tel, demeurer en preuve de l'autorité de Chef Suprême près celui à qui le dit tribut est payé; en effet, souvent une tribu, tout en étant indépendante, paye des tributs au Chef d'une autre tribu plus forte, soit pour se soustraire par ce moyen à ses vexations et éviter la guerre, soit pour en gagner la bienveillance et la protection;

ATTENDU que pas même l'influence exercée par le Chef d'une tribu plus forte sur d'autres plus faibles ne peut être considérée comme preuve décisive de la dépendance et de l'assujettissement réel des tribus qui subissent la dite influence;

ATTENDU conséquemment que, pour reconnaître le Roi Lewanika comme Chef Suprême, il est indispensable que l'on constate quelles étaient les tribus qui, le 11 Juin, 1891, se trouvaient en condition de dépendance réelle vis-à-vis de lui;

ATTENDU que, selon l'organisation interne des tribus le Chef Suprême est celui qui exerce l'autorité gouvernementale selon leurs coutumes, c'est-à-dire, en nommant les Chefs subalternes, ou en leur accordant l'investiture, en décidant des litiges entre ces Chefs, en les déposant selon les circonstances, et en les obligeant à le reconnaître comme leur Seigneur Suprême;

ATTENDU qu'un tel pouvoir avait déjà été sans doute exercé par le Roi du Barotse dans la Province de Nalolo à l'ouest du Zambèze; qu'il a été aussi exercé sur les tribus des Mabuenyi et des Mamboe, de sorte que leur territoire formait partie intégrante du Royaume du Barotse;

ATTENDU que, en ce qui concerne les Balovale, tout en ayant payé des tributs, le 11 Juin, 1891, ils se trouvaient en condition d'indépendance: en effet, ils avaient leur Chef Suprême qui nommait les Chefs subalternes, sans que le Roi du Barotse eût accompli jusqu'alors aucun acte de juridiction et de gouvernement sur les Balovale;

ATTENDU que cela est confirmé par le témoignage du Rév. Adophe Jalla, qui déclare que les Balovale refusaient de se soumettre jusqu'en 1891, et qu'ils ne furent subjugués par les Barotse qu'au commencement de 1892 (circonstance qui a été aussi référée par le Rév. F. Coillard), de sorte qu'on ne peut admettre qu'en Juin 1891 les Balovale fissent partie intégrante du Royaume du Barotse;

ATTENDU pourtant que le Roi Lewanika exerçait quelques droits de seigneurie sur la zone limitrophe de ses vrais domaines, qui demeure interposée entre le Zambèze et le Lungubungu, et qui est habitée par des Balovale, de sorte que, en vue de tels droits de seigneurie, on peut admettre que la dite zone faisait partie intégrante du Royaume du Barotse;

ATTENDU que, en ce qui concerne la région des Balunda, une partie était habitée par les Balekwakwa, qui sont ethniquement des Barotse, et que la zone méridionale avait subi plus directement l'influence du Roi du Barotse jusqu'à

l'assujettissement réel, de sorte que le territoire compris entre le cours inférieur du Kapombo, le Zambèze, et le 13e parallèle, doit être considéré comme partie intégrante du Royaume du Barotse;

ATTENDU que les Bampukush, les Bamarshi, les Mambunda, et les Bamakoma étaient des tribus absolument indépendantes, et que, conséquemment, elles ne pouvaient pas être considérées comme appartenant au Royaume du Barotse;

ATTENDU que, en ce qui concerne la délimitation du territoire sur lequel le Roi Lewanika régnait comme Chef Suprême, toute délimitation précise est impossible, soit à cause du manque d'éléments géographiques séparatifs, soit à cause de la connaissance imparfaite qu'on a des lieux, soit à cause de l'instabilité notoire des tribus et de leurs fréquents entrelacements (circonstances qui ont été admises aussi par le Marquis de Salisbury et le Marquis de Lansdowne), de sorte que, il est indispensable, où les lignes naturelles font défaut, d'avoir recours aux lignes de convention géographiques;

Pour les dits motifs:

Nous décidons comme Arbitre que la frontière occidentale du territoire du Royaume du Barotse, le 11 Juin, 1891, était la suivante (voir le croquis démonstratif ci-joint) [1]: —

La ligne droite joignant les Rapides de Katima, sur le Zambèze, au village Andara sur l'Okovango, jusqu'au point où elle rencontre la Rivière Kwando;

Le bord oriental du lit des hautes eaux du Kwando, jusqu'au point d'intersection avec le 22e méridien est de Greenwich;

Le 22e méridien est de Greenwich jusqu'au point d'intersection avec le 13e parallèle;

Le 13e parallèle jusqu'au point d'intersection avec le 24e méridien est de Greenwich;

Le 24e méridien est de Greenwich jusqu'à la frontière de l'Etat Indépendant du Congo.

[Traduction de la Sentence Arbitrale donnée à Rome, le 30 Mai, 1905, par Sa Majesté le Roi d'Italie.]

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[1] *Parliamentary Paper*, « Africa No. 5 (1905). » Cd. 2584.

AFFAIRE ABOILARD

PARTIES: France, Haïti.

COMPROMIS: Protocole du 15 juin 1904.

ARBITRES: Commission arbitrale: L. Renault; Solon Ménos; H. Vignaud.

SENTENCE: 26 juillet, 1905.

Contestation par le gouvernement d'Haïti de la validité de certains contrats passés entre les autorités haïtiennes et un national français, Louis Aboilard — Contrats nuls pour défaut d'approbation législative — Constitution, en vertu d'une convention conclue, en date du 15 juin 1904, entre la France et Haïti, d'une Commission arbitrale chargée de se prononcer sur la question de la validité de ces contrats, de décider si et dans quelle mesure ces contrats ont engagé la responsabilité du gouvernement d'Haïti, d'apprécier, s'il y a lieu, le préjudice causé à Louis Aboilard par la rupture des contrats et notamment par le retrait des concessions qui lui ont été consenties, de déterminer, le cas échéant, le montant de l'indemnité pouvant être due au réclamant ainsi que les termes et mode de payement — Engagement de la responsabilité de Haïti du fait de la conclusion de ces contrats par l'exécutif de ce pays — Montant des dommages-intérêts inférieur à ce qu'il aurait été si les contrats avaient reçu la sanction législative.

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CONVENTION POUR RÉSOUDRE PAR LA VOIE D'ARBITRAGE L'AFFAIRE ABOILARD, SIGNÉE À PARIS, LE 15 JUIN 1904 [1]

Le Gouvernement de la République française et le Gouvernement de la République d'Haïti, étant animés du désir de mettre fin aux difficultés résultant des réclamations formulées par le citoyen français Louis Aboilard, les soussignés, dûment autorisés par leur gouvernement respectif, sont convenus de ce qui suit:

Article premier. Une commission arbitrale, dont le caractère sera essentiellement juridique, est chargée de se prononcer sur les réclamations formulées par M. Louis Aboilard et repoussées par le Gouvernement haïtien, au sujet du retrait des concessions stipulées dans les actes passés par devant M. Guillaume-Charles-Maximilien Laforest, notaire à Port-au-Prince, les 26 février 1902 et 23 et 26 janvier 1903, entre M. Louis Aboilard et les secrétaires d'Etat de la République d'Haïti, dont l'un, en vertu d'une décision prise en conseil des secrétaires d'Etat, représentait le Gouvernement haïtien;

Cette commission se composera de trois arbitres, savoir: l'un désigné par le Gouvernement français, un autre désigné par le Gouvernement haïtien; et d'un surarbitre, président, choisi d'un commun accord par les deux Gouvernements;

Si l'un des arbitres ainsi désignés était empêché de remplir la mission qui lui est confiée, il serait, dans le plus bref délai, procédé à son remplacement dans la forme où il aurait été nommé;

Au cas où le surarbitre serait empêché de remplir sa mission, un nouveau surarbitre pourrait être désigné d'un commun accord par les deux arbitres;

Article 2. La Commission est chargée de se prononcer sur le point de savoir si les contrats intervenus entre M. Louis Aboilard et les autorités haïtiennes doivent être considérés comme nuls et de nul effet, ou s'ils ont engagé la responsabilité du gouvernement haïtien et dans quelle mesure; d'apprécier, s'il y a lieu, le préjudice causé à M. Louis Aboilard par la rupture de ces contrats et notamment par le retrait des concessions qui lui ont été consenties; le cas échéant, de déterminer le montant de l'indemnité qui pourrait être due à M. Aboilard et les termes et mode du payement;

Article 3. La Commission siégera à Paris, où aura lieu toute la procédure.

Le gouvernement haïtien et M. Louis Aboilard seront représentés devant elle.

L'instruction préparatoire consistera dans un mémoire présenté par le sieur Aboilard à l'appui de sa réclamation, dans un mémoire en réponse du gouvernement haïtien et dans une réplique du sieur Aboilard.

Dans sa première réunion, qui aura lieu trente jours après l'échange des ratifications, la commission, après avoir entendu les observations des représentants des parties, fixera les délais dans lesquels les mémoires respectifs seront soumis par chaque partie à la commission et communiqués à son adversaire. Dans les quinze jours qui suivront l'expiration de ces délais, la commission se réunira et les représentants des parties lui soumettront des conclusions motivées résumant leurs prétentions.

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[1] De Martens, *Nouveau Recueil général de traités*, 2e série, t. XXXIV, p. 306.

La commission pourra demander aux représentants des parties des explications écrites ou orales sur des points déterminés. Les explications orales seront fournies dans une séance où les deux parties seront représentées ou dûment appelées: les explications écrites d'une partie seront communiquées à l'autre qui pourra y répondre sans retard.

Article 4. La commission arbitrale prononcera sa sentence dans les trois mois qui suivront l'expiration des délais fixés pour l'instruction préparatoire. Ses décisions, prises à la majorité des voix, seront définitives et sans appel.

Deux secrétaires désignés, l'un par le Gouvernement français, l'autre par le Gouvernement haïtien, tiendront les procès-verbaux de ses travaux.

Article 5. Il est entendu que chaque gouvernement supportera ses propres dépenses, les honoraires de surarbitre et les frais généraux devant être payés pour moitié par chacun des deux gouvernements.

En foi de quoi, les soussignés, M. Théophile Delcassé, député, ministre des affaires étrangères de la République française, et M. Dalbémar Jean-Joseph, envoyé extraordinaire et ministre plénipotentiaire d'Haïti près le Président de la République française, ont dressé le présent protocole qu'ils ont revêtu de leurs cachets.

FAIT à Paris, en double exemplaire, le 15 juin 1904.

[L.S.] DELCASSÉ

[L.S.] DALBÉMAR Jean-Joseph

SENTENCE DE LA COMMISSION ARBITRALE CHARGÉE DE STATUER SUR LES RÉCLAMATIONS DU CITOYEN FRANÇAIS LOUIS ABOILARD CONTRE LE GOUVERNEMENT HAITIEN. RENDUE À PARIS, LE 26 JUILLET 1905 [1]

Objection by the Government of Haiti to the validity of certain contracts concluded between the authorities of Haiti and a French national, Louis Aboilard — Contracts alleged to be null and void for lack of legislative approval — Establishment, in pursuance of a convention concluded between France and Haiti on 15 June 1904, of an arbitral commission charged with the task of passing on the question of the validity of the contracts; of deciding whether and to what extent the contracts engaged the responsibility of the Government of Haiti; of estimating what damage if any Louis Aboilard suffered as a result of the breach of these contracts and particularly by the withdrawal of the concessions granted thereunder; of determining, if appropriate, the amount of compensation due to the claimant and the conditions and method of payment — Engagement of the responsibility of Haiti as a result of the conclusion of these contracts by the executive of that country — Amount of damages and rate of interest less than would have been the case had the contracts received legislative approval.

Vu le protocole d'arbitrage signé à Paris, le 15 juin 1904, entre la France et Haïti;

Vu le mémoire pour M. Louis Aboilard présenté à la commission d'arbitrage;

Vu la réponse du gouvernement d'Haïti;

Vu la réplique et la note complémentaire présentées au nom de M. Louis Aboilard;

Vu la réponse de M. Aboilard à une question posée par la commission arbitrale et la note y relative du gouvernement haïtien;

Vu les conclusions présentées à la commission par les deux parties;

Vu la note explicative fournie par M. Louis Aboilard en réponse à une demande de la commission;

Vu enfin la réponse du gouvernement haïtien à cette dernière note;

Ensemble les diverses pièces communiquées par les parties:

ATTENDU que la commission arbitrale est, aux termes de l'article 2 du protocole d'arbitrage, chargée de se prononcer sur le point de savoir si les contrats intervenus, le 26 février 1902, entre M. Louis Aboilard et les autorités haïtiennes doivent être considérés comme nuls et de nul effet, ou s'ils ont engagé la responsabilité du gouvernement haïtien et dans quelle mesure; d'apprécier, s'il y a lieu, le préjudice causé à M. Louis Aboilard par la rupture de ces contrats et notamment par le retrait des concessions qui lui ont été consenties; le cas échéant, de déterminer le montant de l'indemnité qui pourrait être due à M. Aboilard et les termes et mode de payement.

Sur le premier point:

ATTENDU qu'au cours d'un procès dans lequel étaient engagés, d'un côté, le gouvernement haïtien, de l'autre MM. Fouchard et Aboilard, ce dernier

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[1] De Martens, *Nouveau Recueil général de traités*, 3e série, t. VIII, p. 377.

exerçant les droits et actions du sieur Fouchard son débiteur, procès alors pendant devant le tribunal civil de Petit-Goave à la suite d'un jugement de cassation obtenu par M. Aboilard, il intervint entre les parties, à la date du 26 février 1902, une transaction où figuraient les secrétaires d'Etat des travaux publics, de l'intérieur et des finances stipulant au nom du gouvernement haïtien et en vertu d'une délibération du conseil des ministres d'une part, MM. Fouchard et Aboilard, d'autre part;

Qu'aux termes de cette transaction, les sieurs Fouchard et Aboilard renoncent à tous les actes de procédure, jugements et arrêts, faits et rendus jusqu'ici, et cèdent à l'Etat tous les droits généralement quelconques résultant en leur faveur du contrat de concession de l'éclairage de la ville de Jacmel, y compris tout le matériel et les constructions en dépendant, sans en rien excepter ni réserver, lesdits sieurs Fouchard et Aboilard cessant par ladite cession et abandon, d'avoir un droit au contrat d'éclairage de la ville de Jacmel, qui devient, à l'avenir la pleine et entière propriété de l'Etat;

Que, d'après la même transaction, en raison de cette cession, dans les termes et conditions ci-dessus mentionnés, l'Etat s'engage à payer conjointement aux sieurs Fouchard et Aboilard la somme de 310,000 dollars en une obligation portant intérêt à 6 p. 100 l'an;

Que l'Etat concède au sieur Aboilard, agissant en son nom personnel et représentant d'une société à constituer, pour une durée de trente années entières et consécutives, *à dater de ce jour*, l'exploitation exclusive du service des eaux de Port-au-Prince et de Pétionville, de l'énergie électrique à Port-au-Prince;

Que les conditions de ces deux concessions ont été précisées et développées dans deux cahiers des charges, de la même date que la transaction et annexés à celle-ci;

ATTENDU que le gouvernement haïtien allègue que la valeur du matériel électrique de Jacmel et de son exploitation se trouvait, lors de la transaction, considérablement diminuée par suite de deux incendies, de sorte que l'indemnité assignée à M. Fouchard était de beaucoup supérieure à ce qui devait lui être raisonnablement alloué;

Qu'il soutient que M. Aboilard n'ayant été au procès que pour ce que pouvait lui devoir M. Fouchard, du moment que M. Fouchard était indemnisé et surabondamment mis en mesure de satisfaire M. Aboilard, celui-ci n'avait absolument rien de plus à prétendre de l'Etat; que, par suite, ce qui lui a été donné en outre se détache de la transaction comme *clauses distinctes et indépendantes de ce qui était relatif au procès éteint*, la transaction sur le procès pouvant parfaitement se faire sans les concessions d'eau et d'énergie électrique de Port-au-Prince, les concessions sans la transaction;

ATTENDU que la majorité de la commission ne saurait admettre un tel système contraire aux termes comme à l'esprit de l'acte du 26 février 1902;

Qu'il ne s'agit pas, en effet, de savoir ce que les parties auraient pu ou dû faire, mais ce qu'elles ont fait; que, sur ce dernier point, il ne saurait y avoir le moindre doute; que, suivant les expressions mêmes employées par elles, elles ont voulu arriver à une aimable composition et transiger sur les clauses du procès et, dans ce but, arrêter les clauses de la transaction; qu'il ne peut être question d'apprécier aujourd'hui la valeur des droits litigieux pour l'abandon desquels les représentants du gouvernement haïtien consentirent des sacrifices; que les concessions faites au sieur Aboilard sont un élément de la transaction au même titre que le bon de 310,000 dollars souscrit au profit de MM. Fouchard et Aboilard; qu'il n'y a pas à tenir compte de ce que Fouchard avait agi dans l'instance en son nom personnel tandis qu'Aboilard était intervenu pour exercer les droits de Fouchard; qu'au regard du gouvernement haïtien,

Fouchard et Aboilard étaient également des adversaires dont il y avait intérêt à obtenir le désistement en leur assurant des avantages qui pouvaient ne pas être identiques pour l'un et pour l'autre;

Que la commission n'a pas à rechercher quels étaient les rapports entre Aboilard et Fouchard, si, comme le prétend le gouvernement haïtien, Aboilard n'était que le prête-nom de Fouchard; qu'elle se trouve en présence des concessions faites à Aboilard dont il lui importe seulement de déterminer le caractère et les conséquences dans les rapports entre le gouvernement haitien et Aboilard, le sieur Fouchard ne figurant et ne pouvant figurer dans la présente instance;

Qu'il y a une étroite connexité entre les divers éléments de l'acte du 26 février 1902 comme de toute transaction et non pas, comme le prétend le gouvernement haitien, une simple juxtaposition qui serait vraiment inexplicable;

Qu'il suit de là que, contrairement à ce que prétend le gouvernement haïtien, les concessions ont bien été consenties en échange d'un droit abandonné par Aboilard; que ce droit avait certainement une valeur appréciable pour le gouvernement haïtien;

Que la commission estime donc faire application des principes du droit comme de l'équité en décidant que la concession de l'exploitation exclusive du service des eaux de Port-au-Prince et de Pétionville et la concession de l'énergie électrique à Port-au-Prince font partie intégrante de la transaction du 26 février 1902 et correspondant à l'abandon par Aboilard des droits pouvant résulter pour lui du procès en cours;

Attendu que le gouvernement haïtien soutient que l'acte du 26 février 1902 doit être regardé comme nul et de nul effet, parce qu'il comprenait des stipulations qui, en vertu de la constitution et des lois spéciales sur la matière, n'étaient exécutables qu'avec l'approbation du Corps législatif, laquelle approbation a été formellement refusée;

Que, dans son opinion, les concessions du 26 février 1902 sont nulles et de nul effet, en ce sens que non seulement, ce qui est bien évident, elles ne sauraient pratiquement recevoir leur exécution, mais, de plus, qu'elles ne sauraient entraîner aucune obligation à la charge du gouvernement;

Attendu qu'aux termes du protocole d'arbitrage, la commission n'a pas pour seule mission de rechercher si les contrats sont nuls ou valables, mais également d'apprécier s'ils ont engagé la responsabilité du gouvernement haïtien et dans quelle mesure;

Qu'en effet, d'une part, si les contrats étaient pleinement valables, la conséquence suivrait d'elle-même logiquement, le gouvernement haïtien devant naturellement procurer au concessionnaire tous les avantages qui seraient résultés pour lui de l'exécution complète des concessions, d'autre part, s'ils étaient nuls, il n'y aurait pas autre chose à examiner.

Que la question de la responsabilité du gouvernement haitien, dans son principe et dans son étendue, se présente précisément au cas où les contrats ne seraient pas, pour une cause ou pour une autre, susceptibles de produire leur plein effet;

Attendu que si, au point de vue des principes du droit constitutionnel haïtien, les concessions contenues dans l'acte du 26 février 1902 n'ont pas reçu le complément qui leur était indispensable pour produire tout leur effet, puisque l'approbation du pouvoir législatif leur a été refusée, l'acte en question n'en a pas moins, dans l'opinion de la commission, engagé la responsabilité du gouvernement haïtien;

Que d'après les circonstances, la nature de l'acte, plusieurs de ses clauses, le sieur Aboilard avait toute raison de croire que les concessions à lui faites

n'étaient pas de simples projets, mais étaient bien définitives; qu'au surplus, ainsi qu'il a été expliqué plus haut, ces concessions ne constituaient pas pour lui un avantage purement gratuit; qu'elles avaient leur contre-partie;

Qu'il y a eu, tout au moins, faute grave de la part du gouvernement haïtien d'alors, à faire un contrat dans de semblables conditions, à créer des attentes légitimes qui, ayant été trompées par le fait du gouvernement lui-même, ont entraîné un préjudice dont réparation est due;

Qu'il s'agissait pour le gouvernement haïtien d'obtenir un résultat immédiat, l'abandon d'un procès dont il craignait l'issue et que par suite un avantage également immédiat devait être conféré à l'autre partie;

Que l'on comprend que les mêmes règles ne soient pas applicables à une transaction qui peut être une nécessité d'administration et à une concession bénévole où le bénéficiaire est à la discrétion du concédent;

Attendu que, loin que l'acte du 26 février 1902 fasse allusion à son caractère soi-disant précaire, à la nécessité d'une approbation législative, il renferme des clauses qui excluent l'idée même de précarité et de nécessité d'une pareille approbation;

Qu'en effet la durée de trente années assignée aux concessions, *part du jour même de la transaction*, ce qui est inexplicable, s'il s'agit d'un contrat soumis à une condition dont il dépend d'une partie de réaliser plus ou moins vite l'accomplissement;

Que cette manière de voir est confirmée par le cahier des charges concernant l'éclairage électrique dont l'article 3 fixe la durée du privilège à trente années à partir de la date du contrat et exige, à peine de nullité, que le concessionnaire ait commencé les travaux dans les six mois de la même date et ait achevé l'installation de l'usine centrale dans un nouveau délai de six mois à partir du jour de l'expiration de celui ci-dessus visé; que de pareilles exigences sont véritablement inintelligibles, s'il n'était pas nettement entendu qu'il s'agissait d'une concession définitive.

Que des clauses dans le même sens se trouvent dans le cahier des charges pour la distribution des eaux; que la durée du droit du concessionnaire et le délai dans lequel il doit s'acquitter de ses obligations partent également de l'acte de concession (combinaison des articles 1, 2 et 4);

Attendu que, s'il ne peut s'agir d'obliger le gouvernement haïtien à exécuter telles quelles les concessions faites à M. Aboilard dans l'acte du 26 février 1902, la commission arbitrale est d'avis, pour répondre à la question à elle posée dans le protocole d'arbitrage, que les contrats intervenus entre M. Louis Aboilard et les autorités haïtiennes ne sauraient être regardés comme nuls et de nul effet, mais qu'ils ont engagé la responsabilité du gouvernement haïtien.

Qu'en conséquence, réparation est due à M. Aboilard à raison de l'inexécution des engagements pris envers lui dans les conditions indiquées plus haut;

Sur le second point:

Attendu que par suite de la réponse à la première question, la commission arbitrale doit déterminer le montant de l'indemnité due à M. Aboilard;

En ce qui touche le bon de 310,000 dollars souscrit au profit de MM. Fouchard et Aboilard:

Attendu que le sieur Aboilard réclame 15,500 dollars, somme qui lui reviendrait sur le bon d'après ses arrangements particuliers avec le sieur Fouchard;

Mais attendu que le bon de 310,000 dollars a été endossé pour le tout par Aboilard au profit de Fouchard, que celui-ci est donc seul titulaire dudit bon

et que c'est à lui à s'arranger avec le gouvernement haïtien pour en obtenir le payement;

Que si, sur le montant de ce bon, le sieur Fouchard est redevable d'une certaine somme au sieur Aboilard, cela ne regarde que leurs rapports personnels, que cela est *res inter alios acta* pour le gouvernement haïtien qui ne connaît que le porteur actuel du bon;

Que les rapports de Fouchard et d'Aboilard ne peuvent pas plus être opposés au gouvernement haïtien que celui-ci n'a le droit de s'en prévaloir pour modifier les effets des concessions par lui faites à Aboilard; qu'il n'appartient à aucun point de vue à la commission de s'en occuper;

ATTENDU, en conséquence, que la réclamation présentée de ce chef par Aboilard doit être rejetée;

En ce qui touche les divers chefs de réclamations présentées par Aboilard, soit à raison du préjudice résultant pour lui de la perte des concessions, soit à raison de dommages d'ordres divers:

ATTENDU que la commission ne saurait admettre que les concessions puissent produire au profit d'Aboilard les mêmes avantages que si elles avaient reçu leur complément indispensable pour être exécutées;

Qu'il s'agit seulement d'apprécier les conséquences de la faute relevée par elle à la charge du gouvernement haïtien qui a consenti les concessions;

Que, dans l'appréciation de ces conséquences, il y a lieu pour la commission de tenir compte des divers éléments qui résultent des pièces produites;

Qu'Aboilard a éprouvé certains dommages directs dont l'existence n'est pas douteuse, bien que la commission regrette que des justifications précises et détaillées ne lui aient pas été fournies; qu'il a fait procéder à des études préparatoires; que son activité a été entravée pendant un délai assez long;

Que s'il y a lieu de constater qu'il n'y avait encore qu'une société d'études et non pas la société d'exploitation prévue par les concessions, de sérieux bénéfices pouvaient être légitimement espérés par Aboilard;

ATTENDU qu'il est impossible à la commission d'entrer dans le détail et d'affecter une indemnité spéciale à chaque élément du préjudice total;

Qu'elle ne peut qu'allouer une indemnité globale pour la fixation de laquelle elle s'est efforcée de tenir équitablement compte des divers éléments en jeu;

ATTENDU que moyennant le payement de ladite indemnité tous les rapports nés entre le gouvernement d'Haïti et Aboilard, des concessions contenues dans l'acte du 26 février 1902, doivent être considérés comme définitivement réglés;

ATTENDU que la commission est chargée de fixer les termes et le mode de payement de l'indemnité.

Par ces motifs,

La commission arbitrale constituée par le protocole du 15 juin 1904.

Après en avoir délibéré dans ses séances des 30 mars, 4 mai, 13 juin, 11, 19, 21 et 26 juillet 1905,

Déclare que les contrats intervenus entre M. Louis Aboilard et les autorités haïtiennes ont engagé la responsabilité du gouvernement haïtien;

Décide que, pour réparation du préjudice causé à M. Louis Aboilard par la rupture de ces contrats, le gouvernement haïtien payera, pour son compte, au gouvernement français la somme de 225,000 fr., ce payement devant être effectué à Paris en monnaie ayant cours en France; que cette somme produira, à partir de ce jour jusqu'à parfait payement, des intérêts à 6 p. 100 l'an; que le gouvernement haïtien pourra effectuer le payement en deux fois, savoir: 125,000 fr. dans un an, à partir de la présente sentence, et 100,000 fr. six mois après;

Décide enfin que, par le paiement de cette indemnité, les conséquences des contrats du 26 février 1902 seront définitivement liquidées.

FAIT à Paris, le 26 juillet 1905.

(*Signé*) Henry VIGNAUD, *président*
(*Signé*) L. RENAULT
(*Signé*) Solon MÉNOS

AFFAIRE DES BOUTRES DE MASCATE

PARTIES: France, Grande-Bretagne.

COMPROMIS: Compromis arbitral du 13 octobre 1904: Arrangements supplémentaires au Compromis, en date des 13 janvier et 19 mai 1905.

ARBITRES: Cour permanente d'Arbitrage: Henri Lammash; Melville W. Fuller; A.F. de Savornin Lohman.

SENTENCE: 8 août 1905.

DOCUMENTS ADDITIONNELS: Traité du 17 novembre 1844; Déclaration du 10 mars 1862; Acte général de Bruxelles du 2 juillet 1890.

Arbitrage ayant pour objet de régler un différend élevé entre la France et la Grande-Bretagne au sujet des boutres protégés français dans les eaux de Mascate — Définition de la qualité de « protégé » — Droit pour un Etat de concéder son pavillon et de fixer les conditions auxquelles est soumise cette concession — Limitations apportées par les traités à l'exercice de ce droit — Statut juridique des navires étrangers et des propriétaires de ces navires dans les eaux territoriales d'un Etat — Interprétation des traités invoqués.

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M. J. P. A. François, « La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir ». Académie de Droit international, *Recueil des cours*, 1955, I, p. 490.

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APERÇU [1]

Par une déclaration du 10 mars 1862 [2], la France et la Grande-Bretagne s'engageaient réciproquement à respecter l'indépendance du Sultan de Mascate. Par la suite, la France, agissant en vertu du traité du 17 novembre 1844 [3], conclu avec le Sultan, adopta la pratique de délivrer à certains de ses ressortissants des pièces les autorisant à arborer le pavillon français sur des boutres ou navires trafiquant sur les côtes de l'Océan Indien, sur celles de la Mer Rouge et du Golfe Persique, et étant aussi généralement employés à la traite des esclaves sur la côte orientale de l'Afrique. Après la signature de l'Acte général de Bruxelles [4], le 2 juillet 1890, ayant trait à la suppression de la traite africaine, la Grande-Bretagne éleva des protestations à l'encontre de cette pratique et soutint que la délivrance d'autorisations de cette nature aux indigènes, ainsi que les privilèges et les immunités réclamés en conséquence par eux, portaient atteinte au droit de juridiction du Sultan sur ses sujets, en violation des engagements conclus entre la France et la Grande-Bretagne en vertu de la déclaration de 1862. N'ayant pas été susceptible d'une solution par la voie diplomatique, la question fut soumise, en vertu d'un compromis, signé le 13 octobre 1904 [5], à un tribunal composé de membres de la Cour permanente d'Arbitrage: M. Henri Lammasch, d'Autriche, M. A. F. de Savornin Lohman, des Pays-Bas, et M. Melville W. Fuller, *Chief Justice* des Etats-Unis d'Amérique. Les séances commencèrent le 25 juillet 1905, et se terminèrent le 2 août 1905; la sentence fut rendue le 8 août 1905.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, édition française, 1921, p. 97.

[2] Voir *infra*, p. 97.

[3] Voir *infra*, p. 97.

[4] Voir *infra*, p. 98.

[5] Voir *infra*, p. 89.

COMPROMIS ARBITRAL CONCLU À LONDRES LE 13 OCTOBRE 1904, ENTRE LA FRANCE ET LA GRANDE BRETAGNE, CONCERNANT LE DIFFÉREND ENTRE CES DEUX PUISSANCES À PROPOS DES BOUTRES DE MASCATE [1]

ATTENDU que le Gouvernement Français et celui de Sa Majesté Britannique ont jugé convenable par la Déclaration du 10 mars 1862, « de s'engager réciproquement à respecter l'indépendance » de Sa Hautesse le Sultan de Mascate;

ATTENDU que des difficultés se sont élevées sur la portée de cette Déclaration relativement à la délivrance, par la République Française, à certains sujets de Sa Hautesse le Sultan de Mascate de pièces les autorisant à arborer le pavillon Français, ainsi qu'au sujet de la nature des privilèges et immunités revendiqués par les sujets de Sa Hautesse, propriétaires ou commandants de boutres (« dhows ») qui sont en possession de semblables pièces ou qui sont membres de l'équipage de ces boutres et leurs familles, particulièrement en ce qui concerne le mode suivant lequel ces privilèges et ces immunités affectent le droit de juridiction de Sa Hautesse le Sultan sur ses dits sujets:

Les soussignés, dûment autorisés à cet effet par leurs Gouvernements respectifs, conviennent, par les présentes, que ces difficultés seront tranchées par voie d'arbitrage conformément à l'Article I de la Convention intervenue entre les deux pays, le 14 octobre dernier [2], et que la décision du Tribunal de La Haye sera définitive.

Il est aussi convenu par les présentes de ce qui suit:

Article I. Chacune des Hautes Parties Contractantes nommera un Arbitre, et ces deux Arbitres ensemble choisiront un Surarbitre; si, dans le délai d'un mois à partir de leur nomination, ils ne peuvent tomber d'accord, le choix d'un Surarbitre sera confié à Sa Majesté le Roi d'Italie. Les Arbitres et le Surarbitre ne seront pas sujets ou citoyens de l'une ou l'autre des Hautes Parties Contractantes et seront choisis parmi les membres de la Cour de La Haye.

Article II. Chacune des Hautes Parties Contractantes devra, dans un délai de trois mois après la signature du présent Compromis, remettre à chaque membre du Tribunal constitué par les présentes, et à l'autre Partie, un Mémoire écrit ou imprimé exposant et motivant sa réclamation et un dossier écrit ou imprimé contenant les documents ou toutes autres pièces probantes écrites ou imprimées sur lesquelles il s'appuie.

Dans les trois mois de la remise des dits Mémoires, chacune des Hautes Parties remettra à chaque membre du Tribunal et à l'autre Partie un Contre-Mémoire écrit ou imprimé, avec les pièces à l'appui.

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[1] Bureau international de la Cour permanente d'Arbitrage, *Recueil des Actes et Protocoles concernant le Différend entre la France et la Grande Bretagne à propos des Boutres de Mascate, soumis au Tribunal d'Arbitrage constitué en vertu du Compromis Arbitral conclu à Londres le 13 octobre 1904 entre les Puissances susmentionnées*. La Haye, juillet-août 1905, p. 5.

[2] Une Convention générale d'arbitrage. Pour le texte anglais et français de cette Convention, voir: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 192.

Dans le mois de la remise des Contre-Mémoires, chaque Partie pourra remettre à chaque Arbitre et à l'autre Partie des conclusions écrites ou imprimées, à l'appui des propositions qu'elle aurait mises en avant.

Les délais fixés par le présent Compromis pour la remise du Mémoire, du Contre-Mémoire, et des conclusions pourront être prolongés d'un commun accord par les Parties Contractantes.

Article III. Le Tribunal se réunira à La Haye, dans la quinzaine de la remise des Arguments.

Chaque Partie sera représentée par un Agent.

Le Tribunal pourra, s'il juge nécessaire de plus amples éclaircissements en ce qui regarde un point quelconque, demander, à chaque Agent, une explication orale ou par écrit: mais, en pareil cas, l'autre Partie aura le droit de répliquer.

Article IV. La décision du Tribunal sera rendue dans les trente jours qui suivront sa réunion à La Haye ou la remise des explications qui auraient été fournies à sa demande, à moins que, à la requête du Tribunal, les Parties Contractantes ne conviennent de prolonger le délai.

Article V. Les dispositions de la Convention de La Haye, du 29 juillet 1899, s'appliqueront à tous les points non prévus par le présent Compromis.

FAIT, en double exemplaire, à Londres, le 13 octobre 1904.

[L.S.] Paul CAMBON

ARRANGEMENT PAR LEQUEL LE DÉLAI POUR LA REMISE DES MÉMOIRES A ÉTÉ PROROGÉ JUSQU'AU 1er FÉVRIER 1905

La Constitution du Tribunal Arbitral institué par le Compromis signé à Londres le 13 Octobre, 1904, ayant été retardée de quelques jours par suite de circonstances indépendantes de la volonté des Hautes Parties Contractantes, le Gouvernement de Sa Majesté Britannique et le Gouvernement de la République Française ont jugé utile, d'un commun accord, d'user de la faculté qui leur est accordée dans le 4e paragraphe de l'Article II du dit Compromis de prolonger le délai fixé pour la remise du Mémoire.

Ils conviennent, en conséquence, par les présentes, de fixer au 1er Février la date à laquelle les membres du Tribunal Arbitral et les deux Gouvernements intéressés recevront communication du Mémoire ou du dossier présenté par les Parties.

Il est également entendu que les délais successifs prévus à l'Article II du Compromis pour la procédure Arbitrale courront du 1er Février au lieu du 13 Janvier, date qui résultait des termes de l'Accord signé le 13 Octobre, 1904, par M. Paul Cambon et Lord Lansdowne.

FAIT à Londres, en double exemplaire, le 13 Janvier, 1905.

[L.S.] Paul CAMBON

ARRANGEMENT EN VUE DE LAISSER AU TRIBUNAL ARBITRAL LE SOIN DE FIXER LUI-MÊME LA DATE DE LA REMISE DES CONCLUSIONS DES DEUX PARTIES

La constitution du Tribunal Arbitral institué par le Compromis signé à Londres le 13 Octobre, 1904, ayant été retardée de quelques jours par suite de circonstances indépendantes de la volonté des Hautes Parties Contractantes, le Gouvernement de la République Française et le Gouvernement de Sa Majesté Britannique ont jugé utile, d'un commun accord, d'user de la faculté qui

leur est accordée par le quatrième paragraphe de l'Article II dudit Compromis de prolonger le delai fixé pour la remise des Conclusions.

Ils conviennent, en conséquence, par les présentes, de laisser au Tribunal Arbitral le soin de fixer la date à laquelle les membres dudit Tribunal et les deux Gouvernements intéressés recevront communication des Conclusions presentées par les Parties.

Cet Accord additionnel sera communiqué au Tribunal Arbitral par les soins du Bureau International de la Cour Permanente d'Arbitrage.

FAIT à Londres, en double exemplaire, le 19 Mai, 1905.

[L.S.] Paul CAMBON

SENTENCE DU TRIBUNAL D'ARBITRAGE CONSTITUÉ EN VERTU DU COMPROMIS SIGNÉ À LONDRES LE 13 OCTOBRE 1904 ENTRE LA FRANCE ET LA GRANDE BRETAGNE, LA HAYE, LE 8 AOÛT 1905[1]

Arbitration to settle a dispute between France and Great-Britain regarding dhows under French protection in the waters of Muscat — Definition of the term "protégé" — Right of a State to permit the use of its flag and to determine the conditions thereof — Treaty restrictions on the exercise of this right — Legal Status of foreign ships and their owners in the territorial sea of a State — Interpretation of relevant treaties.

Le Tribunal d'Arbitrage constitué en vertu du Compromis conclu à Londres le 13 octobre 1904, entre la France et la Grande Bretagne:

ATTENDU que le Gouvernement Français et celui de Sa Majesté Britannique ont jugé convenable, par le Déclaration du 10 mars 1862, « de s'engager réciproquement à respecter l'indépendance » de Sa Hautesse le Sultan de Mascate,

ATTENDU que des difficultés se sont élevées sur la portée de cette Déclaration relativement à la délivrance, par la République Française, à certains sujets de Sa Hautesse le Sultan de Mascate de pièces les autorisant à arborer le pavillon Français, ainsi qu'au sujet de la nature des privilèges et immunités revendiqués par les sujets de Sa Hautesse, propriétaires ou commandants de boutres (« dhows ») qui sont en possession de semblables pièces ou qui sont membres de l'équipage de ces boutres et leurs familles, particulièrement en ce qui concerne le mode suivant lequel ces privilèges et ces immunités affectent le droit de juridiction de Sa Hautesse le Sultan sur ses dits sujets,

ATTENDU que les deux Gouvernements sont tombés d'accord par le Compromis du 13 octobre 1904 de faire décider ces difficultés par voie d'arbitrage conformément à l'article 1 de la Convention conclue par les deux Puissances le 14 octobre 1903 [2],

ATTENDU qu'en exécution de ce Compromis ont été nommés Arbitres,
par le Gouvernement de Sa Majesté Britannique:
Monsieur Melville W. FULLER, Chief Justice des Etats-Unis d'Amérique, et
par le Gouvernement de la République Française:
Monsieur le Jonkheer A. F. DE SAVORNIN LOHMAN, Docteur en droit, ancien Ministre de l'Intérieur des Pays-Bas, ancien Professeur à l'Université libre à Amsterdam, Membre de la Seconde Chambre des Etats-Généraux,

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[1] Bureau international de la Cour permanente d'Arbitrage, *Recueil des Actes et Protocoles concernant le Différend entre la France et la Grande Bretagne à propos des Boutres de Mascate, soumis au Tribunal d'Arbitrage constitué en vertu du Compromis Arbitral conclu à Londres le 13 octobre 1904 entre les Puissances susmentionnées*. La Haye, juillet-août 1905, p. 61. Pour la traduction officielle anglaise, voir *ibid.*, p. 69.

[2] Une Convention générale d'arbitrage. Pour le texte anglais et français de cette Convention, voir: Descamps-Renault, *Recueil international des traités du XX^e siècle*, année 1903, p. 192.

ATTENDU que ces Arbitres n'étant pas tombés d'accord dans le délai d'un mois à partir de leur nomination sur le choix d'un Surarbitre, ce choix étant dévolu dès lors en vertu de l'article 1 du Compromis au Roi d'Italie, Sa Majesté a nommé comme Surarbitre:

Monsieur Henri LAMMASCH, Docteur en droit, Professeur de droit international à l'Université à Vienne, Membre de la Chambre des Seigneurs du Parlement Autrichien,

ATTENDU que les Mémoires, Contre-Mémoires et Conclusions ont été dûment communiqués au Tribunal et aux Parties,

ATTENDU que le Tribunal a examiné avec soin ces documents, et les observations supplémentaires qui leur ont été présentées par les deux Parties;

QUANT À LA PREMIÈRE QUESTION:

CONSIDÉRANT, qu'en général il appartient à tout Souverain de décider à qui il accordera le droit d'arborer son pavillon et de fixer les règles auxquelles l'octroi de ce droit sera soumis, et considérant qu'en conséquence l'octroi du pavillon Français à des sujets de Sa Hautesse le Sultan de Mascate ne constitue en soi aucune atteinte à l'indépendance du Sultan,

CONSIDÉRANT que néanmoins un Souverain peut être limité dans l'exercice de ce droit par des traités, et considérant que le Tribunal en vertu de l'article 48 de la Convention pour le règlement pacifique des conflits internationaux du 29 juillet 1899 et de l'article 5 du Compromis du 13 octobre 1904 « est autorisé à déterminer sa compétence en interprétant le compromis ainsi que les autres traités qui peuvent être invoqués dans la matière, et en appliquant les principes du droit international », et qu'en conséquence la question se pose sous quelles conditions les Puissances qui ont accédé à l'Acte Général de la Conférence de Bruxelles du 2 juillet 1890 concernant la suppression de la traite des esclaves africains, spécialement à l'article 32 de cet Acte, ont le droit d'autoriser des navires indigènes à arborer leurs pavillons,

CONSIDÉRANT que par l'article 32 de cet Acte la faculté des Puissances Signataires d'octroyer leur pavillon à des navires indigènes a été limitée dans le but de supprimer la traite des esclaves et dans les intérêts généraux de l'humanité, sans faire aucune distinction si celui qui sollicite le droit d'arborer le pavillon appartient à un état signataire ou non, et considérant qu'en tout cas la France est liée vis à vis de la Grande Bretagne de n'octroyer son pavillon que sous les conditions prescrites par cet Acte,

CONSIDÉRANT que pour atteindre le but susdit les Puissances Signataires de l'Acte de Bruxelles sont convenues par l'article 32, que l'autorisation d'arborer le pavillon d'une des dites Puissances ne sera accordée à l'avenir qu'aux bâtiments indigènes qui satisferont à la fois aux trois conditions suivantes:

1°. Les armateurs ou propriétaires devront être sujets ou protégés de la Puissance dont ils demandent à porter les couleurs,

2°. Ils seront tenus d'établir qu'ils possèdent des biens-fonds dans la circonscription de l'autorité à qui est adressée leur demande, ou de fournir une caution solvable pour la garantie des amendes qui pourraient être éventuellement encourues,

3°. Les dits armateurs ou propriétaires, ainsi que le capitaine du bâtiment, devront fournir la preuve qu'ils jouissent d'une bonne réputation et notamment n'avoir jamais été l'objet d'une condamnation pour faits de traite,

CONSIDÉRANT qu'à défaut d'une définition du terme « protégé » dans l'Acte Général de la Conférence de Bruxelles, il faut entendre ce terme dans le sens qui correspond le mieux tant aux intentions élevées de cette Conférence et de l'Acte Final qui en est résulté, qu'aux principes du droit international tels qu'ils ont été exprimés dans les conventions en vigueur à cette époque, dans la législation nationale en tant qu'elle a obtenu une reconnaissance internationale et dans la pratique du droit des gens,

CONSIDÉRANT que le but de l'article 32 susdit est de n'admettre à la navigation dans ces mers infestées par la traite des esclaves que ceux des navires indigènes qui sont soumis à la plus stricte surveillance des Puissances Signataires, condition dont l'accomplissement ne peut être assuré que si les propriétaires, armateurs et équipages de ces navires sont exclusivement soumis à la souveraineté et à la juridiction de l'Etat, sous le pavillon duquel ils exercent la navigation,

CONSIDÉRANT que depuis la restriction que le terme « protégé » a subie en vertu de la législation de la Porte Ottomane en 1863, 1865 et 1869, spécialement de la loi Ottomane du 23 sefer 1280 (août 1863), implicitement acceptée par les Puissances qui jouissent du droit des capitulations, et depuis le traité conclu entre la France et le Maroc en 1863, auquel ont accédé un grand nombre d'autres Puissances et qui a obtenu la sanction de la Convention de Madrid du 30 juillet 1880, le terme « protégé » n'embrasse par rapport aux Etats à capitulations que les catégories suivantes: 1°. les personnes sujets d'un pays qui est sous le protectorat de la Puissance dont elles réclament la protection. 2°. les individus qui correspondent aux catégories énumérées dans les traités avec le Maroc de 1863 et de 1880 et dans la loi Ottomane de 1863, 3°. les personnes, qui par un traité spécial ont été reconnues comme « protégés », telles que celles énumérées par l'article 4 de la Convention Franco-Mascataise de 1844 et 4°. les individus qui peuvent établir qu'ils ont été considérés et traités comme protégés par la Puissance en question avant l'année dans laquelle la création de nouveaux protégés fut réglée et limitée, c'est-à-dire avant l'année 1863, ces individus n'ayant pas perdu leur *status* une fois légitimement acquis,

CONSIDÉRANT que, quoique les Puissances n'aient renoncé *expressis verbis* à l'exercice du prétendu droit de créer des protégés en nombre illimité que par rapport à la Turquie et au Maroc, néanmoins l'exercice de ce prétendu droit a été abandonné de même par rapport aux autres Etats Orientaux, l'analogie ayant toujours été reconnue comme un moyen de compléter les dispositions écrites très défectueuses des capitulations, en tant que les circonstances sont analogues,

CONSIDÉRANT d'autre part que la concession *de facto* de la part de la Turquie, de transmettre le *status* de « protégés » aux descendants de personnes qui en 1863 avaient joui de la protection d'une Puissance Chrétienne, ne peut être étendue par analogie à Mascate, les circonstances étant entièrement différentes, puisque les protégés des Etats Chrétiens en Turquie sont d'une race, nationalité et religion différentes de celles de leurs maîtres Ottomans, tandis que les habitants de Sour et les autres Mascatais qui pourraient solliciter le pavillon Français, se trouvent à tous ces égards entièrement dans la même condition que les autres sujets du Sultan de Mascate,

CONSIDÉRANT que les dispositions de l'article 4 du Traité Franco-Mascatais de 1844 s'appliquent seulement aux personnes qui sont *bona fide* au service des Français, mais pas aux personnes qui demandent des titres de navires dans le but d'exercer quelque commerce,

CONSIDÉRANT que le fait d'avoir donné avant la ratification de la Convention de Bruxelles le 2 janvier 1892 des autorisations d'arborer le pavillon Français à des navires indigènes ne répondant pas aux conditions prescrites par l'article 32 de cet Acte n'était pas en contradiction avec une obligation internationale de la France,

PAR CES MOTIFS,

décide et prononce ce qui suit:

1°. Avant le 2 janvier 1892 la France avait le droit d'autoriser des navires appartenant à des sujets de Sa Hautesse le Sultan de Mascate à arborer le pavillon Français, n'étant liée que par ses propres lois et règlements administratifs;

2°. Les boutriers, qui avant 1892 avaient été autorisés par la France à arborer le pavillon Français, conservent cette autorisation aussi longtemps que la France la continue à celui qui l'avait obtenue;

3°. Après le 2 janvier 1892 la France n'avait pas le droit d'autoriser des navires appartenant à des sujets de Sa Hautesse le Sultan de Mascat à arborer le pavillon Français, que sous condition que leurs propriétaires ou armateurs avaient ou auraient établi qu'ils ont été considérés et traités par la France comme ses « protégés » avant l'année 1863;

QUANT À LA 2e QUESTION:

CONSIDÉRANT que la situation légale de navires portant des pavillons étrangers et des propriétaires de ces navires dans les eaux territoriales d'un Etat Oriental est déterminée par les principes généraux de juridiction, par les capitulations ou autres traités et par la pratique qui en est résultée.

CONSIDÉRANT que les termes du Traité d'Amitié et de Commerce entre la France et l'Iman de Mascate du 17 novembre 1844 sont, surtout en raison des expressions employées dans l'article 3 « Nul ne pourra, sous aucun prétexte, pénétrer dans les maisons, magasins et autres propriétés, possédés ou occupés par des Français ou par des personnes au service des Français, ni les visiter sans le consentement de l'occupant, à moins que ce ne soit avec l'intervention du Consul de France », assez larges pour embrasser aussi bien des navires que d'autres propriétés,

CONSIDÉRANT que, quoiqu'il ne saurait être nié qu'en admettant le droit de la France d'octroyer dans certaines circonstances son pavillon à des navires indigènes et de soustraire ces navires à la visite par les autorités du Sultan ou en son nom, la traite des esclaves est facilitée, parce que les marchands d'esclaves pour se soustraire à la recherche peuvent facilement abuser du pavillon Français, la possibilité d'un tel abus, qui peut être entièrement supprimé par l'accession de toutes les Puissances à l'article 42 de l'Acte de Bruxelles, ne peut exercer aucune influence sur la décision de cette affaire, qui ne doit être fondée que sur des motifs d'ordre juridique,

CONSIDÉRANT qu'en vertu des articles 31-41 de l'Acte de Bruxelles l'octroi du pavillon à un navire indigène est strictement limité à ce navire et à son propriétaire et que dès lors il ne peut être transmis ou transféré à quelque autre personne ni à quelque autre navire, même si celui-ci appartenait au même propriétaire,

CONSIDÉRANT que l'article 4 du Traité Franco-Mascatais assure aux sujets de Sa Hautesse le Sultan de Mascate « qui seront au service des Français » la même

protection qu'aux Français eux-mêmes, mais considérant que les propriétaires, commandants et équipages des boutres autorisés à arborer le pavillon Français n'appartiennent pas à cette catégorie de personnes et encore moins les membres de leurs familles,

CONSIDÉRANT que le fait de soustraire ces personnes à la souveraineté, spécialement à la juridiction, de Sa Hautesse le Sultan de Mascate serait en contradiction avec la Déclaration du 10 mars 1862, par laquelle la France et la Grande Bretagne se sont engagées réciproquement à respecter l'indépendance de ce Prince,

PAR CES MOTIFS,

décide et prononce ce qui suit:

1°. Les boutres (« dhows ») de Mascate qui ont été autorisés, ainsi qu'il a été indiqué ci-dessus, à arborer le pavillon Français, ont dans les eaux territoriales de Mascate le droit à l'inviolabilité, réglée par le Traité Franco-Mascatais du 17 novembre 1844;

2°. L'autorisation d'arborer le pavillon Français ne peut être transmise ou transférée à quelque autre personne ou à quelque autre boutre (« dhow »), même si celui-ci appartenait au même propriétaire;

3°. Les sujets du Sultan de Mascate, qui sont propriétaires ou commandants de boutres (« dhows ») autorisés à arborer le pavillon Français ou qui sont membres des équipages de tels boutres ou qui appartiennent à leurs familles ne jouissent en conséquence de ce fait d'aucun droit d'exterritorialité, qui pourrait les exempter de la souveraineté, spécialement de la juridiction, de Sa Hautesse le Sultan de Mascate.

FAIT à *La Haye*, dans l'Hôtel de la Cour permanente d'Arbitrage, le 8 août 1905.

(*Signé*) H. LAMMASCH

(*Signé*) Melville W. FULLER

(*Signé*) A. F. DE SAVORNIN LOHMAN

DOCUMENTS ADDITIONNELS

Traité[1] d'Amitié et de Commerce conclu, le 17 novembre, 1844, entre la France et l'Iman de Mascate[2]

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Article III. Les Français auront la faculté d'acheter, de vendre ou de prendre à bail des terres, maisons, magasins, dans les Etats de Son Altesse le Sultan de Mascate. Nul ne pourra, sous aucun prétexte pénétrer dans les maisons, magasins et autres propriétés, possédés ou cocupés par des Français, ni les visiter sans le consentement de l'occupant, à moins que ce ne soit avec l'intervention du Consul de France.

Les Français ne pourront, sous aucun prétexte, être retenus contre leur volonté dans les Etats du Sultan de Mascate.

Article IV. Les sujets de Son Altesse le Sultan de Mascate qui seront au service des Français jouiront de la même protection que les Français eux-mêmes; mais, si les sujets de Son Altesse sont convaincus de quelque crime ou infraction punissable par la loi, ils seront congédiés par les Français au service desquels ils se trouveraient, et livrés aux autorités locales.

. . .

Déclaration de la France et de la Grande-Bretagne pour la garantie réciproque de l'Indépendance des Sultans de Mascate et de Zanzibar, échangée à Paris, le 10 mars 1862[3]

S.M. l'Empereur des Français et S.M. la Reine du Royaume-Uni de la Grande-Bretagne et d'Irlande, prenant en considération l'importance qui s'attache au maintien de l'indépendance du Sultan de Mascate d'une part, et du Sultan de Zanzibar de l'autre, ont jugé convenable de s'engager réciproquement à respecter l'indépendance de ces deux Princes.

Les soussignés Ministre des Affaires Etrangères de S.M. l'Empereur des Français et Ambassadeur Extraordinaire de S.M. Britannique près la Cour de France, étant munis de pouvoirs à cet effet, déclarent en conséquence, par le présent acte, que leurs dites Majestés prennent réciproquement l'engagement indiqué ci-dessus.

En foi de quoi, les soussignés ont signé en double la présente déclaration et y ont apposé le cachet de leurs armes.

Fait à Paris, le 10 mars 1862.

E. Thouvenel — Cowley

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[1] Extrait.

[2] *British and Foreign State Papers*, Vol. XXXV, p. 1011.

[3] De Martens, *Nouveau Recueil général de traités*, 3e série, t. IV, p. 768.

ACTE[1] GÉNÉRAL DE BRUXELLES DU 2 JUILLET 1890 POUR LA SUPPRESSION DE LA TRAITE AFRICAINE[2]

. . .

Section II. Règlement concernant l'Usage du Pavillon et la Surveillance des Croiseurs

1. Règles pour la Concession du Pavillon aux Bâtiments Indigènes, le Rôle d'Equipage, et le Manifeste des Passagers Noirs

Article XXX. Les Puissances Signataires s'engagent à exercer une surveillance rigoureuse sur les bâtiments indigènes autorisés à porter leur pavillon dans la zone indiquée à l'Article XXI, et sur les opérations commerciales effectuées par ces bâtiments.

Article XXXI. La qualification de bâtiment indigène s'applique aux navires qui remplissent une des deux conditions suivantes: —

1. Présenter les signes extérieurs d'une construction ou d'un gréement indigène.

2. Etre montés par un équipage dont le capitaine et la majorité des matelots soient originaires d'un des pays baignés par les eaux de l'Océan Indien, de la Mer Rouge, ou du Golfe Persique.

Article XXXII. L'autorisation d'aborer le pavillon d'une des dites Puissances ne sera accordée à l'avenir qu'aux bâtiments indigènes qui satisferont à la fois aux trois conditions suivantes: —

1. Les armateurs ou propriétaires devront être sujets ou protégés de la Puissance dont ils demandent à porter les couleurs;

2. Ils seront tenus d'établir qu'ils possèdent des biens-fonds dans la circonscription de l'autorité à qui est adressée leur demande, ou de fournir une caution solvable pour la garantie des amendes qui pourraient être éventuellement encourues;

3. Les dits armateurs ou propriétaires, ainsi que le capitaine du bâtiment, devront fournir la preuve qu'ils jouissent d'une bonne réputation et notamment n'avoir jamais été l'objet d'une condamnation pour faits de Traite.

Article XXXIII. L'autorisation accordée devra être renouvelée chaque année. Elle pourra toujours être suspendue ou retirée par les autorités de la Puissance dont le bâtiment porte les couleurs.

Article XXXIV. L'acte d'autorisation portera les indications nécessaires pour établir l'identité du navire. Le capitaine en sera détenteur. Le nom du bâtiment indigène et l'indication de son tonnage devront être incrustés et peints en caractères Latins à la poupe, et la ou les lettres initiales de son port d'attache, ainsi que le numéro d'enregistrement dans la série des numéros de ce port, seront imprimés en noir sur les voiles.

Article XXXV. Un rôle d'équipage sera délivré au capitaine du bâtiment au port de départ par l'autorité de la Puissance dont il porte le pavillon. Il sera renouvelé à chaque armement du bâtiment ou, au plus tard, au bout d'une année, et conformément aux dispositions suivantes: —

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[1] Etats parties à cet Acte: France, Grande-Bretagne et d'autres.
[2] *British and Foreign State Papers*, Vol. 82, p. 65.

1. Le rôle sera, au moment du départ, visé par l'autorité qui l'a délivré.

2. Aucun noir ne pourra être engagé comme matelot sur un bâtiment sans qu'il ait été préalablement interrogé par l'autorité de la Puissance dont ce bâtiment porte le pavillon, ou, à défaut de celle-ci, par l'autorité territoriale, à l'effet d'établir qu'il contracte un engagement libre.

3. Cette autorité tiendra la main à ce que la proportion des matelots ou mouses ne soit pas anormale par rapport au tonnage ou au gréement des bâtiments.

4. L'autorité qui aura interrogé les hommes préalablement à leur départ les inscrira sur le rôle d'équipage, où ils figureront avec le signalement sommaire de chacun d'eux en regard de son nom.

5. Afin d'empêcher plus sûrement les substitutions, les matelots pourront, en outre, être pourvus d'une marque distinctive.

Article XXXVI. Lorsque le capitaine du bâtiment désirera embarquer des passagers noirs, il devra en faire la déclaration à l'autorité de la Puissance dont il porte le pavillon, ou, à défaut de celle-ci, à l'autorité territoriale. Les passagers seront interrogés, et, quand il aura été constaté qu'ils s'embarquent librement, ils seront inscrits sur un manifeste spécial donnant le signalement de chacun d'eux en regard de son nom, et indiquant notamment le sexe et la taille. Les enfants noirs ne pourront être admis comme passagers qu'autant qu'ils seront accompagnés de leurs parents ou de personnes dont l'honorabilité serait notoire. Au départ le manifeste des passagers sera visé par l'autorité indiquée ci-dessus, après qu'il aura été procédé à un appel. S'il n'y a pas de passagers à bord, mention expresse en sera faite sur le rôle d'équipage.

Article XXXVII. A l'arrivée dans tout port de relâche ou de destination, le capitaine du bâtiment produira devant l'autorité de la Puissance dont il porte le pavillon, ou, à défaut de celle-ci, devant l'autorité territoriale, le rôle d'équipage et, s'il y a lieu, les manifestes de passagers antérieurement délivrés. L'autorité contrôlera les passagers arrivés à destination ou s'arrêtant dans un port de relâche, et fera mention de leur débarquement sur le manifeste. Au départ, la même autorité apposera de nouveau son visa au rôle et au manifeste, et fera l'appel des passagers.

Article XXXVIII. Sur le littoral Africain et dans les îles adjacentes, aucun passager noir ne sera embarqué à bord d'un bâtiment indigène en dehors des localités où réside une autorité relevant d'une des Puissances Signataires.

Dans toute l'étendue de la zone prévue à l'Article XXI, aucun passager noir ne pourra être débarqué d'un bâtiment indigène hors d'une localité où réside une autorité relevant d'une des Hautes Parties Contractantes et sans que cette autorité assiste au débarquement.

Les cas de force majeure qui auraient déterminé l'infraction à ces dispositions devront être examinés par l'autorité de la Puissance dont le bâtiment porte les couleurs, ou, à défaut de celle-ci, par l'autorité territoriale du port dans lequel le bâtiment inculpé fait relâche.

Article XXXIX. Les prescriptions des Articles XXXV, XXXVI, XXXVII, et XXXVIII ne sont pas applicables aux bateaux non pontés entièrement, ayant un maximum de 10 hommes d'équipage, et qui satisferont à l'une des deux conditions suivantes: —

1. S'adonner exclusivement à la pêche dans les eaux territoriales;

2. Se livrer au petit cabotage entre les différents ports de la même Puissance territoriale, sans s'éloigner de la côte à plus de 5 milles.

Ces différents bateaux recevront, suivant les cas, de l'autorité territoriale ou de l'autorité Consulaire, une licence spéciale, renouvelable chaque année et révocable dans les conditions prévues à l'Article XL, et dont le modèle uniforme, annexé au présent Acte Général, sera communiqué au Bureau International de Renseignements.

Article XL. Tout Acte ou tentative de Traite, légalement constaté à la charge du capitaine, armateur, ou propriétaire d'un bâtiment autorisé à porter le pavillon d'une des Puissances Signataires, ou ayant obtenu la licence prévue à l'Article XXXIX, entraînera le retrait immédiat de cette autorisation ou de cette licence. Toutes les infractions aux prescriptions du paragraphe 2 du Chapitre III seront punies, en outre, des pénalités édictées par les Lois et Ordonnances spéciales à chacune des Puissances Contractantes.

Article XLI. Les Puissances Signataires s'engagent à déposer au Bureau International de Renseignements les modèles types des documents ci-après: —

1. Titre autorisant le port du pavillon.
2. Rôle d'équipage.
3. Manifeste des passagers noirs.

Ces documents, dont la teneur peut varier suivant les Règlements propres à chaque pays, devront renfermer obligatoirement les renseignements suivants, libellés dans une langue Européenne: —

1. En ce qui concerne l'autorisation de porter le pavillon:

(*a*) Le nom, le tonnage, le gréement, et les dimensions principales du bâtiment;

(*b*) Le numéro d'inscription et la lettre signalétique du port d'attache;

(*c*) La date de l'obtention du permis et la qualité du fonctionnaire qui l'a délivré.

2. En ce qui concerne le rôle d'équipage:

(*a*) Le nom du bâtiment, du capitaine, et de l'armateur ou des propriétaires,

(*b*) Le tonnage du bâtiment;

(*c*) Le numéro d'inscription et le port d'attache du navire, sa destination, ainsi que les renseignements spécifiés à l'Article XXV.

3. En ce qui concerne le manifeste des passagers noirs:

Le nom du bâtiment qui les transporte et les renseignements indiqués à l'Article XXXVI, et destinés à bien identifier les passagers.

Les Puissances Signataires prendront les mesures nécessaires pour que les autorités territoriales, ou leurs Consuls, envoient au même Bureau des copies certifiées de toute autorisation d'arborer leur pavillon, dès qu'elle aura été accordée, ainsi que l'avis du retrait dont ces autorisations auraient été l'objet.

Les dispositions du présent Article ne concernent que les papiers destinés aux bâtiments indigènes.

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THE BOUNDARY CASE BETWEEN HONDURAS AND NICARAGUA

COMPROMIS: Treaty of 7 October 1894.

ARBITRATOR: Alphonse XIII, King of Spain.

AWARD: 23 December 1906.

Delimitation of the boundary between the Republic of Honduras and Nicaragua from the Atlantic to the *Portillo de Teotecacinte*.

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SYLLABUS

On 7 October 1894, the Republics of Honduras and Nicaragua concluded a convention [1] with a view to terminating their differences regarding the demarcation of their common boundary. Article 1 of this convention provided for the constitution of a Mixed Boundary Commission, whose duty was to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which was to constitute the boundary between the two Republics. This Mixed Commission met from 24 February 1900 onwards and succeeded in fixing the boundary from the Pacific Coast to the *Portillo de Teotecacinte*. It was, however, unable to agree on the boundary from that point to the Atlantic Coast, and recorded its disagreement at its meeting of 4 July 1901. The latter section of the boundary was submitted, in accordance with the relevant articles of the convention of 7 October 1894, to the arbitration of the King of Spain, who handed down his award on 23 December 1906.

Later, the Government of Nicaragua challenged the validity and binding character of the award. Subsequently, the two parties made several attempts at settlement by direct negotiation or through the good offices or mediation of other States, but these were all unfruitful. Certain incidents between the two parties having taken place in 1957, the Organization of American States, acting as a consultative body, was led to deal with the dispute, with the result that on 21 July 1957, Honduras and Nicaragua reached an agreement at Washington by virtue of which they undertook to submit to the International Court of Justice the disagreement existing between them with respect to the arbitral award rendered by the King of Spain on 23 December 1906. By its judgment of 18 November 1960, the Court found that this award was valid and binding and that Nicaragua was under an obligation to give effect to it.[2]

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[1] See *infra*, p. 107

[2] International Court of Justice, *Case concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras V. Nicaragua), Judgment of 18 November 1960.*

BONILLA-GAMEZ TREATY OF 7 OCTOBER 1894 [1]

Article I. The Governments of Honduras and Nicaragua shall appoint representatives who, duly authorized, shall organize a Mixed Boundary Commission, whose duty it shall be to settle in a friendly manner all pending doubts and differences, and to demarcate on the spot the dividing line which is to constitute the boundary between the two Republics.

Article II. The Mixed Commission, composed of an equal number of members appointed by both parties, shall meet at one of the border towns which offers the greater conveniences for study, and shall there begin its work, adhering to the following rules:

1. Boundaries between Honduras and Nicaragua shall be those lines on which both Republics may be agreed or which neither of them may dispute.

2. Those lines drawn in public documents not contradicted by equally public documents of greater force shall also constitute the boundary between Honduras and Nicaragua.

3. It is to be understood that each Republic is owner of the territory which at the date of independence constituted, respectively, the provinces of Honduras and Nicaragua.

4. In determining the boundaries, the Mixed Commission shall consider fully proven ownership of territory and shall not recognize juridical value to *de facto* possession alleged by one party or the other.

5. In case of lack of proof of ownership the maps of both Republics and public or private documents, geographical or of any other nature, which may shed light upon the matter, shall be consulted; and the boundary line between the two Republics shall be that which the Mixed Commission shall equitably determine as a result of such study.

6. The same Mixed Commission, if it deems it appropriate, may grant compensations and even fix indemnities in order to establish, in so far as possible, a well-defined, natural boundary line.

7. In studying the plans, maps and other similar documents which the two Governments may submit, the Mixed Commission shall prefer those which it deems more rational and just.

8. In case the Mixed Commission should fail to reach a friendly agreement on any point, it shall record this fact separately in two special books, signing the double detailed record, with a statement of the allegations of both parties, and it shall continue its study in regard to the other points of the line of demarcation, disregarding the above referred point until the limit at the extreme end of the dividing line is fixed.

9. The books referred to in the preceding clause shall be sent by the Mixed Commission, one to each of the interested Governments, for its custody in the national archives.

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[1] International Court of Justice, *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua), Judgment of 18 November 1960*, p. 199. Translation from the Spanish revised by the Registry.

Article III. The point or points of the boundary line which may not have been settled by the Mixed Commission referred to in this Treaty shall be submitted, no later than one month after the final session of the said Commission, to the decision, without appeal, of an arbitral tribunal which shall be composed of one representative for Honduras and another for Nicaragua, and of one Member of the foreign Diplomatic Corps accredited to Guatemala, the latter to be elected by the first two, or chosen by lot from two lists each containing three names, and proposed one by each party.

Article IV. The arbitral Tribunal shall be organized in the city of Guatemala within twenty days following dissolution of the Mixed Commission, and within the next ten days shall begin its work, which is to be recorded in a Minutes Book, kept in duplicate, the majority vote constituting law.

Article V. In case the foreign Diplomatic Representative should decline the appointment, another election shall take place within the following ten days, and so on. When the membership of the foreign Diplomatic Corps is exhausted, any other foreign or Central American public figure may be elected, by agreement of the Commissions of Honduras and Nicaragua, and should this agreement not be possible, the point or points in controversy shall be submitted to the decision of the Government of Spain, and, failing this, to that of any South American Government upon which the Foreign Offices of both countries may agree.

Article VI. The procedure and time-limit to which the arbitration shall be subject are as follows:

1. Within twenty days following the date on which the acceptance of the third arbitrator shall have been notified to the parties, the latter shall present to him, through their counsel, their pleadings, plans, maps and documents.

2. Should there be pleadings, he shall submit these, within eight days following their presentation, to the respective opposing counsel, who shall have a period of ten days within which to rebut them and to present any other documents they may deem appropriate.

3. The arbitral award shall be rendered within twenty days following the date on which the period for rebutting pleadings shall have expired, whether these have been presented or not.

Article VII. The arbitral decision, whatever it be, rendered by a majority vote, shall be held as a perfect, binding and perpetual treaty between the High Contracting Parties, and shall not be subject to appeal.

Article VIII. This Convention shall be submitted in Honduras and in Nicaragua to constitutional ratifications, the exchange of which shall take place in Tegucigalpa or in Managua, within sixty days following the date on which both Governments shall have complied with the stipulations of this article.

Article IX. The provision in the preceding article shall in no way hinder the immediate organization of the Mixed Commission, which shall begin its studies no later than two months after the last ratification, in conformity with the provisions of the present Convention, without prejudice to so doing prior to the ratifications, should these be delayed, in order to take advantage of the dry or summer season.

Article X. Immediately following exchange of ratifications of this Convention, whether the work of the Mixed Commission has begun or not, the Governments of Honduras and Nicaragua shall appoint their representatives, who, in conformity with Article IV, shall constitute the arbitral Tribunal, in order that, by organizing themselves in a preliminary meeting, they may name the third

arbitrator and so communicate it to the respective Ministers of Foreign Affairs, in order to obtain the acceptance of the appointee. If the latter should decline to serve they shall forthwith proceed to the appointment of another third arbitrator in the manner stipulated, and so on until the arbitral Tribunal shall have been organized.

Article XI. The periods stipulated in this Treaty for the appointment of arbitrators, the initiation of studies, the ratifications and the exchange thereof, as well as any other periods herein fixed, shall not be fatal nor shall they in any way produce nullity.

The object of these periods has been to speed up the work; but if for any reason they cannot be complied with, it is the will of the High Contracting Parties that the negotiation be carried on to its conclusion in the manner herein stipulated, which is the one they deem most appropriate. To this end they agree that this Treaty shall be in force for a period of ten years, in case its execution should be interrupted, within which period it may be neither revised nor amended in any manner whatever, nor the matter of boundaries be settled by any other means.

ARBITRAL AWARD [1] MADE ON 23 DECEMBER 1906 BY H.M. ALFONSO XIII, KING OF SPAIN, IN THE BORDER DISPUTE BETWEEN THE REPUBLICS OF HONDURAS AND NICARAGUA [2]

Détermination de la ligne frontière entre les Républiques du Honduras et du Nicaragua de l'Atlantique au *Portillo de Teotecacinte*.

DON ALFONSO XIII by the Grace of God and the Constitution of Spain.

WHEREAS the question of boundaries pending between the Republics of Honduras and Nicaragua has been submitted to me for my decision by virtue of Articles III, IV, and V of the Treaty of Tegucigalpa of the 7th October, 1894, and pursuant to the notes addressed by my Minister of State on the 11th November, 1904, to the Ministers of Foreign Affairs for the Said Powers;

INSPIRED by the desire to correspond to the trust equally vested by both the said Powers in the mother-country in submitting to my decision a matter of so great importance:

INASMUCH as for that purpose and by the Royal Decree of the 17th April, 1905, a Commission was appointed to inquire into the said question of boundaries in order that it might clear up the points in dispute and draw up a report preparatory to the arbitral finding:

INASMUCH as the High Parties interested presented in due course their respective allegations and replies together with the corresponding documents, in support of what each considered its right:

INASMUCH as the boundaries between the Republics of Honduras and Nicaragua are now definitely settled by mutual consent of both Parties, from the coast of the Pacific Ocean up to the Portillo de Teotecacinte:

INASMUCH as according to the records of Amapala of 14th September, 1902, and 29th August, 1904, the joint Honduras-Nicaragua Commission endeavoured to select a common boundary point on the Atlantic Coast to continue thence the demarcation of the frontier up to the aforesaid Portillo de Teotecacinte, which could not be carried out, as an understanding could not be arrived at:

INASMUCH as the territories in dispute comprised an extensive zone bounded by:

On the north side, starting from the Portillo de Teotecacinte, continuing along the crest of the range and following the water-shed line terminating in the Portillo where the source of the River Frio originates, and following after-

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[1] International Court of Justice, *Case Concerning the Arbitral Award made by the King of Spain on 23 December 1906 (Honduras v. Nicaragua)*, application instituting proceedings filed in the Registry of the Court on 1st July 1958, p. 37.

[2] English translation of the Spanish original. The English translation appearing in the above document of the International Court of Justice is the same as that published in the *British and Foreign State Papers*, vol. 100, 1906-1907, p. 1096.

wards the course of said river up to where it unites with the Guayambre and afterwards by the source of the Guayambre up to where this river unites with the Guayape, and from here up to where the Guayape and Guayambre take the common name of Rio Patuca, following the water-course of this river until it encounters the meridian which passes by Cape Camarón and following this meridian up to the coast;

On the south from the Portillo de Teotecacinte from the headwaters of the River Limón, following the course of this river and afterwards by the Poteca up to its confluence with the River Segovia, continuing the water-course of the latter until it reaches a point situated 20 geographical miles in a straight and perpendicular line from the Atlantic Coast turning southwards at this point on an astronomical meridian until the geographical parallel of latitude which crosses the mouth of the River Arena and the lagoon of Sandy Bay is intercepted, said parallel being followed towards the east from the above-mentioned intersection up to the Atlantic Coast;

INASMUCH as the question which has given rise to this arbitration consists in fixing the dividing lines of both Republics comprised between a point on the Atlantic Coast and the aforementioned Portillo de Teotecacinte;

WHEREAS, as agreed upon between both Parties in the third Stipulation of the second Article of the Treaty of Tegucigalpa or Gámez-Bonilla of 1894, by which this Arbitration is governed, it is to be understood that each of the Republics of Honduras and Nicaragua possesses such territory as on the date of their independence formed respectively the provinces of Honduras and Nicaragua belonging to Spain;

WHEREAS the Spanish provinces of Honduras and Nicaragua were gradually developing by historical evolution in such a manner as to be finally formed into two distinct administrations (intendencias) under the Captaincy-General of Guatemala by virtue of the prescriptions of the Royal Regulations of Provincial Intendants of New Spain of 1786, which were applied to Guatemala and under whose régime they came as administered provinces till their emancipation from Spain in 1821;

WHEREAS by Royal Decree of 24th July, 1791, at the request of the Intendant Governor of Comayagua and in conformity with the decision of the High Council of Guatemala by virtue of the prescriptions laid down in Articles VIII and IX of the Royal Regulations of Intendants of New Spain, the incorporation of the chief muninipality (Alcaldía Mayor) of Tegucigalpa with the Administration (intendencia) and government of Comayagua (Honduras) with all the territory of its bishopric was decided upon, by reason of the fact that the said chief municipality was a neighbouring province to that of Honduras and united with it for ecclesiastical purposes as well as for collecting taxes;

WHEREAS, by virtue of this Royal Decree the Province of Honduras was formed in 1791, with all the territories of the primitive province of Comayagua, those of the neighbouring Province of Tegucigalpa and the territories of the bishopric of Comayagua, thus comprising a region bordering on the south with Nicaragua, on the south-west and west with the Pacific Ocean, San Salvador, and Guatemala; and on the north, north-east, and east with the Atlantic Ocean, with the exception of that part of the coast inhabited at the time by the Mosquito, Zambos, and Payas Indians, etc.;

WHEREAS, taking as a precedent what is ordained in the Royal Decree of 1791, regard should be had for the demarcation made by two other Royal Decrees of the 23rd August, 1745, by which Don Juan de Vera was

appointed Governor and Commander-General of the Province of Honduras for the command of this province and the remainder comprised within the Bishopric of Comayagua and district of the chief municipality of Tegucigalpa and of all the territory and coast comprised between the limit of jurisdiction of the province of Yucatan up to Cape Gracias á Dios: and the other Royal Decree appointed Don Alonso Fernandez de Heredia Governor of the province of Nicaragua and Commander-General of same, of Costa Rica, of the district of Realejo and chief municipalities of Subtiaba, Nicoya and the rest of the territories comprised from Cape Gracias á Dios up to the River Chagre (River Chagre excluded);

IN said documents Cape Gracias á Dios is fixed as the boundary point of the jurisdiction, assigned to the above-mentioned Governors of Honduras and Nicaragua in the respective capacities in which they were appointed.

WHEREAS, furthermore, there is a precedent worthy of note, in the despatch of the Captain-General of Guatemala, Don Pedro de Rivera, addressed to the King on the 23rd of November, 1742, with reference to the Mosquito Indians, which states that Cape Gracias á Dios is situated on the coast of the province of Comayagua (Honduras);

WHEREAS, when by virtue of the Treaty with Great Britain in 1786 the British evacuated the country of the Mosquitos, at the same time that new Regulations were made for the port of Trujillo, it was likewise ordained to raise four new Spanish settlements on the Mosquito Coast in Rio Tinto, Cape Gracias á Dios, Blewfields, and mouth of the River San Juan, although it is nevertheless true that these settlements remained directly subject to the Captain-General's command of Guatemala, both Parties agreed to recognize that this fact in no way altered the territories of the provinces of Nicaragua and Honduras, the latter Republic having shown by means of certified copies of despatches and accounts that before and after 1791 the Intendant Governorship of Comayagua superintended everything appertaining to its competence in Trujillo, Rio Tinto, and Cape Gracias á Dios.

WHEREAS Regulation 7 of Title II and Book II of the Code of the Indies, in fixing the manner as to how the division of the discovered territories was to be made, ordained that it should be carried out in such a manner that the secular division should conform to the ecclesiastical, and that the Archbishoprics should correspond with the districts of the Courts of Law, the Bishoprics with the Governorships and chief municipalities and the parishes with the districts and District Councils;

WHEREAS the Bishopric of Comayagua or Honduras, which prior to 1791 had exercised jurisdiction in territories which at the present moment are in dispute, exercised beyond doubt such acts of jurisdiction from that date within the limits of the Governorship and Administrations of the same name, as would consist in the collection of titles, matrimonial documents, appointment of church livings, and the settlement of ecclesiastical claims in Trujillo, Rio Tinto, and Cape Gracias á Dios;

WHEREAS the settlement and township of Cape Gracias á Dios, situated slightly to the south of the cape of the same name and of the southern margin of the most important mouth of the river known at the present day as the Coco or Segovia, was, prior to 1791, included in the ecclesiastical jurisdiction of the Bishopric of Comayagua, and continued under said jurisdiction until the old Spanish Province of Honduras was constituted into an independent State;

WHEREAS the Constitution of the State of Honduras of 1825, drawn up at the time it was united to the State of Nicaragua, and forming with other States the

Federal Republic of Central America, sets forth that its territory comprises all that corresponds and corresponded with the diocese of Honduras;

WHEREAS the demarcation fixed for the Province or District of Comayagua or Honduras, by virtue of the Royal Decree of the 24th July, 1791, continued to be the same at the time when the Provinces of Honduras and Nicaragua achieved their independence, because though by Royal Decree of the 24th January, 1818, the King sanctioned the re-establishment of the chief municipality of Tegucigalpa with a certain degree of autonomy as to its administration, said chief municipality continued to form a district of the Province of Comayagua or Honduras, subject to the political chief of the province; and in that capacity took part in the election, 5th November, 1820, of a Deputy to the Spanish Cortes and a substitute Deputy for the Province of Comayagua, and likewise took part together with the other districts of Gracias, Choluteca, Olancho, Yoro with Olanchito and Trujillo, Tencoa and Comayagua, in the election of the Provincial Council of Honduras, said election having taken place on the 6th November of the same year, 1820;

WHEREAS on the organization of the Government and Administration of Nicaragua in accordance with the Royal Administrative Statutes of 1786 it consisted of the five districts of Leon, Matagalpa, El Realejo, Subtiaga, and Nicoya, not comprising in this division nor in that proposed in 1788 by the Governor and Intendant Don Juan de Ayssa territories to the north and west of Cape Gracias á Dios, which are at the present day claimed by the Republic of Nicaragua, there being no record either that the jurisdiction of the diocese of Nicaragua reached to that Cape, and whereas it is worthy of note that the last Governor and Intendant of Nicaragua, Don Miguel González Saravia, in describing the province which had been under his rule in his book "*Bosquejo polltico-estadístico de Nicaragua*", published in 1824 stated that the divisionary line of said Province on the north runs from the Gulf of Fonseca on the Pacific to the River Perlas on the Northern Sea (Atlantic);

WHEREAS the Commission of investigation has not found that the expanding influence of Nicaragua has extended to the north of Cape Gracias á Dios, and therefore not reached Cape Camarón; and that in no map, geographical description or other document of those examined by said Commission is there any mention that Nicaragua had extended to said Cape Camarón, and there is no reason, therefore, to select said Cape as a frontier boundary with Honduras on the Atlantic Coast as is claimed by Nicaragua;

WHEREAS, though at some time it may have been believed that the jurisdiction of Honduras reached to the south of Cape Gracias á Dios, the Commission of investigation finds that said expansion of territory was never clearly defined, and in any case was only ephemeral below the township and port of Cape Gracias á Dios, whilst on the other hand the influence of Nicaragua has been extended and exercised in a real and permanent manner towards the aforementioned Cape Gracias á Dios, and therefore it is not equitable that the common boundary on the Atlantic Coast should be Sandy Bay as claimed by Honduras;

WHEREAS in order to arrive at the designation of Cape Camarón or Sandy Bay it would be necessary to resort to artificial divisionary lines which in no wise correspond to well-defined natural boundaries as recommended by the Gámez-Bonilla Treaty;

WHEREAS all the maps (Spanish and foreign) examined by the Commission appointed by the Royal Decree of April, 1905, with reference to the territories of

Honduras and Nicaragua prior to the date of their independence, show the separation between both territories at Cape Gracias á Dios or to the south of this Cape, and that at a date subsequent to the Independence maps, such as those of Squier (New York, 1854), Baily (London, 1856), Dussieux (prepared in the presence of Stieler, Kiepert, Petermann and Berghaus, Paris, 1868), Dunn (New Orleans, 1884), Colton Ohman & Co. (New York, 1890), Andrews (Leipzig, 1901), Armour's (Chicago, 1901), define the limit at Cape Gracias á Dios;

WHEREAS only five of the maps examined with reference to the question fix the limit between Honduras and Nicaragua on the Atlantic side to the north of Cape Gracias á Dios, and these five maps are subsequent to the date of Independence and even to the date when the dispute arose between the two mentioned States, and that out of the five maps three are by Nicaragua and the other two (one German and another North American), though nevertheless placing the limit to the north of Cape Gracias á Dios, fix it at a point very near this Cape, that is, at the northern extremity of the delta of the River Segovia;

WHEREAS such geographical authorities as López de Velasco (1571-1574), Tomás López (1758), González Saravia (Governor of Nicaragua, 1823), Squier (1856), Reclus (1870), Sonnenstern (1874), Bancroff (1890), have fixed the common boundary between Honduras and Nicaragua on the Atlantic Coast at the mouth of the River Segovia or Cape Gracias á Dios, or a point to the south of this Cape;

WHEREAS Cape Gracias á Dios has been recognized as the common boundary between Honduras and Nicaragua in several diplomatic documents from the latter State, such as Circulars addressed to foreign Governments by Don Francisco Castellón, Minister Plenipotentiary of Nicaragua and Honduras (1844), Don Sebastian Salinas, Minister for Foreign Affairs (1848), and Don José Guerrero, Supreme Director of the State of Nicaragua (1848), and by the instructions sent by the Government of Nicaragua to its Envoy Extraordinary to Spain, Don José de Marcoleta, for the purposes of recognition of the independence of the said Republic, 1850;

WHEREAS, from what is inferred from all the foregoing, the point which best answers the purpose by reason of historical right, of equity and of a geographical nature, to serve as a common boundary on the Atlantic Coast between the two contending States, is Cape Gracias á Dios for the Atlantic Coast, and further, as this Cape fixes what has practically been the limit or expansion or encroachment of Nicaragua towards the north and of Honduras towards the south;

WHEREAS, once Cape Gracias á Dios has been fixed as the common boundary between the two contending States, it is necessary to fix the frontier line between this point and the Portillo de Teotecacinte, which was the point reached by the joint Honduras-Nicaragua Commission;

WHEREAS close to Cape Gracias á Dios on the Atlantic there starts no important range of mountains which by reason of the direction followed could serve as a frontier between both States starting from said point, and that on the other hand there exists in that very spot a perfectly defined boundary, that is to say, the mouth and bed of such an important and copious river as the Coco, Segovia or Wanks;

WHEREAS the course of said river, at least a good portion of it, owing to the direction in which it flows and to the conditions of its bed, offers the most precise and natural boundary which could be desired;

WHEREAS this same River Coco, Segovia or Wanks in a great part of its course has figured and figures on many maps, public documents and geographical descriptions as the frontier between Honduras and Nicaragua;

WHEREAS in the volume of the Blue Book for the years 1856 and 1860 presented by Her Britannic Majesty's Government to Parliament, these documents, appearing amongst the documents produced by Nicaragua, show that according to the Note of Great Britain's representative in the United States who took part in the negotiations to solve the question of the Mosquito territory (1852), Honduras and Nicaragua had mutually recognized as a frontier the River Wanks or Segovia; further, that in Article II of the Agreement between Great Britain and Honduras of 27th August, 1859, Her Britannic Majesty's Government recognized the middle of the River Wanks or Segovia, which flows out at Cape Gracias á Dios, as the boundary between the Republic of Honduras and the territory of the Mosquito Indians; and that, in Article IV of the Treaty with Great Britain and the United States of 17th of October of the same year, 1856, it was decided that all the territory to the south of the River Wanks or Segovia not included in the portion reserved to the Mosquito Indians, and without prejudging the rights of Honduras, should be considered within the limits and under the rule of the Republic of Nicaragua;

WHEREAS it is necessary to fix a point where the course of the River Wanks, Coco or Segovia should be abandoned before it turns to the south-west and enters the unquestionable territory of Nicaragua;

WHEREAS the point which best answers the purpose in view is the place where the said River Coco or Segovia receives on its left bank the waters of its tributary Poteca or Bodega;

WHEREAS this point of confluence of the said River Poteca with the River Segovia has been likewise adopted by several authorities, and particularly by the Nicaraguan engineer Don Maximiliano V. Sonnenstern in his " Geography of Nicaragua for use in the Elementary Schools of the Republic " (Managua, 1874);

WHEREAS, continuing the bed of the Poteca upstream until the River Guineo or Namasli is reached, the southern part of the site of Teotecacinte is struck to which the document presented by Nicaragua, dated 26th August, 1720, refers, according to which said site appertained to the jurisdiction of the city of New Segovia (Nicaragua);

WHEREAS, from the point at which the River Guineo commences to form part of the River Poteca, the frontier line that may be taken is that which corresponds to the demarcation of said site of Teotecacinte until it connects with the Portillo of the same name, but in such a manner that the aforementioned site remains within the jurisdiction of Nicaragua;

WHEREAS if the selection of the confluence of the Poteca with the Coco or Segovia be taken as the point where the bed of the latter river is to be abandoned, to look out for the Portillo de Teotecacinte, in the manner described, might give rise to doubts and controversy under the supposition that Honduras would be favoured in the narrow region of the northern valley of the Segovia, which thus remains within the frontier; whilst, on the other hand, and as compensation for having taken the mouth of the Segovia in the manner previously mentioned, the bay and town of Cape Gracias á Dios remain within the domain of Nicaragua, which, according to facts beyond dispute and with a greater right, would correspond to Honduras; and lastly,

WHEREAS, though Regulation 4 of Article II of the Gámez-Bonilla or Tegucigalpa Treaty provides that to fix the boundaries between both Republics due note will be taken of the territory held under undisputed sway, without giving any legal validity to the fact of possession alleged by one or the other Party, Regulation 6 of the same Article lays down that, if considered convenient, compensations can be effected, and even indemnifications made to bring about, if possible, well-defined natural boundaries;

AGREEING with the solution proposed by the Commission of investigation and concurring with the Council of State in full and with my Cabinet,

I DO HEREBY declare that the dividing line between the Republics of Honduras and Nicaragua from the Atlantic to the Portillo de Teotecacinte where the joint Commission of Boundaries abandoned it in 1901, owing to their inability to arrive at an understanding as to its continuation at their subsequent meetings, is now fixed in the following manner;

The extreme common boundary point on the coast of the Atlantic will be the mouth of the River Coco, Segovia or Wanks, where it flows out in the sea close to Cape Gracias á Dios, taking as the mouth of the river its principal arm between Hara and the Island of San Pio where said Cape is situated, leaving to Honduras the islets and shoals existing within said principal arm before reaching the harbour bar, and retaining for Nicaragua the southern shore of the said principal mouth with the said Island of San Pio, and also the bay and town of Cape Gracias á Dios and the arm or estuary called Gracias which flows to Gracias á Dios Bay, between the mainland and said Island of San Pio.

Starting from the mouth of the Segovia or Coco the frontier line will follow the watercourse or thalweg of this river upstream without interruption until it reaches the place of its confluence with the Poteca or Bodega, and thence said frontier line will depart from the River Segovia, continuing along the watercourse of the said Poteca or Bodega upstream until it joins the River Guineo or Namasli.

From this junction the line will follow the direction which corresponds to the demarcation of the site of Teotecacinte in accordance with the demarcation made in 1720 to terminate at the Portillo de Teotecacinte in such manner that said site remains wholly within the jurisdiction of Nicaragua.

GIVEN in duplicate at the Royal Palace in Madrid, 23rd of December, 1906.

(*Signed*) Juan Pérez CABALLERO,
Minister of State

(*Signed*) ALFONSO R. XIII

AFFAIRE DE CASABLANCA

PARTIES: Allemagne, France.

COMPROMIS: 24 novembre 1908.

ARBITRES: Cour permanente d'Arbitrage: K. Hj. L. Hammarskjöld; Sir Edward Fry; Louis Renault; Guido Fusinato; J. Kriege.

SENTENCE: 22 mai 1909.

DOCUMENTS ADDITIONNELS: Protocole du 10 novembre 1908; Procès-verbal du 29 mai 1909.

Conflit de juridictions en pays de Capitulations — Compétence respective, au Maroc, de la juridiction du corps d'occupation français et de la juridiction consulaire allemande — Erreur de droit — Faute — Respect des situations de fait — Abus de droit.

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American Journal of International Law, vol. 3, 1909, p. 755 [texte anglais de la sentence]

British and Foreign State Papers, vol. 102, p. 597 [texte français de la sentence]; p. 916 [texte français du compromis]

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G. G. Wilson, *The Hague Arbitration Cases,* 1915, p. 82 [texte français et anglais du compromis et de la sentence]

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American Journal of International Law, vol. 3, p. 176, 698, 946

Deutsche Juristen-Zeitung, XIII. Jahrgang, p. 1120

M. J. P. A. François, « La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir ». Académie de droit international, *Recueil des Cours,* 1955. I. p. 494.

G. Gidel, « L'arbitrage de Casablanca », *Revue générale de droit international public,* t. XVII, 1910, p. 326.

Journal du droit international privé et de la jurisprudence comparée, publié par E. Clunet, t. 36, 1909, p. 420, 1246.

J. Kohler, « Casablancasache », *Zeitschrift für Völkerrecht und Bundesstaatsrecht*, vol. 6, 1913, p. 29 [y compris le texte français de la sentence]

Ludwig von Bar, « Der Casablanca-streitfall zwischen dem Deutschen Reich und Frankreich », *Die gerichtlichen Entscheidungen*, vol. I, *2ème partie*, p. 1.

Questions diplomatiques et coloniales, *Revue de Politique extérieure*, t. 27, 1909, p. 753 [y compris le texte français de la sentence]

Rivista di Diritto Internazionale, 1909, p. 257

APERÇU [1]

Cet arbitrage eut pour origine un conflit de juridiction entre les autorités militaires françaises occupant Casablanca (Maroc) et le consul d'Allemagne, agissant suivant la juridiction exterritoriale de son Gouvernement au Maroc.

Pendant l'automne de l'année 1908, six soldats appartenant à la Légion étrangère française stationnée à Casablanca, dont trois furent plus tard reconnus comme étant de nationalité allemande, désertèrent et réclamèrent la protection du consul allemand, qui leur accorda un sauf-conduit pour leur rapatriement. Toutefois, avant leur embarquement, ils furent arrêtés par des soldats français, et enlevés de la protection du consul. La France déclara quel'Allemagne n'avait aucun droit à accorder protection au Maroc aux personnes ne ressortissant pas à la nationalité allemande; que le territoire occupé par ses forces militaires au Maroc était placé sous sa juridiction exclusive, et que par conséquent, l'Allemagne n'avait pas le droit de tenter de protéger les trois déserteurs de nationalité allemande. L'Allemagne fit valoir que les déserteurs de nationalité allemande étaient, en vertu de la juridiction exterritoriale de l'Allemagne au Maroc, soumis exclusivement à la juridiction du consul d'Allemagne à Casablanca, et avaient droit à sa protection; que l'arrestation forcée des déserteurs constituait une atteinte à l'inviolabilité de ses agents consulaires, et elle demanda que les trois allemands lui fussent rendus.

Le différend n'ayant pas été susceptible de solution par la voie diplomatique, il fut soumis en vertu d'un compromis signé le 24 novembre 1908 [2], à un tribunal composé de membres de la Cour permanente: M. K. Hj. L. Hammarskjöld, de Suède, Sir Edward Fry, d'Angleterre, M. Louis Renault, de France, M. Guido Fusinato, d'Italie, et M. J. Kriege, d'Allemagne. Les séances commencèrent le 1er mai 1909, et se terminèrent le 17 mai 1909; la décision fut rendue le 22 mai 1909.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 114.

[2] Voir *infra*, p. 125.

COMPROMIS D'ARBITRAGE RELATIF AUX QUESTIONS SOULEVÉES PAR LES ÉVÉNEMENTS QUI SE SONT PRODUITS À CASABLANCA LE 25 SEPTEMBRE 1908, SIGNÉ À BERLIN LE 24 NOVEMBRE 1908 [1]

Le Gouvernement de la République Française et le Gouvernement Impérial Allemand s'étant mis d'accord, le 10 novembre 1908 [2], pour soumettre à l'arbitrage l'ensemble des questions soulevées par les événements qui se sont produits à Casablanca, le 25 septembre dernier, les soussignés, dûment autorisés à cet effet, sont convenus du compromis suivant:

Article 1. Un Tribunal arbitral, constitué comme il est dit ci-après, est chargé de résoudre les questions de fait et de droit que soulèvent les événements qui se sont produits à Casablanca, le 25 septembre dernier, entre les agents des deux pays.

Article 2. Le tribunal arbitral sera composé de cinq arbitres pris parmi les membres de la Cour permanente d'Arbitrage de La Haye.

Chaque Gouvernement, aussitôt que possible et dans un délai qui n'excédera pas quinze jours à partir de la date du présent compromis, choisira deux arbitres dont un seul pourra être son national. Les quatre arbitres ainsi désignés choisiront un surarbitre dans la quinzaine du jour où leur désignation leur aura été notifiée.

Article 3. Le 1er février 1909, chaque partie remettra au Bureau de la Cour permanente dix-huit exemplaires de son Mémoire avec les copies certifiées conformes de toutes pièces et documents qu'elle compte invoquer dans la cause. Le Bureau en assurera sans retard la transmission aux arbitres et aux parties, savoir, de deux exemplaires pour chaque arbitre, de trois exemplaires pour chaque partie. Deux exemplaires resteront dans les archives du Bureau. Le 1er avril 1909, les parties déposeront dans la même forme leurs contre-Mémoires avec les pièces à l'appui de leurs conclusions finales.

Article 4. Chaque partie devra déposer au Bureau International, au plus tard le 15 avril 1909, la somme de 3,000 florins néerlandais, à titre d'avance pour les frais du litige.

Article 5. Le tribunal se réunira à La Haye le 1er mai 1909 et procédera immédiatement à l'examen du litige. Il aura la faculté de se transporter momentanément ou de déléguer un ou plusieurs de ses membres pour se transporter en tel lieu qu'il lui semblerait utile, en vue de procéder à des mesures d'information dans les conditions de l'article XX de la Convention du 18 octobre 1907, pour le règlement pacifique des conflits internationaux.

Article 6. Les parties peuvent faire usage de la langue française ou de la langue allemande. Les membres du tribunal peuvent se servir, à leur choix, de la langue française ou de la langue allemande. Les décisions du Tribunal seront rédigées dans les deux langues.

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[1] *British and Foreign State Papers*, vol. 102, p. 916.

[1] Voir *infra*, p. 131.

Article 7. Chaque partie sera représentée par un agent spécial avec mission de servir d'intermédiaire entre elle et le Tribunal. Ces agents donneront les éclaircissements qui leur seront demandés par le Tribunal et pourront présenter les moyens qu'ils jugeraient utiles à la défense de leur cause.

Article 8. Pour tout ce qui n'est pas prévu par le présent compromis, les stipulations de la Convention précitée du 18 octobre 1907, dont la ratification n'a pas encore eu lieu, mais qui a été signée également par la France et l'Allemagne, seront applicables au présent arbitrage.

Article 9. Après que le Tribunal arbitral aura résolu les questions de fait et de droit qui lui sont soumises, il réglera en conséquence la situation des individus arrêtés le 25 septembre dernier au sujet de laquelle il y a contestation.

FAIT en double à Berlin, le 24 novembre 1908.

[L.S.] Jules CAMBON

[L.S.] KIDERLEN

SENTENCE DU TRIBUNAL D'ARBITRAGE CONSTITUÉ EN VERTU DU COMPROMIS SIGNÉ LE 24 NOVEMBRE 1908, RENDUE À LA HAYE, LE 22 MAI 1909 [1]

Conflict of jurisdiction in countries with a régime of Capitulations — Scope, in Morocco, of the German consular jurisdiction and the jurisdiction exercised by the French corps of occupation — Error in law — Fault — Respect for factual situations — Abuse of rights.

CONSIDÉRANT que, par un Protocole du 10 novembre 1908 [2] et par un Compromis du 24 du même mois, le Gouvernement de la République française et le Gouvernement impérial allemand se sont mis d'accord pour charger un Tribunal arbitral, composé de cinq membres, de résoudre les questions de fait et de droit que soulèvent les événements qui se sont produits à Casablanca, le 25 septembre 1908, entre des agents des deux pays;

CONSIDÉRANT que, en exécution de ce Compromis, les deux Gouvernements ont désigné respectivement comme Arbitres,

le Gouvernement de la République française: le très honorable Sir Edward Fry, Docteur en droit, autrefois siégeant à la Cour d'appel, Membre du Conseil privé du Roi, Membre de la Cour permanente d'Arbitrage, et M. Louis Renault, Membre de l'Institut de France, Ministre plénipotentiaire, Professeur à la Faculté de droit de Paris, Jurisconsulte du Ministère des Affaires Etrangères, Membre de la Cour permanente d'Arbitrage;

et le Gouvernement impérial allemand: M. Guido Fusinato, Docteur en droit, ancien Ministre de l'Instruction publique, ancien Professeur de droit international à l'Université de Turin, Député au Parlement italien, Conseiller d'Etat, Membre de la Cour permanente d'Arbitrage, et M. Kriege, Docteur en droit, Conseiller actuel intime de légation, Conseiller rapporteur et Jurisconsulte au Département des Affaires Etrangères, Membre de la Cour permanente d'Arbitrage;

Que les Arbitres ainsi désignés, chargés de nommer un Surarbitre, ont choisi comme tel M. K. Hj. L. de Hammarskjöld, Docteur en droit, ancien Ministre de la Justice, ancien Ministre des Cultes et de l'Instruction publique, ancien Envoyé extraordinaire et Ministre plénipotentiaire à Copenhague, ancien Président de la Cour d'Appel de Jönköping, ancien Professeur à la Faculté de droit d'Upsal, Gouverneur de la Province d'Upsal, Membre de la Cour permanente d'Arbitrage;

CONSIDÉRANT que, conformément aux dispositions du Compromis du 24 novembre 1908, les mémoires et contre-mémoires on été dûment échangés entre les Parties et communiqués aux Arbitres;

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances du tribunal arbitral constitué en exécution du protocole signé à Berlin le 10 novembre 1908 et du compromis du 24 novembre 1908*, p. 153.

[2] Voir *infra*, p. 131.

CONSIDÉRANT que le Tribunal, constitué comme il est dit ci-dessus, s'est réuni à La Haye le 1er mai 1909;

Que les deux Gouvernements ont respectivement désigné comme Agents, le Gouvernement de la République française: M. André Weiss, Professeur à la Faculté de droit de Paris, Jurisconsulte adjoint du Ministère des Affaires Etrangères,

et le Gouvernement impérial allemand: M. Albrecht Lentze, Docteur en droit, Conseiller intime de Légation, Conseiller rapporteur au Département des Affaires Etrangères;

CONSIDÉRANT que les Agents des Parties ont présenté au Tribunal les conclusions suivantes:

savoir, l'Agent du Gouvernement de la République française:

Plaise au Tribunal,

Dire et juger que c'est à tort que le Consul et les agents du Consulat impérial allemand à Casablanca ont tenté de faire embarquer sur un navire allemand des déserteurs de la Légion étrangère française, ne ressortissant pas à la nationalité allemande;

Dire et juger que c'est à tort que le même Consul et les mêmes agents ont, dans les mêmes conditions, accordé, sur le territoire occupé par le corps de débarquement français à Casablanca, leur protection et leur assistance matérielle à trois autres légionnaires, qu'ils croyaient ou qu'ils pouvaient croire Allemands, méconnaissant ainsi les droits exclusifs de juridiction qui appartiennent à l'Etat occupant, en territoire étranger, même en pays de Capitulations, au regard des soldats de l'armée d'occupation, et des actes, quels qu'ils soient et d'où qu'ils viennent, qui sont de nature à compromettre sa sécurité;

Dire et juger qu'aucune atteinte n'a été portée, en la personne de M. Just, chancelier du Consulat impérial à Casablanca, et du soldat marocain Abd-el-Kerim ben Mansour, à l'inviolabilité consulaire, par les officiers, soldats et marins français qui ont procédé à l'arrestation des déserteurs; et qu'en repoussant les attaques et les voies de fait dirigées contre eux, lesdits officiers, soldats et marins se sont bornés à user du droit de légitime défense.

Et l'Agent du Gouvernement impérial allemand (*conclusions traduites*),

Plaise au Tribunal,

1°. En ce qui concerne les questions de fait,

Déclarer que trois individus qui avaient antérieurement servi dans la Légion étrangère française, Walter Bens, Heinrich Heinemann et Julius Meyer, tous trois Allemands, ont, le 25 septembre 1908, au port de Casablanca, pendant qu'ils étaient accompagnés par des agents de l'Allemagne, été violemment arrachés à ces derniers et arrêtés par des agents de la France; qu'à cette occasion des agents de l'Allemagne ont été attaqués, maltraités, outragés et menacés par des agents de la France;

2°. En ce qui concerne les questions de droit,

Déclarer que les trois individus mentionnés au n° 1 étaient, au 25 septembre 1908, soumis exclusivement à la juridiction et à la protection du Consulat impérial allemand à Casablanca; que des agents de la France n'étaient pas alors autorisés à entraver l'exercice par des agents de l'Allemagne de la protection allemande sur ces trois individus et à revendiquer de leur côté sur eux un droit de juridiction;

3°. En ce qui concerne la situation des individus arrêtés le 25 septembre 1908 au sujet de laquelle il y a contestation,

Décider que le Gouvernement de la République française, aussitôt que possible, se dessaisira des trois Allemands désignés au n° 1 et les mettra à la disposition du Gouvernement allemand.

CONSIDÉRANT que l'Agent de la République française a, dans l'audience du 17 mai 1909, déclaré que, dans ses conclusions, il ne s'agit, soit pour les déserteurs de nationalité allemande, soit pour les autres, que des mesures prises par des agents allemands après la désertion et en vue de faire embarquer les déserteurs;

CONSIDÉRANT qu'après que le Tribunal eut entendu les exposés oraux des Agents des Parties et les explications qu'ils lui ont fournies sur sa demande, les débats ont été déclarés clos dans l'audience du 17 mai 1909;

CONSIDÉRANT que, d'après le régime des Capitulations en vigueur au Maroc, l'autorité consulaire allemande exerce, en règle générale, une juridiction exclusive sur tous les ressortissants allemands qui se trouvent dans ce pays;

CONSIDÉRANT que, d'autre part, un corps d'occupation exerce aussi, en règle générale, une juridiction exclusive sur toutes les personnes appartenant audit corps d'occupation;

Que ce droit de juridiction doit être reconnu, toujours en règle générale. même dans les pays soumis au régime des Capitulations;

CONSIDÉRANT que, dans le cas où des ressortissants d'une Puissance qui bénéficie au Maroc du régime des Capitulations appartiennent au corps d'occupation envoyé dans ce pays par une autre Puissance, il se produit, par la force des choses, un conflit entre les deux juridictions sus-indiquées;

CONSIDÉRANT que le Gouvernement français n'a pas fait connaître la composition du corps expéditionnaire et n'a pas déclaré que le fait de l'occupation militaire modifiait la juridiction consulaire exclusive découlant du régime des Capitulations; que, d'autre part, le Gouvernement allemand n'a pas réclamé au sujet de l'emploi au Maroc de la Légion Etrangère qui, notoirement, est, pour une certaine partie, composée de ressortissants allemands;

CONSIDÉRANT qu'il n'appartient pas à ce Tribunal d'émettre une opinion sur l'organisation de la Légion étrangère ou sur son emploi au Maroc;

CONSIDÉRANT que le conflit de juridictions dont il a été parlé ne saurait être décidé par une règle absolue qui accorderait d'une manière générale la préférence, soit à l'une, soit à l'autre des deux juridictions concurrentes;

Que, dans chaque cas particulier, il faut tenir compte des circonstances de fait qui sont de nature à déterminer la préférence;

CONSIDÉRANT que la juridiction du corps d'occupation doit, en cas de conflit, avoir la préférence, lorsque les personnes appartenant à ce corps n'ont pas quitté le territoire placé sous la domination immédiate, durable et effective de la force armée;

CONSIDÉRANT qu'à l'époque dont il s'agit, la ville fortifiée de Casablanca était militairement occupée et gardée par des forces militaires françaises qui constituaient la garnison de cette ville et se trouvaient, soit dans la ville même, soit dans les camps environnants;

CONSIDÉRANT que, dans ces conditions, les déserteurs de nationalité allemande, appartenant aux forces militaires de l'un de ces camps et étant dans l'enceinte de la ville, restaient soumis à la juridiction militaire exclusive;

CONSIDÉRANT, d'autre part, que, la question de la compétence respective, en pays de Capitulations, de la juridiction consulaire et de la juridiction militaire étant très compliquée et n'ayant pas reçu de solution expresse, nette et univer-

sellement reconnue, l'autorité consulaire allemande ne saurait encourir aucun blâme pour avoir accordé sa protection aux déserteurs susnommés, qui l'avaient sollicitée;

CONSIDÉRANT que le Consul allemand à Casablanca n'a pas accordé la protection du Consulat aux déserteurs de nationalité non allemande et que le drogman du Consulat n'a pas non plus dépassé à ce sujet les limites de sa compétence;

CONSIDÉRANT que le fait que le Consul a signé, sans le lire, le sauf-conduit portant *six* personnes au lieu de *trois* et omettant l'indication de la nationalité allemande, telle qu'il l'avait lui-même prescrite, ne peut lui être imputé que comme une faute non intentionnelle;

CONSIDÉRANT que le soldat marocain du Consulat, en contribuant à l'embarquement des déserteurs, n'a fait qu'agir d'après les ordres de ses supérieurs et que, à raison de sa situation inférieure, aucune responsabilité personnelle ne saurait peser sur lui;

CONSIDÉRANT que le Secrétaire du Consulat a intentionnellement cherché à faire embarquer des déserteurs de nationalité non allemande comme jouissant de la protection du Consulat;

Qu'à cette fin, il a, de propos délibéré, amené le Consul à signer le sauf-conduit mentionné ci-dessus; et que, dans la même intention, il a pris des mesures tant pour conduire au port que pour faire embarquer ces déserteurs;

Qu'en agissant ainsi, il est sorti des limites de sa compétence et a commis une violation grave et manifeste de ses devoirs;

CONSIDÉRANT que les déserteurs de nationalité allemande se sont trouvés au port sous la protection de fait de l'autorité consulaire allemande et que cette protection n'était pas manifestement illégale;

CONSIDÉRANT que cette situation de fait aurait dû, dans la mesure du possible, être respectée par l'autorité militaire française;

CONSIDÉRANT que les déserteurs de nationalité allemande ont été arrêtés par cette autorité malgré les protestations faites au nom du Consulat;

CONSIDÉRANT que l'autorité militaire aurait pu et, par conséquent, dû se borner à empêcher l'embarquement et la fuite de ces déserteurs et, avant de procéder à leur arrestation et à leur emprisonnement, à offrir de les laisser en séquestre au Consulat allemand, jusqu'à ce que la question de la juridiction compétente eût été résolue;

Que cette manière de procéder aurait aussi été de nature à maintenir le prestige de l'autorité consulaire, conformément aux intérêts communs de tous les Européens vivant au Maroc;

CONSIDÉRANT que, même si l'on admet la légalité de l'arrestation, les circonstances ne justifiaient, de la part de militaires français, ni la menace faite à l'aide d'un revolver, ni la prolongation des coups portés au soldat marocain du Consulat même après que sa résistance avait été brisée;

CONSIDÉRANT que, quant aux autres outrages ou voies de fait allégués de part et d'autre, l'enchaînement et la nature exacte des événements sont impossibles à établir;

CONSIDÉRANT que, conformément à ce qui a été dit plus haut, les déserteurs de nationalité allemande auraient dû être remis au Consulat pour rétablir la situation de fait troublée par leur arrestation;

Que cette restitution aurait aussi été désirable en vue de maintenir le prestige consulaire;

Mais, considérant que, dans l'état actuel des choses, ce Tribunal étant appelé à déterminer la situation définitive des déserteurs, il n'y a plus lieu d'ordonner la remise provisoire et temporaire qui aurait dû s'effectuer.

PAR CES MOTIFS,

Le Tribunal arbitral

Déclare et prononce ce qui suit:

C'est à tort et par une faute grave et manifeste que le Secrétaire du Consulat impérial allemand à Casablanca a tenté de faire embarquer, sur un vapeur allemand, des déserteurs de la Légion étrangère française qui n'étaient pas de nationalité allemande.

Le Consul allemand et les autres agents du Consulat ne sont pas responsables de ce chef; toutefois, en signant le sauf-conduit qui lui a été présenté, le Consul a commis une faute non intentionnelle.

Le Consulat allemand n'avait pas, dans les conditions de l'espèce, le droit d'accorder sa protection aux déserteurs de nationalité allemande; toutefois, l'erreur de droit commise sur ce point par les fonctionnaires du Consulat ne saurait leur être imputée comme une faute, soit intentionnelle, soit non intentionnelle.

C'est à tort que les autorités militaires françaises n'ont pas, dans la mesure du possible, respecté la protection de fait exercée sur ces déserteurs au nom du Consulat allemand.

Même abstraction faite du devoir de respecter la protection consulaire, les circonstances ne justifiaient, de la part de militaires français, ni la menace faite à l'aide d'un revolver, ni la prolongation des coups donnés au soldat marocain du Consulat.

Il n'y a pas lieu de donner suite aux autres réclamations contenues dans les conclusions des deux Parties.

FAIT à La Haye, dans l'Hôtel de la Cour permanente d'Arbitrage, le 22 mai 1909.

Le Président: Hj. L. HAMMARSKJÖLD

Le Secrétaire général: Michiels VAN VERDUYNEN

DOCUMENTS ADDITIONNELS

PROTOCOLE ENTRE LA FRANCE ET L'ALLEMAGNE CONTENANT UNE FORMULE DE REGRET SUR LES ÉVÉNEMENTS QUI SE SONT PRODUITS À CASABLANCA LE 28 SEPTEMBRE 1908, SIGNÉ À BERLIN LE 10 NOVEMBRE 1908[1]

Les deux Gouvernements, regrettant les événements qui se sont produits à Casablanca le 25 septembre dernier et qui ont amené des agents subalternes à des violences et à de fâcheuses voies de fait, décident de soumettre l'ensemble des questions soulevées à ce sujet à l'arbitrage.

D'un commun accord, chacun des deux Gouvernements s'engage à exprimer ses regrets sur les actes de ces agents, suivant le jugement que les arbitres auront porté sur les faits et sur la question de droit.

Berlin, le 10 novembre 1908.

Jules CAMBON
KIDERLEN

PROCÈS-VERBAL PAR LEQUEL LES GOUVERNEMENTS FRANÇAIS ET ALLEMAND S'EXPRIMENT MUTUELLEMENT LEURS REGRETS DES FAITS PASSÉS À CASABLANCA, ET RELEVÉS À LA CHARGE DE LEURS AGENTS RESPECTIFS, LE 22 MAI 1909 PAR LA COUR ARBITRALE DE LA HAYE. SIGNÉ À BERLIN LE 29 MAI 1909[1]

Le Gouvernement de la République et le Gouvernement Impérial étant convenus, le 10 novembre dernier, de soumettre l'ensemble des questions soulevées par les événements qui se sont produits à Casablanca, le 25 septembre précédent, à un tribunal arbitral convoqué à cet effet, et les deux Gouvernements s'étant engagés à s'exprimer mutuellement des regrets sur les actes de leurs agents, suivant le jugement que les arbitres auraient porté sur les faits et sur la question de droit; et le Tribunal arbitral ayant, à La Haye, le 22 mai 1909, déclaré et prononcé ce qui suit:

[Suivent la déclaration et le jugement du Tribunal.]

Le Gouvernement de la République française et le Gouvernement Impérial d'Allemagne déclarent, chacun en ce qui le concerne, exprimer les regrets que comportent les actes relevés à la charge de leurs agents par la décision arbitrale.

FAIT à Berlin, en deux exemplaires, le 29 mai 1909.

VON SCHOEN
Baron DE BERCKHEIM

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[1] *British and Foreign State Papers*, vol. 102, p. 916.
[2] *Ibid.*, p. 602.

THE BOUNDARY CASE BETWEEN BOLIVIA AND PERU

COMPROMIS: 30 December 1902.

ARBITRATOR: J. Figueroa Alcorta, President of the Argentine Republic.

AWARD: 9 July 1909.

Delimitation of the frontier line between Bolivia and Peru.

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SYLLABUS [1]

On 21 November 1901, the Governments of Bolivia and Peru concluded a general treaty of arbitration, [2] by virtue of which they bound themselves to submit to arbitration all controversies present or future "whatever may be their nature and causes, provided that it has been found impossible to settle them by direct negotiation " (article 1). In case of a dispute between the Parties a special agreement was to be concluded " with a view to determining the subject-matter of the controversy, to fixing the points that are to be settled, the extent of the powers of the arbitrator, and the procedure to be observed " (article 2). Articles 7 and 8 determined the powers of the arbitrator, who was to decide " in strict obedience to the provisions of international Law, and, on questions relating to boundary, in strict obedience to the American principle of *uti posidetis* of 1810, whenever, in the agreement mentioned in article 2, the application of the special rules shall not be established, or in case the arbitrator shall not be authorized to decide as an amicable referee ".

On 30 December 1902, the Governments of Bolivia and Peru concluded a special agreement, [3] according to which they submitted to the judgment and decision of the Government of the Argentine Republic, as arbitrator, the question of limits pending between them. The documentary evidence to be considered and upon which the arbitrator was to render his decision was defined in article 3. When, however, the evidence indicated in this article did not define the dominion of a territory in clear terms, the arbitrator was empowered to " decide the question according to equity, keeping as near as possible to the meaning of those documents and to the spirit which inspired them " (article 4).

Duly invested with these functions, the President of the Republic of Argentina, by Decree of 20 October 1904, appointed an advisory commission to assist him in this arbitration. In accordance with the conclusions submitted by this commission for his approval the President, Figueroa Alcorta, rendered an award on 9 July 1909 which determined " in an equitable manner " the frontier line in dispute between the two Parties. [4]

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[1] *American Journal of International Law*, vol. 3, 1909, p. 949.

[2] For the text of this treaty see *ibid.*, vol. 3, 1909, Supplement, p. 378.

[3] See *infra*, p. 139.

[4] On 15 September 1909, Bolivia and Peru concluded a Protocol on the recognition of this award (*British and Foreign State Papers*, vol. 105, p. 578).

TREATY [1] OF ARBITRATION FOR THE SETTLEMENT OF THE BOUNDARY QUESTIONS BETWEEN THE REPUBLICS OF BOLIVIA AND PERU, SIGNED AT LA PAZ, 30 DECEMBER, 1902

The President of the Republic of Peru and the President of the Republic of Bolivia, desirous of settling the question of boundaries pending between the two countries, have for that purpose named as their Plenipotentiaries:

His Excellency the President of the Republic of Peru: Doctor Felipe de Osma, His Envoy Extraordinary and Minister Plenipotentiary to the Government of Bolivia; and

His Excellency the President of the Republic of Bolivia: Doctor Eliodoro Villazón, His Minister for Foreign Affairs;

Who, after having communicated to each other their full powers, found to be in good and due form, have, in conformity with the second Article of the General Treaty of Arbitration of the 21st November of last year, [2] concluded the following: —

Article I. The High Contracting Parties submit to the judgment and decision of the Government of the Argentine Republic, in the character of Arbitrator (and) judge of right (Juez de derecho), the question of boundaries pending between the two Republics, in order to obtain an award that shall be definitive and without appeal, whereby all the territory which in 1810 belonged to the jurisdiction or district of the Audiencia of Charcas, within the boundaries of the Viceroyalty of Buenos Aires, in virtue of the enactments of the former Sovereign, shall fall to the Republic of Bolivia; and all the territory which at that same date in virtue of enactments of like origin belonged to the Viceroyalty of Lima, shall fall to the Republic of Peru.

Article II. As the demarcation and delineation of the frontier which commences between the Peruvian provinces of Tacna and Arica and the Bolivian province of Carangas, to the west, as far as the snows of Palomani, have been settled by the Treaty of 23rd September of the present year, this section is excepted from the present Treaty.

Article III. For the purposes of his award, the Arbitrator shall act in conformity with the laws in the Collection of Statutes of the Indies, Royal Letters Patent and Orders (Recopilación de Indias, Cedulas y Ordenes Reales), Ordinances of the Provincial Governors, diplomatic instruments relating to the demarcation of the frontiers, official maps and descriptions, and generally, with such documents of official character as may have been issued, so as to give the true interpretation to and carry out the royal dispositions in question.

Article IV. Wherever the royal enactments or dispositions do not define the right of possession to a territory in a clear manner, the Arbitrator shall decide the question equitably, keeping as far as possible to their meaning and to the spirit which inspired them.

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[1] *British and Foreign State Papers*, vol. 100, p. 803.
[2] *Ibid.*, vol. 95, p. 1018.

Article V. The rights over a territory exercised by one of the High Contracting Parties shall not be a bar to or prevail against titles or royal dispositions establishing the contrary.

Article VI. As soon as the ratifications of the present Treaty are exchanged, the High Contracting Parties shall, through the medium of their Envoys Extraordinary and Ministers Plenipotentiary, simultaneously request the Government of the Argentine Republic to accept the charge of Arbitrator, to assume jurisdiction for taking cognizance of and substantiating and deciding the controversy, and to establish the procedure to be followed.

Article VII. One year after the notification of the acceptance, the said diplomatic representatives shall present an exposition of their case showing the claims of their respective countries and producing the documents on which they rest or are based.

Article VIII. The said diplomatic agents shall represent their Governments in the case with all necessary powers to receive and answer notifications (traslados), submit proofs, present and amplify statements of claim (alegatos), and furnish data for the elucidation of the rights in discussion and, finally, to carry out the case to its conclusion.

Article IX. As soon as the award is given, it shall become definitively executory by the fact of its having been brought to the cognizance of the said Envoys Extraordinary and Ministers Plenipotentiary of the High Contracting Parties. From that moment, the territorial demarcation shall be held to be definitively and obligatorily established, by right, between the two Republics.

Article X. In all matters not specially settled in this Treaty, the Treaty of the 21st November, 1901, shall hold good.

Article XI. The ratifications of this Treaty shall be exchanged at La Paz or at Lima without delay, as soon as it has been duly approved and ratified by the Governments and Legislatures of both countries.

IN FAITH OF WHICH, the Undersigned sign and seal the present Treaty executed in duplicate in the city of La Paz on the 30th day of the month of December of the year 1902.

[L. S.] Felipe DE OSMA

[L. S.] Eliodoro VILLAZON

AWARD[1] OF THE PRESIDENT OF THE ARGENTINE REPUBLIC IN THE ARBITRATION OF THE QUESTION OF THE BOUNDARY BETWEEN BOLIVIA AND PERU. BUENOS AIRES, 9 JULY, 1909

Détermination de la ligne frontière entre la Bolivie et le Pérou.

José Figueroa Alcorta, President of the Argentine nation.

WHEREAS the Government of the Argentine Republic has been appointed as Arbitrator and Umpire for deciding the question of frontiers pending between the Republics of Bolivia and Peru, in accordance with the Treaty of Arbitration signed in the city of La Paz on the 30th day of December, 1902, the ratifications of which were exchanged in the said city on the 9th day of March, 1904.

Animated by the wish to justify the confidence in this Government shown by the Governments of the two Republics so intimately connected with Argentina by origin, traditions, and destiny, an Advisory Commission was appointed, which at present consists of the following gentlemen: Dr. Antonio Bermejo, President of the Supreme Court of Justice of the Nation, ex-Minister of Justice and Public Instruction, and ex-Plenipotentiary at the International American Conference of Mexico; Dr. Manuel Augusto Montes de Oca, ex-Minister of Foreign Affairs, ex-Adviser to the Argentine Government in the Arbitration with the Republic of Chile; Dr. Carlos Rodriquez Larreta, ex-Minister of Foreign Affairs, ex-Plenipotentiary at the Second Conference of La Paz, and member of The Hague Permanent Arbitration Court; and Dr. Horacio Beccar Varela, acting as Secretary. This Commission was to fix the proceedings to be followed in the determination of the Arbitration Award, to receive the exposition of their case, statements of claims and proofs of the High Contracting Parties, and to assist the Arbitrator in the solution of the question of frontiers submitted to his decision.

WHEREAS it appears that the said Commission, after having exchanged views with the Ministers representing Peru and Bolivia, fixed the rules of procedure to be observed, and, in conformity with these rules, there were submitted the respective expositions, replies, proofs, and objections (Case and Counter-Case) which have been carefully studied by the Commission.

That, according to the argument of the Republic of Bolivia, the dividing line should run as follows: —

> " Commencing in the south from the River Suches, the line crosses the lake of the same name for its entire length, rises to the Cordillera, through Palomani-tranca and Palomani-cunca, to the ' pie ' (peak) of the same name, which is the highest of the ' Nevados ' of this region. It descends on the eastern slope through the landmarks of Yaguayagua, Huajra, and Lurirni, which marks the domain of both Republics. It continues as far as the landmarks of Hichocorpa on the mountain ridge of that name, and descends, through the River Corimayo, as

[1] *British and Foreign State Papers*, vol. 105, p. 572.

far as the River San Juan del Oro or Tambopata, and through the course of the said river downstream to its confluence with the Lanza. From this point it runs to the mouth of the Chunchusmayo on the River Inambari, and down that river to its confluence with the Marcapata. Through the latter it rises to the border of the old Province of Paucartambo, and through those borders to the place known colonially under the name of Opatari, at the confluence of the Rivers Tono and Piñipiñi. Continuing through the borders of the Province of Urubamba and the River Yanatile, it enters the River Urubamba, the waters of which it follows to the point of its confluence with the Ucayali, from where it runs to the springs (falls) of the Yavary on the right bank of the said river." (Bolivian Case, page 313.)

That, in the argument of the Republic of Peru, their demand is condensed in the following terms: —

" Within the said limits, the demand of Peru goes to mark out the districts of Charcas and of the Virreinato of Lima, in the following manner:

" 1. The Audiencia (Court District) of Charcas in the Viceroyalty of Buenos Aires, extended in the year 1810, in so far as these present proceedings are concerned, from the place where the demarcation of the frontier between Peru and Bolivia terminates, in accordance with the Agreement of the 23rd September, 1902, through the dividing line of the waters of the Tambopata and of the Tuiche to the sources of the Madidi; it continued, through the course of this river, to its junction with the Beni; it continued eastward until it met the Rio de la Exaltación, or Yruyani, the course of which, and that of the Mamoré River up to the mouth of the Guaporé or Iténez, were the terminal part of the dividing line.

" 2. The territories lying to the north and north-west of that line, as far as the frontier of Portugal, belonged to the Viceroyalty of Peru in 1810." (Case of the Republic of Peru, vol. I, page 3, and vol. II, page 259.)

And considering that, in accordance with Article I of the Treaty of Arbitration, " the High Contracting Parties submit to the judgment and decision of the Government of the Argentine Republic, in its capacity of Arbitrator and Umpire, the question of borders now pending between the two Republics, in order to obtain a definite judgment admitting of no appeal, according to which the whole of the territory, which in 1810 belonged to the jurisdiction or district of the old Audiencia of Charcas, within the borders of the Viceroyalty of Buenos Aires by enactments of the former Sovereign, should belong to the Republic of Bolivia, and all the territory which, on the same date and by enactments of the same origin, belonged to the Viceroyalty of Lima, should belong to the Republic of Peru.

That when interpreting this Article relating to the competency of the Arbitrator in the exercise of the power recognized by international law (Convention for the Pacific Settlement of International Disputes, sanctioned by The Hague Conferences of 1899 and 1907, section 48 of the former and section 73 of the latter), it must be understood that, by the same, the High Contracting Parties empowered him to fix the dividing line between the Audiencia of Charcas and the Viceroyalty of Lima in 1810, in so far as the respective territorial rights are concerned, because if he had to determine the entire perimeter of one and the other of the said colonial entities, rights of various nations which are not parties to the Arbitration Treaty of 1902, which form the basis of this present decision, would be affected. To this must be added the provision of Article IX of the Treaty according to which, after the decision has been given and notified to the Envoys Extraordinary and Ministers Plenipotentiary of the High Contracting Parties, " the territorial delimitation shall be legally considered as having been established in a definite and binding manner between

the two Republics," which expresses clearly that it is the territorial border between the said Republics which the Arbitrator is instructed to determine.

That in conformity with the provision of Article II of the Treaty of Arbitration, as modified by the Act of Exchange of Ratifications, signed at La Paz on the 9th day of March, 1904, the Arbitrator has, for determining the dividing line, a starting point expressly designated, namely, " the place where the present frontier line coincides with the River Suches," in the following terms of the Treaty of Arbitration, supplemented by the aforesaid Act of Ratification: —

> " *Article II.* As by the Treaty dated the 23rd September of this present year the demarcation and the setting of land-marks on the frontier, which commences between the Peruvian provinces of Tacna and Arica and the Bolivian province of Carangas in the west, and runs to the place where the present frontier line coincides with the River Suches, has been settled, this section is excepted from the present Treaty."

That having most carefully examined the titles adduced by the two Parties, the Arbitrator does not find any sufficient ground for considering, as dividing line between the Audiencia of Charcas and the Viceroyalty of Lima in the year 1810, one or the other of the demarcations claimed in the respective pleadings of the States concerned.

That in reality the disputed zone was, in 1810 and up to a recent period, perfectly unexplored, as appears from the numerous maps of the colonial period and of periods subsequent to the latter, which were submitted by both parties, and this the latter themselves recognize, which explains that the demarcations of the said administrative entities, subject to one and the same Sovereign, had not been fully determined. This is recognized in the pleadings of Bolivia, which, when referring to the successive alterations in the frontiers of the principal colonial sections, state that: " In these long proceedings, which have continued for more than three centuries, it is frequently noticed that the dispositions of the Spanish Crown have been contradictory, some of the same being vague and many in disagreement with the situation or the topographical features of the places. This latter was due to the want of geographical knowledge, and an equitable interpretation, according to the respective ideas of the period, is therefore necessary for appreciating the true significance and scope of the said dispositions," even if it is added that, with respect to the district of the Audiencia of Charcas, the Royal Orders and dispositions were more precise (Case of the Government of Bolivia, page 2).

On the other hand, the pleadings of Peru, when entering upon the examination of the priciples on which the demarcation of the districts of the Audiencias is based, state as follows: " That the eastern territories forming the subject-matter of these proceedings, which territories were unknown and unconquered during the entire time of the Spanish domination, could not be included, and were not included, within the district of any subordinate Audiencia " (Case of the Republic of Peru, vol. I, page 77); adding subsequently: " The genuine and honourable way consists in presenting the titles of possession respecting the territories in dispute, considered in bulk *uti universitas*, and in submitting the documents which enable the arbitrator to create a juridical and geographically reasonable demarcation " (Memorandum of observations and objections presented by Peru, page 104).

That the demarcation claimed in these proceedings by the pleadings of Bolivia as following the course of the Rivers Corimayo, San Juan del Oro or Tambopata, Inambari, Yanatile, Urubambe, and Ucayali, as far as the sources of the Yavari, had been previously indicated by a straight line, which, starting

from the said sources of the Yavari, arrived at the confluence of the River Inambari with the River Madre de Dios (Notes of the 5th May, 1894, and 23rd October, 1902, in the Annexes to the reply of Bolivia, pages 26 and 36; Protocol Polar-Gómez of the 21st May, 1897); while at the same time Peru, which in these proceedings traces the line of demarcation through the Rivers Madidi, Yruyani, and Mamoré, had previously fixed it as running through the Rivers Tequeje and Beni, and continuing through the latter as far as its junctions with the Mamoré (Note of the Legation of Peru, dated La Paz, 10th November, 1902, in the Annexe to the reply of Bolivia, page 40).

That the said differences are fully explained, if it is taken into account that, as had been provided in the Treaty of Arbitration of the 30th December, 1902, and, as shown in the notable works submitted by both parties to the assessing committee, the Royal Acts and dispositions, which were in force in 1810, did not define in a clear manner the ownership of the disputed territory, in so far as it had to be determined whether this had been attributed to the jurisdiction of the Viceroyalty of Lima, or to that of the Audiencia of Charcas, which were colonial entities subordinate to the same undisputed Sovereign of the said territories, and, up to the year 1776, the latter formed an integral part of the former.

In order to recognize this it is, moreover, sufficient to mention that the statutes of the Indies, which in the third Article of the Treaty of Arbitration were indicated, in the first instance, as an element for the decision, gave the borders of the Audiencia of Charcas as follows: —

" On the north, by the Royal Audiencia of Lima and unexplored provinces; on the south, by the Royal Audiencia of Chile; and on the east and west, by the northern and southern seas, and the line of demarcation between the Crowns of the Kingdoms of Castilla and Portugal, on the side of the Province of Santa Cruz, in Brazil," and those of the Audiencia of Lima as follows: " On the north, by the Royal Audiencia of Quito; on the south, by that of La Plata; on the west, by the southern sea; and on the east, by unexplored provinces " (Laws 5 and 9, Title 15, Book II).

In the meantime no document whatsoever of a decisive nature has been exhibited which might make it possible to locate the said unexplored provinces, which were bordered on the north by the Audiencia of Charcas, and on the east by the Audiencia of Lima, and to justify us either to extend the same, as claimed by Peru, from the Marañon to the northern frontier of Paraguay, including Hoya (river bed) of the Madre de Dios (Counter-Case of Peru, page 102), or else to establish that they were extending along the banks of the said river, as claimed by Bolivia, when stating: " The only uncertainty which exists in the said demarcations is that of the unexplored provinces. Not a single word, however, is contained in any of these delimitation laws which in any way would allude to the virtual or actual districts. It is true that between the Audiencias of Nueva Granada and Quito on the south, that of Lima on the west, and that of Charcas on the north, there remained a space or zone of lands which was designated as unexplored provinces. These provinces, however, which, according to all probability, extended along the banks of the Marañon, did not come within the limits of the Audiencias referred to " (Reply on the part of Bolivia to the Statement by Peru, page 130).

That the same applies to the borders of the said Audiencia of Charcas towards the northern sea and the line of demarcation between the Crowns of the Kings of Castilla and Portugal, and the inclusion in the same of the Province of Chunchos, according to the said statutes of the Indies, because, even apart from the fact that the standard of demarcation in force in 1810 may have

modified that of the laws of the said code, in accordance with the ordinances of Governors between 1782 and 1803, it is sufficient to mention, that at the time when the said code was promulgated the Audiencia of Charcas may have bordered on the northern sea, either in the region of Para to the west of the line of Tordesillas or in that of the Province of Rio de la Plata, included in its district, and, as regards the Province of Chunchos, afterwards known under the designation of Misiones de Apolobamba, there is nothing which would entitle one to admit that it included the entire area of the concession, which, under the name of Nueva Andalucía, was granted to Alvarez Maldonado in 1567 and 1568, and still less that it extended towards the north as far as the line of the Treaty of San Ildefonso of 1777, which was to connect the sources of the Yavari with a point equidistant from the confluences of the River Madera with the Mamoré and the Marañon.

That, under these circumstances there must be strictly applied to the case the provisions of Article IV of the Treaty of Arbitration, which states: " Wherever the Royal enactments or dispositions do not define clearly the right of possession to a territory, the Arbitrator shall decide the question equitably, keeping as close as possible to their meaning and to the spirit which inspired them. "

That the significance and the spirit of the Statutes of the Indies and of the Royal Letters Patent and Orders, the Ordinances of Governors, the diplomatic Acts relating to the demarcation of frontiers, officials' maps and descriptions and other documents, brought forward by the High Contracting Parties and, in particular, the Laws 1, 5 and 9 of Title 15, Book II, of the Statutes of the Indies, relating to the general demarcation of the Audiencias, and particularly to those of Charcas and Lima, Law 3, Title 7, Book I, of the said code on the demarcation of bishoprics, the Royal Letters Patent, dated the 26th August, 1573, and the 8th February, 1590, relating to the concession granted to Juan Alvarez Maldonado, the Royal Order, dated the 1st February, 1796, by which the district (" intendencia ") of Puno was separated from the Viceroyalty of Buenos Aires, and annexed to the Viceroyalty of Lima, the negotiations relating to the making and carrying into effect of the Border Treaties of 1750 and 1777 between the Crowns of Spain and Portugal, the Ordinances of Governors, of the 28th January, 1782, and the 23rd September, 1803, the documents relating, on the one hand, to the development of the missions of the Carabaya in the district of the River San Juan del Oro or Tambopata and, on the other hand, to the development of the missions of Apolobamba and Mojos, in the district of the River Toromonas, have been studied and carefully considered.

That, in accordance with the preceding considerations, I must decide this question in an equitable manner, keeping in mind, in this present decision, the significance of the Royal Orders invoked in the respective pleadings and the spirit which has inspired them.

Therefore I declare, in accordance with the advice given by the Advisory Commission, that the frontier line in dispute between the Republics of Bolivia and Peru is determined as follows: —

Starting from the place where the present frontier line concides with the River Suches, the line of territorial demarcation between the two Republics crosses the lake of the same name up to the Cerro or Palomani-Grande, from where it continues as far as the lagoons of Yaguayagua, and through the river of the same name reaches the River San Juan del Oro or Tambopata. It will continue through the course of this River Tambopata downstream until it meets the mouth of the River Lanza or Mososhuaico. From the confluence of the River Tambopata with the River Lanza the line of demarcation will run as

far as the western source of the River Abuyama or Heath, and follow the line of this river downstream as far as its junction with the River Amarumayu or Madre de Dios. Through the " thalweg " of the River Madre de Dios the the frontier line will descend as far as the mouth of the Toromonas, its affluent on the right side. From this confluence of the Toromonas with the Madre de Dios, a straight line will be drawn which meets the point of intersection of the River Tahuamanu with the sixty-ninth degree of longitude west of Greenwich and, following this meridian, the dividing line shall be prolonged towards the north until it meets the border of the territorial sovereignty of another nation which is not a party to the Treaty of Arbitration of the 30th December, 1902.

The territories situated to the east and south of the above line of demarcation shall belong to the Republic of Bolivia, and the territories situated to the west and north of the said line shall belong to the Republic of Peru.

Let this award be brought to the knowledge of the Envoys Extraordinary and Ministers Plenipotentiary of the High Contracting Parties, to whom shall be sent a copy in conformity with Article IX of the Treaty of Arbitration.

GIVEN in triplicate, sealed with the Great Seal of the arms of the Republic and counter-signed by the Secretary of State of the Department of Foreign Affairs and Worship, in the Palace of the National Government, in the city of Buenos Aires, capital of the Argentine Republic, on the 9th day of the month of July of the year 1909.

J. Figueroa ALCORTA

V. De La Plaza

AFFAIRE DES GRISBADARNA

PARTIES: Norvège, Suède.

COMPROMIS: 14 mars 1908.

ARBITRES: Cour permanente d'Arbitrage: J. A. Loeff; F. V. N. Beichmann; K. Hj. L. Hammarskjöld.

SENTENCE: 23 octobre 1909.

DOCUMENTS ADDITIONNELS: Résolution du 26 mars 1904, accompagnée du Protocole du 15 mars 1904.

Règlement du conflit de limites maritimes entre la Norvège et la Suède — Détermination par le Tribunal arbitral de sa compétence en interprétant les dispositions pertinentes du Compromis d'arbitrage — Principe fondamental du droit des gens selon lequel le territoire maritime est une dépendance nécessaire d'un territoire terrestre — Ligne médiane — Thalweg — Droit historique.

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American Journal of International Law, vol. 4, 1910, p. 226 [texte anglais de la sentence]

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G. G. Wilson, *The Hague Arbitration Cases*, 1915, p. 102 [texte anglais, norvégien et suédois du compromis]; p. 110 [texte anglais et français de la sentence]

Zeitschrift für Internationales Recht, vol. XXI, 1911, p. 90 [texte français de la sentence]

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American Journal of International Law, vol. 4, 1910, p. 186

M. J. P. A. François, « La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir ». Académie de Droit international, *Recueil des Cours*, 1955, I, p. 498.

Revue générale de droit international public, t. XVII, 1910, p. 177 [y compris le texte français de la sentence]

K. Strupp, « Der Streitfall zwischen Schweden und Norwegen », München-Leipzig 1914; *Die gerichtlichen Entscheidungen*, Erster Band, Zweiter Teil, 1917, p. 47 [y compris le texte allemand du compromis et le texte français de la sentence]

APERÇU [1]

En vertu d'un compromis signé le 14 mars 1908, la Norvège et la Suède décidèrent de soumettre à l'arbitrage la question de la frontière maritime entre les deux pays, « en tant qu'elle n'a pas été réglée par la Résolution royale du 15 mars 1904 ». Le Tribunal constitué aux fins de cet arbitrage fut appelé à décider si la ligne frontière avait été fixée soit entièrement, soit en partie, par le traité de 1661, et dans le cas contraire, de fixer cette ligne en tenant compte des circonstances de fait et des principes du droit international. Il était composé comme suit: M. J. A. Loeff, des Pays-Bas; M. F. V. N. Beichmann, de Norvège, et M. K. Hj. L. Hammarskjöld, de Suède. Seul, ce dernier était membre de la Cour permanente d'arbitrage de La Haye. Le Tribunal siéga du 28 août au 18 octobre 1909, et visita pendant ce temps la zone litigieuse. Il rendit sa sentence en date du 23 octobre 1909. Par cette sentence, le Tribunal détermina la frontière maritime entre la Norvège et la Suède, en application des principes en vigueur dans les deux pays à l'époque de la conclusion du traité originaire de délimitation et compte tenu de plusieurs circonstances de fait existant depuis longtemps.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 125.

CONVENTION ENTRE LA NORVÈGE ET LA SUÈDE POUR SOUMETTRE À L'ARBITRAGE LA QUESTION AYANT TRAIT À CERTAINE PARTIE DE LA FRONTIÈRE MARITIME ENTRE LES DEUX PAYS, RELATIVEMENT AUX RÉCIFS DE GRISBADARNA, SIGNÉE À STOCKHOLM, LE 14 MARS 1908 [1]

Sa Majesté le Roi de Suède et Sa Majesté le Roi de Norvège ayant trouvé désirable de soumettre à la décision d'un tribunal d'arbitrage la question de la frontière maritime entre la Suède et la Norvège, en tant qu'elle n'a pas été fixée par la Résolution du 15 mars 1904 [2], ont désigné dans ce but, comme leurs représentants:

Sa Majesté le Roi de Suède: Son Ministre des Affaires étrangères, M. Eric Birger Trolle;

Sa Majesté le Roi de Norvège: Son Envoi extraordinaire et Ministre plénipotentaire, M. Paul Benjamin Vogt;

Lesquels, après avoir échangé leurs pleins pouvoirs, sont convenus des articles suivants:

Article 1. Les Parties s'engagent dans la mesure mentionnée plus bas, à soumettre le règlement de la question de la frontière maritime entre la Suède et la Norvège à un tribunal d'arbitrage, composé d'un président n'étant pas sujet de l'un de ces deux Etats, et n'y étant pas domicilié, et de deux membres: un suédois et un norvégien. Le Président sera désigné par Sa Majesté la Reine des Pays-Bas, les autres membres, par les parties intéressées. Les parties se réservent toutefois le droit, si elles tombent d'accord, de désigner, par arrangement spécial, soit le Président seul, soit tous les membres du Tribunal.

L'adresse à Sa Majesté la Reine des Pays-Bas, ou au surarbitre qui aura été désigné par consentement réciproque, se fera par les deux parties réunies.

Article 2. Le Tribunal arbitral, après avoir examiné les propositions de chacune des parties, ainsi que leurs arguments et leurs preuves respectives, déterminera la ligne frontière dans les eaux à partir du point indiqué sous XVIII sur la carte annexée au projet des commissaires norvégiens et suédois du 18 août 1897, dans la mer jusqu'à la limite des eaux territoriales. Il est entendu que les lignes limitant la zone, qui peut être l'objet du litige par suite des conclusions des parties, et dans laquelle la ligne frontière sera par conséquent établie, ne doit pas être tracée de façon à comprendre ni des îles, ni des îlots, ni des récifs qui ne sont pas constamment sous l'eau.

Article 3. Le Tribunal arbitral aura à décider si la ligne frontière doit être considérée, soit entièrement soit en partie, comme fixée par le Traité de délimitation de 1661 avec la carte y annexée et de quelle manière la ligne ainsi établie doit être tracée que pour autant que la ligne frontière ne sera pas considérée comme fixée par ce Traité et cette carte, le Tribunal aura à fixer cette ligne

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 138.

[2] See *infra*, p. 163.

frontière en tenant compte des circonstances de fait et des principes du droit international.

Article 4. Jusqu'à la fin de la troisième année civile suivant la déclaration de la décision du Tribunal d'arbitrage, la pêche pourra se faire indépendamment de la ligne frontière fixée par cette décision, dans les eaux qui, conformément à l'article 2, font l'objet du différend entre les sujets des deux royaumes, dans la même mesure qu'elle a été exercée pendant la période des cinq années 1901-1905. En considérant la mesure dans laquelle la pêche est exercée, il sera tenu compte du nombre des pêcheurs, de l'espèce de poissons, et des moyens employés pour la pêche.

Article 5. Il est convenu que le pays situé du côté de la ligne frontière comprenant les bancs de pêche de Grisbadarna n'aura aucune réclamation envers l'autre pays pour une part des frais occasionnés par les bateaux-phares et par les autres installations sur lesdits bancs de pêche ou dans leur voisinage.

La Suède s'engage à maintenir le bateau-phare actuel situé à l'ouest de la limite territoriale, jusqu'à l'expiration du terme mentionné à l'article 4.

Article 6. Le Président du Tribunal d'arbitrage désignera la date et le siège de la première séance du Tribunal, et il y convoquera les autres membres.

Les dates et le siège des autres séances seront désignés par le Tribunal d'arbitrage.

Article 7. La langue officielle dont se servira le Tribunal sera l'anglais, le français, ou l'allemand, ainsi qu'on l'aura décidé, après consultation avec les autres membres.

Les parties pourront présenter les pétitions, les dépositions et les preuves dans la langue de l'un des Etats contestants; le Tribunal se réservant le droit d'en faire faire des traductions.

Article 8. Par rapport à la procédure et aux frais, on adoptera, en tant qu'elles seront applicables, les parties des règlements contenues aux articles 62 à 85 de la Convention révisée, adoptée à la Deuxième Conférence de La Haye de 1907 pour le règlement pacifique des conflits internationaux.

Les pétitions, les répliques et les preuves, mentionnées au 2e paragraphe de l'article 63 de la Convention précitée, seront déposées dans un délai fixé par le Président du Tribunal d'arbitrage, mais avant le 1er mars 1909. Aucun changement n'est substitué ici aux règles de procédure pour la seconde partie, spécialement en ce qui concerne les règlements contenus aux articles 68, 72 et 74 de ladite Convention.

Le Tribunal d'arbitrage a le droit, s'il est nécessaire pour élucider la cause, de pourvoir à la déposition de témoins et d'experts, en présence des deux parties, ainsi que d'ordonner l'entreprise en commun d'une levée hydrographique des eaux litigieuses.

Article 9. La Convention présente sera ratifiée, et les ratifications seront échangées à Stockholm dans le plus court délai possible.

EN FOI DE QUOI les plénipotentiaires respectifs ont signé la présente Convention et y ont apposé leurs sceaux.

FAIT en double, en suédois et en norvégien, à Stockholm, le 14 mars 1908.

[L.S.] Eric TROLLE

[L.S.] Benjamin VOGT

SENTENCE ARBITRALE RENDUE LE 23 OCTOBRE 1909 DANS LA QUESTION DE LA DÉLIMITATION D'UNE CERTAINE PARTIE DE LA FRONTIÈRE MARITIME ENTRE LA NORVÈGE ET LA SUÈDE [1]

Settlement of the question of the maritime boundary between Norway and Sweden — Competence of the Tribunal determined by the interpretation of the Compromis — Maritime territory as essential appurtenance of land territory a fundamental principle of International Law — Median line — Thalweg — Historic title.

CONSIDÉRANT que, par une Convention du 14 mars 1908, la Norvège et la Suède se sont mises d'accord pour soumettre à la décision définitive d'un Tribunal arbitral, composé d'un Président qui ne sera ni sujet d'aucune des Parties contractantes ni domicilié dans l'un des deux pays, et de deux autres Membres, dont l'un sera Norvégien et l'autre Suédois, la question de la frontière maritime entre la Norvège et la Suède, en tant que cette frontière n'a pas été réglée par la Résolution Royale du 15 mars 1904;

CONSIDÉRANT que, en exécution de cette Convention, les deux Gouvernements ont désigné respectivement comme Président et Arbitres:

Monsieur J. A. LOEFF, Docteur en droit et en sciences politiques, ancien Ministre de la Justice, Membre de la Seconde Chambre des Etats-Généraux des Pays-Bas;

Monsieur F. V. N. BEICHMANN, Président de la Cour d'appel de Trondhjem, et

Monsieur K. Hj. L. DE HAMMARSKJÖLD, Docteur en droit, ancien Ministre de la Justice, ancien Ministre des Cultes et de l'Instruction publique, ancien Envoyé extraordinaire et Ministre plénipotentiaire à Copenhague, ancien Président de la Cour d'appel de Jönkoping, ancien Professeur à la Faculté de droit d'Upsal, Gouverneur de la Province d'Upsal, Membre de la Cour permanente d'Arbitrage;

CONSIDÉRANT que, conformément aux dispositions de la Convention, les Mémoires, Contre-Mémoires et Répliques ont été dûment échangés entre les Parties et communiqués aux Arbitres dans les délais fixés par le Président du Tribunal;

Que les deux Gouvernements ont respectivement désigné comme Agents, le Gouvernement de la Norvège: Monsieur Kristen JOHANSSEN, Avocat à la Cour suprême de Norvège,

et le Gouvernement de la Suède: Monsieur C. O. MONTAN, ancien Membre de la Cour d'appel de Svea, Juge au Tribunal mixte d'Alexandrie;

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[1] Bureau International de la Cour permanente d'Arbitrage, *Recueil des Comptes rendus de la visite des lieux et des Protocoles des séances du Tribunal arbitral, constitué en vertu de la Convention du 14 mars 1908, pour juger la question de la délimitation d'une certaine partie de la frontière maritime entre la Norvège et la Suède*, La Haye, 1909, p. 1.

CONSIDÉRANT qu'il a été convenu, par l'article II de la Convention:

1°. que le Tribunal arbitral déterminera la ligne frontière dans les eaux à partir du point indiqué sous XVIII sur la carte annexée au projet des Commissaires norvégiens et suédois du 18 août 1897, dans la mer jusqu'à la limite des eaux territoriales;

2°. que les lignes limitant la zone, qui peut être l'objet du litige par suite des conclusions des Parties et dans laquelle la ligne frontière sera par conséquent établie, ne doivent pas être tracées de façon à comprendre ni des îles, ni des îlots, ni des récifs, qui ne sont pas constamment sous l'eau;

CONSIDÉRANT qu'il a été également convenu, par l'article III de ladite Convention:

1°. que le Tribunal arbitral aura à décider si la ligne frontière doit être considérée, soit entièrement soit en partie, comme fixée par le Traité de délimitation de 1661 avec la carte y annexée et de quelle manière la ligne ainsi établie doit être tracée;

2°. que, pour autant que la ligne frontière ne sera pas considérée comme fixée par ce traité et cette carte, le Tribunal aura à fixer cette ligne frontière en tenant compte des circonstances de fait et des principes du droit international;

CONSIDÉRANT que les Agents des Parties ont présenté au Tribunal les Conclusions suivantes (*conclusions traduites*),

l'Agent du Gouvernement Norvégien:

que la frontière entre la Norvège et la Suède, dans la zone qui forme l'objet de la décision arbitrale, soit déterminée en conformité avec la ligne indiquée sur la carte, annexée sous numéro 35 au Mémoire présenté au nom du Gouvernement Norvégien;

et l'Agent du Gouvernement Suédois:

I. en ce qui concerne la question préliminaire:

Plaise au Tribunal arbitral de déclarer, que la ligne de frontière litigieuse, quant à l'espace entre le point XVIII déjà fixé sur la carte des Commissaires de l'année 1897 et le point A sur la carte du Traité de frontière de l'année 1661, n'est établie qu'incomplètement par ledit traité et la carte du traité, en tant que la situation exacte de ce point-ci n'en ressort pas clairement, et, en ce qui regarde le reste de l'espace, s'étendant vers l'ouest à partir du même point A jusqu'à la limite territoriale, que la ligne de frontière n'a pas du tout été établie par ces documents;

II. en ce qui concerne la question principale:

1. Plaise au Tribunal de vouloir bien, en se laissant diriger par le Traité et la carte de l'année 1661, et en tenant compte des circonstances de fait et des principes du droit des gens, déterminer la ligne de frontière maritime litigieuse entre la Suède et la Norvège à partir du point XVIII, déjà fixé, de telle façon, que d'abord la ligne de frontière soit tracée en ligne droite jusqu'à un point qui forme le point de milieu d'une ligne droite, reliant le récif le plus septentrional des Röskären, faisant partie des îles de Koster, c'est-à-dire celui indiqué sur la table 5 du Rapport de l'année 1906 comme entouré des chiffres de profondeur 9, 10 et 10, et le récif qui est le plus méridional des Svartskajär, faisant partie des îles de Tisler, et qui est muni d'une balise, point indiqué sur la même table 5 comme point XIX;

2. Plaise au Tribunal de vouloir bien en outre en tenant compte des circonstances de fait et des principes du droit des gens, établir le reste de la frontière litigieuse de telle façon, que

a) à partir du point fixé selon les conclusions sub 1 et désigné comme point XIX, la ligne de frontière soit tracée en ligne droite jusqu'à un point situé au milieu d'une ligne droite, reliant le récif le plus septentrional des récifs indiqués par le nom Stora Drammen, du côté suédois, et le rocher Hejeknub situé au sud-est de l'île Heja, du côté norvégien, point indiqué sur ladite table 5 comme point XX, et

b) à partir du point nommé en dernier lieu, la frontière soit tracée en ligne droite vers le vrai ouest aussi loin dans la mer que les territoires maritimes des deux Etats sont censés s'étendre;

CONSIDÉRANT que la ligne mentionnée dans les conclusions de l'Agent Norvégien est tracée comme suit:

du point XVIII indiqué sur la carte des Commissaires de 1897 en ligne droite jusqu'à un point XIX situé au milieu d'une ligne tirée entre le récif le plus méridional des Svartskjär — celui qui est muni d'une balise — et le récif le plus septentrional des Röskären,

de ce point XIX en ligne droite jusqu'à un point XX situé au milieu d'une ligne tirée entre le récif le plus méridional des Heiefluer (söndre Heieflu) et le récif le plus septentrional des récifs compris sous la dénomination de Stora Drammen,

de ce point XX jusqu'à un point XXa en suivant la perpendiculaire tirée au milieu de la ligne nommée en dernier lieu,

de ce point XXa jusqu'à un point XXb en suivant la perpendiculaire tirée au milieu d'une ligne reliant ledit récif le plus méridional des Heiefluer au récif le plus méridional des récifs compris sous la dénomination de Stora Drammen,

de ce point XXb jusqu'à un point XXc en suivant la perpendiculaire tirée au milieu d'une ligne reliant le söndre Heieflu au petit récif situé au Nord de l'îlot Klöfningen près de Mörholmen,

de ce point XXc jusqu'à un point XXd en suivant la perpendiculaire tirée au milieu d'une ligne reliant le midtre Heieflu au dit récif au Nord de l'îlot Klöfningen,

de ce point XXd en suivant la perpendiculaire tirée au milieu de la ligne reliant le midtre Heieflu à un petit récif situé à l'Ouest du dit Klöfningen jusqu'à un point XXI où se croisent les cercles tirés avec un rayon de 4 milles marins (à 60 au degré) autour des dits récifs.

CONSIDÉRANT, qu'après que le Tribunal eut visité la zone litigieuse, examiné les documents et les cartes qui lui ont été présentés, et entendu les plaidoyers et les répliques ainsi que les explications qui lui ont été fournies sur sa demande, les débats ont été déclarés clos dans la séance du 18 octobre 1909;

CONSIDÉRANT, en ce qui concerne l'interprétation de certaines expressions dont s'est servi la Convention et sur lesquelles les deux Parties, au cours des débats, ont émis des opinions différentes,

que — en premier lieu — le Tribunal est d'avis, que la clause d'après laquelle il déterminera la ligne frontière dans la mer *jusqu'à la limite des eaux territoriales* n'a d'autre but que d'exclure l'éventualité d'une détermination incomplète, qui, dans l'avenir, pourrait être cause d'un nouveau litige de frontière;

que, de toute évidence, il a été absolument étranger aux intentions des Parties de fixer d'avance le point final de la frontière, de sorte que le Tribunal n'aurait qu'à déterminer la direction entre deux points donnés;

que — en second lieu — la clause, d'après laquelle les lignes, limitant la zone, qui peut être l'objet du litige par suite des conclusions des Parties, *ne*

doivent pas être tracées de façon à comprendre, ni des îles, ni des îlots, ni des récifs, qui ne sont pas constamment sous l'eau ne saurait être interprétée de manière à impliquer, que des îles, îlots et récifs susindiqués devraient être pris nécessairement comme points de départ pour la détermination de la frontière;

CONSIDÉRANT donc que, sous les deux rapports susmentionnés, le Tribunal conserve toute sa liberté de statuer sur la frontière dans les bornes des prétentions respectives;

CONSIDÉRANT, que d'après les termes de la Convention, la tâche du Tribunal consiste à déterminer la ligne frontière dans les eaux à partir du point indiqué sous XVIII, sur la carte annexée au projet des Commissaires Norvégiens et Suédois du 18 août 1897, dans la mer, jusqu'à la limite des eaux territoriales;

CONSIDÉRANT, quant à la question « si la ligne frontière doit être considérée, soit entièrement soit en partie, comme fixée par le Traité de délimitation de 1661 avec la carte y annexée »,
que la réponse à cette question doit être négative, du moins en ce qui concerne la ligne frontière au delà du point A sur la carte susindiquée;

CONSIDÉRANT que la situation exacte, que le point A occupe sur cette carte ne peut être précisée d'une manière absolue, mais que, en tout cas, il correspond à un point situé entre le point XIX et le point XX, comme ces deux points seront fixés ci-après;

CONSIDÉRANT que les Parties en litige sont d'accord en ce qui concerne la ligne frontière du point indiqué sous XVIII sur la carte du 18 août 1897 jusqu'au point indiqué sous XIX dans les conclusions suédoises;

CONSIDÉRANT que, en ce qui concerne la ligne frontière du dit point XIX jusqu'à un point indiqué sous XX sur des cartes annexées aux mémoires, les Parties sont également d'accord, sauf la seule différence dépendant de la question de savoir si, pour déterminer le point XX, il faut prendre les Heiefluer ou bien le Heieknub comme point de départ du côté norvégien;

CONSIDÉRANT, à ce sujet,
que les Parties ont adopté, en pratique du moins, le principe du partage par la ligne médiane, tirée entre les îles, îlots et récifs, situés des deux côtés et n'étant pas constamment submergés, comme ayant été, à leur avis, le principe qui avait été appliqué en deçà du point A, par le Traité de 1661;
qu'une adoption de principe inspirée par de pareils motifs — abstraction faite de la question, si le principe invoqué a été réellement appliqué par ledit traité — doit avoir pour conséquence logique que, en l'appliquant de nos jours, on tienne compte en même temps des circonstances de fait ayant existé à l'époque du traité;

CONSIDÉRANT que les Heiefluer sont des récifs dont, à un degré suffisant de certitude, on peut prétendre que, au temps du traité de délimitation de 1661, ils n'émergeaient pas de l'eau,
que, par conséquent, à cette époque là ils n'auraient pu servir comme point de départ pour une délimitationde frontière;

CONSIDÉRANT donc que, au point de vue mentionné plus haut, le Heieknub doit être préféré aux Heiefluer;

CONSIDÉRANT que le point XX étant fixé, il reste à déterminer la ligne frontière à partir de ce point XX jusqu'à la limite des eaux territoriales;

CONSIDÉRANT que le point XX est situé, sans aucun doute, au delà du point A, indiqué sur la carte annexée au Traité de délimitation de 1661;

CONSIDÉRANT que la Norvège a soutenu la thèse, qui du reste n'a pas été rejetée par la Suède, que par le seul fait de la paix de Roskilde en 1658 le territoire maritime dont il s'agit a été partagé automatiquement entre Elle et la Suède;

CONSIDÉRANT que le Tribunal se rallie complètement à cette opinion;

CONSIDÉRANT que cette opinion est conforme aux principes fondamentaux du droit des gens, tant ancien que moderne, d'après lesquels le territoire maritime est une dépendance nécessaire d'un territoire terrestre, ce dont il suit, qu'au moment que, en 1658, le territoire terrestre nommé le Bohuslan fut cédé à la Suède, le rayon de territoire maritime formant la dépendance inséparable de ce territoire terrestre dut faire automatiquement partie de cette cession;

CONSIDÉRANT que de ce raisonnement il résulte, que, pour constater quelle peut avoir été la ligne automatique de division de 1658, il faut avoir recours aux principes de droit en vigueur à cette époque;

CONSIDÉRANT que la Norvège prétend, que, en deçà de la ligne Koster-Tisler le principe des documents de frontière de 1661 ayant été que la frontière devrait suivre la ligne médiane entre les îles, îlots et récifs des deux côtés, le même principe doit être appliqué quant à la frontière au delà de cette ligne;

CONSIDÉRANT qu'il n'est pas établi, que la ligne de frontière déterminée par le traité et tracée sur la carte de délimitation ait été basée sur ce principe;

qu'il y a des détails et des particularités dans la ligne suivie, qui font même surgir des doutes sérieux à ce sujet;

que, même si l'on admettait pour la ligne de frontière déterminée par le traité, l'existence de ce principe, il ne s'ensuivrait pas que le même principe aurait du être appliqué pour la détermination de la frontière dans le territoire extérieur;

CONSIDÉRANT, à ce sujet,

que le Traité de délimitation de 1661 et la carte de ce traité font *commencer* la ligne de frontière entre les îles de Koster et de Tisler;

que, en déterminant la ligne de frontière, on est allé dans la direction de la mer vers la côte et non de la côte vers la mer;

que l'on ne saurait donc même parler d'une continuation possible de cette ligne de frontière dans la direction vers le large;

que, par conséquent, le trait-d'union manque pour pouvoir présumer, sans preuve décisive, l'application simultanée du même principe aux territoires situés en deçà et à ceux situés au delà de la ligne Koster-Tisler;

CONSIDÉRANT en outre,

que ni le traité de délimitation, ni la carte y appartenant ne font mention d'îles, îlots ou récifs situés au delà de la ligne Koster-Tisler;

que donc, pour rester dans les intentions probables de ces documents, il faut faire abstraction de tels îles, îlots et récifs;

CONSIDÉRANT en plus,

que le territoire maritime, correspondant à une zone d'une certaine largeur, présente de nombreuses particularités qui le distinguent du territoire terrestre et des espaces maritimes plus ou moins complètement environnés de ces territoires;

CONSIDÉRANT au même sujet encore,

que les règles sur le territoire maritime ne sauraient servir de directives pour la détermination de la frontière entre deux pays limitrophes, d'autant moins qu'il s'agit dans l'espèce de la détermination d'une frontière, qui doit s'être

automatiquement tracée en 1658, tandis que les règles invoquées datent de siècles postérieurs;

qu'il en est de même pour les règles du droit interne Norvégien, concernant la délimitation soit entre les propriétés privées, soit entre les unités administratives;

CONSIDÉRANT que, par tous ces motifs, on ne saurait adopter la méthode d'après laquelle la Norvège a proposé de déterminer la frontière du point XX jusqu'à la limite territoriale;

CONSIDÉRANT que le principe d'une ligne médiane à tirer au milieu des terres habitées ne trouve pas d'appui suffisant dans le droit des gens en vigueur au XVII^e siècle;

CONSIDÉRANT qu'il en est de même pour le principe du thalweg ou du chenal le plus important, principe dont l'application à l'espèce ne se trouve pas non plus établie par les documents invoqués à cet effet;

CONSIDÉRANT que l'on est bien plus en concordance avec les idées du XVII^e siècle et avec les notions de droit en vigueur à cette époque en admettant que la division automatique du territoire en question a du s'effectuer d'après la direction générale du territoire terrestre duquel le territoire maritime formait une appartenance et, en appliquant par conséquent, pour arriver à une détermination légitime et justifiée de la frontière, de nos jours ce même principe;

CONSIDÉRANT que, par suite, la ligne automatique de partage de 1658 doit être déterminée, ou — ce qui en d'autres termes est exactement la même chose — le partage d'aujourd'hui doit être fait en traçant une ligne perpendiculairement à la direction générale de la côte, tout en tenant compte de la nécessité d'indiquer la frontière d'une manière claire et indubitable et d'en faciliter, autant que possible, l'observation de la part des intéressés;

CONSIDÉRANT que, pour savoir quelle est cette direction, il faut, d'une manière égale tenir compte de la direction de la côte située des deux côtés de la frontière;

CONSIDÉRANT que la direction générale de la côte, d'après l'expertise consciencieuse du Tribunal, décline du vrai Nord d'environ 20 degrés vers l'Ouest;

que, par conséquent, la ligne perpendiculaire doit se diriger vers l'Ouest, à environ 20 degrés au Sud;

CONSIDÉRANT que les Parties sont d'accord à reconnaître le grand inconvénient qu'il y aurait à tracer la ligne frontière à travers des bancs importants;

qu'une ligne de frontière, tracée du point XX dans la direction de l'Ouest, à 19 degrés au Sud, éviterait complètement cet inconvénient puis qu'elle passerait juste au Nord des Grisbadarna et au Sud des Skjöttegrunde et qu'elle ne couperait non plus aucun autre banc important;

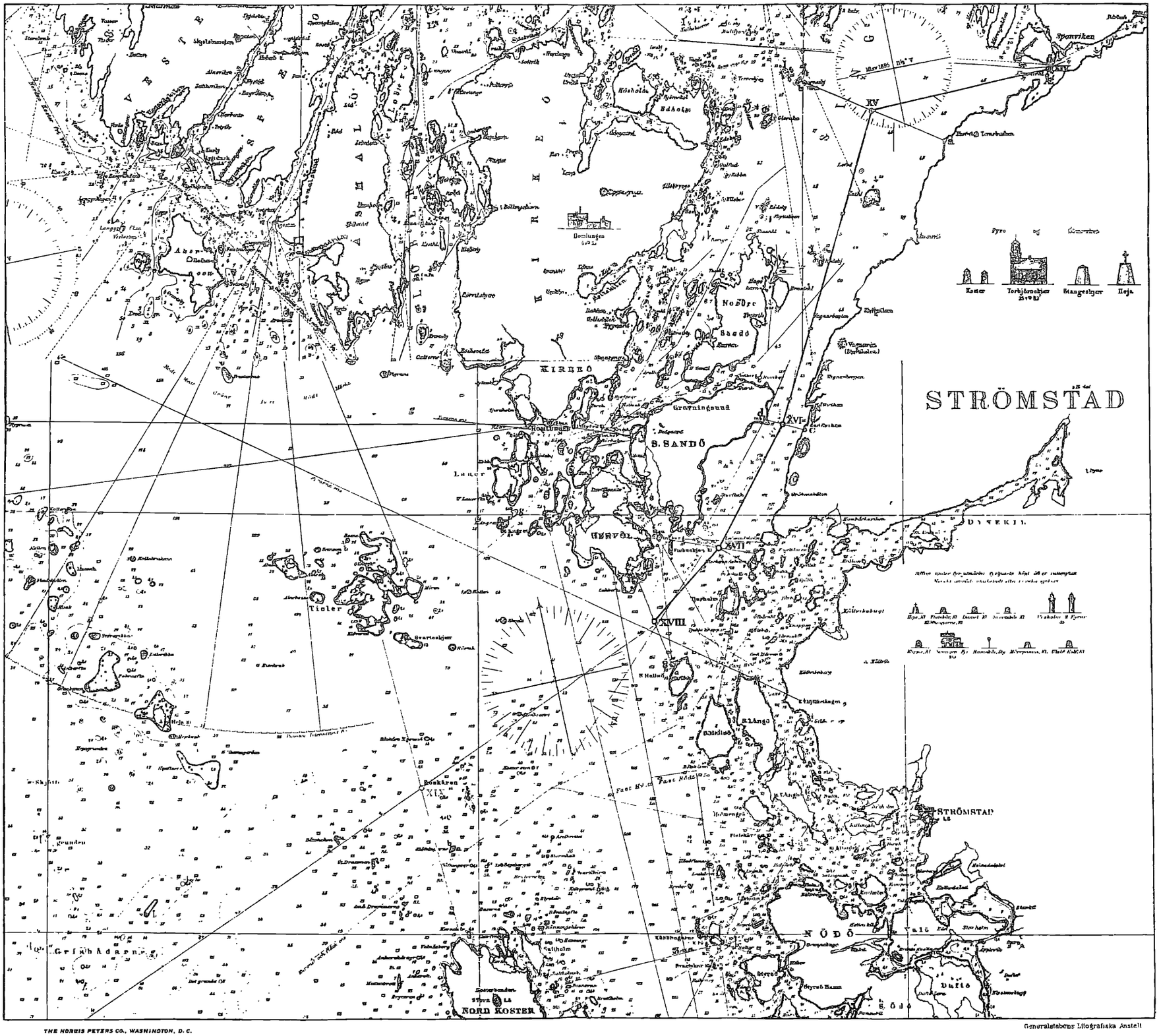
que, par conséquent, la ligne frontière doit être tracée du point XX dans la direction de l'Ouest, à 19 degrés au Sud, de manière qu'elle passe au milieu des bancs Grisbadarna d'un côté et des bancs Skjöttegrunde de l'autre;

CONSIDÉRANT que, bien que les Parties n'aient pas indiqué de marques d'alignement pour une ligne de frontière ainsi tracée, il y a lieu de croire que ce ne soit pas impossible d'en trouver;

CONSIDÉRANT d'autre part que, le cas échéant, on pourrait avoir recours à d'autres méthodes connues de marquer la frontière;

MAPS

CARTES



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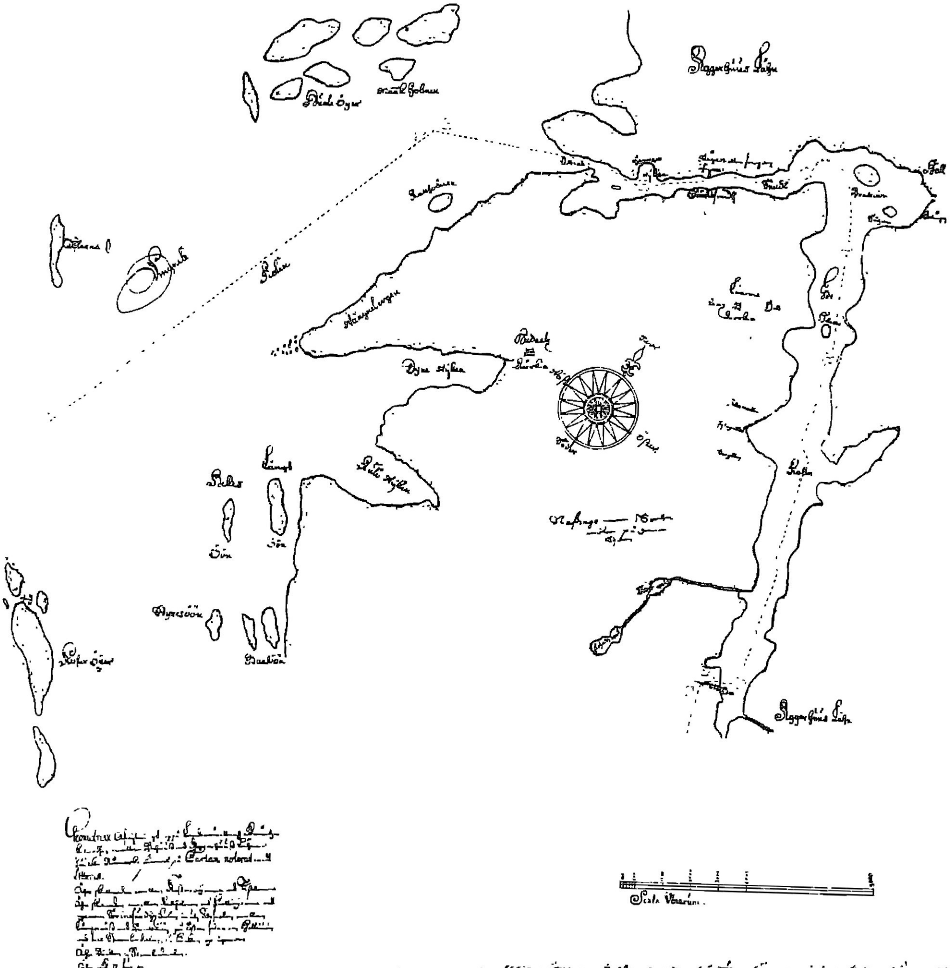

Att denna ritning blifvit riktigen tecknad efter därstädes förvarade original karta, hörande till gränstraktaten af den 26 Oktober 1661 intygar Stockholm Riksarkivet den 29 Juli 1897

ex officio

[illegible]

Arkivarie

THE NORRIS PETERS CO., WASHINGTON, D. C.

CONSIDÉRANT qu'une démarcation qui attribue les Grisbadarna à la Suède se trouve appuyée par l'ensemble de plusieurs circonstances de fait, qui ont été relevées aux cours des débats, et dont les principales sont les suivantes:

a) la circonstance que la pêche aux homards aux bas-fonds de Grisbadarna a été exercée depuis un temps bien plus reculé, dans une bien plus large mesure et avec un bien plus grand nombre de pêcheurs par les ressortissants de la Suède que par ceux de la Norvège;

b) la circonstance que la Suède a effectué dans les parages de Grisbadarna, surtout dans les derniers temps, des actes multiples émanés de sa conviction que ces parages étaient suédois, comme, par exemple, le balisage, le mesurage de la mer et l'installation d'un bateau-phare, lesquels actes entraînaient des frais considérables et par lesquels elle ne croyait pas seulement exercer un droit mais bien plus encore accomplir un devoir; tandis que la Norvège, de son propre aveu, sous ces divers rapports s'est souciée bien moins ou presque pas du tout de ces parages;

CONSIDÉRANT, en ce qui concerne la circonstance de fait mentionnée sous *a*,

que, dans le droit des gens, c'est un principe bien établi, qu'il faut s'abstenir autant que possible de modifier l'état des choses existant de fait et depuis longtemps;

que ce principe trouve une application toute particulière lorsqu'il s'agit d'intérêts privés, qui, une fois mis en souffrance, ne sauraient être sauvegardés d'une manière efficace même par des sacrifices quelconques de l'Etat, auquel appartiennent les intéressés;

que c'est la pêche aux homards, qui, aux bancs de Grisbadarna, est de beaucoup la plus importante et que c'est surtout cette pêche qui donne aux bancs leur valeur, comme place de pêche;

que, sans conteste, les Suédois ont été les premiers à pêcher aux homards à l'aide des engins et des embarcations nécessaires pour l'exercice de la pêche aussi loin dans la mer que sont situés les bancs en question;

que la pêche en général a plus d'importance pour les habitants de Koster que pour ceux de Hvaler et que, au moins jusqu'à un temps assez peu reculé, ceux-ci se sont adonnés plutôt à la navigation qu'à la pêche;

que de ces diverses circonstances il ressort déjà avec une probabilité équivalente à un haut degré de certitude, que les Suédois ont, beaucoup plus tôt et d'une manière beaucoup plus efficace que les Norvégiens, exploité les bancs en question;

que les dépositions et les déclarations des témoins sont en général en pleine concordance avec cette conclusion;

que, également, la Convention d'arbitrage est en pleine concordance avec la même conclusion;

que, d'après cette convention, il existe une certaine connexité entre la jouissance de la pêche des Grisbadarna et l'entretien du bateau-phare et que, la Suède étant obligée d'entretenir le bateau-phare aussi longtemps que continuera l'état actuel, cela démontre que, d'après les raisons de cette clause la jouissance principale en revient aujourd'hui à la Suède;

CONSIDÉRANT, en ce qui concerne les circonstances de fait, mentionnés sous *b*,

Quant au balisage et au stationnement d'un bateau-phare,

que le stationnement d'un bateau-phare, nécessaire à la sécurité de la navigation dans les parages de Grisbadarna, a été effectué par la Suède sans rencontrer de protestation et sur l'initiative même de la Norvège et que, également, l'établissement d'un assez grand nombre de balises y a été opéré sans soulever des protestations;

que ce bateau-phare et ces balises sont maintenus toujours par les soins et aux frais de la Suède;

que la Norvège n'a pris de mesures en quelque manière correspondantes qu'en y plaçant à une époque postérieure au balisage et pour un court laps de temps une bouée sonore, dont les frais d'établissement et d'entretien ne pourraient même être comparés à ceux du balisage et du bateau-phare;

que de ce qui précède ressort que la Suède n'a pas douté de son droit aux Grisbadarna et qu'Elle n'a pas hésité d'encourir les frais incombant au propriétaire et possesseur de ces bancs jusque même à un montant très-considérable;

Quant aux mesurages de mer,

que la Suède a procédé la première et une trentaine d'années avant le commencement de toute contestation, à des mesurages exacts, laborieux et coûteux des parages de Grisbadarna, tandis que les mesurages faits quelques années plus tard par les soins de la Norvège n'ont même pas atteint les limites des mesurages Suédois;

CONSIDÉRANT donc qu'il n'est pas douteux du tout que l'attribution des bancs de Grisbadarna à la Suède est en parfaite concordance avec les circonstances les plus importantes de fait;

CONSIDÉRANT, qu'une démarcation, qui attribue les Skjöttegrunde — la partie la moins importante du territoire litigieux — à la Norvège se trouve suffisamment appuyée, de son côté, par la circonstance de fait sérieuse que, quoiqu'on doive conclure des divers documents et témoignages, que les pêcheurs Suédois — comme il a été dit plus haut — ont exercé la pêche dans les parages en litige depuis un temps plus reculé, dans une plus large mesure et en plus grand nombre, il est certain d'autre part que les pêcheurs Norvégiens n'y ont été jamais exclus de la pêche;

que, en outre, il est avéré qu'aux Skjöttegrunde, les pêcheurs Norvégiens ont presque de tout temps, et d'une manière relativement bien plus efficace qu'aux Grisbadarna, pris part à la pêche aux homards.

PAR CES MOTIFS,

Le Tribunal décide et prononce:

Que la frontière maritime entre la Norvège et la Suède, en tant qu'elle n'a pas été réglée par la Résolution royale du 15 mars 1904 est déterminée comme suit:

du point XVIII, situé comme il est indiqué sur la carte annexée au projet des commissaires Norvégiens et Suédois du 18 août 1897, une ligne droite est tracée au point XIX, formant le point de milieu d'une ligne droite tirée du récif le plus septentrional des Röskären au récif le plus méridional des Svartskjar, celui qui est muni d'une balise.

du point XIX ainsi fixé une ligne droite est tracée au point XX, formant le point de milieu d'une ligne droite tirée du récif le plus septentrional du groupe des récifs Stora Drammen au récif le Hejeknub situé au Sud-est de l'île Heja,

du point XX une ligne droite est tracée dans une direction Ouest, 19 degrés au Sud, laquelle ligne passe au milieu entre les Grisbadarna et le Skjöttegrund Sud et se prolonge dans la même direction jusqu'à ce qu'elle aura atteint la mer libre.

FAIT à La Haye, le 23 octobre 1909 dans l'Hôtel de la Cour permanente d'Arbitrage.

Le Président: J. A. LOEFF
Le Secrétaire général: Michiels VAN VERDUYNEN
Le Secrétaire: ROELL

DOCUMENTS ADDITIONNELS

Résolution de Sa Majesté royale, du 26 mars 1904, avec le Protocole du 15 mars 1904, ayant trait à la détermination de l'étendue d'une certaine partie de la frontière maritime entre la Suède et la Norvège[1]

Par rapport au protocole suivant du Conseil d'Etat mixte norvégien et suédois du 15 mars 1904, ainsi qu'à l'extrait du protocole du Conseil d'Etat ayant trait aux matière civiles de ce jour, Sa Majesté royale, par la présente, autorise le Riksdag à proposer que la question de l'étendue de la frontière maritime entre la Suède et la Norvège, du point 18, mentionné dans ledit protocole, à la mer, jusqu'à la limite de la frontière territoriale, soit renvoyée à la décision d'un tribunal d'arbitrage spécial, conformément au texte des protocoles.

Les autorités du Riksdag désigneront un comité chargé de diriger l'examen des actes; et avec toute Sa grâce et Sa bienveillance royale, Sa Majesté reste à toujours bien disposée envers le Riksdag.

En l'absence de Sa Majesté, mon Très gracieux Roi et Seigneur

Gustave

Hjalmar Westring

Protocole considéré par le Conseil d'État mixte norvégien et suédois, en présence de Son Altesse Royale le Prince Régent héritier de la couronne, au château de Christiana, le 15 mars 1904[2]

Présents: Son Excellence le Ministre d'Etat, M. Hagerup, Son Excellence le Ministre d'Etat, M. Ibsen, Son Excellence le Ministre d'Etat, M. Boström, Son Excellence le Ministre des Affaires Etrangères, M. Lagerheim, les Conseillers d'Etat: M. Kildal, M. Strugstad, M. Hauge, M. Schöning, M. Vogt, M. Mathiesen, et le Conseiller d'Etat suédois, M. Westring.

Le Chef du Département du Commerce et de l'Industrie, le Conseiller d'Etat M. Schöning soumit ce que suit:

Le Département prend la liberté de présenter certaines considérations concernant des mesures ayant trait à une détermination plus exacte des frontières nationales dans les eaux entre la Norvège et la Suède.

Les frontières maritimes entre les deux pays, partant de l'intérieur du Idefjard et se prolongeant à la mer furent déterminées en vertu d'une Convention de délimitation conclue le 26 octobre 1661, exécutée conformément au Traité de

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[1] J. B. Scott, *ibid.*, p. 141.
[2] J. B. Scott, *ibid.*, p. 142.

paix de Roskilde du 26 février/9 mars 1658, et à celui de Copenhague du 27 mars/6 juin 1660.

Dans l'intervalle, une grande incertitude s'éleva au sujet de plusieurs points de la ligne frontière, en raison du fait que pendant la longue période de 1661 à 1897, aucune levée hydrographique des lieux, ni aucune investigation ne furent faites en commun par les deux Etats. En 1897, le Département de l'Intérieur de la Norvège et le Département suédois des Affaires civiles prirent certaines mesures en vue de déterminer la direction exacte de cette partie de la frontière; et au mois d'août de la même année, deux commissaires norvégiens, ainsi que deux commissaires suédois se réunirent pour faire une recherche approfondie des archives, ainsi que pour visiter les lieux, etc., afin de présenter un projet tendant à déterminer la ligne frontière entre la Norvège et la Suède, et pour la tracer sur les cartes, de l'intérieur d'Idefjard à la mer.

Le Secrétaire de bureau, M. Hroar Olsen et le Commandant A. Rieck furent désignés comme commissaires pour la Norvège; le Commandant E. Oldberg et M. le Juge H. Westring, comme commissaires suédois.

Comme résultat de leurs travaux et de leurs recherches, les commissaires présentèrent le 18 août 1897, le « Projet de la Commission royale suédoise et norvégienne pour déterminer la frontière maritime entre la Norvège et la Suède, de l'intérieur d'Idefjard à la mer ».

Les quatre commissaires, ainsi qu'ils le témoignent dans ce document, arrvèrent à une conclusion unanime en ce qui concerne la ligne frontière partant de l'intérieur d'Idefjard et atteignant un point placé entre la bouée Jyete (norvégienne) et une petite île située au nord-ouest de Narro Hellsö (appartenant à la Suède), point qui porte le numéro 18 sur une carte annexée au projet, de telle façon que le Helleholmen est transféré à la Suède, et le Knivsöarna à la Norvège.

En ce qui concerne la longueur de la ligne frontière dudit point 18 à la mer, aucun accord ne fut conclu par la Commission. Les membres norvégiens et suédois soumirent leurs conclusions respectives ayant trait à cette section, et par lesquelles le Grisbadarna, ainsi que quelques bancs et bas-fonds situés au nord de Koster devaient être respectivement attribués, soit à la Norvège, soit à la Suède.

Les projets des Commissaires, ainsi que deux cartes qui s'y rapportent, sont annexés ci-après.

Le Département est d'avis que la ligne proposée par la Commission norvégienne et suédoise, reliant l'intérieur d'Idefjard au point 18, ainsi qu'elle est indiquée sur la carte annexée, doit être considérée comme la ligne frontière correcte.

Vu que pour la description plus détaillée de cette ligne, on fait renvoi au projet des Commissaires, le Département se permet de recommander à Votre Majesté d'approuver cette ligne comme étant la frontière correcte entre les deux royaumes.

S'il plaît à Votre Majesté de prendre une décision conformément à cette recommandation, le Département suppose que la proclamation royale ayant trait à la ligne frontière convenue, sera, dans la suite, promulguée par le Conseil d'Etat de chacun des deux royaumes.

En outre, il faut observer qu'il serait important de démarquer le plus tôt possible cette section de la ligne frontière. Il semblerait plus avantageux qu'un Commissaire de chaque royaume soit désigné pour entreprendre cette démarcation, et le Département recommande, en conséquence, à Votre Majesté de donner son approbation à cette proposition, qui consiste en ce que le Conseil d'Etat de chacun des deux royaumes désigne respectivement un Commissaire norvégien et un Commissaire suédois.

Ainsi qu'on l'a indiqué plus haut, les Commissaires norvégien et suédois n'ont pu tomber d'accord au sujet de la rectification de l'étendue de la frontière du dit point 18 à la mer.

Ci-après est donnée une présentation plus détaillée des conclusions des parties norvégienne et suédoise, ayant trait à la ligne frontière litigieuse.

Le point de vue norvégien

A partir du point 18, placé entre la bouée Jyete et une petite île située au nord-ouest de Narra Hellsö, la ligne doit se prolonger directement à la mer en passant par un point situé au milieu d'une ligne droite reliant l'extrêmité méridionale, Klöveren, de celle des îles norvégiennes de Tisler, située le plus au sud à l'extrêmité septentrionale de l'île Nord Koster (suédoise), de telle façon que la ligne frontière passe par Batshake, et que toutes les îles situées au nord de cette ligne, y compris les Grisbadarna, restent à la Norvège.

Cette ligne est tracée en couleur rouge sur la carte des Commissaires, et ledit point situé entre Klöveren et l'île de Koster est indiqué par le numéro 19.

Le point de vue suédois

A partir du point 18, la ligne frontière doit être tracée en ligne droite, allant à la mer en passant par un point situé à environ 300 mètres au nord de Röskaren, et par conséquent, à peu près à mi-chemin entre les Grisbadarna et le Skättegrund, de telle façon que toutes les îles au sud de cette ligne, eau et terre, y compris les Grisbadarna, restent à la Suède.

Sur la carte des Commissaires cette ligne est indiquée en couleur jaune, et ledit point situé au nord de Röskaren est indiqué par le numéro 19.

Ce Département se permet de proposer respectueusement de soumettre la question de la frontière litigieuse à la décision d'un Tribunal d'arbitrage spécial, après avoir obtenu l'assentiment des représentants des deux royaumes en la matière, et d'observer la procédure suivante:

Les Conseils d'Etat de chacun des deux royaumes désigneront respectivement deux juges.

Les juges ainsi désignés s'accorderont sur le choix d'un cinquième juge qui fonctionnera en même temps en qualité de président du Tribunal. En cas de désaccord, le choix du cinquième membre sera soumis à la décision du Chef d'un Etat étranger, sur la demande que pourrait lui adresser Votre Majesté à cet effet.

Les règles de procédure, les délibérations, ainsi que le siège du Tribunal seront établis par les juges.

La décision du Tribunal, dûment annoncée, ayant trait à la ligne frontière litigieuse sera obligatoire pour les deux parties.

Chacun des deux royaumes supportera les frais de ses représentants; les frais du cinquième membre, etc., seront supportés en parties égales par les deux royaumes.

Conformément à ce qui précède, le Département prend la liberté de soumettre respectueusement:

Afin que Votre Majesté puisse gracieusement décider:

1. Que la ligne frontière entre la Norvège et la Suède, telle qu'elle est proposée par la Commission mixte norvégienne et suédoise de 1897, reliant l'extrémité supérieure du Idefjard au point 18, ainsi qu'elle est tracée sur les deux cartes annexées, soit approuvée conformément au projet des Commissaires;

2. Que la démarcation de ladite ligne frontière soit entreprise par les Commissaires désignés à cet effet, un de chaque royaume;

3. Que les questions ayant trait aux lignes frontières entre la Norvège et la Suède, du point 18 susmentionné à la mer, jusqu'à la limite de la frontière territoriale, soient soumises à la décision d'un Tribunal d'arbitrage spécial, conformément à ce qui a été déclaré plus haut, et avec l'assentiment des représentants des deux royaumes.

Les membres suédois du Conseil d'Etat sont d'accord avec ce qui a été soumis plus haut par le rapporteur, ayant trait à l'approbation des lignes frontières proposées par les Commissaires suédois et norvégiens, reliant l'extrêmité supérieure de Idefjard au point 18, y compris la démarcation de la ligne frontière.

En ce qui concerne la section de la ligne frontière du point 18 à la mer, jusqu'à la frontière territoriale, ces membres remarquent que dans plusieurs déclarations reçues ayant trait à cette question, des suggestions ont été faites relativement à la frontière, d'après lesquelles cette ligne serait placée en partie encore plus au nord que celle proposée par les Commissaires suédois. En exprimant à l'égard de ce qui précède l'opinion que le projet de soumettre à un Tribunal d'arbitrage spécial la décision regardant la question de la position de la ligne frontière dans cette section, puisse donner aux deux parties l'occasion de présenter au Tribunal les demandes qu'elles jugent nécessaires en l'espèce, ces membres se rallient au projet du rapporteur, même en ce qui concerne cette partie de la question.

Les membres norvégiens n'ont eu aucune objection à faire au rapport susmentionné, qui correspondait à ce qui avait déjà été considéré comme admis par la partie norvégienne.

Plaise à Votre Majesté, Prince régent héritier de la couronne, d'approuver, conformément à ce que les membres du Conseil d'Etat recommandent ainsi, le projet soumis par le Chef du Département du Commerce et de l'Industrie de la Norvège.

THE NORTH ATLANTIC COAST FISHERIES CASE

PARTIES: Great Britain, United States of America.

COMPROMIS: 27 January 1909.[1]

ARBITRATORS: Permanent Court of Arbitration: H. Lammash; A. F. de Savornin Lohman; G. Gray; Luis M. Drago; Sir Charles Fitzpatrick.

AWARD: 7 September 1910.

ADDITIONAL DOCUMENTS: Modus vivendi of 6/8 October 1906; memorandum of 12 September 1906; memorandum of 25 September 1906; modus vivendi of 4/6 September 1907; modus vivendi of 15/23 July 1908; correspondence of 27 January-4 March 1909; resolution of 18 February 1909; modus vivendi of 22 July-8 September 1909; agreement of 20 July 1912.

Treaty interpretation — Effects of a treaty authorizing the nationals of a State to exercise activities in the domain of another State — Territorial jurisdiction of the State — Principle of independence of State — Duty of State to fulfil in good faith its obligations arising out of treaties — Ordinary sanctions of international law — Effect of war on treaties — Freedom of fishing — Economic right — International servitude — Legal status of the territorial sea — Breadth of the territorial sea — Legal status of bays — Historic bays — Ships in distress.

[1] As the full text of this compromis is given in the award, it is not printed again under a special heading.

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SYLLABUS [1]

The treaty of peace of 1783 between Great Britain and the United States stipulated that inhabitants of the United States should continue to exercise the privileges theretofore enjoyed in common with British subjects in the fisheries of Newfoundland, Labrador, and other parts of the North Atlantic Coast.

Great Britain regarded this treaty as abrogated by the war of 1812, whereas the United States considered it as only suspended by and during the war. However, on October 20, 1818, a new treaty was signed, article I of which defined the rights and obligations of inhabitants of the United States as to fishing in certain parts of British north Atlantic coast waters.[2] Differences arose as to the scope and meaning of this article. Beginning with the seizure of American fishing vessels in 1821-2, the controversy over fishing rights continued in more or less menacing form until 1905 when, on account of the severe restrictive legislation by Newfoundland, affairs reached a critical stage. Negotiations were begun looking to a settlement, and in 1906 a *modus vivendi* [3] covering the fishing season of 1906-7 was agreed upon by the two Governments for the purpose of allaying friction until some definite adjustment could be reached. The *modus* was renewed for the fishing seasons of 1907-8,[4] 1908-9 [5] and 1909-10,[6] and on January 27, 1909, a *compromis* was signed submitting the controversy to the Permanent Court of Arbitration at The Hague. A tribunal was created composed of the following members of the panel of the court: Heinrich Lammasch, of Austria-Hungary; A. F. de Savornin Lohman, of Holland; George Gray, of the United States; Louis M. Drago, of Argentine; and Sir Charles Fitzpatrick, of Great Britain. The session of the tribunal began June 1, 1910, ended August 12, 1910. The decision which was rendered on 7 September 1910, dealt with seven questions put to the Tribunal by the *compromis*.

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[1] *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford Universtiy Press, 1st series, 1916, p. 141.

[2] For the text of this article, see *infra.*, p. 173.

[3] See *infra.*, p. 212.

[4] See *infra.*, p. 215.

[5] See *infra.*, p. 217.

[6] See *infra.*, p. 221.

AWARD OF THE TRIBUNAL OF ARBITRATION IN THE QUESTION RELATING TO THE NORTH ATLANTIC COAST FISHERIES, THE HAGUE, 7 SEPTEMBER, 1910 [1]

Interprétation des traités — Détermination des effets d'un traité autorisant les nationaux d'un Etat à exercer leur activité dans le domaine géographique d'un autre Etat — Compétence territoriale de l'Etat — Principe de l'indépendance de l'Etat — Devoir de l'Etat d'exécuter de bonne foi ses obligations conventionnelles — Sanctions ordinaires du droit international — Extinction des traités par l'effet de la guerre — Liberté de pêche — Droit économique — Servitude internationale — Condition juridique de la mer territoriale — Etendue de la mer territoriale — Condition juridique des baies — Baies historiques — Relâche forcée.

PREAMBLE

WHEREAS a Special Agreement between the United States of America and Great Britain, signed at Washington the 27th January, 1909, and confirmed by interchange of Notes dated the 4th March, 1909, was concluded in conformity with the provisions of the General Arbitration Treaty between the United States of America and Great Britain, signed the 4th April, 1908, and ratified the 4th June, 1908;

AND WHEREAS the said Special Agreement for the submission of questions relating to fisheries on the North Atlantic Coast under the general treaty of arbitration concluded between the United States and Great Britain on the 4th day of April, 1908, is as follows:

Article I

WHEREAS by Article I of the Convention signed at London on the 20th day of October, 1818, between Great Britain and the United States, it was agreed as follows:

> WHEREAS differences have arisen respecting the liberty claimed by the United States for the Inhabitants thereof, to take, dry and cure Fish on Certain Coasts, Bays, Harbours and Creeks of His Britannic Majesty's Dominions in America, it is agreed between the High Contracting Parties, that the Inhabitants of the said United States shall have forever, in common with the Subjects of His Britannic Majesty, the Liberty to take Fish of every kind on that part of the Southern Coast of Newfoundland which extends from Cape Ray to the Rameau Islands, on the Western and Northern Coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the Coasts, Bays, Harbours, and Creeks from Mount Joly on the Southern Coast of Labrador, to and

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[1] Permanent Court of Arbitration, *North Atlantic Coast Fisheries Tribunal of Arbitration constituted under a Special Agreement signed at Washington, January 27th, 1909, between the United States of America and Great Britain*, The Hague, 1910, p. 104.

through the Straits of Belleisle and thence Northwardly indefinitely along the Coast, without prejudice, however, to any of the exclusive Rights of the Hudson Bay Company; and that the American Fishermen shall also have liberty forever, to dry and cure Fish in any of the unsettled Bays, Harbours and Creeks of the Southern part of the Coast of Newfoundland hereabove described, and of the Coast of Labrador; but so soon as the same, or any Portion thereof, shall be settled, it shall not be lawful for the said Fishermen to dry or cure Fish at such Portion so settled, without previous agreement for such purpose with the Inhabitants, Proprietors, or Possessors of the ground. — And the United States hereby renounce forever, any Liberty heretofore enjoyed or claimed by the Inhabitants thereof, to take, dry, or cure Fish on, or within three marine Miles of any of the Coasts, Bays, Creeks, or Harbours of His Britannic Majesty's Dominions in America not included within the above-mentioned limits; provided, however, that the American Fishermen shall be admitted to enter such Bays or Harbours for the purpose of Shelter and of repairing Damages therein, of purchasing Wood, and of obtaining Water, and for no other purpose whatever. But they shall be under such Restrictions as may be necessary to prevent their taking, drying or curing Fish therein, or in any other manner whatever abusing the Privileges hereby reserved to them.

AND, WHEREAS, differences have arisen as to the scope and meaning of the said Article, and of the liberties therein referred to, and otherwise in respect of the rights and liberties which the inhabitants of the United States have or claim to have in the waters or on the shores therein referred to:

It is agreed that the following questions shall be submitted for decision to a tribunal of arbitration constitutesd as hereinafter provided:

Question 1. — To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance:

(*a*) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(*b*) Desirable on grounds of public order and morals;

(*c*) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means and imple-

ments used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character

(*a*) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(*b*) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(*c*) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question 2. Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

Question 3. Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

Question 4. Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

Question 5. From where must be measured the " three marine miles of any of the coasts, bays, creeks, or harbours " referred to in the said Article?

Question 6. Have the inhabitants of the United States the liberty under the said Article or otherwise to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

Question 7. Are the inhabitants of the United States whose vessels resort to the treaty coasts for the purpose of exercising the liberties referred to in Article I of the treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the treaty coasts accorded by agreement or otherwise to United States trading-vessels generally?

Article II

Either Party may call the attention of the Tribunal to any legislative or executive act of the other Party, specified within three month of the exchange of notes enforcing this agreement, and which is claimed to be inconsistent with the true interpretation of the Treaty of 1818; and may call upon the Tribunal to express in its award its opinion upon such acts, and to point out in what respects, if any, they are inconsistent with the principles laid down in the award in reply to the preceding questions; and each Party agrees to conform to such opinion.

Article III

If any question arises in the arbitration regarding the reasonableness of any regulation or otherwise which requires an examination of the practical effect of any provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, the Tribunal may, in that case, refer such question to a Commission of three expert specialists in such matters; one to be designated by each of the Parties hereto, and the third, who shall not be a national of either Party, to be designated by the Tribunal. This Commission shall examine into and report their conclusions on any question or questions so referred to it by the Tribunal and such report shall be considered by the Tribunal and shall, if incorporated by them in the award, be accepted as a part thereof.

Pending the report of the Commission upon the question or questions so referred and without awaiting such report, the Tribunal may make a separate award upon all or any other questions before it, and such separate award, if made, shall become immediately effective, provided that the report aforesaid shall not be incorporated in the award until it has been considered by the Tribunal. The expenses of such Commission shall be borne in equal moieties by the Parties hereto.

Article IV

The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the High Contracting Parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the Treaty of 1818 or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th October, 1907.

Article V

The Tribunal of Arbitration provided for herein shall be chosen from the general list of members of the Permanent Court at The Hague, in accordance with the provisions of Article XLV of the Convention for the Settlement of International Disputes, concluded at the Second Peace Conference at The Hague on the 18th of October, 1907. The provisions of said Convention, so far as applicable and not inconsistent herewith, and excepting Articles LIII and LIV, shall govern the proceedings under the submission herein provided for.

The time allowed for the direct agreement of His Britannic Majesty and the President of the United States on the composition of such Tribunal shall be three months.

Article VI

The pleadings shall be communicated in the order and within the time following:

As soon as may be and within a period not exceeding seven months from the date of the exchange of notes making this agreement binding the printed case of each of the Parties hereto, accompanied by printed copies of the documents, the official correspondence, and all other evidence on which each Party relies, shall be delivered in duplicate (with such additional copies as may be agreed upon) to the agent of the other Party. It shall be sufficient for this purpose if such case is delivered at the British Embassy at Washington or at the American Embassy at London, as the case may be, for transmission to the agent for its Government.

Within fifteen days thereafter such printed case and accompanying evidence of each of the Parties shall be delivered in duplicate to each member of the Tribunal, and such delivery may be made by depositing within the stated period the necessary number of copies with the International Bureau at The Hague for transmission to the Arbitrators.

After the delivery on both sides of such printed case, either Party may, in like manner, and within four months after the expiration of the period above fixed for the delivery to the agents of the case, deliver to the agent of the other Party (with such additional copies as may be agreed upon), a printed counter-case accompanied by printed copies of additional documents, correspondence, and other evidence in reply to the case, documents, correspondence, and other evidence so presented by the other Party, and within fifteen days thereafter such Party shall, in like manner as above provided, deliver in duplicate such counter-case and accompanying evidence to each of the Arbitrators.

The foregoing provisions shall not prevent the Tribunal from permitting either Party to rely at the hearing upon documentary or other evidence which is shown to have become open to its investigation or examination or available for use too late to be submitted within the period hereinabove fixed for the delivery of copies of evidence, but in case any such evidence is to be presented, printed copies of it, as soon as possible after it is secured, must be delivered, in like manner as provided for the delivery of copies of other evidence, to each of the Arbitrators and to the agent of the other Party. The admission of any such additional evidence, however, shall be subject to such conditions as the Tribunal may impose, and the other Party shall have a reasonable opportunity to offer additional evidence in rebuttal.

The Tribunal shall take into consideration all evidence which is offered by either Party.

Article VII

If in the case or counter-case (exclusive of the accompanying evidence) either Party shall have specified or referred to any documents, correspondence, or other evidence in its own exclusive possession without annexing a copy, such Party shall be bound, if the other Party shall demand it within thirty days after the delivery of the case or countercase respectively, to furnish to the Party applying for it a copy thereof; and either Party may, within the like time, demand that the other shall furnish certified copies or produce for inspection the originals of any documentary evidence adduced by the Party upon whom the demand is made. It shall be the duty of the Party upon whom any such demand is made ot comply with it as soon as may be, and within a period not exceeding fifteen days after the demand has been received. The production for inspection or the furnishing to the other Party of official governmental publications, publishing, as authentic, copies of the documentary evidence referred to, shall be a sufficient compliance with such demand, if such governmental publications shall have been

published prior to the 1st day of January, 1908. If the demand is not complied with, the reasons for the failure to comply must be stated to the Tribunal.

Article VIII

The Tribunal shall meet within six months after the expiration of the period above fixed for the delivery to the agents of the case, and upon the assembling of the Tribunal at its first session each Party, through its agent or counsel, shall deliver in duplicate to each of the Arbitrators and to the agent and counsel of the other Party (with such additional copies as may be agreed upon) a printed argument showing the points and referring to the evidence upon which it relies.

The time fixed by this Agreement for the delivery of the case, counter-case, or argument, and for the meeting of the Tribunal, may be extended by mutual consent of the Parties.

Article IX

The decision of the Tribunal shall, if possible, be made within two months from the close of the arguments on both sides, unless on the request of the Tribunal the Parties shall agree to extend the period.

It shall be made in writing, and dated and signed by each member of the Tribunal, and shall be accompanied by a statement of reasons.

A member who may dissent from the decision may record his dissent when signing.

The language to be used throughout the proceedings shall be English.

Article X

Each Party reserves to itself the right to demand a revision of the award. Such demand shall contain a statement of the grounds on which it is made and shall be made within five days of the promulgation of the award, and shall be heard by the Tribunal within ten days thereafter. The Party making the demand shall serve a copy of the same on the oppposite Party, and both Parties shall be heard in argument by the Tribunal on said demand. The demand can only be made on the discovery of some new fact or circumstance calculated to exercise a decisive influence upon the award and which was unknown to the Tribunal and to the Party demanding the revision at the time the discussion was closed, or upon the ground that the said award does not fully and sufficiently, within the meaning of this Agreement, determine any question or questions submitted. If the Tribunal shall allow the demand for a revision, it shall afford such opportunity for further hearings and arguments as it shall deem necessary.

Article XI

The present Agreement shall be deemed to be binding only when confirmed by the two Governments by an exchange of notes.

In witness whereof this Agreement has been signed and sealed by His Britannic Majesty's Ambassador at Washington, the Right Honourable JAMES BRYCE, O.M., on behalf of Great Britain, and by the Secretary of State of the United States, ELIHU ROOT, on behalf of the United States.

DONE at Washington on the 27th day of January, one thousand nine hundred and nine.

James BRYCE [SEAL.]

Elihu ROOT [SEAL.]

AND WHEREAS, the parties to the said Agreement have by common accord, in accordance with Article V, constituted as a Tribunal of Arbitration the following Members of the Permanent Court at The Hague: Mr. H. LAMMASCH, Doctor of Law, Professor of the University of Vienna, Aulic Councillor, Member of the Upper House of the Austrian Parliament; His Excellency Jonkheer A. F. DE SAVORNIN LOHMAN, Doctor of Law, Minister of State, Former Minister of the Interior, Member of the Second Chamber of the Netherlands; the Honourable GEORGE GRAY, Doctor of Laws, Judge of the United States Circuit Court of Appeals, former United States Senator; the Right Honourable Sir CHARLES FITZPATRICK, Member of the Privy Council, Doctor of Laws, Chief Justice of Canada; the Honourable LUIS MARIA DRAGO, Doctor of Law, former Minister of Foreign Affairs of the Argentine Republic, Member of the Law Academy of Buenos-Aires;

AND WHEREAS, the Agents of the Parties to the said Agreement have duly and in accordance with the terms of the Agreement communicated to this Tribunal their cases, counter-cases, printed arguments and other documents;

AND WHEREAS, counsel for the Parties have fully presented to this Tribunal their oral arguments in the sittings held between the first assembling of the Tribunal on 1st June, 1910, to the close of the hearings on 12th August, 1910;

Now, therefore, this Tribunal having carefully considered the said Agreement, cases, counter-cases, printed and oral arguments, and the documents presented by either side, after due deliberation makes the following decisions and awards:

QUESTION I

To what extent are the following contentions or either of them justified?

It is contended on the part of Great Britain that the exercise of the liberty to take fish referred to in the said Article, which the inhabitants of the United States have forever in common with the subjects of His Britannic Majesty, is subject, without the consent of the United States, to reasonable regulation by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or rules, as, for example, to regulations in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements to be used in the taking of fish or in the carrying on of fishing operations on such coasts; (3) any other matters of a similar character relating to fishing; such regulations being reasonable, as being, for instance:

(*a*) Appropriate or necessary for the protection and preservation of such fisheries and the exercise of the rights of British subjects therein and of the liberty which by the said Article I the inhabitants of the United States have therein in common with British subjects;

(*b*) Desirable on grounds of public order and morals;

(*c*) Equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class.

It is contended on the part of the United States that the exercise of such liberty is not subject to limitations or restraints by Great Britain, Canada, or Newfoundland in the form of municipal laws, ordinances, or regulations in respect of (1) the hours, days, or seasons when the inhabitants of the United States may take fish on the treaty coasts, or (2) the method, means, and implements used by them in taking fish or in carrying on fishing operations on such coasts, or (3) any other limitations or restraints of similar character:

(*a*) Unless they are appropriate and necessary for the protection and preservation of the common rights in such fisheries and the exercise thereof; and

(*b*) Unless they are reasonable in themselves and fair as between local fishermen and fishermen coming from the United States, and not so framed as to give an advantage to the former over the latter class; and

(*c*) Unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement.

Question I, thus submitted to the Tribunal, resolves itself into two main contentions:

1st. Whether the right of regulating reasonably the liberties conferred by the Treaty of 1818 resides in Great Britain;

2nd. And, if such right does so exist, whether such reasonable exercise of the right is permitted to Great Britain without the accord and concurrence of the United States.

The Treaty of 1818 contains no explicit disposition in regard to the right of regulation, reasonable or otherwise; it neither reserves that right in express terms, nor refers to it in any way. It is therefore incumbent on this Tribunal to answer the two questions above indicated by interpreting the general terms of Article I of the Treaty, and more especially the words " the inhabitants of the United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind ". This interpretation must be conformable to the general import of the instrument, the general intention of the parties to it, the subject matter of the contract, the expressions actually used and the evidence submitted.

Now in regard to the preliminary question as to whether the right of reasonable regulation resides in Great Britain:

Considering that the right to regulate the liberties conferred by the Treaty of 1818 is an attribute of sovereignty, and as such must be held to reside in the territorial sovereign, unless the contrary be provided; and considering that one of the essential elements of sovereignty is that it is to be exercised within territorial limits, and that, failing proof to the contrary, the territory is co-terminous with the Sovereignty, it follows that the burden of the assertion involved in the contention of the United States (viz. that the right to regulate does not reside independently in Great Britain, the territorial Sovereign) must fall on the United States. And for the purpose of sustaining this burden, the United States have put forward the following series of propositions, each one of which must be singly considered.

It is contended by the United States:

(1) That the French right of fishery under the treaty of 1713 designated also as a liberty, was never subjected to regulation by Great Britain, and therefore the inference is warranted that the American liberties of fishery are similarly exempted.

The Tribunal is unable to agree with this contention:

(*a*) Because although the French right designated in 1713 merely " an allowance ", (a term of even less force than that used in regard to the American fishery) was nevertheless converted, in practice, into an exclusive right, this concession on the part of Great Britain was presumably made because France, before 1713, claimed to be the sovereign of Newfoundland, and, in ceding the

Island, had, as the American argument says, " reserved for the benefit of its subjects the right to fish and to use the strand ";

(*b*) Because the distinction between the French and American right is indicated by the different wording of the Statutes for the observance of Treaty obligations towards France and the United States, and by the British Declaration of 1783;

(*c*) And, also, because this distinction is maintained in the Treaty with France of 1904, concluded at a date when the American claim was approaching its present stage, and by which certain common rights of regulation are recognized to France.

For the further purpose of such proof it is contended by the United States:

(2) That the liberties of fishery, being accorded to the inhabitants of the United States " for ever ", acquire, by being in perpetuity and unilateral, a character exempting them from local legislation.

The Tribunal is unable to agree with this contention:

(*a*) Because there is no necessary connection between the duration of a grant and its essential status in its relation to local regulation; a right granted in perpetuity may yet be subject to regulation, or, granted temporarily, may yet be exempted therefrom; or being reciprocal may yet be unregulated, or being unilateral may yet be regulated: as is evidenced by the claim of the United States that the liberties of fishery accorded by the Reciprocity Treaty of 1854 and the Treaty of 1871 were exempt from regulation, though they were neither permanent nor unilateral;

(*b*) Because no peculiar character need be claimed for these liberties in order to secure their enjoyment in perpetuity, as is evidenced by the American negotiators in 1818 asking for the insertion of the words " for ever ". International law in its modern development recognizes that a great number of Treaty obligations are not annulled by war, but at most suspended by it;

(*c*) Because the liberty to dry and cure is, pursuant to the terms of the Treaty, provisional and not permanent, and is nevertheless, in respect of the liability to regulation, identical in its nature with, and never distinguished from, the liberty to fish.

For the further purpose of such proof, the United States allege:

(3) That the liberties of fishery granted to the United States constitute an International servitude in their favour over the territory of Great Britain, thereby involving a derogation from the sovereignty of Great Britain, the servient State, and that therefore Great Britain is deprived, by reason of the grant, of its independent right to regulate the fishery.

The Tribunal is unable to agree with this contention:

(*a*) Because there is no evidence that the doctrine of International servitudes was one with which either American or British Statesmen were conversant in 1818, no English publicists employing the term before 1818, and the mention of it in Mr. GALLATIN's report being insufficient;

(*b*) Because a servitude in the French law, referred to by Mr. GALLATIN, can, since the Code, be only real and cannot be personal (Code Civil, art. 686);

(*c*) Because a servitude in International law predicates an express grant of a sovereign right and involves an analogy to the relation of a *praedium dominans* and a *praedium serviens;* whereas by the Treaty of 1818 one State grants a liberty to fish, which is not a sovereign right, but a purely economic right, to the inhabitants of another State;

(*d*) Because the doctrine of international servitude in the sense which is now sought to be attributed to it originated in the peculiar and now obsolete conditions prevailing in the Holy Roman Empire of which the *domini terrae* were not fully sovereigns; they holding territory under the Roman Empire, subject at least theoretically, and in some respects also practically, to the Courts of that Empire; their right being, moreover, rather of a civil than of a public nature, partaking more of the character of *dominium* than of *imperium*, and therefore certainly not a complete sovereignty. And because in contradistinction to this quasi-sovereignty with its incoherent attributes acquired at various times, by various means, and not impaired in its character by being incomplete in any one respect or by being limited in favour of another territory and its possessor, the modern State, and particularly Great Britain, has never admitted partition of sovereignty, owing to the constitution of a modern State requiring essential sovereignty and independence;

(*e*) Because this doctrine being but little suited to the principle of sovereignty which prevails in States under a system of constitutional government such as Great Britain and the United States, and to the present International relations of Sovereign States, has found little, if any, support from modern publicists. It could therefore in the general interest of the Community of Nations, and of the Parties to this Treaty, be affirmed by this Tribunal only on the express evidence of an International contract;

(*f*) Because even if these liberties of fishery constituted an International servitude, the servitude would derogate from the sovereignty of the servient State only in so far as the exercise of the rights of sovereignty by the servient State would be contrary to the exercise of the servitude right by the dominant State. Whereas it is evident that, though every regulation of the fishery is to some extent a limitation, as it puts limits to the exercise of the fishery at will, yet such regulations as are reasonable and made for the purpose of securing and preserving the fishery and its exercise for the common benefit, are clearly to be distinguished from those restrictions and " molestations ", the annulment of which was the purpose of the American demands formulated by MR. ADAMS in 1782, and such regulations consequently cannot be held to be inconsistent with a servitude;

(*g*) Because the fishery to which the inhabitants of the United States were admitted in 1783, and again in 1818, was a regulated fishery, as is evidenced by the following regulations:

Act 15 Charles II, Cap. 16, s. 7 (1663) forbidding " to lay any seine or other net in or near any harbour in Newfoundland, whereby to take the spawn or young fry of the Poor-John, or for any other use or uses, except for the taking of bait only ", which had not been superseded either by the order in council of March 10th, 1670, or by the statute 10 and XI Wm. III, Cap. 25, 1699. The order in council provides expressly for the obligation " to submit unto and to observe all rules and orders as are now, or hereafter shall be established ", an obligation which cannot be read as referring only to the rules established by this very act, and having no reference to anteceding rules " as are now established ". In a similar way, the statute of 1699 preserves in force prior legislation, conferring the freedom of fishery only "as fully and freely as at any time heretofore ". The order in council, 1670, provides that the Admirals, who always were fishermen, arriving from an English or Welsh port, " see that His Majesty's rules and orders concerning the regulation of the fisheries are duly put in execution " (sec. 13). Likewise the Act 10 and XI, Wm. III, Cap. 25 (1699) provides that the Admirals do settle differences between the fishermen

arising in respect of the places to be assigned to the different vessels. As to Nova Scotia, the proclamation of 1665 ordains that no one shall fish without license; that the licensed fishermen are obliged " to observe all laws and orders which now are made and published, or shall hereafter be made and published in this jurisdiction ", and that they shall not fish on the Lord's day and shall not take fish at the time they come to spawn. The judgment of the Chief Justice of Newfoundland, October 26th 1820, is not held by the Tribunal sufficient to set aside the proclamations referred to. After 1783, the statute 26 Geo. III, Cap. 26, 1786, forbids " the use, on the shores of Newfoundland, of seines or nets for catching cod by hauling on shore or taking into boat, with meshes less than 4 inches "; a prohibition which cannot be considered as limited to the bank fishery. The act for regulating the fisheries of New Brunswick, 1793, which forbids " the placing of nets or seines across any cove or creek in the Province so as to obstruct the natural course of fish ", and which makes specific provision for fishing in the Harbour of St. John, as to the manner and time of fishing, cannot be read as being limited to fishing from the shore. The act for regulating the fishing on the coast of Northumberland (1799) contains very elaborate dispositions concerning the fisheries in the bay of Miramichi which were continued in 1823, 1829 and 1834. The statutes of Lower Canada, 1788 and 1807, forbid the throwing overboard of offal. The fact that these acts extend the prohibition over a greater distance than the first marine league from the shore may make them nonoperative against foreigners without the territorial limits of Great Britain, but is certainly no reason to deny their obligatory character for foreigners within these limits;

(*h*) Because the fact that Great Britain rareley exercised the right of regulation in the period immediately succeeding 1818 is to be explained by various circumstances and is not evidence of the non-existence of the right;

(*i*) Because the words " in common with British subjects " tend to confirm the opinion that the inhabitants of the United States were admitted to a regulated fishery;

(*j*) Because the statute of Great Britain, 1819, which gives legislative sanction to the Treaty of 1818, provides for the making of " regulations with relation to the taking, drying and curing of fish by inhabitants of the United States in 'common' ".

For the purpose of such proof, it is further contended by the United States, in this latter connection:

(4) That the words " in common with British subjects " used in the Treaty should not be held as importing a common subjection to regulation, but as intending to negative a possible pretention on the part of the inhabitants of the United States to liberties of fishery exclusive of the right of British subjects to fish.

The Tribunal is unable to agree with this contention:

(*a*) Because such an interpretation is inconsistent with the historical basis of the American fishing liberty. The ground on which Mr. ADAMS founded the American right in 1782 was that the people then constituting the United States had always, when still under British rule, a part in these fisheries and that they must continue to enjoy their past right in the future. He proposed " that the subjects of His Britannic Majesty and the people of the United States shall continue to enjoy unmolested the right to take fish . . . where the inhabitants of both countries used, at any time heretofore, to fish ". The theory of the partition of the fisheries, which by the American negotiators had been advanced with so much force, negatives the assumption that the United States

could ever pretend to an exclusive right to fish on the British shores; and to insert a special disposition to that end would have been wholly superfluous;

(*b*) Because the words "in common" occur in the same connexion in the Treaty of 1818 as in the Treaties of 1854 and 1871. It will certainly not be suggested that in these Treaties of 1854 and 1871 the American negotiators meant by inserting the words "in common" to imply that without these words American citizens would be precluded from the right to fish on their own coasts and that, on American shores, British subjects should have an exclusive privilege. It would have been the very opposite of the concept of territorial waters to suppose that, without a special treaty-provision, British subjects could be excluded from fishing in British waters. Therefore that cannot have been the scope and the sense of the words "in common";

(*c*) Because the words "in common" exclude the supposition that American inhabitants were at liberty to act at will for the purpose of taking fish, without any regard to the co-existing rights of other persons entitled to do the same thing; and because these words admit them only as members of a social community, subject to the ordinary duties binding upon the citizens of that community, as to the regulations made for the common benefit; thus avoiding the "bellum omnium contra omnes" which would otherwise arise in the exercise of this industry;

(*d*) Because these words are such as would naturally suggest themselves to the negotiators of 1818 if their intention had been to express a common subjection to regulations as well as a common right.

In the course of the Argument it has also been alleged by the United States:

(5) That the Treaty of 1818 should be held to have entailed a transfer or partition of sovereignty, in that it must in respect to the liberties of fishery be interpreted in its relation to the Treaty of 1783; and that this latter Treaty was an act of partition of sovereignty and of separation, and as such was not annulled by the war of 1812.

Although the Tribunal is not called upon to decide the issue whether the treaty of 1783 was a treaty of partition or not, the questions involved therein having been set at rest by the subsequent Treaty of 1818, nevertheless the Tribunal could not forbear to consider the contention on account of the important bearing the controversy has upon the true interpretation of the Treaty of 1818. In that respect the Tribunal is of opinion:

(*a*) That the right to take fish was accorded as a condition of peace to a foreign people; wherefore the British negotiators refused to place the right of British subjects on the same footing with those of American inhabitants; and further, refused to insert the words also proposed by Mr. ADAMS —"continue to enjoy"— in the second branch of Art. III of the Treaty of 1783;

(*b*) That the Treaty of 1818 was in different terms, and very different in extent, from that of 1783, and was made for different considerations. It was, in other words, a new grant.

For the purpose of such proof it is further contended by the United States:

(6) That as contemporary Commercial Treaties contain express provisions for submitting foreigners to local legislation, and the Treaty of 1818 contains no such provision, it should be held, *a contrario*, that inhabitants of the United States exercising these liberties are exempt from regulation.

The Tribunal is unable to agree with this contention:

(*a*) Because the Commercial Treaties contemplated did not admit foreigners to all and equal rights, seeing that local legislation excluded them from many rights of importance, e.g. that of holding land; and the purport of the provisions in question consequently was to preserve these discriminations. But no such discriminations existing in the common enjoyment of the fishery by American and British fishermen, no such provision was required;

(*b*) Because no proof is furnished of similar exemptions of foreigners from local legislation in default of Treaty stipulations subjecting them thereto;

(*c*) Because no such express provision for subjection of the nationals of either Party to local law was made either in this Treaty, in respect to their reciprocal admission to certain territories as agreed in Art. III, or in Art. III of the Treaty of 1794; although such subjection was clearly contemplated by the Parties.

For the purpose of such proof it is further contended by the United States:

(7) That, as the liberty to dry and cure on the Treaty coasts and to enter bays and harbours on the non-treaty coasts are both subjected to conditions, and the latter to specific restrictions, it should therefore be held that the liberty to fish should be subjected to no restrictions, as none are provided for in the Treaty.

The Tribunal is unable to apply the principle of "*expressio unius exclusio alterius*" to this case:

(*a*) Because the conditions and restrictions as to the liberty to dry and cure on the shore and to enter the harbours are limitations of the rights themselves, and not restrictions of their exercise. Thus the right to dry and cure is limited in duration, and the right to enter bays and harbours is limited to particular purposes;

(*b*) Because these restrictions of the right to enter bays and harbours applying solely to American fishermen must have been expressed in the Treaty, whereas regulations of the fishery, applying equally to American and British, are made by right of territorial sovereignty.

For the purpose of such proof it has been contended by the United States:

(8) That Lord BATHURST in 1815 mentionded the American right under the Treaty of 1783 as a right to be exercised "at the discretion of the United States"; and that this should be held as to be derogatory to the claim of exclusive regulation by Great Britain.

But the Tribunal is unable to agree with this contention:

(*a*) Because these words implied only the necessity of an express stipulation for any liberty to use foreign territory at the pleasure of the grantee, without touching any question as to regulation;

(*b*) Because in this same letter Lord BATHURST characterized this right as a policy "temporary and experimental, depending on the use that might be made of it, on the condition of the islands and places where it was to be exercised, and the more general conveniences or inconveniences from a military, naval and commercial point of view"; so that it cannot have been his intention to acknowledge the exclusion of British interference with this right;

(*c*) Because Lord BATHURST in his note to Governor Sir C. HAMILTON in 1819 orders the Governor to take care that the American fishery on the coast of Labrador be carried on *in the same manner* as previous to the late war; showing

that he did not interpret the Treaty just signed as a grant conveying absolute immunity from interference with the American fishery right.

For the purpose of such proof it is further contended by the United States:

(9) That on various other occasions following the conclusion of the Treaty, as evidenced by official correspondence, Great Britain made use of expressions inconsistent with the claim to a right of regulation.

The Tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.

Now with regard to the second contention involved in Question I, as to whether the right of regulation can be reasonably exercised by Great Britain without the consent of the United States:

Considering that the recognition of a concurrent right of consent in the United States would affect the independence of Great Britain, which would become dependent on the Government of the United States for the exercise of its sovereign right of regulation, and considering that such a co-dominium would be contrary to the constitution of both sovereign States; the burden of proof is imposed on the United States to show that the independence of Great Britain was thus impaired by international contract in 1818 and that a co-dominium was created.

For the purpose of such proof it is contended by the United States:

(10) That a concurrent right to co-operate in the making and enforcement of regulations is the only possible and proper security to their inhabitants for the enjoyment of their liberties of fishery, and that such a right must be held to be implied in the grant of those liberties by the Treaty under interpretation.

The Tribunal is unable to accede to this claim on the ground of a right so implied:

(*a*) Because every State has to execute the obligations incurred by Treaty *bona fide*, and is urged thereto by the ordinary sanctions of International Law in regard to observance of Treaty obligations. Such sanctions are, for instance, appeal to public opinion, publication of correspondence, censure by Parliamentary vote, demand for arbitration with the odium attendant on a refusal to arbitrate, rupture of relations, reprisal, etc. But no reason has been shown why this Treaty, in this respect, should be considerd as different from every other Treaty under which the right of a State to regulate the action of foreigners admitted by it on its territory is recognized;

(*b*) Because the exercise of such a right of consent by the United States would predicate an abandonment of its independence in this respect by Great Britain, and the recognition by the latter of a concurrent right of regulation in the United States. But the Treaty conveys only a liberty to take fish in common, and neither directly nor indirectly conveys a joint right of regulation;

(*c*) Because the Treaty does not convey a common right of fishery, but a liberty to fish in common. This is evidenced by the attitude of the United States Government in 1823, with respect to the relations of Great Britain and France in regard to the fishery;

(*d*) Because if the consent of the United States were requisite for the fishery a general veto would be accorded them, the full exercise of which would be socially subversive and would lead to the consequence of an unregulatable fishery;

(*e*) Because the United States cannot by assent give legal force and validity to British legislation;

(*f*) Because the liberties to take fish in British territorial waters and to dry and cure fish on land in British territory are in principle on the same footing; but in practice a right of co-operation in the elaboration and enforcement of regulations in regard to the latter liberty (drying and curing fish on land) is unrealisable.

In any event, Great Britain, as the local sovereign, has the duty of preserving and protecting the fisheries. In so far as it is necessary for that purpose, Great Britain is not only entitled, but obliged, to provide for the protection and preservation of the fisheries; always remembering that the exercise of this right of legislation is limited by the obligation to execute the Treaty in good faith. This has been admitted by counsel and recognized by Great Britain in limiting the right of regulation to that of reasonable regulation. The inherent defect of this limitation of reasonableness, without any sanction except in diplomatic remonstrance, has been supplied by the submission to arbitral award as to existing regulations in accordance with Arts. II and III of the Special Agreement, and as to further regulation by the obligation to submit their reasonableness to an arbitral test in accordance with Art. IV of the Agreement.

It is finally contended by the United States:

That the United States did not expressly agree that the liberty granted to them could be subjected to any restriction that the grantor might choose to impose on the ground that in her judgment such restriction was reasonable. And that while admittting that all laws of a general character, controlling the conduct of men within the territory of Great Britain, are effective, binding and beyond objection by the United States, and competent to be made upon the sole determination of Great Britain or her colony, without accountability to anyone whomsoever; yet there is somewhere a line, beyond which it is not competent for Great Britain to go, or beyond which she cannot rightfully go, because to go beyond it would be an invasion of the right granted to the United States in 1818. That the legal effect of the grant of 1818 was not to leave the determination as to where that line is to be drawn to the uncontrolled judgment of the grantor, either upon the grantor's consideration as to what would be a reasonable exercise of its sovereignty over the British Empire, or upon the grantor's consideration of what would be a reasonable exercise thereof towards the grantee.

But this contention is founded on assumptions, which this Tribunal cannot accept for the following reasons in addition to those already set forth:

(*a*) Because the line by which the respective rights of both Parties accruing out of the Treaty are to be circumscribed, can refer only to the right granted by the Treaty; that is to say to the liberty of taking, drying and curing fish by American inhabitants in certain British waters in common with British subjects, and not to the exercise of rights of legislation by Great Britain not referred to in the Treaty;

(*b*) Because a line which would limit the exercise of sovereignty of a State within the limits of its own territory can be drawn only on the ground of express stipulation, and not by implication from stipulations concerning a different subject-matter;

(*c*) Because the line in question is drawn according to the principle of international law that treaty obligations are to be executed in perfect good faith, therefore excluding the right to legislate *at will* concerning the subject-matter of the Treaty, and limiting the exercise of sovereignty of the States bound by a treaty with respect to that subject-matter to such acts as are consistent with the treaty;

(*d*) Because on a true construction of the Treaty the question does not arise whether the United States agreed that Great Britain should retain the right to legislate with regard to the fisheries in her own territory; but whether the Treaty contains an abdication by Great Britain of the right which Great Britain, as the sovereign power, undoubtedly possessed when the Treaty was made, to regulate those fisheries;

(*e*) Because the right to make reasonable regulations, not inconsistent with the obligations of the Treaty, which is all that is claimed by Great Britain, for a fishery which both Parties admit requires regulation for its preservation, is not a restriction of or an invasion of the liberty granted to the inhabitants of the United States. This grant does not contain words to justify the assumption that the sovereignty of Great Britain upon its own territory was in any way affected; nor can words be found in the Treaty transferring any part of that sovereignty to the United States. Great Britain assumed only duties with regard to the exercise of its sovereignty. The sovereignty of Great Britain over the coastal waters and territory of Newfoundland remains after the Treaty as unimpaired as it was before. But from the Treaty results an obligatory relation whereby the right of Great Britain to exercise its right of sovereignty by making regulations is limited to such regulations as are made in good faith, and are not in violation of the Treaty;

(*f*) Finally to hold that the United States, the grantee of the fishing right, has a voice in the preparation of fishery legislation involves the recognition of a right in that country to participate in the internal legislation of Great Britain and her Colonies, and to that extent would reduce these countries to a state of dependence.

While therefore unable to concede the claim of the United States as based on the Treaty, this Tribunal considers that such claim has been and is to some extent, conceded in the relations now existing between the two Parties. Whatever may have been the situation under the Treaty of 1818 standing alone, the exercise of the right of regulation inherent in Great Britain has been, and is, limited by the repeated recognition of the obligations already referred to, by the limitations and liabilities accepted in the Special Agreement, by the unequivocal position assumed by Great Britain in the presentation of its case before this Tribunal, and by the consequent view of this Tribunal that it would be consistent with all the circumstances, as revealed by this record, as to the duty of Great Britain, that she should submit the reasonableness of any future regulation to such an impartial arbitral test, affording full opportunity therefor, as is hereafter recommended under the authority of Article IV of the Special Agreement, whenever the reasonableness of any regulation is objected to or challenged by the United States in the manner, and within the time hereinafter specified in the said recommendation.

Now therefore this Tribunal decides and awards as follows:

The right of Great Britain to make regulations without the consent of the United States, as to the exercise of the liberty to take fish referred to in Article I of the Treaty of October 20th, 1818, in the form of municipal laws, ordinances or rules

of Great Britain, Canada or Newfoundland is inherent to the sovereignty of Great Britain.

The exercise of that right by Great Britain is, however, limited by the said Treaty in respect of the said liberties therein granted to the inhabitants of the United States in that such regulations must be made bona fide and must not be in violation of the said Treaty.

Regulations which are (1) appropriate or necessary for the protection and preservation of such fisheries, or (2) desirable or necessary on grounds of public order and morals without unnecessarily interfering with the fishery itself, and in both cases equitable and fair as between local and American fishermen, and not so framed as to give unfairly an advantage to the former over the latter class, are not inconsistent with the obligation to execute the Treaty in good faith, and are therefore reasonable and not in violation of the Treaty.

For the decision of the question whether a regulation is or is not reasonable, as being or not in accordance with the dispositions of the Treaty and not in violation thereof, the Treaty of 1818 contains no special provision. The settlement of differences in this respect that might arise thereafter was left to the ordinary means of diplomatic intercourse. By reason, however, of the form in which Question I is put, and by further reason of the admission of Great Gritain by her counsel before this Tribunal that it is not now for either of the Parties to the Treaty to determine the reasonableness of any regulation made by Great Britain, Canada or Newfoundland, the reasonableness of any such regulation, if contested, must be decided not by either of the Parties, but by an impartial authority in accordance with the principles hereinabove laid down, and in the manner proposed in the recommendations made by the Tribunal in virtue of Article IV of the Agreement.

The Tribunal further decides that Article IV of the Agreement is, as stated by counsel of the respective Parties at the argument, permanent in its effect, and not terminable, by the expiration of the General Arbitration Treaty of 1908, between Great Britain and the United States.

In execution, therefore, of the responsibilities imposed upon this Tribunal in regard to Articles II, III and IV of the Special Agreement, we hereby pronounce in their regard as follows:

AS TO ARTICLE II

Pursuant to the provisions of this Article, hereinbefore cited, either Party has called the attention of this Tribunal to acts of the other claimed to be inconsistent with the true interpretation of the Treaty of 1818.

But in response to a request from the Tribunal, recorded in Protocol No. XXVI of 19th July, for an exposition of the grounds of such objections, the Parties replied as reported in Protocol No. XXX of 28th July to the following effect:

His Majesty's Government considered that it would be unnecessary to call upon the Tribunal for an opinion under the second clause of Article II, in regard to the executive act of the United States of America in sending warships to the territorial waters in question, in view of the recognized motives of the United States of America in taking this action and of the relations maintained by their representatives with the local authorities. And this being the sole act to which the attention of this Tribunal has been called by His Majesty's Government, no further action in their behalf is required from this Tribunal under Article II.

The United States of America presented a statement in which their claim that specific provisions of certain legislative and executive acts of the Governments of Canada and Newfoundland were inconsistent with the true interpretation of the Treaty of 1818 was based on the contention that these provisions were not " reasonable " within the meaning of Question I.

After calling upon this Tribunal to express an opinion on these acts, pursuant to the second clause of Article II, the United States of America pointed out in that statement that under Article III any question regarding the reasonableness of any regulation might be referred by the Tribunal to a Commission of expert specialists, and expressed an intention of asking for such reference under certain circumstances.

The Tribunal having carefully considered the counter-statement presented on behalf of Great Britain at the session of August 2nd, is of opinion that the decision on the reasonableness of these regulations requires expert information about the fisheries themselves and an examination of the practical effect of a great number of these provisions in relation to the conditions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, as contemplated by Article III. No further action on behalf of the United States is therefore required from this Tribunal under Article II.

AS TO ARTICLE III

As provided in Article III, hereinbefore cited and above referred to, " any question regarding the reasonableness of any regulation, or otherwise, which requires an examination of the practical effect of any provisions surrounding the exercise of the liberty of fishery enjoyed by the inhabitants of the United States, or which requires expert information about the fisheries themselves, may be referred by this Tribunal to a Commission of expert specialists: one to be designated by each of the Parties hereto and the third, who shall not be a national of either Party, to be designated by the Tribunal."

The Tribunal now therefore calls upon the Parties to designate within one month their national Commissioners for the expert examination of the questions submitted.

As the third non-national Commissioner this Tribunal designates Doctor P. P. C. Hoek, Scientific Adviser for the fisheries of the Netherlands and if any necessity arises therefor a substitute may be appointed by the President of this Tribunal.

After a reasonable time, to be agreed on by the Parties, for the expert Commission to arrive at a conclusion, by conference, or, if necessary, by local inspection, the Tribunal shall, if convoked by the President at the request of either Party, thereupon at the earliest convenient date, reconvene to consider the report of the Commission, and if it be on the whole unanimous shall incorporate it in the award. If not on the whole unanimous, i.e., on all points which in the opinion of the Tribunal are of essential importance, the Tribunal shall make its award as to the regulations concerned after consideration of the conclusions of the expert Commissioners and after hearing argument by counsel.

But while recognizing its responsibilities to meet the obligations imposed on it under Article III of the Special Agreement, the Tribunal hereby recommends as an alternative to having recourse to a reconvention of this Tribunal, that the Parties should accept the unanimous opinion of the Commission or the opinion of the non-national Commissioner on any points in dispute as an arbitral award rendered under the provisions of Chapter IV of the Hague Convention of 1907.

AS TO ARTICLE IV

Pursuant to the provisions of this Article, hereinbefore cited, this Tribunal recommends for the consideration of the Parties the following rules and method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in this award.

1

All future municipal laws, ordinances or rules for the regulation of the fishery by Great Britain in respect of (1) the hours, days or seasons when fish may be taken on the Treaty coasts; (2) the method, means and implements used in the taking of fish or in carrying on fishing operations; (3) any other regulation of a similar character shall be published in the London Gazette two months before going into operation.

Similar regulations by Canada or Newfoundland shall be similarly published in the Canada Gazette and the Newfoundland Gazette respectively.

2

If the Government of the United States considers any such laws or regulations inconsistent with the Treaty of 1818, it is entitled so to notify the Government of Great Britain within the two months referred to in Rule No. 1.

3

Any law or regulation so notified shall not come into effect with respect to inhabitants of the United States until the Permanent Mixed Fishery Commission has decided that the regulation is reasonable within the meaning of this award.

4

Permanent Mixed Fishery Commissions for Canada and Newfoundland respectively shall be established for the decision of such questions as to the reasonableness of future regulations, as contemplated by Article IV of the Special Agreement; these Commissions shall consist of an expert national appointed by either Party for five years. The third member shall not be a national of either Party; he shall be nominated for five years by agreement of the Parties, or failing such agreement within two months, he shall be nominated by Her Majesty the Queen of the Netherlands. The two national members shall be convoked by the Government of Great Britain within one month from the date of notification by the Government of the United States.

5

The two national members having failed to agree within one month, within another month the full Commission, under the presidency of the umpire, is to be convoked by Great Britain. It must deliver its decision, if the two Governments do not agree otherwise, at the latest in three months. The Umpire shall conduct the procedure in accordance with that provided in Chapter IV of the Convention for the Pacific Settlement of International Disputes, except in so far as herein otherwise provided.

6

The form of convocation of the Commission including the terms of reference of the question at issue shall be as follows: " The provision hereinafter fully set forth of an Act dated ————————, published in the ———————— has been notified to the Government of Great Britain by the Government of the United States, under date of ————————, as provided by the award of the Hague Tribunal of September 7th, 1910.

" Pursuant to the provisions of that award the Government of Great Britain hereby convokes the Permanent Mixed Fishery Commission for $\frac{\text{(Canada)}}{\text{(Newfoundland)}}$, composed of ———————— Commissioner for the United States of America, and of ———————— Commissioner for $\frac{\text{(Canada)}}{\text{(Newfoundland)}}$, which shall meet at ———————— and render a decision within

one month as to whether the provision so notified is reasonable and consistent with the Treaty of 1818, as interpreted by the award of the Hague Tribunal of September 7th, 1910, and if not, in what respect it is unreasonable and inconsistent therewith.

" Failing an agreement on this question within one month the Commission shall so notify the Government of Great Britain in order that the further action required by that award may be taken for the decision of the above question.

" The provision is as follows: ———————————————— "

7

The unanimous decision of the two national Commissioners, or the majority decision of the Umpire and one Commissioner, shall be final and binding.

QUESTION II

Have the inhabitants of the United States, while exercising the liberties referred to in said Article, a right to employ as members of the fishing crews of their vessels persons not inhabitants of the United States?

In regard to this question the United States claim in substance:

1. That the liberty assured to their inhabitants by the Treaty plainly includes the right to use all the means customary or appropriate for fishing upon the sea, not only ships and nets and boats, but crews to handle the ships and the nets and the boats;
2. That no right to control or limit the means which these inhabitans shall use in fishing can be admitted unless it is provided in the terms of the Treaty and no right to question the nationality or inhabitancy of the crews employed is contained in the terms of the Treaty.

And Great Britain claims:

1. That the Treaty confers the liberty to inhabitants of the United States exclusively;
2. That the Governments of Great Britain, Canada or Newfoundland may, without infraction of the Treaty, prohibit persons from engaging as fishermen in American vessels.

Now considering (1) that the liberty to take fish is an economic right attributed by the Treaty; (2) that it is attributed to inhabitants of the United States, without any mention of their nationality; (3) that the exercise of an economic right includes the right to employ servants; (4) that the right of employing servants has not been limited by the Treaty to the employment of persons of a distinct nationality or inhabitancy; (5) that the liberty to take fish as an economic liberty refers not only to the individuals doing the manual act of fishing, but also to those for whose profit the fish are taken.

But considering, that the Treaty does not intend to grant to individual persons or to a class of persons the liberty to take fish in certain waters " in common ", that is to say in company, with individual British subjects, in the sense that no law could forbid British subjects to take service on American fishing ships; (2) that the Treaty intends to secure to the United States a share of the fisheries designated therein, not only in the interest of a certain class of individuals, but also in the interest of both the United States and Great Britain, as appears from the evidence and notably form the correspondence between Mr. ADAMS and Lord BATHURST in 1815; (3) that the inhabitants of the United States do not derive the liberty to take fish directly from the Treaty, but from the United States Government as party to the Treaty with Great Britain and

moreover exercising the right to regulate the conditions under which its inhabitants may enjoy the granted liberty; (4) that it is in the interest of the inhabitants of the United States that the fishing liberty granted to them be restricted to exercise by them and removed from the enjoyment of other aliens not entitled by this Treaty to participate in the fisheries; (5) that such restrictions have been throughout enacted in the British Statute of June 15, 1819, and that of June 3, 1824, to this effect, that no alien or stranger whatsoever shall fish in the waters designated therein, except in so far as by treaty thereto entitled, and that this exception will, in virtue of the Treaty of 1818, as hereinabove interpreted by this award, exempt from these statutes American fishermen fishing by the agency of non-inhabitant aliens employed in their service; (6) that the Treaty does not affect the sovereign right of Great Britain as to aliens, non-inhabitants of the United States, nor the right of Great Britain to regulate the engagement of British subjects, while these aliens or British subjects are on British territory.

Now therefore, in view of the preceding considerations this Tribunal is of opinion that the inhabitants of the United States while exercising the liberties referred to in the said article have a right to employ, as members of the fishing crews of their vessels, persons not inhabitants of the United States.

But in view of the preceding considerations the Tribunal, to prevent any misunderstanding as to the effect of its award, expresses the opinion that non-inhabitants employed as members of the fishing crews of United States vessels derive no benefit or immunity from the Treaty and it is so decided and awarded.

QUESTION III

Can the exercise by the inhabitants of the United States of the liberties referred to in the said Article be subjected, without the consent of the United States, to the requirements of entry or report at custom-houses or the payment of light or harbour or other dues, or to any other similar requirement or condition or exaction?

The Tribunal is of opinion as follows:

It is obvious that the liberties referred to in this question are those that relate to taking fish and to drying and curing fish on certain coasts as prescribed in the Treaty of October 20, 1818. The exercise of these liberties by the inhabitants of the United States in the prescribed waters to which they relate, has no reference to any commercial privileges which may or may not attach to such vessels by reason of any supposed authority outside the Treaty, which itself confers no commercial privileges whatever upon the inhabitants of the United States or the vessels in which they may exercise the fishing liberty. It follows, therefore, that when the inhabitants of the United States are not seeking to exercise the commercial privileges accorded to trading vessels for the vessels in which they are exercising the granted liberty of fishing, they ought not to be subjected to requirements as to report and entry at custom houses that are only appropriate to the exercise of commercial privileges. The exercise of the fishing liberty is distinct from the exercise of commercial or trading privileges and it is not competent for Great Britain or her colonies to impose upon the former exactions only appropriate to the latter. The reasons for the requirements enumerated in the case of commercial vessels have no relation to the case of fishing vessels.

We think, however, that the requirement that American fishing vessels should report, if proper conveniences and an opportunity for doing so are provided, is not unreasonable or inappropriate. Such a report, while serving

the purpose of a notification of the presence of a fishing vessel in the treaty waters for the purpose of exercising the treaty liberty, while it gives an opportunity for a proper surveillance of such vessel by revenue officers, may also serve to afford to such fishing vessel protection from interference in the exercise of the fishing liberty. There should be no such requirement, however, unless reasonably convenient opportunity therefor be afforded in person or by telegraph, at a custom-house or to a customs official.

The Tribunal is also of opinion that light and harbor dues, if not imposed on Newfoundland fishermen, should not be imposed on American fishermen while exercising the liberty granted by the Treaty. To impose such dues on American fishermen only would constitute an unfair discrimination between them and Newfoundland fishermen and one inconsistent with the liberty granted to American fishermen to take fish, etc., " in common with the subjects of His Britannic Majesty ".

Further the Tribunal considers that the fulfilment of the requirement as to report by fishing vessels on arrival at the fishery would be greatly facilitated in the interests of both parties by the adoption of a system of registration, and distinctive marking of the fishing boats of both parties, analogous to that established by Articles V to XIII, inclusive, of the International Convention signed at The Hague, 8 May, 1882, for the regulation of the North Sea Fisheries.

The Tribunal therefore decides and awards as follows:

The requirement that an American fishing vessel should report, if proper conveniences for doing so are at hand, is not unreasonable, for the reasons stated in the foregoing opinion. There should be no such requirement, however, unless there be reasonably convenient opportunity afforded to report in person or by telegraph, either at a custom-house or to a customs official.

But the exercise of the fishing liberty by the inhabitants of the United States should not be subjected to the purely commercial formalities of report, entry and clearance at a custom-house, nor to light, harbor or other dues not imposed upon Newfoundland fishermen.

QUESTION IV

Under the provision of the said Article that the American fishermen shall be admitted to enter certain bays or harbours for shelter, repairs, wood, or water, and for no other purpose whatever, but that they shall be under such restrictions as may be necessary to prevent their taking, drying, or curing fish therein or in any other manner whatever abusing the privileges thereby reserved to them, is it permissible to impose restrictions making the exercise of such privileges conditional upon the payment of light or harbour or other dues, or entering or reporting at custom-houses or any similar conditions?

The Tribunal is of opinion that the provision in the first Article of the Treaty of October 20th, 1818, admitting American fishermen to enter certain bays or harbors for shelter, repairs, wood and water, and for no other purpose whatever, is an exercise in large measure of those duties of hospitality and humanity which all civilized nations impose upon themselves and expect the performance of from others. The enumerated purposes for which entry is permitted all relate to the exigencies in which those who pursue their perilous calling on the sea may be involved. The proviso which appears in the first article of the said Treaty immediately after the so-called renunciation clause, was doubtless due to a recognition by Great Britain of what was expected from the humanity and civilization of the then leading commercial nation of the world. To impose restrictions making the exercise of such privileges conditional upon the payment

of light, harbor or other dues, or entering and reporting at custom-houses, or any similar conditions would be inconsistent with the grounds upon which such privileges rest and therefore is not permissible.

And it is decided and awarded that such restrictions are not permissible.

It seems reasonable, however, in order that these privileges accorded by Great Britain on these grounds of hospitality and humanity should not be abused, that the American fishermen entering such bays for any of the four purposes aforesaid and remaining more than 48 hours therein, should be required, if thought necessary by Great Britain or the Colonial Government, to report, either in person or by telegraph, at a custom-house or to a customs official, if reasonably convenient opportunity therefor is afforded.

And it is so decided and awarded.

QUESTION V

From where must be measured the " three marine miles of any of the coasts, bays, creeks, or harbours " referred to in the said Article?

In regard to this question, Great Britain claims that the renunciation applies to all bays generally and

The United States contend that it applies to bays of a certain class or condition.

Now, considering that the Treaty used the general term " bays " without qualification, the Tribunal is of opinion that these words of the Treaty must be interpreted in a general sense as applying to every bay on the coast in question that might be reasonably supposed to have been considered as a bay by the negotiators of the Treaty under the general conditions then prevailing, unless the United States can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds.

And for the purpose of such proof the United States contend:

1°. That while a State may renounce the treaty right to fish in foreign territorial waters, it cannot renounce the natural right to fish on the High Seas.

But the Tribunal is unable to agree with this contention. Because though a State cannot grant rights on the High Seas it certainly can abandon the exercise of its right to fish on the High Seas within certain definite limits. Such an abandonment was made with respect to their fishing rights in the waters in question by France and Spain in 1763. By a convention between the United Kingdom and the United States in 1846, the two countries assumed ownership over waters in Fuca Straits at distances from the shore as great as 17 miles.

The United States contend moreover:

2°. That by the use of the term " liberty to fish " the United States manifested the intention to renounce the liberty in the waters referred to only in so far as that liberty was dependent upon or derived from a concession on the part of Great Britain, and not to renounce the right to fish in those waters where it was enjoyed by virtue of their natural right as an independent State.

But the Tribunal is unable to agree with this contention:

(*a*) Because the term " liberty to fish " was used in the renunciatory clause of the Treaty of 1818 because the same term had been previously used in the

Treaty of 1783 which gave the liberty; and it was proper to use in the renunciation clause the same term that was used in the grant with respect to the object of the grant; and, in view of the terms of the grant, it would have been improper to use the term " right " in the renunciation. Therefore the conclusion drawn from the use of the term " liberty " instead of the term " right " is not justified;

(*b*) Because the term " liberty " was a term properly applicable to the renunciation which referred not only to fishing in the territorial waters but also to drying and curing on the shore. This latter rights wat undoubtedly held under the provisions of the Treaty and was not a right accruing to the United States by virtue of any principle of International law.

3°. The United States also contend that the term " bays of His Britannic Majesty's Dominions " in the renunciatory clause must be read as including only those bays which were under the territorial sovereignty of Great Britain.

But the Tribunal is unable to accept this contention:

(*a*) Because the description of the coast on which the fishery is to be exercised by the inhabitants of the United States is expressed throughout the Treaty of 1818 in geographical terms and not by reference to political control; the Treaty describes the coast as contained between capes;

(*b*) Because to express the political concept of dominion as equivalent to sovereignty, the word " dominion " in the singular would have been an adequate term and not " dominions " in the plural; this latter term having a recognized and well settled meaning as descriptive of those portions of the Earth which owe political allegiance to His Majesty; e.g. " His Britannic Majesty's Dominions beyond the Seas ".

4°. It has been further contended by the United States that the renunciation applies only to bays six miles or less in width " inter fauces terrae ", those bays only being territorial bays, because the three mile rule is, as shown by this Treaty, a principle of international law applicable to coasts and should be strictly and systematically applied to bays.

But the Tribunal is unable to agree with this contention:

(*a*) Because admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally in proportion to the penetration inland of the bay; but as no principle of international law recognizes any specified relation between the concavity of the bay and the requirements for control by the territorial sovereignty, this Tribunal is unable to qualify by the application of any new principle its interpretation of the Treaty of 1818 as excluding bays in general from the strict and systematic application of the three mile rule; nor can this Tribunal take cognizance in this connection of other principles concerning the territorial sovereignty over bays such as ten mile or twelve mile limits of exclusion based on international acts subsequent to the treaty of 1818 and relating to coasts of a different configuration and conditions of a different character:

(*b*) Because the opinion of jurists and publicists quoted in the proceedings conduce to the opinion that speaking generally the three mile rule should not be strictly and systematically applied to bays:

(*c*) Because the treaties referring to these coasts, antedating the treaty of 1818, made special provisions as to bays, such as the Treaties of 1686 and 1713 between Great Britain and France, and especially the Treaty of 1778 between the United States and France. Likewise JAY's Treaty of 1794, Art. 25, distinguished bays from the space " within cannon-shot of the coast " in regard to the right of seizure in times of war. If the proposed treaty of 1806 and the treaty of 1818 contained no disposition to that effect, the explanation may be found in the fact that the first extended the marginal belt to five miles, and also in the circumstance that the American proposition of 1818 in that respect was not limited to " bays ", but extended to " chambers formed by headlands " and to " five marine miles from a right line from one headland to another ", a proposition which in the times of the Napoleonic wars would have affected to a very large extent the operations of the British navy;

(*d*) Because it has not been shown by the documents and correspondence in evidence here that the application of the three mile rule to bays was present to the minds of the negotiators in 1818 and they could not reasonably have been expected either to presume it or to provide against its presumption;

(*e*) Because it is difficult to explain the words in art. III of the Treaty under interpretation " country . . . together with its bays, harbours and creeks " otherwise than that all bays without distinction as to their width were, in the opinion of the negotiators, part of the territory;

(*f*) Because from the information before this Tribunal it is evident that the three mile rule is not applied to bays strictly or systematically either by the United States or by any other Power;

(*g*) It has been recognized by the United States that bays stand apart, and that in respect of them territorial jurisdiction may be exercised farther than the marginal belt in the case of Delaware bay by the report of the United States Attorney General of May 19th 1793; and the letter of Mr. JEFFERSON to Mr. GENET of Nov. 8th 1793 declares the bays of the United States generally to be, " as being landlocked, within the body of the United States ".

5°. In this latter regard it is further contended by the United States, that such exceptions only should be made from the application of the three mile rule to bays as are sanctioned by conventions and established usage; that all exceptions for which the United States of America were responsible are so sanctioned; and that His Majesty's Government are unable to provide evidence to show that the bays concerned by the Treaty of 1818 could be claimed as exceptions on these grounds either generally, or except possibly in one or two cases, specifically.

But the Tribunal while recognizing that conventions and established usage might be considered as the basis for claiming as territorial those bays which on this ground might be called historic bays, and that such claim should be held valid in the absence of any principle of international law on the subject; nevertheless is unable to apply this, *a contrario*, so as to subject the bays in question to the three mile rule, as desired by the United States:

(*a*) Because Great Britain has during this controversy asserted a claim to these bays generally, and has enforced such claim specifically in statutes or otherwise, in regard to the more important bays such as Chaleurs, Conception and Miramichi;

(*b*) Because neither should such relaxations of this claim, as are in evidence, be construed as renunciations of it; nor should omissions to enforce the claim in regard to bays as to which no controversy arose, be so construed. Such a

construction by this Tribunal would not only be intrinsically inequitable but internationally injurious; in that it would discourage conciliatory diplomatic transactions and encourage the assertion of extreme claims in their fullest extent;

(*c*) Because any such relaxations in the extreme claim of Great Britain in its international relations are compensated by recognitions of it in the same sphere by the United States; notably in relations with France for instance in 1823 when they applied to Great Britain for the protection of their fishery in the bays on the western coast of Newfoundland, whence they had been driven by French war vessels on the ground of the pretended exclusive right of the French. Though they never asserted that their fishermen had been disturbed within the three mile zone, only alleging that the disturbance had taken place in the bays, they claimed to be protected by Great Britain for having been molested in waters which were, as Mr. RUSH stated " clearly within the jurisdiction and sovereignty of Great Britain ".

6°. It has been contended by the United States that the words " coasts, bays, creeks or harbours " are here used only to express different parts of the coast and are intended to express and be equivalent to the word " coast ", whereby the three marine miles would be measured from the sinuosities of the coast and the renunciation would apply only to the waters of bays within three miles.

But the Tribunal is unable to agree with this contention:

(*a*) Because it is a principle of interpretation that words in a document ought not to be considered as being without any meaning if there is not specific evidence to that purpose and the interpretation referred to would lead to the consequence, practically, of reading the words " bays, creeks and harbours " out of the Treaty; so that it would read " within three miles of any of the coasts " including therein the coasts of the bays and harbours;

(*b*) Because the word " therein " in the proviso —" restrictions necessary to prevent their taking, drying or curing fish therein " can refer only to " bays ", and not to the belt of three miles along the coast; and can be explained only on the supposition that the words " bays, creeks and harbours " are to be understood in their usual ordinary sense and not in an artificially restricted sense of bays within the three mile belt;

(*c*) Because the practical distinction for the purpose of this fishery between coasts and bays and the exceptional conditions pertaining to the latter has been shown from the correspondence and the documents in evidence, especially the Treaty of 1783, to have been in all probability present to the minds of the negotiators of the Treaty of 1818;

(*d*) Because the existence of this distinction is confirmed in the same article of the Treaty by the proviso permitting the United States fishermen to enter bays for certain purposes;

(*e*) Because the word " coasts " is used in the plural form whereas the contention would require its use in the singular;

(*f*) Because the Tribunal is unable to understand the term " bays " in the renunciatory clause in other than its geographical sense, by which a bay is to be considered as an indentation of the coast, bearing a configuration of a particular character easy to determine specifically, but difficult to describe generally.

The negotiators of the Treaty of 1818 did probably not trouble themselves with subtle theories concerning the notion of " bays "; they most probably thought that everybody would know what was a bay. In this popular sense

the term must be interpreted in the Treaty. The interpretation must take into account all the individual circumstances which for any one of the different bays are to be appreciated, the relation of its width to the length of penetration inland, the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value which it has for the industry of the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general.

For these reasons the Tribunal decides and awards:

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

But considering the Tribunal cannot overlook that this answer to Question V, although correct in principle and the only one possible in view of the want of a sufficient basis for a more concrete answer, is not entirely satisfactory as to its practical applicability, and that it leaves room for doubts and differences in practice. Therefore the Tribunal considers it its duty to render the decision more practicable and to remove the danger of future differences by adjoining to it, a recommendation in virtue of the responsibilities imposed by Art. IV of the Special Agreement.

Considering, moreover, that in treaties with France, with the North German Confederation and the German Empire and likewise in the North Sea Convention, Great Britain has adopted for similar cases the rule that only bays of ten miles width should be considered as those wherein the fishing is reserved to nationals. And that in the course of the negotiations between Great Britain and the United States a similar rule has been on various occasions proposed and adopted by Great Britain in instructions to the naval officers stationed on these coasts. And that though these circumstances are not sufficient to constitute this a principle of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions has already formed the basis of an agreement between the two Powers.

Now therefore this Tribunal in pursuance of the provisions of art. IV hereby recommends for the consideration and acceptance of the High Contracting Parties the following rules and method of procedure for determining the limits of the bays hereinbefore enumerated.

1

In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.

2

In the following bays where the configuration of the coast and the local climatic conditions are such that foreign fishermen when within the geographic headlands might reasonably and bona fide believe themselves on the high seas, the limits of exclusion shall be drawn in each case between the headlands hereinafter specified as being those at and within which such fishermen might be reasonably expected to recognize the bay under average conditions.

For the Baie des Chaleurs the line from the Light at Birch Point on Miscou Island to Macquereau Point Light: for the Bay of Miramichi, the line from the Light at

Point Escuminac to the Light on the Eastern Point of Tabisintac Gully; for Egmont Bay, in Prince Edward Island, the line from the light at Cape Egmont to the Light at West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from the Light at Point Anconi to the nearest point on the opposite shore of the mainland.

For Fortune Bay, in Newfoundland, the line from Connaigre Head to the Light on the Southeasterly end of Brunet Island, thence to Fortune Head.

For or near the following bays the limits of exclusion shall be three marine miles seawards from the following lines, namely:

For or near Barrington Bay, in Nova Scotia, the line from the Light on Stoddart Island to the Light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island Light to Green Island Light, thence to Point Rouge; for Mira Bay, the line from the Light on the East Point of Scatari Island to the Northeasterly Point of Cape Morien; and at Placentia Bay, in Newfoundland, the line from Latine Point, on the Eastern mainland shore, to the most Southerly Point of Red Island, thence by the most Southerly Point of Merasheen Island to the mainland.

Long Island and Bryer Island, on St. Mary's Bay, in Nova Scotia, shall, for the purpose of delimitation, be taken as the caasts of such bays.

It is understood that nothing in these rules refers either to the Bay of Fundy considered as a whole apart from its bays and creeks or as to the innocent passage through the Gut of Canso, which were excluded by the agreement made by exchange of notes between Mr. Bacon and Mr. Bryce dated February 21st 1909 and March 4th 1909; or to Conception Bay, which was provided for by the decision of the Privy Council in the case of the Direct United States Cable Company v. The Anglo American Telegraph Company, in which decision the United States have acquiesced.

QUESTION VI

Have the inhabitants of the United States the liberty under the said Article or otherwise, to take fish in the bays, harbours, and creeks on that part of the southern coast of Newfoundland which extends from Cape Ray to Rameau Islands, or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands, or on the Magdalen Islands?

In regard to this question, it is contended by the United States that the inhabitants of the United States have the liberty under Art. I of the Treaty of taking fish in the bays, harbours and creeks on that part of the Southern Coast of Newfoundland which extends from Cape Ray to Rameau Islands or on the western and northern coasts of Newfoundland from Cape Ray to Quirpon Islands and on the Magdalen Islands. It is contended by Great Britain that they have no such liberty.

Now considering that the evidence seems to show that the intention of the Parties to the Treaty of 1818, as indicated by the records of the negotiations and by the subsequent attitude of the Governments was to admit the United States to such fishery, this Tribunal is of opinion that it is incumbent on Great Britain to produce satisfactory proof that the United States are not so entitled under the Treaty.

For this purpose Great Britain points to the fact that whereas the Treaty grants to American fishermen liberty to take fish " on the coasts, bays, harbours, and creeks from Mount Joly on the Southern coast of Labrador " the liberty is granted to the " coast " only of Newfoundland and to the " shore " only of the Magdalen Islands; and argues that evidence can be found in the correspondence submitted indicating an intention to exclude Americans from Newfound-

land bays on the Treaty Coast, and that no value would have been attached at that time by the United States Government to the liberty of fishing in such bays because there was no cod fishery there as there was in the bays of Labrador.

But the Tribunal is unable to agree with this contention:

(*a*) Because the words " part of the southern coast. . . from . . . to " and the words " Western and Northern Coast . . . from . . . to ", clearly indicate one uninterrupted coast-line; and there is no reason to read into the words " coasts " a contradistinction to bays, in order to exclude bays. On the contrary, as already held in the answer to Question V, the words " liberty, forever, to dry and cure fish in any of the unsettled bays, harbours and creeks of the Southern part of the Coast of Newfoundland hereabove described ", indicate that in the meaning of the Treaty, as in all the preceding treaties relating to the same territories, the words coast, coasts, harbours, bays, etc., are used, without attaching to the word " coast " the specific meaning of excluding bays. Thus in the provision of the Treaty of 1783 giving liberty " to take fish on such part of the coast of Newfoundland as British fishermen shall use "; the word " coast " necessarily includes bays, because if the intention had been to prohibit the entering of the bays for fishing the following words " but not to dry or cure the same on that island ", would have no meaning. The contention that in the Treaty of 1783 the word " bays " is inserted lest otherwise Great Britain would have had the right to exclude the Americans to the three mile line, is inadmissible, because in that Treaty that line is not mentioned;

(*b*) Because the correspondence between Mr. ADAMS and Lord BATHURST also shows that during the negotiations for the Treaty the United States demanded the former rights enjoyed under the Treaty of 1783, and that Lord BATHURST in the letter of 30th October 1815 made no objection to granting those " former rights " " placed under some modifications ", which latter did not relate to the right of fishing in bays, but only to the " preoccupation of British harbours and creeks by the fishing vessels of the United States and the forcible exclusion of British subjects where the fishery might be most advantageously conducted ", and " to the clandestine introduction of prohibited goods into the British colonies ". It may be therefore assumed that the word " coast " is used in both Treaties in the same sense, including bays;

(*c*) Because the Treaty expressly allows the liberty to dry and cure in the unsettled bays, etc. of the southern part of the coast of Newfoundland, and this shows that, a fortiori, the taking of fish in those bays is also allowed; because the fishing liberty was a lesser burden than the grant to cure and dry, and the restrictive clauses never refer to fishing in contradistinction to drying, but always to drying in contradistinction to fishing. Fishing is granted without drying, never drying without fishing;

(*d*) Because there is not sufficient evidence to show that the enumeration of the component parts of the coast of Labrador was made in order to discriminate between the coast of Labrador and the coast of Newfoundland;

(*e*) Because the statement that there is no codfish in the bays of Newfoundland and that the Americans only took interest in the codfishery is not proved; and evidence to the contrary is to be found in Mr. JOHN ADAMS Journal of peace Negotiations of November 25, 1782;

(*f*) Because the Treaty grants the right to take fish of every kind, and not only codfish;

(*g*) Because the evidence shows that, in 1823, the Americans were fishing in Newfoundland bays and that Great Britain when summoned to protect

them against expulsion therefrom by the French did not deny their right to enter such bays.

Therefore this Tribunal is of opinion that American inhabitants are entitled to fish in the bays, creeks and harbours of the Treaty coasts of Newfoundland and the Magdalen Islands and it is so decided and awarded.

QUESTION VII

Are the inhabitants of the United States whose vessels resort to the Treaty coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818 entitled to have for those vessels, when duly authorized by the United States in that behalf, the commercial privileges on the Treaty coasts accorded by agreement or otherwise to United States trading vessels generally?

Now assuming that commercial privileges on the Treaty coasts are accorded by agreement or otherwise to United States trading vessels generally, without any exception, the inhabitants of the United States, whose vessels resort to the same coasts for the purpose of exercising the liberties referred to in Article I of the Treaty of 1818, are entitled to have for those vessels when duly authorized by the United States in that behalf, the above mentioned commercial privileges, the Treaty containing nothing to the contrary. But they cannot at the same time and during the same voyage exercise their Treaty rights and commercial privileges are submitted to different rules, regulations and restraints.

For these reasons this Tribunal is of opinion that the inhabitants of the United States are so entitled in so far as concerns this Treaty, there being nothing in its provisions to disentitle them provided the Treaty liberty of fishing and the commercial privileges are not exercised concurrently and it is so decided and awarded.

DONE at The Hague, in the Permanent Court of Arbitration, in triplicate original, September 7th, 1910.

H. LAMMASCH

A. F. DE SAVORNIN LOHMAN

George GRAY

C. FITZPATRICK

Luis M. DRAGO

Signing the Award, I state pursuant to Article IX clause 2 of the Special Agreement my dissent from the majority of the Tribunal in respect to the considerations and enacting part of the Award as to Question V.

Grounds for this dissent have been filed at the International Bureau of the Permanent Court of Arbitration.

Luis M. DRAGO

Grounds for the Dissent

to

the Award on Question V

by Dr. Luis M. Drago

Counsel for Great Britain have very clearly stated that according to their contention the territoriality of the bays referred to in the Treaty of 1818 is immaterial because whether they are or are not territorial, the United States should be excluded from fishing in them by the terms of the renunciatory clause, which simply refers to " bays, creeks or harbours of His Britannic Majesty's Dominions " without any other qualification or description. If that were so, the necessity might arise of discussing whether or not a nation has the right to exclude another by contract or otherwise from any portion or portions of the high seas. But in my opinion the Tribunal need not concern itself with such general question, the wording of the treaty being clear enough to decide the point at issue.

Article I begins with the statement that differences have arisen respecting the liberty claimed by the United States for the inhabitants thereof to take, dry and cure fish on " certain coasts, bays, harbours and creeks of His Britannic Majesty's Dominions in America ", and then proceeds to locate the specific portions of the coast with its corresponding indentations, in which the liberty of taking, drying and curing fish should be exercised. The renunciatory clause, which the Tribunal is called upon to construe, runs thus: " And the United States hereby renounce, forever, any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry or cure fish on, or within three marine miles of any of the Coasts, Bays, Creeks or Harbours of His Britannic Majesty's Dominions in America not included within the above mentioned limits. " This language does not lend itself to different constructions. If the bays in which the liberty has been renounced are those " of His Britannic Majesty's Dominions in America ", they must necessarily be territorial bays, because in so far as they are not so considered they should belong to the high seas and consequently form no part of His Britannic Majesty's Dominions, which, by definition, do not extend to the high seas. It cannot be said, as has been suggested, that the use of the word " dominions ", in the plural, implies a different meaning than would be conveyed by the same term as used in the singular, so that in the present case ," the British dominions in America " ought to be considered as a mere geographical expression, without reference to any right of sovereignty or " *dominion* ". It seems to me, on the contrary, that " dominions ", or " possessions ", or " estates ", or such other equivalent terms, simply designate the places over which the " dominion " or property rights are exercised. Where there is no possibility of appropriation or dominion, as on the high seas, we cannot speak of dominions. The " dominions " extend exactly to the point which the " dominion " reaches; they are simply the actual or physical thing over which the abstract power or authority, the *right*, as given to the proprietor or the ruler, applies. The interpretation as to the territoriality of the bays as mentioned in the renunciatory clause of the treaty appears stronger when considering that the United States specifically renounced the " liberty ", not the " right " to fish or to cure and dry fish. " The United States renounce, forever, any *liberty* heretofore enjoyed or claimed, to take, cure or dry fish on, or within three marine miles of any of the coasts, bays, creeks or harbours of His Britannic Majesty's Dominions in America ". It is well known that the negotiators of the Treaty of 1783 gave a very different meaning to the

terms *liberty* and *right*, as distinguished from each other. In this connection Mr. ADAMS' Journal may be recited. To this Journal the British Counter Case refers in the following terms: " From an entry in Mr. ADAMS' Journal it appears that he drafted an article by which he distinguished the *right* to take fish (both on the high seas and on the shores) and the *liberty* to take and cure fish on the land. But on the following day he presented to the British negotiators a draft in which he distinguishes between the ' *right* ' to take fish on the high seas, and the ' *liberty* ' to take fish on the ' *coasts* ', and to dry and cure fish on the land ****. The British Commissioner called attention to the distinction thus suggested by Mr. ADAMS and proposed that the word *liberty* should be applied to the privileges both on the water and on the land. Mr. ADAMS thereupon rose up and made a vehement protest, as is recorded in his Diary, against the suggestion that the United States enjoyed the fishing on the banks of Newfoundland by any other title than that of *right*. **** The application of the word *liberty* to the coast fishery was left as Mr. ADAMS proposed. " " The incident, proceeds the British Case, is of importance, since it shows that the difference between the two phrases was intentional. " (British Counter Case, page 17). And the British Argument emphasizes again the difference. " More cogent still is the distinction between the words *right* and *liberty*. The word *right* is applied to the sea fisheries, and the word *liberty* to the shore fisheries. The history of the negotiations shows that this distinction was advisedly adopted. " If then a *liberty* is a grant and not the recognition of a *right*; if, as the British Case, Counter Case and Argument recognize, the United States had the right to fish in the open sea in contradistinction with the *liberty* to fish near the shores or portions of the shores, and if what has been renounced in the words of the treaty is the " *liberty* " to fish on, or within three miles of the bays, creeks and harbours of His Britannic Majesty's Dominions, it clearly follows that such *liberty* and the corresponding renunciation refers only to such portions of the bays which were under the sovereignty of Great Britain and not to such other portions, if any, as form part of the high seas.

And thus it appears that far from being immaterial the territoriality of bays is of the utmost importance. The treaty not containing any rule or indication upon the subject, the Tribunal cannot help a decision as to this point, which involves the second branch of the British contention that all so-called bays are not only geographical but wholly territorial as well, and subject to the jurisdiction of Great Britain. The situation was very accurately described on almost the same lines as above stated by the British Memorandum sent in 1870 by the Earl of Kimberley to Governor Sir JOHN YOUNG: " The right of Great Britain to exclude American fishermen from waters within three miles of the coasts is unambiguous, and, it is believed, uncontested. But there appears to be some doubt what are the waters described as within three miles of bays, creeks or harbors. When a bay is less than six miles broad its waters are within the three mile limit, and therefore clearly within the meaning of the treaty; *but when it is more than that breadth, the question arises whether it is a bay of Her Britannic Majesty's Dominions.* This is a question which has to be considered in each particular case with regard to international law and usage. When such a bay is not a bay of Her Majesty's dominions, the American fishermen shall be entitled to fish in it, except within three marine miles of the ' coast '; when it is a bay of Her Majesty's dominions they will not be entitled to fish within three miles of it, that is to say (it is presumed) within three miles of a line drawn from headland to headland. " (American Case Appendix, page 629.)

Now, it must be stated in the first place that there does not seem to exist any general rule of international law which may be considered final, even in what

refers to the marginal belt of territorial waters. The old rule of the cannon-shot, crystallized into the present three marine miles measured from low water mark, may be modified at a later period inasmuch as certain nations claim wider jurisdiction and an extension has already been recommended by the Institute of International Law. There is an obvious reason for that. The marginal strip of territorial waters based originally on the cannon-shot, was founded on the necessity of the riparian State to protect itself from outward attack, by providing something in the nature of an insulating zone, which very reasonably should be extended with the accrued possibility of offense due to the wider range of modern ordnance. In what refers to bays, it has been proposed as a general rule (subject to certain important exceptions) that the marginal belt of territorial waters should follow the sinuosities of the coast more or less in the manner held by the United States in the present contention, so that the marginal belt being of three miles, as in the Treaty under consideration, only such bays should be held as territorial as have an entrance not wider than six miles. (See Sir THOMAS BARCLAY's Report to Institute of International Law, 1894, page 129, in which he also strongly recommends these limits). This is the doctrine which WESTLAKE, the eminent English writer on International Law, has summed up in very few words: " As to bays, " he says, " if the entrance to one of them is not more than twice the width of the littoral sea enjoyed by the country in question — that is, not more than six sea miles in the ordinary case, eight in that of Norway, and so forth — there is no access from the open sea to the bay except through the territorial water of that country, and the inner part of the bay will belong to that country no matter how widely it may expand. The line drawn from shore to shore at the part where, in approaching from the open sea, the width first contracts to that mentioned, will take the place of the line of low water, and the littoral sea belonging to the State will be measured outwards from that line to the distance of three miles or more, proper to the State " (WESTLAKE, Vol. 1, page 187). But the learned author takes care to add: " But although this is the general rule it often meets with an exception in the case of bays which penetrate deep into the land and are called gulfs. Many of these are recognized by immemorial usage as territorial sea of the States into which they penetrate, notwithstanding that their entrance is wider than the general rule for bays would give as a limit for such appropriation. " And he proceeds to quote as examples of this kind the Bay of Conception in Newfoundland, which he considers as wholly British, Chesapeake and Delaware Bays, which belong to the United States, and others. (*Ibid,* page 188.) The Institute of International Law, in its Annual Meeting of 1894, recommended a marginal belt of six miles for the general line of the coast and as a consequence established that for bays the line should be drawn up across at the nearest portion of the entrance toward the sea where the distance between the two sides do not exceed twelve miles. But the learned association very wisely added a proviso to the effect, " that bays should be so considered and measured *unless a continuous and established usage* has sanctioned a greater breadth ". Many great authorities are agreed as to that. Counsel for the United States proclaimed the right to the exclusive jurisdiction of certain bays, no matter what the width of their entrance should be, when the littoral nation has asserted its right to take it into their jurisdiction upon reasons which go always back to the doctrine of protection. Lord BLACKBURN, one of the most eminent of English Judges, delivering the opinion of the Privy Council about Conception Bay in Newfoundland, adhered to the same doctrine when he asserted the territoriality of that branch of the sea, giving as a reason for such finding " that the British Government for a long period had exercised dominion over this bay and its

claim had been acquiesced in by other nations, so as to show that the bay had been for a long time occupied exclusively by Great Britain, a circumstance which, in the tribunals of any country, would be very important. " And moreover, " he added, " the British Legislature has, by Acts of Parliament, declared it to be part of the British territory, and part of the country made subject to the legislation of Newfoundland. " (Direct U. S. Cable Co. v. The Anglo-American Telegraph Co., Law Reports, 2 Appeal Cases, 374.)

So it may be safely asserted that a certain class of bays, which might be properly called the historical bays such as Chesapeake Bay and Delaware Bay in North America and the great estuary of the River Plate in South America, form a class distinct and apart and undoubtedly belong to the littoral country, whatever be their depth of penetration and the width of their mouths, when such country has asserted its sovereignty over them, and particular circumstances such as geographical configuration, immemorial usage and above all, the requirements of self-defense, justify such a pretension. The right of Great Britain over the bays of Conception, Chaleur and Miramichi are of this description. In what refers to the other bays, as might be termed the common, ordinary bays, indenting the coasts, over which no special claim or assertion of sovereignty has been made, there does not seem to be any other general principle to be applied than the one resulting from the custom and usage of each individual nation as shown by their Treaties and their general and time honored practice.

The well kwown words of BYNKERSHOEK might be very appropriately recalled in this connection when so many and divergent opinions and authorities have been recited: " The common law of nations, " he says, " can only be learnt from reason and custom. I do not deny that authority may add weight to reason, but I prefer to seek it in a constant custom of concluding treaties in one sense or another and in examples that have occurred in one country or another." (Questiones Jure Publici, Vol. 1, Cap. 3.)

It is to be borne in mind in this respect that the Tribunal has been called upon to decide as the subject matter of this controversy, the construction to be given to the fishery Treaty of 1818 between Great Britain and the United States. And so it is that from the usage and the practice of Great Britain in this and other like fisheries and from Treaties entered into by them with other nations as to fisherics, may be evolved the right interpretation to be given to the particular convention which has been submitted. In this connection the following Treaties may be recited:

Treaty between Great Britain and France. 2nd August, 1839. It reads as follows:

Article IX. The subjects of Her Britannic Majesty shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark along the whole extent of the coasts of the British Islands.

It is agreed that the distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries, shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

Article X. It is agreed and understood, that the miles mentioned in the present Convention are geographical miles, whereof 60 make a degree of latitude.

(HERTSLETT's Treaties and Conventions, Vol. V, p. 89.)

Regulations between Great Britain and France. 24th May, 1843.

Art. II. The limits, within which the general right of fishery is exclusively reserved to the subjects of the two kingdoms respectively, are fixed with the exception of those in Granville Bay) at 3 miles distance from low water mark.

With respect to bays, the mouths of which do not exceed ten miles in width, the 3 mile distance is measured from a straight line drawn from headland to headland.

Art. III. The miles mentioned in the present regulations are geographical miles, of which 60 make a degree of latitude.

(HERTSLETT, Vol. VI, p. 416.)

Treaty between Great Britain and France. November 11, 1867.

Art. I. British fishermen shall enjoy the exclusive right of fishery within the distance of 3 miles from low water mark, along the whole extent of the coasts of the British Islands.

The distance of 3 miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width be measured from a straight line drawn from headland to headland.

The miles mentioned in the present convention are geographical miles whereof 60 make a degree of latitude.

(HERTSLETT's Treaties, Vol. XII, p. 1126, British Case App., p. 38.)

Great Britain and North German Confederation. British notice to fishermen by the Board of Trade. Board of Trade, November 1868.

Her Majesty's Government and the North German Confederation having come to an agreement respecting the regulations to be observed by British fishermen fishing off the coasts of the North German Confederation, the following notice is issued for the guidance and warning of British fishermen:

1. The exclusive fishery limits of the German Empire are designated by the Imperial Government as follows: that tract of the sea which extends to a distance of 3 sea miles from the extremest limits which the ebb leaves dry of the German North Sea Coast of the German Islands or flats lying before it, as well as those bays and incurvations of the coast which are ten sea miles or less in breadth reckoned from the extremest points of the land and the flats, must be considered as under the territorial sovereignty of North Germany.

(HERTSLETT's Treaties, Vol. XIV, p. 1055.)

Great Britain and German Empire. British Board of Trade, December 1874.

(Same recital referring to an arrangement entered into between Her Britannic Majesty and the German Government.)

Then the same articles follow with the alteration of the words " German Empire " for " North Germany ".

(HERTSLETT's, Vol. XIV, p. 1058.)

Treaty between Great Britain, Belgium, Denmark, France, Germany and the *Netherlands* for regulating the police of the North Sea Fisheries, May 6, 1882.

II. Les pêcheurs nationaux jouiront du droit exclusif de pêche dans le rayon de 3 milles, à partir de la laisse de basse mer, le long de toute l'étendue des côtes de leurs pays respectifs, ainsi que des îles et des bancs qui en dépendent.

Pour les baies le rayon de 3 milles sera mesuré à partir d'une ligne droite, tirée, en travers de la baie, dans la partie la plus rapprochée de l'entrée, au premier point où l'ouverture n'excédera pas 10 milles.

(HERTSLETT, Vol. XV, p. 794.)

British Order in Council, October 23rd, 1877.

Prescribes the obligation of not concealing or effacing numbers or marks on boats, employed in fishing or dredging for purposes of sale on the coasts of England, Wales, Scotland and the Islands of Guernsey, Jersey, Alderney, Sark and Man, and not going outside;

(*a*) The distance of 3 miles from low water mark along the whole extent of the said coasts;

(*b*) In cases of bays less than 10 miles wide the line joining the headlands of said bays.

(HERTSLETT's, Vol. XIV, p. 1032.)

To this list may be added the unratified Treaty of 1888 between Great Britain and the United States which is so familiar to the Tribunal. Such unratified Treaty contains an authoritative interpretation of the Convention of October 20th, 1818, *sub-judice*: " The three marine miles mentioned in Article I of the Convention of October 20th, 1818, shall be measured seaward from low-water mark; but at every bay, creek or harbor, not otherwise specifically provided for in this Treaty, such three marine miles shall be measured seaward from a straight line drawn across the bay, creek or harbor, in the part nearest the entrance at the first point where the width does not exceed ten marine miles ", which is recognizing the exceptional bays as aforesaid and laying the rule for the general and common bays.

It has been suggested that the Treaty of 1818 ought not to be studied as hereabove in the light of any Treaties of a later date, but rather be referred to such British international Conventions as preceded it and clearly illustrate, according to this view, what were, at the time, the principles maintained by Great Britain as to their sovereignty over the sea and over the coast and the adjacent territorial waters. In this connection the Treaties of 1686 and 1713 with France and of 1763 with France and Spain have been recited and offered as examples also of exclusion of nations by agreement from fishery rights on the high seas. I cannot partake of such a view. The treaties of 1686, 1713 and 1763 can hardly be understood with respect to this, otherwise than as examples of the wild, obsolete claims over the common ocean which all nations have of old abandoned with the progress of an enlightened civilization. And if certain nations accepted long ago to be excluded by convention from fishing on what is to-day considered a common sea, it is precisely because it was then understood that such tracts of water, now free and open to all, were the exclusive property of a particular power, who, being the owners, admitted or excluded others from their use. The Treaty of 1818 is in the meantime one of the few which mark an era in the diplomacy of the world. As a matter of fact it is the very first which commuted the rule of the cannon-shot into the three marine miles of coastal jurisdiction. And it really would appear unjustified to explain such historic document.

by referring it to international Agreements of a hundred and two hundred years before when the doctrine of SELDEN's *Mare Clausum* was at its height and when the coastal waters were fixed at such distances as sixty miles, or a hundred miles, or two days' journey from the shore and the like. It seems very appropriate, on the contrary, to explain the meaning of the Treaty of 1818 by comparing it with those which immediately followed and established the same limit of coastal jurisdiction. As a general rule a Treaty of a former date may be very safely construed by referring it to the provisions of like Treaties made by the same nation on the same matter at a later time. Much more so when, as occurs in the present case, the later Conventions, with no exception, starting from the same premise of the three miles coastal jurisdiction arrive always to an uniform policy and line of action in what refers to bays. As a matter of fact all authorities approach and connect the modern fishery Treaties of Great Britain and refer them to the Treaty of 1818. The second edition of KLUBER, for instance, quotes in the same sentence the Treaties of October 20th, 1818, and August 2, 1839, as fixing a distance of three miles from low water mark for coastal jurisdiction. And FIORI, the well-known Italian jurist, referring to the same marine miles of coastal jurisdiction, says: " This rule recognized as early as the Treaty of 1818 between the United States and Great Britain, and that between Great Britain and France in 1839, has again been admitted in the treaty of 1867 ." (Nouveau Droit International Public, Paris, 1885, Section 803.)

This is only a recognition of the permanency and the continuity of States. The Treaty of 1818 is not a separate fact unconnected with the later policy of Great Britain. Its negotiators were not parties to such international Convention and their powers disappeared as soon as they signed the document on behalf of their countries. The parties to the Treaty of 1818 were the United States and Great Britain, and what Great Britain meant in 1818 about bays and fisheries, when they for the first time fixed a marginal jurisdiction of three miles, can be very well explained by what Great Britain, the same permanent political entity, understood in 1839, 1843, 1867, 1874, 1878 and 1882, when fixing the very same zone of territorial waters. That a bay in Europe should be considered as different from a bay in America and subject to other principles of international law cannot be admitted in the face of it. What the practice of Great Britain has been outside the Treaties is very well known to the Tribunal, and the examples might be multiplied of the cases in which that nation has ordered its subordinates to apply to the bays on these fisheries the ten mile entrance rule or the six miles according to the occasion. It has been repeatedly said that such have been only relaxations of the strict right, assented to by Great Britain in order to avoid friction on certain special occasions. That may be. But it may also be asserted that such relaxations have been very many and that the constant, uniform, never contradicted practice of concluding fishery Treaties from 1839 down to the present day, in all of which the ten miles entrance bays are recognized, is the clear sign of a policy. This policy has but very lately found a most public, solemn and unequivocal expression. " On a question asked in Parliament on the 21st of February 1907, says PITT COBBETT, a distinguished English writer, with respect to the Moray Firth Case, it was stated that, according to the view of the Foreign Office, the Admiralty, the Colonial Office, the Board of Trade and the Board of Agriculture and Fisheries, the term " territorial waters " was deemed to include waters extending from the coast line of any part of the territory of a State to three miles from the low-water mark of such coast line and the waters of all bays, the entrance to which is not more than *six miles*, and of which the entire land boundary

forms part of the territory of the same state. (PITT COBBETT Cases and Opinions on International Law, Vol. 1, p. 143.)

Is there a contradiction between these six miles and the ten miles of the treaties just referred to? Not at all. The six miles are the consequence of the three miles marginal belt of territorial waters in their coincidence from both sides at the inlets of the coast and the ten miles far from being an arbitrary measure are simply an extension, a margin given for convenience to the strict six miles with fishery purposes. Where the miles represent sixty to a degree in latitude the ten miles are besides the sixth part of the same degree. The American Government in reply to the observations made to Secretary BAYARD's Memorandum of 1888, said very precisely: "The width of ten miles was proposed not only because it had been followed in Conventions between many other powers, but also because it was deemed reasonable and just in the present case; this Government recognizing the fact that while it might have claimed a width of six miles as a basis of settlement, fishing within bays and harbors only slightly wider would be confined to areas so narrow as to render it practically valueless and almost necessarily expose the fishermen to constant danger of carrying their operations into forbidden waters." (British Case Appendix, page 416.) And Professor JOHN BASSET MOORE, a recognized authority on International law, in a communication addressed to the Institute of International law, said very forcibly: "Since you observe that there does not appear to be any convincing reason to prefer the ten mile line in such a case to that of double three miles, I may say that there have been supposed to exist reasons both of convenience and of safety. The ten mile line has been adopted in the cases referred to as a practical rule. The transgression of an encroachment upon territorial waters by fishing vessels is generally a grave offense, involving in many instances the forfeiture of the offending vessel, and it is obvious that the narrower the space in which it is permissible to fish the more likely the offense is to be committed. In order, therefore, that fishing may be practicable and safe and not constantly attended with the risk of violating territorial waters, it has been thought to be expedient not to allow it where the extent of free waters between the three miles drawn on each side of the bay is less than four miles. This is the reason of the ten mile line. Its intention is not to hamper or restrict the right to fish, but to render its exercise practicable and safe. When fishermen fall in with a shoal of fish, the impulse to follow it is so strong as to make the possibilities of transgression very serious within narrow limits of free waters. Hence it has been deemed wiser to exclude them from space less than four miles each way from the forbidden lines. In spaces less than this operations are not only hazardous, but so circumscribed as to render them of little practical value." (Annuaire de l'Institut de Droit International, 1894, p. 146.)

So the use of the ten mile bays so constantly put into practice by Great Britain in its fishery Treaties has its root and connection with the marginal belt of three miles for the territorial waters. So much so that the Tribunal having decided not to adjudicate in this case the ten miles entrance to the bays of the treaty of 1818, this will be the only one exception in which the ten miles of the bays do not follow as a consequence the strip of three miles of territorial waters, the historical bays and estuaries always excepted.

And it is for that reason that an usage so firmly and for so long a time established ought, in my opinion, be applied to the construction of the Treaty under consideration, much more so, when custom, one of the recognized sources of law, international as well as municipal, is supported in this case by reason and by the acquiescence and the practice of many nations.

The Tribunal has decided that: " In case of bays the 3 miles (of the Treaty) are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration characteristic of a bay. At all other places the three miles are to be measured following the sinuosities of the coast ". But no rule is laid out or general principle evolved for the parties to know what the nature of such configuration is or by what methods the points should be ascertained from which the bay should lose the characteristics of such. There lies the whole contention and the whole difficulty, not satisfactorily solved, to my mind, by simply recommending, without the scope of the award and as a system of procedure for resolving future contestations under Article IV of the Treaty of Arbitration, a series of lines, which practical as they may be supposed to be, cannot be adopted by the Parties without concluding a new Treaty.

These are the reasons for my dissent, which I much regret, on Question Five.

DONE at the Hague, September 7th, 1910.

Luis M. DRAGO

ADDITIONAL DOCUMENTS

Modus vivendi BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO INSHORE FISHERIES ON THE TREATY COAST OF NEWFOUNDLAND. AGREEMENT EFFECTED BY EXCHANGE OF NOTES AT LONDON, OCTOBER 6/8, 1906[1]

AMERICAN EMBASSY,
London, October 6, 1906

SIR: I am authorized by my Government to ratify a *modus vivendi* in regard to the Newfoundland fishery question on the basis of the Foreign Office memorandum, dated the 25th of September, 1906, in which you accept the arrangement set out in my memorandum of the 12th of September and consent accordingly to the use of purse seines by American fishermen during the ensuing season, subject, of course, to due regard being paid in the use of such implements to other modes of fishery, which, as you state, is only intended to secure that that there shall be the same spirit of give and take and of respect for common rights between the users of purse seines and the users of stationary nets as would be expected to exist if both sets of fishermen employed the same gear.

My Government understand by this that the use of purse seines by American fishermen is not to be interfered with, and that the shipment of Newfoundlanders by American fishermen outside the 3-mile limit is not to be made the basis of interference or to be penalized; at the same time they are glad to assure His Majesty's Government, should such shipments be found necessary, that they will be made far enough from the exact 3-mile limit to avoid any reasonable doubt.

On the other hand, it is also understood that our fishermen are to be advised by my Government, and to agree, not to fish on Sunday.

It is further understood that His Majesty's Government will not bring into force the Newfoundland foreign fishing vessels Act of 1906 which imposes on American fishing vessels certain restrictions in addition to those imposed by the Act of 1905, and also that the provisions of the first part of section 1 of the Act of 1905, as to boarding and bringing into port, and also the whole of section 3 of the same Act, will not be regarded as applying to American fishing vessels.

It also being understood that our fishermen will gladly pay light dues if they are not deprived of their rights to fish, and that our fishermen are not unwilling to comply with the provisions of the colonial customs law as to reporting at a custom-house when physically possible to do so.

I need not add that my Government are most anxious that the provisions of the *modus vivendi* should be made effective at the earliest possible moment. I am glad to be assured by you that this note will be considered as sufficient ratification of the *modus vivendi* on the part of my Government.

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[1] *Foreign Relations of the United States*, 1906, pt. 1, p. 701.

I have the honor to be, with the highest consideration, sir,
Your most obedient, humble servant,

Whitelaw REID

The Right Honorable Sir Edward Grey, Bt.,
Etc., etc., etc.

FOREIGN OFFICE,
October 8, 1906.

YOUR EXCELLENCY: I have received with satisfaction the note of the 6th instant in which your Excellency states that you have been authorized by your Government to ratify a *modus vivendi* in regard to the Newfoundland fishery question on the basis of the memorandum which I had the honor to communicate to you on the 25th ultimo, and I am glad to assure your Excellency that the note in question will be considered by His Majesty's Government as a sufficient ratification of that arrangement on the part of the United States Government.

His Majesty's Government fully share the desire of your Government that the provisions of the *modus vivendi* should be made effective at the earliest moment possible, and the necessary instructions for its observance were accordingly sent to the Government of Newfoundland immediately on receipt of you Excellency's communication.

I have the honor to be, with the highest consideration, your Excellency's most obedient, humble servant,

(In the absence of the Secretary of State)
E. GORST

His Excellency the Honorable Whitelaw Reid,
Etc., etc., etc.

MEMORANDUM OF THE AMERICAN EMBASSY OF SEPTEMBER 12, 1906[1]

My Government hears with the greatest concern and regret that in the opinion of His Majesty's Government there is so wide a divergence of views with regard to the Newfoundland fisheries that an immediate settlement is hopeless.

But it is much gratified with His Majesty's Government's desire to reach a *modus vivendi* for this season, and appreciates the readiness to waive the foreign fishing vessels Act of 1906. This and other restrictive legislation had compelled our fishermen to use purse seines or abandon their treaty rights.

My Government sees in the offer not to apply section 3, Act of 1905, and that part of section 1 relating to boarding fishing vessels and bringing them into port fresh proof of a cordial disposition not to press unduly this kind of regulation.

Our fishermen will also gladly pay light dues, if not hindered in their right to fish. They are not unwilling, either, to comply with the regulation to

[1] *Foreign Relations of the United States*, 1906, pt. 1, p. 702.

report at custom-houses, when possible. It is sometimes physically impossible, however, to break through the ice for that purpose.

Most unfortunately the remaining proposals, those as to purse seining and Sunday fishing, present very grave difficulties.

We appreciate perfectly the desire of His Majesty's Government to prevent Sunday fishing. But if both this and purse seine fishing are taken away, as things stand there might be no opportunity for profitable fishing left under our treaty rights. We are convinced that purse seines are no more injurious to the common fishery than the gill nets commonly used — are not, in fact, so destructive and do not tend to change the migratory course of the herring as gill nets do, through the death of a large percentage of the catch and consequent pollution of the water.

The small amount of purse seining this season could not, of course, materially affect the common fishery anyway. Besides many of our fishermen have already sailed, with purse seines as usual, and the others are already provided with them. This use of the purse seine was not the free choice of our fishermen. They have been driven to it by local regulations, and the continued use of it at this late date this year seems vital.

But we will renounce Sunday fishing for this season if His Majesty's Government will consent to the use of purse seines, and we can not too strongly urge an acceptance of this solution.

AMERICAN EMBASSY,
London, September 12, 1906.

MEMORANDUM OF THE BRITISH FOREIGN OFFICE OF SEPTEMBER 25, 1906[1]

His Majesty's Government have considered, after consultation with the Government of Newfoundland, the proposals put forward in the memorandum communicated by the United States Ambassador on the 12th instant, respecting the suggested *modus vivendi* in regard to the Newfoundland fishery question.

They are glad to be able to state that they accept the arrangement set out in the above memorandum and consent accordingly to the use of purse seines by United States fishermen during the ensuing season, subject, of course, to due regard being paid, in the use of such implements, to other modes of fishery.

His Majesty's Government trust that the United States Government will raise no objection to such a stipulation, which is only intended to secure that there shall be the same spirit of give and take and of respect of common rights between the users of purse seines and the users of stationary nets as would be expected to exist if both sets of fishermen employed the same gear.

They further hope that, in view of this temporary authorization of the purse seines, the United States Government will see their way to arranging that the practice of engaging Newfoundland fishermen just outside the three-mile limit, which, to some extent, prevailed last year, should not be resorted to this year.

An arrangement to this effect would save both His Majesty's Government and the Newfoundland Government from embarrassment which, it is conceived, having regard to the circumstances in which the *modus vivendi* is being settled, the United States Government would not willingly impose upon them. More-

[1] *Foreign Relations of the United States*, 1906, pt. 1, p. 703.

over, it is not in itself unreasonable, seeing that the unwillingness of the United States Government to forgo the use of purse seines appears to be largely based upon the inability of their fishermen to engage local men to work the form of net recognized by the colonial fishery regulations.

The United States Government assured His Majesty's late Government in November last that they would not countenance a specified evasion of the Newfoundland foreign fishing vessels Act, 1905, and the proposed arrangement would appear to be in accordance with the spirit which prompted that assurance.

FOREIGN OFFICE,
September 25, 1906.

Modus vivendi BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO INSHORE FISHERIES ON THE TREATY COAST OF NEWFOUNDLAND. AGREEMENT EFFECTED BY EXCHANGE OF NOTES AT LONDON, SEPTEMBER 4/6, 1907[1]

AMERICAN EMBASSY,
London, September 4, 1907.

SIR: I am authorized by my Government to ratify a *modus vivendi* in regard to the Newfoundland fishery question, as follows:

It is agreed that the fisheries shall be carried on during the present year substantially as they were actually carried on for the most of the time by mutual agreement, under the *modus vivendi* of 1906.

(1) It is understood that His Majesty's Government will not bring into force the Newfoundland foreign fishing vessels Act of 1906, which imposes on American fishing vessels certain restrictions in addition to those imposed by the Act of 1905, and also that the provisions of the first part of section 1 of the Act of 1905, as to boarding and bringing into port, and also the whole of section three of the same Act, will not be regarded as applying to American fishing vessels.

(2) In consideration of the fact that the shipment of Newfoundlanders by American fishermen outside the three-mile limit is not to be made the basis of interference or to be penalized, my Government waives the use of purse seines by American fishermen during the term governed by this agreement, and also waives the right to fish on Sundays.

(3) It is understood that American fishing vessels will make their shipment of Newfoundlanders, as fishermen, sufficiently far from the exact three-mile limit to avoid reasonable doubt.

(4) It is further understood that American fishermen will pay light dues when not deprived of their rights to fish, and will comply with the provisions of the colonial customs law as to reporting at a custom-house when physically possible to do so.

I need not add that my Government is most anxious that the provisions of this *modus vivendi* should be made effective at the earliest possible moment, and that, in view of this, and of the actual presence of our fishing fleet on the

[1] *Foreign Relations of the United States*, 1907, pt. 1, p. 531.

treaty shore, we do not feel that an exchange of ratifications should be longer delayed. But my Government has every desire to make the arrangement, pending arbitration, as agreeable as possible to the Newfoundland authorities, consistent with the due safeguarding of treaty rights which we have enjoyed for nearly a century. If, therefore, the proposals you have recently shown me from the Premier of Newfoundland or any other changes in the above *modus vivendi* should be proposed by mutual agreement between the Newfoundland authorities and our fishermen, having due regard to the losses that might be incurred by a change of plans so long after preparations for the season's fishing had been made and the voyage begun, my Government will be ready to consider such changes with you in the most friendly spirit, and if found not to compromise our rights, to unite with you in ratifying them at once.

I am glad to be assured by you that this note will be considered as sufficient ratification of the *modus vivendi* on the part of my Government.

I have the honor to be, with the highest consideration, sir, your most obedient humble servant,

Whitelaw REID

The Right Honorable Sir Edward Grey, Baronet,
etc., etc., etc.

FOREIGN OFFICE,
September 6, 1907

YOUR EXCELLENCY: I have the honor to acknowledge the receipt of your Excellency's note of the 4th instant, containing the terms of the *modus vivendi* with regard to the Newfoundland fisheries — which you are authorized by your Government to ratify.

I am glad to assure your Excellency that His Majesty's Government agrees to the terms of the *modus vivendi* and that your Excellency's note will be considered by His Majesty's Government as a sufficient ratification of that arrangement on the part of His Majesty's Government.

His Majesty's Government fully shares the desire of your Government that the provisions of the *modus vivendi* should be made effective at the earliest possible moment, and the necessary steps will be taken by His Majesty's Government to secure its observance.

His Majesty's Government takes note of the conciliatory offer of the United States Government to consider in a most friendly spirit any changes in the *modus vivendi* which may be agreed upon locally between the Newfoundland authorities and the United States fishermen and which may be acceptable both to the United States Government and to His Majesty's Government.

I have the honor to be, with the highest consideration, your Ecxellency's most obedient humble servant,

E. GREY

His Excellency the Honorable Whitelaw Reid,
etc., etc., etc.

Modus vivendi BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO INSHORE FISHERIES ON THE TREATY COAST OF NEWFOUNDLAND.

AGREEMENT EFFECTED BY EXCHANGE OF NOTES SIGNED AT LONDON, JULY 15/23, 1908[1]

FOREIGN OFFICE,
July 15, 1908

YOUR EXCELLENCY: On the 18th ultimo your Excellency proposed on behalf of the United States Government that, as arbitration in regard to the Newfoundland fisheries question could not be arranged before the forthcoming fishery season, the *modus vivendi* of last year should be renewed with the same elasticity as before for the parties concerned to make local arrangements satisfactory to both sides.

I have the honor to inform your Excellency that the Newfoundland Government, having been consulted on the subject, have expressed the desire that the herring fishery during the ensuing season should be conducted on the same principles as in the season of 1907, and formally undertake to permit during this year the conduct of the herring fishery as last year.

As the arrangements for last year were admittedly satisfactory to all concerned in the fishing, His Majesty's Government hope that the United States Government will see their way to accept this formal assurance on the part of the Newfoundland Government as a satisfactory arrangement for the season of 1908. If this course be adopted it would seem unnecessary to enter into any further formal arrangements, seeing that the communication of this assurance to the United States Government and its acceptance by them would be tantamount to a *modus vivendi*.

I have the honor to be, with the highest consideration, your Excellency's most obedient, humble servant,

Louis MALLET
(For Sir Edward Grey)

His Excellency the Honorable Whitelaw Reid,
etc., etc., etc.

AMERICAN EMBASSY,
London, July 23, 1908

SIR: The reply, in your letter of July 15, 1908, to my proposal of June 18th, for a renewal of last year's *modus vivendi* for the approaching Newfoundland fisheries season, with the same elasticity as before for local arrangements, has been duly considered.

I am gratified to learn that the Newfoundland Government was so well satisfied with the result of these arrangements under the *modus vivendi* for last year that it offers a formal undertaking that the American fishermen shall be permitted to conduct the herring fisheries this year in the same way.

It is proper to observe that our fishermen would have preferred last year, and would prefer now to work the fisheries with purse seines, as heretofore, as

[1] *Foreign Relations of the United States*, 1908, p. 378.

provided in the *modus vivendi* of 1906. But they yielded last year to the strong wishes of the Newfoundland Government in this matter, and joined in the arrangement under the elastic clause at the close of the *modus vivendi* of 1907 by which, with the approval of the British and American Governments, they gave up also other claims in return for certain concessions. I must reserve their right to these and to purse seines, as heretofore enjoyed, as not now abandoned, and therefore to be duly considered in the pending arbitration before the Hague tribunal.

But with this reservation, and with the approval of my Government, I now have pleasure in accepting the offer that the herring fishery during the ensuing season shall be conducted on the same principles as in the season of 1907, and the formal undertaking against interference with this by the Newfoundland Government, as a substantial agreement on my proposal of June 18th.

We unite also with you in regarding this exchange of letters as constituting in itself a satisfactory agreement for the season of 1908, without the necessity for any further formal correspondence.

I am glad to add that Mr. Alexander, of the United States Fish Commission, will be sent again this year to the treaty shore, and that my Government feels sure that, through his influence, there will be general willingness to carry out the spirit of the understanding, and work on the lines of least resistance.

I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

Whitelaw REID

The Right Honorable Sir Edward Grey, Bart.,
etc., etc., etc.

CORRESPONDENCE OF JANUARY 27-MARCH 4, 1909, SUPPLEMENTARY TO THE AGREEMENT FOR ARBITRATION[1]

DEPARTMENT OF STATE,
Washington, January 27, 1909

EXCELLENCY: In order to place officially on record the understanding already arrived at by us in preparing the special agreement which we have signed to-day for the submission of questions relating to fisheries on the north Atlantic coast under the general treaty of arbitration concluded between the United States and Great Britain on the fourth day of April, 1908, I have the honor to declare on behalf of the Government of the United States that Question 5 of the series submitted, namely, " From where must be measured the ' three marine miles of any of the coast, bays, creeks, or harbors ' referred to in the said article " is submitted in its present form with the agreed understanding that no question as to the Bay of Fundy, considered as a whole apart from its bays or creeks, or as to innocent passage through the Gut of Canso is included in this question as one to be raised in the present arbitration; it being the intention of the parties that their respective views or contentions on either subject shall be in no wise prejudiced by anything in the present arbitration.

[1] Malloy, *Treaties, Conventions, etc., between the United States and Other Powers*, vol. 1, p. 841.

I have the honor to be, with the highest respect, your Excellency's most obedient servant,

Elihu Root

His Excellency The Right Honorable James Bryce, O.M.,
Ambassador of Great Britain

British Embassy,
Washington, January 27, 1909

Sir: I have the honour to acknowledge your note of to-day's date and in reply have to declare on behalf of His Majesty's Government, in order to place officially on record the understanding already arrived at by us in preparing the special agreement which we have signed to-day for the submission of questions relating to fisheries on the north Atlantic coast under the general treaty of arbitration concluded between Great Britain and the United States on the 4th day of April, 1908, that Question 5 of the series submitted, namely, " From where must be measured the ' three marine miles of any of the coasts, bays, creeks or harbors ' referred to in the said article " is submitted in its present form with the agreed understanding that no question as to the Bay of Fundy, considered as a whole apart from its bays and creeks, or as to innocent passage through the Gut of Canso is included in this question as one to be raised in the present arbitration; it being the intention of the parties that their respective views or contentions on either subject shall be in no wise prejudiced by anything in the present arbitration.

I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

James Bryce

The Honorable Elihu Root,
Etc., etc., etc.,
Secretary of State

Department of State,
Washington, February 21, 1909

Excellency: I have the honor to inform you that the Senate, by its resolution of the 18th instant, gave its advice and consent to the ratification of the special agreement between the United States and Great Britain, signed on January 27, 1909, for the submission to the Permanent Court of Arbitration at The Hague of questions relating to fisheries on the north Atlantic coast.

In giving this advice and consent to the ratification of the special agreement, and as a part of the act of ratification, the Senate states in the resolution its understanding — " that it is agreed by the United States and Great Britain that Question 5 of the series submitted, namely, ' from where must be measured the three marine miles of any of the coasts, bays, creeks, or harbors referred to in said article? ' does not include any question as to the Bay of Fundy, considered as a whole apart from its bays or creeks, or as to innocent passage through the Gut of Canso, and that the respective views or contentions of the United States and Great Britain on either subject shall be in no wise prejudiced by anything

in the present arbitration, and that this agreement on the part of the United States will be mentioned in the ratification of the special agreement and will, in effect, form part of this special agreement."

In thus formally confirming what I stated to you orally, I have the honor to express the hope that you will in like manner formally confirm the assent of His Majesty's Government to this understanding which you heretofore stated to me orally, and that you will be prepared at an early day to exchange the notes confirming the special agreement as provided for therein and in the general arbitration convention of June 5, 1908.

I have the honor to be, with the highest consideration, your Excellency's most obedient servant,

Robert Bacon

His Excellency The Right Honorable James Bryce, O.M.
Ambassador of Great Britain.

BRITISH EMBASSY,
Washington, March 4, 1909

SIR: I have the honor to acknowledge the receipt of your note informing me that the Senate of the United States has approved the special agreement for the reference to arbitration of the questions relating to the fisheries on the north Atlantic coast and of the terms of the resolution in which that approval is given.

It is now my duty to inform you that the Government of His Britannic Majesty confirms the special agreement aforesaid and in so doing confirms also the understanding arrived at by us that Question 5 of the series of questions submitted for arbitration, namely, from where must be measured the " three marine miles of any of the coasts, bays, creeks, or harbors " referred to in the said article, is submitted in its present form with the agreed understanding that no question as to the Bay of Fundy considered as a whole apart from its bays or creeks, or as to innocent passage through the Gut of Canso, is included in this question as one to be raised in the present arbitration, it being the intention of the parties that their respective views or contentions on either subject shall be in no wise prejudiced by anything in the present arbitration.

This understanding is that which was embodied in notes exchanged between your predecessor and myself on January 27th, and is that expressed in the abovementioned resolution of the Senate of the United States.

I have the honor to be, with the highest respect, sir, your most obedient, humble servant,

James BRYCE

The Honorable Robert Bacon,
Secretary of State

DEPARTMENT OF STATE,
Washington, March 4, 1909

EXCELLENCY: I have the honor to acknowledge the receipt of your note of the 4th instant in which you confirm the understanding in the matter of the special agreement submitting to arbitration the differences between the Govern-

ments of the United States and Great Britain concerning the north Atlantic fisheries, as expressed in the resolution of the Senate of February 18, 1909, and as previously agreed upon by the interchange of notes with my predecessor of January 27, 1909.

I therefore have the honor to inform you that this Government considers the special agreement as in full force and effect from and after the 4th day of March, 1909.

I have the honor to be, with the highest consideration, your Excellency's most obedient servant,

Robert BACON

His Excellency The Right Honorable James Bryce, O.M.,
Ambassador of Great Britain.

RESOLUTION OF THE UNITED STATES SENATE CONCERNING NEWFOUNDLAND FISHERIES [1]

February 18, 1909

Resolved (two-thirds of the Senators present concurring therein): That the Senate advise and consent to the ratification of a special agreement between the United States and Great Britain for the submission to the Permanent Court of Arbitration at The Hague of questions relating to fisheries on the north Atlantic coast, signed on the 27th day of January, 1909.

In giving this advice and consent to the ratification of the said special agreement, and as a part of the act of ratification, the Senate understands that it is agreed by the United States and Great Britain that Question 5 of the series submitted, namely, " from where must be measured the ' three marine miles of any of the coasts, bays, creeks, or harbors ' referred to in the said article," does not include any question as to the Bay of Fundy, considered as a whole apart from its bays, or creeks, or as to innocent passage through the Gut of Canso, and that the respective views or contentions of the United States and Great Britain on either subject shall be in nowise prejudiced by anything in the present arbitration, and that this agreement on the part of the United States will be mentioned in the ratification of the special agreement and will, in effect, form part of this special agreement.

Modus vivendi BETWEEN THE UNITED STATES AND GREAT BRITAIN IN REGARD TO INSHORE FISHERIES ON THE TREATY COAST OF NEWFOUNDLAND. AGREEMENT EFFECTED BY EXCHANGE OF NOTES SIGNED AT LONDON, JULY 22/SEPTEMBER 8, 1909 [1]

AMERICAN EMBASSY,
London, July 22, 1909

SIR: Inasmuch as under the provisions of the special agreement, dated January 27, 1909, between the United States and Great Britain for the sub-

[1] Malloy, *Treaties, Conventions, etc., between the United States and Other Powers*, vol. 1, p. 843.

[2] *Foreign Relations of the United States*, 1909, p. 283.

mission to arbitration of certain questions arising with respect to the north Atlantic coast fisheries, the decision of the tribunal on such questions will not be rendered before the summer of 1910, and inasmuch as the *modus vivendi* entered into with Great Britain last July with respect to the Newfoundland fisheries does not in terms extend beyond the season of 1908, my Government thinks it desirable that the *modus* of last year should be renewed for the coming season, and, if possible, until the termination of the arbitration proceedings for the settlement of these questions.

I am therefore instructed to propose such a renewal to His Majesty's Government, the understanding on both sides originally having been, as you may remember, that the *modus* was entered into pending arbitration.

I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

Whitelaw REID

The Right Honorable Sir Edward Grey, Bt.,
etc., etc., etc.

FOREIGN OFFICE,
September 8, 1909

SIR: In reply to Mr. Whitelaw Reid's note of July 22 last I have the honor to state that His Majesty's Government agree to the renewal of the *modus vivendi* of 1908 for the regulation of the Newfoundland fisheries, until the termination of the arbitration proceedings before the Hague tribunal for the settlement of the Atlantic fisheries questions.

His Majesty's Government suggest that Mr. Whitelaw Reid's note of July 22 and my present reply should be regarded as constituting a sufficient ratification of the above understanding without the necessity for embodying it in a more formal document.

I have the honor to be, with high consideration, sir, your most obedient, humble servant,

E. GREY

J. R. Carter, Esq.,
etc., etc., etc.

AGREEMENT BETWEEN THE UNITED STATES AND GREAT BRITAIN ADOPTING WITH CERTAIN MODIFICATIONS THE RULES AND METHOD OF PROCEDURE RECOMMENDED IN THE AWARD OF SEPTEMBER 7, 1910, OF THE NORTH ATLANTIC COAST FISHERIES ARBITRATION, SIGNED AT WASHINGTON, JULY 20, 1912 [1]

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being desirous of concluding an agreement regarding the exercise of the liberties referred to in Article 1 of the treaty of October 20, 1818, have for this purpose named as their plenipotentiaries:

[1] *U.S. Statutes at Large*, vol. 37, pt. 2, p. 1634.

The President of the United States of America:

Chandler P. Anderson, Counselor for the Department of State of the United States;

His Britannic Majesty:

Alfred Mitchell Innes, *Chargé d'Affaires* of His Majesty's Embassy at Washington;

Who, having communicated to each other their respective full powers, which were found to be in due and proper form, have agreed to and concluded the following articles:

Article I. Whereas the award of the Hague tribunal of September 7, 1910, recommended for the consideration of the parties certain rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties referred to in Article 1 of the treaty of October 20, 1818, may be determined in accordance with the principles laid down in the award, and the parties having agreed to make certain modifications therein, the rules and method of procedure so modified are hereby accepted by the parties in the following form:

1. All future municipal laws, ordinances, or rules for the regulation of the fisheries by Great Britain, Canada, or Newfoundland in respect of (1) the hours, days, or seasons when fish may be taken on the treaty coasts; (2) the method, means, and implements used in the taking of fish or in carrying on fishing operations; (3) any other regulations of a similar character; and all alterations or amendments of such laws, ordinances, or rules shall be promulgated and come into operation within the first fifteen days of November in each year; provided, however, in so far as any such law, ordinance, or rule shall apply to a fishery conducted between the 1st day of November and the 1st day of February, the same shall be promulgated at least six months before the 1st day of November in each year.

Such laws, ordinances, or rules by Great Britain shall be promulgated by publication in the London *Gazette*, by Canada in the Canada *Gazette*, and by Newfoundland in the Newfoundland *Gazette*.

After the expiration of ten years from the date of this agreement, and so on at intervals of ten years thereafter, either party may propose to the other that the dates fixed for promulgation be revised in consequence of the varying conditions due to changes in the habits of the fish or other natural causes; and if there shall be a difference of opinion as to whether the conditions have so varied as to render a revision desirable, such difference shall be referred for decision to a commission possessing expert knowledge, such as the permanent mixed fishery commission hereinafter mentioned.

2. If the Government of the United States considers any such laws or regulations inconsistent with the treaty of 1818, it is entitled so to notify the Government of Great Britain within forty-five days after the publication above referred to, and may require that the same be submitted to and their reasonableness, within the meaning of the award, be determined by the permanent mixed fishery commission constituted as hereinafter provided.

3. Any law or regulation not so notified within the said period of forty-five days, or which, having been so notified, has been declared reasonable and consistent with the treaty of 1818 (as interpreted by the said award) by the per-

manent mixed fishery commission, shall be held to be reasonable within the meaning of the award; but if declared by the said commission to be unreasonable and inconsistent with the treaty of 1818, it shall not be applicable to the inhabitants of the United States exercising their fishing liberties under the treaty of 1818.

4. Permanent mixed fishery commissions for Canada and Newfoundland, respectively, shall be established for the decision of such questions as to the reasonableness of future regulations, as contemplated by Article 4 of the special agreement of January 27, 1909. These commissions shall consist of an expert national, appointed by each party for five years; the third member shall not be a national of either party. He shall be nominated for five years by agreement of the parties, or, failing such agreement, within two months from the date, when either of the parties to this agreement shall call upon the other to agree upon such third member, he shall be nominated by Her Majesty the Queen of the Netherlands.

5. The two national members shall be summoned by the Government of Great Britain, and shall convene within thirty days from the date of notification by the Government of the United States. These two members having failed to agree on any or all of the questions submitted within thirty days after they have convened, or having before the expiration of that period notified the Government of Great Britain that they are unable to agree, the full commission, under the presidency of the umpire, is to be summoned by the Government of Great Britain, and shall convene within thirty days thereafter to decide all questions upon which the two national members had disagreed. The commission must deliver its decision, if the two Governments do not agree otherwise, within forty-five days after it has convened. The Umpire shall conduct the procedure in accordance with that provided in Chapter IV of the Convention for the pacific settlement of international disputes, of October 18, 1907, except in so far as herein otherwise provided.

6. The form of convocation of the commission, including the terms of reference of the question at issue, shall be as follows:

" The provision hereinafter fully set forth of an act dated . . . published in the . . . Gazette, has been notified to the Government of Great Britain by the Government of the United States under date of . . . , as provided by the agreement entered into on July 20, 1912, pursuant to the award of the Hague tribunal of September 7, 1910.

" Pursuant to the provisions of that agreement the Government of Great Britain hereby summons the permanent mixed fishery commission for

Canada / Newfoundland } composed of . . . commissioner for the

United States of America, and of . . . commissioner for

Canada / Newfoundland } who shall meet at Halifax, Nova Scotia, with

power to hold subsequent meetings at such other place or places as they may determine, and render a decision within thirty days as to whether the provision so notified is reasonable and consistent with the treaty of 1818, as interpreted by the award of the Hague tribunal of September 7, 1910, and if not, in what respect it is unreasonable and inconsistent therewith.

" Failing an agreement on this question within thirty days, the commission shall so notify the Government of Great Britain in order that the further action required by that award shall be taken for the decision of the above question.

" The provision is as follows . . . . . ."

7. The unanimous decision of the two national commissioners, or the majority decision of the umpire and one commissioner, shall be final and binding.

8. Any difference in regard to the regulations specified in Protocol XXX of the arbitration proceedings, which shall not have been disposed of by diplomatic methods, shall be referred not to the commission of expert specialists mentioned in the award but to the permanent mixed fishery commissions, to be constituted as hereinbefore provided, in the same manner as a difference in regard to future regulations would be so referred.

Article 2. And whereas the tribunal of arbitration in its award decided that —

In case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.

And whereas the tribunal made certain recommendations for the determination of the limits of the bays enumerated in the award;

Now, therefore, it is agreed that the recommendations, in so far as the same relate to bays contiguous to the territory of the Dominion of Canada, to which Question 5 of the special agreement is applicable, are hereby adopted, to wit:

In every bay not hereinafter specifically provided for, the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.

For the Baie des Chaleurs the limits of exclusion shall be drawn from the line from the light at Birch Point on Miscou Island to Macquereau Point light; for the Bay of Miramichi, the line from the light at Point Escuminac to the light on the eastern point of Tabisintac Gully; for Egmont Bay, in Prince Edward Island, the line from the light of Cape Egmont to the light of West Point; and off St. Ann's Bay, in the Province of Nova Scotia, the line from the light at Point Anconi to the nearest point on the opposite shore of the mainland.

For or near the following bays the limits of exclusion shall be three marine miles seawards from the following lines, namely:

For or near Barrington Bay, in Nova Scotia, the line from the light on Stoddard Island to the light on the south point of Cape Sable, thence to the light at Baccaro Point; at Chedabucto and St. Peter's Bays, the line from Cranberry Island light to Green Island light, thence to Point Rouge; for Mira Bay, the line from the light on the east point of Scatary Island to the north-easterly point of Cape Morien.

Long Island and Bryer Island, on St. Mary's Bay, in Nova Scotia, shall for the purpose of delimitation, be taken as the coasts of such bays.

It is understood that the award does not cover Hudson Bay.

Article 3. It is further agreed that the delimitation of all or any of the bays on the coast of Newfoundland, whether mentioned in the recommendations or not, does not require consideration at present.

Article 4. The present agreement shall be ratified by the President of the United States, by and with the advice and consent of the Senate thereof, and by His Britannic Majesty, and the ratifications shall be exchanged in Washington as soon as practicable.

IN FAITH WHEREOF the respective plenipotentiaries have signed this agreement in duplicate and have hereunto affixed their seals.

DONE at Washington on the 20th day of July, one thousand nine hundred and twelve.

Chandler P. ANDERSON [SEAL]

Alfred Mitchell INNES [SEAL]

THE ORINOCO STEAMSHIP COMPANY CASE

PARTIES: United States of America, Venezuela.

COMPROMIS: 13 February 1909.

ARBITRATORS: Permanent Court of Arbitration: H. Lammasch; A. M. F. Beernaert; G. de Quesada.

AWARD: 25 October 1910.

Proceedings for the revision of an arbitral award — Excess of jurisdiction and essential error in the judgment, as vices involving the nullity of an arbitral award — Facts considered as constituting excess of jurisdiction — Effect of the nullity of a decision regarding one part of an arbitral award on the remaining parts of this award.

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American Journal of International Law, vol. 3, 1909, Supplement, p. 224 [English text of the compromis]; vol. 5, 1911, p. 230 [English text of the award]

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W. Malloy, *Treaties, Conventions, International Acts, Protocols and Agreements between the United States of America and other Powers*, vol. II, p. 1881 [English text of the compromis]

De Martens, *Nouveau Recueil général de traités*, 3e série, t. IV. p. 72 [English text of the compromis]; p. 79 [French text of the award]

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William Cullen Dennis, " The Orinoco Steamship Company Case ", *American Journal of International Law*, vol. 5, 1911, p. 35; " Compromise-The great defect of Arbitration ", *Columbia Law Review*, vol. XI, June 1911, No. 6, p. 500.

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SYLLABUS [1]

This claim originated in a concession from Venezuela to one Ellis Grell, granted on January 17, 1894,[2] for the exclusive right to navigate the Orinoco River in steam vessels between Trinidad and Ciudad Bolívar. The contract embodying the concession contained the so-called Calvo clause, which provided that " questions and controversies which may arise with regard to the interpretation or execution of this contract shall be resolved by the tribunals of the Republic in accordance with its laws, and shall not in any case give occasion for international reclamations ".

By subsequent assignment the Grell concession came into possession of the Orinoco Shipping and Trading Company, a British corporation, the majority of the stock and bonds of which was held by American citizens. The Government of Venezuela became indebted to this company for approximately half a million dollars for services rendered and damages sustained. An adjustment was effected on May 10, 1900, by which the concession was extended for a period of six years and the Government agreed to pay the company 100,000 bolivars ($19,200) in cash and a second sum of the same amount at a later date. The company, on its part, acknowledged as settled all of its claims against the Government. The contract of settlement also contained the so-called Calvo clause. The first payment of 100,000 bolivars was duly made, but the second was not.

On October 5, 1900, Venezuela opened the navigation of the Orinoco River to the commerce of all nations, thus destroying the monopoly claimed by the company as assignee of the Grell concession. This was done by repealing a decree promulgated on July 1, 1893 [3] a few months before the original concession was granted, which closed the Orinoco to foreign trade. On December 14, 1901, the Venezuelan Government further cancelled the extension of the concession granted in accordance with the contract of settlement of May 10, 1900. The company's efforts to obtain relief from the Government of Venezuela being unsuccessful, the matter was brought to the attention of the United States and British Governments. Later, the American stockholders of the British company organized an American corporation known as the Orinoco Steamship Company, which took over the business, assets and liabilities of the former company. The claims of the corporation taken over from the company for the payment overdue under the agreement of May 10, 1900, for damages arising from the annulment of the exclusive concession, for services rendered, imposts illegally exacted, for the use and detention of and damage to vessels, loss of earnings and counsel fees, amounting to approximately $1,400,000, were presented to the United States and Venezuelan claims commission under the protocol of February 17, 1903.[4] The commission assumed jurisdiction over

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[1] *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st series, 1916, p. 226.

[2] United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 193.

[3] *Ibid.*, p. 190.

[4] *Ibid.*, p. 115.

the claims under the wording of the protocol, which included " all claims owned by citizens of the United States ", and the umpire, C. A. H. Barge, on February 22, 1904,[1] made an award in favor of the claimants, amounting to approximately $28,000, covering the detention and use of steamers, goods delivered to the Government and passages furnished to it.

Although the protocol provided that the decision of the commission and of the umpire should be final and conclusive, the United States protested the award on the grounds that it disregarded the terms of the protocol and contained essential errors of law and fact such as invalidated it in accordance with the principles of international law.

After several years of negotiations about this and other claims, in the course of which diplomatic relations were severed, a protocol was signed on February 13, 1909,[2] which provided for the submission of the case to arbitration in the following form:

The arbitral tribunal shall first decide whether the decision of umpire Barge in this case, in view of all the circumstances and under the principles of international law, is not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits. If the arbitral tribunal decides that said decision must be considered final, the case will be considered by the United States of America as closed; but on the other hand, if the arbitral tribunal decides that said decision of umpire Barge should not be considered as final, said arbitral tribunal shall then hear, examine and determine the case and render its decision on the merits. The arbitral tribunal shall, in each case submitted to it, determine, decide and make its awards in accordance with justice and equity. Its decision in each case shall be accepted and upheld by the United States of America and the United States of Venezuela as final and conclusive.[3]

The tribunal, composed of three members selected from the Permanent Court of Arbitration at The Hague, none of whom could be a citizen of either of the two Parties, was constituted as follows: Heinrich Lammasch of Austria, Auguste M. F. Beernaert of Belgium, and Gonzalo de Quesada of Cuba. Its sessions began September 28 and ended October 19, 1910, the decision being rendered on October 25, 1910.

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[1] United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 191.
[2] *Infra.*, p. 233.
[3] *Infra.*, articles I and II of the Compromis.

PROTOCOL OF AN AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF VENEZUELA FOR THE DECISION AND ADJUSTMENT OF CERTAIN CLAIMS, SIGNED AT CARACAS ON 13 FEBRUARY 1909 [1]

William I. Buchanan, High Commissioner, representing the President of the United States of America, and Doctor Francisco González Guinán, Minister for Foreign Affairs of the United States of Venezuela, duly authorized by General Juan Vicente Gómez, Vice-President of the United States of Venezuela, in charge of the Presidency of the Republic, having exhibited to each other and found in due form their respective powers, and animated by the spirit of sincere friendship that has always existed and should exist between the two nations they represent, having conferred during repeated and lengthy conferences concerning the manner of amicably and equitably adjusting the differences existing between their respective Governments with regard to the claims pending between them since neither the United States of America nor the United States of Venezuela aspires to anything other than sustaining that to which in justice and equity it is entitled; and as a result of these conferences have recognized the great importance of arbitration as a means toward maintaining the good understanding which should exist and increase between their respective nations, and to the end of avoiding hereafter, so far as possible, differences between them, they believe it is from every point of view desirable that a treaty of arbitration shall be adjusted between their respective Governments.

With respect to the claims that have been the subject of their long and friendly conferences, William I. Buchanan and Doctor Francisco González Guinán have found that the opinions and views concerning them sustained by their respective Governments have been, and are, so diametrically opposed and so different that they have found it difficult to adjust them by common accord; wherefore it is necessary to resort to the conciliatory means of arbitration, a measure to which the two nations they represent are mutually bound by their signatures to the treaties of the Second Peace Conference at The Hague in 1907, and one which is recognized by the entire civilized world as the only satisfactory means of terminating international disputes.

Being so convinced, and firm in their resolution not to permit, for any reason whatever, the cordiality that has always existed between their respective countries to be disturbed, the said William I. Buchanan and Doctor Francisco González Guinán, thereunto fully authorized, have adjusted agreed to and signed the present Protocol for the settlement of the said claims against the United States of Venezuela, which are as follows:

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances du Tribunal d'Arbitrage constitué en exécution du compromis signé entre les Etats-Unis d'Amérique et les Etats-Unis du Vénézuela le 13 février 1909, Différend au sujet d'une réclamation de la Compagnie des bateaux à vapeur " Orinoco "*, La Haye, 1910, p. 1.

1. The claim of the United States of America on behalf of the Orinoco Steamship Company;

. . .[1]

Article I. With respect to the first of these claims, that of the Orinoco Steamship Company, the United States of Venezuela has upheld the immutability of the arbitral decision of Umpire Barge, rendered in this case, alleging that said decision does not suffer from any of the causes which by universal jurisprudence give rise to its nullity, but rather that it is of an unappealable character, since the Compromis arbitration cannot be considered as void, nor has there been an excessive exercise of jurisdiction, nor can the corruption of the judges be alleged, nor an essential error in the judgment; while on the other hand, the United States of America, citing practical cases, among them the case of the revision, with the consent of the United States of America, of the arbitral awards rendered by the American-Venezuelan Mixed Commission created by the Convention of April 25, 1866, and basing itself on the circumstances of the case, considering the principles of international law and of universal jurisprudence, has upheld not only the admissibility but the necessity of the revision of said award; in consequence of this situation, William I. Buchanan and Doctor Francisco González Guinán, in the spirit that has marked their conferences, have agreed to submit this case to the elevated criterion of the Arbitral Tribunal created by this Protocol, in the following form:

The Arbitral Tribunal shall first decide whether the decision of Umpire Barge, in this case, in view of all the circumstances and under the principles of international law, is not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits. If the Arbitral Tribunal decides that said decision must be considered final, the case will be considered by the United States of America as closed; but on the other hand, if the Arbitral Tribunal decides that said decision of Umpire Barge should not be considered as final, said Arbitral Tribunal shall then hear, examine and determine the case and render its decision on the merits.

. . .[2]

Article IV. The United States of America and the United States of Venezuela having, at the Second Peace Conference held at The Hague in 1907, accepted and recognized the permanent court of The Hague, it is agreed that the cases mentioned in Articles I, II, and III of this Protocol, that is to say, the case of the Orinoco Steamship Company, that of the Orinoco Corporation and of its predecessors in interest and that of the United States and Venezuela Company, shall be submitted to the jurisdiction of an Arbitral Tribunal composed of Three Arbitrators chosen from the abovementioned Permanent Court of The Hague.

No member of said Court who is a citizen of the United States of America or of the United States of Venezuela shall form part of said Arbitral Tribunal, and no member of said Court can appear as counsel for either nation before said Tribunal.

This Arbitral Tribunal shall sit at The Hague.

Article V. The said Arbitral Tribunal shall, in each case submitted to it, determine, decide and make its award, in accordance with justice and equity.

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[1] Paragraphs No. 2 and 3 are omitted as they do not refer to the case of the Orinoco Steamship Company.

[2] Articles II and III are omitted as they do not refer to the case of the Orinoco Steamship Company.

Its decisions in each case shall be accepted and upheld by the United States of America and the United States of Venezuela as final and conclusive.

Article VI. In the presentation of the cases to the Arbitral Tribunal both parties may use the French, English or Spanish language.

Article VII. Within eight months from the date of this Protocol, each of the parties shall present to the other and to each of the members of the Arbitral Tribunal, two printed copies of its case, with the documents and evidence on which it relies, together with the testimony of its respective witnesses.

Within an additional term of four months, either of the Parties may in like manner present a counter case with documents and additional evidence and depositions, in answer to the case, documents, evidence and depositions of the other party.

Within sixty days from the expiration of the time designated for the filing of the counter cases, each Government may, through its Representative, make its arguments before the Arbitral Tribunal, either orally or in writing, and each shall deliver to the other copies of any arguments thus made in writing and each party shall have a right to reply in writing, provided such reply be submitted within the sixty days last named.

Article VIII. All public records and documents under the control or at the disposal of either Government or in its possession, relating to the matters in litigation shall be accessible to the other, and, upon request, certified copies of them shall be furnished. The documents which each party produces in evidence shall be authenticated by the respective Minister for Foreign Affairs.

Article IX. All pecuniary awards that the Arbitral Tribunal may make in said cases shall be in gold coin of the United States of America, or in its equivalent in Venezuelan money, and the Arbitral Tribunal shall fix the time of payment, after consultation with the Representatives of the two countries.

Article X. It is agreed that within six months from the date of this Protocol, the Government of the United States of America and that of the United States of Venezuela shall communicate to each other, and to the Bureau of the Permanent Court at The Hague, the name of the Arbitrator they select from among the members of the Permanent Court of Arbitration.

Within sixty days thereafter the Arbitrators shall meet at The Hague and proceed to the choice of the Third Arbitrator in accordance with the provisions of Article 45 of the Hague Convention for the Peaceful Settlement of International Disputes, referred to herein.

Within the same time each of the two Governments shall deposit with the said Bureau the sum of fifteen thousand francs on account of the expenses of the arbitration provided for herein, and from time to time thereafter they shall in like manner deposit such further sums as may be necessary to defray said expenses.

The Arbitral Tribunal shall meet at The Hague twelve months from the date of this Protocol to begin its deliberations and to hear the arguments submitted to it. Within sixty days after the hearings are closed its decisions shall be rendered.

Article XI. Except as provided in this Protocol the arbitral procedure shall conform to the provisions of the Convention for the Peaceful Settlement of International Disputes, signed at The Hague on October 18, 1907, to which both parties are signatory, and especially to the provisions of Chapter III thereof.

Article XII. It is hereby understood and agreed that nothing herein contained shall preclude the United States of Venezuela, during the period of five months from the date of this Protocol, from reaching an amicable adjustment with either or both of the claimant companies referred to in Articles II and III herein, provided that in each case wherein a settlement may be reached, the respective company shall first have obtained the consent of the Government of the United States of America.

The undersigned, WILLIAM I. BUCHANAN and FRANCISCO GONZÁLEZ GUINÁN, in the capacity which each holds, thus consider their conferences with respect to the differences between the United States of America and the United States of Venezuela as closed, and sign two copies of this protocol of the same tenor and to one effect, in both the English and Spanish languages, at Caracas, on the thirteenth day of February one thousand nine hundred and nine.

William I. BUCHANAN [SEAL]

F. GONZÁLEZ GUINÁN [SEAL]

AWARD OF THE TRIBUNAL OF ARBITRATION, CONSTITUTED UNDER AN AGREEMENT SIGNED AT CARACAS FEBRUARY 13TH 1909 BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED STATES OF VENEZUELA, 25 OCTOBER 1910 [1]

Instance en révision d'une sentence arbitrale — Vices entraînant la nullité d'une sentence arbitrale: excès de pouvoir et erreur essentielle dans le jugement — Faits considérés comme constituant des excès de pouvoirs — Effet de la nullité d'une décision concernant une partie d'une sentence arbitrale sur les autres parties de cette sentence.

By an Agreement signed at Caracas the 13th of February 1909, the United States of America and of Venezuela have agreed to submit to a Tribunal of Arbitration, composed of three Arbitrators, chosen from the Permanent Court of Arbitration, a claim of the United States of America against the United States of Venezuela;

This Agreement states:

" The Arbitral Tribunal shall first decide whether the decision of Umpire BARGE,[2] in this case, in view of all the circumstances and under the principles of international law, is not void, and whether it must be considered to be so conclusive as to preclude a re-examination of the case on its merits. If the Arbitral Tribunal decides that said decision must be considered final, the case will be considered by the United States of America as closed; but on the other hand, if the Arbitral Tribunal decides that said decision of Umpire BARGE should not be considered as final, the said Tribunal shall then hear, examine and determine the case and render its decisions on its merits ";

In virtue of said Agreement, the two Governments respectively have named as Arbitrators the following Members of the Permanent Court of Arbitration:

His Excellency Gonzalo DE QUESADA, Envoy Extraordinary and Minister Plenipotentiary of Cuba at Berlin etc.;

His Excellency A. BEERNAERT, Minister of State, Member of the Chamber of Representatives of Belgium etc.;

And the Arbitrators so designated, in virtue of said Agreement, have named as Umpire:

Mr. H. LAMMASCH, Professor in the University of Vienna, Member of the Upper House of the Austrian Parliament etc.;

The Cases, Countercases and Conclusions have been duly submitted to the Arbitrators and communicated to the Parties;

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances du tribunal d'Arbitrage constitué en execution du compromis signé entre les Etats-Unis d'Amérique et les Etats-Unis du Vénézuela le 13 février 1909, Différend au sujet d'une réclamation de la Compagnie des bateaux à vapeur " Orinoco "*, La Haye, 1910, p. 64.

[2] For the text of this decision see: United Nations, *Reports of International Arbitral Awards*, vol. IX, p. 191.

The Parties have both pleaded and replied, both having pleaded the merits of the case, as well the previous question, and the discussion was declared closed on October 19th 1910;

Upon which the Tribunal, after mature deliberation, pronounces as follows:

WHEREAS by the terms of an Agreement dated February 17th 1903, a Mixed Commission was charged with the decision of all claims owned (poseidas) by citizens of the United States of America against the Republic of Venezuela, which shall not have been settled by a diplomatic agreement or by arbitration between the two Governments and which shall have been presented by the United States of America; an Umpire, to be named by Her Majesty the Queen of the Netherlands, was eventually to give his final and conclusive decision (definitiva y concluyente) on any question upon which the Commissioners might not have been able to agree;

WHEREAS the Umpire thus appointed, Mr. BARGE, has pronounced on the said claims on the 22nd of February 1904;

WHEREAS it is assuredly in the interest of peace and the development of the institution of International Arbitration, so essential to the well-being of nations, that on principle, such a decision be accepted, respected and carried out by the Parties without any reservation, as it is laid down in Article 81 of the Convention for the Pacific Settlement of International Disputes of October 18th 1907; and besides no jurisdiction whatever has been instituted for reconsidering similar decisions;

BUT WHEREAS in the present case, it having been argued that the decision is void, the Parties have entered into a new Agreement under date of the 13th of February 1909, according to which, without considering the conclusive character of the fierst decision this Tribunal is called upon to decide whether the decision of Umpire BARGE, in virtue of the circumstances and in accordance with the principles of international law, be not void, and whether it must be considered so conclusive as to preclude a re-examination of the case on its merits;

WHEREAS by the Agreement of February 13th 1909, both Parties have at least implicitly admitted, as vices involving the nullity of an arbitral decision, excessive exercise of jurisdiction and essential error in the judgment (exceso de poder y error esencial en el fallo);

WHEREAS the plaintiff Party alleges excessive exercise of jurisdiction and numerous errors in law and fact equivalent to essential error;

WHEREAS, following the principles of equity in accordance with law, when an arbitral award embraces several independent claims, and consequently several decisions, the nullity of one is without influence on any of the others, more especially when, as in the present case, the integrity and the good faith of the Arbitrator are not questioned; this being ground for pronouncing separately on each of the points at issue;

I. AS REGARDS THE 1,209,701.04 DOLLARS:

WHEREAS this Tribunal is in the first place called upon to decide whether the Award of the Umpire is void, and whether it must be considered conclusive and whereas this Tribunal would have to decide on the merits of the case only if the Umpire's Award be declared void;

WHEREAS it is alleged that the Umpire deviated from the terms of the Agreement by giving an inexact account of the GRELL Contract and the claim

based on it, and in consequence thereof fell into an essential error; but since the Award reproduces said contract textually and in its entire tenor;

WHEREAS it is scarcely admissible that the Umpire should have misunderstood the text and should have exceeded his authority by pronouncing on a claim which had not been submitted to him, by failing to appreciate the connection between the concession in question and exterior navigation, the Umpire having decided in terminis, that " the permission to navigate these channels was only annexed to the permission to call at Trinidad";

WHEREAS the appreciation of the facts of the case and the interpretation of the documents were within the competence of the Umpire and as his decisions, when based on such interpretation, are not subject to revision by this Tribunal, whose duty it is not to say if the case has been well or ill judged, but whether the award must be annulled; that if an arbitral decision could be disputed on the ground of erroneous appreciation, appeal and revision, which the Conventions of The Hague of 1899 and 1907 made it their object to avert would be the general rule;

WHEREAS the point of view from which the Umpire considered the claim of $513,000, (afterwards reduced in the conclusions of the United States of America to $335,000, and being part of the said sum of $1,209,701,04), is the consequence of his interpretation of the contract of May 10th 1900 and of the relation between this contract and the decree of the same date;

WHEREAS the circumstance that the Umpire, not content to have based his Award on his interpretation of the contracts, which of itself should be deemed sufficient, has invoked other subsidiary reasons, of a rather more technical character, cannot viciate his decision;

II. AS REGARDS THE 19,200 DOLLARS (100,000 BOLIVARES):

WHEREAS the Agreement of February 17th 1903 did not invest the Arbitrators with discretionary powers, but obliged them to give their decision on a basis of absolute equity without regard to objections of a technical nature, or to the provisions of local legislation (con arreglo absoluto á la equidad, sin reparar en objeciones técnicas, ni en las disposiciones de la legislación local);

WHEREAS excessive exercise of power may consist, not only in deciding a question not submitted to the Arbitrators, but also in misinterpreting the express provisions of the Agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied;

WHEREAS the only motives for the rejection of the claim for 19.200 dollars are: 1st. the absence of all appeal to the Venezuelan Courts of Justice, and 2nd. the omission of any previous notification of cession to the debtor, it being evident that " the circumstance that the question might be asked if on the day this claim was filed, this indebtness was proved compellable," could not serve as a justification of rejection;

WHEREAS it follows from the Agreements of 1903 and 1909 — on which the present Arbitration is based — that the United States of Venezuela had by convention renounced invoking the provisions of Article 14 of the GRELL contract and of Article 4 of the contract of May 10th 1900, and as, at the date of said Agreements, it was, in fact, certain that no lawsuit between the Parties had been brought before the Venezuelan Courts; and as the maintenance of Venezuelan Jurisdiction with regard to these claims would have been incompatible and irreconcilable with the arbitration which had been instituted;

WHEREAS there is question not of the cession of a concession but of the cession of a debt, and as the omission to notify previously the cession of a debt constitutes but a failure to observe a prescription of local legislation, though a similar prescription also exists in other legislations, it cannot be considered as required by absolute equity, at least when the debtor actually possessed knowledge of the cession and has paid neither the assignor nor the assignee;

III. AS REGARDS THE 147,638.79 DOLLARS:

WHEREAS with regard to the 1,053 dollars for the transport of passengers and merchandise in 1900 and the 25,845.20 dollars for the hire of the steamers Delta, Socorro, Masparro, Guanare, Heroe, from July 1900 to April 1902, the Award of the Umpire is based only on the omission of previous notification of the cession to the Government of Venezuela or of the acceptance by it, this means of defense being eliminated by the Agreement, as mentioned before;

WHEREAS the same might be said of the claim for 19.571,34 dollars for the restitution of national taxes, said to have been collected contrary to law, and of that of 3.509,22 dollars on account of the retention of the " Bolivar "; but as it has not been proved on the one hand that the taxes here under discussion belonged to those from which the Orinoco Shipping and Trading Company was exempt, and on the other hand that the fact objected to proceeded from abuse of authority on the part of the Venezuelan Consul; and as both claims must therefore be rejected on their merits, though on other grounds, the annulment of the Award on this point would be without interest;

WHEREAS the decision of the Umpire, allowing 27,692.31 dollars instead of 28,461.53 dollars for the retention and hire of the Masparro and Socorro from March 21st to September 18th 1902, as regards the 769.22 dollars disallowed, is based here also only on the omission of notification of the cession of the debt;

WHEREAS the Umpire's decision with regard to the other claims included under this head for the period after April 1st 1902 is based on a consideration of facts and on an interpretation of legal principles which are subject neither to re-examination nor to revision by this Tribunal, the decisions awarded on these points not being void;

IV. AS REGARDS THE 25,000 DOLLARS:

WHEREAS the claim for 25.000 dollars for counsel fees and expenses of litigation has been disallowed by the Umpire in consequence of the rejection of the greater part of the claims of the United States of America, and as by the present award some of these claims having been admitted it seems equitable to allow part of this sum, which the Tribunal fixes ex aequo et bono at 7000 dollars;

WHEREAS the Venezuelan law fixes the legal interest at 3% and as, under these conditions, the Tribunal, though aware of the insufficiency of this percentage, cannot allow more;

FOR THESE REASONS:

THE TRIBUNAL DECLARES void the Award of Umpire Barge dated February 22nd 1904 on the four following points:

1°. as regards the 19,200 dollars;

2°. as regards the 1,053 dollars;

3°. as regards the 25,845.20 dollars;

4°. as regards the 769,22 dollars deducted from the claim for 28.461,53 dollars for the retention and hire of the Masparro and Socorro;

AND DECIDING, in consequence of the nullity thus recognized and by reason of the elements submitted to its appreciation:

DECLARES these claims founded and allows to the United States of America, besides the sums allowed by the Award of the Umpire of February 22nd 1904, the sums of:

1°. 19,200 dollars;
2°. 1,053 dollars;
3°. 25,845.20 dollars;
4°. 769.22 dollars;

the whole with interest at 3 per cent from the date of the claim (June 16th 1903), the whole to be paid within two months after the date of the present Award;

ALLOWS besides for the indemnification of counsel fees and expenses of litigation 7000 dollars;

REJECTS the claim for the surplus, the Award of Umpire Barge of February 22nd 1904 preserving, save for the above points, its full and entire effect.

DONE at The Hague in the Permanent Court of Arbitration in triplicate original, October 25th, 1910.

The President: LAMMASCH

The Secretary-general: Michiels VAN VERDUYNEN

THE SAVARKAR CASE

PARTIES: Great Britain, France.

COMPROMIS: 25 October 1910.

ARBITRATORS: Permanent Court of Arbitration: A. M. F. Beernaert; Earl of Desart; L. Renault; G. Gram; A. F. Savornin Lohman.

AWARD: 24 February 1911.

Settlement of the questions of fact and law raised by the arrest and restoration to the mail steamer " Morea " at Marseilles, on the 8th July 1910, of the British Indian Savarkar, who had escaped from that vessel where he was in custody — Person taking refuge in the territory of a foreign State — Sovereignty of this State — Extradition.

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SYLLABUS [1]

This case arose as the result of the escape of Savarkar, a Hindoo, who was being transported from England to India for trial on a charge of abetment of murder, and who at Marseilles on July 8, 1910, escaped to the shore from the *Morea*, a British merchant vessel, which was carrying him. While being pursued by Indian policemen from the vessel, he was captured by a French police officer, who returned him to the *Morea*, which sailed with the fugitive on board on the following day. Subsequently, France demanded the restitution of the fugitive on the ground that his delivery to the British officers on board the vessel was contrary to the rules of international law, and, upon Great Britain's refusal to comply, the questions of law and fact involved were, by a *compromis* signed October 25, 1910,[2] submitted to the arbitration of a tribunal composed of the following members of the Permanent Court of Arbitration: August M. F. Beernaert of Belgium, Earl of Desart of England, Louis Renault of France, Gregors Gram of Norway and A. F. de Savornin Lohman of Holland. The sessions began February 14, 1911, and ended February 17, 1911, the decision being rendered February 24, 1911.

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[1] *The Hague Court Reports*, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st series, 1916, p. 275.

[2] See *infra*, p. 249.

AGREEMENT BETWEEN THE UNITED KINGDOM AND FRANCE REFERRING TO ARBITRATION THE CASE OF VINAYAK DAMODAR SAVARKAR. SIGNED AT LONDON, 25 OCTOBER, 1910 [1]

THE GOVERNMENT OF HIS BRITANNIC MAJESTY AND THE GOVERNMENT OF THE FRENCH REPUBLIC having agreed, by an exchange of notes dated the 4th and 5th October, 1910, to submit to arbitration, on the one hand, the questions of fact and law raised by the arrest and restoration to the mail steamer " Morea ", at Marseilles, on the 8th July, 1910, of the Indian, VINAYAK DAMODAR SAVARKAR, who had escaped from that vessel, on board of which he was in custody; and on the other hand, the demand of the Government of the Republic with a view to the restitution to them of SAVARKAR;

THE UNDERSIGNED, duly authorised to this effect, have arrived at the following Agreement:

Article 1. An Arbitral Tribunal, composed as hereinafter stated, shall undertake to decide the following question:

Should VINAYAK DAMODAR SAVARKAR, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic?

Article 2. The Arbitral Tribunal shall be composed of five arbitrators chosen from the members of the Permanent Court at The Hague. The two Contracting Parties shall settle the composition of the Tribunal. Each of them may choose as arbitrator one of their nationals.

Article 3. On the 6th December, 1910, each of the High Contracting Parties shall forward to the Bureau of the Permanent Court fifteen copies of its case, with duly certified copies of all documents which it proposes to put in. The Bureau will undertake without delay to forward them to the arbitrators and to each Party: that is to say, two copies for each arbitrator and three copies for each Party. Two copies will remain in the archives of the Bureau.

On the 17th January, 1911, the High Contracting Parties will deposit in the same manner their counter-cases, with documents in support of them.

These counter-cases may necessitate replies, which must be presented within a period of fifteen days after the delivery of the counter-cases.

The periods fixed by the present Agreement for the delivery of the cases, counter-cases, and replies may be extended by mutual agreement between the High Contracting Parties.

Article 4. The Tribunal shall meet at The Hague the 14th February, 1911.

Each Party shall be represented by an Agent, who shall serve as intermediary between it and the Tribunal.

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances et sentence du Tribunal d'Arbitrage constitué en exécution du Compromis signé entre la France et la Grande-Bretagne le 25 octobre 1910 — Différend au sujet de l'arrestation et de la réintégration à bord du paquebot " Morea " le 8 juillet 1910, à Marseille du sujet britannique (British Indian) SAVARKAR.* La Haye, 1911, p. 7.

The Arbitral Tribunal may, if it thinks necessary, call upon one or other of the agents to furnish it with oral or written explanations, to which the agent of the other Party shall have the right to reply.

It shall also have the right to order the attendance of witnesses.

Article 5. The Parties may employ the French or English language. The members of the Tribunal may, at their own choice, make use of the French or English language. The decisions of the Tribunal shall be drawn up in the two languages.

Article 6. The award of the Tribunal shall be given as soon as possible, and, in any case, within thirty days following the date of its meeting at The Hague or that of the delivery of the written explanations which may have been furnished at its request. This period may, however, be prolonged at the request of the Tribunal if the two High Contracting Parties agree.

DONE in duplicate at London, October 25, 1910.

[L. S.] E. GREY
[L.] S. Paul CAMBON

NOTE ADRESSÉE PAR SON EXCELLENCE M. PAUL CAMBON, AMBASSADEUR DE LA RÉPUBLIQUE FRANÇAISE À LONDRES, À SON EXCELLENCE LE TRÈS HONORABLE SIR EDWARD GREY, PRINCIPAL SECRÉTAIRE D'ÉTAT DE SA MAJESTÉ BRITANNIQUE AU DÉPARTEMENT DES AFFAIRES ÉTRANGÈRES

25 octobre 1910

MONSIEUR LE MINISTRE,

J'ai l'honneur d'accuser réception à Votre Excellence de sa note de ce jour relative à l'arrangement que nous avons signé aujourd'hui en vue de soumettre à l'arbitrage certaines questions concernant l'arrestation et la restitution de VINAYAK DAMODAR SAVARKAR, à Marseille, le 8 juillet dernier. Je suis autorisé à constater, avec Votre Excellence, l'entente d'après laquelle toutes les questions qui pourraient s'élever au cours de cet arbitrage, et qui ne seraient pas prévues par le susdit arrangement, seront réglées conformément aux stipulations de la Convention, pour le règlement pacifique des conflits internationaux, signée à La Haye le 18 octobre 1907.

Il est également entendu que chaque partie supportera ses propres frais et une part égale des dépenses du Tribunal.

Veuillez agréer, etc.

Signé: Paul CAMBON

NOTE ADRESSÉE PAR SON EXCELLENCE LE TRÈS HONORABLE SIR EDWARD GREY, PRINCIPAL SECRÉTAIRE D'ÉTAT DE SA MAJESTÉ BRITANNIQUE AU DÉPARTEMENT DES AFFAIRES ÉTRANGÈRES, À SON EXCELLENCE M. PAUL CAMBON, AMBASSADEUR DE LA RÉPUBLIQUE FRANÇAISE, À LONDRES

25 octobre 1910.

YOUR EXCELLENCY,

With reference to the agreement which we have concluded this day, for the purpose of submitting to arbitration certain matters in connexion with the arrest and restitution of VINAYAK DAMODAR SAVARKAR, at Marseilles, in July last, I have the honour to place on record the understanding that any points which may arise in the course of this arbitration which are not covered by the terms of the Agreement above referred to shall be determined by the provisions of the International Convention for the pacific settlement of international disputes signed at the Hague, on the 18th of October, 1907.

It is further understood that each party shall bear its own expenses and an equal share of the expenses of the Tribunal.

I have the honour, etc.

Signed: E. GREY

AWARD DELIVERED ON 24 FEBRUARY 1911 BY THE ARBITRAL TRIBUNAL APPOINTED TO DECIDE THE " CASE OF SAVARKAR " [1]

Solution des questions de fait et de droit soulevées par l'arrestation et la réintégration, à bord du paquebot « Morea » le 8 juillet 1910, à Marseille, du sujet britannique (British Indian) Savarkar, évadé de ce bâtiment où il était détenu — Personne réfugiée sur le territoire d'un Etat étranger — Souveraineté de cet Etat — Extradition.

WHEREAS, by an agreement dated the 25th October 1910, the Government of the French Republic and the Government of His Britannic Majesty agreed to submit to Arbitration the questions of fact and law raised by the arrest and restoration to the mail-steamer " Morea " at Marseilles, on the 8th July 1910, of the British Indian SAVARKAR, who had escaped from that vessel where he was in custody; and the demand made by the Government of the French Republic for the restitution of SAVARKAR;

the Arbitral Tribunal has been called upon to decide the following question:

Should VINAYAK DAMODAR SAVARKAR, in conformity with the rules of international law, be restored or not be restored by His Britannic Majesty's Government to the Government of the French Republic?

WHEREAS, for the purpose of carrying out this agreement, the two Governments have respectively appointed as Arbitrators:

His Excellency Monsieur BEERNAERT, Minister of State, Member of the Belgian Chamber of Representatives, etc., President;

The Right Honourable the EARL OF DESART, formerly His Britannic Majesty's Procurator-general;

Monsieur Louis RENAULT, Professor at the University of Paris, Minister plenipotentiary, Legal Adviser of the Department of Foreign Affairs;

Monsieur G. GRAM, formerly Norwegian Minister of State, Provincial Governor;

His Excellency, the Jonkheer A. F. DE SAVORNIN LOHMAN, Minister of State, Member of the Second Chamber of the States-General of the Netherlands.

And, further, the two Governments have respectively appointed as their Agents,

The Government of the French Republic:

Monsieur ANDRÉ WEISS, assistant legal Adviser of the Department of Foreign Affairs of the French Republic, Professor of Law at the University of Paris.

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances et sentence du Tribunal d'Arbitrage constitué en exécution du Compromis signé entre la France et la Grande-Bretagne le 25 octobre 1910 — Différend au sujet de l'arrestation et de la réintégration à bord du paquebot « Morea » le 8 juillet 1910, à Marseille du sujet britannique (British Indian) SAVARKAR.* La Haye, 1911, p. 54.

The Government of His Britannic Majesty:

Mr. EYRE CROWE, Councillor of Embassy, a Senior Clerk at the British Foreign Office.

WHEREAS, in accordance with the provisions of the Agreement, Cases, Counter-Cases and Replies have been duly exchanged between the Parties, and communicated to the Arbitrators.

WHEREAS the Tribunal met at The Hague on the 14th February 1911.

WHEREAS, with regard to the facts which gave rise to the difference of opinion between the two Governments, it is established that, by a letter, dated the 29th June 1910, the Commissioner of the Metropolitan Police in London informed the " Directeur de la Sûreté générale " at Paris, that the British-Indian VINAYAK DAMODAR SAVARKAR was about to be sent to India, in order to be prosecuted for abetment of murder etc., and that he would be on board the vessel " Morea " touching at Marseilles on the 7th or 8th July.

WHEREAS, in consequence of the receipt of this letter, the Ministry of the Interior informed the Prefect of the " Bouches-du-Rhône ", by a telegram dated the 4th July 1910, that the British Police were sending SAVARKAR to India on board the steamship " Morea ". This telegram states that some " révolutionnaires hindous " then on the Continent, might take advantage of this to further the escape of this foreigner, and the Prefect was requested to take the measures necessary to guard against any attempt of that kind.

WHEREAS the " Directeur de la Sûreté générale " replied by a letter dated the 9th July 1910 to the letter of the Commissioner of the Metropolitan Police, stating that he had given the necessary instructions for the purpose of guarding against the occurrence of any incident during the presence at Marseilles of the said VINAYAK DAMODAR SAVARKAR, on board the steamship " Morea ".

WHEREAS, on the 7th July, the " Morea " arrived at Marseilles. The following morning, between 6 and 7 o'clock, SAVARKAR, having succeeded in effecting his escape, swam ashore and began to run; he was arrested by a brigadier of the French maritime gendarmerie and taken back to the vessel. Three persons, who had come ashore from the vessel, assisted the brigadier in taking the fugitive back. On the 9th July, the " Morea " left Marseilles with SAVARKAR on board.

WHEREAS, from the statements made by the French brigadier to the Police at Marseilles, it appears:

that he saw the fugitive, who was almost naked, get out of a porthole of the steamer, throw himself into the sea and swim to the quay;

that at the same moment some persons from the ship, who were shouting and gesticulating, rushed over the bridge leading to the shore, in order to pursue him;

that a number of people on the quay commenced to shout " Arrêtez-le ";

that the brigadier at once went in pursuit of the fugitive and, coming up to him after running about five hundred metres, arrested him.

WHEREAS the brigadier declares that he was altogether unaware of the identity of the person with whom he was dealing, that he only thought that the man who was escaping was one of the crew, who had possibly committed an offence on board the vessel.

WHEREAS, with regard to the assistance afforded him by one of the crew and two Indian policemen, it appears from the explanations given on this point, that these men came up after the arrest of SAVARKAR, and that their intervention was only auxiliary to the action of the brigadier. The brigadier had seized SAVARKAR by one arm for the purpose of taking him back to the ship, and the prisoner went peaceably with him. The brigadier, assisted by the above mentioned persons, did not relax his hold, till he reached the half deck of the vessel.

The brigadier said that he did not know English.

From what has been stated, it would appear that the incident did not occupy more than a few minutes.

WHEREAS, it is alleged that the brigadier who effected the arrest was not ignorant of the presence of SAVARKAR on board the vessel, and that his orders, like those of all the French Police and Gendarmes, were to prevent any Hindoo from coming on board who had not got a ticket.

WHEREAS these circumstances show that the persons on board in charge of SAVARKAR might well have believed that they could count on the assistance of the French Police.

WHEREAS it is established that a " Commissaire " of the French Police came on board the vessel shortly after her arrival at the port, and, in accordance with the orders of the Prefect, placed himself at the disposal of the Commander in respect of the watch to be kept;

that, in consequence, this " Commissaire " was put into communication with the British Police Officer who, with other Police Officers, was in charge of the prisoner;

that the Prefect of Marseilles, as appears from a telegram dated the 13th July 1910 addressed to the Minister of the Interior, stated that he had acted in this matter in accordance with instructions given by the " Sûreté générale " to make the necessary arrangements to prevent the escape of SAVARKAR.

WHEREAS, having regard to what has been stated, it is manifest that the case is not one of recourse to fraud or force in order to obtain possession of a person who had taken refuge in foreign territory, and that there was not, in the circumstances of the arrest and delivery of SAVARKAR to the British Authorities and of his removal to India, anything in the nature of a violation of the sovereignty of France, and that all those who took part in the matter certainly acted in good faith and had no thought of doing anything unlawful.

WHEREAS, in the circumstances cited above, the conduct of the brigadier not having been disclaimed by his chiefs before the morning of the 9th July, that is to say before the " Morea " left Marseilles, the British Police might naturally have believed that the brigadier had acted in accordance with his instructions, or that his conduct had been approved.

WHEREAS, while admitting that an irregularity was committed by the arrest of SAVARKAR, and by his being handed over to the British Police, there is no rule of International Law imposing, in circumstances such as those which have been set out above, any obligation on the Power which has in its custody a prisoner, to restore him because of a mistake committed by the foreign agent who delivered him up to that Power.

FOR THESE REASONS:

The Arbitral Tribunal decides that the Government of His Britannic Majesty is not required to restore the said VINAYAK DAMODAR SAVARKAR to the Government of the French Republic.

DONE at The Hague, at the Permanent Court of Arbitration, February 24th, 1911.

The President: A. BEERNAERT

The Secretary-general: Michiels VAN VERDUYNEN

AFFAIRE RELATIVE À L'INTERPRÉTATION DU TRAITÉ DE COMMERCE CONCLU ENTRE L'ITALIE ET LA SUISSE LE 13 JUILLET 1904.

PARTIES: Italie, Suisse.

COMPROMIS: Echange de notes des 30 août et 21 septembre 1909.

ARBITRES: E. Giampietro; E. Borel; W. H. de Beaufort.

SENTENCE: 27 avril 1911.

Interprétation des traités — Détermination de la signification exacte d'une expression — Sens attribué à l'expression par la pratique de l'un des deux Etats en litige, acceptée par d'autres Etats — Défaut d'objection de la part de l'autre Etat à l'égard de l'interprétation donnée à l'expression contenue dans un traité antérieur dont il est partie.

COMPROMIS [1]

ARTICLE 18 DU TRAITÉ DE COMMERCE CONCLU À ROME ENTRE L'ITALIE ET LA SUISSE LE 13 JUILLET 1904 [2]

« Si des contestations venaient à surgir au sujet de l'interprétation du présent traité, y compris les annexés A à F, et que l'une des Parties contractantes demande qu'elles soient soumises à la décision d'un tribunal arbitral, l'autre Partie devra y consentir, même pour la question préjudicielle de savoir si la contestation se rapporte à l'interprétation du traité. La décision des arbitres aura force obligatoire. »

AD ARTICLE 18 DU TRAITÉ DE COMMERCE CONCLU À ROME ENTRE L'ITALIE ET LA SUISSE LE 13 JUILLET 1904 [2]

« A l'égard de la composition et de la procédure du tribunal arbitral, il est convenu ce qui suit:

« 1. Le tribunal se composera de trois membres. Chacune des deux Parties en nommera un dans le délai de quinze jours après la notification de la demande d'arbitrage.

« Ces deux arbitres choisiront le surarbitre qui ne pourra ni être ressortissant d'un des deux Etats en cause, ni habiter sur leur territoire. S'ils n'arrivent pas à s'entendre sur son choix dans un délai de huit jours, sa nomination sera immédiatement confiée au Président du Conseil administratif de la Cour permanente d'arbitrage à La Haye.

« Le surarbitre sera président du tribunal; celui-ci prendra ses décisions à la majorité des voix.

« 2. Au premier cas d'arbitrage, le tribunal siégera dans le territoire de la Partie contractante défenderesse; au second cas, dans le territoire de l'autre Partie et ainsi de suite alternativement, dans l'un et dans l'autre territoire, dans une ville que désignera la Partie respective; celle-ci fournira les locaux ainsi que le personnel de bureau et de service nécessaires pour le fonctionnement du tribunal.

« 3. Les Parties contractantes s'entendront dans chaque cas spécial ou une fois pour toutes sur la procédure du tribunal arbitral. A défaut d'une telle entente, la procédure sera réglée par le tribunal lui-même. La procédure peut se faire

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[1] Voir la partie introductive de la sentence où l'on trouve une référence à l'échange de notes des 30 août et 21 septembre 1909, par lequel l'Italie et la Suisse se sont mises d'accord pour soumettre à l'arbitrage le différend en question, donformément à l'article 18 du traité de commerce du 13 juillet 1904 et à la disposition additionnelle à cet article dont le texte est reproduit ici.

[2] De Martens, *Nouveau Recueil général de traités*, 2e série, t. XXXIII, p. 539.

par écrit si aucune des Parties ne soulève d'objection; dans ce cas, les dispositions du chiffre 2 ci-dessus ne reçoivent leur application que dans la mesure nécessitée par les circonstances.

« 4. Pour la citation et l'audition de témoins et d'experts, les autorités de chacune des Parties contractantes prêteront, sur la réquisition du tribunal arbitral à adresser au Gouvernement respectif, leur assistance de la même manière que sur les réquisitions des tribunaux civils du pays. »

SENTENCE ARBITRALE AU SUJET DE L'INTERPRÉTATION D'UNE DISPOSITION DU TRAITÉ DE COMMERCE CONCLU LE 13 JUILLET 1904 [1]; RENDUE À BERNE, LE 27 AVRIL 1911 [1]

Treaty interpretation — Determination of the precise meaning of an expression — Interpretation in practice by one party accepted by other States — Absence of objection by the other party to the interpretation of the expression in a prior treaty to which it was a party.

Par un échange de notes des 30 août et 21 septembre 1909, l'Italie et la Suisse se sont mises d'accord, conformément à l'article 18 du Traité de commerce entre l'Italie et la Suisse du 13 juillet 1904 et à la disposition additionnelle à cet article, pour soumettre à la décision définitive d'un tribunal arbitral le différend surgi entre les deux Etats au sujet de l'interprétation de la Note ad Nos 117 et 119 de l'Annexe C (Droits à l'entrée en Suisse) du dit Traité de commerce, ainsi conçue:

« Est accordée une déduction de 6% pour le vin nouveau, c'est-à-dire que les 100 kg de vin nouveau ne seront comptés que pour 94 kg lorsque l'importation en aura lieu jusqu'au 31 décembre inclusivement de l'année de la vendange, dans des fûts, tonneaux ou wagons réservoirs à bonde ouverte ou à bonde à air. »

L'Italie soutient que la disposition qui précède s'applique à tous les vins de la dernière récolte, même séparés de leurs lies, importés en Suisse jusqu'au 31 décembre dans des récipients à bonde à air.

La Suisse soutient que la dite disposition ne s'applique qu'aux vins de la dernière récolte non encore séparés de leurs lies et importés jusqu'au 31 décembre dans des récipients à bonde à air.

En application de la disposition additionnelle précitée au Traité de commerce entre l'Italie et la Suisse, les deux Parties ont désigné comme arbitres: l'Italie, Monsieur Emile Giampietro, ancien Député, à Rome, la Suisse, Monsieur le Professeur Eugène Borel, à Genève.

Conformément à la dite disposition additionnelle, la nomination du surarbitre a été confiée au Président du Conseil administratif de la Cour permanente d'arbitrage à La Haye, lequel a porté son choix sur Monsieur W. H. de Beaufort, ancien Ministre des Affaires étrangères, Membre de la Seconde Chambre des Etats Généraux des Pays-Bas.

Conformément à la procédure fixée par le Tribunal arbitral ainsi composé dans sa première séance, tenue à Berne le 16 juin 1910, les Mémoires, Réplique et Duplique des deux Parties ont été présentés.

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[1] Pour le texte de ce traité, voir: De Martens, *Nouveau Recueil général de traités*, 2e série, t. t. XXXIII, p. 539; t. XXXIV, p. 525.

[2] De Martens, *ibid.*, 3e série, t. VII, p. 350; *Rivista di diritto internazionale*, vol. 6, 1912, p. 270.

Dans les deuxième et troisième séances du Tribunal, tenues à Berne les 26 et 27 avril 1911, deux experts œnologues désignés par les Parties ont été entendus, et après délibérations des arbitres, la sentence suivante a été rendue:

CONSIDÉRANT que l'expression de vin «nouveau» a été dès longtemps et généralement employée en Suisse pour désigner le vin non encore séparé de ses lies, ainsi que cela résulte, entre autres, de l'Instruction pour les Autorités suisses de péages arrêtée par le Conseil fédéral le 4 janvier 1860 et du Message du Conseil fédéral à l'Assemblée fédérale, du 13 mai 1892, concernant le Traité de commerce conclu avec l'Italie le 19 avril 1892,

CONSIDÉRANT que cette même interprétation a été acceptée par d'autres Etats, entre autres par l'Autriche-Hongrie, ainsi que cela résulte de l'Exposé des motifs présenté par le Gouvernement austro-hongrois à l'appui du Traité de commerce conclu entre l'Autriche-Hongrie et la Suisse le 10 décembre 1891,

CONSIDÉRANT que, sans qu'il y ait unanimité à cet égard, les ouvrages publiés par un certain nombre d'œnologues dont la compétence est reconnue emploient l'expression de « vin nouveau » dans le même sens que celui que lui attribue le Gouvernement fédéral suisse,

CONSIDÉRANT que la déduction de 6% correspond, à l'avis concordant des experts entendus par le Tribunal, à la diminution de poids que submit le vin par suite de la séparation de ses lies,

CONSIDÉRANT que, sous l'empire déjà du Traité de commerce italo-suisse du 19 avril 1892, la Suisse n'a pas cessé d'appliquer la disposition relative au « vin nouveau » en l'interprétant tel qu'elle le fait aujourd'hui et qu'à aucun moment l'Italie n'a soulevé d'objection à ce sujet,

CONSIDÉRANT que rien n'indique que la prolongation jusqu'au 31 décembre du délai pour l'importation du « vin nouveau » avec le bénéfice de la déduction de 6% accordée par le Traité du 13 juillet 1904 ait modifié l'interprétation jusqu'alors donnée par la Suisse à l'expression de « vin nouveau » et connue de l'Italie,

CONSIDÉRANT qu'à l'avis concordant des experts, des vins sont encore transportés sur leurs lies après le 1er décembre, d'où il résulte que la prolongation de délai consentie par la Suisse constituait une réelle concession, nonobstant l'interprétation limitative de la Suisse,

CONSIDÉRANT qu'il résulte du procès-verbal de la séance du 8 juillet 1904 de la Conférence pour la conclusion d'un Traité de commerce entre l'Italie et la Suisse que la prolongation du délai jusqu'au 31 décembre a été considérée, tant par les négociateurs italiens que par les négociateurs suisses, comme une concession de peu d'importance et qu'il n'en eût point été ainsi si l'on admettait la thèse de l'Italie,

par ces motifs:

le Tribunal décide et prononce que la Note ad Nos 117 et 119 de l'Annexe C au Traité de commerce conclu entre l'Italie et la Suisse le 13 juillet 1904 doit être considérée comme ne s'appliquant qu'au vin nouveau non encore séparé de ses lies.

FAIT à Berne, au Palais fédéral, le 27 avril 1911.

Le Président: W. H. DE BEAUFORT

Le Secrétaire: Paul DINICHERT

THE WALFISH BAY BOUNDARY CASE

PARTIES: Germany, Great Britain.

COMPROMIS: Declaration of 30 January 1909.

ARBITRATION: Don Joaquin Fernandez Prida, Professor of international law, University of Madrid.

AWARD: 23 May, 1911.

Title to territory — Annexation — Occupation — Acts constituting effective occupation — Acquiescence and possession — Hinterland doctrine — Interpretation of Proclamation of Annexation — Elements of interpretation — Meaning of the term " plateau " — Maps and charts as evidence — Value of hearsay evidence — Value of evidence of natives — Capacity of official to bind his State — Power of arbitrator to determine his own competence — Effect of unilateral demarcation of boundary.

DECLARATION BETWEEN GREAT BRITAIN AND GERMANY REFERRING THE DELIMITATION OF THE SOUTHERN BOUNDARY OF THE BRITISH TERRITORY OF WALFISH BAY TO ARBITRATION. SIGNED AT BERLIN, 30 JANUARY 1909 [1]

WHEREAS on the 1st July, 1890, an Agreement was signed respecting questions affecting the Colonial interests of Great Britain and Germany;

AND WHEREAS the third Article of this Agreement dealt with the limits of the sphere in South-West Africa in which the exercise of influence was reserved to Germany, and provided *inter alia* that " the delimitation of the Southern Boundary of the British Territory of Walfish Bay is reserved for arbitration, unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement ";

AND WHEREAS the period of two years specified in the Agreement elapsed without any settlement of the question of the Southern Boundary having been reached;

AND WHEREAS in 1904 the question was referred to two local Commissioners, one appointed by the Government of the Colony of the Cape of Good Hope, and the other by the German Government;

AND WHEREAS the two Commissioners presented a Joint Report, from which it appeared that they were unable to agree in regard to the question in dispute:

Now, therefore, the Government of His Britannic Majesty and the Imperial German Government have accordingly decided in pursuance of the provisions of the said third Article of the Agreement of the 1st July, 1890, to have recourse to the arbitration of His Majesty the King of Spain in the manner provided in the following Articles:

Article I. His Majesty the King of Spain shall be asked to select from among his subjects a jurist of repute to decide as Arbitrator in the matter of the delimitation of the Southern Boundary of the British Territory of Walfish Bay.

II. Within a period of ten months from the date of signing of the present Declaration each of the two parties shall present to His Majesty the King of Spain, for communication to the Arbitrator, a Memorandum on the question at issue between them.

III. After the period fixed in Article II, each of the parties shall have a further period of eight months within which to furnish the Arbitrator, if it is considered necessary, with a reply to the Memorandum presented by the other party.

IV. The Memorandum and the reply, and any documents annexed to them, shall be printed and shall be delivered in duplicate to His Majesty the King of Spain, and simultaneously to the other party. The Memorandum and the

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[1] *British and Foreign State Papers*, vol. 102, p. 91. See also: *Hertslet's Commercial Treaties*, vol. XXVI, p. 172; De Martens, *Nouveau Recueil général de traités*, 3e série, t. II, p. 705; *United Kingdom Treaty Series No. 10 (1909)*.

reply of each party shall be in the language of that party, and it shall not be necessary for them to be accompanied by a translation.

V. The Arbitrator shall have the right to ask for such explanations from the parties as he may deem necessary, and shall decide any question of procedure not foreseen by the Declaration and any incidental points which may arise.

VI. The Arbitrator may employ any necessary help and in particular, if he thinks fit, either with or without the previous request of one of the parties, he may appoint an expert officer to proceed to the post and make any survey or examination or receive any oral evidence which he may consider necessary to enable him to arrive at a decision.

VII. On the application of either party, the Arbitrator may, if he thinks fit, grant an extension of time for the delivery of the Memorandum or the reply.

VIII. Each of the parties shall bear their own expenses of the arbitration, and the common expenses of the arbitration, such as the honorarium to be paid to the Arbitrator, and, if necessary, his travelling or any other expenses, shall be shared equally between the two parties to the arbitration.

IX. The decision of the Arbitrator when communicated to the parties by His Majesty the King of Spain, shall be accepted as final.

Berlin, January 30, 1909.

(L. S.) W. E. GOSCHEN

(L. S.) v. SCHOEN

AWARD OF DON JOAQUIN FERNANDEZ PRIDA, ARBITRATOR IN THE MATTER OF THE SOUTHERN BOUNDARY OF THE TERRITORY OF WALFISH BAY. MADRID, 23 MAY, 1911 [1]

Titre sur un territoire — Annexion — Occupation — Actes constituant une occupation effective — Acquiescement et possession — Doctrine dite de " hinterland " — Interprétation de la Proclamation d'annexion — Eléments d'interprétation — Sens du terme « plateau » — Cartes géographiques considérées comme preuves — Valeur d'une déposition sur la foi d'autrui — Valeur d'une déposition faite par des natifs — La responsabilité de l'Etat et les actes officiels de ses fonctionnaires — Pouvoir de l'arbitre de déterminer sa propre compétence — Effet de la délimitation unilatérale d'une frontière.

DON JOAQUIN FERNANDEZ PRIDA, Senator of the Kingdom of Spain and Professor of International Law at the University of Madrid, performing the functions of Arbitrator conferred on him by His Majesty the King of Spain in pursuance of the Declaration of the 30th January, 1909, signed at Berlin by the Representatives of Great Britain and Germany, to settle the question pending between those Powers on the subject of the southern frontier of the British territory of Walfish Bay, has given in the said capacity, after having examined the facts and arguments adduced by the two parties, the following Award:

I. WHEREAS on the 12th March, 1878,[2] the Captain of the ship *Industry*, belonging to the British squadron, took possession, in the name of Her Majesty the Queen of Great Britain and Ireland, of the port and station of Walfish Bay and of certain adjacent territory, announcing by the necessary Proclamation that the annexed district was bounded as follows:

" On the south by a line from a point on the coast 15 miles south of Pelican Point to Scheppman's Dorp; on the east by a line from Scheppman's Dorp to Rooibank, including the plateau, and thence to 10 miles inland from the mouth of the Swakop River; on the north by the last 10 miles of the course of the Swakop River";

II. WHEREAS the said annexation and Proclamation were preceded by various preparatory documents emanating from the Cape Government, the Colonial Office at London, and other British authorities, amongst which documents a special series was constituted by those intended to fix the extent and boundaries of the territory which was to be annexed, together with the harbour of Walfish Bay, the following being especially noteworthy in that series:

(1.) The communication of the 23rd January, 1878, addressed by Lord Carnarvon to Governor Sir H. Bartle Frere, which states that " the British

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[1] *British and Foreign State Papers*, vol. 104, p. 50. See also: *Hertslet's Commercial Treaties*, vol. 26, p. 187; De Martens, *Nouveau Recueil général de traités*, 3e série, t. VI, p. 396; *Parliamentary Paper*, " *Africa, No. 1 (1911)* " Cd. 5857.

[2] *British and Foreign State Papers*, vol. LXIX, p. 1177.

flag should be hoisted in Walfish Bay, but that, at least for the present, no jurisdiction was to be exercised beyond the shores of the bay itself ";

(2.) The telegram of the 23rd February, 1878, addressed by the Governor from King William's Town to Captain Mills, the Colonial Secretary, stating with regard to Walfish Bay that it would be preferable that the naval officer should, on the hoisting of the flag, proclaim sovereignty only over the station and the bay itself and a radius of 10 or 12 miles or so, according as it might appear necessary after consultation with Palgrave, it being added to these instructions that, although the author of the telegram proposed to ask for the increase of the territory annexed, it was understood that " for the present the annexation should be confined to the precise limits indicated by the Minister ";

(3.) The communication of the 26th February, 1878, addressed by the Colonial Secretary of Cape Colony to the Senior Naval Officer at Simon's Bay, instructing him to direct the Captain of Her Majesty's ship *Industry* to proceed to Walfish Bay and hoist the British flag and take possession of the port, station and adjacent territory to a distance in the interior which he should determine in consultation with Mr. Palgrave if he were on the spot; and

(4.) The supplementary instructions addressed on the 28th February, 1878, by Captain J. Child Purvis to the Captain of the ship *Industry*, Richard C. Dyer, in which, among other things, he is told to consult with Mr. Palgrave " as to the exact amount of territory to be annexed ";

III. WHEREAS on the date of the Proclamation of Annexation, Commander Dyer, in conformity with instructions received, drew up a short memorandum addressed to Commodore F. W. Sullivan, with the intention of explaining the circumstances of the annexation, and in which he states among other things: —

That, owing to the absence of Mr. Palgrave, he judged it necessary to decide for himself the extent of the territory to be annexed, " being guided generally by the telegram from Sir Bartle Frere, dated the 23rd February, and by the requirements of the Bay "; that he fixed the boundaries of the said territory in accordance with the information and advice of Mr. Ryden, representative of Ericsson and Co., of Capetown, and of other white people residing in the Colony; that " as there was no fresh water nor pasture in Walfish Bay," he considered it indispensable that there should be included in the annexation, if possible, a place containing both these things, and that " with this object he made a journey in a bullock-waggon to Rooibank, taking with him two officers as companions to view the plateau "; that " this place is considered with some differences of opinion as from 13 to 18 miles to the east of Walfish Bay, but that it is nine hours by wagon," and " is an oasis thickly covered with grassand scrub and well watered, and the nearest point available to supply the Bay with water and good pasture "; that " as there are no fixed points on the immediate coast, it was decided that the plateau of Rooibank and Scheppmansdorf to the south-east should be included in a line drawn from 15 miles south of Pelican Point to 10 miles inland from the mouth of the Swakop," and that the natives especially invited to be present at the annexation ceremonies and modestly entertained in honour of the solemnity were apparently very pleased and satisfied with the annexation, which was explained to them by means of an interpreter;

IV. WHEREAS on the 1st May, 1878, Commodore F. W. Sullivan sent to Sir B. Frere a copy of the memorandum mentioned in the preceding recital, accompanied by a communication in which he states that " the boundaries fixed by Commander Dyer appear reasonable ";

V. WHEREAS, by Letters Patent dated at Westminster the 14th December, 1878, Her Britannic Majesty ratified and confirmed the aforesaid Proclamation of the 12th March of the same year, and authorized the Governor of the Colony of the Cape of Good Hope, with the assent of the Legislature, to declare by a new Proclamation that from the date fixed in it " the harbour, station, and territory of Walfish Bay," as demarcated by Commander Dyer, should be annexed to the said Colony;

VI. WHEREAS on the 25th July, 1884 [1] the Legislature of the Cape of Good Hope consented to the annexation to that Colony of the harbour or station of Walfisch Bay and of the surrounding territory, in virtue of which the Governor, Sir Hercules G. R. Robinson, proclaimed, on the 7th August of the same year,[2] the incorporation in Cape Colony and subjection to the laws in force there of the territory of Walfish Bay, and confirmed the demarcation of the same contained in former documents. and established there in addition a Court constituted by a resident magistrate;

VII. WHEREAS on the date of the 7th August aforementioned the zone on the West African Coast comprised between the mouth of the Orange River and the 26th parallel south latitude was placed under German protection; and, soon after, the adjacent coast comprised between the 26th parallel and Cape Frio, with the exception of the British territory of Walfish Bay;

VIII. WHEREAS in the month of March 1885 a Commission was appointed, entitled " the Mixed Claims Commission of Angra Pequeña and the West Coast," formed by Dr. Bieber as German representative and Judge Shippard as British representative, and the said Commission, after conducting an enquiry on oath, alluded to above, relative to the limits of Walfish Bay, signed on the 14th August of the said year 1885 a letter addressed to the High Commissioner, Sir H. Robinson, in which, with the object of correcting errors and deficiencies noticed in the determination of the boundaries, the following is stated: —

" The limits of the territory of Walfish Bay, laid down in Commander Dyer's Proclamation, and in the Letters Patent of 1878, in the Annexation Act of 1884, and in the Proclamation of the 7th August of the same year, should be corrected as follows: —

" 'Scheppmansdorf' should be designated as 'Scheppmansdorf' or 'Rooibank', and what has been called 'the Rooibank' should be 'Rooikop.' The Admiralty charts should also be corrected to agree with this. The eastern boundary, marked on Dr. Theophilus Hahn's map, published in 1879, and copied in Juta's map of 1885, is incorrect ";

IX. WHEREAS the Governor and High Commissioner, Sir H. Robinson, addressed a communication to Colonel Stanley, dated the 24th September, 1885, on the subject of the statement of the Mixed Commission quoted above, taking into account the mistakes pointed out in the text of the Proclamation of the 12th March, 1878, and the official documents reproducing it, observing, besides, that the mistake arose from Commander Dyer calling the hill near the centre of the eastern frontier " Rooibank" , when its name is really " Rooikop ", adding that Rooibank and Scheppmansdorf are two names for the same place, which is a township situated on both banks of the River Kuisip, remarking that there is no difference of opinion between the German and British Commissioners with regard to the real boundary of the territory of Walfish Bay on the eastern side, but that this boundary has been incorrectly described in the various

[1] *Ibid.*, Vol. LXXV, page 408. The Act was assented to on July 22 and promulgated on July 25, 1884.

[2] *Ibid.*, Vol. LXXV, page 407.

documents defining it, asking him further whether he considered himself to possess the necessary powers to publish a new Proclamation correcting the mistake alluded to; and stating finally that " nevertheless it might be convenient before publishing a new Proclamation or Letters Patent, to await the conclusion of the survey of the boundaries of the territory of Walfish Bay which the Colonial Government was carrying out at that moment, as it would be desirable that the boundaries of the plateau between Scheppmansdorf and Rooikop included in the territory should be defined with precision ";

X. WHEREAS the British Government, in agreement with the final observation contained in the communication quoted in the preceding recital, postponed the publication of new Letters Patent setting forth a complete and exact description of the territory of Walfish Bay until the conclusion of the labours of examination and survey which the surveyor (Mr. Wrey) was then carrying out on the spot by the orders of the Cape Government, the results of which labours with regard to the fixing of the boundaries could, according to a letter addressed by the Colonial Office to the Foreign Office on the 22nd October, 1885, be communicated to the German Government before the publication of the Letters Patent referred to;

XI. WHEREAS Mr. Wrey, after the termination of the work of inspection and survey which the Cape Government ordered him to undertake, drew up a report, dated the 14th January, 1886, accompanied by a map on which he marks out the territory of Walfish Bay by means of thirteen pillars designated by as many letters in alphabetical order in the following manner: —

Pillar A, situated at Pelican Point;

Pillar B, 15 geographical miles to the south of the former, near the coast;

Pillar C, behind the mission station at Rooibank;

Pillars D, E, and F, between the preceding pillar and Ururas, marking a line which separates the sand-hills from the left, or south, bank of the River Kuisip;

Pillar G, on the opposite side of the same river, coinciding with the extremity of the land asked for by by Messrs. Wilmer and Evensen in Ururas;

Pillar H, on the top of Rooikop, in the desert of Nariep;

Pillar J, on the top of the black rock called Nuberoff, situated on the south bank of the River Swakop, at a distance of 10 miles approximately from its mouth;

Pillars K, L, and M, following the general direction of the course of the Swakop towards the sea; and

Pillar N, in Walfisch Bay, in front of the Resident's house;

XII. WHEREAS, in accordance with the demarcation mentioned, the area now in dispute, *i.e.*, the fertile tract of the bed of the Kuisip, bounded by the mission station at Rooibank and the place called Ururas, some 5 miles distant from it, is included in British territory; which tract, in the judgment of Mr. Wrey, as it appears from his report quoted and the supplementary report dated the 31st August, 1889, is the only one whose natural features can correspond with the " plateau " spoken of in the Proclamation of the 12th March, 1878, since, although the word " plateau ", he says, is a term unsuited to the land referred to, the inspection and verification carried out made it impossible for him to refer to anything but the area or surface in question, that is to say, to the area which the waters of the Kuisip, which ordinarily run underground, cover when in flood from Rooibank to Ururas in one direction and from the desert to the boundary of the dunes or sand-hills in the other;

XIII. WHEREAS in his communication of the 8th June, 1886, Dr. Bieber, German Consul-General at the Cape, called the attention of the British authori-

ties to the action of Mr. Wrey, who (instead of stopping at Scheppmansdorf to draw the eastern frontier of the territory of Walfish Bay from that place to Rooikop) had beaconed the bed of the Kuisip as far as Ururas, in spite of the fact that the last-named place is not mentioned in the Act or in the Proclamation of Annexation;

XIV. WHEREAS, in reply to Dr. Bieber's communication, the following documents were furnished him amongst others: —

1. A report, addressed on the 22nd August, 1886, to the Ministry of Crown Lands by the Surveyor-General of the Colony of the Cape of Good Hope, Mr. Smidt, giving it to be understood that Mr. Wrey proceeded in accordance with instructions received, based in their turn on a memorandum by Judge Shippard, drawn up in June 1885, according to which the frontier-line should include the pastures of Scheppmansdorf as far as Ururas, and should continue thence to Rooibank, in order that in this way the whole of the plateau should be included in British territory;

2. A communication addressed by the Ministry of Crown Lands to the Colonial Office, dated the 1st September, 1886, in which it is stated that Judge Shippard's opinion should be ascertained as to Dr. Bieber's claim, in view of the circumstance that he had drawn up the memorandum which served as the basis of Mr. Wrey's instructions, and of the lack of precision in the terms employed in the Act of Annexation and in Commander Dyer's Proclamation, and because the fact of there being no mention of Ururas in the said documents makes it difficult to understand the reasons why Mr. Shippard considered that the southern boundary should be extended in an easterly direction to Ururas instead of stopping at Rooibank or Scheppmansdorf.

3. A report drawn up by Mr. Shippard on the 30th September, 1886, in consequence of what was indicated in the preceding document, in which he expresses his agreement with the demarcation carried out by Mr. Wrey, basing it on arguments which since they were accepted and reproduced in the British memorandum in the course of the arbitration proceedings, will have to be mentioned later, as also all the other arguments which are in an analogous position;

XV. WHEREAS, in his communication of the 20th October, 1886, Dr. Bieber, when invited to express his opinion as to the documents cited in the preceding recital, insists upon considering Mr. Wrey's demarcation inadmissible, alleging, in justification of this opinion, various reasons, the substance of which was incorporated afterwards in the German memorandum, which will be dealt with at the proper moment;

XVI. WHEREAS the Ministers of the Colony of the Cape of Good Hope, in minutes dated the 4th November, 1886, and the 25th July, 1887, showed their complete agreement, in spite of Dr. Bieber's observations, with Mr. Wrey's demarcation, and pressed in the first of the said documents for its approval, believing it to be in accord with the fixed intention of Her Majesty's Government, and adding in the second new reasons in support of the said demarcation;

XVII. WHEREAS at this juncture, Commander, afterwards Captain, Dyer was consulted by the British Government as to the reasons which had guided him in drawing up the Annexation Proclamation, and stated on the 14th September, 1887, that his principal object in mentioning the plateau above Rooibank was to include the pasture-land situated in the bed of the River Kuisip, as persons acquainted with the locality advised him, and that the adoption of the line drawn 15 miles south of Pelican Point carried out the intention of including Scheppmansdorf and the neighbouring pasture-lands;

XVIII. WHEREAS, since on the facts being made known, a considerable correspondence followed between the British and German Governments and the two parties did not arrive at a solution of the difficulty in the course of the negotiations, it was agreed to appoint a mixed commission consisting of Dr. Goering, as German representative, and Colonel Philips, as British representative, who, being unable to draw up a joint report, signed in January 1889 separate reports maintaining the original views of their respective Governments and agreeing only in recognizing, as each of the Commissioners stated separately —

1. That Mr. Wrey's and Dr. Stapff's maps represent accurately the position and topographical features of the ground;

2. That, if it is considered that the plateau in dispute is the river plain beyond Scheppmansdorf, it should be included as far as Ururas;

XIX. WHEREAS, when Captain Dyer, on being invited by the British Government to furnish a new report in reply to the observations and arguments formulated by Dr. Goering, stated on the 24th April, 1889:

That, although his first intention had been to carry out the annexation of Walfisch Bay strictly in accordance with the terms of the telegram sent by the Governor to Captain Mills on the 22nd February, 1878, it was decided, after a conversation with Mr. Ryden and others, and for the reasons explained in his letter of the 12th March of that year, to include Rooibank in the annexed territory:

That, having received information that pasture-lands existed in the neighbourhood of Scheppmansdorf to the south-east of Rooibank, and that it was desirable that they should be included in the annexation, he decided to include Scheppmansdorf entirely, as his principal reason for mentioning this place in defining the boundaries was to secure the plateau or lands which he understood to belong to it;

That, as there was no map of the interior, and reference could only be made to the ordinary map of the coast, he had not been able to mention concrete points, and had been obliged to rely on the experience of the persons resident at the bay and to their description of the places in question;

That he had no recollection of the conversation alluded to by Dr. Goering with reference to Mr. Koch, a witness of the annexation (according to which Captain Dyer had not accepted the advice to annex any part of the valley of the river beyond Scheppmansdorf, stating that he was not authorized to do so, and that he had already exceeded his instructions in drawing the boundary as far as that place), and that, on the other hand, it was difficult to understand Mr. Koch, whose statements, in the last resort, were sufficiently refuted by the fact that Scheppmansdorf had been included on his advice in the annexed territory, and by the fact that the said Mr. Koch had stated, before the Proclamation was published, that he was in agreement with the boundary laid down in it;

XX. WHEREAS, in view of the discrepancies revealed in the course of the discussion, of which mention has been made above, Article 3 of the Agreement signed at Berlin by the representatives of the British and German Governments on the 1st July, 1890 [1] contained the following provisions:

" The delimitation of the southern boundary of the territory of Walfish Bay is reserved for arbitration unless it shall be settled by the consent of the two Powers within two years from the date of the conclusion of this Agreement ";

[1] *Ibid.*, Vol. LXXXII, page 35.

XXI. WHEREAS on the two years mentioned in the Agreement of 1890 elapsing without the High Contracting Parties reaching an agreement about the limits of Walfish Bay, an effort was made nevertheless to solve the matter in dispute by appointing in 1904 a new mixed commission formed by Herr von Frankenberg, nominated by the German Government, and Mr. John J. Cleverly, as British representative, who also failed to settle the dispute, the German commissioner formulating on this occasion claims in regard to another part of the boundary not till then discussed, and considered by the British representative as foreign to the present controversy;

XXII. WHEREAS on the 30th January, 1909, the representatives of the High Parties interested in the matter signed a Declaration at Berlin, having, in accordance with the Agreement of the 1st July, 1890, recourse to His Majesty the King of Spain to designate from amongst his subjects a lawyer to decide as arbitrator the affair relative to the demarcation of the southern frontier of the British territory of Walfish Bay in accordance with the procedure laid down in the same Declaration;

XXIII. WHEREAS by the Royal Decree of the 7th March, 1909, published in the Gazette of Madrid of the 12th of the same month and year, His Majesty the King of Spain deigned to appoint the undersigned to exercise the functions of arbitrator alluded to in the preceding paragraph, the acceptation of which functions was verbally notified by the undersigned on the 19th of the month and year above mentioned at a meeting held at the Ministry of State at Madrid in the presence of the Minister of State and of the German and British Ambassadors;

XXIV. WHEREAS on the 29th November, 1909, and therefore within the space of twelve months laid down in Article 2 of the Declaration of Berlin of the 30th January of that year, the Ministry of State transmitted to the undersigned the memoranda in which the German and British Governments state and support their respective claims with regard to the question in dispute between them, the German memorandum being accompanied by four annexes containing authenticated copies of documents inserted in it and the British memorandum by a full-scale copy of Mr. Wrey's map already referred to;

XXV. WHEREAS the German memorandum, after reciting the history of the question, classifies the arguments in support of the claims advanced in it and the statement made of them, dividing them into various groups designated by as many letters in alphabetical order; examining in the first group, marked (A), the official statements of Captain Dyer interpreted in accordance with the usual technicalities and the topographical conditions of the territory of Walfish Bay; dealing in the second, marked (B), with the official statements of Captain Dyer considered in the light of the economic circumstances of the population, native and white, of the said territory, and further with what Rooibank, Scheppman's Dorp, and Ururas and their mutual connection are or imply: the third group, marked (C), being devoted to showing the discrepancy between the British views before and after 1885, with regard to the drawing of the boundary and to fixing the facts which favour the German views of claims, and to the consideration of the information obtained about them; discussing in the fourth, marked (D), the demarcation carried out by Mr. Wrey and the question of how far it is binding on Germany from the point of view of international law; formulating in the fifth, marked (E), the questions put by the German Government to the arbitrator; and completing all the arguments contained in the preceding groups by an appendix containing some British documents and a criticism of some of them;

XXVI. WHEREAS in the first group, marked (A), it is alleged —

That the word " plateau " employed in Captain Dyer's Proclamation always expresses the idea of a " high plain ", and designates besides in the present case, having regard to the text of the said Proclamation, a district included in the territory of Walfish Bay, by the eastern frontier starting from Scheppmansdorf;

That both conditions are fulfilled, if it is understood that the plateau in question is the Namib, since this is in actual fact a high plain situated to the north-east of Scheppmansdorf;

That the British magistrate at Walfish Bay, Mr. Simpson, alluded to the Namib, when on being questioned before the " Mixed claims Commission for Angra Pequeña and the West Coast ," he stated in a declaration of the 16th April ,1885, that " he had crossed *from Rooibank to the River Swakop by the plateau* " ;

That the Governor of Cape Colony, Sir Hercules Robinson, also employed the word " plateau " to designate the Namib, since, in a letter of the 24th September, 1885, addressed to Colonel Stanley, he had expressed the desire that the limit of the *plateau between Scheppmansdorf and Rooibank* should be accurately defined;

That the portion of the bed of the River Kuisip comprised between Scheppmansdorf and Ururas, and considered by the British Government as the plateau alluded to in Captain Dyer's Proclamation, neither complies with the condition of being a high plain (since it is a watercourse of lower elevation than the Namib and the dunes which serve as its boundary) nor with the condition of being included in the territory of Walfisch Bay by the eastern frontier starting from Scheppmansdorf;

That the impropriety of applying the word " plateau " to this part of the bed of the Kuisip is recognized by the British commissioner, Mr. Philips, when he says in his report of the 23rd February, 1889, that the use of the word " plain " to designate the country referred to " would have been more satisfactory as a technical term and less open to misinterpretation ";

That Mr. Wrey expresses a similar opinion when he says in his report of the 14th January, 1886, that the word " plateau " is an erroneous term as applied to the tract of land situated between Rooibank and Ururas;

That therefore the interpretation of Captain Dyer's Proclamation held by Great Britain implies the supposition that he made a mistake in the use of the most elementary geographical expressions which, in view of his profession, must have been familiar to him; whilst the interpretation put on it by Germany assumes that the text of the Proclamation is entirely correct, except for the confusion of Rooibank with Rooikop, and that the supplementary report, although less clear, leaves hardly anything to be desired;

That the intentions of Captain Dyer, to which his second letter or communication of the 14th September, 1887, refers, cannot be taken into account to decide the question unless they were expressed in the official Proclamation;

That as to the indication in the said report that the plateau is situated *above* Rooibank, this new word " above " is intelligible as referring to the Namib, which precisely is situated " above " Rooibank;

That if Captain Dyer had desired to include in British territory the flat pasture-land towards Ururas, as Mr. Wrey's demarcation includes it, he should have said so explicitly in his second letter when he had before him every kind of map;

That according to Captain Dyer's report dated the 12th March, 1878, the fact that there was in the coastal region no fixed point which could serve as a natural boundary was the reason which, combined with the wish of the colonists,

led to the interior of the country as far as Scheppmansdorf being included in the annexation, because this place was considered as one of the fixed points of the line which was to bound the territory of Walfish Bay on the land side;

That in the said report the words, " this place . . . is an oasis ", referred to Rooibank, and not to the plateau or to the part of the bed of the Kuisip between Rooibank and Ururas, because the plateau cannot be called " a place ", nor a strip arbitrarily taken in the bed of a river be designated by the word " oasis ", above all, when the vegetation on it is less luxuriant than on other contiguous strips;

That to carry out the desire of Captain Dyer to include in the annexation a territory where water and pasture were to be found, there was no need to go as far as Ururas, but that it was sufficient to draw the frontier from Scheppmansdorf, all the more so as between that place and Ururas, according to the evidence of the missionary Boehm, the pastures ordinarily end at the bed of the river, as it is always bare and grassless, although covered with trees;

That when in Captain Dyer's report the inclusion of the plateau " and Scheppmansdorf to the south-east " is spoken of, these words can be understood in a double sense: either that Scheppmansdorf limits the territory to the south-east, or that it is situated to the south-east of the interior plateau; and, finally,

That the phrase " including the plateau ", contained in the Proclamation of Annexation, and reproduced in the report of the same date, is a phrase simply used by Captain Dyer with the object of explaining the motive and manner of annexing a part of the interior of the territory which he incorporated in excess of his instructions and in accordance with his own views;

XXVII. WHEREAS in the second group of arguments, marked (B), it is alleged on the part of the German Government:

That Captain Dyer, in deciding to annex a district containing fresh water and pasture, only had regard to the interest of the white colonists resident at Walfish Bay, without considering at all the convenience of the native population, especially that of not dividing the so-called " grazing commonage " of Rooibank, used by the inhabitants of Scheppmansdorf, since there is not the slightest allusion to it in his explanatory report, although he might have given it as a further reason in justification of his breaking his instructions;

That from the whole context of the Proclamation of Annexation is deduced the intention of establishing in the neighbourhood of Scheppmansdorf not a vague boundary pending further decision, but strict and absolutely precise limits as required by the instructions emanating from Captain Purvis, which directed Commander Dyer to fix in the Proclamation of Annexation, after consulting with Mr. Palgrave, the exact quantity of territory which was to be annexed;

That the place called Rooibank, near Scheppmansdorf, which designates the country surrounding a spring, near a red vein of granite which crosses the Kuisip, is of an undecided character, its extent depending on individual views and on the greater or lesser quantity of pasture used for the cattle belonging to persons residing there, it being understood, until it is expressly stated otherwise, that the boundary between Rooibank and Ururas is half-way between the wells which give names to the two points;

That the mention in Captain Dyer's Proclamation of the place called Rooibank has no bearing on the question of boundaries, since " the Rooibank " spoken of in it is not a place or settlement, but a hill or a large rock some distance from the Kuisip;

That, on the contrary, when it was a question of establishing a fourth fixed point in the description of the south-east corner of the annexed territory,

Captain Dyer (who intentionally avoided the use of the expression " Rooibank ", the indefinite character of which was known to him through his relations with the natives) had mentioned Scheppmansdorf expressly twice, a name which expresses neither less nor more than the mission station situated in Rooibank, consisting of two houses near together;

That there can be no question of a village in the district of Scheppmansdorf, and that this name only indicates that when the station founded by the missionary Scheppman in 1845 was consecrated, there was a hope, which was afterwards not realised, that a native hamlet would be formed round it;

That the British assertion that the territory of the tribe of the Topnaars extended as far as Ururas and ought not to be divided or split up, as it would be if the frontier were drawn in the position claimed by Germany, is refuted by the circumstance that the Topnaar Hottentots are really nomads living along the whole course of the Kuisip right into German territory, at least as far as Hudaob, whence it follows that the territory of the said tribe was divided after the annexation of Walfish Bay, whether the frontier was fixed at Scheppmansdorf or Ururas;

That " the village " and " grazing commonage " of Scheppmansdorf repeatedly cited by Great Britain, assuming that the latter extends to Ururas, do not really exist, since, with one very special exception, life in common in the manner suggested by a village does not correspond with either the character or the mode of living of the Hottentots, nor can there be any question of grazing commonage without the antecedent condition of a juridical community to which it could be attributed;

That the British supposition that the pretended grazing commonage at Scheppmansdorf ought to have been included in the annexation, since otherwise the " inhabitants of the village " would not have shown satisfaction at it, as Captain Dyer expressly says they did in his report of the 12th March, 1878, is a supposition founded on an incomplete quotation of the passage in the report, which alludes not to the " inhabitants of the village of Rooibank ", but to natives whose habitual residence is not stated (" summoned from some distance "), which natives, on the other hand, if they displayed joy at the act of annexation, did so in any case, given their fondness for Cape brandy, on account of the entertainment in which they took part and not because the ceremonies, of which the entertainment formed a part, were intelligible to them;

That the declarations made by the witnesses, Mr. Simpson and the Rev. J. Boehm, in 1885 before the mixed commission on the subject of the grazing commonage of Scheppmansdorf or Rooibank, the meaning of the name Awahaus and the identity of Ururas and Rooibank were full of contradictions;

That, in proof of this, on comparing the said declarations, it is noticed with regard to the first that the witness Simpson states successively that " he does not believe that any community was indicated by the name of Rooibank " (answer to question 384), that " if the grazing commonage includes all the plateau it would include Ururas " (answer to question 395), and that " the commonage of Rooibank extends to Ururas, where a certain number of Bastards have gardens given by Mr. Palgrave and the magistrate who was the witness's predecessor, which Bastards were in the habit, when the grass was finished at Rooibank, of sending their cattle along the river to Ururas, considering it as the pasture of Rooibank " (answers to questions 408 and 409);

That, with regard to the second, the witness Mr. Simpson declares that the place called Awahaus is designated by the name of Ururas (answer to question 381), whilst the witness Boehm states that Rooibank is the translation of the Namaqua name " Awahaus " (answer to question 421);

That, with regard to the third, Boehm declares that Rooibank, Ururas, and Scheppmansdorf are near one another (answer to question 422), and declares afterwards that Rooibank or Scheppmansdorf and Ururas are not very close, but are from three to four hours apart (answer to question 426);

That, with regard to the last, Simpson declares that it would be difficult to say that Rooibank is Ururas (answer to question 404), and Boehm affirms that he has heard it said that they are scarcely half a day apart (answer to question 425), adding immediately that the commissioner to whom the witness is speaking could cover the distance which separates them in some three hours (answer to question 426); and, finally,

That, whatever attitude is adopted towards these statements, so divergent one from the other, and towards their testamentary value in the present case, nevertheless it is not explained why, if Captain Dyer understood by " plateau " the bed of the Kuisip and the " commonage " and desired to include in the annexation the strip of valley midway between Scheppmansdorf and Ururas, he did not mention this last name, which was generally known to the natives, in the text of the Proclamation — a name which he did not insert, nevertheless, in the said text, in order to exceed as little as possible the instructions received by him, and in view of the fact that the principal pastures and springs of Scheppmansdorf were situated below that place, above which Captain Dyer did not desire to annex any territory, in spite of the fact that the agent Koch and the trader Ryden advised him to do so, as stated, in connection with the evidence of the former, in Dr. Goering's report alluded to in recital XVIII of this arbitral decision;

XXVIII. WHEREAS in the third group of arguments, marked (C), it is alleged:

That till the year 1885 it was admitted by the British authorities that the district situated between Scheppmansdorf and Ururas, now claimed by Cape Colony, did not belong to the territory of Walfisch Bay;

That this is proved by the English maps made before the date mentioned, as according to them British territory extends only to Scheppmansdorf, since, although it is true that the eastern boundary shown on the maps published by the Admiralty is marked " approximate boundaries of the station of Walfisch Bay ", this indication of the boundary being approximate refers only to the circumstance that the proposal put forward by the Angra Pequeña and West Coast Mixed Commission was then awaiting a decision, the object of the proposal being to change the word " Rooibank " employed in Dyer's Proclamation and substitute for it the word " Rooikop ";

That a second proof is furnished by a contract for the concession of mining rights signed the 4th August, 1883, in which Rooibank, " within the limits of the territory of Walfish Bay ", is designated as the limit of the mining area granted. In view of the fact that the contract had been signed before a British magistrate, this description could not be explained if England already held the view that the territory extended not only to Rooibank but also to Ururas, and it would also be impossible to explain, if this was the view held, the declaration made by Mr. Deary before the mixed commission, confirmed by the evidence of Mr. Evensen, that the mining concessions were beyond Rooibank and outside British territory;

That in the same sense as the preceding proofs a third proof is constituted by the fact that, before Walfish Bay was declared an open port, the goods destined for Damaraland and the adjacent territory inland were disembarked at Sandwichhafen, and conveyed thence to their destination behind the church of Scheppmansdorf without paying customs dues and without the British authorities raising any objection to such expeditions, or to the storing of the goods in the

warehouse of the trader Wilmer, situated 1,600 metres to the east of the mission station at Scheppmansdorf, all of which goes to prove that at that time the belief prevailed that the territory of Walfish Bay did not extend beyond the said station eastwards;

That a fourth proof analogous to the preceding ones is to be found in the attitude adopted by the British magistrate, Mr. Simpson, on the occasion of a murder committed by the chief of the Hottentots, Jan Jonker Afrikander, who hanged a Berg Damara from a tree situated, according to a report written by the same Mr. Simpson, and dated the 18th March, 1885, in " German territory ", " at some 600 yards from Rooibank (Scheppmansdorf) ", from which it follows that the magistrate considered the eastern boundary of the territory of Walfish Bay, in the valley of the Kuisip (the only ground on which there are trees within the said territory), to be very close to Rooibank and not to Ururas, or, what is the same thing, he thought the bed of the Kuisip, which extends from the neighbourhood of Scheppmansdorf as far as Ururas, beaconed later by Mr. Wrey and now claimed by the British Government, to be German territory; that the sworn declarations of the missionary J. Boehm, of the trader J. Sichel, of the farmer G. Evensen, and of Dr. W. Belck confirm as a whole the German assertion that, until the date of Mr. Wrey's survey, both the British authorities and the colonists living in that locality, who were acquainted with the question of the boundaries, understood that the eastern frontier of the territory of Walfish Bay passed near the church at Scheppmansdorf, or, more precisely, crossed a water-hole situated some 100 paces to the east of the mission-house, and that no one thought of extending the said territory to Ururas;

That the missionary Johannes Boehm, in a declaration made on the 30th April, 1909, by the request of the German Government (after various considerations about Scheppmansdorf, and saying that this place, " about 1½ kilom. in extent, previously called Awahaus — the red bank — Rooibank ", is the " principal place of the Namas or Hottentots ", although without the fixed limits proper to European villages or populated places, and " without exact limits for the community or tribe "), attests in effect that, as he had heard the missionary Daniel Cloete, a witness of the annexation, say, Captain Dyer had laid down the eastern boundary of Walfish Bay " near a well situated at some 100 paces to the east of the mission-house " of Scheppmansdorf; that this had also been the unanimous opinion of the people on the subject of the drawing of the boundary, as it was also the unanimous opinion that the phrase " including the plateau " contained in the Proclamation of Annexation referred to the Namib; that the best pastures of the district which Captain Dyer wished to include in British territory are situated to the west of Scheppmansdorf; that to transfer the boundary more to the east had no visible object, unless it was desired to annex more river sand or a larger and entirely barren strip of the Namib; that when once the customs were established in Walfish Bay the goods landed at Sandwichhafen were conveyed to Damaraland by the route above Scheppmansdorf without paying dues of any kind and without protest from the British authorities, although it must be noticed that such an importation of goods could not be considerable, and lasted besides only a short time, because the customs at Walfish Bay produced so little that they were not sufficient to maintain one functionary; and, finally, that Mr. Wrey continued his survey beyond the limits admitted until then, carrying it up-stream as far as Ururas, by which the only road possible for the transit of goods coming from Sandwichhafen was cut, and the business was abondoned by the trader Wilmer, a British subject who was dedicating himself to it, and in whose opinion Mr. Wrey's demarcation implied a usurpation of German territory;

That the trader Joseph Sichel, in a declaration made on the 28th May, 1909, made the same statement: That till the arrival of Surveyor Wrey it was the common opinion of the inhabitants of the colony that the south-eastern extremity of British territory was " near the church of Scheppmansdorf ", " which place is generally called Rooibank "; that the traders Wilmer and Evensen, who were habitually engaged in the traffic mentioned in the preceding paragraph, " had their house and store to the east of the mission station of Scheppmansdorf some ten minutes' walk " (1½ to 2 kilom.), and they considered that this house lay within German territory, as is proved by the name Wilmersеck, chosen by them for their establishment, a name whose final syllable is the German word " eck " which means " corner "; and, finally, that the traffic carried on by the firm of Wilmer and Evensen made considerable competition with the traders of Walfish Bay;

That Dr. Waldemar Belck, in a declaration made at the request of the German Government on the 6th August, 1909, also states: That the word " Namib " means in Hottentot a high plain or plateau; that the place in which the mission-house of Scheppmansdorf is situated is always called by the natives Rooibank, and does not constitute a fixed village in the European sense, because the huts of the Topnaars (who live there in considerable numbers, as they did when the witness visited the spot in the month of November 1884), are habitually abondoned by the majority of the families living in them as soon as the gathering of the fruit of the nara is finished; that the house, or rather the church, of the mission mentioned so many times was generally considered in 1884 as the limit of British territory; that the goods landed years before in Sandwich Harbour were conveyed to the interior duty free by Rehoboth Bastards, without protest from the British authorities, who allowed them to pass through the neighbourhood of the mission station at Rooibank, which proves that those authorities considered the territory of Walfish Bay to terminate there, as did also the persons who were resident in the locality or who were acquainted with it; that after the month of November 1884 the traders of Walfish Bay, and among them Mr. Carington Wilmer, also began to transport goods from Sandwich Harbour, to Rooibank to avoid paying customs dues; that the British magistrate, Mr. Simpson, on being repeatedly asked to state whether objection would be raised to this transporting to goods as far as Frederiksdam (a point near the frontier of the territory, not clearly determined then), had avoided a precise answer, whilst as regards Rooibank he had raised no difficulties and had confined his vigilance to stopping smuggling into the district which extends to the property of the mission, where, in the opinion of all, German territory began, and consequently the jurisdiction of the British authorities ceased; that, as regards Frederiksdam, the witness after fixing its position astronomically, was confirmed in his presumption that the said place was within German territory, although very near the British southern boundary, this being the reason why he instructed the agent Koch to put up a notice of a purely private character, with the words " territory of Lüderitz ", at a certain distance from this boundary, so as to be sure of remaining in German territory; and that a new proof that the British authorities considered that the territory of Walfish Bay ended near the property of the Rooibank mission was furnished by the fact that in January 1885 the resident magistrate did not arrest or pursue as a deserter a Cape police constable who, after abandoning his duty, stayed for four days a little beyond the mission buildings secure that no one could molest him, as he was on territory under German jurisdiction;

That the farmer George Evensen testifies in a declaration made on the 14th June, 1909, that according to general opinion, and the intentions attributed

to Captain Dyer, the southern and eastern limits of the territory of Walfish Bay meet approximately at the spot occupied now by the Scheppmansdorf missionhouse at Rooibank; that the house inhabited by the witness and his partner, Mr. Wilmer, in 1885 (it stood south-east of the mission buildings according to a sketch presented by the former) was constructed on ground which, in the opinion of all, was German, the magistrate at Walfish Bay included, since he did not demand from Messrs. Wilmer and Evensen the payment of customs dues nor of any other impost on the goods that they conveyed to the said house from Sandwichhafen; that the tree on which Jan Jonker Afrikander hanged a Berg Damara early in 1885 was situated some 200 metres to the south-east of the house inhabited by the witness, and in territory undoubtedly German, according to the common opinion at that time; and that where the mining concession contract mentioned in paragraph 4 of this recital contains the phrase" Rooibank within the territory of Walfish Bay ", it means, in the opinion of the witness, who took part in the drafting of the document, that " the western corner of the concession ought to coincide with the southern boundary of the territory of Walfish Bay ";

That, lastly, when in 1885 the British view was modified as to the situation of the boundaries in the Kuisip Valley and the authorities dissociated themselves from the earlier general opinion attested in the preceding declarations, they repudiated Mr. Shippard's mistake in thinking that Ururas was the same as Awahaus, the native name of Rooibank, and in addition they invoked, among other reasons, to justify the extension of British territory to Ururas, the consideration urged by Mr. Wrey that the land at the end of this territory (*i.e.*, of that limited to the east by the boundary pillars (F) and (G) mentioned in recital XI of this award) had been asked for by the Europeans Wilmer and Evensen, whose private rights in the land granted, as was shown above, indisputably enjoyed British protection; to which it may be answered that such an invocation of the private interests of subjects which would naturally remain equally guaranteed under German administration cannot have any value in the decision of a boundary question;

XXIX. WHEREAS in the fourth group of arguments, marked (D), it is stated:

That the pillar (B) set up by Mr. Wrey 15 miles south of Pelican Point is not properly placed, since this distance of 15 miles which separates it from pillar (A) was measured, as stated by the German commissioner Von Frankenberg in 1904, in geographical nautical miles of 1,852.8 metres, instead of being in statute miles of 1,609 metres, with the result that the line (A-B) is increased from 24.1 to 27.8 kilom. approximately, or by 3 kilom. 700 m.;

That against the propriety of the use of nautical miles in drawing the line (A-B) the fact is to be urged that surveys are carried out in statute miles all over the British Empire, and also the circumstance that this measure was used to determine the distance between the points or pillars (J and M), situated on the south bank of the River Swakop, since according to Mr. Wrey's map they are 15.35 kilom. apart when they ought to be 18-53 kilom., if the 10 miles which ought to separate them were taken as maritime or nautical miles;

That, having regard to the terms of the Anglo-German agreement of the 1st July, 1890, according to which the demarcation of the southern frontier of Walfish Bay is reserved for arbitration, since point (B) constitutes the starting point of this frontier and forms an integral part of it the German Government submit to the decision of the arbitrator the question whether the position of point (B) with regard to point (A) should be fixed by statute miles or nautical miles; and, finally,

That both with regard to the question, the merits of which have been discussed, and in general terms, the German Government consider the demarcation carried out by Mr. Wrey without the co-operation of a German representative as null and ineffective from the point of view of international law; for when the said demarcation was carried out the territory of Walfish Bay was surrounded on the land side not by the territory of nomad tribes as in 1878, but by that of a European Power, and the boundary was consequently an international one and could not be fixed by an administrative act of one of the interested States without it being necessary for the two limitrophe Powers to proceed in agreement;

XXX. WHEREAS the German Government, on the strength of the preceding considerations, propose to the arbitrator in section (E) of their memorandum:

1. That the survey and demarcation of the southern frontier of the territory of Walfish Bay, carries out by Mr. Wrey in 1888 by the instructions of the Government of Cape Colony in a unilateral manner without the co-operation of a representative of the German Government, should be declared null and of no effect;

2. That the southern boundary of the territory should be fixed in the following way:

The boundary should start at a point on the coast of the Atlantic Ocean, 15 statute miles (1,609 metres) south of a boundary pillar placed at Pelican Point, and should run thence in a straight line towards the most southerly point of the western side of the present property of the Scheppmansdorf Mission, which property is in this way included in British territory, since its southern and eastern boundaries coincide with those of the said territory; from the extreme north of the eastern side of the mission's farm or property, the boundary of the territory should run in a straight line across the valley of the Kuisip above the Namib plateau towards Rooikop, or point (H) on Mr. Wrey's map;

3. That the portion of the boundary of Walfish Bay mentioned in paragraph 2 should be surveyed afresh conjointly by both parties, and provided with durable pillars by experts authorized by the Powers interested and within the space of time fixed by the award;

XXXI. WHEREAS various documents of British origin are inserted in the appendix to the German memorandum and some of them are criticized, and whereas it is unnecessary to mention their contents or the arguments used to refute them, since in the statement of the arguments and replies presented by the High Parties interested in the matter, during the course of the arbitral proceedings, both have or should have proper influence on the decision of the question pending;

XXXII. WHEREAS the British memorandum, after duly stating the history of the question, advances the following arguments, divided into thirteen groups or sections numbered correlatively, in order to demonstrate the correctness of the demarcation carried out by Mr. Wrey:

(*a*) That the question at issue refers above all to the interpretation of the phrase " including the plateau ", used in the Annexation Proclamation and the documents confirming it, which phrase indicates the desire of the author of the Proclamation to include an area of value which otherwise would remain outside the boundary laid down, or, in other words, the desire that the line traced from Scheppmansdorf to Rooibank (Rooikop) should be diverted to include something which would not be included by a straight line between the two points, and which, as it could not be defined exactly on that occasion for lack of maps and exact information, was indicated by the term " plateau ";

(*b*) That it is not claimed by Germany that the phrase " including the plateau " lacked all meaning, but that her contention is that by this phrase Captain Dyer alluded to the fact that a straight line from Scheppmansdorf to Rooibank (Rooikop) did include in the annexed territory a plateau, *i.e.*, a portion of the extensive and elevated desert of the Namib; but that against this interpretation it should be observed that the small portion of the Namib included by such a line would be a plateau separated from the large tract of desert of which it forms a part, and an insignificant part, whilst if by plateau is understood the whole or larger part of the Namib, the line in question would cut it and not include it, so that the phrase employed thus becomes inappropriate, nor is the fact explained of special mention being made of ground without any value, which, in the first case, in addition, was already clearly within the boundaries laid down;

(*c*) That the hypothesis advanced by Germany of the Namib being the plateau referred to in the Proclamation of Annexation is in open discord, given the extreme aridness and absolute valuelessness of that desert, with the intentions shown by Captain Dyer in 1878, and in later documents, according to which the object of the annexation was to provide the annexed territory with drinkable water and pasture;

(*d*) That Captain Dyer's report, dated the 12th March, 1878, and his letters of the 14th September, 1887, and the 24th April, 1889, extracts of which are given in recitals III, XVII, and XIX of this award, prove that his intention was to include in the annexed territory the ground now in dispute, and that the use of the phrase " including the plateau " was dictated by this intention; and, further, that this was proved by the researches carried out in 1885 by Mr. Wrey, who, as he says in his report of the 31st August, 1889, cited in recital XII, knew, by the evidence of Mr. Ryden, a witness of the annexation, and by that of other persons who were present at it or remembered it, that Commander Dyer, in view of the statements made to him about the value as pasture-land of the area under discussion, had included it in the territory annexed;

(*e*) That the appearance of Rooibank makes it a striking object in the midst of the desolation which surrounds it, since, although it is lower than the Namib desert situated to the north and the sand-hills to the south, it appears to dominate both without its being noticeable that on rare occasions it is converted into a river-bed; that whoever rides over the desert in the neighbourhood of Rooibank sees at the level of his eyes the tops of the trees growing on the disputed plain; that to Captain Dyer, on his journey across the desert on his way to the mission station, this ground must have appeared, in comparison with its arid surroundings, isolated and dominating; that if it is argued that an essential attribute of a plateau is that it should present a dominating aspect with regard to its surroundings, it can be held that this condition is fulfilled by the Rooibank; that although the application of the word " plain " to the area under discussion would have been more in accordance with the ordinary use of language, it cannot be pretended, in view of what has been said, that the use of the word " plateau " by Captain Dyer implies a grammatical or etymological impropriety, since that word is correctly applicable to an extent of land more or less isolated which presents the appearance of flatness in comparison with its surroundings; that the idea of flatness is always connected with that of "plateau", whilst height is an ordinary, but not essential, attribute of the term; and, finally, that when Captain Dyer described as a plateau the plain of Rooibank, which did not show any sign of the passage of a river, which was conspicuous for its fertility, and was 300 feet above the level of the sea, he was clearly influenced by the

fact that the residents on the coast from whom he received the information which guided him called this land a plateau;

(*f*) That the Dutch word " plaat ", which may have been used amongst the inhabitants of the bay to designate the Rooibank, and a word that does not carry with it the idea of height, probably led to the employment of the word " plateau ", which is its nearest equivalent in English; that before the acquisition by Germany of territorial rights in South-West Africa, the area to-day in dispute was called " the plateau of Rooibank " in British official documents, as is proved by a despatch of the 14th January, 1882, in which the Governor of the Cape of Good Hope, describing the territory of Walfish Bay, says of it that for the space of 15 miles, reckoned from the sea, it is nothing but a desert formed by sand flats and dunes " until you arrive at the plateau of Rooibank "; and that an analogous proof of earlier date than the beginning of the boundary question is afforded by the reply of the magistrate, Mr. Simpson, on the 16th April, 1885, who, when questioned before the " Angra Pequeña and West Coast Claims Commission ", called the area which extends from the mission station up to and including Ururas " the whole of the plateau ";

(*g*) That the phrase employed by Captain Dyer in his report of the 12th March, 1878, " the plateau of Rooibank and Scheppmansdorf to the south-east ", does not imply that the plateau is situated north-west of Scheppmansdorf, but that it alludes to the fact that both places lie in the south-east part of the annexed territory; because it is notorious that, at the north-west of Scheppmansdorf, there is neither to be found the plateau of Rooibank nor anything the physical aspect of which corresponds with the description of the oasis annexed by Captain Dyer;

(*h*) That there is no doubt that in order to solve the question at issue, and in particular to know the intention with which the author of the Proclamation employed the words " including the plateau ", the best witness must be Captain Dyer himself. His evidence, as has been seen, not only was entirely in agreement with the official report on the annexation, but also proved the correctness of the demarcation made by Mr. Wrey, and is in its turn corroborated by the physical aspect of the area in dispute and of the surrounding country, as well as by the sworn declarations of different people, declarations which may be summed up in the following form:

(i) Daniel Exma Dixon, 60 years of age, declares that he has known the territory of Walfisch Bay perfectly since 1861; that he was there on the date of the annexation, and was present when Captain Dyer was urged to annex grazing land beyond the mission station; that on the following day he conducted Dyer and the officers who accompanied him to Rooibank, and showed the former from the top of a sand-hill the grazing lands beyond the mission station towards the Ururas and indicated the position of that point; that Rooibank includes the whole bed of the river from the mission station up to Ururas, and that Dyer said that the boundary would run past that place; that a later effort to induce Dyer to extend the demarcation was unsuccessful; that between the mission station and Walfish Bay there are no pastures properly so called, so that if Rooibank were excluded from the territory the colony would have none; and, finally, as the water to the west of the mission station is brackish it is not as good as that found on the Ururas side;

(ii) Hendrik Petros, an old native, states that he was present at a conversation between Dyer and the deceased Piet Haibib, the chief of the tribe of the Topnaars, in whose territory Rooibank was situated, and that he heard Haibib agree to the annexation being extended as far as Ururas and Dyer declare that British territory would be extended to Ururas;

(iii) Willem, a native of about 65 years of age, states that he was present at Rooibank with Dixon and others at the time of Dyer's visit (Dyer in the course of his journey reached Zwartbank, the witness believed) and that he heard it agreed between Dyer and Piet Haibib that British territory should be extended to Ururas;

(iv) John Englebrecht, a native about 75 years old, states that he was present at the interview between Dyer and Haibib, and heard the latter consent to the cession of his territory as far as Ururas;

(v) Jan Sarop, an old native, states that a few days after the annexation he was informed by his chief, Piet Haibib, that the Englishman had annexed the territory as far as Ururas, that there was not sufficient pasture to the west of the mission station, and that both he and his father had always used the pasture at Rooibank;

(vi) Old Jim, *alias* Zacharias, a native of from 70 to 75 years old, asserts that two weeks after the annexation he was informed by Piet Haibib that it extended as far as Ururas, and adds that he recollects that a certain Outate had been arrested in Ururas by a British police officer;

(*i*) That at the time of the annexation Captain Dyer had no map of the interior, and could not define with accuracy particular spots; that amongst primitive tribes of nomad tendencies like those which inhabit South-West Africa, the names of places do not possess a fixed and definite meaning which is characteristic of European names; that Rooibank (a Dutch translation of the Hottentot word " Awahaus ") is the term long employed to indicate the plain of the Kuisip between the mission station and Ururas; that Scheppmansdorf was originally the name given by the missionaries to the mission station founded in 1842 in the Rooibank area, but that it applied afterwards to the whole area which was considered and made use of as the property and grazing commonage of the natives living in the mission station or in its neighbourhood; that the evidence given in 1885 before the mixed commission shows that the names Rooibank and Scheppmansdorf are in actual practice the same, and are used indiscriminately or with very little distinction to designate the tract of country extending between the mission station and Ururas; but this last word, as Mr. Wrey stated, " is merely the native name given to a large watering place for the cattle grazing between Ururas and Rooibank ", a name which does not express precise limits, and is applied by the natives to a certain part of the Scheppmansdorf lands; that the German Consul-General, Dr. Bieber, in his communication of the 8th June, 1886, stated that Awahaus, Rooibank, and Scheppmansdorf are names of the same place; that the word " Rooibank " can therefore be substituted for the word " Scheppmansdorf " wherever it appears in the Annexation Proclamation, and Commander Dyer's demarcation can be amended accordingly, as was proposed by the mixed commission of 1885, whose joint report is referred to in Recital VIII of this award; that as Rooibank or Scheppmansdorf forms an extensive area, it is impossible to fix a point within it for the termination of the line under discussion, but that the difficulty disappears, thanks to the words " including the plateau ", if by plateau be understood a definite area situated in the eastern or southern extremity of the former; and, finally, that the German member of the Philips-Goering Commission of 1889 agreed that if the plateau of Dyer's Proclamation were the area now in dispute the boundary line should run as far as Ururas;

(*j*) That the natives who inhabit Rooibank live and always have lived in the vicinity of the mission station, and from time immemorial have made use of the area under discussion to provide themselves with the means of subsistence,

to cultivate patches of ground, and to have at their disposal pasture, water, and fuel; that it is beyond doubt that all this extent of territory has been, in fact, an indispensable adjunct to a British village; that the natives have gardens in the tract in question, and that their cattle is pastured and watered ordinarily southwards as far as Ururas; that it is highly improbable that Commander Dyer failed to include in the boundary of the annexed territory and to place under a single jurisdiction the whole of the lands in which the natives of the country were interested; that Commander Dyer, advised as he was by persons acquainted with the locality, had the intention, as he says in his letter of the 14th September, 1887, of including in the annexation the native pasture-lands; and that according to his letter of the 24th April, 1889, he understood that the plateau annexed belonged to and formed part of Scheppmansdorf;

(*k*) That to the west of the mission station there is no adequate pasture-land or fuel supply, so that Dyer's intention " to annex an oasis thickly covered with grass and scrub and well watered " could not be carried out by drawing the boundary line in the position claimed by the German Government; but the presence of the tree called the " anna ", whose pods provide excellent food for cattle, makes of Rooibank a pasture-land of great value, whilst on the opposite or western side those trees do not exist, nor does the vegetation required for keeping cattle; that the water found in the river-bed between the mission station and the coast is brackish, and lacks the good qualities of Rooibank water; that, in addition to Mr. Wrey's report and the evidence of Mr. Dixon and Jan Sarop, mentioned above, as to the importance of the pastures situated to the east of the mission station and of the relative worthlessness of the land on the opposite side, these statements are corroborated by Dr. T. C. Sinclair and Mr. George Gale, the latter being the owner of herds grazing at Rooibank. Both are very well acquainted with the territory in dispute, and their respective assertions lend force to the other arguments employed in this memorandum; and, finally, that to the west of the mission station the bed of the Kuisip no longer offers that definite aspect which distinguishes it from the surrounding territory, an aspect which is characteristic of Rooibank, and justifies the application to it of the term " plateau ";

(*l*) That Great Britain exercised full jurisdiction over the territory in dispute before the acquisition by Germany of any territorial interest in South-West Africa, and also between the date of such acquisition and the commencement of the present controversy; that before the controversy commenced Great Britain protected the natives resident in Rooibank during the tribal wars carried on in Damaraland, and took the responsibility of preventing, by constant care and vigilance, their participation in such conflicts; that on the 16th April, 1885, Mr. Simpson, the resident magistrate at Walfish Bay, stated before the Angra Pequeña and West Coast Claims Commission the following: " It has always been understood that the Rooibank commonage extends to Ururas, and the people who live there have always made use of it. A certain number of Bastards have gardens there, given them by Mr. Palgrave and by my predecessor, and the said Bastards have been wont, when the grass was finished at Rooibank, to send their cattle along the river to Ururas "; that, according to the criminal register of the resident magistrate at Walfish Bay, he exercised jurisdiction at Ururas in 1882, and punished by flogging and imprisonment a person convicted of having stolen a sheep at that place; and that as a new proof of the exercise of sovereignty at Ururas may be cited the arrest there by a British officer in 1884 of one " Outate ", an incident mentioned in the statement of Old Jim, *alias* Zacharias, already quoted ;

(*m*) That the British settlement of Walfish Bay was acquired and its limits defined before any civilised nation thought of annexing the adjacent territory, for which reason it did not appear urgent to specify the boundary exactly until the neighbouring country was placed under the sovereignty of Germany; that in 1884 the British Government applied, without being asked, the doctrine of the " hinterland " in favour of Germany, abstaining, in spite of favourable circumstances and pressure brought to bear, from occupying the land in the interior bordering on German territory, which at that time comprised a zone of 20 miles only, reckoned from the coast line; and that therefore a reciprocal recognition of the said doctrine can be advanced against the present claim of the German Government, especially taking into account that this claim disputes an area actually annexed and effectively occupied by Great Britain before the existence of any German territorial right;

XXXIII. WHEREAS the British memorandum, the arguments in which are summed up in the preceding clauses, contains as appendices various documents of different descriptions supporting or amplifying the preceding statements without advancing any fact or argument of importance, as far as the decision of the question at issue is concerned, which in substance has not been already stated;

XXXIV. WHEREAS, on the 30th July, 1910, within the space fixed by Article 3 of the Declaration of Berlin of the 30th January, 1909, the replies in which each of the High Parties answers the memorandum previously presented by the other were handed to the Minister of State of His Catholic Majesty by the representatives of Germany and Great Britain, the German reply being accompanied by annexes containing authentic copies of the documents inserted in it and two copies of Dr. Stapff's map of the lower valley of the Kuisip, all of which documents were without delay officially transmitted to the arbitrator;

XXXV. WHEREAS in the German reply the following considerations or facts are advanced which are not contained in the preceding recitals:

1. That the argument which runs through the whole of the British memorandum, that the territory under discussion ought to belong to Walfish Bay because of its value to this possession, is an argument which, apart from the exaggeration involved by the supposition that the said territory is the only useful portion of the colony, would authorise the German Government to claim it on account of its importance for the service or development of the police station at Ururas;

2. That in the decision of the present dispute the statements of Captain Dyer contained in the Annexation Proclamation and in his report of the same date should alone be taken into account, but not what he said in much later statements;

3. That neither the Governor nor inhabitants of Walfish Bay ever made use of the territory under discussion for grazing sheep or working oxen;

4. That the word " Rooibank " which the mixed commission of 1885 proposed should be added to that of " Scheppmansdorf " in the text of Captain Dyer's Proclamation can only be admitted as explanatory and supplemental, although the authority of the proposal is recognised, but not as a substitute for the other word, whose greater precision does not allow the attribution to it of the different meanings (" commonage or pasture ", " river-bed ", "valley ", " oasis ", " patch of ground ", and " plateau "), which the British memorandum attributes to the term " Rooibank ";

5. That the use of the phrase " including the plateau " found in the Proclamation of 1878 is not only explained on the grounds stated at the proper moment in the German memorandum, but is also explained because at the time of annexation there were no maps of the territory;

6. That the Namib is not absolutely worthless as is claimed by England, but, as the British commissioner, Colonel Philips, remarked in his report of the 23rd January, 1889, " it has the advantage, owing to the hardness of its surface, that it can be crossed more easily and rapidly than the river plain ";

7. That the fact that an area presents notable or salient features in comparison with its surroundings or as contrasted with them, as may happen in the case of Rooibank, does not justify its description as a " plateau ";

8. That the Dutch phrase " de plaat " supposed to be used by the inhabitants of Walfish Bay to designate the valley of the river between Scheppmansdorf and Ururas, and which it is thought probable that Captain Dyer translated by the word " plateau ", is a phrase whose use in this particular sense is denied, according to their recent statements or reports, by Hugo Köhler, Administrator at Swakopmund, George Evensen, the District Commissioner Von Frankenberg, and the missionary Johannes Boehm, all of them knowing the bay well, and also the adjacent territory and its inhabitants;

9. That when Captain Dyer speaks in his report explaining the annexation of " an oasis thickly covered with grass and scrub " it is not because he had orders or the intention to annex it, but because the words quoted are a mere supplementasy description, and at the same time a defence of his exceeding the proper boundaries when he settled the extent of the annexed territory;

10. That Rooibank is too far from Walfish Bay for people living at the bay to go there for drinking water, and that the brackish water found to the west of Scheppmansdorf is useful and beneficial for cattle;

11. That the tree from which Jan Jonker hanged the Berg Damara was situated in the middle of the bed of the Kuisip and within the territory in dispute to-day, and it is impossible that it could have stood at the place marked with a red cross on the map facing p. 74 of the British memorandum, since in the said place there are only bare sand-hills without trees or scrub of any kind, all of which is expressly attested by the farmer George Evensen in a new statement made on the 9th March, 1910;

12. That the evidence of the Topnaar Hottentots, made use of by Great Britain, deserves no credit not only on account of their natural inclination to deviate from the truth, but also on account of the effect produced upon them by appearing before the authorities and of their ignorance of what an oath means; this statement being confirmed indirectly by the qualities attributed to the Topnaars by Mr. Wrey in his report, and directly by the evidence of the employé of the Mining Syndicate of South-West Africa, Eugene von Broen, in a recent statement;

13. That, according to the declaration made on the 22nd March, 1910, by the German sergeant of police, Carl Leis (ordered, as he says, to ascertain whether any of the natives living on the bank of the Kuisip could make a statement with regard to the taking possession of the territory), approximately one month earlier the missionary Schaible asked the Hottentot Gottlieb, called also Jan Sarop, whether he was at Rooibank at the time of the annexation, and he answered that at that time he was at Walfish Bay, and added, in reply to fresh questions, that, with the exception of Piet Haibib, the only person who was living ordinarily at Rooibank was a Hottentot now deceased;

14. That the evidence of Von Broen, dated the 21st March, 1910, is in agreement with the evidence of Carl Leis. Von Broen states that he had heard from the lips of a native that all the natives of the country who were present at the annexation were dead, believing that this was said after the death of Piet Haibib " about a year ago ";

15. That, in view of this, the evidence of the old Topnaar Hottentots, Hendrik Petros, Willem (an old native policeman in receipt of a pension from the Cape Government), and John Engelbrecht, inserted in the British memorandum, cannot be accepted, at least in the sense that the witnesses were present at Captain Dyer's visit to Rooibank;

16. That the Hottentot Willem in his declaration also falls into the error of supposing that Captain Dyer and his companions were in Ururas and Zwartbank in 1878, when they did not go beyond Scheppmansdorf;

17. That the credibility of the witness Mr. Koch, which was incidentally questioned in the British memorandum on the ground of statements made by Mr. Shippard, cannot be impugned, as it was, out of mere personal considerations, above all in the case of an individual who, during the long years in which he was successively a landing agent and in the service of the Rhenish Missionary Society and of the German Government in Swakopmund, did nothing to justify in the least the bitter criticism of Mr. Shippard;

18. That, in contradistinction to what was done in the British memorandum in the matter of Ludwig Koch's evidence, care has been taken in the German memorandum not to set up a similar precedent, although an unfavourable opinion could have been expressed on the subject of the witness Daniel Dixon, whose first statement, made on the 16th March, 1892, and examined at length in the appendix to the German memorandum, raises, as therein stated, such questions that value of any kind can hardly be attached to it;

19. That communication between Sandwichhafen and Scheppmansdorf for the transport of goods is not only possible (in spite of what is said by Dr. Sinclair in his report inserted at the end of the British memorandum), but is proved by the fact that this route was covered in a few hours by German troops, a fact mentioned by Von Broen in his report of the 21st March, 1910;

20. That the bed of the Kuisip between Scheppmansdorf and Ururas never was a plateau, as is stated in Dr. Sinclair's report referred to, and such a story was refuted long ago by the investigations of the eminent geologist, Dr. Stapff, published, as a commentary on the map of the lower valley of the Kuisip, in the copy annexed to the present reply;

XXXVI. WHEREAS in the reply of the British Government the following facts and arguments are added to those contained in their memorandum:

1. That the letter of the 12th August, 1885, signed by Dr. Bieber and Mr. Shippard, and cited in recital VIII, proves, by saying that " the eastern boundary marked on Dr. Theophilus Hahn's map, published in 1879 ", is incorrect, that the German commissioner of that time thought the frontier which the German Government now claim, that is to say, the frontier formed by a straight line from the mission station to the Swakop, erroneous;

2. That Mr. Simpson's statement cited in the German memorandum, that he " had crossed from Rooibank to the Swakop River by the plateau ", does not necessarily signify that he meant the Namib by " plateau ", but that it may refer to the fact of his having crossed in this journey the river plain, starting from the mission station; that, however, in any case it is undeniable that in the same circumstances in which Mr. Simpson made the statement alluded to, he

also asserted, as it was stated in the proper place, that " the whole of the plateau " contains or includes Ururas, by which name he designated the territory in dispute to-day;

3. Nor does Sir Hercules Robinson's letter referred to in recital XXVI, in which the desire is expressed that the boundaries of the " plateau between Scheppmansdorf and Rooikop " should be defined precisely, justify the contention that that word referred to the Namib, but, on the contrary, shows that the writer's mind was dominated by the idea that the plateau alluded to, little known then on account of the lack of maps, was a definite area susceptible of demarcation, conditions which do not apply to the part of the Namib situated to the west of the Scheppmansdorf-Rooikop line; and it ought to be added to all this that Sir H. Robinson's despatch of the 14th January, 1882, cited in paragraph (*f*) of recital XXXII, makes use of the phrase "plateau of Rooibank" to designate the territory now in dispute;

4. That when Captain Dyer was recently consulted with reference to the meaning attributed to his former statements in the German memorandum, he declared on the 9th June, 1910, that in the year 1878 he proceeded from Walfisch Bay to Rooibank, where he was told he would find the pasture and water necessary for the use of the station; that he made the journey in a bullock-wagon driven by Dixon and arrived at the mission station on a fine, clear day, which made it possible to see at a considerable distance; that Mr. Ryden, who accompanied him, showed him from a sand-hill in a south-easterly direction a wide, flat space of some miles in extent where there was water, and that his intention in using the term " plateau " was to include that space within the annexed territory; that Dixon made some remarks to him about Zwartbank, but that he did not pay much attention to them, because they were vague and contradictory; that he does not recollect any allusion to Ururas, nor does any such name appear on the map of the coast; that in fixing the boundary he was entirely guided with regard to distances by the Admiralty chart, which was drawn to a scale of nautical miles; and that all the colonists appeared entirely satisfied with the demarcation, and they showed themselves so expressly a year afterwards when he made a new visit to Walfish Bay;

5. That on the same date as the former statement Mr. Sandys, the official paymaster of Her Majesty's ship *Industry* and the companion of Captain Dyer in his visit to Rooibank, corroborated all the details testified to by the latter;

6. That the German observations contained in recital XXVI, according to which it is curious and remarkable that Commander Dyer, in his second letter or communication of the 14th September, 1889, did not cite Ururas, if he understood that the grazing flats, included in the annexed territory, terminated there, and say that the plateau was situated " above Rooibank ", are observations which are answered by remarking that Ururas was not marked on the map used by Dyer for the annexation, and that the bed of the Kuisip rises continually and gradually from Walfish Bay towards the interior;

7. That the hypothesis or argument mentioned in the last paragraph of recital XXVI, that Captain Dyer used the phrase " including the plateau " to justify his having delimited territory in excess of his instructions, is not only not in accord with the evidence given by him and fails sufficiently to explain the phrase quoted, but disregards the extent of the discretional powers conferred on the official entrusted with the annexation, and which he had perforce to exercise by himself owing to the absence of Mr. Palgrave;

8. That the evidence of the missionary Bochm cited in the German memorandum to prove that the bed of the Kuisip, to the east of the mission station, is

barren except for trees, and does not contain the grass, pastures, and water to which Captain Dyer alluded, disregards the importance of the tree called the " anna " as regards the feeding of cattle, and is contradicted besides by statements by Mr. Simpson, Surveyor Wrey, Captain Dyer, Mr. Dixon, Jan Sarop, Dr. Sinclair, and George Gale, to be found in their proper places in the preceding recitals;

9. That the invitation given to the natives to attend the ceremony of annexation is a proof that care was taken of their interests, and therefore of the stretch of pasture-land which they used for their cattle, which stretch prolonged to Ururas is not excessive, after all, even for the needs of the white population resident at Walfish Bay; that the Topnaars, although partly nomad, have always formed, as it appears from the evidence already cited, a native community in the neighbourhood of the mission station, which was established there precisely for this reason; and that there does not exist the slightest proof that, as is insinuated by Germany, the satisfaction of the natives of the country at the annexation was stimulated by alcohol, for this satisfaction was testified to by Captain Dyer and corroborated by other evidence produced in the British memorandum;

10. That against the German statements that the extent of the place called Rooibank never can be determined, because it depends on individual opinions, and that with this word Captain Dyer's Proclamation does not designate a place but a physical feature, such as a mountain or rock, two facts are to be invoked: the firm opinion of the natives, who consider that their pastures extend to Ururas, and the South African custom of deriving the name of extensive areas from some natural feature;

11. That the Admiralty charts cited in the German memorandum, as is stated in recital XXVIII, to prove that until the year 1885 the British authorities thought that the district now under discussion was outside the territory of Walfish Bay did not show exact but only approximate boundaries, as is expressly stated on them, because it was necessary to wait until they could be fixed by an inspection of the plateau, as Captain Dyer, for lack of a map of the interior, had neither been able to fix them precisely nor had indicated them on the map which he used;

12. That the argument in the German memorandum immediately following the preceding one, and based on the contract of the 4th August, 1883, with regard to the concession of mining rights, is to be met with this reply: That the term Rooibank is the name of an extensive tract of land which reaches to Ururas; that the act of the British magistrate in legalising the deed does not indicate his agreement with its contents; that there is nothing in the agreement to show that the contracting parties, Messrs. Wilmer and Evensen, failed to understand, as Mr. Simpson the magistrate did, that Rooibank extended to Ururas, and that both places were situated within the British boundaries; that, on the contrary, it is proved that the said gentlemen admitted these facts, since in 1885, during Mr. Wrey's visit of inspection, they petitioned the Cape Government for two lots of territory in Rooibank and another lot in Ururas; that Mr. Wilmer understood the territory of Walfish Bay to continue to Ururas, as Mr. Wrey makes it clear in his affidavit of the 25th June, 1910; and, finally, that the circumstance that the mining concession alluded to was outside Rooibank, and bounded by the south bank of the Kuisip, is in no way opposed to the claims of Great Britain;

13. That the fact of goods being transported from Sandwich Harbour to Damaraland by the back of the church at Scheppmansdorf and of their being

stored in its vicinity without paying duty, cited in the German memorandum as a proof that the British authorities did not consider formerly that the district now in dispute formed part of the territory of Walfish Bay, are facts as to which the following observations must be made: That it was only during the short period between the 17th August, 1884, and the 13th August, 1885, that customs duties were levied at Walfish Bay, and that, therefore, there was no object in avoiding their payment; that it is possible that during this time some contraband trade may have been carried on in an extreme corner of the territory at a considerable distance from the place where the authorities resided and without the magistrate being able to prevent it, owing to the smallness of the police force at his disposal, but that in any case the existence of such a trade would only prove that the value of the goods carried was too insignificant to justify the establishment of a custom-house on the Kuisip, a consideration corroborated by the evidence of the missionary Boehm, mentioned in recital XXVIII, in which it is stated that the " importation of goods could not be considerable and lasted besides only a short time, because the custom-house at Walfish Bay produced so little that it was not sufficient to maintain one functionary "; that, on the other hand, the lack of precise boundaries could make Mr. Simpson doubtful whether the store or depôt of Messrs. Wilmer and Evensen, situated, according to a sketch shown by the latter, to the south of the mission buildings, was or was not within British territory, since a comparison between the said sketch and Mr. Wrey's plan shows that the place in which Mr. Evensen lived in 1885 was on the boundary-line (C—D) near a place where the valley of the Kuisip cutting that line forms an extensive " kloof " with trees and other vegeation to which the word "corner" (" eck "), used in Mr. Sichel's declaration, may refer; and, finally, that the German statement that Messrs. Wilmer and Evensen conveyed their goods, before Walfish Bay was declared an open port, to a depôt situated 1,600 metres to the east of the mission station (that is to say, within the territory now in dispute) is inexact, for it appears from the evidence of Mr. Evensen himself that his residence was transferred to the place the position of which coincides with that of the depôt referred to towards the year 1886, a time when the Customs had already been suppressed;

14. That the incident of the murder committed in the month of March 1885 by Jan Jonker, used by Germany to maintain that the place where the victim was hanged was within the district now in dispute, in spite of Mr. Simpson's recognition that it was outside British territory, rests on the totally unfounded hypothesis that there are no trees in the Kuisip valley outside the lines laid down as the boundary by Mr. Wrey; that the British Government maintain against this hypothesis, with the authority of Mr. Simpson, that the Berg Damara was hanged by Jan Jonker from a tree situated outside the boundary mark (C), 600 yards from the mission station; that the existence of trees in this place has been proved in the preceding paragraph of this recital; and that Mr. Simpson's statements are confirmed by Mr. Evensen's evidence, cited in the German memorandum, which asserts that the tree from which the body of the man was hanging stood *at some 200 metres to south-west of the witness's house*, which was situated then, as is also noticed in the preceding paragraph, on the boundary line uniting the pillars (C) and (D):

15. That as the uninterrupted claim of England to the bed of the Kuisip as far as Ururas and the constant exercise of sovereignty over this territory is established in the British memorandum, the statements adduced in section (C) of the German memorandum are rebutted, most of which statements, on the other hand, although based on sufficient evidence, would only prove that

Mr. Simpson was ignorant of the exact position of the boundaries or misunderstood the Proclamation of Annexation, without its being possible in any case for the case of Great Britain to be prejudiced thereby;

16. That the evidence of the missionary Boehm, in which he refers to the circumstances of the annexation in 1878, is merely incorrect or hearsay, because the witness was not transferred to Walfish Bay till 1883;

17. That it is impossible to rely on the accuracy of the declaration of the trader Sichel as to the position of Messrs. Wilmer and Evensen's store, which at the moment to which the witness refers was situated on the boundary line half-way between the pillars (C) and (D); and that, on the other hand, there is an indication that Mr. Sichel himself admitted the extension of British territory to Ururas by the fact that the firm Martens and Sichel, in which he was a partner, asked the Government of the Cape through the resident magistrate for three lots, two of them in Rooibank and the third in Ururas, which is bounded on one of its sides by the line (F—G) in Mr. Wrey's plan:

18. That a great part of the evidence of Dr. Belck is also hearsay or rumour; that, with regard to the statement of this witness as to the position of Fredericksdam and the boundary post or beacon which was ordered to be placed at this point, it is to be noted that the said beacon was afterwards pulled down, and that the German Colonial Company, after having formulated a protest, recognized in a letter dated the 29th January, 1887, addressed to Prince Bismarck, and officially transmitted by him to the British Government, that he ought to withdraw the complaint against " the removal of the beacon indicating the German frontier which had been put up at Fredericksdam in accordance with data supplied by Dr. Belck, because more exact data showed that the said place is in fact situated in British territory "; that such a statement prevented further discussion as to the position of Fredericksdam with regard to the boundary, and any difficulty from arising as to the correctness of that part of the southern frontier of Walfish Bay, until the Commissioner Von Frankenberg raised the question again in 1904; and, finally, that in spite of the private character which Dr. Belck ascribed to the boundary beacon mentioned above it is very clear that the German Colonial Company considered it as a frontier mark or sign;

19. That the fact that the policeman referred to by Dr. Belck at the end of his declaration was not pursued or arrested proves nothing, since there is no evidence that the resident magistrate knew his whereabouts or desired to compel him to continue his service after his desertion;

20. That the part of Mr. Evensen's declaration referring to Captain Dyer's intention is based solely on hearsay, and that his partner, Mr. Wilmer, thought differently about the matter, according to Mr. Wrey's affidavit of the 25th June, 1910, in which he says that Mr. Wilmer considered the evidence of the natives who lived at the time of the annexation to be in conformity with the opinion firmly held relative to Captain Dyer's action, the evidence being that the water and the pastures in the area extending between Rooibank and Ururas were unreliable, that the whole area is run over by their cattle, belongs to their lands, and is subject to the common rights of their tribe;

21. That the origin of the boundary question cannot be ascribed to a supposed confusion on Mr. Shippard's part between the names Awahaus and Ururas, because the assertion is based on an unofficial suggestion, written on the 1st September, 1886, on the back of a communication or letter, and Mr. Shippard, in a report on the 30th of the same month and year, proves most completely that he had not fallen into the error or confusion supposed, because

he defines clearly the terms " Awahaus ", " Rooibank ", and " Ururas "; to all of which it is necessary to add that the British Government have never founded any argument on the hypothesis of Ururas and Awahaus being identical:

22. That according to Captain Dyer's statement, mentioned in section 4 of this recital, he used nautical miles in the settlement of the boundaries of the territory; that Surveyor Wrey understood this to be the case; and that point (J) on the northern frontier was fixed on Nuberoff Kop on account of the fact that this hill forms a natural eminence situated more or less 10 miles from the mouth of the Swakop, and that it was believed that Captain Dyer had referred to it, as Mr. Wrey says in his sworn declaration of the 25th June, 1910, and as Mr. Simpson equally declared before the mixed commission of 1885, observing also that the point chosen was reckoned to be a little less than 10 miles from the coast;

23. That, apart from the indisputable fact that Captain Dyer referred to nautical miles, as it was to be expected, in his description of the annexed territory, the British Government do not admit the existence of any question other than that relative to the frontier between Scheppmansdorf and Rooikop, including the plateau; because this was the point in dispute at the date of the Anglo-German Agreement of 1890, and it would involve a departure from the spirit of this Agreement to import into the controversy new claims like those formulated by the German Commissioner, Von Frankenberg, in 1904, and rebutted immediately by the British commissioner, Mr. Cleverly, claims which were not authorised then by the German Government, and are raised afresh now after thirty years of continuous and effective occupation on the part of Great Britain when it had been always understood and recognised since 1885, that the interpretation of the phrase " including the plateau " was the only matter in dispute, and when the correctness of the British frontier at Fredericksdam had been admitted, as stated in section 18 of this recital;

24. That the thesis that the demarcation of the territory of Walfisch Bay carried out in 1885 ought to have been made jointly by the German and British Governments, having regard to the contiguity of their respective possessions, cannot be admitted, because, as that territory was acquired and its boundaries fixed in a general way years before any civilized nation had established itself in the adjacent region, the only thing lacking, at the time of Mr. Wrey's survey, was a precise survey of the boundaries proclaimed previously, with regard to which demarcation the fact that another Power had come to occupy the neighbouring district could not exercise any influence or require any co-operation; and that in so far as the authority of international law can be invoked to decide the present dispute it comes to the support of the British claim, because the civilized nation acquiring territorial rights in a region where another is established must respect in its entirety the position of the latter, and any doubt as to whether it acquired, or wished to acquire, a certain area must be settled in favour of the first occupant;

25. That, in conclusion, the British Government maintain that Mr. Wrey's demarcation represents exactly the boundaries of the territory of which Great Britain took possession on the 12th March, 1878; that Britain has always held this view without any change of opinion; that she has exercised full and uninterrupted sovereignty over the area named from the date of the annexation; that the drawing of the boundaries as proposed and defended by the German Government would deprive the British station of ground used until the Agreement of 1890 and indispensable to the needs of the inhabitants of the Colony;

and that the German Government have not succeeded in rebutting the proofs of these contentions adduced by the British Government;

XXXVII. WHEREAS the arbitrator undertook, the better to understand the question at issue, to make an ocular inspection of the territory in dispute, and whereas he visited the spot towards the end of the year 1910 and at the beginning of 1911, accompanied by the German commissioner, Herr van Frankenberg, and the British commissioner, Mr. Lansdown, and examined for the length of time that he considered necessary the aspect, conditions, and boundary of the district in dispute, asked for and heard the necessary explanations of both commissioners, and endeavoured as far as posssible, in agreement with them, to go over the ground in the direction followed by Captain Dyer in 1878, in order to obtain impressions similar to those obtained by that officer, and to judge of his intentions with the best guarantees of accuracy:

I. Considering that there are two fundamental questions which it is necessary to examine in this award: (1) Whether the southern limit of the territory of Walfish Bay ends in the proximity of the mission church of Scheppmansdorf, or, on the contrary, whether it should be prolonged to Ururas in accordance with Mr. Wrey's survey; (2) whether this southern boundary should begin at a point 15 nautical miles or 15 statute miles from Pelican Point;

II. Considering that the two questions should be examined separately, having regard to the varied character of the arguments which can be invoked for their solution, and in view of the fact that, as regards the second question, one of the High Parties asserts that it was provided for by the Agreement of the 1st July, 1890, and is therefore included in the present controversy, whilst the other denies this;

III. Considering that both questions must be solved in conformity with the principles and positive rules of public international law, and, where they fail, in conformity with the general principles of law, since neither the said Agreement of 1890 not the supplementary Declaration of Berlin of the 30th January, 1909, in any way authorize the arbitrator to base his decision on other rules, and it is notorious, according to constant theory and practice, that such authority cannot be presumed;

IV. Considering that since, with regard to the first of the questions indicated, both parties recognize that its solution depends on the interpretation placed on the phrase "including the pluteau", contained in the Annexation Proclamation of the 12th March, 1878, and later official documents confirming it, it is necessary to determine the interpretation which should be placed on those words, utilizing the general principles of law, which are the same as the principles of international law, and according to which it is necessary to consider, in order to determine the intention which inspires an arrangement or act, the grammatical value of the terms used, the consequences which result from understanding them in one sense or the other, and the facts or antecedent circumstances which contribute to explain them;

V. Considering that, in order to attribute to the phrase quoted the value which belongs to it in law, it is necessary in the first place to decide what the Annexation Proclamation or its author, Commander Dyer, understood by the word "plateau", that is to say, whether he understood the high plain of the Namib as is asserted in the German case, or a portion of the valley of the River Kuisip comprised between the houses of the Scheppmansdorf mission and Ururas as is maintained in the British case;

VI. Considering that, even if it is admitted that by "plateau" is ordinarily understood "a high plain", this secondary attribute of "height" is essentially

relative, inasmuch as there are places called " plateaux " lying lower than the surrounding country, as is shown by the slightest examination of the use which is made of this word, not only amongst common people, but amongst persons of undoubted competence, who, in geographical descriptions, speak of terraced plateaux, of plateaux dominated by the adjacent mountains, and even in one case of a plateau which a contemporaneous writer says " descends " between two chains of mountains to form the beginning of a river-bed;

VII. Considering that it follows from this that the greater elevation of the plain of the Namib as compared with the adjacent plain of the Kuisip is not in itself a sufficient reason to suppose that Commander Dyer necessarily referred to the former when he spoke of " the plateau " which was to be included in the annexed territory;

VIII. Considering, further, that a sufficient reason for asserting that Commander Dyer alluded to the Namib by the word " plateau " is not afforded by the statement in the Annexation Proclamation that the territory of Walfish Bay should be bounded " to the east by a line from Scheppmansdorf to Rooibank, *including the plateau* ", which only shows that the plateau in question must be included in the territory *by the eastern frontier*, which starts from Scheppmansdorf; because, without denying anything, it is very clear that, even if by " plateau " is understood, not the Namib, but the district comprised between the Scheppmansdorf Mission and Ururas, and it is therefore admitted that the southern frontier should be prolonged to this last point (which is regarded as the end of the Scheppmansdorf pastures), the plateau in question must always be in the south-eastern corner of the annexed territory, and will be included in it not only by the southern frontier, but also by the eastern, as required by the Annexation Proclamation;

IX. Considering that the phrases used by Mr. Simpson and Sir Hercules Robinson, and cited in the German memorandum to prove that in the year 1885, before the question of the boundary arose, the Namib was called a plateau by those British authorities, are phrases which, besides admitting of a different interpretation, as is shown in the reply of Great Britain, do not set aside the fact, which is amply evidenced, that Mr. Simpson, at the same date, and Sir H. Robinson in 1882, called the territory now under discussion " a plateau ", a fact which deprives an argument based on the hypothesis that that word was only used to designate the Namib of all its force;

X. Considering that, although Captain Dyer, in his report explaining the annexation, spoke of " the plateau of Rooibank and Scheppmansdorf to the south-east ", it does not necessarily follow from these words that Scheppmansdorf is situated to the south-east of the plateau nor the plateau to the north-west of Scheppmansdorf (in which case it would be necessary to understand by " plateau " the Namib); because, as it is admitted in the German memorandum, the words quoted can be taken also in the sense of merely indicating that Scheppmansdorf is on the south-east of the annexed territory, which neither fixes its position with regard to the plateau nor excludes the possibility of understanding the phrase as an allusion to the fact that both places lie to the south-east of the territory;

XI. Considering that, on the supposition that " the plateau " is the Namib, it would not be possible to explain what Commander Dyer wrote in his report of the 12th March, 1878, viz., that he made " a journey in a bullock-wagon to Rooibank ", taking with him two officers to accompany him " in the examination of the plateau ", because, in order to examine the plateau, assuming the Namib was thereby meant, it was not necessary to go to Rooibank, since hours

before reaching that point he would have begun to cross " the plateau ", and could take into consideration its characteristics as far as he considered that they offered any interest from the point of view of the annexation;

XII. Considering that, on the hypothesis that by plateau the Namib was meant, it would be impossible to explain the words used by Commander Dyer in the report mentioned in the preceding consideration, which words immediately followed those quoted in that consideration, *i.e.*, " *this place is an oasis* ", words which must refer to the word " plateau " which immediately precedes them, since the demonstrative pronoun " this " can only be properly used in this way, as the use of another pronoun or expression would be grammatically necessary to refer to a word farther from it in the phrase;

XIII. Considering that against this grammatical interpretation it cannot be argued that the word " place " cannot properly refer to a " plateau ", and it must be supposed, therefore, that it refers to some other term in the text quoted; because the word " place " has a sufficiently wide meaning both in English and other European languages to designate a space, position, or locality of very varied extent and conditions;

XIV. Considering that, without prejudice to examining later the real meaning of the phrase " including the plateau ", around the interpretation of which a great part of the question at issue revolves, the difficulty is at once noticed of reconciling the use of that phrase with the hypothesis repeatedly advanced that the Namib is the plateau alluded to by Captain Dyer; because if by plateau is to be understood the part of the Namib situated to the west of the Scheppmansdorp–Rooikop line, it is well known that the said line includes that district in the annexed territory, with the result that the phrase becomes absolutely superfluous, and if by plateau is understood the whole Namib in general it is evident that the Scheppmansdorf–Rooikop line *cuts* it and does not *include* it, so that the phrase in question becomes entirely inappropriate;

XV. Considering that if the hypothesis that the word " plateau " alludes to the Namib in the Annexation Proclamation is discarded, and the hypothesis is examined that the said word refers to a portion of the Kuisip valley, it is impossible to cite against this hypothesis Colonel Philips's statements that this district can be designated in a more satisfactory manner by the term" plain " than by the term " plateau ", nor Mr. Wrey's that that term is an erroneous designation as employed in the Annexation Proclamation; because, although such statements imply a criticism of the word used by Commander Dyer, they do not throw doubt on the fact that " plateau " refers to the bed of the river, nor do they justify the deduction that a mistake impossible in the case of a person of his competence is thereby attributed to the author of the Proclamation, since the statements do not prejudice in any way the question whether he used the term "plateau" of his own initiative or whether he confined himself to respecting or translating another term already used by the inhabitants of the territory;

XVI. Considering that, although it is held to be fully proved that the witnesses, Messrs. Kohler, Evensen, Frankenberg, and Boehm, mentioned in recital XXXV, paragraph 8, of this award, never heard the inhabitants of Walfish Bay use the Dutch phrase " de plaat ", which is supposed to be the origin of the use of the word " plateau " as a designation of the territory under discussion, the said witnesses neither assert nor can assert anything of their own knowledge as to whether the phrase " de plaat " or the term " plateau " were employed at the time of the annexation in the sense mentioned, since at that time none of them was living in the territory;

XVII. Considering that Mr. Simpson, when he appeared in 1885 before the mixed commission, and Sir Hercules Robinson, in his despatch of the 14th January, 1882 — that is to say, before the question of the boundary arose, and more than a quarter of a century before the statements of the former witnesses — called the strip of the valley of the Kuisip under discussion a plateau, and that the word does not appear to be taken from the Annexation Proclamation in either of the two statements, as they are found in the case, and that the possibility is not excluded that its employment was authorized by the general use of language;

XVIII. Considering that there is nothing to justify the contention that Captain Dyer, in his report of the 12th March, 1878, used the word " plateau " as a description, which he considered exact, of the territory now under discussion, and not as a more or less special name consecrated by custom, and which it was his business not to correct but to repeat, since he had not sufficient reason to reject it as absurd;

XIX. Considering that, for the reasons explained, it cannot be asserted that the criticism passed on Mr. Philips and Mr. Wrey with regard to their use of the word " plateau " as referring to a portion of the Kuisip valley implies the attribution to Mr. Dyer of incompetence and error only admissible on the hypothesis, which has not been proved, that he used the term " plateau " for the first time in the sense of which we are speaking;

XX. Considering that Captain Dyer's statement in his second report of the 14th September, 1887, that the plateau was situated " above Rooibank ", cannot be cited against the assumption that the term " plateau " in the Annexation Proclamation referred to the valley of the Kuisip, because, besides these words being sufficiently explained in later reports of Mr. Dyer, which must be considered to have the same weight as evidence as his report in 1887, the statement in this last report is perfectly applicable to the bed of the Kuisip, which rises constantly and gradually towards the interior from the coast and runs on above Rooibank within the zone in dispute, this name being understood in the sense which will be stated and justified later on;

XXI. Considering that, in view of the terms in which Commander Dyer expresses himself in his report of the 12th March, 1878, the importance of which as regards the solution of the question pending, in contrast to what is the case with other later reports, is not disputed by either of the High Parties interested in the matter, it is to be understood that, if the natural meaning of the words is not strained and the order in which they appear is attended to, the lack of " fresh water and pasture in Walfish Bay " and the necessity of including in the annexation " a place which contained both things " was the motive which determined his " journey to Rooibank " in order to examine " the plateau " which " is an oasis thickly covered with grass, with a good water supply, and the nearest available to provide the bay with water and good pasture ", from which it necessarily follows that a greater or smaller part of the valley of the Kuisip was what Commander Dyer desired to designate and did designate by the word " plateau ", since within the annexed territory the characteristics required to comply with the description cited can only be found in the river bed;

XXII. Considering that, Mr. Dyer's words being thus understood, the fact that he made a journey to Rooibank to examine the plateau is explained, because the pasture-land and well-watered country which the plateau contained, and with the annexation of which we are dealing, could only be found at Rooibank;

XXIII. Considering that, this point having been established, the phrase " this place is an oasis " becomes also intelligible because the German memorandum ends by recognizing the possibility, which in any case would be evident, of calling Rooibank an oasis when its fertility is compared with the rest of the annexed territory — a comparison which, even if not explicitly indicated in Captain Dyer's words, may be supposed to have been present in his mind, as it would be in the mind of anyone who, after travelling for long hours over a poor or barren country and over the desolate plain of the Namib, enters the district of Rooibank, which is covered with grass and well wooded;

XXIV. Considering the featureless character of the bed of the Kuisip from the neighbourhood of Scheppmansdorf, the regularity of its broad surface, its noticeable height, which contributes to diminish the impression which the Namib might cause as the dominating height (when the trees do not hide it), and the absence from it of any channel indicating the superficial passage of the waters of a river, explain how it was called " plateau ", that is to say, " elevated plain ", although its elevation was less than that of the Namib, which bounds it to the north, and of that of the sand-hills which surround it on the south;

XXV. Considering that if the previous arguments are admitted, and therefore that, with more or less propriety as to the use of the word, but with no uncertainty as to the intention, what is called " plateau " in the Proclamation of Annexation is part of the valley of the Kuisip, the principal problem still remains undecided, namely, that relative to its extent and limits, or, in other words, whether the said plateau should be understood as ending near the old church at Scheppmansdorf or, on the contrary, should be prolonged to Ururas;

XXVI. Considering that against the prolongation of the plateau to Ururas the omission of any mention of this locality, both in the Proclamation and in the report of the 12th March, 1878, and even in the second report of Mr. Dyer, dated the 14th September, 1887, cannot be urged; because, with regard to the two first the omission is easily explained, since neither does the name " Ururas " appear in the map of the coast used for the annexation, nor is it clear that Commander Dyer knew of it at that time; and with regard to the second report, it was natural that its author did not wish to use, in explanation of his intentions, a name which he had not had in his mind when he carried out those intentions;

XXVII. Considering that it cannot be maintained either, in the sense set out, that Scheppmansdorf is a fixed point constituted by the mission buildings, in such a way that the mention of it in the Proclamation of 1878 is sufficient to warrant the claim that the eastern frontier of the annexed territory should be traced close to them; because all the information obtained with regard to this matter, and even the very declarations of the German witnesses, agree that Scheppmansdorf is something indefinite and vague; the missionary Boehm saying in effect, as was stated in recital XXVIII, that this place is about a " kilometre and a half in extent ", that it was called previously Awahaus or Rooibank, and that it is the principal place of the Namas and Hottentots, although lacking the fixed character common to European hamlets or villages and the " exact limits for the community or tribe "; the trader, Joseph Sichel, asserting that Scheppmansdorf is ordinarily called Rooibank (whose undefined character is expressly recognized in the German statements), and Dr. Belck expressing himself in analogous terms;

XXVIII. Considering that, though the witnesses mentioned think that the eastern frontier of the territory ought to pass close to the church of Scheppmansdorf, the words transcribed prove that their opinion is not based on the fact that Scheppmansdorf being a fixed point, which is the question at issue at this

moment, but that it is an opinion maintained after recognizing as clearly as possible, as we have seen, that that place has no precise limits, or, in other words, is exactly the opposite to what a fixed point represents;

XXIX. Considering that the words employed by Mr. Dyer in his report of the 12th March, 1878, " there being no fixed points on this immediate coast, it was determined that the Rooibank plateau and Scheppmansdorf to the south-east should be included in a line drawn from 15 miles south of Pelican Point to 10 miles inland from the mouth of the Swakop River ", cannot be interpreted in the sense that Scheppmansdorf was considered at that date as a fixed point and chosen for lack of fixed points in the coastal region to establish the boundary of the territory, because against this interpretation the following arguments militate:

(i) That if it is understood that Scheppmansdorf is designated as a fixed point in the sentence which is being discussed, this is no reason for not attributing the same character and function to the plateau of Rooibank, which is mentioned immediately before and is governed grammatically by the same verb — a sequence which nevertheless seems to be avoided, or which it is not desired to deduce from the interpretation which is impugned;

(ii) That, far from its appearing that the plateau and Scheppmansdorf are both fixed points, as follows from what has been said, they embrace a considerable area;

(iii) That the mere fact that the author of the report refers to the *inclusion* of Scheppmansdorf and the plateau of Rooibank within a line indicates that neither the former nor the latter are to be taken as fixed points, but as places of greater or less extent situated *inside* the frontier, and which therefore cannot be points on it marking or indicating its direction precisely;

(iv) And, finally, that it is much more natural, simple, and logical to understand, in consonance with what precedes, that the lack of fixed points on the coast is invoked in Mr. Dyer's report in order to justify the extension of the western frontier of the territory along the " immediate coast " being determined in miles and not by means of places or physical features;

XXX. Considering that, in order to maintain that the plateau and the territory of Walfish Bay end near the church of Scheppmansdorf, it is impossible effectually to assert the existence, in the portion of the bed of the Kuisip situated to the west, within undoubted British territory, of grazing ground and water sufficient for the needs of the white colonists resident in the bay; because, in addition to this assertion not being proved, to its being openly contradicted by one of the High Parties, and to its prejudicing the solution of questions which will have to be examined later, it is very clear that the relation between the needs of the colonists and the extension of the pasture-land depends on circumstances and considerations both diverse and variable, and does not offer by itself alone a sure criterion to solve the problem, all the more so that at the time of the annexation it is reasonable to suppose that the probable development of the British station was thought of, although there is no datum to-day for a calculation how far the forethought of Mr. Dyer and his advisers extended in regard to the matter;

XXXI. Considering that the fact that the British Admiralty charts before 1885 show that the eastern frontier starts at Scheppmansdorf and not at Ururas does not constitute a recognition of the thesis that the territory of Walfish Bay ought to finish in the vicinity of the Scheppmansdorf mission buildings (with the result that " the plateau ", as understood in the previous considerations, would end there); because, from the moment that the note " approximate

boundaries of the station of Walfish Bay " is found on the said charts, the uncertainty prevailing as to those boundaries is demonstrated without any doubt, an uncertainty which is perfectly explicable in the days before Mr. Wrey's survey when the topographical data were lacking which were necessary to mark on a map the exact extent of the plateau which Mr. Dyer expressly mentioned when he described the frontiers of the territory;

XXXII. Considering that the supposition cannot be admitted that the phrase " approximate limits of the station of Walfish Bay ", found on the Admiralty charts before 1885, must be explained not in the manner set out in the preceding consideration, but as an allusion to the fact that the proposal of the Mixed Commission of Angra Pequeña and the West Coast was then awaiting a settlement, a proposal which was designed to change the word " Rooibank " employed in Mr. Dyer's Proclamation and to substitute for it the word " Rooikop ", because it is sufficient to observe that, as this proposal was made on the 14th August, 1885, the Admiralty charts published in previous years could not allude to it;

XXXIII. Considering that the fact that the magistrate, Mr. Simpson, gave his authority to a contract in which it was stated that the limit of the said territory was at Rooibank cannot be taken as a proof that the British authorities formerly took a different view from what they do to-day as to the eastern frontier of the territory of Walfish Bay, and believed it to be near the church at Scheppmansdorf and at a distance from Ururas; because, even assuming the assent of the magistrate to what was stated by the parties to the contract, it is certain that he did not compromise to any extent his more or less firm opinion with regard to the boundaries by agreeing to Rooibank being designated as a point on the frontier, as it was a name which admittedly implied an area and its extension as a grazing ground to Ururas was affirmed by Mr. Simpson before the mixed commission of 1885, and its use in the contract referred to invalidates the argument in question, since the assertion that Rooibank signifies " at the side of or near the mission buildings of Scheppmansdorf " would be opposed to the whole general tenor of the German argument;

XXXIV. Considering that this sense of space and indefiniteness implied by the word " Rooibank " is implicitly recognized by the parties signing the contract by their placing with significant insistence after the word " Rooibank " the words " within the limits of the territories of Walfish Bay ", showing very clearly that nothing precise is indicated by the word " Rooibank ", and that what they referred to was a line crossing or touching the lands of Rooibank and serving as the frontier of British territory;

XXXV. Considering that the transport of goods from Sandwich Harbour to Damaraland via the back of the church at Scheppmansdorf and the storing of them in its vicinity without paying customs duty does not constitute evidence of the same value as the former evidence, because this proceeding can be explained as a case of smuggling of little importance, of short duration, and difficult for the authorities at Walfish Bay to know of or to prevent;

XXXVI. Considering that as a matter of fact the small importance of the smuggling is recognized by the declaration of the missionary Boehm, cited by Germany, that its short duration follows not only from the fact, supported by documentary evidence, that customs duties were established in Walfish Bay on the 17th August, 1884, and ceased on the 13th August, 1885, but also from the declaration of the German witness Dr. Belck, who affirms that the carrying of the goods began after the month of November of the first of the years mentioned, and that the difficulty of knowing of and stopping a traffic such as the

one we are dealing with was due to the distance between Scheppmansdorf and Walfish Bay and to the vigilance required to stop all contraband in a comparatively extensive zone;

XXXVII. Considering that to complete the case the explanation of these proceedings as a case of contraband is not the only one possible, because it is to be seen from the sketch presented by the witness Mr. Evensen, and reproduced in the German memorandum, that the house which he lived in with Mr. Wilmer during the year 1885 was situated to the south-east of the former church at Scheppmansdorf, and at a distance which (comparing the dimension of the sketch with the scale, approximately twice as large, of the map which faces the first page of the German memorandum) does not allow the inference that the house was at times a depôt for goods within the limits beaconed by Mr. Wrey; by which reasoning it is clear that the transport of goods disembarked at Sandwich Harbour would have been effected across territory undeniably German, and could not have been prevented by the British authorities;

XXXVIII. Considering that the force of the preceding reasoning is in no way diminished by the fact that some witness or other, such as the trader Joseph Sichel, supposes that the depôt of merchandise belonging to Messrs. Wilmer and Evensen was situated more than 1½ kilom. to the east of the mission station, from which it could be deduced that it was situated within the disputed territory, because, apart from the fact that nobody could know better than Mr. Evensen the situation of his own house and store, and apart from the fact that nobody took the trouble as he did to sketch it, it is easily understood that Messrs. Wilmer and Evensen, having lived after 1886 at a different place from where they lived in 1885, confusion between the two might arise in the minds of outsiders, and goods might be supposed to be stored in one place which, during the levy of customs duties in Walfish Bay, were really kept in the other;

XXXIX. Considering that, to judge by the argument, based on the admission of the magistrate, Mr. Simpson, that the tree from which Jan Jonker Afrikander hanged a Berg Damara shepherd stood on German territory 600 yards from Rooibank (Scheppmansdorp), the data at the disposal of both parties are deficient and even contradictory, so that it is impossible to fix with certainty the exact point where the murder was committed;

XL. Considering that this is very largely due to the vagueness as to the names Rooibank and Scheppmansdorf, as they are understood and as Mr. Simpson understood them in some of his stamteents before the mixed commission, a vagueness which enables the distance to be reckoned as 600 yards from the mission buildings, and also from a place situated more to the east or near the line drawn by Mr. Wrey;

XLI. Considering that if the distance of 600 yards is measured in a southerly direction from different points at Rooibank, near the straight line which serves as the boundary of the territory, and joins boundary pillars (C) and (D) set up by Mr. Wrey, trees on which the Berg Damara might have been hanged are found within this distance (growing in the kloof mentioned in paragraph 13 of recital XXXVI, and therefore in German territory), just as the man might have been hanged, as is claimed by Germany, from one of the trees in the Kuisip valley standing to the east of the Scheppmansdorf mission;

XLII. Considering that if the German Government maintain firmly, in accordance with information derived from their officials, that the scene of the murder was on the disputed territory, the British Government assert with equal firmness and persistency, referring to Mr. Simpson's statements, that the said

line is outside the line (C-D), though without determining its position more than approximately;

XLIII. Considering that the evidence of Mr. Evensen with regard to this question is inconsistent, because, from his statement of the 14th January, 1909, it follows that the tree from which the Berg Damara was hanged was some 200 metres to the south-west of the house inhabited by the witness, which house in its turn stood at that time to the south-west of the Scheppmansdorf church (an assertion which supports the British case), whilst the evidence given on the 9th March, 1910, corroborates the German view, as he then stated that the murder took place in the territory now in dispute;

XLIV. Considering that, for the reasons given, it cannot be regarded as proved that Mr. Simpson's statements respecting the scene of the crime imply the admission that the eastern frontier of Walfish Bay passed very close to the church at Scheppmansdorf, where, accordingly, it would be necessary to suppose the grazing flats, included by Mr. Dyer in the annexation, terminated;

XLV. Considering that, even assuming that it was proved, in spite of all that has been said in the preceding considerations, that the magistrate Mr. Simpson had admitted, in connection with the contents of a contract, the transport and storing of goods duty free and the commission of a crime, that the eastern frontier of the territory of Walfish Bay passed close to the church at Scheppmansdorf, such an admission would only express an opinion which, even if it were an echo of other more general opinion held at that time, cannot be accepted until it is shown by an investigation analogous to that which is taking place in connection with this award to be in consonance with the Proclamation of Annexation of 1878 and with the acts and documents by which it must be interpreted, and considering that the rights of Great Britain cannot in any case be prejudiced by the error which one of her officials may have fallen into, as he lacked the representative character indispensable to bind the State, in this matter, by his words or acts;

XLVI. Considering that the evidence constituted by the sworn declarations of Messrs. Boehm, Sichel, Evensen, and Belck, cited in the German memorandum to show that until 1885 both the British authorities and the colonists resident in Walfish Bay who were acquainted with the boundary question understood that the eastern frontier of the territory passed close to the church at Scheppmansdorf, is evidence like that advanced by Great Britain in the opposite sense, the value of which, being in favour of the High Party which invokes it, should be weighed more carefully than is necessary when it is unfavourable to that party, and, starting from the basis, as has been done till now, that this method is in accordance with the rules of sane criticism, in conformity with the leading system in modern law, and the only one acceptable in the proceedings of an international arbitration, in which no principle or positive rule imposes any other limit on the powers of the arbitrator;

XLVII. Considering that all the evidence alluded to has been produced out of Court, in the sense that the arbitrator has not been able to conduct any cross-examination and without being disputed, inasmuch as the party prejudiced by it has not cross-examined the witnesses either, circumstances which, though they do not deserve blame, and appear easily explicable in the present case, certainly diminish the value of the evidence;

XLVIII. Considering that to judge by the respective assertions of the two parties, the witnesses brought forward by one or the other depend in some way or other, by reason of nationality, residence, or office, on the State in whose favour they are giving evidence — a fact which, though it does not properly

constitute a legal objection, is a ground for a reasonable presumption that they may accentuate their assertions, whether they wish it or not, in a definite sense;

XLIX. Considering that the four German witnesses, Messrs. Boehm, Sichel, Evensen, and Belck, speak of the boundaries established by Mr. Dyer, not by personal and first-hand knowledge of the facts of annexation, but referring to what they have heard other people say, and that, in giving evidence as to the opinion of those persons, they simply give evidence as to public opinion or rumour supported by indirect testimony, and therefore weak and dangerous:

L. Considering that these statements and common report are inconsistent not only with the evidence of Dixon, Hendrik Petros, Willem, Engelbrecht, Jan Sarop, and Jim, adduced by Great Britain, but also with the evidence given by Mr. Wrey, alluded to at the end of paragraph (*d*) of section XXXII, with the last statements of Captain Dyer, and with what Mr. Sandys declared on the 9th June, 1910, in confirmation of some of the statements by the last named;

LI. Considering that, though the value of this British evidence is questionable, because some of it is based on hearsay and some of it emanates from natives whose credibility is disputed, because mistakes are noticed in it, because the credibility of the witness, Mr. Dixon, is placed in doubt, and because the value of statements made by Mr. Dyer subsequent to 1878 have been denied, it is certain: —

(i) That the majority of the witnesses mentioned speak of the boundaries with a direct knowledge of the facts of the annexation and not by a mere reference to other persons;

(ii) That neither the evidence of the German sergeant of police, Carl Leis, nor that of Von Broen, respectively mentioned in paragraphs 13 and 14 of recital XXXV, is a sufficient proof that the native witnesses Hendrik Petros, Willem, and Engelbrecht, were not present as they allege, and as it is supposed they were in the first paragraph mentioned, when Captain Dyer visited Rooibank; because Carl Leis merely states, *on the authority* of Jan Sarop, that at that time only two Hottentots, now dead, resided *ordinarily* at Rooibank; and because Von Broen confined himself to stating with glaring vagueness and indecisiveness that he heard *some native* say that all the natives of the country who were present at the annexation were dead, and that he believes that it was said *about a year ago*;

(iii) That whatever the characteristics of the native race that inhabits the territory of Walfish Bay, and the general traits attributed to it may be, it is not possible entirely to deny the value of the evidence given by the individuals belonging to it, above all, when these statements are confirmed by similar statements by Europeans;

(iv) That if the Hottentot Willem is mistaken in declaring that Captain Dyer was at Ururas and Zwartbank in 1878, the German witness Sichel is also mistaken, as was shown in consideration XXXVIII, with regard to the storing of the goods transported on account of Messrs. Wilmer and Evensen, and the view of the missionary Boehm that the transfer of the boundary of the territory farther east of the church of Scheppmansdorf would only have as its object the annexation of a greater quantity of *river sand* is also erroneous;

(v) That even if the evidence of Mr. Dixon is discarded on account of the criticism levelled at him in the German case, just as for an analogous reason the evidence of Mr. Koch must be discarded as it is impugned in the British memorandum, it is imperative to add to the statements of the natives mentioned

those of Messrs. Dyer, Wrey, and Sandys; since, though with regard to Captain Dyer it has been pointed out that his statements subsequent to the date of annexation lack the decisive value of his earlier ones, they nevertheless also constitute an element of opinion worthy of consideration, though it must be recognised that, like all the rest, they are impaired by deficiencies and lack full force as evidence;

LII. Considering that the conflict between the German evidence and that of Great Britain is sufficient to prevent its being considered proved that, as is maintained in the former, it was the common opinion until 1885 that the eastern frontier of Walfish Bay passed near the church of Scheppmansdorf, and that it is best to suppose, for the sake of the credit of both sets of witnesses, that, even at that time, the news of the Proclamation of Annexation raised a difference of opinion which foreshadowed the question now at issue, and that each view is reflected in the evidence of the High Party which brings it forward;

LIII. Considering that after examining and testing the arguments expounded to prove that " the plateau ", as it has been defined above, and with it the territory of Walfish Bay end at the mission buildings at Scheppmansdorf, it is clear that the prolongation of both in an easterly direction to Ururas is required by the topographical conditions of the region; for if this region can be called a plateau as far as the church at Scheppmansdorf by reason of its height and the regularity of its wide surface, it can be so termed all the way to Ururas, since it does not lose either of these characteristics, nor in general its direction and shape, till it reaches that place, authorising the supposition, unless something else disproves it expressly, that such a topographical unity cannot be divided on pain of dividing the plateau which Commander Dyer wished to include, taking the natural meaning of his words, in its entirety and not partially;

LIV. Considering that this topographical unity of " the plateau " as far as Ururas was recognized by the German commissioner, Dr. Goering, as was said at the end of recital XVIII, and that it is confirmed by Mr. Simpson in his statements made before the mixed commission of 1885, before the boundary question arose, when in answer to a question by the British commissioner he says that if the grazing commonage includes the *whole of the plateau* it would also include Ururas;

LV. Considering that the declaration with which we are dealing, like all those made before the mixed commission, has special value on account of its date and because the two parties are represented in the report, and it is not possible to discredit them generally on the pretext of contradictions attributed to the witnesses, since those pointed out in the last paragraphs of recital XXVII are explained (with the exception of an erroneous interpretation in the name " Awahaus ") by noting that, as Mr. Simpson himself indicates, the names " Rooibank " and " Scheppmansdorf " have a wide meaning in which they are identical, and a more limited one in which they represent something different, and the apparent contradiction in the replies only disappears when they are referred, according to their nature, sometimes to one and sometimes to the the other of the two senses explained;

LVI. Considering that the whole plateau, whose topographical untiy and consequent extension to Ururas is emphasized in the preceding considerations, is pasture land with plenty of water, since there exist or have existed to the east of the church at Scheppmansdorf wells and gardens, also a large area covered with " quickgrass ", as Mr. Wrey's map indicates, and a considerable number of trees which afford, in addition to fuel, valuable fodder for cattle, such as the anna — circumstances which, if taken in conjunction with the

obvious intention of Mr. Dyer to provide water and good pasture for the station of Walfish Bay and with the fact of his having been advised in this matter by persons knowing the locality, render any interpretation difficult which would result in this grazing ground being divided, since in the conception of this word, as in the conception of " plateau ", there is a sense of unity whose division in case of doubt cannot be presumed;

LVII. Considering that, whether or no there existed in Captain Dyer's mind the initial intention of considering the interests of the natives in the matter of the extent of the grazing grounds which were to be annexed, there is no doubt that in all the hypotheses advanced the place where they habitually have their dwellings in the vicinity of the mission house at Scheppmansdorf was included in British territory, and this being so it was not natural that Captain Dyer should annex a more or less primitive population and fail to annex the adjoining pasture zone, on which the said population keeps its cattle and secures to itself, its conditions being as aforesaid, the principal elements of life;

LVIII. Considering that the constant existence at Scheppmansdorf of a village or small native population, which is the basis of the preceding reasoning, is perfectly proved not only by British evidence of later date than the boundary controversy, but also by the declarations of Mr. Simpson before the mixed commission of 1885, by the missionary Boehm, who calls that place " the principal place of the Namas and Hottentots ", and by Dr. Belck, who states that there were at the place a number of huts, as there were in 1884, though the majority of the inhabitants are accustomed to abandon them after the gathering of the fruit of the nara;

LIX. Considering that the natives residing at Scheppmansdorf feed their cattle along the valley of the Kuisip, sharing the pastures, which in different forms (for example, quickgrass and fruit of the anna) and with some variety, depending on places and seasons, extend to Ururas, without the existence of this community, which was recognised by Mr. Simpson before the mixed commission of 1885 and vigorously asserted on the British side and supported by a diversity of evidence, appearing to be contradicted in a direct and definite manner by the German witnesses;

LX. Considering that, though the cattle belonging to the inhabitants of Scheppmansdorf may have grazed or may sometimes graze beyond Ururas, it is not proved that this happens habitually, and in any case it must be held that such cattle were therefore on ground already designated by another name, for which reason it is necessary to recognize that the pastures referred to in the preceding considerations, as well as the plateau, terminate at Ururas;

LXI. Considering that both the plateau and the pastures in question can be called without distinction " the plateau or pastures of Scheppmansdorf or Rooibank ", when once both names are completely identified in common usage in the sense explained, as numerous depositions prove, and especially the evidence given before the mixed commission of 1885 and the joint letter signed on the 14th August of the same year by Dr. Bieber and Judge Shippard, in which the correction of the boundaries of the territory laid down in Commander Dyer's Proclamation is suggested, with the object that Scheppmansdorf should be designated " Scheppmansdorf or Rooibank ";

LXII. Considering that the prolongation of the plateau of pastures of Scheppmansdorf to Ururas explains satisfactorily the terms of the proclamation of the 12th March, 1878, because, as Scheppmansdorf was therein indicated as the limit of British territory and the name was known to be somewhat vague,

inasmuch as it applied to land extending some miles, it was necessary to add something to make the frontier more precise; and this necessity was the origin of the use of the words " including the plateau ", by which it was desired to indicate beyond doubt, in the only possible way, as there were no maps, that the boundary would have to be laid down, not at the beginning nor in the middle of the lands of Scheppmansdorf, but where its pastures terminate, and with them the plateau whose annexation was desired;

LXIII. Considering that the explanations, based on the phrase " including the plateau " being superfluous, and on an attempt to justify the theory that Captain Dyer annexed territory beyond his instructions in extending the territory of Walfish Bay to Scheppmansdorf, are much less probable than the explanation in LXII, because with regard to the first the repetition of the expression in Commander Dyer's report explaining the annexation shows that he considered its employment indispensable, and with regard to the second the following arguments contribute to rebut the hypothesis which it expresses:

(i) That the instructions received by Commander Dyer from his superiors left him full liberty to include all that he did include in the annexed territory, since they authorized him in the first instance, as was said in recital II, to proclaim sovereignty over a radius of 10 or 12 miles *or so*, as it appeared to him necessary after consultation with Palgrave, and authorized him some days afterwards, with still more latitude, to take possession of the territory adjacent to Walfish Bay to a distance inland which he was to fix in consultation with Mr. Palgrave if he was there, it being evident that the absence of Mr. Palgrave forced Commander Dyer to settle by himself the extent of the territory to be annexed and to substitute for Mr. Palgrave's advice information obtained from the white colonists inhabiting the bay;

(ii) That the letter from Commodore Sullivan, cited in recital IV, which states that the boundaries laid down by Commander Dyer " appear reasonable ", proves that he was not considered in any way to have exceeded his instructions;

(iii) That a mere glance at the map is enough to show that, taking the harbour at Walfish Bay as the centre, the radius which connects it with Nuberoff is longer than the one connecting it with the mission buildings at Rooibank and a little shorter than the one connecting it with Ururas, for which reason Captain Dyer's delimitation, supposed to be in excess of his instructions, would affect both extremities of the territory without his anxiety to justify his action in one case, and not in the other, being explained;

LXIV. Considering that the effective occupation and the exercise of jurisdiction on the part of Great Britain over all the disputed territory before the boundary question arose are indicated by different acts which are not impugned, such as the grant of gardens by the resident magistrates at Walfish Bay and of the lands in Rooibank and Ururas for which the traders, Messrs. Wilmer and Evensen, petitioned the Cape Government, as also the punishment of an illegal act and the arrest of an offender at Ururas;

LXV. Considering that if, for the reasons explained, the prolongation of the territory of Walfish Bay to Ururas is admitted as correct, it is unnecessary to invoke the hinterland doctrine in support of the British claim, a doctrine which, further, would not be applicable to the case in discussion, because the taking possession of the said territory and its antecedents indicate the intention of including the land annexed within precise limits, with the implicit renunciation of all intention to extend them, and because, as that doctrine is understood, it requires for its application the existence or assertion of political influence over

certain territory, or a treaty in which it is concretely formulated, none of which circumstances apply to the case which is the cause of this controversy;

LXVI. Considering that the second of the questions to be examined in this award, *i.e.*, whether the southern boundary of the territory of Walfish Bay should be traced from a point distant 15 nautical miles, or, on the contrary, from one distant 15 statute miles from Pelican Point, is a question which raises as a preliminary another one as to which the necessary powers of settlement have been given to the arbitrator in the Arbitration Agreement;

LXVII. Considering that it is a constant doctrine of public international law that the arbitrator has powers to settle questions as to his own competence by interpreting the range of the agreement, submitting to his decision the questions in dispute;

LXVIII. Considering that the decision whether the eastern frontier of the territory of Walfish Bay should be measured in nautical or statute miles affects the starting-point of the southern frontier, whose demarcation is submitted to the decision of the arbitrator in general terms and without restriction of any kind, in accordance with the Convention of the 1st July, 1890, and the Declaration of the 30th January, 1909;

LXIX. Considering that if, in spite of the fact that both instruments speak simply of submitting to arbitration the settlement of the " southern frontier of the territory of Walfish Bay ", it is understood to be necessary to interpret the former in accordance with its antecedents, and accordingly that the Agreement of 1890 referred only to the part of the southern frontier in dispute at that date, *i.e.*, to the line from the vicinity of the church of Scheppmansdorf to Ururas, this same reasoning would conduce to recognizing that the declaration of 1909 refers to all that was then at issue, and therefore to the starting-point of the southern frontier disputed since 1904;

LXX. Considering that, in virtue of what has been said, the arbitrator is competent to settle this second question which has been brought forward in the German memorandum;

LXXI. Considering that, although nautical miles are not ordinarily used to measure land in British territory, there is no reason to suppose that a naval officer like Commander Dyer did not use them, as he states, to determine an extent of coast (which is what is meant by the western frontier), above all, when he had as his guide an Admiralty chart and had to refer to the distances on it;

LXXII. Considering that, from the selection of Nuberoff as the boundary of the territory on the Swakop River, it does not follow that, in contradistinction to what was done in the case of the western frontier, the northern frontier was measured in statute miles, because it is clear from Mr. Wrey's report, dated the 14th January, 1886, that the distance between Nuberoff and the mouth of the Swakop was not estimated to be 10 exact miles, and therefore that that point was marked as the boundary, not in accordance with the result of a scrupulous survey of the ground, but as being a natural feature near the place where the north-eastern corner of the territory ought to lie, and which it was necessary to accept, even if the extent of the territory was thereby reduced, as a permanent and visible mark of the frontier established;

LXXIII. Considering that, as exception has not been taken to the continued possession on the part of Great Britain of the territory extending to the point on the coast where the southern frontier, as drawn by Mr. Wrey, commences, it is necessary to accept the fact of possession, cited by the British Government, and to see in it not only a proof of the sense in which the Proclamation of

Annexation was always interpreted with reference to the matter under discussion, but also the evidence of a wish to acquire, and of an effective occupation, by which in any case British sovereignty could have been established over the zone in dispute, before the adjacent territory was placed under the protection of Germany;

LXXIV. Considering that the demarcation of the southern boundary of the territory of Walfish Bay by Mr. Wrey in 1885 has only been disputed as regards the points which have now been investigated;

LXXV. Considering that, although the accuracy with which the demarcation was carried out is proved by all the preceding arguments, it does not follow from this that it had binding force of any kind on Germany, who, as the Power conterminous with the territory of Walfish Bay at the time of the demarcation, could only be bound thereby so far as either she took part in it or gave her assent to it, since there is no juridical principle which applies the effect of a demarcation to States which, being directly interested in it, have not co-operated in any way in its execution or consented to accept its consequences.

For the reasons explained the arbitrator declares:

Firstly, that the demarcation of the southern boundary of the territory of Walfish Bay carried out by Surveyor Wrey in 1885 is not binding on Germany on the ground that that Power did not take part in it and did not give her assent to it subsequently;

Secondly, that since the said demarcation fixes the southern boundary referred to accurately, it must be accepted in future, by virtue of this arbitral award, as the exact definition of the frontier under discussion, which therefore must have the starting-point and termination indicated by Mr. Wrey, passing through the two other points where he erected the present intermediate beacons.

Joaquin F. PRIDA

Madrid, May 23, 1911.

THE CHAMIZAL CASE [1]

PARTIES: Mexico, United States of America.

COMPROMIS: Convention of 24 June 1910.

ARBITRATORS: International Boundary Commission: E. Lafleur; A. Mills; F. Beltram y Puga.

AWARD: 15 June 1911.

Title to the Chamizal Tract — Boundary rivers — Effects of natural change in the course of such rivers — Treaty interpretation — Retroactive effects of treaty provisions — Prescription.

[1] For the questions at issue, the background of this case, and for the contentions of the Parties, see the introductory part of the award.

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CONVENTION FOR THE ARBITRATION OF THE CHAMIZAL CASE CONCLUDED ON 24 JUNE 1910 [1]

The United States of America and the United States of Mexico, desiring to terminate, in accordance with the various treaties and conventions now existing between the two countries, and in accordance with the principles of international law, the differences which have arisen between the two Governments as to the international title to the Chamizal tract, upon which the members of the International Boundary Commission have failed to agree, and having determined to refer these differences to the said commission, established by the convention of 1889, which for this case only shall be enlarged as hereinafter provided, have resolved to conclude a convention for that purpose, and have appointed as their respective plenipotentiaries:

The President of the United States of America, Philander C. Knox, Secretary of State of the United States of America; and

The President of the United States of Mexico, Don Francisco León de la Barra, ambassador extraordinary and plenipotentiary of the United States of Mexico at Washington;

Who, after having exhibited their respective full powers, and having found the same to be in good and due form, have agreed upon the following articles:

Article I. The Chamizal tract in dispute is located at El Paso, Texas, and Ciudad Juarez, Chihuahua, and is bounded westerly and southerly by the middle of the present channel of the Rio Grande, otherwise called Rio Bravo del Norte, easterly by the middle of the abandoned channel of 1901, and northerly by the middle of the channel of the river as surveyed by Emory and Salazar in 1852, and is substantially as shown on a map on a scale of 1-5,000 signed by General Anson Mills, commissioner on the part of the United States, and Señor Don F. Javier Osorno, commissioner on the part of Mexico, which accompanies the report of the International Boundary Commission, in Case No. 13, entitled " Alleged Obstruction in the Mexican End of the El Paso Street Railway Bridge and Backwaters Caused by the Great Bend in the River Below ", and on file in the archives of the two Governments.

Article II. The difference as to the international title of the Chamizal tract shall be again referred to the International Boundary Commission, which shall be enlarged by the addition, for the purposes of the consideration and decision of the aforesaid difference only, of a third commissioner, who shall preside over the deliberations of the commission. This commissioner shall be a Canadian jurist and shall be selected by the two Governments by common accord, or, failing such agreement, by the Government of Canada, which shall be requested to designate him. No decision of the Commission shall be perfectly valid unless the commission shall have been fully constituted by the three members who compose it.

Article III. The commission shall decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America

[1] *Papers relating to Foreign Relations of the United States*, 1911, p. 566.

or Mexico. The decision of the commission, whether rendered unanimously or by majority vote of the commissioners, shall be final and conclusive upon both Governments, and without appeal. The decision shall be in writing and shall state the reasons upon which it is based. It shall be rendered within thirty days after the close of the hearings.

Article IV. Each Government shall be entitled to be represented before the commission by an agent and such counsel as it may deem necessary to designate; the agent and counsel shall be entitled to make oral argument and to examine and cross-examine witnesses and, provided that the commission so decides, to introduce further documentary evidence.

Article V.[1] On or before December 1, 1910, each Government shall present to the agent of the other party two or more printed copies of its case, together with the documentary evidence upon which it relies. It shall be sufficient for this purpose if each Government delivers the copies and documents aforesaid at the Mexican Embassy at Washington or at the American Embassy at the City of Mexico, as the case may be, for transmission. As soon thereafter as possible, and within ten days, each party shall deliver two printed copies of its case and accompanying documentary evidence to each member of the commission. Delivery to the American and Mexican commissioners may be made at their offices in El Paso, Texas; the copies intended for the Canadian commissioner may be delivered at the British Embassy at Washington or at the British legation at the City of Mexico.

On or before February 1, 1911, each Government may present to the agent of the other a countercase, with documentary evidence, in answer to the case and documentary evidence of the other party. The countercase shall be delivered in the manner provided in the foregoing paragraph.

The commission shall hold its first session in the city of El Paso, State of Texas, where the offices of the International Boundary Commission are situated, on March 1, 1911, and shall proceed to the trial of the case with all convenient speed, sitting either at El Paso, Texas, or Ciudad Juarez, Chihuahua, as convenience may require. The commission shall act in accordance with the procedure established in the Boundary Convention of 1889. It shall, however, be empowered to adopt such rules and regulations as it may deem convenient in the course of the case.

At the first meeting of the three commissioners each party shall deliver to each of the commissioners and to the agent of the other party, in duplicate, with such additional copies as may be required, a printed argument showing the points relied upon in the case and countercase, and referring to the documentary evidence upon which it is based. Each party shall have the right to file such supplemental printed brief as it may deem requisite. Such briefs shall be filed within ten days after the close of the hearings, unless further time be granted by the commission.

Article VI. Each Government shall pay the expenses of the presentation and conduct of its case before the commission; all other expenses which by their nature are a charge on both Governments, including the honorarium for the

[1] In accordance with a Supplementary Protocol, signed at Washington on 5 December 1910, the date for the presentation of the respective cases and documentary evidence was fixed for 15 February 1911; the date for the presentation of the respective countercases and documentary evidence was fixed for 15 April 1911; the date for the first session of the Commission was fixed for 15 May 1911. (For this Protocol see: *Papers relating to Foreign Relations of the United States,* 1911, p. 569.)

Canadian commissioner, shall be borne by the two Governments in equal moieties.

Article VII. In case of the temporary or permanent unavoidable absence of any one of the commissioners, his place will be filled by the Government concerned, except in the case of the Canadian jurist. The latter under any like circumstances shall be replaced in accordance with the provisions of this convention.

Article VIII. If the arbitral award provided for by this convention shall be favorable to Mexico, it shall be executed within the term of two years, which cannot be extended, and which shall be counted from the date on which the award is rendered. During that time the *status quo* shall be maintained in the Chamizal tract on the terms agreed upon by both Governments.

Article IX. By this convention the contracting parties declare to be null and void all previous propositions that have reciprocally been made for the diplomatic settlement of the Chamizal case; but each party shall be entitled to put in evidence by way of information such of this official correspondence as it deems advisable.

Article X. The present convention shall be ratified in accordance with the constitutional forms of the contracting parties and shall take effect from the date of the exchange of its ratifications.

The ratifications shall be exchanged at Washington as soon as possible.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed the above articles, both in the English and Spanish languages, and have hereunto affixed their seals.

DONE in duplicate at the city of Washington, this 24th day of June, one thousand nine hundred and ten.

Philander C. KNOX [SEAL]

F. L. DE LA BARRA [SEAL]

AWARD BY THE INTERNATIONAL BOUNDARY COMMISSION IN THE MATTER OF THE INTERNATIONAL TITLE TO THE CHAMIZAL TRACT, RENDERED ON 15 JUNE 1911 [1]

Titre sur le territoire dit « Chamizal » — Fleuves frontières — Effets des modifications naturelles du lit de tels fleuves — Interprétation des traités — Effets rétroactifs des traités — Prescription.

PREAMBLE

WHEREAS a convention between the United States of America and the United States of Mexico for the arbitration of the differences which have arisen between the two Governments as to the international title to the Chamizal tract was concluded and signed by their respective plenipotentiaries at Washington on the twenty-fourth day of June, 1910, which is as follows: [2]

AND WHEREAS the said convention was duly ratified on both parts and the ratifications of the two Governments were exchanged at the city of Washington on the twenty-fourth day of January, 1911.

AND WHEREAS on the fifth day of December, 1910, the plenipotentiaries who negotiated and signed the said convention of June 24, 1910, being thereunto duly empowered by their respective Governments, agreed upon a supplementary protocol, which is as follows: [3]

AND WHEREAS the parties to the said convention of 24th of June, 1910, have by common accord, in conformity with Article II thereof, enlarged the said International Boundary Commission by the addition for the purposes of the consideration and decision of the aforesaid difference of a third commissioner, viz:

Eugene Lafleur, one of His Britannic Majesty's counsel, doctor of civil law and former professor of international law at McGill University, who, together with

Anson Mills, brigadier-general of the United States Army (retired), member of the American Geographical Society, American Commissioner of the International Boundary Commission, and

Fernando Beltrán y Puga, civil engineer, Mexican commissioner of the International Boundary Commission, member of the Geographical Society of Mexico and of the American Geographical Society, member of the Society of Civil Engineers and Architects of Mexico,

Have been constituted as a commission for the decision as to whether the international title to the Chamizal tract is in the United States of America or in the United States of Mexico.

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[1] *Papers relating to Foreign Relations of the United States*, 1911, p. 573.

[2] See *supra.*, p. 313.

[3] See *supra*, p. 314, footnote 1.

AND WHEREAS the agents of the parties to the said convention have duly, and in accordance with the terms of the convention, communicated to this commission their cases, countercases, printed arguments, and other documents.

AND WHEREAS the agents and counsel for the parties have fully presented to this commission their oral arguments during the sittings held at the city of El Paso between the first assembling of the commission on the 15th May, 1911, to the close of the hearing on the 2d June, 1911.

Now, therefore, this commission, having carefully considered the said convention, cases, countercases, printed and oral arguments, and the documents presented by either side, after due deliberation, makes the following decision and award:

The Chamizal tract consists of about six hundred acres, and lies between the old bed of the Rio Grande, as it was surveyed in 1852, and the present bed of the river, as more particularly described in article 1 of the convention of 1910. It is the result of changes which have taken place through the action of the water upon the banks of the river causing the river to move southward into Mexican territory.

With the progressive movement of the river to the south, the American city of El Paso has been extending on the accretions formed by the action of the river on its north bank, while the Mexican city of Juarez to the south has suffered a corresponding loss of territory.

By the treaties of 1848 and 1853 the Rio Grande, from a point a little higher than the present city of El Paso, to its mouth in the Gulf of Mexico, was constituted the boundary line between the United States and Mexico.

The contention on behalf of the United States of Mexico is that this dividing line was fixed under those treaties in a permanent and invariable manner, and consequently that the changes which have taken place in the river have not affected the boundary line, which was established and marked in 1852.

On behalf of the United States of America it is contended that according to the true intent and meaning of the treaties of 1848 and 1853, if the channel of the river changes by gradual accretion, the boundary follows the channel, and that it is only in case of a sudden change of bed that the river ceases to be the boundary, which then remains in the abandoned bed of the river.

It is further contended on behalf of the United States of America that by the terms of a subsequent boundary convention in 1884 rules of interpretation were adopted which became applicable to all changes in the Rio Grande which have occurred since the river became the international boundary, and that the changes which determined the formation of the Chamizal tract are changes resulting from slow and gradual erosion and deposit of alluvion within the meaning of that convention and consequently changes which left the channel of the river as the international boundary line.

The Mexican Government, on the other hand, contends that the Chamizal tract having been formed before the coming in force of the convention of 1884, that convention was not retroactive and could not affect the title to the tract, and further contends that, even assuming the case to be governed by the convention of 1884, the changes in the channel have not been the result of slow and gradual erosion and deposit of alluvion.

Finally the United States of America have set up a claim to the Chamizal tract by prescription, alleged to result from the undisturbed, uninterrupted, and unchallenged possession of the territory since the treaty of 1848.

In 1889 the Governments of the United States and of Mexico, by a convention, created the International Boundary Commission for the purpose of carrying out the principles contained in the convention of 1884 and to avoid the difficul-

ties occasioned by the changes which take place in the bed of the Rio Grande where it serves as the boundary between the two Republics, and for other purposes enumerated in Article I of the convention of 1889.

At a session of the boundary commissioners held on the 28th September, 1894, the Mexican commissioner presented the papers in a case known as " El Chamizal No. 4 ". These included a complaint made by Pedro Ignacio García, who alleged, in substance, that he had acquired certain property formerly lying on the south side of the Rio Grande, known as El Chamizal, which, in consequence of the abrupt and sudden change of current of the Rio Grande, was now on the north side of the river and within the limits of El Paso, Texas. This claim was examined by the International Boundary Commissioners, who heard witnesses upon the facts, and who, after consideration, were unable to come to any agreement, and so reported to their respective Governments.

As a result of this disagreement the convention of 24th June, 1910, was signed, and the decision of the question was submitted to the present commission.

Fixed line theory

Article V of the treaty of Guadalupe Hidalgo of 1848 provides for a boundary between the United States and Mexico in the following terms:

The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence northward, along the western line of New Mexico until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence, across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled " *Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York in 1847 by J. Disturnell* "; of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing master of the Spanish fleet, and published at Madrid in the year 1802 in the atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both Republics, as described in the present article, the two Governments shall each appoint a commissioner and a surveyor, who, before the expiration

of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations, and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with its own constitution.

The fluvial portion of the boundary called for by the above treaty, in so far as the Rio Grande is concerned, extending from its mouth to the point where it strikes the southern boundary of New Mexico, appears to have been fixed by the surveys of the International Boundary Commission in 1852.

In 1853, in consequence of a dispute as to the land boundary and the acquisition of a portion of territory now forming part of New Mexico and Arizona, known as the " Gadsden Purchase ", the boundary treaty of 1853 was signed, the first article of which deals with the boundary as follows:

The Mexican Republic agrees to designate the following as her true limits with the United States for the future: Retaining the same dividing line between the two Californias as already defined and established, according to the fifth article of the treaty of Guadalupe Hidalgo, the limits between the two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo; thence, as defined in the said article, up the middle of that river to the point where the parallel of 31° 47′ north latitude crosses the same; thence due west 100 miles; thence south to the parallel of 31° 20′, north latitude; thence along the said parallel of 31° 20′ to the 111th meridian of longitude west of Greenwich; thence in a straight line to a point on the Colorado River 20 English miles below the junction of the Gila and Colorado Rivers; thence up the middle of the said river Colorado until it intersects the present line between the United States and Mexico.

For the performance of this portion of the treaty, each of the two Governments shall nominate one commissioner, to the end that, by common consent, the two thus nominated, having met in the city of Paso del Norte, three months after the exchange of the ratifications of this treaty, may proceed to survey and mark out upon the land the dividing line stipulated by this article, where it shall not have already been surveyed and established by the mixed commission, according to the treaty of Guadalupe, keeping a journal and making proper plans of their operations. For this purpose, if they should judge it necessary, the contracting parties shall be at liberty each to unite to its respective commissioner, scientific or other assistants, such as astronomers and surveyors, whose concurrence shall not be considered necessary for the settlement and ratification of a true line of division between the two republics; that line shall be alone established upon which the commissioners may fix, their consent in this particular being considered decisive and an integral part of this treaty, without necessity of ulterior ratification or approval, and without room for interpretation of any kind by either of the parties contracting.

The dividing line thus established shall, in all time, be faithfully respected by the two Governments, without any variation therein, unless of the express

and free consent of the two, given in conformity to the principles of the law of nations, and in accordance with the constitution of each country, respectively.

In consequence, the stipulation in the fifth article of the treaty of Guadalupe upon the boundary line therein described is no longer of any force, wherein it may conflict with that here established, the said line being considered annulled and abolished wherever it may not coincide with the present, and in the same manner remaining in full force where in accordance with the same.

The treaty of Guadalupe Hidalgo, signed on the 2d February, 1848, provides that the boundary line between the two Republics from the Gulf of Mexico shall be the middle of the Rio Grande, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico. It is conceded on both sides that if this provision stood alone it would undoubtedly constitute a natural, or arcifinious, boundary between the two nations and that according to well-known principles of international law this fluvial boundary would continue, notwithstanding modification of the course of the river caused by gradual accretion on the one bank or degradation on the other bank; whereas if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed. It is contended, however, on behalf of Mexico, that the provisions in the treaty providing for a designation of the boundary line with due precision, upon authoritative maps, and for establishing upon the grounds landmarks showing the limits of both Republics, and the direction to commissioners and surveyors to run and mark the boundary in its full course to the mouth of the Rio Grande, coupled with the final stipulation that the boundary line thus established should be religiously respected by the two Republics, and no change should ever be made therein, except by the express and free consent of both nations, takes this case out of the ordinary rules of international law, and by a conventional agreement converts a natural, or arcifinious, boundary into an artificial and invariable one. In support of this contention copious references have been made to the civil law distinguishing between lands whose limits were established by fixed measurements (*agri limitati*) and arcifinious lands, which were not so limited (*agri arcifinii*). These two classes of lands were sometimes contrasted by saying that arcifinious lands were those which had natural boundaries, such as mountains and rivers, while limited estates were those which had fixed measurements. As a consequence of this distinction the Roman law denied the existence of the right of alluvion in favor of the limited estates which it was the custom to distribute among the Roman generals, and subsequently to the legionaries, out of conquered territory. This restriction of the ordinary rights appurtenant to riparian ownership is, however, considered by the best authorities to have been an exceptional provision applicable only to the case above mentioned, and one of the principal authorities relied on by the Mexican counsel (A. Plocquo, *Legislation des caux et de la navigation*, vol. 2, p. 66) clearly establishes that the mere fact that a riparian proprietor holds under a title which gives him a specified number of acres of land does not prevent him from profiting by alluvion. The difficulty in this case does not arise from the fact that the territories in question are established by any measurement, but because the boundary is ordered to be run and marked along the fluvial portion as well as on the land, and on account of the further stipulation that no change shall ever be made therein. Do these provisions and expression, in so far as they refer to the fluvial portion of the boundary, convert it into an artificial boundary which will persist notwithstanding all changes in the course of the river? In one sense it may be said that the adoption of a fixed and invariable line, so far as the river is concerned, would not be a

perpetual retaining of the river boundary provided for by the treaty, and would be at variance with the agreement of the parties that the boundary should forever run in the middle of the river. The direction as to marking the course of the river as it existed at the time of the treaty of 1848 is not inconsistent with a fluvial line varying only in accordance with the general rules of international law, by erosion on one bank and alluvial deposits on the other bank, for this marking of the boundary may serve the purpose of preserving a record of the old river bed to serve as a boundary in cases in which it cuts a new channel.

Numerous treaties containing provisions as to river boundaries have been referred to by the two parties, showing that in some cases conventional arrangements are made that the river *simpliciter* shall be the boundary, or that the boundary shall run along the middle of the river, or along the *thalweg* or center or thread of the channel, while a small number of treaties contain elaborate dispositions for a fixed line boundary, notwithstanding the alterations which may take place in the river, with provision, however, for periodical readjustments in certain specified cases. The difficulty with these instances is that no cases appear to have arisen upon the treaties in question and their provisions throw little, if any, light upon the present controversy. In one case only among those cited there appears to have been a decision by the Court of Cassation in France (Dalloz, 1858, Part 1, p. 401) holding that when a river separates two departments or two districts, the boundary is fixed in an irrevocable manner along the middle of the bed of the river as it existed at the time of the establishment of the boundary and that it is not subject ot any subsequent variation, notwithstanding the changes in the river. Whatever authority this decision may have in the delimitation of departmental boundaries in France, it does not seem to be in accordance with recognized principles of international law, if, as appears from the report, it holds that the mere designation of a river as a boundary establishes a fixed and invariable line.

The above observations as to the treaty of 1848 would seem to apply to the Gadsden treaty of 1853, taken by itself, for it provides, in similar language, that the boundary shall follow the middle of the Rio Grande, that the boundary line shall be established and marked, and that the dividing line shall in all time be faithfully respected by the two Governments without any variation therein.

While, however, the treaty of 1848 standing alone, or the treaty of 1853, standing alone, might seem to be more consistent with the idea of a fixed boundary than one which would vary by reason of alluvial processes, the language of the treaty of 1853, taken in conjunction with the existing circumstances, renders it difficult to accept the idea of a fixed and invariable boundary. During the five years which elapsed between the two treaties, notable variations of the course of the Rio Grande took place, to such an extent that surveys made in the early part of 1853, at intervals of six months, revealed discrepancies which are accounted for only by reason of the changes which the river had undergone in the meantime. Notwithstanding the existence of such changes the treaty of 1853 reiterates the provision that the boundary line runs up the middle of the river, which could not have been an accurate statement upon the fixed line theory.

Some stress had been laid upon the observations contained in the records of the boundary commissioners that the line they were fixing would be thenceforth invariable, but apart from the inconclusive character of this conversation, it seems clear that in making any remarks of this nature, the boundary commissioners were exceeding their mandate, and that their views as to the proper construction of the treaties under which they were working could not in any way bind their respective Governments.

In November, 1856, the draft for the proposed report of the boundary commissioners for determining the boundary between Mexico and the United States under the treaty of 1853 was submitted by the Secretary of the Interior of the United States to the Hon. Caleb Cushing for his opinion as to whether the boundary line under that treaty shifted with changes taking place in the bed of the river, or whether the line remained constant where the main course of the river ran as represented by the maps accompanying the report of the commissioners. The opinion of Mr. Cushing is a valuable contribution to the subject by an authority on international law. After consideration of the provisions of the treaty, and an examination of a great number of authorities upon the subject, Mr. Cushing reported that the Rio Grande retained its function of an international boundary, notwithstanding changes brought about by accretion to one bank and the degradation of the other bank, but that, on the other hand, if the river deserted its original bed and forced for itself a new channel in another direction, then the nation through whose territory the river thus broke its way did not lose the land so separated; the international boundary in that case remaining in the middle of the deserted river bed.

This opinion was transmitted to the Mexican legation at Washington and acknowledged by Señor Romero, then Mexican ambassador at Washington, who, without in any way committing his Government, stated his own personal acquiescence in the principles enunciated as being equitable and founded upon the teachings of the most accredited expositors of international law. He further stated that he was transmitting a copy of the opinion to his Government. There does not appear to have been any expression of opinion by the Mexican Government at that time as to the soundness of the views expressed by the Hon. Mr. Cushing.

From the last-mentioned date until the signing of the convention of 1884 a considerable amount of diplomatic correspondence took place as to the meaning and effect of the boundary treaties of 1848 and 1853. Without going into all the details of this correspondence, which has been fully discussed in the printed and oral arguments of the parties, it is sufficient to say that during that period, with the exception of certain statements contained in a letter of Mr. Frelinghuysen, which will be adverted to later, the Government of the United States consistently adhered to the principles enunciated by Attorney-General Cushing. On the Mexican side the correspondence reveals more fluctuations of opinion; the writers sometimes indicating their view that the boundary created by the treaties in question was a fixed line, but more frequently qualifying such statements by making an exception in the case of slow and successive increases resulting from alluvial deposits.

While considerable importance appeared to be attached by the parties to various expressions contained in this correspondence, the commissioners, at an early stage in the argument, expressed their view that neither of the high contracting parties should be bound by the unguarded language contained in many of the letters. The only real importance to be attached to this correspondence is that it shows conclusively that a considerable doubt existed as to the meaning and effect of the boundary treaties of 1848 and 1853.

However strongly one might be disposed to think that the treaty of 1848, taken by itself, or the treaty of 1853, taken by itself, indicated an intention to establish a fixed line boundary, it would be difficult to say that the question is free from doubt, in view of the opinion expressed by so high an authority as the Hon. Mr. Cushing upon the very point at issue, and in view of the occasional concurrence in this opinion by some of the higher Mexican officials at the time it was given.

It is in consequence of this legitimate doubt as to the true construction of the boundary treaties of 1848 and 1853 that the subsequent course of conduct of the parties and their formal conventions may be resorted to as aids to construction. In the opinion of the majority of this commission the language of the subsequent conventions and the consistent course of conduct of the high contracting parties is wholly incompatible with the existence of a fixed line boundary.

In 1884 the following boundary convention was concluded between the two Republics:

Boundary Convention, Rio Grande and Rio Colorado

Convention between the United States of America and the United States of Mexico touching the boundary line between the two countries where it follows the bed of the Rio Grande and the Rio Colorado

Whereas, in virtue of the 5th article of the treaty of Guadalupe Hidalgo between the United States of America and the United States of Mexico, concluded February 2, 1848, and of the first article of that of December 30, 1853, certain parts of the dividing line between the two countries follow the middle of the channel of the Rio Grande and the Rio Colorado, to avoid difficulties which may arise through the changes of channel to which those rivers are subject through the operation of natural forces, the Government of the United States of America and the Government of the United States of Mexico have resolved to conclude a convention which shall lay down rules for the determination of such questions, and have appointed as their plenipotentiaries:

The President of the United States of America, Frederick T. Frelinghuysen, Secretary of State of the United States; and the President of the United States of Mexico, Matias Romero, envoy extraordinary and minister plenipotentiary of the United Mexican States;

Who, after exhibiting their respective full powers, found in good and due form, have agreed upon the following articles:

Article I

The dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

Article II

Any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

Article III

No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the

aforesaid commissions in 1852 or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

ARTICLE IV

If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention.

ARTICLE V

Rights of property in respect of lands which may have become separated through the creation of new channels as defined in Article II hereof shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged.

In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of Article VII of the aforesaid treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice throughout the actually navigable main channels of the said rivers, from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of said rivers, through the changes herein provided against, may be comprised within the territory of one of the two nations.

ARTICLE VI

This convention shall be ratified by both parties in accordance with their respective constitutional procedure, and the ratifications exchanged in the city of Washington as soon as possible.

In witness whereof the undersigned plenipotentiaries have hereunto set their hands and seals.

Done at the city of Washington, in duplicate, in the English and Spanish languages, this 12th day of November, A.D. 1884.

The preamble of this convention states that it refers to those parts of the boundary line between the two countries *which follow the bed of the Rio Grande and the Rio Colorado*, and proceeds to explain that the portions of the dividing line between the two countries which follows the middle of the channel of the Rio Grande and the Rio Colorado are those mentioned in the treaties of 1848 and 1853. The convention thus seems to have been designed to apply to the whole of the Rio Grande in so far as the treaties of 1848 and 1853 constitute this river as the dividing line between the two countries. The first article provides that the dividing line shall forever be that described in the aforesaid treaty, and following the center of the normal channel of the rivers named, etc. This appears to be a clear recognition of the fact that the line which is, according to the agreement of the parties, to be henceforth their boundary line, is also that which was created by the former treaties. It is, to that extent, a declaratory article importing in the treaties of 1848 and 1853 the construction which the parties had determined to adopt, as the preamble states, in order " to avoid difficulties which may arise through the changes of channel to which those

rivers are subject through the operation of natural forces ", and " to lay down rules for the determination of such questions ".

On behalf of Mexico it has been strenuously contended that this convention was intended to operate in the future only, and that it should not be given a retroactive effect so as to apply to any changes which had previously occurred. Reference was made to a number of well-known authorities establishing the proposition that laws and treaties are not usually deemed to be retrospective in their effect. An equally well-known exception to this rule is that of laws or treaties which are intended to be declaratory, and which evidence the intention of putting an end to controversies by adopting a rule of construction applicable to laws or conventions which have been subject to dispute. The internal evidence contained in the convention of 1884 appears to be sufficient to show an intention to apply the rules laid down for the determination of difficulties which might arise through the changes in the Rio Grande, whether these changes had occurred prior to or after the convention, and they appear to have been intended to codify the rules for the interpretation of the previous treaties of 1848 and 1853 which had formed the subject of diplomatic correspondence between the parties. While it is perfectly true that the convention was to be applied to *disputes* which might arise in future, it nowhere restricts these difficulties to future changes in the river. It expressly declares that by the treaties of 1848 and 1853, the dividing line had followed the middle of the river, and that henceforth the same rule was to apply.

At the time this convention was signed all the great changes in the course of the Rio Grande had occurred, and practically the whole Chamizal tract had been formed. It appears, in fact, that the river of 1852 and the river of 1884 had no points in common, except points of intersection. It is quite true that the parties may not have been aware of the entire separation of the old river bed from the new, from El Paso down to the Gulf of Mexico, but the fact remains that all the great and visible changes which are reported to have taken place during the floods extending ffrom 1864 to 1868 had done their work, and, in the case of the Chamizal tract, the changes had been so considerable in the upper portion of the river, which is proved to have been less liable to modifications owing to the nature of its soil than the lower part of the river, that it formed the subject of much diplomatic correspondence.

Having regard to the existence of such notable changes in the river bed, it is obvious that the convention of 1884 would have been nugatory and inapplicable upon the hypothesis of a fixed line boundary, for when once the river had moved away from the fixed line into the territory of one or other of the two nations it was idle and useless to provide for erosive or other changes which might subsequently occur in its bed, the river being *ex hypothesi*, wholly in the territory of one or other of the nations on either side of the supposed fixed boundary.

If any doubt could be entertained as to the intention of the parties in making this convention, it would disappear upon a consideration of the uniform and consistent manner in which it was subsequently declared by the two Governments to apply to past as well as to future changes in the river.

Copious references were made by the parties to the diplomatic correspondence which preceded this convention, but these communications, when closely examined, are inconclusive and add little or nothing to the language of the treaty.

Equally inconclusive are the declarations made after the signing of the convention by high officers of States on both sides. For example, Senor Romero, on the 13th April, 1834, is reported to have said to the Mexican department of foreign affairs that the treaty did not decide cases previous to its date, because it could not have retroactive effect, but could only be applied to such cases as

might occur subsequently. On the other hand, the President of Mexico, in his message of April, 1891, recommending the adoption of the convention of 1889, which created the boundary commission to carry out the provisions of the convention of 1884, refers to the convention as being for the establishment of an international commission to study and determine *pending* boundary questions, or those which may arise by reason of the variation of the course of the river.

It would be useless to multiply citations from diplomatic correspondence, which is not always consistent, and which falls under the rule laid down by The Hague Tribunal in the recent award in the North Atlantic Coast Fisheries reference. Speaking of similar unguarded expressions contained in diplomatic correspondence the presiding commissioner expressed the following opinion, which seems applicable to a great many of the communications which have been relied upon by one or other of the parties in the present case:

> The tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.

The same considerations apply to the correspondence with reference to a claim to Morteritors Island, on which considerable reliance was placed by Mexican counsel as showing the abandonment of the United States of the view seth forth in Attorney-General Cushing's opinion, and an acceptance of the fixed line theory. Without discussing the details of this case, it is sufficient to say that the decision arrived at was in no way based upon the fixed boundary theory, but was a conclusion which was inevitable from the application of the treaties of 1848 to 1853. It is contended, however, that certain expressions used by Mr. Secretary Frelinghuysen in his correspondence with the Mexican Government, when he was resisting the Mexican claim, are inconsistent with the idea of a fluvial boundary, and can only be explained on the theory that Mr. Frelinghuysen believed in the existence of a fixed boundary. Viewed in connection with the facts of the case, these expressions scarcely bear the interpretation which the Mexican counsel desire to put upon them, but even assuming that in the course of his argument on behalf of his department, Mr. Frelinghuysen committed himself to the theory that the United States could not recognize the annexation of its territory by accretion, such casual and unguarded language, which was certainly not relevant to the decision of the case upon the facts actually proved, could not bind his Government any more than similar expressions used by Mexican high officials, above referred to, could bind their Government.

Far more conclusive is the course of action entered upon and persistently followed by both nations upon the appointment of the boundary commission of 1889.

In 1893 a dispute arose in a case known as the " Banco de Camargo ", which involved a claim that the land had formed by gradual erosion and deposit of alluvium since 1865. After a correspondence between Señor Mariscal and the United States minister, in which they refer to the convention of 1884, it was decided to bring the case, along with similar ones, before the attention of the boundary commission, when organized. Upon the organization of the commission the case was duly submitted, and the commission found that the erosion in question dated back to the year 1865, and applied the provisions of the convention of 1884 to its solution.

In 1893 a dispute arose as to the arrest of American citizens on land which was claimed by citizens of both nations, and which had formed on the edge of the river prior to 1884. The two Governments thereupon agreed to refer the matter to the International Boundary Commission, which was organized for work on the 4th January, 1894.

In the case of the " Banco de Vela ", a claim based upon accretions which began in 1853, the matter was also referred to the boundary commission.

In the case of the " Banco de Granjeno ", under circumstances which were similar, the accretions having begun in 1853, the controversy was referred to and dealt with by the same commission.

In the case of the " Banco de Santa Margarita ", an analogous condition existed, and a similar disposition of the case was made.

The bancos above referred to were formed by accretions to land on one side of the river, with erosions on the other side, until the channel ran on a curve, and a time came when the force of the current made a new channel, leaving a banco between the new and old channel.

In dealing with the above cases the commissioners, in a joint report dated 15th January, 1895, concluded that the application of the treaty of 1884 to these bancos would be inconvenient and would create difficulties which had not been foreseen. They accordingly recommended the elimination of the bancos from the convention of 1884 and the signing of a special agreement with reference thereto.

As a result of this report, a convention was formally signed in 1905, which clearly acknowledges the application of Article II of the Convention of 1884 to fifty-eight bancos which had been surveyed and described in the report of the consulting engineers.

The convention further recites " That the application to these bancos of the principle established in Article II of the Convention of 1884 renders difficult the solution of the controversies mentioned, and, instead of simplifying, complicates the said boundary line between the two countries ", and provides that these bancos, together with those which may in future be formed, shall be eliminated from the operation of the convention of 1884, and shall be dealt with in a different manner.

This recognition of the retrospective application of the convention of 1884 is not that of subordinates, but of the Governments themselves, which expressly adopted the views of the commissioners as to the application of the treaty of 1884 and as to the desirability of taking such cases, both past and future, out of the convention and substituting new provisions.

In 1895 the Chamizal claim was submitted to the commission in a letter of Mr. Mariscal, above referred to. While the claim is a private one, there is no doubt that it was presented with the authority and concurrence of the Mexican Government and received its support throughout its various stages as involving a controversy as to the international title to the Chamizal tract. The claim of Pedro Y. García, on its face, showed that it was based on changes which had occurred in the river prior to 1884, and, notwithstanding this well-known fact, the matter was referred to the International Boundary Commission to be dealt with, and would have been disposed of but for a disagreement between the two commissioners, one of whom considered that the changes had resulted from slow and gradual erosion, as required by the convention of 1884, while the other commissioner considered that the erosion had been violent and intermittent and not of such a character as, under the terms of the convention of 1884, could change the international boundary.

While the Chamizal case was pending before the International Boundary Commission, they became seized of the controversy concerning the island of San Elizario, which was presented to the commission by the Mexican commissioner on the 4th November, 1895. The decision in this case, rendered on the 5th October, 1896, was based upon changes which occurred in the years 1857 and 1858. Like all other decisions of the boundary commission, it was communicated to the Mexican Government, which, under the terms of the Convention of 1889, could disapprove of the action of the commissioners within one month from the day of its pronouncement. Far from being disallowed, the decision was expressly approved by the Mexican Government, as appears from the letter addressed by Mr. Mariscal to the Mexican minister at Washington on 5th October, 1896.

Thus in all cases dealt with by the two Governments after the convention of 1884 referring to river changes occurring prior to that date, the provisions of that convention were invariably and consistently applied.

On the whole, it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.

The presiding commissioner and the American commissioner therefore hold that the treaties of 1848 and 1853, as interpreted by subsequent conventions between the parties and by their course of conduct, created an arcifinious boundary, and that the convention of 1884 was intended to be and was made retroactive by the high contracting parties.

(Mr. Commissioner Puga dissents from this holding for the reasons set forth in his subjoined opinion.)

PRESCRIPTION

In the countercase of the United States, the contention is advanced that the United States has acquired a good title by prescription to the tract in dispute, in addition to its title under treaty provisions.

In the argument it is contended that the Republic of Mexico is estopped from asserting the national title over the territory known as " El Chamizal " by reason of the undisturbed, uninterrupted, and unchallenged possession of said territory by the United States of America since the treaty of Guadalupe Hidalgo.

Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted, and unchallenged from the date of the treaty of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and Federal Governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.

As early as 1856, the river changes threatening the Valley of El Paso had caused anxious inquiries, which resulted in a reference of the matter to the Hon. Caleb Cushing for his opinion.

In January, 1867, Don Matias Romero forwarded to Mr. Seward, Secretary of State, a communication from the perfecture of Brazos relating to the controversy between the people of El Paso del Norte (now Juarez) and the people of Franklin (now El Paso, Tex.) over the Chamizal tract, then in process of formation. From that time until the negotiation of the convention of 1884, a considerable amount of diplomatic correspondence is devoted to this very question, and the convention of 1884 was an endeavor to fix the rights of the two nations with respect to the changes brought about by the action of the waters of the Rio Grande.

The very existence of that convention precludes the United States from acquiring by prescription against the terms of their title, and, as has been pointed out above, the two Republics have ever since the signing of that convention treated it as a source of all their rights in respect of accretion to the territory on one side or the other of the river.

Another characteristic of possession serving as a foundation for prescription is that it should be peaceable. In one of the affidavits filed by the United States to prove their possession and control over the Chamizal distict (that of Mr. Coldwell) we find the following significant statement:

> In 1874 or 1875 I was present at an interview between my father and Mr. Jesús Necobar y Armendariz, then Mexican collector of customs at Paso del Norte, now Ciudad Juarez, which meeting took place at my father's office on this side of the river.
>
> Mr. Necobar asked my father for permission to station a Mexican customhouse officer on the road leading from El Paso to Juarez, about 200 or 300 yards north of the river. My father replied in substance that he had no authority to grant any such permission, and even if he had, and granted permission, it would not be safe for a Mexican customs officer to attempt to exercise any authority on this side of the river.

It is quite clear from the circumstances related in this affidavit that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.

In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.

Under these circumstances the commissioners have no difficulty in coming to the conclusion that the plea of prescription should be dismissed.

Application of the convention of 1884

Upon the application of the convention of 1884 to the facts of this case the commissioners are unable to agree.

The presiding commissioner and the Mexican commissioner are of the opinion that the evidence establishes that from 1852 to 1864 the changes in the river, which during that interval formed a portion of the Chamizal tract, were

caused by slow and gradual erosion and deposit of alluvium within the meaning of Article I of the convention of 1884.

They are further of opinion that all the changes which have taken place in the Chamizal district from 1852 up to the present date have not resulted from any change of bed of the river. It is sufficiently shown that the Mexican bank opposite the Chamizal tract was at all times high and that it was never overflowed, and there is no evidence tending to show that the Rio Grande in that vicinity ever abandoned its existing bed and opened a new one. The changes, such as they were, resulted from the degradation of the Mexican bank and the alluvial deposits formed on the American bank, and, as has been said, up to 1864 this erosion and deposit appear to come within Article I of the convention of 1884.

With respect to the nature of the changes which occurred in 1864 and during the four succeeding years, the presiding commissioner and the Mexican commissioner are of opinion that the phenomena described by the witnesses as having occurred during that period cannot properly be described as alterations in the river effected through the slow and gradual erosion and deposit of alluvium.

The following extracts from the evidence are quoted by the presiding commissioner and the Mexican commissioner in support of their views:

JESÚS SERNA: Q. When the change took place was it slow or violent?—A. The change was violent, and destroyed the trees crops, and houses.

YNOCENTE OCHOA: Q. When the change took place was it slow or violent?—A. As I said before, it was sometimes slow and sometimes violent, and with such force that the noise of the banks falling seemed like the boom of cannon, and it was frightful.

E. PROVINCIO: Q. Explain how you know what you have stated.—A. Because the violent changes of the river in 1864 caused considerable alarm to the city, and the people went to the banks of the river and pulled down trees and tried to check the advance of the waters. I was there sometimes to help and sometimes simply to observe. I helped to take out furniture from houses in danger and to remove beams of houses, etc.

Q. When the change took place was it slow or violent?—A. I cannot appreciate what is meant by slow or violent, but sometimes as much as fifty yards would be washed away at certain points in a day.

* * * * * * *

Q. Please describe the destruction of the bank on the Mexican side that you spoke of in your former testimony. Describe the size of the pieces of earth that you saw fall into the river.—A. When the river made the alarming change it carried away pieces of earth one yard, two yards, etc., constantly, in intervals of a few minutes. At the time of these changes the people would be standing on the banks watching a piece going down, and somebody would call " look out, there is more going to fall " and they would have to jump back to keep from falling into the river.

* * * * * * *

Q. Do you think that those works were constructed to protect against the slow and gradual work of the river or against the floods?—A. They were made to protect the town from being carried away in the event of another flood like that of '64, because the curve that the river had made was dangerous to the town.

JOSÉ M. FLORES: Q. Did the current come with such violence between 1864 and 1868 that houses and fields were destroyed?—A. Yes, sir.

* * * * * * *

Q. Please describe the manner of the tearing away of the Mexican bank by the current when these changes were taking place.—A. The current carried the sand

from the bank and cut in under, and then these pieces would fall into the water. If the bank was very high it took larger pieces; say two yards, never more than three yards wide, and where the banks were low it took smaller pieces.

DOCTOR MARIANO SAMANIEGO describes the violence of the change as follows: " The changes were to such a degree that at times during the night the river would wear away from fifty to one hundred yards. There were instances in which people living in houses fifty yards from the banks on one evening had to fly in the morning from the place on account of the enroachments of the river, and on many occasions they had no time to cut down their wheat or other crops. It carried away forests without giving time to the people to cut the trees down."

Q. Of the changes of the river that you have mentioned, were they all perceptible to the eye?—A. Yes, sir.

The presiding commissioner and the Mexican commissioner consider that the changes referred to in this testimony cannot by any stretch of the imagination, or elasticity of language, be characterized as slow and gradual erosion.

The case of Nebraska *v.* Iowa (143 U.S., 359), decided by the Supreme Court of the United States in 1892, is clearly distinguishable from the present case. In Nebraska *v.* Iowa the court, applying the ordinary rules of international law to a fluvial boundary between two States, held that while there might be an instantaneous and obvious dropping into the Missouri River of quite a portion of its banks, and while the disappearance, by reason of this process, of a mass of bank might be sudden and obvious, the accretion to the other side was always gradual and by the imperceptible deposit of floating particles of earth. The conclusion was, therefore, that notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side onto the other, the law of accretion controlled on the Missouri River, as elsewhere.

In the present case, however, while the accretion may have been slow and gradual, the parties have expressly contracted that not only the accretion, but the erosion, must be slow and gradual. The convention of 1884 expressly adopts a rule of construction which is to be applied to the fluvial boundary created by the treaties of 1848 and 1853, and this rule is manifestly different from that which was applied in the case of Nebraska *v.* Iowa, in which the court was not dealing with a special contract. If it had been called upon, in the case just cited, to decide whether the degradation of the bank of the Missouri River had occurred through a slow and gradual process, the answer would undoubtedly have been in the negative.

In the case of St. Louis *v.* Rutz (138 U.S., 226), the Supreme Court of the United States, dealing with facts very similar to those established by the evidence in the present case, found that the washing away of the bank of the Mississippi River did not take place slowly and imperceptibly, but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the rises of floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasing from four to eight weeks before the waters of the river would subside to their ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from 240 to 300 feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two and that blocks or masses of earth from 10 to 15 feet in width frequently caved in and were carried away at one time.

If the degradation of the bank of the Mississippi River, above described, was found by the Supreme Court not to be slow and imperceptible progress, it is difficult to understand how the destruction of land, houses, and forests, described by the witnesses in the present case, can be regarded as examples of slow and gradual erosion.

Nor can the presiding commissioner and the Mexican commissioner give effect to the contention that Mexico must be held to have put a construction on the words " slow and gradual " in the preamble of the Banco Treaty of 1905, which adopted the report of the commissioners stating that the changes producing the bancos were due to slow and gradual erosion coupled with avulsion, although it is alleged by the United States that the erosion in that case was even more violent than that which occurred at the Chamizal. The report rendered by the commissioners to their respective governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that by making a minute examination of the plans accompanying the report the actual extent of the erosive changes might have been ascertained, but there certainty was nothing in the question submitted to the governments for solution to necessitate, or even suggest, such an inquiry.

It has also been contended on behalf of the United States that before the signing of the treaty of 1905 the Mexican government had received the opinion of the American commissioner in the Chamizal case, which asserted that if the erosion in Chamizal was not slow and gradual, then *a fortiori* the erosion which had formed the bancos in the lower part of the river could not be slow and gradual. The effect of this assertion on the part of the American commissioner, however, was counteracted by the reply of the Mexican commissioner, who argued that there was no similarity between the two cases and no inconsistency between his report on the bancos and his attitude in the Chamizal case. Under these circumstances it is reasonable to conclude that the Mexican Government adopted the view of their commissioner, and in any event it can not be successfully contended that in assenting to the language of the preamble of the Banco Treaty it was precluded from contending that the Chamizal case was of a different nature.

It has been suggested, and the American commissioner is of opinion, that the bed of the Rio Grande, as it existed in 1864, before the flood, cannot be located, and moreover that the present commissioners are not authorized by the convention of the 5th December, 1910, to divide the Chamizal tract and attribute a portion thereof to the United States and another portion to Mexico. The presiding commissioner and the Mexican commissioner cannot assent to this view and conceive that in dividing the tract in question between the parties, according to the evidence as they appreciate it, they are following the precedent laid down by the Supreme Court of the United States in Nebraska *v.* Iowa, above cited. In that case the court found that up to the year 1877, the changes in the Missouri River were due to accretion, and that, in that year, the river made for itself a new channel. Upon these findings it was held that the boundary between Iowa and Nebraska was a varying line in so far as affected by accretion, but that from and after 1877 the boundary was not changed, and remained as it was before the cutting of a new channel. Applying this principle, *mutatis mutandis*, to the present case, the presiding commissioner and the Mexican commissioner are of opinion that the accretions which occurred in the Chamizal tract up to the time of the great flood in 1864 should be awarded to the United States of America, and that inasmuch as the changes which occurred in that

year did not constitute slow and gradual erosion within the meaning of the convention of 1884, the balance of the tract should be awarded to Mexico.

They also conceive that it is not within their province to relocate that line, inasmuch as the parties have offered no evidence to enable the commissioners to do so. In the case of Nebraska *v.* Iowa the court contented itself with indicating, as above stated, the boundary between the two States and invited the parties to agree to a designation of the boundary upon the principles enunciated in the decision.

The American commissioner dissents from the above holding, for the reasons given in his subjoined memorandum, and is of opinion that all the changes which have taken place at the Chamizal since 1852 were due to slow and gradual erosion and deposit of alluvium, within the meaning of the convention of 1884.

He is further of opinion that the commissioners have no jurisdiction to separate the Chamizal tract, and award a portion to the United States and a portion to Mexico; and, in view of his conviction that the position of the river bed in 1864 can not be ascertained, he considers that the award of the majority of the commissioners cannot be made effective.

Wherefore the presiding commissioner and the Mexican commissioner, constituting a majority of the said commission, hereby award and declare that the international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico.

The American commissioner dissents from the above award.

El Paso, 15th June, 1911.

(*Signed*) E. LAFLEUR
ANSON MILLS
F. B. PUGA

Dissenting opinion of the American commissioner

The American commissioner concurs in the findings of the presiding commissioner to the effect that the treaties of 1848 and 1853 did not establish a fixed and invariable line; that the treaty of 1884 was retroactive, and in the finding of the presiding commissioner and the Mexican commissioner to the effect that the United States has not established a title to the Chamizal tract by prescription. He is compelled to dissent *in toto* from so much of the opinion and award as assumes to segregate the Chamizal tract and to divide the parts so segregated between the two nations, and from that part of the opinion and award which holds that a portion of the Chamizal tract was not formed through " slow and gradual erosion and deposit of alluvium " within the terms of the treaty of 1884.

The reasons for the dissent are threefold: First, because in his opinion, the commission is wholly without jurisdiction to segregate the tract or to make other findings concerning the change at El Chamizal than " to decide whether it has occurred through avulsion or erosion, for the effects of articles 1 and 2 of the convention of November 12, 1884 " (and art. 4, convention of 1889); secondly, because, in his opinion, the convention of 1884 is not susceptible to

any other construction than that the change of the river at El Chamizal was embraced within the first alternative of the treaty of 1884. And, thirdly, because, in his opinion, the finding and award is vague, indeterminate, and uncertain in its terms, and impossible of execution.

Division of tract a departure from convention of 1910

In the judgment of the American commissioner, articles 1 and 3 of the convention of June 24, 1910, providing for the present arbitration, submit to this commission the question as to the international title of the Chamizal tract in its entirety and this question only. Article I of the convention bounds the Chamizal tract with technical accuracy, while article 3 provides that " the Commission shall decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico ".

It is believed that by those provisions, when read together, the two governments have asked this commission a specific and definite question and that the commission is " solely and exclusively " empowered and required to give a specific and definite answer — either that the international title to the Chamizal tract as defined in the convention is in the United States or that it is in Mexico. The *prima facie* meaning of the language of the convention is reinforced when the convention is read in the light of the history of the controversy which called it into being, and in the light of the conduct of the two parties before this commission. From Señor Romero's note of January 9, 1867 (U.S. Case App., p. 553) which is, so far as appears, the first reference to what is now known as the Chamizal tract in the correspondence between the two governments, down to the concluding arguments before this commission on June 2 last, there is not the slightest suggestion on the part of either of the two governments that there could be any question of a division of the tract. The presiding commissioner was the first to raise the question of a division of the tract in connection with another point which was under discussion by counsel for the United States. (Record, pp. 430, 432.) Subsequently, counsel for Mexico defined the attitude of Mexico as to the issue before the Tribunal in the following language:

> In answer to that (*i.e.*, the suggestion that no monuments were fixed) I have but to remind this court that the treaty of 1910 says that the monuments are fixed, says that the line was run, tells this court where to find it and says that either that is the line between this country and Mexico or the present channel of the Rio Grande as it runs is the line. (Record, p. 500.)

Thereafter, counsel for the United States recurred to the question and specifically took the position that the only question before the Tribunal was as to the international title to the tract in its entirety, called attention to the evident agreement of the parties upon this point, and pointed out that a decree segregating the tract " would be a departure from the terms of the convention ". (Record, pp. 535, 536.)

Even in ordinary tribunals of general jurisdiction it is regarded as a dangerous practice for the court to award a decree not solicited or indorsed by counsel for either party. Is not this danger accentuated when an international tribunal, which has no powers except those conferred upon it by the terms of the submission under which it sits, assumes to raise and answer a question never suggested by the parties in the course of negotiations extending over fifty years and not indorsed by either party in argument when suggested from the bench? Particularly is this true when it can be asserted without fear of contradiction that if there had been the slightest idea in the minds of the negotiators of the treaty of June 24, 1910, that it was susceptible of the construction which has been

placed upon it by the majority of the commission, the possibility of such an unfortunate result would have been eliminated in even more precise and affirmative language.

The commissioner for the United States is unable to understand the force of the reference in the opinion of the presiding commissioner to the case of Nebraska *v.* Iowa as a " precedent " for " dividing the tract in question between the parties ". There is an apparent difference between the powers of the Supreme Court of the United States, acting under the provisions of the Constitution of the United States, conferring general and original jurisdiction in controversies between States on a bill and cross bill in equity to establish a disputed boundary line between two States, and this commission with powers and jurisdiction strictly limited by the conventions which have called it into being. Indeed, the opinion of the majority of the commission seems to recognize this distinction in another connection is stating the proposition, in which the American commissioner concurs, that the present commission, unlike the Supreme Court in Nebraska *v.* Iowa, is bound by the terms of the convention of 1884. It is also bound by the terms of the convention of 1910.

It is axiomatic that " a clear departure from the terms of the reference " (Twiss, The Law of Nations, 2d ed., 1875, p. 8) invalidates an international award, and the American commissioner is constrained to believe that such a departure has been committed by the majority of the commission in this case in dividing the Chamizal tract and deciding a question not submitted by the parties.

Two kinds of erosion a departure from convention of 1884

But this is not all; as The Hague Court recently pointed out in the case of the Orinoco Steamship Co., " excessive exercise of power may consist not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied ". (United States *v.* Venezuela, before The Hague Court. American Journal of International Law, vol. 5, No. 1, pp. 232 and 233.)

The preamble of the convention of June 24, 1910, prescribed the law which governs this commission, namely, " the various treaties and conventions now existing between the two countries and * * * the principles of international law ". The commission has held the convention of 1884 retroactive and therefore in general applicable to this case. While the convention of 1884 purports to cover all changes that may occur in the course of the Rio Grande and the Rio Colorado where they constitute a boundary between the United States and Mexico, it nevertheless makes provision for but two methods of effecting such changes, or rather distinguishes the changes which may occur into two distinct classes, viz, one covers alterations in the banks or the course of those rivers, effected by natural causes through the slow and gradual erosion and deposit of alluvium, and the other covers " any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made in 1852 ".

The American commissioner deems it unnecessary to examine further into the question of the cutting or deepening of a new bed since the presiding commissioner and the Mexican commissioner have found that no change which has taken place opposite the Chamizal tract since 1852 has resulted " from any change of bed of the river " (Opinion, p. 29), and in that finding the American commissioner concurs.

The commissioner for the United States does deem it proper, however, to point out that the language of Article II of the convention of 1884 makes no provisions respecting the boundary in the event of any other change of the river than that embraced in " the cutting of a new bed " or the " deepening of another channel than that which marked the boundary at the time of the survey " of 1852.

It is true that Article II of the convention begins with the words " any other change wrought by the force of the current ", but those words are immediately followed by the provision " whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which formed the boundary at the time of the survey made under the aforesaid treaty ."

It is a rule of interpretation which the Supreme Court of the United States says to be " of universal application " (United States *v.* Arredondo, 6 Pet., 691) that " where specific and general terms of the same nature are embraced in the statute, whether the latter precede or follow the former, the general terms take their meaning from the specific and are presumed to embrace only things or persons designated by them ". (Fontenet *v.* The State, 112 La., 628, 36 So. Rep., 630.)

Authorities to support this proposition might be adduced without number, but reference will be made to a few; U.S. *v.* Bevans, 3 Wheat., at pl. 390; Moore *v.* American Transportation Co., 24 Howard, 1–41; U.S. *v.* Irwin, Federal Cases No. 14445; Supreme Court of Ky. in City of Covington *v.* McNicholas Heirs, 57 Ky., 262; Rogers *v.* Boiller, 3 Mart. O.S., 665; City of St. Louis *v.* Laughlin, 49 Mo., 559; Brandon *v.* Davis, 2 Leg. Rec., 142; Felt *v.* Felt, 19 Wis., 183, also State *v.* Gootz, 22 Wis., 363; Gaither *v.* Green, 40 La. Ann., 362; 4 So. Rep., 210; Phillips *v.* Christian Co., 87 Ill. App., 481; in re Rouse, Hazzard & Co., 91 Fed. Rep., 96; Barbour *v.* City of Louisville, 83 Ky., 95; Townsend Gas & Electric Co. *v.* Hill, 64 Pac. Rep., 778, 24 Wash., 369; State *v.* Hobe, 82 N.W., Rep., 336, 106 Wis., 411.

In Regina *v.* France, 7 Quebec Q.B., 83, it is stated that:

It is immaterial, it has been held, whether the generic term precedes or follows the specific terms which are used. In either case the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words. (Quoted from Am. & Eng. Enc. of Law, vol. 26, p. 610, under captain " Statute ".)

Did the United States abandon vested rights?

Not only does the language of Article II confine its meaning to specific changes of channel described therein, but the fifth article of the same convention makes provision for the protection of property rights " in respect of lands which may have became separated through the creation of new channels as defined in Article II ", but it makes no provision whatever for the protection of property rights in contemplation of any other change in the course of the river, much less does it make such provision as to lands degraded by rapid and violent erosion. It was suggested by the honorable presiding commissioner during the argument of this case that no provision was necessary to protect private rights in case the land was carried away by any character of erosion because the property itself was destroyed and no private rights could remain. (Record, pp. 704, 705.) In this proposition the United States commissioner concurs, but he is wholly at a loss to discover how a public or international title could remain in property that was so effectually destroyed as to annihilate private rights. Even supposing it was unnecessary to protect private rights on the banks thus degraded, would no idea have suggested itself with regard

to the rights of those who had taken up their residence on the other side, for instance at El Chamizal, or at Santa Cruz Point? As suggested by the presiding commissioner, " all the great changes in the course of the Rio Grande had occurred and practically the whole Chamizal tract had been formed * * * but the fact remains that all the great and visible changes which are reported to have taken place during the floods extending from 1864 to 1868 had done their work, and, in the case of the Chamizal tract, the changes had been so considerable in the upper portion of the river, which is proved to have been less liable to modifications owing to the nature of its soil than the lower part of the river, that it formed the subject of much diplomatic correspondence ". (Opinion, p. 20.) And yet the record in the case discloses that every foot of the accretion at El Chamizal had been occupied prior to 1884 under color of American title. (See official map of El Paso, Tex., 1881, U.S. Countercase, Portfolio, Map No. 10; also act incorporating the city of El Paso, U.S. Countercase, p. 139, and Patents of the State of Texas and Minutes of the City Council of the City of El Paso, U.S. Countercase, pp. 139–168.)

The Supreme Court of the United States, in the case of United States *v.* Arredondo, supra, says:

> That it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and never refused.

And further in that case the court, in alluding to the treaty between the United States and Spain, concluded on the 27th of October, 1795, said:

> Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and national honor would have demanded and which the United States could not have refused.

Under the fluvial boundary, which this commission has held the treaties of 1848 and 1853 created, a title had vested in the United States and the citizens thereof in all accretions to the Chamizal tract under the recognized principles of international law. If the language of the convention of 1884 recognized in Mexico or its citizens any right in any portion of such accretions, however formed, the United States divested itself and its citizens of rights which international law had given them and yet the United States did, if the opinion of the majority of this commission is correct, neglect " a stipulation which every sentiment of justice and national honor would have demanded, and which the United States [Mexico] could not have refused ".

Vattel says (Law of Nations, Book 1, chap. 2, sec. 17):

> The body of a nation cannot then abandon a province, a town, or even a single individual who is a part of it unless compelled to it by necessity or indispensably obligated to it by the strongest reasons founded on the public safety.

The foregoing views are in entire accord with the opinion of the Mexican commissioner as expressed in the second paragraph of the dissenting opinion.

WHAT LAW GOVERNS?

The commissioner for the United States has been unable to discover, although he has made a careful study of the opinion of the majority of the commission, under what provision of the convention of 1884 it is conceived that Mexico can

be entitled to any portion of the Chamizal tract, the formation of which may be ascribed to any character of erosion, whether slow and gradual or rapid and violent. Had the commissioner for the United States been able to expel from his mind and to disregard the language of the treaties of 1889 and 1905, had he been able to forget and disregard the construction which has been placed upon Article I of the convention of 1884 by the International Boundary Commission since its organization in 1893, and had he been wholly uninfluenced by the fact that counsel for Mexico as well as counsel for the United States were agreed that the convention of 1884 embraced but two classes of changes as hereinbefore set forth (Record, p. 608), he might have been able to concur with the majority of the commission that the degradation of the Mexican bank of the river at some uncertain points and at some uncertain times was not within the meaning of Article I of the treaty of 1884; but the commissioner for the United States does not believe that by any strength of the imagination or any elasticity of the law, any character of erosion and deposit can be brought within the meaning of Article II of that convention. Therefore, the result must have been the same; if the change which occurred at El Chamizal was not within the meaning of either Article I or II of the convention of 1884, then said convention becomes inapplicable and we must look to the principles of international law for the rule which is to govern our action. But it is admitted both in the language of the commission as embodied in the record of our hearing (Record, pp. 203, 300) as well as in the printed argument of counsel for Mexico (Mexican Argument, p. 31) that under the principles of international law the change in the course of the river due to erosion and deposit would carry the boundary line with it, no matter how rapid might be the degradation of one bank by erosion, provided only that the growth of the other bank was accomplished by gradual deposit of alluvium, and such the American commissioner conceives to be the undisputed evidence and the admitted facts of this case.

The precise language in which the learned agent of Mexico sets forth his position upon this point is so significant as to deserve quotation:

> In fact, the convention only occupied itself with two classes of alterations or changes of the bank and channel of the river; one, that originated by the slow and gradual erosion of one bank and the deposit of alluvium, and the other by the abandonment of an old bed and the opening of a new one. (Record, p. 203.)

In view of the foregoing the commissioner for the United States cannot but regard it as unfortunate that the commission should have indicated no desire to hear further argument on this point (as appears in the record of the hearing at pp. 608–614), where the commission indicated that it scarcely seemed desirable to pursue this point since counsel for both sides seemed agreed that the convention of 1884 embraced but two classes of changes, because he ventures to believe that counsel for the United States would have convinced the commission that it must assign the change at El Chamizal to the first alternative in Article I of the convention of 1884, or else disregard the convention of 1884 entirely and decide the case upon the principles of international law.

In the opinion of the presiding commissioner (Opinion, p. 33) reference has been made to the case of the City of St. Louis *v.* Rutz (138 U.S., 226), and it is stated that the facts in that case are very similar to those established by the evidence in the present case. But, with all respect, the American commissioner submits that while the rapid degradation of the east bank of the Mississippi River, as described in that case, is very similar to the erosion that is shown to have occurred at certain or rather uncertain points opposite El Chamizal, the vital facts in that case and the present case are very different. In that case the

evidence disclosed a rapid degradation of the east bank of the river and the complete submergence for several years of that portion of plaintiff's surveys. Subsequently an island formed on the east side of the thread of the river and that island became joined by accretion to plaintiff's surveys. The court held that under the laws of Illinois the plaintiff owned in fee simple that portion of the river bed lying east of the thread of the stream and that when new land formed east of the thread of the stream it belonged to the former owner. The court makes very clear that the ground of its decision is that the holder of the Missouri title on the west bank could not own the land which thus appeared first by an island formation and subsequently by accretion thereto *east* of the thread of the stream.

An analogous case would have been presented here if after the river had invaded Mexican territory by rapid erosion, making for itself a bed 500 yards wide, as one witness testified it did (U.S. Case, App., p. 118), an island had subsequently arisen to the south of the thread of the stream. That island would have belonged to Mexico whether it subsequently became joined to the south bank or not, or even though it might have become joined by accretion after its formation to the north bank, but there is not a suggestion in the evidence that such a fact ever occurred. On the contrary, the evidence indisputably shows that the north bank did not even move south simultaneously with the destruction of the south bank but that it grew up in a long course of years by the slow and gradual deposit of alluvium.

The American commissioner is constrained to hold, therefore, that the majority of the commission have failed to apply to the case the express rules laid down by the convention of 1884; and by this failure have departed from the terms of the submission and invalidated the award.

A DEPARTURE FROM THE CONVENTION OF 1889

In the opinion of the American commissioner this failure becomes the more manifest by reference to the terms of article 4 of the convention of 1889, to which, supplemented by the convention of 1910, this commission owes its life. By that article, the very law of its being, this commission when considering any alteration in the course of the river named, is confined " to decide whether it has occurred through avulsion or erosion, for the effects of articles 1 and 2 of the convention of November 12, 1884 ". The American commissioner conceives that this provision was not only declaratory and interpretative of the changes contemplated by the convention of 1884, but that said clause is jurisdictional in so far as the powers of this commission are concerned.

In the opinion of the American commissioner, the two Governments in the preamble of the Banco Treaty of 1905 again placed an authoritative interpretation upon the words " slow and gradual " in the convention of 1884. In that treaty the two Governments after reciting articles 1 and 2 of the treaty of 1884, expressly declared that the changes whereby the so-called bancos had been formed were " owing to the slow and gradual erosion coupled with avulsion. " That the erosive action thus rerfered to was and is far more rapid and violent than that which occurred in the Chamizal tract is unquestionable, but the presiding commissioner and the Mexican commissioner observe, with reference to the investigations undertaken by the International Boundary Commission upon which the banco treaty was based, that

The report rendered by the commissioners to their respective Governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that, by making a minute examination of the plans accompanying the report,

the actual extent of the erosive changes might have been ascertained, but there certainly was nothing in the question submitted to the Governments for solution to necessitate, or even to suggest, such an inquiry. (Opinion, p. 34.)

With all respect, it would seem that the question as to whether or not the changes which resulted in the banco formation were " slow and gradual " within the meaning of the treaty of 1884, was so " material to the question to be decided " that if those changes were not " slow and gradual " there would in most instances have been no bancos to eliminate. It is true that the commissioners did not think it necessary to state in figures the rate of erosion on each banco, but the rate of erosion was obtainable by a casual examination of the maps and reports if the plenipotentiaries were interested in knowing the rate. Having the information before them they were free to use it or not in framing their language, but no rule either of logic or justice is perceived that would relieve them or the contracting parties from being held to the accountability which binds all other men when they use language in a legal document to express ideas.

And again the American commissioner feels constrained to say that he can not understand the method of the interpretation which gives such emphasis to the words " slow and gradual " in Article I of the treaty of 1884 as to override not only the ordinary rules of international law and the uniform construction placed upon the treaty by the International Boundary Commission since its organization and by agents and counsel for both parties before this commission, but also what appears to him to be the plain and unmistakable intent of Article II to confine all "other changes " to the cutting of a new bed or the deepening of an existing channel, while the same words in the Banco Treaty of 1905, although entirely consistent with the purpose and scope of that treaty, are apparently deemed negligible and unimportant.

The failure of the presiding commissioner to regard the Banco Treaty of 1905 as placing an authoritative interpretation upon the words " slow and gradual " in the treaty of 1884, appears all the more strange to the American commissioner in view of the fact that the presiding commissioner, earlier in his opinion, in his discussion of the retroactivity of the treaty of 1884, attaches great weight to this same treaty of 1905 because it provides for the elimination from the treaty of 1884 of bancos formed prior to 1884. The presiding commissioner has no difficulty in holding the governing minds of the two countries responsible for the language which they used in the treaty of 1905 so far as it construes the treaty of 1884 retroactively. He says:

This recognition of the retrospective application of the convention of 1884 is not that of subordinates, but of the Governments themselves, which expressly adopted the views of the commissioners as to the application of the treaty of 1884 and as to the desirability of taking such cases, both past and future, out of the convention and substituting new provisions. (Opinion, p. 24.)

It is difficult to see why the plenipotentiaries should be charged with notice of the date at which these bancos were cut off and not of the rate at which they were formed.

It should furthermore be remembered that in his opinion in Chamizal case No. 4 in 1896 the American commissioner called attention to the rapidity of the erosion which has been recognized as slow and gradual in the case of the bancos and gave the figures of erosion in the case of one banco, the Banco de Camargo, 87 meters a year, figures which exceed any erosion which could have taken place in the Chamizal tract, even on an assumption most favorable to the

Mexican contention. In discussing the reports rendered by the commissioners to their respective Governments in 1896, in which the American commissioner asserted that if the erosion in El Chamizal was not slow and gradual, then *a fortiori*, the erosion which had formed the bancos in the lower part of the river could not be slow and gradual,[1] the presiding commissioner suggests that that report " was counteracted by the reply of the Mexican commissioner, who argues that there was no similarity between the two cases ", and deduces therefrom the conclusion that " under these circumstances it is reasonable to conclude that the Mexican Government adopted the view of their commissioner " (Opinion, pp. 34, 35). It is difficult to accept this conclusion in view of the fact that in drafting the treaty of 1905 the Mexican Government brushed aside the distinction, sought to be established by its commissioner and applied the provisions of the banco treaty to the Rio Grande in the upper as well as in the lower division of the river " throughout that part of the Rio Grande * * * which serves as a boundary between the two nations ." (U.S. Case, App., p. 87.)

The irresistible logic with which the presiding commissioner drives home the conclusion that the ambiguity, if any, in the convention of 1884, in so far as the retroactivity of the convention is concerned, is removed by the practical construction placed upon that treaty by the contracting parties as well as by the language of the treaties of 1889 and 1905, compels the admiration and approval of the American commissioner, but he cannot expel from his mind that the conclusion from the same course of practical construction and subsequent treaty interpretation applies with equal force to the ambiguity, if any, of the convention of 1884 when dealing with erosion and avulsion.

The words " slow and gradual " are relative terms. The treaty of 1884 was drafted specifically for the Rio Grande, and its changes at the point in question have been slow and gradual compared to other changes both in the upper and lower river or when compared with the progress of a snail.

AWARD VOID FOR UNCERTAINTY

The award of the presiding commissioner and the Mexican commissioner, constituting a majority of the commission, is to the effect that the —

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[1] The presiding commissioner has fallen into error (Opinion, p. 34) in suggesting that the American commissioner in 1896 compared the erosion at Chamizal to that which formed the bancos only, whereas the American commissioner in his opinion was referring to the erosion at every bend in the river throughout the 800 miles where it flowed through alluvial formation.

The following are the words used by him:

" In the opinion of the United States commissioner, if the changes at El Chamizal have not been ' slow and gradual ' by erosion and deposit within the meaning of Article I of the treaty of 1884, there will never be such a one found in all the 800 miles where the Rio Grande with alluvial banks constitutes the boundary, and the object of the treaty will be lost to both Governments, as it will be meaningless and useless, and the boundary will perforce be through all these 800 miles continuously that laid down in 1852, having literally no points in common with the present river, save in its many hundred intersections with the river, and to restore and establish this boundary will be the incessant work of large parties for years, entailing hundreds of thousands of dollars in expense to each Government and uniformly dividing the lands between the nations and individual owners that are now, under the supposition that for the past forty years the changes have been gradual and the river accepted generally as the boundary, under the same authority and ownership; for it must be remembered that the river in the alluvial lands, which constitute 800 miles, has nowhere to-day the same location it had in 1852." (Proceedings of International Boundary Commission, vol. 1, p. 93.)

international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico. (Opinion, p. 36.)

The American commissioner is of opinion that this award is void for the further reason that it is equivocal and uncertain in its terms and impossible of accomplishment. The presiding commissioner and the Mexican commissioner " conceive that it is not within their province to relocate that line [the line of 1864], inasmuch as the parties have offered no evidence to enable the commissioners to do so ". (Opinion, p. 36.) It is submitted, with all respect, that the fact that the parties have offered no evidence of the location of the line of 1864 is suggestive of the fact that it was not within the contemplation of the parties that the tract should be divided. Perhaps the reason that agent and counsel on either side, even after the suggestion of the court as to the possibility of dividing the tract along the channel of 1864, did not ask leave to offer evidence for the purpose of relocating this channel was because they were and are well aware that it would be as impossible to locate the channel of the Rio Grande in the Chamizal tract in 1864 as to relocate the Garden of Eden or the lost Continent of Atlantis.

In concluding this dissenting opinion it is impossible to refrain from pointing out the unfortunate results which this decision would have in the contingency that the two countries should attempt to follow it in interpreting the treaty of 1884 in other cases.

The American commissioner does not believe that it is given to human understanding to measure for any practical use when erosion ceases to be slow and gradual and becomes sudden and violent, but even if this difficulty could be surmounted, the practical application of the interpretation could not be viewed in any other light than as calamitous to both nations. Because, as is manifest from the record in this case, all the land on both sides of the river from the Bosque de Cordoba, which adjoins the Chamizal tract, to the Gulf of Mexico (excepting the canyon region) has been traversed by the river since 1852 in its unending lateral movement, and the mass, if not all, of that land is the product of similar erosion to that which occurred at El Chamizal, and by the new interpretation which is now placed upon the contention of 1884 by the majority of this commission not only is the entire boundary thrown into well-nigh inextricable confusion, but the very treaty itself is subjected to an interpretation that makes its application impossible in practice in all cases where an erosive movement is in question.

The convention of 1910 sets forth that the United States and Mexico " desiring to terminate * * * the differences which have arisen between the two countries ", have " determined to refer these differences " to this commission enlarged for this purpose. The present decision terminates nothing; settles nothing. It is simply an invitation for international litigation. It breathes the spirit of unconscious but nevertheless unauthorized compromise rather than of judicial determination.

(*Signed*) Anson MILLS

Individual opinion of the commissioner of Mexico

[Translation.]

The Mexican commissioner respectfully begs to differ from the opinion of his learned colleagues in definitely judging the subject of the Chamizal in the matter of the fixedness and invariability of the boundary line of 1852, and also in regard to the retrospective application of the convention of 1884, as it does not appear to him that the findings of the majority on both points are supported by the record and the arguments that figure in the proceedings.

The agent of the Government of Mexico has left established a fundamental axiom in right — that the alluvium should be governed and qualified by the laws in force at the time in which it commenced to form. In the depth of this principle is enveloped the universal maxim of the irretroactivity of the laws, unless it is stipulated expressly in them, or that at the time the phenomena in question took place there should have been no provisions to cover it.

Neither of the two exceptions cited occur in the case of the Chamizal, as in 1852 there existed a perfectly defined law to apply — the treaty of Guadalupe. The convention of 1884 evidently does not contain any direct and precise stipulation as to its retrospective power.

My first proposition, according to this, is that the treaty of 1848 stipulated in a clear and precise manner a fixed or " limited " line.

The agent of Mexico expounds in methodical and sufficient form the classical division, universally adopted, of property in two large categories: " Arcifinious " property and " limited " property. The characteristic of the former is to be determined in one of its boundaries by natural geographical " accidents ", such as mountain ranges, rivers, etc., which by their manifest discernibility on the ground constitute within themselves limited lines, which in order to designate perfectly it is sufficient to mention. In order that the property may be in the second category, evidently it is sufficient that it does not pertain to the first, although further than that it is indicated characteristically as that whose boundaries in all senses are marked by means of definite and permanent lines or signs.

Now, it has remained undenied in this judgment that the treaty of 1848 directed the general setting of landmarks on the dividing line between Mexico and the United States, and the marking of these landmarks on precise and authentic plans, as well as a religious conservation in the future of the line so fixed, and it is also shown in the record, without discussion on the part of America, that the commissioners charged with executing this convention, complying with the letter of their instructions, agreed, ordered, and carried to a conclusion the erection of permanent monuments, identical in character to those of the nonfluvial line, along the length of the fluvial, and that this operation was known to the two Governments and was not disapproved by them, to which they gave account of all their acts.

In the matter of the Chamizal, there is data to prove that at least two of these monuments (of iron) were placed; one on the right bank of the river, in what is now Cuidad Juarez, and another on the left, in Magoffinsville, now part of El Paso. That these monuments were properly " mojoneras " (landmarks) and not signs of topographical reference is undeniable, for the reason that they did not connect topographically with the lines of the survey. Their sole object was to " show the limits of both Republics ", and their erection would have been absolutely unnecessary in case of an arcifinious boundary.

It is the opinion of the majority of the commissioners that the declaration in the treaty of 1853 (Article I) that the limits between both countries should follow the middle of the Rio Bravo, *as stipulated in that of 1848*, is the best proof that the former treaty created an arcifinious and not a fixed line; because, it is said, if the line had been fixed before 1853, it would not have been affirmed then — both Governments knowing, as they did know, that the river had changed its course between the former and the latter treaty — that *the center of the bed* would continue being the point of separation between the eminent domains of the two nations. The commissioner for Mexico feels it necessary to state that he fails to see the force of the argument, because in his conception the treaty of 1853 had three objects: First, to establish a boundary line in the territory between the Rivers Bravo and Colorado; second, to finish the establishment, where it had not already been concluded, of that portion of the line of 1848 not affected by the Gadsden Treaty; third, and very important, *to ratify the portions already established* of the line of 1848; and the new commissioners, to whom was entrusted the execution of Article I of the agreement, were given entire and final powers for each and every one of the three parts of their trust. Therefore, when in 1857 they jointly delivered to their Governments as result of their labors a collection of plans in which was clearly shown the position of the dividing line, according to the last treaty, that line (it might have been run in 1849, in 1852, or in any other year) remained adopted as the sole and invariable line of separation between the two Republics.

In the particular matter referred to the judgment of this arbitration court, the river has varied after the survey of 1852 and before the signing of the convention of La Mesilla, and the new commissioners knew it perfectly. What should they have done had they believed the treaty of 1853 considered the river as arcifinious? Undoubtedly resurveyed map No. 29 in order to clearly mark out upon it the new and exact position of the dividing line; but as they did not so understand it, but knew that the line of 1852 ought to be fixed, and that the new line to be established after 1853 not having been already established before, would also have to be fixed, they comprehended that, assuming that in 1852 the position of said line in this valley had been finally decided and marked on official maps adopted by both commissions, the treaty of 1853 imposed upon them the obligation of ratifying it, and thus they did, signing in 1855 the final sheet No. 29, notwithstanding the fact that the river marked on it did not then correspond with the true position which its course followed in the valley in 1855. This is the reason why the argument of his colleagues works in an opposite sense in the mind of the Mexican commissioner than [sic] it does in theirs.

The opinion of the majority of the honorable commissioners is that the subsequent acts of the two Governments show: On the part of the United States, an invariable judgment in favor of the interpretation of the treaties of 1848 and 1853 as establishing an arcifinious limit in the fluvial portion of the boundary common to them; on the part of Mexico a lack of determination between the idea of the fixed line and a fluvial arcifinious limit.

Admitting, as the Mexican commissioner clearly does, the doctrine of this court that isolated expressions of officials of one or the other Governments do not in any manner constitute an international obligation binding upon the nations whom they serve respectively, it is right to pass over the diverse opinions emitted by Messrs. Lerdo de Tejada, Frelinghuysen, etc., and look exclusively to the correspondence and negotiations sanctioned internationally and recognized by both Governments, in order to ascertain their attitudes in the matters under discussion, and even then in only their vital points and not in their minor or incidental points.

It is not shown in the record that there was correspondence or negotiations of that character touching the interpretations of the treaties of 1848 and 1853 but on three occasions: In 1875 between Mr. Mariscal and Mr. Cadwalader; in 1884, between Mr. Romero and Mr. Frelinghuysen, in connection with the island of Morteritos; and in the same year and between the same last-named persons, concerning the preliminaries of the convention of 1884.

In 1875 the allusion to the fixed line, in the past, appears evident by the terms of Article II, both of the draft for a convention presented by Mr. Mariscal to Mr. Cadwalader on March 25 and a second draft dated December 2 of that year. In both reference is unmistakably made to the dividing line astronomically fixed by the boundary commission of both Governments in 1852, which runs in the middle of the current of the rivers, according to their course at the time of their survey.

In regard to the case of Morteritos, the terms of the decision of the majority of this tribunal relieve the Mexican commissioner of the necessity of insisting here that the uniform attitude then shown by the Mexican Government was in the sense of the fixed line, inasmuch as it is thus recognized in such document.

Lastly, in the negotiations of the convention of 1884, a reading of the instructions which guided Mr. Romero, and of his correspondence with the American Department of State, does not leave room for doubt as to the position adopted by Mexico in regard to the nature of the boundary line from its original demarcation until then — that it was fixed and invariable and constituted to Mexico in her northern frontier an " ager limitatus ", as these properties are understood by civil and international law.

It being established that until 1884 Mexico considered the line of 1852 as fixed, is it admissible that in that year she would negotiate a treaty converting it into an arcifinious boundary with retroactive effect? If the declarations of the Mexican negotiator, Don Matisa Romero, are not sufficient to destroy all doubt in this respect, the following consideration would be more than sufficient: that Mexico could not in any manner have adopted a new boundary — supposing that the river had then ceased to be the boundary and was again taken as such — without protecting or ceding conveniently or by means of an express clause free from confusion, the rights of individuals and of the Mexican nation, to the lands embraced between the fixed line which was abandoned and the new fluvial line then adopted. As no such clause existed in the convention of 1884, in view of the fact that all the language of it refers indisputably to the future; and considering the nature of the negotiations that preceded it, the Mexican commissioner feels himself unable to accept the possible retroactivity of that convention.

Then, the opinion of the majority of the honorable commissioners is that the application which both Governments made of the convention of 1884 to the case of San Elizario and the 58 original bancos of the lower Bravo is another proof that the principle of the retroactivity had firm connection in the mind of the Mexican Government in respect to the application of that convention. From such an opinion also dissents, and he believes with good reason, the Mexican commissioner.

In the first place, there is no reason to infer from the fact that the Mexican commissioner in 1894 presented the commission with the case of San Elizario, that the Government of Mexico, by this act, knowingly put under the jurisdiction of the treaty of 1884 the changes which occurred in the Bravo since 1857. The only thing that the cited procedure indicates is that Mexico submitted *that question* to the jurisdiction of the boundary commission established by the treaty of 1889. Now, the powers of such commission were not limited in any

manner to the application of the principles of 1884, but they covered and they were declared " exclusive ", the resolution of *all the questions or difficulties that in the future* might arise between the two countries and *in which affected the position of the dividing line*, subject to the approval of both Governments. In San Elizario, without doubt, it was endeavored to ascertain if that so-called " island " pertained to Mexico or to the United States, and it certainly was the commission who had to decide it, whether the theory of a fixed or of an arcifinious line in regard to that ground was in force. The case was discussed, then, in quality of question solely, and not of erosive or avulsive change. It is certain that the commission decided it, taking into consideration certain very slight alluvial changes, occurring between 1852 and 1857; but taking the terms of their judgment, and considering that the essential of it was the definition of the nationality of the ground, *that was that* which was asked of the commissioners, it is not to be believed that the Governments paid any attention to the insignificant divergences, shown by the consulting engineers between the courses of the river, as given by Salazar, Emory, and the survey of 1890, because such divergences might very well appear to be due to the imperfection of the methods employed by one or the other of the engineers, notwithstanding what the later commission said to the contrary.

Now, in regard to the resolutions adopted by the two Governments, in the matter of the bancos in the lower River Bravo, it is sufficient to destroy the inference that is alleged to be deduced as to the retroactivity of the convention of 1884, to say that the treaty in virtue of which it has been possible to approve said resolutions, *expressly adopted as retroactive* certain principles which called for " elimination " of those bancos *in all those parts of the international dividing line* which are constituted by the centers of the beds of the Bravo and Colorado Rivers. This condition of the internationality of the river remained plainly decided by that treaty in regard to the stretch of the Bravo embraced between its mouth and the confluence of the San Juan, due to the explicit adoption of the central line of its course of 1897 as boundary between the two countries and to the declaration that in future that boundary would follow *the deepest channel*, which was equivalent to converting into arcifinious this stretch of the Bravo. In regard to the rest of this river and to the Colorado, the principle of elimination will also be applicable with retroactive force in all those parts in which their course may be international, and in no other, unless in the future some arrangement may be made in virtue of which in the whole course of the Bravo and Colorado the fixed boundary of 1852 may be abandoned, and, as was done in the lower river, the real watercourse adopted as the new international boundary. In any event, the retroactivity that has resulted or might result from this should be attributed solely and directly to the express and clear clauses of the convention of 1905, that adopt it as a rule, but never to the power, direct or indirect, of that of 1884.

Such are the ideas of the Mexican commissioner on the fixedness of the dividing line of 1852, and the irretroactivity of the convention of 1884; but as he has been defeated in both points by the majority of the court, and the latter has left established that as a result of the sequel of the case, the only principles which should govern are those contained in that convention of 1884, this commissioner believed it to be his duty to amply express his opinion from the new point of view and had the fortune to have the presiding commissioner agree with him in regard to the matter in which the convention referred to should be applied to the case, which has permitted the court to dictate by majority a final sentence, that would otherwise have been impossible, since the attitude of the

commissioner of the United States in regard to such application diverges diametrically from that of the presiding commissioner.

This opinion and the context of the sentence in the points agreed to leave sufficiently and totally explained the position of the commissioner of Mexico in the present arbitral judgment.

(*Signed*) F. B. PUGA

THE ALSOP CLAIM

PARTIES: Chile, United States of America.

COMPROMIS: Protocol of 1 December 1909.[1]

ARBITRATOR: George V, King of Great Britain.

AWARD: 5 July 1911.

Claim originated in a contract between Bolivia and Alsop and Co., a firm in liquidation, registered in Chile and composed of American citizens — War — Occupation of a part of Bolivia's territory by Chile — Transfer of Bolivia's liability to Chile as a result of arrangements between the two States — Claim put forward by the United States on behalf of Alsop and Co.— Controversy as to the amount equitably due to the claimants — Submission of the case to an arbitrator as an *amiable compositeur* — Functions of an *amiable compositeur* — State succession in the matter of obligations — Extinctive prescription — Protection of the rights of aliens — Relevance of Notes exchanged between the respective representatives of two States on the occasion of the negotiation of a treaty, and intimately related to the subject matter of such treaty.

[1] As the full text of this Protocol is given in the award, it is not printed again under a special heading.

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SYLLABUS

The firm of Alsop and Co. was registered in Chile, but it was composed of American citizens. The Alsop claim arose out of an agreement made with the Government of Bolivia so long ago as the year 1876. In that year the firm was in liquidation, and through its liquidator, a certain Mr. Wheelwright, entered into arrangements with the Government of Bolivia for the settlement of a debt arising out of previous transactions between that Government and one Pedro Lopez Gama, a Brazilian citizen, which debt had been assigned to Alsop and Co. These arrangements were set out in the form of a contract between the Bolivian Government and Wheelwright. By this contract Bolivia admitted that it was then indebted to Alsop and Co. in the sum of 835,000 bolivianos, and agreed that the debt was to carry interest at the rate of 5 per cent per annum. For the payment of this sum two kinds of security were given: (1) a charge was created upon the custom-house at Arica, in which Bolivia then had an interest; and (2) a share was granted in the rich Government mines of Caracoles along the Bolivian coast.

After the war between Chile, Bolivia and Peru, in 1879 and 1880, the territory which had been charged with the payment of these obligations passed into the hands of Chile. The Government of the United States of America began to put forward the claim of Alsop and Co. as a good claim against the Government of Chile. The latter agreed to assume Bolivia's liability under the Wheelwright contract to a limited extent by arrangements entered into between the two States, and offered the payment of a certain sum in respect of the claim. This sum was rejected by the Government of the United States as insufficient.

The claim was presented to the United States and Chilean Claims Commission in 1890 and 1894 and dismissed by that Commission for want of jurisdiction.

As the two parties were not able to agree upon the amount equitably due to the claimants, they concluded a Protocol dated the 1st of December 1909, by which they submitted the whole controversy to the decision of the King of Great Britain, as an *amiable compositeur*, who handed down his award on 5 July 1911.

AWARD PRONOUNCED BY HIS MAJESTY KING GEORGE V AS *AMIABLE COMPOSITEUR* BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF CHILE IN THE MATTER OF THE ALSOP CLAIM, 5 JULY, 1911 [1]

Réclamation ayant pour origine un contrat conclu entre la Bolivie et *Alsop and Co.*, une Société en liquidation qui avait son siège social au Chili et qui était composée de nationaux américains — Guerre — Occupation d'une partie du territoire bolivien par le Chili — Transfert à ce dernier des obligations de la Bolivie par suite d'arrangements entre les deux Etats — Réclamation présentée par les Etats-Unies au nom de *Alsop and Co.*— Contestation au sujet de la somme équitable due aux réclamants — Désignation d'un arbitre chargé, en tant qu'amiable compositeur, de trancher la question litigieuse — Compétence d'un amiable compositeur — Succession d'Etats en matière d'obligations — Prescription extinctive — Protection des droits des étrangers — Respect dû aux Notes échangées entre les représentants respectifs de deux Etats à l'occasion de la négociation d'un traité et ayant un rapport intime avec l'objet de ce traité.

WHEREAS by a Protocol dated the 1st day of December, 1909, the Government of the United States of America and the Government of the Republic of Chile resolved that, as they had not been able to agree as to the amount equitably due to the claimants in the Alsop case, they would submit the whole controversy to His late Majesty King Edward VII as an *amiable compositeur* to determine the amount equitably due to the said claimants; and

WHEREAS on account of his untimely death His late Majesty was not able to carry out the duty which he had undertaken; and

WHEREAS at the request of the two Governments We agreed to act in place of His late Majesty; and

WHEREAS We determined to designate a Commission to study the papers submitted to Us on either side, and submit a Report to Us for Our consideration as to the amount equitably due to the said claimants; and

WHEREAS We appointed for that purpose:

Our right trusty and right well-beloved cousin Hamilton John Agmondesham, Earl of Desart, K.C.B., a Member of the Permanent Court of Arbitration;

Our right trusty and well-beloved William Snowden, Baron Robson, G.C.M.G., a Lord of Appeal in Ordinary, and a Member of Court Most Honourable Privy Council; and

Our trusty and well-beloved Cecil James Barrington Hurst, C.B., of the Middle Temple, Barrister-at-Law, Assistant Legal Adviser to Our Principal Secretary of State for Foreign Affairs; and

WHEREAS the said Commission have submitted unto Us for Our consideration the following Report:

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[1] *Papers relating to Foreign Relations of the United States*, 1911, p. 38.

May it please Your Majesty:

On the 1st December, 1909, the Government of the United States of America and the Government of the Republic of Chile entered into the following Protocol submitting to His late Majesty what is known as the Alsop claim against the Republic of Chile:

PROTOCOL

The Government of the United States of America and the Government of the Republic of Chile, through their respective plenipotentiaries, to wit: Seth Lew Pierrepont, Chargé d'affaires of the United States of America, and Agustin Edwards, Minister of Foreign Affairs of Chile, who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon and concluded the following:

Protocol of Submission

WHEREAS the Government of the United States of America and the Government of the Republic of Chile have not been able to agree as to the amount equitably due the claimants in the Alsop claim;

THEREFORE, the two Governments have resolved to submit the whole controversy to His Britannic Majesty Edward VII, who as an " amiable compositeur " shall determine what amount, if any, is, under all the facts and circumstances of the case, and taking into consideration all documents, evidence, correspondence, allegations, and arguments which may be presented by either Government, equitably due said claimants.

The full case of each Government shall be submitted to His Britannic Majesty, and to the other Government through its duly accredited representative at St. James, within six months from the date of this agreement; each Government shall then have four months in which to submit a counter-case to His Britannic Majesty and to the other Government as above provided, which counter-case shall contain only matters in defence of the other's case.

The case shall then be closed unless His Britannic Majesty shall call for further documents, evidence, correspondence, or arguments from either Government, in which case such further documents, evidence, correspondence, or arguments shall be furnished within sixty days from the date of the call. If not so furnished within the time specified, a decision in the case shall be given as if such documents, evidence, correspondence, or arguments did not exist.

The decision by His Britannic Majesty shall be accepted as final and binding upon the two Governments.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries of the United States and Chile have signed the above Protocol both in the English and Spanish languages, and hereunto affixed their seals.

DONE in duplicate, at the City of Santiago, this first day of December, 1909.

[SEAL] Seth Low PIERREPONT

[SEAL] Agustin EDWARDS

Your Majesty has been pleased at the request of the parties to the reference to consent to act as arbitrator in place of His late Majesty. The duty which Your Majesty has been pleased to undertake is one of pronouncing an award which shall do substantial justice between the parties without attaching too great an importance to the technical points which may be raised on either side. This is what we conceive to be the function of an " amiable compositeur ".

In accordance with the terms of the Protocol, cases have been submitted to Your Majesty by both the above-named Governments. These cases are very voluminous and elaborate, and the United States Government annexes three volumes of appendices.

The arguments put forward are, in relation to some matters, of a very technical character, and in relation to all matters are elaborated at great length.

The United States case runs into 352 pages, their countercase into 198 pages, and there are, as stated above, three volumes of appendices.

The Chilean case is of 54 folio pages, the countercase of 335 folio pages, but, the material documents being quoted over and over again in the cases and countercases, only a short appendix of documents is annexed.

Your Majesty has been pleased to do us the honour of directing us to give our consideration to the whole matter, and to report to Your Majesty thereon.

It was necessary for us for this purpose to consider and weigh the arguments set out in these books, and this occupied a considerable time, but we are glad to be able to state that in our judgment the issues raised and our conclusions can be set out for the consideration of Your Majesty in a comparitively small compass.

The firm of Alsop and Co. was registered in Chile, its seat of business being in Valparaiso, but it was composed of American citizens. The claim arises out of an agreement made with the Government of Bolivia so long ago as the year 1876.

In that year the firm was in liquidation, and through its liquidator, a Mr. Wheelwright, entered into arrangements with the Government of Bolivia for the settlement of a debt arising out of previous transactions between that government and one Pedro Lopez Gama, a Brazilian citizen, which debt had been assigned to Alsop and Co.

These arrangements were set out in the form of a contract between the Bolivian Government and Wheelwright, called herein, for convenience of reference, the Wheelwright contract, and it is in respect of the unfulfilled obligations of Bolivia under that contract, which obligations are alleged by the United States Government both to have fallen upon, and to have been specifically undertaken by, the Government of Chile, that the claim arises which has been submitted for the decision of Your Majesty.

The amount of the claim put forward by the United States Government on behalf of Alsop and Co. is for the sum of 2,803,370 dol. 36 c.

The Chilean Government admit that they have assumed Bolivia's liability under the Wheelwright contract to a limited extent by a treaty entered into between the two states in 1904, and have offered the payment of a certain sum in respect of the claim. This sum has been refused by the United States Government as being insufficient to satisfy either the just claim of Alsop and Co. on Bolivia or Chile, or the liability which Chile has herself undertaken on behalf of Bolivia.

The claim has now been the subject of discussion and controversy between the Government of the United States and of Chile for more than twenty-five years, and the failure to arrive at any conclusion acceptable to both governments has induced them to invite Your Majesty to pronounce an award which both parties have undertaken to accept as final and binding upon the two governments.

It has already been stated that the object of the Wheelwright contract was to provide for the payment of a debt from the Government of Bolivia to Alsop and Co. as the assignees of Gama, who had been involved in various transactions of a complicated nature with the Government of Bolivia, resulting in

that government's admission that there was due a capital sum of 835,000 bolivianos and certain arrears of interest thereon.

The contract itself states that it is " for the consolidation and amortisation of the credits which he (Wheelwright) has pending against the state ".

It is important to notice that, though the Wheelwright contract was made with the Government of Bolivia, it is against the Government of Chile that the Alsop claim is now put forward by the Government of the United States.

Bolivia admitted by this contract that she was then indebted to Alsop and Co. in the sum of 835,000 bolivianos, and agreed that the debt was to carry interest at the rate of 5 per cent. per annum, not compoundable. The contract provided for the liquidation of this debt by giving Wheelwright the right to the sums by which the Bolivian share of certain customs receipts might exceed 405,000 bolivianos annually, and also by giving him the right to work the government silver mines in the coast department of Bolivia for a term of twenty-five years upon the terms that the government share of the proceeds of the mines should be retained by him and applied in reduction of the debt.

At the time of this contract these customs dues were collected in Peruvian territory, at the port of Arica, which was the natural port of access to a large part of the territory of Bolivia, and an arrangement was in force between the two Republics under which the customs duties levied at the port were divided between them, and no further duties were levied at the Bolivian frontier on goods going to that country. Under this arrangement Bolivia took a fixed annual sum of 405,000 bolivianos as her share, the balance, whatever its amount, going to Peru. Bolivia was, however, dissatisfied with the arrangement, and had given notice to terminate it; she hoped that under any new agreement her income from this source would be increased, and it was this anticipated increase which she agreed to apply toward the liquidation of the Alsop claim.

The origin of the government silver mines, of which the proceeds were to be applied to the same purpose was as follows: Under the Bolivian mining law the discoverer of a mine was entitled to two, sometimes three, " estacas ", or plots, of certain size, which were first marked off along the reef or lode. Another " estaca " of 60 by 30 metres was then marked off, and was government property. The right to work these small mines was given to the firm of Alsop and Co., upon the terms that 60 per cent. of the net proceeds were to go to the firm as a reward for its labours, and 40 per cent. was to be regarded as the share of the government, but was to be retained by the firm and applied in liquidation of the debt.

Early in the year 1879, less than three years after the making of the Wheelwright contract, war broke out between Chile and Bolivia, and the coast province of Bolivia rapidly passed into the military occupation of the former republic. Shortly afterwards Peru also became engaged in the conflict, and by June, 1880, the port of Arica had passed into the possession of the Chilean Government.

The result of the war, therefore, was that both the sources to which Alsop and Co. were entitled to look for the money which would pay their debt had passed out of the control of Bolivia into the possession of Chile, and in Chile's possession they still remain. Her military occupation of the coast province of Bolivia was rendered permanent by the Pact of Indefinite Truce of 1884 between Bolivia and Chile, and this military occupation was definitely converted into sovereignty by the Treaty of Peace of 1904. Subject to a future plébiscite, Arica was transferred from Peru to Chile by the Treaty of Ancon, 1883.

The debt admitted by Bolivia in 1876 as due to Alsop and Co. has never been paid, and though it is not alleged by the United States of America that the

conquest of Arica, and of the coast province, would of itself affect the indebtedness of Bolivia, or transfer the liability to Chile, it is contended by them that, on other grounds, the firm of Alsop and Co. are now entitled to recover the amount of their claim from Chile.

These grounds are, (1) that Chile appropriated to her own use the proceeds of the customs house of Arica, thereby preventing any money coming to Bolivia which Alsop and Co. might claim under the Wheelwright contract to be applicable to the repayment of the debt; (2) that Chile prevented Alsop and Co. from working the government silver mines in the coast province in the way they were entitled to work them by applying Chilean law in the province from the date of the military occupation, and thereby subjecting Alsop and Co. to more onerous terms than would have been the case under Bolivian law; and (3) that from time to time Chile undertook to pay the claim.

The Government of the United States of America began to put forward the claim of Alsop and Co. as a good claim against the Government of Chile from a comparatively early date, though it is only recently that the claim has assumed its present shape and magnitude. The United States, however, so far as concerns the original debt admitted in 1876 by the Government of Bolivia (viz., 835,000 bolivianos carrying interest at 5 per cent.), also allege that Bolivia is still the debtor.

The Republic of Bolivia is not a party to the submission of the matter to Your Majesty, and cannot be bound by the result, but her standpoint is that her liability has been entirely transferred to Chile as a result of her loss of the coast province, and of the arrangements concluded between her and Chile.

Chile, on the other hand, repudiates liability for the claim altogether so far as the claim is based on her appropriation of the Arica customs, or on the application of Chilean law to the province she had conquered; and so far as the claim against her is based upon her undertakings to pay, she maintains that it is a matter in which she is only liable to the extent of the provision made in the treaty between her and Bolivia and that to that extent she is and always has been ready and willing to pay Alsop and Co., but that the amount offered has been refused.

Before passing to a detailed examination of the claim it is desirable to state that in 1890 a claims commission was appointed to deal with the various outstanding claims between Chile and the United States of America, but the commission was unable to deal with the Alsop claim within the time at its disposal. This commission was revived in 1894, and the Alsop claim was again brought before it, but was disallowed on the ground that Alsop and Co. had no *locus standi*, not being included within the term " corporations, companies, or private individuals, citizens of the United States ", as the firm had been organized as a partnership under Chilean law, and had thereby become a juridical entity possessing Chilean nationality. The labors of the commission therefore failed to bring about a settlement of the dispute, and it now comes before Your Majesty to determine the amount, if any, which is equitably due to the claimants, the representatives of the former partners of the firm of Alsop and Co., now in liquidation, all of whom are alleged to be citizens of the United States.

The Chilean Government, in the case presented to Your Majesty, again suggest that, as the firm was registered in Chile, and is a Chilean company, their grievances cannot properly be the subject of a diplomatic claim, and that the claimants should be referred to the Chilean courts for the establishment of any rights they may possess.

We hardly think that this contention is seriously put forward as precluding Your Majesty from dealing with the merits of the case. It would be inconsistent with the terms of the reference to Your Majesty, and would practically exclude the possibility of any real decision on the equities of the claim put forward.

The remedy suggested would probably be illusory, and, so far from removing friction, an award in this sense, transferring the real decision from an impartial arbitrator with full powers to the courts of the country concerned, which in all probability have not sufficient power to deal equitably with the claim, could afford no effective solution of the points at issue or do otherwise than increase the friction which has already arisen between the two States.

We are clearly of opinion, looking to the terms of reference and to all the circumstances of the case, that such a contention, if intended to be seriously put forward by Chile, should be rejected. We think that it may be disregarded by Your Majesty.

We pass now to a more detailed examination of the claim.

The Wheelwright contract was entered into by the parties with the intention of placing upon a permanent basis the large claims which Alsop and Co. then had against Bolivia.

The claims originated in the transactions between a Brazilian citizen of the name of Pedro López Gama who had advanced money to the Bolivian Government in connection with the exploitation of guano and the working of mines. Gama was financed by the house of Alsop, but he became involved in financial difficulties and in 1875 he assigned the whole of his interests in his concessions and the whole of his claims against the Republic to the firm.

The finances of Bolivia were, as it is stated, at that time in a very bad condition, and it was of the first importance to the liquidator of Alsop and Co. to come to some definite arrangement with the Republic and to obtain, if possible, payment of, or security for, the sums which she owed. Such an arrangement was effected in 1876 by the Wheelwright contract, which fixed the amount of the State's liability to the firm of Alsop at 835,000 bolivianos, and provided two sources to which the firm might look with some degree of hope for the payment of the debt.

It is not, in our opinion, incumbent upon Your Majesty to go behind this contract of 1876 or to deal in any way with the transactions which preceded it.

It is contended by the Government of Chile that the transactions between Gama and Bolivia were of so speculative a character, and that the cash advances which Bolivia had received from Gama were so small in amount, that, in determining the amount of the Chilean liability, if any, in connection with the claim, it would be reasonable to disregard the Wheelwright contract as a settlement between the parties. Apart from the fact that the statements on this point are not conclusive, we cannot advise Your Majesty to adopt this view. The Government of Bolivia definitely admitted in the contract that they owed a particular sum to Alsop and Co., and agreed that this sum should carry interest at a specified rate. No sufficient grounds are shown for holding that Chile, any more than Bolivia herself, is entitled to say that at the time of the contract Bolivia really owed Alsop and Co. a smaller sum than she herself admitted.

The important articles of the contract are as follows:

In view of a proposition made by Mr. John Wheelwright, a member and representative of the firm of Alsop and Co., of Valparaiso, in liquidation for the purpose of providing for the consolidation and payment of its claims against the Government by an assignment of the rights which were acknowledged in favor of Pedro López Gama, a new compromise has been concluded in a Cabinet meeting with Mr. Wheelwright which finally terminates this matter. It is drawn up in the following terms:

First. The sum of 835,000 bolivianos is acknowledges as due the aforesaid representative of the firm of Alsop and Co., together with interest at the rate of 5 per cent per annum, not addable to the principal, and to be reckoned from the date on which the contract is duly executed.

Second. The said principal and interest shall be amortised by means of drafts, all of which are to be drawn in quarterly instalments on the surplus which, from the date on which the present customs contract with Peru terminates, shall arise from the quota due Bolivia in the collection of duties in the northern customhouse, over and above the 405,000 bolivianos which the Peruvian Government now pays whether the customs treaty with that Republic is renewed or whether the national customhouse is re established.

Third. All of the silver mines of the Government in the department along the coast are hereby devoted to payment of the said amortisation, for which purpose 40 per cent of the net profit shall be utilised, except in the mine known as " Flor del Desierto," concerning which provision is made in the ensuing article. . . .

Special arrangements with regard to the Flor del Desierto were made, because under article 4 of the contract Bolivia admitted that, in addition to the sum of 835,000 bolivianos referred to above, she was in arrears with the interest to the extent of 170,700 bolivianos, and under the same article Alsop and Co. received in settlement of this sum for arrears of interest the right to work two mines, of which one was the Flor del Desierto and the other was to be agreed between the parties. If these two mines produced more than enough to pay this interest claim, the surplus was to go in reduction of the principal debt; but, if they failed to do so, the loss was to fall on the firm.

The second mine was selected; both were worked, and they failed to produce sufficient available profits to pay the claim for arrears of interest. Under the terms of this article, therefore, the liability for arrears of interest fell to the ground, and no question with regard to it arises in the present arbitration.

Arica customs

The first of the two sources to which, under the Wheelwright contract, Messrs. Alsop were to look for the payment of their debt was the income which Bolivia might draw from the northern customhouse in excess of the sum of 405,000 bolivianos.

The northern customhouse was situated at Arica, a port at that time in Peruvian territory. There was, however, only a narrow belt between Arica and Bolivia, and it formed the natural port of access to the sea for a considerable portion of the territory of Bolivia. On the 23d July, 1870, an arrangement had been made between Bolivia and Peru under which Peru was to levy, in accordance with the Peruvian tariff, all the customs dues on goods imported at the port of Arica, whether they were intended for Peru or for Bolivia, and out of the proceeds was to pay a fixed annual sum of 405,000 bolivianos to Bolivia, keeping the whole of the remainder for her own use. This arrangement had been concluded for a term of five years certain, and was thereafter terminable by 18 months' notice on either side. Notice to terminate had been given by Bolivia on the 5th of October, 1876, and in the ordinary course would have taken effect on the 5th April, 1878.

At the time of the Wheelwright contract Bolivia presumably anticipated that before long she would receive a larger income from this source, and though she was not in a financial position to suffer any diminution of her existing income, she was willing to apply the anticipated increase, whatever it might be, to the payment of this debt.

No further agreement was, in fact, come to between Peru and Bolivia until October, 1878, and by mutual arrangement the agreement of 1870 continued in force until May, 1879.

Under the new agreement concluded on the 26th October, 1878, goods for Bolivia were to pay import dues at Arica in accordance with the Bolivian tariff, and the proceeds of such dues were to belong to Bolivia, but in return for the use of the customhouses, ports, and public works, Peru was to levy for her own use on such goods a duty of 4 per cent (subsequently raised to 5 per cent).

In June, 1880, after the treaty of 1878 had only been in operation for about a year, the port of Arica was occupied by the Chilean troops, war having been declared by Chile against Peru in the meantime.

From the moment when Chile as a military invader occupied the port of Arica the arrangement in force between Bolivia and Peru was necessarily superseded; such import dues as were levied by Chile by virtue of her military occupation and because the goods were being introduced into what was, for the time being, Chilean territory. A further result was that Bolivia became entitled to set up a customhouse on her own frontier and there levy a duty upon such goods as should be imported into her territory, even though they had already paid duty to Chile at Arica, but the papers do not disclose whether any attempt was made by her to do so.

The result was that from the time of the Chilean occupation of Arica until an arrangement was come to between Chile and Bolivia, the import dues levied at Arica were levied by Chile and appropriated to her own use as being import dues paid on goods introduced into territory of which she was in possession.

This state of things continued until the 29th November, 1884, when the ratifications were exchanged of the pact of indefinite truce between Chile and Bolivia. Under this treaty the system of levying at Arica the customs dues on imported goods intended for Bolivia was revived. By article 6, as interpreted by the additional protocol of the 8th April, the total receipts of the Arica customhouse were divided as follows: Twenty-five per cent were allotted to Chile for her own use, 35 per cent were allotted to Bolivia for her own use, the remaining 40 per cent were considered to belong to Bolivia, but were to be retained by Chile until certain claims by Chile for losses suffered by Chilean citizens at the hands of Bolivia during the war were satisfied.

The United States maintain that Chile had no right to the customs dues she levied at Arica between the date when her military occupation of the port commenced and the pact of indefinite truce or to the share which she received under that truce.

It is contended that the effect of the Wheelwright contract was to hypothecate in favor of Alsop and Co., or even actually to assign to Alsop and Co., after the manner of an equitable assignment of book debts, all the receipts of the Arica customhouse to which Bolivia could lay claim, except the 405,000 bolivianos which she had been accustomed to receive annually under the former arrangement.

They further contend that such assignment of hypothecation of customs was a transaction which could not be set aside, and constituted an arrangement which Chile was bound to respect: in support of this theory reference is made to the well-known case of the Silesian loan, and to others where specified customs receipts have been set aside in favor of a particular group of creditors. It is therefore contended that as and when Chile received these customs receipts they formed in her hands money which was had and received to the use of

Alsop and Co., and which she was bound to pay to Wheelwright until the debt to the firm had been paid off.

In their case the United States of America give a table of the customs receipts at Arica from the time of the Chilean occupation up till 1884, and contend that the whole of these sums, except 5 per cent, would have gone to Bolivia under the 1878 agreement with Peru, and were therefore subject to the assignment to Alsop and Co., and that if Alsop and Co. had received them, the whole of their debt would have been paid off by the end of 1882.

They further contend that the value of the original debt with interest should be calculated in gold at the date when it would have been paid off under the above calculation, and that from that time it became a debt payable in gold and bearing interest at 6 per cent, the legal rate in Chile, instead of a debt payable in bolivianos, and bearing interest at 5 per cent as stipulated in the Wheelwright contract.

The net result is a claim under this head of $2,337,384.28.

In view of these contentions it becomes necessary to analyze the situation created by article 2 of the Wheelwright contract and by the Chilean military occupation of Arica with some care.

At the time of the contract Arica was a Peruvian port, and consequently Bolivia could have no interest in customs dues levied there except by virtue of some arrangement subsisting between herself and the sovereign of Arica.

Under no possible circumstances could an agreement between Bolivia and a private individual affect anything more than the remittances she might from time to time receive from the sovereign authority of Arica under the arrangement subsisting between them. Such a contract as that of 1876 between Wheelwright and Bolivia necessarily presupposes, so far as it affects Arica and the customs dues levied there, the existence of an agreement in force and operative between Bolivia and the sovereign of Arica. The effect of the Chilean occupation of Arica was to put it out of the power of Peru to carry out the agreement of 1878; consequently Bolivia's right to any share in the customs collected at Arica determined from that moment and continued in suspense until such time as that or some new agreement was again in operation between herself and the power in possession of Arica.

In the light of these considerations it is desirable to consider closely the wording of article 2 of the Wheelwright contract; it will be noticed that it makes no mention whatever of Arica; all it says is that the indebtedness to Alsop is to be amortized by drafts on the surplus of the quota due Bolivia in the collection of duties *in the northern customhouse* over and above the 450,000 bolivianos whether the customs treaty with Peru is renewed or *whether the national customhouse is re-established.* It is in fact no more than an undertaking by Bolivia that *her receipts* from a specified part of the customs dues shall be applied to the Alsop debt whether those customs dues are levied at Arica or elsewhere.

Such an undertaking does not amount to an hypothecation of the Arica customs, the Arica customs could not be hypothecated or assigned except by the sovereign of Arica, and Bolivia was not in 1876, nor at any subsequent time has she been, the sovereign of Arica.

The precedents, such as the case of the Silesian loan and others, to which the attention of Your Majesty is directed, have therefore no bearing on this case at all, as they were all instances where arrangements had been made or were in contemplation with reference to the disposition of customs receipts by the sovereign who was entitled to levy them.

The Wheelwright contract was not binding on Peru, the then sovereign of Arica, as she was not a party to it; still less was it binding on Chile, who by right of military occupation ousted Peru from Arica in 1880. In short, the conditions which were the basis of this part of the agreement had ceased to exist. As a prospective source of payment it had disappeared, and it was for the debtor to find some other source of payment or some security.

There remains a further question whether the arrangements embodied in the pact of indefinite truce of 1884 between Chile and Bolivia constituted violation of the rights of Alsop and Co., and afford any just ground for complaint against the former Republic.

Under the pact Chile was to receive 25 per cent of the proceeds of the customs receipts on Bolivian goods at Arica, and was to retain a further 40 per cent in payment of certain Chilean claims, and Bolivia received 35 per cent for her own use. In 1876, the date of the Wheelwright contract, Bolivia was receiving nothing from the Arica customs beyond the 405,000 bolivianos which she was to retain; she undertook under that contract no obligation, either to vary the arrangement then in force and insure to herself an increased income, or to set up her own customhouses; nor was she debarred from making an altogether different arrangement under which she might never receive more than the 405,000 bolivianos; all she undertook that Alsop and Co. should have was the surplus she hoped to receive above the 405,000 bolivianos as and when she did receive it.

It follows from this that the 1884 pact constituted no breach of duty on the part of Bolivia toward the firm of Alsop and Co., still less was it an infringement of the rights of the firm on the part of Chile. It is, however, noteworthy that in the year 1885, when Bolivia's 35 per cent yielded a sum which substantially exceeded the 405,000 bolivianos which she was entitled to retain, Alsop and Co. appear to have made no attempt to secure the surplus in reduction of their debt.

The result is that with regard to this part of the case we can only report to Your Majesty that the Wheelwright contract effected no assignment or hypothecation of the Arica customs, that the arrangement embodied in article 2 of that contract was not binding on Chile, that Chile in appropriating the proceeds of the Arica customs, either before or after the pact of indefinite truce in 1884, did not receive the money to the use of Alsop and Co., and that the claim under this head for $2,337,384.28 payable in gold is not sustainable.

The Government silver mines

The second source to which Alsop and Co. were to look for the repayment of their debt was the right given them by article 3 of the Wheelwright contract to exploit the Government silver mines in the coast department.

Third. All of the silver mines of the Government in the department along the coast are hereby devoted to the payment of the said amortization, for which purpose 40 per cent of the net profit shall be utilized. . . .

The terms on which these mines were to be worked were set out in a subsidiary document, which formed part of the contract. Among the articles which it contained were the following:

1. Mr. John Wheelwright shall have a period of three years within which to examine the Government silver mines and find the necessary capital with which to put them in operation, it being his duty to take the necessary preliminary measures to this end as soon as possible. The mines shall remain at the disposal of the concessionary during these three years, and the Government shall enable him to gain actual possession thereof by giving the proper instructions to the authorities. . . .

4. The concessionary . . . shall present semiannual balances, on the strength of which, together with the records of the books, the distribution shall be made of the net proceeds, 40 per cent being applied by the Government to the paying off of the debt according to the terms agreed upon in the compromise of this date, and 60 per cent going to the petitioners.

5. The Government shall appoint one or more agents to superintend the work performed, who shall be compensated out of the common funds of the enterprise.

6. This contract shall last for 25 years, after which time, if there is any residue after paying off the Government debt in accordance with the compromise, it shall be turned over to the Government.

7. If, within the first three years or thereafter until the expiration of the 25 years mentioned in the foregoing article, any persons or companies should offer to operate one or more of the mines included in this contract, they may do so provided the present concessionary does not care to undertake the operation thereof, and so states in writing to the Government, or else deliberately neglects to make such statement.

It has already been stated that these Government " estacas " were plots measuring 60 by 30 meters which were marked off on the lode or reef of a mine after those which belonged under the Bolivian law to the discoverer of the mine.

Under the Bolivian decree of the 23d July, 1852, these " estacas " were applied to the treasury of public instruction, but under subsequent legislation the Government was authorized to enter into contracts for the working of the mines for the benefit of the State, and it was under this power that the Government acted when it entered into the Wheelwright contract in 1876.

The parties are not agreed as to the exact nature of the rights which the Wheelwright contract conferred on Alsop and Co. in respect of the Government mines. The United States of America contend that it amounts to an absolute lease of the mines for a period of 25 years, creating a vested right in the firm to the possession of the mines, which the Government of Chile were bound to treat as the property of Alsop and Co.

On the other hand, the Chilean Government contend that the contract amounted to no more than a contract of " anticresis ", which is defined in the Chilean Code as a contract whereby there is delivered to the creditor a real property in order that he may pay himself out of the proceeds (Code, art. 2435). They state that the question of the extent of the rights created by the contract was the subject of litigation in the Chilean courts in the case of the mine " Amonita ", that the courts held that the rights so created amounted to a contract of " anticresis ", and contend that in a matter relating to real property the decision of the national courts must be final.

The point is only of importance in connection with the question whether the rights of the firm in these various Government mines were rights which could be described as " property " in such sense that Chile was bound, under the modern practice of nations, to respect them as the private property of an individual when by force of arms she acquired possession of the province in which the mines were situated. It is not easy to define the exact nature of the rights which the contract gave to the firm. We can only report to Your Majesty that their nature seems to us to be more accurately described as an " option ". The liquidator was entitled, as against the Bolivian Government, to be put into possession of any of the Government " estacas " which he desired to occupy. That the rights of the firm under the contract were no more than an option is, we think, made clearer by article 7 of the document quoted above, under which any person who desired to work one of the Government " estacas " was to be allowed to do so if the firm did not care to undertake its

operation and either informed the Government to that effect or neglected to answer. The permit giving the right would have been issued under this article by the Government and not by Wheelwright.

As soon as the contract of 1876 had been made, Wheelwright turned his attention to these mines to see what could be made out of them. The result was not reassuring. His agent admits that he had to contend with a thousand difficulties. People had unlawfully taken possession of the mines; boundary marks had been moved; the documents of title were lost; local authorities were half-hearted, and, in short, up till the time of the Chilean war but little had been accomplished. Furthermore, the mining industry of the district was heavily handicapped by the scarcity of cheap transport and the high freights. Judging from the half-year's reports furnished by Wheelwright to the Bolivian Government during 1877 and 1878, there can be little doubt but that the exploitation of the mines had been carried on at a loss up till the outbreak of the war.

The actual effect of the Chilean occupation of the Province on the mining operations of the firm of Alsop is not very clear; but the Chilean Government states, and so far as can be gathered, correctly states, that Wheelwright was left in possession of all the mines of which he had been able to obtain the control. His position, however, was very materially affected in respect of mines of which he had not been able, up till then, to obtain possession. The obligation of the Bolivian Government to assist him to obtain possession of any particular mine was one they were no longer able to carry out, and the rights of the Bolivian Government to these " estacas " were rights upon which Wheelwright could no longer base his claims to the possession of the mines.

Two decisions in the Chilean courts demonstrated the change which the Chilean occupation had effected. The first was the decision in the case of the mine " Justicia ", in an action brought by Wheelwright to recover an " estaca " which had been erroneously included in other mines. Wheelwright claimed that the owners of these latter mines were bound to put him in possession of the " estaca ". The court of second instance, on appeal, decided against him on the ground that Wheelwright's contract was, with regard to the mines, one of " anticresis "; that the paricular " estaca " to which the suit related had not existed in fact during the Bolivian dominion, and could not now be created; that with regard to it the 1876 contract had not been actually carried into effect by the handing over of the real property, and that his claim therefore failed.

The second decision was one which related to the mine " Amonita ", where the action was brought against an occupier in possession, and a declaration was asked for that the mine belonged to the Bolivian State, whose rights Wheelwright represented. The court admitted that the " Amonita " was a Government " estaca ", but decided that the Government " estacas " were among the Bolivian Government possessions which had passed to Chile; consequently, as Wheelwright's right to the mine was not a real right, but only a right of " anticresis ", and as he had not obtained possession his title was not one which a conqueror was called upon to respect, nor did it prevail against a private person who was in possession. Against this decision no attempt was made to appeal.

The effect of these decisions must have been to deprive Wheelwright of the means of obtaining possession of " estacas " in the occupation of persons with an adverse title. They probably also rendered it necessary for him to work the mines of which he had obtained possession in order to prevent any

third party gaining a good title. They did not, however, deprive Wheelwright of the possession of any mines of which he was in occupation.

The deductions which the Government of the United States draw from these decisions are very far-reaching. They contend that the decision deprived Alsop and Co. of private rights which they held under the Wheelwright contract, and constituted a violation of the modern principle of international law, that a conqueror must respect private rights. Upon them is therefore based a claim on behalf of Alsop and Co. to a sum of $508,538.14 made up as follows: $333.823.91 represents the profits which the concessionnaires calculate they would have obtained from certain profit-bearing " estacas " of which they ought to have been enabled to obtain possession; $61,013.43 represents sums expended in working mines to prevent their being denounced by others; $48,340.91 represents expenses of litigation rendered necessary by these decisions; and $65,359.89 represents expenses of increased working staff rendered necessary in the same way. In all cases these sums include interest calculated up till the signing of the protocol of submission in 1909.

The essence of the United States contention is that the rights of Alsop and Co. to these mines under the Wheelwright contract, whether the firm were in possession of the " estacas " or not, were landed property rights, and that Chile was bound to protect such rights, either by applying Bolivian law to the interpretation of the contract or even by enacting laws for the purpose if her own laws were insufficient, and that, as the " Amonita " and " Justicia " decisions did not protect the rights of Alsop and Co. in the " estacas ", these decisions constituted violations of international law for which Chile is liable in damages. No suggestion is made that the decisions were corrupt, and with regard to one of them it has been stated that there was no appeal.

These contentions do not appear to us to be well founded. The right which Alsop and Co. possessed under the Wheelwright contract to work a particular " estaca " was merely a contractual right against Bolivia; until they had secured possession of the " estaca " they had nothing which could fairly be described as " property ".

The outbreak of the war and the occupation of the province by Chile deprived Bolivia of these Government " estacas ". It also put it out of her power to carry out her obligation under the Wheelwright contract to facilitate the acquisition of the " estacas " by Alsop and Co., but though the " estacas " passed to Chile she did not thereby become bound by Bolivia's contract to put Alsop and Co. into possession; she was under no obligation to facilitate the transfer of the " estacas " to Alsop and Co. in order that they might use them to obtain money for the payment of a debt owing by Bolivia.

Where the rights of Alsop and Co. to a particular " estaca " had been converted into " property " by the firm obtaining possession, their rights were not affected by the " Amonita " and the " Justicia " decisions, except that it might become necessary to work the mine, which, if it were worth working, would have been no injury. Where no possession of a particular " estaca " had been obtained, the firm had merely a contractual right, which the war put an end to so far as regards Bolivia, and which was not valid against Chile.

The decisions of the Chilean courts, therefore, in the cases of the " Justicia " and the " Amonita " do not, in our opinion, afford any real ground for the contention put forward by the United States.

This matter may be regarded from another point of view. Your Majesty is acting as " amiable compositeur ", and is free to look at the essence of things without too strict a regard to technicalities, and from that point of view also it

appears to us that the claim put forward on this head is not one which should be approved by Your Majesty.

It is to be observed that in respect of the mines of which Wheelwright had obtained possession and which he had worked, the general result, though one or two mines might have been remunerative, was not favorable to him, and with regard to the " estacas ", of which he had not obtained possession before the Chilean occupation, it can hardly be assumed, for the purpose of assessing damages, that, even if the imposition of Chilean law denied him the right of entering into possession of other mines which he might possibly have obtained under Bolivian law, the result would have been profitable to him.

Further, it is fairly clear from the facts that whatever might have been the theoretic strength of his position under Bolivian law, he had not in fact been able under that law and administration to obtain possession of the mines which he alleged to be Government " estacas " which were in the occupation of other persons. His complaints to the Bolivian Government on this head show that in fact he was no better off under the Bolivian administration than he was under the Chilean, and there is really nothing to indicate even a probabillty that he would have obtained possession of these " estacas " if Bolivia had continued in occupation of the territory in which they were situated. So far as it goes the evidence is all the other way.

Chilean law and Chilean administration left him in possession of the mines he had occupied. They did not help him to oust others who were in possession of mines he had not occupied, and which were being worked by other people and of which under Bolivian law and Bolivian administration he had not been able up till then to obtain possession.

Further, if Your Majesty should be pleased to adopt the recommendation we shall venture to make at a later stage of this report, the principal object of the concession will be satisfied, which was to provide for the repayment of the debt of 835,000 bolivianos and interest. If this obligation be met, we do not think that Wheelwright can substantiate any equitable claim for damages in respect of possible profits he might have made for himself if he had been able to get possession of more of the " estacas ". There is really nothing to indicate that such profits would have arisen.

The only plausible ground from his point of view on which to claim damages is that he spent money to prevent strangers acquiring a title by adverse possession, which would not have been necessary if Bolivian law had been applied in the construction of the contract.

If, however, the mines could be made profitable, this involved no hardship and no ultimate loss, and if they were worthless, there was no occasion for him to spend the money, while the requirement itself is reasonable and may be justified as being in the public interest, The claim to retain possession of an " estaca " indefinitely without developing or working it, is one of a very objectionable character, and is not, we think, in accordance with the spirit of the contract itself.

We do not think that, either technically or on grounds of equity, the claimants are entitled to damages under this head, and we can only report to Your Majesty that, in our opinion, the claims put forward by the United States, based upon an alleged wrongful deprivation of the mining rights of the firm of Alsop and Co., should not be admitted.

The Nature of Chile's Undertaking

The third ground upon which the United States contend that Chile should pay the Alsop claim, is that she has undertaken to do so. Such undertakings are alleged to have been given both to the United States and to Bolivia.

None of the undertakings given directly to the United States, which are enumerated in their case, amount to anything in the nature of a contract or agreement to pay the claim. They cannot be regarded as undertakings to pay the claim either in the form in which it is now put forward or in the form in which it was put forward at the time. There is no need to deal with them in detail; many of them are of the vaguest character, others are mere assurances that the claim will be dealt with in the definitive treaty of peace when one is concluded between Bolivia and Chile; others are only announcements that the claim has been provided for in such a treaty, but come to nothing because the treaty in question was not ratified; others relate to the contemplated treaty, which was completed in 1904, and are merely announcements as to what will happen when that treaty is ratified.

The only one which, as we think, needs express mention is the statement made by the Chilean agent before the claims commission which dealt with American and Chilean claims in 1901. The case of Alsop and Co. was brought before that commission by the United States Government, but the Chilean agent filed a plea to the jurisdiction on the ground that Alsop and Co. was a Chilean firm and that the claim was therefore not within the jurisdiction of the commission, because the treaty gave the commission no power to consider claims on the part of Chilean citizens against Chile.

The commission upheld this view, but in doing so they referred to the following passage in the brief of the agent for Chile:

> The Chilean Government has always regarded it (the Alsop Claim) and does still regard it, as a liability on the part of Bolivia toward the claimant; and in order to induce the Bolivian Government to sign the definite treaty of peace which has been negotiated for many years, the Chilean Government offers to meet this and other claims as part of the payment or consideration which it offers to Bolivia for the signature of the treaty.

The commission therefore remitted the claimants to the Government of Chile for relief.

There is in the above passage nothing more than an undertaking to pay the Alsop claim *as a claim against Bolivia* and as part of the consideration for a permanent settlement between the two Governments. This was in effect the attitude of the Chilean Government toward the claim throughout the period which followed the occupation of the coast province of Bolivia. The Chilean Government were aware that the Government of Bolivia could not pay the debt, and they had themselves obtained possession of both the sources to which the claimants were to look, under the Wheelwright contract, for money to pay it off. They were willing, therefore, to take over the liability for that and other claims as part of the general settlement which they desired with the neighboring Republic.

Offers on the part of Chile to pay the claim as a claim against Bolivia can only be made upon the assumption that Bolivia is still liable for the debt, and the question must first be considered whether anything has happened to terminate Bolivia's liability.

Bolivia has not paid the sum which she admitted in the Wheelwright contract she owed to Alsop and Co., but it is suggested in the Chilean countercase that Bolivia had in effect been discharged from liability under her contract by reason of the absence of any effort on the part of the firm or of the United States of America to obtain payment of the debt from her, and bankruptcy and the principle of the limitation of actions are referred to as affording by analogy arguments of substance in support of this view.

It is undoubtedly true that from the time of the Chilean occupation no real effort was made to secure payment of the debt by Bolivia, or even to treat her as the principal debtor, until 1906. But the explanation is not difficult to find. It is the plain fact that Bolivia was not in a position to pay, and no advantage would have accrued from attempts to make her do so.

The principle of the limitation of actions does not, in our opinion, operate as between States. It is based upon the theory that the party had a right of action capable of being enforced by legal proceedings, neglect of which should in time relieve the debtor from further liability, but as against, or between, sovereign States this rule does not apply, and it would be unreasonable that the creditor's rights should suffer because he realizes that his only course is to wait until the financial position of the debtor improves. The liability of Bolivia under the Wheelwright contract remains, in our view, unaffected.

The various undertakings by Chile to Bolivia, upon which the United States of America rely as constituting an obligation upon Chile to pay the claim, are all contained in notes, protocols, or treaties between the two powers which were intended to constitute or to form part of a general settlement and permanent treaty of peace between them. As to five out of the seven such undertakings specified it is only necessary to state that they never became binding instruments, and they are therefore immaterial.

A permanent settlement was at last effected by the treaty of the 20th October, 1904. Under article 5 of that treaty Chile devoted 2,000,000 pesos in gold of 18 pence to the cancellation of certain specified obligations of Bolivia, among them being " the debt recognized to Don Pedro López Gama, represented by Messrs. Alsop and Co., successors of the former's rights ", and 4,500,000 pesos to certain other claims.

Attached to this treaty were a variety of notes and protocols, of which the following bear upon the Alsop claim: By a protocol, dated the 15th November, 1904, Chile was to be free to " examine into, pass judgment upon, and liquidate said credits ", and by notes dated the 17th and 21st November, 1904, it was agreed that as the total of the claims, for the settlement of which 6,500,000 pesos were to be paid under article 5, amounted to more than 6,500,000 pesos, that sum was to be distributed *pro rata* among them.

Two other notes of great importance had been signed on the 21st October. These notes were not published at the time, and were almost certainly intended (at any rate by Chile) to remain secret, but they were published in the Bolivian newspapers in the following February, and, since 1906, have not been treated as secret by Bolivia.

The Bolivian note was as follows:

The Government of Bolivia agrees with your excellency's Government on the necessity of determining the purport of the wording of article 5 of the treaty of peace and friendship signed to-day by your excellency on behalf of the Government of Chile and by the undersigned in representation of the Government of Bolivia.

Both in regard to the claims of the Corocoro, Huanchaca, and Oruru companies, and of the bondholders of the Bolivian loan of 1867 which were being paid out of 40 per cent of the receipts of the Arica customhouse, and in regard to the claims against Bolivia of the bondholders of the Mejillones Railroad, of Alsop and Co. (assignees of Pedro López Gama), of the estate of Juan Garday, and of Edward Squire, it has been agreed that the Government of Chile shall permanently cancel all of them, so that Bolivia shall be relieved of all liability, the Government of Chile being obligated to answer every subsequent claim presented either by private means or through diplomatic channels, and considering itself liable for every obligation, bond, or document of the Government of Bolivia relating to any of the

claims enumerated, Bolivia's liability being entirely eliminated for all time, and the Government of Chile assuming all liabilities to their full extent.

My Government desires that your excellency may be pleased to state to me, on behalf of the Government of Chile, whether this is the purport which it has given to article 5 of the treaty of peace and friendship signed to-day between the representatives of the two Governments.

I avail, etc. . . .

The Chilean reply was as follows:

In reply to the note which your excellency addressed to me on this day, I take pleasure, in compliance with your request, in defining the purport which this chancellery assigns to clause 5 of the treaty of peace and friendship signed to-day by your excellency in representation of the Government of Bolivia and by the undersigned on behalf of the Government of Chile.

My Government considers that the obligation which Chile contracts by article 5 of the said treaty comprises that of arranging directly with the two groups of creditors recognized by Bolivia for the permanent cancellation of each of the claims mentioned in said article, thus relieving Bolivia of all subsequent liabilities.

It is consequently understood that Chile, as assignee of all the obligations and rights which might be incumbent on or pertain to Bolivia in connection with these claims, shall answer any reclamation which may be presented to your excellency's Government by any of the parties interested in the said claims.

I renew, etc. . . .

The contention put forward in the Chilean case with reference to these notes is that they do not mean that Chile is to take over the whole liability of Bolivia for the capital debt (835,000 bolivianos and interest at 5 per cent), but are intended to insure that Bolivia should be relieved finally from any liability under the Wheelwright contract by the payment of the sum provided in article 5 of the treaty; that their purpose was in fact to insure that Chile should not pay to any of the claimants their proportion of the 6,500,000 pesos without procuring from the claimant a full discharge so that no further claim could be preferred either against Bolivia or Chile.

The arguments which are adduced in favor of this construction are not convincing. The more natural construction of the wording of the two notes is that they were intended to relieve Bolivia altogether of any further liability under these claims whether the proportionate share of the six and a half millions was accepted in final settlement or not, and the more closely the surrounding facts are looked into, the more carefully the details of the long diplomatic struggle between Bolivia and Chile are studied, the stronger does this conviction become.

The treaty of 1904, with its accompanying notes, was a contract to which the only parties were Bolivia and Chile, while the claims were claims by strangers; it is obvious that the rights of such strangers could not be prejudiced by any agreement to which they were not parties. In so far as the claim of Alsop and Co. was a valid claim against Bolivia, it could not be extinguished by an agreement between Bolivia and Chile. Chile undoubtedly might (and did) agree to provide a certain sum in payment of the claim; but if that sum was less than the full amount for which the claim was good the liability for the balance would, unless the claimant was content to waive the balance, remain a burden upon Bolivia.

The fact that Bolivia was poor and Chile was rich would not affect the above argument in the least; it might no doubt have a very potent effect upon the

mind of the claimant in considering whether or not to accept the sum offered in full discharge, because an immediate cash payment of a smaller sum might be worth more than a larger liability which was unlikely to be met, but in the absence of acceptance of the sum offered the liability of Bolivia would not and could not be affected.

It is impossible to read through the abortive treaties which were drawn up between Chile and Bolivia without appreciating the reluctance of Bolivia to part with the sovereignty of her coast province and her determination that, if that province was to be lost, she should be freed from any further liability in connection with certain claims which, to use her own expression, " encumbered the littoral ". It is clear also from the contemporaneous documents that Bolivia believed that this had been effected by the treaty arrangements of 1904.

If Bolivia's liability to the claimants was to be extinguished it could only be done by the whole burden of the claim being undertaken by Chile, and this is what appears to be the natural construction and effect of the notes. It is clear from the language that the possibility of the sum not being accepted was contemplated.

The object of Chile in keeping the notes in which this arrangement was embodied secret is obvious. Chile had no desire to pay more than the claims were really worth; if she could ostensibly limit her liability to a particular sum it might be possible to coerce the claimants into accepting the reduced amount, and the fact that the majority of the claimants referred to in the treaty were Chilean citizens would facilitate her so doing. Were she, on the other hand, to undertake full liability for the claims in the treaty it must have been clear to her that she would have to deal with her own citizens upon the same footing as the foreign claimants whose claims were strongly pressed by their own Governments.

The rights which Chile claimed under the protocol of the 15th November to deal with each individual claim upon its merits was to insure that Chile should not be worse off than Bolivia in dealing with these claims. Bolivia would not be bound by the amount which a claimant himself chose to put upon his claim, and under the protocol Chile was to have a like power.

An argument is suggested, but scarcely pressed, in the Chilean case and countercase, that these notes have no validity because they were not included in the ratification, but neither were the later notes nor the protocol of the 15th November, which admittedly formed part of the treaty arrangement.

It would be very dangerous if States were to be at liberty to repudiate notes exchanged by their respective plenipotentiaries appointed to negotiate a particular treaty when those notes had an intimate relation with the subject matter of the treaty and when the action of the plenipotentiaries had not been disavowed by their Governments as soon as it was known. It would be highly inconvenient if secret notes attached to a treaty were obliged to be included in the ratifications.

It is also alleged that Bolivia's liability under the Wheelwright contract cannot have been transferred to Chile by these notes because that liability had been discharged by the absence during a prolonged period of any attempt on the part of the claimant to make good his claim against Bolivia. This contention has already been examined and we have stated that we do not consider it to be well founded; but if any such view had been held by the parties at the time, it would render their handling of the Alsop claim in article 5 of the treaty inexplicable.

The fair and reasonable construction of the secret notes is that they were intended to insure that Bolivia should be finally relieved of any liability for

the Alsop claim, whether the claimants accepted their share of the 6,500,000 pesos under article 5 of the treaty or not.

Another deduction which may be drawn from the wording of these notes, particularly that of the Chilean note, is that the parties intended that Chile should not merely indemnify Bolivia by repaying to her any compensation which Bolivia should pay the claimant but that Chile should deal directly with the claimants thus eliminating Bolivia from the transaction altogether. The United States are therefore justified in dealing directly with Chile.

The Bolivian liability which Chile thus assumed can only be the liability which Bolivia recognized under the Wheelwright contract of 1876, i.e., the debt of 835,000 bolivianos carrying interest at 5 per cent. Bolivia could not now be heard to say that she was not liable for the debt which she admitted in 1876, and which she has never paid; nor could she be heard to say that she was liable for the capital and not for the interest. The liability under the 1876 contract is for the capital debt carrying " interest at 5 per cent not addable to the principal and to be reckoned from the date on which this contract is duly executed ".

In our opinion the payment of the debt with interest is consequently now incumbent upon Chile by virtue of the obligation undertaken by the treaty of peace of 1904 as embodied in the treaty and the supplementary notes and protocol.

The subsequent facts need be touched upon but briefly. In December, 1904, and again in 1907, the Chilean Government offered in settlement of the claim a sum which was the *pro rata* share of the 6,500,000 pesos provided in article 5 of the treaty of 1904, adding in the latter case a small sum by way of accrued interest, and explaining also that it was the final offer of Chile, and that, if the claimants were unwilling to accept it, they would be invited to turn for payment to Bolivia.

Both these offers were declined, and in 1908, the State Department at Washington asked whether the Chilean Government would furnish information regarding the case, as there was nothing in the archives of the Department which would justify the offer of a sum which was actually less than the debt admitted by Bolivia in 1876. No such information was supplied, and in April 1909, the Chilean minister in Washington stated that his Government had no such evidence to produce.

No serious effort is made in either the case or the countercase of the Chilean Government to show that if any liability to pay the claim attaches to them the merits of the claim do not warrant payment in full. It is true that suggestions are put forward that Gama's transactions with the Bolivian Government before 1876 were not such as to justify so large an admission of liability on the part of Bolivia as the debt which was recognized in the Wheelwright contract, but we have already stated that there seems to be no sufficient grounds for going behind that contract. The motives which induced Bolivia to sign it and the question whether it was reasonable for her to do so must be matters of mere speculation. Even if the bargain was a bad one for Bolivia, there can be no doubt but that she did in fact admit liability for the sum there mentioned, and in the view we take of the proper construction of the secret notes attached to the treaty of 1904 Chile agreed to relieve Bolivia of that burden.

It is perhaps worth while to point out that the liability which Chile assumed by those notes was not dependent on the merits of the claim. She did not undertake to pay the claim because she considered it a just claim; she agreed to it as part of the price which she was willing to pay for securing the recognition and acceptance by Bolivia of her title to the territory which she had wrested

from that Republic by force of arms; and even if she may consider the sum Your Majesty may be pleased to award large, having regard to all the circumstances, it is certainly small as compared with the advantages of a sure title to a valuable territory.

The indebtedness admitted by Bolivia under article 2 of the Wheelwright contract, which it is now incumbent upon Chile to discharge, was 835,000 bolivianos, with interest, but a question arises whether certain profits from the working of the mines by Alsop and Co. ought not to be deducted from this sum.

The United States admit that profits were obtained from the working of six of the mines, and under article 3 of the Wheelwright contract it might be contended that 40 per cent of these profits should be applied in reduction of Bolivia's debt. The amount of profit admitted in the United States case is $45,095.22.

The great majority of the mines appear to have been worked at a loss; and so far as can be gathered from the accounts printed in the appendices, if the working of the mines is regarded as a whole, a loss ensued.

The power of the Bolivian Government to give the firm of Alsop and Co. the right to work the Government " estacas " under the Wheelwright contract was derived from the Bolivian decree of the 2nd November, 1871, which enacted that the working of the mines was to be *in partnership with the State*, the State being considered as an industrial partner and being under no obligation as such to reimburse losses to the partners.

If the working of each individual mine under article 3 of the Wheelwright contract is to be regarded as a separate venture, then losses in respect of any such mine would fall on the firm, while 40 per cent of the profits made at any such mine would go in reduction of the debt.

If the working of the Government " estacas " is regarded as a whole, then a share of the profits made at any particular mine would not go in reduction of the debt unless the mining venture as a whole was profitable. If, as a whole, the mining venture resulted in loss, the Bolivian Government would not benefit by the profits made at one or two mines.

It is not easy to determine which of these two views is the right one, but it seems to be more reasonable, and more consistent with the intention of the parties, to adopt the latter, and treat the mining venture as a whole.

The accounts of the mining operations of the firm of Alsop and Co. have not been laid before Your Majesty very fully, but the accounts which are printed in the United States case indicate that those operations, treated as a whole, resulted in a loss, and, if that is so, no part of the profits admitted to have been earned at six of the mines would go in reduction of the debt.

We have considered the question whether we ought to report to Your Majesty that further evidence should be called for under the power reserved to Your Majesty in the protocol of submission between the parties. The conclusion at which we have arrived is that it is not incumbent upon Your Majesty to do so.

If Chile desired to diminish the liability which she has undertaken, it was for her to establish that Alsop and Co. made profits out of the mines. Access to the books of the firm has been afforded to her, and she has not availed herself of the offer. In the absence of some proof by her that the firm did make profits out of the mines, we see no reason why Your Majesty should assume it.

The liability admitted by Bolivia was 835,000 bolivianos with interest at 5 per cent from the date of the execution of the contract, i.e., from the 26th December, 1876, that is practically 34 years and 6 months. The amount of

the debt at the present time, therefore, is 835,000 bolivianos for the principal, and 1,440,375 bolivianos for interest.

As the debt admitted by Bolivia was payable in bolivianos, the award must be payable in the same currency, or in gold at the current rate of exchange.

We humbly submit to Your Majesty that Your Majesty should be pleased to award that the sum of 2,275,375 bolivianos is equitably due to the representatives of the firm of Alsop and Co.

AND WHEREAS, after mature consideration, We are fully persuaded of the wisdom and justice of the said report:

NOW THEREFORE WE, George, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the seas King, Defender of the Faith, Emperor of India, do hereby award and determine that the sum of two million two hundred and seventy-five thousand three hundred and seventy-five (2,275,375) bolivianos is equitably due to the representatives of the firm of Alsop and Company.

GIVEN in triplicate under our hand and seal at our Court of St. James's, this fifth day of July, one thousand nine hundred and eleven, in the second year of our reign.

[SEAL]

GEORGE R. I.

AFFAIRE CERRUTI

PARTIES: Colombie, Italie

COMPROMIS: Convention du 28 octobre 1909.

ARBITRES: Commission arbitrale: Santiago Aldunate; P. Grippo; F. Hagerup

SENTENCE: 6 juillet 1911

DOCUMENT ADDITIONNEL: Sentence arbitrale rendue le 2 mars 1897 par le Président des Etats-Unis d'Amérique.

Confiscation par les autorités colombiennes des biens appartenant à E. Cerruti, national italien résidant en Colombie — Réclamation du Gouvernement italien pour le compte de son national — Fixation par une sentence arbitrale du montant des indemnités à verser — Interprétation et exécutoin de cette sentence.

APERÇU [1]

En 1885, Ernesto Cerruti, national italien résidant en Colombie, fut accusé de participation à un mouvement révolutionnaire, et ses biens furent confisqués par décision administrative de l'autorité locale. L'Italie intervint pour le compte de son national. A la suite de cette intervention, la Colombie et l'Italie conclurent, le 24 mai 1886, un Protocole [2] par lequel elles décidèrent de soumettre à la médiation du Gouvernement espagnol la question de savoir si la Colombie devait indemniser le sieur Cerruti des dommages qu'il avait soufferts. Le Gouvernement médiateur de l'Espagne répondit affirmativement à cette question [3]. En conséquence, une Commission arbitrale de liquidation fut constituée, qui se réunit à Bogotá le 5 septembre 1888. Mais E. Cerruti, n'ayant pas confiance dans l'impartialité de cette Commission, ne formula pas de conclusions, et la Commission dut suspendre ses travaux sans avoir pris de décision.

Après de longues négociations diplomatiques entre les Parties, celles-ci conclurent, le 18 août 1894, un Protocole aux termes duquel les réclamations de E. Cerruti étaient soumises à l'arbitrage du Président des Etats-Unis d'Amérique, M. Grover Cleveland. Celui-ci rendit sa sentence le 2 mars 1897 [4].

Le Gouvernement colombien refusa d'exécuter la partie de la sentence qui concernait le relevé des dettes de la Maison E. Cerruti et Cie, dont E. Cerruti était associé et gérant. Il soutint que l'arbitre était sorti des limites de ses pouvoirs en se déclarant compétent pour statuer sur les dommages causés à la Maison, celle-ci étant, en sa qualité d'établissement commercial, sujette aux lois et aux tribunaux de la Colombie. Le Gouvernement italien n'admit nullement cette manière de voir. A diverses reprises, et d'une façon pressante, il mit en demeure le Gouvernement colombien d'avoir à exécuter intégralement la sentence arbitrale.

Par la suite, le Gouvernement de la Colombie déclara qu'il exécuterait intégralement la sentence, y compris les dispositions de l'article 5 ayant trait aux dettes de la Maison E. Cerruti et Cie, et prit formellement l'engagement de pourvoir dans le délai de huit mois à la satisfaction de ces dettes.

Un retard cependant se produisit dans le payement d'une partie de la somme due à E. Cerruti en vertu de la sentence arbitrale. Pour ce retard E. Cerruti se réclama d'une certaine somme à titre d'intérêts. En outre, des difficultés surgirent entre les Parties à propos de l'application des dispositions de l'article 5 de la sentence concernant les dettes de la Maison E. Cerruti et Cie, ainsi qu'au sujet des frais que E. Cerruti avait été personnellement obligé de supporter à raison des poursuites judiciaires intentées contre lui par divers créanciers de

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[1] *Revue générale de droit international public*, t. XIX. 1912, p. 268. *American Journal of International Law*, vol. 6, 1912, p. 965.

[2] De Martens, *Nouveau Recueil général de traités*, 2e série, t. XVIII, p. 659. Voir également *supra*, affaire Spadafora.

[3] *American Journal of International Law*, vol. 6, 1912, p. 1003. *Revue de droit international et de législation comparée*, t. XIX, 1887, p. 196.

[4] Voir *infra.*, p. 394.

ladite Maison. Après de longues négociations diplomatiques, les deux Parties se mirent d'accord, par un Compromis signé le 28 octobre 1909, pour soumettre à l'arbitrage les questions demeurées litigieuses dans l'affaire Cerruti.

En exécution de ce Compromis, les deux Gouvernements nommèrent respectivement comme arbitres: Santiago Aldunate, envoyé extraordinaire et ministre plénipotentiaire du Chili près du roi d'Italie; P. Grippo, vice-président de la Chambre des députés italienne; et les arbitres, ainsi désignés, nommèrent comme surarbitre F. Hagerup, envoyé extraordinaire et ministre plénipotentiaire du Roi de Norvège. La Commission arbitrale se réunit à Rome le 24 avril 1911 et rendit sa sentence le 6 juillet de la même année.

COMPROMIS D'ARBITRAGE ENTRE L'ITALIE ET LA COLOMBIE CONCERNANT L'AFFAIRE CERRUTI, 28 OCTOBRE 1909 [1]

Monsieur Ruffilo Agnoli, Ministre résident de SA MAJESTÉ LE ROI D'ITALIE et Son Excellence Don Carlos Calderón, Ministre des relations extérieures de LA RÉPUBLIQUE DE COLOMBIE, désireux de prendre toutes dispositions utiles en vue de la liquidation et de la restitution, le cas échéant, au Gouvernement de la Colombie du dépôt de vingt mille livres sterling qui a été effectué entre les mains de la Banque Hambro de Londres, le dix-huit août mil huit cent quatre-vingt-dix-huit, en garantie de l'exécution de la sentence d'arbitrage Cleveland en date du deux mars mil huit cent quatre-vingt-dix-sept, majoré des intérêts y afférents, et désireux de mettre fin aux différends qui ont surgi au sujet de trois questions concernant l'exécution de ladite sentence, pour lesquelles un règlement doit intervenir de manière que la sentence susmentionnée puisse être considérée comme ayant été exécutée intégralement et définitivement par le Gouvernement de la Colombie, ces trois questions étant les suivantes:

I — Quel est le montant de la somme que le Gouvernement de la Colombie a été obligé de payer et qu'il doit payer en raison du crédit de feu l'ingénieur Gaspare Mazza contre la Maison E. Cerruti et Cie;

II — Parmi les retards qui se sont produits dans le paiement au sieur Ernesto Cerruti de l'indemnité à lui accordée par la sentence d'arbitrage Cleveland, retards que le Gouvernement de la Colombie admet en partie, quels sont ceux qui ont produit des intérêts, à la charge de la République, et quel est le montant de ces intérêts;

III — Combien est-il dû au même sieur Cerruti en conformité et en exécution de la dernière phrase de l'article V de la sentence d'arbitrage susdite et qui, dans le texte anglais, est rédigée en ces termes: " Such guarantee and reimbursement shall include all necessary expenses for properly contesting such partnership debts ";

A ce dûment autorisés par leurs gouvernements respectifs, sont convenus de ce qui suit:

Article premier

Les Gouvernements du Royaume d'Italie et de la République de Colombie conviennent de constituer une Commission mixte d'arbitrage, qui siégera à Rome, avec les attributions et dans les conditions énoncées dans les articles ci-après:

Article 2

La Commission mixte se composera d'un arbitre nommé par le Gouvernement de la Colombie, d'un arbitre nommé par le Gouvernement de l'Italie et d'un surarbitre.

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[1] *Texte espagnol et italien dans: Trattati e Convenzioni fra il regno d'Italia e gli altri stati*, vol. 20, p. 465, 472. Traduction établie par le Secrétariat de l'Organisation des Nations Unies.

Article 3

Au moment où ils entreront en fonctions, les deux arbitres désigneront le surarbitre et, en cas de désaccord, la désignation du surarbitre sera confiée à Son Excellence l'Ambassadeur de Sa Majesté le Roi d'Espagne auprès de la Cour royale, auquel une requête à cet effet sera présentée par le Ministère royal des affaires étrangères d'Italie et la Légation de Colombie auprès de Sa Majesté le Roi d'Italie.

Article 4

Au cas où Son Excellence l'Ambassadeur d'Espagne ne pourrait ou ne voudrait pas accepter la charge susmentionnée, la personne chargée de désigner le surbarbitre sera choisie d'un commun accord par le Ministère royal des affaires étrangères d'Italie et la Légation de Colombie auprès du Gouvernement royal, qui présenteront conjointement à la personne choisie une requête à cet effet.

Article 5

Il sera recommandé spécialement à l'Ambassadeur ou à la personne qui aura accepté de procéder à la désignation visée aux articles précédents de choisir un surbarbitre possédant les connaissances juridiques nécessaires pour statuer sur les matières visées par le présent compromis.

Article 6

La Commission mixte, constituée en application des articles précédents, aura pleine compétence et entière liberté pour examiner et trancher, conformément à la sentence d'arbitrage Cleveland, toute question relative aux trois points énumérés dans le préambule du présent compromis qui lui aura été soumise par l'un ou l'autre des deux Gouvernements ou par le sieur Ernesto Cerruti, non seulement sur la base des principes du droit et sur le vu des preuves, mais également en tant que tribunal d'équité; elle aura, en outre, pleine compétence et entière liberté pour formuler ses propres règles de procédure en ce qui concerne tous les points qui n'auront pas été stipulés dans le présent compromis, et pour fixer les délais dans lesquels les deux Gouvernements et le sieur Ernesto Cerruti pourront présenter, en défense de leurs intérêts, des mémoires, documents et preuves à l'appui des droits qu'ils revendiquent.

Les mémoires, documents et preuves susmentionnés pourront être rédigés en italien, en espagnol ou en français, et en toute autre langue que la Commission mixte jugera opportun d'admettre.

La Commission déterminera la langue ou les langues qui pourront être employées au cours des débats oraux; elle pourra s'adjoindre un secrétaire et un traducteur, et demander l'avis de personnes compétentes en matière de procédure et de frais judiciaires italiens.

Article 7

La Commission mixte devra se réunir et commencer ses travaux dans un délai de six mois à compter de ce jour. En cas d'absolue nécessité, ce délai pourra être prorogé de trois mois; toutefois, la prorogation devra faire l'objet d'un accord spécial à intervenir entre le Ministère royal des affaires étrangères d'Italie et la Légation de la République de Colombie auprès de Sa Majesté le Roi d'Italie.

Article 8

Les réunions de la Commission mixte seront présidées par le surarbitre; la voix et l'opinion de ce dernier seront prépondérantes en cas de désaccord entre les deux autres membres de la Commission.

Article 9

Le Gouvernement de l'Italie présentera au Gouvernement de la Colombie, par l'intermédiaire de la Légation de la République auprès de la Cour royale, ou à la Commission mixte si celle-ci le demande, un relevé détaillé du compte de gestion relatif au dépôt de vingt mille livres sterling qui a été effectué par le Gouvernement de la Colombie entre les mains de la Banque Hambro de Londres.

La Légation royale à Bogota en fera autant en ce qui concerne le dépôt relatif à la créance Mazza, lequel dépôt s'élevait à l'origine, en pesos courants colombiens, à vingt-deux mille neuf cent sept pesos et vingt-deux centavos et demi.

Il sera prélevé sur le montant de ces dépôts, y compris les intérêts versés dans l'intervalle par les banques qui en avaient la gestion — lesdits dépôts devant être mis à l'entière disposition du Gouvernement royal d'Italie — la somme qui sera fixée par la Commission mixte conformément à l'article suivant, et le solde éventuel sera restitué au Gouvernement de la Colombie, par l'intermédiaire de la Légation de la République auprès de la Cour royale, dans un délai de trente jours à compter de la date à laquelle la sentence arbitrale aura été notifiée simultanément au Gouvernement royal et à la Légation susdite.

La sentence sera notifiée dans les cinq jours qui suivront la date à laquelle elle aura été prononcée.

Le cas échéant, la Légation royale à Bogota restituera directement au Gouvernement de la Colombie le dépôt effectué entre ses mains.

Article 10

Dans sa sentence arbitrale, la Commission mixte fixera en francs or, procédant à cette fin aux réductions et conversions de monnaie nécessaires, la somme qui devra être versée par le Gouvernement de la Colombie au titre des trois chefs de créance énoncés dans le préambule du présent compromis.

Pour fixer le montant dû au titre de ces trois chefs de créance, la Commission se fondera sur les dispositions de la sentence d'arbitrage Cleveland, qu'elle interprétera et appliquera en tenant compte à cette fin et en évaluant les mérites des faits exposés et des arguments avancés, des motifs d'endettement et d'exclusion de responsabilité, des preuves et contrepreuves présentées par les deux Gouvernements et par le sieur Ernesto Cerruti, ainsi que des autres éléments qu'elle jugerait opportun de demander aux parties en ce qui concerne les trois questions susmentionnées.

Le montant de la somme qui, aux termes de la décision de la Commission mixte, sera due par le Gouvernement de la République de Colombie sera prélevé sur les dépôts existant à la Banque Hambro de Londres et à la Légation royale à Bogota conformément à l'article précédent, et ladite somme sera versée à qui de droit, selon les dispositions de la sentence arbitrale, dans un délai de trente jours à compter de la date à laquelle la sentence arbitrale aura été notifiée simultanément au Gouvernement royal et à la Légation de Colombie auprès dudit gouvernement.

Article 11

La Commission mixte devra prononcer sa sentence dans un délai de trois mois à compter de la date de sa première réunion; en cas de besoin, elle pourra proroger d'un mois, de sa propre initiative, le délai dans lequel elle pourra utilement rendre sa sentence. Toute prorogation ultérieure devra faire l'objet d'un accord spécial entre les deux Gouvernements.

Article 12

La sentence de la Commission mixte sera définitive et sans appel; elle sera exécutée intégralement dans les délais fixés par le présent compromis, étant entendu qu'une fois la sentence arbitrale rendue et intégralement exécutée, les différends existant entre les deux Gouvernements au sujet des réclamations du sieur Ernesto Cerruti seront considérés comme ayant été réglés de façon irrévocable et lesdits Gouvernements comme ayant été, en ce qui les concerne, désintéressés à cet égard.

Article 13

Le Gouvernement de l'Italie et le Gouvernement de la Colombie par l'intermédiaire de sa Légation auprès de la Cour royale fixeront et verseront séparément les honoraires de leurs arbitres respectifs et conviendront des honoraires du surarbitre; ces derniers honoraires, de même que les autres dépenses de caractère commun résultant de l'arbitrage, seront partagés par moitié et seront réglés par les deux Gouvernements dans le délai fixé, pour l'exécution de la sentence arbitrale, à l'article 10 du présent compromis.

Article 14

Le présent compromis a été rédigé en italien et en espagnol et les deux Hautes Parties contractantes reconnaissent que les deux textes sont identiques et font également foi.

Les deux Gouvernements confèrent à la Commission mixte le pouvoir de déterminer, en cas de doute, le sens et la portée des clauses du présent compromis.

EN FOI DE QUOI, Monsieur Ruffillo Agnoli, Ministre résident de Sa Majesté le Roi d'Italie à Bogota et Son Excellence Don Carlos Calderón, Ministre des relations extérieures de la République de Colombie, ont signé le présent compromis en deux exemplaires, rédigés en italien et en espagnol, et y ont apposé leurs sceaux respectifs à Bogota, le vingt-huit octobre mil neuf cent neuf.

Ruffillo AGNOLI

Carlos CALDERÓN

SENTENCE DE LA COMMISSION ARBITRALE INSTITUÉE EN VERTU DU COMPROMIS D'ARBITRAGE SUR L'AFFAIRE CERRUTI DU 28 OCTOBRE 1909, RENDUE À ROME LE 6 JUILLET 1911 [1]

Confiscation by Colombian authorities of goods belonging to E. Cerruti, an Italian national residing in Colombia — Claim of the Italian Government on behalf of its national — Determination by an arbitral award of the amount of indemnity — Interpretation and execution of this award.

Par un Compromis signé le 28 octobre 1909, LE GOUVERNEMENT DE LA RÉPUBLIQUE DE COLOMBIE et LE GOUVERNEMENT DE SA MAJESTÉ LE ROI D'ITALIE se sont mis d'accord à l'effet de soumettre à l'arbitrage les trois questions suivantes:

I.— Quel est le montant de la somme que le Gouvernement de la Colombie a été obligé de payer et qu'il doit payer en raison du crédit de feu l'ingénieur Gaspare Mazza contre la Maison E. Cerruti et C^ie^.

II.— Parmi les retards qui se sont produits dans le paiement, au sieur Ernesto Cerruti, de l'indemnité à lui accordée par la sentence d'arbitrage Cleveland, retards que le Gouvernement de la Colombie admet en partie, quels sont ceux qui ont produit des intérêts à la charge de la République et quel est le montant de ces intérêts?

III.— Combien est-il dû au même sieur Cerruti en conformité et en exécution de la dernière phase de l'art. V de la sentence d'arbitrage susdite et qui, dans le texte anglais, est rédigée en ces termes: « Such guarantee and reimbursement shall include all necessary expenses for properly contesting such partnership debts »?

En exécution de ce Compromis, les deux Gouvernements ont nommé respectivement comme Arbitres: M. le Docteur Santiago Aldunate, Envoyé extraordinaire et Ministre plénipotentiaire du Chili près de Sa Majesté le Roi d'Italie et l'Hon. Prof. Pasquale Grippo Vice-président de la Chambre des députés italienne, et, en vertu du Compromis, les Arbitres ainsi désignés ont nommé comme Surarbitre M. le Docteur Francis Hagerup, Envoyé extraordinaire et Ministre plénipotentiaire de Sa Majesté le Roi de Norvège.

La Commission arbitrale s'est réunie à Rome le 24 avril 1911. Conformément au règlement de procédure élaboré par elle, des Mémoires, Contre-Mémoires et Conclusions ont été dûment soumis aux Arbitres et communiqués aux Parties, lesquelles ont plaidé oralement devant la Commission le 28 juin 1911.

Sur quoi, la Commission arbitrale, après en avoir murement délibéré, rend la Sentence suivante:

I.— Quant à la première question:

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[1] *Trattati e Convenzioni fra il regno d'Italia e gli altri stati*, vol. 21, Roma, p. 312. Voir également: *American Journal of International Law*, vol. 6, 1912, p. 1018; *Journal du droit international privé et de la jurisprudence comparée*, t. 40, 1913, p. 723; De Martens, *Nouveau Recueil général de traités*, 3^e^ série, t. VI, p. 386; *Rivista di diritto internazionale*, vol. 6. 1912, p. 460.

Considérant que d'après ce qui ressort de la procédure et des documents produits par les Parties les faits se rattachant à cette question sont les suivants:

Dans les livres de la Maison Cerruti et C^ie figurait un compte du sieur Gaspare Mazza, ingénieur italien, lequel compte, le 31 janvier 1885, accusait en faveur du sieur Mazza un solde de *pesos* colombiens 19,089.355.

Ce solde se compose des chefs suivants:

Solde du compte courant	*pesos*	1,210.610
Honoraires etc. pour des travaux d'ingénieur, exécutés pour la Maison	,,	5,038.200
Intérêts	,,	1,866.055
Montant en or donné à E. Cerruti	,,	8,635.290
Agio de cette dernière somme, convertie en monnaie colombienne courante	,,	2,339.200
Total	*pesos*	19,089.355

Il ressort des dits livres que les intérêts sont liquidés semestriellement à un taux de 7% par an et à raison composée.

Sur l'origine du crédit, résultant du versement de la somme de *pesos* 8,635.290 en or effectué entre les mains de sieur E. Cerruti, celui-ci qui était associé et gérant de la Maison Cerruti et C^ie, s'exprime dans une lettre au sieur G. Mazza en date du 29 juillet 1893 dans les termes suivants:

(Voir document n. 5 produit avec le 2^e Mémoire de l'agent du Gouvernement colombien);

« Le somme mi furono date senza condizioni. Dieci mila lire mi furono consegnate da te a Parigi prima di partire per l'America. Venti mila franchi furono consegnati a mio cognato Panicali; il resto della somma fu consegnato in due volte al signor M. Heurtematte di Parigi, e cosi io evitavo l'invio di somme in Europa, mentre tu avevi il tuo denaro in qualsiasi momento l'avessi chiesto.

« Io ho creduto di mettere questa somma nella Casa, però tu mi hai sempre detto che non riconoscevi che me e nessun altro della Ditta, per cui io sono il responsabile.

« Io ho pure creduto di farti passare sui libri un interesse del 7% annuo senza che da te mi fosse chiesto e fosse dopo discusso.

« Naturalmente per passare il tuo deposito ai libri dovetti convertirlo in moneta colombiana, le prime dieci mila lire al 10% di aggio e altre al 20%. Pero io sono impegnato a restituirti la somma coll'aggio nelle proporzioni sopra indicate e far la restituzione in franchi come la ricevetti ».

Il est en outre produit une quittance pour la dite créance signée au nom de la Maison Cerruti et C^ie par son associé M. Quilici le 28 octobre 1885 et qui porte ce qui suit (Document n. 3 produit avec le premier Mémoire de l'Agent du Gouvernement italien et Document n. 8 produit avec le premier Mémoire de l'Agent du Gouvernement colombien): « A nome della Casa Ernesto Cerruti e Compagnia di Cali dichiariamo che il signor ingegnere Gaspare Mazza è, come risulta dai libri e dal bilancio della Casa, dal 1° genaio dell'anno corrente creditore di detta Casa della somma di quattordici mila e ottantanove scudi e trencento cinquanta cinque millesimi ($ 14.089.355), somma che il detto signor ingegnere lasciò nella nostra Casa in qualità di deposito colla sola condizione di poterla ritirare a sua volontà, e inoltre di cinquemila scudi ($ 5000.00) per lavori eseguiti in varie mine per conto della nostra Casa, ciò che forma un totale di diciannove mila ottantanove scudi e trecento cinquanta cinque milesime ($ 19,089.355). Questa somma, allo scoppiare della rivoluzione,

non potemmo consegnarla al citato signor Mazza perchè il Governo s'impadroni di tutti i nostri beni. La nostra Casa decise allora di pagare l'interesse mensile del 11%, che è l'interesse corrente nel commercio di questo paese, finchè la casa possa ricuperare i suoi beni, senza pregiudizio dei maggiori danni che potesse causare il ritardo ».

Le Gouvernement colombien, auquel l'art. V de la sentence arbitrale Cleveland du 2 mars 1897 imposa l'obligation de protéger le sieur E. Cerruti contre toute responsabilité émanant des dettes de la Maison E. Cerruti et C^ie^, se déclara, le 8 février 1899, disposé à payer la créance du sieur G. Mazza en monnaie colombienne (avec une majoration, d'abord fixée à 20 p. ct., portée plus tard à 40 p. ct.). Mais le sieur G. Mazza qui exigeait d'être payé en or n'accepta pas cette offre. Le Gouvernement colombien envoya, au mois de septembre 1899, comme paiement de la dite créance, une somme de *pesos* 22,907.22 $^1/_2$ en monnaie courante à M. Welby, Ministre de la Grande-Bretagne à Bogotá et qui était à cette époque le représentant de l'Italie auprès du Gouvernement colombien; et M. Welby ayant accepté cette somme sous réserve d'instructions ultérieures du Gouvernement italien, la déposa à la Banque de Bogotá. (Voir doc. 4 produit avec le premier Mémoire de l'Agent du Gouvernement colombien, pag. 39). Déjà en avril 1897 monsieur G. Mazza avait fait des démarches auprès des autorités judiciaires d'Italie pour obtenir une saisie-arrêt sur la somme de 50,000 livres sterlings payée par le Gouvernement colombien au Gouvernement italien, en vertu de la sentence d'arbitrage Cleveland, comme indemnité au sieur E. Cerruti pour la confiscation de ses biens pendant la révolution de 1885. La saisie-arrêt, accordée par le Président du Tribunal de Rome, fut maintenue par la Cour de Cassation qui, par un arrêt en date des 9-27 juillet 1901, renvoya l'affaire par devant la Cour d'Appel de Pérouse pour être jugée quant au fond. Par une sentence de cette dernière Cour en date des 24 mars-1 avril 1902 le sieur E. Cerruti fut condamné, tant comme associé de la Maison Cerruti et C^ie^ qu'en son propre nom, à payer au Général Mazza comme héritier de feu l'ingérieur G. Mazza:

I.— La somme de lires 59,539 en or avec les intérêts, à partir du 1^er^ janvier 1885, à un taux de 7 pour cent, échus et en cours jusqu'au paiement final;

II.— La somme de lires 21,739.10 en monnaie courante avec les intérêts au taux légal de 5 pour cent à partir du 12 avril 1897 (date de l'assignation);

III.— Les frais judiciaires encourus dans l'affaire par M. Mazza (outre les frais du Ministère des Affaires Etrangères italien, partie du litige en sa qualité de dépositaire de la somme séquestrée par M. Mazza).

En vertu de cette sentence, le sieur E. Cerruti paya, le 3 avril 1903, au Général Mazza la somme de lires italiennes 181,359.46.

CONSIDÉRANT que pour ce qui concerne la somme de *pesos* 5,038.200, due à feu l'ingénieur G. Mazza, comme honoraires, il n'est pas contesté que cette somme était une dette incombant à la Maison E. Cerruti et C^ie^;

CONSIDÉRANT, pour ce qui concerne le reste du dit crédit, que la responsabilité du Gouvernement colombien à ce sujet dépend de la question de savoir, si, oui ou non, la somme inscrite dans les livres de la Maison Cerruti et C^ie^ pour le compte de M. Mazza a été versée dans la caisse de la dite Maison; et considérant que la Commission, après avoir soigneusement apprécié toutes les circonstances invoquées par l'Agent du Gouvernement colombien et qui sont de nature à provoquer des doutes sur la régularité des écritures de ces livres, en vue de l'ensemble des faits présentés à la Commission et surtout en vue de la reconnaissance de la dette de la part du Gouvernement colombien, contenue

dans le paiement offert par lui au mois de septembre 1899, doit reconnaître que ce versement a eu lieu;

CONSIDÉRANT que le versement fait à la Maison E. Cerruti et C^ie^ par le sieur Cerruti au nom du sieur Mazza dans l'intention d'établir pour celui-ci une créance envers cette Maison à côté de l'obligation assumée par le sieur Cerruti personnellement,— soit qu'on y applique les règles des *contractus in favorem tertii*, soit qu'on envisage le versement comme une *negotiorum gestio* — était obligatoire pour la dite Maison même si le versement avait eu lieu sans l'autorisation du sieur Mazza ou à son insu, à moins qu'il n'ait protesté contre cet acte, ce qui n'a pas eu lieu, le sieur Mazza s'étant au contraire prévalu de sa créance envers la Maison E. Cerruti et C^ie^ en demandant le paiement au Gouvernement colombien;

CONSIDÉRANT que le sieur Cerruti, en payant la créance du sieur Mazza, acquiert un droit de recours envers le Gouvernement colombien comme successeur, d'après la sentence d'arbitrage Cleveland, de la Maison E. Cerruti et C^ie^, à laquelle avait finalement profité la somme versée par le sieur Mazza;

CONSIDÉRANT que dans les livres de la Maison E. Cerruti et C^ie^ la créance est inscrite en monnaie colombienne mais que dans l'esprit de la sentence d'arbitrage Cleveland on doit, dans l'appréciation des rapports de la Maison E. Cerruti et C^ie^, et par conséquent dans l'appréciation de la valeur de la monnaie colombienne se remettre autant que possible dans l'état existant avant la confiscation des biens du sieur Cerruti survenue aux mois de janvier et de février 1885;

CONSIDÉRANT que pour cette raison l'offre de paiement faite par le Gouvernement colombien en 1899, et qui avait pour base une valeur de la monnaie colombienne très dépréciée, ne fut pas suffisante;

CONSIDÉRANT que pour ce cas les parties ont accepté le calcul de la valeur de la créance fait par la Cour d'appel de Pérouse, et que par conséquent il n'est pas nécessaire de chercher la vraie valeur de la monnaie colombienne en 1885;

CONSIDÉRANT, pour ce qui concerne les intérêts, que la somme payée par le sieur Cerruti en exécution de la sentence de la Cour d'appel de Pérouse, s'élevant — abstraction faite des frais judiciaires dont il sera parlé ci-dessous — à lires italiennes 167,216.56, représente une diminution de l'indemnité à lui accordée par la sentence d'arbitrage Cleveland, et que, d'après cette sentence, il a le droit de 6 pour cent par an comme intérêts des sommes non versées par lui à partir de la date du paiement, le 3 avril 1903, mais qu'il n'y a pas lieu d'après la dite sentence de réclamer des intérêts composés;

CONSIDÉRANT, pour ce qui concerne les frais judiciaires, que ce point de la question se trouvera réglé par la disposition concernant la troisième question posée à la Commission arbitrale;

II.— Quant à la deuxième question:

CONSIDÉRANT que les faits se rattachant à cette question sont les suivants: l'art. IV de la sentence d'arbitrage Cleveland adjugeait au sieur Cerruti «la somme nette de 60,000 livres sterlings, dont 10,000 ayant déjà été payées, le Gouvernement de la République de Colombie devra, en plus, payer au Gouvernement du Royaume d'Italie à l'usage du (*for the use of*) sieur Ernesto Cerruti 10,000 livres sterlings de la dite somme dans le délai de 60 jours à partir de cette date, et le reste, soit 40,000 livres sterlings, dans l'espace de 9 mois, à partir de cette date, avec les intérêts à courir de la date de la présente sentence au taux de six pour cent par an jusqu'à ce que le paiement soit effectué».

En conséquence de cette sentence, 10,000 livres sterlings furent versées au Gouvernement italien le 5 juin 1897, 40,000 livres sterlings le 2 décembre 1897, et les 1800 livres sterlings constituant les intérêts des 40,000 livres sterlings pour le temps écoulé 2 mars au 2 décembre 1897 furent payées le 14 octobre 1900. Ces sommes ne furent cependant pas remises immédiatement et intégralement au sieur E. Cerruti. Divers créanciers de la Maison E. Cerruti et C^ie^ et du sieur Cerruti personnellement avaient obtenu du Tribunal de Rome de mettre saisie-arrêt sur les sommes que le Gouvernement colombien avait versées au Gouvernement italien comme indemnité au sieur Cerruti. Par un arrêt de la Cour de Cassation en date des 4-28 février 1899, les chambres réunies de cette Cour suprême annullaient une de ces saisies-arrêts, exécutée dans l'intérêt de la Maison Isaac et Samuel. Dans les considérants de cet arrêt, la dite Cour fit valoir la manière de voir suivante: « La sentence d'arbitrage Cleveland constitue une mesure d'ordre international, et, en tant qu'il s'agit de l'attribution de 60,000 livres au sieur E. Cerruti et C^ie^ ne peuvent intenter des actions de créance par devant les autorités judiciaires, étant donné la nature de la sentence d'arbitrage, qui a le caractère d'un traité international, en raison de l'accord intervenu entre le Gouvernement de Colombie et le Gouvernement d'Italie, qui recevait l'indemnité pour la transférer au sieur Cerruti, lequel transfert constituait de la part du Gouvernement l'exécution de la Convention diplomatique ». Cet arrêt n'annullant que la saisie-arrêt effectuée dans l'intérêt de la Maison Isaac et Samuel, et toutes les autres saisies-arrêts effectuée dans l'intérêt d'autres créanciers persistant, le Gouvernement italien ne trouvait pas qu'il pût verser au sieur Cerruti l'indemnité qu'il avait touchée pour son compte. Alors le sieur E. Cerruti cita le Ministère des Affaires Etrangères italien par devant le Tribunal de Rome, pour obtenir l'ordre qu'on lui versât l'indemnité payée par le Gouvernement colombien. Le dit Tribunal, par son jugement des 18-25 juin 1900, rejetait cette demande, qui fut pourtant admise (sauf quelques déductions faites pour des sommes avancées par le Ministère des Affaires Etrangères ou autrement dues par le sieur Cerruti) par un jugement rendu les 7-20 décembre 1900 par la Cour d'Appel de Rome, devant laquelle le sieur Cerruti avait porté l'affaire.

La Cour d'Appel de Rome, dans les considérants de sa sentence, avançait l'opinion, que la conséquence du susdit arrêt de la Cour de Cassation en date des 4-28 février 1899 devait nécessairement être que toutes les saisies-arrêts effectuées sur l'indemnité accordée au sieur Cerruti par la sentence d'arbitrage Cleveland étaient inadmissibles. Telle n'était pourtant pas l'opinion de la Cour de Cassation devant laquelle le sieur Mazza se pourvoyait en Cassation contre la sentence de la Cour d'Appel de Rome. Par l'arrêt en date des 9-27 juillet 1901 dont il a déjà été fait mention ci-dessus la Cour de Cassation maintenait les saisies-arrêts effectuées dans l'intérêt des dettes faites par le sieur Cerruti *personnellement* et indépendamment de sa qualité d'associé de la Maison Cerruti et C^ie^.

Ce ne fut que le 3 avril 1903 que put être effectué au sieur Cerruti le paiement de lires 474,005 en or constituant à ce jour le reste des 50,000 livres sterlings versées par le Gouvernement colombien.

CONSIDÉRANT que les réclamations des intérêts faites de part et d'autre à l'occasion des faits qui viennent d'être relatés peuvent se résumer sous les chefs suivants:

a) Intérêts au taux de 6 pour cent du premier accompte de l'indemnité accordée par la sentence d'arbitrage Cleveland pour les 60 jours entre la date de cette sentence (2 mars 1897) et la date fixée pour le versement du premier acompte de l'Indemnité (1^er^ mai 1897). L'obligation de payer ces intérêts dont

le montant est de livres sterlings 98,12.7 est contestée par le Gouvernement colombien.

b) Intérêts au taux de 6 pour cent de 10,000 livres sterlings pour les 35 jours du 1er mai au 5 juin 1897, pendant lesquels le Gouvernement colombien a retardé le paiement du premier acompte de l'indemnité. L'obligation de payer ces intérêts (s'élevant à livres sterlings 57.10.8) est reconnue par ledit Gouvernement.

c) Intérêts au taux de 6 pour cent — s'élevant à une somme de livres sterlings 309.10.0 — d'une somme de livres sterlings 1800 qui devait être payée comme intérêts des 40,000 livres sterlings et qui fut versée avec un retard de 2 ans et 316 jours. L'obligation de payer ces intérêts est également reconnue par le Gouvernement colombien.

d) Intérêts composés au taux de 6 pour cent par an pour le temps pendant lequel le sieur E. Cerruti, à cause de poursuites judiciaires effectuées concernant la somme déposée entre les mains du Gouvernement italien, fut empêché de faire usage de l'indemnité à lui accordée par la sentence d'arbitrage Cleveland. L'obligation de payer ces intérêts est contestée par le Gouvernement colombien.

e) Ce Gouvernement a soulevé la question de savoir s'il n'y a pas lieu de tenir compte, en sa faveur, des intérêts de la somme de 10,000 livres sterlings versée par lui le 4 juillet 1890 comme indemnité au sieur Cerruti.

CONSIDÉRANT, pour ce qui concerne les intérêts susmentionnés sous la lettre *a*), que les termes de l'art. IV de la sentence arbitrale Cleveland « avec les intérêts à partir de la date de cette sentence d'arbitrage au taux de six pour cent par an jusqu'à la date du paiement » doivent, aussi bien d'après la construction du sus dit article que d'après l'esprit de la sentence, se rapporter tant au premier qu'au second acompte de l'indemnité;

CONSIDÉRANT qu'il n'est pas contesté que le Gouvernement colombien doit payer les intérêts dont il est question aux lettres *b*) et *c*);

CONSIDÉRANT que le sieur Cerruti avait le droit d'imputer préalablement sur les intérêts mentionnés aux lettres *a*), *b*) et *c*) les sommes de 10,000, 40,000 et 1800 livres sterlings versées par le Gouvernement colombien, de sorte que le sieur Cerruti résulte encore créancier des capitaux de livres sterlings 156,3.3. et 309.10.0, comme il appert des deux comptes suivants:

	Capitaux	*Intérêts*
2 mars 1897. Premier acompte de l'indemnité assignée au sieur Cerruti par la sentence arbitrale Cleveland	Lst. 10,000	
1 mai 1897. Intérêts 6% sur la somme de Lst. 10,000 à partir du 2 mars jusqu'au 1er mai 1907 (60 jours)		Lst. 98.12. 7
5 juin 1897. Intérêts 6% sur la somme de Lst. 10,000 à partir du 1er mai jusqu'au 5 juin 1897 (35 jours)		,, 57.10. 8
	Lst. 10,000	Lst. 156. 3. 3
5 juin 1897. Somme payée par le Gouvernement colombien. Lst. 10,000	,, —9,843.16. 9	,, —156. 3. 3
Crédit du sieur Cerruti le 5 juin 1897 relativement au premier acompte	Lst. 156. 3. 3	0

	Capitaux	*Intérêts*
2 mars 1897. Deuxième acompte de l'indemnité assignée au sieur Cerruti par la sentence arbitrale Cleveland	Lst. 40,000	
2 décembre 1897. Intérêts 6% sur la somme de Lst. 40,000 à partir du 2 mars jusqu'au 2 décembre 1897 (9 mois)		Lst. 1,800
2 décembre 1897. Somme payée par le Gouvernement colombien Lst. 40,000 . .	,, 38,200	,, —1,800
	Lst. 1,800	0
14 octobre 1900. Intérêts 6% sur le capital de Lst. 1,800 à partir du 2 décembre 1897 jusqu'au 14 octobre 1900 (2 ans et 316 jours)		Lst. 309.10. 0
14 octobre 1900. Somme payée par le Gouvernement colombien Lst. 1,800	,, —1,490.10. 0	,, —309.10.
Crédit du sieur Cerruti le 14 octobre 1900 relativement au deuxième acompte . . .	Lst. 309.10. 0	0

CONSIDÉRANT que, d'après la sentence Cleveland, le Gouvernement colombien doit payer les intérêts au taux de 6% par an sur les sommes non versées se rapportant à l'indemnité et que, suivant les comptes ci-dessus, les intérêts sur les capitaux de livres sterlings 156.3.3 et 309.10.0 doivent être calculés respectivement à partir des dates du 5 juin 1897 et du 14 octobre 1900 jusqu'au paiement final;

CONSIDÉRANT, pour ce qui concerne les intérêts mentionnés sous la lettre *d*), que le Gouvernement colombien, en payant au Gouvernement italien la somme accordée par la sentence d'arbitrage Cleveland au sieur Cerruti, s'était conformé aux dispositions de la dite sentence, d'après les règles générales de droit maintenues par la Cour de Cassation de Rome, devait pouvoir compter sur ce que la somme versée à l'usage du sieur Cerruti ne serait pas assignée à un usage étranger aux dispositions du dit acte international;

CONSIDÉRANT que le Gouvernement colombien ne peut non plus être responsable des retards occasionnés par les séquestres effectués par des créanciers *personnels* du sieur Cerruti et admis par la Cour susmentionnée seulement parce qu'il s'agissait de créances personnelles;

CONSIDÉRANT qu'il n'est pas nécessaire, pour la décision de la question soumise à cet arbitrage, d'entrer dans une appréciation des divergences d'opinion qui après la sentence d'arbitrage Cleveland se soulevaient entre les Gouvernements intéressés au sujet des obligations imposées par cette sentence, parce que, quelle que soit l'appréciation des dites divergences d'opinion, le Gouvernement colombien ne peut pas, en droit, être rendu responsable des séquestrations effectuées en violation des susdites règles de droit maintenues par la Cour de Cassation de Rome, bien que l'attitude du Gouvernement italien fut d'une correction incontestable en tant qu'il refusait le versement au sieur Cerruti de la somme séquestrée;

CONSIDÉRANT, toutefois, que la présente Commission arbitrale est appelée d'après le compromis à statuer aussi comme tribunal d'équité et considérant que, si le Gouvernement colombien, d'après le droit strict, n'a pas l'obligation

de rembourser au sieur Cerruti les pertes subies par lui à cause des susdites mesures illégales entreprises dans l'intérêt des créances de la Maison E. Cerruti et C^ie pour lesquelles le Gouvernement colombien avait assumé la responsabilité, il semble équitable que le sieur Cerruti, qui n'a aussi commis aucune faute en ce qui concerne ces mesures, n'en supporte pas seul les conséquences pécuniaires qui diminueraient sensiblement l'indemnité à lui accordée par la sentence d'arbitrage Cleveland, et que pour cette raison il paraît équitable et dans l'esprit de la dite sentence de lui accorder pour perte d'intérêts une somme globale de deux cent mille francs d'or (sans des intérêts d'intérêts);

CONSIDÉRANT pour ce qui concerne les intérêts mentionnés sous la lettre *e*) qu'il y a tout lieu d'affirmer que la sentence d'arbitrage Cleveland, par la fixation de l'indemnité à accorder au sieur Cerruti, a tenu compte du fait que ces 10,000 livres sterlings avaient été avancées par la Colombie et qu'il pourrait en jouir ainsi que des intérêts;

III.— Quant à la troisième question:,

CONSIDÉRANT que les termes de l'art. V de la sentence d'arbitrage Cleveland, ainsi conçus en anglais « such guarantee and reimbursement shall include all necessary expenses for properly contesting such partnership debts » doivent être interprétés de la manière suivante: le Gouvernement colombien, qui, d'après la dite sentence devait assumer la responsabilité de toutes les dettes de la Maison E. Cerruti et C^ie, doit rembourser au sieur Cerruti tous les frais encourus de bonne foi par celui-ci dans le but de voir établir d'une manière décisive l'étendue de ces obligations;

CONSIDÉRANT que les frais qui se rapportent au crédit Mazza — aussi bien ceux qui sont imposés au sieur Cerruti par la sentence de la Cour d'appel de Pérouse que ceux qu'il a dû payer pour sa défense dans les différents procès se rattachant à cette affaire — sont sous le rapport sus-indiqué nature mixte, quelques-uns se rattachant à la saisie-arrêt effectuée en faveur du sieur Mazza et à l'intervention dans le procès du Gouvernement italien comme dépositaire de la somme séquestrée, d'autres se rattachant à la question de la nature de la créance — et qu'une distinction des différents groupes de frais ne peut pas être établie exactement;

CONSIDÉRANT que tous les autres procès et actes judiciaires, dont le sieur Cerruti réclame les frais, ont eu pour but non pas d'établir l'étendue du passif de la Maison E. Cerruti et C^ie, mais de protéger la somme versée par le Gouvernement colombien contre des saisies-arrêts illégales dont la responsabilité, d'après ce qui a été dit plus haut, ne retombe pas, en droit strict, sur la Colombie;

CONSIDÉRANT, toutefois, que les mêmes raisons d'équité qui ont été invoquées ci-dessus ont aussi leur valeur dans la question des frais judiciaires et que pour cette raison il semble équitable de ne pas faire supporter par le sieur Cerruti tous les frais et de lui adjuger comme indemnité une somme globale de soixante quinze mille francs en or (sans intérêts) dans laquelle somme entre comme élément une part raisonnable des frais à lui imposés par la sentence de la Cour d'appel de Pérouse;

CONSIDÉRANT que d'après le compromis la Commission arbitrale n'a pas la compétence de trancher les questions soulevées par le sieur Cerruti concernant ses dommages personnels et celles qui se rapportent aux frais du présent arbitrage;

CONSIDÉRANT que conformément au compromis les sommes à payer en vertu de la présente sentence doivent être fixées en francs en or aussi bien pour les intérêts que pour les capitaux;

Pour ces raisons la Commission arbitrale déclare:

I.— Le montant de la somme que le Gouvernement colombien doit payer en raison de la créance de feu l'ingénieur G. Mazza envers la Maison E. Cerruti et C^ie^ est de 166,589.49 francs en or avec les intérêts, également en or, au taux de 6 pour cent par an, calculés à partir du 3 avril 1903 jusqu'au paiement final.

II. — Le Gouvernement colombien doit payer comme intérêts à cause des différents termes auxquels ont été effectués les versements au sieur Cerruti de l'indemnité qui lui était due

a) francs en or 3,950.11 avec les intérêts, également en or, au taux de 6 pour cent par an, calculés à partir du 5 juin 1897 jusqu'au paiement final;

b) francs en or 7,828.80 avec les intérêts, également en or, au taux de 6 pour cent par an, calculés à partir du 14 octobre 1900 jusqu'au paiement final;

c) une somme globale de 200,000 francs en or.

III.— Le Gouvernement colombien doit rembourser au sieur Cerruti une somme de francs en or 75,000 pour les frais judiciaires payés par lui.

Rome, le 6 juillet 1911.

F. HAGERUP Santiago Aldunate B. P. GRIPPO

DOCUMENT ADDITIONNEL

Award of the President of the United States under the Protocol concluded the eighteenth day of August, in the year one thousand eight hundred and ninety-four, between the Government of the Kingdom of Italy and the Government of the Republic of Colombia. Washington, 2 March 1897 [1]

This protocol, concluded August 18, 1894, between the Kingdom of Italy and the Republic of Colombia, was entered into for the purpose of putting an end to the subjects of disagreement between the two governments growing out of the claims of Signor Ernesto Cerruti against the Government of Colombia for losses and damages to his property in the State (now Department) of Cauca in the said republic during the political troubles of 1885, and for the further purpose of making a just disposition of said claims. By the terms of the protocol each government agreed to submit to arbitration the matters and claims above referred to for the purpose of arriving at a settlement thereof as between the two governments, and they joined in asking me, Grover Cleveland, President of the United States of America, to accept the position of arbitrator in the case and discharge the duties pertaining thereto as a friendly act to both governments, vesting in me full power, authority, and jurisdiction to do and perform and to cause to be done and performed all things without any limitation whatsoever which, in my judgment, might be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes the agreement is intended to secure.

Pursuant to the terms of the said protocol, the two governments, and the claimant, Signor Ernesto Cerruti, as one of the two parties interested in the suit, have submitted to me within the time specified in said protocol the documents and evidence in support of their several asserted rights.

Now, therefore, be it known, that I, Grover Cleveland, President of the United States of America, upon whom the functions of arbitrator have been conferred as aforesaid, having duly examined the documents and evidence submitted by the respective parties pursuant to the provisions of said protocol, and having considered the arguments addressed to me in relation thereto, do hereby decide and award:

1. That the claims made by Signor Ernesto Cerruti against the Republic of Colombia for losses of and damages to the real and personal property owned by him individually in the said State of Cauca, and the claims of said Signor Ernesto Cerruti for injury sustained by him by reason of losses of and damages to his interest in the firm of E. Cerruti and Company, are proper claims for international adjudication.

2. That the claim submitted to me by Signor Ernesto Cerruti for personal damages resulting from imprisonment, arrest, enforced separation from his

[1] *American Journal of International Law*, vol. 6, 1912, p. 1015.

family, and sufferings and privations endured by himself and family is disallowed. I therefore make no award on account of this claim.

3. The claim of Signor Ernesto Cerruti for moneys expended and obligations incurred for legal expenses in the preparation and prosecution of this claim, including former and present proceedings, is disallowed by me.

4. I award for losses and damages to the individual property of Signor Ernesto Cerruti in the State of Cauca, and to his interest in the copartnership of E. Cerruti and Company, of which he was a member, including interest, the net sum of sixty thousand pounds sterling, of which sum ten thousand having been paid, the Government of the Republic of Colombia will, in addition, pay to the Government of the Kingdom of Italy, for the use of Signor Ernesto Cerruti, ten thousand pounds sterling thereof within sixty days from the date hereof, and the remainder, being forty thousand pounds, within nine months from the date hereof, with interest from the date of this award at the rate of six per cent per annum, until paid, both payments to be made by draft, payable in London, England, with exchange from Bogotá at the time of payment.

5. It being my judgment that Signor Cerruti is, as between himself and the Government of the Republic of Colombia, which I find has by its acts destroyed his means for liquidating the debts of the copartnership of E. Cerruti and Company for which he may be held personally liable, entitled to enjoy and be protected in the net sum awarded him hereby, I do, under the protocol which invests me with full power, authority, and jurisdiction to do and to perform and to cause to be done and performed all things without any limitation whatsoever which in my judgment may be necessary or conducive to the attainment in a fair and equitable manner of the ends and purposes which the protocol is intended to secure, decide and adjudge to the Government of the Republic of Colombia all rights, legal and equitable, of the said Signor Ernesto Cerruti in and to all property, real, personal, and mixed in the Department of Cauca and which has been called in question in this proceeding, and I further adjudge and decide that the Government of the Republic of Colombia shall guarantee and protect Signor Ernesto Cerruti against any and all liability on account of the debts of the said copartnership, and shall reimburse Signor Ernesto Cerruti to the extent that he may be compelled to pay such *bona fide* copartnership debts duly established against all proper defenses which could and ought to have been made and such guaranty and reimbursement shall include all necessary expenses for properly contesting such partnership debts.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE in duplicate at the city of Washington on the second day of March, in the year one thousand eight hundred and ninety-seven, and of the Independence of the United States the 121st.

[Seal of the United States]

Grover CLEVELAND

By the President:

Richard OLNEY,

Secretary of State.

AFFAIRE CANEVARO

PARTIES: Italie, Pérou.

COMPROMIS: Protocole du 25 avril 1910.

ARBITRES: Cour permanente d'Arbitrage: L. Renault; Guido Fusinato; M. A. Calderón.

SENTENCE: 3 mai 1912.

Règlement d'une réclamation pécuniaire présentée au nom de la société Canevaro, établie à Lima — Nationalité de la société — Siège social de la société et nationalité de ses membres — Nationalité des personnes — Conflit du *jus soli* et du *jus sanguinis* — Préférence donnée à la nationalité active — Effets de la cession de créance à un étranger.

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Texte du compromis et de la sentence

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American Journal of International Law, vol. VI, 1912, Supplement, p. 212 [texte anglais du compromis]; vol. 6, 1912, p. 746 [texte anglais de la sentence]

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Journal du droit international privé et de la jurisprudence comparée, t. 39, 1912, p. 1317 [texte français de la sentence]

De Martens, *Nouveau Recueil général de traités*, 3e série, t. VI, p. 52 [texte espagnol du compromis]; p. 54 [texte français de la sentence]

The Hague Court Reports, edited by J. B. Scott, Carnegie Endowment for International Peace, New York Oxford University Press, 1st series 1916, p. 285 [texte anglais de la sentence]; p. 294 [texte anglais du compromis]; p. 522 [texte français de la sentence]; p. 528 [texte espagnol et italien du compromis]. Edition française, 1921, p. 305 [texte français de la sentence et du compromis]

G. G. Wilson, *The Hague Arbitration Cases*, 1915, p. 238 [texte anglais, espagnol et italien du compromis]; p. 242 [texte anglais et français de la sentence]

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Charles de Boeck, « La sentence arbitrale de la Cour permanente de La Haye dans l'affaire Canevaro (3 mai 1912) », *Revue générale de droit international public*, t. XX, 1913, p. 317 [y compris le texte français de la sentence]

M. J. P. A. François, « La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir », Académie de droit international, *Recueil des Cours*, 1955, I, p. 516

J. Kohler, „Die Lehren des Canevarofalles" *Zeitschrift für Volkerrecht*, VII Band, 1913, p. 1.

Rivista di diritto internazionale, vol. VI, 1912, p. 475 [y compris le texte français de la sentence]

Ernst Zitelmann, „Der Canevaro-Streitfall . . . " *Die gerichtlichen Entscheidungen*", Erster Band, Dritter Teil, 1914, p. 167

APERÇU [1]

La réclamation du Gouvernement italien contre le Pérou, présentée au nom de Napoléon, Carlos et Raphaël Canevaro, prit naissance de la manière suivante. Il semble que le 12 décembre 1880, le gouvernement du Pérou promulgua un décret en vertu duquel furent créés, en date du 23 décembre 1880, des bons de payement (*libramientos*) à l'ordre de la maison José Canevaro et fils, pour le montant de 77,000 livres stèrling, payables à diverses échéances; que ces bons de payement n'ont pas été payés aux échéances fixées; qu'en 1885, le père Canevaro étant mort en 1883, la maison de commerce fut reconstituée, avec José Francisco, César et Raphaël Canevaro, citoyens péruviens, comme associés, formant une societé péruvienne; qu'en 1885, le Gouvernement péruvien paya un acompte de 35,000 livres sterling, laissant une créance de 43,140 livres sterling; que la maison Canevaro continua d'exister jusqu'en 1900, date de sa dissolution, causée par la mort de José Francisco Canevaro; et que les bons de payement passèrent enfin entre les mains de Napoléon et Carlos Canevaro, sujets italiens, et de Raphaël Canevaro, dont la prétention à la nationalité italienne fut contestée par le Pérou.

Des différends surgirent entre les rèclamants et le Pérou sur la question de savoir si les bons de payement devaient être payés en espèces, ou en bons d'un pour cent, conformément aux dispositions de la loi péruvienne sur la dette intérieure du 12 juin 1889, sur le total de la somme que les réclamants avaient le droit d'exiger, et sur la nationalité de Raphaël Canevaro. Comme résultat des négociations diplomatiques entre les deux Parties, celles-ci signèrent un compromis [2] soumettant les questions en litige à un tribunal de la Cour permanente de La Haye, composé des membres suivants: M. Louis Renault, de France, M. Guido Fusinato, d'Italie, et M. Manuel Alvarez Calderón, du Pérou. Les séances commencèrent le 20 avril 1912, et se terminèrent le 22 avril 1912. La sentence fut rendue le 3 mai 1912.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 303.

[2] Voir *infra.*, p. 403.

PROTOCOLE SIGNÉ À LIMA, LE 25 AVRIL 1910, ENTRE L'ITALIE ET LE PÉROU POUR SOUMETTRE À L'ARBITRAGE LA RÉCLAMATION CANEVARO [1]

Les soussignés, le Dr. Don Meliton F. Porras, Ministre des Affaires étrangères du Pérou et le Comte Giulio Bolognesi, Chargé d'affaires d'Italie, s'étant réunis au Ministère des Affaires étrangères du Pérou, sont convenus des dispositions suivantes:

Le Gouvernement de la République du Pérou et le Gouvernement de Sa Majesté le roi d'Italie n'ayant pu se mettre d'accord pour régler la réclamation présentée par l'Italie au nom du Comte Napoléon, de Carlos et de Raphaël Canevaro, par rapport au versement de la somme de quarante-trois mille, cent quarante livres sterling, ainsi que des intérêts légaux de cette somme, qu'ils réclament du Gouvernement du Pérou.

Ont résolu, conformément à l'article 1 du traité général d'arbitrage en vigueur entre les deux pays, de soumettre cette controverse à la Cour permanente d'arbitrage de La Haye, qui sera chargée de statuer, conformément au droit, sur les points suivants:

Le Gouvernement du Pérou doit-il payer en espèces, ou bien d'après les dispositions de la loi péruvienne sur la dette intérieure du 12 juin 1889 les bons de payement (*libramientos*) dont sont actuellement possesseurs les frères Napoléon, Carlos et Raphaël Canevaro, lesquels furent tirés par le Gouvernement péruvien à l'ordre de la maison José Canevaro et fils pour le montant de 43,140 livres sterling, plus les intérêts légaux du montant susdit.

Les frères Canevaro ont-ils le droit d'exiger le total du montant réclamé?

Don Raphael Canevaro a-t-il le droit d'être considéré comme réclamant italien?

Le Gouvernement de la République du Pérou et le Gouvernement de Sa Majesté le roi d'Italie s'engagent à désigner, dans le délai de quatre mois à partir de la date de ce protocole, les membres de ce tribunal arbitral.

Sept mois après la constitution dudit tribunal arbitral, les deux Gouvernements lui soumettront un exposé complet de la controverse, ainsi que tous les documents, preuves, allégations et arguments ayant trait au litige, chaque Gouvernement ayant droit à un délai de cinq mois pour présenter sa réponse à l'autre Gouvernement, et dans ladite réponse, ils ne pourront toucher qu'aux allégations contenues dans l'exposé de l'autre partie.

La discussion sera alors close, à moins que le tribunal arbitral ne demande de nouveaux documents, preuves, ou allégations; qui devront alors être présentés dans le délai de quatre mois à partir du jour où l'arbitre en fera la demande.

Au cas où ces documents, preuves ou allégations ne seraient pas présentés dans le délai prévu, la sentence arbitrale sera rendue comme s'ils n'existaient pas.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 314.

EN FOI DE QUOI, les soussignés ont signé le présent protocole, dressé en espagnol et en italien, et l'ont revêtu de leurs cachets respectifs.

FAIT en double, à Lima, le 25 avril 1910.

(L.S.) M. F. PORRAS
(L.S.) Giulio BOLOGNESI

NOTES RELATIVES À LA CONSTITUTION DU TRIBUNAL ARBITRAL[1]

MINISTÈRE DES AFFAIRES ÉTRANGÈRES,

Lima, le 27 avril 1910

MONSIEUR LE CHARGÉ D'AFFAIRES: Le protocole renvoyant à l'arbitrage la réclamation présentée à l'encontre du Gouvernement du Pérou par les frères Canevaro, ne contenant aucune disposition relative à la constitution du tribunal arbitral, je suis heureux, de proposer à Votre Excellence qu'il soit composé conformément à l'article 87 de la Convention pour le règlement pacifique des conflits internationaux, signée à La Haye en 1907.

J'ai l'honneur de renouveler à Votre Excellence l'assurance de ma plus haute considération.

M. F. PORRAS

A Monsieur le Comte Giulio Bolognesi,
Chargé d'Affaires d'Italie

LÉGATION DE SA MAJESTÉ, LE ROI D'ITALIE,

Lima, le 27 avril 1910

MONSIEUR LE MINISTRE: J'ai l'honneur d'accuser réception de la note no. 18 de Votre Excellence, en date de ce jour. Je suis très heureux d'accepter la proposition de Votre Excellence ayant trait à la constitution du tribunal d'arbitrage à La Haye pour régler la controverse Canevaro, conformément aux stipulations de l'article 87 de la Convention pour le règlement pacifique des conflits internationaux, signée à La Haye en 1907.

Je vous prie d'accepter, Monsieur, l'assurance de ma très haute et très distinguée considération.

Giulio BOLOGNESI

A Son Excellence, Dr. Melito F. Porras,
Ministre des Relations Etrangères.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 315.

SENTENCE RENDUE LE 3 MAI 1912 PAR LE TRIBUNAL ARBITRAL CHARGÉ DE STATUER SUR LE DIFFÉREND ENTRE L'ITALIE ET LE PÉROU AU SUJET DE LA RÉCLAMATION DES FRÈRES CANEVARO [1]

Settlement of claim presented on behalf of the Canevaro Company established at Lima — Nationality of the Company — Registered office of the Company and nationality of its members — Nationality of individuals — Conflict between *jus soli* and *jus sanguinis* — Effective nationality preferred — Effect of assignment of debt to a foreigner.

CONSIDÉRANT que, par un Compromis en date du 25 avril 1910, le Gouvernement Italien et le Gouvernement du Pérou se sont mis d'accord à l'effet de soumettre à l'arbitrage les questions suivantes:

« Le Gouvernement du Pérou doit-il payer en espèces ou bien d'après les dispositions de la loi péruvienne sur la dette intérieure du 12 juin 1889 les lettres à ordre (*cambiali*, *libramientos*) dont sont actuellement possesseurs les frères NAPOLÉON, CARLO et RAPHAËL CANEVARO, qui furent tirées par le Gouvernement du Pérou à l'ordre de la maison JOSÉ CANEVARO E HIJOS pour le montant de 43140 livres sterling plus les intérêts légaux du montant susdit? »

« Les frères CANEVARO ont-ils le droit d'exiger le total de la somme réclamée? »

« Le comte RAPHAËL CANEVARO a-t-il le droit d'être considéré comme réclamant italien? »

CONSIDÉRANT qu'en exécution de ce Compromis, ont été désignés comme Arbitres:

Monsieur LOUIS RENAULT, Ministre plénipotentiaire, Membre de l'Institut, Professeur à la Faculté de droit de l'Université de Paris et à l'Ecole des sciences politiques, Jurisconsulte du Ministère des Affaires Etrangères, Président;

Monsieur GUIDO FUSINATO, Docteur en droit, ancien Ministre de l'Instruction publique, Professeur honoraire de droit international à l'Université de Turin, Député, Conseiller d'Etat;

Son Excellence Monsieur MANUEL ALVAREZ CALDERON, Docteur en droit, Professeur à l'Université de Lima, Envoyé extraordinaire et Ministre plénipotentiaire du Pérou à Bruxelles et à Berne.

Considérant que les deux Gouvernements ont respectivement désigné comme Conseils:

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[1] Bureau international de la Cour permanente d'Arbitrage, *Protocoles des séances et sentence du tribunal d'Arbitrage constitué en exécution du Compromis signé entre l'Italie et et le Pérou le 25 avril 1910 — Différend au sujet de la réclamation des Frères CANEVARO*, La Haye, 1912, p. 14.

Le Gouvernement Royal Italien:

Monsieur le Professeur VITTORIO SCIALOJA, Sénateur du Royaume d'Italie et, comme conseil adjoint, le Comte GIUSEPPE FRANCESCO CANEVARO, Docteur en droit,

Le Gouvernement Péruvien:

Monsieur MANUEL MARIA MESONES, Docteur en droit, Avocat.

CONSIDÉRANT que, conformément aux dispositions du Compromis, les Mémoires et Contre-mémoires ont été dûment échangés entre les Parties et communiqués aux Arbitres;

CONSIDÉRANT que le Tribunal s'est réuni à La Haye le 20 avril 1912.

CONSIDÉRANT que, pour la simplification de l'exposé qui suivra, il vaut mieux statuer d'abord sur la troisième question posée par le Compromis, c'est-à-dire sur la qualité de RAPHAËL CANEVARO;

CONSIDÉRANT que, d'après la législation péruvienne (Art. 34 de la Constitution), RAPHAËL CANEVARO est Péruvien de naissance comme étant né sur le territoire péruvien,

Que, d'autre part, la législation italienne (art. 4 du Code civil) lui attribue la nationalité italienne comme étant né d'un père italien;

CONSIDÉRANT qu'en fait, RAPHAËL CANEVARO s'est, à plusieurs reprises, comporté comme citoyen péruvien, soit en posant sa candidature au Sénat où ne sont admis que les citoyens péruviens et où il est allé défendre son élection, soit surtout en acceptant les fonctions de Consul général des Pays-Bas, après avoir sollicité l'autorisation du Gouvernement, puis du Congrès péruvien;

CONSIDÉRANT que, dans ces circonstances, quelle que puisse être en Italie, au point de vue de la nationalité, la condition de RAPHAËL CANEVARO, le Gouvernement du Pérou a le droit de le considérer comme citoyen péruvien et le lui dénier la qualité de réclamant italien.

CONSIDÉRANT que la créance qui a donné lieu à la réclamation soumise au Tribunal résulte d'un décret du dictateur PIEROLA du 12 décembre 1880, en vertu duquel ont été créés, à la date du 23 du même mois, des bons de paiement (*libramientos*) à l'ordre de la maison « JOSÉ CANEVARO E HIJOS » pour une somme de 77.000 livres sterling, payables à diverses échéances;

Que ces bons n'ont pas été payés aux échéances fixées, qui ont coïncidé avec l'occupation ennemie;

Qu'un acompte de 35 000 livres sterling ayant été payé à Londres en 1885 il reste une créance de 43 140 livres sterling sur le sort de laquelle il s'agit de statuer;

CONSIDÉRANT qu'il résulte des faits de la cause que la maison de commerce « JOSÉ CANEVARO E HIJOS », établie à Lima, a été reconstituée en 1885 après la mort de son fondateur, survenue en 1883;

Qu'elle a bien conservé la raison sociale « JOSÉ CANEVARO E HIJOS », mais qu'en réalité, comme le constate l'acte de liquidation du 6 février 1905, elle était composée de JOSÉ FRANCISCO et de CÉSAR CANEVARO, dont la nationalité péruvienne n'a jamais été contestée, et de RAPHAËL CANEVARO, dont la même nationalité, aux termes de la loi du Pérou, vient d'être reconnue par le Tribunal;

Que cette société, péruvienne à un double titre et par son siège social et par la nationalité de ses membres, a subsisté jusqu'à la mort de JOSÉ FRANCISCO CANEVARO, survenue en 1900;

CONSIDÉRANT que c'est au cours de l'existence de cette société que sont intervenues les lois péruviennes du 26 octobre 1886, du 12 juin 1889 et du 17 décembre 1898 qui ont édicté les mesures les plus graves en ce qui concerne les dettes de l'Etat péruvien, mesures qu'a paru nécessiter l'état désastreux auquel le Pérou avait été réduit par les malheurs de la guerre étrangère et de la guerre civile;

CONSIDÉRANT que, sans qu'il y ait lieu pour le Tribunal d'apprécier en elles-mêmes les dispositions des lois de 1889 et de 1898. certainement très rigoureuses pour les créanciers du Pérou, leurs dispositions s'imposaient sans aucun doute aux Péruviens individuellement comme aux sociétés péruviennes, qu'il y a là un pur fait que le Tribunal n'a qu'à constater.

CONSIDÉRANT que, le 30 septembre 1890, la Société Canevaro, par son représentant GIACOMETTI, s'adressait au Sénat pour obtenir le paiement des 43 140 livres sterling qui auraient été, suivent lui, fournis pour satisfaire aux nécessités de la guerre:

Que, le 9 avril 1891, dans une lettre adressée au Président du Tribunal des Comptes, GIACOMETTI asignait une triple origine à la créance: un solde dû à la maison CANEVARO par le Gouvernement comme prix d'armements achetés en Europe au temps de la guerre; lettres tirées par le Gouvernement à la charge de la consignation du guano aux Etats-Unis, protestées et payées par JOSÉ FRANCISCO CANEVARO; argent fourni pour l'armée par le Général CANEVARO;

Qu'enfin, le 1er avril 1891, le même GIACOMETTI, s'adressant encore au Président du Tribunal des Comptes, invoquait l'article 14 de la loi du 12 juin 1889 que, disait-il, le Congrès avait votée « animado del mas patriotico proposito », pour obtenir le règlement de la créance;

CONSIDÉRANT que le représentant de la maison CANEVARO avait d'abord assigné à la créance une origine manifestement erronée, qu'il ne s'agissait nullement de fournitures ou d'avances faites en vue de la guerre contre le Chili, mais, comme il a été reconnu plus tard, uniquement du remboursement de lettres de change antérieures qui, tirées par le Gouvernement péruvien, avaient été protestées, puis acquittées par la maison CANEVARO;

Que c'est en présence de cette situation qu'il convient de se placer;

CONSIDÉRANT que la maison CANEVARO reconnaissait bien, en 1890 et en 1891, qu'elle était soumise à la loi de 1889 sur la dette intérieure, qu'elle cherchait seulement à se placer dans le cas de profiter d'une disposition favorable de cette loi au lieu de subir le sort commun des créanciers;

Que sa créance ne rentre pas dans les dispositions de l'article 14 de la dite loi qu'elle a invoquée, ainsi qu'il a été dit plus haut; qu'il ne s'agit pas, dans l'espèce, d'un dépôt reçu par le Gouvernement, ni de lettres de change tirées sur le Gouvernement, acceptées par lui et reconnues légitimes par le Gouvernement « actuel », mais d'une opération de comptabilité n'ayant pas pour but de procurer des ressources à l'Etat, mais de régler une dette antérieure;

Que la créance CANEVARO rentre, au contraire, dans les termes très compréhensifs de l'article 1er, n° 4 de la loi qui mentionnent les ordres de paiement (*libramientos*), bons, chèques, lettres et autres mandats de paiement émis par les bureaux nationaux *jusqu'en janvier 1880*; qu'on peut, à la vérité, objecter que ce membre de phrase semble devoir laisser en dehors la créance CANEVARO qui est du 23 décembre 1880; mais qu'il importe de faire remarquer que cette limitation quant à la date avait pour but d'exclure les créances nées des actes du dictateur PIEROLA, conformément à la loi de 1886 qui a déclaré nuls tous les actes de ce dernier; qu'ainsi, en prenant à la lettre la disposition dont il s'agit, la créance CANEVARO ne pourrait être invoquée à aucun titre, même pour obtenir la faible proportion admise par la loi de 1889;

Mais considérant que, d'une part, il résulte des circonstances et des termes du Compromis que le Gouvernement péruvien reconnaît lui-même comme non applicable à la créance CANEVARO la nullité édictée par la loi de 1886; que, d'autre part, là nullité du décret de PIEROLA laisserait subsister la créance antérieure née du paiement des lettres de change;

Qu'ainsi, la créance résultant des bons de 1880 délivrés à la maison CANEVARO doit être considérée comme rentrant dans la catégorie des titres énumérés dans l'article 1er, n° 4, de la loi.

CONSIDÉRANT qu'il a été soutenu d'une manière générale que la dette CANEVARO ne devait pas subir l'application de la loi de 1889, qu'elle ne pouvait être considérée comme rentrant *dans la dette intérieure*, parce que tous ses éléments y répugnaient, le titre étant à ordre, stipulé payable en livres sterling, appartenant à des Italiens;

CONSIDÉRANT qu'en dehors de la nationalité des personnes, on comprend que des mesures financières, prises dans l'intérieur d'un pays, n'atteignent pas les actes intervenus au dehors par lesquels le Gouvernement a fait directement appel au crédit étranger; mais que tel n'est pas le cas dans l'espèce: qu'il s'agit bien, dans les titres délivrés en décembre 1880, d'un règlement d'ordre intérieur, de titres créés à Lima, payables à Lima, en compensation d'un paiement fait volontairement dans l'intérêt du Gouvernement du Pérou;

Que cela n'est pas infirmé par les circonstances que les titres étaient à ordre, payables en livres sterling, circonstances qui n'empêchaient pas la loi péruvienne de s'appliquer à des titres créés et payables sur le territoire où elle commandait;

Que l'énumération de l'article 1er n° 4 rappelée plus haut comprend des titres à ordre et que l'article 5 prévoit qu'il peut y avoir des conversions de monnaies à faire.

Qu'enfin il a été constaté précédemment que, lorsque sont intervenues les mesures financières qui motivent la réclamation, la créance appartenait à une société incontestablement péruvienne.

CONSIDÉRANT que la créance de 1880 appartient actuellement aux trois frères CANEVARO dont deux sont certainement Italiens;

Qu'il convient de se demander si cette circonstance rend inapplicable la loi de 1889;

CONSIDÉRANT que le Tribunal n'a pas à rechercher ce qu'il faudrait décider si la créance avait appartenu à des Italiens au moment où intervenait la loi qui réduisait dans de si grandes proportions les droits des créanciers du Pérou et si les mêmes sacrifices pouvaient être imposés aux étrangers et aux nationaux;

Mais qu'en ce moment, il s'agit uniquement de savoir si la situation faite aux nationaux, et qu'ils doivent subir, sera modifiée radicalement, parce qu'aux nationaux sont substitués des étrangers sous une forme ou sous une autre;

Qu'une telle modification ne saurait être admise aisément, parce qu'elle serait contraire à cette idée simple que l'ayant-cause n'a pas plus de droit que son auteur.

CONSIDÉRANT que les frères CANEVARO se présentent comme détenant les titres litigieux en vertu d'un endossement;

Que l'on invoque à leur profit l'effet ordinaire de l'endossement qui est de faire considérer le porteur d'un titre à ordre comme créancier direct du débiteur, de telle sorte qu'il peut repousser les exceptions qui auraient été opposables à son endosseur;

CONSIDÉRANT que, même en écartant la théorie d'après laquelle, en dehors des effets de commerce, l'endossement est une cession entièrement civile, il y a lieu, dans l'espèce, d'écarter l'effet attribué à l'endossement;

Qu'en effet, si la date de l'endossement des titres de 1880 n'est pas connue, il est incontestable que cet endossement est de beaucoup postérieur à l'échéance; qu'il y a lieu, dès lors, d'appliquer la disposition du Code de commerce péruvien de 1902 (art. 436) d'après laquelle l'endossement postérieur à l'échéance ne vaut que comme cession ordinaire;

Que, d'ailleurs, le principe susrappelé au sujet de l'effet de l'endossement n'empêche pas d'opposer au porteur les exceptions tirées de la nature même du titre, qu'il a connues ou dû connaître; qu'il est inutile de faire remarquer que les frères CANEVARO connaissaient parfaitement le caractère des titres endossés à leur profit.

CONSIDÉRANT que, si les frères CANEVARO ne peuvent, en tant que possesseurs de la créance en vertu d'un endossement, prétendre à une condition plus favorable que celle de la société dont ils tiendraient leurs droits, il est permis de se demander si leur situation ne doit pas être différente en les envisageant en qualité d'héritiers de JOSÉ FRANCISCO CANEVARO, comme les présente une déclaration notariée du 6 février 1905;

Qu'il y a, en effet, cette différence entre le cas de cession et le cas d'hérédité que, dans ce dernier, ce n'est pas par un acte de pure volonté que la créance a passé d'une tête sur une autre;

Que, néanmoins, on ne trouve aucune raison décisive pour admettre que la situation a changé par ce fait que des Italiens ont succédé à un Péruvien et que les héritiers ont un titre nouveau qui leur permet de se prévaloir de la créance dans des conditions plus favorables que le *de cujus*;

Que c'est une règle générale que les héritiers prennent les biens dans l'état où ils se trouvaient entre les mains du défunt.

CONSIDÉRANT qu'enfin il a été soutenu que la loi péruvienne de 1889 sur la dette intérieure, sans changer les créances existantes contre le Pérou, avait seulement donné au Gouvernement la faculté de s'acquitter de ses dettes d'une certaine manière quand les créanciers en réclameraient le paiement, que c'est au moment où le paiement est réclamé qu'il faut se placer pour savoir si l'exception résultant de la loi peut être invoquée contre toutes personnes, spécialement contre les étrangers;

Que, les propriétaires actuels de la créance étant des Italiens, il y aurait lieu pour le Tribunal de se prononcer sur le point de savoir si la loi péruvienne de 1889, malgré son caractère exceptionnel, peut être imposée aux étrangers;

Mais considérant que ce point de vue paraît en désaccord avec les termes généraux et l'esprit de la loi de 1889;

Que le Congrès, dont il ne s'agit pas d'apprécier l'œuvre en elle-même, a entendu liquider complètement la situation financière du Pérou, substituer les titres qu'il créait aux titres anciens;

Que cette situation ne peut être modifiée, parce que les créanciers se présentent plus ou moins tôt pour le règlement de leurs créances;

Que telle était la situation de la maison CANEVARO, péruvienne au moment où la loi de 1889 entrait en vigueur, et que, pour les motifs déjà indiqués, cette situation n'a pas été changée en droit par le fait que la créance a, par endossement ou par héritage, passé à des Italiens.

CONSIDÉRANT, en dernier lieu, qu'il a été allégué que le Gouvernement péruvien doit indemniser les réclamants du préjudice que leur a occasionné son retard à s'acquitter de la dette de 1880, que le préjudice consiste dans la différence entre le paiement en or et le paiement en titres de la dette consolidée; qu'ainsi le Gouvernement péruvien serait tenu de payer en or la somme réclamée, en admettant même que la loi de 1889 se soit régulièrement appliquée à la créance;

CONSIDÉRANT que le Tribunal estime qu'en entrant dans cet ordre d'idées, il sortirait des termes du Compromis qui le charge seulement de décider si le Gouvernement du Pérou doit payer en argent comptant *ou* d'après les dispositions de la loi péruvienne du 12 juin 1889; que, le Tribunal ayant admis cette dernière alternative, la première solution doit être exclue; qu'il n'est pas chargé d'apprécier la responsabilité qu'aurait encourue à un autre titre le Gouvernement péruvien, de rechercher notamment si le retard à payer peut ou non être excusé par les circonstances difficiles dans lesquelles il se trouvait, étant donné surtout qu'il s'agirait en réalité d'une responsabilité encourue envers une maison péruvienne qui était créancière quand le retard s'est produit.

CONSIDÉRANT qu'il y a lieu de rechercher quel était le montant de la créance CANEVARO au moment où est entrée en vigueur la loi de 1889;

Qu'elle se composait d'abord du capital de 43 140 livres sterling, mais qu'il faut y ajouter les intérêts ayant couru jusque là;

Que les intérêts qui étaient, d'après le décret du 23 décembre 1880, de 4% par an jusqu'aux échéances respectives des bons délivrés et qui étaient compris dans le montant de ces bons, doivent être, à partir de ces échéances, calculés au taux légal de 6% (Art. 1274 du Code civil péruvien) jusqu'au 1er janvier 1889;

Qu'on obtient ainsi une somme de £ 16577.2.2 qui doit être jointe au principal pour former la somme globale devant être remboursée en titres de la dette consolidée et devant produire un intérêt de 1% payable en or à partir du 1er janvier 1889 jusqu'au paiement définitif:

CONSIDÉRANT que, d'après ce qui a été décidé plus haut relativement à la situation de RAPHAËL CANEVARO, c'est seulement au sujet de ses deux frères que le Tribunal doit statuer.

CONSIDÉRANT qu'il appartient au Tribunal de régler le mode d'exécution de sa sentence.

PAR CES MOTIFS,

Le Tribunal arbitral décide que le Gouvernement Péruvien devra, le 31 juillet 1912, remettre à la Légation d'Italie à Lima pour le compte des frères NAPOLÉON et CARLO CANEVARO:

1°. en titres de la dette intérieure (1%) de 1889, le montant nominal de trente-neuf mille huit cent onze livres sterling huit sh. un p. (£ 39811.8.1.) contre remise des deux tiers des titres délivrés le 23 décembre 1880 à la maison JOSÉ CANEVARO E HIJOS;

2°. en or, la somme de neuf mille trois cent quatre-vingt huit livres sterling dix-sept sh. un p. (£ 9388.17.1), correspondant à l'intérêt de 1% du 1er janvier 1889 au 31 juillet 1912.

Le Gouvernement péruvien pourra retarder le paiement de cette dernière somme jusqu'au 1er janvier 1913 à la charge d'en payer les intérêts à 6% à partir du 1er août 1912.

FAIT à La Haye, dans l'Hôtel de la Cour permanente d'Arbitrage, le 3 mai 1912.

Le Président: Louis RENAULT

Le Secrétaire général: Michiels VAN VERDUYNEN

AFFAIRE DE L'INTERPRÉTATION D'UNE DISPOSITION DE LA CONVENTION DE COMMERCE ENTRE LA FRANCE ET LA SUISSE ET DU PROCÈS-VERBAL SIGNÉS À BERNE LE 20 OCTOBRE 1906

PARTIES: France, Suisse.

COMPROMIS: Echange de Notes des 18 novembre 1910 et 13 juillet 1911: Convention du 20 octobre 1906.

ARBITRES: Tribunal arbitral: E. Borel; Plichon, remplacé par Noël; Lord Reay.

SENTENCE: 3 août 1912.

Interprétation des traités — Efficacité de l'interprétation — Réparation des dommages.

COMPROMIS [1]

Convention de Commerce conclue entre la France et la Suisse le 20 octobre 1906 [2]

. . .

Article 24. Si une contestation venait à surgir entre les parties contractantes au sujet de l'interprétation de la présente Convention ou de ses annexes, ainsi qu'au sujet de l'application des droits fixés dans les traités à tarifs conclus par les parties contractantes avec des puissances tierces, et même s'il s'agit de la question préjudicielle de savoir si la contestation se rapporte à l'interprétation de la Convention, cette contestation sera tranchée, sur la demande de l'une ou de l'autre partie, par voie d'arbitrage, dans les conditions prévues à l'annexe E.

. . .

ANNEXE E

Constitution et procédure du tribunal arbitral

Lorsque, conformément à l'article 24, un arbitrage doit avoir lieu, le tribunal arbitral sera composé dans chaque cas de la manière suivante:

1°. L'une et l'autre des parties contractantes appellera aux fonctions d'arbitre une personne qualifiée choisie parmi ses propres ressortissants.

2°. Les deux parties contractantes choisiront ensuite le sur-arbitre parmi les ressortissants d'une puissance tierce.

3°. Si l'accord ne s'établit pas à ce sujet, chaque partie présentera un candidat d'une nationalité différente de celles des personnes proposées par application du paragraphe précédent.

4°. Le sort déterminera celui des deux candidats ainsi désignés qui remplira le rôle de sur-arbitre, à moins que les deux parties ne se soient entendues à ce sujet.

5°. Le sur-arbitre présidera le tribunal, qui rendra ses décisions à la majorité des voix.

Au premier cas d'arbitrage, le tribunal siégera sur le territoire de la partie désignée par le sort; au second cas, sur le territoire de l'autre partie et ainsi de suite alternativement sur l'un et sur l'autre territoire, dans la ville que choisira le gouvernement du pays dans lequel le tribunal sera appelé à se réunir. Ce

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[1] Ainsi qu'il est indiqué au premier paragraphe de la sentence, la France et la Suisse, par un échange de notes des 18 novembre 1910 et 13 juillet 1911, se sont mises d'accord pour soumettre à l'arbitrage l'affaire en question, conformément à l'article 24 de la Convention de commerce intervenue entre elles le 20 octobre 1906 et à l'annexe E de cette Convention dont le texte est reproduit ici.

[2] De Martens, *Nouveau Recueil général de traités*, 3e série, t. I, p. 509.

gouvernement mettra à la disposition du tribunal le personnel et le local nécessaires à son fonctionnement.

Chaque partie sera représentée devant le tribunal par un agent qui servira d'intermédiaire entre le tribunal et le gouvernement qui l'aura désigné.

La procédure aura lieu exclusivement par écrit. Toutefois, le tribunal aura la faculté de demander des explications orales aux agents des deux parties, ainsi qu'aux experts et témoins dont il aura jugé la comparution utile.

Pour assurer la citation ou l'audition de ces experts ou témoins, chacune des parties contractantes, sur la demande du tribunal arbitral, prêtera son assistance dans les mêmes conditions que pour l'exécution des commissions rogatoires.

Les frais de l'arbitrage seront par moitié à la charge des deux parties.

SENTENCE ARBITRALE RENDUE LE 3 AOÛT 1912 [1] AU SUJET DE L'INTERPRÉTATION D'UNE DISPOSITION DE LA CONVENTION DE COMMERCE ENTRE LA FRANCE ET LA SUISSE ET DU PROCÈS-VERBAL SIGNÉS À BERNE LE 20 OCTOBRE 1906 [2]

Treaty interpretation — Principle of effectiveness — Reparation and damages.

I

Par un échange de notes des 18 novembre 1910 et 13 juillet 1911, la France et la Suisse se sont mises d'accord, conformément à l'article 24 de la Convention de commerce intervenue entre elles le 20 octobre 1906 et à l'annexe E de cette Convention, pour soumettre à la décision définitive d'un tribunal arbitral le différend qui s'est élevé entre les deux Etats au sujet de la portée et de l'interprétation d'une note insérée dans le procès-verbal, signé à Berne le 20 octobre 1906 en même temps que la Convention de commerce. Par ce procès-verbal « il a été convenu que la ' Direction générale des Douanes françaises appliquerait, pendant toute la durée de ' cette même Convention, les règles consignées dans la pièce annexée sous le n° 2. » Au nombre de ces règles figure la suivante: « N° 510. Rentrent dans ce numéro les *turbines à ' vapeur '*. »

II

La Suisse soutient que sous le régime douanier en vigueur en France au moment des négociations et de l'entrée en vigueur de la Convention de commerce du 20 octobre 1906, les turbines à vapeur étaient déjà assimilées par voie administrative aux machines à vapeur fixes du n° 510 du tarif français;

Que la Suisse a demandé et obtenu, par l'insertion de la *Règle* faisant rentrer les turbines dans le n° 510, que cette assimilation fût rendue conventionnelle et internationalisée « pour toute la durée de la Convention »; qu'en conséquence la France n'avait plus la faculté de modifier à son gré le traitement douanier des turbines à vapeur et devait maintenir leur assimilation aux machines à vapeur fixes; que la France a, néanmoins, lors de la revision de son tarif douanier par la loi du 29 mars 1910, entré en vigueur le surlendemain 1er avril, non seulement usé de son droit de modifier et d'augmenter le taux des droits de douane sur les machines à vapeur fixes, mais créé, dans ce n° 510, une catégorie spéciale intitulée « machines à vapeur sans piston », catégorie qui a été grevée d'une surtaxe de 50 p. 100 des droits applicables aux autres machines à vapeur fixes avec piston; — que toute la préparation à la Chambre et au Sénat français du tarif revisé du 29 mars 1910 implique l'intention de frapper de cette augmentation les turbines à vapeur et non d'autres machines; — qu'en fait, en adoptant

[1] De Martens, *Nouveau Recueil général de traités*, 3e série, t. VII, p. 193. Voir également: *American Journal of International Law*, vol. 6. 1912, p. 995; *Jahrbuch des Volkerrechts*, vol. I, p. 327; *Rivista di diritto internazionale*, vol. 7, 1913, p. 518.

[2] Pour le texte de cette Convention, voir De Martens, *ibid.*, 3e série, t. I, p. 509.

la rédaction « machines à vapeur sans piston », on a voulu désigner les turbines à vapeur sous une autre dénomination; — qu'il n'existe pas, pratiquement et industriellement, d'autres machines à vapeur sans piston que les turbines; — que toutes les machines indiquées du côté français comme sans piston possèdent au contraire cet organe, conformément aux descriptions déposées par les inventeurs eux-mêmes dans les demandes de brevet en France; — que si la France s'est, il est vrai, refusée à consolider le tarif des machines à vapeur fixes et si la Suisse n'a pu obtenir cette consolidation dans le tarif B annexé à la Convention du 20 octobre 1906, la France a d'autre part perdu la maîtrise de son tarif dans la mesure des engagements contractés par elle envers la Suisse, c'est-à-dire dans la limite de la note qui fait rentrer les turbines dans le n° 510, qui leur assure le traitement douanier des machines fixes, et qui exclut la faculté de frapper les turbines à vapeur comme telles, et en leur donnant le nom de machines sans piston, de droits plus élevés que les autres machines fixes; — que la « Règle administrative » a été stipulée pour transformer en assimilation conventionnelle l'assimilation administrative déjà existante des turbines à vapeur aux machines fixes en ce qui concerne le traitement douanier; — que si cette stipulation n'avait pas ce sens, elle n'aurait aucune portée pratique, en sorte qu'on ne s'expliquerait pas pourquoi elle a été demandée par la Suisse et longtemps refusée par la France au cours des négociations de 1905-1906; — que le Gouvernement français lui-même, dans la période qui s'est écoulée entre l'adoption par la Chambre des députés de droits relevés frappant spécialement les turbines à vapeur et l'adoption du texte du tarif actuel de 1910 par le Sénat, a, sur les représentations du Gouvernement fédéral, demandé au Sénat la suppression de ces droits différentiels, ainsi que cela résulte des documents parlementaires du Sénat — reconnaissant ainsi implicitement la vraie portée de la « Règle administrative ».

La Suisse demande, en conséquence que pour toute la durée de la Convention, les turbines à vapeur de provenance suisse soient admises en France au traitement douanier des machines à vapeur fixes avec piston, sans pouvoir être grevées de surtaxes ni subir un traitement différentiel quelconque plus onéreux.

En outre, la Suisse demande le remboursement des droits perçus indûment, à son avis, sur les turbines à vapeur de provenance suisse depuis le 1er avril 1910, et demande aussi qu'en raison de la longue durée tant des négociations qui ont précédé la réunion du Tribunal arbitral que de la procédure à partir de la constitution du Tribunal, une indemnité équitable lui soit allouée pour être remise à ses constructeurs de turbines à vapeur, dont l'exportation en France a été paralysée depuis le 1er avril 1910 en même temps que leur clientèle prenait l'habitude de s'adresser à des concurrents.

III

La France répond que toute sa politique repose depuis vingt ans sur le principe qu'elle doit conserver la maîtrise de son tarif douanier, ce tarif devant pouvoir être incessamment modifié unilatéralement et se composant de deux colonnes dont l'une, le tarif général, est applicable aux produits des Etats auxquels la France n'entend consentir aucune faveur commerciale, et dont l'autre, le tarif minimum, représentant la protection minimum jugée nécessaire à l'industrie française, est concédé en totalité ou en partie à certains Etats et ne peut être modifié que par la loi;

Qu'au cours des négociations et malgré les vives instances de la Suisse, le Gouvernement français a constamment refusé de consolider les droits de douane sur les machines à vapeur fixes, droits qui figurent au n° 510 de ce tarif;

Que si la France a accepté la note administrative du 20 octobre 1906 faisant rentrer les turbines à vapeur dans ce numéro pour la perception du droit douanier, elle a entendu garder néanmoins la pleine liberté de ses décisions tarifaires et sur la rédaction et sur le classement de l'article.

Qu'en refusant de restreindre en quoi que ce soit la liberté de son tarif des machines, la France a conservé la faculté d'y apporter telles modifications qu'il pouvait lui convenir; qu'elle pouvait librement faire, dans le n° 510, des modifications du taux des droits, de l'échelle des poids des machines, créer des catégories de machines en les soumettant à des taxes variées, et qu'il était d'autant plus naturel de relever le droit afférent aux turbines que celles-ci ont un prix de revient deux à trois fois plus élevé au kilogramme que les machines à piston et ne sauraient équitablement continuer à être soumises aux mêmes droits de douane;

Que le tarif minimum peut être modifié seulement par la loi, c'est-à-dire avec le concours du Parlement;

Que le renvoi, par une note administrative, des turbines à vapeur au n° 510 du tarif, c'est-à-dire à un numéro que la France pouvait modifier à son gré, a forcément un caractère secondaire et ne peut avoir plus d'effet que le texte législatif de la Convention elle-même; les règles administratives sont de simples pratiques douanières, rien de plus;

Que le nouveau tarif français entré en vigueur le 1er avril 1910 a respecté l'assimilation douanière consentie à la Suisse par la règle administrative, puisque les turbines à vapeur, qui figuraient sous un n° 510 *bis*, avec un droit spécial dans le texte adopté au début des travaux de revision du tarif par la Chambre des députés, ont été rangées dans le texte définitif au n° 510 où figurent maintenant deux grandes catégories de machines fixes, les machines à piston et celles sans piston; que rien ne s'opposait, dans le Convention avec la Suisse, à l'adoption d'une distinction de ce genre; que les turbines sont des machines à vapeur fixes sans piston; qu'il y en a d'autres, peu nombreuses il est vrai, mais qu'il était prudent d'envisager dans le tarif douanier les efforts qui se font journellement dans ce genre de constructions et de prendre dès maintenant les dispositions nécessaires pour garantir la production nationale.

Que le fait de consacrer, dans une disposition administrative résultant d'une convention de commerce, une assimilation tarifaire, ne saurait avoir pour effet d'entraîner la consolidation des droits afférents à la marchandise qui fait l'objet de cette assimilation; un tel engagement ne peut avoir d'autre signification que le maintien de l'article dans la catégorie désignée. — S'il en était autrement, il suffirait de procéder par voie de disposition administrative, non soumise au contrôle du Parlement, pour engager l'avenir en matière tarifaire; la législation française s'oppose formellement à cette procédure.

Qu'il n'est pas juste de dire que le Gouvernement français en s'opposant à l'inscription des turbines à vapeur sous un n° 510 *bis* ait pour cela renoncé à accepter une nouvelle classification du 510 lui-même, et que, du reste, il n'a présenté aucune observation lors du vote du 510 par le Parlement.

Que si le Gouvernement suisse voulait obtenir pour les turbines les mêmes avantages que ceux réservés aux machines à vapeur fixes à piston, il aurait dû demander qu'une note figure au Tableau B de la Convention du 20 octobre 1910, consacrant cette assimilation, comme cela existe pour nombre de machines ou d'objets dans le Tarif douanier français.

La France demande, en conséquence, que les turbines à vapeur de provenance suisse soient soumises au traitement douanier du n° 510 du tarif du 29 mars 1910, la note administrative trouvant, de la sorte, la seule application dont elle est raisonnablement susceptible. — Elle demande en outre subsidiairement le

rejet de la demande suisse tendant à obtenir le remboursement des droits perçus sur la base du tarif de 1910 et une indemnité au profit des fabricants helvétiques de turbines à vapeur, cette demande n'étant appuyée d'aucun chiffre précis, et la diminution des envois de turbines à vapeur en France étant due, moins au nouveau tarif, qu'à la fondation en France de succursales des fabriques suisses, à la vente de licences par les inventeurs aux fabricants français et enfin au développement des moteurs à gaz et à huiles lourdes qui assurent de plus larges bénéfices. Une indemnité pour de vagues dommages indirects est inadmissible.

IV

En conformité de l'annexe E à la Convention de commerce du 20 octobre 1906, la Suisse a désigné comme arbitre M. Eugène Borel, docteur en droit, professeur à l'université de Genève, et la France, M. Plichon, ingénieur, membre de la Chambre des députés, remplacé en décembre 1911 par M. Noël, sénateur, Directeur de l'Ecole centrale des Arts et Manufactures, et les deux Parties ont désigné comme surarbitre Lord Reay, membre et ancien Président de l'Académie britannique, membre et ancien Président de l'Institut de droit international, associé de l'Académie française des sciences morales et politiques, ancien Gouverneur de Bombay. M. J. de Sillac, secrétaire permanent de la Commission des conférences de La Haye, a rempli les fonctions de secrétaire du Tribunal. Il a été suppléé, pendant la séance du 18 janvier 1912, par M. Leroy, attaché au Ministère des affaires étrangères.

Les Parties ont renoncé à se faire représenter devant le Tribunal par des agents.

Conformément à la procédure fixée par le Tribunal dans sa première séance, tenue à Paris, au Ministère des affaires étrangères, le 18 janvier 1912, les Mémoire, Réponse, Réplique et Duplique des deux Parties ont été présentés, dans les délais fixés, asuf en ce qui concerne la Réponse dont la remise a été retardée par suite de circonstances fortuites.

Après délibération des arbitres, dans la seconde séance tenue à Paris le 2 août, la sentence suivante a été rendue par le Tribunal dans la troisième séance, le 3 août.

V

CONSIDÉRANT que le procès-verbal, signé par les plénipotentiaires des deux Parties contractantes, le 20 octobre 1906, constate que les règles consignées dans les pièces annexées sous le n° 1 et sous le n° 2, seront appliquées par voie administrative pendant la durée de la Convention du 20 octobre 1906;

Le Tribunal arbitral estime que ces Règles convenues dans les négociations de ladite Convention en sont une partie intégrale et que les Parties contractantes sont tenues d'observer le régime douanier que ces règles ont établi;

Le Tribunal, en conséquence, ne peut attribuer à ces règles un autre caractère que celui des stipulations insérées dans la Convention même.

CONSIDÉRANT que le Traité de commerce et les Règles sont des Conventions internationales régies par la sanction que les Parties contractantes, représentées par leurs plénipotentiaires, leur ont donnée;

Le Tribunal n'est pas appelé à examiner si les règles doivent être soumises à la sanction du législateur, ce qui est une question de droit interne.

CONSIDÉRANT que d'après les principes généraux admis pour l'interprétation des contrats ' une clause doit être entendue dans le sens avec lequel elle peut avoir « quelque effet plutôt que dans le sens avec lequel elle n'en pourrait produire aucun '. » (Code civil français, art. 1157).

CONSIDÉRANT que la Note administrative prescrivant que, pour toute la durée de la Convention de commerce franco-suisse du 20 octobre 1906, les turbines à vapeur rentreront dans le n° 510 du tarif douanier français, n'aurait aucun sens ni aucune portée pratique si elle signifiait seulement le renvoi à un numéro dudit tarif, cette question de numérotage étant en soi indifférente.

CONSIDÉRANT que le sens de ce renvoi au n° 510 est précisé historiquement par le fait qu'antérieurement à la Convention, les turbines à vapeur avaient été assimilées, pour le traitement douanier, par décision administrative de la Direction générale des douanes de France, aux machines à vapeur fixes, et qu'ainsi l'adoption de la Note avait cette signification de lui donner la valeur d'un engagement international, pour la soustraire à des changements d'interprétation unilatérale de la douane française.

CONSIDÉRANT que, dans la circulaire de mise à exécution de la Convention franco-suisse du 20 octobre 1906, la Direction générale des douanes de France a, le 22 novembre de la même année, rappelé que « la Convention stipule un certain nombre ' de dispositions qui confirment les Facilités déjà existantes ou règle des détails d'exécution. Ces clauses ou positions administratives sont énumérées dans la présente circulaire aux articles qu'elle concerne; elles recevront leur application pendant toute la durée de la Convention '. La circulaire, en regard du n° 510, insère les mots: Turbines à vapeur, note administrative *confirmant* le classement des turbines à vapeur dans le n° 510. Les turbines à vapeur sont traitées comme machines à vapeur fixes » (1er mémoire suisse, p. 8).

CONSIDÉRANT que l'Administration françaies a ainsi fourni elle-même le commentaire et indiqueé le sens de la Note en rappelant qu'il s'agissait de continuer la pratique douanière antérieure, cette pratique étant devenue obligatoire pendant toute la durée de la Convention.

CONSIDÉRANT que si la France a conservé la maîtrise de son tarif pour les taux des machines énumérées au n° 510, taux qu'elle a refusé de consolider dans la Convention de commerce conclue avec le Gouvernement helvétique et que par conséquent elle demeurait libre de modifier, elle ne pouvait faire usage de cette maîtrise que dans la limite de l'engagement pris envers la Suisse de traiter les turbines comme les machines du n° 510.

CONSIDÉRANT que, lors de l'élaboration du nouveau tarif français en 1909-1910 des augmentations de droits visant spécialement les turbines ont été adoptées par la Chambre des députés, puis, malgré l'opposition de la Suisse, furent proposées par la Commission des douanes du Sénat; que cette assemblée a finalement, il est vrai, supprimé la mention expresse des turbines, mais a établi sans débat, sur les machines à vapeur sans piston, une surtaxe de 50. p. 100 des droits afférents aux autres machines fixes; que cette surtaxe a été adoptée peu de jours après, également sans débat, par la Chambre des députés et a passé dans la loi douanière du 29 mars 1910.

CONSIDÉRANT qu'en fait, il ne paraît exister pratiquement dans l'industrie aucune machine fixe à vapeur sans piston autre que les turbines.

CONSIDÉRANT qu'en frappant d'une surtaxe de 50 p. 100 les machines à vapeur sans piston, le nouveau tarif français a, en réalité, créé un traitement différentiel au préjudice des turbines à vapeur, ce qui n'est pas compatible avec l'assimilation douanière existant avant la Convention de 1906 et consacrée par le procès-verbal de 1906.

CONSIDÉRANT enfin, en ce qui concerne la demande suisse de remboursement des surtaxes perçues depuis le 1er avril 1910 sur les turbines à leur importation en France et d'allocation d'une indemnité pour les bénéfices non réalisés depuis

plus de deux ans par suite de la perception de taxes douanières renforcées, que le tribunal n'a pas reçu d'indications précises et pertinentes sur le nombre, le poids, etc., de ces importations; qu'il est difficile dans ces conditions de statuer sur des dommages indirects, sur un manque à gagner, et que, d'ailleurs, les relations amicales et cordiales existant entre les Parties contestantes rendent désirable de ne pas tirer rigoureusement toutes les conséquences juridiques pouvant résulter des considérations développées ci-dessus;

Par ces motifs,

Arrêté:

1° La France devra appliquer aux turbines de provenance suisse le traitement douanier et notamment les tarifs indiqués pour les machines à vapeur fixes à piston au n° 510 du tarif du 29 mars 1910. Cette décision n'a pas d'effet rétro-actif. Elle entre immédiatement en vigueur.

2° Il n'est pas alloué d'indemnité globale au Gouvernement suisse pour la réduction des envois de turbines à vapeur de Suisse en France ayant pu résulter indirectement des surtaxes prélevées sur ces machines depuis le 1er avril 1910.

Ainsi fait à Paris, le 3 août 1912.

Le Secrétaire, *Le Président,*

Jarousse de Sillac Reay

AFFAIRE DE L'INDEMNITÉ RUSSE

PARTIES: Russie, Turquie.

COMPROMIS: 22 juillet/4 août 1910.

ARBITRES: Cour permanente d'Arbitrage: C. E. Lardy; Baron M. de Taube et A. Mandelstam; Herante Abro Bey; Ahmed Réchid Bey.

SENTENCE: 11 novembre 1912.

Indemnité de guerre — Allocation d'indemnité à des particuliers victimes de la guerre — Dette d'Etat à Etat — Responsabilité des Etats — Responsabilité spéciale en matière de retard dans le payement d'une dette d'argent — Intérêts moratoires ou compensatoires — Mise en demeure.

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APERÇU [1]

L'Article 5 du traité de Constantinople, conclu le 27 janvier/8 février 1879, par la Russie et la Turquie, et qui mit fin à la guerre de 1877-78 entre ces deux pays, stipulait que « les réclamations des sujets et institutions russes en Turquie, à titre d'indemnité pour les dommages subis pendant la guerre seront payées à mesure qu'elles seront examinées par l'Ambassade de Russie à Constantinople et transmises à la Sublime Porte ».

Les réclamations furent dûment examinées par l'Ambassade et présentées au Gouvernement turc, mais il y eut des retards dans les payements, qui ne furent faits qu'après demande constante de la part du Gouvernement russe.

Les réclamations s'élevaient à une totalité de 6,186,543 francs; de cette somme 50,000 livres turques furent payées en 1884, 50,000 en 1889, 75,000 en 1893, 50,000 en 1894, et une somme dépassant quelque peu 42,438 en 1902, laissant une balance de 1,539 livres turques, que le Gouvernement turc déposa à la Banque Ottomane au crédit de la Russie, mais que cette dernière refusa d'accepter parce que le payement de l'intérêt réclamé par la Russie pour payements arriérés n'avait pas été effectué. La controverse ayant trait à cet intérêt fut soumise en vertu d'un compromis, signé à Constantinople le 22 juillet/4 août 1910, à l'arbitrage d'un tribunal composé de M. Charles Edouard Lardy, de Suisse, le Baron Michel de Taube et M. André Mandelstam, de Russie, et Herante Abro Bey et Ahmed Réchid Bey, de Turquie. De ces membres, deux seulement, MM. Lardy et de Taube, furent choisis parmi les membres de la Cour permanente. Les séances commencèrent le 15 février 1911, et se terminèrent le 6 novembre 1912. La sentence fut rendue le 11 novembre 1912.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 327

COMPROMIS D'ARBITRAGE ENTRE LE GOUVERNEMENT IMPÉRIAL RUSSE ET LE GOUVERNEMENT IMPÉRIAL OTTOMAN. SIGNÉ À CONSTANTINOPLE, LE 22 JUILLET/4 AOÛT 1910 [1]

Le Gouvernement Impérial Russe et le Gouvernement Impérial Ottoman, cosignataires de la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux:

CONSIDÉRANT les dispositions de l'Article 5 du Traité signé à Constantinople entre la Russie et la Turquie, le 27 janvier/8 février 1879, ainsi conçu:

« Les réclamations des sujets et institutions russes en Turquie à titre d'indemnité pour les dommages subis pendant la guerre seront payées à mesure qu'elles seront examinées par l'Ambassade de Russie à Constantinople et transmises à la Sublime-Porte. »
« La totalité de ces réclamations ne pourra en aucun cas dépasser le chiffre de 26,750,000 francs. »
« Le terme d'une année après l'échange des ratifications est fixé comme date à partir de laquelle les réclamations pourront être présentées à la Sublime-Porte, et celui de deux ans comme date après laquelle les réclamations ne seront plus admises; »

CONSIDÉRANT l'explication additionnelle insérée au Protocole de même date portant:

« Quant au terme d'une année fixé par cet Article comme date à partir de laquelle les réclamations pourront être présentées à la Sublime-Porte, il est entendu qu'une exception y sera faite en faveur de la réclamation de l'Hôpital Russe s'élevant à la somme de 11,200 livres sterling; »

CONSIDÉRANT qu'un désaccord s'est élevé entre le Gouvernement Impérial Russe et le Gouvernement Impérial Ottoman relativement aux conséquences de droit résultant des dates auxquelles le Gouvernement Impérial Ottoman a effectué, sur les montants des indemnités régulièrement présentées en exécution dudit Article 5, les payements ci-après, savoir:

	livr. turq.	*pi.*	*par.*
En 1884	50,000	—	—
En 1889	50,000	—	—
En 1893	75,000	—	—
En 1894	50,000	—	—
En 1902	42,438	67	22/40

[1] Bureau International de la Cour Permanente d'Arbitrage, *Protocoles des séances et sentence du tribunal d'arbitrage constitué en vertu du compromis d'arbitrage signé à Constantinople entre la Russie et la Turquie le 22 juillet/4 août 1910. Litige russo-turc relatif aux dommages-intérêts réclamés par la Russie pour le retard apporté dans le payement des indemnités dues aux particuliers russes lésés par la guerre de 1877-1878*, p. 5.

CONSIDÉRANT que le Gouvernement Impérial Russe soutient que le Gouvernement Impérial Ottoman est responsable de dommages-intérêts à l'égard des indemnitaires russes pour le retard apporté au règlement de sa dette;

CONSIDÉRANT que le Gouvernement Impérial Ottoman conteste, tant en fait qu'en droit, le bien-fondé de la prétention du Gouvernement Impérial Russe;

CONSIDÉRANT que le litige n'a pu être réglé par la voie diplomatique;

Et ayant résolu, conformément aux stipulations de ladite Convention de La Haye, de terminer ce différend en soumettant la question à un Arbitrage;

Ont, à cet effet, autorisé leurs Représentants ci-dessous désignés, savoir:

pour la Russie,

Son Excellence Monsieur Tcharykow, Ambassadeur de Sa Majesté l'Empereur de Russie à Constantinople;

pour la Turquie,

Son Excellence Rifaat Pacha, Ministre des Affaires étrangères.

A conclure le Compromis suivant:

Article premier. Les Puissances en litige décident que le Tribunal Arbitral auquel la question sera soumise en dernier ressort sera composé de cinq membres, lequels seront désignés de la manière suivante:

Chaque Partie, aussitôt que possible, et dans un délai qui n'excédera pas deux mois à partir de la date de ce Compromis, devra nommer deux Arbitres, et les quatre Arbitres ainsi désignés choisiront ensemble un Sur-Arbitre. Dans le cas où les quatre Arbitres n'auront pas, dans le délai de deux mois après leur désignation, choisi à l'unanimité ou à la majorité un Sur-Arbitre, le choix du Sur-Arbitre est confiné à une Puissance tierce désignée de commun accord par les Parties. Si, dans un délai de deux autres mois, l'accord ne s'établit pas à ce sujet, chaque Partie désigne une Puissance différente et le choix du Sur-Arbitre est fait de concert par les Puissances ainsi désignées.

Si, dans un délai de deux autres mois, ces deux Puissances n'ont pu tomber d'accord, chacune d'elles présente deux candidats pris sur la liste des membres de la Cour permanente en dehors des membres de ladite Cour désignés par ces deux Puissances ou par les Parties, et n'étant les nationaux ni des uns ni des autres. Ces candidats ne pourront, en plus, appartenir à la nationalité des Arbitres nommés par les Parties dans le présent Arbitrage. Le sort détermine lequel des candidats ainsi présentés sera le Sur-Arbitre.

Le tirage au sort sera effectué par les soins du Bureau International de la Cour Permanente de La Haye.

Article 2. Les Puissances en litige se feront représenter auprès du Tribunal Arbitral par des agents, conseils ou avocats, en conformité des prévisions de l'Article 62 de la Convention de La Haye de 1907 pour le règlement pacifique des conflits internationaux.

Ces agents, conseils ou avocats seront désignés par les Parties à temps pour que le fonctionnement de l'Arbitrage ne subisse aucun retard.

Article 3. Les questions en litige et sur lesquelles les Parties demandent au Tribunal Arbitral de prononcer une décision définitive sont les suivantes:

I. Oui ou non, le Gouvernement Impérial Ottoman est-il tenu de payer aux indemnitaires russes des dommages-intérêts à raison des dates auxquelles ledit Gouvernement a procédé au payement des indemnités fixées en exécution de l'article 5 du Traité du 27 janvier/8 février 1879, ainsi que du Protocole de même date?

II. En cas de décision affirmative sur la première question, quel serait le montant de ces dommages-intérêts?

Article 4. Le Tribunal Arbitral, une fois constitué, se réunira à La Haye à une date qui sera fixée par les Arbitres, et dans le délai d'un mois à partir de la nomination du Sur-Arbitre. Après le règlement — en conformité avec le texte et l'esprit de la Convention de La Haye de 1907 — de toutes les questions de procédure qui pourraient surgir et qui ne seraient pas prévues par le présent Compromis, ledit Tribunal ajournera sa prochaine séance à la date qu'il fixera.

Toutefois, il reste convenu que le Tribunal ne pourra ouvrir les débats sur les questions en litige ni avant les deux mois, ni plus tard que les trois mois qui suivront la remise du Contre-Mémoire ou de la Contre-Réplique prévus par l'article 6 et éventuellement des conclusions stipulées à l'article 8.

Article 5. La procédure arbitrale comprendra deux phases distinctes : l'instruction écrite et les débats qui consisteront dans le développement oral des moyens des Parties devant le Tribunal.

La seule langue dont fera usage le Tribunal et dont l'emploi sera autorisé devant lui sera la langue française.

Article 6. Dans le délai de huit mois au plus après la date du présent Compromis, le Gouvernement Impérial Russe devra remettre à chacun des membres du Tribunal Arbitral, en un exemplaire, et au Gouvernement Impérial Ottoman, en dix exemplaires, les copies complètes, écrites ou imprimées, de son Mémoire contenant toutes pièces à l'appui de sa demande et pouvant se référer aux deux questions visées par l'article 3.

Dans un délai de huit mois au plus tard après cette remise, le Gouvernement Impérial Ottoman devra remettre à chacun des membres du Tribunal, ainsi qu'au Gouvernement Impérial Russe, en autant d'exemplaires que ci-dessus, les copies complètes, manuscrites ou imprimées, de son Contre-Mémoire, avec toutes pièces à l'appui, mais pouvant se borner à la question n° I de l'article 3.

Dans le délai d'un mois après cette remise, le Gouvernement Impérial Russe notifiera au Président du Tribunal Arbitral s'il a l'intention de présenter une Réplique. Dans ce cas, il aura un délai de trois mois au plus, à compter de cette notification, pour communiquer ladite Réplique dans les mêmes conditions que le Mémoire. Le Gouverment Impérial Ottoman aura alors un délai de quatre mois, à compter de cette communication, pour présenter sa Contre-Réplique, dans les mêmes conditions que le Contre-Mémoire.

Les délais fixés par le présent article pourront être prolongés de commun accord par les Parties, ou par le Tribunal, quand il le juge nécessaire, pour arriver à une décision juste.

Mais le Tribunal ne prendra pas en considération les Mémoires, Contre-Mémoires ou autres communications qui lui seront présentées par les Parties après l'expiration du dernier délai par lui fixé.

Article 7. Si, dans les mémoires ou autres pièces échangés, l'une ou l'autre Partie s'est référée ou a fait allusion à un document ou papier en sa possession exclusive, dont elle n'aura pas joint la copie, elle sera tenue, si l'autre Partie le demande, de lui en donner la copie, au plus tard dans les trente jours.

Article 8. Dans le cas où le Tribunal Arbitral aurait affirmativement statué sur la question posée au n° I de l'article 3, il devra, avant d'aborder l'examen du n° II du même article, donner aux Parties de nouveaux délais ne pouvant être inférieurs à trois mois chacun, pour présenter et échanger leurs conclusions et arguments à l'appui.

Article 9. Les décisions du Tribunal sur la première, et éventuellement sur la seconde question en litige, seront prononcées, autant que possible, dans le délai d'un mois après la clôture par le Président des débats relatifs à chacune de ces questions.

Article 10. Le jugement du Tribunal Arbitral sera définitif et devra être exécuté strictement et sans aucun retard.

Article 11. Chaque Partie supporte ses propres frais et une part égale des frais du Tribunal.

Article 12. En tout ce qui n'est pas prévu par le présent Compromis, les stipulations de la Convention de La Haye de 1907 pour le règlement pacifique des Conflits internationaux seront appliquées à cet Arbitrage, à l'exception, toutefois, des articles dont l'acceptation a été réservée par le Gouvernement Impérial Ottoman.

FAIT à Constantinople, le 22 juillet/4 août 1910.

(*Signé*): N. TCHARYKOW

(*Signé*): RIFAAT

SENTENCE DU TRIBUNAL ARBITRAL CONSTITUÉ EN VERTU DU COMPROMIS D'ARBITRAGE SIGNÉ À CONSTANTINOPLE ENTRE LA RUSSIE ET LA TURQUIE LE 22 JUILLET/4 AOÛT 1910. LA HAYE, LE 11 NOVEMBRE 1912 [1]

War indemnities — Allocation of an indemnity to individual victims of war — Debt of State to State — State responsibility — Special responsibility in the matter of delay in the payment of a monetary debt — Moratory or compensatory interests — Demand in due form of law.

Par un Compromis signé à Constantinople le 22 juillet/4 août 1910, le Gouvernement Impérial de Russie et le Gouvernement Impérial Ottoman sont convenus de soumettre à un Tribunal arbitral la décision définitive des questions suivantes:

« I. Oui ou non, le Gouvernement Impérial Ottoman est-il tenu de payer aux indemnitaires russes des dommages-intérêts à raison des dates auxquelles ledit gouvernement a procédé au payement des indemnités fixées en exécution de l'article 5 du traité du 27 janvier/8 février 1879, ainsi que du Protocole de même date? »

« II. En cas de décision affirmative sur la première question, quel serait le montant de ces dommages-intérêts? »

Le Tribunal arbitral a été composé de

Son Excellence Monsieur Lardy, Docteur en droit, Membre et ancien Président de l'Institut de droit international, Envoyé extraordinaire et Ministre plénipotentiaire de Suisse à Paris, Membre de la Cour Permanente d'Arbitrage, Surarbitre;

Son Excellence le Baron Michel de Taube, Adjoint du Ministre de l'Instruction publique de Russie, Conseiller d'Etat actuel, Docteur en droit, associé de l'Institut de droit international, Membre de la Cour Permanente d'Arbitrage;

Monsieur André Mandelstam, Premier Drogman de l'Ambassade Impériale de Russie à Constantinople, Conseiller d'Etat, Docteur en droit international, associé de l'Institut de droit international;

Herante Abro Bey, Licencié en droit, Conseiller légiste de la Sublime-Porte;

et Ahmed Réchid Bey, Licencié en droit, Conseiller légiste de la Sublime-Porte;

Monsieur Henri Fromageot, Docteur en droit, associé de l'Institut de droit international, Avocat à la Cour d'Appel de Paris, a fonctionné comme Agent du Gouvernement Impérial Russe et a été assisté de

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Protocoles des séances et sentence du tribunal d'arbitrage constitué en vertu du compromis d'arbitrage signé à Constantinople entre la Russie et la Turquie le 22 juillet/4 août 1910. Litige russo-turc relatif aux dommages-intérêts réclamés par la Russie pour le retard apporté dans le payement des indemnités dues aux particuliers russes lésés par la guerre de 1877-1878*, p. 79.

Monsieur Francis Rey, Docteur en droit, Secrétaire de la Commission Européenne du Danube, en qualité de Secrétaire;

Monsieur Edouard Clunet, Avocat à la Cour d'Appel de Paris, Membre et ancien Président de l'institut de droit international, a fonctionné comme Agent du Gouvernement Impérial Ottoman et a été assisté de

Monsieur Ernest Roguin, Professeur de Législation comparée à l'Université de Lausanne, Membre de l'Institut de droit international, en qualité de Conseil du Gouvernement Ottoman;

Monsieur André Hesse, Docteur en droit, Avocat à la Cour d'Appel de Paris, Député, en qualité de Conseil du Gouvernement Ottoman;

Youssouf Kémâl Bey, Professeur à la Faculté de droit de Constantinople, ancien Député, Directeur de la Mission Ottomane d'études juridiques, en qualité de Conseil du Gouvernement Ottoman;

Monsieur C. Campinchi, Avocat à la Cour d'Appel de Paris, en qualité de Secrétaire de l'Agent du Gouvernement Ottoman.

Le Baron Michiels van Verduynen, Secrétaire général du Bureau international de la Cour Permanente d'Arbitrage, a fonctionné comme Secrétaire général et

le Jonkheer W. Röell, Premier secrétaire du Bureau international de la Cour, a pourvu au Secrétariat.

Après une première séance à La Haye le 15 février 1911, pour régler certaines questions de procédure, les Mémoire, Contre-Mémoire, Réplique et Contre-Réplique ont été dûment échangés entre les Parties et communiqués aux Arbitres, qui ont respectivement déclaré, ainsi que les Agents des Parties, renoncer à demander des compléments de renseignements.

Le Tribunal arbitral s'est réuni de nouveau à La Haye les 28, 29, 30, 31 octobre, 1er, 2, 5 et 6 novembre 1912,

et après avoir entendu les conclusions orales des Agents et Conseils des Parties, il a rendu la Sentence suivante:

Question préjudicielle

Vu la demande préjudicielle du Gouvernement Impérial Ottoman tendant à faire déclarer la réclamation du Gouvernement Impérial Russe non recevable sans examen du fond, le Tribunal

attendu que le Gouvernement Impérial Ottoman base cette demande préjudicielle, dans ses conclusions écrites, sur le fait

« Que, dans toute la correspondance diplomatique, ce sont les sujets russes individuellement qui, bénéficiant d'une stipulation faite en leurs noms, soit dans les Préliminaires de Paix signés à San Stéfano le 19 février/3 mars 1878, soit par l'article 5 du Traité de Constantinople du 27 janvier/8 février 1879, soit par le Protocole du même jour, ont été les créanciers directs des sommes capitales à eux adjugées, et que leurs titres à cet égard ont été constitués par les décisions nominatives prises par la Commission *ad hoc* réunie à l'Ambassade de Russie à Constantinople, décisions nominatives qui ont été notifiées à la Sublime-Porte;

« Que, dans ces circonstances, le Gouvernement Impérial de Russie aurait dû justifier de la survivance des droits de chaque indemnitaire, et de l'individualité des personnes aptes à s'en prévaloir aujourd'hui, cela d'autant plus que la cession de certains de ces droits a été communiquée au Gouvernement Impérial Ottoman »;

« Que le Gouvernement Impérial de Russie aurait dû agir de même, dans l'hypothèse où l'Etat russe aurait été le créancier direct unique des indemnités; cela parce que le dit Gouvernement ne saurait méconnaître son devoir de

transmettre aux indemnitaires ou à leurs ayants-cause les sommes qu'il pourrait obtenir dans le procès actuel à titre de dommages-intérêts moratoires, les indemnitaires se présentant, dans cette supposition, comme les bénéficiaires, si non comme les créanciers, de la stipulation faite dans leur intérêt;

« Que cependant, le Gouvernement Impérial de Russie n'a fourni aucune justification quant à la personnalité des indemnitaires ou de leurs ayants-droit, ni quant à la survivance de leurs prétentions ». (Contre-Réplique Ottomane, p. 81 et 82).

Attendu que le Gouvernement Impérial de Russie soutient, au contraire, dans ses conclusions écrites,

« Que la dette stipulée dans le Traité de 1879 n'en est pas moins une dette d'Etat à Etat; qu'il n'en saurait être autrement de la responsabilité résultant de l'inexécution de la dite dette; qu'en conséquence le Gouvernement Impérial Russe est seul qualifié pour en donner quittance et, par là-même, pour toucher les sommes destinées à être payées aux indemnitaires; qu'au surplus, le Gouvernement Impérial Ottoman ne conteste pas au Gouvernement Impérial Russe la qualité de créancier direct de la Sublime-Porte;

« Que le Gouvernement Impérial Russe agit en vertu du droit qui lui est propre de réclamer des dommages-intérêts en raison de l'inexécution d'un engagement pris vis-à-vis de lui directement;

« Qu'il en justifie pleinement en établissant cette inexécution, qui n'est d'ailleurs pas contestée, et en apportant son titre, qui est le Traité de 1879 . . .;

« Que la Sublime-Porte, nantie de la quittance à elle régulièrement délivrée par le Gouvernement Impérial Russe, n'a pas à s'immiscer dans la répartition des sommes distribuées ou à distribuer par ledit Gouvernement entre ses sujets indemnitaires; que c'est là une question d'ordre intérieur, dont le Gouvernement Impérial Ottoman n'a pas à connaître »; (Réplique Russe, pages 49 et 50).

Considérant que l'origine de la réclamation remonte à une guerre, fait international au premier chef; que la source de l'indemnité est non seulement un Traité international mais un Traité de paix et les accords ayant pour objet l'exécution de ce Traité de paix; que ce traité et ces accords sont intervenus entre la Russie et la Turquie réglant entre elles, d'Etat à Etat, comme Puissances publiques et souveraines, une question de droit des gens; que les préliminaires de paix ont fait rentrer les 10 millions de roubles attribués à titre de dommages et intérêts aux sujets russes victimes des opérations de guerre en Turquie au nombre des indemnités « que S. M. l'Empereur de Russie réclame et que la Sublime-Porte s'est engagée à lui rembourser »; que ce caractère de créance d'Etat à Etat a été confirmé par le fait que les réclamations devaient être examinées par une Commission exclusivement russe; que le Gouvernement Impérial de Russie a conservé la haute main sur l'attribution, l'encaissement et la distribution des indemnités, en sa qualité de seul créancier; qu'il importe peu de savoir si, en théorie, la Russie a agi en vertu de son droit de protéger ses nationaux ou à un autre titre, du moment où c'est envers le Gouvernement Impérial Russe seul que la Sublime-Porte a pris ou a subi l'engagement réclamé d'elle;

Considérant que l'exécution des engagements est, entre Etats comme entre particuliers, le plus sûr commentaire du sens de ces engagements;

Que, lors d'une tentative de l'administration Ottomane des Finances de percevoir, en 1885, sur une quittance donnée par l'Ambassade de Russie à Constantinople lors du payement d'un acompte, le timbre proportionnel exigé des particuliers par la législation ottomane, la Russie a immédiatement protesté et soutenu « que la dette était contractée par le Gouvernement Ottoman

vis-à-vis celui de Russie » . . . et « non pas une simple créance de particuliers découlant d'un engagement ou contrat privé » (Note verbale russe du 15/27 mars 1885, Mémoire Russe, annexe n° 19, page 19); que la Sublime-Porte n'a pas insisté, et qu'en fait, les deux Parties ont constamment, dans leur pratique de plus de quinze ans, agi comme si la Russie était la créancière de la Turquie à l'exclusion des indemnitaires privés;

Que la Sublime-Porte a payé sans aucune exception tous les versements successifs sur la seule quittance de l'Ambassade de Russie à Constantinople agissant pour compte de son Gouvernement;

Que la Sublime-Porte n'a jamais demandé, lors des versements d'acomptes, si les bénéficiaires existaient toujours ou quels étaient leurs ayants-cause du moment, ni d'après quelles normes les acomptes étaient répartis entre eux, laissant cette mission au seul Gouvernement Impérial de Russie;

CONSIDÉRANT que la Sublime-Porte prétend, au fond, dans le litige actuel, précisément être entièrement libérée par les payements qu'elle a, en fait, effectués en dehors de toute participation des indemnitaires entre les mains du seul Gouvernement Impérial de Russie représenté par son ambassade;

PAR CES MOTIFS:

Arrête

la demande préjudicielle est écartée.

Statuant ensuite sur le fond le Tribunal arbitral a rendu la Sentence suivante:

I

EN FAIT

Dans le Protocole signé à Andrinople le 19/31 janvier 1878 et qui a mis fin par un armistice aux hostilités entre la Russie et la Turquie, se trouve la stipulation suivante:

« 5°. La Sublime-Porte s'engage à dédommager la Russie des frais de la guerre et des pertes qu'elle a dû s'imposer. Le mode, soit pécuniaire, soit territorial ou autre, de cette indemnité sera réglé ultérieurement ».

L'article 19 des Préliminaires de paix signés à San Stefano le 19 février/3 mars 1878 est ainsi conçu:

« Les indemnités de guerre et les pertes imposées à la Russie que S. M. l'Empereur de Russie réclame et que la Sublime-Porte s'est engagée à lui rembourser se composent de: a) 900 millions de roubles de frais de guerre . . . b) 400 millions de roubles de dommages infligés au littoral méridional . . . c) 100 millions de roubles de dommages causés au Caucase . . . d) *dix millions de roubles de dommages et intérêts aux sujets et institutions russes en Turquie:* total 1,400 millions de roubles ».

Et plus loin: « *Les dix millions de roubles réclamés comme indemnité pour les sujets et institutions russes en Turquie seront payés à mesure que les réclamations des intéressés seront examinées par l'ambassade de Russie à Constantinople et transmises à la Sublime-Porte* ».

Au congrès de Berlin, à la séance du 2 juillet 1878, protocole n°. 11, il fut entendu que les 10 millions de roubles dont il s'agit ne regardaient pas l'Europe, mais seulement les deux Etats intéressés, et qu'ils ne seraient pas insérés dans le traité entre les Puissances représentées à Berlin. En conséquence la question fut reprise directement entre la Russie et la Turquie, qui stipulèrent, dans le traité définitif de paix signé à Constantinople le 27 janvier/8 février 1879, la disposition suivante:

« *Art. V.* Les réclamations des sujets et institutions russes en Turquie à titre d'indemnité pour les dommages subis pendant la guerre seront payées à mesure qu'elles seront examinées par l'ambassade de Russie à Constantinople et transmises à la Sublime-Porte. La totalité de ces réclamations ne pourra, en aucun cas, dépasser le chiffre de vingt-six millions sept cent cinquante milles francs. Le terme d'une année après l'échange des ratifications est fixé comme date à partir de laquelle les réclamations pourront être présentées à la Sublime-Porte, et celui de deux ans comme date après laquelle les réclamations ne seront plus admises ».

Le même jour, 27 janvier/8 février 1879, dans le Protocole de signature du traité de paix, le Plénipotentiaire russe prince Lobanow déclara que la somme de 26,750,000 francs spécifiée à l'article V:

« constitue un maximum auquel la totalité des réclamations ne pourra vraisemblablement jamais atteindre; il ajoute qu'une commission *ad hoc* sera instituée à l'ambassade de Russie pour examiner scrupuleusement les réclamations qui lui seront présentées, et que, d'après les instructions de son Gouvernement, un délégué ottoman pourra prendre part à l'examen de ces réclamations ».

Les ratifications du traité de paix ont été échangées à Saint-Pétersbourg le 9/21 février 1879.

La commission instituée à l'ambassade de Russie et composée de trois fonctionnaires russes commença aussitôt ses travaux. Le commissaire ottoman s'abstint généralement d'y prendre part. Le montant des pertes des sujets russes fut fixé par la commission à 6 millions 186,543 francs. Elles furent successivement notifiées à la Sublime-Porte entre le 22 octobre/3 novembre 1880 et le 29 janvier/10 février 1881; leur montant ne fut pas contesté et l'ambassade de Russie réclama le payement en même temps qu'elle transmettait à la Sublime-Porte les dernières décisions de la commmission.

Le 23 septembre 1881, l'ambassade transmet une « pétition » de l'avocat Rossolato, « mandataire spécial de plusieurs sujets russes » ayant à toucher des indemnités, pétition adressée à l'ambassade et mettant le Gouvernement Ottoman en demeure de s'entendre avec lui « dans un délai de huit jours à partir de la signification, sur le mode de payement », déclarant « le tenir d'ores et déjà responsable de tous dommages-intérêts et notamment des intérêts moratoires ».

Par convention signée à Constantinople le 2/14 mai 1882, les deux gouvernements conviennent, art. I^er^, que l'indemnité de guerre, dont le solde avait été fixé à 802,500,000 francs par l'art. IV du traité de paix de 1879 après défalcation de la valeur des territoires cédés par la Turquie, ne porterait pas d'intérêts et serait payée sous forme de cent versements annuels de 350,000 livres turques soit environ 8 millions de francs.

Le 19 juin/1^er^ juillet 1884, aucune somme n'ayant été versée pour les indemnitaires, l'ambassade « réclame formellement le payement intégral des indemnités qui ont été adjugées aux sujets russes . . .; elle se verra obligée, dans le cas contraire, à leur reconnaître la faculté de prétendre, outre le capital, à des intérêts proportionnés au retard que subit le règlement de leur créance ».

Le 19 décembre 1884, la Sublime-Porte verse un premier acompte de 50,000 livres turques, soit environ 1,150,000 fr.

En 1885 se produit l'union de la Bulgarie et de la Roumélie orientale et la guerre serbo-bulgare. La Turquie ne paie aucun nouvel acompte. Une note de rappel en date de janvier 1886 ayant été sans résultat, l'ambassade insiste, le 15/27 février 1887; elle transmet une « pétition » qui lui est parvenue d'indemnitaires russes, dans laquelle ils tiennent le Gouvernement Ottoman

« responsable de ce surcroît de dommages qui résulte pour eux du retard apporté au payement de leurs indemnités », et l'ambassade ajoute : « De nouveaux ajournements obligeraient le Gouvernement Impérial à réclamer en faveur de ses nationaux des intérêts pour les retards que subit le règlement de leurs créances. »

Après des notes de rappel de juillet et décembre 1887 demeurées sans effet, l'ambassade se plaint le 26 janvier / 7 février 1888 de ce que la Turquie ait payé diverses créances postérieures aux obligations contractées envers les indemnitaires russes. Elle rappelle que « les arriérés se montent à la somme d'environ 215,000 livres turques, un seul versement de 50,000 livres turques ayant été fait sur le total de 265,000 livres turques adjugées » ; elle demande donc « d'urgence . . . que les sommes dues aux sujets russes soient immédiatement, et avant tout autre payement, prélevées sur celles qui seront payées par X . . . » (un débiteur du Gouvernement Impérial Ottoman).

Le 22 avril 1889, la Turquie verse un second acompte de 50,000 livres.

Le 31 décembre 1890/12 janvier 1891, l'ambassade, constatant qu'il a été payé seulement 100,000 livres sur un total de 265,000, écrit à la Sublime-Porte que le retard apporté au règlement de cette créance fait subir des pertes toujours croissantes aux nationaux russes ; elle croit donc devoir prier la Sublime-Porte de provoquer des ordres immédiats à qui de droit pour que la somme due . . . soit payée sans retard, *aussi bien que les intérêts légaux* au sujet desquels [l'ambassade] a eu l'honneur de prévenir la Sublime-Porte par note du 15/27 février 1887 ».

En août 1891 nouveau rappel. En octobre/novembre 1892, l'ambassade écrit « que cela ne peut durer indéfiniment ainsi » ; que « les instances des sujets russes deviennent de plus en plus pressantes », que « l'ambassade a le devoir de s'en faire avec énergie l'interprète, . . . qu'il s'agit là d'une obligation indiscutable et d'un devoir international à remplir . . . », que « le Gouvernement Ottoman ne saurait plus invoquer pour s'y soustraire l'état précaire de ses finances », et conclut en demandant un « prompt et définitif règlement de la créance . . . »

Le 2/14 avril 1893, un troisième versement de 75,000 livres turques est effectué ; la Sublime-Porte, en donnant avis de ce payement dès le 27 mars, ajoute que, pour le reliquat, la moitié en sera inscrite au budget courant et l'autre moitié au budget prochain ; « la question ainsi réglée met heureusement fin aux incidents auxquels elle avait donné lieu. » La Porte espère dès lors que l'ambassade voudra bien, dans ses sentiments d'amitié sincère à l'égard de la Turquie, accepter définitivement le monopole du tumbéki à l'instar des autres Puissances.

A cette occasion, et en rappelant que le Gouvernement Impérial Russe « s'est toujours montré amical et conciliant dans toutes les affaires touchant aux intérêts financiers de l'Empire ottoman, » l'ambassade prend acte le 30 du même mois des dispositions annoncées en vue du payement et consent à ce que les Russes faisant en Turquie le commerce des tumbéki soient soumis au régime nouvellement créé.

Un an plus tard, le 23 mai/4 juin 1894, n'ayant reçu aucun versement nouveau, l'ambassadeur, après avoir constaté la non-exécution de « l'arrangement » auquel il avait « consenti afin de faciliter au Gouvernement Ottoman l'accomplissement de son obligation, » se déclare « placé dans l'impossibilité d'accepter des promesses, des arrangements ou des atermoiements ultérieurs, » et « obligé d'insister pour *que la totalité de reliquat* dû aux sujets russes, *qui monte à* 91,000 *livres turques*, soit, sans plus de retard, versé à l'ambassade . . . De récentes

opérations financières viennent de mettre à la disposition[de la Sublime-Porte] des sommes importantes. »

Le 27 octobre de la même année 1894, un versement de 50,000 livres turques est effectué, et la Sublime-Porte écrit, déjà le 3 du même mois, à l'ambassade: « Quant au reliquat de 41 mille livres turques, la Banque Ottomane en garantira le payement dans le cours de l'exercice prochain. »

En 1896, une correspondance est échangée entre la Sublime-Porte et l'ambassade sur la question de savoir si les revenus sur lesquels la Banque Ottomane devait prélever le reliquat ne sont pas déjà engagés à la Russie pour le payement de l'indemnité de guerre proprement dite ou si la partie de ces revenus supérieure à l'annuité affectée à l'indemnité de guerre ne peut pas être employée à l'indemnisation des sujets russes victimes des événements de 1877/8. Au cours de cette correspondance, la Sublime-Porte indique, dans les notes qu'elle adresse à l'ambassade les 11 février et 28 mai 1896, que le reliquat dû s'élève à la somme de 43,978 livres turques.

De 1895 à 1899, de graves événements survenus en Asie-Mineure obligent la Turquie à provoquer un moratoire en faveur de la Banque Ottomane sur sa demande; l'insurrection des Druses, celle de la Crête qui est suivie de la guerre turco-grecque de 1897, des insurrections en Macédoine amènent à diverses reprises la Turquie à mobiliser des troupes et mêmes des armées.

Pendant trois ans, aucune correspondance n'est échangée, et, lorsqu'elle reprend, la Sublime-Porte indique de nouveau le chiffre de 43,978 livres turques, comme le montant du reliquat des indemnités dans les notes qu'elle adresse à l'ambassade les 19 juillet 1899 et 4 juillet 1900. A son tour, l'ambassade, dans ses notes des 25 avril/8 mai 1900 et 3/16 mars 1901, indique le même chiffre mais se plaint de ce que les ordres donnés dans diverses provinces « pour le payement des 43,978 livres turques, montant du reliquat de l'indemnité due aux sujets russes, » n'ont pas été suivis d'effet, et de ce que la Banque Ottomane n'a rien versé; elle prie instamment la Sublime-Porte de vouloir bien donner à qui de droit des ordres catégoriques pour le payement, sans plus de retard, des sommes susmentionnées. »

Après qu'en mai 1901 la Sublime-Porte eut annoncé que le Département des Finances avait été invité à régler dans le courant du mois le reliquat de l'indemnité, la Banque Ottomane avisait enfin, les 24 février et 26 mai 1902, l'ambassade de Russie qu'elle avait reçu et tenait à la disposition de l'ambassade 42,438 livres turques sur le reliquat de 43,978 livres.

L'ambassade, en accusant deux mois plus tard réception de cet envoi à la Sublime-Porte le 23 juin/6 juillet 1902, faisait observer « que le Gouvernement Impérial Ottoman a mis plus de vingt ans pour s'acquitter, et imparfaitement encore, d'une dette dont le règlement immédiat s'imposait à tous les points de vue, un solde de 1,539 livres turques restant toujours impayé. Se référant, par conséquent, à ses notes des 23 septembre 1881, 15/27 février 1887 et 31 décembre 1890/12 janvier 1891 au sujet des intérêts à courir sur la dite créance, restée si longtemps en souffrance » l'ambassade transmet une requête par laquelle les indemnitaires réclament, en substance, des intérêts composés à 12% depuis le 1er janvier 1881 jusqu'au 15 mars 1887, et à 9% depuis cette date, à laquelle le taux de l'intérêt légal a été abaissé par une loi ottomane. La somme réclamée par les signataires s'élevait à une vingtaine de millions de francs au printemps de 1902 pour un capital primitif de 6,200,000 francs environ. La note se terminait comme suit: « L'ambassade impériale se plaît à croire que la Sublime-Porte n'hésitera pas à reconnaître en principe le bien fondé de la réclamation exposée dans cette requête; dans le cas pourtant où la Sublime-Porte trouverait des objections à soulever contre le montant de la somme réclamée par les sujets

russes, l'ambassade impériale ne verrait pas d'inconvénients à déférer l'examen des détails à une commission composée de délégués Russes et Ottomans. »

La Sublime-Porte répond le 17 de ce même mois de juillet 1902 que l'art. V du Traité de paix de 1879 et le protocole de même date ne stipulent pas d'intérêts et qu'à la lumière des négociations diplomatiques qui ont eu lieu à ce sujet, elle était loin de s'attendre à voir formuler au dernier moment de la part des indemnitaires de telles demandes, dont l'effet serait de rouvrir une question qui se trouvait heureusement terminée. L'ambassade réplique le 3/16 février 1903 en insistant « sur le payement des dommages-intérêts réclamés par ses ressortissants. Il n'y a que le montant de ces dommages qui pourrait faire l'objet d'une enquête. » — Sur une note de rrappel en date du 2/15 août 1903, la Sublime-Porte répond le 4 mai 1904 en maintenant sa manière de voir et en se déclarant toutefois disposée à déférer la question à un arbitrage à La Haye le cas où l'on insisterait sur la réclamation.

Au bout de quatre ans, l'ambassade accepte cette suggestion par note du 19 mars/1er avril 1908.

Le compromis d'arbitrage a été signé à Constantinople le 22 juillet/4 août 1910.

Quant au petit solde de 1,539 livres turques, il avait été mis par la Banque Ottomane en décembre 1902 à la disposition de l'ambassade de Russie qui l'a refusé et il demeure consigné à la disposition de l'ambassade.

II

EN DROIT

1. Le Gouvernement Impérial de Russie base sa demande sur « la responsabilité des Etats pour inexécution de dettes pécuniaires »; cette responsabilité implique, selon lui, « l'obligation de payer des dommages-intérêts et spécialement les intérêts des sommes indûment retenues »; « l'obligation de payer des intérêts moratoires » est « la manifestation pratique, en matière de dettes d'argent, » de la responsabilité des Etats (Réplique Russe, pp. 27 et 51). « La méconnaissance de ces principes serait aussi contraire à la notion même du droit des gens que dangereuse pour la sécurité des relations pacifiques; en effet, en déclarant l'Etat débiteur irresponsable du délai qu'il inflige à son créancier, on lui reconnaîtrait, par là même, la liberté de n'écouter que son caprice pour s'exécuter; . . . on obligerait, d'autre part, l'Etat créancier à recourir à la violence contre une semblable prétention . . . et à ne rien attendre d'un prétendu droit des gens manifestement incapable d'assurer le respect de la parole donnée. » (Mémoire Russe, p. 29).

En d'autres termes, et toujours dans l'opinion du Gouvernement Impérial de Russie, « il ne s'agit nullement ici d'intérêts conventionnels, c'est-à-dire nés d'une stipulation particulière . . . » mais « l'obligation incombant au Gouvernement Impérial Ottoman de payer des intérêts moratoires est née du retard à exécuter, c'est-à-dire de l'inexécution partielle du Traité de paix; cette obligation est bien née, il est vrai, à l'occasion du traité de 1879, mais elle provient *ex post facto* d'une cause nouvelle et accidentelle, qui est la faute de la Sublime-Porte à remplir ses engagements comme elle s'y était obligée. » (Mémoire Russe, p. 29; Réplique Russe, pp. 22 et 27.)

2. Le Gouvernement Impérial Ottoman, tout en admettant en termes explicites le principe général de la responsabilité des Etats à raison de l'inexécution de leurs engagements (Contre-Réplique, p. 29, n° 286 Note et p. 52, n° 358), soutient, au contraire, qu'en droit international public, des intérêts moratoires n'existent pas « sans stipulation expresse » (Contre-Mémoire Ottoman, p. 31.

n° 83 et p. 34, n° 95); qu'un Etat « n'est pas un débiteur comme un autre » (*Ibidem*, p. 33, n° 90), et que, sans songer à soutenir « qu'aucune règle observable entre particuliers ne puisse être appliquée entre Etats » (Contre-Réplique Ottomane, p. 26, n° 275), on doit tenir compte de la situation *sui generis* de l'Etat puissance publique; que diverses législations (par exemple la loi française de 1831 qui institue une prescription extinctive de cinq ans pour les dettes de l'Etat, le droit romain qui pose le principe « *Fiscus ex suis contractivus usuras non dat,* » Lex 17, paragr. 5, Digeste 22, 1) reconnaissent à l'Etat débiteur une situation privilégiée (Contre-Mémoire Ottoman, p. 33, n° 92); qu'en admettant contre un Etat une obligation implicite, non expressément stipulée, en étendant par exemple à un Etat débiteur les règles de la mise en demeure et ses effets en droit privé, on rendrait cet Etat « débiteur dans une mesure plus forte qu'il ne l'aurait voulu, risquerait de compromettre la vie politique de l'Etat, de nuire à ses intérêts primordiaux, de bouleverser son budget, de l'empêcher de se défendre contre une insurrection ou contre l'étranger. » (Contre-Mémoire Ottoman, p. 33, n° 91.)

Eventuellement et pour le cas où une responsabilité devrait lui incomber, le Gouvernement Impérial Ottoman conclut à ce que cette responsabilité consiste uniquement en intérêts moratoires et cela seulement à partir d'une mise en demeure reconnue régulière. (Contre-Réplique Ottomane, pp. 71 et suivantes, N[os] 410 et suivants.)

Il oppose en outre les exceptions de la chose jugée, de la force majeure, du caractère de libéralité des indemnités, et de la renonciation tacite ou expresse de la Russie au bénéfice de la mise en demeure.

3. Les rapports de droit qui font l'objet du présent litige étant intervenus entre Etats Puissances publiques sujets du droit international et ces rapports rentrant dans le domaine du droit public, *le droit applicable est le droit international public* soit droit des gens et les Parties sont avec raison d'accord sur ce point. (Mémoire Russe, p. 32; Contre-Mémoire Ottoman, numéros 47 à 54, p. 18-20; Réplique Russe, p. 18; Contre-Réplique Ottomane, p. 17 numéros 244 et 245.)

4. La demande du Gouvernement Impérial de Russie est fondée sur le principe général de la responsabilité des Etats, à l'appui duquel il a invoqué un grand nombre de sentences arbitrales.

La Sublime-Porte, sans contester ce principe général, prétend échapper à son application en affirmant le droit des Etats à une situation exceptionnelle et privilégiée dans le cas spécial de la responsabilité en matière de dettes d'argent.

Elle déclare inopérants la plupart des précédents arbitraux invoqués, comme ne s'appliquant pas à cette catégorie spéciale.

Le Gouvernement Impérial Ottoman fait observer, à l'appui de sa manière de voir, qu'en doctrine, on distingue des responsabilités diverses selon leur origine et selon leur étendue. Ces nuances se rattachent surtout à la théorie des responsabilités en Droit romain et dans les législations inspirées du Droit romain. Les Mémoires Ottomans rappellent les distinctions suivantes dont quelques-unes sont classiques: Les responsabilités sont d'abord divisées en deux catégories, suivant qu'elles ont pour cause un délit ou quasi-délit (responsabilité délictuelle) ou un contrat (responsabilité contractuelle). — Parmi les responsabilités contractuelles, on distingue encore suivant qu'il s'agit d'obligations ayant pour objet une prestation quelconque autre qu'une somme d'argent ou suivant qu'il s'agit de prestations d'un caractère exclusivement pécuniaire, d'une dette d'argent proprement dite. Ces diverses catégories de responsabilités ne sont pas appréciées en droit civil d'une manière absolument identique, les circonstances nécessaires à la naissance de la responsabilité ainsi que ces conséquences étant variables. — Tandis qu'en matière de responsabilités délictuelles aucune

formalité quelconque n'est nécessaire, en matière contractuelle il faut toujours une mise en demeure. Tandis qu'en matière d'obligations ayant pour objet une prestation autre qu'une somme d'argent comme d'ailleurs en matière délictuelle, la réparation du dommage est complète (*lucrum cessans* et *damnum emergens*), cette réparation, en matière de dettes d'argent, est restreinte forfaitairement aux intérêts de la somme due, lesquels ne courront qu'à partir de la mise en demeure. Les *dommages-intérêts* sont appelés *compensatoires* quand ils sont la compensation du dommage résultant d'un délit ou de l'inexécution d'une obligation. Ils sont appelés *dommages-intérêts moratoires*, bien qu'ils représentent encore une compensation, lorsqu'ils sont la conséquence d'un retard dans l'exécution d'une obligation. — Les auteurs enfin appellent *intérêts moratoires* les intérêts forfaitairement alloués en cas de retard dans le payement de dettes d'argent, les distinguant ainsi d'autres intérêts ajoutés, parfois, pour fixer le montant total d'une indemnité, à l'évaluation en argent d'un dommage, ces derniers étant appelés *intérêts compensatoires*.

Ces distinctions du droit civil s'expliquent: En matière de responsabilité contractuelle en effet, on est en droit d'exiger d'un co-contractant une diligence dont la victime d'un délit imprévu ne saurait être tenue. — En matière de dettes d'argent, la difficulté d'évaluer les conséquences de la demeure explique qu'on ait fixé forfaitairement le montant du dommage.

La thèse du Gouvernement Impérial Ottoman consiste à soutenir qu'en droit international public, la responsabilité spéciale consistant au payement d'intérêts moratoires en cas de retard dans le règlement d'une dette d'argent liquide n'existe pas pour un Etat débiteur. La Sublime-Porte ne conteste pas la responsabilité des Etats s'il s'agit de dommages-intérêts compensatoires, ni des intérêts pouvant rentrer dans le calcul de ces dommages- intérêts compensatoires. La responsabilité que la Sublime-Porte décline, c'est celle pouvant résulter, sous forme d'intérêts de retard ou moratoires au sens restreint, du retard dans l'exécution d'une obligation pécuniaire.

Il importe de rechercher si ces dénominations variées, ces appellations créées par les commentateurs, correspondent à des différences intrinsèques dans la nature même du droit, à des différences dans l'essence juridique de la notion de responsabilité. — Le tribunal est d'avis que tous les dommages-intérêts sont toujours la réparation, la compensation d'une faute. A ce point de vue, tous les dommages-intérêts sont compensatoires, peu importe le nom qu'on leur donne. Les intérêts forfaitaires alloués au créancier d'une somme d'argent à partir de la mise en demeure sont la compensation forfaitaire de la faute du débiteur en retard exactement comme les dommages-intérêts ou les intérêts alloués en cas de délit, de quasi-délit ou d'inexécution d'une obligation de faire, sont la compensation du préjudice subi par le créancier, la représentation en argent de la responsabilité du débiteur fautif. — Exagérer les conséquences des distinctions faites en droit civil dans la responsabilité se légitimerait d'autant moins qu'il se dessine, dans plusieurs législations récentes, une tendance à atténuer ou à supprimer les adoucissements apportés par le Droit romain et ses dérivés à la responsabilité en matière de dettes d'argent. — Il est certain en effet que toutes les fautes, quelle qu'en soit l'origine, finissent par être évaluées en argent et transformées en obligation de payer; elles aboutissent toutes, ou peuvent aboutir, en dernière analyse, à une dette d'argent. — Il n'est donc pas possible au tribunal d'apercevoir des différences essentielles entre les diverses responsabilités. Identiques dans leur origine, la faute, elles sont les mêmes dans leurs conséquences, la réparation en argent.

Le Tribunal est donc de l'avis que le principe général de la responsabilité des Etats implique une responsabilité spéciale en matière de retard dans le payement d'une dette d'argent, à moins d'établir l'existence d'une coutume internationale contraire.

Le Gouvernement Impérial de Russie et la Sublime-Porte ont apporté au débat une série de sentences arbitrales qui ont admis, affirmé et consacré le principe de la responsabilité des Etats. La Sublime-Porte considère comme inopérantes la presque totalité de ces sentences et élimine même celles dans lesquelles l'arbitre a expressément alloué l'intérêt de sommes d'argent. Le Gouvernement Impérial Ottoman est d'avis qu'il s'agit là d'intérêts compensatoires et il les écarte comme sans application dans le litige actuel. Le Tribunal, pour les motifs indiqués plus haut, est au contraire de l'avis qu'il n'existe pas de raisons pour ne pas s'inspirer de la grande analogie qui existe entre les diverses formes de la responsabilité; cette analogie apparaît comme particulièrement étroite entre les *intérêts* dits moratoires et les *intérêts* dits compensatoires; l'analogie paraît complète entre l'allocation d'intérêts à partir d'une certaine date à l'occasion de l'évaluation de la responsabilité en capital et l'allocation d'intérêts sur un capital fixé par convention et demeuré impayé par un débiteur en faute. La seule différence est que, dans un des cas, les intérêts sont alloués par le juge puisque la dette n'était pas exigible et que dans l'autre le montant de la dette était fixé par convention et que les intérêts deviennent exigibles automatiquement en cas de mise en demeure.

Pour infirmer cette analogie très étroite, il faudrait que la Sublime-Porte pût établir l'existence d'une coutume, de précédents d'après lesquels des intérêts moratoires au sens restreint du mot auraient été refusés *en tant qu'intérêts moratoires*, l'existence d'une coutume dérogeant, en matière de dette pécuniaire, aux règles générales de la responsabilité. — Le Tribunal est d'avis que cette preuve, non seulement n'a pas été faite, mais que le Gouvernement Impérial Russe a pu se prévaloir, au contraire, de plusieurs sentences arbitrales dans lesquelles des intérêts moratoires ont été, parfois il est vrai avec des nuances et dans une mesure discutables, alloués à des Etats (*Mexique-Venezuela*, 2 octobre 1903, Mémoire Russe, p. 28 et note 5; Contre-Mémoire Ottoman, p. 38, n° 107; *Colombie-Italie*, 9 avril 1904, Réplique Russe, p. 28 et note 7; Contre-Réplique Ottomane p. 58, n° 368; *Etats-Unis-Choctaws*, Réplique Russe, p. 29; Contre-Réplique Ottomane, p. 59, n° 369. *Etats-Unis-Venezuela*, 5 décembre 1885, Réplique Russe p. 28 et note 5). Il y a lieu d'ajouter à ces cas la sentence rendue le 2 juillet 1881 par S. M. l'Empereur d'Autriche dans l'affaire de la Mosquitia, en ce sens que l'arbitre n'a nullement refusé des intérêts moratoires comme tels, mais a simplement prononcé que l'allocation du capital ayant le caractère d'une libéralité, cela excluait, dans la pensée de l'arbitre, des intérêts de retard (Réplique Russe, p. 28, note 4; Contre-Réplique Ottomane, p. 55, n° 365, note).

Il reste à examiner si la Sublime-Porte est fondée à soutenir qu'un Etat n'est pas un débiteur comme un autre, qu'il ne peut être « débiteur dans une mesure plus forte qu'il ne l'aurait voulu, » et qu'en lui imposant des obligations qu'il n'a pas stipulées, par exemple les responsabilités d'un débiteur privé, on risquerait de compromettre ses finances et même son existence politique.

Dès l'instant où le Tribunal a admis que les diverses responsabilités des Etats ne se distinguent pas les unes des autres par des différences essentielles, que toutes se résolvent ou peuvent finir par se résoudre dans le payement d'une somme d'argent, et que la coutume internationale et les précédents concordent avec ces principes, il faut en conclure que la responsabilité des Etats ne saurait être niée ou admise qu'entièrement et non pour partie; il ne serait dès lors pas

possible au tribunal de la déclarer inapplicable en matière de dettes d'argent sans étendre cette inapplicabilité à toutes les autres catégories de responsabilités.

Si un Etat est condamné à des dommages-intérêts compensatoires d'un délit ou de l'inexécution d'un obligation, il est, encore plus que dans le cas de retard dans le payement d'une dette d'argent conventionnelle, débiteur dans une mesure qu'il n'aurait pas stipulée volontairement. — Quant aux conséquences de ces responsabilités pour les finances de l'Etat débiteur, elles peuvent être au moins aussi graves, sinon davantage, s'il s'agit des dommages-intérêts appelés compensatoires par la Sublime-Porte, que s'il s'agit des simples intérêts moratoires au sens restreint du mot. Pour peu d'ailleurs que la responsabilité mette en péril l'existence de l'Etat, elle constituerait un cas de force majeure qui pourrait être invoqué en droit international public aussi bien que par un débiteur privé.

Le Tribunal est donc d'avis que la Sublime-Porte, qui a accepté explicitement le principe de la responsabilité des Etats, n'est pas fondée à demander une exception à cette responsabilité en matière de dettes d'argent, en invoquant sa qualité de Puissance publique et les conséquences politiques et financières de cette responsabilité.

5. Pour établir en quoi consiste cette responsabilité spéciale incombant à l'Etat débiteur d'une dette conventionnelle liquide et exigible, il convient maintenant de rechercher, en procédant par analogie comme l'ont fait les sentences arbitrales invoquées, les principes généraux de droit public et privé en cette matière, tant au point de vue de l'étendue de cette responsabilité qu'à celui des exceptions opposables.

Les législations privées des Etats faisant partie du concert européen admettent toutes, comme le faisait autrefois le Droit romain, l'obligation de payer au moins des intérêts de retard à titre d'indemnité forfaitaire lorsqu'il s'agit de l'inexécution d'une obligation consistant dans le payement d'une somme d'argent fixée conventionnellement, liquide et exigible, et cela au moins à partir de la mise en demeure du débiteur. — Quelques législations vont plus loin et considèrent que le débiteur est déjà en demeure dès la date de l'échéance ou encore admettent la réparation complète des dommages au lieu des simples intérêts forfaitaires.

Si la plupart des législations ont, à l'exemple du Droit romain, exigé une mise en demeure expresse, c'est que le créancier est en faute de son côté par manque de diligence tant qu'il ne réclame pas le payement d'une somme liquide et exigible.

Le Gouvernement Impérial Russe (Mémoire, p. 32) admet lui-même, en faveur de la nécessité d'une mise en demeure, qu'en équité, il peut convenir « de ne pas prendre par surprise un Etat débiteur passible d'intérêts moratoires, alors qu'aucun avertissement ne l'a rappelé à l'observation de ses engagements. » Les auteurs (p. ex. Heffter, *Droit international de l'Europe*, paragr. 94), font observer que, lors de « l'exécution d'un traité public, il faut procéder avec modération et avec équité, d'après la maxime qu'on doit traiter les autres comme on voudrait être traité soi-même. Il faut, en conséquence, accorder des délais convenables, afin que la partie obligée subisse le moins de préjudice possible. L'obligé peut attendre la mise en demeure du créancier avant d'être responsable du retard, s'il ne s'agit pas de prestations dont l'exécution est rattachée d'une manière expresse à une époque déterminée. » Voir aussi Mérignhac, *Traité de l'arbitrage international*, Paris, 1895, p. 290.

D'assez nombreuses sentences arbitrales internationales ont admis, même lorsqu'il s'agissait de *dommages-intérêts* moratoires, qu'il n'y avait pas lieu de les faire courir toujours dès la date du fait dommageable (*Etats-Unis contre Venezuela*,

Orinoco, sentence de La Haye du 25 octobre 1910, protocoles, p. 59; *Etats-Unis contre Chili*, 15 mai 1863, sentence de S.M. le Roi des Belges Léopold I, La Fontaine, *Pasicrisie*, p. 36, colonne 2 et p. 37 colonne 1; *Allemagne contre Venezuela*, Arrangement du 7 mai 1903, Ralston and Doyle, *Venezuelan Arbitrations*, Washington, 1904, p. 520 à 523; *Etats-Unis contre Venezuela*, 5 décembre 1885, Moore, *Digest of International Arbitrations* p. 3545 et p. 3567, Vol. 4, etc., etc.).

Il n'y a donc pas lieu, et il serait contraire à l'équité de présumer une responsabilité de l'Etat débiteur plus rigoureuse que celle imposée au débiteur privé dans un grand nombre de législations européennes. L'équité exige, comme l'indique la doctrine, et comme le Gouvernement Impérial Russe l'admet lui-même, qu'il y ait eu avertissement, mise en demeure adressée au débiteur d'une somme ne portant pas d'intérêts. Les mêmes motifs réclament que la mise en demeure mentionne expressément les intérêts, et concourent à faire écarter une responsabilité dépassant les simples intérêts forfaitaires.

Il résulte de la correspondance produite que le Gouvernement Impérial Russe a expressément et en termes absolument catégoriques, réclamé de la Sublime-Porte le payement du capital et « des intérêts » par note de son ambassade à Constantinople en date du 31 décembre 1890/12 janvier 1891. Entre Etats, la voie diplomatique constitue le mode de communication normal et régulier pour leurs relations de droit international public; cette mise en demeure est donc régulière en la forme.

Le Gouvernement Impérial Ottoman doit être tenu pour responsable des intérêts de retard à partir de la réception de cette mise en demeure.

Le Gouvernement Impérial Ottoman invoque, pour le cas où une responsabilité lui serait imposée, diverses *exceptions* dont il rest à examiner la portée:

6. *L'exception de la force majeure*, invoquée en première ligne, est opposable en droit international public aussi bien qu'en droit privé; le droit international doit s'adapter aux nécessités politiques. Le Gouvernement Impérial Russe admet expressément (Réplique Russe, p. 33 et note 2) que l'obligation pour un Etat d'exécuter les traités peut fléchir « si l'existence même de l'Etat vient à être en danger, si l'observation du devoir international est . . . *self destructive.* »

Il est incontestable que la Sublime-Porte prouve, à l'appui de l'exception de la force majeure (Contre-Mémoire Ottoman, p. 43, nos 119 à 128, Contre-Réplique Ottomane, p. 64, nos 382 à 398 et p. 87) que la Turquie s'est trouvée de 1881 à 1902 aux prises avec des difficultés financières de la plus extrême gravité, cumulées avec des événements intérieurs et extérieurs (insurrections, guerres) qui l'ont obligée à donner des affectations spéciales à un grand nombre de ses revenus, à subir un contrôle étranger d'une partie de ses finances, à accorder même un moratoire à la Banque Ottomane, et, en général, à ne pouvoir faire face à ses engagements qu'avec des retards ou des lacunes et cela au prix de grands sacrifices. Mais il est avéré, d'autre part, que, pendant cette même période et notamment à la suite de la création de la Banque Ottomane, la Turquie a pu contracter des emprunts à des taux favorables, en convertir d'autres, et finalement amortir une partie importante, évaluée à 350 millions de francs, de sa dette publique (Réplique Russe, p. 37). Il serait manifestement exagéré d'admettre que le payement (ou la conclusion d'un emprunt pour le payement) de la somme relativement minime d'environ six millions de francs due aux indemnitaires russes aurait mis en péril l'existence de l'Empire Ottoman ou gravement compromis sa situation intérieure ou extérieure. *L'exception de la force majeure ne saurait donc être accueillie.*

7. La Sublime-Porte soutient ensuite « que la reconnaissance d'une créance de capital au profit des indemnitaires russes constituait une *libéralité* convenue dans leur intérêt entre les deux Gouvernements » (Contre-Réplique, n° 253,

p. 19; n° 331, p. 44; n° 365, p. 55, et conclusions, p. 87). — Elle fait observer que le Code civil allemand, paragraphe 522, le Droit commun germanique, la jurisprudence autrichienne et le Droit romain invoqué à titre supplétoire (Loi 16 *praemium*, Digeste 22, 1) interdisent de frapper d'intérêts moratoires la donation. — Elle invoque surtout la sentence arbitrale rendue le 2 juillet 1881 par S.M. l'Empereur d'Autriche dans l'affaire de la Mosquitia entre la Grande-Bretagne et le Nicaragua.

Dans cette affaire, la Grande-Bretagne avait renoncé, par un traité de 1860, au protectorat sur la Mosquitia et à la ville de Grey Town (San Juan del Norte) et reconnu sur la Mosquitia la souveraineté du Nicaragua en stipulant que cette République payerait pendant dix ans au chef des Mosquitos, pour lui faciliter l'établissement du *self-government* dans ses territoires, une rente de 5,000 dollars qui ne tarda pas à demeurer impayée. Le chef des Mosquitos bénéficiait donc, dans la pensée de l'arbitre, d'une véritable libéralité, réclamée en sa faveur du Nicaragua par la Grande-Bretagne, qui, elle, avait fait des sacrifices politiques en renonçant à son protectorat et au port de Grey Town. — Dans l'opinion du Tribunal, les indemnitaires russes, eux, ont subi des dommages, ont été victimes de faits de guerre; la Turquie s'est engagée à rembourser le montant de ces dommages à toutes les victimes russes qui auraient fait évaluer leur préjudice par la commission instituée auprès de l'ambassade de Russie à Constantinople. Les décisions de cette commission n'ont pas été contestées et le Tribunal arbitral n'a pas à les reviser ni à apprécier si elles ont ou non été trop généreuses. Si l'indemnisation par la Turquie des Russes victimes des opérations de guerre n'était pas obligatoire en droit des gens commun, elle n'a rien de contraire à celui-ci et peut être considérée comme la transformation en obligation juridique d'un devoir moral par un traité de paix dans des conditions analogues à une indemnité de guerre proprement dite. — Dans toute la correspondance diplomatique échangée depuis trente ans sur cette affaire, les Russes victimes des opérations de guerre ont toujours été considérés par les deux parties signataires des accords de 1878/1879 comme des indemnitaires et non comme des donataires. Enfin, la Turquie a reçu la contre-partie de sa prétendue libéralité dans le fait de la cessation des hostilités (Réplique Russe, p. 50, paragr. 2). *Il n'est donc pas possible d'admettre l'existence d'une libéralité* et encore moins une donation, et il devient, par suite, superflu de rechercher si, en droit international public, les donateurs doivent bénéficier de l'exemption d'intérêts moratoires établie à leur profit par certaines législations privées.

8. La Sublime-Porte invoque *l'exception de la chose jugée*, en s'appuyant sur le fait que trois indemnitaires ont demandé à la commission instituée auprès de l'ambassade de Russie à Constantinople des intérêts jusqu'à parfait payement, que la commission a écarté leur requête et que cette solution négative serait encore plus certainement intervenue à l'égard des autres indemnitaires qui n'ont pas réclamé de semblables intérêts. (Contre-Réplique Ottomane, p. 86).

Cette exception ne saurait être accueillie parce que, même en admettant que la commission de Constantinople puisse être considérée comme un tribunal, la question actuellement pendante est celle de savoir si des dommages-intérêts sont dus, *a posteriori*, à raison des dates auxquelles ont été payées les indemnités évaluées en 1879/81 par la Commission; or celle-ci n'a pas jugé et n'a pu juger cette question.

9. La Sublime-Porte invoque, comme dernière exception, le fait « qu'il a été rentendu, tacitement et même expressément, pendant tout le cours des onze ou douze dernières années de correspondances diplomatiques, que la Russie ne réclamait pas d'intérêts ni de dommages-intérêts d'aucune sorte qui auraient été à la charge de l'Empire Ottoman » et « que le Gouvernement Impérial de

Russie, une fois le capital intégralement mis à sa disposition, ne pouvait pas valablement revenir d'une façon unilatérale sur l'entente convenue de sa part » (Contre-Réplique Ottomane, pp. 89-91).

Le Gouvernement Impérial Ottoman fait observer avec raison que si la Russie a fait parvenir à Constantinople, par la voie diplomatique, le 31 décembre 1890/12 janvier 1891, une mise en demeure régulière d'avoir à payer le capital et les intérêts, il résulte, d'autre part, de la correspondance *subséquente*, qu'à l'occasion du payement des acomptes, aucune réserve d'intérêts n'a figuré dans les reçus délivrés par l'ambassade, et que celle-ci n'a jamais imputé les sommes reçues sur les intérêts. Il en résulte aussi que les Parties ont non seulement ébauché des combinaisons pour arriver au payement, mais se sont abstenues de faire mention des intérêts pendant dix ans environ. Il en résulte surtout que les deux Gouvernements ont interprété de façon identique le terme de *reliquat* de l'indemnité; que ce terme, employé pour la première fois par le Ministère Ottoman des Affaires Etrangères dans une communication du 27 mars 1893, revient fréquemment dans la suite; que les deux Gouvernements ont visé constamment par le mot *reliquat* les fractions du capital restant dû à la date des notes échangées, ce qui laisse de côté les intérêts moratoires; que l'ambassadeur de Russie à Constantinople a écrit le 23 mai/4 juin 1894: « Je suis obligé d'insister pour que la *totalité du reliquat* dû aux sujets russes, *qui monte à 91,000 livres turques*, soit, sans plus de retard, versé à l'ambassade, afin de faire droit aux justes plaintes et réclamations des intéressés . . . et mettre ainsi réellement, selon l'expression de Votre Excellence, fin aux incidents auxquels elle avait donné lieu »; que cette somme de 91,000 livres turques était exactement celle qui demeurait alors due sur le capital et qu'ainsi les intérêts moratoires ont été laissés de côté; — que le 3 octobre de la même année 1894, la Turquie, sur le point de payer un acompte de 50,000 livres, a annoncé à l'ambassade, sans rencontrer d'objections, que la Banque Ottomane « garantira le payement du *reliquat de 41,000 livres turques* »; — que le 13/25 janvier 1896, l'ambassade a repris le même terme de reliquat de l'indemnité tout en protestant contre l'affectation par la Turquie à la Banque Ottomane, de délégations sur des revenus déjà engagés au Gouvernement Impérial Russe pour le payement de l'indemnité de guerre; — que, le 11 février de cette même année 1896, à l'occasion de la discussion des ressources à fournir à la Banque Ottomane, la Sublime-Porte a mentionné, dans une note adressée à l'ambassade, « les 43,978 livres turques représentant *le reliquat de l'indemnité* »; — que, quelques jours plus tard, le 10/22 février, l'ambassade a répondu en se servant des mêmes mots « *solde* » ou « *reliquat de l'indemnité*, » et, que le 28 mai, le Ministère Ottoman des Affaires Etrangères a mentionné derechef, « la somme de 43,978 livres turques représentant ledit reliquat »; — qu'il en a été de même dans une note de l'ambassade datée du 25 avril/8 mai 1900, bien qu'il se fût écoulé près de quatre ans entre ces communications et celles de 1896 et qu'un rappel de la question des intérêts s'imposât en quelque sorte après un aussi long délai; que cette même expression « reliquat de l'indemnité » figure dans une note de la Sublime-Porte du 5 juillet 1900; — qu'enfin, le 3/16 mars 1901, l'Ambassade de Russie, après avoir constaté que la Banque Ottomane n'a pas fait de nouveaux versements « pour le payement des 43, 978 livres turques, montant du *reliquat de l'indemnité* due aux sujets russes, » a demandé l'envoi à qui de droit d'ordres « catégoriques pour le payement sans plus de retard des sommes susmentionnées »; — que ce reliquat ayant, à un petit solde près, été tenu par la Banque Ottomane à la disposition de l'ambassade, c'est seulement au bout de plusieurs mois, le 23 juin/6 juillet, que cette dernière a transmis à la Sublime-Porte une demande « des intéressés » concluant au payement d'une vingtaine de millions de francs pour

intérêts de retard, en exprimant l'espoir que la Sublime-Porte « n'hésitera pas à reconnaître, en principe, le bien fondé de la réclamation », sauf « à déférer l'examen des détails à une commission » mixte russo-turque; — qu'en résumé, depuis onze ans et davantage, et jusqu'à une date postérieure au payement du reliquat du capital, il n'avait non seulement plus été question d'intérêts entre les deux Gouvernements mais été à maintes reprises fait mention seulement du reliquat du capital.

Dès l'instant où le Tribunal a reconnu que, d'après les principes généraux et la coutume en droit international public, il y avait similitude des situations entre un Etat et un particulier débiteurs d'une somme conventionnelle liquide et exigible, il est équitable et juridique d'appliquer aussi par analogie les règles de droit privé commun aux cas où la demeure doit être considérée comme purgée et le bénéfice de celle-ci supprimée. — En droit privé, les effets de la demeure sont supprimés lorsque le créancier, après avoir constitué le débiteur en demeure, accorde un ou plusieurs délais pour satisfaire à l'obligation principale sans réserver les droits acquis par la demeure (*Toullier-Duvergier, Droit français*, tome III, p. 159, n° 256), ou encore lorsque « le créancier ne donne pas suite à la sommation qu'il avait faite au débiteur, » et « ces règles s'appliquent aux dommages-intérêts et aussi aux intérêts dus pour l'inexécution de l'obligation . . . ou pour retard dans l'exécution » (Duranton, *Droit français*, [3e ed.] X, p. 470; Aubry *et* Rau, *Droit Civil*, 1871, IV, p. 99; Berney, *De la demeure*, etc., Lausanne, 1886, p. 62; Windscheid, *Lehrbuch des Pandektenrechts*, 1879, p. 99; Demolombe, X p. 49; Larombière, I, art. 1139, n° 22, etc.).

Entre le Gouvernement Impérial Russe et la Sublime-Porte, il y a donc eu renonciation aux intérêts de la part de la Russie, puisque son ambassade a successivement accepté sans discussion ni réserve et reproduit à maintes reprises dans sa propre correspondance diplomatique les chiffres du reliquat de l'indemnité comme identiques aux chiffres du reliquat en capital. — En d'autres termes, la correspondance des dernières années établit que les deux Parties ont interprété en fait, les actes de 1879 comme impliquant l'identité entre le payement du solde du capital et le payement du solde auquel avaient droit les indemnitaires, ce qui impliquait l'abandon des intérêts ou dommages-intérêts moratoires.

Le Gouvernement Impérial Russe ne peut, une fois le capital de l'indemnité intégralement versé ou mis à sa disposition, revenir valablement d'une façon unilatérale sur une interprétation acceptée et pratiquée en son nom par son ambassade.

III

EN CONCLUSION

Le Tribunal arbitral, se basant sur les observations de droit et de fait qui précèdent, est d'avis

qu'en principe, le Gouvernement Impérial Ottoman était tenu, vis-à-vis du Gouvernement Impérial de Russie, à des indemnités moratoires à partir du 31 décembre 1890/12 janvier 1891, date de la réception d'une mise en demeure explicite et régulière,

mais que, de fait, le bénéfice de cette mise en demeure ayant cessé pour le Gouvernement Impérial de Russie par suite de la renonciation subséquente de son ambassade à Constantinople, le Gouvernement Impérial Ottoman n'est pas tenu aujourd'hui de lui payer des dommages-intérêts à raison des dates auxquelles a été effectué le payement des indemnités,

et, en conséquence,

il est répondu négativement à la question posée au chiffre 1 de l'article 3 du Compromis et ainsi conçue: « Oui ou non, le Gouvernement Impérial Ottoman est-il tenu de payer aux indemnitaires russes des dommages-intérêts à raison des dates auxquelles ledit Gouvernement a procédé au payement des indemnités fixées en exécution de l'article 5 du traité du 27 janvier/8 février 1879, ainsi que du Protocole de même date »?

FAIT à La Haye, dans l'hôtel de la Cour Permanente d'Arbitrage, le 11 novembre 1912.

Le Président: LARDY

Le Secrétaire général: Michiels VAN VERDUYNEN

Le Secrétaire: RÖELL

AFFAIRE DU CARTHAGE

PARTIES: France, Italie.

COMPROMIS: 6 mars 1912.

ARBITRES: Cour permanente d'Arbitrage: G. Fusinato; K. Hj. L. Hammarskjöld; J. Kriege; L. Renault; Baron M. de Taube.

SENTENCE: 6 mai 1913.

Capture et saisie momentanée, en haute mer, au cours de la guerre turco-italienne en 1912, du vapeur postal français, le Carthage, par un bâtiment de guerre italien — Allégation que le Carthage aurait eu à bord des objets constituant de la contrebande de guerre — Réclamation du Gouvernement français pour le compte du navire saisi — Droit de visite — Manquement aux obligations internationales — Sanction — Fixation du montant des pertes et dommages éprouvés par les particuliers intéressés au navire et à son expédition.

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APERÇU [1]

Au cours de la guerre turco-italienne en Afrique, en 1912, les italiens établirent une stricte surveillance pour empêcher l'envoi par Tunis, d'approvisionnements militaires ou de secours d'aucune sorte, aux Turcs à Tripoli. Comme résultat, le Carthage, navire appartenant à la Compagnie générale transatlantique, en route de Marseille à Tunis, fut arrêté, le 16 janvier 1912, en pleine mer, par un vaisseau de guerre italien, parce qu'il avait à bord un aéroplane et les parties d'un autre, consignés à l'adresse d'un particulier de Tunis, et que les italiens considéraient comme constituant de la contrebande de guerre. Le transbordement de l'aéroplane d'un navire à l'autre n'ayant pu être opéré, le *Carthage* fut conduit à Cagliari, où il fut retenu jusqu'au 20 janvier 1912. Le Gouvernement italien ayant reçu l'assurance que l'aéroplane était simplement destiné à des exhibitions publiques et que le propriétaire n'avait aucune intention d'offrir ses services au Gouvernement turc, l'aéroplane fut relâché le 21 janvier 1912. Le Gouvernement français demanda au Gouvernement italien des dommages-intérêts pour atteinte portée au pavillon français, pour réparation du préjudice moral et politique résultant de l'inobservation du droit commun international et des conventions entre les deux Gouvernements, ainsi que pour les pertes et dommages réclamés par les particuliers intéressés au navire et à son expédition. Le Gouvernement italien présenta une contre-réclamation contre la France pour le montant des frais occasionnés par la saisie du *Carthage*. En vertu d'un compromis en date du 6 mars 1912, la controverse fut soumise, à un tribunal constitué de membres de la Cour permanente d'arbitrage de La Haye. Ce tribunal se composait de Guido Fusinato, d'Italie, Knut Hjalmar Léonard de Hammarskjöld, de Suède, J. Kriege, d'Allemagne, Louis Renault, de France et du Baron Michel de Taube, de Russie. Ses séances commencèrent le 31 mars 1913, et se terminèrent le 6 mai 1913, date à laquelle la sentence fut rendue.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 350.

COMPROMIS RELATIF A LA QUESTION SOULEVÉE PAR LA CAPTURE ET LA SAISIE MOMENTANÉE DU VAPEUR POSTAL FRANÇAIS « CARTHAGE ». SIGNÉ A PARIS, LE 6 MARS 1912 [1]

Le Gouvernement de la République Française et le Gouvernement Royal Italien, s'étant mis d'accord le 26 janvier 1912 par application de la Convention d'arbitrage du 25 décembre 1903, renouvelée le 24 décembre 1908 pour confier à un Tribunal d'arbitrage l'examen de la capture et de la saisie momentanée du vapeur postal français « Carthage » par les autorités navales italiennes, ainsi que la mission de se prononcer sur les conséquences qui en dérivent,

Les soussignés, dûment autorisés à cet effet, sont convenus du Compromis suivant:

Article 1. Un Tribunal arbitral, composé comme il est dit ci-après, est chargé de résoudre les questions suivantes:

1°. Les autorités navales italiennes étaient-elles en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Carthage »?

2°. Quelles conséquences pécuniaires ou autres doivent résulter de la solution donnée à la question précédente?

Article 2. Le Tribunal sera composé de cinq Arbitres que les deux Gouvernements choisiront parmi les Membres de la Cour permanente d'Arbitrage de La Haye, en désignant celui d'entre eux qui remplira les fonctions de Surarbitre.

Article 3. A la date du 15 juin 1912, chaque Partie déposera au Bureau de la Cour permanente d'Arbitrage quinze exemplaires de son mémoire, avec les copies certifiées conformes de tous les documents et pièces qu'elle compte invoquer dans la cause.

Le Bureau en assurera sans retard la transmission aux Arbitres et aux Parties, savoir deux exemplaires pour chaque Arbitre, trois exemplaires pour la Partie adverse; deux exemplaires resteront dans les archives du Bureau.

A la date du 15 août 1912, chaque Partie déposera dans les mêmes conditions que ci-dessus son contre-mémoire avec les pièces à l'appui et ses conclusions finales.

Articles 4. Chacune des Parties déposera au Bureau de la Cour Permanente d'Arbitrage de La Haye, en même temps que son mémoire et à titre de provision, une somme qui sera fixée d'un commun accord.

Article 5. Le Tribunal se réunira à La Haye, sur la convocation de son Président, dans la deuxième quinzaine du mois de septembre 1912.

Article 6. Chaque Partie sera représentée par un Agent avec mission de servir d'intermédiaire entre elle et le Tribunal.

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Compromis, protocoles des séances et sentences du tribunal d'arbitrage franco-italien. Affaire du « Carthage »*, p. 5.

Le Tribunal pourra, s'il l'estime nécessaire, demander à l'un ou à l'autre des Agents de lui fournir des explications orales ou écrites auxquelles l'Agent de la Partie adverse aura le droit de répondre.

Article 7. La langue française est la langue du Tribunal. Chaque Partie pourra faire usage de sa propre langue.

Article 8. La sentence du Tribunal devra être rendue dans le plus bref délai possible et dans tous les cas dans les trente jours qui suivront la clôture des débats. Toutefois, ce délai pourra être prolongé à la demande du Tribunal et du consentement des Parties.

Article 9. Le Tribunal est compétent pour régler les conditions d'exécution de sa sentence.

Article 10. Pour tout ce qui n'est pas prévu par le présent Compromis, les dispositions de la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux seront applicables au présent Arbitrage.

FAIT en double à Paris, le 6 mars 1912.

Signé: L. RENAULT

Signé: G. FUSINATO

SENTENCE DU TRIBUNAL ARBITRAL DANS L'AFFAIRE DU VAPEUR POSTAL FRANÇAIS « CARTHAGE ». LA HAYE, LE 6 MAI 1913 [1]

Capture and temporary detention, on the high sea, during the Turco-Italian war in 1912, of the French mail steamer *Carthage* by an Italian warship — Allegation that the Carthage had on board contraband of war — Claim of the French Government on behalf of the seized vessel — Right of visit and search — Failure to fulfil international obligations — Sanctions — Determination of the amount of the losses and damages suffered by the private parties interested in the steamer and its voyage.

CONSIDÉRANT que, par un Accord du 26 janvier 1912 et par un Compromis du 6 mars suivant, le Gouvernement de la République Française et le Gouvernement Royal Italien sont convenus de soumettre à un Tribunal Arbitral composé de cinq Membres la solution des questions suivantes:

1°. Les autorités navales italiennes étaient-elles en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Carthage »?

2°. Quelles conséquences pécuniaires ou autres doivent résulter de la solution donnée à la question précédente?

CONSIDÉRANT qu'en exécution de ce Compromis les deux Gouvernements ont choisi, d'un commun accord, pour constituer le Tribunal Arbitral les Membres suivants de la Cour Permanente d'Arbitrage:

Son Excellence Monsieur Guido Fusinato, Docteur en droit, Ministre d'Etat, ancien Ministre de l'Instruction publique, Professeur honoraire de droit international à l'Université de Turin, Député, Conseiller d'Etat;

Monsieur Knut Hjalmar Léonard de Hammarskjöld, Docteur en droit, ancien Ministre de la Justice, ancien Ministre des Cultes et de l'Instruction publique, ancien Envoyé extraordinaire et Ministre plénipotentiaire à Copenhague, ancien Président de la Cour d'appel de Jönköping, ancien Professeur à la Faculté de droit d'Upsal, Gouverneur de la province d'Upsal;

Monsieur Kriege, Docteur en droit, Conseiller actuel intime de Légation et Directeur au Département des Affaires Etrangères, Plénipotentiaire au Conseil Fédéral-Allemand;

Monsieur Louis Renault, Ministre plénipotentiaire, Membre de l'Institut, Professeur à la Faculté de droit de l'Université de Paris et à l'Ecole libre des sciences politiques, Jurisconsulte du Ministère des Affaires Etrangères;

Son Excellence le Baron Michel de Taube, Docteur en droit, Adjoint du Ministre de l'Instruction publique de Russie, Conseiller d'Etat actuel;

que les deux Gouvernements ont, en même temps, désigné Monsieur de Hammarskjöld pour remplir les fonctions de Président.

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[1] Bureau International de la Cour Permanente d'Arbitrage, *Compromis, protocoles des séances et sentences du tribunal d'arbitrage franco-italien. Affaire du « Carthage »*, p. 112.

CONSIDÉRANT que, en exécution du Compromis du 6 mars 1912, les Mémoires et Contre-Mémoires ont été dûment échangés entre les Parties et communiqués aux Arbitres;

CONSIDÉRANT que le Tribunal, constitué comme il est dit ci-dessus, s'est réuni à La Haye le 31 mars 1913;

que les deux Gouvernements ont respectivement désigné comme Agents et Conseils,

le Gouvernement de la République Française:

Monsieur Henri Fromageot, Avocat à la Cour d'appel de Paris, Jurisconsulte suppléant du Ministère des Affaires Etrangères, Conseiller du Département de la Marine en droit international, Agent;

Monsieur André Hesse, Avocat à la Cour d'appel de Paris, Membre de la Chambre des Députés, Conseil;

Le Gouvernement Royal Italien:

Monsieur Arturo Ricci-Busatti, Envoyé extraordinaire et Ministre plénipotentiaire, Chef du Bureau du Contentieux et de la Législation au Ministère Royal des Affaires Etrangères, Agent;

Monsieur Dionisio Anzilotti, Professeur de droit international à l'Université de Rome, Conseil.

CONSIDÉRANT que les Agents des Parties ont présenté au Tribunal les conclusions suivantes, savoir,

l'Agent du Gouvernement de la République Française:

PLAISE AU TRIBUNAL,

Sur la première question posée par le Compromis,

Dire que les autorités navales italiennes n'étaient pas en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Carthage »;

En conséquence et sur la seconde question,

Dire que le Gouvernement Royal Italien sera tenu de verser au Gouvernement de la République Française à titre de dommages-intérêts:

1°. La somme de *un franc* pour atteinte portée au pavillon français;

2°. La somme de cent mille francs pour réparation du préjudice moral et politique résultant de l'inobservation du droit commun international et des conventions réciproquement obligatoires pour l'Italie comme pour la France;

3°. La somme de cinq cent soixante-seize mille sept cent trente-huit francs vingt-trois centimes, montant total des pertes et dommages réclamés par les particuliers intéressés au navire et à son expédition;

Dire que la somme susdite de cent mille francs sera versée au Gouvernement de la République pour le bénéfice en être attribué à telle œuvre ou institution d'intérêt international qu'il plaira au Tribunal d'indiquer;

Subsidiairement et dans le cas où le Tribunal ne se croirait pas, dès à présent, suffisamment éclairé sur le bien fondé des réclamations pariculières,

Dire que, par tel ou tels de ses membres qu'il lui plaira de commettre à cet effet, il sera, en présence des Agents et Conseils des deux Gouvernements, procédé, en la Chambre de ses délibérations, à l'examen de chacune desdites réclamations particulières;

Dans tous les cas, et par application de l'article 9 du Compromis,

Dire que, à l'expiration d'un délai de trois mois à compter du jour de la sentence, les sommes mises à la charge du Gouvernement Royal Italien et non encore versées seront productives d'intérêts à raison de quatre pour cent par an.

Et l'Agent du Gouvernement Royal Italien:

PLAISE AU TRIBUNAL,

Sur la première question posée par le Compromis,

Dire et juger que les autorités navales italiennes étaient pleinement en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Carthage »;

En conséquence et sur la seconde question,

Dire et juger qu'aucune conséquence pécuniaire ou autre ne saurait résulter, à la charge du Gouvernement Royal Italien, de la capture et de la saisie momentanée du vapeur postal français « Carthage »;

Dire que le Gouvernement Français sera tenu de verser au Gouvernement Italien la somme de deux mille soixante-douxe francs vingt-cinq centimes, montant des frais occasionnés par la saisie du « Carthage »;

Dire que, à l'expiration d'un délai de trois mois à compter du jour de la sentence, la somme mise à la charge du Gouvernement de la République Française sera, si elle n'a pas encore été versée, productive d'intérêts à raison de quatre pour cent par an.

CONSIDÉRANT que, après que le Tribunal eut entendu les exposés oraux des Agents des Parties et les explications qu'ils lui ont fournies sur sa demande, les débats ont été dûment déclarés clos.

EN FAIT:

CONSIDÉRANT que le vapeur postal français « Carthage, » de la Compagnie Générale Transatlantique, au cours d'un voyage régulier entre Marseille et Tunis, fut arrêté, le 16 janvier 1912, à 6 heures 30 du matin, en pleine mer, à 17 milles des côtes de Sardaigne, par le contre-torpilleur de la Marine Royale Italienne « Agordat »;

que le commandant de l'« Agordat », ayant constaté la présence à bord du « Carthage » d'un aéroplane appartenant au sieur Duval, avaiteur français, et expédié à Tunis à l'adresse de celui-ci, a déclaré au capitaine du « Carthage » que l'aéroplane en question était considéré par le Gouvernement Italien comme contrebande de guerre;

que, le transbordement de l'aéroplane n'ayant pu être opéré, le capitaine du « Carthage » a reçu l'ordre de suivre l'« Agordat » à Cagliari, où il a été retenu jusqu'au 20 janvier;

EN DROIT:

CONSIDÉRANT que, d'après les principes universellement admis, un bâtiment de guerre belligérant a, en thèse générale et sans conditions particulières, le droit d'arrêter en pleine mer un navire de commerce neutre et de procéder à la visite pour s'assurer s'il observe les règles sur la neutralité, spécialement au point de vue de la contrebande;

CONSIDÉRANT, d'autre part, que la légitimité de tout acte dépassant les limites de la visite dépend de l'existence, soit d'un trafic de contrebande, soit de motifs suffisants pour y croire,

que, à cet égard, il faut s'en tenir aux motifs d'ordre juridique;

CONSIDÉRANT que, dans l'espèce, le « Carthage » n'a pas été seulement arrêté et visité par l'« Agordat », mais aussi amené à Cagliari, séquestré et retenu un certain temps, après lequel il a été relaxé par voie administrative;

CONSIDÉRANT que le but poursuivi par les mesures prises contre le paquebot-poste français était d'empêcher le transport de l'aéroplane appartenant au sieur Duval, et embarqué sur le « Carthage » à l'adresse de ce même Duval, à Tunis;

que cet aéroplane était considéré par les autorités italiennes comme constituant de la contrebande de guerre, tant par sa nature que par sa destination qui, en réalité, aurait été pour les forces ottomanes en Tripolitaine;

CONSIDÉRANT, pour ce qui concerne la destination hostile de l'aéroplane, élément essentiel de la saisissabilité,

que les renseignements possédés par les autorités italiennes étaient d'une nature trop générale et avaient trop peu de connexité avec l'aéroplane dont il s'agit, pour constituer des motifs juridiques suffisants de croire à une destination hostile quelconque et, par conséquent, pour justifier la capture du navire qui transportait l'aéroplane;

que la dépêche de Marseille, relatant certains propos tenus par le mécanicien du sieur Duval, n'est parvenue aux autorités italiennes qu'après que le « Carthage » avait été arrêté et conduit à Cagliari et n'a pu, par suite, motiver ces mesures; que, d'ailleurs, elle n'aurait pu, dans tous les cas, fournir des motifs suffisants dans le sens de ce qui a été dit précédemment;

CONSIDÉRANT que, ce résultat acquis, il n'importe pas au Tribunal de rechercher si l'aéroplane devait ou non par sa nature être compris dans les articles de la contrebande, soit relative, soit absolue, pas plus que d'examiner si la théorie du voyage continu serait ou non applicable dans l'espèce;

CONSIDÉRANT que le Tribunal trouve également superflu d'examiner s'il y a eu lors des mesures prises contre le « Carthage », des irrégularités de forme et si, en cas d'affirmative, ces irrégularités étaient de nature à vicier des mesures autrement légitimes;

CONSIDÉRANT que les autorités italiennes n'ont demandé la remise du *port postal* que pour le faire parvenir à destination le plus tôt possible,

que cette demande, qui paraît avoir été d'abord mal comprise par le capitaine du « Carthage », était conforme à la Convention du 18 octobre 1907 *relative à certaines restrictions à l'exercice du droit de capture*, qui, d'ailleurs, n'était pas ratifiée par les belligérants.

Sur la demande tendant à faire condamner le Gouvernement Royal Italien à verser au Gouvernement de la République Française à titre de dommages-intérêts:

1°. la somme de *un franc* pour atteinte portée au pavillon français;

2°. la somme de cent mille francs pour réparation du préjudice moral et politique résultant de l'inobservation du droit commun international et des conventions réciproquement obligatoires pour l'Italie comme pour la France,

CONSIDÉRANT que, pour le cas où une Puissance aurait manqué à remplir ses obligations, soit générales, soit spéciales, vis-à-vis d'une autre Puissance, la constatation de ce fait, surtout dans une sentence arbitrale, constitue déjà une sanction sérieuse;

que cette sanction est renforcée, le cas échéant, par le paiement de dommages-intérêts pour les pertes matérielles;

que, en thèse générale et abstraction faite de situations particulières, ces sanctions paraissent suffisantes;

que, également en thèse générale, l'introduction d'une autre sanction pécuniaire paraît être superflue et dépasser le but de la juridiction internationale;

CONSIDÉRANT que, par application de ce qui vient d'être dit, les circonstances de la cause présente ne sauraient motiver une telle sanction supplémentaire; que, sans autre examen, il n'y a donc pas lieu de donner suite à la demande susmentionnée.

Sur la demande de l'Agent français tendant à faire condamner le Gouvernement Italien à payer la somme de cinq cent soixante-seize mille sept cent trente-huit francs vingt-trois centimes, montant total des pertes et dommages réclamés par les particuliers intéressés au navire et à son expédition,

CONSIDÉRANT que la demande d'une indemnité est, en principe, justifiée;

CONSIDÉRANT que le Tribunal, après avoir entendu les explications concordantes de deux de ses membres chargés par lui de procéder à une enquête sur lesdites réclamations, a évalué à soixante-quinze mille francs le montant de l'indemnité due à la Compagnie générale transatlantique, à vingt-cinq mille francs le montant de l'indemnité due à l'aviateur Duval et consorts, enfin à soixante mille francs l'indemnité due à l'ensemble des passagers et chargeurs, soit à cent soixante mille francs la somme totale à payer par le Gouvernement Italien au Gouvernement Français.

PAR CES MOTIFS,

Le Tribunal Arbitral déclare et prononce ce qui suit:

Les autorités navales italiennes n'étaient pas en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Carthage ».

Le Gouvernement Royal Italien sera tenu, dans les trois mois de la présente sentence, de verser au Gouvernement de la République Française la somme de cent soixante mille francs, montant des pertes et dommages éprouvés, à raison de la capture et de la saisie du « Carthage » par les particuliers intéressés au navire et à son expédition.

Il n'y a pas lieu de donner suite aux autres réclamations contenues dans les conclusions des deux Parties.

FAIT à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, le 6 mai 1913.

Le Président: Hj. L. HAMMARSKJÖLD

Le Secrétaire général: Michiels VAN VERDUYNEN

Le Secrétaire: RÖELL

AFFAIRE DU MANOUBA

PARTIES: France, Italie.

COMPROMIS: 6 mars 1912.

ARBITRES: Cour permanente d'Arbitrage: G. Fusinato; K. Hj. L. Hammarskjöld; J. Kriege; L. Renault; Baron M. de Taube.

SENTENCE: 6 mai 1913.

DOCUMENTS ADDITIONNELS: Note commune du 26 janvier 1912; Accord du 4 avril 1912.

Capture et saisie momentanée, au cours de la guerre turco-italienne en 1912, du vapeur postal français, le Manouba, par un bâtiment de guerre italien — Arrestation de passagers turcs se trouvant à bord de ce vapeur — Allégation que ces passagers auraient été des militaires enrôlés dans l'armée ennemie — Réclamation du Gouvernement français pour le compte du navire saisi — Droit de visite — Transport de passagers suspects d'avoir la qualité de belligérants — Manquement aux obligations internationales — Sanction — Fixation du montant des pertes et dommages éprouvés par les particuliers interessés au navire et à son expédition — Indemnité due au Gouvernement italien couvrant les frais de surveillance du Manouba.

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APERÇU [1]

Au cours de la guerre concernant Tripoli et la Cyrénaïque entre la Turquie et l'Italie, le Gouvernement ottoman demanda, le 5 janvier 1912, au Gouvernement français de faciliter le passage par Tunis d'une Mission du Croissant-Rouge ottoman désirant se rendre au théâtre de la guerre. Cette demande fut acceptée par le Gouvernement français. Toutefois, l'ambassadeur d'Italie ayant protesté contre la concession de cette faveur, le Gouvernement français lui donna l'assurance que les sujets ottomans en question étaient des membres de la Mission du Croissant-Rouge, et ordonna aux autorités de Tunis de s'assurer de ce fait, avant de laisser passer lesdits sujets ottomans. L'ambassadeur d'Italie fut satisfait de ce renseignement, ainsi que des mesures prises, et il envoya une communication à cet effet à son Gouvernement. Cependant, avant que cette communication fût arrivée à destination, le *Manouba,* navire français transportant lesdits sujets ottomans, fut saisi le 18 janvier 1912, par un vaisseau de guerre italien, et conduit à Cagliari, où il arriva le même jour. Les italiens, maintenant que ces sujets ottomans portaient des armes et de l'argent à destination des forces ottomanes à Tripoli, exigèrent qu'ils leur fussent livrés, et ils saisirent le navire, sur le refus du capitaine du *Manouba* de faire suite à la sommation. L'ambassade de France fut informée de ce qui s'était passé, et après avoir reçu l'assurance de la part des italiens que les passagers ottomans étaient des militaires, instruisit le vice-consul français à Cagliari de remettre ces passagers aux autorités italiennes. Ce fait fut accompli dans l'après-midi du 19 janvier 1912, et le navire continua son voyage. Des représentations pressantes furent faites immédiatement au Gouvernement italien par le Gouvernement français, qui réclama la relâche des sujets ottomans et une réparation pour atteinte portée au pavillon français, pour infraction aux engagements conventionnels entre les deux pays, particulièrement à l'article 2 de la Convention de La Haye de 1907, ayant trait à certaines restrictions au droit de capture dans la guerre maritime, ainsi qu'à l'article 9 de la Convention de Genève du 6 juillet 1906 pour l'amélioration du sort des blessés et malades dans les armées en campagne, ainsi que pour violation des engagements verbaux entre les deux Gouvernements relatifs aux passagers du *Manouba.* Des indemnités pour les particuliers intéressés au navire et à son expédition furent également réclamées. Le Gouvernement italien consentit à livrer les sujets ottomans au consul de France à Cagliari, pour qu'ils fussent renvoyés, sur la responsabilité de la France, au port où ils s'étaient embarqués. Cependant, le Gouvernement italien ne consentit pas aux autres demandes du Gouvernement français, et fit une contre-réclamation pour violation des droits de belligérants qu'il possédait en vertu du droit international, afin de contrôler la véritable qualité des individus trouvés à bord de navires de commerce neutres et soupçonnés d'être des militaires ennemis, ainsi que pour le remboursement des frais occasionnés par la saisie du navire. La controverse fut

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 363.

soumise, en vertu d'un compromis en date du 6 mars 1912, à un tribunal d'arbitrage composé de membres de la Cour permanente d'arbitrage de La Haye. Le tribunal fut constitué comme suit: Guido Fusinato, d'Italie, Knut Hjalmar Léonard de Hammarskjöld, de Suède, J. Kriege, d'Allemagne, Louis Renault, de France et le Baron Michel de Taube, de Russie. Les séances commencèrent le 31 mars 1913 et prirent fin le 6 mai 1913, date à laquelle la sentence fut rendue.

COMPROMIS RELATIF A LA QUESTION SOULEVÉE PAR LA CAPTURE ET LA SAISIE MOMENTANÉE DU VAPEUR POSTAL FRANÇAIS « MANOUBA ». SIGNÉ A PARIS, LE 6 MARS 1912 [1]

Le Gouvernement de la République Française et le Gouvernement Royal Italien, s'étant mis d'accord le 26 janvier 1912 par application de la Convention d'arbitrage franco-italienne du 25 décembre 1903, renouvelée le 24 décembre 1908 pour confier à un Tribunal d'arbitrage l'examen de la capture et de la saisie momentanée du vapeur postal français « Manouba » par les autorités navales italiennes notamment dans les circonstances spéciales où cette opération a été accomplie et de l'arrestation de vingt-neuf passagers ottomans qui s'y trouvaient embarqués, ainsi que la mission de se prononcer sur les conséquences qui en dérivent,

Les soussignés, dûment autorisés à cet effet, sont convenus du Compromis suivant:

Article 1. Un Tribunal arbitral, composé comme il est dit ci-après, est chargé de résoudre les questions suivantes:

1°. Les autorités navales italiennes étaient-elles, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Manouba », ainsi qu'à l'arrestation des vingt-neuf passagers ottomans qui s'y trouvaient embarqués?

2°. Quelles conséquences pécuniaires ou autres doivent résulter de la solution donnée à la question précédente?

Article 2. Le Tribunal sera composé de cinq Arbitres que les deux Gouvernements choisiront parmi les Membres de la Cour permanente d'Arbitrage de La Haye, en désignant celui d'entre eux qui remplira les fonctions de Sur-arbitre.

Article 3. A la date du 15 juin 1912, chaque Partie déposera au Bureau de la Cour permanente d'Arbitrage quinze exemplaires de son mémoire, avec les copies certifiées conformes de tous les documents et pièces qu'elle compte invoquer dans la cause.

Le Bureau en assurera sans retard la transmission aux Arbitres et aux Parties, savoir deux exemplaires pour chaque Arbitre, trois exemplaires pour la Partie adverse; deux exemplaires resteront dans les archives du Bureau.

A la date du 15 août 1912, chaque Partie déposera dans les mêmes conditions que ci-dessus, son contre-mémoire avec les pièces à l'appui et ses conclusions finales.

Article 4. Chacune des Parties déposera au Bureau de la Cour permanente d'Arbitrage de La Haye, en même temps que son mémoire et à titre de provision, une somme qui sera fixée d'un commun accord.

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Compromis, protocoles des séances et sentences du tribunal d'arbitrage franco-italien. Affaire du « Manouba »*, p. 9.

Article 5. Le Tribunal se réunira à La Haye, sur la convocation de son Président, dans la deuxième quinzaine du mois de septembre 1912.

Article 6. Chaque Partie sera représentée par un Agent avec mission de servir d'intermédiaire entre elle et le Tribunal.

Le Tribunal pourra, s'il l'estime nécessaire, demander à l'un ou à l'autre des Agents de lui fournir des explications orales ou écrites, auxquelles l'Agent de la Partie adverse aura le droit de répondre.

Article 7. La langue française est la langue du Tribunal. Chaque Partie pourra faire usage de sa propre langue.

Article 8. La sentence du Tribunal sera rendue dans le plus bref délai possible et dans tous les cas dans les trente jours qui suivront la clôture des débats. Toutefois, ce délai pourra être prolongé à la demande du Tribunal et du consentement des Parties.

Article 9. Le Tribunal est compétent pour régler les conditions d'exécution de sa sentence.

Article 10. Pour tout ce qui n'est pas prévu par le présent Compromis, les dispositions de la Convention de La Haye du 18 octobre 1907 pour le règlement pacifique des conflits internationaux seront applicables au présent Arbitrage.

Fait en double à Paris, le 6 mars 1912.

Signé: L. RENAULT

Signé: G. FUSINATO

SENTENCE DU TRIBUNAL ARBITRAL DANS L'AFFAIRE DU VAPEUR POSTAL FRANÇAIS « MANOUBA ». LA HAYE, LE 6 MAI 1913 [1]

Capture and temporary detention, during the Turco-Italian war in 1912, of the French mail steamer *Manouba* by an Italian warship — Arrest of Ottoman passengers on board that steamer — Allegation that these passengers were military persons enrolled in the enemy's army — Claim of the French Government on behalf of the seized vessel — Right of visit and search — Carriage of passengers suspected of being belligerents — Failure to fulfil international obligations — Sanctions — Determination of the amount of losses and damages sustained by the private individuals interested in the steamer and its voyage — Indemnity, due to the Italian Government, covering the expenses of guarding the Manouba.

CONSIDÉRANT que, par un Accord du 26 janvier 1912 et par un Compromis du 6 mars suivant, le Gouvernement de la République Française et le Gouvernement Royal Italien sont convenus de soumettre à un Tribunal Arbitral composé de cinq Membres la solution des questions suivantes:

1°. Les autorités navales italiennes étaient-elles, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Manouba » ainsi qu'à l'arrestation des vingt-neuf passagers ottomans qui s'y trouvaient embarqués?

2°. Quelles conséquences pécuniaires ou autres doivent résulter de la solution donnée à la question précédente?

CONSIDÉRANT qu'en exécution de ce Compromis les deux Gouvernements ont choisi, d'un commun accord, pour constituer le Tribunal Arbitral les Membres suivants de la Cour Permanente d'Arbitrage:

Son Excellence Monsieur Guido Fusinato, Docteur en droit, Ministre d'Etat, ancien Ministre de l'Instruction publique, Professeur honoraire de droit international à l'Université de Turin, Député, Conseiller d'Etat;

Monsieur Knut Hjalmar Léonard de Hammarskjöld, Docteur en droit, ancien Ministre de la Justice, ancien Ministre des Cultes et de l'Instruction publique, ancien Envoyé extraordinaire et Ministre plénipotentiaire à Copenhague, ancien Président de la Cour d'appel de Jönköping, ancien Professeur à la Faculté de droit d'Upsal, Gouverneur de la province d'Upsal;

Monsieur Kriege, Docteur en droit, Conseiller actuel intime de Légation et Directeur au Département des Affaires Etrangères, Plenipotentiaire au Conseil Fédéral Allemand;

Monsieur Louis Renault, Ministre plénipotentiaire, Membre de l'Institut, Professeur à la Faculté de droit de l'Université de Paris et à l'Ecole libre des sciences politiques, Jurisconsulte du Ministère des Affaires Etrangères;

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[1] Bureau International de la Cour Permanente d'Arbitrage. *Compromis, protocoles des séances et sentences du tribunal d'arbitrage franco-italien. Affaire du « Manouba »*. p. 119.

Son Excellence le Baron Michel de Taube, Docteur en droit, Adjoint du Ministre de l'Instruction publique de Russie, Conseiller d'Etat actuel;

que les deux Gouvernements ont, en même temps, désigné Monsieur de Hammarskjöld pour remplir les fonctions de Président.

CONSIDÉRANT que, en exécution du Compromis du 6 mars 1912, les Mémoires et Contre-Mémoires ont été dûment échangés entre les Parties et communiqués aux Arbitres;

CONSIDÉRANT que le Tribunal, constitué comme il est dit ci-dessus, s'est réuni à La Haye le 31 mars 1913;

que les deux Gouvernements ont respectivement désigné comme Agents et Conseils,

le Gouvernement de la République Française:

Monsieur Henri Fromageot, Avocat à la Cour d'appel de Paris, jurisconsulte suppléant du Ministère des Affaires Etrangères, Conseiller du Département de la Marine en droit international, Agent;

Monsieur André Hesse, Avocat à la Cour d'appel de Paris, Membre de la Chambre des Députés, Conseil;

Le Gouvernement Royal Italien:

Monsieur Arturo Ricci-Busatti, Envoyé extraordinaire et Ministre plénipotentiaire, Chef du Bureau du Contentieux et de la Législation au Ministère Royal des Affaires Etrangères, Agent;

Monsieur Dionisio Anzilotti, Professeur de droit international à l'Université de Rome, Conseil.

CONSIDÉRANT que les Agents des Parties ont présenté au Tribunal les conclusions suivantes, savoir,

l'Agent du Gouvernement de la République Française:

PLAISE AU TRIBUNAL,

Sur la première question posée par le Compromis,

Dire et juger que les autorités navales italiennes n'étaient pas, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Manouba » ainsi qu'à l'arrestation des vingt-neuf passagers ottomans qui s'y trouvaient embarqués.

Sur la seconde question posée par le Compromis,

Dire que le Gouvernement Royal Italien sera tenu de verser au Gouvernement de la République Française la somme de *un franc* de dommages-intérêts, à titre de réparation morale de l'atteinte portée à l'honneur du pavillon français;

Dire que le Gouvernement Royal Italien sera tenu de verser au Gouvernement de la République la somme de cent mille francs, à titre de sanction et de réparation du péjudice politique et moral résultant de l'infraction par le Gouvernement Royal Italien à ses engagements conventionnels généraux et spéciaux et notamment à la Convention de La Haye du 18 octobre 1907 *relative à certaines restrictions au droit de capture dans la guerre maritime*, article 2, à la Convention de Genève du 6 juillet 1906 *pour l'amélioration du sort des blessés et malades dans les armées en campagne*, article 9, et à l'accord verbalement intervenu entre les deux Gouvernements, le 17 janvier 1912, relativement au contrôle des passagers embarqués sur le paquebot « Manouba »;

Dire que ladite somme sera versée au Gouvernement de la République pour le bénéfice en être attribué à telle œuvre ou institution d'intérêt international qu'il plaira au Tribunal d'indiquer;

Dire que le Gouvernement Royal Italien sera tenu de verser au Gouvernement de la République Française la somme de cent huit mille six cent un francs soixante-dix centimes, montant des indemnités réclamées par les particuliers intéressés, soit dans le paquebot « Manouba, » soit dans son expédition;

Subsidiairement et pour le cas où, sur ce dernier chef, le Tribunal ne se croirait pas suffisamment éclairé,

Dire, avant faire droit, que, par tel ou tels de ses membres qu'il commettra à cet effet, il sera procédé, dans la Chambre de ses délibérations et en présence des Agents et Conseils des deux Gouvernements, à l'examen des diverses réclamations des particuliers intéressés;

Dans tous les cas, et par application de l'article 9 du Compromis,

Dire que, à l'expiration d'un délai de trois mois à compter du jour de la sentence, les sommes mises à la charge du Gouvernement Royal Italien et non encore versées seront productives d'intérêts à raison de quatre pour cent par an.

Et l'Agent du Gouvernement Royal Italien:

PLAISE AU TRIBUNAL,

Sur la première question posée par le Compromis,

Dire et juger que les autorités navales italiennes étaient pleinement en droit de procéder comme elles ont fait à la capture et à la saisie momentanée du vapeur postal français « Manouba » ainsi qu'à l'arrestation des vingt-neuf passagers ottomans sur lesquels pesait le soupçon qu'ils étaient des militaires, et dont le Gouvernement Italien avait le droit de contrôler la véritable qualité.

En conséquence et sur la seconde question,

Dire et juger qu'aucune conséquence pécuniaire ou autre ne saurait résulter à la charge du Gouvernement Italien de la capture et de la saisie momentanée du vapeur postal français « Manouba »;

Dire et juger que le Gouvernement Français a prétendu à tort qu'on lui remît les passagers ottomans qui se trouvaient légalement entre les mains des autorités italiennes;

Dire que le Gouvernement de la République sera tenu de verser au Gouvernement Royal la somme de cent mille francs à titre de sanction et de réparation du préjudice matériel et moral résultant de la violation du droit international notamment en ce qui concerne le droit que le belligérant a de vérifier la qualité d'individus soupçonnés être des militaires ennemis, trouvés à bord de navires de commerce neutres;

Dire que ladite somme sera versée au Gouvernement Royal Italien pour être attribuée à telle œuvre ou institution d'intérêt international qu'il plaira au Tribunal d'indiquer;

Subsidiairement et pour le cas où le Tribunal ne croirait pas devoir admettre cette forme de sanction,

Dire que le Gouvernement de la République sera tenu de réparer le tort fait au Gouvernement Royal Italien de telle manière qu'il plaira au Tribunal d'indiquer;

Dans tous les cas,

Dire que le Gouvernement de la République sera tenu de verser au Gouvernement Royal Italien la somme de quatre cent quatorze francs quarante-cinq centimes, montant des frais occasionnés par la saisie du « Manouba »;

Dire que, à l'expiration d'un délai de trois mois à compter du jour de la sentence, les sommes mises à la charge du Gouvernement de la République et non encore versées seront productives d'intérêts à raison de quatre pour cent par an.

CONSIDÉRANT que, après que le Tribunal eut entendu les exposés oraux des Agents des Parties et les explications qu'ils lui ont fournies sur sa demande, les débats ont été dûment déclarés clos.

EN FAIT:

CONSIDÉRANT que le vapeur postal français « Manouba », de la Compagnie de Navigation Mixte, au cours d'un voyage régulier entre Marseille et Tunis, fut arrêté dans les parages de l'île de San Pietro, le 18 janvier 1912, vers 8 heures du matin, par le contre-torpilleur de la Marine Royale Italienne « Agordat »;

CONSIDÉRANT que, après constatation de la présence, à bord dudit vapeur, de vingt-neuf passagers turcs, soupçonnés d'appartenir à l'armée ottomane, le « Manouba » fut conduit sous capture à Cagliari;

CONSIDÉRANT que, arrivé dans ce port le même jour, vers 5 heures du soir, le capitaine du « Manouba » fut sommé de livrer les vingt-neuf passagers susmentionnés aux autorités italiennes et que, sur son refus, ces autorités procédèrent à la saisie du vapeur;

CONSIDÉRANT enfin que, sur l'invitation du Vice-Consul de France à Cagliari, les vingt-neuf passagers turcs furent livrés le 19 janvier, à 4 heures 30 de l'après-midi, aux autorités italiennes,

et que le « Manouba », alors relaxé, se remit en route sur Tunis le même jour, à 7 heures 20 du soir.

EN DROIT:

CONSIDÉRANT que, si le Gouvernement Français a dû penser, étant donné les circonstances dans lesquelles la présence de passagers ottomans à bord du « Manouba » lui était signalée, que, moyennant la promesse de faire vérifier le caractère desdits passagers, il exemptait le « Manouba » de toute mesure de visite ou de coercition de la part des autorités navales italiennes, il est établi qu'en toute bonne foi le Gouvernement Italien n'a pas entendu la chose de cette façon;

que, par suite, en l'absence d'un accord spécial entre les deux Gouvernements, les autorités navales italiennes ont pu agir conformément au droit commun;

CONSIDÉRANT que, d'après la teneur du Compromis, l'opération effectuée par les autorités navales italiennes renferme trois phases successives, savoir: la capture, la saisie momentanée du « Manouba » et l'arrestation des vingt-neuf passagers ottomans qui s'y trouvaient embarqués;

qu'il convient d'examiner d'abord la légitimité de chacune de ces trois phases, regardées comme des actes isolés et indépendants de l'ensemble de l'opération susmentionnée;

Dans cet ordre d'idées,

CONSIDÉRANT que les autorités navales italiennes avaient, lors de la capture du « Manouba, » des motifs suffisants de croire que les passagers ottomans qui s'y trouvaient embarqués étaient, au moins en partie, des militaires enrôlés dans l'armée ennemie;

que ces autorités avaient, par conséquent, le droit de se les faire remettre;

CONSIDÉRANT qu'elles pouvaient, à cet effet, sommer le capitaine de les livrer, ainsi que prendre, en cas de refus, les mesures nécessaires pour l'y contraindre ou pour s'emparer de ces passagers;

CONSIDÉRANT, d'autre part, que, même étant admis que les passagers ottomans aient pu être considérés comme formant une troupe ou un détachement militaire,

rien ne permettait de révoquer en doute l'entière bonne foi de l'armateur et du capitaine du « Manouba »;

CONSIDÉRANT que, dans ces circonstances, les autorités navales italiennes n'étaient pas en droit de capturer le « Manouba » et de le faire dévier pour suivre l'« Agordat » à Cagliari, si ce n'est comme moyen de contrainte et après que le capitaine eût refusé d'obéir à une sommation de livrer les passagers ottomans;

que, aucune sommation de ce genre n'ayant eu lieu avant la capture, l'acte de capturer le « Manouba » et de l'amener à Cagliari n'était pas légitime;

CONSIDÉRANT que, la sommation faite à Cagliari étant restée sans effet immédiat, les autorités navales italiennes avaient le droit de prendre les mesures de contrainte nécessaires et, spécialement, de retenir le « Manouba » jusqu'à ce que les passagers ottomans fussent livrés;

que la saisie effectuée n'était légitime que dans les limites d'un séquestre temporaire et conditionnel;

CONSIDÉRANT enfin que les autorités navales italiennes avaient le droit de se faire livrer et d'arrêter les passagers ottomans.

Pour ce qui concerne l'ensemble de l'opération,

CONSIDÉRANT que les trois phases dont se compose l'opération unique prévue par le Compromis doivent être appréciées en elles-mêmes, sans que l'illégalité de l'une d'elles doive, dans l'espèce, influer sur la régularité des autres;

que l'illégalité de la capture et de la conduite du « Manouba » à Cagliari n'a pas vicié les phases postérieures de l'opération;

CONSIDÉRANT que la capture ne pourrait non plus être légitimée par la régularité, relative ou absolue, de ces dernières phases envisagées séparément.

Sur la demande tendant à faire condamner le Gouvernement Royal Italien à verser à titre de dommages-intérêts:

1°. la somme de *un franc* pour atteinte portée au pavillon français;

2°. la somme de cent mille francs pour réparation du préjudice moral et politique résultant de l'inobservation du droit commun international et des conventions réciproquement obligatoires pour l'Italie comme pour la France,

Et sur la demande tendant à faire condamner le Gouvernement de la République Française à verser la somme de cent mille francs à titre de sanction et de réparation du préjudice matériel et moral résultant de la violation du droit international, notamment en ce qui concerne le droit que le belligérant a de vérifier la qualité d'individus soupçonnés être des militaires ennemis, trouvés à bord de navires de commerce neutres,

CONSIDÉRANT que, pour le cas où une Puissance aurait manqué à remplir ses obligations, soit générales, soit spéciales, vis-à-vis d'une autre Puissance, la constation de ce fait, surtout dans une sentence arbitrale, constitue déjà une sanction sérieuse;

que cette sanction est renforcée, le cas échéant, par le paiement de dommages-intérêts pour les pertes matérielles;

que, en thèse générale et abstraction faite de situations particulières, ces sanctions paraissent suffisantes;

que, également en thèse générale, l'introduction d'une autre sanction pécuniaire paraît être superflue et dépasser le but de la juridiction internationale;

CONSIDÉRANT que, par application de ce qui vient d'être dit, les circonstances de la cause présente ne sauraient motiver une telle sanction supplémentaire; que, sans autre examen, il n'y a donc pas lieu de donner suite aux demandes susmentionnées.

Sur la demande de l'Agent français tendant à ce que le Gouvernement Royal Italien soit tenu de verser au Gouvernement de la République Française la somme de cent huit mille six cent un francs soixante-dix centimes, montant des indemnités réclamées par les particulliers intéressés, soit dans le vapeur « Manouba », soit dans son expédition,

CONSIDÉRANT qu'une indemnité est due pour le retard occasionné au « Manouba » par sa capture non justifiée et sa conduite à Cagliari, mais qu'il y a lieu de tenir compte du retard provenant du refus non légitime du capitaine de livrer à Cagliari les vingt-neuf passagers turcs et aussi du fait que le navire n'a pas été entièrement détourné de sa route sur Tunis;

CONSIDÉRANT que, si les autorités navales italiennes ont opéré la saisie du « Manouba » au lieu du séquestre temporaire et conditionnel qui était légitime, il apparaît que, de ce chef, les intéressés n'ont pas éprouvé de pertes et dommages;

CONSIDÉRANT que, en faisant état de ces circonstances et aussi des frais occasionnés au Gouvernement Italien par la surveillance du navire retenu, le Tribunal, après avoir entendu les explications concordantes de deux de ses Membres chargés par lui de procéder à une enquête sur lesdites réclamations, a évalué à quatre mille francs la somme due à l'ensemble des intéressés au navire et à son expédition.

PAR CES MOTIFS,

Le Tribunal Arbitral déclare et prononce ce qui suit:

Pour ce qui concerne l'ensemble de l'opération visée dans la première question posée par le Compromis,

Les différentes phases de cette opération ne doivent pas être considérées comme connexes en ce sens que le caractère de l'une doive, dans l'espèce, influer sur le caractère des autres.

Pour ce qui concerne les différentes phases de ladite opération, appréciées séparément,

Les autorités navales italiennes n'étaient pas, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à la capture du vapeur postal français « Manouba » et à sa conduite à Cagliari;

Le « Manouba » une fois capturé et amené à Cagliari, les autorités navales italiennes étaient, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à la saisie momentanée du « Manouba », dans la mesure où cette saisie ne dépassait pas les limites d'un séquestre temporaire et conditionnel, ayant pour but de contraindre le capitaine du « Manouba » à livrer les vingt-neuf passagers ottomans qui s'y trouvaient embarqués;

Le « Manouba » une fois capturé, amené à Cagliari et saisi, les autorités navales italiennes étaient, d'une façon générale et d'après les circonstances spéciales où l'opération a été accomplie, en droit de procéder comme elles ont fait à l'arrestation des vingt-neuf passagers ottomans qui s'y trouvaient embarqués.

Pour ce qui concerne la seconde question posée par le Compromis,

Le Gouvernement Royal Italien sera tenu, dans les trois mois de la présente sentence, de verser au Gouvernement de la République Française la somme de quatre mille francs, qui, déduction faite des frais de surveillance du « Manouba » dûs au Gouvernement italien, forme le montant des pertes et dommages éprouvés, à raison de la capture et de la conduite du « Manouba » à Cagliari, par les particuliers intéressés au navire et à son expédition.

Il n'y a pas lieu de donner suite aux autres réclamations contenues dans les conclusions des deux Parties.

FAIT à La Haye, dans l'Hôtel de la Cour Permanente d'Arbitrage, le 6 mai 1913.

Le Président: Hj. L. HAMMARSKJÖLD

Le Secrétaire général: Michiels VAN VERDUYNEN

Le Secrétaire: RÖELL

DOCUMENTS ADDITIONNELS

NOTE COMMUNE DU 26 JANVIER 1912 CONCERNANT LE RÈGLEMENT DES AFFAIRES DU « CARTHAGE » ET DU « MANOUBA »[1]

L'ambassadeur de France et le ministre des Affaires étrangères d'Italie ayant examiné dans l'esprit le plus cordial les circonstances qui ont précédé et suivi l'arrêt et la visite par un croiseur italien de deux vapeurs français se rendant de Marseille à Tunis, ont été heureux de constater, d'un commun accord et avant toute autre considération, qu'il n'en résultait de la part d'aucun des deux pays aucune intention contraire aux sentiments de sincère et constante amitié qui les unissent.

Cette constatation a amené sans difficulté les deux gouvernements à décider:

1°. Que les questions dérivant de la capture et de l'arrêt momentané du vapeur *Carthage*, seront déférées à l'examen de la cour d'arbitrage de La Haye, en vertu de la convention d'arbitrage franco-italienne du 23 décembre 1903, renouvelée le 24 décembre 1908;

2°. Qu'en ce qui concerne la saisie du vapeur *Manouba* et des passagers ottomans qui y étaient embarqués, cette opération ayant été effectuée, d'après le gouvernement italien, en vertu des droits qu'il déclare tenir des principes généraux du droit international et de l'article 47 de la déclaration de Londres de 1909, les circonstances spéciales dans lesquelles cette opération a été faite et les conséquences qui en découlent seront également soumises à l'examen de la haute juridiction internationale instituée à La Haye; que dans le but de rétablir le *statu quo ante* en ce qui concerne les personnes, les passagers ottomans saisis, ces derniers seront remis au consul de France à Cagliari, pour être reconduits par ses soins à leur lieu d'embarquement, sous la responsabilité du gouvernement français, qui prendra les mesures nécessaires pour empêcher que les passagers ottomans n'appartenant pas au « Croissant Rouge », mais à des corps combattants, se rendent d'un port français en Tunisie ou sur le théâtre des opérations militaires.

ACCORD FRANCO-ITALIEN SIGNÉ À PARIS, LE 4 AVRIL 1912[2]

Le Gouvernement de la République Française et le Gouvernement Royal Italien ayant pris connaissance des deux Compromis, établis le 6 mars 1912 par MM. Louis Renault et Fusinato, en vue de régler par l'arbitrage devant la Cour de la Haye les incidents relatifs à la saisie du *Carthage* et à la saisie du *Manouba*, déclarent en approuver les termes et se considèrent comme liés par leur texte;

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 360.

[2] Cour permanente d'Arbitrage de La Haye. *Affaire de la capture et de la saisie momentanée du vapeur postal français « Tavignano », etc. Mémoire de la République Française*, p. 7, note 2.

Ils désignent, d'un commun accord, pour constituer le tribunal arbitral les membres suivants de la Cour d'arbitrage de La Haye;

M. Guido Fusinato, docteur en droit, ancien ministre de l'Instruction Publique, ancien professeur de droit international à l'université de Turin, député, conseiller d'Etat;

M. Knut Hjalmar Léonard de Hammarskjöld, docteur en droit, ancien ministre de la Justice, ancien ministre des Cultes et de l'Instruction Publique, ancien envoyé extraordinaire et ministre plénipotentiaire à Copenhague, ancien président de la Cour d'appel de Jönköping, ancien professeur à la faculté de droit d'Upsal, gouverneur de la province d'Upsal;

M. Kriege, docteur en droit, conseiller intime actuel de légation, directeur au département des Affaires Etrangères;

M. Louis Renault, ministre plénipotentiaire, professeur à la faculté de droit de Paris, jurisconsulte du ministère des Affaires Etrangères;

M. le baron Taube, membre permanent du Conseil du ministère des Affaires Etrangères, professeur de droit international à l'Université impériale de Saint-Pétersbourg, conseiller d'Etat;

M. de Hammarskjöld remplira les fonctions de Surarbitre ou Président du tribunal.

Les deux Gouvernements conviennent de fixer à 3,000 florins néerlandais la somme à déposer par chacun d'eux, conformément à l'article 4 de chaque Compromis, étant entendu que ladite somme est destinée à servir de provision pour toutes les affaires dont le tribunal arbitral ci-dessus désigné sera chargé de connaître.

Les deux Gouvernements se réservent la faculté de modifier, d'un commun accord, l'article 5 de chacun des Compromis en ce qui touche la date de la réunion du tribunal arbitral.

FAIT à Paris, le 4 avril 1912.

(L.S.) *Signé:* R. POINCARÉ

(L.S.) *Signé:* M. RUSPOLI

AFFAIRE DE L'ILE DE TIMOR

PARTIES: Pays-Bas, Portugal.

COMPROMIS: 3 avril 1913.

ARBITRE: Cour permanente d'Arbitrage: C. E. Lardy.

SENTENCE: 25 juin 1914.

DOCUMENTS ADDITIONNELS: Traité du 20 avril 1859; Convention du 10 juin 1893; Déclaration du 1er juillet 1893; Convention du 1er octobre 1904.

Délimitation d'une partie des possessions néerlandaises et portugaises dans l'île de Timor — Règlement du litige sur la base des traités et des principes généraux du droit international — Interprétation des traités — Intention des parties.

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Texte du compromis et de la sentence

Bureau international de la Cour permanente d'Arbitrage, *Sentence arbitrale rendue en exécution du compromis signé à La Haye le 3 avril 1913 entre les Pays-Bas et le Portugal au sujet de la délimitation d'une partie de leurs possessions dans l'île de Timor*, Neuchâtel, 1914, p. 3 [texte français de la sentence]; p. 41 [texte français du compromis]

American Journal of International Law, vol. 9, 1915, Supplement, p. 107 [texte anglais du compromis]; vol. 9, 1915, p. 240 [texte anglais de la sentence]

British and Foreign State Papers, vol. 107, p. 1027 [texte français du compromis]

Grotius Annuaire international pour 1914, p. 221 [texte français du compromis]; 1915, p. 144 [texte français des conclusions de la sentence]

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The Hague Court Reports, edited by J. B. Scott, Carnegie Endowment for International Peace, New York, Oxford University Press, 1st series 1916, p. 355 [texte anglais de la sentence]; p. 387 [texte anglais du compromis]; p. 574 [texte français de la sentence]; p. 596 [texte français du compromis]. Edition française, 1921, p. 378 [texte français de la sentence et du compromis]

G. G. Wilson, *The Hague Arbitration Cases*, 1915, p. 374 [texte anglais et français du compromis]; p. 380 [texte anglais et français de la sentence]

Zeitschrift für Völkerrecht, vol. VIII, 1914, p. 88 [texte français du compromis]

Commentaires

M. J. P. A. François, « La Cour permanente d'Arbitrage, son origine, sa jurisprudence, son avenir », Académie de droit international, *Recueil des Cours*, 1955, I, p. 521.

Revue générale de droit international public, t. XXIII, 1916, p. 89 [y compris le texte français de la sentence]

Rivista di diritto internazionale, vol. IX, 1915, p. 211.

APERÇU [1]

Cet arbitrage fut provoqué par un différend survenu entre les Pays-Bas et le Portugal au sujet des frontières de leurs possessions respectives dans l'île de Timor, qui fut divisée entre ces pays, en vertu d'un traité conclu le 20 avril 1859 [2]. Ce traité avait laissé subsister une certaine « enclave » néerlandaise à l'intérieur des frontières attribuées au Portugal et une certaine « enclave » portugaise à l'intérieur des territoires attribués aux Pays-Bas. Cependant, le 10 juin 1893, les deux parties signèrent une convention [3], dans le but de faire disparaître ces enclaves et d'établir d'une façon plus claire et plus exacte la démarcation de leurs possessions respectives dans l'île en question. Une commission, agissant en vertu de cette convention, se mit d'accord en 1898-1899, sur la plus grande partie de la frontière, tandis que les points demeurés litigieux furent soumis à une conférence qui se réunit à La Haye, dans le but de les régler. Celle-ci arrêta, le 3 juillet 1902, un projet qui fut transformé en une convention signée le 1er octobre 1904 [4]. Cette convention détermina le reste de la frontière à l'exception d'une partie de l'enclave portugaise qui se trouvait précédemment dans le territoire néerlandais. Par rapport à ce dernier point, on tira une ligne théorique qu'une commission mixte fut chargée d'arpenter et de déterminer. Les commissaires, ne pouvant tomber d'accord sur certains points géographiques qui avaient été établis pour leur servir de guide, durent dans le suite suspendre leurs travaux. Une longue correspondance diplomatique entre les Ministères des Affaires étrangères des Gouvernements respectifs aboutit à un accord, signé le 3 avril 1913 [5] à La Haye, pour soumettre la question de la frontière litigieuse à un arbitre, qui devait rendre sa décision d'après les données fournies par les parties, et en se basant sur les traités et les principes généraux du droit international. M. Charles Edouard Lardy, Ministre de Suisse en France, fut désigné comme arbitre. Il rendit une sentence le 25 juin 1914, fixant la frontière conformément aux prétentions des Pays-Bas.

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[1] J. B. Scott, *Les travaux de la Cour permanente d'Arbitrage de La Haye*, New York, Oxford University Press, 1921, p. 377.

[2] Voir *infra*, p. 510.

[3] Voir *infra*, p. 512.

[4] Voir *infra*, p. 514.

[5] Voir *infra*, p. 487.

COMPROMIS D'ARBITRAGE SIGNÉ À LA HAYE LE 3 AVRIL 1913 [1]

Sa Majesté la Reine des Pays-Bas et le Président de la République Portugaise considérant que l'exécution de la Convention conclue entre les Pays-Bas et le Portugal à La Haye le 1er octobre 1904, concernant la délimitation des possessions néerlandaises et portugaises dans l'île de Timor, a fait naitre un différend au sujet de l'arpentage de la partie de la limite visée à l'article 3, 10° de cette Convention;

désirant mettre fin à l'amiable à ce différend;

vus l'article 14 de la dite Convention et l'article 38 de la Convention pour le règlement pacifique des conflits internationaux conclue à La Haye le 18 octobre 1907;

ont nommé pour Leurs plénipotentiaires, savoir:

. . . . . .

lesquels, dûment autorisés à cet effet, sont convenus des articles suivants:

Article 1er

Le Gouvernement de Sa Majesté la Reine des Pays-Bas et le Gouvernement de la République Portugaise conviennent de soumettre le différend susmentionné à un arbitre unique à choisir parmi les membres de la Cour permanente d'Arbitrage.

Si les deux Gouvernements ne pouvaient tomber d'accord sur le choix de tel arbitre, ils adresseront au Président de la Confédération Suisse la requête de le désigner.

Art. 2.

L'arbitre statuant sur les données fournies par les Parties, décidera en se basant sur les traités et les principes généraux du droit international, comment doit être fixée conformément à l'article 3, 10° de la Convention conclue à La Haye le 1er octobre 1904, concernant la délimitation des possessions néerlandaises et portugaises dans l'île de Timor, la limite à partir de la Noèl Bilomi jusqu'à la source de la Noèl Meto.

Art. 3.

Chacune des Parties remettra par l'intermédiaire du Bureau International de la Cour permanente d'Arbitrage à l'arbitre dans un délai de 3 mois après l'échange des ratifications de la présente Convention un mémoire contenant l'exposé de ses droits et les documents à l'appui et en fera parvenir immédiatement une copie certifiée conforme à l'autre Partie.

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[1] Bureau international de la Cour permanente d'Arbitrage, *Sentence arbitrale rendue en exécution du compromis signé à La Haye le 3 avril 1913 entre les Pays-Bas et le Portugal au sujet de la délimitation d'une partie de leurs possessions dans l'Ile de Timor*, Neuchâtel, 1914, p. 41.

A l'expiration du délai susnommé chacune des Parties aura un nouveau délai de 3 mois pour remettre par l'intermédiaire susindiqué à l'arbitre, si elle le juge utile, un second mémoire dont elle fera parvenir une copie certifiée conforme à l'autre Partie.

L'arbitre est autorisé à accorder à chacune des Parties qui le demanderait une prorogation de 2 mois par rapport aux délais mentionnés dans cet article. Il donnera connaissance de chaque prorogation à la Partie adverse.[1]

ART. 4.

Après l'échange de ces mémoires aucune communication écrite ou verbale ne sera faite à l'arbitre, à moins que celui-ci ne s'adresse aux Parties pour obtenir d'elles ou de l'une d'elles des renseignements ultérieurs par écrit.

La Partie qui donnera ces renseignements en fera parvenir immédiatement une copie certifiée conforme à l'autre Partie et celle-ci pourra, si bon lui semble, dans un délai de 2 mois après la réception de cette copie, communiquer par écrit à l'arbitre les observations auxquelles ils lui donneront lieu. Ces observations seront également communiquées immédiatement en copie certifiée conforme à la Partie adverse.

ART. 5.

L'arbitre siégera à un endroit à désigner par lui.

ART. 6.

L'arbitre fera usage de la langue française tant dans la sentence que dans les communications qu'il aura à adresser aux Parties dans le cours de la procédure. Les mémoires et autres communications émanant des Parties seront dressés dans cette langue.

ART. 7.

L'arbitre décidera de toutes les questions qui pourraient surgir relativement à la procédure dans le cours du litige.

ART. 8.

Aussitôt après la ratification de la présente Convention chacune des Parties déposera entre les mains de l'arbitre une somme de deux mille francs à titre d'avance pour les frais de la procédure.

ART. 9.

La sentence sera communiquée par écrit par l'arbitre aux Parties.

Elle sera motivée.

L'arbitre fixera dans sa sentence le montant des frais de la procédure. Chaque Partie supportera ses propres frais et une part égale des dits frais de procédure.

ART. 10.

Les Parties s'engagent à accepter comme jugement en dernier ressort la décision prononcée par l'arbitre dans les limites de la présente Convention et à l'exécuter sans aucune réserve.

Tous différends concernant l'exécution seront soumis à l'arbitre.

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[1] Une prorogation de deux mois a été accordée aux Parties par l'arbitre pour la remise de leurs *seconds* mémoires.

ART. 11.

La Présente Convention sera ratifée et entrera en vigueur immédiatement après l'échange des ratifications qui aura lieu à La Haye aussitôt que possible.

En foi de quoi, les plénipotentiaires respectifs ont signé la présente Convention qu'ils ont revêtue de leurs dachets.

FAIT en double à La Haye, le 3 avril 1913.

[*L.S.*] (*Signé*) R. DE MAREES VAN SWINDEREN

[*L.S.*] (*Signé*) Antonio Maria Bartholomeu FERREIRA

SENTENCE ARBITRALE RENDUE EN EXÉCUTION DU COMPROMIS SIGNÉ A LA HAYE LE 3 AVRIL 1913 ENTRE LES PAYS-BAS ET LE PORTUGAL AU SUJET DE LA DÉLIMITATION D'UNE PARTIE DE LEURS POSSESSIONS DANS L'ILE DE TIMOR, 25 JUIN 1914 [1]

Delimitation of a part of the Dutch and Portuguese possessions in the Island of Timor — Settlement of the dispute on the basis of the treaties and the general principles of international law — Treaty interpretation — Intention of the parties.

Une contestation étant survenue entre le Gouvernement royal néerlandais et celui de la République portugaise au sujet de la délimitation d'une partie de leurs possessions respectives dans l'île de Timor, les deux Gouvernements ont décidé, par une Convention signée à La Haye le 3 avril 1913 et dont les ratifications ont été échangées dans la même ville le 31 juillet suivant, d'en remettre la solution en dernier ressort à un arbitre, et ont à cet effet désigné d'un commun accord le souissgné.

Pour comprendre le sens et la portée du compromis du 3 avril 1913, il y a lieu d'exposer succinctement les négociations qui ont précédé ce compromis.

I

Historique

L'île de Timor, la dernière à l'orient de la série continue des îles de la Sonde et la plus rapprochée de l'Australie, fut découverte au XVI^me^ siècle par les Portugais; cette île mesure environ 500 kilomètres de longueur de l'ouest à l'est sur une largeur de 100 kilomètres au maximum. Une haute chaîne de montagnes, dont certains sommets atteignent près de 3000 mètres d'altitude, sépare l'île dans le sens de la longueur en deux versants.

La partie orientale de l'île, d'une superficie approximative de 19,000 kilomètres carrés avec une population d'environ 300,000 habitants, est portugaise. La partie occidentale, avec une population évaluée en 1907 à 131.000 habitants et une superficie d'environ 20,000 kilomètres carrés, est sous la souveraineté des Pays-Bas, à l'exception du « Royaume d'Okussi et d'Ambeno », situé sur la côte nord-ouest au milieu de territoires néerlandais de tous les côtés sauf du côté de la mer. Ce nom de « rois » donné par les Portugais aux chefs des tribus s'explique par le fait que, dans la langue indigène, on les appelle *Leorey*; la syllabe finale de ce mot a été traduite en portugais par le mot *Rey*. Les Néerlandais donnent à ces chefs le titre plus modeste de *radjahs*.

Cette répartition territoriale entre les Pays-Bas et le Portugal repose sur les Accords suivants:

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[1] *Bureau international de la Cour permanente d'Arbitrage*, ibid., p. 3.

Le 20 avril 1859, un traité signé à Lisbonne et dûment ratifié au cours de l'été de 1860, avait déterminé les frontières respectives par le milieu de l'île, mais avait laissé subsister (art. 2) « l'enclave » néerlandaise de Maucatar au milieu des territoires portugais et « l'enclave » portugaise d'Oikoussi au milieu des territoires néerlandais de l'ouest de l'île. Il fut stipulé (art. 3) que cette « enclave d'Oikoussi comprend l'État d'Ambenu partout où y est « arboré le pavillon portugais, l'État d'Oikoussi proprement dit et celui de Noimuti » [1].

Par une autre Convention signée à Lisbonne le 10 juin 1893 et dûment ratifiée, les deux Gouvernements, « désirant régler dans les conditions les plus favorables au développement de la civilisation et du commerce » leurs relations dans l'archipel de Timor, convinrent « d'établir d'une façon plus claire et plus exacte la démarcation de leurs possessions » dans cette île « et de faire disparaître les enclaves actuellement existantes » (Préambule et art. Ier). Une commission d'experts devait être désignée à l'effet de « formuler une proposition pouvant servir de base à la conclusion d'une Convention ultérieure déterminant la nouvelle ligne de démarcation dans ladite île » (art. II). En cas de difficultés, les deux Parties s'engageaient « à se soumettre à la décision . . . d'arbitres » (art. 7) [2].

Cette commission mixte se rendit sur les lieux et se mit d'accord en 1898-1899 sur la plus grande partie de la délimitation. Toutefois, tant sur la frontière principale au milieu de l'île de Timor que sur la frontière du Royaume d'Okussi-Ambenu dans la partie occidentale de l'île, d'assez nombreuses divergences persistaient. La carte annexée sous N° II indique les prétentions respectives. Une Conférence fut réunie à La Haye du 23 juin au 3 juillet 1902 pour tâcher de les solutionner. Elle arrêta le 3 juillet 1902 un projet qui fut transformé en Convention diplomatique signée à La Haye le 1er octobre 1904 et dûment ratifiée [3].

Les résultats sommaires de cette Convention de 1904 sont figurés sur la carte transparente annexée sous N° I; la superposition de la carte transparente N° I sur la carte N° II permet de constater que le Portugal a obtenu, au centre de l'île de Timor, l'enclave néerlandaise de Maukatar, et que les Pays-Bas ont obtenu dans cette même région le Tahakay et le Tamira Ailala. D'autre part, au nord-ouest de l'île de Timor et au sud du territoire désigné par le traité de 1859 sous le nom d'enclave d'Oikussi, les Pays-Bas obtiennent le Noimuti. Enfin la limite orientale contestée de ce territoire d'Oikussi-Ambeno est fixée théoriquement selon une ligne A-C qui devra être « arpentée et indiquée sur le terrain dans le plus court délai possible ». (Actes de la Conférence de 1902, séances du 27 juin, pages 10 et 11, et du 28 juin, page 12; Convention du 1er octobre 1904, article 4). La ligne A-C admise en Conférence fut définie à l'article 3 chiffre 10 de la Convention de 1904 dans les termes suivants: « A partir de ce point » (le confluent de la Noèl Bilomi avec l'Oè-Sunan) « la limite suit le thalweg de l'Oè-Sunan, traverse autant que possible Nipani et Kelali (Keli), gagne la source de la Noèl Meto et suit le thalweg de cette rivière jusqu'à son embouchure ».

Tout semblait terminé, lorsque les commissaires délimitateurs arrivés sur les lieux en juin 1909 pour les opérations du bornage de la frontière orientale de l'Oikussi-Ambeno ne purent se mettre d'accord et décidèrent d'en référer à leurs Gouvernements. Les deux Gouvernements ne purent pas davantage se mettre d'accord et décidèrent de recourir à un arbitrage. Quelle était cette difficulté rencontrée par les commissaires délimitateurs?

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[1] Voir *infra.*, p. 511.
[2] Voir *infra.*, p. 514.
[3] Voir *infra.*, p. 514.

II

La difficulté qui a provoqué l'arbitrage

En procédant aux travaux de délimitation de la frontière orientale de l'Oikussi-Ambeno, les commissaires avaient commencé au nord, sur la côté, et remonté dans la direction du sud le cours de la rivière Noèl Meto, qui devait servir de frontière de son embouchure à sa source. Ces opérations eurent lieu entre le 1er et le 10 juin 1909, et une borne fut placée à la source de la Noèl Meto. Cette source étant dominée par des falaises abruptes impossibles à franchir, les commissaires résolurent une reconnaissance générale du terrain entre la partie septentrionale et la partie méridionale du territoire encore à délimiter, c'est-à-dire entre la source de la Noèl Meto au nord et la rivière Noèl Bilomi au sud.

Au nord, un premier dissentiment surgit: La carte (voir annexe III) signée en 1904 en même temps que la Convention, portait le mot *Kelali* accompagné entre parenthèses du mot *Keli*. Les délégués néerlandais soutinrent que le mot Keli désigne, sur le sommet du mont Kelali, un point spécial situé à l'ouest de la source de la Noèl Meto entre deux pierres « en pic » et qui a été indiqué par les indigènes du Tumbaba (néerlandais) comme la limite entre eux et les indigènes (portugais) de l'Ambeno; ce point est, d'après les commissaires néerlandais, une « magnifique limite » naturelle qui suit à peu près la limite figurée sur la carte de 1904. Les commissaires portugais au contraire proposaient « de suivre... quelques thalwegs dans le terrain à l'est de la ligne proposée par les délégués néerlandais, en partant de la même borne » placée à la source de la Noèl Meto. La commission décida d'arpenter les deux lignes et de laisser la solution aux autorités supérieures.

Dans la partie sud, sur la rivière Bilomi, les commissaires constatent, dans leur séance du 17 juin 1909, qu'ils ont suivi de l'ouest à l'est le cours de la Nono Nisi (ou Nise) puis le cours de la Noèl Bilomi et qu'ils ont maintenant « *atteint l'endroit* (où la commission de 1899 avait terminé son travail) *où il faut continuer l'arpentage vers le nord* ». Ce point avait été désigné dans la Convention de 1904, article 3, chiffres 9 et 10, et sur la carte y annexée, comme le confluent de la Noèl Bilomi et de l'Oè Sunan. « Les quatre délégués constatent *qu'à cet endroit, il y a deux affluents venant du nord, mais qu'aucun d'eux ne s'appelle l'Oè Sunan* ».

Les délégués néerlandais exposent alors que la contrée située entre ces deux affluents est nommée Sunan, qu'ils ne connaissent d'ailleurs aucun affluent de la Noèl Bilomi portant le nom d'Oè Sunan et qu'il n'en existe pas; ils insistent donc pour que la ligne frontière soit arpentée vers le nord à partir du point désigné sur les cartes de 1899 et de 1904.

Les délégués portugais font observer qu'une rivière nommée Oè Sunan ou Oil Sunan, qui n'est, il est vrai, pas un affluent de la Bilomi, existe plus à l'est et a sa source « tout près du Bilomi ».

Les commissaires décident à l'unanimité d'arpenter les deux lignes « *en partant du point* » indiqué sur les cartes de 1899 et de 1904 et « *où la commission de 1899 a terminé son travail* », savoir la ligne proposée par les délégués néerlandais dans la direction du nord et la ligne désirée par les Portugais dans la direction de l'est (séance du 17 juin 1909, Premier Mémoire portugais, page 27).

A la séance du 21 juin 1909 et au cours de l'arpentage de la ligne frontière proposée par les délégués portugais dans la direction de l'est en remontant la rivière Noèl Bilomi, « les quatre délégués constatent unanimement « qu'ils n'ont pas rencontré un affluent (de la Noèl Bilomi) nommé l'Oè-Sunan ». Les Délégués néerlandais font observer que la Bilomi a, dans cette région, changé de nom, à quoi leurs collègues portugais répliquent « que la rivière de Bilomi continue toujours, mais que, suivant les usages indigènes, elle porte le nom de la

contrée qu'elle traverse ». Enfin et surtout, les délégués portugais font observer qu'à peu de distance de la Bilomi se trouve, sur la rive nord, un mont Kinapua, sur le versant opposé duquel se trouve une rivière portant le nom d'Oè Sunan et qui coule vers le nord. Il suffirait de suivre le cours de cette rivière, de remonter ensuite la rivière Noi Fulan et de relier enfin la source de celle-ci avec la source de la Noèl Meto déjà reconnue par la commission mixte.

Les délégués néerlandais déclarent inutile de procéder à la reconnaissance de cette rivière, car le mont Kinapua et la limite qui résulterait de la proposition portugaise sont en dehors du territoire qui était contesté en 1899; le mont Tasona figure sur la carte de 1899 sur l'extrême limite orientale des *prétentions* portugaises d'alors, prétentions que le traité de 1904 a écartées; il ne saurait donc être question d'une délimitation allant encore plus loin vers l'est.

Les travaux de la Commission mixte furent suspendus et la question, portée sur le terrain diplomatique, donna lieu à un long échange de correspondances entre les cabinets de La Haye et de Lisbonne.

Ces correspondances ont abouti à l'accord de 1913 confiant à l'arbitre le mandat de décider, d'après « les données fournies par les parties », et « en se basant sur les principes généraux du droit, comment doit être fixée, conformément à l'art. 3, 10 de la Convention conclue à La Haye le 1er octobre 1904 . . , la limite à partir de la Noèl Bilomi jusqu'à la source de la Noèl Meto » [1].

III

Le point de vue portugais

Les principaux arguments invoqués par le Gouvernement de la République portugaise en faveur de la thèse soutenue par ses commissaires délimitateurs peuvent être résumés comme suit:

1. Au point où les travaux de délimitation de 1899 ont été arrêtés et où, d'après le traité de 1904 et d'après la carte y annexée, la Noèl Bilomi doit recevoir un affluent du nom de l'Oè Sunan, il est reconnu d'un commun accord qu'il n'existe aucun affluent de ce nom.

2. Il existe au contraire, plus à l'est, une rivière Oè Sunan qui n'est pas, il est vrai, un affluent de la Bilomi, mais qui prend sa source très près de cette rivière Bilomi, sur le versant nord de la montagne Kinapua; sur le mont Kinapua se trouve une borne proclamée par de nombreux chefs indigènes comme ayant servi de limite reconnue entre les Ambenos portugais et les Tumbabas néerlandais. De ce même mont Kinapua descend vers la Bilomi un ruisseau, et, du sommet, ces deux cours d'eau semblent se continuer. D'après les chefs indigènes, le cours de cette rivière Oè-Sunan est la limite historique et naturelle entre les Ambenos portugais d'une part et les Tumbabas et les Amakonos néerlandais d'autre part.

3. Les mêmes chefs indigènes font rentrer dans l'Ambeno toute la région comprise entre cette rivière d'Oè Sunan à l'est, la rivière Ni Fullan au nord, et le territoire incontestablement portugais de l'Oikoussi Ambeno à l'ouest des monts Kelali et Netton. Sur une carte privée publiée à Batavia, le nom d'Ambeno se trouve même en entier inscrit dans la partie revendiquée à tort aujourd'hui par les Pays-Bas.

4. Le traité de 1859 pose en principe que les États indigènes ne doivent pas être séparés, morcelés; or la délimitation proposée par les Pays-Bas coupe le

[1] Voir *supra*, p. 491.

territoire des Ambenos et priverait ces indigènes de leurs pâturages et terrains maraîchers qui se trouveraient par là situés à l'orient de la frontière et en territoire néerlandais.

5. Rien ne prouve que le bornage à effectuer doive nécessairement commencer au point où le travail de délimitation avait été suspendu en 1899 à la suite d'hostilités entre les indigènes et marqué sur les cartes au confluent de la Bilomi avec le ruisseau l'Oè Sunan qui n'existe pas en réalité à cet endroit. A cet endroit se trouvent deux affluents: le Kaboun et le Nono-Offi. Pourquoi suivre vers le nord le cours du Kaboun plutôt que celui du Nono-Offi qui vient du nord-est et qui se jette au même point dans la Bilomi?

Dans la pensée du Gouvernement portugais, on a voulu seulement donner dans les cartes de 1899 et 1904 aux commissaires délimitateurs « un graphique destiné à fixer les idées, et comme une vague et simple indication de ce qui devait être réglé plus tard ».

La véritable intention des Signataires du traité de 1904 a été de suivre le cours de l'Oè Sunan, là où il est en réalité, c'est-à-dire beaucoup plus à l'est. Rien n'empêche donc, dans l'esprit du traité, de remonter la Bilomi jusqu'au point le plus rapproché de la source du vrai Oé Sunan, source si rapprochée du cours de la Bilomi qu'elle en est presque un affluent.

6. La ligne proposée par les Pays-Bas qui, d'après le traité de 1904, doit « traverser autant que possible Nipani et Kelali (Keli) » ne *traverse* pas Nipani, mais touche seulement Fatu Nipani, c'est-à-dire l'extrémité occidentale de Nipani. Elle ne répond donc pas au programme de 1904.

7. La ligne proposée par les Pays-Bas ne constitue pas une frontière naturelle, tandis que celle suggérée par le Portugal suit des cours d'eau sur presque tout son parcours.

IV

Le point de vue néerlandais

Les principaux arguments du Gouvernement royal néerlandais peuvent être résumés comme suit:

1. Le traité de 1859 n'avait nullement prescrit d'une façon impérative que les territoires indigènes ne doivent pas être divisés ou morcelés. Il a, au contraire, attribué au Portugal « l'État d'Ambenu partout où y est arboré le pavillon portugais », sanctionnant ainsi non seulement la division d'un État indigène, mais précisément la division de l'État d'Ambenu et cela dans les termes suivants: « La Néerlande cède au Portugal . . . *cette partie* de l'État d'Ambenu ou d'Ambeno qui, depuis plusieurs années, a arboré le pavillon portugais ».

Au surplus, le traité de 1859 a pu être et a été effectivement modifié par les traités subséquents et ce sont les traités subséquents qui, aujourd'hui, doivent seuls être pris en considération là où ils ont modifié le traité de 1859.

2. Il n'existe aucune incertitude sur le point auquel les commissaires délimitateurs se sont arrêtés en 1899. Ce point a servi de base aux négociations de 1902 et a été repéré sur la carte (annexe III) signée alors par les négociateurs des deux Pays pour être jointe au projet de traité. Ce projet de 1902 est devenu le traité de 1904. C'est de ce point et non d'un autre que par la ligne A-C, admise en 1902 comme devant former la frontière (carte annexe I). Cette ligne A-C se dirige de ce point vers le nord jusqu'à la source de la rivière Noèl Meto et la

frontière doit suivre ensuite ce cours d'eau jusqu'à son embouchure dans la mer au nord.

L'emplacement de la source de la Noèl Meto a été contradictoirement reconnu en 1909; une borne y a été plantée d'un commun accord. La discussion ne porte que sur le tracé entre cette source et le point A situé à l'endroit où les commissaires se sont arrêtés en 1899.

3. Sur la carte officielle de 1899 (annexe IV) comme sur la carte officielle de 1904 (annexe III), figure au point dont il s'agit un affluent venant du nord et auquel on a, par une erreur que les Pays-Bas ne contestent pas, donné à tort le nom d'Oè Sunan. Cet affluent, qui porte en réalité chez les Tumbabas le nom de Kabun et chez les Ambenos celui de Leos, répond entièrement à l'intention des Parties contractantes, qui était de suivre, à partir du point A, un affluent venant du nord dans la direction A C. L'erreur de nom a d'autant moins de portée que, très fréquemment dans la région, les cours d'eau portent plusieurs noms, ou changent de nom, ou portent le nom de la contrée qu'ils traversent; or la région à l'est du Kabun ou Léos (l'Oè Sunan de 1904) porte, d'après le Gouvernement portugais, le nom à consonnance analogue d'Hue Son, et d'après les commissaires néerlandais celui de Sunan, ce qui peut expliquer l'erreur des commissaires.

4. Les chefs indigènes de l'Amakono (néerlandais) ont déclaré (commission mixte, séance du 21 février 1899) que leur pays comprend toute la région « située entre l'Oè Sunan, Nipani, Kelali-Keli, et la Noèl Meto (à l'ouest), la mer de Timor (au nord), la Noèl Boll Bass, les sommets Humusu et Kin Napua (à l'est), Tasona, la Noèl Boho et la Noèl Bilomi (au sud) ». Or la frontière occidentale décrite ici et indiquée dès 1899 comme séparant les Amakonos (néerlandais) de l'Ambeno (portugais) est précisément celle qui a été consacrée par le traité de 1904. L'Oè Sunan qui y figure ne peut être que le cours d'eau auquel on a donné à tort mais d'un commun accord ce nom dans les cartes officielles de 1899 et de 1904, c'est-à-dire un cours d'eau situé à l'*ouest* du territoire contesté, et non le prétendu Oè Sunan actuellement invoqué par le Portugal, et qui est situé sur la frontière *orientale* du territoire contesté. Le traité de 1904 a attribué aux Pays-Bas ce territoire contesté. C'est donc bien le cours d'eau, peu importe son nom, situé à l'ouest dudit territoire que les parties ont entendu adopter comme limite.

La preuve que le Portugal n'a pu, en 1899 et 1904, avoir en vue la rivière orientale à laquelle il donne maintenant le nom d'Oè Sunan, est fournie par le fait qu'à la séance du 21 février 1899, ses commissaires ont proposé comme limite une ligne partant du point où la rivière appelée alors Oè Sunan se jette dans la Bilomi et remontant ensuite vers l'est la Noèl Bilomi jusqu'à Nunkalai (puis traversant Tasona et, à partir de Kin Napua se dirigeant vers le nord jusqu'à Humusu et à la source de la Noèl Boll Bass dont le cours aurait servi de frontière jusqu'à son embouchure dans la mer). Cette proposition portugaise de 1899 serait incompréhensible s'il s'agissait d'une rivière autre que celle figurant sur les cartes officielles de 1899 et 1904 sous le nom d'Oè Sunan; comment pourrait-il être question d'une autre rivière Oè Sunan située à l'*est* de Nunkalaï, alors que Nunkalaï est, en réalité, à l'*ouest* de ce nouvel Oè Sunan découvert par les Portugais et non pas à l'est?

5. Deux enquêtes récentes instituées par les autorités néerlandaises de l'île de Timor ont, d'ailleurs, confirmé qu'aucune rivière du nom d'Oè Sunan ne prend sa source sur le mont Kinapua; la rivière qui prend sa source sur le versant nord, à une certaine distance du sommet, porte les noms de Poeamesse ou de Noilpolan, et se jette à Fatoe Metassa (Fatu Mutassa des Portugais) dans

la Noèl Manama, la Ni Fullan des cartes protugaises (Second Mémoire néerlandais, chiffre VII, page 6).

6. Il est exact que la ligne proposée par les Pays-Bas ne traverse pas le territoire de Nipani, mais le traité de 1904 ne l'exige pas. Il stipule que le ligne destinée à relier la source de l'Oé Sunan à la source de la Noèl Meto traversera « autant que possible Nipani ». Comme le territoire à délimiter était inexploré, les mots « autant que possible » étaient justifiés; en fait, la ligne suggérée par les Pays-Bas, si elle ne traverse pas tout le territoire de Nipani, en traverse l'extrémité occidentale appelée Fatu Nipani. Or, d'après les déclarations consignées au procès-verbal de délimitation du 21 février 1899, les indigènes, en désignant l'Oè-Sunan, Nipani, Kelali et la Noèl Meto comme la frontière orientale de l'Okussi Ambeno (portugais) et comme la frontière occidentale de l'Amakono (néerlandais), avaient eu en vue la masse rocheuse de Fatu Nipani formant l'extrémité occidentale de Nipani.

7. La frontière proposée par les Pays-Bas est une frontière naturelle formée par une chaîne de montagnes séparant partout les cours d'eau.

Il n'a jamais été prescrit ou recommandé en 1902-1904 de suivre avant tout des cours d'eau comme limite, et, sur la frontière méridionale de l'Okussi-Ambeno, on a, sur plusieurs points, notamment lorsque la ligne passait du bassin d'une rivière dans un autre, placé des bornes d'un commun accord (Voir notamment l'art. 3 de la Convention de 1904, chiffres 2, 3 et 4).

Il suffira aussi de quelques bornes pour délimiter la frontière sur la ligne de faîte proposée par les Pays-Bas.

Le tracé réclamé par le Portugal exigerait d'ailleurs lui aussi des bornes dans la région du mont Kinapua entre la Bilomi et le prétendu nouvel Oè Sunan, et en outre dans la région entre la source de la Noèl Meto et la rivière à laquelle les Portugais donnent le nom de Ni-Fullan c'est-à-dire aux deux extrémités du tracé portugais.

8. La ligne que le Portugal propose aujourd'hui reproduit en substance ses prétentions de 1899 et de 1902 dans cette région. Or il est incontestable qu'en acceptant à la Conférence de 1902 et en consignant dans le traité de 1904 la ligne A C, le Portugal a cédé un territoire auquel il prétendait auparavant. Il ne saurait équitablement revendiquer aujourd'hui ce même territoire.

V

Les règles de droit applicables

A teneur de l'article 2 du compromis, l'arbitre doit baser sa décision non seulement sur les traités en vigueur entre les Pays-Bas et le Portugal relatifs à la délimitation de leurs possessions dans l'île de Timor, mais aussi sur « les principes généraux du droit international ».

Il est presque superflu de rappeler ces principes.

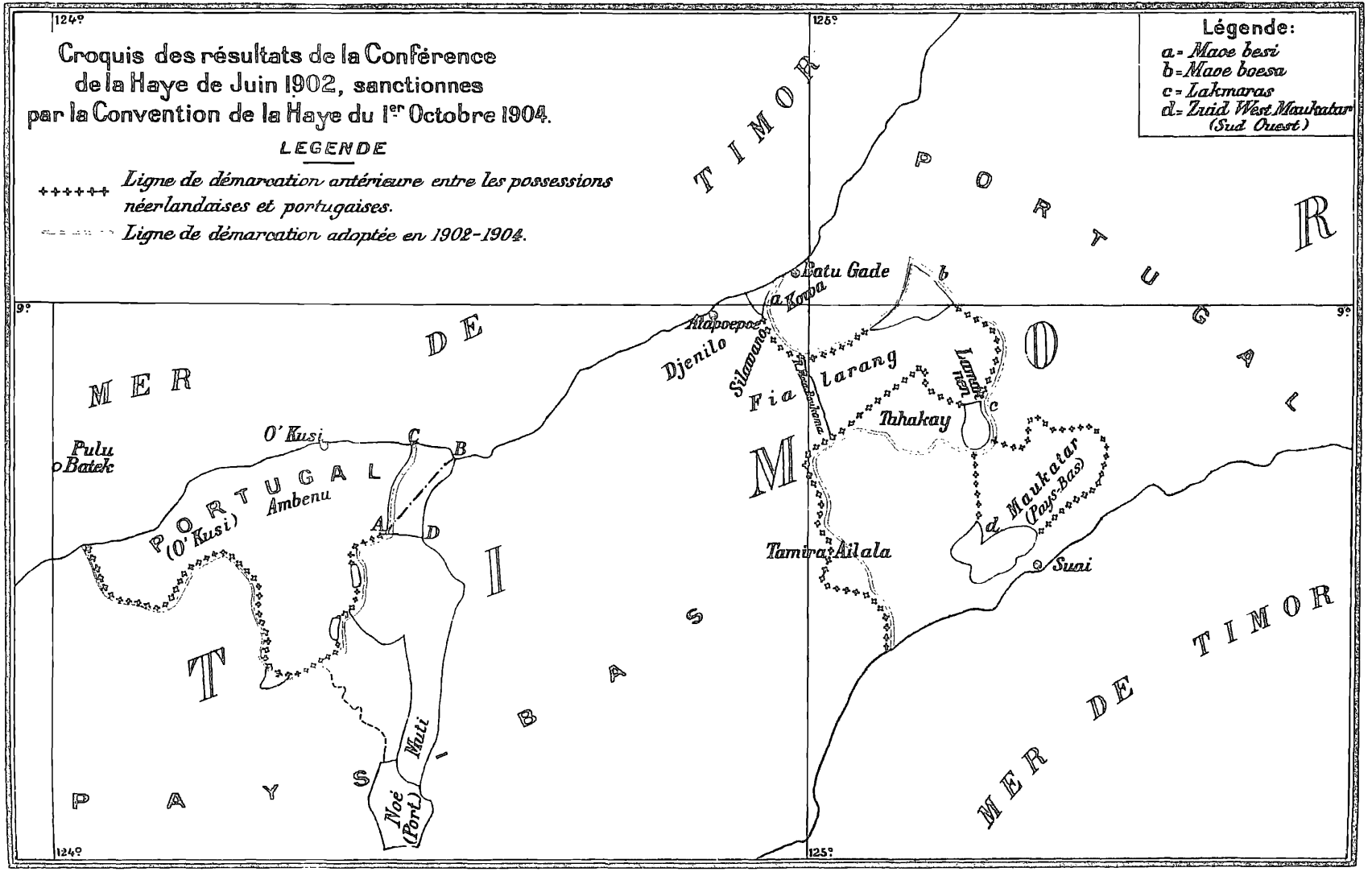
Heffter, *Völkerrecht*, § 94 [1], s'exprime, par exemple, comme suit: « Tous les traités obligent à l'exécution loyale et complète, non pas seulement de ce qui

[1] 94. Alle Verträge verpflichten zur vollständigen redlichen Erfüllung dessen, was dadurch zu leisten übernommen worden, und zwar nicht blos desjenigen, was dadurch buchstäblich versprochen, sondern auch desjenigen, was dem Wesen eines jeden Vertrages, so wie der übereinstimmenden Absicht der Contrahenten gemäss ist (dem s. g. Geist der Verträge).

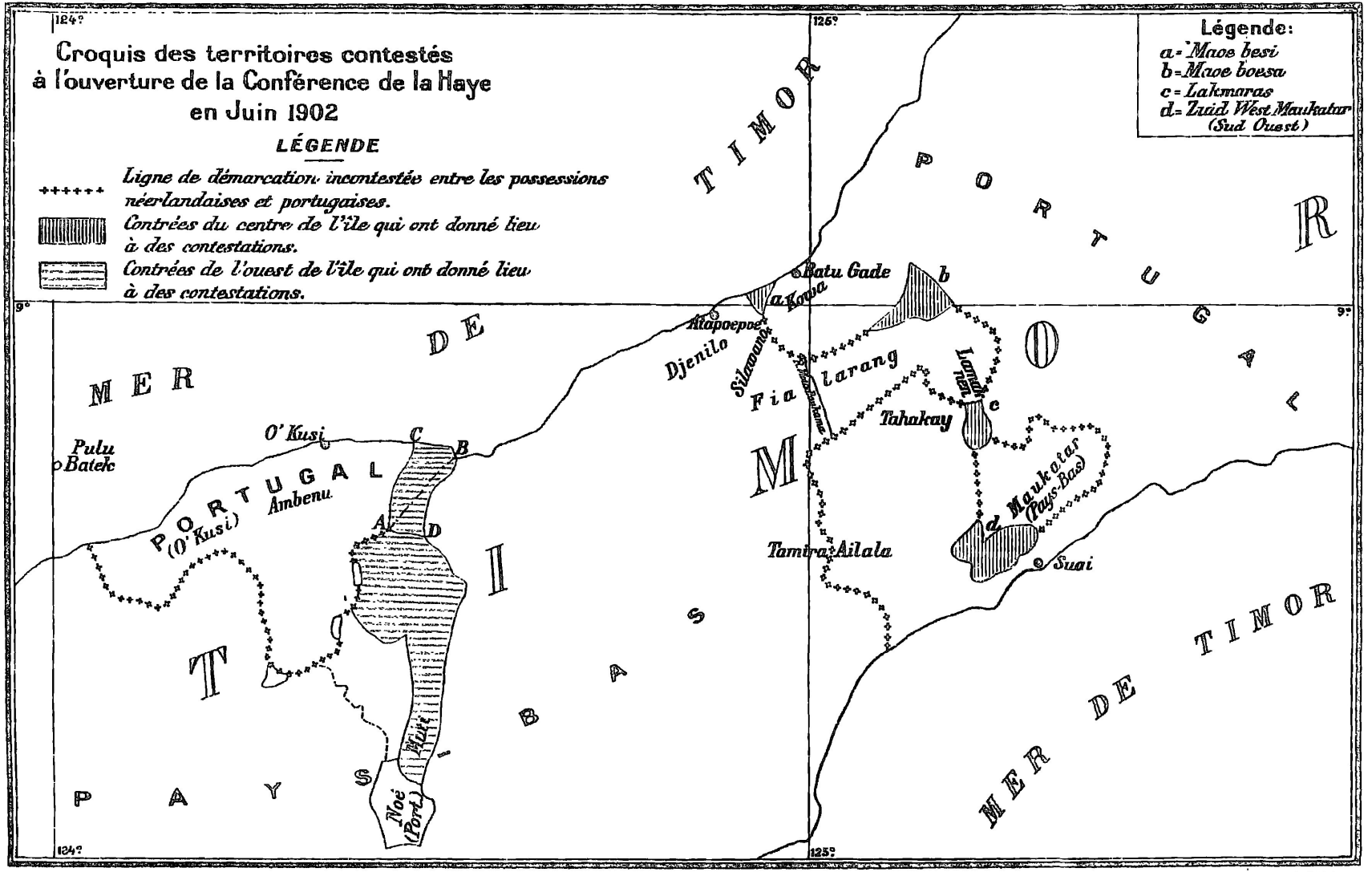
MAPS

CARTES

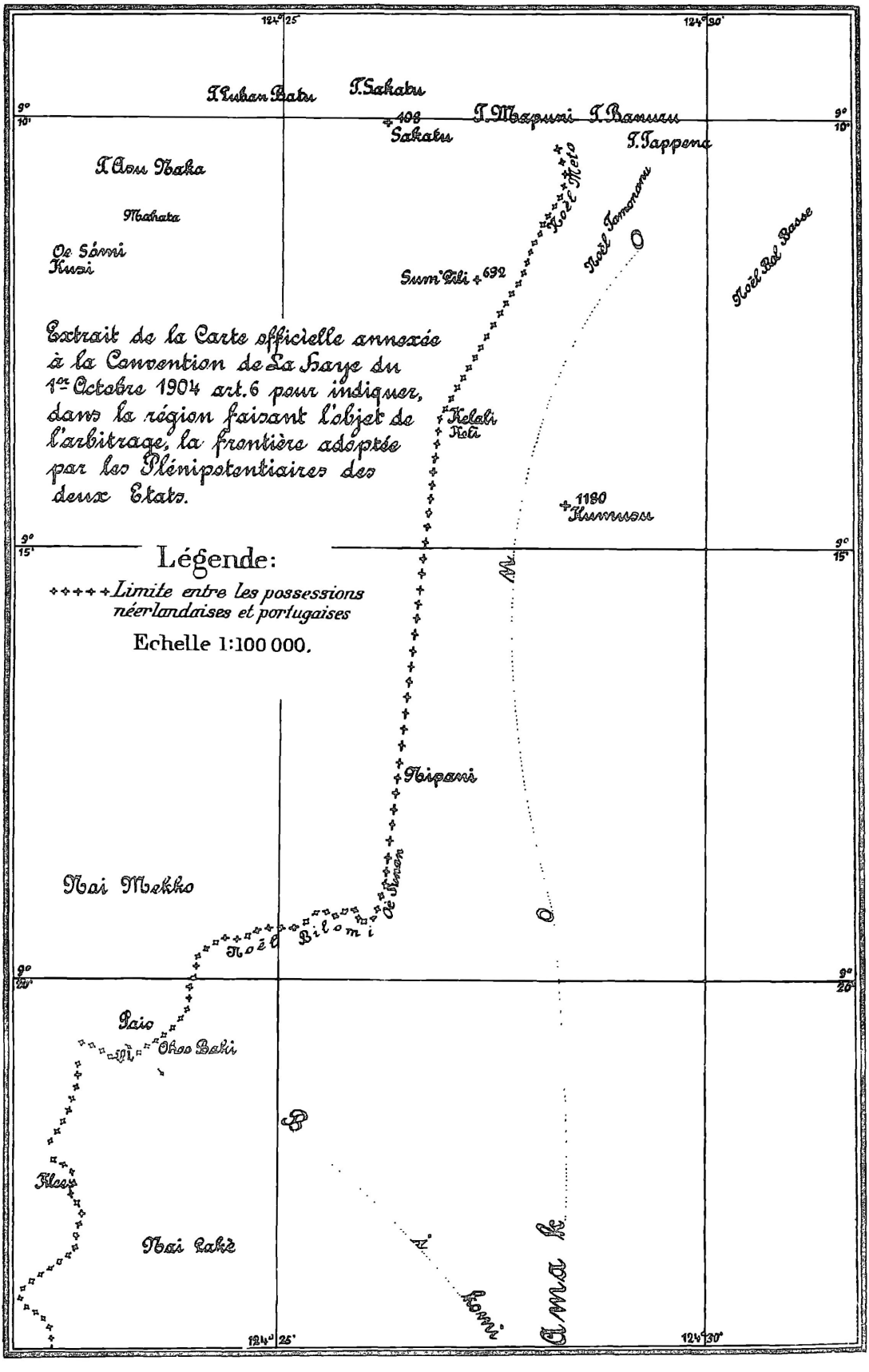
Annexe 1


Croquis des résultats de la Conférence de la Haye de Juin 1902, sanctionnes par la Convention de la Haye du 1er Octobre 1904.
LEGENDE
Ligne de démarcation antérieure entre les possessions néerlandaises et portugaises.
Ligne de démarcation adoptée en 1902-1904.
Légende:
a = Maoe besi
b = Maoe boesa
c = Lakmaras
d = Zuid West Maukatar (Sud Ouest)
124°
125°
9°
TIMOR PORTUGAIS
MER DE TIMOR
PAYS-BAS
PORTUGAL
(O'Kusi)
Ambenu
O'Kusi
Pulu Batek
Noé (Port.)
Nuti
Batu Gade
a Kowa
Alapoepoe
Djenilo
Silawan
Fialarang
Lamakan
Tahakay
Tamira
Ailala
Maukatar (Pays-Bas)
Suai
A
B
C
D
a
b
c
d

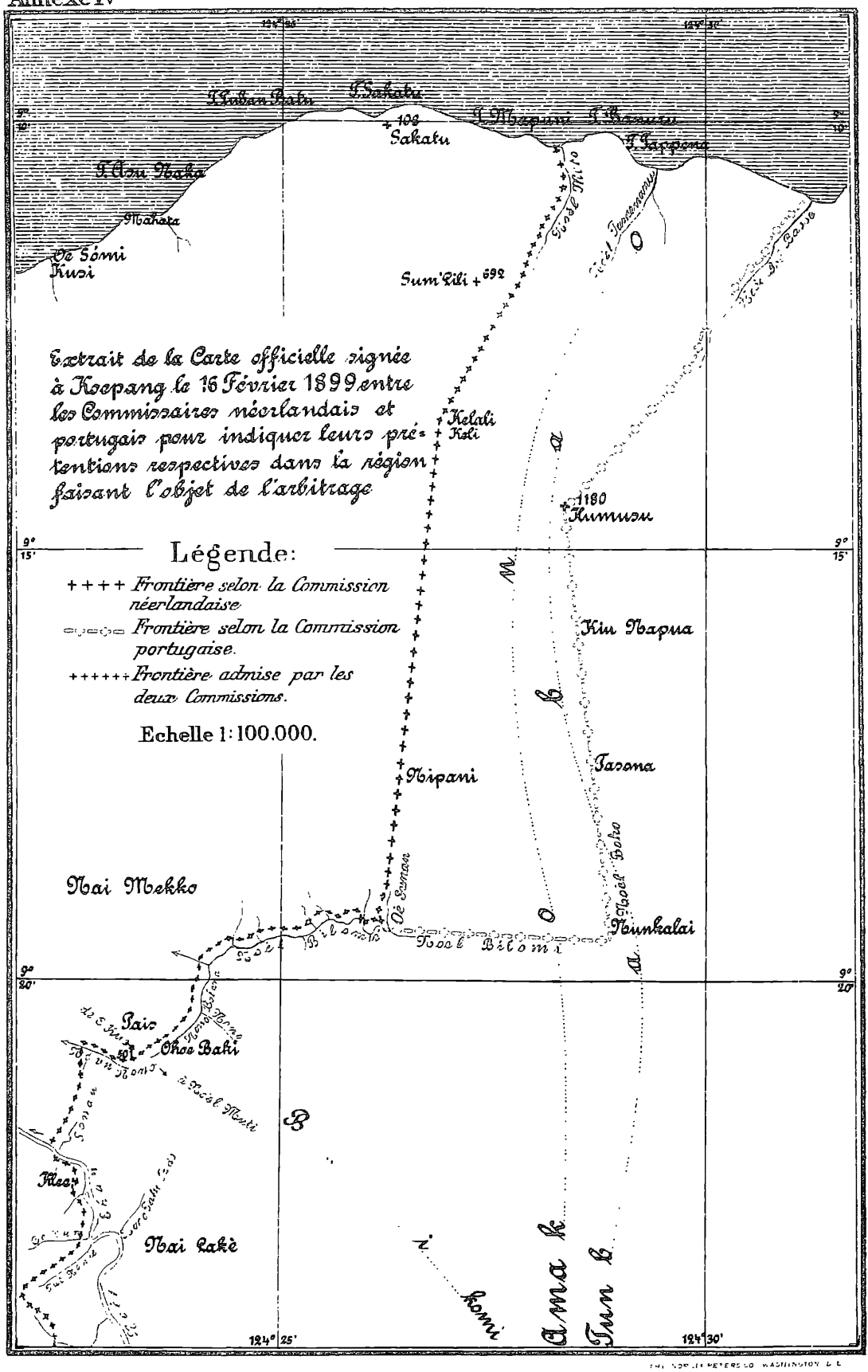
Annexe II


Croquis des territoires contestés
à l'ouverture de la Conférence de la Haye
en Juin 1902
LÉGENDE
Ligne de démarcation incontestée entre les possessions néerlandaises et portugaises.
Contrées du centre de l'île qui ont donné lieu à des contestations.
Contrées de l'ouest de l'île qui ont donné lieu à des contestations.
Légende:
a = Maoe besi
b = Maoe boesa
c = Lakmaras
d = Zuid West Maukatar (Sud Ouest)
124°
125°
9°
TIMOR
PORTUGAL
MER DE TIMOR
PAYS-BAS
Batu Gade
Kowa
Atapoepoe
Djenilo
Silaoane
Fialarang
Lamaknen
Tahakay
Maukatar (Pays-Bas)
Tamira
Ailala
Suai
Pulu Batek
O'Kusi
Ambenu
PORTUGAL (O'Kusi)
Noé (Port.)
A
B
C
D
a
b
c
d

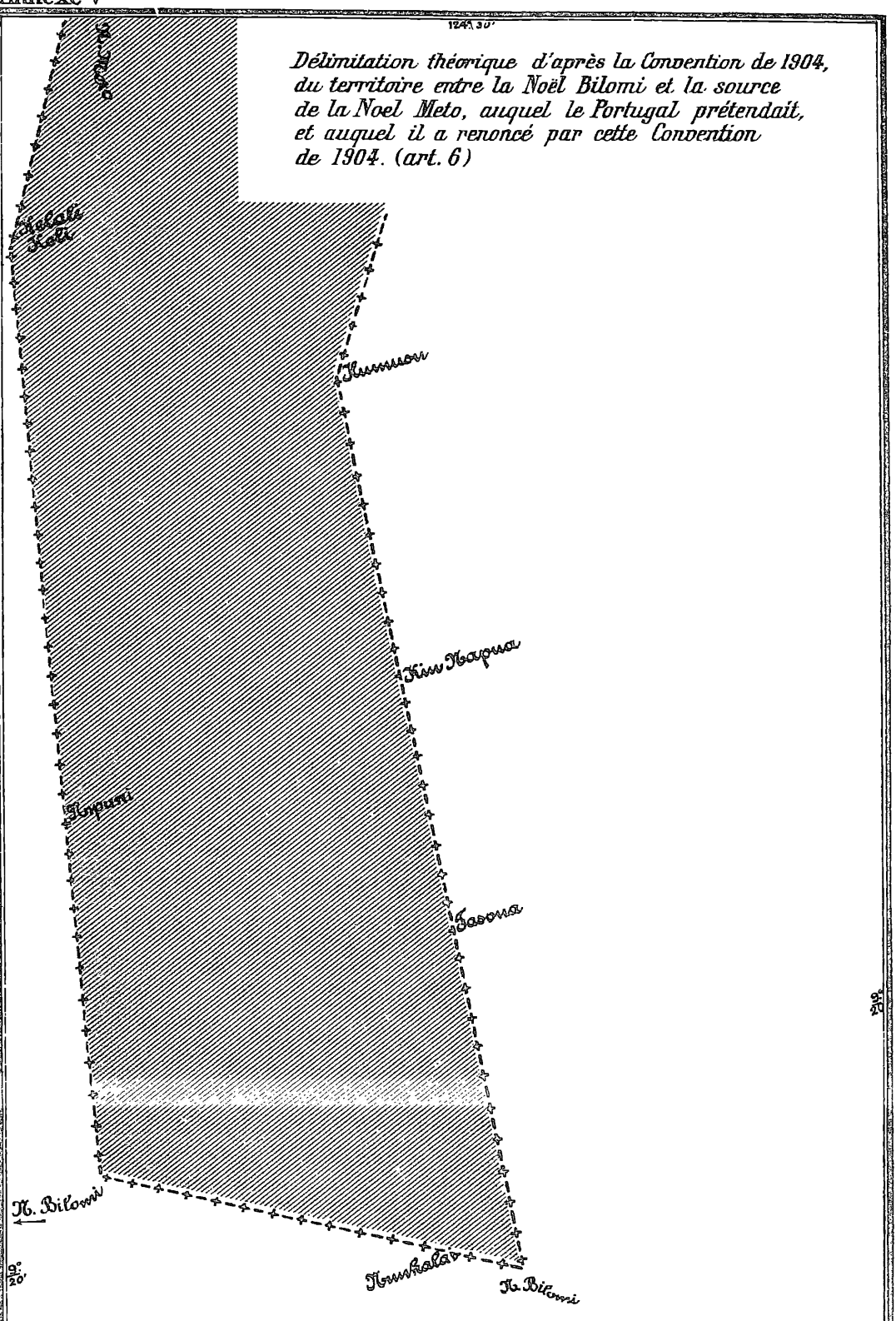
Annexe III


124° 25'
124° 30'
9° 10'
9° 15'
9° 20'
9° 26'
T. Luban Batu
T. Sakatu
T. Mapuni
T. Banuun
T. Tappena
T. Aou Naka
Mahata
Oe Sómi Kuzi
Sakatu
408
Noël Metro
Noël Tomanoni
Noël Rol Basse
Sum'Pili 692
Kelali Kota
1180 Kumuun
Légende:
Limite entre les possessions néerlandaises et portugaises
Echelle 1:100 000.
Tipani
Nai Mekko
Noël Bilomi
Oe Kuan
Baio
Oko Baki
Nai Lakè
Noël Kaumi
Amaf

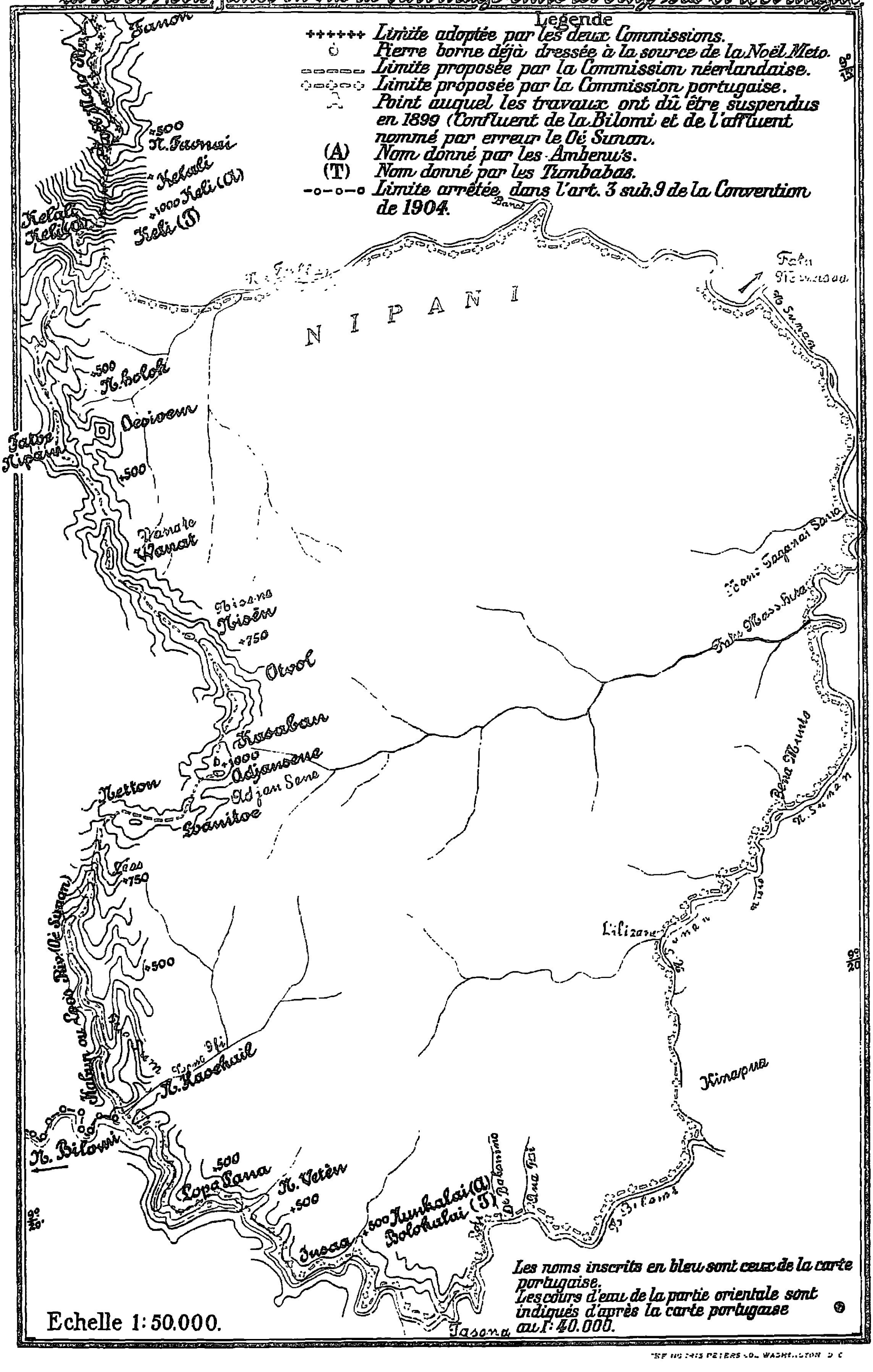
Annexe IV


Extrait de la Carte officielle signée à Koepang le 16 Février 1899 entre les Commissaires néerlandais et portugais pour indiquer leurs prétentions respectives dans la région faisant l'objet de l'arbitrage
Légende:
++++ Frontière selon la Commission néerlandaise
Frontière selon la Commission portugaise.
++++++ Frontière admise par les deux Commissions.
Echelle 1:100.000.
Sakatu
Sum'Eli + 692
Kelali
Kili
Humusu
Kiu Napua
Nipani
Tasona
Nai Mekko
Nunkalai
Nai Lakè
Anna R.
Tun B.
124° 25'
124° 30'
9° 15'
9° 20'

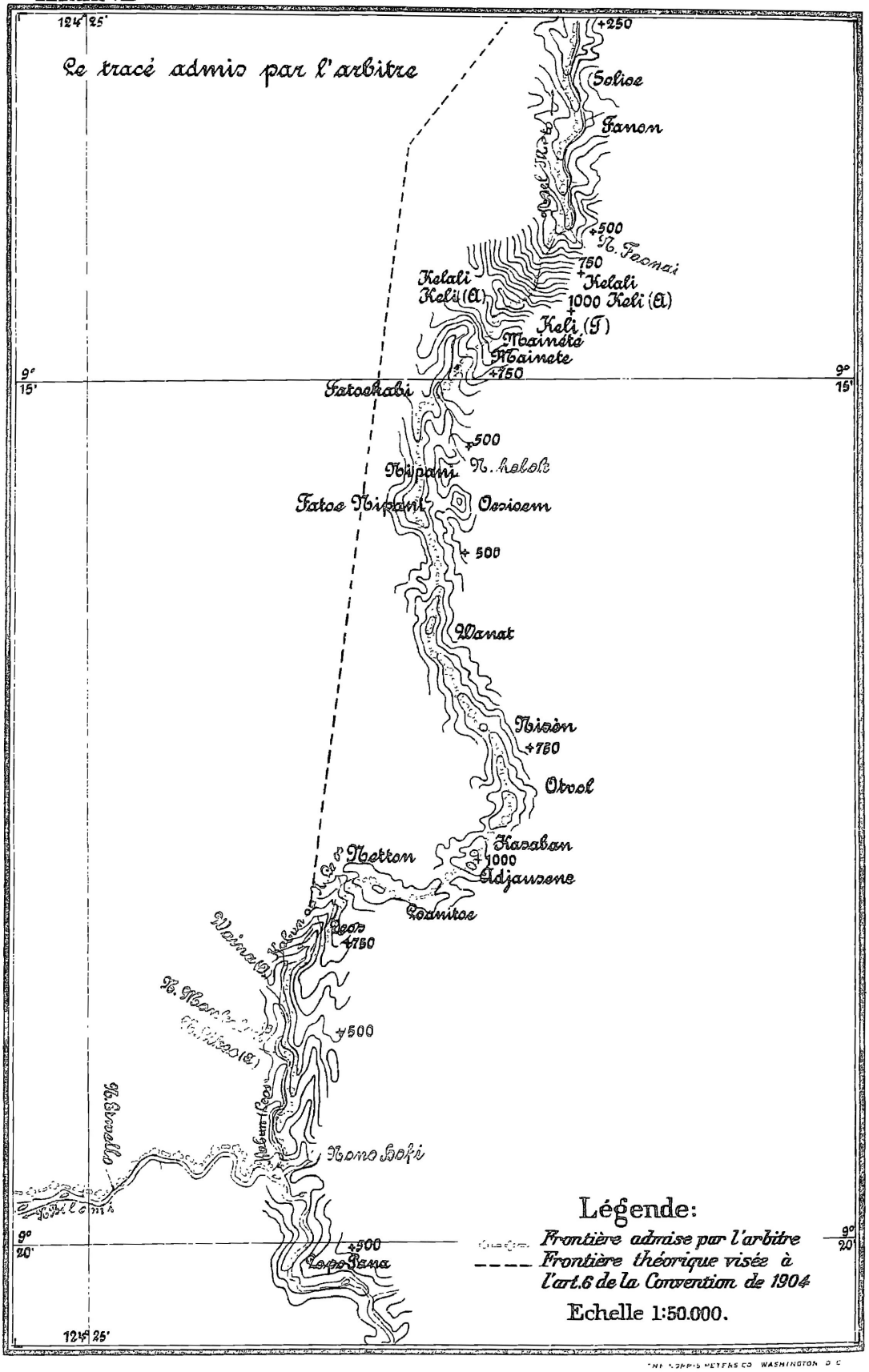
Annexe V


12° 30'
Délimitation théorique d'après la Convention de 1904, du territoire entre la Noël Bilomi et la source de la Noel Meto, auquel le Portugal prétendait, et auquel il a renoncé par cette Convention de 1904. (art. 6)
Noël Meto
Kalale Kali
Kumuon
Kiw Kapua
Kapuri
Kasoua
N. Bilomi
Nounkala
N. Bilomi
9° 20'
9° 20'
Echelle 1:50.000.

VI Les propositions de délimitation entre la Noel Bilomi et la source de la Noel Meto, faites en vue de l'arbitrage entre les Pays-Bas et le Portugal.



Annexe VII



a été littéralement promis, mais de ce à quoi on s'est engagé, et aussi de ce qui est conforme à l'essence de tout traité quelconque comme à l'intention concordante des contractants (c'est-à-dire à ce qu'on appelle l'esprit des traités).» Heffter ajoute § 95 [1]: « L'interprétation des traités doit, dans le doute, se faire « conformément à l'intention réciproque constatable, et aussi conformément à « ce qui peut être présumé, entre Parties agissant loyalement et raisonnablement, « avoir été promis par l'une à l'autre à teneur des termes employés ».

RIVIER, *Principes du droit des gens*, II, N° 157, formule les mêmes pensées dans les termes suivants: « Il faut avant tout constater la commune intention des parties: *id quod actum est*... La bonne foi dominant toute cette matière, les traités doivent être interprétés non pas exclusivement selon leur lettre, mais selon leur esprit. . . Les principes de l'interprétation des traités sont, en somme, et *mutatis mutandis*, ceux de l'interprétation des conventions *entre particuliers*, principes de bon sens et d'expérience, formulés déjà par les Prudents de Rome » (Ulpien, L. 34, au Digeste De R. J. 50.17: « Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est »).

Entre particuliers, les règles auxquelles Rivier renvoie ont été formulées dans les principaux codes en termes suffisamment précis pour se passer de commentaires:

Code civil français, néerlandais, etc., art. 1156-1157. « On doit dans les Conventions *rechercher quelle a été la commune intention des parties, plutot que de s'arrêter au sens littéral des termes*. Lorsqu'une clause est susceptible de deux sens, on doit plutôt l'entendre dans celui avec lequel elle peut avoir quelque effet, que dans le sens avec lequel elle n'en pourrait produire aucun. » *Code civil allemand* de 1896, art. 133: « Pour l'interprétation d'une déclaration de volonté, il faut *rechercher la volonté réelle et ne pas s'en tenir au sens littéral de l'expression* (Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen und nicht an dem buchstäblichen Sinne des Ausdrucks *zu haften*. » Code civil portugais de 1867, art. 684. *Code suisse des obligations de 1911*, art. 18: « Pour apprécier la forme et les clauses d'un contrat, il y a lieu de *rechercher la réelle et commune intention des parties, sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir, soit par erreur*, soit pour déguiser la nature véritable de la Convention. »

Il est inutile d'insister, le droit des gens comme le droit privé étant sur ce point entièrement concordants.

Il ne reste plus qu'à faire application aux circonstances de la cause de ces règles et à rechercher quelle a été la réelle et commune intention des Pays-Bas et du Portugal lors des négociations de 1902 qui ont abouti à la Convention de 1904.

VI

L'INTENTION DES PARTIES EN SIGNANT LA CONVENTION DE 1904

1. Le traité de Lisbonne du 10 juin 1893 avait eu pour but de chercher à établir une démarcation plus claire et plus exacte des possessions respectives dans l'île de Timor et de faire disparaître les « enclaves actuellement existantes » (art. 1er). Les « enclaves » figurant sous ce nom au traité antérieur signé à

[1] 95. Die Auslegung der Verträge muss im Falle des Zweifels nach der erkennbaren gegenseitigen Absicht, dann aber nach demjenigen geschehen, was dem Einen Theile von dem Anderen nach den dabei gebrauchten Worten als versprochen, bei redlicher und verständiger Gesinnung verausgesetzt werden darf.

Lisbonne le 20 avril 1859, étaient celles de Maucatar (art. 2, premier alinéa) et d'Oi Koussi (art. 2, second alinéa, et art. 3, premier alinéa).

Lorsqu'en juin 1902, les Délégués des deux Gouvernements se réunirent à La Haye pour chercher à concilier les propositions divergentes des commissaires délimitateurs envoyés sur les lieux en 1898-1899, les délégués furent immédiatement d'accord pour attribuer au Portugal l'enclave néerlandaise de Maucatar au centre de l'île de Timor, et aux Pays-Bas l'enclave portugaise de Noimuti, au sud du « royaume » d'Ambeno. A la séance du 26 juin, les Portugais demandèrent, au milieu de l'île, toute la partie du territoire de Fialarang située à l'est de la rivière Mota Bankarna (voir la carte annexe II); ils soutinrent en outre que le royaume d'Ambeno confinant à la mer ne pouvait pas plus être considéré comme une enclave que la Belgique, le Portugal ou les Pays-Bas et qu'il ne pouvait donc être question de l'attribuer à la Néerlande; ils revendiquèrent aussi pour l'Ambeno tout le Hinterland de la côte comprise au nord entre les embouchures de la Noèl Meto et de la Noèl Boll Bass. Ce Hinterland devait s'étendre au sud jusqu'à la rivière Noèl Bilomi et suivre cette rivière de l'ouest à l'est entre le point auquel les commissaires délimitateurs s'étaient, à l'ouest, arrêtés en 1899 et, à l'est, un lieu dénommé Nunkalai sur la carte dessinée alors en commun par les commissaires délimitateurs des deux Pays. — Les limites de ce territoire contesté ayant été désignées par les quatre lettres A B C D sur une carte (voir annexe II) présentée par les Délégués néerlandais à la Conférence de 1902, la discussion s'engagea sur la ligne occidentale A C préconisée par les Pays-Bas, et la ligne orientale B D réclamée par le Portugal.

Sur la carte ci-annexée sous N° IV, on a reproduit les prétentions respectives, telles qu'elles résultent de la carte signée en commun par tous les commissaires délimitateurs, à Kœpang, le 16 février 1899.

Les délégués néerlandais déclarèrent à la Conférence du 26 juin 1902 que les chefs du territoire de Fialarang, au milieu de l'île de Timor, se refusaient absolument à passer sous la souveraineté du Portugal, en sorte qu'il n'était pas ou n'était plus possible de supprimer cette pointe que le territoire néerlandais fait dans cette région en territoire portugais (Voir carte II).

Le premier délégué portugais répliqua qu'il ne fallait pas trop se « laisser guider par des préoccupations d'humanité envers les peuples de l'île de Timor; pour des cas peu graves, ces tribus quittent leur sol natal pour s'établir ailleurs, et ils ont plusieurs fois quitté le territoire néerlandais pour s'établir dans le territoire portugais et inversement ». Finalement, le Délégué portugais renonça au territoire des Fiamarangs au milieu de l'île de Timor, mais demanda que la frontière orientale de l'Oikoussi fût fixée « selon la proposition des com- « missaires néerlandais de 1899 ». (Voir cette proposition dans le procès-verbal de la séance tenue à Kœpang le 8 février 1899 dans le premier Mémoire portugais, p. 24).

Le lendemain 27 juin, le premier Délégué néerlandais accepta la proposition portugaise, mais, pour éviter tout malentendu, réclama pour son Gouvernement « la certitude *absolue* que la limite orientale d'Okussi *représentée par la* « *ligne A C* sera démarquée autant que possible sur le terrain même ».

Il y avait, en effet, malentendu, car le premier délégué portugais répondit que sa proposition de la veille « ne disait pas que la frontière à l'est d'Okussi sera formée par la ligne A C, mais au contraire par la ligne proposée par la commission mixte de 1899 et indiquée par les lettres « A B ».

Le premier délégué néerlandais répliqua aussitôt que, « si la ligne A C n'est pas acceptée comme frontière à l'est d'Oikoussi (et si les demandes néerlandaises pour la frontière au centre de Timor ne sont pas agréées) . . . « les délégués néerlandais retirent leur consentement à la proposition portugaise . . .

Jamais ils ne pourraient soumettre à leur Gouvernement un projet ne satisfaisant pas à ces conditions ». — Le délégué néerlandais termina en déclarant que, si un accord amiable sur ces bases n'intervenait pas, les Pays-Bas recourraient à l'arbitrage prévu par la Convention de 1893 sur la « question des enclaves », donnant ainsi à entendre qu'en cas de refus de la ligne A C pour la frontière orientale de l'Ambeno, les Pays-Bas soulèveraient la question beaucoup plus vaste de savoir si la totalité de l'Ambeno n'était pas une enclave pouvant revenir logiquement à la Néerlande, puisque l'Ambeno avait été à plusieurs reprises désigné comme enclave dans le traité de 1859 et puisqu'un des buts de la Convention de 1893 était la « suppression des enclaves ».

A la séance du 28 juin, les délégués portugais « ayant examiné sérieusement la proposition des délégués néerlandais, émise dans la séance du 27 juin, ont résolu d'accepter cette proposition, ainsi que les conditions posées par eux (par les délégués néerlandais)à ce sujet ».

Il importait de reproduire avec détails cette discussion, parce qu'elle jette un jour décisif sur la réelle et commune intention des Parties. — Le Portugal s'est déclaré satisfait de la situation qui lui était offerte. Au milieu de l'île de Timor, il gagnait la grande enclave de Maukatar; s'il n'y gagnait pas le pays des Fialarangs, il conservait dans l'ouest de l'île de Timor l'Oikussi Ambeno et évitait d'avoir à discuter devant des arbitres la question délicate de savoir si ce royaume était ou non une « enclave » susceptible d'être attribuée en entier aux Pays-Bas; le Portugal a préféré dans ces circonstances renoncer à la partie orientale contestée de l'Oikussi Ambeno plutôt que de risquer d'y perdre davantage ou même d'y perdre tout; il a trouvé, en un mot, dans l'ensemble de la négociation, des compensations jugées par lui suffisantes à l'abandon de la ligne B D et de la ligne intermédiaire A B qu'il réclamait. — Il a finalement accepté la ligne A C réclamée *sine qua non* par les Pays-Bas.

Il est donc certain que cette ligne A C doit, dans l'intention des Parties, être considérée comme une *concession* faite par le Portugal aux Pays-Bas et ce fait a été proclamé par les Délégués portugais eux-mêmes dans le Mémoire qu'ils ont remis à la séance du 26 juin 1902, au cours des Conférences de La Haye, en ces termes: « ces territoires représentent une *réduction considérable* des frontières du royaume d'Ocussi-Ambenou ».

2. Qu'est-ce que la ligne A C ?

a) Et d'abord où est le point C? A l'embouchure de la rivière Noèl Meto dans la mer de Timor au nord de l'île. Aucune constestation n'existe à ce sujet, et la Convention de 1904, article 3, chiffre 10, stipule expressément que la frontière suit le thalweg de la Noèl Meto de sa source à son embouchure. — Entre 1899 et 1902-1904, le Portugal prétendait au contraire à tout le territoire à l'est de la Noèl Meto jusqu'à la rivière Noèl Boll Bass; l'embouchure de la Noèl Boll Bass était le point B, terminus nord de la ligne A B revendiquée par le Portugal (Proposition portugaise, séance du 21 février 1899, 2e Mémoire néerlandais annexe II, Procès-verbaux des Conférences de La Haye 1902, page 10, et cartes ci-annexées I et II).

Si l'emplacement du point C n'est pas contesté, il est cependant utile de constater que l'adoption en 1904, comme ligne de démarcation, du cours de la Noèl Meto plutôt que du cours de la Noèl Boll Bass prouve l'intention générale de ramener la frontière vers l'ouest.

b) L'emplacement de la source de la Noèl Meto a été déterminé et une borne y a été plantée d'un commun accord (procès-verbal du 14 juin 1909, 1er Mémoire portugais, page 26). Toute cette partie du tracé est ainsi définitivement réglée. (Voir carte annexe VI.)

c) Où est maintenant, à l'autre extrémité de la ligne, le point A convenu à la Conférence de 1902? Les Pays-Bas soutiennent que ce point A se trouve là où se termina la reconnaissance de 1899 et où les commissaires durent arrêter leurs travaux à cause d'hostilités entre les tribus indigènes, c'est-à-dire au point où les commissaires, après avoir suivi la Nono Balena, la Nono Nive et la Noèl Bilomi, ont atteint le confluent de cette dernière rivière avec une autre venant du nord et à laquelle avait été attribué d'un commun accord le nom d'Oè Sunan.

Toute la ligne de démarcation dans cette partie occidentale et inférieure du bassin de la Bilomi a été sanctionnée et définitivement admise comme frontière par le traité de 1904, article 3, chiffre 9. Lors de la reconnaissance postérieure du 17 juin 1909, il est constaté au procès-verbal que ce point n'est pas douteux: « On décide *unanimement* que de ce point, *c'est à dire le point où la commission de 1899 a terminé son travail*, l'arpentage sera poursuivi. » (1er Mémoire néerlandais, annexe III, page 4, 1er Mémoire portugais, page 27.) La divergence se produit seulement sur ce qu'il y a lieu de faire *à partir de ce point*, soit vers le nord (demande néerlandaise) soit dans la direction de l'est (demande portugaise). Or ce point, celui auquel les travaux avaient été suspendus en 1899, celui à partir duquel des divergences s'étaient produites entre 1899 et 1902, a été marqué sur la carte officielle signée contradictoirement par les commissaires délimitateurs des deux Pays le 16 février 1899; c'est ce même point qui a été envisagé lorsqu'à la Conférence de La Haye de 1902, les délégués des deux États ont solutionné le différend en se prononçant pour une frontière se dirigeant vers le nord et désignée sous le nom de ligne A C. En plaçant cette carte du 16 février 1899 (annexe IV ci-jointe) sous la carte annexée à la Convention de 1904 (annexe III ci-jointe), on constate qu'il y a concordance absolue entre elles quant à l'emplacement du point dont il s'agit.

Le Gouvernement portugais ne conteste d'ailleurs pas très vivement l'emplacement du point A, car dans son premier Mémoire il s'exprime comme suit, page 10: « On ne prétend pas nier que la ligne ne part du point A, auquel se rapportent les procès-verbaux des négociations, vers le point C. Ce qu'on discute, ce sont ses inflexions subordonnées . . . » et plus loin, page 15: « On ne conteste pas que la frontière dont il s'agit ne parte du point où les arpenteurs ont été empêchés d'aller plus loin; ce qu'on nie, c'est qu'on ait eu l'intention de la diriger *de là* directement vers le nord. »

De ce qui précède, il résulte pour l'arbitre la certitude que trois points de la ligne A C sont dûment établis, incontestables et même incontestés: le point C au nord, la source de la Noèl Meto au milieu et le point A au sud, à l'endroit où les travaux de délimitation ont été suspendus en 1899. Ces trois points correspondent certainement à l'intention des Parties lorsqu'elles ont négocié le projet de convention de 1902 et l'ont transformé en convention en 1904. Admettre une autre solution quant à l'emplacement du point A serait d'ailleurs remettre en question la frontière convenue pour le cours inférieur de la Noèl Bilomi par le chiffre 9 de l'article 3 du traité de 1904; or ce chiffre 9 n'est pas contesté et n'est pas en cause.

3. Il reste à examiner maintenant la partie de la ligne A C comprise entre le point A au sud et la source de la Noèl Meto au milieu de cette ligne A C.

Ici encore et toujours, il faut rechercher l'intention réelle et concordante des Parties au moment où elles ont contracté:

En 1902, deux propositions étaient en présence: Celle du Portugal avait été formulée comme suit dans le procès-verbal de la séance des commissaires délimitateurs tenue à Kœpang le 21 février 1899 (annexe II au 2me Mémoire néerlandais): « De ce dernier point (le point A), le long de la Noèl Bilomi

jusqu'à Nunkalai, de là traversant Tasona, Kin Napua, Humusu, jusqu'à la source de la Noèl Boll Bass; puis le long de cette rivière jusqu'à l'embouchure ». Aux Conférences de La Haye de 1902, ce tracé (D B) fut abandonné dès la séance du 26 juin par la Délégation portugaise et remplacé par la demande d'un tracé intermédiaire et diagonal A B qui prenait pour frontière au nord-est le cours de la Noèl Boll Bass au lieu de la Noèl Meto (voir la carte ci-jointe II). Le 28 juin, la délégation portugaise abandonnait cette ligne de retraite A B, reculait vers l'ouest de la Noèl Boll Bass à la Noèl Meto (voir carte ci-jointe II), et acceptait la ligne A C réclamée par les Pays-Bas. Cette ligne A C était aussitôt tracée sur une carte qui a été annexée officiellement au traité de 1904 (voir carte annexe III.)

Sur cette carte, la frontière, partant du point A auquel aboutissait la frontière incontestée du cours inférieur de la Noèl Bilomi, remonte dans la direction du cours inférieur de la Noèl Bilomi, remonte dans la direction du nord le cours d'un petit affluent appelé d'un commun accord Oè Sunan, puis continue vers le nord jusqu'à l'emplacement, alors inconnu, de la source de la Noèl Meto. Ce tracé de la carte était défini et commenté comme suit dans le traité, art. 3, chiffre 10: « à partir de ce point (A), la limite suit le thalweg de l'Oè Sunan, traverse autant que possible Nipani et Kelali (Keli), gagne la source de la Noèl Meto et suit le thalweg de cette rivière jusqu'à son embouchure ». Or ce texte, devenu définitif dans le traité de 1904, *est la reproduction mot à mot du texte proposé par les commissaires néerlandais* à cette même séance de Kœpang, 21 février 1899, en opposition aux prétentions portugaises d'alors. La simple mise en regard de ces deux cartes et le fait qu'en 1902-1904, la proposition portugaise a été totalement écartée et la proposition néerlandaise insérée mot à mot, suffit à établir avec évidence l'intention des Parties contractantes: lorsqu'elles ont négocié et signé l'accord de 1904, elles ont adopté le tracé néerlandais et écarté le tracé désiré par le Portugal sur cette partie des frontières des deux Etats dans l'île de Timor. Les deux parties ont donc eu, dans la pensée de l'arbitre, *la volonté réelle et concordante d'adopter le tracé le plus occidental*, non seulement sur le versant nord de l'île entre la Noél Boll Bass et la Noèl Meto, mais aussi dans le centre de l'île, entre le cours de la Noèl Bilomi et la source de la Noèl Meto.

Il convient maintenant d'entrer dans les détails de l'examen de ce tracé le plus occidental:

4. Le Portugal fait observer aujourd'hui que le cours d'eau dénommé Oè Sunan sur les cartes officielles de 1899 et de 1904 et dans l'art. 3, chiffre 9, du traité de 1904, n'existe pas; que ce cours d'eau porte en réalité le nom de Kabun chez les membres de la tribu des Tumbabas ou de Lèos chez les membres de la tribu des Ambenos, et que le véritable Oè Sunan se trouve à six ou sept kilomètres plus à l'est. Il est vrai, ajoute le Gouvernement portugais, que cet autre Oè Sunan n'est pas un affluent de la rivière Bilomi, qu'il prend sa source à une certaine distance de cette rivière, sur le versant nord du Mont Kinapua, mais cet autre Oè Sunan et le Mont Kinapua sont revendiqués par les Ambenos (portugais) comme formant d'ancienne date la frontière entre eux à l'ouest et les Amakonos néerlandais à l'est. C'est donc bien, dans la pensée du Gouvernement portugais, à cet autre Oè Sunan que les deux Gouvernements ont pensé lorsqu'ils ont, à l'art. 3, chiffre 10, du traité de 1904, stipulé que la frontière suivrait le cours de l'Oé Sunan.

Pour apprécier la portée de cette allégation, il y a lieu de se rappeler que, sur la carte dressée par les commissaires délimitateurs des deux Pays le 16 février 1899 à Koepang (carte annexe IV), la frontière demandée alors par le Portugal est indiquée par un pointillé *en suivant à la montée le cours présumé de la Noèl Bilomi* dans la direction de l'est à partir du point (A) auquel les dits commissaires

avaient dû alors arrêter leurs travaux, c'est-à-dire à partir du confluent de la Noèl Bilomi avec ce qu'on appelait alors d'un commun accord l'Oè Sunan; on a eu soin, dans cette carte de 1899, de faire suivre le pointillé des mots « Noèl Bilomi », pour bien indiquer le désir des commissaires portugais de continuer à suivre, en le remontant, le cours de la rivière.

D'autre part, lors de la signature du traité de 1904, on a, au contraire, sur la carte annexée au traité, supprimé tout ce pointillé à l'est du point auquel on s'était arrêté en 1899, pour bien montrer qu'il n'y avait plus lieu de continuer à remonter dans la direction de l'est le cours alors inexploré de la Noèl Bilomi, et qu'au contraire, la frontière devait se diriger vers le nord (voir carte transparente annexe III). Cela implique, dans la pensée de l'arbitre, l'intention concordante d'attribuer, en amont du point A, les *deux rives* de la Noèl Bilomi aux Pays-Bas.

Un autre fait qui paraît à l'arbitre impliquer la même intention concordante des Parties lors de la signature de la Covnention de 1904, es que, dans la description de la frontière proposée en 1899 par les commissaires portugais, ils ont suggéré de *l'ouest à l'est* le tracé suivant: « De ce dernier point (le confluent de la Noèl Bilomi avec l'affluent nommé alors l'Oè Sunan) le long de la Noèl Bilomi *jusqu' à Nunkalaï*, de là traversant Tasona, Kinapua . . . »; d'après cette description portugaise, Nunkalaï se trouve donc à l'est de la rivière d'Oè-Sunan et à l'ouest de Kinapua. Or l'autre rivière Oè-Sunan, actuellement revendiquée comme frontière par le Portugal, se trouve située à plusieurs kilomètres *à l'est* et non à l'ouest de Nunkalaï, d'où résulte l'impossibilité que cette rivière ait été visée par les délégués portugais dans leurs propositions d'alors.

Ce qui confirme encore cette impression de l'arbitre, c'est le fait que le nouvel Oè Sunan, celui qui, six kilomètres plus à l'est, a sa source sur le versant septentrional du mont Kinapua, n'est pas un *affluent* de la Noèl Bilomi.

Enfin, cet autre Oè Sunan ne se dirige pas « vers Nipani et Kelali (Keli) » comme le prescrit le traité de 1904, mais se confond très vite avec d'autres rivières se dirigeant vers l'est pour aboutir finalement dans des régions incontestablement néerlandaises.

Tout cet ensemble de circonstances concordantes amène l'arbitre à la conviction qu'il n'y a pas lieu de s'arrêter à l'erreur de nom commise par les commissaires délimitateurs en 1899 et par les négociateurs des actes internationaux de 1902 et 1904 lorsqu'ils ont donné au Kabun ou Lèos le nom d'Oè Sunan, et qu'il y a lieu au contraire d'admettre que c'est bien le Kabun ou Lèos que les Parties ont eu l'intention de viser comme devant servir de frontière à partir du point A dans la direction du nord. Cette erreur commune aux commissaires des deux Pays s'explique d'ailleurs lorsqu'on constate que la plupart des cours d'eau de la région portent plusieurs noms ou portent le nom de la région qu'ils traversent et qu'une région voisine du Kabun ou Lèos porte le nom de Sunan dont la consonnance se rapproche d'Oè Sunan.

Admettre une autre solution, accepter un tracé remontant le cours de la Noèl Bilomi jusqu'au mont Kinapua, puis passant dans le bassin d'un autre Oè Sunan qui n'est pas un affluent de la Bilomi et qui ne se dirige pas vers Nipani et Kelali, serait contraire à tout l'esprit de la négociation de 1902-1904, et inconciliable avec la carte annexée à la convention de 1904. Le Portugal ne saurait équitablement revendiquer après coup, entre la Noèl Bilomi et la source de la Noèl Meto et à propos d'un bornage, presque exactement le territoire auquel il a expressément renoncé en 1902-1904 contre des compensations jugées par lui suffisantes ou parce qu'il a voulu éviter alors de la part des Pays-Bas un appel à l'arbitrage ou des revendications plus étendues dans la région d'Okussi (voir cartes annexes V et VI).

De ce qui précède, se dégage, en d'autres termes, la conviction que la volonté des Parties contractantes doit être interprétée en ce sens qu'à partir du point A situé sur la rivière Bilomi, la frontière suit, dans la direction du nord, le thalweg de la rivière Kabun ou Leos jusqu'à la source de ce dernier cours d'eau dénommé à tort Oè Sunan en 1899, 1902 et 1904.

Le raisonnement exposé ci-dessus sous chiffre 4 serait superflu si, comme l'affirme le Gouvernement des Pays-Bas (second Mémoire, chiffre VII page 6) les dernières reconnaissances faites sur place ont établi que ce nouvel Oè Sunan n'existe pas et que le cours d'eau auquel les Portugais donnent ce nom s'appelle en réalité Noèl Polan ou Poeamesse.

5. Il ne reste plus à rechercher l'intention des Parties que pour la section comprise entre la source de la rivière Kabun ou Lèos (dénommée à tort Oè Sunan de 1899 à 1904) et la source de la Noèl Meto.

La Convention de 1904 s'exprime comme suit: « Le Thalweg de l'Oè Sunan [reconnu sous N° 4 ci-devant devoir être dénommé Kabun ou Lèos] traverse *autant que possible* Nipani et Kelali (Keli), [et] gagne la source de la Noèl Meto . . . »

Les commissaires délimitateurs néerlandais et leur Gouvernement proposent de relier les sources des rivières Kabun et Noèl Meto en suivant presque exactement la ligne de partage des eaux, c'est-à-dire une suite de sommets dont les principaux porteraient, du sud au nord, les noms de Netton, Adjausene, Niseu ou Nisene, Wanat ou Vanate, Fatu Nipani ou Fatoe Nipani, Fatu Kabi (Fatoe Kabi) et Kelali (Keli).

Cette proposition est contestée par le Gouvernement portugais parce qu'elle serait contraire aux intentions des Parties dont le but aurait été, lors de la conclusion des traités entre les deux Gouvernements, de ne pas séparer les États indigènes; or cette ligne détacherait de l'Ambeno portugais toute la partie orientale; le Gouvernement portugais invoque, dans son premier et surtout dans les annexes de son second Mémoire, les dépositions de nombreux chefs indigènes pour établir, en substance, que tout l'espace qui serait attribué aux Pays-Bas fait partie de l'Ambeno et appartient aux Ambenos. Il invoque en outre une carte privée éditée à Batavia, sur laquelle les Ambenos sont indiqués comme occupant le territoire revendiqué par les Pays-Bas. Le Gouvernement portugais est d'avis que l'Ambenu-Oïkussi a incontestablement été attribué au Portugal par le traité de 1859 et que la tribu des Ambenos ne saurait être partagée entre deux souverainetés.

Une fois de plus, l'arbitre doit chercher à reconstituer la volonté des Parties. Or d'après le texte du traité de 1859, le Portugal a obtenu seulement la « partie » de l'État d'Ambeno qui « a arboré le pavillon portugais »; il n'y aurait donc rien d'anormal à ce que certaines parties de l'Ambeno eussent été considérées, dès 1859, comme restant sous la souveraineté des Pays-Bas. En outre, la carte privée éditée à Batavia ne saurait prévaloir contre les deux cartes officielles signées par les commissaires ou délégués des deux États en 1899 et en 1904 et ces deux cartes officielles (annexes III et IV) ne font pas figurer le nom d'Ambeno dans le territoire contesté; l'une et l'autre inscrivent ce nom à l'ouest et en dehors du territoire contesté. Il résulte, d'ailleurs, des documents fournis que, dès 1899, les commissaires néerlandais produisaient des déclarations des chefs indigènes tumbabas et amakonos assurant que ce territoire leur appartenait et ne faisait pas partie de l'Ambeno (annexe III au second Mémoire néerlandais, déclaration faite à la séance tenue à Koepang le 21 février 1899). On se trouve donc en présence d'affirmations contradictoires des indigènes. Ceux-ci se battaient en 1899 depuis plus de vingt ans (premier Mémoire portugais, p. 22), lors de l'arrivée dans cette région des commissaires-délimitateurs, et le Gouvernement

portugais reconnaît (dans son premier Mémoire, p. 9) comme « certain que les peuples à l'Est de l'Oikussi Ambeno se disputent depuis longtemps les territoires contigus et que ces peuples se trouvent de telle sorte entremêlés, qu'il est difficile de distinguer ce qui leur appartient en réalité ». Voir aussi dans le second Mémoire portugais, p. 10, la déposition du chef ambeno Béne Necat: « La partie orientale d'Oikussi et d'Ambeno a été habitée par le peuple Tumbaba qui en a été chassé il y a trois générations . . . par les Ambenos . . . Depuis lors cette région est déserte, bien qu'elle soit parcourue par les Tumbabas et par les Ambenos. »

L'intention des Parties lors de la négociation de 1902 se trouve documentée par le procès-verbal de la séance du 26 juin (procès verbaux, page 7) au cours de laquelle le premier Délégué portugais a, lui-même, conseillé « de ne pas trop se laisser guider en cette matière par les préoccupations d'humanité envers les peuples dans l'île de Timor; pour des causes peu graves, ces tribus quittent leur sol natal pour s'établir ailleurs et ont plusieurs fois quitté le territoire néerlandais pour s'établir dans le territoire portugais et inversement ». Le lendemain, procès-verbaux, page 11, le premier délégué néerlandais faisait observer que son Gouvernement faisait « une grande concession » en ne réclamant pas la totalité de l'Ambeno, « attendu qu'à son avis la convention de 1893 impliquait la « disparition de l'enclave d'Oikussi »; il déclarait que, si les deux Gouvernements ne pouvaient en venir à un arrangement sur la base de la ligne A C proposée par les Pays-Bas, ceux-ci se verraient engagés à recourir à l'arbitrage pour établir si l'Ambeno n'était pas une « enclave » devant leur être attribuée toute entière, et c'est alors que, le 28 juin, la délégation portugaise accepta sans restriction ni réserve la ligne A C telle qu'elle était réclamée par la délégation néerlandaise.

De tout cet ensemble de faits résulte pour l'arbitre la conviction qu'en 1902-1904, l'accord s'est fait sans tenir compte du risque de détacher telle ou telle parcelle réclamée par les Ambenos, les Tumbabas ou les Amakonos et en constatant expressément qu'on ne se préoccuperait pas des prétentions, d'ailleurs contradictoires, des indigènes. Des procès-verbaux de 1902 résulte, en d'autres termes, pour l'arbitre, la conviction que le Portugal a accepté la ligne A C telle qu'elle était réclamée *par les Pays-Bas*, précisément parce que le Portugal préférait abandonner des prétentions d'ordre secondaire à l'est afin de conserver le gros morceau, c'est-à-dire afin de conserver ce que le traité de de 1859 avait appelé l'« enclave » d'Ambeno-Okussi. C'est avec raison aussi, dans la pensée de l'arbitre, que le Gouvernement néerlandais soutient dans son second mémoire, page 2, que rien dans le traité de 1859 ne s'opposait à la division du royaume d'Ambeno et ajoute: « Même si le traité de 1859 n'avait pas sanctionné une telle division . . . le Gouvernement portugais ne pourrait légitimement s'opposer *à présent* à une pareille division. De telles objections viendraient trop tard et auraient dû être élevées *avant* la conclusion du traité de 1904. »

L'arbitre fait observer en outre que, sur les deux cartes officielles de 1899 et de 1904 (annexes III et IV), le Nipani est indiqué comme se trouvant très près et légèrement à l'est de la ligne A C, à peu de distance de la source de l'Oè Sunan (aujourd'hui reconnu devoir être appelé Kabun ou Lèos); si l'on adoptait le tracé actuellement réclamé par le Portugal, ce tracé passerait fort loin à l'est et au nord du Nipani et par conséquent « traverserait » encore moins ce territoire que le tracé proposé par les Pays-Bas. Il est vrai que le Gouvernement portugais place le Nipani (voir la carte annexée sous chiffre VI au premier Mémoire néerlandais et mot *Nipani* inscrit *en bleu* sur la carte ci-jointe annexe IV) au nord-est du territoire contesté, mais cette carte unilatérale portugaise ne saurait être opposée aux deux cartes officielles de 1899 et de 1904, (annexes III et IV)

signées des délégués des deux États; d'ailleurs, même sur cette carte exclusivement portugaise, la frontière désirée par le Portugal semble tracée au nord de Nipani et ne paraît pas « traverser » ce territoire.

6. Le Gouvernement de la République portugaise objecte enfin à ce tracé d'une ligne à peu près directe du sud au nord entre la source de la rivière Kabun ou Lèos et la source de la Noèl Meto, que c'est une frontière terrestre, devant nécessiter la pose de bornes, tandis que la ligne orientale suggérée par le Portugal est essentiellement formée par une succession de rivières, ce qui est préférable pour éviter des conflits entre les indigènes. Dans la pensée de l'arbitre, cette objection ne repose sur aucune indication résultant des négociations de 1899 à 1904. Sur la frontière méridionale de l'Okussi-Ambeno, la frontière adoptée en 1904 est, sur un assez grand nombre de points, indépendante des cours d'eau et a dû ou pourra devoir être marquée sur le terrain par des bornes. Le tracé suggéré par le Portugal comporterait, lui aussi, des parties terrestres et la plantation de bornes, notamment à l'angle sud-est, (aux environs du mont Kinapua, entre le cours de la rivière Bilomi et le cours de la rivière dénommée Oè Sunan par les Portugais,) et à l'angle nord-ouest, (entre la source de la rivière appelée par les Portugais Ni-Fullan et la source de la Noèl Meto).

Le tracé suggéré par les commissaires néerlandais paraît à l'arbitre constituer une frontière suffisamment naturelle pour être facilement délimitable sur le terrain. Il se compose d'une série continue de sommets assez élevés, portant, du sud au nord, les noms de Netton, Loamitoe, Adjausene, Niseu, Wanat, Fatoe-Nipani, Kelali ou Keli, dont l'altitude est indiquée entre 500 et 1000 mètres. Cette chaîne sert de ligne de partage des eaux et les rivières à l'est de cette ligne coulent vers l'orient. Il ne semble donc pas qu'il soit techniquement difficile de procéder à la délimitation le long de cette chaîne de hauteurs, dont la direction générale répond entièrement à la ligne théorique A C adoptée d'un commun accord en 1904.

VII

Conclusions

Les considérations de fait et de droit qui précèdent ont amené l'arbitre aux conclusions suivantes:

1. Le traité de 1859 avait attribué au Portugal, dans la partie occidentale de l'île de Timor, l'« enclave » d'Oikussi-Ambenu, et les Pays-Bas ont cédé alors au Portugal « *cette partie* d'Ambenu qui, depuis plusieurs années, a arboré le pavillon portugais ».

2. La Convention de 1893 a eu pour but « d'établir d'une façon plus claire et plus exacte la démarcation » des possessions respectives à Timor et d'y « faire disparaître les enclaves actuellement existantes ».

3. La Convention de 1904 a régularisé la frontière au centre de l'île en attribuant au Portugal l'enclave néerlandaise de Maukatar et d'autres territoires contestés, et aux Pays-Bas au sud-ouest de l'île, l'enclave portugaise de Noemuti. D'autre part, les Pays-Bas ont renoncé, au cours des négociations de 1902, à soulever la grosse question de savoir si l'Oikussi Ambenu n'était pas, comme l'indiquait le traité de 1859, une « enclave » devant leur revenir. Cet accord a eu lieu à la condition, expressément acceptée par le Portugal, d'adopter, pour la frontière orientale de ce royaume d'Oikussi (Ambenu), la ligne A C réclamée au cours des négociations de 1902 par les Pays-Bas. Cette ligne A C a été consacrée par le traité de 1904. (Voir Cartes annexes I et II.)

4. Le point C de cette ligne n'est pas contesté; il est situé sur la côte nord de l'île de Timor, à l'embouchure dans la mer de la Noèl Meto, dont le cours a été substitué en 1902-1904 au cours de la rivière Noèl Boll Bass, située plus à l'est et qu'avait réclamé le Portugal.

Le cours de la Noèl Meto, dont le thalweg doit servir de frontière jusqu'à sa source, a été reconnu, n'est pas contesté, et une borne a été plantée contradictoirement à sa source.

5. Le point A, à l'extrémité méridionale de la ligne convenue en 1904, est le point auquel les travaux de délimtation ont été interrompus en 1899. Cela n'est pas sérieusement contesté par le Portugal, qui, à deux reprises dans son premier Mémoire, se sert des mots: « On ne peut pas nier que le ligne part du point A, auquel se rapportent les procès-verbaux des négociations (p. 10) . . . On ne conteste pas que la frontière dont il s'agit ne parte du point où les arpenteurs de 1899 ont été empêchés d'aller plus loin » p. (15). Contester l'emplacement du point A serait remettre en question la délimitation du cours inférieur de la Noèl Bilomi en aval de ce point; or cette partie de la frontière a été réglée définitivement par le chiffre 9 de l'article 3 du traité de 1904; le point A a été d'ailleurs repéré contradictoirement sur les cartes officielles de 1899 et de 1904 (Voir annexes III et VI).

6. Les négociateurs de 1902-1904 se sont trouvés à partir de ce point A en présence de deux propositions. L'une, la proposition portugaise, consistait à faire remonter à la frontière la rivière Noèl Bilomi dans la direction de l'est jusqu'à Nunkalaï, puis à diriger la frontière vers le nord, par Humusu, afin d'atteindre la source de la rivière la Noèl Boll Bass se jetant dans la mer à l'orient de la Noèl Meto (ligne B D). L'autre, la proposition néerlandaise, dite ligne A C, consistait à se diriger vers le nord dès le point A jusqu'aux sources de la Noèl Meto. Les négociateurs ont nettement, catégoriquement, répudié le premier tracé portugais pour accepter la seconde ligne A C réclamée par les Pays-Bas; ils ont, sur la carte annexée au traité de 1904, attribué aux Pays-Bas *les deux rives* de la Noèl Meto en amont du point A, auquel les délimitateurs avaient arrêté leurs travaux en 1899 (Voir les cartes III et IV).

7. La description dans le traité de 1904, article 3, chiffre 10, de cette ligne A C, la carte contradictoirement dessinée en 1899 et sur laquelle les négociateurs de 1902 ont délibéré, comme enfin la carte officiellement annexée au traité de 1904, mentionnent au point A, comme devant former limite dans la direction du nord, un affluent auquel toutes les Parties ont donné de 1899 à 1909 le nom d'Oè-Sunan. Les Parties sont aujourd'hui d'accord que cet affluent porte en réalité le nom de Kabun ou de Lèos. Une autre rivière, découverte postérieurement à environ six kilomètres plus à l'est, porte, d'après les Portugais, le nom d'Oe Sunan et prend sa source au nord du Kinapua, montagne située très près de la rive nord de la Bilomi. L'existence de cette rivière Oè Sunan est contestée par les Pays-Bas dans leur second Mémoire à la suite de deux reconnaissances récentes; ce prétendu Oè Sunan s'appellerait en réalité Poeamesse ou Noèl Polan.

Il est, dans la pensée de l'arbitre, impossible que cette autre rivière Oè Sunan, si elle existe, ait été celle que les négociateurs de 1899 et de 1902-1904 avaient en vue, car

a) elle n'est pas un affluent de la Noèl Bilomi;

b) la frontière *proposée* à cette époque *par le Portugal* et *écartée* d'un commun accord en 1902-1904 devait, en partant du point A et en se dirigeant *vers l'est*, passer par *Nunkalaï* puis par Kinapua; or Nunkalaï est situé plusieurs kilomètres

à l'*ouest* du mont Kinapua et à l'*ouest* de la source de cette nouvelle rivière dénommée Oè Sunan par les Portugais;

c) Les *deux* rives de la Noèl Bilomi en amont et à l'est du point A ayant été attribuées aux Pays-Bas en 1904, l'affluent devant servir de frontière dans la direction du nord ne peut être recherché en amont et à l'est du point A.

Les principes généraux sur l'interprétation des Conventions exigent qu'on tienne compte « de la réelle et commune intention des Parties sans s'arrêter aux expressions ou dénominations inexactes dont elles ont pu se servir par erreur ». Les Parties ont, il est vrai, commis une erreur en donnant le nom d'Oè Sunan à l'affluent venant du nord au point A, mais c'est cet affluent seul (dénommé alors par erreur Oè Sunan) qui était nécessairement, dans la pensée concordante des Parties, le point auquel la frontière devait quitter la Noèl Bilomi pour se diriger vers le nord, — et non une autre rivière à laquelle les Portugais donnent ce nom d'Oè Sunan et qui serait située six kilomètres plus à l'est. En d'autres termes, c'est bien le thalweg de la rivière aujourd'hui dénommée Kabun ou Lèos qui doit servir de frontière à partir du point A dans la direction du nord.

8. A partir de la source de cette rivière Kabun ou Lèos (dénommée à tort Oè Sunan de 1899 à 1909) au sud, la frontière doit, à teneur de l'article 3, chiffre 10, du traité de 1904, « traverser autant que possible Nipani et Kelali (Keli) » pour gagner la source de la Noèl Meto, au nord.

La délimitation proposée par le Portugal contournerait entièrement la région désignée sur la carte officielle de 1904 sous le nom de Nipani et située, d'après cette carte, près de la source du Kabun ou Lèos; la frontière s'éloignerait de Nipani de plusieurs kilomètres dans la direction de l'est. Même si, comme le fait une carte portugaise qui n'a pas de caractère contradictoirement reconnu, on donnait le nom de Nipani à une région située beaucoup plus au nord, à l'orient des sources de la Noèl Meto, la frontière réclamée par le Portugal ne traverserait pas davantage Nipani, mais le contournerait par le nord.

Le traité de 1904 prescrit de traverser « autant que possible » le Nipani. Le tracé suggéré par les Pays-Bas longe la partie occidentale du Nipani et s'en trouve plus près que le tracé proposé par le Portugal.

9. Le Portugal objecte que la ligne directe nord-sud entre les sources de la rivière Kabun et de la rivière Noèl Meto morcellerait le territoire des Ambenos en l'attribuant partie aux Pays-Bas et partie au Portugal; ce morcellement serait contraire au traité de 1859.

Dans la pensée de l'arbitre, cette objection n'est pas fondée en ce sens que, déjà en 1859, une « partie » de l'Ambeno était incontestablement placée sous la souveraineté des Pays-Bas. En outre, au cours des négociations de 1899 à 1904, il a été produit des déclarations contradictoires des indigènes, les Amakonos et les Tumbabas néerlandais revendiquant le territoire contesté et les Ambenos portugais le revendiquant de leur côté. Ce prétendu morcellement n'est donc pas démontré. De plus, il a été entendu aux Conférences de 1902, sur les observations du premier délégué portugais lui-même, qu'il n'y avait pas lieu de se préoccuper outre mesure des prétentions de tribus qui se déplacent fréquemment et passent successivement du territoire de l'un des États dans celui de l'autre. L'objection que les territoires d'une même tribu ne doivent pas être morcelés, ne saurait ainsi être retenue par l'arbitre, car elle aurait dû être présentée au cours des négociations de 1902-1904; actuellement, elle est tardive, parce que le traité de 1904, le seul dont l'arbitre ait à interpréter l'article 3, chiffre 10, ne fait aucune mention d'une volonté des Parties de ne jamais séparer des populations indigènes; ce traité a au contraire tracé la ligne de démarcation à la suite de Conférences au cours desquelles il a été entendu que les considérations de ce genre ne doivent pas être prépondérantes.

10. La ligne de faîte proposée par le Gouvernement néerlandais entre la source de la rivière Kabun (Lèos), au sud, et la source de la Noèl Meto, au nord, est suffisamment naturelle pour pouvoir être tracée sur le terrain sans grandes difficultés pratiques. Elle offre l'avantage que les cours d'eau descendent uniformément de cette ligne de faîte vers des territoires tous placés sous la souveraineté néerlandaise. Le tracé suggéré par le Gouvernement portugais attribuerait au contraire à des souverainetés différentes la partie supérieure et la partie inférieure de ces divers cours d'eau.

11. D'une façon générale, la demande du Portugal reproduit, en fait, complètement, pour tout le territoire entre la Noèl Bilomi au sud et la source de la Noèl Meto au nord, la ligne que cet État revendiquait en 1902 et qu'il a abandonnée tant à la fin de la Conférence de 1902 que par le traité de 1904. Si la demande portugaise actuelle était fondée, on ne s'expliquerait pas pourquoi les Pays-Bas ont fait, en 1902, du rejet de cette demande portugaise une condition *sine qua non*. Les Conventions entre États, comme celles entre particuliers, doivent être interprétées « plutôt dans le sens avec lequel elles peuvent avoir quelque effet que dans le sens avec lequel elles n'en pourraient produire « aucun ». La menace néerlandaise de rompre les négociations en 1902 n'aurait pas de sens si l'intention avait été alors d'attribuer au Portugal précisément le territoire réclamé par les Pays-Bas comme une condition de l'accord.

12. Enfin, si l'on se place au point de vue de l'équité, qu'il importe de ne pas perdre de vue dans les relations internationales, la ligne de faîte suggérée par les Pays-Bas n'est pas contraire à l'équité, en ce sens que le Portugal recevra plus de territoires qu'il n'en devait espérer selon la ligne théorique A C, à laquelle il a consenti en 1904, avant qu'on pût aller reconnaître le terrain. La ligne A C est toute entière tracée à l'intérieur du territoire qui reviendra au Portugal; la République portugaise sera de la sorte mieux partagée, en fait, qu'elle ne pouvait s'y attendre (voir carte annexée VII). Si, au contraire, le tracé oriental suggéré par le Gouvernement portugais était adopté, les Pays-Bas pourraient avec raison prétendre qu'on les prive de presque tout le territoire qui leur avait été attribué théoriquement en 1904 en contre-partie de l'abandon de l'enclave de Maukatar au centre de l'île de Timor et en contre-partie de l'abandon des revendications néerlandaises sur l'ensemble de l'« enclave » d'Ambeno.

En conséquence,

L'ARBITRE

vu les deux traités signés à Lisbonne les 20 avril 1859 et 10 juin 1893 et le traité signé à La Haye le 1er octobre 1904 entre les Pays-Bas et le Portugal pour la délimitation de leurs possessions respectives dans l'île de Timor;

vu le compromis d'arbitrage signé à La Haye le 3 avril 1913, et notamment l'article 2 ainsi conçu: « L'arbitre, statuant sur les données fournies par les Parties, décidera en se basant sur les traités et les principes généraux du droit international, comment doit être fixée conformément à l'article 3, 10° de la Convention conclue à La Haye le 1er octobre 1904, concernant la délimitation des possessions néerlandaises et portugaises dans l'île de Timor, la limite à partir de la Noèl Bilomi jusqu'à la source de la Noèl Meto »;

vu les Notes diplomatiques faisant part au soussigné de sa désignation comme arbitre par application de l'article 1er du compromis;

vu les premiers et seconds Mémoires remis en temps utile par chacune des hautes Parties contestantes, ainsi que les cartes et documents annexés aux dits mémoires;

vu les considérations de fait et de droit formulées ci-dessus sous chiffres I à VII;

vu la Convention signée à La Haye le 18 octobre 1907 pour le règlement pacifique des conflits internationaux;

ARRÊTE

L'article 3, chiffre 10, de la Convention conclue à La Haye le 1er octobre 1904 concernant la délimitation des possessions néerlandaises et portugaises dans l'île de Timor doit être interprété conformément aux conclusions du Gouvernement royal des Pays-Bas, pour la limite à partir de la Noèl Bilomi jusqu'à la source de la Noèl Meto; en conséquence, il sera procédé à l'arpentage de cette partie de la frontière sur la base de la carte au 1/50 000 annexée sous N° IV au premier Mémoire remis à l'arbitre par le Gouvernement néerlandais. Une reproduction de cette carte signée par l'arbitre est jointe comme annexe VII à la présente sentence dont elle fera partie intégrante.

Les frais, fixés à fr. 2000, ont été prélevés sur la somme de 4000 fr. consignée entre les mains de l'arbitre en exécution de l'art. 8 du compromis du 3 avril 1913; la différence, soit fr. 2000, sera restituée aux deux parties par égales portions et contre quittance, au moment de la notification de la sentence.

FAIT en trois exemplaires dont l'un sera remis contre récépissé par M. le secrétaire général du Bureau international de la Cour permanente d'arbitrage à La Haye, à Son Excellence le Ministre des Affaires Étrangères des Pays- Bas pour valoir notification au Gouvernement royal néerlandais, et dont le second sera remis le même jour et dans les mêmes formes à Son Excellence l'Envoyé extraordinaire et Ministre Plénipotentiaire de la République portugaise près S. M. la Reine des Pays-Bas pour valoir notification au Gouvernement de la République portugaise. Le troisième exemplaire sera déposé aux archives du Bureau international de la Cour permanente d'arbitrage.

Paris, le 25 juin 1914.

LARDY

DOCUMENTS ADDITIONNELS

TRAITÉ DE LISBONNE DU 20 AVRIL 1859[1]

Sa Majesté le Roi des Pays-Bas et Sa Majesté le Roi de Portugal et des Algarves, ayant jugé utile de mettre fin aux inceritudes existantes relativement aux limites des possessions Néerlandaises et Portugaises dans l'Archipel de Timor et Solor, et voulant prévenir à jamais tout malentendu que pourraient provoquer des limites mal définies et des enclaves trop multipliées, ont muni, afin de s'entendre à cet égard, de leurs pleins-pouvoirs, savoir:

. . . . . .

Lesquels, après s'être communiqués les dits pleins-pouvoirs, trouvés en bonne et due forme, sont convenus de conclure un traité de démarcation et d'échange, contenant les articles suivants:

ARTICLE 1er.

Les limites entre les possessions Néerlandaises et Portugaises sur l'île de Timor seront au nord, les frontières qui séparent Cova de Juanilo; et au sud, celles qui séparent Sua de Lakecune.

Entre ces deux points, les limites des deux possessions sont les mêmes que celles des États limitrophes Néerlandais et Portugais.

Ces États sont les suivants:

États limitrophes sous la domination de la Néerlande:	*États limitrophes sous la domination du Portugal:*
Juanilo,	Cova,
Silawang,	Balibo,
Fialarang (Fialara),	Lamakitu,
Lamaksanulu,	Tafakaij ou Takaij,
Lamakanée,	Tatumea,
Naitimu (Nartimu),	Lanken,
Manden,	Dacolo,
Dirma,	Tamiru Eulalang (Eulaleng),
Lakecune.	Suai.

ART. 2.

La Néerlande reconnaît la souveraineté du Portugal sur tous les États qui se trouvent à l'est des limites ainsi circonscrites, à l'exception de l'État Néerlandais de Maucatar ou Caluninène (Coluninène), qui se trouve enclavé dans les États Portugais de Lamakitu, de Tanterine, de Follafaix (Follefait) et du Suai.

Le Portugal reconnaît la souveraineté de la Néerlande sur tous les États qui se trouvent à l'ouest de ces limites, à l'exception de l'enclave d'Oikoussi, qui demeure Portugaise.

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[1] Bureau international de la Cour permanente d'Arbitrage, *ibid.*, p. 31.

ART. 3.

L'enclave d'Oikoussi comprend l'État d'Ambenu partout où y est arboré le pavillon Portugais, l'État d'Oikoussi proprement dit, et celui de Noimuti.

Les limites de cette enclave sont les frontières entre Ambenu et Amfoang à l'ouest, d'Insana et Reboki (Beboki), y compris Cicale à l'est, et Sonnebait, y compris Amakono et Tunebaba (Timebaba) au sud.

ART. 4.

Sur l'île de Timor, le Portugal reconnaît donc la souveraineté de la Néerlande sur les États d'Amarassi, de Bibico (Traijnico, Waijniko), de Buboque (Reboki), de Derima (Dirma), de Fialara (Fialarang), de Lamakanée, de Nira (Lidak), de Juanilo, de Mena et de Fulgarite ou Folgarita (dépendances de l'État de Harnenno).

ART. 5.

La Néerlande cède au Portugal le royaume de Moubara (Maubara) et cette partie d'Ambenu ou d'Ambeno (Sutrana) qui, depuis plusieurs années, a arboré le pavillon Portugais.

Immédiatement après que l'échange des ratifications de ce traité par Leurs Majestés le Roi des Pays Bas et le Roi de Portugal aura eu lieu, le Gouvernement des Pays-Bas donnera l'ordre à l'autorité supérieure des Indes Néerlandaises de remettre le royaume de Moubara (Maubara) à l'autorité supérieure Portugaise de Timor Dilly.

ART. 6.

La Néerlande se désiste de toute prétention sur l'île de Kambing (Pulo Kambing), au nord de Dilly, et reconnaît la souveraineté du Portugal sur cette île.

ART. 7.

Le Portugal cède à la Néerlande les possessions suivantes:

sur l'île de Flores, les États de Larantuca, Sicca et Paga, avec leurs dépendances:

sur l'île d'Adenara, l'État de Wouré;

sur l'île de Solor, l'État de Pamangkaju.

Le Portugal se désiste de toutes les prétentions que, peut-être, il aurait pu faire valoir sur d'autres États ou endroits situés sur les îles ci-dessus nommées, ou sur celles de Lomblen, de Pantar et d'Ombaij, que ces États portent le pavillon Néerlandais ou Portugais.

ART. 8.

En vertu des dispositions de l'article précédent, la Néerlande obtient la possession entière en non-partagée de toutes les îles situées au nord de Timor, savoir: celles de Flores, d'Adenara, de Solor, de Lomblen, de Pantar (Quantar) et d'Ombaij, avec les petites îles environnantes appartenant à l'Archipel de Solor.

ART. 9.

En compensation de ce que le Portugal pourrait perdre à l'échange des possessions respectives ci-dessus mentionnées, le Gouvernement des Pays-Bas:

1° donnera au Gouvernement Portugais quittance complète de la somme de 80.000 florins, empruntée en 1851 par le Gouvernement des possessions Portugaises dans l'Archipel de Timor au Gouvernement des Indes Néerlandaises;

2° remettra en outre au Gouvernement Portugais une somme de 120,000 florins des Pays-Bas.

Cette somme sera versée un mois après l'échange des ratifications du présent traité.

ART. 10.

La liberté des cultes est garantie de part et d'autre aux habitants des territoires échangés par le présent traité.

ART. 11.

Le présent traité, qui sera soumis à la sanction des pouvoirs législatifs en conformité des règles prescrites par les lois fondamentales en vigueur dans les Royaumes des Pays-Bas et du Portugal, sera ratifié et les ratifications seront échangées à Lisbonne, dans le délai de huit mois, à partir de sa signature, ou plus tôt, si faire se peut.

En foi de quoi les plénipotentiaires respectifs ont signé le présent traité, et y ont apposé le sceau de leurs armes.

FAIT à Lisbonne, le vingt Avril mil huit cent cinquante-neuf.

(*Signé*) M. HELDEWIER. *L. S.*

(*Signé*) A. M. DE FONTES PEREIRA DE MELLO *L. S.*

CONVENTION DE LISBONNE DU 10 JUIN 1893[1]

Sa Majesté la Reine des Pays-Bas et en Son Nom Sa Majesté la Reine-Régente du Royaume

et Sa Majesté le Roi de Portugal et des Algarves, reconnaissant la communauté d'intérêts qui existe entre Leurs possessions dans l'Archipel de Timor et Solor et voulant régler dans un esprit de bonne entente mutuelle les conditions les plus favorables au développement de la civilisation et du commerce dans Leurs dites possessions, ont résolu de conclure une convention spéciale et ont nommé à cet effet pour Leurs plénipotentiaires, savoir:

. . . . . .

lesquels, après s'être communiqué leurs pleins pouvoirs respectifs, trouvés en bonne et due forme, sont convenus des articles suivants:

ARTICLE 1er.

Afin de faciliter l'exercice de leurs droits de Souveraineté, les Hautes Parties contractantes estiment qu'il y a lieu d'établir d'une façon plus claire et plus exacte la démarcation de leurs possessions à l'île de Timor et de faire disparaître les enclaves actuellement existantes.

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[1] Bureau international de la Cour permanente d'Arbitrage, *ibid.*, p. 34.

ART. 2.

Les Hautes Parties contractantes nommeront à cet effet une commission d'experts qui sera chargée de formuler une proposition pouvant servir de base à la conclusion d'une convention ultérieure, déterminant la nouvelle ligne de démarcation dans la dite île.

Cette convention sera soumise à l'approbation de la législature des deux pays.

ART. 3.

Il sera accordé à l'île de Timor aux bateaux pêcheurs appartenant aux sujets de chacune des Hautes Parties contractantes, ainsi qu'à leurs équipages, la même protection de la part des autorités respectives, que celles dont jouiront les sujets respectifs.

Le commerce, l'industrie et la navigation des deux pays y jouiront du traitement de la nation étrangère la plus favorisée, sauf le traitement spécial accordé respectivement par les Hautes Parties contractantes aux États indigènes.

ART. 4.

Les Hautes Parties contractantes décident que l'importation et l'exportation de toutes armes à feu entières ou en pièces détachées, de leurs cartouches, des capsules ou d'autres munitions, destinées à les approvisionner, sont interdites dans leurs possessions de l'Archipel de Timor et Solor.

Indépendamment des mesures prises directement par les Gouvernements pour l'armement de la force publique et l'organisation de leur défense, des exceptions pourront être admises à titre individuel pour leurs sujets Européens, offrant une garantie suffisante que l'arme et les munitions qui leur seraient délivrées, ne seront pas cédées ou vendues à des tiers, et pour des voyageurs étrangers, munis d'une déclaration de leur Gouvernement constatant que l'arme et les munitions sont exclusivement destinées à leur défense personnelle.

ART. 5.

Toutefois les autorités supérieures de la partie néerlandaise et de la partie portugaise de l'île de Timor seront autorisées à fixer annuellement, d'un commun accord, le nombre et la qualité des armes à feu non perfectionnées et la quantité de munitions qui pourront être introduites dans le courant de la même année, ainsi que les conditions dans lesquelles cette importation pourra être accordée.

Cette importation cependant ne pourra se faire que par l'intermédiaire de certaines personnes ou agents qui résident à l'île même et qui auront obtenu à cet égard une autorisation spéciale de l'administration supérieure respective.

En cas d'abus cette autorisation sera immédiatement retirée et ne pourra être renouvelée.

ART. 6.

Le Gouvernement néerlandais, voulant donner une preuve de son désir de consolider ses rapports de bon voisinage, déclare renoncer à l'indemnité à laquelle il prétend avoir droit du chef de certains traitements que des pêcheurs Néerlando-Indiens ont subi de 1889 à 1892 de la part des autorités du Timor-portugais.

ART. 7.

Dans le cas où quelque difficulté surgirait par rapport à leurs relations intercoloniales dans l'Archipel de Timor et Solor ou au sujet de l'interprétation de la présente convention, les Hautes Parties contractantes s'engagent à se soumettre à la décision d'une commission d'arbitres.

Cette commission sera composée d'un nombre égal d'arbitres choisis par les Hautes Parties contractantes et d'un arbitre désigné par ces arbitres.

ART. 8.

La présente convention sera ratifiée et les ratifications en seront échangées à Lisbonne.

En foi de quoi, les plénipotentiaires l'ont signée et y ont apposé leurs cachets.

FAIT à Lisbonne, en double expédition, le dix juin mil huit cent quatre-vingt-treize.

[L.S.] (*Signé*) Carel van HEECKEREN

[L.S.] (*Signé*) Ernesto Rodolpho Hintze RIBEIRO

DÉCLARATION DU 1er JUILLET 1893

Les soussignés plénipotentiaires des Gouvernements signataires de la convention du 10 juin 1893 sont convenus de la déclaration suivante.

Afin d'assurer le résultat de leur action commune qui tend surtout à encourager le commerce et l'industrie de leurs nationaux par des garanties de sécurité et de stabilité, les Hautes Parties contractantes déclarent qu'elles se reconnaissent réciproquement, en cas de cession soit en partie soit en totalité de leurs territoires ou de leurs droits de souveraineté dans l'Archipel de Timor et Solor, le droit de préférence à des conditions similaires ou équivalentes à celles qui auront été offertes. Les cas de désaccord sur ces conditions tombent également sous l'application de l'article septième de la convention précitée.

La présente déclaration qui sera ratifiée en même temps que la convention conclue à Lisbonne le 10 juin 1893, sera considérée comme faisant partie intégrante de cette convention et aura la même force et valeur.

En foi de quoi, les plénipotentiaires respectifs ont signé la présente déclaration et y ont apposé leurs cachets.

FAIT à Lisbonne en double expédition, le 1er juillet 1893.

(*L. S.*) (*Signé*) Carel van HEECKEREN

(*L. S.*) (*Signé*) Ernesto Rodolpho Hintze RIBEIRO

CONVENTION DE LA HAYE DU 1er OCTOBRE 1904 [1]

Sa Majesté la Reine des Pays-Bas et Sa Majesté le Roi de Portugal et des Algarves, etc., etc.

[1] Bureau international de la Cour permanente d'Arbitrage, *ibid.*, p. 37.

reconnaissant la communauté d'intérêts qui existe entre Leurs possessions dans l'Archipel de Timor et de Solor, et désirant arriver à une démarcation claire et exacte de ces possessions dans l'Ile de Timor, après avoir pris connaissance du résultat des travaux de la Commission mixte pour la régularisation des frontières néerlandaises et portugaises dans l'Ile de Timor, instituée par les Gouvernements respectifs en vertu de l'article II de la Convention conclue entre les Hautes Parties à Lisbonne le 10 juin 1893, ont résolu de conclure une Convention à cet effet et ont nommé pour Leurs plénipotentiaires.

. . . . . .

Lesquels après s'être communiqué leurs pleins-pouvoirs, trouvés en bonne et due forme, sont convenus de ce qui suit:

ARTICLE 1er.

Les Pays-Bas cèdent le Maucatar au Portugal.

ART. 2.

Le Portugal cède aux Pays-Bas le Noimuti, le Tahakay et le Tamiru Ailala.

ART. 3.

La limite entre O'Kussi-Ambenu, appartenant au Portugal, et les possessions néerlandaises dans l'île de Timor est formée par une ligne:

1° partant du point à l'embouchure de la Noèl (rivière) Besi d'où le point culminant de Pulu-(île) Batek se voit sous un azimut astronomique de trente degrés quarante-sept minutes Nord-Ouest, suivant le thalweg de la Noèl Besi, celui de la Noèl Niema et celui de la Bidjael Sunan jusqu'à sa source;

2° montant de là jusqu'au sommet Bidjael Sunan, et descendant par le thalweg de la Noèl Miu Mavo jusqu'au point situé au Sud-Ouest du village Oben;

3° de là passant à l'ouest de ce village par les sommets Banat et Kita jusqu'au sommet Nivo Nun Po; de là suivant le thalweg des rivières la Nono Boni et la Noèl Pasab jusqu'à son affluent le Nono Susu, et montant le Nono Susu jusqu'à sa source;

4° passant le Klus (Crus) jusqu'au point où la frontière entre Abani et Nai Bobbo croise la rivière la Fatu Basin, et de là au point nommé Subina;

5° descendant ensuite par le thalweg de la Fatu Basin jusqu'à la Kè An; de là jusqu'au Nai Naö;

6° passant le Nai Naö et descendant dans la Tut Nonie, par le thalweg de la Tut Nonie jusqu'à la Noèl Ekan;

7° suivant le thalweg de la Noèl Ekan jusqu'à l'affluent le Sonau, par le thalweg de cet affluent jusqu'à sa source et de là à la rivière Nivo Nono;

8° montant par le thalweg de cette rivière jusqu'à sa source, pour aboutir, en passant le point nommé Ohoè Baki, à la source de la Nono Balena;

9° suivant le thalweg de cette rivière, celui de la Nono Nisè et celui de la Noèl Bilomi jusqu'à l'affluent de celle-ci le Oè Sunan;

10° à partir de ce point la limite suit le thalweg de l'Oè Sunan, traverse autant que possible Nipani et Kelali (Keli), gagne la source de la Noèl Meto et suit le thalweg de cette rivière jusqu'à son embouchure.

ART. 4.

La partie de la limite entre O'kussi-Ambenu et les possessions néerlandaises, visée à l'article 3 10°, sera arpentée et indiquée sur le terrain dans le plus court délai possible.

L'arpentage de cette partie et l'indication sur le terrain seront certifiés par un procès-verbal avec une carte à dresser en deux exemplaires qui seront soumis à l'approbation des Hautes Parties contractantes; après leur approbation, ces documents seront signés au nom des Gouvernements respectifs.

Ce n'est qu'après la signature de ces documents que les Hautes Parties contractantes acquèreront la souveraineté des régions mentionnées aux articles 1 et 2.

ART. 5.

La limite entre les possessions des Pays-Bas dans la partie occidentale et du Portugal dans la partie orientale de l'île de Timor suivra du Nord au Sud une ligne:

1° partant de l'embouchure de la Mota Biku (Silaba) par le thalweg de cette rivière jusqu'à son affluent le We Bedain, par le thalweg du We Bedain, jusqu'à la Mota Asudaät (Assudat), par le thalweg de cette rivière jusqu'à sa source, et suivant de là dans la direction du Nord au Sud les coteaux du Kleek Teruïn (Klin Teruïn) et du Berènis (Birènis) Kakótun;

2° puis jusqu'à la rivière Muda Sorun, suivant le thalweg de cette rivière, et celui de la Tuah Naruk jusqu'à la rivière la Telau (Talau);

3° suivant le thalweg de la Telau jusqu'à la rivière la Malibaka, par le thalweg de cette rivière, celui de la Mautilu, et celui de la Pepies jusqu'à la montagne Bulu Hulu (Bulu Bulu);

4° de là jusqu'au Karawa Kotun, du Karawa Kotun par le thalweg de la rivière la Marees (Lolu) jusqu'à la rivière la Tafara, par le thalweg de cette rivière jusqu'à sa source appelée la Mota Tiborok (Tibor), et montant de là au sommet Dato Miet et descendant à la Mota Alun;

5° par le thalweg de la Mota Alun, celui de la Mota Sukaër (Sukar), et celui de la Mota Baukama, jusqu'à l'affluent de celle-ci, appelé Kalan-Féhan;

6° passant les montagnes Tahi Fehu, Fatu Suta, Fatu Rusa, le grand arbre nommé Halifea, le sommet Uas Lulik, puis traversant la rivière la We Merak où elle reçoit son affluent We Nu, puis passant la grande pierre nommée Fatu Rokon, les sommets Fitun Monu, Debu Kasabauk, Ainin Matan et Lak Fuin;

7° du Lak Fuin jusqu'au point où la Hali Sobuk se jette dans la Mota Haliboï et par le thalweg de cette rivière jusqu'à sa source;

8° de cette source jusqu'à celle de la Mota Bebulu, par le thalweg de cette rivière jusqu'à la We Diek, montant aux sommets Ai kakar et Takis, descendant dans la Mota Masin et suivant le thalweg de la Mota et de son embouchure nommée Mota Talas.

ART. 6.

Sauf les dispositions de l'article 4, les limites décrites aux articles 3 et 5 sont tracées sur les cartes annexées à la présente Convention et signées par les plénipotentiaires respectifs.

ART. 7.

Les territoires respectivement cédés seront évacués et l'administration en sera remise aux autorités compétentes dans les six mois après l'approbation du procès-verbal visé à l'article 4.

ART. 8.

Les archives, cartes et autres documents relatifs aux territoires cédés, seront remis aux nouvelles autorités en même temps que les territoires mêmes.

ART. 9.

La navigation sur les rivières formant limite sera libre aux sujets des deux Hautes Parties contractantes à l'exception du transport d'armes et de munitions.

ART. 10.

Lors de la remise des territoires cédés, des bornes en pierre indiquant l'année de la présente convention, d'une forme et d'une dimension convenables au but qu'elles sont destinées à remplir, seront plantées avec solennité à un endroit convenable de la côte près de l'embouchure des rivières nommées ci-après. Les bornes néerlandaises seront plantées sur les rives occidentales de la Mota Biku et de la Mota Masin et les bornes portugaises sur les rives orientales de ces rivières. Les quatre bornes en pierre seront fournies par le Gouvernement Néerlandais aux frais des deux gouvernements et le Gouvernement Néerlandais mettra un bâtiment de la marine royale à la disposition des autorités respectives pour la remise solennelle des territoires cédés et la plantation des bornes.

En outre la frontière, où elle n'est pas formée par des limites naturelles, sera d'un commun accord démarquée sur le terrain par les autorités locales.

ART. 11.

Sauf les dispositions de l'article 4, il sera dressé procès-verbal en langue française constatant la cession des territoires et la plantation des bornes.

Les procès-verbaux seront dressés en doubles exemplaires et signés par les autorités respectives des deux pays.

ART. 12.

La liberté des cultes est garantie de part et d'autre aux habitants des territoires échangés par la présente Convention.

ART. 13.

Les Hautes Parties contractantes se reconnaissent réciproquement, en cas de cession soit en partie soit en totalité de leurs territoires ou de leurs droits de souveraineté dans l'Archipel de Timor et Solor, le droit de préférence à des conditions similaires ou équivalentes à celles qui auraient été offertes.

ART. 14.

Toutes questions ou tous différends sur l'interprétation ou l'exécution de la présente Convention, s'ils ne peuvent être réglés à l'amiable, seront soumis à la Cour Permanente d'Arbitrage conformément aux dispositions prévues au chapitre II de la Convention internationale du 29 juillet 1899 pour la solution pacifique des conflits internationaux.

ART. 15.

La présente Convention sera ratifiée et les ratifications en seront échangées aussitôt que possible après l'approbation de la législature des deux Pays.

En foi de quoi les plénipotentiaires respectifs ont signé la présente Convention et y ont apposé leurs cachets.

FAIT, en double expédition, à La Haye le 1er Octobre 1904.

[L.S.] (*Signé*) Bn MELVIL DE LYNDEN

[L.S.] (*Signé*) IDENBURG

[L.S.] (*Signé*) CONDE DE SELIR

THE BOUNDARY CASE BETWEEN COSTA-RICA AND PANAMA

PARTIES: Costa-Rica, Panama.

COMPROMIS: Convention of 17 March, 1910.

ARBITRATOR: E. Douglass White, Chief Justice of the United States.

AWARD: 12 September, 1914.

Validity of a previous arbitral award — Interpretation of this award — Excess of jurisdiction — Nullity — Revision.

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SYLLABUS [1]

On 11 September 1900, Emile Loubet, President of the French Republic, acting in the capacity of arbitrator by virtue of the Treaty of 4 November 1896 between Colombia and Costa Rica, rendered an award defining the common boundary between these two States.[2]

After the separation of Colombia and Panama in 1902, Panama succeeded Colombia as one of the parties in a controversy with Costa Rica concerning the Loubet award.

Although they considered that the boundary between their respective territories designated by the arbitral award of the President of the French Republic was validly established with regard to the section between the Central Cordillera and the Pacific, Costa Rica and Panama were not able to reach an agreement on the interpretation which ought to be given to that award as to the rest of the boundary line. For the purpose of settling their dispute the two parties agreed, by a Convention concluded on 17 March 1910, to submit to the decision of the Chief Justice of the United States, as arbitrator, the following question: " What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September, 1900? "

In the arbitration proceedings, Panama contended that the question at issue called for no more than an interpretation of the Loubet award, whereas Costa Rica insisted that the scope of the arbitration should be much wider and that the arbitrator should fix the boundary in accordance with the merits of the controversy between the parties, taking into account all relevant considerations.

The award of the Chief Justice of the United States, E. Douglass White, was handed down on 12 September 1914.

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[1] *American Journal of International Law*, vol. 15, 1921, p. 236.

[2] De Martens, *Nouveau Recueil général de traités*, 2e série, t. 32, p. 411; *Papers relating to the Foreign Relations of the United States*, 1910, p. 786.

CONVENTION BETWEEN COSTA RICA AND PANAMA FOR THE SETTLEMENT OF THE BOUNDARY CONTROVERSY, SIGNED AT WASHINGTON, 17 MARCH 1910 [1]

The Republic of Costa Rica and the Republic of Panama, in view of the friendly mediation of the Government of the United States of America, and prompted by the desire to adjust in an adequate manner their differences on account of their boundary line, have appointed plenipotentiaries as follows:

Costa Rica, His Excellency Señor Licenciado Don Luis Anderson, Envoy Extraordinary and Minister Plenipotentiary on Special Mission.

Panama, His Exellency Señor Dr. Don Beliscario Porras, Envoy Extraordinary and Minister Plenipotentiary on Special Mission,

Who, after having communicated their respective full powers, and found them to be in good and due form, have agreed upon the following convention:

Article I. The Republic of Costa Rica and the Republic of Panama, although they consider that the boundary between their respective territories designated by the arbitral award of His Excellency the President of the French Republic the 11th of September 1900 is clear and indisputable in the region of the Pacific from Punta Burica to a point beyond Cerro Pando on the Central Cordillera near the ninth degree of north latitude, have not been able to reach an agreement in respect to the interpretation which ought to be given to the arbitral award as to the rest of the boundary line; and for the purpose of settling their said disagreements agree to submit to the decision of the honorable the Chief Justice of the United States, who will determine, in the capacity of arbitrator, the question: What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September, 1900?

In order to decide this the arbitrator will take into account all the facts, circumstances, and considerations which may have a bearing upon the case, as well as the limitation of the Loubet Award expressed in the letter of His Excellency Monsieur Delcassé, Minister of Foreign Relations of France, to His Excellency Señor Peralta, Minister of Costa Rica in Paris, of November 23, 1900, that this boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Costa Rica and the Republic of Colombia of January 20, 1886.

Article II. If the case shall arise for making a survey of the territory, either because the arbitrator shall deem it advisable or because either of the high contracting parties shall ask for a survey (in either of which cases it shall be made), it shall be conducted in the manner which the arbitrator shall determine upon, and by a commission of four engineers, one of whom shall be named by the President of Costa Rica, a second by the President of Panama, and the two others by the arbitrator. The persons selected by the arbitrator shall be civil engineers in private practice, in every respect independent and impartial, and

[1] *American Journal of International Law*, Vol. 6, 1912, Supplement, p. 1.

without personal interest of any kind as respects either Costa Rica or Panama, and not citizens or residents of either of said countries.

Said commission shall make detailed reports, with maps of the territory covered by their survey or surveys, which reports and maps, with the data relating thereto, shall be returned to the arbitrator, and copies thereof shall be communicated to the high contracting parties.

Article III. If, by virtue of the award of the arbitrator, any portion of the territory now administered by either of the high contracting parties shall pass to the jurisdiction and sovereignty of the other, the titles to lands or other real property rights in said region granted by the government of the former, prior to the date of this convention, shall be recognized and protected just as if they had issued from the other of them.

Article IV. One month after the ratifications of this convention are exchanged, the representatives of the two governments, or of either of them, shall make request of the Chief Justice to accept the position of arbitrator. Within four months from the date when the Chief Justice shall communicate to the signatory governments, through their respective legations in Washington, his willingness to accept the position of arbitrator, each said government through its representative, shall present to the arbitrator a complete exposition of the question and of its pretensions, together with the documents, allegations and proofs upon which it rests them.

If any survey shall be directed, as provided in Article II, said period of four months shall begin from the delivery to the arbitrator and to the high contracting parties of the reports, maps and data of the commission of survey hereinbefore provided for.

The arbitrator shall communicate to the representative of each government the case, with its exhibits, of the other party within two months after they shall be presented to him. Within the period of six months after the arbitrator shall so communicate the same, answers thereto shall be made, and such answers shall be limited to the subjects treated of in the allegations of the opposite party. The arbitrator may, in his discretion, extend any of the foregoing periods.

The cases and the proofs sustaining the same shall be presented in duplicate and the arbitrator shall deliver a copy to the representative of each government.

Either high contracting party may submit secondary evidence of documents and records when it is not practicable to produce the originals thereof.

Article V. The Chief Justice shall make his decision within three months following the closing of the arguments.

Article VI. The compensation and expenses of the arbitrator, including the expenses of any survey and delimitation which may be made, shall be equally borne by the high contracting parties.

Article VII. The award, whatever it be, shall be held as a perfect and compulsory treaty between the high contracting parties. Both high contracting parties bind themselves to the faithful execution of the award and waive all claims against it.

The boundary line between the two republics as finally fixed by the arbitrator shall be deemed the true line and his determination of the same shall be final, conclusive and without appeal.

Thereupon a commission of delimitation shall be constituted in the same manner as provided in Article II with respect to the commission of survey, and shall immediately thereafter proceed to mark and delimitate the boundary line, permanently, in accordance with such decision of the arbitrator. Such commis-

sion of delimitation shall act under the direction of the arbitrator, who shall settle and determine any dispute as to the same.

Article VIII. The present convention shall be submitted for the approval of the respective congresses of the Republics of Costa Rica and Panama, and ratifications shall be exchanged in the City of Washington, as soon as possible.

IN WITNESS WHEREOF the respective plenipotentiaries shave signed the present convention in duplicate, and have thereunto affixed their seals.

DONE at Washington the 17th day of March, A.D. one thousand nine hundred and ten.

(*Signed*) Luis ANDERSON

(*Signed*) Belisario PORRAS

OPINION AND DECISION OF EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES, ACTING IN THE CAPACITY OF ARBITRATOR AS PROVIDED IN THE CONVENTION BETWEEN COSTA RICA AND PANAMA OF 17 MARCH 1910. WASHINGTON, 12 SEPTEMBER 1914 [1]

Validité d'une sentence arbitrale — Interprétation de cette sentence — Excès des pouvoirs — Nullité — Révision.

Before proceeding to a consideration of the subject for decision, to avoid breaking continuity of statement, it is observed that a motion made by one of the parties to strike out certain documents because not filed in duplicate, and a motion by the other party to eliminate certain papers because they are said to be partial and hence unauthorized, have both been considered and found irrelevant to the determination of the case and the motions are therefore overruled without further statement on the subject.

Moreover, at the threshold I say that when the duty of considering this case as provided in the treaty was undertaken, it was understood that all the documents and papers in the Spanish language would be translated by the parties into English, and therefore such documents will be referred to in the translations which the parties have furnished.

To state at the outset, first, the geographical situation of the two countries, parties to this arbitration, and, second, to give the history of the nature, origin, development and undisputed facts of the controversy, will conduce to a clearer appreciation of the matters to be passed upon. In doing so for the purposes of the rights with which this arbitration is concerned, Costa Rica will be taken as representing not only rights enjoyed by it in its own name, but all those concerning the matter here in dispute which it possesses as the successor of a prior government, the Republic of Central America; and Panama will likewise be taken as representing for the same purposes, not only its own rights, but also those of its governmental ancestors, the Republic of Colombia, the Republic of New Granada, the United States of Colombia and the Republic of Colombia.

First. The two countries have an extended coast line on the Atlantic and the Pacific Oceans, the territory between the oceans being divided by the main range of the Cordilleras. Not taking into account any conflict as to boundary, if any there be, between Panama and the Republic of Colombia lying southeast of Panama, the territory of Costa Rica and Panama on the Atlantic extends from the upper boundary of Costa Rica at about the eleventh parallel of latitude in a southeasterly direction down to about 8° 40′, a distance not considering the sinuosities of the coast approximating 450 miles.

Second. For seventy-five or eighty years there were controversies between Panama and Costa Rica or their predecessors concerning the extent of their territorial authority. All the disputes referred to arose from two subjects

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[1] *Papers relating to the Foreign Relations of the United States*, 1914, p. 1000.

differing fundamentally; the one, a contention on the part of Panama that its territorial sovereignty embraced the entire Atlantic coast, not only along its own front, but also along the front of Costa Rica and Nicaragua, which country lies above Costa Rica, since the claim of sovereignty terminated only at Cape Gracias a Dios, which was practically the uppermost boundary of Nicaragua dividing that country from Honduras. This claim was based upon what was asserted to be the operation of a Spanish Royal Order of 1803. The other claim, distinct from the former because resting upon independent considerations and which would require to be disposed of even if the former claim was held to be unfounded, concerned the boundary dividing the territory of the two countries in the expanse from the Atlantic to the Cordilleras, across the same and on the Pacific side. So far as the entire territorial claim is concerned and the points in the mere boundary claim which concern the crossing of the Cordilllasr and the line of boundary on the Pacific side, no further statement need be made for reasons hereafter to be set forth. The aspect of the controversy therefore necessary to be stated here involves only the boundary between the two countries in the territory situated on the Atlantic side between that ocean and the range of the Cordilleras.

On the part of Costa Rica in substance from the beginning its lower boundary was claimed to embrace an island in the Atlantic Ocean designated as Escudo de Veragua opposite the mouth of a river named as the Chiriquí, which emptied into the Atlantic shortly below what was known as Almirante Bay, and following the course of that river to the Cordilleras. This claim of boundary, if valid, would necessarily have deprived Panama or its predecessors of a large area of territory over which that country asserted jurisdiction. This assertion of boundary right made by Costa Rica was based, besides a reference to other Spanish documents or decrees, especially on what was asserted to be the result of certain Spanish Cédulas or Capitulaciones of 1540, 1573 and 1600. Again for reasons which will hereafter be made apparent, the facts concerning the rightfulness of this claim of boundary on the part of Costa Rica need not be further enumerated.

On the other hand, the claim on the part of Panama or its predecessors was that the boundary line was made by a river which took its source in the Cordilleras and flowed into the Atlantic at a point much above Almirante Bay. The river which it was thus contended by Panama constituted the boundary was designated by various names and the point at which it emptied into the Atlantic would seem for a considerable time to have been in doubt. There is no ground, however, for real dispute that it came finally to pass that Panama recognized that the stream which it relied upon and continued to insist constituted the boundary along its entire course from the mountains debouched in the Atlantic Ocean shortly below a point indifferently designated as Punta Carreta or Punta Mona — indeed that such river was the first stream emptying into the Atlantic below that point — and that at its mouth at least the stream in question was known as the Sixaola. The boundary dispute therefore involved the territory lying between the two rivers contended for in their courses as they flowed from the mountain range in which directly or indirectly they took their sources to the ocean, and the area, and extent of the controversy, therefore, depended in the nature of things upon the direction of the flow of the bounding rivers which the parties had in mind and upon which they respectively relied as constituting the division between the two countries.

As the statement just made in a general way points to the questions of fact and law to be passed upon, it might well be taken as adequate for the purposes of the mere outline which I at the outset indicated, and therefore would render

it necessary now to make no further statement before coming to an analysis of the questions of law and fact for decision under the present arbitration.

But as when the discharge of that duty is reached it will become apparent that in its last analysis every issue for decision will involve an appreciation of the facts concerning the claim of river boundary relied upon by Panama, the assertion of the river boundary contended for by Costa Rica being, as I have said, out of the case, in order to avoid repetition and to clear a broad way leading to the merits, I propose to state the facts concerning the essential matters which require to be considered, concerning the claim of Panama under a third heading as follows:

Third. The origin of the claim made by Panama, the acts, dealings and admissions of that Government or its predecessors concerning such claim, the negotiations for a prior arbitration, the environment of such negotiations, the treaties made agreeing to the same, the award, the course taken by the parties in executing it, the controversy which resulted, either concerning its interpretation or its binding force, the entering into the arbitration treaty now being executed, and such additional facts as are found in this record as may be considered necessary to be taken into view in connection with the questions of law which require to be passed upon.

To the end of orderly consideration I state the subjects which this general proposition embraces separately under four headings enumerated (a), (b), (c) and (d).

(a) *The source of the boundary claim of Panama and Panama's official assertions of its right by way of negotiations or attempts to negotiate with Costa Rica with reference to the same or otherwise.*

There is no document in the record upon which the assertion by Panama or its predecessors to the river boundary above referred to can be said to rest as an original muniment of title, and therefore the non-existence of any document of that character may be assumed. I say this because although Señor Madrid, a Colombian publicist, in 1852 in a report made to the Colombian Minister of Foreign Affairs declared that official documents to such effect existed, Señor Borda, another Colombian publicist, as late as 1896 in a work prepared officially for the use of the Colombian Government declared that no such official documents had been found and could not be said to exist unless they were considered to be embraced by two alleged maps which were referred to.

But without reference to the source of the title, the existence of the dispute as to boundary at an early date is clearly shown, since in 1825 Costa Rica as a state of the United Provinces of Central America in its Constitution declared its boundary to be the Escudo de Veragua, the island opposite the Chiriquí River which, as I have said, is the boundary now relied upon by Costa Rica. And in the same year, presumably as the result of a dispute concerning this boundary, the Republic of Colombia (Panama) and the United Provinces of Central America (Costa Rica) entered into a convention by which they obliged themselves to " respect the limits of each other as they now exist ", and expressed their purpose to fix their boundaries upon that basis and contemplated a future agreement or convention to give effect to that purpose. The provisions thus referred to were embraced in Articles VII and VIII of the convention. There was no express agreement between the parties for the settlement or demarcation of the territorial claim as to sovereignty over the coast up to Cape Gracias a Dios, although Article IX of the convention contained a provision for a *modus vivendi* between the parties concerning such claim.

Clear as is the text of the treaty in question on the two distinct subjects

stated, if there were room for obscurity it would be greatly illumined by a consideration of the negotiations which preceded the adoption of the treaty. I say this because in those negotiations a proposition on the part of Colombia (Panama) to adjust or compromise the larger territorial claim on a basis stated was promptly rejected by Costa Rica, and on the other hand a proposition made by the representative of Colombia that " as to boundaries it is necessary to hold to the *uti possidetis* of 1810 or 1820 as may be desired ", was promptly accepted by Costa Rica, thus indicating why as to the larger claim nothing but a provision for a *modus vivendi* was inserted, while as to the boundary claim proper a basis for its adjustment was agreed upon and a declaration of the purpose to execute in the future that agreement was made. What exactly was the possessory boundary relied upon as then existing does not appear. Subsequently, the contemplated purpose of delimiting the boundary stated in the convention not having been carried out, that is in 1836, the Republic of New Granada (Panama), in establishing a new territory called Bocas del Toro fixed the limits of that territory on the Atlantic coast from the river called Concepción up to the mouth of a river described as the Culebras and then " on the northwest [that is, from the mountains to the mouth of the Culebras] by the frontier line which separates on that side the Republic of New Granada from that of Central America ". It is apparent that this description, while it amounted to an attempt to definitely fix a line of boundary on the Atlantic coast at the entrance of the Culebras River, did not define the line of that boundary from the point of the mouth of that river to the main Cordilleras, but left it to follow the course of the existing boundary line between the two countries — an omission which was presumably caused by the fact that by Articles VII and VIII of the Convention of 1825, as we have seen, the line of such boundary was to be determined by the application of the doctrine of *uti possidetis* and the subsequent demarcation which was contemplated but which had not taken place. It is to be observed, however, that while the line from the mouth of the river to the mountains was thus left open to be marked, the provision clearly points out that the line of boundary or frontier as it then existed and as it was understood between the parties, considered in its trend from the mountains to the mouth of the river, ran in a northeasterly direction, or, conversely, from the mouth of the selected river to the mountains, in a southwesterly course.

Following the assertions of right on behalf of Costa Rica to the southern boundary at the Chiriquí River, as at the outset stated, and of Panama to a northern boundary at the mouth of the river called the Culebras, running from the mountains to the ocean on a line having the course above indicated, many subsequent negotiations occurred which we outline briefly as follows:

In 1856 a treaty was drawn between New Granada (Panama) and Costa Rica, by which the northern boundary between the two countries on the Atlantic was fixed by a river named the Doraces from its source in the Cordilleras " down-stream by the middle of the principal channel of this river until it empties into the Atlantic ". When the Congress of New Granada (Panama) came to act upon this Treaty it defined the mouth of this river in the Atlantic as being " the first river which is found at a short distance to the southeast of Punta Carreta [Punta Mona] ." As a result of this definition the Treaty was not ratified because Costa Rica declined to agree to the definition, which, of course, if accepted, would have destroyed its claim to a boundary by the Chiriquí, whose point of emptying into the Atlantic was many miles below Punta Carreta. And this serves to demonstrate that the real difference between the parties, at least as to the boundary on the Atlantic side, did not arise from the fact that the parties were quarrelling over the direction of either of the

different bounding rivers upon which they respectively relied, but were disputing and unalterably at odds as to which river was the boundary.

Again in 1865 a further attempt by treaty was made to fix a boundary by a river described as the Carnaveral, which if made the boundary would in substance, that is, for all practical purposes, have created a boundary the equivalent of that claimed by Costa Rica in the Chiriquí River. The treaty failed of ratification, and without going into detail it is true here again to say that the failure of the ratification in part at least arose from the impossibility of securing a meeting of minds of the two countries as to the abandonment of the claims of the river boundary pressed by either side, and was not concerned with the contention upon one side or the other concerning the course or direction of the bounding river which either claimed, if that river had been accepted as the boundary.

In 1873 another treaty was drawn which defined the boundary by a river called the Bananos flowing from its source in the Cordilleras emptying in the Atlantic at Almirante Bay. As the concession of the boundary by this river would have clearly repudiated Panama's claim previously asserted of a river emptying into the Atlantic, the first below Punta Carreta or Punta Mona, its ratification would have destroyed all right of Panama to such claim. But the treaty was not ratified, thus again affording an illustration of what was the real dispute, that is, which of the rivers was the boundary, and the difficulty of securing the ratification of any treaty on that subject.

In the long period of time embracing the acts to which I have just referred there were various official statements of responsible officers of the Colombia (Panama) Government, all resting its boundary claim upon a river boundary, and not one word of intimation is found in the slightest degree tending to show that any other or different boundary right was claimed than one by a river, whatever may have been the controversies or doubts suggested concerning the particular name of the river or the point where it emptied into the Atlantic, and, indeed, this also is true concerning the general course and trend of the bounding river relied upon. I make these statements, not overlooking the fact that there are instances where Punta Mona, a place on the Atlantic shore not on the mouth of any river, is mentioned as the boundary and indeed one instance where it was declared that Humboldt was authority for that proposition, although the very official making the statement pointed out that the boundary was the Culebras River which, as then understood, was a stream entering the ocean below Punta Mona. Likewise, Madrid, the distinguished Colombian publicist already referred to, making a report to the Colombian Senate said in referring to the boundary on the Pacific as well as on the Atlantic and of the crossing of the boundary line over the Cordillera range, that the whole boundary line, both on the Pacific and the Atlantic sides, including the crossing of the mountains, consisted of a line to be drawn from the middle of the Gulf of Dulce on the Pacific side, thence crossing the Cordilleras and traversing the Atlantic side to " the mouth of the River Doraces or Culebras, a short distance from Punta Careta, which is also, approximately, the boundary indicated by Baron de Humboldt and other celebrated travelers ", thus in effect confirming a river boundary as asserted from the beginning and at all times without hesitation or deviation by Panama, and in addition making in quite clear that the course and direction of the bounding river as understood between the parties was that which has been previously stated.

(b) *The light thrown upon the subject, if any, by a consideration of maps and charts applicable to the claim.*

It is undoubted that in the earlier maps there was great uncertainty as to the particular name of the river relied upon, some, showing a river named Dorces, Doraces or Dorados, some a river called Culebras, and some showing two distinct rivers—one named Dorces, Doraces or Dorados and the other Culebras. However, it is true to say that in a general sense all the rivers so named are shown on all these maps to have a general northeasterly direction from the main Cordilleras where, or in the vicinage of which, they purported to take their source and flowed to the Atlantic Ocean, whatever was the confusion in the respective maps as to the precise point of location of the rivers or the place where they emptied into the Atlantic. For instance, what is known as the Spherical Chart of 1805-9 shows the Dorados river flowing from the region of the mountains in a northeastern direction without tributaries to its mouth in the Atlantic, the first below Punta Mona, while the map of Ponce de Leon and Paz of 1864 showed the Culebras or Dorados having the same general course emptying into the Atlantic above Punta Mona. But none of these differences serve to confuse the situation when looked at comprehensively, that is, they do not serve to create any material doubt concerning the boundary river, the first below Punta Mona, relied upon by Panama and the general northeasterly course which such river was considered to have from the point of view of its source in the mountains and journeying from thence to the place where it emptied into the ocean.

And indeed it is here again worthy of remark that this coincidence of course corresponds in its general trend with the assertion by Colombia (Panama) of its boundary line in the very first instance where it found exact expression in the definition of the boundary in the act creating the territory of Bocas del Toro, to which I have referred.

(c) *The demonstration as to the exact nature of the claim afforded by the occupation or settlement of the territory covered by the boundary during the period of dispute.*

It is, moreover, to be observed that it is obvious if the parties contemplated the boundary to be a river flowing from the mountains to the ocean in a northeasterly course, the eastern bank of such river would belong to Colombia (Panama) and the western bank to Costa Rica, an understanding which it is undoubted was the one entertained by the two Governments. I say this because the proof here is adequate and comprehensive that the western bank of a river so flowing was occupied and settled under the jurisdiction of Costa Rica, and that as far as settlements were made by Colombia (Panama) the eastern bank was taken as the line of its jurisdiction of that country. This is aptly illustrated by the following facts. A Colombian settlement was located at the mouth of the boundary river, the first below Punta Mona, which came to be known as the Sixaola. This bank, if a river had been contemplated as flowing east and west in its course from the Cordilleras to the sea, would have been the south bank of the river, as indeed at the point of settlement it was accurately speaking such bank owing to the direction of the flow of the Sixaola in the immediate region of its mouth. But disregarding this merely local condition and evidently looking at the situation with reference to the trend of the boundary line which it had entertained from the beginning and the general course of the river which had been from the commencement and without change considered to be the boundary, complaint was made by Colombia (Panama) to Costa Rica of intrusion upon " the Colombian village ' Sixaula ', situated upon the eastern side of that river ". And similar language was repeatedly used in the course of the negotiations between the parties. Indeed, it is correct to say that whatever may have been the more accurate knowledge acquired of the names of rivers and of their true location and courses and distances, there

is nothing whatever in the record to indicate any action taken or any expression by word which directly or indirectly would justify the belief that up to the period when the previous award was rendered, the consideration of which we shall hereafter approach, the boundary line between the two countries as insisted upon by Panama, was made in any other way than by a river having the general trend and course of the river or rivers to which we have referrred and which in practice were treated as the dividing line — a practice which, as I have said, was shown by official action in many forms, by the exercise of dominion by the respective countries and was demonstrated by the settlements which manifested the practical conception which prevailed concerning the real situation as to boundary.

(d) *The controlling effect of the action of Panama concerning the submission of the matter to a former arbitration, and the dominating influence of its conduct in connection with the hearing and submission thus previously made.*

The failure to provide for the exact delimitation of the boundary line as contemplated by the Convention of 1825 may well be presumed to have produced its natural results. Certain is it that there had been a failure to do so not only on the Atlantic but on the Pacific side of the mountains, in 1880, growing out of disputes as to rights of possession and authority in the territory on the Pacific side, a rupture between the two countries was threatened and war between them was imminent. In view of these exigencies and in contemplation of a proposed negotiation with Costa Rica for an adjustment which might obviate an armed conflict, the Senate of Colombia (Panama) on July 14, 1880, formulated a statement of the claim of Colombia embracing the following conclusions:

(1) Colombia has, under titles emanating from the Spanish Government and the *uti possidetis* of 1810, a perfect right of dominion to, and is in possession of the territory which extends towards the north between the Atlantic and Pacific Oceans to the following line:

From the mouth of the River Culebras, in the Atlantic, going upstream to its source, from thence a line along the crest of the ridge of Las Cruces to the origin of River Golfito; thence the natural course of the latter river to its outlet into the Gulf of Duice in the Pacific.

(2) Colombia has titles which accredit its right, emanating from the King of Spain, to the Atlantic littoral embraced from the mouth of the River Culebras as far as Cape Gracias a Dios.

(3) Colombia has been in uninterrupted possession of the territory included within the limits indicated in Conclusion I.

And in another Conclusion which I do not reproduce, it was virtually declared that as a condition precedent to negotiations there must be an " evacuation [by Costa Rica] of any portion of territory in which that nation may have established its authorities beyond the limits marked out in Conclusion I ". Although these Conclusions were communicated for his guidance to the Negotiator representing Colombia, who was endeavoring to reach an adjustment with Costa Rica, it is worthy of remark that the instructions transmitting to the Negotiator the Conclusions of the Senate while insisting that as a *sine qua non* to the negotiations certain territory situated on the Pacific coast which was the more immediate cause of the dispute should be evacuated, made no request of such a character as to one foot of soil on the Atlantic side based on the want of right to possess along the bounding river having the course and direction which I have stated. This conduct certainly shows that even in the vivid light

which must have been thrown on the controversy between the two countries resulting from the almost flagrancy of war, the parties concerning the boundary on the Atlantic coast entertained and suggested no different view of that boundary than a river, by whatever name it might have been called, following the general trend and course of the bounding river which had been asserted by Panama from the beginning, and that settlements by Costa Rica on the Atlantic coast which did not transcend or interfere with such a boundary were not really the subject of serious dispute between the two countries. It is also worthy to be observed that although the larger territorial claim of the Atlantic coast to Cape Gracias a Dios was embodied in the Conclusions of the Senate under Number 2, no express instructions whatever concerning that claim were given to the Negotiator, and it is in addition of importance that the President of Colombia issued a proclamation concerning the claims of that Government and although in such proclamation he embodied in so many words the propositions contained in the Senate Conclusions with reference to the assertion of the river boundary, no mention whatever was made as to the claim of sovereignty over the coast up to Cape Gracias a Dios as mentioned in the Senate Conclusions since the Senate's statement as to that asserted right was wholly omitted from the proclamation — a fact which gives support to the view that such controversy was not embraced by the Treaty of 1880.

The rupture between the two countries was avoided and a treaty was negotiated and ratified between them for the purpose of submitting to the arbitrament of the King of Spain the disputes stated in the treaty. The preamble of this treaty recited that its purpose was " to close the only source of differences that may arise between them, which is no other than the question of boundaries foreseen in articles VII and VIII of the Convention of March 15, 1825, between Central America and Colombia, and which has subsequently been the subject of diverse treaties between Costa Rica and Colombia " — a declaration of purpose clearly embracing the river boundary dispute which was the subject provided for in the articles of the Convention of 1825 referred to and which articles were therefore virtually incorporated into the treaty and became by reference a part thereof. The first article, which gave effect to the purpose thus expressed in the preamble, by its terms when reasonably construed related to the fixing of a boundary along the disputed line coming within the scope of articles VII and VIII of the Convention of 1825 to the end that the possession of both parties within their proper territory might be secured — a boundary which, as we have seen, by the acts and declarations of Colombia, by the authoritative writings of the publicists of that country, and by the very conclusions of the Senate leading up to the treaty had come to mean a river flowing from its source in the Cordilleras in a northeasterly direction to a point where it emptied into the Atlantic Ocean as the first river having its mouth below Punta Mona. And the fact that this was the subject contemplated by the treaty is further shown when it is considered that the Convention of 1825 had in it an article expressly referring to a *modus vivendi* regarding the larger claim concerning the Atlantic coast to Cape Gracias a Dios, and that no reference or incorporation of the provisions on that subject was made in the treaty — a view additionally sustained by the instructions to the Negotiator who commenced the negotiation of the treaty and by the President in his proclamation, in both of which the controversy as to the sovereignty of the coast line was treated as negligible for the purpose of the negotiations which the treaty consummated.

The King of Spain accepted, but before his duty was discharged, although the Government of Spain had taken initial steps towards its performance, the

King died. Thereafter in 1886 the two Governments negotiated an additional treaty of arbitration. The preamble of this Convention after reciting the previous treaty, the acceptance of the King of Spain, the beginning by the Spanish Government of the execution of the duties incident to the arbitration and the death of the King, declared that the parties to remove all doubt regarding the competency " of his successor [the King's] to continue to exercise jurisdiction over said arbitral suit until final judgment, have agreed to execute the following convention *ad referendum* additional to that signed * * * on December 25, 1880 ". The first Article of this treaty recognized in express terms the right of the successor of the King or the government of Spain " to continue exercising jurisdiction over the arbitration proposed by the two Republics, and to render an irrevocable and final award in the controversy pending concerning the territorial boundaries between the High Contracting Parties." While no reference in terms was made to an additional power to consider and decide as an arbitrator the controversy concerning the larger territorial claim, it can not be subject to serious dispute that under the terms of the treaty an additional power to that conferred by the previous treaty was given to the arbitrator to adjudge as to the larger claim of Panama to territorial sovereignty extending along the coast line to Cape Gracias a Dios. I say this because such is the natural result of an enumeration of the limits of the territory in dispute embraced in Article II and the statement in Article III concerning the authority of the arbitrator to decide the controversies.

I do not reproduce the text of the two articles since it is hereafter quoted in the analysis of the legal questions which are involved in the merits of the controversy. But in my opinion the fact that the additional power was given concerning the territorial claim clearly did not change or expand the power conferred by the previous treaty concerning the boundary claim, since such conclusion is rendered absolutely necessary by the express statements which I have referred to in the treaty that the power formerly given and which had been partially executed was to continue until final judgment, and finally by the provision saving the prior treaty from abrogation as a result of the adoption of the latter.

It having resulted from reasons purely of convenience not necessary to be stated, that the King of Spain did not complete the discharge of the duties of arbitrator begun under the first treaty nor enter upon those resulting from the second treaty, the parties in 1896 entered into a Convention agreeing to submit the subjects to the arbitration of the President of the French Republic. The Convention expressly declared that it made no change in the fundamental matters referred to, and that it was but intended to submit the controversy under the terms and limitations thereof to the arbitrament of a new tribunal. Prior to the assumption by the President of the French Republic of the duties created by this treaty, the authorized representative of Costa Rica addressed to him a letter enclosing the text of the arbitration treaty and asking him to undertake the duties which it imposed. The letter in addition said: " I also enclose a geographical map of the territory in litigation upon which are indicated the boundaries claimed by each of the contracting parties." The map which was thus sent clearly delineated the bounding river, the Chiriquí claimed by Costa Rica, and the river claimed to be the boundary by Colombia (Panama), that river being marked on the map as entering into the Atlantic the first below Punta Mona and having in its flow from the mountains to the ocean a general northeasterly direction conforming to the course and flow of the bounding river which, as I have seen, had prevailed without question or hesitation from the beginning. The river which was thus delineated on the map was designated as

the " Yurquin " (Yorquin) from its source in or near the Cordilleras to a point where it emptied into a river named the " Sixola " (Sixaola), the two in the course and direction indicated thus being marked on the map as the bounding river on which Colombia relied. There is no proof in this record that such letter written by the representative of Costa Rica, was ever communicated to the representatives of Panama, but there is nothing in the record indicating that anything occurred which called for its communication, as there is nothing to show that there was any intimation of controversy between the parties as to the trend and course of the bounding river claimed by Colombia to constitute the boundary if the general controversy between Colombia and Costa Rica as to which of the two rivers was the boundary should be determined in favor of Colombia. The duty under the treaties was accepted by the President of the French Republic and the case was made up and submitted for award.

On the part of Panama an elaborate argument was submitted to sustain the claim of that country to sovereignty over the Atlantic coast to Cape Gracias a Dios, under the Royal Order of 1803, and in addition an argument was made to sustain a broad claim of territorial authority under a Royal Cédula of March 2, 1537, which it would seem was presented for the first time in the argument in question. Aside from the elaborate argument just stated there was no detailed discussion or argument on the part of Panama concerning the dispute between itself and Costa Rica as to which of the two rivers was the boundary and nothing whatever was said concerning the course and trend and location of the river claimed by Panama as the boundary, if the river asserted by it should be found to be the true boundary, which in the slightest degree conflicted with the statements on that subject contained in the letter written by the minister of Costa Rica or which, moreover, in any way whatever challenged the source, the course, and the trend of the river relied upon by Colombia as resulting from the history of the boundary controversy from the beginning which has been previously given. I say this because the only statement concerning these subjects contained in the argument made by Colombia after a discussion concerning the validity of its claim to authority over the coast line was a general reference to Colombia's title to what it called the Duchy of Veragua, which Colombia confessedly held, and the claim in the following words asserted to exist as the result of the ownership of that title: " This title alone would suffice to show the actual right of possession of Colombia over Chiriquí Lagoon, the Bay of the Admiral [Almirante Bay] and the contiguous country in the direction of the Sixaola River (dans la direction du Rio Sigsaula)."

On the part of Costa Rica the argument was addressed to an attempt to refute the larger claim as to sovereignty over the coast made by Panama and in addition as to the boundary dispute to establish that the River Chiriquí was the true boundary and by a negative pregnant to thereby demonstrate that the river claimed by Colombia was not. But there was not one word in the argument tending to show that it was considered that if Colombia's claim to boundary was rightful, it embraced any other territory or any other river than that which had been described in the letter to the Arbitrator, and which description conformed to all the facts which, as I have stated, are demonstrated by the history of the subject from the beginning.

The whole record which was before the former Arbitrator is not shown to be a part of this record, but neither party disputes, if they do not in terms concede, that the substantial facts which I have previously stated were embraced in the record for the purposes of the prior arbitration. Prior to making the award and as an aid in doing so, the Arbitrator appointed a Commission of distinguished officials of the French diplomatic corps, and in addition the

Keeper of the Maps in the National Library, to consider the subject presented by the arbitration. The written report to that Commission, if any was made, is not in this record.

The award of the Arbitrator was made on September 11, 1900. Leaving aside certain provisions contained therein as to islands both along the Atlantic and Pacific so much of the award as is necessary here to be considered is as follows, the translation from the French being taken from the argument of the Republic of Panama in this case, there being no question on the other side as to its substantial accuracy.

The Frontier between the Republics of Colombia and Costa Rica shall be formed by the counterfort of the Cordillera which starts from Cape Mona, on the Atlantic Ocean, and closes on the North the valley of the Tariare or Rio Sixola; then by the chain of division of waters between the Atlantic and Pacific, to nine degrees, about, of latitude; it will follow then the line of division of waters between the Cheriquí Viejo and the affluents of Gulf Dulce, to end at Point Burica on the Pacific Ocean.

Upon the announcement of this award the Minister of Costa Rica who had also been its agent for the purposes of the proceedings under the arbitration addressed a letter to Monsieur Delcassé, the Minister of Foreign Affairs of France, in the name of Costa Rica in form at least seeking to interpret the award and requesting that a particular line be indicated by the arbitrator as a boundary. The line thus asked as an interpretation of what had been awarded was substantially like that which the Minister of Costa Rica had marked on the map which he sent to the President of the French Republic before the arbitration was undertaken as showing what the claim of Colombia was as to the river which it asserted to be the boundary and therefore as demonstrating what that country would be entitled to if its claim was allowed.

To this letter the Minister of Foreign Affairs replied as follows:

Answering the request which you have been pleased to express in your letters of September 29th and October 23rd ultimo, I have the honor to inform you that, on account of the lack of exact geographic data, the Arbitrator was not able to fix the boundary except by means of general indications; I think, therefore, that there would be difficulty in fixing them on a map. But there is no doubt, as you observe, that, in conformity with the terms of articles 2 and 3 of the Convention of Paris of January 20, 1886, this boundary line must be drawn within the confines of the territory in dispute, as they are determined by the text of said articles.

It is in accordance with these principles that it is for the Republics of Colombia and Costa Rica to proceed to the physical delimitation of their frontiers, and the Arbitrator trusts, on this point, to the spirit of conciliation and good understanding with which the two Governments in litigation have up to the present time been inspired. * * *

Costa Rica declined to accept the award unless it was interpreted according to its view as stated in the letter written by its minister to Monsieur Delcassé, and Colombia insisted that the award required no interpretation and should be executed according to its terms. The award remained without practical effect although various negotiations were had on the subject and although a proposed treaty for adjusting the differences was drawn but failed of ratification. In this situation a treaty providing for the duty of arbitration to be performed by the Chief Justice of the United States, now being executed, was entered into. By that treaty the previous award as to the Pacific coast, as to the line crossing the Cordilleras and the dividing line on that range of mountains " to a point beyond Cerro Pando * * * near the ninth degree of North Latitude " was expressly declared to be binding, and, therefore, all controversy concerning

those subjects was put at rest. It follows, therefore, that the treaty accepted in its entirety the award as to the Pacific coast and provided only by the methods and to the extent contemplated by its terms, which I shall hereafter have occasion to specifically state and consider, for an examination and decision concerning the controversy in relation to the award concerning the dispute as to the boundary between the two countries on the Atlantic coast from the mountains to the ocean.

The record contains nearly fifty volumes, and the arguments submitted as to the subject-matter in controversy are voluminous, covering on one side or the other the widest possible field and every aspect of everything that has taken place in the long period of time to which I have referred. Without reference to its materiality to the issues here to be decided there is certainly this distinction between the record now under consideration and that which was before the previous Arbitrator which ought not to be passed without mention. By the terms of the present treaty, provision was made for the appointment of a commission " for making a survey of the territory "; and this request having been made, in October, 1911, such a board was organized, composed of four members, one appointed by the President of Costa Rica, one by the President of Panama, and the other two by the Arbitrator. The appointees were all civil engineers of the highest attainment and distinction in their profession. They were as follows: Professor John F. Hayford, of Northwestern University, Evanston, Illinois, Chairman; Professor Ora M. Leland, of Cornell University, Ithaca, New York, Secretary; Mr. P. H. Ashmead, of New York City; and Mr. Frank W. Hodgdon, of Boston, Massachusetts. After the organization of the board and after the adoption of a plan to govern the performance of its duty, which plan was approved by both countries, a survey in the field was undertaken and accomplished after prolonged and arduous labor, and its results were submitted in a report and in many maps and charts displaying the situation in the most careful, comprehensive and accurate manner. It is true to say, overlooking what may be qualified as minor differences, the board was in substance united. And great as is the satisfaction afforded by the action of the Commission of Survey, there is an additional and important cause of gratification arising from the fact that its work as to fiscal arrangements and in every other respect was aided and facilitated by the two countries whose controversy is here for decision. I do not go into detail concerning the report or the map or maps which accompanied it, since in the view now taken of the case it does not depend upon their analysis or statement. But although it is not essential to the conclusion which I have reached, it is pertinent to the contentions which I shall be obliged to notice before announcing that conclusion to state the facts shown by the report and maps of the Commission concerning a continuous counterfort (range or spur) stretching from the main Cordilleras to Punta Mona which was made the boundary line in the previous arbitration. These facts show that there is undoubtedly a high spur projecting itself out in the direction of Punta Mona from the main range for a distance of about nine miles, but there is then a sudden drop of about 3,600 feet in less than four miles, where an elevated but broken country begins, full of ridges, transverse to the direction of the spur. From this region continuing towards the Atlantic there is a gradual lowering except for occasional peaks, the country falling to an elevation of about six hundred feet when a distance of about sixteen miles from Punta Mona is reached, and sinking yet farther to about three hundred feet most of the way and finally subsiding into a swamp which is a mile and one-half wide, until a small eminence which marks Punta Mona is attained. Whether, as is urged, the designation of " counterfort " was mistakenly applied to such a situation, however, I am

not called upon to consider, since my conclusion, as I have said, is wholly independent of that fact.

There is no real controversy between the parties as to the facts previously stated. I say real controversy because if it be that there is any dispute on the subject the preponderance of evidence makes such clear proof concerning such facts that they may be accurately said to be not disputable. And in my opinion it is also true to say that likewise the inferences which I have drawn from the facts stated in the course of making the statement are so clearly compelled by the facts stated as to be equally beyond dispute. I now come to consider the propositions relied upon by the parties in the light of the facts and the inferences which I have heretofore or shall hereafter draw from them under a heading — The Merits of the Controversy.

THE MERITS OF THE CONTROVERSY

Costa Rica insists, first, that under the facts the selection by the Arbitrator of Punta Mona as an initial boundary point and the making of the boundary line by a range or spur of mountains extending from there to the Cordilleras was void because beyond the scope of the authority which the arbitration embraced. Second, it insists that in any event as something cannot be made out of that which does not exist, it clearly follows that the selection of the line was in other respects void since under the proof it is demonstrated that the mountain range made the basis of the award has no existence.

On the part of Panama the contention is, first, that assuming the facts which I have given in stating the history of the case to be true, nevertheless the line of alleged mountain boundary was within the power of the Arbitrator to fix because the authority to do so was conferred upon him by the treaty upon which the arbitration was made. And second, that this view remains unaffected even if it be assumed that the range of mountains has no existence since the line of boundary which that range was intended to mark remains and is plainly discernible by the conformation of the country and the watershed which it contains. Third. It is additionally insisted by Panama that the validity of the line of mountain boundary must be tested not by the assumed dominancy of any general principles of law governing arbitration, but by the former arbitration treaty alone, because the treaty under which the power to arbitrate is now being exercised confines the authority of the present Arbitrator to determining whether the previous award was within the terms of the previous treaty and excludes the power to hold the previous award invalid if it was within the treaty upon the theory that it conflicted with general and controlling principles of law.

Considering these propositions as a whole, inasmuch as there can be no question of the power of the two Governments to have entered into the previous treaties of arbitration and to insert in them such provisions as they deemed best, it clearly results that the first proposition of Panama, if its premise be true, is well founded and is controlling since it cannot be said that action taken under the treaties was void for want of power if it was within the power which the treaties conferred. It also is patent, this being true, that it cannot be held under this treaty that an act done under the prior treaty was void although sanctioned by such treaty because of some conception of general principles of law. This must be the case because to so do would amount to deciding that this treaty gave the power to set aside acts which were authorized by the previous treaty. It thus necessarily comes to pass that the fundamental question to be decided requires it to be determined whether the boundary line fixed by the previous arbitration was within the previous treaty or treaties. And if it was not, it

must follow that its correction is within the scope of the authority conferred by this treaty; and if it was, no power here obtains to revise it. It is therefore true that the whole case comes down to the question stated: which is, the scope and meaning of the prior arbitration treaty or treaties, and the solution of that inquiry will decide both of the propositions relied upon by Costa Rica, as well as all those insisted upon by Panama.

The study of that question from the point of view of the argument presented by Panama requires the immediate consideration of the text of the previous treaty, that of 1886, the pertinent articles of which are as follows:

Article II. The territorial limit which the Republic of Costa Rica claims, on the Atlantic side reaches as far as the Island Escudo de Veraguas, and the River Chiriquí (Calobebora) inclusive; and on the Pacific side, as far as the River Chiriquí Viejo, inclusive, to the East of Point Burica.

The territorial limit which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias a Dios, inclusive; and on the Pacific side, as far as the mouth of the River Golfito and in Gulf Dulce.

Article III. The arbitral award shall confine itself to the disputed territory that lies within the extreme limits already described, and cannot affect in any manner any rights that a third party, who has not taken part in the arbitration, may set up to the ownership of the territory comprised within the limits indicated.

The construction relied upon to establish that the mountain boundary was within these treaty provisions and therefore valid and not subject to be re-examined under this treaty is this: The second article, it is said, specifically states the exterior points of the vast territory which was in dispute and therefore brought within the jurisdiction of the Arbitrator everything within those exterior boundaries and gave him authority at his discretion wholly without reference to any particular controversy pending or dispute existing as to claims within the boundaries, to fix such a line of boundary within the exterior limits as was deemed best. And support for this proposition is derived from the clause of the third article saying, " The Arbitral award shall confine itself to the disputed territory that lies within the extreme limits already described," the construction given to these words being that they empower the fixing of a line not only concerning a dispute as to the exterior limits, but a line within the exterior limits wholly without reference to the disputes prevailing between the parties as to land within the exterior limits. The demonstration of the extreme result which would come from maintaining the construction thus asserted is too plain to require more than to direct attention to the consequences which would result from sustaining it — consequences which could not be better exemplified than they are by the facts of this case where in a dispute only as to which of two rivers was the bounding one with no difference whatever as to what either of the parties would be entitled to if either river relied upon was made the boundary, no river boundary was made, but a mountain range was fixed carrying with it a large amount of territory to which the successful party would not possibly have had any title if every claim which was made in the dispute as to that boundary had been held to be correct. Besides, on the face of the text the curious premise upon which the argument proceeds is patent since it in substance is that from a grant of power to determine as to the " disputed territory that lies within the extreme limits " there arose the right to determine as to territory within such limits as to which there was no dispute whatever. And that this anomalous result of the proposition is not overdrawn is made manifest by the statement on the subject in the argument on behalf of Panama, where it is said:

Article III only provides that the award shall be confined to the disputed territory within the limits fixed by Article II, and cannot affect the rights of third parties.
* * *

It will be noted that the only limitation which these Articles imposed upon the Arbitrator was with regard to the terminal points of the boundary which he should fix. He could not, upon the Atlantic, fix a line which should begin south or east of Escudo de Veraguas or the mouth of the river Chiriquí, nor north of the northern frontier of Costa Rica; nor could he fix any line which should meet the Pacific at a point south of the Chiriqui Viejo or north of the Golfito.

But except in this respect his jurisdiction was unlimited. No claim was made by either party as to interior lines and nothing in the treaty prescribes any rule upon the subject. So long as the terminal points upon the two coasts were within those stated, he was at complete liberty, in the interior, to connect them by a line running in whatever course he should think proper.

I do not stop to point out how plain would be the duty to resort to every *reasonable intendment* to save the articles of the treaty from the construction attributed to them if the premise upon which the proposition rests were true that their text alone afforded the measure of deciding the question of power conferred as to the boundary issue. But the question of power is not to be solved alone by the article of the treaty thus relied upon by Panama, since on the face of the record it is apparent that it must be solved by the text of a different treaty which when it is considered renders it impossible to ascribe the meaning relied upon to the provisions referred to. A brief recurrence to the history of the case previously made will make this clear since that history shows beyond the possibility of question that the boundary dispute was first provided for by the Treaty of 1880 and contained a limitation or direction based upon the Treaty of 1825 between Colombia (Panama) and Central America (Costa Rica) which causes it to be impossible to suppose that the extensive power now claimed was conferred concerning the boundary dispute. This becomes clearer, if it were possible to add to its clearness, when the statement is recalled that when the Treaty of 1886 was drawn in express terms it reserved the powers granted by the previous Treaty of 1880 and declared that the powers created under the new treaty were additional to those conferred by the former, and to make assurance doubly sure, there was added to the Treaty of 1886 a cause saving from repeal the Treaty of 1880.

Even upon the hypothesis that the Treaty of 1880 provided both for the boundary dispute and for the territorial claim up to Cape Gracias a Dios which embraced on the Atlantic side the exterior boundaries subsequently stated in the Treaty of 1886, such assumption would be without consequence because it could not possibly be assumed that the inclusion of the larger and wholly distinct territorial claim was intended to destroy the express limitations concerning the boundary claim which the treaty embodied by making reference as it did on that subject to the articles of the Treaty of 1825. And, indeed, this would be the result if it were additionally supposed for the sake of argument that the Treaty of 1880 and the Treaty of 1886 became incorporated into one and the same instrument by the effect of the adoption of the Treaty of 1886, since it would be obvious under the terms of the Treaty of 1886 as thus construed that it was the clear intention of that treaty to preserve unimpaired and unchanged the powers, duties and limitations previously created and therefore to impose the duty of enforcing the two harmoniously so that the duties under both might be performed.

While these considerations dispose of all the principal arguments advanced to maintain the contention that the text of the Treaty of 1886 sustains the

extreme power asserted and I might well pass from the subject, nevertheless before doing so in order not to seem to overlook suggestions made or necessarily arising, I proceed to notice some considerations concerning some words in the text which have been deemed to be of importance but which I have not previously noticed in order to avoid breaking the continuity of the argument. The clause in the third article of the Treaty of 1886 saving the rights of third parties, it is suggested by reasoning whose import is not clearly discernible, lends some strength to the contention that the treaty conferred the extreme authority claimed. But it is obvious that this clause instead of removing a limit, imposed one, since its plain terms evidence that it was intended in any and all events but to restrict the operation of the award so as not to affect third parties — a restriction presumably inserted because at the time the treaty was drawn the United States [sic] was insisting that rights which it asserted might otherwise without such restriction be affected, and, moreover, because the line embraced in the shore claim of Panama, as we have seen, extended beyond the territory of Costa Rica up to Cape Gracias a Dios. And the contention in another aspect, manifests a confusion like that which I have previously pointed out since it would be singular, indeed, to say that a limitation which was inserted for the purpose of protecting those who were not heard had for its object the extension of the scope of the arbitration so as to cause it to embrace as to the parties to the convention the absolute right on the part of the arbitrator to condemn them without a hearing, which, of course, would be the result if the provision had the extreme construction which it is now insisted belongs to it.

From these considerations the following general conclusions are established: (1) That the controversy as to boundary between the parties which had existed for so many years was limited to a boundary line asserted by one party and to that asserted by the other, the territory in dispute between them, therefore, being that embraced between the lines of their respectively asserted boundaries. (2) That the previous treaties of 1880 and 1886 by which the boundary dispute thus stated was submitted to arbitration, instead of going beyond the general principles of law which otherwise would have applied and conferring an extreme power to make an award wholly without reference to the dispute or the disputed territory, by their very terms confined the award to the matter in dispute and the disputed territory. (3) That as the line of boundary fixed by the previous award from Punta Mona to the Cordilleras was not within the matter in dispute or within the disputed territory, it results that such award was beyond the submission and that the Arbitrator was without power to make it, and it must therefore be set aside and treated as non-existing. The only question then is, What in other respects is the duty arising under the present arbitration from that situation?

As by the terms of the present treaty the previous award was not set aside as a whole, and the power was only given to correct it in so far as it might be found to be without the authority conferred, the consequence is that all the results necessarily implied by the selection of the mountain line from Punta Mona along the stated counterfort, which can be upheld consistently with the previous treaty, must be sustained although the mountain line itself be void for want of authority to make it. While not in express terms urged, it may be implied from the argument that the contention is that, the mountain line being out of the way for illegality, there would remain as a part of the previous award a river line composed of the Sixaola-Tarire Rivers since the award declared that the mountain line would bound on the north the valley of such rivers and hence they may constitute a boundary line within the award previ-

ously made. To dispose of this suggestion it is only necessary to point out the fallacy of the premise upon which it must rest since that premise virtually is that the previous selection was of a line formed by the Sixaola-Tarire Rivers instead of the counterfort or range of mountains. But this is so obviously refuted by the record as to need only a few words of statement to demonstrate its error. In the first place the line previously fixed did not even commence with the mouth of a river, but began at Punta Mona, and in express terms was declared to proceed along the counterfort. It is true, as is suggested, that it was said that the line thus made bounded on the north the valley of the Sixaola and Tarire, but this declaration did not convert the mountain boundary into a river one. In fact such a view of the previous award could only be taken as the result of wholly inadmissible surmises and conjectures. It is certain, as indicated by the letter of Monsieur Delcassé previously quoted, that there was not a complete knowledge of the geography of the country when the previous award was made. And it is also certain that under the previous arbitration there were present maps showing a range of mountains from Punta Mona to the Cordilleras ostensibly of such a permanent and dominant character as to cause it, if existing, to constitute a natural frontier dividing for all practical purposes the country on the one side from that lying on the other. When this is borne in mind a reason which may have given rise to the selection of the mountains is not far to presume since the natural frontier which their presence would cause and the benefit to arise from the establishment of such frontier may well have led the mind to consider that subject from the point of view of statesmanship alone and therefore have unwittingly concentrated attention exclusively on the advantages of such a boundary and thus have diverted attention from the consideration of the limits which inhered in the submission. On the contrary the suggestion relied upon would necessarily compel it to be assumed that although a river boundary was selected, a mountain boundary was for some unaccountable and undisclosed reason named.

As it is conceded by both parties that under this treaty there is the power and duty to substitute for the line set aside, a line within the scope of the authority granted under the previous treaty " most in accordance with the correct interpretation and true intention " of the former award, I come to that subject. As it was impossible to make the previous selection of a mountain line without rejecting both the claim of Colombia (Panama) to the shore up to Cape Gracias a Dios and also without adversely disposing of the claim of Costa Rica to the boundary of the Chiriquí River, both of those express or implied awards remain unaffected by the fact that it is now held that the mountain boundary line was void. And by the same reasoning it follows that the initial point of the boundary which is to replace the rejected one must and can only be the mouth of the first river below Punta Mona, the Sixaola, since there is physically no other river mouth to respond to the claim made under the circumstances stated. Besides, this result is inevitable because the mouth of such river, under the facts stated, is indubitably the initial point on the Atlantic of the river boundary contemplated by the parties from the beginning, sustained by all the facts to which I have referred as to negotiations, declarations and settlements and the exertion of governmental power by the two countries consequent thereon. It is true it results from the previous statement that the river which was relied upon by Colombia (Panama) as the boundary was designated by various names because, undoubtedly, of the want of accurate geographical knowledge which prevailed. But whatever may have been the Babel of names, there can be no doubt that they all came to be used to designate virtually one and the same river emptying into the Atlantic at about one

and the same place and having virtually one and the same course or flow from the source near the mountains to the mouth in the Atlantic. Nothing could serve to make this clearer than does the statement which was made by the Colombian Congress in 1856 which, while it described the river as the Doraces, fixed its mouth as the one first below Punta Mona, and the further illustration which is afforded by the facts previously stated concerning the settlements at the mouth of the Sixaola by Colombia and the claim of authority which the government of that country asserted thereunder. And this serves to make clear what river was referred to by the use of the name Culebras, since the President of the State of Panama had in 1870 declared that that river was the same as the Doraces. Moreover, when the situation is rightly appreciated these facts readily explain why in the Resolutions of the Colombian Senate which immediately preceded the Treaty of 1880 the river upon which Colombia relied as the boundary was described as the Culebras and not as the Sixaola, which latter river was then known to be the river having its mouth the first below Punta Mona, and therefore was the same as the Doraces or Culebras. But the claim of Colombia as first formulated in 1836 in the organization of the territory known as Bocas del Toro, called the river whose mouth was fixed as the boundary, the Culebras. And therefore it is quite natural to assume that in stating the claim for the purposes of the Resolutions and the controversy then pending, desirous of losing nothing of the original right and of retaining everything that had accrued under it by way of negotiations, admissions and settlements the original description was adhered to and reiterated — a conclusion whose cogency is greatly reinforced when it is considered that years before Señor Madrid, the Colombian publicist, had recognized that the river which Colombia referred to as the Culebras was the river which Costa Rica referred to as the Sixaola. To adopt views contrary to those just stated would necessarily lead to the conclusion that because in formulating its claim Colombia in order to preserve it in its integrity had resorted to the definition of that claim as originally stated, it had thereby abandoned its right, or, what is equivalent thereto, had by resorting to the most efficient way of stating that claim acquired a non-existing, unheard of or imaginary one.

The only remaining question then is, how is the boundary line to proceed from the mouth of the Sixaola River to the Cordilleras until it joins the line terminating " beyond Cerro Pando "?

On the one hand it is claimed that such line should follow the thalweg of the Sixaola River to the point where it joins with a river called the Yorquin, then follow that stream in a southerly direction to its source in or near the mountains and thence to the point " beyond Cerro Pando ". On the other hand the contention is that the line should run by the Sixaola passing the entrance of the Yorquin to a point where the Tarire is attained and then follow that river to its source in the Cordilleras and thence by a line to the point " beyond Cerro Pando ". This contention rests upon the assumption that the Sixaola and Tarire Rivers are shown to be really one and the same, although designated by different names. It cannot be denied that the direction of the boundary river, if the Sixaola-Tarire be selected, would be wholly at variance with the trend of the river boundary contemplated from the beginning and would project a line of boundary into territory over which the authority of Costa Rica was never questioned and thus give to Panama what she had never claimed. While, on the contrary, the line of the Sixaola-Yorquin, if followed, would in substance conform in its course and direction with that which had been recognized as the direction of the boundary line from the beginning and had been virtually treated as not the subject matter of dispute up to and during the proceedings had

under the previous treaty. And no reason is afforded for departing from the river line thus shown to be the boundary line within the dispute between the parties by suggesting that some other river line would most comport with the interests of the two governments and best subserve the purpose of a boundary. To admit such considerations would in substance but be indulging in views of public policy and public interest which would lead the mind away from the fundamental proposition which is here controlling, that is, the execution of the duty of arbitration which calls for judgment as to a dispute between the parties and affords no room for the application of discretion beyond the limit which that consideration necessarily imposes. Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated. Under these circumstances, since the duty here is not to elucidate and pass upon mere abstract question of geography, nor to substitute mere expediency for judgment, but to determine what was the river claimed as the boundary by Colombia, declared by her to be the boundary for so many years, to which she asserted rights and which virtually was claimed to be the boundary upon which she relied prior to the entry into the previous treaty for arbitration and in the proceedings under that treaty, it is plain that the Sixaola-Yorquin is the line which should take the place of the line from Punta Mona along the counterfort of the Cordilleras to the point " beyond Cerro Pando ", as declared in the previous award.

In framing the award and coming to particularly specify the new line there may arise some difficulty because of the absence of precise geographical data as to the situation at the headwaters of the Yorquin River and therefore of the considerations which should control the drawing of the line from such headwaters to the Cordilleras. In the argument of this case Costa Rica stated a formal decree which it deemed should be entered upon the hypothesis that the award here made should be against the mountain line and in favor of the Sixaola-Yorquin line, and no objection to the form of such proposed decree has been made by Panama. Following the line to the headwaters of the Yorquin, the proposed decree from thence directs a stated line to the Cordilleras. This line rests upon the assumption that the headwaters of the Yorquin lie in the region of the northern slope of the northern watershed of a river known as the Changuinola, and the proposed line runs from the headwaters of the Yorquin along such watershed to the Cordilleras. The situation thus assumed by the proposed decree to exist in the region of the headwaters of the Yorquin is in conformity with maps which are in the record, one of which was made by the Commission of Engineers in this case, but which is not, however, the result of a survey by that body as it was not called upon by either party to make one. As the line thus suggested would seem to be in all respects the most reasonable, I shall adopt it with some verbal modifications as a part of the award to be entered, however, with the following reservation: Without prejudice to the right of the parties in case there should be differences between them resulting from contentions as to the topography of the country between the headwaters of the Yorquin and the Cordilleras differing from that above stated, to raise such question in any appropriate way consistent with the provisions of the treaty now being enforced.

Coming to give effect to the opinions previously stated and the conclusions deduced from them, the award now made under the authority of the treaty is as follows:

1. That the line of boundary which was purported to be established by the previous award from Punta Mona to the main range of the Cordilleras and which was declared to be a counterfort or spur of mountains in said award described, be and the same is held to be non-existing.

2. And it is now adjudged that the boundary between the two countries " most in accordance with the correct interpretation and true intention " of the former award is a line which, starting at the mouth of the Sixaola River in the Atlantic, follows the thalweg of that river, upstream, until it reaches the Yorquin, or Zhorquin River; thence along the thalweg of the Yorquin River to that one of its headwaters which is nearest to the divide which is the north limit of the drainage area of the Changuinola, or Tilorio River; thence up the thalweg which contains said headwater to said divide; thence along said divide to the divide which separates waters running to the Atlantic from those running to the Pacific; thence along said Atlantic-Pacific divide to the point near the ninth degree of north latitude " beyond Cerro Pando ", referred to in Article I of the Treaty of March 17th, 1910; and that line is hereby decreed and established as the proper boundary.

3. That this decree is subject to the following reservations in addition to the one above stated:

(*a*) That nothing therein shall be considered as in any way reopening or changing the decree in the previous arbitration rejecting directly or by necessary implication the claim of Panama to a territorial boundary up to Cape Gracias a Dios, or the claim of Costa Rica to the boundary of the Chiriquí River.

(*b*) And, moreover, that nothing in this decree shall be considered as affecting the previous decree awarding the islands off the coast since neither party has suggested in this hearing that any question concerning said islands was here open for consideration in any respect whatever.

(*c*) That nothing in the award now made is to be construed by its silence on that subject as affecting the right of either party to act under Article VII of the treaty providing for the delimitation of the boundary fixed if it should be so desired.

LA MASICA CASE

PARTIES: Great Britain, Honduras.

COMPROMIS: Arrangement of 4 April 1914.

ARBITRATOR: Alphonso XIII, King of Spain.

AWARD: 7 December 1916.

State responsibility — Obligation of a State to make reparation for injuries caused to aliens as a result of illegal acts or omissions imputable to its authorities — Duty to fulfil obligations arising out of treaties freely concluded — Determination of indemnity for injuries suffered.

ARRANGEMENT BETWEEN GREAT BRITAIN AND HONDURAS REFERRING TO ARBITRATION MATTERS RELATING TO THE MASICA INCIDENT. SIGNED AT TEGUCIGALPA, 4 APRIL 1914 [1]

Terms of Reference

WHEREAS on the 16th June, 1910, an affray took place in the village of La Masica, in the Department of Atlántida, Republic of Honduras, between a squad of soldiers of the Government of Honduras, which at the moment of the affray was under the command of the Mayor de Plaza of that Department, Don Joaquin Medina Planas, and a party of three British West Indian subjects, named Alexander Thurston, Wilfred Robinson, and Joseph Holland, which affray resulted in the death of Alexander Thurston, the wounding of Wilfred Robinson, and the beating of Joseph Holland;

AND WHEREAS a Court of Enquiry, opened at La Ceiba on the 29th August, 1910, made investigations into the circumstances attending the above-mentioned incident and pronounced a decision thereupon:

AND WHEREAS, in view of the result of these investigations and the decision referred to, the Government of Honduras, basing themselves on the Agreement concluded at Tegucigalpa on the 13th August, 1910,[2] between the Honduranean Minister for Foreign Affairs, Don R. Rivera Retes, and His Britannic Majesty's Chargé d'Affaires, Mr. Godfrey Haggard, have refused to accept any responsibility in regard to the event mentioned;

AND WHEREAS the Government of Great Britain consider that the results of these investigations, and the decision of the Court give them good ground for claiming from the Government of Honduras a reasonable indemnity;

AND WHEREAS both Governments, being desirous of removing as soon as possible this source of disagreement between them, have resolved to submit the above question to the arbitral decision of His Majesty the King of Spain;

Now, therefore, they have authorized duly and properly their Representatives, namely:

The Government of His Britannic Majesty: Charles Alban Young, Esq., Envoy Extraordinary and Minister Plenipotentiary of His Britannic Majesty to Honduras; and

The Government of Honduras: His Excellency Señor Dr. Don Mariano Vásquez, their Minister for Foreign Affairs, to conclude the following Arrangement:

Article I. The question whether, under the principles established by international law, and taking into consideration the Agreement of the 13th August, 1910, above referred to, any responsibility attaches to the Government of

[1] *British and Foreign State Papers*, Vol. 107, p. 405. See also: *Hertslet's Commercial Treaties*, vol. 27, p. 872; De Martens, *Nouveau Recueil général de traités*, 3e série, t. XV, p. 55; *Treaty Series No. 12 (1914)*.

[2] See *infra, Annex*, p. 559.

Honduras in respect of the affray and the injuries inflicted on the above-mentioned British subjects in the circumstances as disclosed before the said Court of Enquiry at La Ceiba, shall be submitted to the decision of His Majesty the King of Spain.

II. Within four months of the signature of this Arrangement, the Government of His Britannic Majesty shall present to the Royal Arbitrator and to the Government of Honduras a memorial in support of their case. The presentation of the British memorial to the Government of Honduras shall be effected by its presentation to the Honduranean Minister in Guatemala by His Britannic Majesty's Representative in Guatemala.

III. Within four months of the presentation of the British memorial to the Government of Honduras, that Government shall present to the Royal Arbitrator and to the Government of His Britannic Majesty an answer. The presentation of the answer to the Government of His Britannic Majesty shall be effected by its presentation to His Britannic Majesty's Representative in Guatemala by the Honduranean Minister in Guatemala.

IV. Within four months of the presentation of the answer of Honduras, the Government of His Britannic Majesty may, if they think if necessary, present to the Royal Arbitrator and to the Government of Honduras a reply to the answer. Such reply shall be presented to the Government of Honduras in the same manner as the British memorial.

V. The memorial and the reply shall be in the English language, accompanied by a translation into Spanish. The answer shall be in Spanish, accompanied by a translation into English. These pleadings shall all be printed. They shall be accompanied by such documents and proofs as may be considered necessary by the Government presenting them, but neither Government shall be entitled to put in any further evidence as to the events which occurred on the 16th June, 1910, beyond that which was given before, or taken into consideration by, the above-mentioned Court of Enquiry at La Ceiba.

VI. In matters not provided for in the present Arrangement, the proceedings shall be regulated by such of the provisions of the Convention for the Pacific Settlement of International Disputes signed at The Hague the 18th October, 1907, as the Royal Arbitrator may consider to be applicable.

VII. If the award of the Royal Arbitrator is in favour of Great Britain, the award shall specify the amount of the pecuniary indemnity to be paid by the Government of Honduras to the Government of His Britannic Majesty. Such indemnity shall be paid by the Government of Honduras within three months dating from the notification to them of the award of the Royal Arbitrator.

VIII. Each Party shall bear its own expenses and a moiety of the common expenses of the arbitration.

In witness whereof the aforesaid Representatives of the Governments of Great Britain and Honduras have signed in triplicate the present Arrangement, and have affixed thereto their seals, in the city of Tegucigalpa, this 4th day of April, 1914.

[L. S.] Charles Alban YOUNG

[L. S.] Mariano VÁSQUEZ

ANNEX

AGREEMENT FOR THE ARRANGEMENT OF THE MASICA INCIDENT, 13 AUGUST, 1910

Article I. The Government of Honduras engages within three days to remove from his post the Mayor de Plaza, of the Department of Atlántida, Don Joaquín Medina, pending the course of the judicial enquiry. His trial is to be commenced with all the urgency which the case demands, and shall take place under the following conditions:

(*a*) As a guarantee of impartiality, the substitution of the present Judge of Letters of the Department of Atlántida will be proposed to the Supreme Court of Justice; the Licentiate Don Serapio Hernández y Hernández, who is acceptable to both parties, shall be appointed in his stead.

(*b*) In order still further to avoid any suspicion of partiality during the trial, the Governor and Commandant of the Department shall temporarily leave his post; he shall have absented himself within eight days from the date of this Agreement, and shall remain away during the course of the summary proceedings.

(*c*) The British Consul at Puerto Cortes, or, failing him, some other person especially named by the British Legation, shall be present at the judicial sittings of the Court at La Ceiba.

Article II. In the event of the Mayor de Plaza being found guilty, the Government of Honduras will grant a proper indemnity to the family of the late Thurston, as also to the wounded man Robinson. The amounts payable in this respect shall be agreed upon later with the English Legation.

Tegucigalpa, August 13, 1910.

[L.S.] GODFREY HAGGARD,
His Britannic Majesty's Chargé d'Affaires
[L.S.] R. RIVERA RETES.

AWARD OF THE KING OF SPAIN SETTLING THE DISPUTE SUBMITTED TO ARBITRATION BY GREAT BRITAIN AND HONDURAS WITH REGARD TO THE AFFRAY OF LA MASICA. MADRID, 7 DECEMBER, 1916 [1]

Responsabilité des Etats — Obligation de l'Etat de réparer les dommages causés à des étrangers en raison d'un acte illégal, action ou omission imputable à ses autorités — Respect des obligations nées des traités librement conclus — Allocation d'une indemnité pour les dommages subis.

ALFONSO XIII, by the Grace of God and the Constitution, King of Spain.

WHEREAS the question has been submitted to my decision whether, according to the established principles of international law and taking into consideration the agreement dated the 13th August, 1910, between His Britannic Majesty's Government and the Government of the Republic of Honduras, any responsibility rests with the latter in respect of the affray which took place on the 16th June, 1910, in the village of La Masica, department of Atlántida, Republic of Honduras, under circumstances such as were revealed in the proceedings before the court of enquiry opened at La Ceiba on the 29th August of the said year, between a squad of soldiers of the Government of Honduras which, at the time of the affray, were under the command of the Mayor de Plaza of the said department, Don Joaquín Medina Planas, and a group of three British West Indian subjects named Alexander Thurston, Wilfred Robinson and Joseph Holland, which affray resulted in the death of Alexander Thurston, the wounding of Wilfred Robinson and the beating of Joseph Holland:

Having seen —

(a) The *compromis* signed in Tegucigalpa on the 4th April, 1914, by the representatives of His Britannic Majesty's Government and the Government of Honduras, and the agreement made between the two Governments dated the 13th August, 1910, as aforesaid;

(b) The memorandum submitted by the British Government in support of its case, in conformity with the provisions of article 2 of the said *compromis* and within the period designated in the said deed;

(c) The counter-case of the Government of Honduras submitted in the form and within the period indicated in article 3 of the *compromis*;

(d) The reply of His Britannic Majesty's Government submitted in accordance with article 4 of the *compromis* and also within the period designated in the latter; and

(e) The memorandum submitted by His Britannic Majesty's Ambassador the 25th June of this year, in virtue of the invitation which, making use of the

[1] *British and Foreign State Papers*, vol. 121, p. 784.

powers bestowed on me by article 6 of the *compromis*, and in relation to article 56 of the Hague Convention of 1907 for the pacific settlement of international disputes, I agreed should be made to British Government to explain the circumstances serving as a basis for fixing the amount of the indemnity which it demands;

WHEREAS, according to the proceedings before the court of enquiry opened at La Ceiba on the 21st August, 1910, on the 16th day of June of the said year, between 4 and 5 in the afternoon, there were at the station of La Masica Alexander Thurston, Wilfred Robinson and Joseph Holland, British subjects and negroes from the Antilles, the two former being shunters and the latter the stoker of the train between La Ceiba and La Masica, which line was inaugurated that day, Thurston, who was somewhat inebriated and who, some hours previously, wanted to enter a ballroom accompanied by other negroes, and having been forcibly turned back by the Mayor de Plaza, Colonel Joaquín Medina Planas, took from a wagon some bananas belonging to an elderly lady, and when reproved in a friendly way by the soldier Higinio Hernández, he, Thurston, according to the declaration of the said soldier, tapped him on the shoulder signifying affection, telling him that he had already given the bananas to the old lady, but then other British negroes arrived and surrounded the soldier, trying to take from him a knife which he carried, for which reason the commander of police came to Hernández's succour, remonstrating with the negroes that they should leave him alone;

WHEREAS, as the negroes showed themselves rebellious and hostile, the commander of police, with the police magistrate, who had also arrived, and the soldier Hernández went in search of assistance and returned to the station with some policemen and soldiers, and were joined on the way by the Mayor de Plaza, who, in view of what had occurred, ordered the three negroes to come down from the engine on which they had meantime mounted in order to attend to their work, and on which were also the white men Macnamara, engine driver, and Bacucci or Bacense, also a railway employee;

WHEREAS, since the negroes did not immediately obey the order to come down, the Mayor de Plaza, after telling the two white men to descend from the engine, ordered the soldiers to pull out the negroes, but it has not been possible to make it clear whether the said chief ordered them expressly to shoot, or to abstain from doing so, or whether he said anything at all in one sense or the other respecting this matter, and whether or not he discharged his revolver, which he held in his hand from the beginning;

WHEREAS an affray between the soldiers and the negroes having arisen, Thurston was killed and Robinson wounded, in each case by rifle bullets, and Holland was beaten;

WHEREAS, judicial proceedings having been commenced on the 21st June by the Honduranean authorities to clear up the incident of " the military guard who kept order in La Masica having been attacked with weapons ", it was ordered by the learned judge of La Ceiba that Holland and Robinson should be imprisoned as being responsible and answerable for the crime of resisting the authority of the commander of police and his guard, and the latter, moreover, for the death of Alexander Thurston;

WHEREAS, notwithstanding this and in consequence of the negotiations carried on between the diplomatic representative of Great Britain in Tegucigalpa and the Minister for Foreign Affairs of Honduras, an agreement was signed on the 13th August, 1910, for the settlement of this matter, by which agreement the following was stipulated:

" 1. The Government of Honduras engages within 3 days to remove from his post the Mayor de Plaza of the department of Atlántida, Don Joaquín Medina, pending the course of the judicial enquiry. His trial shall be commenced with all the urgency which the case demands, and shall take place under the following conditions:

" (a) As a guarantee of impartiality, the substitution of the present learned judge of the department of Atlántida will be proposed to the Supreme Court of Justice; the licentiate Don Serapio Hernández y Hernández, who is acceptable to both parties, shall be appointed in his stead;

" (*b*) In order still further to avoid any suspicion of partiality during the trial, the Governor and commandant of the said department shall temporarily leave his post; he shall absent himself within 8 days from the date of this arrangement, and shall remain away during the course of the summary proceedings;

" (c) The British Consul at Puerto Cortés or, failing him, some other person appointed for this purpose by the British Legation, shall be present at the judicial sittings of the court at La Ceiba;

" 2. In the event of the Mayor de Plaza being found guilty, the Government of Honduras will grant a proper indemnity to the family of the late Thurston, as also to the wounded man Robinson. The amounts payable in this respect shall be agreed upon later with the British Legation ";

WHEREAS, in accordance with the provisions of article 1 of the said agreement, the proceedings before the learned judge of La Ceiba were continued and amplified by licentiate Don Serapio Hernández y Hernández, in the presence of the British Consul at Puerto Cortés, Mr. Henry T. Panting, and new declarations were received, some of them upon the proposal of Consul Panting, and such further investigations took place as were considered advisable;

WHEREAS, on the 4th October, 1910, the following judgment, confirmed by the court of appeal of Comayague on the 15th November of the same year, was pronounced by the said Judge Hernández:

" Having seen these present proceedings initiated with a view of ascertaining the identity of the persons responsible for the death of Alexander Thurston and the wounding of Wilfred Robinson, which took place on the 16th June of the present year, in the village of La Masica, municipal district of San Francisco;

" It results that the *corpus delicti* was duly established by the expert opinion of the doctors, Don Virgilio Reynolds, Don Francisco A. Matute and Don Rubén Andino Aguilar;

" It results that, according to the judicial proceedings before the said learned judge, the latter, by judgment of the 21st of the said month of June, ordered Joseph Holland and Wilfred Robinson to be imprisoned, declaring the former guilty of the crime of resisting the authority of the commander of police and his guard, and the latter answerable for the death of Alexander Thurston;

" It results that the defendant, Wilfred Robinson, and the witnesses, Curtis Sinclair, John Stewart and John Henry, asserted in their declarations that the Mayor de Plaza, Don Joaquín Medina Planas, and two soldiers had discarge their arms at the said Thurson and Robinson, the ex-Mayor de Plaza having discharged his revolver at Thurston and the soldiers having discharged their rifles, by which shots Thurston was killed and Robinson wounded;

" It results that, on the 22nd September last, a judicial inspection took place on engine No. 2 at the place where the facts occurred, whereby it was cleary shown that the shots had been fired by Remington rifles from outside the engine;

" Considering that, after the body of Alexander Thurston had been exhumed, a lead Remington rifle bullet, calibre 43, was extracted, by which fact all evidence against Wilfred Robinson and the former Mayor de Plaza, Don Joaquín Medina y Planas, with respect to their being answerable for the death of Alexander Thurston, falls to the ground, and that the culpability imputed to Joseph Holland has not been established in a clear manner;

" Considering that there exist proofs that three soldiers out of those who formed the various guards keeping order in La Masica discharged their rifles, causing the death of Alexander Thurston and wounding Wilfred Robinson:

" Therefore this court, in the name of the Republic and in virtue of section 1255 (2) of the Code of Procedure, suspends definitely, in this matter, the proceedings against the aforesaid Joseph Holland, Wilfred Robinson and Joaquín Medina Planas, ordering that a copy be taken of these present proceedings for the purpose of communicating this decision to the respective court which is to continue the investigation in order to establish which soldiers are answerable for the death of Thurston and the wounding of Robinson ";

WHEREAS, in accordance with the provisions of this judgment, Judge Hernández continued, in the month of October and in the presence of Consul Panting, to receive declarations from various witnesses, without its appearing that any judgment was given as a result of the said fresh proceedings;

WHEREAS the Government of Honduras, basing itself on the agreement of the 13th August, 1910, above quoted, refused, in view of the results of the said investigations and of the judgment referred to, to accept any liability for what had occurred;

WHEREAS the Government of Great Britain, on its part, considers that the results of the said investigations and the judgment of the tribunal afford valid reasons for claiming from the Government of Honduras a reasonable indemnity which, in the course of its correspondence with the Ministry for Foreign Affairs in Tegucigalpa, it had fixed at £ 2,450, and that it maintains in the memorandum this figure, which the Government of Honduras did not previously and does not now discuss, taking into account that, by the death of Thurston, a woman and a child have become destitute, and that the wound of Robinson, far from having healed within a period of 15 days and preventing him from doing work for 1 month only, incapacitated him at least until the 17th February, 1911, and that Holland, in consequence of having been hit by the soldiers with the butt end of their rifles, apparently suffered internal lesions, which caused his death on the 16th February, 1911, all of which resaons are reproduced in the memorandum submitted by His Britannic Majesty's Ambassador on the 25th January last;

WHEREAS both Governments, being desirous of removing, as quickly as possible, this cause of difference between them, decided to submit it to my arbitration, in the form and according to the terms contained in the *compromis* dated the 4th April, 1914, articles 1 and 7 of which read as follows:

" 1. The question whether, under the principles established by international law and taking into consideration the agreement of the 13th August, 1910, above referred to, any responsibility attaches to the Government of

Honduras in respect of the affray and the injuries inflicted on the above-mentioned British subjects in the circumstances as disclosed before the said court of enquiry at La Ceiba, shall be submitted to the decision of His Majesty the King of Spain. "

" 7. If the award of the Royal arbitrator is in favour of Great Britain, it shall specify the amount of the pecuniary indemnity to be paid by the Government of Honduras to His Britannic Majesty's Government. Such indemnity shall be paid by the Government of Honduras within 3 months, dating from the notification to them of the award of the Royal arbitrator ";

WHEREAS the task of settling this difference having been accepted by me under the dates of the 29th July and the 8th December, 1914, and the 6th February, 1915, His Britannic Majesty's Ambassador submitted to me, through my Minister of State and within the period designated by the two high parties, the memorandum, the counter-case and the reply provided for in articles 2, 3 and 4 of the said *compromis*, in the form laid down by article 5, all of which documents, with their respective enclosures, have been subjected to a minute and careful examination;

WHEREAS, on my agreeing that the British Government should be asked for explanations respecting the circumstances which it may have taken into account on fixing at £2,450 the amount of indemnity which it desires, the said Government through its diplomatic representative, submitted the respetive memorandum on the 25th January last;

Inspired by the wish to respond to the trust placed in me by both the Governments of His Britannic Majesty and of the Republic of Honduras in submitting this matter to my decision:

CONSIDERING that, by article 1 of the *compromis* of the 4th April, 1914, by which the Government of His Britannic Majesty and that of the Republic of Honduras agreed to submit this question to my decision, they designated as guiding rules on which the award should be given, as far as facts are concerned, " the circumstances as disclosed to the court of enquiry opened at La Ceiba on the 29th October, 1910 ", and, as regards the bases of law, the principles established by international law and the agreement of the 13th August, 1910;

CONSIDERING that the fulfilment of obligations freely entered into by Governments by means of treaties or agreements is a principle established by international law, and that consequently it is necessary to seek inspiration for the decision in the matter of this arbitration, in the first instance, in what has been expressly stipulated by the Cabinets of London and of Tegucigalpa, that is to say, the agreements of the 13th August, 1910, and the *compromis* of the 4th April, 1914, by interpreting them and supplying the blanks in accordance with the principles of international law;

CONSIDERING that, from the terms in which both documents are drawn up, it may be assumed that the two high parties are agreed in considering as one single act the affray which occurred at the station of La Masica on the 16th June, 1910, between 4 and 5 o'clock in the afternoon and which has as a result the death of Alexander Thurston, the wounding of Wilfred Robinson and the contusions received by Joseph Holland, because, in both agreements, the Government of Honduras admitted the close connexion of the affray with the act by which its agents intervened in the said incident, which act was attributed to the person directing it, the Mayor de Plaza, Don Joaquín Medina Planas, seeing that, in the *compromis*, it is definitely stated that the affray took place between a squad of soldiers of the Government of Honduras, which, at that moment, was under the command of the said Mayor de Plaza, and that, in

the agreement of the 13th August, 1910, article 2 deals with the culpability of the said officer, not in one or other concrete and isolated act but " in the matter ", whilst making dependent on this culpability the grant of indemnities, not only to the family of the deceased Thurston, whose wound was then ascribed to a revolver bullet, but also to the injured man Robinson, who was wounded by a Remington bullet, as was shown by the expert report issued on the 17th June of the said year;

CONSIDERING that, in the judgment of suspension pronounced by the learned judge of La Ceiba on the 4th October, 1914, and confirmed by the court of appeal of Comayagua, a decision is only given with respect to the material and direct participation of Don Medina Planas in the death of Alexander Thurston, without making any declaration with regard to his culpability or non-culpability " in the matter ", which declaration, on the other hand, would have been premature, seeing that, in the said judgment, it was ordered that further proceedings with respect to the death of Thurston and the wounding of Robinson should be taken, the result of which proceedings could not be immaterial to the effects of fixing the said culpability;

CONSIDERING that it has not been shown that shots were fired by any of the three British subjects at the public force who tried to arrest them, seeing that the only positive evidence which could be adduced, that is to say, the declaration of the local chief of police, Don Arturo Pineda, to the effect that he had seen Robinson throwing away the revolver and that he had picked it up and found that one cartridge had been discharged, is not corroborated by any other evidence, not even by that of the commander of police, Don Cruz Lobo, to whom the former handed the said revolver, and who, in his turn, presented it to the court, limiting himself to referring to the fact that Pineda had taken it from the engine, but without stating that it had been discharged or causing this interesting circumstance to be taken cognisance of by the judge;

CONSIDERING that, by the agreement of the 13th August, 1910, the Government of Honduras undertook to pay an indemnity to the injured parties, provided that the culpability of the Mayor de Plaza, Don Medina Planas, should be proved in the matter, and that, to this effect, it has admitted the liability of Medina for the acts of the soldiers who were under his orders because, as has already been stated, only in this manner can it be explained that it made the payment of an indemnity to Robinson, who had been wounded, dependent on the culpability of Medina;

CONSIDERING that, if it is not shown that the Mayor de Plaza, Medina Planas, gave orders to the soldiers to fire on the negroes, neither does it appear to be proved that he prohibited them from doing so, nor that he did anything to prevent them; on the contrary, it may be inferred from his attitude during the incident and afterwards that he approved of the conduct of the said soldiers, as he did not cause steps to be taken against them and did not inflict the slightest punishment upon any of them, and it has neither been shown that the investigation carried out by Judge Hernández has achieved any result other than making it clear that the wounds of Thurston and Robinson had been caused by Remington bullets in consequence of shots fired by the soldiers, and by one of them at least from outside the engine, nor has it been possible to prove whether or not the Mayor de Plaza fired his revolver, which fact some witnesses definitely assert and others as positively deny, but against which it cannot be a proof that Thurston was mortally wounded by a rifle bullet, because it might also be the case that the bullet from the revolver which the Mayor de Plaza held in his hand missed him, even if it had been fired;

CONSIDERING that the predispostion of the soldiers against the negroes for personal motives derived from previous incident, in some of which Don Medena Planas also intervened, does not appear to be proved in such a manner as would make it possible to attribute to the act of the public force, in the affray in question, a character distinct from that of agents of the authority, or to suppose that they had been impelled by personal motives not connected with the fulfilment of their duty;

CONSIDERING that, if the attitude of the negroes and their refusal to come down from the engine to be arrested cannot justify the public force having discharged their rifles at them, the same cannot be said with respect to the action taken in the case of Joseph Holland because, as it is admitted by the two high parties that there was an affray and that the negroes refused to come down from the engine, the employment of force to compel them to do so was justified within certain limits, and there is no reason to think that these limits were exceeded in the case of Holland, seeing that it does not appear that the latter, although he received some blows before being arrested and conducted to the prison, required expert assistance, and that no expert examination into the injuries which Holland might have received had been demanded from the court of enquiry, either by the person interested or by the British Consul Panting, who proposed other steps, and that no allusion whatever has been made to the same in the agreement of the 13th August, 1910, and no expert opinion has been brought forward which would have established in a trustworthy manner a direct connexion between the death of Holland, which occurred on the 16th February, 1911, and the contusions he received on the 16th June, 1910;

CONSIDERING that it may be deduced from what has been stated that, as the Government of Honduras admitted its pecuniary liability for the culpability of Don Medina Planas in the matter, the application to the case of the principles of international law, in conformity with which a State is bound on certain occasions, to make good the damage caused to foreign nationals by illegal acts of omission or commission on the part of its authorities, has also been accepted by the said Government;

CONSIDERING that, from what has been stated above, the culpability of the Mayor de Plaza, Don Joaquín Medina, in the matter may be deduced, and that it therefore follows that the Government of Honduras should grant an equitable indemnity to the family of the deceased Thurston and to the wounded man Robinson;

CONSIDERING that the British Government fixed the indemnity which it considered just at £2,450 sterling, including in this figure the death of Holland, and that the Government of Honduras has not discussed the amount of this figure, limiting itself to the rejection of its pecuniary liability:

In conformity with the solution proposed by the Special Commissioner entrusted with the examination of this matter and in agreement with my Council of Ministers, I declare:

First, that, in accordance with the general principles established by international law and taking into consideration the agreement signed at Tegucigalpa on the 13th August, 1910, the Government of Honduras is responsible for the the injuries caused in the village of La Masica, department of Atlántida, on the 16th June of the said year, by a squad of soldiers commanded by the Mayor de Plaza of the said department, Don Joaquín Medina Planas, to the British subjects Alexander Thurston and Wilfred Robinson, the former of whom died

at the time of the occurrence in consequence of the said injuries, but not for the death of Joseph Holland; and

Second, that the Government of Honduras must pay to His Britannic Majesty's Government, within a period of 3 months, reckoned from the date on which it is notified of this award, the sum of £ 1,450 sterling.

GIVEN at the Royal Palace in Madrid, in duplicate, on the 7th December, 1916.

ALFONSO

The Minister of State,
GIMENO

CASE RELATING TO THE INTERPRETATION OF THE RUNCIMAN-CLEMENTEL AGREEMENT OF 3 DECEMBER 1916

PARTIES: Great Britain, France.

COMPROMIS (See the syllabus below).

ARBITRATOR: Jerome D. Greene, Secretary on the American Shipping Mission.

AWARD: 9 August 1918.

Interpretation of an international agreement — Lack of precision in the drafting of the agreement — Attendant circumstances as factor in interpretation.

SYLLABUS [1]

An agreement known as the Runciman-Clémentel Agreement was concluded between Great Britain and France on 3 December 1916 for the purpose of effecting a co-ordination of the use of vessels by the Parties. Clause 5 of the agreement which gave rise to the dispute provided for the British Government's granting the transfer to the French flag of steamers ordered by and constructed for French firms, these steamers being specified on an attached list; and certificates of priority for the construction of cargo steamers ordered by French firms before the date of the agreement on condition that they were employed by the French Government, these steamers also being specified on an attached list. The actual list or lists seem to have been prepared at a later date. In the early months of 1918, application was made for an export licence for two steamships, the *Ville de Reims* and the *Ville d'Arras*, to enable these ships to be transferred to the French flag. This application was denied by the Board of Trade on the ground that as these two vessels had not been completed on December 3, 1916, the only obligation assumed by the British Government under the Runciman-Clémentel Agreement was to give priority with reference to them, and this had in fact been given. The French Government insisted, on the other hand, that the British Government's obligation extended to permitting the export of the two steamships for transfer to the French flag. After considerable correspondence, the two governments agreed to refer the matter to an arbitrator to be appointed by Mr. Raymond B. Stevens, a member of the American Shipping Mission then in London. It was the desire of the parties that the procedure should be conducted in the most simple manner and with the least expense, and no formal *compromis* was drawn up.

Mr. Jerome D. Greene, Secretary on the American Shipping Mission, was appointed arbitrator on June 6, 1918. He promptly outlined the procedure to be followed: the parties were to file written statements simultaneously, only a few days being allowed for this purpose; the statements were to be followed by answers; at the request of either party or of both parties an opportunity was to be given for an oral hearing and for the submission of evidence. On July 8, in addressing three questions to the parties, the arbitrator stated that he was not " impressed with the necessity of supporting the statements made on either side by oral testimony, " as he assumed " that the facts and arguments submitted on both sides are all that are considered relevant by each of the parties respectively; and it does not appear with reference to any point that its cogency is dependent on the precise mode of its presentation as between written and oral statements. " The replies to the arbitrator's questions called for the filing of further documents, and the written proceedings were not completed until July 29, 1918.

Mr. Greene's award was handed down on August 9, 1918, barely two months after his appointment as arbitrator. He defined the question to be, " whether certain steamers listed as in the process of construction and for which certificates of priority were granted, should or should not on their completion be transferred

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[1] Manley O. Hudson, *American Journal of International Law*, vol. 35, 1941, p. 334.

to the French flag. " As the Runciman-Clémentel Agreement was devoted chiefly to stating what the British Government was prepared to do as a matter of co-operation with its ally, the arbitrator thought that it was " perhaps not a bargain in the ordinary sense of that word ", but that it did constitute " an engagement ". He observed that in the drafting of the agreement and in the preparation of the list of steamers there had been a " lack of that precision and punctuality usually observed in matters of similar importance ", and he sought the meaning of the agreement " in the light of all the attendant circumstances ". Mr. Greene reached the conclusion that steamers listed as in process of construction should be regarded as a sub-category of the steamers referred to in paragraph A of Clause 5, all of which were to be transferred to the French flag; only with this interpretation could he reconcile the statement of the condition in paragraph B. He therefore found " that the steamers in question should have been transferred to the French flag ".

On August 9, 1918, the competent official of the Board of Trade announced that " the necessary steps will, of course, be taken to give effect to the award ", and some months later the Board of Trade informed the arbitrator that three steamers, including the *Ville de Reims* and the *Ville d'Arras*, had been transferred to the French flag in accordance with the award.

AWARD IN REGARD TO THE INTERPRETATION OF THE RUNCIMAN-CLÉMENTEL AGREEMENT OF 3 DECEMBER 1916, RENDERED ON 9 AUGUST 1918 [1]

Interprétation d'un accord international — Manque de précision dans la rédaction de l'accord — Détermination du sens de l'accord à la lumière des circonstances concomitantes.

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1. This is an arbitration of an issue that has arisen between the British Government and the French Government in regard to the interpretation of Clause 5 of an agreement entered into on December 3, 1916, between His Excellency M. Clémentel, Minister of Commerce, on behalf of the French Government, and the Right Honorable Walter Runciman, M.P., President of the Board of Trade, on behalf of the British Government. The clause of the said agreement, of which the interpretation is in dispute, reads as follows:

5. The British Government will grant—

(A) The transfer to the French flag of the steamers ordered by and constructed for French firms as specified on the attached list, which list may be subject to alteration after consultation between the competent authorities of the respective countries.

(B) Certificates of Priority A, for the construction of such cargo steamers which French firms can prove to have been ordered by them before the date of this agreement, on condition that they are employed by the French Government. The steamers referred to in this paragraph are specified on the attached list (B).

2. The contention of the British Government is that their obligation under Clause 5 of the agreement was limited to the transfer to the French flag of steamers scheduled as already completed, and to the granting of certificates of priority for the completion of those steamers scheduled to the agreement which were still in process of construction, and also in the case of the latter steamers to the making of arrangements whereby these steamers, when completed, should be employed by the French Government but subject to their registry under the British flag.

3. The contention of the French Government is that the list of steamers referred to in Paragraph " B " is not a separate list from the list referred to in Clause " A " of steamers to be transferred to the French flag, but merely a sub-category of the list referred to in Clause " A " consisting of those steamers ordered by and under construction for French firms which were not yet completed and for the acceleration of which, to the point of completion, certificates of priority were desired.

4. The representatives of the two Governments having agreed that a certain list of steamers, built and building, submitted to the Board of Trade by M. de

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[1] *American Journal of International Law*, vol. 35, 1941, p. 379.

Fleuriau with his letter dated February 5, 1917, is to be regarded as the list scheduled to the agreement, and all the vessels appearing in that list having been transferred to the French flag or granted certificates of priority according as they were completed, or in process of construction, the question to be decided is whether certain steamers listed as in process of construction, and for which certificates of priority were granted, should or should not on their completion be transferred to the French flag.

5. The agreed procedure for the submission of statements of fact and arguments for each side in this arbitration is indicated by the following documents, filed with the Arbitrator and exchanged between the parties, to which reference is made in this award.

I

Statement of Case of the French Government, 19th June 1918. Statement by the Board of Trade, 19th June 1918.

II

Answer of the French Government, 5th July 1918. Answer by the Board of Trade, 5th July 1918.

III

Interrogatory letter addressed by the Arbitrator in identical terms to the representative of the French Government, and to the representative of the Board of Trade, 8th July 1918.

IV

Replies by the Board of Trade to the questions of the Arbitrator, 10th July 1918.
Replies of the French Government to the questions of the Arbitrator, 29th July 1918.

V

Submissions of the French Government, 29th July 1918. Note by the Board of Trade on the Submissions of the French Government, 31st July 1918.

6. It appears from the correspondence between the two Governments that the interpretation of Clause 5 of the agreement, for which the French Government contend, was expressly embodied in three letters from M. de Fleuriau dated 16th December 1916, 12th January and 5th February 1917 respectively. In all three letters M. de Fleuriau prefaces the list " B " with the following words: " Cargo steamers ordered by French firms before date of agreement on condition that they are employed by the French Government, for which Certificates of Priority A are to be granted *and transfer to the French flag when completed.*" No issue is joined upon the use of these words in any acknowledgment of M. de Fleuriau's letters by Mr. Hipwood, and the first disagreement as to the construction of Clause 5 arises out of the letter of Sir N. Highmore, K.C.B., dated 26th September 1917, refusing an export license for S.S. *Ville de Verdun.*

7. The question was, however, raised by a note written by Sir E. Wyldbore Smith on the official papers of the Board of Trade, dated 20th January 1917, as follows:

I should also draw your attention to paragraph " B ", on the second page of M. de Fleuriau's letter of January 12th, in which he asks not only that certificates of priority should be granted in respect of certain vessels which he proceeds to enumerate, but also that they should be transferred to the French flag when completed. No such transfer is mentioned in Section (b) of Clause 5 of the agreement.

8. It is evident that in the framing of the agreement and in the preparation of the list of steamers to be scheduled to the agreement, as well as in the protracted correspondence relating to this matter, there was a lack of that precision and punctuality usually observed in matters of similar importance — a lack which is fully explained by war-time conditions and the consequent preoccupation of the officials concerned with other weighty matters; and by the necessity, exhibited in many important negotiations of this kind, of arriving as quickly as possible at an agreement on general principles, subject to the later perfection of details. The risk of inaccuracies and misunderstandings, due to these conditions, is one that cannot always be avoided and indeed, must often be taken if substantial results are to be obtained. For this reason I have not given great weight, in arriving at a decision in this matter, to the prejudice to which the position of either party may seem to have been subjected at one time or another by an apparent delinquency in asserting its position, but have rather given my attention to the meaning of the agreement, in the light of all the attendant circumstances.

9. Practically the whole agreement, of which Clause 5 is in dispute, is a statement by the British Government of certain things it was prepared to do as a matter of co-operation with its ally. This co-operation was actuated by a broad and indeed a generous view of the common interest. Under these circumstances, if the case were one of acknowledged obscurity as to the meaning of any part of the agreement, the greatest deference would naturally be shown to the British Government's interpretation of its desires and intentions. On the other hand, such a statement of what the British Government was prepared to do in co-operation with its ally, though perhaps not a bargain in the ordinary sense of that word, was, nevertheless, an engagement expressed by the words " The British Government will grant ". It is in order that this engagement, as to which a difference of opinion has arisen, should be defined, that the services of an arbitrator have been requested by the friendly action of the two parties.

10. Having examined the statements of the case submitted on behalf of the two Governments and the arguments submitted in addition thereto, I find that those steamers the names of which were scheduled to the agreement under Paragraph " B " as in process of construction, should be regarded as a subcategory of the list of steamers referred to in Paragraph " A ", all of which were to be transferred to the French flag. This finding is based upon the following considerations:

(*a*) Only with this interpretation of the agreement does it seem possible to reconcile the use of the words in Paragraph " B " of Clause 5 " on condition that they are employed by the French Government." These words indicate that upon the completion of the steamers the French Government would be in a position, but for the limiting condition, in which they would be able to permit the steamers to be employed otherwise than in government service. It was naturally not to the interest of the British Government to grant priority certificates without the assurance that the steamers profiting by these certificates should be used for public purposes conneced with the prosecution of the war, rather than in private interests, and the words used in the limiting condition seem to have been appropriately chosen to limit the action *of the French Government.*

(*b*) Whilst it was entirely within the right of the British Government to prevent the export of any steamers built or building for the account of French owners, it was a natural desire on the part of the French Government to persuade the British Government to waive this right in the interest of an allied nation, and it seems reasonable to infer that it was in order to secure possession and control of the steamers already ordered, without regard to the precise date of their completion, that the agreement was entered into. The effect of Paragraph " B " was to prevent this object from being defeated by undue delay in the completion of the unfinished steamers. Had the British Government at the time of making the agreement attached importance as regards export, to the distinction between the steamers completed before December 3rd and steamers completed shortly after that date, it would be reasonable to expect that this distinction would be clearly expressed. The fact seems to have been, however, that information was lacking at the time the agreement was signed as to what steamers were completed and what steamers were still under construction.

(*c*) The alternative procedures by which the British Government proposed to carry into effect the provisions of Paragraph " B ", while adequate for the purpose of placing the tonnage in question in the service of the French Government (as would have been equally true of the completed steamers) cannot be fairly regarded as implied or understood by the language of the agreement. Moreover the opening clauses of the agreement deal specifically with the question of British tonnage chartered for French use, and it would seem that some cross reference would have had to be used to bring the ships of List " B " within the provisions of Clause 1, or at least to provide that the limitation to the amount in use as of October 31, 1916, would not operate against the employment of the List " B " ships, should this addition lead to an excess over the total stipulated in Clause 1.

(*d*) The evidence brought forward by the British Government to show that its policy had been becoming less and less favourable to the export of ships built in the United Kingdom for foreign owners, tends to explain the occasion for the negotiations leading up to the agreement, rather than to support the British Government's interpretation of the agreement. The very fact that difficulties were experienced in securing the export of steamers built for foreign account was an adequate reason from the point of view of the French Government for securing a general agreement covering all cases of steamers constructed in the United Kingdom for French owners.

11. The above considerations oblige me to express my judgment in favor of the contentions of the French Government, and to find that the steamers in question should have been transferred to the French flag.

[Signed] Jerome D. GREENE
Arbitrator

Lancaster House
London, *9th August 1918*

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