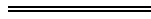


REPORTS OF INTERNATIONAL
ARBITRAL AWARDS



RECUEIL DES SENTENCES ARBITRALES

VOLUME XXVIII

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REPORTS OF INTERNATIONAL
ARBITRAL AWARDS
—
RECUEIL DES SENTENCES
ARBITRALES

VOLUME XXVIII



UNITED NATIONS – NATIONS UNIES

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** Les sentences suivantes ont été omises de la présente publication en raison de leurs natures techniques ou redondantes: No. 8 – Fortune; No. 9 – Souris; No. 11 – Tryon; No. 12 – Crapaud; No. 14 – Hunter; No. 18 – Pierre Jacques; No. 19 – Brae; No. 22 – Ox and No. 24 – Sable.

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* The maps relating to this decision are contained in the back pocket of this volume.

** Les cartes qui ont trait à cette décision sont classées dans la pochette au dos de la dernière page de couverture de ce volume.

FOREWORD

The present volume of the *Reports of International Arbitral Awards* consists of a collection of awards and similar decisions relating to a particular field of international law, namely the delimitation and demarcation of international boundaries. The volume contains awards handed down in 34 different dispute-settlement procedures over a period of more than one hundred and fifty years, from the late eighteenth century to the mid-twentieth century. It should be noted that in order to preserve the accuracy of the awards the historical names of the Parties at the time of the awards have been retained, even though the names of the States may have subsequently changed. Moreover, some of the awards involve Parties that are no longer sovereign entities, but were so at the time of the award.

The *Reports of International Arbitral Awards* publication was originally conceived in order to provide a systematic collection of arbitral awards and similar decisions in the absence of any such collection. Accordingly, at the time of the preparation of the first volume of *RIAA* in 1948, the decision was made to exclude arbitral awards contained in highly authoritative collections which were easily accessible at the time, including some of the awards which appear in the present volume. However, with the passage of time, the accessibility of the awards in these collections has diminished, despite the continuing historical and legal significance of the awards. This contemporary relevance is illustrated, *inter alia*, by the inclusion of the *Award in regard to the validity of the Treaty of Limits of 15 July 1858, decision of 22 March 1888* which is at issue in the case concerning the *Dispute regarding navigational and related rights (Costa Rica v. Nicaragua)* which was pending before the International Court of Justice when this volume was published. Moreover, the field of boundary delimitation and demarcation remains an important, contentious and developing area of public international law.

In contrast to recent volumes of this publication, some of the awards included in the present volume have been reproduced from authoritative secondary sources when the original awards were not available, as indicated in explanatory notes accompanying the texts of the awards. Any technical corrections or editorial changes introduced in any of the awards by the Secretariat for purposes of the present publication are indicated in explanatory notes accompanying the awards. It should be noted that, in some instances, additional historical background information may also be available in the secondary sources indicated.

In accordance with the practice followed in this series, awards in English or French are published in the original language, as long as the original language text was available. Those in both languages are published in one of the original languages. Awards in other languages are published in English. A footnote indicates when the text reproduced is a translation made by the Secretariat.

This volume, like volumes IV to XXVII, was prepared by the Codification Division of the Office of Legal Affairs.

AVANT-PROPOS

Le présent volume du *Recueil des sentences arbitrales* est constitué d'une collection de sentences et de décisions assimilées relatives à un champ particulier du droit international, à savoir, la délimitation et la démarcation des frontières internationales. Le volume contient des sentences rendues par 34 instances différentes sur une période de plus de cent cinquante ans, allant de la fin du dix-huitième siècle au milieu du vingtième siècle. Il faut remarquer qu'afin de préserver la pertinence des sentences, le nom historique des Parties lors de la sentence a été conservé, même lorsque le nom de l'État a par la suite été modifié. De plus, certaines sentences impliquent des Parties qui ne sont plus à l'heure actuelle des entités souveraines, mais qui en étaient à l'époque de la sentence.

La publication du *Recueil des sentences arbitrales* a été conçue à l'origine pour fournir une collection systématique des sentences arbitrales et décisions assimilées, en l'absence de telle collection. Ainsi, au moment de la préparation du premier volume du *Recueil* en 1948, la décision avait été prise d'exclure les sentences arbitrales contenues dans des collections de référence facilement accessibles à l'époque, y compris certaines sentences qui sont incluses dans le présent volume. Néanmoins, avec le temps, la possibilité d'accéder à ces collections de référence a diminué, malgré la persistance de l'intérêt juridique et historique de ces sentences. Leur pertinence contemporaine est illustrée, *inter alia*, par la prise en considération de la *Sentence arbitrale relative à la validité du Traité de limites du 15 juillet 1858*, datée du 22 mars 1888, dans l'affaire du *Différend relatif à des droits de navigation et des droits connexes (Costa Rica c. Nicaragua)*, qui est pendante devant la Cour internationale de Justice au moment de la publication de ce volume. De plus, le champ de la délimitation et de la démarcation frontalière reste un domaine du droit international public important, conflictuel et en développement.

À la différence des volumes récents de cette publication, certaines sentences incluses dans le présent volume ont été reproduites de sources de références secondaires lorsque les textes originaux n'étaient pas disponibles, comme cela est expliqué dans les notes accompagnant les textes des sentences. Toute correction technique ou modification éditoriale introduites dans les sentences par le Secrétariat dans l'objectif de la présente publication, sont indiquées dans les notes explicatives accompagnant lesdites sentences. Il faut noter que, dans certains cas, des informations additionnelles sur le contexte historique de l'affaire peuvent également être disponibles dans les sources secondaires mentionnées.

Conformément à la pratique, le présent *Recueil* reproduit les sentences rendues en anglais ou en français dans la langue originale dès lors que le texte dans la langue originale était disponible. Celles qui ont été rendues en anglais et en français ont été publiées dans une des deux langues originales. Il fournit

une version anglaise des sentences rendues dans d'autres langues en spécifiant, le cas échéant, dans une note de bas de page, si la traduction émane du Secrétariat de l'Organisation des Nations Unies.

Le présent volume, comme les volumes IV à XXVII, a été préparé par la Division de la Codification du Bureau des Affaires juridiques de l'Organisation des Nations Unies.

PART I

**Declaration under Article V of the Treaty of 1794,
between the United States and Great Britain,
respecting the true River Saint Croix.**

Decision of 25 October 1798

**Déclaration en vertu de l'article V du Traité de 1794
entre les États-Unis et la Grande-Bretagne,
concernant le vrai fleuve Sainte Croix**

Décision du 25 octobre 1798

DECLARATION OF THE COMMISSIONERS UNDER ARTICLE V OF
THE TREATY OF 1794, BETWEEN THE UNITED STATES AND
GREAT BRITAIN, RESPECTING THE TRUE RIVER SAINT CROIX,
DECISION OF 25 OCTOBER 1798*

DÉCLARATION DES COMMISSAIRES EN VERTU DE L'ARTICLE V
DU TRAITÉ DE 1794 ENTRE LES ÉTATS-UNIS ET LA GRANDE-
BRETAGNE, CONCERNANT LE VRAI FLEUVE SAINTE CROIX,
DÉCISION DU 25 OCTOBRE 1798**

Determination of borders – question of the river boundary-line in respect of River Saint Croix – interpretation of a treaty – Treaty of Amity, Commerce and Navigation between his Britannic Majesty and the United States of America.

Délimitation frontalière – question de la frontière fluviale au niveau de la rivière Sainte Croix – interprétation conventionnelle – Traité d'amitié, de commerce et de navigation entre sa Majesté britannique et les États-Unis d'Amérique.

* * * * *

We, the said Commissioners, having been sworn “impartially to examine and decide the said question, according to such evidence as should respectively be laid before us, on the part of the British Government, and of the United States,” and having heard the evidence which hath been laid before us, by the Agent of His Majesty, and the Agent of the United States, respectively appointed and authorized to manage the business on behalf of the respective Governments, have decided, and hereby do decide, the River, hereinafter particularly described and mentioned, to be the River truly intended under the name of the River Saint Croix, in the said Treaty of Peace, and forming a part of the boundary therein described; that is to say, the mouth of the said river is in Passamaquoddy Bay, at a point of land called Joe’s Point,*** about one mile northward from the northern part of Saint Andrew’s Island, and in the latitude of forty-five degrees five minutes and five seconds north, and in the longitude of sixty-seven degrees twelve minutes and thirty seconds west, from the Royal Observatory at Greenwich, in Great Britain, and

* Reprinted from John Basset Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 29.

** Reproduit de John Basset Moore (éd.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 29.

*** Editor’s note: “This is ‘Ive’s Point’ in some of the copies of the award, but in the original it is properly given as Joe’s Point.”

three degrees fifty-four minutes and fifteen seconds east from Harvard College, in the University of Cambridge, in the State of Massachusetts, and the course of the said river up from its said mouth, is northerly to a point of land called the Devil's Head, then turning the said point, is westerly to where it divides into two streams, the one coming from the westward, and the other coming from the northward, having the Indian name of Chiputnaticook or Chibuitcook, as the same may be variously spelt, then up the said stream, so coming from the northward to its source, which is at a stake near a Yellow Birch Tree, hooped with iron, and marked S. T. and J. H. 1797, by Samuel Titcomb and John Harris, the Surveyors employed to survey the above-mentioned stream, coming from the northward. And the said River is designated on the Map hereunto annexed,* and hereby referred to as farther descriptive of it, by the letters A B C D E F G H I K and L, the letter A being at its said mouth, and the letter L being at its said source; and the course and distance of the said source from the Island, at the confluence of the above-mentioned two streams, is, as laid down on the said map, north five degrees and about fifteen minutes west, by the magnet, about forty-eight miles and one quarter.

In testimony whereof, we have hereunto set our hands and seals, at Providence, in the State of Rhode Island, the twenty-fifth day of October, in the year one thousand seven hundred and ninety-eight.

[L. S.] THOMAS BARCLAY,
 [L. S.] DAVID HOWELL,
 [L. S.] EGBERT BENSON.

Witness, ED. WINSLOW,
Secretary to the Commissioners.

* Secretariat note: See map 1.

PART II

**Decision under Article IV of the Treaty of Ghent
of 1814, between the United Kingdom and the United States
relating to the Islands in the Bay of Fundy**

Decision of 24 November 1817

**Décision en vertu de l'article IV du Traité de Gand
de 1814, entre le Royaume-Uni et les États-Unis
concernant les îles de la Baie de Fundy**

Décision du 24 novembre 1817

DECISION UNDER ARTICLE IV OF THE TREATY OF GHENT,
BETWEEN THE UNITED KINGDOM AND THE UNITED STATES
RELATING TO THE ISLANDS IN THE BAY OF FUNDY, DECISION
OF 24 NOVEMBER 1817*

DÉCISION EN VERTU DE L'ARTICLE IV DU TRAITÉ DE GAND,
ENTRE LE ROYAUME-UNI ET LES ÉTATS-UNIS CONCERNANT
LES ÎLES DE LA BAIE DE FUNDY, DÉCISION DU 24 NOVEMBRE
1817**

Territorial determination – control over the islands in the Bay of Fundy – interpretation of the Treaty of Peace 1783 – true intent of provision.

Délimitation territoriale – contrôle des îles de la Baie de Fundy – interprétation du Traité de paix de 1783 – objectif réel d'une disposition.

* * * * *

NEW YORK, *November 24, 1817.*

Sir: The undersigned Commissioners, appointed by virtue of the fourth article of the treaty of Ghent, have attended to the duties assigned them; and have decided that Moose Island, Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do each of them belong to the United States of America; and that all the other islands in the Bay of Passamaquoddy, and the Island of Grand Menan in the Bay of Fundy, do each of them belong to His Britannic Majesty, in conformity with the true intent of the second article of the treaty of peace of one thousand seven hundred and eighty-three. The Commissioners have the honor to enclose herewith their decision.

In making this decision, it became necessary that each of the Commissioners should yield a part of his individual opinion. Several reasons induced them to adopt this measure; one of which was the impression and

* Reprinted from John Basset Moore (ed.), *International adjudications, ancient and modern. Modern Series*, vol. VI, New York, Oxford University Press, 1933, p. 35.

** Reproduit de John Basset Moore (éd.), *International adjudications, ancient and modern. Modern Series*, vol. VI, New York, Oxford University Press, 1933, p. 35.

belief that the navigable waters of the Bay of Passamaquoddy, which, by the treaty of Ghent, is said to be part of the Bay of Fundy, are common to both parties for the purpose of all lawful and direct communication with their own territories and foreign ports.

The undersigned have the honor to be [etc.]

J. HOLMES

THO. BARCLAY

The HON. JOHN QUINCY ADAMS,
Secretary of State.

**Decision of the Commissioners under the fourth article
of the Treaty of Ghent, 24 November 1817.**

By Thomas Barclay and John Holmes, Esquires, Commissioners, appointed by virtue of the fourth article of the treaty of peace and amity between His Britannic Majesty and the United States of America, concluded at Ghent on the twenty-fourth day of December, one thousand eight hundred and fourteen to decide to which of the two contracting parties to the said treaty the several islands in the Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, do respectively belong, in conformity with the true intent of the second article of the treaty of peace of one thousand seven hundred and eighty-three, between his said Britannic Majesty and the aforesaid United States of America.

We, the said Thomas Barclay and John Holmes, Commissioners as aforesaid, having been duly sworn impartially to examine and decide upon the said claims according to such evidence as should be laid before us on the part of his Britannic Majesty and the United States, respectively, have decided, and do decide, that Moose Island, Dudley Island, and Frederick Island, in the Bay of Passamaquoddy, which is part of the Bay of Fundy, do, and each of them does, belong to the United States of America; and we have also decided, and do decide, that all the other islands, and each and every of them, in the said Bay of Passamaquoddy, which is part of the Bay of Fundy, and the Island of Grand Menan, in the said Bay of Fundy, do belong to his said Britannic Majesty, in conformity with the true intent of the said second article of said treaty of one thousand seven hundred and eighty-three.

In faith and testimony whereof we have set our hands and affixed our seals, at the city of New York, in the State of New York, in the United States of America, this twenty-fourth day of November, in the year of our Lord one thousand eight hundred and seventeen.

[SEAL]

JOHN. HOLMES

[SEAL]

THO. BARCLAY

Witness:

JAMES T. AUSTIN, *Agt. U. S. A.*

ANTH: BARCLAY, *Sec'y*

PART III

**Declaration and decision of the Commissioners of Great Britain
and the United States, under Article VI of the Treaty of
Ghent of 1814, respecting Boundaries, relating to lakes
Ontario, Erie and Huron and River St. Lawrence**

Decision of 18 June 1822

**Déclaration et décision des Commissaires de Grande-Bretagne et des
États-Unis, en vertu de l'article VI du Traité de Gand de 1814,
concernant leurs frontières, au niveau des lacs Ontario, Érié et
Huron et du fleuve Saint Laurent**

Décision du 18 juin 1822

DECLARATION AND DECISION OF THE COMMISSIONERS OF GREAT BRITAIN AND THE UNITED STATES, UNDER ARTICLE VI OF THE TREATY OF GHENT OF 1814, RESPECTING BOUNDARIES, RELATING TO LAKES ONTARIO, ERIE AND HURON AND RIVER ST. LAWRENCE, DECISION OF 18 JUNE 1822*

DÉCLARATION ET DÉCISION DES COMMISSAIRES DE GRANDE-BRETAGNE ET DES ÉTATS-UNIS EN VERTU DE L'ARTICLE VI DU TRAITÉ DE GAND DE 1814, CONCERNANT LEURS FRONTIÈRES, AU NIVEAU DES LACS ONTARIO, ÉRIÉ ET HURON ET DU FLEUVE SAINT LAURENT, DÉCISION DU 18 JUIN 1822**

Determination of borders – lake and river boundary-lines in respect of lakes Ontario, Erie and Huron and the river St. Lawrence – interpretation of the Treaty of Peace of 1783.

Délimitation frontalière – frontières lacustres et fluviales au niveau des lacs Ontario, Érié et Huron et du fleuve Saint-Laurent – interprétation du Traité de paix de 1783.

* * * * *

THE Undersigned, Commissioners, appointed, sworn, and authorized, in virtue of the VIth Article of the Treaty of Peace and Amity, between His Britannick Majesty and the United States of America, concluded at Ghent, on the 24th December, 1814, impartially to examine, and, by a Report or Declaration, under their hands and Seals, to designate “that portion of the Boundary of, The United States, from the point where the 45th degree of North Latitude strikes the River Iroquois, or Cataragui, along the middle of said River into Lake Ontario, through the middle of said Lake until it strikes the communication, by water, between that Lake and Lake Erie; thence, along the middle of said communication, into Lake Erie, through the middle of said Lake, until it arrives at the water communication into Lake Huron; thence, through the middle of said water communication, into Lake Huron; thence, through the middle of said Lake, to the water communication between that Lake and Lake Superior,” and to “decide to which of the two Contracting Parties the several Islands, lying within the said Rivers, Lakes, and Water Communications, do respectively belong, in conformity with the true intent of the Treaty of 1783;” do decide and declare, that the following described Line,

* Reprinted from Edward Hertslet and C. E. Hertslet (eds.), *British and Foreign State Papers*, vol. 9, London, 1892, Compiled by The Librarian and Keeper of the Papers, Foreign Office, p. 791.

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(which is more clearly indicated in a series of Maps* accompanying this Report, exhibiting correct surveys and delineations of all the Rivers, Lakes, Water Communications, and Islands, embraced by the VIth Article of the Treaty of Ghent, by a black line, shaded on the British side with red, and on the American side with blue; and each sheet of which series of Maps is identified by a Certificate, subscribed by the Commissioners, and by the two principal Surveyors employed by them) is the true Boundary intended by the two before mentioned Treaties; that is to say:

Beginning at a stone Monument, erected by Andrew Ellicott, Esq. in the Year 1817, on the South Bank, or Shore, of the said River Iroquois, or Cataragui (now called the St. Lawrence) which Monument bears South 74 deg. 45 min. West, and 1,840 yards distant from the stone Church in the Indian Village of St Regis, and indicates the point at which the 45th parallel of North Latitude strikes the said River; thence, running North 35 deg. 45 sec. West into the River, on a line at right angles with the Southern shore, to a point 100 yards South of the opposite Island, called Cornwall Island; thence, turning Westerly, and passing around the Southern and Western sides of said Island, keeping 100 yards distant therefrom, and following the curvatures of its shores, to a point opposite to the North-west corner, or angle, of said Island; thence, to and along the middle of the main River, until it approaches the Eastern extremity of Barnhart's Island; thence, Northerly, along the Channel which divides the last mentioned Island from the Canada shore, keeping 100 yards distant from the Island, until it approaches Sheik's Island; thence, along the middle of the Strait which divides Barnhart's and Sheik's Islands, to the Channel called the Long Sault, which separates the two last mentioned Islands from the lower Long Sault Island; thence, Westerly, (crossing the centre of the last mentioned Channel) until it approaches within 100 yards of the North shore of the Lower Sault Island; thence, up the north branch of the River, keeping to the North of, and near, the lower Sault Island, and also North of, and near, the Upper Sault (sometimes called Baxter's) Island, and South of the two small Islands, marked on the Map A and B, to the Western extremity of the Upper Sault, or Baxter's Island; thence, passing between the two Islands called the Cats, to the middle of the River above; thence, along the middle of the River, keeping to the North of the small Islands marked C and D; and North also of Chrystler's Island, and of the small Island next above it, marked E, until it approaches the North-east angle of Goose Neck Island; thence, along the passage which divides the last mentioned Island from the Canada shore, keeping 100 yards from the Island, to the upper end of the same; thence, South of, and near, the two small Islands called the Nut Islands; thence, North of, and near, the Island marked F, and also of the Island called Dry or Smuggler's Island; thence, passing between the Islands marked G and H, to the North of the Island called Isle au Rapid Plat; thence, along the North side

* Secretariat note: Relevant maps under Articles VI and VII of the Treaty of Ghent are contained in John Basset Moore, *International Arbitrations to which the United States has been a party*, vol. VI "Maps", Washington, Government printing office, 1898.

of the last mentioned Island, keeping 100 yards from the shore, to the upper end thereof; thence, along the middle of the River, keeping to the South of, and near, the Islands called Cousson (or Tussin) and Presque Isle; thence, up the River, keeping North of, and near, the several Gallop Isles, numbered on the Map 1, 2, 3, 4, 5, 6, 7, 8, 9, and 10, and also of Tick, Tibbet's, and Chimney Islands; and South of, and near, the Gallop Isles, numbered 11, 12, and 13, and also of Duck, Drummond, and Sheep Islands; thence, along the middle of the River, passing North of Island No. 14, South of 15 and 16, North of 17; South of 18, 19, 20, 21, 22, 23, 24, 25, and 28, and North of 26 and 27; thence, along the middle of the River, North of Gull Island and of the Islands No. 29, 32, 33, 34, 35, Bluff Island, and No. 39, 44, and 45, and to the South of No. 30, 31, 36, Grenadier Island, and No. 37, 38, 40, 41, 42, 43, 46, 47, and 48, until it approaches the East end of Well's Island; thence, to the North of Well's Island, and along the Strait which divides it from Rowe's Island, keeping to the North of the small Islands No. 51, 52, 54, 58, 59, and 61, and to the South of the small Islands numbered and marked 49, 50, 53, 55, 57, 60, and X, until it approaches the North-east point of Grindstone Island; thence, to the North of Grindstone Island, and keeping to the North also of the small Islands No. 63, 65, 67, 68, 70, 72, 73, 74, 75, 76, 77, and 78, and to the South of No. 62, 64, 66, 69, and 71, until it approaches the Southern point of Hickory Island; thence, passing to the South of Hickory Island, and of the two small Islands lying near its Southern extremity, numbered 79 and 80; thence, to the South of Grand or Long Island, keeping near its Southern shore, and passing to the North of Carlton Island, until it arrives opposite to the South-western point of said Grand Island in Lake Ontario; thence, passing to the North of Grenadier, Fox, Stony, and the Gallop Islands, in Lake Ontario, and to the South of, and near, the Islands called the Ducks, to the middle of the said Lake; thence, Westerly, along the middle of said Lake, to a point opposite the mouth of the Niagara River; thence, to and up the middle of the said River, to the Great Falls; thence, up the Falls, through the point of the Horse Shoe, keeping to the West of Iris or Goat Island, and of the group of small Islands at its head, and following the bends of the River so as to enter the Strait between Navy and Grand Islands; thence, along the middle of said Strait, to the head of Navy Island; thence, to the West and South of, and near to, Grand and Beaver Islands, and to the West of Strawberry, Squaw, and Bird Islands, to Lake Erie; thence, Southerly and Westerly, along the middle of Lake Erie, in a direction to enter the passage immediately South of Middle Island, being one of the Easternmost of the group of Islands lying in the Western part of said Lake; thence, along the said passage, proceeding to the North of Cunningham's Island, and of the three Bass Islands, and of the Western Sister, and to the South of the Islands called the Hen and Chickens, and of the Eastern and Middle Sisters; thence, to the middle of the mouth of the Detroit River, in a direction to enter the Channel which divides Bois-blanc and Sugar Islands; thence, up the said Channel to the West of Bois-blanc Island, and to the East of Sugar, Fox, and Stony Islands, until it approaches Fighting, or Great Turkey Island; thence, along the Western side and near the shore of said last

mentioned Island, to the middle of the River above the same; thence, along the middle of said River, keeping to the South-east of, and near, Hog Island, and to the North-west of, and near, the Island called Isle à la Pêche, to Lake St. Clair; thence, through the middle of said Lake, in a direction to enter that mouth or Channel of the River St. Clair which is usually denominated The Old Ship Channel; thence, along the middle of said Channel, between Squirrel Island on the South-east, and Herson's Island on the North-west, to the upper end of last mentioned Island, which is nearly opposite to Point au Chênes, on the American shore; thence, along the middle of the River St. Clair, keeping to the West of, and near, the Islands called Belle Riviere Isle, and Isle aux Cerfs, to Lake Huron; thence, through the middle of Lake Huron, in a direction to enter the Strait or Passage between Drummond's Island on the West, and the little Manitou Island on the East; thence, through the middle of the passage which divides the two last mentioned Islands; thence, turning Northerly and Westerly, around the Eastern and Northern shores of Drummond's Island, and proceeding in a direction to enter the passage between the Island of St. Joseph's and the American shore, passing to the North of the intermediate Islands No. 61, 11, 10, 12, 9, 6, 4, and 2, and to the South of those numbered 15, 13, 5, and 1; thence, up the said last mentioned passage, keeping near to the Island St. Joseph's, and passing to the North and East of Isle à la Crosse, and of the small Islands numbered 16, 17, 18, 19, and 20, and to the South and West of those numbered 21, 22, and 23, until it strikes a line (drawn on the Map with black ink, and shaded on one side of the point of intersection with blue, and on the other side with red) passing across the River at the head of St. Joseph's Island, and at the foot of the Neebish Rapids, which line denotes the termination of the Boundary directed to be run by the VIth Article of the Treaty of Ghent.

And the said Commissioners do further decide and declare, that all the Islands lying in the Rivers, Lakes, and Water Communications, between the before described Boundary line, and the adjacent Shores of Upper Canada do, and each of them does, belong to His Britannick Majesty, and that, all the Islands lying in the Rivers, Lakes, and Water Communications, between the said Boundary Line and the adjacent Shores of The United States, or their Territories, do, and each of them does, belong to The United States of America, in conformity with the true intent of the IId Article of the said Treaty of 1783, and of the VIth Article of the Treaty of Ghent.

In faith whereof, we, the Commissioners aforesaid, have signed this Declaration, and thereunto affixed our Seals.

Done in Quadruplicate, at Utica, in The State of New York, in the United States of America, this 18th day of June, in the Year of our Lord 1822.

(L.S.) ANTH. BARCLAY.

(L.S.) PETER B. PORTER.

PART IV

**Report of the Commissioners of Great Britain and the United States
appointed to trace the Line of Boundary under Article VII of the
Treaty of Ghent of 1814, nearby Sugar Island**

Decision of 23 October 1826

**Rapport des Commissaires de Grande-Bretagne et des États-Unis
désignés pour délimiter la ligne frontière, en vertu de l'article VII
du Traité de Gand du 1814, dans la région de Sugar Island**

Décision du 23 octobre 1826

REPORT OF THE COMMISSIONERS OF GREAT BRITAIN AND THE UNITED STATES APPOINTED TO TRACE THE LINE OF BOUNDARY UNDER ARTICLE VII OF THE TREATY OF GHENT OF 1814, NEARBY SUGAR ISLAND, DECISION OF 23 OCTOBER 1826*

RAPPORT DES COMMISSAIRES DE GRANDE-BRETAGNE ET DES ÉTATS-UNIS DÉSIGNÉS POUR DÉLIMITER LA LIGNE FRONTIÈRE, EN VERTU DE L'ARTICLE VII DU TRAITÉ DE GAND DU 24 DÉCEMBRE 1814, DANS LA RÉGION DE SUGAR ISLAND, DÉCISION DU 23 OCTOBRE 1826**

Determination of borders – territorial determination – boundary under Article VII of the Treaty of Ghent 1814 – question of the course of the lake and land boundary-line from a point in the Neebish Channel to a point in the middle of St. Mary's River approximately one mile above St. George's or Sugar Island particularly in relation to the question of control over St. George's or Sugar Island – question of the course of the boundary-line from a point in Lake Superior located 100 yards north-east of Chapeau Island and near to the north-eastern point of Ile Royale to the foot of the Chaudière Falls in Lac la Pluie – disagreement between the American and British Commissioners – interpretation of Article VII of the Treaty of Ghent of 24 December 1814 – interpretation of Treaty of 1713 – true intent of provisions.

Determination of borders – boundary to follow the midline of river and lakes – exceptions for islands – navigable channels preserved for the access and use of both nations.

Délimitation frontalière – délimitation territoriale – frontière en vertu de l'article VII du traité de Gand de 1814 – question du tracé de la ligne frontière entre le lac et le territoire compris entre le Canal de Neebish et le milieu du fleuve Sainte-Marie, approximativement à un mille au-dessus de l'île Saint George (Sugar island), particulièrement dans l'optique du contrôle de celle-ci – question du tracé de la ligne frontière entre le Lac supérieur situé à 100 yards au Nord-Est de l'île Chapeau et le point situé le plus au Nord-Est de l'île Royale, au point de chute de la Cascade Chaudière dans le Lac de la Pluie – désaccord entre les Commissaires américains et britanniques – interprétation de l'article VII du Traité de Gand du 24 décembre 1814 – interprétation du Traité de 1713 – objectif réel des dispositions.

Délimitation frontalière – frontière devant suivre la ligne médiane des rivières et des lacs – exception insulaire – libre accès et utilisation par les deux États des canaux navigables.

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* Reprinted from *British and Foreign State Papers*, compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 57, London, 1871, H. M. Stationery Office, pp. 803; 816-817 and 823.

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New York, October 23, 1826.

THE Commissioners having carefully examined and considered the claims, proofs, and arguments presented by the Agents of the respective Governments, as well as the reports, maps, and observations made and prepared pursuant to their instructions by the Surveyors of the Board, and having fully and freely conferred together, and exchanged opinions on the whole subject matter referred to them, have agreed upon parts only of the boundary proposed to be established under Article VII of the Treaty of Ghent, and have disagreed as to other parts.

In order, therefore, to prevent any future misunderstanding as to the opinions which they respectively maintain in regard to the course which the boundary ought to pursue, and to form a basis for the report or reports which they are required in case of disagreement to prepare, they now proceed to commit to the journal the result of their deliberations, by describing and declaring the course of the boundary so far as they have agreed, and specifying the points of difference in places where they could not agree.

Thereupon:

Resolved, That the Commissioners disagree as to the course which the boundary line should pursue from the termination thereof under Article VI of the Treaty of Ghent, at a point in the Neebish Channel near Muddy Lake, to another point in the middle of St. Mary's River, about one mile above St. George's or Sugar Island, the British Commissioner being of opinion that the line should be conducted from the before-mentioned terminating point of the boundary line under Article VI, being at the entrance from Muddy Lake into the ship channel between St. Joseph's Island and St. Tammany's Island, to the division of the channels at or near the head of St. Joseph's Island; thence between St. George's Island and St. Tammany's Island, turning westwardly through the middle of the middle Neebish, proceeding up to and through the Sugar Rapids between the American main shore and the said St. George's Island, so as to appropriate the said island to His Britannic Majesty, and the American Commissioner being of opinion that the line should be conducted from the before-mentioned terminating point of the boundary under Article VI, into and along the ship channel between St. Joseph's and St. Tammany's Islands, to the division of the channel at or near the head of St. Joseph's Island (concurring thus far with the British Commissioner), thence turning eastwardly and northwardly around the lower end of St. George's or Sugar Island, and following the middle of the channel which divides St. George's Island first from St. Joseph's Island, and afterwards from the main British shore to the before-mentioned point in the middle of St. Mary's River, about one mile above St. George's or Sugar Island, so as to appropriate the said island to The United States.

Resolved, That in the opinion of the Commissioners the following described line, which is more clearly indicated by a series of maps prepared by the surveyors, and now on the files of this Board, by a line of black ink, shaded on the British side with red and on the American side with blue, is, so far as the same extends, the true boundary intended by the Treaties of 1783 and 1814. That is to say: — Beginning at a point in the middle of St. Mary's River, about one mile above the head of St. George's or Sugar Island, and running thence westerly through the middle of said river, passing between the groups of islands and rocks which lie on the north side and those which lie on the south side the Saut de Ste. Marie as exhibited on the maps, thence through the middle of said river between Points Iroquois and Gros Cap, which are situated on the opposite main shores at the head of the River St. Mary's, and at the entrance into Lake Superior; thence in a straight line through Lake Superior, passing a little to the south of Ile Carreboeuf, to a point in said lake 100 yards to the north and east of a small island named on the map Chapeau, and lying opposite and near to the north-eastern, point of Ile Royale.

Resolved, That the Commissioners disagree as to the course of the boundary from the point last mentioned in Lake Superior, to another point designated in the maps at the foot of the Chaudière Fall in Lac la Pluie, situated between Lake Superior and the Lake of the Woods. The American Commissioner being of opinion that the line between the said two points ought to take the following described course, namely, to proceed from the said point in Lake Superior, and passing to the north of the island named on the map Paté, and the small group of surrounding islands which he supposes to be the islands called Phillipeaux in the Treaty, of 1783, in a direction to enter the mouth of the River Kamanistiguia, to the mouth of said river; thence up the middle of the river to the lake called Dog Lake, but which the American Commissioner supposes to be the same water which is called in the Treaty of 1783 Long Lake; thence through the middle of Dog or Long Lake and through the middle of the river marked on the maps Dog River until it arrives at a tributary water which leads to Lac de l'Eau Froide; thence through the middle of said tributary water to its source in the highlands which divide the waters of Lake Superior from those of Hudson's Bay near Lac de l'Eau Froide; thence across the height of land, and through the middle of the lakes and rivers known and described as the Old Road of the French, viz.: — To the River Savannah, and thence through the middle of the Savannah to Mille Lacs, through the middle of Mille Lacs, and its water communication with Lac Dorade through the middle of Lac Dorade and its water communication with Lake Winedago, through the middle of Lake Winedago, and its water communication with Sturgeon Lake to Sturgeon Lake, through the middle of Sturgeon Lake and the Rivière Maligne to Lac à la Croix, through the middle of Lac à la Croix and its water communication with Lake Namecan to Lake Namecan; thence through the middle of Lake Namecan and its water communication with Lac la Pluie to the point in Lac la Pluie where the two routes assumed by the Commissioners again unite as represented on the maps. And the British Commissioner being of opinion that the boundary ought to

proceed from the before-mentioned point of agreement in Lake Superior, namely, from the point in said lake 100 yards to the north and east of a small island named Chapeau, lying north-east of the north-east point of Ile Royale; passing north of the said Chapeau Island, thence westward, passing north of Island No. 2; thence south-westward passing close north of Ile Royale, and all its contiguous islets, to the west end of the said Ile Royale; thence through the middle of Lake Superior, passing north of the islands called the Apostles; thence through the middle of the Fond du Lac, to the middle of the sortie or mouth of the estuary or lake of St. Louis River; thence up the middle of the said lake and river, passing midway between the points No. 1 and No. 2, and south-west of Islets No. 3, No. 4, No. 5, No. 6, and No. 7; thence midway between the points No. 8 and No. 9; thence through the middle of the said river midway between the points No. 10 and No. 11, and midway between points No. 12 and No. 13; thence between the Island No. 12 and Island No. 14; thence up the middle of the east channel, passing north-west of Island No. 15 and Island No. 16, and west of the point No. 17; thence east of the island No. 18 and Island No. 19, south-east of Island No. 20, and between Islands No. 21 and No. 22; thence north of point No. 23, south of Island No. 24, north of Islands No. 25 and No. 26, south of Island No. 27, and between Islands No. 27 and No. 28, eastward, northward, and south-westward of Island No. 28, and south of point No. 29, north-eastward of Islands No. 30, No. 31, and Island No. 32; thence up the middle of said river to the Grand Portage of about 11,915 yards on the right or north side, having the river and falls on its south side; thence through the middle of the road of this portage, and up the middle of said river, passing south and west of Island No. 33 east and north of Islet No. 34, south and west of Island No. 35, east of Islands No. 36, No. 37, and No. 38, and between Islets No. 39 and No. 40; thence up the middle of said river to the Portage des Couteaux of about 2,029 yards on the left or south side, having the river and falls on its north side, through the middle of the said portage, and up the middle of the said River St. Louis, passing south of Islands No. 41, No. 42, and No. 43, and No. 44, north of Island No. 45, and east of Island No. 46; thence up the middle of the said river, passing east of Islet No. 47, west of Islet Nos. 48 and 49; thence south-west of Island No. 50; thence west of Islet No. 51, and west of Island No. 52; thence up the middle of the said River St. Louis to its junction with the Rivière des Embarras, on the left or north-west side of the River St. Louis; thence up the middle of the Rivière des Embarras to and through a portage of about 32 yards on the right or east side, having the river on the west side; thence up the middle of the said river to and through a portage of about 58 yards on either side of the river; thence up the middle of the said river and its lakes to and through a portage of about 173 yards on the left or west side, having the river and rapids on its east side; thence up the middle of the said river and its lake, passing between Islets No. 1 and No. 2; thence east of Islets No. 2, No. 3, and No. 4; thence to and through a portage of about 145 yards on the left or north-west side, having the river on its south-east side; thence through the middle of a small lake, to and through a portage of about 150 yards on the left or north-west side, having the river and falls on the south-east side; thence into a lake and through the

middle of the said Jake, passing north-west of Island No. 5 and Island No. 6, to its north-east end; thence up the middle of the said Rivière des Embarras, and through the middle of its lake west of Island No. 7, and to and through a portage of about 473 yards on its right or north-east side, having the river and rapids on the west side; thence through the middle of a small lake, to and through a portage of about 631 yards on the right or east side, having the river and rapids on the west side; thence up the middle of the said Rivière des Embarras to the portage of the height of land of about 6,278 yards, on the left or north side the said river being wholly on the right coming from the south-eastward; thence through the middle of the portage of the height of land to the south-east bank of the Vermilion River, coming from the westward; thence down the middle of the said river to and through a portage of about 1,200 yards on the left or north side, having the river and its rapids on the south side; thence down the middle of the said river to and through a portage of about 457 yards on the right or south-east side, having the river and rapids on the north-west side; thence down the middle of the said river, to and through a portage of about 304 yards on the left or north-west side, having the river and rapids on its south-east side; thence down the middle of the said river to the Great Vermilion Lake; thence through the middle of this said lake, south and east of Island No. 1; thence east of Island No. 2; thence west of Island No. 3; thence west of Island No. 4, and east of Island No. 5; thence south of Island No. 6, and north of Islet No. 7; thence south of Island No. 8, south of Island No. 9 and its contiguous islets, north of Island No. 10; thence south-west of Island No. 9, and north-east of Island No. 11; thence west of Island No. 12; thence east and north of Island No. 13, and north of Islands No. 14, No. 15, No. 16, No. 17, and No. 18; thence south of Island No. 19, north of Island No. 20, south and west of Island No. 21, south of Island No. 22; and between Islands No. 23 and 24; thence north of Island No. 25; thence down the middle of Vermilion River to and through a portage on the right or east side of about 378 yards, having the river and falls on its west side; thence down the middle of the said river to and through a portage of about 416 yards on the left or north-west side, having the river and falls on the south-east side; thence down the middle of the said river to and through a portage of about 17 yards on its right or south side, the river and falls being on its north side; thence down the middle of the said river and its lakes to and through a portage of about 1,396 yards on the right or east side, the river being on the west side; thence passing north-west of Islet No. 1, and north of Islet No. 2, to and through a portage of about 176 yards on the right or south-east side, the river and falls being on its north side; thence down the middle of the said river to and through a portage of about 251 yards on the left or west side, the river and falls being on the east side; thence down the middle of the said River Vermilion to and through the Crane Portage of about 1,383 yards on the left or north-west side, having the river and falls on its south-east side; thence down the middle of the said river into Crane Lake; thence through the middle of this said lake, passing north of Island No. 1, east of Island No. 2 and Island No. 3, and east of Islands No. 4 and No. 5 to the Sand Point Lake; thence through the middle of this said lake

east of Islet No. 1 and of Island No. 2, east of Islet No. 3 and Island No. 4, and west of Islet No. 5; thence west of Islet No. 6, and east of Islets No. 7 and No. 8; thence east of Island No. 9, south of Island No. 10, north of Island No. 11, south-west of Island No. 12 and Islet No. 13, north-east of Island No. 14; thence down the middle of its strait or river to its entrance into Lake Namecan; thence through the middle of said lake, passing close west of Island No. 1; thence westward, passing south of Islet No. 2; thence south of Island No. 3, and Islets No. 4, No. 5, and No. 6, and Island No. 7; thence north of Islets Nos. 8 and 9 and No. 10, and south of Island No. 11, north of No. 12, then south of Islands No. 13, No. 14, No. 15; of Islets No. 16; thence northerly, passing west of Island No. 17, and east of Islet No. 18, of Island No. 19, and No. 20; thence passing east of Island No. 21, and west of Island No. 22; thence east of No. 23, and down the middle of the river south-eastward of Island No. 24; thence passing north of Island No. 25 and No. 26, and down the middle of the north channel to a fall, having a portage of about 127 yards, on the left or north side; thence through said portage; thence down the said river, passing north of Island No. 1 in the nearest channel to Lac la Pluie.

For a better general understanding of the routes respectively assumed by the Commissioners in this case of disagreement, reference may be had to a reduced map on the files of the Commission, marked "a general map of the country north-west of Lake Superior," and for greater exactness to the series of maps, before-mentioned, of the surveys made by order of the Commissioners.

Resolved, That the following described line (also represented on said maps as before-mentioned) is, in the opinion of the Commissioners, so far as the same extends, the true boundary intended by the before-mentioned Treaties, namely:

Beginning at a point in Lac la Pluie close north of Island marked No. 1, lying below the Chaudière Falls of Lake Namecan, thence down this channel between the Isles marked No. 2 and No. 3, thence down the middle of said channel into Lac la Pluie west-ward of Island No. 4, thence through the said Lake close to the south point of Island No. 5, thence through the middle of said Lake north of Island No. 6, and south of Island No. 7, thence through the middle of said Lake north of Islet No. 8, and south of Islands No. 9, No. 10, No. 11, and between Islands No. 12 and No. 13; thence south of Islands No. 14 and No. 15, thence through the middle of said Lake north of a group of Islands No. 16, thence north of a group of rocks No. 17, thence south of a group of islets No. 18, thence north of an Islet No. 19, thence through the middle of said Lake to the south of Island No. 20, and all its contiguous Islets; thence south of Island No. 21, and midway between Islands No. 22 and No. 23, thence south-west of No. 24, thence north of Island No. 25, thence through the middle of said Lake to its sortie, which is the head of the Rivière la Pluie, thence down the middle of the said River to the Chaudière Falls, having a portage on each side, thence down the middle of said Falls and River, passing close south of Islet No. 26, thence down the middle of said Rivière la Pluie,

and passing north of Islands No. 27, No. 28, No. 29, and No. 30, thence down the middle of said River passing west of Island No. 31, thence east of Island No. 32, thence down the middle of said River and of the Manito Rapid, and passing south of No. 33, thence down the middle of said River and the Longue Saut Rapid, passing north of Island No. 34, and south of Islets No. 35, No. 36, and No. 37, thence down the middle of said River passing south of Island No. 38, thence down the middle of said River to its entrance between the mainland and Great Sand Island, into the Lake of the Woods; thence by a direct line to a point in said Lake, 100 yards east of the most eastern point of Island No. 1, thence north-westward, passing south of Islands No. 2 and No. 3, thence north-eastward of Island No. 4, and south-westward of Islands No. 5 and No. 6, thence northward of Island No. 7, and southward of Islands No. 8, No. 9, No. 10, and No. 11, thence through the middle of the waters of this bay, to the north-west extremity of the same, being the most north-western point of the Lake of the Woods, and from a monument erected in this bay; on the nearest firm ground to the above north-west extremity of said bay, the courses and distances are as follow, viz: 1st. N. 56, W. 1,565½ feet. 2nd. N. 6, W. 861½ feet. 3rd. N. 28, W. 615.4 feet. 4th. N. 27, 10 W., 495.4 feet. 5th. N. 5, 10 E., 1,322½ feet. 6th. N. 7, 45 W., 493 feet. The variation being 12° east. The termination of this 6th or last course and distance being the above said most north-western point of the Lake of the Woods, as designated by Article VII of the Treaty of Ghent, and being in latitude 49° 23' 55" north of the Equator, and in longitude, 95° 14' 38" west from the Observatory at Greenwich.

For the better understanding of many of the arguments and observations which it will become the duty of the Commissioners to submit in their separate Reports, to the two Governments, on the subject of their differences; they deem it proper further to state on the Journal, that during the verbal discussions between them, relative to the course of the boundary, certain propositions were made by each of them, for the adoption of lines different from either of those which they have assumed in the preceding joint declaration.

These propositions which each of the Commissioners avers were submitted on his part by way of compromise, and under the influence of a strong desire to bring the Commission to a speedy and amicable termination, and of a belief that it would be for the interests of both Governments rather to yield such claims as were susceptible of the least doubt, than incur the delay and expense of a reference to a third party, were as follow, namely:

Mr. Porter, adhering inflexibly to his opinion, that the boundary ought to be run through the channel which divides St. George's Island, in the River St. Mary's from the British shore, so as to appropriate that Island to The United States, inasmuch as the establishment of the line through the American Channel, which is much the smallest branch of the River would have the effect to throw the only navigable communication for lake vessels, exclusively within the territories of one of the parties, and thereby violate a principle, the strict observance of which is in his view more important to the interests of

both Governments, than any other consideration connected with the fair adjustment of the boundary (and from which he has never departed), proposed to his colleague, that in regard to their differences respecting the boundary between Lake Superior and the Chaudière Falls in Lac la Pluie (St. George's Island being first appropriated to The United States), they should both relinquish the lines which they had respectively assumed, and adopt in lieu thereof the following route, namely:

Beginning at the point in Lake Superior described as 100 yards distant from the island named Chapeau, near the north-east end of Ile Royale, and proceeding thence to the mouth of the Pigeon River, on the north-western shore of the lake, enter and ascend the middle of that river, and leaving it at its junction with Arrow River, proceed to Lake Namecan and Lac la Pluie, by the most direct and most continuous water communication, as delineated on the reduced map on the files of this board to which reference was already made.

The British Commissioner, on the other hand, still maintaining the claim of Great Britain to St. George's Island, and to the establishment of the boundary line through the middle Neebish, and the Sugar Rapids, as before set forth, stated to his colleague the necessity of his adherence to the same, as he considered that the application of the same principles which under Article VI of the Treaty of Ghent, appropriated Bainhart's Island in the St. Lawrence, and the islands at the head of Lake St. Clair, lying between the boundary line as there settled, and the American main shore to The United States, would in this instance require St. George's Island to be allotted to Great Britain.

Mr. Barclay, however, impressed with the propriety not only of dividing the doubtful territory between the two Governments, but also of preserving the navigation free to both nations, proposed to stipulate with the American Commissioner, upon condition of his agreeing to fix the boundary in the Middle Neebish and Sugar Rapids, and to allot St. George's Island to Great Britain, that the channel through the East Neebish and Lake George should remain free for the fair and lawful commerce of both nations, provided the Commissioner of The United States would guarantee the like with respect to the channel running on the south-east side of Bainhart's Island, and to that channel, through the islands of Lake St. Clair, which is contiguous to the American mainland, and which is commonly used because it is the easiest and safest. And as to the proposition of Mr. Porter to conduct the line "from Lake Superior to the mouth of Pigeon River; thence through the middle of said river, proceeding to Lac la Pluie by the most direct and continuous water communication." Mr. Barclay consented to adopt a route from Lake Superior, by the Grand Portage, to Pigeon River, and thence by the most easy and direct route to Lac la Pluie, provided the American Commissioner would consent that the boundary should be conducted from water to water, overland, through the middle of the old and accustomed portages, in those places where from falls, rapids, shallows, or any other obstruction, the navigation and access into the interior by water, are rendered impracticable. Such a route with all the portages is here described by Mr. Barclay for greater certainty;

To wit, — From the before-mentioned point in Lake Superior, 100 yards from the Chapeau Island, till, it approach within 200 yards of Ile aux Montous, at the south-west end thereof, thence north-westwardly to the south-east end of the Grand Portage on the shore of Lake Superior; thence through the middle of the road of the Grand Portage, westward to its west end on the south-east bank of the Pigeon River, being a distance in length of portage of about 14,366 yards, equal to 8 statute miles and 286 yards; thence, up the middle of the said Pigeon River to the Chute de la Perdrix, having a portage of about 445 yards on the left or east side; thence, through the said portage to the said river again; thence up the middle of said river to the Rapide aux Outardes, having on the right or east side a portage of about 2,000 yards, through said portage to the South Fowl Lake; thence, through the middle of the South Fowl Lake, to its river or strait connecting it with North Fowl Lake, and up the middle of the above river or strait to North Fowl Lake; thence, through the middle of this lake to the mouth. of Moose Brook; thence up the middle of this brook to the Portage de l'Original of about 721 yards on the right or east side, having the brook on the west, through said portage to Lac de l'Original; thence, through the middle of this lake to the Great Portage aux Cerises of about 844 yards on the right or north side, having a brook with falls and rapids on its south side, and through said portage to Lac Vaseux, or pond; thence, through the middle of this lake or pond, to the Portage Vaseux of about 265 yards on the right or north side, and through said portage to another pond; thence, through the middle of this pond, to Petit Portage aux Cerises of about 233 yards on the right or north side, having a brook on its south side, and through said portage to the Lac à la Montague; thence, through the middle of this lake to its west end and Wattup Portage of about 539 yards, and through said portage into a lake; thence, through the middle of this lake to a strait, through the middle of this strait to another lake; thence, through the middle of this lake to its west end and Grand Portage Neuf of about 2,579 yards; thence, through the middle of the road of this portage to Rose or Mud Lake; thence, through the middle of said lake to its west end and mouth of a brook, on the left or south side of which is a portage of about 24 yards, and through said portage to a small lake; thence, through the middle of this lake to its west end, having a portage of about 347 yards (the connecting brook being north of this portage), and through said portage to the South Lake of the Height of Land; thence, through the middle of this lake to the Height of Land Portage of about 468 yards; thence, through the middle of this portage to the lake north of the Height of Land; thence, through the middle of this lake to the entrance of a strait; thence, south-westward, through the middle of this strait to the Lac des Pierres à Fusil; thence, through the middle of this said lake to its sortie; thence, through its middle and the middle of the following waters to a fall, having the Portage de la Petite Roche of about 33 yards on its right or north-east side; thence through said portage to the same waters, and following down the said waters to a portage of about 116 yards, on an island having a channel and falls on each side; thence, through said portage and downward, through the middle of the waters to the Portage du Gros Pin of about 509 yards, on an island

having a channel and falls on each side; thence through said portage; thence, northward, following the middle of the small lakes and straits, to a portage of about 119 yards, on the left or south side, the rivulet being on the north side; thence through said portage; thence, following the middle of the small lakes and straits, passing east and north of Island No. 1, and north of Island No. 2, west of Islet No. 3, and between Islets No. 4, and No. 5; thence south of Islet No. 6; thence, northward through the middle of the lakes and straits, passing west of Island No. 7 and of Island No. 8, thence down the middle of a rapid and following river to a fall, having a portage of about 32 yards on the left or west side, thence through said portage, thence down the river between the Islets No. 1 and No. 2 into Lake Kasiganagah, thence through the middle of this said lake, east of Island No. 3, north-east of Island No. 4, and south-west of Islets No. 5, and south of Island No. 6; thence south-east and south of Island No. 7 and Islet No. 8, north of Island No. 9, No. 10, No. 11, and No. 12, south of Islands No. 13 and No. 14, west of Island No. 12, and east of Islet No. 15, west of Islet No. 16 and Island No. 17, south of Island No. 18, of Islet No. 19, and Island No. 20 and No. 23, north of Islets No. 21, of Island No. 22, south of Islet No. 24, of Islands No. 25 and No. 26, east of Islets No. 27, south-east of Island No. 28, south of Island No. 29; thence passing through the middle of the said lake to the portage of about 20 yards on the north side of a small brook coming from Swamp Lake, thence through the middle of the said portage and of Swamp Lake passing north of Islet No. 1 to the swamp portage of about 423 yards, thence through the middle of said portage to the Cypress Lake, thence through the middle of this lake passing north of Islet No. 1 and of Islet No. 2, south of Islet No. 3, and east of Islet No. 4, to the Portage des Couteaux of about 47 yards, having a brook and falls on its north-east side, running into Lac des Couteaux; thence through the middle of this portage and of the lake last named, south of Islets No. 1, to the strait, thence through the middle of the said strait, and thence through the middle of the said Lac des Couteaux, passing south of Island No. 2, and north of Islands No. 3, No. 4, and No. 5, and close north of Island No. 6, to the head of the sortie of the lake and river; thence down the middle of this river and its rapids and small lakes or ponds to a steep rapid, having a portage of about 80 yards on the left or south-east side, the river being on the north-west side; thence through the said portage, thence through the middle of a pond to a portage of about 173 yards on the left or south side, having the river and falls on its north side; thence through said portage; thence into Carp Lake, and through the south part of the said lake to the Carp Portage of about 378 yards on the left or south side, the river and falls being on its north side; thence through said portage, thence into Brick Lake and through the middle of said lake, passing north of Islet No. 1, south of Islet No. 2, and north of Islet No. 3, to and through the Portage du Bois Blanc of about 196 yards, the river and fall passing westward of it to Lac du Bois Blanc; thence through the middle of this said lake, and its straits passing west of Island No. 1, east of Islet No. 2, south of Islet No. 3, north of Islet No. 4, south of Islet No. 5, of Island No. 6 and No. 7, west of Islet No. 8 and No. 9, and between Island No. 10 and Islet No. 11, eastward and northward of Islet No. 12, south of Islet No. 13, of Island No. 14, and Islet No.

15, north of Island No. 16, and south-west of Islet and Island No. 17, to the head of a fall having a portage of about 190 yards, on the left or west side; thence through said portage, thence down the river, and turning west through the middle of a narrow arm to and through the Portage du Gros Pin of about 358 yards at its west end, having the river and falls north of it; thence down the said river west of Islet No. 1, and eastward, northward and south-westward of Islands No. 2 and No. 3, to and through a portage of about 166 yards, going south across a point of land; thence down the river, passing between Islet No. 4 and Island No. 5, south of Island No. 5 and Islet No. 6, to and through the islet portage of about 33 yards, having a channel and falls on each side; thence down the river into Crooked Lake, thence as near as the route permits through the middle of this said lake and its straits, passing between Islets No. 1 and 2, and between Islets No. 3 and No. 4; thence between Islands No. 5 and No. 6, thence north of Island No. 5, and south and west of Island No. 7, thence west of Islet No. 8, thence between Islands No. 9 and No. 10, thence passing east and north of Island No. 11 and east of Island No. 12, thence north of Island No. 12 and south of No. 13, thence east and north of Island No. 14, north and west of Island No. 15, thence north of Island No. 16, and between Islands No. 16 and No. 17, south of Island No. 17; thence between Island No. 18 and Island No. 19, thence south of Island No. 20, west of Island No. 21, and south of Islets No. 22, No. 23, No. 24, and No. 25; thence north of Island No. 26 and between Islands No. 27 and No. 28, thence south of Island No. 29 and its islets, thence south of Islet No. 30, and thence to and through the portage aux Rideaux of about 183 yards, on the left or south side, having the river and Rideau Fall on its north side; thence down the middle of the river to the Iron Lake, thence through the middle of said lake, passing north of Islet No. 1 and south of Islet No. 2, thence north and west of Island No. 3, thence south of Island No. 4, thence between Island No. 5 and Islet No. 6, thence west of Islet No. 7, thence east of Island No. 8 and west of Islet No. 9, thence east of Islet No. 10, thence through the middle of said waters to the west end and to and through Portage au Flacon of about 448 yards, having a channel of the river running south and west of it to Lac la Croix or Naquakeen, thence through the middle of the said Lac la Croix, passing south of a rock marked No. 1; thence south of an Islet No. 2, thence passing north of Islands No. 3, No. 4, and No. 5, thence north-east of Island No. 6 and Islet No. 7, east of Islands No. 8, No. 9, and No. 10; thence passing between Islands No. 11 and No. 12, thence east and north of the Great Island No. 13, west of Island No. 14, south of Island No. 15, west of Islet No. 16 and Islet No. 17, south-west of Islets No. 18, west of Islet No. 19 and of Islets No. 20, east of Islet No. 21, south of Islets No. 22, south of Islet No. 23; thence south of Island No. 24 and north of Island No. 25; thence south-west of Island No. 26, north of Island No. 27, south of Islet No. 28, north and west of Island No. 29, west of Islet No. 30, east of Islet No. 31, north of Island No. 32, and south of Islets No. 33, No. 34, and No. 35, north of Island No. 36 and its islets, south of Islet No. 37, west of Islet No. 38, east of Islets No. 39 and No. 40, north of Island No. 41, south of Island No. 42, north-east and north of Islands No. 43 and No. 44, south of Islands No. 45 and No.

46, north of Island No. 47, south of Island No. 48, north of Islands No. 49 and No. 50, east of Island No. 51, west of Islands No. 52 and No. 53, west of Islet No. 54, thence passing through the middle of the said lake, north and west of Islets No. 55, Island No. 56, and Island No. 59, east of Islands No. 57 and No. 58, and east of Island No. 60; thence down the middle of the said Lac la Croix to and through a portage of about 217 yards (having when the lake is high a brook running from the lake, by falls and rapids, on its west side, when the lake is low this brook is dry) to the lake of the Loon's Narrow; thence, through the middle of the said lake passing west of Island No. 1 and Islet No. 2, and north of Island No. 3; thence through the middle of said lake to and through a portage of about 263 yards on the left or south-east side, having the Loon Rivulet and falls on its north-west side; thence down the middle of the said rivulet, to and through a portage of about 67 yards on the left or south side, having the rivulet and fall on the north side; thence down the middle of the said rivulet to its entrance into the lesser Vermilion Lake; thence through the middle of this lake, passing east of Island No. 1, and south-west of Island No. 2 and Islet No. 3; thence down through the middle of its sortie or river to its entrance into the Sand Point Lake; thence through the middle of this lake, passing east of Islet No. 1 and of Island No. 2, east of Islet No. 3 and Island No. 4, and west of Island No. 5; thence west of Islet No. 6, and east of Islets No. 7 and No. 8; thence east of Island No. 9, south of Island No. 10, north of Island No. 11, south-west of Island No. 12 and Islet No. 13, north-east of Island No. 14; thence down the middle of its sortie or river to its entrance into Lake Namecan; thence through the middle of the said lake, passing close west of Island No. 1; thence westward, passing south of Islet No. 2; thence south of Island No. 3 and Islets No. 4 and No. 5, of Islet No. 6 and Island No. 7; thence north of Islets No. 8, No. 9, and No. 10, and south of Island No. 11, north of Island No. 12; thence south of Islands No. 13, No. 14, and No. 15, and of Islet No. 16; thence northerly, passing west of Island No. 17, east of Islet No. 18, of Island No. 19, and Island No. 20; thence passing east of Island No. 21, and west of Island No. 22; thence east of No. 23, and down the middle of the river south-east of Island No. 24; thence passing north of Islands No. 25 and No. 26, and down the middle of the north channel to a fall having a portage of 127 yards on the left or north side; thence through said portage; thence down the said river, passing north of Island No. 1, and thence to Lac la Pluie as already described. The said route being intended to pass through all the portages and decharges for partial unloadings, named or not named, which are necessary to connect the water communications into the interior.

Mr. Ferguson, one of the principal surveyors presented a report describing the astronomical observations made by him on the course of the boundary under Article VII of the Treaty, and detailing the results derived from them; which was ordered to be filed. The maps presented to the Board the 5th day of October were ordered to be filed.

November 10, 1826.

The preceding differences between the Commissioners, as well as other subjects in regard to the boundary between the British territory and The United States having been submitted to the respective Governments for instructions thereupon, and it appearing consequently that several months must necessarily elapse before the information can be received which is required for the final closing of the Commission, it was considered advisable to allow time for that purpose rather than to detain the several officers in unnecessary attendance and expense during the winter at New York.

Thereupon, on the suggestion of Mr. Commissioner Porter:

Resolved, that this Board stand adjourned to the 1st day of March next, then to meet at this place, unless called together upon an earlier day by either Commissioner, and that, in the meantime, the Commissioners will delay the exchange and transmission of the final reports which they are required to make in relation to the points on which they have differed, in the anxious hope that the explanations and instructions which they may receive will enable them to reconcile their differences and agree upon the whole line of boundary.

ANTH. BARCLAY

PETER B. PORTER

DONALD FRASER, *Secretary*

RICHD. WILLIAMS, *Assistant Secretary*

PART V

**Sentence arbitrale relative aux limites des possessions
britanniques et américaines du Nord-Est**

Décision du 10 janvier 1831

**Arbitral award relating to the boundaries of British
and American Northeastern territories**

Decision of 10 January 1831

SENTENCE ARBITRALE DU ROI DES PAYS-BAS EN VERTU DE
L'ARTICLE V DU TRAITÉ DE GAND DU 24 DÉCEMBRE 1814, AU
SUJET DES LIMITES DES POSSESSIONS BRITANNIQUES ET
AMÉRICAINES DU NORD-EST, DÉCISION DU 10 JANVIER 1831*

ARBITRAL AWARD OF THE KING OF THE NETHERLANDS UNDER
ARTICLE V OF THE TREATY OF GHENT OF 24 DECEMBER 1814,
RELATING TO THE BOUNDARIES OF BRITISH AND AMERICAN
NORTHEASTERN TERRITORIES, DECISION OF 10 JANUARY 1831**

La frontière du Nord-Est entre les possessions des États-Unis et du Royaume-Uni doit être décidée en vertu des traités, actes et conventions conclus entre les deux puissances : traité de paix de 1783 – traité d'amitié, de commerce et de navigation de 1794 – déclaration relative à la rivière Sainte Croix de 1798 – traité de paix signé à Gand en 1814 – convention du 29 septembre 1827 comprenant les cartes de Mitchell et «A».

La délimitation de la frontière depuis l'Angle Nord-Ouest de la Nouvelle-Écosse jusqu'au point situé le plus au Nord-Ouest du fleuve Connecticut doit suivre la ligne de partage des eaux située le long des *highlands*, qui sépare les fleuves se jetant dans le fleuve Saint-Laurent de celles se jetant dans l'Océan Atlantique, comme prévu dans les traités: le terme «highlands» s'applique non seulement à un pays vallonné ou élevé, mais encore, à un terrain qui sans être vallonné, sépare des eaux coulant dans des directions différentes – le caractère plus ou moins vallonné et élevé du terrain à travers lequel la frontière doit être tracée ne doit pas être le critère de sélection – l'ancienne délimitation des provinces britanniques n'est pas une base décisive pour la délimitation de la nouvelle frontière entre les deux États puisque la coïncidence entre celles-ci n'est pas requise – la revendication d'exercice de droits souverains est circonscrite à une partie du territoire contesté – les Parties ont reconnu que le territoire se situant entre les lignes frontalières revendiquées est bien l'objet d'un litige, et par conséquent, sa possession ne saurait être censée déroger au droit – la nature du différend et les stipulations vagues des dispositions du Traité de 1783 ne permettent pas d'adjuger à l'une des Parties l'une des frontières revendiquées sans violer les principes de droit et d'équité vis-à-vis de l'autre – la frontière entre les deux États doit être déterminée sur la base pratique du *thalweg* (le chenal le plus profond) des fleuves en question.

La source située la plus au Nord-Ouest du fleuve Connecticut: la source et le lit du fleuve sont désignés par le nom du fleuve attaché à la source et au lit en question, et par leur prépondérance relative par rapport aux autres cours d'eau communiquant avec ledit fleuve – le lac Connecticut est la source située la plus au Nord-Ouest du fleuve Connecticut.

La frontière depuis le fleuve Connecticut jusqu'au Saint-Laurent le long du parallèle du 45^{ème} degré de latitude septentrionale: les relevés antérieurs qui ont été commandés par les autorités provinciales et non par commun accord des deux Parties, sont incorrects et incomplets – usage de fixer la latitude selon le principe de latitude observée – les États-Unis ont érigé des fortifications sur la base d'une présomption suffisamment légitime que le terrain faisait partie du

* Reproduit de John Basset Moore (éd.), *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. I, Washington, 1898, Government Printing Office, p.119 (traduction anglaise, p.127). (Pour plus de détails y compris sur le désistement mutuel de l'attribution par les Parties, cf. *ibid.*, p. 137 et s.).

** Reprinted from John Basset Moore (ed.), *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 119 (English translation, p.127). (For further information, including the mutual waiver of the Award by the Parties, see *ibid.*, p. 137 et seq.).

territoire américain – afin que le territoire américain s'étende jusqu'à ces fortifications et au rayon kilométrique y afférent, il faut procéder à une nouvelle évaluation de la latitude observée.

Northeastern boundary of the possessions of the United States and Great Britain to be decided according to the Treaties, Acts and Conventions concluded between the two Powers: Treaty of Peace of 1783 – Treaty of Friendship, Commerce and Navigation of 1794 – Declaration relative to the river St. Croix of 1798 – Treaty of Peace signed at Ghent in 1814 – Convention of 29 September 1827, as well as Mitchell's Map and Map A referred to therein.

Boundary line from the northwest angle of Nova Scotia to the northwesternmost head of the Connecticut River to be drawn along the highlands dividing the rivers that empty themselves into the St. Lawrence River from those which fall into the Atlantic Ocean as designated in the treaties: the term "highlands" applies not only to hilly or elevated country, but also to land which divides waters flowing in different directions – the more or less hilly and elevated character of the country through which the respective claimed boundary lines are drawn cannot form the basis of a choice between them – the ancient delimitation of the British provinces does not imply the entire coincidence of the boundaries between the two Powers and does not afford the basis of a decision – the rights of sovereignty claimed to have been exercised cover only a portion of the disputed territory – the Parties have acknowledged that the country lying between the lines respectively claimed by them is contested and therefore possession cannot be considered as derogating from the right – the nature of the dispute and the vague stipulations of the Treaty of 1783 do not permit awarding either of the claimed boundary lines to one of the Parties without violating the principles of law and equity with regard to the other – the boundary of the two States should be determined according to a line of convenience based on the *thalweg* (the deepest channel) of the rivers concerned.

Northwesternmost head of the Connecticut River: the source and the bed of a river are denoted by the name of the river which is attached to such source and to such bed, and by their greater relative importance, as compared to that of other waters communicating with said river – the Connecticut Lake is the northwesternmost head of the Connecticut River.

Boundary from the Connecticut River along the parallel of the 45th degree of north latitude to the St. Lawrence River: prior survey ordered by ancient provincial authorities, rather than by agreement between the two Parties, found to be incorrect – customary principle of observed latitude – United States erected fortifications under the sufficiently authorized impression that the ground formed part of United States territory – undertake new measurement of the observed latitude in order to mark this boundary in such a manner that the United States territory extends to those fortifications and the kilometrical radius thereof.

* * * * *

Nous, GUILLAUME, par la grâce de Dieu, Roi des Pays-Bas, Prince d'Orange-Nassau, Grand Duc de Luxembourg, &c. &c. &c.

Ayant accepté les fonctions d'arbitrateur, qui Nous ont été conférées par la note du Chargé d'Affaires des Etats Unis d'Amérique, et par celle de l'Ambassadeur extraordinaire et plénipotentiaire de la Grande Bretagne, à Notre Ministre des Affaires Etrangères, en date du 12 Janvier 1829, d'après l'art: V. du traité de Gand, du 24 Décembre 1814, et l'art: I. de la convention conclue entre ces Puissances à Londres le 29 Septembre 1827, dans le

différend, qui s'est élevé entre Elles au sujet des limites de leur possessions respectives.

Animés du désir sincère de répondre par une décision scrupuleuse, et impartiale à la confiance, qu'Elles Nous ont témoignée, et de leur donner ainsi un nouveau gage du haut prix que Nous y attachons.

Ayant à cet effet dûment examiné, et mûrement pesé le contenu du premier exposé, ainsi que de l'exposé définitif dudit différend, que Nous ont respectivement remis le premier Avril de l'année 1830 l'Envoyé extraordinaire et Ministre plénipotentiaire des Etats Unis d'Amérique, et l'Ambassadeur extraordinaire et plénipotentiaire de sa Majesté Britannique, avec toutes les pièces, qui y ont été jointes à l'appui:

Voulant accomplir aujourd'hui les obligations, que nous venons de contracter par l'acceptation des fonctions d'arbitrateur dans le susdit différend, en portant à la connaissance des deux hautes parties intéressées le résultat de Notre examen, et Notre opinion sur les trois points, dans lesquels se divise de leur commun accord la contestation.

CONSIDÉRANT,

que les trois points précités doivent être jugés d'après les traités, actes et conventions conclus entre les deux Puissances, savoir le traité de paix de 1783, le traité d'amitié, de commerce et de navigation de 1794, la déclaration relative à la rivière St. Croix de 1798, le traité de paix signé à Gand en 1814, la convention du 29 Septembre 1827, et la carte de Mitchell, et la carte A citées dans cette convention:

DÉCLARONS, QUE

Quant au premier point, savoir la question, quel est l'endroit désigné dans les traités, comme l'Angle Nord-Ouest de la Nouvelle Ecosse, et quels sont les *highlands* séparant les rivières, qui se déchargent dans le fleuve St. Laurent, de celles tombant dans l'Océan Atlantique, le long desquels doit être tirée la ligne de limites depuis cet Angle jusqu'à la source Nord-Ouest de la rivière Connecticut.

CONSIDÉRANT:

que les hautes parties intéressées réclamant respectivement cette ligne de limites au midi et au nord de la rivière St. John, et ont indiqué chacune sur la carte A la ligne, qu'elles demandent.

CONSIDÉRANT:

que selon les exemples allégués, le terme *highlands* s'applique non seulement à un pays montueux, ou élevé, mais encore à un terrain, qui, sans être montueux, sépare des eaux coulant dans une direction différente, et qu'ainsi le caractère plus ou moins montueux, et élevé du pays, à travers

lequel sont tirées les deux lignes respectivement réclamées au Nord et au Midi de la rivière St. John, ne saurait faire la base d'une option entre elles.

Que le texte du second article du traité de paix de 1783 reproduit en partie les expressions, dont on s'est antérieurement servi dans la proclamation de 1763, et dans l'acte de Québec de 1774, pour indiquer les limites méridionales du Gouvernement de Québec, depuis le lac Champlain, «in forty-five degrees of North latitude along the highlands, which divide the rivers, that empty themselves into the river St. Lawrence, from those, which fall into the sea, and also along the North coast of the Bay des Chaleurs.»

Qu'en 1763, 1765, 1773 et 1782 il a été établi, que la nouvelle Ecosse serait bornée au Nord, jusqu'à l'extrémité Occidentale de la baie des Chaleurs par la limite méridionale de la province de Québec, que cette délimitation se retrouve pour la province de Québec dans la commission du Gouverneur Général de Québec de 1786, où l'on a fait usage des termes de la proclamation de 1763, et de l'acte de Québec de 1774, et dans les Commissions de 1786 et postérieures des Gouverneurs du nouveau Brunswick pour cette dernière province, ainsi que dans un grand nombre de Cartes antérieures, et postérieures au traité de 1783, et que l'article premier dudit traité cite nominativement les Etats, dont l'indépendance est reconnue:

Mais que cette mention n'implique point l'entière coïncidence des limites entre les deux Puissances, réglées par l'article suivant, avec l'ancienne délimitation des provinces Anglaises, dont le maintien n'est pas mentionné dans le traité de 1783, et qui par ses variations continuelles, et par l'incertitude, qui continua d'exister à son égard, provoqua de temps à autre des différends entre les autorités provinciales.

Qu'il résulte de la ligne tirée par le traité de 1783 à travers les grands lacs à l'Ouest du fleuve St. Laurent, une déviation des anciennes chartes provinciales, en ce qui concerne les limites.

Qu'on chercherait en vain à s'expliquer, pourquoi, si l'on entendait maintenir l'ancienne délimitation provinciale, l'on a précisément fait usage dans la négociation de 1783 de la carte de Mitchell, publiée en 1755, et par conséquent antérieure à la proclamation de 1763, et à l'Acte de Québec de 1774.

Que la Grande Bretagne proposa d'abord la rivière Piscataqua pour limite à l'est des Etats Unis, et ensuite n'accepta pas la proposition de faire plus tard la limite du Maine, ou de Massachusetts bay.

Que le traité de Gand stipula un nouvel examen sur les lieux, lequel ne pouvait s'appliquer à une limite historique, ou administrative,

et que dès lors l'ancienne délimitation des provinces Anglaises n'offre pas non plus une base de décision.

Que la longitude de l'angle Nord-Ouest de la nouvelle Ecosse, laquelle doit coïncider avec celle de la source de la rivière St. Croix, fut seulement fixée par la déclaration de 1798, qui indiqua cette rivière.

Que le traité d'amitié, de commerce et de navigation de 1794 mentionne le doute, qui s'était élevé à l'égard de la rivière St. Croix, et que les premières instructions du Congrès lors des négociations, dont résulta le traité de 1783, placent ledit angle à la source de la rivière St. John.

Que la latitude de cet angle se trouve sur les bords du St. Laurent selon la carte de Mitchell, reconnue pour avoir réglé de travail combiné, et officiel des négociateurs du traité de 1783, au lieu qu'en vertu de la délimitation du Gouvernement de Québec, l'on devrait la chercher aux *highlands* séparant les rivières, qui se déchargent dans la rivière St. Laurent, de celles tombant dans la mer.

Que la nature de terrain à l'est de l'angle précité n'ayant pas été indiquée dans le traité de 1783, il ne s'en laisse pas tirer d'argument pour le fixer de préférence dans tel endroit plutôt que dans un autre.

Qu'au surplus si l'on croyait devoir le rapprocher de la source de la rivière St. Croix, et le chercher par exemple à *Mars hill*, il serait d'autant plus possible, que la limite du nouveau Brunswick tirée de là au Nord-Est donnerait à cette province plusieurs Angles Nord-Ouest, situés davantage au Nord, et à l'Est selon leur plus grand éloignement de *Mars hill*, que le nombre de degrés de l'angle mentionné dans le traité a été passé sous silence.

Que par conséquent l'angle Nord-Ouest de la nouvelle Ecosse, dont il est ici question, ayant été inconnu en 1783, et le traité de Gand l'ayant encore déclaré non constaté, la mention de cet angle historique dans le traité de 1783 doit être considérée comme une pétition de principe, que ne présente aucune base de décision, tandis que si on l'envisage comme un point topographique, eu égard à la définition, «viz, that angle, which is formed by a line drawn due north from the source of the St. Croix river to the highlands,» il forme simplement l'extrémité de la ligne «along the said highlands, which divide those rivers, that empty themselves into the river St. Lawrence, from those which fall into the Atlantic Ocean,» — extrémité que la mention de l'angle Nord-Ouest de la nouvelle Ecosse ne contribue pas à constater, et qui, étant à trouver elle même ne saurait mener à la découverte de la ligne, qu'elle termine.

Enfin que les arguments tirés des droits de souveraineté exercés sur le fief de Madawaska, et sur le Madawaska Settlement, admis même que cet exercice fut suffisamment prouvé, ne peuvent point décider la question, par la raison que ces deux établissements n'embarrassent qu'un terrain partiel de celui en litige, que les hautes parties intéressées ont reconnu le pays situé entre les lignes respectivement réclamées par elles, comme faisant un objet de contestation, et qu'ainsi la possession ne saurait être censée déroger au droit, et que si l'on écarte l'ancienne délimitation des provinces alléguée en faveur de la ligne réclamée au Nord de la rivière St. John, et spécialement celle

mentionnée dans la proclamation de 1763, et dans l'acte de Québec de 1774, l'on ne saurait admettre à l'appui de la ligne demandée au midi de la rivière St. John, des arguments tendant à prouver, que telle partie du terrain litigieux appartient au Canada, ou au nouveau Brunswick.

CONSIDÉRANT:

que la question, dépouillée des arguments non décisifs tirés du caractère plus ou moins montueux de terrain, de l'ancienne délimitation des provinces, de l'angle Nord-Ouest de la nouvelle Ecosse, et de l'état de possession, se réduit en dernière analyse à celles-ci, quelle est la ligne tirée droit au Nord depuis la source de la rivière St. Croix, et quel est le terrain, n'importe qu'il soit montueux et élevé, ou non, qui depuis cette ligne jusqu'à la source Nord-Ouest de la rivière Connecticut, sépare les rivières se déchargeant dans le fleuve St. Laurent, de celles, qui tombent dans l'Océan Atlantique; que les hautes parties intéressées ne sont d'accord, que sur la circonstance, que la limite à trouver doit être déterminée par une telle ligne, et par un tel terrain, qu'elles le sont encore depuis la déclaration de 1798 sur la réponse à faire à la première question, à l'exception de la latitude, à laquelle la ligne tirée droit au Nord de la source de la rivière St. Croix doit se terminer, que cette latitude coïncide avec l'extrémité du terrain, qui depuis cette ligne jusqu'à la source Nord-Ouest de la rivière Connecticut sépare les rivières, se déchargeant dans le fleuve St. Laurent, de celles qui tombent dans l'Océan Atlantique, et que dès lors il ne reste, qu'à déterminer ce terrain.

Qu'en se livrant à cette opération, on trouve d'un côté d'abord, que si par l'adoption de la ligne réclamée au Nord de la rivière St. John, la Grande Bretagne ne pourrait pas être estimée obtenir un terrain de moindre valeur, que si elle eut accepté en 1783 la rivière St. John pour frontière, eu égard à la situation du pays entre les rivières St. John et St. Croix dans le voisinage de la mer, et à la possession des deux rives de la rivière St. John dans la dernière partie de son cours, cette compensation serait cependant détruite par l'interruption de la communication entre le Bas Canada, et le nouveau Brunswick, spécialement entre Québec et Fredericton, et qu'on chercherait vainement, quels motifs auraient déterminé la Cour de Londres à consentir à une semblable interruption.

Que si, en second lieu, en opposition aux rivières se déchargeant dans le fleuve St. Laurent, on aurait convenablement d'après le langage usité en géographie, pu comprendre les rivières tombant dans les baies de Fundy et des Chaleurs, avec celles se jetant directement dans l'Océan Atlantique, dans la dénomination générique de rivières tombant dans l'Océan Atlantique, il serait hasardeux de ranger dans l'espèce parmi cette catégorie les rivières St. John et Ristigouche, que la ligne réclamée au Nord de la rivière St. John sépare immédiatement des rivières se déchargeant dans le fleuve St. Laurent, non pas avec d'autres rivières coulant dans l'Océan Atlantique, mais seules, et d'appliquer ainsi, en interprétant la délimitation fixée par un traité, où chaque expression doit compter, à deux cas exclusivement spéciaux, et où il ne s'agit

pas du genre, une expression générique, qui leur assignerait un sens plus large, ou qui, étendue aux Scoudiac Lakes, Penobscot et Kennebec, qui se jettent directement dans l'Océan Atlantique, établirait le principe, que le traité de 1783 a entendu des *highlands* séparant aussi bien médiatement, qu'immédiatement, les rivières se déchargeant dans le fleuve St. Laurent, de celles, qui tombent dans l'Océan Atlantique, principe également réalisé par les deux lignes.

Troisièmement, que la ligne réclamée au Nord de la rivière St. John ne sépare pas même immédiatement les rivières se déchargeant dans le fleuve St. Laurent, des rivières St. John et Ristigouche, mais seulement des rivières, qui se jettent dans le St. John et Ristigouche, à l'exception de la dernière partie de cette ligne près des sources de la rivière St. John, et qu'ainsi pour arriver à l'Océan Atlantique les rivières séparées par cette ligne de celle se déchargeant dans le fleuve St. Laurent, ont chacune besoin de deux intermédiaires, savoir les unes de la rivière- St. John, et de baie Fundy, et les autres de la rivière Ristigouche, et de baie des Chaleurs;

Et de l'autre,

qu'on ne peut expliquer suffisamment, comment si les hautes parties contractantes ont entendu établir en 1783 la limite au midi de la rivière St. John, cette rivière, à laquelle le terrain litigieux doit en grande partie son caractère distinctif, a été neutralisée, et mise hors de cause,

Que le verbe «divide» paraît exiger la contiguïté des objets, qui doivent être «divided.»

Que ladite limite forme seulement à son extrémité occidentale la séparation immédiate entre la rivière Mettjarmette, et la source Nord Ouest du Penobscot, et ne sépare que médiatement les rivières se déchargeant dans le fleuve St. Laurent, des eaux du Kennebec, du Penobscot, et des Scoudiac Lakes, tandis que la limite réclamée au Nord, de la rivière St. John sépare immédiatement les eaux des rivières Ristigouche et St. John, et médiatement les Scoudiac Lakes et les eaux des rivières Penobscot et Kennebec, des rivières se déchargeant dans le fleuve St. Laurent, savoir les rivières Beaver, Metis, Rimousky, Trois pistoles, Green, du Loup, Kamouraska, Ouelle, Bras St. Nicholas, du Sud, La Famine et Chaudière.

Que même en mettant hors de cause les rivières Ristigouche et St. John, par le motif, qu'elles ne pourraient être censées tomber dans l'Océan Atlantique, la ligne septentrionale se trouverait encore aussi près des Scoudiac Lakes, et des eaux du Penobscot, et du Kennebec, que la ligne méridionale des rivières Beaver, Metis, Rimousky et autres, se déchargeant dans le fleuve St. Laurent, et formerait aussi bien que l'autre une séparation médiante entre celles-ci, et les rivières tombant dans l'Océan Atlantique.

Que la rencontre antérieure de la limite méridionale, lorsque de la source de la rivière St. Croix, on tire une ligne au Nord, pourrait seulement lui

assurer un avantage accessoire sur l'autre, dans le cas, où l'une et l'autre limite réunissent au même degré les qualités exigées par les traités.

Et que le sort assigné par celui de 1783 au Connecticut, et au St. Laurent même, écarte la supposition que les deux Puissances auraient voulu faire tomber la totalité de chaque rivière, depuis son origine jusqu'à son embouchure, en partage à l'une, ou à l'autre.

CONSIDÉRANT:

Que d'après ce qui précède, les arguments allégués de part et d'autre, et les pièces exhibées à l'appui, ne peuvent être estimés assez prépondérants pour déterminer la préférence en faveur d'une des deux lignes, respectivement réclamées par les hautes parties intéressées, comme limites de leur possessions depuis la source de la rivière St. Croix jusqu'à la source Nord Ouest de la rivière Connecticut; et que la nature du différend, et les stipulations vagues, et non suffisamment déterminées du traité de 1783 n'admettent pas d'adjudger l'une ou l'autre de ces lignes à l'une desdites parties, sans blesser les principes du droit, et de l'équité envers l'autre.

CONSIDÉRANT:

Que la question se réduit, comme il a été exprimé ci-dessus à un choix à faire du terrain séparant les rivières, se déchargeant dans le fleuve St. Laurent de celles, qui tombent dans l'Océan Atlantique, que les hautes parties intéressées se sont entendues à l'égard du cours des eaux, indiqué de commun accord sur la Carte A, et présentant le seul élément de décision.

Et que dès lors les circonstances, dont dépend cette décision, ne sauraient être éclaircies davantage, au moyen de nouvelles recherches topographiques, ni par la production de pièces nouvelles.

NOUS SOMMES D'AVIS:

Qu'il conviendra d'adopter pour limite des deux Etats une ligne tirée droit au Nord depuis la source de la rivière St. Croix jusqu'au point, où elle coupe le milieu du *thalweg* de la rivière St. John, de là, le milieu du *thalweg* de cette rivière en la remontant jusqu'au point, où la rivière St. Francis se décharge dans la rivière St. John, de là, le milieu du *thalweg* de la rivière St. Francis en la remontant jusqu'à la source de sa branche la plus Sud Ouest, laquelle source Nous indiquons sur la Carte A par la lettre X, authentiquée par la signature de Notre ministre des affaires étrangères, de là une ligne tirée droit à l'Ouest jusqu'au point, où elle se réunit à la ligne réclamée par les Etats Unis d'Amérique, et tracée sur la Carte A, de là cette ligne jusqu'au point, où d'après cette carte, elle coïncide avec celle demandée par la Grande Bretagne, et de là la ligne indiquée sur ladite Carte par les deux Puissances jusqu'à la source la plus Nord Ouest de la rivière Connecticut.

Quant au second point, savoir la question, quelle est la source la plus Nord Ouest (*Northwesternmost head*) de la rivière Connecticut.

CONSIDÉRANT:

Que pour résoudre cette question, il s'agit d'opter entre la rivière de Connecticut Lake, Perry's stream, Indian Stream, et Hall's Stream.

CONSIDÉRANT:

Que d'après l'usage adopté en géographie, la source et le lit d'une rivière sont indiqués par le nom de la rivière attaché à cette source, et à ce lit, et par leur plus grande importance relative comparée à celle d'autres eaux, communiquant avec cette rivière.

CONSIDÉRANT:

Qu'une lettre officielle de 1772 mentionne déjà le nom de Hall's brook, et que dans une lettre officielle postérieure de la même année du même inspecteur, on trouve Hall's brook représenté comme une petite rivière tombant dans le Connecticut.

Que la rivière, dans laquelle se trouve Connecticut Lake, paraît plus considérable, que Hall's, Indian ou Perry's stream, que le Connecticut Lake, et les deux lacs situés au Nord de celui-ci, semblent lui assigner un plus grand volume d'eau, qu'aux trois autres rivières, et qu'en l'admettant comme le lit du Connecticut, on prolonge davantage ce fleuve, que si l'on donnait la préférence à une de ces trois autres rivières.

Enfin que la carte A ayant été reconnue dans la convention de 1827 comme indiquant le cours des eaux, l'autorité de cette carte semble s'étendre également à leur dénomination, vu qu'en cas de contestation tel nom de rivière, ou de lac, sur lequel on n'eût pas été d'accord, eût pu avoir été omis, que ladite Carte mentionne Connecticut Lake, et que le nom de Connecticut Lake implique l'application du nom Connecticut à la rivière, qui traverse ledit lac.

NOUS SOMMES D'AVIS:

que le ruisseau situé le plus au Nord Ouest de ceux, qui coulent dans le plus septentrional des trois lacs, dont le dernier porte le nom de Connecticut Lake, doit être considéré comme la source la plus Nord Ouest (Northwesternmost head) du Connecticut.

Et quant au troisième point, savoir la question, quelle est la limite à tracer depuis la rivière Connecticut le long du parallèle du 45e degré de latitude septentrionale, jusqu'au fleuve St. Laurent, nommé dans les traités Iroquois, ou Cataraquy.

CONSIDÉRANT:

que les hautes parties intéressées diffèrent d'opinion, sur la question de savoir, si les traités exigent un nouveau levé de toute la ligne de limite depuis la rivière Connecticut, jusqu'au fleuve St. Laurent, nommé dans les traités

Iroquois ou Cataraquy, ou bien seulement le complément des anciens levés provinciaux.

CONSIDÉRANT:

que le cinquième article du traité de Gand de 1814, ne stipule point, qu'on lèvera telle partie des limites, qui n'aurait pas été levée jusqu'ici, mais déclare que les limites n'ont pas été levées, et établit, qu'elles le seront.

Qu'en effet ce levé dans les rapports entre les deux Puissances doit être censé n'avoir pas eu lieu depuis le Connecticut jusqu'à la rivière St. Laurent, nommée dans les traités Iroquois ou Cataraquy, vu que l'ancien levé s'est trouvé inexact, et avait été ordonné non par les deux Puissances d'un commun accord mais par les anciennes autorités provinciales.

Qu'il est d'usage de suivre en fixant la latitude, le principe de latitude observée,

et que le Gouvernement des Etats Unis d'Amérique a établi certaines fortifications à l'endroit dit Rouse's point, dans la persuasion, que le terrain faisait partie de leur territoire, — persuasion suffisamment légitimée par la ligne réputée jusqu'alors correspondre avec le 45e degré de latitude septentrionale.

NOUS SOMMES D'AVIS:

Qu'il conviendra de procéder à de nouvelles opérations pour mesurer la latitude observée, afin de tracer la limite depuis la rivière Connecticut, le long du parallèle de 45e degré de latitude septentrionale jusqu'au fleuve St. Laurent nommé dans les traités Iroquois ou Cataraquy, de manière cependant, qu'en tout cas à l'endroit dit Rouse's point, le territoire des Etats Unis d'Amérique s'étendra jusqu'au fort qui s'y trouve établi, et comprendra ce fort, et son rayon kilométrique.

Ainsi fait et donné sous Notre Sceau Royal à La Haye, ce dix Janvier de l'an de grâce Mil Huit Cent Trente Un, et de Notre règne le dix huitième.

(Signé) GUILLAUME

(Signé) VERSTOLK DE SOELEN
Le Ministre des Affaires Étrangères

PART VI

**Sentences austrécales relatives aux litiges
entre les maisons princières de
Schaumbourg-Lippe et Lippe-Detmold**

Décisions du 25 janvier 1839

**Austregal judgments relating to the disputes
between the Princely Houses of
Schaumbourg-Lippe and Lippe-Detmold**

Decisions of 25 January 1839

SENTENCE AUSTRÉGALE DANS L'AFFAIRE DE LA MAISON PRINCIFIÈRE DE SCHAUMBOURG-LIPPE CONTRE LA MAISON PRINCIFIÈRE DE LIPPE-DETMOLD, RELATIVEMENT À LA REMISE DE LA MOITIÉ DES BAILLIAGES DE SCHIEDER ET DE BLOMBERG ET DU BAILLIAGE DE LIPPERODE, Y COMPRIS LA JOUISSANCE, DÉCISION DU 25 JANVIER 1839*

AUSTREGAL JUDGMENT IN THE DISPUTE BETWEEN THE PRINCELY HOUSES OF SCHAUMBOURG-LIPPE, AND LIPPE-DETMOLD, ABOUT THE HANDING OF HALF OF THE SCHIEDER, BLOMBERG BAILIWICKS AND THE LIPPERODE BAILIWICK INCLUDING ENJOYMENT, DECISION OF 25 JANUARY 1839**

Exception d'incompétence – une action reconventionnelle par un des États, Partie au litige, ne signifie pas une reconnaissance de la compétence du tribunal – l'instruction du procès par le tribunal ne signifie pas qu'il ait repoussé l'exception d'incompétence – Acte final de Vienne.

Différend international – un conflit armé ne peut naître du point de vue du droit des Gens que là où il existe un litige entre États indépendants ou entre souverains.

Extinction des traités internationaux – la dissolution de la Confédération du Rhin n'a pas automatiquement entraîné la nullité du traité international qui l'a créée – la plupart des dispositions de l'acte de la Confédération ont sans doute disparu avec celle-ci, mais il n'en résulte nullement que toutes les obligations entre les princes contractants stipulées dans cet acte, aient également cessé d'exister – la clause de renonciation est toujours en vigueur entre les États Parties – Acte de la Confédération des États du Rhin du 12 juillet 1806.

Bonne foi – une Partie ne peut invoquer un traité sur certains points et le rejeter sur d'autres – un traité ne peut être à la fois valable et nul – Traité de Stadhagen de 1748.

Droits patrimoniaux et souveraineté – lors d'une cession de territoire entre États souverains, les droits de propriété ne peuvent être séparés des droits souverains

Jurisdictional objection – A counter-claim by one State party to the dispute does not signify recognition of the tribunal's jurisdiction – communication of instructions by tribunal does not signify the denial of the objection – Final Act of Vienna.

International dispute – An armed conflict can arise under international law only where the dispute is between independent States or between sovereigns as such.

Expiration of international treaties – Dissolution of the Confederation of the Rhine does not automatically entail the nullification of the international treaty by which it was created – Although most provisions are no longer valid, some obligations between contracting princes remain in effect – Continued validity of renunciation clause – Act of the Confederation of the Rhine of 12 July 1806.

* Reproduit de A. De La Pradelle, et N. Politis, *Recueil des Arbitrages Internationaux*, vol. 1, Paris, 1905, Les Editions Internationales, p. 416.

** Reprinted from A. De La Pradelle, and N. Politis, *Recueil des Arbitrages Internationaux*, vol. 1, Paris, 1905, Les Editions Internationales, p. 416.

Good faith – A party may not invoke a treaty with regard to one question and reject it with regard to others – A treaty may not be both valid and invalid – Stadthagen Treaty of 1748.

Patrimonial and sovereign rights – When a territory is ceded from one State to another, the property rights cannot be separated from the sovereign rights.

* * * * *

Sentences austrégales* du 25 janvier 1839**

1. *Sentence dans l'affaire de la maison princière de Schaumbourg-Lippe, demanderesse,*

contre

*la maison princière de Lippe-Detmold, défenderesse, relativement à la remise de la moitié des bailliages de Schieder et de Blomberg*** et du bailliage de Lipperode, y compris la jouissance.*

Attendu qu'après préalable tentative de conciliation des maisons princières litigantes, cette affaire a été soumise, par décision de la haute Diète germanique du 5 août 1830, au jugement de la Cour suprême d'appel du Grand-Duché de Bade, statuant comme tribunal austrégale;

Ladite Cour, après avoir mûrement examiné l'affaire conformément aux lois, décide au nom de la haute Diète:

* Note du Secrétariat: Un tribunal austrégale n'est pas un tribunal arbitral *stricto sensu*. Il s'agit d'une instance spécifique au système juridique du Saint Empire Romain Germanique (Austrégale Instanz), qui a survécu jusqu'à la Confédération germanique du 19^{ème} siècle où le tribunal d'un État tiers tranche le différend. En l'espèce, et conformément aux dispositions de l'Acte du Congrès de Vienne du 9 juin 1815, les différends entre États confédérés, doivent être réglés par la médiation, et en cas d'échec de celle-ci par un jugement austrégale qui est sans appel et obligatoire pour les Parties. Lorsqu'elle est saisie d'un différend entre États d'ordre public ou privé, c'est-à-dire lorsque le monarque agit en sa qualité de souverain pour l'intérêt de l'État, la Diète désigne la Cour suprême d'un autre État confédéré qui tranchera le différend en tant que Tribunal austrégale. Dans les deux sentences présentées, la Cour suprême d'appel du Grand-duché de Bade a statué comme tribunal austrégale.

[Secretariat note: An austregal tribunal is not, *stricto sensu*, an arbitral tribunal. It is a procedure specific to the Holy Roman Empire of the German Nation (Austrégale Instanz), which survived until the German Confederation of the 19th century, where the tribunal of a third State would resolve the dispute arising amongst two other States. In the instant case, in conformity with the provisions of the Final Act of the Congress of Vienna of 9 June 1815, disputes amongst confederated States needed to be resolved by mediation. In the event of failure of such mediation, by a mandatory judgment of an austregal tribunal. The Diet, once seized of a dispute between States of a public or private nature, would designate the Supreme Court of a third confederated State to settle the dispute. In the two awards in question, the Supreme Court of Bade acted as austregal tribunal.]

** Note éditoriale: Traduites de l'allemand d'après le texte donné par de Martens, N. R. XVI, 4.32 et s.

*** Note éditoriale: En réalité, la demande portait sur la remise du bailliage entier de Schieder comme représentant la moitié de ce bailliage et de celui de Blomberg.

1° que l'exception d'incompétence, produite par la maison princière de Lippe-Detmold contre le tribunal austrégal de la Confédération est rejetée comme mal fondée.

Par contre et quant au fond:

2° que la maison princière de Schaumbourg-Lippe est déboutée de sa quadruple demande relative:

a) à la remise de la moitié des bailliages de Blomberg et de Schieder avec la jouissance à partir de 1789;

b) à la remise de la part de la succession Brake, y compris les fruits et intérêts, enlevée à la branche Alverdissen par la convention de 1722;

c) au dédommagement pour ce qui a été consenti ou remis à la maison princière de Lippe-Detmold par la branche Bückebourg, au traité de Stadthagen de 1748, à raison de la renonciation des droits acquis par elle en vertu de la convention de 1722;

d) à la restitution du bailliage de Lipperode cédé par Bückebourg à Detmold par le traité de Stadthagen de 1748.

3° que les dépens de la procédure judiciaire seront supportés dans la proportion des trois quarts par la maison princière de Schaumbourg-Lippe et d'un quart par celle de Lippe-Detmold.

En foi de quoi, la présente sentence a été rendue sur l'ordre de la Cour suprême d'appel du Grand-Duché de Bade et revêtue du grand sceau de la Cour.

Fait à Mannheim, le 20 décembre 1838.

Cour suprême d'appel du Grand-Duché de Bade.

Baron de STENGEL. — MINET.
HÜBSCH.

Motifs de la sentence [Résumé].

Avant d'apprécier la quadruple action formée par la maison de Schaumbourg-Lippe, il y a lieu d'examiner la:

Question de compétence.

La défenderesse conteste la compétence du tribunal austrégal pour connaître des actions que Schaumbourg-Lippe exerce, non en sa qualité de souverain de Schaumbourg, mais en sa qualité de seigneur de Lippe. Si les fils puînés de Lippe ne possèdent pas à titre souverain les biens qui leur sont échus par succession, les contestations successorales doivent être portées devant les tribunaux territoriaux du souverain.

La demanderesse a présenté contre la recevabilité en la forme de cette exception d'incompétence un certain nombre de considérations qui ne sont pas fondées:

1° En déférant la présente affaire à cette Cour, la Diète aurait par là-même reconnu la compétence de cette dernière et lui aurait enlevé le pouvoir de statuer sur sa propre compétence. Il n'y aurait sans doute pas de difficulté si la Diète avait déjà tranché le point relatif à la compétence. Mais cela n'a pas eu lieu. Au contraire, il a été formellement dit dans le rapport présenté à la Diète, qui a abouti à la résolution du 5 août 1830, qu'on devait laisser à la maison princière de Lippe-Detmold le soin de faire valoir l'exception d'incompétence devant le tribunal austrégale.

2° N'est pas davantage fondé l'argument que la maison princière de Lippe-Detmold aurait elle-même reconnu la compétence de cette Cour en formant une action reconventionnelle relativement à la souveraineté sur le bailliage de Blomberg, parce qu'elle n'a introduit cette action que pour faire trancher une question préjudicielle à la compétence de la Cour pour statuer sur l'action successorale de Schaumbourg.

3° Il est enfin inexact que cette Cour ait en fait repoussé l'exception d'incompétence en procédant à l'instruction du procès, parce que la procédure n'a eu lieu que réserve faite de la connaissance de tous les points litigieux, y compris celui relatif à la compétence.

Il convient, dès lors, d'examiner l'exception produite quant au fond.

Il résulte de l'article 11 de l'acte de la Confédération, du § 1^{er} de la résolution de la Diète du 16 juin 1817, d'après lequel: «la Diète est l'autorité devant laquelle doivent être portés tous les différends des membres de la Confédération», et de l'article 21 de l'acte final de Vienne de 1820, aux termes duquel «la Diète doit, dans tous les litiges des membres de la Confédération, qui lui sont soumis d'après l'acte fédéral, essayer par l'intermédiaire d'un Comité de concilier les parties», que tous les litiges des membres de la Confédération sont de la compétence de la Diète et, par voie de conséquence, d'un tribunal austrégale, sans aucune distinction entre les litiges de droit public et ceux de droit privé. Il en est ainsi, même dans le cas où il s'agit d'une convention entre deux États souverains en matière privée, par exemple d'un emprunt¹.

Par contre, il importera dans un tel conflit de distinguer si les souverains y figurent en leur qualité de souverains, agissant comme détenteurs de la puissance publique et par conséquent dans l'intérêt de l'État, ou s'ils n'y figurent qu'à titre privé, agissant pour leurs intérêts propres.

¹ Klüber, *Öffentliches Recht des deutschen Bundes*, 2^e édit., § 148 i, note a; Leonhardi, *Austrägalverfahren des deutschen Bundes*, § 95, n° II, 1.

Les textes précités ne visent que les procès entre membres de la Confédération. Mais en tant qu'un prince poursuit des intérêts privés qui n'ont aucun lien avec sa situation publique, il n'apparaît pas comme membre de la Confédération et ces textes ne s'appliquent pas. Cela résulte très clairement de ce que l'article 11 de l'acte fédéral établit le pouvoir judiciaire de la Confédération pour éviter les conflits armés des États; or, un conflit armé ne peut naître au point de vue du droit international que là où il y a litige entre États indépendants ou entre souverains comme tels. C'est pourquoi Leonhardi (p. 95, n° 2) soutient aussi que le tribunal austrégial n'est compétent que pour les affaires qui concernent «des membres de la Confédération agissant en leur qualité publique de Confédérés ou en leur qualité d'États» et que, d'après Klüber (§ 148 i, note a et § 148 n, n° 16), «la Confédération est incompétente lorsque les membres confédérés n'agissent qu'en leur qualité de personnes privées».

Cela posé, dans l'espèce, le pouvoir de la Confédération ne pourrait être écarté que s'il s'agissait de réclamations formées par le prince de Schaumbourg-Lippe sur la propriété des bailliages de Schieder et de Lipperode reconnus comme se trouvant sous la souveraineté de Lippe-Detmold. Car, dans ce cas, le prince de Schaumbourg-Lippe ne serait pas souverain, mais seigneur de la maison de Lippe et aurait, comme tout prince puîné qui ne serait pas lui-même investi du gouvernement, à porter sa pétition d'hérédité devant le tribunal de son souverain. La circonstance qu'il est souverain de ses possessions de Schaumbourg n'aurait aucune influence à cet égard, parce qu'en tant qu'il réclame des droits successoraux sur les possessions de Lippe, il n'est pas souverain de Schaumbourg, mais prince et seigneur de Lippe.

Or, il n'est pas exact que la demanderesse ne réclame que la propriété privée des bailliages de Schieder et de Lipperode. Elle réclame au contraire le bailliage de Schieder avec les droits qui ont appartenu depuis 1789 à Lippe-Detmold, c'est-à-dire avec les droits qui furent dévolus sur les biens partagés aux descendants de Simon VI d'après le testament de ce dernier. Elle soutient que ces droits, avec lesquels la branche Bückebourg posséda le bailliage de Lipperode, constituaient jadis le droit de souveraineté relative (*Landeshoheit*) qui se transforma en droit de souveraineté proprement dit (*Souveraineté*) en vertu de l'acte de la Confédération du Rhin.

En tout cas, la demanderesse réclame lesdits bailliages en niant la souveraineté de Lippe-Detmold sur eux. Elle ne peut, dès lors, sans se mettre en contradiction avec elle-même, porter son action devant les tribunaux territoriaux de Lippe-Detmold.

Par conséquent, le prince de Schaumbourg-Lippe n'agit pas, dans l'espèce, comme personne privée, mais comme chef d'État.

La maison princière de Lippe-Detmold ne donne aucun fondement juridique à sa prétention que la question de la souveraineté sur lesdits bailliages doit être tranchée comme question préjudicielle, sauf à se pourvoir

ensuite devant le tribunal de celui à qui la souveraineté aura été reconnue, à l'effet de décider de la question de la propriété privée et patrimoniale sur ces bailliages.

Sans doute, si la souveraineté de Lippe-Detmold avait été reconnue au moment de la formation de l'action sur la propriété, cette action n'aurait pu être portée que devant le tribunal territorial de Lippe-Detmold. Mais cette souveraineté loin d'être reconnue est justement contestée avec le reste. On ne saurait disjoindre les prétentions sur la propriété des prétentions sur la souveraineté, alors qu'elles sont les unes et les autres basées sur les mêmes arguments: la compétence doit donc être maintenue jusqu'au moment où cette double action sera jugée.

La défenderesse base en outre son exception d'incompétence sur l'article 9 du compromis du 5 juillet 1812 qui dispose que:

«après l'exécution du compromis sur la souveraineté, il sera conclu une convention soumettant à un jugement arbitral toute espèce de prétentions respectives ultérieures.».

Abstraction faite de ce que ce compromis ne vise que les différends subsistants relativement à la souveraineté sur le bailliage de Blomberg et ne se réfère pas aux bailliages de Schieder et de Lipperode, il en résulte, en tout cas, que l'accord en vue de la soumission à des arbitres des difficultés ultérieures n'ayant pas été conclu, le texte précité n'a aucune valeur.

L'exception d'incompétence doit, par conséquent, être repoussée.

Questions de fond.

Les quatre actions soumises à l'examen de la Cour soulèvent des exceptions particulières et une exception commune.

Exceptions particulières.

1^{re} action. — La demanderesse réclame la remise du bailliage de Schieder possédé par Lippe-Detmold depuis 1789, comme représentant la moitié des bailliages de Schieder et de Blomberg, se trouvant en 1777 dans la succession de la branche Bückebourg.

Elle appuie sa réclamation sur un double argument:

- a) sur ce qu'étant l'héritière de la branche Bückebourg, elle doit recueillir les bailliages précités échus à cette dernière en vertu du traité de Stadthagen de 1748; et
- b) sur ce que les biens de la ligne Schaumbourg-Lippe, faisant partie d'un fidéicomis spécial, doivent appartenir en entier à la branche subsistante,

A. — *Pétition d'hérédité.* D'après le § 20 du testament de Simon VI de 1597, il n'y a lieu de procéder à un partage de succession entre le seigneur régnant et les autres frères ou leurs descendants qu'en cas d'extinction d'une

souche entière. Or, l'extinction de Bückebourg avait mis fin, non à une souche entière, mais seulement à une branche spéciale de la lignée Schaumbourg-Lippe, fondée par le fils Philippe. Le paragraphe précité du testament de 1597 ne pouvait donc recevoir aucune application et la succession de Bückebourg devait revenir uniquement à l'autre branche de la même lignée: Alverdissen.

Cet argument semble fondé, mais il soulève des objections:

1° Aux termes du traité de Stadthagen de 1748, art. 6, Bückebourg n'avait reçu les deux bailliages de Schieder et de Blomberg qu'à charge de réversion, en cas d'extinction de la branche bénéficiaire, au profit de l'autre cocontractant: Lippe-Detmold.

La demanderesse conteste qu'il y ait là une obligation conventionnelle, mais sa prétention est formellement contredite par le texte.

Elle soutient en outre que la réserve de l'acte de 1748 ne vise pas les bailliages de Schieder et de Blomberg, mais ici encore le texte, comparé à la cession de 1722, ne laisse place à aucun doute.

2° Si la maison de Schaumbourg-Lippe est héritière de la branche Bückebourg, elle n'en est pas moins l'ayant cause général de la branche Alverdissen. Or, par l'acte de 1722, Alverdissen avait renoncé à toutes les prétentions qu'elle pouvait *quocumque titulo* produire dans la succession de Brake.

Mais cette objection n'est pas fondée, parce que la renonciation de 1722 portait sur les réclamations que la branche Alverdissen aurait pu former à cette époque et non sur les prétentions qu'elle aurait pu élever par la suite à raison d'événements ultérieurs. En effet, en 1722, Alverdissen a renoncé à son propre droit sur la moitié de la moitié de la succession Brake et à présent il ne s'agit pas de cela, mais du droit qu'elle a sur la part de cette succession devenue vacante, en 1777, par l'extinction de la branche Bückebourg.

Dans ces circonstances, la réplique consistant à dire que la renonciation de 1722 est entachée de nullité n'a, même fondée, aucune importance. Cependant cette réplique n'est pas fondée.

La nullité de l'acte de 1722 serait basée sur le triple motif:

- a) que le comte Philippe Ernest de Schaumbourg-Lippe-Alverdissen, qui l'a conclu, était alors, à raison d'imbécillité, sous la curatelle du landgrave de Hesse et que son curateur ne l'a pas assisté dans ce contrat;
- b) que l'acte aurait été conclu par erreur et contiendrait une grave lésion;

c) que la renonciation aurait été déclarée non valable par rescrit impérial du 17 juillet 1747.

Le premier motif n'a aucune valeur en présence de la confirmation que la cession de 1722 reçut en 1747 de la part du fils du contractant et de la ratification tacite des autres descendants, résultant de ce qu'ils ont continué à toucher les arrérages de la rente qui y était stipulée.

Le second motif est inopérant, parce que, d'une part, les droits cédés en 1722 étaient litigieux et que, d'autre part, quand bien même il y aurait eu erreur, l'erreur ne suffirait pas pour annuler le contrat. Il en est de même de la lésion.

Quant, enfin, au troisième motif, il suffit de faire remarquer qu'il résulte du contexte même du rescrit impérial qu'il ne s'agit pas là d'une véritable décision.

3° Une troisième objection contre la pétition d'hérédité est tirée de la prescription. Mais elle n'est pas fondée. Detmold est en possession du bailliage de Schieder depuis 1789. C'est donc de cette époque qu'a commencé à courir le délai de 30 ans pour la demande en restitution au pétitoire. Or, ce délai n'était pas encore expiré lorsqu'en 1818, Schaumbourg-Lippe porta son action devant la Diète.

Reste la première objection développée ci-dessus: elle suffit à faire repousser l'action en pétition d'hérédité.

B. — *Action révocatoire*. Les biens de la ligne Schaumbourg-Lippe sont compris dans un fidéicommiss spécial permettant à la branche survivante de réclamer les biens vacants.

Donc, alors même qu'en vertu des actes de 1722 et de 1748 combinés, les héritiers de la branche Bückebourg n'en auraient pas le droit, néanmoins, grâce au fidéicommiss, tout descendant de la ligne Schaumbourg-Lippe peut réclamer les biens qui y ont été compris.

Mais Lippe-Detmold soutient à son tour que l'ensemble des biens de la maison princière de Lippe sont compris dans un fidéicommiss général qui contredit le fidéicommiss spécial de Schaumbourg-Lippe.

Le fidéicommiss général de Lippe résulte du testament de 1597 combiné avec l'acte de transaction entre frères de 1621. L'un exclut les filles de l'ordre de succession et l'autre prononce la nullité de toutes aliénations intervenues sans le consentement général. Cette disposition fut renouvelée par le § 16 d'une autre convention de 1667.

Il en résulte, sans aucun doute, que toute disposition au profit d'une personne autre qu'un membre de la famille est illégale. Aucune disposition ne peut avoir lieu au détriment d'un membre qui pourrait avoir sur le bien aliéné des droits éventuels en vertu du fidéicommiss.

Par conséquent, on doit interdire même les aliénations faites par une ligne en faveur d'une autre et au préjudice d'une troisième.

Tel fut le cas lorsque les fils de Simon VI, Otton et Hermann, voulurent se partager la succession au préjudice de leurs autres frères, parce qu'après la mort d'Hermann sans postérité, Otton eût reçu la part de ce dernier en totalité, alors que d'après le testament paternel la moitié aurait dû appartenir à Simon VII et l'autre moitié être partagée entre Otton et Philippe. Le cas aurait été le même si Hermann eût vendu ou donné sa part à Otton.

Mais tout autre est la question de savoir si l'aliénation doit être également interdite entre deux lignes principales existant seules, alors que, comme en 1722, il ne peut y avoir de préjudice pour une troisième ligne. On peut dire pour la négative que, d'après le droit fidéicommissaire, l'aliénation d'une possession dans les rapports d'une branche spéciale avec une autre n'est pas interdite au même titre que l'aliénation dans les rapports de deux lignes principales. Dès lors, on pourrait admettre que la cession consentie en 1722 par la ligne Schaumbourg-Lippe à la ligne Detmold, alors qu'il n'y avait aucune autre ligne possédant des droits fidéicommissaires, n'est pas interdite.

Mais il n'est pas nécessaire d'insister sur ce point, parce que, en tout cas, la renonciation consentie en 1722 par Alverdissen à ses prétentions sur la succession de Brake n'était pas relative à une possession de la branche Alverdissen sur laquelle l'inaliénabilité fidéicommissaire eût pu s'appliquer. Il s'agissait alors d'une succession contestée et, en admettant qu'il y eût au profit de la ligne Schaumbourg-Lippe un fidéicommiss spécial, ce fidéicommiss ne pouvait porter que sur les biens qui, au moment de son établissement, se trouvaient déjà dans la ligne Schaumbourg-Lippe ou qui devaient y tomber à l'avenir sans contestation.

Il en résulte que l'action révocatoire est mal fondée et ce, sans qu'il soit nécessaire d'examiner si elle est intentée par Schaumbourg-Lippe au lieu et place de Bückebourg ou en sa qualité d'Alverdissen.

Au surplus, elle rencontre encore bien des objections:

1° D'après le droit commun², et d'après l'arrangement fraternel de 1621, l'aliénation d'un bien, même fidéicommissaire, est valable si au moment où elle se réalise tous les intéressés y consentent. Cette aliénation ne peut être critiquée ultérieurement ni par ceux qui y ont consenti, ni par leurs descendants, qui à l'époque de cette aliénation n'avaient acquis aucun droit éventuel. Et tel est le cas de Schaumbourg-Lippe, si elle agit en sa qualité de branche Alverdissen.

2° Que si elle agit comme ayant cause de Bückebourg, on peut lui opposer l'exception développée ci-dessus, tirée de la clause de réversion du traité de Stadthagen de 1748.

² Runde, *Teutsches Privatrecht*, § 697; Moser, *Teutsches Staatsrecht*, XIII, p. 514-517.

3° Quelle que soit d'ailleurs la qualité en laquelle elle agit, le pacte de 1722 permet de lui opposer la règle *quem de evictione tenet actio, eundem agentem repellit exceptio*.

Dans ces conditions, il n'y a pas lieu de tenir compte des exceptions suivantes invoquées par Lippe-Detmold, et qui ne sont pas fondées:

4° Alors même que les biens de la ligne de Schaumbourg-Lippe seraient compris dans un fidéicommis spécial, ce fidéicommis, se trouvant contredit par le fidéicommis général sur les possessions de la maison de Lippe, ne saurait avoir aucune valeur.

5° Alors même que le testament de 1597 aurait établi des fidéicommis particuliers au profit des lignes spéciales, cela ne serait pas applicable aux possessions de la ligne Schaumbourg-Lippe, parce que le fondateur de cette ligne, Philippe, n'avait rien à recevoir en vertu même du testament; il n'eut une part dans la succession paternelle qu'en vertu d'un arrangement avec ses frères.

6° L'action en révocation de la cession de 1722 aurait été éteinte par prescription à la suite de l'inaction de la branche Bückebourg.

En conséquence, l'action tendant à la remise du bailliage actuel de Schieder, comme représentant la moitié des anciens bailliages de Schieder et de Blomberg, doit être rejetée, en partie parce qu'elle manque de base en soi, et en partie à raison des exceptions qui lui ont été opposées.

Du même coup tombe la réclamation relative à la jouissance de bailliage depuis 1789, et disparaît la question de savoir avec quels droits le dit bailliage doit faire retour à Schaumbourg-Lippe, et quels droits a sur lui Lippe-Detmold.

2^e et 3^e actions. — Par là-même tombent également ces deux actions, tendant à imposer à Detmold de rembourser à Schaumbourg-Lippe ce que Alverdissen réclame de la succession Brake, en dehors de la moitié de Schieder et de Blomberg, revendiquée par la première action, et à quoi elle avait renoncé par l'acte de 1722, prétendu entaché de nullité, ainsi que ce que Bückebourg a dû céder à la maison princière de Lippe-Detmold par le traité de Stadthagen, en considération de la cession soi-disant nulle consentie par Alverdissen.

En effet, outre qu'il n'est pas prouvé, ainsi que cela a été dit plus haut, que Bückebourg ait consenti à Lippe-Detmold les cessions stipulées par le traité de Stadthagen, en considération de la cession faite par Alverdissen, les 2^e et 3^e actions, fondées sur la prétendue nullité de l'acte de 1722, manquent de base. Du moment que Schaumbourg-Lippe ne saurait prétendre à la moitié des bailliages de Schieder et de Blomberg, elle ne saurait davantage réclamer ce qui pouvait former le quart d'Alverdissen, ni ce que Bückebourg lui avait consenti dans le traité de Stadthagen de 1748, en échange du retour éventuel de la moitié de Schieder et de Blomberg.

4^e action. — Elle concerne la restitution du bailliage de Lipperode, cédé par Bückebourg à Detmold par le traité de Stadthagen, y compris la jouissance.

Lipperode ne faisait pas partie de la succession Brake. Il échut, dans le partage de la succession de Simon VI, au plus jeune des fils de ce dernier, au comte Philippe, fondateur de la ligne Schaumbourg-Lippe, puis il passa au fils aîné de Philippe, Frédéric-Christian, fondateur de la branche Bückebourg, et de celui-ci à Albrecht Wolfgang, qui le céda en 1748 à Detmold, par le § 7 du traité de Stadthagen, parce que Detmold s'était engagé à continuer à payer, à l'avenir, la rente de 1250 thalers stipulée dans l'acte de 1722 en faveur d'Alverdissen, bien que, par le même traité, Detmold eût cédé à Bückebourg la plus grosse partie du quart d'Alverdissen, c'est-à-dire la moitié des bailliages de Schieder et de Blomberg, avec l'unique réserve de retour dans le cas d'extinction de la branche Bückebourg, et qu'il eût par là perdu la majeure partie du bénéfice réalisé par l'acte de 1722. Mais Bückebourg se réserva la faculté de reprendre le bailliage de Lipperode, moyennant l'abandon de la rente de 1250 thalers, dans le cas d'extinction de la branche Alverdissen.

Or, c'est la branche Bückebourg qui est venue à s'éteindre, et celle d'Alverdissen, ayant succédé à Bückebourg, réclame maintenant le bailliage Lipperode *ex pacto et providentia majorum*.

Ici encore, on se demande si les possessions de Lippe de la maison princière de Schaumbourg sont comprises dans un fidéicommiss spécial. Outre les raisons données plus haut pour contester ce fidéicommiss, — abstraction faite, notamment, de ce que l'aliénation d'une ligne à une autre n'est interdite que dans le cas où elle léserait les droits fidéicommissaires d'une troisième ligne d'après le testament de 1597, ce qui n'est pas le cas ici, où les deux lignes contractantes sont seules en présence, — on peut, en tout cas, exciper contre l'action en restitution de ceci :

1^o Que Schaumbourg-Lippe ne peut tantôt invoquer et tantôt repousser le traité de Stadthagen. Elle l'invoque pour revendiquer, comme héritière de Bückebourg, la moitié des bailliages de Schieder et de Blomberg; elle le critique à présent pour obtenir, en sa qualité d'Alverdissen, l'annulation de la cession de Lipperode. Cependant, le traité de 1748 ne peut être à la fois valable et nul, et Schaumbourg-Lippe ne peut profiter de sa double personnalité pour critiquer en l'une de ces qualités ce qu'elle a fait elle-même en l'autre qualité. Comme héritière de Bückebourg, elle est tenue de garantir Detmold contre l'éviction provenant d'un tiers. Il n'est pas possible qu'en sa qualité d'Alverdissen elle provoque elle-même cette éviction.

La défenderesse oppose d'autres exceptions, mais à tort :

2^o Exception de chose jugée tirée de ce que, par arrêt du Conseil de l'Empire du 27 avril 1778, Schaumbourg-Lippe fut déboutée dans sa demande en restitution du bailliage de Lipperode. Mais Detmold n'a pas

prouvé qu'il s'agit alors d'une action pétitoire et que l'arrêt de 1778 fût une décision définitive sur les réclamations mêmes.

3° Exception tirée de la prescription. L'action en révocation de la cession de Lipperode, née le 10 septembre 1777, au moment de l'extinction de la branche Bückebourg, aurait été prescrite le 10 septembre 1807, ou tout au moins, si la prescription a été interrompue par le procès de 1778, le nouveau délai — même de quarante ans — serait expiré le 27 avril 1818, alors que Schaumbourg-Lippe ne renouvela sa réclamation auprès de la Diète fédérale qu'en juin 1818. Mais on peut dire que, depuis 1806, époque à laquelle l'Empire allemand fut dissous, jusqu'à l'établissement de la Confédération germanique, qui organisa de nouveau une procédure austrégale, il n'y avait aucun tribunal devant lequel Schaumbourg-Lippe pût porter son action. Sans doute, pour ce qui concerne la propriété domaniale et privée du bailliage de Lipperode, l'action eût pu être portée, même entre 1806 et 1815, devant les tribunaux territoriaux de Detmold. Mais en agissant ainsi, Schaumbourg-Lippe eût reconnu la souveraineté de Detmold.

4° Exception tirée de l'acceptation par Alverdissen de la rente de 1250 thalers. Cette acceptation et la jouissance de la rente pendant de longues années seraient une confirmation de fait tant de l'acte de 1722 que du traité de 1748. Mais la confirmation de l'acte de 1722 est un fait sans valeur, puisque la cession de Lipperode n'a eu lieu que par le traité de 1748. Quant à la confirmation de ce dernier, elle ne peut nullement résulter de l'acceptation par Alverdissen de la rente de 1250 thalers, puisque cette rente était due en vertu de l'acte de 1722 et n'avait, dès lors, pas besoin d'être basée sur le traité de 1748.

Mais les exceptions 2 à 4 ne sont pas nécessaires, parce que l'action en restitution du bailliage de Lipperode — abstraction faite du point de savoir si en soi elle est bien ou mal fondée — se trouve être dans tous les cas infirmée par l'exception n° 1.

Il reste à examiner une exception commune aux quatre actions.

Exception commune.

La principauté de Lippe-Detmold tire cette exception de l'article 34 de l'acte de la Confédération des États du Rhin du 12 juillet 1806, acte auquel adhèrent les deux parties litigantes, en entrant le 18 avril 1807 dans la dite Confédération.

Cet article 34 est ainsi conçu:

«Les rois, grands-ducs, ducs et princes confédérés renoncent, chacun d'eux pour soi, ses héritiers et successeurs, à tout *droit actuel*, qu'il pourrait avoir ou prétendre sur les possessions des autres membres de la Confédération, telles qu'elles sont et telles qu'elles doivent être en conséquence du présent traité; les droits éventuels de succession demeurant seuls réservés et pour le cas seulement où viendrait à s'éteindre la maison ou la branche qui possède maintenant ou qui

doit, en vertu du présent traité, posséder en souveraineté les territoires, domaines et biens sur lesquels les susdits droits peuvent s'étendre.»

Detmold déclare que les bailliages de Schieder et de Lipperode faisaient, en 1807, partie des possessions d'État de la principauté de Lippe-Detmold et que Schaumbourg-Lippe a renoncé, par son adhésion à l'acte de la Confédération du Rhin, à tous les droits qu'elle aurait pu alors avoir sur les dits bailliages.

Ce qui infirmerait les actions 1 et 4 et, par voie de conséquence, les actions 2 et 3.

Schaumbourg-Lippe estime, au contraire, que l'acte de la Confédération perdit sa force avec la dissolution de la Confédération du Rhin et que, dès lors, l'article 34 n'a plus de valeur.

Mais cette allégation, n'étant appuyée ni sur un traité ultérieur de paix ou d'État, ni sur une résolution de la Confédération germanique, manque de base juridique.

Sans doute la plupart des dispositions de l'acte de la Confédération ont disparu avec la dissolution de la Confédération du Rhin. Mais il n'en résulte nullement que toutes autres obligations stipulées dans cet acte entre les princes contractants aient également cessé d'exister. Tout au moins, les droits qui furent éteints par la renonciation, contenue dans l'article 34, ne pouvaient revivre sans une disposition formelle³.

Manque également de base l'objection que l'article 34 n'est pas applicable dans les rapports des membres de la même ligne. Le texte ne contient aucune restriction à cet égard, et il résulte du passage relatif aux "droits éventuels de succession" qu'on y a eu justement en vue principalement les droits des maisons ou lignes apparentées les unes avec les autres.

Du reste, il s'agit maintenant de savoir:

1^o Quel est l'objet des droits visés par l'article 34. Il y est question seulement du droit qu'un prince confédéré pourrait avoir sur les possessions d'un autre. Mais pour savoir ce qu'on entend par possessions, il faut surtout rechercher de quels droits en général s'occupait l'acte de la Confédération du Rhin.

Cet acte contient des dispositions relatives à des cessions, des échanges et des partages de territoires entre anciens États de l'Empire, devenant membres de la Confédération. Ainsi, l'article 4 parle de la pleine souveraineté dont les membres de la Confédération doivent jouir à la place de la souveraineté relative (*Landeshoheit*) qu'ils avaient jadis d'après le droit allemand; l'article

³ Klüber, *Abhandlungen und Beobachtungen für Geschichtskunde, Staats- und Rechtswissenschaft*, pp. 44, 51 et 89.

26 indique l'objet de la souveraineté et l'article 27 énumère les droits qui doivent rester aux princes médiatisés.

Ces deux dernières dispositions indiquent précisément les droits relatifs aux possessions territoriales, qui faisaient l'objet de la conclusion de la paix et de l'acte de la Confédération. Ce sont, d'après l'article 26, le droit de souveraineté et, d'après l'article 27, «les domaines et les droits seigneuriaux et féodaux non essentiellement inhérents à la souveraineté».

Les droits spécifiés dans l'article 27 ont été réservés aux anciens États de l'Empire qui furent assujettis à d'autres États. Lorsqu'au contraire, un membre confédéré cédait ses biens à un autre, le nouveau possesseur acquérait, en même temps que la souveraineté, la propriété domaniale et les prérogatives seigneuriales. Les droits patrimoniaux et seigneuriaux n'étaient séparés de la souveraineté du nouveau possesseur qu'au profit des princes médiatisés; mais dans la cession faite de l'un à l'autre, entre deux membres confédérés souverains, il n'y avait pas lieu d'opérer cette séparation et de laisser l'un d'eux exercer, sur le territoire soumis à la souveraineté d'un autre, les droits patrimoniaux et seigneuriaux.

De même, dans l'article 34, où l'on suppose deux souverains l'un en présence de l'autre, il faut entendre par possession d'un membre confédéré non seulement la possession souveraine, mais aussi la possession domaniale, en tant que cette dernière revient au souverain en sa qualité de souverain et non en vertu d'un titre particulier, indépendant de la possession d'État. C'est pourquoi, dans la même hypothèse, les droits auxquels il est renoncé par l'article 34 sont tous les droits d'un souverain sur la possession d'État d'un autre, y compris la domanialité.

Aussi, relativement à la renonciation stipulée dans l'article 34, le souverain, auteur de cette renonciation, apparaît-il dans sa qualité d'État: les droits de nature privée qu'il aurait, indépendamment de sa qualité d'État, sur les domaines d'un autre souverain, ne seraient pas compris dans la dite renonciation.

Mais lorsqu'il s'agit des droits d'un souverain comme tel sur les possessions d'État d'un autre, il importe peu que ces droits se rapportent au contenu de la puissance d'État dans son ensemble, y compris les domaines, ou seulement à certaines facultés souveraines particulières. Dans les deux cas, le droit entier sur la possession d'État étrangère est bien l'objet de la renonciation dont parle l'article 34, et, dans l'espèce, si Schaumbourg-Lippe réclame les deux bailliages de Schieder et de Lipperode avec les droits de suprématie, qui forment maintenant, d'après sa prétention, la souveraineté, la renonciation de l'article 34 est censée porter sur l'ensemble des droits souverains et domaniaux qui, sur ces dits bailliages, sont contestés à Detmold. Il reste à savoir:

2° Dans quelles hypothèses la renonciation dont il s'agit a pu se produire.

L'article 34 parle du «droit actuel» par opposition aux «droits éventuels de succession». Et la renonciation ne porte que sur les droits de la première catégorie. Or, le droit actuel est celui que le renonçant a déjà réellement et non celui qui lui appartiendra à l'avenir par succession. Et pour qu'un tel droit fût compris dans la renonciation, il fallait qu'il se trouvât en la possession d'un autre membre confédéré au moment de son adhésion à l'acte de la Confédération du Rhin.

Ainsi, en 1806, chaque membre entre dans la Confédération avec ses possessions actuelles, «les possessions telles qu'elles sont». Il n'y a pas à rechercher si les possessions d'un prince confédéré étaient ou non contestées par un autre, car autrement la paix eût été compromise. Que tel soit bien le sens de l'article 34, cela ressort de ce que même les droits de succession qu'un prince pourrait réclamer sur les possessions d'un autre n'étaient réservés que pour le cas où «viendrait à s'éteindre la maison ou la branche qui possède maintenant». D'où il résulte que les droits sur des successions déjà ouvertes au moment de la fondation de la Confédération n'auraient pu désormais être exercés contre la maison en possession.

Dès lors, l'exception tirée de l'article 34 contre Schaumbourg-Lippe est fondée. Il n'en serait autrement que dans le cas où, la question de souveraineté étant tranchée en faveur de Detmold, Detmold serait considérée comme souveraine des deux bailliages de Schieder et de Lipperode, et où l'action de Schaumbourg-Lippe ne tendrait qu'à la propriété patrimoniale des deux bailliages, indépendamment de toute idée de possession d'État.

Par conséquent, il n'y a pas lieu de connaître des contre-réclamations éventuelles de Detmold, puisque cette dernière, de son propre aveu, n'a fait que les indiquer provisoirement sans les faire valoir directement par une action reconventionnelle formelle.

Quant aux dépens, la défenderesse, ayant échoué dans l'exception d'incompétence, doit en supporter un quart et la demanderesse, succombant au fond, en supportera les trois autres quarts.

Pour copie conforme des motifs de la sentence.

Mannheim, le 25 janvier 1839.

Le greffier de la Cour suprême d'appel du Grand-Duché de Bade.

HÜBSCH.

SENTENCE AUSTRÉGALE DANS L'AFFAIRE DE LA MAISON
PRINCIÈRE DE LIPPE-DETMOLD, CONTRE LA MAISON
PRINCIÈRE DE SCHAUMBOURG-LIPPE RELATIVEMENT À LA
SOUVERAINETÉ SUR LE BAILLIAGE DE BLOMBERG ET À UNE
DEMANDE D'INDEMNITÉ, DÉCISION DU 25 JANVIER 1839

AUSTREGAL JUDGMENT IN THE DISPUTE BETWEEN THE
PRINCELY HOUSES OF LIPPE-DETMOLD AND SCHAUMBOURG-
LIPPE IN RESPECT OF THE SOVEREIGNTY OVER BLOMBERG
BAILIWICK AND A COMPENSATION CLAIM, DECISION OF 25
JANUARY 1839

Souveraineté – L'État souverain est celui qui a le droit de réclamer hommage, le droit de représentation extérieure, l'exercice du pouvoir législatif avec le droit de convoquer les Assemblées locales, le droit de Haute Justice, le droit d'administration religieuse, l'administration militaire et le droit de lever les impôts d'Empire et de Province – ces droits souverains particuliers forment selon le droit germanique la souveraineté relative, qui a été transformée en souveraineté absolue lors de la création de la Confédération du Rhin.

Bonne foi – Croyant être le souverain, la maison Schaumbourg-Lippe a prélevé les impôts pendant des années en toute bonne foi, ce qui est confirmé par le fait que la maison Detmold l'a laissée en possession des impôts et ne lui a pas demandé de modification à cet égard. Elle ne doit donc pas les rembourser au souverain légitime – elle a cessé d'être de bonne foi le jour où Detmold a formé son action, et elle est donc devenue comptable des impôts perçus.

Sovereignty – A sovereign State is one with the right to demand homage, the right to external representation, the exercise of legislative power through the convocation of local Assemblies, the right to higher justice, the right to religious administration, the right to military administration, and the right to levy taxes for the Empire and the Province – these sovereign rights create relative sovereignty under German law which was transformed into absolute sovereignty with the creation of the Confederation of the Rhine.

Good faith – Since the House of Schaumbourg-Lippe collected taxes with a good faith belief in its sovereign rights, and its right to tax was not contested by the House of Detmold, it is not required to reimburse legitimate sovereign – it ceased to be in good faith when Detmold brought its action, and is therefore responsible for subsequent taxes collected.

* * * * *

2. *Sentence dans l'affaire de la maison princière de Lippe-Detmold,
demanderesse reconventionnelle,
contre*

*la maison princière de Schaumbourg-Lippe, défenderesse
reconventionnelle, relativement à la souveraineté sur le bailliage de
Blomberg et à une demande d'indemnité.*

Attendu qu'après préalable tentative de conciliation des maisons
princières litigantes, cette affaire a été soumise par décision de la haute Diète

germanique du 5 août 1830 au jugement de la Cour suprême d'appel du Grand-Duché de Bade, statuant comme tribunal austrégale;

La dite Cour, après avoir mûrement examiné l'affaire conformément aux lois, décide au nom de la haute Diète:

1° que la souveraineté sur le bailliage héréditaire de Blomberg est reconnue à la maison princière de Lippe-Detmold avec les droits qui, d'après le droit public de la Confédération germanique, découlent de la souveraineté;

2° que la maison princière de Schaumbourg-Lippe doit restituer à la maison princière de Lippe-Detmold la moitié seigneuriale des tributs levés sur les juifs depuis le 5 octobre 1831 dans le bailliage de Blomberg;

3° qu'elle doit également lui restituer les impôts ordinaires perçus dans le bailliage de Blomberg depuis le 5 octobre 1831 et les impôts indirects qui auraient été levés depuis ce même jour, déduction faite de ce qui en a été versé par Schaumbourg-Lippe à la Caisse locale de Detmold ou de ce qu'elle a employé, au lieu et place de la dite Caisse, pour dépenses de perception des impôts;

4° moyennant quoi, la maison princière de Lippe-Detmold est déboutée de sa demande d'indemnité pour les tributs sur les juifs et les impôts ordinaires et indirects levés avant le 5 octobre 1831;

5° que les dépens de la procédure judiciaire seront supportés dans la proportion de trois quarts par la maison princière de Schaumbourg-Lippe et d'un quart par la maison princière de Lippe-Detmold.

En foi de quoi, la présente sentence a été rendue sur l'ordre de la Cour suprême d'appel du Grand-Duché de Bade et revêtue du grand sceau de la Cour.

Fait à Mannheim le 22 décembre 1838.

Cour suprême d'appel du Grand-Duché de Bade.

Baron de STENGEL. — MINET.
HÜBSCH.

Motifs de la sentence [Résumé].

Le bailliage de Blomberg est un des bailliages échus au fils puîné Otton, fondateur de la ligne Brake, en exécution du testament de Simon VI de 1597.

Après l'extinction de la ligne Brake, ce bailliage parvint avec celui de Schieder, en vertu du traité de 1748, à la branche Bückebourg, et, à l'extinction de cette dernière, en 1777, l'acte possessoire de 1789 attribua le bailliage de Blomberg à la branche Alverdissen et celui de Schieder à la ligne Detmold.

Mais Detmold prétend avoir aussi la souveraineté sur le bailliage de Blomberg et réclame une indemnité pour les dommages qui lui ont été causés du chef de la possession de ce bailliage par la maison princière de Schaumbourg-Lippe.

Son action tend spécialement:

1° A ce que la souveraineté sur le bailliage de Blomberg soit reconnue à Lippe-Detmold et, par conséquent, que Schaumbourg-Lippe soit condamnée à s'abstenir à l'avenir de tout empiétement et à n'apporter aucune entrave à l'exercice de la souveraineté par Lippe-Detmold; et

2° A ce que Schaumbourg-Lippe soit condamnée à indemniser Lippe-Detmold pour tous les dommages qu'elle lui a causés: spécialement, à rembourser les impôts illégalement perçus, c'est-à-dire à restituer l'impôt foncier ou la contribution à partir de 1737, et en tout cas à partir de 1807, à rembourser, en outre, les autres impôts perçus dans le bailliage de Blomberg à partir de 1807 et dont la recette sera établie par la production des comptes y relatifs et du registre de levée et de contrôle et à rembourser enfin la moitié retenue du tribut levé sur les juifs dans le bailliage de Blomberg, le tout avec intérêts en cas de retard.

Bien que possédé par Schaumbourg-Lippe depuis 1789, le bailliage de Blomberg ne releva d'elle d'une manière incontestée que pour ce qui concerne les droits domaniaux et patrimoniaux, tandis que la souveraineté en fut réclamée par Lippe-Detmold.

Relativement à cette souveraineté, il a été conclu entre les deux parties le 5 juillet 1812 un *intermistikum* d'après lequel le droit de légiférer était suspendu tandis que les autres droits souverains devaient être exercés les uns par Lippe-Detmold et les autres par Schaumbourg-Lippe.

Avant d'examiner la réclamation de Detmold relative à la souveraineté, il convient de parler d'abord de la:

Question de compétence.

Le 8 juin 1818, Schaumbourg-Lippe demandait à la Diète de soumettre la contestation relative à la succession Brake au jugement d'un tribunal austréal. Une Commission de médiation fut aussitôt instituée. Devant elle, le 8 septembre 1819, répondant sommairement à la plainte de Schaumbourg-Lippe, Lippe-Detmold mit en avant le différend sur la souveraineté, en observant qu'il était préjudiciel par rapport à la compétence de la Confédération sur la question de la succession.

Le 3 avril 1827, devant la Commission, reconstituée par décision de la Diète du 8 mars 1827, la maison Schaumbourg-Lippe présenta, à la suite de la réponse de Detmold, des propositions d'arrangement et la Commission prépara les bases d'une transaction portant sur le différend, tant relatif à la succession Brake que relatif à la souveraineté. Mais aucun arrangement ne

s'en étant suivi, la Diète décida, le 27 mai 1829, la nomination d'un tribunal austrégale.

Au cours des négociations, Schaumbourg-Lippe présentait à la Diète contre Detmold une plainte basée sur ce que Detmold s'arrogeait l'exercice des droits de souveraineté dans les limites territoriales de Blomberg par l'établissement arbitraire de pieux, de poteaux indicateurs et d'un tarif de chaussée et sur ce que, à l'occasion d'un procès, relatif à la comparution d'un sujet de Detmold devant le bailliage de Blomberg et à la saisie de ce dernier, elle avait retenu le terme de Noël 1828 des droits judiciaires dus à Schaumbourg-Lippe, en vertu d'anciens arrangements héréditaires.

La Diète communiqua cette plainte, avec une demande d'explications, au gouvernement de Lippe-Detmold, qui paya les droits de justice arriérés, mais essaya de réfuter l'autre plainte et demanda que la Diète renvoyât devant le tribunal austrégale non seulement cette plainte, mais toute la question de la souveraineté de Blomberg. Le 27 mai 1830, il fut décidé que la plainte sur les droits de justice et celle sur les pieux, poteaux indicateurs et tarif de chaussée seraient renvoyées au tribunal austrégale déjà saisi du différend sur la succession Brake.

Il en résulta la nomination de cette Cour en qualité de tribunal austrégale. Devant elle, Detmold porta son action principale en revendication de la souveraineté en général avec les deux réclamations sus-mentionnées et subsidiairement, en tant que l'action principale ne serait pas déclarée recevable, présenta la même demande comme action reconventionnelle, renonçant dans ce cas à l'exception d'incompétence précédemment présentée par elle contre l'action de Schaumbourg-Lippe.

Schaumbourg-Lippe, au contraire, a contesté la recevabilité de l'action sur la souveraineté, comme action principale, indépendante de l'action sur la succession, parce que Detmold n'a pas préalablement soumis cette affaire à la Diète, ainsi que le veut la procédure fédérale, et que la Diète ne l'a pas renvoyée devant le tribunal austrégale.

Cependant Schaumbourg-Lippe a reconnu la compétence du tribunal dans sa réplique et dans sa duplique, pourvu que l'action sur la souveraineté fût considérée comme action reconventionnelle, à raison de sa connexité avec l'action sur la succession, et qu'il fût dès lors en même temps statué sur les deux actions.

Ainsi le tribunal connaîtra des deux actions, de l'entente même des deux parties. Quant au nom de l'action (principale ou reconventionnelle), il importe peu, car ce n'est que faute de compétence sur l'action successorale qu'il ne pourrait être question d'une action reconventionnelle.

D'ailleurs, sans avoir égard à l'entente des parties, et sans examiner si l'action sur la souveraineté a déjà été, comme action principale, soumise à la Diète, l'admissibilité de cette action reconventionnelle serait acquise en vertu de la résolution de la Diète du 3 août 1820 (art. 3): texte qui prévoit

l'admission d'une action reconventionnelle lorsqu'un lien essentiel existe entre elle et l'action principale, ce qui sans doute est le cas ici, puisque les deux actions reposent en grande partie sur les mêmes rapports de droit et que notamment les dispositions paternelles, les arrangements et arrêts, qui sont à examiner pour la solution de l'affaire successorale, le sont aussi pour celle de la question de souveraineté.

Questions de fond.

1^{re} action. — Lippe-Detmold prétend avoir la souveraineté sur le bailliage de Blomberg, parce que jusqu'en 1806 elle aurait eu sur lui la souveraineté relative (*Landeshoheit*) dans le sens du droit allemand. L'acte de la Confédération du Rhin a transformé l'ancienne souveraineté limitée en souveraineté absolue. Cette transformation s'opère au profit des anciens seigneurs. Dans le cas où un seigneur aurait eu des droits patrimoniaux sur le territoire d'un autre seigneur, et sous la souveraineté relative de celui-ci, c'est ce dernier qui devient souverain absolu du territoire.

Detmold prétend que les choses se sont ainsi passées pour elle sur Blomberg ainsi que sur les autres territoires échus aux fils de Lippe. Sur eux, la souveraineté serait restée à la maison de Lippe-Detmold par droit d'aînesse, alors même que les puînés y auraient eu des droits domaniaux.

A cet effet, Detmold essaye de prouver que, jusqu'à la fondation de la Confédération du Rhin, elle a exercé sur Blomberg la souveraineté relative, spécialement:

- a) d'après les lois et traités de famille en général;
- b) d'après la nomenclature des droits souverains particuliers visés par eux et exercés par elle.

A. — *Lois et traités en général.* Ce sont:

1° Le *pactum vel privilegium unionis* de 1368, confirmé par l'Empereur Charles V en 1521, d'après lequel Simon III donnait à ses chevaliers, serfs, bourgeois et autres habitants du comté l'assurance qu'ils n'auraient à l'avenir qu'un seul maître.

- a) Schaumbourg-Lippe conteste l'authenticité du document de 1368 dont l'original est illisible, mais cette authenticité est confirmée par d'autres documents postérieurs;
- b) Schaumbourg-Lippe objecte, quant au dispositif de l'acte, que, s'il vise bien l'indivisibilité de la seigneurie, il n'établit aucun droit de primogéniture, mais la question de savoir à qui appartenait la souveraineté indivise à une époque où la maison était unie n'a, ici, aucune importance;
- c) Schaumbourg-Lippe prétend que le *pactum unionis* n'est jamais entré en vigueur et que, non observé, il aurait été infirmé, mais les

exemples donnés à l'appui ne sont pas probants et l'on n'a pas prouvé que cette souveraineté de la maison de Lippe ait jamais été fractionnée.

2° L'ordonnance de primogéniture confirmée par l'Empereur Rudolph II en 1593 et par l'Empereur Ferdinand II en 1626.

Schaumbourg-Lippe remarque que ces confirmations impériales n'ont aucune valeur, parce qu'on avait demandé à l'Empereur de confirmer un droit résultant de prétendues coutumes anciennes qui n'avaient pas existé, mais ce dernier fait importe peu, la confirmation ayant été donnée à l'ordonnance, elle vaut par elle seule comme droit nouveau.

3° Le testament de Simon VI de 1597, qui a, contrairement à l'ordonnance sur la primogéniture, attribué complètement certains bailliages aux fils du testateur; cependant il est reconnu par tous les intéressés que le testament est valable, et que l'ordonnance ne continue à s'appliquer que là où le testateur ne s'explique pas nettement; de plus, le testament reconnaît à l'aîné seul la qualité de maître, à titre de successeur de Simon VI, avec le droit de souveraineté sur toutes les possessions, même sur celles dévolues aux puînés.

4° Les arrangements entre frères de 1614, 1616, 1621, pour l'exécution du testament paternel, où l'aîné est désigné comme seigneur régnant et les puînés comme seigneurs copartageants et héréditaires et où il est reconnu que l'aîné a un droit supérieur sur toutes les possessions.

5° L'arrangement de famille entre Detmold et la branche Brake de 1661, qui reconnaît à l'aîné la *superioritas territorialis*: dans l'arrangement de 1721, Alverdissen reconnu formellement le droit de primogéniture. Dans l'arrangement de 1748, la ligne Alverdissen est désignée comme ligne apanagère, le seigneur de Schaumbourg-Lippe comme un seigneur héréditaire, et le comte de Lippe-Detmold comme un seigneur régnant.

De tout cela il résulte sans aucun doute que la ligne aînée avait avant 1806 la souveraineté relative (*Landeshoheit*), en général, même sur les possessions héréditaires.

B. — *Droits souverains particuliers*. Alors même qu'il ne résulterait pas des documents précités que Lippe-Detmold avait la souveraineté générale sur toutes les possessions, il convient d'examiner si les droits particuliers accordés à Lippe-Detmold et exercés par elle n'ont pas le caractère souverain. Ce sont:

1° Le droit de réclamer l'hommage résultant sinon du testament de 1597, du moins d'autres actes ultérieurs, notamment de la reconnaissance du comte Otton, fondateur de la branche Brake, alors possesseur du bailliage de Blomberg, dans le recès de 1655 (art. 1);

2° Le droit de représentation extérieure, qui donnait à Lippe-Detmold le droit de parler à la Diète de l'Empire au nom de tous les bailliages héréditaires;

3° L'exercice du pouvoir législatif avec convocation des Assemblées locales, résultant de l'article 6 du testament de 1597 et du recès de 1655 (art. 5); le fait que les ordonnances, notamment en matière de police, étaient, de même, publiées au nom du seigneur régnant sans que le consentement des seigneurs héréditaires fût nécessaire;

4° Le droit de haute justice, se manifestant dans la direction de la Cour d'appel et dans la formule des jugements dans les bailliages, formule qui contenait non seulement le nom du seigneur justicier, mais aussi celui du seigneur régnant;

5° Le droit d'administration religieuse, quoique ne résultant pas du testament, mais confirmé par les arrangements avec les frères et par d'autres actes postérieurs;

6° L'administration militaire également donnée par le testament de 1597 (art. 7) à l'aîné en sa qualité de seigneur régnant, confirmée et reconnue par les actes ultérieurs, notamment par le recès de 1655 (art. 18, n° 2);

7° Le droit de lever des impôts pour l'Empire ou pour la province, appartenant également, en vertu de l'article 7 du testament, à l'aîné. Le testament ne parlait pas d'autres impôts. Il semble toutefois en résulter que le droit de lever certains impôts locaux appartenait à tous les fils; et cette solution fut confirmée par l'arrangement de 1614.

Brake eut donc le droit de lever des impôts locaux, et après l'extinction de cette branche, lorsque la ligne de Bückebourg reçut la moitié de la succession, l'arrêt du Conseil d'appel de l'Empire du 12 novembre 1739 (art. 5) lui reconnut la jouissance de la contribution ordinaire, en déclarant libre au comte de Lippe-Detmold le *possessorium ordinarium et petitorium*; cependant, il était dit dans le traité de Stadthagen de 1748 (art. 5) que Schaumbourg-Lippe était maintenue dans la jouissance de la contribution ordinaire qu'elle avait eue jusque-là; mais, de son côté, Schaumbourg-Lippe prenait certains engagements vis-à-vis de Detmold.

De tout ce qui précède, il résulte:

- a) que Detmold a levé les impôts d'Empire et de province même sur les bailliages héréditaires représentés par elle dans l'Empire et dans la province;
- b) qu'elle a levé particulièrement ces impôts pour faits de guerre;
- c) qu'en revanche, Schaumbourg-Lippe a levé dans ses bailliages, pour son propre compte, les impôts locaux ordinaires et la contribution militaire;

d) que cette perception, approuvée par Detmold, contestée par les États, a fait l'objet d'un procès que les tribunaux de l'Empire n'ont jamais tranché au pétitoire;

e) que Schaumbourg-Lippe promet d'ailleurs de contribuer, par le produit des impôts perçus dans ses bailliages, à toutes les charges du pays en général;

f) enfin, que Schaumbourg-Lippe paya, à cet effet, une somme annuelle convenue.

Tous ces droits donnaient incontestablement à Lippe-Detmold la souveraineté relative, qui, en 1806, fut transformée en souveraineté proprement dite.

A cette conclusion, Schaumbourg-Lippe oppose la double exception tirée de la prescription et de la renonciation de Lippe-Detmold à ces droits.

1° Quant à la prescription, il ne peut s'agir que d'une prescription acquisitive et non d'une prescription libératoire. Celui qui s'en prévaut ne peut se plaindre du non exercice des droits de son adversaire qu'en tant qu'il a lui-même exercé ces mêmes droits.

Schaumbourg-Lippe devrait donc prouver que, durant trente ans, depuis son entrée dans la Confédération du Rhin, Lippe-Detmold n'a pas exercé ses droits, mais qu'elle-même les a exercés à sa place, ce qui n'a pas été prouvé pour un seul droit particulier de souveraineté.

2° Quant à la renonciation, Schaumbourg-Lippe prétend qu'étant en possession au moment de son entrée dans la Confédération du Rhin, elle a acquis sur ces possessions la souveraineté définitive, parce qu'en vertu de l'article 34 de l'acte, Lippe-Detmold a dû renoncer envers le possesseur à toute prétention contraire.

Mais Detmold était alors justement en possession des droits qui formaient la souveraineté relative, et l'article 34 ne peut avoir aucune application à l'encontre du *statu quo*.

Detmold est donc devenue, en vertu de l'acte de la Confédération du Rhin, souveraine du bailliage de Blomberg.

La première réclamation est fondée. Dès lors les droits patrimoniaux ou seigneuriaux inférieurs de Schaumbourg-Lippe demeurent sous la souveraineté de Detmold.

2° *action*. — Elle s'analyse ainsi:

1° Detmold réclame le remboursement du produit de la contribution ordinaire ou impôt foncier depuis 1737, ou éventuellement depuis l'adhésion à la Confédération du Rhin, en 1807.

Pour la période de 1737 à 1807, la réclamation n'est faite qu'au nom de la Caisse locale, puisque, par le traité de 1748, Detmold avait abandonné cet impôt à la branche Bückebourg, et n'a réservé que les droits des États, dont les intérêts sont aujourd'hui représentés par elle.

Mais à ce point de vue, il n'a été nulle part soutenu que Schaumbourg-Lippe eût arbitrairement levé des impôts non consentis par les États. Il s'agit seulement de savoir si elle était autorisée à percevoir pour elle, sur le bailliage de Blomberg, les impôts légaux, sauf à donner une partie de leur produit pour les charges générales du pays. Or, ce droit ne va nullement de soi, car même les véritables souverains n'avaient jadis le droit de lever des impôts — autres que ceux qui devaient faire face aux charges de l'Empire et de la province — sans le consentement des États, que s'ils y étaient autorisés par les lois impériales, par un titre juridique ou par la coutume. Si donc il s'agissait actuellement de la question de savoir si Schaumbourg-Lippe a définitivement le droit de lever des impôts, il lui faudrait établir qu'elle a des titres particuliers, ou qu'elle peut invoquer la coutume. Mais puisqu'il s'agit d'impôts déjà prélevés, et que le prélèvement de ces impôts ne pouvait à l'origine reposer que sur une erreur — s'il n'existait pas un vrai fondement juridique ou un consentement spontané — et que ce fait a été provisoirement maintenu, il s'en suit que la demanderesse, qui réclame ce qui a été perçu illégalement, doit prouver que Brake, et après elle la branche Schaumbourg-Lippe, n'avait aucun titre juridique particulier, et qu'aucune coutume ne l'autorisait à lever l'impôt en question. Mais cette preuve n'a pas été fournie. Donc, la répétition pour le compte de la Caisse régionale n'est pas fondée.

Pour ce qui est de la période postérieure à 1807, les deux parties avaient, par l'acte de la Confédération (art. 26 et 34) le «droit d'impôt», mais Schaumbourg-Lippe avait, par l'article 34, renoncé à tous les droits souverains, alors même qu'elle les aurait précédemment exercés. Seule Lippe-Detmold avait ce droit, en sa qualité de souveraine. Mais il ne s'en suit pas qu'à compter de cette date, Schaumbourg-Lippe ait été *ipso jure* de mauvaise foi. Dans la croyance que, d'après l'acte de 1806, elle avait la souveraineté sur Blomberg, elle s'est crue autorisée à percevoir les impôts, comme attribut de la souveraineté. Sa bonne foi est d'autant moins contestable que Detmold elle-même la laissa tranquillement en possession des impôts; qu'elle n'admit aucune modification à cet égard par le *modus vivendi* de 1812, et qu'elle n'établit même pas que jamais elle ait demandé une modification de ce genre. Tant que Schaumbourg-Lippe fut de bonne foi, elle n'est pas obligée à restitution. Elle n'a cessé d'être de bonne foi que du jour où Detmold a formé son action, c'est-à-dire à partir du 5 octobre 1831. A partir de ce jour, elle a été de mauvaise foi et elle est devenue comptable des impôts, déduction faite de la somme payée à la Caisse de Detmold, pour charges publiques, et des sommes qu'elle a appliquées à des dépenses d'Etat au lieu et place de ladite Caisse.

2° Ce qui a été dit des impôts ordinaires depuis l'adhésion à la Confédération du Rhin, peut se dire des impôts indirects levés par Schaumbourg-Lippe à Blomberg.

3° Mais pour ce qui concerne le tribut des juifs, l'adhésion à la Confédération du Rhin n'entre pas en ligne de compte. Ce tribut n'avait aucun lien nécessaire avec la souveraineté.

La plainte trouve son fondement dans le § 4 du traité de Stadthagen de 1748, qui dispose que la moitié du tribut appartiendrait au seigneur régnant et l'autre moitié au seigneur héréditaire. Et ce texte a été exécuté jusqu'à l'extinction de la ligne de Bückebourg en 1777. En 1789, les bailliages de Schieder et de Blomberg furent partagés, et Schaumbourg-Lippe reçut le bailliage de Blomberg. En 1793, il y eut un arrangement pour les profits tirés par Schaumbourg-Lippe jusqu'en 1789. Depuis 1789, chaque partie a possédé son lot, et Schaumbourg-Lippe a perçu le tribut à Blomberg sans en donner la moitié à Lippe-Detmold. Schaumbourg-Lippe prétend y avoir été autorisée, malgré le traité de 1748, parce que, d'après le partage de 1789, dans lequel elle reçut le bailliage de Blomberg, chaque partie obtint le tribut avec les autres revenus de son lot.

Toutefois, en se partageant les possessions de Bückebourg, chaque partie recevait son lot avec les droits, avec lesquels Bückebourg l'avait possédé: or, d'après le traité de 1748, ces droits ne comprenaient que la moitié du tribut, l'autre moitié appartenant à la branche aînée; ainsi, la moitié du tribut sur le bailliage de Blomberg continuait à appartenir, même après 1789, à la maison princière de Detmold.

Toutefois, on doit admettre que Schaumbourg-Lippe perçut aussi ce tribut de bonne foi jusqu'à l'introduction de l'action, parce que, aucune réserve particulière sur le partage du tribut, stipulé en 1748, n'ayant été faite en 1789, Schaumbourg-Lippe pouvait se croire autorisée à percevoir ce tribut en entier, sans partage avec Detmold, dans son bailliage de Blomberg, et cela d'autant plus que Detmold, à partir de ce moment, ne réclama jamais sa part.

Donc, même pour ce tribut, la maison de Schaumbourg-Lippe n'est tenue à indemnité qu'à partir du 5 octobre 1831.

Il en résulte que Lippe-Detmold obtient gain de cause dans sa principale réclamation, sur la souveraineté, et succombe dans la majeure partie de ses réclamations sur l'indemnité: aussi doit-elle supporter le quart des dépens, les trois autres quarts restant à la charge de Schaumbourg-Lippe.

Pour copie conforme des motifs de la sentence

Mannheim, le 25 janvier 1839.

Le greffier de la Cour suprême d'appel du Grand-Duché de Bade,

HÜBSCH.

PART VII

**Disagreements between the United States and the
United Kingdom relating to the Treaty extending the
right of fishing, signed at Washington, 5 June 1854**

Decisions of 8 April 1858

**Contentieux entre les États-Unis et le Royaume-Uni,
relatif au Traité prolongeant le droit de pêche
signé à Washington le 5 juin 1854**

Décisions du 8 avril 1858

DISAGREEMENTS BETWEEN THE UNITED STATES AND THE UNITED KINGDOM, RELATING TO THE TREATY EXTENDING THE RIGHT OF FISHING, SIGNED AT WASHINGTON ON 5 JUNE 1854, DECISION OF 8 APRIL 1858*

CONTENTIEUX ENTRE LES ÉTATS-UNIS ET LE ROYAUME-UNI, RELATIF AU TRAITÉ PROLONGEANT LE DROIT DE PÊCHE SIGNÉ À WASHINGTON LE 5 JUIN 1854, DÉCISION DU 8 AVRIL 1858**

Treaty interpretation – Reciprocity Treaty of 1854 (Treaty extending the right of fishing, signed at Washington, 5 June 1854) – Joint Fishery Commission – Awards of the Umpire of 8 April 1858.

History of dispute over fishing rights – Treaty of 1783 between Great Britain and the United States – omission of issue from Treaty of Ghent – Convention of 20 October 1818.

Effect of armed conflict on treaties – abrogation of treaty provision following the War of 1814.

Treaty interpretation – duty of Umpire to look at spirit and object of the Treaty, the causes of difficulty it intended to remove and the mode of removal proposed – intent of the parties – unnecessary to construe terms of a grant in a treaty against grantor where the contracting parties are exchanging equal advantages.

Treaty interpretation – terminology – determining what constitutes a river – no limitation on size, navigability, salinity of water, height of bank, water level – existence of bars at mouth of river – value of past practice, acts of legislature – reliance on common use of language to determine intention of contracting parties.

Determining what constitutes a river – a bay or harbour can constitute the mouth of a river when it is formed by the escape of waters from the interior.

Interprétation des traités – Traité de réciprocité de 1854 (traité prolongeant les droits de pêche, signé à Washington le 5 juin 1854) – Commission mixte de pêche – Sentence arbitrale du 8 avril 1858.

Historique du conflit sur les droits de pêche – Traité de 1783 entre la Grande-Bretagne et les États-Unis – omission de la question dans le Traité de Gand – Convention du 20 octobre 1818.

Effet des conflits armés sur les traités – abrogation des dispositions du traité consécutive à la guerre de 1814.

* Reprinted from H. La Fontaine, *Pacific International: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Berne, 1902, Imprimerie Stampelli & CIE, p.437; and from John Bassett Moore, *International Arbitrations to which the United States has been a party*, vol. I, Washington 1898, Government Printing Office, p. 459.

** Reproduit de H. La Fontaine, *Pacific International: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Berne, 1902, Imprimerie Stampelli & CIE, p.437; et de John Bassett Moore, *International Arbitrations to which the United States have been a party*, vol. I, Washington 1898, Government Printing Office, p. 459.

Interprétation des traités – obligation de l'arbitre de se référer à l'esprit et à l'objet du traité, aux causes des problèmes que celui-ci entend résoudre et à la solution proposée – intention des Parties – inutilité d'interpréter les dispositions d'un traité relatives à une concession en défaveur du donateur lorsque les parties contractantes procèdent à un échange équitable.

Interprétation des traités – terminologie – détermination de ce qu'est un fleuve – aucune limitation relative à la taille, la navigabilité, la salinité de l'eau, la hauteur des rives ou le niveau d'eau – présence de bancs de sable à l'embouchure du fleuve – valeur des pratiques antérieures, actes législatifs – recours au sens commun des termes afin de déterminer l'intention des Parties contractantes.

Détermination des éléments constitutifs d'un fleuve – une baie ou un port peuvent constituer l'embouchure d'un fleuve lorsqu'ils sont constitués par un cours d'eau évacuant leurs eaux.

* * * * *

**Treaty extending the right of fishing, signed at Washington,
June 5, 1854. (Extract)**

The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain to avoid further misunderstanding between their respective citizens and subjects in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I of a convention between the United States and Great Britain signed at London on the 20th day of October 1818; and being also desirous to regulate the commerce and navigation between their respective territories and people, and more especially between Her Majesty's possessions in North America and the United States, in such manner as to render the same reciprocally beneficial and satisfactory, have, respectively, named Plenipotentiaries to confer and agree thereupon, that is to say:

The President of the United States of America, William M. Marcy, Secretary of State of the United States, and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, James, Earl of Elgin and Kincardine, Lord Bruce and Elgin, a peer of the United Kingdom, Knight of the most ancient and most noble Order of the Thistle and Governor General in and over all Her Britannic Majesty's provinces on the continent of North America, and in and over the Island of Prince Edward;

Who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

ARTICLE I. It is agreed by the high contracting parties that in addition to the liberty secured to the United States fishermen by the above-mentioned convention of October 20, 1818, of taking, curing, and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind, except shell-fish, on the sea-coasts and shores, and in the bays, harbours, and creeks of Canada, New-

Brunswick, Nova Scotia, Prince Edward's Island, and of the several islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those colonies and the islands thereof, and also upon the Magdalen Islands, for the purpose of drying their nets and curing their fish: provided that, in so doing, they do not interfere with the rights of private property, or with British fishermen, in the peaceable use of any part of the said coast in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery, and that the salmon and shad fisheries, and all fisheries in rivers and the mouths of rivers, are hereby reserved exclusively for British fishermen.

And it is further agreed that, in order to prevent or settle any disputes as to the places to which the reservation of exclusive right to British fishermen contained in this article, and that of fishermen of the United States contained in the next succeeding article, apply, each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a Commissioner. The said Commissioners, before proceeding to any business, shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide, to the best of their judgment, and according to justice and equity, without fear, favor, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under this and the next succeeding article, and such declaration shall be entered on the record of their proceedings.

The Commissioners shall name some third person to act as an Arbitrator or Umpire in any case or cases on which they may themselves differ in opinion. If they should not be able to agree upon the name of such third person, they shall each name a person and it shall be determined by lot which of the two persons so named shall be the Arbitrator or Umpire in cases of difference or disagreement between the Commissioners. The person so to be chosen to be Arbitrator or Umpire shall, before proceeding to act as such in any case, make and subscribe a solemn declaration in a form similar to that which shall already have been made and subscribed by the Commissioners, which shall be entered on the record of their proceedings.

In the event of the death, absence, or incapacity of either of the Commissioners, or of the Arbitrator or Umpire, or of their or his omitting, declining, or ceasing, to act as such Commissioner, Arbitrator, or Umpire, in the place and stead of the person so originally appointed or named as aforesaid, and shall make and subscribe such declaration as aforesaid.

Such Commissioners shall proceed to examine the coasts of the North American provinces and of the United States, embraced within the provisions of the first and second articles of this treaty, and shall designate the places reserved by the said articles from the common right of fishing therein.

The decision of the Commissioners and of the Arbitrator or Umpire shall be given in writing in each case, and shall be signed by them respectively. The

high contracting parties hereby solemnly engage to consider the decision of the Commissioners conjointly or of the Arbitrator or Umpire, as the case may be, as absolutely final and conclusive in each case decided upon by them or him respectively.

ARTICLE II. It is agreed by the high contracting parties that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind, except shell-fish, on the eastern sea coasts and shores of the United States north of the 36th parallel of north latitude, and on the shores of the several islands thereunto adjacent, and in the bays, harbours, and creeks of the said sea coast and shores of the United States and of the said islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States and of the islands aforesaid, for the purpose of drying their nets and curing their fish.

Provided, that in so doing, they do not interfere with the rights of private property, or with the fishermen of the United States, in the peaceable use of any part of the said coasts in their occupancy for the same purpose.

It is understood that the above-mentioned liberty applies solely to the sea fishery and that salmon and shad fisheries in rivers and mouths of rivers, are hereby reserved exclusively for fishermen of the United States.

[...]

ARTICLE VII. The present treaty shall be duly ratified, and the mutual exchange of ratifications shall take place in Washington within six months from the date hereof, or earlier if possible.

In faith whereof we, the respective Plenipotentiaries, have signed this treaty and have hereunto affixed our seals.

Done in triplicate, at Washington, the fifth day of June, anno Domini one thousand eight hundred and fifty-four.

**Award of the Umpire dated at Saint John,
New Brunswick, April 8, 1858.**

By the third Article of the Treaty of 1783 between Great Britain and the United States it was stipulated, "That the people of the United States should continue to enjoy unmolested the right to take fish of every kind in the Grand Bank, and on all the other Banks of Newfoundland: also in the Gulph of Saint Lawrence, and at all other places in the sea where the inhabitants of both countries used at any time theretofore to fish. That the inhabitants of the United States shall have liberty to take fish of every kind on such part of the coast of Newfoundland as British fishery shall use (but not to cure or dry them on the island) and also on the coasts, bays and creeks of all His Majesty's dominions in America. And that the American fishermen shall have liberty to

dry and cure fish in any of the unsettled bays, harbours and creeks in Nova Scotia, Magdalen Islands and Labrador, so long as the same shall remain unsettled: but so soon as the same or either of them shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such settlement, without a previous agreement for that purpose, with the inhabitants, proprietors, or possessors of the ground.” The War of 1814, between Great Britain and the United States, was held by the former to have abrogated this stipulation, and the declaration of peace, and Treaty of Ghent, which subsequently followed, were entirely silent on the point. This silence was intentional – during the negotiations the question had been expressly raised – and the claim of the United States to the continued enjoyment of the rights secured by that stipulation denied. By the Convention of the 20th October 1818, the privilege of the Fisheries within certain limits was again conceded to the United States – and the United States by that Convention “renounced any liberty before enjoyed or claimed by them, or their inhabitants, to take, dry or cure fish, on or within three marine miles of any of the coasts, bays, creeks, or harbours of any of the British dominions of America, not included within that part of the Southern Coast of Newfoundland extending from Cape Ray to the Rameau Islands: on the Western and Northern Coast of Newfoundland, from Cape Ray to the Quirpon Islands – on the shores of the Magdalen Islands – and also on the coasts, bays harbours, and creeks, from Mount Jolly on the South of Labrador, to and through the Straits of Bellisle, and thence Northerly along the Coast”. This concession was to be without prejudice to any of the exclusive rights of the Hudson Bay Company, and the American Fishermen were also to have the 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 therein described, and of the Coast of Labrador, but so soon as the same or any portion thereof should be settled, it should 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 was further subject to a proviso, that the American Fishermen should be permitted to enter the bays and harbours in His Britannic Majesty’s dominions in America, not included within those limits, for purpose of shelter, and of repairing damages therein, of purchasing wood and obtaining water, and for no other purpose whatever.

But they should be under such restrictions as might be necessary to prevent their taking, drying or curing fish therein, or in any other manner whatever abusing the privileges thereby reserved to them.

A difference arose between the two countries, Great Britain contending that the prescribed limits “of three marine miles”, the line of exclusion should be measured from headland to headland, while the United States Government contended it should be measured from the interior of the bays and the sinuosities of the coasts.

The mutual enforcement of these positions led to further misunderstandings between the two countries.

To do away with the causes of these misunderstandings, and to remove all grounds of future embroilment, by the treaty of Washington, June 5th, 1854, it was by Article 1st agreed:

“That in addition to the liberty secured to the United States Fishermen by the above-mentioned Convention of October 20th, 1818, of taking, curing and drying fish on certain coasts of the British North American Colonies therein defined, the inhabitants of the United States shall have, in common with the subjects of Her Britannic Majesty, the liberty to take fish of every kind (except shell-fish) on the sea coasts and shores, and in the bays, harbours and creeks of Canada, New Brunswick, Nova Scotia, Prince Edward Island, and of the several Islands thereunto adjacent, without being restricted to any distance from the shore, with permission to land upon the coasts and shores of those Colonies, and the Inlands thereof, and also upon the Magdalen Islands for the purpose of drying their nets and curing their fish: provided that in so doing, they do not interfere with the rights of private property, or with British Fishermen in the peaceable use of any parts of the said Coast, in their occupancy for the same purpose.

“It is understood that the above-mentioned liberty applies solely to the Sea Fishery, and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of River, are hereby reserved exclusively for British Fishermen”.

By Article the 2nd:

“It is agreed by the high contracting parties, that British subjects shall have, in common with the citizens of the United States, the liberty to take fish of every kind (except shell-fish), on the eastern sea coasts and shores of the United States, North of the 36th parallel of North Latitude, and on the shores of the several Islands thereunto adjacent, and in the bays, harbours and creeks of the said sea coasts and shores of the said United States, and of the said Islands, without being restricted to any distance from the shore, with permission to land upon the said coasts of the United States, and of the Islands aforesaid for the purpose of drying their nets and curing their fish: provided that in so doing they do not interfere with the rights of private property, or with the fishermen of the United States in the peaceable use of any part of the said coasts in their occupancy for the same purpose. It is understood that the above mentioned liberty applies solely to the Sea Fishery: and that the Salmon and Shad Fisheries, and all Fisheries in Rivers, and the mouths of Rivers, are hereby reserved exclusively for Fishermen of the United States”.

By the 1st Article it was also further agreed:

“That in order to prevent or settle any dispute as to the places to which the reservation of exclusive right to British Fishermen contained in this Article, and that of Fisherman of the United States contained in this second Article, should apply each of the high contracting parties, on the application of either to the other, shall, within six months thereafter, appoint a Commissioner. The said Commissioners before proceeding to any business shall make and subscribe a solemn declaration that they will impartially and carefully examine and decide to the best of their judgment, and according to justice and equity, without fear, favour, or affection to their own country, upon all such places as are intended to be reserved and excluded from the common liberty of fishing under the said two articles. In case of disagreement, provision is made for an umpire, and the high

contracting parties solemnly engage to consider the decision of the commissioners conjointly, or of the arbitrator or umpire, as the case may be absolutely final and conclusive in each case decided upon by them, or him, respectively”.

By Article 3, the Treaty was to “take effect as soon as the laws required to carry it into operation should be passed by the Imperial Parliament of Great Britain, and by the Provincial Parliaments of those British North American Colonies which are affected by this Treaty, on the one hand, and by the Congress of the United States on the other”.

It is understood that, in making this last Treaty, neither Government admitted itself to have been in error, with reference to the position it had before maintained. The Treaty was emphatically an arrangement for the future: “The Government of the United States being equally desirous with Her Majesty the Queen of Great Britain (as declared in the preamble) to avoid further misunderstanding between their respective citizens and subjects, in regard to the extent of the right of fishing on the coasts of British North America, secured to each by Article I of a Convention between the United States and Great Britain, signed at London on the 20th day of October 1818”.

The Commissioners appointed under the provisions of this Treaty, proceeded to examine and decide upon the places intended to be reserved and excluded from the common liberty of fishing under the 1st and 2nd Articles. They differed in opinion as to the places hereinafter named, and it has been submitted to me as umpire under the provisions of that Treaty, to determine those differences.

The copies of the Records of disagreement between the Commissioners, transmitted to me, are as follows:

RECORD N^o 1. We, the undersigned, Commissioners respectively on the part of Great Britain and the United States, under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having met at Halifax, in the Province of Nova Scotia, on the 17th day of August, A. D. 1855, thence proceeded to sea in the British Brigantine “Halifax” and passing through the Strait of Canso, first examined the River Buctouche, in the Province of New Brunswick.

A survey was made of the mouth of the said River Buctouche by the surveyors attached to the Commission, George H. Perley, on the part of Great Britain, and Richard D. Cutts, on the part of the United States, a plan of which, marked N^o 1, and signed by the Commissioners respectively, will be found in Record Book N^o 2. We, the Commissioners, are unable to agree upon a line defining the mouth of said River.

Her Majesty’s Commissioner claims that a line from Glover’s Point to the Southern extremity of the Sand Bar (marked in red upon the foresaid Plan N^o 1) designates the mouth of the said River Buctouche: the United States Commissioner claims that a line from Chapel Point, bearing South, 4^o West

(magnetic), marked in blue on the aforesaid Plan N° 1, designates the mouth of said river: and of this disagreement record is here made accordingly.

Dated at Buctouche, in the Province of New Brunswick, this 19th day of September, A. D. 1856.

RECORD N° 2. We, the undersigned Commissioners respectively, on the part of Great Britain and the United States, under the reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having examined the river Miramichi, in the Province of New Brunswick, are unable to agree upon a line defining the mouth of said River.

Her Majesty's Commissioner claims that a line connecting Fox and Portage Islands, marked in red, Plan 2, Record Book N° 2, designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point, marked in blue on Plan N° 2, Record Book N° 2, designates the mouth of said River; and of this disagreement record is here made accordingly.

Dated at Chatham, on the Miramichi, in the Province of New Brunswick, on this 27th day of September A. D. 1855.

RECORD N° 9. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Elliot River, emptying into Hillsborough Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 85° East (Magnetic) drawn from Block House Point, to Sea Trout Point, as shown on Plan 7, Record Book N° 2, shall mark the mouth, or outer limit, of the said Elliot River; and that all the waters within, or to the Northward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second articles of Treaty aforesaid.

Her Majesty's Commissioner, in marking the above line, claims the same as defining the joint mouth of the Elliot, York, and Hillsborough Rivers.

The United States Commissioner agrees to the above line as the mouth of the Elliot River only, not recognizing or acknowledging any other River.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

RECORD N° 10. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Montague River, emptying into Cardigan Bay, on the Coast of Prince Edward Island, one of the British North American Colonies, do hereby agree and decide, that a line bearing North, 72° East (magnetic), drawn from Grave Point to Cardigan Point, as shown on Plan 7, Record Book N° 2, shall mark the mouth, or outer limit, of the said Montague River; and that all the waters

within, or to the Westward of such line, shall be reserved and excluded from the common right of fishing therein, under the first and second Articles of the Treaty aforesaid.

Her Majesty's Commissioner, in marking the above line, claims the same as defining the joint mouth of the Montague and Brudenell Rivers.

The United States Commissioner agrees to the above line, as marking the mouth of the Montague only, not recognizing, or acknowledging any other River.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

RECORD N° 11. We, the undersigned, Commissioners under the Reciprocity Treaty between Great Britain and the United States, signed at Washington on the 5th day of June, A. D. 1854, having examined the Coasts of Prince Edward Island, one of the British North American Colonies, are unable to agree in the following respect:

Her Majesty's Commissioner claims, that the undermentioned places are Rivers, and that their mouths should be marked, and defined, under the provisions of the said Treaty:

Vernon, Orwell, Seal, Pinnette, Murray, Cardigan, Boughton, Fortune, Souris, S^t Peter's (designated S^t Peters Bay on the Map of the Island), Tryon, Crapaud, Winter, Hunter, Stanley, Ellis, Foxley, Pierre Jacques, Brae, Percival, Enmore, Ox, Haldiman, Sable.

The United States Commissioner denies that the above-mentioned places are Rivers, or such places as are intended to be reserved and excluded from the common liberty of fishing.

Dated at Bangor, in the State of Maine, United States, this twenty-seventh day of September, A. D. 1856.

It will thus be seen that the differences between the Commissioners resolve themselves into two divisions:

1st. – Whether the twenty-four places named in Prince Edward Island, or any of them, as is contended by Her Majesty's Commissioner, are to be deemed Rivers, and therefore reserved and excluded from the common liberty of the Fishery? Or whether, as is contended by the United States Commissioner, these places, or some of them, are not Rivers, and therefore open to the common liberty of the Fishery?

2nd. – The Miramichi and Buctouche in New Brunswick, being admitted to be Rivers, by what lines are the mouths of those Rivers respectively to be determined?

In coming to any conclusion on these points, it is unquestionably the duty of the Umpire, to look at the spirit and object of the Treaty, – the causes of difficulty it was intended to remove, – the mode of removal proposed.

The classes of fish sought for in the deep sea Fisheries strike within “three marine miles” from the shore; the “Bays” within the headlands are their places of resort, but unlike the salmon or the shad, they do not ascend the Rivers, or particularly seek their entrances. To prosecute the Mackerel Fishery with success, the right of fishing “on the sea coast and shores” within three marine miles, and within the “Bays” with the privilege of landing for drying nets and curing fish was absolutely necessary: the convenience of a “Harbour”, and the right of fishing therein, desirable.

A “creek”, which Webster and Maunders both define to be, according to English usage and etymology, “a small inlet, bay or cove, a recess in the shore of the sea, or of a river” and which though in some of the American States, “meaning a small River, Webster says, is contrary to English usage, and not justified by etymology”, would also in many instances afford accommodation. A right to the “sea coast and shores” – to the “Harbours” and the “Creeks” would thus afford the fisherman all that he would require, and leave to the Rivers, rising far in the interior of the respective countries, and flowing by the homes and the hearths of a different nation, the sacred character which would save them from the stranger’s intrusion.

PART FIRST.

The question then that first presents itself, are the twenty-four places named, or any and which of them, in Prince Edward Island, to be deemed Rivers?

It is difficult to lay down any general proposition the application of which would determine the question. There is no limitation as to size or volume: the Mississippi and the Amazon roll their waters over one fourth of the circumference of the earth. The “Tamar”, the “Ex” and the “Tweed” would hardly add a ripple to the S^t Lawrence: yet all alike bear the designation, are vested with the privileges, and governed by the laws and regulations of Rivers. It is not the absence of prevalence of fresh or salt, water: that distinction has been expressly ignored in the celebrated case of Horne against McKenzie on appeal in the House of Lords. It is not the height or lowness of the banks: the Rhine is still the same River, whether flowing amid the mountains of Germany or fertilizing the low plains of Holland. It is not the rise or fall of tide, or the fact that there may be little, or any water, when the tide is out. The Stour and Orwell in England, are dry at low water, yet they have always been recognized and treated as Rivers. The Petitcodiac in New Brunswick, the Avon in Nova Scotia, owe their width, their waters, their utility, entirely to the Bay of Fundy; yet their claim to be classed among Rivers has never been doubted. The permanent or extraordinary extent of the stream, in cases where not at all or but little influenced by the tides is no criterion. The periodical thaws and freshets of Spring and Autumn in America make rivers of vast

magnitude, useful for a thousand commercial purposes, in places where, when those thousand freshets have passed away, their dry beds are visible for weeks. The term "flottable" applied to such streams, is well recognized in the Courts of the United States, classing them among rivers, and clothing the inhabitants upon their banks with the rights of riparian proprietors, and the public at large with the privilege of accommodation.

An important test may be said to be the existence or nonexistence of bars at the mouths of waters or streams running into the sea. The existence of such bars necessarily presupposes a conflict of antagonistic powers. An interior water forcing its way out, yet not of sufficient strength to plough a direct passage through the sands accumulated by the inward rolling of the sea, would necessarily diverge, and thus leave a bar in front of its passage, just at that distance where the force of its direct action would be expended. Some rivers, such as the Mississippi and the Nile, make deltas, and run into the sea.

In these cases, the extreme land would give a natural outlet. Others again run straight into the sea, without any delta, and without any estuary. In these cases, the bar at the mouth would give a natural limit: but the bar at the mouth is equally characteristic of its being a river. There are cases again, where the estuary gradually widening into the sea, leaves neither bar nor delta to mark its outlet, or determine its character. In such cases, for the latter object, other grounds must be sought on which to base a decision: and in making the former, the exercise of a sound discretion could be the only guide.

The decision upon any such question must, after all, be more or less arbitrary. The physical features of the surrounding country, the impressions created by local inspection, the recognized and admitted character the disputed places have always borne, constitute material elements in forming conclusion. The possibility that the privileges conceded by this Treaty may be abused, can have no weight. There will doubtless be found in both countries men who will disregard its solemn obligations, and take advantage of its concessions, to defraud the revenue, violate local laws, and infringe private rights, and in thus disgracing themselves, affect the character of the nation to which they belong: they will, however, meet with no consideration at the hands of the honourable and right thinking people of either country. The framers of this Treaty would not permit such minor difficulties to stand in the way of the great object they had in view, to cement the alliance, and further the commercial prosperity of two Empires. Such difficulties can be obviated, if necessary, by national or local legislation.

The Rivers of Prince Edward Island, whether one or one hundred in number, must, as to length, necessarily be small. The Island is in no part much over thirty miles in width, and the streams run through it, more or less transversely, not longitudinally. Captain (now Admiral) Bayfield, the accomplished hydrographer, and Surveyor of the Gulf of S^t Lawrence, thus describes it:

“Prince Edward Island, separated from the Southern shore of the Gulf of the S^t Lawrence by Northumberland straits, is one hundred and two miles long, and in one part about thirty miles broad: but the breadth is rendered extremely irregular by large Bays, inlets, and rivers, or rather sea creeks, which penetrate the Island, so that no part of it is distant more than seven or eight miles from navigable water. Its shape is an irregular crescent, concave towards the Gulf, the Northern shore forming a great Bay, ninety-one miles wide and twenty-two miles deep, out of which, the set of the tides and the heavy sea render it very difficult to extricate a ship, when caught in the Northeast gales which frequently occur towards the fall of the year, occasionally blowing with great strength and duration, and at such times proving fatal to many vessels.”

This passage has been particularly called to my attention in a very elaborate and able statement of his views, placed before me by the United States Commissioner, who further adds, that Sir Charles A. Fitzroy, the Lieut. Governor of the Island of Prince Edward, in an official communication to the British Government, calls the Island Rivers “strictly speaking, narrows arms of the sea”; and that Lord Glenelg, in his reply, alludes to them as “inlets of the sea.”

On examining the Records referred to by the Commissioner, I find the first to be a Dispatch (in January, 1858) from Sir Charles Fitzroy, to the Colonial Secretary, Lord Glenelg, with reference to the reserves for Fisheries, contained in the original grants in the Island, arising out of the Order in Council, under which those grants were issued, and which was as follows:

“That in order to promote and encourage the Fishing, for which many parts of the Islands are conveniently situated, there be a clause in the grants of each Township that abuts upon the sea shore, containing a reservation of liberty to all Her Majesty’s subjects in general, of carrying on a free fishery on the coasts of the said Townships, and of erecting stages and other necessary buildings for the said fishery, within the distance of five hundred feet from high water mark.”

He then states he enclosed for the information of the Government – “a return showing the several reserves for this purpose contained in the different Townships, from which it will appear that the reservation as contemplated in the Order of Council has been strictly followed in only twelve Townships. In thirty-two Townships the reservation is as follows – ‘and further saving and reserving for the disposal of His Majesty, his heirs and successors, five hundred feet from high water mark, on the coast of the tract of land hereby granted, to erect stages and other necessary buildings for carrying on the Fishery’: of the remaining twenty-three Townships, eighteen contain no fishery reservation; and of five no grants whatever are on record.” And he then remarks: – “By reference to apian of the Island annexed to the return, your Lordship will perceive that several of the Townships which do contain reservations abut upon rivers only, or more strictly speaking, narrow arms of the Sea.”

Lord Glenelg, in his reply (May, 1858), says: “It appears to me that the reservation made of lands adjacent to the sea coast, or to the shores of inlets

from the sea, for the purpose of fishing, so far as the right has been reserved to the Queen's subjects collectively, constitute(s) a property, over which the power of the Crown is exceedingly questionable."

It does not appear to me that these passages bear the construction put upon them, or were intended to designate the Island rivers generally, or in any way determine their character. Is it not rather a mere qualified mode of expression used at the time, without any definite object, or perhaps if any, to avoid being concluded by either term? But if the use of a term by one or two of the local authorities is to be deemed of such weight, of how much more weight would be the continued use by the legislature for years of a contrary term? There are Acts of the Assembly vesting rights, imposing penalties, and creating privileges with reference to these waters, under the name and designation of Rivers, to a series of which I call attention, namely: 10 Geo. IV., c. II; 2 Win. IV., c. 2 and 13; 3 Wm. IV., c. 8, 9 and 10; 5 Wm. IV., 3 and 7; 6 Wm. IV., c. 25; 7 Wm. IV., c. 23; 1 Vic., c. 19; 2 Vic., c. 10; 3 Vic., c. 12; 4 Vic., c. 16; 4 Vic., c. 18; 5 Vic., c. 9; 7 Vic., c. 3; 8 Vic., c. 20; 12 Vic., c. 18, 35 and 22; 15 Vic., c. 34; 16 Vic., c. 28. Also to the various reports of the Annual Appropriations and Expenditures, to be found in the Journals of the Legislature.

On an examination of these Acts, it will be found that the Legislature of the Island has by a continued series of enactments, extending over a period of thirty years, legislated upon the "Rivers", "Bays", "Creeks", "Harbours" and "lesser streams" of the Island, recognizing their existence and difference, appropriating the local revenues to their improvement, establishing rights, and creating private interests with reference to them, entirely inconsistent with their being aught but the internal waters and rivers of the Island, and directly at variance with the terms and character of legislation, which would have been used had they been considered "arms" or mere "inlets in the sea". Such Acts by the Congress of the United States, or by the respective Legislatures of the several States, on any matter within their jurisdiction would be regarded as conclusive of the character of the subject legislated upon. The legislation of Prince Edward Island, *in pari materia*, is entitled to the same consideration. The British Government at the present day, neither legislates away, nor interferes with the local administration of the affairs of the Colonies. This very treaty is depended upon the action of the Provincial Parliaments, and based upon the preservation of private rights. Can it be contended, or shall it be admitted, that this Treaty abrogates the Legislation of years, ignores the Laws of the Island, and by implication annuls rights and privileges the most sacred a Colony can possess? Certainly not. If it be desirable from the peculiar conformation of this Island and its waters, that the latter should be viewed in a light different from that in which they have been hitherto regarded, the local Legislature can so determine.

In a very important decision of the Supreme Court of Iowa, reported in the American Law Register, issued at Philadelphia, in August 1857, it was determined, "that the real test of navigability in the United States was

ascertained by *use*, or by *public act of declaration*; and that the Acts and Declarations of the United States, declare and constitute the Mississippi River, a public highway, in the highest and broadest intendment possible". Shall not therefore the public Acts and Declarations of the Legislature of Prince Edward Island be considered of some authority in determining what are the Rivers of that Island? And particularly when those Acts and Declarations were made long anterior to the present question being raised? But might it not also be assumed, that where a country had, by a long series of public documents, legislative enactments, grants and proclamations, defined certain waters to be rivers, or spoken of them as such, or defined where the mouths of certain rivers were, and another country subsequently entered into a Treaty with the former respecting those very waters, and used the same terms, without specifically assigning to them a different meaning, nay, further stipulated that the Treaty should not take effect in the localities where those waters were, until confirmed by the local authorities, might it not be well assumed that the definitions previously used, and adopted, would be mutually binding in interpreting the Treaty, and that the two countries had consented to use the terms in the sense in which each had before treated them in their public instruments, and to apply them as they had been previously applied in the localities where used? I think it might.

Admiral Bayfield did not intend by the term "sea creeks", as he informs me in reply to a communication on this subject, to convey the impression contended for by the United States Commissioner, that they were not Rivers. He says, under date of 3^d September, 1857: "With reference to the term 'sea creeks', to which your attention has been called as having been used by me at page 92, and various other parts of the Directions, I have used that term in order to distinguish the inlets from the small streams (disproportionably small in summer) that flow through them to the sea.

In the instances referred to, I mean by "sea creeks", inlets formed by the combined action of the Rivers and the Tides, and through which those rivers flow in the channels, more or less direct, and more or less plainly defined by shoals on either side. Wherever there are bars across the inlets, as is very generally the case, I consider the channels through those bars, to form the common entrances from the sea to both Inlets and Rivers; for it appears to me that a River is not the less a River, because it flows through a creek, an inlet, or an estuary. The point where the fresh water enters the estuary, and mixes with the tide waters, may be miles inland, but it does not, I think, cease to be a River until it flows over its bar into the sea.

This view of Admiral Bayfield, that such waters do not lose their character of Rivers because flowing through an inlet, or an estuary, is confirmed by the principles laid down to determine what are "navigable" Rivers, in the technical sense of the term, as distinguished from its common acceptation. To the extent that fresh waters are backwardly propelled by the ingress and pressure of the tide, they are denominated navigable *Rivers*; and to determine whether or not a River is navigable both in the common law, and in

the Admiralty acceptance of the term, regard must be had to the ebbing and flowing of the tide. In the celebrated case of the River Bann, in Ireland, the Sea is spoken of as *ebbing and flowing in the River*. These principles are recognized in the Courts of the United States, and the authorities collated, and most ably commented upon by Angel.

Indeed, it would seem that the Commissioners themselves have not attached to this term "sea creek" as used by Admiral Bayfield, the force or character which it is now alleged it should bear, as they have by their Record N° 10, under date of 27th of September 1856, transmitted to me, with the other official documents in this matter, pronounced the "Montague" to be a River and determined upon its mouth, though Captain Bayfield, in his Sailing Directions, before referred to, page 123, speaks of it as a "sea creek". It has been urged, that if these places are declared to be Rivers, and not creeks or harbours, then where are the creeks and harbours, contemplated by the Treaty. To this it may be answered, that this treaty does not contemplate Prince Edward Island alone – and even though none such might be found within its narrow circle – yet they may be found in numbers along the five thousand miles of coast, exclusive of Newfoundland, which this Treaty covers, extending from 36th parallel of north latitude in the United States, to the furthest limits of Labrador.

With these preliminary observations, I shall take up the disputed places in Prince Edward Islands, and proceed to decide upon them, in the order in which they have been submitted.*

NO. 1. – VERNON

Determining what constitutes a river – sufficient water for navigation at low tide – salinity of water – proximity of ship building facilities - sufficient breadth to require a bridge crossing – surrounding land of the same general formation as other rivers – prior description as a river in Henry Molesley Bayfield's Sailing Directions and in various Acts of Assembly.

Détermination de ce qui constitue un fleuve – niveau d'eau suffisant pour la navigation à marée basse – salinité de l'eau – proximité des chantiers navals – largeur suffisante pour nécessiter un pont de traversée – terrain environnant de même facture générale que celui des rives des autres fleuves – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield Sailing Directions et dans divers actes du Parlement.

* * * * *

* Secretariat note: The following awards were omitted from the instant publication because of their technical or duplicative nature; they are: No. 8 – Fortune; No. 9 – Souris; No. 11 – Tryon; No. 12 – Crapaud; No. 14 – Hunter; No. 18 – Pierre Jacques; No. 19 – Brae; No. 22 – Ox and No. 24 – Sable. They are reproduced in John Bassett Moore, *International Arbitrations to which the United States has been a party*, Vol. I, Washington 1898, Government Printing Office, pp. 461-467.

I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Vernon, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Vernon is entitled to be considered a River.

It has, at low tide, water for boat and shallop navigation. It has good breadth, requiring long and strong bridge to cross it. Vessels are built two miles from its mouth. As you drive along its banks, there would be no hesitation in speaking of it, were no question raised, as a River. It would appear as if the salt water were an intrusion into a channel, formed and supplied by a running stream, enlarging and deepening the channel, but finding it there, the banks and surrounding lands all bearing towards the Vernon the same relative formation as the banks towards admitted Rivers. It is spoken of in Bayfield's Sailing Directions as a River, and as such in various Acts of Assembly.

As such Arbitrator or Umpire, I decide that the Vernon is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A.D. 1858.

JOHN HAMILTON GRAY.

NO. 2. – ORWELL.

Determining what constitutes a river – prior description as a river by Bayfield, in Public Acts and in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans des actes officiels et dans d'anciens actes de concessions territoriales.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Orwell, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as is disclosed in Record No. 11 of their proceedings, am of opinion that the Orwell is entitled to be considered River.

It is spoken of by Bayfield, in conjunction with the Vernon, as a River; has been recognized as such in the Public Acts of the Island; and described under that designation, as boundary in the ancient grants, as far back as 1769.

As such Arbitrator or Umpire, I decide that the Orwell is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 3. – SEAL.

Determining what constitutes a river – prior description as a river by Bayfield and in Public Acts – small tributary constitutes a river.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans des actes officiels – un petit affluent peut constituer un fleuve.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Seal, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Seal is entitled to be considered a River.

The Seal is spoken of by Bayfield as a River, and recognized as such in the Public Acts of the Island. It is small tributary of the Vernon, and as such Arbitrator or Umpire, I decide it is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 4. – PINNETTE.

Determining what constitutes a river – tidal basin or harbour is not a river.

Détermination de ce qui constitue un fleuve – un bassin de marée ou un port ne constituent pas un fleuve.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Pinnette, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as

disclosed in Record No. 11 of their proceedings, am of opinion that the Pinnette is tidal basin or harbour; and as such Arbitrator or Umpire, I decide that it is not a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 5 – MURRAY.

Determining what constitutes a river – abundant supply of fresh water, its formation and a deep and navigable channel – ancient land grants distinguish between the river, the harbour and the sea coast – prior recognition as a river in Public Acts of appropriation of the island.

Détermination de ce qui constitue un fleuve – distribution abondante d’eau fraîche, forme et chenal profond et navigable – les concessions territoriales antérieures font la distinction entre le fleuve, le port et la côte maritime – reconnaissance antérieure en tant que rivière dans les actes officiels d’acquisition de l’île.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Murray, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty’s Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Murray is entitled to be considered a River.

The Murray is a River, and entitled to be so considered, in view of its abundant supply of fresh water, its formation, and deep and navigable channel. By reference to the original grants in 1769, of Lots 63 and 64, bordering on the “Murray,” it will be seen that the Crown at that early day drew the distinction between the river, the harbour, and the sea coast, and bounds these lots by the harbour and river, and by the sea coast respectively. It is also recognized in the Public Acts of appropriation of the Island, under that designation.

As such Arbitrator or Umpire, I decide that the Murray is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 6 – CARDIGAN.

Determining what constitutes a river – prior description as a river by Bayfield, in ancient land grants and repeatedly by the legislature – resemblance to other rivers.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement – ressemblance avec les autres fleuves.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Cardigan, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Cardigan is entitled to be considered a River.

It is so described by Bayfield. It bears close resemblance to the Montague and the Elliot, which have been declared by both Commissioners, as appears by Records Nos. 9 and 10, to be Rivers. It is so designated by the Crown, in the grant of Lot 34 in 1769; and has been repeatedly recognized as such by the Legislature.

As such Arbitrator or Umpire, I decide the Cardigan is a River.

Dated at Saint John, in the province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 7. – BOUGHTON.

Determining what constitutes a river – deep, broad and navigable – ship building facilities – narrow entrance and bar across mouth – prior description as a river by Bayfield, in ancient land grants and repeatedly by the legislature.

Détermination de ce qui constitue un fleuve – profondeur, largeur et navigabilité – proximité des chantiers navals – entrée étroite et présence de banc de sable à l'embouchure – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield, dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Boughton, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Boughton is entitled to be considered a River.

It is deep and broad, affording accommodation for vessels, and facilities for ship building, far in the interior. Its comparatively narrow entrance, and bar across its mouth, are observable and striking characteristics. It is described as such by the Crown, in the grant of Lot 56 in 1769; has been repeatedly recognized by the Legislature, under the name of Grand River; and by Bayfield in his Sailing Directions.

As such Arbitrator or Umpire, I decide that the Boughton is a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 10. – ST. PETER’S.

Determining what constitutes a river – inlet of the sea or harbour does not constitute a river – prior description in ancient land grants and legislation as St. Peter’s Bay.

Détermination de ce qui constitue un fleuve – un bras de mer ou un port ne constituent pas un fleuve – désignation antérieure en tant que fleuve dans d’anciens actes de concessions territoriales et lois de la Baie de St. Peter.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June A. D. 1854, having proceeded to and examined St. Peter’s, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty’s Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that St. Peter’s is not entitled to be considered a River.

It is claimed by Her Majesty’s Commissioner, as a River; by the United States Commissioner, as an inlet of the Sea, or at most a harbour. I think the view taken by the United States Commissioner correct. It is certainly not formed by the Morel, the Midgie, or the Marie, which run into it; and the little stream called Saint Peter’s at its head, is entirely unequal to the task. It is also to be observed, that in the ancient grant of Lot 39, in 1769, it is given as boundary under the designation of St. Peter’s Bay; and in the grants of Lots 40 and 41, in the same year (1769), partly bordering on, and partly embracing within their boundaries. Saint Peter’s Bay, it is described (though inaccurately as a boundary) as “the Sea”. I do not find it any where recognized in the legislation of the Island as a River; but always as Saint Peter’s Bay.

As such Arbitrator or Umpire, I decide that Saint Peter's is not a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 13. – WINTER.

Determining what constitutes a river – rise in the interior – abundant fresh water – channel through Bedford Bay bounded by shoals – continuous flow of water from the interior to the sea – breach in the sands by the sea shore formed by the water seeking an outlet of sufficient strength to form a bay or harbour.

Détermination de ce qui constitue un fleuve – élévation interne - eau fraîche en abondance – chenal dans la Baie de Bedford borné par des bancs de sable – flux d'eau continu depuis le cours d'eau jusqu'à la mer – les brèches dans le sable de la plage engendrées par l'eau cherchant un écoulement sont suffisantes pour créer une baie ou un port.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Winter, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Winter is entitled to be considered a River.

Apart from its rise in the interior, and its abundant fresh water, its channel through Bedford Bay, (as it is called,) is marked and distinct – showing a continuous flow or current of water, from the interior towards the Sea; a channel bounded by shoals; and proving by its deflected course, that the breach in the sands on the sea shore, forming the entrance to the so-called Bedford Bay, has been formed by the water seeking an outlet for itself, not from the Sea making a passage in. In fact, if there were no River or stream in the interior, of sufficient strength to make the outlet, and keep it open, the water of the Sea would only make the embankment more solid, and there would be no bay or harbour at all.

As such, Arbitrator or Umpire, I decide the Winter to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 15. – STANLEY.

Determining what constitutes a river – full deep stream with two or three heads, several affluents, numerous feeders and large tributaries – prior description as a river in ancient land grants and by legislature.

Détermination de ce qui constitue un fleuve – un ruisseau profond avec deux ou trois sources, plusieurs affluents variés – désignation antérieure en tant que fleuve dans d'anciens actes de concessions territoriales et de manière répétée par le Parlement.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Stanley in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Stanley is entitled to be considered a River.

The Stanley is a full deep stream, having, if the expression may be used, two or three heads and several affluents, and is surrounded, from its sources to its outlet, by a succession of hills of rapid elevation and descent, converging in many different parts towards the River, and affording by their slopes, and the courses at their base, numerous feeders. Its large tributaries, the Trout and Old Mill Rivers, help to swell its volume. It is described as one of the boundaries of Lot 21 in the ancient grant of 1769, and recognized by the Legislature under the designation of Stanley River.

As such Arbitrator or Umpire, I decide the Stanley to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 16. – ELLIS.

Determining what constitutes a river – existence of a broad, deep channel and abundant supply of fresh water – importance of the extent of its drainage basin – repeated prior description as a river by legislative enactments.

Détermination de ce qui constitue un fleuve – existence d'un chenal large, profond et abondamment pourvu en eau fraîche – importance de l'existence d'un bassin de drainage – désignation antérieure en tant que fleuve de manière répétée dans les dispositions législatives.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Ellis, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Ellis is a River.

In the grants of Lots 14 and 16 in 1769, it is so described. A long succession of Legislative enactments so recognizes it. Its broad, deep channel; its abundant supply of fresh water; and the extent of country it drains, leaves no question about it.

As such Arbitrator or Umpire, I decide the Ellis to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 17. – FOXLEY.

Determining what constitutes a river – prior description as a river in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans d'anciens actes de concessions territoriales.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th of June, A. D. 1854, having proceeded to and examined the Foxley, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Foxley is entitled to be considered a River.

The Foxley is described as a River in the ancient grants in 1769.

As such Arbitrator or Umpire, I decide the Foxley to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 20. – PERCIVAL.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants – reliance on resemblance to other rivers which owe their waters entirely to the sea.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales – confiance dans sa ressemblance avec les autres fleuves dont les eaux vont exclusivement à la mer.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Percival, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Percival is a River.

The Percival is spoken of by Bayfield as a River. It is so described in the grant of Lot 10, in 1769; and like the Stour and the Orwell in England, owes its waters almost entirely to the Sea.

As such Arbitrator or Umpire, I decide the Percival to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 21. – ENMORE.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants – bar at its mouth formed by the conflict of tides and the descending stream.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales – banc de sable à l'embouchure formé par l'opposition entre le flux des marées et le cours d'eau descendant.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Enmore, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Enmore is entitled to be considered a River.

The Enmore was treated as a River in the grants of Lots 10 and 13, in 1769; is so recognized by Bayfield; and has a bar at its mouth, formed by the conflict of the tides and the descending stream.

As such Arbitrator or Umpire, I decide the Enmore to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

NO. 23. – HALDIMAN.

Determining what constitutes a river – prior description as a river by Bayfield and in ancient land grants.

Détermination de ce qui constitue un fleuve – désignation antérieure en tant que fleuve dans l'ouvrage de Henry Mosley Bayfield et dans d'anciens actes de concessions territoriales.

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I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the Haldiman, in Prince Edward Island, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record No. 11 of their proceedings, am of opinion that the Haldiman is entitled to be considered a River.

The Haldiman is described as a River in the grant of Lot 15, in 1769, and is so regarded by Bayfield.

As such Arbitrator or Umpire, I decide the Haldiman to be a River.

Dated at Saint John, in the Province of New-Brunswick, this 8th day of April, A. D. 1858.

JOHN HAMILTON GRAY.

PART SECOND.

I now come to the second division, namely: the Miramichi and the Buctouche, being admitted to be Rivers, which of the lines pointed out by the Commissioners shall respectively designate the mouths of those Rivers?

THE MIRAMICHI. — I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th, day of June, A. D. 1854, having proceeded to and examined the mouth of the Miramichi, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, and disclosed in Record N° 2 of their proceedings, declare as follows: —

With reference to the Miramichi, it will be seen by Record N° 2 — Her Majesty's Commissioner claims, that a line connecting Fox and Portage

Islands (marked in red, Plan N° 2, Record Book N° 2) designates the mouth of the Miramichi River. The United States Commissioner claims, that a line from Spit Point to Moody Point (marked in blue, Plan N° 2, Record Book N° 2) designates the mouth of said River.

By the Treaty it is provided, that “the above mentioned liberty applies solely to the sea fishery: and that the salmon and shad Fisheries, and all Fisheries in Rivers, and mouths of Rivers, are reserved exclusively, etc. etc.”

The preceding portion of Article 1st gives the right to fish “on the sea coasts and shores, and in the bays, harbours and creeks”.

The Inner Bay of the Miramichi, and the Harbour of Buctouche, are among other grounds, claimed as coming within the definition of “Bays and Harbours”, and it has been urged, that the clause just referred to, is conclusive in favor of that claim, whether such bay or harbour does or does not constitute the mouth of a River.

It is therefore necessary, before deciding which of the lines above designated as the mouth of the Miramichi, is the correct one, to dispose of this preliminary question, namely: — Does the mouth of a River forfeit its exclusive character, under this Treaty, because it may constitute a bay, or harbour? Is the restriction imposed, limited to particular fish, or locality? The spirit with which this Treaty was made, and the object it has in view, demand for it the most liberal construction: but, consistently with the most liberal construction, there are many wise and judicious reasons why the exception should be made. The joint, or common Fishery in those places where the forbidden fish resort, would be a prolific cause of dispute. The very fact, that after the forbidden fish are named, there should follow the significant expression that *all* fisheries in those places should be reserved, is conclusive as to the idea predominant in the minds of the framers of the Treaty. They wanted peace; they would not put the fishermen of the two nations together, on the same ground, where they would have unequal rights. Considerations of a national, administrative, or fiscal character, may have determined them to exclude the entrances of the great thoroughfares into the respective countries, from common possession. There are large and magnificent bays and harbours, unconnected with Rivers; there are bays and harbours dependent upon and formed by mouths of Rivers. The terms are not indicative of locality. Bays and harbours may be found far up in the interior of a country; in lakes or in rivers, and on the sea board. The “mouths of Rivers” are found only in one locality, namely, in that part of the River by which its waters are discharged into the sea or ocean, or into a lake, and that part of the River is by the express language of this Treaty excluded. Is the use of a term which may be applicable to many places, to supersede that which can only be applied to a particular place, when the latter is pointedly, *lo nomine*, excluded? But why should such a construction be required, when the object of the Treaty can be obtained without it?

The cause of the difficulty was not the refusal to permit a common fishery within the mouths of Rivers, but within three marine miles of the sea coast. That difficulty is entirely removed, by the liberty to take fish “on the sea coast and shores, and in the bays, harbours and creeks, without being restricted to any distance from the shore”.

The position taken by the Commissioner of the United States is further pressed upon the ground. — “That the terms of a grant are always to be construed most strongly against the granting party”. The application of that principle to the present case is not very perceptible. This is rather the case of two contracting parties exchanging equal advantages: and the contract must be governed by the ordinary rules of interpretation. Vattel says, — “In the interpretation of Treaties, compacts, and promises, we ought not to deviate from the common use of the language, unless we have very strong reasons for it”. And, “When we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning”. It is plain that the framers of this Treaty intended to exclude the “mouths of Rivers” from the common possession.

Ought we, by construing the terms of the Treaty most strongly against the nation where the River in dispute may happen to be, to “wrest their words to a contrary meaning”? I think not.

Mr. Andrews, for many years the United States Consul in New Brunswick and in Canada, a gentleman whose great researches and untiring energies were materially instrumental in bringing about this Treaty and to whom the British Colonies are much indebted for the benefits they are now deriving and may yet derive from its adoption, thus speaks of the Miramichi in his Report to his Government in 1852: —

“The extensive harbour of Miramichi is formed by the estuary of the beautiful River of that name, which is two hundred and twenty miles in length. At its entrance into the Gulf this River is nine miles in width.

“There is a bar at the entrance of the Miramichi, but the River is of such great size, and pours forth such a volume of water, that the bar offers no impediment to navigation, there being sufficient depth of water on it at all times for ships of six and seven hundred tons, or even more. The tide flows nearly forty miles up the Miramichi, from the Gulf. The River is navigable for vessels of the largest class full thirty miles of that distance, there being from five to eight fathoms of water in the channel; but schooners and small craft can proceed nearly to the head of the tide. Owing to the size and depth of the Miramichi, ships can load along its banks for miles”.

In Brook’s Gazetteer, an American work of authority, the width of the Potomac, at its entrance into the Chesapeake, is given at seven and a half miles.

In the same work, the mouth of the Amazon is given at “one hundred and fifty-nine miles broad”.

In Harper's Gazetteer (Edition of 1855), the width of the Severn, at its junction with the Bristol Channel, is given at ten miles across. That of the Humber, at its mouth, at six or seven miles; and that of the Thames, at its junction with the North sea at the Nore, between the Isle of Sheppey and Foulness Point, or between Sheerness and Southend, at fifteen miles across. And the Saint Lawrence, in two different places in the same work, is described as entering "the Gulf of Saint Lawrence at Gaspe Point, by a mouth one hundred miles wide". And also that "at its mouth, the Gulf from Cape Rosier to Mingan settlement in Labrador, is one hundred and five miles in length".

Thus width is no objection. The real entrance to the Miramichi is, however, but one and a half miles wide. Captain Bayfield may, apparently, be cited by both Commissioners as authority. He says, pages 30, 31 and 32: —

"Miramichi Bay is nearly fourteen miles wide from the sand-bars off Point Blackland to Point Escumenac beacon, and six and a half miles deep from that line across its mouth to the main entrance of the Miramichi, between Portage and Fox Islands. The bay is formed by a semicircular range of low sandy islands, between which there are three small passages and one main or ship channel leading into the inner bay or estuary of the Miramichi. The Negowac Gully, between the sand bar of the same name and a small one to the S. W., is 280 fathoms wide and 3 fathoms deep: but a sandy bar of the usual mutable character lies off it, nearly a mile to the S. S. E., and had about 9 feet over it at low water at the time of our survey. Within the Gully a very narrow channel only fit for boats or very small craft, leads westward up the inner bay. The shoal water extends 1¼ miles off this Gully, but there is excellent warning by the lead here and everywhere in this bay, as will be seen by the chart. Shoals nearly dry at low water extend from the Negowac Gully to Portage Island, a distance of 1¼ miles to the S. W. Portage Island is 4 miles long in a S. W. by S. direction: narrow, low, and partially wooded with small spruce trees and bushes. The ship channel between this Island and Fox Island, is 1½ miles wide.

"Fox Island, 3¾ miles long, in a S. S. E. direction, is narrow and partially wooded, like Portage Island: it is formed of parallel ranges of sand hills which contain imbedded drift timber, and have evidently been thrown up by the sea in the course of ages. The islands are merely sand bars on a large scale, and nowhere rise higher than 50 feet above the sea. They are incapable of agricultural cultivation, but yet they abound in plants and shrubs suited to such a locality, and in wild fruits, such as the blueberry, strawberry and raspberry. Wild fowl of various kinds are also plentiful in their season: and so also are salmon, which are taken in nets and weirs along the beaches outside the islands, as well as in the gullies.

"The next and last of these islands is Huckleberry Island, which is nearly 1½ miles long, in a S. E. direction. Fox Gully between Huckleberry and Fox Islands is about 150 fathoms wide at high water, and from 2 to 2½ fathoms deep, but there is a bar outside with 7 feet at low water. Huckleberry Gully, between the island of the same name and the mainland, is about 200 fathoms wide, but is not quite as deep as Fox Gully. They are both only fit for boats or very small craft; and the channels leading from them to the westward, up a bay of the main within Huckleberry Island or across to the French river and village, are narrow and

intricate, between flats of sand, mud and eel-grass, and with only water enough for boats. Six and a quarter miles from the Huckleberry Gully, along the low shore of the mainland, in an E. S. E. $\frac{1}{2}$ E. direction, brings us to the beacon at point Escumenac, and completes the circuit of the bay.

“The Bar of Miramichi commences from the S. E. end of Portage Island, and extends across the main entrance and parallel to Fox Island, nearly 6 miles in a S. E. by S. direction. It consists of sand, and has not more than a foot or two of water over it in some parts, at low spring tides.”

He also says pp. 37 and 39:

“The Inner Bay of Miramichi is of great extent, being about thirteen miles long from its entrance at Fox Island to Sheldrake Island (where the river may properly be said to commence) and 7 or 8 miles wide. The depth of water across the bay is sufficient for the largest vessels that can cross the inner bar being $2\frac{3}{4}$ fathoms at low water in ordinary springtides, with muddy bottom. Sheldrake Island lies off Napan Point, at the distance of rather more than 3 quarters of a mile, and bears from Point Cheval N. W. by W. $1\frac{3}{4}$ miles. Shallow water extends far off this island in every direction, westward to Bartiboque Island, and eastward to Oak Point. It also sweeps round to the south and southeast, so as to leave only a very narrow channel between it and the shoal, which fills Napan Bay, and trending away to the eastward past Point Cheval, forms the Middle Ground already mentioned. Murdoch Spit and Murdoch Point are two sandy points, a third of a mile apart, with a cove between them, and about a mile W. S. W. of Sheldrake Island. The entrance of Miramichi River is 3 quarters of a mile wide between these points and Moody Point, which has a small Indian church upon it, and is the east Point of entrance of Bartiboque River, a mile N. W. by W. $\frac{1}{2}$ W. from Sheldrake Island.”

But a strong, and I may add, a conclusive point in showing the passage between Fox and Portage Islands, to be the main entrance, or mouth of the Miramichi, is the peculiar action of the tides. It is thus described by Bayfield p. 35:

“The stream of the tides is not strong in the open bay outside the bar of Miramichi. The flood draws in towards the entrance as into a funnel, coming both from the N. E. and S. E. alongshore of Tabisintac, as well as from Point Escumenac. It sets fairly through the ship channel at the rate of about $1\frac{1}{2}$ knots at the black buoy increasing to 2 or $2\frac{1}{2}$ knots in strong springtides between Portage and Fox Islands, where it is strongest. The principal part of the stream continues to flow westward, in the direction of the buoys of the Horse Shoe Shoal, although some part of it flows to the northward between that shoal and Portage Island”.

The effect of this is thus singularly felt. A boat leaving Negowac to ascend to Miramichi with the flood tide is absolutely met by the tide flowing northerly against it until coming abreast of the Horse Shoe Shoal, or in the line of the main entrance; and the boat at the Horse Shoe Shoal, steering for Negowac, with the ebb tide making, would have the current against it, though Negowac is on a line as far seaward as the entrance to the Portage and Fox Islands; thus showing conclusively that the main inlet and outlet of the tidal

waters, to and from the mouth or entrance of the Miramichi, is between Portage and Fox Islands.

As such Arbitrator or Umpire, I decide that a line connecting Fox and Portage Islands (marked in red, Plan N° 2, Record Book N° 2) designates the mouth of the Miramichi River.

THE BUCTOUCHE. — I, the undersigned, Arbitrator or Umpire under the Reciprocity Treaty, concluded and signed at Washington on the 5th day of June, A. D. 1854, having proceeded to and examined the mouth of the River Buctouche, in the Province of New Brunswick, concerning which a difference of opinion had arisen between Her Britannic Majesty's Commissioner and the Commissioner of the United States, as disclosed in Record N° 1 of their proceedings. With reference to the Buctouche it will be seen by Record N° 1: Her Majesty's Commissioner claims that a line from Glover's Point to the Southern extremity of the Sand Bar, marked in red on the Plan N° 1, designates the mouth of the said River Buctouche. The United States Commissioner claims, that a line from Chapel Point, bearing South 4° West (magnetic), marked in blue on said Plan N° 1, designates the mouth of said River.

On the subject of this River the United States Commissioner addresses me as follows: "The red line extending from Glover's Point, to the Point of the Sand Bar, is the line marked by Her Majesty's Commissioner as designating the mouth of the River: in that line I could not concur because it excludes from the common right of fishing the whole of Buctouche Harbour in contravention of the express words of the Treaty. If it had been the duty and office of the Commissioners to indicate the point which constitutes the mouth of the Harbour, I should have been disposed to acquiesce in the point and line thus denoted: but from the proposition that it marks the entrance of these Rivers, or any one of them, into the Sea or Bay, or Harbour, and constitutes their mouth, I entirely dissent".

With the views I have already expressed that the mouth of a River does not lose its treaty character because it constitutes a harbour, it becomes important to determine which is the principal agent in forming this harbour, the River or the Sea. If it is a mere indentation of the coast, formed by the sea, a creek, a bay, or harbour, unformed by and unconnected with any River, one of those indentations in a coast, indebted to the sea mainly for its waters, then plainly it is not intended or entitled to be reserved; but if on the contrary it is formed by the escape of waters from the interior, by a River seeking its outlet to the deep, showing by the width and depth of its channel at low water that it is not to the sea it owes its formation, then plainly it is the mouth of a River and intended to be reserved.

Captain Bayfield describes the Buctouche as follows, pp. 53 and 54:

"Buctouche Roadstead, off the entrance of Buctouche River and in the widest part of the channel within the outer bar, is perfectly safe for a vessel with good anchors and cables; the ground being a stiff tenacious clay, and the outer bar

preventing any very heavy sea from coming into the anchorage. It is here that vessels, of too great draft of water to enter the river, lie moored to take in cargoes of lumber.

“Buctouche River enters the sea to the S. E., through the shallow bay within the Buctouche sand-bar, as will be seen in the chart. The two white beacons which I have mentioned, as pointing out the best anchorage in the roadstead, are intended to lead in over the bar of sand and flat sandstone, in the best water, namely, 8 feet at low water and 12 feet at high water in ordinary spring tides. But the channel is so narrow, intricate, and encumbered with oyster beds, that written directions are as useless as the assistance of a pilot is absolutely necessary to take a vessel safely into the River. Within the bar is a wide part of the channel in which vessel may ride safely in 2½ and 3 fathoms over mud bottom; but off Giddis Point the channel becomes as difficult, narrow, and shallow as the bar. It is in its course through the bay that the Buctouche is so shallow and intricate; higher up its channel being free from obstruction, and in some places 5 fathoms deep. Having crossed the bar, a vessel may ascend about 10 miles further, and boats 13 or 14 miles to where the tide water ends”.

By an examination of the Channel we find miles up this River a deep continuous channel of twelve, fifteen, twenty, twenty-four and thirty feet, down to Priest Point, varying from eighteen to twenty-four feet to Giddis Point, and thence to a line drawn across from the Sand Bar to Glover’s Point, from seven to twenty feet, but of greater width. On the outside of this channel, which is clearly defined, and between the Sand Bar and the channel, we find mud flats with dry patches and oyster beds, “flats of mud and ell-grass, with dry patches at low water”; with depths from Priest Point to the Sand Bar, varying from four to six feet and from the channel of Giddis Point to the bar, from one foot to three. On the other side of the channel, from Priest Point and Giddis Point we find “flats of mud and weeds, with dry patches and oyster beds”. What has given depth and breadth to this channel? The tide rises in this vicinity about four feet: would that rise create a channel of the average depth above named? Can there be any doubt that it is created by the great body of the river water finding its way to the sea? The line from “Glover’s Point to the southern extremity of the Sand Bar, marked in red on plan N° 1”, is claimed by Her Majesty’s Commissioner as the mouth of the River, and admitted by the United States Commissioner as the mouth of the Harbour; but if there no River here, would there be any harbour at all? I think not, and this line therefore, while it constitutes the mouth of the harbour, also constitutes the mouth of the River.

This conclusion is consonant with the conclusion at which the Commissioners themselves arrived in the cases of the Elliot and Montague Rivers in Prince Edward Island, as shown by Records N^{os} 9 and 10. The harbours of Charlottetown and Georgetown are clearly within the lines they have marked and designated as the mouths of those Rivers respectively, and thus within the lines of exclusion: but if the express words of the Treaty gave a right to such harbours, because “harbours”, then why did the Commissioners exclude them? And why should not the same principle which governed the

Commissioners in their decision with regard to those “harbours”, not (*sic*) also govern with regard to Buctouche Harbour?

As Arbitrator or Umpire, I decide that a line from Glover’s Point to the southern extremity of the Sand Bar, marked in red on Plan N^o 1, in Record N^o 2, designates the mouth of the River Buctouche.

It may not come within the exact line of my duty, but I cannot forbear remarking, that the true benefits of this Treaty can only be realized to the inhabitants of both countries by a course of mutual forbearance, and enlightened liberality. Captious objections, fancied violations and insults, should be discountenanced; and above all, there should be an abstinence from attributing to either nations or people, as a national feeling, the spirit of aggression which may occasionally lead individuals to act in direct contravention of its terms. Every friend of humanity would regret further misunderstanding between Great Britain and the United States. The march of improvement which is to bring the broad regions of North America, between the Atlantic and Pacific, within the pale of civilization, is committed by Providence to their direction: fearful will be the responsibility of that nation which mars so noble a heritage.

Dated at Saint John, in the Province of New Brunswick, this 8th day of April, 1858¹.

¹ J. B. MOORE, *History and Digest of International Arbitrations*, 1898, pp. 449-473.

PART VIII

**Arrangement for the Settlement of Differences between
the Sultan of Muscat and the Sultan of Zanzibar,
and the Independence of their respective States**

Decision of 2 April 1861

**Arrangement pour le règlement de différends entre
le Sultan de Mascate et le Sultan de Zanzibar,
et pour l'indépendance de leurs États respectifs**

Décision du 2 avril 1861

ARRANGEMENT FOR THE SETTLEMENT OF DIFFERENCES
BETWEEN THE SULTAN OF MUSCAT AND THE SULTAN OF
ZANZIBAR, AND THE INDEPENDENCE OF THEIR RESPECTIVE
STATES, DECISION OF 2 APRIL 1861*

ARRANGEMENT POUR LE RÈGLEMENT DE DIFFÉRENDS ENTRE LE
SULTAN DE MASCATE ET LE SULTAN DE ZANZIBAR ET POUR
L'INDÉPENDANCE DE LEURS ÉTATS RESPECTIFS, DÉCISION DU
2 AVRIL 1861**

Territorial determination – control and sovereignty over Zanzibar and Muscat – independence of States – monetary compensation for abandoning claim to territory.

Territorial determination – inheritance.

Délimitation territoriale – contrôle et souveraineté sur Zanzibar et Mascate – indépendance des États – compensation financière pour le retrait d'une revendication territoriale.

Délimitation territoriale – succession.

* * * * *

*No. 1. — The Governor-General of India to the Sultan of Zanzibar.****

BELOVED AND ESTEEMED FRIEND,

Fort William, April 2, 1861.

I ADDRESS your Highness on the subject of the unhappy differences which have arisen between yourself and your Highness's brother, the Imam of Muscat, and for the settlement of which your Highness has engaged to accept the arbitration of the Viceroy and Governor-General of India.

Having regard to the friendly relations which have always existed between the Government of Her Majesty the Queen and the Government of Oman and Zanzibar, and desiring to prevent war between kinsmen, I accepted the charge of arbitration between you, and in order to obtain the fullest knowledge of all the points in dispute, I directed the Government of Bombay to send an officer to Muscat and Zanzibar to make the necessary inquiries. Brigadier Coghlan was selected for this purpose, an officer in whose judgment,

* Reprinted from British and Foreign State Papers, compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 56, London, 1870, H. M. Stationery Office, p. 1396.

** Reproduit de British and Foreign State Papers, compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 56, London, 1870, H. M. Stationery Office, p. 1396.

*** Editor's note: A similar letter was addressed by the Governor-General of India to His Highness Syud Thowaynee Bin Saeed bin Sultan, of Muscat.

intelligence, and impartiality the Government of India reposes the utmost confidence.

Brigadier Coghlan has submitted a full and clear report of all the questions at issue between your Highness and your brother.

I have given my most careful attention to each of these questions.

The terms of my decision are as follows:

1st. That his Highness Syud Majeed be declared ruler of Zanzibar and the African dominions of his late Highness Syud Saeed.

2nd. That the ruler of Zanzibar pay annually to the ruler of Muscat a subsidy of 40,000 crowns.

3rd. That his Highness Syud Majeed pay to his Highness Syud Thowaynee the arrears of subsidy for two years, or 80,000 crowns.

I am satisfied that these terms are just and honourable to both of you; and as you have deliberately and solemnly accepted my arbitration, I shall expect that you will cheerfully and faithfully abide by them, and that they will be carried out without unnecessary delay.

The annual payment of 40,000 crowns is not to be understood as a recognition of the dependence of Zanzibar upon Muscat, neither is it to be considered as merely personal between your Highness and your brother Syud Thowaynee. It is to extend to your respective successors, and is to be held to be a final and permanent arrangement, compensating the ruler of Muscat for the abandonment of all claims upon Zanzibar and adjusting the inequality between the two inheritances derived from your father, his late Highness Syud Saeed, the venerated friend of the British Government, which two inheritances are to be henceforward distinct and separate.

I am, &c.

His Highness Syud, the Sultan of Zanzibar.
Fort William, April 2, 1861.

CANNING.

No. 2. — The Sultan of Muscat to the Governor-General of India.

(Translation.)

May 15, 1861.

In the name of the Great God!

After compliments.

AT a most propitious and favourable time we were honoured with the receipt of your esteemed letter, and were highly gratified with its contents. What your Excellency has stated is most satisfactory to us, more especially as regards your award betwixt us and our brother Majid. We heartily accept the

same, and are at a loss how to express our regret for having occasioned you so much trouble, and our appreciation of the kindness which has been manifested towards us in this matter. We thank God for your efforts in our behalf, praying also that your good will may be rewarded, and that you may never cease to be our support. We further pray that our sincere affection may always be towards the Great (British) Government, and that it may increase continually: moreover, that your exalted affection and noble solicitude may always be exercised towards us, and that we may never be deprived thereof. As regards our brother Majid, we pray God during our lifetime he may never experience anything from us but kindness and hearty good will. Furthermore, we rely implicitly on your arbitration between us (being carried out).

What your exalted Excellency may require in any way from your attached friend, a hint alone will suffice for its accomplishment, and we shall feel honoured in executing it.

We pray, finally, that you may be preserved to the highest honours and in the most perfect health. We send you the salutation of peace as the best conclusion.

From your truly sincere friend, the servant of God, who confides in him as the Giver of all good.

(L.S.) THOWAYNEE BIN SAEED BIN SULTAN.

4th of Eb Kaada, 1277; 15th May, 1861.

His Excellency Lord Canning.

No. 3. — The Sultan of Zanzibar to the Governor-General of India.

(Translation.)

June 25, 1861.

After usual compliments.

MY chief object in addressing this friendly letter to your Excellency is to inquire after your health. May the Almighty always protect your Excellency from all evils. As to myself, who am under great obligations to your Excellency, I beg to state that by the grace of God, and under your auspices, I am in the enjoyment of good health. I offer my prayers to the Almighty for your long life and for the destruction of your enemies. Your Excellency's kind letter reached me at an auspicious time and I have become fully acquainted with its contents. When I referred to your Excellency for settlement the dispute which long existed between myself and my brother Syud Thowaynee bin Saeed, I made up my mind to act up to any award which you might pass on the case. I agree, as directed by your Excellency, to pay to my said brother the sum of 40,000 crowns annually, and 80,000 crowns on account of arrears for the last two years.

Considering me as a sincere friend, your Excellency will not, I hope, forget me, and I will cheerfully execute any commissions which shall be entrusted to me by your Excellency.

Zilhej, A.H. 1267; 25th June, 1861.
His Excellency Lord Canning.

MAJEED BIN SAEED.

No. 4. — The Sultan of Zanzibar to the British Consul at Zanzibar.

(Translation.)

June 29, 1861.

After compliments.

I DESIRE to inform you that have been very much gratified by the receipt of the letters from his Lordship the Governor-General of India and his Excellency the Governor of Bombay, conveying to me the intelligence of the settlement of the disputes which existed between myself and my brother Thowaynee bin Saeed. And, regarding the decision, that I shall pay to my brother Thowaynee the sum of 40,000 crowns annually, and also the sum of 80,000 crowns on account of arrears for two years, I agree to pay these sums, and I accept and am satisfied with the terms of the decision, and they are binding on me, and it is the desire of the British Government (Javabel Sircar) that each of us, that is, myself and my brother Thowaynee, shall be independent of each other in his own dominions, and Sultan over his own subjects, that is to say, that Zanzibar and the Islands (Pemba and Monfea), and the dominions on the continent of Africa dependent upon it, shall be subject to me, and that Muscat and its dependencies, with the land of Oman, shall be subject to my brother Thowaynee bin Saeed, and that we should dwell in peace and friendly alliance the one with the other, as is customary between brothers. I pray that it may be so, if it please God. I feel very much obliged to the British Government for all its kindness and favour, and for having averted from my dominions disorders and hostilities. During my lifetime I shall never forget the kindness which it has shown to me. And now what I desire from you is this, that you will mention to his Lordship the Governor-General of India that he should kindly determine that the payment of the 40,000 crowns per annum to my brother Thowaynee shall be settled as follows, viz., that 20,000 crowns shall be due and payable each year at the "Monsim" (about April, when the south-west monsoon sets in), and that the other 20,000 crowns shall be due and payable each year at the "Daman" (about September, October, when the annual accounts are made up, and the revenue from the Customs is paid), in like manner as I before agreed to do when I made the arrangement, through my cousin Mahomed bin Salim, to pay 40,000 crowns annually to Muscat.

And respecting the 80,000 crowns, arrears for two years, that it shall be paid as I can possibly do so.

This I desire, in order that there may be no ground of dispute hereafter.

This is what I wish for from the friendship of the Government.

And for whatsoever you may desire from me the sign is with, you.

From the confiding slave in God's mercy,

MAJEED BIN SAEED.

Written on the 19th day of the month of Zilhej, in the year 1277 of the Hegira, corresponding to the 29th June, A. D. 1861.

Lieut.-Col. C. P. Rigby.

No. 5. — The Governor-General of India to the Sultan of Zanzibar.

BELOVED AND ESTEEMED FRIEND,

August 22, 1861.

I HAVE received with much satisfaction your friendly letter dated 15th Zilhej, A.H. 1277. I am gratified to learn that my award for the settlement of the disputes which long existed between yourself and your brother Syud Thowaynee bin Saeed, the ruler of Muscat, has given satisfaction to your Highness.

The terms of the arbitration will be fulfilled if the sum of 40,000 crowns, payable to your brother annually, be paid by two installments, viz., the first at the Monsim and the second at the Daman.

I beg, &c.

His Highness Syud bin Saeed.

CANNING.

PART IX

**Sentence arbitrale relative à la question élevée entre
le Venezuela et le Royaume des Pays-Bas, de la
domination et de la souveraineté de l'île d'Aves**

Décision du 30 juin 1865

**Arbitral award relating to the issue of control and
sovereignty over Aves Island, raised between
Venezuela and the Kingdom of the Netherlands**

Decision of 30 June 1865

SENTENCE ARBITRALE DE LA REINE D'ESPAGNE RELATIVE À LA
QUESTION ÉLEVÉE ENTRE LE VENEZUELA ET LE ROYAUME DES
PAYS-BAS, DE LA DOMINATION ET DE LA SOUVERAINETÉ DE
L'ÎLE D'AVES, DÉCISION DU 30 JUIN 1865*

ARBITRAL AWARD OF THE QUEEN OF SPAIN RELATING TO THE
ISSUE OF CONTROL AND SOVEREIGNTY OVER AVES ISLAND,
RAISED BETWEEN VENEZUELA AND THE KINGDOM OF THE
NETHERLANDS, DECISION OF 30 JUNE 1865**

Domination et souveraineté sur l'île d'Aves – continuité territoriale – valorisation de l'expertise des géographes afin de déterminer la souveraineté – unanimité nécessaire entre les géographes.

Détermination de la souveraineté – une occupation territoriale temporaire et précaire est insuffisante pour soutenir l'existence de droits souverains – une occupation de trois ou quatre mois par an par des personnes privées ne suffit pas à créer de tels droits.

Détermination de la souveraineté – terra nullius – absence d'intention d'acquérir – absence d'acte de souveraineté.

La prévoyance dans un contrat de la possibilité d'être dépossédé ne constitue pas une reconnaissance de l'absence de droit.

Maintien des droits coutumiers après la décision arbitrale – droit de pêche – indemnisation requise pour la perte d'un droit

Control and sovereignty over Aves Island – territorial continuity – value of the authority of geographers to determine sovereignty – need for unanimity among geographers.

Determination of sovereignty – temporary, precarious occupation of territory is insufficient to support the right to sovereignty – occupation by private individuals for three or four months per year is insufficient to establish such rights.

Determination of sovereignty – terra nullius – no intention to acquire – no instrument of sovereignty.

Providing in a contract for the possibility of being dispossessed does not constitute recognition of the absence of a right.

Maintenance of customary rights after the arbitral decision – the right to fish – compensation required for loss of the right.

* * * * *

* Reproduit de A. De La Pradelle, et N. Politis, *Recueil des Arbitrages Internationaux*, Tome II, Paris, 1923, Les Editions Internationales, p.408.

** Reprinted from A. De La Pradelle, and N. Politis, *Recueil des Arbitrages Internationaux*, Tome II, Paris, 1932, Les Editions Internationales, p.408.

Convention du 5 août 1857

S. M. le Roi des Pays-Bas, grand-duc de Luxembourg, et S. E. le Président de la République du Vénézuéla, animés également du désir de régler d'une manière amicale les différends qui, depuis plus de deux ans, ont surgi entre les deux gouvernements, d'une part, au sujet de la domination [*dominio*] et la souveraineté [*soberanía*] de l'île d'Aves, située à 15° 40' de latitude Nord et à 63° 35' de longitude Ouest, et, d'autre part, au sujet des événements regrettables survenus à Coro en février 1855, ont nommé à cet effet:

S. M. le Roi des P.-B., M. Pierre Van Rees, chevalier de l'ordre du Lion Néerlandais etc., son commissaire spécial en mission extraordinaire et consul général intérimaire près la R. du V., et

S. E. le Président de la R. du V., M. François Condé, vice-président du Conseil d'État et son commissaire spécial.

Lesquels, après s'être communiqués leurs pleins pouvoirs, trouvés en bonne et due forme, sont convenus des articles suivants:

Art. 1^{er}. — La question du droit de domination [*dominio*] et de souveraineté [*soberanía*] de l'île Aves sera soumise à l'arbitrage d'une puissance amie, préalablement choisie d'un commun accord.

Art. 2. — Le gouvernement du V. s'oblige à payer au gouvernement des P.-B., par l'intermédiaire du commissaire spécial néerlandais ou du consul général des P.-B., résidant à Caracas, la somme de deux cent mille florins des P.-B., à l'effet d'indemniser les commerçants hollandais établis à Coro, des préjudices qu'ils ont soufferts à la suite des événements de février 1855.

Art. 3. — Le paiement de cette somme s'effectuera de la manière suivante:

1° Cinquante mille pesos ou cent mille florins des P.-B., dix jours après l'échange des ratifications de la présente convention;

2° Cinquante mille pesos ou cent mille florins des P.-B., vingt jours après le dit échange.

Art. 4. — S. E. le Président de la République ayant procédé par anticipation au remplacement du commandant d'armes de la province de Coro, M. le général Jean C. Falcon, afin que son maintien à ces fonctions ne pût être un obstacle pour l'arrangement amiable des difficultés provenues des dits événements regrettables, et ayant en outre renvoyé le susdit général devant un tribunal compétent, pour connaître du bien-fondé des imputations de culpabilité ou de complicité qui lui étaient faites à raison de ces événements, le gouvernement de S. M. le Roi des P.-B. déclare que l'adoption de ces mesures et l'approbation et l'exécution de

cette convention mettent fin à l'affaire engagée contre l'ex-gouverneur Charles Navarro, et à toutes les réclamations qui s'y rattachent.

Art. 5. — Immédiatement après l'échange des ratifications de cette convention et le paiement des cent mille pesos ou deux cent mille florins des P.-B., stipulé dans l'article 2, le commissaire spécial de S. M. le Roi des P.-B. se rendra à Curaçao, muni d'ordres écrits du gouvernement du V. à l'adresse des autorités civiles et militaires de Coro, pour présider au retour à cette ville des commerçants juifs.

Art. 6. — Les H. P. C., animées seulement du désir de terminer d'une manière définitive et irrévocable ces réclamations, déclarent formellement que la présente convention ne s'applique qu'à ces dernières et que, n'ayant d'autre fin, elle ne pourra jamais à l'avenir être invoquée par l'une ou l'autre des parties, soit comme un précédent, soit comme une règle.

Art. 7. — Comme l'article 38, paragraphe 8, de la nouvelle Constitution du V. prescrit que nulle convention ou traité public conclu par le pouvoir exécutif ne pourra être ratifié sans l'approbation préalable du Congrès, il est expressément convenu que S. E. le Président de la République soumettra et recommandera la présente convention à l'approbation du Congrès, dans les premiers jours de sa session ordinaire de 1858.

Art. 8. — La présente convention sera ratifiée par l'une et l'autre partie, et les ratifications seront échangées à Caracas, huit jours après l'approbation du Congrès, ou plus tôt si faire se peut.

En foi de quoi, les plénipotentiaires respectifs ont signé la présente convention et y ont apposé leurs cachets.

Fait à Caracas, le 5 août 1857.

P. VAN REES. — FRANCISCO CONDE.

Sentence du 30 juin 1865

Nous, Doña Isabelle II, par la grâce de Dieu et la Constitution de la Monarchie, Reine des Espagnes, ayant accepté les fonctions de juge arbitre qui nous ont été conférées par les notes respectivement adressées à notre ministre d'État par le ministre des Affaires étrangères de la République du Vénézuéla et le ministre plénipotentiaire de S. M. le Roi des Pays-Bas, en vertu d'un accord intervenu entre les deux nations précitées, le 5 août 1857, à l'effet de soumettre à notre jugement la question élevée entre elles de la domination [*dominio*] et de la souveraineté [*soberanía*] de l'île d'Aves;

Animée du désir de répondre dignement à la confiance que les Hautes Parties intéressées nous ont manifestée, nous avons scrupuleusement examiné, à cet effet, avec l'assistance de notre Conseil des ministres, tous les

documents, mémoires et cartes que le ministre des Affaires étrangères de la République du Vénézuéla et le ministre plénipotentiaire de S. M. le Roi des Pays-Bas, susmentionnés, ont respectivement remis à notre ministre d'État;

Attendu qu'il résulte des documents susvisés que les principales raisons alléguées par le gouvernement des Pays-Bas à l'appui du droit qu'il dit lui appartenir sont:

- 1° Que, dans les anciennes cartes, figure un banc de sable unissant l'île d'Aves à celle de Saba, possession hollandaise, ce qui laisse supposer que jadis ces deux îles constituaient un territoire unique;
- 2° Qu'un grand nombre de géographes, dont plusieurs Vénézuéliens, citent l'île d'Aves parmi les Antilles hollandaises, dépendant du gouvernement de Curaçao, et affirment qu'elle est habitée par des pêcheurs hollandais;
- 3° Que, suivant le témoignage des voisins de Saba et de Saint-Eustache, possessions des Pays-Bas, les habitants de ces îles avaient et ont encore coutume d'aller pêcher des tortues et cueillir des œufs d'oiseaux dans les îles de ce nom *aves*, où ils ont parfois arboré le drapeau de Pays-Bas; et
- 4° Que la République du Vénézuéla, en concédant un privilège pour l'extraction du guano existant dans ladite île d'Aves, stipula, dans une des clauses du contrat que, si elle venait à en être dépossédée, elle ne serait obligée de payer aucune indemnité;

Attendu, d'autre part, que la République du Vénézuéla fait, à son tour, valoir à l'appui de sa demande, les arguments suivants:

- 1° Qu'il n'y a pas de banc de sable unissant l'île Aves à celle de Saba;
- 2° Que l'occupation matérielle de la première par des personnes privées, qui n'agissent pas au nom de leur gouvernement, mais obéissent à un intérêt personnel, ne constitue pas une possession;
- 3° Que toutes les îles de la mer des Caraïbes, parmi lesquelles se trouve l'île d'Aves, ont été découvertes par les Espagnols et qu'en se constituant sur le territoire de l'ancienne capitainerie générale de Caracas, ladite République a succédé à tous les droits que l'Espagne avait sur l'île en question; et
- 4° Que le continent vénézuélien est le territoire le plus proche de l'île d'Aves, ce qui lui donne un droit de préférence, en vertu du principe établi dans une question analogue entre les États-Unis et la Grande-Bretagne.

Vu la carte géographique des Antilles, produite par le gouvernement des Pays-Bas, où figure un banc de sable allant de l'île Aves à celle de Saba, mais qui ne porte ni date ni indication d'auteur;

Vu les copies de deux cartes anglaises publiées en 1802, où figure le même banc de sable, sous la dénomination de banc de Aves;

Vu les documents présentés par le gouvernement de la République du Vénézuéla et, parmi eux, une information de la Direction hydrographique d'Espagne, où, se référant par erreur à d'autres îles d'Aves, on affirme qu'elles ont fait partie de la capitainerie générale de Caracas;

Vu l'Ordonnance royale du 13 juin 1786, qui, en décrétant la création à Caracas d'un tribunal, à l'effet d'éviter les préjudices qui résultaient pour les habitants de cette ville de l'obligation de recourir en appel devant le tribunal de Saint-Domingue, disposait que le ressort de ce tribunal ne comprendrait plus que la partie espagnole de l'île, l'île de Cuba et celle de Porto-Rico, d'où il résulte que l'île d'Aves devait faire partie du ressort du tribunal de Caracas;

Considérant que, si certains géographes ont fait figurer dans des cartes anciennes ledit banc de sable entre l'île d'Aves et l'île de Saba, les dernières observations faites sur ce banc de sable démontrent qu'il ne s'étend pas au delà de douze lieues au Sud de l'île de ce nom et qu'à cet endroit on est à une profondeur de plus de cent soixante brasses ainsi que cela appert d'une carte publiée par l'amirauté anglaise en 1857;

Que, comme l'île d'Aves se trouve à une quarantaine de lieues au Sud de Saba et comme le banc de sable finit à douze lieues de cet endroit, il est indubitable que le banc de sable fait défaut sur une étendue de vingt-huit lieues et, dès lors, qu'il n'y a ni union ni lien entre l'île d'Aves et celle de Saba;

Qu'alors même qu'elles auraient formé jadis une seule île, au moment où le gouvernement des Pays-Bas a pris possession de l'île de Saba, l'île d'Aves n'en faisait pas partie, c'est ce que signifient les paroles d'Alcedo, auteur cité par le gouvernement des Pays-Bas, lequel dit au sujet de Saba .. «elle appartenait au début aux Danois... mais les Hollandais y envoyèrent une colonie de Saint-Eustache, etc.», et parle ensuite séparément de l'île d'Aves, il en résulte que les deux îles étaient séparées quand les Hollandais prirent possession de la première;

Considérant que, dans les références géographiques produites par le gouvernement des Pays-Bas à l'appui de sa demande, il y a une grande confusion, car plusieurs d'entre elles sont relatives à d'autres îles d'Aves distinctes de celle qui fait l'objet du présent litige, île à laquelle la plupart des géographes n'assignent aucune nationalité déterminée;

Considérant que, pour donner de l'importance en matière de propriété à l'autorité des géographes, il est nécessaire qu'ils soient tous, ou la plupart d'entre eux, unanimement d'accord sur la nationalité d'un territoire donné et que, n'en étant pas ainsi en l'espèce, on doit exiger d'autres titres d'une force et d'une valeur plus grandes que l'opinion des géographes;

Considérant que, s'il est bien établi que les habitants de Saint-Eustache, possession néerlandaise vont pêcher des tortues et cueillir des œufs à l'île d'Aves, ce fait ne peut pas servir d'appui au droit de souveraineté, car il implique seulement une occupation temporaire et précaire de l'île, étant donné qu'il n'est pas, en l'espèce, la manifestation d'un droit exclusif, mais la conséquence de l'abandon de la pêche par les habitants des contrées voisines ou par son maître légitime;

Considérant que si, en accordant un privilège pour l'extraction du guano dans l'île d'Aves, la République du Vénézuéla stipula qu'elle ne serait pas tenue de payer une indemnité si elle venait à être dépossédée de ce territoire, cette condition ne prouve rien en faveur de la prétention des Pays-Bas, car elle n'est qu'une sage précaution de la part de la République et qu'une preuve de respect naturel de l'état litigieux dans lequel se trouve l'île;

Considérant que, dans cet exposé, le gouvernement néerlandais a prouvé uniquement que quelques-uns de ses ressortissants établis à Saint-Eustache et à Saba vont depuis le milieu du XVIII^e siècle, pêcher la tortue et cueillir des œufs dans l'île d'Aves et qu'à cette fin ils y résident trois ou quatre mois par an;

Considérant qu'à son tour le Vénézuéla fonde principalement son droit sur celui qu'avait l'Espagne avant la constitution de cette République comme État indépendant et que, s'il résulte bien que l'Espagne n'a pas matériellement occupé le territoire de l'île d'Aves, il est indubitable qu'il lui appartenait comme faisant partie des Indes Occidentales qui étaient sous la domination [*dominio*] des rois d'Espagne, conformément à la loi 1, titre V, livre I, de la *Recopilación* des Indes.

Considérant que l'île d'Aves a dû faire partie du territoire compris dans le ressort du tribunal de Caracas, lorsque ce tribunal fut créé le 13 juin 1786 et qu'en devenant nation indépendante, le Vénézuéla se constitua sur le territoire de la capitainerie générale du même nom, en déclarant, après coup, en vigueur dans le nouvel État toutes les dispositions adoptées par le gouvernement espagnol jusqu'en 1808, par quoi il put considérer l'île d'Aves comme partie de la province espagnole de Vénézuéla;

Considérant que, même en faisant abstraction de ce qui précède, il n'en reste pas moins que, si on peut dire que l'île d'Aves ne fut jamais réellement et vraiment occupée par l'Espagne et habitée par des Espagnols, la résidence temporaire de quelques indigènes de Saba et de Saint-Eustache n'est qu'une occupation précaire qui ne vaut pas possession; et bien que, à raison des immersions auxquelles elle est exposée, l'île ne soit pas susceptible d'une habitation permanente, si les Hollandais, la croyant abandonnée, l'avaient occupée dans l'intention de l'acquérir, ils auraient construit quelque édifice et essayé de rendre l'île habitable d'une manière constante, ce qu'ils n'ont pas fait;

Considérant enfin que le gouvernement des Pays-Bas n'a fait qu'utiliser la pêche dans la dite île par l'intermédiaire de ses colons, tandis que le gouvernement vénézuélien a été le premier à y tenir une force armée et à y faire des actes de souveraineté, confirmant ainsi la domination [*dominio*] qu'il avait acquise en vertu d'un titre général dérivant de l'Espagne,

NOUS DÉCIDONS, d'accord avec notre Conseil des ministres et après avoir entendu l'avis de notre Conseil d'Etat tout entier, que la propriété [*propriedad*] de l'île en question appartient à la République du Vénézuéla, à charge pour cette dernière d'indemniser les sujets hollandais s'ils venaient à être privés de la faculté d'y exercer la pêche, auquel cas l'indemnité sera calculée sur la base du produit net annuel de la pêche dans les cinq dernières années, capitalisé au taux de 5%.

Donné à notre Palais de Madrid, le 30 juin 1865.

ISABELLE.

PART X

**Sentence arbitrale relative à la délimitation de la
frontière entre la République Sud-Africaine
(Transvaal) et l'État libre d'Orange**

Décision du 19 février 1870

**Arbitral award relating to boundary delimitation
between South-African Republic (Transvaal)
and Free State of Orange**

Decision of 19 February 1870

SENTENCE ARBITRALE DU LIEUTENANT-GOUVERNEUR DE
NATAL AU SUJET DE LA DÉLIMITATION DE LA FRONTIÈRE
ENTRE LA RÉPUBLIQUE SUD-AFRICAINE (TRANSVAAL) ET
L'ÉTAT LIBRE D'ORANGE, DÉCISION DU 19 FÉVRIER 1870*

ARBITRAL AWARD OF LIEUTENANT-GOVERNOR OF NATAL
RELATING TO BOUNDARY DELIMITATION BETWEEN OF SOUTH-
AFRICAN REPUBLIC (TRANSVAAL) AND FREE STATE OF
ORANGE, DECISION OF 19 FEBRUARY 1870**

Délimitation frontalière – interprétation du Traité du 23 février 1854 – différend quant à la source de la rivière du Vaal qui constitue la frontière entre les Parties – rivière ayant plusieurs sources ou branches originelles.

Interprétation des traités – pour l'interprétation d'un terme controversé, il convient d'utiliser la même définition que celle précédemment utilisée dans un autre instrument international.

Souveraineté – octroi de concessions dans la zone contestée par une Partie et son prédécesseur légal – manque d'opposition ou de protestation de l'autre Partie.

Delimitation of borders – interpretation of Treaty of 23 February 1854 – dispute regarding the source of the Vaal river, which constitutes the border between the Parties – river having multiple sources or originating branches.

Treaty interpretation – convenience of relying on same definition adopted in previously existing international instrument to interpret disputed term.

Sovereignty – awarding of concessions in the disputed territory by one Party to dispute and its legal predecessor – lack of opposition or protest by the other Party.

* * * * *

Sentence du 19 février 1870

À tous ceux à qui parviendra le présent acte, moi, Robert William Keate, Esq., lieutenant-gouverneur du Natal, salut.

Attendu qu'une convention est intervenue, le 30 octobre 1869, entre S. E. Marthinus Wessel Pretorius, en sa qualité de Président de la République Sud-Africaine, et S. E. Johannes Hendrikus Brand, en sa qualité de Président de l'État libre d'Orange, stipulant que, le 16 janvier de l'an de N. S. 1852, il fut conclu à Sand River, par les commissaires de S. M. B., Hogge et Owen, et une

* Reproduit de A. De La Pradelle and N. Politis, *Recueil des Arbitrages Internationaux*, vol. II, Paris, 1923, Les Editions Internationales, p. 576.

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députation d'émigrés Boers demeurant au Nord du Vaal, composée du commandant-général Pretorius et d'autres, une convention, approuvée et confirmée, le 15 avril 1852, à King Williamstown, par S. E. sir George Cathcart, lieutenant général et haut commissaire de S. M. B., aux termes de laquelle le gouvernement britannique garantit aux émigrés Boers d'au-delà du Vaal, habitant le territoire actuellement connu sous le nom de République Sud-Africaine, le droit de diriger leurs affaires et de se gouverner eux-mêmes; que, par une convention conclue à Bloemfontein, le 23 février 1854, entre sir George Russel Clerk, commissaire spécial de S. M. pour le règlement et l'arrangement des affaires du territoire de la rivière Orange, et les représentants de ce territoire, le gouvernement du territoire de la rivière Orange fut transmis aux délégués des habitants de ce territoire pour en prendre possession, avec la garantie du gouvernement de S. M. pour la future indépendance de ce pays, qui est actuellement connu sous le nom d'État libre d'Orange; qu'il fut convenu et entendu que, dans le cas où il viendrait à s'élever quelque doute sur la véritable signification des mots «la rivière du Vaal», en ce qui concerne la frontière à partir de la source de cette rivière dans le Drakenberg, ce différend serait réglé et liquidé par des commissaires, désignés à cet effet par les deux parties; que des difficultés se sont présentées entre le gouvernement de la République Sud-Africaine et celui de l'État libre d'Orange, relativement à la véritable source du Vaal qui doit séparer ladite République Sud-Africaine de l'État libre d'Orange, et que lesdits gouvernements ont vainement essayé de régler ces difficultés; que les parties contractantes, désireuses de voir régler exactement, amicalement et rapidement le différend au sujet de la dite frontière, ont prié S. E. Robert William Keate, Esq., lieutenant-gouverneur de la colonie du Natal, de connaître dudit différend en qualité d'arbitre et de le résoudre par un jugement définitif, et que Robert William Keate, Esq., a accepté la charge de cet arbitrage, à la condition que lesdites parties agiraient respectivement de manière à faciliter la tâche de Robert William Keate, Esq., de rendre un jugement équitable et qu'elles ne feraient rien, ni par paroles, ni par actes, pour retarder ou empêcher le jugement de Robert William Keate, Esq., les dites parties étant respectivement convenues, au nom de leurs peuple et gouvernement respectifs, de soutenir, d'accepter et d'exécuter le jugement qui serait rendu par Robert William Keate, Esq.;

Qu'il soit ainsi rendu public que j'ai minutieusement examiné, étudié et pesé tous les documents et toutes les preuves qui m'ont été fournies respectivement par les deux parties; entendu les parties au sujet de cette affaire; pesé les correspondances et autres documents relatifs à cette question, que j'avais à ma disposition; fait examiner dans tous ses détails le territoire dont il s'agit; qu'il m'a paru que la véritable portée et signification de l'article de la convention du 16 janvier 1852, relatif à la frontière à partir de la source du Vaal dans le Drakenberg, tel qu'il est expliqué par la correspondance du lieutenant-gouverneur Pine et sir George Cathcart avec les commissaires-adjoints de S. M. en 1852, et par l'acte de proclamation de la cession de la souveraineté du territoire de la rivière Orange aux habitants de ce territoire en

1854, était que le Vaal, lequel, d'après la convention, constituait la frontière septentrionale du territoire de la rivière Orange, actuellement l'État libre d'Orange, devait ainsi, autant que possible, former le trait d'union entre ce territoire et la chaîne du Drakenberg qui, d'après la convention, forme la frontière orientale de ce territoire ou État, et que la petite partie restante, dans la direction du point où ces frontières devaient naturellement se croiser, devait être fixée par des commissaires désignés à cette fin, qui, autant que possible, avaient à prendre la source du Vaal dans le Drakenberg comme chaînon ou jonction de cette ligne de démarcation;

Qu'il m'a semblé, en outre, que le Vaal n'est pas une rivière ayant pour origine une source unique dans le Drakenberg, mais a, comme il est indiqué dans la correspondance précitée du lieutenant-gouverneur Pine, plusieurs sources ou branches dont la plus méridionale venant du Drakenberg, la Wilge, est considérée par le gouvernement de la République Sud-Africaine comme la véritable source du Vaal, au sens de la convention; que cette partie du Vaal, qui, d'après la convention, forme la frontière Nord de la Souveraineté, actuellement l'État libre d'Orange, est une rivière produite par la réunion de deux branches principales situées à l'Est de la Wilge; que l'une de ces branches venant du veld non accidenté de la partie supérieure du rand, où est le partage des eaux coulant à l'Est et à l'Ouest, est, dans son cours, appelée par les indigènes la Likwa et, par les Hollandais, la Kapok jusqu'à un certain endroit, et de là le Vaal, et se trouve alimentée par des rivières venant dudit rand dont la principale aboutissant à l'endroit où le nom hollandais de Kapok se transforme en celui de Vaal, dénommée par les indigènes la petite Likwa et, par les Hollandais, le Bakspruit, coupe dans son cours le district de Wakkerstroom de la République Sud-Africaine; que cette branche, étant l'affluent le plus occidental du Vaal, est considérée par le gouvernement de l'État libre d'Orange comme la véritable source du Vaal, au sens de la convention; que l'autre branche, dénommée par les Hollandais le Klip, se forme au contraire par la réunion de plusieurs cours d'eau venant de la chaîne du Drakenberg, au-dessous ou près de la frontière Nord du Natal, dans la partie de la chaîne qui constitue, d'après la convention, la frontière orientale du territoire d'Orange ou de l'État libre;

Que, lors de la délimitation du Natal par l'ordre du Conseil de S. M. en date du 3 février 1858, qui choisit le premier affluent du Buffalo comme frontière Nord de cette colonie, il a été convenu d'entendre par Drakenberg, à partir de l'endroit où finit la chaîne proprement dite, une série de montagnes isolées dans la direction N.-E. où se trouvent d'autres affluents du Buffalo et du Vaal; que, dès lors, s'agissant d'établir une frontière entre l'État libre d'Orange et la République Sud-Africaine, il convient de prendre le mot Drakenberg dans le même sens que lors de la fixation de la frontière entre la dite République et la colonie du Natal;

Qu'avant la cession de la Souveraineté du territoire d'Orange, considérant le Drakenberg comme la frontière orientale de ce territoire, le gouvernement britannique avait accordé jusqu'à cette région des concessions, dont quelques-

unes dépassaient certains affluents du cours supérieur du Klip ou branche méridionale du Vaal ou les sources de ces fleuves dans la chaîne de montagnes; que, depuis la cession de la Souveraineté, le gouvernement de l'État libre d'Orange a parfois accordé d'autres concessions dans la même région ou dans les environs; que, depuis la naissance du conflit entre les deux gouvernements intéressés dans la délimitation de la frontière, une convention est intervenue le 1er juin 1867, par laquelle, en vue de mettre fin à ce conflit, les deux parties se sont respectivement engagées, notamment, à s'en tenir, quant à la frontière, à la convention du 16 janvier 1852; que, depuis lors, le gouvernement de la République Sud-Africaine a parfois accordé des concessions sur les rives orientales des affluents Nord et Sud du Vaal et, pendant plusieurs années, administré les affaires de ces contrées sans qu'il y eût aucune opposition ou protestation de la part du gouvernement de l'État libre d'Orange:

PAR CES MOTIFS, je décide et déclare, maintenant et pour l'avenir, que la ligne de frontière entre la République Sud-Africaine et l'État libre d'Orange, à l'endroit où la convention du 16 janvier 1852 en avait laissé la fixation à un arbitrage ultérieur, partira d'un point de la frontière de la colonie du Natal situé à proximité immédiate de la source du ruisseau dit Gansvallei la plus proche de la frontière Nord de la dite colonie; de là, elle suivra ce ruisseau jusqu'à sa réunion avec le Klip, et, de là, le cours de ce fleuve jusqu'à sa jonction avec le Vaal.

Fait et délivré sous mon sceau, à Pietermaritzburg, le 19 février 1870, et signifié le même jour, par copie séparée, à S. E. le Président de l'État libre d'Orange et à S. E. le Président de la République Sud-Africaine.

ROBERT WILLIAM KEATE.

PART XI

**Arbitral award between Portugal and the United Kingdom,
regarding the dispute about the sovereignty over the Island
of Bulama, and over a part of the mainland opposite to it**

Decision of 21 April 1870

**Sentence arbitrale entre le Portugal et le Royaume-Uni,
relative au différend concernant la souveraineté sur l'île de
Bulama, et sur une partie du territoire continental adjacent**

Décision du 21 avril 1870

ARBITRAL AWARD OF THE PRESIDENT OF THE UNITED STATES,
REGARDING THE DISPUTE BETWEEN PORTUGAL AND THE
UNITED KINGDOM ABOUT THE SOVEREIGNTY OVER THE
ISLAND OF BULAMA, AND OVER A PART OF THE MAINLAND
OPPOSITE TO IT, DECISION OF 21 APRIL 1870*

SENTENCE ARBITRALE DU PRÉSIDENT DES ETATS-UNIS,
RELATIVE AU DIFFÉREND ENTRE LE PORTUGAL ET LE
ROYAUME-UNI CONCERNANT LA SOUVERAINETÉ SUR L'ÎLE DE
BULAMA ET SUR UNE PARTIE DU TERRITOIRE CONTINENTAL
ADJACENT, DÉCISION DU 21 AVRIL 1870**

Territorial determination – control and sovereignty over the Island of Bulama and certain territory on the mainland coast of West Africa adjacent to it – discovery, formal claim and inhabitation of adjacent mainland territory sufficient to establish sovereign rights – proximity to mainland – cession by indigenous people – use of land for agriculture did not give claim to land since sovereign rights had already been established – lack of acquiescence to subsequent claim of sovereignty.

Délimitation territoriale – contrôle et souveraineté sur l'île de Bulama et le territoire limitrophe de la côte continentale de l'Afrique de l'Ouest – la découverte, la réclamation formelle et l'occupation du territoire continental limitrophe, sont des actes suffisants pour établir des droits souverains – proximité du continent - cession par le peuple autochtone – l'utilisation agricole de la terre n'a pas donné droit au territoire puisque des droits souverains avaient été déjà établis – absence de consentement à la revendication ultérieure de la souveraineté.

* * * * *

**Report Of J.C. Bancroft Davis, Assistant Secretary
of State of the United States**

MEMORANDUM.

[For the President.]

The subject in dispute is the sovereignty over the Island of Bulama, and over a part of the mainland opposite to it.

The island is a low, densely wooded, and unhealthy tract, about twenty miles in length by ten in width, and is situated in latitude 11° 34' N., longitude 15° 33' W. from Greenwich, off the west coast of Africa, at the outlet, on its

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eastern shore, of the river Rio Grande, and at the outlet on its western shore of the river Jeba; and is so near the mainland that cattle can pass with ease thence to it.

The Portuguese settlement of Bissao is on the island of Bissao on the west bank of the river Jeba, about twenty miles north from Bulama. The settlement of Guinala on the mainland is near the right bank of the Rio Grande about the same distance east of Bulama. The tract of mainland in dispute is contained within a line drawn from one of these settlements to the other, and thence from Guinala nearly due south.

The annexed map*, submitted with the English case, indicates these several points.

The voluminous evidence covers a period from A. D. 1446 to A. D. 1869. The following points may be regarded as admitted or proved.

1st. It is admitted that the island was discovered by the Portuguese in 1446; but it is not shown that this discovery was followed by possession by them before the year 1752.

2nd. It is admitted or shown that in some past time the whole archipelago (of which the island of Bulama forms the most eastern part) as well as the mainland had been occupied or claimed by a native tribe known as the Biafares; that before 1699 another native tribe known as the Bissagoo had driven the Biafares out of the archipelago; and that in 1699 and ever since (except for the acts hereafter stated) the Bissagoo had claimed the archipelago, and the Biafares the mainland. It is also admitted that neither tribe has actually dwelt upon this particular island of Bulama, and that neither had occupied it, except that the Bissagoo had sometimes cultivated a few acres on the western extremity when the rains began.

3rd. It is shown that in 1752 orders were given at Lisbon for the formal occupation of Bulama; that on the 4th of April 1753 possession was formally taken in the name of the King of Portugal; but it does not appear that this was followed by continued occupation, or by any act of sovereignty except the cutting of timber in 1753 for a fortification at Bissao.

4th. It is shown that in 1702 a British colony of 275 persons (having first agreed with the British Government that the acquisition of any territory which they might acquire should be made for and in the name of the King of Great Britain as sovereign), arrived at Bulama; that they obtained from the chief of the Bissagoo for a small sum paid a cession of the island; that they also obtained from the chief of the Biafares for a small consideration paid a relinquishment of the claim of his tribe to the island and also a cession of the portion of the mainland now claimed by Great Britain; that at the time of these cessions there was no Portuguese or other settlement on the island; but that

* Secretariat note: See map No. 2.

there was and for a long time had been a Portuguese settlement at Bissao. It is also admitted that there was a Portuguese settlement at Guinala on the mainland in 1599, and it is shown that this Portuguese settlement continued, and that in 1768 it was a "large village inhabited only by Portuguese who have been there from father to son for a long time." It does not appear, however, that there was any Portuguese settlement on the mainland within the territory between Guinala and the mouth of the river claimed to have been ceded to the British colonists for the benefit of their sovereign.

5th. It is admitted that the British colony remained in Bulama about eighteen months; that during this time the colonists were attacked by the Bissagoo and a large number were killed; that fever and other diseases nearly destroyed the remainder; and that the remnant of the colony was obliged to return to England.

6th. It is shown that in 1814 the governor of Sierra Leone made another attempt on the part of Great Britain to colonize the island of Bulama, and that in less than two years the Bissagoo attacked the settlement, plundered the place, and compelled the colonists to return to Sierra Leone.

7th. It is admitted that between 1824 and 1828 the Portuguese authorities, on several occasions, entered upon the island of Bulama and cut and removed timber without molestation from either native tribe or from Great Britain.

8th. It is admitted that in 1827 the British authorities set up the rights claimed to have been acquired by the two deeds of cession of 1792, and that they have since steadily asserted the same by various hostile acts as against the Portuguese. It also appears that, simultaneously with the revival of the British claim, the governor of Sierra Leone "on behalf of His Majesty the King of the United Kingdom," entered into a treaty with the King of Bulola (Bulama) engaging that no native should be dispossessed of ground in cultivation or actually occupied; and also into a treaty with the Biafares to the same purport. The latter treaty also cedes to Great Britain the sovereignty of Bulama, and the territory on the mainland, and confirms the cessions of 1792.

9th. It is shown that in 1828 the Portuguese obtained from the King of the Canabacs (i. e., Bissagoo) and from the envoys of the Kings of the Biafares, a declaration that they had never sold the island of Bulama to the British.

10th. It is shown that in 1830 the Portuguese established a settlement on the island of Bulama, which has been maintained there from that time to this; and that that settlement now numbers over seven hundred persons of various shades of color, speaking the Portuguese language, and acknowledging the sovereignty of the King of Portugal.

11th. It is claimed by Great Britain, and denied by Portugal, that this settlement was a colorable one, for the purpose of carrying on the slave trade through the factories and estates established there.

12th. It is admitted that this settlement has been often disturbed by armed British cruisers, and that Great Britain has never ceased to assert its claims, both by diplomacy and by force; and most of the acts complained of by Portugal are acts done by Great Britain under claim of title with the avowed object of breaking up the slave trade.

13th. It appears that, in 1804, the question began to be diplomatically discussed between the two powers, and that the discussion resulted in 1869 in the submission to the President of the United States.

It will be observed from the foregoing statement that one important fact is established — viz: that the island of Bulama since the year 1699 is not known to have been actually inhabited by either the Bissagoo or the Biafares, or by any other native tribe.

This fact seems to dispose of all titles on either side derived from deeds, cessions, declarations, or other acts of the native tribes.

Whatever force might be given to such a title in case of actual occupancy of the territory ceded at the time of the cession, to admit the validity of such title when the grantor did not reside upon or permanently possess and occupy the territory ceded, would be contrary to the whole policy of the United States, and to all the rules of public law recognized by it. It is to be presumed that the parties made the submission knowing the American doctrine.¹

This disposes of a large part of the argument and a large part of the case.

The British answer cites with approval certain doctrines from Vattel, which may be regarded as sound so far as applicable to this case. They are these:

I. That all mankind have an equal right to things that have not yet fallen into the hands of anyone, and those things belong to the person who first takes possession of them. When therefore a nation finds a country uninhabited, and without an owner, it may lawfully take possession of it, and after it has sufficiently made known its will in this respect, it can not be deprived of it by another nation. Thus, navigators going on voyages of discovery, and meeting with islands or other lands in a desert state, have taken possession of them in the name of their nations, and this title has been usually respected, *provided it was soon after followed by a real possession.*

II. "It is questioned whether a nation can by the mere act of taking possession, appropriate to itself countries which it really does not occupy, and thus engross a much greater extent of territory than it is able to people or cultivate.

* * *

¹ See correspondence with Great Britain as to the Mosquito coast.

The law of nations will therefore not acknowledge the property and sovereignty of a nation over any uninhabited countries, except those in which it has really taken possession, and in which it has formed settlements, or of which it has made actual use.”

It is to be observed, in qualification of these rules, that countries inhabited by savage tribes may, under well-established rules of public law, be so occupied and possessed by the representatives of a Christian power as to dispossess the native sovereignty and transfer it to the Christian power. The word “uninhabited” in the extract from Vattel must therefore be taken with this limitation.²

It is also to be remarked that islands in the vicinity of the mainland are regarded as its appendages: that the ownership and occupation of the mainland includes the adjacent islands, even though no positive acts of ownership may have been exercised over them.

To apply these principles.

We find that from 1699 to 1768 (how much later does not appear) Portugal had a settlement on the Jeba at Bissao and another at Guinala on the Rio Grande — that she asserted sovereignty over the whole country and over the island of Bulama which lies off the coast between the two; and that on one occasion she took formal possession and exercised acts of sovereignty on the island.

It is not denied that these acts gave her the sovereignty over Bissao. But according to the principles laid down such a continued possession, with claim of dominion, vested in Portugal the sovereignty of the whole of the peninsula between the two rivers, and this sovereignty carried with it, in the absence of anything to the contrary, the dominion over the island which was so near to the mainland.

The continued occupancy of Bissao, and the occupancy of Bulama when not interfered with by Great Britain, perpetuated that sovereignty, and precluded the idea of a voluntary abandonment or disuser of it.

If these views are correct, it will follow that an award is to be made on both points in favor of Portugal.

**Award of the President of the United States
of America, dated 21 April 1870**

Ulysses S. Grant, President of the United States, to whom it shall concern,
Greeting:

The functions of Arbiter having been conferred upon the President of the United States, by virtue of a Protocol of a conference held in Lisbon, in the

² See discussions of the “Oregon” and “Mosquito” questions.

Foreign Office, on the thirteenth day of January, in the year of our Lord eighteen hundred and sixty-eight, between the Minister and Secretary of State for Foreign Affairs of His Most Faithful Majesty the King of Portugal, and Her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary, whereby it was agreed that the respective claims of His Most Faithful Majesty's Government and of the Government of Her Britannic Majesty, to the Island of Bulama on the Western coast of Africa, and to a certain portion of territory opposite to that Island, on the mainland, should be submitted to the arbitration and award of the President of the United States of America, who should decide thereupon finally and without appeal.

And the written or printed case of each of the two parties, accompanied by the evidence offered in support of the same, having been laid before the Arbiter within six months from the date of the said protocol, and a copy of such case and evidence having been communicated by each party to the other through their respective Ministers at Washington, and each party, after such communication had taken place, having drawn up and laid before the Arbiter a second and definitive statement in reply to the case of the other party so communicated, which said definitive statements were so laid before the Arbiter, and were also mutually communicated, in the same manner as aforesaid, by each party to the other, within six months from the date of laying the first statement before the Arbiter:

And it appearing that neither party desires to apply for any report or document in the exclusive possession of the other party which has been specified or alluded to in any of the cases submitted to the Arbiter, and that neither party desires to be heard by counsel or agent in relation to any of the matters submitted in this arbitration:

And a person named by the Arbiter for that purpose, according to the terms of said Protocol, having carefully considered each of the said written or printed statements so laid before the Arbiter, and the evidence offered in support of each of the same, and each of the said second or definitive statements:

And it appearing that the said Island of Bulama and the said mainland opposite thereto were discovered by a Portuguese navigator in 1446; that long before the year 1792 a Portuguese settlement was made at Bissao on the river Jeba, which said settlement has ever since been maintained under Portuguese sovereignty; that in the year 1699, or about that time, a Portuguese settlement was made at Guinala on the Rio Grande, which last-named settlement, in the year 1778, was "a large village inhabited only by Portuguese who had been there from father to son for a long time;" that the coast line from Bissao to Guinala, after crossing the river Jeba, includes the whole coast on the mainland opposite to the Island of Bulama; that the Island of Bulama is adjacent to the mainland and so near to it that animals cross at low water; that in 1752 formal claim was made by Portugal to the Island of Bulama, which claim has ever since been asserted; that the Island was not inhabited prior to

1792, and was unoccupied, with the exception of a few acres thereof at the west end, which were used by a native tribe for the purpose of raising vegetables; that the British title is derived from an alleged cession by native chiefs in 1792, at which time the sovereignty of Portugal had been established over the mainland and over the Island of Bulama; that the Portuguese Government has not relinquished its claim, and now occupies the Island with a Portuguese settlement of about seven hundred persons; that attempts have been made since 1792 to fortify the British claim by further similar cessions from native chiefs; and that none of the acts done in support of the British title have been acquiesced in by Portugal:

And no further elucidation or evidence with regard to any point contained in the statements so laid before the Arbiter being required:

Now, therefore, I, Ulysses S. Grant, President of the United States, do award and decide that the claims of the Government of His Most Faithful Majesty the King of Portugal to the Island of Bulama on the Western Coast of Africa, and to a certain portion of territory opposite to this Island on the mainland are proved and established.

In testimony whereof I have hereunto set my hand, and have caused the seal of the United States to be hereto affixed.

[SEAL] Done in triplicate, in the city of Washington, on the 21st day of April in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

U. S. GRANT.

By the President:
HAMILTON FISH,
Secretary of State.

PART XII

**Decision of arbitration concerning the definite
Fixing of the Italian-Swiss frontier at the
place called Alpe de Cravairola**

Decision of 23 September 1874

**Décision d'arbitrage relative à la délimitation
définitive de la frontière italo-suisse, à
l'endroit dénommé Alpe de Cravairola**

Décision du 23 septembre 1874

OPINION OF GEORGE P. MARSH, UMPIRE UNDER THE ARBITRAL AGREEMENT CONCERNING THE DEFINITE FIXING OF THE ITALIAN-SWISS FRONTIER AT THE PLACE CALLED ALPE DE CRAVAIROLA, CONCLUDED BETWEEN THE GOVERNMENTS OF ITALY AND SWITZERLAND ON THE 31ST OF DECEMBER ONE THOUSAND EIGHT HUNDRED AND SEVENTY THREE, DECISION OF 23 SEPTEMBER 1874*

OPINION DE GEORGE P. MARSH, SURARBITRE EN VERTU DU COMPROMIS D'ARBITRAGE RELATIF À LA DÉLIMITATION DÉFINITIVE DE LA FRONTIÈRE ITALO-SUISSE, À L'ENDROIT DÉNOMMÉ ALPE DE CRAVAIROLA, CONCLU ENTRE LES GOUVERNEMENTS DE L'ITALIE ET DE LA SUISSE LE 31 DÉCEMBRE 1873, DÉCISION DU 23 SEPTEMBRE 1874**

Determination of borders – sovereignty over the Alpe de Cravairola – interpretation of the Treaty of 1516 between Francis I and the Helvetian Confederation, the pamphlet “*Jura Crodensium et Pontemaliensium contra Campenses Vallis Madaie*” and the document “*Copia Partitionis*” within it, Judgement of 1 July 1367 of the Vicar of Matterello, Deed of Sale of 24 February 1406, Conveyance of 10 June 1454, Deed of 20 April 1497, Deed of 17 March 1420 and the Deed of 8 December 1490

Determination of borders - right to the territory based on use and occupation or right by acquisition pursuant to the conquest of 1513 and the Treaty of 1516 – reliance on previous determination and acquiescence – geographical principle of political division of territories according to the watershed not sufficiently recognized in the international law of Europe to constitute basis of the decision.

Arbitration – basis of determination of borders – award must be based on right to land rather than principles of convenience unless specified in arbitration agreement -convenience and cost of administering disputed territory, particularly to prevent continued environmental damage to the physical condition of the area are only subsidiary factors in the decision – mutual interest of States considered - question of whether principles of political economy are relevant in that the disputed territory should be assigned to the State which can derive the most profit from it.

Délimitation frontalière – souveraineté sur le Mont alpin Cravairola – interprétation du Traité de 1516 entre François Ier et la Confédération helvétique, de la maxime «*Jura Crodensium et Pontemaliensium contra Campenses Vallis Madaie*» et du document «*Copia Partitionis*» qui en font partie, jugement du Vicaire de Mattarello du 1er juillet 1367, Acte de vente du 24 février 1406, Acte de transfert du 10 juin 1454, Acte du 20 avril 1497, Acte du 17 mars 142 et Acte du 8 décembre 1490.

* Reprinted from John Basset Moore (ed.), *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington 1898, Government Printing Office, p.2028.

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Délimitation frontalière – droits territoriaux basés sur l’usage et l’occupation ou obtenus pas l’acquisition consécutive à la conquête de 1513 et au Traité de 1516 – confiance dans la délimitation antérieure et son acquiescence – reconnaissance insuffisante dans le droit des Gens en vigueur en Europe, du principe géographique de la division politique des territoires selon la ligne de partage des eaux pour qu’il puisse servir de base à la décision.

Arbitrage – base de la délimitation frontalière – à moins de stipulations contraires dans le compromis d’arbitrage, l’attribution doit être fondée sur le droit de possession du territoire plutôt que sur des principes de convenance – la convenance et les coûts d’administration du territoire contesté, particulièrement afin de prévenir des dommages environnementaux persistants à la situation physique de la région sont seulement des facteurs subsidiaires de décision – considération de l’intérêt mutuel des États – question de savoir si des principes d’économie politique sont des éléments pertinents, dans le sens où le territoire devrait être attribué à l’Etat pouvant retirer le plus de profit de ce territoire.

* * * *

**Decision of Arbitration pronounced by the Umpire,
George P. Marsh, September 23, 1874.**

Opinion of George P. Marsh, umpire under the arbitral agreement concerning the definite fixing of the Italian-Swiss frontier at the place called *Alpe de Cravairola*, concluded between the governments of Italy and Switzerland on the 31st of December one thousand eight hundred and seventy-three.

The Honorable Commissioner Enrico Guicciardi, Senator of the Kingdom of Italy, and the Honorable Councillor of the States, Hans Hold, Colonel of the Swiss federal staff, duly nominated by the respective governments of Italy and the Swiss Confederation, arbitrators for the definite determination of the Italian-Swiss frontier at the place called *Alpe Cravairola*, having, by means of an agreement dated July thirteen one thousand eight hundred and seventy-four and in virtue of the fourth article of the above-mentioned “arbitral agreement,” selected the undersigned as umpire in case they could not reach a solution of the said question; and the same arbitrators having duly declared in a report and notified the said umpire that they found it impossible to reach an agreement; the undersigned having carefully considered the arguments and the proofs submitted by the high contracting parties through their respective agents, proceeds and pronounces on the subject submitted to him, the following decision:

The question submitted to this Arbitral Tribunal by the two interested governments is formulated as follows in the first article of the arbitral agreement, by which authority the Tribunal acts:

“Ought the frontier line above mentioned [which divides the Italian territory from the territory of the Swiss Confederation] to follow, according to the opinion of Switzerland, the summit of the principal chain by passing by the Crown of Groppo, Peak of the Croselli, Peak Pioda, Peak of the Furnace, Peak of the

Monastery; or ought it, according to the opinion of Italy, to leave the principal chain at the specified summit of Sonnenhorn Δ 2788^m in order to descend towards the stream of the valley of Campo by following the secondary ridge called Creta Tremolina [or Mosso del Lodano 2556^m on the Swiss map], to meet the principal chain at the Peak of the Frozen Lake”?

It is not clear to the undersigned whether the high contracting parties have intended to authorize the arbitrators to determine a frontier line with a view to mere convenience or whether it is expected that they should solve the question strictly according to the principles of right. It is therefore necessary to examine the considerations and arguments presented by them as well with regard to convenience as with respect to right.

In the first place therefore, considering simply convenience and leaving aside for the present the question of right:

In the interest of Switzerland the fact is insisted on, that the contested territory is much more accessible from the Valle Maggia than from the Val Antigorio; that therefore it can be more conveniently and more advantageously administered by the Swiss authorities than by the Italian, the latter being able to approach it only during three months of the year; and consequently that all the rights and interests of the residents, both as to person and as to property, can be more effectually protected by the institutions and the judicial and executive authorities of Switzerland than by those of Italy.

It is also alleged that for want of legal control and of oversight of the actual occupants of the soil, the physical condition of the territory is rapidly deteriorating, by the diminution of the extent of pastures and grazing grounds, by the invasion of Alpine bushes, which, according to the rules of a wise administration, ought to be eradicated, – and by the continuous deluging of the soil due to an injudicious cutting down of forests that ought to be preserved and to the negligence of the owners in not taking proper measures to prevent the evil by new planting, settling the loose earth around the springs and the edges of the torrents and constructing barriers in the beds of the same.

It is moreover observed that the excessive and irregular floating of timber, cut on those Alps, down in the torrents whose waters are discharged in the Maggia occasions, owing to the numerous enclosures, an extraordinary accumulation of water, the descent of which down through the valley, when those enclosures are opened, causes grave injuries not only along the edges of the torrents in the Alp itself, but in a greater proportion along those of the Rovana in the commune of Campo.

It may be added that the movement of that torrent already produces most damaging effects on the course of the Maggia, that the violence of the torrent and its devastations are constantly increasing for the above-mentioned causes, and that it is even believed that it has a sensible influence upon the bed of Lake Maggiore at the mouth of the Maggia, and hence upon the navigation of a part of the same.

The fact is insisted upon that these damages, already so prejudicial to the interests of the Swiss population and its territory, can be prevented only by the application to the Alp of Cravairola of modern methods concerning forestal economy and the regulating of the waters.

Now this, it is said, can hardly be done by the Italian government, on account of the inaccessibility of the territory from the Italian side of the mountains, and because Italy has no sufficient interest in the protection of the forests and soil of these Alps to make it an adequate subject for her intervention in such an undertaking; and lastly because the cost of the application of such measures if taken by Italy would be far beyond their cost to Switzerland as a part of her regular forestal system.

Perhaps it is not out of place to observe here that though Switzerland, in case the contested territory should be assigned to Italy, could not adopt any measure of safety or of improvement within the limits of those same Alps, yet, in case of such an assignment, the fourth Article of the Convention of the Borromee Islands of the year 1650 would become annulled in virtue of Article seven of the same Convention, and, consequently, Switzerland would be free to prohibit the floating of timber from those Alps across Swiss territory, and to enforce such prohibition by the confiscation of the timber itself or by any other legal means, and thus to protect the banks of the Rovana from damages occurring from that cause.

In connection with the above-mentioned facts, it is proper to remember that in the argument of Lawyer Scaciga della Silva, submitted by the Italian agents, it is asserted that the productive power of the Alps is already diminished by half; and from the reports of the agents on both sides it appears that the diminution has been going on for a long time. Besides, it is evident by a superficial inspection of the territory and of the landed property of the Commune of Campos, that the physical damages that have resulted or those that are feared from a bad administration of the soil and forests of the Alps, have not been exaggerated in the reports of the Swiss agents.

Finally, it is suggested that, according to the general principles of political economy, it is most expedient that the contested territory should be assigned to those who can derive the most profit from it, and that the Alp of Cravairola would be of greater value to the inhabitants of adjacent Swiss communes, than it could be to owners so distant as those of Crodo. And this argument acquires greater force from the observation already made, viz, that it is in the power of Switzerland to adopt severe legal measures for the protection of her territory and by such means to deprive Alpine timber of any mercantile value in the hands of Italian residents.

These observations, here imperfectly sketched, and other analogous arguments which could be adduced, seem to the undersigned to be of no light weight, and he is fully convinced that if a satisfactory compensation could be found for the communes and the Italian private citizens, residing at present in the Alp of Cravairola, the interests of the two countries would be effectively

promoted by the cession to Switzerland of the sovereignty and ownership of the debated territory. Fortunately, the two countries have few or no opposite or even rival interests; on the contrary, there is solidarity of interests between them. Each of the two derives advantage from the material prosperity and the political and social progress of the other; and the removal from them of any cause of dissension and irritation is highly advantageous to both.

If therefore it were clear that the arbitrators had the power to follow considerations of mere convenience, and if they or other arbitrators were authorized to fix a compensation for the present owners of the soil, the undersigned would not hesitate to say that the sovereignty and the ownership of the Alp ought to be ceded to Switzerland and a just equivalent granted to the actual residents for the transfer of the property.

But the terms of the "agreement" do not in any way imply that such a power is conferred on the arbitrators; and the absence of any provision for the indemnity of the present owners of the soil induces the undersigned to believe that the high contracting parties did not intend to confer upon their arbitrators such authority. Furthermore, it is the opinion of the undersigned, that the extension of Swiss institutions, laws and administration to the territory while the owners of the same continued to be subjects of the Kingdom of Italy and to reside for the most part of the year in that country, would give rise to jealousies, dissensions and endless disputes, and would prove more hurtful to the peace and harmony of the two countries than the present unsatisfactory condition of the territory; and according to all probabilities would give rise to more international questions than any decision of this tribunal could settle within the limits of its competency.

The question of convenience cannot therefore be considered as a fundamental basis for a decision, but can only serve as a subsidiary criterion in case of failure of the means to reach a well-grounded conclusion.

We now reach the question of mere *right*.

It is understood to be admitted that certain communes of Valdossola, or rather of a part of that valley, the Val Antigorio, had the incontestable possession and use of certain parts of the Alp of Cravairola for nearly four centuries, and of other parts of the same for a period of time much longer still, and this under the claim of a title of absolute ownership over land acquired by money, a title accompanied by various official acts, more or less important, of Italian public authorities, which acts are interpreted by the Italian agents as proofs of the exercise of sovereignty over the territory on the part of Italy.

The agents of Switzerland claim high dominion over the Alp of Cravairola as being part of Val Maggia which the XII. Cantons acquired by conquest in 1513 and by treaty in 1516, in support of which claim they insist upon the principle of political geography that, at least in the absence of proof to the contrary, the watershed must be taken as the limit of jurisdiction between adjoining states, and consequently that the denomination "Val

Maggia” in the treaty of 1516 must be considered as embracing all the smaller basins that drain into the principal valley.

Moreover they claim that, among the circumstances of the case, certain proceedings of the year 1554 for the determination of the eastern limits of the Cravairola Alp, constitute in themselves a binding acknowledgment of the sovereignty and of the high dominion of Switzerland over the territory in question.

These are the cardinal points submitted to our examination. Other minor arguments presented by the parties will be mentioned in the course of discussion.

Numerous documents have been presented by the respective parties, which have all been studied, but the undersigned will only mention here such as he considers have a substantial relation to the argument.

The documents brought forward by Italy, are:

“Judgment of the 1^o of July 1367 of the Vicar of Matterello, annulling a sale made by the Commune of Crodo of a part of Cravairola, on the ground of reciprocity.”

“Deed of sale of the 24th of February 1406, of a part of the Cravairola Alp in the territory of Cravairola.”

“Conveyance on the 10th of June 1454, of three parts of the Alp of Collobiasco, in the territory of Cravairola.”

“Deed of April 20, 1497, which reads: *‘busco existente et jacente in et supra territorio et dominio de Crodo in the Cravairola Alp.’*”

These documents, all prior to the Swiss conquest and the treaty of 1516, are presented by the Italian agents for the purpose of proving by the exercise of jurisdiction and by legal descriptions that the *locus in quo* was independent of the jurisdiction of the Val Maggia and belonged to the commune of Crodo. Italy also brings forward a pamphlet entitled “*Jura Crodensium et Pontemaliensium contra Campenses Vallis Madiæ*,” containing a relation of the proceedings during 1554 to define the limits of the Alp of Cravairola, besides various other documents relating to such delimitation.

The agents of Switzerland appeal to the deed of March 17, 1420, by which a third part of the Alp of Cravairola “*jacente in territorio Vallis Madiæ*” was sold to the commune of Crodo; and to the deed of December 8, 1490, which cedes to the Commune of Crodo the Alp of Collobiasco “*existing and situated in the dominion of the men of Valmaggia, said to be in Cravairola.*”

Switzerland maintains that these words imply an acknowledgment of the jurisdiction of Val Maggia, and adduces besides the treaty concluded in 1516

between Francis I. and the Helvetian Confederation in which Val Maggia is recognized as belonging to Switzerland.

This country also relies on a document already mentioned, entitled: "*Copia positionis terminorum anni 1554*," contained in the pamphlet entitled "*Jura*" referring to the determination of the eastern limits of the Alp of Cravairola, which document the Swiss say proves a submission of the Commune of Crodo to the jurisdiction of a Swiss tribunal, in a matter involving the high dominion over the territory in question.

It being admitted that subjects of the kingdom of Italy are in possession of the soil under the protection of Italian jurisdiction, it is proper, first of all, to examine the principal proofs with which this right is impugned by Switzerland, and the testimony opposed to these proofs.

In the "*Copia positionis terminorum Anni 1554*" it is stated that "*quædam differentia, lis et quæstio juridica*" had arisen between the authorities of Crodo and those of Campo "*causa et occasione confinium Alpīs Cravairolæ ipsorum de Crodo, et domini ipsorum de Campo cumque fuerit, etc., quod litigando in jure coram Magnific. D. Christophorum Quintoni de Friburgo et Honor. Comm. Vallis Madix,*" etc., and that the parties agreed to the conclusion that certain citizens of Crodo, named in the document, should define the limits by means of permanent signs, which was done. In the subscription or attestation of the notary the document is called "*Instrumentum definitionis domini.*"

The Swiss agents contend that these proceedings are necessarily an acknowledgement on the part of the Commonwealth of Crodo of the jurisdiction of the Swiss authorities in the matter. On this point it must be observed that although "*la differentia et lis*" imply the question of the limits of the Alp of Cravairola, we are not informed as to what was the nature of the litigation. Perhaps it was originally a suit against citizens of Crodo arrested on territory claimed by Campo, on account of the violation of the same, and in that case the Swiss magistrates of Campo would naturally insist on the right of jurisdiction.

Many other suppositions could be made to demonstrate that an appearance of the Commune of Crodo before a Swiss magistrate may constitute a presumption but not necessarily an acknowledgment of the competency of said magistrate. In this case we can also suppose that a friendly arrangement had been accepted because objections had arisen to the jurisdiction of the magistrate himself. Howsoever it was, no indication of the nature of the question was made by the magistrate, the difference having been adjusted by an agreement among the parties.

In the able and ingenious argument of the Swiss agents it is averred that the expression *ipsorum di Crodo* indicates simply the right of proprietorship, while the words "*et domini ipsorum hominum de Campo,*" signify the jurisdiction of *high dominion*, and moreover that the same word *dominii* in the

“*Attestatu Instrumentum deffinitionis domini*” is merely a casual expression used by the notary and not by the parties, in the sense of simple ownership.

If this construction can be sustained, it is important as an admission of the sovereignty of Val Maggia on the part of persons perhaps not authorized by their governments, but still probably well informed as to effective jurisdiction. But the notary, who subscribed the document, according to all probabilities, also extended it, and it is improbable that he would have used the same expression in two different senses in the same document. According to the principles of legal interpretation, the same word used more than once by the same writer in the same document must be taken as having always the same meaning, unless the contrary appears from the context. In the present case, the undersigned does not find in the context a sufficient reason for believing that the notary intended to use the word *dominium* in different senses in the two paragraphs in which it occurs; therefore if he meant to speak of *alto dominio* in the body of the deed, it must be supposed that he was alluding to *alto dominio* in the *attestatu*.

According to this interpretation, the proceedings in question would assume the aspect of an attempt at a final definition of the question of territorial sovereignty and jurisdiction.

But, independently of this, the undersigned opines that as a grammatical question the words *Alpis Cravairolæ e domini* are in the same category, being both genitives placed after *confinium*, the first indicating by name a certain territory, and the second designating another territory by means of a descriptive term which simply indicates land by its ownership, without any allusion to the sovereignty and without including in fact the first tract of territory. In other words, the Alp of Cravairola is a portion of the soil situated on one side of the boundary, and the *dominium* of Campo is another portion of the soil situated on another side of the same boundary. In fact, from the examination of the several documents submitted and from others of the same period the undersigned finds no well-defined difference between *territorium* and *dominium*. These words seem to have been used indiscriminately in the sense of ownership or of sovereignty according to the argument and in conformity with the context of the acts.

But whatever may be the grammatical construction and the logical sense of the word which is used in this document, the pamphlet *Jura* contains other documents of great importance tending to demonstrate that, whatever was the opinion entertained by the parties to this transaction as to its value, their superiors, the respective governments of Milan and of Switzerland, gave it the value of an international convention for the definition of the limits of the territorial jurisdiction between the two countries.

The document that follows the *Copia Partitionis* in the pamphlet *Jura*, is an official communication from the Milanese government to the Commissary or Mayor of Domodossola, dated February 16, 1555. It sets forth that “the Ambassadors of the Lords of the XIII Swiss Cantons have complained as in

the preceding months, that parties from that land and its jurisdiction went to Valle Maggia, under the jurisdiction of the aforesaid Lords, and violently tore down certain terminal posts *placed on the confines between one and the other jurisdiction* and planted them beyond the place where they formerly stood.”

Now, in this sentence, the *terminal posts* were evidently those planted in the month of June of the preceding year, that is, the limits between the Alp of Cravairola and the lands of the Commune of Campo, and “*one and the other jurisdiction*” can hardly mean other than the jurisdiction of Switzerland, exercised by the authorities of Val Maggia and west of the posts placed in 1554, and the jurisdiction of Milan, exercised by the authorities of Domodossola and limited to the east of these same posts.

According to date there follows an official communication from the government of Milan addressed “*to the Eminent jurisconsult Castilioneo and to the Podestà (Mayor) of Domodossola*” relative to the contest “*inter Domodossolanos subditos nostros et homines Vallis Madix subditos Helvetiorum de finibus.*” This is followed by five or six other communications of the year 1556 from the same source and on the same subject, all insisting on the reestablishment of the limits of 1554 and all using the same expressions to indicate the contending parties.

Among these, there is one (No. 14) of June 19, 1556, in which allusion is made to the “*Controversia finium inter dictum Commune Crodi et Commune loci di Campo*”; and the expressions “*fines inter ipsa Communia*” and “*termini inter ipsa Communia*” are used.

It is very remarkable that in none of these maps, except the one of 1554, is mention made of the Alp of Cravairola, but the controversy is always described as concerning the limits, not of possessions foreign to Crodo, but of the respective communes; and, as already stated, the complaints of the Swiss ambassadors of the 16th of February, 1555, mention particularly the terminal posts placed in 1554 as limit between the *respective jurisdictions*. From these facts it seems clearly to result that, although it is not evident that the immediate parties to the transaction considered it as an argument of great importance, the two supreme governments of the Val Maggia and the Val d'Ossola, in the middle of the XVIth century and for nearly one hundred years after, agreed to retain the covenant of 1554 as definitely fixing the limits between their respective territories.

There is no proof that at the time of the transaction of 1554 a claim of jurisdiction was made by the authorities of Val Maggia or by the XIII Cantons, nor does it appear that at any period before or after that date till the year 1641, that Switzerland asserted any supremacy or high dominion over that territory. But on the other hand it appears that the governments of the two countries accepted the settlement of 1554 as definitive.

In connection with the fact that no claim was made by Switzerland, it is well to notice an analogous state of things relative to the government of Val

Maggia. No document of any nature whatever is produced from the records of Val Maggia, and there is no proof that the Commune of Campo was at any time in the historic period in possession of the Alp of Cravairola.

There is a merely intrinsic probability that in some remote age this Alp may have been the property of that commune and the two documents wherein the Alp is described as belonging to the *dominium* of Val Maggia add force to this supposition. But these documents are not acts to which Val Maggia was an active party, and there is in them no positive proof of that kind, showing that the authorities of Val Maggia ever exercised or claimed jurisdiction over the Alp of Cravairola till 1641. It is a very probable supposition that in those rough times during which the law of the strongest generally prevailed, and few owners could show title-deeds to their lands or their jurisdiction, save the title of possession, the transferring of the soil to the inhabitants of Val Antigorio may have been considered as in itself implying also the sovereignty. And as far as we have the means of knowing it, Switzerland seems to have acquiesced in this point of view for more than a hundred years from the acquisition of Val Maggia.

In 1641, Oswald of Schaffhausen, Commissioner, Bailiff of Val Maggia, whether by order of his superiors or for personal reasons no one knows, called an assembly of the delegates of the Communes of Crodo, Pontimaglio, and Campo to adjust the differences arising in relation to the Alp of Cravairola. Pursuant to this convocation certain citizens of Crodo and of Pontimaglio met him and his companions on the Alp on the 2d of October 1641 and declared that they were not authorized by their communes, but that they would make a report to them, in order that a delegation might be named to discuss the subject. On that occasion, Commissioner Oswald "in the presence of the subjects of Antigorio, protested that the jurisdiction over the Alp was his, and that he could not and must not neglect the acts that would be judged necessary for the maintenance of the jurisdiction of his illustrious Lords of the XII Cantons of the Most Serene Helvetic Republic." This, as has been observed, is the first formal claim that is known of the sovereignty of the Alp by Switzerland. If this was done in obedience to orders from Switzerland and not merely personally by the Commissioner, it would be right to suppose that the archives of Switzerland could furnish the proof the fact; but no proof of this kind has been presented.

This claim was often repeated during the following years and the result was a greater excitement and a growing irritation. It is not necessary to follow the history of these facts, because in 1650 a convention held at the Borromeo Islands, by the authorities of the two governments, recognized the limits of 1554, made several grants, to the two sides, and especially this one, of authority to the people of Crodo to carry the timber of the Alp by means of the Rovana into Val Maggia, a provision, it must be observed, entirely superfluous had this Alp been Swiss territory. Another provision did away with suits growing out of all previous quarrels and riots; and lastly an article conceived in these words: "And this provision, shall last till the point of the

jurisdiction over the said Alp is decided, and no prejudice is intended to any of the above mentioned cases.”

The undersigned understands the term “provision” as applying to the whole subject matter of the Convention, and not only to one or several particular articles. The convention decided nothing in relation to jurisdiction, but left the question just as it found it, and naturally, this point, in the state in which it then was, must be judged by facts and by the laws connected with its preceding history.

After 1650 other numerous attempts, more or less serious, were made on both sides to establish a jurisdiction over the contested territory, but in the opinion of the undersigned they do not possess a sufficiently conclusive character to affect the case materially either one way or the other, and we must refer for a decision to the rights of the parties, such as they were at the time of the Convention of 1650.

Recapitulation. – The evidence of the title of Italy consists in the acquisition of the soil previous to 1500 by communes now belonging to the Kingdom of Italy, or in the incontestable possession of the territory by these same communes up to the present day; in certain acts of jurisdiction which are said to have been accomplished by the official authorities of Domodossola relative to the soil of the Alp, acts which are alleged to be not only conclusive in their nature, but which are also considered to afford strong presumptive evidence of the fact, so long as they are not refuted; in the proceedings of 1554, 1555 and 1556, which treat of the definition of the limits by a territorial and jurisdictional delimitation, and which were accepted as such by both governments for nearly a century without protest; and finally in the absence of any claim of high dominion or jurisdiction from Switzerland or its dependencies previous to the year 1641, when the Alp had been possessed by Italian communes for whole centuries.

The right of Switzerland is founded: on considerations of convenience; on the alleged principle of political geography, according to which the limits of bordering States in mountainous regions are determined by the watershed; on the conquest of 1513 and on the treaty of 1516, which recognizes Val Maggia, of which the Alp of Cravairola is part, as belonging to Switzerland; and its provisions for the establishment of the limits between the Alp of Cravairola and the Commune of Campo.

Considering all these points, the undersigned is of opinion:

Firstly: That the title of Italy over the said territory is established *prima facie* by the above considerations and therefore valid, unless it is refuted by proofs adduced by Switzerland.

Secondly: Though reasons of convenience and of mutual interest advise the cession of the Alp of Cravairola to Switzerland, nevertheless, for the

reasons already expressed, the arbitrators would not be justified in assigning that territory to the Confederation merely on this basis alone.

Thirdly: That the geographical principle of the political division of territories according to the watershed is not generally enough recognized in the practical international law of Europe to constitute an independent basis of decision in contested cases. It is true that geographically a large valley includes its minor basins, but in ordinary parlance the word "valley," when used with reference to a large river, is generally restricted to the principal basin, the lateral tributary valleys having usually their own proper names; hence such a designation does not necessarily include minor valleys, but must be interpreted according to possession and other circumstances if any exist. As stated, there is no proof of any formal claim on the part of Switzerland, relative to the sovereignty over the Alp, as part of Val Maggia, previous to the assertion of jurisdiction by Oswaldo in 1641; and if in the mediæval period, through which the history of the Alp of Cravairola extends, it was accepted as a principle of law, that tributary valleys must follow the jurisdiction of the principal current of the waters, it cannot be explained why the Commune of Campo did not claim the sovereignty of Cravairola as belonging to its own territory, at the time when the Italian Communes acquired it. But there is no trace of such a claim at any time till a century after the definition of the limits in 1554.

Fourthly: That although, in a scientific sense, the principal valley of a river embraces those of its tributaries, yet these words, when used in public documents, especially in those of ancient date, must be interpreted according to the contemporaneous use and sense. The undersigned sees no proof that any of the parties to the treaty of 1516, or of any subsequent period previous to 1641, considered the Alp of Cravairola as included in the denomination of Val Maggia; but, on the contrary, the absence of any claim of sovereignty by Switzerland or by the Commune of Campo over the soil geographically situated in Val Maggia, but possessed and enjoyed by foreign moral bodies, shows *prima facie*, that the Confederation and the Commune of Campo did not consider themselves invested with the right of such sovereignty at any time before such claim was put forward by a Swiss official in 1641.

Fifthly: That the proceedings of 1554, which the undersigned is obliged to interpret as in harmony with the corresponding official documents of 1555 or 1556, tend rather to negative than to establish the right of Switzerland to the sovereignty of the territory in question, and to show that the limits established by the parties immediately interested were considered by them and their respective governments as a territorial and jurisdictional delimitation.

On the whole question, the undersigned is of opinion that, using the expressions of the Agreement: "The frontier line that divides the Italian territory from that of the Swiss Confederation (Canton Tessin), at the spot called the Alp of Cravairola, must leave the principal chain of mountains at the summit called Sonnenhorn, and descend towards the stream of the Valley

of Campo and following the secondary ridge called Creta Tremolina (or Mosso del Lodano on the Swiss map) to meet the principal chain at the Peak of the Frozen Lake,” * * * and he pronounces his decision accordingly.

In conclusion, the undersigned has the honor to express his high appreciation of the ability, moderation and impartiality displayed by all the members of the arbitration, and also his sincere thanks for the continued courtesousness and consideration manifested towards him by all with whom his office brought him into contact.

Given at Milan in duplicate September 23, 1874.

Signed:

GEORGE P. MARSH.

The present copy conforms with the original, preserved in the archives of the Ministry of Foreign Affairs of the Kingdom of Italy.

Rome, December 6, 1894.

The director of the archives.

[Seal Min. of For. Af.]

G. GORRINI.

**Decree adopted by the Swiss Federal Council
for the execution of the Award**

LE CONSEIL FÉDÉRAL SUISSE.

Vu le Compromis passé entre le Conseil fédéral et le Gouvernement Italien, du 31 Décembre 1873, relatif à la frontière Italo-Suisse au lieu dit «Alpe de Cravaïrola;»

Vu la sentence du sur-arbitre, M. Marsh, Ministre des États-Unis à Rome, en date du 23 Septembre 1874, qui porte: «La ligne frontière qui sépare le territoire Italien du territoire de la Confédération Suisse (Canton du Tessin) au lieu dit «Alpe de Cravaïrola» doit quitter la chaîne principale des montagnes au sommet désigné ‘Sonnenhorn’, pour descendre vers le ruisseau de la vallée de Campo et, en suivant l’arête secondaire nommée Creta Tremolina (ou ‘Mosso del Lodano’ sur la carte Suisse) rejoindre la chaîne principale au ‘Pizzo del Lago Gelato’»,

Arrêté du Cons. féd. conc. la frontière sur l’Alpe de Cravaïrola.

Vu l’art. 2 du Compromis arbitral,¹ qui statue: «Les hautes parties contractantes admettront la sentence arbitrale qui interviendra et reconnaîtront comme définitive la ligne frontière qui elle aura déterminée;»

¹ Voir Recueil officiel des lois, tome XI, page 516.

Et l'art. 8 du même Compromis en ces termes: «Les hautes Parties contractantes s'engagent à procéder aussitôt que faire se pourra à l'exécution du jugement arbitral.»

ARRÊTÉ:

Art. 1^{er}. La ligne frontière déterminée par la sentence arbitrale de M. Marsh, du 23 Septembre 1874, est reconnue comme définitive, cette sentence étant admise et devant entrer en rigueur dès ce jour.

Art. 2^{ème}. Le présent arrêté sera inséré au Recueil Officiel, et l'original de la sentence arbitrale déposé aux archives fédérales.

Berne, le 4 Janvier 1875.

Au nom de Conseil Fédéral Suisse,
Le Président de la Confédération:

Le Chancelier de la Confédération:

SCHERER
SCHIESS.

**Protocol signed by the President of the Swiss Confederation
and the Italian minister in Berne at 17 May 1875:**

Les Soussignés, Monsieur le Sénateur L. A. Melegari, Ministre d'Italie en Suisse, et Monsieur J. Scherer, Président de la Confédération Suisse, à cela dûment autorisés, reconnaissent et déclarent, au nom de leurs Gouvernements respectifs, que la sentence arbitrale, rendue à Milan, le 23 Septembre 1874, par Monsieur Marsh, Ministre des États-Unis d'Amérique à Rome, surarbitre nommé, en la forme convenue dans le compromis signé à Berne le 31 Décembre 1873, pour fixer définitivement la frontière Italo-Suisse au lieu dit «Alpe de Cravairola,» sentence dont suit le dispositif:

«La ligne-frontière qui sépare le territoire Italien du territoire de la Confédération Suisse (Canton du Tessin) au lieu dit «Alpe de Cravairola» doit quitter la chaîne principale des montagnes au sommet désigné «Sonnenhorn,» pour descendre vers le ruisseau de la vallée de Campo, et, en suivant l'arête secondaire nommée «Creta Tremolina» (ou «Mosso del Lodano» sur la carte Suisse), rejoindre la chaîne principale au «Pizzo del Lago Gelato:»»

Est devenue, en vertu de l'Article II. du dit compromis, obligatoire pour les deux États contractants, lesquels, par conséquent, s'engagent à faire procéder, dans l'année et aussitôt que faire se pourra, par le moyen de délégués spéciaux, à la collocation des bornes sur la ligne-frontière définitivement tracée dans le dispositif de la sentence arbitrale précitée.

Fait à Berne, le 17 Mai 1875.

[L. S.] MELEGARI.
[L. S.] SCHERER.

PART XIII

Sentence arbitrale relative aux requêtes de la Grande-Bretagne et du Portugal sur certains territoires de la côte Est de l'Afrique appartenant autrefois aux Rois de Tembe et Mapoota, incluant les îles de Inyack et Éléphant (Baie de Delagoa ou Lorenzo Marques)

Décision du 24 juillet 1875

Award on the claims of Great Britain and Portugal to certain territories formerly belonging to the Kings of Tembe and Mapoota, on the eastern coast of Africa, including the islands of Inyack and Elephant (Delagoa Bay or Lorenzo Marques)

Decision of 24 July 1875

SENTENCE ARBITRALE DU PRÉSIDENT DE LA RÉPUBLIQUE FRANÇAISE RELATIVE AUX REQUÊTES DE LA GRANDE-BRETAGNE ET DU PORTUGAL SUR CERTAINS TERRITOIRES DE LA CÔTE EST DE L'AFRIQUE APPARTENANT AUTREFOIS AUX ROIS DE TEMBE ET MAPOOTA, INCLUANT LES ÎLES DE INYACK ET ÉLÉPHANT (BAIE DE DELAGOA OU LORENZO MARQUES), DÉCISION DU 24 JUILLET 1875*

AWARD OF THE PRESIDENT OF THE FRENCH REPUBLIC ON THE CLAIMS OF GREAT BRITAIN AND PORTUGAL TO CERTAIN TERRITORIES FORMERLY BELONGING TO THE KINGS OF TEMBE AND MAPOOTA, ON THE EASTERN COAST OF AFRICA, INCLUDING THE ISLANDS OF INYACK AND ELEPHANT (DELAGOA BAY OR LORENZO MARQUES), DECISION OF 24 JULY 1875**

Souveraineté – découverte – réclamation continue de droits souverains – recours à l'armée pour réclamer des droits.

Souveraineté – absence d'objection à l'invocation de droits souverains – l'affaiblissement fortuit de l'autorité de l'État n'abroge pas ses droits souverains.

Sovereignty – discovery – ongoing claim of sovereignty rights – use of the army to claim rights.

Sovereignty – no objection to the invocation of sovereignty rights – fortuitous weakening of a State's authority does not terminate sovereignty rights.

* * * * *

Nous, Marie Edme Patrice Maurice de MacMahon, Duc de Magenta, Maréchal de France, Président de la République Française, statuant en vertu des pouvoirs qui ont été conférés au Président de la République Française aux termes du Protocole signé à Lisbonne, le 25 septembre 1872, par lequel le Gouvernement de Sa Majesté la reine de la Grande Bretagne et d'Irlande et celui de Sa Majesté le Roi de Portugal sont convenus de déférer au Président de la République Française, pour être réglé par lui définitivement et sans appel, le litige qui est pendant entre eux depuis l'année 1823, au sujet de la

* Reproduit de *British and Foreign State Papers*, compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 66, London, 1882, H. M. Stationery Office, p.554.

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possession des territoires de Tembe et de Maputo et des Iles d'Inyack et des Éléphants, situés sur la Baie de Delagoa ou Lorenzo Marquez, à la Côte orientale d'Afrique;

Vu les mémoires remis à l'Arbitre par les représentants des deux parties, le 15 septembre 1873, et les contre-mémoires également remis par eux les 14 et 15 septembre 1874;

Vu les lettres de son excellence M. l'Ambassadeur d'Angleterre et de M. le Ministre de Portugal à Paris, en date du 8 février 1875;

La commission instituée, le 10 mars 1873, à l'effet d'étudier les pièces et documents respectivement produits, nous ayant fait part du résultat de son examen;

Attendu que le litige, tel que l'objet en a été déterminé par les Mémoires présentés à l'Arbitre et, en dernier lieu, par les lettres ci-dessus citées des représentants à Paris des deux parties, porte sur le droit aux territoires suivants, savoir:

1. Le territoire de Tembe, borné au nord par le Fleuve Espirito Santo ou English River, et par la rivière Lorenzo Marquez ou Dundas, à l'ouest par les Monts Lebombo, au sud et à l'est par le Fleuve Maputo, et de l'embouchure de ce fleuve jusqu' à celle de l'Espirito Santo par le rivage de la Baie de Delagoa ou Lorenzo Marquez;
2. Le territoire de Maputo, dans lequel sont comprises la presque île et l'île d'Inyack, ainsi que l'île des Éléphants, et qui est borné au nord par le rivage de la baie, à l'ouest par le Fleuve Maputo, de son embouchure, jusqu'au parallèle de 26° 30' de latitude australe, au sud par ce même parallèle, et à l'est par la mer:

Attendu que la Baie de Delagoa ou Lorenzo Marquez a été découverte au 16^{ème} siècle par les navigateurs Portugais, et qu'au 17^{ème} et 18^{ème} le Portugal a occupé divers points sur la côte nord de cette baie et à l'île d'Inyack dont l'îlot des Éléphants est une dépendance;

Attendu que, depuis la découverte, le Portugal a, en tout temps, revendiqué des droits de souveraineté sur la totalité de la baie et des territoires riverains, ainsi que le droit exclusif d'y faire le commerce; que, de plus, il a appuyé à main armée cette revendication contre les Hollandais vers 1732, et contre les Autrichiens en 1781;

Attendu que, les actes par lesquels le Portugal a appuyé ses prétentions n'ont soulevé aucune réclamation de la part du Gouvernement des Provinces Unies; qu'en 1782 ces prétentions ont été tacitement acceptées par l'Autriche, à la suite d'explications diplomatiques échangées entre cette Puissance et le Portugal;

Attendu qu'en 1817 l'Angleterre elle-même n'a pas contesté le droit du Portugal, lorsqu'elle a conclu avec le Gouvernement de Sa Majesté Très-

Fidèle la convention du 28 juillet, pour la répression de la traite; qu'en effet, l'Article 2^{ème} de cette convention doit être interprété en ce sens qu'il désigne comme faisant partie des possessions de la Couronne de Portugal la totalité de la baie, à laquelle s'applique indifféremment l'une ou l'autre des dénominations de Delagoa ou de Lorenzo Marquez;

Attendu qu'en 1822 le Gouvernement de Sa Majesté Britannique, lorsqu'il chargea le Capitaine Owen de la reconnaissance hydrographique de la Baie de Delagoa et des rivières qui y ont leur embouchure, l'avait recommandé aux bons offices du Gouvernement Portugais;

Attendu que si l'affaiblissement accidentel de l'autorité Portugaise dans ces parages a pu, en 1823, induire en erreur le Capitaine Owen et lui faire considérer de bonne foi comme réellement indépendants de la Couronne de Portugal les chefs indigènes des territoires aujourd'hui contestés, les actes par lui conclus avec ces chefs n'en étaient pas moins contraires aux droits du Portugal;

Attendu que, presque aussitôt après le départ des bâtiments Anglais, les chefs indigènes de Tembe et de Maputo ont de nouveau reconnu leur dépendance vis-à-vis des autorités Portugaises, attestant ainsi eux-mêmes qu'ils n'avaient pas eu la capacité de contracter;

Attendu que, les Conventions signées par le Capitaine Owen et les chefs indigènes du Tembe et du Maputo, alors même qu'elles auraient été passées entre parties aptes à contracter, seraient aujourd'hui sans effet, l'acte relatif au Tembe stipulant des conditions essentielles qui n'ont pas reçu d'exécution, et les actes concernant le Maputo, conclus pour des périodes de temps déterminées, n'ayant point été renouvelés après l'expiration de ces délais;

Par ces motifs, nous avons jugé et décidé que les prétentions du Gouvernement de Sa Majesté Très-Fidèle sur les territoires de Tembe et de Maputo, sur la presqu'île d'Inyack, sur les îles d'Inyack et des Éléphants, sont dûment prouvées et établies.

Versailles, le 24 juillet 1875.

MAL. DE MACMAHON, *Duc de Magenta.*

PART XIV

**Sentence arbitrale portant rectification de la
frontière entre la Grèce et la Turquie**

Décision du 1er juillet 1880

**Award for the rectification of the
Frontier between Greece and Turkey**

Decision of 1 July 1880

SENTENCE ARBITRALE DE LA CONFÉRENCE DES
REPRÉSENTANTS DE GRANDE-BRETAGNE, AUTRICHE-HONGRIE,
FRANCE, ALLEMAGNE, ITALIE ET RUSSIE PORTANT
RECTIFICATION DE LA FRONTIÈRE ENTRE LA GRÈCE ET LA
TURQUIE, DÉCISION DU 1^{er} JUILLET 1880*

AWARD OF THE CONFERENCE OF THE REPRESENTATIVES OF
GREAT BRITAIN, AUSTRIA-HUNGARY, FRANCE, GERMANY,
ITALY, AND RUSSIA, FOR THE RECTIFICATION OF THE
FRONTIER BETWEEN GREECE AND TURKEY, DECISION OF
1 JULY 1880**

Médiation – rectification de frontières – la frontière suivra le thalweg (chenal le plus profond) du fleuve Kalamas puis la ligne des crêtes qui forme la ligne de séparation entre les bassins.

Médiation – Protocole No. 13 du Congrès de Berlin – Acte du 13 juillet 1878.

Mediation – correction of borders – border will follow the thalweg of Kalamas river and ridges which form the line of separation between the basins.

Mediation – Protocol 13 of Congress of Berlin – Act of 13 July 1878.

* * * * *

LES pourparlers engagés entre la Turquie et la Grèce pour la rectification de leurs frontières n'ayant point amené de résultat, les Soussignés, Plénipotentiaires des Puissances appelées par les prévisions de l'Acte du 13 Juillet, 1878, à exercer la médiation entre les deux États, se sont réunis en Conférence à Berlin, conformément aux instructions de leurs Gouvernements, et après mûre délibération, s'inspirant de l'esprit et des termes du Protocole No. 13 du Congrès de Berlin, ont adopté, à l'unanimité, le tracé suivant: —

«La frontière suivra le thalweg du Kalamas depuis l'embouchure de cette rivière dans la Mer Ionienne, jusqu'à sa source dans le voisinage de Han Kalibaki puis les crêtes qui forment la ligne de séparation entre les bassins.

«Au nord, de la Voïoussa, de l'Haliacmon, et du Mavronérie, et leurs tributaires.

* Reprinted from *British and Foreign State Papers*, compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 71, London, 1887, H. M. Stationery Office, p. 699.

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«Au sud, du Kalamas, de l'Arta, de l'Aspropotamos, et du Salamyrias (Pénée ancien), et leurs tributaires, pour aboutir à l'Olympe, dont elle suivra la crête jusqu'à son extrémité orientale sur la Mer Égée.

«Cette ligne laisse au sud le Lac de Janina, et tous ses affluents, ainsi que Metzovo, qui resteront acquis à la Grèce.»

Les Soussignés ont l'honneur de soumettre aux Puissances dont ils sont les représentants et les mandataires, la présente décision, afin qu'elles veuillent bien l'approuver et la notifier aux parties intéressées.

Fait à Berlin, le 1^{er} Juillet, 1880.

HOHENLOHE.
SZÉCHÉNYI.
SAINT-VALLIER.
ODO RUSSELL.
LAUNAY.
SABOUROW.

PART XV

**Award as to the Interpretation of the Treaty of Managua
between the United Kingdom and Nicaragua**

Decision of 2 July 1881

**Sentence arbitrale relative à l'interprétation du Traité
de Managua entre le Royaume-Uni et le Nicaragua**

Décision du 2 juillet 1881

AWARD OF THE EMPEROR OF AUSTRIA AS TO THE
INTERPRETATION OF THE TREATY OF MANAGUA BETWEEN
THE UNITED KINGDOM AND NICARAGUA, DECISION OF 2 JULY
1881*

SENTENCE ARBITRALE DE L'EMPEREUR D'AUTRICHE À PROPOS
DE L'INTERPRÉTATION DU TRAITÉ DE MANAGUA ENTRE LE
ROYAUME-UNI ET LE NICARAGUA, DÉCISION DU 2 JUILLET
1881**

Treaty interpretation – Treaty of Managua of 28 January 1860 – sovereignty over the Mosquito Islands – respective rights of Nicaragua and the self-governed Mosquito Indians.

Sovereignty – extent of sovereignty over a self-governed territory – limited sovereignty of the sovereign State Nicaragua over the self-governed territory of Mosquito Islands by native Indians – right to hoist their respective flags – emblem of the sovereignty of Nicaragua to be attached to Mosquito Indians' flag – protection of the sovereign rights on the territory by appointment of a Commissioner.

Self-governing territory – self-governance of Mosquito Indians deeply rooted in history – territory never under full foreign sovereignty but only under a protectorate status – foreign affairs not included in the self-governance – optional right to agree to full incorporation into Nicaragua – exclusive and full legislative and administrative system proper to the territory – exclusive economic rights on natural resources and to grant commission for their acquisition and exploitation – exclusive rights to regulate trade and to levy duties – prohibition of interferences from the government of Nicaragua or its Commissioner – termination of presidential decrees of Nicaragua in contradiction with the self-governing status.

Indian status – diversity of legal status of Indians depending on the law of the State (absolute incorporation and immediate unconditional equalization with the rest of the population or separation); geographical (separation, confinement and remoteness of the territory) and ethnographical (ethnicity of the surrounding population) circumstances.

Payment of annuities to the self-governing territory by the sovereign State – validity of the relevant treaty disposition – annuities linked to social and governmental improvement purposes - liability of Nicaragua for the non-payment of the annuities – absence of back-interest linked to the non-payment due to the nature of remunerating liberality of the annuity.

Free port (San Juan del Norte) – possibility to level duties only on export goods leaving the territory of Nicaragua and entering the free port and inversely – prohibition of duties on goods transiting by the projected inter-oceanic canal within the territory of Nicaragua – prohibition of duties on goods for port maintenance purposes – right of England to insist on the maintenance of the free port character of San Juan del Norte, treaty condition of its renunciation to its protectorate over Mosquito Islands – right under international law for a State to complain on behalf of some of

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington, 1898, Government Printing Office, p.4954.

** Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington, 1898, Government Printing Office, p.4954.

its nationals directly interested in the question – difference between such a litigation and intermeddling with internal affairs of a State or continuing exercise of protectorate.

Treaty interpretation – no right created by way of interpretation – exclusive affirmation and establishment of existing rights by way of interpretation.

Interprétation conventionnelle – Traité de Managua du 28 janvier 1860 – souveraineté sur les îles Mosquito – droits respectifs du Nicaragua et des Indiens Mosquito bénéficiant d'un statut autonome.

Souveraineté – étendue de la souveraineté sur un territoire autonome – souveraineté limitée de l'Etat souverain du Nicaragua sur le territoire autonome des îles Mosquito attribué aux Indiens autochtones – droit de faire flotter leurs drapeaux respectifs – un emblème de la souveraineté du Nicaragua doit être attaché au drapeau des indiens Mosquito – protection des droits souverains sur le territoire par l'affectation d'un Commissaire.

Territoire autonome – autonomie des Indiens Mosquito profondément enracinée dans l'histoire – leur territoire ne fut jamais sous complète souveraineté étrangère, mais seulement sous un statut de protectorat – exclusion des affaires étrangères des compétences autonomes - droit optionnel de consentir à une complète incorporation au Nicaragua – système législatif et administratif exclusif et complet spécifique au territoire – droits économiques exclusifs sur les ressources naturelles et leur concession pour acquisition et exploitation – droits exclusifs de réguler le commerce et de prélever des taxes – interdiction d'interférences de la part du gouvernement du Nicaragua ou de son Commissaire – extinction des décrets présidentiels du Nicaragua en contradiction avec le statut d'autonomie.

Statut des tribus indiennes – diversité du statut juridique des tribus indiennes selon l'Etat (incorporation complète et égalisation inconditionnelle immédiate avec le reste de la population ou séparation), les circonstances géographiques (séparation, limitation et éloignement du territoire) et ethnologiques (ethnicité de la population environnante).

Versement d'une rente au territoire autonome par l'Etat souverain – validité de la disposition conventionnelle en question – rente visant le progrès social et gouvernemental – responsabilité du Nicaragua pour le non paiement de la rente – absence d'intérêts liés au non paiement de la rente du fait de son caractère de rémunération altruiste.

Port franc (San Juan del Norte) – possibilité de prélever des taxes seulement sur le marchandises quittant le territoire du Nicaragua et entrant dans le port franc ou inversement – interdiction de taxer les marchandises transitant par le canal interocéanique prévu sur le territoire du Nicaragua – interdiction de taxer les marchandises à des fins d'entretien portuaire – droit de l'Angleterre d'exiger le maintien du statut de port franc de San Juan del Norte, condition conventionnelle de sa renonciation à son protectorat sur les îles Mosquito – droit dans l'ordre juridique international d'un Etat de porter plainte au nom de ses ressortissants directement impliqués dans la question – distinction entre un tel litige et l'immixtion dans les affaires intérieures d'un Etat ou la continuation d'un protectorat.

Interprétation conventionnelle – aucun droit ne peut être créé par le biais de l'interprétation – uniquement des droits existants sont affirmés et établis par le biais de l'interprétation.

* * * * *

We, Francis Joseph the First, by the grace of God, Emperor of Austria, King of Bohemia, &c., and Apostolic King of Hungary:

Whereas the Government of Her Britannic Majesty and the Government of Nicaragua have consented to submit to our arbitration the question in dispute between them of the interpretation of certain articles of the treaty of Managua, signed on the 28th January 1860, and whereas we declared ourselves willing to accept the office of arbitrator in this matter, we have come to the following decision, based on one of the three legal opinions which were drawn up and submitted to us at our request:

ARTICLE I. The sovereignty of the Republic of Nicaragua, which was recognized by Articles I. and II. of the Treaty of Managua of the 28th January 1860, is not full and unlimited with regard to the territory assigned to the Mosquito Indians, but is limited by the self-government conceded to the Mosquito Indians in Article III. of this treaty.

ARTICLE II. The Republic of Nicaragua, as a mark of its sovereignty, is entitled to hoist the flag of the Republic throughout the territory assigned to the Mosquito Indians.

ARTICLE III. The Republic of Nicaragua is entitled to appoint a commissioner for the protection of its sovereign rights throughout the territory assigned to the Mosquito Indians.

ARTICLE IV. The Mosquito Indians are also to be allowed to hoist their flag henceforward, but they must at the same time attach to it some emblem of the sovereignty of the Republic of Nicaragua.

ARTICLE V. The Republic of Nicaragua is not entitled to grant concessions for the acquisition of natural products in the territory assigned to the Mosquito Indians. That right belongs to the Mosquito Government.

ARTICLE VI. The Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy duties on goods imported into or exported from the territory reserved to the Mosquito Indians. That right belongs to the Mosquito Indians.

ARTICLE VII. The Republic of Nicaragua is bound to pay over to the Mosquito Indians the arrears of the yearly sums assured to them by Article V. of the Treaty of Managua, which arrears now amount to 30,859 dol. 3 c. For this purpose the sum of 30,859 dol. 3 c., deposited in the Bank of England, together with the interest accruing thereto in the meantime, is to be handed over to the British Government. The Republic of Nicaragua is not bound to pay back-interest ("Verzugszinsen") on the sums in arrear.

ARTICLE VIII. The Republic of Nicaragua is not entitled to impose either import or export duties on goods which are either imported into or exported from the territory of the free port of San Juan del Norte (Greytown).

The Republic of Nicaragua is, however, entitled to impose import duties on goods on their conveyance from the territory of the free port of Greytown to the territory of the Republic, and export duties on their conveyance from the territory of the Republic to the free port of San Juan del Norte (Greytown).*

Given under our hand and seal at Vienna.

FRANCIS-JOSEPH.

JULY 2, 1881.

Legal Opinion on which the Award was based — Translation

In order to appreciate and settle the differences that have arisen between Her Britannic Majesty's Government and that of the Republic of Nicaragua respecting the interpretation of some articles of the treaty concluded by them at Managua on the 28th January 1860, it is necessary to recapitulate as succinctly as possible, in so far as they bear upon the declaration of the award, the complicated relations and the conflicting claims which existed before that treaty was drawn up and which led to its conclusion.

(The following exposition, apart from the materials contained in the controversial documents of the two governments, is based upon the works cited below: Martens-Samwer, *Recueil Général de Traités*, Tome XV, pp.158-250; Von Reden, *Das Mosquito-Gebiet*, in *Petermann's Geographischen Mittheilungen*, 1856, p. 250 sq.; Samwer, *Die Gebietsverhältnisse Centralamerika's*, ebenda, p. 257 sq.; Scherzer, *Wanderungen durch Nicaragua, Honduras, und San Salvador*, 1857; P. Lévy, *Notas Geográficas y Económicas sobre la República de Nicaragua*, Paris, 1873.)

The rightful sovereignty over the territory inhabited by the Mosquito Indians on the east coast of Central America along the Caribbean Sea, but not exactly defined inland, had been long in dispute. On the one side it was claimed by those republics which had broken loose from Spain in the third decade of the present century, and which founded their claim to the Mosquito territory upon their succession to the rights of the mother country. The Spanish Crown had claimed from of old the sovereignty over the Mosquito Indians, and this claim was expressly put forward by a decree in the year 1803 regulating the territorial demarcation and the administrative distribution of the coast territory. But as neither Spain nor the colonies which had fallen away from her and attained independence had actually exercised the pretended rightful sovereignty, and consequently the asserted occupation

* Editor's note: See Mr. Evarts, Sec. of State, to Mr. Kasson, MS. Inst. to Austria, August 1, December 18, and December 26, 1879, and June 4, 1880. This award and the accompanying opinion have become obsolete as the result of the formal and voluntary incorporation of the Mosquito Indians into the Republic of Nicaragua (For. Rel. 1894, App. I.354-363.).

lacked the essential element of taking possession in fact, the Mosquito Indians were able to maintain not only their actual freedom, but also their legislative independence, and to act as a separate community. As such the Mosquito Indians entered into commercial and international relations, especially with England. The relations with that power reach back to the time immediately after the conquest of Jamaica, in the second half of the seventeenth century. They led, in the year 1720, to a formal treaty between the governor of Jamaica and the chieftain, styled "king," of the Mosquito Indians, and finally took the shape of international protection. This protectorate of England's was, however, contested not only by the Central American Republics, but also by the United States of North America, and all the more keenly inasmuch as the greatly coveted regions at the mouth of the River San Juan had acquired considerable importance in reference to commercial policy, owing to the intended construction of an interoceanic canal for the connection of the Atlantic and Pacific oceans.

When the Mosquito Indians, by the aid of England, after several vicissitudes, had got possession, in the year 1848, of the important seaport town of San Juan del Norte (Greytown), at the mouth of the San Juan River, warlike complications threatened to break out with the United States, under whose protection the Republic of Nicaragua had placed itself. In order to avert these dangers, and to obtain a basis for a uniform policy of abstention on the part of England and of the United States in regard to the regions along the intended interoceanic canal, the two states concluded the so-called Bulwer-Clayton Treaty in April 1850 (Case, Appendix, pp. 69 sq.), which, however, became itself a starting point for fresh disputes. England now sought to obtain by negotiations with the United States the groundwork for an arrangement of Central American affairs, and especially for determining the fate of the Mosquito Indians, as well as the political position of the important seaport town of San Juan del Norte (Greytown), and with this view in the first place to secure definite results by a treaty with the United States, to which both states were to endeavor to get the adhesion of the Republic of Nicaragua. This was the origin of the so-called Crampton-Webster Treaty in April 1852 (Martens-Samwer, *Recueil de Traités*, Tome XV, pp. 195 sq.), wherein England tacitly renounced the protectorate of the Mosquito Indians, and by the provisions of which the whole of the Mosquito territory situated within the bounds of Nicaragua was to come under the sovereignty of the republic, but without any exact demarcation of the territory that should remain to the Mosquito Indians in absolute and independent sovereignty (Article I.). The grounds of this treaty were not, however, accepted by Nicaragua. The republic would not allow the Mosquito Indians even a partially independent territory, but wished to see the whole coast placed under its sovereignty. As further negotiations with the United States did not attain the desired end, and as, in particular, a treaty concluded in the year 1856 (the so-called Clarendon-Dallas Treaty — Case, Appendix, pp. 72 sq.) was not ratified, England adopted the course of direct negotiations with the Republic of Nicaragua, and finally concluded the Treaty of Managua on the 28th of January 1860, which contains an adjustment of the

conflicting interests and claims. For the historical comprehension and proper realization of that treaty, the previous treaty negotiations between England and the United States are not without importance.

II. In the Treaty of Managua the protectorate over the Mosquito district was expressly given up by England (Article I. par. 2), the sovereignty of the Republic of Nicaragua over the whole district of the Mosquito Indians lying within its bounds was acknowledged under the conditions and engagements specified in the treaty (Article I. par. 1), whilst an exactly defined territory was assigned and reserved to the Mosquito Indians (Articles II., VIII.), within which they are to enjoy the right of self-government (Article III.).

The dispute between the two governments refers to the connection with each other of the coexistent sovereignty and self-government, the purport and extent of the domination appertaining to the republic on the one side, and on the other the self-regulation conceded to the Mosquito Indians.

An unprejudiced consideration of the case as it stands leads to the following results:

The sovereignty over the whole region of the coast, always claimed by the Republic of Nicaragua, has been acknowledged by the treaty. The separation of a part of that region for the maintenance or constitution of an entirely independent community of the Mosquito Indians, absolutely free with respect to political and international relations, and such as was contemplated in the treaty negotiations between England and the United States, has not been carried out.

In place of the international relation of protection heretofore existing a relation of political subjection has been created; the Mosquito Indians, in place of their former protector (England), have got a ruler (the Republic of Nicaragua), under whose political power and authority they are placed.

But, on the other hand, an exactly defined territory is assigned to the Mosquito Indians, and they have still the right of self-government within it.

The territory so reserved to the Mosquito Indians, and therefore usually called "Mosquito Reserve," forms an integral and inseparable component of the aggregate territory of the republic, a political appurtenance of the main country.

In this region, closed and parted off, the Mosquito Indians have to lead their own life and provide for their own national existence. This territory, though permanently belonging to the Republic of Nicaragua, is to be considered as primarily and immediately a territory owned by Indians, as the country of the Mosquitos. This also follows indirectly from the prohibition against the cession of this tract of land by the Mosquito Indians to a foreign person or power (Article II. par. 3). The Mosquito Indians are not allowed to make over the dominion of their country to anyone else.

Within and upon this territory the Mosquito Indians are allowed “the right of governing according to their own customs and according to any regulations which may from time to time be adopted by them, not inconsistent with the sovereign rights of the Republic of Nicaragua, themselves and all persons residing within such district. Subject to the above-mentioned reserve, the Republic of Nicaragua agrees to respect and not to interfere with such customs and regulations so established, or to be established, within the said district.” (Article III.) When we come to examine and interpret this treaty stipulation impartially, we can hardly do otherwise than admit that the concession of self-government in the sense of self-legislation and self-administration is involved in it. This result necessarily follows also from the stipulation of Article IV., according to which the Mosquito Indians are not to be prevented at any time “from agreeing to absolute incorporation into the Republic of Nicaragua on the same footing as other citizens of the republic, and from subjecting themselves to be governed by the general laws and regulations of the republic, instead of their own customs and regulations.” So long as this shall not have taken place, and the efforts of the Republic of Nicaragua in this respect have hitherto been fruitless, the Mosquito Indians have not been completely incorporated with the Republic of Nicaragua, they do not stand on the same footing as the other subjects of the republic, they are not amenable to the general laws and regulations of the republic, but they govern themselves according to their own customs and laws; until the date of such voluntary agreement *dies incertus an et quando*, the incorporation of the Mosquito district into the territory of the republic is a relative and incomplete incorporation. The Mosquito Indians are consequently in a peculiar position guaranteed to them in conformity with treaty; their territory is a district exempt from the legislation and administration of the republic, and forms an absolute legislative and administrative sphere of their own. This local self-government is the last remnant of the freedom and self-dependence claimed and exercised by the Mosquito Indians for centuries.

This self-government can not, of course, extend to foreign affairs, inasmuch as the “Mosquito Reserve” forms a political and international whole with the Republic of Nicaragua. The Mosquito Indians have, therefore, no right to enter into relations or conclude treaties with foreign states, or to send or receive envoys, or to wage war or make peace. But their self-government does extend, according to the general purport and conception of Article III., to the whole range of internal affairs, in the regulation of which the Republic of Nicaragua has undertaken not to interfere.

The position which the Government of the Republic of Nicaragua takes up and seeks to maintain in its controversial writings can not be justified.

The government of the republic denies that «une autonomie véritable, une autonomie séparée du reste de la République» (Réponse, pp. 9, 12) was conceded to the Mosquito Indians. According to the view of that government its inherent sovereignty is absolute and entire («pleine et absolue,» Réponse, pp. 4, 10), even in regard to the Mosquito district, and the republic is entitled

to enforce its dominion to the full meaning and extent thereof even on the Mosquito soil («d'être pratiquement souverain,» Exposé, pp. 4, 49-51, 63), to enjoy plenary use of paramount and governmental rights involved in sovereignty («de nommer ses employés, d'ouvrir des ports de mer, de déterminer les droits de Douane . . . en un mot, d'y établir comme dans toutes les autres parties de la nation, la constitution, et les lois de la République*,» Réponse, p. 10), and has only to refrain from any encroachment on the national customs and municipal usages («us et coutumes») of the Mosquito Indians (Exposé, pp. 5, 43; Réponse, p. 12).

This assertion is in direct contradiction with Articles I-IV., wherein the sovereignty of the republic is recognized only in a limited form ("subject to the conditions and engagements specified in the present treaty"), and it is stipulated that the "general laws and regulations of the republic" are not binding for the Mosquito Indians, to whom is conceded the right of governing, not only themselves, but all persons in general residing in Mosquitia. It is, moreover, in indirect contradiction with Article V., whereby the subvention from the republic is also granted for the maintenance of the government authorities of the Mosquitoes, "for the maintenance of the authorities to be constituted under the provisions of Article III." The assertion of the government of the republic contains a thoroughly gratuitous and unjustifiable anticipation of the absolute incorporation and complete equalization of the Mosquito Indians with the rest of the subjects of the republic, which is reserved in Article IV. for a future voluntary agreement.

If the government of the republic declares its opinion that the tribe of Mosquito Indians is an exhausted and degenerate race, incapable of education and development, and that therefore the talents and presumptions required for self-government are lacking (Réponse, pp. 4, 9), it may be said on the other hand that impartial authors, well acquainted with the facts, are not altogether of that opinion; that the Republic of Nicaragua has promised the ten years' subvention for the purpose, amongst others, of promoting "the social improvement" of the Mosquito Indians (Article V.); that they, in case of the absolute incorporation, so much striven for by the Republic of Nicaragua, are at once to enjoy the same rights as all other citizens of the republic (Article IV.); and that, according to the statement of their chief, a number of schools, etc., have already been established (Case, p. 52), whilst nothing has apparently been done for improving the position of those Mosquito Indians who live outside the reserved territory, and are completely incorporated with the Republic of Nicaragua. However that may be, this consideration ought at the time to have prevented the government of the republic from concluding the treaty of Managua on such grounds; it ought to have followed the example of the Republic of Honduras in its treaty with England, concluded at Comayagua

* Secretariat note: [sic]

on the 28th November 1859, wherein no separate territory was reserved for the self-government of the Mosquito Indians within the jurisdiction of that republic, but their absolute incorporation and immediate unconditional equalization with the rest of the subjects of the Republic of Honduras were definitely fixed. (Articles II. and III.)

The appeal of the Nicaraguan Government to the legal status of the Indians within the United States of North America is likewise inapplicable. According to the evidence of Kent (Commentaries on American Law, 5th edition, 1844, vol. III., p. 378 sq.), the Indian tribes in North America have always been treated “as free and independent tribes, governed by their own laws and usages, under their own chiefs, and competent to act in a national character and exercise self-government, and, while residing in their own territories, owing no allegiance to the municipal laws of the whites” (p. 384). They have occupied a position of protection under the United States, and have been considered and treated as “dependent allies.” (Kent, pp. 383, 385; Wheaton, *Eléments de Droit International*, 1848, I., p. 50 sq.; Beach-Lawrence, *Commentaire sur les Eléments de Droit International de H. Wheaton*, 1868, I., p. 264 sq.; Calvo, *Le Droit International*, 3d edition, 1880, I., sec. 69, p. 178 sq.; Rüttiman, *Das Nordamerikanische Bundesstaatsrecht*, I., 1867, p. 1 sq.). It is but quite lately that (3d March 1871) the Congress at Washington has decided that the Indian tribes are in future no longer to be regarded as independent nations, and that, without prejudice to the validity and operation of the treaties already concluded, no more treaties of alliance are to be concluded with them (Revised Statutes of the United States, 1873-74, sec. 2079, p. 366). Moreover, considering the diversity of geographical and ethnographical circumstances, it is quite impossible to draw a parallel. Whilst the Indian tribes in the United States live everywhere in inclosed districts and surrounded by an immense unmixed white population that overwhelms them, the Mosquito Indians (about 6,000 in number) inhabit a separated strip of coast, and the Republic of Nicaragua itself has but a feeble and mixed population (from 250,000 to 300,000 inhabitants, half Ladinos, one-third Indians, one-sixth mulattoes and blacks). (Martin, *The Statesman’s Year-Book*, 1874, pp. 543,544; Wappäus, *Handbuch der Geographie des Ehemaligen Spanischen Mittel-und Südamerika*, 1870, p. 335; Mayer, *Conversations-Lexicon*, 3d edition, Art. Nicaragua und Mosquito-Küste). The result of the foregoing discussion and statement is that the Republic of Nicaragua’s sovereignty over the district of the Mosquito Indians is not complete and unlimited, but that it is restricted and circumscribed by the right of self-government, conceded to the Mosquito Indians (Article I of the Draft¹).

¹ “P. Lévy says much the same in his work, *Notas Geográficas y Económicas sobre la República de Nicaragua* (Paris, 1873), published with the approval and pecuniary aid of the Nicaraguan Government. His observation, p. 400, is: “In regard to Nicaragua, by *the Managua convention she has taken the place of England in the protectorate of the Mosquitoes, but on the*

This connection of the Republic of Nicaragua with the «Mosquito Reserve» may be shortly described in the phrase «La République règne, mais elle ne gouverne pas.»

It must be acknowledged at once that the Republic of Nicaragua, as a sovereign of the Mosquito district, is entitled to hoist the flag of the republic as a sign of its dominion («en signe de souveraineté») in the territory of the Mosquito Indians (Draft, Article II.). Nor does the English Government oppose this claim of the government of the republic (Exposé, p. 55; Counter Case, p. 8, No. 16), although it forms an item of complaint in the memorial of the chieftain of the Mosquito Indians (Case, p. 52). It must likewise be acknowledged that the Republic of Nicaragua has the right to appoint a commissioner, who has to see that the Mosquito government does not go beyond its province and encroach upon the sovereign rights of the republic (Article III.; Draft, Article III.). But this commissioner must not meddle with the internal affairs of the Mosquito Indians, or exercise any jurisdiction in the Mosquito district. In so far as the Nicaraguan presidential decree of the 6th January 1875 (Case, p. 82) is in contradiction with this, it must therefore cease to take effect.

The Mosquito Indians can not well be forbidden from using their old flag still. But they must connect therewith a sign of the sovereignty of the Republic of Nicaragua, to which they are subject, in order that this connection with the paramount authority may be generally recognizable (Draft, Article IV.). This is the more imperative, inasmuch as even states which only exercise a protectorate have insisted that the protected state should exhibit a sign on its flag denoting the protective connection (“as a mark of the protection”).

Thus, the Ionian Islands, so long as they were under the protectorate of England, had to indicate that connection on their flag (Phillimore, Commentaries upon International Law, I. p. 96, sq.).

III. Self-administration comprises in itself the people's own administration of their economical affairs. It is just where material interests are concerned that the right of self-government assumes special practical importance.

The Mosquito Indians have to provide from their own means for all the requirements of their separate national existence and all the costs of their self-government. They have to procure those means for themselves, and can only derive them from the natural produce of their territory and the most profitable disposal thereof. The cession to them of a territory of their own naturally includes the right of employing it to their own advantage. In consequence of

express condition that they shall acknowledge her sovereignty. The former King of Blewfields, or his lawful successors, retain a purely administrative authority over the jurisdiction that we have indicated above” (i. e., the Mosquito Reserve).”

the separate territorial and governmental position conceded to the Mosquito Indians, the district reserved to them forms a department economically dependent upon itself.

As a necessary consequence of this, the Mosquito government must have the right of granting licenses for the acquisition of the natural products of its territory (wood, caoutchouc, gum, cocoanuts, minerals, etc.) and that of levying dues on such products.

It would be against the universal principles of justice that he to whom the ground belongs should not be entitled to reap the produce of it himself or to transfer the collection of such produce to others for a consideration. The utilization of the Mosquito soil can but belong to the Mosquitoes only; therefore the Republic of Nicaragua can not be considered as entitled «de délivrer des patentes pour l'exploitation des produits naturels de la Mosquitia,» and thus deprive the Mosquitoes of their source of revenue (Draft, Article V.). The pretension to such a right on the part of the government of the republic (Exposé, p. 49, sq.) rests upon a confusion of the political idea of a sovereignty with the notion of a private right of ownership.

As the Mosquito Indians constitute a community endowed with its own self-government, under the dominion of the Republic of Nicaragua, they must be considered as also entitled to carry on their trade according to their own regulations (Article III.), and if they should deem it expedient, for the purpose of creating a revenue, to levy duties on goods that are imported into or exported from their district, they may do so.

If the government of the Republic of Nicaragua claims these rights for the republic «en sa qualité de souverain,» and asserts its privilege «de régler le commerce extérieur de la «Reserva Mosquita,» de régler le cabotage, d'ouvrir et de fermer ceux des ports pour lesquels l'une ou l'autre de ces mesures lui paraît opportune» (Exposé, pp. 51, 63), «d'imposer les droits généraux d'importation et d'exportation dans le territoire de la reserva» (Exposé, pp. 52, 53), this is only a consequence of its radically erroneous notion that the Republic of Nicaragua is entitled to the full and unlimited exercise of the rights of sovereignty even over the Mosquito territory. The assertion that the republic has a right «d'appliquer dans le territoire de la reserva les droits généraux qui régissent les autres parties de la république» (Exposé, p. 63) is altogether contrary both to Articles III. and IV. of the treaty, whereby the “general laws and regulations of the republic” are not binding in the Mosquito district, and to the right of self-government guaranteed to the Mosquitoes, for that undoubtedly comprises the exclusive right of self-taxation, both direct and indirect.

In justification of its claim to impose a duty on goods imported into Greytown and intended for consumption in the Mosquito district on their reexportation by sea from that port, the government of the Republic of Nicaragua appeals to the final clause of Article VII., whereby the constitution of San Juan del Norte (Greytown) as a free port is not to prevent the Republic

of Nicaragua from levying the usual duties on goods intended for consumption within the territory of the republic; for, as the Mosquito district also belongs to the territory of the republic, the latter must therefore be entitled to levy a duty on the goods exported to Mosquitia from the free port Greytown (Exposé, pp. 52, 53; Réponse, p. 18). But the words "territory of the republic," in the final clause of Article VII., which does not refer at all to the connection of Nicaragua with Mosquitia, can not, any more than in Article V., paragraph 2, bear the signification of the whole territory of the republic; they are only to be understood as the proper territory of the republic, exclusive of the "territory reserved for the Indians" (Article VIII.). Moreover, the levying of a duty is incompatible with the free port character of Greytown (No. V.).

The apprehension of the government of the Republic of Nicaragua that the duty-free importation of goods into the Mosquito district would cause or encourage smuggling in the other parts of the republic (Exposé, p. 51) is met by Her Britannic Majesty's Government with the objection that the frontier parts of the Mosquito district are quite impassable (Counter Case, p. 28, No. 93). Were this not the case, the Republic of Nicaragua would have no alternative but to establish an immediate customs line. The difficulty or impracticability of such an undertaking can not derogate from the right of the Mosquito Indians as once for all settled by the Treaty of Managua.

It must therefore be allowed that the Republic of Nicaragua is not entitled to regulate the trade of the Mosquito Indians, or to levy import or export duties on goods which are imported into or exported from the Mosquito district (Draft, Article VI.) Articles I. and II. of the Nicaraguan presidential decree of 4th October 1864 (Case, p. 82), which are in contradiction with this, must consequently cease to take effect.

IV. In Article V. of the Treaty of Managua the Republic of Nicaragua undertook to pay the Mosquito Indians an annuity of \$5,000 for the term of ten years, for the purpose of improving their social position and of maintaining their government authorities constituted in virtue of Article III. This annuity was to be paid half-yearly at Greytown to a person empowered by the chieftain of the Mosquitoes to receive it, and the first installment was to be paid six months after the exchange of ratifications of the Managua Treaty. This said exchange was effected on the 2d August 1860, in London.

The payment of the annuity was irregular, and soon ceased altogether. When, in November 1865, the chieftain of the Mosquito Indians died, and his cousin, a boy of 11 years old, was proclaimed his successor, the Republic of Nicaragua refused to recognize him. It is not necessary to inquire here whether there were good grounds for the refusal, or whether it was to serve as a welcome pretext for withholding the payments of the subvention. The said chieftain afterward died (since 1875), and no objection has been raised against the legitimacy of his successor. Now, as the objects for the attainment of which the subvention was promised are still the same as they were before, and

as the payment thereof is attached to no conditions whatever, there can be no doubt that the Republic of Nicaragua must be declared liable for the payment of the arrears to the amount of \$30,859.03. This sum has meanwhile been deposited by the Republic of Nicaragua in the Bank of England on condition (Case, p. 78) that upon the delivery of an award for payment it is to be made over to the British Government for the benefit of the Mosquito Indians (Draft, Article VII.).

When the Government of the Republic of Nicaragua intimates the desire to have the sum deposited in the Bank of England paid over to itself, in order that the said sum may be duly applied for the benefit of the Mosquito Indians, inasmuch as no one can be in a better position to judge of what is to be done than «le Souverain dans ses domaines, et que le territoire de Mosquitia se trouvant dans les limites et sous la juridiction de la République, il est de son devoir de s'enquérir de ses besoins pour y subvenir autant que possible, prenant toutes les mesures qui peuvent contribuer à l'avancement moral et au progrès matériel de ce district» (Réponse, p. 16), it first of all overlooks the fact that the subvention is not only to serve for the improvement of the social position of the Mosquitoes, but also for the maintenance of their own government authorities. The Nicaraguan Government hereby seeks, in a way that is radically inadmissible, to take the place of the Mosquito government, whose own business is independently to attend to and provide for the concerns and interests of the Mosquitoes. For even in the treaty which the Republic of Honduras concluded with Great Britain at Comayagua on the 28th November 1859 it was stipulated that the ten years' subvention of \$5,000 a year to be furnished by the said republic for the improvement of the intellectual and material position of the fully incorporated Mosquitoes should be paid to their chieftain (Article III, par. 2).

The Republic of Nicaragua, however, can not be called upon to pay back-interest on the subvention sum in arrear. The subvention is not, indeed, as the Government of the Republic of Nicaragua intimates (Réponse, p. 18), a pure donation («un don gratuit, un présent»), inasmuch as it was more properly promised "in consideration" of the manifold advantages which were secured to the republic in the treaty and have accrued therefrom, such as the relinquishment of the protectorate on the part of England, and the recognition of the republic's sovereignty over the whole Mosquito district, including the town of San Juan del Norte (Greytown). But, though the subvention has not the character of a pure donation, still it has the character of remunerating liberality, and the equitable nature of such an obligation precludes the liability for the payment of back-interest (Draft, Article VII.).

V. As is generally acknowledged in theory and practice, the essence of a free port consists in this, that all goods imported and exported therein free and without payment of duty remain within the jurisdiction of the port itself, either to be sold or consumed there, or to be again exported therefrom to a place in the interior or abroad. A free port, which belongs to the territory of a certain

state, and therefore is under the sovereignty of that state, is to be looked upon in regard to the customs just as a foreign country. But so soon as the goods are imported from the jurisdiction of the free port into the other part of the state territory, they may, on their entry into this territory, and consequently passing beyond the jurisdiction of the free port, be charged with an import duty. It is only in this sense that the concluding words of Article VII. of the Treaty of Managua can be understood; they are set in their true light by the stipulation immediately preceding, whereby the Republic of Nicaragua is not to be allowed to levy transit dues on goods which pass from sea to sea through the territory of the republic on the projected interoceanic canal. In like manner the goods exported from inland («les articles du pays») can not indeed be charged with an export duty when they go out of the free port, but they can be so charged on their passage from the state territory into the jurisdiction of the free port (Draft, Article VIII.). The Nicaraguan presidential decree of the 22d June 1877 (Case, pp. 92, 93), which contradicts these principles, and which has already been suspended, for so long as the dispute is pending, by presidential decree of the 10th April 1878 (Case, pp. 93, 94), for San Juan del Norte (Greytown), must therefore definitively cease to take effect for that free port.

Inasmuch as no duties at all may be levied on goods in a free port, it is equally unallowable to levy duties on imported or exported goods for the purpose of meeting the costs of the administration of the port town and of the maintenance of the free port. The means for covering such local requirements must be raised by local taxation in other forms, as, for example, by levying a tax upon the consumption of goods imported duty free. The system of providing for the costs of the administration of the town and the maintenance of the free port of Greytown, introduced by presidential decree of the 20th February 1861 (Case, pp. 88, 89), by an import duty on the goods imported there, will therefore have to make room for some other system.

There is no dispute about the right of the Republic of Nicaragua to levy “duties and charges” on ships in the free port of San Juan del Norte (Greytown) for the purposes of the port (Article VIII.).

Upon the other points brought forward by Her Britannic Majesty’s Government for decision (Counter Case, pp. 32, 33, Nos. 15-19) it is not expedient to enter, inasmuch as some of them relate partly to administrative affairs and to reclamations in civil law by private persons, while, in regard to others, the necessary statistical materials and particulars of account are not within reach.

VI. The Government of the Republic of Nicaragua disputes the right of Her Britannic Majesty’s government to take part in the affairs relating to the Mosquito Indians and to the free port of San Juan del Norte (Greytown), or to come forward as complainant in the present litigation, inasmuch as such a proceeding would involve an unauthorized intermeddling with the internal

concerns of Nicaragua, and a reassertion contrary to treaty of the relinquished protectorate over Mosquitia (Exposé, pp. 53, 54, 63; Réponse, pp. 16, 17).

This contention against England's *legitimitio ad causam* can not be pronounced well founded.

Then, in regard to the port of San Juan del Norte (Greytown), the Republic of Nicaragua, in Article VII. of the Managua Treaty concluded with England, undertook the engagement to constitute and declare it a free port; and such constitution and declaration did ensue by presidential decree of the 23d November 1860 (Case, p. 87). But England has a treaty right to insist also that that constitution and declaration should not be merely nominal, but that the Government of the Republic of Nicaragua should not enact any provisions and regulations incompatible with the essence and character of a free port. Now, if English merchants, settled in Greytown or trading thither, appeal to the protection and interposition of the English Government against measures on the part of the Nicaraguan Government which are prejudicial to the free port character of Greytown, and thereby to their commercial interests, and if subjects of other states join in such steps, there would be nothing herein contrary to the rules of international law or to the ordinary practice generally acknowledged as admissible.

In regard, however, to the affairs of the Mosquito Indians, it is true that England, in the Treaty of Managua, has acknowledged the sovereignty of Nicaragua and renounced the protectorate, but this still only on condition, set forth in the treaty, of certain political and pecuniary advantages for the Mosquitoes ("subject to the conditions and engagements specified in the treaty, Article I.") England has an interest of its own in the fulfillment of these conditions stipulated in favor of those who were formerly under its protection, and therefore also a right of its own to insist upon the fulfillment of those promises as well as of all other clauses of the treaty. The Government of Nicaragua is wrong in calling this an inadmissible "intervention," inasmuch as pressing for the fulfillment of engagements undertaken by treaty on the part of a foreign state is not to be classified as intermeddling with the internal affairs of that state, which intermeddling has unquestionably been prohibited under penalty. No less unjustly does the Government of Nicaragua seek to qualify this insistence on treaty claims as a continued exercise of the relinquished protectorate, and on that ground wish to declare England's interposition inadmissible.

Finally, the Government of the Republic of Nicaragua also expresses the desire (Réponse, p. 17) that the award should declare that the Treaty of Nicaragua [Managua], as having accomplished its purpose, is annulled in respect of Mosquitia, and that in future the parties concerned are bound in this respect to comply solely with the decisions adopted and enumerated in the award. This desire militates against universal principles of law, and therefore can not be acceded to. The interpretation of a treaty can never supersede the

treaty interpreted, and the judicial decision creates no new right, but only affirms and establishes the existing right.

Given under our hands at Ottawa, in the province of Ontario, this 3d day of August 1878.

ROBT. A. HARRISON.
EDWARD THORNTON.
F. KINCKS.

Signed in presence of:
THOMAS HODGINS.
E. MONK.

PART XVI

**Award as to the boundary between the
United Kingdom and the South African
Republic (Transvaal)**

Decision of 5 August 1885

**Sentence arbitrale relative à la frontière
entre le Royaume-Uni et la République
Sud-Africaine (Transvaal)**

Décision du 5 août 1885

AWARD AS TO THE BOUNDARY BETWEEN THE UNITED
KINGDOM AND THE SOUTH AFRICAN REPUBLIC (TRANSVAAL),
DECISION OF 5 AUGUST 1885*

SENTENCE ARBITRALE RELATIVE À LA FRONTIÈRE ENTRE LE
ROYAUME-UNI ET LA RÉPUBLIQUE SUD-AFRICAINE
(TRANSVAAL), DÉCISION DU 5 AOÛT 1885**

Territorial determination – question of control and sovereignty over ground to the west of the roads from Lotlakana to Kunana and from Kunana to Taungs in the context of its intended inclusion within the South African Republic – interpretation of a treaty.

Délimitation territoriale – question du contrôle et de la souveraineté sur le territoire situé à l'Ouest des routes entre Lotlakana et Kunana et entre Kunana et Taungs, dans le contexte de son incorporation au sein de la République d'Afrique du Sud – interprétation conventionnelle.

* * * * *

Whereas it is stipulated by Article II of a convention between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the South African Republic, signed in London on the 27th day of February 1884 by the representatives of the respective parties to the said convention, that “Her Majesty’s government and the South African Republic will each appoint a person to proceed together to beacon off the amended southwest boundary as described in Article I. of this convention, and the President of the Orange Free State shall be requested to appoint a referee, to whom the said persons shall refer any questions on which they may disagree respecting the interpretation of the said article,” and that “the decision of such referee shall be final;”

And whereas Her Majesty’s government did appoint Captain Claude Reignier Conder, R. E., and the government of the South African Republic did appoint Tielman Nieuwoudt de Villiers, esq., as such persons to proceed together to beacon off the said amended southwest boundary;

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol.V, Washington, 1898, Government Printing Office, p. 5015.

** Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol.V, Washington, 1898, Government Printing Office, p. 5015.

And whereas thereafter the President of the Orange Free State, being thereunto requested, did, on the 5th day of June 1885, appoint Meluis de Villiers, one of the judges of the high court of justice of the Orange Free State, to be such referee as aforesaid;

And whereas the before-mentioned Captain Claude Reignier Conder, R. E., and Tielman Nieuwoudt de Villiers, esq., did refer to the said referee the following question on which they disagree respecting the interpretation of Article I. of the said convention, namely, What extent of ground to the west of the roads from Lotlakana to Kunana and from Kunana to Taungs, as such roads have been accepted and agreed upon by the commissioners of the governments of Her Majesty and of the South African Republic respectively, was intended to be included in the South African Republic by the words "skirting Kunana so as to include it and all its garden ground but no more in the Transvaal:"

Now therefore I, the said referee, do hereby decide and declare that the said words denote the ground included between the said roads and the following boundaries, namely: A straight line from a point on the road from Lotlakana to Kunana, as accepted and agreed upon by the respective commissioners before mentioned, 1 mile southwest of the point where the road crosses the "spruit" known as "Tlakayeng," to a point on the "kopje" immediately behind Batubatu's kraal, where the line next to be mentioned reaches the summit of the "kopje;" thence a straight line to a point 200 yards northwest of an isolated hut whereof compass observations were taken by the British commissioners in the presence of the referee and of the commissioner of the South African Republic, this straight line passing immediately behind the huts of Batubatu's kraal so as to exclude them from the South African Republic; next a straight line from the said point 200 yards from the said hut to the northwestern corner of Ramatlane's garden, of which similar observations were taken; thence a straight line skirting the western side of the garden to its southwestern corner, that point being very nearly magnetic north of the "kopje," being the northernmost of three "kopjes" forming the termination of a range of hills which is crossed by the road from Kunana to Marebogo, about 6 miles from the former place; next a straight line from the said southwestern corner of Ramatlane's garden to the summit of the said "kopje;" thence a line along the ridge of the said range of hills to the point where the hill is crossed by the road last mentioned.

Dated at Kunana this 5th day of August 1885.

MELUIS DE VILLIERS.

PART XVII

**Awards regarding the border
between Costa Rica and Nicaragua**

**Decisions of 22 March 1888
30 September 1897
20 December 1897
22 March 1898
26 July 1899**

**Sentences arbitrales relatives à la frontière
entre le Costa Rica et le Nicaragua**

**Décisions du 22 mars 1888
30 septembre 1897
20 décembre 1897
22 mars 1898
26 juillet 1899**

AWARD OF THE PRESIDENT OF THE UNITED STATES IN REGARD
TO THE VALIDITY OF THE TREATY OF LIMITS BETWEEN COSTA
RICA AND NICARAGUA OF 15 JULY 1858, DECISION OF 22
MARCH 1888*

SENTENCE ARBITRALE DU PRÉSIDENT DES ÉTATS-UNIS
RELATIVE À LA VALIDITÉ DU TRAITÉ DE LIMITES ENTRE LE
COSTA RICA ET LE NICARAGUA DU 15 JUILLET 1858, DÉCISION
DU 22 MARS 1888**

Validity of treaty of delimitation – unconstitutionality of ratification process – statement in the Constitution of Nicaragua that the boundary is on the Southeast, the Costa Rica State, is not precise enough preclude further frontier delimitation – defects in ratification process – irregularities and defects in the formalities of ratification may be remedied by subsequent acquiescence in and approval of the treaty – the fact of approval being established, the time of approval is immaterial, provided the other party by its acquiescence has seen fit to waive the delay – acquiescence during several years in the validity of the treaty is a strong evidence of the contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation, even if such acquiescence is not a substitute for ratification by a Legislature – Nicaragua cannot seek to invalidate the treaty on any mere ground of irregularity in the order of its own proceedings.

Validity of treaty – treaty between two States which provides for a third State as a guarantor is not a tripartite treaty but a bilateral one with an independent and separable clause of guarantee as a feature of the arrangement – the lack of ratification by the guarantor does not preclude the validity of the treaty – in international law a guarantee is always subsidiary to the principal contract – acquiescence – failure of Government of Nicaragua to object prior to the ratification, resulted in waiver of the objection – facts which existed and were known at the time of the treaty ratification cannot be accepted as reasons for rescinding the treaty.

Boundary delimitation – interpretation of a treaty – rights of navigation on the River San Juan*** – Costa Rica has no right of navigation with vessels of war in the River San Juan, which belongs to Nicaragua – it has the right of navigation with vessels of the Revenue service for the sole purpose of commerce – Costa Rica is not bound to contribute financially to any work for the preservation and the improvement of the navigation of the river – Costa Rica may not prevent Nicaragua from undertaking work for the improvement of the River San Juan, provided that such work does not damage Costa Rican territory – Right to indemnification for transboundary harm or interference with right to navigation – Costa Rica can deny to Nicaragua the right of deviating the waters of River San Juan in case such deviation will result in the destruction or serious

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 1946.

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*** Secretariat note: The territorial dispute between Costa Rica and Nicaragua remains a current issue as a case is pending in 2006 in front of the International Court of Justice, namely “Dispute regarding navigational and related rights”. It has been submitted by Costa Rica on 29 September 2005 with regard to the infringement of its rights on the San Juan River, and in its application Costa Rica made due reference to the arbitral award of 22 March 1888.

impairment of the navigation – Consent of Costa Rica is required where the construction of inter-oceanic canals would injure its natural rights.

Validité d'un traité de délimitation – inconstitutionnalité de la procédure de ratification – l'affirmation dans la Constitution du Nicaragua selon laquelle sa frontière Sud-Est est l'État du Costa Rica, n'est pas suffisamment précise pour exclure toute délimitation frontalière supplémentaire – défauts dans la procédure de ratification – les irrégularités et les défauts dans la procédure de ratification peuvent être compensés postérieurement par l'acquiescence à ceux-ci et à la validité du traité. Une fois que le consentement a été établi, la question de la date du consentement est inconsistante, sous réserve que l'autre Partie ait acquiescé à la prorogation du délai – l'acquiescement pendant plusieurs années à la validité du traité est une preuve sérieuse de la position qui était à l'époque considérée comme pertinente pour trancher des points d'interprétation litigieux, même si un tel acquiescement ne peut remplacer une ratification parlementaire. Le Nicaragua ne peut demander l'annulation du traité sur la seule base d'irrégularités intervenues dans ses propres procédures.

Validité conventionnelle – un traité entre deux États prévoyant la garantie d'un troisième État n'est pas un accord tripartite, mais un accord bilatéral qui comporte une clause indépendante et dissociable de garantie, spécifique à cet arrangement – l'absence de ratification par l'État garant ne compromet pas la validité du traité – en droit international une garantie est toujours accessoire au contrat principal – acquiescence – le défaut d'objection du gouvernement du Nicaragua préalablement à la ratification conduit au rejet de cette objection – des faits existants et notoires au moment de la ratification du traité ne peuvent être acceptés comme bases pour annuler un traité.

Délimitation frontalière – interprétation conventionnelle – droits de navigation sur le fleuve San Juan* – le Costa Rica n'a pas le droit de naviguer avec des vaisseaux de guerre sur le fleuve San Juan qui appartient au Nicaragua – il a le droit de naviguer avec des vaisseaux du Trésor à des seules fins commerciales – le Costa Rica n'est pas obligé de contribuer financièrement à des travaux visant la préservation et l'amélioration de la navigation sur le fleuve – le Costa Rica ne peut empêcher le Nicaragua d'entreprendre des travaux d'amélioration du fleuve San Juan, tant que ces travaux ne causent pas de dommages au territoire Costaricain – droit à l'indemnisation des préjudices transfrontaliers et des atteintes au droit de navigation – le Costa Rica peut interdire au Nicaragua la possibilité de dévier les eaux du fleuve San Juan au cas où des destructions ou des obstructions à la navigation résulteraient de cette déviation – le consentement du Costa Rica est requis lorsque la construction d'un canal interocéanique portant atteinte à ses droits naturels.

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Report to the Arbitrator, the President of the United States.

By GEORGE L. RIVES, *Assistant Secretary of State.*

To the PRESIDENT.

SIR: On the 24th day of December 1886 the Republics of Costa Rica and Nicaragua, by a treaty signed on that day, agreed that the question pending

* Note du Secrétariat : Le différend territorial entre le Costa Rica et le Nicaragua est toujours une question d'actualité puisqu'en 2006 une affaire est pendante devant la Cour Internationale de Justice, à savoir «le différend relatif à des droits de navigation et des droits connexes». La requête introductive d'instance, qui a été déposée le 29 septembre 2005 par le Costa Rica, concerne les violations de ses droits sur le fleuve San Juan et fait dûment référence à la sentence arbitrale du 22 mars 1888.

between the Contracting Governments in regard to the validity of the "Treaty of Limits" of the 15th April 1858 should be submitted to arbitration. It was further agreed that the Arbitrator of that question should be the President of the United States of America; that within sixty days from the ratification of the Treaty of Arbitration the Contracting Governments should solicit of the Arbitrator his acceptance of the charge; that within ninety days from the notification to the parties of the acceptance of the Arbitrator, they should present to him their allegations and documents; that the arbitrator should communicate to the representative of each Government, within eight days after their presentation, the allegations of the opposing party, in order that the opposing party might be able to answer them within thirty days following that upon which the same should have been communicated; that the decision of the Arbitrator must be pronounced within six months from the date upon which the term allowed for the answers to the allegations should have expired; and that the Arbitrator might delegate his powers, provided he did not fail to intervene directly in pronouncing the final decision. It was further provided that if the Arbitrator's award should determine that the Treaty of the 15th April 1858 was valid, the same award should also declare whether Costa Rica has the right of navigation of the river San Juan with vessels of war or of the revenue service; and that he should in the same manner decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and communicate to the other within thirty days after the exchange of ratifications of the Treaty of Arbitration.

In accordance with the procedure thus agreed on, the Republic of Nicaragua communicated to the Republic of Costa Rica a statement of eleven points of doubtful interpretation in the Treaty of the 15th April 1858 which it proposed to submit to the decision of the Arbitrator. The Government of Costa Rica did not communicate any corresponding statement, and now declares that it finds nothing in that Treaty which is not perfectly clear and intelligible.

The two Governments having thereafter solicited your acceptance of the charge, you were pleased, on the 30th day of July 1887, to signify your acceptance of it, and the representatives of both Governments were duly notified of that fact.

On the 27th day of October 1887 both Governments presented to you their allegations and documents. These were duly communicated to the opposing parties, and on the 3d day of December 1887 they both presented answers to the allegations of their opponents. The Spanish documents were subsequently translated and printed.

On the 16th day of January 1888, by an instrument in writing, you were pleased to delegate your powers as Arbitrator to me, in pursuance of the provisions contained in the last sentence of Article V. of the Treaty of Arbitration, and to direct me to examine into the questions at issue and report my conclusions to you.

In accordance with these directions, and after a careful consideration of the allegations of the respective parties, of their answers, and of the documents submitted by each, I have now the honor to submit the following:

Report

The questions to be passed upon by the Arbitrator, as will be observed from the foregoing statement of the Treaty of Arbitration, are capable of being classified under two heads:

First. Whether the Treaty of Limits of the 15th of April 1858 is valid.

Second. If valid, what is its true meaning in respect of the right of Costa Rica to navigate the River San Juan with vessels of war or of the revenue service, and also in respect of the eleven points submitted for decision by the Government of Nicaragua?

If the first of these questions is decided in the negative — that is, if the Treaty of Limits is decided to be invalid — it will not be necessary to consider at all the questions under the second head.

Before discussing the grounds urged by the Government of Nicaragua, on the one hand, as proving the invalidity of the Treaty of Limits, and those urged by the Government of Costa Rica on the other as establishing its validity, it will be essential to consider briefly the evidence submitted to show what were the recognized boundaries prior to the date of the Treaty, and what were the powers of the respective Governments in regard to it. This historical enquiry, it must be remembered, is not a matter of immediate concern, nor is it directly involved in the decision of the questions now submitted to arbitration; but it is important as elucidating the nature of the principal controversy, and as showing the facts upon which the parties base their respective arguments.

Two questions, essentially distinct in their character, were in discussion in 1858 touching the boundary of the two Republics. The first of these was the question whether the District of Nicoya lawfully belonged to Costa Rica or to Nicaragua; the second, as to the true boundary line between the Republics from the Caribbean Sea to the borders of Nicoya. The evidence in regard to each of these disputed questions must be reviewed in its order.

The District of Nicoya lies on the Pacific side of the Continent, and — roughly speaking — is triangular in shape, its apex lying toward the South. It is bounded on the Westward by the Pacific Ocean and on the Eastward by the Gulf of Nicoya and the Rio del Salto, or Tempisque, a small stream emptying into the head of the Gulf and having its sources not far from the Southerly shore of Lake Nicaragua. The Northerly boundary, or base of the triangle, seems to have never been accurately fixed, and its position is a matter of dispute between the Governments of Costa Rica and Nicaragua. The argument of Nicaragua, submitted to the Arbitrator, cites the authority of Don Antonio Alcedo and the historian Juarros to the effect that it is bounded by the Lake of Nicaragua on the North, which seems to imply a further boundary line running

from the Southern end of the Lake to the Pacific Ocean. The arguments of the Costa Rican Government, on the other hand, place the Northern boundary as far up as the La Flor River; and the records of land titles, and the statements of Stephens and Baily, are cited in support of this view. It is wholly unimportant, however, for the present purpose, to decide which of these opposing views is correct. It is only needful to point out that a diversity of opinion exists, and that there is no grant or agreement precisely fixing the boundaries of the District.

As to the title to the District, the facts are plainer. Nicoya, or, as it is sometimes called, Guanacaste, was undoubtedly recognized as a part of Nicaragua prior to 1826. It is asserted by Costa Rica that at times Nicoya was temporarily united with it, or placed under the control of its authorities; and some evidence is produced tending to show that such a change was made in 1573, 1593, 1692, the middle of the XVIIIth century, and even as late as 1812. But any such connection with Costa Rica can have been but temporary, and it may be regarded as settled that at the time of the Declaration of Independence from Spain in September 1821, Nicoya formed a part of Nicaragua. This condition of things seems to be distinctly recognized in the Constitution of Costa Rica, adopted 21st January 1825, in which it is stated that — “the territory of the State extends at present from West to East, from the Rio del Salto, *which divides it from Nicaragua, etc.*”

It would seem, however, that about 1824 the inhabitants of Nicoya, or some of them, asked to be annexed to Costa Rica. This question was referred to the Federal Congress of Central America, the Federal Republic of Central America having been theretofore formed and its Constitution adopted 22nd November 1824, and that body on the 9th December 1825, passed the following decree:

“The Federal Congress of the Republic of Central America, taking into consideration, firstly, the reiterated petitions of the authorities and municipal bodies of the towns of the District of Nicoya, asking for their separation from Nicaragua and their annexation to Costa Rica; and, secondly, that the said towns and people actually annexed themselves to Costa Rica at the time in which the political troubles of Nicaragua took place; and, thirdly, the topographical situation of the same district, has been pleased to decree, and does hereby decree:

Article 1. For the time being, and until the demarcation of the territory of each State provided by Article VII of the Constitution is made, the District of Nicoya shall continue to be separated from Nicaragua and annexed to Costa Rica.

Article 2. In consequence thereof, the District of Nicoya shall recognize its dependence upon the authorities of Costa Rica, and shall have, in the Legislature of the latter, such representation as corresponds to it.”

It further appears that the Government of Costa Rica thereupon took possession of Nicoya, and has been continuously in possession of it ever since; and was so at the date of the Treaty of 1858.

The Government of Nicaragua, however, has not always acquiesced in the validity of this act of annexation. It has, on the contrary, on several occasions protested against it; and in its arguments, now before the Arbitrator, it contends that the decree above referred to was not recognized at the time; that Nicaragua was not then represented in the Federal Congress; that the decree was, by its terms, only temporary; and that the municipalities of Nicoya as well as the Legislature of Nicaragua protested against the action of Congress as soon as they were aware of it.

Here again, it is not necessary for the Arbitrator to decide the question of title. But it is clear that in 1858 Costa Rica had been continuously in possession of the District of Nicoya, under a claim of title, for more than thirty-two years.

As to the boundary line between the Rio del Salto and the Caribbean Sea, the question was purely one of fact; and it can hardly be said that any very clear or satisfactory answer was possible.

The Government of Costa Rica, in the arguments submitted to the Arbitrator, has presented an elaborate historical review of the two Provinces of Costa Rica and Nicaragua under Spanish rule, which, it may be assumed, contains a reference to all the important documents bearing upon the question of boundaries. Passing over the history of the discovery and first settlement of this region in the early part of the XVIth century, it appears that in 1541 the Emperor Charles V. decreed that the upper fifteen leagues of the San Juan River, should belong to the Province of Nicaragua; that the lower, or remaining portion of the river, should belong to the Government of Costa Rica; and that the use of the river and lake, for purposes of navigation and fishing, should be common to both Provinces. In 1561 King Philip II appointed Licentiate Don Juan Cavallon to be "Alcalde Mayor" of the Province of New Cartago and Costa Rica, describing it in the preamble of the letter of appointment as extending along the Northern Sea "up to the Outlet, this being included" (*hasta el Desaguadero inclusive*). In 1573, by articles of agreement between the Spanish Crown and Diego de Artieda, who was appointed Governor and Captain-General of Costa Rica, the boundaries of that Province were defined substantially as they continued to be down to 1821. The limits of Artieda's jurisdiction are thus defined:

"From the Northern to the Southern Sea in width; and in length from the boundary of Nicaragua, on the side of Nicoya, right to the Valleys of Chiriqui, as far as the Province of Veragua on the Southern side; and on the Northern side, from the mouths of the Outlet, which is towards Nicaragua (*desde las bocas del Desaguadero, que es a las partes de Nicaragua*), the whole tract of land as far as the Province of Veragua."

No subsequent grant or decree by the Spanish Crown is cited, and — apart from some evidence of acts of possession by the respective Government — there is nothing further to define the boundaries of the two Provinces.

Soon after the Declaration of Independence, Costa Rica and Nicaragua, then States of the Republic of Central America, adopted Constitutions defining generally their respective boundaries.

The Constitution of Costa Rica, adopted the 21st January 1825, provides as follows:

“Article 15. The territory of the State extends at present from West to East, from the River del Salto, which divides it from that of Nicaragua, up to the River Chiriqui, the boundary of the Republic of Colombia; and North and South from one to the other sea, the limits being on the North [Sea] the mouth of the San Juan River and the Escudo de Veraguas, and on the South [Sea] the mouth of the River Alvarado and that of the Chiriqui.”

Nicaragua, by the Constitution adopted the 8th April 1826, defines her boundaries thus:

“On the East, the sea of the Antilles; on the North, the State of Honduras; on the West, the Gulf of Conchagua; on the South, the Pacific Ocean; and on the Southeast, the free State of Costa Rica.”

These are the last declarations *ante litem motam*. It will be observed that all these documents leave the precise boundary vague and undetermined. Indeed, the line to be followed between the Rio del Salto and the “mouths of the Outlet,” is nowhere laid down. Nicaragua contends that a straight line from the mouth of the Rio del Salto to the mouth of the Colorado, the most Southerly of the three mouths of the San Juan, is intended. This is met by the argument that as the Rio del Salto was the boundary, that river in its whole length, and not the mouth or any other part of it, was the dividing line; and that the San Juan River proper — the Northernmost of the three channels at the mouth of that stream — formed the end of the line on the Caribbean Sea. Costa Rica further contends that the boundary line was not straight, but that it followed the course of the San Juan in its whole length and the Southern shore of Lake Nicaragua; and she alleges that she was in possession of the territory up to that line — an allegation not admitted by Nicaragua.

In my judgment the evidence establishes that the boundary of Costa Rica, under the terms of the Spanish grants (leaving Nicoya out of the question), began at the head of the Gulf of Nicoya, ran northerly along the River del Salto to its source, and thence ran to the mouth of the San Juan River at the port of San Juan del Norte — this being, at the time, the mouth of the principal channel or outlet of the stream. But the evidence is not sufficient to form the basis for any satisfactory judgment as to how this line was to be drawn between the source of the del Salto and the mouth of the San Juan. I perceive no reason for thinking that it should have been a straight line.

No decision of this question is, however, necessary; for it is only important, for present purposes, to point out that no precise line of demarcation can be found in any of the earlier documents. Nor is this surprising in view of the fact, to be inferred from the evidence that the region

through which the line ran was a rough, densely wooded and thinly settled country, where no need was felt of any exact delimitation in the days of the Spanish dominion.

But with the establishment of the Federal Republic, and, still more, with its dissolution, the questions of boundary began to assume importance.

The Federal Constitution seems to have provided by its Article VII for the demarcation of each State; but nevertheless nothing was done towards the establishment of the line between Costa Rica and Nicaragua.

In 1838 Costa Rica seems to have urged upon Nicaragua — then assuming the rank of an independent State upon her withdrawal from the Federation — a desire for a recognition of the annexation of Nicoya. In 1846, 1848, and 1852 other fruitless negotiations were undertaken with a view to settling the boundary; and in 1858, when the Treaty of Limits was signed, the question, in one form or another, had been before the two Governments for at least twenty years.

That the documentary evidence was slight and unsatisfactory, has been already shown; and that Costa Rica had for nearly the same period of twenty years laid claim to more territory than she obtained under the Treaty of Limits, fully appears from her decree of “Basis and Guarantees” of the 8th March 1841 — which asserts as the boundaries of Costa Rica the line of the River La Flor, the Shore of Lake Nicaragua and the River San Juan.

I now proceed to state the history of the negotiations which resulted in the Treaty in question, and of the executive and legislative acts which are relied on by Costa Rica as constituting a sufficient ratification.

The long and bitter struggle in which Nicaragua and other Central American States had been involved, and of which the part played by Walker and the filibusters was the most notorious incident, came to an end in 1857. The Republic of Costa Rica had taken part in that struggle, and her case states as a fact that at the close of the contest the Costa Rican troops held military positions on both sides of the San Juan. The argument of Nicaragua seems to imply that such possession was not taken until after the close of the war; but the fact itself is not in dispute. It was regarded by Nicaragua, at the time, as constituting a *casus belli*; and Costa Rica having failed to withdraw her troops, war was declared by Nicaragua on the 25th November 1857 — although negotiations for a settlement of the difficulty still continued, but without success.

In this posture of affairs the Republic of San Salvador offered mediation through its Minister, Colonel Don Pedro Rómulo Negrete. Owing principally, as it would seem, to Colonel Negrete's earnest efforts, the opposing Governments appointed Ministers Plenipotentiary, who met with the Salvadorian Minister at San José de Costa Rica, and there concluded the Treaty of Limits — the validity of which is now under examination.

By that instrument, the boundary line is made to begin at Punta de Castilla, at the mouth of the San Juan River; thence it follows the right or Southern bank of that stream to a point three miles below the Castillo Viejo; thence it runs along the circumference of a circle drawn round the outworks of the Castle as a center, with a radius of three miles, to a point on the Western side of the Castle, distant two miles from the River; thence parallel to the San Juan and the lake, at a distance of two miles therefrom, to the Sapoa River; and thence in a straight line to the center of Salinas Bay on the Pacific Ocean. The Treaty further provides that surveys shall be made to locate the boundary; that the Bay of San Juan del Norte and Salinas Bay shall be common to both Republics; and that Nicaragua shall have, exclusively, dominion and supreme control of the waters of the San Juan, — Costa Rica having the right of free navigation for the purposes of commerce in that part of the River on which she is bounded. It was further agreed that in the event of war between Costa Rica and Nicaragua, no act of hostility was to be practiced in the Port or River of San Juan, or on the Lake of Nicaragua; and the observance of this article of the Treaty was guaranteed by the Republic of San Salvador.

It is admitted by the parties to the present arbitration that the Treaty was duly ratified by Costa Rica on the 16th April 1858; and that it was not ratified at all by San Salvador. It is further established that there was some ratification by representatives of Nicaragua — but whether or not such ratification was sufficient is one of the points now in controversy, and it is therefore necessary to examine fully the powers and the proceedings of the Nicaraguan authorities.

The Republic of Nicaragua, as appears from the evidence, was a Constitutional Government of limited powers, which were defined by a written Constitution. Nicaragua, as one of the States of the Central American Republic, adopted her first Constitution on the 8th April 1826. Upon the dissolution of the Federal Republic she assumed the rank of an independent nation; and in 1838 adopted a new Constitution, which her representatives now contend was in full force and vigor at the time of the execution of the Treaty of Limits. The full text of the Nicaraguan Constitution of 1838 is not contained in the arguments which have been laid before the Arbitrator; but it sufficiently appears that power was vested in an elective President and a Congress. It also appears that by Article 2 (cited in full below), the boundaries of the State were defined; and that by Article 194, quoted in the argument of Nicaragua, a complicated method of amendment was provided, of which the only feature now necessary to notice is that no proposed amendment shall take effect until it has been approved by two successive Legislatures.

In 1857 the necessity for a complete revision of the Constitution of 1838 seems to have been generally recognized. The long and exhausting conflicts which had been waged from 1854 to 1857, and the existence, during the greater part of that time, of two hostile governments, each claiming to exercise constitutional and supreme power throughout the country, had demonstrated, to the satisfaction of the inhabitants, the importance of changes in the organic law. Accordingly a Constituent Assembly, with ample powers, was duly

elected. The due election, and the full constituent powers of this body, are facts not disputed in the arguments now submitted on behalf of Nicaragua.

In November 1857, the Constituent Assembly met, and addressed itself at once to the task of framing a new Constitution for Nicaragua, as well as of legislating upon the ordinary affairs of the nation.

On the 18th of January 1858, the previous negotiations with Costa Rica having failed, the Assembly ordered new Commissioners to be appointed to negotiate treaties of peace, limits, friendship and alliance between Nicaragua and Costa Rica.

On the 5th February 1858, a further and supplemental decree on the same subject was adopted, which is as follows:

The Constituent Assembly of the Republic of Nicaragua, in use of the legislative faculties with which it is invested, decrees:

“Article 1. For the purpose that the Executive may comply with the decree of January 18th instant, the said Executive is hereby amply authorized to act in the settlement of the difficulties with Costa Rica in such manner as it may deem best for the interest of both countries, and for the independence of Central America, without the necessity of ratification by the legislative power.

Article 2. Such treaties of limits as it may adjust shall be final, if adjusted in accordance with the bases which separately will be given to it; but, if not, they shall be subject to the ratification of the Assembly.”

What were the separate bases of negotiation given to the Nicaraguan Executive does not appear from any of the documents submitted to the Arbitrator. But it is not distinctly asserted by the representatives of Nicaragua that such instructions were disregarded in the negotiation of the Treaty — the arguments relied on to prove its invalidity resting upon entirely different grounds, which will be stated hereafter.

On the 15th April 1858, the Treaty of Limits was signed by the Plenipotentiaries of Costa Rica, Nicaragua and San Salvador; and on the 26th April 1858, ratifications were personally exchanged by the Presidents of Costa Rica and Nicaragua, who met for the purpose on Nicaraguan territory at the City of Rivas. The Treaty had not then been passed upon by the Assembly, the decree of ratification being by the President alone. It is as follows:

TOMAS MARTINEZ, the President of the Republic of Nicaragua:

“Whereas General Máximo Jerez, Envoy Extraordinary and Minister Plenipotentiary of Nicaragua to the Republic of Costa Rica, has adjusted, agreed upon and signed, on the 15th instant, a Treaty of Limits, fully in accordance with the bases which, for that purpose, were transmitted to him by way of instructions; finding that said Treaty is conducive to the peace and prosperity of the two countries, and reciprocally useful to both of them, and that it facilitates, by removing all obstacles that might prevent it, the mutual alliance of both countries, and their unity of action against all attempts of foreign conquest; considering that

the Executive has been duly and competently authorized, by legislative decree of February 26th ultimo, to do everything conducive to secure the safety and independence of the Republic; and by viture, furthermore, of the reservation of faculties spoken of in the executive decree of the 17th instant:

Does hereby ratify each and all of the articles of the Treaty of Limits made and concluded by Don José María Cañas, Minister Plenipotentiary of the Government of Costa Rica, and Don Máximo Jerez, Minister Plenipotentiary of the Supreme Government of Nicaragua, signed by them on the 15th instant, and ratified by the Costa Rican Government on the 16th. And the additional act of the same date is likewise ratified."

On the 28th May 1858, thirty-two days after the ratification, and forty-three days after the signature of the Treaty of Limits, the following decree was passed by the Constituent Assembly:

"The Constituent Assembly of the Republic of Nicaragua, in the use of legislative powers vested in it, decrees:

Sole Article. The Treaty of Limits concluded at San José on the 15th of April, instant, between General Don Máximo Jerez, Minister Plenipotentiary from this Republic, and General Don José María Cañas, Minister Plenipotentiary from the Republic of Costa Rica, with the intervention of Colonel Don Pedro Rómulo Negrete, Minister Plenipotentiary from Salvador, is hereby approved."

On the 19th August 1858, the Constituent Assembly adopted the new Constitution, of which it is only needful to cite the first article, viz:

"The Republic of Nicaragua is the same which was, in ancient times, called the Province of Nicaragua, and, after the independence, State of Nicaragua. Its territory is bounded on the East and Northeast by the Sea of the Antilles; on the North and Northwest by the State of Honduras; on the West and South by the Pacific Ocean; and on the Southeast by the Republic of Costa Rica. The laws on special limits form part of the Constitution."

No further formal ratification of the Treaty of Limits was ever had; but the arguments submitted by Costa Rica cite a number of instances in which the Government of Nicaragua, during the period between 1858 and 1870, recognized the Treaty as a valid and binding instrument.

Since 1870 the Government of Nicaragua has contended that the Treaty is invalid; and that view is now urged upon three distinct grounds, which are stated as follows in the argument submitted on its behalf:

"The Government of Nicaragua affirms the invalidity of the Treaty of 1858, and insists that it ought not to be bound thereby, for the reason —

First. That it has not received that sanction which the Constitution of the State of Nicaragua requires to give effect to, and validate, a treaty of its character.

Second. It has not been ratified by the Government of San Salvador, so as to give effect to the guarantees on behalf of that Government of the tenth article of the Treaty.

Third. That the pretended ratifications of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII.”

I shall consider each of these three reasons in order.

I.

The argument very forcibly presented on behalf of Nicaragua to establish the first ground of objection — the lack of such a sanction as was required by the Constitution to give effect to, and validate, a Treaty of the character of the one in question — is as follows: The Constitution of 1838 was in full force on the 15th April 1858; that Constitution fixed the boundaries of Nicaragua; the Treaty of Limits curtailed the boundaries so fixed by the Constitution; it was therefore, “in direct and flagrant violation of the fundamental law of the State, and to have validity must receive the same formal ratification that an amendment to the Constitution itself demands;” the Constitution provides that an amendment adopted by one Legislature in the manner prescribed, by a two-thirds vote of both houses, “shall not be considered as valid nor form part of the Constitution until it has received the sanction of the next Legislature;” the Treaty of Limits was never sanctioned by a second Legislature; therefore it is not valid.

This argument, it will be perceived, rests wholly upon the fundamental assumptions that the Constitution of 1838 was in force, and that it fixed the boundaries of Nicaragua. If, as a matter of fact, that Constitution was not in force, or if the boundaries were not definitely fixed by its provisions, then the whole argument falls; for the Treaty is then a mere treaty of limits, settling disputed boundaries, and is not one involving a concession of territory and an amendment to the Constitution. It is not pretended that a treaty fixing boundaries requires, on general principles, any extraordinary sanction.

The general doctrine that in determining the validity of a treaty made in the name of a state, the fundamental laws of such state must furnish the guide for determination, has been fully and ably discussed on the part of Nicaragua, and its correctness may certainly be admitted. But it is also certain that where a treaty has been approved by a government, and an effort is subsequently made to avoid it for the lack of some formality, the burden is upon the party who alleges invalidity to show clearly that the requirements of the fundamental law have not been complied with. In my judgment, Nicaragua has failed in establishing a case under this rule.

In the first place, it may well be doubted whether the Constitution of 1838 can be said to have been in full force and effect at the time of the execution of the Treaty on the 15th April 1858. The legislative power was then vested in a Constituent Assembly, — a body, it would seem, expressly chosen for the purpose of amending the Constitution in any way it saw fit. To say that such a

body could not adopt a decree which in effect modified the Constitution, is to deny to it the power to carry out the very objects for which it existed.

Moreover, the Constitution framed by the Assembly, and promulgated on the 19th August 1858, defining the boundaries of Nicaragua, adds that "the laws on special limits form part of the Constitution." If therefore the decree of the 28th May 1858, and the other acts of the Assembly, were in any respect insufficient as involving some unconstitutionality, the defect was supplied by practically embodying the Treaty of Limits, and the decree approving it, in the new Constitution, — thus giving the highest sanction possible to this legislation.

But whether or not the Constitution of 1838 was in full force in April and May 1858, I am clearly of opinion that it did not definitely fix the boundaries of the State. The power of defining absolute boundaries by a Constitution is not denied. The question is merely whether the Constitution of 1838 did in fact contain such a definition of the boundaries of Nicaragua as to preclude their adjustment by an ordinary treaty.

The provisions of that Constitution, respecting boundaries, are as follows:

"Article 2. The territory of the State is the same as was formerly given to the Province of Nicaragua; its limits being on the East and Northeast the Sea of the Antilles; on the North and Northwest the State of Honduras; on the West and South the Pacific Ocean; and on the Southeast the State of Costa Rica. *The dividing lines with the bordering States shall be marked by a law which will make a part of the Constitution.*"

Thus it appears that "the dividing lines with the bordering States" were expressly not defined. It was plainly the intention to leave the Constitution incomplete in this respect; though a means of completing it was provided, by allowing the passage of an ordinary law by a single Legislature. It is not pretended that any law, marking the boundary on the side of Costa Rica, was passed before the execution of the Treaty of Limits. The decree approving the Treaty is the only attempt, so far as appears, to comply with this provision of the Constitution. The statement that the boundary is, "on the Southeast, the State of Costa Rica," defines nothing. What were the limits of Costa Rica in 1838, was a matter of dispute. No precise decision was possible, and I have already expressed my opinion that the evidence laid before the Arbitrator is altogether too vague to afford grounds for any satisfactory judgment. The Constitution of 1838 therefore did not fix the boundaries of Nicaragua definitely.

These views are strengthened by a consideration of the evidence adduced on the part of Costa Rica to prove acquiescence by Nicaragua for ten or twelve years in the validity of the Treaty. I do not regard such acquiescence as a substitute for ratification by a second Legislature, if such had been needed. But it is strong evidence of that contemporaneous exposition which has ever been thought valuable as a guide in determining doubtful questions of interpretation.

I conclude therefore that the first ground of objection stated by Nicaragua is untenable.

II.

The second ground of objection urged by Nicaragua to the validity of the Treaty, is that it has not been ratified by the Government at San Salvador, so as to give effect to the guarantees on behalf of that Government of the *tenth* article of the Treaty.

It is argued, in support of this objection, that the guarantee of the mediating Government against hostilities on the River and Lake was of great importance to Nicaragua; that it might well have been the controlling consideration in the mind of the negotiator of the Treaty that led him to agree to the relinquishment of claims to great tracts of territory; that the failure of San Salvador to ratify this Treaty took from it one of the chief considerations moving to Nicaragua; and that the consideration never having taken effect, the Treaty never became of valid or binding force. It is added that this was, in effect, a tripartite Treaty, and unless all the parties became bound, neither of them was.

In my opinion this argument is unsound. The Treaty was not tripartite, but was between Costa Rica and Nicaragua only, with an independent and separable clause of guarantee, as to a single feature of the arrangement, on the part of San Salvador. Without the guarantee, the Treaty was complete as between the two principals, if they saw fit to accept it in that shape. The non-ratification by the Republic of San Salvador was known to the Government of Nicaragua when ratifications were exchanged with Costa Rica. It follows therefore that Nicaragua never lost any of the considerations which induced her to consummate, by an exchange of ratifications, the negotiations for the Treaty.

The facts may be briefly recalled.

On the 15th April 1858 the Treaty of Limits was signed. In form it is a Convention agreed upon by the representatives of Costa Rica and Nicaragua, and declares that they having exchanged their respective powers, "which were examined by Hon. Señor Don Pedro R. Negrete, exercising the function of fraternal mediator in these negotiations," had agreed to and adjusted the terms of the Treaty. The Treaty itself, after reciting the desire of Costa Rica and Nicaragua for peace, fixes the boundary line between them; provides for a survey of the line, and for the common use and defense of the Bay of San Juan del Norte and Salinas Bay, and of that portion of the San Juan River on which Costa Rica borders; grants the use in common of the Punta de Castilla until Nicaragua recovers full possession of all her rights in the Port of San Juan del Norte; forbids the levying of custom duties at Punta de Castilla while San Juan del Norte remains a free port; defines the jurisdiction over, and right of navigation on, the waters of the San Juan River; secures existing contracts of canalization or public transit made by the Government of Nicaragua, and

regulates the execution of future contracts; and neutralizes the Port and River of San Juan and the Lake of Nicaragua in the event of war between Costa Rica and Nicaragua. Then follows this:

“Article X. The stipulation of the foregoing article (that relating to neutrality) being essentially important for the proper custody of both the Port and the River against foreign aggression, which would affect the general interests of the country, the strict performance thereof is left under the special guarantee, which in the name of the mediator Government, its Minister Plenipotentiary herein present is ready to give, and does hereby give, in use of the faculties vested in him for that purpose by his Government.”

Finally, Costa Rica and Nicaragua mutually give up all claims against each other, and “the two contracting parties” waive all claims for damages which either might have against the other.

This instrument is plainly, neither in form nor in substance, tripartite. The “two Governments,” the “two contracting parties” spoken of in the Treaty, are always Costa Rica and Nicaragua, never San Salvador. San Salvador is not in form a contracting party at all. And in substance that Government is not a party to the agreement — the clause containing the guarantee being entirely separable from all the rest.

As a proposition of international law, it may be regarded as settled that a guarantee is always merely subsidiary to the principal contract. «Le traité par lequel un état se porte garant d'un traité conclu entre deux autres puissances, est un traité accessoire destiné à assurer l'exécution du traité principal.» (Bluntschli, 430 *note*, Lardy's trans.) “La garantie peut être comprise dans les stipulations annexées au traité principal qu'on veut garantir, et devient alors une obligation accessoire.” (Vattel, *Droit des Gens*, Ed. 1863, Liv. II., ch. 16, §240; note by Pradier Fodéré, the editor.) “Lorsque la garantie est destinée à assurer l'inviolabilité d'un traité elle forme toujours une obligation et un traité accessoire (*pactum accessorium*), même quand elle ferait partie de l'acte principal.” (Klüber, *Droit des Gens*, §158.) It follows that the clause of guarantee in the Treaty of Limits is no part of the principal agreement, and that on general principles the rest of the Treaty would not stand or fall with this subsidiary or accessory contract.

The necessity for ratification by contracting powers may be freely admitted. But even conceding to it as high an importance as the execution of deeds by individuals, the failure of a guaranteeing state to ratify will not necessarily invalidate a treaty which the principal contracting parties have concluded by an exchange of ratifications as between themselves.

The analogy of individual deeds may serve to illustrate the point now under discussion. The case may readily be imagined of a deed between two parties as principals with a third party as guarantor. Leases of this character are not infrequent. If such a deed were prepared by the agents of the three parties, and if the two principal parties were to sign, seal, acknowledge, and formally deliver to each other duly executed duplicates of the deed, without

waiting for the signature of the guarantor, it is too plain for argument that neither could subsequently object, and claim the right to rescind, because the deed had not been executed and delivered by the guarantor.

So in this case. The Presidents of Costa Rica and Nicaragua in person, on the 26th April 1858 formally exchanged ratifications of the Treaty, without waiting for San Salvador. The arguments now advanced by Nicaragua, as establishing the invalidity of the Treaty, might perhaps have been urged as reasons for refusing to exchange the ratifications until San Salvador was ready to unite in the act. But the Government of Nicaragua was silent when it ought to have spoken, and so waived the objection now made. It saw fit to proceed to the exchange of ratifications without waiting for San Salvador. The Treaty was complete without Article X. To all the other articles and stipulations it contained Costa Rica and Nicaragua alone might fully bind themselves. They did so, irrevocably, by a formal exchange of ratifications; and neither may now be heard to allege, as reasons for rescinding this completed Treaty, any facts which existed and were known at the time of its consummation.

I conclude therefore that the *second* ground of objection stated by Nicaragua is untenable.

III.

The third ground of objection urged by Nicaragua to the validity of the Treaty is “that the pretended ratifications, of the Treaty were exchanged before the Treaty had been submitted to the Congress of Nicaragua, and it was not approved by the first Congress of Nicaragua until after the expiration of the forty days provided for the exchange of ratifications in Article XII.”

It will be remembered that on the 5th February 1858 the Constituent Assembly of Nicaragua passed a decree by which the Executive was “amply authorized” to treat with Costa Rica “without the necessity of ratification by the legislative power”; and that it was further decreed that such treaties of limits as the Executive might adjust should be final, — if in accordance with certain separate instructions. Acting under this grant of power, the President of Nicaragua concluded and ratified the present Treaty on the 26th April 1858, eleven days after its signature by the Plenipotentiaries, without “ratification by the legislative power.” On the 28th of May 1858 the Constituent Assembly adopted a decree approving the Treaty; and this decree was signed by the President on the 4th June 1858.

The argument now presented by Nicaragua is twofold, and raises two points, *first*, that the Treaty is invalid because ratifications were exchanged before approval by the Assembly; and, *second*, that it is invalid because such approval was given more than forty days after signature.

As to the first of these points, it would perhaps be enough to say that Nicaragua can not now seek to invalidate the Treaty on any mere ground of irregularity in the order of its own proceedings. If its Legislature did in fact approve the Treaty, that is enough for the present purpose. Whether such

approval was expressed before or after the exchange of ratifications is an immaterial matter now, — certainly so far as Nicaragua is concerned.

But it does not appear that there was any real irregularity in these proceedings. The full text of the Nicaraguan Constitution of 1838 not being contained in the arguments submitted to the Arbitrator, it is not made clear just what restrictions upon the treaty making power that instrument imposed. Ratification by legislative authority is not always required, even in constitutional governments. The necessity for legislative ratification is not to be presumed, but must be established as a fact. Still less can there be any presumption as to the form and manner in which the legislative sanction is to be expressed. In the present instance, the Constituent Assembly, a body of extensive powers, expressed in advance its approval of any treaty of limits that might be concluded by the Executive upon certain bases. It is not shown that the authority so given was exceeded; and it can not be said, in the absence of an express prohibition, that this mode of dealing with the subject was improper.

Again, the fact of the subsequent approval of the Treaty by the Assembly is satisfactory proof that that body approved not only the terms of the instrument, but also the manner in which the Executive had executed the authority conferred by the decree of the 5th February 1858. The time and manner of exchange of ratifications was before the Assembly, and it was fully aware that the time agreed upon for exchange had passed. Its action, under these circumstances, shows that it was of the opinion that the Treaty had been legally and in due time ratified by the President, in pursuance of the special powers conferred upon him.

In any event, all irregularities would seem to have been effectually cured by this subsequent approval of the Constituent Assembly. *Ratihabitio retrotrahitur, et mandato equiparatur*, is a recognized maxim of municipal law; and the reasons of that rule may fairly be regarded as applying to cases like the present.

That irregularities and defects in the formalities of ratification may be supplied and made good by subsequent acquiescence in and approval of the treaty, is laid down by Heffter (*Droit International*, § 87 *fin.*):

«Mais il est constant qu'elle (*i. e.*, ratification) peut être supplée par des actes équivalents, et notamment par l'exécution tacite des stipulations arrêtées.»

And this opinion is cited by Pradier-Fodéré in his translation of Grotius (*Vol. II.*, p. 270, note 1). See also Hall's *International Law*, page 276.

The second point — that the legislative sanction was not given until after the expiration of the forty days fixed by the Treaty for the exchange of the ratifications — seems clearly untenable. Costa Rica, and not Nicaragua, might have complained of this delay. Assuming that subsequent legislative approval was needed, Costa Rica might, if it had desired to do so, have declared the negotiations at an end on the expiration of the forty days. But it was not bound

to do so. It had a perfect right to waive this limitation of time. Either party to a Treaty may extend the time of the other, either by express agreement or by acts indicating acquiescence. Nicaragua cannot be permitted to say, as she does in effect say in this branch of her argument — “it is true that this Treaty was approved unreservedly by both the executive and legislative branches of the Government; but such approval is worthless, as it was expressed not forty but forty-three days after the signature of the Treaty.”

The *fact* of approval being established, the *time* of approval is immaterial, provided the other party by its acquiescence has seen fit to waive delay.

I conclude therefore that the *third* ground of objection stated by Nicaragua is untenable.

And having examined in detail the three reasons urged by Nicaragua for holding the Treaty invalid, and finding all these reasons untenable, I conclude that the Arbitrator should decide in favor of the validity of this Treaty.

The Award

Grover Cleveland, President of the United States, to whom it shall concern, Greeting:

The functions of Arbitrator having been conferred upon the President of the United States by virtue of a Treaty signed at the City of Guatemala on the 24th day of December one thousand eight hundred and eighty-six, between the Republics of Costa Rica and Nicaragua, whereby it was agreed that the question pending between the contracting Governments in regard to the validity of their Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight, should be submitted to the arbitration of the President of the United States of America; that if the Arbitrator's award should determine that the Treaty was valid, the same award should also declare whether Costa Rica has the right of navigation of the River San Juan with vessels of war or of the revenue service; and that in the same manner the Arbitrator should decide, in case of the validity of the Treaty, upon all the other points of doubtful interpretation which either of the parties might find in the Treaty and should communicate to the other party within thirty days after the exchange of the ratifications of the said Treaty of the 24th day of December one thousand eight hundred and eighty six;

And the Republic of Nicaragua having duly communicated to the Republic of Costa Rica eleven points of doubtful interpretation found in the said Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight; and the Republic of Costa Rica having failed to communicate to the Republic of Nicaragua any points of doubtful interpretation found in the said last-mentioned Treaty;

And both parties having duly presented their allegations and documents to the Arbitrator, and having thereafter duly presented their respective answers

to the allegations of the other party as provided in the Treaty of the 24th day of December one thousand eight hundred and eighty-six;

And the Arbitrator pursuant to the fifth clause of said last-named Treaty having delegated his powers to the Honorable George L. Rives, Assistant Secretary of State, who, after examining and considering the said allegations, documents and answers, has made his report in writing thereon to the Arbitrator;

Now therefore I, Grover Cleveland, President of the United States of America, do hereby make the following decision and award:

First. The above-mentioned Treaty of Limits signed on the 15th day of April one thousand eight hundred and fifty-eight, is valid.

Second. The Republic of Costa Rica under said Treaty and the stipulations contained in the sixth article thereof, has not the right of navigation of the River San Juan with vessels of war; but she may navigate said river with such vessels of the Revenue Service as may be related to and connected with her enjoyment of the 'purposes of commerce' accorded to her in said article, or as may be necessary to the protection of said enjoyment.

Third. With respect to the points of doubtful interpretation communicated as aforesaid by the Republic of Nicaragua, I decide as follows:

1. The boundary line between the Republics of Costa Rica and Nicaragua, on the Atlantic side, begins at the extremity of Punta de Castilla at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th day of April 1858. The ownership of any accretion to said Punta de Castilla is to be governed by the laws applicable to that subject.

2. The central point of the Salinas Bay is to be fixed by drawing a straight line across the mouth of the Bay and determining mathematically the centre of the closed geometrical figure formed by such straight line and the shore of the Bay at low-water mark.

3. By the central point of Salinas Bay is to be understood the centre of the geometrical figure formed as above stated. The limit of the Bay towards the ocean is a straight line drawn from the extremity of Punta Arranca Barba, nearly true South to the Westernmost portion of the land about Punta Sacate.

4. The Republic of Costa Rica is not bound to concur with the Republic of Nicaragua in the expenses necessary to prevent the Bay of San Juan del Norte from being obstructed; to keep the navigation of the River or Port free and unembarrassed, or to improve it for the common benefit.

5. The Republic of Costa Rica is not bound to contribute any proportion of the expenses that may be incurred by the Republic of Nicaragua for any of the purposes above mentioned.

6. The Republic of Costa Rica cannot prevent the Republic of Nicaragua from executing at her own expense and within her own territory such works of improvement, *provided* such works of improvement do not result in the occupation or flooding or damage of Costa Rica territory, or in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same. The Republic of Costa Rica has the right to demand indemnification for any places belonging to her on the right bank of the River San Juan which may be occupied without her consent, and for any lands on the same bank which may be flooded or damaged in any other way in consequence of works of improvement.

7. The branch of the River San Juan known as the Colorado River must not be considered as the boundary between the Republics of Costa Rica and Nicaragua in any part of its course.

8. The right of the Republic of Costa Rica to the navigation of the River San Juan with men-of-war or revenue cutters is determined and defined in the Second Article of this award.

9. The Republic of Costa Rica can deny to the Republic of Nicaragua the right of deviating the waters of the River San Juan in case such deviation will result in the destruction or serious impairment of the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same.

10. The Republic of Nicaragua remains bound not to make any grants for canal purposes across her territory without first asking the opinion of the Republic of Costa Rica, as provided in Article VIII of the Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight. The natural rights of the Republic of Costa Rica alluded to in the said stipulation are the rights which, in view of the boundaries fixed by the said Treaty of Limits, she possesses in the soil thereby recognized as belonging exclusively to her; the rights which she possesses in the harbors of San Juan del Norte and Salinas Bay; and the rights which she possesses in so much of the River San Juan as lies more than three English miles below Castillo Viejo, measuring from the exterior fortifications of the said castle as the same existed in the year 1858; and perhaps other rights not here particularly specified. These rights are to be deemed injured in any case where the territory belonging to the Republic of Costa Rica is occupied or flooded; where there is an encroachment upon either of the said harbors injurious to Costa Rica; or where there is such an obstruction or deviation of the River San Juan as to destroy or seriously impair the navigation of the said River or any of its branches at any point where Costa Rica is entitled to navigate the same.

11. The Treaty of Limits of the 15th day of April one thousand eight hundred and fifty-eight does not give to the Republic of Costa Rica the right to be a party to grants which Nicaragua may make for inter-oceanic canals; though in cases where the construction of the canal will involve an injury to

the natural rights of Costa Rica, her opinion or advice, as mentioned in Article VIII of the Treaty, should be more than “advisory” or “consultative.” It would seem in such cases that her consent is necessary, and that she may thereupon demand compensation for the concessions she is asked to make; but she is not entitled as a right to share in the profits that the Republic of Nicaragua may reserve for herself as a compensation for such favors and privileges as she, in her turn, may concede.

In testimony whereof, I have hereunto set my hand and have caused the Seal of the United States to be hereunto affixed.

[SEAL.] Done in duplicate at the City of Washington, on the twenty-second day of March, in the year one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

GROVER CLEVELAND.

By the President:
T. F. BAYARD,
Secretary of State.

**Convention on border demarcation concluded between
the Republic of Costa Rica and the Republic of Nicaragua
signed at El Salvador on 27 March 1896***

The Presidents of Costa Rica and Nicaragua, having accepted the mediation of the Government of El Salvador in resolving the issue of demarcating the border between their two countries, have respectively designated as their extraordinary and plenipotentiary envoys, their Excellencies, Mr. Leonidas Pacheco and Mr. Manuel C. Matus. Following various meetings held in the presence of His Excellency, Mr. Jacinto Castellanos, Minister for Foreign Affairs of El Salvador, specially mandated representative of that Government, and their full powers having been found to be in good and proper form, the envoys have signed the following Convention. His Excellency, General Rafael A. Gutiérrez, President of the Republic of El Salvador, attended the signing ceremony to confer greater solemnity to the event.

ARTICLE I. — The Contracting Governments are bound to appoint a Commission, respectively, each composed of two engineers, or surveyors, for the purpose of duly defining and marking out the dividing line between the Republics of Costa Rica and Nicaragua according to the stipulations of the

* Original Spanish version, translation by the Secretariat of the United Nations.

Treaty of 15 April 1858 and the award of the President of the United States of America, Mr. Grover Cleveland.

ARTICLE II. — The Commissions established under article I shall include an engineer appointed by the President of the United States of America at the request of the two Parties, whose mandate shall include the following: to resolve any dispute between the Commissions of Costa Rica and Nicaragua arising from the operations. He shall have broad powers to decide whatever kind of differences may arise in the course of any operations and his ruling shall be final.

ARTICLE III. — Within three months of the signing of this Convention, which shall be duly ratified by the respective Congresses, the Representatives of both Contracting Governments in Washington shall jointly request the President of the United States of America to appoint the aforementioned engineer and confirm such appointment. Should such joint request fail to be made by the Representative in Washington of either Government or for any other reason within the stipulated time limit, upon expiration of such time limit, the Representatives of either Costa Rica or Nicaragua in Washington may separately make such request, which shall be as valid as if it had been made jointly by both Parties.

ARTICLE IV. — Upon confirmation of the appointment of the United States engineer and within three months of such appointment, the engineer shall proceed with demarcations of the border line and such operation shall be completed within 20 months of its starting date. The Commissions of the Contracting Parties shall meet in San Juan del Norte as agreed and shall begin their work at the extremity of the border starting from the Atlantic coast, as provided for by the aforementioned Treaty and award.

ARTICLE V. — The Contracting Parties agree that if, on the scheduled start date of the work, either one of the Commissions of the Republics of Costa Rica or Nicaragua failed for any reason to appear at the designated venue, the Commission of the other Republic present shall begin the work with the agreement of the United States Government engineer and such work as shall have been done shall be valid and definitive and shall not be open to appeal by the Republic that failed to send its Commissioners. The same shall apply should any or all the Commissioners of either Contracting Republic be absent once the work starts or refuse to carry out such operations as provided for in the award and Treaty referred to herein or as decided by the engineer appointed by the President of the United States.

ARTICLE VI. — The Contracting Parties agree that the deadline for the completion of the boundary marking is not mandatory so that any operations carried out upon the expiration thereof shall be valid either because such operations could not have been completed within the deadline or because the commissioners of Costa Rica and Nicaragua have agreed together with the United States Government engineer to temporarily suspended such operations

so that the time remaining would not allow for the completion of the operations.

ARTICLE VII. — Should the demarcation work be temporarily suspended, such work as has been completed until then shall be considered final and completed, with the borders being fixed at that particular location even where such suspension were to be extended indefinitely as a result of unforeseen and insuperable circumstances.

ARTICLE VIII. — The records of the operations shall be in triplicate and shall be duly signed and sealed by the commissioners and shall constitute the definitive demarcation document of the borders of the Republics with no approval or any other formality being required on the part of the signatory Republics.

ARTICLE IX. — The records to which reference is made in the foregoing article shall be prepared as follows: every day, at the end of operations, such operations as are completed shall be documented in a detailed manner, including the starting point of the operations of the day, the types of survey markers constructed, the distances separating them, the direction of the line as based on the common boundary. Any dispute arising between the Commissions of Costa Rica and Nicaragua with respect to any particular point shall be documented in the relevant record along with the ruling of the United States engineer. The records shall be in triplicate: the Commissions of Costa Rica and Nicaragua shall each keep a copy and the third copy shall be kept by the United States engineer to be deposited upon completion of the operations with the Department of State in Washington.

ARTICLE X. — The expenses relating to the travel and subsistence of the United States engineer as well as to the salary payable during his functions shall be defrayed equally by the signatory Republics.

ARTICLE XI. — The Contracting Parties undertake to cause this Convention to be ratified by their respective Congresses within six months starting from this date, even if such ratification were to require convening extraordinary sessions of the said Congresses, and the subsequent exchange shall take place within a month following the date of the last such ratification, at San José de Costa Rica or at Managua.

ARTICLE XII. — Failure to complete the acts to which reference is made earlier within the deadlines stipulated shall not render this Convention void and the Republic which failed to complete such act shall endeavour to do so as soon as possible.

In witness whereof, the parties have signed and sealed this Convention in duplicate, at the City of San Salvador on the twenty-seventh of March eighteen hundred and ninety-six.¹

¹ *Memoria de Relaciones Exteriores* (Costa Rica), 1897, p. 28.

FIRST AWARD OF THE ENGINEER-UMPIRE, UNDER THE
CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8
APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY
BETWEEN THE TWO REPUBLICS, DECISION OF 30 SEPTEMBER
1897*

PREMIÈRE SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE
INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA
RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA
DÉMARCATIION DE LA FRONTIÈRE ENTRE LES DEUX
RÉPUBLIQUES, DÉCISION DU 30 SEPTEMBRE 1897**

Interpretation of treaty – treaty must be interpreted in the way in which it was mutually understood at the time by its makers – meaning understood from the language taken as a whole and not deduced from isolated words or sentences – the non use of some names may be as significant as the use of others – Treaty of limits of 15 April 1858.

Delimitation of boundary – a temporary connection between an island and mainland during the dry season may not change permanently the geographical character and political ownership of the island – the river being treated and regarded as an outlet of commerce in the Treaty; it has to be considered when it is navigable, with an average water level.

Interprétation des traités – un traité doit être interprété conformément à la conception mutuelle de ses auteurs au moment de son élaboration – le sens doit être dégagé du texte pris dans sa globalité et non déduit de termes ou de phrases isolés – le non emploi de certains noms propres peut être aussi significatif que l'emploi de certains autres.

Délimitation frontalière – une liaison temporaire pendant la saison sèche entre une île et le continent ne peut pas changer de façon permanente le caractère géographique et la possession politique de cette île – dans le traité, le fleuve étant désigné et envisagé comme une infrastructure commerciale, il doit être pris en compte lorsqu'il est navigable, c'est à dire avec un niveau d'eau moyen.

* * * * *

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington 1898, Government Printing Office, p.5074.

** Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. V, Washington, 1898, Government Printing Office, p. 5074.

SAN JUAN DEL NORTE, NICARAGUA,

September 30, 1897.

To the Commissions of Limits of Costa Rica and Nicaragua.

GENTLEMEN: In pursuance of the duties assigned me by my commission as engineer-arbitrator to your two bodies, with the power to decide finally any points of difference that may arise in tracing and marking out the boundary line between the two republics, I have given careful study and consideration to all arguments, counter arguments, maps, and documents submitted to me in the matter of the proper location of the initial point of the said boundary line upon the Caribbean coast.

The conclusion at which I have arrived and the award I am about to make do not accord with the views of either commission. So, in deference to the very excellent and earnest arguments so faithfully and loyally urged by each commission for its respective side, I will indicate briefly my line of thought and the considerations which have seemed to me to be paramount in determining the question; and of these considerations the principal and the controlling one is that we are to interpret and give effect to the treaty of April 15, 1858, in the way *in which it was mutually understood at the time by its makers.*

Each commission has presented an elaborate and well-argued contention that the language of that treaty is consistent with its claim for a location of the initial point of the boundary line at a place which would give to its country great advantages. These points are over six miles apart, and are indicated on the map accompanying this award.

The Costa Rican claim is located on the left-hand shore or west headland of the harbor; the Nicaraguan on the east headland of the mouth of the Taura branch.

Without attempting to reply in detail to every argument advanced by either side in support of its respective claim, all will be met and sufficiently answered by showing that those who made the treaty mutually understood and had in view another point, to wit, the eastern headland at the mouth of the harbor.

It is the meaning of the men who framed the treaty which we are to seek, rather than some possible meaning which can be forced upon isolated words or sentences. And this meaning of the men seems to me abundantly plain and obvious.

This treaty was not made hastily or carelessly. Each state had born wrought up by years of fruitless negotiations to a state of readiness for war in defense of what it considered its rights, as is set forth in article 1. In fact, war had actually been declared by Nicaragua on November 25, 1857, when, through the mediation of the Republic of Salvador, a final effort to avert it

was made, another convention was held, and this treaty resulted. Now, we may arrive at the mutual understanding finally reached by its framers by first seeking in the treaty as a whole for the general idea or scheme of compromise upon which they were able to agree. Next, we must see that this general idea of the treaty as a whole harmonizes fully with any description of the line given in detail, and the proper names of all the localities used, or *not used*, in connection therewith, for the *non use* of some names may be as significant as the use of others. Now, from the general consideration of the treaty as a whole the scheme of compromise stands out clear and simple.

Costa Rica was to have as a boundary line the right or southeast bank of the river, considered as an outlet for commerce, from a point 3 miles below Castillo to the sea.

Nicaragua was to have her prized “sumo imperio” of all the waters of this same outlet for commerce, also unbroken to the sea.

It is to be noted that this division implied also, of course, the ownership by Nicaragua of all islands in the river and of the left or northwest bank and headland.

This division brings the boundary line (supposing it to be traced downward along the right bank from the point near Castillo) across both the Colorado and the Taura branches.

It can not follow either of them, for neither is an outlet for commerce, as neither has a harbor at its mouth.

It must follow the remaining branch, the one called the Lower San Juan, through its harbor and into the sea.

The natural terminus of that line is the right-hand headland of the harbor mouth.

Next let us note the language of description used in the treaty, telling whence the line is to start and how it is to run, leaving out for the moment the proper name applied to the initial point. It is to start “at the mouth of the river San Juan de Nicaragua, and shall continue following the right bank of the said river to a point three English miles from Castillo Viejo”.

This language is evidently carefully considered and precise, and there is but one starting point possible for such a line, and that is at the right headland of the bay.

Lastly, we come to the proper name applied to the starting point, “the extremity of Punta de Castillo”. This name Punta de Castillo does not appear upon a single one of all the original maps of the bay of San Juan which have been presented by either side, and which seem to include all that were ever published before the treaty or since. This is a significant fact, and its meaning is obvious. Punta de Castillo must have been, and must have remained, a point of no importance, political or commercial, otherwise it could not possibly

have so utterly escaped note or mention upon the maps. This agrees entirely with the characteristics of the mainland and the headland on the right of the bay. It remains until today obscure and unoccupied, except by the hut of a fisherman. But the identification of the locality is still further put beyond all question by the incidental mention, in another article of the treaty itself, of the name Punta de Castillo.

In Article V. Costa Rica agrees temporarily to permit Nicaragua to use Costa Rica's side of the harbor without payment of port dues, and the name Punta de Castillo is plainly applied to it. Thus we have, concurring, the general idea of compromise in the treaty as a whole, the literal description of the line in detail, and the verification of the name applied to the initial point by its incidental mention in another portion of the treaty, and by the concurrent testimony of every map maker of every nation, both before the treaty and since, in excluding this name from all other portions of the harbor. This might seem to be sufficient argument upon the subject, but it will present the whole situation in a still clearer light to give a brief explanation of the local geography and of one special peculiarity of this Bay of San Juan.

The great feature in the local geography of this bay, since our earliest accounts of it, has been the existence of an island in its outlet, called on some early maps the island of San Juan. It was an island of such importance as to have been mentioned in 1820 by two distinguished authors, quoted in the Costa Rican reply to Nicaragua's argument (page 12), and it is an island today, and so appears in the map accompanying this award. The peculiarity of this bay, to be noted, is that the river brings down very little water during the annual dry season. When that happens, particularly of late years, sand bars, dry at all ordinary tides, but submerged more or less and broken over by the waves at all high ones, are formed, frequently reaching the adjacent headlands, so that a man might cross dry-shod.

Now, the whole claim of Costa Rica is based upon the assumption that on April 15, 1858, the date of the treaty, a connection existed between the island and the eastern headland, and that this converted the island into mainland, and carried the initial point of the boundary over to the western extremity of the island. To this claim there are at least two replies, either one seeming to me conclusive.

First, the exact state of the bar on that day can not be definitely proven, which would seem to be necessary before drawing important conclusions.

However, as the date was near the end of the dry season, it is most probable that there was such a connection between the island and the eastern Costa Rican shore as has been described. But even if that be true, it would be unreasonable to suppose that such temporary connection could operate to change permanently the geographical character and political ownership of the island. The same principle, if allowed, would give to Costa Rica *every island in the river* to which sand bars from her shore had made out during that dry season. But throughout the treaty the river is treated and regarded as an outlet

of commerce. This implies that it is to be considered as in average condition of water, in which condition alone it is navigable.

But the overwhelming consideration in the matter is that by the use of the name of Punta de Castillo for the starting point, instead of the name Punta Arenas, the makers of the treaty intended to designate the mainland on the east of the harbor. This has already been discussed, but no direct reply was made to the argument of Costa Rica quoting three authors as applying the name Punta de Castillo to the western extremity of the before-mentioned island, the point invariably called Point Arenas by all the naval and other officers, surveyors, and engineers who ever mapped it.

These authors are L. Montufar, a Guatemalan, in 1887; J. D. Gamez, a Nicaraguan, in 1889, and E. G. Squier, an American, date not given exactly, but subsequent to the treaty. Even of these, the last two merely used, once each, the name Punta de Castillo as an alternate for Punta Arenas. Against this array of authority we have, first, an innumerable number of other writers clearly far more entitled to confidence; second, the original makers of all the maps, as before pointed out, and third, the framers of the treaty itself, by their use of Punta de Castillo in Article V.

It must be borne in mind that for some years before the making of this treaty Punta Arenas had been by far the most important and conspicuous point in the bay. On it were located the wharves, workshops, offices, etc., of Vanderbilt's great transit company, conducting the through line from New York to San Francisco during the gold excitement of the early fifties. Here the ocean and river steamers met and exchanged passengers and cargo. This was the point sought to be controlled by Walker and the filibusters.

The village of San Juan cut no figure at all in comparison, and it would doubtless be easy to produce by hundreds references to this point as Punta Arenas by naval and diplomatic officers of all prominent nations, by prominent residents and officials, and by engineers and surveyors constantly investigating the canal problem, and all having a personal knowledge of the locality.

In view of all these circumstances, the jealousy with which each party to the treaty defined what it gave up and what it kept, the prominence and importance of the locality, the concurrence of all the original maps in the name, and its universal notoriety, I find it impossible to conceive that Nicaragua had conceded this extensive and important territory to Costa Rica, and that the latter's representative had failed to have the name Punta Arenas appear anywhere in the treaty. And for reasons so similar that it is unnecessary to repeat them, it is also impossible to conceive that Costa Rica should have accepted the Taura as her boundary and that Nicaragua's representative should have entirely failed to have the name Taura appear anywhere in the treaty.

Having then designated generally the mainland east of Harbor Head as the location of the initial point of the boundary line, it now becomes necessary

to specify more minutely, in order that the said line may be exactly located and permanently marked. The exact location of the initial point is given in President Cleveland's award as the "extremity of Punta de Castillo, at the mouth of the San Juan de Nicaragua River, as they both existed on the 15th of April 1858".

A careful study of all available maps and comparisons between those made before the treaty and those of recent date made by boards of engineers and officers of the canal company, and one of to-day made by yourselves to accompany this award, makes very clear one fact: The exact spot which was the extremity of the headland of Punta de Castillo April 15, 1858, has long been swept over by the Caribbean Sea, and there is too little concurrence in the shore outline of the old maps to permit any certainty of statement of distance or exact direction to it from the present headland. It was somewhere to the northeastward, and probably between 600 and 1,600 feet distant, but it can not now be certainly located. Under these circumstances it best fulfills the demands of the treaty and of President Cleveland's award to adopt what is practically the headland of to-day, or the northwestern extremity of what seems to be the solid land, on the east side of Harbor Head Lagoon.

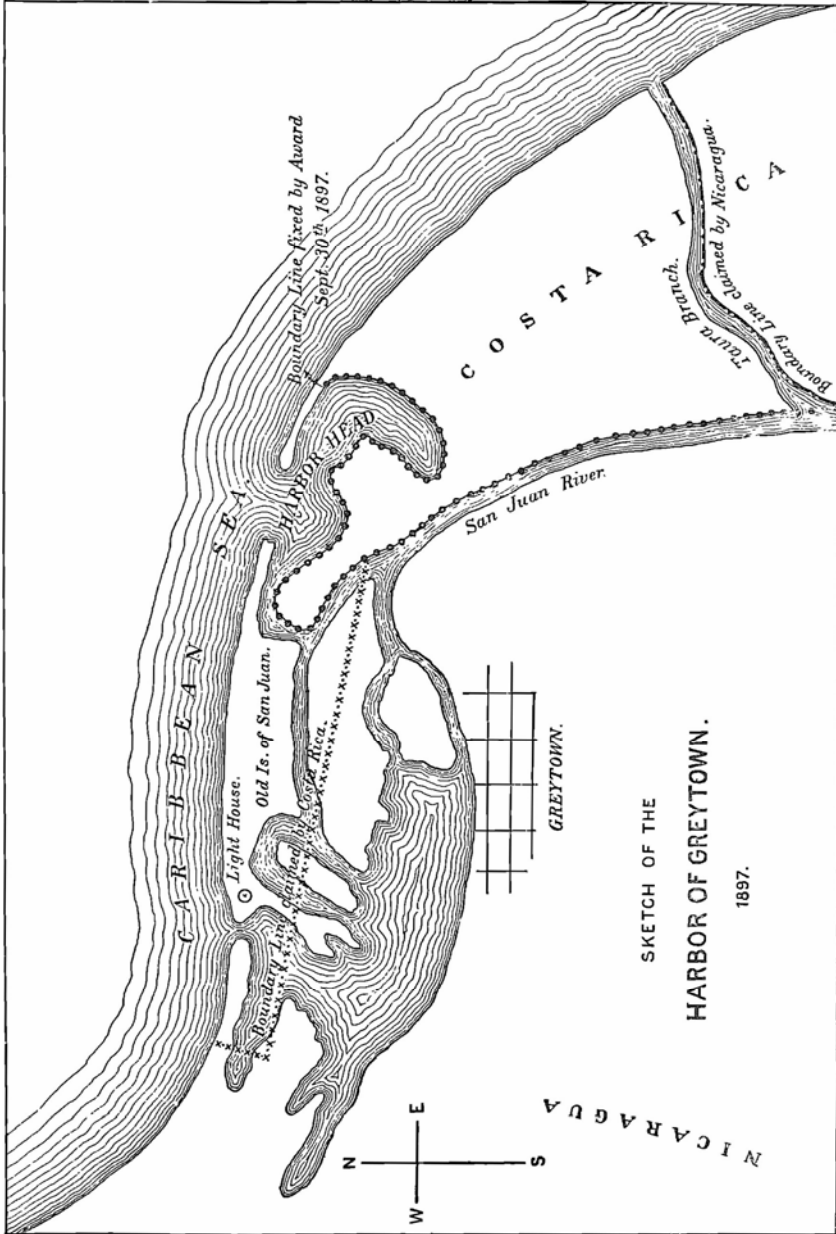
I have accordingly made personal inspection of this ground, and declare the initial line of the boundary to run as follows, to wit:

Its direction shall be due northeast and southwest, across the bank of sand, from the Caribbean Sea into the waters of Harbor Head Lagoon. It shall pass, at its nearest point, 300 feet on the northwest side from the small hut now standing in that vicinity. On reaching the waters of Harbor Head Lagoon the boundary line shall turn to the left, or southeastward, and shall follow the water's edge around the harbor until it reaches the river proper by the first channel met. Up this channel, and up the river proper, the line shall continue to ascend as directed in the treaty.

I am, gentlemen, very respectfully, your obedient servant,

E. P. ALEXANDER.

SKETCH OF THE HARBOR OF GREYTOWN – 1897



SECOND AWARD OF THE ENGINEER-UMPIRE, UNDER THE CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8 APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY BETWEEN THE TWO REPUBLICS, DECISION OF 20 DECEMBER 1897*

DEUXIÈME SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA DÉMARCATIION DE LA FRONTIÈRE ENTRE LES DEUX RÉPUBLIQUES, DÉCISION DU 20 DÉCEMBRE 1897**

Interpretation of treaty of delimitation – during demarcation process, accuracy of the measurement of the border-line is not as important as the finding natural landmarks, provided there is agreement between the two Parties – in case of disagreement, the view of the party favouring greater accuracy must prevail.

International boundary – natural changes of the banks of a river serving as an international boundary – determination of future changes made easier thanks to measurement and demarcation.

Interprétation d'un traité de délimitation – durant la procédure de démarcation, l'exactitude du métrage de la ligne frontière est moins importante que l'établissement de repères naturels, sous réserve de l'accord des deux Parties – en cas de désaccord, la position de la Partie en faveur de la plus grande exactitude doit prévaloir.

Frontière internationale – altérations naturelles des rives d'un fleuve servant de frontière internationale – détermination des modifications futures facilitée par le métrage et la démarcation.

* * * * *

**Second award rendered, to San Juan del Norte, on
December 20, 1897, in the boundary question between
Nicaragua and Costa Rica. *****

In pursuance once again of the duties assigned me by my commission as engineer-arbitrator to your two bodies, I have been called upon to decide on the matter submitted to me in the record dated the 7th of this month, as per the following paragraph of that record: “The Costa Rican Commission proposed

* Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p.532.

** Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p.532.

*** Original Spanish version, translated by the Secretariat of the United Nations.

that we proceed to the measurement of the line that ran from the starting point and continued along the shore of Harbor Head and thence along the shore around the harbor until it reaches the San Juan river proper by the first channel met and thence along the bank of the river to a point three miles below Castillo Viejo and that a map should be made of such line and that all of that should be set down in the daily record. The Nicaraguan Commission expressed the view that the measurement and mapping work on that portion of the line was pointless and worthless because, according to the Award by General E. P. Alexander, the left bank of the Harbor and of the river formed the boundary and that therefore the dividing line was subject to change and not permanent. Therefore, the map and any data obtained shall never correspond to the actual dividing line. To that end, the two Commissions have decided to hear the decision that the arbitrator would render within a week to their respective arguments submitted to him on that question.”

The above-mentioned arguments of each party have been received and duly considered. It should be noted, for a clearer understanding of the question at hand, that the San Juan river runs through a flat and sandy delta in the lower portion of its course and that it is obviously possible that its banks will not only gradually expand or contract but that there will be wholesale changes in its channels. Such changes may occur fairly rapidly and suddenly and may not always be the result of unusual factors such as earthquakes or major storms. Examples abound of previous channels now abandoned and banks that are now changing as a result of gradual expansions or contractions.

Today’s boundary line must necessarily be affected in future by all these gradual or sudden changes. But the impact in each case can only be determined by the circumstances of the case itself, on a case-by-case basis in accordance with such principles of international law as may be applicable.

The proposed measurement and demarcation of the boundary line will not have any effect on the application of those principles.

The fact that the line has been measured and demarcated will neither increase nor decrease any legal standing that it might have had if not been measured or demarcated.

The only effect obtained from measurement and demarcation is that the nature and extent of future changes may be easier to determine.

There is no denying the fact that there is a certain contingent advantage to being always able to locate the original line in future. But there may well be a difference of opinion as to how much time and expense needs to be spent in order to obtain such a contingent advantage. That is the difference now between the two Commissions.

Costa Rica wants to have that future capacity. Nicaragua feels that the contingent benefit is not worth the current expenditure.

In order to decide which one of these views should hold sway, I have to abide by the spirit and letter of the 1858 Treaty and to determine whether there is anything in either point of view that is applicable to the question. I find both things in article 3.

Article 2 describes the entire dividing line from the Caribbean Sea to the Pacific and article 3 continues thus: "measurements corresponding to this dividing line shall be taken in whole or in part by the Government commissioners, who shall agree on the time required for such measurements to be made. The commissioners shall be empowered to diverge slightly from the curve around El Castillo, from the line parallel to the banks of the river and lake, or from the straight astronomical line between Sapoá and Salinas, provided that they can agree upon this, in order to adopt natural landmarks."

The entire article is devoted to prescribing how the Commissioners should perform their task. It allows them to dispense with a few details because it says that the whole or part of the line may be measured and implies that accuracy is not as important as finding natural landmarks. But the condition expressly stipulated in the latter case and clearly understood also in the former is that the two Commissions must agree.

Otherwise, the line in its entirety must be measured, following all the practical steps described in article 2.

Clearly, therefore, the consequence of any disagreement on the question of whether the measurement is more or less accurate must be that the view of the party favouring greater accuracy should prevail.

I therefore announce my award as follows: the Commissioners shall immediately proceed to measuring the line from the starting point to a point three miles below El Castillo Viejo, as proposed by Costa Rica.

THIRD AWARD OF THE ENGINEER-UMPIRE, UNDER THE
CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8
APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY
BETWEEN THE TWO REPUBLICS, DECISION OF 22 MARCH 1898*

TROISIÈME SENTENCE ARBITRALE RENDUE PAR LE SURARBITRE
INGÉNIEUR, EN VERTU DE LA CONVENTION ENTRE LE COSTA
RICA ET LE NICARAGUA DU 8 AVRIL 1896 POUR LA
DÉMARCATIION DE LA FRONTIÈRE ENTRE LES DEUX
RÉPUBLIQUES, DÉCISION DU 22 MARS 1898**

International boundary – necessity of stable boundaries – the bank of a river serving as boundary means the bank with the water at the ordinary stage – fluctuations in the water level do not alter the position of the boundary line – changes in the boundary can only occur when they affect the bed of the river.

Frontière internationale – nécessité de frontières stables – les berges d'un fleuve servant de frontière sont les berges correspondantes au niveau d'eau ordinaire – les fluctuations du niveau d'eau ne modifient pas la position de la ligne frontière – les modifications de la frontière ne peuvent résulter que de changements dans le lit du fleuve.

* * * * *

**Third award rendered, to San Juan del Norte,
on 22 March 1898, in the boundary question
between Nicaragua and Costa Rica.*****

In indicating my reasons for the second award I referred briefly to the fact that, according to the well known rules of international law, the precise location of the dividing line on the right bank of the San Juan river that this Commission is now determining, may be altered in future by possible changes in the banks or channels of the river.

I am now being requesting by the current Nicaraguan Commissioner to complete this award with a more definitive statement as to the legal and permanent nature or stability of the border line, which is being demarcated on a daily basis.

* Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp -533-535.

** Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp -533-535.

*** Original Spanish version, translated by the Secretariat of the United Nations.

What is effectively being sought is that I declare that this line will remain as the exact dividing line only as long as the waters of the river remain at their current level and that in future the dividing line may be determined on the basis of the water level at any particular moment.

The commissioner for Nicaragua submits the following in support of his argument:

“Without engaging in a detailed discussion as to the meaning of a river bed or channel, which is the entire area of a territory through which a watercourse flows, I do wish to recall the doctrine of experts on public international law, which is summed up by Mr. Carlos Calvo in his work ‘Le droit international théorique et pratique’, [book 40, para. 295, page 385] thus: — ‘Frontiers delimited by watercourses are subject to change when the beds of such watercourses undergo changes...’

I note that present-day codes are consistent with that doctrine in providing that land that a river or lake submerges and uncovers periodically does not accrue to the adjoining land because it is the watercourse bed. According to article 728 of the Honduran Civil Code, land submerged or uncovered by a watercourse from time to time during periods of ebb and flow in water level does not accrue to adjoining land.

It is therefore obvious that the mathematical line obtained and which continues to be obtained in the form to which reference is made, shall be used for illustrative purposes and as a possible reference point; however, that line is not the accurate measurement of the border line, which is and always shall be the right bank of the river as it may stand at any point in time.”

The commissioner’s argument, seen in the light of his mandate, as mentioned earlier, is born of a misconception which must be corrected.

While it is strictly speaking accurate that “the right bank of the river as it may stand at any point in time” shall always be the border line, the commissioner is obviously mistaken in believing that the legal location of the line defining the bank of a river will change in accordance with the river’s water level.

Indeed, the word “bank” is often used loosely to refer to the first piece of dry land that emerges from the water; however the inappropriateness of such language becomes apparent if one considers instances where rivers overflow their banks for many miles or where their beds dry out completely. Such loose language cannot be entertained in interpreting a treaty on the demarcation of a border line. Borders are intended to maintain peace, thus avoiding disputes over jurisdiction. In order to achieve that goal, the border should be as stable as possible.

Obviously, such a state of affairs would be unacceptable to residents and property owners close to the borders of the two countries, if the line that determines the country to which they owe allegiance and must pay taxes, and whose laws govern all their affairs, was there one minute and not there the next, because such a border line would just generate conflicts instead of

preventing them. The difficulties that would arise, for example, if certain lands and forests and their owners and residents or people employed in any capacity thereon, were required to be Costa Ricans in the dry season and Nicaraguans in the rainy season and alternatively of either nationality during the intermediate seasons are self evident. But such difficulties would definitely be inevitable if the border line between the two countries were subject to daily changes on the bank where land first rose above the water on the Costa Rican side, because in the rainy season, the river's waters submerge many miles of land in some localities.

It is for such reasons that writers on international law specifically maintain that temporary flooding does not give title to the submerged land. This is the real meaning of the language of the Honduran Code quoted by the Commissioner from Nicaragua. Transposed to the case at hand, it would read as follows: "Costa Rican land that Nicaraguan waters submerge or uncover from time to time, during periods of rise or fall in water level, does not accrue to adjoining (Nicaraguan) territory". As proof of that rule, I would like to cite examples of a host of cases in the United States of America where there are many ongoing law suits between states that have a river bank, and not the thread of a river channel, as one of their borders. I am personally familiar with one such case, where the left bank of the Savannah river is the boundary line between Georgia on the right bank and South Carolina on the left bank. During flooding, the river submerges miles of South Carolina territory, but this does not extend the power or jurisdiction of Georgia beyond the limits it had before with the water at ordinary stage. Thus, no advantage would be given to Georgia and it would be a great inconvenience to South Carolina. Nor do I believe that there is any example of such a mobile boundary in the world.

Clearly, therefore, wherever a treaty rules that the bank of a river shall be taken as a boundary, what is understood is not the temporary bank of land that emerges during exceptional high- or low-water stages, but the bank with the water at ordinary stage. And once defined by treaty, it will become permanent like the surface of the soil over which it flows. If the bank recedes the boundary line shrinks, if the bank expands towards the river, it moves forward.

The periodic rise and fall of the water level does not affect it. This is perfectly consistent with Carlos Calvo's rule quoted by the commissioner for Nicaragua that borders delimited by waterways are likely to change when changes occur in the beds of such waterways. In other words, it is the river bed that affects changes and not the water within, over or below its banks.

It would be useless to try to discuss all possible future changes in the bed or banks of the river and their impact just as it would be equally pointless to try to envisage future scenarios.

It is not this Commission's job to lay down rules for future contingencies but rather to define and mark out today's boundary line.

Let me sum up briefly and provide a clearer understanding of the entire question in accordance with the principles set out in my first award, to wit, that in the practical interpretation of the 1858 Treaty, the San Juan river must be considered a navigable river. I therefore rule that the exact dividing line between the jurisdictions of the two countries is the right bank of the river, with the water at ordinary stage and navigable by ships and general-purpose boats. At that stage, every portion of the waters of the river is under Nicaraguan jurisdiction. Every portion of land on the right bank is under Costa Rican jurisdiction. The measurement and delimitation work now being performed by the parties in the field every day defines points along this line at convenient intervals, but the border line between those points does not run in a straight line; as noted above, it runs along the banks of the river at the navigable stage in a curve with innumerable irregularities of little value which would require considerable expenditure to minutely demarcate.

Fluctuations in the water level will not alter the position of the boundary line, but changes in the banks or channels of the river will alter it, as may be determined by the rules of international law applicable on a case-by-case basis.

FOURTH AWARD OF THE ENGINEER-UMPIRE, UNDER THE
CONVENTION BETWEEN COSTA RICA AND NICARAGUA OF 8
APRIL 1896 FOR THE DEMARCATION OF THE BOUNDARY
BETWEEN THE TWO REPUBLICS, DECISION OF 26 JULY 1899*

QUATRIÈME SENTENCE ARBITRALE RENDUE PAR LE
SURARBITRE INGÉNIEUR, EN VERTU DE LA CONVENTION
ENTRE LE COSTA RICA ET LE NICARAGUA DU 8 AVRIL 1896
POUR LA DÉMARCATIION DE LA FRONTIÈRE ENTRE LES DEUX
RÉPUBLIQUES, DÉCISION DU 26 JUILLET 1899**

Interpretation of treaty – words must be taken in their first and simplest meanings, in their natural and obvious sense, according to their general use.

Lake boundary – bank of a lake – limit of water by dry land comprising some elements of permanency – natural, obvious and reasonable waterline preferable to technical one – water level for determining water boundary in the absence of an explicit level; general custom treats mean high water as the normal level and the assumed lake boundary, wherever wet and dry seasons prevail, in all ordinary topographical maps – exceptional situation of waterline used as starting point for boundary line rather than as boundary line – choice of the line of mean high water.

Interprétation des traités – les termes doivent être pris dans leur sens premier le plus simple, naturel et évident, conformément à leur emploi courant.

Frontière lacustre – rives d'un lac – limite de l'eau par un terrain sec comprenant des éléments de permanence – ligne de niveau d'eau naturelle, évidente et raisonnable, préférable à une ligne technique – ligne de niveau d'eau déterminant la frontière lacustre en l'absence de niveau explicite; pour les régions d'alternance de saisons sèches et humides, pratique générale de se référer dans les cartes topographiques ordinaires, à la ligne moyenne du niveau d'eau haut comme niveau normal et ligne de délimitation du lac – situation exceptionnelle où la ligne d'eau sert de point de départ de la ligne frontière au lieu d'être elle-même la ligne frontière – choix de la ligne moyenne du niveau d'eau haut.

* * * * *

**Fourth Award made to Greytown, July 26, 1899,
in the question of the limit between Costa Rica and Nicaragua.**

As the arbitrator of whatever points of difference may arise between your two bodies in tracing and marking the boundary lines between the Republics you represent, I am called upon to decide the following question:

* Reprinted from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp.-535-537. (Only one of the maps mentioned in this award is reprinted)

** Reproduit de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne 1902, pp. 535-537.

What level of its waters shall be taken to determine the shore line of Lake Nicaragua, parallel to which and 2 miles distant therefrom the boundary line must be traced, from near the San Juan River to the Sapoa?

It will facilitate discussion to define in advance the principal levels which must be frequently referred to. Under the influence of rainy seasons of about seven months and dry seasons of about five the level of Lake Nicaragua is in constant fluctuation. We shall have to discuss five different stages.

First. Extreme high water, the level reached only in years of maximum rainfall or some extraordinary conditions.

Second. Mean high water, the average high level of average years.

Third. Mean low water, the average low level of average years.

Fourth. Extreme low water, the lowest level reached in years of minimum rainfall or other extraordinary conditions.

Fifth. Mean water, the average between mean high water and mean low water.

The argument presented to me in behalf of Nicaragua claims that the level to be adopted in this case should be the first level named, to wit extreme high water. It argues that this line and this alone, is the true limit of what the argument calls the bed of the lake. Costa Rica claims the adoption of the third level, to wit, mean low water. This is argued principally upon two grounds: First, it is shown by a great number of legal decisions that in most States all water boundaries are invariably held to run at either extreme or mean low water. Second, it is claimed that in case of any doubt Costa Rica is entitled to its benefit, as she is conceding territory geographically hers.

I will begin with Costa Rica's first argument. The equity of adopting a low water line in the case of all water boundaries is readily admitted, even though instances of contrary practice exist.

Between all permanent lands and permanent waters usually runs a strip of land, sometimes dry and sometimes submerged. We may call it, for short, semisubmerged. Its value for ordinary purposes is much diminished by its liability to overflow, but, as an adjunct to the permanent land, it possesses often very great value. If the owner of the permanent land can fence across the semisubmerged he may save fencing his entire water front. He also can utilize whatever agricultural value may be in the semisubmerged land in dry seasons. Both of these values would be destroyed and wasted if the ownership were conferred upon the owner of the water. Therefore equity always and law generally, confers it upon the owner of the permanent land.

I recognized and followed this principle in my award No. 3, where I held that the boundary line following the right bank of the San Juan River, below Castillo, follows the lowest water mark of a navigable stage of river. And, if now the lake shore were itself to be the boundary of Costa Rica, I would not

hesitate to declare that the semisubmerged land went with the permanent land and carried her limits at least to the mean low water line.

But this case is not one of a water boundary, nor is it at all similar, or on all fours with one, for none of the equities above set forth have any application. It is a case of rare and singular occurrence and without precedent within my knowledge. A water line is in question, but not as a boundary. It is only to furnish starting points whence to measure off a certain strip of territory. Clearly the case stands alone, and must be governed strictly by the instrument under which it has arisen. That is the treaty of 1858, and its language is as follows:

“Thence the line shall continue toward the river Sapoa, which discharges into the Lake Nicaragua, following a course which is distant always 2 miles from the right bank of the river San Juan, with its sinuosities, up to its origin at the lake, and from the right bank of the Lake itself up to the said river Sapoa, where this line parallel to the said bank will terminate.”

The principles, upon which the language and intent of treaties are to be interpreted, are well set forth in the Costa Rica argument by many quotations from eminent authors. All concur that words are to be taken as far as possible in their first and simplest meanings — “in their natural and obvious sense, according to the general use of the same words”, “in the usual sense, and not in any extraordinary or unused acceptation”.

We must suppose that the language of the treaty above quoted suggested to its framers some very definite picture of the lake with its banks and of the 2 miles strip of territory. It evidently seemed to them all so simple and obvious that no further words were necessary. Let us first call up pictures of the lake at different levels and see which seems the most natural, obvious and reasonable.

The very effort to call up a picture of the lake at either extreme high water or at extreme low water seems to me immediately to rule both of these levels out of further consideration. Both seem unnatural conditions, and I must believe that had either been intended, additional details would have been given.

Next, is the mean low water mark the first, most obvious and natural picture called up by the expression “the bank of the lake”? It seems to me decidedly not. During about eleven months of the year this line is submerged, invisible and inaccessible. It seems rather a technical line than a natural one. The idea of a bank is of water limited by dry land with some elements of permanency about it. Even during the brief period when the line is uncovered the idea of it is suggestive far more of mud and aquatic growths than of dry land and forest growths.

To my mind, the natural, simple and obvious idea of the bank of a lake in this climate is presented only by the line of mean high water. Here we would first find permanent dry ground every day of an average year. Here an observer, during every annual round of ordinary seasons, would see the water

advance to his very feet and then recede, as if some power had drawn the line and said to the waters, "Hitherto shalt thou come, but no further". Here the struggle between forest growths and aquatic vegetation begins to change the landscape. Here lines of drift, the flotsam and jetsam of the waves, naturally suggest the limits of the "bed of the lake".

One level of the lake remains for discussion, the mean level, or average of all waters. In a different climate, where the rainfall is more uniformly distributed throughout the year, the mean high water and mean low water lines, with all their respective features, would approach each other, tending to finally merge in the line of mean water. But, where wet and dry seasons prevail, as in the present case, the line of mean water is destitute of all obvious features, and is submerged for many months of the year. It is purely a technical and not a natural line, and is not to be understood where not expressly called for.

In argument against Nicaragua's claim of the extreme high water line, Costa Rica appeals to the general custom of geographers and scientific men in making ordinary topographical maps, who never adopt the extreme lines of overflows for the outlines of lakes. This argument of general custom has great weight but it is equally against Costa Rica's claim for the mean low water line. Wherever wet and dry seasons prevail, general custom treats mean high water as the normal state, always to be understood where no other level is expressed, and the line is assumed as the lake boundary in all ordinary topographical maps. Two quotations from Commander Lull's report of his Nicaraguan Canal survey will illustrate "Report Secretary of the Navy, 1873, p. 187":

"In a survey made by Mr. John Baily, many years since, that gentleman professed to have found a pass with but 56 feet above the lake level, but the most of his statements are found to be entirely unreliable... For example, he finds Lake Nicaragua to be 121 feet above mean tide in the Pacific, while the true difference of level is but 107 feet." (Ibid., p. 199.)

"The surface of Lake Nicaragua is 107 feet above mean tide in either sea."

From comparison of this level with the levels found by other surveys, there is no question that this figure was Lull's estimate of mean high water, as shown by his line of levels.

From every consideration of the lake, therefore, I am driven to conclude that the shore line of the lake contemplated in the treaty is the mean high water line.

I am led to the same conclusion also from the standpoint of the 2 miles strip of territory.

The treaty gives no intimation as to the purpose of this concession, and we have no right to assume one, either political or commercial. We have only to observe the two conditions put upon the strip in the treaty. Under all ordinary conditions it must be land, and 2 miles wide. This would not be the case if we adopted the line of either mean low water or mean water. In the

former case the strip would be too narrow for about eleven months of an ordinary year: in the latter case for about five months.

Without doubt, then, I conclude that mean high water mark determines the shore of the lake and it now remains to designate that level and how it shall be found.

Several surveys of the proposed Nicaraguan Canal route besides that of Commander Lull above quoted, have been made within the last fifty years. Each found a certain mean high level of the lake, and it might seem a simple solution to take an average of them all, but, as each adopted its own bench mark on the ocean and ran its own line of levels to the lake, I have no means of bringing their figures to a common standard. It seems best, therefore, to adopt the figures of that one which is at once the latest and most thorough, which has enjoyed the benefit of all of the investigations of all of its predecessors, and whose bench marks on the lake are known and can be referred to. That is the survey, still in progress, under the direction of the United States Canal Commission. Its results have not yet been made public, but, by the courtesy of Rear Admiral J. G. Walker, President of the Commission, I am informed of them in a letter dated July 10, 1899, from which I quote:

“In reply I am cabling you to-day as follows: ‘Alexander, Greytown, six,’ the six meaning, as per your letter, 106 as mean high level of lake. This elevation of 106 is, to the best of our knowledge (Mr. Davis, our hydrographer) the mean high water for a number of years... The highest level of the lake in 1898 was 106.7, last of November. The elevation of our bench mark on inshore end of boiler at San Carlos is 109.37.”

A complete copy of this letter will be handed you and also blue prints of the maps made by the Commission of the lower end of the lake, which may facilitate your work.

As this Commission is the highest existing authority, I adopt its finding and announce my award as follows:

The shore line of Lake Nicaragua, at the level of 106 feet, by the bench marks of the United States Nicaragua Canal Commission, shall be taken as the bank of said lake referred to in the treaty of 1858¹.

¹ *Monthly Bulletin of the Bureau of the American Republics*, 1899, vol. VII, p. 877.

PART XVIII

**Arbitrage entre l'Allemagne et le
Royaume-Uni concernant l'île de Lamu**

Décision du 17 août 1889

**Arbitration between Germany and the
United Kingdom relating to Lamu Island**

Decision of 17 August 1889

ARBITRAGE ENTRE L'ALLEMAGNE ET LE ROYAUME-UNI
CONCERNANT L'ÎLE DE LAMU ; SENTENCE RENDUE PAR LE
BARON LAMBERMONT, DÉCISION DU 17 AOÛT 1889*

ARBITRATION BETWEEN GERMANY AND THE UNITED KINGDOM
RELATING TO LAMU ISLAND; AWARD OF BARON
LAMBERMONT, DECISION OF 17 AUGUST 1889**

Renforcement des douanes et de l'administration sur l'île de Lamu – zones d'influences déterminées par accord entre les deux États

Détermination de la souveraineté – défaut de preuve d'un mode d'acquisition territoriale reconnu par le droit international.

Acte unilatéral – pour qu'une promesse unilatérale vaille convention, l'accord de volontés doit se manifester par la promesse expresse de l'une des Parties, jointe à l'acceptation de l'autre, et il doit porter sur les éléments essentiels qui constituent l'objet de la convention – une promesse orale ne suffit pas à créer un droit de préférence ou de priorité commerciale

Droit des traités – aucune règle ne prescrit une forme spéciale pour les accords entre États indépendants, mais il est contraire aux usages internationaux de contracter oralement des engagements d'une certaine nature et d'une certaine importance – un acte non signé n'est pas créateur de droits.

Strengthening of Customs and administration of Lamu Island – areas of influence determined by agreement between two States.

Determination of sovereignty – lack of proof of acquisition of territory by a means recognized by international law.

Unilateral action – if a unilateral promise is to be considered an agreement, the concurrence of wills must be indicated through the express promise of one of the parties, along with the acceptance of the other party, and the concurrence of wills must relate to essential elements which are the object of the agreement – an oral promise is not sufficient to establish a right to trade preference or priority.

Law of treaties – no law prescribes a special form for agreements between independent States, but it is contrary to international usage verbally to enter into commitments of a certain nature and magnitude – an unsigned instrument does not convey rights.

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* Reproduit de G. Fr. De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, Deuxième Série, Tome XXII, Leipzig, 1897, Librairie Dieterich, p.101.

** Reprinted from G. Fr. De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, Deuxième Série, Tome XXII, Leipzig, 1897, Librairie Dieterich, p.101.

**Arbitrage concernant l'île de Lamu; Sentence arbitrale
rendue par le baron Lambermont à Bruxelles le 17 août 1889**

Nous, baron Lambermont, Ministre d'État de Sa Majesté le Roi des Belges,

Ayant accepté les fonctions d'arbitre qui nous ont été conférées par le gouvernement de S. M. l'Empereur d'Allemagne, Roi de Prusse, et par le gouvernement de S. M. la Reine de Grande-Bretagne et d'Irlande, Impératrice des Indes, au sujet d'un différend survenu entre la Compagnie allemande de Witu et la Compagnie impériale anglaise de l'Afrique orientale;

Animé du désir sincère de répondre par une décision scrupuleuse et impartiale à la confiance que les deux gouvernements nous ont témoignée;

Ayant, à cet effet, dûment examiné et mûrement pesé les documents qui ont été produits de part et d'autre;

Et voulant statuer sur l'objet du litige qui est l'affermage des douanes et de l'administration de l'île de Lamu, située à la côte orientale d'Afrique;

L'une des parties revendiquant pour la Compagnie allemande de Witu la priorité du droit quant à cette prise à ferme;

L'autre soutenant que le feu Sultan et le Sultan actuel de Zanzibar se sont engagés à concéder ce même affermage à la Compagnie impériale anglaise de l'Afrique orientale et que les objections élevées du côté de l'Allemagne ne sont pas de nature à mettre obstacle à ce que le Souverain de l'île de Lamu remplisse les obligations contractées par son prédécesseur et par lui-même envers cette société.

I.

Considérant que le mémoire présenté par le gouvernement impérial allemand fait, en premier lieu, dériver le droit de la Compagnie de Witu de la convention intervenue, les 29 octobre et 1er novembre 1886¹, entre l'Allemagne et l'Angleterre et de la portée qui aurait été attachée à cet accord par les puissances contractantes;

Attendu que la dite convention a circonscrit le terrain sur lequel elle devra recevoir son application dans des limites expressément déterminées, à savoir, en partant de la mer, la Rowuma au sud et le Tana au nord;

Qu'elle a ensuite divisé cet espace en deux zones, séparées par une ligne de démarcation suivant la Wanga ou Umbe;

¹ G. Fr. De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International*, Deuxième série, Tome XII, Leipzig, 1897, Librairie Dieterich, p. 298.

Que, de ces deux zones, l'une est attribuée exclusivement à l'influence allemande qui s'exercera au sud de la ligne de démarcation et l'autre exclusivement à l'influence anglaise qui s'exercera au nord de la même ligne;

Que les limites respectives des deux zones d'influence sont ainsi nettement fixées et sont formées par la ligne de démarcation et le périmètre au delà duquel elles ne pourraient s'étendre sans sortir du territoire régi par l'arrangement;

Attendu que, pour tirer de l'esprit ou du sens de la convention une conséquence qui ne naît pas de son texte et qui attribuerait à l'Allemagne une liberté exclusive d'action sur les territoires situés au nord du Tana, il faudrait qu'une entente spéciale et nouvelle se fût, à cet effet, établie entre les puissances contractantes et qu'elle fût dûment constatée;

Qu'il n'est produit aucun acte justifiant de l'existence d'une telle entente, et

Que cette constatation ne résulte point de la note du gouvernement britannique en date du 7 septembre 1888, puisque, en reconnaissant que la sphère d'influence anglaise ne s'étend pas jusqu'à la rivière Osi, ce document est en parfaite concordance avec les termes de l'accord de 1886, qui limite son application aux territoires compris entre la Rowuma et le Tana,

Par ces motifs:

Nous sommes d'avis que, sauf la clause qui reconnaît comme appartenant au territoire de Witu la bande côtière entre Kipini et l'extrémité septentrionale de la baie de Manda, l'accord anglo-allemand des 29 octobre et 1er novembre 1886 n'étend pas plus ses effets au delà du Tana qu'au delà de la Rowuma et ne donne à aucune des parties un droit de préférence quant à l'affermage des douanes et de l'administration de l'île de Lamu, située en dehors des limites dans lesquelles cet arrangement doit, d'après ses propres termes, recevoir son application.

II.

Considérant que, selon le mémoire allemand, les îles de la baie de Manda, au point de vue géographique, appartiennent au pays de Witu, dont elles formeraient le prolongement; que, envisagée sous le rapport commercial, l'île de Lamu est le lieu de dépôt des marchandises qui arrivent du pays de Witu ou qui sont destinées à cette possession allemande, et enfin que sa dépendance du continent apparaît encore dans l'ordre juridique ou politique à raison des relations multipliées des habitants de l'île avec le continent et des questions de propriété ou de culture qui s'y rattachent, l'ensemble de ces faits démontrant que l'administration de l'île doit être confiée aux mains qui détiennent celle du continent;

Considérant que, de son côté, le mémoire anglais représente l'île de Lamu comme étant, depuis longtemps, un entrepôt du commerce britannique, un lieu

d'escale pour les bateaux à vapeur de la Compagnie des Indes britanniques desservant l'Afrique orientale et un centre de commerce qui est presque exclusivement entre les mains de négociants anglais;

Attendu qu'aucune déduction tirée du voisinage du continent ne saurait, en ce qui concerne l'île de Lamu, prévaloir contre la clause formelle de l'accord anglo-allemand des 29 octobre et 1er novembre 1886, qui range cette île parmi les possessions dont la souveraineté est reconnue au Sultan de Zanzibar, et

Que, si des considérations basées sur l'intérêt économique et administratif ou sur des convenances politiques peuvent mettre en lumière les avantages ou les inconvénients qu'offrirait une solution conforme aux vues de l'une ou de l'autre des parties, de telles raisons ne tiennent pas lieu d'un mode d'acquisition reconnu par le droit international,

Par ces motifs:

Nous sommes d'avis que ni la dépendance géographique, ni la dépendance commerciale, ni l'intérêt politique proprement dit ne mettent aucune des parties en position de réclamer, à titre de droit, la cession des douanes et de l'administration de l'île de Lamu.

III.

Les questions d'un caractère préjudiciel ainsi résolues et le débat étant amené sur le terrain des engagements qu'auraient pris les Sultans de Zanzibar envers les deux parties:

Considérant qu'il y a lieu de rechercher si, et jusqu'à quel point, les engagements invoqués par les deux parties réunissent les conditions nécessaires à la justification de leur existence et de leur validité;

En ce qui concerne la Compagnie allemande de Witu:

Considérant que, le 10 décembre 1887, le consul général d'Allemagne et M. Töppen, représentant de la Compagnie de Witu, ont été reçus en audience par le Sultan Said Bargash, audience dont le consul général a rendu compte à son gouvernement par un rapport qui n'est pas produit, mais dont le mémoire allemand termine l'analyse en ces termes: «Le résultat de cet entretien développé peut être résumé en ce sens que le Sultan se déclarait être immédiatement prêt (sofort sich bereit erklärte) à accorder la concession pour les îles de la baie de Manda à la Compagnie de Witu aussitôt que l'autre arrangement avec la Compagnie orientale africaine allemande serait conclu, et qu'il ne désirait conserver sa liberté d'action que pour la fixation de l'un ou de l'autre mode, de l'indemniser en argent»; et que, dans sa lettre du 16 novembre 1888 au Sultan Said Khalifa, le consul général s'exprime ainsi: «Je me permets de rappeler que sous Said Bargash déjà des négociations se sont poursuivies tendant à une concession des îles de la baie de Manda à la Compagnie allemande de Witu, dont M. Töppen est le représentant à Lamu;

Said Bargash a reçu M. Töppen en ma présence et il s'est montré prêt à prendre un semblable engagement (Said Bargash hat seine Bereitwilligkeit ein derartiges Abkommen zu treffen, ausgesprochen) aussitôt que la convention avec la Compagnie orientale africaine serait arrivée à conclusion»;

Attendu que les termes dont se serait servi le Sultan, pris dans leur sens naturel, impliqueraient l'intention de conclure une convention;

Que, pour transformer cette intention en une promesse unilatérale valant convention, l'accord des volontés aurait dû se manifester par la promesse expresse de l'une des parties, jointe à l'acceptation de l'autre, et que cet accord de volontés aurait dû porter sur les éléments essentiels qui constituent l'objet de la convention;

Attendu que, dans une espèce telle que celle dont il s'agit, la prise à ferme des douanes et de l'administration d'un territoire ou d'un port devait être un contrat synallagmatique, comprenant de la part du bailleur la cession de l'exercice de droits souverains qui peuvent être formulés de manières très diverses quant à leur objet et leur durée et consistant de la part du preneur en une redevance fixe ou proportionnelle;

Que dans les paroles attribuées au Sultan, telles qu'elles sont résumées par le mémoire allemand et reproduites par la lettre du consul général d'Allemagne du 16 novembre 1888, les conditions essentielles du contrat à intervenir ne se trouvent pas déterminées;

Attendu que, si aucune loi ne prescrit une forme spéciale pour les conventions entre États indépendants, il n'en est pas moins contraire aux usages internationaux de contracter verbalement des engagements de cette nature et de cette importance;

Que l'adoption de la forme écrite s'impose particulièrement dans les rapports avec les gouvernements de nations peu civilisées, qui souvent n'attachent la force obligatoire qu'aux promesses faites en une forme solennelle ou par écrit;

Que, surtout dans l'espèce, l'existence d'une convention verbale devrait résulter de stipulations formelles et qu'on ne pourrait, sans grave détriment pour la sécurité et la facilité des rapports internationaux, la déduire de la simple déclaration qu'on est prêt à accorder une concession;

Attendu qu'il n'est produit d'autres pièces écrites vers l'époque dont il s'agit que la lettre, en date du 21 novembre 1887, par laquelle le consul général d'Allemagne a transmis au Sultan Said Bargash la proposition de M. Töppen et l'accusé de réception du Sultan, daté du même jour, et qui ne se prononçait pas sur le fond;

Que, entre le 10 décembre 1887, date de la promesse qu'aurait faite le Sultan, et le 28 mars 1888, date de sa mort, il n'est fourni aucun document, aucune indication écrite ou verbale émanant de Sa Hautesse et constatant ou

impliquant son assentiment à la proposition du représentant de la Compagnie de Witu;

Que, d'après les assurances réitérées du Sultan actuel et données soit au consul général d'Allemagne, soit au consul général d'Angleterre, on n'aurait découvert, ni dans les archives du sultanat, ni dans les souvenirs des employés, aucune trace de cet acquiescement et que, eût-on retrouvé les pièces écrites qui viennent d'être mentionnées, l'accusé de réception du Sultan Said Bargash aurait témoigné qu'à leur date Sa Hautesse n'avait rien préjugé;

Que, dès lors, quel que soit le sens que l'on attache aux paroles du Sultan Said Bargash, la preuve de l'ouverture de la négociation a seule été administrée; qu'en ce qui concerne l'engagement lui-même, s'il en est fait mention dans la lettre que le consul général d'Allemagne a écrite au Sultan, le 16 novembre 1888, et s'il est rapporté dans la dépêche adressée par le même agent à son propre gouvernement à la suite de l'audience du 10 décembre 1887, il doit être de principe, en matière internationale comme en toute autre, et toute question de bonne foi à part, qu'on ne peut se créer de titre à soi-même;

Attendu, enfin, quelque digne de confiance que soit l'agent consulaire et sa bonne foi étant absolument mise hors de cause, que les paroles du Sultan Said Bargash ont été prononcées en arabe, recueillies et traduites par un drogman sans qu'il soit possible de contrôler la fidélité de cette traduction et que leur interprétation n'a été ni confirmée par le défunt Sultan, ni reconnue par son successeur,

Par ces motifs:

Nous sommes d'avis que la preuve de l'engagement qu'aurait contracté le Sultan Said Bargash au 10 décembre 1887 d'affirmer les douanes et l'administration de l'île de Lamu à la Compagnie allemande de Witu n'est pas fournie à suffisance de droit, et

Que, en conséquence, ladite compagnie ne peut fonder aucun droit de préférence ou de priorité sur les déclarations du Sultan au cours de l'entretien qui a eu lieu à cette date;

Considérant qu'il y a lieu d'examiner si les faits accomplis depuis l'avènement du Sultan actuel ne sont pas venus modifier le bien-fondé de ces conclusions;

Attendu que, d'après le mémoire allemand, le Sultan Said Khalifa aurait déclaré au consul général d'Allemagne, en juin 1888, qu'il n'accorderait plus aucune concession sans s'être entendu avec les représentants de l'Allemagne et de l'Angleterre et que, d'après la lettre du consul général d'Allemagne au Sultan, en date du 16 novembre suivant, ce dernier l'aurait assuré qu'il n'existait pas encore de proposition anglaise et que, s'il s'en produisait, il demanderait à l'avance l'opinion du consul général d'Allemagne;

Attendu que, dans sa lettre du 12 janvier 1889 audit consul général, Saïd Khalifa se défend d'avoir fait ou pu faire ces déclarations, l'erreur pouvant dans son opinion provenir d'un malentendu attribuable au drogmanat et que, dans sa lettre du 16 du même mois au consul général d'Angleterre, lettre insérée au mémoire anglais, Sa Hautesse a répété ses dénégations;

Que, sans mettre en question la bonne foi des parties, on peut et on doit reconnaître que les déclarations dont il s'agit n'auraient pu conférer par elles-mêmes aucun droit à la Compagnie de Witu sur l'île de Lamu, et

Que, au surplus, quant à leur portée à d'autres égards, elles tomberaient par leur forme sous l'application des principes ci-dessus développés,

Par ces motifs:

Nous sommes d'avis que les faits postérieurs à l'entretien du 10 décembre 1887 n'ont pas changé sa portée, telle qu'elle est définie dans les conclusions précédentes;

En ce qui concerne la Compagnie impériale anglaise de l'Afrique orientale;

Considérant que, dans le système du mémoire anglais, les Sultans de Zanzibar auraient, dès 1877, constamment tenu à la disposition de M. William Mackinnon, de ses associés et de la future compagnie britannique, une concession de territoires comprenant l'île de Lamu, que la dite concession, loin d'être jamais rejetée ou retirée, aurait été acceptée de temps en temps pour ce qui concerne certaines parties de ces territoires, le reste, et particulièrement Lamu, ayant été réservé à la disposition ultérieure des dites personnes et de la dite compagnie;

Attendu que le contrat de cession qui doit servir de base à ces promesses n'est représenté qu'en un projet qui ne porte ni date ni signature;

Que, dans cette forme, on ne peut y voir qu'une proposition faite au Sultan Saïd Bargash, sans qu'il soit prouvé que celle-ci ait été transformée en une concession de Sa Hautesse à M. Mackinnon ou en une promesse générale de céder l'administration du sultanat à la compagnie anglaise, promesse que cette société aurait successivement acceptée pour les diverses parties des territoires appartenant au Sultan;

Qu'aucun des actes postérieurs allégués par la compagnie anglaise ne mentionne directement et clairement ce projet, qui n'a reçu aucun commencement d'exécution;

Que le témoignage du général Mathews, commandant des troupes du Sultan, témoignage inscrit au mémoire anglais et reçu sous serment, le 23 janvier 1889, rappelle des négociations entamées environ neuf ans auparavant et poursuivies jusqu'au commencement de 1887, mais ne cite aucune convention conclue pendant cette période;

Que l'écrit en forme solennelle remis par le Sultan Said Bargash au consul général d'Angleterre, à la date du 6 décembre 1884, eût été inutile si le projet de 1877 avait eu la valeur d'une promesse contractuelle liant absolument le Sultan à l'égard de la Compagnie impériale anglaise;

Qu'il n'est pas possible, à l'aide des documents produits, de rattacher à ce projet, par un lien direct d'où résulterait l'exécution d'une convention antérieure parfaite et valable, les négociations qui ont été reprises par M. Mackinnon au printemps de 1887;

Attendu que, à la date du 22 février 1887, le Sultan Said Bargash adressa à M. Mackinnon un télégramme par lequel Sa Hautesse se déclarait prête à lui accorder les concessions qu'il (M. Mackinnon) avait antérieurement proposées et que cette offre a été suivie, le 24 mai, de la conclusion d'un accord concédant à la Compagnie impériale anglaise la bande côtière de la Wanga à Kipini;

Que, dans cet accord, il n'est fait aucune mention des territoires situés au nord de Kipini et comprenant l'île de Lamu;

Que, à l'égard de ceux-ci, la Compagnie impériale anglaise se borne à invoquer le témoignage du général Mathews, déclarant qu'à sa connaissance ces territoires ont été offerts par le Sultan à M. Mackinnon en 1887; qu'il a toujours compris qu'ils ont été réservés, selon le désir de M. Mackinnon, pour une concession ultérieure, et qu'il fut envoyé, comme représentant du Sultan, faire à M. E. N. Mackenzie, agent de la Compagnie impériale anglaise, une communication verbale l'autorisant à informer M. Mackinnon que tous les territoires au nord de Kipini lui seraient offerts de préférence quand ils viendraient à être afferchés ou cédés;

Attendu qu'on ne peut trouver dans le message verbal dont a été chargé le général Mathews, quelque considération d'ailleurs que puisse mériter son témoignage, les éléments d'une promesse actuelle et positive de faire une concession dont les conditions essentielles seraient suffisamment déterminées, et

Que, quant à l'acceptation réservée ou anticipée de M. Mackinnon, elle ne fait l'objet de la part du général que d'une appréciation purement personnelle;

Attendu que le témoignage du général Mathews est en concordance avec le télégramme ci-dessus cité du Sultan Said Bargash quant à l'intention de traiter avec les Anglais et que cette intention se retrouve et prend corps dans la lettre adressée par son successeur le 26 août 1888, au consul général d'Angleterre;

Que toutefois, si cette dernière lettre constitue un engagement politique de gouvernement à gouvernement de ne point céder l'administration du sultanat à d'autres qu'à des sujets du Sultan ou à des Anglais ou à M. Mackinnon pour ce qui concerne Zanzibar et Pemba, on n'y rencontre pas

encore la promesse directe et actuelle de céder à la Compagnie impériale anglaise elle-même tous les ports du Nord;

Attendu que l'intention de traiter avec les Anglais est, d'autre part, exprimée d'une manière évidente dans la lettre de Saïd Khalifa au consul général d'Allemagne, en date du 12 janvier 1889, et

Qu'il n'y a pas lieu de s'arrêter à l'objection que cette détermination serait viciée pour avoir eu une cause fautive, à savoir que le Sultan Saïd Khalifa ne l'aurait prise qu'en raison d'une promesse qu'il croyait avoir été faite par son prédécesseur à la société anglaise, la connaissance de la communication faite, le 22 février 1887, par son prédécesseur, ainsi que des démarches faites au nom de celui-ci par le général Mathews ayant pu légitimement influencer sur sa résolution, et le Sultan ayant pu d'ailleurs ne pas se décider d'après un mobile unique, ainsi qu'il ressort de sa dite lettre au consul général d'Allemagne et de celles qu'il a, dans le cours du même mois, adressées au consul général d'Angleterre et qui sont reproduites au mémoire anglais;

Attendu que l'intention itérativement manifestée par le Sultan Saïd Khalifa s'est traduite en fait par les négociations qui s'ouvrirent au mois de janvier 1889 entre Sa Hautesse et M. Mackensie, mandataire de M. Mackinnon;

Que, dans ces négociations, les conditions essentielles de la reprise de l'administration et des douanes de l'île de Lamu ont été posées et débattues pour la première fois entre les parties;

Que l'accord des volontés s'est établi sur tous les points, ainsi que cela résulte de l'échange des lettres du 19 et du 20 janvier 1889 entre le Sultan et M. Mackensie, combiné avec le télégramme du Sultan à M. Mackinnon en date du 30 du même mois;

Mais attendu que l'acte ainsi préparé n'a pas reçu la signature du Sultan et que celui-ci l'a subordonnée à la levée d'un obstacle qui arrêta sa détermination définitive,

Par ces motifs:

Nous sommes d'avis que le Sultan est resté maître de disposer de l'exercice de ses droits souverains dans les limites tracées par la lettre de son prédécesseur à Sir John Kirck du 6 décembre 1884 et par celle qu'il a lui-même adressée au consul général d'Angleterre le 26 août 1888, et

Que la Compagnie impériale anglaise de l'Afrique orientale ne produit aucun engagement valablement pris envers elle par l'un des Sultans de Zanzibar et créant en sa faveur un droit exclusif à la reprise des douanes et de l'administration de l'île de Lamu;

Considérant enfin que la signature de la convention formulée entre le Sultan Saïd Khalifa et le représentant de la Compagnie impériale anglaise de

l'Afrique orientale n'a été différée qu'à raison de l'opposition du consul général d'Allemagne;

Et attendu que cette opposition se fonde sur le droit de priorité réclamé par la Compagnie allemande de Witu, droit dont la réalité a fait l'objet de conclusions précédentes,

Par ces motifs:

Nous sommes d'avis que l'accord projeté entre le Sultan Said Khalifa et le représentant de la Compagnie impériale anglaise de l'Afrique orientale au sujet de l'île de Lamu peut être signé sans donner prise à une opposition fondée en droit.

Fait à Bruxelles, en double original, le 17 août 1889.

B^{on} Lambermont.

PART XIX

**Sentence arbitrale pour mettre fin au différend entre
la France et les Pays-Bas quant à la délimitation
de leurs colonies respectives en Guyane**

Décision du 25 mai 1891

**Award to resolve the dispute between France
and the Netherlands in regard to the limits
of their respective colonies in Guyana**

Decision of 25 May 1891

SENTENCE ARBITRALE RENDUE PAR L'EMPEREUR DE RUSSIE
POUR METTRE FIN AU DIFFÉREND ENTRE LA FRANCE ET LES
PAYS-BAS QUANT À LA DÉLIMITATION DE LEURS COLONIES
RESPECTIVES EN GUYANE, DÉCISION DU 25 MAI 1891*

AWARD OF THE EMPEROR OF RUSSIA TO RESOLVE THE DISPUTE
BETWEEN FRANCE AND THE NETHERLANDS IN REGARD TO THE
LIMITS OF THEIR RESPECTIVE COLONIES IN GUYANA, DECISION
OF 25 MAY 1891**

Délimitation des frontières entre la Guyane française et le Surinam – choix de fleuve limitrophe – possession du territoire situé entre les fleuves Awa et Tapanahui

Inapplicabilité de la Convention du 28 août 1817 fixant les conditions de la restitution de la Guyane française à la France par le Portugal – absence de reconnaissance de la Convention par la Hollande – la restitution de territoire à la France par le Portugal est limité à la partie cédée à celui-ci par le Traité d'Utrecht de 1713, même si ce traité ne définissait pas les limites dudit territoire.

Possession du territoire – maintien de postes militaires sur le territoire

Possession du territoire – relations avec les indigènes – les autorités françaises ont reconnu les indigènes dépendaient de la souveraineté hollandaise – les autorités françaises n'entraient en relations avec les tribus indigènes que par l'entremise et en présence de représentants des autorités hollandaises.

Détermination du fleuve limitrophe – reconnaissance par la Commission mixte de 1861 du fleuve Awa comme cours supérieur du fleuve Maroni qui est la limite incontestée entre les territoires.

Effets de la détermination de la frontière – la détermination ne porte pas préjudice aux droits acquis bona fide par les ressortissants français sur le territoire litigieux.

Delimitation of border between French Guyana and Surinam – Choice of border river – ownership of land between Rivers Awa and Tapanahui.

Inapplicability of Convention of 28 August 1817 setting the conditions for restitution of French Guyana to France by Portugal – Convention never recognized by Holland – Ability of Portugal to return to France on that part of territory ceded to it by Treaty of Utrecht of 1713, and failure of Treaty to establish limits to territory.

Possession of territory – maintenance of military personnel on territory.

Possession of territory – relations with indigenous inhabitants – recognition by France of dependence of indigenous inhabitants on Dutch domination – interactions with indigenous inhabitants limited to when representative of Dutch authorities was present.

* Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol.V, Washington, 1898, Government Printing Office, p.4869.

** Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol.V, Washington, 1898, Government Printing Office, p.4869.

Determination of border river – Awa recognized as upper portion of Maroni river, uncontested border established by mixed commission in 1861.

Effects of the border determination – determination without prejudice to rights acquired, bona fide, by French nationals in disputed territory.

* * * * *

Nous, Alexandre III. par la grâce de Dieu, Empereur de toutes les Russies,

Le Gouvernement des Pays-Bas ayant résolu, aux termes d'une Convention conclue entre les deux pays, le 29 novembre 1888, de mettre fin à l'amiable au différend qui existe touchant les limites de leurs colonies respectives de la Guyane française et de Surinam, et de remettre à un arbitre le soin de procéder à cette délimitation, nous ont adressé la demande de nous charger de cet arbitrage;

Voulant répondre à la confiance que les deux puissances litigantes nous ont ainsi témoignée, et après avoir reçu l'assurance de leurs Gouvernements d'accepter notre décision comme jugement suprême et sans appel et de s'y soumettre sans aucune réserve, nous avons accepté la mission de résoudre comme arbitre le différend qui les divise et nous tenons pour juste de prononcer la sentence suivante:

Considérant que la Convention du 28 août 1817, qui a fixé les conditions de la restitution de la Guyane française à la France par le Portugal n'a jamais été reconnue par les Pays-Bas;

Qu'en outre cette Convention ne saurait servir de base pour résoudre la question en litige, vu que le Portugal, qui avait pris possession, en vertu du traité d'Utrecht de 1713, d'une partie de la Guyane française, ne pouvait restituer à la France en 1815 que le territoire qui lui avait été cédé: or les limites de ce territoire ne se trouvent nullement définies par le traité d'Utrecht de 1713;

Considérant, d'autre part:

Que le Gouvernement hollandais, ainsi que le démontrent des faits non contestés par le Gouvernement français, entretenait à la fin du siècle dernier des postes militaires sur l'Awa;

Que les autorités françaises de la Guyane ont maintes fois reconnu les nègres établis sur le territoire contesté comme dépendant médiatement ou immédiatement de la domination hollandaise, et que ces autorités n'entraient en relation avec les tribus indigènes habitant ce territoire que par l'entremise et en présence du représentant des autorités hollandaises;

Qu'il est admis sans conteste par les deux pays intéressés que le fleuve Maroni, à partir de sa source, doit servir de limite entre leurs colonies respectives;

Que la commission mixte de 1861 a recueilli des données en faveur de la reconnaissance de l'Awa comme cours supérieur du Maroni;

Par ces motifs:

Nous déclarons que l'Awa doit être considéré comme fleuve limitrophe, devant servir de frontière entre les deux possessions.

En vertu de cette décision arbitrale, le territoire en amont du confluent des rivières Awa et Tapanahui doit appartenir désormais à la Hollande, sans préjudice, toutefois, des droits acquis, bona fide, par les ressortissants français dans les limites du territoire qui avait été en litige.

Fait à Gatchina, les 13-25 mai 1891.

Signé :	ALEXANDRE.
Contresigné:	GIERS.

PART XX

**Arrangements entre la Grande-Bretagne et la
France relatifs à la région du Niger**

**Décisions du 26 juin 1891
12 juillet 1893**

**Arrangements between Great Britain and
France regarding Niger districts**

**Decisions of 26 June 1891
12 July 1893**

ARRANGEMENT ENTRE LA GRANDE-BRETAGNE ET LA FRANCE
AFIN DE DÉLIMITER LEURS ZONES D'INFLUENCE RESPECTIVES
DANS LA RÉGION DU NIGER, DÉCISION DU 26 JUIN 1891 *

ARRANGEMENT BETWEEN GREAT BRITAIN AND FRANCE, FOR
THE DEMARCATION OF THEIR RESPECTIVE SPHERES OF
INFLUENCE IN NIGER DISTRICTS, DECISION OF 26 JUNE 1891 **

Délimitation frontalière – suivi de la direction générale d'un méridien – prise en compte d'un commun accord, de la configuration du terrain et des circonstances locales pour infléchir la ligne de démarcation – tout fléchissement doit être compensé équitablement – suivi de la ligne des crêtes.

Frontier delimitation – follow the general direction of a meridian – mutual agreement to consider the ground layout and local context to alter the demarcation line – any alteration must be fairly compensated – follow the summit line.

* * * * *

LES Soussignés, Commissaires Plénipotentiaires chargés, en exécution des Déclarations échangées à Londres, le 5 Août 1890,^{***} entre le Gouvernement de Sa Majesté Britannique et le Gouvernement de la République Française, de procéder à l'établissement de la ligne de démarcation des zones d'influence respectives des deux pays dans la région qui s'étend à l'ouest et au sud du Moyen- et du Haut-Niger, sont convenus de ce qui suit: —

Les Commissaires Techniques qui seront désignés par les Gouvernements Anglais et Français, par application de l'Article II de l'Arrangement du 10 Août 1889,^{****} en vue de tracer la démarcation des zones respectives, suivront autant que possible, ainsi qu'il est indiqué au dit Arrangement, la ligne du méridien 13 ouest de Paris, à partir du 10° degré de latitude en se dirigeant vers le sud. En établissant la frontière d'après la direction générale de ce méridien, ils pourront tenir compte d'un commun accord de la configuration

* Reproduit de *British and Foreign State Papers*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 83, London, 1897, H. M. Stationery Office, p.43.

** Reprinted from *British and Foreign State Papers*, Compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 83, London, 1897, H. M. Stationery Office, p.43.

*** Note éditoriale: *British and Foreign State Papers (1889-1890)*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 82, London, H. M. Stationery Office, p. 89.

**** Note éditoriale: *British and Foreign State Papers (1888-1889)*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 81, London, H. M. Stationery Office, p.1126.

du terrain et des circonstances locales, et faire fléchir la ligne de démarcation soit à l'est soit à l'ouest du méridien, en prenant soin de ne pas avantager l'une des deux parties sans compensation équitable pour l'autre. Ces modifications ne seront d'ailleurs définitives qu'après ratification des deux Gouvernements.

Il est entendu que la ligne de démarcation suivra autant que possible la crête des hauteurs qui, d'après la Carte Monteil, avoisinent le cours du Niger sur la rive gauche entre le 10° degré et Tembé Counda.

Cependant, au cas où la ligne de partage des eaux ne serait pas telle qu'elle figure sur la Carte Monteil, les Commissaires des deux pays pourront tracer la frontière sans en tenir compte, sous la réserve expresse que les deux rives du Niger resteront dans la zone d'influence Française.

Par le terme Niger est entendu le Djalibi, ainsi que ses deux sources principales, le Fatiko et le Tembé. Dans le cas précité, la ligne-frontière à partir du 10° degré jusqu'à Tembé Counda suivra, à une distance de 10 kilom., la rive gauche du Djalibi, du Fatiko, et ensuite du Tembé jusqu'à sa source, s'il y a lieu.

Au cas où la crête des montagnes se trouverait plus rapprochée de la rive gauche du Niger la frontière suivrait la ligne de partage des eaux.

Les Commissaires Techniques qui seront nommés par les deux Gouvernements, en exécution de l'Article III de l'entente du 10 Août, 1889, recevront pour instruction de tracer la frontière d'après les indications suivantes, relevées sur la Carte Binger: —

La ligne suivrait la frontière de Nougoua sur le Tanoé, entre la Sanwi et le Broussa, l'Indenié et le Sahué, laissant le Broussa, le Aowin, et le Sahué à l'Angleterre ; puis la frontière couperait la route d'Annibilekrou au Cape Coast Castle, à égale distance de Debison et d'Atiebendekrou, et longerait à une distance de 10 kilom. dans l'est la route directe d'Annibilekrou à Bondoukou, par Bodomfil et Dadiasi. Elle passerait ensuite par Bonko pour atteindre la Volta à l'endroit où cette rivière est coupée par le chemin de Bandagadi à Kirhindi, et la suivrait jusqu'au 9° degré de latitude nord.

Fait à Paris, le 26 Juin, 1891.

EDWIN HENRY EGERTON.
JOSEPH ARCHER CROWE.
GABRIEL HANOTAUX.
JACQUES HAUSSMANN.

ARRANGEMENT ENTRE LA GRANDE-BRETAGNE ET LA FRANCE
POUR FIXER LA FRONTIÈRE ENTRE LES POSSESSIONS
BRITANNIQUES ET FRANÇAISES EN CÔTE D'OR, DÉCISION DU 12
JUILLET 1893*

ARRANGEMENT BETWEEN GREAT BRITAIN AND FRANCE, FIXING
THE BOUNDARY BETWEEN THE BRITISH AND FRENCH
POSSESSIONS ON THE GOLD COAST, DECISION OF 12 JULY 1893**

Délimitation frontalière – Accord du 10 août 1889 – Accord du 26 juin 1891 – Côte d'Or.

Délimitation frontalière – pratique – frontière suivant le *thalweg* de la rivière (chenal le plus profond).

Cession de territoire – conservation par les populations locales de leurs droits de pêche sur le territoire cédé.

Frontier delimitation – Agreement of 10 August 1889 – Agreement of 26 June 1891 – Gold Coast.

Frontier delimitation – practice – border follows *thalweg* of river (deepest channel)

Change of possession of territory – retention of fishing rights on rivers by local population of ceding State.

* * * * *

LES Commissaires Spéciaux nommés par les Gouvernements de la France et de la Grande-Bretagne, en vertu de l'Article V de l'Arrangement du 10 Août, 1889,*** n'étant pas parvenus à tracer, entre les territoires respectifs des deux Puissances, sur la Côte d'Or, une ligne de démarcation conforme aux dispositions générales de l'Article III de cet Arrangement et aux indications du paragraphe final de l'Arrangement du 26 Juin, 1891, les Plénipotentiaires soussignés, chargés, en exécution des déclarations échangées à Londres, le 5 Août, 1890,**** entre le Gouvernement de la République Française et le Gouvernement de Sa Majesté Britannique, de délimiter les sphères d'intérêt respectif des deux pays, dans les districts sud et ouest du Moyenet du Haut-

* Reproduit de *British and Foreign State Papers*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 85, London, 1899, H. M. Stationery Office, p.31.

** Reprinted from *British and Foreign State Papers*, Compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 85, London, 1899, H. M. Stationery Office, p.31.

*** Note éditoriale: *British and Foreign State Papers (1888-1889)*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 81, London, H. M. Stationery Office, p.1126.

**** Note éditoriale: *British and Foreign State Papers (1889-1890)*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 82, London, H. M. Stationery Office, p. 89.

Niger, se sont entendus pour fixer, dans les conditions ci-après énoncées, la ligne de démarcation entre les possessions Françaises et Britanniques de la Côte d'Or: —

1. La frontière Britannique part de la côte à Newtown, à une distance de 1,000 mètres à l'ouest de la maison occupée, en 1884, par les Commissaires Britanniques, puis se dirige droit vers le nord jusqu'à la lagune de Tanoé ou Tendo, suit la rive sud de cette lagune jusqu'à l'embouchure de la Rivière Tanoé ou Tendo (des quatre îles qui se trouvent à proximité de cette embouchure, les deux qui sont au sud étant attribuées à la Grande-Bretagne, et les deux qui sont au nord, à la France). La frontière Britannique longe, à partir de cet endroit, la rive gauche de la Rivière Tanoé ou Tendo jusqu'au village de Nougoua, que, vu sa situation sur la rive droite de cette rivière, l'Angleterre consent à reconnaître à la France.

2. La frontière Française part également sur la côte de Newtown, à une distance de 1,000 mètres à l'ouest de la maison occupée, en 1884, par les Commissaires Britanniques. Elle s'avance, de là, droit au nord, vers la lagune de Tanoé ou Tendo, puis, traversant cette lagune, en suit la rive nord, et les rives nord et est de la lagune Ehi, jusqu'à l'embouchure de la Rivière Tanoé ou Tendo, et suit la rive droite de cette rivière jusqu'au Tillage de Nougoua.

3. La frontière Britannique continue à suivre la rive gauche du Tanoé ou Tendo durant 5 milles Anglais en amont de la maison qui sert actuellement de résidence au Chef de Nougoua. Elle traverse en ce point la rivière et se confond avec la frontière commune déterminée ci-dessous.

La frontière Française suit la rive droite du Tanoé ou Tendo, également pendant 5 milles en amont de Nougoua, jusqu'au moment où elle est rejointe par la frontière Anglaise.

4. La frontière commune quitte la Bavière Tanoé et se dirige au nord vers le sommet de la colline de Ferra-ferrako. De là, passant à 2 milles à l'est des villages d'Assikasso, Sankaina, Assambossoua, et Akouakrou, elle court à 2 milles à l'est de la route conduisant de Souakrou à la Rivière Boi, pour atteindre cette rivière à 2 milles au sud-est de Bamianko, village qui appartient à la France. De là, elle suit le thalweg de la Rivière Boi et la ligne tracée par le Capitaine Binger (telle qu'elle est marquée sur la carte ci-annexée),* laissant Edubi, avec un territoire s'étendant à 1 mille au nord de ce point, à la France, jusqu'à ce qu'elle atteigne un point situé à 16,000 mètres droit à l'est de Yaou. A partir de ce point, elle coïncide avec la ligne tracée par le Capitaine Binger (voir la carte ci-annexée), jusqu'à un point situé à 1,000 mètres au sud d'Abourouferrassi, village appartenant à la France. Elle continue à se tenir ensuite à une distance de 10 kilom. à l'est de la route conduisant directement d'Annibilekrou à Bondoukou, par Bodomfil et Dadiassi, passe à micchemin entre Buko et Adjamrab, court à 10 kilom. à l'est de la route de Bondoukou,

* Note du Secrétariat: La carte mentionnée n'est pas reproduite.

via Sorobango, Tambi, Takhari, et Bandagadi, et atteint la Volta au point d'intersection de cette rivière et de la route de Bandagadi à Kirhindi. Elle suit alors le thalweg de la Volta jusqu'à son intersection par le 9e degré de latitude nord.

5. Il est convenu que les habitants des villages Français qui, antérieurement à la conclusion du présent Arrangement, jouissaient du droit de pêche sur la Rivière de Tanoë ou de Tendo continueront à jouir de ce droit, en se conformant aux Règlements locaux.

6. La frontière déterminée par le présent Arrangement est inscrite sur la carte ci-annexée.

7. Dans la pensée des Parties Contractantes, le présent Arrangement complète et interprète la section 1 de l'Article III de l'Arrangement du 10 Août, 1889, relatif à la délimitation des possessions Britanniques et Françaises sur la Côte d'Or, et le paragraphe final de l'Arrangement du 26 Juin, 1891.

Fait à Paris, le 12 Juillet, 1893.

Les Commissaires Britanniques,

E. C. H. PHIPPS.

J. A. CROWE.

Les Commissaires Français,

GABRIEL HANOTAUX.

J. HAUSSMAN.

PART XXI

**Award between the United States and the United Kingdom
relating to the rights of jurisdiction of United States in
the Bering's sea and the preservation of fur seals**

Decision of 15 August 1893

**Sentence entre les États-Unis et le Royaume-Uni relative
aux droits de juridiction des États-Unis dans les eaux de la
mer de Behring et à la préservation des phoques à fourrure**

Décision du 15 août 1893

AWARD OF THE ARBITRAL TRIBUNAL ESTABLISHED UNDER THE TREATY SIGNED IN WASHINGTON, ON THE 29TH OF FEBRUARY 1892, BETWEEN UNITED STATES AND HER MAJESTY THE QUEEN OF UNITED KINGDOM OF GREAT-BRITAIN AND IRELAND (RELATING TO THE RIGHTS OF JURISDICTION OF UNITED STATES IN THE BERING'S SEA AND THE PRESERVATION OF FUR SEALS), DECISION OF 15 AUGUST 1893*

SENTENCE DU TRIBUNAL D'ARBITRAGE CONSTITUÉ EN VERTU DU TRAITÉ CONCLU À WASHINGTON, LE 29 FÉVRIER 1892, ENTRE LES ÉTATS-UNIS D'AMÉRIQUE ET SA MAJESTÉ LA REINE DU ROYAUME-UNI DE GRANDE-BRETAGNE ET D'IRLANDE (AU SUJET DES DROITS DE JURIDICTION DES ÉTATS-UNIS DANS LES EAUX DE LA MER DE BEHRING ET RELATIVEMENT À LA PRÉSERVATION DES PHOQUES À FOURRURE), DÉCISION DU 15 AOÛT 1893 **

Treaty between Russia and United States of 1824, Treaty between Russia and United Kingdom of 1825, Treaty between Russia and United States about the handover of Alaska of 30 March 1867, Treaty of Washington between United States and United Kingdom of 29 February 1892.

Transfer of territory through treaty – The jurisdictional rights and seal fisheries rights which belonged to Russia passed unimpaired to the United States under the Treaty on the handover of Alaska of 30 March 1867.

Exclusive rights – Since the United Kingdom never accepted any exclusive rights of jurisdiction or seal fisheries on the Bering's sea for Russia beyond the ordinary three-mile territorial waters limit, no such exclusive rights could have been transferred to the United States.

Species preservation – United States has no right of property or protection with regard to fur-seals frequenting the islands of United States in the Bering's sea when they are outside their territorial sea - the establishment of common rules for the preservation of fur-seals in the Bering's sea applicable outside territorial jurisdiction of respective governments would require the concurrence of other States, including the United Kingdom.

Species preservation – establishment by the arbitrators of transitional rules for the preservation of fur seals in the Bering Sea, applicable beyond the States' ordinary jurisdiction.

International recognition of facts – The arbitral Tribunal has examined and acknowledged that the said statement of facts involved in the compensation claim presented by United Kingdom is true and accurate.

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 935.

** Reproduit de John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. I, Washington, 1898, Government Printing Office, p. 935.

Droits de juridiction et de pêcheries – Traité entre les États-Unis et le Royaume-Uni du 29 février 1892.

Cession conventionnelle de territoire – l'ensemble des droits de juridiction et sur les pêcheries de phoques de la Russie, a été intégralement transféré aux États-Unis en vertu du Traité de cession de l'Alaska entre la Russie et les États-Unis du 30 mars 1867.

Droits exclusifs – le Royaume-Uni n'ayant jamais reconnu à la Russie ni droit exclusif de juridiction, ni droit exclusif sur les pêcheries de phoques dans la mer de Behring au-delà de la limite ordinaire des eaux territoriales, de tels droits exclusifs ne peuvent être accordés aux États-Unis au-delà de la limite ordinaire des trois milles – Traité entre la Russie et les États-Unis de 1824 – Traité entre la Russie et le Royaume-Uni de 1825.

Protection des espèces – les États-Unis n'ont aucun droit de propriété ou de protection vis-à-vis des phoques à fourrure qui fréquentent les îles américaines de la mer de Behring, lorsqu'ils se trouvent au-delà de leur mer territoriale – l'établissement d'une réglementation commune afin de protéger les phoques à fourrure de la mer de Behring, applicable hors des juridictions territoriales des gouvernements respectifs, nécessite le concours d'autres États, dont le Royaume-Uni.

Protection des espèces – établissement par les arbitres de règles transitoires pour la protection des phoques à fourrure de la Mer de Behring, applicables au-delà des zones ordinaires de juridiction des États.

Constatation internationale de faits – le Tribunal arbitral a examiné et reconnu que toutes les questions de fait impliquées dans les réclamations en dédommagement présentées par le Royaume-Uni étaient confirmées et véritables.

* * * * *

Award of the Tribunal of Arbitration constituted under the Treaty concluded at Washington, the 29th of February 1892, between the United States of America and Her Majesty the Queen of the United Kingdom of Great Britain and Ireland.

Whereas by a Treaty between the United States of America and Great Britain, signed at Washington, February 29, 1892, the ratifications of which by the Governments of the two Countries were exchanged at London on May the 7th, 1892, it was, amongst other things, agreed and concluded that the questions which had arisen between the Government of the United States of America and the Government of Her Britannic Majesty concerning the jurisdictional rights of the United States in the waters of Behring's Sea, and concerning also the preservation of the fur-seal in or habitually resorting to the said sea, and the rights of the citizens and subjects of either Country as regards the taking of fur-seals in or habitually resorting to the said waters, should be submitted to a Tribunal of Arbitration to be composed of seven Arbitrators, who should be appointed in the following manner, that is to say: two should be named by the President of the United States; two Should be named by Her Britannic Majesty; His Excellency the President of the French Republic should be jointly requested by the High Contracting Parties to name one; His Majesty the King of Italy should be so requested to name one; His Majesty the King of Sweden and Norway should be so requested to name one;

the seven Arbitrators to be so named should be jurists of distinguished reputation in their respective Countries, and the selecting Powers should be requested to choose, if possible, jurists who are acquainted with the English language;

And whereas it was further agreed by article II of the said Treaty that the Arbitrators should meet at Paris within twenty days after the delivery of the Counter-Cases mentioned in article IV, and should proceed impartially and carefully to examine and decide the questions which had been or should be laid before them as in the said Treaty provided on the part of the Governments of the United States and of Her Britannic Majesty respectively, and that all questions considered by the Tribunal, including the final decision, should be determined by a majority of all the Arbitrators;

And whereas by article VI of the said Treaty, it was further provided as follows: "In deciding the matters submitted to the said Arbitrators, it is agreed that the following five points shall be submitted to them in order that their award shall embrace a distinct decision upon each of said five points, to wit:

1. What exclusive jurisdiction in the sea now known as the Behring's Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the seal fisheries recognized and conceded by Great Britain?

3. Was the body of water now known as the Behring's Sea included in the phrase *Pacific Ocean*, as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the Behring's Sea were held and exclusively exercised by Russia after said Treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring's Sea east of the water boundary, in the Treaty between the United States and Russia of the 30th of March 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit?"

And whereas, by article VII of the said Treaty, it was further agreed as follows:

"If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent Regulations, outside the jurisdictional limits of the respective Governments, are necessary, and over what waters such Regulations should extend;

The High Contracting Parties furthermore agree to cooperate in securing the adhesion of other Powers to such Regulations;"

And whereas, by article VIII of the said Treaty after reciting that the High Contracting Parties had found themselves unable to agree upon a reference which should include the question of the liability of each for the injuries alleged to have been sustained by the other, or by its citizens, in connection with the claims presented and urged by it, and that "they were solicitous that this subordinate question should not interrupt or longer delay the submission and determination of the main questions," the High Contracting Parties agreed that "either of them might submit to the Arbitrators any question of fact involved in said claims and ask for a finding thereon, the question of the liability of either Government upon the facts found, to be the subject of further negotiation;"

And whereas the President of the United States of America named the Honourable John M. Harlan, Justice of the Supreme Court of the United States, and the Honourable John T. Morgan, Senator of the United States, to be two of the said Arbitrators, and Her Britannic Majesty named the Right Honourable Lord Hannen and the Honourable Sir John Thompson, Minister of Justice and Attorney General for Canada, to be two of the said Arbitrators, and His Excellency the President of the French Republic named the Baron de Courcel, Senator, Ambassador of France, to be one of the said Arbitrators, and His Majesty the King of Italy named the Marquis Emilio Visconti Venosta, former Minister of Foreign Affairs and Senator of the Kingdom of Italy to be one of the said Arbitrators, and His Majesty the King of Sweden and Norway named Mr. Gregers Gram, Minister of State, to be one of the said Arbitrators;

And whereas We, the said Arbitrators, so named and appointed, having taken upon ourselves the burden of the said arbitration, and having duly met at Paris, proceeded impartially and carefully to examine and decide all the questions submitted to us the said Arbitrators, under the said Treaty, or laid before us as provided in the said Treaty on the part of the Governments of Her Britannic Majesty and the United States respectively;

Now we, the said Arbitrators, having impartially and carefully examined the said questions, do in like manner by this our Award decide and determine the said questions in manner following, that is to say, we decide and determine as to the five points mentioned in article VI as to which our Award is to embrace a distinct decision upon each of them

As to the first of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine as follows:

By the Ukase of 1821, Russia claimed jurisdiction in the sea now known as the Behring's Sea, to the extent of 100 Italian miles from the coasts and islands belonging to her, but, in the course of the negotiations which led to the

conclusion of the Treaties of 1824 with the United States and of 1825 with Great Britain, Russia admitted that her jurisdiction in the said sea should be restricted to the reach of cannon shot from shore, and it appears that, from that time up to the time of the cession of Alaska to the United States, Russia never asserted in fact or exercised any exclusive jurisdiction in Behring's Sea or any exclusive rights in the seal fisheries therein beyond the ordinary limits of territorial waters.

As to the second of the said five points, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that Great Britain did not recognize or concede any claim, upon the part of Russia, to exclusive jurisdiction as to the seal fisheries in Behring Sea, outside of ordinary territorial waters.

As to the third of the said five points, as to so much thereof as requires us to decide whether the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the Treaty of 1825 between Great Britain and Russia, We, the said Arbitrators, do unanimously decide and determine that the body of water now known as the Behring Sea was included in the phrase "Pacific Ocean" as used in the said Treaty.

And as to so much of the said third point as requires us to decide what rights, if any in the Behring Sea were held and exclusively exercised by Russia after the said Treaty of 1825, We, the said Baron de Courcel, Mr. Justice Harlan, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said Arbitrators, do decide and determine that no exclusive rights of jurisdiction in Behring Sea and no exclusive rights as to the seal fisheries therein, were held or exercised by Russia outside of ordinary territorial waters after the Treaty of 1825.

As to the fourth of the said five points, We, the said Arbitrators, do unanimously decide and determine that all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea, east of the water boundary in the Treaty between the United States and Russia of the 30th March 1867, did pass unimpaired to the United under the said Treaty.

As to the fifth of the said five points, We, the said Baron de Courcel, Lord Hannen, Sir John Thompson, Marquis Visconti Venosta and Mr. Gregers Gram, being a majority of the said arbitrators, do decide and determine that the United States has not any right of protection or property in the fur-seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit.

And whereas the aforesaid determination of the foregoing questions as to the exclusive jurisdiction of the United States mentioned in Article VI leaves the subject in such a position that the concurrence of Great Britain is necessary to the establishment of Regulations for the proper protection and preservation of the fur-seal in or habitually resorting to the Behring Sea, the

Tribunal having decided by a majority as to each Article of the following Regulations, We, the said Baron de Courcel, Lord Hannen, Marquis Visconti Venosta and Mr. Gregers Gram, assenting to the whole of the nine Articles of the following Regulations, and being a majority of the said Arbitrators, do decide and determine in the mode provided by the Treaty, that the following concurrent Regulations outside the jurisdictional limits of the respective Governments are necessary and that they should extend over the waters hereinafter mentioned, that is to say:

ARTICLE 1.

The Governments of the United States and of Great Britain shall forbid their citizens and subjects respectively to kill, capture or pursue at any time and in any manner whatever, the animals commonly called fur seals, within a zone of sixty miles around the Pribilov Islands, inclusive of the territorial waters.

The miles mentioned in the preceding paragraph are geographical miles, of sixty to a degree of latitude.

ARTICLE 2.

The two Governments shall forbid their citizens and subjects respectively to kill, capture or pursue, in any manner whatever, during the season extending, each year, from the 1st of May to the 31st of July, both inclusive, the fur seals on the high sea, in the part of the Pacific Ocean, inclusive of the Behring sea, which is situated to the North of the 35th degree of North latitude, and eastward of the 180th degree of longitude from Greenwich till it strikes the water boundary described in Article 1 of the Treaty of 1867 between the United States and Russia, and following that line up to Behring straits.

ARTICLE 3.

During the period of time and in the waters in which the fur seal fishing is allowed, only sailing vessels shall be permitted to carry on or take part in fur-seal fishing operations. They will however be at liberty to avail themselves of the use of such canoes or undecked boats, propelled by paddles, oars, or sails, as are in common use as fishing boats.

ARTICLE 4.

Each sailing vessel authorised to fish for fur seals must be provided with a special license issued for that purpose by its Government and shall be required to carry a distinguishing flag to be prescribed by its Government.

ARTICLE 5.

The masters of the vessels engaged in fur seal fishing shall enter accurately in their official log book the date and place of each fur seal fishing operation, and also the number and sex of the seals captured upon each day.

These entries shall be communicated by each of the two Governments to the other at the end of each fishing season.

ARTICLE 6.

The use of nets, fire arms and explosives shall be forbidden in the fur seal fishing. This restriction shall not apply to shot guns when such fishing takes place outside of Behring's sea, during the season when it may be lawfully earned on.

ARTICLE 7

The two Governments shall take measures to control the fitness of the men authorized to engage in fur seal fishing; these men shall have been proved fit to handle with sufficient skill the weapons by means of which this fishing may be carried on.

ARTICLE 8.

The regulations contained in the preceding articles shall not apply to Indians dwelling on the coasts of the territory of the United States or of Great Britain, and carrying on fur seal fishing in canoes or undecked boats not transported by or used in connection with other vessels and propelled wholly by paddles, oars or sails and manned by not more than five persons each in the way hitherto practised by the Indians, provided such Indians are not in the employment of other persons and provided that, when so hunting in canoes or undecked boats, they shall not hunt fur seals outside of territorial waters under contract for the delivery of the skins to any person.

This exemption shall not be construed to affect the Municipal law of either country, nor shall it extend to the waters of Behring Sea or the waters of the Aleutian Passes.

Nothing herein, contained is intended to interfere with the employment of Indians as hunters or otherwise in connection with fur sealing vessels as heretofore.

ARTICLE 9.

The concurrent regulations hereby determined with a view to the protection and preservation of the fur seals, shall remain in force until they have been, in whole or in part, abolished or modified by common agreement between the Governments of the United States and of Great Britain.

The said concurrent regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof.

And whereas the Government of Her Britannic Majesty did submit to the Tribunal of Arbitration by article VIII of the said Treaty certain questions of fact involved in the claims referred to in the said article VIII, and did also

submit to us, the said Tribunal, a statement of the said facts, as follows, that is to say:

“FINDINGS OF PACT PROPOSED BY THE AGENT OF GREAT BRITAIN AND
AGREED TO AS PROVED BY THE AGENT FOR THE UNITED STATES, AND
SUBMITTED TO THE TRIBUNAL OF ARBITRATION FOR ITS CONSIDERATION.

1. That the several searches and seizures, whether of ships or goods, and the several arrests of masters and crews, respectively mentioned in the Schedule to the British Case, pages 1 to 60 inclusive, were made by the authority of the United States Government. The questions as to the value of the said vessels or their contents or either of them, and the question as to whether the vessels mentioned in the Schedule to the British Case, or any of them, were wholly or in part the actual property, of citizens of the United States, have been withdrawn from and have not been considered by the Tribunal, it being understood that it is open to the United States to raise these questions or any of them, if they think fit, in any future negotiations as to the liability of the United States Government to pay the amounts mentioned in the Schedule to the British Case;

2. That the seizures aforesaid, with the exception of the ‘Pathfinder’ seized at Neah-Bay, were made in Behring Sea at the distances from shore mentioned in the Schedule annexed hereto marked ‘C’;

3. That the said several searches and seizures of vessels were made by public armed vessels of the United States, the commanders of which had, at the several times when they were made, from the Executive Department of the Government of the United States, instructions, a copy of one of which is annexed hereto, marked ‘A’ and that the others were, in all substantial respects, the same: that in all the instances in which proceedings were had in the District Courts of the United States resulting in condemnation, such proceedings were begun by the filing of libels, a copy of one of which is annexed hereto, marked ‘B’ and that the libels in the other proceedings were in all substantial respects the same: that the alleged acts or offences for which said several searches and seizures were made were in each case done or committed in Behring Sea at the distances from shore aforesaid and that in each case in which sentence of condemnation was passed, except in those cases when the vessels were released after condemnation, the seizure was adopted by the Government of the United States: and in those cases in which the vessels were released the seizure was made by the authority of the United States; that the said fines and imprisonments were for alleged breaches of the municipal laws of the United States, which alleged breaches were wholly committed in Behring Sea at the distances from the shore aforesaid;

4. That the several orders mentioned in the Schedule annexed hereto and marked ‘C’ warning vessels to leave or not to enter Behring Sea were made by public armed vessels of the United States the commanders of which had, at the several times when they were given, like instructions as mentioned in finding 3, and that the vessels so warned were engaged in sealing or prosecuting

voyages for that purpose, and that such action was adopted by the Government of the United States;

5. That the District courts of the United States in which any proceedings were had or taken for the purpose of condemning any vessel seized as mentioned in the Schedule to the Case of Great Britain, pages 1 to 60, inclusive, had all the jurisdiction and powers of Courts of Admiralty including the prize jurisdiction, but that in each case the sentence pronounced by the Court was based upon the grounds set forth in the libel.

ANNEX A.

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY.

Washington, April 21, 1896.

SIR,

Referring to Department letter of this date, directing you to proceed with the revenue-steamer *Bear*, under your command, to the seal Islands, etc., you are hereby clothed with full power to enforce the law contained in the provisions of Section 1956 of the United States' Revised Statutes, and directed to seize all vessels and arrest and deliver to the proper authorities any or all persons whom you may detect violating the law referred to, after due notice shall have been given.

You will also seize any liquors or fire-arms attempted to be introduced into the country without proper permit, under the provisions of Section 1955 of the Revised Statutes, and the Proclamation of the President dated 4th February, 1870.

Respectfully yours,

Signed, C. S. FAIRCHILD.

Acting Secretary.

Captain M. A. HEALY,

Commanding revenue-steamer Bear, San-Francisco, California.

ANNEX B.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF ALASKA.

AUGUST SPECIAL TERM, 1886.

To the Honourable Lafayette Dawson, Judge of said District Court:

The libel of information of M. D. Ball, Attorney for the United States for the District of Alaska, who prosecutes on behalf of said United States, and being present here in Court in his proper person, in the name and on behalf of

the said United States, against the schooner *Thornton*, her tackle, apparel, boats, cargo, and furniture, and against all persons intervening for their interest therein, in cause of forfeiture, alleges and informs as follows:

That Charles A. Abbey, an officer in the Revenue Marine Service of the United States, and on special duty in the waters of the district of Alaska, heretofore, to wit, on the 1st day of August, 1886, within the limits of Alaska Territory, and in the waters thereof, and within the civil and judicial district of Alaska, to wit, within the waters of that portion of Behring sea belonging to the said district, on waters navigable from the sea by vessels of 10 or more tons burden, seized the ship or vessel commonly called a schooner, the *Thornton*, her tackle, apparel, boats, cargo, and furniture, being the property of some person or persons to the said Attorney unknown, as forfeited to the United States, for the following causes:

That the said vessel or schooner was found engaged in killing fur-seal within the limits of Alaska Territory, and in the waters thereof, in violation of section 1956 of the Revised Statutes of the United States.

And the said Attorney saith that all and singular the premises are and were true, and within the Admiralty and maritime jurisdiction of this Court, and that by reason thereof and by force of the Statutes of the United States in such cases made and provided, the afore mentioned and described schooner or vessel, being a vessel of over 20 tons burden, her tackle, apparel, boats, cargo, and furniture, became and are forfeited to the use of the said United States, and that said schooner is now within the district aforesaid.

Wherefore the said Attorney prays the usual process and monition of this honourable Court issue in this behalf, and that all persons interested in the before-mentioned and described schooner or vessel may be cited in general and special to answer the premises, and all due proceedings being had, that the said schooner or vessel, her tackle, apparel, boats, cargo, and furniture may, for the cause aforesaid, and others appearing, be condemned by the definite sentence and decree of this honourable Court, as forfeited to the use of the said United States, according to the form of the Statute of the said United States in such cases made and provided.

Signed. M. D. BALL.

United States District Attorney for the District of Alaska.

ANNEX C.

The following table shows the names of the British sealing-vessels seized or warned by United States revenue cruisers 1886-1890, and the approximate distance from land when seized. The distances assigned in the cases of the *Carolena*, *Thornton* and *Onward* are on the authority of U. S. Naval Commander Abbey (see 50th Congress, 2nd Session, Senate Executive Documents N^o 106, pp. 20, 30, 40). The distances assigned in the cases of the

Anna Beck, *W. P. Sayward*, *Dolphin* and *Grace* are on the authority of Captain Shepard U. S. R. M. (*Blue Book*, United States N° 2, 1890.— pp. 80-82. See Appendix, vol. III).*

Name of vessel.	Date of seizure.	Aproximate distance from land when seized.	United States vessel making seizure.
Carolena	August 1 1886	75 miles	Corwin.
Thornton	August 1 1886	70 miles	Corwin.
Onward.....	August 2 1886	115 miles	Corwin.
Favourite.....	August 2 1886 ...	Warned by Corwin in about same position as Onward.....	
Anna Beck.....	July 2 1887	66 miles	Rush.
W. P. Sayward ...	July 9 1887	59 miles	Rush.
Dolphin	July 12 1887	40 miles	Rush.
Grace.....	July 17 1887	96 miles	Rush.
Alfred Adams ...	August 10 1887 ...	62 miles	Rush.
Ada	August 25 1887 ...	15 miles	Bear.
Triumph	August 4 1887	Warned by Rush not to enter Behring Sea	
Juanita	July 31 1889	66 miles	Rush.
Pathfinder	July 29 1889	50 miles	Rush.
Triumph.....	July 11 1889	Ordered out of Behring Sea by Rush: (?) As to position when warned	
Black Diamond..	July 11 1889	35 miles	Rush.
Lily	August 6 1889.....	66 miles	Rush.
Ariel	July 30 1889.....	Ordered out of Behring Sea by Rush	
Kate	August 13 1889....	Ditto	
Minnie	July 15 1889.....	65 miles	Rush.
Pathfinder	March 27 1890 ...	Seized in Neah Bay ¹	Corwin.

And whereas the Government of Her Britannic Majesty did ask the said Arbitrators to find the said facts as set forth in the said statement, and whereas the Agent and Counsel for the United States Government thereupon in our presence informed us that the said statement of facts was sustained by the evidence, and that they had agreed with the Agent and Counsel for Her Britannic Majesty that We, the Arbitrators, if we should think fit so to do might find the said statement of facts to be true.

* Secretariat note: Not reproduced

¹ Neah Bay is in the State of Washington, and the *Pathfinder* was seized there on charges made against her in the Behring Sea in the previous year. She was released two days later.

Now, We, the said Arbitrators, do unanimously find the facts as set forth in the said statement to be true.

And whereas each and every question which has been considered by the Tribunal has been determined by a majority of all the Arbitrators;

Now We, Baron de Courcel, Lord Hannen, Mr. Justice Harlan, Sir John Thompson, Senator Morgan, the Marquis Visconti Venosta and Mr. Gregers Gram, the respective minorities not withdrawing their votes, do declare this to be the final Decision and Award in writing of this Tribunal in accordance with the Treaty

Made in duplicate at Paris and signed by us the fifteenth day of August in the year 1893.

And We do certify this English Version thereof to be true, and accurate.

ALPH. DE COURCEL.
JOHN M. HARLAN.
JOHN T. MORGAN.
HANNEN.
JNO S. D. THOMPSON.
VISCONTI VENOSTA.
G. GRAM.

PART XXII

**Award for the settlement of the disputed
boundary between Argentina and Brazil
at Uruguay and Yguazu Rivers**

Decision of 5 February 1895

**Sentence arbitrale pour la délimitation de la
frontière litigieuse entre l'Argentine et le Brésil
au niveau des fleuves Uruguay et Yguazu**

Décision du 5 février 1895

AWARD OF THE PRESIDENT OF THE UNITED STATES UNDER THE
TREATY OF 7 SEPTEMBER 1899 BETWEEN THE ARGENTINE
REPUBLIC AND BRAZIL, FOR THE SETTLEMENT OF THE
DISPUTED BOUNDARY BETWEEN URUGUAY AND YGUAZU
RIVERS, DECISION OF 5 FEBRUARY 1895*

SENTENCE ARBITRALE DU PRÉSIDENT DES ÉTATS-UNIS EN
VERTU DU TRAITÉ DU 7 SEPTEMBRE 1899 ENTRE L'ARGENTINE
ET LE BRÉSIL, POUR LA DÉLIMITATION DE LA FRONTIÈRE
LITIGIEUSE ENTRE LES FLEUVES URUGUAY ET YGUAZU,
DÉCISION DU 5 FÉVRIER 1895**

Determination of borders – question of the river boundary-line between Brazil and the Argentine Republic in their adjoining territory between the Uruguay and Yguazu Rivers – reliance on previous determination of boundary between Spanish and Portuguese possessions in South America by Joint Commission established by Treaty of 13 January 1750 between Spain and Portugal.

Délimitation frontalière – question de la frontière fluviale entre le Brésil et la République Argentine au niveau de leurs territoires adjacents aux fleuves Uruguay et Yguazu – déférence envers la délimitation antérieure de la frontière entre les possessions espagnoles et portugaises en Amérique du Sud, réalisée par la Commission Mixte établie par le Traité du 13 janvier 1750 entre l'Espagne et le Portugal.

* * * * *

The Treaty concluded September 7, 1889, between the Argentine Republic and Brazil for the settlement of a disputed boundary question provides, among other things, as follows:

“ARTICLE I.

The contention about the right that each one of the High Contracting Parties judges to have to the territory in dispute between them, shall be closed within the term of ninety days to be counted from the ending of the survey of the land in which the headwaters of the rivers Chapeco or Pequiriguazu and Jangada, or San Antonio-Guazú are found. The said survey is understood to

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 2020.

** Reproduit de Moore, John Basset. *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol. II, Washington, 1898, Government Printing Office, p. 2020.

end the day on which the commissions appointed by virtue of the Treaty of September 28, 1885, shall present to their governments their reports and plans referred to in Article IV. of the same treaty.

ARTICLE II.

Should the time specified in the preceding Article expire without an amicable solution being reached, the question shall be submitted to the Arbitration of the President of the United States of America, to whom the High Contracting Parties shall address themselves within the next sixty days, requesting him to accept that Commission.

ARTICLE V.

The boundaries shall be established by the rivers that either Brazil or the Argentine Republic has designated, and the arbitrator shall be invited to decide in favor of one of the Parties, as he may deem just, and in view of the reasons and the documents they may produce.

ARTICLE VI.

The decision shall be pronounced within the term of twelve months, counting from the date of the presentation of the expositions, or from the latest one, if the presentation be not made at the same time by both Parties. It shall be final and obligatory, and no reason shall be alleged to obstruct its enactment.”

The High Contracting Parties having failed to arrive at an amicable solution within the time stipulated as aforesaid, have, in accordance with the alternative provisions of the Treaty, submitted the controverted question to me, Grover Cleveland, President of the United States of America, for Arbitration and Award under the conditions in said Treaty prescribed.

Each Party has presented to me within the time and in the manner specified in Article IY. of the Treaty, an Argument, with evidence, documents and titles in support of its asserted right.

The question submitted to me for decision under the treaty aforesaid is, which of two certain systems of rivers constitutes the boundary of Brazil and the Argentine Republic in that part of their adjoining territory which lies between the Uruguay and Yguazu Rivers. Each of the designated boundary systems is composed of two rivers having their sources near together and flowing in opposite directions, one into the Uruguay and the other into the Yguazu.

The two rivers designated by Brazil as constituting the boundary in question (which may be denominated the Westerly System) are a tributary of the Uruguay and a tributary of the Yguazu, which were marked, recognized and declared as boundary rivers in 1759 and 1760 by the Joint Commission appointed under the treaty of January 13, 1750, between Spain and Portugal, to locate the boundary between the Spanish and Portuguese possessions in

South America. The affluent of the Uruguay is designated in the report of those commissioners as the Pepiri river (sometimes spelled Pepiry). In certain later documents put in evidence it is called the Pepiri-Guazu. The opposite river flowing into the Yguazu was named the San Antonio by the said Commissioners, and it retains that name.

The two rivers claimed by the Argentine Republic as forming the boundary (which may be denominated the Easterly System) lie more to the east and are by that Republic called the Pequiri-Guazu (flowing into the Uruguay) and the San Antonio-Guazu (flowing into the Yguazu). Of these two rivers last aforesaid, the first is by Brazil called the Chapeco and the second the Jangada.

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 in the premises, having duly examined and considered the arguments, documents, and evidence to me submitted by the respective Parties pursuant to the provisions of said Treaty, do hereby make the following decision and award:

That the boundary line between the Argentine Republic and the United States of Brazil in that part submitted to me for arbitration and decision, is constituted and shall be established by and upon the rivers Pepiri (also called Pepiri-Guazu) and San Antonio, to wit, the rivers which Brazil has designated in the argument and documents submitted to me as constituting the boundary, and hereinbefore denominated the Westerly System.

For convenience of identification, these rivers may be further described as those recognized, designated, marked and declared as the Pepiri and San Antonio, respectively, and as the boundary rivers, in the years 1759 and 1760, by the Spanish and Portuguese Commissioners in that behalf appointed pursuant to the treaty of limits concluded January 13, 1750, between Spain and Portugal, as is recorded in the official report of the said commissioners. The mouth of the affluent of the Uruguay last aforesaid, to-wit, the Pepiri (also called Pepiri-Guazú) which, with the San Antonio, is hereby determined to be the boundary in question, was reckoned and reported by the said commissioners who surveyed it in 1759 to be one and one-third leagues upstream from the Great Falls (Salto Grande) of the Uruguay, and two-thirds of a league above a smaller affluent on the same side called by the said Commissioners the Ytaya. According to the map and report of the survey made in 1887 by the Brazilian-Argentine Joint Commission, in pursuance of the treaty concluded September 28, 1885, between the Argentine Republic and Brazil, the distance from the Great Falls of the Uruguay to the mouth of the aforesaid Pepiri (also called Pepiri-Guazu) was ascertained and shown to be four and one-half miles as the river flows. The mouth of the affluent of the Yguazu last aforesaid, to-wit, the San Antonio, was reckoned and reported by the said commissioners of 1759 and 1760 to be nineteen leagues upstream from the Great Falls (Salto Grande) of the Yguazu, and twenty-three leagues

from the mouth of the latter river. It was also by them reported as the second important river that empties itself on the south bank of the Yguazu above its Salto Grande; the San Francisco, about seventeen and one-fourth leagues above the Great Falls, being the first. In the report of the Joint Survey made in 1788 under the treaty of October 1, 1777, between Spain and Portugal, the location of the San Antonio with reference to the mouth and the Great Falls of the Yguazu agrees with that above stated.

In testimony whereof I have hereunto set my hand and caused the seal of the United States to be affixed,

Done in triplicate at the City of Washington on the fifth day of February in the year one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

[SEAL.]

GROVER CLEVELAND.

By the President:

W. Q. GRESHAM,
Secretary of State.

PART XXIII

**Arbitration between Great Britain and Portugal
as regards questions relative to the delimitation of their
spheres of influence in East Africa (Manica plateau)**

Decision of 30 January 1897

**Arbitrage entre la Grande-Bretagne et le Portugal sur les
questions relatives à la délimitation de leurs sphères d'influence
respectives en Afrique de l'Est (Plateau de Manica)**

Décision du 30 janvier 1897

ARBITRATION BETWEEN GREAT BRITAIN AND PORTUGAL AS
REGARDS QUESTIONS RELATIVE TO THE DELIMITATION OF
THEIR SPHERES OF INFLUENCE IN EAST AFRICA (MANICA
PLATEAU), DECISION OF 30 JANUARY 1897*

ARBITRAGE ENTRE LA GRANDE-BRETAGNE ET LE PORTUGAL
SUR LES QUESTIONS RELATIVES À LA DÉLIMITATION DE LEURS
SPHÈRES D'INFLUENCE RESPECTIVES EN AFRIQUE DE L'EST
(PLATEAU DE MANICA), DÉCISION DU 30 JANVIER 1897**

Interpretation of the delimitation of border during the demarcation process – problem of implementing a delimitation provision of a treaty which has several official languages – delimitation of African territories was made in Europe with only a vague and imperfect knowledge of the topography, the actual configuration and without an accurate map – the general principles in matter of delimitation of frontier shall not be substituted for a delimitation made in a treaty – recourse to the opinion of an independent expert specially qualified in questions of geography and topography – Treaty between Portugal and United Kingdom of 11 June 1891.

Interpretation of treaty – importance of preparatory work in order to determine the intention of the negotiators – the formula “plateau for the United Kingdom and slope for Portugal” is a guiding rule clearly accepted during the preparatory work of the conventional delimitation – for legal interpretation of a contract, the expressions must be taken in the sense the most in accordance with the intentions of the parties who have arranged it and most favourable to the aim of the contract – in the diplomatic and technical language of the delimitation convention, “to follow a river” means to follow upstream as well as to follow downstream – geographical expressions should be taken in their broader sense.

International frontier – reliance on a natural line which follows the edge of the plateau to separate the table and the slope of the plateau – straight lines drawn between natural points don't constitute a natural line – in certain cases, a line though technically accurate which contains too many inflections is difficult to define accurately on the ground and so a more practical one should be established – it would be contrary to the principles of justice if Portugal could reacquire part of the territory in exchange for which it had accepted previously a significant parcel of territory as compensation from United Kingdom. Having accepted by treaty the territory as equitable compensation, Portugal cannot be permitted to raise objection, in particular without justification.

Interprétation de la délimitation de la frontière durant la procédure de démarcation – problème lors de la mise en œuvre d'une disposition conventionnelle établissant la délimitation frontalière, qui a été rédigée en plusieurs langues faisant toutes également foi – la délimitation des territoires africains a été effectuée depuis l'Europe avec une connaissance vague et imparfaite de la topographie, de la configuration réelle et sans carte pertinente – les principes généraux en matière de délimitation de frontière ne doivent pas être substitués à la délimitation agréée par voie

* Reprinted from John Basset Moore, *History and Digest of the International Arbitrations to Which the United States has been a Party*, vol.V, Washington, 1898, Government Printing Office, p.4985.

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conventionnelle – recours à l'opinion d'un expert indépendant hautement qualifié en matière de géographie et de topographie – Traité entre le Portugal et le Royaume-Uni du 11 juin 1891.

Interprétation conventionnelle – importance des travaux préparatoires afin de déterminer les intentions des Parties lors des négociations – la formule «le plateau pour le Royaume-Uni et le versant pour le Portugal» est une règle qui a été clairement admise lors des travaux préparatoires du Traité de délimitation – pour ce qui est de l'interprétation juridique d'un contrat, les expressions doivent être comprises dans le sens qui correspond le mieux aux intentions des Parties qui en sont à l'origine et le plus favorable aux objectifs dudit contrat – dans le langage diplomatique et technique du Traité de délimitation, «suivre un fleuve» signifie le suivre en amont, comme en aval – les expressions géographiques doivent être comprises dans leur sens le plus large.

Frontière internationale – elle doit être une ligne naturelle suivant le bord du plateau qui sépare la table du versant – des lignes droites tracées entre des points naturels ne constituent pas une ligne naturelle – dans certains cas, une ligne techniquement correcte, mais qui comporte de trop nombreux points d'inflexion, est difficile à démarquer précisément sur le terrain, et une ligne plus pratique doit être établie – il serait contraire au principe de la justice si le Portugal pouvait récupérer une partie du territoire en échange duquel il a précédemment accepté une large portion de territoire à titre de compensation de la part du Royaume-Uni. Le Portugal, après avoir accepté par traité le territoire comme compensation équitable, ne doit pas être autorisé à soulever d'objection à ce sujet, qui plus est lorsqu'il le fait sans aucune justification.

* * * * *

We, Paul-Honoré Vigliani, late chief president of the court of cassation of Florence, minister of state and senator of the Kingdom of Italy, arbitrator between Great Britain and Portugal as regards questions relative to the delimitation of their spheres of influence in east Africa;

Considering the, declaration signed in London on the 7th January, 1895, by Lord Kimberley and M. Luiz de Soveral, which contains the reference to the arbitrator (“Acte de Compromis”), the tenor of which is as follows:

On the 11th June 1891 a treaty was signed between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, Empress of India, and his Most Faithful Majesty the King of Portugal and the Algarves, which treaty settled the question of the boundaries of their possessions and spheres of influence in eastern and central Africa.

Article II. of this treaty contains the demarcation of the boundary to the south of the Zambezi; that is to say, from the point on the bank of this river opposite the mouth of the Aroangoa, or Loangwa, as far as the point where the boundary of Swaiziland intersects the river Maputo.

Differences having arisen with regard to the meaning of certain phrases in the said article, the two governments have decided to have recourse to the arbitration of his Excellency M. Paul-Honoré Vigliani, formerly first president of the “Cour de Cassation,” senator, and minister of state of the Kingdom of Italy.

They do not, however, propose that the whole of the above-mentioned line should be submitted to the arbitration.

The boundary to the south of the Zambezi may be considered as divided into three sections:

1. From the Zambezi as far as 18° 30' south latitude.
2. From 18° 30' south latitude to a point where the rivers Sabi and Lunde, or Lunte, meet.
3. From this point to the river Maputo.

It is not considered necessary to submit to arbitration the line defined in sections 1 and 3; the differences only concern the second section.

The negotiations took place in London. The text of the treaty was drawn up in English, and initialed by the Marquess of Salisbury, then minister for foreign affairs, and by M. de Soveral, Portuguese minister. The treaty, having been compared with the copy initialed in London, was signed at Lisbon by Count Valbom, Portuguese minister for foreign affairs, and by Sir George Petre, Her Britannic Majesty's minister at Lisbon.

That portion of the article which deals with the second section of the boundary is drawn up in the following terms:

“Thence (i.e., from the intersection of the thirty-third degree of longitude east of Greenwich by the parallel of latitude 18° 30' south) it follows the upper part of the eastern slope of the Manica plateau southwards to the center of the main channel of the Sabi, follows that channel to its confluence with the Lunte. * * *

It is understood that in tracing the frontier along the slope of the plateau no territory west of longitude 32° 30' east of Greenwich shall be comprised in the Portuguese sphere, and no territory east of longitude 33° east of Greenwich shall be comprised in the British sphere. The line shall, however, if necessary, be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere.”

The following are the terms, in English and Portuguese:

* * * “Thence it follows the upper part of the eastern slope of the Manica plateau southwards to the centre of the main channel of Sabi, follows that channel to its confluence with the Lunte, whence it strikes direct to the northeastern point of the frontier of the South African Republic, and follows the eastern frontier of the republic and the frontier of Swaziland to the river Maputo.

* * * “D’abi acompanha a crista da vertente oriental do plan-alto de Manica na sua direcção sul até á linha media do eito principal do Save, seguindo por elle até á sua confluencia com o Lunde, d’onde corta direito ao extremo nordeste da fronteira da Republica Sul Africana, continuando pelas fronteiras orientaes d’esta republica, e da Swazilandia até ao Rio Maputo.

It is understood that in tracing the frontier along the slope of the plateau no territory west of longitude $32^{\circ} 30'$ east of Greenwich shall be comprised in the Portuguese sphere, and no territory east of longitude 33° east of Greenwich shall be comprised in the British sphere. The line shall, however, if necessary, be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere."

Fica entendido ao traçar a fronteira ao longo da crista do planalto, nenhum territorio a oeste do meridiano de $32^{\circ} 30'$ de longitude leste de Greenwich será comprehendido na esfera Portugueza, e que nenhum territorio a leste do meridiano de 33° de longitude leste de Greenwich ficará comprehendido na esfera Britannica. Esta linha soffrerá comtudo, sendo necessario, a inflexão bastante para que Mutassa fique na esfera Britannica, e Macequeze na esfera Portugueza."

In the month of June 1892, the commissioners of the two governments endeavored to trace the boundary line according to the above-mentioned stipulations, but a difference having arisen between them, the settlement was referred to their governments. Direct negotiations between the ministry for foreign affairs of Lisbon and the foreign office have taken place; but all prospect of arriving at an understanding having appeared impossible, the two governments have decided to have recourse to arbitration.

These diplomatic negotiations and the technical labors of the commissioners have left the question of demarcation in the following position:

1. As regards the territory comprised between the parallel $18^{\circ} 30'$ and a point situated at a distance of a few miles to the south of the Chimanimani Pass, each commissioner has proposed a boundary line, and each Government has adopted the line proposed by the commissioner; whence a difference of opinions has arisen which they have not yet found means of reconciling.
2. As regards the territory comprised between a point situated at a distance of a few miles to the south of the Chimanimani Pass and the parallel $20^{\circ} 42' 17''$ of south latitude, the British commissioner and a delegate of the Portuguese commissioner, as far as he was authorized, have agreed upon a boundary line, the examination of which by the two governments has remained unfinished.
3. As regards the territory which extends from the parallel $20^{\circ} 42' 17''$ of south latitude as far as the point where the rivers Sabi and Lunte meet, no project of demarcation has been discussed between the two governments.

In these circumstances, the two governments have agreed to request the arbitrator to take into consideration the documents, the reports of the negotiations, and the results of the technical labors, to weigh the arguments of the two governments, based upon their respective opinions, and to decide on the line which shall separate the Portuguese sphere of influence from that of Great Britain from the parallel $18^{\circ} 30'$ to the point of confluence of the Lunte and Sabi.

In faith of which the undersigned, duly authorized by their respective governments, have signed the present declaration, to which they have affixed the seals of their arms.

Done at London, on the 7th January 1895.

KIMBERLEY.

LUIZ DE SOVERAL

After our acceptance of the functions of arbitrator, it was agreed between us and the two governments that the arbitration proceedings should take place at Florence, and that the documents relating to the arbitration should be drawn up in French.

We then invited each of the two governments to submit to us a memorandum setting forth its claim, with documents to support it, and a geographical map* showing the line of frontier claimed; and we reserved the right to ask them, after the examination of these documents, to send to us technical delegates instructed to furnish us with such information and explanations as would be useful for a thorough comprehension of the facts and localities connected with the questions to be decided.

For the drawing up of the reports of the proceedings and other work connected with the arbitration, we appointed as our secretary the Marquis Alexandre Corsi, professor of international law at the University of Pisa.

After the examination of the case presented by the Government of Great Britain on the 16th March, 1896 together with five maps, of which the one marked D shows the line of frontier claimed by Great Britain.

The conclusions of this case are as follows:

As regards the first section of the boundary in dispute —

1. That the watershed between the basin of the Sabi on the one side and those of the Pungwe and the Busi on the other, proposed as the boundary by M. du Bocage, was definitely rejected during the negotiations which preceded the conclusion of the convention.
2. That a large addition of territory was assigned to Portugal north of the Zambezi, in return for the abandonment by her of the claim to the watershed.
3. That the plateau mentioned in Article II. of the Anglo-Portuguese convention actually exists much as it is shown on maps published prior to the conclusion of that convention, though its eastern escarpment is in places less sharply defined than it was then supposed to be.

* Secretariat note: None of the maps mentioned in the award are reproduced here in.

4. That the British claim leaves the plateau, as was intended, within the British sphere, and the whole of the slope connecting it with the plain within the Portuguese sphere.

5. That the line of the British claim, following the upper edge of the plateau and drawn across the mouths of the ravines, is in accordance with the text of the convention and is exactly coincident with that in the minds of the British and Portuguese negotiators.

6. That the deflection round Massi-Kessi of the line of the British claim amply meets the requirements of the case.

As regards the second section of the boundary —

7. That the line agreed to by Major Leveson and Captain d'Andrade is the line that should be adopted.

As regards the third section of the boundary —

8. That till the Sabi is reached the boundary must run southwards between the limits $32^{\circ} 30'$ and 33° of longitude east of Greenwich.

9. That it is immaterial as regards compliance with the text and spirit of the convention whether the boundary follows the Sabi up or down stream, that river merely serving as a connecting link by means of which to reach its confluence with the Lunte, which had been selected as a fixed point, whence the line was to be carried to the northeastern corner of the South African Republic.

After the examination, also, of the case presented on the 10th June 1896, in the name of the Portuguese Government, with a volume of the White Book and three maps, of which the one marked C shows the line claimed.

The conclusions of this case are as follows:

1. That the frontier from latitude $18^{\circ} 30'$ south of the defile of the Chimanimani should follow the line proposed by the Portuguese commissioner.

2. That southwards from Chimanimani to Mapungwana the frontier may follow the line proposed by the British commissioner and accepted by the Portuguese technical delegate, Freire d'Andrade.

3. That between Mapungwana and latitude about $20^{\circ} 30'$ south, the project of delimitation agreed to between the British commissioner and the Portuguese delegate should be rectified, the frontier to run from Mapungwana by Mount Xerinda towards the mountain situated on the above-mentioned parallel between the basins of the Zona and the Chinica.

4. That as the plateau does not exist south of latitude $20^{\circ} 30'$ south, it appears just and reasonable that from this parallel the frontier should run

to the Save by Mounts Mero and Zunone and the River Lacati, following after this the course of the Save to its junction with the Lunde.

At our invitation the two governments sent to Florence and placed at our disposal their delegates, viz: Major Julian John Levenson, on the part of Great Britain; his excellency the Councillor Antonio Ennes, and Captain Alfred Freire d'Andrade, for Portugal.

The delegates of the two governments after having, on the 16th and 18th of June, been made acquainted reciprocally with the cases and the maps having reference to them, laid before us fully, in a series of meetings which took place in our presence, and of which minutes were drawn up, the circumstances and arguments in support of the claims of their respective governments; and in their discussions they furnished us with the most careful and detailed information and explanations which we deemed it useful to ask them as to the doubts and difficulties which the nature and unexpected configuration of the mountainous and irregular plateau of Manica place in the way of an exact and literal application of the text of Article II. of the convention of the 11th June 1891 to the territory to be delimited.

In the course of these discussions there were presented to us on the 9th July 1896 "Observations on the British Case," by M. Ennes and Captain d'Andrade, and "Notes on the Portuguese Case," by Major Levenson, and, further, "Observations on the British Counter Case," by Captain d'Andrade, as well as some replies in manuscript submitted by one side, and by the other illustrative maps and sections prepared before the close of the meetings by Captain d'Andrade; also a topographical map, submitted on the 14th July by Major Levenson, modifying two small parts of the first section of the frontier claimed by his government.

Lastly, after the conclusion of the meetings on the 17th August, Major Levenson submitted to us his "final observations," and M. Freire d'Andrade caused to be transmitted to us on the 21st August 1896 his "conclusions". All printed documents were communicated by our secretary to each of the delegates, the exchange of each one from one party to the other being as far as possible contemporaneous. The manuscripts and maps were at the same time placed at their disposal.

I. *Preliminary questions.* — During the study of the documents, and during the discussions, certain preliminary questions presented themselves in the first place to our examination. They have reference to the text of the treaty of the 11th June 1891.

It is pointed out in the joint memorandum ("Acte de Compromis") that the treaty was originally drawn up in English and initialed on the 14th May 1891 by the Marquess of Salisbury, secretary of state for foreign affairs of Great Britain, and M. Luiz de Soveral, Portuguese minister plenipotentiary in London; that after this the Portuguese text having been compared with the English text initialed in London, the double English and Portuguese text was

signed at Lisbon by Count de Valbom, minister for foreign affairs in Portugal, and Sir George Petre, Her Britannic Majesty's minister at Lisbon, on the 11th June 1891.

These circumstances are confirmed in the cases of the two governments (*Vide* Part I. of the English Case, and the Portuguese Case, p. 43). It has nowhere been declared which of the two texts, the English or the Portuguese, should be considered the original of the treaty.

It results therefrom that each of the two texts contained in the protocol signed at Lisbon on the 11th June 1891 may aspire to the honor of being considered the original, whilst the English text initialed in London constitutes properly the first minute. In any case there can be no doubt that each of the two should serve equally for the interpretation of the treaty.

To the double text of the original there has been added in the joint memorandum ("Acte de Compromis") a French version of Article II. of the treaty, the use of this language having been agreed to for the arbitration proceedings. But as following this French translation the double English and Portuguese text has been reproduced therein, it is to be imagined that the high contracting parties considered this version as being in all respects equivalent to the double text of the original.

Nevertheless, the use of two languages in the drawing up of the document could easily cause, as actually happened, namely, in the scientific world at Lisbon, doubts and differences of opinion in its interpretation, and this has been one of the principal causes of the necessity for recourse to arbitration (British Case, paragraph 1).

The principal questions were: (1) What was the meaning of the expression "Plateau de Manica?" (2) What was the signification of the words, "la partie supérieure du versant oriental" ("the upper part of the eastern slope — a crista da vertente oriental")? (3) What was understood by the word "plateau", as used in opposition to the words "pente" or "versant"? (4) If these last words, "pente" and "versant," were used as synonymous, what is the surface (*table, terrace, or esplanade*) of the plateau properly so called? What is the *pente* or *versant* [slope], and what is the *bord* or *escarpement* [edge]? (5) Is the expression "vers le sud" in the French version equivalent to "southwards" in the English text and to "na direcção sul" in the Portuguese text, and do these three expressions signify a direction due south or simply *towards the south*, between the east and the west? (6) Lastly, does the expression "follows the channel" (of the Save) signify indifferently follows that river down or up stream, or does it necessarily signify *follows downstream*?

All these doubts, and the discussions of which they were the subject, were brought before the arbitrator by means of the cases of the two parties, and in the discussions of their delegates. But it may happily be affirmed that after loyal explanations these doubts have now lost all importance.

In fact, the parties have been led by their declarations to recognize that by the expression "Plateau of Manica" the negotiators of the convention of 1891, putting aside the much more restricted definition of geographers, were of one opinion, and had clearly the intention to include not only the administrative district of Manica, bounded by the rivers Munene and Sucuwa, but all the territory which extends south of the Zambezi from latitude 18° 30' to the confluence of the Save with the Lunte — that is to say, the whole region, the delimitation of which was traced out by the Anglo-Portuguese Commission, and which forms the subject of discussion before the arbitrator.

It is in reality to the whole extent of this territory, formed by a series of highlands connected with the ancient plateau of Manica, that the geographical maps published in the two countries interested at the time when the treaty was drawn up, applied the designation "plateau" of Manica in reference both to the text of Article II. and to the intention of the negotiators.

The Portuguese Government, in its case (p. 70), with a loyalty which does honor to it, has made the following declaration:

"It is thus incontestable that the Portuguese negotiator had admitted that the plateau did not terminate at latitude 19°, and if his proposal of the 19th April had not proved this with sufficient evidence the demonstration would have been completed by the telegraphic instructions which he transmitted subsequently to the minister in London and which are published in the White Book of 1891, p. 196, document No. 200. This document alone settles the question. 'As a last attempt', said M. du Bocage, 'it would be well to propose to divide the plateau by latitude 20°, leaving to us the southern portion'. What was this *plateau* which reached latitude 20° and extended even beyond it to the south? Evidently it was that of Manica, as there never was any question of any other during the course of the negotiations."

This frank declaration, which is strengthened in the Portuguese memorandum by other observations and deductions of great value, leaves no doubt that the plateau of Manica, to which the treaty of 1891 refers, is not at all merely the small country of Manica of ancient geographers, but that it includes all the high ground between latitude 18° 30' and the confluence of the Save with the Lunte — that is to say, all the ancient kingdom or Plateau of Manica, together with the *plateau covered with grass* and the other *2,000 to 4,000 feet above the level of the sea* (? [sic], but the actual words on the map are: *Plateau between 3,000 and 4,000*. — Tr.), which are to be seen in continuation of the Plateau of Manica on Mr. Maund's map, which was certainly under the eyes of the negotiators (British Case, par. 20).

As to the true signification of the expression "partie supérieure" ("the upper part" — "a crista") of the eastern slope, the parties came easily to the agreement that in the treaty it can have no other meaning than that of the *line* along which, and generally in a well-defined manner, the plateau commences to descend towards the plain; or, in fact, it is the *upper edge* which separates the table (or surface) from the slope of the plateau, and not the upper portion of the slope of the plateau, situated above the line of its mean altitude. It is

precisely along this line or edge that the frontier is to be traced (British Case, par. 21, and Notes of the British Delegate, par. 19; Portuguese Case, pp. 71, 72, and 73). The words “il suit” (“it follows” — “acompanha”) would lose their proper signification if, instead of referring to a line which is to be followed as much as possible, they referred to a zone susceptible in its turn of being delimited by other boundaries.

This interpretation, which is certainly in conformity with the spirit of the convention, renders the two texts identical, and causes to disappear all difference between the expressions “upper part” and “crista” of the slope. They can not express, and do not in fact express, anything but a line, and this line could not be any but that which separates the table from the slope (“pente ou versant”) of the plateau.

The disputes as to the signification of the words “plateau,” “terrace,” or “esplanade of the plateau — and edge or escarpment” of the plateau — were brought to an end by the definitions which were adopted, and were accepted by both parties.

Thus, the Portuguese delegate, Captain d’Andrade, gave us an exact and complete definition, applicable in general to all plateaux, in the following terms: “A vast extent of ground which dominates in a manner clearly defined on one or more sides the regions which surround it, and which is connected with these regions by slopes the inclination of which is greater than that of the plateau itself.” A similar definition has been proposed by the British delegate in the British Case (par. 37), on the authority of the illustrious geographer, M. Élysée Réclus, and other very distinguished writers on this subject are not at variance with it.

It is therefore not necessary, according to modern geography, that the surface of a plateau should be an even and regular plain, as its name would appear to imply; but it may be, and even is, very often uneven, irregular, broken, covered with mountains, peaks, and hills, crossed by valleys, cut up by deep ravines, furrowed by rivers and streams, of which some have no exit from its surface or table, whilst others flow down its slopes and are of necessity cut by the edges of the slopes themselves.

Such is the configuration of the so-called Plateau of Manica. It is known as one of the most irregular and most mountainous. M. Réclus, adopting the description of the engineer Kuss, who has recently explored this region, and to whom the cases of both parties refer, informs us that it is a *group of mountains*, having the appearance of a plateau (E. Réclus, “La Terre”, Paris, 1888, Vol. XIII., pp. 618, 619).

Every plateau has its *table* or *esplanade* and its *slope* (“*pente ou versant*”).

There is an agreement to call *table* or *esplanade* all the ground which, though inclined and uneven on account of the existence of mountains or hills, maintains a pretty constant and uniform elevation above the level of the surrounding country, and where the waters flow more or less rapidly on the

more or less inclined surface, in their natural direction, ending their course there sometimes by forming lakes, but more frequently discharging themselves over the slopes.

It is agreed to consider the *pente* or *versant* (*slope*) of the plateau (these two words having been used synonymously) all the steep sloping ground which connects the table of the plateau with the adjacent plain. As the plateau, according to its most correct definition, can slope to one side or the other, it is evident that a mere inclination is not sufficient to determine the commencement of the slope; it must be well marked and general.

This line which separates the *table* of the plateau from its slope — that is to say, that which marks the extremity of the table and the commencement of the slope (“*pente ou versant*”) — is given the name of “edge” or “crest of the slope”. Taken in this sense, “*la partie supérieure du versant*,” of which mention is made in Article II of the treaty, is synonymous with the expressions “upper part of the slope” and “*crista da vertente*”.

The English expression “southwards,” which one finds in the same article, is not to be understood as meaning due south, but should be taken in a broader sense as in the direction of the southern side or pretty nearly towards the south. In this sense it is accepted by both parties and is perfectly adapted to the article above mentioned; according to which the frontier from latitude 18° 30' to the Sabi, confined between longitude 32° 30' and 33°, and having to follow the sinuous inflexions of the eastern edge of the plateau, cannot run in a straight line to the south, but has to bend sometimes to the southeast, at others to the southwest. (*Vide* Portuguese Case, p. 82, and Levenson's notes, No. 31)

As to the last question, whether, when in a conversation on delimitation one says, *follow a waterway*, it must necessarily mean *follow downstream*; as the two parties continue to disagree, we reserve the solution for the latter part of our award.

Having thus eliminated the question which we qualified as preliminary, we will now proceed to examine the two lines of frontier claimed by the parties.

II. *General conditions with reference to the frontier according to Article II. of the treaty.* — We must begin by acknowledging the rules laid down by the convention of the 11th June 1891, for the delimitation of Manica.

Article II of this convention lays down that the frontier on leaving the intersection of longitude 33° east of Greenwich by the parallel of latitude 18° 30' —

- (a) Follows southwards the upper part of the eastern slope of the plateau of Manica;
- (b) As far as the centre of the principal channel of the Sabí;
- (c) Then follows this channel to the point where it meets the Lunde;

(d) In tracing the frontier along the slope of the plateau no territory west of longitude 32° 30' east of Greenwich shall be included in the Portuguese sphere, nor any territory east of longitude 33° east of Greenwich in the British sphere;

(e) If necessary the line shall be deflected so as to leave Mutassa in the British sphere and Massi-Kessi in the Portuguese sphere.

The final result of the delimitation should be that the whole of the *plateau* — that is to say, the table or esplanade — should be adjudged to Great Britain, and all the slope (“*la pente* ou le versant oriental”) should be reserved to Portugal.

The fundamental rule is not written in the treaty; but it has been admitted by those who drew it up as a natural consequence, and is an essential and necessary condition, as the Marquess of Salisbury declared in a clear and characteristic formula in his reply to M. de Soveral on the 22nd April 1891: “The plateau for us” (Great Britain) “and the slope for you” (Portugal).

This reply was transmitted by M. de Soveral in his dispatch of the 22nd April to his government, which acknowledged it (*vide* Portuguese White Book of 1891, p. 188), and which not only did not protest against this proposition, but did not suggest any expressions to prove that it had other intentions.

Besides, the Geographical Society of Lisbon, having some time afterwards raised doubts with reference to this, Privy Councillor Ennes, Portuguese commissioner for the settlement of questions relative to the convention, undertook to dissipate them by declaring in a letter which he addressed on the 25th January 1894, to the president of the society (*vide* British Case, par. 19) that “the idea was to partition Manicaland so that the plateau — or to be more precise, the esplanade — should remain in the British sphere, whilst the slope should be in the Portuguese sphere.”

There therefore remains no doubt that the formula “the plateau for Great Britain and the slope for Portugal” has been clearly admitted as a guiding rule for the delimitation of Manicaland according to the treaty of 1891.

Now, we shall see how these rules have been applied and interpreted by the two governments.

What we have said of the mountainous and irregular configuration of the high mass to which the name of Plateau of Manica has been given, and the circumstance that the persons who arranged its delimitation from London and Lisbon could only have a very vague and imperfect knowledge of it, are sufficient to explain the serious differences of opinion which arose when it came to the point of applying Article II. of the treaty to ground, which presented at every moment surprises, unknown features, and topographical conditions far removed from what was expected and supposed, both by the authors of the treaty and the delimitation commission.

The greatest spirit of conciliation would barely have sufficed to overcome all the causes of disagreement. This good spirit, it must be confessed, was not altogether wanting, and its effects may be seen in the part — and not a small one either — of the line of demarcation about which an agreement was arrived at between Major Levenson and Captain Freire d'Andrade. The difference of opinion, however, notwithstanding lengthy negotiations, remains as regards the first and most important part of the frontier as well as regards other portions.

In order to settle all the points connected with the questions which have arisen, we propose to follow the order adopted in the joint note of reference (“Acte de Compromis”). We will therefore divide the line submitted to our arbitration into three sections, viz:

1. From the intersection of latitude $18^{\circ} 30'$ south by longitude 33° east of Greenwich to a point situated on this meridian at a distance of a few miles south of the defile of Chimanimani. In this section each government has adopted the line proposed by its commissioner during the work of delimitation and claims it before the arbitrator.
2. From the southern extremity of the first section to the point where the edge of the slope of the plateau cuts longitude $32^{\circ} 30'$ east of Greenwich. This section having been agreed to by the commissioners of the two governments, Great Britain asks that it should be adopted in its entirety. Portugal accepts the line agreed to in part only; for the remainder she proposes another line.
3. From the point at which the second section ends to the confluence of the rivers Save and Lunde. As regards this third section no proposal for delimitation having been discussed between the parties, Great Britain in its memorandum claims a line which would run southwards to the centre of the main channel of the Save, and would then follow this channel upstream to its confluence with the Lunde. The direction in which the line should be drawn is left to the decision of the arbitrator, but in no case must it extend to the west beyond longitude $32^{\circ} 30'$ and to the east beyond longitude 33° . Portugal refuses this line, and claims for special reasons another, which, departing from the rules established by the treaty, would run westwards to the Save.

No geographical map was annexed to the treaty nor to the joint memorandum, and in our opinion there is none which can be adopted as a sure and complete proof of the intentions of the negotiators of the treaty.

Not even can the map published by Mr. Maund in the “Proceedings of the Royal Geographical Society” and submitted by England, lettered A, and which forms the object of the third English conclusion, be considered as a map which was recognized as being accurate, especially as regards its details, during the negotiations.

Lastly, during the arbitration proceedings no map was produced which was recognized as being entirely accurate by both parties. They discussed much about the importance and accuracy of their maps, but unfortunately these discussions did not lead to any decided conclusion as to the value to be given to one of these maps more than to the other as regards the various features of the frontier.

It is an inconvenience much to be regretted, for in the absence of a solid and constant basis for discussion we are obliged to follow minutely the two parties through the arguments which they brought forward, and to seek section by section the intentions of the negotiators to make these arguments fit in with the text of the treaty and the facts established by the examination and comparison which we have made of these different maps, and by the impartial observations of a third expert.

III. *First section of the frontier.* — In undertaking the examination of the lines claimed by the high contracting parties in the first section, we observe, first, that in this section (which is the most important and the most contested, on account of the value attached to the territory) the two governments, not having succeeded in coming to an agreement, either during or after the work done by the delimitation commissioners, now claim lines quite distinct and very distant from each other.

In fact, Great Britain claims a line which, according to a definition given by the British commissioner in a first memorandum, dated the 29th April 1893 (*vide* Portuguese Case, p. 38), “is in parts the crest line of mountains, in others a line joining the summits of the eastern peaks of the ranges which run out eastwards from the main watershed,” and more particularly as regards the district between Mount Vumba and the Mabata Mountains, the British commissioner declares that his frontier “is a line running nearly due south, and joining the well-defined eastern edges of the mountainous spurs which project in an easterly direction.” (*Vide* minutes of the meeting held on the 27th June 1892, reproduced in the Portuguese Case, p. 22.)

The principal mountains attained by the British line after leaving latitude 18° 30' are Panga, Gorongue, Shuara, Vengo, Saddle Hill, Vumba, a peak north of the river Mazongue (2,350 feet), another peak on the Mussapa River (5,100 feet), and the col of Chimanimani. All these points of different altitudes are connected by straight lines, which the British commissioner justifies by the observation that straight lines between well-defined natural points form, in his opinion, a good practical frontier.

The Portuguese commissioner objects to this line —

1. That it is not a natural line; that it does not follow any edge marked on the ground, that [it] is all artificial, drawn on the map with a ruler, and not in accordance with the nature of the plateau.

2. That it does not reach the highest points of the mountains where it passes them; that it crosses the edges of the spurs which project towards the east rather than the general mass of the plateau, and that, in consequence, it crosses the eastern slope.
3. That in drawing straight lines which connect the chains and spurs of the mountains or the peaks, many water courses, mouths of ravines, and broad and deep valleys like that of the Inhamucarara are cut, and also that it is not continuous, as it projects often onto the slope, and descends sometimes to low ground, notably between Vumba and Chimanimani.
4. That such a line cannot be in accordance with Article II. of the treaty, which requires a natural line traced along the upper part or edge of the slope of the plateau.
5. That a straight line may be, in the abstract and as a general rule, a good frontier, but that it is not admissible in [the] case in which another direction has been laid down in a convention.
6. Lastly, that the deflection which the line makes to include Massi-Kessi in the Portuguese sphere does not leave round this village, as it should in accordance with the spirit of the convention, an extent of territory sufficient for the development of its commercial and industrial life, as well as for its military defence.

After these objections had been made, the British delegate, in a map which he submitted at the meeting of the 14th July, bearing his signature of that date, introduced into his line two small modifications, one of which changes the point of departure from latitude $18^{\circ} 30'$, from which it ascends to a peak on the northern spur of Mount Panga, and the other does away with a detour towards Shiromiro between Mount Shuara and Mount Vengo, which did not appear justifiable.

The Portuguese line follows quite a different direction. It is traced along the crest of the high mountains which form the watershed between the basin of the Save and the basins of the Pungwe and the Busi, and, starting from Mount Samanga, it follows the watershed to Chimanimani. The Portuguese commissioner maintains that this line coincides with the edge of the eastern slope of the plateau. The table or esplanade would thus remain to the west of, and the slope to the east of, the watershed.

He points out, besides, that the frontier claimed by Portugal passes through the highest points of the plateau without descending into the valleys or cutting them or their rivers; that east of this line the ground falls, and numerous water courses run from it towards the plain with a rapidity which is in some cases torrential; that it is precisely the declivity of the ground and the direction of the rivers which determine the commencement of the incline and the edge of the slope.

Great Britain objects to the watershed line for the following reasons:

1. It has the fault of confounding the most elevated crest line of the plateau with the edge of its slope and supposes that one cannot find the edge till one reaches the summit of its highest chains of mountains, whilst all the mountain chains of Manica, whether turned towards the east or towards the west, form part of the mountainous plateau.

2. The country immediately east of the line of watershed being composed of mountain chains, and being furrowed by rivers and deep valleys, in accordance with the nature of a mountainous plateau, does not represent a slope, of which it has not the characteristics. It is true that more or less rapid streams flow through it, but the great irregularity and inequality of the table of the plateau suffice to explain the more or less rapid flow of its rivers, and to prove that they traverse the table or surface of the plateau before reaching its edge, which necessarily cuts them. Also, as it is here a question of a mountainous table, it can easily be conceived that it should have a certain inclination before reaching the beginning of its slope, which would be recognized by having a well-defined and general fall.

3. What is more essential is that the watershed as frontier is in no way in conformity with the text of the convention, which makes no mention of it, even indirectly. The silence of the convention on so important a point is of the greatest value, for it must be remembered that a watershed is such a very usual frontier line, and so excellent a one in a mountainous country, that if the high contracting parties had wished to adopt it they would have made explicit mention of it, as they have done in Article I. of the same convention, in which the watershed is mentioned as the frontier in certain parts north of the Zambezi.

But there is more than the silence of the convention; there is a formal refusal by Great Britain. During the course of the negotiations the watershed was proposed as the frontier line in the draft which M. du Bocage, minister of Portugal, submitted on the 19th April 1891; and it was refused by the Marquis of Salisbury, the British minister, who insisted on his draft of the 3rd of that month, which contained the proposal of the edge of the eastern slope as the frontier line. This refusal suffices to exclude the possibility that the Marquis of Salisbury, at the time of the conclusion of the treaty, considered the watershed and the 33rd meridian as identic, for between the two lines (no matter what may have been the idea expressed by mistake in Lord Salisbury's dispatch of the 4th February 1891) there exists a difference of several miles.

So that Portugal invokes to no purpose the expressions contained in that document, and all the more so because she rejected the proposal to follow approximately the 33rd degree of east longitude, which was the principal object of the conversation reported in the above-mentioned dispatch of the 4th February.

Besides this, it is to be observed that it was on purpose to assure to Great Britain the strip of territory between the watershed and the line of the edge of the eastern slope that Lord Salisbury increased from 18,000 to 60,000 square kilom. the compensation or rectification north of the Zambezi offered to Portugal, which she accepted (British Case, par. 17).

4. If one agrees with Portugal that the whole portion of the plateau of Manica situated east of the watershed is an *eastern* slope, the portion situated west of this watershed could, with equal reason, be called *western* slope, seeing that the watershed cuts in two the mountainous table which stretches as well to the west as to the east. From this there would result the absurd consequence that the plateau of Manica would have no table, as it would be entirely absorbed by its two slopes.

Portugal always based its defense on the existence of a great stretch of territory west of the watershed, referring to its maps, which show the River Odzi in the Strait ("détroit") of Umtali (Mutari Port) at a distance of 40 kilom. from that town. But during the course of the discussions Major Leveson proved, and Captain d'Andrade was unable to dispute, that the Odzi is only separated from Umtali by a distance of about 15 kilom. (Major Leveson's final observations, note to No. 7).

The extent of the plateau west of the line of the watershed is therefore not so very considerable, and this line is only a central crest of the plateau, the table of which necessarily stretches out on both sides, to the east as well as to the west.

IV. *Examination of the report of the third expert.* — In presence of such a difference of opinion as to the meaning and exactitude of the maps submitted by the two parties — in view of the arguments of an essentially technical character which they deduced from them, all our efforts to render possible an amicable settlement having proved ineffectual — in order to reassure our conscience, we recognized the extreme propriety of having recourse, with the consent of the two parties, to the opinion of an expert specially qualified in questions of geography and topography.

For this purpose we addressed ourselves to the management of the Military Geographical Institute of Italy, situated at Florence, and, following the advice given to us, appointed as expert the Chevalier Raphael Vinaj, major of the general staff and chief of the topographical division of the above-mentioned institute. We communicated to him all the documents and maps which had been presented in the name of the two parties, as well as the minutes of the meetings, and we submitted to him the following questions:

What is, from the intersection of latitude 18° 30' by longitude 33° east of Greenwich to the col of Chimanimani, the frontier line which follows the upper part of the eastern slope of the plateau of Manica, according to Article II. of the treaty of delimitation of the 11th June 1891? Is it altogether, or in part, the line drawn on the Map D of the British Government? Is it entirely, or

in part, the line drawn on the Map C of the Portuguese Government? Is it altogether, or in part, some other line?

In the last case, what is the line which, with reference to the maps mentioned, should be drawn so as to be in conformity with Article II. of the treaty of the 11th June 1891?

In submitting these questions in our letter of the 10th October 1896, we invited him to bear in mind the following:

1. That the watershed, having been proposed by Portugal and refused by Great Britain during the negotiations, and not having been admitted in the text of the treaty, could not be approved as the frontier line agreed to between the high contracting parties, except in so far as it should be found to coincide with the upper part of the eastern slope and the other provisions of Article II of the treaty.

2. That from the documents exchanged during the negotiations it appears that the high contracting parties had agreed that the delimitation should be carried out in such a manner as, according to the expression used by Lord Salisbury, to leave the plateau to Great Britain and the slope to Portugal.

The expert, having carefully completed his task, submitted to us a report, dated 19th December 1896, which proved to us how well founded were the doubts which we had conceived as to the justice of each of the lines claimed as regards the text of the treaty and the avowed intentions of the parties.

We consider it right to give it in some detail, in order that the conclusions may be understood.

After having examined with the greatest diligence the various characteristics of plateaux, upper and lower slopes (called by geographers *reclining or upright "couchés ou debout"*), and their escarpments, and the various acceptations of these words in science, in the practical study of localities, and in the documents submitted for arbitration, Major Vinaj lays down as the basis of his decision the following four postulates or geographical principles:

1. The upper part *or table* of a plateau, as it is accepted in the largest sense of the word by modern geographers, can be the more irregular the more extensive it is; that is to say, that it may include peaks, mountains, and mountain chains, and that it may be furrowed by valleys and even by deep ravines.

2. The division between the upper part *or table* of a plateau and its slopes (taken in the sense of the surfaces which unite the plateau to the low-lying region, that is to say, that part of the general slope which is distinguished by the name of "upright slope" or "versant debout") can in general be formed by a line (an edge or crest more or less well marked) beyond

which the ground falls more rapidly and in a well-defined manner towards the lower region.

3. The continuity of this line may be broken by valleys or ravines which are the prolongation of those which furrow the plateau and produce real notches.

4. The surface which forms the slope is not necessarily always even and regular, but may also be composed of various formations, by chains at angles to the longitudinal run of the edge of the plateau, or by valleys and chains parallel to it, which grow gradually lower, and this variety of regular and irregular slopes may be found in one and the same plateau, especially if it is of considerable extent.

Then Major Vinaj, proceeding to examine the questions submitted to him, adopts, as regards the first question, the conclusions, which he says are identical, of the two commissioners, according to which the frontier should follow the line which constitutes the edge or crest which defines the separation of the table of the plateau from its eastern slope.

It is in the search for this line of separation that the disagreement between the two commissioners shows itself. It therefore becomes necessary to examine bit by bit the two lines claimed. The reasons which justify this opinion having been developed and discussed at length by the commissioners in their written production, and orally at the meetings, he confines himself to summing up those which he considers of most importance.

As regards the modified British line, he remarks that, with the exception of the first portion from 18° 30' to Mount Venga, and the last portion close to Chimanimani, it is almost an artificial line, which is only justified by the preference which the British commissioner gives to straight lines between well-defined natural points.

But this preference not having been sanctioned by an agreement, which would have been permissible under Article VII. of the treaty, it is necessary to confine one's self to investigating whether it is in conformity with Article II. And he is of opinion that it is not so, because it does not follow any natural topographical feature, such as the edge of the slope; but that, connecting by straight lines points with project, sometimes considerably, on to the surface which sinks and forms the slope, it often cuts the latter, and descends even occasionally to the region which may be described as that of the lowlands below the plateau. He deduces therefrom that the British line between Mount Venga and the height marked 5,100 feet on the left bank of the Little Mussapa (Map D) is not in conformity with Article II. of the treaty.

As regards the Portuguese line, the expert remarks that it follows throughout, except in the modified northern portion (*vide* minutes of the meetings of the 13th and 14th July), the crest of the chain which forms the real watershed of the region of this section. As a rule, the edge of a plateau does

not coincide with the watershed, as would appear even from the definition of a plateau given by Captain d'Andrade (*vide* section 1, "preliminary questions"), except in cases where from the watershed the ground, falls in a marked and almost uniform manner, or falls gradually, even with short detached spurs, or with parallel chains and valleys, towards the low ground.

Now, these conditions, after a careful examination of the maps and surveys, both English and Portuguese, are only realized in two places, viz, around the basin in which Massi-Kessi is situated and between Inyamatumba and a point situated due west of Mount Guzane (Portuguese map) on the left bank of the Little Mussapa.

The watershed chain, which is highest, especially in the southern portion, includes almost everywhere the most pronounced elevations of the country, and, except in the two places above mentioned, is surrounded, not only to the west, but also to the east, by a district remarkably elevated, especially in its northern portion above Mount Venga, in which in reality are found the highest summits.

The claim to trace the delimitation for the whole length of this section exactly along the crest of the watershed does not appear to be in conformity with the definition of the plateau and of the slope given by Captain d'Andrade, because one would come to consider as slope all the ground inclined towards one direction, whilst, according to this definition, the table of the plateau may be inclined and the edge of its slope not commence till the point where the inclination of the ground becomes well marked and general.

And one can not maintain that this crest coincides throughout the section with the edge of the eastern slope, because along the greater portion of it, immediately beyond the crest, there is also to the east a gentle slope, which at a certain point in its fall becomes much steeper (Mount Vumba-Inyamatumba), and which constitutes, therefore, what Colonel de la Noë («Les Formes du Terrain», Paris, 1888) has called the *upright* ("debout" or lower slope, in opposition to the *reclining* ("couché") or upper slope, which still forms part of the table of the plateau.

Therefore neither is the Portuguese line in its entirety in accordance with Article II. of the treaty.

Thus, having reached the examination of the last question, the expert, with the assistance of a series of sections at intervals of 2' 30", drawn as carefully as possible from the maps, and with the remark that certain elements necessary for this kind of work were wanting, shows that the line which is in conformity with the treaty is in part different from either of the lines claimed by the two governments. He divides it into four parts, and traces it as follows:

First part. — Starting from latitude 18° 30' south, near the confluence of the Garura and the Honde, which corresponds with the narrow gorge between Mount Mahemasemika and the northern spur of Panga on the British map, and immediately below the point marked 760 meters, a little above the said

parallel on the Portuguese map, the line ascends to the summit of the above-mentioned spur to Panga. Then, on the British map it runs to the southeast (point marked 3,890 feet) and crosses the River Inhamucarara to the height marked 6,740 feet north of Gorongoe, whilst according to the Portuguese map it runs from Panga to the southeast (point marked 1,257 meters) and crosses the Inhamucarara to the height north of Gorongoe (1,810 meters). Thence it follows the crest of the Gorongoe by Mount Shuara (5,540 feet, British map) to Mount Venga or Vengo (British and Portuguese maps).

This part of the section may be justified by observing that the basin of the Honde from its sources to the gorge, well defined by the spur of Mahemasemika on the north and that of Panga on the south, forms part of the plateau, because its general altitude is very considerable, and it is inclosed by an extensive and elevated country which evidently forms part of the plateau. The gorge whence the Honde issues must be considered as a true notch in the edge of the plateau, after which the slope descends by an almost uniform gradient to the region of the River Pungwe.

Descending to the east from the Portuguese line there is no general slope, but the ground after a certain fall ascends again towards the very elevated region of Panga and Gorongoe. Thus it is only beyond this last mountain that the true eastern slope of the plateau commences with a pretty steep inclination.

The mountain masses Pungwa-Panga and Venga-Shuara-Gorongoe can not be looked upon as parallel chains forming an integral part of the eastern slope, because their elevation and importance, as well as the general elevation of the lands and valleys which they inclose, show evidently that they still belong to the surface of the plateau.

And in fact the upper valley of the Inhamucarara, inclosed by these two chains, cannot be considered as a water course of the eastern slope, because, independently of its general elevation, owing to its narrow and little practicable bed, it has altogether the appearance of a true and deep notch in the table of the plateau; and its direction north-northeast is very different from the eastern direction of the slope.

The objection that this line starts from a very low point on latitude $18^{\circ} 30'$, and that this point at first sight does not appear to be situated on the edge or crest one is in search of, is of no weight, because it happens by chance that latitude $18^{\circ} 30'$ corresponds exactly with one of the deepest notches, which causes the edge to be noncontinuous.

Second part. — Leaving Mount Venga it follows the crest which runs towards the west-northwest and towards the point marked 6,200 feet on Gomoriyangani (British map), or to the east of the point marked 1,620 meters on Mabonde (Portuguese map). Thence, on the British map it follows the line coloured blue, which, following the crest of the above-mentioned Gomoriyangani, reaches Mount Snuta (5,570 feet), Mount Chenadombue (4,700 feet), and the height marked 4,510 feet, and the sources of the Menini,

where the col is marked 3,750, by which the road called by the name of "Selous Road" passes; whilst on the Portuguese map it follows the crest of Mabonde, reaches Mugudo, Lapulare (1,600 meters), Chitumbo (1,530 meters), and passes to the east of Bumbuli, to a point where the spur of Ihamazire projects towards the west. From this point, describing the arc of a circle with its concavity nearly towards the northeast, it joins the spur which runs towards Mount Vumba (or Serra Chitumba on the Portuguese map), cutting the upper valley of the Munene or Menini.

The justification of this part of the line is as follows: It circles round the region of Massi-Kessi from Mount Venga to Mount Vumba, leaving thus in the Portuguese sphere the upper valleys of the Revue, Zambusi, and Menini, which, being more open and separated by narrow spurs with a steeper fall, form part of the eastern slope.

The spurs between the Revue and its affluent, the Chua, the one which projects from Chenadombue and finishes at Saddle Hill (British map) or Maritza (Portuguese map), and the one called Clarke's Hill may be classed among the spurs mentioned in the fourth postulate above referred to, and must be considered as forming part of the slope.

Lastly, the proposed line starting from the col marked 3,750 feet on the British map runs towards Vumba, because to its right and to the south of the valley of the Menini there is such a general increase in the elevation of the ground that it must be considered as belonging to the plateau.

Third part. — Leaving Vumba the line makes several bends, so as to follow southwards the crest of the steepest slope. It crosses the upper valleys of the Zombi or Zombe, of the Mazongwe or Zomoe, reaches Mount Matura at the point marked 4,495 feet (British map), where is situated the trigonometrical point which is shown on the Portuguese map at a distance of 2,500 meters west of the point marked 596 meters on the prolongation of the Serra Chaura, and then continues, crossing the upper valleys of the Mangwene and Pambe or Ihamatoca, of the Litanti or Bonde, and of the Inyamangwene, to the eastern extremity of Mount Inyamatumba at the point marked 4,650 feet (British map); that is to say, to the southwest of Chabua (Portuguese map).

This part of the section is justified by the remark that between it and the Portuguese line there is included all the high ground which commences a little south of the Menini, and in which are found the upper valleys and drainage areas of the above-mentioned torrents, and which without doubt forms part of the table of the plateau, whilst the whole way along this line there is an échelon or sensible change of slope which marks the true edge, at which the eastern slope, properly so called, commences. On looking attentively at the British map D one easily perceives the characteristic difference of the ground situated between the streams Zombi, Mazongwe, Mangwene, &c., and that included between the narrow spurs of Saddle Hill and Clarke's Hill, and between the Revue, Zambusi, and Menini, which belong to the slope.

Fourth part. — From Mount Inyamatumba the line, ascending a spur of this chain towards the west, again rejoins the Portuguese line, and follows it along Mount Kokoboudira (British map), or Choanda (Portuguese map), to the point marked 1,500 meters (Portuguese map); that is to say, to the northwest of the point marked 5,100 feet (British map). From this point, turning towards the east, it crosses the upper valley of the Little Mussapa, and reaches Mount Guzane (Portuguese map), rejoining, after cutting off the angle made by the English line, longitude 33° east of Greenwich, and following it to Chimanimani, after having crossed the Great Mussapa.

This last part of the line proposed is justified as follows:

The same reasons for which the Revue, the Zambusi, and the Menini were acknowledged as water courses of the slope, force one to the conclusion that the Mangwingi (British map), or Munhinga (Portuguese map), can not be a water course of the plateau. The same must be said of the other torrents farther to the south, as far as the Little Mussapa, with the exception, however, of the last mentioned; because the upper valleys of the Little and the Great Mussapa form part of a region much more elevated, and which belongs to the plateau by the admission of both parties. The line once having reached the 33rd meridian follows it to the south in accordance with the stipulation of Article II. of the convention, which forbids that the line should cross this meridian for the benefit of Great Britain.

The learned and careful report of the honorable expert has thus wrought into relief all that is improper in the lines of the two governments, and in rectifying them has proposed to us a third line, which, having been examined by us with the greatest care, and compared with those of the two parties, appears to us to be exempt from the faults which have always been evident to us in both of them, and which prevented us from pronouncing ourselves in favour of one or the other.

We have in fact, in the proposal of the expert, a natural line, which, in its tortuous course, conforms as far as possible to the mountainous configuration of the plateau, and which, following the heights which define it and form its eastern slope, runs along the upper part or edge of this slope. It therefore only cuts those water courses and valleys which, in consequence of the elevation of the ground, must form part of the table of the plateau; and it leaves in the slope the others, which have a lower altitude and steeper gradient.

We may add that this line is a just application of the treaty, as it does not adopt as frontier the watershed except in those places where it is proved that it coincides with the edge of the plateau, which is in conformity with the letter and spirit of Article II.

So we see that in its *ensemble* this line encroaches neither on the surface of the plateau nor on that of the slope, but that it fulfills, as far as the irregularity of Manica allows, and as is possible with the maps submitted, the

final object of the delimitation, summed up in the words “the plateau for Great Britain and the slope for Portugal”.

Furthermore, this line leaves in the Portuguese sphere the whole district of Massi-Kessi, running along the summits of a kind of mountainous amphitheatre, which seems to have been made by nature as a territorial limit and rampart towards the west.

The aspirations of Portugal with respect to this had an insufficient guarantee in the text of the treaty, and the intentions of the negotiators were not clearly enough manifested to serve as a basis for a judicial decision. But we have, nevertheless, recognized that these aspirations find their foundation in a happy correspondence between a line traced by nature and the inspirations of equity.

For all these reasons the line proposed by the expert appears to us to possess all the characteristics required by Article II. in the frontier between the spheres of influence of the two countries, and seems to be the only one which is in conformity with the letter and spirit of the treaty. Consequently, we should be inclined to adopt it in its entirety with full conviction.

But on reflection we find that the trace of the line proposed by the expert from Mount Vumba to Inyamatumba, though technically accurate, might, owing to its numerous inflections and the difficulty of defining accurately its course on maps giving so little detail, whether it be on account of their small scale or the rapid system of survey adopted, easily give rise, on ground as irregular as it is, to doubts and differences of opinion which should be carefully avoided.

In consequence of this we considered it desirable to ask the same expert to point out to us in this locality a better-defined and more practical line.

In accordance with our invitation, of which he recognized the opportuneness, the expert pointed out slight modifications which might be introduced into his trace, substituting some nearly straight and better-defined lines for the natural inflections of the edge of the slope, but in a manner so that the extent of ground which each party gets by the substitution of straight lines for the rigorous demarcation of the edge remains almost equivalent.

He proposes, in consequence, that from Mount Vumba the frontier shall run in a straight line to a trigonometrical point situated between 4 and 5 kilom. to the east of the watershed (Serra Chaura), and from this point that it should continue in a straight line to a point marked 4650 at the eastern extremity of Inyamatumba. Thence it would follow this mountain and rejoin the line already proposed.

These modifications appearing to us to be in accordance with the aim of rendering the delimitation easier, more practical, and better defined, we have made our decision accord with them.

Following the division adopted in the joint note of reference, we add, to complete the first section of the frontier, that after Chimanimani the frontier continues to follow, without doubt, the 33rd meridian to the point marked A on the British map, some miles south of the defile of Chimanimani.

V. *Second section of the frontier.* — The joint note of reference informs us that, as regards the second section of the frontier, an agreement was entered into between Major Leveson, the British commissioner, and Captain d'Andrade, the delegate of the Portuguese commissioner, on the very ground which they were to delimit.

This agreement is admitted in the cases which the two parties have presented to us, but with this difference, the British Government maintains it, and claims the adoption of the whole of it, whilst the Portuguese Government, basing itself on Article 15 of the regulations for the execution of the delimitation signed at Mozambique on the 24th October 1891 by the commissioners of the two countries, insists that the acceptance of the agreement signed by Captain d'Andrade, the technical delegate, could not be definitive and obligatory on him, unless he gave it his approval, which he did not do before the arbitration.

In fact, it is not for the first time in the case presented to the arbitrator that the Portuguese commissioner declared that Portugal approves the Leveson-d'Andrade agreement, *even in part only*, viz., from Chimanimani to Mapungwana (Portuguese Case, p. 98).

In support of this partial approval the Portuguese commissioner remarks that in the portion which he has accepted the delimitation agreed to is exactly in conformity with article II. of the treaty until about latitude 20°; that south of this parallel, till about latitude 20° 30', the relief of the ground is so irregular that it is difficult to apply to it the rules of article II.; that *the table and the slope* of the plateau are there so badly marked, on account of the irregularity of the river system and the absence of well-defined general lines in the configuration of the ground, that it is almost impossible to determine with precision what is the line which separates them — that is to say what is the edge of the eastern slope. It was only by a spirit of conciliation, according to him, that the serious questions which presented themselves in the delimitation were eliminated, because “the ground lends itself to be *interpreted* in different ways” (Portuguese Case, p. 93). Lastly, in this portion, the line agreed to, even in the opinion of those who traced it, does not follow the crest of the slope (*vide* observations on the British Counter Case, No. 32, *et seq.*), so that here the rules of Article II. were only followed as far as it was possible.

In other words, though this demarcation may, perhaps, not be absolutely correct, the Portuguese Government acknowledges that the ground in this instance does not admit of any other, the accuracy of which would be less open to dispute.

But it thinks the same can not be said of the prolongation of the line from Mapunguana to latitude $20^{\circ} 42' 17''$, and it therefore rejects this last part of the agreement, and proposes to substitute for it a new line which would follow the mountains of Xerinda to Mount Zuzunye, and which, passing through the altitudes marked 990, 1,150, and 960 meters, which separate the basin of the Zona from that of the Chinica, would be naturally determined by the orographical relief. This line, Portugal adds (Observations on the British Case, No. 68), avoids the useless detour made by the line agreed to, which, from Mapunguana, runs toward the southeast across the Inhamazi, to reach a height marked 1,100 meters, and then descends to altitudes of 670 and 760 meters. And, whilst it is almost rectilinear, it preserves a mean altitude of 1,110 meters, and has a greater regularity than that of the line agreed to.

The British Government, as we have said, claims the maintenance of the whole of the agreement, according to which the line, having reached Mapunguana (point marked H on the British map), makes a sharp angle, turns to the southeast, and runs straight to a well-marked hill east of the river Zoma, or Zona, and then continues to a point situated on the range which separates the valley of the Zoma from that of the Sheneyka, or Chinica, after which, turning almost due west, it runs in a straight line to the summit of Mount Zuzunye.

Against the adoption of the rectification claimed by Portugal, Great Britain advances two objections — one legal and the other technical.

The legal objection consists in the special character of the Levenson-d'Andrade agreement. It is admitted on both sides that this agreement, taken as a whole, represents a transaction discussed and accepted on the ground itself in consequence of mutual concessions by technical experts who had acquired a personal knowledge of the localities, and were very competent to form an opinion of their topographical characteristics.

The above-quoted description which Portugal has given of the very irregular and hilly country which the line agreed to traverses to Mapunguana enables us to understand clearly how much give-and-take was necessary to enable this line to be traced. The British commissioner declares that, in the desire to arrive at an immediate solution, he decided to accept the modifications of his first proposals suggested by Captain d'Andrade, though he felt convinced that the first line corresponded more accurately to the terms of Article II. of the treaty.

The extent of the concessions made by the British commissioner is shown on the British map D, on which the dotted red line represents the frontier at first proposed by him in those places where it does not coincide with the line agreed to, viz, from C to K. One sees from this map that the portion *accepted* by the Portuguese delegate is very important; he declares himself, in his case (p. 93), that it is *the greater portion of the delimitation* which was agreed to. It is just there that the largest concessions were made to him; of these concessions he wishes to take advantage.

Besides, the manner in which this compromise was effected is explained to us even by Captain d'Andrade in terms which it may be useful to quote: "The Leveson-d'Andrade line" (says he, at No. 100 of Observations on the British Case), "was traced by making mutual concessions; there was the Leveson line and the d'Andrade line, and after prolonged discussions on the ground, in order to afford proof of a spirit of conciliation on both sides, the line above mentioned was determined on, though each was persuaded that his line was more in conformity with the text of the convention."

The language of the delegates of the two governments affords evidence, therefore, that the whole line agreed to was the result of a compromise or of a transaction which could not be repudiated without going against the intentions of its authors, and without wounding justice at the expense of one or the other of the parties. Of this agreement one must say that it must be taken in its entirety or dropped altogether. Portugal, which accepts the greater part which is to its advantage, can not reject the other to the disadvantage of Great Britain without evidently disturbing the balance of justice and deranging the equilibrium between the parties.

The want of full powers as regards the Delegate d'Andrade, to which Portugal calls our attention in many memoranda which are included in its case, even if it were proved in an irrefutable manner, could not be accepted as an argument in favor of Portugal, except in the event of that power rejecting the agreement altogether and proposing a new line in lieu of the whole of the one agreed to.

But Portugal pretends that in this matter it only makes its line conform to the convention.

Great Britain contests this statement by the second objection, which we have described as technical. Its delegate at No. 15 of his *final observations* remarks that the Portuguese line from Mapungwana to Mount Zuzunye, *is, it is true, a natural crest line, but it is a crest situated on the plateau and not the edge of the plateau*. On examining the English map D one sees in fact that the slope from this crest to the northwest towards the Umswilizi is much more rapid than the general slope on the other side towards the southeast and the district of the Umswilizi (or Moussurize), which river, even according to Captain d'Andrade, is without doubt a true river of the plateau. (Observations on the British Counter Case No. 68.)

The Portuguese Government seeks here, it would appear, as in the first section, for the edge of the slope on the most prominent heights, and again confounds a crest line of the plateau with the crest or edge of its slope. If the line of the eastern edge descends to a lower altitude in this locality, it is the natural effect of the gradual depression of the whole plateau of Manica, which is seen to the west of the line on proceeding southward from the Lusitu. This general inclination of the country and of the table of the plateau itself must not be confused with the slope ("pente ou versant") which becomes lower naturally with the lowering of the plateau.

One must have before one, besides, the avowal of the parties (to which we have already drawn attention) that this section of the line is the result of mutual concessions, so that if in its course there should be some features not altogether regular or in conformity with the exact application of Article II. of the treaty, these irregularities compensate each other reciprocally; and if beyond Mapungwana there is some advantage for Great Britain, Portugal has, on the other hand, large compensation in the concessions which were made to it in the much greater portion which precedes Mapungwana and in that which follows [*sic?*].

We consider, then, well founded the two objections of Great Britain. Though they be essentially distinct they afford mutual support to each other, and the two together bring us to the conclusion that the partial acceptance of the agreement, together with the modification proposed by Portugal between the point *H* and the point *M*, is as contrary to the principles of justice as to the rules of Article II. of the treaty. For this reason the agreement ought, in our opinion, to be maintained as far as Mount Zuzunye.

As regards the last part of this section to the point *O*, we will discuss it when we examine the third section, to which this part was united during the discussion by the delegates.

VI. *Third section of the frontier.* — The line once carried by the delegates of the two governments to the summit of Mount Zuzunye, a great divergence of opinion arises as to the interpretation and application of the convention to the ground which remains to be delimited before the Save is reached.

For the British Government, on leaving the summit of Mount Zuzunye (point marked *M* on the map D), the line crosses the valley of the Umswilizi to a high point on the watershed which separates the valley of the Nyamgamba from that of other affluents of the Umswilizi (which are all rivers of the plateau), and follows the line of the agreement to the point *O* where it meets the meridian $32^{\circ} 30'$.

This small part of the frontier is the last section of the line agreed to by Major Leveson and Captain d'Andrade, and one must in consequence apply to it all the remarks which we have made above on the indivisibility of the proposed agreement as a bilateral transaction which admits of no alteration. The appreciable fall of the whole plateau in this part and its deviation to the southwest naturally cause the line, which runs along its eastern edge, to bend toward the west as far as meridian $32^{\circ} 30'$; then stopping at this meridian, fixed as the extreme western limit by Article II., it follows it to the Save, leaving in the Portuguese sphere all the territory situated east of the aforesaid meridian.

We consider it opportune to remark here, that the agreement having caused the line to recede to the west, the result is that in its course from the point *M* to the point *N*, it causes to be included in the Portuguese sphere the triangle *LMN*, the importance of which is seen on the Map D, and the whole

of which triangle forms part of the district of the Umswilizi, which is situated on the plateau. This is, then, another considerable concession to the advantage of Portugal.

The English line taken as a whole in this last section would be in conformity with the conditions required by the treaty, viz, that the direction towards the south follows the deviations of the edge of the plateau, and the limitation of the parallel [*?sic*] $32^{\circ} 30'$ to the west.

The Portuguese Government, on the contrary, considers itself authorized by the configuration of the country in this part to follow quite another direction, and deviate from the conditions laid down in the treaty.

Taking as a basis the supposition that the depression of the country between the latitude of Mount Zuzunye and the channel of the Save is so marked that the Plateau of Manica and its slope cease altogether to the south, the deduction is drawn that the frontier can no longer follow its eastern edge towards the south. There arises, says Portugal, a case not foreseen, or omitted in the treaty, for the treaty supposes that the plateau is prolonged southwards to the Save. From that moment the rules laid down in Article II. cease to be applicable, and they must be supplemented by having recourse to the general principles of diplomatic interpretation, according to which when in a delimitation convention it is stated that a line has to go from one point to another, without specifying the course, it must proceed there straight by the shortest route.

In applying this rule to the supposed case the Portuguese commissioner maintains that the frontier being unable to run *southwards* to the Save as required by the treaty, it must proceed thither westwards by the shortest route, so as to follow the course of the river downstream to its confluence with the Lunde. He adds that this would be in conformity not only with the intention of the negotiators, who only had in view to leave all the plateau to Great Britain, but also with the principles of justice and equity, which militate [*?sic*] in favor of Portugal, and lastly with the expression used in the treaty, "follows this channel to its confluence with the Lunde," as *follow a water course*, according to him, signifies rather *follow downstream* than *upstream*, which the English line would do.

Rejecting on account of these arguments the line proposed by Great Britain, Portugal considers it *just and rational* that the frontier from about $20^{\circ} 30'$ should run to the Save by Mounts Nero and Zuzunye and by the River Lacati, following thence the course of the Save to its confluence with the Lunde.

And as this line would extend beyond $32^{\circ} 30'$, an endeavor is made to overcome this difficulty by remarking "that the meridians 33° to the east and $32^{\circ} 30'$ to the west only figure in the treaty as limits which the frontier in its course must not cross so long as it is a case of tracing it along the edge of the eastern slope of the plateau; hence, he concludes, these limits count for

nothing in the delimitation of a country in which the plateau and the slope are wanting.” (Portuguese Case, p. 97)

The reasoning, of which we have above given a summary, appears to us rather specious than solid, and to be founded really neither on fact nor on right. Two questions are raised by it taken as a whole: (1) Whether the Plateau of Manica really ceases to exist in the south before reaching the Save; (2) whether if the answer be in the affirmative the deductions drawn therefrom are legitimate.

1. We will commence by remarking that the topographical officers who settled in agreement the frontier from the point *M*, the summit of Mount Zuzunye, to the point *O*, where the edge cuts $32^{\circ} 30'$, must have recognized in this stretch the existence of the plateau and the slope, which was a necessary condition of the line adopted.

Major Leveson remarks (No. 30 of his Notes) that the supposition of the treaty that the slope of the plateau, without ceasing to be an eastern slope extended to the Save, was perfectly justified by Mr. Maund’s map, in which it will be seen that the edge of the plateau after having crossed meridian $32^{\circ} 30'$ runs in a direction nearly southwest to the Save; and that, in fact, the examination of the ground proved that the general deflection west of this meridian given to the edge on this map is not very inaccurate. He adds that he does not in any way admit that the plateau ceases to exist south of Mount Zuzunye, as this mountain is situated, he says, to the east even of the great watershed, and precedes [*sic?*] the triangle *LMN*, the whole of which is included in the district of the Umswilizi (or Moussurise) which river, by the admission of Captain d’Andrade, even as we have already remarked, is a true river of the plateau.

The considerable diminution of elevation of the high lands of Manica before reaching the Save is, according to Portugal, a proof that the plateau has ceased to exist and that its place has been taken by the plain; but while recognizing the diminution in altitude we are of opinion that it is not sufficient to do away with the characteristics of the plateau. In the first place, it must not be forgotten that the Plateau of Manica (like the plateaux of Africa in general), by the admission of the parties and according to the observations of geographers and travellers, is highest to the east and falls gradually to the south and west; but this natural fall does not deprive plateaux of their characteristics. In fact, the British delegate, whilst acknowledging that the portion of the Plateau of Manica south of the latitude of the intersection of its edge by $32^{\circ} 30'$ is less elevated than the country farther to the north, maintains that this does not prevent its being still considered as part of the table of the plateau. He explains and supports strongly this proposition by remarking that the diminution in the general altitude of the country to the west on proceeding southwards from the Lusitu is caused by the gradual lowering of the whole plateau from Mapungwana, and by the manner in which, on approaching the Limpopo, it recedes towards the southwest; but this general

inclination of the ground does not justify one in seeing in it an exterior slope — that is to say, a slope connecting the plateau with the plain — and much less the commencement of the plain.

It is admitted by geographers that the surface of an elevated district may have a general slope of this kind without necessarily ceasing on that account to be a plateau. The authority of M. Élysee Réclus furnishes an example of this in his work already referred to (“La Terre”, Vol. I., 2nd edition, p. 137), in which he informs us that “the greater portion of the high lands of Africa are of little elevation, and their slopes offer an easy means of access; thus the plateaux of Cape Colony, the mean altitude of which in the south is barely 200 meters, rise by degrees towards the north to an altitude of 600 to 1,000 meters above the level of the sea”.

This observation is perfectly applicable to the high lands of Manica, which undoubtedly rise in the north to more than 1,000 meters, whilst in the south a little before arriving at the Wave, their altitude is not more than 300 meters. (Observations on the British Counter Case, No. 12, and conclusions of the Portuguese delegate, No. 4)

One more observation will complete this demonstration. It is generally acknowledged, even by Captain d’Andrade (Observations on the British Case, No. 71) that “the definition of ‘plateaux’ is susceptible of a certain elasticity on account of the somewhat unrestricted use made of the word”. Geography, then, does not fix any *minimum* for its altitude. This *minimum* depends on the country which surrounds it and on the particular conditions of each region. We have just called attention to the fact that, according to the evidence of M. Réclus, 200 meters are sufficient to constitute a plateau in Africa. This opinion we find shared by M. Ritter (mentioned among other writers in the Portuguese Case, p. 48), who considers an elevation of 500 feet (about 160 meters) as being the lowest limit of the level of a plateau. Also Captain d’Andrade, in his Conclusions (No. 4), acknowledges that according to Réclus there may be a plateau of an altitude of 50 meters, and that according to the illustrious Italian geographer, Marinelli, the minimum altitude of a plateau is 200 meters (Marinelli “La Terra”, Vol. I., p. 302).

In our case the rule of legal interpretation, according to which the expressions made use of in a contract must be taken in the sense most in accordance with the intentions of the parties who have arranged it and the most favorable to the aim of the contract, obliges us to give to the word “plateau” the broadest possible signification — that is to say, to require only the minimum normal altitude — so as to be able to affirm its existence as far as the Save, as the high contracting parties had supposed, and so as thus to render possible the application of the text of Article II. of the treaty. Following thus, from the legal point of view, an universal rule of interpretation, and from the technical point of view the opinion of the most illustrious geographers to whom the two parties have made reference, we come to the conclusion that the Plateau of Manica, though it falls gradually

towards the south and becomes reduced to the smallest proportions, preserves, nevertheless, a sufficient elevation (as was supposed by the authors of the treaty) for it to be admitted that it exists right to the Save.

2. Lastly, to examine the question under all its aspects, we will suppose, with Portugal, that the plateau, contrary to the anticipation of the authors of the treaty, comes to an end at a distance more or less great before reaching the Save. The consequences which would result would certainly not be those which Portugal tries to deduce therefrom.

The direction that the line must have towards the south would not cease, and the limits of the meridians, within which it must maintain its course, would remain the same; therefore, one can not even say that there has been proved to exist a case that was not foreseen, or a gap in the convention.

In fact, as regards the direction of the line towards the south, it is sufficient to reflect that it is the only one which is laid down in Article II. of the treaty as a general rule for the tracing of the whole of the frontier between $18^{\circ} 30'$ and the Save. The words "southwards to the centre" of the English text, as well as the words "na sua direcção sul ate á linha media" of the Portuguese text, signify "towards the south to the centre," and not merely "towards the Sabi". (*Vide* Major Leveson's Observations, No. 18) It is true that the article says at the same time "follows the upper part of the eastern slope of the plateau"; but by these words it was not intended to convey that the line should only run towards the south, provided it could, and as far as it could, follow the edge of the slope, as the Portuguese delegate makes out, but simply that the frontier in running southwards to the Save should follow the naturally tortuous course of the edge and not proceed there direct in a straight line.

This is evidently only a condition imposed on the trace and not on the direction of the line, which must, before everything, run towards the south; only in running southwards to the Save it must follow the edge of the eastern slope; but if the edge, which is supposed by the treaty to extend to the channel of the Save, comes to an end before reaching there, this flexibility of the trace comes necessarily to an end at the same time as the edge, as a condition which has been fulfilled; and from the point where the edge finishes, the line, freed from all restraint, must run straight to the Save, according to the general rule of its direction towards the south, to the application of which, moreover, no obstacle presents itself. But it must not pass to the east beyond longitude 33° , nor to the west beyond longitude $32^{\circ} 30'$, for the reasons which we are now about to explain.

This is the only rational interpretation, the only one that is in conformity with the text of Article II., and with the intentions of its authors.

The objection that the text supposes the plateau to extend to the Save can in no way shake this conviction.

The authors of the treaty, by the admission of the parties, had only an imperfect knowledge of the plateau which they delimited. Now, even if they did make a mistake, this mistake, which does not affect one of the essential conditions, but only the flexibility of the line to be traced, cannot make any difference as to its final direction towards the south, which can and must be followed notwithstanding.

Further, this conviction held by the negotiators that the plateau extended to the Save, though erroneous, would furnish evident proof that by the words "*the frontier follows southwards the upper part of the eastern slope to the Save,*" they meant simply that the frontier runs southwards to the Save *throughout its length*, which expression for them was identical with the extent of the edge.

As regards the limitation of longitude $32^{\circ} 30'$, we are of opinion that Portugal would not have the right to free itself from it by supposing that the plateau ceased before the Save was reached.

If one seeks the cause of and the reasons for this limitation, one easily understands that it is entirely independent of the continuity of the edge as far as the Save.

It appears from the history of the negotiations which preceded the drawing up of the treaty that the Marquess of Salisbury had first proposed to make longitude 33° the frontier from $18^{\circ} 30'$ to the Save; that Portugal, not having accepted this proposal, nevertheless declared through its minister, M. du Bocage, that it could agree to $32^{\circ} 30'$ as a dividing line, provided that attention were paid to the modifications required by the geographical conditions. (British Case, para. 13) The two proposals reduced the difference between the two lines to the strip of territory comprised between longitudes $32^{\circ} 30'$ and 33° . It was, then, in order to reconcile this difference that Lord Salisbury submitted a kind of compromise which instituted as frontier line the upper part or edge of the eastern slope from $18^{\circ} 30'$ to the confluence of the Save with the Lunde.

This means of conciliation was accepted by Portugal, and adopted in Article II. of the treaty.

But, foreseeing naturally that the edge of an irregular mountainous plateau, like that of Manica, would be tortuous in its development, the negotiators deemed it necessary to lay down that the frontier, whilst following the sinuous course of the edge, should never extend beyond the limit proposed by the two parties, viz, meridian 33° to the east, proposed by England, and meridian $32^{\circ} 30'$ to the west, proposed by Portugal.

Thus the line came to be, so to say, shut in the groove bounded by the two meridians, with the double object that it should not leave the strip of territory in dispute, or assign to either party more than it had asked for.

It is precisely this which was agreed to in the following paragraph of Article II.: "It is understood that in tracing the frontier along the above slope of the plateau no territory west of longitude $32^{\circ} 30'$ shall be included," &c. This line, then, *throughout* its length can not extend beyond the limits above mentioned; if it is mentioned that its trace is along the slope this is only for the simple reason above mentioned, that the negotiators of the treaty were fully persuaded that the edge of the slope extended as well as the line towards the Save. If by chance it has been found that the edge comes to an end before reaching the river, this circumstance does not do away with the *raison d'être* of the limit of the two meridians, and does not prevent the line, when running straight to the Save after the supposed cessation of the edge, from remaining in the groove which the parties fixed for it by expressions which contain a clear and absolute prohibition.

The impossibility of tracing the line between those limits (as has been observed by the British delegate) would be the only reason which could be invoked for overstepping them; but such impossibility is so far from having been proved that it has not even been alleged by Portugal.

The only effect which the cessation of the plateau before reaching the Save can have to the advantage of Portugal is to give to the Portuguese sphere its greatest possible breadth towards the west by extending it till it reaches $32^{\circ} 30'$, the extreme limit. Just as Great Britain immediately south of Chimanimani has acknowledged that it can not follow the plateau in its detour beyond 33° , so Portugal has no right to follow the slope ("le versant ou la pente") or the plain beyond $32^{\circ} 30'$ in face of the explicit prohibition in the treaty.

Finally, it must not be forgotten that Great Britain, to make sure that the frontier should not cross $32^{\circ} 30'$ and should not trespass on its sphere beyond this limit, made, as we have already more than once remarked, the concession of a large extent of territory north of the Zambezi to Portugal to indemnify it for the loss which it would sustain on the plateau of Manica. Now, it would be contrary to the principles of justice that Portugal in crossing this limit should take back part of the territory in exchange for which it had accepted the above-mentioned compensation. It is true as regards this concession, or, it would be better to say, this arrangement, that Portugal did not fail to raise objections both as to the value and the rights of Great Britain as regards the ceded territory. But we must repeat that we have already had occasion to remark that Portugal, after having accepted by the treaty this territory as equitable compensation, can not be permitted to raise objections, for which besides it has furnished no justification, having confined itself to simple allegations.

There remains only the last argument of Portugal deduced from the phrase "the frontier follows the channel of the Save to the point where it meets the Lunde," which is held to signify that the frontier reaches the Save *above* its confluence with the Lunde, and that consequently it must reach it before its

(the Save's) arrival at the Lunde. This argument is destroyed by the fact that, according to the convention, the line being obliged to enter the Save before reaching meridian $32^{\circ} 30'$, this meridian intersecting the Save below its confluence with the Lunde, it must necessarily have been understood that to reach the confluence of the Lunde the Save would have to be ascended.

But apart from the question whether the expression "to follow a river upstream" be rigorously accurate from a philological point of view, it is certain that in the diplomatic and technical language of the delimitation convention, to follow a river, or stream, is made use of with the meaning to follow *upstream* as well as to follow downstream.

The British delegate furnished in his notes (No. 3) a proof of this by quoting the act of delimitation of the Turco-Greek frontier signed at Constantinople by the Mixed European Commission on the 15th (27th) November 1891 (*sic*: should be 1881). (See Vol. III of the *N. Raccolta dei Trattati e delle Convenzioni fra il Regno d'Italia e i Governi Esteri*, Turin, 1890, pp. 99, *et seq.*, Articles I. and II. of the convention referred to, where evidently the words "suit" (follows) and "suivre" (follow) the *thalweg* of a river are used to signify follow *upstream*).

Many other examples could be quoted, but this is superfluous, once the Portuguese delegate has himself declared in his observations on the British Counter Case (No. 32 *h*) that even if the natural interpretation of the words "to follow a river" is to follow it *downstream* "this is not absolutely necessary".

To sum up, we are of opinion that the pretension of Portugal to lay aside Article II. of the convention beyond Mount Zuzunye and to substitute for it general principles in matters of delimitation is justified neither by fact nor by right, and that the line which should be adopted in this section is that traced on the British map D, and which had been agreed to by the delegates of the two governments as far as the point at which it meets $32^{\circ} 30'$. That the line should be continued thence along this meridian to the Save is a necessary consequence of this.

For these reasons:

We declare that according to Article II. of the treaty signed at Lisbon on the 11th June 1891 the line which should separate the spheres of influence of Great Britain and Portugal in Eastern Africa south of the Zambezi, from latitude $18^{\circ} 30'$ to the confluence of the Save (or Sabi) with the Lunde (or Lunte) should be drawn as follows:

1. As regards the first section of the frontier in dispute, according to the designation used in the joint note of reference ("Compromis") the line on leaving the point where latitude $18^{\circ} 30'$ intersects longitude 33° east of Greenwich runs due west to a point situated at the intersection of $18^{\circ} 30'$ by a straight line drawn from the *stone pinnacle* on the crest of Mahemasemika (or Massimique) and a height on the northern spur of

Mount Panga, marked 6,340 feet. From this point of intersection on the parallel of latitude it ascends in a straight line to the above-mentioned point marked 6,340 feet; then, after following the watershed to a point marked 6,504 feet, it runs in a straight line to the summit of Mount Panga (6,970). From this point it runs in a straight line to the point marked 3,890 feet, and thence it runs also in a straight line, crossing the River Inyamkarara (or Inhamucarara) to the point marked 6,740 feet, situated to the north of Mount Gorongoe.

After this it follows the watershed, passing through the points marked 4,960 feet and 4,650 feet, till it reaches the summit of Mount Shuara or Chuara (5,540 feet), and then, following the watershed between the Inyamkarara and the Shimezi or Chimeza (3,700 feet), reaches the trigonometrical point marked on Mount Venga or Vengo (5,550 feet).

From Mount Venga it follows the watershed between the upper valley of the Inyamkarara and the Revué, and subsequently that between the Revué and the Odzi, as far as the point at which the spur branches off which forms the watershed between the Menini (or Munene) and the Zombi (or Zombe), whence it follows the crest of this spur to Mount Vumba (4,950 feet).

From Mount Vumba it runs in a straight line to the trigonometrical point situated on the Serra Chaura between 4 and 5 kilom. east of the main watershed, and thence in a straight line to a point situated at the eastern extremity of Serra Inyamatumba (4,650 feet).

From there it follows the watershed, which incloses on the north of the valley of the Mangwingi (or Munhinga), till it rejoins the main watershed between the Save and Revué. It follows this watershed to the point where the small spur branches off which incloses on the north the upper valley of the Little Mussapa (or Mussapa Pegueno), and runs along the crest of this spur to the point marked 5,100 feet, whence it runs due east, crossing the Little Mussapa, and reaching the crest of the eastern slope of Mount Guzane, which it follows till it meets the meridian of longitude 33° east of Greenwich; after this it follows this meridian, crossing the Great Mussapa (defile of Chimanimani) till it reaches the point marked A on the map hereto annexed.

2. As regards the second section of the frontier, which is comprised between the end of the preceding section and the point where the upper part of the eastern slope of the plateau cuts longitude $32^{\circ} 30'$ east of Greenwich, the boundary follows the line shown on the map hereto annexed by the letters A, B, C, V, E, F, C, H, I, J, L, M, N, O, meeting the meridian $32^{\circ} 30'$ at about latitude $20^{\circ} 42' 17''$.

3. As to the third section, which concerns the territory which extends from the intersection of the edge of the eastern slope by $32^{\circ} 30'$ in latitude about $20^{\circ} 42' 17''$ to the point at which the Rivers Save and

Lunde meet, the line, following the aforesaid meridian $32^{\circ} 30'$, runs in a straight line to the center of the main channel of the Save, and then ascends this channel to its confluence with the Lunde, where the frontier submitted to our arbitration comes to an end.

A map, on which the line of delimitation in conformity with our decision has been drawn and which has been signed by us and bears our seal, is annexed to each of the originals of our award, of which it forms an integral part.

Done at Florence, in duplicate, this 30th day of January 1897.

[L. S.]

PAUL HONORÉ VIGLIANI.

ALEXANDRE CORSI, *Secretary*.

PART XXIV

**Award relating to the demarcation of the
Puna de Atacama boundary between
Argentine Republic and Chile**

Decision of 24 March 1899

**Sentence arbitrale relative à la démarcation
de la frontière au niveau de Puna de Atacama
entre l'Argentine et le Chili**

Décision du 24 mars 1899

AWARD OF THE COMMISSIONERS APPOINTED TO DEMARCATÉ
THE PUNA DE ATACAMA BOUNDARY BETWEEN THE
ARGENTINE REPUBLIC AND CHILE, DECISION OF 24 MARCH
1899*

SENTENCE ARBITRALE DES COMMISSAIRES DÉSIGNÉS POUR
DÉMARQUER LA FRONTIÈRE AU NIVEAU DE PUNA DE
ATACAMA ENTRE L'ARGENTINE ET LE CHILI, DÉCISION DU 24
MARS 1899**

Demarcation of frontier – use of straight lines drawn between different Mountain summits
in accordance with the agreement of 22 September 1898.

Démarcation frontalière – recours à des lignes droites tracées entre différents sommets
montagneux conformément à l'accord du 22 septembre 1898.

* * * * *

IN Buenos Ayres, on the 24th of the month of March of the year 1899, the
Members of the Demarcation Commission, Dr. José E. Uriburu, on behalf of
the Argentine Republic; Don Enrique MacIver; on behalf of the Republic of
Chile; and Mr. William I. Buchanan, Envoy Extraordinary and Minister
Plenipotentiary of the United States of America in the Argentine Republic,
met together at 10 A.M. in the Legation of the United States of America, as
arranged in the third session, with the object of continuing their work.

Dr. Uriburu proposed to trace the boundary-line between the Argentine
Republic and Chile through the following points: —

“The chain of the Andes between the parallels 23° and 26° 52' 45” is that range
which contains the peaks and volcanoes Lincancaur, Honar, Potor Lascar, Aguas
Calientes, Miñiques, Capur, Pular, Salinas, Socompa, Tecar, Lullaillaco, Azufre,
Bayo, Aguas Blancas, Morado, Peinado Falso, Laguna Brava, Juncalito, Juncal or
Wheelright. In that chain the frontier line shall run through the following points:
The intersection of parallel 23° with the anticlinal line in its highest points of
concatenation, which intersection shall serve as the starting point (No. 1 on the
map). Mount Honar (No. 4) at which the line arrives after passing between
Mounts Niño and Putana on the east side and an unnamed volcano, Mount Aspero,

* Reprinted from *British and Foreign State Papers*, Compiled by The Librarian and Keeper
of the Papers, Foreign Office, vol. 96, London, 1906, H. M. Stationery Office, p. 379.

** Reproduit de *British and Foreign State Papers*, Compilé par The Librarian and Keeper of
the Papers, Foreign Office, vol. 96, London, 1906, H. M. Stationery Office, p. 379.

Bordos Colorados, and, at some distance, Zarzo and Zapa to the west (Nos. 2 and 3). From Honar the line shall follow the ridge to Mount Potor (No. 5), Potor Pass (No. 6), Mount Colache (No. 7), Mount Abra Grande (No. 8), Mount Volcon (No. 9), Barrial (No. 10), Mount Lejia (No. 11), Mount Overo (No. 12), Mount Agua Caliente (No. 13), Mount Puntas Negras (to the south of Aguas Calientes (No. 14), slopes of Laguna Verde (No. 15), Mount Miñiques (No. 16), Puntas Negras (No. 17), Mount Cozor (No. 18), Media Luna de Cozor (No. 19), Mount Capur (No. 20), Mount Cobos (No. 21), the chain from Capur to the Pular Pass (No. 22, height 4,740 metres); from here it will continue by the ridge to Mount Pular (No. 23), and the height immediately to the southward (No. 24, height 4,780 metres), Mount Salinas (No. 25), the slope to the east of Socompa Pass (No. 26, height 4,380 metres), the western slopes (No. 27), Mount Socompa (No. 28), the summit immediately to the south (No. 29, height 4,240 metres), Mount Socompa Caipis (No. 30), Mount Tecar (No. 31), principal points of the chain of mountains between Tecar and Mount Inca (Nos. 32, 33, 34 and 35), Mount Inca (No. 36), Mount Zorra Vieja (No. 37, height 4,440 metres), Llullaillaco (No. 38), Portezuelo de Llullaillaco — little pass of Llullaillaco — (No. 39, height 4,920 metres), Cori Ridge (No. 40), Azufre Volcano or Lastarria Volcano (No. 41), Azufre or Lastarria Chain to Mount Bayo (Nos. 42, 43, 44, 45, 46, and 47); the resting place to the south of Mount Bayo (No. 48, height 4,970 metres), Mount Agua de la Falda (No. 49), Mounts Aguas Blancas (No. 50), Mount Parinas (No. 51), Mount Morado (No. 52), Mount del Medio (No. 53), Mount Peinado Falso (No. 54), No. 26 station of the Argentine Commission, situated to the eastward of a small pass, (No. 55, height 4,997 metres), the mountain to the south-west (No. 56, height 5,134 metres), Mount Laguna Brava Oeste (No. 57), Mount Juncalito I (No. 58), Mount Juncalito II (No. 59), Juncal or Wheelright (No. 60), and Pircas de Indios, at the foot of Juncal or Wheelright (No. 61).”

Mr. MacIver proposed, on his side, the tracing of the same line through the following points: —

“Point of intersection of parallel 23° south with the Incabuasi Range, Mount Pircas or Peñas, River de las Burras (a point approximately 10 kilom. distant from Susques), Cortadera Pass (the road from Susques to Cobre), Mount Tranca, Pass del Pasto Chico, Mount Negro, to the east of Mount Tuler or Tugli, Chorillos Pass, Colorado Pass (road from Pastos Grandes to San Antonio de los Cobres), Pass del Mojon, Pass de las Pircas (road from Pastos Grandes to Poma), Mount de la Capilla, Mount Cienaga Grande (to the north of Nevado de Cachi), Pass de la Cortadera or del Tolar (the road from Pastos Grandes to Molinos), Mount Juere Grande, Passes de las Cuevas (the road to Encrucijada), Mount Blanco Pass, Mount Blanco, Mount Gordo, Mount del Agua Caliente, Nevado Diamante or Mecara (Mount Leon Muerto), Vicuñorco Pass, Nevado de Laguna Blanca, the small pass of Pasto de Ventura, Mount de Curuto, Mount Azul, the small pass of Robledo, Mount Robledo, small pass of San Buenaventura, Nevado del Negro Muerto, Bertrand Cone, Dos Conos, Mount Falso Azufre, little pass of San Francisco.”

These proposals on being put to the vote were thrown out, the former by the votes of Messrs. Buchanan and MacIver, and the latter by the votes of Messrs. Buchanan and Uriburu.

Mr. Buchanan proposed that the line should be fixed in the following manner: —

From the intersection of parallel 23° with the meridian of 67° straight to the summit of Mount del Rincon.

This proposition was approved of by the votes of Messrs. Buchanan and MacIver, Señor Urriburu objecting.

He thereupon proposed another straight line from the summit of Mount del Rincon to the summit of the Socompa Volcano.

Mr. MacIver proposed, in place of this, another line, which, starting from Mount del Rincon would reach Mount Macon. These propositions on being put to the vote, that of Señor MacIver was thrown out by the votes of Messrs. Buchanan and Urriburu, and that of Mr. Buchanan was approved by the votes of Messrs. Buchanan and Urriburu, Señor MacIver objecting.

Mr. Buchanan thereupon proposed that the boundary-line should run from the summit of the Socompa Volcano to the place called, in the Argentine maps, Aguas Blancas, through the points and stretches called Socompa Volcano, the point marked with the No. 29 in the proposal of the Argentine expert — which is clearly shown in the instrument drawn up in Santiago de Chile on the 1st September, 1898 — Mount Socompa Caipis, Mount Tecar, the principal point of the chain of mountains between Tecar and Mount Inca, Mount Inca, Mount de la Zorra Vieja, Mount Llullaillaco, the small pass of Llullaillaco, the point marked by the No. 39 in the aforesaid proposal, the Cori Ridge, Azufre or Lastarria Volcano, the Azufre or Lastarria Chain to Mount Bayo, the point to the south of Mount Bayo, No. 48, in the proposal above referred to, Mount del Agua de la Falda, Mount Aguas Blancas.

This line was approved of by the votes of Messrs. Buchanan and Urriburu, Señor MacIver objecting.

Mr. Buchanan then proposed as the continuation of the boundary-line a straight line, which starting from the summit of Mount de Aguas Blancas would arrive at the summit of the Colorados Mountains.

This proposal was voted and approved of by Messrs. Buchanan and MacIver, Señor Urriburu objecting.

Mr. Buchanan then proposed another straight line from the summit of the Colorados Mountains to the summit of the Lagunas Bravas Mountains.

This proposal was approved of by the votes of Messrs. Buchanan and Urriburu, Señor MacIver objecting.

Mr. Buchanan indicated another straight line as the continuation of the boundary-line, from the summit of the Lagunas Bravas Mountains to the summit of that called Sierra Nevada in the Argentine map, and calculated in the same map to have a height of 6,400 metres.

This proposal, on being voted, was approved by Messrs. Buchanan and Uriburu, Señor MacIver objecting.

Finally Mr. Buchanan proposed, in order to finish the demarcation, a straight line which, starting from the last point indicated, would meet that which may be fixed on parallel $26^{\circ} 52' 45''$ by Her Britannic Majesty's Government, in conformity with the Agreement of the 22nd September, 1898, signed in Santiago de Chile by the Minister for Foreign Affairs of that Republic and the Envoy Extraordinary and Minister Plenipotentiary of the Argentine Republic, as the dividing point between these two countries on the said parallel.

The last proposal was unanimously approved.

In consequence the boundary-line between the Argentine Republic and the Republic of Chile, between parallels 23° and $26^{\circ} 52' 45''$ of south latitude, which this demarcation, in accordance with the second Agreement of the 2nd November, 1898, must trace, is fixed in the following manner: — From the intersection of parallel 23° with the meridian of 67° , a straight line to the summit of Mount del Rincon, another straight line from the summit of Mount del Rincon to the summit of the Socompa Volcano.

The boundary-line then runs from the summit of the Socompa Volcano to the place called Aguas Blancas on the Argentine maps, through the points and stretches called Socompa Volcano, the point marked by the No. 29 in the proposal of the Argentine expert, which is clearly shown in the instrument drawn up in Santiago de Chile on the 1st September, 1898; Mount Socompa Caipis, Mount Tecar, the principal point of the chain of mountains between Tecar and Mount Inca, Mount Inca, Mount de la Zorra Vieja, Mount Llullaillaco, little pass of Llullaillaco, the point marked by the No. 39 of the aforesaid proposal; the Cori Ridge, Azufre or Lastarria Volcano, Azufre or Lastarria Chain to Mount Bayo, the point to the south of Mount Bayo, No. 48 of the proposal already referred to; Mount del Agua de la Falda, Mount Aguas Blancas. As continuation of the boundary-line, a straight line, which starting from Mount Aguas Blancas, arrives at the summit of the Colorados Mountains; then another straight line from the summit of the Colorados Mountains to the summit of the Lagunas Bravas Mountains; and another straight line from the summit of the Lagunas Bravas Mountains to the summit of that called in the Argentine map Sierra Nevada, and calculated in the same map to have a height of 6,400 metres. Finally, a straight line which, starting from the last point mentioned, would meet that which may be fixed by Her Britannic Majesty's Government on parallel $26^{\circ} 52' 45''$, in accordance with the Agreement of the 22nd September, 1898, signed in Santiago de Chile by the Minister for Foreign Affairs of that Republic and by the Envoy Extraordinary and Minister Plenipotentiary of the Argentine Republic, as the dividing point on the said parallel between these two countries.

In witness whereof the members of the Demarcation Commission agreed to sign the Argentine map to which reference is made in the present instrument.

With which they considered their charge completed, only having to bring the contents of this document to the knowledge of both Governments.

JOSÉ E. URIBURU.
ENRIQUE MACIVER.
WILLIAM I. BUCHANAN.

Secretaries:

JUAN S. GÓMEZ.
MARCIAL MARTINEZ FERRARI.
F. FRANÇOIS S. JONES.

PART XXV

**Award regarding the Boundary between
the Colony of British Guiana and
the United States of Venezuela**

Decision of 3 October 1899

**Sentence arbitrale relative à la frontière
entre la colonie de Guyane britannique
et les États-Unis du Venezuela**

Décision du 3 octobre 1899

AWARD OF THE TRIBUNAL OF ARBITRATION CONSTITUTED UNDER ARTICLE I OF THE TREATY OF ARBITRATION SIGNED AT WASHINGTON, BETWEEN GREAT BRITAIN AND THE UNITED STATES OF VENEZUELA, REGARDING THE BOUNDARY BETWEEN THE COLONY OF BRITISH GUIANA AND THE UNITED STATES OF VENEZUELA, DECISION OF 3 OCTOBER 1899*

SENTENCE DU TRIBUNAL ARBITRAL, ÉTABLI EN VERTU DE L'ARTICLE I DU TRAITÉ D'ARBITRAGE, SIGNÉ À WASHINGTON, ENTRE LA GRANDE BRETAGNE ET LES ÉTATS-UNIS DU VENEZUELA, RELATIVE À LA FRONTIÈRE ENTRE LA COLONIE DE GUYANE BRITANNIQUE ET LES ÉTATS-UNIS DU VENEZUELA, DÉCISION DU 3 OCTOBRE 1899**

Determination of borders – question of the boundary-line between the Colony of British Guiana and the United States of Venezuela.

Maintenance of navigation rights for merchant ships of all nations on rivers Amakuru and Barima – rights of British and Venezuelan ships on shared rivers.

Délimitation frontalière – question de la ligne frontière entre la colonie de la Guyane britannique et les États-Unis du Venezuela.

Conservation des droits de navigation pour les navires marchands de toutes les nations sur les fleuves Amakuru et Barima – droits des navires britanniques et vénézuéliens sur les fleuves transfrontaliers.

* * * * *

WHEREAS, on the 2nd day of February, 1897, a Treaty of Arbitration was concluded between Her Majesty the Queen of the United Kingdom of Great Britain and Ireland and the United States of Venezuela in the terms following:—

Ratifications exchanged at Washington, June 14, 1897.

HER Majesty the Queen of the United Kingdom of Great Britain and Ireland, and the United States of Venezuela, 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

* Reprinted from *British and Foreign State Papers*, Compiled by The Librarian and Keeper of the Papers, Foreign Office, vol. 92, London, 1903, H. M. Stationery Office, p.160.

** Reproduit de *British and Foreign State Papers*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 92, London, 1903, H. M. Stationery Office, p.160.

and the United States of Venezuela, 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:

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, the Right Honourable Sir Julian Pauncefote, a Member of Her Majesty's Most Honourable Privy Council, Knight Grand Cross of the Most Honourable Order of the Bath and of the Most Distinguished Order of St. Michael and St. George, and Her Majesty's Ambassador Extraordinary and Plenipotentiary to the United States;

And the President of the United States of Venezuela, Señor José Andrade, Envoy Extraordinary and Minister Plenipotentiary of Venezuela to the United States of America;

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. An Arbitral Tribunal shall be immediately appointed to determine the boundary-line between the Colony of British Guiana and the United States of Venezuela.

II. The Tribunal shall consist of five Jurists: two on the part of Great Britain, nominated by the members of the Judicial Committee of Her Majesty's Privy Council, namely, the Right Honourable Baron Herschell, Knight Grand Cross of the Most Honourable Order of the Bath, and the Honourable Sir Richard Henn Collins, Knight, one of the Justices of Her Britannic Majesty's Supreme Court of Judicature; two on the part of Venezuela, nominated, one by the President of the United States of Venezuela, namely, the Honourable Melville Western Fuller, Chief Justice of the United States of America, and one nominated by the Justices of the Supreme Court of the United States of America, namely, the Honourable David Josiah Brewer, a Justice of the Supreme Court of the United States of America; and of a fifth Jurist to be selected by the four persons so nominated, or in the event of their failure to agree within three months from the date of the exchange of ratifications of the present Treaty, to be selected by His Majesty the King of Sweden and Norway. The Jurist so selected shall be President of the Tribunal.

In case of the death, absence, or incapacity to serve of any of the four Arbitrators above named, or in the event of any such Arbitrator omitting or declining or ceasing to act as such, another Jurist of repute shall be forthwith substituted in his place. If such vacancy shall occur among those nominated on the part of Great Britain, the substitute shall be appointed by the members for the time being of the Judicial Committee of Her Majesty's Privy Council, acting by a majority, and if among those nominated on the part of Venezuela, he shall be appointed by the Justices of the Supreme Court of the United States, acting by a majority. If such vacancy shall occur in the case of the

fifth Arbitrator, a substitute shall be selected in the manner herein provided for with regard to the original appointment.

III. The Tribunal shall investigate and ascertain the extent of the territories belonging to, or that might lawfully be claimed by, the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana, and shall determine the boundary-line between the Colony of British Guiana and the United States of Venezuela.

IV. In deciding the matters submitted, the Arbitrators shall ascertain all facts which they deem necessary to a decision of the controversy, and shall be governed by the following Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case, and by such principles of international law not inconsistent therewith as the Arbitrators shall determine to be applicable to the case: —

Rules.

(a.) Adverse holding or prescription during a period of fifty years shall make a good title. The Arbitrators may deem exclusive political control of a district, as well as actual settlement thereof, sufficient to constitute adverse holding or to make title by prescription.

(b.) The Arbitrators may recognize and give effect to rights and claims resting on any other ground whatever valid according to international law, and on any principles of international law which the Arbitrators may deem to be applicable to the case, and which are not in contravention of the foregoing rule.

(c.) In determining the boundary-line, if territory of one Party be found by the Tribunal to have been at the date of this Treaty in the occupation of the subjects or citizens of the other Party, such effect shall be given to such occupation as reason, justice, the principles of international law, and the equities of the case shall, in the opinion of the Tribunal, require.

V. The Arbitrators shall meet at Paris, within sixty days after the delivery of the printed arguments mentioned in Article VIII, and shall proceed impartially and carefully to examine and decide the questions that have been, or shall be, laid before them, as herein provided, on the part of the Governments of Her Britannic Majesty and the United States of Venezuela respectively.

Provided always that the Arbitrators may, if they shall think fit, hold their meetings, or any of them, at any other place which they may determine.

All questions considered by the Tribunal, including the final decision, shall be determined by a majority of all the Arbitrators.

Each of the High Contracting Parties shall name one person as its Agent to attend the Tribunal, and to represent it generally in all matters connected with the Tribunal.

VI. 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 each of the Arbitrators and to the Agent of the other Party as soon as may be after the appointment of the members of the Tribunal, but within a period not exceeding eight months from the date of the exchange of the ratifications of this Treaty.

VII. Within four months after the delivery on both sides of the printed Case, either Party may in like manner deliver in duplicate to each of the said Arbitrators, and to the Agent of the other Party, a Counter-Case, and additional documents, correspondence, and evidence, in reply to the Case, documents, correspondence, and evidence so presented by the other Party.

If in the Case submitted to the Arbitrators 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 Arbitrators, to produce the originals or certified copies of any papers adduced as evidence, giving in each instance notice thereof within thirty days after delivery of the Case, and the original or copy so requested shall be delivered as soon as may be, and within a period not exceeding forty days after receipt of notice.

VIII. It shall be the duty of the Agent of each Party, within three months after the expiration of the time limited for the delivery of the Counter-Case on both sides, to deliver in duplicate to each of the said Arbitrators, and to the Agent of the other Party, a printed Argument showing the points, and referring to the evidence upon which his Government relies, and either Party may also support the same before the Arbitrators by oral argument of Counsel; and the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by Counsel upon it; but in such case the other Party shall be entitled to reply either orally or in writing, as the case may be.

IX. The Arbitrators may, for any cause deemed by them sufficient, enlarge either of the periods fixed by Articles VI, VII, and VIII by the allowance of thirty days additional.

X. The decision of the Tribunal shall, if possible, be made within three months from the close of the argument on both sides.

It shall be made in writing and dated, and shall be signed by the Arbitrators who may assent to it.

The decision shall be in duplicate, one copy whereof shall be delivered to the Agent of Great Britain for his Government, and the other copy shall be delivered to the Agent of the United States of Venezuela for his Government.

XI. The Arbitrators shall keep an accurate record of their proceedings, and may appoint and employ the necessary officers to assist them.

XII. Each Government shall pay its own Agent and provide for the proper remuneration of the Counsel employed by it, and of the Arbitrators appointed by it or in its behalf, and for the expense of preparing and submitting its case to the Tribunal. All other expenses connected with the Arbitration shall be defrayed by the two Governments in equal moities.

XIII. The High Contracting Parties engage to consider the result of the proceedings of the Tribunal of Arbitration as a full, perfect, and final settlement of all the questions referred to the Arbitrators.

XIV. The present Treaty shall be duly ratified by Her Britannic Majesty and by the President of the United States of Venezuela, by and with the approval of the Congress thereof, and the ratifications shall be exchanged in London or in Washington within six months from the date hereof.

In faith whereof we, the respective Plenipotentiaries, have signed this Treaty, and have hereunto affixed our seals.

Done in duplicate at Washington, the 2nd day of February, 1897.

(L.S.)

JULIAN PAUNCEFOTE.

(L.S.)

JOSÉ ANDRADE

And whereas the said Treaty was duly ratified, and the ratifications were duly exchanged in Washington on the 14th day of June, 1897, in conformity with the said Treaty;

And whereas since the date of the said Treaty, and before the arbitration thereby contemplated had been entered upon, the said Right Honourable Baron Herschell departed this life;

And whereas the Right Honourable Charles Baron Russell of Killowen, Lord Chief Justice of England, Knight Grand Cross of the Most Distinguished Order of St. Michael and St. George has, conformably to the terms of the said Treaty, been duly nominated by the members of the Judicial Committee of Her Majesty's Privy Council to act under the said Treaty in the place and stead of the said late Baron Herschell;

And whereas the said four Arbitrators, namely: the said Right Honourable Lord Russell of Killowen, the Right Honourable Sir Richard Henn Collins, the Honourable Melville Weston Fuller, and the Honourable David Josiah Brewer, have, conformably to the terms of the said Treaty, selected his Excellency Frederic de Martens, Privy Councillor, Permanent Member of the Council of

the Ministry of Foreign Affairs in Russia, LL.D. of the Universities of Cambridge and Edinburgh, to be the fifth Arbitrator;

And whereas the said Arbitrators have duly entered upon the said Arbitration, and have duly heard and considered the oral and written arguments of the Counsel representing respectively Her Majesty the Queen and the United States of Venezuela, and have impartially and carefully examined the questions laid before them, and have investigated and ascertained the extent of the territories belonging to or that might lawfully be claimed by the United Netherlands or by the Kingdom of Spain respectively at the time of the acquisition by Great Britain of the Colony of British Guiana:

Now we, the undersigned Arbitrators, do hereby make and publish our decision, determination, and award of, upon, and concerning the questions submitted to us by the said Treaty of Arbitration, finally decide, award, and determine that the boundary-line between the Colony of British Guiana and the United States of Venezuela is as follows: —

Starting from the coast at Point Playa, the line of boundary shall run in a straight line to the River Barima at its junction with the River Mururuma, and thence along the mid-stream of the latter river to its source, and from that point to the junction of the River Haiowa with the Amakuru, and thence along the mid-stream of the Amakuru to its source in the Imataka Ridge, and thence in a south-westerly direction along the highest ridge of the spur of the Imataka Mountains to the highest point of the main range of such Imataka Mountains opposite to the source of the Barima, and thence along the summit of the main ridge in a south-easterly direction of the Imataka Mountains to the source of the Acarabisi, and thence along the mid-stream of the Acarabisi to the Cuyuni, and thence along the northern bank of the River Cuyuni westward to its junction with the Wenamu, and thence following the mid-stream of the Wenamu to its westernmost source, and thence in a direct line to the summit of Mount Roraima, and from Mount Roraima to the source of the Cotinga, and along the mid-stream of that river to its junction with the Takutu, and thence along the mid-stream of the Takutu to its source, thence in a straight line to the westernmost point of the Akarai Mountains, and thence along the ridge of the Akarai Mountains to the source of the Corentin called the Cutari River:

Provided always that the line of delimitation fixed by this Award shall be subject and without prejudice to any questions now existing, or which may arise, to be determined between the Government of Her Britannic Majesty and the Republic of Brazil, or between the latter Republic and the United States of Venezuela.

In fixing the above delimitation, the Arbitrators consider and decide that in times of peace the Rivers Amakuru and Barima shall be open to navigation by the merchant-ships of all nations, subject to all just regulations and to the payment of light or other like dues: Provided that the dues charged by the Republic of Venezuela and the Government of the Colony of British Guiana in respect of the passage of vessels along the portions of such rivers

respectively owned by them shall be charged at the same rates upon the vessels of Venezuela and Great Britain, such rates being no higher than those charged to any other nation: Provided also that no customs duties shall be chargeable either by the Republic of Venezuela or by the Colony of British Guiana in respect of goods carried on board ships, vessels, or boats passing along the said rivers; but customs duties shall only be chargeable in respect of goods landed in the territory of Venezuela or Great Britain respectively.

Executed and published in duplicate by us in Paris, this 3rd day of October, A.D. 1899.

F. DE MARTENS.
MELVILLE WESTON FULLER.
DAVID J. BREWER.
RUSSELL OF K^N.
R. HENN COLLINS.

PART XXVI

**Sentence arbitrale relative au différend
frontalier entre la Colombie et le Costa Rica**

Décision du 11 septembre 1900

**Award relating to the boundary dispute
between Colombia and Costa Rica**

Decision of 11 September 1900

SENTENCE ARBITRALE DU PRÉSIDENT DE LA RÉPUBLIQUE
FRANÇAISE RELATIVE AU DIFFÉREND FRONTALIER ENTRE LA
COLOMBIE ET LE COSTA RICA, DÉCISION DU 11 SEPTEMBRE
1900*

AWARD BY THE PRESIDENT OF THE FRENCH REPUBLIC IN THE
BOUNDARY DISPUTE BETWEEN COLOMBIA AND COSTA RICA,
DECISION OF 11 SEPTEMBER 1900**

Délimitation frontalière – traité conclu à Bogotá le 4 novembre 1896 – procédure – documents consultés.

Délimitation frontalière – la frontière doit suivre le contrefort de la Cordillère, puis la ligne de partage des eaux.

Délimitation frontalière – partage des îles, groupes d'îles, îlots et bancs de sable – îles à proximité du continent – îles plus éloignées du continent.

Boundary delimitation – treaty made in Bogotá on 4 November 1896 – procedure – referred documents.

Boundary delimitation – boundary must follow the foothill of the Cordillera then the watershed.

Boundary delimitation – partitioning of islands, groups of islands, small islands and sandbanks – islands closed to mainland – islands away from mainland.

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NOUS, Président de la République Française,

Arbitre en vertu du Traité signé le 4 Novembre, 1896*** à Bogotá, par les Républiques de Colombie et de Costa-Rica, Acte qui nous a conféré pleins pouvoirs en vue d'apprécier, suivant les principes de droit et les précédents historiques, la délimitation à intervenir entre les deux États susnommés;

Ayant pris connaissance de tous les documents fournis par les parties en cause, et notamment —

* Reproduit de *British and Foreign State Papers*, Compilé par The Librarian and Keeper of the Papers, Foreign Office, vol. 92, London, 1903, H. M. Stationery Office, pp. 1036-1040.

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*** Note du Secretariat: Le Traité traduit en anglais est reproduit ci-après, p. 348.

1. En ce qui concerne la Colombie: de l'exposé de Don François Silvela, Avocat de la Légation de Colombie en Espagne;

Des deuxième et troisième Mémoires, présentés au nom de la République de Colombie par M. Poincaré, Avocat à la Cour d'Appel de Paris;

D'une consultation de M. Maura, Député aux Cortès Espagnoles, Président de l'Académie Royale de Jurisprudence de Madrid, sur la question de limites entre la Colombie et le Costa-Rica;

D'une autre consultation de MM. le Dr. Simon de la Rosa y Lopez, Professeur de Droit Politique à l'Université de Séville, et ses Collaborateurs;

Du résumé chronologique des titres territoriaux de Colombie;

Et des nombreuses cartes géographiques et textes, tant originaux que traduits et annotés, à nous remis par le Représentant de la Colombie, spécialement accrédité auprès de nous pour le litige actuel;

2. En ce qui concerne le Costa-Rica;

Des ouvrages de M. Manuel M. de Peralta, Envoyé Extraordinaire et Ministre Plénipotentiaire de cette République à Paris, intitulés:

“Limites de Costa-Rica et Colombia;”

“Costa-Rica y Costa de Mosquitos;”

“Jurisdiction Territoriale de Costa-Rica;”

De l'exposé des titres territoriaux de la République de Costa-Rica;

De la réplique à l'exposé de la République de Colombie;

De l'atlas historico-geografico de Costa-Rica, Veragua y Costa de Mosquitos;

Du volume de M. de Peralta: “Géographie Historique et Droits Territoriaux du Costa-Rica,” &c.;

Et, en général, de tous et toutes décisions, capitulations, ordres royaux, provisions, cédules royales, lois, édictés et promulgués par l'ancienne Monarchie Espagnole, Souveraine absolue et libre dispositrice des territoires qui ont fait partie, dans la suite, des deux Républiques;

Ayant procédé à une étude minutieuse et approfondie desdits Actes, à nous soumis par les Parties, notamment; des Cédules Royales du 27 Juillet, 1513, du 6 Septembre, 1521, de la Provision Royale du 21 Avril, 1529, des Cédules Royales du 2 Mars, 1537, des 11 Janvier et 9 Mai, 1541, du 21 Janvier, 1557, des 23 Février et 18 Juillet, 1560, des 4 et 9 Août, 1561, du 8 Septembre, 1563, du 28 Juin, 1568, du 17 Juillet, 1572, de la capitulation du Pardo du 1er Décembre, 1573, de la Recopilacion de las Leyes de Indias de

1680, particulièrement des Lois 4, 6, et 9 de ce recueil, des Cédules Royales des 21 Juillet et 13 Novembre, 1722, du 20 Août, 1739, du 24 Mai, 1740, du 31 Octobre, 1742, du 30 Novembre, 1756, des différentes instructions émanant du Souverain Espagnol et adressées tant aux autorités supérieures de la Vice-Royauté de Santa-Fé qu'à celles de la Capitainerie Générale de Guatemala au cours du dixhuitième siècle et dans les années suivantes; des Ordres Royaux de 1803 et 1805, des stipulations du Traité conclu en 1825, entre les deux Républiques Indépendantes, &c.;

Et conscient de l'importance de notre haute mission, ainsi que du très grand honneur qui nous a été fait d'être choisi comme juge dans le présent débat, n'ayant rien négligé pour nous rendre un compte exact de la valeur des titres invoqués par l'un et l'autre des deux pays,

Arrêtons:

La frontière entre les Républiques de Colombie et de Costa-Rica sera formée par le contrefort de la Cordillère, qui part du Cap Mona sur l'Océan Atlantique et ferme au nord la vallée du Rio Tarire au Rio-Sixola, puis par la chaîne de partage des eaux entre l'Atlantique et le Pacifique jusqu'à par 9 degrés environ de latitude; elle suivra ensuite la ligne de partage des eaux entre le Chérique-Viejo et les affluents du Golfe Dulce, pour aboutir à la Pointe Burica sur l'Océan Pacifique.

En ce qui concerne les îles, groupes d'îles, îlots, bancs, situés dans l'Océan Atlantique, à proximité de la côte, à l'est et au sud-est de la Pointe Mona, ces îles, quels que soient leur nombre et leur étendue, feront partie du domaine de la Colombie. Celles qui sont sises à l'ouest et au nord-ouest de la dite pointe appartiendront à la République de Costa-Rica.

Quant aux îles les plus éloignées du continent et comprises entre la côte de Mosquitos et l'Isthme de Panama, nommément: Mangle-Chico, Mangle-Grande, Cayos-de-Albuquerque, San Andrés, Santa-Catalina, Providencia, Escudo-de-Veragua, ainsi que toutes autres îles, îlots et bancs relevant de l'ancienne Province de Cartagena, sous la dénomination de canton de San-Andrés, il est entendu que le territoire de ces îles, sans en excepter aucune, appartient aux États-Unis de Colombie.

Du côté de l'Océan Pacifique la Colombie possédera également, à partir des îles Burica et y compris celles-ci, toutes les îles situées à l'est de la pointe du même nom, celles qui sont sises à l'ouest de cette pointe étant attribuée au Costa-Rica.

ÉMILE LOUBET.

**Convention between Colombia and Costa Rica,
signed at Bogotá, November 4, 1896.**

(Translation.)

THE Republic of Colombia and the Republic of Costa Rica, desiring to put an end to the boundary question now pending between them, and to arrive at a definite territorial adjustment, have decided to put into effect, with the additions and modifications here below expressed, the Arbitration Conventions entered into in San José de Costa Rica the 25th December, 1880, through their Plenipotentiaries Dr. José Maria Quijano Otero and José Maria Castro, and in Paris the 20th January, 1886, through their Plenipotentiaries Dr. Carlos Holguin and Don Leon Fernandez; and to this end have named as Plenipotentiaries:

The Government of Colombia, General Don Jorge Holguin, Minister for Foreign Affairs; and

The Government of Costa Rica, M. Ascencion Esquivel, Envoy Extraordinary and Minister Plenipotentiary to Colombia;

Who, after having shown their full powers, found to be in due form, have agreed upon the following Articles: —

ART. I. The above-mentioned Arbitration Conventions are hereby declared in force, and they shall be observed and executed with the modifications expressed in the following Articles:

II. The High Contracting Parties name as Arbitrator his Excellency the President of the French Republic, or, should he be unable to accept, the President of the United States of Mexico, and in case that he should also refuse to accept, the President of the Swiss Confederation, in all of whom the High Contracting Parties without any difference have the most unlimited confidence. The High Contracting Parties hereby state that, if in declaring the validity of the Arbitration Conventions, they have not chosen the Spanish Government Arbitrator, which had previously accepted this office, it is because Colombia hesitates to ask so many continuous services from the said Government, having but recently signed with Ecuador and Peru a Treaty in regard to frontiers wherein His Catholic Majesty is named Arbitrator, and this after the laborious question of the Colombian-Venezuelan frontier question.

III. The acceptance of the first Arbitrator on the list shall be requested within three months after the exchange of the ratifications of the present Agreement, and in case one of the Arbitrators should excuse himself, and it should be necessary to apply to the next in order, the request to accept shall be made within three months after the day on which the excuse has been notified to the Parties.

Should the three months elapse without one of the Parties having requested the acceptance, the Party present is thereby authorized to request it, and the acceptance shall be as valid as if the two Parties had solicited it.

IV. The Arbitration Court shall be governed by the following Rules: —

Within the limit of eighteen months, counted from the time when the acceptance of the Arbitrator shall have been notified to the High Contracting Parties, they shall present their pleadings and documents.

In order that the acceptance may have been duly notified to the Parties, so that they cannot allege ignorance of it, it is sufficient that it should be published in the official Gazette of the country of the Arbitrator.

The Arbitrator shall present the Representative of each Government with a copy of the pleadings of the other three months after having been presented, in order that he may refute them, during the following six months.

The decision of the Arbitrator, to be valid, must be given within a year, counting from the date upon which the time for the reply to the pleadings shall have elapsed, whether they have or have not been presented.

The Arbitrator may delegate his authority, provided that he take part, personally, in drawing up the final decision.

The decision of the Arbitrator, whatever it may be, shall be considered as a perfect and obligatory Treaty between the High Contracting Parties, and shall be final. Both Parties bind themselves to comply faithfully with the decision of the Arbitrator, and renounce all rights of appeal, pledging thereto their national honour.

V. Articles II and IV of the present Agreement are substituted for Articles II and VI of the Agreement of the 25th December, 1880, and for Articles I and IV of the Agreement of the 20th January, 1886. Excepting these modifications and expressed additions, which are binding, the Arbitral Agreements referred to shall again become valid and in force.

VI. The present Convention shall be submitted to the approval of the Congress of Colombia, during its present Sessions, and to the Congress of Costa Rica during its next Sessions, and the ratifications shall be exchanged in Panamá, San José de Costa Rica, or Washington, within the shortest possible time.

In faith whereof the aforesaid Plenipotentiaries sign and seal the present Convention in Bogotá, the 4th November, 1896.

(L.S.) JORGE HOLGUIN.

(L.S.) ASCENCION ESQUIVEL.

PART XXVII

**Sentence arbitrale relative à la question des
frontières du Brésil et de la Guyane Française**

Décision du 1^{er} décembre 1900

**Arbitral award relating to the question of the
boundaries between Brazil and French Guyana**

Decision of 1 December 1900

SENTENCE RENDUE PAR LE CONSEIL FÉDÉRAL SUISSE DANS LA
QUESTION DES FRONTIÈRES DU BRÉSIL ET DE LA GUYANE
FRANÇAISE, DÉCISION DU 1^{er} DÉCEMBRE 1900*

AWARD OF THE SWISS FEDERAL COUNCIL RELATING TO THE
QUESTION BETWEEN BOUNDARIES OF BRAZIL AND FRENCH
GUYANA, DECISION OF 1 DECEMBER 1900**

Délimitation frontalière – interprétation conventionnelle – Traité d’Utrecht du 11 avril 1713 – définition des termes – nécessité de rechercher préalablement si les pièces contemporaines à la conclusion du traité établissent d’une manière précise le sens que les Parties contractantes pouvaient avoir du terme en question.

Étendue des pouvoirs de l’arbitre – droit d’arbitrer *ex aequo et bono* – arbitre lié par le compromis d’arbitrage tel que signé par les Parties – en l’absence de traité, il est permis de prendre en compte des considérations d’équité.

Procédure – l’arbitre n’est pas limité par les allégations faites et les preuves invoquées par les Parties – il doit rechercher la vérité par tous les moyens à sa disposition.

Procédure – l’arbitre ne doit pas tenir compte des allégations et des documents produits sur lesquels la partie adverse n’a pas pu s’exprimer, à moins que leur exactitude et leur authenticité ne lui paraissent hors de doute.

Determination of borders – interpretation of a treaty – definition of terms – need for preliminary research if the documents in effect at the time the treaty is concluded establish precisely what the contracting parties understand the term to mean.

Extent of the arbitrator’s powers – right to arbitrate *ex aequo et bono* – arbitrator bound by the arbitration agreement as signed by the parties – in the absence of a treaty, it is permissible to take account of grounds for fairness.

Procedure – the arbitrator is not limited by allegations made or evidence put forward by the parties – he must seek the truth by all means available to him.

Procedure – the arbitrator should not take account of allegations made or documents produced if the opposing party has not been able to express a view on them, unless the arbitrator finds their accuracy and authenticity to be beyond doubt.

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* Reproduit, avec certaines corrections techniques, de H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p. 563.

** Reprinted, with minor technical corrections, from H. La Fontaine, *Pasicrisie Internationale: Histoire Documentaire des Arbitrages Internationaux (1794-1900)*, Imprimerie Stampelli & CIE, Berne, 1902, p. 563.

Traité pour soumettre à un arbitrage la question des frontières du Brésil et de la Guyane française, signé à Rio de Janeiro, le 10 avril 1897.

Le gouvernement de la République des États-Unis du Brésil et le gouvernement de la République française, désirant fixer définitivement les frontières du Brésil et de la Guyane française, sont convenus de recourir dans ce but à la décision arbitrale du gouvernement de la Confédération suisse.

L'arbitre sera invité à décider quelle est la rivière Yapoc ou Vincent-Pinson et à fixer la limite intérieure du territoire.

Pour la conclusion du traité, les deux gouvernements ont nommé leurs plénipotentiaires, à savoir:

Le Président de la République des États-Unis du Brésil a nommé le général de brigade Dionysio Evangelista de Castro Cerqueira, ministre d'Etat aux affaires étrangères;

Le Président de la République française a nommé Stéphane Pichon, envoyé extraordinaire et ministre plénipotentiaire de la même République au Brésil;

Lesquels après avoir échangé leurs pleins pouvoirs, qui ont été trouvés en bonne et due forme, ont arrêté les articles suivants:

ART. I. — La République des États-Unis du Brésil prétend que, conformément au sens précis de l'article VIII du traité d'Utrecht, la rivière Yapoc ou Vincent-Pinson est l'Oyapoc qui débouche dans l'Océan à l'ouest du cap Orange et que la ligne de démarcation doit être tracée par le thalweg de cette rivière.

La République française prétend que, conformément au sens précis de l'article VIII du traité d'Utrecht, la rivière Yapoc ou Vincent-Pinson est la rivière Araguay (Araouary) qui débouche dans l'Océan au sud du cap Nord et que la ligne de démarcation doit être tracée par le thalweg de cette rivière.

L'arbitre résoudra définitivement les prétentions des deux parties en adoptant, dans sa sentence qui sera obligatoire et sans appel, une des deux rivières réclamées comme limite, ou, s'il le juge bon, quelque'une des rivières comprises entre elles.

ART. II. — La République des États-Unis du Brésil prétend que la limite intérieure dont une partie a été reconnue provisoirement par la Convention de Paris du 28 août 1817, est le parallèle 2° 24' qui, partant de l'Oyapoc, va aboutir à la frontière de la Guyane hollandaise.

La France prétend que la limite intérieure est la ligne qui, partant de la source principale du bras principal de l'Araguary, court à l'ouest parallèlement au fleuve des Amazones jusqu'à la rive gauche du Rio Branco et suit cette rive jusqu'à sa rencontre avec le point extrême de la montagne Acarary.

L'arbitre décidera définitivement quelle est la limite intérieure en adoptant dans sa sentence, qui sera obligatoire et sans appel, une des lignes revendiquées par les deux parties ou en choisissant comme solution intermédiaire à partir de la source principale de la rivière adoptée comme étant le Yapoc ou Vincent-Pinson jusqu'à la frontière de la Guyane hollandaise, la ligne de partage des eaux du bassin des Amazones, qui, dans cette région, est constituée en presque totalité par le faite des monts Tumuc-Humac.

ART. III. — Afin de mettre l'arbitre à même de prononcer sa sentence, chacune des parties devra, dans le délai de huit mois après l'échange des ratifications du présent traité, lui présenter un mémoire contenant l'exposé de ses droits et les documents à l'appui. Ces mémoires imprimés seront en même temps communiqués aux parties contractantes.

ART. IV. — À l'expiration du délai prévu dans l'article III chacune des parties aura un nouveau délai de huit mois pour présenter à l'arbitre, si elle le juge convenable, un second mémoire en réponse aux arguments de l'autre partie.

ART. V. — L'arbitre aura le droit d'exiger des parties les éclaircissements qu'il jugera nécessaires et de régler les termes non prévus de la procédure d'arbitrage et les incidents occurants.

ART. VI. — Les dépenses de la procédure d'arbitrage établies par l'arbitre seront partagées par moitié entre les parties contractantes.

ART. VII. — Les communications entre représentants des parties contractantes se feront par l'intermédiaire du département des affaires étrangères de la Confédération suisse.

ART. VIII. — L'arbitre se prononcera dans le délai maximum d'un an à compter du dépôt des premiers mémoires ou des seconds si les parties ont répliqué.

ART. IX. — Ce traité, les formalités légales une fois remplies, sera ratifié par les deux gouvernements et les ratifications seront échangées dans la capitale fédérale des États-Unis du Brésil dans le délai de quatre mois ou avant s'il est possible.

En foi de quoi les plénipotentiaires respectifs signent le dit traité et y apposent leur sceau¹.

¹ F. DE MARTENS, *Nouveau Recueil Général*, 2^{ème} série, t. XXV, p. 335.

Sentence rendue par le Conseil Fédéral Suisse dans la question des frontières de la Guyane, prononcée à Berne le 1 décembre 1900.

1. Le traité d'arbitrage.

1. — Le 10 avril 1897, a été signé à Rio de Janeiro entre le Gouvernement de la République française et le Gouvernement de la République des États-Unis du Brésil un traité par lequel les deux États ont chargé le Conseil fédéral suisse de fixer définitivement, par décision arbitrale, les frontières du Brésil et de la Guyane française.

Dans ce traité, les parties ont défini comme suit les questions à résoudre, ainsi que la nature et l'étendue de la mission de l'arbitre [...]².

L'article 8 du traité d'Utrecht du 11 avril 1713, visé dans la convention d'arbitrage, est ainsi conçu :

« Afin de prévenir toute occasion de discordes qui pourroit naître entre les sujets de la Couronne de France et ceux de la Couronne de Portugal, Sa Majesté très Chrestienne se désistera pour toujours, comme elle se désiste dès à présent par ce Traité dans les termes les plus forts, et les plus authentiques, et avec toutes les clauses requises, comme si elles étoient insérées icy, tant en son nom, qu'en celui de ses hoirs, successeurs et héritiers, de tous droits et prétentions, qu'elle peut ou pourra prétendre sur la propriété des terres appellées du Cap du Nord, et situées entre la rivière des Amazones, et celle du Japoc, ou de Vincent Pinson, sans se réserver ou retenir aucune portion desdites terres, afin qu'elles soient désormais possédées par Sa Majesté Portugaise, ses hoirs, successeurs, et héritiers avec tous les droits de souveraineté, d'absolue puissance, et d'entier domaine, comme faisant partie de ces États, et qu'elles luy demeurent à perpétuité, sans que Sadite Majesté Portugaise, ses hoirs, successeurs et héritiers puissent jamais estre troublés dans ladite possession par Sa Majesté très Chrestienne ny par ses hoirs, successeurs et héritiers. »

2. — La convention distingue par conséquent entre la limite extérieure qui, partant de l'Océan, suit un cours d'eau à déterminer, et la limite intérieure, qui, partant de ce cours d'eau, continue dans l'intérieur du pays. En ce qui concerne la première, l'arbitre décidera quel est le cours d'eau que désigne l'article 8 du traité d'Utrecht; en ce qui concerne la limite intérieure, l'arbitre adoptera ou bien l'une des frontières revendiquées par les parties, ou bien, partant de la source principale du cours d'eau qu'il aura choisi comme frontière extérieure, il adoptera comme limite jusqu'à la Guyane hollandaise la ligne de partage des eaux du bassin de l'Amazone, qui, dans cette région, est constituée dans sa presque totalité par la ligne de faite des monts Tumuc-Humac.

Quant à la limite extérieure, l'arbitre désignera soit l'un des cours d'eau revendiqués par les parties comme frontière, soit, à son choix, une des rivières comprises entre ces deux cours d'eau. Quant à la limite intérieure, l'arbitre

² La sentence reproduit les deux premiers articles du traité que nous avons publié plus haut.

choisira entre les frontières revendiquées par les parties et la ligne de partage des eaux des monts Tumuc-Humac, qui aura un point de départ différent selon que l'Araguary ou l'Oyapoc ou un des cours d'eau intermédiaires sera adopté comme limite maritime.

La sentence de l'arbitre déterminant les limites intérieure et maritime sera obligatoire pour les parties et sans appel.

Quelque simples et claires que paraissent ces dispositions, elles n'en ont pas moins donné lieu, dans les mémoires des parties, à des commentaires et parfois à des controverses qui doivent être mentionnées ici.

1. En ce qui concerne la limite *extérieure*, que les parties appellent aussi «limite maritime», le Brésil soutient, dans son premier mémoire, que l'arbitre est libre d'adopter comme frontière un des cours d'eau intermédiaires, «pourvu que le cours d'eau choisi soit, *selon lui*, le Japoc ou Vincent Pinçon de l'article 8 du Traité d'Utrecht». Suivant cette opinion, l'arbitre ne peut donc choisir une des rivières qui coulent entre l'Araguary et l'Oyapoc comme cours d'eau frontière que s'il tient cette rivière pour le Japoc ou Vincent Pinçon de l'article 8 du traité d'Utrecht.

Dans sa réplique, la France fait observer à cet égard: «Nous sommes [...] amenés à adhérer à l'interprétation brésilienne sur ce point et nous convenons que l'arbitre, devant statuer conformément aux stipulations d'Utrecht, ne pourra prendre comme frontière que le cours d'eau qui lui paraîtra représenter le plus exactement le Japoc ou Vincent Pinçon prévu par ce traité. Mais c'est à lui seul à désigner librement la rivière qu'il adopte comme telle dans la pleine souveraineté de sa conscience.»

Il n'est pas besoin de rechercher si cette interprétation répond au texte du traité, attendu que l'examen de la question a conduit l'arbitre à adopter une solution précise sur le point de savoir quel est le cours d'eau visé dans le traité d'Utrecht sous le nom de Japoc ou Vincent Pinçon. Il sera permis de relever toutefois que si l'arbitre s'était vu obligé d'admettre que le Japoc et le Vincent Pinçon sont deux fleuves différents et que, par conséquent, les rédacteurs du traité d'Utrecht se trouvaient dans l'erreur lors de la conclusion de cet acte, il lui serait impossible sur la base de ladite interprétation, de rendre une sentence fixant la frontière.

2. Selon cette convention, la France revendique comme limite *intérieure* la ligne «qui, partant de la source principale du bras principal de l'Araguary, continue par l'Ouest parallèlement à la rivière des Amazones» [...]

Il y a lieu de remarquer à ce sujet:

Le Brésil se fondant sur les explorations auxquelles il a fait procéder en 1891 et 1896 par le capitaine d'état-major *Felinto Alcino Braga Cavalcante*, prétend que le cours supérieur de l'Araguary se dirige du nord au sud, qu'il faut chercher la source principale de cette rivière à proximité de la source principale de l'Oyapoc et non pas dans la direction de l'ouest. La France

conteste la valeur de cette exploration isolément entreprise par le Brésil: lors de la signature de la convention d'arbitrage, explique-t-elle, l'opinion dominante était que l'Araguary coulait de l'ouest à l'est: il est donc conforme au compromis que l'Araguary ne constitue la limite extérieure que dans la partie de son cours qui vient de l'ouest, laquelle a été explorée scientifiquement, et que, par conséquent, on fasse commencer à la Grande Pancada la limite intérieure se dirigeant vers l'ouest. Les deux parties ont fait dresser des cartes à l'appui de leur démonstration. Au moyen d'une des cartes annexées, à son mémoire, le Brésil expose comment, dans son opinion, la frontière qui, partant de la source de l'Araguary et se dirigeant vers l'ouest parallèlement à l'Amazone, se confondrait presque avec la ligne de partage des eaux des monts Tumuc-Humac. La France oppose à cette démonstration deux cartes annexées à sa réplique et dont la première a pour but d'établir qu'étant admise l'hypothèse du Brésil quant à la source de l'Araguary, la frontière serait déplacée beaucoup plus au sud que ne la fixe le Brésil; la deuxième représente en son entier le territoire réclamé par la France. Par note du 27 juillet 1900, l'Ambassade de France a communiqué à l'arbitre une rectification de la deuxième de ces cartes, où la frontière partant également de la source de l'Araguary se dirige vers l'ouest, de sorte que cette carte n° 2 se rapproche sensiblement de la carte n° 1 de R. F.³: la seule différence qu'on constate entre elles porte sur le tracé du cours supérieur de l'Araguary. L'Ambassadeur de France dit dans sa note que cette carte n° 2, rectifiée, « a [...] été établie d'une manière exactement conforme à la Convention ». La France ne maintient donc plus la manière de voir qu'elle a exposée dans sa réponse au sujet du point de départ de la limite intérieure.

3. La France prétend dans sa réplique que la convention d'arbitrage règle et met hors de contestation un point de fait, savoir la position du *Cap de Nord*. L'article 1er désigne l'Araguary comme étant le cours d'eau «*qui se jette dans l'Océan au Sud du Cap Nord*». Le Cap Nord serait donc le promontoire au sud duquel l'Araguary se jette dans la mer. La France ajoute que les deux parties ont reconnu expressément par là que l'Araguary se jette dans l'Océan et qu'il n'est par conséquent pas un affluent de l'Amazone.

Mais il est impossible d'attribuer cette portée à la convention d'arbitrage. Bien que le texte en ait été arrêté d'accord entre les parties, le traité ne saurait à l'évidence déterminer ce qui, à diverses époques et d'après différents auteurs, a été considéré comme l'embouchure de l'Amazone, ou comme appartenant encore ou n'appartenant plus à cette embouchure. On n'a pas pu davantage décider une fois pour toutes que, d'après les données géographiques et l'opinion des auteurs sur la situation du Vincent Pinçon ou Oyapoc, le Cap de Nord devait être le cap qui est immédiatement au nord de l'embouchure de l'Araguary. Imposer cette interprétation à l'arbitre serait l'obliger à adopter des conclusions manifestement inexacts dans le cas où il est établi, sans doute possible, que, par Cap de Nord, il faut, entendre le cap de l'île de

³ Les lettres R. F. signifient: Réponse du Gouvernement de la République française.

Maraca et non pas le cap de l'embouchure de l'Araguay. Aussi importe-t-il de maintenir que toute liberté est laissée à l'arbitre d'examiner et de trancher cette question sans être lié par la terminologie employée par la convention.

4. Un désaccord plus profond s'est manifesté entre les parties au sujet de l'étendue des pouvoirs de l'arbitre.

Nous lisons à ce sujet dans le mémoire de la France: «D'après ce traité, le traité d'arbitrage, le Gouvernement de la Confédération suisse est appelé à connaître de tous les éléments du litige. Ses pouvoirs ne sont pas bornés à l'appréciation de formules irréductibles et invariables. Il peut, soit dire le droit tel qu'il lui paraît découler des textes, soit arbitrer *ex aequo et bono* telle décision transactionnelle qui lui semblerait justifiée. Si nous avons cru devoir investir le Gouvernement de la Confédération suisse de ces pouvoirs illimités, ce n'est point par défiance de notre cause, c'est pour donner à l'arbitre un témoignage éclatant de notre confiance dans sa justice, dans son impartialité et dans l'élévation de ses vues. Désirant avoir une solution complète, nous n'avons pas voulu entraver son jugement en l'enfermant dans des bornes trop étroites: nous avons tenu à lui fournir tous les moyens d'exercer librement sa mission et de décider, sans appel et sans restriction, soit sur le terrain du droit, soit sur celui de la convenance et de l'équité.»

La France entend par conséquent donner à l'arbitre le droit de baser sa sentence sur des motifs tirés de la convenance ou de l'équité.

Dans sa réplique, le Brésil s'est élevé contre cette manière de voir que ne justifient, d'après lui, ni la lettre, ni l'esprit, ni la genèse du traité d'arbitrage. Les parties ont voulu s'en remettre non pas à un *médiateur*, mais à un véritable *arbitre appelé seulement à dire le droit*.

Le premier projet de traité d'arbitrage rédigé par le Gouvernement français et remis en janvier 1896 par la Légation de France à Rio de Janeiro au Ministre des Relations Extérieures, Monsieur Carlos de Carvalho, contenait cette clause:

Art 2. L'Arbitre réglera définitivement la question, soit qu'il adopte entièrement dans sa sentence le tracé de frontière qui lui sera proposé par l'une ou l'autre des deux Puissances, soit qu'il choisisse toute autre solution intermédiaire qui lui paraîtrait plus conforme au sens précis de l'article VIII du Traité d'Utrecht.

Le 20 mars 1896, M. Berthelot, Ministre des affaires étrangères de France, remettait au Ministre du Brésil à Paris un second projet dans lequel le même article était rédigé comme suit:

L'Arbitre réglera définitivement la délimitation dont il s'agit, soit qu'il adopte dans sa sentence la ligne de frontière qui lui sera proposée par l'une ou l'autre des deux Parties, soit qu'il choisisse toute autre solution intermédiaire, les Parties entendant donner à l'Arbitre les pouvoirs les plus étendus afin d'arriver à une solution équitable de la difficulté.

Le Ministre du Brésil répondit le 25 mars:

«J'étudierai avec soin ces deux pièces (c'est-à-dire un projet de compromis arbitral du 20 mars et un projet de convention relative à la constitution d'une police mixte) et j'aurai l'honneur de soumettre prochainement à Votre Excellence un contre-projet de traité d'arbitrage, mais, dès maintenant, et pour ce qui est de l'article 2 du nouveau projet, je prends la liberté de rappeler à Votre Excellence que l'arrangement amiable à intervenir, c'est-à-dire l'arrangement définitif des limites par un Arbitre, ne saurait être fait que <conformément au sens précis de l'article VIII du Traité d'Utrecht et aux stipulations de l'Acte du Congrès de Vienne>, ainsi qu'il a été convenu à Paris le 28 août 1817.

«Dans l'entretien auquel votre Excellence fait allusion, j'ai eu l'honneur de la prier de vouloir bien préciser par écrit les limites réclamées par la France. Il importe que le Traité établisse clairement les lignes prétendues par les deux Parties; et cette délimitation préalable du territoire contesté, ainsi que les pouvoirs à conférer à l'Arbitre constituent certainement les deux questions délicates à discuter et à résoudre dans la négociation du Traité.»

Le Brésil expose ensuite comment la convention définitive n'a pas repris la clause, inacceptable pour lui, autorisant l'arbitre à statuer en équité, tandis qu'elle a maintenu le renvoi à l'article 8 du traité d'Utrecht, malgré l'opposition des négociateurs français; elle oblige au contraire l'arbitre à fixer la limite maritime selon le sens précis de l'article 8 du traité d'Utrecht exclusivement.

L'arbitre est lié par la convention d'arbitrage telle qu'elle a été signée par les parties le 10 avril 1897 et ratifiée le 6 août 1898. Aux termes de cette convention, il doit dire quel est le cours d'eau appelé Japoc ou Vincent Pinçon par l'article 8 du traité d'Utrecht, comme il doit aussi fixer la frontière intérieure des deux États limitrophes.

La frontière intérieure doit forcément être fixée d'après la limite maritime qui sera tout d'abord déterminée; pour la frontière intérieure, l'arbitre ne peut que choisir entre les prétentions des parties et une solution intermédiaire que prévoit la convention. Sur ce point, l'arbitre n'est pas lié par une convention, invoquée par les parties et qu'il aurait à interpréter. Il lui serait en conséquence loisible de tenir compte de motifs d'équité en ce qui concerne la limite intérieure.

Mais, en revanche, pour ce qui concerne la limite maritime, le compromis arbitral l'oblige à rechercher et à fixer le sens précis de l'article 8 du traité d'Utrecht. Il s'agit donc d'interpréter le traité et pour résoudre le problème, il lui faudra recourir aux données scientifiques que lui fournissent l'histoire et la géographie. La nature des choses exclut toute interprétation du traité d'Utrecht tirée de motifs d'équité ou de convenance: on ne saurait, en effet, déduire de considérants de cet ordre quelle fut, lors de la signature du traité, l'intention de ses auteurs.

3. — Pour plus de clarté, il y a lieu d'expliquer ici l'article 2 de la convention d'arbitrage. Le Brésil prétend que la limite intérieure, *dont une*

partie a été reconnue provisoirement par la convention du 28 août 1817, est sur le parallèle de 2° 24' latitude nord, entre l'Oyapoc et la frontière de la Guyane hollandaise. Il se réfère à la convention de Paris, conclue à cette date entre la France et le Portugal et dont l'article premier est ainsi conçu:

«Sa Majesté Très Fidèle étant animée du désir de mettre à exécution l'article 107 de l'Acte du Congrès de Vienne, s'engage à remettre à Sa Majesté Très Chrétienne dans le délai de trois mois, ou plus tôt si faire se peut, la Guyane française jusqu'à la Rivière d'Oyapock, dont l'embouchure est située entre le quatrième et le cinquième degré de latitude septentrionale et jusqu'au trois cent vingt-deuxième degré de longitude à l'Est de l'île de Fer, par le parallèle de deux degrés vingt-quatre minutes de latitude septentrionale.»

Incontestablement l'Oyapoc que mentionne cet article est le cours d'eau que le Brésil désigne aujourd'hui comme étant le Japoc ou Vincent Pinçon du Traité d'Utrecht et qu'il revendique pour frontière maritime. L'article 2 de la convention de Paris dit en ce qui concerne la limite intérieure:

«On procédera immédiatement des deux parts à la nomination et à l'envoi de Commissaires pour fixer définitivement les limites des Guyanes française et portugaise, conformément au sens précis de l'article VIII du Traité d'Utrecht, et aux stipulations de l'acte du Congrès de Vienne. Lesdits commissaires devront terminer leur travail dans un délai d'un an, au plus tard, à dater du jour de leur réunion à la Guyane. Si, à l'expiration de ce terme d'un an, lesdits Commissaires respectifs ne parvenaient pas à s'accorder, les deux hautes Parties contractantes procéderaient à l'amiable à un autre arrangement sous la médiation de la Grande-Bretagne, et toujours conformément au sens précis de l'article VIII du Traité d'Utrecht, conclu sous la garantie de cette puissance.»

Cette disposition resta sans exécution. Aussi la France s'empare-t-elle du fait pour affirmer que la question est demeurée entière et qu'il faut, pour la trancher, interpréter définitivement l'article 8 du traité d'Utrecht, ainsi que le disait Guizot dans une dépêche qu'il adressait le 5 juillet 1841 au Ministre de France à Rio de Janeiro et qui fut communiquée au Gouvernement brésilien: «Je vous ai entretenu, le 21 octobre précédent, des circonstances qui avaient empêché la nomination de commissaires français pour la démarcation des limites de la Guyane du côté de Para. J'ai à vous parler aujourd'hui des motifs qui nous font regarder cette nomination comme inutile, parce que, dans notre opinion, la réunion de commissaires français et brésiliens serait peu propre à conduire à un résultat complet et définitif. Il ne s'agit point, en effet, d'un travail ordinaire de démarcation, suite naturelle d'une négociation où la limite qui doit séparer deux territoires a été convenue en principe, pour être réalisée ensuite sur le terrain. Avant que la question soit arrivée à des termes aussi simples, il faut d'abord s'entendre sur l'interprétation de l'article 8 du traité d'Utrecht et déterminer une base de délimitation; il faut, ce qui ne peut se faire que par une négociation entre les deux Cabinets, vider d'abord la question des traités et définir les droits respectifs avant d'arriver à l'application pratique de ces mêmes droits.»

Le Brésil s'est dans la suite rangé à cette manière de voir, ce qui explique pourquoi l'article premier du compromis d'arbitrage stipule que l'arbitre désignera le cours d'eau qui est le Japoc ou Vincent Pinçon du traité d'Utrecht, en se basant exclusivement sur le sens précis de ce traité et sans recourir à la convention de Paris. Et dans son premier mémoire, le Brésil déclare à réitérées fois, qu'en ce qui concerne la frontière maritime, il s'agit uniquement d'interpréter l'article 8 du traité d'Utrecht. Aucun désaccord ne règne entre les parties sur ce point, de sorte que l'arbitre peut se dispenser d'examiner si, par la convention de Paris, les parties n'entendaient pas reconnaître l'Oyapoc actuel pour le Japoc ou Vincent Pinçon de l'article 8 du traité d'Utrecht.

Mais si la convention de Paris n'a pas désigné définitivement le cours d'eau frontière, elle doit, en ce qui concerne la limite intérieure, avoir d'autant plus un caractère provisoire, puisque la fixation de cette limite dépend de celle de la limite maritime, qui est à déterminer tout d'abord.

Il est vrai que la convention de Paris a essayé de formuler une norme constitutive de la frontière intérieure et c'est peut-être ce qui aura engagé le Brésil à en invoquer le texte. Le Brésil reconnaît d'ailleurs lui-même, dans sa prétention, que la démarcation de 1817 n'avait été fixée que *provisoirement*.

II. La Procédure.

1. — Le traité d'arbitrage contient quant à la procédure les dispositions essentielles ci-après:

Chacune des parties doit, dans le délai de huit mois après l'échange des ratifications du traité, présenter à l'arbitre un mémoire contenant l'exposé de ses droits et les documents qui s'y rapportent. Ces mémoires sont en même temps communiqués aux parties contractantes. Passé ce premier délai de huit mois, chacune des parties en aura un nouveau, de même durée, pour présenter à l'arbitre, si elle le juge nécessaire, un second mémoire en réponse aux allégations de l'autre partie. L'arbitre a le droit d'exiger des parties les éclaircissements qu'il juge nécessaires: il règle les cas non prévus par la procédure de l'arbitrage et les incidents pouvant survenir. Les frais du procès arbitral sont déterminés par l'arbitre et partagés également entre les parties contractantes. Les communications entre les parties contractantes ont lieu par l'intermédiaire du Département politique de la Confédération suisse. Enfin l'arbitre décidera dans le délai maximum d'un an à compter de la remise des répliques.

2. — L'échange des ratifications a eu lieu le 6 août 1898, à Rio de Janeiro et le 8 septembre 1898 le Conseil fédéral, sur la demande des deux parties, accepta la mission que lui confiait la convention du 10 avril 1897.

Les États-Unis du Brésil désignèrent pour les représenter dans le litige Monsieur Paranhos do Rio-Branco qui présenta le 6 avril 1899 au Président de la Confédération ses lettres de créance comme Envoyé extraordinaire et Ministre plénipotentiaire en mission spéciale.

La France se fit représenter par son Ambassadeur accrédité auprès du Conseil fédéral, feu le comte de Montholon, puis par son successeur Monsieur Paul-Louis-Georges Bihourd, auxquels furent adjoints comme conseillers en mission spéciale le Marquis de Ripert-Monclar, Ministre plénipotentiaire, et Monsieur Albert Grodet, Gouverneur des colonies de première classe.

Le 6 avril 1899, l'Ambassadeur de la République française remit au Président de la Confédération, pour être communiqués au Conseil fédéral :

1. Un Mémoire contenant l'exposé des droits de la France dans la question des frontières de la Guyane française et du Brésil: deux volumes, dont le premier contient l'exposé de la demande, le deuxième les documents et pièces justificatives.

2. Un atlas, contenant des reproductions de cartes du territoire contesté.

Le 4 avril 1899, le Ministre du Brésil remit au Président de la Confédération, pour être communiqués au Conseil fédéral:

1. Un Mémoire présenté par les États-Unis du Brésil au Gouvernement de la Confédération Helvétique, Arbitre choisi selon les stipulations du Traité conclu à Rio de Janeiro, le 10 avril 1897, entre le Brésil et la France: trois volumes, dont le premier contient l'exposé de la demande du Brésil, le second des documents et le troisième des documents et procès-verbaux relatifs aux négociations qui ont eu lieu à Paris en 1855 et 1856 (Mission spéciale du Vicomte do Uruguay à Paris, 1855-1856);

2. L'ouvrage: L'Oyapoc et l'Amazone, question Brésilienne et Française, par Joaquim Caetano da Silva, deux volumes;

3. Un atlas contenant des reproductions de cartes du territoire contesté;

4. Un atlas contenant les relevés géographiques de la Commission brésilienne d'exploration du haut Araguay, sous la direction du capitaine d'état-major Felinto Alcino Braga Cavalcante.

Le Département politique de la Confédération remit aux parties le nombre convenu d'exemplaires de ces diverses pièces.

On constata lors du dépôt des premiers mémoires que les parties différaient d'avis quant au calcul du délai de huit mois. Pour lever tout doute à cet égard, le Conseil fédéral décida, le 5 juin 1899, que le délai prévu à l'article 4 du traité d'arbitrage du 10 avril 1897 expirait le 6 décembre 1899, à 6 heures après midi, heure de l'Europe centrale, ce dont avis fut donné aux deux parties.

Le 6 décembre 1899, les deux parties ont remis leurs répliques au Président de la Confédération: le mémoire du Brésil est accompagné de trois tomes contenant des documents, d'un atlas et d'un volume renfermant le fac-similé de toute une série des pièces imprimées dans les tomes annexes.

3. — Dans l'intervalle, l'Ambassade de France avait fait au Conseil fédéral les communications ci-après :

a) Par note du 30 mars 1900, il fut expliqué que M. F. I, pages 171 et 175⁴, contenait une erreur, en ce que deux passages d'une lettre de Pontchartrain à Lefebvre d'Albon, du 19 décembre 1714, y sont mentionnées, qui sont en réalité empruntées à deux documents différents. L'erreur a passé dans le volume contenant les pièces justificatives où l'on trouve, sous le titre de «Lettre de Pontchartrain, Ministre de la Marine, à l'ordonnateur de la Guyane, Lefebvre d'Albon» un document qui est visiblement composé de deux pièces différentes. Selon la première partie, en effet, le traité d'Utrecht n'est encore ni ratifié ni publié, tandis que suivant la seconde, ce traité serait en voie d'exécution. Vérification faite, il a été constaté que la première partie est un extrait d'une lettre du Secrétaire d'État de la Marine, d'avril 1713, tandis que les passages subséquents sont la reproduction d'une lettre du même Secrétaire d'État, du 19 décembre 1714.

b) Par note du 21 mai 1900, en réponse à une question posée par le Conseil fédéral, il a été fourni des éclaircissements sur les rapports de 1688, de M. de Ferrolles, qui fut plus tard Gouverneur de Cayenne. La question concernait la controverse qui s'est élevée entre les parties au sujet de la lettre de Ferrolles, du 22 septembre 1688, adressée à « Monsieur et Madame de Seignelay », et reproduite dans M. F. II, pages 155 et suivantes, et des passages qu'en donne M. F. I, pages 163 et suivantes, d'après les Archives des Colonies, t. LXIII.

La note du 21 mai 1900 expose que c'est par erreur qu'il est renvoyé au t. LXIII des Archives des Colonies «pour ce qui concerne le voyage de Ferrolles à l'Araguay. Le rédacteur travaillait sur des notes réunies par divers employés, et l'inexactitude vient de ce que le volume LXIII a été plus particulièrement consulté. Mais il ne renferme rien sur le voyage de Ferrolles en 1688.» De plus, la lettre à Monsieur et Madame de Seignelay n'est pas une pièce originale, mais une copie, dont il existe deux exemplaires, le premier, le meilleur, aux Archives des Colonies, volume II de la Correspondance générale (Guyane) fol. 44 et suiv., le deuxième, défectueux, aux Archives nationales, K 1232, n° 54; en outre, la lettre était adressée non à Monsieur et Madame, mais au Ministre de Seignelay. L'original de la lettre de Ferrolles n'a pu être retrouvé, mais aucune des deux copies ne contient les mots: «à la rivière du Cap d'Orange». Ces deux copies ont été remises à l'arbitre en expédition authentique, en partie en reproduction photographique.

c) Enfin, l'Ambassade de France a, comme il est dit ci-dessus, communiqué au Conseil fédéral par note du 27 juillet 1900, une

⁴ Les lettres M. F. signifient: Mémoire de la France.

rectification de la carte n° 2 annexée à R. F., sur laquelle la frontière méridionale revendiquée par la France est tracée non plus à partir de la Grande Pancada, mais de la source de l'Araguary dans la direction de l'ouest.

Sur la demande du Conseil fédéral, le Représentant des États-Unis du Brésil a, le 11 juillet 1900, produit les pièces ci-après:

a) Une copie du «*Compendio das mais substanciaes Razões e argumentos que evidentemente provam que a Capitania chamada do Norte situada na boca do rio das Amazonas legitimamente pertence a Coroa de Portugal, etc...*» légalisée par le conservateur de la Bibliothèque royale de Ajuda à Lisbonne, M. Rodrigo V. d'Almeida.

b) Des extraits de l'ouvrage d'*Enciso* «*Suma de geographia, etc.*» Séville 1519, que le représentant du Brésil déclare conformes au texte de l'exemplaire qui se trouve à la Bibliothèque nationale de Paris.

4. — La réponse de la France, page 20, dit quant au droit de réplique accordé aux parties par le traité d'arbitrage: «Nous tenons [...] à dire un mot de la signification que nous donnons à l'article 4 (du traité d'arbitrage) relatif au droit de réplique. Après avoir imposé à chacune des deux parties, dans l'article 3, l'obligation de présenter un mémoire imprimé contenant l'exposé de ses droits et les documents s'y rapportant, le compromis ouvre à chacune d'elles la faculté d'adresser à l'arbitre un second mémoire en réponse aux allégations de l'autre partie. Il ne s'agit plus, comme on le voit, que d'une réponse aux dires de l'adversaire. Il nous semble résulter de ce texte qu'en principe les seconds mémoires doivent être consacrés à la discussion des premiers. Ceci est plus amplement démontré encore par ce fait qu'après l'expiration du second délai de huit mois la procédure écrite est close. Le juge peut encore demander des éclaircissements: mais les parties n'ont plus le droit d'argumenter l'une contre l'autre: on est entré dans la période finale d'une année pendant laquelle l'arbitre a la parole pour élaborer et rendre sa sentence. Mettre au jour pour la première fois dans le second mémoire des systèmes tenus jusque-là en réserve, et qui ne pourront plus être contrôlés, nous paraîtrait contraire à l'esprit du compromis. C'est évidemment une question de mesure et de bonne foi: en combattant un argument adverse, on est tout naturellement et très légitimement entraîné à des raisonnements nouveaux et à des justifications nouvelles. Mais nous pensons que, d'une façon générale, le second mémoire doit être essentiellement une réponse, et c'est dans ces termes que nous nous sommes efforcés de nous maintenir.»

Le Brésil ne se prononce pas sur la question, mais il a joint à sa réplique une si grande quantité de moyens de preuve nouveaux qu'on est tenté de croire qu'il ne se place pas au même point de vue que la France.

L'arbitre estime qu'il n'est pas réduit à s'en tenir aux allégations des parties et aux moyens de preuve qu'elles invoquent. Il ne s'agit pas, pour lui, de trancher un différend de droit civil, selon les voies de la procédure civile,

mais d'établir un fait historique: il doit rechercher la vérité par tous les moyens qui sont à sa disposition. Il ne tiendra compte des allégations des parties et des documents produits, sur lesquels la partie adverse n'aurait pas pu s'expliquer, que si leur exactitude et leur authenticité lui paraissent hors de doute.

III. Exposé des motifs.

1. — Le traité d'arbitrage conclu le 10 avril 1897 entre la République française et les États-Unis du Brésil, qui a pour objet de faire fixer définitivement les frontières de la Guyane française et du Brésil, soumet deux points litigieux à la décision de l'arbitre choisi par les parties: le premier concerne la frontière extérieure ou maritime, soit la question de savoir quelle est «conformément au sens précis de l'article 8 du traité d'Utrecht» la rivière «Japoc ou Vincent Pinçon»: le second est relatif à la frontière intérieure, l'arbitre ayant pour mission de la déterminer.

La tâche de l'arbitre diffère essentiellement selon qu'il a à juger l'une ou l'autre des questions. Le traité d'arbitrage le fait ressortir très nettement. Dans cet acte, les parties formulent leurs prétentions tant en ce qui concerne la frontière extérieure que la frontière intérieure. Pour déterminer la première, l'arbitre doit rechercher quelle est, d'après le sens précis de l'article 8 du traité d'Utrecht, la rivière Japoc ou Vincent Pinçon. La rivière qu'il aura adoptée comme telle sera la rivière frontière et son thalweg formera la ligne frontière, que cette rivière soit celle indiquée par la France, ou celle indiquée par le Brésil, ou un troisième cours d'eau. En revanche, pour résoudre quelle est la limite intérieure, s'il n'admet comme fondée la prétention ni de l'une ni de l'autre des parties, il prononcera selon la « solution intermédiaire » que les parties d'un commun accord ont déterminée dans le traité d'arbitrage; il tracera en conséquence la frontière intérieure qui partira du point extrême de la limite extérieure.

La première question a donc exclusivement pour objet d'interpréter les termes «Japoc ou Vincent Pinçon» de l'article 8 du traité d'Utrecht; la seconde concerne uniquement l'examen de la légitimité des prétentions de chacune des parties.

2. — L'arbitre, considérant que la fixation de la frontière intérieure dépend de la solution qui sera donnée à la question de la frontière extérieure, constate, sur la base des données détaillées fournies par l'exposé historique et géographique que «conformément au sens précis de l'article 8 du traité d'Utrecht» la rivière «Japoc ou Vincent Pinçon» de cet article 8 est l'Oyapoc actuel qui se jette dans l'Océan entre le 4^e et le 5^e degré de latitude nord immédiatement à l'ouest du Cap d'Orange.

Pour déterminer quelle est la rivière Japoc ou Vincent Pinçon du traité d'Utrecht du 11 avril 1713, il faut rechercher préalablement si les pièces contemporaines de la conclusion du traité établissent d'une manière précise quel sens les parties contractantes ont entendu attribuer et ont effectivement

attribué à la dénomination «Japoc ou Vincent Pinçon» dont se sert l'acte diplomatique.

En procédant à cette recherche, l'arbitre a été amené à étudier non pas seulement les négociations qui ont immédiatement abouti à l'adoption de l'article 8 et des autres dispositions connexes du traité d'Utrecht, mais encore les traités de 1700, 1701 et 1703. Le traité provisionnel du 4 mars 1700 a, en effet, revêtu une telle importance lors de la discussion du traité d'Utrecht qu'il a fallu admettre d'emblée qu'il existait un certain rapport d'identité entre le Japoc ou Vincent Pinçon du traité d'Utrecht et la «Rivière d'Oyapoc dite de Vincent Pinçon» (Rio de Oiapoc ou de Vicente Pinson) du traité provisionnel.

Les délibérations dont est sorti le traité provisionnel de 1700 ont été précédées en 1698 et 1699 de tout un échange d'explications écrites par lesquelles les parties, la France d'un côté, le Portugal de l'autre, ont développé dans leurs moindres détails les questions qui les divisaient, chacune s'efforçant à l'aide de faits, de documents, de considérations tirées de l'histoire et de la géographie, de convaincre sa partie adverse du bien-fondé de ses prétentions. Pour arriver à apprécier sainement les mémoires si importants de 1698 et 1699, qui ont exercé une incontestable influence même sur les thèses soutenues par les parties dans le litige actuel, et à bien comprendre les documents qui sont en connexité plus ou moins étroite avec ces mémoires, il a été nécessaire de se livrer à une étude complète des faits et des pièces.

C'est pourquoi l'arbitre a eu pour tâche d'examiner toute l'histoire du contesté, du territoire en litige qui va de l'Amazone jusqu'à l'Oyapoc actuel à l'ouest du Cap d'Orange, depuis les premiers voyages de découverte effectués dans l'Amérique du sud; il a dû notamment se former une opinion sur la valeur des revendications du contesté fondées sur des concessions de terrains octroyées par des gouvernements d'Europe et voir jusqu'à quel point de semblables concessions ont été suivies de l'occupation effective du pays.

Il eût d'ailleurs été impossible d'omettre cette étude approfondie de l'histoire du contesté depuis l'origine de sa découverte par des Européens, cela d'autant moins que les parties ont invoqué dans leurs mémoires l'historique de la question et que le nom de la rivière frontière, Vincent Pinçon, se rattache à l'évidence à Vicente Yañez Pinzon, qui découvrit l'embouchure de l'Amazone et le littoral du continent au sud-est et au nord-ouest de celle-ci. C'est précisément pourquoi les questions d'ordre purement géographique que soulève l'identification de la rivière Vincent Pinçon avec un des cours d'eau du littoral brésilien-guyanais ne pouvaient pas être tranchées à l'aide seulement des cartes datant de l'époque du traité d'Utrecht: il a fallu examiner ces questions dans leur relation avec l'histoire, et c'est ainsi qu'on est parvenu au cœur de l'étude de ce problème scientifique aussi intéressant que controversé du développement de la cartographie de la côte sud-est de l'Amérique en général, du littoral du contesté en particulier.

3. — Cela posé, il y a lieu de relever les points ci-après:

Ce n'est qu'à la fin du XVI^e siècle et au commencement du XVII^e siècle que divers États d'Europe se préoccupent du territoire côtier situé au nord-ouest de l'embouchure de l'Amazone. À cette époque, les Portugais s'établissent et restent fixés à l'embouchure et sur les rives du fleuve, non pas seulement en vertu du titre historique créé par le partage du monde fait par le Pape entre l'Espagne et le Portugal, mais plutôt en vertu d'une domination effective et d'une possession défendue à main armée contre quiconque cherchait à la troubler ou à la restreindre.

Seule l'Espagne aurait pu disputer cette contrée au Portugal en se fondant sur le traité de Tordesillas, mais le conflit fut écarté grâce à la réunion des deux Couronnes qui dura jusqu'en 1640. À la fin du XVI^e et au commencement du XVII^e siècle, l'opinion généralement accréditée chez les auteurs espagnols et portugais semble avoir été que la frontière entre l'Espagne et le Portugal, l'ancienne «*linea de demarcacion*» passait au nord-ouest de l'embouchure de l'Amazone et qu'en particulier la rivière Vincent Pinçon qui se jette dans la mer au nord-ouest du «*Cabo del Norte*» formait la limite du Brésil portugais et des possessions espagnoles au nord. Il n'est pas besoin de rechercher comment cette opinion a pu se former: il suffira de constater que le roi d'Espagne Philippe IV, troisième du nom en Portugal, avait par ordonnance du 13 juin 1621 partagé les possessions portugaises dans l'Amérique du sud en deux grands arrondissements administratifs dont l'un, l'Estado do Maranhão, situé au nord-ouest, s'étendait au delà de l'embouchure de l'Amazone jusqu'à la frontière du territoire espagnol. Or cette frontière était la rivière Vincent Pinçon.

À la même époque des Brésiliens relevant du Portugal avaient entrepris de chasser du territoire de l'embouchure de l'Amazone les ressortissants des nations européennes, notamment les Hollandais, les Anglais et les Français, et de se défendre contre toute intrusion étrangère: cette entreprise, ils la menèrent à bien.

Il ne s'agit plus aujourd'hui de décider si c'est le Portugal ou toute autre puissance européenne dont la prétention à posséder le territoire de l'embouchure de l'Amazone était la mieux fondée en droit, mais uniquement de constater qu'effectivement les Portugais devinrent les maîtres du pays et qu'ils assurèrent également leur domination sur la rive gauche du fleuve en refoulant toutes les autres nations européennes; puis, que la Couronne de Portugal partagea le territoire en «*Capitaineries*» et qu'en 1637 elle fit donation de la «*capitania do cabo do norte*» à Bento Maciel Parente, un des Conquistadores portugais. Le long du littoral cette Capitainerie avait une étendue de 30 ou 35 à 40 leguas comptées du Cabo do Norte. À lui seul le texte de l'acte de donation montre que cette concession n'était pas une «*commission de découverte*»: le fait que Parente dressa procès-verbal officiel de la prise de possession de sa Capitainerie, que celle-ci passa à ses héritiers,

et la présence d'agents de Parente dans le territoire, prouvent bien que la donation fut suivie d'exécution.

Ce n'est que depuis 1676 que les Français ont pris définitivement possession de Cayenne. À partir de ce moment-là, ils tentèrent de donner à leur colonie le développement que lui attribuaient les concessions des rois de France. Ces concessions assignaient à la France Équinoxiale les territoires entre l'Amazone et l'Orénoque. Le lieutenant-général de ce pays, Lefebvre de la Barre, dans sa description de la contrée, fait ressortir la différence qui existe entre les concessions et l'occupation effective des Français. Il désigne le pays situé entre l'embouchure de l'Amazone et le Cap d'Orange, où débouche la rivière Yapoco, comme étant la Guyane indienne à laquelle il oppose, comme formant la Guyane française, le pays compris entre le Cap d'Orange et la rivière Maroni. C'est ce dernier territoire et non l'autre qui est possession française. Et encore pour Lefebvre de la Barre la Guyane indienne est-elle susceptible d'être occupée. Lorsque les Français s'appliquèrent à procéder à l'occupation du Cap d'Orange jusqu'au fleuve des Amazones, en se prévalant des concessions de leur roi et «pour le maintien et l'augmentation de la Colonie de Cayenne», comme il est dit dans les instructions du Président Rouillé, en date du 11 décembre 1697, ils se heurtèrent aux Portugais. Ceux-ci s'opposèrent à la pénétration des Français dans leur territoire qui, selon le Portugal, s'étendait au delà de l'Amazone et du Cap de Nord jusqu'à la rivière de Vincent Pinçon. Ils se mirent à construire des forts pour défendre leur possession où ils avaient déjà quelques missions. Le conflit entre la France et le Portugal ne tarda pas à éclater.

Tout d'abord les Français, venant de Cayenne et rencontrés aux alentours du Cap de Nord, sont pris par les Portugais et expulsés du pays, pendant qu'à Cayenne les autorités continuent à autoriser des Français à se rendre dans ce territoire jusqu'au fleuve des Amazones, et notamment à y faire le commerce avec les Indiens. Le conflit s'aggrave du moment que des Français élèvent leurs protestations contre l'établissement des forts construits par les Portugais sur la rive gauche de l'Amazone, qu'ils demandent la destruction des ouvrages de défense, l'abandon du territoire par les Portugais «attendu que toute la rive septentrionale de l'Amazone appartenait de droit à Sa Majesté Très Chrétienne», tandis que les Portugais songeaient à de nouvelles mesures pour protéger leurs possessions. Pierre-Éléonor de la Ville de Ferrolles qui en 1688 alla de Cayenne remettre la «sommation» de la France au commandant du fort portugais sur la rive gauche de l'Araguary, relate en ces mots l'accueil qu'il y reçut: «Il me demanda ensuite ce que j'étois venu faire. Je dis que j'étois venu scauloir pourquoi ils s'établissoient sur les terres du Roy qui estoient séparées des leurs par le fleuve des Amazones. Ce qui l'estonna, disant que le capitaine-major de Para auoit encore des ordres de construire des forts plus prez de nous et que les terres du Roy son maistre s'estendoient jusques à la Rivière Pinçon, que nous appelons Ouyapoque.» L'attaque infructueuse tentée par de Ferrolles en mai 1697 contre les forts portugais sur l'Amazone marque la phase aiguë de la querelle.

Sur ces entrefaites, on recourut aux voies diplomatiques pour mettre fin au litige; en même temps les parties, après avoir recueilli des données historiques et géographiques, exposaient leurs prétentions dans les mémoires de 1698 et 1699.

Le traité du 4 mars 1700 régla provisoirement la question. Il s'agissait de «l'affaire de la rivière des Amazones», ainsi que le faisait remarquer fort bien le négociateur français, le Président Rouillé: aussi son mémoire de janvier 1698, qu'il remit au gouvernement portugais, était-il intitulé: «Mémoire contenant les droits de la France sur les pays scituez à l'ouïest de la rivière des Amazones». Ce n'était donc pas la frontière de la rivière Vincent Pinçon, appelé «Ouyapoque» par les Français de Cayenne, qui aux yeux de la France formait l'objet du litige, mais bien la frontière de l'Amazone; et l'instruction remise à l'Ambassadeur de France à Lisbonne lui recommandait d'obtenir des Portugais qu'ils reconnussent «que la rivière des Amazones serve de borne aux deux nations et que les Portugais laissent aux François la possession libre de la partie occidentale de ses bords». Le Portugal opposait à cette prétention la revendication de la rive gauche de l'Amazone jusqu'au «Rio de Oyapoca ou Vincente Pinson, como querem os Castelhanos, ou Rio Fresco como mostrão muitos roteiros e cartas».

Les mémoires ainsi que les documents et cartes communiqués à l'arbitre établissent à l'évidence que lors de la conclusion du traité du 4 mars 1700 les États contractants, par Rivière d'Oyapoc dite de Vincent Pinçon, n'ont pas entendu désigner et n'ont pas en fait désigné d'autre cours d'eau que l'Oyapoc actuel, immédiatement à l'ouest du Cap d'Orange.

Les différences d'orthographe du nom Oyapoc n'avaient aucune importance: en effet, l'Oyapoca ou Oyapoc de la réponse du Portugal de 1698, s'appelle Yapoco dans la réplique de la France de février 1699, probablement parce que de la Barre et d'autres auteurs français le dénommaient ainsi, tandis que la duplique du Portugal écrit: Ojapoc (Oyapoc) ou Oviapoc (Wiapoc ou Yapoc); c'est le même cours d'eau qui figurera dans le traité d'Utrecht sous le nom Japoc, que de Ferrolles écrit Ouyapoc ou Ouyapoque, tandis que les Hollandais et les Anglais employaient plutôt les expressions Wiapago, Wiapoco, Wyapogo, Wayapoco, Wajabego, etc. Or, pour les Français, cet Oyapoc était l'Oyapoc actuel du Cap d'Orange. De Ferrolles le dit clairement dans son rapport du 20 juin 1698, quand, voulant établir la différence entre l'île d'Ouyapoc (Hyapoc) et la rivière de ce nom, il fait observer au sujet de celle-ci: elle «est dans la Guyane au deçà du Cap de Nord à quinze lieues de nos habitations de Cayenne». Déjà même, en 1688, dans son rapport sur son expédition vers l'Araguary, il avait décrit exactement sous le nom d'Ouyapoque le fleuve qui se jette dans l'Océan à l'ouest du Cap d'Orange, sans connaître ni nommer aucun autre cours d'eau de ce nom dans le contesté entre Cayenne et l'Amazone. Bien plus, il n'eut aucune objection quelconque à faire, ainsi qu'il résulte de son entretien avec le commandant portugais du fort sur l'Araguary, contre l'identification du Pinson, la rivière frontière portugaise (Vincent Pinçon) et de son propre Ouyapoque (c'est-à-dire

l'Oyapoc du Cap d'Orange). Son objection ne visait pas cette identification, mais simplement la fixation de la frontière à l'Oyapoc du Cap d'Orange, parce qu'il revendiquait pour la France la frontière de l'Amazone.

Des délibérations qui eurent lieu entre 1698 et 1700 se dégagent la même conclusion. À la revendication par les Portugais de la frontière Oyapoc-Vincent-Pinçon, les Français n'opposent pas cette objection: il n'y a pas d'identité entre l'Oyapoc et le Vincent Pinçon, car l'Oyapoc est la rivière qui coule près du Cap d'Orange et le Vincent Pinçon est un cours d'eau plus rapproché de l'Amazone. Les Français s'attachent plutôt à démontrer que le Vincent Pinçon est une rivière imaginaire: les Portugais, disent-ils, n'ont aucun droit à revendiquer l'Oyapoc comme rivière frontière; en outre, cette frontière serait inutile et insuffisante; il existe d'ailleurs dans l'Amazone une île du nom d'Oyapoc (Yapoco), elle peut servir de frontière entre le Portugal et la France. On voit clairement que pour les Français, lorsqu'ils ont à s'occuper de la frontière de la rivière d'Oyapoc, il s'agit de l'Oyapoc d'eux connu, de l'Oyapoc du Cap d'Orange et non d'une autre rivière. Aussi les Portugais se bornent-ils à répondre dans leur duplique: il n'existe pas d'île d'Oyapoc dans l'embouchure de l'Amazone, les auteurs et les cartes signalent l'existence d'une rivière Vincent Pinçon qui n'est autre que l'Oyapoc: cette frontière de l'Oyapoc n'est d'ailleurs, à l'égard même de la France, ni inutile ni insuffisante, pas plus qu'elle ne le fut autrefois lorsqu'elle constituait la limite de l'Espagne et du Portugal.

Il importe toutefois de retenir que les Portugais étaient loin d'être renseignés avec exactitude sur la position de l'Oyapoc du Cap d'Orange, pour eux le Vincent Pinçon. Mais on attachait si peu d'importance à connaître exactement la position de la rivière revendiquée comme frontière par les Portugais, que le mémoire français de janvier 1698 ne contient sur la latitude aucune des indications figurant dans le mémoire sur lequel il se basait.

On conçoit que les Français connussent l'Oyapoc mieux que les Portugais, puisque pour atteindre l'Amazone, ils devaient passer près de l'Oyapoc et du Cap d'Orange; pour les Portugais en revanche, cette rivière frontière était fort éloignée.

Une fois que les négociations eurent abouti à obliger les Portugais à raser tous leurs forts sur la rive gauche de l'Amazone et que la possession du Contesté fut déclarée «indécise entre les deux Couronnes», la France n'avait plus d'intérêt à ne pas délimiter le Contesté de manière à lui donner l'Amazone pour frontière méridionale, conformément à sa propre revendication, et l'Oyapoc (Ojapoc) ou Vincent Pinçon pour frontière septentrionale et occidentale, conformément à la revendication du Portugal. La France avait atteint le but qui lui importait le plus, le libre accès de l'Amazone. Elle n'avait pas à redouter que les Portugais avançassent vers Cayenne. Mais rien n'indique que l'Oyapoc ou Vincent Pinçon du traité provisionnel du 4 mars 1700 fut un autre cours d'eau que celui que les débats préliminaires font connaître sous ce nom, savoir l'Oyapoc d'aujourd'hui.

4. — On s'en tint à la convention du 4 mars 1700. L'article 9 du traité avait prévu que la question des frontières, Amazone ou Oyapoc-Vincent-Pinçon, serait éclaircie et définitivement tranchée selon les nouvelles données qui devaient être recueillies, mais cette disposition resta lettre morte, et le 18 juin 1701, le traité provisionnel de l'année précédente fut converti en un traité définitif et perpétuel.

La France considérait cet acte comme une concession qu'elle devait faire au Portugal à cause de la situation politique générale. Aucune réserve ou exception n'ayant été stipulée, il faut admettre que la dénomination adoptée en 1701, «terres du Cap de Nord, confinant à la rivière des Amazones». L'article 15, première rédaction, ou article 6, seconde rédaction du traité, ne peut pas viser autre chose que le territoire du Contesté, tel que le délimitait le traité provisionnel, auquel on se réfère expressément.

Ce que le Portugal avait en vain demandé à la France en 1701, savoir la renonciation de cette puissance «à toute prétention des terres du Cap de Nord confinant à la rivière des Amazones», et s'étendant «jusqu'à la rivière de Vincent Pinçon autrement dit de Oyapoc», il se le fit garantir le 16 mai 1703 dans son traité d'alliance avec l'Empereur, l'Angleterre et les Pays-Bas. L'article 22 de ce traité d'alliance stipule expressément: «... pax fieri non poterit cum Rege Christianissimo, nisi ipse cedat quocumque Jure, quod habere intendit in Regiones ad Promontorium Boreale vulgo Caput de Norte pertinentes et ad ditionem Status Maranonii spectantes, jacentesque inter Fluvios Amazonium et Vincentis Pinsonis». Le Portugal désignait la rivière devant servir de frontière septentrionale sous le nom qu'il lui donnait d'habitude, rien ne l'engageait à y ajouter la dénomination adoptée par les Français pour la même rivière. La désignation «Regiones ad Promontorium Boreale vulgo Caput de Norte pertinentes» est la traduction aussi exacte que possible du terme «Terres du Cap de Nord».

Le traité de 1703 donne au Contesté la même étendue que les traités de 1700 et de 1701, et le traité d'Utrecht du 11 avril 1713 ne peut être interprété différemment.

Cela ressort directement des articles 8 et 9 du traité d'Utrecht, où le traité provisionnel de 1700 est déclaré nul et de nulle vigueur, où le même territoire dont avait disposé ce traité provisionnel est définitivement attribué au Portugal et où ce territoire, le Contesté, est désigné selon les mêmes termes que ceux dont s'étaient servis les traités antérieurs «Terres appelées du Cap du Nord et situées entre la rivière des Amazones et celle de Japoc ou de Vincent Pinçon». Cette opinion est corroborée par l'article 12 qui fait défense aux Français «de passer la rivière de Vincent Pinçon, pour négocier... dans les terres du Cap du Nord»; cette dénomination ne vise pas d'autre territoire que celui délimité par l'article 8. En conséquence, les terres françaises de Cayenne commencent sur la rive gauche et nord-ouest du Vincent Pinçon des Portugais ou du Japoc des Français et c'est pourquoi l'article 12 précité stipule en outre: «Sa Majesté Portugaise promet... qu'aucuns de ses sujets n'iront commercer à Cayenne.»

L'origine des articles du traité d'Utrecht que l'arbitre doit interpréter est expliquée dans toute une série de documents dignes de foi; l'arbitre a puisé dans toutes ces pièces la conviction que par le Japoc ou Vincent Pinson de l'article 8, on ne peut pas entendre une autre rivière que celle à laquelle se rapportent les traités de 1700 et de 1703, donc pas d'autre cours d'eau que l'Oyapoc actuel du Cap d'Orange.

Au fond, les parties sont d'accord pour reconnaître qu'il ne saurait être attaché aucune importance à la différence d'orthographe de Japoc et d'Oyapoc: dans les délibérations qui ont abouti à la conclusion du traité, on a écrit indifféremment Yapoco, Oyapoco, Oyapoc (Ojapoc). La dénomination Japoc est due probablement à ce que les plénipotentiaires portugais à Utrecht, qui connaissaient la rivière sous le nom de Vincent Pinçon, rédigèrent les articles du traité, et, d'après la forme usuelle pour eux, firent alors du Yapoco des cartes françaises un Japoc.

Il résulte des négociations que l'intervention de l'Angleterre a valu au Portugal des clauses favorables, en premier lieu l'attribution du Contesté et l'interdiction faite aux Français de naviguer sur l'Amazone. Cette ligne de conduite était dictée aux Anglais par leur propre intérêt et aussi par le respect des obligations que le traité de 1703 leur imposait à l'égard du Portugal.

Dès le début des négociations, le Portugal, se prévalant du traité d'alliance de 1703, et ce nonobstant le traité du 4 mars 1700, demandait que la France renonçât à son profit à toute prétention sur les «Terres du Cap du Nord situées entre la Rivière des Amazones et celle de Vincent Pinson»: sa demande avait incontestablement pour objet le territoire dont, en 1700, la possession avait été déclarée «indécise entre les deux Couronnes» et dont la frontière vers Cayenne était formée par l'Oyapoc actuel du Cap d'Orange. La France, en revanche, entendait d'abord maintenir l'état de choses antérieur à la guerre et observait: «quant aux domaines de l'Amérique, s'il y a quelques différends à régler, on tâchera d'en convenir à l'amiable»: plus tard, les plénipotentiaires français au congrès d'Utrecht avaient pour instruction de réclamer la frontière de l'Amazone et, au cas où ils ne pourraient pas l'obtenir, d'insister sur ce point «que les François auront la liberté entière de la Navigation dans la Rivière des Amazones», en même temps que le traité provisionnel de 1700 resterait en vigueur «jusqu'à ce qu'on soit convenu définitivement des Limites de la Province de la Guyane»; mais si cette convention venait à ne pas être conclue dans le délai d'une année à partir du traité de paix, le fleuve des Amazones deviendrait la frontière.

Le Portugal qui avait complètement confié la défense de ses intérêts à l'Angleterre fut soutenu par cette Puissance. Lord Bolingbroke fit savoir au Marquis de Torcy, ministre français des Affaires étrangères, que la reine d'Angleterre avait pris à l'égard du roi de Portugal «par traité des engagements plus solides qu'à l'égard de tout autre allié»; à Londres, ce fut principalement le ministre portugais José da Cunha Brochado qui fit valoir avec succès les prétentions du Portugal; il exposa combien le traité

provisionnel de 1700 avait été préjudiciable au Portugal, en imposant au roi de Portugal de «s'abstenir de l'ancienne Possession et de la jouissance des Terres, qu'il possédait, situées depuis la Rivière appelée Yapoco jusques au Cap du Nort de la Rivière des Amazones inclusive», «au grand préjudice de son ancien Domaine, avec si peu de seureté pour le reste du Maragnan»; il faisait ressortir que le maintien de ce traité de 1700 amènerait de nouvelles disputes et de nouvelles querelles. L'Angleterre était disposée à prendre contre la France la défense de la prétention du Portugal sur le Contesté, cela en ce sens «que les Français abandonnent totalement ces terres-là, pour les éloigner du voisinage du Brésil», mais les égards qu'elle avait pour la France firent qu'elle ne mit toute son énergie à soutenir cette prétention que du moment où, au cours des négociations, la France réclama pour ses ressortissants la libre navigation sur l'Amazone et présenta cette demande comme étant pour elle la plus importante.

Les rapports sur la mémorable conférence d'Utrecht, du 9 février 1713, à laquelle ont pris part les plénipotentiaires français, portugais et anglais, démontrent — et cela mérite d'être relevé — que la contestation au sujet de la latitude de l'embouchure de la rivière frontière aurait pu naître alors, si l'on avait attaché quelque importance à connaître exactement cette latitude. Mais comme tel n'était pas le cas, la question ne devint pas aiguë. Il faut toutefois insister sur ce point: en 1713, pas plus qu'en 1700 et dans les années précédentes, la question actuellement litigieuse n'existait et elle n'existait pas par cette raison; l'on était d'accord sur l'identité du Japoc (Oyapoc) et du Vincent Pinçon et d'accord aussi que, sous ce nom, il fallait entendre une seule et unique rivière et cette rivière était l'Oyapoc d'aujourd'hui, l'Oyapoc du Cap d'Orange.

La discussion du 9 février 1713 montra bien que les Français et les Portugais n'étaient pas du même avis touchant la latitude de l'embouchure de ce cours d'eau. Deux prétentions étaient en présence: le Brésil réclamait le Contesté, la France le maintien du traité provisionnel de 1700, subsidiairement le partage du Contesté, avec la clause que la libre navigation de l'Amazone serait garantie aux ressortissants français. Et quand le partage fut discuté, les Portugais déclarèrent l'accepter en principe; ils exigeaient cependant que le traité même traçât la ligne frontière de manière que celle-ci atteignit la côte par $3^{\frac{3}{4}}$ ° de latitude nord: partant du point de vue que leur carte, qui donnait au Vincent Pinçon ou Oyapoc une latitude nord de $3^{\frac{3}{4}}$ °, était plus exacte et plus précise que les cartes françaises, qui plaçaient la rivière beaucoup plus au nord, ils estimaient que ce partage leur vaudrait non seulement tout le Contesté, mais encore une frontière sûre et indiscutable à l'avenir. Mais les Français étaient opposés à ce mode de partage: en premier lieu, un partage immédiat ne leur convenait pas: ils préféraient un partage auquel il aurait été procédé après la conclusion de la paix, sur place ou ailleurs, par des commissaires des deux États; en outre, ils n'agréaient pas le projet, parce que la part qu'il attribuait au Portugal leur paraissait trop grande. Parlant des plénipotentiaires portugais, ils rapportent: «Ils... se réservèrent toujours, non seulement la plus grande partie

des costes jusqu'au cap de Nort, mais encore tous les bords de la rivière des Amazones, jusqu'au fort le plus reculé, qu'ils avoient avant 1700.»

Ce qui importait le plus aux Français, c'était la libre navigation de l'Amazone. Leurs plénipotentiaires le disent clairement dans un rapport qu'ils adressaient à Louis XIV sur la conférence du 9 février 1713: «La première chose que nous demandâmes fut la liberté de la navigation pour les sujets de Vostre Majesté dans la rivière des Amazones.» Et Louis XIV qualifie la liberté de navigation sur l'Amazone de «condition fondamentale» qui seule le déterminera à entrer en matière sur le projet de partage du Contesté. La divergence des opinions sur la latitude de la rivière frontière perdit toute importance, du moment que la France, au lieu d'obtenir la libre navigation fut obligée d'y renoncer expressément ensuite de l'ultimatum de l'Angleterre, des 17 février — 6 mars 1713, en même temps qu'elle devait abandonner au Portugal tout le Contesté tel qu'il avait été délimité par les précédents traités. Les Français acceptèrent le Japoc (Oyapoc) ou Vincent Pinçon comme étant le cours d'eau frontière visé par le traité de 1700, cela sans restriction ni réserve. La réserve que Louis XIV fit stipuler, lors de la signature du traité d'Utrecht, concernait non l'identité du Vincent Pinçon et de l'Oyapoc actuel, mais la liberté de navigation de l'Amazone: c'était là le but qu'il se proposait, il ne tenait pas à une ligne frontière au sud-est de l'Oyapoc actuel et qui n'eût pas atteint l'Amazone.

5. — Le litige, tel qu'il existe actuellement entre les parties, est né depuis la conclusion du traité d'Utrecht, en un espace de temps relativement court.

Le conflit surgit lorsqu'en 1723, le Gouverneur français de Cayenne, Claude d'Orvilliers, tout en reconnaissant encore l'Oyapoc actuel comme étant la frontière adoptée par le traité d'Utrecht, revendiqua pour la France le territoire entier de l'embouchure de ce cours d'eau, par la raison que le traité d'Utrecht avait attribué au Portugal les terres du Cap de Nord seulement et non pas celles du Cap d'Orange. Il estimait qu'on pouvait d'un commun accord prendre le Cachipour pour limite. De son côté, João da Maya da Gama, gouverneur portugais à Pará, soutenait, en invoquant la découverte faite en 1723 par João Paes do Amaral d'une borne frontière entre les possessions espagnoles et portugaises sur la Montagne d'Argent, qui est sur la rive gauche de l'Oyapoc, que «les territoires du Roi Très Chrétien commencent à la dite pointe appelée Comaribô, qui se trouve à l'Ouest de la rivière de Vicente Pinçon et non pas au Cap d'Orange... attendu que celui-ci se trouve à l'Est, et que toute l'embouchure de la rivière de Vicente Pinçon laquelle est et forme la limite des deux territoires appartient au Roi mon Maître». Les deux parties partent donc du même cours d'eau comme cours d'eau frontière, c'est-à-dire de l'Oyapoc du Cap d'Orange, mais non pas du thalweg de ce cours d'eau: elles revendiquent par contre le territoire sis de l'autre côté.

Tandis que le Portugal renoncera tôt après à toute prétention sur la rive gauche de l'Oyapoc, il n'en sera pas de même de la part des autorités françaises à Cayenne. En 1726 déjà, d'Orvilliers tire argument de la «Baie de

Vincent Pinson» qui devient pour la suite du litige d'une grande importance: il considère la frontière du Cachipour comme une concession à faire au Portugal et motive son opinion en ces termes: «Quoique la Baie de Vincent Pinson soit plus au Sud que la Rivière de Cachipour, je conviendrais, pour le Roi mon Maître, que nos limites soient à la Rivière de Cachipour: cette Rivière ne dépend nullement des terres dites du Cap du Nord, qui sont celles que le Roi a cédées par le dernier traité au Roi de Portugal; mais comme la Rivière de Vincent Pinson, autrement nommée Oyapoc, est petite, je crois que le Roi ne désapprouvera pas que nous placions la limite à la Rivière de Cachipour, qui est une grande rivière».

L'exposé historique a démontré que cette argumentation ne peut pas se concilier avec l'article 8 du traité d'Utrecht; il suffit d'avoir signalé les premiers faits auxquels se rattache le litige actuel. Ceux-ci ne sauraient rien changer aux constatations qui se dégagent des débats qui ont précédé le traité d'Utrecht et qui fixent le sens véritable et précis de son article 8. L'histoire des rapports qu'ont entretenus depuis 1713, au sujet de la question de la frontière, les autorités françaises de Cayenne et les autorités brésiliennes de Pará d'une part, puis, d'autre part, le Gouvernement français et le Gouvernement portugais, remplacé plus tard par le Gouvernement brésilien, n'a d'autre intérêt pour l'arbitre que de démontrer avec une entière clarté, quelle est l'origine du litige actuel et de quelle manière les parties, au cours du conflit, ont formulé et défendu leurs prétentions. Il n'est pas nécessaire de revenir encore sur cette partie de l'histoire de la contestation, pas plus que sur les œuvres cartographiques sur lesquelles elle exerça son influence: ces points ont été examinés d'une manière approfondie dans l'exposé historique et géographique.

6. — Après qu'en 1822, le Brésil se fut séparé du Portugal pour devenir un État indépendant et ont été reconnu comme tel par les puissances, il se trouva à l'égard de la France, en ce qui concerne le Contesté, dans la même situation que le Portugal jusqu'alors. Aucun désaccord n'existe sur ce point entre les parties.

7. — L'examen auquel l'arbitre s'est livré l'a conduit à adopter, en conformité de la demande formulée par le Brésil dans l'article 1^{er} du traité d'arbitrage, l'Oyapoc d'aujourd'hui comme devant former la frontière extérieure ou maritime entre la Guyane française et le Brésil. Cette décision entraîne le rejet de la revendication par la France de la frontière de l'Araguary. Il y a lieu de même d'écarter comme frontière tout autre cours d'eau coulant entre l'Araguary et l'Oyapoc. Ce résultat se trouve confirmé, sous tous les rapports, par l'examen de chacune des questions d'ordre purement géographique.

L'exposé géographique a montré comment un seul et même cours d'eau a reçu des noms différents, le nom de Vincent Pinçon de la part des Espagnols et des Portugais, le nom d'Oyapoc, très diversement orthographié d'après la dénomination primitive d'origine indienne, de la part des Anglais, des

Hollandais et des Français. Il montre aussi que les indications de la latitude de cette rivière variaient beaucoup selon les divers géographes et les diverses cartes géographiques, mais que l'identité du cours d'eau n'en peut pas moins être établie grâce aux «montagnes» qui, situées à l'ouest de son embouchure, le signalent, grâce aussi à la détermination de sa position et à la nomenclature reproduite dans les cartes.

Il reste acquis pour l'arbitre que la cartographie espagnole et portugaise du XVI^e siècle, depuis le *Padron real* de Chaves de 1536, entend par le Rio de Vicente Pinzon accompagné de «Montañas», l'Oyapoc actuel du Cap d'Orange. Vers le milieu du XVI^e siècle, un fleuve nouveau et important fut introduit dans les cartes, en premier lieu par Nicolas Desliens et Sebastiano Cabotto, qui l'empruntèrent à la relation qu'Orellana avait donnée de son voyage. Il figura sur les cartes comme un cours d'eau distinct du Marañon déjà connu et au nord-ouest de celui-ci. Or les cartes identifiaient le Marañon connu avec l'Amazone d'aujourd'hui, lui donnaient une position presque analogue, et le nouveau fleuve étant également identifié avec l'Amazone, il s'ensuit que la position du nouveau fleuve était inexacte: il devait forcément être déplacé trop au nord-ouest, parce que le reste du littoral n'avait subi aucun changement. Le Rio de Vicente Pinzon, abstraction faite du fleuve nouvellement introduit, garda l'ancienne position que lui avait donnée Chaves, il était en conséquence beaucoup plus rapproché du nouveau cours d'eau que de l'ancien Marañon. Mais quelques géographes reconnurent bientôt l'erreur ainsi commise, et en 1558 déjà Diogo Homem remet le Rio de Vicente Pinzon, avec les Montañas, à la distance primitive et exacte du fleuve des Amazones. Le représentant le plus autorisé de la cartographie portugaise de la seconde moitié du XVI^e siècle, Vaz Dourado, se rallia à cette opinion, ainsi que Gerardus Mercator dans ses mappemondes, établies d'après les cartes de l'école de Séville, qui firent connaître universellement et transmirent au XVII^e siècle le nom du Rio de Vicente Pinzon.

La description que donna B. M. Parente vers 1630 et la donation qui lui fut octroyée en 1637, démontrent avec une assez grande certitude, ainsi que l'explique l'exposé géographique, que le Rio de Vicente Pinzon et l'Oyapoc sont un seul et même cours d'eau. En revanche, les cartes de João Teixeira ne peuvent pas servir à déterminer la position du cours d'eau frontière, par le motif qu'elles ne figurent cette partie du littoral que d'une manière absolument insuffisante.

L'exposé géographique réfute aussi les divers arguments développés par la France à l'appui de la frontière de l'Araguary. Il est démontré que cette prétention n'est pas fondée, par la raison qu'il est impossible d'établir que l'Araguary ait eu autrefois une seconde embouchure et qu'il n'a pas été constaté de fait permettant d'admettre l'identification du Rio de Vicente Pinzon avec un bras septentrional, aujourd'hui disparu, de l'Araguary. L'Araguary a son embouchure au sud du Cap de Nord, tandis qu'incontestablement le Rio de Vicente Pinzon se jette dans l'Océan au nord-

ouest du Cap de Nord. Et de tout temps, on a fait une distinction entre ces deux cours d'eau.

C'est ensuite d'une fausse combinaison que la Baie de Vincent Pinçon figure sur la carte dressée en 1703 par Guillaume de l'Isle et plus tard notamment sur celle de La Condamine, au débouché septentrional du Canal actuel de Carapaporis; cette erreur provient, d'après les documents versés aux débats, de celle qu'a commise Robert Dudley dans son interprétation du rapport que Keymis avait fait de son voyage, et des fausses notions qu'avaient au sujet de l'Amazone Desliens, Cabotto et d'autres.

Outre les mémoires de 1698 et 1699, ce sont notamment la carte dressée par le père Fritz en 1691 et la description du père Pfeil qui montrent que le Portugal, à la fin du XVII^e siècle et lors de la conclusion du traité de 1700, identifiait le Rio de Vicente Pinzon et l'Oyapoc d'aujourd'hui. Sur la carte du père Fritz, qui suit en général la nomenclature indienne, le Rio de Vicente Pinzon prend la place de l'Oyapoc: le père Pfeil identifie expressément le Vincent Pinzon avec l'Oyapoc, en relevant que c'est toujours le même cours d'eau, qu'on l'appelle Rio Pinçon ou Wiapoc, ou Yapoc, ou Vaiabogo, ou Oyapoc. La rivière dont il parle est l'Oyapoc d'aujourd'hui, car il dit: il se jette dans la mer en formant une belle baie et son eau douce se perd entre les deux célèbres promontoires du Mont-d'Argent et du Cabo d'Orange. Il est d'ordre secondaire que le père Pfeil, à l'exemple de tant d'autres géographes, indique une latitude inexacte, car c'est le cours d'eau et non la latitude qui revêt de l'importance.

8. — À teneur du traité d'arbitrage et en conformité des explications ci-dessus, la frontière extérieure ou maritime va jusqu'à la source principale de l'Oyapoc d'aujourd'hui, à moins que le Brésil ne puisse donner un fondement juridique à la prétention qu'il a articulée aux fins d'obtenir une frontière intérieure passant par le parallèle de 2° 24'. Mais le Brésil n'a pas réussi à justifier sa prétention, pour la raison que le seul argument qu'il invoque est tiré de la convention de Paris du 28 août 1817; mais ce moyen, de l'aveu général, n'est pas définitif: il n'est que provisoire. Or comme il s'agit en l'espèce de la revendication d'une frontière définitive, la convention de Paris doit être écartée du débat.

Il y a lieu de remarquer en outre qu'une ligne frontière déterminée d'après un parallèle, constitue une limite artificielle, que l'arbitre ne saurait adopter si elle ne peut pas se fonder sur un titre.

La limite intérieure que la France revendique dans le traité d'arbitrage, et qui devrait suivre une ligne parallèle au cours de l'Amazone jusqu'au Rio Branco, manque, elle aussi, de base juridique.

Il est exact que la ligne parallèle qu'elle revendique aujourd'hui, la France l'a déjà en principe réclamée sous la forme de la «ligne de M. de Castries»: mais pour que l'arbitre pût attribuer à la France cette ligne parallèle,

il serait nécessaire qu'elle fût basée sur une convention ou sur un autre acte incontestable.

Ce titre fait défaut: car c'est à tort que la France estime que l'article 10 du traité d'Utrecht n'a cédé au Portugal qu'une bande de terres relativement étroite le long des bords, tandis que le vaste territoire qui se trouve derrière cette bande serait resté à la France.

Le traité d'Utrecht se borne à édicter: «les deux bords de la rivière des Amazones, tant le méridional que le septentrional, appartiennent... à Sa Majesté Portugaise». Il ne parle pas d'une bande de terrain le long des bords, mais des bords même; il ne stipule pas davantage que le territoire qui s'étend derrière la bande côtière appartient à la France, pas plus qu'il ne dit que les terres qui sont derrière les bords sont cédées au Portugal. Il dispose en termes identiques des deux bords: une interprétation restrictive du terme «bord» ne paraît admissible ni pour l'un ni pour l'autre côté du fleuve.

L'allégation de la France qu'elle est fondée à revendiquer, en vertu d'une possession effective, les territoires qui sont limités par la frontière intérieure qu'elle propose, n'est pas confirmée par des faits.

Par ces motifs, l'arbitre doit, en ce qui concerne la frontière intérieure, adopter la «solution intermédiaire» convenue par les parties dans l'article 2 du traité d'arbitrage.

IV. Sentence.

Vu les faits et les motifs ci-dessus, le Conseil fédéral suisse, en sa qualité d'arbitre appelé par le Gouvernement de la République française et par le Gouvernement des États-Unis du Brésil, selon le traité d'arbitrage du 10 avril 1897, à fixer la frontière de la Guyane française et du Brésil, constate, décide et prononce:

I. — Conformément au sens précis de l'article 8 du traité d'Utrecht, la rivière Japoc ou Vincent Pinçon est l'Oyapoc qui se jette dans l'Océan immédiatement à l'ouest du Cap d'Orange et qui par son thalweg forme la ligne frontière.

II. — À partir de la source principale de cette rivière Oyapoc jusqu'à la frontière hollandaise, la ligne de partage des eaux du bassin des Amazones qui, dans cette région, est constituée dans sa presque totalité par la ligne de faîte des monts Tumuc-Humac, forme la limite intérieure.

Ainsi arrêté à Berne dans notre séance du 1^{er} décembre 1900.

La présente sentence, revêtue du sceau de la Confédération suisse, sera expédiée en trois exemplaires français et trois exemplaires allemands. Un exemplaire français et un exemplaire allemand seront communiqués à chacune des deux parties par les soins de notre Département politique; le troisième exemplaire français et le troisième exemplaire allemand seront déposés aux Archives de la Confédération suisse.

PART XXVIII

**Decision of the arbitral tribunal established to
settle the dispute concerning the course of the
boundary between Austria and Hungary
near the lake called the “Meerauge”**

Decision of 13 September 1902

**Décision du tribunal arbitral établi afin
de résoudre le différend relatif au tracé de la
frontière entre l’Autriche et la Hongrie,
près du lac appelé «Meerauge»**

Décision du 13 septembre 1902

DECISION OF THE ARBITRAL TRIBUNAL ESTABLISHED TO SETTLE
THE DISPUTE CONCERNING THE COURSE OF THE BOUNDARY
BETWEEN AUSTRIA AND HUNGARY NEAR THE LAKE CALLED
THE “MEERAUGE”, DECISION OF 13 SEPTEMBER 1902*

DÉCISION DU TRIBUNAL ARBITRAL ÉTABLI AFIN DE RÉSOUDRE
LE DIFFÉREND RELATIF AU TRACÉ DE LA FRONTIÈRE ENTRE
L’AUTRICHE ET LA HONGRIE, PRÈS DU LAC APPELÉ
«MEERAUGE», DÉCISION DU 13 SEPTEMBRE 1902**

Arbitration – procedure – competence of arbitrators limited to disputed territory by arbitral agreement – In absence of restrictive provision on how frontier should be determined, it is left to arbitral tribunal’s discretion and conscientious judgment – inadmissibility of a reservation made by a Party as inconsistent with the content and the purpose of the arbitral agreement, since it involved reserving the right to claim a further modification of the border, which would undermine the position of the arbitral tribunal and the validity and finality of its decision.

Border delimitation – absence of evidence indicating a mutually agreed boundary – mere exercise of territorial sovereignty by conducting territorial survey in order to determine taxation cannot be recognized as an act legally determining a national frontier; since act was unilateral and land office lacked the power to define the frontier – power to define borders belongs only to the monarch – the statement made by an Austrian treasury officer belonging to a previous mixed boundary commission which did not finish its task, does not bind the State as approval of a higher authority would certainly have been needed. However, it proved that Austria did not acknowledge the Hungarian claim of a wet boundary, fact which might have formed the basis of a favourable decision of arbitral tribunal with respect to Hungary’s claim.

Border delimitation – evidence – burden of proof belongs to Party not currently in possession of land – if no evidence submitted to counter expert’s opinion, it must form the basis of the tribunal’s decision – maps produced prior to adoption of treaty which established validity of acquisition of territory under international law cannot be considered dispositive – as the disputed territory constitutes a topographical whole, it is hard to imagine without any proof in support, that just a small part of it has been treated differently from the whole.

Border delimitation – absence of possession from time immemorial (form of possession where no evidence can be adduced that situation was ever different and no living person has ever heard of a different state of affairs, and that the possession has been unbroken, uncontested and continued up to the present) – the exercise of sovereign rights during a century and a half has no prescriptive benefit and is not relevant for the award as sovereignty remained disputed and hostilities occurred between the parties.

Natural boundary – the arbitral tribunal considers itself bound to proceed with consideration of the natural boundary – any natural obstacle qualifies as natural boundary – at any point

* Reprinted from Georges Frédéric De Martens, *Nouveau Recueil Général de Traités et Autres Actes Relatifs aux Rapports de Droit International, continuation du Grand Recueil par H. Triepel*, Troisième série, tome III, Leipzig, 1910, Librairie Dieterich, p. 71. (German version, translation by the Secretariat of the United Nations).

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boundary may shift from river to ridge line or from stream bed to rise – the location of the source of Bialka river is at the heart of the dispute. Regarding a river which is formed by confluence of two brooks, it is the most important one which has to be considered as the source of the river - a brook does not divide a forest which presents a uniform character on both sides – as a natural boundary, the mountain ridge should be preferred to a river – if a brook has a changeable stream bed, it is not suitable to serve as a boundary because of the possible disputes regarding bridging points.

Arbitrage – procédure – compétence des arbitres limitée par le compromis d'arbitrage au territoire qui fait l'objet du litige – à défaut de toute disposition limitative, la manière dont la frontière doit être délimitée est laissée à la libre appréciation du tribunal arbitral – inadmissibilité de la réserve d'une Partie invoquant le droit de réclamer ultérieurement une modification de la frontière, du fait de son incompatibilité avec le contenu et le but du compromis d'arbitrage et de l'affaiblissement qui en résulterait sur la position du tribunal et sur la force de la chose jugée propre à sa sentence.

Délimitation frontalière – absence de preuve indiquant l'établissement d'une frontière par consentement mutuel – l'exercice de prérogatives souveraines sur un territoire telle que l'exécution de travaux d'arpentage à des fins fiscales, ne peut être considéré comme un acte de nature à délimiter juridiquement les frontières de l'État, étant donné qu'il s'agit d'un acte unilatéral, et que le Cadastre n'a pas la compétence de délimiter la frontière – la délimitation frontalière est une compétence exclusive du Souverain – la déclaration d'un officier du trésor autrichien appartenant à une précédente Commission mixte de délimitation frontalière n'ayant pas terminé son travail, ne lie pas son État puisque l'approbation subséquente d'une autorité supérieure aurait certainement été requise. Néanmoins, cela permet de prouver que l'Autriche n'a pas accepté la prétention hongroise d'avoir une frontière fluviale, ce qui a contrario aurait pu offrir une base à une sentence arbitrale favorable aux prétentions hongroises.

Délimitation frontalière – preuve – la charge de la preuve pèse sur la Partie non actuellement en possession du territoire revendiqué – en l'absence de preuves contraires à l'opinion de l'expert, celle-ci doit être la base de la décision du tribunal – des cartes établies avant l'adoption du traité qui a validé le titre juridique de l'acquisition territoriale du point de vue du droit des gens, ne peuvent être considérées comme décisives – le territoire contesté formant un ensemble topographique, il est difficile d'imaginer sans preuve à l'appui, qu'une petite partie de ce territoire ait été traitée de manière différente du tout.

Délimitation frontalière – absence de possession immémoriale (forme de possession où la preuve ne peut être faite qu'elle ait jamais été autre et où la possession fut ininterrompue, incontestée et continue jusqu'à la période présente) – l'exercice de droits souverains pendant près d'un siècle et demi ne donne pas le titre juridique de la prescription acquisitive, et en l'espèce, cela n'est pas un fait pertinent puisque la souveraineté est restée contestée et des hostilités ont régulièrement éclaté entre les Parties.

Frontière naturelle – le tribunal arbitral s'estime lié de procéder en considérant les frontières naturelles – tout obstacle naturel est éligible pour servir de frontière naturelle – à n'importe quel endroit la frontière peut se déplacer de la rivière à la crête des montagnes, de la faille à l'arête – l'emplacement de la source Bialka est au cœur du différend. Pour ce qui est d'une rivière formée par la confluence de deux torrents, c'est le plus important des deux qui doit être considéré comme le cours d'eau générateur – un ruisseau ne divise pas une forêt qui présente un caractère uniforme des deux côtés – en tant que frontière naturelle, la crête d'une montagne doit être préférée à une rivière – si un ruisseau à un cours changeant, il n'est pas approprié pour servir de frontière en raison notamment des possibles différends relatifs à la construction de ponts.

**Arbitral tribunal constituted to determine the course of the
boundary between Austria and Hungary and between Galicia
and Hungary near the lake called the "Meerauge"**

By Imperial Austrian Act of 25 January 1897 (Reichsgesetzblatt RGBI No. 32) and Royal Hungarian Law II of 1897, the Imperial Austrian Government and the Royal Hungarian Government were authorized to entrust an arbitral tribunal, to be constituted, with determining the course of the boundary between Galicia and Hungary close to the lake called the "Meerauge" in the Tatra mountains. In implementation of the Act, the Imperial Austrian Government appointed as arbitrator Dr. Alexander Ritter v. Mniszek-Tchorznicki, Imperial and Royal Privy Councillor and Treasurer and President of the Imperial Superior Court at Lemberg. The Royal Hungarian Government appointed as arbitrator Koloman Lehoczky de Kisráko und Bistricska, Imperial and Royal Privy Councillor and President of the Royal Court at Pozsony (Pressburg). The arbitrators selected Dr. Johannes Winkler, President of the Swiss Federal Court, as President of the tribunal. Dr. Victor Korn, Imperial Hofrat and Inspector of Revenues at Lemburg, and Dr. Ludwig Lában, Judge at the Royal Court of Pressburg, were appointed by the two Governments to assist the arbitrators in their deliberations. The interests of the Austrian half of the Empire and the Province of Galicia were represented before the arbitral tribunal by Dr. Oswald Balzer, Professor at the University of Lemberg. Hungary's interests were represented by Julius v. Bölcs, Royal Hungarian Chief of Section in the Ministry of the Interior. After the arbitral tribunal had been constituted, on 5 and 6 April 1902 in Vienna, and had agreed upon the rules governing its procedures, a public hearing was held, in accordance with those rules of procedure, beginning in Graz on 21 August 1902 and adjourning temporarily on 31 August. During the hearing, the contentions and claims of both parties to the dispute, along with the documentary evidence produced, were submitted by the two arbitrators.

From 1 to 8 September the arbitral tribunal travelled from Graz to the region of the High Tatra mountains and conducted an on-site inspection. In the disputed territory, particular mention should be made of two mountain lakes. The upper lake (elevation 1,584 m) is known in Galicia as Czarny staw ("Black Lake") and in Hungary as Tengersizem ("Meerauge" or "tarn"), while the lower lake (elevation 1,393 m) is known in Galicia as Morskie oko ("Meerauge" or "tarn") and in Hungary as Halastó ("Fischsee" or "Tish Lake").

Fridolin Becker, Colonel on the Swiss General Staff and Professor at Zurich Polytechnic, was invited to participate in the on-site inspection as expert. On 10 September, at the resumed public hearing in Graz, the report of the expert and the concluding arguments of the representatives of both parties were heard.

At its sessions of 11, 12 and 13 September, the tribunal deliberated in the case, on the basis of the documents produced by both sides and the other evidence submitted.

On 13 September the tribunal issued the following:

Decision

I. The frontier shall run from the peak called “Meeraugenspitze”^{*} (marked A on the sketch prepared by the expert, attached as exhibit 1)^{**} in a northerly direction, across the Froschsee peak (marked B on the sketch), the Zabie ridge and Siedem granatów, to the point where the ridge no longer forms a ridge line, drops off and begins to level out (marked C on the sketch). From there the boundary shall run to the point where Fischsee brook is joined by a small stream flowing from Czuba mountain to the west (marked D on the sketch), some 700 metres above the point where Fischsee brook flows into Poduplaski brook. From point D on the sketch to the confluence of Fischsee and Poduplaski brooks (marked E on the sketch), the boundary shall follow the channel of Fischsee brook.

II. The reservation put on record by the representative of the Imperial Austrian Government on behalf of his principals, to the effect that further territorial claims might later be brought against Hungary regarding the area up to the so-called Polish crest, is rejected as inadmissible because it is inconsistent with the content and purpose of the laws passed by both parties underlying the arbitration agreement.

Grounds

Ad I. In fulfilling the task assigned to the arbitral tribunal under the laws passed by both parties mutually creating the arbitration agreement, one must first determine how the competence of the arbitrators was defined.

The laws in question provide for a restriction only with respect to territory. Thus, the findings of the arbitral tribunal may relate only to the territory in dispute.

In that respect, the claims of the two parties are defining. The Austrian side is claiming a dry boundary line running from Meeraugenspitze, along the Zabie ridge, to the confluence of Fischsee and Poduplaski brooks, as indicated by the letters f, e and d on the sketch appended in document A. Although not correct in all topographical details, the sketch does make it clear which boundaries the two sides are discussing and is attached to this decision only for that reason. The Hungarian party is claiming a wet boundary line running from the tip of Meeraugenspitze along Fischsee brook, as indicated in the said sketch by the letters f, a, b, c and d.

^{*} Secretariat note: The name of the peak is currently Rysy.

^{**} Secretariat note: See map No. 3.

Otherwise, the laws in question contain no provisions regarding how the arbitral tribunal should proceed to determine the course of the frontier: whether it should consider previously determined boundaries, or whether it is empowered to determine the boundary on the basis of its own conscientious judgement.

In the absence of any restrictive provision in this regard, the arbitral tribunal took the position that it was left to its discretion to determine the course of the disputed boundary by a thorough evaluation of all the circumstances.

Nonetheless, the arbitral tribunal did commence by examining the documents submitted with a view to ascertaining whether the disputed region contained any boundary previously determined by mutual agreement of the disputing parties.

In the proceedings, both parties to the dispute submitted arguments in that regard. Hungary's submission rested mainly on the contract concluded between Albert a Lasko and Georg Horváth Palocsa on 8 October 1589 and the royal decree of approval of 1 March 1594, as well as the statements made to the boundary adjustment commission in 1793 and 1794 by Galician treasury official, Gregor Ritter v. Nikorowicz. Austria cited a number of legal acts, notably the Josephine Survey, as well as the use, sale and transfer of the rights to the tax district of Zakopane and its attached territories to Emanuel Homolacz in 1824.

However, after careful consideration of the relevant documents, the arbitral tribunal became convinced that none indicated the existence of any mutually agreed boundary.

The Lasko-Palocsa agreement of 8 October 1589, which was confirmed by decree of donation of Emperor Rudolf II, King of Hungary, of 1 May 1594, and the document of 16 March 1595, referring to the same purchase, which concerns the transfer of ownership of the purchased property to the purchaser Georg Horváth von Palocsa, by act of the Cathedral Chapter of Zips as *locus credibilis*, does indeed cover the areas of Ribijstaw and Okolo Ribnieho Stawu, which are certainly part of the territory presently in dispute.

The Austrian side also conceded that Hungary had owned and exercised sovereignty over the territory presently in dispute from 1589 to 1624.

On the other hand, it must not be overlooked that the related documents also refer to towns and lands, such as Bukowinka, Pod czerwenim, and Kiczora, which now indisputably belong to Galicia, and indeed lie rather deep in Galician territory, to the west of the disputed region.

Furthermore, the statements made and documents submitted by both sides show that during the first decade of the seventeenth century armed incursions were made into the region by both sides, leading to an exchange of complaints

between Emperor Ferdinand II and King August III of Poland, and to the appointment of boundary commissions, whose conclusions are not known.

Hungary argued in particular that the Palocsay family had been superseded in possession of the territory west of the Bialka river by the Polish Starost Nikolaus von Komorowski. In the proceedings, the Austrian party submitted a document stating that Komorowski had been awarded possession of the towns of Brzegi, Bukowina and Bialka by Polish authorities in the name of the King of Poland.

The results of the on-site inspection and the very decisive opinions of the expert indicated that it is not Fischsee brook (the boundary line claimed in the present case by Hungary), but Poduplaski brook, which flows to the east of the mountain ridge line, that should be regarded as the source of the Bialka, and that, consequently, the presently disputed territory constitutes a topographical whole with the towns of Brzegi, Bukowina and Bialka.

It is therefore hard to imagine that Komorowski had been awarded ownership of the villages only up to Fischsee brook, and that the small, now disputed part of the whole which lies on the right bank of Fischsee brook had remained in the possession of Hungary.

General procedural principles would indicate that the burden of proof lies with Hungary, not with Austria. Such proof was not given, and the simple fact remains that the Hungarian side at one time owned the territory now in dispute, as part of a larger whole, which reverted and has belonged to Galicia for a long time, on an undisputed basis.

In the absence of proof that the part has been treated differently from the whole since then, the earlier possession obviously does not lead to a conclusion in favour of Hungary's claim.

The so-called Seeger-Török maps produced by both sides are of no great relevance in the present case since they date from the period before the acquisition of Galicia by Austria and before the Warsaw Treaty of 18 September 1773, which established the validity of the acquisition in international law.

At that time, prior to the Warsaw Treaty, Poland was an independent State and the unilateral boundary delimitation done by Seeger and Török was not binding on Poland. A more detailed analysis of the various interpretations and a critique of the Seeger-Török maps are therefore moot.

The later Austro-Hungarian military maps were clearly based on Seeger's first surveys. Indeed, they accord to Hungary an area even more extensive than the area claimed by Hungary at the time of the mixed boundary commissions of 1837, 1858 and 1883, or, for that matter, than the area claimed by Hungary in the present proceedings.

On the older maps, the Bialka river is designated as the border. However, the question of the location of the source of the Bialka river is in fact at the heart of the dispute. It therefore seems to be a matter of paramount importance to determine the source of the Bialka.

In the expert's opinion, the Bialka river is formed by the confluence of Fischsee and Poduplaski brooks, and the Poduplaski is the more important of the two in terms of both the volume of water carried and the size of catchment area. Only the Poduplaski has something of the look of a river, like the Bialka in its lower reaches, from the confluence of the two streams downwards, whereas the water flowing out of the Fischsee valley (Fischsee brook) clearly looks like a brook.

Clarified by the lakes, the water of Fischsee brook foams over dark boulders in its lowest stretch and gives the impression of spring water. Poduplaski brook, on the other hand, carries glacial debris; this debris is white and, in contrast to Fischsee brook, gives Poduplaski brook a cloudy, whitish colour. Above the point where it is joined by Fischsee brook, the Poduplaski may not look like a true river, but it is clearly recognizable as the source of the Bialka; moreover, the stream-bed of Poduplaski brook is clearly distinguishable in type from that of Fischsee brook as that of a much wilder body of water.

The expert's opinion is also supported by the older maps submitted during the proceedings, in which the Bialka river is not designated as such until the confluence of Fischsee and Poduplaski brooks. It is also supported by the fact that in several maps Poduplaski brook is called Biala woda ("white water"), and the names "Bialka" and "Biala woda" are synonymous in Polish. In the view of the arbitral tribunal — based on its own view of the terrain and the impressions gained from the on-site inspection — the expert's opinion is highly convincing. According to the expert, the source of the Bialka river is to be sought at the confluence of the two aforementioned brooks and, if one wished to attribute the same name to a stretch of water further upstream, only Poduplaski brook might be called the Bialka, whereas the Fischsee certainly could not, since a river's name continues with its main course, not with a tributary stream. Moreover, since no evidence was submitted to counter the expert's opinion, it must form the basis for the tribunal's decision.

Thus, all the arguments advanced in support of the Hungarian claim, to the effect that, based on the evidence of certain maps, Fischsee brook forms the upper course of the Bialka river, and that the source of Fischsee brook is the source of the Bialka river, may be discounted.

Arguments were put forward by the Austrian side based on the so-called Josephine Survey carried out in 1785 and 1789, which shows a part of the presently disputed territory — namely the forest — as Galician territory for tax purposes. The Hungarian party contested the identification of the forest presently in dispute as a part of the forest indicated in the Josephine Survey as "las panski Rybie", under topographical No. 4328, measuring 532 Joch and

886 Quadratklafter. However, the expert decisively confirmed the identification through convincing arguments that are included in his opinion attached to the record of the proceedings.

Nonetheless, although the Josephine Survey must be regarded as an act of exercise of territorial sovereignty, it cannot be recognized as an act legally determining the national frontier, since it was a unilateral survey carried out by the Austrian land office without the participation of the Hungarian authorities and the Austrian land office lacked the power to define the national frontier. That power would have belonged to the monarch, who had incorporated Galicia into Austria and granted Hungary's claim to the Zips towns.

The Josephine Survey is therefore not decisive evidence in the present dispute. Like the literary works cited by the Austrian side which more or less clearly confirm that the two lakes belong to Galicia, it can only be regarded as circumstantial evidence indicating that, during the years immediately preceding the transfer of Galicia, the Kingdom of Poland had been in possession of the disputed region and that Austria, following its acquisition of Galicia, had then taken over the exercise of ownership as Poland's legal successor.

Of particular importance in the present boundary dispute are the records of the mixed boundary commissions 1793 and 1794 that carried out their functions in. In accordance with the order of the Governor of Galicia, Z. 3109, of 28 April 1828, issued pursuant to the order of Imperial Minister of State Saurau, Z. 6375, of 27 March 1828, His Majesty the Emperor and King, in consequence of the decision of the Hungarian Parliament to the effect that a formal boundary adjustment should be undertaken between the Kingdom of Hungary and the neighbouring provinces, decreed (court Decree Z. 176, of 28 December 1792) that the Galician side should establish a commission for that purpose. According to the report of the Office of the Governor of Galicia, Z. 1949, of 10 March 1828, Provincial Councillor v. Erggelet was appointed to conduct the boundary adjustment proceedings as General Commissioner and two political officials — an engineer and a treasury official — were assigned to assist him. Under this commission, the existing border differences were presented by the parties as formal written submissions. Hungarian private parties and the Hungarian Government brought claims before the Galician Chancellor of the Exchequer Oliwa, against the Galician Government for the award of various territories. The process only progressed to replies or in some cases counter-replies, and was not concluded, because the proceedings were broken off, with the possibility of resumption at a later date, by an imperial decision of 1794. The records of the proceedings were thus neither concluded nor signed. In this process the Hungarian side claimed a much larger territory, encompassing some 130,000 inhabitants and 47 square miles, including the city of Neumarkt, three market towns and 234 villages, running the so-called Török border to the Beskid mountains. Treasury official Gregor Ritter v. Nikorowicz, in his rebuttal of that claim, made certain statements which the

Hungarian side pointed to as a binding acknowledgement of the wet boundary line claimed in the present dispute. His statements were included verbatim in the presentations of the two arbitrators, but only the following two statements need be recorded here, as being of particular importance. In the proceedings of the Hungarian Government against the Government of Galicia, Nikorowicz stated, in his rebuttal of 13 September 1793, "*hodie linea granicialis inter Scepusium et Galiciam penes montem Rybi Staw cum fluvio Bialka descendit in fluvium Dunajec*" [today the boundary line running between Zips and Galicia to the Rybi Staw mountain descends along the Bialka river to the Dunajec river], and further, "*a praefato monte Rybi Staw progreditur limes inter Scepusiensem comitatum et Sandecensem circum erga septentrionem usque ad caput rivuli Bialka, quem Hungari Bela nominant*" [from Rybi Staw mountain, the boundary shall proceed north, between the district of Zips and Nowy Sącz, to the source of the Bialka river, called by the Hungarians "Bela"]. Nikorowicz accompanied these statements with a marked map, with the letter M, intended to illustrate his description. At a second proceeding held on 4 April 1794, Nikorowicz stated, in his rebuttal of the claims of the district of Zips to the territory between the White Dunajec and the Black Dunajec, that any mountain, or mountain chain, whose summits formed a boundary might easily be designated, and that that was the case between Hungary and Galicia in the Neumarkt region, where the boundary extended over the mountains of Grzebienie, Mala, Wierch, Pięć Stawy, and so forth. He further reiterated that the boundary ran from Gruby Wierch mountain to Rybi Staw mountain and on to the source (caput) of the Bialka river.

These statements would indicate a dry boundary line running across the mountain ridges to the source of the Bialka river. If, as Hungary asserts, one should take Rybi Staw mountain, which features prominently in these statements, to be Meeraugenspitze and thus the source of the Bialka river above the upper lake, then the statements would not accord with the terrain, because the mountain rivulet that flows above the upper lake, which, according to the Hungarian argument, forms the beginning of the Bialka river, lies in a saddle to the west, not to the north, of Meeraugenspitze. This rivulet, which flows down across a large rock face, could in no way be described by anyone as a brook. A comparison of these statements with the situation on the ground shows that Nikorowicz was describing the dry boundary line of the Zabie ridge, which runs north from Meeraugenspitze, and that he must have been referring to the confluence of Poduplaski and Fischsee brooks as the source of the Bialka river.

Moreover, it is significant in this context that not one of Nikorowicz's statements refers to the two lakes in the disputed region, despite the fact that the lakes would, without doubt, be the most significant objects in the wet frontier claimed by the Hungarian side, and that, on the other hand, the Polish crest is mentioned, although it lies much farther east in the middle of the what is now undisputedly Hungarian territory. All this clearly points to a dry

boundary line, across mountain ridges, to the confluence of Poduplaski and Fischsee brooks.

However, this is contradicted by map M, which shows the boundary line running along Fischsee brook. According to the expert, this map is not an independent map drawn up on the basis of an on-site survey, but merely a rough sketch, put together from a number of different maps, which omits any depiction of the mountains. This map was clearly drawn up, not by Nikorowicz himself, but by someone else, and thus did not emanate directly from him; it shows a stream situated above the upper lake as the source of Fischsee brook. However, according to the results of the on-site inspection and the expert's opinion, no such stream exists.

In view of this inconsistency between the map and Nikorowicz's statements, which suggest a boundary line running along the dry mountain ridges, it is simply not possible to derive from his statements a binding acknowledgement of the Hungarian wet boundary line, which might then form the basis of a favourable decision of the arbitral tribunal with respect to Hungary's claims.

On the contrary, the text of Nikorowicz's statements, has more validity than the information provided by map M (which is not reliable, for the aforementioned reasons), and provides a strong argument in favour of the Austrian version — that is, in favour of the dry boundary line.

It should also be noted that, in accordance with the instructions issued on 23 March 1754 by Empress Maria Theresa to the boundary adjustment commission of 1755, the final decision was held in reserve, so that, in the event that both sides reached agreement, approval would have been sought, but if there were competing claims, the imperial decision would have been asserted. According to the aforementioned reports of the Governor of Galicia and the above-mentioned order of the Minister of State to Provincial Councillor v. Erggelet, those instructions were made available to the commissions of 1793 and 1794.

It is fairly obvious, moreover, that neither the Galician Government nor treasury official Nikorowicz, whose task it was to rebut Hungary's much broader claim to the Beskid boundary line, were authorized to speak on the boundary question in a manner that bound the State, and that approval of a higher authority would certainly have been required.

It should be reiterated that these commission proceedings were not concluded; that it is conceivable that those statements might have been expanded upon and explained if the commission proceedings had continued; and that if Nikorowicz really had meant to propose the wet boundary line of Fischsee brook, he would have run counter to the boundary description set forth in the Josephine Survey, which defined a dry boundary line along the mountain ridges. In that light, *restitutio in integrum ob malam defensionem* [restitution in full, on the grounds of invalid defence] by the Austrian side

could not be ruled out. Thus, one cannot conclude that the frontier was set by agreement in the commission proceedings of 1793 and 1794.

The subsequent events referred to by the two parties to the dispute in support of their claims, including the visits to both lakes by the Archduke and the Governor, the sale and transfer of the disputed territory to Emanuel Homolacz in 1824, subleases, fines levied against Galician farmers for grazing livestock on the disputed territory, as well as the various literary works and maps produced during that period or in various decades of the nineteenth century, do no more than provide circumstantial evidence supporting one version or the other to a lesser or greater degree and are thus inconclusive and must be disregarded. The settlement reached by Clementine Homolacz with the minor Palocsay heirs does appear, at first sight, to support the Hungarian claim, since Clementine Homolacz waived her own personal claim to the disputed territory in favour of her Hungarian opponents. However, the petition of the opposing parties that the boundary thus agreed on should be recognized as the national frontier was rejected by the Austrian Government. This purely private settlement cannot, therefore, constitute legal grounds for deciding the question of the national frontier.

As these observations make clear, the supporting evidence presented does not permit the conclusion that, in the present case, a national frontier was ever previously defined in the disputed region, whether by mutual agreement between the parties, expressly under a State treaty or tacitly, or by some other sovereign decision binding on both parties.

However, nor could a decision be reached in the present case on the basis of possession from time immemorial, which if need be might determine the boundary. Possession from time immemorial is understood as the form of possession where no evidence can be adduced that the situation was ever different and no living person has ever heard of a different state of affairs. Such possession must also be unbroken and uncontested (Heffter-Geffcken, *Das europäische Völkerrecht*, 8th ed., 1888, pp. 39 and 155; Rivier, *Droit des gens*, 1896, vol. I, p. 182), and it is self-evident that possession so defined must have continued up to the present — that is, up to the time at which the dispute leading to the conclusion of an arbitration agreement occurred. It cannot be said that these requirements are fulfilled in the present case. It should be noted that sovereignty rights were exercised in the disputed region by both Governments for at least a century and a half, but were never recognized by the opposing party, and the situation frequently led to the outbreak of outright hostilities. Although the Austrian side placed particular emphasis on the fact that, at least from the occupation by Komorowski (1624) until the appearance of Seeger and Török (1769), Poland had enjoyed uninterrupted possession, and that this was a sufficient length of time to accord the Austrian side the benefit of prescription, the above remarks suggest that this argument is completely irrelevant to the present day, when the arbitral tribunal must decide.

The arbitral tribunal therefore considers itself bound to proceed with consideration of the natural boundary, as it is clearly entitled to do under the provisions of the arbitral agreement.

In the opinion of the expert, the valley of Poduplaski brook represents the main valley, because of its topographical situation and formation, whereas the valley of Fischsee brook represents the tributary, or side valley, and the valley of Poduplaski brook forms the natural upstream continuation of the Bialka valley.

Again according to the expert opinion, Fischsee brook originates in the lower lake, which is fed from all sides by streams of various sizes. The most important of the water courses that feed the lower lake is that which flows out of the upper lake and may thus be considered the upper or original course of Fischsee brook. The upper lake is fed by a number of smaller rivulets, some of which are visible flowing over the rocks, and some of which flow into the lake unseen beneath snow and mountain debris. The most significant influx of water comes from the channel that is deepest and most often filled with avalanche snow and begins at the deepest point of the so-called Ochsenrücke ["Ox's Back"], 600 metres west of Meeraugenspitze, and flows into the upper lake. However, none of these channels leads to Meeraugenspitze. There is no natural line, such as a rivulet, from the upper lake to Meeraugenspitze, and if one wished to take a line running through the depths of the valley as the boundary, only the aforementioned channel running down from the Ochsenrücke would qualify. From Meeraugenspitze, a mountain ridge runs with slight bends in a generally northerly direction towards the mouth of the Fischsee valley. The first third of the ridge is rocky and wild and broken in many places, notably breaking down into separate ridges and minor peaks around Froschsee peak; and then from Froschsee peak, directly east of the lake, the main ridge descends about 400 metres and continues as far as the so-called Siedem granatów. This second third of the ridge rises to altitudes of 1,753 to 2,023 metres; in the final third, it ceases to form a rock ridge line, becoming a rounded ridge covered in pasture and forest, veering slightly to the northeast. From a point about 200 metres by the shortest line from Fischsee brook and some 700 to 750 metres from the point where Fischsee brook flows into Poduplaski brook, this rounded ridge levels out between the two brooks. This deepest part of the Zabie ridge descends gradually, in a north-easterly direction, down to the confluence of the two brooks, and then becomes more properly a part of the western slope of the Poduplaski valley than of the Zabie ridge, which thrusts against Fischsee brook at the point where a stream channel flows in from the west, down from Czuba mountain. Up to the aforementioned point about 200 metres from Fischsee brook, the Zabie ridge might clearly serve as a boundary ridge. That point marks the last clearly defined, naturally conspicuous point on the ridge: a slight depression, a protrusion, covered with forest, which stands out on the ridge both from the east and the west. It lies about 150 metres above the path that leads down from the right-hand side of the valley, out of the Fischsee valley to the Poduplaski

valley. In the opinion of the expert, and in the tribunal's own view, all natural obstacles qualify as natural boundaries. At lower levels — that is, in low-lying areas — this includes the watercourses, even more for their beds, or rather their banks, so difficult to climb over, than for the constantly fluctuating flow of water. Higher up in the mountains, the ridges qualify as natural boundaries. Where the watercourse ceases to form an obstacle, whether due to the shape of the stream channel or the volume of water, the boundary naturally follows the mountain ridge, becoming more clearly defined as the land rises. The watercourses become less significant as obstacles, as the mountain ridges become more significant. At any point the boundary may shift from river to ridge line, or from stream-led to rise (see also article II of the Berlin Treaty of 1878, in Rivier, vol. I, p. 169). Here the outlines are somewhat obscured, because two or more brooks come together and by erosion or deposit may reshape and flatten the base of an otherwise distinct ridge.

In the present case, therefore, the most natural boundary would follow the Bialka river upstream as far as its source, that is, to the confluence of Fischsee and Poduplaski brooks, and proceed upstream from this confluence along the Zabie mountain ridge to its highest peak, the Meerauge. The expert feels that acceptance of this natural boundary would also be consistent with the various earlier border descriptions, which make no mention whatsoever of the two lakes situated in the disputed region.

The aforementioned views of the expert and the tribunal are also supported by writers on international law who either utterly reject the suitability of rivers to serve as boundaries (Heffter-Geffcken, p. 151) or at least give preference to mountain ridges (Gareis, *Völkerrecht*, 1887 p. 66; Rivier, vol. I, p. 166).

As it happens, for the segment in dispute a natural boundary between Hungary and Galicia may be found only on the jagged Zabie ridge line, not in the small Fischsee brook, which flows through the forest and in no way divides it, since the forest presents a uniform character on both sides. Lastly, this brook would not be suitable as a boundary because the stream bed is changeable, particularly in its higher, flatter reaches, and the possibility of disputes regarding bridging points could certainly not be ruled out. Additional considerations are that the disputed area is easily reached from Galicia; that it is of considerably greater value to Galicia than it is to Hungary; and that so far the Galician side has clearly shown a stronger interest in the area.

Consequently, despite the strong arguments put forward by the Hungarian representatives, the boundary defined is essentially the dry boundary along the Zabie ridge claimed by the Austrian side. As shall be further summarized below, the arbitral tribunal not only regards this as the natural boundary, but also believes, in view of the determination of the source of the Bialka and the interpretation it felt obliged to give to Nikorowicz's statements at the proceedings, that the documentary evidence predominantly supports this boundary line rather than the one claimed by Hungary.

As a matter of strict logic, this dry boundary line should extend to the confluence of Fischsee and Poduplaski brooks. On the other hand, the arbitral tribunal has taken into account the fact that the present dispute is attributable merely to a misunderstanding regarding the upper reaches and the source of the Bialka river, and that the Hungarian party to the dispute, with reference in particular to its interpretation of the statements of treasury official Nikorowicz and the official military maps, was clearly acting in good faith, especially since lengthy proceedings were required in order to clear up the misunderstanding.

The arbitral tribunal also took into account the expert's opinion that the Zabie ridge ceases to be a ridge line proper in its depression by the protrusion; that it is not well-defined from there to the confluence of the two streams and would need to be physically marked as a boundary line; and, lastly, that this lowest part of the Zabie ridge is really more a part of Hungary's Poduplaski valley than a continuation of the ridge line. Since the protrusion forms a fixed, easily recognizable point merely some 200 metres from that other fixed point mentioned where the mountain stream that flows out of Czuba joins Fischsee brook, a line was drawn between these two fixed points to form the frontier, which would then proceed to follow Fischsee brook until it joins Poduplaski brook. This solution makes it possible to award a part of the forest, which is without doubt the most valuable part of the disputed territory, to Hungary.

As a result, occasion for conflict in the disputed region is reduced to a minimum, and it seems certain that the splendid forest, which has been enclosed by, and cared for by its present owner, the Hungarian Güter Jurgo Javorina, will not be dissected by the border.

In this way, in the interest of fairness and out of a practical concern for the peaceful coexistence of those living on both sides of the frontier, the interests of Hungary with respect to the opportunities afforded by the nature of the terrain were therefore taken into account as far as possible.

It should be noted, lastly, that the line approximately 200 metres long running from the point at which the Zabie ridge ceases to be a ridge line to the point where the mountain stream running down from Czuba mountain flows into Fischsee brook, shall be marked by boundary posts or boundary stones, and that this procedure, which should not encounter any difficulties or doubts related to the terrain, may be entrusted to the two Governments, since it already falls within the sphere of implementation of the present arbitration decision.

Ad II. In the course of the proceedings, Dr. Balzer, as representative of Austria and the province of Galicia, made the reservation, on behalf of his principals, that Galicia should have the right without time limitation to assert and claim, at a later date, a frontier removed further eastwards to the Polish crest. Dr. Balzer justified his reservation on the grounds that a similar reservation had been contained in a Hungarian document concerning a frontier stretching to the Beskid mountains. In fact, however, the reservation

mentioned was not introduced into the proceedings by the Hungarian side. Instead, the Hungarian representative very properly declared that he would submit to the decision reached by the arbitral tribunal. Consequently, the Austrian representative lacked the formal grounds he had adduced for presenting his reservation. Indeed he was not entitled to do so, since his powers only extended to claims relating to the territory presently in dispute. Apart from this, the arbitral tribunal was obliged to reject this reservation, which undermines its position and the validity of its decision, since the purpose of the arbitration agreement was to arrive at not a provisional or temporary but a final determination of the national and provincial boundaries as requested by the two Governments, and to provide a definitive settlement of the boundary dispute in that region, which precludes any further reservations. The reservation submitted by Dr. Balzer is therefore inconsistent with the content and purpose of the arbitration agreement, and is thus inadmissible.

Graz, 13 September 1902

(Signed) *Winkler*

(Signed) *Tschorznicki*

(Signed) *Lehoczky*

PART XXIX

**The Arbitration of the Aaroo Mountain
between Saudi Arabia and Yemen**

Decision of 3 December 1931

**Arbitrage de la Montagne Aaroo
entre l'Arabie Saoudite et le Yémen**

Décision du 3 décembre 1931

THE ARBITRATION OF THE AAROO MOUNTAIN BETWEEN SAUDI
ARABIA AND YEMEN, DECISION OF 3 DECEMBER 1931*

ARBITRAGE DE LA MONTAGNE AAROO ENTRE L'ARABIE
SAOUDITE ET LE YÉMEN, DÉCISION DU 3 DECEMBRE 1931**

Territorial attribution not on a juridical basis – the arbitrator, the King of Saudi Arabia, is a Party to the dispute and has been chosen by the other party, the King of Yemen – even if the arbitrator is convinced of his right and sovereignty over the disputed territory, in view of the opposing party's confidence in him and the love of peace between Muslim Kingdoms, he concedes the Aaroo Mountain to Yemen.

Arbitrage territorial sur une base non-juridique – l'arbitre choisi par le Roi du Yémen, l'une des Parties, est le Roi d'Arabie Saoudite, qui est l'autre Partie au différend – même si l'arbitre est convaincu de son bon droit et de sa souveraineté sur le territoire contesté, au vu de la confiance de l'autre Partie en sa personne et de l'amour de la paix entre Royaumes musulmans, il accorde la montagne d'Aaroo au Yémen.

* * * * *

Telegram from the plenipotentiary of Imam Yahya (King of Yemen) wired to His Majesty Ibn Saud, including therein a telegram from the Imam asking for arbitration

Nazir, Rejeb 18th, 1350***

His Majesty the King, God sustain Him,

As there has been no agreement between the plenipotentiaries of both sides because of the adamant stand of both, a thing which had come to mind previously, we have sent this telegram to your Presence assuring that we leave the decision to you. We had conveyed the truth to your Presence and there remains nothing except your good sight for whatever might grace both sides and bring about harmony. May God lead you for what He likes and approves.

Peace be on you.

(signed)

Ibn Mamer and his colleagues

* Reprinted from *American Journal of International Law*, vol. 33, 1939, p.356.

** Reproduit de *American Journal of International Law*, vol. 33, 1939, p.356.

*** Secretariat note: The dates in the award are based on the Hijra Calendar – 18th Rejeb 1350 corresponds to 29 November 1931 in Gregorian Calendar.

The answer of His Majesty Ibn Saud

To:

Abuchillah Ibn Mamer and his Colleagues, Nazir.

We have come to knowledge of the telegram of the Imam and we are certain that Aaroo is within our boundary. As to talks about Beni Malik and Figha and Beni Minebbik, it is inconceivable to take notice of it and we do not think that the Imam talks about it because it is above doubt. But for the sake of peace and because of our esteem for the Imam and his acceptance of us as arbitrator, we have decided in the matter as you see in our telegram and thereon to act.

We beg God to lead all to do the best.

(signed)

Abdul-Aziz

Telegram of His Majesty the King (Abdul-Aziz) to the Imam Yahya with his decision on the Aaroo Mountain, Rejeb 22, 1350*

Your telegram through the Plenipotentiaries has arrived. Thank Your Eminence for the sincerity for peace and Islam and the jealousy for the harmonious agreement of the Moslems which you have shown. You know that Moslem and Arabian rules demand that a man should offer all the power and honor that he possesses for what he undertakes in order to fulfill his duty. It is not unknown to you what we undertook for the Idrissi to safeguard his possessions according to the common interest and because of the previous protection between ourself and Mohammed (Idrissi) necessitated by the interest of our country. This is a thing which we disclosed to your Presence and had become known to all. It is known to you that our habit on which God disposed us is to fulfil our promise. We have looked over the proofs advanced by the Deputies of the two Kingdoms and have found some unexpected contradictions. Your plenipotentiaries raise it because there is no point of doubt nor anything akin to that. But the error of deputies can be erased by the harmony of brotherhood. Therefore, according to your choice of Your Brother as arbiter, and your good confidence in him, it has become my duty to take the responsibility on me from all sides — whether from the side of the compact between the Idrissi and ourself, or whether from the side of the country of the Idrissi and its people and that of Nejd and Hedjaz and Asir, who always like to fulfil their obligations and defend their rights — and so I take this step, which I see your Presence worthy of it — and because of love for peace among the Moslems in general and between the two Kingdoms in particular, — and say that we concede the Aaroo Mountain to you hoping that God may guide the Moslems and the Arabs and the two Kingdoms to peace and tranquillity, and we have informed our plenipotentiaries thereof. May God lead all to do the best.

* Secretariat note: 3 December 1931.

PART XXX

**Arbitral award establishing the
Czechoslovak-Hungarian boundary**

Decision of 2 November 1938

**Sentence arbitrale fixant la frontière entre
la Hongrie et la Tchécoslovaquie**

Décision du 2 novembre 1938

ARBITRAL AWARD ESTABLISHING THE CZECHOSLOVAK-
HUNGARIAN BOUNDARY, DECISION OF 2 NOVEMBER 1938*

SENTENCE ARBITRALE FIXANT LA FRONTIÈRE ENTRE LA
HONGRIE ET LA TCHÉCOSLOVAQUIE, DÉCISION DU 2
NOVEMBRE 1938**

Territorial determination – cession of territories – question of the areas to be ceded by Czechoslovakia to Hungary – modalities of transfer.

Nationality – protection of persons of Magyar nationality remaining in Czechoslovakian territory and of persons of non-Magyar nationality remaining in the ceded territories to be agreed upon by a Hungarian-Czechoslovak Commission.

Délimitation territoriale – cession de territoires – question des secteurs devant être cédés par la Tchécoslovaquie à la Hongrie – modalités du transfert.

Nationalité – la protection des personnes d'origine magyare, restant sur le territoire tchécoslovaque, et des personnes d'origine non-magyare, restant dans les territoires cédés, est à convenir par une Commission Hongroise-Tchécoslovaque.

* * * * *

* Reprinted from M. O. Hudson, *International Legislation: a collection of the texts of multipartite international instruments of general interest*, vol. VIII, Washington, 1949, Carnegie Endowment on international peace, p.202.

** Reproduit de M. O. Hudson, *International Legislation: a collection of the texts of multipartite international instruments of general interest*, vol. VIII, Washington, 1949, Carnegie Endowment on international peace, p.202.

Protocol concerning the Arbitral Award Establishing the Czechoslovak-Hungarian Boundary. Signed at Vienna, November 2, 1938.*

Entered into force November 2, 1938.**

Translation from 8 *Völkerbund* (1938), No. 3-4, pp. 54-55.

In pursuance of the request made by the Royal Hungarian and the Czechoslovak Governments to the German and the Royal Italian Governments to settle by arbitration the outstanding question of the areas to be ceded to Hungary, and in pursuance of the notes exchanged on the subject between the Governments concerned on October 30th 1938, the German Reich Minister of Foreign Affairs, Herr Joachim von Ribbentrop, and the Minister of Foreign Affairs of His Majesty the King of Italy and Emperor of Ethiopia, Count Galeazzo Ciano, have today met at the Belvedere Castle at Vienna and given the desired arbitral award in the names of their Governments.

For this purpose they have invited to Vienna the Royal Hungarian Minister of Foreign Affairs, M. Koloman von Kanya, and the Czechoslovak Minister of Foreign Affairs, Dr. Franz Chvalkovsky, in order to give them an opportunity in the first place again to explain the point of view of their Governments.

This arbitral award, together with the map mentioned in paragraph I, has been handed to the Royal Hungarian Minister of Foreign Affairs and to the Czechoslovak Minister of Foreign Affairs. They have taken cognizance of it and have again confirmed, on behalf of their Governments, the statement which they made on October 30th 1938 that they accept the arbitral award as a final settlement and that they undertake to carry it out unconditionally and without delay.

DONE in the German and Italian languages in quadruplicate.

Vienna, November 2nd 1938.

v. RIBBENTROP COUNT CIANO v. KANYA CHVALKOVSKY

* Editor's note: Provisions relating to the Czechoslovak-Hungarian boundary were included in Article 27 of the Treaty of Trianon of June 4, 1920 (*British and Foreign State Papers*, vol. 113, p. 505); a delimitation convention was signed at Prague, November 14, 1928 (*League of Nations Treaty Series*, vol. 110, p. 425). At the time of the conclusion of the Munich Agreement of September 29 1938, the heads of the British, French, German and Italian governments declared that "the problems of the Polish and Hungarian minorities in Czechoslovakia, if not settled within three months by agreement between the respective Governments, shall form the subject of another meeting" of the four heads of the governments. On a proposal by the Czechoslovak Government, the question of the transfer of territories from Czechoslovakia to Hungary was submitted to the arbitration of the German and Italian Foreign Ministers, whose award was annexed to this Protocol. A convention on nationality was concluded between Czechoslovakia and Hungary on February 18, 1939. The treaty of peace with Hungary of February 10, 1947, declared the decisions of the Vienna award "null and void" (Article 1, §4). U.S. Department of State Publication 2743.

** Editor's note: Not registered with the Secretariat of the League of Nations.

Annex

Arbitral Award of November 2, 1938

In pursuance of the request made by the Royal Hungarian and the Czechoslovak Governments to the German and the Royal Italian Governments to settle by arbitration the outstanding question of the areas to be ceded to Hungary, and in pursuance of the notes exchanged on the subject between the Governments concerned on October 30th 1938, the German Reich Minister of Foreign Affairs, Herr Joachim von Ribbentrop, and the Minister of Foreign Affairs of His Majesty the King of Italy and Emperor of Ethiopia, Count Galeazzo Ciano, have today met at Vienna and, after a further discussion with the Royal Hungarian Minister of Foreign affairs, M. Koloman von Kanya, and the Czechoslovak Minister of Foreign Affairs, Dr. Franz Chvalkovsky, have given the following arbitral award in the names of their Governments:

1. The areas to be ceded by Czechoslovakia to Hungary are marked on the annexed map.* The demarcation of the frontier on the spot is confided to a Hungarian-Czechoslovak Commission.

2. The evacuation of the ceded territories by Czechoslovakia and their occupation by Hungary begins on November 5th and is to be concluded by November 10th. The individual stages of the evacuation and occupation together with other details are to be fixed by a Hungarian-Czechoslovak Commission.

3. The Czechoslovak Government will take care that the ceded territories are left in an orderly condition on evacuation.

4. Individual questions arising out of the cession of territory, in particular questions relating to nationality and options are to be settled by a Hungarian-Czechoslovak Commission.

5. Likewise, detailed provisions for the protection of persons of Magyar nationality remaining in the territory of Czechoslovakia and of persons of non-Magyar nationality remaining in the ceded territories are to be agreed upon by a Hungarian-Czechoslovak Commission. This Commission will take particular care that the Magyar national group in Pressburg is given the same position as the other national groups.

6. In so far as the cession of territories to Hungary involves disadvantages and difficulties of an economic or transport character for the territory remaining with Czechoslovakia, the Royal Hungarian Government will do everything possible, in agreement with the Czechoslovak Government, to remove such disadvantages and difficulties.

* Secretariat note: The map is not reproduced herein.

7. Should any difficulties or doubts arise in the execution of this arbitral award, the Royal Hungarian and the Czech Governments will immediately consult with each other. Should they be unable to reach an agreement on any question, such question will be submitted to the German and Royal Italian Governments for final decision.

Vienna, November 2nd 1938.

JOACHIM VON RIBBENTROP

GALEAZZO CIANO

PART XXXI

**Award relating to the Territory
ceded by Romania to Hungary**

Decision of 30 August 1940

**Sentence arbitrale relative au territoire
cédé par la Roumanie à la Hongrie**

Décision du 30 août 1940

AWARD RELATING TO THE TERRITORY CEDED BY ROMANIA TO
HUNGARY, DECISION OF 30 AUGUST 1940*

SENTENCE ARBITRALE RELATIVE AU TERRITOIRE CÉDÉ PAR LA
ROUMANIE À LA HONGRIE, DÉCISION DU 30 AOÛT 1940**

Territorial determination – cession of territories – question of the areas to be ceded by Romania to Hungary – modalities of transfer.

Nationality – Romanian subjects domiciled in territory ceded to Hungary immediately acquire Hungarian citizenship – option to acquire Romanian citizenship and leave ceded territory – compensation for unliquidated immovable property.

Nationality – Romanian subjects of Hungarian descent domiciled in territory ceded to Romania by Hungary in 1919 and which remains Romanian have right to opt for Hungarian nationality within six months.

Délimitation territoriale – cession de territoires – question des secteurs devant être cédés par la Roumanie à la Hongrie – modalités du transfert.

Nationalité – acquisition immédiate de la citoyenneté hongroise par les ressortissants roumains domiciliés sur le territoire cédé à la Hongrie – option pour acquérir la citoyenneté roumaine et quitter le territoire cédé – compensation pour un bien immobilier non revendu.

Nationalité – option offerte aux ressortissants roumains de descendance hongroise domiciliés dans le territoire cédé à la Roumanie par la Hongrie en 1919, d’opter pour la nationalité hongroise dans un délai de six mois.

* * * * *

AWARD. Territory ceded by Roumania to Hungary. —

Vienna, August 30, 1940

(Translation)

THE Roumanian and Hungarian Governments have addressed themselves to the Reich Government and to the Italian Government with the request that they should determine by an arbitral award the question at issue between Roumania and Hungary of the territory to be ceded to Hungary. It is officially stated that, on the basis of this request and on the basis of the declaration made by the Roumanian and Hungarian Governments in connexion with this request that they would regard such an arbitral award as final and binding, the

* Reprinted from *British and Foreign State Papers*, Compiled by the Librarian and Keeper of the Papers, Foreign Office, vol. 144, London, 1952, H. M. Stationery Office, p.417.

** Reproduit de *British and Foreign State Papers*, Compiled by the Librarian and Keeper of the Papers, Foreign Office, vol. 144, London, 1952, H. M. Stationery Office, p.417.

Reich Minister for Foreign Affairs Ribbentrop, and the Italian Minister for Foreign Affairs Count Ciano have, after repeated discussions with the Roumanian Minister for Foreign Affairs Manoilescu and the Hungarian Minister for Foreign Affairs Count Csáky to-day in Vienna, made the following arbitral awards: —

1. The frontier traced on the attached map* shall be the final and definitive frontier between Roumania and Hungary. The precise delimitation of the frontier shall be carried out on the spot by a joint Roumanian-Hungarian Commission.

2. The Roumanian territory which is to be ceded to Hungary shall be evacuated by the Roumanian troops within a period of fourteen days and handed over to Hungary in good order. The precise stages of the evacuation and occupation and the manner in which they shall proceed shall be determined forthwith by a Roumanian-Hungarian Commission. The Roumanian and Hungarian Governments shall see to it that the evacuation and occupation take place in a peaceable and orderly manner.

3. All Roumanian subjects who are to-day domiciled in the territory to be ceded to Hungary shall immediately acquire Hungarian citizenship. They are entitled within a period of six months to opt for Roumanian citizenship. Persons availing themselves of this right of option must leave Hungarian territory within a further period of one year and will be accepted by Roumania. They may take their movable property with them. They may furthermore liquidate their immovable property and take the proceeds with them. If it does not prove possible to liquidate the property they shall be compensated by Hungary. Hungary will deal with all matters appertaining to the transfer of optants in a generous and conciliatory manner.

4. Roumanian subjects of Hungarian race who are domiciled in territory which was ceded to Roumania by Hungary in 1919 and which now remains Roumanian have the right to opt for Hungarian nationality within six months. The principles laid down in paragraph 3 shall be applicable to persons who make use of this right of option.

5. The Hungarian Government formally undertakes that persons who have acquired Hungarian nationality as a result of this arbitral award but who are of Roumanian race shall be treated in exactly the same manner as other Hungarian subjects. The Roumanian Government gives the same under taking in respect of Roumanian subjects of Hungarian race who remain in Roumanian territory.

6. The settlement of other questions arising out of the change of sovereignty shall be achieved by direct negotiations between the Roumanian and Hungarian Governments.

* Secretariat note: The map is not reproduced herein.

7. In the event of any difficulties or doubts arising out of the putting into effect of this arbitral award the Roumanian and Hungarian Governments shall enter into direct negotiations. Should they fail to reach agreement in regard to any question, it shall be referred to the Reich Government and the Italian Government for a final decision.

PART XXXII

**Ruling concerning the disagreement
between Ecuador and Peru over the
Zamora-Santiago sector**

Decision of 14 July 1945

**Décision concernant le litige entre
l'Équateur et le Pérou sur le
secteur de Zamora-Santiago**

Décision du 14 juillet 1945

RULING CONCERNING THE DISAGREEMENT BETWEEN ECUADOR
AND PERU OVER THE ZAMORA-SANTIAGO SECTOR, DECISION
OF 14 JULY 1945*

DÉCISION CONCERNANT LE LITIGE ENTRE L'ÉQUATEUR ET LE
PÉROU SUR LE SECTEUR DE ZAMORA-SANTIAGO, DÉCISION DU
14 JUILLET 1945**

Determination of borders – question of the delimitation of the Zamora-Santiago sector (Maranon Basin) – interpretation of the Rio de Janeiro Protocol of Peace, Friendship and Boundaries of 1942 and the agreements of the preliminary conferences of Puerto Bolívar – question of whether the boundary should follow the watershed between the last tributary of the Zamora River and the first tributary of the Santiago River to near the confluence of both rivers and continue in a straight line to the mouth of the Yaupi River or instead follow the course of the high peaks of the Condor Range.

Determination of borders – disagreement between Peruvian and Ecuadorian commission as expressed in “official notices” published in press – previous demarcation by the joint commission including the placement of a boundary marker is not dispositive since its goal was purely to gather data – intention of negotiators of Protocol was for the border to run from the San Francisco River to the confluence of the Yaupi River with the Santiago River along the most direct and easily-recognizable natural boundary line namely the Zamora-Santiago watershed.

Interpretation of treaties - true intent of provisions – error in text of Protocol which assumes that the Zamora-Santiago watershed extends to confluence of the Yaupi River when it does not thereby leaving a gap in the boundary line – recognized rule of international law regarding interpretation of treaties is “if the literal meaning of a word is in contradiction with the manifest objective of the treaty, that interpretation must not exclude a broader interpretation if it is indispensable for giving effect to the objective in question”, the text of the Protocol should be given a broader meaning to achieve the objective both Governments envisaged – interpretation to follow to the spirit of the Protocol as close as possible such that the boundary line follows the Zamora-Santiago watershed regardless of whether it corresponds to the high peaks of the Condor Range and a land boundary line drawn from the source of the San Francisco River to the confluence of the Yaupi River.

Délimitation frontalière – question de la délimitation du secteur Zamora-Santiago (Bassin de Maranon) – interprétation du Protocole de paix, d'amitié et de frontières de Rio de Janeiro de 1942 et des accords relatifs aux conférences préliminaires de Puerto Bolívar – question de savoir si les frontières doivent suivre la ligne de partage des eaux entre le premier affluent du fleuve Zamora et le dernier affluent du fleuve Santiago, rejoindre le point de confluence des deux fleuves et continuer en ligne droite jusqu'à l'embouchure du fleuve Yaupi, ou au contraire, suivre la ligne des crêtes de la chaîne du Condor.

Délimitation frontalière – désaccord entre les Commissions péruviennes et équatoriennes exprimé dans les «informations officielles» publiées dans la presse – la démarcation antérieure réalisée par la Commission mixte comprenant la pose de piquets frontaliers, n'est pas pertinente

* Reprinted from Ministerio de Relaciones Exteriores del Perú, *Documentos Básicos sobre el Protocolo de Rio de Janeiro de 1942 y su ejecución*. Tercera Edición, Lima, 1961.

** Réproduit de Ministerio de Relaciones Exteriores del Perú, *Documentos Básicos sobre el Protocolo de Rio de Janeiro de 1942 y su ejecución*. Tercera Edición, Lima, 1961.

puisque son but était simplement de collecter des informations – l'intention des auteurs du Protocole était que la frontière suive le plus directement possible une ligne naturelle facilement reconnaissable depuis le fleuve San Francisco jusqu'à la confluence des fleuves Yaupi et Santiago, à savoir la ligne de partage des eaux Zamora-Santiago.

Interprétation conventionnelle – objectif réel des dispositions – erreur dans le texte du Protocole qui affirme que la ligne de partage des eaux Zamora-Santiago s'étend jusqu'à la confluence du fleuve Yaupi alors qu'elle ne le fait qu'approximativement, laissant un vide sur la ligne frontière – la règle reconnue du droit international en matière d'interprétation conventionnelle, est que « si le sens littéral du terme est en contradiction avec l'objectif manifeste du traité, cette interprétation ne doit pas exclure une interprétation plus large lorsqu'elle s'avère indispensable pour donner effet au but en question ». Un sens plus large devrait donc être donné au texte du Protocole afin que les objectifs manifestés par les deux gouvernements puissent être remplis – l'interprétation doit suivre autant que possible l'esprit du Protocole, de sorte que la frontière suive la ligne de partage des eaux sans se soucier de savoir si elle correspond bien à la ligne de crête de la Chaîne du Condor et à la ligne territoriale tracée entre la source du fleuve San Francisco et la confluence du fleuve Yaupi.

* * * * *

Protocol of Peace, Friendship, and Boundaries between Peru and Ecuador

Rio de Janeiro, 1942*

The Governments of Peru and Ecuador, desiring to settle the boundary dispute which, over a long period of time, has separated them, and taking into consideration the offer which was made to them by the Governments of the United States of America, of the Argentine Republic, of the United States of Brazil, and of Chile, of their friendly services to seek a prompt and honourable solution to the programme, and moved by the American spirit which prevails in the Third Consultative Meeting of the Ministers of Foreign Affairs of the American Republics, have resolved to conclude a protocol of peace, friendship, and boundaries in the presence of the representatives of those four friendly Governments. To this end, the following plenipotentiaries take part:

For the Republic of Peru, Doctor Alfredo Solf y Muro, Minister of Foreign Affairs; and

For the Republic of Ecuador, Doctor Julio Tobar Donoso, Minister of Foreign Affairs;

Who, after having exhibited the respective full powers of the parties, and having found them in good and due form, agree to the signing of the following protocol:

* Original Spanish version, translated by the Secretariat of the United Nations.

ARTICLE I

The Governments of Peru and Ecuador solemnly affirm their resolute intention of maintaining between the two peoples relations of peace and friendship, of understanding and good faith and of abstaining, the one with respect to the other, from any action capable of disturbing such relations.

ARTICLE II

The Government of Peru shall, within a period of 15 days from this date, withdraw its military forces to the line described in article VIII of this protocol.

ARTICLE III

The United States of America, Argentina, Brazil, and Chile shall cooperate, by means of military observers, in order to adjust to circumstances this evacuation and retirement of troops, according to the terms of the preceding article.

ARTICLE IV

The military forces of the two countries shall remain in their new positions until the definitive demarcation of the frontier line. Until then, Ecuador shall have only civil jurisdiction in the zones evacuated by Peru, which remain in the same status as the demilitarized zone of the Talara Act.

ARTICLE V

The activity of the United States, Argentina, Brazil, and Chile shall continue until the definitive demarcation of frontiers between Peru and Ecuador has been completed, this protocol and the execution thereof being under the guaranty of the four countries mentioned at the beginning of this article.

ARTICLE VI

Ecuador shall enjoy, for purposes of navigation on the Amazon and its northern tributaries, the same concessions which Brazil and Colombia enjoy, in addition to those which may be agreed upon in a Treaty of Commerce and Navigation designed to facilitate free and untaxed navigation on the aforesaid rivers.

ARTICLE VII

Any doubt or disagreement which may arise in the execution of this protocol shall be settled by the parties concerned, with the assistance of the representatives of the United States, Argentina, Brazil, and Chile, in the shortest possible time.

ARTICLE VIII

The boundary line shall follow the points named below:

- a) In the west. –
 1. – The mouth of the Capones in the ocean;
 2. – The Zarumilla River and the Balsamal or Lajas Quebrada;
 3. – The Puyango or Tumbes River to the Quebrada de Cazaderos;
 4. – Cazaderos;
 5. – The Quebrada de Pilares y del Alamor to the Chira River;
 6. – The Chira River, upstream;
 7. – The Macará, Calvas, and Espíndola Rivers, upstream, to the sources of the last mentioned in the Nudo de Sabanillas;
 8. – From the Nudo de Sabanillas to the Canchis River;
 9. – Along the whole course of the Canchis River, downstream;
 10. – The Chinchipe River, downstream, to the point at which it receives the San Francisco River.
- b) In the east. –
 1. – From the Quebrada de San Francisco, the watershed between the Zamora and Santiago Rivers, to the confluence of the Santiago River with the Yaupi;
 2. – A line to the outlet of the Bobonaza into the Pastaza. The confluence of the Conambo River with the Pintoyacu in the Tigre River;
 3. – Outlet of the Cononaco into the Curaray, downstream, to Bellavista;
 4. – A line to the outlet of the Yasuní into the Napo River. Along the Napo, downstream, to the mouth of the Aguarico;
 5. – Along the latter, upstream, to the confluence of the Lagartococha or Zancudo River with the Aguarico;
 6. – The Lagartococha or Zancudo River, upstream, to its sources and from there a straight line meeting the Güepí River and along this river to its outlet into the Putumayo, and along the Putumayo upstream to the boundary of Ecuador and Colombia.

ARTICLE IX

It is understood that the line above described shall be accepted by Peru and Ecuador for the demarcation of the boundary between the two countries,

by technical experts, on the grounds. The parties may, however, when the line is being laid out on the ground, grant such reciprocal concessions as they may consider advisable in order to adjust the aforesaid line to geographical realities. These rectifications shall be made with the collaboration of the representatives of the United States of America, the Argentine Republic, Brazil, and Chile.

The Governments of Peru and Ecuador shall submit this protocol to their respective Congresses and the corresponding approval is to be obtained within a period of not more than 30 days.

In witness thereof, the plenipotentiaries mentioned above sign and seal the present protocol, in two copies, in Spanish, in the city of Rio de Janeiro, at one o'clock, the twenty-ninth day of January, of the year nineteen hundred and forty-two, under the auspices of His Excellency the President of Brazil and in the presence of the Ministers of Foreign Affairs of the Argentine Republic, Brazil, and Chile and of the Under Secretary of State of the United States of America.

Signed:	<i>Alfredo Solf y Muro</i>	<i>Oswaldo Aranha</i>
	<i>J. Tobar Donoso</i>	<i>Juan B. Rossetti</i>
	<i>E. Ruiz Guiñazú</i>	<i>Sumner Welles</i>

Ruling of Captain Dias de Aguiar concerning the disagreement over the Zamora-Santiago sector

BACKGROUND.—

On 5 and 6 July 1943, Lieutenant Colonel Bernardo Dianderas and Major Manuel Llanos, members of Peru's demarcation commission, carried out a reconnaissance flight over the Condor Range, with a view to studying the area in which the demarcation work of the joint group operating in that sector was to begin.

On 7 July Dr. Luis Tufiño, chairman of the Ecuadorian boundary commission, having learned of their reconnaissance mission, sent a note to his counterpart, Captain José Felix Barandiarán, chairman of the Peruvian commission, protesting that the mission had been carried out without his prior and due knowledge and without the participation of any member of the Ecuadorian commission.

On 9 August 1943, at Iquitos, Captain Barandiarán, chairman of the Peruvian commission, presented an official letter to the chairman of the Ecuadorian commission, outlining a plan for the demarcation of the boundary in the Zamora-Santiago sector, and stated: "the demarcation line shall commence at the nearest accessible point to the source of the San Francisco River. It shall then proceed through the high peaks that form the watershed of

the Zamoro and Santiago rivers, or their tributaries, until the end point of the said watershed, and from this point shall follow a straight line to the thalweg of the confluence of the Yaupi and Santiago rivers.”

On 8 October 1943, while the joint group was carrying out its work in that sector, the chairman of the Peruvian commission sent an official letter to the chairman of the Ecuadorian commission, in which he proposed “that the observations necessary to set up the marker indicating the northernmost point of the watershed of the tributaries of the Santiago and Zamora rivers shall be carried out”.

It was not until 13 October 1943 that the chairman of the Ecuadorian commission replied to the proposals of his Peruvian counterpart. In his reply, Mr. Tufiño reviewed Peru’s proposal and disputed it, largely on the grounds that the chairman of the Peruvian commission had referred to the end point of the watershed and had stated that the boundary “from this point shall follow a straight line to the thalweg of the confluence of the Yaupi and Santiago rivers”. The chairman of the Ecuadorian commission concluded by stating: “until there is scientific evidence of where that end point is located, I shall give no order to proceed immediately with the observations necessary for setting up the marker”.

This is the origin of the difference of opinion regarding the boundary sector between the source of the Quebrada de San Francisco and the mouth of the Yaupi river.

On 18 October 1943 the chairman of the Peruvian commission responded to the official letter of his Ecuadorian counterpart’s note by reaffirming the position of his Government, stating that the boundary should follow the watershed between the last tributary of the Zamora and the first tributary of the Santiago River to the end of the watershed near the confluence of the Zamora and Santiago rivers, from which point it should continue by a straight line to the mouth of the Yaupi river.

On 28 October 1943 the chairman of the Ecuadorian commission reiterated his view that the demarcation line should not follow the confluence of the Zamora and Santiago rivers rather than continuing directly to the mouth of the Yaupi river. He further: *asserted that the line should follow the course of the high peaks of the Condor Range.*

Two days later, on 30 October, the chairman of the Peruvian commission replied by reaffirming his position and adding: “since we have been unable to agree on a common position, I believe we must turn to the provisions of the Rio de Janeiro Protocol and to the agreements of the preliminary conferences of Puerto Bolívar, by bringing the matter to the attention of our respective Governments so that they may, by mutual agreement, issue the instructions necessary for the demarcation of the sector concerned”. The chairman of the Peruvian commission then proposed that the joint group operating in the sector should proceed to “determine the coordinates of the point at which the

line of the watershed of the Santiago and Zamora rivers intersects one of those rivers” and to “survey the stretch of the Santiago river between that point and the mouth of the Yaupi river”.

Despite the opposition of the chairman of the Ecuadorian commission, as may be seen from official letter No. 104 SE of 2 November 1943, the joint group surveyed the Santiago river from the mouth of the Zamora river to the mouth of the Yaupi river, and explored and surveyed about 15 kilometres of the watershed of the Zamora river and the Cuango river, which is the first tributary on the Santiago river’s right bank, downstream from the mouth of the Zamora, and set up a marker at the northernmost point of the surveyed watershed, at a distance of 510 metres from and at the azimuth of $61^{\circ} 30'$ SW of the confluence of the Zamora and Santiago rivers. In the document recording the marker’s inauguration, which was undersigned by the members of the joint group on 23 January 1944, the head of the Ecuadorian group stated: “even though the word ‘Peru’ has been engraved on the surface of the marker, which faces south and stands in the northernmost part of the watershed of the Zamora and Santiago rivers, the marker is not intended as a boundary marker, but as a basis for the aerial surveys to be carried out with a view to identifying the permanent boundary between Ecuador and Peru in the sector allocated to the undersigned”.

On 16 November 1943, Mr. Francisco Guarderas, Minister for Foreign Affairs of Ecuador, referring to articles 5 and 7 of the Protocol signed at Rio de Janeiro on 29 January 1942, sent a note to Mr. Oswaldo Aranha, Minister for Foreign Affairs of Brazil, to inform him of the differences of opinion between the Governments concerning the demarcation of the boundary in the sector between San Francisco and the mouth of the Yaupi river, and requesting that he should intervene in accordance with the provisions of the Protocol.

Following several months of negotiations, mediated by Brazil’s Minister for Foreign Affairs, Ecuador and Peru signed an agreement, by exchange of notes, accepting his proposals for resolving the various differences of opinion that had arisen in implementation of the Protocol.

The aforementioned agreement states that the differences of opinion concerning the *Condor Range* “shall be resolved according to the solution recommended by Captain Braz Dias de Aguiar, following an in situ inspection”.

ANALYSIS OF THE PERUVIAN INTERPRETATION. —

In support of its point of view the Peruvian commission submitted a memorandum of 28 June 1944 signed by its President, referring to the Protocol “of the Quebrada de San Francisco, the watershed between the Zamora and the Santiago rivers, to the confluence of the Santiago River with the Yaupi”, and stating, “as the confluence of the Santiago and the Yaupi rivers is not located along the course of the Zamora-Santiago watershed and as

the Protocol does not indicate any restriction in this regard, it should be understood that the boundary should follow the Zamora-Santiago watershed until its end point, which is the confluence of the Paute and Zamora rivers (tributaries of the Santiago) and should then continue in the direction of the Yaupi-Santiago confluence”.

As the issue at hand is the demarcation of a borderline which, in the words of the Treaty itself, must follow a watershed, Adami says on page 110, of “National Frontiers in Relation to International Law”, “... a commission’s duty is to interpret the intention of the Treaty’s drafters and signatories, provided it is possible to determine it exactly, and, if proof of that intention is lacking, to proceed in accordance with the general spirit of the Treaty to the greatest extent possible”.

The clear intention of the negotiators of the Protocol of Rio de Janeiro was that the border should run as directly as possible from the source of the San Francisco to the confluence of the Yaupi with the Santiago, and, since a geodesic line would be difficult and costly to set and therefore not suitable, they naturally tried to make the Zamora-Santiago watershed the boundary line.

“Any creek or river, no matter how small, forms its own river system, and the line appearing on a map and marked by a name is hardly more than the main current of a particular river basin, which represents all waters originating in that part of the area. We would see the number of secondary rivers grow steadily if we went from studying a general map to a particular section” (Tratado de Geografia (Geographical Treatise), p. 231). The signatories of the Rio de Janeiro Protocol, using general geographical maps with very small scales, did not notice that the line representing the section of the Santiago river located between the mouths of its tributaries, the Zamora and the Yaupi, is hardly more than the “collector” of waters in that region and that it would necessarily receive tributaries, both large and small, on both banks, which were not represented, some because they were too small and others because the maps were not sufficiently precise.

In the Itamaraty map library we found a few of those maps, which were available when the Protocol was being negotiated, two copies of which we are attaching. On all of them the section of the Santiago River under consideration is represented by no more than one line with no tributaries. On one of the maps there is a light line, in pencil, connecting the source of the San Francisco with the mouth of the Yaupi, which was probably used for study during the negotiations.

For the reasons we have just put forward, the negotiators of the boundary agreement used the expression “to the confluence of the Santiago and the Yaupi rivers” improperly, since that watershed does not actually run that far.

But should the border follow the watershed to the point indicated by the chairman of the Peruvian commission, thus departing considerably from its goal, which is the mouth of the Yaupi?

If the boundary were to be taken up to the mouth of the Zamora, that would solve the problem of continuity between the mouths of the Zamora and the Yaupi. How should those two points be connected? By following the course of the Santiago River? By a straight line connecting the confluences of both the Zamora and the Santiago, as the chairman of the Peruvian commission says? Either solution would introduce a border of nearly 50 kilometres which does not appear in the Protocol. The interpretation according to which the boundary would be extended to the mouth of the Zamora would lead to incompatibility with the general provisions of the Protocol.

A rule of international law in interpreting treaties is that "if the literal meaning of a word is in contradiction with the manifest objective of the treaty, that interpretation must not exclude a broader interpretation if it is indispensable for giving effect to the objective in question" (*Derecho Internacional Público*, Accioly, Vol. II, p. 462). Consequently, if the literal interpretation of the text of the Protocol leads to a result that is clearly outside the objective envisaged by its negotiators, it must be given a broader meaning, in order to achieve the objective that both Governments had in mind, *which was to connect the source of the San Francisco and the confluence of the Yaupi with the Santiago by a natural line.*

In his Memorandum of 28 June the chairman of the Peruvian commission, referring to the interpretation according to which the boundary would be taken up to the mouth of the Zamora River, that "this interpretation of the Protocol is the one Peru had in mind when it signed the Agreement. The official notice from the Boundary Office which the Peruvian Foreign Ministry published a few days after the Protocol was signed (6 February 1942), reads as follows: "The line, which passes through the point where the Yaupi flows into the Santiago, grants Peru the entirety of this river up to the Marañón, which clearly shows awareness that, after going through the Paute-Zamora confluence, the boundary should extend to the Yaupi-Santiago confluence".

We do not agree with the chairman of the Peruvian commission, since, if the boundary line, in the words of the Protocol, intersects or crosses the Santiago River at any point, it leaves part of the river's course in Peru and part in Ecuador. This was also the interpretation of the Government of Peru in its official notices, as we shall show. — When reference is made to a river or section of a river which crosses a border, i.e. when only one bank remains within Peruvian territory, official notices use the expression "as a boundary" instead of "entire". The issue of the newspaper "El Comercio" of Lima dated 1 February 1942, that is, three days after the Protocol was signed, published a notice from the Boundary Office of the Ministry of Foreign Affairs dated the day before, which read: "In accordance with the borderline between Peru and Ecuador, established by the Protocol concluded on 29 January 1942 in the city

of Rio de Janeiro, the following rivers belong to the Oriente region of Peru: the *Cenepa in its entirety*; the entire Santiago from the mouth of the Yaupi to its outlet into the Marañón; the entire Morona and part of its tributaries, the Mangosisa and the Cangaimé; the entire Pastaza from the mouth of the Bobonaza to the Marañón; the entire Tigre, from the point at which it is formed by the Cunambo and the Pintoyacu; the Curaray, as a boundary from the mouth of the Cononaco to Bellavista, and from that point the entire course of the river downstream to its outlet into the Napo; the Napo, as a boundary from the mouth of the Yasuni to that of the Aguarico, the long stretch from the mouth of the Aguarico to the Amazonas being entirely within Peruvian territory; the Aguarico from its confluence with the Lagartococha to its outlet Napo; the entire Lagartococha River to its source, and the Güepi River from near the source of the Lagartococha to the Putumayo.”

A mere reading of this notice shows us that when the Peruvian Government speaks of “the entire river”, “entirety” or “entire course” it is referring to both banks of the river. With regard to the Santiago, when the notice speaks of “the entire Santiago, or from the mouth of the Yaupi to its outlet into the Marañón”, it is limiting the course of the river between two perfectly defined points, the mouth of the Yaupi and that of the Marañón. “The entire Pastaza from the mouth of the Bobonaza to the Marañón”, “the entire Tigre”, etc., are similarly defined.

The notice in question gives us two clear examples of this interpretation when it says: “The Curaray, as a boundary from the mouth of the Cononaco to Bellavista, and from that point the entire course of the river downstream to its outlet into the Napo; the Napo, as a boundary from the mouth of the Yasuni to that of the Aguarico, the long stretch from the mouth of the Aguarico to the Amazonas being entirely within Peruvian territory.” Here we see two rivers that have parts that border Peru and others that are entirely within Peruvian territory, that is, both of whose banks belong to Peru.

The Peruvian Government’s second official notice, published in the 7 February 1942 issue of “El Comercio” and cited in the memorandum of the chairman of the Peruvian commission, reflects the same thinking, as it limits the course of the Santiago from its mouth to its confluence with the Yaupi; the Pastaza River from the mouth of the Bobonaza and the Tigre from the confluence of the Cunambo with the Pintoyacu River.

When the Government of Peru wishes to refer to the complete course of a river, from its source to its mouth, it uses the expression “entirety” or “entire course” without indicating specific points. Thus in its first notice it speaks of “*the Cenepa in its entirety*”; and in the second “the entire course of the Corrientes”, without using the expressions “from” and “to”.

The entirety of the course of the Santiago goes from its mouth to its source, and this is not located at the confluence of the Zamora and the Paute. For the the Government of Peru, if the matter were viewed in this way, it would have to be acknowledged that the source of the Lagartococha was at the confluence of the Zancudo or Quebrada Norte with the Yuracyacu or Quebrada Central, as the chairman of the Ecuadorian commission claims.

The Santiago River is not formed at the union of the Zamora and the Paute. If that were the case it would be necessary for both tributaries to be of equal importance and to join without either of the two constituting the extension of the river they form. And this is not the case. The Santiago River, like many others, is called by several names from its headwaters to its mouth.

Villavicencio, describing this river, says: "Santiago: its most remote source lies in the Province of Cuenca, in the Quinuas, Cajas and Culebrillas lakes, on the western branch of the Andes, whose streams, taken as a whole, are called by the name of Matadero, with which it passes in front of the city of Cuenca; however, half a league downstream, it receives the Yanuncay, and takes the name of Verien, with which it flows for 1 1/2 leagues; it then receives the Machángura and takes the name of Chaullabamba or Chalgubamba (lake of fishes) until it receives the Azogues at Guangarcucho, where it takes the name of Chicticay River; it then flows for three leagues until it receives the Gualaceo, at Paute lake, whose name it takes; it flows for six leagues with this name to the mouth of the Pan, where it is called Jordán or Paute, with which it breaks through the eastern branch, turns sharply and enters the woods as just Paute; it first takes an east-south-east direction, then flows south-south-east until it joins the Zamora, where it changes its name to Santiago, and flows into the Marañón, below the Manseriche ravine." He goes on to say:

"Following its waters the main tributaries of the Santiago are: on the right, the Pucará, Yanuncay, Quinjeo, Gualaceo and Pan, until it enters the Andes and, on the left, up to the same point, the Machángara and the Azogues. Once through the Andes the Rosario and the Zamora are on its right" (*Geografía de la República del Ecuador*, Villavicencio, pp. 85 and 86). Later, on page 89, he says: "Zamora: this river is larger and almost rivals the Paute".

On page 534 of the *Geografía del Perú*, a posthumous work by Mateo Paz Soldán, Paris, 1862, we read the following: "Santiago River: it comes down from Ecuador and increases the volume of the Marañón upstream from the Manseriche ravines; it can be navigated by canoe".

Similarly, in chapter IV, page 89, of the "Study on the Question of Boundaries between the Republics of Perú and Ecuador", Santa María de Paredes, describing the general demarcation of the Government and Comandancia of Maynas, writes: "Santiago de las Montañas is found at the juncture of the Paute or Santiago and the Marañón ...". Further on, on page 95, we read: "Village of Paute, on the Paute or Santiago River".

These quotations show us that the confluence of the Santiago with the Zamora is not the source of the Santiago River. That river comes down from the branches of the Andes mountain range and, after being given several names, according to the different regions it crosses, takes the name of Paute, when it receives the Gualaceo, in the Paute plains, and finally that of Santiago after the mouth of the Zamora.

Consequently, the Santiago River in its entirety, as referred to by the official notice of the Boundary Office of the Foreign Ministry of Peru, published in the 7 February 1942 issue of "El Comercio", can only be both banks of the river from the confluence with the Yaupi onwards, and not its entire course from its source to its mouth.

If the interpretation that Peru had in mind when it signed the agreement was the one that the memorandum of the chairman of the demarcation commission is trying to give it, both official notices would say "from the mouth of the Zamora", and not, as they say, "from the mouth of the Yaupi", which is approximately 50 kilometres away.

The interpretation of the Government of Peru, which is provided to us by the official notice of the Boundary Office, is that the border should extend to the mouth of the Yaupi without going through the Paute-Zamora confluence, as is clarified by the map of the Peruvian-Ecuadorian region, dated 4 February 1942 in Lima, with the stamp of the Ministry of Foreign Affairs of Peru, which was published on the same page as the notice in the 7 February 1942 issue of "El Comercio".

On it the borderline clearly follows the Zamora-Santiago watershed north to a point at which it turns north-east and goes directly to the mouth of the Yaupi, thus confirming the text of the official notice.

The same map was published in Jose Pareja Paz Soldán's *Geografía del Perú*, published in Lima in 1943 (p. 29), i.e. after the Rio de Janeiro Protocol.

It was also reproduced, although without the official stamp, in a publication produced in Lima in 1942 in which a comparison is made between the area obtained by Peru in 1942 with the areas that would have been attributed to it under the Pedemonte-Mosquera Protocol (1830), the Treaty of García-Herrera (1890), the Menéndez Pidal line, the line of the Spanish Technical Arbitration Commission and, finally, the line of the Spanish Council of State. This publication does not have the earmarks of an official publication but appears to be semi-official in nature.

In paragraph 4 of the memorandum of 28 June 1944, the chairman of the Peruvian commission says: "This is also, without a doubt, the same interpretation that Ecuador made when it signed the Protocol and when the demarcation work began. This was why the technical experts of the Joint Boundary Demarcation Commission, on instructions from their Governments, worked on the northern part of the Zamora-Santiago watershed up to the end

point of that watershed and were able to set a boundary mark on the watershed a few metres from the confluence of the Paute and Zamora (tributaries of the Santiago). That boundary mark has all the physical features of the definitive boundary marks already set up along the demarcation line. In the instrument that was signed when the site was inaugurated, however, the head of the Ecuadorian group noted that the marker was not being inaugurated as a boundary line, but as a basis for the work 'to identify the permanent boundary between Ecuador and Peru in the sector allocated to the undersigned'. This means that the definitive demarcation of the boundary line in this area should be based on the boundary mark located near the Paute-Zamora confluence."

As can be seen from the joint group's correspondence, this was not the thinking of the Ecuadorian commission, or even the intention of the chairman of the Peruvian commission.

As we have already seen, in his first official letter, dated 13 October 1943, the chairman of the Ecuadorian commission protested against the Peruvian proposal of 9 August 1943 that the boundary demarcation should extend to the Zamora-Santiago confluence.

The work done by the joint group's technical experts on the northern part of the Zamora-Santiago watershed, the placing of the boundary mark at what they considered to be the end point and the placing of the Santiago River between the mouth of the Zamora and the confluence of the Santiago with the Yaupi, were the result of the Peruvian commission's proposal in an official letter dated 30 October 1943, which states "since we have been unable to agree on a common position, I believe we must turn to the provisions of the Rio de Janeiro Protocol and to the agreements of the preliminary conferences of Puerto Bolívar, by bringing the matter to the attention of our respective Governments so that they may, by mutual agreement, issue the instructions necessary for the demarcation of the sector concerned". He goes on to say, in paragraph 3: "In order to provide our Governments with as much information as possible about the actual geographic situation of this region, I suggest that the Santiago-Zamora or Morona-Santiago joint group should proceed to determine the coordinates of the point at which the line of the watershed of the Santiago and Zamora rivers intersects one of those rivers and to survey the stretch of the Santiago River between that point and the mouth of the Yaupi River."

The foregoing proves that the Ecuadorian interpretation "when the demarcation work began" was the opposite of Peru's interpretation, and that it was not the intention of the chairman of the Peruvian commission to conduct demarcation work, but to obtain data to be submitted to his Government to better inform it about the region's geographic situation.

Regarding the marker located near the Zamora-Santiago confluence, the document recording its inauguration itself states that it is not to be considered a boundary marker, because the head of the Peruvian group accepted and signed, without reservations, his Ecuadorian colleague's statement that it was not being inaugurated as a boundary marker but as a basis for future work.

ANALYSIS OF THE ECUADORIAN INTERPRETATION. —

In a memorandum dated 23 November 1943, the Minister for Foreign Affairs of Ecuador argues that, "following the letter of the Protocol, the boundary line should run from the Quebrada de San Francisco to the Yaupi along the watershed *between the Zamora and Santiago rivers, and if that watershed cannot be located in whole or in part the boundary should be completed by a geodesic line connecting the end points of the line, namely, the Quebrada de San Francisco and the point where the Yaupi flows into the Santiago, which will then be adjusted to the accidents of the terrain and to geographical realities*".

In support of this position, the Government of Ecuador states: "We should not forget that part B, point 1, speaks only of a section of the boundary from one known point, the Quebrada de San Francisco, to another known point, the confluence of the Santiago with the Yaupi, along a *line that is to follow the windings of the Condor Range*. To state, therefore, that this line should end at the confluence of the Zamora with the Santiago and not the confluence of the Santiago with the Yaupi is an idea contrary not only to the spirit of the Protocol but also to its literal sense. The Protocol identifies the two end points of the line with complete clarity, namely, the Quebrada de San Francisco and the confluence of the Santiago with the Yaupi, and that should be sufficient to prevent any argument to the contrary".

The Rio de Janeiro Protocol does not mention the Condor Range, *but that is in fact where the watershed (divortium aquarum) between the Zamora and Santiago Rivers is to be found, although the watershed does not coincide with the line of the high peaks at all points*. The watershed terminates close to the confluence of the Zamora with the Santiago, but the boundary line is supposed to extend to the mouth of the Yaupi.

Further on, the memorandum states in paragraph 4: "Peru is considering the watershed from a simplistic standpoint, as the points of drop-off in level from which water flows naturally to one side or the other of the terrain, but that is not the accurate, scientific concept of a watershed". It goes on to say: "The correct concept of a watershed involves other features more complex than a simple drop-off in ground level; it requires, for example, that the river systems on the two sides should not flow back together, so that the climatic conditions should not be the same". The memorandum at this point does not clearly define the author's thinking with regard to the concept of a watershed.

In the same paragraph, the memorandum states: "If the special characteristics of the watershed are to be found by examining the peaks and

ravines of a mountain range, it is because those are the only points that form the fundamental geographical figure of a given watershed. *We need hardly mention the special situation of the Condor Range, which borders the vast Amazon jungle and divides the eastern region into two highly distinct climatic zones. If the watershed is formed, therefore, by a range such as this, the problem at hand should be resolved simply by determining the topography of the range, without reference to the actual dividing of the waters*".

We do not understand what the author is trying to say in this part of the memorandum, which appears contradictory. *If the Protocol provides that the boundary line should follow the watershed, how can the problem be resolved without considering the actual dividing of the waters?*

In paragraph 6 of the memorandum, the Ecuadorian Minister states: "With regard to demarcation of frontiers, a watershed and a watercourse have similar value and significance. For example, if a section of the border is to be defined by a river and two end points of the natural feature are identified, the main arm of the river in between those two points is to be followed; *when the border is to be defined by a watershed and the end points are identified, then among all the watersheds that may lie between them the border should follow the most important and definitive. This is the case with the watershed line that Ecuador is proposing between the source of the San Francisco River and the mouth of the Yaupi*".

That statement is incorrect. Between two fixed points of a section of the border defined by a river, that is, between two points on the same river, it may happen that in the stretch between those points the river divides into various arms, forming islands. In that case, the border will follow the arm that follows the river's thalweg or median line, whichever the boundary treaty stipulates. But in the case of two points on the same watershed, the situation is different. The dividing ridge may have many spurs between those two points, *but there will be only one watershed line*. The spurs will be secondary dividing features, separating the waters of rivers running into the same basin, *but there will be no doubt as to the location of the watershed line*.

The Ecuadorian memorandum continues its line of argument in paragraph 12 by distinguishing the concept of "mountain systems", defined as "a set of chains or ranges", and ends by saying: "Only in a mountain system may it happen that the line of the high peaks does not coincide with or is not the same as the watershed line". It should be noted that these two lines may not coincide in any case.

In the written instructions of the chairman of the Ecuadorian commission to the head of the demarcation group operating in the region of the *Zamora-Santiago watershed*, paragraph 4 states: "*Tasks to be accomplished: the boundary line in the Condor Range sector corresponds to the ridgeline of the range, where the following features must be identified: a).- the highest elevations or peaks; b).- the lowest elevations or ravines; c).- the curving line of its horizontal projection*".

The boundary line specified in the Rio de Janeiro Protocol is a watershed, *which may or may not coincide with the line of the high peaks of the Condor Range.*

The chairman of the Ecuadorian commission, in official letter No. 104 SE of 2 November 1943 addressed to the chairman of the Peruvian commission, makes the same mistake when he says: "My thesis is based on the assumption that the boundary line should not extend beyond the limits of the Zamora and Santiago Rivers; in that area there is only a single mountain range or chain and not a system of chains or ranges, and in a single mountain range the line of the high peaks will always coincide with the watershed line. That is not the case in a system of mountain ranges or chains, where at times the two lines will not be the same". Again, the chairman of the Ecuadorian commission says that in a mountain range "the line of the high peaks" coincides with the watershed line. As we have said, those two lines do not always coincide. We can cite as an example the border between Argentina and Chile, whose boundary treaty, by stipulating that the frontier should follow the Cordillera of the Andes, left the door open to differing interpretations, which had to be settled through arbitration by the King of England in 1902.

CONCLUSIONS. —

Considering, on the basis of the above analysis, that:

The clear intention of the Protocol is that the border should run from the San Francisco river to the confluence of the Yaupi with the Santiago along the most direct and easily recognizable natural line;

The watershed between the Zamora and the Santiago does not extend to the confluence of the Yaupi, as the negotiators of the Protocol supposed, thereby leaving a gap to be filled in the boundary line;

The interpretation given by both Governments following the signing of the Protocol as expressed in the "official notices" published in the press, *was that the frontier would run directly from the San Francisco to the mouth of the Yaupi without passing through the confluence of the Zamora;*

The Ecuadorian commission never agreed with the interpretation whereby the boundary would run to the mouth of the Zamora and consistently protested against such an interpretation;

In accordance with the Protocol, the demarcation of the boundary line should follow *the Zamora-Santiago watershed, since the watershed line is what was intended*, regardless of whether or not it corresponds to the line of the high peaks of the Condor Range;

The work done by the joint commission in the northern end of the Zamora-Santiago watershed, including the setting up of a boundary marker, cannot be considered a definitive demarcation, since it was done in order to

gather data that would provide the two Governments with further information, as proposed by the chairman of the Peruvian commission in his official letter of 30 October 1943;

The Protocol is not executable in the region in which the main watershed ramifies into a number of others (point D on appended map No. 18);

In the northern section of the Zamora-Santiago watershed there is a major outlier or spur of the range that terminates at the right bank of the Santiago across from the mouth of the Yaupi, as can be seen from the said map on a scale of 1:1,000,000;

The solution must come as close as possible to the spirit of the Protocol, which suggests a land boundary line from the source of the San Francisco to the confluence of the Yaupi;

We are of the opinion that the frontier should be defined as follows:

From the source of the San Francisco River, it shall follow the watershed between the Zamora and Santiago Rivers until it reaches the section in the north where a spur extends that ends across from the confluence of the Yaupi (approximately at point D on appended map No. 18); at that point it will follow the spur, that is, the watershed line that divides the waters that flow to the north into the Santiago River upstream of the mouth of the Yaupi from those that flow to the east into the same river downstream from the Yaupi. If the watershed line does not reach all the way to the confluence with the Yaupi, the boundary line shall follow a straight line from the end of the watershed line to the said confluence.

Braz Dias de Aguiar
Naval and Military Captain

(July 1945)

PART XXXIII

**Rapport de la Commission de
conciliation Franco-Siamoise**

Décision du 27 juin 1947

**Report of the French-Siamese
Conciliation Commission**

Decision of 27 June 1947

RAPPORT DE LA COMMISSION DE CONCILIATION FRANCO-SIAMOISE, DÉCISION DU 27 JUIN 1947*

REPORT OF THE FRENCH-SIAMESE CONCILIATION COMMISSION, DECISION OF 27 JUNE 1947**

Délimitation conventionnelle de la frontière - Traité franco-siamois du 3 octobre 1893, Convention franco-siamoise du 13 février 1904, Traité franco-siamois du 23 mars 1907, Traité franco-siamois du 7 décembre 1937 et Convention franco-siamoise du 9 mai 1941.

Révision de la délimitation frontalière – Demande de révision des frontières établies par voie conventionnelle pour des motifs d'unité ethnique, économique ou géographique - Accord de règlement franco-siamois du 17 novembre 1946.

Controverse internationale - La Commission spéciale de Conciliation franco-siamoise est compétente dans les limites du domaine propre des controverses internationales. Une question ne prend pas le caractère de controverse internationale pour avoir fait l'objet d'une requête, mais en raison de la nature intrinsèque de la question posée - le transfert d'unités politiques constituées n'est pas du domaine des controverses internationales.

Frontières naturelles – frontières adéquates du point de vue géographique : chaîne continue de montagnes constituant la ligne de partage des eaux, principal chenal navigable, ligne de faite des montagnes, repères naturels bien marqués et facilement reconnaissables, forêts.

Libre-échange – le bonheur et le bien-être véritables des habitants des districts frontaliers dépendent de libres échanges avec leurs voisins de l'autre côté de la frontière - les zones libres de douanes et démilitarisées favorisent les échanges et stimulent le maintien de rapports amicaux entre les habitants d'un bassin fluvial.

Border delimitation through treaties - Franco-Siamese Treaty of 3 October 1893, Franco-Siamese Convention of 13 February 1904, Franco-Siamese Treaty of 23 March 1907, Franco-Siamese Treaty of 7 December 1937 and Franco-Siamese Convention of 9 May 1941.

Review of the delimitation of borders - Request to review the border established by treaties on ethnic, economic and geographic grounds - Franco-Siamese Settlement Agreement of 17 November 1946.

International controversy – The Special Franco-Siamese Commission of Conciliation has competence only regarding international controversies. A question does not become an international controversy solely because it is the subject of a request, but because of its intrinsic nature. The transfer of political sub-units of a State is not an international controversy.

Natural borders – Appropriate borders based on geographical feature: continuous mountain range watershed, principal navigable channel, mountain summit, easily recognizable natural landmarks, forests.

* Reproduit de Cour Internationale de Justice, *Mémoires, Affaire du Temple de Preah Vihear*, vol. I, La Haye, 1962, CIJ, p.21 (F).

** Reprinted from International Court of Justice, *Memoirs, Case concerning the Temple of Preah Vihear*, vol. I, The Hague, 1962, ICJ, p.21 (F).

Free-trade – Actual happiness and well-being of people living in border areas depends on free-trade with their neighbors on the other side – duty-free and demilitarized zones support exchanges and encourage friendly relationships between inhabitants of a river basin.

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Rapport de la Commission de conciliation Franco-Siamoise, Washington, 27 Juin 1947

Première Partie

PRÉAMBULE

1. Une Commission spéciale de Conciliation franco-siamoise a été constituée par les Gouvernements français et siamois à la suite de la signature à Washington par les représentants des Gouvernements de la République française et du Royaume du Siam de l'accord de règlement franco-siamois du 17 novembre 1946, conformément aux dispositions de cet accord.

2. La composition et le fonctionnement de la Commission sont régis par l'article 3 de l'accord en question, article dont le texte est le suivant:

«*Article 3:* Aussitôt après la signature du présent accord, la France et le Siam constitueront, par application de l'article 21 du traité franco-siamois du 7 décembre 1937, une commission de conciliation composée des deux représentants des parties et de trois neutres conformément à l'Acte général de Genève du 26 septembre 1928 pour le règlement pacifique des différends internationaux qui règle la constitution et le fonctionnement de la Commission. La Commission commencera ses travaux aussitôt que possible après que le transfert des territoires visés au deuxième paragraphe de l'article 1 aura été effectué. Elle sera chargée d'examiner les arguments ethniques, géographiques et économiques des parties en faveur de la révision ou de la confirmation des clauses du traité du 3 octobre 1893, de la convention du 13 février 1904 et du traité du 23 mars 1907 maintenues en vigueur par l'article 22 du traité du 7 décembre 1937.»

3. Les attributions de la Commission sont déterminées par l'article 3 de l'accord du 17 novembre 1946 et par le chapitre premier de l'Acte Général de Genève.

4. Le siège de la Commission a été fixé à Washington par les deux gouvernements.

Ils se sont mis d'accord sur le choix des trois Commissaires suivants:

M. Victor Andres BELAUNDE, Ambassadeur, membre du Comité Consultatif des Affaires Étrangères du Pérou, Président de l'Université Catholique de Lima, membre de la Cour Internationale d'Arbitrage de La Haye.

M. William PHILLIPS, ancien Ambassadeur des États-Unis à Rome, ancien sous-secrétaire d'État.

Sir Horace SEYMOUR, ancien Ambassadeur du Royaume-Uni en Chine.

Chacun des deux gouvernements a, de plus, désigné un commissaire choisi parmi ses nationaux, à savoir:

Le Gouvernement siamois: S.A. le Prince WAN WAITHAYAKON, Ambassadeur du Siam aux États-Unis.

Le Gouvernement français: M. Paul-Emile NAGGIAR, Ambassadeur de France en mission, anciennement Ambassadeur en Chine et en U.R.S.S., Délégué à la Commission de l'Extrême-Orient à Washington.

Chacun des deux gouvernements a également désigné son agent auprès de la Commission, à savoir:

Le Siam, S.A. le Prince SAKOL VARAVARN, anciennement Conseiller du Ministère de l'Intérieur.

Nai Tieng SIRIKHANDA, Député, agent suppléant du Gouvernement siamois.

La France, M. Francis LACOSTE, Ministre plénipotentiaire, Conseiller de l'Ambassade de France à Washington.

M. Jean BURNAY, Conseiller d'État, Conseiller et suppléant de l'agent du Gouvernement français.

5. Les Gouvernements français et siamois se sont mis d'accord pour offrir la présidence de la Commission à M. William PHILLIPS qui a accepté cette offre.

6. La Commission a tenu, à dater du 5 mai, de nombreuses séances plénières en présence des agents et des experts des deux parties, dans une suite de bureaux mis gracieusement à sa disposition par les autorités américaines.

Au cours des deux premières séances, diverses questions d'ordre ont été résolues: constitution de la présidence; désignation de M. BELAUNDE comme rapporteur; lecture d'une lettre en date du 5 mai 1947, par laquelle l'agent du Gouvernement siamois faisait connaître au Président son intention de déposer incessamment les arguments ethniques, géographiques et économiques de son Gouvernement en faveur d'une révision des clauses des traités franco-siamois mentionnés dans l'article 3 de l'accord du 17 novembre 1946, clauses relatives à la frontière entre le Siam et l'Indochine, maintenues en vigueur par l'article 22 du traité franco-siamois du 7 décembre 1937; lecture d'une lettre en date du 5 mai 1947, par laquelle l'agent du Gouvernement français faisait, de son côté, connaître au Président qu'il se tenait à sa disposition pour présenter et développer les arguments de son Gouvernement au sujet de ces mêmes clauses dès qu'il aurait reçu notification d'une requête siamoise.

7. Parmi les autres questions d'ordre réglées au cours des deux premières séances, il y a lieu de mentionner en outre les suivantes: les langues française et anglaise ont été reconnues les deux seules langues de travail de la

Commission conformément aux règlements des Nations Unies; un communiqué du 5 mai a fait connaître à la presse la réunion de la Commission; conformément à l'article 10 de l'Acte Général de Genève, il a été décidé que les travaux de la Commission ne seraient pas publics; les deux gouvernements ont notifié par lettre du 9 mai la constitution de la Commission au Secrétaire Général des Nations Unies.

8. Le 12 mai, l'agent siamois a formellement déposé au nom de son Gouvernement sa requête devant la Commission ainsi que la carte annexée et la Commission a commencé l'examen des questions à elle soumises.

L'agent du Gouvernement français a répondu par un mémoire du 22 mai auquel l'agent du Gouvernement siamois a fait une réplique le 29 mai. A cette réplique, l'agent du Gouvernement français a opposé la sienne en date du 7 juin.

La Commission a entendu les agents des deux gouvernements dans leurs explications verbales et leurs réponses aux questions qui leur ont été posées, soit sous forme verbale au cours des séances, soit sur questionnaires écrits auxquels ils ont pu faire réponse verbale à loisir.

Elle a, de même, entendu les exposés faits devant elle par les experts des deux parties en diverses matières ethniques, géographiques et économiques, et les réponses que ces experts ont faites aux diverses questions qui leur ont été posées.

La Commission a pris note, en outre, de l'accord des agents des deux gouvernements sur le fait que le statut juridique de la frontière entre le Siam et l'Indochine repose sur l'article premier de l'accord de règlement franco-siamois du 17 novembre 1946.

9. Les arguments présentés par l'agent du Gouvernement siamois en faveur d'une modification à l'avantage du Siam de la frontière entre l'Indochine et le Siam, et les arguments présentés par l'agent du Gouvernement français en faveur du maintien du statu quo antérieur à la convention du 9 mai 1941, annulée par l'accord franco-siamois du 17 novembre 1946, ayant été largement exposés par les représentants des deux parties, la tâche de ces derniers à cet égard s'est trouvée ainsi entièrement remplie.

10. Les chapitres suivants de ce rapport contiennent un résumé des principaux arguments développés devant la Commission ainsi que les conclusions de la Commission à leur égard.

En représentant les revendications de Son Gouvernement, l'agent siamois a mis en cause la révision de presque toute la frontière entre le Siam et l'Indochine. Par suite, il sera nécessaire d'examiner ces revendications une par une et dans l'ordre suivant:

Territoires de la rive gauche du Mékong
Luang Prabang rive droite (Lanchang)
Mékong frontière
Bassac rive droite (Champasak)
Battambang.

Partie II

TERRITOIRES DE LA RIVE GAUCHE DU MÉKONG

1. Par une requête du 12 mai, l'agent du Gouvernement siamois a demandé la révision des clauses du traité franco-siamois du 3 octobre 1893 relatives à la renonciation par le Siam à ses prétentions sur l'ensemble des territoires de la rive gauche du Mékong et sur les îles du fleuve.

2. Il a fait valoir qu'au point de vue «racial», les habitants des territoires revendiqués par son Gouvernement sont de même origine que ceux de la rive droite du Mékong, que ces territoires forment une unité géographique séparée de l'Annam par la chaîne annamitique et que l'interdépendance entre ces deux groupes de territoires au point de vue de la production et de la distribution des principales commodités en fait une unité économique.

3. L'agent français a fait la critique des arguments ethniques, économiques et géographiques développés par l'agent siamois. Sans soulever à leur propos une exception formelle de non recevabilité, il n'en a pas moins posé à la Commission une question préalable, celle de l'admissibilité devant elle d'une requête ayant pour objet le transfert à un autre État d'une unité politique établie.

L'agent français affirme que c'est bien là la nature de la requête siamoise car elle réclame, dit-il, sur le Laos tout entier et même au-delà des droits comportant la cession au Siam de parties constitutives de l'Indochine dont la structure politique serait par là même détruite.

4. La Commission constate que la carte déposée par l'agent siamois à l'appui de sa requête illustre de façon graphique la revendication siamoise et démontre que son étendue géographique comprend l'ensemble des territoires de la rive gauche du Mékong jusqu'au Tonkin, soit plus du tiers du territoire de l'Indochine.

5. L'article 3 de l'accord du règlement franco-siamois de 1946, mentionnant le traité du 3 octobre 1893 parmi ceux au sujet desquels la Commission a reçu son mandat d'examen, il importe que celle-ci élucide la question préalable soulevée par l'agent français.

6. La Commission considère que, du point de vue de sa compétence, une requête en faveur de la révision des traités franco-siamois aux termes de l'article 3 de l'accord franco-siamois de 1946 peut être valablement portée devant elle si cette requête se réfère à des ajustements ou à des changements du tracé de la frontière même s'ils affectent des territoires non organisés en

unité politique constituée, mais non si elle implique des transferts d'unités politiques constituées.

7. Il est vrai que la marge d'initiative d'une Commission de Conciliation est plus large que celle reconnue à un Tribunal arbitral ou à une Cour de Justice. Cette faculté dont la Commission pourrait se prévaloir ne peut être exercée cependant que dans les limites du domaine propre des controverses internationales. Or une question ne prend pas le caractère de controverse internationale pour avoir fait l'objet d'une requête, mais en raison de la nature intrinsèque de la question posée.

Il est évident que le transfert d'une unité politique constituée (modus vivendi franco-laotien du 27 août 1946) est l'objet de la requête siamoise relative au traité de 1893. Cet objet n'est pas du domaine des controverses internationales et échappe donc de ce fait à la compétence de la Commission.

8. Quoiqu'il en soit, la Commission estime que, même si elle était compétente quant à l'examen des revendications siamoises sur l'ensemble des territoires de la rive gauche du Mékong, l'élucidation des arguments ethniques, géographiques et économiques ne l'autoriserait pas à appuyer la requête siamoise ni la révision des clauses du traité de 1893 relatives à ces territoires. Cette conclusion résulte de l'examen fait par elle de ces arguments, examen qui figure à la partie III B de ce rapport.

Partie III

A. LUANG PRABANG RIVE DROITE

(Lanchang)

1. L'agent siamois fait remarquer que la cession du territoire de Luang Prabang rive droite (Lanchang) à la France résulte de la convention franco-siamoise du 13 février 1904. Ce territoire a une superficie de 15.000 kilomètres carrés.

Il appuie sa demande de révision des clauses de cette convention sur des arguments ethniques, géographiques et économiques.

Il assure que la plupart des habitants de Lanchang appartiennent à la race Thaï et ne peuvent être distingués de leurs voisins du Nord-Est du Siam et que leur langage et leur culture sont similaires.

Il prétend qu'au point de vue géographique la cession de ce territoire à la France a projeté une enclave française dans le territoire du Siam et réduit la valeur du Mékong comme voie de grande communication internationale, parce que le passage dans cette section du Mékong qui, autrefois, était de droit, est aujourd'hui de tolérance.

Il ajoute que la frontière actuelle oppose un obstacle au courant commercial normal entre communes. Elle affecte de même, dit-il, celui des marchés plus importants vers le sud et l'ouest et vers leur exutoire naturel, le

port de Bangkok, avec lequel les voies de communication sont plus courtes et meilleures que celles se dirigeant vers Saïgon.

Enfin, il maintient qu'il y a toute raison de croire que l'état d'isolement dans lequel se trouve actuellement cette région ferait place bientôt à une plus grande activité commerciale comme suite à un développement des routes et à une augmentation en valeur et en volume de ses exportations.

Il conclut que les voies d'accès entre le Siam et Luang Prabang (Lanchang) sont de beaucoup plus faciles que celles qui le relient à l'Indochine et que, par conséquent, la frontière actuelle constitue un obstacle à son développement futur.

2. L'agent français attire l'attention sur le fait que le tracé de la frontière occidentale de Luang Prabang (Lanchang) définie par le traité de 1904 a été soigneusement délimité; que cette frontière est formée par une chaîne de montagnes continue qui, s'élevant à plus de 2.000 mètres en certains points, descend rarement à moins de 700 mètres, que cette chaîne forme la ligne de partage des eaux entre le bassin de la Ménam et celui du Mékong et qu'il s'agit d'une frontière qui, dans cette section comme dans les autres, depuis près d'un demi-siècle, a été paisible.

Il déclare que 80.000 habitants vivent sur la rive droite du Mékong (Lanchang) et 22.000 sur la rive gauche (Luang Prabang).

Il fait remarquer que les territoires de la rive droite du Mékong (Lanchang) forment justement avec ceux de la rive gauche une de ces unités ethniques et géographiques dont l'agent siamois recommande, dans sa requête, la constitution et le maintien ailleurs.

En outre, il signale, comme un fait bien établi, que la plus grande partie des exportations de Luang Prabang rive droite (Lanchang) descend par le Mékong ou par la route vers Saïgon.

Il rappelle, enfin, à la Commission que, par son article 4, le traité de 1904, maintenu en vigueur par l'article 4 de la convention franco-siamoise de 1926, garantit la liberté de navigation aux bateaux siamois dans la partie du Mékong qui traverse Luang Prabang, mais qu'en fait l'activité de cette navigation est peu importante dans ces secteurs de la rivière.

3. La Commission a examiné avec le plus grand soin les revendications du Siam sur Luang Prabang rive droite (Lanchang) ainsi que les déclarations de l'agent français à l'encontre de ces revendications. Un accord entre les deux agents au sujet d'une révision de la frontière dans cette section ne lui a pas paru possible, puisque l'agent français a rejeté dans sa totalité la requête siamoise au sujet de Lanchang.

En ce qui la concerne, la Commission est arrivée à la conclusion que les arguments ethniques mis en avant par l'agent siamois en ce qui concerne l'analogie de langage, d'origine et de culture des habitants de chaque côté de

la frontière actuelle ne suffisent pas, en eux-mêmes, à justifier une modification de cette frontière en faveur du Siam.

L'examen de la situation économique ne paraît pas non plus à la Commission pouvoir comporter de conclusion favorable à cette modification, car le territoire des deux rives du Mékong constitue, en fait, dans cette région, une unité économique comportant des échanges intercommunaux constants à travers la rivière.

Au point de vue géographique, la Commission estime que la ligne de partage des eaux entre le Mékong et la Ménam est une frontière appropriée et naturelle, bien établie et clairement définie. Des forêts épaisses s'étendent de chaque côté de la ligne de faite de la chaîne de montagnes et celle-ci n'est franchissable que par deux chemins de charrettes. Il en résulte qu'actuellement l'activité commerciale ne peut qu'être réduite entre habitants à l'est et à l'ouest de la frontière.

Aucun inconvénient particulier ne paraît résulter pour les habitants du Siam de l'emplacement actuel du tracé de la frontière et la même remarque est applicable aux habitants de Luang Prabang rive droite (Lanchang).

En conclusion, sur aucun des arguments ethniques, économiques ou géographiques avancés, la Commission estime être en mesure d'appuyer les revendications siamoises sur Luang Prabang rive droite (Lanchang) et sa demande de révision de la frontière.

B. MÉKONG FRONTIERES

1. Dans cette section, les arguments exposés par la requête siamoise ont pour but de démontrer que les deux rives du Mékong forment une unité naturelle au point de vue ethnique, géographique et économique, que cette unité est anéantie par la frontière fluviale et qu'elle doit être rétablie au profit du Siam. A l'appui de cette thèse, l'agent siamois soutient que les communications sont plus aisées entre cette région et Bangkok qu'entre elle et Saigon et il voit la preuve de l'existence de son unité naturelle dans le fait que les deux gouvernements ont créé la Haute Commission permanente franco-siamoise du Mékong.

2. L'agent français conteste, dans sa réponse, l'exactitude et la pertinence des arguments ethniques, géographiques et économiques de l'agent siamois. Il fait valoir qu'en matière ethnique, il n'y a pas identité entre habitants des deux rives, mais seulement certains caractères communs qui les apparentent aux groupes parlant des langues d'origine thaï et que quelques-unes appartiennent à des groupes différents, entre autres, aux groupes Moï. Il dit qu'une route excellente relie la rive gauche à Saigon et que les échanges commerciaux entre les deux rives sont ceux qui se forment normalement entre des frontaliers. Il ajoute que le bassin du Mékong, comme tout bassin fluvial, pourrait, à ce titre, paraître constituer une unité géographique, mais que cela ne justifie pas la prétention de l'agent siamois de vouloir transformer au profit du Siam une unité géographique en une unité politique. Il suffit, dit-il,

d'appliquer la thèse siamoise à d'autres bassins fluviaux pour mesurer le bouleversement que provoquerait une pareille doctrine dans les relations internationales, la plupart des grands bassins fluviaux, analogues à celui du Mékong, n'étant pas intégrés dans une seule unité politique.

3. Ayant pesé avec soin tant la requête siamoise que les réponses et répliques des parties, et en se référant aux considérations exposées dans la partie II du rapport, la Commission considère que les arguments avancés ne justifient pas, dans cette section du Mékong, le transfert de territoires demandés.

4. L'examen de la situation de droit et de fait, dans cette section, a permis cependant à la Commission de constater l'existence du régime suivant:

a) le tracé de la frontière, tel qu'il résulte des traités franco-siamois et de la délimitation faite sur place, est fixé au thalweg du Mékong là où ce fleuve coule en un bras unique; ce même tracé est fixé au thalweg du bras le plus proche de la rive siamoise là où le fleuve coule en plusieurs bras et, dans ce cas, les îles font partie de la rive française quand elles ne sont jamais recouvertes par les hautes eaux.

b) de chaque côté du tracé de la frontière, la convention franco-siamoise de 1926 a établi une zone démilitarisée de 25 kilomètres de large qui coïncide avec une zone franche de droits de douane également de 25 kilomètres de large établie en 1937 sous sa forme actuelle.

c) la même convention de 1926 a créé la Haute Commission permanente franco-siamoise du Mékong dans laquelle siègent des représentants de l'Indochine et du Siam. Cette Haute Commission possède des attributions, les unes de surveillance, les autres d'élaboration et de proposition dans des matières diverses du plus grand intérêt pour la vie des populations des deux rives, telles que: pêcheries, police frontière, délimitation du tracé, navigation fluviale, énergie électrique, navigation aérienne, etc.

5. La Commission estime que le régime ainsi établi dans cette région et auquel préside la Haute Commission répond, quant à son principe, aux intérêts des habitants mais qu'il pourrait être plus efficacement appliqué et plus complètement développé par les deux gouvernements.

6. L'agent français a déclaré, dans sa réponse du 22 mai, que, sous certaines conditions, son Gouvernement était disposé à donner au Siam un accès à un chenal navigable en eau profonde, sous réserve de la question de souveraineté. La Commission estime que, pour des raisons techniques et dans un but de conciliation, il y aurait avantage à fixer le tracé de la frontière au principal chenal navigable par une délimitation nouvelle qui serait confiée à la Haute Commission permanente franco-siamoise du Mékong, après conclusion d'un accord à ce sujet par les deux gouvernements.

7. En outre, l'aire géographique de la compétence de cette Commission, actuellement limitée au Mékong frontière, pourrait être utilement étendue à

cette partie du Mékong qui ne coïncide pas avec la frontière et, dans ce cas, ses attributions également étendues en s'inspirant des dispositions des deux Conventions de Barcelone du 20 avril 1921 qui établissent le statut de la liberté du transit et celui du régime des voies navigables d'intérêt international.

C. — BASSAC RIVE DROITE

(Champasak)

1. La revendication mise en avant par l'agent siamois se réfère au transfert au Siam du territoire de Bassac (Champasak) situé à l'ouest du Mékong et au nord de la rivière Se Lam Pao. La superficie de ce territoire est d'environ 6.000 kilomètres carrés. Cette province a été cédée par le Siam à la France par la convention du 13 février 1904.

2. A l'appui de cette revendication, l'agent siamois a fait valoir que la presque totalité de la population de ce territoire appartient au même groupe ethnique (Lao) que celui du nord-est du Siam et que la frontière sépare des habitants de même origine, langage et culture.

Le tracé de la frontière suit le sommet d'un escarpement qui se dresse à pic sur sa face orientale (Indochine) et s'incline en pente douce sur sa face occidentale (Siam). L'agent siamois décrit là essentiellement une frontière de montagne qui, au sens strictement géographique du mot, peut être considérée comme l'idéal le plus proche de l'impénétrabilité et de la permanence.

Il prétend, cependant, que les considérations géographiques ne sont pas les seules importantes et que les meilleurs débouchés pour le district, déjà relié par la route au terminus des chemins de fer siamois à Oubone, sont à travers le territoire siamois vers le port de Bangkok. Il ajoute que ces communications pourraient être améliorées pour obtenir des moyens d'accès plus avantageux que le Mékong et le réseau routier de l'Indochine française. Par exemple, si la frontière était déplacée vers le Mékong, les chemins de fer siamois pourraient être étendus jusqu'à ce fleuve et la ville de Bassac amenée à deux jours de voyage de Bangkok. Le volume du trafic marchandises transportées en 1946 par la route entre Pimun au Siam et Chongmek à la frontière est évalué par lui à 10.000 tonnes. A son avis, si le territoire était cédé au Siam, l'amélioration des moyens de communication signifierait un commerce plus actif et un niveau de vie plus élevé dans cette région relativement isolée.

3. L'agent français reconnaît que la population parle un langage du groupe des langues thaï, bien que ce langage, Lao, soit différent du Siamois. Il fait remarquer que ce fait ne justifie pas un transfert du territoire au Siam.

Il signale que le tracé de la frontière n'a pas été fixé au hasard, mais qu'il suit la ligne de faite de la chaîne de montagnes qui sépare le bassin de la Semun de celui du Mékong.

Il fait remarquer que le régime dans cette section, comme dans les autres, est libéral et que les échanges intercommunaux de part et d'autre de la frontière ne sont soumis pratiquement à aucune restriction.

Il remarque, de plus, que le Gouvernement siamois n'a pas démontré que la population, d'un côté ou de l'autre de la frontière, souffre de façon quelconque de l'existence de cette frontière. De plus, il n'existe aucune minorité siamoise dans le territoire en question.

4. Pour ce qui est des communications, l'agent français a fourni des renseignements sur les liaisons entre le Bassac et les régions situées à l'est et au sud, les plus importantes étant le fleuve Mékong et la grand-route fédérale n° 13 ainsi que deux routes vers la côte d'Annam.

Il a insisté sur le fait que les parties du Bassac traversées par le Mékong constituent une unité économique étroite et que le transfert au Siam du territoire revendiqué causerait un grave dommage aux habitants des deux rives du fleuve, sans qu'aucun avantage correspondant pour les intéressés puisse justifier la revendication de transférer sous la souveraineté siamoise un territoire qui fait partie intégrante de l'État du Laos.

5. D'après les chiffres fournis à la Commission par l'agent français, la population du territoire de Bassac rive droite s'élève à environ 50.000 (un tiers de la population de la province de Bassac). La production de riz est d'environ 30.000 tonnes, sur lesquelles 17.000 sont exportées vers la rive gauche et 3.000 au Siam.

6. La Commission considère que la frontière actuelle, formée comme elle est par des repères naturels bien marqués et facilement reconnaissables est une bonne frontière au point de vue géographique.

Elle est de plus d'avis qu'au point de vue de la composition ethnique de sa population, le Bassac (Champasak) ne souffre en rien de son présent statut comme partie intégrante du Laos et que, à ce même point de vue, il ne souffrirait pas non plus si le territoire revendiqué était transféré au Siam.

C'est avec la rive gauche du Mékong plutôt qu'avec le Siam que se font actuellement les rapports économiques et, dans l'hypothèse où un changement de souveraineté sur une partie de ce territoire serait décidé par les deux gouvernements, de sûres garanties seraient à prévoir pour éviter que les deux parties du Bassac ne souffrent de l'interruption des échanges commerciaux à travers le fleuve.

7. La Commission estime, cependant, que les circonstances décrites ci-dessus ne l'autorisent pas à appuyer, en vertu d'arguments ethniques, économiques ni géographiques, les revendications siamoises sur le Bassac rive droite (Champasak) ni sa demande de révision de la frontière à ce sujet.

D. BATTAMBANG

1. La revendication du Gouvernement siamois a pour objet le transfert du Siam de l'actuelle province de Battambang. La superficie en est de 20.335 kilomètres carrés et la population est évaluée à 271.000. La province, partie actuelle de l'État du Cambodge, a été cédée par le Siam à la France en vertu du traité franco-siamois du 23 mars 1907.

2. A l'appui de sa revendication, l'agent siamois déclare que la population était à l'origine de souche Mon-Khmer, mais que les habitants des deux côtés de la frontière se sont étroitement alliés à la suite de mélanges fort anciens et d'intimes relations économiques et culturelles.

Il assure que les rapports naturels géographiques et économiques de la province sont avec les territoires siamois du nord et avec Bangkok, plutôt qu'avec l'Indochine.

Par exemple, Bangkok, situé à 35 kilomètres du golfe du Siam, offrirait un meilleur débouché que Phnompenh avec lequel Battambang est relié par la route et par le rail mais qui se trouve à 350 kilomètres de la mer et qui ne peut pas recevoir de navire calant plus de 4 mètres. D'autre part, Battambang est également relié par la route et le rail à Bangkok, port dont la capacité est bien plus grande que celle de Phnompenh et qui est en cours d'amélioration. D'autres liaisons routières avec le Siam pourraient être développées et offriraient à l'avenir de meilleures opportunités que les routes du sud. La frontière actuelle, de l'avis du Gouvernement siamois, empêche le futur développement de la province en limitant ses meilleurs moyens d'accès.

3. Du côté français, on assure que la démarcation ethnique entre Siamois et Cambodgiens passe, en fait, au nord et à l'ouest de la frontière actuelle et que la nouvelle frontière revendiquée par le Gouvernement siamois ne se conformerait à aucune donnée naturelle et qu'elle traverserait un territoire habité par des populations cambodgiennes.

L'agent français signale que la chaîne de montagne Dang Rek que suit la présente frontière, de même que les forêts qui en recouvrent au sud-ouest la masse terminale, fournissent une frontière naturelle (et la seule possible) entre les territoires de l'ouest où la majorité de la population est siamoise et le pays à l'est et au sud-est habité par les Cambodgiens.

4. En ce qui concerne les communications, l'agent français a montré que le territoire de Battambang est relié non seulement par la route et le rail à Phnompenh mais aussi à Saigon par des voies d'eau ininterrompues et deux routes. Il déclare que les liaisons économiques de Battambang, ainsi que celles du reste du Cambodge, ont toujours été et doivent nécessairement être orientées vers le sud-est et vers Saigon pour ce qui est du trafic maritime, grâce au réseau des voies d'eau naturelles.

5. La province constitue un important centre rizicole. D'après l'agent français, les exportations de riz, avant 1941, atteignaient une quantité variable

allant de 235.000 à 150.000 tonnes suivant l'importance de la récolte. L'exportation de poissons séchés, produit des remarquables pêcheries du grand lac, s'élevait à 35.000 tonnes environ dont quelques 2.000 tonnes allaient au Siam.

6. Pour autant qu'il s'agisse de considérations ethniques, la Commission estime que la justification d'un transfert sous la souveraineté siamoise d'un territoire dont la population n'est pas siamoise n'a pas été établie. La frontière principalement formée par la chaîne montagneuse du Dang Rek satisfait la Commission. Elle lui paraît correspondre aux exigences ethniques et géographiques mieux qu'aucune frontière suggérée.

Au point de vue économique, la Commission considère que, si les communications avec le Siam pourraient être sans aucun doute développées à l'avantage de tous les intéressés, il n'en est pas moins vrai que le courant naturel du commerce de Battambang suit les voies d'eau existantes et les autres voies de communication routières et ferroviaires vers le sud et l'est.

Dans ces conditions, la Commission exprime l'opinion que séparer la province de Battambang du reste du Cambodge serait au désavantage des habitants de la province et à celui des autres habitants de l'État, sans qu'aucun avantage suffisant soit à envisager en compensation.

7. La Commission n'est donc pas en mesure d'appuyer la revendication siamoise de transfert au Siam de la province de Battambang ni la demande de révision de la frontière à ce sujet.

8. En raison de l'importance du rôle que les pêcheries du grand lac jouent comme réservoir de produits alimentaires pour les territoires adjacents, la Commission recommande que des mesures soient prises, d'accord entre les deux parties, en vue d'assurer au marché siamois un approvisionnement régulier et suffisant de poissons préparés.

PARTIE IV

COMMISSION CONSULTATIVE INTERNATIONALE

Au cours de l'élucidation qu'elle a faite des arguments soumis à son examen par l'article 3 de l'accord de règlement franco-siamois du 17 novembre 1946, la Commission a pu se rendre compte qu'il existe entre les divers pays de la péninsule indochinoise d'importantes questions techniques d'intérêt commun.

A titre d'exemple, on peut citer les sujets suivants:

Agriculture: Amélioration des récoltes et statistiques, maladies des animaux et des plantes, nouvelles techniques agricoles, une politique du riz, etc.

Irrigation
Santé publique
Pêcheries
Communications
Recherches scientifiques
Archéologie
Relations culturelles

La Commission recommande que les Gouvernements français et siamois se mettent d'accord pour prendre l'initiative de promouvoir la réunion d'une conférence de représentants des gouvernements voisins intéressés en vue d'examiner les conditions d'établissement, à titre permanent, d'une commission consultative internationale chargée d'étudier ces questions ou d'autres questions techniques analogues.

En raison de la position géographique centrale du Siam, le siège de cette commission consultative technique pourrait être avantageusement placé à Bangkok.

PARTIE V

RÉSUMÉ DES RECOMMANDATIONS

Les recommandations de la Commission, telles qu'elles résultent des parties précédentes de ce rapport, peuvent être résumées brièvement comme suit:

1. La Commission n'appuie pas les revendications siamoises sur Luang Prabang rive droite (Lanchang) et les clauses de la convention du 13 février 1904 au sujet de la frontière entre le Siam et l'Indochine dans le secteur de Luang Prabang rive droite (Lanchang) ne devraient pas être révisées (Partie III A paragraphe 9).

2. La Commission n'appuie pas les revendications siamoises sur les territoires de la rive gauche du Mékong et les clauses du traité du 3 octobre 1893 ne devraient pas être révisées (Partie II paragraphe 8). Le tracé de la frontière fluviale tel qu'il est défini par les traités et tel qu'il résulte de la démarcation faite sur place devrait être modifié, cependant, de façon à le mettre au principal chenal navigable (Partie III B paragraphe 6).

3. L'aire géographique de la compétence de la Haute Commission du Mékong devrait être étendue ainsi que ses fonctions (Partie III B paragraphe 7).

4. La Commission n'appuie pas les revendications siamoises sur le territoire de Bassac rive droite (Champasak) et les clauses de la convention du 13 février 1904 au sujet de la frontière entre le Siam et l'Indochine ne devraient par conséquent pas être révisées (Partie III C paragraphe 7).

5. La Commission n'appuie pas les revendications siamoises sur la province de Battambang et les clauses du traité du 23 mars 1907 au sujet de la frontière entre le Siam et l'Indochine ne devraient pas être révisées (Partie III D paragraphe 7).

6. En ce qui concerne les pêcheries dans le grand lac, la Commission recommande un arrangement entre les parties en vue d'assurer un approvisionnement adéquat de poissons au Siam (Partie III D paragraphe 8).

7. La Commission recommande que les Gouvernements français et siamois entrent en négociation dans le but d'établir à Bangkok une commission consultative internationale chargée d'étudier des questions techniques d'intérêt commun aux pays de la péninsule indochinoise (Partie IV).

Conclusion

La Commission désire souligner qu'agissant dans la limite de ses attributions, elle a borné son examen et ses délibérations aux arguments ethniques, géographiques et économiques, à l'exclusion des considérations politiques et historiques. Leurs dossiers respectifs ont été plaidés devant la Commission par les deux agents, parlant au nom de leurs Gouvernements.

Bien que la Commission n'ait pas jugé possible d'appuyer les revendications territoriales du Siam, elle n'en a pas moins fait certaines recommandations qui seraient à l'avantage des populations intéressées si les deux Gouvernements les acceptaient. La Commission estime que le simple transfert de territoires d'un côté à l'autre de la frontière sans le contentement des habitants ne comporterait pas en soi d'avantage pour les habitants des districts frontaliers dont le bonheur et le bien-être véritables dépendent de libres échanges avec leurs voisins de l'autre côté de la frontière. Les zones de 25 kilomètres (libres de douanes et démilitarisées) qui existent déjà de chaque côté de la frontière fluviale favorisent ces échanges communaux et stimulent le maintien de rapports amicaux entre les habitants du bassin fluvial.

Dans ces conditions et grâce à la mise en application par les deux Gouvernements de ses recommandations, la Commission espère vivement que la bonne entente et la coopération se développeront dans les relations des deux parties, contribuant ainsi à la paix et à la prospérité si nécessaires non seulement pour l'avenir du Siam et de l'Indochine mais aussi pour celui de toute la péninsule.

Douze annexes jointes.

Fait à Washington, le 27 juin 1947.

Pour la Commission:
Le Président,
William PHILLIPS.

PART XXXIV

**Decision of the Chairman of the
Honduras-Nicaragua Mixed Commission**

Decision of 5 August 1961

**Décision du Président de la
Commission Mixte Honduras-Nicaragua**

Décision du 5 août 1961

BASIS OF ARRANGEMENT PROPOSED BY THE INTER-AMERICAN
PEACE COMMITTEE TO THE GOVERNMENT OF HONDURAS AND
NICARAGUA, DECISION OF 5 AUGUST 1961 *

BASE D'ACCORD PROPOSÉE PAR LA COMMISSION DE PAIX
INTERAMÉRICAINNE AUX GOUVERNEMENTS DU HONDURAS ET
DU NICARAGUA, DÉCISION DU 5 AOÛT 1961 **

Validity of arbitral award – the arbitral award establishing the delimitation of the frontier line is valid and binding since the operative clause and its explanations give clear directives and does not include omissions, contradictions or obscurities that would prevent its execution – Arbitral award by the King of Spain of 23 December 1906 – validity of award reaffirmed by the International Court of Justice judgment of 18 November 1960.

Demarcation of boundary – the Mixed Commission in charge of achieving the demarcation of the boundary is not competent to resolve any question of technico-judicial nature and to pronounce itself on the theory of *ultra petita* raised by a party – the Commission is bound by the delimitation of boundary established in previous treaties and decisions – it cannot designate a stream as an international boundary line of it has not been done beforehand – Gamez-Borilla Treaty – Arbitral award of 23 December 1906 – International Court of Justice judgment of 18 November 1960 – “demarcation made in 1720”.

Natural frontier – The international frontier should be insofar as possible, a well-defined natural boundary line – the rule on natural boundaries was well respected by the Arbitrator which delimited the frontier – the centre of the bed of the Limon river is an adequate natural frontier – a stream which is dry several months a year may not meet the criteria for a well-defined natural boundary.

Validité d'une sentence arbitrale – la sentence arbitrale qui établit la délimitation frontalière est valide et contraignante puisque la disposition opérationnelle et les explications qui y sont attachées donnent des indications claires, et elle ne comportent pas d'omissions, de contradictions ou de zones d'obscurités qui empêcheraient sa mise en œuvre – Sentence arbitrale du Roi d'Espagne du 23 décembre 1906 – validité de la Sentence arbitrale confirmée par l'arrêt de la Cour internationale de Justice du 18 novembre 1960.

Démarcation frontalière – la Commission mixte chargée de réaliser la démarcation de la frontière n'est pas compétente pour résoudre des questions d'ordre technico-juridique et se prononcer sur la théorie d'*ultra petita* soulevée par l'une des Parties – la Commission est liée par la délimitation établie dans les traités et les décisions antérieures – elle ne peut pas désigner un ruisseau comme frontière internationale s'il ne l'a pas été auparavant – Traité de Gamez-Borilla – Sentence arbitrale du 23 décembre 1906 – Arrêt de la Cour internationale de Justice du 18 novembre 1960 – «démarcation faite en 1720».

* Reprinted from Inter-American Peace Committee, *Report of the Inter-American Peace Committee to the eighth meeting of consultation of Ministers of Foreign Affairs of 1962*, Official Records of the Secretariat of the Organisation of the American States, Washington D.C., (OEA/Ser.L/III/CIP/1/62), p. 10-11 and 39-54.

** Reproduit de Inter-American Peace Committee, *Report of the Inter-American Peace Committee to the eighth meeting of consultation of Ministers of Foreign Affairs of 1962*, Official Records of the Secretariat of the Organisation of the American States, Washington D.C., (OEA/Ser.L/III/CIP/1/62), p. 10-11 et 39-54.

Frontière naturelle – la frontière internationale doit être autant que possible une ligne naturelle bien définie – la règle des frontières naturelles a été scrupuleusement respectée par l'arbitre pour délimiter la frontière – le milieu du lit de la rivière Limon est une frontière naturelle adéquate – un ruisseau asséché pendant plusieurs mois de l'année ne peut pas satisfaire au critère de définition précise d'une frontière naturelle.

* * * * *

Basis of Arrangement proposed by the Inter-American Peace Committee to the Governments of Honduras and Nicaragua

1. The Government of Nicaragua will immediately withdraw its authorities from the territory.¹

2. There is hereby established the Honduras-Nicaragua Mixed Commission, which will be composed of the Chairman of the Inter-American Peace Committee, as Representative of Honduras, and as Representative of Nicaragua. The Chairman of the Inter-American Peace Committee will be the Chairman of the Mixed Commission.

3. The Mixed Commission will begin its meetings in the place and on the date determined by the Chairman; it will go to the territory as soon as possible and will remain there for as long as may be necessary. During the time that the Mixed Commission is in the territory, the Chairman may be represented by the official of the Organization of American States whom the Secretary General thereof appoints for the purpose.

4. The powers of the Mixed Commission are:

- a. To aid the two governments in their efforts to guarantee the inhabitants of the territory a choice between the two nationalities and to permit those persons who may wish to do so to move to Nicaragua.
- b. Under the terms of the Arbitral Award of December 23, 1906, to fix on the ground the boundary line from the junction of the Bodega or Poteca River with the Guineo River as far as Portillo de Teotecacinte, as well as to determine the starting point of the natural boundary between the two countries at the mouth of the Coco River*.
- c. To supervise the setting of markers for the boundary line laid out according to the preceding paragraph.

¹ "Territory" is understood to mean the region which, according to the Arbitral Award of December 23, 1906, belongs to Honduras, and which Nicaraguan authorities have occupied for several years.

* Secretariat note: See map No. 4.

5. In exercising the powers set forth in paragraph 4b., the Mixed Commission will avail itself of the Commission of Engineers already created by the two governments.

6. In the event of disagreement between the Representatives of Honduras and Nicaragua on the Mixed Commission, the Chairman will make the final decision. This power may not be delegated.

7. The Secretary General of the Organization of American States will provide the Mixed Commission with the technical staff and secretariat requested by the Chairman.

8. Under the terms of Article 1 of its Statutes, the Inter-American Peace Committee will suggest measures and steps conducive to a settlement of all questions that may arise between the two governments in carrying out the Arbitral Award of December 23, 1906, and that are not submitted to the Mixed Commission in accordance with this Basis.

**Decision of the Chairman of the
Honduras-Nicaragua Mixed Commission
Pan American Union, August 5, 1961**

I

The final paragraph of the Award of December 23, 1906, states the following:

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

The "demarcation made in 1720," cited above, is the Act which appears as Appendix XIV of the Reply of the Government of Honduras in the proceedings in which the International Court of Justice rendered judgment on November 18, 1960.

The Honduras-Nicaragua Mixed Commission, with the advisory services of the Commission of Engineers, in accordance with paragraph 5 of the Basis of Arrangement, in the exercise of the power conferred upon it by paragraph 4b. of the aforesaid Basis and based upon the map which the said Commission of Engineers has made of the Sitio de Teotecacinte (i.e. estate or land-grant of Teotecacinte) as well as on its own observations on the site, has interpreted the abovementioned Act and, by unanimous decision, has determined the eastern and northern boundaries of the Sitio. In this way, the Mixed Commission has brought the demarcation of the dividing line to the point where the only section that remains to be determined is that from the northwestern corner of the Sitio de Teotecacinte to the Portillo (i.e. the pass or notch) of the same name.

Appendix 1 to this Decision is a map* of the Teotecacinte area, signed by Messrs. McIlwaine, Lanza, and Rugama, members of the Commission of Engineers. Appendix 2 is a diagram** of the western portion of the aforementioned map, in which the letter A indicates the northwestern corner of the Sitio, the letter B corresponds to the Portillo, and C to Cruz sin Brazo. The Representative of Honduras maintains that the section of the frontier that remains to be determined should consist of the two straight lines AC and CB. The Representative of Nicaragua proposes the straight line AB for this purpose. This constitutes the disagreement between the national representatives and, therefore, the subject of this Decision.***

II

The International Court of Justice, at the end of its aforementioned judgment of November 18, 1960, refers to the problem of the connection from the Sitio to the Portillo de Teotecacinte, as follows:

Nicaragua argues further that the delimitation in the operative clause leaves a gap of a few kilometres between the point of departure of the frontier line from the junction of the Poteca or Bodega with the Guineo or Namaslí up to the *Portillo de Teotecacinte*, which was the point to which the Mixed Commission had brought the frontier line from its western boundary point. An examination of the Award fails to reveal that there is in fact any gap with regard to the drawing of the frontier line between the junction of the Poteca or Bodega with the Guineo or Namaslí and the *Portillo de Teotecacinte*.

Immediately thereafter, the judgment concludes in this way:

In view of the clear directive in the operative clause and the explanations in support of it in the Award, the Court does not consider that the Award is incapable of execution by reason of any omissions, contradictions or obscurities.

For these reasons,

THE COURT,

by fourteen votes to one,

finds that the Award made by the King of Spain on 23 December 1906 is valid and binding and that Nicaragua is under an obligation to give effect to it.

This constitutes the legal truth. It is necessary, therefore, to consider that the operative clause of the Award, cited at the beginning of this Decision, contains the elements necessary for drawing the frontier line to connect the Sitio with the Portillo de Teotecacinte, or that these elements, together with

* Secretariat note: See map No. 5.

** Secretariat note: See map No. 6.

*** Secretariat note: The memoranda of the Parties are available in Inter-American Peace Committee, *Report of the Inter-American Peace Committee to the eighth meeting of consultation of Ministers of Foreign Affairs of 1962*, Official Records of the Secretariat of the Organisation of the American States, Washington D.C., (OEA/Ser.L/III/CIP/1/62).

others available to the Governments of Honduras and Nicaragua, are sufficient for that purpose.

III

In order to justify his interpretation of the paragraph of the Award quoted above, the Representative of Honduras asserts, as his major argument, that the boundaries of the Sitio de Teotecacinte, established in the demarcation of 1720, are an international frontier in their entirety.

In support of this position, the said Representative cites the following clause from the Report of the Commission of Investigation:

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 afore-mentioned site remains within the jurisdiction of Nicaragua;

This text was incorporated intact into the Award as the second from the last Whereas. Without doubt it provides a better basis for the thesis of the Representative of Honduras than the corresponding paragraph of the operative clause of the Award. In effect, the expression "...the frontier line that may be taken is that which corresponds to the demarcation..." is more logically interpreted to indicate that the boundaries of the Sitio, fixed in the demarcation, are an international frontier in their entirety than the expression "...the line will follow the direction which corresponds to the demarcation of the site of Teotecacinte in accordance with the demarcation...".

Nevertheless, if, first the Commission of Investigation, and, later the King of Spain had intended that their reference to the demarcation of 1720 was to be interpreted to mean that the frontier between the two countries, in the area which concerns us here, coincided with the boundaries of the Sitio de Teotecacinte established in that demarcation, would it not have been logical for them to express that intention in their conclusions, refining and clarifying the formula employed in the corresponding Whereas?

Far from doing this, both the Commission of Investigation in the conclusions of its Report and the King of Spain in the operative clause of the Award — which is the one to which the Honduras-Nicaragua Mixed Commission has been giving effect — further departed from the meaning which the Representative of Honduras gives to that formula when they chose the ambiguous expression "...the line will follow the direction which corresponds to the demarcation of the Sitio de Teotecacinte in accordance with the demarcation made...".

In addition, as the Representative of Nicaragua emphasizes, "...in the whereases which served as a basis for the recommendation of the Commission of Investigation for the operative clause, the Honduran thesis is clearly destroyed, since they state that the boundaries of the site of Teotecacinte

should not be followed in their *entirety* but only in *that part which corresponds to it* so as to connect with the Portillo of the same name” (p. 10 of the Representative of Nicaragua’s memorandum of July 29, 1961).

The paragraph of the Report of the Commission of Investigation in reference is as follows:

Therefore, the said site of Teotecacinte belonging to Nicaragua, as proved by the aforementioned document, which has not been refuted, it is obvious that upon arriving at the juncture of the southern extremity of the aforementioned Guineo river, that is at its point of confluence with the Poteca, the frontier line should be taken in such a way that the said site of Teotecacinte remains wholly within the jurisdiction of Nicaragua, for which effect the frontier line should follow that part of the line of demarcation of the site of Teoteca-cinte which corresponds to it in order to arrive at the Portillo of the same name and in such a manner that the site demarcated remains in Nicaraguan territory.

IV

As a corollary to his major argument, the Representative of Honduras maintains that the connection of the Sitio with the Portillo de Teotecacinte should be made by drawing the straight line Cruz sin Brazo-Portillo (CB in Appendix 2) since the demarcation of 1720 terminated in Cruz sin Brazo.

In effect, after citing the pertinent part of the Act of the demarcation of 1720, the said Representative describes Cruz sin Brazo as the “place where the measurement of the said Sitio was terminated, this point being the southwestern extremity of its perimeter” (p. 4 of the Representative of Honduras’ memorandum of July 30, 1961).

No objection can be made to the final clause of this sentence. Cruz sin Brazo is the southwestern extremity or corner of the Sitio de Teotecacinte. It may also be accepted that Cruz sin Brazo is the place where the measurement of the said Sitio terminated, although it will be recalled that the person who made the demarcation, Pedro Gutiérrez de Osorio, after having fixed Cruz sin Brazo measured the northeast corner of the Sitio, called “Saquinlí.” However, the claim that the Sitio and the Portillo de Teotecacinte must be connected by a straight line from Cruz sin Brazo, rests entirely on the premise that the entire boundary of the Sitio is an international boundary.

This conclusion is obvious. The Representative of Honduras expresses it as follows:

It is logical to think that the connection of the Sitio de Teotecacinte with the Portillo of the same name must start from the place where the demarcation terminates, the demarcation having already been converted by the Award into an international frontier (p. 7 of the memorandum of July 30).

Since the evidences examined so far are insufficient to justify acceptance of the fact that the demarcation of 1720 was converted, by the Award, into an international frontier, it would be unjust to attribute to the fact that the

demarcation terminated in Cruz sin Brazo the effect which the Representative of Honduras attributes to it.

V

The following reasoning of the said Representative of Honduras is closely related to what we have just studied. To better understand it, it is preferable to refer to the map that appears as Appendix 1 to this Decision.

The argument consists in maintaining that, in view of the fact that the point of departure of the section of the dividing line in question is the confluence of the Poteca and Guineo rivers and its end is the Portillo de Teotecacinte, "...it should be understood that the grant of the Sitio de Teotecacinte to Nicaragua constitutes a deviation from the frontier recommended by the Commission of Investigation as the clearest, most precise and most natural one between the two points indicated."

The argument continues in the following manner:

The arbiter had to make this deviation in observance of paragraph 2 of Article II of the Gámez-Bonilla Treaty. This deviation notwithstanding, on reaching Cruz sin Brazo, after having followed the outline of the Sitio, it is observed that the connection of this point with the Portillo de Teotecacinte follows the direction which the arbiter sought in order to arrive at the Portillo de Teotecacinte from the point of departure (p. 8 of the memorandum of July 30).

The words "most natural," with which the Representative of Honduras refers to what he calls "the frontier recommended by the Commission of Investigation," are difficult to interpret since no section of either the straight line from the confluence of the Poteca and Guineo rivers to the Portillo, or that which would connect the southeastern corner of the Sitio with the Portillo, constitutes a natural boundary.

In any event, the aforesaid line between the southeast corner and the Portillo does approximate the one from Cruz sin Brazo to the Portillo, in that particular section, and this fact carries considerable weight as a supplementary piece of evidence. In itself, or in relation to the arguments examined so far, it is insufficient to warrant acceptance of the interpretation of the operative clause of the Award under study in the sense that Cruz sin Brazo should be part of the international boundary.

Furthermore, the undersigned considers it valid to maintain, as does the Representative of Honduras, that the Award had to make a deviation from the frontier in order to recognize Nicaragua's rights to the Sitio; but he makes it clear that, in his opinion, what was abandoned by this deviation was not the straight line between the terminal point of the natural boundary and the rest of the demarcation, but simply the rule of establishing natural boundaries to which the King of Spain had adhered up to that point.

VI

Finally, the Representative of Honduras claims that “by explicit actions Nicaragua has recognized that Cruz sin Brazo is a point in the international boundary” since in 1880 “the Sitio de Teotecacinte was resurveyed and a stone corner marker was erected at Cruz sin Brazo...” (p. 11 of the memorandum of July 30). Later he adds that “...in view of the action taken by the Government of Nicaragua in making the resurvey and erecting an international corner marker in the aforementioned place..., a corner marker which has been in existence for more than 60 years, there is no basis for contending...” that Cruz sin Brazo, as Nicaragua insists, is located in Nicaraguan territory.

The Act of the resurvey made in 1880 appears as Appendix 20 of the Rejoinder of the Government of Nicaragua in the proceedings in the International Court of Justice. Its perusal brings out the fact that the resurvey was made at the request of an individual, the owner of a plot in the Sitio, who asserted that since this plot belonged to various individuals, “questions frequently arise among the co-owners.”

The Government of Nicaragua, then, ordered the new survey of the Sitio in order to avoid controversies among individuals. Consequently, it is impossible to attribute to that survey the effects claimed by the Representative of Honduras. Furthermore, the Mixed Commission has had no knowledge of any act of the Nicaraguan Government, relative to the resurvey of 1880 or to any other measures or actions, which could be interpreted as a recognition, either explicit or implicit, of Cruz sin Brazo as a frontier point or “international corner marker.”

VII

On his part, the Representative of Nicaragua maintains that the straight line between Murupuxí and the Portillo (AB in Appendix 2) complies with the Award and follows the southwesterly direction which the frontier follows in the sector in question. He then alleges the following:

The Mixed Boundary Commission of the Republics of Honduras and Nicaragua clearly stated in Act. No. 4, signed in Danlí on June 26, 1901, that since the time both Republics were colonial provinces of Spain, the ridge of the Dipilto mountain range had been considered as the common boundary between them, for which reason it found a basis for definitely establishing as the boundary line between the two countries the divide along the crest of the aforementioned mountain range. Only by preserving the line claimed by Nicaragua can the DIVIDE (between the watersheds) agreed upon by the Mixed Border Commission in 1901 be maintained.

In keeping with the Award made by the King of Spain, that line is identified as a straight line from the Portillo de Teotecacinte to the Rincón de Murupuchí. By identifying the line in this manner Nicaragua’s rights to the waters that flow toward the south of the Dipilto mountain range are respected and the resolution of

the Royal Award which orders that all of the Sitio is to remain within Nicaraguan jurisdiction is fully complied with (p. 5 of the memorandum of July 29).

The Representative of Honduras, in turn, maintains that there is no basis for the claim that the point of connection of the Sitio with the Portillo should be Murupuxí (p. 9 of the memorandum of July 30).

VIII

The undersigned has reached the conclusion that both the line proposed by Nicaragua and the one Honduras wishes adopted are in agreement with the terms of the Award. In reality, both “follow the direction which corresponds to the demarcation of the Sitio de Teotecacinte in accordance with the demarcation made in 1720” and both terminate in the Portillo “in such a manner that the said Sitio remains wholly within the jurisdiction of Nicaragua.”

The logical consequence of this conclusion is the necessity to supplement the operative clause of the Award with additional points of evidence. These are analyzed in the following chapters.

IX

In the first place, paragraph 6 of Article II of the Gámez-Bonilla Treaty and, above all, the manner in which the Arbiter applied the rule contained therein, seem to indicate the course to a just decision.

The aforesaid disposition is couched in these terms:

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 convenience for study, and shall there begin its work, adhering to the following rules:

...

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

The Award complies so faithfully with this rule on the fixation of natural boundaries that it established a natural frontier from the Atlantic Ocean to the Sitio de Teotecacinte. In order to have an exact idea of what this signifies in terms of proportions, it is sufficient to recall that this section of the frontier measures approximately 500 kilometers in length and that the distance between the point where it terminates (southeast corner of the Sitio) and the point where the entire demarcation is to terminate (Portillo de Teotecacinte), following the outline of the Sitio, is only 25 or 30 kilometers. It was so difficult to obtain such a high proportion that the Arbiter considered himself obligated to justify the extremes to which he had recourse.

In effect, the next to the last Whereas of the Award states that if the selection of the confluence of the Poteca with the Coco or Segovia “...might

give rise to doubts and controversy under the supposition that Honduras would be favored... on the other hand, and as compensation for having taken the mouth of the Segovia... the bay and town of Cape Gracias a Dios remain within the domain of Nicaragua, which, according to facts beyond dispute and with a greater right, would correspond to Honduras...”

X

The course that this decision should take is made clearer when it is recalled that the Government of Honduras, when the controversy was defined in 1901, and later when the process was brought before the Arbiter, requested recognition of the fact that “...from the Portillo de Teotecacinte, terminal point of the third section of the frontier as already determined and the place where one of the headwaters of the Limón river rises, the frontier continues downstream in the bed of this river until it joins the Guineo river.” With respect to this matter, the national representatives have expressed some of their most penetrating arguments.

The Representative of Nicaragua qualifies the claim of the Government of Honduras that the line connecting Murupuxí and the Portillo follow a course south of the Limón River, as would the line starting from Cruz sin Brazo, as “contrary to the very essence of the Award and to the judgment of the International Court of Justice...” since it would make “the decision of King Alfonso XIII, as it pertains to the demarcation of the western region of the Sitio de Teotecacinte, a judgment that is defective by reason of what is known in Law as *ultra petita*, inasmuch as it would appear to give Honduras more than it officially requested.”

For his part the Representative of Honduras considers that the foregoing contention “is entirely beyond the competence of the Mixed Commission, whose function is to demarcate the frontier established by the Award of the King of Spain, in accordance with the demarcation made in 1720”.

The question of the competence of the Honduras-Nicaragua Mixed Commission is a complicated one. It seems evident that when it acts, as in the present case, in observance of paragraph 4b. of the Basis of Arrangement, it is a Commission of Demarcation and the mere perusal of the extensive observations of Lapradelle (pp. 144-166, *La Frontière*, Paris, 1928) on the legitimate sphere of action of such agencies is sufficient to make one aware of the difficulties of this subject.

In the case of a decision by the Chairman of the Commission the problem is even more delicate, since the Basis of Arrangement limits itself to stating that, in the event of disagreement between the national representatives, “the Chairman will make the final decision”.

With the cooperation of both Representatives, the undersigned has attempted to make up for the obvious deficiency of such a meager disposition. Thus, he was able to establish a procedure thanks to which each Representative has requested, in writing, that this decision be made; the terms

of disagreement have been defined; and the respective arguments have been presented. The schematic nature of this procedure, nevertheless, supports the position taken by the Representative of Honduras, substantial in itself, relative to incompetence.

Consequently, no attempt will be made to resolve any question of a technico-juridical nature. No pronouncement will be made on the Nicaraguan thesis of *ultra petita*.

The foregoing notwithstanding, the fact that the Government of Honduras requested the Arbiter to indicate the Limón River as the international boundary in the sector of the Teotecacinte area in question, must be examined as one of the supplementary pieces of evidence, the value of which has been brought out by the declaration that the lines proposed by both national representatives conform to the terms of the pertinent paragraph of the Award.

XI

The bases which can be deduced from the rule on natural boundaries, from the way in which the Arbiter respected this rule, and from the original petition of the Government of Honduras having been established, special force is acquired by the argument of the Representative of Nicaragua, summarized at the end of Chapter III above, that the frontier should not follow the limits of the Sitio de Teotecacinte in their entirety but only in “that part which corresponds to it,” just as the Commission of Investigation recommended in the part of its Report quoted in the same chapter.

Unfortunately, the expression contains no indication as to which portion of the line of demarcation of 1720 should correspond to the frontier. It is necessary, therefore, to look for the point at which it is justifiable to abandon the boundary of the Sitio de Teotecacinte so as to return to the tracing of a natural boundary and, thus, bring to an end that which the Representative of Honduras so opportunely terms a “deviation.”

The search commences in the Rincón de Murupuxí, since the frontier has been established up to this point by agreement between the national representatives.

Some meters to the west of the corresponding corner marker is the stream called Arenal, whose bed is well defined at this point; however, approximately 400 meters downstream, where it is crossed by a trail, it widens and its borders lack those characteristics which facilitate the determination of the middle or center of the bed. During several months of the year it is dry.

A Border Commission, such as that established by the Governments of Honduras and Nicaragua in accordance with the Gámez-Bonilla Treaty, might perhaps have chosen this stream — in spite of its deficiencies for the purpose — so as to cease as rapidly as possible the tracing of artificial boundaries; but the undersigned would have no justification for following this

course since by so doing he would be introducing a new element to solve the problem submitted to his decision.

In effect, the rule stated in paragraph 6 of Article II of the Treaty is “to establish, insofar as possible, a well-defined natural boundary line.” If, because of the physical characteristics noted, it is debatable that the stream Arenal meets the requirements of a “well-defined” line, there is no doubt that its designation as an international boundary line is beyond the limited sphere of what is juridically “possible” for the undersigned Chairman.

Consequently, the western boundary of the Sitio de Teotecacinte, which is, in the understanding of the undersigned, a straight line from the corner marker of Murupuxí, south 8 degrees, 31 minutes, 30 seconds west, according to the triangulation of the Commission of Engineers, should be followed. After approximately 600 meters, this boundary crosses the Limón River, one of whose headwaters rises in the Portillo de Teotecacinte.

Not only does the Limón River carry water all during the year, but also, as can be verified by referring to the map (Appendix I), the Poteca, designated by the Arbitrator as a boundary line from its confluence with the Coco, is the same Limón River, its volume increased by the waters of the Guineo.

If the whole of the frontier traced by the Award were examined in the light of the argumentation of the Representative of Honduras relative to the deviation which this demarcation undergoes in the southeast corner of the Sitio de Teotecacinte, the eastern and northern boundaries of the Sitio, together with the 600 meters south from Murupuxí, would clearly appear as the only break in continuity in a perfect natural boundary.

By reason of the foregoing, the undersigned Chairman of the Honduras-Nicaragua Mixed Commission, with a basis in the power conferred upon him by paragraph 6 of the Basis of Arrangement,

Decides:

That from the corner marker of Murupuxí (A in Appendix 2) the boundary line will be a straight line south 8 degrees, 31 minutes, 30 seconds west, to its intersection with the center of the bed of the Limón River and, from that point, will continue upstream along the center of the bed of the Limón River and that one of its headwaters which rises in the Portillo de Teotecacinte (only one shown in Appendix 2) until it meets the terminal point of the third section of the boundary line, fixed by the Mixed Border Commission of Honduras and Nicaragua in Act IV of its meeting on June 26, 1901.

Pan American Union, on the fifth day of the month of August in the year one thousand nine hundred and sixty-one.

Vicente Sánchez Gavito, Chairman
Honduras-Nicaragua Mixed Commission

Modesto Lucero
Secretary