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The Boundary Case between Costa Rica and Panama

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THE BOUNDARY CASE BETWEEN COSTA-RICA AND PANAMA

PARTIES: Costa-Rica, Panama.

COMPROMIS: Convention of 17 March, 1910.

ARBITRATOR: E. Douglass White, Chief Justice of the United States.

AWARD: 12 September, 1914.

Validity of a previous arbitral award — Interpretation of this award — Excess of jurisdiction — Nullity — Revision.

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SYLLABUS [1]

On 11 September 1900, Emile Loubet, President of the French Republic, acting in the capacity of arbitrator by virtue of the Treaty of 4 November 1896 between Colombia and Costa Rica, rendered an award defining the common boundary between these two States.[2]

After the separation of Colombia and Panama in 1902, Panama succeeded Colombia as one of the parties in a controversy with Costa Rica concerning the Loubet award.

Although they considered that the boundary between their respective territories designated by the arbitral award of the President of the French Republic was validly established with regard to the section between the Central Cordillera and the Pacific, Costa Rica and Panama were not able to reach an agreement on the interpretation which ought to be given to that award as to the rest of the boundary line. For the purpose of settling their dispute the two parties agreed, by a Convention concluded on 17 March 1910, to submit to the decision of the Chief Justice of the United States, as arbitrator, the following question: " What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September, 1900? "

In the arbitration proceedings, Panama contended that the question at issue called for no more than an interpretation of the Loubet award, whereas Costa Rica insisted that the scope of the arbitration should be much wider and that the arbitrator should fix the boundary in accordance with the merits of the controversy between the parties, taking into account all relevant considerations.

The award of the Chief Justice of the United States, E. Douglass White, was handed down on 12 September 1914.

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[1] *American Journal of International Law*, vol. 15, 1921, p. 236.

[2] De Martens, *Nouveau Recueil général de traités*, 2e série, t. 32, p. 411; *Papers relating to the Foreign Relations of the United States*, 1910, p. 786.

CONVENTION BETWEEN COSTA RICA AND PANAMA FOR THE SETTLEMENT OF THE BOUNDARY CONTROVERSY, SIGNED AT WASHINGTON, 17 MARCH 1910 [1]

The Republic of Costa Rica and the Republic of Panama, in view of the friendly mediation of the Government of the United States of America, and prompted by the desire to adjust in an adequate manner their differences on account of their boundary line, have appointed plenipotentiaries as follows:

Costa Rica, His Excellency Señor Licenciado Don Luis Anderson, Envoy Extraordinary and Minister Plenipotentiary on Special Mission.

Panama, His Exellency Señor Dr. Don Beliscario Porras, Envoy Extraordinary and Minister Plenipotentiary on Special Mission,

Who, after having communicated their respective full powers, and found them to be in good and due form, have agreed upon the following convention:

Article I. The Republic of Costa Rica and the Republic of Panama, although they consider that the boundary between their respective territories designated by the arbitral award of His Excellency the President of the French Republic the 11th of September 1900 is clear and indisputable in the region of the Pacific from Punta Burica to a point beyond Cerro Pando on the Central Cordillera near the ninth degree of north latitude, have not been able to reach an agreement in respect to the interpretation which ought to be given to the arbitral award as to the rest of the boundary line; and for the purpose of settling their said disagreements agree to submit to the decision of the honorable the Chief Justice of the United States, who will determine, in the capacity of arbitrator, the question: What is the boundary between Costa Rica and Panama under and most in accordance with the correct interpretation and true intention of the award of the President of the French Republic made the 11th of September, 1900?

In order to decide this the arbitrator will take into account all the facts, circumstances, and considerations which may have a bearing upon the case, as well as the limitation of the Loubet Award expressed in the letter of His Excellency Monsieur Delcassé, Minister of Foreign Relations of France, to His Excellency Señor Peralta, Minister of Costa Rica in Paris, of November 23, 1900, that this boundary line must be drawn within the confines of the territory in dispute as determined by the Convention of Paris between the Republic of Costa Rica and the Republic of Colombia of January 20, 1886.

Article II. If the case shall arise for making a survey of the territory, either because the arbitrator shall deem it advisable or because either of the high contracting parties shall ask for a survey (in either of which cases it shall be made), it shall be conducted in the manner which the arbitrator shall determine upon, and by a commission of four engineers, one of whom shall be named by the President of Costa Rica, a second by the President of Panama, and the two others by the arbitrator. The persons selected by the arbitrator shall be civil engineers in private practice, in every respect independent and impartial, and

[1] *American Journal of International Law*, Vol. 6, 1912, Supplement, p. 1.

without personal interest of any kind as respects either Costa Rica or Panama, and not citizens or residents of either of said countries.

Said commission shall make detailed reports, with maps of the territory covered by their survey or surveys, which reports and maps, with the data relating thereto, shall be returned to the arbitrator, and copies thereof shall be communicated to the high contracting parties.

Article III. If, by virtue of the award of the arbitrator, any portion of the territory now administered by either of the high contracting parties shall pass to the jurisdiction and sovereignty of the other, the titles to lands or other real property rights in said region granted by the government of the former, prior to the date of this convention, shall be recognized and protected just as if they had issued from the other of them.

Article IV. One month after the ratifications of this convention are exchanged, the representatives of the two governments, or of either of them, shall make request of the Chief Justice to accept the position of arbitrator. Within four months from the date when the Chief Justice shall communicate to the signatory governments, through their respective legations in Washington, his willingness to accept the position of arbitrator, each said government through its representative, shall present to the arbitrator a complete exposition of the question and of its pretensions, together with the documents, allegations and proofs upon which it rests them.

If any survey shall be directed, as provided in Article II, said period of four months shall begin from the delivery to the arbitrator and to the high contracting parties of the reports, maps and data of the commission of survey hereinbefore provided for.

The arbitrator shall communicate to the representative of each government the case, with its exhibits, of the other party within two months after they shall be presented to him. Within the period of six months after the arbitrator shall so communicate the same, answers thereto shall be made, and such answers shall be limited to the subjects treated of in the allegations of the opposite party. The arbitrator may, in his discretion, extend any of the foregoing periods.

The cases and the proofs sustaining the same shall be presented in duplicate and the arbitrator shall deliver a copy to the representative of each government.

Either high contracting party may submit secondary evidence of documents and records when it is not practicable to produce the originals thereof.

Article V. The Chief Justice shall make his decision within three months following the closing of the arguments.

Article VI. The compensation and expenses of the arbitrator, including the expenses of any survey and delimitation which may be made, shall be equally borne by the high contracting parties.

Article VII. The award, whatever it be, shall be held as a perfect and compulsory treaty between the high contracting parties. Both high contracting parties bind themselves to the faithful execution of the award and waive all claims against it.

The boundary line between the two republics as finally fixed by the arbitrator shall be deemed the true line and his determination of the same shall be final, conclusive and without appeal.

Thereupon a commission of delimitation shall be constituted in the same manner as provided in Article II with respect to the commission of survey, and shall immediately thereafter proceed to mark and delimitate the boundary line, permanently, in accordance with such decision of the arbitrator. Such commis-

sion of delimitation shall act under the direction of the arbitrator, who shall settle and determine any dispute as to the same.

Article VIII. The present convention shall be submitted for the approval of the respective congresses of the Republics of Costa Rica and Panama, and ratifications shall be exchanged in the City of Washington, as soon as possible.

IN WITNESS WHEREOF the respective plenipotentiaries shave signed the present convention in duplicate, and have thereunto affixed their seals.

DONE at Washington the 17th day of March, A.D. one thousand nine hundred and ten.

(*Signed*) Luis ANDERSON

(*Signed*) Belisario PORRAS

OPINION AND DECISION OF EDWARD DOUGLASS WHITE, CHIEF JUSTICE OF THE UNITED STATES, ACTING IN THE CAPACITY OF ARBITRATOR AS PROVIDED IN THE CONVENTION BETWEEN COSTA RICA AND PANAMA OF 17 MARCH 1910. WASHINGTON, 12 SEPTEMBER 1914 [1]

Validité d'une sentence arbitrale — Interprétation de cette sentence — Excès des pouvoirs — Nullité — Révision.

Before proceeding to a consideration of the subject for decision, to avoid breaking continuity of statement, it is observed that a motion made by one of the parties to strike out certain documents because not filed in duplicate, and a motion by the other party to eliminate certain papers because they are said to be partial and hence unauthorized, have both been considered and found irrelevant to the determination of the case and the motions are therefore overruled without further statement on the subject.

Moreover, at the threshold I say that when the duty of considering this case as provided in the treaty was undertaken, it was understood that all the documents and papers in the Spanish language would be translated by the parties into English, and therefore such documents will be referred to in the translations which the parties have furnished.

To state at the outset, first, the geographical situation of the two countries, parties to this arbitration, and, second, to give the history of the nature, origin, development and undisputed facts of the controversy, will conduce to a clearer appreciation of the matters to be passed upon. In doing so for the purposes of the rights with which this arbitration is concerned, Costa Rica will be taken as representing not only rights enjoyed by it in its own name, but all those concerning the matter here in dispute which it possesses as the successor of a prior government, the Republic of Central America; and Panama will likewise be taken as representing for the same purposes, not only its own rights, but also those of its governmental ancestors, the Republic of Colombia, the Republic of New Granada, the United States of Colombia and the Republic of Colombia.

First. The two countries have an extended coast line on the Atlantic and the Pacific Oceans, the territory between the oceans being divided by the main range of the Cordilleras. Not taking into account any conflict as to boundary, if any there be, between Panama and the Republic of Colombia lying southeast of Panama, the territory of Costa Rica and Panama on the Atlantic extends from the upper boundary of Costa Rica at about the eleventh parallel of latitude in a southeasterly direction down to about 8° 40′, a distance not considering the sinuosities of the coast approximating 450 miles.

Second. For seventy-five or eighty years there were controversies between Panama and Costa Rica or their predecessors concerning the extent of their territorial authority. All the disputes referred to arose from two subjects

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[1] *Papers relating to the Foreign Relations of the United States*, 1914, p. 1000.

differing fundamentally; the one, a contention on the part of Panama that its territorial sovereignty embraced the entire Atlantic coast, not only along its own front, but also along the front of Costa Rica and Nicaragua, which country lies above Costa Rica, since the claim of sovereignty terminated only at Cape Gracias a Dios, which was practically the uppermost boundary of Nicaragua dividing that country from Honduras. This claim was based upon what was asserted to be the operation of a Spanish Royal Order of 1803. The other claim, distinct from the former because resting upon independent considerations and which would require to be disposed of even if the former claim was held to be unfounded, concerned the boundary dividing the territory of the two countries in the expanse from the Atlantic to the Cordilleras, across the same and on the Pacific side. So far as the entire territorial claim is concerned and the points in the mere boundary claim which concern the crossing of the Cordilllasr and the line of boundary on the Pacific side, no further statement need be made for reasons hereafter to be set forth. The aspect of the controversy therefore necessary to be stated here involves only the boundary between the two countries in the territory situated on the Atlantic side between that ocean and the range of the Cordilleras.

On the part of Costa Rica in substance from the beginning its lower boundary was claimed to embrace an island in the Atlantic Ocean designated as Escudo de Veragua opposite the mouth of a river named as the Chiriquí, which emptied into the Atlantic shortly below what was known as Almirante Bay, and following the course of that river to the Cordilleras. This claim of boundary, if valid, would necessarily have deprived Panama or its predecessors of a large area of territory over which that country asserted jurisdiction. This assertion of boundary right made by Costa Rica was based, besides a reference to other Spanish documents or decrees, especially on what was asserted to be the result of certain Spanish Cédulas or Capitulaciones of 1540, 1573 and 1600. Again for reasons which will hereafter be made apparent, the facts concerning the rightfulness of this claim of boundary on the part of Costa Rica need not be further enumerated.

On the other hand, the claim on the part of Panama or its predecessors was that the boundary line was made by a river which took its source in the Cordilleras and flowed into the Atlantic at a point much above Almirante Bay. The river which it was thus contended by Panama constituted the boundary was designated by various names and the point at which it emptied into the Atlantic would seem for a considerable time to have been in doubt. There is no ground, however, for real dispute that it came finally to pass that Panama recognized that the stream which it relied upon and continued to insist constituted the boundary along its entire course from the mountains debouched in the Atlantic Ocean shortly below a point indifferently designated as Punta Carreta or Punta Mona — indeed that such river was the first stream emptying into the Atlantic below that point — and that at its mouth at least the stream in question was known as the Sixaola. The boundary dispute therefore involved the territory lying between the two rivers contended for in their courses as they flowed from the mountain range in which directly or indirectly they took their sources to the ocean, and the area, and extent of the controversy, therefore, depended in the nature of things upon the direction of the flow of the bounding rivers which the parties had in mind and upon which they respectively relied as constituting the division between the two countries.

As the statement just made in a general way points to the questions of fact and law to be passed upon, it might well be taken as adequate for the purposes of the mere outline which I at the outset indicated, and therefore would render

it necessary now to make no further statement before coming to an analysis of the questions of law and fact for decision under the present arbitration.

But as when the discharge of that duty is reached it will become apparent that in its last analysis every issue for decision will involve an appreciation of the facts concerning the claim of river boundary relied upon by Panama, the assertion of the river boundary contended for by Costa Rica being, as I have said, out of the case, in order to avoid repetition and to clear a broad way leading to the merits, I propose to state the facts concerning the essential matters which require to be considered, concerning the claim of Panama under a third heading as follows:

Third. The origin of the claim made by Panama, the acts, dealings and admissions of that Government or its predecessors concerning such claim, the negotiations for a prior arbitration, the environment of such negotiations, the treaties made agreeing to the same, the award, the course taken by the parties in executing it, the controversy which resulted, either concerning its interpretation or its binding force, the entering into the arbitration treaty now being executed, and such additional facts as are found in this record as may be considered necessary to be taken into view in connection with the questions of law which require to be passed upon.

To the end of orderly consideration I state the subjects which this general proposition embraces separately under four headings enumerated (a), (b), (c) and (d).

(a) *The source of the boundary claim of Panama and Panama's official assertions of its right by way of negotiations or attempts to negotiate with Costa Rica with reference to the same or otherwise.*

There is no document in the record upon which the assertion by Panama or its predecessors to the river boundary above referred to can be said to rest as an original muniment of title, and therefore the non-existence of any document of that character may be assumed. I say this because although Señor Madrid, a Colombian publicist, in 1852 in a report made to the Colombian Minister of Foreign Affairs declared that official documents to such effect existed, Señor Borda, another Colombian publicist, as late as 1896 in a work prepared officially for the use of the Colombian Government declared that no such official documents had been found and could not be said to exist unless they were considered to be embraced by two alleged maps which were referred to.

But without reference to the source of the title, the existence of the dispute as to boundary at an early date is clearly shown, since in 1825 Costa Rica as a state of the United Provinces of Central America in its Constitution declared its boundary to be the Escudo de Veragua, the island opposite the Chiriquí River which, as I have said, is the boundary now relied upon by Costa Rica. And in the same year, presumably as the result of a dispute concerning this boundary, the Republic of Colombia (Panama) and the United Provinces of Central America (Costa Rica) entered into a convention by which they obliged themselves to " respect the limits of each other as they now exist ", and expressed their purpose to fix their boundaries upon that basis and contemplated a future agreement or convention to give effect to that purpose. The provisions thus referred to were embraced in Articles VII and VIII of the convention. There was no express agreement between the parties for the settlement or demarcation of the territorial claim as to sovereignty over the coast up to Cape Gracias a Dios, although Article IX of the convention contained a provision for a *modus vivendi* between the parties concerning such claim.

Clear as is the text of the treaty in question on the two distinct subjects

stated, if there were room for obscurity it would be greatly illumined by a consideration of the negotiations which preceded the adoption of the treaty. I say this because in those negotiations a proposition on the part of Colombia (Panama) to adjust or compromise the larger territorial claim on a basis stated was promptly rejected by Costa Rica, and on the other hand a proposition made by the representative of Colombia that " as to boundaries it is necessary to hold to the *uti possidetis* of 1810 or 1820 as may be desired ", was promptly accepted by Costa Rica, thus indicating why as to the larger claim nothing but a provision for a *modus vivendi* was inserted, while as to the boundary claim proper a basis for its adjustment was agreed upon and a declaration of the purpose to execute in the future that agreement was made. What exactly was the possessory boundary relied upon as then existing does not appear. Subsequently, the contemplated purpose of delimiting the boundary stated in the convention not having been carried out, that is in 1836, the Republic of New Granada (Panama), in establishing a new territory called Bocas del Toro fixed the limits of that territory on the Atlantic coast from the river called Concepción up to the mouth of a river described as the Culebras and then " on the northwest [that is, from the mountains to the mouth of the Culebras] by the frontier line which separates on that side the Republic of New Granada from that of Central America ". It is apparent that this description, while it amounted to an attempt to definitely fix a line of boundary on the Atlantic coast at the entrance of the Culebras River, did not define the line of that boundary from the point of the mouth of that river to the main Cordilleras, but left it to follow the course of the existing boundary line between the two countries — an omission which was presumably caused by the fact that by Articles VII and VIII of the Convention of 1825, as we have seen, the line of such boundary was to be determined by the application of the doctrine of *uti possidetis* and the subsequent demarcation which was contemplated but which had not taken place. It is to be observed, however, that while the line from the mouth of the river to the mountains was thus left open to be marked, the provision clearly points out that the line of boundary or frontier as it then existed and as it was understood between the parties, considered in its trend from the mountains to the mouth of the river, ran in a northeasterly direction, or, conversely, from the mouth of the selected river to the mountains, in a southwesterly course.

Following the assertions of right on behalf of Costa Rica to the southern boundary at the Chiriquí River, as at the outset stated, and of Panama to a northern boundary at the mouth of the river called the Culebras, running from the mountains to the ocean on a line having the course above indicated, many subsequent negotiations occurred which we outline briefly as follows:

In 1856 a treaty was drawn between New Granada (Panama) and Costa Rica, by which the northern boundary between the two countries on the Atlantic was fixed by a river named the Doraces from its source in the Cordilleras " down-stream by the middle of the principal channel of this river until it empties into the Atlantic ". When the Congress of New Granada (Panama) came to act upon this Treaty it defined the mouth of this river in the Atlantic as being " the first river which is found at a short distance to the southeast of Punta Carreta [Punta Mona] ." As a result of this definition the Treaty was not ratified because Costa Rica declined to agree to the definition, which, of course, if accepted, would have destroyed its claim to a boundary by the Chiriquí, whose point of emptying into the Atlantic was many miles below Punta Carreta. And this serves to demonstrate that the real difference between the parties, at least as to the boundary on the Atlantic side, did not arise from the fact that the parties were quarrelling over the direction of either of the

different bounding rivers upon which they respectively relied, but were disputing and unalterably at odds as to which river was the boundary.

Again in 1865 a further attempt by treaty was made to fix a boundary by a river described as the Carnaveral, which if made the boundary would in substance, that is, for all practical purposes, have created a boundary the equivalent of that claimed by Costa Rica in the Chiriquí River. The treaty failed of ratification, and without going into detail it is true here again to say that the failure of the ratification in part at least arose from the impossibility of securing a meeting of minds of the two countries as to the abandonment of the claims of the river boundary pressed by either side, and was not concerned with the contention upon one side or the other concerning the course or direction of the bounding river which either claimed, if that river had been accepted as the boundary.

In 1873 another treaty was drawn which defined the boundary by a river called the Bananos flowing from its source in the Cordilleras emptying in the Atlantic at Almirante Bay. As the concession of the boundary by this river would have clearly repudiated Panama's claim previously asserted of a river emptying into the Atlantic, the first below Punta Carreta or Punta Mona, its ratification would have destroyed all right of Panama to such claim. But the treaty was not ratified, thus again affording an illustration of what was the real dispute, that is, which of the rivers was the boundary, and the difficulty of securing the ratification of any treaty on that subject.

In the long period of time embracing the acts to which I have just referred there were various official statements of responsible officers of the Colombia (Panama) Government, all resting its boundary claim upon a river boundary, and not one word of intimation is found in the slightest degree tending to show that any other or different boundary right was claimed than one by a river, whatever may have been the controversies or doubts suggested concerning the particular name of the river or the point where it emptied into the Atlantic, and, indeed, this also is true concerning the general course and trend of the bounding river relied upon. I make these statements, not overlooking the fact that there are instances where Punta Mona, a place on the Atlantic shore not on the mouth of any river, is mentioned as the boundary and indeed one instance where it was declared that Humboldt was authority for that proposition, although the very official making the statement pointed out that the boundary was the Culebras River which, as then understood, was a stream entering the ocean below Punta Mona. Likewise, Madrid, the distinguished Colombian publicist already referred to, making a report to the Colombian Senate said in referring to the boundary on the Pacific as well as on the Atlantic and of the crossing of the boundary line over the Cordillera range, that the whole boundary line, both on the Pacific and the Atlantic sides, including the crossing of the mountains, consisted of a line to be drawn from the middle of the Gulf of Dulce on the Pacific side, thence crossing the Cordilleras and traversing the Atlantic side to " the mouth of the River Doraces or Culebras, a short distance from Punta Careta, which is also, approximately, the boundary indicated by Baron de Humboldt and other celebrated travelers ", thus in effect confirming a river boundary as asserted from the beginning and at all times without hesitation or deviation by Panama, and in addition making in quite clear that the course and direction of the bounding river as understood between the parties was that which has been previously stated.

(b) *The light thrown upon the subject, if any, by a consideration of maps and charts applicable to the claim.*

It is undoubted that in the earlier maps there was great uncertainty as to the particular name of the river relied upon, some, showing a river named Dorces, Doraces or Dorados, some a river called Culebras, and some showing two distinct rivers—one named Dorces, Doraces or Dorados and the other Culebras. However, it is true to say that in a general sense all the rivers so named are shown on all these maps to have a general northeasterly direction from the main Cordilleras where, or in the vicinage of which, they purported to take their source and flowed to the Atlantic Ocean, whatever was the confusion in the respective maps as to the precise point of location of the rivers or the place where they emptied into the Atlantic. For instance, what is known as the Spherical Chart of 1805-9 shows the Dorados river flowing from the region of the mountains in a northeastern direction without tributaries to its mouth in the Atlantic, the first below Punta Mona, while the map of Ponce de Leon and Paz of 1864 showed the Culebras or Dorados having the same general course emptying into the Atlantic above Punta Mona. But none of these differences serve to confuse the situation when looked at comprehensively, that is, they do not serve to create any material doubt concerning the boundary river, the first below Punta Mona, relied upon by Panama and the general northeasterly course which such river was considered to have from the point of view of its source in the mountains and journeying from thence to the place where it emptied into the ocean.

And indeed it is here again worthy of remark that this coincidence of course corresponds in its general trend with the assertion by Colombia (Panama) of its boundary line in the very first instance where it found exact expression in the definition of the boundary in the act creating the territory of Bocas del Toro, to which I have referred.

(c) *The demonstration as to the exact nature of the claim afforded by the occupation or settlement of the territory covered by the boundary during the period of dispute.*

It is, moreover, to be observed that it is obvious if the parties contemplated the boundary to be a river flowing from the mountains to the ocean in a northeasterly course, the eastern bank of such river would belong to Colombia (Panama) and the western bank to Costa Rica, an understanding which it is undoubted was the one entertained by the two Governments. I say this because the proof here is adequate and comprehensive that the western bank of a river so flowing was occupied and settled under the jurisdiction of Costa Rica, and that as far as settlements were made by Colombia (Panama) the eastern bank was taken as the line of its jurisdiction of that country. This is aptly illustrated by the following facts. A Colombian settlement was located at the mouth of the boundary river, the first below Punta Mona, which came to be known as the Sixaola. This bank, if a river had been contemplated as flowing east and west in its course from the Cordilleras to the sea, would have been the south bank of the river, as indeed at the point of settlement it was accurately speaking such bank owing to the direction of the flow of the Sixaola in the immediate region of its mouth. But disregarding this merely local condition and evidently looking at the situation with reference to the trend of the boundary line which it had entertained from the beginning and the general course of the river which had been from the commencement and without change considered to be the boundary, complaint was made by Colombia (Panama) to Costa Rica of intrusion upon " the Colombian village ' Sixaula ', situated upon the eastern side of that river ". And similar language was repeatedly used in the course of the negotiations between the parties. Indeed, it is correct to say that whatever may have been the more accurate knowledge acquired of the names of rivers and of their true location and courses and distances, there

is nothing whatever in the record to indicate any action taken or any expression by word which directly or indirectly would justify the belief that up to the period when the previous award was rendered, the consideration of which we shall hereafter approach, the boundary line between the two countries as insisted upon by Panama, was made in any other way than by a river having the general trend and course of the river or rivers to which we have referrred and which in practice were treated as the dividing line — a practice which, as I have said, was shown by official action in many forms, by the exercise of dominion by the respective countries and was demonstrated by the settlements which manifested the practical conception which prevailed concerning the real situation as to boundary.

(d) *The controlling effect of the action of Panama concerning the submission of the matter to a former arbitration, and the dominating influence of its conduct in connection with the hearing and submission thus previously made.*

The failure to provide for the exact delimitation of the boundary line as contemplated by the Convention of 1825 may well be presumed to have produced its natural results. Certain is it that there had been a failure to do so not only on the Atlantic but on the Pacific side of the mountains, in 1880, growing out of disputes as to rights of possession and authority in the territory on the Pacific side, a rupture between the two countries was threatened and war between them was imminent. In view of these exigencies and in contemplation of a proposed negotiation with Costa Rica for an adjustment which might obviate an armed conflict, the Senate of Colombia (Panama) on July 14, 1880, formulated a statement of the claim of Colombia embracing the following conclusions:

(1) Colombia has, under titles emanating from the Spanish Government and the *uti possidetis* of 1810, a perfect right of dominion to, and is in possession of the territory which extends towards the north between the Atlantic and Pacific Oceans to the following line:

From the mouth of the River Culebras, in the Atlantic, going upstream to its source, from thence a line along the crest of the ridge of Las Cruces to the origin of River Golfito; thence the natural course of the latter river to its outlet into the Gulf of Duice in the Pacific.

(2) Colombia has titles which accredit its right, emanating from the King of Spain, to the Atlantic littoral embraced from the mouth of the River Culebras as far as Cape Gracias a Dios.

(3) Colombia has been in uninterrupted possession of the territory included within the limits indicated in Conclusion I.

And in another Conclusion which I do not reproduce, it was virtually declared that as a condition precedent to negotiations there must be an " evacuation [by Costa Rica] of any portion of territory in which that nation may have established its authorities beyond the limits marked out in Conclusion I ". Although these Conclusions were communicated for his guidance to the Negotiator representing Colombia, who was endeavoring to reach an adjustment with Costa Rica, it is worthy of remark that the instructions transmitting to the Negotiator the Conclusions of the Senate while insisting that as a *sine qua non* to the negotiations certain territory situated on the Pacific coast which was the more immediate cause of the dispute should be evacuated, made no request of such a character as to one foot of soil on the Atlantic side based on the want of right to possess along the bounding river having the course and direction which I have stated. This conduct certainly shows that even in the vivid light

which must have been thrown on the controversy between the two countries resulting from the almost flagrancy of war, the parties concerning the boundary on the Atlantic coast entertained and suggested no different view of that boundary than a river, by whatever name it might have been called, following the general trend and course of the bounding river which had been asserted by Panama from the beginning, and that settlements by Costa Rica on the Atlantic coast which did not transcend or interfere with such a boundary were not really the subject of serious dispute between the two countries. It is also worthy to be observed that although the larger territorial claim of the Atlantic coast to Cape Gracias a Dios was embodied in the Conclusions of the Senate under Number 2, no express instructions whatever concerning that claim were given to the Negotiator, and it is in addition of importance that the President of Colombia issued a proclamation concerning the claims of that Government and although in such proclamation he embodied in so many words the propositions contained in the Senate Conclusions with reference to the assertion of the river boundary, no mention whatever was made as to the claim of sovereignty over the coast up to Cape Gracias a Dios as mentioned in the Senate Conclusions since the Senate's statement as to that asserted right was wholly omitted from the proclamation — a fact which gives support to the view that such controversy was not embraced by the Treaty of 1880.

The rupture between the two countries was avoided and a treaty was negotiated and ratified between them for the purpose of submitting to the arbitrament of the King of Spain the disputes stated in the treaty. The preamble of this treaty recited that its purpose was " to close the only source of differences that may arise between them, which is no other than the question of boundaries foreseen in articles VII and VIII of the Convention of March 15, 1825, between Central America and Colombia, and which has subsequently been the subject of diverse treaties between Costa Rica and Colombia " — a declaration of purpose clearly embracing the river boundary dispute which was the subject provided for in the articles of the Convention of 1825 referred to and which articles were therefore virtually incorporated into the treaty and became by reference a part thereof. The first article, which gave effect to the purpose thus expressed in the preamble, by its terms when reasonably construed related to the fixing of a boundary along the disputed line coming within the scope of articles VII and VIII of the Convention of 1825 to the end that the possession of both parties within their proper territory might be secured — a boundary which, as we have seen, by the acts and declarations of Colombia, by the authoritative writings of the publicists of that country, and by the very conclusions of the Senate leading up to the treaty had come to mean a river flowing from its source in the Cordilleras in a northeasterly direction to a point where it emptied into the Atlantic Ocean as the first river having its mouth below Punta Mona. And the fact that this was the subject contemplated by the treaty is further shown when it is considered that the Convention of 1825 had in it an article expressly referring to a *modus vivendi* regarding the larger claim concerning the Atlantic coast to Cape Gracias a Dios, and that no reference or incorporation of the provisions on that subject was made in the treaty — a view additionally sustained by the instructions to the Negotiator who commenced the negotiation of the treaty and by the President in his proclamation, in both of which the controversy as to the sovereignty of the coast line was treated as negligible for the purpose of the negotiations which the treaty consummated.

The King of Spain accepted, but before his duty was discharged, although the Government of Spain had taken initial steps towards its performance, the

King died. Thereafter in 1886 the two Governments negotiated an additional treaty of arbitration. The preamble of this Convention after reciting the previous treaty, the acceptance of the King of Spain, the beginning by the Spanish Government of the execution of the duties incident to the arbitration and the death of the King, declared that the parties to remove all doubt regarding the competency " of his successor [the King's] to continue to exercise jurisdiction over said arbitral suit until final judgment, have agreed to execute the following convention *ad referendum* additional to that signed * * * on December 25, 1880 ". The first Article of this treaty recognized in express terms the right of the successor of the King or the government of Spain " to continue exercising jurisdiction over the arbitration proposed by the two Republics, and to render an irrevocable and final award in the controversy pending concerning the territorial boundaries between the High Contracting Parties." While no reference in terms was made to an additional power to consider and decide as an arbitrator the controversy concerning the larger territorial claim, it can not be subject to serious dispute that under the terms of the treaty an additional power to that conferred by the previous treaty was given to the arbitrator to adjudge as to the larger claim of Panama to territorial sovereignty extending along the coast line to Cape Gracias a Dios. I say this because such is the natural result of an enumeration of the limits of the territory in dispute embraced in Article II and the statement in Article III concerning the authority of the arbitrator to decide the controversies.

I do not reproduce the text of the two articles since it is hereafter quoted in the analysis of the legal questions which are involved in the merits of the controversy. But in my opinion the fact that the additional power was given concerning the territorial claim clearly did not change or expand the power conferred by the previous treaty concerning the boundary claim, since such conclusion is rendered absolutely necessary by the express statements which I have referred to in the treaty that the power formerly given and which had been partially executed was to continue until final judgment, and finally by the provision saving the prior treaty from abrogation as a result of the adoption of the latter.

It having resulted from reasons purely of convenience not necessary to be stated, that the King of Spain did not complete the discharge of the duties of arbitrator begun under the first treaty nor enter upon those resulting from the second treaty, the parties in 1896 entered into a Convention agreeing to submit the subjects to the arbitration of the President of the French Republic. The Convention expressly declared that it made no change in the fundamental matters referred to, and that it was but intended to submit the controversy under the terms and limitations thereof to the arbitrament of a new tribunal. Prior to the assumption by the President of the French Republic of the duties created by this treaty, the authorized representative of Costa Rica addressed to him a letter enclosing the text of the arbitration treaty and asking him to undertake the duties which it imposed. The letter in addition said: " I also enclose a geographical map of the territory in litigation upon which are indicated the boundaries claimed by each of the contracting parties." The map which was thus sent clearly delineated the bounding river, the Chiriquí claimed by Costa Rica, and the river claimed to be the boundary by Colombia (Panama), that river being marked on the map as entering into the Atlantic the first below Punta Mona and having in its flow from the mountains to the ocean a general northeasterly direction conforming to the course and flow of the bounding river which, as I have seen, had prevailed without question or hesitation from the beginning. The river which was thus delineated on the map was designated as

the " Yurquin " (Yorquin) from its source in or near the Cordilleras to a point where it emptied into a river named the " Sixola " (Sixaola), the two in the course and direction indicated thus being marked on the map as the bounding river on which Colombia relied. There is no proof in this record that such letter written by the representative of Costa Rica, was ever communicated to the representatives of Panama, but there is nothing in the record indicating that anything occurred which called for its communication, as there is nothing to show that there was any intimation of controversy between the parties as to the trend and course of the bounding river claimed by Colombia to constitute the boundary if the general controversy between Colombia and Costa Rica as to which of the two rivers was the boundary should be determined in favor of Colombia. The duty under the treaties was accepted by the President of the French Republic and the case was made up and submitted for award.

On the part of Panama an elaborate argument was submitted to sustain the claim of that country to sovereignty over the Atlantic coast to Cape Gracias a Dios, under the Royal Order of 1803, and in addition an argument was made to sustain a broad claim of territorial authority under a Royal Cédula of March 2, 1537, which it would seem was presented for the first time in the argument in question. Aside from the elaborate argument just stated there was no detailed discussion or argument on the part of Panama concerning the dispute between itself and Costa Rica as to which of the two rivers was the boundary and nothing whatever was said concerning the course and trend and location of the river claimed by Panama as the boundary, if the river asserted by it should be found to be the true boundary, which in the slightest degree conflicted with the statements on that subject contained in the letter written by the minister of Costa Rica or which, moreover, in any way whatever challenged the source, the course, and the trend of the river relied upon by Colombia as resulting from the history of the boundary controversy from the beginning which has been previously given. I say this because the only statement concerning these subjects contained in the argument made by Colombia after a discussion concerning the validity of its claim to authority over the coast line was a general reference to Colombia's title to what it called the Duchy of Veragua, which Colombia confessedly held, and the claim in the following words asserted to exist as the result of the ownership of that title: " This title alone would suffice to show the actual right of possession of Colombia over Chiriquí Lagoon, the Bay of the Admiral [Almirante Bay] and the contiguous country in the direction of the Sixaola River (dans la direction du Rio Sigsaula)."

On the part of Costa Rica the argument was addressed to an attempt to refute the larger claim as to sovereignty over the coast made by Panama and in addition as to the boundary dispute to establish that the River Chiriquí was the true boundary and by a negative pregnant to thereby demonstrate that the river claimed by Colombia was not. But there was not one word in the argument tending to show that it was considered that if Colombia's claim to boundary was rightful, it embraced any other territory or any other river than that which had been described in the letter to the Arbitrator, and which description conformed to all the facts which, as I have stated, are demonstrated by the history of the subject from the beginning.

The whole record which was before the former Arbitrator is not shown to be a part of this record, but neither party disputes, if they do not in terms concede, that the substantial facts which I have previously stated were embraced in the record for the purposes of the prior arbitration. Prior to making the award and as an aid in doing so, the Arbitrator appointed a Commission of distinguished officials of the French diplomatic corps, and in addition the

Keeper of the Maps in the National Library, to consider the subject presented by the arbitration. The written report to that Commission, if any was made, is not in this record.

The award of the Arbitrator was made on September 11, 1900. Leaving aside certain provisions contained therein as to islands both along the Atlantic and Pacific so much of the award as is necessary here to be considered is as follows, the translation from the French being taken from the argument of the Republic of Panama in this case, there being no question on the other side as to its substantial accuracy.

The Frontier between the Republics of Colombia and Costa Rica shall be formed by the counterfort of the Cordillera which starts from Cape Mona, on the Atlantic Ocean, and closes on the North the valley of the Tariare or Rio Sixola; then by the chain of division of waters between the Atlantic and Pacific, to nine degrees, about, of latitude; it will follow then the line of division of waters between the Cheriquí Viejo and the affluents of Gulf Dulce, to end at Point Burica on the Pacific Ocean.

Upon the announcement of this award the Minister of Costa Rica who had also been its agent for the purposes of the proceedings under the arbitration addressed a letter to Monsieur Delcassé, the Minister of Foreign Affairs of France, in the name of Costa Rica in form at least seeking to interpret the award and requesting that a particular line be indicated by the arbitrator as a boundary. The line thus asked as an interpretation of what had been awarded was substantially like that which the Minister of Costa Rica had marked on the map which he sent to the President of the French Republic before the arbitration was undertaken as showing what the claim of Colombia was as to the river which it asserted to be the boundary and therefore as demonstrating what that country would be entitled to if its claim was allowed.

To this letter the Minister of Foreign Affairs replied as follows:

Answering the request which you have been pleased to express in your letters of September 29th and October 23rd ultimo, I have the honor to inform you that, on account of the lack of exact geographic data, the Arbitrator was not able to fix the boundary except by means of general indications; I think, therefore, that there would be difficulty in fixing them on a map. But there is no doubt, as you observe, that, in conformity with the terms of articles 2 and 3 of the Convention of Paris of January 20, 1886, this boundary line must be drawn within the confines of the territory in dispute, as they are determined by the text of said articles.

It is in accordance with these principles that it is for the Republics of Colombia and Costa Rica to proceed to the physical delimitation of their frontiers, and the Arbitrator trusts, on this point, to the spirit of conciliation and good understanding with which the two Governments in litigation have up to the present time been inspired. * * *

Costa Rica declined to accept the award unless it was interpreted according to its view as stated in the letter written by its minister to Monsieur Delcassé, and Colombia insisted that the award required no interpretation and should be executed according to its terms. The award remained without practical effect although various negotiations were had on the subject and although a proposed treaty for adjusting the differences was drawn but failed of ratification. In this situation a treaty providing for the duty of arbitration to be performed by the Chief Justice of the United States, now being executed, was entered into. By that treaty the previous award as to the Pacific coast, as to the line crossing the Cordilleras and the dividing line on that range of mountains " to a point beyond Cerro Pando * * * near the ninth degree of North Latitude " was expressly declared to be binding, and, therefore, all controversy concerning

those subjects was put at rest. It follows, therefore, that the treaty accepted in its entirety the award as to the Pacific coast and provided only by the methods and to the extent contemplated by its terms, which I shall hereafter have occasion to specifically state and consider, for an examination and decision concerning the controversy in relation to the award concerning the dispute as to the boundary between the two countries on the Atlantic coast from the mountains to the ocean.

The record contains nearly fifty volumes, and the arguments submitted as to the subject-matter in controversy are voluminous, covering on one side or the other the widest possible field and every aspect of everything that has taken place in the long period of time to which I have referred. Without reference to its materiality to the issues here to be decided there is certainly this distinction between the record now under consideration and that which was before the previous Arbitrator which ought not to be passed without mention. By the terms of the present treaty, provision was made for the appointment of a commission " for making a survey of the territory "; and this request having been made, in October, 1911, such a board was organized, composed of four members, one appointed by the President of Costa Rica, one by the President of Panama, and the other two by the Arbitrator. The appointees were all civil engineers of the highest attainment and distinction in their profession. They were as follows: Professor John F. Hayford, of Northwestern University, Evanston, Illinois, Chairman; Professor Ora M. Leland, of Cornell University, Ithaca, New York, Secretary; Mr. P. H. Ashmead, of New York City; and Mr. Frank W. Hodgdon, of Boston, Massachusetts. After the organization of the board and after the adoption of a plan to govern the performance of its duty, which plan was approved by both countries, a survey in the field was undertaken and accomplished after prolonged and arduous labor, and its results were submitted in a report and in many maps and charts displaying the situation in the most careful, comprehensive and accurate manner. It is true to say, overlooking what may be qualified as minor differences, the board was in substance united. And great as is the satisfaction afforded by the action of the Commission of Survey, there is an additional and important cause of gratification arising from the fact that its work as to fiscal arrangements and in every other respect was aided and facilitated by the two countries whose controversy is here for decision. I do not go into detail concerning the report or the map or maps which accompanied it, since in the view now taken of the case it does not depend upon their analysis or statement. But although it is not essential to the conclusion which I have reached, it is pertinent to the contentions which I shall be obliged to notice before announcing that conclusion to state the facts shown by the report and maps of the Commission concerning a continuous counterfort (range or spur) stretching from the main Cordilleras to Punta Mona which was made the boundary line in the previous arbitration. These facts show that there is undoubtedly a high spur projecting itself out in the direction of Punta Mona from the main range for a distance of about nine miles, but there is then a sudden drop of about 3,600 feet in less than four miles, where an elevated but broken country begins, full of ridges, transverse to the direction of the spur. From this region continuing towards the Atlantic there is a gradual lowering except for occasional peaks, the country falling to an elevation of about six hundred feet when a distance of about sixteen miles from Punta Mona is reached, and sinking yet farther to about three hundred feet most of the way and finally subsiding into a swamp which is a mile and one-half wide, until a small eminence which marks Punta Mona is attained. Whether, as is urged, the designation of " counterfort " was mistakenly applied to such a situation, however, I am

not called upon to consider, since my conclusion, as I have said, is wholly independent of that fact.

There is no real controversy between the parties as to the facts previously stated. I say real controversy because if it be that there is any dispute on the subject the preponderance of evidence makes such clear proof concerning such facts that they may be accurately said to be not disputable. And in my opinion it is also true to say that likewise the inferences which I have drawn from the facts stated in the course of making the statement are so clearly compelled by the facts stated as to be equally beyond dispute. I now come to consider the propositions relied upon by the parties in the light of the facts and the inferences which I have heretofore or shall hereafter draw from them under a heading — The Merits of the Controversy.

THE MERITS OF THE CONTROVERSY

Costa Rica insists, first, that under the facts the selection by the Arbitrator of Punta Mona as an initial boundary point and the making of the boundary line by a range or spur of mountains extending from there to the Cordilleras was void because beyond the scope of the authority which the arbitration embraced. Second, it insists that in any event as something cannot be made out of that which does not exist, it clearly follows that the selection of the line was in other respects void since under the proof it is demonstrated that the mountain range made the basis of the award has no existence.

On the part of Panama the contention is, first, that assuming the facts which I have given in stating the history of the case to be true, nevertheless the line of alleged mountain boundary was within the power of the Arbitrator to fix because the authority to do so was conferred upon him by the treaty upon which the arbitration was made. And second, that this view remains unaffected even if it be assumed that the range of mountains has no existence since the line of boundary which that range was intended to mark remains and is plainly discernible by the conformation of the country and the watershed which it contains. Third. It is additionally insisted by Panama that the validity of the line of mountain boundary must be tested not by the assumed dominancy of any general principles of law governing arbitration, but by the former arbitration treaty alone, because the treaty under which the power to arbitrate is now being exercised confines the authority of the present Arbitrator to determining whether the previous award was within the terms of the previous treaty and excludes the power to hold the previous award invalid if it was within the treaty upon the theory that it conflicted with general and controlling principles of law.

Considering these propositions as a whole, inasmuch as there can be no question of the power of the two Governments to have entered into the previous treaties of arbitration and to insert in them such provisions as they deemed best, it clearly results that the first proposition of Panama, if its premise be true, is well founded and is controlling since it cannot be said that action taken under the treaties was void for want of power if it was within the power which the treaties conferred. It also is patent, this being true, that it cannot be held under this treaty that an act done under the prior treaty was void although sanctioned by such treaty because of some conception of general principles of law. This must be the case because to so do would amount to deciding that this treaty gave the power to set aside acts which were authorized by the previous treaty. It thus necessarily comes to pass that the fundamental question to be decided requires it to be determined whether the boundary line fixed by the previous arbitration was within the previous treaty or treaties. And if it was not, it

must follow that its correction is within the scope of the authority conferred by this treaty; and if it was, no power here obtains to revise it. It is therefore true that the whole case comes down to the question stated: which is, the scope and meaning of the prior arbitration treaty or treaties, and the solution of that inquiry will decide both of the propositions relied upon by Costa Rica, as well as all those insisted upon by Panama.

The study of that question from the point of view of the argument presented by Panama requires the immediate consideration of the text of the previous treaty, that of 1886, the pertinent articles of which are as follows:

Article II. The territorial limit which the Republic of Costa Rica claims, on the Atlantic side reaches as far as the Island Escudo de Veraguas, and the River Chiriquí (Calobebora) inclusive; and on the Pacific side, as far as the River Chiriquí Viejo, inclusive, to the East of Point Burica.

The territorial limit which the United States of Colombia claims reaches, on the Atlantic side, as far as Cape Gracias a Dios, inclusive; and on the Pacific side, as far as the mouth of the River Golfito and in Gulf Dulce.

Article III. The arbitral award shall confine itself to the disputed territory that lies within the extreme limits already described, and cannot affect in any manner any rights that a third party, who has not taken part in the arbitration, may set up to the ownership of the territory comprised within the limits indicated.

The construction relied upon to establish that the mountain boundary was within these treaty provisions and therefore valid and not subject to be re-examined under this treaty is this: The second article, it is said, specifically states the exterior points of the vast territory which was in dispute and therefore brought within the jurisdiction of the Arbitrator everything within those exterior boundaries and gave him authority at his discretion wholly without reference to any particular controversy pending or dispute existing as to claims within the boundaries, to fix such a line of boundary within the exterior limits as was deemed best. And support for this proposition is derived from the clause of the third article saying, " The Arbitral award shall confine itself to the disputed territory that lies within the extreme limits already described," the construction given to these words being that they empower the fixing of a line not only concerning a dispute as to the exterior limits, but a line within the exterior limits wholly without reference to the disputes prevailing between the parties as to land within the exterior limits. The demonstration of the extreme result which would come from maintaining the construction thus asserted is too plain to require more than to direct attention to the consequences which would result from sustaining it — consequences which could not be better exemplified than they are by the facts of this case where in a dispute only as to which of two rivers was the bounding one with no difference whatever as to what either of the parties would be entitled to if either river relied upon was made the boundary, no river boundary was made, but a mountain range was fixed carrying with it a large amount of territory to which the successful party would not possibly have had any title if every claim which was made in the dispute as to that boundary had been held to be correct. Besides, on the face of the text the curious premise upon which the argument proceeds is patent since it in substance is that from a grant of power to determine as to the " disputed territory that lies within the extreme limits " there arose the right to determine as to territory within such limits as to which there was no dispute whatever. And that this anomalous result of the proposition is not overdrawn is made manifest by the statement on the subject in the argument on behalf of Panama, where it is said:

Article III only provides that the award shall be confined to the disputed territory within the limits fixed by Article II, and cannot affect the rights of third parties.
* * *

It will be noted that the only limitation which these Articles imposed upon the Arbitrator was with regard to the terminal points of the boundary which he should fix. He could not, upon the Atlantic, fix a line which should begin south or east of Escudo de Veraguas or the mouth of the river Chiriquí, nor north of the northern frontier of Costa Rica; nor could he fix any line which should meet the Pacific at a point south of the Chiriqui Viejo or north of the Golfito.

But except in this respect his jurisdiction was unlimited. No claim was made by either party as to interior lines and nothing in the treaty prescribes any rule upon the subject. So long as the terminal points upon the two coasts were within those stated, he was at complete liberty, in the interior, to connect them by a line running in whatever course he should think proper.

I do not stop to point out how plain would be the duty to resort to every *reasonable intendment* to save the articles of the treaty from the construction attributed to them if the premise upon which the proposition rests were true that their text alone afforded the measure of deciding the question of power conferred as to the boundary issue. But the question of power is not to be solved alone by the article of the treaty thus relied upon by Panama, since on the face of the record it is apparent that it must be solved by the text of a different treaty which when it is considered renders it impossible to ascribe the meaning relied upon to the provisions referred to. A brief recurrence to the history of the case previously made will make this clear since that history shows beyond the possibility of question that the boundary dispute was first provided for by the Treaty of 1880 and contained a limitation or direction based upon the Treaty of 1825 between Colombia (Panama) and Central America (Costa Rica) which causes it to be impossible to suppose that the extensive power now claimed was conferred concerning the boundary dispute. This becomes clearer, if it were possible to add to its clearness, when the statement is recalled that when the Treaty of 1886 was drawn in express terms it reserved the powers granted by the previous Treaty of 1880 and declared that the powers created under the new treaty were additional to those conferred by the former, and to make assurance doubly sure, there was added to the Treaty of 1886 a cause saving from repeal the Treaty of 1880.

Even upon the hypothesis that the Treaty of 1880 provided both for the boundary dispute and for the territorial claim up to Cape Gracias a Dios which embraced on the Atlantic side the exterior boundaries subsequently stated in the Treaty of 1886, such assumption would be without consequence because it could not possibly be assumed that the inclusion of the larger and wholly distinct territorial claim was intended to destroy the express limitations concerning the boundary claim which the treaty embodied by making reference as it did on that subject to the articles of the Treaty of 1825. And, indeed, this would be the result if it were additionally supposed for the sake of argument that the Treaty of 1880 and the Treaty of 1886 became incorporated into one and the same instrument by the effect of the adoption of the Treaty of 1886, since it would be obvious under the terms of the Treaty of 1886 as thus construed that it was the clear intention of that treaty to preserve unimpaired and unchanged the powers, duties and limitations previously created and therefore to impose the duty of enforcing the two harmoniously so that the duties under both might be performed.

While these considerations dispose of all the principal arguments advanced to maintain the contention that the text of the Treaty of 1886 sustains the

extreme power asserted and I might well pass from the subject, nevertheless before doing so in order not to seem to overlook suggestions made or necessarily arising, I proceed to notice some considerations concerning some words in the text which have been deemed to be of importance but which I have not previously noticed in order to avoid breaking the continuity of the argument. The clause in the third article of the Treaty of 1886 saving the rights of third parties, it is suggested by reasoning whose import is not clearly discernible, lends some strength to the contention that the treaty conferred the extreme authority claimed. But it is obvious that this clause instead of removing a limit, imposed one, since its plain terms evidence that it was intended in any and all events but to restrict the operation of the award so as not to affect third parties — a restriction presumably inserted because at the time the treaty was drawn the United States [sic] was insisting that rights which it asserted might otherwise without such restriction be affected, and, moreover, because the line embraced in the shore claim of Panama, as we have seen, extended beyond the territory of Costa Rica up to Cape Gracias a Dios. And the contention in another aspect, manifests a confusion like that which I have previously pointed out since it would be singular, indeed, to say that a limitation which was inserted for the purpose of protecting those who were not heard had for its object the extension of the scope of the arbitration so as to cause it to embrace as to the parties to the convention the absolute right on the part of the arbitrator to condemn them without a hearing, which, of course, would be the result if the provision had the extreme construction which it is now insisted belongs to it.

From these considerations the following general conclusions are established: (1) That the controversy as to boundary between the parties which had existed for so many years was limited to a boundary line asserted by one party and to that asserted by the other, the territory in dispute between them, therefore, being that embraced between the lines of their respectively asserted boundaries. (2) That the previous treaties of 1880 and 1886 by which the boundary dispute thus stated was submitted to arbitration, instead of going beyond the general principles of law which otherwise would have applied and conferring an extreme power to make an award wholly without reference to the dispute or the disputed territory, by their very terms confined the award to the matter in dispute and the disputed territory. (3) That as the line of boundary fixed by the previous award from Punta Mona to the Cordilleras was not within the matter in dispute or within the disputed territory, it results that such award was beyond the submission and that the Arbitrator was without power to make it, and it must therefore be set aside and treated as non-existing. The only question then is, What in other respects is the duty arising under the present arbitration from that situation?

As by the terms of the present treaty the previous award was not set aside as a whole, and the power was only given to correct it in so far as it might be found to be without the authority conferred, the consequence is that all the results necessarily implied by the selection of the mountain line from Punta Mona along the stated counterfort, which can be upheld consistently with the previous treaty, must be sustained although the mountain line itself be void for want of authority to make it. While not in express terms urged, it may be implied from the argument that the contention is that, the mountain line being out of the way for illegality, there would remain as a part of the previous award a river line composed of the Sixaola-Tarire Rivers since the award declared that the mountain line would bound on the north the valley of such rivers and hence they may constitute a boundary line within the award previ-

ously made. To dispose of this suggestion it is only necessary to point out the fallacy of the premise upon which it must rest since that premise virtually is that the previous selection was of a line formed by the Sixaola-Tarire Rivers instead of the counterfort or range of mountains. But this is so obviously refuted by the record as to need only a few words of statement to demonstrate its error. In the first place the line previously fixed did not even commence with the mouth of a river, but began at Punta Mona, and in express terms was declared to proceed along the counterfort. It is true, as is suggested, that it was said that the line thus made bounded on the north the valley of the Sixaola and Tarire, but this declaration did not convert the mountain boundary into a river one. In fact such a view of the previous award could only be taken as the result of wholly inadmissible surmises and conjectures. It is certain, as indicated by the letter of Monsieur Delcassé previously quoted, that there was not a complete knowledge of the geography of the country when the previous award was made. And it is also certain that under the previous arbitration there were present maps showing a range of mountains from Punta Mona to the Cordilleras ostensibly of such a permanent and dominant character as to cause it, if existing, to constitute a natural frontier dividing for all practical purposes the country on the one side from that lying on the other. When this is borne in mind a reason which may have given rise to the selection of the mountains is not far to presume since the natural frontier which their presence would cause and the benefit to arise from the establishment of such frontier may well have led the mind to consider that subject from the point of view of statesmanship alone and therefore have unwittingly concentrated attention exclusively on the advantages of such a boundary and thus have diverted attention from the consideration of the limits which inhered in the submission. On the contrary the suggestion relied upon would necessarily compel it to be assumed that although a river boundary was selected, a mountain boundary was for some unaccountable and undisclosed reason named.

As it is conceded by both parties that under this treaty there is the power and duty to substitute for the line set aside, a line within the scope of the authority granted under the previous treaty " most in accordance with the correct interpretation and true intention " of the former award, I come to that subject. As it was impossible to make the previous selection of a mountain line without rejecting both the claim of Colombia (Panama) to the shore up to Cape Gracias a Dios and also without adversely disposing of the claim of Costa Rica to the boundary of the Chiriquí River, both of those express or implied awards remain unaffected by the fact that it is now held that the mountain boundary line was void. And by the same reasoning it follows that the initial point of the boundary which is to replace the rejected one must and can only be the mouth of the first river below Punta Mona, the Sixaola, since there is physically no other river mouth to respond to the claim made under the circumstances stated. Besides, this result is inevitable because the mouth of such river, under the facts stated, is indubitably the initial point on the Atlantic of the river boundary contemplated by the parties from the beginning, sustained by all the facts to which I have referred as to negotiations, declarations and settlements and the exertion of governmental power by the two countries consequent thereon. It is true it results from the previous statement that the river which was relied upon by Colombia (Panama) as the boundary was designated by various names because, undoubtedly, of the want of accurate geographical knowledge which prevailed. But whatever may have been the Babel of names, there can be no doubt that they all came to be used to designate virtually one and the same river emptying into the Atlantic at about one

and the same place and having virtually one and the same course or flow from the source near the mountains to the mouth in the Atlantic. Nothing could serve to make this clearer than does the statement which was made by the Colombian Congress in 1856 which, while it described the river as the Doraces, fixed its mouth as the one first below Punta Mona, and the further illustration which is afforded by the facts previously stated concerning the settlements at the mouth of the Sixaola by Colombia and the claim of authority which the government of that country asserted thereunder. And this serves to make clear what river was referred to by the use of the name Culebras, since the President of the State of Panama had in 1870 declared that that river was the same as the Doraces. Moreover, when the situation is rightly appreciated these facts readily explain why in the Resolutions of the Colombian Senate which immediately preceded the Treaty of 1880 the river upon which Colombia relied as the boundary was described as the Culebras and not as the Sixaola, which latter river was then known to be the river having its mouth the first below Punta Mona, and therefore was the same as the Doraces or Culebras. But the claim of Colombia as first formulated in 1836 in the organization of the territory known as Bocas del Toro, called the river whose mouth was fixed as the boundary, the Culebras. And therefore it is quite natural to assume that in stating the claim for the purposes of the Resolutions and the controversy then pending, desirous of losing nothing of the original right and of retaining everything that had accrued under it by way of negotiations, admissions and settlements the original description was adhered to and reiterated — a conclusion whose cogency is greatly reinforced when it is considered that years before Señor Madrid, the Colombian publicist, had recognized that the river which Colombia referred to as the Culebras was the river which Costa Rica referred to as the Sixaola. To adopt views contrary to those just stated would necessarily lead to the conclusion that because in formulating its claim Colombia in order to preserve it in its integrity had resorted to the definition of that claim as originally stated, it had thereby abandoned its right, or, what is equivalent thereto, had by resorting to the most efficient way of stating that claim acquired a non-existing, unheard of or imaginary one.

The only remaining question then is, how is the boundary line to proceed from the mouth of the Sixaola River to the Cordilleras until it joins the line terminating " beyond Cerro Pando "?

On the one hand it is claimed that such line should follow the thalweg of the Sixaola River to the point where it joins with a river called the Yorquin, then follow that stream in a southerly direction to its source in or near the mountains and thence to the point " beyond Cerro Pando ". On the other hand the contention is that the line should run by the Sixaola passing the entrance of the Yorquin to a point where the Tarire is attained and then follow that river to its source in the Cordilleras and thence by a line to the point " beyond Cerro Pando ". This contention rests upon the assumption that the Sixaola and Tarire Rivers are shown to be really one and the same, although designated by different names. It cannot be denied that the direction of the boundary river, if the Sixaola-Tarire be selected, would be wholly at variance with the trend of the river boundary contemplated from the beginning and would project a line of boundary into territory over which the authority of Costa Rica was never questioned and thus give to Panama what she had never claimed. While, on the contrary, the line of the Sixaola-Yorquin, if followed, would in substance conform in its course and direction with that which had been recognized as the direction of the boundary line from the beginning and had been virtually treated as not the subject matter of dispute up to and during the proceedings had

under the previous treaty. And no reason is afforded for departing from the river line thus shown to be the boundary line within the dispute between the parties by suggesting that some other river line would most comport with the interests of the two governments and best subserve the purpose of a boundary. To admit such considerations would in substance but be indulging in views of public policy and public interest which would lead the mind away from the fundamental proposition which is here controlling, that is, the execution of the duty of arbitration which calls for judgment as to a dispute between the parties and affords no room for the application of discretion beyond the limit which that consideration necessarily imposes. Discretion or compromise or adjustment, however cogent might be the reasons which would lead the mind beyond the domain of rightful power, and however much they might control if excess of authority could be indulged in, can find no place in the discharge of the duty to arbitrate a matter in dispute according to the submission and to go no further. No more fatal blow could be struck at the possibility of arbitration for adjusting international disputes than to take from the submission of such disputes the element of security arising from the restrictions just indicated. Under these circumstances, since the duty here is not to elucidate and pass upon mere abstract question of geography, nor to substitute mere expediency for judgment, but to determine what was the river claimed as the boundary by Colombia, declared by her to be the boundary for so many years, to which she asserted rights and which virtually was claimed to be the boundary upon which she relied prior to the entry into the previous treaty for arbitration and in the proceedings under that treaty, it is plain that the Sixaola-Yorquin is the line which should take the place of the line from Punta Mona along the counterfort of the Cordilleras to the point " beyond Cerro Pando ", as declared in the previous award.

In framing the award and coming to particularly specify the new line there may arise some difficulty because of the absence of precise geographical data as to the situation at the headwaters of the Yorquin River and therefore of the considerations which should control the drawing of the line from such headwaters to the Cordilleras. In the argument of this case Costa Rica stated a formal decree which it deemed should be entered upon the hypothesis that the award here made should be against the mountain line and in favor of the Sixaola-Yorquin line, and no objection to the form of such proposed decree has been made by Panama. Following the line to the headwaters of the Yorquin, the proposed decree from thence directs a stated line to the Cordilleras. This line rests upon the assumption that the headwaters of the Yorquin lie in the region of the northern slope of the northern watershed of a river known as the Changuinola, and the proposed line runs from the headwaters of the Yorquin along such watershed to the Cordilleras. The situation thus assumed by the proposed decree to exist in the region of the headwaters of the Yorquin is in conformity with maps which are in the record, one of which was made by the Commission of Engineers in this case, but which is not, however, the result of a survey by that body as it was not called upon by either party to make one. As the line thus suggested would seem to be in all respects the most reasonable, I shall adopt it with some verbal modifications as a part of the award to be entered, however, with the following reservation: Without prejudice to the right of the parties in case there should be differences between them resulting from contentions as to the topography of the country between the headwaters of the Yorquin and the Cordilleras differing from that above stated, to raise such question in any appropriate way consistent with the provisions of the treaty now being enforced.

Coming to give effect to the opinions previously stated and the conclusions deduced from them, the award now made under the authority of the treaty is as follows:

1. That the line of boundary which was purported to be established by the previous award from Punta Mona to the main range of the Cordilleras and which was declared to be a counterfort or spur of mountains in said award described, be and the same is held to be non-existing.

2. And it is now adjudged that the boundary between the two countries " most in accordance with the correct interpretation and true intention " of the former award is a line which, starting at the mouth of the Sixaola River in the Atlantic, follows the thalweg of that river, upstream, until it reaches the Yorquin, or Zhorquin River; thence along the thalweg of the Yorquin River to that one of its headwaters which is nearest to the divide which is the north limit of the drainage area of the Changuinola, or Tilorio River; thence up the thalweg which contains said headwater to said divide; thence along said divide to the divide which separates waters running to the Atlantic from those running to the Pacific; thence along said Atlantic-Pacific divide to the point near the ninth degree of north latitude " beyond Cerro Pando ", referred to in Article I of the Treaty of March 17th, 1910; and that line is hereby decreed and established as the proper boundary.

3. That this decree is subject to the following reservations in addition to the one above stated:

(*a*) That nothing therein shall be considered as in any way reopening or changing the decree in the previous arbitration rejecting directly or by necessary implication the claim of Panama to a territorial boundary up to Cape Gracias a Dios, or the claim of Costa Rica to the boundary of the Chiriquí River.

(*b*) And, moreover, that nothing in this decree shall be considered as affecting the previous decree awarding the islands off the coast since neither party has suggested in this hearing that any question concerning said islands was here open for consideration in any respect whatever.

(*c*) That nothing in the award now made is to be construed by its silence on that subject as affecting the right of either party to act under Article VII of the treaty providing for the delimitation of the boundary fixed if it should be so desired.