REMARKS ON THE ARBITRAL SENTENCE

Pronounced by the President of the Argentine Republic on July 9, 1909

ON THE

BOUNDARY QUESTION

BETWEEN

BOLIVIA AND PERU

By PASQUALE FIORE

Member of the Council for Diplomatic Contentions and of the Institute of International Law,
Senator of the Kingdom of Italy

Translated from the French by

FANNY R. BANDELIER

From the

REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC

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OBSERVATIONS

REMARKS UPON THE ARBITRAL SENTENCE RENDERED BY THE PRESIDENT OF THE ARGENTINE REPUBLIC ON JULY 9, 1909, IN THE CONFLICT BETWEEN THE REPUBLIC OF BOLIVIA AND THAT OF PERU IN THE MATTER OF DEMARCATION OF THE BOUNDARY BETWEEN THE TWO STATES.

Arbitration has become one of the most important juridical institutions for disposing of international conflicts and giving satisfaction to the aspirations of those who endeavor to settle differences between States without hurting their respective dignity, by removing the causes of ill-feeling that might occasionally jeopardize their peaceful relations.

All who comprehend its importance and practical efficiency acknowledge that in order to better enable arbitration to attain its purpose it must be useful to secure for it a regular working. It must therefore be considered as opportune, not only to place in evidence its undeniable advantages but also to indicate the inconveniences which might result from the administration of arbitral Justice, in order to prevent their recurrence and thus render in future the functioning of this judicial method more perfectly.

Having been invited to express our opinion on the sentence of arbitration rendered by the President of the Argentine Republic in the controversy between Bolivia and Peru, we have concluded to do it with the view of presenting an impartial study of that arbi-

tration and of investigating if the principles of international law that in our understanding should always preside over the administration of arbitral Justice, have been rigorously observed. Our remarks will not be in the least based upon the preconceived idea of criticizing or of favoring the manifestation of certain sentiments that have revealed themselves in regard to that sentence. Far be it from us to forget the respect due in principle to the decisions of the arbitrating authority destined to settle definitively all disputes, nor to perpetuate the discussion of facts which may have given rise to the said decisions. We belong to the class of authors that have devoted and do devote their existence to the consolidation, in international society the preponderating rule of Right, and only in the quality of a modest writer do we propose to submit our observations in the hope of contributing as much as we may be able to do toward an improvement in the exercise of arbitral Justice, increase its growing prestige and enable it to attain more securely the aim which it must have in view.

Under these premises our remarks may be regarded as the work of a Jurisconsult expressing his opinion on decisions rendered by high juridic authorities. It cannot be sufficient that Justice be just, it must also appear as solidly based upon the just principles of Law. Thus it must be with arbitral Justice, so that its sentence will not merely terminate litigation, but that it may have indisputable moral value. It is always through critical observations on the sentences of the highest courts that progressive development of justice is attained. It lies beyond all doubt that these high authorities whose sentences are discussed in complete scientific independence, cannot find in that anything that might affect their dignity or diminish their prestige. Thus, at the present time, while we write these lines, a profound discussion is carried on in the juridic circles of Naples to critically examine an important sentence pronounced by the Court of Appeals of Rome with the attendance of all its sections, on a question already discussed extensively in the courts of Italy, as to whether the excess in value of stocks issued by an anonymous society is liable to a

revenue tax like all industrial income. The decision of the High Court of Justice has been vigorously combated and criticized, nevertheless, none of the members of that court has found in those criticisms anything derogatory to his dignity or prestige.

In the above it has been our purpose to indicate that critical remarks on the sentences of tribunals of arbitration, if impartial, cannot have the effect of impairing the importance or efficiency of the arbitration destined to satisfy the aspirations of friends of peace who look to it as the institution best adapted for the settlement of international conflicts. We have also wanted to demonstrate that these observations can in no manner affect the dignity of the arbiter from whom the sentence emanates.

The remarks we purpose to make can in no manner offend the high personality of the President of the Argentine Republic, nor lead to suspect his indisputable impartiality as judge. We profess the highest respect for the exalted magistracy of the arbiter and regard as beyond discussion the exalted sentiments of Justice that inspire him in ultimately solving and settling the dispute between Bolivia and Peru, hence we simply propose to formulate objective criticisms, in the general interest, of a better functioning of arbitral Justice, as jurists who desire to co-operate to an improved administration of national Justice.

FACTS

On the 21st of November, 1901, Bolivia and Peru concluded, at La Paz, a general treaty of arbitration, by which they agreed on principle, by Article 1, to submit to arbitration all differences existing and hereafter to come up, of whatever origin and nature, and they also have determined the general rules after which the arbitrage is to be affected.

Art. 2 of that convention disposes:

Art. 2.—If the case should present itself, the contracting parties will conclude a special convention for determining the nature of the

disagreement, to fix the points to be settled, the extent of the faculties of the arbiter and the procedure to be observed.

The High Contracting Parties have determined the functions of the arbiter in Articles 7 and 8 in which his competency is precised and which read as follows:

Art. 7.—On the questions of a technical or scientific character that will come up in the course of this litigation, the arbiter is under the obligation to ask for the advice of the Royal Geographical Society of London or of the International Geodetic Institute of Berlin.

Art. 8.—The arbiter shall pronounce in strict conformity with the prescriptions of international law and, in the matter of boundaries, to the American principle of *uti possidetis* of 1810, whenever the convention referred to in Article 2 does not establish special rules or does not authorize the arbiter to pronounce in the quality of a friendly intermediary.

In conformity with this general agreement Bolivia and Peru executed at La Paz the special convention of December 11, 1902, for the purpose of settling their dispute about the limitation of their respective territories.

This convention reads as follows:

Art. 1.—The High Contracting Parties submit to the judgment and decision of the Government of the Argentine Republic, in the quality of arbitral "Judge of Law," the question of boundaries pending between the two Republics of Bolivia and Peru, in order to obtain by it a sentence, definitive and without appeal, according to which the entire area which, in 1810, pertained to the jurisdiction or district of the former AUDIENCIA of CHARCAS, within the limits of the viceroyalty of Buenos Ayres according to the decrees of the former sovereign, the King of Spain—shall belong to the Republic of Bolivia and all the territory that, at the same date and, according to the enactment of the same sovereign, pertained to the viceroyalty of Lima, shall revert to the Republic of Peru.

Art. 2.—The treaty of September 23d of the current year having regulated the demarcation and bounding of the frontier that

begins between the Peruvian provinces of ARICA and TACNA and the Bolivian province of CARANGAS on the West to the glaciers of PALOMANI—that section is not included in the present treaty.

Art. 3.—In order to pronounce sentence the arbiter shall adhere to the laws in the "Recopilacion de Indias," to the royal decrees and ordinances, Ordinances of the Intendentes, to the diplomatic documents concerning the outlining of boundaries, to the official maps and descriptions and, in general, to all official documents issued in order to furnish the true bearing of and to enable the execution of the royal dispositions aforesaid.

Art. 4.—Whenever the legal enactments or dispositions should not clearly define the domain of a territory, the arbiter shall solve the question in an equitable manner, adhering, as far as possible, to the bearings of these documents and to the spirit that may have inspired them.

Art. 5.—Possession of a territory by one of the High Contracting Parties cannot militate against the titles or royal acts which would establish the contrary, nor can it prevail against them.

Art. 6.—The High Contracting Parties shall, as soon as the ratifications of this present treaty have been exchanged, simultaneously solicit from the Argentine Government, by means of their Envoys Extraordinary and Plenipotentiaries to accept the charge of arbiter, assuming the jurisdiction through the cognizance, investigation and resolution of the controversy and establish the procedure to be followed or observed.

Art. 7.—One year after the acceptance of the charge has been communicated, the said diplomatic representatives shall present their informations exposing the rights of their respective States and shall produce the documents supporting them and upon which they are based.

Art. 8.—The aforesaid diplomatic agents shall be the legal representatives of their governments with all faculties requisite for receiving and presenting allegations and answering the same, offering

evidence, presenting and developing annexes, furnishing all data that might explain rights under discussion and finally, for following the litigation to its end.

Art. 9.—Once the sentence rendered it shall be carried out definitively through the fact of having been brought to the knowledge of the said Envoys Extraordinary and Ministers Plenipotentiary of the High Contracting Parties. From that time on, the territorial delimitation will be held as definitive and binding between the two Republics.

Art. 10.—In regard to what is not specially established by this treaty, the one of November 21, 1901, shall remain in force.

Art. 11.—After this treaty has been approved and ratified by the governments of both countries, its ratifications shall be exchanged without delay at LA PAZ or at LIMA.

(Signed) ELIODORO VILLAZON.
FELIPE DE OSMA.

This treaty, approved by the National Government of Bolivia at LA PAZ on November 11, 1903, was ratified there on January 14, 1904.

The Argentine Government was solicited to that effect by the respective Plenipotentiaries of both Republics, who communicated to it the compromise of December 30, 1902, to accept the functions of arbiter. His Excellency the President of the Argentine Republic consented to accept, in order to render thus a new service to the cause of peace, and his acceptance was notified to the Plenipotentiaries of the two contending States on July 30, 1904.

The President thus legally invested with the functions of arbiter, in this quality appointed, by his decree of October 20, 1904, a Commission destined to assist him in his arbitration.

This consulting Commission fulfilled its mission by examining all the allegations, replies and counter replies, documents and all the evidence produced by each of the two parties and, considering its mission as thereby fulfilled, submitted to the President in a note

dated June 1, 1909, and addressed to the Minister of Foreign Affairs of the Argentine Republic, the following project relative to the line of demarcation.

This note reads as follows:

"MR. MINISTER.

"In the various meetings held with His Excellency the President of the Republic and with Your Excellency for the purpose of deliberating on the question of boundaries pending between Peru and Bolivia and submitted to the Argentine Government for arbitration, we have had ample opportunity to state the reasons which impede the adoption of either one of the boundary lines upheld by the High Parties in litigation.

"The written allegations, replies and criticisms presented by the Ministers of the two Republics in support of their respective doctrines, however erudite and remarkable for their historic and juridic value, have placed the discussion at the high level to which it is entitled, and allows the analysis of the basis on which they rest, with the abundance of data that are necessary for forming definitive judgment.

"Having studied them we have reached the conclusion that the law embodied in the 'Recopilacion de Indias,' the royal decrees and edicts, the Ordinances of Intendentes, the diplomatic acts relating to the demarcation of boundaries, the maps and official descriptions and, in general, the official documents issued for giving to these enactments their scope and for effecting their execution, do not define the domain of these territories in litigation in a clear and precise manner, so that the Argentine Government in conformity with Article 4 of the treaty of arbitration, the ratifications of which were exchanged at LA PAZ on March 9, 1904, will have to resolve the question in equity by adhering, as much as possible, to the intentions of all these elements and to the spirit that may have inspired them.

"Considerations *de facto* and *de jure* which we have extensively exposed to His Excellency the President and to Your Excellency,

lead us to think that the line most adapted to these conditions and most in accordance with the antecedents of the debate is the following: (Here follows the identical designation of the arbitral sentence in which it is textually reproduced.)

"Basing upon these considerations we must understand that the line indicated can be regarded as the one approaching the division line which, in 1810, divided the jurisdiction and district of the former Audiencia de Charcas within the viceroyalty of Buenos Ayres and of the jurisdiction of the viceroyalty of Lima and, in fulfillment of the mission entrusted to us by decrees of October 20, 1904, and December 13 and 27, 1908, we recommend to the Government of Your Excellency to sanction it, as boundary between the Republics of Bolivia and of Peru in order to put an end to the transcendental controversy concerning the boundary of these two nations."

Before the arbitral sentence had been pronounced Mr. Escalier, Plenipotentiary of Bolivia, by his note of July 6, 1909, requested that the question be studied *in situ,* in order to verify the condition of the territories, the population inhabiting them, and all that might be useful to protect the moral and economical interest involved in the delimitation of the territories between the two Republics. This request was not considered since it was admitted that, if the Commission had judged it useful, it would, of its own accord, have decreed the measure thus solicited. Finally, the President of the Argentine Republic rendered the sentence, the text of which is as follows:

ARBITRAL SENTENCE OF THE ARGENTINE GOVERNMENT

Joseph Figueroa Alcorta, President of the Argentine Nation:

The Government of the Argentine Republic having been named Arbiter and Judge in law to decide the boundary question pending between the Republics of Bolivia and Peru according to the treaty

of arbitration celebrated at the city of La Paz on December 30, 1902, and exchanged at that city May 9, 1904.

Desirous of justifying the confidence thus placed in this Government by the aforesaid Republics, which are so intimately connected with the Argentine through their origin, traditions and destinies and having appointed a Commission of assessors actually composed of Dr. Antonio Bermejo, President of the Supreme Court of this nation, one-time Minister of Justice and Public Instruction and former Plenipotentiary to the American International Conference of Mexico; of Dr. Manuel Angustus Montes de Oca, former Minister of Foreign Affairs, and ex-Assessor of the Argentine Government in the arbitration between Chile and the Argentine; and Dr. Carlos Rodriguez Larreta, one-time Minister of Foreign Affairs, ex-Plenipotentiary to the Second Peace Conference and member of the Permanent Court of Arbitration of The Hague; Secretary, Dr. Horacio Beccar Varela. This Commission was to determine the mode of procedure to be followed, receive the memoirs, pleadings and testimony of the High Contracting Parties and assist the arbiter in the solution of the question of boundaries submitted to his decision.

In view of: that this Commission after conferring with the Ministers representing Peru and Bolivia, established the rules of procedure to be followed and that, in conformity with these rules were presented the various pleadings, replies, proofs, all carefully studied by the Commission.

In view of: that according to the defense presented by Bolivia the dividing line should be the following:

Starting from the South on the river Suchez, the line runs across the lake of the same name its entire length and rises on the Cordillera by Palomanitranca and by Palomanicunca to the summit of that name which is the highest of the glaciers of that region—then descends to the eastern slope by the boundaries of Yagua-Yagua, Huajza and Lurirni which define the possessions of the two Republics. Then it follows the boundary of Hichocorpa, in the moun-

tain chain thus called, and descends again, by the river Corimayo to the river San Juan del Oro or Tambopata and beyond that stream to the confluence of the river Lanza. From that point, the line goes to the mouth of the Chunchusmayo at its confluence with the river Inambari and then descends by it to its junction with the Marcopata. It thence rises on this river to the frontier of the ancient province of Paucartambo and along these limits to the place known in colonial times by the name of Opotari at the junction of the rivers Zono and Pinipini. Continuing by the boundaries of the province of Urubamba and by the river Janatili, the line penetrates into the Urubamba river the course of which it follows to its junction with the Ucayali, whence it goes to the slope of the Yavari along the right bank of this stream.

In view of: that the defense of Peru resumes the claims of that State in the following manner:

(1) In 1810 the Audiencia of Charcas in the viceroyalty of Buenos Ayres comprised, in what pertains to the question now under our consideration, from the point, where, according to the treaty of September 23, 1902, the demarcation of the Peru-Bolivian frontier is to terminate, by the line dividing the waters of the rivers Tambopata and Tuiche to the sources of the river Madidi following that stream to its confluence with the Beni and thence eastward to meet the river of the Exaltation Iruyani, the course of which and that of the Mamoré to the mouth of the Guaporé or Iteneéz were the terminal points of the lines of demarcation.

(2) The territories north and northeast of that line as far as the frontier of Portugal pertained to the viceroyalty of Peru in 1810. (See Statement of the Republic of Peru, Vol. I, p. 259.)

In consideration of that the High Contracting Parties, according to Art. I of the treaty of arbitration, submit to the decision of the Government of the Argentine Republic as arbiter and lawful Judge, the question of boundaries between the two Republics in order to obtain a sentence, definitive and without appeal, according to which the entire territory that in 1810, pertained to the jurisdiction

of the ancient Audiencia of Charcas, within the limits of the viceroyalty of Buenos Ayres through the enactments of the former sovereign—be declared to pertain to the Republic of Bolivia and that all the territory which, at the same date and by the enactments of the same sovereign pertained to the viceroyalty of Lima, should be assigned to the Republic of Peru.

Considering that, interpreting this article relative to the competency of the arbiter according to the faculties admitted by international law (see Conventions for the peaceable settlement of international conflicts adopted by the Congresses of The Hague, 1899-1907, Art. 48 of the first and 75 of the second, also Calvo Droit International, Vol. III, 1857), it must be understood to mean that the High Contracting Parties have given the faculty of fixing the division line between the Audiencia of Charcas and the viceroyalty of Lima in 1810 only in regard to the respective territorial right. because, if he ought to determine the whole perimeter of each of these colonial entities, it might affect the rights of various nations which are not concerned in the arbitral compromise of 1902, basis of the present judgment. Besides this, Article 9 of the treaty states that once the sentence pronounced and notified to the Envoys Extraordinary and Ministers Plenipotentiaries of the High Contracting Parties, the territorial delimitation of right between the two Republics shall be held as definitive and obligatorily established, which expresses clearly that it is the demarcation (territorial) between the two Republics which is to be determined.

Considering that, in accordance with Article 2 of the treaty of arbitration, modified according to terms of the minutes of exchange of ratifications dated La Paz, the 9th of March, 1904, the arbiter finds himself, in regard to the determination of the division line, in the presence of a point of departure expressly signalled to wit: "the place where the actual boundary line coincides with river Suchez according to the following terms of Art. 2 of the treaty of arbitration, completed by the minutes of the exchange before mentioned."

Art. 2.—"The treaty of the 23d of September of the present year having settled the demarcation and the setting of landmarks of the frontier which begins between the Peruvian provinces of Tacna and Arica and the Bolivian province of Carangas in the West to the site where the actual frontier line coincides with the river Suchez this section is excepted from the treaty."

Considering that the arbiter, after having studied with the utmost attention the invoked titles of one and the other party, does not find enough grounds to consider as dividing line between the Audiencia of Charcas and the viceroyalty of Lima in 1810, neither one or the other of the demarcations pretended by the defenses of the States who have signed the compromise.

Considering that, in reality, the disputed zone was in 1810 and until recently, completely unexplored, as it appears by the numerous geographical maps of the colonial period as well as from posterior ones presented by one and the other party and recognized by both; which explains that the demarcations of these governmental entities (the viceroyalty and the Audiencia), subject to the same sovereign, had not been perfectly determined.

The defense of Bolivia acknowledges it when, indicating the successive modifications in the frontiers of the principal colonial sections, it expresses that: "during this long process, which lasted more than three centuries, one perceives frequently that the dispositions of the Spanish Crown have been contradictory, vague some of them and many in disagreement with the position of the places and topographical features. This was due to the lack of geographical knowledge and therefore the interpretation must be equitable within the frame of the ideas of the period, in order to appreciate the true signification and bearing of these dispositions; although it adds: that with regard to the district of the Audiencia of Charcas, the royal orders and dispositions were more precise (Memorial presented by Bolivia, p. 2).

In its turn, the defense of Peru, entering upon the study of the principles upon which the demarcation of the Audiencias is founded,

says: "that the eastern territories, which are the object of this litigation, territories ignored and unconquered during the entire colonial period, could not be included or excluded from any inferior and subaltern Audiencia." (Memorie du Perou, t. l, p. 77.) Further on it adds, "Circumspection and honorability consist here in presenting the title of the disputed domains, considered as a whole *uti universitas,* and to produce thereof the documents which allow the arbiter to create a juridic demarcation and also geographically 'prudent.'" (Memoirs d'observations et censures du Perou, p. 104.)

Considering that the demarcation sustained in this litigation by the defense of Bolivia, in following the course of the rivers Corimayo, San Juan del Oro or Tambopata, Inambari, Yanatile, Urubamba and Ucayali as far as the sources of the Yavari, had been indicated previously as a straight line that, starting from the said sources of the Yavari reached as far as the confluence of the Inambari with the river Madre de Dios (Notes du 5 Mai 1894 et du 23 Octobre 1902, dans les annexes de la Republique de Bolivie, pp. 26 et 36; Protocole Polar Gomez du 21 Mai 1877; whereas Peru which, in this litigation traces the line along the rivers Madidi, Beni and Mamoré, and formerly fixed it by the rivers Tequeje and Beni to its reunion with the Mamoré. (Note de la legation du Perou, datée á La Paz le 10 Novembre 1902, dans les Annexes de Bolivie, p. 40.)

Considering that these differences explain themselves perfectly, if one takes into account as the treaty of arbitration of the 30th of December foresaw it, and as it follows the notable works presented by the two parties to the assessorial commission, that the royal acts and dispositions in vigor in 1810 did not define clearly if the disputed territory had been assigned to the jurisdiction of the viceroyalty of Lima or to the Audiencia of Charcas, two colonial entities subject to the same undoubted sovereign of these territories and that, until 1776, the second constituted a part of the first.

To understand it, it suffices to note besides the Laws in the "Recopilacion de Indias" indicated as the first element of decision

in Article 3 of the treaty of arbitration, bounded the "Audiencia of Charcas": "In the North by the Royal Audiencia of Lima and undiscovered provinces, in the South by the Royal Audiencia of Chile, and in the East and West by the Atlantic and Pacific Oceans, and the boundaries between the crowns of Spain and Portugal on the side of the province of Santa Cruz, of Brazil" and that of Lima, "on the North by the Royal Audiencia of Quito, in the South by the one of La Plata, and in the West by the Pacific Ocean and in the East by undiscovered countries." (Lois 5 et 9, tit. 15, livre II.)

In the meantime no document of a decisive character has been presented that would allow to place these undiscovered provinces which bounded in the North the Audiencia of Charcas and in the East the Audiencia of Lima, that could authorize to extend them, as Peru sustains, from the Marañon to the northern frontier of Paragua, comprising the valley of the river Madre de Dios (Réponse du Perou, p. 102) or rather as Bolivia asserts, that they extend along the shores of that river, when it says: "The only vague point which exists in these demarcations consists in these undiscovered provinces. But there is not a single word in all these laws on boundaries which even makes allusion to the virtual and actual districts. It is true, that between the Audiencias of New Granada and of Quito to the South and the one of Lima to the West and the one of Charcas to the North, there remained a space or zone of lands which were called the undiscovered provinces; but these provinces which according to all probability extended along the borders of the river Marañon did not enter within the limits of the stated Audiencias.

As to the province of Chunchos, known later on under the designation of Missions of Apolobamba, nothing authorizes to admit that it comprised the whole extension of the concession which, under the name of New Andalusia, was granted to Alvarez Maldonado in 1568 and 1569 and much less still that it extended toward the North as far as the line of the treaty of St. Ildefonso of 1777, which extended from the sources of the Yavari to a point at equal

distance of the confluence of the Madera with the Mamoré and the Marañon.

Considering that the same thing takes place in regard to the boundary of the said Audiencia of Charcas with the Atlantic Ocean and the demarcation line between the crowns of Spain and Portugal and the inclusion of the province of Chunchos according to the said Recopilacion de Leyes de Indias since even without taking into account that the criterium of the demarcation in vigor in 1810 had modified that of this compilation, according to the Ordinances of Intendentes of 1782 and 1803, it suffices to observe, that, at the time when they were promulgated, the Audiencia of Charcas could not confine with the Atlantic Ocean as well in the region of Pará, West of the line of Tordecillas, as well as with the province of Rio de la Plata, comprised in its district.

Considering that under those circumstances, Clause 4 of the treaty which stipulates that

"Whenever the acts or royal dispositions should not define the dominion of a territory in a clear way, the arbiter shall resolve the question equitably, by coming as close as possible to the signification of the said acts or dispositions and to the spirit which might have inspired them," becomes applicable.

Considering the signification as well as the spirit of the laws contained in the "Recopilacion de Indias," of the royal decrees and orders, ordinances of intendentes, diplomatic acts relative to the demarcation of frontiers, maps and official descriptions and other documents presented by the High Contracting Parties and especially the laws 1, 5, and 9 of title 15, book II of the "Recopilacion de Indias," relative to the general demarcation of the Audiencias and in particular of those of Charcas and Lima, law 3, title 7, book I of the same recopilacion on the demarcation of the bishoprics, the royal decrees of 26th of August, 1573, and February 8, 1590, relative to the concession made to Juan Alvarez Maldonado; the royal decree of February 1, 1796, which severed the Intendencia of Puno from the viceroyalty of Buenos Ayres in order to add it to the vice-

royalty of Lima; the negotiations relative to the formation and execution of treaties of limits of 1750 and 1777 between the crowns of Spain and Portugal; the Ordinances of Intendentes of January 28, 1782, and September 23, 1803; the documents concerning on the one hand the development of the missions of Carabay in the region of San Juan del Oro or Tambopata and, on the other, development of Apolobamba and Mojos in the region of the river Toromanas.

And, in accordance to the considerations that precede, *I must decide this question equitably and conform this decision as much as possible to the meaning of the royal dispositions invoked by the respective defenses and to the spirit which inspired them.*

For these reasons, in accordance with the advice given by the assessorial commission, I declare that the line of boundaries is the following:

Starting from the place where the actual frontier lines coincides with the river Suchez, the territorial boundary line between the two Republics will cross the lake of the same name as far as the mountain cerro of Palomani Grande, whence it will continue to the lagunes of Yagua-Yagua and along the river of that name will reach the river San Juan del Oro or Tambopata. It will follow the course of this river Tambopata as far as to meet the mouth of the river Lanza or Mosohuaico. From the confluence of the Tambopata and Lanza the line will run as far as the western extremity of the river Abuyama or Heath and continue along the latter to its juncture with the Amarumayo or Madre de Dios. By following the "Thalweg" of the Madre de Dios the boundary line will descend to the mouth of the Toromanas, its tributary on the right bank. From this confluence of the Toromanas and Madre de Dios a straight line shall be drawn to the intersection of the river Tahamanu with the 69th degree longitude West of Greenwich and following this meridian the divisory line will extend toward the North until its meeting with the limits of the territorial domain of another nation that has not been party to the arbitration treaty of the 30th of December, 1902.

The territories lying to the East and South of the boundary lines just established pertain to the Republic of Bolivia and the territories lying to the West and North of the same line pertain to the Republic of Peru.

This arbitral sentence shall be brought to the cognizance of the Envoys Extraordinary and Ministers Plenipotentiaries of the High Contracting Parties to whom one copy be given according to terms of Article 9 of the treaty of arbitration.

Executed in three copies, sealed with the big seal, with the arms of the Republic and countersigned by the Minister of Foreign Affairs, and Cult in the Palace of the National Government in the city of Buenos Ayres, capital of the Republic of the Argentine, the ninth of July One Thousand Nine Hundred and Nine.

J. FIGUEROA ALCORTA,
V. DE LA PLAZA.

OBSERVATIONS ON THE ARBITRAL SENTENCE

Our observations taking their inspiration from the general interest in the better functioning of arbitration, we will in the first place say that the prevailing custom to choose as arbiter the head of a State does not seem to us a happy choice. This custom was adopted in former times when the object of arbitration was to resolve conflicts between two sovereigns. These naturally entrusted this task to another sovereign. This usage has continued through the Middle Ages and has prevailed even in our era. It seems to us that, in order to preserve to arbitration its true character, namely, that of an exclusively juristic institution, official bodies like the Court of Arbitration of The Hague, the Institute of International Law, a law faculty should be preferred, or the task should be entrusted to eminent jurists enjoying the confidence of the litigating parties. We do not wish to intimate by this that the sovereigns should be systematically excluded from arbitral functions.

It would be truly abnormal to create such an incapacity or to limit the autonomy of the parties in their faculty to select as arbiter a king, an emperor or a president of a republic. We only say that the choice of a chief of State cannot be considered as the best.

Indeed even if it were not in this capacity that a chief of State assumes the functions of arbiter, and though undoubtedly he will fulfill his mission as a judge with scrupulous impartiality, it cannot always be avoided that when the sentence is contrary to the interests of one of the parties the inconsiderate manifestations of the people of the country to which the sentence is unfavorable, should attack the dignity of the State whose sovereign is the judge. It is in reality not always easy for the inhabitants of the two litigating countries, excited by national interests, to distinguish the function of judge from that of sovereign united in the same personality. In this manner the criticisms intended for the sentence may attack the dignity of the head of State and a conflict originally of a juristic character may be transformed into a conflict of a political nature. The arbitration having for its object the consolidation of pacific relations between the States one should, therefore, to our idea, consider it preferable not to select sovereigns as arbiters. What has happened on the occasion of the arbitral sentence rendered by the President of the Argentine Republic demonstrates this fully. We will certainly not criticize but only indicate the facts. The people of Bolivia allowed themselves to be driven to demonstrations as noisy as they were inconsiderate in front of the Argentine Legation to express in that manner very improperly their resentment and the Bolivian Government was obliged to check this popular movement. Furthermore, the press improperly meddled with this question and the people continued to make manifestations, the dignity of the two Governments was fatally compromised; the conflict of an eminently juristic character was transformed into political difficulty and the recall of the respective representatives of the two States confirmed the rupture of their diplomatic relations. The civilized world was painfully shocked thereby. Even a declaration of war could be feared.

Admitted in principle that the authority of sentences has to be respected religiously, especially when arbitral sentences are concerned where it is absolutely inconceivable that the juristic foundation of these decisions might be the object to popular demonstrations: that the Bolivian Government has done all in its power to suppress the popular manifestations, while we abstain absolutely from judging the conduct of the two Governments, we limit ourselves to state that, what has occurred must constitute a lesson absolutely demonstrative for the future.

The whole world agrees to admit that the sovereigns designated as arbiters conscientiously fulfilled their mission and are sheltered from all the influences which could have impaired their impartiality.

Notwithstanding, this cannot prevent the people, excited by their passions, to suppose that diverse influences outside of strict justice, might have determined the decision of the arbiter. It is advisable to avoid this danger by abstaining from choosing as arbiter chiefs of States and to submit the matter in litigation to the arbitral Court of The Hague.

In principle, one must admit that international conventions duly concluded must have between the parties the same authority as law, and that therefore one must consider as absolutely obligatory and reciprocal the fulfillment of engagements taken and the production of effects thereof notwithstanding the prejudice that could result therefrom.

In matters of private interest regulated by a contract, one may admit that a lesion beyond certain limits may be a motive for annulling the convention, or suspension of the execution of the contract, but it cannot thus be regarding international treaties. If a State, after having duly concluded an international convention, could misconceive its compulsory nature and refuse the strict and faithful execution of the obligations contracted under pretext of lesion of its interest, one would thus arrive to legitimize under an unjustifiable pretext the non-observation of the treaty.

Any serious government should exactly know to what it engages itself, and even, had it imprudently entered into a compromise without competent knowledge, it could, nevertheless, not fail to acknowledge the obligatory power of the convention and of its effects.

We have thought it useful to recall here these principles, which must serve to maintain the integrity and the prestige of the authority and the efficacy of the arbitral sentences. Arbitration, at our present time, is regarded as the most efficient means and the most rational one to realize, as far as possible, the generous and peaceful aspirations and to resolve conflicts when it could not have been done by means of diplomacy. Nevertheless, one must not exaggerate the practical importance of general conventions of arbitration by which a compromising clause is stipulated which in reality depends effectively upon the good will of governments, What is really efficient in this matter is the special convention, in other words the compromise, by which the litigating parties leave to the decision of the arbiter the definitive solution of the difficulty which has arisen between them.

To the compromise one must apply the general rule that this convention, constituting an international treaty, must be reputed as concluded in good faith and that the same must be the case with the execution of the arbitral sentence rendered by virtue of the same agreement. No government after having concluded an arbitral convention by which the arbiter is entrusted with the solution of the conflict by a definitive sentence without appeal, can later on misconceive the authority of this sentence and refuse to execute it under the pretext of the damages that might accrue. Arbitration would be deprived from all efficacy.

We therefore agree with the authors who maintain that the arbitral sentence, duly rendered, must have the authority of a judgment, that it should be, in principle, executed in good faith, and that in the absence, in the compromise of all reserve for the revision of this sentence, it shall be reputed as absolute in the sense that

the rights and obligations of the parties, such as they have been determined by the arbiter, must be considered as definitively established.

Whenever the fulfillment of the obligations imposed by the sentence should necessitate the authorization of the legislative power, or the adoption of certain measures on the part of the same power it will always encumber upon the favored government to call forth this authorization and these measures; and its international responsibility could not be excluded but in the case when it would have done all that is necessary to this end. All that regards means of execution of the arbitral sentence must needs be considered as belonging to the domain of internal public law, and in a well organized State it could not be admitted that an arbitral sentence could be made illusory, under pretext of lack of authorization of the legislative power. When the parliament of a constitutional State has approved the arbitral convention, it is self-evident that it cannot misunderstand the authority of the sentence rendered in execution of the compromise, nor refuse to fulfill the tasks resulting from that sentence by rejecting the legislative measures proposed by the government to this end.

In the case of the *Alabama* submitted to the arbitral tribunal of Geneva, the English arbiter, Cockburn, refused to sign the arbitral sentence, presenting a memorandum to justify his refusal. He concluded as follows: "Although the decision of the tribunal, to my idea, may justify my objections, I hope, nevertheless, that the English people will receive the sentence with the submission and the respect due to the sentence of a tribunal the decision of which it has freely consented to accept."

In exposing those principles we have thought to justify our opinion based upon the doctrine of the most esteemed publicists, and according to which the arbitral sentence duly rendered, must have the authority of a judgment and must be considered by the parties as effective to insure the obligatory observation of the duties imposed by the arbiter.

This theory concerns the sentence legally rendered. But can it be sufficient that someone has been chosen by the parties as arbiter with the duty to render a definitive sentence without appeal and that he should have rendered it, in order to maintain that one must attribute to such a decision the authority of the judgment that the parties should execute blindly?

The authors maintain on principle that, in order that every act might have the legal force which is attached to it, it should bear the characteristics reputed as indispensable or essential to give it its juridic value.

The absence of one of these essential characteristics deprives the action of its proper juridic value, renders it legally null and void and juridically inefficacious, through the application of the principle *quod nullum est nullum producit effectum.*

This rule which applies to acts of any kind must also be applied to the arbitral sentence. This sentence cannot exist juridically as such, unless it bears all the essential characteristics to be considered as a sentence. Nobody would dare to question the absolute authority of a sentence nor refuse to it the authority of a judgment. *Status enim rei publicae maxime judicatis rebus continetur.* (Cicero, Por. Sulla, cap. 22: 69.) Nevertheless, we repeat it, in order that the decision should have absolute authority, it is necessary above all that it constitutes a sentence. May a decision, lacking the essential characteristics for being considered as a sentence, be regarded as one?

The publicists have examined which are the substantial or essential points required to give the arbitral sentence the legal power which it needs, and in the absence of which it must be considered as null. They disagree in this matter but this is not the place to expose the different theories emitted on this matter. We will limit ourselves to say that all the authors agree to maintain that there is one essential characteristic necessary for the value of the arbitral sentence, and in the absence of which this sentence is radically null; it is necessary that it be rendered within the terms of the agreement.

They all agree on this point, because then the nullity results *ex re ipsa.*

It must indeed be admitted that the arbiter invested with jurisdiction to definitely settle the controversy started between the parties, in virtue of the compromise concluded between them, which compromise not only must state precisely the object of the litigation, but also the powers of the arbiter, and, furthermore, the conditions the parties had understood to establish in accordance with what concerns the procedure and execution of the arbitral sentence. Consequently, it is the arbitral convention, called compromise, which forms the juridic basis of the jurisdiction of the arbiter and fixes the limits of his power as a judge. It establishes rigorously what the arbiter can or cannot do as judge.

The result therefrom is that the arbiter must always be inspired by the rule of Roman law, *"Arbiter nil extra compromissum facere potest."* This rule is consecrated in the following fashion by the French Court of Cassation in its decision, in the Mauny affair, from the 18th of January, 1842: "In the matter of arbitration or compromise, the compromise is the only essential thing to consult in order to decide whether the arbiters have judged without power or with due competency." (Journal du Palais.)

It was in virtue of this principle that when that Court was invited in the quality of arbiter, to settle the conflict which had arisen between the French Republic and that of Nicaragua, it determined by its decision of the 25th of April, 1879, that it accepted unanimously this mission of arbitration, but that it demanded that the French Minister of Foreign Affairs should come to an agreement with the Representatives of Nicaragua in order to draw up a compromise by which the object of the arbitration and the extent of the powers which the parties intended to confer upon the Court would be clearly determined. It motivated its decision as follows: "It is important as much for the guarantee of the interests involved in the controversy as well as for the fixity of the sentence that is to intervene, that the powers of the arbiter be exactly and rigorously precised."

It is indeed self understood that the extent and limitation of jurisdiction of the arbiter and the juridic value of the sentence are entirely dependent of the powers which are conferred upon him unanimously just as they are determined by the parties themselves in their agreement. Consequently, the parties who invest the arbiter with the power to declare the contested right and to terminate the litigation definitively and without appeal can, in complete autonomy, establish that the arbiter must base his decision on titles and documents specified and produced by one and the other of the two parties and that he must observe the general rules of international law or the principles of equity. All this is within the domain of their autonomy. However, if the parties should have fixed expressly the powers of the arbiter and had, by the compromise conferred upon him the power to determine as judge in law in virtue of the legal proof resulting from documents, precisely indicated, could the arbiter, in case the legal proof founded upon the titles were not complete and conclusive, constitute himself as judge in equity and decide the question according to his conscience, if this power had not been conferred upon him by the agreement?

The whole question in this matter resumes itself in the following manner:

Given, in principle, that the arbiter, nominated by the parties, must be considered as invested with the jurisdiction to decide the litigation in virtue of the compromise concluded by it;

Given that, in case the parties have expressly determined and circumscribed, in the compromise, the powers of the arbiter, must he be considered as compelled as judge, to exercise his powers within the limits and within the terms of the compromise?

Given that the parties have conferred upon the arbiter the power to judge as judge in law (*juez de derecho*) and not as judge in equity, can the sentence pronounced by the President of the Argentine Republic be considered as based upon the compromise and as pronounced within the limits of the jurisdiction which were attributed to him?

Before discussing this question thoroughly, we hold it to be useful to eliminate an error.

It is incontestable that the arbiter, invested with the jurisdiction to resolve the controversy, has the right to determine its own competence. This right is given him by Article 73 of the convention I, title IV, of the conference of The Hague of 1907. It must be stated, however, that this rule cannot be understood in the sense that the arbiter, while determining his competence, could arrogate to himself a power which finds no base in the compromise, only legal title of his jurisdiction. To determine signifies to precise, to circumscribe, to verify, and not to attribute to himself, to arrogate to himself a jurisdiction which does not belong to the arbiter according to the agreement.

Such would be the case with an arbiter, who, invested with the power to statuate as judge in law, in determining his own jurisdiction would transform it by arrogating to himself the power to decide as amicable adjustor or as judge in equity. Being given that the parties had clearly determined, in the agreement, the powers of the arbiter if in the exercise of these powers he finds it impossible to solve the conflict, may he hold himself to be authorized to render a final sentence to put an end to the difficulty, and may he under the pretext of determining his own competency transform his powers in arrogating to himself a jurisdiction not based upon the compromise?

We cannot admit this solution according to the true principles of international law. Having thus removed all equivocation on this point, we shall try to ascertain in an impartial way if the President of the Argentine Republic has exercised his arbitral jurisdiction within the limits of the agreement and what shall be the juridic value of his sentence.

The High Contracting Parties who have signed the arbitral convention have clearly determined the powers of the arbiter, according to the terms of Article 1, which we have textually cited above. They have left to him the solution of the question regard-

ing the boundary lines between the Republics of Bolivia and Peru, conferring upon him the right to judge in his capacity as arbiter *in juri.*

Which were the legal titles on which the arbiter as judge in law should base his decision?

They were thus determined in limitation, by Article 3:

"The laws of the 'Recopilacion de Indias' the royal decrees and orders, the Ordinances of Intendentes, the diplomatic instruments, relating to the delimitation of the boundaries, the maps and official descriptions, and, in general, all the documents of an official character, appropriate for fixing the true meaning and the execution of the royal dispositions aforesaid."

The mandate to judge and to decide as legal arbiter, according to the titles thus specified, was accepted without reserve by the note of the Minister of Foreign Affairs of the Argentine Republic dated July 15, 1904.

We acknowledge that, in virtue of such a mandate, it must have been very difficult for the arbiter to render the sentence by basing upon the legal titles indicated by the parties, it being given that, as the arbiter indicates it in his considerations that, since the points in question are colonial entities, subject to the same sovereign to whom, without possible opposition the whole territory belonged, this sovereign could not have understood to establish through his acts, precise and well defined territorial demarcations. We must observe, however, that this just consideration by the arbiter, who recognized the difficulty to statuate as judge *in juri* ought to have induced him to ask of the parties more extended powers in order to pronounce his final sentence on the limitation of the respective territories.

This is what the Emperor of Russia did when he was nominated as arbiter to settle the difficulty between France and the Netherlands relative to the boundaries of French and Dutch Guiana. The High Contracting Parties, through the compromise of 29th of November, 1888, had determined the powers of the

arbiter, giving him the mission to decide according to titles and documents, which of the two rivers Awa or Tapanahin should be considered as forming the boundary line between their respective possessions. The Czar would not accept a task so closely circumscribed because he feared not to be able to solve the question by fixing the boundary line within the indicated terms. It is for this reason that the Dutch Government proposed to the States General of the Netherlands to extend the powers of the arbiter by allowing him, in the case that he, according to titles and documents, should not have been able to indicate as dividing line one or the other of the two rivers mentioned, to trace this line in any other way which seemed to him the best justified. In consequence a new compromise was agreed upon between France and Holland which accorded to the arbiter the subsidiary powers indispensable to solve the difficulty, Alexander II then accepted the arbitration with more extended jurisdiction and pronounced his sentence the 13-25th May, 1891.

The President of the Argentine Republic could have demanded, following the considerations wisely proposed by himself in his sentence, a subsidiary power of the parties for the case when he could not solve the difficulty as judge in law according to the documents and titles specified in the agreement. Having neglected to do it there is reason to examine whether he has or not duly exercised the powers conferred upon him as arbiter, according to terms of the agreement, which he had accepted without reserve.

As we have already stated, His Excellency, President Alcorta, had nominated a consultative commission to study all the documents which should serve as basis for his sentence. The commission, after having examined the titles and documents, expressed its opinion in the communication addressed to the Minister of Foreign Affairs which is reported textually above and which terminates in the following manner:

"After having studied the written allegations, the replies and criticisms of the Ministers of both Republics in defense of their

respective doctrines, we have arrived at the conclusion that the laws of the Recopilacion de Indias, the royal decrees, the Ordinances of Intendentes, the diplomatic documents relative to the demarcation of boundaries, and in general the documents of an official character produced to give their true signification and execution to the said royal dispositions do not determine in a clear and precise way the dominion of the disputed territory.

First of all we shall call attention to, that the compromise of July 9, 1909, recalled the general convention of arbitration concluded by the two Republics on the 21st of November, 1901, and that Article 10 of this same agreement expressly stipulated that this general treaty of arbitration should be applied to all that was not limitatively regulated by this agreement, and that therefore the arbiter could not be dispensed from applying the stipulations of the treaty of 1901. Now it is to be noted that in this treaty of 1901 the following special dispositions will be found:

Art. 7.—"Upon questions bearing a technical or scientific character that will present themselves in the litigation, the arbiter shall obligatorily request the decision of the Royal Geographical Society of London or of the International Geodetic Institute of Berlin."

It was without question not in the power of the arbiter since the commission had found in the titles no certain legal proof relating to contested territorial possessions, to apply or not to the Royal Geographical Society of London. Article 7 at the convention of arbitration imposed upon him formally and categorically the obligation to consult that Society. The said Society might perhaps have been able to find in the official documents sufficient legal proofs to establish the respective legal right of the parties to the contested territories, or else she could have found in those same documents, interpreting them according to their meaning, sufficient motives to determine rights that could not be considered by the terms of the said documents. Undoubtedly the arbiter has neglected to consult this Society, although he was bound to do so.

If the Royal Geographical Society of London or the Interna-

tional Geodetic Institute of Berlin had not been able to throw any light on the matter of determining the question of limits of the contested territory according to official documents and would therefore have confirmed the conclusions of the consultative commission, then the arbiter, not being able to decide the contest as judge in law, by basing himself upon the indicated titles in the agreement would have had to either insist to statuate by demanding subsidiary powers of the parties, or then limit himself to pronounce the *non liquet.*

Indeed the arbiter, not being permitted to exercise his power beyond the limits of the agreement and unable to judge definitively the case by exercising his powers as *judex juris,* could not arrogate to himself a jurisdiction not attributed to him by the agreement for pronouncing a sentence based upon other elements of proof.

In choosing him, what did the parties want?

They wanted of him that in his quality of judge in law he should decide which were the territories pertaining to each of them according to the terms of the titles indicated and specified in the agreement, being given that this arbiter after investigation by the consultative commission and the interpellation of the Societies of London and Berlin, had not found, in the official documents the juridic proof of the respective rights of the parties to the territory in contest, could he, if he wanted to exercise the powers held by him by the agreement, do anything else than to pronounce the *non liquet?*

On the contrary the consultative commission was of the opinion that the arbiter, according to the terms of Article 9, could decide the controversy as judge in equity, and the President of the Argentine Republic admitted in interpreting his own competence, that he could statuate as judge in equity. It is thus that in his sentence he traced the boundary line according to his conscience and in conformity to the conclusions of the Peruvian Plenipotentiary. Nevertheless, since the competence which he thus attributed to himself cannot be found to result from the terms of the agreement, it is clear that he arrogated to himself a jurisdiction which did not belong to him.

If the agreement had really attributed to the arbiter such a power his decision should have been exempt from criticism, in whatever manner he might have used it. It could not have been pretended, actually, that he had not judged properly because he would have found legal proofs insufficient which one of the parties considered peremptory, because the arbiter ought to have been considered as invested with the jurisdiction to decide the controversy in equity, and it could not have been pretended that thus deciding according to his enlightened conscience, he would have given evidence of partiality, because such a pretention would not only prove injurious to the arbiter, but would be unsustainable in law. The arbiter having been appointed by mutual consent of the parties, the one of these parties who would accuse him of partiality should impute to itself the deed for having chosen him.

In the case we are examining, the fundamental argument against the sentence is that the arbiter had no power to statuate as judge in equity and that by doing so, he arrogated to himself a power which did not belong to him.

The commission has thought to be entitled to base upon the text of Article 4 of the agreement in order to conclude that, the titles not being sufficient to establish the legal proof of the respective rights of the parties on the disputed territories, the arbiter could decide the question as judge in equity. The President of the Argentine Republic who naturally thought he could not do better than to adopt the advice of the consulting commission which he had nominated, and considering himself as invested of a jurisdiction in equity, rendered his sentence *ex equo et bono*.

We really do not know how the commission could find in the agreement legal reasons for transforming the jurisdiction of the arbiter. It thought to be entitled to invoke Article 4 without having well informed itself of the exact meaning of this clause, as is shown clearly by their comparison of said Article with Articles 1 and 3 which exclude absolutely the power to decide as judge in equity in what concerns the disputed territories.

What did the parties require of the arbiter?

Admitting that the sovereign decrees, the royal decrees and other official documents indicated in Article 3 could obtain as legal titles of their respective domination on the contested territories, the parties invested their arbiter with the power to decide in the quality of judge in law which was the territory belonging to each one of them (Art. 1), basing his decision on the legal proof resulting from the titles. They did not suppose that those titles might be insufficient to establish their rights. If they had supposed it, and wishing to obtain a definitive sentence they would not have agreed upon an arbitration "juris," but upon an arbitration in equity. The intrinsic character and the nature of the arbitral jurisdiction, relative to the delimitation of the territory, not being established in the agreement, we are undoubtedly to conclude that it is a case of a *jurisdictio juris*. However the parties have stipulated in Article 4 that, whenever the documents and royal dispositions should not define in a clear and precise manner the domain of a territory, the arbiter should decide regarding this special territory according to equity, inspiring himself, as much as possible, by the royal dispositions and the spirit which dictated them. It appears to us as evident therefore, that by interpreting this clause of Article 4 it appears that the parties did not wish to transform the substantial character of the arbitral jurisdiction with regard to all of the disputed territory, but that in stipulating regarding the disputed territory the arbiter should decide in his quality of judge in law, they have subsequently admitted that in case the royal dispositions, the titles and documents should not constitute sufficient evidence of the sovereignty of a territory, then the arbiter, in this exceptional case, could decide as judge in equity.

If the parties had wished to confer upon the arbiter the power to decide in equity, the question of limits in its whole extent, they would have expressed themselves in the following way:

"If the documents and royal dispositions did not define the domain of the territory in a clear way, the arbiter will decide the

question according to equity." They say on the contrary: "Siempre que los actos ó disposiciones reales no definan el dominio de un territorio de manera clara, el arbitro resolvera la cuestión equitativamente." Here we say again that it results, as well from the literal text of the clause, as from its likeness to the articles which precede and which follow, that the power of the arbiter to act as judge in equity has been stipulated for an exceptional case and not for what concerns the delimitation of the frontier in regard to which the arbiter was only invested with the power to statuate as judge in law.

Furthermore, what indicates well that Article 4 referred to an exceptional case, is the text of Article 5 which is thus conceived: "The possession of a territory, executed by one of the contracting parties shall not be opposed to, nor prevail against the titles or royal dispositions which establish the contrary."

By this clause the parties have agreed that, when the arbiter, judging as *judex juris,* found titles and royal dispositions sufficient to establish the rights of one of the parties to a disputed territory, the other party could not take advantage of its possession of this territory to contest the authority of these titles and royal enactments.

It appears to us evident, therefore, that the clauses, as well of Article 4 as of Article 5 refer not to the whole of the contested territory but to a special part of it.

Therefrom it results that the arbiter, by arrogating to himself the power of deciding as judge in equity concerning the whole contested territory, when according to terms of the agreement he was invested solely with the mission to statuate as judge in law, has thus arrogated to himself a jurisdiction which was not given him by the parties.

Can the sentence pronounced by the arbiter be considered as valid, when he has arrogated to himself a jurisdiction which is not based upon the agreement?

Calvo, after having exposed his theory on the legal principles that should rule international arbitration, puts the question relative to the efficiency of the arbitral sentence in this manner.

"From the fact that arbitral sentence is obligatory without appeal it should not be concluded that the absolute consequence be that the parties cannot contest it, there are, on the contrary, certain cases when they are plainly authorized to refuse to accept or execute it. These cases can be summarized as follows:

1.—"If the sentence has been pronounced without the arbiters having been sufficiently authorized, or if it has been statuated outside or beyond the terms of the agreement, etc."

The authors whom we cite express the same opinion. Admitting that the essential condition of the efficiency of the arbitral sentence is, that the arbiter should exercise his jurisdiction within the limits of the agreement they naturally refuse all legal value to a sentence rendered outside of the terms of the agreement.

Heffter, p. 210, says the following:

"An arbitral sentence is subject to being attacked in the following cases:

1.—"If it has been rendered without valid compromise or outside of the terms of the compromise * * *"

Goldschmidt says on his part:

(P. 32) "The arbitral sentence duly pronounced can be attacked and annulled * * * if the arbitral tribunal has exceeded the limits of the competence which the compromise gave it" (*loc. cit.*).

Merignac, treating of the causes of nullity of an arbitral sentence, indicates in the first place the excess of power and expresses himself thus:

"The arbiters can commit excesses of power of various kinds. They will in the first place exceed their power by according to one party more than the compromise will allow them. * * * They would, on the other hand, exceed their powers also if they go beyond the faculties attributed to them."

Bluntschli also says:

"The decision of the arbitral tribunal can be considered as null:

(*a*)—"In the measure in which the arbitral tribunal has exceeded its powers." (Droit international codifié.)

Rivier on his side says that:

"The State against whom the sentence has been rendered may have just reasons to refuse its execution * * * finally, and this is most frequently the case, that the arbiter has exceeded his powers or has not observed the prescriptions of the compromise." (Principes du Droit des Gens, t. II, p. 185.)

We will not continue our quotations, because in reality the *communis opinion* of all jurists is that the arbitral sentence has no value when the arbiter has not observed the prescriptions of the compromise and when he has arrogated to himself a jurisdiction which was not stipulated. This results besides from the general principles of law and the nature of things.

Nobody can assume the quality of judge if he has not been invested with the jurisdiction to judge and to decide. Ulpien expresses himself in the following manner: "Qui judices esse non possunt." He says, furthermore: "Qui neque jurisdictioni praeest, neque a principe potestate aliqua praeditus est neque ab eo, qui jus dandorum judicum habet, datut est, *nec ex compromisso sumptus:* judex esse non potuit." (L. 81 Dig. de Judicis, 51.)

Admitting, therefore, as incontestable, that nobody can be arbiter without having been invested with the jurisdiction to decide the litigation by virtue of the agreement and that the competence of the arbiter, as judge, does not exist except within the limits established by the agreement, it seems to us evident, according to the reply of Ulpien, that the arbiter who has arrogated to himself the competence which is not based upon the agreement, *judex esse non potuit.*

What would then be the legal value of the sentence rendered according to this hypothesis?

We will refer to the wise doctrine of the Roman jurisconsults who have taught us that the jurisdiction, having to be reputed as the substantial condition of the imperative force of the sentence, nobody is compelled to execute a sentence pronounced by somebody who has not the legal power, or rendered outside the limits of the jurisdiction belonging to the judge.

In the first period of Roman society each magistrate had the plentitude of his imperative power in the province or district subject to his authority, because he possessed the full jurisdiction within his territorial limits. But what happened after he had exercised his jurisdiction (which expired at the boundary line of the province or district) outside the territorial limits of this jurisdiction?

Here is the reply on this subject given by the jurisconsult Paul, Lib. III ad Sabinum:

"Praeses provinciae in suae provinciae homines tantum imperium habet: et hoc, dum in provincia est: nam si excesserit, privatus est." (L. 3 Dig: de officio Presidis, 1-18.)

What was the consequence of an authority exercised by the governor of the province outside the boundaries of the territory over which he held jurisdiction?

The jurisconsult Paul solves the question in Lib. I ad Edictum:

"Extra territorium jusdicenti impune non paretur." (L. 20 Dig. de Jurisdictione, 2, 1.)

Consequently nobody was bound to obey the orders of the magistrate who exercised his functions outside of the limits of the territory over which he had the jurisdiction.

Posterior to that, special magistracies were instituted, and the power of each one of these found its limit in the jurisdiction. Ulpien said that who had no jurisdiction could not be considered as judge. Paul, on his side, expresses himself in the following manner on the subject: "extra territorium jusdicenti impune non paretur." Further he added: "idem est, et si supra jurisdictionem suamvelit jus dicere." (L. 20 de jurisdictione.)

One was, therefore, not compelled to consider as judiciary sentence one that emanated from somebody who had not the jurisdiction for it.

Taking as basis the doctrine of the Roman jurisconsults and that of the authors whom we have quoted previously, we do not hesitate to assert that legal force of the thing judged cannot be

attributed to the sentence pronounced by an arbiter who had arrogated to himself a competence not given him by the agreement. It is incontestable that the execution of such a sentence cannot be imposed upon the parties since the obligatory character of the execution of an arbitral sentence must have as basis the obligatory character of the compromise and the legal force of the sentence rendered within the limits of this same compromise.

Henceforth the decision of the arbiter could have the character of a proposal made by him in the quality of amicable adjustor with the laudable purpose to put an end to the controversy, or in the quality of a mediator proposing a transaction. However, in such a case it would be necessary for the arbiter to announce his intention, and he ought never to consider himself offended if the parties should refuse to accept and execute his sentence, every time that, for the reasons we have just stated, the character of an executory sentence could not be attributed to his decision as having the authority of the judgment.

The question was solved with reference to the executory force of the sentence rendered on the 10th of May, 1831, by the King of the Netherlands who had been chosen arbiter to solve the pending difficulty between Great Britain and the United States of America regarding their boundaries of the Northeast. In that case, the arbiter had statuated without remaining within the limits of the powers which had been conferred upon him by the compromise and the United States availed themselves of this reason to refuse to execute the sentence.

The reasons invoked were exposed at length in the thorough report of the legislative commission of the State of Maine, which was composed of four Senators and of seven members of the Legislature. The commission concluded that the arbitral sentence could not be considered as obligatory because while the arbiter had been asked to judge and decide according to the titles and documents he, on the contrary, had eliminated them and had not attained himself to the conditions fixed in the compromise.

In the arbitral convention concluded by the parties on the 20th of September, 1827, it had thus been stipulated in Article 7: "The decision of the arbiter once given shall be held as final and definitive and shall be put in execution without reserve by the commissioner appointed to this purpose by the contracting parties." Nevertheless, this clause did not prevent the United States from considering the sentence as not susceptible of execution in consequence of the just motive that this sentence had not been rendered in conformity with the prescriptions of the agreement which determined the powers of the arbiter.

Asser, in his learned observations formulated in the doctrinal note which he wrote below this sentence, expresses himself on the subject in this manner:

"It is true that the compromise, foreseeing that the arbiter would have to terminate the conflict in a final manner, could appear to have given him all the necessary powers to enable him to trace the boundary line: this was at least the reply of England to the refusal of execution by the United States. But this reply was superficial and hasty. By that clause, expressed in due form, the parties did not mean to deprive the arbiter of the right to pronounce the *non liquet* in virtue of the compromise, but simply to stipulate that the arbitral sentence should be final, that is, without appeal and decisive, that is, to be executed immediately. Now, in order to have this double character, it was indispensable that this sentence be in conformity with the compromise. But, in order to be in conformity with the compromise, it was necessary that the sentence be rendered by interpretation and in execution of the texts which precisely King William had thought to be able to reject." (*Loc. cit.*, p. 300.)

It results from what we have just stated that, when the arbiter arrogated to himself a power which had not been attributed to him by the terms of the compromise, his sentence cannot have the same legal value as the decision of a judge who has judged within the limits of his competence.

Now we propose to examine if, given but not admitted, that the

President of the Argentine Republic could draw the boundaries according to equity, he has exercised his power in conformity with the principles of international law.

In the general treaty of arbitration concluded between Bolivia and Peru on the 21st of November, 1901, which is recalled in the compromise passed between the two States on the 30th of December, 1902, it is specified in Article 8:

"The arbiter shall pronounce in strict conformity with the prescriptions of international law, and, in the question of limits to the American principles of the *uti possidetis* of 1810, every time when the convention, to which Article 2 refers (that is the special compromise) does not establish the application of special rules, or does not authorize the arbiter to pronounce the sentence as amicable adjustor."

According to principles of international law, the rule of *uti possediti*s, of 1810, admitted for the territorial delimitations by the American States, must be understood in its exact sense.

The colonial possessions, taken as a whole and in the special parts which compose them, have to be reputed as being in the domain of the State to which the colonies belong. Therefrom it results that, as long as the colonial relation persisted regarding the different countries of America which formed the Spanish colonies, the whole colonial territory was exclusively in the domain of the sovereignty to which it belonged. Therefore the Spanish Sovereign could, in absolute autonomy, regulate the administrative regime of his colonies, institute Captaincies General, Audiencias, Residencias and Viceroyalties; comprise in these circumscriptions such and such a region in order to determine the territorial circumscriptions of the jurisdictions; and decree the delimitation of these circumscriptions the uniting or separating of territories in virtue of right of dominion which belonged to him exclusively on his colonial possessions.

It must be said, however, that the territorial circumscriptions established by the King of Spain, in order to provide for the ad-

ministrative regime of his colonial possessions, did not have the result of creating true rights of territorial domination for the benefit of this or that one of these circumscriptions, since the right of domain had never ceased to belong to the King of Spain, as well on the whole of the territory as on each one of the countries composing it. The real question of right of territorial domain belonging to this or that of the American Republics was created when, in the wake of revolution and emancipation of these countries who in the beginning were Spanish colonies of South America, they constituted themselves into independent States. It was natural that when it came to determine and to delimitate the territories belonging to each one of these new States, the administrative circumscriptions had to be taken into account such as they had been established by the King of Spain.

It could indeed not be overlooked that the inhabitants of one and the same administrative circumscription had formed an actual association and that this circumstance had established among them certain ties of affinity, which had in the first place brought about their moral union and which afterwards became the foundation of their political union. Henceforth it was reasonable to admit that the delimitation of each circumscription as soon as it had proclaimed its independence, had to serve as basis for the delimitation of the territory of each of the new States of South America. From this point of view, the colonial regime which from the first was the historical factor of the different administrative organisms, had naturally to be considered also as the historical factor of the diverse political organisms, and in order to determine the territorial delimitations of the confining Republics, observation of the rules of possession at the time when these Republics were constituted, could not be dispensed with.

It is in this sense that the rule of the *uti possidetis* of 1810 admitted by the American States as principle of common right to draw their respective boundaries has to be understood. Peru itself confirms it by its treaty of December 18, 1823, when it was

in conflict with Colombia about its boundaries with that State. It must be said, however, by taking into account the principles which we have exposed above, that, as the decrees, the royal ordinances, the acts of the government, the official maps, could not have the effect of establishing in an absolute manner the territorial domain, these documents had to be referred to in taking into account the spirit which had inspired them and the meaning of these acts which had for object the fixing of territorial circumscriptions of the administrative organic unities.

We cannot study thoroughly, in order to appreciate their value, the acts, edicts, the royal decrees and the ordinances, so as to be able to decide if really these documents did not furnish positive data of fixing the limits of the contested territory. There is no doubt, as we have indicated above, that the arbiter has omitted to do what he was obliged to, that is to allow himself to be enlightened by the Geographical Society of London, since proof with the aid of geographical maps was mentioned among the documents by which the expert had to inspire himself for rendering his sentence.

Now we will examine a last point, that is, to know if, it even being admitted that the arbiter had not been able to find any decisive ground to statuate by application of the rule of the *uti possidetis,* he should not have observed the general principles of the international law to draw the boundary line between the two Republics?

Article 8 of the general convention of arbitration of the 21st of November, 1901, imposed upon him the obligation to conform himself strictly to the prescriptions of this law.

The rules of international law always applicable to arbitrations relating to delimitations of boundaries are the following:

"To avoid in principle an unreasonable and noxious severity, consisting in adhering too strongly to the mathematical line, but to trace the limits, taking into account territorial irregularities, commercial and agricultural exigencies and ways of communication:

"To even rectify the lines traced by nature, when this is neces-

sary in order not to divide up a complex of works, and to subordinate the tracing of the boundary to the temperaments suggested by the exigencies of economy, agriculture and industry and by the considerations of equity."

For the strict observation of these rules a journey to the sites had to be considered as indispensable. Indeed M. Escalier, Minister Plenipotentiary of Bolivia, had justly requested this measure, but the arbiter did not think it necessary to pay attention to this request.

Furthermore, it was certainly in accordance with the rules of international law to respect, as much as possible, the actual possession.

Indeed, the general rule applicable in this matter is that when the boundaries of two States have to be determined, in the absence of positive titles that could serve as basis for the determination of the respective rights of domain, possession must be regarded as a title.

According to international law, such an importance is attributed to the effective and actual possession that publicists admit that, even when a territory had originally been taken in a violent and unjust manner, it can, nevertheless, become legitimized by time as a matter of fact and be respected as such. Consequently, it is admitted that we must consider as belonging to each State the territory and its annexes over which the sovereignty had actually exercised its eminent right of domain during a reasonable length of time and notwithstanding that the legitimacy of the title in virtue of which this possession had been effected could be assailed.

Already at his time Grotius maintained that, in order to avoid interminable conflicts between the States, it had to be admitted that time consolidated everything because otherwise interminable difficulties would exist on the subject of boundaries of States.

"A very great inconvenience appears necessarily to be the consequence, that is, that never by no lapse of time differences about States and their limits can be extinguished which, not only is capable

of troubling the minds of many and to incite war, but even is contrary to the common sentiment of nations." (Le Droit de la Guerre, liv. II, ch. IV, No. 1. Traduit par Pradier Fodere.)

Philimore teaches the same doctrine.

"It is only," says he, "by allowing to time the virtue of obliterating injustice and to create right that the sentiment of security can be consolidated among peoples and international peace insured." (International Law, p. 255 et suiv.)

Bluntschli thus attributes to possession as matter of fact the faculty of eliminating for an indefinite length of time all discussion.

"Even if it can be proven that the original taking possession has been accompanied by violence and has taken place in defiance to law, but if, on the other hand, the peaceful possession lasts since long enough that the stability and necessity of the established order of things be recognized by the population, it must be admitted that the *de facto* condition brought about by violence has been transformed with the time into a lawful condition." (Le Droit international codifié, p. 290.)

We have admitted this same doctrine into our codified international law formulating it in rules 1074 and 1075 of our fourth edition; our rule 1076 is thus expressed:

"The action on the part of a third power, which intends to attack the right of the one who is in actual possession cannot be considered as capable of indefinite execution. A limit to this action must be admitted considering in principle that time validates everything and that the original acquisition cannot be submitted to a discussion of indefinite length.

"Actual possession maintained and prolonged during a long period of years shall be reputed an obstacle to the admissibility of the action."

These principles of international law which, in a general way, should be applied to territorial acquisitions, realized by means of prolonged possession lasting a considerable length of time, must undoubtedly be applied in order to determine the attribution of cer-

tain parts of the colonial territory which are at the present time in the possession of one or the other of the American Republics.

In this matter, the application of the rule of the *uti possidetis* imposes itself and the arbiter could not neglect to apply it, when he was called upon to statuate according to principles of international law.

The taking into account of the possession should not have been dispensed with should the conventional clause stipulated by the parties in Article 5 of the compromise be respected. Indeed the parties by this enactment had agreed that the possession of one territory, exercised by one of them, could not be opposed to or made to prevail against the titles and royal enactments establishing the contrary. Therefore, that clause signified that, when the arbiter, basing on the titles and royal dispositions had, in his quality as *judex juris* been able to determine which were the respective territories belonging to Bolivia and to Peru, if one or the other of these parties who claimed the zone of the contested territory had found itself in possession of part of that zone, this possession could not prevail against the attribution of the boundary line made by the arbiter in virtue of the legal titles.

Now, as the arbiter had not found positive legal titles, by virtue of which the distribution of the zone of contested territory could be made, and had decided to draw the boundary line according to rules of equity, it was his duty to conform himself to the principles of international law and undoubtedly he could not abstain from taking into account the possession; and he certainly could not refer to the clause of Article 5 of the compromise, which was in no way applicable.

The arbiter was therefore bound to respect, at the very least, the possession *de facto*. On the contrary, in virtue of the arbitral sentence Bolivia has been despoiled, to the advantage of Peru, of certain parts of territory, of which it had realized effective occupation, by founding there industrial establishments, by developing actively commerce and agriculture, and by establishing military

garrisons and planting there the indispensable signs of possession. These regions, inhabited by Bolivians, independently of royal enactments and dispositions, formed already integral part of Bolivian patrimony. This was the case with important territories situated on the banks of the rivers Acre, Taguamanu, Buyuyumanu, Manuripo, Madre de Dios and Tambopata. To regard the sentence as valid and to establish the division of the contested territory in accordance with the line drawn by the arbiter, possessions, belonging indisputably to Bolivia in the regions occupied by it before the treaty was concluded, would have to be attributed to Peru.

Could, perhaps, the decision of the arbiter be justified, when it is contrary to the principles of international law, according to which the possession *de facto* achieved in an effective and permanent manner by founding military and industrial establishments thereon and by developing agriculture, must be considered as sufficient title for the acquirement of territorial sovereignty?

We pay respectful homage to His Excellency the President of the Argentine Republic, whose high intelligence and moral authority everybody recognizes, and we consider it as above discussion that he intended to fulfill conscientiously the noble mission entrusted to him, in tracing the disputed frontier between Bolivia and Peru and thus contribute to consolidate the peace between these nations. Nevertheless, we take the liberty of respectfully observing that the sentence prepared by the competent ocmmission and rendered by him (the President) to solve this difficulty, does not appear to us to be soundly based on the agreement between the High Contracting Parties.

Naples, May 14, 1910.

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