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COUR INTERNATIONALE DE JUSTICE

MÉMOIRES, PLAIDOIRIES ET DOCUMENTS

AFFAIRE DU DROIT DE PASSAGE SUR TERRITOIRE INDIEN

(PORTUGAL c. INDE)

(Rôle général n° 32 — Arrêts du 26 novembre 1957 et du 12 avril 1960)

VOLUME III

Duplique

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[1] The page references originally appearing in the pleadings have been altered to correspond with the pagination of the present edition.

Where the reference is to another volume of the present edition, the volume is indicated by a figure in heavy Roman type.

[2] Les renvois d'un mémoire à l'autre ont été modifiés pour tenir compte de la pagination de la présente édition.

Lorsqu'il s'agit d'un renvoi à un autre volume de la présente édition, un chiffre romain gras indique le numéro de ce volume.

[1] The text of Indian Annexes A, B and C (to the Preliminary Objection and Counter-Memorial) and of Annexes D and E (to the Counter-Memorial) is to be found in Vol. I pp. 189-564, and Vol. II, pp. 157-396, respectively.

PART I

APPLICATION INSTITUTING PROCEEDINGS AND PLEADINGS

(continued)

PREMIÈRE PARTIE

REQUÊTE INTRODUCTIVE D'INSTANCE ET MÉMOIRES

(suite)

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(continued)

SECTION B. — MÉMOIRES

(suite)

6. REJOINDER OF THE GOVERNMENT OF INDIA

INTRODUCTION

The Government of India, in paragraphs 3 and 50 of the Counter-Memorial and in communications to the Court with respect to time-limits fixed for the delivery of pleadings, has previously underlined the fact that in the Memorial the Portuguese Government refrained to a very large extent from placing before the Court the evidence in Portuguese archives relative to the claim which it had put forward in its Application. Portugal's failure to annex to her Memorial a large part of the relevant historical evidence was the more remarkable in that her claim is essentially a historical claim, and the burden of proving the historical facts manifestly rested upon her. At any rate, the unusual procedure adopted by Portugal had the result that it was left to the Government of India to take the initiative in laying the historical evidence before the Court in the Counter-Memorial and that it was only in the Reply that the Government of India was able to see for the first time a more or less full formulation of Portugal's contentions and evidence in regard to the historical facts. Unfortunately, Portugal's presentation and interpretation of the evidence in the Reply is so selective and tendentious on all the matters relevant to the Portuguese claim, that the Government of India was compelled to ask for additional time to check and examine the evidence presented by Portugal and now finds it necessary to review the historical facts at considerable length in the present Rejoinder. For the same reason the Government of India finds it necessary to annex to the present Rejoinder a considerable number of additional documents supplementing and confirming the evidence which it annexed to the Counter-Memorial.

2. Among the documents annexed to this Rejoinder will be found a facsimile of the Portuguese text of the 4th May 1779, of the alleged Portuguese-Maratha treaty of 1779. (Indian Annex F. No. 23.) This text was not produced by the Portuguese Government. In fact, the Portuguese Government denies in the Reply that the Maratha version which was described by the Government of India as the Portuguese envoy's translation in Marathi of the Portuguese text of the 4th May, 1779, ever existed or ever came to the knowledge of the Portuguese Government. This Marathi version, which contains the description of the intended Maratha grant to the Portuguese as *Jagir*, is now found to be an integral part of the Portuguese text of the 4th May, 1779, and bears the signature of Camara, the Portuguese Viceroy. As is stated in paragraph 96

of the Rejoinder the conclusion is inevitable that this document exists in Portuguese archives and has been deliberately withheld by the Portuguese Government. In this connection it will be recalled that in paragraph 13 of its letter of the 10th November 1956 the Government of India stated that the Portuguese Government had relied in the Memorial on certain documents, which purported to be translations in Portuguese from alleged Marathi originals, and other documents which were extracts from registers in the Portuguese language asserting the existence of alleged Marathi documents. The Government of India requested the Portuguese Government to produce the originals of the documents which were alleged to exist. The Portuguese Government did not respond to this request. In its letter of the 31st October, 1958, in paragraph 4, the Government of India referred again to this request and added that several Annexes to the Portuguese Reply, which were stated to be Maratha documents were in fact found to be alleged translations in the Portuguese language of alleged Maratha documents. In its letter of the 6th November, 1958, addressed to the Court, the Portuguese Government stated that the Marathi originals of these documents were not in its possession. The Agent of the Portuguese Government stated in paragraph 7 of that letter:

> "As regards paragraph 4 of the said letter of the 31st October, 1958, I have to say: (a) that the photographic copies I had the honour of lodging with the Court, do in fact include photographic copies of the Marathi originals of Annexes Nos. 23, 38 and 39 to the Reply specifically mentioned in paragraph 4; (b) but that the Government of Portugal is not in the possession of the Marathi originals of the other documents therein cited, but consider the latter to be entirely trustworthy."

The Government of India would, at this stage, merely wish to draw the attention of the Court to the statement of the Portuguese Government that the Maratha originals of the documents in question are not to be found in Portuguese archives and are not in the possession of the Portuguese Government.

3. In paragraphs 3 to 9 of the Reply the Portuguese Government professes to find some difficulty in understanding India's contentions in support of the Fifth Preliminary Objection and invites the Government of India to clarify the subject-matter of the disagreement between the Parties with respect to the submission based on the two paragraphs of Article 38 of the Statute of the Court. The Government of India does not really think that this submission can give rise to any doubts but it will respond to the Portuguese Government's request for clarification by furnishing the further explanations contained in the immediately following paragraphs.

4. India's Fifth Preliminary Objection, as the Court will recall, is that the present dispute is one which relates to a question which by international law falls exclusively within India's jurisdiction

and for that reason is a dispute which is not covered by India's acceptance of the Court's jurisdiction under the Optional Clause. India has framed her argument in support of this Objection in more than one way. One argument is that the subject-matter of the dispute—the transit of persons and goods across Indian territory—is a matter which in principle falls by international law exclusively within India's jurisdiction, and that, in the absence of clear proof of an express grant to Portugal of rights of transit by the territorial sovereign or of its specific consent to the exercise by Portugal of rights of transit, the dispute falls outside the scope of India's acceptance of the Optional Clause. Another argument is that the Portuguese claim does not find a basis in a legal rule derived from any of the sources of international law which Article 38 of the Statute authorizes the Court to apply, and therefore, *ex hypothesi*, the dispute is one concerning a question which, by international law, falls exclusively within India's jurisdiction. A further consequence is that, as the Portuguese claim does not have any basis in the sources of law mentioned in Article 38 of the Statute, the dispute is not a "legal dispute" falling within any of the categories of legal dispute listed in the Optional Clause and for that reason also is *ex hypothesi* a dispute concerning a question which by international law falls exclusively within India's jurisdiction. Portugal, while disputing the correctness of the foregoing arguments, does not appear to encounter any difficulty in understanding them. It is India's fourth way of putting her case on this Preliminary Objection which Portugal professes to find difficulty in appreciating.

5. India's fourth argument is that the claim formulated by Portugal is by its very nature not justiciable by reference only to the sources of law which the Court is authorized to apply under paragraph 1 of Article 38 of the Statute, but could only be given effect if recourse were had to the exceptional power of the Court—for which the express agreement of the Parties is required—to decide a case *ex aequo et bono* under paragraph 2 of that Article; and that the subject-matter of the claim not being justiciable under the ordinary jurisdiction of the Court to decide cases in accordance with international law, the dispute is again *ex hypothesi* one concerning a question which, by international law, falls exclusively within India's jurisdiction. Portugal observes that she is unable to see any basis for this argument; she has never invoked paragraph 2 of Article 38; there is no agreement between the Parties for the application of that paragraph and, in consequence, no question in the present case of abandoning the field of law in favour of that of "equity" or "expediency"; she is merely asking the Court to discharge its judicial function, i.e. to declare the law. Portugal then goes on in effect to say that the only question in the case is whether her claim to rights of transit is, or is not, well founded having regard to the sources of international law enumerated in paragraph 1 of Article 38.

6. Portugal's observations miss the point of India's argument with reference to paragraph 2 of Article 38. There is, of course, no question of any agreement between the Parties that the Court should be empowered to decide the case *ex aequo et bono* or of Portugal having in terms invoked the powers of the Court under paragraph 2 or of the Court abandoning in the present case the field of law in favour of that of "equity" or "expediency". India is in full agreement with Portugal on these points. The disagreement between the Parties relates to the question whether the rights claimed by Portugal are, or are not, capable of application by the Court by reference to its ordinary powers under paragraph 1 of Article 38. Portugal simply asks the Court to assume that her claim is justiciable under paragraph 1. India, on the other hand, maintains that the vague claim formulated by Portugal to abstract rights of transit across India's territory is incapable of any application by the Court, without either the Parties agreeing upon, or the Court drawing up, a concrete scheme to regulate the exercise of the alleged rights; that the Parties have not made any such agreement, and the Court is not invested with any power to legislate for the Parties in this way under paragraph 1 of Article 38 and could only exercise such a function if specially invested by the Parties to decide the case *ex aequo et bono* under paragraph 2 of that Article; that, as the rights which are the subject-matter of the Portuguese claim are not such as can be given effect under rules derived from the ordinary sources of international law and can only be given effect with the specific agreement in one form or another of the Government of India, the dispute is clearly one concerning a question which by international law falls exclusively within India's jurisdiction.

7. In short, the disagreement between the Parties centres upon the justiciability or otherwise of the Portuguese claim by reference to the ordinary sources of international law laid down in paragraph 1 of Article 38. That Portugal is not unaware of the true character of India's argument on this point seems clear from the close attention which she gives in Part 1 of the Reply, especially in paragraphs 20-24, to India's contentions in regard to the vague and ill-defined nature of the Portuguese claim. So far as India can discern, the only real response which Portugal makes to India's *ex aequo et bono* argument is the one found in paragraph 24 of the Reply, namely, that it is not exceptional for international law to recognise rights which are so flexible that they "may even be regarded as extremely vague". This proposition, when made with reference to the passage of foreign armed troops and police across a State's territory, is so startling that it can hardly be regarded as a serious answer to India's argument concerning the vagueness of Portugal's claim. The Government of India will, however, comment further on this proposition in Part II of the present Rejoinder.

8. The Government of India notes in paragraph 2 of the Reply that the Portuguese Government, in order to save useless repetition, is reserving its further arguments concerning India's Sixth Objection *ratione temporis* until the oral hearings. The same course will therefore be followed by the Government of India.

The present Rejoinder is divided into five Parts:—

Part I. The Historical Facts

Part II. The Rights Claimed by Portugal

Part III. The Law Applicable to the Portuguese Claim

Part IV. The Alleged Portuguese Right of Transit is not exercisable in the Circumstances of the Insurrection

Part V. The Conclusions

* * *

9. In paragraph 6 of the Counter-Memorial the Government of India underlined the fact that the case submitted by Portugal to the Court concerns, and only concerns, Portugal's claim to alleged rights of transit between Daman and the enclaves and between the enclaves themselves. It stressed that the allegation in paragraph 57 of the Memorial that "India failed to observe its international obligations towards Portugal by tolerating the organisation on its territory of the armed expeditions which were directed against the Portuguese enclaves" raises an issue which is quite different from the issue submitted to the Court in the Application. It further pointed out that in the Preliminary Objection it had formally reserved its rights to object to any attempt by Portugal to introduce into the present case any claim not distinctly raised in the Application. Some of the arguments which Portugal has advanced in the Reply, in regard to events which are alleged to have occurred prior to the insurrection in the enclaves, make it necessary for the Government of India to draw attention once again in this Rejoinder to the clear position which it has taken up concerning the scope of the case submitted to the Court.

10. In the Reply, in paragraphs 274-290 and again in its submission in paragraph 406, the Portuguese Government has carried its accusations in regard to India's alleged responsibility with respect to the insurrection a good deal farther than she did in the Memorial. She now accuses India not of mere tolerance—not of mere lack of due diligence—but of active participation in a Goan plan to capture the enclaves. If Portugal had really believed that India had actively participated in bringing about the insurrection, it is astonishing that she did not make India's international responsibility in the matter the subject of a claim in her Application. It is no less astonishing that in her Memorial she complained only of India

having "tolerated" the organization on Indian territory of the "expeditions" which entered the enclaves. Be that as it may, the claim submitted to the Court in the Application was a claim to certain rights of transit, and to nothing else, and the Portuguese Government is not entitled, at this stage of the case, to introduce new complaints of an alleged international responsibility resting upon India in regard to the so-called invasion of the enclaves. The Government of India will be as anxious in this Rejoinder to refute the Portuguese allegation of its active participation in the insurrection as it was in the Counter-Memorial to refute the allegation that it "tolerated" on Indian territory the organization of the so-called invasion of the enclaves. But the Government of India must again, and even more emphatically, reserve its right to object to the introduction into the case of completely new issues of India's alleged international responsibility.

Part I

THE HISTORICAL FACTS

The Maratha Period

Section I

The Background to Portuguese-Maratha negotiations for a treaty of friendship and alliance and the mission of the Portuguese envoy, Narayan Vithal Dhume in 1775

11. In paragraph 11 of the Memorial the Portuguese Government stated in connection with the alleged "treaty of 1779":

> "This Treaty was preceded by *protacted negotiations* [1] which were carried on on the Portuguese side, by a Luso-Indian, Narana (or Narena) Sinai Dumo by name—also known as Narana Vithal Dumo or Narana Rau Vital.
>
> *A number of questions remainea pending between Portugal and the Marhatta Empire, following the conclusion of the Treaty of Raia of 1739* [1] by virtue of which certain territories had been ceded by the Portuguese to the Marhattas, namely, the territory of Bassein and a portion of the former territory of Damao (which constituted its North Province). *Negotiations were opened to settle these questions. They related particularly to the return to Portugal of the territories of the North Province* [1], which had been ceded in 1739, or failing such return, the acquisition of other territories as compensation."

The Portuguese Government contended in these words that certain territorial matters were left open by the treaty of 1739, that the question of the restoration of the former Portuguese "Province of the North" was the subject of negotiations with the Marathas opened on the Portuguese side by their envoy, Narayan Vithal Dhume, and that the "treaty of 1779" resulted from such negotiations.

12. In paragraph 37 of its Reply the Portuguese Government disclosed its purpose in giving an account of the "Historic Antecedents of the Treaty of 1779": "the historical framework in which this Treaty was concluded" provided, according to the Portuguese Government, "an accurate interpretation of the said Treaty".

13. At paragraphs 59 and 60 of its Counter-Memorial the Government of India set out the correct facts relating to the antecedents and background of Narayan Vithal Dhume's mission to the Maratha Court. The Government of India annexed the texts of the treaties of 1739, 1740 and 1741 (at Indian Annex E. No. 2 and C. No. 32) and demonstrated that no territorial questions had been left open

[1] Italics supplied by the Portuguese Government.

by the treaty of 1739, or by the treaties of 1740 and 1741. The treaty of 1739 resulted from a military defeat inflicted by the Marathas on the Portuguese and it was not and could not have been in the contemplation of the Parties to make territorial transfers to the benefit of the Portuguese. The treaty of 1740 settled in a final manner the relations of the Marathas and the Portuguese and provided for a grant which was actually made under the treaty of 1741. (See Counter-Memorial, paragraph 59. Indian Annex E. No. 2 and Indian Annex C. No. 32.) The Government of India pointed out there that there was no connection between the treaties of 1739, 1740 and 1741, and the alleged "treaty of 1779" and that the Portuguese envoy Narayan Vithal Dhume was deputed to the Poona Court for the ostensible purpose of resolving the conflict of the Portuguese and Maratha fleets on the Indian Seas and for obtaining from the Marathas compensation for capture or destruction of Portuguese vessels.

14. At paragraph 47 of the Reply, however, the Portuguese Government reassert their contention that the subject matter of negotiations which were started by the Portuguese Envoy at the Maratha Court was the restoration to Portugal of its old "Province of the North" and that the "treaty of 1779" was the result and fruit of such negotiations. The Government of India submits that there is no evidence whatever in support of the Portuguese contention The Portuguese Government have not been able to produce any document to show that Dhume did in fact discuss the question of the restoration of the "Province of the North" with the Marathas nor have they shown what was the Maratha reaction to a claim of this nature.

15. The Government of India will now proceed to demonstrate the following points and at the same time deal with the relevant paragraphs in the Portuguese Reply:

1. The treaties of 1739, 1740 and 1741 had no relationship to the negotiations started by Dhume in 1775. No territorial questions were left open by these treaties.

2. Portugal had no territorial claims against the Marathas. Under a later treaty of 1760 Portugal expressly gave up all claims against the Marathas.

3. The Portuguese Sovereign gave clear instructions to his officers in India not even to contemplate the recovery of the old "Province of the North" or to take up an aggressive attitude against the Marathas.

4. The question of the restoration of the "Province of the North" did not form the subject matter of Dhume's negotiations with the Marathas from 1775 onwards. Nor did Dhume at any time so much as mention any territorial question to the Marathas. The attitude of the Marathas in the matter of Portuguese presence in India was

well-known not only to Dhume but also to the Portuguese Government in Goa and in Lisbon.

5. The grant of rights of collection of revenue in villages yielding annual revenue only of Rs. 12000 could not be termed restoration of the old "Province of the North" or compensation for the old "Province of the North".

6. The villages in which revenue rights were granted by the Marathas to the Portuguese in 1783 and 1785 as the result of Dhume's mission were not in fact situated in the old "Province of the North" and had never belonged to the Portuguese at any period of time.

* *

1. *The Treaties of 1739, 1740 and 1741 had no relationship to the negotiations started by Dhume in 1775. No territorial questions were left open by these Treaties.*

16. At paragraph 59 of its Counter-Memorial the Government of India made the following points:

1. The Portuguese Government did not annex to its Memorial the texts of the treaties of 1739, 1740 and 1741 cited by it in paragraphs 9 and 11 of its Memorial.

2. The texts of the treaties disclose clearly that no territorial questions were left open by the treaty of 1739 as alleged by the Portuguese Government.

3. The treaty of 1739 resulted from a military defeat inflicted by the Marathas on the Portuguese and it was not and could not have been in the contemplation of the Parties to make territorial transfers to the benefit of the Portuguese.

4. The treaty of 1740 provided for a grant; this grant was made under the treaty of 1741.

5. The treaty of 1779 was in no way related to the treaties of 1739, 1740 and 1741. Neither in the negotiations nor in the text of the "treaty of 1779" was there a reference to the earlier treaties.

17. As regards the non-production of the texts of the treaties of 1739, 1740 and 1741 with its Memorial, the Portuguese Government stated in a footnote to paragraph 39 of its Reply that "it did not feel it necessary to append it to the Annexes because it has no relationship to the bases of the action and in order not to increase beyond reasonable need the scope of the documentation joined to its file." It went on to add: "The Government of India ... inserted this Treaty as its Annex E. No. 2. Since the versions which it furnished thereof are incomplete, the Portuguese Government now reproduces it in full at Annex 3 to their Reply." However, if the two Annexes (Indian Annex E. No. 2 and Portuguese Reply Annex

No. 3) are compared it emerges that whereas the Government of India appended all the *three* documents which constituted the treaty of 1739, the Portuguese Government not only did not improve on that documentation but on the contrary produced only two documents and failed to produce the "Second Document of 27th April, 1739" [1]. This document is the Convention signed by the Portuguese plenipotentiaries under which Convention Portugal was to pay the Marathas the war indemnity of seven lacs of rupees (Rs. 700,000). The Government of India respectfully invites the attention of the Court to the three documents at Indian Annex E. No. 2. These documents show that the treaty of 1739 was the result of a war between the Portuguese and the Marathas in which the Portuguese suffered a humiliating defeat. No territorial questions were left open in the treaty of 1739, nor was it, nor could it have been, the intention of the Parties to provide for a future territorial disposition to the benefit or advantage of the vanquished Party.

18. At paragraph 37 of its Reply the Portuguese Government expresses its intention "to correct the erroneous version submitted on this subject by the Government of India in its Counter-Memorial (paras. 59-64)". It begins this so-called "correction" by complaining that the Marathas coveted territory which "legitimately" belonged to Portugal, described in a grand fashion as the "Province of the North", and by apologizing for the defeat of the Portuguese at the hands of the Marathas "due to the help of favourable circumstances which it would be useless to outline". It thus becomes necessary for the Government of India to give some account of the circumstances which resulted in the treaty of 1739.

19. Of the places and territories on the Western Coast of India which were seized by Portugal in the 16th century, the so-called "Province of the North" was a part of the Maratha homeland. In the 17th century the Marathas organized themselves and established a national state. By the beginning of the 18th century they had fought back their main enemy, the Moghuls, and turned towards the liberation of the remaining parts of their country.

20. In 1737 an open conflict broke out between the Portuguese and the Marathas. One Maratha army attacked Portuguese strongholds in the north and another invaded Goa in the south. In the north the Marathas took the island of Salsette [2] with Thana and other forts, the province of Daman with its forts, and the renowned fortress of Bassein and its dependent territory and other places,

[1] The Government of India would like to remark that in the *"Boletim do Instituto Vasco da Gama"*, Volume 11, which contains the study by Pissurlencar *"Portugueses e Marathas"*, and which is so heavily relied upon by the Portuguese Government, it is clearly mentioned at pages 72 to 76 that the treaty of 1739 consisted of *three* documents or parts.

[2] The island north of Bombay which is not to be confused with the district of Salsette in Goa.

all of which constituted the Portuguese "Province of the North". In the south they invaded Goa and took the province of Salsette, Bardez and Ponda and the fort of Margao and reached the gates of the capital[1]. The Portuguese sued for peace. In April, 1739, the Maratha and Portuguese Generals met at Raia (in the province of Salsette and away from the theatre of war in the north) and concluded an agreement—the "treaty of Raia". (The fortress of Bassein in the north capitulated to the Marathas only on the 5th May, 1739, about a fortnight after the conclusion of the agreement). The agreement was concluded in three parts. First, as regards the war in the north, the Marathas agreed to the cessation of the hostilities on the delivery to them of the fortress of Bassein together with its territory and posts. In return the Marathas were to restore to the Portuguese the port of Daman, its territory and posts, and to withdraw their forces from that territory. However, it was stipulated: "But should fighting have taken place between the two parties before information of this agreement reaches the north then it is left entirely to the Rao[2] to adhere (or not) to this agreement." (Indian Annex E. No. 2, Part I (1), **II**, p. 249.)

21. Secondly, as regards the south, the Portuguese undertook to pay war indemnity of seven lakhs of rupees (Rs. 7,00,000), in instalments of 2 lakhs, 3 lakhs and 2 lakhs, for the withdrawal of the Maratha armies from Salsette and Bardez. (Indian Annex E. No. 2 Part I (2) at **II**, p. 249). In a third document the territory of Ponda was declared to belong to the Marathas; the Marathas undertook to restore to the Portuguese the province of Salsette and Bardez and to evacuate their troops subject to the payment to them "every year" of 40 per cent. of the revenue. (Indian Annex E. No. 2, Part I (3), **II**, p. 250.)

22. The treaty of 1739 was concluded away from the theatre of war in the north. Before the news of treaty of Raia could reach the leader of the military campaign in the north, Chimaji Appa, the Peshwa's brother, he had assaulted and taken the Portuguese fortress of Bassein together with several other places.

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[1] An account of the war and the details of Maratha acquisitions and the Portuguese losses will be found in Danvers, "*The Portuguese in India*", London 1894, Volume II. Of the Portuguese losses as the result of the war Danvers writes at page 412:

> "The government of the Viceroy was thus reduced to the island of Goa, which is two leagues long (from Nossa Senhora do Cabo to S. Thyago) and nearly six in circumference, Chorao, Piedale, S. Estevao, and Cambarjua, and the island of Anjediva, nine leagues south of Marmagoa, a very small island, simply held to prevent any pirates settling there."

A more detailed account is found in V. G. Dighe, "*Peshwa Baji Rao I and the Maratha Expansion*", Bombay, 1944, at page 154-190.

[2] The Maratha Ruler.

23. Under the terms of the treaty of 1739 the Marathas were free to impose fresh conditions of peace and this they intended to do [1].

In their extreme peril the Portuguese requested the English to intercede on their behalf. The English Governor of Bombay, Stephen Law, sent one Captain James Inchbird to the Marathas to negotiate the peace on behalf of the Portuguese and to dissuade the Marathas from continuing the hostilities. Captain Inchbird found the Marathas in an intractable mood. "The Marathas talked as if Daman and Goa were already theirs". "They despise with great indignation and were merry upon the offers made to them of what they had already conquered and were in their possession" (Indian Annex F. No. 1). Upon receiving a report from Captain Inchbird Stephen Law, the Governor of Bombay, wrote to the Viceroy of Goa:

> " 'Tis needless informing your Excellency of the Haughtiness of the Morattas, who in Discourse with the Captain frequently expressed their Resolution to enter Goa, as then by the Roots being cut off, the Branches would fall of course, and nothing but the want of money (which there was a Prospect of being soon possessed of) had retarded the execution of their Design." (Indian Annex F. No. 2).

24. With great difficulty the English were able to make the Marathas agree to less onerous conditions of peace. Under the treaty of 1740, which was the result of these negotiations, the Marathas retained their conquest of the "Province of the North" and returned to the Portuguese the provinces of Salsette and Bardez in the south (Articles 1 and 2). The Marathas were also to retain the province of Ponda and other territories taken by them in the south (Article 3). The Portuguese, while retaining in the north the forts of Daman and St. Jerome [2], were also to receive from the Marathas a grant of lands and villages adjacent to "Lodhe Daman", that is Upper Daman, for the maintenance of these forts (Article 9). The Portuguese also undertook several other obligations, in particular the obligation to render all kind of help to the Marathas in their war against the Angria (Article 10).

25. The text of the treaty of 1740 will show clearly that all the territorial questions between the Portuguese and the Marathas were settled under it. The only provision which required a grant from the Marathas was contained in Article 9 [3] which reads:

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[1] In paragraph 40 of its Reply the Portuguese Government admits that the Marathas were victors and were entitled to dictate their terms. In paragraph 39 it quoted the text of the treaty of 1739 to show that under that treaty the victorious party had the right to accept or reject its terms. However, in the same paragraph 40, the Portuguese Government seems to resent the fact that the Mapathas exercised their right under the treaty, and it seems to imply that the Marathas went back on their word given at Raia. Nothing could be further from the truth.

[2] Corrupted in Marathi as "Sau Jatane".

[3] Article 9 in the text of the treaty of 1740 given at Indian Annex E. No. 2, Part 2, II, p. 252, corresponds to Article 2 in the text produced by the Portuguese Government at Annex 4 to the Portuguese Reply.

"The forts of Daman and Sau Jatane also known as Lodhe Daman belong to the Firangee. They will be retained by the Firangee. They will not be molested by the Sarkar. It is agreed to grant a pargana towards the maintenance of the two forts. Accordingly the Sarkar will grant Pargana Neher in Prant Daman. There are forts belonging to Sarkar in the said Pargana; places contiguous to the forts will be retained for the forts; in exchange the Sarkar will give lands and villages to Lodhe Daman. An agent on behalf of the Sarkar and another on behalf of the Firangee will fix places contiguous to the forts to be kept by the Sarkar and the places to be granted in exchange." (Indian Annex E. No. 2, Part II, **II**, p. 252.)

26. Accordingly, under the treaty of 1740 the Marathas agreed to make to the Portuguese a grant in Pargana Neher which was not to include the Maratha forts and surrounding lands, instead of which some other lands contiguous to Upper Daman were to be selected and granted.

27. Under the treaty of 1741 the grant was made. The agents of both Parties having selected and measured the lands in question, the Marathas gave to the Portuguese 9 villages from Pargana Neher and 11 from Pargana Khaladi Pawadi. (See Annex 6 to the Portuguese Reply.)

28. It will thus be seen that neither the treaty of 1739, nor the treaty of 1740, nor the treaty of 1741 left open any territorial question which was to be determined at a later date. Under the treaty of 1739 the Marathas agreed to restore Salsette and Bardez to the Portuguese and withdraw their army from that territory on condition of payment of a war indemnity and the yearly tribute of 40 per cent. of the revenue. The treaty of 1740 gave to the Marathas the Portuguese "Province of the North" and provided for grant of land adjacent to the fort of Daman and St. Jeronimo. This grant was made under the treaty of 1741. There was nothing left to be settled at a later date.

29. It will be noticed in passing that by agreeing to pay to the Marathas the yearly tribute of 40 per cent. of the revenues under the treaty of Raia of 1739 (Indian Annex E. No. 2, Part I (3), at **II**, p. 250) the Portuguese clearly placed themselves in an inferior and subordinate position to the Marathas. Furthermore, under Article 6 of the treaty of 1741 the Marathas imposed on the Portuguese the obligation to give them 50% of certain of the customs duties levied in Daman. (See Annex 6 to the Portuguese Reply.) The result of the treaties was that Portuguese rule in North Konkan was annihilated and the Portuguese were subjected to Maratha tax.

30. The Government of India would like to point to two prominent errors in the narrative of the Portuguese Government. At paragraph 39 of the Reply the Portuguese Government stated that by the treaty of 1739 "Portugal ceded to the Maratha Empire the town of Bassein and its jurisdiction" and that the Marathas under-

took "to recognize Portuguese sovereignty over Daman". None of the documents which are said to constitute the treaty of 1739 support the above assertions of the Portuguese Government. The First Document of 25th April 1739 which related to the North (Indian Annex E. No. 2, Part I (1), at **II**, p. 249) spoke of "delivery", not of cession or recognition of sovereignty; it was an armistice arrangement between military commanders and did not incorporate notions of cession or recognition of sovereignty. Furthermore, under the treaty of 1739 the arrangements were purely temporary. It was stated: "But should fighting have taken place between the two parties before information of this agreement reaches the north then it is left entirely to the Rao [1] to adhere (or not) to this agreement." Secondly, at paragraph 42 and 43 of the Reply the Portuguese Government states that the treaties of 1740 and 1741 provided for "an exchange of villages" and "a reciprocal transfer of sovereignty". There is nothing in the two treaties to support this assertion of the Portuguese Government. The two treaties provided for a grant one way from the Marathas to the Portuguese, and there was no exchange or transfer between the Marathas and the Portuguese.

2. *Portugal had no territorial claims against the Marathas. Under the later treaty of 1760 Portugal expressly gave up all her claims against the Marathas.*

3. *The Portuguese Sovereign gave clear instructions to his representatives in India not even to contemplate the recovery of the old Province of the North or to take up an aggressive attitude against the Marathas.*

31. In paragraph 45 of its Reply the Portuguese Government states that it was the "policy" of the Portuguese Government after the conclusion of the treaties of 1739-1741, to make an attempt to obtain the recovery of the territories of the old "Province of North". In proof of this assertion the Portuguese Government refers to "an abundant and voluminous documentation concerning the evolution of this policy". It appends extracts from this "voluminous documentation" at Annexes 7 to 17. In footnote 3 to the same paragraph the Portuguese Government describes these documents as "sufficient to show that the recuperation of the fortified towns of the North and their respective Parganas was the *leit-motiv* of the Portuguese *policy* [2] in India in the decade which followed the Treaty of Punem of 1740 and 1741".

32. It will be noticed that the Portuguese Government have carefully chosen the word "policy" and have not stated that the Portuguese Government had or asserted "a claim" to its lost

[1] The Maratha Ruler.
[2] Our italics.

territories. Indeed, as is absolutely clear the treaties of 1739-1741 dealt with and confirmed the loss of Portuguese territories in favour of the Marathas and did not recognize any "claim" of Portugal to those territories. The treaties of 1739-1741 constitute a surrender on the part of Portugal of any "claim" to the territories in question.

33. Consequently, any intention of Portugal to reconquer its lost territories "*manu militari*" (see Portuguese Reply, paragraph 45) or its hope "that the accidents of timing would offer some opportune situation" is irrelevant. Nor can Portugal cite in her favour the fact that by her action immediately after the conclusion of the treaties of 1739 to 1741, she dishonoured them in a most flagrant fashion.

34. Under article 3 of the text of the treaty of 1740 which has been given at Annex 4 to the Portuguese Reply, Portugal undertook "to refrain from committing any hostilities in the entire jurisdiction of Bassein, Salsette, and Daman, Belapur, Urna (Caranja), Rovoddanda (Chaul), and Corla (Chaul Hillock)". Under this article Portugal had solemnly pledged not to commit hostilities against the Marathas in respect of the territories lost by her under the treaty, namely, the old "Province of North". Article 4 stated: "Likewise the Portuguese will not commit any act of hostility against our [Maratha] conquests made in Phonda, Zambolim, Panchemal, Saundem and Bidnur, nor against those which we may take in future."

35. Despite these pledges Portugal did in fact commence hostilities in respect of its former possessions adjacent to Goa. It is a historical fact that in 1741 a new Viceroy arrived in Goa with a strong reinforcement of Portuguese troops and he lost no time in making war on the Marathas [1]. Thereafter, territories in the South, adjacent to Goa, were the subject of continuous armed conflict between the Portuguese on the one hand and the Marathas and their allies on the other.

It is strange that Portugal having given specific pledges in the treaties of 1739-1741 and having flagrantly repudiated them immediately after their conclusion, the Portuguese Government should claim in the Memorial, and repeat the claim in the Reply that the treaties of 1739-1741 had left some territorial questions outstanding and that the alleged treaty of 1779 was based on the earlier treaties of 1739-41 and was intended to settle outstanding questions left open by those earlier treaties.

36. Furthermore, the Portuguese Government has kept completely silent about the treaty of 1760. This treaty between the Portuguese and the Marathas provides a break in the period between the treaties of 1739-41 and the alleged treaty of 1779. In the treaty of

[1] See Danvers, "*The Portuguese in India*", Volume II, p. 416.

1760 Portugal expressly undertook "to forget completely any previous claim". (Indian Annex F. No. 3.)

37. The intention and the "policy" of Portugal to reconquer her lost territories or to put forward a "claim" in 1779 would have been in complete contradiction of her undertakings in the past treaties. The Marathas on their part had placed entire faith on the solemn assurances of the Portuguese not to commit, even indirectly, any hostilities against them. The Marathas also put faith in article 10 of the treaty of 1740 which obliged the Portuguese to assist the Marathas against the Angria. (See Indian Annex E. No. 2, Part 2, **II,** p. 252, and paragraph 24 above.) Thus in 1755 the Maratha ruler, Balaji Baji Rao, commonly known as Nana, wrote to the Portuguese Viceroy, the Count of Alva, complaining of Portuguese assistance to the Angria and calling on him to desist from it. (Indian Annex F. No. 4.) The Portuguese Viceroy denied having given assistance to the Angria and protested his friendship with the Maratha Ruler. (Indian Annex F. No. 5.) The Portuguese Secretary of State also gave his assurances to the Peshwa in the same connection. (Indian Annex F. No. 6.) However, it is a historical fact that in 1756, the Portuguese Viceroy entered into an engagement with the Angria to assist him with troops in a war he was engaged in against the Peshwa. See Danvers "*The Portuguese in India*", London 1894, Volume II, page 431, where it reads:

> "On the 5th November, the Viceroy entered into an engagement with Tullagi Angria to assist him with 500 troops in a war he was then engaged in with Balagi Bagi Rao, the Angria undertaking to pay those men out of his treasury at the rate they would have been paid by the Portuguese Government. It would, however, appear that Tullagi Angria failed to fulfil certain of the stipulated conditions, whereupon the Portuguese commander withdrew his men, and retired to Goa. Tullagi Angria complained of having been thus deserted in the face of his enemies, but the Viceroy declared that the commander had committed no act worthy of punishment, inasmuch as he had received special instructions to see that all the stipulations agreed upon were duly carried out." [1]

38. Furthermore, quite apart from the solemn pledges given by Portugal, it is difficult to see how Portugal's hopes, ambitions, designs or policies could be of any relevance in the face of the determination of the Marathas to put an end to Portuguese presence in India. In paragraph 23 above the attitude of the Marathas as conveyed by Captain Inchbird to the English Governor of Bombay and by the Governor of Bombay to Portuguese Viceroy has already been referred to. The Portuguese historian, Alexander Lobato, confirms this. Writing of the negotiations for the conclusion of the

[1] The Portuguese Sovereign himself admitted in 1765 that the Count of Alva had "inconsiderately assisted the Angria" and had thus broken faith with the Maratha "so contrary to my Royal Orders, as well as to my Religious Intentions". See Indian Annex F. No. 7.

treaty of 1740 he states in his book, *"Fundamentos da Presenca de Portuguesa na India"* [1]:

> "The Maratha rejected all the counter-proposals, determined not to cede 'more than one pragana', inasmuch as he stated, *his intention was "to deprive us totally from our dominions in India."*

39. Even as regards the alleged Portuguese "policy" to recover the old "Province of the North", there are documents which demonstrate the despondency of the Portuguese Government, their lack of interest and unwillingness to make any attempt to retrieve their lost territories from the Marathas. The Portuguese Sovereign gave strict instructions to his Viceroy in Goa not even to contemplate the recovery of the lost territories and forbade him to take up an aggressive attitude against the Marathas. Thus in 1761 the Portuguese Secretary of State conveyed the Portuguese Sovereign's instructions to the Viceroy in Goa, the Count of Ega:

> "His Majesty has approved of your plan in the spirit of the said first instructions with which you left this Court and of the principles which you have well observed in the above mentioned manner, that is, of seeking an alliance of the State with the Maratha or commonly known as Nana, because it will be certainly profitable to maintain it with all caution dictated by prudence, as long as it can be maintained. Towards this end you should seek all means which are practicable and decorous. For this purpose it would appear convenient that you should maintain with the same Nana a personal and close and friendly correspondence.
>
> His Majesty has approved entirely the said instructions carried under the above mentioned title by the said Jacques Phelippe de Landreset considering it thoughtfully written and in everything conforming to his Royal Order, as long as they are directed towards the maintenance, *without any aim of future conquests, not even of the Island of Salcete or any other Northern Territory; because the said Master again reiterates to you that he does not want absolutely any extension in his dominions but rather and only in the trade and shipping towards which he will in due course take steps as time permits."* [2]
>
> (Indian Annex F. No. 8)

The above instructions of the Portuguese Sovereign contain a clear expression of Portuguese "policy" at the highest level of the Portuguese Government. Briefly stated it was that no attempt was to be made, direct or indirect, to recover any territories from the Marathas.

40. In 1762 the Viceroy of Goa acknowledged the clear instructions of his Sovereign. This acknowledgement is found at Annex 16 to the Portuguese Reply. However, the Portuguese Government, for reasons best known to it, has omitted from the printed Annex the part which is most relevant to this question. The part which has been omitted in the Portuguese Annex reads as follows:

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[1] *Esmeraldo*, Issue No. 3, 1954, at page 131.

[2] Our italics.

"... The instructions issued by H. Majesty to me at the time of my departure for India, ordered me that I should endeavour to make efforts for the preservation of peace, promotion of trade, spread of the Gospel, the good administration of justice, policy with European nations and for establishing good relations with the neighbouring Chieftains, and that I should not entertain ideas either of conquests or restorations, as long as the same Master did not decide otherwise in due course ...

You tell me in the same letter that H. Majesty was pleased to approve the instructions with which I sent Lt. Col. Jacques Filipe de Landreset to the Court of Punem finding that those instructions were in accordance with the Royal Order, as long as he went for the purpose of preservation, without any other objective of future conquest, nor even of the conquest of the Island of Salcete, or of any other land of the North, because the said Master does not absolutely desire the extension of the dominions, but only of commerce and shipping, and you stress in the next paragraphs the matter which is put down in such specific terms and which relate to the same end..." (Portuguese Reply, Photostat Copy of Annex 16 [1].)

In this letter the Viceroy rendered an apology and explanation for his past conduct and undertook in future to abide by his Sovereign's instructions not to entertain designs on the dominions of the Marathas.

* * *

41. In its pleadings the Portuguese Government proceeds as if Portugal had a "claim" to the territories which the Marathas acquired in 1739 by title of conquest and cession. It is interesting to find that this was the attitude maintained by the Portuguese in 1781 and that the absurdity and hollowness of the Portuguese "claim" was effectively exposed at that time by the British in Bombay. At paragraph 102 of its Reply the Portuguese Government stated that in 1780 the Portuguese Viceroy in Goa forwarded a "strong protest" to the Bombay Government and pointed out that "Portugal had never deviated from the idea of restoring its sovereignty over the territories of the Province of the North which the Marathas occupied by force without just cause of war". At Annex 27 the Portuguese Government set out the text of the "strong protest". In that document the Portuguese Viceroy stated that territories constituting its "Province of the North" had belonged to Portugal for two centuries, that although for 40 years the Marathas had "without just cause of war, invaded and occupied through violence some places and villages that the State possessed in the North, usurping them by force and by the strength of arms", Portugal had not lost her "powers and rights that she had on all

[1] A translation of the part omitted by the Portuguese Government in the printed Annex 16 to its Reply has been carried out by the Government of India and will be found at Annex F. No. 9.

the said villages, places and territories". The Portuguese Viceroy put forward the claim of Portugal in the following words:

> "It is nevertheless unquestionable that the Crown of Portugal has not lost the powers and the rights that she had and has on all the said villages, places and territories, though she is at present deprived of their possession; for, according to positive and incontestable law, sovereignty can be preserved by force of will alone and the Crown has always reserved its right to the said territories, has never abandoned the intention to restore them nor ever ceases, at any time, to take all possible steps to incorporate them again under its sovereignty, to regain possession and to unite them to its domain."

It will be observed that the Portuguese Viceroy took no account of, nor did he mention to the Bombay Government, the treaties of 1739, 1740 and 1741 under which Portugal had solemnly ceded these territories to the Marathas.

42. The Portuguese Government, however, did not find it convenient to produce the reply which was received by the Portuguese Viceroy from the Government of Bombay. The Government of India will let the letter from the Council of Bombay answer the argument of the Portuguese Government that Portugal had a "claim" to the territories lost by her to the Marathas. The Council of Bombay wrote to the Portuguese Viceroy:

> "... we find a difficulty in treating seriously or with regular arguments a position so contrary to reason and received maxims as the existence of a right of sovereignty in your nation to territories dismembered from its dominions almost half a century, or that a regard on our part to such a supposed right should prevent the English from carrying the war into such part of the Mharatta dominions as they may find most convenient or conducive to their success..."
>
> "The Portuguese acquired most of their territories in India by conquest and force of arms. In the same manner they were deprived of what they term the Province of the North, and their right consequently expired on the same principle that it originated..."
>
> (Indian Annex F. No. 10.)

The rejection by the Council of Bombay of the Portuguese "strong protest" in such terms provoked the Portuguese Sovereign to rebuke her Viceroy in no uncertain manner. The Portuguese Secretary of State wrote to the Viceroy:

> "Her Majesty has been shown your letter... it goes without saying that, after having lost the above-mentioned cities and territories of Thana, the Island of Salsette and Bassein, and the Maratha being in possession of the same for over thirty or forty years, when the British made their conquest, we have no right to blame the said British for having done so, and the reply given by them to your protest is based on such solid grounds that they cannot be challenged. The only thing we must feel more keenly, in the circumstances, is the fact that the State should have been reduced to

such a deplorable plight that the only weapons and forces that we resort to should consist of useless *protests which only provoke laughter* [1] amidst those against whom they are directed..."

(Indian Annex F. No. 11.)

* * *

43. The documents produced by the Portuguese Government at Annexes No. 7 to 17 to the Reply, which are intended to demonstrate that Portugal never gave up her hopes, ambitions and attempts to recover her former territories, are not only of little or no relevance to the Case, but they themselves prove that the Portuguese Sovereigns were aware of the futility of attempting to regain their lost territories, and that their representatives in India often disregarded the instructions given to them in this matter. They further prove the *mala fides* of the Portuguese Government at Goa and its utter contempt for treaties entered into with the Marathas. The Government of India will not waste the time of the Court by dealing with these documents in detail. It will content itself with commenting on them in a very brief manner.

Annex 7 sums up the entire attitude of the Portuguese Government towards treaties with the Marathas and contains the expressive words: "if it is opportune to break the treaty and to pursue the war...".

Annex 8 relates not to Daman but to Thana and Bassein, both places being about 100 miles distant from Daman. No mention is made in that document of any desire to obtain territory contiguous to Daman. The document demonstrates the fear of the Portuguese Government that the undertaking of hostilities in the North might invite the wrath of the Marathas in the South, and it also shows the reliance of the Portuguese Government on bribery and corruption of Maratha officials as instruments of policy.

Annex 9 likewise does not relate to territory contiguous to Daman. On the other hand it contains an expression of the despondency of the Portuguese Government.

Annex 10 contains an affirmation on the part of the Portuguese authorities that the Marathas would under no circumstances be willing to part with their territory in favour of the Portuguese: "Now stating before all the arbitrators, I ask them by which compulsion, love or necessity, the Marathas want to give us back these places?... they know very well they have everything to lose in becoming our subjects." This document confirms what has been stated above at paragraphs 23 and 38.

Annex 11 purports to be an internal document of the Marathas and it illustrates again the determination of the Marathas to expel

[1] Our italics.

the Portuguese. The Maratha Ruler is said to have instructed his General: "... it is proper that you should remain at Bacaim at this juncture, for in the presence of a prudent officer like you, the enemy will not venture to march against that place; and in case he does proceed there, I am certain that with all your courage you will dispose of him".

Annex 12 contains the vain boast of the Viceroy of Goa that if he were given 1500 white men and life boats he would be able to conquer Bassein and Thana from the Marathas. The nature of the boast of the Portuguese Viceroy is exposed by the very last sentence in the report in which he describes his grandiose plan as "an intention which I really do not possess".

Annex 13 contains an irrelevant document and does not merit any comment.

Annex 14 is a letter from the Portuguese Viceroy to the Angria. This letter is in clear repudiation of article 10 of the treaty of 1740. (See paragraph 24 and 37 above.) Under that article the Portuguese undertook to assist the Marathas in their war against the Angria. In his letter to the Angria the Portuguese Viceroy suggested an attack on the Marathas and wrote: "The ruin of Nana [1] suits both of us as he is our common enemy".

Annex 15 contains plans of an attack by the Portuguese on the Maratha island of Salsette. This was in repudiation of Portuguese pledges contained in article 2 of the treaty of 1740. (See paragraph 24 above.)

Annex 16 has already been referred to in paragraph 40 above.

Annex 17 is not relevant and merits no comment [2].

44. Thus the documents in Annexes 7 to 17 to the Portuguese Reply instead of lending support to the assertions of the Portuguese Government in paragraphs 44 and 45 go only to show that the Portuguese had no respect for their treaties with the Marathas and in fact repudiated them; that they made attempts to gather allies against the Marathas; that they were aware that the Marathas would not give up their territories without an armed conflict; that they did not consider themselves able to match the military power of the Marathas; and that their designs were concerned not with villages contiguous to Daman, but rather with the island of Salsette, the fortresses of Thana and Bassein—about 100 miles distant from Daman.

[1] Peshwa Balaji Baji Rao, the Maratha Ruler.

[2] This document refers presumably to the Nizam between whom and the Marathas a struggle existed at that time. The Portuguese hoped that the Nizam would emerge as victor. In actual fact the Nizam was completely defeated by the Marathas in August 1763.

4. *The question of the restoration of the Province of the North did not form the subject matter of Dhume's negotiations with the Marathas from 1775 onwards. Nor did Dhume at any time so much as mention the question of the restoration of the Province of the North to the Marathas. The attitude of the Marathas in the matter of Portuguese presence in India was well known not only to Dhume but also to the Portuguese Government in Goa and in Lisbon.*

45. In paragraph 60 of its Counter-Memorial the Government of India set out the object of the negotiations opened by Narayan Vithal Dhume at the Poona Court in 1774-75. At paragraphs 46 and 47 of its Reply the Portuguese Government have described the statement of the Government of India relating to the subject matter of Dhume's negotiations as inaccurate. They have sought to show there that Dhume proceeded to the Poona Court not in connection with a claim for compensation for the capture or destruction of Portuguese vessels at the hands of the Marathas but as the result of an "intuition" of the Portuguese Viceroy who had "a well thought out diplomatic action which might make it possible for the Portuguese State to accomplish the much desired recuperation of the territories in the North without recourse to war". (Portuguese Reply, paragraph 46.) In support of that assertion the Portuguese Government has referred to documents at Annex Nos. 18, 19 and 20.

46. The Government of India is grateful for the documents which the Portuguese Government has produced in evidence of the remarkable "diplomatic action" undertaken by the Portuguese Viceroy. According to the Portuguese Government the patience of the Viceroy of Goa was rewarded when an "opportune situation" arose after a wait of 30 years. This "opportune situation" was the civil war which broke out in the Maratha Empire and it was the intention of the Portuguese Viceroy to profit by this situation as much as possible.

Annex 18 expresses the delight of the Portuguese authorities at the news of a civil war among the Marathas: "The time of our redemption has come ... all are in civil war".

Annex 19 which is a letter from the Portuguese Viceroy to the Governor of Daman is a tirade against the English: "The English of the island of Bombay, always jealous enemy to the name and interest of our State, forgetful of the alliance and of the defence treaties which exist between the two royal crowns of Portugal and the Great Britain, unmindful of the duties towards and of the sacred respect for the hospitality with which the Portuguese nation received them in the island of Bombay". In this letter the Portuguese Viceroy suggested to the Governor of Daman a plan for "dissimulation". This plan was to prevent the Maratha territories, in particular the fortresses of Bassein and Thana, from falling to the British

so that the Portuguese could later recover them from the Marathas. According to the Portuguese Viceroy "if once the English enter there we will lose for ever the hope of getting them back". The Governor of Daman was asked to encourage the Marathas to resist with vigour and steadfastness the attacks of the English, and he was instructed to carry out his measures "in a secret and dissimulating way".

Annex 20 is a remarkable document and the Government of India seek the indulgence of the Court in quoting from it at some length. This document shows that *Narayan Vithal Dhume was not sent openly as the Portuguese Envoy to the Maratha Court, but was sent there as a spy, and that he was sent with two letters, one addressed to the rightful Maratha Government and another to the rebel, Raghoba*[1]*:*

> "2nd ... nobody should know that you have been sent by the State with a view to pursue this measure . . . enjoin upon the said Leandro to keep the same *secret and dissimulating manner*[1] as yourself."
>
> "3rd ... pay a visit to the Ministers you know as also to those to whom you can have access *telling them all unpretentiously*[1] *that you have come to these places to deal with your affairs.*" [1]
>
> "5th ... In the course of your first conversation with anyone of the said Ministers find an occasion to provoke a discussion ... on this question speak to him in the following terms.
>
> "6th. That the perfidy and the execration attending the death of Narana Rao has filled the whole of Asia and all the parts of the world where the sad news has been known with horror; that this tragedy wherein Raghoba played the part of monster of wickedness has rendered him odious and abominable in the eyes of all the princes and the Governments of Asia and the nations of Europe. That only the English in that region (i.e. Europe) who do not see wickedness in even the most despicable person, so long as that person serves their interests clandestinely, can agree to deal with and conclude an alliance with the said Raghoba; that you heard people say that they are making an alliance with Raghoba and have promised him help ...
>
> "8th. That you are convinced that His Majesty prefers the cause and justice of the Most Blessed Madho Rao Narana to the unjust designs of Raghoba...
>
> "16th. *Considering that the Asians are used to allowing themselves to be bribed easily you should follow this wide channel if you find any difficulty whatever or opposition to the end you have in view...*[1]
>
> "17th. If, on the contrary, you find from the beginning and from the first measures of your mission that the party of Raghoba is stronger than that of the widow; that he has sway over some important places; that he has some powerful allies; and that there are sufficient indications that he will conquer the part of the widow, you should not take the measures which I enjoin upon you in

[1] Our italics.

respect of the party of the widow, *instead immediately cross over the place where Raghoba is and hand over the letter which I address to him and speak to him conformably to the way indicated below in substance* [1].

"18th. That ... the great Raghoba knows very well that those places and territories of the North belong to this Majestic State; and that he should be convinced that this capital has always kept its eye on them; that if the great Raghoba is disposed to restore them to it, it will be ready to help him with its army; that the Portuguese Nation has always considered it a most precious and invaluable glory to help generously oppressed Princes; that, quite to the contrary, when the English raise some of them, they do so only to reduce them later to an absolute slavery (and thus) promote their trade and interests; that you beg of the great Raghoba not to deliver the said places of the North to the English; and that if he wants the alliance and help of the State, he has only to indicate the nature of the help and the terms of the alliance; that you will communicate them to this Court and that you have good hope that they will be replied to in reasonable terms."

The above in the submission of the Government of India is conclusive and eloquent proof of the duplicity and double dealing indulged in by the Portuguese Government in Goa [2]. It also answers in a final manner paragraph 48 of the Portuguese Reply in which it is stated that it was not Portugal who took the initiative but the rival parties in the civil war who approached the Portuguese Government for its help. The document shows that the initiative for obtaining Portuguese "neutrality" did not come from the Marathas. The Portuguese Government in Goa being most anxious to profit from the dissensions among the Marathas deputed Dhume to try one party and then another. Dhume was asked to describe Raghoba as "the monster of wickedness" when parleying with the Maratha Government at Poona, and at the same time to assure Raghoba that "the Portuguese Nation has always considered it a most precious and invaluable glory to help generously oppressed Princes" and would be ready to help him with its army.

47. Article 17 and 18 of Dhume's instructions quoted in the above paragraph and Annex 20 to the Portuguese Reply themselves make it quite conceivable that while assurances of neutrality were given to the Marathas at Poona, assurances of active military help were also given to Raghoba. It is a historical fact that while Portugal parleyed with the Poona Court in a different sense it also formed a military alliance with Raghoba. In 1776 Raghoba wrote to his emissary with the Portuguese, one Laxman Appaji, and described the extent of his faith in the honesty, integrity and military strength

[1] Our italics.

[2] Pissurlencar's "*Agentes da Diplomacia na India*" contains a most revealing letter from Goraksh, a colleague of Dhume, who describes how he and Dhume went to Poona in disguise, carried two letters, one addressed to Raghoba and another to the Maratha Ruler, and how they concealed the letter to Raghoba when they were interrogated by Maratha Guards. See Indian Annex F. No. 12.

of his Portuguese allies. He described his alliance with the Portuguese as "riding on a small horse":

> "Having formed an alliance with the Firangee we propose to make a move. But his resources are poor, his strength is inconsiderable, honesty is also lacking. We were riding the elephant. Now unfortunately we have taken to a small horse. The reason for this, the elephant no doubt is respectable and reliable, but on account of an injury to the foot he cannot walk. As soon as the elephant is up on his feet and can walk, we will again go back to the elephant."
> (Indian Annex F. No. 13.)

48. It is in the light of the above that Raghoba's offer "to cede for ever to the Portuguese nation the right and domination over all the territories which have been taken from them by the Marathas on this coast of the North" must be seen. (See Portuguese Reply, paragraphs 48 and 51.) First, Raghoba had no territories to offer; he was a rebel in a desperate plight—his fortresses in the old "Province of the North" were castles in the air and existed only in his imagination. Secondly, he did not have much faith in the Portuguese, did not expect much from them and was aware of their military weakness [1].

49. It may be asked, if Raghoba was able to cede to the Portuguese the old "Province of the North", why did not the Portuguese Government, which by its own admission was most anxious to recover its lost territories, and did not have any particular regard for the Maratha Government at Poona, accept his offer?

50. It is obvious that territorial offers made by a desperate rebel who did not have any territory to offer cannot be of any relevance in determining whether the legitimate Government was willing to cede or had promised to cede its territory. At paragraph 51 of its Reply the Portuguese Government assumes that as against the generous terms offered by the rebel the Maratha Government at Poona must have made an offer of similar magnitude to induce the Portuguese at Goa to adopt an attitude of neutrality. Nothing could be further from truth and logic.

51. The Portuguese Government is entirely unable to show that the Marathas ever offered to cede any territories to the Portuguese or ever discussed with them the restoration of the "Province of the North". Moreover, the Portuguese Government is unable to show that the Marathas ever required Portuguese military help or sought it or placed any reliance on it. The text of the alleged treaty of 1779 discloses clearly that there was no question of military help from the Portuguese, nor did it contain any offer of cession of territory in return for such help. Under the text of the alleged treaty it was merely required of the Portuguese not to give asylum to traitors

[1] Annex 24 to the Portuguese Reply shows that in place of 3500 well-equipped troops, 15 pieces of artillery, 5 mortars, et cetera, demanded by Raghoba, all that the Portuguese could offer him was "shelter in the place of Daman, every time he asks for it, with two hundred men only accompanying him".

(Article 11) nor to render assistance to the enemies of the Marathas (Article 12). The desperate rebel Raghoba promised to give imaginary territories to the Portuguese in return for active military help in the form of 3500 well-equipped troops, armament, guns and mortars. (See paragraph 47 above, and Annex 24 to the Portuguese Reply.) Would the proud Maratha Government of Poona have promised restoration of the "Province of the North" in return for a mere reciprocal undertaking not to give asylum to traitors and not to render assistance to each other's enemies?

52. The Portuguese Government have not been able to give any proof that Narayan Vithal Dhume did indeed carry out or was able to carry out his alleged instructions relating to the restitution of the "Province of the North" or that he had the courage to mention this question to the Marathas. What transpired between the Portuguese Viceroy and Dhume is of little relevance. The Portuguese Government should be able to show that in fact Dhume negotiated with the Marathas on the basis of the restoration of the "Province of the North". It is of no consequence if the Portuguese hopes, ambitions and designs for the restoration of the "Province of the North" were hidden from the Marathas and were not made the subject of negotiations with them. Narayan Vithal Dhume considered himself eminently successful in his mission. If his mission had been to obtain the old "Province of the North" then by any standards he could not be said to have been successful: he did not bring about the restoration of any part of the old "Province of the North", nor did he obtain equivalent compensation. In paragraph 47 of its Reply the Portuguese Government say that the instructions which were given to Dhume dealt exclusively with the purpose of the recuperation of the territories in the old "Province of the North" and that there was in those instructions not the least reference to the subject of indemnity for capture or destruction of Portuguese vessels. However, it is a historical fact and one which emerges clearly from the course of the negotiations for the alleged treaty that these negotiations were concerned not with the question of restoration of the territories of the old "Province of the North" but with compensation for the capture or destruction of Portuguese vessels.
It was with this ostensible purpose that Dhume entered the Maratha Court. As a result of his representations in 1775 the Maratha Government decided to return to the Portuguese the ship "Santa Ana". (Indian Annex F. No. 14.) Again in 1776 a Sanad was issued for the return of another vessel and this Sanad mentioned the representations which had been made by "Narayan Vithal Dhume, Envoy from the Firangee of Goa". (Indian Annex F. No. 15.)

53. The fact that Dhume's actual negotiations were concerned only with the question of compensation for loss of Portuguese shipping, and did not concern any representation for the return of the "Province of the North", is clearly proved by a letter written by

the Portuguese Viceroy to the Portuguese Secretary of State at Lisbon in which he reported the success of Dhume's mission and the Maratha grant of 1783 and 1785. This letter of the 12th March, 1787, written by Governor Francisco da Cunha e Meneses to the Secretary of State in Lisbon, Martinho de Melo e Castro, reads as follows:

> "This is how the affairs stand at present, and as the said Narana Sinai Dumo was instrumental in concluding in Punem the negotiations for making up to the State the losses suffered by the latter owing to the seizure of the frigate '*Santa Anna* and *S. Joaquim*', as a compensation for which we have been given Rs. 63,000, besides the 72 villages in Pragana Nagar Aveli and duties of the Customs, which the State took over on the 22nd July, 1785..."
>
> (Indian Annex F. No. 16.)

54. Further, the fact that the negotiations for the alleged treaty of 1779 had nothing to do with restoration of the old "Province of the North" is borne out by many historians. As will be seen below in the following sections, many historians, who did not have access to the actual documents and who had no opportunity to examine closely Portugal's title, were deceived by Portuguese pretensions and took it for granted that Portugal had acquired Dadra and Nagar Aveli "by cession" from the Marathas under a valid treaty[1]. But the historians were well aware of the purpose and background of the alleged treaty of 1779. Thus in his "*The Portuguese in India*", Danvers wrote:

> "On the 17th December, Dom Frederico Guilherme concluded a treaty of peace with the Peishwa Madou Rao, *in accordance with which the fleets of the respective parties were not to attack one another at sea*, but to provide each other with any necessaries they might require and to trade freely in their respective ports. All disagreements between them were to be settled by arbitration, and whilst the Portuguese bound themselves not to render assistance to the enemies of the Peishwa, the latter agreed not to help the enemies of Portugal. The Portuguese were not to erect forts at Guzerat, Sant, Cantevad, Surat, or other places belonging to Madou Rao. In *consideration of the existing friendship* between the two parties, the Peishwa agreed to hand over to the Portuguese certain villages in Daman, of the annual value of Rs. 12,000,— on condition that *no forts were to be erected in them.*"[2]

In the same manner it is found in a Portuguese history book by A. Lopes Mendes, "*A India Portuguese*", published by order of the "Ministerio da Marinha":

[1] In the absence of knowledge of documents relating to the alleged treaty the historians also came to the conclusion that a valid treaty had been entered into, though they gave the date of the "treaty" variously as 4th May 1779, 17th December 1779, 6th January 1780, etc.

[2] London, 1854, pages 438-39. As has been seen above, the old "Province of the North" consisted mainly of forts, fortresses and strongholds. Restoration of a part of the "Province of the North" on condition that "no forts were to be erected in them" would have been no restoration at all.

"By the Treaty signed with the Court of Poona on January 6, 1780, the King Xahu, Lord of people and treasure of Happiness, ceded to the Portuguese in Pragana of Nagar Aveli, situated in the lands of Ramnagar of the jurisdiction of Bassein, a certain number of villages, which would bring the rent of Rs. 12000 or francs 24000 per year, *in order to indemnify for some captures, which the Marathas had taken in time of peace.*" (Indian Annex F. No. 17 [1].)

55. In paragraphs 50 to 56 of its Reply the Portuguese Government has endeavoured to reply to paragraphs 61 *et seq.* of the Indian Counter-Memorial where the Government of India dealt with the facts relating to the various drafts of the alleged treaty. The Government of India will deal with these facts again in Section II below. At this point, however, the Government of India will seek to show the significance of the fact that none of the drafts of the alleged treaty discloses any reference to the question of the restoration of the "Province of the North" to the Portuguese.

56. In paragraph 50 of its Reply the Portuguese Government admits that the draft of 1775 contained no reference to territorial matters. In paragraph 51 the Portuguese Government admits that the draft of 1776 contained no mention of territorial matters but contained an offer of "twelve thousand rupees of revenue in villages at Daman". The Government of India is also obliged to the Portuguese Government for the admission in paragraph 52 and Annex 25 to the Reply that the Maratha proposal of August, 1776 was in fact conveyed to the Portuguese Government by Narayan Vithal Dhume. In August 1776 all that the Marathas proposed to offer to the Portuguese in return for their friendship was 68,254 rupees in currency, 3,000 rupees in timber, and 12,000 rupees of annual revenue from unspecified villages. (Indian Annex C. No. 6.) In paragraph 56 the Portuguese Government admits that the draft of 1777 did not mention any territorial matters, nor even a grant of revenue.

57. The Government of India submits that the question whether the restoration of former Portuguese territories actually formed the subject matter of negotiations between the Portuguese and the Marathas is to be ascertained not from the letters from the Portuguese Viceroy to Dhume or from Dhume to the Portuguese Viceroy, but from the drafts of the proposed treaty. The texts of the drafts of the proposed treaty prove beyond a shadow of doubt that the question of restoration of the old "Province of the North" to the Portuguese, or equivalent compensation in the form of cession of some other territory, was never before the Parties and was never discussed between them at any time.

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[1] Annex 80 to the Portuguese Reply which is an internal document of the Portuguese Government corroborates this and speaks of "compensation for some seizures of ships" as the motive of an alleged "Treaty of Agreement concluded between the two Governments on the 6th January 1780."

58. In paragraph 52 of its Reply the Portuguese Government refers to the doubt and uncertainty of Dhume as the result of the Marathas having embarked on a search for the texts of "certain conventions". Dhume urgently asked the Portuguese Viceroy to send him "the convention of the old peace". From the text of Dhume's letter which has been produced at Annex 25 to the Portuguese Reply it is clear that Dhume was rendered extremely nervous by the search of the Marathas for "some old conventions":

> "I am not, however, satisfied in view of the uncertainties resulting from some conventions. To verify them we are searching for the old ones. *I do not know how these were made and by whom. I am taking steps to find this out. God is Great. May He help me* [1]. And the same Lord knows that this is for the well-being of the State. I, on my part, am proceeding with the work."

On the basis of the above statement of Dhume the Portuguese Government assert at paragraph 52:

> "It can thus be inferred that the agreement planned was considered, on both sides, as a *rectification of the capitulations of the old Peace* [2], i.e., the Treaties of 1740 and 1741. In exchange for the *friendship* [2] and the *neutrality* [2] of the Portuguese State ('not to work one against the other'), Punem agreed to amend the conditions of peace of 1740-1741 and, specifically, to return to Portugal a part of the territories of the old Province of the North, a part represented by the villages located around Daman of a revenue of 12,000 rupees: cede 'the said villages of the said revenue'."

59. The Portuguese Government wish the Court to believe that Dhume had been deputed to the Poona Court to bring about rectification of the treaties of 1739-41 and to obtain the restoration of the Province of the North, when, even as regards the proposed grant of the annual revenue of Rs. 12,000, Dhume was rendered nervous by the efforts of the Marathas to find "some old conventions", when he had not taken with him to Poona the texts of the old treaties, and when he did not even know what the old treaties were about—"*I do not know how these were made and by whom*" [1].

60. Likewise, in paragraph 53 the Portuguese Government stated that a mention of the treaties of 1739-41 is found in the preamble of the draft of 1775. That preamble may be examined again to see if the contentions of the Portuguese Government find any support there (apart from what has been stated above of Dhume's ignorance of those treaties). The preamble of the draft of 1775 states:

> "Previously treaty between the Firangee State and Shrimant Peshwa Pant Pradhan was concluded *to the effect that they should work in perpetual amity without interruption.*" [1]

Can it be said that this was a reference to the treaties of 1739-41, and in particular to the territorial dispositions under those treaties,

[1] Our italics.
[2] Italics supplied by the Portuguese Government.

or to the intention of the Marathas to rectify those dispositions? In fact the mutual obligation "to maintain perpetual amity without interruption" is found not in the treaties of 1739-41, but in the treaty of 1760. If, at all, the preamble of the draft of 1775 referred to any specific treaty, it referred to the treaty of 1760 under which Portugal abandoned her claim to her former territories and undertook not to revive any disputes. (See paragraph 36 above.)

61. Thus neither the draft of 1775 at Indian Annex E. No. 3 nor Dhume's letter of 1776 at Annex No. 25 to its Reply can help the Portuguese Government in substantiating its assertions.

62. At paragraph 57 of its Reply the Portuguese Government speaks again of Raghoba. It says that in 1778 the Marathas gave a resounding defeat to Raghoba and made him a prisoner. It says that this was the moment when negotiations between the Portuguese Government at Goa and the Maratha Court at Poona reached a successful conclusion. It further says that at this point of time, in 1779, one year after Raghoba's final defeat and imprisonment, the Marathas were obliged to make a territorial concession in order to "assure Portuguese neutrality" and to "pay for this neutrality to which it owed its victory to a large extent". The Government of India would like to ask, first, if it could really be said that the Marathas owed their victory against Raghoba to the Portuguese, if Portugal had the strength and resources to help the Marathas, and whether the Marathas needed Portuguese help at all? Secondly, if it stands to reason that having given a resounding defeat to Raghoba in 1778, the Marathas would have proceeded to promise to the Portuguese in 1779 cession of territory and to make actual cession in 1783 and 1785? History has yet to record an instance of a proud nation, contemptuous of foreign rule and determined to root out its presence, ceding away, in the hour of its victory, some territory to a weak foreign neighbour.

* * *

63. The Government of India has thus demonstrated that there is no truth in the statement in paragraph 58 of the Portuguese Reply that the alleged Treaty of 1779 "appears as the crowning of a series of a diplomatic demarches the purpose of which, right from the beginning was the restoration of the Portuguese sovereignty over at least a part of the old Province of the North; the Accord is sealed in the form of a rectification of the onerous peace conditions which had been imposed upon the Portuguese by the first Treaty of Punem of 1740".

64. The Government of India would like to draw attention to the fact that the claim of the Portuguese Government as presented in its Reply is quite different from the one made in its Memorial, namely

that the alleged territorial grant was contemplated in and arose from the treaty of 1739. Paragraph 11 of the Memorial reads:

> "A number of questions remained pending between Portugal and the Maratha empire, following the conclusion of the Treaty of Raia of 1739, by virtue of which certain territories had been ceded by the Portuguese to the Marathas, namely, the fort of Bassein, and a portion of the former territory of Daman which was situated in its North Province. Negotiations were opened to settle these questions. They related particularly to the return to Portugal of the territories of the North Province which had been ceded in 1739, or, failing such return, to the acquisition of other territories as compensation."

5. *The grant of rights of collection of revenue in villages yielding annual revenue only of Rs. 12,000 could not be termed restoration of the old Province of the North or compensation for the old Province of the North.*

6. *The villages in which revenue rights were granted by the Marathas to the Portuguese in 1783 and 1785 as the result of Dhume's mission were not in fact situated in the old Province of the North and had never belonged to the Portuguese at any period of time.*

65. As has been shown in the Counter-Memorial and will be further referred to in this Rejoinder the subject matter of the actual grant made by the Marathas to the Portuguese in 1783 and 1785 was the revenue of Rs. 12,000 to be collected every year, while the grant continued, from Maratha villages in Dadra and Nagar Aveli.

66. The Portuguese old "Province of the North" was a vast territory and consisted of renowned forts, fortresses and strongholds. It extended from Chaul 50 miles south of modern Bombay to Daman which is about 100 miles north of Bombay and extended about 25 to 50 miles into the interior. (Annex F. No. 18.) Its worth to Portugal in terms of money would have had no relation to an annual revenue grant of Rs. 12,000.

67. Dadra and Nagar Aveli never formed part of Portuguese possessions and did not belong to the old "Province of the North". (Indian Annex C. No. 25 and Indian Annex F. No. 19.) For this clear reason the Portuguese assertion that Dadra and Nagar Aveli was ceded to them in restoration of their old "Province of the North" or as compensation for the loss of the old "Province of the North" is seen to be without reality.

* * *

68. The Portuguese Government have set out the historical antecedents of the alleged treaty in order to give interpretation to its clauses. However, instead of setting out the policy and intentions

of the Marathas in the matter it has set out at great length the hopes, ambitions and designs of the Portuguese Government at Goa. It is evident that where the intentions of the parties are not *ad idem* it is the intention of the grantor which must govern the transaction and give interpretation to the grant. The Government of India has demonstrated above that the policy and intention of the Marathas was not only not to cede to the Portuguese fresh territory in India but positively to expel them from India.

SECTION II

The bases of negotiations for a Treaty of friendship and alliance. Portuguese proposals. The Portuguese Text of the 4th May 1779 in Portuguese and Marathi languages. The Maratha text of 17th December 1779. The Maratha decision of 1776 to make a grant of Saranjam to the Portuguese and to their Envoy, Narayan Vithal Dhume

69. At paragraphs 61 to 81 of the Counter-Memorial the Government of India gave an account in chronological manner of the negotiations between the Portuguese Envoy, Narayan Vithal Dhume, and the Maratha Officials at the Poona Court for the proposed treaty and demonstrated that no treaty was finally concluded between the Portuguese and Maratha Governments. After setting out the relevant facts the Government of India summed them up in paragraph 82 as follows:

> 1. The treaty as proposed by the Marathas on the 17th December, 1779, was not approved or accepted by the Portuguese; the Queen of Portugal did not receive a faithful translation of the Maratha text of 17th December, 1779;
>
> 2. The Portuguese text of the proposed treaty was not seen or approved by the Queen of Portugal; nor was it accepted or approved by the Marathas; nor did the Marathas see a correct translation of that text;
>
> 3. There was a divergence between the Portuguese and the Maratha texts;
>
> 4. The documents did not constitute a treaty between the parties.
>
> 5. The Maratha text made it clear that a grant only of the revenues was in question;
>
> 6. The Portuguese text while being different from the Maratha text also contemplated a fiscal grant;
>
> 7. Wagh's translations of the Maratha text were incorrect and ambiguous.
>
> 8. Wagh's translation is the text relied upon by the Portuguese Government.

The Government of India submits that the above statement of facts stands unchallenged by the Portuguese Reply. In respect of Point 8, however, it is now found that while in the Memorial the Portuguese Government relied exclusively on Wagh's translation of the alleged treaty, in the Reply it has taken into consideration the original of the Marathi text of 17th December, 1779.

70. The Portuguese Government has dealt with the above facts at paragraphs 50 to 56 and 59 to 75 of its Reply. Broadly the argument

of the Portuguese Government falls into two parts: (1) that a valid treaty was formally concluded between the Portuguese Government and the Maratha Government in 1779, and (2) that a true accord and understanding existed between the parties, and the intentions of the Maratha Government and the Portuguese Government were *ad idem* in respect of the grant intended to be made to the Portuguese Government. In support of the above argument the Portuguese Government has made several statements of fact which are not supported by evidence in the file and it has given an entirely erroneous interpretation of these facts. It is the intention of the Government of India to re-state the correct facts relating to the negotiations for a proposed treaty of friendship and alliance and to show that the evidence in the file can lead only to the conclusion that there was no treaty concluded between the Marathas and the Portuguese in 1779 and that the intention of the Marathas was to grant to the Portuguese a revocable title to the collection of revenues from territory under Maratha sovereignty in a tenure known as Saranjam or Jagir.

The Draft of 1775:

71. At paragraph 61 of the Counter-Memorial the Government of India stated that the first draft of the treaty appeared to have been drawn up in 1775 by the Portuguese Envoy, Narayan Vithal Dhume. In support of this statement the Government of India referred to the document at Indian Annex E. No. 3. The Government of India stated that this draft did not contain any reference to cession of territory or even to the grant of revenues. At paragraph 50 of its Reply the Portuguese Government denies the attribution of this draft to Narayan Vithal Dhume and states that there is nothing in the text of the draft to lead to that conclusion. The Portuguese Government asserts that the text was drawn up by the Maratha Government and the proposals contained in the text were rejected for the reason:

> "that the Portuguese State would only sign an alliance with the Punem Government in exchange for territorial concessions in the old Province of the North".

In the previous section the Government of India has already shown the Maratha attitude towards Portuguese claims to the old "Province of the North". It will therefore refrain from making any further comments on this aspect of the Portuguese argument. The Portuguese Government has not produced any proof in support of its assertion in paragraph 50 that the proposal of 1775 emanated from the Maratha Government. On the other hand, if regard is had to the text of the proposal of 1775 one is left in no doubt that it was drawn up by a respresentative of the Portuguese Government. (Photocopy of Indian Annex E. No. 3 and its translation at Annex F. No. 20.) In the text the Portuguese Government of Goa is described

as "Hazrat Estad", that is the Majestic State, and the Maratha Ruler is described as "Shrimant Peshwa Pant Pradhan". It is a well-known fact and one which emerges again and again from the documents in the file that these were the appellations used by the Portuguese Government and that the Maratha appellation for the Portuguese Government of Goa was not "Hazrat Estad" but "Firangee". The Maratha Ruler described himself not as "Shrimant Peshwa Pant Pradhan", but as "Sarkar". The language of the document of 1775 therefore makes it absolutely clear that it emanated not from the Marathas but from the Portuguese, and since it was in the Marathi language its author obviously was Narayan Vithal Dhume, the Portuguese Envoy, whose mission it was to carry on negotiations on behalf of the Portuguese Government [1].

The Maratha decision of 1776 to make a grant of Saranjam to the Portuguese and to Narayan Vithal Dhume:

72. At paragraph 62 of the Counter-Memorial the Government of India referred to a Maratha document at Indian Annex C. No. 6. This document is a resolution of the Maratha Government dated the 24th August, 1776. This document describes the protestations of Portuguese friendship with the Sarkar and the consequent decision of the Maratha Government to make a revenue grant to the Portuguese and to Narayan Vithal Dhume. This decision is described in the Maratha memorandum in the following words:

> "the Sarkar and the Firangee entered into friendship. Therefore the Firangee should be assigned villages of the total revenue yield of Rs. 15,000 useful to Daman. Care should be taken that after the assignment the authority of the Sarkar will meet with no obstruction. Accordingly, without interruption of Sarkar's authority, they should be assigned. Imarat should not be erected in villages so granted. According to this agreement be made."

At paragraphs 51 and 52 of the Reply the Portuguese Government admits the authenticity of this document and states that the Maratha decision of the 24th August, 1776, was conveyed to the Portuguese Government by Marayan Vithal Dhume in a letter of the 26th August, 1776. This letter, which, it will be noticed, was written only two days after the Maratha decision is given at Annex 25 of the Portuguese Reply. Narayan Vithal Dhume writes:

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[1] While it is most improbable that some other representative of the Portuguese Government was responsible for drawing up this text, the relevant point is that this was a draft proposed by the Portuguese Government and not by the Maratha Government. The nature of the proposals themselves make this clear, for example, Article 1 of the text required the Marathas to show honour to the Portuguese Fleet:

> "Hazrat Estad should be shown the honour which other Western Powers extend to it."

It is hardly conceivable that such a proposition would have emanated from the Maratha Government.

> "*I have also obtained Rs. 12,000 revenue* [1] more than what is given to the State in the villages of Daman *with obligation of not constructing buildings* [1] in any part of the State and of presenting to the Most Blessed *the revenue of one year that is Rs. 12,000* [1] either in the form of powder, bullets and artillery or in money."

Narayan Vithal Dhume's letter of the 26th August, 1776, shows that his principal purpose in negotiating with the Marathas was to obtain compensation for damage to the Portuguese Navy. After stating in the third paragraph that he had been able to obtain compensation of a sum of Rs. 66,454 for the damage to the Portuguese ship "Santa Anna", he proceeds in the next paragraph to state that he had *also* obtained Rs. 12,000 of revenue. It is in the sixth paragraph that he gives expression to his nervousness arising from the search conducted by Maratha Officials for former treaties with the Portuguese. (At paragraphs 16 to 30 above the Government of India have already refuted the Portuguese argument that the proposed treaty had anything to do with the earlier treaties of 1739, 1740 and 1741.) In the submission of the Government of India, Dhume's letter, which has been produced by the Portuguese Government, entirely supports the Indian argument that in August 1776 the Maratha Government decided to make a Saranjam grant to the Portuguese in consideration of their friendship and a similar grant of Rs. 3,000 to Narayan Vithal Dhume for his services to the Maratha State. It will be noticed that while the Maratha document speaks of a total grant of Rs. 15,000—Rs. 12,000 for the Portuguese and Rs. 3,000 for Narayan Vithal Dhume—Dhume in his letter says nothing about the Saranjam grant received by him.

73. In paragraphs 54 and 55 of the Reply the Portuguese Government finds some difficulty in accepting the implication of the clear words in the Maratha memorandum:

> "care should be taken that after the assignment the authority of the Sarkar will meet no obstruction. Accordingly, without interruption of Sarkar's authority they should be assigned".

The Portuguese Government states that these words were not conveyed to Dhume and therefore they could not have any value vis-à-vis the Portuguese Government. It states that had these words come to Dhume's knowledge he would have without doubt conveyed them to the Portuguese Government. The fact, however, is that these words are found in the Maratha document, and there is a strong presumption that Narayan Vithal Dhume who was at the Poona Court and who was canvassing the grants in question did, in fact, take note of all the contents of the Maratha memorandum of the 24th August, 1776. It has been pointed out above that while the Maratha Government had decided to make a total grant of

[1] Our italics.

Rs. 15,000—Rs. 12,000 to the Portuguese and Rs. 3,000 to Dhume —he informed the Portuguese only about a grant of Rs. 12,000 to them. This conduct on the part of the Portuguese Envoy is in itself sufficient to refute the Portuguese statement that

> "he would certainly have informed the Viceroy thereof as he had informed him of all the other proposals concerning the planned Agreement". [1] (Portuguese Reply, paragraph 54.)

74. As will be shown below in Section IV the grants of Saranjam which were actually made by the Maratha Government in 1783 and 1785 were made in pursuance of the decision of the 24th August, 1776. This is abundantly clear from the documents relating to the grant. The "agreement" referred to in those documents is the above decision, resolution or assurance of 1776. No formal treaty was concluded between the Maratha Government and the Portuguese Government on the subject of the grant of Rs. 15,000—Rs. 12,000 to the Portuguese and Rs. 3,000 to Narayan Vithal Dhume. Yet, the "agreement" referred to in the Sanads relating to the grant is "an agreement for Rs. 15,000". In the view of the Government of India, Dhume's letter written two days after the decision of the 24th August, 1776, constitutes an admission of the nature of the Saranjam grant made to the Portuguese Government and to him. This letter estops the Portuguese Government from asserting that the Portuguese Government at Goa and Narayan Vithal Dhume were under the impression that the Maratha Government had undertaken to cede to them in full sovereignty any of its territory. In his letter Dhume makes it clear that he had "obtained Rs. 12,000 of revenue". He also took express note of the fact that no Imarat could be constructed in the Maratha villages from which such revenue was to be collected.

75. At paragraph 56 of the Reply, the Portuguese Government referred to a letter dated 21st January, 1777, from Camara, the Portuguese Viceroy of Goa, to a Maratha official, requesting that the agreement reached by the Maratha Government with Dhume be implemented. In this letter (Indian Annex E. No. 4), the Portuguese Viceroy obviously referred to the Maratha Resolution of August, 1776, and the informal understanding then given by Maratha

[1] The Portuguese Government have suggested at paragraph 55 an alternative translation of the original Marathi of the document at Annex C. No. 6. The Government of India finds the translation suggested by the Portuguese Government erroneous and untenable from every point of view. The argument of the Portuguese Government that the reservation in respect of the authority of the Sarkar could not have any value *vis-à-vis* the Portuguese Government in the absence of such reservation having been conveyed to the Portuguese Government by Narayan Vithal Dhume is also erroneous and untenable. It is sufficiently clear from Dhume's letter that he had only obtained revenue of Rs. 12,000 and that there was no question of cession of territory. Consequently it was not necessary for the Marathas to make any reservation or to convey such reservation to the Portuguese.

officials, to Narayan Vithal Dhume. The Portuguese Government stated in paragraph 56 of the Reply that in this letter the Portuguese Viceroy insisted on cession of territory to the Portuguese Government "in accordance with the agreement made with Narana Sinai Dumo". The Portuguese Government stated that "this agreement was embodied in the Treaty of 1779". The Government of India is unable to find in the Maratha Resolution of 1776, or in Dhume's letter written two days after that Resolution, any agreement for cession of territory to the Portuguese Government. The decision in 1776 related to a grant of "12,000 Rupees of revenue" to the Portuguese, and another 3,000 Rupees to Narayan Vithal Dhume.

76. At paragraph 64 of the Counter-Memorial, the Government of India stated that a draft of the 21st October, 1777, which appeared to have been drawn up jointly by Narayan Vithal Dhume, the Portuguese Envoy, and a Maratha official, by the name of Vinayak, did not contain any provision for cession of territory, nor did it mention the Maratha decision of the 26th August, 1776. In paragraph 56 of the Reply, the Portuguese Government denies the attribution of this draft to the joint efforts of Narayan Vithal Dhume and Vinayak, and states that this is a Maratha draft which was rejected by the Portuguese Government for the reason that it "remained silent upon the subject of territorial concession which had already been promised". The Portuguese Government, however, is unable to produce any evidence to explain how and in what circumstances this draft, which it alleges was a proposal of the Maratha Government, was rejected by the Portuguese Government. The fact, however, remains that this draft of the proposed treaty did not contain any provision for cession of Maratha territory to the Portuguese.

The Portuguese text of the 4th May 1779 and the Maratha text of the 17th December 1779:

77. The argument in the Portuguese Reply from paragraph 59 onwards is that the Portuguese text of the 4th May 1779 and the Maratha text of 17th December 1779 constitute a true treaty between the Maratha Government and the Portuguese Government. The Portuguese contention is that *a formal treaty was concluded in 1779* and that under this treaty the Maratha Government ceded to the Portuguese Government of Goa a part of its territory in full sovereignty. The Portuguese Government also appears to argue in the alternative that, even if it were to be admitted by it that there was no formal treaty between the parties "it is impossible to conclude therefrom that no *accord* existed between the two Governments".

78. The Government of India denies that there was any document or a series of documents which could be said to constitute a treaty

between the Marathas and the Portuguese and it also denies that there was an accord, understanding or agreement between the parties as to alleged cession of territory in sovereignty.

79. At paragraph 82 (2) of the Counter-Memorial the Government of India stated that the Portuguese text of the proposed treaty was not seen or approved by the Queen of Portugal, nor was it accepted or approved by the Marathas, nor did the Marathas see a correct translation of that text. However, the Portuguese Government states in paragraph 64 of the Reply that the Maratha Ruler took cognizance of the Portuguese text of the 4th May 1779.

80. At paragraph 63 the Portuguese Government admits that there does not exist any document relating to the alleged treaty which contains the seal and signature of both the Portuguese Government and the Maratha Government. However, in spite of this admission the Portuguese Government proceeds to assert in the same paragraph that "it is impossible to conclude therefrom that no accord existed between the two Governments". It argues that there was at that time a usage among the peoples of Asia according to which authentic texts of treaties were exchanged between the parties which exchange constituted a "treaty" between the parties. In respect of the existence of this usage the Portuguese Government cites the example of the "treaty" with Angria. It is significant, however, that in the preceding paragraph, paragraph 62 of the Reply, the Portuguese Government admits that the "treaty" concluded between the Portuguese State of India and the native ruler Angria in 1778 was *refused* ratification by the Portuguese Queen in 1782 and consequently that "treaty" never came into existence and never created legal obligations for any party. As the Government of India pointed out at paragraph 72 of its Counter-Memorial, the possibility of the Queen of Portugal refusing to ratify a treaty made it absolutely clear that such a treaty could not have come into existence or created any legal obligations unless it obtained ratification and was signed by an authorized agent of the Portuguese Government. The very instance cited by Portugal lends force to the Indian argument that there could have been no treaty between the Marathas and the Portuguese Government unless both the Maratha ruler and an authorized plenipotentiary of the Portuguese Government put their seal and signature on the same document. Furthermore, the Government of India would like to state that the Portuguese assertion that there was at that time usage in India according to which an exchange of documents constituted a formal treaty between the parties is erroneous and has no foundation. The Government of India has put together a few instances of treaties entered into in India at that time which show that these treaties were signed, sealed and ratified in a proper manner. These treaties show that it was considered necessary that

the seal and signature of both the contracting parties should appear on a single document (Indian Annex F. No. 21).

81. At paragraph 70 of the Counter-Memorial the Government of India reproduced a quotation from a letter written on the 1st January, 1781, by de Sousa, the Portuguese Viceroy, to the Portuguese Government at Lisbon. In this letter he wrote:

> "Madhav Rao, Ruler of the Marathas, signed the treaty and forwarded it to me, *with the request that I should approve it* [1]. I approved *it* [1] and signed *it* [1] as it seemed convenient in the public interests of the State."

This letter shows that the text of the 17th December, 1779, forwarded by the Maratha Ruler was a proposal and the Maratha Ruler desired the proposal to be "approved". In the above mentioned letter the Portuguese Viceroy asserts that he had signed the document sent by the Maratha Ruler. The fact, however, is, which fact can also be verified by an examination of the photocopy of the original Maratha document of the 17th December 1779 produced by the Portuguese Government, that de Sousa did not put his seal or signature on the Maratha document of 17th December 1779. This fact is also admitted by the Portuguese Government at paragraph 65 of the Reply. It will be noticed that this very letter of the 1st January 1781 from de Sousa, the Portuguese Viceroy, to the Government at Lisbon, makes it absolutely clear that it was necessary for the Queen of Portugal to ratify the treaty. The Portuguese Viceroy wrote:

> "I enclose herewith the copy of the letter of Madhav Rao and the treaty; of which I inform you in order that *it being submitted to Her Majesty she may decide what she thinks is the best* [1]."

At paragraph 68 the Portuguese Government state: "one way or the other the treaty was ratified by the Queen".

82. At paragraph 60 the Portuguese Government seemed to imply that in paragraphs 70, 71 and 72 of the Counter-Memorial the Government of India had accepted the Portuguese contention that the Queen of Portugal:

> "simply ratified a Portuguese translation of the original Marathi".

If paragraphs 70, 71 and 72 of the Counter-Memorial are seen again it will be noticed that the Government of India did not admit that the Portuguese Queen had made any "ratification". At paragraph 71 of the Counter-Memorial the Government of India reproduced a letter from the Secretary of State at Lisbon to the Viceroy of Goa stating that he had received from him a translation of the treaty which had been submitted to the Queen and that the

[1] Our italics.

Queen had found the translation to be unintelligible[1] but that in any case she had found it fit to approve the treaty. In paragraph 72 of the Counter-Memorial the Government of India accordingly stated that:

> "the only text of the draft treaty which was seen and approved by the Queen of Portugal was the Portuguese translation of the Maratha text of 17th December 1779; and that the Portuguese text of 4th May 1779/11th January 1780 was not sent to her by the Governor of Goa, *nor did she sign, approve or ratify that text, or indeed any other text*".

Indeed, the Portuguese Government appears to accept this statement of fact but it proceeds to state at paragraph 68 of the Reply that:

> "the ratification of the treaty by Queen D. Maria I, the fact that she only had cognizance of the Portuguese translation of the Marathi original and the question as to whether or not this translation informed the Queen fully concerning the thought of the Maratha Government, are circumstances which are relied upon by the Government of India entirely irrelevantly since they do not concern the question before us".

and again in the same paragraph:

> "one way or the other the treaty was ratified by the Queen".

Accordingly, the Government of India wish to draw the attention of the Court to the fact that the Portuguese Government asserts at one and the same time that the Queen of Portugal ratified the treaty "one way or the other"; that the question of ratification is irrelevant; that the fact that the Queen approved of a mistranslation is of no consequence; and that it does not matter at all whether the Queen was informed of the "thought of the Maratha Government". The Portuguese Government seems to ignore the fact that there is a great divergence between the original text of the Maratha document of 17th December 1779 and the translation carried out by Anant Kamodi Wagh, particularly in Article 17 which is the Article invoked by the Portuguese as their title to cession of territory in full sovereignty from the Marathas. It is a remarkable fact and one on which the Portuguese Government has not commented, that the Portuguese Viceroy at Goa did not send to the Queen the text of the 4th May, 1779, which was available in the Portuguese language but sent her Wagh's mistranslation of the Maratha text of the 17th December, 1779. Accordingly, it emerges from these facts:

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[1] It was precisely Wagh's deliberate mistranslation of Article 17 by the introduction of a grammatical ambiguity which is unintelligible and requires some effort to understand. The Government of India have already referred to this grammatical ambiguity in paragraph 81 of the Counter-Memorial and will refer to it again below in paragraph 93.

1. That it was necessary for the Queen of Portugal to ratify the alleged treaty.

2. That the Portuguese text of the 4th May, 1779, never came to the notice of the Queen of Portugal.

3. That the contents of the Maratha text of the 17th December, 1779, never came to her notice.

4. That what came to her notice and was approved by her was a mistranslation of the Maratha text of 17th December 1779, which mistranslation seemed to indicate that the Marathas intended to part with their "dominion" over certain territories.

83. However, assuming for the sake of argument, that in order to bring a treaty into existence it was not necessary for the Queen of Portugal to ratify either the Portuguese text or the Maratha text, or for the Portuguese Viceroy of Goa to formally approve the Maratha text of the 17th December, 1779, and that an exchange of authentic texts could have, according to the alleged usage of the times, brought a treaty between the parties into existence, it is clear that no exchange of authentic texts ever took place and the Maratha Government never received an authenticated text of the 4th May, 1779. At paragraph 64 of the Reply the Portuguese Government states the sequence of events as follows:

> "this was exactly what happened in connection with the treaty of Punem in 1779—this and nothing else:—Viceroy Camara forwarded to the Peshwa on the 4th May 1779 a text authenticated by his signature which meant that as of that time, he undertook, in the name of the Portuguese State, to fulfil the provisions of that document.
>
> —the Peshwa took cognizance of that text since he stated in a letter which he wrote to the Portuguese Viceroy on December 23rd of that year that the treaty 'was given to (my) Sarkar by Narana Vital'; having decided to accept it he had a text in the Marathi language drafted, affixed his seal to it on the 17th December and transmitted it to the Viceroy thus considering himself, as of this time, bound vis-à-vis the Portuguese State to comply with the provisions of that document."

and in paragraph 65:

> "from that time on the treaty was concluded since a reciprocal undertaking existed which had been solemnly accepted.
>
> No further formality remained to be accomplished; that is the reason why the Peshwa upon writing to the Viceroy on the 23rd December to inform him of the transmission of the Marathi text simply asked him for an acknowledgement of receipt. He did not ask him in any way to ratify it and to return it to him: he had no reason to do so since the ratification of the treaty by the Government of Goa had already been made by the Viceroy Camara on the 4th May 1779.

> And that is also the reason why Viceroy Sousa when he received the Maratha text was not at all concerned with signing it. This text then, was not a proposal for a treaty which was forwarded to him for ratification; it was the treaty itself with the official ratification given to it by the Master of Punem. What Viceroy D. Frederico Guilherme de Sousa did was to sign the Portuguese version of the 4th May 1779 to endorse the undertakings agreed to in this text by his predecessor."

In the submission of the Government of India the above account is entirely inaccurate. The Portuguese Viceroy did not send any authenticated text of the alleged treaty to the Maratha Government. The Portuguese Government has produced no evidence that the Maratha Government received an authenticated Portuguese text of the 4th May, 1779. As the Government of India will show below, all that the Maratha Government received from the Portuguese was an official proposal in the form of a draft in the Marathi language which was drawn up at the same time as the Portuguese text of the 4th May 1779. The Government of India will show below that the text it had described in paragraphs 69, 73, 75 and 77 of the Counter-Memorial as "Dhume's translation" of the Portuguese text, is now found to be an official text sent by the Portuguese Government to the Maratha Government as the basis of negotiation. For its statement that the Maratha Government received an authenticated Portuguese text of the alleged treaty the Portuguese Government relies on a letter purported to have been written by the Maratha Ruler on the 23rd December, 1779. As the Government of India pointed out in paragraph 67 of the Counter-Memorial, this letter is found in the form of a translation in the Portuguese language made by Anant Kamodi Wagh and printed in a Portuguese "Collection of Treaties" by Biker. The Government of India finds it difficult to place reliance on a translation carried out by Anant Kamodi Wagh who was responsible for a serious and deliberate mistranslation of Article 17 of the Maratha text of 17th December, 1779. Quite apart from the unreliability of the translation, there is nothing in that letter to indicate that the Maratha Government had received an authenticated Portuguese text of the 4th May 1779. Kamodi's translation speaks of:

> "the treaty of agreement which was given to my Sarkar by Narana Vital".

The words "treaty of agreement" mean no more than *a draft* of a treaty. Indeed, as appears from other documents and circumstances, it is clear that the Maratha Ruler did not receive any text other than the one which was described in the Counter-Memorial as "Dhume's translation" of the Portuguese text. It is a well-known historical fact that the Marathas did not have any knowledge of the Portuguese language and that they could not have taken cognizance of a text in the Portuguese language. There is evidence to show

that the draft which was received from the Portuguese Government and which was circulated to various officials of the Maratha Government for their comments was in the Marathi language. From a letter dated the 17th November, 1779, which a Maratha official, Mahadji Scindia, wrote to the Maratha Minister Nana Phadnis, it is found that a draft of the proposals of the Portuguese Government in the Marathi language was being considered by these Maratha officials (Annex F. No. 22). Furthermore, the fact that the Portuguese official document of the 4th May, 1779, bearing the signature of Camara was countersigned at Goa on the 11th January 1780 by his successor de Sousa proves conclusively that at least till that date this document remained in Goa and had not been sent to the Maratha Government at Poona. The Portuguese Government has put forward no evidence that this document went to Poona after being signed by Camara, came back to Goa for de Sousa's countersignature, and was again sent to the Marathas as their "authenticated copy of the Portuguese treaty". As the Government of India will show below in paragraph 96, this document never left Goa either before or after de Sousa's countersignature and still remains in the archives of the Portuguese Government. The Government of India during its long search among Maratha archives has not been able to find any official text of the Portuguese Government resembling the one found to exist in Portuguese archives under the signature of Camara and de Sousa.

84. At paragraph 69 of the Reply the Portuguese Government had come to the conclusion that "the Treaty was concluded on 17th December 1779" and that it is contained in two official texts, an original text in the Portuguese language and an original text in the Maratha language. Earlier, in paragraph 64 of the Reply, the Portuguese Government states that on the 4th May, 1779, the Portuguese Viceroy authenticated the text of the "treaty" and sent it to the Marathas, and that "as of that time he undertook, in the name of the Portuguese state, to fulfil the provisions of that document". The Portuguese Government also states, in paragraph 65, that "the ratification of the Treaty by the Government of Goa had already been made by Viceroy Camara on the 4th May 1779". The Government of India finds some difficulty in reconciling the statements of the Portuguese Government that a Treaty came into force on the 4th May, 1779, and also on the 17th December, 1779. If, however, the alleged treaty came into force vis-a-vis the Portuguese Government on the 4th May, 1779, why was it necessary for the Portuguese Viceroy to countersign it on the 11th January, 1780? If the "treaty" came into operation on the 17th December, 1779, why was it necessary for the Portuguese Viceroy to seek ratification and approval from the Queen of Portugal? From what has been stated above by the Government of India in paragraph 80 and 81, it is obvious that a treaty could not have come into force until it had

been ratified in a proper manner by the Queen of Portugal and her approval and ratification conveyed to the Maratha ruler. The Queen of Portugal, in fact, did not ratify any text of the Treaty, but merely "approved" a mistranslation of the Maratha text. This approval was given some time in February 1782. There is no evidence that the Queen's approval of the "treaty" was communicated to the Maratha ruler. In this connection the Government of India would refer to the letter of the Governor of Goa addressed to the Secretary of State at Lisbon dated the 1st January, 1781 (see paragraph 81 above). The Portuguese Viceroy de Sousa states there that no treaty was in existence when he succeeded Camara as the Viceroy at Goa. He states:

> "my predecessor sent Narayan Sinai Dumo, Envoy, on behalf of the Majestic State to the Court of Poona of Madhav Rao Pandit Pradhan, Ruler of the Marathas in order to discuss and conclude the negotiation of peace and interests of the State. The Envoy had discussed the clauses *but when I assumed office the agreement had not yet been made and concluded.*"[1]

The above constitutes an admission of the Portuguese Representative that when he assumed office towards the end of the year 1779 *a treaty had not been made and concluded*[1].

85. The Government of India accordingly submits that no treaty was finally concluded between the Marathas and the Portuguese on the 4th May, 1779, or the 17th December, 1779, or on any other date. This is to be seen from the following facts:—

(1) There is no document which contains the signature and seal of the two parties;

(2) There was no ratification on the part of the Portuguese sovereign or the Portuguese Viceroy;

(3) There was no exchange of authentic documents; and

(4) The documents in question are divergent.

86. On the last point, namely the divergence of the documents, the Portuguese Government states, in paragraph 69 of the Reply, that the fact that the texts are not strictly identical does not invalidate the existence of a "true accord" between the parties. The Portuguese Government asserts that the divergence between the texts does not exist to the extent that the Government of India wishes to have the Court believe. It asserts that it is sufficient to compare the "two official versions in question" to find that:—

[1] At paragraph 59 of the Reply the Portuguese Government state that the Government of India has changed its stand since the submission of the Preliminary Objection and that it admitted the existence of a treaty in that document. A reading of the Preliminary Objection makes it quite clear that even at that time the Government of India did not accept the validity of the alleged treaty. By using the words "treaty of 1779" it had not admitted the existence of a "treaty" creating a legal obligation for the Marathas.

(a) the two texts have the same number of articles,

(b) the subject matter treated in each Article of the Portuguese text is exactly the same as that treated in the Article bearing the corresponding number in the Marathi text,

(c) the undertakings assumed on both sides in each Article are exactly the same in Portuguese and Marathi texts, and

(d) the existence of discrepancies with the exception of rare details and simple differences of words are pefectly explainable by the difference of the structure of the two languages.

87. As the Government of India demonstrated in the Counter-Memorial, and will again demonstrate below, there is no truth in the Portuguese assertion that the divergence between the texts is such that a "treaty" could be said to exist in spite of it. The Government of India would like to point out that the mere fact that two proposals or drafts of a treaty are more or less identical does not by itself constitute a Treaty between the parties. Two different proposals or drafts are also capable of having the same number of Articles and the same subject matter in the Articles. The Portuguese Government appears to have missed the point that it has invoked the alleged treaty, particularly in regard to Article 17, and it is precisely this Article which is found to contain vital differences of language in each different document alleged to be the "treaty of 1779". These differences in language go to the root of the matter, and have given rise to opposite interpretations. In the view of the Government of India it is not possible to say that, in spite of these vital differences in the various documents, they can be said to be identical. In order to demonstrate the divergence in the text of Article 17 in the various documents in question, the Government of India set these texts side by side at paragraph 77 of the Counter-Memorial. For the convenience of the Court, these documents are again set out below:—

In the Portuguese text of 4th May 1779

> "As the Majestic State has evinced the greatest friendship towards the Pandit Pradhan, as proved by the Attorney, Pandit Pradhan has agreed to make *a contribution in Daman of 12,000 rupees starting from this year* [1] through his Daman jurisdiction by virtue of which he shall specifically give to the State the Sanad or the confirmatory order of the villages." (Indian Annex C. No. 2.)

In the Maratha text of 17th December 1779

> "Narayan Vithal Dhume conveyed assurances that the Firangee had evinced friendly sentiments towards the Sarkar and would in

[1] Our italics.

future be more friendly. In response, it is agreed that *villages yielding revenue of twelve thousand rupees where the authority of the Sarkar is unimpeded would be assigned towards Daman from the current year. The Firangee will not raise any Imarat in the same* [1]. Such villages will be specified." (Indian Annex C. No. 3.)

In Wagh's translation of the 6th January 1780 in Portuguese of the Maratha text of the 17th December 1779

"As the Portuguese have acted with the greatest friendship towards this Sarkar, as proved by Naraen Vital Dumo, which friendship shall be maintained henceforward, from the current year he shall give, namely in Daman, villages of 12,000 rupees, *without having in them dominion, nor any other hindrance on the part of the Sarkar* [1] and in which the Portuguese shall not erect buildings in accordance with the arrangement made, and the villages shall be specifically mentioned." (Indian Annex C. No. 4.)

In the Marathi version of the official Portuguese text of 4th May 1779 [2]

"The Firangee State entertains friendly sentiments towards Pandit Pradhan; the envoy conveyed assurances. Therefore it is agreed that the Pandit Pradhan should assign towards Daman *from the current year a Jagir of the revenue of twelve thousand rupees* [1] in Prant Daman. Accordingly a sanad listing the villages be given to the Firangee State by making a separate agreement." (Indian Annex C. No. 5 and Annex F. No. 23.)

88. It will be seen from the above that, according to the Portuguese text of the 4th May, 1779, the Portuguese were to receive from the Marathas *"a contribution in Daman of 12,000 rupees starting from this year"*. Under the Maratha text of the 17th December, 1779, *"villages yielding revenue of 12,000 rupees where the authority of the Sarkar is unimpeded would be assigned towards Daman from the current year. The Firangee will not raise any Imarat in the same."* In Wagh's mistranslation of the above Maratha text, the Marathas were to "give, namely in Daman, villages of Rs. 12,000 *without having in them dominion, nor any other hindrance, on the part of the Sarkar*, and in which the Portuguese shall not erect buildings". In the text, which was described by the Government of India in the Counter-Memorial as "Dhume's Translation of the Portuguese text", and which, as will be presently shown, is a text emanating from the Portuguese Government, "the Pandit Pradhan should assign towards Daman from the current year a *Jagir* of the revenue of twelve thousand rupees in Prant Daman".

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[1] Our italics.

[2] This was described in the Counter-Memorial as "Dhume's translation of the Portuguese text". As will be explained below this document is now found to be an official Portuguese document under the signature of the Portuguese Viceroy, Camara.

89. It will be seen that the texts are far from being identical with each other, and that there are major differences in the description of the subject matter of the grant which was proposed to be made by the Marathas to the Portuguese. It will be noticed that, in the Portuguese text, whole sentences are missing. Nothing is to be found there regarding the restriction on the building of "Imarat".

90. At paragraph 69 of the Reply, the Portuguese Government argues that, in spite of the divergence, a "Treaty" and a "true accord" could be said to exist, for the reason that one of the Articles in the documents was sufficient to keep a "Treaty" in force by providing for the solution of differences between the parties. The Portuguese Government states that Article 6 in the documents provided for the solution of "divergences" by direct conversation and through the mediation of the Envoy, Narayan Vithal Dhume. Article 6 in the documents, however, speaks of no settlement of "divergences" in the sense in which the Portuguese Government has used that word. It does not contain a provision for an authoritative construction of the clauses of the alleged "treaty" in the event of there being a difference in the language of the documents. This is to be seen quite clearly from the wording of Article 6 itself. In the Portuguese text of the 4th May 1779, Article 6 reads:—

> "this Treaty being concluded, *should there still be any motive of jealousy and discord* [1], the matter shall first be treated through the Attorney and both parties shall reciprocally act with all sincerity".

It will be seen that there is nothing in this Article to show that it provided for an authoritative interpretation of the clauses of the alleged "treaty" in the event of there being vital differences in the text of the various documents. The reference in this Article is to *jealousy and discord*, and differences of a *political* kind, and not to the question of the validity of the Treaty itself.

Wagh's mistranslation of the Maratha document of 17th December 1779

91. At paragraph 61 of the Reply, the Portuguese Government refers to the statement of the Government of India on the collusion between the two servants of the Portuguese Government of Goa, the Portuguese Envoy at the Maratha Court, Narayan Vithal Dhume, and the Portuguese official translator at Goa, Anant Kamodi Wagh. At paragraph 75 of the Counter-Memorial, the Government of India stated:—

[1] Our italics.

"... if the four texts—the Portuguese text of 4th May 1779/ 11th January 1780; the Maratha text of 17th December 1779; Wagh's translation into Portuguese of the Maratha text; and Dhume's translation into Marathi of the Portuguese text—are kept side by side, it emerges that (A) the two treaties differed in text, and (B) what purported to be a contemporary translation of, for example, the Maratha text, was in fact not a translation at all, but a repetition of the Portuguese text with certain alterations to make it appear as a document emanating from the Marathas. That is, Anant Kamodi Wagh and Narayan Vithal Dhume, both belonging to the same caste of Shenvai Brahmins, both in the pay of the Portuguese Government, presented to the Portuguese an altered text of the Portuguese document as a translation of the Maratha text, and to the Marathas an altered text of the Maratha text as a translation of the Portuguese text."

At paragraph 76 of the Counter-Memorial, the Government of India stated that because of the obvious collusion between the two servants of the Portuguese Government, the parties to the negotiations had no means of knowing and did not know what was actually contained in the texts prepared by the other party. The Maratha Government relied on the Marathi version of the Portuguese text of 4th May, 1779, and apparently the Portuguese Viceroy never saw a correct translation of the Maratha text of the 17th December, 1779.

92. The fact that there was collusion between Narayan Vithal Dhume and Anant Kamodi Wagh is not a mere presumption arising from both of them belonging to the same caste of Shenvai Brahmins, being well-known to each other, and in the service of the same Government; there is evidence of a deliberate attempt on the part of Anant Kamodi Wagh to distort the meaning of Article 17 of the Maratha text of 17th December 1779 by the introduction of a grammatical ambiguity. The Government of India will now proceed to demonstrate this point.

93. In his translation, Anant Kamodi Wagh rendered the provision "where the authority of the Sarkar be unimpeded" in the Maratha text of 17th December 1779 as "without having in them dominion nor any other hindrance on the part of the Sarkar". The difference in the sense brought out by Kamodi's translation will be seen more clearly if the two texts are again set side by side:—

In the Maratha text of 17th December 1779

"Narayan Vithal Dhume conveyed assurances that the Firangee had evinced friendly sentiments towards the Sarkar and would in future be more friendly. In response, it is agreed that *villages yielding revenue of twelve thousand rupees where the authority of the Sarkar is unimpeded would be assigned towards Daman from the*

current year. The Firangee will not raise any Imarat in the same [1]. Such villages will be specified." (Indian Annex C. No. 3.)

In Wagh's translation of the 6th January 1780 in Portuguese of the Maratha text of the 17th December 1779

"As the Portuguese have acted with the greatest friendship towards this Sarkar, as proved by Naraen Vital Dumo, which friendship shall be maintained henceforward, from the current year he shall give, namely in Daman, villages of 12,000 rupees, *without having in them dominion, nor any other hindrance on the part of the Sarkar* [1] and in which the Portuguese shall not erect buildings in accordance with the arrangement made, and the villages shall be specifically mentioned." (Indian Annex C. No. 4.)

Thus Wagh, instead of setting out the Maratha intention that their authority and jurisdiction in the villages of which revenues were to be assigned to the Portuguese would continue unhindered, conveyed the impression to the Portuguese Government that the Maratha Government had agreed to cease to have dominion in their villages. Thus, in order to convey the right impression, instead of rendering the Maratha phrase as "without having in them dominion, nor any other hindrance on the part of the Sarkar", he should have rendered it as "without the Portuguese having in them dominion or putting any hindrance on the authority of the Sarkar". The actual sentence in the original Portuguese language of Wagh is ungrammatical. Article 17 in Wagh's translation in the Portuguese language reads:—

"Como os Portugueses corresponderão com maior demonstracão da amizade com este Sarcar, provada por Naraena Vital Dumó, e que continuarão o mesmo ao diante, desde o anno corrente dará nomeadamente em Damão aldeias de 12,000 rupias sem ter nellas dominio, *nem* [1] outros embaracos da parte do Sarcar, nas quaes os Portugueses não levantarão obra na forma do ajuste feito, e serão determinadas as aldeias."

and the phrase in it can only be translated as:

"without having in them dominion, *nor* any other hindrance on the part of the Sarkar".

To make any sense, the word "*nor*" should have been "or". The Portuguese Government has covered up this oddity in Wagh's translation by setting it right in the French translation of Wagh's document, which they appended at Annex 1. to their Memorial. The French translation given there reads:—

"le Sarcar donnera dès cette année à Damao, les spécifiant, des villages d'un revenu de 12,000 roupies, sans avoir sur eux domination *et sans élever* d'autres difficultés de la part du Sarcar".

[1] Our italics.

However, in order to preserve the grammatical oddity in Wagh's mistranslation, it should have read as follows:—

> "le Sarcar donnera dès cette année à Damão, les spécifiant, des villages d'un revenu de 12,000 roupies, sans avoir sur eux domination, *ni* d'autres difficultés de la part du Sarcar".

This very oddity makes it clear that the ambiguity was introduced deliberately by Wagh and that his intention was to distort and mislead.

94. The Government of India cannot help but comment on the fact that it was this distortion which was sent to the Queen of Portugal for her approval and ratification, and that the Portuguese Viceroy refrained from sending her the Portuguese text of the 4th May, 1779, which described the grant as "a *contribution* in Daman of Rs. 12,000 starting from this year through his (Sarkar's) jurisdiction", and as *Jagir* in the Maratha version of that document, which, as the Government of India will presently show, was contained in that very document under the signature of Camara, and formed an integral part of it.

"Dhume's Translation." The Marathi version in the official Portuguese Text of the 4th May 1779

95. At paragraph 70 of the Reply the Portuguese Government refers to paragraphs 69, 73 and 75 of the Counter-Memorial and states that the assertions of fact made therein by the Government of India are entirely inaccurate. At paragraph 71 the Portuguese Government states that the attribution of the Marathi translation of the Portuguese text of the 4th May, 1779, to Narayan Vithal Dhume does not have any historical basis. The Portuguese Government make the following statement:

> "what can however, be said, with certainty concerning the said translation is solely:
>
> (a) that it *was made subsequently to the conclusion of the treaty* [1] since it mentions its ratification by Viceroy D. Frederico Guilherme de Sousa on 11th January 1780.
>
> (b) that *we do not know under what conditions it was made, nor when, nor by whom, nor for what purpose* [1]" (Portuguese Reply, paragraph 71).

96. The Government of India admits that when it prepared the Counter-Memorial it attributed the authorship of the Marathi translation of the Portuguese text of the 4th May, 1779, to Narayan Vithal Dhume on the basis of circumstantial evidence. However, the Government of India is now in a position to inform the Court that after the submission of the Counter-Memorial its Research Officers engaged in the preparation of the historical material on the

[1] Italics of the Portuguese Government.

facts of the Maratha Period have been able to bring to light the fact that the Marathi version of the Portuguese text of the 4th May, 1779, which the Government of India described as "Dhume's Translation", is an official document of the Portuguese Government and forms an integral part of a single document which contains the Portuguese text of the 4th May, 1779, under the signature of the Portuguese Viceroy Camara, himself. The Government of India has reason to believe that this document is available with the Portuguese Government and has always been available with it. In fact, photostats of certain documents produced by the Portuguese Government with its Memorial indicate quite clearly that this very document, "Dhume's translation", was actually at hand to those who were responsible for preparing the Portuguese case, and that obviously as an act of deliberate policy this document was withheld from the Court and was not added to the file. In proof of this assertion the Government of India has annexed at Indian Annex F. No. 23 a facsimile of the document in question. If the Court will kindly refer to the photocopy of the original of Annex 1 of the Portuguese Memorial it will notice that it is a photocopy of a document taken from *Arquivo Historico do Estado da India—Livro 2° de Pazes Tratados das Pazes entre o Magestoso Estado e Punem (Ano de 1779)* fls. 286r.- 289v. At the top right hand corner of the first sheet the page number is inscribed as 286. If the Court will refer to the facsimile of the document which is produced from the same source it will find a document with the page numbers 277 to 284. A comparison of the facsimile and the photocopy will show clearly that both the documents are from the same book, contain the same handwriting and even bear the same worm marks. It cannot be contested that the Portuguese Government had no knowledge of this document or that they did not know "under what conditions it was made, nor when, nor by whom, nor for what purpose". (Paragraph 71 of the Reply.) It is this very document which contains Article 17 in the Marathi language in the following words:

> "Pandit Pradhan should assign towards Daman from the current year a *Jagir* of the revenue of Rs. 12,000 in Prant Daman."

This document is dated the 4th May, 1779, bears the signature of Camara, and has inside it the Portuguese text of the 4th May, 1779, with a translation, article by article, in the Marathi language. The Portuguese text in this document is the same as the one given in translation at Indian Annex C. No. 2 and the Marathi version contained in this document is the same as that given in Indian Annex C. No. 5. In the view of the Government of India it is significant that the Portuguese Government did not at any stage of its pleadings produce the Portuguese official text of the 4th May, 1779.

97. The Government of India is now in a position to answer the question posed by the Portuguese Government in paragraph 71.

The Portuguese Government has asked under what conditions was the Marathi translation of the Portuguese text of the 4th May, 1779, made. The answer is that it was made officially by the Portuguese Government under the signature of the Portuguese Viceroy, Camara. The Portuguese Government has asked when it was made. The answer is that since it contains the signature of Camara and is found inside a document of the 4th May 1779 it must have been made on or before that date. The Portuguese Government asks by whom it was made. The answer is that it was made either by the Portuguese Envoy, Dhume, or by the Portuguese official translator, Wagh, and in any case it was made under the authority of the Portuguese Government. As the Government of India has stated in paragraph 76 of the Counter-Memorial, it is not of much relevance whether Anant Kamodi Wagh or Narayan Vithal Dhume was responsible for the translation in question. The relevant fact is that the description "Jagir" is found in a Portuguese document under the signature of the Portuguese Viceroy, was known to the Portuguese Government, and it was on the basis of this description that the Maratha Government drew up the text of 17th December 1779. At paragraphs 70 to 74 of its Reply the Portuguese Government deny even the interpretative value of the above document and call it:

> "an anonymous, defective and tendentious translation of the Portuguese original of the 4th May 1779".

The Government of India believe that they have made their point and they will not add to the bulk of the Rejoinder by making any further comment either on the arguments of the Portuguese Government which are based on the suppression of this document from the Court or on this conduct of the Portuguese Government.

SECTION III

The Nature of the Saranjam or Jagir Grant received by the Portuguese in 1783 and 1785

98. In paragraph 52 *et seq.* of the Counter-Memorial, the Government of India set out to show that, contrary to what is asserted by the Portuguese Government all that the Portuguese received from the Marathas in 1783 and 1785 was a revocable and temporary title to a share of the public revenues of villages in Dadra and Nagar Aveli in Maratha territory. In 1783 and 1785, for the purpose of ensuring friendly relations on the part of the Portuguese of Goa, and on condition of the Portuguese of Goa continuing such relations and rendering certain services to the Marathas, the Maratha Government made to the former an annual subsidy of Rs. 12,000 which was to be collected in the form of public revenues from certain Maratha villages. This grant was known as Jagir or Saranjam, was made for a political purpose, and its tenure was dependent on the existence of friendly relations on the part of the Portuguese of Goa and on the performance by them of certain services incidental to the grant, i.e., the services of a feudatory grantee to the Sovereign Grantor. In no case could the performance of such service on the part of the grantee qualify or derogate from the sovereign rights of the Grantor in the subject matter of the grant.

99. The grant known in Indian Public Law as Saranjam or Jagir was explained in paragraph 56 of the Counter-Memorial as follows:

> "Saranjam or Jagir (the two terms being interchangeable, Saranjam being the Maratha equivalent of the Moghul term Jagir) was the temporary assignment by a sovereign grantor of a share of the public revenue from villages or lands. A Saranjam was neither transferable nor hereditary. It was enjoyed at the pleasure of the Sovereign and was terminable at any time. This tenure is well-known in India and originated in the Moghul times when it was known as Jagir. In Maratha country it was known as Saranjam. The revocable nature of the grant known as Saranjam or Jagir was consistently stressed by the British Government which did, in fact "resume" many saranjams and jagirs. There is considerable jurisprudence on the subject and it appears clearly from numerous decisions of British Indian Courts and of the Judicial Committee of the Privy Council that (A) a Saranjam was a grant only of the royal share of the revenue, and unless expressly provided for did not grant any proprietary interest in the soil, and (B) in either case the grant was revocable at the pleasure of the Government. In Secretary of State v. Girjabai (A.I.R. 1927 (P.C.) 238), the Privy Council held: "Now we find from Wilson's Glossary that amongst

the Marathas the term saranjam was applied specially to a temporary assignment of revenue from villages or lands for the support of troops or for personal military services usually for the life of the grantee: also to grants made to persons appointed to civil offices of the States to enable them to maintain their dignity and to grants for charitable purposes. These were neither transferable nor hereditary and were held at the pleasure of the sovereign."

A similar view was taken by the Privy Council in Raghoji Rao v. Lakshman Rao (36 Bombay 639), wherein it was held that the term jagir implied no grant of the soil but a personal grant only of the revenue to the grantee. In their rules and regulations relating to Saranjam and Jagir, the British Government recognized and accepted that in Indian Public Law Saranjams and jagirs were revocable and terminable at the pleasure of the Government. (Reports and studies of British officers on the nature of saranjams and jagir will be found at Indian Annex E. No. 1.) Section 38 of the Bombay Regulation 7 of 1827 provided that a Jagir was liable to resumption at the pleasure of the Government. This principle was repeated in Section I (3) of the Bombay Regulation 6 of 1833, and in the Saranjam Rules of 1898. In Daulatrao v. Province of Bombay (49 Bombay Law Reports (1947) page 270) the Full Bench of the Bombay High Court observed that "the whole structure of the Saranjam tenure is founded in the sovereign right, which can only be changed by conquest or treaty. So founded, jagirs or saranjams, with the feudal incidents connected with them, are granted or withheld at the will of the sovereign power, and, if granted, the fixity of the tenure is always subject to interruption or revocation by resumption, be it temporary or absolute in character". Under the Bombay Saranjam Rules, 1952, all saranjams were resumed by the Government with effect from 1st November, 1952. (Indian Annex E. No. 1)."

100. As authority for the above account of the tenure known as saranjam or jagir, as it was understood by the Moghul rulers of India, by the Marathas, by the British Indian Government and the Government of Independent India, reference was made to the books and reports of British officers of the nineteenth century—Harington (1817), Maddock (1841) and Etheridge (1874) and a book by Patel published in 1954 (Indian Annex E. No. 1 at **II**, pp. 216, 224 and 236, respectively), and also to important decisions of the Judicial Committee of the Privy Council, and of Indian courts.

101. The points which the Government of India wished to emphasize in the Counter-Memorial were:

(1) Saranjam or jagir was a grant made by a Sovereign Grantor to a subject, vassal or feudatory;

(2) The grant of saranjam or jagir consisted of the assignment by the Sovereign Grantor of the public revenue or a share of the public revenue from villages or lands under the sovereign jurisdiction of the Grantor. In rare cases, the property in the villages or lands was included in the grant. However, unless the grant of property was absolutely clear from the terms of the grant, the

grant carried with it only an assignment of public revenue or a share of public revenue;

(3) The grant was enjoyed at the pleasure of the Sovereign Grantor and was terminable at any time at his will and discretion;

(4) The grant by its very nature was temporary, non-transferable and non-hereditary.

102. At Annexes 1 and 2 of their Reply, the Portuguese Government have appended an argument based apparently on a study of saranjam and jagir tenure. The Government of India cannot help but remark that the study of the tenure by the Portuguese Government is very incomplete and that the Portuguese Government have seriously mis-stated the Indian Public Law relating to the subject. The Government of India therefore seeks the indulgence of the Court for the somewhat fuller exposition of the Indian Public Law relating to saranjam and jagir tenure which Portugal's misrepresentation of that law obliges it to present to the Court.

Jagirs granted by the Moghul Rulers of India

103. The practice of granting jagirs was started by the Moghul emperors who ruled India from the sixteenth to the eighteenth century. It was their practice to keep and maintain a feudal aristocracy as the main provider of services—political and military—by assigning [1] to them, villages or tracts of land whose revenue they could collect and appropriate. In Moghul law and practice, the jagirdar, i.e., the holder of the jagir, was a servant of the government and he usually held an office called the *munsub*. A classic account of the jagirdar system under the Moghuls is contained in an erudite work by John Herbert Harington, President of the Council of the College Regulations of Bengal Presidency, which was printed at Calcutta in 1817. An extract from the work will be found at Indian Annex E. No. 1, **II**, pp. 216-223. The attention of the Court is respectfully directed to the passage which reads:

> "A jageer is properly an appendage of a dignity called munsub, which it is therefore necessary to explain. In the Moghul Empire there are no hereditary dignities. The rank of the nobles was offered by special appointment from the emperor for life only, and revocable at his pleasure; and it was estimated by the number of horse which they were supposed to command. This command was denominated munsub: and a jageer was an appendage to it ... *The jageers were granted for the purpose of enabling the munsubdars to appear with a suitable retinue in the presence of the sovereign, or to enable them to discharge the duties of the station assigned to them...*

[1] The word "assignment" has a strict connotation in Indian law. It means the selection, nomination, appointment, or the marking out of certain fiscal rights to a grantee by the sovereign grantor. For example, the right to collect and appropriate public revenue was always "assigned". This word has been consistently used in connection with revenue grants in British Indian jurisprudence.

and as the dignity itself was granted for life so were the funds assigned for it... From the preceding explanation *a jageer may be defined to mean assignment in land or money, for the support of a certain dignity and for the troops annexed thereto.* That it was either conditional or unconditional. The former implied that it was granted for the expenses of a particular office or station; the latter that it was independent of any office or station, being appropriated for the maintenance of a dignity, a suitable number of attendants and the effective troops annexed to it. *In the latter case, it was granted for life or until the emperor should please to resume the dignity or diminish it.* In the former case, it existed whilst the possessor continued in office only; and upon his removal or dismissal devolved either in whole or in part upon his successor. *The services required from the jagirdars were either specific or they were bound to the performance of whatever duties might be assigned to them and to attend in person with their effective troops whenever required...* As an equivalent for the pay which a munsubdar was entitled to receive, either on account of his personal allowance, or that of the troops under him, he received possessions and certain lands, the rent of which was calculated in daums... *If they were found to produce more than the jagirdar was entitled to, he was obliged to account for the overplus under the denomination of towfeer or excess .. the following instance in proof of the strictness with which the government exacted the towfeer is so remarkable that I shall insert it at length from a book of good authority...* Such were the ancient and regular forms of the Moghul Constitution regarding the dignity of munsub; and its appendage jageer; and from these it will appear that *a jageerdar had not originally or constitutionally, any right or property in the lands.*"

The above is believed by the Government of India to be the most accurate and authoritative account of the Moghul grant known as jagir [1].

[1] The definition of Jagir given by Professor H. H. Wilson in his monumental "*Glossary of Judicial and Revenue Terms*" published at London in 1855 may also be noted:

"a tenure, under the Mohammadan government in which the *public revenues* of a given tract of land were made over to *a servant of the state* together with the powers requisite to enable him to collect and appropriate such revenues and administer the general government of the district. The assignment was either conditional or unconditional; in the former case, some public service, as the levy of maintenance of troops or other specified duty, was engaged for: the latter was left to the entire disposal of the grantee. The assignment was either for a stated term, or, more usually, for the lifetime of the holder, lapsing, on his death, to the state, although not unusually renewed to his heir, on payment of a *nazarana* or fine and sometimes specified to be a hereditary assignment; upon which specification it was held to be a life tenure only; Bom. Reg. xxxvii 1793 cl. 15; *A jagir was also liable to forfeiture on failure of performance of the conditions on which it was granted or on the holder's incurring the displeasure of the emperor.* On the other hand, *in the inability of the state to vindicate its rights, a jagir was sometimes converted into a perpetual and transferable estate . . .*" (page 224.)

Jagirs or Saranjams Granted by the Marathas

104. The Maratha system of administration was to a great extent modelled on the Moghul system and it was also the practice of the Maratha Government to make to their subjects, vassals and feudatories, grants of public revenue. The Marathas borrowed a great deal of their administrative terminology from the Moghuls and the word jagir was also used by them. More commonly, however, the Marathas used another word to describe the grant of jagir and that word was Saranjam. The grant known as saranjam came to be associated exclusively with Maratha rule. There was no practical difference between the Moghul jagir and the Maratha saranjam. Professor Wilson in his "*Glossary of Judicial and Revenue Terms*" [1] described saranjam in the following words:

> "among the Marathas it was applied especially to *the temporary assignment of revenue from villages or lands* for the support of troops or for personal military service, usually for the life of the grantee; also to grants made to persons appointed to civil offices of the state to enable them to maintain their dignity, and to grants for charitable purposes: *these were neither transferable nor hereditary and were held at the pleasure of the sovereign*" [2].

As regards the practical similarity of saranjam and jagir, the attention of the Court is directed to the Preface of Colonel Etheridge, the British Revenue Officer of Bombay Presidency,[3] to his List of Saranjams published in 1874 (Indian Annex E. No. 1, **II**, p. 236) where he says:

> "It was the practice under former Government both Mohomedan and Mahratta to maintain a species of feudal aristocracy for State purposes by *temporary assignments of revenue* either for the support of troops for personal service, the maintenance of official dignity or for other specific reason. *Holders of such grants were entrusted at the time with the powers requisite to enable them to collect and appropriate the revenue and to administer the general government of the tract*

[1] Referred to above.

[2] Page 465.

[3] Colonel A. T. Etheridge, C.S.I., Settlement Officer, Southern Division, was head of the Alienation Office at Poona. The word 'Alienation' has a specific connotation in Indian law. The following extract from Phadnis, "*The Law of Saranjams and Inams*", Dharwar, 1936, page 68, explains shortly and admirably the meaning of the word 'alienated':

> "*Alienated: Meaning of:—*
>
> 'Alienated' means transferred in so far as the rights of Government to payment of rent or land revenue are concerned, wholly or partially, to the ownership of any person. (Definition of 'alienated', Land Revenue Code, 1879, S. 3 (20)). Alienated holdings as a class fall into three main divisions, viz:—
>
> (a) Saranjam, jagir or other political alienations;
>
> (b) Service Inams;
>
> (c) Non-service Inams.
>
> Of these three classes of alienated holdings, the first is already dealt with in the foregoing part of this book under the heading, 'The Law of Saranjams'..."

of land which produced it. Under the Mahomedan dynasty such holdings were known as Jaghir, under the Mahratta rule Saranjam. *If any original distinctive feature marked the tenure of Jaghir and Saranjam, it ceased to exist during the Mahratta Empire,* for at the period of the introduction of the British Government there was no practical difference between a Jaghirdar and a Saranjamdar either in the Deccan or Southern Marhatta country. The terms Jaghir and Saranjam are convertible. The latter term is now almost universally adopted."

105. The rule of the Marathas in the west of India came to an end in 1817-1818 when they were conquered by the British. The British Government appointed Mountstuart Elphinstone as Commissioner for the Conquered Territories. Previous to this appointment, Elphinstone was the British Resident at the Poona Court from 1802 to 1803 and again from 1811 to 1817. During that time and afterwards as Commissioner for the Conquered Territories he made a careful study of the Maratha administrative and revenue system and his views on the jagirdari and saranjamdari system are contained in his despatch from Poona dated the 26th October, 1811 [1]; his report of the 25th October, 1819 to the Governor-General of India [2]; his evidence before the Select Committee of the House of Lords in March 1830; and in his History of India published in London in 1841. The account of the jagirdari and saranjamdari system of the Marathas given in Elphinstone's *History of India* is the most easy to comprehend and does not abound in technical terms and the following extract from that book may assist the Court in understanding the jagirdari and saranjamdari system:—

"It has been mentioned that the King can alienate his share in a village. In like manner he often alienates large portions of territory, including numerous villages as well as tracts of unappropriated waste. But in all these cases it is only his own rights that he makes over: those of the village landholders and permanent tenants (where such exist), of district and village officers, and of persons holding by previous grants from himself or his predecessors, remaining unaffected by the transfer [3]. These grants are made for the payment of troops and civil officers, for the support of temples, the maintenance of holy men, or for rewards of public service. Lands given for the two first purposes are called Jagirs [4].

[1] English Records of Maratha History, Poona Residency Correspondence, Vol. XII, Poona Affairs (Elphinstone's Embassy) Part 1, 1811-1815, edited by G. S. Sardesai, Bombay, 1950, page 79:

[2] See Indian Annex E. No. 1, II, p. 229.
Footnotes in Elphinstone's *History of India.*

[3] Want of advertence of this circumstance has led to *mistakes* regarding the property in the soil. The native expression being *"to grant a village"*, or "a district", it has been inferred that grant implied the whole, and excluded the notion of any other proprietors.

[4] "Jagir, which is a Persian word in its origin, is applied to lands given by government for personal support, or as a fief for the maintenance of troops for the service of the state: Some service is implied in the personal, as well as military, Jagir." (Col. Sykes on Land Tenures in the Dekkan, Jour R. A. S. 1835.)

This mode of remunerating the services of certain officers, and of providing for holy men, is as old as Menu. When it came to be applied to troops is uncertain. It was in use in Bijayanagar, and other states of the south of India, when they were overturned by the Mussulmans; but the more perfect form in which it is now found among the Marattas is probably of modern date. Such grants originate in the convenience of giving an assignment in a district near the station of the troops, instead of an order on the general treasury; a mode of transfer particularly adapted to a country where the revenue is paid in kind.

These assignments at first were for specific sums equal to the pay due: but when they had long been continued, and were large enough to swallow up the whole revenue of a district, it was natural to simplify the arrangement, by transferring the collection to the chief of the military body. This was done with every precaution to prevent the chiefs appropriating more than the pay of the troops, or exercising any power not usually vested in other collectors. The system adopted by the Marathas gives a full illustration of the means resorted to for this purpose.

According to their plan, the number and description of troops to be maintained by each chief was described; the pay of each division carefully calculated; allowances made for officers, sometimes even to the extent of naming individuals; a sum was allotted for the personal expenses of the chief himself; and every particular regarding the terms of service, the mode of mustering, and other arrangements, was laid down. A portion of territory was then selected, of which the share belonging to the government should be sufficient, after deducting the expenses of collection and other charges, to supply the amount which had been shown to be requisite; and the whole territory yielding that amount was made over to the chief. The chief was now placed in the situation of the governor of a revenue division, and exercised all the other functions which are now united in the holder of that office.

The power to interfere for the protection of subordinate rights was, however, retained by the government, as well as a claim to any revenue which the tract assigned might yield beyond the amount for which it was granted. Those stipulations were enforced by the appointment of two or more civil officers, directly from the government, to inspect the whole of the chief's proceedings, as well in managing his troops as his lands.

Nothwithsanding all these precautions, the usual consequences of such grants did not fail to appear. The lands had from the first a tendency to become hereditary; and the control of the government always grew weaker in proportion to the time that had elapsed from the first assignment. The original principle of the grant, however, was never lost sight of, and the necessity of observing its conditions was never denied." [1]

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[1] *The History of India, The Hindu and Mahomedan Periods*, by the Hon. Mountstuart Elphinstone, with Notes and Additions by E. B. Cowell, M.A., late Principal of Sanskrit College, Calcutta, 9th Edition, London, 1916, pages 80-82. Indian Annex F. No. 24.

106. As will appear below, the British Indian authorities, for reasons of expediency, decided to continue certain saranjam and jagir grants made by former governments. In doing so they shed considerable light on the nature of the saranjam or jagir tenure known to the Marathas. The British Indian Government made a deep and careful study of the Maratha system and adopted it as its own, subject to minor changes. On this basis, it drew up "rules of convenience" as a guide to its administrators[1]. A study of the original Maratha system was also made by British Indian Courts when dealing with saranjam or jagir cases. In this manner, the incidents of the original Maratha tenure of saranjam or jagir are to be gathered from the administrative practice of the British Indian Government, from the judicial decisions of British Indian Courts, and particularly from the decisions of the Judicial Committee of the Privy Council which was until recently the highest judicial tribunal for Indian cases.

The Incidents of the original Maratha tenure of Saranjam or Jagir as understood and applied by the British Indian Government

107. Maratha territory was acquired by the British in two stages. The northern territory was taken from the Marathas under the Treaty of 1817 and the southern territory was taken by them under Proclamation of Conquest. (Indian Annex E. No. 12, **II**, p. 266.) Elphinstone, who was appointed Commissioner for the Conquered Territories, was charged with the settlement of the southern country. On the 16th June, 1818, Elphinstone submitted to the Governor General a plan for the continuation of certain Maratha grants of saranjam and jagir. Elphinstone recommended that certain grants might, as a matter of policy, be continued from father to son. He stated:

> "all Jaghirs held by ancient and great families *were recommended to be hereditary* (but no communication has been made on this subject to the holders). Those which were to cease at the death of the present possessors were specified, and where any allowance was to be continued to their heirs it was likewise noted down..." [2]

A proclamation in Marathi calling on all who had claims to jaghirs to appear and show their sanads, with lists of their personal lands, was made by Elphinstone to obtain the necessary information (Annex F. No. 25).

108. On the 4th March, 1820, the Governor-General replied to Elphinstone's report. He said that he was:

> *"anxious that the alienations of public revenue, either in Jaghirs, pensions, or other grants, should be limited as much as possible as to number, amount, and duration"*. (Indian Annex E. No. 1, **II**, p. 240).

[1] See paragraphs 109 to 111 below.
[2] Annex E. No. 1, **II**, p. 238.

109. In a despatch of the 26th October, 1842, the Court of Directors of the East India Company disapproved of a recommendation made on the same subject by one Mills, a British officer in India. With regard to jagirs granted after the year 1751 the Court said:

> "... Mr. Mills has fallen into another error in supposing us to have determined that all estates which were marked 'hereditary' in Mr. Elphinstone's original recommendation should be hereditary. On the contrary, we expressly declared our intention to be only 'that Mr. Elphinstone's schedules be compared with those submitted with the letters under reply, in order that, in any case where the latter are less favourable to the parties, it may be deliberately considered which of the two should be acted upon'." (Indian AnnexE. No.1, **II**, pp. 242-243.)

Finally, it was determined that all saranjams granted before 1751 were to be treated as hereditary, that all saranjams granted between 1751 and 1796 would be continued to the holder at the introduction of British rule for one generation further, with a pension to the third generation, and that all saranjams granted after 1796 would be continued to the holder at the introduction of British rule with a pension to the next generation. (Annex E. No. 1, **II**, p. 244.)

110. The history of the manner in which saranjams and jagirs granted by the Marathas were dealt with by the British Government after the conquest of the Maratha territories is thus succintly stated in Colonel Etheridge's preface: he shows clearly that when, on the advice of Elphinstone, it was determined that all saranjams granted *before 1751* should be continued in hereditary manner, this concession was made, not as of right of the saranjamdars, but as an act of grace on the part of the British Government and as a matter of policy, and the British Government reserved to itself the power to determine, whenever occasion might arise, the nature and extent of its own bounty. The traditional power of government to terminate a saranjam or jagir grant at its pleasure and in its sole discretion was declared again and again in the various rules and regulations that were framed for the guidance of the administration. This traditional power to cancel or revoke a saranjam or jagir grant came to be known as the power of "resumption". Thus Section 38 of Regulation XVII of 1827 described the traditional power in the following words:

> "land held exempt as jaghir shall be liable to resumption and assessment under the general rules at the pleasure of the Government".

This was further explained in Clause (3) of Section 1 of Regulation VI of 1833 which read:

> "jaghir or other lands held on service tenure are declared to be resumable at the pleasure of the Government under forms laid down by Clause (1) Section 38 of Regulation XVII of 1827".

The "general rules" relating to saranjam and jagir grants were determined, revised and altered from time to time according to the convenience of the government. It was accepted that in the field of saranjam or jagir grants the power of the government was supreme and that its power to make and revise rules relating to these grants could not be questioned by courts of law [1].

Saranjam Rules of 1898, as amended in 1901, continued to govern Government's attitude towards saranjam grants till the time such grants were finally terminated in 1952. These Rules described each saranjam to be a "life-estate" even though it was one which Government had decided to continue from father to son. Rules (I) and (V) read as follows:

> "(I) Saranjams shall be ordinarily continued in accordance with the decisions already passed by Government in each case."
>
> "(V) Every Saranjam shall be held as a life estate. It shall be formally resumed on the death of the holder and in cases in which it is capable of further continuance it shall be made to continue to the next holder as a fresh grant from Government, unencumbered by any debts or charges, save such as may be specially imposed by Government itself." (India Annex F. No. 26.)

111. In the last available judicial decision on the subject of Saranjam, *Daulatrao Malojirao* v. *Province of Bombay*, the full Bench of the High Court of Bombay held that Saranjam Rules made by the Government were rules of convenience only. They did not exhaust the general power of Government or prevent Government from making a decision or determination referable to a particular saranjam without altering the rules with regard to all of them [2].

112. We may now state the incidents of the Maratha grant of Saranjam or jagir in the form of principles enunciated in British Indian jurisprudence.

Principle No. 1

Saranjam or jagir was the assignment of the right to collect public revenue or a share of public revenue from given villages or tracts of land. In very rare cases the proprietary interest in the land was also assigned together with the above right to collect public revenue or a share of public revenue.

113. Abundant authority can be found in support of the above principle. In *Ramchandra* v. *Venkatrao*, an appeal decided by the High Court of Bombay in 1882 [3], the High Court held that the grant

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[1] See *Ramchandra* v. *Venkatrao*, Indian Law Reports, 6 Bombay Series, Volume VI, page 598. Indian Annex F. No. 28. See paragraph 113 below.

[2] The Indian Law Reports, 1947, Bombay Series, page 337. Indian Annex F. No. 27.

[3] Indian Law Reports, Bombay Series, Volume VI, 1882, pages 598 to 616. Indian Annex F. No. 28.

in jaghir or saranjam was very rarely a grant of the soil and in any particular case the burden of proving that it was a grant of the soil lay very heavily on the party alleging it. In case of the grant of the soil, special and express words to that effect should be contained in the Sanad of grant. The Court quoted from another decision[1]:

> "Sanadi grants in inam, saranjam, jagir, wazifa, wakf, devasthan, and sevasthan, are generally speaking, more properly described as *alienations of the royal share in the produce of the land, i.e. of land revenue,* than grants of land, although in popular parlance, and in this judgment, occasionally so-called."

That observation of Westropp, C. J., the Court said, was the foundation of many subsequent decisions. The Court also cited a qualification of the principle made by the same judge[2]:

> "if words are employed in a grant, which expressly, or by necessary implication, indicate that Government intends that so far as it may have any ownership in the soil, that ownership may pass to the grantee, neither Government nor any other person subsequently to the date of the grant deriving from Government, can be permitted to say that the ownership did not so pass... In the sanad in evidence here whosoever framed it, was apparently determined that no ambiguity should exist as to what the force of the term 'village' might be, and, in order to be explicit, he added to the grant of the village in inam the words 'including the waters, the trees, the stones (including quarries), the mines and the hidden treasures therein."

The Court said that if this principle was true as regards grants in inam it was *specially applicable to grants in jaghirs and saranjam.* The Court after quoting a passage from Neil Baillie, *"Essay on the Land Tax of India"*[3], said:

> "We understand Mr. Neill Baillie as expressing in this passage a clear opinion that, although the etymology of the word jaghir has sometimes given rise to the idea that the term involves a taking of land, or an estate in land, yet, in fact, *the grant is nothing more than assignment of land revenue.* And the case of *The East India Company* v. *Syed Ati*[4] shows that it was upon this ground that the Madras Government justified the resumption of jagirs, when it first assumed the Government of the Carnatic in 1801. At page 575 of the Report[5] is the plea of The East India Company, that:
> "even when the language of the grants might seem to convey a proprietary interest in the soil, the grantees confessedly possessed no such interest, the subject matter of the grant being a mere jaghir, or portion of public land revenue, together with the Government powers of collecting the same." The authorities which we have quoted, (and none have been shown to us which support a different

[1] Westropp, C.J., in *Krishnarao Ganesh* v. *Rangrao* 4 Bom. H. C. Rep. I.A.C.J.
[2] Westropp, C. J., in another case, *Rowji Narayan* v. *Dadaji Bapuji*, Indian Law Reports, Bombay Series, Volume 1, page 523.
[3] London, 1873.
[4] 7 Moore I. App. 555.
[5] 7 Moore I. App.

conclusion), may, we think, be taken as at least establishing that *a grant in jaghir or saranjam is very rarely a grant of the soil*, and that the burden of proving that it is in any particular case a grant of the soil lies very heavily upon the party alleging it."

114. In a Privy Council case of 1922, *The Secretary of State* v. *Laxmibai* [1] a decision was given on three points. One, that Saranjam was ordinarily a grant of the royal share of the revenue only, but that whether it was a grant of the soil or the grant of the royal share of the revenue only was to be determined upon the facts in each case and that there was no presumption either way; and, Two, that *in the case of a Saranjam which included the grant of the soil, the Government, in the exercise of its sovereign rights, was entitled to eject the plaintiff, the holder of the Saranjam, and not merely to reassess the revenue of the land;* and, Three, *that the right of the Government to resume the Saranjam, both as regards its revenue and the soil, could not be questioned in Civil Courts.* For the time being, we shall consider only the first point. Nothing is to be found in the decision to show that the Privy Council overruled the judgment in *Ramchandra* v. *Venkatrao.* On the contrary, the Privy Council agreed that a Saranjam was *"ordinarily a grant of the royal revenue only"*. However, in laying down that there was no *presumption* either way the Privy Council seemed to be influenced by two of its previous decisions [2] which had nothing to do with Saranjam or Jagir granted by the Marathas but related to a grant known as Inam in Madras Presidency—the incidents of which grant, as recognized in many decisions, were quite different from the Maratha grant of Saranjam or Jagir.

Inam

115. In 1927 in the leading case of *Secretary of State* v. *Girjabai* [3], the Privy Council pointed out—

> "there are essential differences, statutory and otherwise between a saranjam and an inam; an inam is a heritable estate whereas *a saranjam is an estate for life.* The judgment of the Privy Council in Laxmibai's case shows that the inam rules do not apply to a saranjam... The word Inam is sometimes vaguely applied to revenue-free land, without reference to perpetuity or any specified conditions. *But it would be unsafe to apply to a peculiar grant like Mahratta saranjam rules which were held applicable to grants in perpetuity."* [4]

[1] Law Reports, Indian Appeals, Vol. L, 1922-23, pages 49 to 57. Indian Annex F. No. 29.

[2] *Suryanarayana* v. *Patanna,* L. R. 45 I.A. 209, and *Chidambara Siraprakasa Pandara Sannadhigal* v. *Veerama Reddi,* L.R. 49 I.A. 286. Both these were Inam cases from Madras and did not concern a study of the Maratha tenure of Saranjam.

[3] Law Reports, Indian Appeals, Volume LIV, 1926-27, pages 359 to 371. Indian Annex F. No. 30.

[4] Professor Wilson in his *Glossary,* referred to above, defines Inam as follows:

> "A gift, a benefaction in general, a gift by a superior to an inferior. In India, and especially in the south and among the Marathas, the term was specially applied to grants of land held rent free, and in hereditary and perpetual

116. Several sub-principles arise from Principle No. 1. We may now proceed to examine three sub-principles.

Sub-Principle (1):

The grantee of saranjam or jagir could not interfere in the rights in lands existing previously to the grant.

117. We have already seen this principle enunciated in the extract from Elphinstone's *History of India*[1]. Phadnis in *"The Law of Saranjams and Inams"* quoted above[2] states:

> "Saranjams whether they are grants of soil itself or of the revenue only of specified lands, they could not and were not meant to interfere with the rights in lands existing previously to and at the time of the grant. In so far as there were occupancy tenants on those lands they would retain their right of possession but subject to paying the assessed land revenue payable before the grant to Government and then after the grant to the Saranjamdar."[3]

In the *Secretary of State* v. *Girjabai*[4] the Privy Council stated:

> "It would seem to follow from the nature of saranjams that whether they were grants of the soil itself or the revenue only of specified lands, they could not and were not meant to interfere with rights in those lands existing previously to and at the time of the grant."

Certain rights known as Kadimi rights or Huqs, which included Watans, or the rights of hereditary officers of the village to receive cesses, taxes or a share of the public revenue, were distinct and outside the grant of the Saranjam or Jagir: the village hereditary officers were officers of the King and their ancient rights were to be respected by the Saranjamdar or Jagirdar[4].

Sub-Principle (2):

The right of the Saranjamdar or Jagirdar to collect revenue was limited to the sum assessed by the Sovereign and specified in the grant. The surplus was to be surrendered to the Sovereign.

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occupation... the term was also vaguely applied to grants of rent-free land, without reference to the perpetuity or any specified conditions..." Pages 217 to 218.

[1] Paragraph 105 above.

[2] In footnote 3 to paragraph 104.

[3] Page 49.

[4] Indian Law on this point was exceedingly detailed and intricate. The Government of India is constrained to give some account of the Indian law on the point for the reason that in their Sanads respecting the grant of Saranjam to the Portuguese, the Marathas expressly excluded from the grant the rights of the hereditary village officers — the Kulkarni, Patel, etc.—and the Portuguese were called upon to respect those rights. See paragraphs 88 and 89 of the Counter-Memorial. In order to assist the Court a brief extract on "Watan" from Dandekar, *"The Law of Land Tenures"*, Volume I, Bombay 1912, is given at Indian Annex F. No. 31.

118. We have seen this principle enunciated in the extract from Harington [1].

Sub-Principle (3):

The Saranjamdar or Jagirdar could not appropriate the land or create permanent occupancy rights in his favour.

119. We have already referred to the Privy Council decision in *Secretary of State* v. *Girjabai* [2].

The case concerned certain villages granted in Saranjam by the Marathas. The grant was not of the land of the villages but of the royal share of the revenue. Upon the death of the Saranjamdar the British Government resumed the Saranjam and the lands in suit were held by the British Commissioner to have become the property of the Government. The Privy Council held that where land of the Saranjam grant of the revenue of the villages had for some reason or other passed into the possession of the Saranjamdar, the rights of the Saranjamdar in those lands ceased upon the resumption of the Saranjam by the Government. The Government was entitled to resume not only the revenue, but also rights and benefits which the grantee had secured by virtue of the grant. (Indian Annex F. No. 30.)

Principle No. 2

Saranjam or Jagirs were granted in consideration of, and their continuation was conditional on, the future performance of faithful service to the Sovereign. The Saranjamdar or Jagirdar was a servant of the State and he was charged with co-operation with the Sovereign in the maintenance of general order in the lands the public revenue of which, or a share of the public revenue of which, was assigned to him.

120. In the classic definitions of Saranjam or Jagir grants which we have noticed above (see paragraph 103 to 105 above) the service nature of the grant is clearly brought out. We have seen that the grant was made by a Sovereign to a subject, vassal or feudatory. In *Raghojirao* v. *Lakshmanrao* the High Court of Bombay said, "all jaghirs were rather for services to be rendered than for service already rendered:". In the case of *Shekh Sultan Sani* v. *Shekh Ajmodin* (see paragraph 135 below), the Privy Council emphasised the service nature of the grant "the grant is made for service to be rendered by him and is in its terms personal."

121. After the conquest of the Maratha territories when the British Government regranted by its grace and bounty Saranjams and Jagirs to those who had received these grants from the Marathas, they made it perfectly clear that all Jagirdars were subjects,

[1] Paragraph 103 above. Reference may also be made to the extract from Dandekar, Indian Annex F. No. 31.

[2] Law Reports, Indian Appeals, Volume LIV, 1926-27, pages 359 to 371.

vassals and feudatories of the British Government. They were required to render loyal and faithful service to the British Government [1].

122. During Moghul and Maratha times, as we have already seen, Jagirs and Saranjams were granted to *servants* of the State, usually for the performance of military duties. The British Government, however, did not, for considerations of public policy, exact military service from its Jagirdars and Saranjamdars.

123. During Moghul and Maratha times, holders of Jagirs and Saranjam grants were entrusted with powers sufficient to enable them to collect and appropriate the revenue and to administer the general government of the tract of land which produced it. In fact the maintenance of general order in the tract of land was a duty to be performed by the Saranjamdar or Jagirdar in service to the Sovereign Grantor.

While, for reasons of public policy, the British Government waived military service from saranjamdars and jagirdars, and took the general administration in its own hand, it delegated to them, in the traditional manner certain powers for the collection of the revenue. The Commission granting such power described it as "delegated power vested in you during the pleasure and subject to the recall of the said Governor in Council". (Annex F. No. 33.)

124. Thus it will be seen that whatever powers of management or duties of maintaining general order were made incidental to the grant of Saranjam or Jagir, these powers were exercised and the obligations fulfilled by the Saranjamdar or Jagirdar *as a servant of the State*. He could not exercise these powers against the State or in competition with the State.

Principle No. 3

Saranjam or Jagir tenure by its nature was political and temporary, personal, non-transferable, impartible, and non-hereditary. It was held during the pleasure of the Sovereign and was terminable at his will and discretion.

(1) *Political and Temporary*

125. We have already noted above the classic descriptions of Jagir and Saranjam defining it as a temporary assignment of revenue made on political considerations [2] and it has been so de-

[1] The words, "all the jageerdars will be feudatories of the British Government with the exception of two or three whom it may be expedient to place in that relation to the Rajah of Sattarah", are found in the Governor General's instructions to Elphinstone dated 14th July 1818. See Indian Annex F. No. 32.

[2] Harington, Wilson, Elphinstone. See paragraphs 103 to 105 above. In *Raghojirao* v. *Lakshmanrao* (see paragraph 131 below) the Privy Council described saranjam as a "temporary" grant. In Girjabai's case it quoted with approval Wilson's description of saranjam as a temporary assignment of revenue.

scribed in British Indian legislation, administrative practice and judicial decisions.

126. Saranjam and Jagir, in contradistinction to Inam[1] was described as a "Political tenure". In *Ramchandra* v. *Venkatrao* (see paragraph 113 above) the High Court of Bombay dealt with the effect of Government Legislation and Rules on Saranjam. It quoted Section 10 of Act XI of 1852 "... jaghirs or saranjams or other tenures for service to Government, or tenures of a *political* nature..."; Section 1 of the Bombay Act II of 1863: "... Lands granted or held as jaghirs or saranjams, or on *similar* political tenure... Section 16 of the same Act which defined "political tenure" *"tenure created from, or dependent upon, political consideration, the existence of which shall be determined by the Government"*; and Section 2 of Bombay Act VII of 1863: *"lands granted or held as saranjam, or on similar political tenure, shall be resumable or continuable in such terms as Government, on political considerations, may from time to time see fit to determine."*

127. Thus, Saranjam and Jagir were held to be political tenures and the essence of a political tenure was its temporary character and its liability to revocation on political considerations.

128. In the latest case on Saranjam and Jagir, *Daulatrao* v. *Province of Bombay* (see paragraph 140 below), the temporary character of the grant was emphasized by the High Court of Bombay in the following words:

> "Jagirs and Saranjams are granted or withheld at the will and pleasure of the Sovereign, and, if granted, *the fixity of tenure is always subject to interruption* and revocation by resumption, be it temporary or absolute in character."

(2) *Personal, non-transferable, impartible*

129. The personal, non-transferable and impartible nature of the grant of Saranjam or Jagir easily and logically followed from its political and temporary and service character. In *Raghojirao* v. *Lakshmanrao*[2], the Privy Council approved of the observation of the High Court of Bombay on the impartibility of jagir and saranjam grants in the following words:

> "The Subordinate Judge, after referring to the fact that some of the villages are referred to as Jagirs in old records, is of the opinion that 'that fact per se is not sufficient to make them impartible'. If this be stated as a conclusion with regard to the Jagir tenure in general, their Lordships cannot agree with it; but, upon the contrary, they are of opinion that the following statement in the judgment of the High Court is correct, namely, 'The grants were manifestly

[1] See paragraph 115 above. Inam was a grant usually in perpetuity as reward or benefaction and not in consideration of future services to the State.

[2] Law Reports, Indian Appeals, Volume XXXIX, 1911-1912. pages 202-218. Indian Annex F. No. 34.

grants in jagir of the ordinary character, that is to say, *they were personal and not hereditary, and were resumable at pleasure. Being personal and temporary they were necessarily impartible.'* This accurately distinguishes between partibility as such, and any consequence, whether in the direction of hereditary or primogenital succession, which may be supposed to flow from that fact. The impartibility of jagir lands is in truth entirely separated from the idea of succession by the fact that the impartible lands were held together as a unit in the hands of one man who was rendering *personal service* to the Government of the day. It may be that upon his death a fresh grant, again to one man, *and again in return for personal service,* was made; and it may also be that the one man selected was in the ordinary case the eldest son; but these matters of practice were not consequences of law, and the impartibility and unit which attached to personal service were not related to, but on the contrary, were distinct from, the idea of succession by force of law to the impartible lands."

130. In *Daulatrao* v. *Provincial Government of Bombay.* (see paragraph 128 above) the High Court of Bombay held that land held by virtue of a saranjam could not be alienated by the saranjamdar to a stranger.

(3) *Non-hereditary*

131. We have noted above (paragraphs 103 to 105) the classic definition of Jagir and Saranjam, particularly Saranjams granted by the Marathas, as non-hereditary grants. The non-hereditary nature of the Saranjam or Jagir grant was also brought out, as we have seen above, in the Privy Council decision in *Raghojirao* v. *Lakshmanrao.* (See paragraph 125 above [1].)

132. We have already seen how the British Government dealt with the Maratha Saranjam or Jagir grants. (Paragraphs 107 to 111 above). Certain grants were continued as a matter of "grace and bounty"; some were *recommended to be hereditary*—not that they were originally considered to be hereditary. The Saranjam Rules declared every saranjam as being held as a life-estate. It was to be formally resumed on the death of the holder and in cases in which according to the decision of the Government it was capable of being continued it was to be made over the next holder as a fresh grant from Government. Rule (II) of the Saranjam Rules of 1898 reads:

[1] Till the Privy Council decision in *Raghojirao* v. *Lakshmanrao* the earlier Privy Council decision of *Gulabdas Jagjirandar* v. *Collector of Surat of 1878* used to be followed as authority for the dictum that a jagir was prima facie an estate for life "although it may possibly be granted in such terms as to make it hereditary". The case of 1878 however did not concern a true Mogul Jagir or Maratha Saranjam, but a grant analogous to that of a Jagir granted by the East India Company, and is therefore to be distinguished from the clear dicta of later cases relating to Mogul Jagirs or Maratha Saranjams. See in particular the Privy Council decision in *Sheikh Sultan Sani* v. *Ajmodin,* paragraph 135 below, and *Daulatrao* v. *Province of Bombay* paragraph 140 below.

"A Saranjam *which has been decided to be hereditarily continuable* shall ordinarily descend to the eldest male representative in the order of primogeniture, of the senior branch of the family descended from the first *British Grantee* or any of his brothers who were undivided in interest. *But Government reserve to themselves their rights for sufficient reason to direct the continuance of the Saranjam to any other member of the said family, or as an act of grace, to a person adopted into the same family with the sanction of Government.* When a Saranjam is thus continued to an adopted son *he shall be liable to pay to Government a Nazarana not exceeding one year's value of the Saranjam,* and it shall be levied from him in such instalments as Government may, in each case, direct."

In his Glossary, Wilson [1] defines *Nazarana* as

"A gift, a present, *especially from an inferior to a superior;* but the sum was more particularly applied to sums received as gratuities, although in fact exacted by the state on various occasions, as *fees or fines upon an assignment of revenue* to an individual or on appointment or succession to office, or to a Jagir... also an exaction of additional *tribute from a tributary dependent.*"

It is significant that at the time of the making of the grant to the Portuguese the Marathas exacted from them a Nazarana of Rs. 12,000, one year's revenue grant, as is admitted by the Portuguese Government in Annex No. 25 to their Reply.

133. Thus it will be seen that while there was no hereditary Saranjam at the time of the Marathas, the British Government for reasons of policy and expediency decided by their will and discretion to make certain Saranjam grants continuable for all practical purposes in hereditary fashion. This is made abundantly clear in the report of Maddock of the 8th November, 1891 (Indian Annex E. No. 1 at **II,** p. 225) and in the Privy Council decision in *Shekh Sultan Sani* v. *Shekh Ajmodin* in 1891 [2].

134. In his report Maddock said:

"It may safely be assumed that prior to the establishment of the British rule, no notion had ever been entertained of hereditary rights in the holders of these grants and it is only necessary to refer to any of the existing Native States of the present day to learn that no such principle or practice are still known there.

In the Mahratha principality of Sindiah, Jageers are constantly taken from one and bestowed upon another as partiality or expediency dictate. Even in the Rajpoot States, the Thakoors, though holding by a far superior tenure to that of ordinary jageers, are liable to be dispossessed and to see their Estates confiscated or conferred on others. And everywhere throughout India will it be found the practice of Native Governments to consider land tenures

[1] See footnote to paragraph 103.

[2] Law Reports, Indian Appeals, Volume XX, 1891-92, pages 50-69. Indian Annex F. No. 35.

of this nature resumable at the pleasure of the prince who conferred them, or of his successor. It is perfectly certain moreover that in former times when one dynasty has been subverted by another, the conquering power paid little or no attention to the grants of its predecessors; in the papers now submitted not a single case occurred of a jageer granted by the predecessors of the Peishwahs; and had the Peishwah's dominions fallen into the hands of the Nizam or Hyder Allee or any Hindoo conqueror no consideration would have been shown to the ancient jageerdars beyond what policy dictated or money could purchase. And their resumptions of such tenures would not have been regarded as rapacity or usurpation but would have been considered as the natural and almost inevitable result of the change of dynasty." [1]

135. In *Shekh Sultan Sani* v. *Shekh Ajmodin*, the Privy Council held that a *Saranjam granted under treaty was resumable at the pleasure of the Government.* The Privy Council said:

"With regard to the expression contained in some of the sunnuds previously cited of the grant being to the person named, 'his son, grandson, etc., from generation to generation', it has been observed by many writers of authority on this subject that *they do not, as might be supposed, impart* a fixed hereditary tenure. Colonel Etheridge, in his preface to the narrative of the Bombay Inam Commission, quotes the language of Sir Thomas Munro, in a minute of the 15th of March 1822, in which he states that 'the terms in such documents (sunnuds) for ever, from generation to generation, or in Hindu grants while the sun and moon endure, are mere forms of expression, and *were never supposed either by the donor or receiver, to convey the durability which they imply,* or any beyond the will of the Sovereign' [2]; and in a subsequent minute of the 16th of January, 1823, Sir Thomas Munro shews that while the seizure of private property by the native princes would have been considered unjust by the country, jaghir grants were not regarded by the people in the light of private property. (Etheridge pg. 1).

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[1] Indian Annex E. No. 1, II, p. 225.

[2] Sir Thomas Munro continues: "The injunction with which they usually conclude "Let them not require a fresh sanad every year", *indicates plainly enough the opinion, that such grants were not secure from revocation.*" At page 376, Rev. G. R. Gleig, *"The Life of Thomas Munro, Bart."*

At pages 386 to 387 of the same book is found the following opinion of Sir Thomas Munro:

"The land revenue in India is what the excise and customs are in England—the main source of revenue—and cannot permanently be aliened with safety to the State. The Kings of England never could alienate the public revenue in perpetuity nor could any Government do so. Any Government could debar a successor from the use of a public revenue. The existing Government must always have the power calling in forth for the preservation and defence of the State. In India there is no assembly or public body between the prince and the people, to regulate the rate or the amount or the taxation or revenue. The sovereign himself is the only authority by which revenue is levied and disbursed and by which it is granted and resumed. The power to resume as well as to grant must be lodged somewhere. In India where there is no other authority it is obvious that it must be vested in the prince."

Their Lordships entertain no doubt that *the engagements entered into by the English Government with the Rajah of Satara and with the several jaghirdars, did not impart any greater fixity of tenure than had been previously enjoyed by those jaghirdars under the native rulers, and that their jaghirs were liable to resumption at the will of the Government,* although from reasons of political expediency the English authorities would not be disposed to add to the disturbance and confusion attending a conquest, by dispossessing the holders of property to any greater extent than was necessary for safety."

(4) *Held during the pleasure of the Sovereign and terminable at his will and discretion*

136. We have noted above the power of the Sovereign Grantor to revoke the grant of saranjam or jagir at his will and discretion and without hesitation of any kind. This is clear not only from the classic studies of Moghul jagir and Maratha saranjam tenure but also from the administrative practice and jurisprudence of the British Indian Government, which, as we have seen above, was most anxious not to disturb the order of things but to continue, for reasons of public policy, the temporary and revocable grants made by previous Governments. In spite of such inclination the British Government itself resumed many grants of saranjam and jagir [1]. As we shall see below (paragraph 142) the Government of Independent India in exercise of its sovereign right, and with a view to bringing about agrarian reform in the country, altogether abolished jagir and saranjam tenures.

137. In *Secretary of State* v. *Girjabai:* the Privy Council gave expression to the principle that while revoking a saranjam, Government was entitled not only to take away the saranjamdar's right to collect public revenue but also to abolish occupancy and other rights acquired by him in the lands in question.

138. In *Secretary of State* v. *Lakshmibai* the Privy Council felt that where a saranjam was a grant both of the public revenue and of the soil, upon its revocation Government was entitled not only to abolish the right of the saranjamdar to collect public revenue but also to eject him from the land and take possession thereof. The Privy Council also held that *"the right of the Government to resume these lands could not be questioned in the Civil Courts".*

139. The Privy Council decision in *Shekh Sultan Sani* v. *Shekh Ajmodin* illustrates the power of the Government to resume *"Treaty saranjams".* In that case the Privy Council held that the saranjam

[1] The word "resumption" was usually applied to revocation of revenue grants. Resumption could be either temporary or absolute. The right to collect public revenue which had been assigned to a grantee was resumed, i.e. taken back.

granted by treaty was resumable at the pleasure of the Government, that it rested with Government to re-grant the same at its discretion at the death of the holder, and that it was not within the competency of any legal tribunal to review the decision of the Government. We have already quoted from the judgment:

> "... the engagements entered into by the English Government with the Rajah of Satara and with the several jaghirdars, did not impart any greater fixity of tenure . . . their jaghirs were liable to resumption at the will of the Government...".

In the case of *His Highness Sir Sayaji Rao, Gaekwar of Baroda* v. *Madhavrao Raghunathrao Dhavale* [1] shortly known as the *Baroda Saranjam Case*, it was held that the Saranjam of the Ruler of Baroda could be resumed by the British Government as the Sovereign of the Saranjamdar. The Court held that the saranjam grant to the Ruler of Baroda must be held to be subject to the restrictions that applied to a grant of that nature.

140. In a full Bench decision of the High Court of Bombay given on 9th January, 1946, in the case of *Daulatrao Malojarao* v. *Provincial Government of Bombay* [2] the Sovereign right of the Government to revoke saranjam and jagir grants was stressed in the clearest terms. The Court held that Government as a Sovereign power, could revoke a saranjam or jagir grant at its will and pleasure, that the saranjam rules made by Government were rules of convenience only and could not bind the Government or restrict its sovereign rights, and that adverse possession by a private person for however long duration was nugatory before the sovereign right of resumption. In the course of the decision the right of resumption of saranjam was also declared to be "a common law right of Government". In that case the British Indian Government had set forth certain propositions:

> "(1) that every saranjam is held by the saranjamdar as a life estate; (2) that Government have a Common Law right to resume it at pleasure; (3) that the Law does not require Government to exercise that right within a particular time; (4) that land held on saranjam tenure does not lose its saranjam character until the tenure is terminated; so long as the tenure subsists, no possession of the land can be adverse to that tenure; on the contrary it would be subject to the tenure; (5) that the character of land held by a saranjam tenure does not change by efflux of time..."

The Court said:

> "An examination of the authorities, in my judgment, makes it clear that the whole structure of saranjam tenure is founded in the

[1] Indian Law Reports, Bombay Series, Vol. XXX, 1928. Indian Annex F. No. 36.
[2] Indian Law Reports, Bombay Series, 1947, pages 337-350, Indian Annex F. No. 27.

Sovereign right, which can only change by conquest or by treaty. So founded jaghirs and saranjams, with the feudal incidents connected with them, are granted or withheld at the will and pleasure of his Sovereign power, and, if granted, the fixity of tenure is always subject to interruption and revocation of resumption, be it temporary or absolute in character. No incidents normally applicable to private rights between subject and subject can fetter or disturb the Sovereign will. Thus adverse possession by a private person for however long duration is nugatory before a paramount resumption or re-grant. But Mr. Coyajee on behalf of the appellant, the saranjamdar, submits that even so the sovereign power has by its legislative constituent bound itself by rules, and that even if historically the basis of the tenure was the Sovereign will and pleasure, the rules have created a new quality of durability. In my previous judgment I referred to these rules as being rules of convenience only and a further examination of them and their origin confirms me in that view... in my opinion the rules with which we are concerned cannot exhaust the general power or prevent the Government from making a decision or determination referential to a particular saranjam without altering the rules with regard to all of them."

141. The above shows quite clearly that saranjam or jagir was revocable at the pleasure of the Government, whether the saranjam or jagir was a grant only of the public revenue or a grant both of public revenue and of the soil, whether it was a grant by treaty or a grant to a ruling power.

The Attitude of the Government of Independent India towards Jagir and Saranjam Grants

142. After the independence of India the various land tenures existing in India continued for some time. However it was the declared policy of the new Government to bring about agrarian reform in the country. Consequently, the public revenue rights of zamindars, saranjamdars, jagirdars and inamdars were abolished by the Government. In 1952 new rules entitled Bombay Saranjams, Jahagirs and other Inams of Political Nature, Resumption Rules, 1952, were framed and these superseded the Saranjam Rules of 1898. *With effect from the 1st November, 1952,* all *saranjams, jagirs and political inams in the State of Bombay were resumed by Government and all rights which had existed before that date in respect of those grants were extinguished*[1].

Similar laws and regulations were enacted for other parts of India. The result is that there are now in India no remnants of the medieval land tenures which were found and continued by the British Government in India.

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[1] See G. D. Patel, *"The Indian Land Problem and Legislation"*, 1954, pages 48-54, Indian Annex E. No. 1 and F. No. 37.

* * *

143. The Government of India hopes that it has given ample demonstration above that the study of the Portuguese Government at Annex No. 1 of the Portuguese Reply is inaccurate, incomplete and misleading and contradicts the legal and historical studies of Moghul and Maratha grants made by British officers in India, the administrative practice of the British Indian Government and the dicta in judicial decisions including those of the Judicial Committee of the Privy Council. The Government of India would like to repeat that the decisions of Indian Courts and of the Judicial Committee of the Privy Council are highly relevant because these Courts were concerned with original Maratha grants and they sought to interpret the original nature of the grant known as jagir and saranjam on the basis of serious legal and historical studies made in India over more than century.

144. The Government of India will now proceed to examine and answer the Portuguese Reply from paragraph 87 onwards in which paragraph the Portuguese Government described the considerations outlined by the Indian Government at paragraph 56 of the Counter Memorial in connection with the nature of saranjam and jagir as "inaccurate" and suggested by implication that they had made a better study in Annex No. 1.

145. Paragraph 87 of the Portuguese Reply contains the Portuguese arguments on the nature of the grant of saranjam or jagir. The Portuguese Government have stated there two propositions:

(1) "There existed 'saranjams' (even in favour of simple individuals) which included the concession of the land on a hereditary and perpetual basis"; and

(2) "There did not even exist a legal presumption in favour of the first hypothesis (i.e. "that a saranjam was the concession only of revenue on a precarious and revocable basis") and therefore it was always necessary to show by documents and by the facts that surrounded the concession what its true legal nature was."

146. The Portuguese Government dilated on the above assertions in Annex No. 1. At paragraph 7 of Annex No. 1 the Portuguese Government admitted that most saranjams granted by the Maratha Government were *grants of revenue and not grants of the soil*, and they also admitted that *saranjam grants were freely annulled by the Maratha Government*. They said there:

> "nobody claims to contest that most of the saranjams given by the Maratha Government were in fact simple *grants of revenue, and not donations of land* [1], and it is not to be contested either that these 'Saranjams' were in most cases freely annulled by the Government which granted them. The error in the Indian argument consists in their trying to make out that they are invariably and *always* [1] annulled, arriving thus at a generalization not justified by the facts."

[1] Italics of the Portuguese Government.

The Government of India have demonstrated above that *it was in the nature of the grant of saranjam and jagir that they could be revoked at the pleasure of the sovereign grantor.* The saranjam or jagir by definition was a revocable grant. Therefore the Portuguese suggestion that they could not be revoked contradicts all the authority that we have cited above unless the Portuguese Government mean that as a historical fact all grants of saranjam or jagir were not in fact resumed. That, in the submission of the Government of India, is quite a different thing. The fact whether all the saranjam or jagir grants that were made by the Maratha and Moghul rulers in the 17th and 18th century were actually revoked or not is quite distinct from the fact that the nature of the grant was such that the grantor had the power to revoke it at will.

147. In the same paragraph 7 of the Annex No. 1 of the Portuguese Reply the Portuguese Government stated that:

> "there were 'saranjams' which implied the donation even of the land used to produce certain revenues; and by the side of 'saranjams' which implied the total, hereditary and everlasting transfer of lands granted".

The Government of India would like to ask, what is the authority of the Portuguese Government for asserting that a saranjam could be, "the total, hereditary and everlasting transfer of lands granted"? This assertion of the Portuguese Government contradicts the clearest dicta on the point. At paragraph 12 of the same Annex, the Portuguese Government persists in the assertion—without referring to any authority—that saranjams could be grants of the soil "in perpetuity and hereditarily". The Government of India would like to refer to Principle II (3) and the decisions cited under that Principle. In the Privy Council decisions of *Raghojirao* v. *Lakshmanrao* and in *Shekh Sultan Sani* v. *Shekh Ajmodin* it was held quite clearly that a saranjam grant was non-hereditary. These decisions relied on several authoritative works some of them dating from 1817, in particular the opinion of a great Indian administrator, Sir Thomas Munro, to the effect that the Rulers of India did not know of any saranjam or jagir grant which was hereditary. The Government of India also cited the reports of Etheridge and Maddock, both experienced officers of the British Indian Government, to the effect *that the Maratha grant of saranjam was a conditional, temporary and non-hereditary grant*[1].

148. The Portuguese Government devoted in the same Annex, paragraphs 8, 9, 10 and 11 to showing that it was possible for a saranjam and jagir grant to include in certain cases a grant of the soil in addition to the grant of the public revenue. The Government

[1] The opinions of Sir Thomas Munro, much quoted by Indian Courts, will be found at Indian Annex F. No. 38.

of India does not dispute this at all. In fact in paragraph 56 of the Counter-Memorial it said:

> "a saranjam was a grant only of the royal share of the revenue and *unless expressly provided for* did not grant any proprietary interest in the soil".

It will be seen from paragraphs 113 and 114 above, that this statement of the Government of India is clearly supported by authority. Saranjam or jagir grants were in almost all cases grants only of the public revenue; in very rare cases they included grants of the soil also. The decision in *The Secretary of State* v. *Lakshmibai*, laid down that there was no presumption either way and it was to be seen from the documents whether a particular grant was a grant of the revenue only or included a grant of the soil also. But in *the very same case, which we note is being relied upon by the Portuguese Government, it was also held that the grant of saranjam whether it was a grant of the revenue only or a grant also of the soil, was revocable by the Government at its will and discretion.* In that case it was held that in the exercise of its sovereign power the British Government could not only revoke the grant of saranjam which included grant of the soil also, but as a consequence of the revocation the Government could also eject the holder of the grant from the lands in question. (See paragraph 114 above and Indian Annex F. No. 29.)

149. The Government of India would therefore like to ask how it helps the Portuguese Government to draw a distinction between a grant of saranjam or jagir which was a grant only of a share of the public revenue and a grant of saranjam or jagir which was also a grant of the soil when in both cases it was a grant which by definition could be revoked at the will and discretion of the Grantor.

150. In paragraph 14 of the same Annex the Portuguese Government states that:

> "The legal nature of the concession has always to be judged in the light of the documents which relate to it and in the light of the facts which surround it."

The Government of India has shown in the Counter-Memorial and will show further in this Rejoinder that judged in the light of the documents which relate to the grant and in the light of the facts which surround the documents, particularly the intentions of the Marathas who were the grantors, it is clear that the legal nature of the concession was a saranjam or jagir grant of public revenues in villages under Maratha sovereignty. Documents emanating from the grantor are the foundation of the grant and define its nature. The Government of India has already shown and will further show that the Maratha documents clearly define the nature of the grant. The sum total of the rights of the Portuguese in the Maratha villages were contained in the Sanads which

were charters from the Maratha Government and it was from these sanads exclusively that the Portuguese derived their temporary, conditional and precarious rights (see Counter-Memorial, and paragraphs below).

151. The second assertion which the Portuguese Government make in paragraph 87 of their Reply is that the legal incidents attached to the grants of Saranjams and Jagirs were "inapplicable to the concession in question because the grant of jagir or saranjam to the Portuguese Government was guaranteed by treaty and made in favour of a sovereign State". The Portuguese Government stated there that it had always been understood that saranjams guaranteed by treaty, "treaty saranjams", constituted a special class the legal nature of which depended solely on the treaty. This line of argument is taken up in paragraphs 15, 16 and 17 of Annex No. 1 to the Portuguese Reply where the Portugese Government seeks to draw a distinction between what they called "ordinary saranjams" and "treaty saranjams". In this connection the Portuguese Government cite selected quotations, torn from the context, from the report of Etheridge, a book by Gejji and the book by Patel. The purposes of these quotations is to show that saranjams "guaranteed" or "protected" by treaties were considered to be a special class and that the discussion on Saranjam and Jagir in the above mentioned works did not apply to them for the reason that they belonged to a special class. From these selected quotations the Portuguese Government proceed to infer that the incidents attached to "treaty saranjams" were different from those attached to what are called "ordinary saranjams". The texts however show that the distinction between the two classes lay not in their inherent nature but the manner in which the British Government, as a matter of grace, bounty and public policy decided to deal with them. The Government of India has already mentioned in paragraphs 107 to 110 above how, on the assumption of British power, certain saranjams were continued and others were revoked, and rules of expediency were laid down by the British Government for the guidance of its officers. The Government of India asks the indulgence of the Court in quoting in full a portion from the book by Patel a part of which has been relied upon by the Portuguese Government. At page 40 it reads:

> "Historical background.
>
> It is not necessary to trace the history of the families who held the saranjams or dilate upon their vicissitudes. For detailed history, the reader is referred to Grant Duff's "*History of the Mahrathas*". For our purpose, it is important to know how they were treated by the British on their accession to power. It is well-known that the Honb'le the Commissioner Mountstuart Elphinstone first submitted to the Governor General on the 18th June 1818 his 'general review of the measures adopted for the settlement of the Peshwa's late country' and 'suggestions on the plans which seemed best suited

to completion of that object'. One of the most important subjects discussed was about the suitable method of providing Jahagirdars and Saranjamdars whom the events of the war had deprived of their power and possessions. The method adopted was by permitting them to retain their personal holdings and by pensioning on moderate sums the few not so provided for. Elphinstone even recommended grant of pensions to Ministers of the State, who were reduced to poverty and want by the persecution of Baji Rao. On this general basis, the arrangement with the saranjamdars was proposed. But there were exceptions like the Pathwardhan Chiefs, Apa Desai, the Pant Sachiva and others in both the Deccan and Southern Maratha Country, whose possessions were subsequently fixed on different principles. They formed a special class being protected by treaties. Theirs were called the treaty saranjams. We are, however, not concerned here with this class but with a class of grants which were not covered by any treaties and were called non-treaty Saranjams. It should be remembered that Elphinstone's arrangement was against any permanent alienation of land revenue. The pith and substance of the arrangement was the 'convenience of Government and the accommodation of the Jahagirdars'."

It will be seen thus that the *pith and substance of the arrangement was the convenience of the British Government and the accommodation of the jagirdars* and that the arrangements were based purely on principles of expediency. The Government of India has already referred to the Privy Council judgment in the case of the *Waikar Saranjam* to show that *there was no distinction between an ordinary saranjam and a treaty saranjam as regards its inherently revocable nature.* In both cases the rights to collect revenue together with the proprietary right in the soil, where granted, could be extinguished by the Government at its will and discretion. For the convenience of the Court the Government of India will set out here the official summary of the judgment in *Shekh Sultan Sani* v. *Shekh Ajmodin* :—

> "*Grants by Treaty—Saranjam and Inam tenures—Political Tenure —Jurisdiction of Civil Tribunals—HELD*, with regard to both the saranjam and inam tenures in suit, that having been originally granted by treaty to be held on a political tenure, they had continued to be so held, with the result that they were resumable at the pleasure of the Government. Such right of assumption had been recognised by legislation (see Bombay Act 7 of 1863). It accordingly rested with the Government to re-grant the same at its discretion on the death of their holder, and it was not within the competency of any legal tribunal to review its decision."

Thus it will be seen that *so far as the British Government was concerned a treaty did not render a saranjam any more sacrosanct than it was before.* The Government of India would like to refer in this connection to the extract from this judgment given at paragraph 135 above.

152. The Government of India have already referred to the *Baroda Saranjam Case* (see paragraph 139 above). In that case it was

recognized that *the Ruler of Baroda—who was considered the sovereign of his possessions—could enjoy a grant of saranjam in British Indian territory, manage his saranjam through agents, and not be able to exercise in the saranjam villages the rights of sovereignty which he could exercise in his possessions.* It was clearly recognized in that case that the Ruler of Baroda to the extent that he held a saranjam stood in the relationship of a saranjamdar to the British Government (see paragraph 139 above, Indian Annex F. No. 36).

Furthermore, it is a historical fact that the Marathas freely granted saranjams and jagirs to other rulers of India, rendering them their saranjamdars and jagirdars, and that they revoked these grants with equal facility. It is also a historical fact that in the 18th century the East India Company (which was the British Government in India before 1857) received jagirs from the Moghul Government and stood in the relationship of jagirdar to the Moghul Government of the time. It is also a historical fact that the British in India never laid claim to rights of sovereignty over saranjam or jagir villages till the time they annexed the territories in question on conquest, lapse or other ground. (Indian annex F. No. 38; the opinion of Sir Thomas Munro.) There is also an incident on record of a saranjam having been granted by the Marathas to the East India Company and having been resumed by them for several years. (Indian Annex F. No. 39.)

153. It is therefore futile for the Portuguese Government to draw distinctions between different kinds of saranjams. A saranjam or jagir by its very nature was a temporary grant of the public revenue. Sometimes the grant included the proprietary interest in the soil; but in every case, whether it was a proprietary or non-proprietary grant, it was a grant held at the discretion of the sovereign and was conditional and precarious. In no event could a grant of saranjam or jagir amount to a cession of territory in sovereignty.

154. In support of its strained and untenable interpretation of the extract from Patel, the Portuguese Government has cited the judgment of the High Court of Bombay in *Daulatrao* v. *Province of Bombay* (see paragraph 140 above and Indian Annex F. No. 27) from which it has extracted only the following sentence:

> "the whole structure of the saranjam tenure is founded in the sovereign right which can only be changed by conquest or treaty".

The Portuguese Government emphasized the words: "which can only be changed by conquest or treaty," and says that the judgment of the High Court of Bombay enunciated the doctrine that, by a grant of saranjam, (in the words of the Portuguese Government), "the right of sovereignty itself can be negotiated and conceded without any hitch", and that a saranjam established by treaty provided for the "transfer of sovereignty which could be practised freely". The Government of India cannot help but remark

that this is a manifestly incorrect interpretation of the decision in *Daulatrao* v. *Province of Bombay*. The Government of India has quoted that decision in paragraph 140 above and given it in full at Indian Annex F. No. 27. A reading of that decision shows quite clearly that the reference to "the sovereign right" is to the sovereign right of the grantor of the saranjam tenure, and that it was clearly held therein that it was the right of the sovereign to revoke a saranjam grant at his will and discretion and that the sovereign was not bound by administrative rules which he may have laid down for purposes of convenience for deciding which saranjams he should revoke and which he should continue for the time being. The Government of India would like to quote here the official summary of the judgment:

> "Saranjam tenure, incidents of—Saranjam rules, operation of—Adverse possession of saranjam land—Resumption of lands by levy of full assessment payable to Government—Lands cease to be part of Saranjam lands and become Khalsa lands—Bombay Revenue Jurisdiction Act (X of 1876,) s. 12.
>
> The whole structure of saranjam tenure is founded in the sovereign right, which can only change by conquest or by treaty. So founded, *jagirs and saranjams, with the feudal incidents connected with them, are granted or withheld at the will and pleasure of the sovereign power, and, if granted, the fixity of tenure is always subject to interruption and revocation by resumption, be it temporary or absolute in character*[1]. No incident normally applicable to private rights between subject and subject can fetter or disturb the sovereign will. Hence adverse possession by a private person for however long a duration is nugatory before a paramount resumption or re-grant.
>
> *The Saranjam rules made by Government are rules of convenience only. They do not exhaust the general power of Government*[1] or prevent Government from making a decision or determination referable to a particular saranjam without altering the rules with regard to all of them."

It will thus be seen that the decision in *Daulatrao* v. *Province of Bombay* is a complete contradiction of the Portuguese contentions. The judgment points out quite clearly that a saranjam was revocable at the pleasure of the sovereign. The meaning of the sentence "the whole structure of the saranjam tenure is founded in the sovereign right which can only be changed by conquest or treaty", refers to the right not of the grantee but of the grantor as can be clearly seen from the judgment itself. The sentence means that while sovereignty can be changed by conquest or by treaty of cession, a saranjam is dependent on the will of the particular sovereign who may happen to be there by title of conquest or treaty of cession. In the submission of the Government of India that is the plain meaning of the sentence quoted from the decision which the Portuguese Government pretends not to understand.

[1] Our italics.

155. Paragraph 17 of Annex No. 1 of the Portuguese Reply concludes the "study" of the Portuguese Government of the nature of jagir and saranjam grants, except for paragraph 18 in which the Portuguese Government purport to give a summary of the Annex. This summary in addition to repeating in brief the points in the previous seventeen paragraphs contains the baseless and gratuitous assertion that:

> "it is not the simple concession of revenue that the Marathas had granted to the Portuguese but rather a *territorial* grant, and this grant was not made in an insecure way with the possibility of revocation, but rather in the nature of an unconditional concession granted in full *sovereignty*".

Thus, without giving any authority of any kind and immediately after speaking of a saranjam grant as a grant of the revenue and sometimes of the soil, the Portuguese Government proceed to the conclusion that the Marathas granted to the Portuguese a *territorial* grant, and that it conveyed to the Portuguese *full sovereignty*. The Government of India would like to call the attention of the Court to this fact, namely, that while the Portuguese Government has called Annex No. 2 a "Study" it has inserted there gratuitous and sweeping assertions in support of which it has not set out any facts or reasons or authorities[1].

156. In the same summary the Portuguese Government states that the word "jagir" is not found in any bilateral treat y betweenthe Portuguese and the Marathas. The Government of India have already stated that there was no bilateral treaty between the Marathas and the Portuguese. At the same time the Government of India has already pointed out (see paragraph 96 above) that the *word jagir is found in a document purporting to be a text of the alleged treaty itself emanating from the Portuguese Government.* The Government of India will refer to this again below (see paragraph 193).

157. In paragraph 5 and 6 of the Annex No. 1 of the Portuguese Reply, the Portuguese Government are driven to rely on the etymological meaning of saranjam or jagir. They cite in particular the dictionary of Molesworth. But the meaning given in Molesworth

[1] In Annex No. 2 of the Portuguese Reply the Portuguese Government have proceeded in the same fashion. In paragraph 7 of that Annex while speaking of the meaning of the word *Dumala* in the Maratha documents relating to the grant, the Portuguese Government admit:

> "we do not hesitate to admit that the word could be considered in its etymological and legal meaning of 'land on which several *proprietors* exercised rights at the same time'".

They also admit that the word connotes a revenue grant. But they dispute that the meaning of the word is a grant resumable at the pleasure of the sovereign and proceed to the conclusion that the word Dumala referred to "the transfer of sovereignty from the Marathas to the Portuguese". They accomplish this by translating "Dumala village" as "*alienated* village", and translating "*alienated* village" as a "village transferred to another sovereignty".

also does not help them. Molesworth defines jagir *as "an assignment by Government* of lands or revenues", and he describes saranjam as "villages and lands granted in inam to *persons from whom* the maintaining of forts or troops for the *public service is required*". The Government of India is entitled to ask whether these definitions show that saranjam or jagir meant "cession of territory in sovereignty" The Government of India need not stress the obvious fact that instead of finding the meaning of saranjam or jagir grants from works of authority the Portuguese Government has sought to vindicate its *a priori* interpretation from etymological meanings. The Portuguese Government has gone to the extent of saying that the word saranjam could mean "restoration". The Government of Indian would like to ask the Portuguese Government if there is any dictionary available of whatever value or significance which gives the meaning of saranjam as "restoration"? The Portuguese Government also states in paragraph 4 of the same Annex that the Marathas did not use the word saranjam in all their documents, or in all paragraphs of their documents, but only in headings to the documents, and occasionally in the body of the documents. The Government of India would like to submit that this argument, because of its obviously unsustainable nature, merits no answer. The description of the document in the heading governs and helps in the interpretation of its contents. The Portuguese Government have unfortunately to face the fact that the grant is described as Jagir not only in the Maratha documents, sanads, memoranda, orders, Account papers, order of revocation, et cetera, but also in a document emanating from the Portuguese Government itself. It is inconceivable that if the grant was meant to be a cession of territory with sovereign rights over it or a "restoration", *et cetera*, of the old "Province of the North", the intended grant should be described as "Jagir" in the Portuguese text of the alleged treaty. Nor, in view of the fact that the grant was consistently described in Maratha documents as saranjam and jagir, could it be suggested that the word "Jagir" had crept into the Portuguese text by accident.

158. The Government of India would like to observe that while the Portuguese Government seems to contend that the words saranjam or jagir are capable of a meaning other than their ordinary and established meaning, it has brought forward no authority in support of such contention. Nor has the Portuguese Government made any effort to present to the Court a serious and accurate study of the concept of saranjam and jagir in support of such contention. It is this attitude of the Portuguese Government which has obliged the Government of India to set out in detail above the legal and historical authorities in demonstration of the established meaning and connotation of saranjam and jagir grants.

* * *

159. The Portuguese Government has devoted Sub-section III of the "Facts of the Maratha Period" in the Portuguese Reply to the nature of the grant made by the Marathas to the Portuguese in 1783 and 1785. The Government of India will now proceed to reply to the Portuguese arguments made in that sub-section paragraph by paragraph.

160. In paragraph 76 the Portuguese Government state that it was by Article 17 of the alleged Treaty that the Maratha Government "ceded" to the Portuguese the villages of an income of Rs. 12,000 and these villages were specified in 1783 and 1785. The Government of India has already shown that there was no treaty in 1779 between the Marathas and the Portuguese. It has also been shown that the document forwarded by the Portuguese to the Marathas spoke of a revenue grant known as jagir. The Government of India has shown that in actual fact the grant of the revenue of the villages in question was made, not by treaty, but under *sanads* implying clearly a grant from a sovereign to a subject, vassal or feudatory. In the same paragraph 76 the Portuguese Government allege that not the slightest reservation concerning the sovereign rights of the Marathas in the villages in question appeared in any of the known texts of the alleged treaty; nor, allege the Portuguese Government, does there appear any clause reserving to the Maratha sovereign the right to revoke the concession unilaterally. Further, the Portuguese Government say that reservations of this kind would have been valid only if they had been made clearly and expressly. They say that if the Marathas merely said in the alleged treaty that they conceded to the Portuguese "villages of a revenue of Rs. 12,000", it is because they ceded them voluntarily and in full sovereignty and must be so held to have ceded them.

161. The Portuguese Government proceed with its argument as if it had proved in the first place that the Marathas had in fact ceded territory to the Portuguese in 1779 or 1783 or 1785. They proceed as if the cession of territory was to be taken for granted or was to be presumed. According to them, unless reservations expressly made by the Marathas appear from the documents or are proved by the Government of India, the proof of the cession of territory cannot be challenged. The Government of India submits that this is a totally erroneous approach. The burden of proving that the Marathas ceded territory to the Portuguese under an alleged treaty of 1779 lies squarely on the Portuguese Government. The argument of the Portuguese Government proceeds on a novel principle, namely, the principle that cession of sovereignty must be presumed and that a grant must be presumed to be a cession of territory in sovereignty unless a reservation to the contrary appears clearly from the treaty. The Government of India submits that contrary to what is asserted or implied by the Portuguese Government, a title to cession of territory in sovereignty cannot be pre-

sumed but must be proved by the party which alleges it. It is therefore not for the Government of India to furnish evidence and prove that the Portuguese did not receive a title to cession of territory in sovereignty in 1779. It is for the Portuguese Government to produce evidence and prove that it received a title as a Sovereign to the Maratha territories of Dadra and Nagar Aveli by a valid cession made to them by the Maratha Government.

162. Nor can it be said that it was for the Marathas to make express reservations regarding their sovereignty and that unless they made such reservations, a grant of revenue made by them could be interpreted as a cession of territory.

163. However, quite apart from the question of the onus of proof, which, the Government of India submits, is entirely on the Portuguese Government, the Government of India has demonstrated in the Counter-Memorial that not only is nothing to be found in the alleged treaty to show that the Marathas ceded or intended to cede any territory to the Portuguese Government, but that all the evidence points the other way and shows that the Marathas granted to the Portuguese Government in 1783 and 1785 a temporary, revocable and conditional grant of a share of the public revenue from villages situated within Maratha sovereignty, and that the grant was dependent on the performance of certain services by the Portuguese Government.

164. The Government of India submits that the nature of the grant made by the Marathas to the Portuguese was made abundantly clear in the Maratha documents of the grant. As has been seen above in Sections I and II Portugal was well aware on the 4th May, 1779, the day on which she drew up her text of the alleged treaty, that the Marathas did not contemplate granting anything more than a jagir. The Portuguese official texts of the 4th May, 1779, speak in the Portuguese language of a "contribution of Rs. 12,000" and in the Maratha language *(in the same document)*, of a "jagir of Rs. 12,000". In their document of the 17 December, 1779, the Maratha Government clearly set out that the grant contemplated was a grant of revenue, that the grant was to be made in such manner that the authority and jurisdiction of the Maratha Government was to remain unimpeded and that the Portuguese Government were not to raise any building in the villages from which revenue was to be collected by them. The so-called Articles of 1783, which the Portuguese Government appended at Annex 32 of the Reply, and which they say are of a bilateral nature, give to the Portuguese the right to collect revenue *limited* to the sum of Rs. 12,000. Any amount collected above that sum was to be surrendered to the Treasury of the Maratha Government. What do

these conditions signify? Assuming for a moment that the Portuguese Government is entitled to ask what reservations were made by the Maratha Government, the answer is clear; the Marathas defined the grant as one of revenue only; the Portuguese Government well understood in 1779 that it was a grant of jagir; the Maratha Government expressly laid down that its sovereignty was to be unrestricted; the Marathas prohibited the raising of any imarat or building; the right of collection of revenue was limited to Rs. 12,000 only. Besides these conditions, there were many others which have already been enumerated by the Government of India in the Counter-Memorial and will be found below in paragraph 197.

165. In the second place, the right of the Maratha Government to revoke the concession unilaterally was inherent in the nature of the concession made. The Government of India has submitted that there was no treaty entered into between the Marathas and the Portuguese Government on the subject of the grant. The grant was made outside the alleged treaty and by a sanad. However, assuming for the sake of argument that the grant could be said to be made under the alleged treaty, it is nonetheless clear that the continuation of the grant was subject to the conditions set out in the alleged treaty. The continuation of the grant was dependent on the fulfilment of conditions stipulated in the alleged treaty. The moment there was default in the fulfilment of the conditions, even assuming the existence of the alleged treaty, the concession could be withdrawn validly by the Marathas and in full keeping with international norms.

166. We have already seen that the grant of saranjam or jagir was a temporary, conditional and revocable grant. It was a grant of revenue rights; in rare cases it was a grant of proprietary rights but in no case was it made in such manner that it could not be revoked or cancelled. Nor could a grant by way of saranjam or jagir ever be a cession of territory in Sovereignty. When it was a conditional grant it was clearly and positively revocable on the non-fulfilment of the conditions. Assuming the existence of the alleged treaty, Article 17 clearly speaks of the condition of friendship. It was in return for friendship, the continuation of friendly relations and the performance of service, that the grant was intended to be made to the Portuguese. As we shall see below, the Maratha text of the 17th December, 1779, of the alleged treaty spoke of the condition of "future" friendship: "... assurances that the Firangee ... would *in future* [1] be most friendly". In paragraph 13 of Annex No. 1 of the Portuguese Reply already referred to above, the Portuguese Government say that the saranjam granted to the Portuguese Government was "for political reasons" and they rely on the Saranjam Rules of 1898

[1] Our italics.

as showing that under those rules "inam granted on political considerations shall be continued in the terms of the sanad or order creating the grant". The Portuguese Government admits that sanads and orders create the grant and govern its terms. However, the Portuguese Government appears to have overlooked the fact that a political grant was also a service grant and a conditional grant. The conditional nature of the grant is clearly seen from the documents of the Maratha Government. At paragraph 96 of the Counter-Memorial, the Government of India have mentioned the account papers of the Maratha Government in which the revenues of the saranjams of Dadra and Nagar Aveli were shown and accounted for. In these papers the amount annually realised from the villages and collected by the Portuguese Government was entered as "*expenditure* on foreign affairs concerning the Portuguese of Goa". This expenditure was annual and could clearly be stopped if the Portuguese ceased to maintain friendly relations or to perform the services of feudatory and tributory. In fact it was stopped when, in the words of the Maratha Government, "of late, no services to the Sarkar are rendered by the Firengee". (See Indian Annex C. No. 31, **I**, p. 293.)

167. In paragraphs 78 and 79, the Portuguese Government appears to agree with the Government of India that the intentions of the Marathas who were the grantors are important in ascertaining the nature of the grant made to the Portuguese in 1783 and 1785. The Government of India is glad to find that the Portuguese Government agrees with the Government of India that it is the intention of the grantor which is decisive in the interpretation of the nature and the extent of the grant made by him. The Government of India submits that the intentions of the Marathas are to be seen most clearly from the *sanads* under which the grants were made and from the administrative orders issued by the Marathas in connection with these grants. The intention of the Marathas is also to be gathered from Maratha practice subsequent to the grant and from Maratha documents preceding the grant. The sanads which are most relevant to the point in question are those which were issued in 1780 (Counter-Memorial paragraphs 85 to 89 and Indian Annex C, Nos. 8, 9, 10 and 11), in 1783 (Counter-Memorial paragraph 92 and Indian Annex C, Nos. 12, 13, 14 and 15) and in 1785 (Counter-Memorial paragraphs 93 to 96 and Indian Annex C. Nos. 16, 17 and 18). All these documents which describe the grant as saranjam, disclose clearly the purely revenue character of the grant and they impose conditions and restrictions which were the normal accompaniments of revenue grants of this nature.

At paragraph 79, the Portuguese Government seeks to establish the intention of the Marathas from the Maratha document of the 17th December 1779. This is the first time that the Portuguese Government has relied on the original language of the Maratha

document of the 17th December, 1779. It may be recalled that in the Memorial the Portuguese Government relied exclusively on the mistranslation in Portuguese by Wagh of the 6th January, 1780. (See paragraphs 12 and 13 of the Portuguese Memorial.) Now, however, the Portuguese Government states that the text most qualified to define the intention of the Maratha Government is the very text of the original version in the Marathi language dated the 17th December, 1779[1]. While the Government of India takes note of the fact that the Portuguese Government recognizes the authority of the Maratha documents, it is unable to find in Article 17 of the document of 17th December, 1779, any intention on the part of the Marathas to cede territory in sovereignty to the Portuguese Government. Article 17 of the Maratha document of the 17th December, 1779, speaks of the Portuguese having agreed to maintain friendship with the Maratha Government and to continue that friendship in future on condition whereof a grant was proposed to be made. This grant is described as "the assignment of villages of the revenue of Rs. 12,000". The same Article imposes conditions; the grant was to be made in such manner that the authority and jurisdiction of the Maratha Government was to be unrestricted and the Portuguese were not to raise any buildings in the villages from which revenue was to be collected.

168. The Portuguese Government expresses astonishment when faced with the statement of the Government of India in the Counter-Memorial at paragraph 80 that this text "expressly limits the grant to a temporary assignment of revenue in a tenure known as jagir or saranjam". On the contrary, it would be legitimate for the Government of India to express astonishment that the Portuguese Government should ask us to accept that by the above words they received from the Marathas title to the cession of territory in sovereignty.

169. It is significant that in paragraph 82, the Portuguese Government maintains that the Portuguese document of the 4th May, 1779, is of "secondary interest". This attitude of the Portuguese Government is in striking contrast with the stand taken throughout the Reply in which they seek to rely not on Maratha documents but on Portuguese documents for giving interpretation to the nature of the grant. For example, they cite a very large number of Portuguese documents to show the historical antecedents of the alleged treaty. (Portuguese Reply paragraph 37 to 58; Portuguese Reply, Annexes 3 to 25.) While, therefore, they do not have any hesitation in relying on Portuguese documents to show that the Portuguese political ambition ever since the loss of the old "Province of the North" was to regain it and that therefore the alleged treaty of 1779 must be

[1] Portuguese Reply, paragraph 79; and paragraph 74 which, referring to Wagh's translation, reads "it is obvious that its contents cannot prevail against the *Marathi original* of which it is simply a translation".

seen in that light, they are reluctant to rely on the Portuguese text of the alleged treaty. In paragraph 82 they refrain from quoting the full Portuguese text of Article 17. Article 17 in the Portuguese document reads:

> "As the Majestic State has evinced the greatest friendship towards this Pandit Pradan, as proved by the Attorney, Pandit Pradan has agreed to make *a contribution in Daman of twelve thousand Rupees starting from this year* through his Daman jurisdiction by virtue of which he shall specifically give to the State the Sanad or confirmatory order of the villages."

170. The Government of India is entitled to ask if the words "contribution in Daman of twelve thousand rupees starting from this year" denote cession of territory in sovereignty. The Portuguese Government is completely silent about these words. In the Submission of the Government of India these very words in the Portuguese text of the alleged treaty are destructive of the entire Portuguese argument.

171. Furthermore, the Portuguese Government refuses to attach any value to what was described by the Government of India as Dhume's translation of the Portuguese text of the 4th May, 1779 (Counter-Memorial, paragraph 69), and which is now found to be a document, within the knowledge of the Portuguese Government at Goa. The Portuguese Government pretends that it has no knowledge of that translation and cannot therefore admit its relevance. The Portuguese Government says again and again, in paragraph after paragraph, that the word saranjam or jagir is not to be found in any of the versions of the alleged treaty. Thus, as we have seen, it says in paragraph 18 of Annex No. 1 of the Portuguese Reply "the grant cannot be considered as a saranjam because this expression is not used in any text of a bilateral legal nature"; and at paragraph 71, "the said translation . . . was made subsequently to the conclusion of the treaty. We do not know under what conditions it was made, nor when, nor by whom, nor for what purpose". At paragraph 88 which summarizes the Portuguese contentions in Sub-section III, the Portuguese Government states:

> "the concession granted to the Portuguese by Article 17 of the Third Treaty of Punem of 1779 was not classified 'Jagir' or 'Saranjam' in the original versions of the Treaty. This name was given to it only subsequently by the Marathas in a later translation and on their sole responsibility which, due to this fact, has no legal value *vis-à-vis* the Portuguese".

It is unfortunate for the Portuguese governments that the Government of India has been able to find a photographic copy of the Portuguese text of the 4th May, 1779 (see paragraph 96 above). This text, as we have seen above, has the Marathi translation contained in it, article by article. It is in this Marathi

translation of the Portuguese text, which forms an integral part of the Portuguese document, and which is signed, confirmed and approved by two successive Portuguese Governors-General, that the grant is described as "jagir". It is not that the Government of India has invented Dhume's translation or that the Marathas had a translation carried out after the 17th December, 1779. *Whether the translation was made at Goa by Wagh or by Dhume at Poona is immaterial: the material fact is that it was the Portuguese Government which described the grant as jagir in their own document, which document, by their own admission, they sent to the Maratha Government as the basis of negotiation of the alleged treaty.* (See Portuguese Reply, paragraphs 86 and 88.) The Government of India has already expressed astonishment at the extraordinary procedure followed by the Portuguese Government in suppressing this document from the Court. It will therefore refrain from making any further comment on this conduct of the Portuguese Government.

172. The Government of India has pointed out that the words in Article 17 of the Maratha document of 17th December, 1779, clearly contradict the Portuguese assertion that the Marathas intended cession of territory in sovereignty to the Portuguese. The Government of India will demonstrate this from recourse to the Marathi language of the document. With the indulgence of the Court, the Government will set out below, in Latin script, the Marathi language of Article 17 of the document with its translation, word by word:

(1)	(2)	(3)	(4)	(5)
FIRANGEE YANI	SARKARAT	SNEH	BAHUT	CHALVILA
The Portuguese	*with the sarkar*	*friendship*	*much*	*conducts*

(6)	(7)	(8)	(9)	(10)
VAH	PUREHI	VISESH	SNEH	CHALVINAR
and	*in future*	*more*	*friendship*	*will conduct*

(11)	(12)	(13)	(14)	(15)
YEH	VISHI	NARAYAN VITHAL DHUME YANI	NISHA	KELI
this	*subject*	*Narayan Vithal Dhume*	*assurance*	*made*

(16)	(17)	(18)	(19)	(20)
TYAJE VAROON	DAVANES	SAL MASKURA PASSUN	BARA HAZAR	RUPIA
on account of this	*for Daman*	*from the current year*	*twelve thousand*	*rupees*

(21)	(22)	(23)	(24)	(25)
CHE	GAON	SARKAR	AMALAS VAGERE	PECH
of	*villages*	*sarkar's*	*authority jurisdiction etcetera.*	*impediment*

(26)	(27)	(28)	(29)	(30)
NAHIN	ASSE	NEMUN DIAVE	TYAT	FIRANGEE YANI
without	*in that manner*	*be assigned (or allotted)*	*there*	*the Portuguese*

(31)	(32)	(33)	(34)
IMARAT	KARUN NAYE	YA PRAMANE	KARAR
building	*are not to make*	*accordingly*	*agreement*

(35)	(36)	(37)
KELA ASSE	GAON	NEMUN DILE JATIL
has been made	*villages*	*assignment (or allotment) will be made.*

173. It will be observed from the above that the word "friendship" was used twice, and that it was in consideration of present as well as *future* friendship that the assignment was intended to be made; the assurances of the Portuguese envoy, Narayan Vithal Dhume, were relied upon; it was specifically stated that there was to be no impediment to the authority, jurisdiction, etc. of the Sarkar and that the grant was to be made in a manner consistent with the authority and jurisdiction of the Maratha Government; it was expressly stated that the Portuguese were not to erect any building; and the grant was intended to be of Rs. 12,000 from the current year from Maratha villages which were to be "assigned" or "allotted" (NEMUN DILE JATIL).

174. In paragraph 79 of the Reply, the Portuguese Government says that it is entitled to "infer" that the concession covered the villages themselves and not only the revenue of the villages because the Maratha text of the 17th December, 1779, speaks of "villages yielding revenue of Rs. 12,000 ... would be assigned". The Portuguese Government assumes that since the word "villages" is found in the Maratha document it must necessarily mean the territory of the villages in full sovereignty. The Portuguese Government again proceeds on the baseless assumption that it is entitled to "infer" cession of territory in sovereignty. The Portuguese Government also betrays ignorance of the meaning of the term "assignment of villages" and of the significance of the Maratha words "NEMUN DENE"—to assign or to allot. The Portuguese Government pretends ignorance of the fact that the words "assignment of villages" mean no more than the "assignment of the revenue of the villages". The Portuguese Government suggested in paragraph 87 that it had carried out a serious "study" of the nature of the grant known as saranjam or jagir. In Annex No. 1 of their Reply, as has been seen, they cited several decisions of Indian courts and of the Judicial Committee of the Privy Council. It is in these very decisions that the meaning of the expression "assignment of villages" is to be found. Any number of grants of saranjam and jagir could be

cited and judicial decisions quoted to show that "assignment of villages" meant simply "assignment of the revenue of the villages", and did not even raise the presumption that it included a grant of the property in those villages. The word "assignment" was used in relation to revenue grants, corresponding to the Maratha words "NEMUN DENE", and this is the term employed in the Marathi text of 17th December, 1779, which text we note is being relied upon by the Portuguese Government [1].

175. The meaning of the words "assignment of villages" is also to be seen from the Portuguese text in the Portuguese language of the 4th May, 1779, in the following words:

> "Pandit Pradan has agreed to make a *contribution in Daman of twelve thousand rupees* starting from this year *through his Daman jurisdiction.*"

Thus, the Portuguese text speaks of *contribution of Rs. 12,000* making it absolutely clear that the grant was of a fiscal nature and it makes this even more clear by stressing that the contribution was to be from the jurisdiction of Pandit Pradan. The clearest proof is to be found here that the villages from which revenue was to be collected were to remain in the "jurisdiction" of the Maratha Government. The Portuguese Government, as has been seen above, has omitted to mention these words. In paragraph 82 it contented itself with the quotation "by virtue of which he shall specifically give to the State a Sanad or a confirmatory order of the villages". The Portuguese Government assumes that under Article 17 of that text the Marathas were to cede the territory of the villages and were to issue a sanad to that effect. This argument, however, cannot help the Portuguese Government in any way. A sanad never governed cession of territory and transfer of sovereignty. It was a document issued by a sovereign to a subject, vassal or feudatory. The very word "sanad" implies a non-territorial disposition. The issuance of a sanad defined the grant as a "sanadi grant". (See paragraph 113 above, and the decision in *Krishnarao Ganesh* v. *Rangrao.*) The words of Article 17 in the Portuguese text of 4th May, 1779, bring out clearly the nature of the grant and throw light on the significance of the words "assignment of villages" in the Maratha document of the 17th December, 1779. A contribution or subsidy of an annual sum of Rs. 12,000 was to be made to the Portuguese and to this end the Marathas were to issue a sanad assigning the revenue of certain villages. It is obvious that the revenue of the villages could not be assigned without the specification of villages. It is also clear from the above that the assignment was to be done by a sanad and it was the sanad which was to confirm the assignment and form the

[1] Dandekar's *"Law of Land Tenures"* throws a great deal of light on this matter. Several extracts from this book are given at Indian Annex F. No. 40.

foundation of the grant. From these facts certain points clearly emerge: (1) the grant envisaged in the Maratha document of 17th December, 1779, and the Portuguese document of 4th May, 1779, was the assignment of revenue of certain villages; (2) the grant was to be made by Sanad.

176. The Government of India submits that the Portuguese document of the 4th May, 1779, is relevant for the purpose of gathering the intentions of the Marathas and of the understanding at that time of the Portuguese Government of the nature of the grant which they wished to receive from the Maratha Government. It shows that the Portuguese Government was well aware of the fact that the grant could only be an annual money grant and that no jurisdiction was to pass from the Marathas to the Portuguese. The Portuguese text in the Portuguese language and the Portuguese text in the Maratha language of the 4th May, 1779, are also relevant because they *preceded* the Maratha document of the 17th December, 1779. The Maratha Government, having taken account of these documents, incorporated into the document of the 17th December, 1779 express reservations. The Portuguese text did not contain words signifying the prohibition against erecting buildings in Maratha villages. The Maratha document of the 17th December, 1779 made this absolutely clear. The Maratha document also made the condition of friendship absolutely clear; and it expressly stated that there was to be no impediment of any kind to the "authority, jurisdiction etcetera" of the Maratha Government in the villages the revenue of which was to be assigned.

177. In paragraph 83, the Portuguese Government alleged that the reference to the revenue in the various texts of the alleged treaty did not mean anything but that "a fiscal standard" had been adopted to determine the extent of the territorial cession. Here again the Portuguese argument stands completely exposed. This again is an instance of *a priori* reasoning. The Government of India is entitled to ask, "Where does the Portuguese Government find words in the documents relating to the grant denoting cession of territory in sovereignty?"

178. In the same paragraph 83 the Portuguese Government has referred to the Treaty of 1740. It has said that in that Treaty an exchange was made of Portuguese villages against Maratha villages in full sovereignty *on the basis of the fiscal value of the villages.* The Portuguese Government has mixed up two questions: (1) the grant of revenue itself and (2) a territorial grant made on the basis of the revenue yield of the territory. The Portuguese Government has stated that in India of that time it was usual for territorial grants to be measured in terms of the revenue yield of the territory. This may have been so, but a grant of the revenue is totally different from a territorial grant implying cession of territory in sovereignty

using a fiscal standard. The instance cited by Portugal, namely, the territorial disposition under the Treaty of 1740, is most interesting. *That Treaty provided for agents of both parties settling the evaluation of the villages and demarcating the territory. Another treaty was signed subsequently and it was in that treaty that the villages were listed one by one.* It is inconceivable that a territorial cession in sovereignty could have taken place under the alleged Treaty of 1779 without mention of any territory, leaving the selection of territory to be done exclusively by the Marathas and the cession to be made by a Sanad.

179. The Portuguese Government in proof of its assertion that there was no difference between a grant of the revenue and a grant ceding territory made on the basis of the revenue yield of the territory, proceeds to cite the proposal of the dissident Maratha chief, Raghoba, with whom the Portuguese had held parleys. The Portuguese Government says that Raghoba had used the words "villages of the same revenue", and that this showed that a purely fiscal standard was adopted to determine the extent of a territorial cession with the transfer of full sovereignty. But the Portuguese Government seem to forget that in paragraph 51 of the Portuguese Reply they had given the words in which Raghoba proposed to cede his imaginary territories: "*cession for ever to the Portuguese nation, the right and the domination over all the territories* which have been taken over from them by the Marathas on this coast of the North". The Government of India is entitled to point out that no such language is found in any of the texts of the alleged treaty, or in any of the documents of the Marathas concerning their grant of 1783 and 1785.

180. In the same paragraph 83, the Portuguese Government quoted the Marquis of Alorna, a Viceroy of Portugal, in support of the proposition that in those days there was no territorial sovereignty except in function of the collection of revenue. The Government of India do not know how well-acquainted the Marquis of Alorna was with the Public Law of India. The Marquis of Alorna would have been correct in expressing an opinion that rulers in India—Moghul, Maratha and British—were interested in collecting revenue and as sovereigns of their territories had the right to collect revenue. But he would have been completely wrong if he had expressed the opinion that saranjam or jagir grants were not grants of revenue only but cession of territory in sovereignty. If such meaning were to be given to grants of revenue made by the Marathas and the Moghuls, it would reduce to nonsense the study of many learned British administrators who had devoted their lives to the study of the Indian people and their systems, and would go against the facts of history, the jurisprudence of Indian courts and the decisions of the Judicial Committee of the Privy Council.

181. The Government of India would also like to ask the Portuguese Government if the villages which were granted to Dhume,

the Portuguese envoy, were also in cession of territory with sovereignty, "using a fiscal standard".

182. The Government of India has put together a study in Annex F, No. 41 which shows quite clearly that the Maratha Government of that time knew well enough how to cede or acquire territory by the use of clear and unambiguous words. It is not, as is perhaps alleged by the Portuguese Government, that in India at that time, cession of territory in sovereignty was made loosely or that the concept of cession of sovereignty was not understood. The Maratha Government fully understood the difference between a saranjam or jagir grant and a cession of territory in sovereignty and had appropriate expressions for these different kinds of transactions.

183. In paragraph 80 of the Reply, the Portuguese Government have assumed that the words "the authority of Sarkar be unimpeded" suggest that there was a question of granting to the Portuguese certain Maratha villages in full sovereignty and it was necessary for that purpose to ensure that such villages should be chosen for cession where the full sovereignty of the Sarkar had been exercised up to that time without any hindrance. This is indeed a curious interpretation given to the express words of the Maratha Government not only in the document of 17th December, 1779, but in an earlier document given at Indian Annex C, No. 6 and in later sanads and other documents. In support of their interpretation, the Portuguese Government draw the assistance of Wagh's mistranslation of the 6th January, 1780. In paragraph 81, they quote Wagh's mistranslation of Article 17 and they describe the document as one "whose value as an interpretative element of the said original cannot be denied". In paragraph 74 the Portuguese Government has stated:

> "The Portuguese translation of the Maratha text, the value of which the Counter-Memorial attempts to diminish without reason (paragraphs 73 and 75) is a translation worthy of faith by a responsible person (Ananta Camotim Vaga) who affixed his signature thereto in order to authenticate it. It is obvious that its contents cannot prevail against the Maratha original of which it is simply a translation; but because it is an authorized translation, it deserves to be taken into consideration as a precious element interpretative of such original.
>
> The Maratha translation of the Portuguese text, on the contrary, is the work of an anonymous translator; it was made after the conclusion of the treaty under unknown conditions and for an unknown purpose. Therefore, it is not a translation which is authorized."

It would thus appear that while the Portuguese Government still attaches value to Wagh's translation, it describes the Portuguese text in the Portuguese language of the 4th May, 1779, as of secondary interest, and refuses to recognize the existence as a Portuguese

document the Marathi version of the Portuguese text of 4th May, 1779, which the Government of India described in the Counter-Memorial as Dhume's translation and which is now found to be a document emanating from the Portuguese Government itself.

184. As has been shown in paragraph 87 above, the difference in the Maratha text of the 17th December, 1779, and Wagh's translation of this text is particularly obvious in regard to the words in Article 17—"where the authority of the Sarkar is unimpeded" and "without having in them dominion, nor any other hindrance on the part of the Sarkar". *Wagh, in his translation, has set out to give an opposite interpretation of the Maratha text. In the Maratha text the authority and jurisdiction, etc. is reserved by the Sarkar. In Wagh's translation the dominion in the villages is reserved to the Portuguese and taken away from the Marathas.* The Government of India may ask why should a responsible official translator whose translations, according to the Portuguese Government, are worthy of faith, have gone to the trouble of mistranslating the words "where the authority of the sarkar is unimpeded" as "without (the sarkar) having in them dominion nor any other hindrance on the part of the sarkar ...", and invert the meaning, *unless the meaning which was inverted was unfavourable to the Portuguese Government?* [1]

185. While it is clear that when the two texts cannot be reconciled, it is the Maratha original which must prevail over the translation (and the Portuguese Government admits this), Wagh's deliberate mistranslation itself confirms that the words in the original Maratha text—"where the authority of the Sarkar is unimpeded"—refer to a reservation on the part of the Maratha Government of its authority, jurisdiction and dominion.

186. In paragraph 85 the Portuguese Government stated that other articles of the alleged treaty of 1779 lend support to the Portuguese contention that Article 17 envisaged cession of territory in sovereignty, because "otherwise these provisions would be senseless and without practical importance". In this connection the Government of India would like to make three observations: (1) the Portuguese Government assume the existence of a valid and binding treaty between the Marathas and the Portuguese; (2) the Portuguese Government assume that the intention of the Marathas in the alleged treaty was to cede territory in sovereignty to the Portuguese; and (3) the Portuguese Government seem to contend

[1] The Government of India has already compared the Maratha text of the 17th December, 1779, and Wagh's translation thereof and demonstrated that Wagh, instead of translating the Maratha document, copied the language of the Portuguese text of 4th May, 1779, with the exception of Article 17, the meaning of which he inverted in a deliberate manner. The Government of India pointed out the telltale grammatical error in the Portuguese language of Wagh which plainly gives his intention away; and the Government of India also showed how the Portuguese Government had covered up this grammatical incongruity in its French rendering of Wagh's text at Annex 1 of the Portuguese Memorial. See paragraphs 87 to 93.

that the principal and central purpose of the alleged treaty was the grant to the Portuguese Government. The facts as stated by the Government of India in their Counter Memorial show quite the contrary. The principal intention of the Portuguese and of the Marathas in parleying with each other was to end disputes which had arisen as a result of the capture of the Portuguese fleet by the Marathas. The alleged treaty of 1779 was intended to be a treaty of friendship and commerce. It was to establish friendly relations and an alliance between the Portuguese and the Marathas and to provide for freedom of commerce on land and sea between their respective possessions. The principal purpose of the treaty was not to be found in the provisions of Article 17.

187. If the grant of the saranjam or jagir to the Portuguese had been the central purpose of the treaty it would have been set out in the foremost articles and would have been alluded to in other articles. However, the grant is envisaged in the 17th article of a document consisting of eighteen articles. It is therefore futile to suggest that the previous provisions of the treaty should govern what was set out at the tail-end of the treaty, particularly when none of the other provisions allude to it. The Government of India cannot admit that the first sixteen articles of the alleged treaty throw any light on the true interpretation of Article 17. However, if the articles which have been quoted by the Portuguese Government are examined one by one, it will be clear that they cannot bear the interpretation which the Portuguese Government would wish to set upon them.

Article 5

188. At paragraph 85 *(a)* the Portuguese Government states that the provisions of Article 5—"neither party will revive disputes existing prior to this treaty" referred to disputes which had previously arisen between the parties concerning sovereignty over the territories of the old "Province of the North". The Portuguese Government state:

> "it would be absurd to assume that at the historical moment which was most propitious for the restoration of that sovereignty the Portuguese State should have renounced it in exchange for a cession of revenue which the Maratha State could withdraw at will".

189. The Government of India has already set out in Section I above its answer to the Portuguese argument that the historical antecedents of the alleged treaty of 1779 show that a part of the old "Province of the North" was intended to be restored to the Portuguese Government. The Government of India demonstrated there that on no occasion did the Portuguese Government put forward a demand for the restoration of its old "Province of the North" to the Marathas, nor did Dhume, the Portuguese Envoy, ever bring to the notice of the Maratha Government the territorial

ambitions of the Portuguese. It has been stated in those paragraphs that it is impossible for the Portuguese Government to show any document in proof of any such proposal having been made to the Maratha Government. The Government of India has stated in those paragraphs that there was no dispute between the parties concerning territorial dispositions. All out-standing territorial matters had been settled in 1740. Under the treaty of 1760 Portugal had expressly given up all her territorial claims against the Marathas. The Government of India have already cited an article of the treaty of 1760:

> "whereas by the present treaty the friendship between the most happy and the Majestic State is renewed and ratified, both the powers undertake reciprocally to forget completely any reasons for discord, hindrances *or previous claims* and the capitulations clashing with the agreement of this treaty shall not have any effect".

Thus Portugal gave up by the treaty of 1760 all her claims. There was therefore no territorial dispute outstanding in 1779.

Article 6

190. The Portuguese Government have next cited Article 6: "After carrying on negotiations through the vakil both parties should act in strict accordance with it." From these words the Portuguese Government concluded that the grant could not have been revoked unilaterally by the Marathas without reference to the Portuguese Envoy whom Article 6 envisaged as the mediator of the parties. The Government of India agrees that the presence of the Portuguese envoy at the Maratha Court was the basis and guarantee of friendly relations between the Marathas and the Portuguese. The Government of India would like to point out, however, that the Portuguese Government have evidently overlooked the fact that the Portuguese withdrew their Envoy from the Poona Court, thus bringing about a total breakdown of friendly relations and giving the Marathas justification for cancelling the grant. They also forget that when the Marathas revoked the grant of saranjam they expressly stated in the document of revocation:

> "The Vakil from the Firangee of Goa was always accredited to the Sarkar at Poona and the services of the Sarkar were performed by the Firangee of Goa. For this the Mahal of Nagar Aveli, Taluka Bassein, has been granted by the Sarkar in Saranjam to the Firangee of Goa. Of late no services to the Sarkar are rendered by the Firangee. *And the Vakil does not reside at Poona.* Therefore the Mahal should be resumed." (Indian Annex C. No. 31, **I**, p. 293.)

Thus it will be seen that the Portuguese Envoy having been withdrawn from the Poona Court, friendly relations having ceased between the Marathas and the Portuguese, the Portuguese having failed to perform service to the Marathas, the Portuguese having broken pledges of friendship with the Marathas—the Marathas

revoked the temporary and conditional grant made by them to the Portuguese in 1783 and 1785 [1].

Article 13

191. In the same paragraph the Portuguese Government cite Article 13: "Should either of the parties become weaker the other will not start a quarrel on some pretext or other, but will act in friendship according to the agreement." The Portuguese Government state that the effect of this provision was that the Maratha Government could not revoke the concession granted to the Portuguese State "on the pretext that the friendship of that State was no longer of interest to it". The Government of India would like to ask, did the Portuguese Government act in friendship with the Marathas? Did they continue to maintain friendly relations with the Marathas or did they turn on the Marathas during the time when the Marathas were in difficulties and their power was on the decline? It is a historical fact that after 1802 Maratha power began to decline and they were hemmed in from all sides, particularly by the British. Did the Portuguese Government go to the assistence of the Marathas? Or did the Portuguese Government take that occasion to usurp territory which did not belong to them and had never been ceded to them in sovereignty? The Government of India will content itself with stating that it is not for the Portuguese Government to complain of friendship with the Portuguese no longer being of interest to the Marathas. It was the Portuguese who lost interest in the friendship of the Marathas.

Articles 8, 9, 11, 12 and 14

192. The Portuguese Government finally states (in the same paragraph 85) that Articles 8, 9, 11, 12 and 14 brought about *an alliance* between the Marathas and Portuguese. The Portuguese Government states that "it would be absurd to assume that the Portuguese State would have gone so far in its undertakings in consideration of a small revenue which was freely revocable". The untenable nature of the Portuguese argument itself is clearly revealed by the fact that they have referred to articles which are of a reciprocal nature and which, if a treaty could be said to have existed, would have bound both the parties with equal force. The

[1] Dhume died at Poona on the 12th May 1790 and Vithal Rao Gorki was appointed to the same post. See P. Pissurlencar, *"Agents of Portuguese Diplomacy"*, cited in the Portuguese Reply, page 185. Gorki died in Poona on the 23rd July 1808 when he was 78 years old. By an Order-in-Council dated the 3rd July of the same year, the son of the above mentioned Vithal Rao, by name, Lakshmi Narain, was appointed to the post of Envoy of the Portuguese Government in the Court of the Peshwas. Lakshmi Narain held the post of Envoy till the middle of December 1811 and returned to Goa in fulfilment of the Royal Order of the 2nd June 1810 by which the same post was abolished because there were no "political relations requiring the permanent residence of such an Envoy". See P. Pissurlencar, *op. cit.*, pages 350-352.

undertakings were reciprocal and mutual. The Portuguese seem to contend that there should have been a consideration, over and above the condition of reciprocity, in order to obtain agreement to a treaty of friendship, commerce and alliance with the Marathas and that this consideration should have consisted of a cession of territory in sovereignty and not merely a yearly subsidy or grant of revenue. The Government of India finds it quite difficult to reply to an argument so devoid of substance.

193. In paragraph 86 the Portuguese Government attacks what it calls the second Indian argument, namely, that the grant is expressly described as jagir in one of the versions of the alleged treaty and that this expression means the

> "temporary assignment by a sovereign grantor of the public revenue from villages or lands, a grant neither transferable nor hereditary, enjoyed at the pleasure of the sovereign and terminable at any time". (See Portuguese Reply, paragraph 78 (2).)

The Portuguese Government repeats in this paragraph that the document which describes the grant as jagir has no legal value for the Portuguese Government:

> "In accordance with what has already been stated in paragraphs 71, 74 and 75 this is a translation established by the Marathas after the conclusion of the treaty of which we have no knowledge either when, nor how, by whom nor for what purpose it was made. It is inadmissible that the Portuguese State should be bound by such a document."

The Government of India has already dealt fully with the pretended ignorance of the Portuguese Government and it will not repeat its arguments. However, the Government of India wish to emphasise that *the Portuguese Government are bound by this document. The definition of the grant as jagir in this document estops them from denying that it was such a grant.* The reason is that it was this document which was, according to the admission of the Portuguese Government, officially sent to the Maratha Government as the basis of the proposed treaty. It is the official text of the Portuguese Government and bears the signatures of two successive Governors General, Camara and De Souza. Moreover, the Portuguese Government have admitted that this was the text which was signed and ratified by the Portuguese Government. (See paragraph 65 of the Portuguese Reply.)

194. The Government of India would draw attention in this connection to paragraph 64 of the Portuguese Reply which reads:

> "This was exactly what happened in connection with the treaty of Punem in 1779—this and nothing else: Viceroy Camara forwarded to the Peshwa on May 4th 1779 *a text authenticated by his signature* which meant that, as of that time, he undertook in the name of the Portuguese State, to fulfil the provisions of that document.

> The Peshwa *took cognizance of that text* ... thus considering himself as of this time bound vis-a-vis the Portuguese State to comply with the provisions *of that document.*"

195. The next part of the Portuguese argument in paragraph 86 (perhaps anticipating the discovery of the document of the 4th May, 1779, at a subsequent stage of the litigation!) was that a casual occurence of the word jagir in Article 17 of one of the versions of the alleged treaty could not give definition to the grant. The Portuguese Government states that the word jagir or saranjam did not necessarily mean the temporary grant of revenue on a precarious and revocable basis and that the word could not by itself be sufficient legally to qualify the grant. As has been submitted in paragraph 161 above, the Portuguese Government are proceeding on the assumption that cession of territory in full sovereignty must be presumed unless the contrary could be proved by reference to express reservations. It is from that point of view that they argue that the word jagir does not *qualify* cession of territory in sovereignty. The Government of India submits that the view put forward by it is not that the word jagir *qualifies* the alleged grant of sovereignty—it *describes* and indicates the nature of the grant itself.

196. The Government of India would like to repeat that the word jagir in Article 17 in the Marathi language of the Portuguese document of the 4th May 1779 unmistakably defines the nature of the grant alleged to have been made by the Marathas to the Portuguese under the alleged treaty.

197. Furthermore, the Government of India would respectfully draw the attention of the Court to the fact that the word jagir does not occur accidentally in a single document; the whole set of circumstances show clearly that what the Marathas intended to grant to the Portuguese was nothing but a jagir or saranjam and that what the Marathas actually granted to the Portuguese in 1783 and 1785 was nothing but a jagir or saranjam. The conclusion that all that the Maratha Government granted to the Portuguese in 1783 nad 1785 was a share of the public revenue of villages situated in Maratha territory and within Maratha sovereignty, could be arrived at severally and jointly from various facts which are consistent with each other and lend support to each other. These facts may briefly be listed hereunder:

1. The Portuguese had no territorial claims in the North. They expressly gave up all their claims against the Marathas under the Treaty of 1760.

2. The Marathas had no intention of ceding any territory to the Portuguese.

3. The Portuguese envoy at the Maratha Court, Dhume, never referred to any territorial claims or ambitions of the Portuguese.

4. The Portuguese envoy wrote to his Government that he had asked for a grant of revenue rights.

5. No words are found in any of the versions of the alleged treaty to signify session of territory in sovereignty. Under the different texts of the alleged treaty:

(i) revenue of 12,000 in villages within the jurisdiction of the Sarkar was to be assigned—"contribution of Rs. 12,000 starting from the current year" in the Portuguese text of 4th May 1779—"Jagir of Rs. 12,000" in the Marathi version of the Portuguese text of 4th May 1779.

(ii) The Marathas expressly reserved their jurisdiction in their villages.

(iii) The Portuguese were not to erect buildings in Maratha villages.

6. No territory was mentioned in any of the texts of the alleged treaty.

7. The grant was by sanad: it was a sanadi grant.

8. Sanads were issued in identical terms in respect of the grant to the Portuguese and to the Portuguese envoy.

9. The words used in the Sanads, and the conditions attached to to the grant, and the restrictions mentioned therein, clearly stamped it as a grant of a share of the revenue only.

10. Rights of hereditary officers were excluded from the revenue grant to the Portuguese and to the Portuguese envoy.

11. Zakat—both Ramnagar Zakat and Nagar Aveli Zakat—was excluded.

12. For three years a cash allowance was paid to the Portuguese directly from the Maratha treasury.

13. Before the Saranjam grant was made the Marathas required a tribute called the Nazarana to be paid which was paid by the Portuguese.

14. The Portuguese undertook obligations of a saranjamdar—

1. to perform service to the Marathas.

2. to return excess of revenue over Rs. 12,000.

3. not to erect any buildings.

15. A further assignment was made in 1785, because Rs. 12,000 revenue could not be realized from the 1783 assignment.

16. Ramnagar Zakat was continued to be collected by the Marathas.

17. The grant was consistently treated as a conditional and political grant in Maratha revenue papers. The assigned revenue was entered on the debit side and shown as *expenditure* on foreign affairs relating to Portuguese of Goa.

18. The grant was resumed on several occasions and was reassigned.

19. Maratha guards were posted in Dadra and Nagar Aveli.

20. Maratha taxes were collected in Dadra and Nagar Aveli.

21. Cultivators and landowners of Dadra and Nagar Aveli complained to their Maratha Ruler of the exactions of the saranjam holder.

22. In 1817 the Maratha Government revoked the grant of saranjam to the Portuguese.

198. The Portuguese Government itself admits in paragraphs 1, 2 and 3 of Annex No. 1 of the Portuguese Reply that the reference to *jagir* in the translation of the Portuguese text in the Marathi language of 4th May, 1779 is not casual and does not stand by itself. The Portuguese Government states in paragraph 3 of that Annex:

> "Apart from this translation the word jagir as also saranjam appears only in documents of internal service of the Marathi Court, memoranda, sanads, letters sent to subordinate authorities and accounts of fiscal administration of the Peshwa."

199. In the next sub-section the Government of India will proceed to examine in some detail the Maratha documents relating to the grant. Before proceeding to the next sub-section the Government of India will observe that the Portuguese Government has not ventured even to refer to, much less to explain, in any manner the restriction contained in Article 17 of the Maratha document of 17th December, 1779, that no *imarat* was to be raised by the Portuguese in the Maratha villages. The Government of India will take the opportunity of referring to this restriction in some detail in the next sub-section.

SECTION IV

The Maratha Grants of 1783 and 1785

200. In paragraphs 84 and the following of the Counter-Memorial the Government of India described the manner in which the Maratha Government made certain Saranjam or Jagir grants to the Portuguese in 1783 and 1785. The Government of India referred to Maratha Sanads and orders relating to the grant and showed that in response to the assurances of friendship, which they received from the Portuguese Envoy, Narayan Vithal Dhume, they resolved in 1776 to make a Saranjam or Jagir grant to the Portuguese and to Narayan Vithal Dhume and they implemented this resolution in 1783 and 1785. In 1783 the Maratha Government assigned both to the Portuguese and to Narayan Vithal Dhume certain villages from which the named revenue, namely Rs. 12,000 and Rs. 3,000 was to be collected. It prohibited the grantees from raising any Imarat or building in the assigned villages; and it excluded from the grant certain hereditary dues known as Watan and it reserved to itself the collection of the Maratha tax known as Ramnagar Zakat.

201. At paragraphs 89 and the following of the Reply the Portuguese Government has disputed the statements of fact made and conclusions reached by the Government of India. In its attempt to refute the Indian facts and arguments the Portuguese Government has proceeded on several assumptions and premises. These assumptions and premises of the Portuguese Government could be summarized as follows:—

(1) There was a valid treaty concluded between the Marathas and the Portuguese in 1779.

(2) This treaty provided for cession of territory in full sovereignty.

(3) The Maratha version of the 4th May 1779 which describes the proposed grant from the Marathas to the Portuguese as Jagir does not exist as a Portuguese document, cannot bind the Portuguese Government, and is of no value in determining the nature of the grant made by the Marathas.

(4) The study and conclusions of the Government of India relating to the nature of the grant known as Saranjam or Jagir are erroneous and irrelevant.

In the preceding paragraphs of this Rejoinder, the Government of India has shown all the above assumptions and premises of the Portuguese Government to be false and without foundation. The

Government of India has shown in Section II above that no treaty was concluded between the Marathas and Portuguese in 1779 and that none of the documents which are alleged to constitute a treaty contains a provision for cession of territory. The Government of India has also shown in paragraph 96 above that the document which describes the proposed grant as *Jagir* is an official text of the Portuguese Government issued under the signature of the Portuguese Viceroy, Camara. At paragraphs 97 to 199 above the Government of India has demonstrated in detail the nature and legal incidents of the Maratha grant known as Saranjam and Jagir and shown it to be a grant of the share of the public revenues revocable at the pleasure of the Grantor. The Government of India will proceed to examine the arguments advanced by the Portuguese Government on the basis of the above stated assumptions and premises and it will show that the Portuguese superstructure is as faulty as the foundation upon which it is built.

202. The Portuguese line of argument contained in the chapter of the Reply entitled "Execution of the Treaty of 1779 and the Supplementary Accords of 1783 and 1785", and which is based upon the above stated assumptions and premises, may be summarized as follows:—

(1) The nature of the grant actually made by the Marathas in 1783 and 1785 is not to be gathered from the Sanads and Orders of the Marathas.

(2) Internal documents of the Portuguese Government are relevant for the purpose of deciding whether or not the Marathas made a cession of territory in full sovereignty to the Portuguese.

(3) Evidence of a cession of territory by the Marathas to the Portuguese is to be found from certain documents in the Portuguese language which are alleged to be "bilateral".

The Sanads and Orders of the Marathas

203. At paragraph 90 of the Reply the Portuguese Government states:—

"In this connection, the Portuguese Government refutes *ab initio* the argument of the Government of India (Counter-Memorial paragraph 84) according to which the legal nature of the concession made to the Portuguese could *only* be determined by the "sanads" emanating in this connection from the Maratha Chancellory.

This theory is based upon an erroneous assumption that no true treaty was concluded in 1779 and that, therefore, the Maratha "sanads" were the only legal grounds upon which the concession was based.

The truth, however, is quite different. The existence of a luso-maratha treaty concluded in 1779 cannot be drawn into doubt as

has been shown (*supra*, paragraphs 63 to 69); nor can it be drawn into doubt that is was by Article 17 of that Treaty and not by a unilateral subsequent resolution of whatever type it might have been that the Marathas granted a territorial concession to the Portuguese."

At paragraph 92 of the Reply the Portuguese Government described the Sanads as "*documents representing only the unilateral will of one of the signatories to the Treaty of 1779*" [1]. It is clear from these paragraphs of the Reply that this assertion of the Portuguese Government depends entirely on the assumption that there was in 1779 a treaty concluded between the Marathas and the Portuguese. Accordingly, in view of the non-existence of the alleged treaty of 1779, the above assertions of the Portuguese Government fail altogether.

204. At paragraph 84 of the Counter-Memorial the Government of India stated:—

"The nature of the interest actually granted to the Portuguese in the Maratha villages is clearly brought out in the manner in which the grant of revenues was made. These grants were made under sanads. A sanad expresses the notion of a royal grant, diploma, charter, patent; it signifies a document in respect of emoluments, titles, privileges, offices or rights to revenue, etc., made under the seal of the Sovereign. The expression descended from Moghul times, was used by the British Government in India, and is still used. A sanad, by its definition, could not bring about a grant of sovereign rights or rights imposing a binding obligation on the grantor. It was always revocable."

As has been stated by the Government of India in the previous section relating to the nature of the Maratha grants known as Saranjam or Jagir (see paragraphs 97 *et seq.*) and as appears from the administrative practice and judicial decisions cited in connection therewith, a grant made under a Sanad signifies a grant made by a Sovereign Grantor, not as a matter of obligation, but as a matter of bounty. A Sanad creates rights which may be exercised only during the pleasure of the Sovereign.

The Government of India finds that in paragraph 91 of the Reply the Portuguese Government does not contest the fact that a Sanad could not bring about cession of territory or "transmit sovereignty". What the Portuguese Government denies is that the grants made by the Marathas to the Portuguese in 1783 and 1785 were grants made under Sanads. Thus at paragraph 91 of the Reply it states:—

"Indeed, there is not the least interest to determine whether the right of sovereignty can or cannot be transmitted by a 'Sanad' nor whether a 'Sanad' in and of itself is or is not freely revocable, *because it was not by 'Sanad' emanating from the Maratha Government*

[1] Emphasis of the Portuguese Government.

that the sovereignty over the villages adjoining Daman was transferred to the Portuguese State but by the treaty of 1779 itself." [1]

In the submission of the Government of India the above constitutes an admission by the Portuguese Government that *the Portuguese could not and did not acquire sovereignty over Daman and Nagar Aveli under Sanads issued by the Maratha Government.* In short, the Portuguese Government altogether abandons its claim that the Sanads issued by the Maratha Government in 1783 and 1785 constituted Portugal's title to sovereignty over a part of Maratha territory.

205. In the second place, however, the Portuguese Government appears to suggest that the Sanads, orders and executive documents of the Maratha Government are irrelevant for the purpose of determining the nature of the grant made by the Marathas. This contention of the Portuguese Government is obviously untenable. The grant was made by the Maratha Government and the nature and contents of the grant and the intention of the grantor are to be seen from his documents and not from the documents of the grantee. It is from this point of view that the documents of the Marathas occupy a prominent place for the purpose of determining the nature of the grant made to the Portuguese in 1783 and 1785. The *dictum* that the nature of the grant is to be ascertained from the intention of the *grantor* is so well known and obvious that it is not necessary for the Government of India to elaborate it any further.

206. The Portuguese Government then proceeds to allege in paragraph 92 of the Reply that "nothing can be inferred from these Maratha documents which would militate against the *plenary* [2] and *permanent* [2] character of the concession granted to the Portuguese". It refers in paragraph 93 to Maratha documents at Indian Annex C. Nos. 7, 8, 9, 10 and 11, and states that it cannot find in these documents "an *express reservation* [1] of sovereignty in favour of the Master of Punem or an *express reservation* [1] of the right of revocation".

In the submission of the Government of India the above assertions of the Portuguese Government show that the Portuguese Government have entirely missed the point that it is for the Portuguese Government to prove cession of territory in full sovereignty from the Marathas. A title to cession of territory in full sovereignty must be proved; it cannot be presumed. The alleged absence in Maratha documents relating to the Saranjam grant of an "express reservation of sovereignty in favour of the Master of Punem" could neither bring about cession of territory nor create by presumption a title to sovereignty in favour of Portugal. Accordingly, it is not for the Government of India to show an "express reservation" in respect of continuation of the sovereignty of the Marathas over

[1] Our italics.
[2] Emphasis of the Portuguese Government.

their territory, but for the Portuguese Government to find and show express words indicating cession of territory in full sovereignty in some treaty to which the Marathas were a party. This, in the submission of the Government of India, the Portuguese Government has failed to do.

207. Having thus shown the line of the Portuguese argument to be erroneous and founded on assumptions and premises which are themselves without basis in fact, the Government of India will now demonstrate that the very Maratha documents referred to by the Portuguese Government leave no doubt of any kind as to the nature of the grant intended to be made by the Marathas in 1780 and actually made by them in 1783 and 1785.

208. In paragraphs 93, 95, 96, 97, of the Reply the Portuguese Government has referred to Maratha documents at Indian Annex C. Nos. 7, 8, 9, 10, 11, 12, 14, 15. If these documents are examined it will be found that they reveal the following facts:

1. The grant made by the Marathas to the Portuguese and to Narayan Vithal Dhume was a grant of Saranjam or Jagir.

2. The grants in question were made in implementation of the Maratha resolution of 1776 and were in no way dependent on the alleged treaty of 1779.

3. No distinction was made by the Marathas between the grant to the Portuguese and the grant to Narayan Vithal Dhume.

4. The expression "assignment of villages", which means assignment of the revenues of particular villages, was used in documents relating to the grant to Narayan Vithal Dhume as in documents relating to the grant to the Portuguese.

5. The collection of certain dues and taxes was excluded from the grant of revenues, both in the case of the Portuguese and Narayan Vithal Dhume.

6. Both the grantees, the Portuguese and Narayan Vithal Dhume, were prohibited from raising imarat or building in the "assigned villages", where it was stated the authority and jurisdiction of the Maratha Sarkar would continue without interruption.

209. For the convenience of the Court short extracts from these documents and the document at Indian Annex C. No. 13, which the Portuguese Government omitted from its consideration, are set out below:

INDIAN ANNEX C. No. 7

"Jagir of Rs. 15,000 has been assigned together to the Firangee and his Envoy Narayan Vithal Dhume: ... agreement has been made to assign villages of Rs. 15,000 from the current year ... Sanad granted."

INDIAN ANNEX C. No. 8 (Part 1)

"Saranjam to Firangee of Goa...

Narayan Vithal Dhume, Firangee envoy, has conveyed assurances that the Firangee is friendly towards the Sarkar and would continue likewise in future. Therefore a Sanad is issued according to agreement that on behalf of the Sarkar villages adjoining Daman worth Rs. 3,000 where the Sarkar's authority runs unimpeded be assigned to the above person by way of allowance. No Imarat of any sort be raised."

"Saranjam to Firangee of Goa...

The Firangee of Goa is in amity with the Sarkar. Therefore Sanad is issued according to agreement, that villages adjoining Daman and of the revenue of Rs. 12,000 and without restriction on the authority of the Sarkar, and where no building shall be raised, be selected for the Firangee."

INDIAN ANNEX C. No. 8 (Part 2)

"The Firangee of Goa [has put] is keeping friendly relations with the Sarkar. Therefore Sanad has been issued making agreement that to the Firangee may be assigned villages adjoining Daman worth Rs. 12,000 and without restriction on the authority of the Sarkar; and no imarat be raised."

INDIAN ANNEX C. No. 9 (Part 1)

"Sanads for villages assigned to the Firangee...

Sanad to the Firangee envoy...

1 Mauza [1] Kubharia...

1 Mauza Suklav..."

INDIAN ANNEX C. No. 9 (Part 2)

"The Firangee of Goa is keeping friendly relations with the Sarkar. Therefore formerly a Sanad was issued to you after making agreement to the effect that villages adjoining Daman of the revenue of twelve thousand rupees, in which the authority of the Sarkar is unimpeded and of the above Kamal Akar [2] should be assigned from Prant Bassein and no Imarat be constructed.

But villages were not assigned. Therefore this Sanad is issued for assigning villages ... excluding Sarkar's Watans of Deshmukh, Despande, Gaon-Kulkarni and Sar-Patil, and of Zakat ...

Therefore the remaining [Amal] Kamal Akar [2] of the villages excluding Sarkar's Watans and Zakat be made Dumala to the Firangee and be shown on the debit side of the accounts of the said Prant.

No Imarat be constructed in the villages."

INDIAN ANNEX C. No. 9 (Part 3)

"Narayan Vithal Dhume, Firangee Vakil, has conveyed assurances that the Firangee is friendly towards the Sarkar and would continue likewise in future. Therefore formerly a Sanad was issued to you after making an agreement to the effect that villages in

[1] Marathi for "village".

[2] Revenue yield.

Prant Bassein yielding revenue of three thousand and having the authority of the Sarkar unimpeded therein should be assigned and that no Imarat should be constructed therein... Therefore excluding ... Watans and Zakat the remaining Revenue of the said villages be given as Dumala to him and be shown on the debit side of the accounts of the said Prant. No Imarat be constructed. Sanad to Visaji Keshav."

INDIAN ANNEX C. No. 10

... "no Imarat may be permitted to be raised."

INDIAN ANNEX C. No. 11

"Memorandum in respect of villages . . . to be assigned to the Firangee ... Sanads and letters in respect of this ... Letters to the same effect about the two villages Kumbhariya and Suklav granted to the Firangee envoy Narayan Vithal Dhume..."

INDIAN ANNEX C. No. 12

"Sanad should be issued to Anand Rao Bhikaji that he should assign to the Firangee villages in Taluka Bassein of the Kamal Akar of twelve thousand rupees under the administration of Visaji Keshav and which are in the jurisdiction of the Sarkar and are free from disturbances of the English. A detailed memorandum of villages assigned should be sent to the Huzur.

It should be clearly written in the Sanad that these villages are assigned in lieu of villages adjoining Daman formerly assigned but which could not then be made Dumala."

INDIAN ANNEX C. No. 13

"Sanad be [made] toAnand Rao Bhikaji. He should select for Narayan Vithal Dhume villages in Taluka Bassein of the total revenue of Rs. 3000 on the administration of Visaji Keshav and which are under the exclusive authority of the Sarkar and free from disturbance of the English. A detailed memorandum concerning the villages assigned should be sent to the Huzur. The Sanad to make it clear that these villages are being assigned in lieu of villages formerly assigned and which could not be made Dumala."

INDIAN ANNEX C. No. 14

"Now therefore from villages of Taluka Bassein in which the Sarkar's authority is unimpeded villages on the basis of Kamal Akar during the administration of Visaji Keshav and which are free from the disturbances of the English and which yield Kamal Berij [total revenue] of twelve thousand, be assigned and a detailed memorandum of the assigned villages be sent to the Huzur."

INDIAN ANNEX C. No. 15

"Saranjam to the Firangee of Goa.

INDIAN ANNEX C. No. 18

"... the Firangee should not construct in the said Pargana any new Imarat. If he attemps to construct any new Imarat he should be prevented."

210. At paragraphs 99 and 105 of the Reply the Portuguese Government faced with the description of the grant as "Saranjam" and "Dumala" in the Maratha documents resorts once again to the argument that the occurrence of the words "Saranjam" and "Dumala" in the Maratha documents relating to the grant does not in any way derogate from the "plenary and permanent character of the concessions". Thus at paragraph 99 the Portuguese Government states:

> "Once again, as before, the Government of India attempts here with the word 'Saranjam' to deduce from a word, the legal structure of an institution. But this deduction is permissible only when the word in question has a single and uncontroverted sense. This is not true in the present case: 'Dhumala" may have rather varying significance and, in a current sense it is far from meaning, as alleged by the Government of India, "the reversionary nature of the grant'. Furthermore the word could never be considered as binding upon the Portuguese because it is encountered only in documents which have no bilateral legal value."

As will appear from the documents, and as has already been demonstrated by the Government of India in the paragraph above, the Maratha documents define and describe the nature of the grant made to the Portuguese and to Narayan Vithal Dhume. The Government of India has already stated that if the Portuguese Government contends that in these documents the words "Saranjam", "Jagir" or "Dumala" do not have their ordinary meaning then it is for the Portuguese Government to set out and prove that they had another meaning.

211. The Maratha documents also show that the grant which was intended to be made in 1780 and which was actually made in 1783 and 1785 was made on the basis of the Maratha resolution of 1776 and not in implementation of an alleged treaty. The reference in the documents is to an agreement to make a grant for Rs. 15,000 to the Portuguese and to Narayan Vithal Dhume. Obviously, this is a reference not to the documents of the 4th May, 1779, or the 17th December, 1779, which are alleged by the Portuguese Government to constitute a treaty. These documents do not mention a grant to Narayan Vithal Dhume or a sum of Rs. 15,000. The reference is to the Maratha memorandum, resolution or decision of the 24th August, 1776. (Indian Annex C. No. 6.) As the Government of India has shown the documents of the 4th May 1779 and the 17th December 1779 never became a treaty. Furthermore, the Maratha document of 1779 at Indian Annex C. No. 7 referred expressly to the "proposal of 1776". The document of 1776 at Indian Annex C. No. 7 is seen to be a resolution or decision to make a grant of Rs. 12,000 to the Portuguese and a grant of Rs. 3,000 to Narayan Vithal Dhume on the basis of assurances given by Narayan Vithal Dhume that he and the Portuguese

Government had pledged their friendship towards the Maratha Ruler. Thus the Sanads which were issued by the Marathas in 1780 onwards were based not on an alleged treaty but on the decision of the Maratha Sovereign in 1776 to make a grant to the Portuguese and to Dhume as a matter of bounty and on condition of the grantees pledging their friendship towards the Marathas.

211 *a*. The Portuguese Government has sought to show a distinction between the grant made to the Portuguese and the grant made to Narayan Vithal Dhume. However, as will be seen from the Maratha documents referred to above, the grant to the Portuguese and to Narayan Vithal Dhume was made in an identical manner. The Portuguese Government has sought to draw a distinction by asserting that, one, the grant to the Portuguese Government was based on the alleged treaty of 1779 and the grant to Dhume was made outside and independently of the alleged treaty; and two, the grant to the Portuguese Government was of "villages" whereas the grant to Dhume consisted only of the "revenue of villages".

211 *b*. The Portuguese argument clearly fails in so far as it is based on the assumption that a treaty was concluded between the Marathas and Portuguese in 1779 and that it was in implementation of a treaty that a grant was made to the Portuguese.

211 *c*. As regards the Portuguese argument that the grant to the Portuguese Government consisted of "villages" and the grant to Dhume consisted of "the revenue of the villages", the Maratha documents referred to above show quite clearly that no such distinction was maintained. It is clear that the Portuguese Government has not understood the meaning and significance of the expression "assignment of villages". As has been shown in the previous section on the nature of the grant of Saranjam and Jagir, and as appears clearly from the authorities quoted there, "assignment of villages" signified "assignment of the revenue from villages". The expression "assignment of villages" did not signify and was not capable of signifying a transfer of the land of the villages or cession of territory in sovereignty. Furthermore, it will be seen from the Sanads under discussion that these Sanads spoke of the "assignment of villages" to Nayrayan Vithal Dhume in the same manner as to the Portuguese. The Portuguese statement that the Maratha documents indicated a difference between the grant to the Portuguese and the grant to Narayan Vithal Dhume by speaking of "villages" in respect of the grant to the Portuguese and of "simple revenue" in respect of the grant to Dhume has no basis in fact as can be seen from the Maratha documents (e.g. Indian Annex C. No. 8 (Part 1)).

212. The Portuguese Government admits in paragraph 97:

> "The concession granted to Narana Sinai Dumo had only a transitory and precarious character and became moot in 1790 at the time of the death of the interested party."

The Portuguese Government thus admits that the nature of the grant made by the Marathas to Dhume was transitory and precarious. The grant made by the Marathas to Dhume was a Saranjam grant [1]. In the submission of the Government of India it must follow that, since no distinction was maintained by the Maratha Government between the grant to the Portuguese and the grant to Narayan Vithal Dhume, the grant to the Portuguese was also "transitory and precarious".

213. The similarity of the grant made to the Portuguese and to Narayan Vithal Dhume is also to be seen from the fact that the Marathas excluded from both the grants the collection of hereditary dues known as Watan and the tax known as Zakat.

214. Finally, both the grantees were prohibited from raising any Imarat or building in the "assigned villages". The Portuguese Government has said absolutely nothing about the prohibition in respect of the raising of Imarat or building. As the Government of India stated in paragraph 62 of the Counter-Memorial, and as will have emerged from the previous section on the nature of the Maratha grant known as Saranjam or Jagir, the prohibition on the raising of Imarat or building in the villages of which the revenue was assigned to a grantee was customary and the existence of this very prohibition gave definition to the grant as a revocable and terminable grant. The Portuguese Government apparently finds it extremely difficult to give any answer on this point [2].

Internal documents of the Portuguese Government

215. The Portuguese Government proceeds in paragraph 100 and the following of the Reply to deduce from contemporary *Portuguese* documents that "the Goa and Lisbon authorities never had the slightest doubt concerning the plenary and permanent character

[1] In a footnote to paragraph 95 the Portuguese Government admits that a confusion did exist between the grant to the Portuguese and the grant to Narayan Vithal Dhume, and that the Portuguese Government at one time considered the two villages Kubharia and Suklav granted in Saranjam to Narayan Vithal Dhume as also forming part of territory ceded to them by the Marathas.

[2] Indian Annex C. No. 10, which is an entry of a Sanad of the 3rd June 1780, contains a direction that the Portuguese were not permitted to raise any imarat or building. The document reads: "Sanad to Mukadams of the nine villages. No Imarat is to be raised in the said villages. Therefore no imarat may be *permitted* to be raised." The language of this document indicates that the servants of the Maratha State were instructed to exercise their authority and to ensure that the Portuguese did not raise any imarat or building in the assigned villages.

of the concession". It is thus clear that while, on the one hand, the Portuguese Government denies the value and effect of Maratha documents it seeks to find evidence of cession of territory in full sovereignty from the contents of unilateral Portuguese documents. It is hardly necessary for the Government of India to point out again that the documents of the grantee are of no relevance for the purpose of ascertaining whether or not the alleged treaty contains provision for a cession of territory in full sovereignty. A misunderstanding on the part of the grantee as to the nature of the grant received by him cannot turn a grant of revenue into a cession of territory in full sovereignty. The Government of India accordingly submits that the internal documents of the Portuguese Government which are relied upon by the Portuguese Government are entirely irrelevant for the purpose of determining whether an alleged treaty contains a provision for cession of territory in full sovereignty [1].

216. However, while the Portuguese internal documents are absolutely irrelevant from the point of view of giving definition to the grant made by the Marathas to the Portuguese, they themselves contain no indication either that the Portuguese acquired cession of territory in full sovereignty or that the Portuguese understanding at that time was that they were to acquire cession of territory in full sovereignty. Thus a letter written on the 11th January, 1780, by the Portuguese Viceroy at Goa to the Governor of Daman instructing him that he should go "and personally take possession of the said villages", which is relied upon by the Portuguese Government at paragraph 101 of the Reply, states nothing about cession of territory in full sovereignty [2].

217. In paragraph 102 of the Reply the Portuguese Government refers to a "strong protest" made by the Portuguese Viceroy to the British Government of Bombay. The Portuguese Government states:

> "the Viceroy pointed out that Portugal *had never deviated from the idea of restoring its sovereignty over the territories of the Province*

[1] It will be noticed that in paragraphs 92 and 100 of the Reply the Portuguese Government does not speak of cession of territory in full sovereignty. It speaks of "the plenary and permanent character of the concession". It is not clear if by the use of this formula the Portuguese Government has receded from the position adopted elsewhere in the Reply and in previous pleadings that under the alleged treaty of 1779 the Marathas made to Portugal a cession of territory in full sovereignty.

[2] The translation of this letter which was annexed by the Portuguese Government at Annex No. 26 to the Reply has been studied by the Government of India and found to be inaccurate. The Government of India has made a fresh translation from the original Portuguese language in the photocopy of the document in question (Indian Annex F. No. 42). A comparison of the translation at Portuguese Reply Annex No. 26 and Indian Annex F. No. 42 will show that the Portuguese Government has rendered the word "deliver" in the Portuguese language as "cession" or "transfer".

> *of the North*[1], which the Marathas occupied by force without just cause of war; and he added along the same line that the Portuguese State had already obtained by negotiations from the Government of Punem 'that there be delivered to it the Sanads for the transfer of a few villages'."

The Government of India has already referred to this letter at paragraph 42 above and shown that the British Government totally rejected the above mentioned "strong protest" of the Portuguese Viceroy and the Queen of Portugal expressed her mortification as the result of the Portuguese Viceroy having put forward an obviously untenable claim to sovereignty over the lost territories of Portugal. (Indian Annex F. Nos. 10 and 11.) However, the above statement of the Portuguese Government and the letter cited by it have the merit of showing that even at that time (in 1782) the Portuguese Viceroy did not state that he had entered into a *treaty* with the Marathas or that under a treaty he had received from them cession of territory in full sovereignty. He merely stated that he had obtained by *negotiations* and under *Sanads* the transfer of a few villages.

218. Similarly, the documents cited by the Portuguese Government at paragraphs 103 and 104 do not in any way help the Portuguese Government in support of its assertions. At paragraph 103 of the Reply the Portuguese Government speaks of "demarches for the transfer of villages of the revenue promised located elsewhere", and it refers to Annex 28 which contains extracts from two letters of the Portuguese Viceroy, one to Narayan Vithal Dhume and the other to the Governor of Daman. These very documents show that there was no question of cession of territory and that the instructions of the Portuguese Viceroy related to a fiscal grant. This is clear from the extracts printed at Annex 28 of the Portuguese reply and even more clear from the full text of these letters found in the photocopy of the same Annex. The Portuguese Government also cites at Annex 29 to the Reply another letter from the Portuguese Viceroy to the Governor of Daman. This letter makes it clear that the discussion concerned "the annual revenue of Rs. 12,000". These documents themselves are evidence of the fact that what the Portuguese Government was interested in and what even according to their own understanding they were to get from the Maratha Government was "the annual revenue of Rs. 12,000". In a footnote to paragraph 103 of the Reply the Portuguese Government drew attention to Indian Annex E. No. 7 and No. 8. However, nothing is to be found in these documents to show either that the Portuguese received cession of territory in full sovereignty or that the Portuguese understood the intended grant to be one of territory in full sovereignty. The documents cited in paragraph 104 and given at Annexes 30 and 31 to the Portuguese Reply, which are extracts

[1] Emphasis of the Portuguese Government.

from a letter from the Portuguese Agent at Daman to Narayan Vithal Dhume and a letter from the Secretary of State, Lisbon, to the Portuguese Viveroy, also do not help the Portuguese Government in any way.

218 *a*. At paragraph 109 of the Reply the Portuguese Government refers to certain unilateral Portuguese documents the alleged "deeds of possession". The Portuguese Government states that the Government of India does not deny the authenticity of this document. Obviously, the Portuguese Government is under a misunderstanding. If paragraph 108 of the Counter-Memorial of the Government of India is read it will be found that the Government of India did not accept the authenticity of the alleged "deeds of possession". The Government of India stated there:—

> "irrespective of the authenticity or otherwise of the alleged documents, no such documents drawn up or ceremonies performed by the Portuguese without the participation or approval of the Marathas could have affected the sovereign rights of the Marathas in the territories of Dadra and Nagar Aveli, nor could such 'deeds of possession', drawn up by the Portuguese add to the limited non-sovereign, revocable interest granted to them by the Marathas in Dadra and Nagar Aveli".

The Government of India emphatically denies the authenticity and value of the alleged "deeds of possession" given at Annexes 5 to 7 to the Memorial. Annex 5 to the Memorial is seen to be a document in the Portuguese language drawn up by a Portuguese Notary Public of Daman and styled by him as a "deed of possession". In this document, the Notary Public states that certain headmen of the villages of Dadra and Nagar Aveli were assembled together and informed of the orders of the Marathas and that they were called upon to recognize the Queen of Portugal as their Sovereign. It is stated in the document that these assembled headmen, who did not have any knowledge of the Portuguese language, and who could not read or write, were asked to affix their signs to the same "deed of possession". The photocopy of Annex 5 discloses certain scrawls and marks at the end of the Portuguese text which scrawls and marks are stated to be the signatures of Maratha headmen. The Portuguese Government contends in paragraph 109 that the assembled headmen shouted "Vivat" and accepted the Queen of Portugal as their Lady. The Government of India finds it difficult to believe in the first place that headmen of 62 villages were all assembled at one place and that they were made to acknowledge the Queen of Portugal as their Lady, and that when the Portuguese Notary cried "Long Live the Sovereign Queen of Portugal, Our Lady", the headmen responded by shouting "Vivat". It is also difficult for the Government of India to believe that a document was drawn up there and then in the Portuguese language, that it was explained to the illiterate people and that they put their scrawls underneath that document in acknowledgement of Portu-

guese sovereignty over Dadra and Nagar Aveli. Annex 7 to the Memorial is found to be an entry in a Portuguese register of another alleged "deed of possession". This document states that it contains the signature of a minor Maratha official Sadashiv Pant. However, the Portuguese Government have not produced the original document and it is difficult to say if indeed the alleged document exists or if it contains the signature of the said Maratha official.

218*b*. Quite apart from the unreliable nature of these documents it is clear that no deeds drawn up by the Portuguese or the shouting of "Vivat" could have affected the sovereign rights of the Marathas or brought about cession of territory in the absence of an intention on the part of the Marathas to part with sovereignty over their territory.

Alleged bilateral documents

219. At paragraph 106 of the Reply the Portuguese Government states:—

> "As a result of the orders given by the Government of Punem in the documents just referred to, there actually took place on May 29th, 1783 the transfer to the Portuguese State of the entire Pragana of Nagar-Aveli with the exception of six villages and of the taxes collected by the customs authorities of that Pragana.
>
> The transfer took place via an *exchange of official documents*[1] between the local Maratha and Portuguese authorities: on the one hand *two orders of service*[1] issued by the Subedar of Bacaim, one to the Chief of Suarim and the other to the patels and to the people of the Pragana, authenticated copies of which were transmitted to the Governor of Daman for his archives as titles of transfer. (Annexes Nos. 2 and 3 to the Memorial); and on the other hand a *receipt*[1] made out by Commander Manuel Antonio de Faria, Plenipotentiary of the Governor of Daman at the intention of the Maratha authorities (Annex No. 4 to the Memorial.)
>
> These documents have exceptional value as proof, because, since the Treaty of 1779, those are the first documents which have a *truly bilateral legal character*[1]. These are documents directly *exchanged* between the competent authorities of the two High Contracting Parties; they therefore have the character of a supplementary accord to the Treaty of 1779 as binding upon the two governments as the Treaty itself, and to the implementation of which they have reference."

The following points emerge from the above statement of the Portuguese Government:—

1. The Portuguese Government asserts that there was in 1783 an "exchange of official documents";

2. This alleged exchange of official documents consisted of transmission to the Governor of Daman of "authenticated copies" of alleged Sanads issued by the Maratha Government,

[1] Emphasis of the Portuguese Government.

one to the Maratha Chief of Suarim and another to the Patels and people of the Pragana; and

3. The Portuguese Agent of the Governor of Daman transmitted a "receipt" to the Maratha authorities.

The Portuguese Government asserts that these alleged documents are of a "truly bilateral legal character" and that they have the character of a "supplementary accord" to the alleged treaty of 1779.

220. At paragraphs 108 and 112 the Portuguese Government refers to what it calls "Luso-Maratha accords of 1783 and 1785" and states that these accords constitute "proof—to be added to so many other proofs—that the enclaves of Dadra and Nagar Aveli were given to the Portuguese in full sovereignty".

221. The fact that there were no "bilateral documents" in 1783 and 1785 is clear from the very text of the documents referred to by the Portuguese Government. The Portuguese Government states that *authenticated* copies of two Sanads were transmitted to the Governor of Daman for his archives as *title of transfer*. However, when Annexes 2 and 3 and their photocopies are examined, it is found that these are not authenticated copies such as are alleged in paragraph 106 of the Reply. They are merely translations in the Portuguese language of documents alleged to have been made by the Maratha Subedar of Bassein.

222. It will be noticed that the Portuguese Government speaks of the alleged authenticated copies of alleged Sanads as being a "title of transfer". The Portuguese Government appears to have somewhat changed its stand. It stated in paragraph 91 of the Reply that the Portuguese did not receive sovereignty from the Marathas under the Sanads. (See paragraph 204 above.) Now, however, contradicting its previous statement, it alleges that its "title of transfer" is contained in authenticated copies of alleged Sanads issued by the Maratha Government. However, the documents relied upon by Portugal are found to be without the seal, signature or any other mark of the Maratha authorities. They purport to be translations in the Portuguese language of alleged Maratha documents. Further, they purport to be reproductions of alleged Sanads issued not by the Maratha Sovereign but by a Maratha official, namely, the Subedar of Bassein. It is therefore difficult to take account of a translation carried out by the Portuguese authorities of an alleged order issued by a Maratha Official as constituting the title of Portugal to sovereignty over a part of Maratha territory. It has already been shown above and admitted by the Portuguese Government that a Sanad could not bring about cession of territory in sovereignty. These alleged Maratha documents, which are, in fact, *Portuguese* documents stating the existence of alleged Maratha documents, do not lend any support to the claims of the Portuguese

Government. Thus Annex 2 to the Memorial which is an entry in the Portuguese register stating the existence of an alleged order issued in the Marathi language by Ananta Rao Bikaji, the Subedar of Bassein, to a subordinate Maratha Official, reads:—

> "the remaining villages shall be handed over to the said Government and the people and village headmen of the said Pragana shall be instructed to obey the said Government".

Annex 3 to the Memorial is also an entry in a Portuguese register of an alleged order issued by the Subedar of Bassein to the village headmen and cultivators of Nagar Aveli asking them to "obey without questioning the Portuguese Government of Daman".

223. As has been set out in paragraph 2 of this Rejoinder above, in spite of the requests of the Government of India, the Portuguese Government has failed to produce the relevant documents in the Marathi language. They state in paragraph 106 of the Portuguese Reply that "authenticated copies" of these alleged documents were transmitted to the Governor of Daman for his archives. It may be asked that if according to their own statement the Portuguese received "authenticated copies" of the alleged copies and lodged them in their archives, why is it that the authenticated copies have not been produced.

224. The Portuguese Government next cites Annex 4 to the Memorial. It states in paragraphs 106 and 107 of the Reply that "a receipt" was made out by the Agent of the Governor of Daman and that in this receipt the Portuguese Agent stated he had received the possession of the villages in the name of the Portuguese Sovereign.

225. The Government of India would like to point out that it is a well-known fact that the Marathas were unable to read the Portuguese language and that all the letters which were received by the Marathas from the Portuguese were in the Marathi language. No receipts in the Marathi language have been found in the Maratha archives by the Government of India. If any such receipts had been made and passed on to the Maratha Government, the Portuguese archives would have contained a copy of such receipt. As has been stated in paragraph 2, the Government of India requested the Portuguese Government to produce copies of these receipts in the Marathi language. The Portuguese Government has failed to respond to this request. The Government of India is therefore entitled to come to the conclusion that no such receipts were made and handed over to the Maratha authorities [1].

[1] It would not have been inconsistent for a Saranjamdar or Jagirdar to have acknowledged his installation as a rent collector. Nor would it have been inconsistent with the rights of the Sovereign Grantor to announce to the Patels and cultivators that revenue had been assigned to a Saranjamdar or Jagirdar and that revenue was to be paid to him. Such acknowledgement of the receipt of the grant and announcement to the cultivators would have in no way conveyed a larger

226. Quite apart from the non-authentic nature of the documents relied upon by the Portuguese Government there is nothing in the language of these documents to suggest that the Marathas ceded a part of their territory in full sovereignty to the Portuguese.

227. At paragraph 108 of the Reply the Portuguese Government states that on the 29th May, 1783, a "Luso-Maratha Accord" was entered into on the 29th May, 1783, under the title of "Re-adjustment of the accord of the Pragana of Nagar Aveli". The Portuguese Government have produced this document at Annex No. 32 to the Portuguese Reply. The Government of India has examined this document and finds that it is not a bi-lateral accord as is alleged by the Portuguese Government. The document is in the Portuguese language and is not signed by the Marathas and no indication is found in the document that the Marathas were a party to it. At the bottom of the document there is found an incription said to be made by one Mascarenhas which reads:

> "These conditions will take effect when my Governor Mr. Joao Gomes Da Costa will decide accordingly and in the opposite case will be without any effect anywhere."

Nothing is found in the document to indicate if the Governor did indeed accept these conditions. The Government of India do not attach any value to this document and they deny that it is a "bilateral" document as is alleged by the Portuguese Government. However, the text of this very document is so damaging to the Portuguese argument that the Government of India would like to deal with it in some detail.

227*a*. At paragraph 108 of the Reply the Portuguese Government quoted only a part of the title of this alleged document. The full title reads:

> "Recalling the agreement of the Pragana Nagar Aveli of revenue of bygone times which gave to the Portuguese Government of the place of Daman the sum of Rs. 12,000."

The very title of the document shows that it related to the grant of the revenue of the sum of Rs. 12,000. No reference is found in the entire document to any alleged treaty. The document contains not one word about cession of territory in sovereignty. On the contrary, its provisions indicate clearly that its sole subject matter was the grant of revenue. Article 7 of the document is particularly noteworthy. It reads:

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title to the grantee. It was not uncommon for the sovereign grantor to call upon the Patels and cultivators to "make themselves amenable" to the new rent collector. The relevant words in Marathi were "ruzu hone". The Government of India submits that if any receipt was taken from the Portuguese as it must have been taken from Dhume at the same time or if any announcement of the Saranjam grant was made, these must have been made in words quite different from those alleged by the Portuguese Government. The documents produced by the Portuguese Government have no verisimilitude and are not authentic.

> "the revenue of the said Pragana in the Darbar of Punem being more or less, the Sarkar will hand over the village which is preserved, so as to complete the sum of Rs. 12,000 and *if the revenues are more the said Sarkar will have what is in excess*".

Thus, under the above provision the Portuguese Government could collect only a sum of Rs. 12,000 and no more. Any excess over that sum was to be surrendered to the Maratha Government. As the Government of India has stated in the previous section on the nature of the Maratha grant of Saranjam and Jagir a Saranjamdar or Jagirdar could not collect revenue in excess of the sum assigned, the excess which was termed "towfeer" (see paragraph 103 above) was to be returned to the Sovereign Grantor. This very provision proves conclusively the fiscal nature of the grant and negatives any idea of the Portuguese having been granted sovereignty over any part of Maratha territory. Under this provision they were under an obligation to hand over the surplus of revenue over and above Rs. 12,000 taken from the Maratha villages in Dadra and Nagar Aveli. The Portuguese Government has relied on certain articles of this alleged document as corroborating its assertion that Portugal had acquired sovereignty over the Maratha villages in question. (It will be noticed that the Portuguese Government does not assert that this alleged accord provided for cession of territory in sovereignty. The Portuguese Government relies on this alleged accord only in order to find corroboration of previously acquired sovereignty). Thus the Portuguese Government asserts that Article 3 recognizes the existence of "two mutually exclusive sovereignties", that Article 2 recognizes "the full military power" of Portugal over the villages and that Article 5 recognizes "in addition to the full sovereignty over Nagar Aveli a right of transit between Nagar Aveli and Daman". The Government of India will now proceed to examine these assertions of the Portuguese Government.

228. Article 2 of the alleged document which has been relied upon by the Portuguese Government as assuming the existence of two "mutually exclusive sovereignties" reads:

> "If the farmers of the said Praganas go to Nagar Aveli it will not be accepted that they stay, and if they go from the said Pragana Nagar Aveli to the Praganas of the Sarkar they will be sent back."

From the above provision the Portuguese Government concludes that the Marathas had ceded to the Portuguese sovereignty over the Pragana. However, it is obvious that the Portuguese argument is untenable and that no such intention can be found in the above quoted Article 2. The very word "farmers" in Article 2 makes it clear that this provision relates to the collection of revenue and the desirability of disuading cultivators from leaving their land and thus bringing about a decrease in the agricultural revenue.

229. Next the Portuguese Government relies on Article 3 for recognition of Portugal's military power over the Pragana. This article reads:

> "in the said Nagar Aveli Pragana there are many Colles Varlys who are Dubalas and if the latter create malay, which means disorder, causing damages, peace will be restored and they will be asked to refrain in order not to cause damages".

In the above provision the Portuguese Government finds its title to "full military sovereignty" over Pragana Nagar Aveli. The Government of India is unable to find in the above provision any justification for coming to such a conclusion. As has been stated in the preceding Section III a Saranjamdar or Jagirdar was obliged as a condition of his grant to see that the revenues of the villages included in his grant did not diminish and that no damage was caused to the crops. That obligation did not in any way entitle the Saranjamdar or Jagirdar to have "full military power" or to assert rights against the Sovereign Grantor. Article 5 in which the Portuguese Government seeks to find "full sovereignty" and a "right of transit" reads:

> "all the 'jame' for the supplies of the said Nagar Aveli Pragana as well as other dues in kind will be exempted from the duties of the said Pragana".

The word "jame" means revenue collected by the Saranjamdar or Jagirdar in cash or in kind. This provision relates to the reservation of Zakat duties on the part of the Maratha Government and a dispensation from payment of Zakat on the *revenue* collected by the Saranjamdar or Jagirdar in *cash* or in *kind*, that is in agricultural produce. The meaning of Article 5 therefore is that agricultural produce or cash which formed part of the revenue yield assigned to the Saranjamdar was exempted from the normal Maratha tax. These Maratha taxes were levied in all Maratha territory including Maratha territory of Dadra and Nagar Aveli. As will be seen from the following Section 5 (see paragraphs 265 and 266 below) in actual fact exemption from Maratha tax was dependent on orders and permits—granted by the Marathas from time to time according to their will and discretion. Both the Maratha and Portuguese documents make it quite clear that the exemption from Zakat was precarious and was often withdrawn by the Maratha Government. However, whenever the exemption was granted it applied only in respect of "jame" of revenue and to nothing else [1].

[1] It will be noticed that the Portuguese Government interprets a concession in respect of exemption from duties on produce of Nagar Aveli in an alleged document as constituting a "right of transit". The Portuguese Government adopted this line of argument in the Application and in the Memorial but in the face of evidence produced by the Government of India of Maratha and British practice

230. At paragraph 112 of the Reply the Portuguese Government refers to another alleged "bilateral" document which it describes as a "new Luso-Maratha accord concerning the villages transferred to Portuguese Sovereignty". The photocopy of the document at Annex No. 8 to the Memorial reveals a document in the Portuguese language entered in the form of an entry in a Portuguese book and containing neither seal nor signature nor giving any indication of the parties to the document or the date of the document. At paragraph 112 the Portuguese Government asserts the reliability of this document and states:

> "it would be unlikely to assume that it was forged by the Portuguese since it contains obligations, restrictions and charges which by their very nature the Portuguese would have no interest in inventing against themselves".

The Government of India has not charged the Portuguese Government with having forged a document nor indeed does it find it necessary to do so. It is only necessary to look at the photocopy of the document to find that it is not an authentic document, and that it does not contain any indications whatsoever of being a "bilateral" document as it is alleged to be.

231. The above quoted statement of the Portuguese Government, however, has the merit of admitting that the alleged "bilateral" document contains "obligations, restrictions and charges" on the Portuguese. Indeed as the Government of India has already stated in paragraph 110 of the Counter Memorial this very document, were it to be authentic, would corroborate further the limited, non-sovereign, revocable nature of the grant to the Portuguese and the obligations undertaken by them as Saranjamdars of the Marathas. Under its terms the Portuguese are required to preserve pagodas; to respect the usages and customs and religion of the inhabitants of the Pragana; not to convert the religion of orphan children; to restrain the turbulence of the Colles and above all not to raise Imarat. The last obligation, namely, not to raise an imarat negatives completely any idea of the Marathas having made a cession of territory in full sovereignty to the Portuguese.

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which showed consistently that from the earliest times the Portuguese were incapable of asserting their claim to exemption from duties on goods in transit between Nagar Aveli and Daman, the Portuguese Government changed its standpoint and claimed that Portugal's alleged right of transit was in no way connected with the existence or non-existence of "immunities", and that the fact that Portugal did not enjoy exemption from customs duty between Daman and Nagar Aveli did not adversely affect Portugal's alleged "right of transit". However, the difficulty which the Portuguese Government finds in maintaining this standpoint is to be seen from such instances as the above where it relapses into seeking a "right of transit" from an alleged exemption from customs duties.

SECTION V

Maratha Sovereignty over Dadra and Nagar Aveli subsequent to grants of Saranjam or Jagir in 1783 and 1785

232. At paragraphs 93 and the following of its Counter-Memorial, the Government of India demonstrated that Maratha practice and conduct subsequent to the grant of Saranjam or Jagir to the Portuguese in 1783 and 1785, in the villages in Dadra and Nagar Aveli further revealed the fiscal nature of the grant which the Marathas had made to the Portuguese. The Government of India referred to certain documents of the Maratha Government which confirm that right up to its extinction in 1817-1818, the Maratha Power asserted its sovereignty over Dadra and Nagar Aveli and exercised its sovereign rights for example by collecting certain taxes in Dadra and Nagar Aveli, by "attaching" the revenues of Dadra and Nagar Aveli, by posting a special Maratha Guard in Dadra and Nagar Aveli, and finally by revoking the grant altogether.

233. Thus in paragraph 96 of the Counter-Memorial, the Government of India showed that from the year 1783 when the first grant of Saranjam was made, the Maratha Government maintained detailed accounts of revenues assigned to the Portuguese in Saranjam tenure. The accounts were maintained from the year 1783 right up to the time of the extinction of the Maratha Power in 1817-1818. These Maratha documents not only define and describe the nature of the grant made to the Portuguese as a Saranjam grant but also describe the justification for the assignment of revenues as annual "expenditure" on political relations. These documents show that the Maratha Government maintained detailed accounts of the public revenues due to the Maratha Sovereign and of their distribution to various assignees.

234. At paragraphs 97 and 101 of the Counter-Memorial, the Government of India demonstrated that even after 1783 when the first grant of Saranjam was made to the Portuguese, the Maratha Government continued to levy in Nagar Aveli the tax known as "Ramnagar Zakat", and that when the Portuguese failed to pay that tax or to account for its wrongful collection, the Maratha Government confiscated their grant and recovered the amount from the revenue of Nagar Aveli.

235. In paragraph 104 of the Counter-Memorial the Government of India showed that shortly before being conquered by the British the Maratha Ruler had resolved to revoke the grant of Saranjam to the Portuguese. The reason for this was that friendly relations between the Marathas and the Portuguese had broken down as a

result of the attitude adopted by the Portuguese and the Maratha Ruler had received representations from his subjects in Dadra and Nagar Aveli that the Saranjamdar had not fulfilled his obligations to the Maratha State.

236. In a chapter of the Reply entitled "Luso-Maratha relationships subsequent to 1785", the Portuguese Government, notwithstanding all the evidence to the contrary, contends that, starting in 1783 and 1785, the Portuguese State began to exercise its "full sovereignty" over the territory of Dadra and Nagar Aveli. As the Government of India has demonstrated above, and will further demonstrate below, the Portuguese Government is entirely unable to show either that it acquired a valid title to sovereignty over the territory of Dadra and Nagar Aveli in 1779, 1783 and 1785, or that subsequent to the revenue grants in 1783 and 1785, the Maratha Power acquiesced in the gradual usurpation on the part of the Portuguese Government of Goa of Maratha sovereign rights over the territories in question.

Maratha account papers

237. In an effort to explain away the fact that all the account papers of the Maratha Government describe the grant to the Portuguese as an assignment of revenue in Saranjam tenure, the Portuguese Government puts forward several distinct arguments. At paragraph 122 of the Reply it states:

> "These accounts are documents of the internal service of the Maratha Chancellory and they could therefore never have prevailed over the *express* [1] letter of the Treaty of 1779 nor over the Supplementary Accords of 1783 and 1785."

Thus the Portuguese Government disputes the relevance of Maratha documents, asserts the existence of the alleged treaty of 1779 and the alleged accords of 1783 and 1785. The Government of India has already shown in the preceding sections the relevance of the documents of the Grantor, the non-existence of the alleged treaty and the alleged accords, and demonstrated that Article 17 of the Portuguese text of what is alleged by the Portuguese Government to be a "treaty" itself describes the Maratha grant as "contribution of Rs. 12,000" and "Jagir", and that the documents which are alleged to be "bilateral" accords contain conditions and restrictions incompatible with cession of sovereignty.

238. In the same paragraph 122 of the Reply the Portuguese Government gives another explanation:

> "They (the Maratha accounts) must be considered in the light of the financial standards of the time and therefore in no way decrease the value of the cession made by the Marathas to the Portuguese. We must take into account that in the Maratha Empire,

[1] Our italics.

> as with a great number of other peoples with a feudal type of organization, no direct collection of revenue or taxes existed. Such collection was assigned to certain individuals (assignees-*fermiers*) in the legal form of tax assignment *(fermage)*. The transfer of the villages of Nagar Aveli to Portuguese domination therefore made it necessary to include in the accounts a deduction, the registry entry of which was transmitted from year to year to serve as a guarantee for the assignees, to the Subedar themselves and their subordinates."

And in a footnote:

> "That is why the Maratha memorandum of 3rd June, 1780, when it states that a sanad must be sent to the Subedar of Bassein for the transfer of the villages to the Portuguese, expressly states that 'the total receipts of the revenue must be shown on the debit side'."

The above statement of the Portuguese Government in itself constitutes an admission that it was the common practice of the Marathas to assign the collection of revenues. It is the submission of the Government of India that the Portuguese were the recipients of an "assignment of revenues" and that they were the "assignees" of the Maratha Government [1].

239. The Portuguese Government then goes on to assert in the same paragraph 122 of the Reply that the Maratha account papers at Indian Annex C. Nos. 18, 20 and 21 themselves prove that Portugal had "full domination over Nagar Aveli." Thus it states:

> "these accounts confirm absolutely that the Portuguese State had *full domination*" over Nagar-Aveli, since it is constantly repeated there that the Pragana had *been given to the Portuguese in entirety* [2] or that it had *been given together with the Zakat* [2] ('has *been given from the Sarkar's territory* [2] to the Firangee of Goa as Dumala *in entirety*' [2], '*in entirety* [2] together with Zakat', '*entirely* [2] given to the Firangee of Goa', etc.)".

240. In view of the inability of the Portuguese Government to agree upon the effect and meaning of the Maratha account papers the Government of India is obliged to deal with them in some detail and to demonstrate that they do not in any way support the assertion made by the Portuguese Government:

241. Indian Annex C. No. 19 consists of account papers of the Central Secretariat of the Peshwa of 1788, 1789/1792, 1804/1805, 1809, 1811, 1814, 1815, 1816 and 1817. The very first document (at **I**, p. 255) reads:

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[1] The Portuguese Government erroneously describes the Maratha Subedar of Bassein as an "assignee" of the Maratha Government. In fact, the Subedar was an official of the Maratha Government. He was the civil and military Governor of Prant or Taluka Bassein, and Dadra and Nagar Aveli formed part of his civil and military jurisdiction.

[2] Emphasis of the Portuguese Government.

"Expenses in respect of Foreign Darbar Assignment to the Firangee of Goa, of Pargana Nagar-Haveli, Prant Bassein, with Zakat, for the year ... 1788

Said Pargana	Rs. 10,470-0-0
Zakat	Rs. 1,530-0-0
	Rs. 12,000-0-0

Total of twelve thousand rupees may be accounted for as expenditure on Foreign Darbar on account of Firangee of Goa.

Dated . . . . . .[13th June 1788]

Sanctioned."

The above document gives graphic illustration of the following points:

(1) The grant to the Portuguese was described as "Expenses" in respect of foreign affairs.

(2) These "expenses" were yearly. The assignment was "for the year 1788".

(3) The words "Said Pargana" stood for a sum of Rs. 10,470-0-0 as revenue for a particular year.

(4) The sum of Rs. 12,000 was made up of Rs. 10,470-0-0 revenue and Rs. 1,530-0-0 Zakat.

(5) The words "Pargana Nagar-Haveli, Prant Bassein" indicated that Pargana Nagar Aveli formed part of the Maratha jurisdiction of the Province of Bassein.

(6) The word "Sanctioned" at the end of the document showed that the assignment of the sum of Rs. 12,000 had to be sanctioned each year.

The next document (on the same page 81) dated 1791/1792 states the expenses on the Portuguese as Rs. 15,000 and reads: "deduct Rs. 3,000 on account of *villages* in Sholapur Pargana *given* to the Firangee Vakil", that is the Portuguese envoy, Narayan Vithal Dhume. This document shows that the expression, "giving of villages" was used in respect of the grant to Dhume no less than in respect of the grant to the Portuguese. The document of 1804/1805 (at **I**, p. 256) is a mahal-wise audit of accounts of Taluka Bassein and it describes the *Mahal* of Pargana Nagar Aveli as "expended in the name of the Firangee of Goa". Another document of 1805 (on the same page 256) uses the word "Dumala". It reads: "the amount of Rs. 10,980 be shown against Pargana Nagar Aveli and given in Dumala to the Firangee of Goa. Account must be maintained accordingly." The meaning of the word Dumala has already been explained by the Government of India in Section III above. It signifies a grant which reverts to the Sovereign Grantor on the expiry of its term. (See Indian Annex F. No. 40.)

The document of 1809 (at **I**, p. 257) reads:

"Foreign Darbar *[affairs]* expenses on account of Firangee of Goa in the year . . . . . [1809]

Mahal of Pargana Nagar Aveli is given as *Dumala* in *entirety*.

Estimated Akar *[revenue]* of the said Pargana . . .	Rs. 10,980
Zakat	Rs. 1,020
	Rs. 12,000

In all twelve thousand rupees as *allowance* to Firangee of Goa. The *revenue* of the Pargana including Zakat should be shown as *given in Dumala*."

In the same manner the other documents of 1809, 1814, 1816 and 1817 given at Indian Annex C. No. 19 describe the grant as "assignment of revenues", "the grant of Mahal", or "villages given in Dumala". A document of 1815 (at **I**, p. 258) states: "Mahal of Pargana Nagar-Haveli was given to Firangee of Goa as Saranjam in entirety."

242. The Government of India has explained above in Section III that the expressions "assignment of revenue", "grant of Mahal", "grant of villages in Dumala", "assignment of villages", were all used in respect of a Saranjam or Jagir grant. The expression "given in entirety" used in this connection signified "grant of entire or total revenue", the Marathi equivalent being "Mahal Darobast". The Portuguese Government finds in the use of the words "given in entirety" evidence of the "*full* transfer of sovereignty" from the Marathas to the Portuguese. The Portuguese Government is plainly under a misunderstanding as to the significance of the revenue terminology of the Maratha Government.

243. *Indian Annex C. No. 20* consists of detailed account papers of the Central Secretariat of the Peshwa at Poona of 1785, 1784/1785, 1786/1787, 1791/1792, 1793/1794, 1796/1797, 1797/1798, 1805/1806 and 1812/1813. The very first document at **I**, p. 260, reads:

"Expenditure on account of assignment.

Rs. 12,000	Pargana Nagar Aveli in entirety together with Zakat has been assigned to the Firangee. Akar *[revenue]* of the same according to assignment.	
Rs. 3,000	Two villages from Pargana Khaladi-Pawadi assigned to the Firangee Vakil, Narayan Vithal Dhume. Akar of the same according to assignment.	
	Rs. 1,746-12-0	Village Suklav
	Rs. 1,253-4-0	Village Kumbhariye.

Rs. 15,000."

244. *Annex C. No. 21* consists of account papers in still greater detail. These were prepared and maintained in Taluka Bassein of which Nagar Aveli formed part. The document of 1787/1788 (at **I**, p. 282) reads:

> "The Firangee of Goa *and his Vakil* were granted *Saranjam* for the Kamal Berij *[total revenue yield]* of Rs. 15,000."

This document like many other documents describes the grant to the Portuguese and to Narayan Vithal Dhume in identical terms and as Saranjam. The document of 1793/1794 (at **I**, pp. 282 and 283) after deducting 26 villages from the number 719, proceeds to account for the revenue of the "remaining" 693 villages. Out of the 693 which are said to "remain" with the Sarkar, 69 are described as given as Dumala to the Portuguese of Goa [1].

245. The Government of India would not have set out the above facts in such detail were it not for the refusal of the Portuguese Government to accept the clear implications of the above cited Maratha documents. These documents maintained by the Marathas after they made the grants to the Portuguese right up to the end of their Power in 1817/18 show quite clearly that they considered Dadra and Nagar Aveli as an integral part of the Maratha domain and a division of the Maratha Province of Bassein. In these documents the grant to the Portuguese was described as assignment of revenue in a tenure known as Saranjam and the assignment was accounted for as yearly expenditure on political relations with the Portuguese of Goa. These documents also make it clear that the sum set apart for that objective was Rs. 15,000 and that this sum included the Saranjam of Rs. 3,000 to the Portuguese envoy Narayan Vithal Dhume. The words used in respect of the grant to Dhume—"giving of villages"—signified nothing else than that the revenues of certain villages were assigned to him in Saranjam tenure. Finally, these documents show that the original grant to the Portuguese in 1783 and 1785 was a grant of Saranjam and that in so far as the Marathas were concerned it continued to be a Saranjam or Jagir and nothing else right up to the time when they were conquered by the British and became extinct as a Power.

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[1] At paragraph 122 the Portuguese Government states that 10 villages of Pargana Neher and 11 villages of Pargana Khaladi were ceded by the Marathas to the Portuguese in 1741, "Portuguese sovereignty over which is an uncontested fact since they were ceded to the Portuguese State in exchange for other villages which the Portuguese transferred to the Marathas, also in full sovereignty in the Pargana Naer". It has been shown above in paragraph 30 that in 1741 there was no exchange of territory between the Portuguese and the Marathas, and the Portuguese assertion is without foundation in fact. The Portuguese statement in paragraph 122 that these villages are entered in the Maratha documents in exactly the same way as the villages of Dadra and Nagar Aveli is also not true. As will be seen in the document of 1793/1794 the villages from Pargana Neher and Pargana Khaladi—Pawadi were treated differently and they were deducted from the number 719, and they were not described as Saranjam or Jagir.

Ramnagar (or Ghambirgad) Zakat

246. In paragraphs 97 and the following of its Counter-Memorial the Government of India demonstrated that on several occasions after the grant of saranjam to the Portuguese in 1783 and 1785 the Maratha Government confiscated the grant and "attached" the revenues in order to recover debts owed to them by the Portuguese and that these debts related to a Maratha tax called Ramnagar Zakat. At paragraph 99 the Government of India showed that in 1783 and 1785 the Maratha Government reserved to itself the collection of Ramnagar or Ghambirgad Zakat and it continued to collect this tax from its dominions including Pargana Nagar Aveli. The Government of India referred in this connection to Indian Annex C. Nos. 23, 24, 25, 26 and 27, and submitted that the practice of the Marathas showed beyond any doubt that they had not parted with sovereignty over the Pargana of Nagar Aveli in 1783 or 1785, or at any subsequent date and that they had no intention of doing so. (Counter-Memorial, paragraph 103.)

247. In paragraphs 115 to 120 of the Reply the Portuguese Government referred to the question of Ramnagar Zakat and stated:—

(1) that it was not certain that in 1785 the Marathas had excluded Ramnagar Zakat from the grant;

(2) that in any case there was a dispute between the Marathas and the Portuguese on this point;

(3) that the dispute had no connection with the question of Portuguese sovereignty over Dadra and Nagar Aveli; and

(4) that the disagreement was resolved to the satisfaction of the Portuguese Government.

As the Government of India will show below, none of the above assertions of the Portuguese Government find support in fact.

248. In the first place, there is no truth in the statement that there was any doubt whether the Marathas had reserved the collection of Ramnagar of Ghambirgad Zakat in 1783 and 1785 [1]. In paragraph 116 of its Reply the Portuguese Government referred to the alleged "accords of 1783 and 1785". The Government of India has already shown in paragraphs 227 to 230 above that these documents are utterly unreliable as expressing the intentions of the Maratha Government and have no value of any kind as alleged "bilateral" documents. However, even these documents relied upon by the Portuguese Government show the Portuguese assertions to be completely illfounded. Thus, Article 5 of the alleged accord of 1783 reads:

[1] As is conceded by the Portuguese Government, Ramnagar or Ghambirgad Zakat was utilised for the maintenance of the Maratha fortress of Ghambirgad. This fortress continued to be in the hands of the Marathas after the grants of 1783 and 1785 and continued to be maintained by the collection of Ramnagar or Ghambirgad Zakat.

> "The collection of dues belonging to the Serra of Ghambirgad usually performed at Fatepur in the customary way will be made by the Sarkar without any hindrance, so that this be observed." (Portuguese Reply, Annex 32.)

And Article 10 of the alleged accord of 1785 reads:

> "The collections assigned to the Tax Collector of the Marathas in the said Pargana shall be paid without doubts, certifying the said collection with the debtors." (Portuguese Memorial, Annex 8.)

Thus, even on the basis of these alleged "accords", there could not be any doubt that even after 1785 the Marathas were to collect Ghambirgad taxes in Nagar Aveli and that the Portuguese were to pay these Maratha taxes "without doubts".

249. At Indian Annex C. No. 24 will be found a memorandum regarding Zakat of Prant Bassein of the years 1792/1793. From this document it is clear that the Portuguese never defaulted in the payment of Ramnagar Zakat or created any "dispute" before 1790. This document states that in 1785 the grant to the Portuguese was made up of Rs. 10,980 being revenue of the Mahal of 72 villages and Rs. 1,020 being Zakat of Dadra and Naroli and that *Ramnagar Zakat was not included in the grant.* It states that in 1790 and 1791 the Portuguese collected and appropriated certain items of Ramnagar Zakat and also failed to pay certain other items of Ramnagar Zakat to the Maratha Government. A sum of Rs. 1335 is shown to be due from the Portuguese on this account. One of the items of the debt is described as follows:

> "The Firangee carries rice etc. to Daman in addition to rice received in payment of assessment. *Formerly customs duty was paid on this.* The same is not being paid. Estimated receipts—Rs. 125-0-0."

Similarly, the sum due from the Portuguese for the year 1791 was calculated at Rs. 2,169. The same document shows that the Portuguese had accepted the position that Ramnagar Zakat stood excluded from the grant of 1785, had agreed to refund the amounts standing in their name, had actually paid Rs. 535 and promised to pay the balance of Rs. 3,504 later "as the year was a lean one."

250. At paragraph 118 of its Reply the Portuguese Government referred to the above mentioned document and stated that it showed the existence of "full sovereignty" of the Portuguese State over Nagar Aveli. The Portuguese Government quoted the following paragraph from the document:

> "as his Ryots would be molested if the collection were to be made by the Sarkar a peon of the Sarkar and another of the Firangee should make the collection and payment should be received by the Sarkar".

The Portuguese find in the above expression an admission of the Maratha Government that it was unable to send its representatives to Nagar Aveli without their being accompanied by repre-

sentatives of the Portuguese authority. If the above passage is read in its context it will become clear that it cannot bear any such interpretation. The intention of the Marathas clearly was to ensure that the Portuguese who had made a wrongful collection of Ramnagar Zakat, and from whom the debts were due, should be present at the time of collection of the revenue from the Ryots (cultivators) so that they should not collect the same amount from them a second time. This is the clear meaning of the words which the Portuguese Government has quoted in support of its contention that it contains an admission of "full sovereignty" of the Portuguese State over Nagar Aveli.

"The dispute"

251. The above document (Indian Annex C. No. 24) relates to the first default of the Portuguese Government in relation to Ramnagar Zakat, namely in 1790 and 1791. However, in an attempt to show that the Portuguese never understood themselves to be liable to this Maratha tax, the Portuguese Government states in paragraph 117 of the Reply that the "dispute" in regard to Ramnagar Zakat must have started from the time of the transfer of Nagar Aveli and of Dadra to Portuguese sovereignty. In support of this statement they cite a letter of 1787 from Dhume to the Governor of Daman and a letter of unknown date from the Governor of Daman to Dhume. The Portuguese Government states that Dhume's letter indicates the existence of a dispute relating to Ramnagar Zakat "as early as 1787".

252. In the first place the grants were made in 1783 and 1785, and a letter of 1787 cannot therefore prove the existence of the dispute "from the time of the transfer of Nagar Aveli and Dadra to Portuguese Sovereignty". In the second place, this very letter of Dhume not only fails to support the assertion of the Portuguese Government but shows that produce of Nagar Aveli was subject to Maratha tax; that the existence of the right of the Marathas to exact this tax was known to Dhume; and that in his letter to the Governor of Daman he insisted that no attempt be made to evade the Maratha tax. Dhume warned in his letter that if there was such evasion the Maratha Government would altogether revoke the exemption granted to the Portuguese from Zakat on the "Jame" from Nagar Aveli. ("Jame" means revenue yield or collected revenue. Since revenue was often collected in kind—in the form of agricultural produce—"Jame" also included such produce.) Speaking of the practice of evasion he said:

> "If it is true you must stop it. Otherwise under no circumstances would this Sarkar allow the carrying free of duty of any goods even from Nagar Aveli."

At Annex 33 to the Reply the Portuguese Government printed an extract from Dhume's letter which, while it made little sense, seemed to suggest that Dhume was speaking about "the affair of Ghambirgad regarding the dues from Nagar Aveli". The photocopy of the above Annex 33 shows that Dhume's letter bears quite a different meaning. A translation of the photocopy will be found at Indian Annex F. No. 43. As will be seen quite clearly from the full text of Dhume's letter he wrote of two distinct matters: (1) the Saranjam received by him from the Marathas, and (2) the duties imposed by the Marathas on the produce of Nagar Aveli. First, he apologized to the Governor of Daman for having accepted a Saranjam from the Marathas and he assured him of his loyalty to Portugal by relating to him what he had said to the Maratha Prime Minister:

> "I am a servant of the King of Portugal. I cannot receive gifts from another Nation, as the said King has a lot to give..."

He introduced this matter by speaking of Ghambirgad collections in *his* saranjam villages. There is no mention in the letter of the question of Ramnagar or Ghambirgad Zakat in Nagar Aveli or the existence of any doubt in the mind of Dhume as to the rights of the Marathas to levy taxes inside as well as outside Nagar Aveli. Next, Dhume wrote about Maratha customs duties on the produce of Nagar Aveli. He stated:

> "You should never allow the residents of Daman to bring goods of any kind on the grounds that they are goods of 'Zame' belonging to Nagar Aveli, nor to cut the timber of any quality from the Pargana, whether for private purpose or for their sale, except and only the quantity which is necessary for the Royal Service. If this is not done it is not only detrimental to the State but also the sure way of bringing about complaints about the duties..."

and again:

> "One of the most serious complaints of the lessors of the customs of this Sarkar is that the traders of Daman carry goods to various places by the route of Nagar Aveli, and also large quantity of timber for selling, besides carrying goods belonging to the said Nagar Aveli. *If this is true you must stop it. Otherwise under no circumstances would this Sarkar allow the carrying free of duty of any goods even from Nagar Aveli.*"[1]

The above passages were excluded by the Portuguese Government from the printed Annex 33 to the Reply. These are the passages which reveal the fact that it was within the knowledge of the Portuguese Government of Goa even in 1787 that the carriage of the produce of Nagar Aveli to Daman was at the mercy of the Maratha Sarkar. As the Government of India will have opportunity to show later (paragraphs 265 and 266 below), in the light of this letter of Dhume it becomes even more clear that the alleged

[1] Our italics.

Sanad of 26th April 1799 was nothing but a Dastak or an *ad hoc* and temporary permit for the carriage of certain produce of Nagar Aveli free of Maratha tax, and not a concession of a permanent nature.

253. Annex 34 to the Portuguese Reply which is cited by the Portuguese Government in relation to the same subject matter is entitled "Instructions from Daman to Narana Sinai Dumo in August 1789." However, in the photocopy of the document no indication of the date is to be found. The perusal of the full document and of Dhume's letter at Annex 33 makes it clear that Dhume's letter was a reply to the letter of the Governor of Daman and followed rather than preceded it. The Governor of Daman had complained of the exaction of Maratha duties on the produce of Nagar Aveli and had asked Dhume to obtain a new Sanad from the Marathas. In his reply Dhume made it clear that the exemption from duties on the "Zame" of Nagar Aveli was precarious and that he would not be able to guarantee its continuance if the Portuguese Government at Daman did not stop evasions of Maratha tax. The Portuguese Government has omitted from the printed annex the last paragraph of the document which illustrates the exaggerated claim of the Portuguese Governor and to which Dhume's letter itself is a reply and refutation. A full translation of the document in the photocopy will be found at Indian Annex F. No. 44.

Attachment of the Saranjam.
Maratha Military Guard in Nagar Aveli.
Liability to pay Zakat in 1802 and 1807.

254. At paragraph 119 of its Reply, the Portuguese Government states that the question of Ramnagar Zakat was finally settled to the satisfaction of the Portuguese in the year 1791. In support of this statement, the Portuguese Government referred to documents at Annexes 35 to 39 to the Reply. The Government of India will show that these alleged documents stand contradicted by Indian Annex C. Nos. 24, 26, 27, 28 and 29, and by the very admissions of the Portuguese Government that in 1802 the Portuguese were still trying to obtain exemptions from Maratha Zakat.

255. Annexes 35 to 39 to the Reply are seen to be entries in the *Portuguese language* of letters alleged to have been written in the Marathi language and exchanged between minor Maratha officials. Annex 35 is stated to be a translation in the *Portuguese language* of a letter of the year 1791 from the Subedar of Bassein to his deputy. Annex 36 is stated to be a translation in the *Portuguese language* of a letter of 1791 from an "ex-Contractor of Customs of the jurisdiction of Daman" to the Contractor of Customs of Ramnagar. Annex 37 is stated to be a letter from a Maratha Customs collector addressed to another Customs collector. Annex

38 is a translation in the *Portuguese language* of an alleged Sanad issued by the Maratha Ruler in 1791. Annex 39 is stated to be a record in the *Portuguese language* of a letter written by a subordinate collector of Ramnagar Zakat. The Government of India has carefully studied these Annexes to the Reply and found that they are merely *entries* and *translations* in the *Portuguese language* of alleged Maratha originals, and their language is such as to render it extremely unlikely that they are faithful translations of the alleged Maratha documents, were such documents to be in existence. The Government of India finds itself unable to accept the authenticity or value of these documents. From another point of view, also, the value of these documents, were they proved to be reproductions of actual documents, is suspect. The photocopy of Annexes Nos. 35 to 38 to the Reply is found to contain a translation of a "Statement of Expenses made with the Officials and Ministers of the Darbar of the Court of Punem in order to obtain the Sanad relating to the Chauri of Fattepor, which the collector of Gambirgar collected in the Pragana of Nagar Aveli." This statement, which is, presumably, one submitted by the Portuguese Envoy, Goraksh, shows that he gave large sums of money to Maratha officials in order to obtain the letters relating to Ramnagar Zakat [1]. A translation of this Statement of Expenses will be found at Annex F. No. 45.

256. The fact that the Maratha documents which were drawn up subsequent to 1791 show that no exemption from Ramnagar Zakat was granted to the Portuguese, itself contradicts and renders without value the above-mentioned documents in the Portuguese Reply. Reference may be made to the document at Indian Annex C. No. 24 which has been quoted above in paragraphs 247-250. That document is of 1792/1793 and it shows a sum of Rs. 3,504-5-0, standing in the name of the Portuguese as arrears in respect of Ramnagar Zakat.

257. The sequence of events leading to the attachment of the Saranjam granted to the Portuguese also destroys the authenticity and value of the documents cited at Annex Nos. 35 to 39 of the Reply. At paragraph 100 of the Counter-Memorial, the Govern-

[1] It may be noticed that in the photocopy of Annex 38 is found, in addition to a translation in the Portuguese language, a "copy" in the Marathi language of the alleged Sanad. The worthlessness of Portuguese translations from alleged Marathi documents will be clearly seen if the alleged copy of the Marathi document and its alleged translation are compared. The portion in Marathi:

> "Sarkar's revenue from the said Pargana, with its Zakat has been given to the Firangee and Sanad is already issued. You should, therefore, stop the harassment about the (collection) of share of Zakat of Fatepur Chavadi henceforth."—

is rendered in Portuguese as:

> "I order by this letter the handing over of the dominion of the Sarkar with its duties to the said State, in order not to have authority or dominion in it."

The above justifies the anxiety of the Government of India to examine the original document in its original language. A translation of the documents in the photocopy of Annex 38 to the Reply is given at Indian Annex F. No. 46.

ment of India stated that in 1794 the Maratha Government decided to recover certain Ramnagar Zakat dues from the Portuguese by confiscating a part of the revenues which had been assigned to them. The Government of India cited a document at Indian Annex C. No. 26. This document is dated 1794/1795, and it reads:—

"Rs.	Annas
3,929	4

The Zakat of Ghambirgad and of other Zakat posts was formerly received by the Sarkar. Of late, the Firangee of Goa forcibly collects the same, *on the pretext that it forms a part of Nagar Aveli Zakat* [1], and the arrears of previous administration are being carried forward separately. In addition to this, the amount for the last year collected by him is Rs. 3,929. Annas 4. *The same should be collected* [1]. *If it is not paid, the same should be recovered from his Mahal* [1]."

In partial implementation of the above resolution the Maratha Government recovered a sum of Rs. 787-0-0 from the revenues of Nagar Aveli. This fact is to be ascertained from the Maratha document of 1797 at Indian Annex C. No. 27 which reads:—

"On account of dispute over Zakat, attachment was made. Amount in respect of this attachment Rs. 787-0-0."

258. The Portuguese Government, quite unable to explain away the above facts, states in paragraph 120 of the Reply that the recovery of the above sums in respect of Ramnagar Zakat dues was nothing but "an abuse on part of the Maratha authorities", and that the relevant Maratha documents show nothing but "obvious bad faith on part of the local authorities." However, as appears from the documents in the file, the resolutions of the Maratha Government in respect of recovery of arrears of Ramnagar Zakat are entered in authentic and formal documents of the Maratha Secretariat, and they do not contain any indication that they were made in a frivolous manner or that there was no authority for the framing of these resolutions.

259. In paragraphs 101, 102, 109 and 111 of the Counter-Memorial, the Government of India showed that the assignment of revenues to the Portuguese from Pragana of Nagar Aveli was confiscated by the Maratha Government in 1798, and a Maratha military guard was posted in Nagar Aveli to ensure the collection of the revenues. As the Portuguese Government admits in paragraphs 120 and 121 of the Reply, the Maratha Government attached the Saranjam of Nagar Aveli in 1798 for two reasons. In paragraph 121 of the Reply, the Portuguese Government admits that there was an attachment of the Saranjam which took place as a result of the decision of the Maratha ruler to make a collection of revenues "over all his territories" [2].

[1] Our italics.

[2] In a footnote to paragraph 120, the Portuguese Government denies that the Maratha Government had decided to "attach all its Saranjams", but states that

260. At paragraph 121 of the Reply the Portuguese Government states, however, that the attachment of Nagar Aveli Saranjam in 1798 resulted in "a full confirmation of the Portuguese sovereignty over Dadra and Nagar Aveli". In support of this statement, the Portuguese Government refers to Annexes 9, 10, 11, 12 and 13 to the Portuguese Memorial, and Indian Annex C. No. 29.

261. Annexes 9, 10, 11 and 12 to the Portuguese Memorial are translations in the Portuguese language of alleged letters in the Marathi language exchanged between the Government of Daman and the Maratha commander of Bagavara. As has been stated in paragraph 2, the Portuguese Government has failed to produce the originals in the Maratha language on the grounds that these do not exist. The Government of India, for reasons already stated, finds it difficult to attach value and authenticity to the alleged documents and their contents. However, even these documents, as they stand, do not help the Portuguese Government. For example, in reply to the unjustified complaint of the Governor of Daman about the attachment of the Saranjam of Nagar Aveli and the posting of a Maratha military guard in Pragana of Nagar Aveli, the Maratha commander wrote:—

> "As regards your long recital that I did not inform you about the sending of a guard to Pragana Nagar Aveli, I did write two letters recently. The orders of the Sarkar are strict. It is on these orders that I sent the guard: the Most Happy has made collections from his dominions and everyone has paid" (Annex 11 to the Memorial).

The above passage shows that the Maratha commander had no hesitation whatever in sending a military guard to Pragana Nagar Aveli in pursuance of the orders of the Maratha Sarkar. He was under no doubt whatever that Pragana Nagar Aveli formed part of the dominions of the Maratha Sarkar. The very fact that the Portuguese envoy at the Maratha Court had to make extraordinary efforts and to give heavy bribes and gifts to Maratha officials in order to obtain the removal of the attachment and the military guard is in itself sufficient to show that Pargana Nagar Aveli was considered by the Maratha Government as forming part of its dominions. The Portuguese Government gives no account in its Reply of the manner in which the Maratha commander was induced to withdraw the attachment. The Government of India stated the relevant facts at paragraph 111 of the Counter-Memorial. It stated there:—

> "under instructions from his Government, the Portuguese envoy to the Poona Court, Vithal Rao Goraksh, made strenuous efforts to

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the Maratha Government had only decided to make a collection of revenues for one year over all its territories. Evidently the Portuguese Government is unable to grasp the meaning of "attachment of Saranjam". Attachment of Saranjam means precisely the withdrawal of the assignment of revenues and direct collection of the revenues by the Sovereign Grantor.

obtain the removal of the attachment and the withdrawal of the special Maratha guard. Towards this effort, the Portuguese Government supplied him ample funds with which to bribe and corrupt minor Maratha officials. He was instructed to inform the Marathas that if the Portuguese requests were not complied with, the Portuguese on their part would withhold supplies of rifles and artillery guns needed by the Marathas. These facts are disclosed in the correspondence between Vithal Rao Goraksh, the Portuguese envoy, and Jose Caetano Pacheco Tavares, a Secretary to the Portuguese Government of Goa, contained in *'Agents of Portuguese Diplomacy in India'* by Pissurlencar. (Indian Annex E. No. 11.) This correspondence makes it clear that whatever *ad hoc* grants and concessions were obtained by the Portuguese exempting them from arrears of Zakat or permitting the passage of produce of Nagar Aveli without 'harassment' by Maratha Tax-collectors, were not obtained on the basis of a legal claim discussed at high levels of the Maratha Government. These *ad hoc* grants and conditions were obtained from minor Maratha officials as a result of bribe or intimidation."

The above statement of the Government of India is clearly supported by many other letters of the Governor of Daman addressed to Goraksh, the Portuguese envoy, published in the abovementioned book of Pissurlencar, some of which are reproduced at Indian Annex F. No. 47. This publication, however, does not contain the Portuguese envoy's answers to these letters. The answers of the Portuguese envoy are in the archives of the Portuguese Government, and the Government of India has every reason to believe that, were these to be produced, they would show even more clearly the means adopted by the Portuguese envoy to obtain the end desired by the Portuguese Government.

262. Annex No. 13 to the Portuguese Memorial is stated to be a letter from the Subedar of Bassein to certain Maratha officials. Apart from the fact that this document is available only in Portuguese translation, said to have been made by Anant Kamodi Wagh and therefore highly suspect by the Government of India, even its date conflicts with the document at Indian Annex C. No. 29. The letter in Annex No. 13 from the Subedar of Bassein is said to be dated the 17th May, 1798. However, the document at Indian Annex C. No. 29, which purports to be a letter of instructions to the Subedar of Bassein is dated the 19th June, 1798. It may be asked, how did the Subedar of Bassein issue the alleged letter for removal of the attachment two months before he himself received a letter informing him that the attachment may be removed?

263. The letter at Indian Annex C. No. 29, however, is not a Sanad from the Maratha Ruler but from one Amrit Rao, a Maratha official who was the recipient of gifts from the Portuguese envoy (Indian Annex F. No. 47, Letter Nos. 113 and 118). If this letter is examined it becomes absolutely clear that it contains no "confirmation of Portuguese sovereignty over Nagar Aveli". It reads:

"Vithal Rao Goraksh, the Firangee Vakil, represented to the Sarsuba that Mahal [1] of Pragana Nagar Aveli, inclusive of Zakat, Mohtarfa and tax on cattle, *has been assigned* [1] to the Firangee *from the Sarsuba* [1]; that last year the Mamlatdar of Arjungad brought attachment on the Mahal for realizing one year's amount of *Saranjam* [1]."

This document shows quite clearly that even Amrit Rao, the recipient of gifts, was well aware of the fact that the grant to the Portuguese was of a *Mahal* [1] in *Saranjam* [1] from the *Sarsuba* [1], i.e. from territory within the jurisdiction of the Maratha Ruler.

264. The above incidents of the attachment of the Saranjam and the posting of the Maratha military guard show clearly that Pargana Nagar Aveli formed part of the dominions of the Maratha Sarkar and was so considered by Maratha officials.

265. As stated above in paragraph 259, Portuguese indebtedness to the Maratha Government on account of the arrears of Ramnagar Zakat was the reason for another confiscation in 1798. In order to obtain relaxation of this confiscation, the Portuguese envoy furthered his efforts to obtain a Sanad for a release and this time he corrupted a Maratha official by the name of Laxman Pant Chakradev. (Indian Annex F. No. 47. Letter No. 117). It appears that the Portuguese envoy obtained from the said Laxman Pant Chakradev a letter purporting to be under the seal of the Maratha Ruler. The alleged document is given at Annex 19 to the Portuguese Memorial. The photocopy of that Annex contains what is stated to be a *"copy"* of an alleged document in the Marathi language. The Government of India has made a translation of this "copy" and it is given at Indian Annex E. No. 10. This translation reads:—

"Pragana Nagar Aveli has been assigned to the Firangee of Goa by the Sarkar as Saranjam near Daman. He carries food grains, teak wood etc., from there to Daman by water and by land. Though such is the practice in the past, it has been communicated to the Huzur that you have started harassing him in respect of Zakat. Hence this letter is being addressed to you. Therefore the Firangee of Goa will carry from the Pragana Nagar Aveli to Daman by water and by land food grains and teak wood. He should not be pressed for Zakat."

As the Government of India pointed out in paragraph 109 of the Counter-Memorial, if at all the above document could be said to be an authentic document issued under the seal of the Maratha Ruler, it would even then appear to be nothing but an *ad hoc* permit or pass for exemption from "harassment in respect of Zakat." The existence of such a document would clearly demonstrate that the power and discretion to allow or refuse passage of goods inside or through Nagar Aveli as through other parts of Maratha territory, resided

[1] Our italics.

solely with the Maratha Government. These *ad hoc* permits or passes issued by the Maratha Government were called "dastaks", and they usually contained the formula:—

> "X will proceed unmolested on the way and without any harassment on account of Zakat."

These dastaks were issued by the Maratha Government, in its discretion, to pilgrims, marriage parties, merchants, officials, etc. (Indian Annex F. No. 48).

266. The need for obtaining fresh permits for exemption from "harassment on account of Zakat" was recognized by the Portuguese Government, as can be seen from the documents of 1802 at Indian Annex F. No. 47. Letters Nos. 141 & 142, and Annex Nos. 20 and 40 to the Portuguese Reply. At paragraph 120, the Portuguese Government stated that the alleged Sanad of 11th January 1799 issued by the Maratha ruler expressly put an end to the dispute regarding Ramnagar Zakat and acknowledged that the right to collect Ramnagar Zakat belonged to the Portuguese. The very fact that the Governor of Daman found it necessary to write to the Portuguese envoy at the Maratha Court to obtain fresh permits in 1802 in itself contradicts the Portuguese statement in paragraph 119 of the Reply that the matter was settled in 1791 and in paragraph 120 of the Reply that the matter was settled in 1799. In this connection the Government of India would like to draw attention to Annex 40 to the Reply. The Portuguese Government has not printed the portions of the letter of the Portuguese Viceroy which show that even in 1807 there were difficulties in the carriage of produce from Nagar Aveli to Daman and that the Marathas exacted customs duties on such produce. The Government of India has made a translation of the full text in the photocopy of Annex 40 to the Reply and given it at Indian Annex F. No. 49.

267. It emerges from the above facts that long after the grant to the Portuguese of a Saranjam in 1783 and 1785 the Maratha Government collected a tax in Nagar Aveli; that on the failure of the Portuguese Government to pay the tax due to the Maratha Government, the Maratha Government confiscated the assignment of revenues on several occasions; that the Maratha Government attached the Saranjam for the purpose of collecting one year's revenue from Nagar Aveli; that the attachment was subsequently withdrawn and the Portuguese released from their obligation to pay arrears of Zakat as a result of the activities of the Portuguese envoy at the Maratha Court; that, in spite of his efforts, he was not able to obtain a permanent concession to the Portuguese; that the Maratha Government always treated the grant to the Portuguese as assignment of revenues in Saranjam tenure; that the Maratha Government never parted with its rights relating to Ramnagar Zakat; that the exemption from Zakat on "Jame" of Nagar Aveli

was given on an *ad hoc* basis and had to be expressly renewed from time to time.

Petition of the people of Dadra and Nagar Aveli to the Maratha Sovereign

Resumption of the Saranjam in 1817

268. At paragraphs 103, 104, and 105 of its Counter-Memorial the Government of India stated that the precarious nature of interest granted to the Portuguese and the fact that the Maratha Ruler had no intention of parting with his sovereignty over Dadra and Nagar Aveli is further borne out by two documents of the Marathas at Indian Annex C. Nos. 30 and 31.

269. The document at Indian Annex C. No. 30 is a highly revealing petition from the Zamindars (landholders) and Ryots (cultivators) of Pargana Nagar Aveli addressed to their sovereign the Maratha Ruler. In this petition the subjects of the Maratha Ruler prayed for the revocation of the assignment of the Saranjam to the Portuguese. They prayed:

> "... we approach the feet of the Master and make our representations in detail. Let the Master be kind enough to keep the *Mahal* under his *direct* revenue administration..."

There was no doubt in the mind of the Zamindars and Ryots of Nagar Aveli that they were the subjects of the Maratha Ruler and entitled to his protection against the unjust exactions of the Saranjamdar.

270. The document at Indian Annex C. No. 31 is a resolution of the Maratha Government. In five short sentences this resolution gives a complete description of the nature of the grant made to the Portuguese. Its clearness and brevity makes it worthwhile to reproduce it here in full:

> "The Vakil from the Firangee was always accredited to the Sarkar at Poona and services of the Sarkar were performed by the Firangee of Goa. For this the Mahal of Nagar Aveli, Taluka Bassein has been granted by the Sarkar in Saranjam to the Firangee of Goa. Of late no services to the Sarkar are rendered by the Firangee. And the Vakil does not reside at Poona. Therefore the Mahal should be resumed."

This document illustrates the following points:

(1) The grant to the Portuguese consisted of a Saranjam of the Mahal of Nagar Aveli.

(2) Nagar Aveli continued to be in the Maratha jurisdiction of Prant or Taluka Bassein.

(3) The condition of the grant was

(a) the performance of service by the Portuguese to the Maratha Sarkar;

(b) the existence of friendly relations signified by the accreditation of the Portuguese Envoy or Vakil to the Maratha Court.

(4) The Portuguese Government failed in performance of these conditions.

(5) As a result, the Maratha Sarkar resumed the Mahal, that is, terminated the grant.

271. The Portuguese Government has found it extremely difficult to explain away the clear implications of the above mentioned documents. In a footnote to paragraph 123 of the Reply it states that the petition of the Zamindars was "a manoeuvre which was instigated by and for which was solely responsible one Lala Morim, a common law criminal". It appears from this statement of the Portuguese Government that it has a number of documents in its archives relevant to the petition and apparently knows the details of the representations made by the people of Nagar Aveli to the Maratha Sarkar.

272. The Portuguese Government find it even more difficult to explain away the implications of the Maratha resolution of 1817 which terminated the grant of Saranjam. The only comment of the Portuguese Government at paragraph 123 of the Reply is:

> "This seems to be a suggestion made upon the responsibility of no one, made by some lower level official, which as in the case of the document just analysed, contained no response from the Court of the Peshwa. In any event, the fact that no *démarche* was attempted to implement the suggestion contained in that document, shows the impossibility on the part of the Government of Punem to implement it by itself."

The above is a mere presumption of the Portuguese Government arising from a failure to understand the significance of the document. The above document is an official resolution of the Maratha Government and its effect was to bring about the revocation of the grant *ipso facto*. The resolution was made in 1817 a few months before the Maratha Ruler was conquered by the British. From that point of view the Maratha Ruler did not get the opportunity of removing the Portuguese from their position as Saranjamdar. However, as has been stated, from the formal point of view the assignment of Saranjam stood cancelled [1].

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[1] As appears from the decision of the Bombay High Court in the *Baroda Saranjam Case* (Indian Annex F. No. 36), it was never necessary for the Sovereign Grantor to make the order of revocation in writing or in any other formal manner. A mere decision or resolution could bring the grant to an end.

Usurpation of Maratha rights

273. At paragraph 112 of the Counter-Memorial The Government of India pointed out that the Portuguese were present in Dadra and Nagar Aveli in their capacity as Saranjamdars of the Marathas, as assignees and collectors of revenue. If, as seems to be the contention of the Portuguese Government, they exercised in Dadra and Nagar Aveli rights other than those of an assignee of a Saranjam, that exercise was in abuse of the good faith of the Marathas and a usurpation of rights properly belonging to the Maratha Government. As the Government of India stated in paragraph 112 and paragraphs 114 to 119 of the Counter-Memorial, the Portuguese continued in Dadra and Nagar Aveli as a result of misrepresentations to the British Government immediately after the extinction of the Maratha State that under a "Treaty of 1780" the Marathas had ceded Nagar Aveli to the Crown of Portugal. The alleged "Treaty of 1780" was never produced to the British Government. The British Government had no opportunity of verifying the statement made by the Portuguese Government and the Portuguese continued their presence in Dadra and Nagar Aveli. In consequence it cannot be asserted by the Portuguese Government that they acquired a valid title to cession of territory from the Maratha Government. The Portuguese Government has entirely failed to produce evidence of any such title having been received by them from the Marathas. In fact, in paragraph 124 and the following of the Reply the Portuguese Government relies not on a valid title to cession of sovereignty received from the Marathas, but on "effective exercise of sovereign powers", "fiscal power", "administrative government", "maintenance of public order and military powers", "repression of crime and the administration of justice". In short, these high-sounding phrases are meant to convey that although Portugal received no title to cession of territory in sovereignty over Maratha territory either under the alleged treaty of 1779, or the alleged accords of 1783 or 1785, she did in fact act as if she were sovereign over Dadra and Nagar Aveli. As the Government of India has already submitted, no such pretence to sovereign powers on the part of the Portuguese Government could in the absence of a clear cession of territory operate to divest the Marathas of their sovereignty over their territory. No acts of alleged "administration" et cetera could serve to bring about cession of Maratha territory to Portugal.

274. In point of fact, however, the very documents produced by the Portuguese Government contradict its assertions that the Portuguese "exercised sovereignty" over Nagar Aveli or that the Marathas acquiesced in such a situation. Thus in paragraph 125 the Portuguese Government admits that the Portuguese respected the institution of "Patels". The very fact that the Governor of Daman

had doubts about his powers in dealing with the Patels and his reference to the Portuguese Viceroy shows that there was a great deal of doubt in the mind of the Portuguese as to their rights in Pargana Nagar Aveli. In paragraph 126 and 127 of the Reply the Portuguese Government states that in 1814 Maratha troops entered Nagar Aveli for the purpose of catching thieves. The Portuguese Government referred to a letter from the Governor of Daman to the Portuguese Viceroy dated the 28th November 1814 in which letter he reported the matter and asked for instructions. This letter shows again quite clearly that the Marathas looked upon Pargana Nagar Aveli as territory within their sovereign jurisdiction and sent armed forces there without asking the leave of the Portuguese and that they considered it their right to call on the Portuguese Saranjamdar to help in the catching of thieves *on pain of the revocation of the grant.* The letter reveals the doubt in the mind of the Governor of Daman as to the right of the Portuguese in the matter [1].

275. It is also clear from the document of Annexes No. 43 and 44 to the Reply that the Maratha resolution to revoke the grant and terminate altogether the rights of the Portuguese in Nagar Aveli had its origins in a letter addressed to the Portuguese by the Subedar of Bassein and by the Maratha Ruler. These Annexes give clear indication of the existence of these two documents. The Portuguese Government, however, has failed to produce these two documents. These documents, be it noticed, are stated by the Portuguese to be "fabricated". If letters from the Maratha Government were capable of being "fabricated" what guarantee is there that the so-called orders, permits and sanads relied upon by the Portuguese Government were also not fabricated at the instance of the Portuguese envoy at the Poona Court [2].

276. The Government of India accordingly submits that the evidence in the file shows that the Marathas never doubted their sovereignty over their Pargana of Nagar Aveli in the jurisdiction of Prant or Taluka Bassein, that never did the Portuguese make any assertions of claim to sovereignty over Pargana Nagar Aveli; that the Marathas showed by their intentions and conduct that they would not have acquiesced in assertions of Portuguese sovereignty over Pargana Nagar Aveli; that the Portuguese never exercised

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[1] The Portuguese Government printed only a short extract from the document. It totally suppressed the portion of the letter in which the Governor of Daman explained the attitude taken up by the Maratha authorities and the warning given to him that if he did not comply with Maratha orders the grant would be revoked. The Government of India has set out at Indian Annex F. No. 50, a full translation of the photocopy of Annex 42 to the Reply.

[2] The Portuguese Government has omitted relevant parts in the printed Annexes. A full translation of Portuguese Reply Annexes 43 and 44 will be found at Indian Annex F. Nos. 51 and 52 respectively.

any rights in the Pargana Nagar Aveli exceeding the limited, revocable and terminable rights enjoyed by a Saranjamdar. The Government of India also submits that any usurpation of the rights properly belonging to the Maratha Government or defiance of Maratha authority on the part of the Portuguese could not have affected the sovereign rights of the Maratha Government nor changed the nature of the grant from an assignment of revenues in saranjam tenure to cession of territory in full sovereignty.

THE BRITISH PERIOD

277. The discussion in the Reply of the British period, i.e. the period from 1818 to 1947, opens with six introductory paragraphs (paragraphs 129-134). In these paragraphs the claim is made that throughout the whole of this period the British both recognized Portuguese sovereignty over Daman and the enclaves and respected the Portuguese right of access to the enclaves (paragraph 130). It is also claimed that during this period passage of persons, both officials and private individuals, and of goods went on in such a way as to maintain completely "the desired liaisons" between Daman and the enclaves (paragraph 132).

278. It is convenient to state at once the answer of the Government of India to these claims. There is no doubt that throughout the British period traffic passed between Daman and the enclaves. This traffic included both persons and goods, and among the persons were a certain number of armed soldiers and police as well as private individuals. The mere fact that this passage took place, is, however, of no legal significance. Inferences favourable to the Portuguese case could be drawn from this fact only if it were shewn that the British authorities allowed this passage because they conceived themselves to be obliged to do so. If, on the other hand, they allowed it merely as a matter of good neighbourliness, and only so far as it was not prejudicial to British interests, the fact that the passage took place is entirely irrelevant to the question whether a right of passage existed. The history of the British period shows, in the submission of the Government of India, that transit both of persons and of goods between Daman and the enclaves was always subject to control and regulation by the British authorities. This much even the Portuguese Government is constrained to admit. On certain occasions, when British interests so demanded, transit of certain kinds was entirely forbidden; agreements were made and language was used amounting to an acknowledgement on both sides that transit, while in practice permitted, could not be demanded as of right. Transit of persons and goods took place, according to the Reply (paragraph 132)

> "in such a way as to completely fulfil its purpose, i.e. the maintenance of the desired liaisons between these territories (i.e. Daman and the enclaves)".

If, and in so far as, this is true, the reason for it is not that some right existed, but that the "purpose" of the Portuguese Government was during this period unobjectionable to the British Government, and the "liaisons" in question were not only "desired" by

the Portuguese but also consistent with British interests and policy. The history of the period provides no evidence that, in allowing access to the enclaves, the British authorities were recognizing or respecting any Portuguese right.

279. The Portuguese Government complains of "frequent inaccuracies" in the Indian Government's presentation and interpretation of the facts (paragraph 133). The Indian Government is not conscious of having committed such inaccuracies. As the Portuguese Government condescends to no particulars, such as would enable the Indian Government to deal with the alleged inaccuracies, the Indian Government concludes that this charge is not regarded very seriously even by those who make it.

I. Alleged Basic Defects of the Indian Argument.

280. Paragraphs 135 to 145 of the Reply consist of an alleged exposure of "some basic defects of the Indian argument". The following are the "defects" of which complaint is made:—

(i) The Indian Government, it is said, has been at great pains to prove that which the Portuguese Government admits, viz. that transit between Daman and the enclaves did not have the advantage of immunities; but this, according to the Portuguese Government, shows only that the right of passage was regulated, and the conditions for its exercise were laid down, by the British authorities, and has nothing to do with the existence of the right of passage itself.

(ii) The Indian Government is accused of confusing passage for the purpose of reaching the enclaves with entry into neighbouring territory, and relations in general between Portuguese territory in India and neighbouring territories with the allegedly special case of the enclaves. For an example of this error, the Portuguese Government refers to the Indian Government's reliance upon the Treaty of 1878, and contends that that Treaty, while it established a system applicable generally between British and Portuguese territories in India, had nothing to do with the particular case of transit between Daman and the enclaves.

281. With regard to the first of these complaints, it is not merely for the purpose of proving that traffic between Daman and the enclaves did not enjoy any immunity that the Government of India has invited the Court to study the British period in some detail. The Portuguese Government tries to draw a distinction between a right of passage and a right to immunities, between a right to regulate and control and a right to forbid and prevent. It is the submission of the Government of India that these distinctions have no legal basis. The Portuguese cannot have had a right of passage unless they also had a right to immunities, for without immunities a right of passage would have been meaningless. If the British had

the right to regulate and control the passage, they must also have had the right to forbid and prevent it, for without the latter the regulation and control would have been ineffective. The events of the British period, showing that the Portuguese enjoyed no immunity and the British constantly exercised the right of regulating and controlling traffic between Daman and the enclaves, are therefore of great significance. If Portugal had no right of immunity, that indicates that she had no right of passage. If there was power to regulate and control, that indicates that there was power to forbid and prevent. It is for this reason that the events of the British period set out in the Counter-Memorial, so far from being (in the words of the Reply, paragraph 136) "entirely outside the scope of this discussion", are of vital importance for the determination of the matters in issue.

282. Relying upon this first criticism of the Indian argument, the Government of Portugal, referring to the account in the Counter-Memorial of transit between Daman and the enclaves during the British period, professes to find it "unnecessary for us to follow this statement *pari passu*" (paragraph 137). The Indian Government submits that this account of the actual practice in regard to transit during the British period is far more serious in its effect on the Portuguese claims than the Portuguese Government seems to have appreciated. Apart from the general effect of the story, however, it is also important to study the particular language of the individual documents. Such a study reveals that the representations made by the Portuguese authorities from time to time and the terms in which they made them give no hint of any belief in a right which they were in a position to enforce; and the attitude of the British authorities shews them always assuming that transit between Daman and the enclaves was something which they were entitled to allow, to forbid or to control as British interests required; cf. Counter-Memorial, paragraphs 114, 127, 131, 136, 152, 163, 178, and 190-191.

283. In putting forward the second complaint (Reply, paragraph 138), the Portuguese Government draws a distinction between entry into neighbouring territory and passage to the enclaves. The argument overlooks the fact that, while these two things may not be the same, the latter involves the former. Passage from Daman to the enclaves, or vice versa, is not possible without entry into the intervening territory. To forbid all entry into that intervening territory would be to forbid such passage. Any regulation controlling entry of Portuguese troops into British (or Indian) territory generally, or any agreement that Portuguese troops should not enter British (or Indian) territory in general without permission, would necessarily apply, in the absence of a specific exception, to passage between Daman and the enclaves. Documents dealing, with entry

into neighbouring territory, therefore, so far from dealing with a question outside the present dispute (Reply, paragraph 139), are directly relevant to matters in issue.

284. According to the Government of Portugal, it is "quite obvious" that an argument which proceeds by inference from the general relationship between Portuguese territories in India and adjoining territories to the case in hand is defective (Reply, paragraph 139). So to contend, however, is to beg the question. The Portuguese Government assumes that relations between what it calls "the different parts of the district of Daman" and the surrounding territories constitute a special case, to be distinguished from relations between other Portuguese possessions and the territory surrounding them. This is to assume a large part of what the Portuguese Government—the claimant in these proceedings—has to prove. A document dealing with entry from Portuguese territory in India into adjoining territory applies *prima facie* to entry from Daman (and, before 1954, entry from either of the enclaves) into adjoining territory. If such a document contains no specific exception, it could be held inapplicable to Daman and the enclaves only if that results from some general principle of law, or there exists some treaty or custom applying to the territory between the enclaves but not to the territory surrounding other Portuguese possessions. Whether such a general principle, treaty or customs has ever existed is, however, precisely the point in issue in the litigation. That passage through the territory between Daman and the enclaves constitutes a special case, not merely geographically but also legally, is something to be proved, not something which the Portuguese Government is free to assume.

285. As a particular example of this "defect of reasoning" the Government of Portugal refers to the Treaty of 1878. We are told in the Reply (paragraph 140) that this Treaty "covers questions which are irrelevant to the subject matter of this action", and it is for that reason that nothing was said of it in the Memorial; the Treaty established general rules applicable to the Indian territories of the contracting parties, but in the particular case of passage between Daman and the enclaves did not affect Portugal's pre-existing right (paragraph 141). When the Treaty itself and the practice under it are examined, it is seen that the Treaty deals throughout with all British and Portuguese territories in India in general terms, making no attempt at any point to distinguish one territory from the others. From this point of view, the phraseology of Article VII, which is admitted by the Government of Portugal to have applied to the enclaves, is indistinguishable from that of Article XVIII, which, according to the Government of Portugal, did not apply to them. While the Treaty was actually in force, moreover, the Governor-General of Portuguese India himself admitted that the provision regulating the entry of the armed forces of

one party into the territory of the other applied quite generally, without any exception affecting Daman and the enclaves: cf. paragraphs 288-296 below. In the submission of the Government of India, it is perfectly clear that from 1879 to 1892 Daman and the enclaves were subject to the terms of the Treaty in exactly the same way as the other Portuguese possessions in India. When the terms of the Treaty are borne in mind, this throws much light on the question of what rights the Portuguese authorities, immediately before it came into force, believed themselves to possess.

286. The principal purpose of the Treaty (Indian Annex C. No. 40) was the establishment of a customs union between all British and Portuguese territories in India. Freedom of transit was established by Article I. This article, which undoubtedly related to all the Indian territories of either party, referred to

"the Indian dominions of the High Contracting Parties".

The following are the expressions used in other articles of the Treaty:

II. "The subjects of each of the High Contracting Parties shall be entitled to enter into and to travel and reside in *the Indian dominions of the other.*"

III. "The ports, harbours, roadsteads, basins, creeks and rivers in *the Indian dominions of each of the High Contracting Parties shall be open...*"

V. (Agreement of the High Contracting Parties relating to) "the development of commercial relations between *their respective dominions*".

VII. "... the desire of the High Contracting Parties that *their respective Indian dominions* shall become one territory in all matters relating to commerce..."

"All customs duties ... now levied on the frontier lines between *the Indian dominions of the High Contracting Parties* shall be abolished..."

"All articles of commerce of whatever origin, which according to the provisions of this Treaty, may be imported into or exported from *the Indian dominions of either party* shall pass freely into or out of such dominions across such frontier lines ..."

VIII. "... the complete freedom of intercourse between *their respective Indian dominions...*"

X. "Such registers and accounts of traffic shall be kept ... upon any railway which may now or hereafter serve to connect *their respective Indian dominions...*"

XI. "The High Contracting Parties reserve to themselves respectively the right to maintain, modify ... all internal duties of excise ... existing in *their Indian dominions...*"

XVIII. "The High Contracting Parties mutually agree to adopt in *their respective territories* suitable measures for the prevention and punishment of smuggling..."

"The revenue, magisterial and police authorities of *the Indian dominions of the High Contracting Parties* shall cordially co-operate with each other..."

"The armed forces of one of the two High Contracting Parties shall not enter *the Indian dominions of the other*..."

"The exportation of arms, ammunition or military stores from *the Indian dominions of one of the High Contracting Parties* into *those of the other* shall not be permitted..."

XIX. "The High Contracting Parties engage to deliver up to each other those persons who, being accused or convicted of crimes committed in *the Indian dominions* or jurisdiction *of the one party*, shall be found in *the Indian dominions* or jurisdiction *of the other party*."

287. From these quotations it is clear that the same expressions were used throughout the Treaty to describe the territories to which it applied. The intention of the parties in using these expressions in most of the articles is beyond dispute; they intended to refer to all the Indian dominions of either party without exception. The Government of Portugal expressly admits (Reply, paragraph 143) that the customs immunity created by article VII of the Treaty "on the frontier lines between the Indian dominions of the High Contracting Parties" applied to goods in transit between Daman and the enclaves. Yet that Government contends that Article XVIII of the Treaty, forbidding, save with permission, the entry of the armed forces of one party into "the Indian dominions of the other" and the exportation of arms, etc., from "the Indian dominions" of one party "into those of the other", had no application to transit between Daman and the enclaves (Reply, paragraphs 141 and 144). The Government of India submits that the general language of Article XVIII cannot bear any such restricted interpretation. When Article XVIII is read in the context of the rest of the Treaty, it is impossible to believe that the parties, if they had intended such an exception as the Portuguese Government seeks to read into the article, would not have inserted the exception in express terms.

288. In support of the contention that Article XVIII did not apply to transit between Daman and the enclaves, the Portuguese Government alleges that" the facts prove that "passage of police and armed forces between Daman and the enclaves" took place even during the period when the Treaty of 1878 was in force, under conditions which were different from those laid down in its Article 18" (Reply, paragraph 144). Reference is then made to 23 cases, between 1880 and 1889, of soldiers passing between Daman and the enclaves or between the enclaves. The documents produced relating to these cases (Reply, annexes Nos. 50-76) are all communications from one Portuguese official to another. Even on its face, therefore, this evidence does very little to shew what interpretation was placed upon the Treaty. The documents contain nothing to suggest that

the British authorities knew of these incidents, or acquiesced in the entry of the soldiers into British territory without the formal request required by Article XVIII. These documents are perfectly consistent with the view that the 23 incidents took place not in accordance with the Treaty, but in spite of it, and this view is confirmed by evidence emanating from the Governor-General of Portuguese India himself.

289. This evidence is contained in correspondence about Article XVIII of the Treaty, which passed between the Government of Bombay and the Government of Portuguese India in 1890 and 1891. On the 29th May, 1890, the Secretary General to the Government of Portuguese India sent a telegram to the Government of Bombay, reporting that 15 sepoys of the Ratnagiri police had landed armed at Marmagao, and had been disarmed "for want of previous license" (Indian Annex F. No. 53). These policemen had in fact been passing through Marmagao in transit, on their way from Ratnagiri to Belgaum. At the request of the British Consul at Goa, the Portuguese authorities allowed them to proceed on their way without arms. As a result of this incident, the Government of Bombay passed a resolution, No. 4138, of the 2nd July, 1890, in the following terms (Indian Annex F. No. 53):

> "Under Article XVIII of the Treaty of Commerce and Extradition between Great Britain and Portugal, ratified on the 6th of August 1879, it is provided that the armed forces of one of the two high contracting parties shall not enter the Indian dominions of the other, except for the purposes specified in former or in that treaty, or except in consequence of a formal request made by the party desiring such entry to the other. When, therefore the Superintendent of Police, Ratnagiri, desired to despatch a party of armed Police to Marmagao for transit to Belgaum, he ought to have moved Government in this Department to prefer a formal request to the Governor General of Portuguese India and awaited the result.
>
> 2. The Resolution No. 107, dated 9th January 1880, quoted by the Vice-Consul deals with other clauses of Article XVIII in respect of the exportation and importation of arms and ammunition, and is not relevant to the present case. The Commissioners of Divisions, and the Inspector General of Police should have their attention called to the present irregularity, and the regret of Government at the accidental omission to comply with the stipulation of the treaty should be expressed to the authorities at Goa."

A letter expressing such regret was sent to the Secretary General to the Government of Portuguese India on the 2nd July, 1890, and a copy of this letter was sent to the British Vice-Consul at Goa (Indian Annex F. No. 53), with the intimation that in such cases

> "a report should be made to Govt. by telegraph and a formal request will then be sent by telegram, a course which is commonly adopted by the Port. authorities when sending prisoners or reliefs to Daman".

290. This incident shews that there was no laxity about the interpretation of Article XVIII. Neither the British nor the Portuguese authorities felt any doubt that it applied even to small bodies of British soldiers or police passing armed through Portuguese territory in transit only from one part of British dominions to another. It appears from the Government of Bombay's note of the 2nd July, 1890, to the British Vice-Consul at Goa (Indian Annex F. 53), with its reference to the "course which is commonly adopted by the Port. authorities when sending prisoners or reliefs to Daman", that the Portuguese authorities also recognized that the Treaty obliged them to get permission before sending armed men through British territory to Daman. It might be suggested that such permission was asked only when the men were to travel to Daman by land from Goa or from Diu (in which case the journey could be made by sea, so that passage across British territory was of choice and not of necessity), not when they were coming from the enclaves; but what followed shews that this was not the fact.

291. On the 22nd September, 1890, the District Magistrate at Surat wrote to the Commissioner of the Northern District (Indian Annex F. No. 53), referring to Government Resolution No. 4138 (quoted above) and reporting

> "that armed men in the service of the Portuguese Government pass through a portion of Pardi Taluka (British territory) on their way from Damaun to Nagar Haveli and back (both in Portuguese territory) and the practice does not seem authorized by any of the ways mentioned in the 3rd paragraph of Article XVIII".

The Commissioner reported the matter to the Government of Bombay. On the 8th December, 1890, a letter was written to the Secretary-General to the Government of Portuguese India, referring to the report and going on (Indian Annex F. No. 53):

> "It would appear that the provisions of Article XVIII of the Treaty are thus violated: and since this Government has learnt from your letter No. 64 of the 30th of May, 1890 [a letter about the incident of the Ratnagiri police at Marmagao] of the importance which your Government justly attaches to an observance of the Treaty, I am to request that the Governor General may be moved to issue orders on the subject..."

In reply to this letter, the Governor-General of Portuguese India wrote to the Governor of Bombay on the 22nd December, 1890 (Indian Annex F. No. 53), thus:

> "... On so delicate a subject, I request leave to observe that Portuguese troops never cross British territory without previous permission, and that small detachments, whenever on the march, meet a military post or any force or British authority, they halt and only proceed further after applying for and obtaining fresh permission.

> For centuries has this practice been followed, whereby the treaties have been respected and due deference shown to the British Authorities...
>
> I hope Your Excellency will allow the continuance of the practice hitherto followed in regard to the passage of small detachments of Portuguese troops across British territory. Should Your Excellency, however, not allow this, I shall order that any detachments should go unarmed; and with regard to British detachments, I shall maintain the arrangements above referred to, of permitting their free transit through Portuguese territory, whenever notice of their passage has been previously given to the military authorities subordinate to me."

292. The Governor-General of Portuguese India wrote this letter in answer to a specific complaint that passage of Portuguese troops between Daman and Nagar Aveli without the permission of the British authorities constituted an infraction of Article XVIII of the Treaty. He did not contend that passage of Portuguese troops over the British territory between Daman and the enclaves fell outside the operation of the Treaty, nor did he claim for his Government any right of passage over this territory. On the contrary, his letter consisted in effect of:

(i) an acknowledgement that Portuguese armed forces could not be sent over any British territory, including that lying between Daman and the enclaves, without the previous permission of the British authorities;

(ii) a claim that Portuguese troops never did cross any British territory without previous permission, and had not done so for centuries;

(iii) a statement that, if the Governor of Bombay objected to the passage of armed Portuguese troops, they would be sent unarmed.

Not only does this letter contain no claim of a right of passage to the enclaves across British territory; it is, in the submission of the Government of India, inconsistent with the existence of any such right.

293. The clear terms of this letter, written directly on the subject of the application of Article XVIII of the Treaty to passage between Daman and the enclaves, would in any case outweigh any inference which might be drawn from the 23 incidents upon which the Portuguese Government relies. However, there is more than this to be said. The letter was written in 1890, i.e. after all 23 incidents, the last of which occurred in 1889. In it the Governor-General stated that

> "Portuguese troops never cross British territory without previous permission".

If, therefore, on the 23 occasions mentioned in paragraph 144 of the Reply, Portuguese armed forces had crossed British territory without permission, these incidents must have been concealed from the

Governor-General by his subordinates; for it is not to be supposed that the Governor-General was deliberately telling an untruth to the Governor of Bombay. The obvious reason for this concealment would be that the Portuguese authorities knew that in these 23 incidents they had acted in breach of the Treaty. Moreover, if these incidents were concealed from the Governor-General of Portuguese India, it is very probable that the Portuguese authorities in Daman did everything possible to prevent them from becoming known to the Government of Bombay. If the Government of Bombay (as distinct from minor local officials of that Government) never knew of them, the 23 incidents have no value as indications of the parties' common interpretation of the Treaty. On the other hand, as soon as the District Magistrate at Surat's letter of the 22nd September 1890 (Indian Annex F. No. 53) reached the Government of Bombay, complaint was made to the Government of Portuguese India that the Treaty was being broken.

294. On receipt of the letter of the 22nd December, 1890 from the Governor-General of Portuguese India, the Government of Bombay caused inquiries to be made. On the 28th February, 1891, the District Police Inspector of the Bulsar Division submitted a report (Indian Annex F. No. 53), showing that on a number of occasions Portuguese armed men had passed through British territory without permission. He added that British police sometimes went armed into Portuguese territory, and were not subjected to any interference. The District Superintendent of Police recommended that this state of affairs be allowed to continue. The District Magistrate at Surat and the Commissioner of the Northern District concurred in the view that the reciprocal understanding should be maintained (Indian Annex F. No. 53).

295. Accordingly, in answer to the Governor-General's letter of the 22nd December, 1890, the Secretary to the Government of Bombay wrote to the Secretary General to the Government of Portuguese India on the 9th April, 1891. (Indian Annex F. No. 53.) He said investigation had revealed several cases in which Portuguese armed men had apparently passed through British territory without any application for permission, in spite of "the rule, which requires due notice of transit and application for permission to pass"; but, since they seemed to have behaved themselves with perfect propriety, the Governor of Bombay had given orders that there should not ordinarily be any interference with them. The Secretary-General, however, in his answer of the 7th May, 1891 (Indian Annex F. No. 53,) wrote that

> "on the part of this Government injunctions will be given for the strictest observance of the provisions of Article XVIII of the Anglo-Portuguese Treaty".

296. From the whole of this correspondence, it appears that there was no disagreement between the British and the Portuguese

authorities about the effect of Article XVIII of the Treaty. Both sides understood that that article, being general in its application, applied to Portuguese armed men entering British territory for the purpose of transit between Daman and the enclaves. The Government of Bombay was prepared to acquiesce in the passage of small numbers of men without insisting on an application for permission on every occasion; but this was put forward as a concession, not as something to which the Portuguese Government was entitled under the Treaty, and it was suggested because a reciprocal concession on the part of the Portuguese was convenient to the British authorities. (Whether the concession was accepted is, however, uncertain, for the Secretary-General's letter of the 7th May, 1891 (Indian Annex F. No. 53), suggests that the Portuguese Government preferred a strict application of the Treaty.) The submission of the Government of Portugal (Reply, paragraph 144) that during the period of the Treaty passage of armed men between Daman and the enclaves was not governed by its provisions is thus seen to be unfounded.

297. The Treaty also throws interesting light on the question whether before it came into operation the Portuguese possessed any right of transit between Daman and the enclaves. In his letter of the 22nd December, 1890 quoted above (Indian Annex F. No. 53), the Governor-General of Portuguese India, having stated that "Portuguese troops never cross British territory without previous permission", added that "for centuries has this practice been followed". If the Portuguese possessed a right of passage over British territory between Daman and the enclaves before 1879, it is impossible to understand why they should "for centuries" have asked permission (not merely given notice) whenever their troops wished to cross this territory. This, however, is not all. The course of the negotiations leading to the conclusion of the Treaty lends strong support to the view that the Portuguese Government did not believe itself to possess any such right of passage. It was the Portuguese Government, not the British Government, which pressed for the inclusion in the Treaty of that part of Article XVIII which dealt with entry of the armed forces of one party into the territory of the other. The Portuguese Government pressed for the prohibition, unlimited geographically, just as it eventually appeared in the Treaty. This part of the negotiations is described in despatches of the 8th and 17th December, 1876, from the British Minister in Lisbon (Mr. Morier) to the Secretary of State for Foreign Affairs in London (Indian Annex F. No. 54). In the first of these despatches, Mr. Morier stated that the Portuguese Government attached the greatest importance to "a renewal of the guarantee of the Portuguese possessions in India by Great Britain". Senhor Corvo had explained that the proposed treaty would excite opposition in Portugal and be attacked as a betrayal of Portuguese interests, but a clause such as he proposed would "enable him to repel these

attacks". In the second despatch, Mr. Morier stated that Senhor Soares, with the approval of Senhor Corvo, had proposed the inclusion, in the article dealing with extradition, of these words:

> "La force publique se prêtera mutuellement aide des deux côtés pour réprimer la contrebande, poursuivre les brigands; mais la force armée d'un pays ne pourra pas entrer dans l'autre sans qu'elle soit dûment réclamée par l'autorité compétente pour les buts spécifiés dans ce Traité ou dans les Traités antérieurs et notamment dans le Traité de 1661."

Senhor Soares had added that one purpose of this provision would be to shew

> "that the removal of the customs frontier would not imply the disappearance of the frontier itself, or the promiscuous access to Portuguese territory of British functionaries, *as the presence of the armed force of each contracting party on the territory of the other would in each case require the previous consent of the competent authority*". [1]

298. Thus, in 1876 the Portuguese Government was anxious to have inserted in the Treaty a provision that the armed forces of one party should in no case enter the territory of the other without previous permission. Had they then possessed a right to enter with their armed forces a certain part of British territory, viz. the part between Daman and the enclaves, this proposal would have amounted to a suggestion by them of voluntary abandonment of this right. It is inconceivable that the Portuguese Government can have intended any such abandonment. The whole purpose of the provision was to assure the Portuguese public that Portuguese interests were not being sacrificed. Such an abandonment would have defeated that purpose entirely. (Portuguese sensitiveness on this point may explain why in 1891, as set out in paragraph 295 above, the Portuguese Government preferred a strict application of the Treaty to a reciprocal arrangement, which would have involved them in formally permitting armed British police to enter their territory without previous permission.) The conclusion is clear, that in 1876 the Portuguese Government did not suppose themselves to possess any right of passage over British territory in India.

II: British attitude to rights previously acquired by Portugal

299. In paragraph 146 of the Reply, the Government of Portugal refers to the submission of the Government of India that the British, when they began to exercise sovereignty over the territory surrounding Daman, refused to recognize any rights granted to the Portuguese by the Marathas. The Government of Portugal draws attention in that paragraph to the various ways in which this sub-

[1] Italics added.

mission has been put at different places in the Indian pleadings. The Government of India ventures to suggest that its position is in fact clear enough. The submission is that the British Government never recognized that the Portuguese were entitled as against them to any rights, or that they were themselves subject to any obligations, arising from alleged treaties, decrees or grants made between the Portuguese and the Marathas. This submission is naturally made with reference to the subject matter of the present proceedings. It, therefore, refers primarily to rights (if any there were) affecting territory which in 1818 became British. As to the enclaves themselves, the question whether the British recognized the right granted by the Marathas to the Portuguese does not arise. That right was a mere right to collect revenue (cf. Maratha Period facts). The British appear not to have known of any such limited right over the enclaves in 1818, so they cannot have recognized it. Equally, they cannot have "recognized" any grant of sovereignty by the Marathas to the Portuguese, since there had never in fact been any such grant.

300. It is convenient to consider here the grounds upon which the Portuguese Government contend that Portuguese sovereignty over the enclaves was recognized by the British in 1818. This point is discussed in paragraphs 158-164 of the Reply. Attention is drawn in paragraphs 158 and 159 to an alleged difference between Sir Frank Soskice's submissions at the oral hearing of the preliminary objection and the submission set out in paragraphs 320-323 of the Counter-Memorial. In seeking to take advantage of this alleged difference the Portuguese Government, in the submission of the Government of India, is making a quite wrong approach. Portugal is the plaintiff in these proceedings, and she claims relief to which she cannot be entitled except by virtue of sovereignty over the enclaves. It is for the Portuguese Government, therefore, to establish the origin of this alleged sovereignty. If they fail to do so, it does not avail them to point out diversities, or even inconsistencies, between different parts of the Indian case. The Government of Portugal in fact rely for the origin of Portuguese sovereignty over the enclaves solely on the alleged treaty of Punem of 1779. It has been demonstrated that the Marathas did not confer sovereignty over any of their territory upon the Portuguese, but only certain limited rights. The Portuguese Government, therefore, have failed to give any satisfactory account of the origin of Portuguese sovereignty, which is the foundation of their case. In these circumstances, it is hardly surprising if the Indian Government have some difficulty in finding an explanation of the Portuguese claims. No criticism of the Indian suggestion will make good the lack of proof by the Portuguese Government of the origin of the alleged sovereignty, upon which their claim of a right of passage is based.

301. In paragraph 160 of the Reply, the Government of Portugal content themselves with the bare assertion that Portugal obtained full sovereignty over the enclaves by the alleged treaty of 1779. The arguments in support of the Indian contention that the alleged treaty created no such right have already been given above, and need not be repeated. It may be added that, there being no transfer of sovereignty by a treaty, Portugal could not have acquired sovereignty by long occupation by 1818, since, as the Portuguese Government themselves emphasize in paragraph 162 of the Reply, the Portuguese in 1818 had been in Nagar Aveli only for about thirty years.

302. The Portuguese Government contend that no doubt has ever been cast on Portuguese sovereignty over the enclaves. The Indian submissions in this case provide, they say, the first instance of a denial that there existed a treaty, or that the alleged treaty was the origin of Portuguese sovereignty over Dadra and Nagar Aveli. The answer to this is that the denial has been made for the first time, because these proceedings have provided the first occasion for making it. Before these proceedings began, the Portuguese Government had not relied on the alleged treaty of 1779 in any communication, either to the British Government or to the Indian Government, since 1859. In 1859 it had been used, not in support of a claim of sovereignty, but in support of a claim of freedom from customs duties for Portuguese merchandise passing from the enclaves to Daman (Indian Annex C. No. 35, I, pp. 343-344). It is not surprising, therefore, that no full investigation of the rights over the enclaves allegedly confered by a treaty should have taken place before these proceedings.

303. In paragraphs 161 and 162 of the Reply, the Government of Portugal deny that in 1818 the Portuguese authorities either concealed or tried to conceal the true nature of Portuguese rights over the enclaves. "We presented ourselves as sovereigns over the enclaves", they say (paragraph 161), "and we really were sovereigns." Clearly, therefore, on the admission of the Portuguese Government themselves, if they were not sovereigns of the enclaves in 1818, there was misrepresentation. More specifically, the Indian Government submit that it is clear, in spite of what is said in the Reply, that the Portuguese authorities in 1818 misrepresented the facts to the British Government. The Governor of Daman, in his letter of the 11th November, 1818 (Indian Annex C. No. 33, I, p. 295), alleged that by a treaty "His Highness Madow Row Naran Punt Purdan ceded to the Crown of Portugal the Purganna of Nagar Aveli". This, in the submission of the Government of India, was untrue. In the same letter, the Governor alleged that "it was stipulated by one of the articles of the said Treaty that all articles of production of the Purganna of Nagar Avely that should be required to be transported to the Portuguese possession of Daman

should be absolutely exempted from all duties and Taxes". This was untrue. By his answer of the 1st May, 1819 (Indian Annex C. No. 33, **I**, p. 300), the Governor of Bombay made it clear that he knew nothing of the "Treaty", yet the Governor of Daman, although he referred to the "Treaty" again in his letter of the 30th May, 1819 (Indian Annex C. No. 33, **I**, p. 302), did not send a copy of it. By contrast, a copy of the alleged sanad of the 26th April, 1799, which on its face was favourable to the Portuguese claim, had been enclosed with the Governor of Daman's original letter of the 11th November, 1818. In these circumstances, the Government of India submit that they are justified in stating that the Governor of Daman misrepresented and concealed the true facts.

304. The Portuguese Government contend that the Governor of Daman cannot have intended to conceal the alleged treaty and deceive the British authorities, because he mentioned the Treaty in his letter of the 11th November, 1818 (Reply, paragraph 161). What he intended, it is suggested, was not necessarily to conceal the existence of a "Treaty", but to conceal the true nature of the rights or lack of rights of Portugal. Such an intention is made more, rather than less, likely by the fact that he included in his letter an inaccurate account of the alleged treaty's provisions. The suggestion made in the footnote to paragraph 161 of the Reply, that the Governor need not have mentioned the "Treaty" at all in his letter, is hardly justified. He was enclosing with the letter a copy of the alleged sanad of the 26th April, 1799, which contained the statement that "the Portuguese Government of Goa obtained the Purganna of Nagar Huvelee in the said district from this Government, for the support of the Garrison of Daman". It was therefore necessary for him to explain in what way the territory had been "obtained". The Portuguese Government say (Reply, paragraph 162) that the British authorities "certainly studied the Treaty". This is an entirely gratuitous assumption. The Governor of Bombay's letter of the 1st May, 1819 (Indian Annex C. No. 33, **I**, p. 300) shews it to be unjustified.

305. It is suggested in paragraph 162 of the Reply that it is unlikely that the British can have supposed that the Portuguese had acquired the enclaves by conquest; that there were in 1818 a number of persons still living who knew how they had become established in Nagar Aveli; and "a mere reading of the treaty" would have shewn that the territory ceded thereby had not been the subject of conquest. On this last remark, it may be observed that the British authorities did not in fact have the terms of the alleged treaty before them in 1818 (cf. paragraphs 303 and 304 above); nor, in view of the discrepancies between the various versions of the "Treaty", is it by any means certain that a reading of it would have revealed to them that the territory of the enclaves had been ceded to the Portuguese. Apart from this, however,

the suggestions made in paragraph 162 of the Reply are irrelevant to the matter now under consideration. The question is whether the Portuguese enjoyed sovereignty over the enclaves when the British acquired the Maratha territory in 1818 and whether the Portuguese concealed from the British at that time the true nature of the Portuguese rights. The only means by which it is contended that Portugal acquired sovereignty over the enclaves before 1818 is the alleged cession by a "Treaty of 1779". The Government of India submit that that "Treaty" did not confer any sovereignty; whereas the Governor of Daman pretended to the Governor of Bombay in 1818 that it did, and, when the Governor of Bombay answered that he knew nothing of the "Treaty", refrained from showing it to him—no doubt because he knew that inspection of it would have led the British to question his claim. The Governor of Bombay seems simply to have believed what the Governor of Daman wrote about the "Treaty"; so that it is irrelevant to speculate about what he might have supposed about the origin of the enclaves, or what he might have discovered by questioning the old men of the neighbourhood [1].

306. The Government of India submit that the Portuguese were not sovereigns of the enclaves in 1818, but misled the British into thinking that they were. The most that can be said is, not that the British recognized Portuguese sovereignty, but that they were misled into treating the Portuguese as though they were sovereigns of the enclaves. The argument of paragraph 163 of the Reply is merely a repetition of the Portuguese claim that acquisition of sovereignty over an enclave necessarily imports acquisition of a right of passage thereto. This claim is answered in paragraphs 574-577 below.

307. It remains to consider whether the British regarded themselves as bound by the grant which in 1818 the Governor of Daman represented as having been made to the Portuguese by the Marathas, of a privilege of carrying goods from the enclaves to Daman free of customs duties. In paragraph 147 of the Reply, the Government of Portugal protest that this question is "outside the subject matter of the present dispute", because it concerns what they describe as the regulation of the right of passage. The importance of the matter, however, is that here a claim put forward by the Portuguese, expressly on the basis of a treaty between them and the Marathas, was fully argued between the Portuguese and the British. Quite apart therefore, from the difficulty of the distinction which the Portuguese

[1] It is interesting to note that the Maratha records, relating to Concan (in which the enclaves lie) and Gujerat for the ten years up to 1818, running to 652 dufturs (i.e. bundles), were sent off from Poona, on their way to Bombay, only on the 8th December, 1818 (Indian Annex F. No. 55). Many months must have passed before the examination of these 652 dufturs could be completed. When the correspondence with the Governor of Daman took place, therefore, the Governor of Bombay can have had no idea of their contents.

Government seek to draw between a right to regulate and a right to stop, this incident indicates the attitude adopted generally by the British authorities in the face of rights claimed by the Portuguese on the basis of Maratha grants.

308. In paragraphs 149 and 150 of the Reply, the Government of Portugal paraphrase the letter written by the Governor of Daman on the 11th November, 1818 (Indian Annex C. No. 33, I, p. 295). The inaccuracies of this letter have already been noticed in paragraph 115 of the Counter-Memorial, but it is necessary to draw attention to them again. According to the Governor, "the Purganna of Nagar Avely" was ceded to the Crown of Portugal by the Treaty of 1780 and had been governed by the Portuguese from that time. In fact, nothing was ceded by the Treaty of 1780, and the rights which that Treaty did create were not over Nagar Aveli but over other territory adjacent to Daman. It was only because that other territory passed from the Marathas in to the control of the British that the villages forming the enclaves were substituted in 1783 and 1785 (cf. the Counter-Memorial, paragraphs 92 and 95). Again, the Governor stated that it was provided by the Treaty "that all articles of production of the Purganna of Nagar Avely that should require to be transported to the Portuguese Possession of Daman should be absolutely exempted from all duties and Taxes". In fact, the Treaty contained no such provision, and it is obvious that nothing of the kind could have been in the contemplation of the parties, because the Treaty did not deal with Nagar Aveli at all but with territory adjoining the existing Portuguese settlement. Furthermore, the Governor claimed that the Peshwa had subsequently confirmed this privilege by "a sunnud". In fact, the document to which he referred was not a sanad, and dealt, not with customs duties, but with zakat (cf. Counter-Memorial, paragraph 109) [1].

309. The Portuguese Government contend that the fact that the British authorities regarded themselves as free to grant or refuse that for which the Governor of Daman was asking is no indication of the British attitude to rights granted to the Portuguese by the Marathas, because the Governor was asking for a modification of the system of certificates which prevailed immediately before the Marathas were overthrown. The answer to this is twofold. In the first place, the Governor was claiming that against the Marathas the Portuguese had always been entitled as of right to exemption from duty without certificates. In his letter of the 11th November, 1818, he asked for the exemption without certificates, not as a new,

[1] Both officials and private travellers, in order to avoid exactions of zakat, used to obtain documents in the nature of passports, known as "Rahadari Dastak". These documents commonly contained words such as these:

"... will proceed unmolested on the way and without any harassment for the payment of zakat". (For example, see Indian Annex F. No. 56.)

The similarity of this language to that used in the document of the 26th April, 1799 will be observed.

or renewed, favour to be negotiated, but as a matter of "faithful observance of the above-mentioned articles", and in his letter of the 30th May, 1819 (Indian Annex C. No. 33, **I**, p. 302) he referred to "the impropriety" of requiring certificates. It was this demand, based allegedly on arrangements between the Portuguese and the Marathas, which the British considered themselves free to grant or reject according to considerations of policy. Secondly, it is the Portuguese case that the limited right of exemption subject to certificates was enjoyed by them under an agreement made with the Marathas; but the British authorities, although for a time they did allow this system to continue, did not regard even it as a right of the Portuguese which they were obliged to recognize. Thus, in his letter of the 18th June, 1819 (Indian Annex C. No. 33, **I**, p. 304), the Governor of Bombay described it as "the concession which has been made to the Portuguese Government". The Portuguese authorities seem themselves at a later stage to have shared this view; on the 13th December, 1824, the Governor of Daman wrote to the Governor of Bombay asking for the maintenance of the system and, so far from claiming it as a right, said he would "consider it a very particular favour conferred on me" (Indian Annex C. No. 33, **I**, p. 308).

310. In the course of the correspondence arising out of the Governor of Daman's letter of the 11th November, 1818, the Secretary to the Government of Bombay wrote, on the 31st December, 1818, to the Chief Secretary to the Supreme Government at Fort William (Indian Annex C. No. 33, **I**, p. 298), and said that the plea that the concession had originally been made by the Marathas "appears to the Governor in Council to be entitled to little weight: and it is considered a question of Policy alone...". This language is obviously inconsistent with the existence of any right, but the Portuguese Government try (Reply, paragraph 154) to brush it aside as having been used "in a document for the internal use of the British Chancellery". It is hard to see why the views of the Government should be less accurately expressed in a document for "internal use" than in any other document. Furthermore, the letter of the 31st December, 1818, asked for instructions about the attitude the Government of Bombay were to adopt to the Portuguese claims. It is hardly to be thought that, in asking the Governor General for such instructions, the Government of Bombay deliberately misled him about their own view of the position. The Portuguese Government also suggest that the language of the letter is understandable with reference to the total exemption originally granted (according to them) by the Treaty, because a later arrangement with the Marathas had substituted the system of exemption subject to certificates. The fact remains, as shown in paragraph 309 above, that in 1818 the Portuguese were claiming to enforce the original terms of the Treaty. This is confirmed by the report made on the 17th June, 1851 by the

Governor-General of Portuguese India to the Secretary of State in Lisbon (Reply, Annex No. 96, **II**, p. 718), in which he remarked that in 1818 the Governor of Daman

> "a demandé à celui de Bombay *d'observer ledit Traité, et l'exemption de droits en résultant*". [1]

It was in the face of this that the Government of Bombay regarded the reliance upon the Maratha grant as "entitled to little weight".

311. In paragraph 155 of the Reply, the Government of Portugal refer to the letter of the 1st May, 1819, from the Governor of Daman to the Governor of Bombay in which he wrote that the Peshwa had not communicated to the British "any reservation of privileges to the Portuguese Government", so that "any exemption" so granted did not bind the British (Indian Annex C. No. 33, **I**, p. 300). Relying on this, the Portuguese Government contend that the British authorities were assuming freedom to deal only with "privileges" and "exemptions", not with rights. In answer to this, it is enough to observe that in the opening sentence of that very letter the Governor of Bombay referred to the Portuguese claim as a claim to "a privilege which had been granted under a Treaty". It is thus clear that in "privileges" the Governor included treaty rights.

312. The Government of Portugal submit in paragraph 157 of the Reply that in his letter of the 11th November, 1818, the Governor of Daman pointed out that the position of Nagar Aveli made it necessary for its products to pass through the territory separating it from Daman, and this plea of necessity excited no objection on the part of the British authorities. The necessity which the Governor mentioned was in fact merely physical, or geographical, necessity. He based no right upon it, and in consequence the British authorities neither recognized, nor even considered, any such right. The Governor of Daman based his claim solely on the Treaty of 1780. Indeed, the Portuguese Government themselves rely on this circumstance, since they represent the British acceptance of the system of exemption subject to certificates as acceptance of an obligation arising from a Maratha grant. If the Governor was in fact relying, not on the Treaty, but on necessity, the Portuguese argument, that the British accepted obligations under treaties or agreements vesting in them as successors to the Marathas, falls to the ground.

313. The Government of India submit that the issue whether rights granted to the Portuguese by the Marathas under treaties and agreements were binding upon the British was clearly raised in 1818. Equally clearly the British authorities refused to recognize any such obligation. If any doubt about this remains, it is entirely removed by what happened subsequently. In 1849 the British Government terminated the system of exemption subject to certi-

[1] Italics added.

ficate (thereafter only articles for the private consumption of the Governor of Daman were passed free of duty). Clearly, therefore, the British did not regard this system, which, according to the Portuguese Government, rested upon an agreement between the Portuguese and the Marathas, as binding upon them; and even the Portuguese authorities appear to have made no protest at its abolition (cf. Counter-Memorial, paragraphs 124-127).

III. Transit of Persons

314. The section of the Reply dealing with transit of persons opens with a passage (paragraphs 165-173) in which the Government of Portugal contend that passage between Daman and the enclaves and between the two enclaves took place continuously during the British period; this practice indicated the existence of a right; and the British, so far from challenging this right, recognized and respected it. In the submission of the Government of India, this argument rests entirely upon a confusion of transit in fact with transit by right. Having stated that it was normal for persons to travel over British territory between Daman and the enclaves, the Portuguese Government proceed at once to the conclusion that they had a right to do so. Even if the premise be granted, the consequence does not by any means follow. Examples could easily be quoted of passage over the territory of a sovereign State taking place normally and regularly for years without the faintest suggestion of the existence of a right of passage; e.g. passage from a land-locked State over the territory of another State to the sea. The reason for this is that a State may allow persons to pass through its territory without conceding to them any right. So long as such passage is convenient to those who desire to exercise it and does not embarrass the State whose territory is crossed, it is natural that the passage should be allowed, as a matter of neighbourliness and good will. The attempt, however, to deduce from a favour of this kind a legally enforceable right is entirely and obviously unwarranted. The mere occurrence of passage is equivocal. It may indicate the existence of a right; but equally it may indicate that the sovereign of the intervening territory, although entitled to prohibit the passage, has not wished to do so.

315. Simply to shew, therefore, that persons did travel between Daman and the enclaves is not to establish any part of the Portuguese claim. These petty pieces of Portuguese territory were of very little consequence to the British, and it is quite understandable that, as in the case of other foreign settlements in India, they should have allowed travellers to pass to and fro rather than bother themselves with a system of passports or permits. The Portuguese case would be forwarded only if it could be shown that the British allowed such passage, not because they chose to do so, but because they had agreed to do so (or were

obliged to do so by some principle of law). There is nothing in the Reply to support a suggestion that the British regarded themselves as subject to such an obligation. On the other hand, the material before the Court contains a number of clear indications that neither the British nor the Portuguese believed a right of passage to exist (cf. paragraphs 337-343 below).

316. The false reasoning which characterizes this part of the Portuguese argument is exemplified at once in paragraph 165 of the Reply. "The right of transit of persons from Daman to the enclaves and vice-versa", we are told, "thus appeared as a continuous, peaceful and unchanging practice." This sentence shews clearly the confusion of transit with right of transit, and the step, logically and legally unwarranted, from the occurrence of transit to the existence of a right. As has been pointed out above, there is no need to postulate the right in order to account for the transit. The Portuguese argument thus falls to the ground.

317. It is said in paragraph 165 of the Reply, that this alleged right of transit "fully attained its purpose" of making possible "the access necessary to avoid isolation of the enclaved territories and their separation from the rest of Portugal". This reference to a "purpose" attained by a "right" might suggest that the "purpose" was incumbent upon both British and Portuguese and was achieved by a "right" recognized by both. This, of course, is to beg the whole question in issue. It may well have been the purpose of the Portuguese to prevent the separation of the enclaves from Daman. It by no means follows that the British were obliged to facilitate the achievement of this purpose. "The access necessary" may have been allowed by the British over a considerable period, but it by no means follows that the British and their successors were not entitled to interrupt it. Likewise, in paragraph 166 the Portuguese Government observe that there was always a single seat of the administration of both enclaves (situated first in Dadra and subsequently in Nagar Aveli), and suggest that this can be explained only by "the certainty available to the Portuguese Government" that its officials could pass from one enclave to the other. Here again, it is impossible to infer from the facts stated the existence of any right. As is stated in the same paragraph (166) of the Reply, transit between the enclaves "always took place without giving rise to the least opposition". The fact that such transit was permitted, irrespective of the question whether it could legally be claimed, is quite sufficient to explain the maintenance of a single administration for the two enclaves. It is, after all, to be presumed that only in the very last resort would a separate administration have been established for the tiny settlement of Dadra.

318. In paragraph 167 of the Reply, the Portuguese Government refer to four documents (Annexes Nos. 77-80), apparently for the purpose of showing that from 1825 onward there was a garrison in

Dadra, which was relieved periodically from Daman. It is not necessary to repeat the arguments by which it has already been shewn that the mere occurrence of passage across British territory does nothing to establish a right of passage (cf. paragraphs 278 and 314-315 above). There is special need of caution in considering cases in which Portuguese troops have crossed British territory. We have already seen that, whereas the Portuguese Government have produced a number of documents (Annexes Nos. 50-76) for the purpose of trying to shew that during the period of the Treaty of 1878 Portuguese troops crossed British territory between Daman and the enclaves without any request for permission, contemporary correspondence between the Government of Portuguese India and the Government of Bombay reveals that the former both recognized that permission was needed for such passage and maintained that permission was always asked (cf. paragraphs 288-296 above). It follows that the movements to which Annexes Nos. 50-76 refer must either have been preceded by grants of permission, or have been carried out clandestinely in what the Portuguese authorities knew to be an illegal manner. This shews that it is unsafe to draw inferences from the mere fact of the passage of parties of troops, unless full details are available both of each march and of what preceded each march. This must be borne in mind when paragraph 167 of the Reply is considered. No details are there given of any particular case of transit. It is therefore quite possible that permission of the British authorities was asked and obtained on each occasion. Equally, it is possible that (as may have happened again in the period of the Treaty of 1878) the Portuguese authorities failed to ask for permission which they knew to be legally required. Another possibility is that the passage of troops was referable to the reciprocal arrangements mentioned in paragraph 323 below.

319. In paragraph 167, the Government of Portugal observe that the commandant living at Dadra was forced, in order to reach Nagar Aveli, to cross British territory, as were all the other inhabitants. This idea of necessity reappears in paragraph 169, in which it is said that both British and Portuguese "recognized and accepted that which the very nature of things made necessary, i.e., that the existence of the enclaves represented a special case which made transit through neighbouring territories absolutely necessary and which, for that reason, the State which held the sovereignty over these territories could not prohibit". In this connection also, it is essential to distinguish between the mere geographical fact of the isolation of the enclaves and the legal consequence which the Portuguese Government now seek to draw from it. It is no doubt true that the British authorities understood, as well as the Portuguese, that it was necessary to cross British territory in order to travel from Daman to the enclaves and vice-versa; but there is no material whatever to support the view that the British authorities recognized,

as a consequence of this, the existence of any right of passage across British territory.

320. The Portuguese Government cite two incidents in support of their contention that the British authorities recognized special rights arising from the peculiar situation of the enclaves. The first is that of the disarming of two Portuguese soldiers at Tarrapoor in 1859, and the second that of the arrangement of 1940 concerning the passage of police. It may first be observed that, if the contention that the British recognized such special rights rests solely upon these two incidents, then, whatever the nature of the two incidents, it can hardly be regarded as fully established. These are two incidents alone from a period of 130 years; they are widely separated in time, and the second belongs to the very last period of British rule; and the first had nothing directly to do with transit between Daman and the enclaves at all. Quite apart from these considerations, however, an examination of the two incidents shews that neither of them gives any support to the Portuguese case.

321. The incident of 1859 arose from the disarming by the British police at Tarrapoor of two Portuguese soldiers on their way from Daman to Bassein. It did not, therefore, concern passage between Daman and the enclaves. The Portuguese Government mention the incident for the purpose of relying upon the silence of the British authorities in the face of certain language used by the Governor-General of Portuguese India. In his letter of the 16th May, 1859 to the Governor of Bombay complaining of the treatment of the two soldiers (Indian Annex C. No. 39, I, p. 363), the Governor-General asked that such incidents be prevented,

> "in view of the fact that in the territory of Damão and in that of Goa English soldiers come and go armed without anybody causing them hindrances when they hold the necessary authorizations issued by the English authorities; and consequently it is not to be expected that the same procedure should not be adopted in respect of the Portuguese soldiers in the British territories, inasmuch as in Damão it so happens that there are many Portuguese villages surrounded by British territory".

As the Indian Government pointed out in their Counter-Memorial (paragraph 135), the Governor-General based his claim in this letter on reciprocity, and only mentioned the existence of the villages surrounded by British territory as an additional circumstance without trying to base any special right upon it. The Portuguese Government answer (Reply, paragraph 170) that the failure expressly to mention any special right is understandable, "first because no conflict existed which would have called for an express reminder and then because, in the specific case at hand, this transit (i.e. transit between Daman and the enclaves) was not directly in question".

The fact remains, however, that the Governor-General was requesting facilities for Portuguese troops to pass through British territory, and in support of this request was referring to the situation of the enclaves. In such a context, he would naturally be expected, whatever may or may not have been directly in question, to base upon the peculiar situation of the enclaves as much as he thought he justifiably could. If he thought that that situation gave rise to a right of passage, albeit over only one part of British territory, it is incredible that he should have mentioned the enclaves only for the purpose of bolstering up a request for reciprocal privileges. (It may be added that this is only one of a number of occasions on which the Portuguese would naturally have insisted upon passage as a matter of right, if in fact they believed that right to exist; yet no express claim of a right of passage has been produced. Quite apart from other considerations, it is difficult to believe in the existence of a right which was never asserted during a period of more than a century, although on several occasions its assertion would have been to the advantage of the party now claiming it.) The Portuguese Government assert (Reply, paragraph 170) that the reference to the peculiar situation of the enclaves "could have no other meaning than the recognition of the existence of a right of transit to these enclaves". Such a reference might be made for the purpose of claiming, not a right, but an indulgence. The Government of India submit that it is clear that the Governor-General did refer to the enclaves for the purpose of supporting his request for an indulgence on grounds of reciprocity.

322. The mention of the enclaves in the letter of the 16th May, 1859 in fact lends strong support to the Indian case. In that letter, the Governor-General was discussing the passage of Portuguese troops through British territory generally. It is in that connection that he refers to passage to the enclaves. Had passage to the enclaves been governed (as the Government of Portugal now contend) by some special régime, applicable to the British territory between Daman and the enclaves but not to British territory in general, such a reference would have been irrelevant in a letter dealing with passage through British territory in general. If, on the other hand, passage between Daman and the enclaves was a particularly clear example, but still only an example, of arrangements applicable to British territory generally, the reference in the Governor-General's letter becomes intelligible. This letter thus supports the view that passage of Portuguese troops between Daman and the enclaves was not a matter of right, but depended upon such general arrangements as might be made by the British and Portuguese Governments.

323. There remains one more observation of great importance to be made upon the letter of the 16th May, 1859. The Governor-General of Portuguese India wrote that English soldiers holding an authorization issued by the English authorities were allowed to

pass freely through Portuguese territory, both in Daman and in Goa; and for this reason he asked that Portuguese soldiers should on the same terms be allowed to pass through British territory, including the territory surrounding the enclaves. Thus, the request that Portuguese troops be allowed to pass through British territory, including the territory between Daman and the enclaves, was made on the basis of reciprocity. This is obviously inconsistent with the existence of a right of passage between Daman and the enclaves. Had there been such a right, the Portuguese would have claimed that passage, at least, without offering passage through their own territory in return. Furthermore, the letter shews that the Governor-General did not regard passage between Daman and the enclaves as a special and peculiar case. Had he done so, he could not have regarded it (as he did) as part of the question of "the Portuguese soldiers in the British territories" in general; nor could he have regarded (as he did) the passage of Portuguese troops over British territory between Daman and the enclaves as comparable with the passage of British troops over Portuguese territory generally in Daman and Goa. Finally, this letter reveals the basis upon which troops of either power entered the territory of the other in the years before 1879. The reciprocal arrangement explains certain incidents upon which the Portuguese Government rely (cf. paragraph 356 below), and may also be the reason why so few records have been found of incidents concerning the passage of troops during the period before the Treaty of 1878.

324. In paragraph 171 of the Reply, the Portuguese Government refer to the incident of 1940 which led to an agreement concerning the passage of armed police, both British and Portuguese, over the Daman-Silvassa road (Indian Annex C. No. 57). They say that the Governor of Portuguese India referred to the special nature of the road linking Daman and Nagar Aveli, the British authorities accepted its special nature and the result was the agreement. An examination of the correspondence shews that there is nothing in this incident to suggest that the British authorities recognized the existence of special rights arising from the peculiar situation of the enclaves, and the "special nature" of the road had no reference to the fact that it linked Daman with the enclaves. The position appears from the following extract from the letter of the 11th April, 1940 of the Chief of the Cabinet of the Government of Portuguese India (Indian Annex C. No. 57, I, p. 473):

> "5. The road which runs from Damaun to Silvassa passes several times through British territory, and so it is inevitable that armed police forces of the two Governments have to utilise frequently, while travelling on it, portions which belong to the other Government, thus rendering necessary the proper authorization which, although it has never been refused, it will be difficult to obtain (in time) in urgent cases with manifest detriment to the missions which

they may have to fulfil, and this may give rise to incidents which are always disagreeable.

6. The Government of Portuguese India thinks of the possibility of coming to an understanding with the Government of Bombay, by which on this road, and only on this road, owing to its special nature, armed police forces of both the Governments may travel freely, independently of any previous authorization."

In describing the road in question as having a "special nature", the Chief of the Cabinet was not referring to the fact that it was the means of communication between Daman and the enclaves, but to the fact that it "passes several times through British territory". This might be true of any road running in the frontier area between two territories. In referring to this characteristic, therefore, the Chief of the Cabinet was not referring to any peculiarity arising from the special position of the enclaves. This is confirmed by the nature of the suggestion which he made. Had this been based upon necessity arising from the special position of the enclaves, he would have insisted upon the special right of Portuguese armed police to travel along the road from Daman to the enclaves and *vice versa*. In fact he claimed no such right, but suggested a reciprocal arrangement entitling armed police of either power to travel along this road through the territory of the other. Thus, so far from claiming a special right of passage to the enclaves, he equated the position of Portuguese police travelling over British territory between Daman and the enclaves with that of British police travelling over Portuguese territory between one part of British territory and another. The suggestion made was for the convenience of the British as much as that of the Portuguese. Indeed, the incident from which it arose was not an incident in which Portuguese police had been impeded, but an incident in which British armed police had been prevented from travelling through Dadra.

325. The Government of Bombay accepted the suggestion made in the letter of the 11th April, 1940 only subject to limitations. The Chief Secretary of the Political and Services Department of the Government, in his letter of the 30th July, 1940 to the Chief of the Cabinet of the Government of Portuguese India (Indian Annex C. No. 57, **I**, p. 482), said the Government of Bombay was

"prepared to enter into reciprocal arrangements with the Government of Portuguese India in the matter, subject to the understanding that the armed police travelling across intervening British territory on the road in question should not exceed ten in number at one time and that intimation of their passage through British territory is given by post to the local authorities within 24 hours of the passage. If any number exceeding ten at a time are required so to travel at any time the existing practice should be followed and concurrence of the British authorities should be obtained by prior notice as heretofore."

The Governor-General of Portuguese India agreed to this proposal of the Government of Bombay (Indian Annex C. No. 57, **I**, p. 482).

326. In paragraph 175 of the Counter-Memorial, the Government of India submitted that

> "the close limits set by the Government of Bombay to this arrangement are quite inconsistent with the existence of any general right of passage for police".

The Government of Portugal dispute this view (Reply, paragraph 171). They argue that, in view of the peculiarity of transit between Daman and Nagar Aveli, the arrangement presupposed the existence of a right to such transit, and operated only to regulate it; such regulation, they say, was consistent with the existence of the right, because the armed police were able to pass, provided the formality was on each occasion observed of notification (for a party of ten or fewer) or permission (for a party of more than ten). The Indian Government submit that this argument is wholly inadmissible. First, it has already been observed that the correspondence contained no reference to the peculiarity of transit between Daman and Nagar Aveli. There is therefore no warrant for the suggestion that the arrangement presupposed the existence of a right derived from any such peculiarity. So far from this, the Chief of the Cabinet of the Government of Portuguese India, in his letter of the 11th April, 1940 (Indian Annex C. No. 57, **I**, p. 473), while observing that it was "inevitable" that armed police of either power should "frequently" have to pass through the territory of the other on this road, added that "the proper authorization" had to be obtained in each case. Secondly, the Indian Government respectfully repeat that the nature of the arrangement was incompatible with the existence of a general right of passage for armed police. The arrangement expressly provided that a party of Portuguese armed police exceeding ten in number could cross British territory only with the previous permission of the British authorities. The Portuguese Government suggest that this was only "regulation", because such parties were able to cross, provided that the preliminary formality of permission was observed. This ignores the fact that essence of a right of passage is the power to pass without permission. If permission is needed, there is no right. Finally, it must be borne in mind that in the correspondence of 1940 the British and Portuguese Governments were discussing expressly, and solely, the use by armed police of a road running between Daman and the enclaves. In the whole correspondence no right of passage for Portuguese police is so much as suggested. The Portuguese Chief of the Cabinet himself drew no distinction between British and Portuguese police on this road, and suggested a reciprocal arrangement. So far from maintaining that the matter was governed by any right, he only suggested "the possibility of coming to an understanding". The British authorities agreed to a reciprocal arrangement for par-

ties of ten or fewer, but insisted that for parties of more than ten their permission must be obtained. In these circumstances, it is impossible to suppose that either side believed any right of passage to exist.

327. It may be added that on this view the arrangement of 1940 was entirely consistent with earlier arrangements. In 1913 an arrangement was made for the passage of British and Portuguese armed police through Portuguese and British territory respectively (Counter-Memorial, paragraph 167; Indian Annex C. No. 53). This arrangement was based entirely on reciprocity. Neither in the negotitations nor in the terms of the arrangement did the Portuguese seek to reserve any special right of transit between Daman and the enclaves. In 1920 the Governments of Bombay and Portuguese India entered into an agreement "regarding the entry of British Police Officers into Portuguese territory and *vice versa*" (Counter-Memorial, paragraph 173; Indian Annex C. No. 56). This agreement provided expressly that armed police below the rank of Head of Circle or Sub-Inspector might not enter foreign territory without previous consent, unless in actual pursuit of an offender. It contained an express reservation of the rights of British police escorts travelling by rail from stations in British India to Marmagao harbour, but no mention of any special rights of Portuguese police travelling between Daman and the enclaves.

328. In paragraph 172 of the Reply, the Government of Portugal again refer to the constant occurrence of transit over Indian territory between Daman and the enclaves, and repeat their submission, based on their Annexes Nos. 50-76, that, while the Treaty of 1878 was in force, its provisions were not applied to passage of troops and police between Daman and the enclaves. It has already been shewn that the mere fact of constant transit is purely equivocal (cf. paragraphs 278 and 314-315 above), and the Portuguese case based on their Annexes Nos. 50-76 is destroyed by reference to contemporary documents (cf. paragraphs 288-296 above). In these circumstances, there is no foundation for the bare assertions repeated in paragraph 173 of the Reply.

329. In paragraph 175 of the Reply, the Portuguese Government say that to use examples of passage between districts which are neither Daman nor the enclaves in order to prove that no right of passage between Daman and the enclaves existed, is reasoning so obviously defective that it is "almost useless to attempt to refute it any further". Certainly the Portuguese Government do not attempt to refute it any further; but in adopting this attitude they are guilty once more of begging the question. If transit between Daman and the enclaves constituted a special case subject to special rights, then it would be irrelevant in a discussion of it to refer to transit between other districts, but whether transit between Daman and the enclaves did constitute such a special case, and was subject to

special rights, is precisely the question in issue. Before arguments based on transit between other districts can be dismissed in the high-handed manner employed in paragraph 175 of the Reply, the special legal character of transit between Daman and the enclaves has to be proved. The burden of this proof rests on the Government of Portugal, and, in the submission of the Indian Government, it has not been discharged. If no special legal character attaching to transit between Daman and the enclaves is established, but (as the Government of India contend) the question of such transit is only part of the general question of transit from one Portuguese district to another through British territory or from one British district to another through Portuguese territory, then, so far from the reasoning mentioned in paragraph 175 of the Reply being obviously defective, examples shewing the basis on which transit was allowed between other districts are obviously relevant. It is clear, at any rate, that the Government of India are not the first to regard transit between other districts as relevant to a consideration of transit between Daman and the enclaves. On a number of occasions Portuguese officials referred to facilities for transit granted by them in other places in support of requests for such facilities between Daman and the enclaves: cf. (e.g.) letters of the Governor General of Portuguese India of the 27th May, 1892 (Indian Annex C. No. 41, **I**, p. 378), the 2nd September, 1897 (Indian Annex C. No. 43, **I**, p. 393), and the 6th March, 1900 (Indian Annex C. No. 43, **I**, p. 396), and letter of the acting Governor of Daman of the 1st March, 1904 (Indian Annex C. No. 47, **I**, p. 435). It is also relevant to recall the Governor-General's letter of the 16th May, 1859 (Indian Annex C. No. 39, **I**, p. 359; cf. paragraph 321 above), in which transit between Daman and the enclaves was mentioned on exactly the same footing as transit across British or Portuguese territory in general.

330. The Portuguese Government proceed, in paragraphs 176-178, to criticise the submissions made in the Counter-Memorial about the passage of troops and police between 1817 and 1879. They observe that only three cases are cited, and try to shew that all three are irrelevant. They also draw attention to a change of emphasis between the submission made in the Counter-Memorial (paragraph 136) and the corresponding submission made in the Preliminary Objection (paragraph 108). Finally, fastening upon the form of words used in paragraph 136 of the Counter-Memorial, they ask why the Government of India puts forward these three cases, if they have only a negative significance. These criticisms, in the submission of the Indian Government, reveal a failure to understand the true effect of the three cases and the purpose for which the Indian Government rely upon them.

331. This purpose is clearly set out in paragraph 132 of the Counter-Memorial, in the following words:

> "There are three incidents which shew that entry of soldiers and police was regarded as lying entirely with the control of the Government of the territory to be traversed, and no reliance was placed upon any right alleged to exist by treaty, custom or any principle of law."

An examination of the three cases shews that their effect is indeed that claimed in the words just quoted. Thus, the incident of 1851 (Counter-Memorial, paragraph 133; Indian Annex C. No. 37) shews that the Governor of Daman did not recognize any right of British police to enter Portuguese territory in order to arrest criminals, nor did he claim any such right for Portuguese police. The incident of 1857 (Counter-Memorial, paragraph 134; Indian Annex C. No. 38) shews that the British authorities did not regard passage of British troops through Portuguese territory from one part of British territory to another as a matter of right, but as a matter of favour. The incident of 1859 (Counter-Memorial, paragraph 135; Indian Annex C. No. 39) is particularly important. The correspondence in connection with it, shews, first, that both Governments regarded the passage of their troops through the territory of the other as a matter for reciprocal arrangement, not as a matter of right, and secondly, that the Portuguese Government regarded passage between Daman and the enclaves merely as part of the general question, not as a case governed by any special right. This has been shewn in the examination of the incident in paragraphs 321-323 above. (In paragraph 177 of the Reply, the Government of Portugal again refer to "the *special* case of passage between Daman, Dadra and Nagar Aveli", but, as elsewhere, with absolutely no warrant.)

332. It thus appears that these three incidents do establish, as the Government of India claimed in paragraph 132 of the Counter-Memorial, that between 1817 and 1879 the passage of troops and police, including that of Portuguese police between Daman and the enclaves, was regarded on both sides as a matter for reciprocal arrangement and no rights of passage were claimed. In these circumstances, differences of language and emphasis between the Preliminary Objection and the Counter-Memorial, of which the Portuguese Government seek to make much, are of no substantial importance. The comments made on the three incidents in paragraph 176 of the Reply are based, like so much more of the Portuguese argument, on the assumption that transit between Daman and the enclaves was a peculiar case, subject to rights which did not affect transit through any other parts either of British territory or of Portuguese. Enough has already been said to shew that this assumption not only ignores the burden of proof resting upon Portugal, but is also contrary to the facts.

333. Reference may again be made here to the negotiations preceding the Treaty of 1878 (cf. paragraphs 297-298 above). The attitude adopted by the Portuguese Government in those negotiations pro-

vides clear evidence that at that time the Portuguese had no right of passage over any British territory. The fact, as pointed out in paragraph 323 above, is that before 1879 the entry of troops or armed police of either Government into the territory of the other was governed by a reciprocal arrangement. The existence of such an arrangement naturally made it unnecessary for a formal request to be made and permission to be granted on each occasion of entry. This explains the paucity of documents relating to this period, upon which the Portuguese Government comment at paragraph 176 of the Reply. The British Government preferred to retain the reciprocal arrangement, rather than become involved in the bother and expense of applying for and granting permission. The arrangement was wide in its scope, but it was inconsistent with the pre-existence of any right of passage (cf. paragraph 349 below); and no document of this period has been produced containing any allusion to such a right.

334. The answer of the Portuguese Government to the Indian argument concerning passage of troops and armed police between 1892 and 1947 is contained in paragraphs 179-187 of the Reply. What is said in this passage is open to various criticisms; but it is even more remarkable to find that the Government of Portugal have no answer at all to give to some of the most significant points of the Counter-Memorial (cf. paragraphs 336-338 and 340-343 below).

335. In paragraph 179 of the Reply, the Portuguese Government refer to a number of incidents described in the Counter-Memorial. (That mentioned in paragraph 179 *(c)* as "case of 1918" is in fact an incident of 1913.) After pointing out in paragraph 179 that the greater part of these incidents are cases of transit between places "which are neither Daman nor the enclaves", the Government of Portugal contend in paragraph 180 that such incidents "have nothing to do with transit between the territories of Daman, Dadra and Nagar Aveli". This is but another reappearance of the familiar Portuguese argument which starts by assuming what has to be proved, i.e. that transit between Daman and the enclaves constituted a special case. This argument has already been refuted more than once in the course of this Rejoinder (cf. paragraphs 284, 322, 324 and 329 above), and there is no need to refute it again. If transit between Daman and the enclaves was in fact not a special case but an example of transit across British territory in general, the terms upon which Portuguese troops were allowed to enter British territory elsewhere are obviously relevant to the question in issue.

336. The incidents described in the Counter-Memorial do more, however, than shew the general nature of the arrangements for the passage of Portuguese troops through British territory. They contain express statements, both from the British side and from the Portuguese, shewing that no right of passage over any territory was either claimed or conceded. The Reply has nothing to say about

these statements, and it is worth recalling them in order to appreciate the great significance of this silence on the part of the Portuguese Government.

337. Thus, in connection with the incident of 1901, the Secretary to the Government of Bombay, Political Department wrote to the Portuguese Consul General in British India on the 26th November, 1901, as follows (Indian Annex C. No. 51, **I**, p. 453):

> "... the entry of armed troops into British territory cannot be permitted until the orders of Government have been obtained and instructions issued to the local British officers concerned".

It will be observed that this statement is absolutely general in its terms, and does not make an exception of entry into any part of British territory. The Government of Bombay made another statement to the same effect in the case of 1913, as a result of the arrival of a Portuguese force in Bombay without any previous request for permission. The Secretary to the Government wrote on the 15th September, 1913, to the Secretary-General to the Government of Portuguese India (Indian Annex C. No. 54, **I**, p. 468), asking that the Governor-General of Portuguese India should

> "issue orders to secure that in future Portuguese troops do not cross the frontier of the Bombay Presidency until permission for such entry is definitely known to have been received from the Government of Bombay or from higher British authority".

On the 11th January, 1916 a party of Portuguese soldiers arrived in Bombay from Daman, having crossed British territory without permission. The Portuguese Consul-General actually went to the length of sending them back to Daman, because, as he put it (Indian Annex C. No. 55, **I**, p. 469),

> "the required permission to pass through was not previously asked for by the Government of Damaun".

On the 12th February, 1916, the Consul-General sent the following telegram to the Governor of Diu (Indian Annex C. No. 55, **I**, p. 470):

> "Always when soldiers have to cross British territory beg communicate beforehand according to resolution between Government Portuguese India and British to ask for indispensable authorisation and after being granted the soldiers can proceed journey."

338. These statements are too clear to need elaboration. In the first three both British and Portuguese authorities recognise that passage of Portuguese troops through British territory is something requiring previous permission. In the fourth, the Portuguese Consul-General says expressly that for Portuguese soldiers to cross British territory "authorization" is "indispensable" not on certain occasions only, but "always", and only when it has been granted can the soldiers proceed. Such are the statements which, in their Reply, the Portuguese Government do not so much as mention.

339. In paragraph 179*(e)* of the Reply the Portuguese Government appear to suggest that two cases mentioned in the Counter-Memorial, concerning what they describe as "isolated individuals", are for that reason irrelevant. One of these cases in fact concerned a major with his wife and family travelling to Nagar Aveli, and the other a musician. The Government of India respectfully fail to understand how it can be suggested that these cases are irrelevant. If permission had to be asked before one officer could pass through British territory, permission must *a fortiori* have been needed for the passage of a military detachment.

340. The statements mentioned in paragraphs 337 and 338 above are not the only omissions from this part of the Reply. The Portuguese Government do refer to what they call the "case of 1912", but say nothing of the fact that this incident gave rise to a reciprocal arrangement for the passage of parties of armed police. The Portuguese Consul-General wrote to the Secretary to the Government of Bombay, Political Department on the 21st January, 1913 (Indian Annex C. No. 53, **I**, p. 462), stating that the Government of Portuguese India had

> "no objection whatever to the passage of British Police forces through Portuguese territory when engaged in the discharge of their duty, ..., provided there is the same reciprocity under similar conditions...".

The Government of Bombay replied on the 20th February, 1913 (Indian Annex C. No. 53, **I**, p. 463), that

> "Government are willing to grant reciprocity in the matter of allowing parties of Portuguese Armed Police to travel across intervening British territory when it is necessary for them to do so in journeying from one part of Portuguese India to another, provided that previous intimation of their intention is given to the local authorities."

It is to be noted that in this transaction neither Government regarded passage through any part of its territory of the other's armed police as something which they were bound to allow. Each Government regarded such passage as a concession to be made upon terms—the terms of reciprocity. The Portuguese Government make much in these proceedings of the "necessity" of travelling across the intervening territory in order to get from Daman to the enclaves or *vice versa*. In the letter of the 20th February, 1913, the Government of Bombay referred expressly to cases in which it was "necessary" for Portuguese armed police "to travel across intervening British territory ... in journeying from one part of Portuguese India to another". Even in these cases, the Government of Bombay were prepared to allow passage only on terms of reciprocity, i.e. they recognized no right of passage binding upon them. That no right of passage existed apart from the arrangement is emphasized

by the fact that the Government of Bombay, in accepting the Portuguese suggestion, expressly stated (Indian Annex C. No. 53, **I**, p. 463) that

> "this arrangement does not extend to armed troops operating on the frontier between Portuguese and British territory".

Furthermore, when the Portuguese authorities tried to rely upon this arrangement as a justification for having despatched a military force on a journey via Bombay without previously asking for permission, the Government of Bombay, in a letter of the 22nd January, 1914 (Indian Annex E. No. 24, **II**, p. 314), insisted that the arrangement referred

> "to reciprocal arrangements relating to the passage of Police only and not of troops of the British or Portuguese Governments through intervening Portuguese or British territory".

341. Another matter over which the Reply passes in silence is the agreement of 1920 between the Governments of Bombay and Portuguese India "regarding the entry of British Police Officers into Portuguese territory and *vice versa*" (Indian Annex C. No. 56). Reference to this agreement has already been made in paragraph 327 above. It is only necessary here to recall that the agreement is of special significance, because it contains an express reservation of certain rights of British police travelling through Marmagao; so that it is clear that the two Governments meant to record in the agreement any special rights recognized by both sides. In spite of this, there is no mention of any special right affecting passage between Daman and the enclaves.

342. In this section of the Reply, the agreement of 1940 for the passage of armed police over the Daman-Silvassa road (Indian Annex C. No. 57) is also ignored. Reference is made to this agreement in paragraph 171 of the Reply. The contentions there put forward are answered in paragraphs 324-327 of this Rejoinder.

343. To complete the catalogue of omissions from this section of the Reply, it is necessary to note that the Counter-Memorial sets out, in paragraphs 174 and 176, a number of later incidents in which the British authorities were asked to allow the passage of Portuguese troops to and from the enclaves. Except a passing reference in paragraph 193 of the Reply, the Portuguese Government have nothing to say about these.

344. The Government of India submit that the arguments in the Counter-Memorial based upon the instances of passage of troops and police between 1892 and 1947 are unshaken by paragraphs 179-180 of the Reply. This is the result both of the defects of the arguments which those paragraphs contain and of their complete failure to deal with the important matters mentioned in paragraphs 337-343 above. In particular, it is inconceivable that the

Government of Portuguese India, if they had believed themselves to possess special rights of passage between Daman and the enclaves, would have entered into arrangements so restricted in their terms as those of 1913, 1920 and 1940 without any mention or saving of such special rights.

345. The Portuguese Government return to the period 1892-1947 in paragraphs 193-194 of the Reply. In paragraph 193 they admit that

> "the obtaining of an administrative permit was sometimes required during the British period for the passage of police elements or troops between Daman and Nagar-Aveli".

In the face of the facts related in the Counter-Memorial, this could hardly be denied; but the Portuguese Government contend that it is only "a form of regulation and of control of the exercise of" a right of passage. It is not inconsistent with the existence of a right of passage, they argue, because the need for authorization related, not to "transit *in toto*", but to "limited aspects of the transit", and the British authorities could not make a discretionary use of the control and render communication with the enclaves impossible. The requirement of a permit for passage shews, according to them, only that the Portuguese right was not accompanied by "immunities".

346. The Government of India submit that a proper appreciation of the facts is enough to dispose of this argument. According to the Portuguese Government, the requirement of a permit was only a means of ensuring that each separate journey complied with conditions which the British authorities were entitled to impose. It consisted of "case by case, examining whether or not the passage can take place under the conditions claimed". It is necessary only to look at the conduct of the parties to see that this is not what they were doing. When the Portuguese authorities wished to send troops to or from the enclaves, they did not submit that, nor did the British authorities inquire whether, certain conditions were satisfied. The correspondence consisted simply of a request in each case that the troops be allowed to pass through British territory, and an answer: cf. Indian Annex C. No. 55, **I**, pp. 469-471), Indian Annex E. Nos. 25, 26, 31, 32, 33. Likewise, the various statements of both sides set out in paragraph 337 above do not refer to the satisfaction of conditions, nor is it possible to read into them the idea of a conditional right of passage. The two Governments were at one in regarding permission of the British authorities as absolutely necessary before Portuguese troops could cross British territory, and there was no suggestion that this permission was in any circumstances bound to be granted. The conduct of both parties indicates that the British authorities were indeed exercising a discretion, and not merely granting a formal consent which followed automatically

and inescapably upon the satisfaction of certain conditions. As to the question of immunities, there is no indication whatever that Portuguese troops when passing through British territory were deprived of immunities. On the contrary, had there been any offence committed on British territory by one member of those forces against another, the Portuguese authorities, in conformity with international law, would have objected strongly to any interference by British police or British Courts.

347. It should also be observed that the Portuguese argument in paragraph 193 of the Reply is another example of assumption of that which has to be proved. In this paragraph, the Portuguese Government assume the existence of a right of "transit *in toto*", and go on to argue that control by permit of "limited aspects of the transit" is not inconsistent with it. This is putting the situation which in fact existed back to front. As far as the historical facts and the conduct of the parties are concerned, the existence of a right of "transit *in toto*" is a pure assumption. The evidence shews only that the parties corresponded from time to time about what the Portuguese Government call "limited aspects of the transit", and always regarded those "aspects" as requiring permission, the grant of which lay within the discretion of the British authorities. There is no indication that they ever considered any such theoretical concept as "transit *in toto*". It is plainly impossible to argue that, because "limited aspects of the transit" were subject to permission, therefore "transit *in toto*" was a matter of right.

348. In paragraph 194 of the Reply, the Portuguese Government argue that it is unnecessary to consider whether the idea of reciprocity influenced "the definition of conditions of entry into British territory" or "the conditions of access to the enclaves", because "there, the transit claimed by Portugal is not in question". This distinction between "entry into British territory" and "access to the enclaves" on the one hand, and "the transit claimed by Portugal" on the other, is, in the submission of the Government of India, entirely false. "Entry into British territory" and "access to the enclaves" together make up "the transit claimed by Portugal", and to prevent either the entry or the access is necessarily to prevent the transit. It would, no doubt, have been possible to impose conditions on entry into British territory with an express provision that they were not to apply to entry for the purpose of reaching the enclaves. In the absence of such a provision, regulation of entry or of access was *ipso facto* regulation of "the transit claimed by Portugal". Since no example of such a provision has been quoted by either side, it is idle for the Government of Portugal to argue that the idea of reciprocity may have influenced conditions of entry into British territory or of access to the enclaves, but did not influence "the transit claimed by Portugal".

349. The essence of a reciprocal arrangement is that each side makes a concession in order to obtain a concession from the other. Had Portugal been entitled as of right to send troops and armed police to and from the enclaves across British territory, there would have been no reason whatever for her to make concessions in order to obtain from the British authorities, *as a concession*, permission for movements of troops and armed police including movements to and from the enclaves. The constant reliance upon the idea of reciprocity (e.g. paragraphs 321, 323, 325, 326, 327, 332, 333, and 340 above) was therefore absolutely inconsistent with the existence of any such right as Portugal now claims.

350. In paragraphs 181-185 of the Reply, the Government of Portugal discuss what they call "the uniformity of the regulation covering the general case of entry into British territory and the special case of transit between Daman and the enclaves". These words themselves reveal that we are here confronted once more with the *petitio principii* so characteristic of the Portuguese argument. The special legal nature of the transit between Daman and the enclaves, which it is for the Portuguese Government to prove, is simply assumed. In paragraph 181, the Portuguese Government go on to argue that this uniformity of regulation, if it did exist, is of no importance, because "the special case", unlike "the general case", "implies that the Portuguese State has a permanent right to have access to the enclaves". It is not at all easy to see what exactly is meant by the statement that the special case implies that Portugal has a right. What is clear, however, is that here again the question whether there was a special case is being begged in the same way as before, and the argument is consequently invalid.

351. There is also present (though almost concealed) in paragraph 181 another attempt by the Portuguese Government to escape from the consequences of the fact that, throughout the British period, entry into British territory for the purpose of travelling to or from the enclaves and entry into British territory for other purposes were treated in exactly the same way. The Portuguese Government refer to "this uniformity, to the extent where, by accident, it might have existed". The suggestion that the uniformity occurred "by accident" is quite unwarranted. Had there been one set of regulations governing transit between Daman and the enclaves, and another set governing all other entry into British territory, that might have shewn that the British authorities recognized transit between Daman and the enclaves as constituting a special case. Had the two sets of regulations then been the same in their effect, it would have been possible to argue that the similarity had occurred "by accident". In fact, however, the position was quite different. There were not separate sets of regulations, but a series of arrangements of which each applied to all entry into British territory generally, no distinction being made between entry

for the purpose of going to or from the enclaves and entry for other purposes (e.g. paragraphs 323, 327 and 340 above). Thus, in each case the uniformity arose, not from similarity between two sets of regulations, but from the deliberate making of one arrangement to govern all entry into British territory. Such uniformity cannot be said to have existed "by accident". (The same unwarranted suggestion reappears in paragraph 192 of the Reply.)

352. The Government of Portugal next try to shew (in paragraphs 182-187 of the Reply) that the conditions governing "access to the enclaves" were in fact different from those governing "access to British territory". They contend that whereas European foreigners entering British India by land (including, as a general rule, European Portuguese officials) were from 1935 onward required to bear passports, this requirement was not applied to the Governor of Daman and Portuguese officials in transit between Daman and the enclaves until the end of 1953. They further contend that, even after the requirement was thus applied, the Ministry of External Affairs of the Government of India empowered the District Magistrate at Surat, "to facilitate the Administration of the Portuguese enclave of Silvassa, and as a very special case", to grant visas to permanent Portuguese European officials of Daman and Silvassa, whereas normally the District Magistrate had no authority to grant visas.

353. It is necessary to recall what the position would be, if these Portuguese contentions were right as to these facts. There would then be, on the one hand, evidence that throughout the British period the same regulations governing troops and armed police applied indifferently to entry into British territory for the purpose of transit to or from the enclaves and entry into British territory for any other purpose. On the other hand, there would be evidence that for a few years right at the end of the British period a special concession was made, not for troops or armed police, but for officials. (That the special arrangement was recognized to be a concession, and not a matter of right, appears from the language of paragraphs 4 and 5 of the note of the 18th January, 1954, from the Portuguese Legation in New Delhi to the Ministry of External Affairs: Memorial, Annex No. 39.) It is, in the submission of the Government of India, impossible to contend that this one concession, applying only to officials, would outweigh in its effect the practice of considerably more than a century in actual cases of troops and armed police. It would be impossible to contend on the strength of this indulgence, granted as a concession and for a comparatively brief period, that transit between Daman and the enclaves was recognized as a special case giving rise to special legal rights. The same comment may be made on the grant of authority in 1953 to the District Magistrate at Surat to grant visas to permanent Portuguese European officials of Daman and Silvassa. This, too, was regarded by the Indian authorities as a concession (cf. the Ministry of External

Affairs' note of the 23rd December 1953, paragraph 6, reference to any "further concessions": Memorial, Annex No. 38). It is impossible in these circumstances to infer from the use of the words "as a very special case" that the Indian Government recognized the existence of special legal rights.

354. In paragraphs 186-187 of the Reply, the Government of Portugal allege that transit of police and armed forces between Daman and the enclaves was often subject to rules different from those governing entry into neighbouring territory. The only example which they quote is that of the alleged difference during the period of the Treaty of 1878. It has already been shewn that during that period there was, on the admission of the Governor General of Portuguese India himself, no difference between the rules governing transit between Daman and the enclaves and those governing entry into other parts of British India (cf. paragraphs 288-296 above).

355. In paragraphs 189-191 of the Reply, the Government of Portugal refer to certain incidents of the pre-Treaty period. The first two are the incidents of 1826 and 1849, mentioned in paragraphs 21-22 of the Memorial; to these are added incidents of 1830 and 1857, now mentioned for the first time. With regard to the two former, the Portuguese Government dismiss the Indian comment (Counter-Memorial, paragraph 177) that they "belong to the distant past" with the remark that this only shews that the Portuguese have enjoyed for a long time the right now claimed. This, however, is to miss the point of the Indian comment. Portugal can succeed in this case only by establishing a right existing today. It if be true—as, in the submission of the Government of India, it is—that since 1879 (when the Treaty came into force) Portugal has never either exercised or claimed a right to send troops or armed police into, or across, British (or Indian) territory without permission, it would not avail Portugal to shew that before 1879 the position may have been different. In fact, as is shewn in paragraph 356 below, the incidents quoted in the Reply do not shew that even before 1879 the position was as the Portuguese Government represent it to have been. A further criticism of the Counter-Memorial is made in the footnote to paragraph 189 of the Reply, where it is suggested that the object of the expedition of 1826 was not the punishment of the Raja of Dharampur. As to this, it is sufficient to recall that the Governor of Daman, in his letter of the 7th March, 1826, to the Political Agent at Surat (Memorial, Annex No. 14), said he had ordered the arming of 500 villagers,

> "until the Raja gives me suitable satisfaction for the injury suffered".

356. In fact, however, there is nothing in the incidents of 1826, 1849, 1830 and 1857 to support the Portuguese case. The Portuguese Government rely upon them as shewing that at that time transit

between Daman and the enclaves took place without any permission of the British authorities, and was subject to rules different from those governing entry into British territory generally. All four examples seem to be examples of entry into British territory for the purpose of transit to the enclaves, and there is nothing in them to suggest that entry into British territory for other purposes was subject to any different rules. As to the absence of permission granted by the British authorities, it has to be remembered that before 1879 there was a reciprocal arrangement under which British and Portuguese troops and armed police were allowed to enter Portuguese and British territory respectively, and this arrangement applied to the territory between Daman and the enclaves just as it applied to other British territory (cf. paragraph 323 above). Therefore, if it be the fact that in these four incidents mentioned in the Reply Portuguese troops entered British territory without previous permission, the reason was not that they were entitled to do so under some special right, but that they were entitled to do so under the reciprocal arrangement. The reciprocal arrangement came to an end in 1879, so on this view the four incidents have no relevance to the situation today. It is interesting to note that one of the documents relating to the incident of 1826 itself contains evidence confirming the existence of the reciprocal arrangement at that time. The document is that of the 5th March, 1826, containing the Governor of Daman's instructions to the commander of the force sent to Nagar Aveli (Reply, Annex No. 81). Among the instructions is the following:

> "You will oppose no obstacle to the passage of persons in the service of the English Company."

The reference here is clearly to passage through Portuguese territory. The document therefore shews that in 1826 persons in the British service were entitled to pass through Portuguese territory, and this can only have been by virtue of the reciprocal arrangement.

357. Finally, it may be observed that the incident of 1857 is presented in the Reply in such a way that very little weight could in any case be attached to it. Only secondary evidence is produced, consisting of an extract from a book published in 1904, nearly fifty years after the event. There is no reference to any contemporary document, and even in the passage quoted there is only the barest possible reference to the despatch of an armed force.

SECTION IV.—TRANSIT OF GOODS

358. Paragraph 195 of the Reply begins the section containing the Portuguese arguments about the transit of goods between Daman and the enclaves. The Portuguese Government begin by remarking, in paragraph 196, that passage of merchandise between Daman and

the enclaves and *vice versa* took place regularly during the British period. They say that the necessary communications and connections were maintained in this field also. There is no doubt that passage of goods between Daman and the enclaves did go on throughout the British period, but subject all the time to control, and on occasions even to prohibition, imposed by the British authorities. It has already been shown in paragraph 278 above, in connection with passage of troops and police, that the mere fact of passage lends no support to the Portuguese case. It is necessary to look further, and to see the reasons why the British authorities allowed the passage and the terms upon which they allowed it. These observations apply equally to the passage of goods. There is, in the submission of the Government of India, no evidence whatever in the documents produced to show that the Government of Bombay ever regarded themselves during the British period as obliged to allow the passage of goods as a matter of right. If, as the Portuguese Government contend, "the necessary communications and liaison" were maintained, the reason for this was not that they were "necessary" to the Portuguese, but that they were unobjectionable to the British.

359. The best evidence of this is the fact that when traffic in particular goods was for any reason objectionable to the British authorities, they banned it. The Portuguese Government attempt to deal with these cases of prohibition in paragraphs 197 to 203 of the Reply. They first observe that the restrictions were only two in number, relating respectively to salt and to country liquor and materials from which that liquor was made. This is a somewhat misleading classification, since there were in fact not two prohibitions but seven. In order to prevent the distilling of country liquor, the British authorities prohibited by separate orders and on different occasions the entry into British territory of mhowra flowers, dates, jagri, molasses and saccharine as well as the entry of country liquor itself. These prohibitions were made at various times between 1892 and 1924. (To the documents on this subject contained in Indian Annex E. Nos. 15-23 should be added those in Indian Annex F. No. 57.) It may be true to observe, as the Portuguese Government do in paragraph 197 of the Reply, that it is only an extremely limited number of objects the passage of which was ever prohibited in this way, but that does not affect the significance of the prohibitions which were imposed. What is important is the fact that prohibition was possible, not the frequency with which it was imposed. The significance of these instances is that the British authorities did resort on a number of occasions to prohibition and the Portuguese authorities, although very indignant when this was done, never complained that any legal right of theirs was being infringed (cf. Counter-Memorial, paragraph 163). In paragraph 198 of the Reply, the Government of Portugal argue that any effect

upon economic connections between Daman and the enclaves was not the object of these prohibitions, but arose only by reason of "contingencies of an administrative nature". The meaning of this is apparently the following: Some sort of system of control was needed in order to ensure that goods passing into Daman without payment of customs duty were indeed the produce of the enclaves and not the produce of neighbouring British territory; for this purpose a system of certificates was observed for long periods; this system ultimately broke down and no substitute could be devised; it was in those circumstances that prohibition was imposed; and from this the Portuguese Government conclude that it was imposed with the desire of "respecting", rather than the desire of "affecting", transit between Daman and the enclaves.

360. The Government of India submit that this argument is defective at every point. In the first place, it was never the general rule that produce of the enclaves was allowed to enter Daman free of British export duty. This was a concession which from the very first days of British rule the Portuguese repeatedly tried to obtain. They were from time to time (i.e. from 1819 to 1848 and from 1861 to 1879) granted the privilege of introducing to Daman free of customs duty articles produced in the enclaves and intended for use in Daman, if accompanied by certificates showing their origin. This privilege never extended to all goods produced in the enclaves generally. During the period of the Treaty (1879-1892), no duties were levied. After 1892 no exemption ever applied in the British period to anything but rice, and even as regards rice the concession was abolished in 1895 and never renewed during the British period. It is, therefore, inaccurate to suggest that the prohibitions were a development of a general system of exemption from duty.

361. Consequently, it is not correct historically to say that the prohibitions were imposed when the system of certificates broke down. After 1892, i.e. in the period of the prohibitions, certificates were never applied to any product but rice, and rice was never the subject of prohibition. Certificates finally ceased to be used in 1895, and most of the prohibitions were imposed long after that. The prohibitions were imposed on certain goods, not because the British authorities were willing to allow traffic in those goods provided they were genuine products of the enclaves but were unable to satisfy themselves that the traffic was, in fact, confined to such products, but because for the protection of their own revenue the British authorities were unwilling to allow traffic in those goods at all.

362. Finally, the Government of India are unable to understand how, even if the Portuguese premises were to be granted, the conclusion which they draw would follow. The desire and intention of the British authorities in imposing the prohibitions was to stop all

traffic in the goods concerned over the border. There is nothing to suggest that they drew any distinction between goods in transit between Daman and the enclaves and other goods crossing the border. It is therefore irrelevant to say that they had no desire to affect transit between Daman and the enclaves. The fact is that they did not hesitate to affect this transit so far as it was necessary to do so in order to perfect the prohibition.

363. The Government of Portugal suggest in paragraph 201 of the Reply that their argument is supported by the incident of dates. After the prohibition of the import of dates from Portuguese territory (Indian Annex E. No. 18), the British authorities made a concession allowing travellers from Daman to Nagar Aveli to take with them 1 lb. of dates per head for their personal consumption on the journey (Indian Annex C. No. 49). This shows, according to the Portuguese Government, that the British authorities recognized the particular character of transit between Daman and the enclaves and did not intend to affect that transit by the prohibition. This suggestion is entirely unjustified. The dates which the concession allowed to be imported into British territory were dates to be consumed on the journey. In other words, the only reason why they were allowed to be imported was that they were to be consumed in British territory and were never to reach Nagar Aveli at all. Thus, it was precisely because they were not in transit from Daman to the enclaves that these very small quantities of dates were excepted from the prohibition. Quite apart from this, the concession applied only to quantities of dates not exceeding 1 lb. per head in the possession of individual travellers. The export from British India into Nagar Aveli of larger quantities of dates remained absolutely prohibited. The incident, therefore, provides no justification for the suggestion that the prohibition of dates was not intended to affect transit between Daman and the enclaves.

364. Such are the particular defects of the Portuguese argument in paragraphs 199 to 201 of the Reply. Quite apart from these, however, the Government of India submit that it is impossible to explain away the prohibitions by reference to the supposed motive for their imposition. It makes no difference whether they were imposed for administrative reasons or for any other reasons. Where a right of passage over certain territory exists, the owner of that territory cannot justify an interference with the right by saying that he is interfering for a particular reason. His duty is simply to allow the passage. If he is entitled to interrupt the passage and to forbid the transit of certain types of goods, that can only mean that a right of passage does not exist. This is the conclusion to be drawn from the prohibitions which were imposed by the British authorities.

365. Finally, in paragraphs 202 to 203 of the Reply, the Government of Portugal refer again to the limited scope of the prohibitions.

They say that the right which they claim is only a right to maintain such contact between Daman and Nagar Aveli as is necessary for the exercise of their sovereignty, and the power to forbid the transit of certain categories of goods for special reasons is only part of the power of regulation belonging to the sovereign of the intervening territory. It is difficult to see how this argument can have any relevance to the transit of goods in general. It is the passage of troops, police and officials, not the passage of merchandise, which might be said to be necessary for the maintenance of Portuguese sovereignty in the enclaves. In paragraph 202 it is suggested that the object of the transit was to assure "the liaisons required between these parts of Portuguese territory from the economic point of view". However, it is clear that the prohibition of the transit of mhowra flowers and other articles for distilling country liquor was of the gravest economic consequence to the enclaves; yet the Portuguese authorities, although protesting against the prohibitions, never suggested that their rights were being infringed (cf. Counter-Memorial, paragraphs 154-163; Indian Annex C. No. 44, I, pp. 406, 415).

366. It is therefore difficult, in the submission of the Government of India, to see how it can be argued in connection with transit of goods that Portugal possessed what is called in the reply a "global" right. It would be possible to understand a right confined to certain goods, but there is no suggestion of this in the Portuguese pleadings. If not limited in this way, a right of transit of goods can only be a general right of transit, and a general right is quite inconsistent with a power to prohibit at discretion the transit of any kinds of goods. For this reason, the effect of the prohibitions cannot accurately be described as falling within the field of regulation.

367. Between paragraphs 204 and 209 of the Reply, the Portuguese Government argue that both the British and the Portuguese authorities recognized in connection with the transit of goods "the *necessity* and the *special character* of the situation". They quote a number of documents in which, in one way or another, the remark was made that goods passing between Daman and the enclaves had necessarily to cross British territory. An examination of these documents shows that in each case the reference was simply to the geographical fact, and no attempt was made in any of the documents to base upon this fact any legal right.

368. The first document quoted in this connection is a letter of the 11th November, 1818, from the Governor of Daman to the Governor of Bombay (Indian Annex C. No. 33, I, p. 295). With regard to this letter, the Portuguese Government attempted to make this same point as in paragraph 157 of the Reply, and it is enough to refer here to the answer contained in paragraph 312 of this

Rejoinder. The next document mentioned is the letter of the 27th May, 1892, from the Governor General of Portuguese India to the Governor of Bombay (Indian Annex C. No. 41, **I**, p. 378). This was a letter in which, after the expiry of the Treaty of 1878, the request was made that all produce of the enclaves should be allowed to pass through British territory to Daman free of duty. It is true that in support of this request the Governor-General used the words quoted in paragraph 205 of the Reply, but later in the letter he described what he was asking for as "this condescension on the part of the British Authorities". Moreover, he offered to give in return "an equal exemption from duty of products passing from British territory", and pointed out that British trade in Goa was not subject to any transit dues when passing over the Marmagao railway. It is thus clear that the Governor-General was not attempting to claim any right on the basis of necessity, for he himself described what he was asking for as a "condescension", i.e. an indulgence. Furthermore, had he been trying to insist upon a right, he would not have offered a reciprocal concession. That the British authorities did not recognize the existence of any right appears from the fact that they refused practically the whole of the Governor-General's request, granting exemption only to rice produced in Nagar Aveli.

369. The next document quoted by the Portuguese is the letter of the 6th September, 1861, from the Secretary of State for India to the Governor of Bombay (Reply, Annex No. 86). This letter referred to the exemption of customs duty which was granted in 1861 to all produce of the enclaves passing through British territory for consumption in Daman. The Portuguese Government seek to rely upon the statement that this appeared to be "a proper measure". It is only necessary to observe that a proper measure is not the same thing as a measure imposed by legal requirement, or a measure which can be claimed as of right. The Secretary of State may well have meant no more than that the measure was proper because it did not harm British interests and was a means of obliging a friendly country.

370. In paragraph 207 of the Reply, reference is made to the complaint put forward in 1824, that certain goods produced in British territory were prevented from entering Daman. The Portuguese Government suggest that similar goods produced in the enclaves were at the same time allowed to enter Daman, and they say that this would not have been so had there not been a right of passage. An examination of the incident shows that the explanation was in fact different. The only thing of which the exportation to Daman had been forbidden was grain, and this prohibition had been imposed because there was in Daman a similar prohibition against exportation to British territory. In other words, the British order was a retaliation (see the letter from the Acting Collector in Northern Concan of the 1st January, 1825, Indian Annex C. No. 33, **I**, p. 309).

Goods produced in the enclaves entering Daman had necessarily, before reaching the Daman border, been exported from the enclaves into British territory. Thus, these were goods which had not been subjected to any prohibition of export into British territory, and there was therefore no reason in their case why export out of British territory should be prohibited in retaliation. It thus appears that, if a distinction was being made between produce of the enclaves and produce of British territory, the reason for this distinction had nothing to do with any right of passage.

371. In paragraph 208 of the Reply reference is made to correspondence in 1904, as a result of which the customs post at Kunta was opened for the passage of Portuguese Government stores bound for Nagar Aveli on days on which it was closed for general purposes (Indian Annex C. No. 47). This arrangement was obviously made as a matter of friendly concession, and there is no suggestion of any right in the letter asking for it. It was not, moreover, a concession peculiar to the Portuguese Government, for it seems that the luggage of private travellers was also passed through the post on these same days. In other words, arrangements were made for the convenience of various parties, including the Portuguese Government. There are no inferences to be drawn from the fact that the Portuguese Government stores, for which the arrangement was made, were those "bound for Nagar Haveli", for no Portuguese Government stores could have passed through this post except those bound for the enclaves.

372. In paragraph 209 of the Reply the Government of Portugal refer to certain other documents in which reference is made to the necessity for passing over British territory on the journey from Daman to the enclaves. In none of these documents is there any suggestion that this necessity resulted in the existence of a right. In all of them it is mentioned in support of a request for an indulgence.

373. Paragraphs 210-212 of the Reply are devoted to the suggestions which were made at various times, that a strip of land joining Daman and the enclaves should be transferred by the British to the Portuguese by way of sale or by way of exchange. The Government of Portugal argue that a right of sovereignty over such a strip would have been greater than a right of passage, and the right of sovereignty would not therefore have been suggested unless they had already possessed the right of passage. This argument, in the submission of the Government of India, has no justification. When the territory of one sovereign is divided into two by intervening territory of another, it is perfectly possible for the sovereign of the divided territory to ask for, or the sovereign of the intervening territory to offer, a strip of land joining the two parts of the divided territory, even if no right of passage between these two parts already exists. If a proposal is made to grant such a strip,

therefore, it by no means follows that a right of passage is already in existence. Indeed, had Portugal already possessed a right of passage, that would have met any request which the Portuguese Government might have ever put forward, and there would have been no need for the sale or exchange of a strip of territory to be suggested. From this point of view, the fact that such exchange or sale was suggested on more than one occasion indicates rather that no right of passage existed.

374. The Government of Portugal also suggest, in paragraph 210 of the Reply, that, the cession of a strip of territory not being acceptable to the British Government, the more moderate suggestion of a right of transit would then have been suggested, if it had not already existed. Here again, in the submission of the Government of India, the argument is quite illogical. Cession of territory and the grant of a right of passage are two different ideas. If one of them is suggested and rejected, it does not necessarily follow that the other must be suggested in turn. The British Government would naturally not have been anxious to grant a right of transit, and so there would have been no reason for them to suggest such a right. As for the Portuguese authorities, having failed to obtain cession of a strip of territory, they may well have thought that they would only make the existing situation worse if they were then to ask for a right of transit and have that request also refused. Furthermore, extensive smuggling from Daman into the adjacent territories was a constant source of anxiety to the British authorities (and has been in recent years to the Indian authorities). This anxiety, and a fear of making smuggling easier, were largely responsible for the refusal of the British Government to cede a strip of territory joining Daman to the enclaves: cf. the Collector of Surat's report of the 2nd June, 1860, and notes upon it (Indian Annex F. No. 58). For, the same reason the British authorities would have been most unlikely to propose the grant of a right of passage, for that, too, would have produced better opportunities for smuggling. The Portuguese authorities knew very well both that the smuggling was going on and that in consequence the British authorities adopted a strict attitude about the transit of goods. From this they may well have concluded that to ask for a right of transit would be useless. The same considerations would also have been applied at later periods, for the smuggling has always gone on: cf. Counter-Memorial, paragraph 155 and letter of the 27th February, 1901, from the Government of Bombay to the Government of India (Indian Annex F. No. 59).

375. The Government of India therefore submit that no inference relevant to these proceedings can be drawn from the abortive negotiations for cession of a strip of territory uniting Daman and the enclaves.

376. In paragraphs 213-215 of the Reply, the Government of Portugal attempt to build an argument on certain incidents concerning the roads between Daman and the enclaves. These incidents, they say, reveal "the recognition of our right of access to the enclaves". The history of these roads is only very partially outlined in the Reply. When it is more fully investigated, the Portuguese argument is seen to be without foundation.

377. The Portuguese Government first remark, in paragraph 213 of the Reply, that there is only one road joining Daman to the enclaves, that running through Vapi. This road, they say, was constructed between 1863 and 1868. This latter statement is inaccurate. The road was in fact built in two parts. The section from Daman to the railway station at Vapi was built between the dates mentioned in the Reply. The section from Vapi to Dadra and Nagar Aveli, however, was built only between the years 1899 and 1902. The contemporary documents show that when each of these sections of the road was built neither the Portuguese nor the British authorities had in mind communication, still less any right of passage, between Daman and the enclaves. In both cases the object was to secure communications with the railway at Vapi. It appears, moreover, that in the construction of the first section of the road, that between Daman and Vapi, the British authorities were concerned as much with the interests of the inhabitants of British territory as with those of the inhabitants of Daman. Reference is made in the following paragraphs to the contemporary documents which establish these facts, and from these it follows that the construction of the road had nothing to do with any idea of a right of passage between Daman and the enclaves [1].

378. The original suggestion for the building of the road between Daman and Vapi station did not come from the Portuguese Government, but from a number of residents of Daman. They sent a petition on the 5th August, 1862, to "the Governor at Surat", pointing out the desirability of building a road connecting the port of Daman with the railway station at Vapi for "industrious and commercial purposes" (Indian Annex F. No. 60). Having received this petition, the Agent for the Governor at Surat wrote on the 2nd February, 1863, to the Governor of Daman (Indian Annex F. No. 60), asking various questions about the facilities for the export of cotton from the port of Daman. It is thus clear that, in the eyes of the British authorities, the advisability of building the road

[1] In footnote 1 on page 492 of the Reply *[Vol. III]*, the Government of Portugal say that the road extends in Nagar Aveli as far as Canoel, and proceed to give the comparative lengths of the whole road and of the part in Indian territory. It should be noted that, as late as 1931, the road extended in Nagar Aveli no further than Vassona (Reply, Annex No. 95), so that the figures given in the footnote apply only to recent years, and not to the periods in which the two sections forming the road between Daman and the enclaves were built.

depended not solely upon the advantage to traders in Daman of having a connection with the railway, but also from the advantage to residents in the British territory of having a new outlet for their cotton. Satisfactory answers were given to these questions, and on the 25th June, 1863, the Governor General of Portuguese India wrote to the Governor of Bombay agreeing to share the cost of building the road (Indian Annex F. No. 60).

379. The arrangement ultimately made was that each Government should pay for the required land within its own territory, and the Government of Bombay should build the whole of the road, the Government of Portuguese India paying for the portion lying within Portuguese territory (Indian Annex F. No. 60). The road was in fact completed, after various vicissitudes, in 1868. Thereafter each Government was responsible for the maintenance of the part lying within its territory.

380. The Government of Portugal quote certain occasions upon which the Portuguese authorities asked the British authorities to repair portions of the road in British territory, and the British authorities consented to do so. The reason for this, according to the Government of Portugal, was that "that road affected the exercise of our right of passage". The Government of India submit that this conclusion by no means follows from the instances quoted. The simple fact that the Portuguese used the road, and it was of importance to them, suffices to explain the requests which they made. That the British acquiesced was not only a reasonable act in the interests of British users of the road, but also an obvious way of obliging a friendly State. There is no need at all to postulate a right of passage in order to explain these incidents of repairs. This view is confirmed by the fact that the British authorities also requested the Portuguese authorities to repair the part of the road lying in Portuguese territory, and the Portuguese authorities thereupon did the repairs. This emerges from certain correspondence between September and November, 1876 (Indian Annex F. No. 61). The Portuguese Government do not, presumably, contend that the British had a right of passage over this road through Portuguese territory.

381. The other section of the road, running from Vapi to Dadra and Nagar Aveli, was built between 1900 and 1902. Before this, there existed along its course a track, mentioned in the Governor-General of Portuguese India's letter of the 7th February, 1900 (Reply, Annex No. 90). That letter, however, was not the beginning of the correspondence. On the 18th October, 1899, the Governor-General of Portuguese India wrote to the Governor of Bombay, asking whether the Government of Bombay was contemplating the construction of roads from Lavacha (in British territory between Dadra and Nagar Aveli) and Dungra (in British territory on the western boundary of Dadra) to Vapi. The Governor of Bombay

answered on the 19th January, 1900, that a fairly murumed and drained road already existed between Vapi and Dungra and a cart track thence to Lavacha, and no additional work was then contemplated (Indian Annex F. No. 62). It was in answer to this letter that the Governor-General of Portuguese India wrote his letter of the 7th February, 1900. Instructions for the building of the road from Vapi to Lavacha were duly given, the portions in British territory being built by the Government of Bombay and that in Portuguese territory by the Government of Portuguese India. The whole road was completed by the end of 1902 (Indian Annex F. No. 62).

382. The Governor-General of Portuguese India's letter of the 7th February, 1900 contains a passage showing quite clearly that the doing of repairs by the British Government in response to requests by the Portuguese Government does not indicate that any right of passage existed. This is the passage in which, in support of his request for the construction of a road between Lavacha and Vapi, he points out that the British authorities had recently asked for repairs to be done to the road from Karwar to Marmagao (i.e. a road leading from British India into Goa), and the Portuguese Government had complied with the request. It is interesting to note that in fact the British authorities on several occasions pressed the Portuguese authorities to repair the roads leading from British India into Goa, and the Portuguese authorities did the repairs. There is, of course, no suggestion that the British authorities enjoyed any right of passage over these roads. It is therefore clear, from these instances, that a request by one Government to the other, for the repair of a road in the latter Government's territory, does not indicate the existence of any right of passage in favour of the former Government.

383. One road leading from British India into Goa was that running by way of the Tinnai Ghat. Agreement for the building of this road was reached between the two Governments in 1859. About one third of it lay in British territory and two thirds in Portuguese, but the two Governments agreed to share equally the cost of its construction (Indian Annex F. No. 63). In 1881 the Government of Bombay pointed out to the Governor General of Portuguese India that the portion of the road within the Portuguese boundaries was in a neglected condition, and asked him to have it repaired (Indian Annex F. No. 64).

384. Another road leading from British India into Goa was that from Karwar to Marmagao. On the 30th May, 1891, the District Judge of Kanara wrote to the Secretary to the Government of Bombay, pointing out that mails from Bombay to Kanara passed along this road, and various works needed to be done upon it in Portuguese territory. The Governor of Bombay wrote to the Governor General of Portuguese India on the 8th July, 1891, asking him to take these works in hand, and on the 15th July, 1891, the Gover-

nor-General wrote back saying that he was considering "your just observations regarding the completion of the works" (Indian Annex F. No. 65). The works were in fact carried out by May, 1898 (Indian Annex F. No. 65).

385. From this correspondence two features of great importance. emerge. First, the Governor-General of Portuguese India (see his letter of the 7th February, 1900: Reply, Annex No. 90) regarded the construction of a road between Vapi and the enclaves as a suitable return for the road which had been made between Karwar and Marmagao. Thus he did not rely on any right of transit in support of his request for the road between Vapi and the enclaves, but treated that road as equivalent to the road at Goa, over which no right of passage has ever been alleged to exist. Secondly, the British authorities successfully requested the Portuguese authorities to repair the road leading into Goa in exactly the same way as the Portuguese authorities successfully requested the British authorities to repair the roads linking Daman and Lavacha to Vapi. There is no suggestion that the British possessed any right of transit over the roads in Goa, and therefore no reason to infer that the Portuguese possessed any right of transit over the roads leading to Vapi.

386. Finally, the Government of Portugal, in paragraph 214 of the Reply, quote a letter in which the Government of Bombay offered to build another road between Daman and Nagar Aveli, if the Portuguese Government would pay for it. They argue that this suggestion amounts to an admission of their right of passage. In the submission of the Government of India, the explanation of this suggestion is quite different and appears from the letter itself. Immediately before making this suggestion, the Government of Bombay pointed out in the letter that the road would be of no value to them. It is quite clear that this is the reason why they were willing to build it, to oblige a friendly country, but only on condition that the Portuguese paid. No inference about the existence of a right of passage can be drawn from this. It may also be noted that in 1916 the Government of Bombay considered offering to the Government of Portuguese India a subsidy for the proper upkeep of that part of the Karwar to Marmagao road which lay within Portuguese territory. The Portuguese Government would not, presumably, suggest that this indicates that the Government of Bombay believed themselves to possess a right of passage over that road (Indian Annex F. No. 66).

387. In a footnote on page 99 of the Reply, the Government of Portugal refer to an occasion upon which the Government of Bombay offered to build at their own expense a road through the southern part of Nagar Aveli on condition that they should have free passage over it. They argue that the two ideas, payment of expense and right of passage, which in that case were expressly connected,

were also connected, though not expressly, in the case mentioned in paragraph 386 above in which the British authorities offered to build a road at the Portuguese expense. This is only another occasion on which the Portuguese Government construct an argument on the assumption that the right of passage which they claim existed. The correct inference to be drawn is the reverse. Since the British Government, when offering to pay for a road in Portuguese territory, thought it necessary expressly to stipulate for a right of passage, the absence of such a stipulation, in the case in which they offered to build a road at Portuguese expense, shows that no right of passage in favour of the Portuguese was then intended.

388. One final incident concerning roads may here be mentioned. In 1936 the Portuguese Government was building a road from Gobari to Kerdi, across the southern part of Nagar Aveli. On the 2nd January, 1936 the Chief of the Cabinet wrote to the Chief Secretary of the Government of Bombay, Political and Reforms Department, asking if this road might be extended at its western end across British territory, so as to join the road from Bombay to Surat. The Government of Bombay refused to entertain this suggestion, partly because the Portuguese authorities had refused to allow them to build a road through Nagar Aveli in 1930 (cf. paragraph 387 above), and partly because they feared that the suggested road would enable timber merchants in Portuguese territory to compete more efficiently with timber merchants in British territory (Indian Annex F. No. 67). This incident shows once more that the British attitude to roads giving communication to the enclaves was governed by considerations of reciprocity and self-interest, and not by any idea of legal rights possessed by the Portuguese.

389. In paragraph 216 of the Reply, the Portuguese Government attempt to show that the history of the fiscal arrangements affecting Daman and the enclaves is "irrelevant as to the *right of transit* itself". The Indian Government submit that this argument entirely overlooks the real effect of the fiscal arrangements. The fact is that goods passing from Daman to the enclaves appear always (with insignificant exceptions) to have been subject to British duty, and goods passing from the enclaves to Daman were subject to British duty subject to certain exemptions at certain periods, which exemptions never applied after 1895 to anything but rice. For the greater part of the British period, therefore, most goods passing between Daman and the enclaves were subject to British duty. The effect of the imposition of this duty was that the goods were not allowed to cross British territory unless the duty was paid. In other words, the imposition of the duty was a conditional prohibition of the passage of the goods. It is for this reason that, in the submission of the Government of India, the imposition of the duties was quite inconsistent with any right of passage. The Government of Portugal suggest, in paragraph 216 of the Reply, that their right was respect-

ed so long as transit in fact took place, with or without immunity, and sovereignty over the enclaves was exercised. The Government of India reply once more that, for the reasons given in paragraph 278 above, the mere fact that transit took place and Portuguese control over the enclaves was maintained does not show the existence of any right.

390. In the part of the case concerned with the history of the fiscal arrangements, the dispute arises from the inferences to be drawn from the facts. The submissions of the Government of India about this are set out in various places in the Counter-Memorial (see particularly paragraphs 126, 127, 131, 152 and 163), and in paragraph 389 above. As to the facts themselves there is here little dispute, and it is necessary only to make a few comments on paragraphs 217-226 of the Reply, in which the Portuguese Government deal with this fiscal history. The Portuguese Government refer first to the position as it was before the conquest of the Marathas by the British. The submissions of the Indian Government about the nature of the Marathas' arrangements, and the circumstances in which the British authorities after 1818 allowed those arrangements to continue, have been made in paragraphs 299-313 above. It is there shown that the British adopted this attitude not because they conceived themselves to be obliged to do so, but purely as a matter of concession to the Portuguese. The Portuguese Government now admit, in paragraph 217 of the Reply, that "the Treaty had not been *explicit*" about any exemption of customs duty. They say that the Governor of Daman's letter of the 11th November, 1818 (Indian Annex C. No. 33, I, p. 295) "has already related all this". In fact, the Governor stated in paragraph 2 of that letter that "it was stipulated by one of the articles of the said Treaty" that products of Nagar Aveli transported to Daman should be free of duty. It is clear, therefore, that the Governor of Daman was then making his claim on a basis which the Government of Portugal now admit to be unjustified. The letter written by the Collector of Surat on the 14th April, 1819 (Indian Annex C. No. 33, I, p. 300), upon which the Portuguese Government also rely, does not in reality give them any support. That letter shows merely that the British authorities allowed the arrangement prevailing in the last days of Maratha rule to continue. It contains nothing to show either how that arrangement arose, or that the British allowed it to continue as a matter of obligation rather than as an indulgence. In paragraph 218 of the Reply, the Portuguese Government refer to what they allege to have been sanads of permanent character issued by the Peshwa. They complain that the Indian submission that these documents "were obtained from minor Maratha officials as a result of bribe or intimidation" is "entirely gratuitous". The Indian submission is not gratuitous, but is based upon facts set out in paragraph 111 of the Counter-Memorial. The Indian Government submit that "a simple

reading of the texts" does not show these documents to be of a permanent nature. Reference may also be made to the submission on this point set out in paragraph 308 of this Rejoinder.

391. After setting out the different periods between which exemptions subject to certificates were granted to goods passing from the enclaves to Daman, the Portuguese Government (in paragraph 220 of the Reply) add the following words in italics: "it should be noted that—even though the Indian Government does not mention it—the same régime was again applied for the products of the Pragana by an Accord dating of 1944-1945 (Annexes 97-99)". The arrangement to which reference is here made was quite different from the earlier arrangements for exemption from duty subject to certificate, and was concerned not with customs duty at all but with wartime control of the movement of goods. When it is properly investigated, it gives strong support not to the Portuguese, but to the Indian case.

392. The story of the incident is this. In 1944 the British authorities imposed a total prohibition on the import of any commodity into Daman from the surrounding British territory. On the 30th September, 1944, the Governor of Daman wrote to the Collector of Customs and Salt Revenue at Bombay, saying that these measures had caused "a terrible upheaval in the daily life" of the people of Daman. He asked that facilities might be given for the import of any commodity for personal use (Indian Annex F. No. 68). The Government of Bombay offered to allow the export of rice and other local products from Nagar Aveli to Daman provided that the consignments were covered by certificates and the Portuguese Government allowed a reciprocal concession for products of British villages passing through Portuguese territory (Indian Annex F. No. 68). This is the offer which was communicated to the Portuguese authorities by the letter of the 24th January, 1945, which is Annex No. 97 to the Reply. These terms were accepted by the Portuguese authorities. It therefore appears that this incident was not a mere repetition of the 19th century system of the exemption of customs duty subject to certificates. It arose from a total prohibition of passage of any commodities over the border into Daman. The concession which the Government of Bombay granted was only granted reciprocally, in return for a concession from the Portuguese. The Portuguese authorities themselves, even when faced with this total prohibition and its very serious consequences for them, did not attempt to set up and rely upon any right of passage. Thus, this incident, when properly appreciated, is quite inconsistent with the Portuguese claim of a right of passage.

393. It may be added that as a result of these wartime controls a question later arose about goods passing in the opposite direction, from Daman to the enclaves. On this occasion the Portuguese authorities themselves suggested that "the same procedure as is

applicable to Goa, Daman, and Diu should be made to apply to the Nagar Aveli Pargana" (Indian Annex F. No. 69). This is an interesting admission by the Portuguese authorities themselves that entry of goods into the enclaves was not subject to any special considerations, but to the same considerations as applied to other Portuguese territories.

394. In paragraph 221 of the Reply, the Government of Portugal argue that, whatever may have happened from time to time with regard to immunity from customs duty, the right of transit was unaffected. This argument has already been answered in paragraph 389 above. One further observation, however, may be made. It is argued in paragraph 202 of the Reply that the right claimed is a right of transit "to assure the liaisons required between these parts of Portuguese territory from the economic point of view". It is in fact clear that the imposition of customs duty at times involved the Portuguese population in the most serious economic difficulties: cf. letters of the Governor General of Portuguese India of the 27th May, 1892 (Indian Annex C. No. 41, I, p. 378), the 2nd September, 1897, and the 6th March, 1900 (Indian Annex C. No. 43, I, pp. 393 and 396). Even on these occasions, the request for an exemption was made as a request for a concession, and not as insistence upon a right.

395. In paragraph 223 of the Reply, the Portuguese Government appear to suggest that the Indian Government was not justified in alleging, in paragraph 128 of the Counter-Memorial, that Senhor Cunha Rivara's memorandum of the 26th May, 1859 (Indian Annex C. No. 35, I, p. 344), contained "a number of tendentious inaccuracies". The Indian Government submit that this contention, of which full particulars are given at II, p. 50 of the Counter-Memorial, was fully justified. The principal inaccuracy of the memorandum—the contention that the Treaty of 1779 contained a clause establishing "the widest exemption and the freedom of trade"—is now admitted by the Government of Portugal to have been untrue: see paragraph 217 of the Reply.

396. In paragraph 224 of the Reply, the Portuguese Government point out that the case of the Indian Government is sometimes that the Portuguese did not claim any right of passage "outside of the Treaties and Accords" and sometimes that they did not claim to have a right of passage at all. The explanation of this, of course, is that the Portuguese case was indeed put in these different ways at different times. When there was an agreement or treaty in force the Portuguese naturally relied upon that, but claimed no further right. When there was no treaty or agreement in force they claimed no right of transit. Furthermore, in paragraph 225 of the Reply, the Portuguese Government complain that the Indian Government refers sometimes to a right of transit and sometimes to a right of free transit. It may be that the Indian Government has been guilty

in this particular of some looseness of expression. The matter, however, is of little importance. The submission of the Government of India, as has been made clear, is that a right of transit cannot exist unless it is a right of free transit. The effect of the two expressions is thus the same.

397. Paragraphs 227 to 235 of the Reply are devoted to the Barcelona Conference on Freedom of Communications and Transit of 1921. In paragraph 160 of the Counter-Memorial, the Indian Government pointed out that the Portuguese settlements in India were excluded from the convention drawn up at that Conference. The Indian Government also relied upon a letter written at Barcelona by the Portuguese delegate to the Indian delegate, containing the following passage (Indian Annex C. No. 89):

> "As I have told you my Government desires to arrive at a fair arrangement regarding some difficulties in India, where it will be very difficult to apply the Convention we are discussing at Barcelona:—
>
> (A) Transit Damão Nagar Aveli.—An arrangement that will be most convenient for this transit that owing to some difficulties arriving out of the salt trade, could be made on such basis as would be negotiated between the two local Governments."

The Government of Portugal refer to certain incidents of the Barcelona Conference, and contend that (i) India did not then propose to prevent or obstruct transit between Daman and the enclaves, but undertook to do the contrary; (ii) the proposal put forward by the delegates of India, France and Portugal, from which Article 14 of the Convention (the article excluding the Portuguese settlements in India) was developed, arose from purely administrative and fiscal considerations; (iii) that proposal contemplated special agreements between the States concerned, but only for the regulation of the "conditions of transit"; (iv) for this reason, the Portuguese enclaves (like other enclaves) were excluded from the Convention, but with the provision that, "to the extent possible", the provisions of the Convention should be observed and transit and communications facilitated. It is necessary to consider each of these contentions, and see whether they lend any real support to the Portuguese case.

398. The reliance placed by the Government of Portugal upon the use of the expression "conditions of transit" may first be considered. These words occur in the proposal put forward by the Indian, French and Portuguese delegates. The Portuguese Government apparently desire to argue that the fact that the agreement was to be made only about conditions of transit indicates that the right of transit itself was something which already existed, and therefore was beyond the scope of discussion. It is quite clear that the delegates did not have any such idea in mind when they used the word "conditions", for their proposal related to all the French and Portu-

guese settlements in India, both the enclaves and the settlements on the coast. Thus, agreements were contemplated to establish conditions of transit, not only to and from the enclaves, but also to and from the settlements on the coast. There is no suggestion that there is any right of transit applicable to these settlements, and it is therefore clear that the word "conditions" was not used with any presupposition that a right of transit already existed. Even apart from this, however, the Portuguese argument does not proceed upon a proper understanding of the word "conditions". If an agreement was needed in order to establish the conditions upon which transit could take place, there cannot have been any right of transit already in existence. Conversely, if there was already a right of transit in favour of Portugal between Daman and the enclaves, there was no need for any agreement between the Portuguese Government and the Government of Bombay about the conditions of that transit. Yet the Portuguese delegate, in his letter of the 8th April, 1921 (Indian Annex C. No. 89), expressly said that "an arrangement that will be most convenient for this transit" ought to be made. It is interesting to note that the reason why the Portuguese delegate suggested that such an arrangement should be negotiated was the existence of "some difficulties arriving out of the salt trade". At this time, traffic in salt, and also traffic in a number of other commodities, was entirely prohibited between Daman and the enclaves. The delegate, therefore, was saying that traffic which was then subject to a prohibition was a matter for arrangement. If there was room for arrangement over a complete prohibition, there clearly cannot have existed any right of transit.

399. It is hard to see what support the Government of Portugal expect to derive from the allegation that the proposal of the Indian, French and Portuguese delegates was put forward for administrative reasons. What was proposed was that there should be special agreement covering the conditions of transit. If the transit allowed over British territory was only conditional, there could be no right of transit without an agreement on the conditions. (In fact, the negotiations between India and Portugal for the making of such an agreement broke down: Counter-Memorial, paragraph 161.) This was the effect of the proposal, whatever the motive for making it may have been. If, as the Government of India contend, this effect is inconsistent with the existence of a right of passage, it does not help the Government of Portugal to say that the proposal was only made for some administrative reason.

400. The Portuguese Government appear to rely upon the language of the last paragraph of Article 14 of the Barcelona Convention. In fact, the language of this paragraph lends strong support to the Indian case. First, what is there provided is that, in relation to the territories excluded from the Convention, the principles of the Convention shall be observed and transit and communications

facilitated "to the extent possible". If, as the Government of Portugal contend, they had by 1921 possessed and exercised a right of transit for more than a century, it would obviously have been inappropriate to speak of "facilitating" that transit. The argument is made even stronger by the use of the words "to the extent possible". Where a right of passage exists, the obligation of the owner of the land over which it exists is simply to permit the passage. If his obligation is not to permit it, but only to facilitate it to the extent possible, then clearly there is no right of passage in existence. The qualified language of this paragraph of Article 14 shows, therefore, that the parties did not contemplate the existence of a right of transit affecting any of the territories to which Article 14 referred.

401. As to the Portuguese contention that, when the Convention of Barcelona was drawn up, India had no intention of preventing or obstructing transit between Daman and the enclaves, that, no doubt, is true. To say that India at that time had no such intention is not, however, to say that she was bound to permit such transit for ever. In 1921, relations between the Government of India and the Government of Portugal were perfectly friendly and the state of affairs in the enclaves was normal. Because, in those circumstances, India had no intention of preventing or obstructing communications between Daman and the enclaves, it by no means follows that it was her intention to allow such transit in all circumstances. Had the Indian delegate at Barcelona contemplated the adoption by the Government of Portugal of an unfriendly attitude and the outbreak of insurrection in the enclaves, he might well have displayed a very different intention.

402. There is one final consideration of great importance relevant to the Barcelona Conference. It is clear, from the proceedings of the conference, that special and careful consideration was given to the position of enclaves, including the Portuguese enclaves in India. Daman and those enclaves were specifically discussed at the conference. The Convention ultimately signed contained Article 14, one of the purposes of which was to make provision for these enclaves. Yet, throughout all this consideration of these very enclaves and of transit to them, there was apparently no suggestion whatever of the existence of any right of transit. The Government of India submit that it is inconceivable that such a right, if it existed, should not have been mentioned at the conference. From the absence of any such mention, the inference must clearly be drawn that nobody at the conference believed such a right of transit to exist.

403. The Government of India therefore submit that the inference which, in the Counter-Memorial (paragraph 160), they drew from the Portuguese delegate's letter of the 8th April, 1921 was fully justified. The more lengthy examination of the Barcelona

Conference set out in the Reply only shows the more clearly that this inference was right.

404. The final section of the part of the Reply which deals with transit of goods is devoted to the question of the carriage of arms over the territory intervening between Daman and the enclaves. This section extends from paragraph 236 to paragraph 246. In these paragraphs, the Government of Portugal make a number of assertions about Rule 7A of the Indian Arms Rules, 1879. These rules provided, among other things, for the issue of licences for the import and export of arms, ammunition and military stores, into or out of British India. Rule 7A provided as follows:—

> "Nothing in rules 5, 6 or 7 shall be deemed to authorise the grant of licences *(a)* to import any arms, ammunition or military stores from Portuguese India *(b)*..."

In the Counter-Memorial, the Government of India argued that, since the carriage of arms from Daman to the enclaves or *vice versa* necessitated first their importation into British India, this rule was always regarded as making the permission of the Government of India essential to any such carriage, which view was clearly inconsistent with any right to transport arms between Daman and the enclaves. In the Reply, the Government of Portugal makes various assertions in reply to this argument which it is necessary to consider.

405. The Government of Portugal contend that Rule 7A *(a)* was made at the instance of the Portuguese Government. They go on to argue that it cannot, therefore, have had the operation for which the Government of India contend, because, if it had had, the Government of Portugal would not have proposed it. The simple answer to this argument is that Rule 7A *(a)* was not proposed by the Government of Portugal. The rule arose out of Article XVIII of the Treaty of 1878. That article provided:

> "The exportation of arms, ammunition or military stores from the Indian dominions of one of the High Contracting Parties into those of the other shall not be permitted, except with the consent of, and under rules approved of by, the latter" (Indian Annex C. No. 40, **I**, p. 376).

With a view to implementing this provision of the Treaty, the Under Secretary to the Government of India, Foreign Department wrote to the Secretary to the Government of Bombay, Political Department on the 15th September, 1879 (Indian Annex F. No. 70). The answer of the Governor of Bombay, dated the 17th October, 1879, contains the following passage:

> "For these reasons, I am to state that in the opinion of His Excellency the Governor in Council, it is expedient that all importation of arms etc. into British India and native and foreign States from Portuguese India should be absolutely prohibited" (Indian Annex F. No. 70).

The view of the Government of Bombay was repeated in a further letter dated the 20th October, 1879, to the Government of India (Indian Annex F. No. 70). Meanwhile, the Government of Bombay had communicated their views to the Government of Portuguese India. On the 3rd November, 1879, the Governor-General of Portuguese India wrote to the Government of Bombay on this subject, and his letter included the following passage:

> "That I duly note what is stated in Your Excellency's despatch [he had already acknowledged a despatch of the 9th October, 1879] under acknowledgement, and consider that for the present it is advisable to prohibit altogether the exportation of arms, ammunition and warlike implements from Portuguese India into any District in British India" (Indian Annex F. No. 70).

On the 26th November, 1879, the officiating Assistant Secretary to the Government of India, Foreign Department wrote to the Secretary to the Government of Bombay acknowledging the letters of the 17th and 20th of October. He wrote thus:

> "In reply, I am to say that the Government of India concur with His Excellency the Governor of Bombay in Council that it is expedient to permit no importation of arms, ammunition, and military stores from Portuguese India into British India or into Native Indian States. I am to request, therefore, that Mr. Crawford may be instructed to communicate with the Portuguese Government to this effect, and to arrange for the prohibition of all exportation from the Goa territories into British India" (Indian Annex F. No. 70).

It was as a result of this letter that Mr. Crawford, the British delegate for the Treaty, wrote to the Portuguese delegate the letter which is Annex 100 of the Reply. It thus appears that Mr. Crawford, in saying in his letter that "the Government of India gives its agreement to the proposal" for the absolute prohibition of the export of arms, etc. from Portuguese India to British India, was not referring to a proposal made by the Government of Portuguese India, but to a proposal made by the Government of Bombay. That Government communicated it on the 9th October, 1879, to the Government of Portuguese India and on the 17th October, 1879, to the Government of India. The letter written by the Governor General of Portuguese India on the 3rd November, 1879, did not contain an original proposal by the Governor General, but his acquiescence in a proposal made by the Government of Bombay.

406. It thus appears that rule 7A *(a)* originated on the British side and not on the Portuguese, so that the argument set out in paragraph 241 of the Reply is without foundation. It might still be urged that the Government of Portuguese India would have been unlikely to agree to a proposal, the effect of which was to make all transport of arms between Daman and the enclaves subject to the permission of the British authorities. However, it appears that in

fact there are reasons why they should have done so. It has already been shown (see paragraphs 297-298 above) that the Portuguese authorities actually suggested the inclusion in the Treaty of words in article XVIII, the effect of which was that permission of the British authorities was required for the passage of troops or armed police between Daman and the enclaves. The Portuguese Government did this because of their great anxiety that the Treaty should forbid the entry of British troops into Portuguese territory without the prior permission of the Portuguese authorities. If the Portuguese were ready, as they were, to submit to the provisions requiring the permission of the British authorities before their troops could pass between Daman and the enclaves, they may well have seen no objection to agreeing that the transport of arms between Daman and the enclaves should be subject to the same permission.

407. Not only was Rule 7A *(a)* originally made on the proposal of the British, not of the Portuguese, authorities; it was subsequently renewed without any consultation with the Government of Portugal at all. In 1894, as a result of two incidents mentioned below (see paragraph 409), the Under Secretary to the Government of India, Foreign Department wrote to the Secretary to the Government of Bombay, Political Department, asking whether, since the Treaty of 1878 was no longer in force, there was any objection to the cancelling of Rule 7A (Indian Annex F. No. 71). The Government of Bombay replied that they had no objection to the cancelling of clause *(b)* of the rule, but they desired to retain clause *(a)* (Indian Annex F. No. 71). This was in fact done, and there is no sign that the Portuguese authorities were consulted in any way. When the rules of 1908 were being prepared, there was a suggestion in the Foreign Department of the Government of India that importation of arms from Portuguese India should be allowed. This suggestion, however, was abandoned, and Rule 7A *(a)* was retained (India Annex F. No. 72). A rule to the same effect has been in existence ever since.

408. The Portuguese Government further contend that Rule 7A *(a)* contained a general rule, but there was a particular rule applying to transit between Daman and the enclaves, and by this particular rule the transport of arms was not prohibited but authorized (Reply, paragraph 240). There is, in the submission of the Government of India, no evidence whatever of such a particular rule, while there is evidence to show that the rule contained in Rule 7A *(a)* did apply to arms, etc. imported into British India in the course of transit between Daman and the enclaves.

409. In the first place, the fact that exceptions to Rule 7A *(a)* were sometimes made to permit the transit of arms between Daman and the enclaves does not mean that a particular rule was applied to this transit, for exceptions were sometimes made affecting transport from other parts of Portuguese India into British India. Two examples

may be quoted which occurred in 1894. On the 21st May, 1894, the Government of Bombay referred to the Government of India an application from one Adamally Sultanally to import 2500 lbs. of dynamite from Goa into Bombay. The Government pointed out that dynamite fell within the provision of Rule 7A *(a)*. On the 31st May, 1894, the Government of Bombay referred to the Government of India an application from Essoofally Mohamedally and Company to import 12,150 coils of fuse from Goa into Bombay. The Government of India sent the licences for both these imports on the 13th June, 1894 (Indian Annex F. No. 73). Another such incident occurred in 1913, when the Government of Portuguese India wished to send 5 cases of sulphur *via* Bombay to Diu by land. Sulphur fell under the definition of 'military stores', so was subject to Rule 7A. The Government of Bombay referred the matter to the Government of India, and the latter Government issued a licence for the import of the sulphur into Bombay (Indian Annex F. No. 74). Another incident of 1913 (Indian Annex F. No. 75) shows that exceptions were also made in cases of arms.

410. In the second place, the incidents affecting transit between Daman and the enclaves shew, not that such transit was treated as falling under a particular rule different from the general rule, but that in these cases permission was given as a concession in circumstances in which, apart from that concession, the general rule would have applied. It is necessary to examine the incidents of 1898 and 1914/1915, because the account of these incidents given in paragraphs 242 and 243 of the Reply creates a decidedly misleading impression.

411. In discussing the incident of 1898 (Indian Annex C. No. 63), the Government of Portugal first contend that the Governor General of Portuguese India in his letter of the 3rd November, 1898 stressed "the *necessity* of transportation *via British territory*". In fact, a reading of the letter shows that the Governor General was saying that it was necessary to carry the arms from Daman to Nagar Aveli, and he simply added the comment "crossing the British territory". There is no passage in the letter in which it can be said that the Governor-General is relying upon the necessity to cross British territory in support of any right. The Portuguese Government, referring to the notings in the files relating to the incident, allege that "in one of these comments it was recognized that the case should be treated *specially*". This is apparently a reference to the minute at the top of page 493 of the Counter-Memorial [Volume I], in which the words actually used are these:

> "*If* it is decided to treat this request specially..." [1]

[1] Italics added.

The Portuguese Government go on to say this:

> "In another comment it is stressed that in order to go from Daman to Nagar Aveli *it was necessary to pass through British territory*: in the mind of the writer this could only mean that since such passage was *necessary*, it was not lawful for the British to oppose it."

The second part of this sentence is a clearly unwarranted inference. The necessity to pass through British territory may well have been mentioned as a reason for making a concession, not as a foundation of any legal right. Indeed this seems to have been the meaning attached to it by the writer of the next minute, who used the words "this request should, I think, certainly be granted". The Portuguese Government in fact quote these words and apparently rely upon them. In fact, however, it is clear that "should be granted" is by no means the same thing as "cannot be refused". In the submission of the Government of India, the whole correspondence and noting about this incident (Indian Annex C. No. 63) shows that the authorities of the Government of Bombay were approaching the case as a case in which a concession might possibly be made, but otherwise the general rule of prohibition would apply.

412. In discussing the case of 1914/15, the Portuguese Government allege that "there was hesitation in reaching the decision as to whether the absolute import prohibition contained at paragraph *(a)* of Rule 7A was such as to prevent the transit of military arms *between Daman and Nagar Aveli*". There was, in fact, no hesitation of this kind. This appears clearly from the minute at the bottom of page 497 of the Counter-Memorial [*Volume* I], which reads as follows:

> "The transport of the arms and ammunition through British India proposed by the Government of Goa, amounts to an import into, and export from British India. The importation of arms and ammunition into British India from Portuguese India, is prohibited under Rule 7 of the Indian Arms Rules of 1909."

This is a categorical statement that the particular transit proposed, i.e. transit to and from Nagar Aveli, amounted to import and export, of which the import was prohibited by the Indian Arms Rules. The Government of Portugal also rely upon the minute at the top of page 509 of the Counter-Memorial [*Volume* I], reading as follows:—

> "The import of military stores from Portuguese territory into British India is absolutely forbidden but as in this case importation is only a preliminary to immediate exportation which is permissible it might be allowed. The rules relating to transport do not cover the case."

Upon this, the Government of Portugal make the following comment:

> "This constitutes a very clear recognition of the distinction made between the two regimes; the *general* regime forbidding *simple import;* the *special,* allowing *passage* between Daman and the enclaves."

In the submission of the Government of India, the minute does not show any special régime allowing passage between Daman and the enclaves. On the contrary, it recognizes the application of the general rule, but suggests that an exception might be allowed. The observation that "the rules relating to transport do not cover the case" is made in the light of this suggestion, and is only another way of saying that an exception may be made. In any case, to say that the rules do not apply is by no means to say that permission for the transport is bound to be given. The Government of India submit that the correspondence and noting relating to this incident (Indian Annex C. No. 64) show that an exception was being made to a rule which would otherwise have applied. Had the matter fallen, as the Government of Portugal suggested, under a special rule, it would hardly have been necessary to devote to it correspondence and noting covering 15 pages of the Counter-Memorial.

413. In paragraphs 224 and 245 of the Reply, the Portuguese Government endeavour to explain away the rest of the Indian argument about the transport of arms by remarking, first, "that the need to obtain administrative licences is in no way incompatible with a right of transit", and secondly, that cases "solely connected with the problems of the existence or non-existence of immunities" are irrelevant to the case. These arguments have already been answered in this Rejoinder in connection with the transit of persons, and it is necessary here only to make a reference to paragraphs 345, 346 and 389 above.

414. The Government of India therefore submit that the Portuguese Government fail to make any effective answer to the argument presented in the Counter-Memorial about the transit of arms and military stores. The facts relating to such transport provide another illustration of the requirement of permission by the British authorities, which requirement was quite inconsistent with the existence of any right of passage.

THE POST-INDEPENDENCE PERIOD

SECTION I

415. Paragraphs 247 to 290 of the Reply are devoted to the Post-Independence Period, from 1947 to 1954. The first part of this section (paragraphs 248 to 253) deals with what is described as the "Favourable Attitude of the Indian Union in the first place to transit between Daman and the Enclaves." In these paragraphs the Government of Portugal discuss a number of incidents, most of which have already been mentioned in the Counter-Memorial. It is necessary, however, to reconsider these incidents, in order to see that they really lend no support to the Portuguese case.

416. In paragraph 248 of the Reply the Government of Portugal point out that during the first years after the achievement of Indian Independence transit between Daman and the enclaves went on as before. This is a suggestion of the argument, already answered in paragraph 278 above, that the fact that transit took place indicates that there was a right of transit. This idea is suggested in paragraph 248 of the Reply with reference to the Indian Government, whereas in earlier passages of the Reply it is used with reference to the British Government. It is only necessary to remark that, for the reasons given in paragraph 278 above, there is no reason at all to infer the existence of a right of transit from the fact that transit took place.

417. In paragraph 249 of the Reply the Government of Portugal admit that during this initial period the Indian Government showed "a spirit of goodwill and sought by various means to *facilitate* transit". They say that these facilities are really irrelevant to the question of right of transit, but are evidence "of the initial understanding" of India. The Government of India submit that in fact these incidents show nothing other than the spirit of goodwill mentioned by the Portuguese Government themselves. The Indian Government entered at first upon friendly relations with the Portuguese Government, hoping that Portugal would adopt a reasonable attitude about her Indian territories. It was this friendly spirit, and not any consciousness of a legal obligation, which was the cause of the concessions and favours offered by the Indian Government. Later, when a different attitude was adopted by the Portuguese authorities, the Government of India were obliged to stand in the matter of transit between Daman and the enclaves on their strict legal rights. These rights, in the Indian Government's submission, had been well recognized throughout the British period.

418. The first incident of the Post-Independence Period mentioned by the Portuguese Government is that of what they call the "exemption from duty" of products of Nagar Aveli exported to

Daman. The Portuguese Government allege that this exemption from duty was granted by an agreement of 1945. They pretend that it was a renewal of an exemption "which had remained dormant for some time", and appear to reproach the Government of India for not mentioning it. The whole Portuguese account of this incident is quite inaccurate. It has already been shown, in paragraphs 391-392 above, that what was granted in 1945 was not an exemption from duty at all. (It is, anyway, something of an understatement to say that the exemption of products of Nagar Aveli from duty "had remained dormant for some time" in 1945. In 1945 that exemption had been abolished for 50 years, and during that period the Portuguese Government had made vociferous efforts to get it renewed: cf. Counter-Memorial, paragraphs 146-152.) In 1944 the Government of Bombay had imposed a complete embargo on the movement of all commodities into Daman. The exemption granted in 1945 was not an exemption from duty, but an exemption from the operation of this embargo of rice and other products of Nagar Aveli. Moreover, as shown in paragraphs 391-392 above, it was granted by the Government of Bombay only in return for a reciprocal concession granted by the Portuguese. As the Portuguese Government remark, the concession was suspended for a time in 1948 and 1949, because it had been abused. The Portuguese authorities themselves admitted the abuse (Indian Annex F. No. 76). In 1953 the Government of India, at the instance of the Government of Bombay, pointed out to the Portuguese Government that the concession had again been used as a means of smuggling and threatened to terminate it if this were not stopped (Indian Annex F. No. 76). It is perfectly clear that this incident has nothing at all to do with exemption from customs duty. On the other hand, it is a very clear example of the use by the Indian authorities, and the recognition by the Portuguese authorities, of the right to prohibit transit of goods between Daman and the enclaves.

419. The Portuguese Government refer next to an exemption from duty granted to public supplies of the Portuguese administration despatched from Daman to the enclaves. It is necessary only to refer to the language of the correspondence set out in Indian Annex C. No. 72. This language makes it abundantly clear that the attitude of both Governments was not that the charge of duty would have been an infringement of any right, but that the exemption was a mere act of courtesy. There is nothing in this correspondence to suggest a right of transit at all.

420. In Paragraph 250 *(c)* of the Reply, reference is made to the special indulgence granted to the Governor of Daman for travelling between Daman and the enclaves. This is said to disclose "the special position of the enclaves and the compulsory character of transit through the territory which separates them from coastal Daman". It is true that the incident illustrates the particular

geographical position of the enclaves, in the sense that if it had not been for that position no such indulgence would have been needed. The incident does not, however, provide any justification for an argument that the Indian Government recognised some special necessity about the transit giving rise to a legal right. What was asked and what was granted was an act of friendliness towards the Governor personally. It is particularly to be noted that the indulgence did not apply to any other Portuguese officials, although subordinates of the Governor must from time to time have had occasion to seek permission to make the journey (cf. Indian Annex F. No. 77). For a permit system existing in 1941 and applied to Portuguese European officials travelling between Portuguese possessions, including Daman and the enclaves, cf. paragraph 433 below.

421. The last incident mentioned in paragraph 250 of the Reply is that of the abolition of the embargo, imposed in 1895, upon the import of salt from Daman into the adjoining territory. The sole reason for the abolition of this embargo was that the excise duty on salt, for the protection of which it was originally imposed, had been abolished in India (see Indian Annexes C. No. 71 and F. No. 78).

422. In a footnote to paragraph 250 *(d)* of the Reply, the Government of Portugal mention an incident of 1947 described in Paragraph 193 of the Counter-Memorial. They say that the Portuguese Consul at Bombay, in a letter of the 27th November 1947, referred to "the necessity" for goods passing between Daman and Nagar Aveli to cross Indian territory. This letter is contained in Indian Annex C. No. 70, not, as stated in the Portuguese footnote, in Indian Annex C. No. 71. The letter in fact contains no such reference. The Consul did mention in it "articles of primary necessity", but said nothing about any necessity of crossing Indian territory.

423. In Paragraphs 251 to 253 of the Reply, the Portuguese Government make much of the incident of the construction of certain culverts at Lavacha, on the road between Daman and the enclaves. The account of this incident which they give is generally correct, but it is not right to say that the Government of India were the first to take the matter up again after the War. As early as September, 1946 the Governor of Daman renewed the request for this work to be done (Indian Annex F. No. 79). It is hard to see, however, how any argument for the existence of a right of transit can be built upon this incident. The road between Daman and the enclaves was of importance to the Portuguese, but of very little use or importance to the British Government. It seems fair to infer from the correspondence that, if the Portuguese authorities had not asked for them, the culverts would not have been built. In these circumstances, it is perfectly understandable that the Portuguese Government should have made a contribution towards the cost. On the other hand, the construction of the culverts on these terms was a small act of friendliness to oblige the Portuguese Government,

and this, without any supposition of a right of transit, provides ample explanation of the willingness of the British and Indian Governments to do the work. It may be added that if these culverts were essential to a right of transit, it is curious that the Portuguese authorities showed so little interest in them. In 1943, when the Government of Bombay said the work could not be done until after the War, the Portuguese Government made no complaint nor did they try to persuade the Government of Bombay to change this decision. The Indian authorities asked in 1948 whether the Portuguese Government still wished the work to be done, but the Portuguese gave no answer until 1950. Finally, the Portuguese Chief of Police himself advised that it was "preferable not to give them a permanent character" (Indian Annex F. No. 79).

424. One more incident of the Post-Independence Period shows that the Indian Government recognized no obligation upon them to permit or facilitate communications between Daman and the enclaves. On the 6th February, 1952, the Portuguese Legation in New Delhi applied to the Ministry of External Affairs for permission to instal on Indian territory a telephone line between Dadra and Daman. The Director of Telephones commented on this that "it is not the policy of the Indian Government to permit foreign Governments to erect and maintain telecommunication lines in Indian territory". The Indian Consul General at Goa wrote that the real intention of the Portuguese authorities was to link Daman to Nagar Aveli, and he added that "there would appear to be no special reason to accede to the request of the Portuguese Legation". The permission was not given. For this incident, see Indian Annex F. No. 80.

425. To complete the picture of the Post-Independence Period, a few additional examples are given of applications by the Portuguese authorities for permission for armed men to pass through Indian territory (Indian Annex F. No. 81).

SECTION II

Portuguese responsibility for breakdown of traditional regime of intercourse between Portuguese possessions and India

426. At paragraphs 29 to 46 of the Counter-Memorial the Government of India gave a description of the regime of travel between Goa, Daman, Diu, Dadra and Nagar Aveli and British India from about 1857 to 1947. At paragraph 197 the Government of India demonstrated that after the independence of India in 1947 the Government of India maintained the existing regime of travel between Portuguese possessions and India. This meant that natives of Portuguese possessions could travel between India and Portuguese possessions without requirement of passport and visa and were exempted from provisions relating to registration of foreigners. Portuguese Europeans were required to produce a passport and visa when entering Indian territory by sea, air or land, and to comply with provisions relating to registration of foreigners.

427. At paragraph 198 of the Counter-Memorial the Government of India related the manner in which immediately after the independence of India the Portuguese Government in pursuance of a policy of hostility towards the independent people and Government of India imposed restrictions on the entry and sojourn of Indian nationals in the Portuguese possessions. Only four months after India became independent the Portuguese Government promulgated Decree No. 4950 dated the 26th December 1947 and under its terms "natives of neighbouring India" were required to produce documents and declarations of identity on their entry into Portuguese possessions and to present themselves before Portuguese Police authorities within 8 days from the date of entry into Portuguese possessions. At paragraph 200 of the Counter-Memorial the Government of India stated that by an Order in Council No. 4632 dated 25th March 1948 (Indian Annex E. No. 45) the Portuguese Government required Indian nationals who entered Portuguese possessions to present themselves to Portuguese Police authorities within 24 hours of their entry. As a result of the protests of the Government of India that by applying these decrees to Indians the Portuguese Government was undermining the traditional friendship and good neighbourly relations, the Portuguese Government extended the time limit of 24 hours to 72 hours (Indian Annex E. No. 46). The Government of India stated in paragraph 201 of the Counter-Memorial that the Portuguese Police made use of these decrees and orders to stop, interrogate

and harass Indian nationals. The Government of India quoted from a note of the Ministry of External Affairs to show that Indian nationals even after having complied with the regulations were later called up by the Central Police Organization in Nova Goa for further questioning (paragraph 201 of the Counter-Memorial and Indian Annex A. No. 12).

428. At paragraph 205 of the Counter-Memorial the Government of India stated that the hostile policy which the Portuguese Government had adopted towards the Indian Government did not find expression only in the above-mentioned decrees and orders. The Portuguese Government began a spate of restrictive legislation aimed against Indian nationals and various Indian interests, cultural and commercial, in the Portuguese possessions. In 1950 the Portuguese Government decreed restrictions on the setting up of commercial establishments for Indian nationals in Portuguese possessions in India. In 1952 a measure intended to affect the resident Indian population provided that no "foreigner" could rent accommodation without authorization of the Portuguese Government. In the same year an authorization from the Portuguese Overseas Minister at Lisbon was made compulsory in respect of transactions connected with immovable property. (An account of the Portuguese policy of intolerance and hostility is set out in a note of the Ministry of External Affairs at Indian Annex A. No. 12.)

429. As stated in paragraph 206 of the Counter-Memorial, in spite of these measures the Government of India did not retaliate against the Portuguese Government or against Portuguese nationals in India by introducing new laws and regulations either in respect of their cultural and commercial activities in India or as regards intercourse between the territory of the Indian Union and the territory of the Portuguese possessions. The Government of India continued the exemption in favour of natives or domiciled persons of the Portuguese possessions from registration as foreigners on production of passport or identity papers on entering into India.

430. However, the Government of India began to consider then why, in view of the policy of hostility and unfriendliness adopted by the Portuguese Government, it should not insist on strict observance of the laws and regulations which were already applicable in respect of the entry and sojourn of Portuguese Europeans in India, which laws and regulations existed during British times and which had clearly been acquiesced in by the Portuguese Government. The Government of India saw no reason for overlooking breaches of Indian laws and regulations on the part of Portuguese officials. Several instances came to the notice of the Government of India when Portuguese officials openly defied Indian rules and regulations and entered Indian territory in their contravention.

This illegal entry took place both at the Goa and the Daman border (Indian Annex F. No. 94 and Indian Annex E. No. 56.)

431. The Government of independent India in its traditional manner of forbearance and delayed retaliation, desisted from an immediate tightening of the borders. Arrangements were made at the Goa border for prevention of entry into Indian territory on the part of Portuguese European officials without production of the necessary documents but for some time surveillance at the borders with Daman continued to be lax and informal. However, about the end of 1952 it was reported to the Government of India that the Portuguese Government on its part had set up a security check post on the Daman border and that Indian nationals who entered the Portuguese territory of Daman were stopped and questioned at Dabel in Daman territory and were not allowed to proceed without being in possession of the necessary documents. In retaliation to this measure the Government of India opened a check post at Vapi to see that Portuguese Europeans or other foreigners did not enter Indian territory without fulfilling the necessary obligations (Indian Annex F. No. 95).

432. However, in spite of the above measures Portuguese European officials continued to evade Indian laws and regulations and they often managed to get to Bombay without going through the Indian check posts. On the 1st October, 1953, the Indian Consul General protested to the Portuguese Government that on a number of occasions Portuguese European officials had travelled between Portuguese possessions in India, that is, between Goa and Daman and Diu and Dadra and Nagar Aveli without obtaining visas and in contravention of the Indian Passport Act. He sent another letter on the 5th December 1953. To this letter he received a reply from the Chief of Cabinet of the Portuguese Governor General which was quoted in paragraph 207 of the Counter-Memorial. The Portuguese Government stated in that letter that the requirement of visa from Portuguese Officials entering Indian territory in transit from Daman to Nagar Aveli:

> "constituted a change from the *status quo ante*".

Thus the Portuguese Government admitted that its European officials had in fact made such transit on previous occasions without fulfilling the requirements of Indian laws and regulations. However, this was the first time that the Portuguese Government raised an objection to the requirement of passport and visa from Portuguese European officials for entry into India for the purpose of residence or transit. This will become clear from the facts in the following paragraphs.

* * *

Portuguese European officials in transit between Daman and Nagar Aveli (as between other Portuguese possessions) were required by the British Government to be in possession of the necessary documents of travel

433. The British Government did not exempt Portuguese European officials in transit between Daman and Nagar Aveli or between Daman and Goa, *et cetera*, from complying with the rules and regulations relating to entry into and transit over Indian territory. There are documents on record to show that this position was well-known to the Portuguese Government and was clearly accepted by them. At Indian Annex F. No. 82 is found a letter of the 13th June, 1941, from the Collector of Salt Revenue, Bombay, to the British Consul at Goa regarding the non-possession of the requisite travel documents on the part of a Portuguese European official and his wife. At Indian Annex F. No. 83 will be found a letter dated the 28th June, 1941, from the British Consul at Goa to the Portuguese Chief of Cabinet regarding the necessity of the production of a Travel Permit on part of "all non-British subjects desiring to travel in British limits"—including Portuguese European officials and their wives. The acquiescence of the Portuguese Chief of Cabinet dated the 2nd July, 1941, is found at Indian Annex F. No. 84. The fact that this requirement obtained no less in the case of travel between Daman and Nagar Aveli is found in the British Consul's letter to the Government of India dated the 27th March, 1942 (Indian Annex F. No. 85). The British Consul at Goa wrote:

> "The system prevailing on the Goan frontier has worked so smoothly that I record it here, since its application, in some modified form, should be possible on the Daman and Nagar Aveli frontiers ... At the Daman and Nagar Aveli frontiers it should be possible for the Salt Revenue authorities to issue such passes by virtue of their knowledge of the small number of Europeans in each of these areas. Powers would of course have to be delegated to responsible Inspectors. The passes could then be exchanged for regular 'Travel Permits' by the Railway Police at Daman Road (Vapi), Bhilad or Sanjan."

The Government of India in their letter of the 5th January, 1943, (Indian Annex F. No. 86) informed the British Consul that the Police Head Constable at Vapi was authorised to issue travel permits to foreigners who may enter India from the Daman border including Portuguese European officials. The letter stated:

> "the Government of the Portuguese possessions may be asked to inform such officials of the procedure mentioned in paragraph 1 and to advise them to have their passports or other papers of identity with them during the journey".

The Portuguese Government was accordingly informed and an acknowledgement dated the 12th January, 1943, was received by the British Consul from the Portuguese Chief of Cabinet at Goa (Indian Annex F. No. 87).

434. A letter dated the 17th February, 1945, from the British Consul to the Government of India confirms the applicability of the Permit system to travel between Daman and Nagar Aveli (Indian Annex F. No. 88). On the 27th March, 1945, the British Consul informed the Portuguese, Chief of Cabinet:

> "European Portuguese subjects are required to take out a passport for entry into British India, under rule 5 of the Indian Passport Rules, 1921, unless they are specifically exempted under an order of the Government of India." (Indian Annex F. No. 89.)

Receipt of the above letter was acknowledged by the Portuguese Chief of Cabinet on the 29th March, 1945. (Indian Annex F. No. 90.)

435. The above facts make it clear that the Portuguese Government did not make the least protest to the British Government in regard to the requirement of passport and visa for transit of Portuguese European officials between Daman and Nagar Aveli or between any other Portuguese possessions. Nor did they apply for or obtain any exemptions from the British Government.

436. After the independence of India, the above-mentioned rules and regulations were continued (Indian Annex F. No. 91). In his letter of the 12th April 1949 the Portuguese Chief of Cabinet claimed *for the first time* that in interpretation of the Indian Passport Rules, Portuguese European Officials in the service of the Government of Portuguese possessions in India should enjoy the same exemptions as natives "domiciled" in the Portuguese possessions. He argued that according to Portuguese law and practice Portuguese European officials in India had "legal domicile in Portuguese India". (Indian Annex F. No. 92.) He was, however, informed by the Government of India that the Indian Passport Rules were to be interpreted according to Indian law and under Indian law:—

> "in order that a person may be treated as domiciled in a particular country, he must satisfy two conditions:—
>
> (1) that he is resident in that country,
> and
>
> (2) that he intends to make that country his permanent home. A man is not to be deemed to have taken up his fixed habitation in a country merely by reason of his residing there in civil, military, naval or air force service, or in the exercise of any profession or calling." (Indian Annex F. No. 93.)

Accordingly, the Government of India did not extend the exemption to Portuguese European Officials.

* * *

437. At paragraph 183 of the Reply the Portuguese Government states:

"It was only at the end of 1953, that is already subsequent to the independence of India, that a passport and visa began to be required of the Governor of Daman and the Portuguese officials in transit between Daman and the enclaves. The general regime which prescribed these formalities for the entry of European foreigners into Indian territory via the land frontiers had been applicable since 1935. This regime was applied, without exception, to all European Portuguese officials. It was not applied, however, to those who proceeded in transit from Daman to Nagar Aveli and vice versa."

At paragraph 261 and 262 of the Reply the Portuguese Government described the requirement of passport and visa from Portuguese European officials travelling between Daman and Nagar Aveli as an "innovation". It is not necessary for the Government of India to do more than to point out that the documents of 1941, 1945 and 1949 show that the Portuguese Government was well aware in those years that Portuguese European officials travelling between Daman and Nagar Aveli as between other parts of Portuguese possessions were required to comply with Indian rules and regulations relating to entry into and transit over Indian territory, and that the requirement of passport and visa from those officials in 1953 was not an "innovation".

438. At paragraph 262 of the Reply in order to demonstrate the fact of an "innovation" having been made by the Government of India, the Portuguese Government quoted from a note of the Portuguese Legation addressed to the Ministry of External Affairs on the 2nd December, 1953. The Portuguese Government sees in this letter a protest lodged by its representative against the alleged violation of an alleged right of passage. However, quite strangely the Portuguese Government proceeds to state in paragraph 263 of the Reply:

"Here again what is involved is a problem of *immunity*. As such, we repeat, it is not directly relevant to these proceedings. The fact that transit between Daman and the enclaves was made subject to passport and visa formalities does not in itself constitute a violation of our right of transit.

Despite this and quite naturally having regard to the innovation involved, we protested, contrary to the Indian Government's contentions in its Counter-Memorial. This protest was expressly made in the Notes of the Portuguese Legation at New Delhi dated December 2nd, 1953, January 18th, 1954, and February 11th, 1954.

(Memorial, Annexes 37, 39 and 40.)

In the previous paragraph we have set out a particularly enlightening extract from the first of these Notes. With regard to the other two we would respectfully draw the Court's attention to paragraph 7 of the Notes: a mere reading of that paragraph will show that our attitude was very different from the one which the Indian Union has attributed to us in the passages cited from its Counter-Memorial."

The Government of India would like to draw the attention of the Court to the great contradiction in the Portuguese line of argument. On the one hand the Portuguese Government seeks to demonstrate that the introduction of passport and visa requirement in relation to travel between Daman and Nagar Aveli was an "innovation" and violation of an alleged right of passage, and on the other hand states that the question of passport and visa requirement concerns a "problem of immunity" and is irrelevant to the present proceedings. In fact, throughout the Reply there is to be found first an assertion as to the existence of an alleged immunity in demonstration of an alleged right of passage and then the assertion that the question of immunity is irrelevant to the present proceedings.

439. Thus the Portuguese Government refers in the same paragraph 263 of the Reply to Annex 40 to the Memorial which is a note of the 11th February, 1954, from the Portuguese Legation to the Ministry of External Affairs, and particularly to its paragraph 7. Paragraph 7 of the note in question refers to the principle of "*free transit of Portuguese officials*" and protests against the passport and visa requirement in respect of Portuguese European officials.

440. Paragraph 10 of the note is even more revealing. In that paragraph the Portuguese authorities acknowledge the decision of the Government of India, made at the request of the Portuguese Government, to authoritise the District Magistrate of Surat to grant visas to Portuguese European officials of Daman and Nagar Aveli in order to save these officials the inconvenience of applying to the Indian Consul-General at Goa. However, the Portuguese authorities state that even this procedure did not constitute "a practical fulfilment of the principle referred to above nor does it meet the needs of the administration, which, very often requires urgent and immediate action". Thus according to the Portuguese authorities the very existence of passport and visa requirements were contrary to the alleged principle of "free transit of the Portuguese officials".

441. In the submission of the Government of India the above illustrates the manner of the Portuguese presentation of the claim. The Portuguese Government argues that the right of passage which it claims between Daman and Nagar Aveli is a right without immunity and subject to Indian laws and regulations. At the same time it states that the application of Indian laws and regulations to such passage from Daman to Nagar Aveli is in itself an infringement of the alleged principle of "free transit".

442. The Portuguese Government then proceeds in the Reply to deal in some detail with the facts relating to the passport and visa requirement. Commenting on the letter of the Portuguese Chief of Cabinet in respect of the production of "*guias*" in lieu of passports, the Portuguese Government erroneously states that the words "with validity for a period of one year" refers to visas which were

agreed to be granted by the Government of India. If the letter of the Chief of Cabinet (Indian Annex E. No. 52) is read carefully it will become clear that the words "with validity for a period of one year" referred not to visas which were allegedly agreed to be given by the Government of India but to "*guias*" which were to be issued by the Portuguese Government and whose validity as a passport was agreed to be recognized by the Government of India. This is also clear from Annex 128 to the Portuguese Reply which is a letter from the Governor of Daman to the Chief Secretary of the Government of Bombay dated the 5th March, 1954. Referring to "*guias*" the Governor of Daman states, "these passports are valid for one year".

443. At paragraph 268 of the Reply the Portuguese Government states that the Government of India frequently delayed visas for Portuguese European officials, sometimes refused grant of visas, progressively reduced the period of validity of such visas, at a certain moment required two separate visas—one for the outward journey and the other for the return journey—and created difficulties in regard to the determination of the authority competent to issue them. The Portuguese Government referred in this connection to Annexes 41 to 43 to the Memorial and Annexes 126 to 145 to the Reply. These Annexes are miscellaneous communications, some addressed to the Portuguese Ministry of Overseas, some to the Chief Secretary of the Government of Bombay, some to the Ministry of External Affairs, and they refer generally to requests for visas. The Portuguese Government has omitted to annex the communications of the Government of India which illustrate the compliance of the Government of India with Portuguese requests. For example, the Portuguese Government has failed to annex to the file the reply of the Chief Secretary to the Government of Bombay to the letter of the Governor of Daman given at Annex 134 to the Reply. In his letter the Governor of Daman stated that the District Magistrate of Surat was sometimes away from station and his absence caused inconvenience and delay in the granting of visas. The Government of India accordingly authorized the Additional District Magistrate of Surat to grant visas in the absence of the District Magistrate on tour (Indian Annex F. No. 98). In the same manner the Portuguese Government has failed to cite documents which show that on a great number of occasions visas were in fact granted to the Governor of Daman and other Portuguese European officials.

444. Nor has the Portuguese Government told the Court that Portuguese officials were in the habit of contravening Indian laws and regulations. In a footnote to paragraph 268 of the Reply the Portuguese Government refers to paragraph 210 of the Counter-Memorial where the Government of India gave demonstration of the fact that Portuguese officials continually evaded Indian laws and

regulations relating to entry into India (Indian Annex E. No. 56). The Portuguese Government simply states:—

"As a point of fact there were no instances of such evasion"

and refers to Annex 36 to the Memorial. Annex 36 to the Memorial is precisely the note of protest of the Ministry of External Affairs and cites instances of breach of Indian laws by Portuguese officials. In the view of the Government of India the Portuguese Government is not able to refute the fact that such evasion often took place and was encouraged and organised by the Portuguese Government. Indeed, corroboration of this fact is found in a letter of Captain Romba, the Chief of Portuguese Police, which has been produced at Annex 110 to the Reply. In this letter Captain Romba states that detached units could be sent to Nagar Aveli without using the Daman-Silvasa road. This is an obvious reference to the practice of the Portuguese Government of sending police forces and other officials from Goa to Nagar Aveli without obtaining the permission of the Government of India and complying with Indian laws and regulations.

445. At paragraph 261 of the Reply the Portuguese Government abandons itself to conjecture, namely, that the Government of India required passports and visas from Portuguese Europeans in order to hinder communications between Daman and Nagar Aveli and in order to "cut off" Nagar Aveli. However, as the Portuguese Government itself admits in footnote 2 to the same paragraph 261, the requirement existed in relation not only to transit between Daman and Nagar Aveli but to entry into India from any part of the Portuguese possessions. This conjecture is again repeated in paragraph 264 of the Reply. However, the baselessness of this conjecture is to be seen from the facts stated in the Counter-Memorial and in the Rejoinder. The Government of India has shown that the requirement of passports and visas from Portuguese European officials entering India for residence or for travel from one part of Portuguese possessions to another existed during British times and was not "innovated" by the Government of independent India. In the second place, Indian laws and regulations did not apply exclusively to the Daman border or to transit between Daman and Nagar Aveli. These laws and regulations applied equally to all Portuguese possessions. It is also a fact that the enforcement of these laws and regulations was first applied at the Goa border and only later at the Daman border. As has been stated above, it was the Portuguese Government which took the first step and established a check post at Dabel in Daman territory to interrogate Indian travellers. If it had been the intention of the Government of India to apply these laws and regulations with the purpose of "cutting off" Nagar Aveli they would certainly have applied these regulations early at the Daman border. The fact that they did not do so and applied them first at the Goa border and much later at the

Daman border shows that the Government of India had no such intention. In paragraph 264 of the Reply the Portuguese Government has referred to Annex 124 which is seen to be a letter from the Chief of Cabinet of the Overseas Ministry to the Ministry of Foreign Affairs. This letter which is dated 16th July 1953 reads:—

> "... it does not seem possible to maintain connections by sea during the monsoon period with Daman and Diu since these respective harbours do not permit the entrance of any sort of ship, except in very special cases.
>
> It is not considered accpetable that communications be impeded between the territories of Damao and Nagar Aveli across the Indian Union since there are no other communications, *nor that objections be raised concerning the peaceful passage of persons and things from Goa to Damao*[1]. I think that the cases and objections raised cannot but be the subject of diplomatic protests on our side. To *abandon such right of transit would be to give way without any compensation whatever*[1]."

This document itself shows quite clearly that the passport and visa requirement applied to all Portuguese possessions and that the Portuguese authorities were equally concerned about passage from Daman to Goa and vice-versa and that it even went so far as to speak of "right of transit" from Goa to Daman and vice-versa. Accordingly, there was no special character to the Indian laws and regulations requiring possession of passport and visa for travel between Daman and Nagar Aveli. The Government of India did not enact special legislation or initiate special discriminatory measures in regard to travel between Daman and Nagar Aveli or Goa and Nagar Aveli. The fact that these laws and regulations operated in respect of travel between Daman and Nagar Aveli was only incidental to the operation of the ordinary law applicable in respect of entry into or transit through Indian territory.

446. At paragraphs 270 to 278 of the Reply the Portuguese Government has dealt with the question of its responsibility for causing the breakdown of the traditional relations between the Government of India and the Government of Portuguese possessions in India. At paragraph 271 of the Reply the Portuguese Government states that the measures introduced by the Portuguese Government against Indian nationals in Portuguese possessions:—

> "are irrelevant to the subject matter of the present proceedings and it is therefore unnecessary to deal with them in detail".

The Portuguese Government states that if the attitude of the Government of India in relation to the entry of Portuguese European officials was the result of restrictive measures introduced in the Portuguese possessions the Government of India should have acted immediately when the first restrictive measures were promulgated by Portugal in 1947. The Government of India has already

[1] Our italics.

shown that it exercised great restraint and forbearance in the face of the hostility of the Portuguese Government towards the independent people and Government of India. Portuguese restrictive measures started in 1947; they went on increasing and became intolerable about 1952. The fact that the Government of India lagged behind in retaliation and pursued for many years a policy of patience and forbearance cannot be held to work against India or to show anything but good faith on the part of India.

447. In paragraphs 266 and 267 of the Reply the Portuguese Government disputes the statement of the Government of India that it was the Portuguese policy of repression which obliged the Government of India to withdraw the exemption in favour of natives who were officials of the Portuguese Government. The Portuguese Government also states in paragraph 267 that the imprisonment of Dr. Gaitonde and similar acts of the Portuguese Government are not to be discussed in these proceedings. It states:

> "by their nature they are part of the domestic jurisdictional acts of the Portuguese authorities, carried out in conformity with Portuguese laws and in respect of Portuguese subjects".

The Government of India has described at paragraph 226 of the Counter-Memorial the manner in which Dr. Gaitonde, an eminent surgeon, was arrested by the Portuguese authorities for having uttered the words "I protest", in response to a statement made at a private dinner party by a speaker that "Goa is Portugal". For this utterance Dr. Gaitonde was arrested and taken to Lisbon and then deported to a prison island in the Atlantic. The Government of India also described the repercussions that followed in India after Dr. Gaitonde's incarceration. The Portuguese Government states that the Government of India withdrew the exemption in question a few days after sending its note of the 15th March and therefore it could have not been in retaliation to Portuguese repressive measures. As the Government of India pointed out, while Dr. Gaitonde's arrest took place in February and its repercussions were felt in India immediately upon such arrest, the fact is that Portuguese repression had begun and continued long before Dr. Gaitonde's arrest, and his arrest was only an important incident which further exacerbated feelings and emotions in India. While the Portuguese Government imposed restrictions on entry and residence of Indian nationals in Portuguese possessions, the Government of India desisted from withdrawing exemptions enjoyed by natives of the Portuguese possessions. However, the result of Portuguese acts and repressive measures, and the feeling and emotions aroused in India, particularly after the arrest of Dr. Gaitonde in February 1954, were such that the Government of India could not continue these exemptions in respect of those who were in the service of the Portuguese Government, whether European or native. Accordingly, in April

1954 the Government of India excluded those natives who were officials of the Portuguese Government from this exemption. The exemption was however continued in favour of the natives of Portuguese possessions who were not in the service of the Portuguese State.

448. Thus it will be seen that—

(1) The British Government required passports and visas from Portuguese European officials travelling from one part of Portuguese possessions to another.

(2) The British Government did not grant any exemption from such requirement in respect of travel between Daman and Nagar Aveli or Goa and Nagar Aveli.

(3) The Government of India made no "innovation" in the matter.

(4) In spite of Portuguese restrictive measures, Indian check on the borders of Goa and Daman was far from being strict.

(5) Strict surveillance at the Daman border was maintained after the Portuguese Government opened a check post at Dabel.

(6) The Portuguese Government introduced restrictive measures in 1947 in respect of entry and residence of Indian nationals in Portuguese possessions; and embarked on a policy of hostility towards the people and Government of India.

(7) Portuguese officials indulged in evasion of Indian rules and regulations relating to entry into and travel through India.

(8) The Government of India did not take any special measures for instituting restrictions in regard to travel between Daman and Nagar Aveli or between Goa and Nagar Aveli.

SECTION III

The insurrection in Dadra and Nagar Aveli and the establishment of a local de facto *Government*

449. While dealing with the facts of the insurrection in Dadra and Nagar Aveli and the establishment of a local *de facto* government in those territories in paragraphs 274 to 290 of its Reply, the Portuguese Government not only repeats misrepresentations of fact and allegations made in its earlier pleadings, but considerably enlarges on these misrepresentations of fact and allegations, and in particular makes the allegation that the Government of India had "co-operated in the attacks against Dadra and Nagar Aveli". (See paragraphs 275 and 276 of the Portuguese Reply.) The Government of India will in this Rejoinder correct afresh these misrepresentations of fact and will refute the allegations of the Portuguese Government made in its Application, Memorial, Observations on the Indian Preliminary Objection and the Reply.

450. In its Application of the 22nd December, 1955, thePortuguese Government set out the facts relating to the alleged right of passage from Daman to Dadra and Nagar Aveli in paragraphs 3 to 19. After setting out in paragraph 10 that:

> "the right of passage under reference contains in particular the faculty of transit of armed forces or other upholders of law and order, to the full extent required for the effective exercise of Portuguese sovereignty; and that right was always exercised with this latitude throughout the long span of time mentioned in paragraph 9 above" (i.e. "over a long period, almost 200 years"),

the Portuguese Government proceeded to assert that, "as a result of serious events" in July 1954, the above described factual situation, namely the alleged historical exercise of a right of passage, underwent a radical change, and thereafter India prevented Portugal from exercising the alleged right of passage. In other words, Portugal did not assert in her Application that before the events of the insurrection India had prevented her from exercising her alleged right of passage. Thereafter the Portuguese Government gave its account of the events of July 1954 in paragraphs 12, 13 and 14, and it then stated in paragraph 15:

> "In keeping with its duty and by the means within its power, the Portuguese Government attempted to come at once to the aid of these enclaves and their inhabitants, victims of an unjustifiable *armed attack* [1].
>
> Therefore it needed to despatch officials and forces across Indian territory, from Damão (littoral Damão) to the occupied enclaves..."

[1] Our italics.

451. In paragraph 23 the Portuguese Government addressed to the Court three requests which had no connection with, and were in no way dependent upon, the issues rising out of the misrepresentations of fact and allegations which it made on the subject-matter of the insurrection in Dadra and Nagar Aveli. Portugal's request to the Court was (1) to recognize a right of passage vested in Portugal, (2) to recognize and declare that India had prevented the exercise of the alleged right, and (3) to adjudge that India should allow the exercise of the alleged right. These being the requests addressed to the Court, the Portuguese Government made in paragraphs 12, 13 and 14 of the Application the following misrepresentations of fact and allegations against the Government of India:

> (1) On the 21st of July, 1954, the Government of India severed all communications between Daman and Nagar Aveli and prevented the Governor of Daman from having access to them.
>
> (2) The Government of India concentrated troops in considerable strength on Indian soil near the borders of the territories of Daman, Dadra and Nagar Aveli.
>
> (3) On the 21st of July, 1954, armed bands attacked Dadra and occupied it on the 22nd July, 1954, after fighting and bloodshed.
>
> (4) "Similar aggression" was started against Nagar Aveli.
>
> (5) The Portuguese garrison in Nagar Aveli was taken prisoner.

452. In its Memorial the Portuguese Government made misrepresentations of fact and allegations of a similar nature. In Section (D) of the Facts ("The change of attitude of the Indian Union and the events which have given rise to the present dispute"), the Portuguese Government gave its version of the breakdown from 1947 onwards of friendly relations and of the reciprocal regime of easy travel between the Indian Union and the Portuguese possessions in India, and proceeded to make the following assertions in paragraphs 35 and 36:

> (1) On the 21st of July, 1954, India cut off communications between Dadra and Nagar Aveli and the outside world. (Paragraph 35.)
>
> (2) India deployed considerable armed forces between Daman and Dadra and Nagar Aveli and these forces dug trenches along the frontier. (Paragraph 35.)
>
> (3) Armed bands from Indian territory attacked Dadra on the 21st July, 1954.
>
> > "The limited forces garrisoned at Dadra resisted the assailants; but since they did not have the necessary assistance, they were overwhelmed and the band of invaders occupied Dadra on the 22nd following bloodshed." (Paragraph 36.)

(4) A "fresh aggression" was started against Nagar Aveli.

> "In that case as well, Portuguese troops garrisoned at Nagar Aveli, though very limited in number, opposed the invasion; but, as in the case of Dadra, they were obliged to give way to superior numbers; and Nagar Aveli was occupied." (Paragraph 36.)

453. In its Preliminary Objection, the Government of India lost no time in correcting at the outset the misrepresentations of fact made by the Portuguese Government relating to the insurrection in Dadra and Nagar Aveli and denying the various allegations made by it against the Government of India. At paragraphs 4 to 29 of its Preliminary Objection the Government of India set out the facts relating to the movement for freedom from Portuguese rule of the inhabitants of Portuguese possessions in India and the circumstances which had led to the insurrection in Dadra and Nagar Aveli. In paragraph 22 of the Preliminary Objection, the Government of India denied in the most emphatic manner the Portuguese allegation that India had "cut communications" between Daman and Dadra and Nagar Aveli a day before the insurrection took place. The Government of India stated in that paragraph:

> "The fact is that only a day before the liberation of Dadra, that is, on 21 July 1954, the Governor of Daman was permitted by the Government of India to visit Dadra and Nagar Aveli and return to Daman."

In paragraph 23, the Government of India denied in the most emphatic terms the Portuguese allegation that India had deployed armed forces in the area and that these forces had dug trenches along the frontier. In paragraphs 7 to 16, the Government of India pointed out that the key to the understanding of the events which had taken place in Dadra and Nagar Aveli, and the causes and reasons for the same, was the existence of a movement of Goans for freedom from Portuguese rule, which movement existed in Dadra and Nagar Aveli as in other parts of Portuguese possessions in India.

454. In its Observations on the Preliminary Objection the Portuguese Government did not enter into a discussion on the facts and circumstances of the insurrection in Dadra and Nagar Aveli. In the Introduction to its Observations it stated that the account given by the Government of India in the Introduction to the Preliminary Objection was "manifestly outside the subject-matter of the dispute". It said:

> "The Portuguese Government has referred to the Court a dispute of a legal character. It has no intention of allowing it to be diverted into other spheres."

However, in an Annex to that pleading it proceeded to make certain observations on the Goan movement for freedom and the

facts and circumstances of the insurrection and to cite certain documents in that connection. (Annex 1 to the Observations.)

455. In the Counter-Memorial, the Government of India corrected afresh the misrepresentations of fact made by the Portuguese Government and denied all allegations and suggestions of the Portuguese Government that India was in any way responsible for the insurrection in Dadra and Nagar Aveli. In paragraphs 217 to 237 it set out the facts relating to the Goan freedom movement, the insurrection in Dadra and Nagar Aveli and the establishment of a local *de facto* government and referred to records and testimonies in Indian Annexes A and E.

456. In its Reply the Portuguese Government enlarged on its previous misrepresentations and allegations; it described the insurrection in Dadra and Nagar Aveli as "invasion", "armed attack" and "armed aggression"; and it alleged that India had "co-operated in the attacks", (1) by cutting communications between Daman and Dadra and Nagar Aveli, and (2) by deploying armed forces on the frontiers of Daman, Dadra and Nagar Aveli. The Portuguese Government also alleged in a general and indirect way (1) that India had instigated and fomented the insurrection and (2) that Indian nationals including members of Indian armed forces had taken part in the insurrection. Finally, the Portuguese Government alleged that the Portuguese police personnel of Dadra and Nagar Aveli had been "taken prisoner" by the Indian Government.

457. The Government of India, while maintaining its reservation in regard to the attempt by Portugal to raise an issue quite different from the request addressed by her to the Court (see Preliminary Objection, paragraph 196, Counter-Memorial, paragraph 6, and paragraphs 9 and 10 above), will now proceed to show that the representations of fact and allegations made by the Portuguese Government in its Reply, as in earlier pleadings, are false and without foundation and have been made deliberately in a manner calculated to prejudice the Court.

The allegation that India "cut communications" between Daman and the enclaves

458. At paragraph 277 of its Reply, the Portuguese Government repeated its allegation made in paragraph 35 of the Memorial that before the insurrection in Dadra and Nagar Aveli, the Government of India "cut off communications" between Daman and Dadra and Nagar Aveli. In the Reply the Portuguese Government went further than it did in the Memorial and it now alleged two motives for the alleged cutting of communications: (1) the motive to "facilitate the aggression", and (2) to "prevent Portugal from defending herself." In proof of its allegation that the Government of India cut communications between Daman and Dadra and Nagar Aveli, the

Portuguese Government has asserted that on the 20th July, 1954, the Government of India denied visa facilities to the Governor of Daman and prevented him from going to Dadra and Nagar Aveli.

459. As stated in paragraph 22 of the Preliminary Objection and paragraph 211 of the Counter-Memorial, the irrefutable fact is that even one day before the insurrection in Dadra and Nagar Aveli, the Government of India granted a visa to the Governor of Daman and allowed him to proceed from Daman to Dadra and Nagar Aveli and back. The Portuguese Government admits this fact at paragraph 277, sub-paragraph 5, of the Reply, but alleges that the Government of India, by demanding from the Governor of Daman production of a visa in a certain form, had introduced a new procedure in the matter in order to cause difficulty to him. The fact is that in July 1954, the Governor of Daman was well aware of the requirement of the production of a visa in a particular form, Form A and Form B, for permission for passage to and from the enclaves and that this matter had formed the subject of correspondence between him and the Chief Secretary to the Government of Bombay (Indian Annex F. No. 96). The Government of India is glad to find, however, that the Portuguese Government does not dispute the fact that on the 21st July, 1954, the Governor of Daman was in fact accorded the necessary visas and was allowed to proceed to and from Dadra and Nagar Aveli. In the submission of the Government of India this very fact refutes the allegation of the Portuguese Government that immediately before the insurrection the Government of India had "cut communications" between Daman and Dadra and Nagar Aveli.

460. In paragraph 277 of its Reply, the Portuguese Government gave an indication of another meaning attached to what it termed "cutting of communications". It described the breakdown of the reciprocal regime of easy travel which had once existed between Portuguese possessions and the rest of India and the extension of that breakdown to travel between Daman and Nagar Aveli as the "gradual obstruction of *communications*" [1]. At paragraphs 207 to 215 of its Counter-Memorial, the Government of India stated the facts relating to the regime of intercourse which had at one time obtained between Portuguese possessions in India and the rest of India and it described the manner in which this regime underwent change as a result of the restrictive measures initiated by the Portuguese Government, which measures were in themselves a manifestation of a general hostile attitude adopted by the Portuguese Government towards the Government of Independent India. The Portuguese Government gave its own account of this breakdown of relations at paragraph 259 and the following paragraphs in the Reply. While the Government of India does not accept the Portuguese version of these facts or acknowledge its own responsibility for the breakdown of relations between Portugal and India, it does

[1] Our italics.

find, as emerging from the accounts both of the Portuguese Government and the Government of India, the fact that a regime which applied to travel in general between Portuguese possessions in India and the rest of India, that between Goa and India, Daman and India, between Daman and Goa, between Goa and Dadra and Nagar Aveli, and between Daman and Dadra and Nagar Aveli, broke down in gradual stages, *and normal procedures, such as the requirement of passport and visas, came to be applied to such travel.* When the Portuguese allegation that India "cut communications" or "gradually obstructed communications" is seen in the light of this breakdown of relations between Portugal and India, it emerges that all that the Portuguese allegation amounts to is that even before the insurrection in Dadra and Nagar Aveli India denied to Portugal its alleged right of passage over Indian territory between Daman and Dadra and Nagar Aveli. The Government of India would like to observe that in making this allegation, the Portuguese Government has proceeded on the assumption that in July 1954, Portugal had a right of passage over Indian territory and that India was obliged not to regulate in the matter, not to demand visas from the Governor of Daman, not to prohibit the passage of firearms, munitions, or military equipment, over Indian territory between Daman and Nagar Aveli, nor to withdraw the various concessions which may have been granted in the past either by it or by its predecessor, on the basis of friendship and reciprocity. This assumption itself is disputed by the Government of India in the present proceedings. The Government of India never was and never considered itself to be under an obligation to grant passage to Portuguese authorities, armed forces, arms and ammunitions, etc., from Daman to Dadra and Nagar Aveli, or vice versa, or to waive the production of visas by the Governor of Daman or other officials of the Portuguese Government, or to grant a visa every time a request was made therefor.

461. However, the Government of India would like to reiterate the fact that, quite apart from its rights in the matter and the absence of a legal obligation on its part to permit passage over its territory, it did not impose a prohibition on passage from Daman to Nagar Aveli before the insurrection therein and it did not deny transit facilities to Portuguese authorities and their forces. As has been stated in paragraphs 209 to 211 of the Counter-Memorial, before the 1st April, 1954, natives of the Portuguese possessions, even if they were in the service of the Portuguese Government, could freely enter Indian territory and transit over any part of Indian territory. After the 1st April, 1954, however, natives of these possessions who were in the service of the Portuguese Government could enter Indian territory only after obtaining a Permit from the Government of India. The Government of India empowered, among other persons, the Collector and District Magistrate of Surat to issue such Permits. In his instructions dated the 13th May, 1954,

to the Collector and District Magistrate of Surat, the Passport officer of the Government of Bombay wrote:

> "Every application for permit should be disposed of on merits and a permit for such period as you deem fit should be issued. *There is no reason, however, to be specially strict.*"[1] (Indian Annex F. No. 97.)

In June-July, 1954, acting on the request of the Governor of Daman, the Government of Bombay appointed an extra person, the Additional District Magistrate of Surat, to issue such permits and thus expedite and facilitate the granting of the Portuguese requests in the absence of the District Magistrate on tour (Indian Annex F. No. 98).

462. The Portuguese Government has produced no evidence, nor does there exist any evidence, that since the Permit System was instituted in April 1954 it ever addressed a request to the Government of India for permission for transit from Daman to Dadra and Nagar Aveli of its armed forces or police for the purpose of augmenting the strength of its armed forces or police in these enclaves. Having made no such request, the Portuguese Government can have no justification now for alleging in the first place that India "cut communications", and in the second place that India had caused a "breakdown in communications", and thus "facilitated aggression" and "prevented Portugal from defending herself".

463. The true facts, as stated above by the Government of India, find corroboration in the very assertions of the Portuguese Government in paragraphs 251 to 253 of the Reply. There the Portuguese Government admits that, even a month or two before the insurrection in Dadra and Nagar Aveli, the Government of India began, at the request of the Portuguese Government, construction work on parts of the road between Daman and Nagar Aveli with the intention of facilitating travel between Daman and Dadra and Nagar Aveli. It stated in paragraph 253:

> "The construction of the culverts of Lavacha began on the 20th May, 1954... The foregoing shows beyond any possible doubt that the Portuguese, the English and the Indians all recognized our right of passage through the neighbouring territory to maintain our communications with the enclaves."

In the submission of the Government of India, while the Portuguese Government has sought to derive erroneous legal conclusions from the facts stated in the above-mentioned paragraphs of the Reply, the facts themselves have the merit of demonstrating that the Government of India had no intention of hindering communications between Daman and Dadra and Nagar Aveli.

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[1] Our italics.

The allegation that India deployed armed forces on the frontiers of Daman, Dadra and Nagar Aveli

464. At paragraph 35 of its Memorial the Portuguese Government alleged that the Indian Government "deployed considerable armed forces between Daman and the enclaves, as well as around the enclaves, and these troops dug trenches along the frontier", and at paragraph 278 of its Reply it repeated its allegations concerning "the concentration of Indian forces along our borders and between Daman and Nagar Aveli".

16 *(a)* In the Preliminary Objection the Government of India took the first opportunity of denying the allegation made in paragraph 35 of the Memorial, and it stated at paragraph 23:

> "the Government of India did not, contrary to what is alleged in the same paragraph, 'deploy considerable armed forces between Damão and the enclaves, as well as around the enclaves', nor were any trenches dug along the frontier. These allegations are wholly unfounded. The facts are that early in 1953 the Government of Bombay slightly augmented its police along the border in order to deal with increased smuggling and illegal traffic in the area. Smuggling, it may be added, has always been a problem along the frontier of Daman, as appears again and again in the correspondence between the British and Portuguese Authorities set out in Annex C to this Preliminary Objection."

465. In view of the Portuguese Government persisting in this charge, the Government of India would like to repeat here the fact that far from "concentrating" its armed forces on the frontiers of Daman, Dadra or Nagar Aveli, India had not in 1954 or at any other time stationed in the area in question any personnel of the armed forces. In paragraph 278 of its Reply the Portuguese Government have particularly alleged the presence of "Maratha infantry" in Indian territory adjacent to Daman, Dadra and Nagar Aveli. It will be recalled that these and similar allegations were made by the Portuguese Government at the time of the insurrection in Dadra and Nagar Aveli. These allegations were in the nature of a propaganda campaign against India and had no factual basis of any kind (Indian Annex F. No. 99). The Government of India does not feel itself under an obligation to answer these and other allegations of the Portuguese Government. However, out of respect for the Court and in order to vindicate its honour, it places on record a certificate from the Army authorities together with a summary account of the disposition of the Indian armed forces in a part of Western India in July and August 1954 to show that:

(1) In July and August 1954 there was no Indian military station within 92 miles of Daman, Dadra and Nagar Aveli.

(2) In July and August 1954 no troop movements took place either towards or in the region of Daman, Dadra and Nagar Aveli.

(3) In July and August 1954 Maratha battalions were nowhere near the areas in question, the nearest Maratha battalion being at Pathankot which is about 950 miles away from Daman, Dadra and Nagar Aveli (Indian Annex F. No. 100).

These documents are based on the "Order of Battle—Southern Command" and "Movement Reports for the year 1954" which are secret and confidential records of the Indian Army, and, but for its desire to give satisfaction to the Court, and to prove its integrity in the matter, the Government of India would have been very reluctant to produce them.

466. The Government of India would like to observe that, all along, its conduct *vis-à-vis* the Portuguese Government in India has been dictated by a policy of restraint and conciliation. India would have had every justification in bringing her Army to the borders of Goa and Daman by reason of the clearly provocative attitude taken up by the Portuguese Government. At paragraph 12 of its Preliminary Objection the Government of India described how, beginning in 1947, the Portuguese Government introduced into its possessions in India expeditionary forces consisting of several thousand European and African troops. The purpose of this introduction was (1) to suppress the nationalist movement [1] and (2) to provide provocation to India. According to the information received by the Government of India, Portuguese armed forces in their possessions in India rose from 861 in 1947 to 7,062 in early 1954. The Portuguese Government also increased its police force and miscellaneous guards. At Daman, in addition to the armed forces, there was a large number of police and guards. In Dadra and Nagar Aveli alone there were about 200 police equipped with arms and ammunition. Additional show of force was provided by the presence in Indian waters of Portuguese men-of-war [2].

467. The Government of India prides itself on the fact that in the face of this show of force and clear provocation it not only did not bring its army near Portuguese frontiers, but maintained on the borders of the Portuguese possessions police personnel having no proportion of any kind to the number of armed forces and police inside these possessions. The task of the Indian police personnel on the borders of the Portuguese possessions was to regulate entry into Indian territory and to prevent smuggling over the border. Smuggling over the Portuguese border, as the Government of India has had occasion to state at several places in its pleadings has been a perennial problem for Indian authorities. This problem has not been made any easier by the fact that the Portuguese authorities them-

[1] It is significant that the people of the Portuguese possessions made vehement protests and demanded the withdrawal of the Portuguese expeditionary forces. See Annex F. No. 115.

[2] These were "Pedro Nunes", Bortolomeu Dias", "Faial", "Goncalvo Velho" and "Afonso Albuquerque".

selves organized or gave aid to smuggling activities (Portuguese Reply, Annex 161, Note). However, in illustration again of the moderation of the Indian authorities, there were assigned for the task of controlling the entire borders of Daman, Dadra and Nagar Aveli from the point of view of entry of persons and movement of contraband no more than 77 men. These consisted of 3 sub-inspectors of police, 18 head constables, 44 ordinary constables and 12 reserve constables. This is set out in a report dated the 13th May 1954, from the District Superintendent of Police of Surat to the Chief Secretary of the Government of Bombay (Indian Annex F. No. 101).

468. The Government of India accordingly denies in most emphatic terms Portuguese allegations relating to "concentration" of Indian armed forces near or around Daman, Dadra and Nagar Aveli. It denies that Indian armed forces dug trenches around Daman, Dadra and Nagar Aveli. On the contrary the Government of India asserts that it was the Portuguese Government which, in a deliberate effort to whip up an atmosphere of war and emergency, dug trenches all along the Diu, Daman and Goa borders, threw up barbed wire fences at its frontiers and proclaimed virtual martial law in these territories (Annex F. No. 115).

Allegations that India instigated the insurrection and gave aid to the insurgents

469. The Portuguese Government has generally insinuated in its Reply that the Government of India (1) instigated the insurrection, and (2) gave help to the insurgents. Thus in paragraph 276 it asserted: "The Indian authorities encouraged the recruitment of volunteers prepared to act against Portugal and gave them military training." For this extraordinary statement which has no foundation of any kind the Portuguese Government relied on Annexes 157 and 158 to the Reply. These are "Information Service Bulletins" issued in the City of Goa under the hand of Portuguese police chief, Captain Romba and contain allegations made at second hand. The Government of India denies the veracity and worth of "information" bulletins issued in the City of Goa by a Portuguese police officer well-known for his anti-Indian and anti-Goan inclinations. It will be recalled that Captain Romba was the person responsible for practising a deception on two Goan leaders, Mr. Francis Mascarenhas and Mr. Waman Desai. (See Preliminary Objection, paragraph 13, and Counter-Memorial paragraph 225 and paragraph 493 below.) The Government of India had occasion more than once to protest against his behaviour towards Indian nationals. In one incident in which he was involved he man-handled an Engineer of the Bombay Port Trust who was on a visit to Goa and personally took part in a beating given by the Portuguese police to the Engineer's chauffeur, also an Indian national (Indian Annex F. No. 102).

470. In support of its allegation that the Indian authorities instigated the insurrection, the Portuguese Government produced, at Annex 161 to its Reply, another report from the same Captain Romba on a public meeting of Goans alleged to have been held in Bombay. Even in this report there is no mention of Dadra or Nagar Aveli or of any plan or instigation of an insurrection there.

471. At paragraph 281 (sub-paragraph 2) and paragraph 283 the Portuguese Government stated that soldiers from the Indian forces entered Dadra and Nagar Aveli. This statement is completely false and without foundation. As the Government of India has already stated above (paragraph 465) there were no soldiers anywhere near Daman, Dadra or Nagar Aveli. The Portuguese Government produced no support for this statement except another statement at paragraphs 276 *(d)*:

> "At the end of July, New Delhi Radio announced that regular forces of the Indian Union were marching to Nagar Aveli and intended proceeding to Silvassa."

In support of this statement the Portuguese Government relied on Annex 159 to the Reply which is seen to be a telegram from the Governor General of Goa to the Portuguese Minister for Overseas. This telegram reads:

> "Radio Delhi announced regular Indian Union troops left Nagar Aveli for Silvassa *(sic)*."

472. The Government of India would like to repeat that like other allegations relating to the insurrection in Dadra and Nagar Aveli made at that time by Portuguese representatives in India and by the Portuguese Government in Lisbon and now repeated in Portuguese pleadings in this case, the above allegation is false and without any foundation whatsoever. There were no members of the armed forces within 92 miles of the area; no Indian troops marched into Dadra and Nagar Aveli; and no announcement to the effect that Indian troops were marching on Nagar Aveli was made from New Delhi or any other station of All India Radio. The Government of India places on record a letter from the Director General of All India Radio to the effect that he has had the records of All India Radio carefully examined from the 12th July, 1954, to the 15th August, 1954, and found that no broadcast of this kind was made from any station of All India Radio (Indian Annex F. No. 103).

473. The Government of India accordingly repudiates in the most emphatic manner the insinuation of the Portuguese Government that it gave help or assistance to the insurgents of Dadra and Nagar Aveli either in personnel or material.

474. In its Reply, generally in the part dealing with the Post-Independence period, the Portuguese Government has dilated on the desire of the Government of India to see the end of Portuguese

rule in India and on its sympathy for Goans in their aspiration to participate in the national freedom of India. The Portuguese Government has sought to derive from the existence of these feelings the unwarranted conclusion that the Government of India must be presumed to have fomented and instigated the insurrection in Dadra and Nagar Aveli. The Portuguese Government have also spoken of an "annexation programme" of the Government of India and thereby sought to give the impression that India wishes to annex by force of arms Portugal's possessions in India. Nothing could be further from the truth. The Government of India has declared again and again that it has no wish to solve the problem of Portuguese presence in India by resort to force. This is on record and the attention of the Court is most respectfully drawn to the enunciation of policy made in this regard by the Indian Prime Minister which will be found at Indian Annex A. No. 11. The Indian Prime Minister states there:

> "the policy that we have pursued has been, even as in India under British rule, one of non-violence and we have fashioned our approach and conduct accordingly. This adherence to non-violence means
>
> (i) that we may not abandon or permit any derogation of our identification with the cause of our compatriots under Portuguese rule; and.
>
> (ii) *equally we may not adopt, advocate or deliberately bring about situation of violence.*" [1]

The fact is that all along the Government of India has counselled Goans and Indians to subscribe to a policy of restraint and non-violence, even in the face of gross provocation from the side of the Portuguese Government (Indian Annex F. No. 119). The Government of India accordingly repudiates the suggestion or insinuation of the Portuguese Government that India instigated the insurrection in Dadra and Nagar Aveli or incited the Goans to such action.

The allegation that Portuguese police personnel of Dadra and Nagar Aveli were taken "prisoner" by India

475. At paragraph 282 the Portuguese Government has given an entirely erroneous account concerning the Portuguese policemen of Dadra who were expelled by the insurgents and who entered Indian territory after such expulsion. In the Reply, the Portuguese Government has merely repeated the account, which was at first given by the Portuguese Legation in New Delhi, which account was later acknowledged to be erroneous by the same Legation in its note of the 12th August 1954 (Indian Annex F. No. 104). In that very note the Portuguese Legation dropped its earlier story that the police party from Dadra had been taken to a town called Pardi, later returned to Dadra and again expelled from Dadra. That story was

[1] Our italics.

based on a rumour circulated by the Governor of Daman and reported by the Portuguese Governor General to Lisbon.

476. At paragraph 283 the Portuguese Government stated in regard to the Portuguese police of Nagar Aveli:

> "The Portuguese officers were invited to discussions at the frontier with the Indian authorities but following the conference they were not given an opportunity to return to their troops. These troops were left without officers and were also finally taken prisoner by those authorities."

This account of the Portuguese Government of the flight of the Portuguese party from Nagar Aveli is also entirely erroneous. The fact is that, in spite of the Portuguese forces in Nagar Aveli being in some number and in the possession of a great quantity of arms, they deliberately, and of their own decision, abandoned the seat of the Administration at Silvassa. The Portuguese Government states in the same paragraph 283 that the Portuguese police party was "victorious" in "engagements" with the people of Nagar Aveli. While this clearly contradicts the assertions made elsewhere in the Reply that Portuguese police in Nagar Aveli did not have sufficient arms and were defenceless[1], the fact is that there were no "engagements". The fighting was unilateral and the Portuguese police went on shooting up the population of Nagar Aveli indiscriminately. (Annex F. No. 115.) The reason why the Portuguese police party came into Indian territory was that they met with the unanimous hostility of the local population who refused them food and drink, and it was largely on account of hunger and thirst that they took the first opportunity of entering Indian territory (Annex F. No. 115). The joy of the Portuguese police party on entering Indian territory is expressed clearly in the statements which were made to the press by the leader of the party, Captain Fidalgo, the former Administrator of Dadra and Nagar Aveli (Indian Annex F. No. 105). These statements also show quite clearly that Captain Fidalgo entered with his party into Indian territory of his own volition. The Portuguese Government has stated that the Portuguese police of Dadra and Nagar Aveli were kept as "prisoners". Nothing could be further from the truth. Portuguese personnel, which came into Indian territory after the insurrection in Dadra and Nagar Aveli, were shown every courtesy by the local Indian authorities who gave them food and accommodation and purchased them train tickets to Bombay. The Portuguese Government has evidently forgotten that at this time, on the 14th August, 1954, the Portuguese Legation in New Delhi had expressed to the Government of India its gratitude for the good treatment and hospitality afforded by the local Indian authorities

[1] Cf. paragraph 284 of the Reply: "The means of defence in the enclave of Nagar Aveli or in that of Dadra were negligible. All we had were very few police forces and very little material."

to Captain Fidalgo and his party who took asylum in Indian territory on the 11th August, 1954 (Indian Annex F. No. 106). The fact that Portuguese police personnel which came out from Dadra and Nagar Aveli were never prisoners of the Government of India is also shown by the fact that the sums which had been spent on their welfare—food, accommodation, and train tickets to Bombay—were charged to and paid by the Portuguese Government (Indian Annex F. No. 107). In Bombay, where members of the Portuguese police stayed with friends and relations, they were absolutely free to move about as they pleased and there their welfare was the responsibility of the Portuguese Consulate (Indian Annex F. No. 108). Captain Fidalgo, the former Administrator of Dadra and Nagar Aveli, and his wife stayed on in Bombay at their express request. Mrs. Fidalgo wished to get medical treatment in Bombay for a chronic ear condition and the Government of India granted her request for permission to stay on in Bombay for about a month (Indian Annex F. No. 109). At her request also, the Government of Bombay allowed her daughter to enter Indian territory from Goa and join her in Bombay. Soon after, Captain Fidalgo and his family left for Portuguese East Africa and the rest of the Portuguese personnel went to Daman and Goa as soon as the Portuguese Consulate in Bombay complied with Indian passport regulations on their behalf. The Portuguese Consulate however took time to comply with the passport requirements and hence the departure of Portuguese police personnel for Goa or Daman was somewhat delayed (Indian Annex F. No. 110). During investigation by Indian passport officers it also emerged that many of the police personnel had between April and July 1954 transited Indian territory *from Goa to Nagar Aveli* without compliance with Indian passport regulations. This was the subject of a strong protest by the Government of India to the Portuguese Legation in New Delhi (Indian Annex C. No. 86). The Portuguese Legation admitted the fact of the transit of the personnel concerned from Goa to Nagar Aveli but denied that such transit was in contravention of Indian laws. The argument of the Portuguese Legation was that since Portuguese personnel which went from Goa to Nagar Aveli were given police uniforms only in Nagar Aveli, they could not be said to have been in the service of the Portuguese Government while in transit and thus under an obligation to comply with passport requirements. This argument was rejected by the Government of India which continued to maintain its strong protest.

477. It will be seen from the above facts that the Portuguese allegation that Portuguese officers and troops of Dadra and Nagar Aveli were "taken prisoner" by the Government of India is utterly false and without foundation.

The question of impartial observation

478. In paragraph 287 of its Reply the Portuguese Government stated that when it mooted the question of "impartial observation" in August 1954, the proposal was rejected by the Government of India. As the Government of India will show, the facts are quite the opposite.

479. In the first place, the Portuguese proposal for "impartial observation" concerned not the insurrection in Dadra and Nagar Aveli but the situation in Goa and the *Satyagraha* which was proposed to be held there by the Goans on the 15th August. The Portuguese proposal was for "impartial observation" of the situation in Portuguese territories and in adjacent Indian territory (Indian Annex F. No. 111).

480. In the second place, it was not the Government of India which rejected the proposal, but the Portuguese Government which backed out from it. Thus, in its Notes of the 10th August addressed to the Portuguese Legation, the Government of India stated:

> "The Government of India also note with some gratification that it is the present view of the Portuguese Government that, as there are differences in opinions and in the positions held by the two Governments, there should be a joint endeavour by the two parties to ascertain facts and find solutions. To this end the Portuguese Government have proposed that there should be impartial observation and assessment of facts. The Government of India while rejecting the allegations, share the desire of the Portuguese Government, as now expressed, to make every effort to avoid violations of law and peace. Being further moved by the desire to find peaceful solutions, the Government of India readily accept the proposal of the Portuguese Government on the situation in the Portuguese possessions. The Government of India, therefore, request that the Government of Portugal appoint representatives immediately, to discuss with the representatives of the Government of India, ways and means of implementing the principle of impartial observation proposed by the Portuguese Government. The Government of India are only concerned that the method of such implementation should be impartial and peaceful. The detailed provisions set out by the Portuguese Government in their Note, however, are not, in their entirety or in material respects, considered by the Government of India practical or suitable. For that reason, among others, the Government of India have proposed that the representatives of the two sides should meet immediately to consider the steps to implement the principle of impartial observation, on which the two Governments are now agreed." (Indian Annex F. No. 112.)

481. The Portuguese Government, however, interpreted the above statement of the Government of India as amounting to rejection of "impartial observation". Without any loss of time, on the 14th August, the Government of India wrote to the Portuguese Legation:

"The Government of India desire to state that the Government of India's note of the 10th August, is and was intended to be a "prompt and clear acceptance", in principle, of the proposal of the Portuguese Government for impartial observation and report in respect of the situation in the Portuguese possessions. However, to remove the doubts raised by the Portuguese Government, in this regard, the Government of India reiterate their position that they accept, in principle, the proposal of the Portuguese Government and are ready to confer with the representatives of the Portuguese Government in regard to the implementation of the principle. The Government of India regret that they do not consider that the method for settling points in the manner set out in paragraph 12 of the Portuguese Government's note is either satisfactory or indeed practical. They further fail to see how exchange of notes can be a more speedy method or better calculated to resolve difficulties than a conference between the representatives of the two Governments. Such a conference could explore all questions, including terms of reference, the composition of observation teams, methods of operation of the principle of impartial observation and all other relevant questions. The Government of India are ready for such a conference."

(Indian Annex F. No. 113.)

482. On the 19th August the Government of India appointed their representatives for the proposed conference (Indian Annex F. No. 114). However, after the 15th August, 1954, the Portuguese Government lost all interest in "impartial observation" and it refused to attend any conference unless certain of its conditions were accepted by the Government of India in advance. In its note of the 24th August, the Government of India expressed their regret "that the Portuguese Government have failed to convey their agreement to a meeting of the appointed representatives of the two Governments on the 24th August as suggested by the Government of India or to propose any alternative date". It stated:

"It was the firm belief of the Government of India that a beginning had thus been made and conversation could begin. In their present Note (Number One) the Portuguese Government have expressed their unwillingness to proceed with the Conference between the representatives of the two Governments unless the Government of India agree in advance to certain conditions presented to them in the form of a demand, which on the face of them are matters which themselves should be subject of the Conference. Thus, the Government of India are called upon by the Portuguese Government to accept their propositions, instead of their being sought to be discussed and agreed at the Conference. The Government of India, in their desire to reassure the Portuguese Government of their earnest desire to avail themselves of the opportunity of the method of negotiation offered by the Portuguese Government's proposal, laid down no conditions for prior acceptance. They proposed and agreed themselves, that the several detailed propositions pertaining to methods and other details put forward by the Portuguese Government and which bear any relation to the agreed principle may be considered at the Conference. They also proposed and agreed that the parties, if they so desire, may consider other propositions rele-

vant to the purpose of the Conference. The Government of India have not said that there should be no agenda for the Conference. On the other hand, they assume, that, according to normal procedures, the Conference will agree on an agenda and the method of adopting it. The Government of India have set out clearly in their Notes that the purpose of a meeting of the representatives of the two Governments is the implementation of the principle already agreed between them." (Indian Annex C. No. 78.)

483. From the above it emerges clearly that the responsibility for the failure of the plan for "impartial observation" must rest squarely with the Portuguese Government which avoided attending a Conference with the Government of India.

* * *

484. Having thus demonstrated above that the Portuguese allegations—that India cut communications, deployed armed forces, instigated and abetted the insurrection and took Portuguese police as prisoners—are utterly false and without foundation, the Government of India will now proceed to deal with the misrepresentation of facts made by the Portuguese Government concerning the events of the insurrection inside Dadra and Nagar Aveli.

485. In its pleadings the Portuguese Government has invariably prefaced its description of the events of the insurrection in Dadra and Nagar Aveli with the words "aggression", "armed attack" and "invasion" (e.g., Application, paragraphs 13, 14 and 15; Memorial, paragraph 36; Reply, paragraphs 280 *et seq.*). At paragraphs 281 and 287 of its Reply the Portuguese Government gave its version of the events which had taken place inside Dadra and Nagar Aveli in July and August, 1954. For this account of the events the Portuguese Government relied on Appendix 2 to Annex 1 and Annex 17 to the Portuguese Observations on the Preliminary Objection, and Annexes 173 to 177 of the Reply.

486. The Government of India will begin by dealing first with the documents relied upon by the Portuguese Government:

Appendix 2 of Annex 1 to the Portuguese Observations are facsimile copies of cuttings from certain issues of Indian newspapers, the *Hindustan Standard* of the 23rd July, the 2nd and 3rd August, 1954, the *Hindustan Times* of the 2nd August, 1954, and an extract from *Goa Liberation Council Bulletin* of February 1955. An examination of these documents shows that, instead of supporting the account given by the Portuguese Government, they contradict it in a most serious manner. The *Hindustan Standard* of the 23rd July makes it clear that the insurrection in Dadra was brought about by a small number of Goans and a very large number of the inhabitants of Dadra and that it was the local population of Dadra which overcame and arrested the Portuguese police. The same issue

states that Goans did not bring any equipment with them and that whatever equipment they then had in their possession was taken from the Portuguese police. The *Hindustan Standard* of the 2nd August likewise makes it clear that the most active part in the insurrection in Nagar Aveli was taken by Warlis or Advisasis, the inhabitants of Nagar Aveli. The *Hindustan Times* of the 2nd August states the same fact. The *Hindustan Standard* of the 3rd August states that the Portuguese police of Nagar Aveli had abandoned Silvassa and left it free to be occupied by the insurgents and that they had taken with them a large quantity of arms, ammunition and cash. The *Goa Liberation Council Bulletin* states that the Indian Government did not give any kind of help or assistance to the insurgents. It reads:

> "Neither the Goans nor the Warlis had any guns to fight with and could have been swept off with 'a whiff of grape-shot'. The astonishing thing is that the Portuguese force withdrew from Silvassa, the administrative centre, without firing a shot. Tales of heroism have been circulated in Goa and conveyed to Lisbon of brave men fighting heroically against overwhelming odds until their ammunition was spent and they had to surrender to superior force consisting of Indian armed forces camouflaged as Goan volunteers. This is a fiction concocted to save the face of the Portuguese and to keep up the morale of the people."

Annex 17 to the Portuguese Observations on the Preliminary Objection is a speech delivered by the Portuguese Prime Minister on the 30th November 1954. The Portuguese Government have directed attention to page 58 where, in a brief paragraph, the Portuguese Prime Minister gave an entirely erroneous and slanderous account of the insurrection in Dadra and Nagar Aveli, and made the same kind of allegations against the Government of India as were contained in official communiqués of the Portuguese Government issued at that time. It must, therefore, be seen to be not as a document supporting a statement of fact made by the Portuguese Government in its pleading, but rather as evidence of the fact that, since that time, the Portuguese Government has carried on relentless propaganda against the Government of India.

Annex 173 to the Reply is a telegram from the Governor General of Goa to the Portuguese Minister for Overseas at Lisbon dated the 24th July, 1954. It reads:

> "Governor Damão informs reports from person arrived yesterday Damão having had direct knowledge events Dadra leads to believe 3 or 4 dead on our side and 3 or 4 dead plus several injured on enemy side... *Our troops opened fire following intimations for surrender*[1] made from loudspeaker installed motorcar and resistance lasted about one hour... The invaders Dadra numbered over 500..."

The falsity of this information is exposed by the very accounts which were later given by the Portuguese Government. As was

[1] Our italics.

later admitted by the Portuguese Government only one person had died in Dadra at the time of the insurrection. As was also admitted by the Portuguese Government and was corroborated by accounts published by the insurgents and which appeared in newspapers, only a handful of unarmed Goans had gone into Dadra (Indian Annex F. No. 115). However, if the number 500 given in the Portuguese Governor General's account included the population of Dadra, the telegram of the Portuguese Governor General has the merit of admitting that the major part in the insurrection was taken by the local population. This account has also the merit of making it clear that violence did not emanate from the demonstrators. The demonstrators asked the police to surrender and the police answered by opening machine gun fire on them. It was this act of the Portuguese police which provoked the demonstrators to retaliate and resulted in the death of the very policeman who had opened the fire.

Annex 179 is a communiqué issued by the Portuguese Minister for Overseas on the 26th July on the basis of the above-mentioned telegram of 24th July. It embellished the facts stated by the telegram and set them in heroic colour.

Annex 175 is a Note from the Portuguese Legation at New Delhi to the Government of India. This Note repeated the account contained in the communiqué and asserted that the Portuguese police which were ejected from Dadra had been taken as prisoner to the Indian town of Pardi. Annex 176 is a telegram from the Portuguese Governor General to the Portuguese Minister for Overseas repeating the assertion that Portuguese police of Dadra had been taken as prisoner to the Indian town of Pardi. As the Government of India has stated above, in paragraph 475, on the 12th August, 1954, the Portuguese Legation itself gave a different account and admitted that the Portuguese police personnel of Dadra had never been taken to the Indian town of Pardi. Annexes 173 to 176 all of which contain the "Pardi" story thus stand contradicted by the Portuguese Legation note of the 12th August, 1954 (Indian Annex F. No. 104).

Annexes 177 to 181 are notes from the Portuguese Legation at New Delhi concerning the Portuguese police personnel from Dadra and Nagar Aveli who were waiting in Bombay pending compliance with passport formalities by the Portuguese Consulate on their behalf. As has been stated in paragraph 476 above, the Portuguese Consulate was responsible for delay in the departure of Portuguese personnel from Bombay, where, as was shown in the same paragraph, they were absolutely free men and staying with their friends and relations.

487. The above documents constitute the evidence of the Portuguese Government for its assertions in paragraphs 280 to 285 of the Reply concerning the events in Dadra and Nagar Aveli. The Govern-

ment of India has demonstrated that these documents contradict each other and contain statements which are false and without foundation.

488. In the submission of the Government of India the true facts of the insurrection in Dadra and Nagar Aveli are those which have been set out in paragraphs 10 to 16 of the Preliminary Objection and paragraphs 217 to 237 of the Counter-Memorial. As the Government of India pointed out in paragraph 217 of its Counter-Memorial, for its statement of the facts relating to the insurrection in Dadra and Nagar Aveli, it relies on the accounts published by Goans and inhabitants of Dadra and Nagar Aveli and the accounts which appeared in the Indian press (Indian Annex F. No. 115). The Government of India is glad to find that the Portuguese Government also seeks to rely on the same sources. (See Appendix 2 to Annex 1 to the Portuguese Observations on the Preliminary Objection, and paragraphs 485 to 487 above.) These accounts reveal the following main features:

(1) The insurrection in Dadra was spontaneous and sudden and was the result of Portuguese repression of a movement for freedom from foreign rule.

(2) Goans and local inhabitants of Dadra and Nagar Aveli, all Portuguese subjects, rose against Portuguese authority and set up a government of their own.

(3) Indian authorities gave no help or assistance of any kind to the insurgents.

(4) Indian nationals did not take part in the insurrection in Dadra and Nagar Aveli.

(5) Goans who went into Dadra and Nagar Aveli were small in number and carried no arms or ammunition.

(6) At that time, both under Portuguese and Indian laws, movement of native Portuguese subjects between Indian territory and Portuguese possessions was free and unregulated.

(7) The demonstration in Dadra was originally peaceful and non-violent. It took a violent turn when provocation was furnished by the Portuguese police which opened machine gun fire on unarmed persons.

(8) No casualties were suffered by the Portuguese police in Nagar Aveli. The Portuguese police force withdrew from Silvassa, the administrative capital, and voluntarily entered Indian territory after being denied food and drink by the local population for several days. When they entered Indian territory they were shown every courtesy and kindness by local Indian officials.

(9) The insurrection was immediately successful and the people of Dadra and Nagar Aveli set up their own government, independent and effective in every way.

(10) The people of Dadra and Nagar Aveli and the Administration set up by them have since then been firmly determined not to submit to resubjugation by Portugal.

(11) The people of Dadra and Nagar Aveli and their Administration addressed several requests to the Government of India for merger of Dadra and Nagar Aveli in Indian territory. Towards these requests the Government of India has maintained till now an attitude of reserve.

489. In the submission of the Government of India the Portuguese version of the events of the insurrection in Dadra and Nagar Aveli is nothing but a distortion of the truth. The Portuguese Government has given the peaceful liberation of Dadra and Nagar Aveli the name of "armed aggression". However, even according to the Portuguese Government, in the entire insurrection which took place, no more than two persons are stated to have died out of a population of about 41,523. The Portuguese Government has tried to give the seizure of the administration in Dadra and Nagar Aveli by Goans and inhabitants of the enclaves the colour of a major armed conflict and it has described the insurrection as an "invasion". However, the fact is that the insurrection was not armed and was in the nature of a bloodless seizure of power by unarmed demonstrators, who were all Portuguese subjects. The only act of violence against Portuguese authority which occurred in Dadra was unpremeditated and it took place because of sudden provocation provided by machine gun fire on a peaceful and unarmed demonstration. This is fully borne out by the accounts published by Goans and the inhabitants of Dadra and Nagar Aveli (Indian Annex F. Nos. 115 and 117, and E. No. 63.) The very accounts relied upon by the Portuguese Government constitute the clearest rebuttal of the Portuguese allegations and the clearest support for the facts stated by the Government of India.

490. As the Government of India has stated above in paragraph 488, the key to the understanding of the events which took place in Dadra and Nagar Aveli, the causes and reasons for the same, is the existence of the movement of Goans for freedom from the Portuguese rule and the fact of the identity of the people of Portuguese possessions in India with the rest of the population of India from the point of view of race, religion, language and national aspiration. The movement of these people for freedom from the foreign rule obtained in Dadra and Nagar Aveli as in other parts of the Portuguese possessions in India. This movement was not created by the Government of India. It existed even before India attained her independence. In its Preliminary Objection and Counter-Memorial the Government of India demonstrated the identity of the people of Goa, Daman, Diu, Dadra and Nagar Aveli with the people of the rest of India and their common aspiration for deliverance from foreign rule, which aspiration existed even before India attained her indepen-

dence from British and French rule. (See paragraph 4 *et seq.* of the Preliminary Objection and paragraphs 218 *et seq.* of the Counter-Memorial.) The main points which emerge from the facts and documents cited in that connection in the Preliminary Objection and Counter-Memorial are:

(1) The people of Goa, Daman, Diu, Dadra and Nagar Aveli are in no way different from the people of the surrounding Indian regions and have close connections with people in India.

(2) No less than 150,000 Goans reside in India out of which at least 80,000 to 90,000 reside in the State of Bombay.

(3) Natives of Goa, Daman, Diu, Dadra and Nagar Aveli could, till recently, come and go between these territories and neighbouring India without any formalities, and they had constant and close connections in Indian territory.

(4) There was in Portuguese possessions in India a movement for freedom from Portuguese rule which had its origin in 1928 and earlier. There was even before that date a long history of revolt and rebellion from Portuguese rule.

(5) In March, 1946, more than one year before India attained independence, Goans intensified their demand for freedom from Portuguese rule [1].

(6) The Portuguese Government suppressed this peaceful and non-violent movement with the utmost cruelty and introduced into Goa, Daman and Diu several thousand European and African troops.

(7) The result of Portuguese repression was that the Goan liberation movement went underground and many Goans fled to India and joined Goan communities in Bombay.

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[1] It is significant that even Dr. Salazar recognized and gave public expression to the fact that the fulfilment of Indian aspirations on the part of the British had a tremendous effect on the imagination of the people of Portuguese possessions in India. Thus on the 21st November, 1947, he stated:

"It is natural that the gale which swept India should have stirred up the people of Goa as well..."

on the 20th October, 1949:

"... the very magnitude of the historic occurrence across the frontiers had given rise to (similar) aspirations...".

In a speech delivered on the 30th November, 1954, he said:

"There is no denying that this tremendous fact of the English withdrawal and the placing of the future of India in the hands of her people brought a threat of moral crisis for little Goa."

Earlier in the speech he had admitted that the "crisis" had begun with the enactment of the Colonial Act in 1930:

"The discontent of Goans over the ideas contained in the Colonial Act of 1930 must be seen as the starting point of the crisis."

(See Portuguese Observations, Annex 17.)

(8) The new Government of independent India took up the question of foreign enclaves with the French and Portuguese Governments. A friendly settlement was reached with the French Government, but the Portuguese Government refused to enter into discussions of any kind.

(9) The totally intransigent attitude of the Portuguese Government further intensified the Goan freedom movement, and Goans, both in Portuguese possessions and in India, increased their agitation against Portuguese rule.

(10) Inside the Portuguese possessions, Portuguese Government met this freedom movement with severe repression which was characterized by:

(i) Complete denial of civil liberties, absence of freedom of expression, assembly, etc., total censorship of press and publication.

(ii) Infliction of physical punishment on nationalists meted out on the spot by Portuguese military and police;

(iii) Imposition of long terms of imprisonment and deportation to prison islands in the Atlantic.

(11) In 1953-54, Portuguese acts of repression and provocation were more than the Goans could bear, and in 1954, the months of March, April, May, June and July saw the Goan freedom movement at its highest pitch (Indian Annex F. No. 115). This heightened feeling and excitement touched off an insurrection in Dadra and Nagar Aveli and Goans and inhabitants of Dadra and Nagar Aveli proclaimed themselves independent of Portuguese rule and set up an administration of their own.

491. In its Introduction to the Observations on the Preliminary Objection, the Portuguese Government described the facts relating to the Goan freedom movement as having no connection with the case and being "manifestly outside the subject-matter of the dispute". It said: "The Portuguese Government has referred to the Court a dispute of a legal character. It has no intention of allowing it to be diverted into other spheres." The Portuguese Government, however, proceeded to make a certain number of observations with regard to the facts relating to the Goan freedom movement at Annex 1 to the Observations. There the Portuguese Government denied the testimony of its own historians as to the nature of Portuguese conquest and domination in India and even disputed the fact of the identity of the inhabitants of Portuguese possessions with the people of India. In its Reply, the Portuguese Government referred at paragraph 290 *(a)* to the same Annex 1 to its Observations and at paragraph 280 *(f)* it referred to "a small volume containing certain scholarly testimonies by highly qualified persons" which it presented at Annex 195. This Annex is intended by the Portuguese Government to demonstrate that there is no identity between

the populations of Portuguese possessions in India and the rest of India, and that there does not exist a Goan freedom movement. The Government of India will likewise examine in a separate Annex the worth and veracity of the testimonies produced by the Portuguese Government, comment on the various observations made in the above-mentioned Annex 1 and Annex 195, and it will let the argument regarding the identity of the two populations and their national aspirations be decided by the testimony of Goans themselves. It will accordingly produce in that Annex the writings and public pronouncements made by Goans from about 1928 onwards (Indian Annex F. No. 115).

492. As regard the existence of the Goan freedom movement, the Portuguese Government stated in paragraph 290 (d) of the Reply:

> "The Portuguese Government categorically rejects in their entirety the political assertions produced by the Indian Union in these proceedings but, we repeat, it is unwilling to initiate on this point discussion which has no place here. These assertions merely reproduce other assertions made outside these proceedings which have also been duly refuted outside these proceedings."

493. In the view of the Government of India, however, it is necessary to study the facts of the Goan freedom movement for a proper understanding of the insurrection in Dadra and Nagar Aveli. This insurrection was the result of the existence of a movement for freedom from foreign rule and of its suppression by the Portuguese Government. At paragraph 13 of the Preliminary Objection and paragraph 225 of the Counter-Memorial, the Government of India described the manner in which the Portuguese police chief, Romba, wrote to certain leaders of the Goan freedom movement at Bombay and invited them to Daman for discussions on the political future of the Portuguese possessions in India. In his letter, Captain Romba informed them that he had powers conferred on him by the Ministerial Act promulgated by the Overseas Ministry for the purpose of intervening in the political problems of this nature, relating to Goa, Daman and Diu (Indian Annex A. No. 5). Having lured the Goan leaders to Daman, Captain Romba arrested them and subjected them to indignities. For the convenience of the Court, paragraph 225 of the Counter-Memorial is reproduced below:

> "On the 7th August, 1953, the same Captain Fernando R. Romba, the Chief of the Police of the Portuguese possessions, wrote to Mr. Francis Mascarenhas, President of the United Front of Goans at Bombay, inviting him to Daman for discussions on the future of the Portuguese possessions in India. Captain Romba said in the letter that he was empowered by the Overseas Ministry at Lisbon to discuss all political problems regarding Goa, Daman and Diu. (Indian Annex A. No. 5.) After an exchange of telegrams, and having received the necessary assurances, Mr. Mascarenhas, accompanied by Mr. Waman Desai, Secretary of the United Front of Goans, and a party of four, left Bombay for Daman. At Daman they were received

by the Acting Governor. On the 13th August, 1953, at 3 a.m., an agreement was signed. However, as Mr. Mascarenhas and his party were leaving the building, they were suddenly arrested by the police in the presence and at the orders of Captain Romba, and the signed documents as well as other papers were seized from them. After three days of detention and rough treatment Mr. Mascarenhas and his party were let off and conducted to the border."

The above incident was related in some detail by the brother of Francis Mascarenhas, one Mr. G. Mascarenhas, who approached the Government of India and sought its intervention in securing the release of his brother (Indian Annex F. No. 116). In his account he states:

"At Damão the members of the party were introduced to Commandante Romba and other high officials. With the exception of my brother who was housed at the Governor's Palace, boarding and lodging arrangements were made for the other members of the party at a Hotel in Damão. From the day of their arrival in Damão and for the following two days the party used to meet Commandante Romba regularly every morning and evening at the Governor's Palace for discussions in the matter. The meeting which was convened on the 13th evening went on till the early hours of the 14th with the result that even the lighting restrictions had to be relaxed. At this meeting which concluded at about 3 a.m. on the 14th they were supposed to have arrived at a final arrangement. The agreement was accordingly typed out and signed by Commandante Romba and Shree F. Mascarenhas respectively after being thoroughly scrutinized by the Legal Adviser of the Portuguese Government who was also present on that occasion. The meeting then terminated and as the members of F. Mascarenhas party were leaving for their hotel at about 4 a.m. a Police party surrounded the place and put them all under arrest. The signed document and other papers were then taken possession of. With the exception of Pereira and Ferdinands the other members viz. Waman Desai, Mudras and Barreto were hand-cuffed. The arrested persons were then taken charge of and they were interrogated by turn. It was while they were at the palace that Ferdinands noticed Shree F. Mascarenhas being taken away. His personal belongings which were detained in the palace were inspected in the presence of the rest of the party. Commandante Romba it appears offered to pay Ferdinands for the services rendered by him as a Photographer from Shri F. Mascarenhas' purse which he declined to accept."

The Government of India has already stated in paragraph 469 above some facts relating to the character and activities of Captain Romba. It would like to repeat its observation that it is on the baseless rumours and reports circulated by this personage that the Portuguese Government relies for evidence in support of its allegations against India.

494. The above acts of provocation to certain leaders of the Goan freedom movement were followed by other acts of similar nature. The uproar which resulted from these acts was silenced in the

Portuguese possessions with unprecedented severity. Press reports of that time, some of which are appended at Indian Annex F. No. 115, shew that stringent censorship controlled expression of opinion in the Portuguese possessions. Infringements of Portuguese press laws were dealt with severely and newspapers in Goa were required to keep security deposits with the Government. There was no freedom of association. No public meeting or assembly could be convened without previous permission of the authorities and every speech intended to be delivered at such meeting had to be seen and passed by the Censor. Special powers were given to the police and under the laws the Court could not question the legality of police proceedings or permit the assistance of advocates when such proceedings were in progress (Indian Annex F. No. 115).

495. As stated in paragraph 14 of the Preliminary Objection and paragraph 226 of the Counter-Memorial, in February 1954, an eminent Goan surgeon, Dr. Gaitonde, was incarcerated by the Portuguese authorities for having uttered at a private dinner party the simple words "I protest" in response to a statement made by an after-dinner speaker that "Goa is Portugal". Dr. Gaitonde was taken to Lisbon and his trial opened there on the 6th July, 1954. On that day it was stated in the Court:

> "The trial is being held in Lisbon to avoid the environment of excitement it would have caused had it been held in Goa." (Indian Annex F. No. 115.)

This was in itself a tacit admission of the fact that public feeling in Goa (and in India) was highly inflamed by Dr. Gaitonde's arrest, trial and final deportation to a prison island in the Atlantic. A great number of protest meetings and demonstrations were held by Goans both in Goa and in India. The Portuguese Government met this agitation in the Portuguese possessions by making further arrests of eminent Goans, advocates, doctors and teachers and subjected a great many others to interrogation and house search. The news of these further arrests produced the strongest emotions in the Goan population of Bombay (Indian Annex F. No. 115).

496. The Government of India protested to the Portuguese Government and informed them that repression of this kind was likely to have severe repercussions in India, repercussions for which the Government of India could not be held responsible (Indian Annex A. No. 6). The Portuguese Government, however, persisted in its attitude and stated in a communiqué of the 3rd July, 1954:

> "When such activities take place in national territory and, moreover, when they are carried out by Portuguese citizens, they are exclusively a matter for the competence of the Portuguese authorities. In such matters any intervention of foreign countries is inadmissible." (Indian Annex F. No. 118.)

Thus the Portuguese Government, while it recognized the existence of a movement by Portuguese subjects, asserted its sole competence to deal with its subjects. It was in the same month, July 1954, that Francis Mascarenhas and Waman Desai, Goans, subjects of Portugal and victims of Captain Romba's deception and ill-treatment, undertook direct action against Portuguese authority in Dadra.

497. The Government of India, accordingly, submits that the insurrection in Dadra and Nagar Aveli must be seen in the light of the aspirations of the people of Portuguese possessions for independence from foreign rule and of the denial of those aspirations by the Portuguese Government.

498. The Government of India would like to draw the attention of the Court to the fact that the Portuguese Government is either unable or unwilling to acknowledge the existence of the aspirations of the people of Portuguese possessions in India and the movement of Goans directed towards the extinction of Portuguese rule in India. In the same manner, the Portuguese Government does not wish to take account of the fact that there is in Dadra and Nagar Aveli a people and government independent of Portuguese rule who have made remarkable progress on the social, economic and educational fronts, progress of the kind never achieved in a hundred years or more of Portuguese rule. Thus at paragraph 290 *(a)* of its Reply, referring to the Report of the independent Administration of Dadra and Nagar Aveli published by the Goa League of London, the Portuguese Government states:

> "The Indian Government has appended to its Counter-Memorial a booklet which is entirely devoid of value both from the point of view of its contents and its origin. The subject-matter of this booklet falls outside the limits of these proceedings and it is unnecessary, therefore, to review it although it would be extremely easy to do so. In accordance with the position it adopted from the very beginning, the Portuguese Government confines itself to stating that it does not accept the assertions contained therein."

No other comment was made by the Portuguese Government on the establishment of a *de facto* local government in Dadra and Nagar Aveli.

499. As stated in paragraph 16 of the Preliminary Objection and paragraph 229 and the following paragraphs in the Counter-Memorial, the insurrection in Dadra and Nagar Aveli was immediately successful and the people of those territories having proclaimed their independence from Portuguese rule set up an Administration of their own. This Administration, with legislative, judicial and executive machinery of its own, has effectively functioned in these territories and has much achievement to its credit. (Indian Annex F. No. 117.)

500. As also stated in paragraphs 232 to 237 of the Counter-Memorial on a number of times the people of Dadra and Nagar

Aveli and the Administration of the *de facto* local government there have expressed their hatred of Portuguese colonial rule and their determination not to submit to re-subjugation by Portugal, and they have on a number of times requested the Government of India to accept the merger of these territories with greater India (Indian Annex E. Nos. 64, 65, 66, 67 and 68). However, the Government of India has up to the present maintained an attitude of reserve towards those requests.

501. In the submission of the Government of India, if at all proof is required of the bona fides and integrity of the Government of India and its policy of moderation, restraint and patience *vis-à-vis* the problem of Portuguese possessions in India, it is to be found in the fact that in spite of innumerable requests from the people and Administration of Dadra and Nagar Aveli and considerable pressure of public opinion, it had even in the eighteen months preceding Portugal's Application to the Court continued to maintain an attitude of reserve towards these requests.

502. The Government of India, while adhering to its reservation in paragraphs 9 and 457 above, has thus demonstrated that Portuguese assertions in the matter of the alleged responsibility of India for the insurrection in Dadra and Nagar Aveli are false and without foundation; that the Government of India had nothing to do with the insurrection in Dadra and Nagar Aveli which was spontaneous and which was made by Portuguese subjects; that the insurrection in Dadra and Nagar Aveli was a part of the Goan freedom movement, which had its origin in 1928 and earlier, and which gathered strength on the eve of the independence of India; that the people of Portuguese possessions were driven to this form of direct action against Portuguese Government because of total intransigence of the Portuguese Government, coupled with severe repression in Portuguese possessions; that the immediate provocation for the direct action lay in the incident in Daman for which Captain Romba, the Portuguese Chief of Police, was responsible, and in the repression that followed the incarceration of Dr. Gaitonde; and that Francis Mascarenhas and Waman Desai, two Portuguese subjects and leaders of the liberation movement, were the victims of Captain Romba's deception in Daman.

Part II

THE RIGHT CLAIMED BY PORTUGAL

503. In Part III of the Counter-Memorial the Government of India made a careful analysis of the Portuguese claim, pointing out both its dubious legal character and the marked difference of emphasis in its presentation—on the one hand, in the Application and Memorial, and on the other in the proceedings on the Preliminary Objection. The Portuguese Government complains that its claim has been misrepresented by India and it devotes Part I of the Reply to criticizing some of the points in India's analysis of the claim and to setting out its own conception of Portugal's alleged rights. India's views on this matter have already been put before the Court in the Counter-Memorial and in the proceedings on the Preliminary Objection, and it is not proposed to go over all the same ground again. The somewhat tendentious account of the whole matter found in Part I of the Reply does appear, however, to call for some comment.

504. In the Reply, as in the proceedings on the Preliminary Objection, Portugal protests that she claims no immunity from the exercise of India's sovereignty nor any right to share with India in the exercise of any part of the latter's territorial sovereignty, but merely a bare right of transit across India's territory. Thus, in paragraph 25, she says:

> "Le Gouvernement portugais s'étonne de voir poser cette question, à laquelle il lui semblait avoir répondu d'avance. Faut-il répéter qu'il ne songe pas à contester que l'Union indienne possède sur son territoire une compétence exclusive, en ce sens qu'elle seule peut y exercer tous les attributs de la souveraineté? Faut-il répéter qu'il n'entend donc pas soustraire les personnes et les biens en transit à l'exercice de la souveraineté locale? *Faut-il rappeler que tout ce qu'il demande, c'est qu'en exerçant sa souveraineté, l'Union indienne le fasse dans les conditions qui n'empêchent pas le Portugal d'exercer la sienne sur les enclaves?*"

505. Summing up her argument in paragraph 28, Portugal again says:

> "La question qui se pose n'est pas, en effet, de savoir si la compétence de l'Inde est exclusive, en ce sens qu'elle seule est qualifiée pour l'exercer. *La question est de savoir si cette compétence est discrétionnaire ou si elle est soumise à l'obligation de ne pas faire obstacle au transit nécessaire pour que le Portugal puisse exercer effectivement sa souveraineté sur les enclaves.*"

506. In the view of the Government of India, these two passages in the Reply are simply an ingenious attempt by Portugal's counsel

to turn the issue in the case inside out—to make the issue appear to be the question of India's obligations with regard to Portugal's exercise of Portuguese sovereignty in the enclaves, instead of what it actually is, the question whether Portugal possesses an exceptional right of transit requiring India to waive, to a certain extent, in favour of Portugal, the normal exercise of her exclusive sovereignty in the Indian territory lying between Daman and the enclaves. It was the principle of "the exclusive competence of the State *in regard to its own territory*" which Judge Huber said had been established during the last few centuries in such a way as to make it the point of departure in settling most questions that concern international relations (see paragraph 161 of India's Preliminary Objection). Portugal, while paying lip-service to India's exclusive competence in regard to the territory between Daman and the enclaves, is really asking the Court to take as its point of departure for determining a claim to transit over Indian territory, not India's exclusive competence over the territory in question, but Portuguese sovereignty in another territory. This seems to be a complete perversion of the fundamental principle of international law mentioned by Judge Huber.

507. Portugal's whole thesis concerning the nature of the issue in the case hinges upon the proposition that her claim does not involve, and never has involved, any claim to immunity from the exercise of India's exclusive sovereignty in regard to the Indian territory in question. This proposition cannot be accepted for the several reasons which have already been adumbrated by India in her Counter-Memorial.

508. One reason is that it is not true historically that Portugal has never claimed immunity from the exercise of India's sovereignty, as was pointed out in paragraph 246 of India's Counter-Memorial. In both 1818 and 1859 the Portuguese authorities in India claimed, in the most distinct manner, exemptions from customs duties and taxes for goods in transit between the enclaves and Daman, alleging that these exemptions were due to them under the Treaty of Punem. The fact that this claim was completely repudiated by the British authorities does not alter the fact that it was the claim made by Portugal at those dates. In her Reply Portugal avoids this difficulty by simply not noticing the historical facts recounted in paragraph 246 of the Counter-Memorial. She baldly asserts that the claim is, and has always been, a claim to a bare right of transit without immunity. Yet nowhere in all the voluminous records in the case can be found anything resembling this formulation of the Portuguese claim—not even when the Portuguese authorities were objecting to such important local measures as the total embargo on the importation of salt from Daman in 1895 and of dates in 1912.

509. Another serious obstacle to Portugal's proposition is that, under an established rule of customary international law, foreign

troops in transit over a State's territory are accorded immunity from the local jurisdiction in respect, at least, of their internal discipline and administration. The Government of India drew attention to this difficulty in paragraph 257 of the Counter-Memorial and referred to G. P. Barton's scholarly discussion of the immunities of foreign troops in Volumes 26 and 27 of the *British Year Book of International Law*. Portugal's technique—it can hardly be called an argument—for disposing of this difficulty is really rather extraordinary.

510. Portugal says that Barton's articles in the British Year Book were concerned only with the immunities of foreign troops coming to and sojourning on a State's territory pursuant to the latter's unsolicited invitation, and do not therefore support the inference drawn from them by India. It is, of course, perfectly true that the subject of Barton's two articles was the immunities of "visiting" forces, the practice in regard to which has developed so largely in the past thirty-five years. Inevitably, however, Barton was led to refer to troops in transit *because the leading case on the whole subject, the famous case of the Schooner Exchange, concerned the immunities of troops in transit.* In fact, the earlier article in Volume 26 on immunity from supervisory jurisdiction contains numerous references to the case of troops in transit, of which it must suffice to mention two.

511. On page 383, Barton cites the following significant passage from the judgment of Chief Justice Marshall in the *Schooner Exchange:*

> "A third case *in which a sovereign is understood to cede a portion of his territorial jurisdiction is, when he allows the troops of a foreign prince to pass through his dominions.*
>
> In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the Sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. *The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the Government of his army may require.*"

By way of comment upon this passage, Barton emphasizes that the Chief Justice was there referring to the case of the *transit of foreign troops through a territory*, not to the case of foreign troops visiting and sojourning in a territory. Barton certainly distinguishes the case of troops in transit from that of visiting troops and goes on to point out that in some later cases wider interpretations have been put

upon the language of Chief Justice Marshall than his words justify. But he complains of the later interpretations of the judgment in the *Schooner Exchange* only in so far as they read into it authority for the principle that foreign troops present in a State's territory are *totally exempt* from the local jurisdiction and not merely with respect to their internal discipline. His own conclusion is clear that international law recognizes the immunity of foreign troops from the "supervisory" jurisdiction of the local courts, whether they are "visiting" forces or merely forces in transit. Thus, at the end of the article (pages 411-3) he says:

> "The earliest formulation of the principle underlying the immunity of visiting forces from the supervisory jurisdiction of the local courts was made by Chief Justice Marshall in *The Schooner Exchange* v. *M'Faddon*. In that case the jurisdictional immunity of troops in passage was joined with the similar immunity for sovereigns and diplomatic representatives to form a cogent argument for granting jurisdictional immunity to the public armed vessels of a friendly foreign state. It would appear from the reasoning of the Court that the basis of immunity in all cases was the same fundamental principle that the absolute jurisdiction of one state does not envisage the sovereign rights of another state as its object. However satisfactory this principle may be as a basis for sovereign and diplomatic immunity, there are strong reasons of theory and practice for seeking a more solid principle on which to base the jurisdictional immunity of visiting forces. It is, for instance, difficult to appreciate how the fact that a local court entertains an action for false imprisonment brought by a visiting soldier against his superior officer constitutes a violation of the sovereign right of a foreign state. The beginnings of the modern principle can be discerned in Marshall's judgment *where he shows the incompatibility between the grant of a passage to foreign troops and the exercise of supervisory jurisdiction over them.*"

And he then states that from the evidence examined in the article, the following rule of international law may be formulated:

> "The consent of a state to the *presence* in its territory of the armed forces of a friendly foreign State implies an obligation to allow the service courts and authorities of that visiting force to exercise such jurisdiction in matters of discipline and internal administration over members of that force as are derived from their own law. The permission to exercise this jurisdiction effectively implies *an obligation to secure the immunity of the visiting forces from the supervisory jurisdiction of the local courts.*"

512. In the light of the passages cited above it is plain that the Government of India was absolutely justified in citing Barton's article in Volume 26 of the Year Book as evidence of the existence of a customary rule, according to foreign troops in transit immunity from the "supervisory" jurisdiction of the local courts.

513. That the Government of India was also absolutely justified in its reference to Barton's second article in the next volume of the Year Book is no less plain. It referred to that article simply as evi-

dence that there is even some authority for the view that foreign troops in transit are entitled to a *total* immunity from the local criminal jurisdiction. At the same time, it said that this view was controversial and that the legal regime of foreign troops is a matter of such delicacy that in practice it is always covered by express agreement. Barton's second article, like the first, is directed primarily to the question of visiting forces. But a number of the authorities which he discusses relate to troops in transit. Amongst these, of course, is the judgment of Chief Justice Marshall in the *Schooner Exchange*, but he also deals with other cases and discusses, for example, the very strong pronouncement of the Supreme Court of Panama in the case of *Schwartzfiger:*

> "It is a principle of international law that the armed force of one State, *when crossing the territory of another friendly country, with the acquiescence of the latter,* is not subject to the jurisdiction of the territorial sovereign but to that of the officers and superior authorities of its own command."

Barton's own conclusion is that such pronouncements are too widely expressed and that the true rule is that the customary immunity of foreign troops is limited to immunity in matters of internal discipline and does not include a total immunity from the local jurisdiction. In reaching this conclusion he notes that the matter is covered by express agreement in a large number of modern treaties and that some of these treaties, more especially those to which the United States is a party, do provide for a measure of immunity from the local jurisdiction. He considers, however, that the treaty practice taken as a whole confirms that customary international law, *while recognizing that foreign troops have immunity from supervisory jurisdiction,* does not recognize that they have a total or general immunity from the local jurisdiction.

514. Barton, the Government of India emphasizes, represents the most conservative school of thought on this question. It had been hoped, by citing a recent study by a writer taking the minimum view of the immunities possessed by foreign troops, to spare the Court a lengthy digression into the law governing the immunities of armed forces. The Government of India could equally well have referred to other writers who state the matter in a way much more favourable to India's argument. It might, for example, have referred to two articles in the *American Journal of International Law* by Colonel King, who argues in favour of the total immunity of foreign troops from the local jurisdiction (see *American Journal of International Law*, Volume 36, 1942, page 539, and Volume 40, 1946, page 257). Or it might have referred to the opinions of numerous writers such as Wheaton, Hall, Westlake, Oppenheim and Lawrence, who took quite a large view of the immunities of foreign troops, as the following extracts from Oppenheim and Lawrence will show:

"Whenever armed forces are on foreign territory in the service of their home State, they are considered exterritorial and remain, therefore, under its jurisdiction. A crime committed on foreign territory by a member of these forces cannot be punished by the local civil or military authorities, but only by the commanding officer of the forces or by other authorities of their home State. This rule, however, applies only in case the crime is committed, either within the place where the force is stationed, or in some place where the criminal was on duty; it does not apply if, for example, soldiers belonging to a foreign garrison of a fortress leave the *rayon* of the fortress, not for duty but for recreation and pleasure, and then and there commit a crime. The local authorities are in that case competent to punish them."

(Oppenheim, *International Law*, 1948, 7th ed., Vol. I, Sec. 445.)

"... The universally recognized rule of modern times is that a State must obtain express permission before its troops can pass through the territory of another State... Permission may be given as a permanent privilege by treaty for such a purpose as sending relief to garrisons, or it may be granted as a special favour for the special occasion on which it is asked. The agreement for passage generally contains provisions for the maintenance of order in the force by its own officers, and makes them, and the State in whose service they are, responsible for the good behaviour of the soldiers towards the inhabitants. In the absence of special agreement the troops would not be amenable to the local law, but would be under the jurisdiction and control of their own commanders, as long as they remained within their own lines or were away on duty, but not otherwise."

(Lawrence, *Principles of International Law*, 6th ed., p. 246.)

515. The Government of India, however, still believes it to be quite unnecessary for the Court to investigate the limits of the immunities enjoyed by foreign troops in transit through a State's territory. For the discussion of the issues raised in the present case it suffices that, *even on the most conservative estimate of the immunities of foreign armed forces, troops in transit possess under customary law some measure of immunity from the exercise of the local sovereign's jurisdiction*. Thus, even taking the minimum view expressed by Barton, Portugal's formulation of her alleged right of transit for her armed forces conflicts with the relevant customary law.

516. No less extraordinary is the Portuguese Government's other observation on this point in paragraph 23 of the Reply. At the end of that paragraph it says that, even if Portuguese troops in transit between Daman and the enclaves are entitled, by customary law, to immunity from jurisdiction in questions of discipline, that is immaterial, because a right to immunity does not form any part of the Portuguese claim in the present case. If the immunity point is really so wholly immaterial as Portugal says, the Court may well wonder why she finds it necessary to protest on almost every other page of her pleading that the right of transit, which she claims,

is a bare right of transit without any immunity at all from the exercise of India's sovereignty. In fact, as the Court knows, it was Portugal herself who brought this point into the discussion. India has relied on the principle that a right of transit across another State's territory, being a limitation upon, or derogation, from the State's exclusive territorial competence, is only established by clear and unambiguous proof of the consent of the territorial sovereign. Portugal has sought to escape from the difficulty by asserting that she only claims a right of transit without immunity, and by arguing that such a bare right of transit does not constitute a "dismemberment" of India's sovereignty, and does not fall within the above principle at all. India has replied that a right of transit for foreign troops, which inevitably involves some immunity from the local jurisdiction, is, above all, a case of transit with immunity and one which is quite unknown without the clear consent of the territorial sovereign. But it was the Portuguese Government itself which made the absence of any immunity from India's jurisdiction the central point of the argument on this question, and it really will not do for Portugal now to say that the point is immaterial so far as concerns the transit of armed forces. Not only is the point material, it is fatal to the Portuguese argument on this question.

517. A strong feature also of Part I of the Reply is the effort made by Portugal to minimize the impact of the rights of transit which she claims upon India's territorial sovereignty. She declares that she does not claim "access" to Indian territory, but only "transit", and protests that there is a great deal of difference between a right of "access" and a right of "transit" in the impact which they make upon the territorial sovereignty of the servient State. She states that in "transit", as distinct from "access", the exit from the territory is as important as the entry, and that, under the right which she claims, "Indian territory is no more than a route for passing between Daman and the enclaves and *vice versa*". In answer to India's point that no customs or security cordon has ever been maintained around the enclaves or along the transit route, so that transit to the enclaves means in practice access to Indian territory, all she says is that this does not affect the nature of her claim as a claim to transit and that it is up to India to remedy that situation if she wants to.

518. Nobody doubts that there is a distinction between "access" and "transit". But the question is whether that distinction is in any way material in regard to the issues raised in the present case and that is a question which is never really faced by Portugal.

519. The Government of India has already pointed out in paragraphs 247-257 of its Counter-Memorial some of the implications for India of the rights of transit claimed by Portugal, and asks the Court to refer again to those paragraphs. No amount of subtlety and ingenuity can get rid of the hard fact that what Portugal is claiming

is a right to use a piece of Indian territory for a particular purpose and to use it repeatedly and perpetually. Interference with India's own uses of that territory and with the exercise of Indian sovereignty with respect to that territory follows inevitably, if Portugal is held to possess legally enforceable rights of transit. Inevitably also there follows an additional risk to India's customs system through smuggling of goods and an additional risk to India's security system through illicit entry of persons. Portugal makes light of these risks to India's sovereignty, but history has shown that they are considerable. What does Portugal suggest should be done in this connection? She suggests that India should maintain a customs and police cordon round the enclaves which would not only be a heavy expense to India but a serious nuisance to the peoples of the enclaves. Portugal's other suggestion, that India should take steps to protect herself along the transit route, is even worse. For how could India protect herself adequately except by constructing a high fence all along the route from Daman to the enclaves—like the high wire fence that lines each side of the route between the city of Bâle and the airport of Bâle situated in French territory? Such protecting fences would sever India's own territory between Daman and the enclaves into two pieces; and the whole matter is made more complicated by the existence of a main-line railway which runs through Vapi.

520. Portugal finally tries to get rid of the point altogether by saying that, whatever difficulties of this kind India may have, they in no way alter her obligations *vis-à-vis* Portugal. This statement completely begs the question. If it had been established that India, or the British Government before her, had unequivocally agreed to allow to Portugal a legal right of transit, then the fact that these difficulties resulted for India would doubtless not alter her obligations under the treaty. But that is not the position at all. The position is that Portugal is seeking to deduce from an ancient treaty, from friendly concessions of transit facilities, and from general principles of law, a right of transit that was never at any time expressly granted or recognized during the whole of the long period under discussion. In the submission of the Government of India, the fact that the right of transit claimed by Portugal would involve these kinds of consequences for India, is very material in considering whether the deduction which Portugal asks the Court to make from the 1779 Treaty, from the historical facts of the British period and from general principles is one that can be made legitimately. And the answer is plainly, no.

521. In paragraphs 21 and 22 of the Reply, Portugal complains that India has exaggerated the question of the uncertain scope of Portugal's claim to a right of transit for "armed forces" by suggesting that it may cover "regiments" and "army corps". But there was nothing exaggerated or fanciful in India's posing of the question.

India merely set out the possible forms of a right of transit for "armed forces" in order to show the vagueness and uncertainty inherent in Portugal's claim; and it is interesting to observe just how far Portugal has gone in answering India's question.

522. India asked in paragraph 255 of the Counter-Memorial: "Is the alleged right of transit, for example, confined to sending individual members of the armed forces and police or, at most, small squads across Indian territory? Or does it extend to sending whole *platoons, companies, regiments or corps of troops* and police? If transit is indeed claimed for troops and police in large formed bodies, is there any limit to the numbers of soldiers or police who may be in transit at any one time? Are the troops limited to their side arms or does Portugal claim transit for artillery, tanks, armoured cars and ammunition?"

523. Portugal has made two comments upon these questions. First, she has called the reference to "regiments" and "army corps" pure fantasy. She is silent about "platoons" and "companies" and about the numbers that may pass at a time. Are we therefore to understand that she does not regard these as pure fantasy and claims the right to send through a "platoon" or a "company" in a body? She is silent about artillery, tanks, armoured cars and ammunition. Does this mean that the transit of these things is not considered to be pure fantasy and that Portugal claims a right of transit in regard to them? Portugal's second comment is that she is not asking for a new regime but merely for a continuation of the system that has lasted since the eighteenth century. And she adds: "During this long experience has there ever been one case of a deployment of forces comparable to the one which the Counter-Memorial is pleased to describe?" Does this mean that the alleged right of transit is limited to the largest number of men for which there is some past precedent, and to the kinds of weapon and equipment which have been allowed to pass on some previous occasion? Or does Portugal want to keep open the possibility of sending all the forces and arms necessary on this occasion to re-establish Portuguese sovereignty by force?

524. Portugal seems to imply that India was not being serious when she asked these questions. But India was entirely serious. In the case of any enclave—and most certainly in the circumstances of the present case—these are very grave questions for the Sovereign of the intervening territory. They are questions so grave that it is natural to expect the answers to them to be set out with some precision in an agreement between the Sovereign of the enclave and the Sovereign of the intervening territory. The fact that, in the present instance, the scope of alleged rights of transit for Portuguese armed forces and police is not to be found defined or even indicated anywhere in any form of agreement between Portugal and

the territorial sovereign, appears to the Government of India to be a powerful argument against the existence of any such rights.

525. Portugal, on the other hand, takes the rather extraordinary position in paragraph 24 of her Reply that the lack of precision in regard to the scope of her alleged rights of transit is entirely natural. For she there says:

> "The Portuguese Government does not contend that the exercise of the right which it is now claiming is governed in all respects by precise rules or that the implementation is so to speak mechanical. Far from that: there is indeed no doubt that these rules are open to a rather broad power of appreciation. But situations of this kind frequently arise in the field of international law. International law rarely lays upon States the obligation to take clearly defined concrete measures. In most cases international law merely states their obligations in a very broad manner in order to enable them to adapt their municipal law to those obligations having regard to the circumstances."

526. She then proceeds to illustrate her point by reference to the rule of "due diligence" in the sphere of the international responsibility of States for damage caused to foreigners by private persons. "Can it be said", asks the Portuguese Government, "that this criterion (of due diligence) is more precise than the one to which the right claimed by Portugal refers?"

India does not dispute that in some spheres there is less precision in the rules of international law than is usually found in municipal law. But the rule of "due diligence" belongs to an entirely different branch of international law from the question of transit with which the Court is concerned in the present case, and the reference to it as an example of the imprecision of international law does not seem to be at all apt. As with negligence in municipal law, the very ground of liability under the rule of due diligence is a failure to show such reasonable diligence in the prosecution of a crime as would normally be shown by a normally organized State. In the present case, however, the question is whether Portugal has a right to use India's territory for the purpose of passage to the enclaves and, if so, what are the conditions for its exercise. This, the Government of India submits, is an entirely different kind of question from the question of due diligence. Can Portugal really be serious when she contends—as she apparently does—that, in the present case, India's alleged obligations to Portugal with respect to the transit of Portuguese armed forces and police between Daman and the enclaves, are similar in nature to the obligation of a State to show due diligence in the prosecution of a criminal who has injured a foreigner? Can Portugal really be serious when she suggests that the passage of armed forces across another State's territory is a matter which international law may be expected to deal with in an imprecise manner and to leave largely undefined? These propositions have only to be stated for

their absurdity to be apparent. Is it not rather the case that passage across another State's territory, and especially for armed forces, is a matter which it is natural to find made the subject of a treaty and to be regulated in some detail? Is not a general, undefined, obligation to allow the passage of the armed forces of another State an obligation which is inconceivable in international law?

527. Nor is the Portuguese claim made any less inconceivable by saying, as Portugal does say in paragraph 22 of the Reply, that India's obligation is not to be regarded as consisting of an obligation to allow troops to pass over territory, but rather of an obligation not to oppose any obstacles to the passage of what is necessary for the exercise of Portuguese sovereignty in the enclaves. It is by this argument that Portugal tries to turn the issue in the case inside out—to present the legal issue as one concerning the question whether India is under an obligation not to oppose the passage of Portuguese troops, rather than the question whether Portugal has an established title to rights of passage over India's territory. Every legal right can be expressed correlatively in terms of the corresponding obligation. Portugal, however, cannot alter the essential nature of the alleged right which she claims, by the simple process of asking the Court to view the legal relation, alleged to exist between herself and India, in terms of the corresponding obligation alleged to lie upon India. No mere dialectics, however skilful, can change the fact that, in the present case, Portugal is claiming a right to use a strip of India's territory repeatedly for the purpose of passing persons and goods to and fro across it.

Part III

THE LAW APPLICABLE TO THE PORTUGUESE CLAIM

I. The Presumption against Restrictions upon Territorial Sovereignty

528. In Part IV of the Counter-Memorial the Government of India cited a number of passages from judicial decisions and from the works of jurists as establishing two rules:

(1) There is a strong presumption of law in favour of a State's full power to exercise the normal rights of sovereignty within its own territory, and against the existence of limitations upon that power.

(2) This presumption in favour of the territorial State is only to be displaced in any given case by clear and unambiguous proof of its specific consent to the particular limitation to which its power to exercise its sovereignty is alleged to be subject.

And, on the basis of the above rules, the Government of India submitted that a heavy burden of proof rests upon Portugal to establish, by clear and unambiguous evidence, the specific consent of the Sovereigns of the territory lying between Daman and the enclaves to the rights of transit claimed by her in this case.

529. In Part III, Section I, of the Reply, Portugal has sought to rebut India's contentions in regard to the burden of proof, first, by a general argument concerning the relation between rules of international law and State sovereignty and, secondly, by certain observations in regard to the authorities cited by India.

530. Portugal's general argument runs as follows. The effect of most rules of international law is to lay obligations upon States, whether they are rules derived from treaty, custom or general principles of law, and this is no less true when territorial sovereignty is involved than in other cases. Indeed, the limitations upon sovereignty resulting from international legal rules are most frequently felt in the sphere of territorial jurisdiction and by no means all of them derive from treaty. For example, the treatment of foreigners is a matter of customary law and of general principles of law, as well as of treaties. How then can India say that the rights which Portugal claims could not have come into existence without the specific consent of the territorial sovereign?

531. This argument really does not seem to touch India's propositions concerning the burden of proof. India has never contended that the nature of international law or of State sovereignty renders it impossible, in principle, for rights of transit to arise from custom or

general principles of law. India's contention is that, if you look at international law as it has in fact developed, you will find that there are certain kinds of limitation upon State sovereignty—limitations involving derogations from the State's exercise of its territorial sovereignty, and the enjoyment by another State of rights with respect to the territory itself—which can only be established by clear proof of the specific consent of the territorial sovereign. India may well reply to Portugal's question with another. How does Portugal think that she answers India's contention by dragging into the discussion quite different kinds of limitation upon sovereignty, such as the obligation to observe international minimum standards in the treatment of foreigners? The Government of India can scarcely believe that Portugal is serious in representing that, juridically, there is no difference at all between a particular obligation to allow the troops of a particular foreign State to enter and make passage through the territory of the State, and a general obligation to observe minimum standards in the treatment of any foreigners within the territory.

532. The Government of India has no need to labour the point because it seems perfectly clear that Portugal herself admits that there is a category of rights in or affecting another State's territory, the establishment of which requires stricter proof than is required for international rights of other kinds. Why else has Portugal gone to such pains in paragraphs 12-14 and again in paragraphs 291-305 of the Reply, as she did previously in the Memorial and in the proceedings on the Preliminary Objection, to press on the Court a distinction between, on the one hand, limitations involving the participation of a foreign State in the exercise of the territorial sovereignty (paragraph 13) and, on the other limitations involving a derogation from the very principle of sovereignty (paragraph 299)? Portugal, in short, does not seek to counter India's contention by denying that there is a category of territorial rights the establishment of which requires proof of the specific consent of the territorial sovereign; she rather disputes India's definition of that category and seeks to exclude from it the rights which she claims in the present case.

533. If one looks closely into Portugal's argument on this point, it becomes obvious that what she really does, is to invite the Court to hold that the class of territorial rights, requiring strict proof of the consent of the territorial sovereign, is limited to so-called "international servitudes", and to adopt the narrowest possible definition of an international servitude. In paragraph 12 and again in paragraph 296 of the Reply, she once more draws attention to the *North Atlantic Fisheries Arbitration*, where the United States claimed that a grant, by treaty, of rights of fishery to its nationals necessarily implied also a right for the United States Government to participate with Canada in the legal regulation of Canadian fisheries. The

Tribunal in that case, she says, established a sharp and essential distinction between an obligation upon a territorial sovereign to submit to the participation of a foreign State in the exercise of its sovereignty and an obligation upon a territorial sovereign to submit to restrictions on the exercise of its sovereignty. While mentioning the controversial character of the theory of "international servitudes", she underlines that one of the most authoritative writers has expressed the view that the grant of a right of sovereignty in some form or other is an essential feature of an "international servitude". In short, she defines "international servitude" in the narrowest terms, including therein only rights to exercise sovereignty or to share in the exercise of sovereignty in regard to another State's territory. She then insists that the rights of transit which she claims are not rights to exercise or share in the exercise of India's sovereignty, but are merely rights which oblige India to exercise her territorial sovereignty on certain principles in favour of Portugal. She maintains that her alleged rights of transit affect India's territorial sovereignty only in the same way as the right of a State to require India to treat its nationals in accordance with the "minimum standards" for the treatment of foreigners. India's sovereignty, she says, is not "dismembered", it is merely a *"compétence liée"*; and she charges India with failing to distinguish between *"une répartition de compétence"* and *"une compétence liée"*. Following this line of reasoning, she asks the Court to hold that her alleged rights of transit fall quite outside the principle demanding strict proof of the agreement of the territorial sovereign to the creation of rights in or over its territory in favour of another State.

534. Portugal never tires of informing the Court in her Memorial that the theory of international servitudes is *"une théorie fumeuse et incohérente"* and that she would like nothing better than that it should be totally excluded from the case. Yet here, under the thinnest of disguises, she is asking the Court to adopt her own particular definition of international servitudes, and to apply it, for the purpose of determining whether her alleged rights of transit are subject to strict proof of the agreement of the territorial sovereign. The idea that the ambit of the term "international servitude", and the question of a "dismemberment" of sovereignty are of importance for determining this question is, however, a complete fallacy. Portugal quite arbitrarily assumes that the class of rights affecting a State's territorial sovereignty, with regard to which strict proof of the agreement of the territorial sovereign is required, is confined to "international servitudes" as she herself defines international servitudes. That is not the case at all.

535. It is true that rights in or over another State's territory are frequently dealt with in the authorities under the rubric "international servitudes". The reason seems to be that most jurists find irresistible the temptation to discuss a possible analogy in inter-

national law to the servitudes of private law. It is certain that, when they do so, they do not all have in mind the same notion of a servitude. To lawyers from common law countries, for example, the term servitude has a much wider connotation than that given to it by Portugal. The varying definitions of "international servitudes", however, are quite irrelevant in the present connection. The only point that matters in the present connection is that rights of transit, and notably rights of transit for armed forces, are uniformly included by jurists in the class of rights affecting a State's territory, with regard to which strict proof of the agreement of the territorial sovereign is required. The fact that these rights may often be discussed under the rubric "international servitudes" is merely of academic interest. For the need for strict proof of the agreement of the territorial sovereign to the creation of such rights is not a deduction from any particular concept of servitude. It is a deduction simply from the fact that they are particular rights in or over another State's territory involving limitations upon its normal rights of territorial sovereignty.

536. Oppenheim-Lauterpacht, in the passage cited in paragraph 272 of the Counter-Memorial, writes:

> "State servitudes are those *exceptional* restrictions *made by treaty* on the territorial supremacy of a State by which a part or the whole of its territory *is in a limited way made perpetually to serve a certain purpose or interest of another State.* Thus a State may by a *convention* be obliged to allow the *passage of troops* of a neighbouring State...
>
> Since the object of State servitudes is the territory of a State, such restrictions upon the territorial supremacy of a State as do not make a part or the whole of its territory itself serve a purpose or an interest of another State are not State servitudes. The territory as the object is the mark of distinction between State servitudes and other restrictions on the territorial supremacy."

The Government of India does not ask the Court to prefer the Oppenheim-Lauterpacht definition of international servitudes to the definition favoured by Portugal. It asks the Court to disregard the terminological controversy about the definition and simply to take note that the passage of troops—and indeed other rights of transit—are classed by Oppenheim-Lauterpacht as rights in or over territory which are created by treaty.

537. In the same way, all the other writers mentioned in paragraph 164 of India's Preliminary Objection—Sibert, Crusen, Vali and Reid —class rights of transit as "international servitudes", and emphasize that such "international servitudes" are created by treaty. Portugal has made no attempt to contradict the views of those writers on this point.

538. The Government of India has not, however, been content to cite only the opinions of jurists. It has also supported its proposition by a number of passages from judicial decisions. Portugal has

made some remarks in regard to these decisions in paragraphs 295-301 of her Reply. Her remarks do not appear, however, to diminish in any way the individual or collective weight of the decisions relied on by India and, as the Court is already fully seized of India's point of view in regard to them, the Government of India does not find it necessary to embark on a fresh discussion of them. It will content itself with brief observations on two of the remarks made in the Portuguese Reply.

539. The first is that it is difficult to appreciate the distinction Portugal makes in paragraph 299 between the "limitation upon the exercise of territorial sovereignty", which she says is found in the present instance, and the "derogation from the very principle of sovereignty" which the grant of diplomatic asylum to Haya de la Torre is said to constitute, "the Colombian Government having thereby removed the offender from the justice of Peru". The right of a State to authorize or refuse entry into, or transit across, its territory is no less a matter of its discretion than the right to take measures for the punishment of crime. Both the former and the latter rights are matters within the exclusive jurisdiction of the State, except in those cases in which it may have consented in a general treaty or a particular agreement to those rights being made the subject of legal regulation, and except in the rare case where they have been brought under the regulation of an unwritten rule of international law.

540. Similarly, it seems to be an obvious mistake, in paragraph 295 of the Reply, to interpret the decision of Chief Justice Marshall in the case of the *Schooner Exchange* (see paragraph 260 of the Counter-Memorial), as relating to the *exclusive* character of territorial jurisdiction and not to its *discretionary* character, when the two terms are usually employed as synonyms. And the artificial distinction which Portugal attempts to make, seems to be all the more mistaken when it is remembered that the Chief Justice described the State's territorial jurisdiction as "exclusive and absolute", and expressly rejected any limitation upon or derogation from it which does not have its basis in the consent of the State in question.

541. Nor is it to be overlooked that, even if the distinction made by Portugal were to be accepted as valid, she would still not succeed in excluding her own claim from the category of territorial rights requiring strict proof of the consent of the territorial sovereign. For, as has been pointed out in the previous Part of this Rejoinder, the rights which she claims do in fact involve some measure of immunity from India's territorial jurisdiction—do in fact involve a derogation from the very principle of sovereignty.

542. Accordingly, the Government of India adheres most firmly to its opinion that certain kinds of right in or over another State's territory are only to be established by clear proof of the consent

of the territorial sovereign, and that the right of transit claimed by Portugal is a right of that kind. Having reaffirmed its position on this point, however, it repeats what it said at the outset, that it bases its opinion, not on any theory of the impossibility of such a right having been created in general international law, but on the actually existing system of international law. It will, therefore, now proceed to demonstrate the correctness of its contention, by showing that there is no trace of any general right, of the kind claimed by Portugal, in any of the sources of general international law enumerated in Article 38 of the Statute of the Court.

II. Absence of any General Rule restricting Territorial Sovereignty in regard to Transit by Road

A. *Absence of any General Convention*

543. The Government of India, on setting out to demonstrate the non-existence of any general rule concerning the right of passage by land between the metropolitan territory of a State and the territory of an enclave also under its sovereignty, began by considering the first of the sources of international law enumerated in Article 38 (1) of the Statute of the Court. And it believed that it had effectively shown that no such general rule was to be found written into any international convention.

544. The Government of India is glad to observe that its conclusion on this point has not been contradicted by the Portuguese Government. It feels justified, however, in underlining the point here a little further because a rather similar question has been studied, if not dealt with exhaustively, in the very recent Geneva Maritime Conference of 1958. That Conference agreed upon the insertion of the following provisions in Article 3 of the Convention on the High Seas: —

> "1. In order to enjoy the freedom of the seas on equal terms with coastal States, States having no sea-coast should have free access to the sea. To this end a State situated between the sea and a State having no sea-coast shall by common agreement with the latter and in conformity with existing international conventions accord:
>
> *(a)* to the State having no sea-coast on a basis of reciprocity, free transit through their territory, and
>
> *(b)* to ships flying the flag of that State treatment equal to that accorded to their own ships, or to the ships of any other States, as regards access to sea ports and the use of such ports.
>
> 2. A State situated between the sea and the State having no sea-coast shall settle, by mutual agreement with the latter, and taking into account the rights of the coastal State or State of transit and the special conditions of the State having no sea-coast, all matters relating to freedom of transit and equal treatment in ports,

in case such States are not already parties to existing international conventions."

545. One could debate at some length the precise scope of this Article, so full is it of reservations. For present purposes, however, it suffices to note that the obligatory force of its provisions will not extend beyond the States that may ratify the Convention; and that, on this particular point of a right of access over intervening land to the sea, there is no authority for the view that any customary right existed prior to the Convention under any rule binding upon the general body of States.

546. It is also worth observing that when the Article deals with "access to the sea" or with "free transit", it does not specify what persons or property are to be the beneficiaries of the right of access or transit but leaves these matters to be defined by common agreement between the States concerned. It is evident, however, that the Conference had in view normal peaceable traffic to the exclusion of the transport of military forces and of arms in time of war or civil war.

547. The Portuguese Government, no doubt, will contend that it is not possible to assimilate the case of States deprived of access to the sea or of bridgeheads (see paragraph 310 of the Reply) to that of a State cut off from a part of its territory enclaved within the territory of another State. But the Court, it is believed, will not be slow to find that Professor Bauer was right in thinking that he could draw an analogy between these different situations (see Annex 25 of the Observations on the Preliminary Objection at I, pp. 762-763). This being so, the fact that international law does not recognize any right of transit for landlocked States across intervening territory to the sea, independently of the provisions of the Geneva Convention of 1958, seems to the Government of India to be a somewhat serious objection to the Portuguese thesis that general international law does recognize a right of transit to enclaves, despite the absence of any international convention establishing such a right.

B. *Absence of any General Customary Rule*

548. Article 38 of the Statute gives a definition of custom in international law which is so clear that it would appear to rule out any discussion as to the conditions necessary for the existence of a customary rule of law: "Custom as evidence of a general practice accepted as law" (*"une pratique générale acceptée comme étant le droit"*). It would scarcely be possible to indicate more clearly the characteristics of this source of law and the two separate elements, one material and the other psychological, the combination of which the Statute requires if a legal custom is to be established. Nevertheless, in regard to the alleged customary rule invoked by Portugal in support of her claim, there appears in the present case to be

complete disagreement between the two Governments as to the existence of either the one or the other of the two elements.

549. First, as regards the question of a general practice, the Portuguese Government has certainly obtained an interesting opinion from Professor Bauer, Professor of History at the University of Neuchâtel. But the researches of the learned Professor go far outside the actual point at issue, namely, the passage of armed forces by road across foreign territory. And, as the Government of India has previously observed in paragraph 291 of the Counter-Memorial, he has done no more than collect together, on the one hand, old treaty provisions which expressly or impliedly contain a grant of permission for the passage of troops to and from a fortress and, on the other hand, modern treaty provisions or situations relating exclusively to the passage of civilians or of non-military goods. At first sight it really seems inconceivable that the existence of a general customary rule, covering all the forms of transit between a State and its enclave as are deemed necessary by that State, could be deduced from the purely local "practices" mentioned by Professor Bauer, almost all of which exhibit both substantial differences in their circumstances and conditions and are confined to particular forms of transit.

550. Yet that is exactly what the Portuguese Government does attempt in paragraph 318 of the Reply to deduce from Professor Bauer's material. Its reasoning runs as follows. It is quite true that the regimes of the enclaves described by Professor Bauer lack uniformity. It could scarcely be otherwise "since the geographical, political, economic and social conditions to which they must adapt themselves differ materially". But from these varying regimes there is, nevertheless, to be extracted a basic customary rule, namely, that India is under an obligation to allow Portugal "the communications essential for the exercise of her sovereignty of the enclaves". As to the conditions of this passage, however, the Portuguese Government in no way claims that they are fixed by any international rule; on the contrary, it declares that it recognizes that in this regard the Indian Union is "free to exercise its territorial jurisdiction".

Quite apart from the objections which the Government of India has formulated in Part III of the Counter-Memorial and in the preceding Part of this Rejoinder with respect to the imprecise character of the Portuguese claim, it feels bound to challenge the extraordinary method used by Portugal to establish a rule of customary law. The Government of India cannot admit that for the elements of a general practice followed by different States and recognizing the rights claimed by Portugal, it is legitimate for her to substitute a skeletal principle, alleged to be derived from a general practice, and then to deduce from it much wider corollaries that are manifestly not to be found in the great majority of the practices from which the principle itself is said to be derived.

551. That, however, is precisely what the Portuguese Government is doing when it seeks to deduce, from an alleged general practice, a right for every State, possessing an enclave in foreign territory, to despatch an armed force there across the intervening foreign soil. For, in the Annexes produced by Portugal, one looks in vain for any documents or evidence which could possibly establish the existence of such a right in regard to the seven enclaves listed in paragraph 51 of Portugal's Memorial.

552. Not only is there no indication of any such right in the documents published by the Portuguese Government (Annexes 21-24), but in the sole case where the question of military passage seems to have been raised, it has been answered in the negative. For it has already been pointed out in the Counter-Memorial (paragraph 293 *(c)*), that during the first world war the Netherlands did not authorise the passage of German troops over their territory to the Belgian enclave of Baarle Nassau from neighbouring Belgian territory, which was under German military occupation. This fact has been left without any comment in the Reply. It is, however, a fact which is all the more significant in that there was in that enclave a broadcasting station, which served for the transmission of messages both for the civil population in Belgium and for the military intelligence services of the Allies. At no time does the idea appear to have been entertained that, the enclave being the accessory of the occupied Belgian territory, the occupying Power was entitled to be placed in the position of having access to it.

553. In addition, it is to be noted that in most of the cases mentioned by Portugal, the rights of passage accorded by the States concerned have been accorded in virtue of particular conventions and that the real title to those rights is to be found in the respective conventions. The cases in question cannot, therefore, be properly invoked for the purpose of proving the existence of a general customary rule. This objection to the Portuguese argument was pointed out in paragraphs 291-293 of the Counter-Memorial and Portugal has tried to meet it in paragraph 313 of her Reply. Her answer there is that not all conventions are law-creating instruments, the purpose of some of them being rather to make provision, as between the particular contracting Parties, for the application of a norm of general international law. And she claims that "most" of the agreements cited by the Portuguese Government are of this character.

554. The reasoning is ingenious; it is quite true that some general conventions aim at the confirmation, the consolidation of an unwritten rule of law—the term codification would be used if it were a question of a generally agreed rule made safe in this way against any future controversy amongst the contracting Parties. But in that case one would expect to find either in the preamble or the text of the treaty some reference to the rule or principle which it was intended to confirm. Nothing of the kind is to be found in

any of the treaties invoked by Portugal here. These treaties are all particular treaties dealing very specially with particular situations and there is no trace in any of them that the contracting parties considered that they were affirming a general rule of international law or were making provision for the application of a general rule of international law to themselves in regard to the situation in question.

555. There is yet another reason for refusing to attach any real significance to a general practice in regard to the grant of rights of passage to military forces to and from enclaves which, if there ever was such a general practice, had its existence in the seventeenth and eighteenth centuries. This reason is that, at that period, the territorial aspect of sovereignty was by no means so prominent or so rigorous as it is to-day. State frontiers were not then guarded, as they are now, by a continuous customs cordon—and at that time the passage of men and goods was so far free, without its being considered a matter of legal right, that even in time of war a neutral State could permit the passage of the troops of a belligerent without compromising its neutrality Grotius, *De Jure Belli Ac Pacis*, II, paragraph 13). A rule valid in earlier times, as Judge Huber said in the *Island of Palmas Case*, continues in force only so long and in so far as it is not inconsistent with a later rule (*Reports of International Arbitral Awards*, Vol. II, p. 895; see also *Polish Upper Silesia Case*, Series A, No. 7, page 41).

556. It is true that in its Reply the Portuguese Government has added to the enclaves cited in the Memorial the case of Fort de St. Jean Baptiste, d'Ajuda, Portuguese territory enclaved in Dahomey, and that for this case there is no mention of any treaty in the unsigned aide-mémoire of the French Ministry of Foreign Affairs reproduced in Annex 103 of the Reply. But that very document gives us the information that there is no "Portuguese population" in St. Jean Baptiste, in other words, that there is apparently no civil population whatever over which Portugal's sovereignty could be exercised. Her sovereignty manifests itself simply through the presence of a Resident who enjoys customs exemption and a special registration number for his car. He is not confined in the fort, but can move around freely outside it in French territory. This "vestigial link" is described by the anonymous author of the document as a symbol of Franco-Portuguese friendship. Perhaps, it is permissible to see in it also a sample of the vain and meaningless preoccupations with her prestige which apparently continue to inspire Portugal's colonial policies. At any rate, it is quite absurd for Portugal to pretend, as she does, to find in it an illustration of that general practice the existence of which she is trying to establish.

557. The disagreement between India and Portugal, however, is not confined to the existence or non-existence of the material element necessary for a customary rule of international law. It extends to

the question of the psychological element which is also required for the establishment of such a rule. For in paragraph 320 of the Reply the Portuguese Government states that "it is unable to concur in the interpretation of this condition which appears to underlie the Counter-Memorial".

558. The thesis developed by Portugal in the Reply takes as its starting point the Latin expression which is frequently used to denote the psychological element, *"opinio juris sive necessitatis"*. Giving an entirely literal interpretation to the Latin expression, Portugal asserts that the psychological element required for the establishment of a customary rule—the element which distinguishes a legal custom from a mere usage—does not necessarily have to be "the conviction of the pre-existence of a legal rule" but may be simply "the conviction of an inter-social or international necessity".

559. The Portuguese thesis appears to the Government of India to be open to two obvious objections. The first is that the majority of the writers who refer to the Latin expression *"opinio juris sive necessitatis"* in connection with international customary law do not interpret it as admitting two alternative psychological elements as possible bases for the existence of a customary rule. They interpret it rather as denoting a single psychological element, the conviction of a *legal necessity*—of a legal obligation—to act in accordance with the usage; e.g. Anzilotti, *"la conviction d'observer une norme juridique"* (*Cours de Droit international*, pages 73-74); Lauterpacht, *"la pratique actuelle qui se conforme ou obéit à ce qui est déjà le droit"* (*Recueil des Cours*, 1937, Vol. IV, page 158); Morelli, *"un élément subjectif ou psychologique, consistant dans la conviction, acquise peu à peu par les mêmes États, que cette conduite est conforme à une règle de droit, qu'elle est, en d'autres termes, l'exécution d'une obligation ou l'exercice d'une faculté juridique — opinio juris sive necessitatis"* (*Recueil des Cours*, 1956, Vol. I, page 453). It is true that a few writers do consider "social necessity" to provide a sufficient psychological element for the establishment of a customary rule. But, as Sorensen observes, *"cette notion paraît mal appropriée à servir de critère entre la coutume juridique et les actes de courtoisie et de simples usages sans caractère obligatoire"* (*Les Sources du Droit international public*, page 107).

560. The second and even more fundamental objection to the Portuguese thesis is that it appears to be diametrically opposed to the plain words of Article 38 (1) *(b)* of the Statute of the Court, which refer expressly to a general practice *"accepted as law"*. These words clearly contemplate that the States, amongst whom a general practice is seen to have developed, should be acting—to use Anzilotti's phrase—"under a conviction that they are observing a legal rule". It is thus not enough that they should be persuaded of the usefulness, or the social desirability or need, of following the

particular practice; they must have the conviction that the need for this practice has been admitted by the general body of States to the point of giving birth to a customary rule which thenceforth they are under a "legal *necessity*" of obeying. In the Government of India's view, it is this last kind of necessity which is alone capable of conferring on a general practice the stamp and authority of a legal rule.

561. That also seems clearly to have been the conclusion reached by the Court in the three cases when it has had occasion to deal specifically with the psychological element in a general practice alleged by one of the parties to be evidence of a legal custom: the *Lotus* case (1927, A, No. 10, page 28); the *Asylum* case (*I.C.J. Reports 1950*, page 277); and the case of the *United States Nationals in Morocco* (*I.C.J. Reports 1952*, page 199). The language of the present Court in the two last mentioned cases is particularly clear. In the *Asylum* case the Court, in rejecting the Colombian Government's contention that there existed a general practice of granting diplomatic asylum amounting to a customary rule, said:

> "But it has not been shown that the alleged rule of unilateral and definitive qualification has invoked or—if in some cases it was in fact invoked—that it was, apart from conventional stipulations, exercised by the States granting the asylum as a right appertaining to them and respected by the territorial States as a duty incumbent on them and not merely for reasons of political expediency."

562. In a later passage (page 286), the Court stressed that it had not lost sight of the numerous cases of asylum cited by Columbia and then added:

> "In the absence of precise data, it is difficult to assess the value of such cases as precedents tending to establish the existence of a legal obligation upon a territorial State to recognize the validity of asylum which has been granted against proceedings instituted by local judicial authorities. In a more general way, considerations of convenience or simple political expediency seem to have led the territorial State to recognize asylum without that decision being dictated by any feeling of legal obligation."

563. In the *United States Nationals* case the Court, basing itself expressly upon its previous statements in the *Asylum* case, once again held that there was no sufficient proof of the psychological element and that in consequence the alleged customary rule was not established.

564. The Government of India submits that strict proof of the "conviction of observing a legal rule" is particularly necessary and important in the present case. For the general practice alleged in the present case is said by Portugal to place the Sovereigns of certain territories under an obligation to suffer other States to exercise rights on their territory. This is not a case where the alleged general

practice involves a reciprocal recognition of rights and obligations. It is one where the rights are all on one side and the obligations all on the other side. In such a case only the clearest evidence that the practice was one "accepted as law" could, it is submitted, justify a finding that it amounted to a general rule of customary law.

C. *Absence of any General Principle of Law within the Meaning of Article 38 (1) (c) of the Statute*

565. The Government of India must first of all underline the evident hesitations, even contradictions, which mark the attitude of the Portuguese Government on this question. In paragraph 42 of the Memorial, Portugal rejected unambiguously any assimilation of her alleged right of passage to "a servitude more or less analogous to those of private law" and strictly limited her reliance on general principles of law to an appeal to alleged principles of public international law (see paragraphs 52 *et seq.*). Now, however, in the Reply a whole section running to over five pages is devoted to "a general principle derived from the conformity of systems of municipal law" (paragraphs 327-334).

566. It is true that, in order to reconcile its present appeal to principles of private law with its initial condemnation of the transfer of private law servitudes into international law, the Portuguese Government makes a distinction between the principle of the right of passage which is said to emerge from the servitudes of private law and the servitudes themselves which are said to be only the particular vehicle used in certain juridical systems for giving concrete form to the principle.

567. Ingenious though this explanation may be, it is incompatible with the position taken up by Portugal in the Memorial. It was not merely the term "servitude", it was the servitude itself, that is to say, the restriction—whatever name one gives to it—upon the right of private property in a piece of land which adjoins enclaved land, that the Portuguese Government rejected in the Memorial, whereas afterwards, from its Preliminary Observations onwards, it has found it necessary to rely on that restriction.

568. The Government of India continues to think that Portugal's first view is the only correct one, seeing how false is the analogy between private property and sovereignty on which her second view has necessarily to be based. It scarcely needs to be recalled that the contemporary conception of territory is of a space in which a given State has an exclusive competence to exercise its authority, subject to any exceptional rights agreed to by it in favour of other States and those much fewer rights resulting from rules of law, like the right of innocent passage. Manifestly, that has nothing in common with the rights of enjoyment and disposal which form the constituent elements of private property.

569. Little importance therefore attaches to the fact that the majority of civilized States recognize in their private law an obligation for the owner of a servient tenement to allow passage to and from the dominant tenement, when it cannot be established—certainly not by relying exclusively on the auxiliary sources of law authorized by Article 38 of the Statute—that any such rule exists in regard to passage between a State and an enclave under the same sovereignty. Not a single writer or judicial decision has been cited in support of the alleged rule, and Portugal's contention in consequence appears to be simply her own original invention cooked up specially to meet the needs of her case.

D. *General Principles of International Law are not an Additional Source of Law Independent of Article 38 (1) of the Statute*

570. The Government of India adheres to its view that Article 38 (1) of the Statute contains an exhaustive list of the sources from which it is permissible to derive the rules of international law which the Court is authorized to apply, and that it is out of the question that recourse should be had to yet a fifth source in the shape of "general principles of international law".

571. This does not, of course, mean that general principles of international law are non-existent and have no place in legal theory or judicial practice. Nothing is more natural for jurists, especially those brought up in Roman systems of law, than to extract from rules discovered by an examination of the several sources of international law certain general principles which place the various rules in their correct perspective, guide the practitioner in their interpretation and help him to appreciate their relation to each other. These general principles, refined as they are from existing rules of positive law, have their basis in positive law. It follows that, when an alleged general principle is disputed, it is essential to prove its existence by indicating the rules of positive law which are claimed to provide the basis for formulating the general principle. Nor can it be allowed that the general principle should be formulated in a vague and sweeping manner departing materially from the basic rules of positive law nor that corollaries may be deduced from the general principle by a purely logical process without the slightest regard for the underlying elements of positive law. The Government of India has previously made this point in paragraphs 296 and 297 of its Counter-Memorial and it can only restate and reaffirm here what it said there.

572. Does it need to be recalled that the same view was taken by the Permanent Court of International Justice in the *Lotus* case, where it said (Series A, No. 10, at page 16):

> "The Court considers that the words 'principles of international law', as ordinarily used, can only mean international law as it is applied between all nations belonging to the community of States."

Thus the enunciation of an alleged "principle of international law" does not absolve the party which invokes it from proving its basis in positive international law.

573. Similarly, the Government of India concurs without any reservation in the remark of Strupp, who in the course of his lectures at the Hague Academy in 1930 put his audience on guard against the "terminological confusion" which surrounds the phrase 'principles of international law', "by which is meant sometimes simple legal principles, sometimes important legal principles and sometimes natural law" (*Recueil des Cours*, 1930, Volume III, page 447). And it equally endorses the observation of Professor Sörensen in his book, *Les Sources du Droit international*, which is wrongly quoted by our opponents, where he says: "*Étant donné que ni le Statut de la Cour ni la doctrine traditionnelle n'admettent ces principes comme une catégorie indépendante des sources, il y a lieu de présumer que la Cour entend comprendre par ce terme les normes invétérées dans le corps du droit international, quelle qu'en soit la source initiale, plutôt que d'envisager un groupe nouveau et particulier de règles*" (at page 112). And from this proposition the author correctly concludes that for a principle to be applied by the Court it must be so well settled that it imposes itself on the mind of an international judge as a determining factor without its being necessary to re-examine its origins and foundations (*ibid.*, page 115).

574. This being India's position, it goes without saying that the Government of India does not question the principle of territorial sovereignty, or its corollaries the independence and equality of States. Indeed, it could hardly do so, seeing that India herself invokes this very principle for the purpose of rebutting the obligation, to which she is alleged to be subject, of authorizing the passage of the troops and officials of another State over her territory. Does not the Government of India itself contend that it alone is competent to exercise territorial sovereignty over the area of Indian territory which separates Daman from Dadra and Nagar Aveli?

But what Portugal tries to establish in the Reply is that, Portuguese sovereignty not being exercisable without some transit across Indian territory, the Indian Union has to authorize this transit; the territorial sovereignty of the one State having thus to submit to certain limitations in order that the sovereignty of the other may be exercised in its own territory (paragraph 345 of the Reply). But this hierarchy of sovereignties, this duty imposed on the one State of limiting its own sovereignty having regard to the needs of the other, is a mere *petitio principii* arbitrarily deduced from the notions of sovereignty, independence and equality of States, and which finds support neither in treaties nor in custom, nor in the general principles of domestic law, nor in legal writings, nor in judicial practice.

575. Hence, it matters little that in the most varied phrases the Portuguese Government repeats to excess that the exercise of Portuguese sovereignty in the enclaves is "impossible" (paragraph 342), that the sovereignty is "reduced to nothingness" or "annihilated" (paragraph 344), if the sovereign cannot have access to these pockets by crossing neighbouring foreign territory; that the refusal of passage creates a "total interruption" of the sovereignty (paragraph 342), that it leads to suffocation (paragraph 348), that the permission is thus "indispensable" (paragraph 342). So many words does she find to express the necessity of passage. But it still remains for her to prove that from this necessity there has developed a rule of positive law and Portugal fails to furnish any such proof. Nor is this the only instance in which the vital interests of a State are not found to have protection in a rule of law and cannot therefore be likened to substantive rights. India has cited, in paragraph 298 of the Counter-Memorial, other examples of such vital interests, right of access to the sea, right to raw materials, right to commercial outlets, right to immigration, right to living room and before 1940 right to colonies; she has pointed out that they have frequently led to agreements granting them satisfaction within well defined limits, but that in default of agreement it has never been the case that the mere intensity of such needs sufficed to give birth to rules of law which ultimately international tribunals could apply.

576. The Portuguese Government summarily rejects India's argument in paragraph 337 of the Reply: India's comment, it says, is inapplicable to the claim of which it has seized the Court and to the title on which it bases that claim, and it treats this comment as a digression. The Government of India would be surprised if the Court subscribed to that view. For in verifying whether it is proper to deduce from the principle of sovereignty or from its corollaries, such as independence or equality or the right of existence, a positive rule of solidarity imposing on States the sacrifices required to satisfy the essential needs of one of their number, it was legitimate for the Government of India to look at the answer given to this question in cases other than enclaves but having the same vital character for a State. And that answer is completely negative.

577. Whether the Portuguese claim can be based on any other title is another question. In the present section the Government of India is only concerned with the question of the additional title which Portugal thought that she could find in the general principles of the law of nations. It is submitted that this title has been shown to be non-existent.

* * *

578. In concluding its observations on the existing state of the general international law relating to the subject-matter of Portugal's claim the Government of India desires to emphasize that, even if a right of transit for the purpose of having communication with enclaves could be said to find support in one or other source of general international law, that would not suffice to justify Portugal's claim to the transit of armed troops and police for the purpose of suppressing the insurrection in Dadra and Nagar Aveli. A right of transit of the latter kind would go far beyond a mere right to maintain necessary communications for the purpose of exercising sovereignty. A right to send troops and police across Indian territory for the purpose of fighting the people of the enclaves and compelling them into submission goes far beyond any right of transit that could conceivably be deduced from the practice in regard to Büsingen, Llivia, Campione and the other enclaves referred to in paragraph 306 of the Reply. It also goes far beyond any principle that could possibly be deduced from the general principles of law recognized by civilized nations in their domestic law.

III. Absence of any Obligation upon India derived from Particular Sources—Treaties or Local Custom

579. Part VI of the Counter-Memorial contains a full statement of India's arguments with respect to Portugal's claim to derive her alleged rights of transit from certain particular treaties and from local custom. The Government of India there examined the question whether Portugal's alleged rights of transit can be derived from these particular sources in three stages: first, it considered the facts of the Maratha period; then it considered the implications of the displacement of the Maratha Rulers by the British in 1818 and Portugal's assumption of the sovereignty of the enclaves after the extinction of the Maratha Power and as a result of this representation to the British Government; and finally it considered the facts of the British and post-British periods. In Part I of the present Rejoinder the Government of India has submitted to the Court a conscientious and exhaustive study of the historical case put forward by Portugal in the Reply and has supported its criticisms of the Portuguese contentions with numerous further historical documents and citations. In the light of this study of the Portuguese case and of the further evidence adduced by India in the Annexes to the present Rejoinder, the Government of India feels justified in claiming that there is really nothing in the Portuguese Reply which touches in any material point the arguments advanced by India in Part VI of the Counter-Memorial with respect to particular treaties and local custom. Indeed, the new material submitted to the Court in Part I above and in the Annexes to this pleading serves not merely to rebut Portugal's contentions but to give added weight to the arguments of India in the Counter-Memorial.

580. On the question, therefore, whether Portugal can find in treaties or local custom any particular basis for her alleged rights of transit the Government of India takes its stand essentially upon the arguments set out in Part VI of the Counter-Memorial. It will confine itself here to reviewing briefly the contentions of the Portuguese Government on this aspect of the case and to pointing out why it is that they cannot be accepted.

581. Before dealing with Portugal's contentions in regard to the historical facts, it seems necessary to examine a little further the juridical basis of local custom as a possible source of Portugal's alleged rights of transit over India's territory. The Government of India, in paragraphs 308 and 316 of its Counter-Memorial, has already set out its views concerning the conditions under which a legal rule can be deduced from a local usage. It does not suffice to show merely a usage; nor is it, properly speaking, a question of showing a usage accompanied by an *opinio juris*. The essential requirement is to prove that the historical facts provide clear evidence of the specific agreement of the territorial sovereign to the exercise of rights of passage by Portugal.

582. In paragraph 358 of the Reply, however, the Portuguese Government contests this view of the juridical basis of local custom and simply equates local custom with general custom. It maintains that the only subjective element necessary to establish a local custom is an *opinio juris sive necessitatis* which, as in the case of general custom, it interprets as a conviction of the existence of an inter-social or international necessity. It goes even further, saying that the *opinio juris sive necessitatis* does not have to be proven directly in each case and that a presumption in favour of the existence of the psychological element may even be argued.

583. The Government of India believes this view of local custom to be completely mistaken. Properly speaking, in the present case there is not, and cannot be, any local custom in the sense in which Portugal understands local custom. One need only look at the definition of custom in Article 38 of the Statute to see that this is so: "a *general* practice accepted as law". Although the word "general" may not be synonymous with universal, it is clear that it excludes a practice which is only observed in the relations between two particular States. Thus, in the two cases where the Court itself has considered the problem of a local custom and has applied in that connection the test of the *opinio juris*—the *Asylum Case* and the case of the *Rights of United States Nationals in Morocco*—the local practice in question did not concern two States alone but a number of different States.

584. Nor can Portugal get any support for her thesis from the place allowed to local custom, to *"us et coutumes"* in the domestic law of many countries. The place allowed in these systems to local

custom, which is in any event strictly limited by the rules of the civil law, is explained by the fact that the number of the subjects of the law participating in the formation of a local custom is sufficiently great to give to the creation of the local rule that collective character which is the hall-mark of a customary rule. But one cannot visualise a *customary* rule of law being formed by the practice of one State with regard to a single other State.

585. It follows that it is solely in virtue of a tacit agreement—a tacit convention—under Article 38, paragraph 1 *(a)* of the Statute, and not in virtue of an "international custom" under Article 38, paragraph 1 *(b)*, that in the present case local custom can be envisaged as a possible source of legal obligation for India. It also follows that the Government of India was fully justified in the Counter-Memorial when, at the beginning of its examination of the facts alleged by Portugal to establish a local custom, it underlined that these facts, if they were to be of any relevance, must be such as tend to show *the specific agreement of the territorial sovereign to the rights of transit claimed by Portugal.*

The Maratha Period

586. The Portuguese Government, as the Government of India pointed out in paragraph 308 of the Counter-Memorial, claims to find the origin of both her particular titles to rights of transit—both the alleged treaty right and the alleged local custom—in transactions of the Maratha period. It represents transit between Daman and the enclaves during the British and post-British periods simply as a continuation and perpetuation of rights of transit established during the Maratha period for the exercise of a sovereignty over the enclaves said to have been acquired by Portugal from the Maratha Rulers in virtue of a "Treaty of Punem" and the Sanads giving effect to the "Treaty". The Portuguese Government does not, and cannot, refer to any particular fact or document during the British or post-British periods as providing specific evidence of British or Indian consent to and recognition of Portugal's possession of legally enforceable rights of transit. What Portugal does is rather to assert that she acquired the alleged rights of transit as an incident of the acquisition of the sovereignty of the enclaves from the Maratha Rulers, and that the transit of persons and goods during subsequent periods is merely a manifestation and continuation of her ancient rights. In consequence, Portugal's contention, that by the "Treaty of Punem" and the Sanads giving effect to it the Maratha Rulers conferred on her the full sovereignty of the enclaves, constitutes a vital root of her title to rights of transit derived from particular treaties and local custom without which that alleged title altogether withers and dies. How vital Portugal herself realises her root of title in the Maratha period to be is clearly evidenced by her sup-

pression of the Portuguese text of the alleged treaty of 4th May 1779. (See paragraphs 2 and 96 above.)

587. In paragraphs 52-112 of the Counter-Memorial the Government of India adduced what seemed to it the most cogent reasons for holding that Article 17 of the alleged treaty did not and could not bring about a cession to the Portuguese of Maratha territory in full sovereignty. Article 17 of the alleged treaty envisaged a grant of revenues in a tenure known under the names of Jagir or Saranjam. It pointed out that the Maratha grant of Saranjam or Jagir was a grant revocable at the will of the grantor. And in its legal argument in paragraphs 312-3 the Government of India drew the inevitable conclusion from these facts that a Maratha grant of the enclaves to the Portuguese in Saranjam tenure—a *revocable* grant of *revenue*—could not provide any possible legal basis for implying in favour of Portugal *permanent* rights of transit for the purpose of exercising Portuguese *sovereignty* in the enclaves.

588. In the Reply, Portugal has attempted to meet India's case by advancing three principal contentions. The first is that Article 17 of the alleged treaty of 1779 did not in its original versions classify the grant as a grant in Jagir/Saranjam tenure and that it was only the Marathas who afterwards unilaterally described the grant as a Jagir/Saranjam tenure; and that Article 17 in its authentic version effected an assignment not merely of the revenue but of the villages themselves. The second contention is that the name Jagir or Saranjam does not suffice to characterize a tenure as a revocable revenue tenure since, according to her, there are various types of Jagir and Saranjam tenure and only a detailed examination of each particular tenure will disclose what are its characteristics. The third contention is that in any event "treaty-saranjams" were always in a special category and that their legal nature had always to be determined exclusively by reference to the actual terms of the treaty and the historical facts connected with it.

589. The Government of India submits that these three contentions have been completely exploded by the further evidence and authorities collected in Part I of this Rejoinder and in the accompanying Annexes.

590. Portugal's first contention, that Article 17 of the alleged treaty of 1779 did not classify the intended grant as a grant in jagir or saranjam tenure is exploded by the fact that the grant was in fact so described, not only in the Maratha documents relating to the grant but in the official Portuguese text of the alleged treaty of the 4th May 1779 which bears the signature of the Portuguese Viceroy himself. (See paragraph 96 of the Rejoinder.) Portugal's second contention that the name jagir or saranjam does not suffice to characterize a tenure as a revocable revenue tenure is met by the fact that the Maratha Government who made the grant defined

and described it as Saranjam, Jagir and Dumala, which description connoted a conditional, revocable title to collection of revenue from territory within the Grantor's Sovereign Jurisdiction, and that it consistently treated the grant as Saranjam/Jagir/Dumala from the day of the grant till its extinction as a Sovereign Power. The final contention of Portugal that "treaty-saranjams" were in a special category and could not be revoked is shown to be without any value whatever by reason of the fact that, one, no treaty was concluded between the Portuguese and the Marathas and the grant in question was made under Sanads, and, two, whether the grant of saranjam was made by treaty or otherwise, its nature and incidents continued to be the same. Furthermore, the classification "treaty-saranjam" was unknown to the Marathas. The term was first used by the British and it denoted a saranjam whose continuance was guaranteed by the British Government upon the fulfilment by the saranjamdar of stipulated conditions of fidelity and service to the British Government. The Government of India cited in this connection a decision of the Judicial Committee of the Privy Council *(Shekh Sultan Sani* v. *Shekh Ajmodin)* in which it was held that a "treaty-saranjam" was *revocable* at the pleasure of the Government. (See paragraphs 135 and 139 above and Annex F. No. 35.) The Government of India has answered all the contentions of the Portuguese Government in regard to the Maratha Period and shown that the Marathas never had the intention of making a cession of territory to the Portuguese; that Portugal never received from the Marathas a title to cession of territory in full sovereignty; that the Marathas granted to the Portuguese and to Narayan Vithal Dhume, the Portuguese Envoy, a saranjam or jagir on identical terms and conditions; that the Portuguese grant was attached on several occasions in connection with the question of Ramnagar Zakat; that the Marathas never abandoned their sovereign rights over Dadra and Nagar Aveli and had no intention of doing so.

591. Portugal's claim to the enjoyment of a right of exemption from Maratha customs duties has also been exploded. It has been shown that the Marathas granted and withdrew exemption fromduties and taxes on revenue yield ("Jame"—see paragraphs 229, 265 and 266) of Nagar Aveli according to its discretion and that till the very end of Maratha rule the Portuguese had to struggle hard to obtain from the Marathas passes and permits relating to exemption from Maratha duties and taxes. The Government of India has also shown that no right of way over Maratha territory was ever claimed or enjoyed by the Portuguese. Finally, the Government of India has shown that the Portuguese were expressly prohibited from raising "imarat" or buildings in the villages from which they were to collect their revenue under the saranjam grant. Consequently, the terms and conditions of the temporary, revocable and limited title to collection of revenue was such as to negative completely any

question of the Portuguese having acquired sovereign rights over the Maratha territory of Dadra and Nagar Aveli. The Government of India has dealt with all these points in great detail and given a systematic refutation of the Portuguese claims in the five sections on the Maratha Period facts in Part I of the Rejoinder.

The British and Post-Independence Periods

592. In paragraphs 324 to 342 of the Counter-Memorial, the Government of India set out the reasons for the submission that no ground can be discovered in the British Period or the Post-Independence Period for suggesting that there is any Treaty or Local Custom creating the right of passage claimed by Portugal in these proceedings. That submission was based upon the historical facts set out in the Counter-Memorial. The Portuguese Government have tried in their Reply to give another explanation to those facts, but that attempt, in the submission of the Government of India, fails altogether. In view of this, it is not really necessary for the Government of India to do more than to refer to paragraphs 324 to 342 of the Counter-Memorial, and to say that they adhere to the arguments there set out.

593. Those arguments are, however, strengthened by one or two matters emphasized for the first time in this Rejoinder. One of those matters is the reciprocal arrangement which prevailed before 1879 for the entry of armed men of one Government into the territory of the other. The existence of this arrangement, and its termination by the Treaty of 1878, confirms the fact that no special agreement or custom for the passage of Portuguese armed forces between Daman and Nagar Aveli ever existed. This fact is yet more strongly confirmed by the history of Article XVIII of that Treaty, under which the armed forces of either party were forbidden to enter the territory of the other without permission. The fact that the Portuguese Government not merely accepted, but themselves suggested and pressed, that provision shows that they had no right of transit. Had they had such a right between Daman and the Enclaves, they would have been careful to preserve it under the Treaty. After the period of the Treaty they always asked for permission when an armed force had to move between Daman and the Enclaves, and continued so to ask through the Post-Independence Period. This fact is entirely inconsistent with the existence of any Local Custom creating a right of transit.

594. With regard to the transit of goods, one fact now emphasized lends strong support to the argument set out in the Counter-Memorial that neither treaty nor local custom imposed upon the Indian Government any obligation to permit the transit of goods. This fact is that of the concession granted by the Government of

Bombay in 1945. The important feature is not the concession, but the system from which it sprung. The Government of Bombay had prohibited completely the passage of all commodities from their territory into Daman. They made an exception in favour of produce of Nagar Aveli, but this was done purely as a concession; on two occasions, in 1948 and in 1953, the Government of India threatened to withdraw it, and in 1948 they did suspend it for some time. There was no suggestion from the Portuguese authorities that the original prohibition infringed any right, although its effect upon the population of Daman was very serious (Indian Annex F. No. 68). They made no suggestion that they were entitled to the concession which they were given, and when its removal was threatened they made no complaint but, in 1949, apologized for the irregularities which had taken place. Had they possessed any right of transit of goods, it is inconceivable that they should not have referred to it in these circumstances. The Government of India submit that this incident reinforces the arguments set out in paragraphs 324 to 342 of the Counter-Memorial for the view that there has never been any Treaty or Local Custom relevant to the right now claimed.

Part IV

THE ALLEGED PORTUGUESE RIGHT OF TRANSIT IS NOT EXERCISABLE IN THE CIRCUMSTANCES OF THE INSURRECTION

595. The Government of India, in Part VII of the Counter-Memorial, contended that even if Portugal were to be held to have had the rights of transit which she claims, they ceased to be exercisable when the peoples of the enclaves rose against the Portuguese Government and when a *de facto*, independent local authority established itself in the enclaves. In Section VI of its Reply the Portuguese Government has disputed the validity of India's contentions and the Government of India will now examine the Portuguese arguments on this aspect of the case.

596. Portugal begins, in paragraphs 365-370, by challenging India's statement that the liberation of the enclaves and the establishment of the *de facto* local administration took place by a general insurrection. Portugal says that the liberation began with the entry into the enclaves of "invaders" from outside whose express object was to bring all Portuguese territories in India within the Indian Union; and that they only established themselves in the enclaves because India opposed the sending of reinforcements by Portugal to aid the Portuguese local authorities. Portugal then solemnly proceeds to argue that *(a)* the burden of proof is on India to establish the accuracy of her statement that a general insurrection took place in the enclaves but that *(b)* it is legally impossible for India ever to discharge that burden of proof. She maintains that all the evidence submitted by India emanates from the "invaders" or from political bodies which support them and is for that reason alone to be totally rejected by the Court. She further maintains that India neither possesses nor has any possibility of obtaining acceptable evidence establishing that there was a general insurrection, because she says it is not open to India to make inquiries in the enclaves, seeing that they are "Portuguese territory" and, in any event, any such inquiries would have no legal value since they would be carried out unilaterally without any control by Portugal.

597. This whole argument is an ingenious construction for the purpose of loading the dice against India and in favour of Portugal. It really amounts to an invitation to the Court to dismiss from the case altogether the vital fact, that the people of the enclaves have risen up against Portuguese rule and thrown off Portuguese sovereignty, without giving it any consideration. In the view of the

Government of India, however, the Portuguese argument is completely misconceived.

598. In the first place, the Government of India considers inadmissible the Portuguese thesis, that it is up to India to prove to the Court the particular character of the insurrection. The general burden of proof in the case is, of course, upon Portugal, as plaintiff, and she has to prove not merely her title to the right of transit which she claims but her title to exercise it in the particular circumstances of the insurrection in the enclaves. India, as the Court knows, has provided some evidence that there was an insurrection in the enclaves and, this being so, the burden of proving her right to claim passage for her armed forces and officials in case of such an insurrection most certainly rests upon Portugal. The Portuguese Government never tires of repeating that the right of transit which she claims is not an absolute or general right but a right of transit, without any exemption from the exercise of India's sovereignty, and a right strictly limited to what is necessary for the exercise of Portuguese sovereignty within the enclaves. It is a clear consequence of Portugal's own formulation of her claim that she may be called upon to justify to India her right to passage on each occasion that she demands it. Accordingly, the Government of India cannot accept the correctness of the view which Portugal appears to express in paragraphs 365-370 that there is, in effect, a burden upon India to justify her refusal of passage instead of a burden upon Portugal to establish her right to passage in the circumstances of the insurrection in the enclaves.

599. In the second place, the fact that some Goans may have entered the enclaves at the time of the insurrection is in no way inconsistent with the general character of the insurrection. It is a commonplace of history that general insurrections are frequently touched off by a particular incident or have their origin in the action of particular individuals. That there was an insurrection in the enclaves in 1954 no one disputes. That this insurrection resulted in the creation of a new *de facto* local administration covering the whole of the rebel territory is also not in dispute. That the *de facto* administration has continued to operate in the enclaves with the apparent acquiescence and approval of the people of the enclaves is an undeniable fact. These facts alone, without anything more, would justify India in speaking of a general insurrection in the enclaves. In addition India filed with her Counter-Memorial a number of documents relating to the insurrection (Indian Annex E. No. 63-68). In the majority of cases, it is true, the information contained in the documents is derived either from sources on the insurgent side or from the *de facto* local authorities themselves. That does not, however, prevent it from being perfectly good evidence. After all, it was the insurgents who made the insurrection and it is of them that the *de facto* administration is composed. For example, the

Report of the New Administration and the resolutions of the people of Nagar Aveli (Indian Annex E. No. 64 and F. No. 117), even if they are read with every reserve, reveal the structure and working of the *de facto* administration and strongly confirm the general support of the people of the enclaves today for the new regime.

600. In short, the existence in the enclaves of a state of general insurrection against Portuguese rule and of an independent *de facto* local administration are simple facts which cannot be explained away by hypothesis or argument. They are inescapable facts which confront both the Parties and the Court and it is impossible to shut them out of the case, as Portugal seems to propose.

601. Portugal, however, contends that even if it is assumed that there has been a general insurrection in the enclaves, the legal conclusions which India draws from it are inadmissible. In this connection, she advances the following propositions:

(1) When an insurrection breaks out, the duty of third Powers is to undertake no action which might obstruct the efforts of the local government aiming at the re-establishment of the troubled order. At such time, she says, it is only the lawful government which has existence in the eyes of those Powers; the insurgents possess no international legal personality. For this proposition she cites Articles 1 and 2 of the Resolutions of the Institute in 1900 and the Inter-American Convention of 1928 on Duties and Rights of States in the Event of Civil Strife.

(2) The above situation can be modified by a "recognition of belligerency". This submits both the conflicting parties to the rules of war and thereby gives to the insurgents the quality of a subject of international law which previously only the lawful government possesses (Wehberg, *Recueil des Cours*, 1938, Vol. I, page 41).

(3) Even so, "recognition of belligerency" does not place the insurgents in the same position as the lawful government; it does so solely in relation to the conduct of the war and the lawful government otherwise retains the plenitude of its *de jure* powers. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the *de jure* recognition of the revolutionary party as a government constitutes "premature recognition" contrary to international law (Lauterpacht, *Recognition in International Law*, p. 94).

(4) The existence of a true state of war, in the material sense of the word, between a lawful government and insurgents is a necessary condition for the recognition of belligerency. It is the repercussions of this state of hostilities upon third States which explain and justify the decision made by them to recognize the insurgents as belligerents.

(5) Between the legal situation at the outbreak of an insurrection and "recognition of belligerency", practice recognizes the possibility of an intermediate situation, namely, "recognition of insurgency". This status cannot be defined *a priori* but varies according to the case. "Insurgency" as conceived in relation to foreign States, is the sum total of rights and privileges which these States concede to the rebellious party during a civil war (Lauterpacht, *op. cit.*, page 270).

602. Portugal also cites Wehberg as saying that recognition of insurgency is a stage "in which the insurgents are already something more than rebels but have not yet obtained the rights of belligerency" and asserts that such recognition is only possible "if an armed struggle in fact exists between the insurgents and the lawful government".

603. The recognition of the belligerency of the insurgents in the enclaves is not a point which arises at all in the present case. The Government of India does not, therefore, find it necessary to detain the Court with a long disquisition upon the Portuguese propositions concerning "recognition of belligerency". It feels bound, however, to enter a firm reservation as to the correctness to-day of the Portuguese contention that initially insurgents have no status in international law and that only "recognition of belligerency" can give insurgents the quality of subjects of international law. In modern times there has been a strong tendency to bring insurgents within the purview of international law and to grant them in some measure, however limited, recognition as subjects of international law. This tendency is very clearly seen in the four Geneva Conventions of 1949, each of which has a general Article, namely Article 3, laying down certain minimum international obligations which are to apply in cases of armed conflicts *not of an international character*. Moreover, the Article expressly speaks of those obligations as attaching to *"each Party to the conflict"*, thereby clearly ascribing to insurgents a certain capacity as subjects of international law. That they are to have this capacity quite independently of any "recognition of belligerency" is made very clear not only by the general wording of Article 3 itself but also by the terms of Resolution No. 10 of the Geneva Conference, at which the Convention was drawn up. For, owing to the explicit reference in the Convention to "Parties" to a non-international conflict, it was thought necessary to record in a special Resolution that the Conventions were not to be understood as modifying "the conditions under which a Party to a conflict can be recognised as a belligerent by Powers not taking part in this conflict." This Resolution, the clear purpose of which was to avoid confusion between the status of "insurgents" and the status of "belligerents", strongly confirms that in the drafting of the Geneva Conventions it was accepted that insurgents do possess within certain limits the character of subjects of international law. That insurgents possess such a limited status as subjects of inter-

national law is now accepted by many of the leading modern writers; see Oppenheim-Lauterpacht, *International Law*, Volume I (8th edition, 1955), pp. 140-1; Charles De Visscher, *Théories et Réalités en Droit international public* (1953), p. 289; Alf Ross, *Text Book of International Law* (1947), p. 103; Guggenheim, *Traité de Droit international public*, Volume I (1953), pp. 202-208.

604. Nor is it possible to accept the correctness of the Portuguese contention that the existence of an actual armed conflict between the rebels and the Government is the basis and the essential condition of "recognition of insurgency". The *raison d'être* and the legal basis of "recognition of insurgency" is the mere fact of insurrection —the mere fact that in a given piece of territory political power and authority are in dispute—with repercussions on another State. "Recognition of insurgency", it is said in a leading text-book, "is the outcome both of the unwillingness of foreign States to treat the rebels as mere law-breakers and of the desire of those States to put their relations with the insurgents on a regular, although clearly provisional, basis" (Lauterpacht, *Recognition in International Law*, p. 270). An insurrection, of course, is usually attended by a continuing armed conflict, and frequently, no doubt, it is the repercussions of the armed conflict on outside States which lead them to recognize the existence of the insurrection. Neither of these points, however, is an essential element in recognition of insurgency. In the first place, it is absurd to suggest, as Portugal does, that recognition of insurgency is impossible when the armed conflict endures only for a brief moment because the insurrection is immediately and completely successful. The very success of the insurrection, since it results in a clear alteration of the *de facto* effective political power in the area, is an even more urgent case for recognition of insurgency than the case where a continuing armed conflict leaves ambiguous and precarious the *de facto* position in the area. In the second place, it is not only the military repercussions of an armed conflict which may make it impracticable for an outside State to disregard the existence of a civil insurrection and which may cause it to recognize a state of insurgency in the area. It may prove expedient to enter into contact with the insurgent authorities with a view to protecting national interests in the territory occupied by them and to regularizing political and commercial intercourse with them.

605. The Government of India hardly thinks it necessary to demonstrate that the factual situation resulting from an insurrection in an enclave affects in a most particular and urgent manner the government of the territory which surrounds the enclave. Still more is this the case when, as in the present instance, the rebel enclave is separated from the territory of the displaced government by only a few miles. The factual situation is full of dangers and complications for the government of the intervening territory and,

in consequence, it has every reason from the very outset of the insurrection to recognize in some degree the existence of the insurrection.

606. Equally untenable is the proposition in paragraph 374 of the Reply that there were no acts on the part of the Government of India which could be characterized as "recognition of insurgency". Portugal there says: "whatever the purpose of the recognition may be, the stated intention to recognise is always required. If it may be implicit in certain cases, the condition is that the scope of the facts be clear and that the intention to recognise be a necessary result." And, citing a dictum in Judge Lauterpacht's book that "*de facto* intercourse is not *de facto* recognition", it contends that the contacts of the Indian authorities with the insurgents in such day-to-day matters of administration as police, posts, transport, etc., do not constitute recognition of insurgency. In the view of the Government of India, the Portuguese argument on this point is completely misconceived. Leaving aside the question exactly what is meant when it is said that "*de facto* intercourse is not *de facto* recognition", recognition of insurgency is a very different matter from the recognition *de facto* of a State or government. It is of the very essence of recognition of insurgency that it should manifest itself in informal intercourse with the insurgents or in other informal reactions to the factual situation arising from the insurrection. Thus, Oppenheim-Lauterpacht gives as typical examples of recognition of insurgency cases where a third State, without making a formal pronouncement and without conceding to the rebellious forces belligerent rights affecting foreign nationals, *refrains from treating them as law-breakers*, or where it considers them as the *de facto* authority in the territory under their occupation and maintains with them the relations deemed necessary for the protection of its nationals, for securing commercial intercourse or for other purposes (*op. cit.*, Volume I, pp. 140-1; see also in the same sense Lauterpacht, *op. cit.*, p. 270).

607. The basis of "recognition of insurgency", as previously pointed out, is that in a given piece of territory political power is in dispute with repercussions on the other State. The latter by a well-established practice is entitled to make such informal contacts with the insurgents as it may deem necessary to protect the interests of itself and its nationals and is also entitled, by legislative or administrative measures, to take such steps as it may deem necessary to isolate its territory and its nationals from the repercussions of the insurrection. Such reactions on the part of an outside State constitute recognition of insurgency. They do not, however, necessarily involve any larger form of recognition, and a State which does react in these ways cannot justifiably be accused of "premature recognition". For the modern State practice on this point, the Court is respect-

fully referred to Hackworth's *Digest of International Law* (1906), Volume I, page 356-363, and Lauterpacht, *op. cit.*, Chapter XVI.

608. The right of outside States to recognise a situation of insurgency, to take steps to protect their own interests, and to adopt an attitude of reserve and "neutrality" as between the contending parties, without according the status of belligerents to the insurgents, was indeed strikingly confirmed by the practice of States in the Spanish Civil War. This is not to say that, in India's view, recognition of insurgency brings into play all the rights and duties of "neutrality" in the technical sense. But the practice of the Spanish Civil War, as well as the previous practice, shows very clearly that a State, without any recognition of belligerency, is entitled to take measures to prevent the involvement of its territory or its nationals in the dispute. Thus the Parties to the Non-Intervention Agreement of 1936 undertook between themselves to forbid the supply of arms and ammunition either to the insurgents or to the government. Similarly, the Swiss Government, although it was not a Party to the Non-Intervention Agreement and although it refused recognition of belligerency to the rebels, adopted an attitude of complete neutrality between the two contending Parties. Thus, on 6 October, 1936, the Head of the Federal Political Department made the following declaration in the *Conseil des États*:

> "... je désire ... faire quelques brèves remarques sur les conditions et les motifs de notre neutralité. Même si le Gouvernement français n'avait pas pris l'initiative d'une déclaration générale de non-intervention, le Conseil fédéral aurait proclamé sans hésiter la neutralité de la Confédération... Qui dit 'neutralité' parle non des individus, mais de l'État. Qui dit 'neutralité' affirme sa volonté de ne pas prendre partie entre des belligérants. La question des sympathies et des antipathies individuelles, ou même collectives, n'a rien à faire avec celle de la neutralité. On a dit que la neutralité est une notion qui ne s'applique pas à la guerre civile. Celle-ci, a-t-on ajouté, se livre entre un pouvoir légitime et une faction d'insurgés. L'aide accordée au pouvoir légitime — a-t-on conclu — n'est pas contraire à l'idée de la neutralité... Mais pour nous, la politique de neutralité représentait un devoir encore plus clair, encore plus impérieux... Le Conseil fédéral aurait violé une obligation élémentaire s'il n'avait pas annoncé et défini notre neutralité sans retard ..."

609. The Government of India submits that the authorities discussed in the foregoing paragraphs completely justify the statement in paragraph 347 of India's Counter-Memorial that in a civil war or insurrection an outside State has the right "to adopt an attitude of complete reserve and neutrality as between the Government and the rebels". They also show, contrary to the views expressed by Portugal, that the exercise of this right does not depend on the existence of an actual armed conflict between the Government and the rebels or on any prior formal acts of "recognition" of the insurgents.

610. The Government of India also feels bound to emphasize again the absurdity of the Portuguese contention that, in the present instance, India, by reason of the absence of any continuing armed conflict, was not entitled to recognize the situation of insurgency and adopt an attitude of reserve and neutrality between the Government and the rebels. The almost instantaneous success of the rebels resulted almost at once in the cessation of the armed conflict, the completion of the insurrection and the establishment of a settled *de facto* local administration. Thus, the situation passed almost at once beyond a situation of mere insurgency into that of a completed insurrection with a new *de facto* political authority in the rebel territory. If an outside State has a right to recognize a situation of insurgency when the armed conflict continues, *a fortiori* does it have this right when the insurgents are completely successful and establish their authority over the whole of the rebel territory. In the present instance, moreover, the establishment of a new *de facto* political authority in the enclaves produced a fundamental change in the circumstances which could not fail to have a vital effect on any rights of transit which Portugal might previously have possessed between Daman and the enclaves. The Government of India will refer to this question of the legal consequences of the establishment of a new *de facto* government in the enclaves again a little later on. The question is only mentioned now for the purpose of underlining that only a limited importance attaches in the present case to determining the exact scope and conditions of "recognition of insurgency" in international law. In regard to "recognition of insurgency", the submission of the Government of India is that its refusal of transit facilities across its territory to Portugal for the purpose of suppressing the insurrection clearly falls within the scope and conditions of that doctrine.

611. Portugal in paragraphs 376-380 embarks on a quite different argument which for the purposes of this case appears to be rather a digression. First, she asserts that even if it be considered that there was a general insurrection in the enclaves and that the insurgent authorities had been recognized as the *de facto* government, the continuance of Portugal's *de jure* right of sovereignty would be indisputable. In order to justify this assertion, she cites Judge Lauterpacht as authority for the proposition that "no change *de jure* can take place in the established system as long as the lawful government has not ceased all resistence". And she adds that, although temporarily unable to exercise her sovereignty in the enclaves she has not weakened in her determination to re-establish her authority.

612. There are two reasons why Portugal's argument about the continuance of her *de jure* sovereignty must be considered to be completely without point in the present case. The first reason is that here the insurrection is over and the establishment of a new

political organization in the enclaves is complete. The Portuguese thesis that her *de jure* title to the sovereignty of the enclaves still survives is in present circumstances meaningless. The insurrection being complete and the new political organization created by the rebels having manifestly become established and settled, no rule of international law precludes outside States, if they are so minded, from recognizing the new administration both *de facto* and *de jure* as the government of the enclaves—as the government of an embryo *San Marino*. The Government of India has recognized the local administration as the *de facto* provisional government of the enclaves. If other States have not yet felt called upon to do the same, it is only because their interests have not been in any way affected by the political changes in the enclaves.

613. The second reason is that the Government of India has not rested any part of its case on the hypothesis of a total and final termination of Portugal's *de jure* title to sovereignty of the enclaves. The Government of India has rested its case simply on the undoubted fact of the insurrection and the establishment of a new *de facto* local administration in the enclaves. This being so, it does not understand the relevance of the Portuguese argument concerning the continuance of her *de jure* title to sovereignty.

614. Accordingly, it does not seem to the Government of India that any useful purpose would be served in pursuing the question of the theoretical existence or non-existence to-day of Portugal's title to *de jure* sovereignty of the enclaves. At the same time, however, it feels entitled to point out that Portugal in the above-mentioned paragraphs of the Reply has somewhat misrepresented the principle expressed in Judge Lauterpacht's book on Recognition. The principle actually stated in that book on page 94 is as follows:

> "In one respect, however, the presumption in favour of the lawful government is above controversy: the latter is entitled to continued recognition *de jure* so long as the civil war, whatever its prospects, is in progress. So long as the lawful government offers resistance which is not ostensibly hopeless or purely nominal, the *de jure* recognition of the revolutionary party as a government constitutes premature recognition which the lawful government is entitled to regard as an act of intervention contrary to international law."

The test of premature recognition there formulated is clearly quite different from that indicated in the Portuguese Reply. There is nothing in Judge Lauterpacht's text inconsistent with the recognition of the present local administration *de facto* and *de jure* as the government of the enclaves. However, it is quite unnecessary for the Government of India to dwell upon this point since, as already stated, it does not rest any part of its argument upon the question of the *de jure* title.

615. Another development of the same line of argument in paragraphs 377-378 of the Portuguese Reply is not merely irrelevant;

it is completely inadmissible. Having acknowledged that India's reaction to the changes which have taken place in the enclaves has been limited to recognition of the insurgent authorities as a *de facto* and provisional administration in effective control of the enclaves, Portugal nevertheless speculates about India's future policy and calls on India to define her future intentions. Portugal recalls the solicitations previously addressed by the insurgents to the Government of India for the incorporation of the enclaves within the Indian Union. She next asserts that the purpose of the insurgents is neither to set up a rival Portuguese Government nor to create an independent State but to bring the enclaves under Indian rule. Then she takes a leap into the future and says that, if India were at some time hereafter to grant the insurgents a recognition exceeding the limits of a "provisional *de facto* recognition", this would mean that India proposed to accept the annexation of territories falling under Portuguese sovereignty without the consent of Portugal. And it is on this basis that she apparently considers herself entitled to demand from India information as to any possible future change in India's attitude towards the solicitations from the insurgents in regard to the incorporation of the enclaves in the Indian Union.

616. The Portuguese demand is irrelevant and inadmissible because the issue before the Court is her right of passage in the *de facto* situation resulting from the insurrection and not Portugal's title to sovereignty of the enclaves at some future date. Again, it is irrelevant and inadmissible because it also concerns the future intentions of the *de facto* administration of the enclaves, an entity which is not before the Court.

617. In paragraph 379 Portugal turns to the question of the "purpose" of the insurgents and says that it is of capital importance. She maintains that, when jurists speak of the attitude of third States to an insurrection, they contemplate only cases where the "purpose" of the insurrection is foreign to the third State; and she asserts that "the entire regime of recognition of belligerency and recognition of insurgency" is governed by this essential factor. Then she states that in the present instance the purpose of the insurgents merges with that of the Indian Union, as they are seeking the incorporation of the enclaves in India while the Indian Union has never disguised its wish to see the incorporation of Portugal's Indian territories within the Union. And in paragraph 380 Portugal goes on to assert that two important results flow from this alleged link between the purpose of the insurgents and the purpose of the Indian Union.

618. The first comment to be made on paragraph 379 is that the considerations which it introduces are purely political. Indeed, nothing shows more clearly the essentially political nature of the Portuguese claim than the arguments which Portugal advances in this paragraph and in that which follows.

619. The second comment is that there is no foundation in law for Portugal's assertion that "the entire regime of the recognition of belligerency and insurgency" is based on the hypothesis that the purpose of the insurgents is foreign to the purpose of the third State. On the contrary, even in the case of war between sovereign States the law of neutrality does not preclude a neutral State from feeling and showing its sympathy for one or other belligerent provided that it does not break one of the recognized rules of neutrality. So clear is this point that it scarcely needs the support of authority and the Government of India will confine itself to referring to the relevant passage in Oppenheim-Lauterpacht (*op. cit.*, Volume 2 (7th edition, 1952), p. 655):

> "The required attitude of impartiality is not incompatible with sympathy with one belligerent, and disapproval of the other, so long as these feelings do not find expression in actions violating impartiality. Thus, not only public opinion and the press of a neutral State, but also its Government, may show their sympathy to one party or another without thereby violating neutrality."

620. In short, the Portuguese argument fails to distinguish between the question of maintaining an attitude of reserve and neutrality towards the two disputing parties in regard to the hostilities and that of sympathizing with the aims and ideas of one of them.

621. No one doubts that, when the policy of insurgents favours a transfer of allegiance to a third State or otherwise meets with strong sympathy on the part of the third State, the situation is more delicate and more complicated. But the existence of a complication of this kind may well make it even more—not less—necessary for the third State to be in a position legally to adopt an attitude of reserve and neutrality as between the rebels and the Government. The institutions of "belligerency" and "insurgency" are admitted in international law for the very purpose of providing a regime to regulate the delicate factual and political situation resulting from an insurrection. Yet Portugal apparently contends that, when the situation resulting from an insurrection is of particular delicacy owing to the sympathies of the outside State, the principles of belligerency and insurgency are not to have any application at all. Such a contention, in the view of the Government of India, answers itself. Could it really have been seriously argued that by reason of its Monroe Doctrine the United States was disqualified from recognizing the insurgency of a colonial territory in the Western Hemisphere? Obviously not.

622. In the present instance, even if the insurgents were inspired by a wish to bring about the merger of Dadra and Nagar Aveli in the Indian Union, there can be no doubt whatever as to the fact that their first objective was to rid the enclaves of Portuguese rule. In short, there was an insurrection against Portugal and India was confronted with a situation of fact raising in a typical—and indeed

acute—form the problem of insurgency. The Portuguese contention in paragraph 380 of the Reply that the desire of the insurgents to merge the enclaves in the Indian Union disqualified India herself from adopting an attitude of reserve and neutrality in face of that situation of fact, is therefore without any legal foundation.

623. The Government of India has never sought to disguise the fact that it and the people of India were and are in full sympathy with the wish of the insurgents to bring about the incorporation of the enclaves in the Indian Union. But, as already pointed out, this could not in any way deprive India of her right to adopt an attitude of reserve and "neutrality" as between the rebels and the Portuguese Government. For the Government of India to have granted transit facilities to Portuguese armed troops and police sent to suppress the insurrection would have been to implicate Indian territory directly in the dispute and that in a sense utterly opposed to the unanimous opinion of the people of India. The Government of India feels justified in characterizing as altogether incredible Portugal's proposition that India, by reason merely of her sympathy with the insurgents, was not entitled to stand apart from the conflict but was legally bound to assist in the destruction of those with whom she sympathized.

624. The Government of India also feels justified in drawing attention to the fact that when the insurgents, having achieved their first objective of liberating themselves from Portuguese rule, promptly applied to have the enclaves incorporated within the Union, the Government of India did not accede to their request. The same restraint, as members of the Court are aware, has not always been shown by Governments when their sympathies or their political interests have been involved in the success of an insurrection or *coup d'état* in another country.

625. Portugal's other contention in paragraph 380 with regard to the "purpose" of the insurgents concerns the possible future recognition policy of the Government of India and is really covered by what has already been said in paragraph 616 above in answer to Portugal's argument about the continuance of her title to the *de jure* sovereignty of the enclaves. In the present connection Portugal, invoking the fact that the aim of India as well as of the insurgents is the merger of the enclaves in the Union, contends that any recognition of the insurgents by India not purely provisional and not strictly limited to the *de facto* situation would raise a problem of territorial acquisition as between India and Portugal. This contention, like the previous one about the continuance of Portugal's *de jure* title, is totally irrelevant and inadmissible because it concerns matters which are entirely hypothetical and are not the subject of the case now before the Court. The recognition so far accorded by India to the insurgent authorities has in fact been confined to their recognition as a provisional, *de facto*, local government, and it is

that legal and factual situation with which the Court is alone concerned. The Government of India does not propose to waste the time of the Court by discussing a contention which relates to a legal and factual situation different from that before the Court. It feels bound, however, to express the strongest reservations about the validity of the Portuguese contention on this point. When a people, by a successful insurrection, has liberated itself from an unwanted colonial rule and has organized itself as an independent community under a *de facto* government, international law—and least of all the Charter of the United Nations—does not place any restriction on the right of that community to decide in full freedom its own political destiny.

626. The Government of India submits that none of the Portuguese contentions discussed in the preceding paragraphs of this Part really touch the basis of the four separate arguments advanced by India in Part VII of the Counter-Memorial concerning the legal conclusions to be drawn from the insurrection in the enclaves. India's four arguments are, however, taken up individually by Portugal in paragraphs 383-397 of her Reply and the Government of India will now re-examine its own arguments in the light of Portugal's observations in these paragraphs.

627. *First Indian Argument.* This argument was that, even if Portugal should be held to have possessed a right of transit for the day to day exercise of Portuguese sovereignty in the enclaves, that would be a very different thing from a right of transit for the purpose of suppressing a general insurrection and forcibly keeping the peoplein subjection; and that a right of transit of the latter kind would be a grave embarrassment to India's public order, involving as it would the risk of armed conflict and riot at the borders of the enclaves and even within Indian territory (Counter-Memorial, paragraphs 345-346).

628. Portugal, it is true, begins by questioning the general character of the insurrection in the enclaves. This point, however, has already been disposed of in paragraph 599 above, and there is no need to deal with it again. Portugal's main contention is that, even if there was a general insurrection in the enclaves, India, by reason of the responsibility which she is said to have in the events of the insurrection, is precluded from pleading the dangers to her own public order as a ground for not performing her alleged obligations to Portugal. Portugal alleges that before the insurrection India took certain measures which weakened the position of Portugal vis à vis the insurgents; that India refused the prompt request for transit facilities made by Portugal; that if India had not done so, order could have been restored by comparatively small contingents and without the kind of repercussions which India now states that she fears; that the insurgents have become stronger; if order cannot now be restored under the same easy conditions as in 1954, India

is not entitled to rely on this new situation in order to justify the non-fulfilment of her obligations to Portugal.

629. The Government of India has already given, in paragraphs 457-502 above, its reply to the Portuguese complaints concerning certain measures which it is said to have taken in furtherance of the insurrection. The Government of India, as the Court will recall, strongly denies that it took any such measures and vigorously contests Portugal's allegation that India's legal responsibility with respect to the events of the insurrection period is in any way in issue in the present case (see India's reservation on this point in paragraphs 9-10 of the Introduction).

630. In any case, even if the Court were to find that India had shown some lack of due diligence in failing to prevent the Goans from entering the enclaves, and had thereby incurred some legal responsibility toward Portugal with respect to the insurrection, that would not have the legal consequences which Portugal claims in regard to the question of transit over Indian territory. It does not at all follow that, because India may have incurred some legal liability towards Portugal with respect to the events of the insurrection, she is now precluded from invoking the dangers to her public order and the increased strength of the insurgents in justification of her refusal of transit facilities to Portuguese armed forces and police. The question now in issue is whether any rights of transit which Portugal may possibly have possessed have any force or application at all in the circumstances of a general insurrection in the enclaves. This question is quite distinct from the question of India's possible responsibility in law for a failure of due diligence in preventing the entry of the Goans into the enclaves. The latter question, if resolved in Portugal's favour, might, no doubt, result in India's being under some form of legal liability towards Portugal in accordance with the principle endorsed in the *Corfu Channel Case*, that a State is under an obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States (*I.C.J. Reports 1949*, p. 22). But that is not the question before the Court. The question before the Court is the quite different one whether, the insurrection having occurred and the transit of armed Portuguese troops and police now involving a grave risk of implicating Indian territory in the conflict, Portugal's alleged rights of transit are legally of any application in such a situation. In the *Corfu Channel Case* itself, as the Court will recall, the grave breach by Albania of her obligation not to allow her territorial waters to be used for acts contrary to the rights of innocent passage possessed by other States was nevertheless held not to deprive Albania of her right to object to the entry of British warships into those territorial waters for the purpose of removing the mines obstructing the passage. Similarly in the present case, the question of any possible responsibility on the part of India for

not preventing the entry of the Goans into the enclaves is an issue wholly distinct from the question of the exercise of Portugal's rights of passage once the insurrection had begun.

631. Portugal, however, has put forward an additional argument on the same point. She contends that only "clear dangers of really serious impact upon the Indian public order could stand in the way of Portugal's exercise of the right of passage" and she questions the reality of India's fears of riots at the borders of the enclaves and even within Indian territory. She asserts that India could easily guard against these dangers by adopting simple precautionary measures. She adds that, if the passage of Portuguese forces appeared at any moment likely to provoke acts of violence on Indian territory, the Government of Portugal would not hesitate to agree to a momentary suspension of the passage for that reason; but that only an objective evaluation of the facts would make it possible to determine the extent to which passage might possibly be suspended.

632. The Government of India feels that it is entitled to inquire what has become of the Portuguese thesis of a right of transit *without immunity, without exemption from the exercise of India's territorial sovereignty, without exemption from the requirements of India's public order*. Portugal now appears to take the position that no mere possibility, however obvious, of riot or disorder at the borders of the enclaves and in Indian territory would be enough to justify India in refusing the passage of Portuguese armed forces. If India considers that there is such a possibility, she is apparently expected by Portugal to take active steps to prevent any riot or disorder either along the transit route or at the frontiers of the enclaves. Thus, Portugal's alleged rights of transit, it seems, oblige India to co-operate actively with Portuguese armed forces in their attempt to launch themselves upon the insurgents in the enclaves. The Government of Portugal certainly shows realism in recognizing that this is what its claim must mean in actual practice. But, in the view of the Government of India, the very fact that the Portuguese claim would mean this in practice is enough to demonstrate its total lack of any foundation in international law. Nor can such a claim possibly be regarded as a claim to rights of transit without any immunity from India's jurisdiction.

633. Again, the Portuguese claim cannot possibly be said to be a claim to rights of transit without exemption from the exercise of India's sovereignty, when India's evaluation of facts, which clearly carry a certain measure of danger to India's public order, is not to be accepted by Portugal but may be opposed by contrary assertions advanced by Portugal as to the exact degree of the danger. Granted the existence of facts involving some possibility of disorder, the power of appreciating the risks of public order is a power inherent in the sovereignty of India. Yet Portugal would now deny to India

the exercise of this power so far as concerns the transit of Portuguese armed forces across Indian territory.

634. In any event, Portugal's theorizing about the extent of the risks to India's public order and her effort to minimize them are entirely unconvincing. The danger of riot and disorder at the borders of the enclaves and in Indian territory is so starkly obvious that it scarcely seems to need elaboration. All available information indicates that the authorities and people of the enclaves will strenuously oppose any Portuguese troops or police who try to re-establish Portuguese sovereignty there. Indeed, they might even seek to prevent the entry of Portuguese troops or police at an earlier stage by blowing up a key point on the Daman-Silvassa road. It needs very little imagination to see what would happen if Portuguese troops were to attempt to enter the enclaves from Indian territory. Portugal complains that in putting the matter in this way, India is only stating the most extreme possibility. That is not the case at all. India is only stating the obvious probabilities of the situation. A conflict between the insurgents and the Portuguese is almost a certainty.

635. *Second Indian Argument.* This argument was that, confronted by a civil war or insurrection in another country, a State is entitled to adopt an attitude of complete reserve and neutrality as between the Government and the rebels (Counter-Memorial, paragraphs 347-349).

636. The objections raised by Portugal to this argument have really all been dealt with already in paragraphs 601-610 above. The Government of India believes that it has demonstrated in those paragraphs that, confronted with an insurrection in the enclaves and then with the establishment of a *de facto* local government, India was and is now fully entitled to refuse to allow Portuguese armed troops or police to cross her territory for the purpose of launching themselves against the rebels and suppressing the *de facto* government. It believes that it has also demonstrated that its right to take steps to prevent its territory from being implicated in the dispute between the Portuguese Government and the rebels is not in any way modified by the fact that its own sympathies lie with the rebels. It does not, therefore, propose to re-examine here the Portuguese Objections to the second Indian argument on the effect of the insurrection on the Portuguese claim and will confine itself to commenting briefly on an observation made by Portugal in paragraph 389 of the Reply with reference to the *Wimbledon* case.

637. In the *Wimbledon* case, despite the express treaty grant of transit to the *vessels of all nations at peace with Germany*, Judges Huber and Anzilotti held in their joint dissenting opinion that Germany's right under general international law to be neutral in a war between two other States ought to prevail over the rights of transit

granted in the Treaty. Portugal seeks to dispose of the view of these eminent judges by saying that Germany had no personal stake in the conflict then in progress between Poland and Russia—that the war aims of neither belligerent coincided with Germany's own interests. Germany, she contends, could therefore lawfully remain neutral in the conflict, whereas in the present case India is not disinterested in the outcome and cannot lawfully adopt a position of neutrality. Portugal's observation on the *Wimbledon* case is, of course, only a repetition in a particular form of her general contention about the effect of India's sympathies with the aims of the insurgents upon her right to take up a position of neutrality in regard to the passage of Portuguese troops. Her observation on Germany's position in that case does, however, serve to underline the fallaciousness of the Portuguese contention on this point. For it seems obvious that, if the war aim of either belligerent had been one in which Germany could not be said to be disinterested, it would have been all the more vital for her to have the legal possibility of adopting a position of neutrality in order that she might not immediately be drawn into the war. It would be a disastrous principle if possession of an interest in the outcome of a conflict or of sympathy for one side should deprive a State of all legal possibility of keeping out of a war.

638. The peculiarly delicate position of a State, whose territory surrounds a foreign enclave that is in a condition of rebellion, has previously been emphasized. The right to adopt an attitude of reserve and neutrality is clearly of especial importance to such a State, and in the nature of things the most likely way in which the right will find its expression will be in a refusal to allow armed forces to be sent across its territory for the purpose of putting down the insurrection.

639. *Third Indian Argument.* This argument was that, whatever may be the precise scope of the obligations imposed upon Members of the United Nations by the provisions of the Charter concerning respect for national aspirations, there can be no doubt that they must not lend their aid, or have any part in or give any assistance to any action calculated to suppress by force the efforts of people who are seeking to establish, or have established, their liberty (Counter-Memorial, paragraphs 350-351).

640. Portugal complains that this argument is rather vague and that India has not indicated the precise provisions of the Charter on which she relies. Portugal denies that any basis can be found for India's argument in the provisions of Article 38 (1) of the Statute of the Court. The Government of India feels sure, however, that Portugal, as a Member of the United Nations, is fully aware of the several provisions of the Charter to which the Government of India was alluding in its Counter-Memorial. Not only Article 1, but also Articles 55, 56 and 62 contain provisions which express the purpose of the United Nations to promote to the utmost the realization

of human rights and fundamental freedom for all. Precisely what is the scope of the positive obligations which result from these provisions for Members of the United Nations may be a matter which requires further elaboration and clarification. But India's contention is that, whatever may be the position in regard to the *positive* obligations imposed by these provisions, it is clear that a Member of the United Nations is at any rate under a negative obligation to abstain from action which is diametrically opposed to the whole purpose and spirit of those Articles.

641. Accordingly, India's third argument, having its basis in specific provisions of the Charter, an international convention, cannot legitimately be said to have no basis in Article 38 (1) of the Statute. But in truth, Article 38 (1) does not seem necessarily to be very relevant in this connection. The right on which India fundamentally relies is the right which a State has, under customary law, to recognize a situation of insurgency and to adopt an attitude of reserve and neutrality in face of that situation. The principles found in the Charter, which India has invoked, whether they are regarded as legal or moral principles, give additional support to India's claim that she was and is justified in refusing to allow Portuguese armed forces and police to cross her territory for the purpose of overpowering the rebels and suppressing their bid for freedom.

642. *Fourth Indian Argument.* This argument was that account has to be taken of the actual existence today of a *de facto* local government in the enclaves. It is no longer a question of rights of transit merely for the purpose of exercising Portuguese sovereignty in the enclaves. The purpose now is to oust a rival government and reimpose Portuguese rule. Consequently, the case is not one which simply concerns Portugal and India. In the background there is a third entity, the *de facto* local government which is unable to speak for itself before the Court. This, India contends, is a further reason precluding the Court from holding that India is under some obligation to permit the transit of Portuguese armed forces across Indian territories into the territory of the *de facto* local government (Counter-Memorial, paragraphs 352-357).

643. Portugal does not deny the existence of the *de facto* local administration in the enclaves. On the contrary, in paragraph 394 she expressly admits it: "There is no doubt that the administration of the enclaves is now in the hands of the invaders." Accordingly, the Court is confronted by a *de facto* local government the existence of which is accepted by both parties. Portugal, however, claims that the existence of the *de facto* local government has no significance because, she alleges, it has no capacity as a subject of international law. This capacity, she maintains, is only to be acquired through recognition granted by outside States and she baldly asserts that the *de facto* local administration has not even received recognition from India.

644. With all respect to India's learned opponents, it is not for them to say whether India has or has not recognized the insurgent authorities as a *de facto* local government. Recognition is a question of the express or implied intentions of the recognizing State. The Government of India made India's position clear in paragraphs 353-4 of the Counter-Memorial. It has not recognized the insurgent administration as the Government of a new State; but it has most definitely recognized the insurgent administration as a *de facto* provisional Government in effective control of the territory of the enclaves. That the limited recognition given by India to the insurgent administration is fully in accord with international law is not open to any doubt. Thus Judge Spiropoulos in his book *"Die* de facto *Regierung im Völkerrecht"* expresses the view that the effective domination of a territory suffices for the creation of a valid *de facto* local government (Kiel, 1926, p. 59). Again, Judge Lauterpacht says in his book on Recognition: "It is not contrary to international law to recognize the insurgents as a government exercising *de facto* authority over the territory under its control" (*op. cit.*, p. 294). Furthermore, modern State practice contains numerous examples of the recognition of *de facto* local authorities. For example, Great Britain in 1918 recognized the Esthonian National Council as a *"de facto* independent body" and received informal diplomatic representatives of the "Esthonian Provisional Government" (*The Gagara*, 1919 Probate Reports, p. 95). Similarly, in 1938 the United Kingdom recognized the "Nationalist Government" as a "government which at present exercises *de facto* administrative control over the larger portion of Spain". (The Arantzazu Mendi, 1939 Appeal Cases, p. 256.) A number of other States also recognized the Nationalists as a *de facto* government of parts of Spain; Padelford, *International Law and Diplomacy in the Spanish Civil Strife*, page 6, footnote 18.

645. In its Advisory Opinion on *Reparation for Injuries suffered in the Service of the United Nations* (*I.C.J. Reports 1949*, at page 178) the Court itself pointed out that the subjects of international law in any legal system are not necessarily identical in their nature r oin the extent of their rights and that the subjects of international law are not confined to States. That *de facto* local governments are in a certain measure subjects of international law is very clearly stated by Professor Morelli in the passage set out in paragraph 354 of India' s Counter-Memorial, where he includes them among "d'autres groupes sociaux organisés qui sont pourvus de la personnalité juridique internationale". The same position is taken by Guggenheim (*Traité de Droit international public*, Vol. 1, pages 202-203) and by Alf Ross (*Text Book of International Law*, p. 122). The United Kingdom Courts have perhaps gone furthest in the measure of the legal capacity which they attach to *de facto* local governments (see cases discussed in Lauterpacht, *op. cit.*, Chapter XVII). Although some difference of opinion may exist as to the precise extent of the

legal capacity of a *de facto* local government under international law, there can be no doubt, in the view of the Government of India, that such a *de facto* government has a definite, if limited, capacity as a subject of international law.

646. India, as stated above, has recognized the existence of a provisional *de facto* local government administering the enclaves of Dadra and Nagar Aveli. Accordingly, so far as India herself is concerned, that local government undoubtedly possesses a measure of international legal personality. The fact that India has recognized the rebel administration as having the status of a *de facto* local government makes it unnecessary to enter into the doctrinal debate concerning the question whether "recognition" is declaratory or constitutive in its effects. That it is unnecessary to go into this question would also seem to be confirmed by the fact that in paragraph 394 of her Reply Portugal, as previously pointed out, has admitted the existence of a separate *de facto* administration in the enclaves.

647. In any event, a large and weighty body of opinion is opposed to the extreme constitutive view of recognition and international tribunals have not hesitated to give full effect to the reality of the existence of a *de facto* government regardless of its recognition. In the *Tinoco Concessions* arbitration, for example, between Great Britain and Costa Rica, Chief Justice Taft gave full effect to the acts of the Tinoco Government, a revolutionary government of Costa Rica, despite the fact that it had never been recognized by Great Britain or by other leading Powers. The Tinoco Government had granted concessions to British subjects which had been cancelled by the succeeding government of Costa Rica. Great Britain, although she had expressly declined to recognise the Tinoco Government while it existed, brought a claim against Costa Rica in respect of the Tinoco Government's concessions on the basis that *de facto* it was the Government of Costa Rica when it granted the concessions. Having found on the evidence that the Tinoco Government had in truth been an effective, *de facto* government when it granted the concessions, Chief Justice Taft held that the failure of Great Britain to recognize that Government at the time did not preclude her from asserting the validity of its concessions (*Reports of International Arbitral Awards*, Vol. I, 1923, p. 375).

648. The Government of India, therefore, believes that it is fully justified in its submission that the existence of a *de facto* local government in the enclaves is a fact which cannot be left out of account in the present case. Portugal, however, tries to meet the difficulty by asserting that the Court cannot take account of the rights of the *de facto* local government, because it is not an entity, having the capacity either to appear as a party before the Court or to intervene in a case under Article 62 of the Statute. The Government of India cannot see that there is any relation between

the question whether the *de facto* local government has capacity to be a party before the Court, or to intervene in a case, and the question whether its existence is a fact which has to be taken into account. The question at issue is not one of access to the Court. The question is whether the Court can properly administer justice in the case without taking account of the existence of *de facto* local government, which is necessarily not itself before the Court. In the *Monetary Gold Case* (*I.C.J. Reports 1954*, p. 32), the Court held that it was impossible to administer justice between the United Kingdom and Italy when the interest of a third party, Albania, was directly involved in the case and Albania was not before the Court. Admittedly, Albania was a State and, although not a party to the Statute of the Court, was capable of qualifying herself to appear before the Court under Article 93 (2) of the Charter and Article 35 (2) of the Statute. The fact is, however, that Albania had not so qualified herself to be a Party to a case before the Court, and it also happens to have been the fact that Albania was not in diplomatic relations with the United Kingdom. At any rate it seems clear that the Court's refusal to pronounce on the respective merits of the contentions of the United Kingdom and Italy had nothing whatever to do with the question whether or not Albania was qualified to be a Party before the Court or to intervene in the case. That refusal was founded on the simple principle that, in the absence of Albania, it was impossible for the Court properly to administer justice in the case.

649. No doubt, the legal status in international law of the *de facto* local government is different from that of Albania. But, in the submission of the Government of India, it is not a difference which in any way affects the application of the fundamental principle of justice on which the Court acted in the *Monetary Gold Case*. Thus, the existence of the *de facto* local government in the enclaves is a distinct, independent obstacle to the Portuguese claim that the Court should declare India to be under an obligation to permit the transit of Portuguese armed forces and police and officials across Indian territory from Daman to the enclaves.

650. Each one of the four arguments advanced by India in Part VI of the Counter-Memorial and re-stated above presents, it is submitted, a complete and sufficient answer to Portugal's claim to exercise her alleged rights of transit in the particular circumstances of the insurrection in the enclaves and of the establishment of a *de facto* local government there. India's answer to Portugal's claim might equally be put in a more general way on the basis of the fundamental change in the situation resulting from the insurrection and the establishment of the *de facto* local government—on the basis, that is, of the doctrine *rebus sic stantibus*. Portugal's claim is to rights of transit across Indian territory to the extent required by the exercise of Portuguese sovereignty in the enclaves. Whether

her alleged rights are regarded as founded upon treaty, custom or general principles of law, the insurrection and the establishment of the *de facto* local government are new facts which fundamentally change the basic elements of the situation which is said to have given rise to Portugal's rights of transit across Indian territory to the enclaves. If Portugal's alleged rights of transit are considered to be derived by implication from the Maratha Treaty, the basis for making that implication from the Treaty has gone; if from custom, the basis of the usage has gone; and if from general principles of law, the basis of the principle relied on by Portugal has gone. The Court may also feel that, at best, Portugal's alleged rights of transit were a vestigial survival of the old order in India and that they are altogether out of place in the fundamentally different political conditions obtaining in India to-day.

Part V

CONCLUSIONS

651. The Government of India does not find it necessary at this stage of the case, after careful study of the Portuguese Reply, to alter the statement of India's conclusions which is contained in Part VIII of the Counter-Memorial. It reserves the right, however, to present at the oral hearings a further statement of its conclusions covering both the matters dealt with in the pleadings on the merits and the matter raised by India's Fifth and Sixth Preliminary Objections.

(Signed) JOHN ALOYSIUS THIVY,
Agent of the Government
of India.

February, 1959.