DISSENTING OPINION OF JUDGE URRUTIA HOLGUÍN

[Translation]

I regret that I am unable to concur in the Judgment of the Court.

I must state my personal conclusions on:

I. The legal doctrines involved.

II. The different concepts in America and in Europe as to the exercise of the right of States to contest arbitral awards.

III. The *uti possidetis juris* rule which in America excluded decisions in equity.

IV. Possible defects giving rise to nullity and acts of acquiescence in the Award of the King of Spain of 23 December 1906.

I. Legal doctrines

During the course of the present proceedings both Nicaragua and Honduras have set forth legal theories, as to which certain observations should be made:

Effects of the nullity of arbitral awards

In international law, there are not some defects which are "sanabiles" and others which are "insanabiles", the reason being that there is no compulsory international jurisdiction by means of which the causes of nullity may be put right. The absence in international law of such a body cannot confer an automatic character upon nullity, allow a State to be judge in its own case and to declare itself free from any obligation to carry out an award, just as on the other hand it cannot confer an automatic character on an absolute presumption of the validity of the award nor confer the right to require its execution without permitting the verification of its validity when the other party validly raises grounds of nullity.

In a conflict between the rights of the State which invokes the nullity of an arbitral award and of the State which relies upon *res judicata*, the only recourse at the disposal of the countries is to ask an international court to decide the question whether there is a judgment having binding force.

In Latin America, in all the cases referred to in Part II in which the award was disputed, its execution was suspended and the question of its validity referred to the decision of a new arbitrator—as, moreover, in the present case, where Counsel for Honduras explained (at the meeting of 7 October) that the country which he represented claimed the execution of the award, but that the obligation to give effect to the award resulted only from

"a finding by the Court of its binding force".

The Court was asked to consider the cases in which acts of acquiescence, estoppel, or the belated raising of grounds of nullity might limit the right of a State to dispute the validity of an award or might deprive it of that right.

(i) *Acquiescence.* To see what effect acquiescence may have in regard to an award the validity of which is disputed, it is necessary to define the possible limits of acquiescence, and to see whether it is within the power of acquiescence to revive the non-existent effects of an award which is void.

In civil law there are acts which are null and void which cannot be given life even by subsequent acceptance by the parties. In international law, however, States are sovereign and are bound by no limitation upon their acceptance of or agreement to anything whatsoever.

States may agree, if they think fit, to the carrying out of the provisions of a null and void award, but in that case the cause and the legal basis of the provisions of the award are not to be found in the award which is a nullity, but in the valid agreement between two Sovereign States.

If there are in the award itself any essential defects of which the parties cannot know before they receive the text of the award, it is possible to regard as acquiescence only some formal declaration by the competent organ of the State making clear that it expressly renounces the right to dispute the validity of the award.

In treaties which submit a question for decision "without appeal" by an arbitrator or a court, the parties renounce the right to bring proceedings "on appeal", but they cannot in advance renounce the right ever to contest a future award, the contents of which they do not know, on the ground that it is a nullity.

(ii) *Estoppel.* The objection on the grounds of good faith which exists in almost all legal systems and which prevents a party from profiting by its own misrepresentation and which, in Anglo-Saxon law, is known as estoppel, would be applicable in the present case if it were proved that the action and behaviour of one of the States caused the other State to place reliance upon its acts of acquiescence and to believe in its renunciation of its right to dispute the validity of the award.

(iii) *Belated raising of grounds of nullity.* So far there does not exist in international law any uniform custom which makes it possible to assert that inaction on the part of States which may have interest in invoking a ground of nullity involves any presumption of their renunciation of the right to contest the validity of an award.

In private law there are rules relating to prescription and limitation but in general, in almost all legal systems, an exception is made in respect of the rights of the State, which are held not to be barred by the passage of time.

In international relations, in certain cases the challenging of an award by the State concerned has been immediate. In other cases, several years have elapsed before it was disputed. In the *St. Lawrence River* case, the award made in 1814 was contested in a Note of 1831 and the contestation was accepted in 1842. In the case between Venezuela and Colombia, the King of Spain's award was rendered in 1891. Venezuela originally accepted the award but in 1917 secured the agreement of Colombia to the submission of the question of the validity of the award to the Swiss Federal Council. Costa Rica's contestation of President Loubet's award of 1897 was not brought before Chief Justice White until 1910.

In America, in eleven bilateral treaties on general arbitration signed before 1911, a procedure for review on the ground of the nullity of the award was provided for. In two of those treaties, a time-limit of from three to six months was laid down for bringing the proceedings, and in the other cases it was simply stated that they should be brought before the carrying out of the award.

II. Different concepts in America and in Europe as to the exercise of the right of States to contest arbitral awards

The rules and customs generally accepted in America were in 1894 and 1907 far from being those which may be regarded as the most desirable for giving greater authority to arbitration in the international law of 1960.

Whereas in Europe there had only been recourse to arbitration in the nineteenth century with the greatest precautions and on the basis of special agreements signed in respect of each particular case, America was in advance of the times and had, between 1847 and the Second Hague Conference, signed more than two hundred general treaties of arbitration. In forty-eight of these compulsory arbitration was provided for in respect of territorial questions.

That explains why at the Hague Conference of 1907 (only Mexico had been invited to the 1899 Conference) the American representatives: (1) urged the ideal approved in America of compulsory arbitration, even for territorial questions, (2) insisted that it should be restricted to legal decisions, and (3) supported the establishment of a body to verify the validity of awards. In 1907 European prudence, on the contrary, sought to confine the notion of arbitration: (1) to questions which did not involve the honour or the essential interests of States, (2) to arbitration all the rules for which had been laid down in the special agreement, and (3) to awards against which the possibility of any type of remedy was resisted.

Faced with the difficulties presented, in 1960, by the interpretation of the intention of the parties in signing a treaty in 1894, the

circumstances in which certain proceedings took place in 1904, or the significance of the actions of American States in 1906, the Court cannot lose sight of the fact that the diplomatic history of the evolution of the principle of arbitration in America is more authoritative than the literal or textual examination of documents.

In the case with which we are dealing, it is of particular importance not to pass a judgment on the acts or behaviour of the parties in their attempts to ask for explanations or to verify the validity of awards, without studying the customs which, as regards those aspects of arbitration procedure, were accepted in America at that time.

Although the existence of grounds of nullity in respect of arbitral awards was recognized by the *Institut de Droit international* as long ago as 1875, the idea has been accepted in Europe only with very marked reserve.

At the Hague Peace Conferences in 1899 and 1907 the possibility of calling in question the validity of an award was deleted from the two draft Conventions in view of the difficulty of suggesting any authority which should adjudicate upon the issue of validity. The reserve up till 1907 with regard to this aspect of the evolution of the law in Europe is explained in the course of lectures by Professor Borel on *"Voies de recours contre les sentences arbitrales"* (1935, II), and M. Lammasch expressed this European reticence when in 1914 he proposed that proceedings to upset awards should only be allowed with the consent of the arbitrator.

In America, on the other hand, as early as 1899, arbitration treaties had been signed containing clauses which provided for review of awards on grounds of nullity.

In a series of treaties of which the first two were signed in 1899 with Paraguay and with Uruguay, Argentina accepted arbitration by tribunals whose award could be challenged in the event of falsification of documents or "error of fact" resulting from the procedure or from the documents submitted to the arbitrator.

Before the Hague Conference, four other treaties on the same lines were signed: by Bolivia and Peru in 1902, by Argentina and Bolivia in 1902, by Brazil in 1907, by Chile in 1902, and two others in 1911 and 1912 between Colombia and Argentina and between Argentina and Ecuador.

In 1902 and 1905 Brazil signed general arbitration treaties with Bolivia and Peru, in which a new aspect of the nullity of awards was provided for, namely the case where, in whole or in part, the award was based on an error of fact; and in 1907 Peru and Colombia went further, and allowed review in cases where the award was allegedly based on a "positive or negative" error of fact.

Historical circumstances explain these two tendencies:

In Europe, up to the beginning of the present century, resort was as a rule had to arbitration only for the settlement of questions

relating to concessions, claims or compensation which, in sixteen out of twenty-two cases cited between 1850 and 1910, had to be paid by American countries on the basis of arbitral awards more often than not manifestly unjust or vitiated by defects rendering them nullities, and it is understandable that the European countries were not inclined to weaken the principle of *res judicata* nor to accept a change in the rule as to the execution without appeal of awards which had been so successful from their point of view.

In America, on the other hand, the legal abuses to which these arbitrations gave rise resulted in the express recognition of the right of States to challenge the validity of arbitral awards in the eleven treaties signed between 1899 and 1912, mentioned above, and in all arbitrations regarding territorial boundaries where the awards were disputed, and which were the following:

(a) The boundary case between Colombia and Venezuela in which the King of Spain's arbitral award was accepted by the parties in 1891 but in which another arbitration by the Swiss Federal Council was agreed upon in 1917 to decide all the questions relative to the King's award.

(b) President Loubet's award of 1897 in the case between Costa Rica and Panama, which was disputed by Costa Rica and never carried out.

(c) The award by Chief Justice White in 1910, in the proceedings between Panama and Costa Rica in respect of President Loubet's award, which was held by Panama to be vitiated and a nullity and was never carried out.

(d) The validity of the award of 1909 by President Figueroa Alcorta in the frontier dispute between Bolivia and Peru, which was contested by Bolivia. As A. Sanchez de Bustamante explained in his opinion on the question of Costa Rica and Panama, page 11:

> "The Award rendered by Dr. Figueroa Alcorta on 9 July 1909 immediately gave rise to a protest by Bolivia, on the ground that the arbitrator had exceeded his powers and had not kept to the terms of the Agreement ... despite ill-informed passions which were dangerously over-excited, both at Buenos Aires and at Lima patriotism in the end finished by seeing reason, the Peruvian Government renounced part of the advantages which the arbitrator's award offered to it, and dealt directly with its former opponent to arrange in a friendly way the boundary of their respective possessions."

(e) The United States disputed and today still disputes the validity of the award of 1910 in the *Chamizal* case with Mexico. Mexico has still not been able to obtain either the carrying out of the award or agreement to submit the question of its validity to the consideration of another tribunal.

(f) In a matter where not only American countries were concerned, but also Great Britain, the United States disputed the King of Holland's award on the *St. Lawrence River boundary;* that country's objections were accepted by the other side and the award had no effects.

In several cases arising between American countries and bearing upon claims which were submitted to arbitration, the right to verify the validity of the award was also recognized (*Akra Silver Mining* in 1898, *Paraguay Navigation Company* in 1860, the *Orinoco* case in 1904), but, in disputes regarding national sovereignty and territorial questions, the contestation was in all cases accepted or submitted to the decision of a new arbitrator.

III. ARBITRATIONS AGREED TO ON THE BASIS OF "UTI POSSIDETIS JURIS" COULD ONLY BE ON A STRICT BASIS OF LAW AND EXCLUDED DECISIONS IN EQUITY

The countries of Latin America whose constitutions had fixed their boundaries on the basis of the *uti possidetis juris* existing at the time when they became independent envisaged only strictly legal decisions when they undertook to submit the delimitation of their boundaries to arbitration.

This rule which the parties laid down for recourse to arbitration was not merely academic but a condition precedent *sine qua non* which had its origin in the actual constitutions of the States.

The reason why Colombia, Costa Rica, Venezuela, Nicaragua, Honduras, Peru and Ecuador applied to the King of Spain is explained in the decision of the Swiss Federal Council in the proceedings concerning the Award rendered by the King of Spain in 1891 in the dispute between Colombia and Venezuela:

> "When the Spanish colonies of Central and South America proclaimed their independence in the second decade of the nineteenth century, they adopted a principle of constitutional and international law to which they gave the name of *uti possidetis juris* of 1810 for the purpose of laying down the rule that the boundaries of the newly established republics should be the frontiers of the Spanish provinces which they were succeeding. This general principle offered the advantage of establishing an absolute rule that in law no territory of the former Spanish America was without an owner. Although there were many regions that had not been occupied by the Spanish and many regions that were unexplored or inhabited by uncivilized natives, these regions were regarded as belonging in law to the respective republics that had succeeded the Spanish provinces to which these lands were connected by virtue of old royal decrees of the Spanish mother country. These territories, although not occupied in fact, were by common agreement considered as being occupied in law by the new republics from the very beginning. Encroachments and ill-timed efforts at colonization beyond the frontiers, as well as *de facto* occupation, became ineffective and of no legal consequence."

The countries which asked the King of Spain to interpret the *uti possidetis juris* in accordance with the titles of Spanish sovereignty thus did so because they thought that he was the best qualified authority to interpret his own legal rules, but they certainly did not think of entrusting to "his equity" the interpretation of constitutional clauses which had in fact been approved for the very purpose of throwing off the Spanish yoke.

IV. Possible defects giving rise to nullity and acts of acquiescence in the award of the king of spain

Of the four arbitrations entrusted to the King of Spain by these countries, that between Colombia and Venezuela could not be carried out until the decision of 1923 in the new proceedings before the Swiss Federal Council. The arbitration between Colombia and Costa Rica was withdrawn from the King's consideration in 1896, shortly after his Award in the previous case, and the King himself in 1910 declined to give a decision in the arbitration between Peru and Ecuador twenty-three years after the matter had been submitted to him. The fourth arbitration is that between Honduras and Nicaragua.

On the basis of the principles set forth in the foregoing parts, and bearing also in mind the historical reasons which explain the origin of this arbitration, let us consider the King's Award of 23 December 1906 for the purpose of ascertaining

(a) whether the extrinsic defects of the Award entail its nullity;

(b) whether there are intrinsic defects evident in the Award, and whether Nicaragua has forfeited the right conferred upon it by international law to rely on those grounds of complaint, either by reason of her acquiescence or because of their belated submission.

(a) *Extrinsic defects*

The Court considers that the extrinsic defects of the Award resulting from the arbitrator's lack of powers are covered by Nicaragua's subsequent acts of acquiescence.

I consider that the extrinsic defects do not entail the nullity of the Award, for different reasons:

(1) The appointment of the King was irregular, since not all the procedures laid down by the Treaty were complied with. The arbitrators were not authorized to jump from Article III to the end of Article V, leaving out of account mandatory provisions which it was not within their duties nor their competence to be able to change.

(2) There are other manifest irregularities, such as that of the intervention of the Spanish Minister, M. Carrere y Lembeye, in the choice of the King of Spain as sole arbitrator, since if the tribunal provided for in the Gámez-Bonilla Treaty had already

been set up on 2 October 1904, M. Carrere y Lembeye was himself the third arbitrator and the tribunal, once constituted, could not give up its duties and transfer them to a new arbitrator. If, on the contrary, what was involved was merely a preparatory meeting, the Honduran and Nicaraguan arbitrators had no need of M. Carrere y Lembeye, who could not take part in the discussions of the tribunal unless he had already been appointed third arbitrator.

The procedural irregularities at the meetings of 2, 10 and 18 October were not, however, in contradiction with the chief object of the Gámez-Bonilla Treaty, which was to submit the question to a procedure which envisaged the possibility, provided for in Article V, of appointing the Spanish Government as arbitrator.

The fact that the two Governments accepted the appointment of the King, welcomed the choice and argued the case at Madrid, proves that they did not regard as essential the rules of procedure which had been laid down, and non-essential defects do not involve nullity.

Doubts have also been put forward as to the date when the period of ten years of the Gámez-Bonilla Treaty began to run. The intention of the parties is not clear, and different interpretations of the Treaty might be justified, if both Nicaragua and Honduras had not themselves in 1904 believed in good faith that the Treaty had not expired.

It would be questioning the President of Nicaragua's good faith to suppose that he sent a telegram on 7 October 1904, expressing his hope that the King would accept the task of arbitration, on the very day when the Treaty came to an end.

It is not acquiescence and acceptance which revalidate these irregularities, but the interpretations by the Parties in 1904 of the Gámez-Bonilla Treaty, which are definitive and which cannot now be called in question.

(b) *Acquiescence and intrinsic defects of the Award*

To be able to assert, as the Court does, that Nicaragua, by express declaration and by conduct, recognized the Award as valid and binding and that it is no longer open to Nicaragua to go back upon that recognition and to challenge the validity of the Award, it must first of all be established whether there are essential defects.

I. *Intrinsic defects*

The fundamental question on which my opinion is different from that of the majority of the Court is that of the interpretation of the rules of the special agreement set forth in Article II of the Gámez-Bonilla Treaty. Interpreting those rules in a different way, I come to the conclusion that the King exceeded his powers and, thus faced with the nullity of the Award, I cannot accord the same weight to the acts of acquiescence found by the Court.

(i) *Interpretation of the rules of the Agreement*

For the reasons set forth in Parts II and III on the legal rules accepted by the American countries, I do not consider that all the paragraphs of Article II had the same importance.

The rules which constituted a condition precedent governing the whole arbitration were those of paragraphs 3 and 4 on the fixing of the boundaries in accordance with the legal titles existing at the date of independence.

This rule is strengthened by the fact that the arbitrator is expressly forbidden to recognize any juridical value to *de facto* possession.

These two mandatory rules were in conformity with the constitutional provisions of the two countries, and it is difficult to believe that their Parliaments ratified this Treaty while attributing to other paragraphs (5, 6 and 7) of Article II a scope which would have the effect of making them prevail over or which would be in conflict with the rule in their Constitutions.

The text adopted in paragraphs 5 and 6 of Article II of the Gámez-Bonilla Treaty was practically the same as that proposed in 1886 by Colombia and Venezuela, adopted again in the Treaty of 1886 between Nicaragua and Costa Rica, the Treaty of 1902 between Bolivia and Peru, and the Treaty of 1930 between Guatemala and Honduras.

The interpretation given both by the parties and by the arbitrators to clauses drawn up in the same terms as those of Article II of the Gámez-Bonilla Treaty is in consonance with the idea of arbitration strictly on the basis of law and does not recognize the right of the arbitrator to determine a line "according to equity".

These treaties and the interpretations put upon them are as follows:

(a) *Arbitration by President Figueroa Alcorta*

In 1902 Peru and Bolivia signed an arbitration agreement which laid down a rule similar to that of paragraph 4 of Article II of the Gámez-Bonilla Treaty:

> "*Art. 3.*—The possession of a territory, although held by one of the parties, cannot have effect nor prevail against the titles or royal dispositions setting forth the contrary",

and another Article which authorized compensations in the following terms:

> "*Art. 4.*—Only when the royal acts or dispositions do not define the dominion of a territory in clear terms shall the arbitrator decide the question according to equity, keeping as near as possible to the meaning of those documents and to the spirit which inspired them."

These two Articles gave the arbitrator indisputably fuller and clearer powers than those conferred by the Gámez-Bonilla Treaty.

Despite these authorizations, President Figueroa Alcorta was unwilling to interpret them as a right to decide the question as a whole according to equity but merely to fix the frontier line so that it should follow those geographical features which were nearest to the legal line.

But the application even in this restricted sense of the right laid down in the arbitration agreement gave rise to protests, and Argentina and Bolivia broke off relations, but the Argentine internationalist Sanchez Sorondo in the book which he published to justify the award and the attitude of President Figueroa Alcorta explained in the following terms how this article of the agreement was interpreted by the Argentine President:

> "The arbitrator was in any case a judge of law and in no sense a judge of conscience. The treaty laid down two rules to qualify the results of his historical and legal investigation. The first was direct and derived from an express title, the second was approximate and derived from the sense and the spirit of titles which were neither clear nor precise. But the equity of which the treaty speaks is not subjective but merely a matter of the interpretation of the documents submitted.
>
> ... he could not draw capricious lines based upon reasons which could not be inferred from the documents, nor settle the dispute as a mediator by the proportional division of the territory in question."

In his last recital but one, President Figueroa Alcorta confirmed that he "would settle these questions equitably, keeping as near as possible to the sense of the royal provisions".

(b) *Arbitration by the King of Spain in the boundary dispute between Venezuela and Colombia*

This was signed in 1881, but Venezuela refused to accept the clause which conferred the power of judging "in equity", explaining that legal decisions could be considered declaratory, whilst a decision in equity would imply a cession of territory forbidden by the federal constitution.

In 1886, Colombia secured the following clause in an additional instrument signed at Paris:

> "... The arbitrator may fix the line in the way which he thinks the closest to the existing documents when, in one or another part of the line, those documents are not sufficiently clear."

The power thus conferred was similar to that laid down in the Gámez-Bonilla Treaty, yet the King only made use of it in respect of two sectors and for the following reasons: (1) in the Sarrare region, because "the Royal *cédula* of 1786, *which must serve as the legal basis* for the fixing of the boundary in the fifth sector, raises doubts in that it mentions the names of places not known today, namely the Barrancas de Sarrare and the Paso Real de los Casa-

nares"; the King chose the course of the river "Sarrare", on the basis of an interpretation of certain ancient documents which indicated that those two points lay "in the line of communication between Sarrare and the Arauca"; (2) in the second part of the sixth sector, the King accepted as title of sovereignty the Royal *cédula* of 1786 and, holding that its terms were not clear enough to fix the extreme limits of the sector, he selected as boundary a line which, to the west of the Orinoco, followed the rivers Casiquiare and Rio Negro referred to in the same Royal *cédula*.

Thus, in that arbitration, the King did not make use of the power which was granted to him in 1886 to depart from the legal line and to reach a decision "in equity". He confined himself to seeking in other documents the names or rivers which corresponded most nearly to the general lines of the boundaries of the Royal titles.

The King rendered this arbitral award in 1891, and it is most probable that Nicaragua and Honduras adopted the same formula in the Treaty of 1896, in the conviction that the arbitrators would not interpret this authorization otherwise than within the same limits which the King of Spain had observed in 1891.

(c) *Arbitration between Guatemala and Honduras*

This arbitration was only agreed upon in 1930 and it shows that, twenty-four years after the King of Spain's Award in the dispute between Honduras and Nicaragua, the countries of that part of America insisted on arbitration on the basis of strict law, refused to submit boundary questions to arbitration by equity, and accepted compensations only on specific points and only if they had been agreed upon by conciliation tribunals composed of representatives of the parties to the dispute.

Article 5 of the agreement runs as follows:

> "*Art. 5.*—The High Contracting Parties are agreed that the only line that can be established, *de jure*, between their respective countries is that of the *uti possidetis* of 1821. Consequently it is for the Tribunal to determine this line. If the Tribunal finds that either Party has during its subsequent development acquired beyond this line interests which must be taken into consideration in establishing the final frontier, it shall modify as it may consider suitable the line of the *uti possidetis* of 1821 and shall fix such territorial or other compensation as it may deem equitable for one Party to pay to the other."

This agreement insists on the rule of the *uti possidetis* as a condition precedent, and does not authorize compensation except for territories agreed upon in advance in accordance with the *uti possidetis* as being "beyond this line", which is the legal one.

This right was moreover only conferred upon a conciliation tribunal of which the members were to be appointed by the two countries, for as the Honduran delegate, Dr. Mariano Vasquez, said at the meeting of 22 January 1930 at Washington:

"An arbitration tribunal is not set up, as is well known, to reconcile interests, nor to do what is desired by one of the parties to the dispute, but to dispense justice where justice is due.

International questions of fundamental importance for countries, such as territorial boundaries, can only with difficulty be the subject of conciliation procedure and even sometimes of arbitration, because the local political effect that an adverse award might have is to be feared."

(d) *Arbitration between Costa Rica and Nicaragua*

Here the only authorization given, and not to the arbitrator but to a mixed commission, was to "depart slightly from the line laid down so as to find a natural boundary" (Treaty of 1858, Art. 3), a clause which, in the Treaty of 1886, was limited to one mile from the legal line.

The King could not disregard this order of importance—this hierarchy—of the different rules of Article II, since as M. Maura stated in his Rejoinder submitted to the King in 1905:

"The hierarchy of proofs is mandatory, and no public document of greater value can be in contradiction with the legal title."

I cannot concur in the Court's opinion which, while stating that the King had to follow the whole of Article II, on the one hand interprets paragraph 6 as an authorization conferred on the King and not on the Mixed Commission, and on the other hand gives this paragraph a scope which would not confine it to the power to grant compensations but which would also confer on the arbitrator the right of settling the dispute by a compromise on the facts.

The authorization to grant compensations could not apply to the arbitration by the King.

For the reasons developed by the Honduran delegate, Dr. Mariano Vasquez, at Washington on 22 July 1930, the Latin American countries were not ready to accept local compensations, once the legal line was fixed, unless they were agreed upon by mixed commissions.

The King had all the powers laid down in the Gámez-Bonilla Treaty, but on condition that that is understood to mean only those powers which were laid down for the "arbitration" stage and not those for the preliminary conciliation stage of the proceedings. Articles II, VII and IX of the Treaty cannot be interpreted as meaning that the King had to "meet" with anyone "at one of the border towns", that he was to record "in two special books" the points of disagreement, to take "decisions by a majority vote", or to "begin his studies before the rainy season".

Honduras itself rightly stated that not all the clauses of the Gámez-Bonilla Treaty could be applicable to arbitration by the King and that certain of them only concerned the arbitral tribunal.

With regard to Article VI, for example, the President of Honduras in his telegram of 22 October to the Spanish Minister in Central America said:

> "The time-limits laid down in Article VI of the Boundaries Treaty between Honduras and Nicaragua refer only to the Arbitral Tribunal... *Signed* Bonilla" (Annex 5 to the Nicaraguan Rejoinder).

Just as the procedures laid down in Articles II, VII and IX referred to in the previous paragraph could only apply to the conciliation procedure and Article VI to the Arbitral Tribunal, as President Bonilla states, in the same way the authorization laid down in paragraph 6 f Article II could also not apply to the King.

But, even allowing that paragraph 6 could be applicable also to the King, to compensate does not mean to conciliate. The Dictionary of the Spanish Academy gives as the meaning of "*compensar*": to equalize in an opposite sense the effect of one thing with another. Therefore, compensation can only be granted in respect of territories that are equivalent. There is no kind of equivalence nor compensation as between the few hectares of the village of Gracias a Dios and the whole northern basin of the Segovia River, and the King made use of the power conferred by paragraph 6 not to grant compensations but to settle the dispute as mediator or arbitrator of conscience.

The interpretation of the relative importance of the rules laid down in Article II can only be that uniformly accepted by all the American countries which signed treaties containing similar articles, by the arbitrators who were called upon to apply those rules, and by the King himself in his Award of 1891 in the dispute between Colombia and Venezuela, and consequently the King exceeded his powers by the improper application of paragraph 6 of Article II of the Gámez-Bonilla Treaty.

(ii) *The King committed essential errors related to the exceeding of powers in the application of the* uti possidetis juris *rule*

It is not for the Court to review the appreciation of the probative force of the documents and other legal evidence submitted to the arbitrator.

But there is a great difference between the evaluation of evidence which lay within the discretionary power of the arbitrator and that of essential error committed by the King when he asserted that the Warrant which fixed the boundaries was one which in fact did not fix any boundary.

Ours are neither appeal nor revision proceedings, and the Court cannot discuss the choice which the King made of the Decree of 1791 to establish the rights of sovereignty of the two countries in 1821.

Nor can the Court discuss the King's right to seek in previous Decrees the boundaries of the provinces which did not figure in the Decree which he had chosen.

But on the other hand we can hold *prima facie* that he committed a manifest error or that he exceeded his powers in choosing, to fix the boundaries which were lacking in the Decree of 1791, the two Decrees of 1745 which expressly and formally stated that the *Alcaldía* of Tegucigalpa was *excluded* from the boundaries referred to in those decrees.

The relevant text of the Decree of 1745 which, according to the arbitrator, fixed the boundaries and which on the contrary excludes the *Alcaldía Mayor* of Tegucigalpa is as follows:

> "As regards the *Alcaldía Mayor* of Tegucigalpa ... *you will refrain* (and take great pains to do so) from all meddling with the civil affairs of that territory..." (Annex 54 to the Nicaraguan Counter-Memorial.)

This manifest error had already been noted when the same decrees were studied by a tribunal consisting of Charles Evans Hughes, Luis Castro Ureña and Emilio Bello, in the arbitration between Honduras and Guatemala, and by the Spanish Council of State which declared in its Opinion:

> "It may be considered as certain that the Royal Decrees of 1745 did not in any way change the boundaries of Nicaragua and Honduras."

The King thus committed an essential error involving an excess of jurisdiction in taking as proof of a title of sovereignty a Decree which the Spanish Council of State had itself acknowledged to fix no boundary and which, as we have seen, excluded the *Alcaldía* of Tegucigalpa.

(iii) *The King exceeded his powers in recognizing juridical value to* de facto *possession established by acts of jurisdiction*

Paragraph 4 of Article II of the Gámez-Bonilla Treaty precluded the recognition of "juridical value to *de facto* possession".

The Spanish Council of State explained in its Opinion that the Commission appointed by the King had decided, in case of lack of proof of ownership, to take into consideration acts of jurisdiction as being complementary to the study of the royal provisions.

But acts of jurisdiction could not be used except as proofs of possession, and came under the formal prohibition in paragraph 4 of Article II. And it is acts of possession which the King allows when, in recitals 14 and 15, he refers to the "expanding influence of Nicaragua" and to the "ephemeral" nature of the extension of Honduran sovereignty.

This part of the Award is, *prima facie*, contrary to the formal prohibition in paragraph 4 of Article II of the Treaty.

(iv) *Absence of reasons*

The majority of the Court holds that an examination of the Award shows that it contains ample reasoning and explanations in support of its conclusions.

The greater part of the "recitals" in the Award merely indicate one by one the arguments which were put forward by each of the Parties.

Inadequacy of reasons is quite as serious as lack of reasons. In the present case, if the King had not found sufficient reasons to make a decision on the basis of law, he should have declined to promulgate his Award, as he did in 1910 in the case between Ecuador and Peru, instead of affirming in recital 21 that his decision "best answered the purpose by reasons of historical right, of equity and of a geographical nature..." but without indicating either why or how.

This inadequacy of reasons is not in itself sufficient to entail the nullity of the Award, but it confirms the exceeding of jurisdiction dealt with in the foregoing paragraphs and the error committed by the King in rejecting the study of the other Royal titles submitted to him by the Parties.

(v) *Obscurities and contradictions in the Award*

Nicaragua has asked the Court to find that, even if it was valid, the Award was not capable of execution by reason of its omissions, contradictions and obscurities.

It is difficult to define which is the thalweg, the navigable arm or the principal mouth of rivers which, on land still in process of formation, often change their course. A court cannot give opinions on questions which only engineers or technicians can decide. Like the Court, I do "not consider that the Award is incapable of execution", since it is for mixed commissions, or for any other authority to whom the Parties might entrust the drawing of the boundary line, to settle problems which omissions, contradictions or obscurities in the Award present.

II. *Bearing of acquiescences or inaction on the part of Nicaragua from 1906 to 1912*

With regard to Nicaragua's inaction between the years 1906 and 1912, I would make the following observations:

(a) As explained in the section on the legal considerations, the inaction of any American State in respect of appeal for the nullity of an award could only correspond to the state of evolution of international law at that period and in that region.

(b) If even the Hague Conference of 1907, while accepting the principle of the nullity of awards, refrained from endorsing it because it was not in a position to designate an authority responsible for dealing with the appeal, it is natural that at that period Nicaragua should have confined herself to considering only the possibility of obtaining explanations or at most a revision by the arbitrator himself.

(c) As soon as the Nicaraguan Agent received the text of the Award, he submitted a note of protest, dated 25 December 1906, a note which the Spanish Government endeavoured to persuade him to withdraw.

In the months following, Nicaragua sought to bring an appeal so as to obtain either explanations or a revision.

The rules admitted today only allow of revision in the case of the discovery of a new fact; but long before the discussions as to allowing this means of recourse in Europe, and before 1907, Brazil, Argentina, Paraguay, Uruguay, Bolivia, Peru, Chile and later Colombia and Ecuador signed general bilateral arbitration treaties which recognized the right of revision of the Award by the same arbitrator in the case of "*errors of fact* resulting from the proceedings". This concept of "revision" is certainly different from the one accepted today, but in 1906 and 1907 it was a form of appeal accepted by all the countries in the foregoing list. It is therefore understandable that, at that period, Nicaragua only thought of proposing that form of appeal. A too favourable circumstance obliged her however, as a matter of tact and scruple, not to make any such appeal in the earlier years: M. Maura, who was Nicaragua's Counsel during the arbitration proceedings, became Prime Minister of Spain shortly after the Award of 23 December 1906, and it would have been neither proper nor admissible, as Minister Gámez explained, to ask her own Counsel, now become Prime Minister, to suggest to the King that he should revise the Award.

Other historical facts also show that Nicaragua and Honduras between 1906 and 1912 believed in good faith that the problem of the carrying out of the Award would not even arise.

It was only in 1911 that the question of the carrying out of the Award was raised for the first time by Honduras and that Nicaragua declared that it was a nullity and later proposed arbitration to decide as to its validity.

The theory of estoppel cannot be invoked against Nicaragua because she had not brought a nullity appeal between 1906 and 1912, unless it is also invoked against Honduras who, during the same period, seemed to have renounced requiring the carrying out of the Award. It cannot be said that Nicaragua's attitude between 1906 and 1912 caused Honduras to believe that the Award was accepted.

(d) From 1912 to 1957 Nicaragua continually proposed to submit the verification of the validity of the King's Award to fresh arbitration. In 1914 she proposed arbitration by the President of the United States of America. In 1918 she accepted the proposal made by President Bertrand of Honduras to submit the question to President Wilson, but Honduras withdrew her offer. Nicaragua accepted but Honduras refused to accept the arbitration proposals put forward by the Department of State of the United States of America in 1921 and 1923 and the proposal put forward by Nica-

ragua to the commission of mediation of Costa Rica, the United States of America and Venezuela in 1937-1938. The Irías-Ulloa Protocol which, on the other hand, accepted the carrying out of the Award, was signed in 1931 by the Nicaraguan Government, but was not ratified by the Nicaraguan Parliament. The verification of the validity of the Award could not be submitted to the decision of an international court before 1957 because Honduras maintained that Article VI of the Pact of Bogotá did not allow the Court to deal with questions "already settled" by arbitral awards within the framework of compulsory jurisdiction. It was not until 1957 that through the intervention of the Organization of American States Honduras accepted the Court's jurisdiction. All these facts have been mentioned during the oral proceedings by the Nicaraguan Agent without Honduras having raised any objections.

As to the acquiescences relied upon by the Court, they do not constitute a formal renunciation of the right to challenge the validity of the Award.

(a) President Zelaya's telegram of 25 December to the President of Honduras does not fulfil the requirements of proof of renunciation of a nullity appeal.

(b) The note sent by Minister Gámez to the Spanish Chargé d'affaires on 9 January 1907, as he himself explained to Minister Medina on the twenty-first of the same month, was a mere acknowledgment and conventional expression of respectful thanks to the King, since M. Medina had already on 25 December submitted his note of protest direct to the Minister of State at Madrid.

(c) The publication of the complete text of the Award in the Nicaraguan Official Journal on 28 January 1907 cannot be upheld as an argument, since publications given by way of information in the newspapers, even if they are official, have never yet been considered as proofs of engagements on the part of States.

(d) The declaration made by the President of Nicaragua to the Nicaraguan Assembly on 1 December 1907 cannot be held as a proof of renunciation of bringing an appeal against the Award. On the contrary it implies such an appeal, since it ends with the following sentence:

> "... it has instructed Minister Crisanto Medina to request a clarification of a few points in this decision which are obscure and even contradictory...".

(e) The report to the National Assembly of 26 December 1906 could only have constituted a proof of renunciation of disputing the validity of the Award if the Government had expressly so stated and the Assembly had approved that renunciation. But on the contrary, in this report it is said:

"Unfortunately, in this arbitral Award, as in so many similar cases, so-called political expediency, that is to say the very simple device of bisecting the dispute in order to prove to the Parties that the arbitrator has the same consideration and esteem for both of them, has prevailed over legal arguments and historical bases."

This report thus takes note of the exceeding of jurisdiction in the Award and cannot be considered as a renunciation of contesting it.

(f) The approval given by the Nicaraguan Legislative Assembly on 14 January 1908 of "the acts of the executive power in the field of foreign affairs between 1 December 1905 and 26 December 1907" has never legally existed. The photostatic copy of the Official Journal submitted to the Court shows that the Foreign Affairs Committee of the Assembly submitted a draft resolution in that sense, a draft which only had a first reading, but which was never discussed in a second reading nor definitively approved. If the proposal had been approved, then it would inevitably also cover the note of protest from Minister Medina of 25 December 1906, the instructions sent to M. Medina by the notes of 1 February 1907 from President Zelaya and of 21 February and 14 October from Minister Gámez, instructing him to ask for "explanations" and, if possible, even the "revision" *(reforma)* of the Award.

(g) As Minister of the Interior, General Moncada neither was nor could be the competent organ to pledge his country's responsibility in the matter of a nullity appeal against an arbitral award, and his telegram of 23 March 1911 cannot therefore be held as proof of renunciation of a nullity appeal.

(h) The Note of Honduras dated 25 April 1911, and signed by the Foreign Minister, cannot in any way commit Nicaragua. The text of the Nicaraguan reply to that Note might possibly have committed Nicaragua, but in fact the only reply was a note dated 27 November 1911 by M. Chamorro to the Honduran Chargé d'affaires, M. Médal, in which he confined himself to stating that he had not concluded his study of the question.

(i) The information sent on 8 September 1911 by the Honduran Chargé d'affaires, M. Médal, to his Minister regarding his visit to M. Chamorro was not a Note coming from Nicaragua but from a Honduran official, and cannot therefore be a proof serving to show Nicaragua's renunciation of disputing the Award.

There is thus, in these documents or declarations, no proof of renunciation on the part of Nicaragua of disputing the validity of the Award, the intrinsic defects of which in my opinion entail its nullity.

Certain of these declarations might indicate the intention to accept the Award but none of them can be adopted as proof of

"an undertaking by a State" to renounce its right to challenge the validity of the Award within the meaning required by the rules of law set out in Chapter I.

For the foregoing reasons, I arrive at the conclusion that the intrinsic defects studied in Chapter IV entail the nullity of the arbitral Award made by the King of Spain on 23 December 1906.

(Signed) URRUTIA HOLGUÍN.
