AWARD BY THE INTERNATIONAL BOUNDARY COMMISSION IN THE MATTER OF THE INTERNATIONAL TITLE TO THE CHAMIZAL TRACT, RENDERED ON 15 JUNE 1911 [1]

PREAMBLE

WHEREAS a convention between the United States of America and the United States of Mexico for the arbitration of the differences which have arisen between the two Governments as to the international title to the Chamizal tract was concluded and signed by their respective plenipotentiaries at Washington on the twenty-fourth day of June, 1910, which is as follows: [2]

AND WHEREAS the said convention was duly ratified on both parts and the ratifications of the two Governments were exchanged at the city of Washington on the twenty-fourth day of January, 1911.

AND WHEREAS on the fifth day of December, 1910, the plenipotentiaries who negotiated and signed the said convention of June 24, 1910, being thereunto duly empowered by their respective Governments, agreed upon a supplementary protocol, which is as follows: [3]

AND WHEREAS the parties to the said convention of 24th of June, 1910, have by common accord, in conformity with Article II thereof, enlarged the said International Boundary Commission by the addition for the purposes of the consideration and decision of the aforesaid difference of a third commissioner, viz:

Eugene Lafleur, one of His Britannic Majesty's counsel, doctor of civil law and former professor of international law at McGill University, who, together with

Anson Mills, brigadier-general of the United States Army (retired), member of the American Geographical Society, American Commissioner of the International Boundary Commission, and

Fernando Beltrán y Puga, civil engineer, Mexican commissioner of the International Boundary Commission, member of the Geographical Society of Mexico and of the American Geographical Society, member of the Society of Civil Engineers and Architects of Mexico,

Have been constituted as a commission for the decision as to whether the international title to the Chamizal tract is in the United States of America or in the United States of Mexico.

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[1] *Papers relating to Foreign Relations of the United States*, 1911, p. 573.

[2] See *supra*., p. 313.

[3] See *supra*, p. 314, footnote 1.

AND WHEREAS the agents of the parties to the said convention have duly, and in accordance with the terms of the convention, communicated to this commission their cases, countercases, printed arguments, and other documents.

AND WHEREAS the agents and counsel for the parties have fully presented to this commission their oral arguments during the sittings held at the city of El Paso between the first assembling of the commission on the 15th May, 1911, to the close of the hearing on the 2d June, 1911.

Now, therefore, this commission, having carefully considered the said convention, cases, countercases, printed and oral arguments, and the documents presented by either side, after due deliberation, makes the following decision and award:

The Chamizal tract consists of about six hundred acres, and lies between the old bed of the Rio Grande, as it was surveyed in 1852, and the present bed of the river, as more particularly described in article 1 of the convention of 1910. It is the result of changes which have taken place through the action of the water upon the banks of the river causing the river to move southward into Mexican territory.

With the progressive movement of the river to the south, the American city of El Paso has been extending on the accretions formed by the action of the river on its north bank, while the Mexican city of Juarez to the south has suffered a corresponding loss of territory.

By the treaties of 1848 and 1853 the Rio Grande, from a point a little higher than the present city of El Paso, to its mouth in the Gulf of Mexico, was constituted the boundary line between the United States and Mexico.

The contention on behalf of the United States of Mexico is that this dividing line was fixed under those treaties in a permanent and invariable manner, and consequently that the changes which have taken place in the river have not affected the boundary line, which was established and marked in 1852.

On behalf of the United States of America it is contended that according to the true intent and meaning of the treaties of 1848 and 1853, if the channel of the river changes by gradual accretion, the boundary follows the channel, and that it is only in case of a sudden change of bed that the river ceases to be the boundary, which then remains in the abandoned bed of the river.

It is further contended on behalf of the United States of America that by the terms of a subsequent boundary convention in 1884 rules of interpretation were adopted which became applicable to all changes in the Rio Grande which have occurred since the river became the international boundary, and that the changes which determined the formation of the Chamizal tract are changes resulting from slow and gradual erosion and deposit of alluvion within the meaning of that convention and consequently changes which left the channel of the river as the international boundary line.

The Mexican Government, on the other hand, contends that the Chamizal tract having been formed before the coming in force of the convention of 1884, that convention was not retroactive and could not affect the title to the tract, and further contends that, even assuming the case to be governed by the convention of 1884, the changes in the channel have not been the result of slow and gradual erosion and deposit of alluvion.

Finally the United States of America have set up a claim to the Chamizal tract by prescription, alleged to result from the undisturbed, uninterrupted, and unchallenged possession of the territory since the treaty of 1848.

In 1889 the Governments of the United States and of Mexico, by a convention, created the International Boundary Commission for the purpose of carrying out the principles contained in the convention of 1884 and to avoid the difficul-

ties occasioned by the changes which take place in the bed of the Rio Grande where it serves as the boundary between the two Republics, and for other purposes enumerated in Article I of the convention of 1889.

At a session of the boundary commissioners held on the 28th September, 1894, the Mexican commissioner presented the papers in a case known as " El Chamizal No. 4 ". These included a complaint made by Pedro Ignacio García, who alleged, in substance, that he had acquired certain property formerly lying on the south side of the Rio Grande, known as El Chamizal, which, in consequence of the abrupt and sudden change of current of the Rio Grande, was now on the north side of the river and within the limits of El Paso, Texas. This claim was examined by the International Boundary Commissioners, who heard witnesses upon the facts, and who, after consideration, were unable to come to any agreement, and so reported to their respective Governments.

As a result of this disagreement the convention of 24th June, 1910, was signed, and the decision of the question was submitted to the present commission.

Fixed line theory

Article V of the treaty of Guadalupe Hidalgo of 1848 provides for a boundary between the United States and Mexico in the following terms:

The boundary line between the two Republics shall commence in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, otherwise called Rio Bravo del Norte, or opposite the mouth of its deepest branch, if it should have more than one branch emptying directly into the sea; from thence, up the middle of that river, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico; thence, westwardly, along the whole southern boundary of New Mexico (which runs north of the town called Paso) to its western termination; thence northward, along the western line of New Mexico until it intersects the first branch of the river Gila (or if it should not intersect any branch of that river, then to the point on the said line nearest to such branch, and thence in a direct line to the same); thence down the middle of the said branch and of the said river, until it empties into the Rio Colorado; thence, across the Rio Colorado, following the division line between Upper and Lower California, to the Pacific Ocean.

The southern and western limits of New Mexico, mentioned in this article, are those laid down in the map entitled " *Map of the United Mexican States, as organized and defined by various acts of the Congress of said Republic, and constructed according to the best authorities. Revised edition. Published at New York in 1847 by J. Disturnell* "; of which map a copy is added to this treaty, bearing the signatures and seals of the undersigned plenipotentiaries. And, in order to preclude all difficulty in tracing upon the ground the limit separating Upper from Lower California, it is agreed that the said limit shall consist of a straight line, drawn from the middle of the Rio Gila, where it unites with the Colorado, to a point on the coast of the Pacific Ocean, distant one marine league due south of the southernmost point of the port of San Diego, according to the plan of said port made in the year 1782 by Don Juan Pantoja, second sailing master of the Spanish fleet, and published at Madrid in the year 1802 in the atlas to the voyage of the schooners *Sutil* and *Mexicana*, of which plan a copy is hereunto added, signed and sealed by the respective plenipotentiaries.

In order to designate the boundary line with due precision upon authoritative maps, and to establish upon the ground landmarks which shall show the limits of both Republics, as described in the present article, the two Governments shall each appoint a commissioner and a surveyor, who, before the expiration

of one year from the date of the exchange of ratifications of this treaty, shall meet at the port of San Diego and proceed to run and mark the said boundary in its whole course to the mouth of the Rio Bravo del Norte. They shall keep journals and make out plans of their operations, and the result agreed upon by them shall be deemed a part of this treaty, and shall have the same force as if it were inserted therein. The two Governments will amicably agree regarding what may be necessary to these persons, and also as to their respective escorts, should such be necessary.

The boundary line established by this article shall be religiously respected by each of the two Republics, and no change shall ever be made therein, except by the express and free consent of both nations, lawfully given by the General Government of each, in conformity with its own constitution.

The fluvial portion of the boundary called for by the above treaty, in so far as the Rio Grande is concerned, extending from its mouth to the point where it strikes the southern boundary of New Mexico, appears to have been fixed by the surveys of the International Boundary Commission in 1852.

In 1853, in consequence of a dispute as to the land boundary and the acquisition of a portion of territory now forming part of New Mexico and Arizona, known as the " Gadsden Purchase ", the boundary treaty of 1853 was signed, the first article of which deals with the boundary as follows:

The Mexican Republic agrees to designate the following as her true limits with the United States for the future: Retaining the same dividing line between the two Californias as already defined and established, according to the fifth article of the treaty of Guadalupe Hidalgo, the limits between the two Republics shall be as follows: Beginning in the Gulf of Mexico, three leagues from land, opposite the mouth of the Rio Grande, as provided in the fifth article of the treaty of Guadalupe Hidalgo; thence, as defined in the said article, up the middle of that river to the point where the parallel of 31° 47′ north latitude crosses the same; thence due west 100 miles; thence south to the parallel of 31° 20′, north latitude; thence along the said parallel of 31° 20′ to the 111th meridian of longitude west of Greenwich; thence in a straight line to a point on the Colorado River 20 English miles below the junction of the Gila and Colorado Rivers; thence up the middle of the said river Colorado until it intersects the present line between the United States and Mexico.

For the performance of this portion of the treaty, each of the two Governments shall nominate one commissioner, to the end that, by common consent, the two thus nominated, having met in the city of Paso del Norte, three months after the exchange of the ratifications of this treaty, may proceed to survey and mark out upon the land the dividing line stipulated by this article, where it shall not have already been surveyed and established by the mixed commission, according to the treaty of Guadalupe, keeping a journal and making proper plans of their operations. For this purpose, if they should judge it necessary, the contracting parties shall be at liberty each to unite to its respective commissioner, scientific or other assistants, such as astronomers and surveyors, whose concurrence shall not be considered necessary for the settlement and ratification of a true line of division between the two republics; that line shall be alone established upon which the commissioners may fix, their consent in this particular being considered decisive and an integral part of this treaty, without necessity of ulterior ratification or approval, and without room for interpretation of any kind by either of the parties contracting.

The dividing line thus established shall, in all time, be faithfully respected by the two Governments, without any variation therein, unless of the express

and free consent of the two, given in conformity to the principles of the law of nations, and in accordance with the constitution of each country, respectively.

In consequence, the stipulation in the fifth article of the treaty of Guadalupe upon the boundary line therein described is no longer of any force, wherein it may conflict with that here established, the said line being considered annulled and abolished wherever it may not coincide with the present, and in the same manner remaining in full force where in accordance with the same.

The treaty of Guadalupe Hidalgo, signed on the 2d February, 1848, provides that the boundary line between the two Republics from the Gulf of Mexico shall be the middle of the Rio Grande, following the deepest channel, where it has more than one, to the point where it strikes the southern boundary of New Mexico. It is conceded on both sides that if this provision stood alone it would undoubtedly constitute a natural, or arcifinious, boundary between the two nations and that according to well-known principles of international law this fluvial boundary would continue, notwithstanding modification of the course of the river caused by gradual accretion on the one bank or degradation on the other bank; whereas if the river deserted its original bed and forced for itself a new channel in another direction the boundary would remain in the middle of the deserted river bed. It is contended, however, on behalf of Mexico, that the provisions in the treaty providing for a designation of the boundary line with due precision, upon authoritative maps, and for establishing upon the grounds landmarks showing the limits of both Republics, and the direction to commissioners and surveyors to run and mark the boundary in its full course to the mouth of the Rio Grande, coupled with the final stipulation that the boundary line thus established should be religiously respected by the two Republics, and no change should ever be made therein, except by the express and free consent of both nations, takes this case out of the ordinary rules of international law, and by a conventional agreement converts a natural, or arcifinious, boundary into an artificial and invariable one. In support of this contention copious references have been made to the civil law distinguishing between lands whose limits were established by fixed measurements (*agri limitati*) and arcifinious lands, which were not so limited (*agri arcifinii*). These two classes of lands were sometimes contrasted by saying that arcifinious lands were those which had natural boundaries, such as mountains and rivers, while limited estates were those which had fixed measurements. As a consequence of this distinction the Roman law denied the existence of the right of alluvion in favor of the limited estates which it was the custom to distribute among the Roman generals, and subsequently to the legionaries, out of conquered territory. This restriction of the ordinary rights appurtenant to riparian ownership is, however, considered by the best authorities to have been an exceptional provision applicable only to the case above mentioned, and one of the principal authorities relied on by the Mexican counsel (A. Plocquo, *Legislation des caux et de la navigation*, vol. 2, p. 66) clearly establishes that the mere fact that a riparian proprietor holds under a title which gives him a specified number of acres of land does not prevent him from profiting by alluvion. The difficulty in this case does not arise from the fact that the territories in question are established by any measurement, but because the boundary is ordered to be run and marked along the fluvial portion as well as on the land, and on account of the further stipulation that no change shall ever be made therein. Do these provisions and expression, in so far as they refer to the fluvial portion of the boundary, convert it into an artificial boundary which will persist notwithstanding all changes in the course of the river? In one sense it may be said that the adoption of a fixed and invariable line, so far as the river is concerned, would not be a

perpetual retaining of the river boundary provided for by the treaty, and would be at variance with the agreement of the parties that the boundary should forever run in the middle of the river. The direction as to marking the course of the river as it existed at the time of the treaty of 1848 is not inconsistent with a fluvial line varying only in accordance with the general rules of international law, by erosion on one bank and alluvial deposits on the other bank, for this marking of the boundary may serve the purpose of preserving a record of the old river bed to serve as a boundary in cases in which it cuts a new channel.

Numerous treaties containing provisions as to river boundaries have been referred to by the two parties, showing that in some cases conventional arrangements are made that the river *simpliciter* shall be the boundary, or that the boundary shall run along the middle of the river, or along the *thalweg* or center or thread of the channel, while a small number of treaties contain elaborate dispositions for a fixed line boundary, notwithstanding the alterations which may take place in the river, with provision, however, for periodical readjustments in certain specified cases. The difficulty with these instances is that no cases appear to have arisen upon the treaties in question and their provisions throw little, if any, light upon the present controversy. In one case only among those cited there appears to have been a decision by the Court of Cassation in France (Dalloz, 1858, Part 1, p. 401) holding that when a river separates two departments or two districts, the boundary is fixed in an irrevocable manner along the middle of the bed of the river as it existed at the time of the establishment of the boundary and that it is not subject ot any subsequent variation, notwithstanding the changes in the river. Whatever authority this decision may have in the delimitation of departmental boundaries in France, it does not seem to be in accordance with recognized principles of international law, if, as appears from the report, it holds that the mere designation of a river as a boundary establishes a fixed and invariable line.

The above observations as to the treaty of 1848 would seem to apply to the Gadsden treaty of 1853, taken by itself, for it provides, in similar language, that the boundary shall follow the middle of the Rio Grande, that the boundary line shall be established and marked, and that the dividing line shall in all time be faithfully respected by the two Governments without any variation therein.

While, however, the treaty of 1848 standing alone, or the treaty of 1853, standing alone, might seem to be more consistent with the idea of a fixed boundary than one which would vary by reason of alluvial processes, the language of the treaty of 1853, taken in conjunction with the existing circumstances, renders it difficult to accept the idea of a fixed and invariable boundary. During the five years which elapsed between the two treaties, notable variations of the course of the Rio Grande took place, to such an extent that surveys made in the early part of 1853, at intervals of six months, revealed discrepancies which are accounted for only by reason of the changes which the river had undergone in the meantime. Notwithstanding the existence of such changes the treaty of 1853 reiterates the provision that the boundary line runs up the middle of the river, which could not have been an accurate statement upon the fixed line theory.

Some stress had been laid upon the observations contained in the records of the boundary commissioners that the line they were fixing would be thenceforth invariable, but apart from the inconclusive character of this conversation, it seems clear that in making any remarks of this nature, the boundary commissioners were exceeding their mandate, and that their views as to the proper construction of the treaties under which they were working could not in any way bind their respective Governments.

In November, 1856, the draft for the proposed report of the boundary commissioners for determining the boundary between Mexico and the United States under the treaty of 1853 was submitted by the Secretary of the Interior of the United States to the Hon. Caleb Cushing for his opinion as to whether the boundary line under that treaty shifted with changes taking place in the bed of the river, or whether the line remained constant where the main course of the river ran as represented by the maps accompanying the report of the commissioners. The opinion of Mr. Cushing is a valuable contribution to the subject by an authority on international law. After consideration of the provisions of the treaty, and an examination of a great number of authorities upon the subject, Mr. Cushing reported that the Rio Grande retained its function of an international boundary, notwithstanding changes brought about by accretion to one bank and the degradation of the other bank, but that, on the other hand, if the river deserted its original bed and forced for itself a new channel in another direction, then the nation through whose territory the river thus broke its way did not lose the land so separated; the international boundary in that case remaining in the middle of the deserted river bed.

This opinion was transmitted to the Mexican legation at Washington and acknowledged by Señor Romero, then Mexican ambassador at Washington, who, without in any way committing his Government, stated his own personal acquiescence in the principles enunciated as being equitable and founded upon the teachings of the most accredited expositors of international law. He further stated that he was transmitting a copy of the opinion to his Government. There does not appear to have been any expression of opinion by the Mexican Government at that time as to the soundness of the views expressed by the Hon. Mr. Cushing.

From the last-mentioned date until the signing of the convention of 1884 a considerable amount of diplomatic correspondence took place as to the meaning and effect of the boundary treaties of 1848 and 1853. Without going into all the details of this correspondence, which has been fully discussed in the printed and oral arguments of the parties, it is sufficient to say that during that period, with the exception of certain statements contained in a letter of Mr. Frelinghuysen, which will be adverted to later, the Government of the United States consistently adhered to the principles enunciated by Attorney-General Cushing. On the Mexican side the correspondence reveals more fluctuations of opinion; the writers sometimes indicating their view that the boundary created by the treaties in question was a fixed line, but more frequently qualifying such statements by making an exception in the case of slow and successive increases resulting from alluvial deposits.

While considerable importance appeared to be attached by the parties to various expressions contained in this correspondence, the commissioners, at an early stage in the argument, expressed their view that neither of the high contracting parties should be bound by the unguarded language contained in many of the letters. The only real importance to be attached to this correspondence is that it shows conclusively that a considerable doubt existed as to the meaning and effect of the boundary treaties of 1848 and 1853.

However strongly one might be disposed to think that the treaty of 1848, taken by itself, or the treaty of 1853, taken by itself, indicated an intention to establish a fixed line boundary, it would be difficult to say that the question is free from doubt, in view of the opinion expressed by so high an authority as the Hon. Mr. Cushing upon the very point at issue, and in view of the occasional concurrence in this opinion by some of the higher Mexican officials at the time it was given.

It is in consequence of this legitimate doubt as to the true construction of the boundary treaties of 1848 and 1853 that the subsequent course of conduct of the parties and their formal conventions may be resorted to as aids to construction. In the opinion of the majority of this commission the language of the subsequent conventions and the consistent course of conduct of the high contracting parties is wholly incompatible with the existence of a fixed line boundary.

In 1884 the following boundary convention was concluded between the two Republics:

Boundary Convention, Rio Grande and Rio Colorado

Convention between the United States of America and the United States of Mexico touching the boundary line between the two countries where it follows the bed of the Rio Grande and the Rio Colorado

Whereas, in virtue of the 5th article of the treaty of Guadalupe Hidalgo between the United States of America and the United States of Mexico, concluded February 2, 1848, and of the first article of that of December 30, 1853, certain parts of the dividing line between the two countries follow the middle of the channel of the Rio Grande and the Rio Colorado, to avoid difficulties which may arise through the changes of channel to which those rivers are subject through the operation of natural forces, the Government of the United States of America and the Government of the United States of Mexico have resolved to conclude a convention which shall lay down rules for the determination of such questions, and have appointed as their plenipotentiaries:

The President of the United States of America, Frederick T. Frelinghuysen, Secretary of State of the United States; and the President of the United States of Mexico, Matias Romero, envoy extraordinary and minister plenipotentiary of the United Mexican States;

Who, after exhibiting their respective full powers, found in good and due form, have agreed upon the following articles:

Article I

The dividing line shall forever be that described in the aforesaid treaty and follow the center of the normal channel of the rivers named, notwithstanding any alterations in the banks or in the course of those rivers, provided that such alterations be effected by natural causes through the slow and gradual erosion and deposit of alluvium and not by the abandonment of an existing river bed and the opening of a new one.

Article II

Any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made under the aforesaid treaty, shall produce no change in the dividing line as fixed by the surveys of the International Boundary Commissions in 1852; but the line then fixed shall continue to follow the middle of the original channel bed, even though this should become wholly dry or be obstructed by deposits.

Article III

No artificial change in the navigable course of the river, by building jetties, piers, or obstructions which may tend to deflect the current or produce deposits of alluvium, or by dredging to deepen another than the original channel under the treaty when there is more than one channel, or by cutting waterways to shorten the navigable distance, shall be permitted to affect or alter the dividing line as determined by the

aforesaid commissions in 1852 or as determined by Article I hereof and under the reservation therein contained; but the protection of the banks on either side from erosion by revetments of stone or other material not unduly projecting into the current of the river shall not be deemed an artificial change.

ARTICLE IV

If any international bridge have been or shall be built across either of the rivers named, the point on such bridge exactly over the middle of the main channel as herein determined shall be marked by a suitable monument, which shall denote the dividing line for all the purposes of such bridge, notwithstanding any change in the channel which may thereafter supervene. But any rights other than in the bridge itself and in the ground on which it is built shall in event of any such subsequent change be determined in accordance with the general provisions of this convention.

ARTICLE V

Rights of property in respect of lands which may have become separated through the creation of new channels as defined in Article II hereof shall not be affected thereby, but such lands shall continue to be under the jurisdiction of the country to which they previously belonged.

In no case, however, shall this retained jurisdictional right affect or control the right of navigation common to the two countries under the stipulations of Article VII of the aforesaid treaty of Guadalupe Hidalgo; and such common right shall continue without prejudice throughout the actually navigable main channels of the said rivers, from the mouth of the Rio Grande to the point where the Rio Colorado ceases to be the international boundary, even though any part of the channel of said rivers, through the changes herein provided against, may be comprised within the territory of one of the two nations.

ARTICLE VI

This convention shall be ratified by both parties in accordance with their respective constitutional procedure, and the ratifications exchanged in the city of Washington as soon as possible.

In witness whereof the undersigned plenipotentiaries have hereunto set their hands and seals.

Done at the city of Washington, in duplicate, in the English and Spanish languages, this 12th day of November, A.D. 1884.

The preamble of this convention states that it refers to those parts of the boundary line between the two countries *which follow the bed of the Rio Grande and the Rio Colorado*, and proceeds to explain that the portions of the dividing line between the two countries which follows the middle of the channel of the Rio Grande and the Rio Colorado are those mentioned in the treaties of 1848 and 1853. The convention thus seems to have been designed to apply to the whole of the Rio Grande in so far as the treaties of 1848 and 1853 constitute this river as the dividing line between the two countries. The first article provides that the dividing line shall forever be that described in the aforesaid treaty, and following the center of the normal channel of the rivers named, etc. This appears to be a clear recognition of the fact that the line which is, according to the agreement of the parties, to be henceforth their boundary line, is also that which was created by the former treaties. It is, to that extent, a declaratory article importing in the treaties of 1848 and 1853 the construction which the parties had determined to adopt, as the preamble states, in order " to avoid difficulties which may arise through the changes of channel to which those

rivers are subject through the operation of natural forces ", and " to lay down rules for the determination of such questions ".

On behalf of Mexico it has been strenuously contended that this convention was intended to operate in the future only, and that it should not be given a retroactive effect so as to apply to any changes which had previously occurred. Reference was made to a number of well-known authorities establishing the proposition that laws and treaties are not usually deemed to be retrospective in their effect. An equally well-known exception to this rule is that of laws or treaties which are intended to be declaratory, and which evidence the intention of putting an end to controversies by adopting a rule of construction applicable to laws or conventions which have been subject to dispute. The internal evidence contained in the convention of 1884 appears to be sufficient to show an intention to apply the rules laid down for the determination of difficulties which might arise through the changes in the Rio Grande, whether these changes had occurred prior to or after the convention, and they appear to have been intended to codify the rules for the interpretation of the previous treaties of 1848 and 1853 which had formed the subject of diplomatic correspondence between the parties. While it is perfectly true that the convention was to be applied to *disputes* which might arise in future, it nowhere restricts these difficulties to future changes in the river. It expressly declares that by the treaties of 1848 and 1853, the dividing line had followed the middle of the river, and that henceforth the same rule was to apply.

At the time this convention was signed all the great changes in the course of the Rio Grande had occurred, and practically the whole Chamizal tract had been formed. It appears, in fact, that the river of 1852 and the river of 1884 had no points in common, except points of intersection. It is quite true that the parties may not have been aware of the entire separation of the old river bed from the new, from El Paso down to the Gulf of Mexico, but the fact remains that all the great and visible changes which are reported to have taken place during the floods extending ffrom 1864 to 1868 had done their work, and, in the case of the Chamizal tract, the changes had been so considerable in the upper portion of the river, which is proved to have been less liable to modifications owing to the nature of its soil than the lower part of the river, that it formed the subject of much diplomatic correspondence.

Having regard to the existence of such notable changes in the river bed, it is obvious that the convention of 1884 would have been nugatory and inapplicable upon the hypothesis of a fixed line boundary, for when once the river had moved away from the fixed line into the territory of one or other of the two nations it was idle and useless to provide for erosive or other changes which might subsequently occur in its bed, the river being *ex hypothesi*, wholly in the territory of one or other of the nations on either side of the supposed fixed boundary.

If any doubt could be entertained as to the intention of the parties in making this convention, it would disappear upon a consideration of the uniform and consistent manner in which it was subsequently declared by the two Governments to apply to past as well as to future changes in the river.

Copious references were made by the parties to the diplomatic correspondence which preceded this convention, but these communications, when closely examined, are inconclusive and add little or nothing to the language of the treaty.

Equally inconclusive are the declarations made after the signing of the convention by high officers of States on both sides. For example, Senor Romero, on the 13th April, 1834, is reported to have said to the Mexican department of foreign affairs that the treaty did not decide cases previous to its date, because it could not have retroactive effect, but could only be applied to such cases as

might occur subsequently. On the other hand, the President of Mexico, in his message of April, 1891, recommending the adoption of the convention of 1889, which created the boundary commission to carry out the provisions of the convention of 1884, refers to the convention as being for the establishment of an international commission to study and determine *pending* boundary questions, or those which may arise by reason of the variation of the course of the river.

It would be useless to multiply citations from diplomatic correspondence, which is not always consistent, and which falls under the rule laid down by The Hague Tribunal in the recent award in the North Atlantic Coast Fisheries reference. Speaking of similar unguarded expressions contained in diplomatic correspondence the presiding commissioner expressed the following opinion, which seems applicable to a great many of the communications which have been relied upon by one or other of the parties in the present case:

> The tribunal, unwilling to invest such expressions with an importance entitling them to affect the general question, considers that such conflicting or inconsistent expressions as have been exposed on either side are sufficiently explained by their relations to ephemeral phases of a controversy of almost secular duration, and should be held to be without direct effect on the principal and present issues.

The same considerations apply to the correspondence with reference to a claim to Morteritors Island, on which considerable reliance was placed by Mexican counsel as showing the abandonment of the United States of the view seth forth in Attorney-General Cushing's opinion, and an acceptance of the fixed line theory. Without discussing the details of this case, it is sufficient to say that the decision arrived at was in no way based upon the fixed boundary theory, but was a conclusion which was inevitable from the application of the treaties of 1848 to 1853. It is contended, however, that certain expressions used by Mr. Secretary Frelinghuysen in his correspondence with the Mexican Government, when he was resisting the Mexican claim, are inconsistent with the idea of a fluvial boundary, and can only be explained on the theory that Mr. Frelinghuysen believed in the existence of a fixed boundary. Viewed in connection with the facts of the case, these expressions scarcely bear the interpretation which the Mexican counsel desire to put upon them, but even assuming that in the course of his argument on behalf of his department, Mr. Frelinghuysen committed himself to the theory that the United States could not recognize the annexation of its territory by accretion, such casual and unguarded language, which was certainly not relevant to the decision of the case upon the facts actually proved, could not bind his Government any more than similar expressions used by Mexican high officials, above referred to, could bind their Government.

Far more conclusive is the course of action entered upon and persistently followed by both nations upon the appointment of the boundary commission of 1889.

In 1893 a dispute arose in a case known as the " Banco de Camargo ", which involved a claim that the land had formed by gradual erosion and deposit of alluvium since 1865. After a correspondence between Señor Mariscal and the United States minister, in which they refer to the convention of 1884, it was decided to bring the case, along with similar ones, before the attention of the boundary commission, when organized. Upon the organization of the commission the case was duly submitted, and the commission found that the erosion in question dated back to the year 1865, and applied the provisions of the convention of 1884 to its solution.

In 1893 a dispute arose as to the arrest of American citizens on land which was claimed by citizens of both nations, and which had formed on the edge of the river prior to 1884. The two Governments thereupon agreed to refer the matter to the International Boundary Commission, which was organized for work on the 4th January, 1894.

In the case of the " Banco de Vela ", a claim based upon accretions which began in 1853, the matter was also referred to the boundary commission.

In the case of the " Banco de Granjeno ", under circumstances which were similar, the accretions having begun in 1853, the controversy was referred to and dealt with by the same commission.

In the case of the " Banco de Santa Margarita ", an analogous condition existed, and a similar disposition of the case was made.

The bancos above referred to were formed by accretions to land on one side of the river, with erosions on the other side, until the channel ran on a curve, and a time came when the force of the current made a new channel, leaving a banco between the new and old channel.

In dealing with the above cases the commissioners, in a joint report dated 15th January, 1895, concluded that the application of the treaty of 1884 to these bancos would be inconvenient and would create difficulties which had not been foreseen. They accordingly recommended the elimination of the bancos from the convention of 1884 and the signing of a special agreement with reference thereto.

As a result of this report, a convention was formally signed in 1905, which clearly acknowledges the application of Article II of the Convention of 1884 to fifty-eight bancos which had been surveyed and described in the report of the consulting engineers.

The convention further recites " That the application to these bancos of the principle established in Article II of the Convention of 1884 renders difficult the solution of the controversies mentioned, and, instead of simplifying, complicates the said boundary line between the two countries ", and provides that these bancos, together with those which may in future be formed, shall be eliminated from the operation of the convention of 1884, and shall be dealt with in a different manner.

This recognition of the retrospective application of the convention of 1884 is not that of subordinates, but of the Governments themselves, which expressly adopted the views of the commissioners as to the application of the treaty of 1884 and as to the desirability of taking such cases, both past and future, out of the convention and substituting new provisions.

In 1895 the Chamizal claim was submitted to the commission in a letter of Mr. Mariscal, above referred to. While the claim is a private one, there is no doubt that it was presented with the authority and concurrence of the Mexican Government and received its support throughout its various stages as involving a controversy as to the international title to the Chamizal tract. The claim of Pedro Y. García, on its face, showed that it was based on changes which had occurred in the river prior to 1884, and, notwithstanding this well-known fact, the matter was referred to the International Boundary Commission to be dealt with, and would have been disposed of but for a disagreement between the two commissioners, one of whom considered that the changes had resulted from slow and gradual erosion, as required by the convention of 1884, while the other commissioner considered that the erosion had been violent and intermittent and not of such a character as, under the terms of the convention of 1884, could change the international boundary.

While the Chamizal case was pending before the International Boundary Commission, they became seized of the controversy concerning the island of San Elizario, which was presented to the commission by the Mexican commissioner on the 4th November, 1895. The decision in this case, rendered on the 5th October, 1896, was based upon changes which occurred in the years 1857 and 1858. Like all other decisions of the boundary commission, it was communicated to the Mexican Government, which, under the terms of the Convention of 1889, could disapprove of the action of the commissioners within one month from the day of its pronouncement. Far from being disallowed, the decision was expressly approved by the Mexican Government, as appears from the letter addressed by Mr. Mariscal to the Mexican minister at Washington on 5th October, 1896.

Thus in all cases dealt with by the two Governments after the convention of 1884 referring to river changes occurring prior to that date, the provisions of that convention were invariably and consistently applied.

On the whole, it appears to be impossible to come to any other conclusion than that the two nations have, by their subsequent treaties and their consistent course of conduct in connection with all cases arising thereunder, put such an authoritative interpretation upon the language of the treaties of 1848 and 1853 as to preclude them from now contending that the fluvial portion of the boundary created by those treaties is a fixed line boundary.

The presiding commissioner and the American commissioner therefore hold that the treaties of 1848 and 1853, as interpreted by subsequent conventions between the parties and by their course of conduct, created an arcifinious boundary, and that the convention of 1884 was intended to be and was made retroactive by the high contracting parties.

(Mr. Commissioner Puga dissents from this holding for the reasons set forth in his subjoined opinion.)

PRESCRIPTION

In the countercase of the United States, the contention is advanced that the United States has acquired a good title by prescription to the tract in dispute, in addition to its title under treaty provisions.

In the argument it is contended that the Republic of Mexico is estopped from asserting the national title over the territory known as " El Chamizal " by reason of the undisturbed, uninterrupted, and unchallenged possession of said territory by the United States of America since the treaty of Guadalupe Hidalgo.

Without thinking it necessary to discuss the very controversial question as to whether the right of prescription invoked by the United States is an accepted principle of the law of nations, in the absence of any convention establishing a term of prescription, the commissioners are unanimous in coming to the conclusion that the possession of the United States in the present case was not of such a character as to found a prescriptive title. Upon the evidence adduced it is impossible to hold that the possession of El Chamizal by the United States was undisturbed, uninterrupted, and unchallenged from the date of the treaty of the creation of a competent tribunal to decide the question, the Chamizal case was first presented. On the contrary, it may be said that the physical possession taken by citizens of the United States and the political control exercised by the local and Federal Governments, have been constantly challenged and questioned by the Republic of Mexico, through its accredited diplomatic agents.

As early as 1856, the river changes threatening the Valley of El Paso had caused anxious inquiries, which resulted in a reference of the matter to the Hon. Caleb Cushing for his opinion.

In January, 1867, Don Matias Romero forwarded to Mr. Seward, Secretary of State, a communication from the perfecture of Brazos relating to the controversy between the people of El Paso del Norte (now Juarez) and the people of Franklin (now El Paso, Tex.) over the Chamizal tract, then in process of formation. From that time until the negotiation of the convention of 1884, a considerable amount of diplomatic correspondence is devoted to this very question, and the convention of 1884 was an endeavor to fix the rights of the two nations with respect to the changes brought about by the action of the waters of the Rio Grande.

The very existence of that convention precludes the United States from acquiring by prescription against the terms of their title, and, as has been pointed out above, the two Republics have ever since the signing of that convention treated it as a source of all their rights in respect of accretion to the territory on one side or the other of the river.

Another characteristic of possession serving as a foundation for prescription is that it should be peaceable. In one of the affidavits filed by the United States to prove their possession and control over the Chamizal distict (that of Mr. Coldwell) we find the following significant statement:

> In 1874 or 1875 I was present at an interview between my father and Mr. Jesús Necobar y Armendariz, then Mexican collector of customs at Paso del Norte, now Ciudad Juarez, which meeting took place at my father's office on this side of the river.
>
> Mr. Necobar asked my father for permission to station a Mexican customhouse officer on the road leading from El Paso to Juarez, about 200 or 300 yards north of the river. My father replied in substance that he had no authority to grant any such permission, and even if he had, and granted permission, it would not be safe for a Mexican customs officer to attempt to exercise any authority on this side of the river.

It is quite clear from the circumstances related in this affidavit that however much the Mexicans may have desired to take physical possession of the district, the result of any attempt to do so would have provoked scenes of violence and the Republic of Mexico cannot be blamed for resorting to the milder forms of protest contained in its diplomatic correspondence.

In private law, the interruption of prescription is effected by a suit, but in dealings between nations this is of course impossible, unless and until an international tribunal is established for such purpose. In the present case, the Mexican claim was asserted before the International Boundary Commission within a reasonable time after it commenced to exercise its functions, and prior to that date the Mexican Government had done all that could be reasonably required of it by way of protest against the alleged encroachment.

Under these circumstances the commissioners have no difficulty in coming to the conclusion that the plea of prescription should be dismissed.

Application of the convention of 1884

Upon the application of the convention of 1884 to the facts of this case the commissioners are unable to agree.

The presiding commissioner and the Mexican commissioner are of the opinion that the evidence establishes that from 1852 to 1864 the changes in the river, which during that interval formed a portion of the Chamizal tract, were

caused by slow and gradual erosion and deposit of alluvium within the meaning of Article I of the convention of 1884.

They are further of opinion that all the changes which have taken place in the Chamizal district from 1852 up to the present date have not resulted from any change of bed of the river. It is sufficiently shown that the Mexican bank opposite the Chamizal tract was at all times high and that it was never overflowed, and there is no evidence tending to show that the Rio Grande in that vicinity ever abandoned its existing bed and opened a new one. The changes, such as they were, resulted from the degradation of the Mexican bank and the alluvial deposits formed on the American bank, and, as has been said, up to 1864 this erosion and deposit appear to come within Article I of the convention of 1884.

With respect to the nature of the changes which occurred in 1864 and during the four succeeding years, the presiding commissioner and the Mexican commissioner are of opinion that the phenomena described by the witnesses as having occurred during that period cannot properly be described as alterations in the river effected through the slow and gradual erosion and deposit of alluvium.

The following extracts from the evidence are quoted by the presiding commissioner and the Mexican commissioner in support of their views:

JESÚS SERNA: Q. When the change took place was it slow or violent?—A. The change was violent, and destroyed the trees crops, and houses.

YNOCENTE OCHOA: Q. When the change took place was it slow or violent?—A. As I said before, it was sometimes slow and sometimes violent, and with such force that the noise of the banks falling seemed like the boom of cannon, and it was frightful.

E. PROVINCIO: Q. Explain how you know what you have stated.—A. Because the violent changes of the river in 1864 caused considerable alarm to the city, and the people went to the banks of the river and pulled down trees and tried to check the advance of the waters. I was there sometimes to help and sometimes simply to observe. I helped to take out furniture from houses in danger and to remove beams of houses, etc.

Q. When the change took place was it slow or violent?—A. I cannot appreciate what is meant by slow or violent, but sometimes as much as fifty yards would be washed away at certain points in a day.

* * * * * * *

Q. Please describe the destruction of the bank on the Mexican side that you spoke of in your former testimony. Describe the size of the pieces of earth that you saw fall into the river.—A. When the river made the alarming change it carried away pieces of earth one yard, two yards, etc., constantly, in intervals of a few minutes. At the time of these changes the people would be standing on the banks watching a piece going down, and somebody would call " look out, there is more going to fall " and they would have to jump back to keep from falling into the river.

* * * * * * *

Q. Do you think that those works were constructed to protect against the slow and gradual work of the river or against the floods?—A. They were made to protect the town from being carried away in the event of another flood like that of '64, because the curve that the river had made was dangerous to the town.

JOSÉ M. FLORES: Q. Did the current come with such violence between 1864 and 1868 that houses and fields were destroyed?—A. Yes, sir.

* * * * * * *

Q. Please describe the manner of the tearing away of the Mexican bank by the current when these changes were taking place.—A. The current carried the sand

from the bank and cut in under, and then these pieces would fall into the water. If the bank was very high it took larger pieces; say two yards, never more than three yards wide, and where the banks were low it took smaller pieces.

DOCTOR MARIANO SAMANIEGO describes the violence of the change as follows: "The changes were to such a degree that at times during the night the river would wear away from fifty to one hundred yards. There were instances in which people living in houses fifty yards from the banks on one evening had to fly in the morning from the place on account of the enroachments of the river, and on many occasions they had no time to cut down their wheat or other crops. It carried away forests without giving time to the people to cut the trees down."

Q. Of the changes of the river that you have mentioned, were they all perceptible to the eye?—A. Yes, sir.

The presiding commissioner and the Mexican commissioner consider that the changes referred to in this testimony cannot by any stretch of the imagination, or elasticity of language, be characterized as slow and gradual erosion.

The case of Nebraska *v.* Iowa (143 U.S., 359), decided by the Supreme Court of the United States in 1892, is clearly distinguishable from the present case. In Nebraska *v.* Iowa the court, applying the ordinary rules of international law to a fluvial boundary between two States, held that while there might be an instantaneous and obvious dropping into the Missouri River of quite a portion of its banks, and while the disappearance, by reason of this process, of a mass of bank might be sudden and obvious, the accretion to the other side was always gradual and by the imperceptible deposit of floating particles of earth. The conclusion was, therefore, that notwithstanding the rapidity of the changes in the course of the channel, and the washing from the one side onto the other, the law of accretion controlled on the Missouri River, as elsewhere.

In the present case, however, while the accretion may have been slow and gradual, the parties have expressly contracted that not only the accretion, but the erosion, must be slow and gradual. The convention of 1884 expressly adopts a rule of construction which is to be applied to the fluvial boundary created by the treaties of 1848 and 1853, and this rule is manifestly different from that which was applied in the case of Nebraska *v.* Iowa, in which the court was not dealing with a special contract. If it had been called upon, in the case just cited, to decide whether the degradation of the bank of the Missouri River had occurred through a slow and gradual process, the answer would undoubtedly have been in the negative.

In the case of St. Louis *v.* Rutz (138 U.S., 226), the Supreme Court of the United States, dealing with facts very similar to those established by the evidence in the present case, found that the washing away of the bank of the Mississippi River did not take place slowly and imperceptibly, but, on the contrary, the caving in and washing away of the same was rapid and perceptible in its progress; that such washing away of said river bank occurred principally at the rises of floods of high water in the Mississippi River, which usually occurred in the spring of the year; that such rises or floods varied in their duration, lasing from four to eight weeks before the waters of the river would subside to their ordinary stage or level; that during each flood there was usually carried away a strip of land from off said river bank from 240 to 300 feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two and that blocks or masses of earth from 10 to 15 feet in width frequently caved in and were carried away at one time.

If the degradation of the bank of the Mississippi River, above described, was found by the Supreme Court not to be slow and imperceptible progress, it is difficult to understand how the destruction of land, houses, and forests, described by the witnesses in the present case, can be regarded as examples of slow and gradual erosion.

Nor can the presiding commissioner and the Mexican commissioner give effect to the contention that Mexico must be held to have put a construction on the words " slow and gradual " in the preamble of the Banco Treaty of 1905, which adopted the report of the commissioners stating that the changes producing the bancos were due to slow and gradual erosion coupled with avulsion, although it is alleged by the United States that the erosion in that case was even more violent than that which occurred at the Chamizal. The report rendered by the commissioners to their respective governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that by making a minute examination of the plans accompanying the report the actual extent of the erosive changes might have been ascertained, but there certainty was nothing in the question submitted to the governments for solution to necessitate, or even suggest, such an inquiry.

It has also been contended on behalf of the United States that before the signing of the treaty of 1905 the Mexican government had received the opinion of the American commissioner in the Chamizal case, which asserted that if the erosion in Chamizal was not slow and gradual, then *a fortiori* the erosion which had formed the bancos in the lower part of the river could not be slow and gradual. The effect of this assertion on the part of the American commissioner, however, was counteracted by the reply of the Mexican commissioner, who argued that there was no similarity between the two cases and no inconsistency between his report on the bancos and his attitude in the Chamizal case. Under these circumstances it is reasonable to conclude that the Mexican Government adopted the view of their commissioner, and in any event it can not be successfully contended that in assenting to the language of the preamble of the Banco Treaty it was precluded from contending that the Chamizal case was of a different nature.

It has been suggested, and the American commissioner is of opinion, that the bed of the Rio Grande, as it existed in 1864, before the flood, cannot be located, and moreover that the present commissioners are not authorized by the convention of the 5th December, 1910, to divide the Chamizal tract and attribute a portion thereof to the United States and another portion to Mexico. The presiding commissioner and the Mexican commissioner cannot assent to this view and conceive that in dividing the tract in question between the parties, according to the evidence as they appreciate it, they are following the precedent laid down by the Supreme Court of the United States in Nebraska *v.* Iowa, above cited. In that case the court found that up to the year 1877, the changes in the Missouri River were due to accretion, and that, in that year, the river made for itself a new channel. Upon these findings it was held that the boundary between Iowa and Nebraska was a varying line in so far as affected by accretion, but that from and after 1877 the boundary was not changed, and remained as it was before the cutting of a new channel. Applying this principle, *mutatis mutandis*, to the present case, the presiding commissioner and the Mexican commissioner are of opinion that the accretions which occurred in the Chamizal tract up to the time of the great flood in 1864 should be awarded to the United States of America, and that inasmuch as the changes which occurred in that

year did not constitute slow and gradual erosion within the meaning of the convention of 1884, the balance of the tract should be awarded to Mexico.

They also conceive that it is not within their province to relocate that line, inasmuch as the parties have offered no evidence to enable the commissioners to do so. In the case of Nebraska *v.* Iowa the court contented itself with indicating, as above stated, the boundary between the two States and invited the parties to agree to a designation of the boundary upon the principles enunciated in the decision.

The American commissioner dissents from the above holding, for the reasons given in his subjoined memorandum, and is of opinion that all the changes which have taken place at the Chamizal since 1852 were due to slow and gradual erosion and deposit of alluvium, within the meaning of the convention of 1884.

He is further of opinion that the commissioners have no jurisdiction to separate the Chamizal tract, and award a portion to the United States and a portion to Mexico; and, in view of his conviction that the position of the river bed in 1864 can not be ascertained, he considers that the award of the majority of the commissioners cannot be made effective.

Wherefore the presiding commissioner and the Mexican commissioner, constituting a majority of the said commission, hereby award and declare that the international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico.

The American commissioner dissents from the above award.

El Paso, 15th June, 1911.

(*Signed*) E. LAFLEUR
ANSON MILLS
F. B. PUGA

Dissenting opinion of the American commissioner

The American commissioner concurs in the findings of the presiding commissioner to the effect that the treaties of 1848 and 1853 did not establish a fixed and invariable line; that the treaty of 1884 was retroactive, and in the finding of the presiding commissioner and the Mexican commissioner to the effect that the United States has not established a title to the Chamizal tract by prescription. He is compelled to dissent *in toto* from so much of the opinion and award as assumes to segregate the Chamizal tract and to divide the parts so segregated between the two nations, and from that part of the opinion and award which holds that a portion of the Chamizal tract was not formed through "slow and gradual erosion and deposit of alluvium" within the terms of the treaty of 1884.

The reasons for the dissent are threefold: First, because in his opinion, the commission is wholly without jurisdiction to segregate the tract or to make other findings concerning the change at El Chamizal than "to decide whether it has occurred through avulsion or erosion, for the effects of articles 1 and 2 of the convention of November 12, 1884" (and art. 4, convention of 1889); secondly, because, in his opinion, the convention of 1884 is not susceptible to

any other construction than that the change of the river at El Chamizal was embraced within the first alternative of the treaty of 1884. And, thirdly, because, in his opinion, the finding and award is vague, indeterminate, and uncertain in its terms, and impossible of execution.

Division of tract a departure from convention of 1910

In the judgment of the American commissioner, articles 1 and 3 of the convention of June 24, 1910, providing for the present arbitration, submit to this commission the question as to the international title of the Chamizal tract in its entirety and this question only. Article I of the convention bounds the Chamizal tract with technical accuracy, while article 3 provides that " the Commission shall decide solely and exclusively as to whether the international title to the Chamizal tract is in the United States of America or Mexico ".

It is believed that by those provisions, when read together, the two governments have asked this commission a specific and definite question and that the commission is " solely and exclusively " empowered and required to give a specific and definite answer — either that the international title to the Chamizal tract as defined in the convention is in the United States or that it is in Mexico. The *prima facie* meaning of the language of the convention is reinforced when the convention is read in the light of the history of the controversy which called it into being, and in the light of the conduct of the two parties before this commission. From Señor Romero's note of January 9, 1867 (U.S. Case App., p. 553) which is, so far as appears, the first reference to what is now known as the Chamizal tract in the correspondence between the two governments, down to the concluding arguments before this commission on June 2 last, there is not the slightest suggestion on the part of either of the two governments that there could be any question of a division of the tract. The presiding commissioner was the first to raise the question of a division of the tract in connection with another point which was under discussion by counsel for the United States. (Record, pp. 430, 432.) Subsequently, counsel for Mexico defined the attitude of Mexico as to the issue before the Tribunal in the following language:

> In answer to that (*i.e.*, the suggestion that no monuments were fixed) I have but to remind this court that the treaty of 1910 says that the monuments are fixed, says that the line was run, tells this court where to find it and says that either that is the line between this country and Mexico or the present channel of the Rio Grande as it runs is the line. (Record, p. 500.)

Thereafter, counsel for the United States recurred to the question and specifically took the position that the only question before the Tribunal was as to the international title to the tract in its entirety, called attention to the evident agreement of the parties upon this point, and pointed out that a decree segregating the tract " would be a departure from the terms of the convention ". (Record, pp. 535, 536.)

Even in ordinary tribunals of general jurisdiction it is regarded as a dangerous practice for the court to award a decree not solicited or indorsed by counsel for either party. Is not this danger accentuated when an international tribunal, which has no powers except those conferred upon it by the terms of the submission under which it sits, assumes to raise and answer a question never suggested by the parties in the course of negotiations extending over fifty years and not indorsed by either party in argument when suggested from the bench? Particularly is this true when it can be asserted without fear of contradiction that if there had been the slightest idea in the minds of the negotiators of the treaty of June 24, 1910, that it was susceptible of the construction which has been

placed upon it by the majority of the commission, the possibility of such an unfortunate result would have been eliminated in even more precise and affirmative language.

The commissioner for the United States is unable to understand the force of the reference in the opinion of the presiding commissioner to the case of Nebraska *v.* Iowa as a " precedent " for " dividing the tract in question between the parties ". There is an apparent difference between the powers of the Supreme Court of the United States, acting under the provisions of the Constitution of the United States, conferring general and original jurisdiction in controversies between States on a bill and cross bill in equity to establish a disputed boundary line between two States, and this commission with powers and jurisdiction strictly limited by the conventions which have called it into being. Indeed, the opinion of the majority of the commission seems to recognize this distinction in another connection is stating the proposition, in which the American commissioner concurs, that the present commission, unlike the Supreme Court in Nebraska *v.* Iowa, is bound by the terms of the convention of 1884. It is also bound by the terms of the convention of 1910.

It is axiomatic that " a clear departure from the terms of the reference " (Twiss, The Law of Nations, 2d ed., 1875, p. 8) invalidates an international award, and the American commissioner is constrained to believe that such a departure has been committed by the majority of the commission in this case in dividing the Chamizal tract and deciding a question not submitted by the parties.

Two kinds of erosion a departure from convention of 1884

But this is not all; as The Hague Court recently pointed out in the case of the Orinoco Steamship Co., " excessive exercise of power may consist not only in deciding a question not submitted to the arbitrators, but also in misinterpreting the express provisions of the agreement in respect of the way in which they are to reach their decisions, notably with regard to the legislation or the principles of law to be applied ". (United States *v.* Venezuela, before The Hague Court. American Journal of International Law, vol. 5, No. 1, pp. 232 and 233.)

The preamble of the convention of June 24, 1910, prescribed the law which governs this commission, namely, " the various treaties and conventions now existing between the two countries and * * * the principles of international law ". The commission has held the convention of 1884 retroactive and therefore in general applicable to this case. While the convention of 1884 purports to cover all changes that may occur in the course of the Rio Grande and the Rio Colorado where they constitute a boundary between the United States and Mexico, it nevertheless makes provision for but two methods of effecting such changes, or rather distinguishes the changes which may occur into two distinct classes, viz, one covers alterations in the banks or the course of those rivers, effected by natural causes through the slow and gradual erosion and deposit of alluvium, and the other covers " any other change wrought by the force of the current, whether by the cutting of a new bed or when there is more than one channel by the deepening of another channel than that which marked the boundary at the time of the survey made in 1852 ".

The American commissioner deems it unnecessary to examine further into the question of the cutting or deepening of a new bed since the presiding commissioner and the Mexican commissioner have found that no change which has taken place opposite the Chamizal tract since 1852 has resulted " from any change of bed of the river " (Opinion, p. 29), and in that finding the American commissioner concurs.

The commissioner for the United States does deem it proper, however, to point out that the language of Article II of the convention of 1884 makes no provisions respecting the boundary in the event of any other change of the river than that embraced in " the cutting of a new bed " or the " deepening of another channel than that which marked the boundary at the time of the survey " of 1852.

It is true that Article II of the convention begins with the words " any other change wrought by the force of the current ", but those words are immediately followed by the provision " whether by the cutting of a new bed, or when there is more than one channel by the deepening of another channel than that which formed the boundary at the time of the survey made under the aforesaid treaty ."

It is a rule of interpretation which the Supreme Court of the United States says to be " of universal application " (United States *v.* Arredondo, 6 Pet., 691) that " where specific and general terms of the same nature are embraced in the statute, whether the latter precede or follow the former, the general terms take their meaning from the specific and are presumed to embrace only things or persons designated by them ". (Fontenet *v.* The State, 112 La., 628, 36 So. Rep., 630.)

Authorities to support this proposition might be adduced without number, but reference will be made to a few; U.S. *v.* Bevans, 3 Wheat., at pl. 390; Moore *v.* American Transportation Co., 24 Howard, 1–41; U.S. *v.* Irwin, Federal Cases No. 14445; Supreme Court of Ky. in City of Covington *v.* McNicholas Heirs, 57 Ky., 262; Rogers *v.* Boiller, 3 Mart. O.S., 665; City of St. Louis *v.* Laughlin, 49 Mo., 559; Brandon *v.* Davis, 2 Leg. Rec., 142; Felt *v.* Felt, 19 Wis., 183, also State *v.* Gootz, 22 Wis., 363; Gaither *v.* Green, 40 La. Ann., 362; 4 So. Rep., 210; Phillips *v.* Christian Co., 87 Ill. App., 481; in re Rouse, Hazzard & Co., 91 Fed. Rep., 96; Barbour *v.* City of Louisville, 83 Ky., 95; Townsend Gas & Electric Co. *v.* Hill, 64 Pac. Rep., 778, 24 Wash., 369; State *v.* Hobe, 82 N.W., Rep., 336, 106 Wis., 411.

In Regina *v.* France, 7 Quebec Q.B., 83, it is stated that:

It is immaterial, it has been held, whether the generic term precedes or follows the specific terms which are used. In either case the general word must take its meaning and be presumed to embrace only things or persons of the kind designated in the specific words. (Quoted from Am. & Eng. Enc. of Law, vol. 26, p. 610, under captain " Statute ".)

Did the United States abandon vested rights?

Not only does the language of Article II confine its meaning to specific changes of channel described therein, but the fifth article of the same convention makes provision for the protection of property rights " in respect of lands which may have became separated through the creation of new channels as defined in Article II ", but it makes no provision whatever for the protection of property rights in contemplation of any other change in the course of the river, much less does it make such provision as to lands degraded by rapid and violent erosion. It was suggested by the honorable presiding commissioner during the argument of this case that no provision was necessary to protect private rights in case the land was carried away by any character of erosion because the property itself was destroyed and no private rights could remain. (Record, pp. 704, 705.) In this proposition the United States commissioner concurs, but he is wholly at a loss to discover how a public or international title could remain in property that was so effectually destroyed as to annihilate private rights. Even supposing it was unnecessary to protect private rights on the banks thus degraded, would no idea have suggested itself with regard

to the rights of those who had taken up their residence on the other side, for instance at El Chamizal, or at Santa Cruz Point? As suggested by the presiding commissioner, " all the great changes in the course of the Rio Grande had occurred and practically the whole Chamizal tract had been formed * * * but the fact remains that all the great and visible changes which are reported to have taken place during the floods extending from 1864 to 1868 had done their work, and, in the case of the Chamizal tract, the changes had been so considerable in the upper portion of the river, which is proved to have been less liable to modifications owing to the nature of its soil than the lower part of the river, that it formed the subject of much diplomatic correspondence ". (Opinion, p. 20.) And yet the record in the case discloses that every foot of the accretion at El Chamizal had been occupied prior to 1884 under color of American title. (See official map of El Paso, Tex., 1881, U.S. Countercase, Portfolio, Map No. 10; also act incorporating the city of El Paso, U.S. Countercase, p. 139, and Patents of the State of Texas and Minutes of the City Council of the City of El Paso, U.S. Countercase, pp. 139–168.)

The Supreme Court of the United States, in the case of United States *v.* Arredondo, supra, says:

> That it has been very truly urged by the counsel of the defendant in error that it is the usage of all the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. An article to secure this object, so deservedly held sacred in the view of policy as well as of justice and humanity, is always required and never refused.

And further in that case the court, in alluding to the treaty between the United States and Spain, concluded on the 27th of October, 1795, said:

> Had Spain considered herself as ceding territory, she could not have neglected a stipulation which every sentiment of justice and national honor would have demanded and which the United States could not have refused.

Under the fluvial boundary, which this commission has held the treaties of 1848 and 1853 created, a title had vested in the United States and the citizens thereof in all accretions to the Chamizal tract under the recognized principles of international law. If the language of the convention of 1884 recognized in Mexico or its citizens any right in any portion of such accretions, however formed, the United States divested itself and its citizens of rights which international law had given them and yet the United States did, if the opinion of the majority of this commission is correct, neglect " a stipulation which every sentiment of justice and national honor would have demanded, and which the United States [Mexico] could not have refused ".

Vattel says (Law of Nations, Book 1, chap. 2, sec. 17):

> The body of a nation cannot then abandon a province, a town, or even a single individual who is a part of it unless compelled to it by necessity or indispensably obligated to it by the strongest reasons founded on the public safety.

The foregoing views are in entire accord with the opinion of the Mexican commissioner as expressed in the second paragraph of the dissenting opinion.

WHAT LAW GOVERNS?

The commissioner for the United States has been unable to discover, although he has made a careful study of the opinion of the majority of the commission, under what provision of the convention of 1884 it is conceived that Mexico can

be entitled to any portion of the Chamizal tract, the formation of which may be ascribed to any character of erosion, whether slow and gradual or rapid and violent. Had the commissioner for the United States been able to expel from his mind and to disregard the language of the treaties of 1889 and 1905, had he been able to forget and disregard the construction which has been placed upon Article I of the convention of 1884 by the International Boundary Commission since its organization in 1893, and had he been wholly uninfluenced by the fact that counsel for Mexico as well as counsel for the United States were agreed that the convention of 1884 embraced but two classes of changes as hereinbefore set forth (Record, p. 608), he might have been able to concur with the majority of the commission that the degradation of the Mexican bank of the river at some uncertain points and at some uncertain times was not within the meaning of Article I of the treaty of 1884; but the commissioner for the United States does not believe that by any strength of the imagination or any elasticity of the law, any character of erosion and deposit can be brought within the meaning of Article II of that convention. Therefore, the result must have been the same; if the change which occurred at El Chamizal was not within the meaning of either Article I or II of the convention of 1884, then said convention becomes inapplicable and we must look to the principles of international law for the rule which is to govern our action. But it is admitted both in the language of the commission as embodied in the record of our hearing (Record, pp. 203, 300) as well as in the printed argument of counsel for Mexico (Mexican Argument, p. 31) that under the principles of international law the change in the course of the river due to erosion and deposit would carry the boundary line with it, no matter how rapid might be the degradation of one bank by erosion, provided only that the growth of the other bank was accomplished by gradual deposit of alluvium, and such the American commissioner conceives to be the undisputed evidence and the admitted facts of this case.

The precise language in which the learned agent of Mexico sets forth his position upon this point is so significant as to deserve quotation:

> In fact, the convention only occupied itself with two classes of alterations or changes of the bank and channel of the river; one, that originated by the slow and gradual erosion of one bank and the deposit of alluvium, and the other by the abandonment of an old bed and the opening of a new one. (Record, p. 203.)

In view of the foregoing the commissioner for the United States cannot but regard it as unfortunate that the commission should have indicated no desire to hear further argument on this point (as appears in the record of the hearing at pp. 608–614), where the commission indicated that it scarcely seemed desirable to pursue this point since counsel for both sides seemed agreed that the convention of 1884 embraced but two classes of changes, because he ventures to believe that counsel for the United States would have convinced the commission that it must assign the change at El Chamizal to the first alternative in Article I of the convention of 1884, or else disregard the convention of 1884 entirely and decide the case upon the principles of international law.

In the opinion of the presiding commissioner (Opinion, p. 33) reference has been made to the case of the City of St. Louis *v.* Rutz (138 U.S., 226), and it is stated that the facts in that case are very similar to those established by the evidence in the present case. But, with all respect, the American commissioner submits that while the rapid degradation of the east bank of the Mississippi River, as described in that case, is very similar to the erosion that is shown to have occurred at certain or rather uncertain points opposite El Chamizal, the vital facts in that case and the present case are very different. In that case the

evidence disclosed a rapid degradation of the east bank of the river and the complete submergence for several years of that portion of plaintiff's surveys. Subsequently an island formed on the east side of the thread of the river and that island became joined by accretion to plaintiff's surveys. The court held that under the laws of Illinois the plaintiff owned in fee simple that portion of the river bed lying east of the thread of the stream and that when new land formed east of the thread of the stream it belonged to the former owner. The court makes very clear that the ground of its decision is that the holder of the Missouri title on the west bank could not own the land which thus appeared first by an island formation and subsequently by accretion thereto *east* of the thread of the stream.

An analogous case would have been presented here if after the river had invaded Mexican territory by rapid erosion, making for itself a bed 500 yards wide, as one witness testified it did (U.S. Case, App., p. 118), an island had subsequently arisen to the south of the thread of the stream. That island would have belonged to Mexico whether it subsequently became joined to the south bank or not, or even though it might have become joined by accretion after its formation to the north bank, but there is not a suggestion in the evidence that such a fact ever occurred. On the contrary, the evidence indisputably shows that the north bank did not even move south simultaneously with the destruction of the south bank but that it grew up in a long course of years by the slow and gradual deposit of alluvium.

The American commissioner is constrained to hold, therefore, that the majority of the commission have failed to apply to the case the express rules laid down by the convention of 1884; and by this failure have departed from the terms of the submission and invalidated the award.

A DEPARTURE FROM THE CONVENTION OF 1889

In the opinion of the American commissioner this failure becomes the more manifest by reference to the terms of article 4 of the convention of 1889, to which, supplemented by the convention of 1910, this commission owes its life. By that article, the very law of its being, this commission when considering any alteration in the course of the river named, is confined " to decide whether it has occurred through avulsion or erosion, for the effects of articles 1 and 2 of the convention of November 12, 1884 ". The American commissioner conceives that this provision was not only declaratory and interpretative of the changes contemplated by the convention of 1884, but that said clause is jurisdictional in so far as the powers of this commission are concerned.

In the opinion of the American commissioner, the two Governments in the preamble of the Banco Treaty of 1905 again placed an authoritative interpretation upon the words " slow and gradual " in the convention of 1884. In that treaty the two Governments after reciting articles 1 and 2 of the treaty of 1884, expressly declared that the changes whereby the so-called bancos had been formed were " owing to the slow and gradual erosion coupled with avulsion. " That the erosive action thus rerfered to was and is far more rapid and violent than that which occurred in the Chamizal tract is unquestionable, but the presiding commissioner and the Mexican commissioner observe, with reference to the investigations undertaken by the International Boundary Commission upon which the banco treaty was based, that

The report rendered by the commissioners to their respective Governments in no way discloses any facts tending to show the nature and extent of the erosive changes, and properly so, because that was not material to the question to be decided. It is true that, by making a minute examination of the plans accompanying the report,

the actual extent of the erosive changes might have been ascertained, but there certainly was nothing in the question submitted to the Governments for solution to necessitate, or even to suggest, such an inquiry. (Opinion, p. 34.)

With all respect, it would seem that the question as to whether or not the changes which resulted in the banco formation were " slow and gradual " within the meaning of the treaty of 1884, was so " material to the question to be decided " that if those changes were not " slow and gradual " there would in most instances have been no bancos to eliminate. It is true that the commissioners did not think it necessary to state in figures the rate of erosion on each banco, but the rate of erosion was obtainable by a casual examination of the maps and reports if the plenipotentiaries were interested in knowing the rate. Having the information before them they were free to use it or not in framing their language, but no rule either of logic or justice is perceived that would relieve them or the contracting parties from being held to the accountability which binds all other men when they use language in a legal document to express ideas.

And again the American commissioner feels constrained to say that he can not understand the method of the interpretation which gives such emphasis to the words " slow and gradual " in Article I of the treaty of 1884 as to override not only the ordinary rules of international law and the uniform construction placed upon the treaty by the International Boundary Commission since its organization and by agents and counsel for both parties before this commission, but also what appears to him to be the plain and unmistakable intent of Article II to confine all "other changes " to the cutting of a new bed or the deepening of an existing channel, while the same words in the Banco Treaty of 1905, although entirely consistent with the purpose and scope of that treaty, are apparently deemed negligible and unimportant.

The failure of the presiding commissioner to regard the Banco Treaty of 1905 as placing an authoritative interpretation upon the words " slow and gradual " in the treaty of 1884, appears all the more strange to the American commissioner in view of the fact that the presiding commissioner, earlier in his opinion, in his discussion of the retroactivity of the treaty of 1884, attaches great weight to this same treaty of 1905 because it provides for the elimination from the treaty of 1884 of bancos formed prior to 1884. The presiding commissioner has no difficulty in holding the governing minds of the two countries responsible for the language which they used in the treaty of 1905 so far as it construes the treaty of 1884 retroactively. He says:

This recognition of the retrospective application of the convention of 1884 is not that of subordinates, but of the Governments themselves, which expressly adopted the views of the commissioners as to the application of the treaty of 1884 and as to the desirability of taking such cases, both past and future, out of the convention and substituting new provisions. (Opinion, p. 24.)

It is difficult to see why the plenipotentiaries should be charged with notice of the date at which these bancos were cut off and not of the rate at which they were formed.

It should furthermore be remembered that in his opinion in Chamizal case No. 4 in 1896 the American commissioner called attention to the rapidity of the erosion which has been recognized as slow and gradual in the case of the bancos and gave the figures of erosion in the case of one banco, the Banco de Camargo, 87 meters a year, figures which exceed any erosion which could have taken place in the Chamizal tract, even on an assumption most favorable to the

Mexican contention. In discussing the reports rendered by the commissioners to their respective Governments in 1896, in which the American commissioner asserted that if the erosion in El Chamizal was not slow and gradual, then *a fortiori*, the erosion which had formed the bancos in the lower part of the river could not be slow and gradual,[1] the presiding commissioner suggests that that report " was counteracted by the reply of the Mexican commissioner, who argues that there was no similarity between the two cases ", and deduces therefrom the conclusion that " under these circumstances it is reasonable to conclude that the Mexican Government adopted the view of their commissioner " (Opinion, pp. 34, 35). It is difficult to accept this conclusion in view of the fact that in drafting the treaty of 1905 the Mexican Government brushed aside the distinction, sought to be established by its commissioner and applied the provisions of the banco treaty to the Rio Grande in the upper as well as in the lower division of the river " throughout that part of the Rio Grande * * * which serves as a boundary between the two nations ." (U.S. Case, App., p. 87.)

The irresistible logic with which the presiding commissioner drives home the conclusion that the ambiguity, if any, in the convention of 1884, in so far as the retroactivity of the convention is concerned, is removed by the practical construction placed upon that treaty by the contracting parties as well as by the language of the treaties of 1889 and 1905, compels the admiration and approval of the American commissioner, but he cannot expel from his mind that the conclusion from the same course of practical construction and subsequent treaty interpretation applies with equal force to the ambiguity, if any, of the convention of 1884 when dealing with erosion and avulsion.

The words " slow and gradual " are relative terms. The treaty of 1884 was drafted specifically for the Rio Grande, and its changes at the point in question have been slow and gradual compared to other changes both in the upper and lower river or when compared with the progress of a snail.

AWARD VOID FOR UNCERTAINTY

The award of the presiding commissioner and the Mexican commissioner, constituting a majority of the commission, is to the effect that the —

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[1] The presiding commissioner has fallen into error (Opinion, p. 34) in suggesting that the American commissioner in 1896 compared the erosion at Chamizal to that which formed the bancos only, whereas the American commissioner in his opinion was referring to the erosion at every bend in the river throughout the 800 miles where it flowed through alluvial formation.

The following are the words used by him:

" In the opinion of the United States commissioner, if the changes at El Chamizal have not been ' slow and gradual ' by erosion and deposit within the meaning of Article I of the treaty of 1884, there will never be such a one found in all the 800 miles where the Rio Grande with alluvial banks constitutes the boundary, and the object of the treaty will be lost to both Governments, as it will be meaningless and useless, and the boundary will perforce be through all these 800 miles continuously that laid down in 1852, having literally no points in common with the present river, save in its many hundred intersections with the river, and to restore and establish this boundary will be the incessant work of large parties for years, entailing hundreds of thousands of dollars in expense to each Government and uniformly dividing the lands between the nations and individual owners that are now, under the supposition that for the past forty years the changes have been gradual and the river accepted generally as the boundary, under the same authority and ownership; for it must be remembered that the river in the alluvial lands, which constitute 800 miles, has nowhere to-day the same location it had in 1852." (Proceedings of International Boundary Commission, vol. 1, p. 93.)

international title to the portion of the Chamizal tract lying between the middle of the bed of the Rio Grande, as surveyed by Emory and Salazar in 1852, and the middle of the bed of the said river as it existed before the flood of 1864, is in the United States of America, and the international title to the balance of the said Chamizal tract is in the United States of Mexico. (Opinion, p. 36.)

The American commissioner is of opinion that this award is void for the further reason that it is equivocal and uncertain in its terms and impossible of accomplishment. The presiding commissioner and the Mexican commissioner " conceive that it is not within their province to relocate that line [the line of 1864], inasmuch as the parties have offered no evidence to enable the commissioners to do so ". (Opinion, p. 36.) It is submitted, with all respect, that the fact that the parties have offered no evidence of the location of the line of 1864 is suggestive of the fact that it was not within the contemplation of the parties that the tract should be divided. Perhaps the reason that agent and counsel on either side, even after the suggestion of the court as to the possibility of dividing the tract along the channel of 1864, did not ask leave to offer evidence for the purpose of relocating this channel was because they were and are well aware that it would be as impossible to locate the channel of the Rio Grande in the Chamizal tract in 1864 as to relocate the Garden of Eden or the lost Continent of Atlantis.

In concluding this dissenting opinion it is impossible to refrain from pointing out the unfortunate results which this decision would have in the contingency that the two countries should attempt to follow it in interpreting the treaty of 1884 in other cases.

The American commissioner does not believe that it is given to human understanding to measure for any practical use when erosion ceases to be slow and gradual and becomes sudden and violent, but even if this difficulty could be surmounted, the practical application of the interpretation could not be viewed in any other light than as calamitous to both nations. Because, as is manifest from the record in this case, all the land on both sides of the river from the Bosque de Cordoba, which adjoins the Chamizal tract, to the Gulf of Mexico (excepting the canyon region) has been traversed by the river since 1852 in its unending lateral movement, and the mass, if not all, of that land is the product of similar erosion to that which occurred at El Chamizal, and by the new interpretation which is now placed upon the contention of 1884 by the majority of this commission not only is the entire boundary thrown into well-nigh inextricable confusion, but the very treaty itself is subjected to an interpretation that makes its application impossible in practice in all cases where an erosive movement is in question.

The convention of 1910 sets forth that the United States and Mexico " desiring to terminate * * * the differences which have arisen between the two countries ", have " determined to refer these differences " to this commission enlarged for this purpose. The present decision terminates nothing; settles nothing. It is simply an invitation for international litigation. It breathes the spirit of unconscious but nevertheless unauthorized compromise rather than of judicial determination.

(*Signed*) Anson MILLS

Individual opinion of the commissioner of Mexico

[Translation.]

The Mexican commissioner respectfully begs to differ from the opinion of his learned colleagues in definitely judging the subject of the Chamizal in the matter of the fixedness and invariability of the boundary line of 1852, and also in regard to the retrospective application of the convention of 1884, as it does not appear to him that the findings of the majority on both points are supported by the record and the arguments that figure in the proceedings.

The agent of the Government of Mexico has left established a fundamental axiom in right — that the alluvium should be governed and qualified by the laws in force at the time in which it commenced to form. In the depth of this principle is enveloped the universal maxim of the irretroactivity of the laws, unless it is stipulated expressly in them, or that at the time the phenomena in question took place there should have been no provisions to cover it.

Neither of the two exceptions cited occur in the case of the Chamizal, as in 1852 there existed a perfectly defined law to apply — the treaty of Guadalupe. The convention of 1884 evidently does not contain any direct and precise stipulation as to its retrospective power.

My first proposition, according to this, is that the treaty of 1848 stipulated in a clear and precise manner a fixed or " limited " line.

The agent of Mexico expounds in methodical and sufficient form the classical division, universally adopted, of property in two large categories: " Arcifinious " property and " limited " property. The characteristic of the former is to be determined in one of its boundaries by natural geographical " accidents ", such as mountain ranges, rivers, etc., which by their manifest discernibility on the ground constitute within themselves limited lines, which in order to designate perfectly it is sufficient to mention. In order that the property may be in the second category, evidently it is sufficient that it does not pertain to the first, although further than that it is indicated characteristically as that whose boundaries in all senses are marked by means of definite and permanent lines or signs.

Now, it has remained undenied in this judgment that the treaty of 1848 directed the general setting of landmarks on the dividing line between Mexico and the United States, and the marking of these landmarks on precise and authentic plans, as well as a religious conservation in the future of the line so fixed, and it is also shown in the record, without discussion on the part of America, that the commissioners charged with executing this convention, complying with the letter of their instructions, agreed, ordered, and carried to a conclusion the erection of permanent monuments, identical in character to those of the nonfluvial line, along the length of the fluvial, and that this operation was known to the two Governments and was not disapproved by them, to which they gave account of all their acts.

In the matter of the Chamizal, there is data to prove that at least two of these monuments (of iron) were placed; one on the right bank of the river, in what is now Cuidad Juarez, and another on the left, in Magoffinsville, now part of El Paso. That these monuments were properly " mojoneras " (landmarks) and not signs of topographical reference is undeniable, for the reason that they did not connect topographically with the lines of the survey. Their sole object was to " show the limits of both Republics ", and their erection would have been absolutely unnecessary in case of an arcifinious boundary.

It is the opinion of the majority of the commissioners that the declaration in the treaty of 1853 (Article I) that the limits between both countries should follow the middle of the Rio Bravo, *as stipulated in that of 1848*, is the best proof that the former treaty created an arcifinious and not a fixed line; because, it is said, if the line had been fixed before 1853, it would not have been affirmed then — both Governments knowing, as they did know, that the river had changed its course between the former and the latter treaty — that *the center of the bed* would continue being the point of separation between the eminent domains of the two nations. The commissioner for Mexico feels it necessary to state that he fails to see the force of the argument, because in his conception the treaty of 1853 had three objects: First, to establish a boundary line in the territory between the Rivers Bravo and Colorado; second, to finish the establishment, where it had not already been concluded, of that portion of the line of 1848 not affected by the Gadsden Treaty; third, and very important, *to ratify the portions already established* of the line of 1848; and the new commissioners, to whom was entrusted the execution of Article I of the agreement, were given entire and final powers for each and every one of the three parts of their trust. Therefore, when in 1857 they jointly delivered to their Governments as result of their labors a collection of plans in which was clearly shown the position of the dividing line, according to the last treaty, that line (it might have been run in 1849, in 1852, or in any other year) remained adopted as the sole and invariable line of separation between the two Republics.

In the particular matter referred to the judgment of this arbitration court, the river has varied after the survey of 1852 and before the signing of the convention of La Mesilla, and the new commissioners knew it perfectly. What should they have done had they believed the treaty of 1853 considered the river as arcifinious? Undoubtedly resurveyed map No. 29 in order to clearly mark out upon it the new and exact position of the dividing line; but as they did not so understand it, but knew that the line of 1852 ought to be fixed, and that the new line to be established after 1853 not having been already established before, would also have to be fixed, they comprehended that, assuming that in 1852 the position of said line in this valley had been finally decided and marked on official maps adopted by both commissions, the treaty of 1853 imposed upon them the obligation of ratifying it, and thus they did, signing in 1855 the final sheet No. 29, notwithstanding the fact that the river marked on it did not then correspond with the true position which its course followed in the valley in 1855. This is the reason why the argument of his colleagues works in an opposite sense in the mind of the Mexican commissioner than [sic] it does in theirs.

The opinion of the majority of the honorable commissioners is that the subsequent acts of the two Governments show: On the part of the United States, an invariable judgment in favor of the interpretation of the treaties of 1848 and 1853 as establishing an arcifinious limit in the fluvial portion of the boundary common to them; on the part of Mexico a lack of determination between the idea of the fixed line and a fluvial arcifinious limit.

Admitting, as the Mexican commissioner clearly does, the doctrine of this court that isolated expressions of officials of one or the other Governments do not in any manner constitute an international obligation binding upon the nations whom they serve respectively, it is right to pass over the diverse opinions emitted by Messrs. Lerdo de Tejada, Frelinghuysen, etc., and look exclusively to the correspondence and negotiations sanctioned internationally and recognized by both Governments, in order to ascertain their attitudes in the matters under discussion, and even then in only their vital points and not in their minor or incidental points.

It is not shown in the record that there was correspondence or negotiations of that character touching the interpretations of the treaties of 1848 and 1853 but on three occasions: In 1875 between Mr. Mariscal and Mr. Cadwalader; in 1884, between Mr. Romero and Mr. Frelinghuysen, in connection with the island of Morteritos; and in the same year and between the same last-named persons, concerning the preliminaries of the convention of 1884.

In 1875 the allusion to the fixed line, in the past, appears evident by the terms of Article II, both of the draft for a convention presented by Mr. Mariscal to Mr. Cadwalader on March 25 and a second draft dated December 2 of that year. In both reference is unmistakably made to the dividing line astronomically fixed by the boundary commission of both Governments in 1852, which runs in the middle of the current of the rivers, according to their course at the time of their survey.

In regard to the case of Morteritos, the terms of the decision of the majority of this tribunal relieve the Mexican commissioner of the necessity of insisting here that the uniform attitude then shown by the Mexican Government was in the sense of the fixed line, inasmuch as it is thus recognized in such document.

Lastly, in the negotiations of the convention of 1884, a reading of the instructions which guided Mr. Romero, and of his correspondence with the American Department of State, does not leave room for doubt as to the position adopted by Mexico in regard to the nature of the boundary line from its original demarcation until then — that it was fixed and invariable and constituted to Mexico in her northern frontier an " ager limitatus ", as these properties are understood by civil and international law.

It being established that until 1884 Mexico considered the line of 1852 as fixed, is it admissible that in that year she would negotiate a treaty converting it into an arcifinious boundary with retroactive effect? If the declarations of the Mexican negotiator, Don Matisa Romero, are not sufficient to destroy all doubt in this respect, the following consideration would be more than sufficient: that Mexico could not in any manner have adopted a new boundary — supposing that the river had then ceased to be the boundary and was again taken as such — without protecting or ceding conveniently or by means of an express clause free from confusion, the rights of individuals and of the Mexican nation, to the lands embraced between the fixed line which was abandoned and the new fluvial line then adopted. As no such clause existed in the convention of 1884, in view of the fact that all the language of it refers indisputably to the future; and considering the nature of the negotiations that preceded it, the Mexican commissioner feels himself unable to accept the possible retroactivity of that convention.

Then, the opinion of the majority of the honorable commissioners is that the application which both Governments made of the convention of 1884 to the case of San Elizario and the 58 original bancos of the lower Bravo is another proof that the principle of the retroactivity had firm connection in the mind of the Mexican Government in respect to the application of that convention. From such an opinion also dissents, and he believes with good reason, the Mexican commissioner.

In the first place, there is no reason to infer from the fact that the Mexican commissioner in 1894 presented the commission with the case of San Elizario, that the Government of Mexico, by this act, knowingly put under the jurisdiction of the treaty of 1884 the changes which occurred in the Bravo since 1857. The only thing that the cited procedure indicates is that Mexico submitted *that question* to the jurisdiction of the boundary commission established by the treaty of 1889. Now, the powers of such commission were not limited in any

manner to the application of the principles of 1884, but they covered and they were declared " exclusive ", the resolution of *all the questions or difficulties that in the future* might arise between the two countries and *in which affected the position of the dividing line*, subject to the approval of both Governments. In San Elizario, without doubt, it was endeavored to ascertain if that so-called " island " pertained to Mexico or to the United States, and it certainly was the commission who had to decide it, whether the theory of a fixed or of an arcifinious line in regard to that ground was in force. The case was discussed, then, in quality of question solely, and not of erosive or avulsive change. It is certain that the commission decided it, taking into consideration certain very slight alluvial changes, occurring between 1852 and 1857; but taking the terms of their judgment, and considering that the essential of it was the definition of the nationality of the ground, *that was that* which was asked of the commissioners, it is not to be believed that the Governments paid any attention to the insignificant divergences, shown by the consulting engineers between the courses of the river, as given by Salazar, Emory, and the survey of 1890, because such divergences might very well appear to be due to the imperfection of the methods employed by one or the other of the engineers, notwithstanding what the later commission said to the contrary.

Now, in regard to the resolutions adopted by the two Governments, in the matter of the bancos in the lower River Bravo, it is sufficient to destroy the inference that is alleged to be deduced as to the retroactivity of the convention of 1884, to say that the treaty in virtue of which it has been possible to approve said resolutions, *expressly adopted as retroactive* certain principles which called for " elimination " of those bancos *in all those parts of the international dividing line* which are constituted by the centers of the beds of the Bravo and Colorado Rivers. This condition of the internationality of the river remained plainly decided by that treaty in regard to the stretch of the Bravo embraced between its mouth and the confluence of the San Juan, due to the explicit adoption of the central line of its course of 1897 as boundary between the two countries and to the declaration that in future that boundary would follow *the deepest channel*, which was equivalent to converting into arcifinious this stretch of the Bravo. In regard to the rest of this river and to the Colorado, the principle of elimination will also be applicable with retroactive force in all those parts in which their course may be international, and in no other, unless in the future some arrangement may be made in virtue of which in the whole course of the Bravo and Colorado the fixed boundary of 1852 may be abandoned, and, as was done in the lower river, the real watercourse adopted as the new international boundary. In any event, the retroactivity that has resulted or might result from this should be attributed solely and directly to the express and clear clauses of the convention of 1905, that adopt it as a rule, but never to the power, direct or indirect, of that of 1884.

Such are the ideas of the Mexican commissioner on the fixedness of the dividing line of 1852, and the irretroactivity of the convention of 1884; but as he has been defeated in both points by the majority of the court, and the latter has left established that as a result of the sequel of the case, the only principles which should govern are those contained in that convention of 1884, this commissioner believed it to be his duty to amply express his opinion from the new point of view and had the fortune to have the presiding commissioner agree with him in regard to the matter in which the convention referred to should be applied to the case, which has permitted the court to dictate by majority a final sentence, that would otherwise have been impossible, since the attitude of the

commissioner of the United States in regard to such application diverges diametrically from that of the presiding commissioner.

This opinion and the context of the sentence in the points agreed to leave sufficiently and totally explained the position of the commissioner of Mexico in the present arbitral judgment.

(*Signed*) F. B. PUGA