PERMANENT COURT OF ARBITRATION

BOUNDARIES IN THE ISLAND OF TIMOR

NETHERLANDS

v.

PORTUGAL

AWARD

Unofficial English Translation

Arbitrator:

C.E. Lardy

The Hague, 25 June 1914

ARBITRAL AWARD
RENDERED IN EXECUTION OF THE COMPROMIS SIGNED AT THE HAGUE, APRIL 3, 1913 BETWEEN THE NETHERLANDS AND PORTUGAL ON THE SUBJECT OF THE BOUNDARY OF A PART OF THEIR POSSESSIONS IN THE ISLAND OF TIMOR
25 JUNE 1914 [1]

A dispute having arisen between the Royal Netherlands Government and that of the Portuguese Republic on the subject of the delimitation of a part of their respective possessions in the Island of Timor, the two Governments decided by a Convention signed at The Hague, April 3, 1913, of which ratifications were exchanged in the same city on July 31 following, to refer its solution, as a last resort, to an arbitrator, and have accordingly with mutual agreement designated the undersigned.

To understand the meaning and significance of the compromis of April 3, 1913, it is necessary to succinctly explain the negotiations which have preceded that compromis.

I.

HISTORICAL BACKGROUND

The Island of Timor, the farthest east of the continuous series of the Sunda islands and the nearest to Australia, was discovered in the sixteenth century by the Portuguese; the island measures about 500 kilometers in length from west to east by a maximum width of 100 kilometers. A lofty chain of mountains, certain summits of which reach a height of nearly 3,000 meters, divides this island lengthwise into two slopes.

The eastern part of the island, of an approximate area of 19,000 square kilometers, with a population of about 300,000 inhabitants, is Portuguese. The western part, with a population estimated in 1907 at 131,000 inhabitants and an area of about 20,000 square kilometers, is under the sovereignty of the Netherlands, with the exception of the "Kingdom of Okussi and Ambeno," situated on the northwest coast and surrounded on all sides by Dutch territory except on the side toward the sea. The name of "kings" given by the Portuguese to the chieftains of tribes is explained by the fact that, in the native tongue, they are called *Leorey*; the final syllable of this word has been translated into Portuguese by the word *Rey*. The Dutch give these chieftains the more modest title of *radjahs*.

This division of territory between the Netherlands and Portugal rests on the following agreements:

April 20, 1859, a treaty signed at Lisbon and duly ratified in the course of the summer of 1860, had defined the respective frontiers across the middle of the island, but had allowed to remain (art. 2) the Dutch "enclave" of Maucatar in the midst of Portuguese territory, and the Portuguese "enclave" of "Oikoussi" in the midst of Dutch territory in the west of the island. It was stipulated (art. 3) that the "enclave" of Oikoussi includes the state of Ambenu wherever the "Portuguese flag is raised, the state of Oikoussi proper and that of Noimuti." See Annex A, page 31.[2]

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[1] Translated from French into English, based on the version in GEORGE GRAFTON WILSON, THE HAGUE ARBITRATION CASES (1915).

[2] The annexes referred to in the Award are omitted in this version.

By another Convention signed at Lisbon on June 10, 1893, and duly ratified, the two Governments, "desiring to determine according to conditions most favorable to the development of civilization and commerce" their relations in the archipelago of Timor, agreed "to establish in the clearest and most exact fashion the boundary of their possessions" in that island "and to cause the enclaves now existing to disappear" (Preamble and art. I). A commission of experts was to be designated for the purpose of "formulating a proposal capable of serving as the basis for the conclusion of a further convention fixing the new boundary line in the said island" (art. II). In case of difficulties the two Parties undertook "to submit to the decision . . . of an arbitrator" (art. VII). See annex B, page 34.

This mixed commission visited the places and agreed in 1898–1899 on most of the boundary. Notwithstanding, as to the principal frontier in the middle of the Island of Timor as well as to the frontier of the Kingdom of Okussi-Ambenu in the western part of the island, there remained a considerable number of divergences. The map annexed under No. II[3] indicates the respective claims. A conference was held at The Hague from June 23 to July 3, 1902, to attempt their solution. A plan was resolved upon on July 3, 1902, which was embodied in a diplomatic convention signed at The Hague, October 1, 1904, and duly ratified. See annex C, page 37.

A summary of the results of the Convention of 1904 are shown on the transparent map annexed under No. I; the superposition of the transparent map No. I on the map No. II affords evidence of what Portugal obtained, in the center of the Island of Timor, the Dutch enclave of Maukatar, and what the Netherlands obtained in the same region, Tahakay and Tamira Ailala.[4] On the other hand, in the northwest of the Island of Timor and to the south of the territory designated by the treaty of 1859, under the name of Oikussi enclave, the Netherlands obtained Noimuti. Finally, the disputed eastern limit of the territory of Oikussi-Ambeno is fixed theoretically according to a line A C which was to be "surveyed and indicated on the ground within the shortest delay possible" (Acts of the Conference of 1902, sessions of June 27, pages 10 and 11, and of June 28, page 12; Convention of October 1, 1904, article 4). The line A C accepted by the Conference was fixed in article 3, number 10, of the Convention of 1904 in the following terms: "From this point" (the confluence of the Noèl Bilomi with the Oè Sunan) "the boundary follows the thalweg of the Oè Sunan, runs as much as possible across Nipani and Kelali (Keli), reaches the source of the Noèl Meto, and follows the thalweg of that river to its mouth."

All seemed finished, when the boundary commissioners, after arriving at the places in June 1909 for the work of marking the eastern frontier of Oikussi-Ambeno, could not agree, and decided to refer it to their Governments. The two Governments were no more able to agree and decided to resort to arbitration. What was this difficulty encountered by the boundary commissioners?

II.

THE DIFFICULTY WHICH INSTIGATED THE ARBITRATION

In proceeding to the work of delimitation of the eastern frontier of Oikussi-Ambeno, the commissioners had commenced in the north, on the coast, and ascended in a southerly direction the course of the Noèl Meto river, which was to serve as a frontier from its mouth to its source. These operations took place between the 1st and the 10th of June, 1909, and a mete was placed at the source of the Noèl Meto. The source being obstructed by some steep cliffs impossible to cross, the commissioners decided on a general survey of the country between

[3] Annex A. For convenience and clearness some of the maps have been combined.
[4] Annex A. Changes shown by continuous line.

the northern and southern parts of the territory still to be bounded, that is to say, between the source of the Noèl Meto, in the north, and the Noèl Bilomi river, in the south.

A disagreement first arose in the north: The map (see Annex III)[5] signed in 1904, at the same time as the Convention, bore the name *Kelali* accompanied within parentheses by the word *Keli*. The Dutch delegates maintained the word Keli meant on the summit of Mount Kelali, a particular point, situated to the west of the Noèl Meto between two "peaked" rocks, and which had been indicated by the natives of Tumbaba (Dutch) as the boundary between them and the natives (Portuguese) of Ambeno; this point is, according to the Dutch commissioners, a "magnificent" natural "boundary" which nearly follows the boundary described on the map of 1904. The Portuguese commissioners, on the contrary, proposed "to follow . . . some thalwegs in the country to the east of the line proposed by the Dutch delegates, starting from the same mete" placed at the source of the Noèl Meto. The commission decided to survey the two lines and leave the solution to the higher authorities.

In the southern part, on the Bilomi river, the commissioners state, in their session of June 17, 1909, that they followed from west to east the course of the Nono Nisi (or Nise), then the course of the Noél Bilomi, and that they now "*reached the spot* (where the commission of 1899 had terminated its work) *where the survey must be continued to the north*." That point had been designated in the Convention of 1904, article 3, numbers 9 and 10, and on the map annexed, as the confluence of the Noèl Bilomi and the Oè Sunan. "The four delegates state that *at that place there are two affluents coming from the north, but neither is called the Oè-Sunan*."

The Dutch delegates then explain that the region situated between the two affluents is called Sunan, that moreover they do not know of any affluent of the Noèl Bilomi bearing the name of Oè Sunan and that none exists; thus they insist that the frontier line be surveyed toward the north, starting from the point designated on the maps of 1899 and 1904.

The Portuguese delegates observe that a river called Oè Sunan or Oil Sunan, which is not, it is true, an affluent of the Bilomi, exists farther to the east and has its source "very near the Bilomi."

The commissioners unanimously decided to survey the two lines, "*starting from a point*" indicated on the maps of 1899 and 1904, and "*where the commission of 1899 finished its work*,"[6] that is, the line proposed by the Dutch delegates in a northerly direction and the line desired by the Portuguese in an easterly direction (session of June 17, 1909. First Portuguese Memorial, page 27).

At the session of June 21, 1909, and in the course of the survey of the frontier line proposed by the Portuguese delegates in the easterly direction ascending the Noèl Bilomi river, "the four delegates agree unanimously that they have not met an affluent (of the Noèl Bilomi) called the Oè Sunan." The Dutch delegates observe that the Bilomi has, in this region, changed its name, to which their Portuguese colleagues answer "that the Bilomi river still exists, but that, according to the native customs, it bears the name of the country it crosses." Finally and above all, the Portuguese delegates observe that a short distance from the Bilomi, on the north bank, is a Mount Kinapua, on the opposite slope of which is a river bearing the name of Oè Sunan, and which flows north. It would be enough to follow the course of that river, then to ascend the Noi Fulan river and finally to connect the source of the latter with the source of the Noèl Meto already recognized by the mixed commission.

The Dutch delegates declare it useless to proceed to a survey of this river, for Mount Kinapua and the boundary that would result from the Portuguese proposal are outside the territory which was disputed in 1899; Mount Tasona[7] appears on the map of 1899 on the

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[5] Annex B. Kelali or Keli is at the break in the western line.
[6] Point A, Annex A.
[7] Annex B.

extreme eastern limit of the Portuguese *claims* of that time, claims which the treaty of 1904 has set aside; thus there could be no question of a boundary going still farther east.

The work of the mixed commission was suspended and the question, brought within the domain of diplomacy, gave way to an extended exchange of correspondence between the cabinets of The Hague and Lisbon.

This correspondence resulted in the agreement of 1913, entrusting to the arbitrator the power to decide, according to "the data furnished by the parties" and "on the basis of the general principles of law, how ought to be fixed in conformity with article 3, number 10 of the Convention concluded at The Hague, October 1, 1904 . . . the boundary starting from the Noèl Bilomi to the source of the Noèl Meto." See annex D, page 41.

III.

THE PORTUGUESE POINT OF VIEW

The principal arguments advanced by the Government of the Portuguese Republic in favor of the position supported by its boundary commissioners may be summarized as follows:

1. At the point where the work of the 1899 boundary was stopped, and where, according to the treaty of 1904 and according to the map annexed thereto, the Noèl Bilomi should receive an affluent with the name of Oè Sunan, it is recognized by common agreement that no affluent of that name exists.

2. There exists, on the contrary, farther to the east, a river Oè Sunan, which is not, it is true, an affluent of the Bilomi, but which takes its source very close to this river Bilomi on the north slope of Kinapua Mountain; on Mount Kinapua there is a mete proclaimed by numerous native chieftains as having served as the recognized boundary between the Portuguese Ambenos and the Dutch Tumbabas. From this same Mount Kinapua a brook runs toward the Bilomi, and from the summit, these two water-courses seem to be continuous. According to the native chieftains, the course of this river Oè Sunan is the historical and natural boundary between the Portuguese Ambenos on one side and the Dutch Tumbabas and Amakonos on the other side.

3. The same native chieftains include in Ambeno all that region comprised between the river Oè Sunan on the east, the river Ni Fullan on the north and the incontestably Portuguese territory of Oikoussi Ambeno west of Mounts Kelali and Netton. On a private map published at Batavia the name Ambeno is even found inscribed in full in that part wrongly claimed today by the Netherlands.

4. The treaty of 1859 rests on the principle that native states should not be partitioned, parceled out; but the boundary line proposed by the Netherlands divides the territory of the Ambenos and would deprive these natives of their pasture and garden lands that are located to the east of the frontier and in Dutch territory.

5. There is no proof that the boundary to be established ought necessarily to commence at the point where the work of delimitation had been suspended in 1899 in consequence of hostilities among the natives, and marked on the maps at the confluence of the Bilomi and the Oè Sunan brook, which in reality does not exist at that place. At that place there are two affluents, the Kamboun and the Nono-Offi. Why follow the course of the Kamboun to the north rather than that of the Nono-Offi, which comes from the north-east and empties into the Bilomi at that point?

In the opinion of the Portuguese Government, it was desired only to give the boundary commissioners, by the maps of 1899 and 1904, "a sketch designed to fix ideas, and as a vague and simple indication of what ought to be settled later."

The true intention of the signatories of the treaty of 1904 was to follow the course of the Oè Sunan, where it is in reality, that is to say, much farther east. Thus, in the sense of the treaty, nothing hinders ascending the Bilomi to the point nearest the source of the true Oè Sunan, a source so near the course of the Bilomi that it is almost an affluent.

6. The line proposed by the Netherlands, which according to the treaty of 1904 ought "to cross Nipani and Kelali (Keli) as much as possible," does not *cross* Nipani but touches only Fatu Nipani, that is to say, the western extremity of Nipani. Hence it does not correspond to the plan of 1904.

7. The line proposed by the Netherlands does not constitute a natural frontier, while that suggested by Portugal follows water-courses nearly all the way.

IV.

THE DUTCH POINT OF VIEW

The principal arguments of the Royal Government of the Netherlands may be summarized as follows:

1. The treaty of 1859 did not prescribe in any imperative manner that native territories should not be partitioned or parceled out. On the contrary, it assigned to Portugal "the state of Ambenu wherever the Portuguese flag is raised there," thus sanctioning not only the division of a native state, but precisely the division of the very state of Ambenu, and that in the following terms: "The Netherlands cedes to Portugal . . . *that part* of the state of Ambenu or Ambeno which, for several years, has flown the Portuguese flag."

Besides, the treaty of 1859 could have been, and really has been, modified by the subsequent treaties, treaties which alone ought to be taken into consideration today where they have modified the treaty of 1859.

2. No uncertainty exists as to the point at which the boundary commissioners stopped in 1899. That point served as a basis for the negotiations of 1902, and was marked on the map (Annex III)[8] signed at that time by the negotiators of the two countries in order to be annexed to the draft of the treaty. That draft of 1902 became the treaty of 1904. It is from this point and not from any other that the line A C starts, accepted in 1902 as properly forming the frontier (map annex I).[9] That line A C extends from this point north as far as the source of the river Noèl Meto, and the frontier ought then to follow that water-course as far as its mouth on the sea in the north.

The location of the source of the Noèl Meto was recognized differently in 1909: a mete was placed there by common agreement. The discussion concerned only the survey between that source and point A situated at the place where the commissioners stopped in 1899.

3. On the official map of 1899 (annex IV),[10] as on the official map of 1904 (annex III),[11] an affluent to which, by an error that the Netherlands does not contest, has been given the name of Oè Sunan, is represented as coming from the north to the point in question. This affluent, which in reality bears among the Tumbabas the name of Kabun, and among the Ambenos that of Lèos, corresponds entirely with the intention of the contracting Parties, which was to follow, beginning from point A, an affluent coming from the north in the direction A C. The error of name has less bearing since the water-courses in that region very often have several names, or change their names, or bear the name of the country they

[8] Point A on Annex A. See also Annex B and Annex C.
[9] Annex A.
[10] Annex B.
[11] Annex B.

traverse: the region east of Kabun, or Lèos (the Oè Sunan of 1904) now has, according to the Portuguese Government, the name of Hue Son, of similar sound, and according to the Dutch commissioners, that of Sunan, which may explain the error of the commissioners.

4. The native chieftains of Amakono (Dutch) declared (mixed commission, session of February 21, 1899) that their country comprises all the region "situated between the Oè Sunan, Nipani, Kelali-Keli, and the Noèl Meto (on the west), the sea of Timor (on the north), the Noèl Boll Bass, the Humusu and Kin Napua summits (on the east), Tasona, the Noèl Boho and the Noèl Bilomi (on the south)." Now the western frontier here described and indicated in 1899 as separating the Amakonos (Dutch) from Ambeno (Portuguese) is precisely that which has been established by the treaty of 1904. The Oè Sunan which appears there can only be the water-course to which mistakenly but by mutual agreement this name was given in the official maps of 1899 and of 1904, that is to say, a water-course situated *west* of the disputed territory, and not the alleged Oè Sunan now pleaded by Portugal, and which is situated on the *eastern* frontier of the disputed territory. The treaty of 1904 has assigned to the Netherlands this disputed territory. This is then, whatever its name, the very water-course situated to the west of the said territory which the parties intended to adopt as a boundary.

The proof that Portugal could not in 1899 and 1904 have had in mind the eastern stream to which it now gives the name of Oè Sunan, is provided by the fact that in the session of February 21, 1899, its commissioners proposed as a boundary a line starting from the point where the stream then called Oè Sunan empties into the Bilomi and then ascending the Noèl Bilomi easterly as far as Nunkalaï (then crossing Tasona and from Kin Napua proceeding northerly as far as Humusu and to the source of the Noèl Boll Bass, of which the course would have served as a frontier as far as its mouth into the sea). This Portuguese proposal of 1899 would be unintelligible if there were a question of any stream other than that appearing on the official maps of 1899 and 1904 under the name of Oè Sunan; how could there be a question of another river Oè Sunan situated *east* of Nunkalaï, since Nunkalaï is really *west* and not east of this new Oè Sunan discovered by the Portuguese?

5. Two inquiries recently instituted by the Dutch authorities of the Island of Timor confirmed, moreover, that no river by name of Oè Sunan takes its source on Mount Kinapua; the stream that takes its source on the north slope, at a certain distance from the summit, has the names Poeamesse and Noilpolan, and empties at Fatoe Metassa (Fatu Mutassa of the Portuguese) into the Noèl Manama, the Ni Fullan of the Portuguese maps (second Dutch Memorial, number VII, page 6).

6. It is true that the line proposed by the Netherlands does not traverse the territory of Nipani, but the treaty of 1904 does not require that. It stipulates that the line designed to unite the source of the Oè Sunan and the source of the Noèl Meto shall cross "Nipani as much as possible." As the territory to be bounded was unexplored, the words "as much as possible" were justified; in fact, the line suggested by the Netherlands, if it crosses the territory of Nipani at all, crosses the western extremity called Fatu Nipani. Now, according to the declarations recorded in the procès-verbal of the delimitation of February 21, 1899, the natives, in designating the Oè Sunan, Nipani, Kelali, and the Noèl Meto as the eastern frontier of Okussi-Ambeno (Portuguese) and as the western frontier of Amakono (Dutch), had in mind the rocky pile of Fatu Nipani, forming the western end of Nipani.

7. The frontier proposed by the Netherlands is a natural frontier formed by a chain of mountains separating the water-courses all the way.

It was never prescribed or recommended in 1902–1904 to follow water-courses absolutely as a boundary, and, on the northern frontier of Okussi-Ambeno, at many points, especially where the line passes from the basin of one river to another, metes have been placed by common agreement. (See especially art. 3 of the Convention of 1904, numbers 2, 3, and 4.)

It will also suffice to mark the frontier on the ridge line proposed by the Netherlands by a few metes.

The survey claimed by Portugal would itself also require, moreover, metes in the region of Mount Kinapua, between the Bilomi and the alleged new Oè Sunan, and elsewhere in the region between the source of the Noèl Meto and the stream to which the Portuguese give the name Ni-Fullan, that is to say, at the two ends of the Portuguese survey.

8. The line that Portugal proposes today reproduces the substance of its claims of 1899 and 1902 in that region. It is indisputable now, that by accepting the line A C at the Conference of 1902 and incorporating it in the treaty of 1904, Portugal ceded territory to which it formerly made claim. Equitably it could not renew its claim today to this same territory.

V.

THE RULES OF APPLICABLE LAW

According to the terms of article 2 of the compromis, the arbitrator should base his decision not only on the treaties in force between the Netherlands and Portugal relative to the delimitation of their possessions in the Island of Timor, but also on the "general principles of international law."

It is almost superfluous to call these principles to mind.

HEFFTER, *Völkerrecht*, section 94,[12] for example, is of this opinion: "Every treaty binds the parties to a loyal and complete execution, not only of what has been literally promised but of that to which a party has bound itself, and also that which conforms to the essence of any treaty whatsoever as to the harmonious intention of the contracting parties (that is to say, what is called the spirit of treaties)." Heffter adds, section 95:[13] "The interpretation of treaties ought, in cases of doubt, to be made in conformity with the real mutual intentions of the parties, and also in conformity with what can be presumed between parties acting loyally and with reason, not that which has been promised by one to the other according to the meaning of the words used."

RIVIER, *Principes du droit des gens*, II, No. 157, expresses the same thought in the following terms: "It is necessary, above all, to establish the mutual intention of the parties: *id quod actum est* . . . Good faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit. . . . The principles of interpretation of treaties are, in short, and *mutatis mutandis*, those of the interpretation of agreements *between individuals*, principles of common sense and experience, already formulated by the jurists of Rome." (Ulpian, L. 34, in Digest De R. J. 50.17: "Semper in stipulationibus et in ceteris contractibus id sequimur quod actum est").

Between individuals, the rules to which Rivier refers were formulated in the principal codes in terms sufficiently precise to be used as commentaries:

Code civil français, néerlandais, etc., arts. 1156–1157. "In conventions one should *seek to find what the mutual intention of the parties was, rather than content himself with the*

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[12] 94. *Alle Verträge verpflichten zur vollständigen redlichen Erfüllung dessen, was dadurch zu leisten übernommen worden, und zwar nicht blos desjenigen, was dadurch buchstäblich versprochen, sondern auch desjenigen, was dem Wesen eines jeden Vertrages, so wie der übereinstimmenden Absicht der Contrahenten gemäss ist* (*dem s.g. Geist der Verträge*).

[13] 95. *Die Auslegung der Vertrüge muss im Falle des Zweifels nach der erkennbaren gegenseitigen Absicht, dann aber nach demjenigen geschehen, was dem Einen Theile von dem Anderen nach dem dabei gebrauchten Worten als versprochen, bei redlicher und verständiger Gesinnung vorausgesetzt werden darf.*

literal sense of the terms. When a clause is open to two meanings, it should be interpreted according to that which gives it some effect, rather than in that meaning which produces no effect." *German Civil Code of 1896*, art. 133: "To interpret a declaration of will, it is necessary to *seek the actual will and not to be held to the literal meaning of the expression* ("Bei der Auslegung einer Willenserklärung ist der wirkliche Wille zu erforschen and nicht an dem buchstäblichen Sinne des Ausdrucks *zu haften*.") *Portuguese Civil Code of 1867*, art. 684. *Swiss Code of Obligations of 1911*, art. 18: "To appreciate the character and clauses of a contract, there is occasion to *look for the actual and mutual intention of the parties, without dwelling on inexact expressions or terms of which use might have been made, either erroneously*, or to disguise the true nature of the Convention."

It is useless to insist on the entire accord of private law and the law of nations on this point.

It remains only to apply these rules to the circumstances of the case and to seek to find what the actual and mutual intention of the Netherlands and Portugal was at the time of the negotiations of 1902 which resulted in the Convention of 1904.

VI.

THE INTENTION OF THE PARTIES IN SIGNING THE CONVENTION OF 1904

1. The object of the treaty of Lisbon of June 10, 1893, had been to seek to establish a clearer and more exact delimitation of the respective possessions in the Island of Timor, and to cause "the enclaves now existing" to disappear (art. 1). The "enclaves" appearing under this name in the previous treaty signed at Lisbon, April 20, 1859, were those of Maucatar (art. 2, paragraph 1) and of Oi Koussi (art. 2, second paragraph, and art. 3, first paragraph).

When the delegates of both Governments met at The Hague in June, 1902 to seek to reconcile the differing proposals of the boundary commissioners sent to those places in 1898–1899, the delegates immediately agreed to grant Portugal the Dutch enclave of Maucatar in the center of the Island of Timor, and to the Netherlands the Portuguese enclave of Noimuti to the south of the "kingdom" of Ambeno. In the session of June 26 the Portuguese demanded, in the middle of the island, all the part of the territory of Fialarung, situated east of the river Mota Bankarna (see map, annex II); they maintained further that the kingdom of Ambeno, being bounded by the sea, could no more be considered as an enclave than Belgium, Portugal, or the Netherlands, and so there could be no question of granting it to the Netherlands; they also claimed for Ambeno all the hinterland of the coast extending to the north between the mouths of the Noèl Meto and the Noèl Boll Bass. This hinterland was to extend southerly as far as the river Noèl Bilomi and to follow that river from west to east between the point at which the boundary commissioners stopped, in the west, in 1899 and, in the east, a place called Nunkalaï on the map drawn up jointly by the boundary commissioners of the two countries at that time. — The limits of the disputed territory having been designated by the four letters A B C D on a map (see annex II) presented by the Dutch delegates to the Conference of 1902, the discussion turned to the western line A C, recommended by the Netherlands, and the eastern line B D claimed by Portugal.

On the map annexed here under Number IV[14] the respective claims have been reproduced, as they result from the map signed in common by all the boundary commissioners at Kœpang, February 16, 1899.

[14] Annex B.

The Dutch delegates declared at the Conference of June 26, 1902, that the chieftains of the territory of Fialarang, in the middle of the Island of Timor, refused absolutely to pass under the sovereignty of Portugal, so that it was not, or was no longer, possible to detach that projection which the Dutch territory makes into Portuguese territory in that region (see map II).[15]

The first Portuguese delegate replied that one should not "allow oneself to be guided by humanitarian motives toward the peoples of the Island of Timor; for on account of causes of little importance these tribes leave their native soil to set up elsewhere, and several times they have left Dutch territory to establish themselves in Portuguese territory, and vice versa." Finally the Portuguese delegate renounced the territory of the Fiamarangs in the middle of the Island of Timor, but asked that the western frontier of Oikoussi be fixed "according to the proposal of the Dutch commissioners of 1899." (See this proposal in the procès-verbal of the session held at Kœpang, February 8, 1899, in the first Portuguese Memorial, p. 24.)

The next day, June 27, the first Dutch delegate accepted the Portuguese proposal, but, to avoid all misunderstanding, claimed for his Government "*absolute* assurance that the eastern limit of Oikussi *represented by the line A C* shall be laid out so far as possible on the ground itself."

There was, in fact, misunderstanding, for the first Portuguese delegate replied that his proposal of the day before "did not say that the frontier east of Oikussi would be formed by the line A C, but on the contrary by the line proposed by the mixed commission of 1899 and indicated by the letters A B."

The first Dutch delegate replied immediately that "if the line A C is not accepted as the frontier on the east of Oikussi (and if the Dutch claims for the frontier in the center of Timor are not agreed upon) . . . the Dutch delegates withdraw their consent to the Portuguese proposal. . . . They would never be able to submit to their Government a plan not satisfying these conditions." — The Dutch delegate ended by declaring that if a friendly agreement on this basis could not be reached, the Netherlands would have recourse to the arbitration provided for by the Convention of 1893 on the "enclave question," thus giving the impression that in the event of rejection of the line A C for the eastern frontier of Ambeno, the Netherlands would raise the much broader question as to whether the whole of Ambeno was not an enclave that might logically revert to the Netherlands, since Ambeno had been designated several times in the treaty of 1859 as an enclave, and since one of the objects of the Convention of 1893 was the " suppression of enclaves."

At the session of June 28, the Portuguese delegates, "having seriously examined the proposal of the Dutch delegates put forward in the session of June 27, resolved to accept that proposal as well as the conditions advanced by them (by the Dutch delegates) on that subject."

It is important to reproduce this discussion in detail, since it throws a decisive light on the actual and mutual intention of the parties. Portugal declared itself satisfied with the conditions offered to it. In the middle of the Island of Timor it gained the large enclave of Maukatar; if it did not there gain the country of the Fialarangs, it retained Oikussi Ambeno in the west of the Island of Timor, and avoided having to discuss before arbitrators the delicate question as to whether this realm was or was not an "enclave" capable of being granted in its entirety to the Netherlands; Portugal had preferred under these circumstances to give up the disputed eastern part of Oikussi Ambeno rather than to risk losing more or even all of it. It had found, in a word, throughout the negotiations, compensation it deemed sufficient for abandoning line B D and the intermediate line A B that it claimed. — It finally accepted the line A C claimed by the Netherlands *sine qua non*.

[15] Annex A.

It is thus clear that this line A C should be considered, in the intention of the Parties, as a *concession* made by Portugal to the Netherlands, and that fact was stated by the Portuguese delegates themselves, in the Memorial which they presented at the session of June 26, 1902, during the Conferences at The Hague, in these terms: "These territories represent a *considerable reduction* of the frontiers of the kingdom of Ocussi-Ambenou."

2. What is the line A C?

a) First, where is point C? At the mouth of the river Noèl Meto into the Sea of Timor in the northern part of the island. There is no dispute on this subject, and the Convention of 1904, article 3, number 10, expressly stipulates that the frontier follows the thalweg of the Noèl Meto from its source to its mouth. — Between 1899 and 1902–1904 Portugal claimed on the contrary all that territory east of the Noèl Meto as far as the river Noèl Boll Bass; the mouth of the Noèl Boll Bass was point B, the northern end of the line A B claimed by Portugal (Portuguese proposition, session of February 21, 1899, second Dutch Memorial, annex II, Procès-verbaux of the Hague Conferences, 1902, page 10, and maps here annexed I and II).[16]

If the location of point C is not disputed, it is nevertheless useful to state that the adoption in 1904 of the course of the Noèl Meto as a boundary line, rather than the course of the Noèl Boll Bass, shows the general intention to restore the frontier toward the west.

b) The location of the source of the Noèl Meto was determined and a mete set there by mutual agreement (procès-verbal of June 14, 1909, first Portuguese Memorial, page 26). All that part of the survey is thus definitely settled (see map annex VI).[17]

c) Where now, at the other end of the line, is point A agreed at the Conference of 1902? The Netherlands maintain this point A is where the survey of 1899 ended and where the commissioners had to stop their work because of hostilities between the native tribes, that is to say at the point where the commissioners, after having followed the Nono Balena, the Nono Nive and the Noèl Bilomi, had reached the confluence of this last river with another coming from the north and to which by common agreement had been assigned the name of Oè Sunan.

All of the boundary line in this western and lower part of the basin of the Bilomi was confirmed and definitely settled as frontier by the treaty of 1904, article 3, number 9. At the time of the later examination of June 17, 1909, it is stated in the procès-verbal that this point is not in doubt: "It is decided *unanimously* that from this point, *that is to say, the point where the commission of 1899 stopped its work*, the survey shall be followed." (First Dutch Memorial, annex III, page 4, first Portuguese Memorial, page 27.) The disagreement arises only as to what is to be done *from this point on*, whether toward the north (Dutch claim) or in the easterly direction (Portuguese claim). Now this point, at which the work was suspended in 1899, starting from which the differences had arisen between 1899 and 1902, was marked on the official signed map in a different manner by the boundary commissioners of the two nations on February 16, 1899. It is this very point which was considered when, at the Conference at The Hague of 1902, the delegates of the two states settled the dispute by pronouncing in favor of a frontier extending toward the north and designated by the name of line A C. In placing this map of February 16, 1899 (annex IV appended here) under the map annexed to the Convention of 1904 (annex III, appended here), it is established that there is absolute agreement between them as to the location of the point in question.[18]

The Portuguese Government, moreover, does not contest the location of point A very strongly, for in its first Memorial it expresses itself as follows, page 10: "There is no claim to deny that the line runs from point A, to which the procès-verbaux of the negotiations refer,

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[16] Annex A.

[17] Annex C.

[18] Annex B. The point where the western line strikes the Noèl Bilomi.

toward point C. What is debated are the subordinate variations . . ." and farther on page 15: "There is no denial that the frontier in question starts from the point where the surveyors were prevented from going farther; what is denied is that they had the intention of running it north *from there*."

From what precedes, the arbitrator can be certain that three points of the line A C are duly established indisputably, and are not even contested: point C in the north, the source of the Noèl Meto in the middle, and point A in the south, at the place where the boundary work was suspended in 1899. These three points certainly correspond to the intention of the Parties when they negotiated the plan for the convention of 1902 and transformed it into the convention of 1904. To permit any other solution as to the location of point A, moreover, would again place in question the frontier for the lower course of the Noèl Bilomi agreed upon by number 9 of article 3 of the treaty of 1904; now, number 9 is not contested and is not in dispute.

3. It is now left to examine the part of line A C included between point A in the south and the source of the Noèl Meto in the middle of line A C.

Here again, as always, we must look for the actual and harmonious intention of the Parties at the time when they bound themselves:

In 1902 two proposals were in view: That of Portugal had been formulated as follows in the procès-verbal of the session of the boundary commissioners held at Kœpang on February 21, 1899 (annex II in the second Dutch Memorial): "From this last point (point A), along the Noèl Bilomi as far as Nunkalai, from there crossing Tasona, Kin Napua, Humusu, as far as the source of the Noèl Boll Bass; then along that river as far as its mouth." At the Conferences of The Hague of 1902, this survey (D B) was abandoned at the session of June 26 by the Portuguese delegation and replaced by the claim for an intermediate and diagonal survey A B, which would have as a frontier in the northwest the course of the Noè1 Boll Bass instead of the Noèl Meto (see map II here appended).[19] On the 28th of June the Portuguese delegation abandoned this line of retreat A B, moved back westerly from the Noèl Boll Bass to the Noèl Meto, and accepted the line A C claimed by the Netherlands. This line A C was immediately drawn on a map which had been officially annexed to the treaty of 1904 (see map annex III).[20]

On this map, the frontier, starting from point A where the undisputed frontier of the lower course of the Noèl Bilomi ends, ascends in a northerly direction the course of a small affluent called, by mutual agreement, Oè Sunan, then continues northerly as far as the location, not then known, of the source of the Noèl Meto. This survey on the map was defined and explained as follows in the treaty, art. 3, number 10: "Starting from this point (A) the boundary follows the thalweg of the Oè Sunan, crosses Nipani and Kelali (Keli) as much as possible, reaches the source of the Noèl Meto and follows the thalweg of that river as far as its mouth." Now this clause, made definitive in the treaty of 1904*, repeats word for word the clause proposed by the Dutch commissioners* at that same session at Kœpang, February 21, 1899, in opposition to what the Portuguese claimed at that time. The simple taking into consideration of these two maps and the fact that in 1902–1904 the Portuguese proposal was totally disregarded and the Dutch proposal inserted word for word, suffices to establish with evidence the intention of the contracting Parties: when they negotiated and signed the agreement of 1904 they adopted the Dutch survey and disregarded the survey desired by Portugal on that part of the frontier of the two states in the Island of Timor. The two Parties had then, in the opinion of the arbitrator, *an actual and harmonious wish to adopt the most western survey*, not only on the northern slope of the island between the Noèl Boll Bass and

[19] Annex A.
[20] The line extending south from the mouth of the Noèl Meto, Annex B.

the Noèl Meto, but also in the center of the island, between the course of the Noèl Bilomi and the source of the Noèl Meto.

It is now appropriate to appreciate the scope of the examination of the most western survey:

4. Portugal observes today that the water-course named Oè Sunan on the official maps of 1899 and of 1904, and in art. 3, number 9 of the treaty of 1904, does not exist; that this water-course actually bears the name of Kabun among the members of the tribe of the Tumbaba, or of Lèos among the members of the tribe of Ambeno, and that the true Oè Sunan is six or seven kilometers farther to the east. It is true, the Portuguese Government adds, that this other Oè Sunan is not an affluent of the river Bilomi, that it takes its source at a certain distance from that river, on the north slope of Mount Kinapua, but this other Oè Sunan and Mount Kinapua are claimed by the Ambenos (Portuguese) as forming from an early date the frontier between them on the west and the Dutch Amakonos on the east. It is thus indeed, in the opinion of the Portuguese Government, this other Oè Sunan that the two Governments had in mind when, in article 3, number 10, of the treaty of 1904, they stipulated that the frontier would follow the course of the Oè Sunan.

To appreciate the scope of this allegation there is reason to recall that, on the map prepared by the boundary commissioners of the two countries at Kœpang on February 16, 1899 (map annex IV),[21] the frontier then claimed by Portugal is indicated by a dotted line *following the presumed course of the Noel Bilomi upstream* in an easterly direction starting from the point (A) where the said commissioners were obliged to stop their work at that time, that is to say, starting from the confluence of the Noèl Bilomi with what then by mutual agreement was called the Oè Sunan; care was taken in the map of 1899 to have the words "Noèl Bilomi" follow the dotted line so as to indicate with certainty the desire of the Portuguese commissioners to continue to follow the course of the river in ascending it.

On the other side, at the time of the signing of the treaty of 1904, on the map annexed to the treaty, all of the dotted line east of the point where a stop was made in 1899 was omitted, to show clearly that there was no longer reason to ascend in an easterly direction the then unexplored course of the Noèl Bilomi, and that on the contrary the frontier should incline toward the north (see transparent map annex III).[22] This implies, in the opinion of the arbitrator, the harmonious intention to grant, from point A upstream, *both banks* of the Noèl Bilomi to the Netherlands.

Another fact which seems to the arbitrator to imply the same harmonious intention of the Parties at the time of the signature of the Convention of 1904, is that, in the description of the frontier proposed in 1899 by the Portuguese commissioners, they suggested the following survey from *west to east*: "From this last point (the confluence of the Noèl Bilomi with the affluent at that time called Oè Sunan) along the Noèl Bilomi *as far as Nunkalaï*, thence crossing Tasona, Kinapua . . . ;" according to this Portuguese description Nunkalaï is east of the river Oè Sunan and west of Kinapua. Now, the other river Oè Sunan, now claimed as a frontier by Portugal, is situated several kilometers *east*, and not west, of Nunkalaï, which leads to the impossibility that this river had been considered by the Portuguese delegates in their proposals at that time.

What further confirms this impression of the arbitrator is the fact that the new Oè Sunan, this one which, six kilometers farther to the east, has its source on the northern slope of Mount Kinapua, is not an *affluent* of the Noèl Bilomi.

Finally, this other Oè Sunan does not flow "toward Nipani and Kelali (Keli)" as the treaty of 1904 requires it, but is very quickly confused with other rivers flowing toward the east and finally ends in regions unquestionably Dutch.

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[21] Annex B.

[22] Annex B, line running north from A.

Together all of these harmonious circumstances lead the arbitrator to the conviction that there is no reason to dwell on the mistake of name made by the boundary commissioners in 1899 and by the negotiators of the international acts of 1902 and 1904 when they gave to Kabun or Lèos the name of Oè Sunan, and that there is on the contrary reason to accept that it is this very Kabun or Lèos that the Parties intended to consider as properly serving as a frontier from point A north. This mutual error of the commissioners of both nations is explained, moreover, when one states that most of the water-courses of the region bear several names or bear the name of the region which they cross and that a region near to Kabun or Lèos has the name Sunan, the sound of which resembles that of Oè Sunan.

To permit any other solution, to accept a survey following up the course of the Noèl Bilomi as far as Mount Kinapua, then passing into the basin of another Oè Sunan which is not an affluent of the Bilomi, and which does not flow toward Nipani and Kelali, would be contrary to the whole spirit of the negotiation of 1902–1904, and irreconcilable with the map annexed to the Convention of 1904. Portugal could not afterwards equitably claim, between the Noèl Bilomi and the source of the Noèl Meto and in regard to the setting of metes, almost exactly the territory which it expressly renounced in 1902–1904 for compensation it deemed sufficient or because it wished at that time to avoid an appeal on the part of the Netherlands to arbitration or more extensive claims in the Oikussi region (see maps annexes V and VI).[23]

From what precedes, there evolves, in other words, the conviction that the will of the contracting Parties ought to be interpreted in the sense that, starting from point A situated on the Bilomi river, the frontier follows the thalweg of the river Kabun or Lèos in a northerly direction as far as the source of this last water-course wrongly called Oè Sunan in 1899, 1902 and 1904.

The reasoning set forth above under Number 4 would be superfluous if, as the Government of the Netherlands affirms (second Memorial, number VII, page 6), the last reconnaissances made on the ground established that this new Oè Sunan does not exist and that the water-course to which the Portuguese gave this name is in reality called Noèl Polan or Poeamesse.

5. It remains still to investigate the intention of the Parties as to that region included between the source of the river Kabun or Lèos (wrongly called Oè Sunan in 1899–1904) and the source of the Noèl Meto.

The Convention of 1904 sets it forth as follows: "The thalweg of the Oè Sunan [recognized under Number 4 above as rightfully called Kabun or Lèos] crosses Nipani and Kelali (Keli) as much as possible, (and) reaches the source of the Noèl Meto . . ."

The Dutch boundary commissioners and their Government propose to connect the sources of the Kabun and Noèl Meto rivers by following the line dividing the streams almost exactly, that is to say, a series of peaks of which the principal ones, from north to south, would bear the names of Netton, Adjausene, Niseu or Nisene, Wanat or Vanate, Fatu Nipani or Fatoe Nipani, Fatu Kabi (Fatoe Kabi) and Kelali (Keli).

This proposal is opposed by the Portuguese Government because it would be contrary to the intention of the Parties, whose aim was, at the time of the conclusion of the treaties between the two Governments, not to divide the native states; now, that line would detach the whole eastern part from Portuguese Ambeno; the Portuguese Government invokes, in its first Memorial, and especially in the annexes to the second, the depositions of numerous native chieftains to prove, in substance, that the whole area which would be attributed to the Netherlands forms a part of Ambeno and belongs to the Ambenos. They produce, moreover, a private map published at Batavia, on which the Ambenos are shown as occupying the territory

[23] Annex C.

claimed by the Netherlands. The Portuguese Government is of the opinion that Ambenu-Oïkussi was granted incontestably to Portugal by the treaty of 1859, and that the tribe of Ambenos should not be partitioned between two sovereignties.

Once again, the arbitrator must seek to reconstruct the will of the Parties. Now, according to the text of the treaty of 1859, Portugal obtained only the "part" of the state of Ambeno which "has raised the Portuguese flag"; there would then be nothing anomalous in that certain parts of Ambeno should have been considered, since 1859, as remaining under the sovereignty of the Netherlands. Further, the private map published at Batavia could not outweigh the two official maps signed by the commissioners or delegates of the two States in 1899 and in 1904, and on these two official maps (annexes III and IV)[24] the name of Ambeno does not appear within the disputed territory; both show that name west and outside of the disputed territory. It appears, moreover, from the documents produced, that since 1899, the Dutch commissioners produced declarations of the native Tumbaba and Amakano chieftains affirming that this territory belonged to them and did not form a part of Ambeno (annex III in the second Dutch Memorial, declaration made at the session held at Kœpang, February 21, 1899). One is thus faced with the contradictory assertions of natives. The latter in 1899 had been fighting for more than twenty years (first Portuguese Memorial, page 22) at the time of the arrival of the boundary commissioners in that region, and the Portuguese Government acknowledged (in its first Memorial, page 9) that "certain that the peoples east of Oikussi Ambeno have contested the contiguous territories for a long time and that these peoples are so intermingled that it is difficult to distinguish what really does belong to them." See also in the second Portuguese Memorial, page 10, the deposition of the native Ambeno chieftain, Béne Necat: "The eastern part of Oikussi and Ambeno was inhabited by the Tumbaba people who were driven away three generations ago . . . by the Ambenos. . . . Since then that region has been unoccupied, although it has been overrun by both Tumbabas and Ambenos."

The intention of the Parties at the time of the negotiation of 1902 is found documented in the procès-verbal of the session of June 26 (procès-verbaux, page 7) during the course of which the first Portuguese delegate himself had advised "against allowing oneself to be guided in this matter by humanitarian motives toward the peoples of the Island of Timor; for on account of causes of little importance these tribes leave their native soil to set up elsewhere, and several times they have left Dutch territory to establish themselves in Portuguese territory, and vice versa." The next day, procès-verbaux, page 11, the first Dutch delegate observed that his Government was making "a great concession" in not claiming the whole of Ambeno, "considering that according to his opinion the Convention of 1893 implied the disappearance of the enclave of Oikussi"; he declared that, if the two Governments were not able to come to an arrangement on the basis of the line A C proposed by the Netherlands, the latter would bind itself to have recourse to arbitration to determine whether Ambeno was an "enclave" which should be granted to it entirely, and thereupon, on June 28, the Portuguese delegation accepted the line A C as it was claimed by the Dutch delegation without restriction or reservation.

All these facts lead the arbitrator to the conviction that in 1902–1904, an agreement was reached without taking into account the possibility of detaching one or another parcel claimed by the Ambenos, the Tumbabas, or the Amakonos, and expressly stating that there would be no trouble concerning the claims, contradictory as they were, with the natives. In other words, from the procès-verbaux of 1902, this leads to the arbitrator's conviction that Portugal accepted the line A C as it was claimed *by the Netherlands*, precisely because Portugal preferred to abandon claims of a secondary order to the east, in order to retain the

[24] Annex B.

large piece, that is to say, in order to retain what the treaty of 1859 calls the "enclave" of Ambeno-Okussi. In the opinion of the arbitrator, the Government of the Netherlands also correctly maintains in its second Memorial, page 2, that nothing in the treaty of 1859 prevented the division of the realm of Ambeno, and adds: "Even if the treaty of 1859 had not sanctioned such a division . . . the Portuguese Government could not legitimately oppose such a division *at present*. Such objections would come too late, and ought to have been raised *before* the conclusion of the treaty of 1904."

The arbitrator observes, moreover, that on the two official maps of 1899 and 1904 (annexes III and IV)[25] Nipani is indicated as being very close and slightly to the east of line A C, a short distance from the source of the Oè Sunan (recognized today as rightfully called Kabun or Lèos); if the survey now claimed by Portugal were adopted, that survey would pass very far to the east and to the north of Nipani, and consequently would "cross" that territory still less than the survey proposed by the Netherlands. It is true that the Portuguese Government locates Nipani (see the map annexed under number VI of the first Dutch Memorial and the word *Nipani* written *in blue* on the map here appended, annex IV)[26] north-west of the disputed territory, but this unilateral Portuguese map could not outweigh the two official maps of 1899 and 1904, (annexes III and IV)[27] signed by the delegates of the two States; moreover, even on this exclusively Portuguese map, the frontier desired by Portugal seems surveyed to the north of Nipani and does not appear to "cross" that territory.

6. The Government of the Portuguese Republic finally objects to this survey of a line almost due north and south between the source of the Kabun or Lèos river and the source of the Noèl Meto, since it is a land frontier, necessitating the placing of metes, while the eastern line suggested by Portugal is formed mainly by a succession of streams, which is preferable in order to avoid conflicts among the natives. In the opinion of the arbitrator, this objection does not rest on information resulting from the negotiations from 1899 to 1904. On the southern frontier of the Okussi-Ambeno, the frontier adopted in 1904 is independent of water-courses on a somewhat large number of points, and ought to have been or would have been marked on the ground by metes. The very survey suggested by Portugal would also be partly on land and necessitating the setting of metes, notably at the south-east angle (in the vicinity of Mount Kinapua, between the course of the river Bilomi and the river called Oè Sunan by the Portuguese), and at the north-east angle (between the source of the river called Ni Fullan by the Portuguese and the source of the Noèl Meto).[28]

The survey suggested by the Dutch boundary commissioners would appear to the arbitrator to constitute a frontier sufficiently natural to be bounded easily on land. It consists of a continuous series of rather high summits, from north to south, bearing the names of Netton, Loamitoe, Adjausene, Niseu, Wanat, Fatoe-Nipani, Kelali or Keli, of which the altitude is indicated as between 500 and 1,000 meters. This range serves as a line of division of the waters, and the rivers east of that line flow toward the east. It does not seem then that it would technically be difficult to proceed to the boundary along that range of elevations, of which the general direction corresponds entirely to the theoretical line A C adopted by mutual agreement in 1904.

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[25] Annex B.
[26] Annex B, here printed in black.
[27] Annex B, combines the maps of 1899 and 1904 in which the line A C coincided.
[28] Annex C.

VII.

CONCLUSIONS

The above considerations of fact and law have led the arbitrator to the following conclusions:

1. The treaty of 1859 granted to Portugal, in the eastern part of the Island of Timor, the "enclave" Oikussi-Ambeno, and the Netherlands at that time ceded to Portugal "*that part* of Ambenu which, for several years, has raised the Portuguese flag."

2. The purpose of the Convention of 1893 was "to establish in the clearest and most exact fashion the boundary" of the respective possessions in Timor and "to cause the enclaves now existing" there "to disappear."

3. The Convention of 1904 rectified the frontier in the center of the island by granting to Portugal the Dutch enclave of Maukatar and other disputed territory, and to the Netherlands, the Portuguese enclave of Noemuti in the southwestern part of the island. On the other hand, during the negotiations of 1902 the Netherlands renounced raising the larger question as to whether Oikussi Ambenu was, as the treaty of 1859 indicated, an "enclave" rightfully reverting to them. This agreement was reached on the condition, expressly accepted by Portugal, of adopting, for the eastern frontier of the kingdom of Oikussi (Ambenu), the line A C claimed by the Netherlands during the negotiations of 1902. This line A C was established by the treaty of 1904. (See map annexed I and II.)[29]

4. Point C of this line is not disputed; it is located on the north coast of the Island of Timor, at the emptying into the sea of the Noèl Meto river, the course of which was substituted in 1902–1904 for the course of the Noèl Boll Bass river, located farther east and claimed by Portugal.

The course of the Noèl Meto, of which the thalweg was to serve as the frontier as far as its source was recognized, is not disputed, and a mete was located differently at its source.

5. Point A, at the southern end of the line agreed on in 1904, is the point where the work of delimitation was interrupted in 1899. This has not been seriously disputed by Portugal, who twice in the first Memorial uses the words: "It cannot be denied that the line starts from point A, to which the procès-verbaux of the negotiations refer (p. 10). . . . It is not disputed that the frontier concerning which there is question does not start from the point where the surveyors of 1899 were hindered from going any farther" (p. 15). To dispute the location of point A would again put in question the delimitation of the lower course of the Noèl Bilomi downstream from that point; now, that part of the frontier was settled definitively by number 9 of article 3 of the treaty of 1904; besides, point A was marked differently on the official maps of 1899 and 1904 (see annexes III and IV).[30]

6. Starting from point A, the negotiators of 1902–1904 found themselves confronted with two proposals. One, the Portuguese proposal, consisted of making the frontier ascend the Noèl Bilomi river in an easterly direction as far as Nunkalaï, then in directing the frontier to the north, through Humusu, finally reaching the source of the Noèl Boll Bass emptying into the sea east of the Noèl Meto (line B D). The other, the Dutch proposal, said that line A C consisted of striking it north from point A as far as the sources of the Noèl Meto. The negotiators clearly and categorically repudiated the first Portuguese survey to accept the second line A C claimed by the Netherlands; they have, on the map annexed to the treaty of 1904, granted to the Netherlands *both banks* of the Noèl Meto upstream from point A, at which the boundary runners had stopped their work in 1899 (see maps III and IV).[31]

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[29] Annex A.
[30] Annex B.
[31] Annex B.

7. The description of this line A C in the treaty of 1904, article 3, number 10, the map sketched conflictingly in 1899 and on which the negotiators of 1902 deliberated, and finally the official map annexed to the treaty of 1904, mention an affluent at point A as properly forming a boundary in a northerly direction to which all Parties gave the name of Oè Sunan from 1899 to 1909. Today all Parties agree this affluent actually bears the name of Kabun or Lèos. Another river subsequently discovered about six kilometers farther east bears, according to the Portuguese, the name of Oè Sunan, and rises north of Kinapua, a mountain situated very near the north bank of the Bilomi. The existence of this Oè Sunan stream is disputed by the Netherlands, in their second Memorial, in consequence of two recent reconnaissances: this alleged Oè Sunan really should be called Poeamesse or Noèl Polan.

In the mind of the arbitrator, it is impossible that this other Oè Sunan river, if it exists, could have been the one the negotiators of 1899 and of 1902–1904 had in mind, for

a) It is not an affluent of the Noèl Bilomi;

b) The frontier *proposed by Portugal* at that period and *mapped* by mutual agreement in 1902–1904 would, starting from point A and proceeding *easterly*, pass through *Nunkalaï*, then through Kinapua; now Nunkalaï is situated several kilometers to the *west* of the mount Kinapua, and *west* of the source of this new river called Oè Sunan by the Portuguese;

c) *Both* banks of the Noèl Bilomi upstream to the east of point A having been granted to the Netherlands in 1904, the affluent that is to serve as a frontier in a northerly direction cannot be sought upstream and east of point A.

The general principles for the interpretation of conventions demand that account be taken "of the actual and mutual intention of the parties without dwelling on inexact expressions or terms which they may possibly have used erroneously." The Parties have, it is true, erred in giving the name Oè Sunan to the affluent coming from the north at point A, but this is the only affluent (then wrongly called Oè Sunan) which was necessarily, in the common thinking of the Parties, the point at which the boundary ought to leave the Noèl Bilomi to proceed north, — and not any other river to which the Portuguese give the name Oè Sunan and which would be located six kilometers farther east. In other words, it is clearly the thalweg of the river today called Kabun or Lèos which ought to serve as boundary from point A in a northerly direction.

8. Starting from the source of this Kabun or Lèos river (wrongly called Oè Sunan from 1899 to 1909) in the south, the boundary ought, according to the tenor of article 3, number 10, of the treaty of 1904, "to cross Nipani and Kelali (Keli) as much as possible" to reach the source of the Noèl Meto, to the north.

The boundary proposed by the Portuguese would go entirely around the region designated on the official map of 1904 under the name of Nipani, and situated, according to that map, near the source of the Kabun or Lèos; the frontier would be several kilometers distant from Nipani in an easterly direction. Even if one gives the name of Nipani to a region located much more to the north, east of the sources of the Noèl Meto, as does a Portuguese map which has no significance as being admittedly conflicting, the frontier claimed by Portugal would then not even cross Nipani, but would go around it to the north.

The treaty of 1904 requires crossing Nipani "as much as possible." The survey suggested by the Netherlands runs along the western part of Nipani and is nearer to it than the survey proposed by Portugal.

9. Portugal objects that the direct north and south line between the sources of the river Kabun and the river Noèl Meto would divide the territory of the Ambenos, assigning part of it to the Netherlands and part to Portugal; this partition would be contrary to the treaty of 1859.

In the mind of the arbitrator this contention is not established in that sense as in 1859 a "part" of Ambeno was already placed unquestionably under the sovereignty of the Netherlands. Besides, in the course of the negotiations from 1899 to 1904, contradictory declarations of the natives were produced, the Dutch Amakonos and Tumbabas claiming the disputed territory, and the Portuguese Ambenos claiming it on their side. Thus the alleged partition is not established. It was understood, moreover, in the conferences of 1902, from the observation of the first Portuguese delegate himself, that there was no need to be too concerned with the claims of the tribes who frequently displaced each other and moved successively from the territory of one of the states to that of the other. The objection that the territories of even one tribe ought not to be partitioned could also not be entertained by the arbitrator, for it would need to have been presented during the course of the negotiations from 1902–1904; now, it is too late, because the treaty of 1904, the only one of which the arbitrator had to interpret article 3, number 10, makes no mention of any will of the Parties never to divide the native populations; on the contrary, that treaty laid out the boundary line according to the conferences in the course of which it was understood that considerations of this character ought not to be preponderant.

10. The line of the ridge proposed by the Netherlands Government between the source of the river Kabun (Lèos) to the south, and the source of the Noèl Meto to the north, is sufficiently natural to be laid out on land without great practical difficulties. It offers the advantage that the water-courses uniformly descend from that line of the ridge toward the territories placed wholly under Dutch sovereignty. The survey suggested by the Portuguese Government, on the contrary, would assign the upper and lower part of these several streams to different sovereignties.

11. In a general way, in fact, Portugal's claim reproduces completely all the territory between the Noèl Bilomi to the south and the Noèl Meto to the north, the line which that State claimed in 1902 and which it abandoned both at the end of the Conference of 1902 and by the treaty of 1904. If the present Portuguese claim were established, it would not explain why the Netherlands in 1902 made the rejection of this Portuguese claim a condition *sine qua non*. Agreements between States, as those between individuals, ought to be interpreted "rather in the sense in which they would have some effect than in the sense in which they would produce none." The Dutch threat to break off the negotiations in 1902 would have meant nothing if the intention had then been to grant Portugal precisely the territory claimed by the Netherlands as a condition for agreement.

12. Finally, if one takes the point of view of equity, which it is important not to lose sight of in international relations, the line of the ridge proposed by the Netherlands is not contrary to equity, in the sense that Portugal will receive more territory than it could have hoped for according to the theoretical line A C, to which it consented in 1904, before it was possible to explore the land. The line A C is laid out altogether within the territory that will revert to Portugal; the Portuguese Republic will thus receive a better share, in fact, than it might expect there (see map appended VII).[32] If, on the contrary, the eastern survey suggested by the Portuguese Government were adopted, the Netherlands could rightfully allege they were being deprived of almost all the territory which theoretically had been granted them in 1904 as compensation for abandoning the enclave of Maukatar in the center of the Island of Timor and in compensation for abandoning Dutch claims to the whole of the "enclave" of Ambeno.

[32] Annex C.

Consequently,

THE ARBITRATOR

considering the two treaties signed at Lisbon, April 20, 1859, and June 10, 1893, and the treaty signed at The Hague, October 1, 1904, between the Netherlands and Portugal for the delimitation of their respective possessions in the Island of Timor;

considering the compromis of arbitration signed at The Hague, April 3, 1913, and especially article 2 thus stated: "The arbitrator, relying on the evidence furnished by the Parties, shall decide, on the basis of the treaties and the general principles of international law, how, in conformity with article 3, number 10 of the Convention concluded at The Hague, October 1, 1904, concerning the delimitation of Dutch and Portuguese possessions in the Island of Timor, the boundary ought to be fixed from the Noèl Bilomi as far as the source of the Noèl Meto";

considering the diplomatic notes informing the undersigned of his appointment as arbitrator by application of article 1 of the compromis;

considering the first and second Memorial deposited in due time by each of the high contracting Parties, as well as the maps and documents annexed to the said Memorials;

considering the matters of fact and of law formulated above under numbers I to VII;

considering the Convention signed at The Hague, October 18, 1907, for the Pacific Settlement of International Disputes;

AWARDS

Article 3, number 10, of the Convention concluded at The Hague, October 1, 1904, concerning the delimitation of Dutch and Portuguese possessions in the Island of Timor, ought to be interpreted in conformity with the conclusions of the Royal Government of the Netherlands as to the boundary from the Noèl Bilomi as far as the source of the Noel Meto; consequently there will be a survey of that part of the frontier on the basis of the map at 1/50,000 annexed under No. IV of the first Memorial deposited with the arbitrator by the Dutch Government. A reproduction of this map signed by the arbitrator is appended as annex VII[33] to the present award of which it shall be an integral part.

Expenses, fixed at 2,000 francs, have been deducted from the sum of 4,000 francs placed in the hands of the arbitrator in execution of art. 8 of the compromis of April 3, 1913; the remainder, or 2,000 francs, will be remitted in equal shares to the two Parties and against receipt, at the time of the notification of the award.

Done in triplicate of which one copy shall be delivered, against receipt by the Secretary General of the International Bureau of the Permanent Court of Arbitration at The Hague, to His Excellency the Minister of Foreign Affairs of the Netherlands to serve as notification to the Royal Government of the Netherlands, and of which the second shall be delivered on the same day and in the same manner to His Excellency the Envoy Extraordinary and Minister Plenipotentiary of the Portuguese Republic to H.M. the Queen of the Netherlands, to serve as notification to the Government of the Portuguese Republic. The third shall be deposited in the archives of the International Bureau of the Permanent Court of Arbitration.

Paris, June 25, 1914. LARDY.

[33] Annex C.